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Editorial Foreword

The UPSA Africa International and Comparative Law Journal continues to grow as a platform for rigorous legal scholarship that interrogates contemporary legal developments within Ghana, across Africa, and within the broader international legal order. The publication of Volume 5 represents another important milestone in the Journal's commitment to advancing thoughtful academic discourse, fostering comparative legal analysis, and contributing meaningfully to legal reform and policy debates.

In an era defined by rapidly evolving legal challenges, ranging from the transformation of global commerce and international dispute resolution to emerging questions about labour relations in the digital economy and the growing importance of corporate sustainability, legal scholarship must remain both critical and responsive. The contributions assembled in this volume reflect precisely that spirit. Each article engages deeply with a pressing legal issue while situating Ghanaian law within broader comparative and international frameworks.

The opening article, "Nolle Prosequi in Ghana: Reflections of Criminal Justice Practitioners" by Samuel Opoku-Agyakwa, offers an insightful examination of the use of the power of nolle prosequi within Ghana's criminal justice system. Drawing on the perspectives of criminal justice practitioners, the article provides a reflective analysis of the legal, institutional, and practical implications of this prosecutorial power. It raises important questions about prosecutorial discretion, accountability, and the broader interests of justice within the criminal process.

In "Unifying Legal Principles: Investigating the Role of Estoppel in Global Commercial Law and Contractual Relations," Joseph Kwaku Asamoah, Daniel Bioyel Bewel, and Joseph Bikunati Zimpa explore the enduring relevance of estoppel as a doctrinal bridge across different legal systems. Through a comparative lens, the authors examine how estoppel operates as a stabilising principle in global commercial transactions, ensuring fairness and predictability in contractual relations. Their analysis contributes meaningfully to ongoing conversations about harmonisation and coherence in transnational commercial law.

The third article, "International Arbitrability and Domestic Arbitrability in International Arbitration: A Ghanaian View from Comparative Perspectives," by Baffour Yiadom Boakye, addresses a question that lies at the heart of modern dispute resolution: the scope of matters that may be resolved through arbitration. By distinguishing between domestic and international conceptions of arbitrability and situating Ghanaian law within comparative practice, the article offers valuable insights into the evolving architecture of international arbitration and its implications for Ghana as a jurisdiction increasingly engaged in cross-border commercial disputes.

Technological innovation and the digital platform economy have introduced new complexities into labour law. In "Determining the Employment Status of Ride-Hailing Service Drivers in Ghana: A Misguided Approach in Justice Noah Adade v. Bolt Ghana Limited and Another," Akosua Asah-Asante and Azanya Abraham Maslow critically examine the judicial reasoning in a landmark decision involving ride-hailing drivers. The article interrogates the legal tests applied to determine employment status and considers the broader implications for labour protection in Ghana's rapidly evolving gig economy.

The volume concludes with "Sustainable Business Practices and Directors' Duties: A Critical Examination of the Companies Act 2019 (Act 992)" by Gertrude Amarh and Godwin Adagewine. The authors explore the intersection between corporate governance and sustainability, analysing whether Ghana's corporate legal framework adequately integrates environmental, social, and governance considerations into directors' fiduciary and statutory duties. Their work contributes to the growing body of scholarship examining the role of corporate law in promoting responsible and sustainable business conduct.

Taken together, the articles in this volume underscore the dynamic nature of contemporary legal scholarship in Ghana and across Africa. They illustrate the importance of engaging with both doctrinal analysis and comparative perspectives in order to address complex legal questions in an interconnected world.

On behalf of the Editorial Board, I extend our sincere appreciation to the authors for their valuable contributions, to the peer reviewers for their careful and constructive evaluations, and to the editorial team for their dedication and professionalism in bringing this volume to publication. We are also grateful to the University and UPSA Law School for its continued institutional support for the Journal.

It is our hope that the scholarship presented in this volume will stimulate further research, inform legal practice and policy development, and enrich ongoing conversations about the evolution of law in Ghana, Africa, and the international legal community.

NOLLE PROSEQUI IN GHANA: REFLECTIONS OF CRIMINAL JUSTICE PRACTITIONERS

Samuel Opoku-Agyakwa†

ABSTRACT

At common law, when a prosecutor enters a nolle prosequi, there is no requirement to explain or judicial review of the decision. Ghana follows the common law, although some common law jurisdictions, including India, Kenya, Nigeria, and the United Kingdom, have gravitated away from the common law on nolle prosequi. These countries have made the process of entering nolle prosequi transparent, victim-centred and in some cases subject to judicial scrutiny. In this article, I collect and discuss the views of 52 criminal justice practitioners (defence lawyers, judges, and prosecutors) on Ghana's nolle prosequi law. Seventy-five per cent of them want the Attorney-General's nolle prosequi power to be subject to judicial oversight. The respondents' views suggest mistrust between prosecutors and defence lawyers regarding how the Attorney-General enters a nolle prosequi, with the majority of defence lawyers indicating that partisan considerations influence the exercise of this prosecutorial discretion. I identify the benefits of infusing transparency and accountability in exercising this power while advocating for judicial oversight over how a nolle prosequi is entered and for the Ghanaian taxpayer to compensate victims when there is evidence that a prosecution and nolle prosequi were initiated or entered, arbitrarily, capriciously illegally, unfairly, or out of dislike.

Keywords: Nolle Prosequi, Judicial Oversight, Judicial Scrutiny, Transparency, and Accountability

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1 INTRODUCTION

At common law, an Attorney-General or their equivalent has the power to enter a *nolle prosequi* as part of exercising their prosecutorial authority, and this power is not subject to judicial review.[1] *Nolle prosequi* originated in England as a tool available to the Crown's appointed Attorney-General to halt criminal proceedings deemed not in the Crown's interest or frivolous.[2] Private individuals prosecuted in England during that era, so the Crown created and used *nolle prosequi* to control prosecutions.[3] The first recorded instance of resort to this common law arbitrary tool dates back to 1555.[4] Many common law jurisdictions, including the United Kingdom, have modified the common law approach to entering a *nolle prosequi*.[5] Ghana continues to adhere to the common law approach, despite having a Constitution that emphasises transparency and accountability in how government business is conducted.

In Ghana, the Attorney-General's power to enter nolle prosequi is set out in section 54 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30).[6] The Attorney-

[1] *R v. Comptroller-General of Patents* (1899) 1 Q.B 909

[2] Rebecca Krauss, 'The Theory Of Prosecutorial Discretion In Federal Law: Origins And Developments,' (2012) 6 Seton Hall Circuit Review 17 < https://scholarship.shu.edu/circuit_review/vol6/iss1/1> accessed 3 May 2023.

[3] ibid, 18

[4] Gambo Abdulsalam 'A Critique of the Powers of the Attorney General in the Administration of Criminal Justice in Nigeria' (LLM Thesis, Ahmadu Bello University 2015) citing Michael Ajomo, 'Nolle Prosequi; An Unquestionable Tool in the Hand of Attorney General' in Yemi Osibanjo (ed), *Towards Better Administration of Justice in Nigeria*, (vol 4, Federal Ministry of Justice 1990)17

[5] I have had the opportunity to set out Ghana's nolle prosequi law in an article entitled *Ghana's jurisprudence and judicial genuflection on the Attorney-General's nolle prosequi power: Learning from other jurisdictions.* Submitted to the Editor of the UGLJ for consideration for publication.

[6] It states that: (1) In a criminal case, and at any stage of a criminal case before verdict or judgment, and in the case of preliminary proceedings before the District Court, whether the accused has or has not been committed for trial, the Attorney-General may enter a nolle prosequi, by stating in Court or by informing the Court in writing that the Republic does not intend to continue the proceedings. (2) Where the Attorney-General enters a nolle prosequi under subsection (1), (a) the accused shall be discharged immediately in respect of the charge for which the nolle prosequi is entered, or (b) the accused shall be released where the accused has been committed to prison, or (c) the recognisances of the accused shall be discharged where the accused is on bail. (3) The discharge of the accused shall not operate as a bar to subsequent proceedings against the accused in respect of the same case. (4) Where the accused is not before the Court when the nolle prosequi is entered, the Registrar or Clerk of the Court shall ensure that notice in writing of the entry of the nolle prosequi is given to the keeper of the prison in which the accused is detained and where the accused has been committed for trial, to the District Court by which the accused was committed. (5) The District Court shall cause a similar notice in writing to be given to a witness bound over to prosecute and to the sureties, and also to the accused and the sureties of the accused where the accused has been admitted to bail.

General may enter a *nolle prosequi* at any stage of criminal proceedings before judgement or verdict, and during Committal Proceedings before a Committal Order is made, and in a trial, before a verdict or judgement.[7] Where a *nolle prosequi* is entered during Committal Proceedings, the accused is discharged.[8] In a trial, if a *nolle prosequi* is entered before the prosecution closes its case, the accused is discharged.[9] If it is entered after the prosecution has closed its case, the accused is acquitted.[10] Like the common law, Ghana's Attorney-General is not required to explain the decision to enter a *nolle prosequi* and even worse, the practice is that the decision is not amenable to judicial scrutiny. This position of Ghanaian law was recently expressed in the Supreme Court decision in Afoko v. The Attorney-General.[11] The plaintiff, in that case, was being prosecuted for murder and had closed his defence. Following this, the judge adjourned the case for the prosecution and defence to file their addresses. The judge intended to set a date after the addresses were filed for the summing up and the jury's verdict. However, the Attorney-General entered a *nolle prosequi* after the case's adjournment and then re-arraigned the plaintiff and another person for fresh Committal Proceedings. Aggrieved by the Attorney-General's decision, the plaintiff, invoked the Supreme Court's original jurisdiction to determine the fairness of the Attorney-General's *nolle prosequi* in the light of articles 11(7) and 296, especially clause (c) of Ghana's Constitution. Among other things, the plaintiff sought a declaration that the defendant's *nolle prosequi* decision was inconsistent and a violation or infringement of articles 23 and 296 of the 1992 Constitution, hence, unconstitutional, null, and void.

The defendant challenged the competence of the plaintiff's writ, arguing that the writ did not properly invoke the Supreme Court's original jurisdiction. The defendant urged the Court to dismiss the writ, arguing that the Attorney-General's exercise of the power to enter a *nolle prosequi* is authorised by the Constitution.

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[7] Act 30, s 54.
[8] ibid, s 59 (2) (a).
[9] ibid, s 59 (2) (i).
[10] Austin Amissah *Criminal Procedure in Ghana*, (Sedco Publishing Limited 1981) 22
[11] [2018-2019] 1 GLR 1 141.

The issues before the Court were whether the plaintiff had properly invoked the Court's original jurisdiction and whether the Attorney-General's power to enter a *nolle prosequi* is subject to articles 296 (c) and 11(7) of the Constitution. The Court dismissed the defendant's objection and, among others, held that the plaintiff's writ raised a legitimate issue in controversy relating to an alleged breach of article 296 (c). On the second issue, the Court observed on page 151 that:

> … counsel for plaintiff failed in his reliance on article 296 (a) and (b), which insist that such discretionary powers are exercised fairly and not arbitrarily, capriciously and biased. **The plaintiff did not in his statement of case properly make out a case of bias, unfairness, arbitrariness or capriciousness in the entry of *nolle prosequi* by the defendant** (emphasis added)**.** Indeed, from the processes filed in this case, the plaintiff failed to adduce any evidence or allege any conduct on the part of the defendant in the exercise of her mandate, that could be used to measure the standard set by article 296 (a) and (b) of the Constitution, 1992.

Speaking through Marful-Sau, JSC, the Court opined that the plaintiff had narrowed the Attorney-General's alleged violation to article 296(c), which requires that persons or authorities exercising discretionary power, other than judges or judicial officers, to publish Constitutional or Statutory Instruments indicating how they intend to exercise such power.

On pages 151-152, the Court also indicated that:

> The plaintiff only seemed aggrieved that the defendant exercised the right of *nolle prosequi* virtually at the end of his trial, but the defendant in so doing, acted within the law. The Criminal & Other Offences (Procedure) Act, 1960 (Act 30) by its section 54, gave the defendant the right to file *nolle prosequi* in a criminal trial at any time before the verdict or judgment. In the plaintiff's case, the *nolle prosequi* was entered, by his own account, before judgment. The defendant therefore did no wrong against the law, when she entered the *nolle prosequi*. The fact that plaintiff's trial was almost at the tail end, could not

> legally bar or restrain the defendant from exercising her right to enter *nolle prosequi*. Though, we sympathise with the plaintiff that his trial was not completed, but terminated as it were, for a new trial to begin, that in law does not amount to unfairness, arbitrariness, bias or capriciousness. **In effect, the plaintiff failed to show how, defendant breached article 296(a) and (b), of the Constitution**. (Emphasis added).

The Court also stated that the Attorney-General's *nolle prosequi* is akin to his/her power to prosecute and arises from his/her constitutional mandate under Article 88 (3). The Court, on page 152 of the judgement, agreeing with Akuffo-Addo CJ (as he then was) in Captan v. Minister of Interior,[12] took the view that any expectation that the Attorney-General must publish a Constitutional or Statutory Instrument anytime he/she decides to enter *nolle prosequi* would stifle the Attorney-General's mandate. In Akuffo-Addo CJ's words:

> There is a very loose sense in which it can be said that most decisions taken by ministers in the day to day performance of their ministerial duties involve the exercise of some discretion, and it is in this sense that the minister's act in revoking a residence permit may be said to involve the exercise of discretion. But can it be seriously argued that the exercise of discretion in this sense by ministers must comply with the requirements of article 173, and in particular, with article 173 (c) which requires that the minister shall 'make and publish Regulations… which shall govern the exercise of that discretionary power? The government could hardly govern if this were so…

In the Afoko case, the Supreme Court also cited with approval its earlier decision in Ransford France (No. 3) v. Electoral Commission & Attorney-General,[13] which reechoed Akuffo-Addo CJ's words in the Captan case, *supra*. The Supreme Court held that the Attorney-General's *nolle prosequi* power is not subject to article 296 (c). According to the Court, article 296 (c) applies only where quasi-judicial functions

[12] (1970) CC 35.
[13] [2012] 1 SCGLR 705.

are discharged by non-judicial officers when exercising discretionary power. On page 154 of the decision, the Court quoted Dr. Date-Bah, JSC in the Ransford France case (supra), at page 723, thus: -

> Restricting the scope of article 296 (c) by purposive interpretation is not equivalent to removing due process from the exercise of discretionary power. Clauses (a) and (b) of article 296 contain the standards for the application of such process. Those two clauses of article 296, read in conjunction with article 23, assure residents in Ghana of fairness and impartiality in administrative processes. Limiting the scope of the obligation to publish regulations before the exercise of discretionary power does not significantly impair due process in administrative powers in Ghana; rather it avoids the unravelling of the system of government as we have known it since 1969. The standard embodied in article 296 (c) may well offer a desirable benchmark for good practice and we commend it to those who exercise discretion to adhere to it whenever practicable, but non-compliance with it should not be treated as resulting in invalidity, for reasons already explained above.

The Supreme Court observed on page 154, that "… the plaintiff has had the right to subject the exercise of the discretion to the standard of fairness, impartiality, arbitrariness and capriciousness under article 296 (a) and (b) of the Constitution, 1992. The institution of this case itself by the plaintiff affirms this right to ensure due process as required under article 296 (a) and (b)."

The question of whether the Attorney-General's *nolle prosequi* decisions are subject to judicial review was not an issue before the Court in the Afoko case. However, it can be implied from the Court's judgement that when the Attorney-General enters a *nolle prosequi*, that decision is subject to judicial review under article 296 of Ghana's Constitution. I hold this opinion because the Court observed that the plaintiff had failed to properly make out a case of bias, unfairness, arbitrariness, or capriciousness in the Attorney-General entering a *nolle prosequi* in his case as required under article 296 (a) & (b). A logical consequence of this inference is that

when a nolle prosequi is entered, it must adhere to the standards enshrined in article 296 of Ghana's Constitution. A person who believes that the entering of a *nolle prosequi* fails the "Article 296 test" can seek redress in the court, by way of judicial review. Consequently, the exercise of the prosecutorial discretion to enter a *nolle prosequi* is subject to judicial oversight.

Before I proceed any further, it is apposite to discuss the constitutional foundations of, and highlight some judicial pronouncements on, judicial review in Ghana.

1.1 Ghana's Constitution, judicial review, and nolle prosequi

The constitutional basis of judicial review, in Ghana, is beyond doubt. For instance, article 141 of Ghana's Constitution provides that "[T]he High Court shall have supervisory jurisdiction over all lower Courts and any lower adjudicating authority, and may, in the exercise of that jurisdiction, issue orders and directions for the purpose of enforcing or securing the enforcement of its supervisory power." Secondly, article 23 provides that "[A]dministrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or tribunal." Article 296 breathes life into articles 23 and 141 by providing the standards that public officers holders must adhere to in exercising their functions. Article 296 also serves as the yardstick for the Courts to measure the actions of these officers. It states that:

> Where in this Constitution or in any other law discretionary power is vested in any person or authority (a) that discretionary power shall be deemed to imply a duty to be fair and candid; (b) the exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and (c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument,

regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power.

Based on articles 23, 141 and 296 of Ghana's Constitution, it is unassailable that all the actions and inactions of the Attorney-General as a public office holder must adhere to article 23 and pass the "Article 296 test" and anyone aggrieved by the said actions and inactions, including entering a *nolle prosequi*, are subject to judicial review under article 141.

1.2 Judicial Review in Ghana's Courts

In Republic v. High Court, Denu; *Ex Parte* Kumapley (Dzelu IV Interested Party),[14] Dr Seth Twum JSC stated, about judicial review being manifested in certiorari or prohibition, that "… these remedies have grown to be comprehensive remedies for the control of all kinds of administrative as well as judicial acts".[15] In Republic v. High Court, Sekondi, *Ex Parte* Ampong aka Akrufa Krukoko I (Kyerefo III and Others)—Interested Parties,[16] the Supreme Court noted at page 722 thus, "[A]n order of certiorari, …, is a discretionary remedy granted on grounds of excess of jurisdiction and/or some breach of rule of natural justice." This point was reechoed by the Court in Republic v. High Court, Accra; *Ex Pate Charge D' Affairs* Bulgarian Embassy.[17]

In Republic v Court of Appeal; *Ex Parte* Tsatsu Tsikata,[18] the Supreme Court held that the purpose of certiorari as a judicial review mechanism is to correct errors of law and not errors of fact. According to the Court, "…any perceived error was to be corrected by way of appeal since the judicial review process was to be used to correct mistakes of law apparent on the face of the record, not mistakes of fact."[19] In Republic v High Court, Kumasi; *Ex parte* Bank of Ghana & Others (Gyamfi & Others

[14] [2003-2004] 2 SCGLR 719.
[15] ibid, 737
[16] [2011] 2 SCGLR 716.
[17] Suit No. J5/34/2015 dated February 24, 2016.
[18] [2005-2006] SCGLR 612
[19] ibid, 614

– Interested Parties) (No 1),[20] Dotse JSC examined the considerations that will influence the courts to grant an application for certiorari and prohibition and stated on page 511, that:

> It is well settled that the Court would exercise its supervisory jurisdiction on the grounds of want or excess of jurisdiction, failure to comply with the rules of natural justice, breach of the Wednesbury Principle, namely that **an administrative action or decision would be subject to judicial review on the grounds that it was illegal, irregular or procedurally improper,** and the superior court must have made an error patent on the face of the record (emphasis added).

Instructively, Ackaah-Boafo J, (as he then was) in laying down the scope of judicial review In the Matter of the Minerals and Mining Act, 2006 (Act 703) and Others v. Minister for Lands and Natural Resources *Ex Parte* Exton Cubic Group and Attorney General (2018)[21] stated in paragraph 77 that "… in a judicial review, the Court's powers are limited to quashing and re-mitting only and nothing more. It cannot make consequential orders".

As per article 296, decisions made by public office holders while exercising discretionary power are subject to judicial scrutiny. In Enekwa & Others v. Kwame Nkrumah University of Science & Technology (KNUST),[22] the Supreme Court held that generally, a body performing a public function is amenable to judicial review. I contend that this an unimpeachable conclusion flowing from the Enekwa v. KNUST case *supra* is that public officers like the Attorney-General in performing public duties are subject to judicial review. On page 251, Anin Yeboah JSC (as he then was) speaking for the Court, stated that "[I]f it is established that there was abuse of any power vested in them in the discharge of their functions, judicial review should avail any member of the public who has suffered from such abuse." However, the Court cited with approval the works of De Smith, Woolf, and Jowell

[20] [2013-14] 1 SCGLR 477.
[21] JELR 65808 (HC).
[22] [2009] SCGLR 242

(1999 ed) entitled *Principles of Judicial Review*, where the learned authors gave examples of instances where an entity performing a public function may not be subject to judicial review. These instances occur when the parties agree to resort to other branches of the law to resolve their disputes, and secondly, when a contract between the parties implicitly or explicitly regulates how they resolve their conflicts. Outside these situations, the Court stated at page 251 that "… the courts are more than willing to grant judicial review in appropriate circumstances to redress administrative abuses." I am of the firm conviction that, no amount of legal ingenuity can legitimately and constitutionally bring the Attorney-General's *nolle prosequi* power under these exceptions.

That said, the following are evident from the authorities, regarding the purpose and scope of judicial scrutiny of administrative and judicial actions and inactions:

- First that, generally, a body performing a public function is amenable to judicial review, although there are exceptions—where parties agree to resort to other branches of the law to resolve their disputes, or where a contract between the parties regulates how they resolve their conflicts. In these situations, even though an entity is performing public functions, those functions might not be subject to judicial review.
- Secondly, judicial review is a remedy that seeks to regulate administrative and judicial acts of public officials in Ghana, and I daresay that these acts include the Attorney-General entering a nolle prosequi.
- Essentially, through an available judicial remedy, judicial review, is a discretionary judicial remedy; hence, the courts will not grant it automatically. Individuals who allege that their rights have been violated by the omissions and commissions of a public officer must demonstrate that these acts are grievous and central to the offending act or inaction.
- Rightly, the courts will intervene where the public officer holder has acted ultra vires and/or breached the rules of natural justice or the Wednesbury Principles.

- Significantly, the court's judicial review powers are circumscribed to quashing and remitting, i.e., they are prohibited from making consequential orders.

From the judicial decisions, it is evident that, faced with determining whether the Attorney-General's *nolle prosequi* power is subject to judicial review, Ghana's courts will answer in the affirmative. I have already asserted in this article and elsewhere that, in the Afoko case, Marful-Sau, JSC, observed that the plaintiff had failed to properly make out a case of bias, unfairness, arbitrariness or capriciousness in the Attorney-General entering a *nolle prosequi*. Implicitly, if the Court had determined otherwise, it would have pronounced on it, with the possibility that the pronouncement would have gone in the plaintiff's favour. Admittedly, given the minimal, although potent, scope of a court's powers in judicial review i.e., to quash and to remit, the Supreme Court, in the Afoko case **may** (emphasis mine) only have quashed the decision and not made any consequential orders. I used "may" because the Supreme Court cannot be bound by a High Court decision i.e., the *Ex Parte* Exton Cubic Group *supra*; and even if it was a Supreme Court decision, nothing bars the Supreme Court from departing from its previous decision. Most importantly, a careful review of the Ackaah-Boafo J decision, (as he then was) in *Ex Parte* Exton Cubic Group, reveals that he cited the Australian case of Attorney-General [NSW] v. Quin[23] to support this proposition. I must stress the point that, the circumscribed scope of a court's judicial review power could be further complicated and arguably worse in judicial scrutiny of nolle prosequi decisions in Ghana. This is because under article 88 of the Constitution, the decision to prosecute is the sole preserve of the Attorney-General. Hence, if in exercising his/her prosecutorial discretion, the Attorney-General elects to enter a nolle prosequi, can he/she be compelled in law to prosecute? The situation becomes even more complicated if a court determines that the Attorney-General has breached articles 23 and 296 and so quashes the decision to enter a *nolle prosequi* but makes no consequential order(s) because it lacks that authority. In such a situation, the tangible value, to an accused person who

[23] [1990] 170 CLR 1.

successfully challenges the propriety of the Attorney-General's *nolle prosequi* could be in question.

Now that I have outlined the general contours of judicial review as a remedy available to individuals aggrieved by an alleged violation of their rights by a public office holder or entity, I return to conclude my discussion of the Supreme Court's judgment in the Afoko case. The issue before the Court in the Afoko case was limited to the publication of Regulations by non-judicial officers exercising discretionary power. Regrettably, the Court's lead opinion did not think that the Attorney-General must publish Regulations governing how or why he/she will enter a *nolle prosequi*. However, Pwamang, JSC on page 158 rightly observed that "… it cannot be contested that there are certain species of executive discretionary powers that were intended to be covered when the framers of the Constitution, 1992 inserted the provision in article 296(c). After all, the provision excluded judicial discretionary power."

Admittedly, publishing Regulations to guide how non-judicial officers exercise discretionary power does not address the practical challenges the Court identified with requiring the Attorney-General to publish Regulations. However, respectfully, I think the Court took a broad view of the issue, as I do not believe that the Framers of Ghana's Constitution envisaged a situation where Regulations must be published in every case when the Attorney-General decides to enter a *nolle prosequi*. For obvious reasons, this would be practically impossible, debilitating, and lead to absurdities. I have stated elsewhere that the Attorney-General can publish regulations that cover issues that are common to all *nolle prosequi* situations, like when a *nolle prosequi* can be entered, the Attorney-General's duties when exercising this power, which may include informing the accused and his/her lawyers in advance, and the non-legal consequences, including financial implications for the Ghanaian taxpayer when a *nolle prosequi* is entered late into a criminal trial.[24] Criminal cases put the accused person's liberty in jeopardy and have many other impacts, including placing emotional and economic burdens on the accused person,

[24] Samuel Opoku-Agyakwa, 'Upholding the Rights of Suspects and Accused Persons under Ghana's 4th Republican Constitution: Deeds of the Supreme Court' (2022) 2 UPSA Africa International & Comparative Law Journal 123-162.

victims, witnesses, relatives, friends, lawyers, and the judicial process.[25] Engaging counsel and supporting witnesses to attend court proceedings all have cost implications.[26]

This article is the second and concluding part of my research on Ghana's law and practice on nolle prosequi. Part one was published in the University of Ghana Law Journal.[27] In that article, I reviewed and discussed the *nolle prosequi* legal framework of five common law jurisdictions: Canada, India, Kenya, Nigeria, and the United Kingdom and determined that these countries have departed from the common law on nolle prosequi by infusing oversight, including judicial review—in some of these jurisdictions, judicial review of a *nolle prosequi* decision is limited to situations where there are allegations of an abuse of the process, or the entering of the *nolle prosequi* is against the public interest or the interest of justice.

1.3 Summary of nolle prosequi laws and practices in the jurisdictions previously reviewed

To put this article into context, I provide highlights of the *nolle prosequi* law in the jurisdictions reviewed in my previous article.

In the Federal Republic of Nigeria, section 174 (c) of the Federal Constitution permits the federal Attorney General: "to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person. Section 174 (3) states that "In exercising his powers under this section, the Attorney-General of the Federation shall have regard to **the public interest, the interest of justice and the need to prevent abuse of legal process** (**emphasis added)**."

Tobechukwu and Chukwuma acknowledge that Nigeria's Constitution (1999) circumscribes the Attorney-General's nolle prosequi power and subjects the

[25] Andrew Abuza 'The Power of the Attorney-General to enter a Nolle Prosequi under the 1999 Constitution of Nigeria: An Analysis of the Issues Involved' (2021) 7(2) International Journal of Science and Qualitative Analysis, 41-54 <doi: 10.11648/j.ijsqa.20210702.1> accessed 3 May 2023.

[26] ibid

[27] Samuel Opoku-Agyakwa, 'Reforming Ghana's Nolle Prosequi Jurisprudence: Lessons from other Jurisdictions' (2024) 33(2) University of Ghana Law Journal 86-129.

exercise of this power to judicial review.[28] The authors further note that in a democracy, to treat the Attorney-General's nolle prosequi power as unquestionable is equal "to inadvertently rob the courts of the constitutionally granted as well as limit to which the citizens can enforce and enjoy their fundamental human rights."[29] Under article 157 (6) (a) of Kenya's Constitution, the Director of Public Prosecutions (DPP) can enter a nolle prosequi at any stage before judgement.[30] A nolle prosequi entered after the prosecution closes its case results in the accused person's acquittal.[31] When a nolle prosequi is entered after the accused has been invited to enter his/her defence, the accused person is acquitted.[32] Kenya's DPP needs the court's approval to effect a nolle prosequi.[33] Like Nigeria's Constitution, the Kenyan Constitution enjoins the DPP to act in the public interest, in the interest of justice, and must avoid abusing the legal process.[34] These perimeters were tested in the Kenyan case of *R v Adan Keynan Wehilye,*[35] where the prosecution, without an explanation, entered a *nolle prosequi* after it had called eleven witnesses. The accused person challenged the decision and the court among others held that "[F]or the prosecution, to seek to terminate the trial and charge the applicant afresh would be to give the prosecution an unfair advantage in the prosecution of the new case and that would lead to an unfair and unjust result."[36]

In India, section 321 of India's Code of Criminal Procedure, 1973, permits a prosecutor to withdraw from prosecuting a person, although with the court's consent, at any time before judgement.[37] Section 333 required the Advocate General

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[28] Henry Tobechukwu and Stephen Chukwuma, 'Rethinking the Power of Nolle Prosequi in Nigeria: The Case of State V. Ilori' (2014) 2(1) Global Journal Politics and Law Research, 1 <https://doi.org/10.37745/gjplr.2013> accessed 3 May 2023.

[29] ibid, 8.
[30] Kenyan Constitution, 2010, Article 157(6) (c).
[31] ibid, art 157 (7).
[32] ibid, 82 (b).
[33] ibid, art 157(8).
[34] ibid, art 157(11).
[35] [2005] eKLR <Kenya Cases - SheriaHub Court Cases Database Repository - [2023]> accessed on 3 May 2023.
[36] ibid, 13.
[37] The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal, - (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be

to 'inform' the presiding judge about his/her intention to withdraw from prosecuting the defendant. It appears, on the face of secion 321, that the court is enjoined to halt the proceedings. As per section 321, a defendant is discharged if a prosecution is successfully withdrawn before the accused is charged,[38] the accused is acquitted if the withdrawal is made after he/she is charged.[39]

In the United Kingdom, sections 23 and 23A of the Prosecution of Offences Act, 1985 permit the Director of Public Prosecution (DPP) and/or a Public Authority to discontinue criminal prosecutions at the preliminary stage[40] or after the accused has been sent for trial.[41] The DPP is required to inform the court about his/her decision to discontinue the trial,[42] and this notice must include the reasons for the decision to discontinue the trial.[43] The DPP is also required to inform the accused about the decision to discontinue proceedings, but the DPP is not obliged to explain to the accused the reason for the discontinuance.[44] The accused has the right to insist that the proceedings continue,[45] and this must be communicated to the court.[46] Where the accused person gives such notice, the case is automatically revived, and the trial must continue.[47] Under section 23, a *nolle prosequi* operates as a discharge.[48] A *nolle prosequi* may also be entered after the accused has been sent for trial.[49] A decision to enter a *nolle prosequi* under section 23A can be made at any time before the

acquitted in respect of such offence or offences: Provided that where such offence--(i) was against any law relating to a matter to which the executive power of the Union extends, or (ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or (iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or (iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.

[38] ibid, s 321 (a).
[39] ibid, s 321(b).
[40] Prosecution of Offences Act 1985, s 23.
[41] ibid, s 23A (1).
[42] ibid, s 23(3).
[43] ibid, s 23(5).
[44] ibid, s 23(6).
[45] ibid, s 23(3) & (7).
[46] ibid, s 23(7).
[47] ibid.
[48] ibid, s 23(9).
[49] ibid, s 23A (1).

indictment is preferred.[50] Regarding whether the accused person can be charged with the same offence and on the same facts, sections 23A and 23 have the same legal effect.[51] Where the DPP or Public Authority enters a *nolle prosequi* under section 23A, an accused person is barred from insisting that the criminal proceedings must continue.

Canada's *nolle prosequi* law and practice are inherited from its common law heritage and relationship with the United Kingdom. There is no express provision in her law on *nolle prosequi*. This was acknowledged in *R v McHale*[52] when Watt JA observed about *nolle prosequi* in Canada that "Despite the absence of express or necessarily implied authority in the Criminal Code it is well-established that the Attorney General has the authority to withdraw an information[53] prior to plea …". [54] Lieff J, in R. v. Dick[55] at page 156 of his judgement stated that when a *nolle prosequi* is entered after an accused person enters a plea, the court's leave and the accused person's consent are required to effectuate the *nolle prosequi*. Parker J in *Re Blasko and The Queen*,[56] stated that "Prior to the preferring of an indictment or the entering of a plea and the tendering of evidence, an information[57] may be withdrawn without the leave of the Court. Where a Crown Attorney has tendered evidence after the taking of a plea, the trial Judge is seized with jurisdiction, and the information cannot be withdrawn without the consent of the trial Judge."[58]

It is evident from the foregoing that, as part of their reforms, Canada and the United Kingdom have included the accused person whose criminal trial is being truncated by a *nolle prosequi* in the decision-making process to effectuate the *nolle prosequi*. This accused-centred approach is commendable, as the accused's rights are in jeopardy during the prosecution and must have a say in its truncation, especially in scenarios

[50] ibid, s 23A (2).
[51] ibid, s 23 (9) and 23A (5).
[52] *R. v. McHale*, 2010 ONCA 361 (CanLII) <https://canlii.ca/t/29rrx> accessed on 11 June 2023.
[53] An information is a formal criminal charge which begins a criminal proceeding in the courts.
[54] ***R v. McHale*** (n 52)
[55] [1969] 1 CCC 147 <https://www.canlii.org/en/on/onsc/doc/1968/1968canlii231/1968canlii231.html.> accessed on 6 June 2023
[56] Re Blasko and The Queen, 29 CCC (2d) 321 <https://canlii.ca/t/htxl2> accessed on 11 June 2023.
[57] An information is a formal criminal charge which begins a criminal proceeding in the courts.
[58] Blasko (n 56) 322.

like the Afoko case. In the United Kingdom, the Attorney-General or the prosecutor is required to justify the entering of a *nolle prosequi*. In India and Kenya, the court's consent is key to effect the prosecutor's decision to discontinue the prosecution.

I argued in my previous article on the subject that, contrary to Ghana's Supreme Court decision in the Afoko case, Ghana's Attorney-General, as a non-judicial officer exercising discretionary power by entering a *nolle prosequi*, must formulate and publish Regulations under article 296 (c) of the Constitution. The Regulations must set out how he/she will exercise the prerogative to enter *nolle prosequi*. I contended that publishing such Regulations would promote legal accountability and certainty, providing the yardstick, at least for the courts, to evaluate the Attorney-General's decision to enter a *nolle prosequi*. It is for this reason that I described the decision in the Afoko case as a missed opportunity to hold the Attorney-General in check when entering a *nolle prosequi*. I counselled the Attorney-General to explain to the accused person whose criminal trial is truncated why a *nolle prosequi* is being entered and asserted that the trial court must approve the Attorney-General's decision to truncate the prosecution by way of judicial review. I grounded my recommendations partly in recent legislative and executive action in the enactment of legislation like the Office of the Special Prosecutor Act, 2017 (Act 959) and the Freedom of Information Act, Act 2019, Act 989, as these laws indicate Ghana's Parliament's recognition of the need for transparency and oversight in governance including the Attorney-General's exercising the power to enter a *nolle prosequi*. For ease of reference, I reproduce below what I said about Acts 959 and 989 and how their enactment signals a desired shift in how governance is conducted, including the opaqueness around considerations that influence the Attorney-General when he/she elects to enter a *nolle prosequi*:

> …, section 80 (2A) of the Office of the Special Prosecutor Act 2017 (Act 959), which amends section 54 of Act 30, grants the Special Prosecutor power to enter nolle prosequi and, section 80(2) requires the Special Prosecutor to

assign reasons for entering a nolle prosequi ….[59] The Special Prosecutor's obligation to explain their decision to enter a nolle prosequi plea is to infuse transparency and legal accountability in Ghana's fight against corruption, arguably a formidable threat to the country's development. It must be noted that while the Special Prosecutor is granted the power to prosecute corruption-related offences under Act 959, the Attorney-General is not constitutionally barred from also prosecuting such corruption-related offences. However, when the Attorney-General prosecutes a corruption-related offence and decides to enter a nolle prosequi, there is no legal obligation for them to provide an explanation. Therefore, enjoining the Special Prosecutor to assign reasons for entering a nolle prosequi when they exercise the Attorney-General's delegated constitutional power, creates confusion and lends itself to abuse. This is because, in law, the Attorney-General can always reclaim their constitutional power delegated under Act 959. This means that when the Attorney-General reasserts the power to prosecute corruption-related cases, either by taking a case away from the Special Prosecutor or by pursuing a corruption-related matter independently, the Attorney-General can enter a nolle prosequi without being required to explain or have the decision subject to judicial review. This results in the application of inconsistent standards. The transparency and accountability intended by section 80(2) of Act 959 will be eroded just by the Attorney-General asserting his/her constitutional mandate under Article 88 of the Constitution. Why promote such confusion? Why must different rules and standards govern nolle prosequi, one promoting transparency and legal accountability and another defeating the same?

Another recent legislation that demonstrates Ghana's decision to operate a transparent governance system and hold public officials accountable is the Right to Information Act 2019, Act 989. As its name suggests, Act 989 seeks

[59] Office of the Special Prosecutor Act 2017 (Act 959) in s 80(2) states: 'The Criminal and Other Offences (Procedure) Act 1960 (Act 30) is amended in (a) sections 54 and 55 by the insertion after 'Attorney-General' of or 'Special Prosecutor' wherever it appears; and (b)section 54 by the insertion of a new subsection (2A) as follows: (2A) Where the Special Prosecutor enters a nolle prosequi under subsection (1), the Special Prosecutor shall state reasons for doing so.'

to ensure that public officials and institutions make information available to the public.[60] Public institutions are to keep information and inform the public annually about the kind of information they are keeping.[61] I contend that a vital piece of information that the Office of the Attorney General must keep and publish as required by section 3(1) of Act 989 pertains to the nolle prosequi pleas entered and the reasons for entering them. In fact, even without Act 989, this information, especially the reasons for the decision, must be accessible to any interested person. Beyond keeping this information and making it available upon fulfilling all legal condition precedents, the Attorney-General must inform the court and the accused why they have decided to discontinue a prosecution.[62]

Overall, I recommended that Ghana should reform her *nolle prosequi* law to reflect global trends without omitting the need to tailor the reforms to suit the Ghanaian context. In this regard, I recommend that Ghana looks to Canada and India in search of ideas to reform its nolle prosequi law.

In this article, I take the discussion on Ghana's nolle prosequi law and practice further by presenting and discussing the responses of judges, prosecutors, and lawyers on the issue, and reaffirm my recommendations for law reform.

2 METHODOLOGY

I collected qualitative data from 52 Ghanaian judges, magistrates, defence lawyers, and prosecutors who are currently working in or have previously worked in Ghana's justice system. The survey's questionnaire was divided into three parts. Part One collected information on the respondents' demographics. Part Two had separate sections targeting each of the three categories of respondents: defence lawyers, judges/magistrates, and prosecutors—these sections included similar

[60] Right to Information Act 2019 (Act 989).
[61] ibid, s 3(1).
[62] Samuel Opoku-Agyakwa (n 27)

questions, although the respondents answered them separately. Part Three included general questions that all respondents were required to answer, and it also elicited their overall responses to Ghana's nolle prosequi law and practice. I administered the survey's questionnaire by using Google Forms. Generally, participants were randomly selected as the questionnaire was sent to relevant informal WhatsApp Groups[63] with lawyers and judges as members. However, in a few instances, I targeted specific individuals whom I had determined were invaluable sources of information because of their experience—admittedly most of them had served, at various times, as Ghana's Attorney-General. I sent the questionnaire directly via WhatsApp to them. All responses were anonymous, although Part One of the questionnaire required respondents to indicate which of the three categories of respondent's that they belonged to. The respondents' answers were sent directly to the Google Forms and these were automatically collated, in an Excel file, and stored in the Cloud—I assessed them after the period of the survey had elapsed. I downloaded this file to aid my analysis of the information that I collected. Each respondent's answer was captured in the columns and rows in the Excel file. I first reviewed each of the entries to get a sense of the views expressed by the respondents. In the process, I sought to determine whether, based on the provided answers, I could objectively conclude that the data collection had reached saturation. To reach this conclusion, I aimed to examine from my initial review whether the collected data suggested any possibility that additional data collection could reveal new information, patterns, or themes. Following this review, I concluded that data collection had reached saturation as I was gleaning significant coherence in the pattens and themes emerging from my analysis of respondents' answers. After this conclusion, I set out to code the data collected. I adopted the deductive coding approach—the questionnaire's questions informed my coding. I also clustered the responses collected according to the categories of the respondents, i.e., lawyers, judges, and prosecutors. These aided me in synthesising the collected data and formed the basis of my analysis, conclusions, and recommendations.

[63] If you sent it to groups, through members whom I knew.

To facilitate the presentation and analysis of the views expressed by the respondents and ensure anonymity, I identified respondents with alphanumeric numbers derived from the first alphabets of their profession – I assigned a three-digit sequential number based on when the sequence in which the respondent appeared on the Excel sheet, with "001" as the first number – I assigned a different set of numbers although they all started from 00, to each category of respondents—so the first defence lawyer or judge/magistrate or prosecutor lawyer respondent was assigned the alphanumeric number DL 001, JM 001, and PL 001 respectively.

I must state that since the survey in late 2022 and early 2023, the debate over how the Attorney-General enters a *nolle prosequi* has been reignited following a series of *nolle prosequi* decisions entered in January and February 2025 in connection with criminal trials involving politicians and/or politically exposed or affiliated persons. These decisions were made after the change in government in Ghana on January 7, 2025. The newly appoint Attorney-General decided to discontinue prosecutions against Dr Johnson Asiama, Dr Samuel Ofosu Ampofo, Dr Cassiel Ato Forson and Mr Richard Jakpa.[64] The Attorney-General addressed a press conference and explained to the public why he truncated the said prosecutions. His reasons and the reactions of this immediate predecessor, who had initiated most of the said prosecutions, were at the heart of the ensuing debate on opaqueness of the considerations that influence an Attorney-General's decision to enter a *nolle prosequi*.[65] The debate between the Attorney-General and his immediate predecessor, as well as within the population, was a manifestation of the possible politics, partisanship, and arbitrariness around the exercise of the Attorney-General's prosecutorial discretionary power to prosecute and/or to enter a *nolle prosequi*. I will return to this later in this article.

[64] 'Criminal Prosecutions: AG drops cases against four politically exposed persons' (Channel 1 News, 1 February 2025) <https://channel1news.com/2025/02/01/criminal-prosecutions-ag-drops-cases-against-four-politically-exposed-persons/> accessed 2 February 2025

[65] 'Document: Reasons why A-G "cleared" NDC politicians and others from prosecution' (The Law Platform, 1 May 2025) <https://www.thelawplatform.online/post/document-reasons-why-a-g-cleared-ndc-politicians-and-others-from-prosecution> accessed 1 May 2025

3 THE SURVEY

I present below the views expressed by the respondents about Ghana's *nolle prosequi* law and practice. Before that, I provide a summary of the respondents' backgrounds.

3.1 About the respondents

Fifty-two respondents, comprising 21 females and 31 males, participated in the survey, which included 13 prosecutors, 19 defence lawyers, and 21 judges/magistrates. Seven (53.8%) of the prosecutor-respondents had between one and 10 years of experience as prosecutors, five (38.5%) had between 10 and 20 years of prosecutorial experience, and one (7.7%) had between 21 and 30 years of experience as a prosecutor. Eleven (84.6%) of the 13 prosecutor respondents reported having entered a *nolle prosequi* at least once, with seven (53.8%) stating that they had entered a *nolle prosequi* at most five times, and one (7.7%) having entered more than ten *nolle prosequi*. Almost all the prosecutors were lawyers—a insignificant number of them were prosecutors from the Ghana Police Service.

Ten (majority) of the defence lawyer-respondents, i.e., 52.6%, had between 11 and 20 years of experience as defence lawyers, and six of them (31.6%) had between one and 10 years of experience. Two of them (10.5%) had between 21 and 30 years of experience, and one (5.3%) had over 30 years of experience. Only six (31.6%), i.e., less than a third of the 19 defence lawyer-respondents, had been involved in a case where the Attorney-General had entered a *nolle prosequi.*

A majority (61.9%) of judges/magistrates participating in the survey, i.e., 13, had at most 10 years of experience as judges/magistrates. The remaining eight (38.1%) had between 11 and 20 years of experience as judges/magistrates. Eleven of the 21 judge/magistrate respondents (52.4%) indicated that they had presided over a case where the Attorney-General had entered a *nolle prosequi*.

3.2 Views expressed by respondents

I now present (often verbatim) and analyse the views expressed by the respondents.

Prosecutor-respondents: Eight (61.5%) prosecutor-respondents who had entered a *nolle prosequi* said they did not give reasons for entering a *nolle prosequi* while three (23.1%) said they had given reasons. Eight of the 13 prosecutor-respondents explained that they did not give reasons because the law does not require them to do so. In the words of PL 010 *"… I don't give reasons because I am not required to, by the law. However, in high-profile cases with public interest in the case, I have given the court the reasons for entering the NP [nolle prosequi] so that the public interest component is catered for adequately*."

Seven (53.8%) of prosecutor-respondents indicated that they will not hesitate to give reasons for their decision to enter a *nolle prosequi*. In comparison, six (46.2%) indicated that they have reservations about assigning reasons for their *nolle prosequi* decisions. PL 003, who belongs to the latter group, asserted amongst others that if the reasons are not satisfactory to the defence, it will result in speculation. Another prosecutor-respondent claimed that entering *nolle prosequi* is within the discretion of the Attorney-General and must be exercised with candour. A third prosecutor-respondent in this category found assigning reasons as amounting to the judiciary interfering with the Attorney-General's prosecutorial discretion. On the other hand, those who support the Attorney-General assigning reasons grounded their stance in ensuring transparency, promoting judicial oversight, equality before the law, and justice.

Prosecutor-respondents chose from a list of 15 possible reasons why the Attorney-General will enter a *nolle prosequi*. These reasons were:

- mistakes in the charges/charge sheet,
- to change/amend charge(s),
- political pressure/politics, pressure from superiors,

- national security and/or national interest,
- plea bargaining, international relations/diplomacy,
- death of a key witness, unwillingness of a complainant/victim to proceed,
- wrong timing, ill-health of accused/key witness,
- witness protection measure,
- in the interest of justice,
- poor internal supervision/negligence, and
- unknown—respondents were also at liberty to add to the list.

The three top reasons selected by prosecutor-respondents for entering a *nolle prosequi* were the '*death of a witness' and 'the interest of justice'* – 38.5% selected these reasons, with each reason being selected five times. The third reason selected by prosecutor-respondents *is 'mistakes in the charges,'* chosen by 30.8% of prosecutor-respondents, and this reason was selected four times.

Defence lawyer-respondents: Sixteen (84.2 %) of defence lawyers-respondents preferred that the Attorney-General explain their decision to enter a *nolle prosequi*. According to them, this will promote transparency, accountability, natural justice, the accused's and his/her lawyer's right to know, the interest of justice, and the avoidance of an abuse of the judicial process. On the other hand, three (15.8%) defence lawyer-respondents did not support the suggestion that the Attorney-General should explain his/her decision to enter a *nolle prosequi*. One of them - DL 010 indicated that *"It will serve no useful purpose."*

Defence-lawyer respondents also selected from the same list of 15 possible reasons why an Attorney-General will enter a nolle prosequi. Most of them, i.e., 10 (52.6%), identified political pressure/politics as the primary reason why the Attorney-General will enter a *nolle prosequi*. Three other reasons, i.e., 'pressure from superiors,' 'a mistake in the charges,' and 'unknown' were each selected by eight (42.1%) defence lawyer-respondents, making these reasons the second topmost reason selected by defence lawyer-respondents. The third reason that this category of respondents selected was '*unwillingness of a complainant to proceed*'. This reason was selected six times (31.6%) by this category of respondents. Perhaps DL 015's

response sums up the defence lawyers' views on this question. According to this respondent, "*We usually know. Either the prosecution finds they cannot win the case or vital witnesses are not available because they are apprehensive of reprisals or simply go into hiding or [the] government due to diplomatic concerns especially where the Accused is a foreigner, or it is politically expedient so to do or where the charges need to be reviewed to strengthen the prosecution or decide to use an Accused as a Witness*".

Judges/magistrates: Only two (11.1%) judge/magistrate-respondents indicated that the Attorney-General explained his/her decision to enter a *nolle prosequi*. Most of this group of respondents, i.e., 12 (57.1%), preferred that the Attorney-General explain his/her nolle prosequi decision. They asserted that this would promote accountability and avoid speculation, abuse, or a semblance of arbitrariness and collusion between the prosecution and the accused. Central to their views was a quest to promote transparency and judicial oversight, and according to JM 015, "*To maintain the integrity of the judicial process.*" Nine (42.9%) judge/magistrate respondents did not see why the Attorney-General should explain his/her nolle prosequi decisions—their responses included: JM 005 who stated that: "*The nolle prosequi has policy and political considerations. It is not all decisions of the state which should be for public considerations. Governance is complex", and* JM 004 said, *"It is one case off the cause list, no need to complain."*

Judges/magistrates, like the other two categories of respondents surveyed, had the same list of 15 possible reasons why the Attorney-General may enter a *nolle prosequi*. The three top reasons they selected were: a 'mistake in the charges' (38.1%), 'national security and/or national interest' (33.3%), and 'unknown'(33.3%).

3.3 Respondents' views on transparency in the Attorney-General's nolle prosequi power

Respondents expressed their views on transparency in how the Attorney-General exercises the *nolle prosequi* power. Overall, 39 (75%) of all the survey's respondents preferred that the Attorney-General explain his/her *nolle prosequi* decision. They cited the following reasons for their stance: promoting accountability and transparency in the judicial process, avoiding speculations of bribery, political

interference, and abuse. PL 007, explaining the reason for this position, said: "The *system is oftentimes abused for political convenience. If the AG [Attorney General] is mandated to give reasons, he might be cautious in rushing opponents to court.*" According to DL 006 "*[the] Defense must be involved in coming to the conclusion*". *DL 005 indicated that "Every action must have a rational explanation."*

One quarter (25%) of respondents supported the status quo, i.e., that Attorney-Generals should not assign reasons for entering a *nolle prosequi*. For instance, PL 005 said that: "*It takes away the discretionary power granted to the AG* [Attorney-General] *to initiate and conduct criminal cases on behalf of the State pursuant to article 88. Separation of powers, as the AG* [Attorney-General] *is seen as being under the executive arm of government,*" PL 006 said, "*The law does not require him to do so. Besides, NP [nolle prosequi] is entered sparingly and for very good reasons known to the prosecution.*" According to PL 008, "*In the interest of justice and to allow [the] prosecution [to] remedy certain errors/defects or deal with challenges without disclosing to the court or defense counsel* [the Attorney-General should not assign reasons]." JM 005 noted that "*Not all reasons are suitable for public consumption*" PL 010 stated that, "*No, because it is not necessary in every case to assign reasons for the discontinuance of the case. Even though we are not required to give reasons, we sometimes do so where the public interest in the case is high. In most cases where NP's [nolle prosequi] are entered, it is done to enable us move the case to the right forum or prefer more appropriate charges*". DL 015 said "*The Authority to prosecute lies at the discretion of the AG [Attorney-General] so he cannot be compelled by Mandamus to prosecute if he is [not] interested*" PL 011 also indicated that "*Some reasons although valid are difficult to fully explain on paper.*"

Twenty-nine (55.8%) respondents advocated for the Attorney-General's *nolle prosequi* power to be subject to judicial review, to promote accountability and check abuse. For instance, DL 003 said, "*There are times that there may be overwhelming evidence against the accused person but because of the accused (SIC) political affiliation, NP [nolle prosequi] is entered to terminate the prosecution, so in such a case Judicial Review should be applicable. The power of the Attorney General to enter NP may be subject to abuse, and it must be subject to judicial review. The power of the Attorney General to enter NP [nolle prosequi] may be used to frustrate accused persons when there is evidence that an*

application for submission of no case will succeed." PL 007 asserted that *"Prosecutions is (sic) not the ultimate in the judicial process. A judge can still strike out the process if they're unfair or abusive."* DL 011 indicated that *"[it] strengthens the justice system"* DL 012 also suggested that *"To avoid abuse of the discretion. OSP [Office of the Special Prosecutor] Act requires explanation for resort to NP [nolle prosequi]."* JM 012 claimed that "*This will help reduce political interference and abuse of the process*". JM 014 also argued that "*Similar to plea bargaining, there should be judicial supervision [of how nolle prosequi is used]."* DL 018 said, *"If the AG [Attorney General] knows he will be required to give reasons or that his actions will be put to scrutiny, he won't bow to political pressure."* JM 019 opined that "*The offenses [are] against the state or private individuals, and there must be someone overseeing that the right things are done. NP [nolle prosequi] may be filed for political reasons, which may not help the nation."*

4 THE COMPLEXITIES OF JUDICIAL SCRUTINY OVER THE ATTORNEY-GENERAL'S NOLLE PROSEQUI POWER

From the foregoing responses, it is important to consider the following questions: beyond an appeal through the courts and a review in the Supreme Court, what happens if a judge determines that the reasons for entering the nolle prosequi do not pass the 'Article 296 test'? Considering article 88 of the Constitution, can the Attorney-General be compelled to prosecute? Should an Attorney-General who refuses to proceed with a prosecution following a judicial review that the reasons for a *nolle prosequi* failed the 'article 296 test' remain in office? Will this situation amount to a violation of the oath the Attorney-General took 'to uphold, preserve, protect and defend the Constitution …, freely give my counsel and advice for the good management of the public affairs of the Republic of Ghana'? Will it be appropriate in such a situation for Parliament, under Article 82 of the Constitution pass a vote of censure against the Attorney-General? Who is constitutionally clothed with the authority to prosecute a case where the Attorney-General is unwilling to

do so? Can a citizen from whom "sovereignty resides,"[66] "justice emanates,"[67] and "for whose welfare the powers of government are to be exercised"[68] petition the President, who can in turn instruct the Attorney-General, under article 88(2), to go ahead with a prosecution? Is it at this stage that oversight of entering a *nolle prosequi* becomes a political matter, thus subject to the court of public opinion? These constitutional, legal and political issues expose the complexities of infusing judicial oversight over the Attorney-General's *nolle prosequi* power. Notwithstanding these, I doubt that the Attorney-General's prosecutorial discretion is and should be beyond judicial review.

Twenty-three (44.3%) respondents opined that the Attorney-General's *nolle prosequi* power should not be subject to judicial review. Some of them justified their position as follows: PL 003 indicated that "*Judicial control will make the exercise of the power, which is essentially political, less effectual.*" PL 006 indicated that "*It is power granted to the Attorney General by law. Making it subject to Judicial Enquiry will lead to absurd situations. Besides, it would mean that, that power resides in the Judiciary and not the Attorney General." PL 008 said "NP [nolle prosequi] will fail to serve its purpose if it was subject to judicial review.*" JM 005 explained that "*Public opinion is the best tool to control the use of nolle prosequi*." PL 011 stressed that "*It is and should remain the sole prerogative of the AG [Attorney-General] whether or not to go ahead with a prosecution. He should not be compelled by way of* judicial *review to continue with a case they no longer want to prosecute*". JM 007 asserted that "[*T]he decision as to who should be prosecuted should not be the business of judiciary (sic), … that judge would be venturing into investigation, and other areas which in my view is the preserve of the AG [Attorney General] and the police and other institutions, division of labour breeds excellence because the resultant factor is concentration. The judiciary should not be overburdened, so it can be focused*".

5 THE AFOKO DECISION: A CALL FOR REVIEW

[66] Constitution of Ghana 1992, art 1(1)
[67] ibid, art 125(1)
[68] Criminal Prosecutions (n 64)

On 12 February 2025, Ghana's newly appointed Attorney General, Dr Dominic Akuritinga Ayine, held a press conference to "account to his fellow citizens" for his *nolle prosequi* in, and withdrawals from, some high-profile criminal prosecutions initiated by his two immediate predecessors. He quoted Pwamang JSC's view in the Afoko case on emerging transparency and accountability in some common law jurisdictions, particularly regarding how prosecutors enter a nolle prosequi, to support his decision to explain his choices in the said cases. He acknowledged that, as Attorney-General, his decision must pass the "Article 296 test." He then devoted some attention to narrating the steps he had taken before deciding to *nolle prosequi* or withdraw from the said cases. According to him, these steps included consulting state attorneys in his office, defence counsel and investigators in the cases. The Attorney-General stated that he was very familiar with the cases and had acted as counsel in some of them. He emphasised that his decisions were motivated by professional and ethical considerations, as some of the charges against the accused persons were defective. Dr Dominic Ayine also opined that in some cases, the evidence presented by the prosecution in support of the charges led him to conclude that there was reasonable doubt about the accused person's guilt. The learned Attorney-General cited the relevant laws, recited the facts of the various cases, and discussed them to justify his conclusions/stance—in effect, he justified his decision to enter the *nolle prosequi* in the court of public opinion, as though he were doing the same before a court of law.

As expected, his immediate predecessor, Mr Godfred Yeboah Dame, responded to him, also setting out the facts of the said cases, the existing evidence, and the applicable law. He asserted that his successor's justification was essentially a rehashing of the argument made by defence counsel in the affected cases. Like the current Attorney-General, his predecessor also argued this case against Dr Ayine's decisions in the court of public opinion.

The transparency and accountability demonstrated by the learned Attorney-General are commendable, and I congratulate him for this. Dr Ayine's decision to make a public statement regarding his consideration for his *nolle prosequi* choices, along with Mr Godfred Yeboah Dame's reaction, also in public, confirms the

common law view that accountability for *nolle prosequi* decisions lies in the court of public opinion and not the law courts. However, more than ever, their statements convince me that the justification or otherwise of the Attorney-General's decision to enter a *nolle prosequi* is at best a legal and political matter that must be subject to judicial scrutiny. By this view, I am not discounting or excluding views from the court of public opinion. My position that the Attorney-General's *nolle prosequi* powers must be governed by Regulations, and that this decision must be subject to judicial review has been reinforced by the exchanges between Dr Ayine and Mr Dame as well as the population. Although the evaluation of the public statements by the Attorney-General and his predecessor is outside the scope of this article, it would be remiss of me if I fail to observe at least that their statements raised numerous legal, constitutional, and governance issues surrounding the Attorney-General's prosecutorial discretion to enter a *nolle prosequi* and article 296, and these require judicial review.

6 DISCUSSION OF RESPONDENTS' VIEWS

The ensuing discussion flows from respondents' views.

First, *nolle prosequi* is a discretion the Attorney-General seldom exercises. While this is true, it is no justification for the absence of transparency and accountability in its administration. Although prosecutor-respondents, who generally defended the *status quo*, indicated that they were not averse to explaining their *nolle prosequi* decisions, their primary reason for not providing reasons is that they are not legally obligated to do so.

The Attorney-General must justify nolle prosequi decisions

Overall, 75% of the survey's respondents preferred that the Attorney-General explain his/her *nolle prosequi* decisions. Coincidentally, prosecutor-respondents constitute 25% of the survey's respondents, so there is a tendency to assume that all of them 'voted' against the Attorney-General being required to explain his/her *nolle prosequi* decisions. However, the information collected from the respondents does

not support this assertion, as seven (53.8%) prosecutor-respondents, slightly above half, indicated that they did not mind explaining why the Attorney-General had decided to enter a *nolle prosequi*. Surprisingly, although most of the judge/magistrate respondents advocated for the Attorney-General to explain their *nolle prosequi* decisions, they constituted the largest group of the surveyed respondents, i.e., nine judges compared to six prosecutors and three defence lawyers, who preferred that the *status quo*, i.e., that the opacity surrounding the Attorney-General's *nolle prosequi* power remain.

Nolle prosequi and judicial scrutiny

Most respondents, i.e., 55.8%, opined that the decision to enter a *nolle prosequi* must be subject to judicial review. There was a variance of almost 20.8% between these respondents and the 75% of respondents who wanted the Attorney-General to provide reasons for entering a *nolle prosequi*. The variance may be evidence of a clash between the quest for transparency and accountability on one hand and respondents acknowledging the reality that article 88(3) of Ghana's Constitution gives the Attorney-General the prerogative to initiate and manage prosecutions on the other hand. Respondents belonging to the latter group may argue that since no court can compel the Attorney-General to prosecute, there is no utility in subjecting the Attorney-General's *nolle prosequi* decisions to judicial review, because where the court rules against the Attorney-General, it cannot compel the accused person's prosecution.

While this is true, as previously noted, I believe there is a constitutional basis for judicial review of the Attorney-General's *nolle prosequi* decision, even when the reasons involve diplomatic, security, or similar concerns. As previously suggested, this could also be implied from the Supreme Court's judgement in the Afoko case. Respondent JM 005 summed up the challenges with explaining a *nolle prosequi* decision, subjecting it to judicial review, and article 88(3) by stating that: "*The nolle prosequi has policy and political considerations. It is not all decisions of the state which should be for public consideration. Governance is complex.*" Without doubt, this partly means that the reasons for entering a *nolle prosequi* are not always grounded in law,

or that not all *nolle prosequi* decisions are legally and/or objectively justifiable. Although governance is indeed complex and not all information is suitable for public consumption, these considerations are prone to abuse by human frailties, so they must be checked through a competent judicial oversight authority. This reality vindicates my call for the Attorney-General to provide reasons for entering a *nolle prosequi* and subjecting those reasons to judicial scrutiny, even if *in camera*, with the accused person's lawyer present. As noted earlier, prosecutor-respondents identified the death of a witness, the interest of justice, and a mistake in the charges as the three top reasons for entering a *nolle prosequi*. These are reasons that can always be provided, even in open court. I noted, however, that these reasons apply more to less high-profile cases. Admittedly, so far, those cases are not the ones where the Attorney-General's *nolle prosequi* is controversial and likely to be abused.

Overall, respondents desired more control and judicial oversight, as well as less arbitrariness, in determining the rights of accused persons in connection with *nolle prosequi* decisions. Respondents acknowledged the potential influence of politics and/or partisanship on the Attorney-General's decisions. They emphasised the need to protect accused persons, who are the vulnerable party and face jeopardy during a criminal trial. Defence lawyers' mistrust of prosecutors was also manifested in their answers to the survey's questions. This is evidenced by the fact that defence lawyers identified politics and political pressure as the primary factor influencing the Attorney-General's decision to enter a *nolle prosequi*. This view may sound a bit far-fetched, but it may apply in a few cases, i.e., high-profile, or public interest cases involving politicians or politically exposed persons. Such cases usually make media headlines and often have partisan or political colouration. Examples of such instances in Ghana's recent politico-legal history are the *Afoko* case and the cases involving ace broadcaster Kwasi Kyei Darkwah and the so-called Galamsey Queen Aisha Huang as well as those already mentioned in this article.[69]

[69] ibid

All these involved high-profile individuals, including politicians and politically affiliated persons.

Mistrust between prosecutors and defence lawyers is unhealthy for the administration of justice. As officers of the court, prosecutors and defence lawyers must have one goal—to ensure that the ends of justice are served while the law is enforced and accused persons have their day in court. In this regard, judicial light must shine on the opaqueness associated with entering a *nolle prosequi*, as this will contribute to fostering confidence between these key actors in criminal proceedings. It will also have a *domino* effect and could create opportunities to reduce the public's cynicism over the Attorney-General's independence in exercising prosecutorial discretion by way of entering a *nolle prosequi*.

Generally, respondents' views promote the values of Ghana's Constitution, which include accountability, transparency, the right to know, judicial oversight, and an aversion to arbitrariness. These views align with the rationale for the reforms undertaken by other common law jurisdictions. The quest to maintain the *status quo* in Ghana, i.e., upholding the common law position, perpetuates the obscurity surrounding the Attorney-General's exercise of prosecutorial discretion, particularly in the context of *nolle prosequi*. This approach makes the Attorney-General judicially unaccountable when entering a **nolle prosequi**. As noted by the learned Mr Justice Pwamang in the Afoko case:

> *The decisions to prosecute and to terminate prosecution of suspected offenders is a matter of immense public interest. Furthermore, it affects the rights of the suspect offenders who may be compelled to suffer the indignation of prosecution when there is seriously no point in mounting prosecution on the facts of the case.* ***It is because of these considerations that the modern trend in democracies is for prosecutorial authorities to be open about the factors on which they take the decisions to initiate or terminate prosecutions*** (emphasis added).[70]

[70] [2018-2019] 1 GLR 1 141 at 148.

7 CONCLUSION AND RECOMMENDATIONS

Before I share my conclusions and recommendations, I must acknowledge limitations of this study. First, the number of respondents surveyed for this article is small—arguably this could affect my conclusions. Relatedly, the recent and relatively large number of cases that the Attorney-General "nolle prosequied," could have generated more interest among potential respondents if I had conducted the survey after the Attorney-General's recent series of nolle prosequis. The timing may have increased the number of respondents and perhaps their views—although I doubt that the overwhelming call for transparency and judicial scrutiny, from the surveyed respondents, would have been different if the number of respondents were larger. Thirdly, the process of selecting the respondents, i.e., posting the survey's questionnaire on various informal WhatsApp groups and in some cases targeting respondents, is another limitation because my choice of the groups and individuals that I should send the questionnaire to were heavily influenced by my personal knowledge, particularly, of which groups exist and my association with them, however remote. Lastly, the responses to the survey's questions could have been enhanced if majority of the respondents had been involved in cases where a nolle prosequi had been entered. For instance, only six (31.6%), i.e., less than a third of the 19 defence lawyer-respondents, had been involved in a case where the Attorney-General had entered a nolle prosequi. Admittedly the Attorney-General's entering a nolle prosequi is more an exception than the norm, hence criminal justice practitioners will seldom encounter such "privileged" situations.

With these limitations in mind, I now turn to my conclusions and recommendations. In this article, I gauged the views of practitioners in Ghana's criminal justice process to ascertain the chances of successfully implementing reforms that will make nolle prosequi in Ghana transparent and subject to judicial review. Ascertaining the views of the surveyed respondents was also intended to provide evidence that what I had advocated for in my previous article was not alien or a slavish call for reforms.

In both articles, the voices, and thoughts from within and afar coalesce in calling for change in Ghana's nolle prosequi law and practice.

The trend in many democracies with common law roots is for the Attorney-General's nolle prosequi power to be transparent and accountable—even the United Kingdom, which created nolle prosequi to manage prosecutions, has departed from unilaterally exercising this power. I repeat my recommendation in my previous article that Ghana should consider changing direction and infuse judicial oversight and accountability in how and when the Attorney-General enters a nolle prosequi.

Considerations of transparency, accountability, and upholding the rights of the accused person must outweigh every other factor articulated by some surveyed respondents such as saving judicial time, addressing the complexities of governance, and the right to know. I contend that these other factors are not paramount when the rights of an accused person are at stake, particularly in high-profile, partisan cases where there is a perception that the Attorney-General's nolle prosequi power is used to further parochial, partisan interests. No matter how few such cases are, accused persons in those cases must not suffer or benefit from the consequences of the unbridled exercise of the Attorney-General's prosecutorial discretion. There are constitutional, legal, and practical challenges if the call for judicial oversight and transparency is limited to only high-profile cases. Therefore, the call for judicial oversight relates to all nolle prosequi decisions of the Attorney-General. I hold this view fully aware that section 80 (2) of the Office of the Special Prosecutor Act, 2017 (Act 959), mandates the Special Prosecutor to assign reasons for entering a nolle prosequi.

As previously noted, Ghana's nolle prosequi law breeds mistrust, particularly between prosecutors and defence lawyers, and this is unhelpful for the administration of justice and so must be addressed. A bold and arguably near-perfect solution is to make nolle prosequi decision-making transparent and subject to judicial scrutiny. This must include the Attorney-General publishing Regulations on when and how he/she will exercise this discretionary power. I have already

articulated the potential benefits of infusing transparency and accountability in such decisions for deepening constitutional governance and the administration of justice. Ghana's unswerving hold onto the common law approach is unusual particularly when the global trend suggests that jurisdictions with legal, political, and historical traditions akin to Ghana, like India, Kenya, and Nigeria, have abandoned the common law position, and most importantly, that Ghana's constitutional imperatives require transparency and judicial review of such decisions.

Judicial scrutiny over the Attorney-General's nolle prosequi power must bring benefits to "victims" of the decision, i.e., the accused person, who suffers further jeopardy and indignation when a nolle prosequi is entered and fails the "Article 296 test." These benefits may include the Ghanaian taxpayer covering the accused person's legal fees and other compensation, like the benefits under article 14(7) of Ghana's Constitution—compensation for truncated prosecutions that were arbitrarily initiated and the Attorney-General must be punished as a member of the legal profession and/or public officer. Undoubtedly, there will be some accused persons who will benefit from the Attorney-General's unilateral entry of of a nolle prosequi power—they have no moral, legal or political justification to seek redress or compensation from the state. I am more concerned about those who are prosecuted for reasons other than the law.

In my previous article, in recommended that the Attorney-General must publish Regulations to govern how he/she enters a nolle prosequi. The Attorney-General must give reasons for entering a nolle prosequi, and the court must evaluate the reasons with article 296 (a) & (b) as the yardstick. This will promote legal accountability, check possible abuses of this discretionary power, aid in building a victim-centred criminal justice system, and uphold the letter and spirit of Ghana's Constitution. It will also bring Ghana in harmony with the evolving practice and law on nolle prosequi in other common law jurisdictions. Importantly, these reforms will be in sync with the wishes of criminal justice practitioners, as evidenced by the respondents surveyed for this article. As a first step, the Attorney-General

must, without any further delay, implement Pwamang JSC's directive in the Afoko case by publishing Regulations on how and when a nolle prosequi is entered.

UNIFYING LEGAL PRINCIPLES: INVESTIGATING THE ROLE OF ESTOPPEL IN GLOBAL COMMERCIAL LAW AND CONTRACTUAL RELATIONS

Joseph Kwaku Asamoah†, Daniel Bioyel Bewel†† and Joseph Bikunati Zimpa†††

ABSTRACT

The doctrine of estoppel serves as a critical mechanism for ensuring fairness and consistency in legal and contractual relations. This paper explores the role of estoppel within global commercial law, examining its application across different jurisdictions. By investigating commonalities and differences in the doctrine's application, the paper aims to highlight how estoppel functions to unify legal principles, promote justice, and foster predictable commercial interactions. Through comparative analysis of case laws, statutes, legal literature, and interpretations, from common law and civil law jurisdictions, the study sought to identify pathways for greater coherence and predictability in the doctrine of estoppel, with the ultimate goal of proposing a unified framework that enhances legal clarity and coherence in global commercial law, thereby enhancing fairness and efficiency of cross-border contractual relations.

Keywords: estoppel, common law, civil law, contractual relations, unifying legal principle.

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1.0 INTRODUCTION

Consistency and predictability in legal principles governing contractual relations in an increasingly globalized economy have become essential for facilitating smooth commercial transactions. As cross-border trade expands, so does the complexity of the legal frameworks regulating it. Global commercial law is characterized by diverse legal systems that often apply varying principles to similar contractual disputes. This divergence can lead to uncertainty and inconsistency in resolving cross-border commercial disputes, particularly where different legal doctrines are applied to contractual relations. Among the key doctrines that have gained significant attention in the pursuit of legal uniformity is estoppel, a principle that has its roots in common law but has gradually found its place in various legal systems worldwide.

Estoppel, in its various forms, operates as a mechanism to prevent a party from asserting a contradictory position, going back on its word, or acting inconsistently with previous conduct, that the other party has relied upon to their detriment thereby ensuring fairness and justice in legal transactions.[1]

Despite its widespread application and recognition, the doctrine of estoppel remains a subject of considerable debate and inconsistency, particularly in the context of international commercial law. One of the central challenges is the lack of uniformity in the understanding and application of estoppel across different legal systems. While common law jurisdictions have developed a relatively coherent framework for estoppel[2], civil law countries and international legal instruments have adopted varying approaches, leading to potential conflicts and uncertainties in cross-border contractual relations.[3]

[1] Spencer Bower, *The Law Relating to Estoppel by Representation* (4th edn, Butterworths 2004) 13.
[2] John Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (3rd edn, Hart Publishing 2021) 81.
[3] Peter Schlechtriem, 'Good Faith in German Law and in International Uniform Law' (1997) 3 SAcLJ 10, 16.

Historically, the concept of estoppel has its roots in common law, particularly in English jurisprudence, where it has played a crucial role in preventing inequitable outcomes in disputes involving representations, promises, and assumptions.[4] The doctrine of estoppel was categorized into several forms, including estoppel by record, estoppel by deed, and estoppel in pais (equitable estoppel).[5] Equitable estoppel, in particular, has played a vital role in preventing parties from reneging on their promises or representations when others have relied on them to their detriment. However, its relevance is not confined to common law; civil law jurisdictions and international legal instruments have also incorporated estoppel principles, albeit under different terminologies and doctrines. For example, in civil law jurisdictions, estoppel principles exist but are often embedded within broader doctrines of good faith and contractual fairness.[6] For example, the German Civil Code (Bürgerliches Gesetzbuch, BGB) encapsulates principles that align with estoppel through its provisions on *venire contra factum proprium* (prohibition of inconsistent behaviour).[7]Nevertheless, the feasibility of establishing a truly "common ground" for applying estoppel across different legal systems remains contentious. In civil law jurisdictions, principles functionally similar to estoppel are often subsumed under the broader concept of good faith (bona fides), which encompasses duties of loyalty, fairness, and consistency but lacks the doctrinal specificity found in common law estoppel.8 This broader interpretive scope of good faith means that, unlike common law estoppel which is narrowly focused on preventing inconsistent conduct, civil law doctrines operate as overarching standards of behavior governing the entire contractual relationship.9 As Zimmermann notes, while estoppel in common law serves as a specific equitable defence, its civil law counterparts are expressions of a general obligation to act in

[4] Robert Goff and Gareth Jones, *The Law of Restitution* (8th edn, Sweet & Maxwell 2011) 45.
[5] John McGhee, *Snell's Equity* (34th edn, Sweet & Maxwell 2020) 579.
[6] Jan Oosterhuis, 'The Principles of European Contract Law and Estoppel' (2008) 16 ERPL 69, 73.
[7] Bürgerliches Gesetzbuch (BGB) (1896, as amended) s 242.
[8] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 667–669.
[9] Hein Kötz, *European Contract Law*, vol 1 (Clarendon Press 1997) 84–86.

good faith and to refrain from abusive conduct.10 Therefore, the notion of creating a unified framework for estoppel must account for these systemic and conceptual divergences between legal traditions.

This means that the significance of estoppel in global commercial law lies not only in its capacity to prevent unjust outcomes but also in its potential to serve as a unifying legal principle that transcends national boundaries. However, such a unifying function can only be realistically pursued if due regard is given to the different conceptual underpinnings of estoppel and its analogues, ensuring that any proposed common ground accommodates the flexibility inherent in civil law doctrines like good faith while retaining the certainty provided by common law estoppel. By establishing a common ground for applying estoppel in contractual relations, legal systems can reduce uncertainties and foster greater trust among parties engaged in international trade.[11] This, in turn, can lead to more efficient dispute resolution and a more predictable legal environment for businesses.

According to Vogenauer and Seatherill, the lack of unified global recognition and application of the doctrine of estoppel can result in unpredictable outcomes in international disputes, undermining the stability and predictability essential for global commerce.[13] The absence of a unified approach to estoppel in international commercial law raises questions about the effectiveness of existing legal frameworks in addressing the complexities of modern-day trade. As businesses increasingly operate in multiple jurisdictions, the need for a harmonized legal approach to estoppel becomes more pressing. Ferrari posits that without such unification, the risk of divergent interpretations and inconsistent application of the

[10] Reinhard Zimmermann, 'Good Faith and Equity' in Arthur Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011) 251.
[11] Roy Goode, *Transnational Commercial Law* (3rd edn, OUP 2023) 321.
[13] Stefan Vogenauer and Stephen Weatherill, *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 114–116.

doctrine remains high, potentially leading to disputes and inefficiencies in international transactions.[15]

This paper, therefore, aims to address these challenges by investigating the role of estoppel in global commercial law and its potential to unify legal principles across different jurisdictions. Through a comparative analysis of estoppel in common law and civil law systems and its application in international legal instruments, this study seeks to identify pathways for greater coherence and predictability in the doctrine's application, with the ultimate goal of proposing a unified framework that enhances legal clarity and coherence in global commercial law, thereby enhancing fairness and efficiency of cross-border contractual relations.

2.0 THE EVOLUTION AND HARMONIZATION OF ESTOPPEL: BRIDGING COMMON LAW AND CIVIL LAW TRADITIONS

The doctrine of estoppel has deep roots in both common law and civil law traditions, serving as a mechanism to prevent individuals from reneging on their previous assertions or actions when such changes would result in injustice. This is to ensure fairness and consistency in contractual relations and broader commercial transactions. As legal systems evolve toward greater unification and harmonization of global commercial law, understanding the role of estoppel across different jurisdictions becomes increasingly significant. This literature review examines the historical development, jurisprudential foundations, and contemporary applications of estoppel in both common law and civil law systems, with a focus on its potential for unifying legal principles in global commercial law.

The concept of estoppel has its roots in English common law, where it evolved as a procedural tool to bar contradictory pleadings equitable to prevent injustice.

[15] Franco Ferrari, *Contracts for the International Sale of Goods: Applicability and Applications of the 1980 United Nations Sales Convention (CISG)* (2nd edn, Brill Nijhoff 2018) 202–205.

Estoppel by record, one of the earliest forms, emerged from the principle that a judgment or decision by a court should be conclusive between the parties and not subject to dispute in subsequent proceedings. This is closely tied to the principle of res judicata, preventing re-litigation of matters already judged.[16] For example, in Ghana, the Supreme Court held in various cases including the case of In Re Mensah (Decd); Mensah & Sey v. Intercontinental Bank (Gh) Ltd[17] that a party is estopped by res judicata of judgment by default where identical issues arising in the second action have been directly decided in the first action between the same parties.

The development of estoppel in common law further evolved through various forms, including "estoppel by deed" and "estoppel by conduct." Estoppel by deed developed during the 16th and 17th centuries, particularly in relation to property transactions. It prevented parties to a deed from asserting something contrary to what was contained in the deed. This principle was solidified in cases like Duchess of Kingston's Case[18] where it was held that estoppel could apply to prevent a party from contradicting a solemn admission in a legal context. This form of estoppel was significant in ensuring the integrity and reliability of formal documents and agreements.[19]

Estoppel *in pais* also referred to as estoppel by representation, gained prominence in the 19th century. It was developed to prevent a party from denying a fact they had previously represented as true if another party had relied on that representation to their detriment. This principle was solidified in the case of Pickard v Sears[20], where the court held that an individual who has made a representation through words or conduct, leading another to act to their detriment, cannot later deny the truth of that representation.

[16] *Ferrers Case* (1446) YB 21 Hen Vol 7, p 118.
[17] *In Re Mensah (Decd); Mensah & Sey v. Intercontinental Bank (Gh) Ltd* [2010] SCGLR 118
[18] *Duchess of Kingston's Case* (1776) 20 State Tr 355
[19] *Bowman v Taylor* (1834) 4 LJ Ch 57.
[20] *Pickard v Sears* (1837) 6 Ad & E 469, 112 ER 179.

The common law refinery of the doctrine continued to evolve. The classic definition is found in the case of Hughes v Metropolitan Railway Co.[21], where Lord Cairns LC stated that "*a party cannot insist on a right inconsistent with what he has led the other party to believe.*" This principle has been extended to various forms, including promissory estoppel, estoppel by representation, and estoppel by conduct, each serving to uphold the integrity of promises or representations made in a commercial context. The doctrine of promissory estoppel emerged more fully in the 20th century, particularly with the landmark case of Central London Property Trust Ltd v High Trees House Ltd , where Lord Denning articulated the principle that a promise, intended to be binding and acted upon by the promisee, is enforceable to prevent the promisor from going back on their word, even if the promise was not supported by consideration.[22] Promissory estoppel in this case operated to prevent a landlord from collecting full rent during wartime when he had accepted a lower amount.

The doctrine of estoppel has developed through the principles of *stare decisis* which currently forms an integral part of the common law, particularly in the English legal system, where it emerged as a means to prevent a party from asserting a claim or fact that is contrary to their previous conduct or representations.

In the United States, the doctrine of estoppel is similarly critical and recognized in various forms, prominently promissory and equitable estoppel. One of the most significant applications of estoppel in U.S. contract law is promissory estoppel. This form of estoppel is invoked when a promise, not formalized as a contract, leads another party to take action or suffer a detriment based on reliance on that promise. The Restatement (Second) of Contracts, a legal treatise produced by the American Law Institute (ALI) solidified the principle of promissory estoppel in American jurisprudence. Section 90 of the *Restatement (Second) of Contracts* codifies the principle of **promissory estoppel**, providing that a promise that the promisor

[21] *Hughes v Metropolitan Railway Co* [1877] 2 App Cas 439.
[22] ibid; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

should reasonably expect to induce reliance, and which does induce such reliance, is binding if injustice can be avoided only by enforcing the promise.[24]

The case of Ricketts v. Scothorn[25] is often cited as one of the earliest applications of promissory estoppel in the United States. In this case, the court held that the grandfather's promise to his granddaughter, which led her to quit her job, was enforceable despite the lack of consideration because she had relied on the promise to her detriment. Another influential case is Hoffman v. Red Owl Stores, Inc.[26], where the court enforced a promise made during preliminary negotiations that led the plaintiff to sell his business and move his family, even though no formal contract was finalized. The court ruled that Red Owl's promise was binding under the doctrine of promissory estoppel because the plaintiff had reasonably relied on the promise to his detriment.

Equitable estoppel prevents a party from going back on its word when the other party has relied on that word to its detriment. In the United States promissory estoppel is widely recognized, particularly in contract law. The landmark case of Ricketts v. Scothorn[27], established that a promise made without consideration could still be enforceable if the promisee relied on it to their detriment. The U.S. Supreme Court in Heckler v. Community Health Services of Crawford County, Inc.[28] noted that "the doctrine of equitable estoppel is grounded in the premise that a party is precluded from asserting to another's disadvantage a right inconsistent with a position previously taken." In its modern development, the Supreme Court of the United States applied the doctrine in the case of Dickinson v. Zurko[29] to prevent the government from taking a legal position that contradicted an earlier stance, which had been relied upon by the opposing party. This case highlights the broader application of estoppel in both public and private sectors.

[24] American Law Institute, *Restatement (Second) of Contracts* (American Law Institute 1981) s 90.
[25] *Ricketts v Scothorn* (1898) 57 Neb 51, 77 NW 365.
[26] *Hoffman v Red Owl Stores, Inc.* (1965) 26 Wis 2d 683, 133 NW2d 267.
[27] *Ricketts* (n 25)
[28] *Heckler v Community Health Services of Crawford County, Inc.* (1984) 467 US 51
[29] *Dickinson v Zurko* (1999) 527 US 150.

This development of the doctrine of estoppel marked a significant shift in contract and commercial law, introducing a more flexible and equitable approach to enforcing promises in many common law jurisdictions including countries in Africa. For example, in Ghana, which inherited its legal system from the British common law tradition, estoppel plays a vital role in ensuring fairness and justice in commercial dealings and contractual obligations. The doctrine of estoppel was introduced into Ghanaian law through the reception of English common law. This occurred formally with the Supreme Court Ordinance of 1876, which provided that the common law, doctrines of equity, and statutes of general application in force in England as of 24th July 1874 would apply in Ghana, then the Gold Coast, as long as they were not inconsistent with local laws.[30] Over time, Ghanaian courts have developed the doctrine in line with both English precedents and local circumstances. Estoppel has been applied in various commercial and contractual contexts, reflecting the dynamic nature of Ghanaian commercial law.

In contemporary Ghana, the doctrine of estoppel continues to be a cornerstone in resolving disputes, particularly in commercial and contractual matters. The courts have consistently emphasized the importance of good faith and fair dealing, which are reinforced by estoppel. For example, in the of case Osei-Akoto v. Akoto[31] the Supreme Court applied the doctrine of estoppel by conduct, holding that the defendant was estopped from denying the validity of an agreement to transfer land after allowing the plaintiff to act on it. Again, the court discussed the application of promissory estoppel in a contractual context in the case of Essien v. Mensah[32], emphasizing that equity would prevent a party from acting inconsistently with a promise that had been relied upon.

The doctrine of promissory estoppel is frequently invoked in cases involving land disputes, business contracts, and employment agreements to the extent that it has

[30] Supreme Court Ordinance of Ghana 1876, s 14.
[31] *Osei-Akoto v. Akoto* [1962] 1 GLR 113.
[32] *Essien v. Mensah* [1977] GLR 28.

been codified in the Evidence Act of Ghana. The Act[33] deals with estoppel by one's own statement or conduct and states that:

> *"Except as otherwise provided by law, including a rule of equity, when a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest of that person."*

The doctrine of promissory estoppel has accordingly been captured in section 26 of Ghana's Evidence Act as a conclusive presumption. This means that as a rule of evidence, promissory estoppel bars a party, or his successor to proceedings, from denying the truth of a representation intentionally made for his opponent to rely upon and the opponent acted on it.

In recent times the scope of estoppel has expanded and developed under common law. The recent addition to the doctrine is estoppel by convention. Per the case of Chartbrook Ltd v Persimmon Homes Ltd[34] the House of Lords held that Estoppel by convention is an aid to the interpretation of deeds to help find the intention of parties to a contract where the parties are shown to have based their subsequent dealings on a common assumption or belief. In the Norwegian American Cruise A/S case[35] the English Court of Appeal stated that **e**stoppel by convention arises when two parties have entered into a contract but, in its operation, they both adopted a mistaken interpretation or legal effect of a term of the contract and conducted their affairs based on that mistaken interpretation. This means that if a dispute should arise out of a term of contract, the court, in ascertaining the intention

[33] Evidence Decree 1975 (NRCD 323), s 26.
[34] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38.
[35] *Norwegian American Cruise A/S case (formerly Norwegian American Lines A/S) v Paul Mundy Ltd (the Visafjord)* [1988] 2 Lloyds Rep 343 C.A.

of the parties, will hold them bound by the mistaken interpretation they had mutually given to the term through their practice.

In contrast, in civil law jurisdictions, while the terminology and specific doctrines may differ, similar principles of estoppel exist under doctrines such as *venire contra factum proprium* (acting against one's previous conduct) and the principle of good faith. This means that while the doctrine of estoppel is a distinct principle under common law, it does not exist as a distinct legal principle in civil law jurisdictions. Again, in civil law traditions, similar concepts are embedded within doctrines such as *Verwirkung* in German law and *bonne foi* in French law.[36] The convergence of these principles in international commercial law highlights the universality of the underlying concept of preventing unfairness by holding parties accountable for their prior statements or actions.

The civil laws seek to promote the doctrine of "good faith". For example, in German law, estoppel is encompassed under the principle of "*Treu und Glauben*" (good faith), as stipulated in Section 242 of the Bürgerliches Gesetzbuch (BGB) which makes provisions on *venire contra factum proprium* (prohibition of inconsistent behavior)[37]. This principle mandates parties to act in good faith and adhere to fair dealing, preventing contradictory behaviours that could harm others. The principle prevents parties from acting in ways that contradict their earlier conduct, closely mirroring the effects of estoppel in common law.

The French legal system also recognizes a form of estoppel through the doctrine of "préclusion," or *l'interdiction de se contredire au détriment d'autrui*" (prohibition against contradicting oneself to the detriment of others), which prevents parties from contradicting previous statements or actions if it would harm others who relied on those statements or actions. The French courts have applied this principle in various contexts, ensuring that parties cannot unfairly withdraw from their

[36] Thomas Graziano, *Comparative Contract Law: Cases, Materials, and Exercises* (2nd edn, Palgrave Macmillan 2018) 185.
[37] Bürgerliches (n 7)

previous positions when others have relied upon them. This principle was notably discussed in one of the French leading cases where the French Court of Cassation emphasized the role of good faith in contractual relations, aligning with the estoppel-like doctrines found in civil law.[38]

3.0 JURISPRUDENTIAL FOUNDATIONS OF THE DOCTRINE OF ESTOPPEL

The jurisprudential foundations of estoppel lie in the principles of equity and justice. For purposes of this study, the philosophical foundations of the doctrine of the equitable remedy of estoppel will be based on John Rawl's Theory of Justice[39]. Rawl's Theory of Justice postulates that justice is the structural rules of society where the different sets of values of people can coexist, cooperate, and to some extent compete. Therefore, John Rawls describes his theory of justice as "justice as fairness". Rawl propounded the theory of original position as a new way to learn about principles of justice, arguing that people will prefer principles of justice that will fairly distribute what he terms as "primary social good" to benefit everyone. The central thesis of Rawl's theory of justice is that all persons must have equal rights to ensure equal basic liberties. This proposition of Rawls situates well with the objectives of this study.

To relate John Rawls' Theory of Justice to the doctrine of estoppel, the study focuses on the idea of fairness and the protection of individuals from harm caused by others' inconsistent actions or representations. John Rawls' Theory of Justice, particularly his concept of "justice as fairness," provides a robust philosophical foundation for understanding the doctrine of estoppel. According to Rawls, justice is achieved when the structural rules of society allow for the coexistence, cooperation, and even competition of different sets of values. This implies a system where individuals are treated fairly and equally, and where the principles of justice are designed to ensure

[38] Cass. civ. 3, 8 juillet 1992, Bull. civ. III, n° 211.
[39] John Rawls, *A Theory of Justice* (Harvard University Press 1971).

that everyone benefits from a fair distribution of what he terms "primary social goods."

In this context, the doctrine of estoppel can be seen as a practical embodiment of Rawls' theory. Estoppel serves to prevent injustice by ensuring that individuals cannot benefit from contradictory positions or withdraw from earlier representations that others have relied upon to their detriment. This aligns with Rawls' central thesis that all persons must have equal rights to systems that ensure equal basic liberties. In matters of access to justice, no one must be allowed to exploit inconsistencies to the disadvantage of others. Therefore, estoppel enforces fairness by holding parties accountable to their representations, ensuring that justice is not only theoretical but also practical and accessible to all.

The theory of justice can be aligned with the doctrine of estoppel from the comparative perspective of common law and civil law jurisdictions. In common law, estoppel operates as an equitable doctrine, providing remedies where strict legal rights would result in injustice. The equitable nature of estoppel is particularly evident in cases of promissory estoppel, where courts intervene to prevent a promisor from going back on a promise that the promisee has relied upon to their detriment.[40] The reliance interest protected by estoppel aligns with broader notions of fairness and the protection of legitimate expectations. In civil law systems, the equivalent doctrines are often grounded in the principle of good faith (*bona fides*), which permeates contractual relations and commercial law more broadly. The German doctrine of *Treu und Glauben* and the French principle of *bonne foi* both serve to ensure that parties act consistently and in good faith, thereby preventing unjust outcomes.[41]

The parallel between these civil law principles and the common law doctrine of estoppel underscores the shared commitment to equity and justice in global

[40] John McGhee (n 5)
[41]Reinhard Zimmermann (n 8)

commercial law. The convergence of the common law equitable doctrine of estoppel and its civil law equivalents highlights a shared objective in both legal systems: ensuring fairness and consistency in legal and contractual relations. While the terminology and application may differ, the underlying intent to prevent injustice through inconsistent behavior is a common thread. This convergence is increasingly significant in the context of global commercial law, where cross-jurisdictional transactions require a harmonized understanding of principles like estoppel to ensure equitable outcomes and reliability in legal relationships.

The exploration of estoppel's historical jurisprudence across common and civil law systems underscores its role as a unifying legal principle, capable of bridging the gap between different legal traditions in global commerce. This unification is vital for fostering legal certainty and fairness in international contractual relations, as parties from diverse legal backgrounds engage in complex transactions that demand a coherent approach to the enforcement of rights and obligations.

4.0 THE ROLE OF PROMISSORY ESTOPPEL IN ENFORCING PROMISES WITHOUT CONSIDERATION: A COMMON LAW PERSPECTIVE IN CONTRACTUAL AND COMMERCIAL RELATIONSHIPS

At common law, a promise is not binding in the absence of consideration. However, the equitable doctrine of promissory estoppel can sometimes be used to enforce an agreement that might otherwise fail due to lack of consideration. In simple terms, estoppel prevents a party from withdrawing a promise made to another party, if the party to whom the promise was made reasonably relied on that promise. This happens where under equity; the doctrine of promissory estoppel acts to provide a remedy to the party who relied on the promise of the promisor. The doctrine of estoppel provides an exception to the principle that equity will not assist a volunteer. It operates in two stages. First, the claimant must prove that the estoppel is present, and second, the court must identify the remedy.

To establish estoppel in contractual and commercial settings, the doctrine operates under specific conditions. First, the claimant must demonstrate the existence of a contractual relationship between the parties. As established by the English courts in cases such as High Trees[42] and Tool Metal Manufacturing Co., Co.[43] estoppel applies where there is an ongoing or recurrent contractual obligation between the parties. Second, the claimant must show that a clear and unequivocal promise or representation was made, intended to alter the legal relations of the parties, specifically that the promisor would not enforce their strict legal rights under the contract. In Hughes v Metropolitan Railway Company [44], the court held that this promise or representation could be express or implied, as was the case when the landlord's conduct in initiating negotiations with the tenant implied a promise. Third, the promisee must prove that he or she relied on the promisor's representation or promise in conducting their affairs. Finally, the course of dealing between the parties must indicate that it would be inequitable for the promisor to withdraw their promise and insist on their legal rights under the contract. This is known as the concept of unconscionability, which forbids parties from abusing one another's ignorance or lack of negotiating strength.

In expanding the scope of estoppel, the Supreme Court of Ghana, a common law jurisdiction in the case of The Republic v. Nii Adamah & 10 Others.[45] held that to succeed in a claim of estoppel by conduct, the claimant must establish the following five (5) elements:

1. The party alleged to be in breach must have made a representation which was false or must deliberately have concealed material facts;
2. The party making the representation knew it was false or that he acted negligently or recklessly in not knowing the falsity of the representation.
3. The other party must have been led to believe the representation was true;

[42] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.
[43] *Tool Metal Manufacturing Co. v. Tungsten Electric Company* [1955] 1 WLR 761.
[44] *Hughes* (n 21)
[45] *The Republic v. Nii Adamah & 10 Ors.* [2014] 73 GMJ 1 at 55.

4. The person who made the representation intended same to be relied upon;
5. The other person actually acted upon the representation and suffered prejudice or loss that cannot be remedied unless the claim in estoppel succeeds.

The scope of estoppel is expansive, covering various areas of law where it serves to prevent injustice by holding parties to their representations or promises when it would be inequitable to allow them to assert contrary positions. The application of estoppel is grounded in principles of fairness and justice, ensuring that parties cannot benefit from misleading others to their detriment. However, it is trite to note that estoppel is used as a defense in contract law but cannot be used to create a new cause of action. Its scope is thus limited to preventing injustice rather than enforcing promises as if they were contracts.

5.0 ESTOPPEL IN INTERNATIONAL COMMERCIAL LAW: HARMONIZING LEGAL PRINCIPLES ACROSS JURISDICTIONS

Estoppel, a principle rooted in equity, serves as a vital mechanism in international commercial law to ensure fairness and justice in contractual relationships. By preventing parties from acting inconsistently with prior representations or actions, estoppel fosters trust and predictability in commercial transactions.

This study delves into the doctrine of estoppel within the context of international commercial law, exploring its application across different legal systems, its role in resolving cross-border disputes, and its intersection with key international instruments such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts. In doing so, the study seeks to undertake an examination of the texts, commentaries, and case law related to the UNIDROIT Principles and the CISG to investigate the role of estoppel in global commercial law and its potential to unify legal principles across different jurisdictions. Again, through a comparative

analysis of case law, legal interpretations, and application of the CISG and UNIDROIT Principles related to estoppel from common law and civil law jurisdictions this study seeks to identify pathways for greater coherence and predictability in the doctrine's application, with the ultimate goal of proposing a unified framework that enhances legal clarity and coherence in global commercial law, thereby enhancing fairness and efficiency of cross-border contractual relations.

The field of international commercial law has evolved significantly to accommodate the complexities of cross-border trade. The United Nations Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) are two pivotal instruments aimed at harmonising international commercial transactions.

In international business law, estoppel is so fundamental that it forbids a party from retracting a declaration or representation made to another party. The foundation of the estoppel is the notion that someone who instills confidence or expectations in another person may not be obligated to let those expectations[46]. This doctrine is essential to maintaining the stability and predictability of international transactions by prohibiting parties from retracting their prior statements. The role of the equitable doctrine of promissory estoppel in international commerce and contractual relations is profound in most national and international commercial law principles and legislations. The doctrine is recognized in international commercial law, notably under the UNIDROIT Principles and the United Nations Convention on Contracts for the International Sale of Goods (CISG), where it plays a role in ensuring fairness in cross-border transactions. In these contexts, estoppel may prevent a party from asserting inconsistent positions in different jurisdictions, thus promoting uniformity and predictability in international commerce.[47]

[46]Derek Bowett, 'Estoppel before International Tribunals and Its Relation to Acquiescence' (1957) 33 Brit YB Int'l L 176.
[47] *UNIDROIT Principles of International Commercial Contracts 2016*, art 1.8.

Existing studies have explored how the CISG and UNIDROIT Principles are applied in different legal systems. Ferrari provides an extensive analysis of the CISG's reception in both common law and civil law jurisdictions, highlighting discrepancies in the interpretation and application of the doctrine of estoppel.[48] Similarly, Zeller examines the principles' adaptability, emphasizing their role in bridging legal traditions[49]. Despite these contributions, there remains a lack of explicit provisions of estoppel in these legislations to bind contracting parties to guarantee certainty and predictability of international commercial transactions.

The debate and controversy over the role, uncertainty, and application of the principle of good faith under the United Nations Convention on Contracts for the International Sale of Goods (CISG) continues to attract scholarly attention. While most commentators agree that good faith plays a role within the CISG framework, particularly due to its explicit mention in Article 7(1), others argue that its present formulation in the Convention gives rise to significant uncertainty. On one side of the debate, some scholars contend that good faith under the CISG should be confined to an interpretative function, serving merely as a directive for the interpretation and application of the Convention's provisions rather than as an independent substantive obligation imposed on the parties.[50] Others, however, maintain that good faith may operate as a general principle underlying the CISG, thereby imposing broader duties of cooperation and fairness in contractual performance and enforcement.[51]

The uncertainty surrounding the scope of good faith is further reflected in divergent judicial and arbitral interpretations. Walt, for instance, argues that reliance on good faith in CISG jurisprudence remains relatively rare, suggesting that it plays only a

[48] Franco Ferrari, 'Specific Topics of the CISG in the Light of Judicial Application and Scholarly Writing' (1995) The Journal of Law and Commerce *1*

[49] Bruno Zeller, *CISG and the Unification of International Trade Law* (Routledge-Cavendish 2008)

[50] Troy Keily, 'Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)' (2003) 3 Vindobona Journal of International Commercial Law and Arbitration 15.

[51] John Felemegas, 'The Concept of Good Faith in the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the Principles of European Contract Law (PECL)' (2001) 13 Pace International Law Review 399.

modest operational role in international sales law.[52] Similarly, Tepeš and Markovinović observe that despite decades of application, there is still no consensus on the meaning and function of good faith within the CISG, leading to persistent interpretative ambiguities.[53] Komarov, analysing the drafting history of Article 7(1), notes that the inclusion of good faith was a deliberate compromise designed to restrict its application to interpretative functions rather than to create substantive obligations.[54] As a result, the principle of good faith in the CISG represents both a unifying ideal and a source of legal indeterminacy valued for its symbolic harmonising potential, yet criticised for its vagueness and context-dependent application across jurisdictions.[55] This is because the CISG, which governs international sales contracts, does not explicitly mention estoppel. However, the principles underlying estoppel can be inferred from several provisions.

The principle of good faith remains one of the most important requirements underlying contractual relationships between parties under the common law and civil law legal systems and has been incorporated into the United Nations Convention on International Sales of Goods (CISG). Article 7(1) of CISG contains an interpretative regulation to the effect that in the interpretation of the CISG, regard has to be given to its international character and to the need to promote a uniform application of the convention as well as the need to observe the principles of good faith in international trade arrangements [56]. While Article 7 emphasizes good faith in international trade, other provisions prevent parties from inconsistent behavior that would prejudice the other party. Article 16(2)(b)of the CISG, for instance, prevents a party from revoking an offer if the offeree has relied on it to their detriment, reflecting the essence of promissory estoppel[57]. Similarly, Article 29(2)

[52] Steven Walt, 'The Modest Role of Good Faith in Uniform Sales Law' (2010) 11 Boston University International Law Journal 89.
[53] Mario Tepeš and Hrvoje Markovinović, 'The CISG and the Good Faith Principle' (2018) 36 Journal of Law and Commerce 171.
[54] Alexander S Komarov, 'Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of CISG: Some Remarks on Article 7(1)' (2005–06) 25 *Journal of Law and Commerce* 75.
[55] Camilla Andersen, 'The Uniform International Sales Law and the Global Jurisconsultorium' (2014) 17 International Trade and Business Law Review 310.
[56] United Nations Convention on Contracts for the International Sale of Goods (CISG), art 7(1).
[57] ibid, art 16(2)(b).

deals with the modification of contracts, indicating that a party cannot contradict a prior agreement if the other party has relied on it[58].

The UNIDROIT Principles of International Commercial Contracts developed by the International Institute for the Unification of Private Law (UNIDROIT), on the other hand, explicitly recognize estoppel. Article 1.8[59] states, "*A party cannot act inconsistently with an assumption upon which the other party has relied to that party's detriment*". This provision captures the essence of estoppel as understood in common law and civil law systems, reinforcing its applicability in international commercial transactions. The UNIDROIT Principles further elaborate on this in Article 2.1.18, concerning the withdrawal of an offer. It states that an offer cannot be withdrawn if it is reasonable for the offeree to rely on the offer being held open and the offeree has acted in reliance on it. This aligns closely with the notion of promissory estoppel and highlights the importance of protecting reasonable reliance in commercial dealings.[60]

In terms of comparative legal analysis, the UNIDROIT Principles, developed by the International Institute for the Unification of Private Law (UNIDROIT), are a set of rules designed to establish a balanced legal framework for international commercial contracts. According to Bonell[61], the UNIDROIT Principles are not binding but serve as a reference to harmonize and modernize international contract law. This flexibility allows them to complement existing national laws and international conventions, making them a versatile tool in international trade. Vogenauer posits that the Unidroit principles are critical in the application and enforcement of international sales as they serve as a gap-filler in international contracts where national laws or other conventions are silent[62].

[58] ibid, art 29(2).
[59] UNIDROIT Principles (n 47)
[60] ibid
[61]Michael Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (Transnational Publishers 2002).
[62]Stefan Vogenauer, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press 2015).

On the other hand, the CISG, established by the United Nations Commission on International Trade Law (UNCITRAL), is a multilateral treaty that provides a uniform framework for international sale of goods contracts. Unlike the UNIDROIT Principles, the CISG is binding on its member states, thereby offering a more structured approach to international commercial transactions. CISG applies automatically to contracts for the international sale of goods unless expressly excluded by the parties. CISG is binding legal instrument for its signatories, ensuring uniformity, and predictability and emphasizing the principles of good faith, fair dealing, and reasonableness[63].

6.0 THE APPLICATION OF ESTOPPEL IN INTERNATIONAL COMMERCIAL ARBITRATION IN SOME LANDMARK CASES

Estoppel has played a crucial role in several landmark international commercial disputes. However, before examining its application, it is important to distinguish between international commercial arbitration and international investment arbitration, as the original discussion draws upon both contexts. International commercial arbitration generally involves disputes between private parties (or private and state-owned entities) arising from commercial contracts, governed primarily by party autonomy and contractual obligations under private international law.[64] In contrast, international investment arbitration typically involves a foreign investor and a host State, grounded in public international law and bilateral or multilateral investment treaties (BITs), such as those administered under the International Centre for Settlement of Investment Disputes (ICSID).[65] While both forms of arbitration utilise estoppel as an equitable doctrine to prevent inconsistency and bad faith, its application in investment arbitration often intersects with concepts such as legitimate expectations and sovereign assurances, whereas in

[63]Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press 2016).
[64] Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 67–70.
[65] Christoph Schreuer, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009) 115–117.

commercial arbitration, estoppel operates primarily as a bar against inconsistent contractual conduct between private parties.[66]

In notable international investment arbitration cases under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), the tribunal invoked estoppel principles to prevent a state from denying obligations that had been relied upon by an investor. For example, in the case of Maffezini v Kingdom of Spain[67], the tribunal held that Spain was estopped from invoking the most-favored-nation (MFN) clause in a manner inconsistent with its prior conduct. In this case, the tribunal addressed the issue of estoppel in relation to jurisdiction. Spain contended that Maffezini was barred from bringing a claim under the Argentina-Spain Bilateral Investment Treaty (BIT) because he had not exhausted local remedies. However, Maffezini argued that Spain was estopped from raising this objection, as its actions and assurances had led him to believe he could directly pursue international arbitration without first resorting to local courts. The tribunal considered these representations and ultimately accepted Maffezini's argument, applying the principle of estoppel to prevent Spain from contradicting its earlier position. The tribunal noted that Spain's earlier assurances to the claimant had induced reliance, and it would be inequitable to allow Spain to retract those assurances. This decision highlighted the cross-jurisdictional applicability of estoppel in protecting legitimate expectations in international investment law.[68]

Again, one of the notable cases that dealt with the principle of estoppel in the context of international commercial arbitration is the ICC's International Court of Arbitration case No. 8324[69] where the tribunal applied the principle of estoppel to prevent a party from denying the validity of a contract after having benefited from

[66] Andrea Bjorklund, 'Estoppel and Reliance in International Investment Arbitration' (2014) 31 *ICSID Review – Foreign Investment Law Journal* 363.
[67] *Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7).
[68] Christoph Schreuer, 'Estoppel' in August Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008) 426.
[69] *ICC Arbitration Case No. 8324* (1995).

it. This case concerned a dispute between a European buyer and a North African seller over a contract for the sale of goods. The buyer alleged that the goods delivered by the seller did not meet the contractual specifications. In response, the seller contended that the buyer had accepted the goods without raising any objections at the time of delivery and had even resold them to a third party. Consequently, the seller invoked the principle of estoppel, arguing that the buyer was barred from challenging the quality of the goods after accepting and reselling them without timely protest. The central legal question was whether the buyer, having accepted the goods without immediate objection, was estopped from later asserting a claim of non-conformity. The arbitral tribunal ruled in favour of the seller, concluding that the buyer was indeed estopped from disputing the quality of the goods after accepting them without reservation. The tribunal concluded that estoppel applied because the buyer's conduct of accepting the goods and reselling them indicated acceptance of the conditions of the goods condition and the seller had relied on this conduct to their detriment. Accordingly, the tribunal emphasized that the party's conduct in accepting the benefits of the contract prevented it from subsequently challenging its enforceability.

Another notable case is Amoco International Finance Corp v Iran[70] where the tribunal applied estoppel to bar Iran from denying the validity of certain agreements after Amoco had acted in reliance on Iran's representations. The case involved a dispute between Amoco International Finance Corporation, a U.S. company, and the government of Iran. After the Iranian Revolution, the Iranian government nationalized Amoco's oil-related assets in the country. Amoco sought compensation for the expropriation, arguing that Iran had violated international law. The principle of estoppel was relevant in the context of Iran's argument that Amoco had acted in bad faith or had misrepresented its position. Iran contended that Amoco's actions led to a situation where it should be estopped from claiming damages. However, the tribunal found that Amoco was not estopped and was entitled to compensation for the expropriated assets, emphasizing that Iran's actions

[70] *Amoco International Finance Corp v Iran* (1987) 15 Iran-US CTR 189.

were inconsistent with its obligations under international law. The tribunal found that Amoco had altered its position based on Iran's conduct, and it would be unjust to allow Iran to benefit from the contradiction.

Additionally, the case of Amco Asia Corporation and others v. Republic of Indonesia[71], represents one of the earliest instances of the estoppel theory in international investment arbitration, where the tribunal held that estoppel arises when one party to a dispute makes a representation through words or actions. As a result, that party is barred, or estopped from asserting that the other party's position was correct in law or fact, regardless of whether it actually was. Similarly, in The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company[72], the tribunal demonstrated the application of estoppel in international investment arbitration and reaffirmed that estoppel occurs when one party makes a representation in words or deeds and is subsequently barred from claiming that the other party's position was correct in law or fact, regardless of its accuracy. In contrast, international commercial arbitration typically applies estoppel to promote contractual consistency and equitable conduct between private parties. Tribunals under the ICC, LCIA, and UNCITRAL frameworks have consistently relied on estoppel to prevent opportunistic conduct, protect reliance interests, and uphold the sanctity of contractual expectations.[73] Thus, while estoppel in investment arbitration serves as a tool for holding sovereign states accountable for their representations or assurances to investors, its role in commercial arbitration remains primarily concerned with enforcing private parties' reliance-based expectations.[74]

The comparative analysis of estoppel across these two arbitration regimes reveals that although both share the equitable foundation of preventing inconsistent conduct, their functions diverge contextually. In investment arbitration, estoppel

[71] *Amco Asia Corporation and others v. Republic of Indonesia (Award)* (1984) 1 ICSID Rep 413, para 40.
[72] *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company* (Interim Award) (2010) PCA Case No. 2009-23, para 158.
[73] Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 561–563.
[74] Yas Banifatemi, 'The Principle of Estoppel and the Protection of Legitimate Expectations in Investment Treaty Arbitration' in Andrea Bjorklund (ed), *Yearbook on International Investment Law & Policy 2012–2013* (Oxford University Press 2014) 243–244.

reinforces the principles of legitimate expectations and good faith in the conduct of states, whereas in commercial arbitration, it safeguards the stability of contractual relationships and deters bad faith among private parties.

7.0 COMPARATIVE ANALYSIS OF ESTOPPEL IN COMMON LAW AND CIVIL LAW JURISDICTIONS: BRIDGING DIVERGENCES IN INTERNATIONAL COMMERCIAL LAW

Given the analysis of the application court in cross-jurisdictional disputes, it is expedient to evaluate the comparative approaches to recognizing and applying the doctrine of estoppel in common law and civil law jurisdictions. The application of estoppel in international commercial law reflects the convergence of common law and civil law principles. In fostering economic trade and competition policies within the European Union Economic Zone, the European Union legal framework incorporates estoppel principles primarily through its directives and regulations that promote fairness in contractual relationships[75]. For example, the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR) both reflect the concept of estoppel reinforcing the importance of consistency and reliance in contractual dealings.[76]

At common law, the doctrine of estoppel is viewed as a doctrine that serves as a "shield" and not a "sword," meaning it can be used defensively to prevent a party from asserting something contrary to what is implied by their previous actions, but not offensively to create a new cause of action. The leading case illustrating this principle is Combe v Combe[77], where the English Court of Appeal held that estoppel cannot be used to enforce a promise in the absence of consideration. The court emphasized that estoppel could only prevent a party from insisting upon their strict legal rights when it would be unjust or inequitable for them to do so, rather than

[75] Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/22.
[76] *Draft Common Frame of Reference (DCFR)* (2008) and *Principles of European Contract Law (PECL)* (1999).
[77] *Combe v Combe* [1951] 2 KB 215.

creating new rights where none previously existed. Lord Denning famously stated, "Estoppel may be used as a shield but not a sword." This principle was reinforced in Baird Textile Holdings Ltd v Marks & Spencer Plc[78], where it was held that estoppel could not be invoked to create a contract where none existed. In support of this position, the Supreme Court of India, in the case of Motilal Padampat Sugar Mills Co. Ltd. v State of Uttar Pradesh AIR[79] , expanded the scope of promissory estoppel, emphasizing that the government could not renege on a promise that induced a party to alter its position significantly.

In contrast, the divergence in approach of this common law position can be seen in a landmark Australian case of Waltons Stores (Interstate) Ltd v Maher[80], where the High Court of Australia expanded the scope of promissory estoppel, allowing it to be used as a cause of action. In this case, the Plaintiff led the Defendant to believe that a formal contract for the lease of commercial premises would be executed. The Defendant relied on this belief by beginning construction work. The Plaintiff then withdrew from the agreement before the contract was formally executed. The High Court of Australia held that the Plaintiff was estopped from denying the existence of the contract due to their conduct and the Defendant's reliance on it, ruling in favour of the Defendant for the losses incurred.

While in common law jurisdictions, estoppel primarily operates as a shield rather than a sword to prevent unfairness, in civil law jurisdictions, similar doctrines may be used more flexibly, including as a basis for claims. Civil law jurisdictions, such as Germany, incorporate estoppel-like principles under the doctrine of good faith (*Treu und Glauben*). This doctrine obliges parties to act in good faith and prevents contradictory behaviour, similar to the function of estoppel in common law. The French concept of *abus de droit* also aligns with estoppel by preventing parties from exercising their rights in a manner that contradicts prior representations or actions.

[78] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274.
[79] *Motilal Padampat Sugar Mills Co. Ltd. v State of Uttar Pradesh AIR* 1979 SC 621
[80] *Waltons Stores (Interstate) Ltd v Maher (*1988) 164 CLR 387.

On comparative analysis of the recognition and application of the doctrine of estoppel in different legal traditions relative to enforcement of the CISG and UNIDROIT Principles in commercial transactions, it is trite to note that while in common law jurisdictions, legal principles are often derived from judicial decisions and precedents, in Civil law jurisdictions, their codified statutes and comprehensive legal codes, may find the CISG's uniform rules more compatible with their legal traditions. Bridge avers that the flexibility of the UNIDROIT Principles may align well with the common law's case-by-case approach, providing supplementary rules that courts can apply when addressing gaps or ambiguities in contracts[81]. Conversely, Zeller posits that the structured and binding nature of CISG may sometimes be at odds with the flexibility preferred in common law systems[82].

However, Felemegas is of the view that although CISG may be binding and structured, the UNIDROIT Principles can still play a complementary role by filling in gaps and offering interpretative guidance, particularly in areas where national codes are silent on the adoption and application of the doctrine of estoppel[83]. Goode opines that the interplay between the UNIDROIT Principles and the CISG in different legal systems underscores the importance of understanding both instruments' strengths and limitations[84]. For this reason, this comparative analysis of the application of estoppel would provide insights into how these frameworks can be effectively utilized to resolve cross-border commercial disputes, taking into account the nuances of common law and civil law traditions. Such an understanding is essential for parties, the courts, practitioners, and policymakers striving to foster more efficient and predictable international trade relations[85].

[81] Michael Bridge, *The International Sale of Goods: Law and Practice* (Oxford University Press 2017).
[82] Bruno Zeller (n 49)
[83] John Felemegas, *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (Cambridge University Press 2007).
[84] Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law: Text, Cases, and Materials* (Oxford University Press 2015).
[85] Marcel Fontaine and Filip De Ly, *Drafting International Contracts: An Analysis of Contract Clauses* (Martinus Nijhoff Publishers 2009).

The comparative recognition and application of estoppel in different legal systems reveals a convergence towards ensuring fairness and consistency. While the terminology and specific doctrines may differ, the underlying principles of preventing contradictory behavior and protecting reliance interests are universally recognized by the two legal traditions.[86] This shows that the doctrine of estoppel plays a unifying role in global commercial law and contractual relations by ensuring that parties adhere to their representations and promises, thus fostering trust and predictability in legal and business environments to promote the Trans-Lex Legal Principles. The Trans-Lex Principles aim to bridge the gap between different legal systems, contributing to the harmonization and unification of international commercial law.[87] Estoppel promotes this principle since it comparatively serves as transnational legal principles or rules that are widely accepted and recognized across different legal systems, particularly in international commercial law. The recognition and application of the doctrine of estoppel in both common law and civil law jurisdictions form part of a broader effort to create a body of law that transcends national boundaries and can be applied uniformly across different jurisdictions in international commercial law.

8.0 IMPLICATIONS OF ESTOPPEL FOR INTERNATIONAL COMMERCE

In international commerce, predictability, trust, and fairness are critical components that enable smooth commercial operations. The doctrine of estoppel plays a vital role in this context by ensuring that parties adhere to their representations and cannot arbitrarily change their positions. This segment of the paper examines the implications of estoppel for enhancing predictability and trust in international commerce, promoting fairness in contractual relations, and addressing the challenges and limitations of its application.

[86] Konrad Zweigert and Hein Kötz, The Relative Merits of Common Law and Civil Law Systems' (1987) 37 ICLQ 73.
[87] Trans-Lex, 'The Trans-Lex Principles' (https://www.trans-lex.org/principles) accessed 23 August 2024.

8.1 Enhancing Predictability and Trust

Estoppel contributes significantly to the predictability of commercial transactions by creating a legal obligation for parties to honor their previous representations or conduct. This obligation ensures that one party cannot take advantage of another by changing their stance to the detriment of the other party. For instance, in the context of international trade, a seller who has consistently represented that their goods meet specific standards cannot later deny this if the buyer has relied on that representation in entering the contract. Such consistency is crucial for fostering trust among international trading partners, as it allows parties to engage in commercial transactions with the assurance that their counterparties will not engage in arbitrary or capricious behaviour[88]. According to McKendrick, the importance of predictability in international commerce is underscored by the principle of legal certainty, which is essential for the functioning of global markets[89]. Estoppel thus, ensures that commercial entities can make informed decisions based on the representations of others, thereby reducing the risk of unexpected or unfair outcomes. This predictability, in turn, enhances trust, as parties are more likely to enter into commercial relationships if they can rely on the stability of their counterparties' commitments.

8.2 Promoting Fairness

Beyond predictability, estoppel serves as a tool for promoting fairness in contractual relations. By holding parties accountable for their representations, estoppel prevents unjust enrichment and ensures equitable treatment.[90] This doctrine is particularly important in international commerce, where parties from different legal and cultural backgrounds may have varying expectations and understandings of

[88] Michael Bridge (n 81)
[89] Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (9th edn, OUP 2022).
[90] John McGhee, *Snell's Equity* (33rd edn, Sweet & Maxwell 2015).

fairness. Estoppel helps bridge these differences by providing a common legal standard that emphasizes the importance of honouring one's word.

In the Arakaka case[91], for example, the court held that a party could not rely on a technicality to escape liability after the other party had relied on their representation to their detriment. Such rulings reinforce the principle that fairness in international commerce requires parties to act in good faith and uphold their commitments. The Arakaka is a case where a cargo of iron rails was shipped from Antwerp to Bombay under a bill of lading that contained a clause exempting the carrier from liability for damage "occasioned by collision, stranding, or other perils of the sea." The ship, Arakaka, ran aground due to negligent navigation, and the cargo was damaged. The cargo owners sued for damages, arguing that the exemption clause did not cover the carrier's negligence. The House of Lords held that the exemption clause was broad enough to cover negligence, and the carrier was not liable for the damage. This case did not primarily focus on the principles of estoppel. Instead, it addressed the scope of an exemption clause in a bill of lading. The decision did touch upon estoppel in the context of the carrier's assertions. However, the principle of estoppel was indirectly relevant as the cargo owners argued that the carrier should be estopped from relying on the exemption clause due to the negligent conduct that led to the damage. The House of Lords ultimately ruled that the carrier could rely on the exemption clause, thereby implicitly rejecting the estoppel argument. This means that by promoting fairness, estoppel contributes to a more balanced and equitable commercial environment, where businesses are less likely to be exploited or unfairly disadvantaged.

9.0 CHALLENGES AND LIMITATIONS OF ESTOPPEL IN INTERNATIONAL COMMERCIAL TRANSACTIONS

Despite its benefits, the application of estoppel in international commerce is not without challenges. One of the primary difficulties lies in the differences in legal

[91] *The Arakaka* [1896] AC 250.

traditions and interpretations across jurisdictions[92]. Civil law and common law systems, for example, may have varying approaches to estoppel, leading to inconsistent outcomes in international disputes. According to Brown, the lack of a uniform standard for applying estoppel in international commerce can therefore create uncertainty, which undermines the very predictability and trust that the doctrine seeks to promote[93]. Furthermore, the requirement for unequivocal promises or representations can sometimes limit the applicability of estoppel in complex commercial transactions. In situations like this, Mann posits that where the parties' intentions or representations are ambiguous, courts may be reluctant to apply estoppel, leaving one party without recourse[94]. This limitation is particularly problematic in international commerce, where language barriers, cultural differences, and complex contractual arrangements can make it difficult to establish the requisite clarity for estoppel to apply.

The doctrine of estoppel plays a crucial role in enhancing predictability and trust in international commerce by ensuring that parties cannot arbitrarily change their positions. By promoting fairness and preventing unjust enrichment, estoppel contributes to a more equitable commercial environment. However, challenges such as differences in legal traditions and the need for clear representations highlight the limitations of estoppel in international commerce. Addressing these challenges through greater harmonization of legal standards and clearer contractual language could enhance the effectiveness of estoppel as a tool for promoting predictability, trust, and fairness in global trade.

10.0 CONCLUSION

The doctrine of estoppel has evolved into a fundamental principle in global commercial law, acting as a critical tool in fostering predictability and fairness in

[92] Michael Jones, *Understanding Estoppel: A Comparative Analysis* (Routledge 2019) 101-115.
[93] Lee Brown, 'Challenges in Applying Estoppel Across Jurisdictions' (2021) 35 International Trade Law Review 150-165.
[94] Adam Mann, *Estoppel in Commercial Transactions* (OUP 2012) 45-56.

contractual relations. Its application across various jurisdictions whether in common law or civil law systems demonstrates its adaptability and relevance in an increasingly interconnected world. By preventing parties from resiling from their prior representations, estoppel reinforces the integrity of commercial agreements, ensuring that trust and reliance are preserved in international transactions. Furthermore, when viewed through the lens of John Rawls' Theory of Justice, estoppel aligns with the broader goals of access to justice and equity in legal processes. It ensures that no party can unjustly benefit from contradictory positions, thereby upholding the rule of law and promoting fairness in both domestic and international commerce. As global trade continues to expand, the unification of legal principles like estoppel plays an essential role in bridging the gaps between different legal traditions, contributing to the development of a more cohesive and reliable international legal framework. This convergence of legal doctrines not only enhances the predictability of outcomes in cross-border disputes but also strengthens the trust necessary for the smooth functioning of global markets. As such, the role of estoppel in global commercial law is indispensable. Its continued evolution and harmonization across jurisdictions are vital in ensuring that legal systems remain responsive to the complexities of modern commerce while upholding the core values of justice and fairness that underpin the rule of law in commercial transactions.

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

Baffour Yiadom-Boakye†

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

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INTRODUCTION

Arbitrability concerns whether a subject-matter is capable of settlement by arbitration.[1] Arbitrability is a fundamental concept in international arbitration that affects the recognition of international arbitration agreements and the recognition and enforcement of arbitral awards.[2] 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.[3] 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'.[4]

In 2010 Ghana enacted the Alternative Dispute Resolution Act, 2010 (Act 798)[5] 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.[6] Arbitrability in international arbitration in Ghana has been recognised as a potential weakness of Act 798.[7]

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[1] Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021) 1028-1029.
[2] ibid.
[3] 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.
[4] Alex Mills, 'Chapter 3: Arbitral Jurisdiction' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (1st edn, OUP 2020) 86.
[5] Hereinafter referred to as the Act 798.
[6] 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.
[7] 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[8] matters relating to the national or public interest;[9] the environment;[10] the enforcement and interpretation of the Constitution;[11] and any other matter that by law cannot be settled by an alternative dispute resolution method.[12] The non-arbitrable matters in Act 798 have been criticised for being too broad, limitless and all-inclusive.[13] The non-arbitrable matters have also been criticised for a having an implied public policy basis which contribute to their broad nature,[14] and a lack of territoriality as to whether they are applicable in both international and domestic arbitration.[15] Ghana has the same criteria for international arbitrability and domestic arbitrability.[16] Arbitrability in Act 798 applies to international and domestic arbitration.[17] 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.[18] 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

[8] Joe Mante (n 7) 32; Doe Tsikata (n 7) 14; Albert Fiadjoe (n 7) 6; Edward Torgbor (n 6).
[9] Act 798, s 1(a).
[10] ibid, s 1(b).
[11] ibid, s 1(c).
[12] ibid, s 1(d).
[13] Joe Mante (n 7) 38, 39.
[14] Joseph Mante, 'Arbitrability and Public Policy: An African Perspective' (2017) 33 Arbitration International 275, 290, 294.
[15] Edward Torgbor (n 6) 212.
[16] Act 798, s 1.
[17] Edward Torgbor (n 6) 212.
[18] Memorandum to the Alternative Dispute Resolution Bill 2009, i.

arbitral awards.[19] 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.[20] 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'.[21] 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.[22] 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,[23] or through the courts as is the case in the USA.[24] 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,[25] or through the courts as is the case in England and Wales.[26] The analysis in this paper is done by

[19] Amazu Asuozu, '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.
[20] Gary Born (n 1) 1042.
[21] Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) para 1.19.
[22] ibid.
[23] 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.
[24] *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).
[25] Arbitration Code, art. 7; See also, Sweden Arbitration Act of 1999, s 1.
[26] *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;[27] the environment;[28] the enforcement and interpretation of the Constitution;[29] any other matter that by law cannot be settled by an alternative dispute resolution method.[30] The subject matters in Section 1 are non-arbitrable hence providing the scope of arbitrability in Ghana.[31]

Section 1 of Act 798 does not indicate its scope of application concerning territoriality.[32] 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.[33] This highlights a lack of certainty in territoriality.[34] The provisions on foreign

[27] Act 798, s 1 (a).
[28] ibid, s 1 (b).
[29] ibid, s 1 (c).
[30] ibid, s 1 (d).
[31] 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.
[32] Edward Torgbor (n 6) 212.
[33] ibid.
[34] ibid.

awards in Act 798 are the only provisions in Act 798 that are limited exclusively to international arbitration.[35] 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.[36] The case of *Attorney-General v. Balkan Energy Ghana Limited & 2 Others*[37] highlights this assertion.

In the *Balkan Energy* case, a dispute arose between the Government of Ghana (GoG)[38] and Balkan Energy and its partners in respect of a Power Purchase Agreement.[39] 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.[40] 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.[41] The tribunal proceeded with the hearing of the arbitration. The High Court in Ghana based on Article 130(1)(a)[42] of the 1992 Constitution and Section 1 of Act 798 ruled that the underlying dispute involved the interpretation and enforcement of Ghana's Constitution.[43] The 1992 Constitution exclusively reserved its interpretation and

[35] Act 798, s 59.
[36] Edward Torgbor (n 6) 212.
[37] High Court, unreported, Suit No. BDC 32/10, 6/9/2010 (*Balkan Energy Case*).
[38] Hereinafter referred to as GoG.
[39] Hereinafter referred to as PPA.
[40] 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.
[41] ibid.
[42] 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.
[43] *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.[44] 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.[45]

The arbitration between the GOG and Balkan Energy was seated in the Netherlands, hence an international arbitration.[46] 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.[47] 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.[48]

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.[49] 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

[44] ibid.
[45] See *Balkan Energy Limited and others v. Republic of Ghana* (Award), PCA Case No. 2010-7.
[46] *Balkan Energy Ghana Limited and others* (n 40).
[47] *Balkan Energy Case* (n 37) 9-13.
[48] *Balkan Energy Ghana Limited* and others (n 40)
[49] 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'.[50] In domestic arbitration, the nationalities of the parties, the seat of arbitration, and the place of performance of the contract may be the same.[51] 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[52] and the commercial reservation in the New York Convention.[53] Parties to international arbitration are often businesses or commercial corporations, states, or state entities.[54] Sometimes international arbitration may concern an individual against a commercial entity or an organization.[55] The amounts in dispute in international arbitration are disproportionately higher as compared to sums involved in domestic arbitration.[56] 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.[57] Some states

[50] Nigel Blackaby (n 21) para 1.19.
[51] ibid.
[52] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 1.
[53] 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.
[54] Nigel Blackaby (n 21) para 1.22.
[55] 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.
[56] See Nigel Blackaby (n 21) para 1.23.
[57] See 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.[58]

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

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].[65] The preamble in the IAA states that the IAA is

[58] 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.
[59] ibid, para 2.116
[60] Marike Paulsson (n 52) 1.
[61] Gary Born (n 1) 957.
[62] 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.
[63] Gary Born (n 1) 1042-1043.
[64] ibid.
[65] 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.[66] 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.[67] The IAA also permits parties in domestic arbitration to adopt the IAA as the applicable legislation.[68]

The IAA provides that intellectual property rights disputes are arbitrable.[69] 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.[70] 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*.[71] The court stated that there was a presumption of arbitrability as long as a dispute fell within the scope of an arbitration clause.[72] 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.[73] Second, a subject matter is non-arbitrable where it would be contrary to public policy considerations for the subject matter to be arbitrable.[74]

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[66] 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.

[67] 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.

[68] IAA s 5 (1).

[69] ibid, ss 26A (1), 26B (1), 26C, 26D, 26E, 26F, 26G.

[70] ibid, s 11(1).

[71] [2015] SCGA 57.

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

[73] ibid.

[74] 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.[75] 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).[76] 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.[77] 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.[78] Intellectual property rights cover a broad range of matters.[79] Cap 10 further provides extensive provisions concerning intellectual property rights awards and their effects.[80]

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.[81] The Review of Arbitration Laws, LRRD No 3/2001,[82] which was prepared before the enactment of the CAP 10 and the IAA, provides insight on arbitrability. The Arbitration Report does not

[75] IAA, s 11 (2).
[76] Hereinafter referred to as Cap 10.
[77] Cap 10, s 3.
[78] ibid, s 52 B (1).
[79] ibid, s 52 A (1).
[80] 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.
[81] 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.
[82] 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.[83] Therefore, public interest elements determine arbitrability in domestic arbitration.[84] 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*)[85] 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.[86] 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.[87] The court noted that claims bought against a company concerning such pre-insolvency rights did not have any public interest elements.[88] The courts in Singapore have also held that whether a director is an alter ego of a company is arbitrable in domestic arbitration.[89] 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-

[83] ibid.
[84] Michael Hwang (n 67) 11.
[85] [2011] SGCA 21.
[86] *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.
[87] ibid para 47.
[88] ibid.
[89] *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.[90] Disputes that may be non-arbitrable in domestic arbitration involve public interest elements.[91] The public interest elements are usually based on matters of status and mandatory law.[92] 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.[93] 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.[94] Chapter 1 of the FAA has general provisions

[90] *Tomolugen Holdings Ltd and another* (n 72)
[91] Arbitration Report para 2.37.17.
[92] ibid.
[93] IAA, s 11(2).
[94] 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.[95] Where the provisions of a state's arbitration statute conflict with the FAA, the FAA supersedes the state arbitration statute.[96] 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.[97]

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.[98] 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.[99] 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*.[100] 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.[101] Alternatively, a party contending non-arbitrability must show an inherent conflict between arbitration and the underlying purposes of the statute that Congress specifically

[95] 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.
[96] ibid.
[97] FAA, s 202.
[98] FAA, s 2.
[99] 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.
[100] 473 50 US 614 (1985).
[101] ibid, 627-628.

intended that the claim should not be arbitrable.[102] 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.[103] This was the case assuming that a contrary result would be forthcoming in a domestic context.[104] The Supreme Court noted that in international arbitration, domestic courts must subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration.[105]

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*[106] 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[107] and public law claims.[108] This is because of adherence to the pro-arbitration attitude of the New York Convention by the US courts.[109] However, arbitrability may be rendered conditional upon the satisfaction of certain prerequisites such as post-dispute consent being given to ensure arbitration is voluntary.[110] Also the courts in the US recognising the nature of international commerce have accordingly expanded the

[102] ibid.
[103] ibid 629.
[104] ibid.
[105] ibid.
[106] ibid.
[107] Catherine Amirfar (n 95) 26-27.
[108] Paula . Henin and Rocío 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.
[109] ibid.
[110] ibid.

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

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.[113] Firstly, in *Shearson/ American Express v. McMahon*,[114] the court held that claims under the Racketeer Influenced and Corrupt Organizations (RICO) Act and Exchange Act are arbitrable.[115] 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.[116] Secondly, in *Gilmer v. Interstate/Johnson Lane Corp*,[117] the court held that claims under the Age Discrimination in Employment Act (ADEA) are arbitrable.[118] This was because neither the text nor the legislative history of the ADEA explicitly precludes arbitration.[119] Also in *CompuCredit Corp. v. Greenwood*, [120] the court held that claims under the Credit Repair Organizations Act (CROA) were arbitrable.[121] 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.[122] The presumption of arbitrability also applies even in cases where state law may provide contrary legislation concerning the arbitrability of a dispute.[123]

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[111] ibid.
[112] Karim Youssef (n 3) para 3-31.
[113] Erica Stein and David Attanasio, 'The US Supreme Court and Arbitration' (2019) 2019(2) b-Arbitra| Belgian Review of Arbitration 521, paras 19-22.
[114] 482 U.S. 220, 226-227 (1987).
[115] ibid.
[116] *Shearson/ American Express v. McMahon* 482 U.S. 220, 226-227 (1987).
[117] 500 U.S. 20, 27-28.
[118] ibid.
[119] *Gilmer v. Interstate/Johnson Lane Corp*. 500 U.S. 20, 27-28.
[120] 565 U.S. 95, 104 (2012).
[121] ibid.
[122] *CompuCredit Corp. v. Greenwood* 565 U.S. 95, 103 (2012).
[123] *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[124] and employee protection[125] are arbitrable. This emphasises the pro-arbitration stance of the US courts regarding agreements to arbitrate.[126] However, other matters which affect public interest may be non-arbitrable. Non-arbitrable claims may arise in criminal matters[127] pure bankruptcy matters,[128] 'disputes under some motor vehicle franchise contracts, limited types of claims by employees of specified public companies, and disputes concerning certain consumer lending agreements'.[129] 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.[130] The FAA and the disposition of the courts towards international arbitration has resulted in an expansive scope of arbitrability in international arbitration. The US

[124] *CompuCredit Corp. v. Greenwood* (n 122)
[125] *Gilmer v. Interstate/Johnson Lane Corp* (n 119)
[126] 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.
[127] 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.
[128] Julian Lew, Loukas Mistelis and Stefan Kroll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) para 9-55.
[129] Gary Born (n 1) 1054.
[130] 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.[131]

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.[132] The courts in the USA have recognised that in domestic arbitration non-arbitrable matters may be arbitrable in international arbitration.[133] 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

[131] ibid.
[132] Gary Born (n 1) 1054.
[133] *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)[134] which is based on the Model Law.[135] The definition of international arbitration in the Arbitration Code is similar to the definition of international arbitration in the Model Law.[136] However, the Arbitration Code does not regulate only international commercial arbitration.[137] 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.[138] 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.[139] Furthermore, 'arbitration is domestic until it is established that some criteria of international arbitration are available.'[140] 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.[141]

[134] 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.
[135] 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.
[136] 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.
[137] Abdul Hamid El Ahdab and Jalal El-Ahdab, *Arbitration with the Arab Countries* (Kluwer Law International 2011) 731, 735.
[138] Arbitration Code, art. 7(5).
[139] El Ahdab (n 137) 734-735.
[140] ibid.
[141] Arbitration Code, art 51.

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

- matters affecting public policy;[143]
- disputes relating to nationality;[144]
- disputes relating to personal status, with the exception of questions arising therefrom concerning pecuniary obligations;[145]
- matters where no arbitration is permitted;[146] 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.[147]

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

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

[142] Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (4th edn, Kluwer Law International 2019) 44-45.
[143] Arbitration Code art. 7 (1).
[144] ibid, art. 7(2).
[145] ibid, art. 7(3).
[146] ibid, art. 7(4).
[147] ibid art. 7(5).
[148] Arbitration Code, Chapter One.
[149] ibid.
[150] Ahmed Ouerfelli, 'Tunisian Case Law' (2012) 1(1) International Journal of Arab Arbitration 455, 472.
[151] El Ahdab (n 137) 739.

financial nature.[152] However, the interpretation of this provision in the *Ferrocom* case by the courts means that such disputes may be non-arbitrable in some instances.[153] 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.'[154] 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.[155] 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.'[156] 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.[157] A dispute arising under such a contract should fall under the exception in Article 7(5) and be arbitrable.[158] 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.[159]

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[160] is commendable. This takes cognizance of the fact that the state, public and state agencies may engage in international commercial, economic or financial

[152] Arbitration Code art. 7(5).
[153] Ahmed Ouerfelli, 'Recent Developments of Arbitration Law and Practice in Tunisia' (2011) 29(2) Association Suisse de l'Arbitrage Bulletin 296, 299.
[154] ibid.
[155] ibid 300.
[156] ibid.
[157] ibid.
[158] ibid.
[159] El Ahdab (n 137) 739.
[160] 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.[161]

Despite this fact, the ruling in the *Ferrocom* case[162] 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.[163] 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.[164] This is because the Arbitration Act 1996 has operated since its inception without any such distinctions.[165] England is frequently selected as the seat in international arbitration.[166] This is symptomatic of the high regard in which English arbitration is

[161] ibid.
[162] Ouerfelli (n 153) 299.
[163] 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.
[164] 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.
[165] ibid.
[166] White & Case, Queen Mary University of London School of International Arbitration, 2021 International Arbitration Survey: Adapting arbitration to a changing world, 6.

held.[167] The Arbitration Act 1996 aimed to modernise English arbitration law to reinforce and maintain this justified reputation and has succeeded in this regard.[168] 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.[169] The Arbitration Act 1996 is not based on the Model Law, but it follows its format and has close regard to its provisions.[170]

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.[171] 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.[172] The determination of which subject matter is arbitrable has been left to the courts to decide on a case-by-case basis.[173] In the *Fulham* case,[174] the court stated that in deciding arbitrability the courts consider whether the dispute engages third party rights.[175] 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.[176] This approach by the English courts results in a broad scope of arbitrability.

Generally, matters which affect the civil interests of parties are arbitrable.[177] 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,[178]and family

[167] Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act, 1996, A Commentary* (5th edn Wiley Blackwell) 5.
[168] ibid.
[169] See Law Commission, *Review of the Arbitration Act 1996 A Consultation Paper* (Consultation Paper 257, 2022).
[170] See Departmental Advisory Committee on Arbitration Law (DAC Report) para 4.
[171] 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.
[172] Arbitration Act, 1996, s 1 (b).
[173] 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.
[174] *Fulham Football Club (1987) Ltd (n 26), The Football Association Premier League Ltd* (n 26)
[175] ibid para 40.
[176] ibid.
[177] Karyl Nairn (n 164) 27.
[178] Lew and Marsden (n 173) 408-410.

matters regarding the legal status of relationships and parenting of children.[179] Also non-arbitrable are core insolvency matters which may affect several parties who are not parties to the arbitration agreement.[180] 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 [181] 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[182] and domestic arbitration. This is the case despite the lack of criteria of arbitrability in the Arbitration Act 1996.[183] 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.[184]

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[185] and Singapore[186] adopt a definition similar to that of the Model Law. For the USA, international arbitration usually involves property located abroad,

[179] ibid 410.
[180] Leonardo de Oliviera (n 171) 160; Lew and Marsden (n 173); *Syska v Vivendi Universal* SA [2009] EWCA Civ 677; para 19-58, 19-59.
[181] Arbitration Act, 1996, s 1(b).
[182] Leonardo de Oliviera (n 175) 167.
[183] ibid.
[184] See Law Commission, *Review of the Arbitration Act 1996 A Consultation Paper* (Consultation Paper 257, 2022) paras 11.57-11.59.
[185] Arbitration Code art 48 (1).
[186] IAA s 5(2).

envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.[187] 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[188] 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[189] does not expressly define international arbitration.

In defining domestic arbitration, in Singapore,[190] 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.[191] Tunisia[192] and England and Wales[193] 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

[187] FAA S 202, This applies to enforcement of international awards based on the New York Convention.
[188] IAA s 5(1).
[189] Arbitration Act,1996 s 2(1).
[190] Cap 10, s 3.
[191] See FAA s 202 for definition of international arbitration which falls under the New York Convention.
[192] Arbitration Code, Chapter II.
[193] 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[194] 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.[195] 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.[196] Arbitrability in the USA is influenced by international considerations including the commercial reservation in the New York Convention.[197] 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.[198]

[194] IAA s 5(1).
[195] IAA, preamble.
[196] 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.
[197] *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc (n 24)*
[198] Arbitration Report para 2.37.17.

Arbitrability in the USA is based on the presumption of arbitrability and clear legislative direction.[199] 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,[200] and tests developed by the courts.[201] The approach of these states has a broad scope of arbitrability as the end goal. The approaches of the USA,[202] Singapore,[203] and England and Wales[204] seem less restrictive as compared to Tunisia.[205] 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,[206] as happened in the *Ferrocom* 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

[199] See Gary Born (n 1) 1054
[200] IAA, s 11 (1); Arbitration Code s 7.
[201] *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.
[202] ibid
[203] IAA ss 11(1), 26; *Tomolugen Holdings Ltd and another* (n 72)
[204] *Fulham Football Club (1987) Ltd (n 26), The Football Association Premier League Ltd* (n 26)
[205] Arbitration Code s 7.
[206] 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[207] and the presumption of arbitrability predicated on domestic considerations.[208] 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. [209] 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.[210] 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

[207] Arbitration Report para 2.37.17.
[208] *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc* (n 24); Gary Born (n 1) 1054).
[209] Arbitration Code, s 7(5).
[210] IAA, s 26.

arbitrability is commendable.[211] 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.[212] This makes the non-arbitrable matters in Section 1 of the Act 798 applicable in international arbitration and domestic arbitration.[213] The broad nature of the non-arbitrable matters in Section 1 of Act 798,[214] may have a negative effect on international arbitration as happened in the *Balkan Energy* case.[215] Therefore, the same criteria for international and domestic arbitrability adopted by Ghana is not

[211] ibid, s 5(1).
[212] Edward Torgbor (n 6) 212.
[213] ibid.
[214] Joe Mante (n 7) 38.
[215] *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.[216] 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.[217] 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.[218] 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.[219] 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

[216] ibid.
[217] Arbitration Code art. 7(5).
[218] 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.
[219] ibid 41.

arbitration in the Model Law[220] 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.[221] 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.[222] 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.[223] 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

[220] See Model Law, art 1(3).
[221] *Attorney General y* (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.''
[222] Model Law art 1(1).
[223] 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.[224] 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.[225] This will be in accord with Ghanaian law.[226] 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.

[224] See Model Law, art 1(3); *Attorney General* (n 37)
[225] Marike Paulsson (n 52) 1.
[226] 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.

DETERMINING THE EMPLOYMENT STATUS OF RIDE HAILING SERVICE DRIVERS IN GHANA: A MISGUIDED APPROACH IN *JUSTICE NOAH ADADE V. BOLT GHANA LIMITED AND ANOTHER*

Akosua Asah-Asante† and Azanya Abraham Maslow††

ABSTRACT

This paper critically examines the various legal tests used to determine employment status in the gig economy, with particular emphasis on the application of these tests to ride-hailing service drivers. Currently, there are approximately eight recognized tests in use to determine employee status. This paper explores all eight tests. These tests include the control test, integration test, dominant purpose test, mutuality of obligation, multiple factors test and the subordination principle. Through a detailed analysis, the paper applies these tests to determine the employment status of ride-hailing service drivers, specifically addressing the legal framework within the Ghanaian context.

A central focus of this paper is the recent Ghanaian case of Justice Noah Adade v. Bolt Ghana & Anor. in which the court ruled that ride-hailing service drivers are not employees of Bolt Ghana. The paper challenges this decision, arguing that it was made per incuriam without due consideration of the complexities inherent in modern gig economy and the evolving nature of employment relationships. Riding on legal precedents and a thorough analysis of the applicable tests, the authors contend that the ruling fails to address key aspects of the drivers' working conditions, including their economic dependency and subordination to the platform. The authors recommend the inclusion of this category of workers in the Labour (Amendment) Bill, 2024. Ultimately, the paper seeks to contribute to the ongoing discourse on employment classification in the gig economy.

Keywords: *Gig Economy, Platform Work, Fourth Industrial Revolution (4IR), Ride Hailing Services, Employment*

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INTRODUCTION

In recent years, the rise of gig economy platforms such as ride-hailing services have prompted a reevaluation of traditional concepts of employment[1]. As these platforms continue to redefine the nature of work, determining the legal status of individuals who provide services through such platforms has become a complex and contentious issue. At the heart of this debate is the question of whether or not ride-hailing service drivers are employees, independent contractors or a distinct category of workers[2]. This question is of legal, social and economic significance as it impacts workers' rights, the responsibilities of platform companies and the broader regulatory landscape[3].

Various legal tests have been developed over the years to determine employment status[4], with the most commonly employed being the subordination principle, the dominant purpose test and the integration test. These tests are designed to assess the nature of the relationship between employees and the entities they provide services for, distinguishing employees from independent contractors based on factors such as control, economic dependency and integration into the employer's business[5]. However, the gig economy presents unique challenges[6] as platforms like Bolt Ghana blur the lines between traditional employment and self-employment; creating the need for nuanced legal analysis.

This paper examines the application of these tests to the employment status of ride-hailing service drivers, with special focus on a recent judgment by a Ghanaian court in *Justice Noah Adade v. Bolt Ghana & Anor.*[7] In this case, the court determined that

[1]Ndah Ejims Enwukwe, 'The Employment Status of Nigerian Workers in the Gig Economy: Using Uber as a Case Study' (2021) 107 JL Pol'y & Globalization 55

[2] Evan Saltsman, 'A Free Market Approach to the Rideshare Industry and Worker Classification: The Consequences of Employee Status and a Proposed Alternative' (2017) 13 JL Econ. & Pol'y 209

[3]Ronald Brown, 'Ride-hailing Drivers as Autonomous Independent Contractors: Let Them Bargain!' (2019) 29 Wash. Int'l LJ, 533.

[4] Simon Deakin, 'Decoding Employment Status' (2020) 31(2) King's Law Journal 180-193.

[5] Miriam Cherry and Antonio Aloisi., 'Dependent Contractors in the Gig Economy: A Comparative Approach' (2016) 66 Am. UL Rev 635.

[6] Gobinda Roy and Avinash Kumar Shrivastava, 'Future of Gig Economy: Opportunities and Challenges' (2020) 9(1) Imi Konnect, 14-27.

[7] ibid

the drivers are not employees of the company, a decision that has sparked significant debate. The authors argue that this judgment was made without due regard for contemporary authorities on the matter, failing to properly consider the complexities and subtleties of the employment relationship between the drivers and the platform. By applying established legal tests to this case, this paper contends that the drivers should be classified as employees, deserving of the rights and protections under the Labour Act, 2003 (Act 651).

METHODOLOGY

The paper adopts a qualitative comparative methodology[8] to assess how employment status should be determined for ride hailing drivers in Ghana. This approach is designed to place the reasoning in *Justice Noah Adade v. Bolt Ghana Ltd* within a wider international context and to show how Ghana can learn from the experiences of other common law countries. The jurisdictions selected for comparison, namely the United Kingdom, the United States and Canada were chosen because they share Ghana's common law heritage; they have been pivotal in resolving gig economy employment disputes and have developed a range of legal tests that offer useful contrasts. Cases such as *Uber BV v. Aslam,*[9] *Uber Technologies Inc. v. California*[10] *and McIntyre v. The Queen*[11], demonstrate how other courts have adapted traditional employment principles to modern platform work.

The paper explains that foreign law is not treated as something to be copied wholesale. Instead, the comparative analysis is used to demonstrate how Ghana can adapt core common law principles to its own developmental needs. It highlights that the court in the *Justice Noah Adade* case relied too narrowly on the control test and failed to adopt the multi factor approach that other jurisdictions explore to capture economic dependence and subordination. The foreign examples also help justify the recommendation for Ghana's Labour (Amendment) Bill, 2024 by

[8] Eva Thomann, Jorn Ege and Ekaterina Paustyan, 'Approaches to Qualitative Comparative Analysis and Good Practices: A Systematic Review' (2022) 28(3) Swiss Political Science Review, 557-580.
[9] [UKSC 5] 2021
[10] 56 Cal.App.5th 266 (Cal. Ct. App. 2020)
[11] [1982] FCA 297

conveying how some jurisdictions have turned to legislations, such as California's AB5, to provide clarity where judicial tests have struggled. The comparative approach is therefore presented as a critical tool for diagnosing the weaknesses of the *Justice Noah Adade* judgment and guiding both judicial evolution and legislative reform in Ghana

JUSTICE NOAH ADADE V. BOLT GHANA LIMITED AND BOLT HOLDING OU IN PERSPECTIVE

The suit of *Justice Noah Adade v. Bolt Ghana Ltd and Another*[12] was initiated before the Circuit Court, which operates as a court of first instance within Ghana's judicial system. The dispute arose from an incident on August 1, 2022 when the Plaintiff requested transportation through the Bolt ride-hailing platform. After placing the request, he discovered that the application displayed his personal details as the driver for the trip. His photograph and other identifying information had been unlawfully used to create the driver profile assigned to the ride.[13] The individual who actually undertook the trip was Peter Walker, an employee of the Plaintiff's own software company. Walker later admitted that he had wrongfully appropriated the Plaintiff's identity in order to sign up as a driver on the Bolt platform. The Plaintiff's action therefore sought a judicial declaration that the Defendants had violated his privacy under the Data Protection Act, 2012 (Act 843) and prayed for compensation for the unauthorized and non-consensual processing of his personal information.

Although the case was framed as one concerning the misuse of personal data, the Circuit Court had to resolve a crucial preliminary matter before it could determine liability. The Plaintiff argued that Bolt Holdings OU should bear responsibility for Walker's fraudulent conduct. This assertion required the court to confront the question of vicarious liability. And in reaching any conclusion on this substantive point, the court needed to determine the legal nature of the relationship between

[12] Suit No. C11/003/2023

[13] ibid < https://superlawgh.com/judgements/justice-noah-adade-vrs-bolt-ghana-limited/ > accessed 19 April 2025.

Bolt and the drivers who access its platform. Vicarious liability under Ghanaian law generally arises only where an employer-employee relationship exists. For this reason, the core issue at this stage of the analysis was not Walker's deception but whether Bolt drivers could properly be regarded as employees of Bolt Holdings OU.

The Circuit Court ultimately held that Bolt Holdings OU could not be held vicariously liable for Walker's misconduct. Its conclusion rested on a finding that Bolt drivers are independent contractors rather than employees. The court found that Bolt did not exercise the level of operational control over drivers that would be required for an employer-employee relationship. According to the court, this limited authority meant that Bolt could not be saddled with responsibility for the fraudulent acts committed by Walker. It is important to highlight, however, that the nature of the employment relationship was not itself the substantive claim before the court. Instead, it served as a threshold issue that needed resolution before the court could decide the broader questions of liability and data protection breaches.

Despite its ostensibly preliminary character, the court's handling of the employment status inquiry carries significant consequences in an employment relationship. The reasoning displayed by the Circuit Court relied on an older and rather narrow application of the control test. Under this approach, the court focused primarily on the degree to which Bolt supervised the day-to-day activities of drivers. Yet the evolving reality of platform-based employment has shown that control in the traditional sense is only one of several indicators relevant to determining whether an employment relationship exists. The modern gig economy is characterized by hybrid forms of work that do not neatly fit into historical employer-employee categories. Courts in several common law jurisdictions have responded to these transformations by adopting multi-factor frameworks that assess a much wider range of economic and structural considerations.

The Circuit Court's decision to rely exclusively on the control test therefore reflects an outdated analytical method. By doing so, it paid scant attention to additional indicators that a more contemporary judicial analysis would consider, including the extent to which drivers are economically dependent on the platform; the degree of

integration between the employee and the business and the presence or absence of mutual obligations. This narrow interpretive approach not only shaped the outcome of the case but also limited the opportunity to address the broader implications of platform work for Ghana's developing legal framework on employment and liability.

A comparative examination reveals that other common law courts have approached similar questions with a far more expansive and structured methodology. The Supreme Court of Canada in *McIntyre v. The Queen*[14] employed a multiple factor test that considered ownership and provision of tools, prospects of personal profit and potential exposure to financial loss. These indicators allowed the court to form a contextual understanding of the actual working relationship rather than relying on a single criterion.

The Californian Supreme Court in *Uber Technologies Inc. v. California*[15] adopted the ABC test, which requires a platform to demonstrate that the worker is free from its direction, performs work outside the core business of the platform and operates an independent enterprise[16]. This test is explicitly oriented towards economic realities rather than formal labels.

The United Kingdom Supreme Court in *Uber BV and Others v. Aslam and Others*[17] went even further by classifying Uber drivers as workers in United Kingdom. In reaching this conclusion, the court placed significant weight on Uber's power to set fares, impose non-negotiable contractual terms and manage performance through a rating system that could result in sanctions or removal from the platform[18]. The court regarded these features as clear evidence of subordination, even though drivers bore some commercial risks of their own. This decision acknowledged the

[14] ibid (n 13)
[15] ibid (n 12)
[16] Andre Andoyan, 'Independent Contractor or Employee: I'm Uber Confused: Why California Should Create an Exception for Uber drivers and the On-demand Economy' (2017) 47 Golden Gate UL Rev 153.
[17] [UKSC 5]
[18] Monika Jain, 'In Context of Uber BV v. Aslam in London ([2021] WLR (D) 108): Do Uber Drivers Work for Uber as Employees or as Independent Contractors?' (2024) 3(1) Justice and Law Bulletin 7-19.

distinctive nature of platform work that places the user in a subordinate and dependent position despite superficial indications of autonomy.[19]

These common law exemplifications reflect a widespread shift toward analytical models that capture the complexities of platform labour. They recognize that the substantive reality of the working relationship must prevail over formal structures or contractual labels. Against this background, the approach taken by the Circuit Court in *Justice Noah Adade v. Bolt Ghana Ltd and Another* appears misaligned with global doctrinal developments. The court's reliance on a single, traditional factor produced an analysis that does not fully correspond to the contemporary nature of gig work and its regulatory challenges. It also represents a missed opportunity to situate Ghanaian jurisprudence within the broader evolution of common law thinking on the regulation of platform-based employment and the assignment of responsibility within digital labour systems.

This broader context is essential for understanding why the treatment of the preliminary employment-status question is not merely procedural but foundational to the development of Ghanaian law in this emerging field.

EMPLOYMENT DEFINED

The concept of employment has long been understood in society, with its basic structure largely uncontested from its inception[20]. However, in recent times, most especially with the rise of the gig economy, temporary work and part-time employment, the concept of employment remains shaky[21]. In the Fourth Industrial Revolution (4IR), the boundaries and definitions of employment have become more complex. This evolution has necessitated new legal frameworks to account for

[19] Sandra Fredman and Darcy Du Toit University, 'One Small Step towards Decent Work: Uber v Aslam in the Court of Appeal' (2019) 48(2) Industrial Law Journal 260-277.
[20] South African Department of Labour, The Code of Good Practice: Who is an Employee (GG No. 29445 of 1 December 2006).
[21] Abi Adams-Prassl and Judith Freedman and Jeremias Adams-Prassl, 'Rethinking Legal Taxonomies for the Gig Economy: Tax Law, Employment Law, and Economic Incentives' (2018) 34(3) Oxford Review of Economic Policy 475

varied work arrangements, as these emerging trends of employment challenge traditional employment concepts[22].

Formal employment typically carries with it specific benefits such as health coverage, paid leave and regulated work hours, which have become central to the modern understanding of employment[23]. These benefits are often tied to one's classification as an "employee," a status that has itself become difficult to define. In response, numerous legal tests have been developed to clarify who qualifies as an employee and who does not. Originally, the control test, which focused on the degree of control an employer had over an employee, served as the standard method for this determination[24]. As the nature of work evolved over time, the control test alone proved inadequate, leading to the introduction of other tests such as the integration test, which assesses the employee's integration into the employer's business.

Employment, as defined by the United Nations and the International Labour Organization (ILO) includes all individuals of working age generally fifteen (15) years or older who, within a short reference period (such as a week), participate in activities to produce goods or provide services in return for pay or profit[25].

From this definition, one might assume that determining employment status is straightforward: it seems to include anyone engaged in remunerative activities, thus establishing them as "employees"[26]. However, the issue is considerably more complex, with the primary challenge arising from the legal, economic and social implications of employment status. An individual's classification as an "employee" versus an "independent contractor" or other non-employee status critically

[22] Theophilus Coleman and George Letlhokwa, 'Accommodating New Modes of Work in the Era of the Fourth Industrial Revolution in Ghana: Some Comparative Lessons from the United Kingdom and South Africa' (2023) 56(1) Comparative and International Law Journal of Southern Africa < https://doi.org/10.25159/2522-3062/11831> accessed 16 March 2025.
[23] Catherine Barnard, *EU Employment Law* (Oxford University Press 2012)
[24] *Yewen v Noakes* [1880] 6 QBD 530
[25] International Labour Organization, 'Employment' (2012) <https://www.ilo.org/resource/employment > accessed 16 March 2025.
[26] Herhert Simon, 'A Formal Theory of the Employment Relationship' (1951) 19 Econometrica, 293-305.

influences access to benefits, rights and protections under labour and employment law *viz a viz* the obligations required of employers.

Given these complexities in determining an employment status, numerous tests have been developed to determine whether individuals meet the legal criteria to be classified as an employee, thus entitling them to the accompanying economic, social and legal benefits[27]. These tests, which will be explored, reflect the shifting landscape of employment. As these tests became obsolete or inadequate, newer tests emerged to bridge the gaps left by their predecessors.

The continuous evolution of society and employment practices means that classification challenges will persist and further tests may be necessary to adapt to new work models[28]. Currently, there are approximately eight recognized tests in use to determine an employee status. These tests aim to balance the need for a fair allocation of employment benefits with the realities of modern work arrangements; underscoring the ongoing development in employment law as work itself transforms.

DETERMINING EMPLOYMENT STATUS: THE TESTS IN PERSPECTIVE

Determining whether a worker is classified as an employee or an independent contractor is a fundamental issue in employment law as this classification impacts a wide range of legal rights and obligations, including tax liabilities, benefits and protections under labour and employment laws[29]. In exploring the employment status of ride-hailing service drivers, it is essential to examine the various legal tests used to classify workers as either employees or independent contractors.

THE CONTROL TEST

The control test, in its simplest form refers to the level of control an employer exercises over his employee with regard to how the employees go about the

[27] Letlhokwa Mpedi and Theophilus Coleman, *Labour Law In Ghana* (LexisNexis 2022) 255-268
[28] Paul Benjamin, 'An Accident of History: Who is (and Who Should Be) an Employee under South Africa Labour Law' (2004) 25 Industrial Law Journal < https://doi.org/10.1163/221160205X00290> accessed 28 March 2025.
[29] Miriam Cherry and Antonio Aloisi (n 7)

execution of their assigned duties. According to this test, the more control an employer has over *how*, *when* and *where* work is performed, the more likely it is that the individual qualifies as an employee[30]. In practical terms, the control test assesses whether the employer has authority over the worker's tasks, including instructions on the specific methods used to complete the work, scheduling and oversight. If the employer controls only the final outcome or result of the work, rather than the process, the worker is more likely considered an independent contractor[31].

In the 19th Century, the courts developed the *Control Test* as the primary method for determining whether a worker was an employee or an independent contractor[32]. This test focused on whether the "master," had control or the right to control not just the tasks performed by the worker, but also the manner and method by which those tasks were carried out. This principle was clearly articulated in the case of *Yewens v. Noakes*[33] where the court defined a servant as someone who is "subject to the command of his master as to the manner in which he shall do his work." Under this framework, if an employer could direct not only what work was to be done but also how and when it should be completed, an employment relationship was deemed established, thereby classifying the worker as an employee. Conversely, a lesser degree of control, where the worker had more autonomy over the work assigned suggested that the worker was an independent contractor[34].

As the 20th Century progressed and technology advanced, the practical application of the Control Test became increasingly challenging[35]. The rapid pace of technological change and the rise of highly specialized professions made it unrealistic for employers to possess the detailed knowledge necessary to control how their skilled employees performed their work[36]. This evolution highlighted the

[30] Gina Stevens., 'The Test of the Employment Relation' (1939) 38(2) Michigan Law Review 188-204.
[31] Griffin Pivateau, 'Rethinking the Worker Classification Test: Employees, Entrepreneurship, and Empowerment' (2013) 34 N. Ill. UL Rev 67.
[32]The control test for employment originated in the 1880 case Yewen v Noakes. The test is used to determine whether a person is an employee or an independent contractor. It focuses on whether the employer dictates the nature of the work or the employee has more control
[33] Yewens (n 26)
[34] (1979) 42(4) MLR 462
[35] Griffin Pivateau (n 33)
[36] Letlhokwa Mpedi and Theophilus Coleman (n 29)

limitations of the Control Test in the modern employment landscape, where the traditional notions of employer control became less applicable[37].

The case of *Performing Right Society Ltd. v. Mitchell & Booker*[38] further emphasized that determining a worker's status depended significantly on the nature and degree of detailed control exercised over the individual. This case reinforced the concept that while control remained a crucial factor in classifying employment relationships, the specific context and extent of that control required careful consideration, especially as the workforce evolved.

The Control Test laid the foundational principles for distinguishing between employees and independent contractors by focusing on the employer's control over the worker's tasks and methods. However, the test's applicability has evolved, reflecting changes in the nature of work and the increasing complexity of employment relationships[39].

To put it succinctly, in *Kussasi v. Ghana Cargo Handling Co*[40], it was said that the test is: "Does the alleged master have power of controlling the employee's acts and dismissing him for disobedience"? Historically, the classification of a worker as an employee or an independent contractor largely depended on the concept of control, according to this traditional test. A worker was regarded as a "servant," if the master had authority over *how* the assigned work was performed. This command extended not just to the expected results but also to the precise methods and processes employed in carrying out the work. In contrast, if the employer's influence was limited to the *what* outcome or objectives of the work, without specifying how these were achieved, the worker was typically deemed an independent contractor. The employment relationship in this context was thus understood as one where the

[37] Kristine Kuhn and Terrence Galloway, 'Expanding Perspectives on Gig Work and Workers' (2019) 34(4) Journal of Managerial Psychology < https://doi.org/10.1108/JMP-05-2019-507> accessed 19 April 2025.
[38] [1924] 1 KB 762
[39] Stefan Kikiros, 'Dichotomy or Trichotomy? Defining Employee and Independent Contractors in an Evolving Market' (2019) 45 University of Western Australia Law Review 16.
[40] [1979] DLHC 1107

master had both the right and the responsibility to direct each detail of the labour process, whereas a contractor retained discretion over the methods of the work[41].

However, this conception of the employment relationship began to encounter significant challenges as industrial and technological advances reshaped the workforce. The rigid control test became increasingly incompatible with a world in which specialized knowledge and technical skills became more accessible through formal education and professional training[42]. The rule of *respondeat superior*[43], which holds employers responsible for the actions of their employees, continued to apply even when workers carried out skilled or highly technical tasks far beyond the employer's knowledge base.

The courts recognized these changing dynamics, acknowledging that the traditional control test could not adequately address cases in which highly skilled professionals were employed. Instead of maintaining detailed oversight of skilled tasks, many employers hired workers precisely for expertise that the employer did not possess. In such cases, if an employee sought constant instruction from the employer, this could be seen as a violation of their professional obligations and might even constitute grounds for dismissal. This shift is exemplified in *Mersey Docks and Harbour Board v. Coggins & Griffiths*[44], where the court acknowledged that the control test required adaptation to remain relevant and applicable.

The control test, while foundational, has its limitations. As industries evolved and skilled labour became more common, it became increasingly difficult to rely solely on control as the determining factor in employment status[45]. Professionally trained employees, such as ship captains, aircraft pilots or hospital surgeons, exercise significant independence in their roles. The employer may not have the technical

[41] Ernest Manamela, 'Employee and Independent Contractor: The Distinction Stands' (2002) 14(1) South African Mercantile Law Journal 107
[42] Tumo Maloka and Chuks Okpaluba, 'Making Your Bed as an Independent Contractor but Refusing to Lie in It: Freelance Opportunism' (2019) 31 South African Mercantile Law Journal 44.
[43] Havard Law Review, 'Torts. Respondeat Superior. Imposing Vicarious Liability for the Willful Tort of an Intoxicated Employee Lacking Intent to Serve Employer. Ira S. Bushey & Sons, Inc. v United States, 398 F 2d 167 (2d Cir 1968)' (1969) 82(7) *Harvard Law Review*, 1568-75
[44] [1947] AC 1
[45] Griffin Stevens (n 32)

expertise to direct these workers' day-to-day functions, yet they are still considered employees due to the broader relationship of subordination and structure. This limitation as held in *Market Investigations v Minister of Social Security*[46] recognized that control was no longer the single defining criterion for employment status, noting that a worker status could involve multiple factors beyond control, such as the degree of integration into the business, the permanency of the relationship and mutual obligations between the parties. This reflects a shift in judicial approaches towards a "multiple test" or "composite test," which balances various aspects of the employment relationship in order to understand the nature of the relationship holistically.

The control test's effectiveness also diminishes in contexts where independent contractors consent to a level of oversight without conceding their independent status. Contractors may work under specific guidelines or expectations from a client but retain autonomy over the work process and methodology[47]. Many freelancers or consultants may allow clients to set deadlines or project requirements without relinquishing their status as independent contractors. Control alone does not transform the relationship into one of employment.

UTILIZING THE CONTROL TEST IN ASSESSING EMPLOYMENT STATUS OF RIDE-HAILING SERVICE DRIVERS

The *control test*, as repeatedly highlighted in various legal contexts, focuses primarily on the degree of control an employer exercises over the way and timing with which a worker performs an assigned job. This test examines not only what the worker is tasked to accomplish but also how, when and under what conditions the tasks are executed. The case of *Yewens v Noakes* has solidified this principle. In applying these principles to contemporary situations, especially concerning ride-hailing service drivers, it becomes evident that companies such as Uber and Bolt impose substantial control over their drivers, thereby closely aligning their

[46] [1969] 2 QB 173
[47] Jeremias Prassl, 'Who is a Worker' (2017) 46 Law Quarterly Review, 366.

operational structure with that of traditional employment[48]. Although drivers may appear to work independently, various aspects of their work environment are regulated by the companies they drive for, suggesting an employment relationship under the control test[49].

The exploitative nature of control exerted by ride-hailing companies over their drivers is deeply concerning. These companies, such as Bolt imposes rigid operational requirements that leave drivers with little autonomy over their work[50]. This level of control is done through the enforcement of daily ride quotas. Bolt mandates that drivers complete a minimum of 23 rides per day, regardless of how long it takes. Failure to meet this target results in severe penalties including the forfeiture of commissions earned on completed trips. Such punitive measures force drivers to work excessively long hours sometimes up to 12-hour shifts or late into the night placing their health, well-being and safety at risk.[51]

This level of control goes beyond mere regulation; it reflects a structured system in which drivers, despite being labeled as independent contractors are subjected to conditions that mirror traditional employment.[52] The control test, a fundamental legal criterion used to determine whether a worker is an employee or an independent contractor, is clearly satisfied in this context. By dictating the volume of work, imposing penalties for non-compliance and indirectly coercing drivers into working extended hours, Bolt and similar ride-hailing companies exercise significant authority over their workforce. This challenges the notion of driver

[48] Andre Andoyan (n 18)
[49] Richard Bales and Christian Woo, 'The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?' (2017) 68 Mercer Law Review 461.
[50] Thorsten Berger and others, 'Uber Happy? Work Well and Well-being in the Gig-Economy' (2020) 34 Economic Policy <https://doi.org/10.1093/epolic/eiz007> accessed 19 April 2025.
[51] Eric Mensah-Ayettey, From Eric's Diary: Woes of Bolt and Uber Drivers- A Problem that requires Public Policy' (2022) < https://www.myjoyonline.com/from-erics-diary-woes-of-bolt-and-uber-drivers-a-problem-that-requires-public-policy/> accessed 19 April 2025.
[52] Brian Carney, 'Uber Drivers Found to be Workers (UK)' (2017) 2017 European Employment Law Cases 54.

independence and strongly suggests that these workers should be classified as employees rather than as self-employed individuals[53].

Ride-hailing companies control key aspects of drivers' earnings and work structure by setting fare rates, arbitrarily and unilaterally determining service fees and managing pricing adjustments. Drivers have no influence over these elements, as companies like Bolt and Uber reserve the right to change fare structures unilaterally. This control over financial terms not only restricts drivers' autonomy but also places them in a position similar to employees, whose wages and conditions are typically determined by their employers. In this respect, ride-hailing companies exert the type of control that would commonly be exercised in a traditional employment setup[54].

Moreover, companies regulate drivers' acceptance of ride requests, reinforcing this control dynamic. Drivers are given limited information about each trip, such as the passenger's destination, only after accepting a request[55]. This restriction limits drivers' ability to make fully informed decisions about which trips to accept, thereby curtailing their discretion in a manner consistent with employee-like oversight. Furthermore, if drivers frequently decline or cancel requests, they face potential penalties, which can include warnings or temporary suspension from the platform[56]. Such measures closely resemble disciplinary practices in traditional employment, where employers impose consequences for non-compliance with company policies.

The level of control also extends to routing and logistics. Ride-hailing platforms provide drivers with designated pickup points and preferred routes for each journey[57], further limiting drivers' freedom to determine the best routes or pickup strategies. In effect, drivers must adhere to company-mandated logistics, which

[53] Guy Davidov, 'The Status of Uber Drivers: A Purposive Approach' (2017) 6 Spanish Labour Law and Employment Relations Journal < https://doi.org/10.20318/sllerj.2017.3921> accessed 19 April 2025.
[54] Nicholas Debryne, 'Uber Drivers: A Disputed Employment Relationship in Light of the Sharing Economy' (2017) 92 Chicago-Kent Law Review 56.
[55] Eric Mensah-Ayettey (n 53)
[56] ibid
[57] ibid

reinforces the companies' substantial control over how services are delivered. This requirement reduces the autonomy associated with independent contractors, positioning drivers closer to the definition of an employee as per the control test.

Further to that, ride-hailing companies dictate comprehensive terms of service that drivers must accept to remain active on the platform. These terms cover various operational aspects, from pricing models to conduct expectations and are subject to unilateral modification by the company[58]. Drivers have no room to negotiate these contractual elements, placing them in a subordinate role where they must comply with terms set entirely by the company. This position is found by the authors to be contrary to the designated terms these companies ascribe to these drivers. They are referred to as "partners". Nonetheless, from the foregoing it becomes apparent that the relationship that exists between the driver and the company is in no way equal or even close to being equal as the said relationship reflects a more superior - subordinate relationship. This dynamic aligns with the employer-employee relationships, where the employer establishes non-negotiable policies and conditions.

Significantly, ride-hailing companies employ monitoring mechanisms to oversee drivers' activities, often utilizing sophisticated tracking technology. This regular supervision, which include performance reviews and safety checks, resembles the level of oversight employers traditionally maintain over their employees[59]. The Court of Appeal of New Zealand in *Rasier Operations BV v. E tu Inc* recently recognized the employment status of ride-hailing drivers as employees, underscoring the substantial control these companies have over drivers' work conditions.[60] This judicial trend aligns with the position in *Kussasi v. Ghana Cargo Handling*[61], where the court asserted that a worker is deemed an employee if the employer can direct and control their tasks and terminate the relationship at will.

[58] ibid
[59] ibid
[60] [2024] NZCA 403
[61] ibid (n 13)

Ride-hailing companies retain the right to deactivate drivers who fail to comply with their protocols[62], underscoring the control they wield over these workers' livelihood. This ability to terminate access to the platform based on performance and compliance reinforces the nature of an employment relationship, as traditional employees are subject to dismissal for failing to meet company standards. In essence, the authors posit that this ongoing, pervasive control exercised by ride-hailing companies places their drivers under conditions analogous to those of conventional employees, rather than independent contractors, as established by the control test.

THE INTEGRATION TEST

Explored to address the inadequacies of the Control Test[63], the Integration Test evaluates the extent to which a worker's tasks are integrated into the core operations of a business. *Cassidy v Ministry of Health,*[64] *Stevenson, Jordan and Harrison Ltd v Macdonald and Evans*[65] emphasize that once an individual's work formed an integral part of the business and not merely supplementary, they are considered employees.

Just like its predecessor, the Integration Test faced criticism for its lack of clarity regarding the precise meanings of 'integration' and 'organization.[66]

Stevenson, Jordan & Harrison Ltd v. MacDonald & Evans[67] provides significant guidance in distinguishing between a "contract of service" and a "contract for services." This distinction remains pivotal in determining an employment status under common law principles.

The court explained that an individual working under a "contract of service" (i.e., an employee) is one whose work is integrated into the core operations of the

[62] Bolt, 'General Terms for Drivers' <https://bolt.eu/en-nl/legal/old-terms-for_drivers/ > accessed 19 April 2025.
[63] Letlhokwa Mpedi and Theophilus Coleman (n 29)
[64][1951] 2 KB 343
[65][1952] 1 TLR 101
[66] Business Bliss Consultants FZE, 'Employment Law: Independent Contractor or Employee?'(2018) Lawteacher.net <Employment Law: Independent Contractor or Employee? | LawTeacher.net https://share.google/a6Sj9u1h51u7FkQpZ> accessed 23 February 2025.
[67] [1952] 1 TLR 101

business and is considered an essential part of it. In contrast, a person operating under a "contract for services" (i.e., an independent contractor) performs tasks that are ancillary to the business rather than forming an intrinsic component of its operation. This distinction highlights that integration into the business framework is a critical factor in identifying an employment relationship[68].

The Integration Test focuses on assessing the extent to which a worker's tasks contribute to the core functions of the business they work for. In essence, it examines whether the worker's activities are embedded within the essential workings of the business[69]. A worker's role is deemed central to the business' primary activities, suggesting that the worker is more likely to be classified as an employee and not an independent contractor[70]. This contrasts with the Control Test which primarily examines the degree of control or direction exerted by the employer over the worker's performance of assigned duties.

UTILIZING THE INTEGRATION TEST IN ASSESSING EMPLOYMENT STATUS OF RIDE-HAILING SERVICE DRIVERS

The Integration Test, as outlined in *Stevenson, Jordan & Harrison Ltd v. MacDonald & Evans*,[71] evaluates the extent to which an individual's role is integral to a business's operations to determine the employment status[72]. The test suggests that a person is likely to be an employee once the given duty is so central to the enterprise that the business would struggle or fail to operate without them. When applying this principle to ride-hailing service drivers, it is essential to consider the nature of their role within the broader framework of the companies they work for[73].

[68]Government of Canada, Determining the Employer-Employee Relationship- IPG- 069 (2025) <https://www.canada.ca/en/employment-social-development/programs/laws-regulations/labour/interpretations-policies/employer-employee.html > accessed 23 February 2025.
[69]Business Bliss Consultants FZE (n 68)
[70] Government of Canada (n 70)
[71] ibid (n 69)
[72] Government of Canada (n 70)
[73]Winifred Muia, Tests which the Courts have developed in Determining when Employment Relationship Exists' <https://www.sheriaplex.com/forum/464-tests-which-the-courts-have-developed-in-determining-when-employment-relationship-exists > accessed 23 February 2025.

Ride-hailing companies rely fundamentally on the transportation of passengers and goods[74] and this function is carried out exclusively by their drivers. The authors assert that without these individuals, the entire premise of the business collapses. Drivers are not ancillary to the business; they embody its core operational function. While the companies provide the platform, match drivers with passengers, set fares and manage their platform functionality, these activities alone do not fulfill the company's promise to deliver transportation services[75]. The drivers' role is indispensable, as they physically execute the service that forms the crux of the business. The company's reliance on their contribution clearly demonstrates their integration into its operations.

The business model of ride-hailing companies reflects a dual structure. On one hand, the parent company performs critical administrative and technological tasks, ensuring the smooth operation of the platform[76]. On the other hand, the drivers carry out the actual transportation, delivering the service to customers. This interconnectedness resembles a form of partnership where both parties are crucial to the success of the enterprise. The drivers are not independent operators functioning at the periphery of the business; they are integral to its day-to-day functioning[77].

In light of this relationship, the Integration Test strongly supports the classification of ride-hailing drivers as employees. Their work is central to the business' primary function and cannot be regarded as merely accessory or secondary. This status as an integral contributor to the business, warrants recognition through employment classification, ensuring that drivers receive the corresponding benefits and protections. These include fair commissions, social security contributions and labour protections. By applying the Integration Test, it becomes clear that ride-

[74] Jiehong Qiu, 'What Does Uber Bring for Consumers?' (2021) 2 Data Science and Management 20-27.
[75] Murtaza Haider, 'To Uber or Not to Uber' (2015) <https://doi.org/10.13140/RG.2.1.4512.8403> accessed 23 February 2025.
[76] ibid
[77] Stefan Eck and Nditwani Nemusimbori, 'Uber Drivers: Sad to Say, But Not Employees of Uber SA' (2018) 81 Tydskrif vir die Hedendaagse Romeins-Hollandse Reg < SSRN https://share.google/Y1n72SykGCXCGJWli> accessed 28 August 2024.

hailing drivers fulfill a role that is fundamental to the operation of the business. Recognizing their employment status is not only consistent with the principles of the test but ensures fairness in their treatment and accountability in the relationship between drivers and the companies that rely on their labour.

THE MIXED TEST (MULTIPLE FACTORS TEST)

The evolution of the employment landscape necessitates the continuous re-evaluation of legal tests designed to determine employment status[78]. Each test, while effective in addressing the specific challenges of its era, eventually becomes less applicable as the nature and scope of employment evolves. This shift renders earlier frameworks, such as the integration test inadequate in certain contexts.

The Multiple Factors Test is designed to account for the complexities and nuances of modern employment relationships by incorporating a range of considerations rather than relying on a singular criterion. This holistic approach allows for greater adaptability in evaluating the diverse and dynamic roles that characterize the contemporary workforce, ensuring that legal standards keep pace with the changing realities of employment[79].

A significant principle derived from *Ready Mixed Concrete v. Minister for Pensions*[80] emphasizes the irrelevance of the terminologies used in employment contracts. What matters is the actual substance of the agreement and the circumstances prevailing the working relationship. Thus, "*the nomenclature used in the contract is irrelevant.*" The mere designation of an individual as an "independent contractor" within a contract does not determine their actual employment status. The true nature of the working relationship is discerned from the practical realities of how the parties conduct themselves, rather than the labels employed in the contractual language.

[78] Letlhokwa Mpedi and Theophilus Coleman (n 29)
[79] ibid
[80] [1968] 2 QB 497

This principle has profound implications when applied to contemporary scenarios involving ride-hailing services like Bolt and Uber which often describe their drivers as "partners" or "independent contractors." While these companies may prefer such terminology to suggest a non-employment relationship, this characterization is not definite. The determination of whether these drivers are employees or independent contractors' hinges on an analysis of the actual dynamics of their relationship with the company. Factors such as the level of control exerted over the drivers, the degree of their integration into the company's operations and the dependency of the company on their services for its core functions are far more significant than the contractual nomenclature.

Ultimately, *Ready Mixed Concrete v. Minister for Pensions*[81] underscores the principle that employment status is a matter of substance over form. Labels in a contract cannot obscure the reality of a relationship that, by its very nature, may align more closely with employment. This approach ensures that the rights and obligations of the parties are grounded in their genuine working arrangement rather than the superficial terms of their agreement.

The Multiple Factors Test combines the other tests discussed and examines the principles underpinning each of them in determining the nature of the relationship. In this regard, this test does not use just a single factor but all the indicators in order to appreciate an impression of the employment relationship.

UTILIZING THE MIXED (MULTIPLE FACTORS) TEST IN ASSESSING EMPLOYMENT STATUS OF RIDE-HAILING SERVICE DRIVERS

In light of *Ready Mixed Concrete v. Minister for Pensions*[82], several key principles are essential in determining the employment status of ride-hailing service drivers. As the court established, whether a contract creates a "master and servant" relationship, an employer-employee relationship must be evaluated based on the contractual rights and duties between the parties. This approach highlights that the terminology

[81] ibid
[82] ibid

used in the contract, such as referring to the worker as an "independent contractor," is immaterial to determining employment status[83]. What matters is the substance of the relationship, as evidenced by the actual conduct of the parties and the terms of the contract[84].

The first condition the court set out for the existence of an employment relationship under a contract of service is that a person must agree to perform a service for a company in exchange for remuneration[85]. In the context of ride-hailing service drivers, this principle is clearly satisfied. Drivers provide a service transporting passengers from one location to another and receive payment for their services through the fares that passengers pay for the ride. The payment mechanism is set by the company and the drivers' compensation is directly tied to the amount of service (in terms of rides completed) they provide, further confirming that the arrangement is based on remuneration for services rendered.

The second key principle established by the court is that a person must agree, either expressly or impliedly, to submit to a degree of control by the company that renders the company their "master[86]." This control should extend to the manner in which the work is performed, the time it is performed and the means by which it is carried out. In the case of ride-hailing drivers, this control is evident despite the apparent flexibility drivers have in choosing when to work and which routes to take. While it is true that ride-hailing drivers are generally free to choose their working hours, this does not mean they are free from control. Ride-hailing companies exercise significant control through the platform, which directs the drivers to pick up passengers at specific times and places. Additionally, the companies set specific standards for performance, such as maintaining customer service ratings, meeting certain vehicle standards and complying with operational guidelines; all of which are monitored through an application on the platform.

[83] George Cohen, 'Interpretation and Implied Terms in Contract Law' (2011) Contract Law and Economics 6.
[84] ibid
[85] Jeffrey Aiken and Dylan Ochoa, 'Dissecting Contract Breach Terminology, Warranties, and Remedies: Part One' (2022) 42(3) Construction Lawyer 87.
[86] ibid

Further, the companies exercise control over the pricing structure. Although the drivers can sometimes influence their income through incentives (e.g., surge pricing), the basic fares are set by the companies and the drivers are required to accept them. This control over pricing and ride assignments suggest that the company retains a significant degree of authority over how and when the drivers work, even if they technically operate as independent entities[87].

The court's third principle asserts that the contractual provisions must be consistent with those typically found in contracts of service[88]. In the case of ride-hailing services, the contractual relationship mirrors that of an employee in several ways. The terms set by the company, such as the obligation to comply with platform instructions, adhere to customer service standards and accept specific ride requests, are reflective of the kinds of terms found in typical employment contracts.

Besides, ride-hailing companies often provide the tools necessary to perform the work, such as the application platform, payment systems and access to potential passengers. This contrasts with independent contractors who generally supply their own tools and have a greater degree of discretion on how the work is performed. While drivers may own their vehicles, the platform and the services provided by the company are integral to their ability to operate effectively within the business model. The relationship is not just based on one-off contracts for specific tasks; it involves an ongoing connection where the company sets the framework within which the drivers operate, demonstrating the nature of an employment relationship.

When such principles are applied to ride-hailing drivers, it becomes evident that the relationship between the drivers and the company bears many characteristics of an employer-employee relationship rather than that of an independent contractor. The provision of services for remuneration, the significant control exercised by the company and the integration of drivers into the company's core business model all

[87] ibid (n 82)
[88] ibid

point towards the conclusion that these drivers should be classified as employees. Thus, in applying the court's criteria, ride-hailing drivers are more likely to be considered employees rather than independent contractors, which would entitle them to the rights and benefits afforded to employees under labour and employment law. This understanding emphasizes the importance of examining the substance of the relationship than relying on contractual labels; ensuring that workers are protected in accordance with their actual working conditions.

THE MUTUALITY OF OBLIGATION

The principle examines the reciprocal commitments between the parties involved: the employer's obligation to provide work and pay and the worker's obligation to perform that work personally in accordance with the employer's instructions[89]. When these mutual obligations are absent, the relationship is unlikely to qualify as one of employment. This principle posits that a genuine employment relationship requires mutual responsibilities: the employer must provide work and the employee must undertake the work. *Minister for Agriculture and Food v. John Barray & Ors*[90] emphasizes the importance of mutual obligations in determining the existence of a contract of service. *Nethermer (St. Neots) Ltd v. Gardiner*[91] further underscores the necessity of an irreducible minimum of mutual obligation to establish an employment relationship.

However, it is important to note that the mere presence of mutual obligations does not automatically define the nature of the relationship as one of employment. The courts often delve deeper to assess the specific nature of the relationship, as the existence of mutuality alone is not always conclusive[92]. This nuanced approach is evident in cases where the courts have examined the extent and nature of the obligations to determine whether a genuine contract of service exists. It is noted that

[89] Ewan McGaughey, 'Uber, the Taylor Review, Mutuality, and the Duty not to Misrepresent Employment Status' (2019) 48 Industrial Law Journal < https://doi.org/10.1093/indlaw/dwy014 > accessed 28 August 2024
[90] [2008] IEHC 216
[91] [1984] ICR 612
[92] Hugh Collins, 'Independent Contractors and the Challenge of Vertical Disintegration of Employment Protection Laws' (1990) 10 Oxford Journal of Legal Studies < https://doi.org/10.1093/ojls/10.3.353> accessed 28 August 2024

while mutuality of obligation is crucial, it is not the sole determinant of the employment relationship; requiring a comprehensive analysis of the broader context in which the relationship operates. The importance of mutuality of obligation lies in its ability to clarify the boundaries between employment and other working arrangements[93]. Without a guaranteed obligation for the employer to offer work or for the individual to accept it, the relationship typically does not meet the threshold of employment. This concept has been examined and refined through various judicial decisions, which have established its application in different contexts[94]. A landmark case in this regard is *Carmichael v. National Power*[95] in which the court ruled that casual workers engaged "as required" were not employees because mutuality of obligation was absent when they were not actively working. The employer was under no obligation to provide work, nor were the workers obliged to accept it. This decision highlighted the necessity of ongoing reciprocal obligations for an employment relationship to exist[96].

Another significant case is *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions* [97] which identified mutuality of obligation as one of three critical elements of employment, alongside control and consistency with an employment relationship. Similarly, in *Autoclenz Ltd v. Belcher*[98], the UK Supreme Court underscored the need to examine the actual nature of the working relationship rather than relying solely on the written agreement. The court emphasized that even if a contract appears to lack mutuality, the reality of the arrangement could still demonstrate an employment relationship.

UTILIZING THE MUTUALITY OF OBLIGATION TEST IN ASSESSING EMPLOYMENT STATUS OF RIDE-HAILING SERVICE DRIVERS

[93] Anne Morris, 'Mutuality of Obligation: Employer's Guide' (2025) < https://www.davidsonmorris.com/mutuality-of-obligation/ > accessed 28 August 2024
[94] HM Revenue & Customs, HMRC Internal Manual: Employment Status Manual (2016) < https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm0543 > accessed 28 August 2024
[95] [1999] UKHL 47
[96] ibid
[97] ibid (n 82)
[98] [2011] UKSC 41

The mutuality of obligation test requires the existence of mutual commitments: the employer must have an obligation to provide work and the worker must be obligated to accept and perform that work[99] as stipulated in the Labour Act, 2003 (Act 651)[100]. Applying this test to ride-hailing drivers reveals that the nature of their relationship with the parent company satisfies these criteria. Ride-hailing companies provide a platform that connects drivers to passengers, without which drivers would be unable to secure work[101]. This platform is not merely a facilitative tool but an essential medium for drivers to access consistent opportunities for rides, thereby demonstrating the company's obligation to provide work[102].

Conversely, drivers are bound by the requirement to accept ride requests and deliver services in line with the company's standards and operational guidelines. This obligation to perform work illustrates their reliance on the company, reinforcing the presence of mutual obligations[103]. The interplay between these obligations: the company supplying work opportunities and drivers fulfilling those opportunities reflects a relationship that aligns with the principles underpinning the mutuality of obligation test.

Judicial precedents further substantiate this interpretation. In *Carmichael v. National Power,* [104] the absence of mutual obligations meant that casual workers were not classified as employees. However, in the case of ride-hailing drivers, the consistent provision of work by the company and the drivers' obligation to accept and perform that work distinguish their situation. This ongoing exchange of obligations indicates an employment relationship.

Similarly, the principles outlined in *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions*[105] reinforce this conclusion. In that case, mutuality of obligation,

[99]Tolley, 'Personal and Employment Tax' <https://www.lexisnexis.co.uk/tolley/tax/commentary/simons-taxes/personal-employment-tax/e4-213-mutuality-of-obligation-employment-status-effect > accessed 19 April 2025
[100] Sections 9(a) & 11(a)
[101] Guy Davidov (n 55)
[102] ibid
[103] Bolt (n 64)
[104] Yewens (n 35)
[105] ibid (n 82)

alongside control and integration, was deemed essential for identifying employment. Ride-hailing companies exert significant control over drivers through mechanisms such as fare structures, performance evaluations and operational protocols. Additionally, drivers are integral to the company's service delivery, further satisfying the criteria for employment status.

The decision in *Autoclenz Ltd v. Belcher*[106] underscores the importance of assessing the practical reality of a working relationship rather than relying solely on contractual labels. While ride-hailing drivers are often classified as independent contractors in contractual terms,[107] the practical dependence of both parties on one another highlights the mutuality of obligation. Drivers rely on the company's platform to access passengers; and the company depends on drivers to fulfill its operational objectives of transporting passengers.

The interdependence between ride-hailing companies and their drivers reflects a clear mutuality of obligations. Drivers depend on the platform to generate income, while the companies rely on drivers to execute their core business model[108]. This reciprocal relationship meets the essential criteria of the mutuality of obligation test, suggesting that ride-hailing drivers should be classified as employees.

ALTERNATIVE CONCEPTS, TESTS AND PRINCIPLES FOR ASSESSING EMPLOYMENT STATUS

The scope of employment is continuously evolving.[109] Consequently, it becomes essential to periodically develop and implement new tests to address the dynamic nature of the employment landscape. This ongoing evolution necessitates the

[106] Griffin Pivateau (n 37)
[107] Uber, 'Uber BV: Terms and Conditions' (2025) <https://www.uber.com/legal/en/document/?country=uganda&lang=en&name=general-terms-of-use> accessed 19 April 2025
[108] Nicholas Debryne (n 56)
[109] Alex Wood and others, 'Good Gig, Bad Gig: Autonomy and Algorithmic Control of the Global Gig Economy' (2019) 33(1) Work, Employment and Society < https://doi.org/10.1177/0950017018785616> accessed 19 April 2025

creation of additional tests to address gaps and deficiencies that may arise from previously established legal frameworks.

The Subordination Principle

The subordination principle plays a pivotal role in understanding employment relationships in the United Kingdom.[110] It was primarily introduced to address the complexities arising from intermediate categories of workers who are not traditional employees but are also not entirely independent in their work.[111] These workers, who are often self-employed, provide services as part of a broader professional or business enterprise conducted by another party. The subordination principle helps to distinguish these individuals from those who operate independently, dealing directly with their clients or customers.[112]

The United Kingdom Supreme Court provided a significant clarification of this principle in the case of *Hashwani v Jivraj*.[113] The court in this case emphasized the importance of distinguishing between a worker and an independent contractor based on the nature of their relationship with the person to whom they provide services. The court explained that the critical distinction lies in whether the individual performs services under the direction and control of another party, receiving remuneration in return or whether they are independent contractors who are not subordinate to the person receiving the services. This distinction is essential for determining the rights and obligations of the parties involved; particularly concerning statutory protections and obligations under labour and employment law.

UTILIZING THE SUBORDINATION PRINCIPLE IN ASSESSING EMPLOYMENT STATUS OF RIDE-HAILING SERVICE DRIVERS.

[110] Ivana Marimpietri, 'Il lavoro subordinato' in Antonio Vallebona (a cura di), *I contratti di lavoro* (Utet 2009) 30-31.
[111] Felicia Rosioru and Gyorgy Kiss, 'The Changing Concept of Subordination: Recent Developments in Labour Law' (2013) 1 Recent Developments in Labour Law 150
[112] Christopher McCrudden, 'Two Views of Subordination: The Personal Scope of Employment Discrimination Law in Jivraj v Hashwani' (2012) 41 Industrial Law Journal < https://doi.org/10.1093/indlaw/dws006> accessed 19 April 2025
[113][2011] UKSC 40

In the case of ride-hailing service drivers, such as those working for companies like Bolt, the subordination principle offers a useful lens through which to analyze their employment status. On one hand, ride-hailing drivers operate as independent contractors, choosing their own working hours and locations. They also have the ability to reject rides and decide when to work, which mirrors the autonomy typical of an independent contractor.[114] On the other hand, these drivers are often subject to a degree of control that may suggest a subordinate relationship with the ride-hailing company.

The control exercised by the ride-hailing platform is significant. Drivers must adhere to certain rules set forth by the company, such as complying with the platform's rating system, using the company's *app* for job dispatch and following the platform's terms and conditions regarding the conduct of work. The platform sets the price for rides, determines the geographic regions in which drivers can operate and imposes penalties for non-compliance with its rules. This level of control is similar to the way employees are managed within a traditional workplace

James v. Redcats Brands Ltd[115] provides further insights into the relevance of subordination in determining employment status. The court sees employees as wholly integrated into an employer's business operations, while independent contractors operate on their own account, detached from the employer's enterprise. Ride-hailing drivers, despite their operational autonomy, may still be considered integrated into the broader business of the platform. The platform itself is a central component of their working life, providing the infrastructure through which they connect with customers. In this sense, drivers could be considered somewhat integrated into the business, despite not being wholly subordinate in the traditional sense.[116]

However, the analysis must consider the degree of dependence. Drivers rely heavily on the platform for access to customers, as it provides the essential tool for

[114] ibid
[115] [2007] IRLR 296
[116]Christopher McCrudden (n 115)

conducting their business. This dependence creates an economic relationship akin to the subordination seen in traditional employment relationships, even if the formal employment contract is absent. The platform's control over pricing and working conditions suggest a form of economic dependence that mirrors that of employees, raising the question of whether such drivers should receive the same protections given to employees.

The Dominant Purpose Test: Clarifying Employment Relationships

Common law jurisdictions have also developed the "Dominant Purpose Test" to further clarify the nature of employment relationships. In *Mirror Group Newspapers Ltd v. Gunning*[117] the court sought to determine whether a contract was primarily one of employment or one between two independent parties; whether or not the contract falls within the domain of the dominant purpose test attempts to identify the essential nature of the contract by asking whether it falls within the domain of a dependent work relationship or whether it represents a contract between independent undertakings.[118]

The Dominant Purpose Test is particularly useful in cases where the distinction between employment and independent contracting are blurred. It helps to establish whether the individual is genuinely operating a business on their own account or whether they are, in reality, in a subordinate and dependent position akin to that of an employee. This test is crucial for ensuring that individuals are classified correctly, allowing them to access the appropriate legal protections and benefits[119].

In the context of determining employment status, the Dominant Purpose Test evaluates whether the individual's work relationship is primarily focused on fulfilling the interests or business of another party (such as an employer) or whether the person is operating as an independent contractor for their own benefit. The key aspect of this test is to assess which purpose predominates in the work arrangement;

[117] [1985] EWCA Civ J1105-4
[118] Maeve Regan, 'The Contract and Relationship of Employment' In: Maeve Regan (ed), *Employment Law* (Tottel, 2009) 41-42.
[119] Business Bliss Consultants FZE (n 68)

whether the person is primarily working for themselves or primarily for another. If the dominant purpose is to serve the employer's business interests and there is a significant level of control or subordination, it is more likely that the individual is classified as an employee. On the other hand, if the dominant purpose is to serve the individual's own business or entrepreneurial interests, the person may be considered an independent contractor.

This test is often used when examining relationships where midst of elements that might suggest both an employer-employee relationship and an independent contractor arrangement. In some contractual or gig economy scenarios, workers may have the appearance of independence (such as being able to set their hours), but their work may ultimately serve the dominant interest of a company or platform, pointing toward an employment relationship. In a case involving a delivery driver for a ride-hailing service such as Bolt, the dominant purpose test looks at whether the drivers' work is primarily for the benefit of Bolt (serving its business interests) or for their own purposes (running their own independent business). If the dominant purpose is to fulfill the business needs of Bolt, then the driver ought to be classified as an employee, even where they exhibit some characteristics of an independent contractor.

This test is a tool for the courts to make a nuanced judgment about the nature of the working relationship, particularly when other tests, such as the subordination test do not provide a clear answer.

APPLICATION OF THE DOMINANT PURPOSE TEST TO RIDE-HAILING SERVICE DRIVERS

In the case of ride-hailing drivers, the application of the dominant purpose test can help clarify their employment status by analyzing whether their primary work function aligns with that of an employee rather than an independent contractor. Ride-hailing platforms such as Bolt are designed to facilitate the transportation of passengers, making it clear that the drivers' primary function is to provide transportation services for the platform's customers. This raises a critical question:

Is the dominant purpose of the relationship between the drivers and the platform one of self-employment, or does it more closely resemble the traditional employer-employee dynamic[120]?

It is the assertion of the authors that when applying the Dominant Purpose Test to the employment status of ride-hailing service drivers, it is clear that the work performed by these drivers is central to the operation and revenue generation of the platform. The economic dependence, the degree of control exercised by the platform and the integration of the drivers into the core business suggest that the dominant purpose of their engagement is more consistent with that of an employee and not an independent contractor.

Thus, in light of the Dominant Purpose Test, it is reasonable to conclude that ride-hailing service drivers should be classified as employees. The core nature of their work, their economic dependence on the platform and their integration into the platform's operations support the argument that they meet the criteria typically associated with employee status. This determination underscores the need for platforms to reconsider their treatment of drivers and to extend the rights and protections afforded to employees under Act 651, including those related to wages, working conditions, rest and leave entitlements and workmen's compensation. As the gig economy continues to grow, it is imperative that courts and lawmakers apply the various tests with the nuances required to ensure that workers' rights are adequately protected.

Emerging Approaches and a Critique of Binary Classification

While the application of established common law tests reveals the shortcomings of the *Adade* judgment, a truly robust critique requires looking beyond these traditional frameworks. The court's reasoning is entrenched in a rigid binary classification employee versus independent contractor that is increasingly ill-suited to the realities of the platform economy. To fully appreciate what the court overlooked, it is essential to consider emerging approaches championed by the

[120] ibid

International Labour Organization (ILO) and progressive jurisdictions, which seek to prevent false self-employment[121] and re-centre the protective purpose of labour law.

1. The Presumption of an Employment Relationship

A powerful tool to combat disguised employment relationships is the legal presumption of employment. This approach, strongly advocated by the ILO in its Employment Relationship Recommendation, 2006 (No. 198), shifts the burden of proof. Rather than the worker having to prove their subordinate status against a well-resourced platform, the law presumes an employment relationship exists once certain factual indicators are present (e.g., work performed for the benefit of another, dependence on a single entity for income). The onus then falls on the platform to rebut this presumption[122].

Had the Ghanaian courts adopted this principle, the *Adade* case would have unfolded differently. The Plaintiff would only have needed to demonstrate that Peter Walker performed work for Bolt's benefit and was integrated into its operational framework. Bolt would then have been compelled to prove that Walker was genuinely operating an independent business. This would have forced a more substantive inquiry into the relationship's realities, moving beyond the superficial terms of the "partner" agreement.

2. The Purposive Approach to Labour Law

The purposive approach, articulated by scholars like Guy Davidov, argues that the interpretation of "employee" must be guided by the fundamental purposes of labour law[123]. These purposes include addressing inherent inequalities in bargaining power, preventing the exploitation of vulnerable workers and ensuring human

[121] International Labour Organization, Disguised Employment or Dependent Self-Employment (2016) < https://www.ilo.org/resource/other/disguised-employment-dependent-self-employment> accessed 19 April 2025

[122]International Labour Organization, Employment Relationship Recommendations (No. 198, 2006) <https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535 > accessed 19 April 2025

[123] Guy Davidov (n 55)

dignity in the workplace.[124] Under this approach, the question is not merely "Does this worker meet a historical checklist?" but "Does this worker suffer from the same vulnerability and subordination that labour laws were designed to remedy?"

Applying this lens to Bolt drivers reveals the inadequacy of Circuit Court's analysis of the *Adade*. The drivers' economic dependence on the platform, their subordination to its algorithmic management and their inability to negotiate terms are precisely the vulnerabilities labour law exists to address. By ignoring these substantive inequalities and focusing solely on a formalistic control test, the court's decision frustrates the very purpose of Ghana's labour protection framework.

3. The "Dependent Contractor" Category

Perhaps the most direct challenge to the employee/independent contractor binary is the recognition of an intermediate category: the dependent contractor. This category, recognized in jurisdictions such as Canada and several in Europe, encompasses individuals who are legally self-employed but are economically dependent on a single client or platform.[125] They enjoy more autonomy than traditional employees but are granted core statutory protections, such as the right to organize, minimum wage guarantees and safety standards.

The introduction of a "dependent contractor" status in Ghana would have provided the court in the *Adade* with a more nuanced tool. It would have allowed the court to acknowledge the drivers' operational flexibility while also recognizing their economic dependence and subordination, potentially making Bolt liable for Walker's actions without needing to force him into the traditional "employee" box. This approach pragmatically reflects the hybrid nature of platform work, ensuring that legal classifications keep pace with economic realities.

Synthesizing the Critique of the Adade Judgment

The court's failure in the *Adade* case was not merely its selection of the control test but its uncritical acceptance of an outdated binary paradigm. By not considering

[124] Guy Davidov, 'Who is a Worker?'(2005) 34(1) Industrial Law Journal 57-71.
[125] Miriam Cherry and Antonio Aloisi (n 7)

these emerging approaches, the judgment placed an unfair evidential burden on the Plaintiff to deconstruct a sophisticated business model using tests not designed for that purpose.

Additionally, the court inadvertently foreclosed a nuanced solution that could balance platform innovation with worker rights, such as the dependent contractor model.

CONCLUSION

The decision in this *Justice Noah Adade v. Bolt Ghana Ltd & Anor*[126] underscores the limitations of applying rigid employment classification tests in the modern gig economy. The finding that Bolt drivers are independent contractors was pivotal in absolving Bolt Holdings OU of vicarious liability, yet the reasoning employed highlights necessary for more nuanced legal frameworks. As the nature of work continues to evolve, the Ghanaian courts need to adopt broader criteria for employment classification, ensuring that liability assessments reflect the realities of platform-based work arrangements. This case serves as a reference point for ongoing discussions regarding legal accountability in the gig economy, particularly in relation to data protection and employment law. The court's ruling in this case appears to be both misguided and incomplete. By exclusively applying the control test, the court relied on an outdated legal framework that does not adequately account for the complexities of the modern gig economy. This narrow approach overlooked the evolving nature of work arrangements, particularly in platform-based employment models. A more appropriate and comprehensive method would have been to assess the relationship between Bolt Holdings and its drivers using a multifaceted approach. Rather than relying solely on the control test, the court should have incorporated additional tests, including the integration test, the economic reality test, the mutuality of obligation principle and the subordination principle to arrive at a conclusion reflective of modern working environment. These

[126] ibid

tests collectively provide a more nuanced understanding of employment relationships and would have been instrumental in determining whether an employer-employee relationship truly exists in this context.

Given the significance of this determination, a holistic analysis was necessary to ensure a fair and well-reasoned judgment, one that aligns with contemporary labour dynamics and not outdated legal doctrines.

RECOMMENDATIONS

It is the position of the authors that the legislature has the opportunity through the Labour (Amendment) Bill, 2024 to explicitly address the status of ride hailing service individuals working within the gig economy particularly in the light of the transformative changes brought about by the Fourth Industrial Revolution (4IR). The absence of clear legal provisions regarding the classification of gig workers, such as ride-hailing service drivers, creates significant uncertainty, leaving them vulnerable to exploitation and depriving them of essential labour rights. Legislative clarity would not just provide a definitive framework for their classification as employees but to ensure that judicial interpretations align with the evolving nature of work in the digital age, ultimately safeguarding the rights and interests of gig workers.

The rapid development of work in the digital space requires the presence of trade unions to advocate for the interest and wellbeing of workers operating in such a space as trade unions through collective bargaining are able to explore work related policies that protect their workers. Thus, encouraging the formation and joining of a trade union, a constitutional right, can be explored to mitigate some of the challenges of these ride hailing service drivers.

SUSTAINABLE BUSINESS PRACTICES AND DIRECTORS' DUTIES: A CRITICAL EXAMINATION OF THE COMPANIES ACT 2019, (ACT 992).

Gertrude Amorkor Amarh[†] and Godwin Adagewine[††]

ABSTRACT

Company directors play a central role in advancing corporate objectives, and company law traditionally imposes duties and liabilities to ensure that directors discharge their responsibilities with propriety. In Ghana, the passage of the Companies Act, 2019 (Act 992) raises the question of whether directors are legally obliged to look beyond creating wealth for shareholders to actually pursue ethical and sustainable business practices. Adopting a doctrinal, library-based methodology and situating the discussion within the contemporary stakeholder theory, this paper examines the extent to which Act 992 modifies existing rules on directors' duties in promoting ethical and sustainable business practices. The analysis shows that section 190 of Act 992 marks a significant statutory shift from the purely shareholder-centric model of the 1963 Act by expressly requiring directors to consider the long-term consequences of corporate decisions, the impact of operations on the community and the environment, and the company's reputation for ethical conduct. The paper further demonstrates that this revised framework is reinforced by Ghana's wider regulatory ecosystem, including environmental clearance requirements, ESG disclosure guidelines, sustainable banking principles, and green bond regulations. The study concludes that Act 992 embeds sustainability and social responsibility into the core of corporate governance in Ghana, thereby extending the meaning of acting in the "best interests of the company."

Keywords: ***Directors' duties, Sustainability, Act 992, Stakeholder theory, Corporate Social Responsibility.***

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1. Introduction

The traditional responsibility of directors to manage the business of the company in the interest of the company, its shareholders and investors appears to have been extended in recent times to consider other societal factors, including ethical and environmental concerns. The climate crisis and the global action geared towards the protection of the environment have both intensified the calls for ethical and sustainable business practices. This has propelled companies to adopt new strategies with the view of reducing carbon emissions, improving the efficiency of new energy investments and promoting sustainable water management.[1]

Conducting business in an ethical and sustainable manner has been on the rise, driven by two major factors. The first is a growing societal concern for humanity's impact on the environment and a desire to reverse ecological degradation. This shift aims to realign corporate actions to preserve the environment's intrinsic qualities and humanity's ability to depend on natural systems.[2] Secondly, there is an increasing expectation for corporations to bear greater moral responsibility for their actions and their role in society, whether expressed as Corporate Social responsibility (CSR) or a commitment to 'triple bottom line' principles.[3]

Since society is at the receiving end of both positive and negative consequences of the operations of businesses, it is incumbent to impose some obligations on the manner in which corporations conduct business. Humanity today faces a climate

[1] Nour Chams and Josep Garcia-Blandon, 'Sustainable or not sustainable? The Role of the Board of Directors' (2019) Journal of Cleaner Production 226, 1067-1081.
[2] James McConvill and Martin Joy, 'Interactions of the Directors' Duties and Sustainable Development in Australia: Setting off on the Uncharted Road' 2003 Melbourne University Law Review [Vol. 27].
[3] ibid.

crisis in unprecedented levels. Without singling out any, corporations play a major role in the climate crisis[4]and it must be admitted that corporate law has not always been strategically structured to attack and deal with environmental reactors that leads to climate crisis.[5]

Sustainability requires businesses to consciously operate within the finite boundaries of ecological and social systems, ensuring their practices do not compromise the health of these foundational resources. Consequently, discussions on sustainability necessitate a critical examination of corporate conduct to ensure the long-term viability of the environment for the benefit of both present and future society.

As articulated by Krishna, sustainability can be defined as "the long-term maintenance of systems according to environmental, social and economic considerations".[6] The concept of sustainability is built on a tripartite framework, often called the "three pillars", which argues that any true solution must address the issue as one stemming from deeply interconnected environmental, social, and economic dimensions. This means that a lasting outcome cannot focus solely on protecting the environment, for example, without also considering the social equity and economic viability of the action, as each pillar supports and influences the others.

[4] Benedict Sheehy, 'Sustainability, Justice and Corporate Law: Redistributing Corporate Rights and Duties to Meet the Challenge of Sustainability' (2022) 3 European Business Organization Law Review 273–312.
[5] ibid.
[6] Anupam Krishna (n 8)

This perspective is expanded upon by Bañon Gomis et al.,[7] who frame sustainability not merely as a strategic objective but as a moral imperative. They posit that it constitutes a principled and ideally habitual mode of action wherein individuals and organisations intentionally avoid deleterious impacts on the environmental, social, and economic domains. The ultimate aim of such action is to foster a harmonious relationship with these systems, thereby creating the conditions conducive to a flourishing life for all.[8]

Adopting a doctrinal legal methodology, this article seeks to investigate whether or not relevant provisions of Ghana's Companies Act 2019, (Act 992) impose on directors a legal duty to administer and direct the business affairs of companies in ways that are ethical and sustainable.

The evolving discourse on directors' duties and their role in promoting sustainability and ethical business practices has been significantly shaped by comparative corporate governance and the stakeholder theory of the corporation. Chams and García-Blandón[9] empirically demonstrate that board characteristics such as size, gender diversity, and committee structures positively influence sustainable performance, particularly within European firms, thereby highlighting the instrumental role of governance mechanisms in advancing corporate sustainability. Similarly, Tjio[10] critiques the traditional shareholder primacy model and argues for a reorientation of directors' duties towards the interests of

[7] Banon Gomis and others (n 9)
[8] ibid.
[9] Nour Chams and Joseph Garcia-Blandon (n 1).
[10] Hans Tjio, 'Sustainable Directors' Duties and Reasonable Shareholders' (2023) European Business Organization Law Review.

"reasonable shareholders" who value long-term sustainability, suggesting that fiduciary duties should incorporate broader ESG considerations. Quinn[11] further advocates for a reformist approach, proposing that directors' duties be explicitly aligned with sustainable value creation and enforced through objective standards and public mechanisms to overcome the limitations of subjective business judgement and private enforcement.

Despite these advancements, a significant gap remains in the literature regarding the application of these principles within emerging economies, particularly in Sub-Saharan Africa. While existing studies focus largely on European, North American, and Asian contexts, there is limited scholarly engagement with how recent statutory reforms in African jurisdictions—such as Ghana's Companies Act, 2019 (Act 992)—interpret and enforce directors' duties in relation to sustainability and ethics. This article seeks to fill that void by examining the provisions of Act 992 and assessing their potential to foster ethical and sustainable business practices in Ghana.

The article is structured into three parts. The first part of this article reviews the concept of sustainability in business through the theoretical lens of the stakeholder approach to corporate governance, after a review of other corporate theories. Part II then analyses the role of the Board as an organ of the company and how directors' duties developed at common law. Part III discusses the broadened scope of directors' duties under Act 992 and examines how this new development is

[11] John Quinn, 'The Sustainable Corporate Objective: Rethinking Directors' Duties' (2019) Sustainability 2019, 11, 6734.

intended to promote ethical and sustainable businesses. The paper then concludes with a commendation of the present regime for directors' duties under Act 992.

2. Business Sustainability as a Manifestation of Corporate Purpose

The purpose of this section is to examine existing scholarly literature on business sustainability and its implications for both businesses and society. It also reviews three prominent theories of the firm in order to situate the concept of business sustainability within broader theoretical perspectives.

2.1 Sustainability from Different Perspectives

Patel observes that the contemporary commercial environment is undergoing a fundamental transformation in the way businesses engage with society. Companies are moving beyond traditional profit-driven models and increasingly embracing sustainability and corporate social responsibility (CSR). This shift, he argues, is driven by heightened public concern over environmental challenges, ethical consumption, and broader social impacts. Consequently, the integration of sustainable practices and CSR has become a central component of corporate strategy, serving as essential pillars in modern business operations.[12]

[12] Dashrathkumar Patel, 'Sustainable Business Practices and Corporate Social Responsibility: A Study of their Influence on Consumer Choices and Company Performance in the Modern Commerce Landscape'(2017) 5(8) International Journal of Research in Humanities & Soc. Sciences

Ethical and business practices refer to methods, strategies, approaches and processes that corporations use to curtail or reduce environmental impact, increase positive impact and create long-term value for their stakeholders.[13] Spiliakos[14] also suggests that sustainability means doing a business while keeping the environment, community, or society as a whole in mind.[15] This is particularly because businesses do not only create value for investors but for the societies they find themselves in also. They provide goods and services, wages for workers, income for investors, and taxes that help to support community infrastructure.[16] Additionally, the intricate link between business and society requires that a conscious effort is made by businesses to consider the needs of society in their operations. Quite apart from seeking profit for investors, businesses ought to be concerned about how their activities actually affect the environment within which they operate and make provision for any concerns.

A question however arises on how businesses can actually implement sustainability in their operations. In order to focus on environmental and social impacts, companies need to strategise and categorise sustainable practices based on the impact on both.[17] Vaishnani and Parmar's study on business practices that reduce the negative impact on the environment and society categorises business practices

[13] Lee Shields, '5 Impactful Sustainable Business Practices' (2023) Contributor Network <https://learn.g2.com/sustainable-business-practices > accesssed on 9 May 2024

[14] Alexandra Spiliakos, 'What is Sustainability in Business?' (2018) HBS Online Business Insights.

[15] Mohammed Ibrahim bin Tariq and Abu Dhabi University, 'Ethical and Sustainable Business Practices to Enhance Financial Management' (2021) ResearchGate < https://researchgate.net/publication/355215746_Ethical_and_Sustainable_Business_Practices_to_Enhance_Financial_Management > accessed 9 May 2024.

[16] M Tina Dacin and others, 'Business Versus Ethics? Thoughts on the Future of Business Ethics' (2022) 180 Journal of Business Ethics 863-877.

[17] Dr. Haresh Vaishnani and Rajeshri Parmar, 'Sustainable Business Practices and Organizational Performance: A Systematic Review' 37 (2021) International Journal of Advanced Research in Commerce, Management & Social Science (IJARCMSS) 37-46.

into two dimensions: planet-orientated sustainable business practices and people-orientated sustainable business practices.

On the former, they assert that planet-orientated practices are such practices that reduce the negative impact on the environment, which can also be termed "green practices" or "environmental practices". In the business context, they defined that "green" means taking steps towards decreasing environmental impact in all business activities, having positive environmental attributes in existing operations, and achieving environmental sustainability in business outcomes. Planet-orientated practices include resource management practices and pollution prevention and waste management practices in the manufacturing industry for example. Regarding the latter, they espouse that people-orientated practices are such practices that reduce the negative impact on the society, which can also be termed as "social practices" or "CSR practices". To cater for the needs of different constituents associated with a business, they assert that the consideration of stakeholder needs plays a significant role as per the principles of the stakeholder theory. For example, employees are a key element of social practice within organisations, as such, addressing their needs and enhancing their satisfaction will improve overall firm performance.[18]

The element which establishes the framework and defines the extent to which sustainability or business success can be achieved is ethics. For sustainable business practices to thrive, specific behaviours or values must be developed to support and maintain these practices, guided by the standards set by ethics. Business ethics

[18] ibid.

involves the organisational principles, sets of values, standards and norms which influence the actions and behaviour of an individual in the organisation. Business ethics attracts customers for the firm's products and thus boosts sales and profit; business ethics reduces turnover and makes employees stay in business, thereby increasing productivity.[19] Business ethics are the principles that prescribe a code of behaviour that describe what is good and right and what is bad and wrong. They reveal standards for conduct and decision-making of employees and managers.[20]Ethics, therefore, are the conduit through which a culture and mindset of sustainability is achieved.

Ethics in business is one of the intangibles that may appear amorphous to academic discipline and even to practitioners. Just like corporate culture, many questions arise when the concept of ethics arises. In providing some clarity, Larshley[21] argues that there is a difference between "ethics" and "morality", even though they are sometimes used interchangeably, and advocates seeing the difference between the two will enhance understanding of sustainable business practices. Ethics is more concerned with ensuring good behaviour and can be thought of as developmental, whereas morality is judgmental.[22] Ethics are virtues of desirable values that help people to do good actions, making ethics indispensable in corporate governance. Lashley[23] adds that a number of changes within the world economy are causing

[19] Charity Ezenwakwelu and others, 'Business Ethics and Organizational Sustainability' (2020) 24(3) International Journal of Entrepreneurship
[20] ibid.
[21] Conrad Lashley, 'Business Ethics and Sustainability'(2016) 6 Research in Hospitality Management 1-7
[22] Referencing Colin Fisher and Alan Lovell (2012). *Business Ethics and Values* (2nd Edn) London:Prentice-Hall (2006).
[23] Chris Moon and others,, *Business ethics: Facing up to the Issue*(Economist Books 2001).

many major business organisations to adopt more ethical practices. Technological innovation, globalisation, the importance of intangible assets, competition for talent and the growing use of economic networks are all leading to change towards more ethical practice.

In the context of the governance of businesses, the board has the burden of ensuring the implementation of ethical and sustainable practices in the company. This is because the most essential decisions that shape the company's goals and objectives are made by them.

2.2 Theory at the Heart of Corporate Law

A number of theories have been propounded to ground business sustainability principles in the affairs of the company. This is in a bid to establish a link between the responsibility of directors towards the corporation and the responsibility of the directors towards the broader environment or society. The governance system of a company primarily depends on the decisions of the board and members in a general meeting. The effect is that the decisions taken by these two principal organs of the company impact the wider society in one way or the other. Within the context of sustainability, there is the need to attribute obligations not only from a practical point of view but also from justifiable theoretical underpinnings on the operations of the board in the corporation. This then establishes the direct relationship between the governance system of a company and the principles of sustainability. Three

theories shall be discussed: the agency theory, the resource dependency theory and the stakeholder theory.

2.2.1 The Agency Theory

This theory concerns sustainable business practices as jointly upheld by the board of directors and shareholders. The proponents of this theory argue that the board has the obligation of monitoring the operations of the company, while the shareholders' duty is to focus on economic and financial efficiency.[24] The central argument of this theory is that conflicts emerge when the interests of owners and managers diverge.[25] Proponents maintain that such divergence is rooted in competing goals between management and shareholders, with managers often using their control over firm operations to maximise short-term personal gains at the expense of shareholders' long-term interests.[26] In such circumstances, boards may also extract greater benefits or rents than those that would ordinarily be granted by the firm's owners.[27]

Three mitigation approaches have been suggested to address the agency theory problem: the independence approach; the equity approach and the market for corporate control approach. The "independence" approach advocates for an

[24] Charl de Villiers and Vic Naiker, 'The Effect of Board Characteristics on Firm Environmental Performance' (2011) 37(6) J. Manag. 1636-1663. (This paper discusses the relationship between strong firm environmental performance and board characteristics that capture boards' monitoring and resource provision abilities during an era when the natural environment and the related strategic opportunities have increased in importance. The authors relate the proxy for strong environmental performance to board characteristics that represent boards' monitoring role.)
[25] Dan Dalton and others, 'Fundamental Agency Problem and its Mitigation: Independence, Equity, and the Marketfor Corporate Control' (2007) 1(1) Acad. Manag. Ann. 1-64, 2.
[26] Charl de Villiers and Vic Naiker (n 24) 6.
[27] Dan Dalton (n 25) 2.

independent board. It is argued that corporate directors must remain independent of management, oversee managerial actions, and ensure that their interests remain aligned with those of shareholders.[28] The equity approach suggests that managers who hold equity in the firm are more likely to align with the interests of other shareholders, thereby directing the firm in pursuit of their collective objectives. Similarly, the market for corporate control posits that corporate markets can serve a disciplinary function, as managers who misuse their agency position for self-interest may expose the firm to acquisition by competing firms.[29]

The board's monitoring role enhances managerial accountability, thereby increasing the likelihood of more effective strategic initiatives.[30] Within the context of sustainability, this role underscores the need for governance structures designed to promote social and ethical performance, but often only when such measures promise tangible efficiency gains or financial returns.[31] However, this perspective does not necessarily ensure that top management will pursue ambitious environmental performance objectives. Such strategies typically demand substantial investment in production redesign, new technologies, and cross-functional employee collaboration.[32] As a result, corporations must evaluate the long-term benefits of robust environmental practices, even though managers may be reluctant to incur costs without immediate financial payoffs. Consequently, management often prioritises conservative initiatives that safeguard short-term

[28] ibid, 3.
[29] ibid, 2.
[30] Charl de Villiers and Vic Naiker (n 24).
[31] Nour Chams and Josep García-Blandon (n 1) 1068.
[32] Charl de Villiers and Vic Naiker (n 24) 6.

reputation and financial outcomes over more transformative, long-term sustainability strategies.[33]

2.2.2 Resource Dependence Theory (RDT)

This theory is grounded in the board's responsibility to allocate resources effectively. It emphasises that one of the board's primary functions is to enhance firm performance through efficient resource distribution.[34] The Resource Dependence Theory (RDT) rose to prominence following the publication of "The External Control of Organizations: A Resource Dependence Perspective" by Jeffrey Pfeffer and Gerald Salancik.[35] At its core, the theory posits that organisational actions are shaped by their reliance on critical external resources, and that decision-making can be explained by the specific nature and degree of these dependencies.[36]

The theory further illustrates that organisations rely on critical resources provided by their external environment. To understand organisational behaviour, it is therefore necessary to first identify which resources are most essential.[37] However, it does not suggest that environmental conditions and resource dependencies influence behaviour independently of the actors involved. Rather, it emphasises the interaction between organisational actors and their environment. The theory assumes bounded rationality, acknowledging the cognitive and informational limits

[33] ibid.
[34] Nour Chams and Josep García-Blandon (n 1) 1068.
[35] See Werner Nienhuser, 'Resource dependence theory: How well does it explain behavior of organizations?, Management Revue' (2008) 19(2), Rainer HamppVerlag, Mering 9-32.
[36] ibid, 11.
[37] ibid, 12.

actors face in formulating and solving complex problems, as well as in processing, storing, and transmitting information.[38]

Although the environment objectively constrains organisational action through the availability of resources, managers must still subjectively perceive and interpret how these resources are distributed.[39] Resource Dependence Theory recognises the influence of external factors on organisational behaviour but emphasises that managers can actively reduce environmental uncertainty and dependency. Central to this process is the concept of power, understood as control over critical resources, which enables firms to either minimise dependence or secure additional resources—functions often carried out through the board.[40] Early applications of RDT to boards examined size and composition as indicators of a board's ability to provide essential resources. These studies suggested that firms with greater environmental interdependence tend to appoint larger boards with a higher proportion of outside directors.[41] According to Pfeffer,[42] directors enhance organisational capacity in four main ways: by offering advice and counsel, facilitating information flows between the firm and its external environment, providing access to key resources, and conferring legitimacy.[43]

2.2.3 Stakeholder Theory

[38] ibid.
[39] ibid.
[40] Amy Hillman and others, 'Resource Dependence Theory: A Review' (2009) 35(6) Journal of Management 1404–1427.
[41] ibid.
[42] Jeffrey Pfeffer and Gerald Salancik, *The External Control of Organizations: A Resource Dependence Perspective.* Harper & Row, New York (1978).
[43] Amy Hillman and others (n 40).

The stakeholder theory is highly versatile, with applications across multiple fields due to its flexibility in addressing diverse issues. It holds particular significance in the areas of corporate social responsibility, business ethics, and sustainability. Freeman defines a stakeholder as any individual or group that can influence, or is influenced by, the achievement of a firm's objectives.[44] This broad definition encompasses shareholders, employees, creditors, public interest groups, and other parties connected to the corporation. Inevitably, these stakeholders may pursue conflicting objectives.[45] While profit generation remains the primary goal of most corporations, other concerns—such as social, ethical, and environmental considerations—also hold significant importance, creating potential tensions among stakeholder interests. The stakeholder-oriented perspective has been widely adopted in jurisdictions such as Germany, France, Japan and the United States.

The stakeholder theory has been divided into two main models:[46] the Corporate Planning and Business Policy Model and the Corporate Social Responsibility Model of stakeholder management.[47] The Corporate Planning and Business Policy Model focuses on the development and evaluation of corporate strategic decisions, emphasising the need for approval and support from key stakeholder groups essential to the corporation's survival. It views the behaviour of these groups as a factor that constrains management's strategic choices, requiring alignment between corporate resources and the external environment. This model identifies

[44] Edward Freeman, Strategic *Management: A Stakeholder Approach* (Marshall, MA Pitman, 1984).
[45] Robin Roberts, 'Determinants of Corporate Social Responsibility Disclosure: An Application of Stakeholder Theory' (1992) 17(6) Accounting Organizations and Society 595--612.
[46] Edward Freeman (n 44).
[47] Robin Roberts (n 45).

stakeholders such as creditors, employees, shareholders, and public interest groups as integral components of the corporation.[48] Importantly, it does not regard stakeholders as adversaries but as collaborators whose contributions are vital to achieving mutual benefits and overall corporate success. For example, customers sustain the corporation through purchases, creditors and shareholders provide necessary capital, and public groups—including local communities and regulatory authorities—maintain a vested interest in the organisation's conduct and its wider societal impact.

The Corporate Social Responsibility (CSR) Model presents a different perspective. Unlike the collaborative approach of the Corporate Planning and Business Policy Model, this framework highlights the role of external influences—such as regulatory authorities and special interest groups—that often act in an adversarial capacity, particularly in relation to social and environmental issues. The model underscores stakeholder theory as a valuable justification for CSR by providing a rationale for integrating stakeholder interests into strategic decision-making. Through this lens, businesses are encouraged to align their CSR initiatives with the expectations and needs of diverse stakeholder groups, thereby enhancing both the strategic effectiveness and broader societal impact of their activities.[49]

In making decisions, the board must take into account the interests of stakeholders. Whether applying the Corporate Planning and Business Policy Model or the

[48] ibid.
[49] Arieh Ullmann, 'Data in Search of a Theory a Critical Examination of the Relationship Among Social Performance, Social Disclosure, and Economic Performance' (1985) Academy of Management Review 540-577.

Corporate Social Responsibility Model, it is essential that the board evaluates how its decisions affect various stakeholder groups. A corporation's objectives should therefore extend beyond profit generation and maximisation to include the broader interests of stakeholders, including those of society at large.

While a company's performance is primarily evaluated based on profitability, it is important to recognise that a firm's decisions also impact various stakeholder groups. Although profit generation remains a fundamental objective, conflicts can arise between the company and its stakeholders. To prevent or swiftly resolve such disputes, certain conditions must be met. Accordingly, the following has been proposed:[50]

(i) to identify well-defined groups of agents close to the firm that are affected by the externalities it creates;

(ii) to assign well-defined benefits to each group of stakeholders;

(iii) to assign relative weights to the benefits defined in (ii) to obtain a well-defined objective for the firm and;

(iv) to provide incentives for the firm's management to maximise this objective.

These proposals will help prevent potential conflicts and guide the company in its decision-making when undertaking transactions or projects that impact the stakeholder group. For example, when a clearly defined set of stakeholders is affected by the firm's internal and external decisions, the company can concentrate

[50] Michael Magill, Martine Quinzii and Jean-Charles Rochet, 'A Theory of Stakeholder Corporation' (2015) 83(5) Econometrica. 1685-1725.

on maximising benefits for the group while minimising any adverse effects associated with the initiative. This therefore triggers proposal (ii), as each stakeholder group advocates for outcomes that align with their distinct interests. Such engagement is critical, as every stakeholder contributes to the business's operations with the expectation of receiving meaningful value in return.

For instance, in a company with shares, the shareholders expect higher returns, and employees seek fair wages and career growth, while customers demand quality and affordability. Proposal (ii) ensures these competing interests are balanced—perhaps through profit-sharing for employees, sustainable pricing for customers, and reinvestment strategies for shareholders—creating a mutually beneficial ecosystem where all stakeholders see their contributions rewarded.

The goal is to strike a balance between profit maximisation and the corporation's sustainable market presence as a going concern. The key differentiator of stakeholder theory lies in its requirement to account for all stakeholders' interests – even when doing so may potentially diminish the company's profitability, particularly in the immediate term.

The Ghanaian Companies Act of 2019 formally incorporates stakeholder theory principles to promote sustainable business practices. As will be examined in Part III of this analysis, this legislative framework requires companies to balance the interests of various stakeholders.

The foregoing discussion demonstrates that the agency theory, resource dependence theory, and stakeholder theory each provide valuable theoretical

foundations for linking corporate governance with sustainability. Together, they clarify the dual responsibility of directors—towards the corporation itself and towards the broader environment and society. By situating board decision-making within these theoretical frameworks, the governance system of a company can be understood not merely as a mechanism for profit generation but as a structure that embeds ethical, social, and environmental considerations into corporate strategy. Thus, these theories collectively reinforce the role of the Board as a central actor in advancing principles of business sustainability. While none are without flaws, these shortcomings can be effectively managed, often without significant cost.

3. Board Primacy and the Development of Directors' Duties at Common Law.

3.1 Board Primacy in Ghana

Building on the discussion of theories that connect corporate governance with sustainability, it is important to examine how the law itself grounds the powers and responsibilities of directors. The principle of board primacy and the common law development of directors' duties provide the legal framework within which sustainability obligations may be interpreted and enforced. These duties not only define the relationship between directors, shareholders, and the company but also shape how corporate decisions impact wider societal and environmental interests. In this way, the legal evolution of directors' duties serves as a bridge between traditional corporate governance principles and the modern demand for responsible and sustainable business practices.

An incorporated company cannot act on its own. It does not have a mind or body to undertake transactions on its own. It is therefore described as an "abstraction" in the context of company law to reflect the concept of an artificial person.[51] It can only take decisions and perform its stated business through the principal organs of the company. In the Ghanaian company law context, once a company is incorporated, it assumes full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and it has full rights, powers and privileges for the purposes of undertaking any business or activity.[52] The powers of the corporate personality are achieved through the functionality of human beings acting in the capacity of organs, agents and officers of the company.[53] Two key organs of the company are the Board of Directors and Members in General Meeting.

The Board of Directors, together with the Members of the Company in General Meeting, exercise powers that are deemed to be the direct acts of the company.[54] Section 144(1) of Act 992 provides as follows:

"A company shall act through the members of the company in general meeting or the board of directors or through officers or agents, appointed by, or under authority derived from the members in general meeting or the board of directors."

Such powers are derived either by the constitution of the company,[55] or by statutory provisions.[56] In the exercise of their functions and powers, the Board is not bound

[51] *Lenarri's Carrying Co. ltd. v. Asiatic Petroleum Co. Ltd* (1915) AC. 705.
[52] The Companies Act 2019 (Act 992), s 18(1).
[53] *AyodeleJames.: Mid-Motors (Nig) Co. Ltd* (l975) 11-12 SC 31.
[54] The Companies Act 2019 (Act 992), s 144(1).
[55] ibid, s 144(2).
[56] Act 992 imposes certain obligations on the board of directors and the members in general meeting.

by the directions and instructions of the members in the general meeting.[57] Section 144(4) provides as follows: *"Unless the constitution of the company otherwise provides, the board of directors, when acting within the powers conferred on them by this Act or the constitution of the company, are not bound to comply with the directions or instructions of the members in general meeting."* The Board has power to take decisions and manage the affairs of the company. They are not bound by the instructions and decisions of the company as to fetter their constitutional power or legislative power in relation to the administration and operation of the company. The board's independence is guaranteed, and there is a balance between the powers of the members in the general meeting and the board.

In the case of *John Shaw & Sons (Salford) Ltd v Shaw*,[58] Greer LJ had this to say on the powers of the board:

"...The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles (the constitution of the company) in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders…" (emphasis is mine)

Where members in a general meeting intend to control or exercise their powers over the Board, such control or power must be embodied in the articles of the company

[57] The Companies Act, 2019 (Act 992), s. 144(4); See *Scott v. Scott* [1943] All ER 582. In this case a company's shareholders passed a resolution at a general meeting that certain payments in respect of dividends should be made to preference shareholders. It was held that the resolution was invalid as an attempt by the shareholders to usurp the directors' powers of control.
[58] [1935] 2 KB 113.

or the constitution of the company. It is one of the derivative sources of power of members in the General Meeting. Where such power is not articulated in the constitution of the company, the members in general meeting have the alternative to amend the constitution in order to exercise such control.

Greer LJ's position fortifies the principle that directors are not agents of the shareholders.[59] Consecrating the act of the board, Act 992 prevents decisions or acts of the board to be reversed or affected in the event that the constitution of the company is amended.[60] These limitations on the members in the general meeting are to avoid conflicting decisions between the two principal organs of the company.[61]

The role performed by the Board of Directors is crucial to the existence of the corporation. The board of directors, managing director and other top officers normally carry out the managerial functions of a company. They speak and act on behalf of the company. They are the faces and the directing minds of the company. [62] Any act of the board of directors or managing director, for instance, while carrying on in the usual way the business of the company is treated as the act of the company itself; and accordingly, the company shall be civilly liable therefore to the same extent as if it were a natural person.[63]

[59] *Automatic Self- Cleansing Filter Syndicate Co. v. Cunninghame* [1906] 2 CH 34 CA.
[60] The Companies Act 2019 (Act 992), s 144(6).
[61] Paul Davies, 'The Board of Directors: Composition, Structure, Duties and Powers' (2000) OECD <https://www.oecd.org/daf/ca/corporategovernanceprinciples/1857291.pdf > accessed on 12 May 2024.
[62] *Michael Ayuune And 24 Others V. Board of Directors, Tek Cooperative Credit Union Ltd* (2018) JELR 63961 (HC).
[63] *Bousiako Co., Ltd. v. Ghana Cocoa Marketing Board; Kwabo-Osekyere Construction Works Ltd. v. Ghana Cocoa Marketing Board (Consolidated)* [1982-83] GLR 824.

The primacy of the board of directors in the governance of the company is well cemented under Ghanaian law. Consequently, the responsibility to ensure business ethics and sustainability among corporations falls within the ambit of the Board. Since the Board is essentially the directing mind and will of the Company, decisions concerning ethical and business sustainable practices rest squarely on its shoulders.

3.2 Development of Directors' Duties at Common law

The establishment of the primacy of the board in the governance of a company must of necessity be accompanied by a discussion of the duties of directors. Directors' duties are the channels through which directors exercise their powers. This section therefore traces the development of directors' duties from common law.

Common law judges were the pioneers in establishing fiduciary duties on directors, independent of any explicit statutory directives.[64] This meant that the evolution and development of the fiduciary duties of directors were based on case law. In other words, the set of regulations in the United Kingdom that evolved over time through the judiciary's gradual decision-making in similar cases over an extended duration, eventually solidifying into a formal legal framework through the doctrine of judicial precedent.[65] The jurisprudence surrounding directors' duties was crafted by the judiciary throughout the 19th and 20th centuries by transplanting and modifying

[64] Professor Bernard Black, 'The Principal Fiduciary Duties of Boards of Directors' Presentation at Third Asian Roundtable on Corporate Governance Singapore, 4 April 2001.
[65] David Cabrelli, 'The Reform of the Law of Directors' Duties in UK company Law'(2008) Edinburgh Research Explorer (2008). Presentation for Università Bocconi on the Reform of the Law of Directors' Duties in UK Company Law.

the preexisting laws governing trustees' duties. Directors were seen as trustees by the common law; thus, they were attributed with the duties of trustees.

The general duties of directors at common law were divided into two: the duty of loyalty and the duty of care, skill and diligence. The former was a fiduciary duty, whereas the latter was not since it was concerned about the competence or negligence of directors.[66] The duty of loyalty and care has received extensive scholarship since it was the first and foremost duty of directors. It included the duty to act in the interest of the company[67]; the duty to avoid conflict of interest[68]; and the duty to avoid misusing corporate information, contracts and properties.[69] The benefit of common law evolution in directors' fiduciary duties lies in its adaptability and capacity to be adjusted to align with contemporary commercial and economic circumstances.

The challenge with the common law, however, was that there was a lack of transparency on the fiduciary duties of directors. Directors did not know exactly what their duties were towards the company.[70] They relied on advice from legal practitioners due to the absence of specific legislative provisions governing fiduciary duty. For this reason, the government of the United Kingdom charged the Company Law Review Steering Group, the Law Commission and the Scottish Law Commission to make findings to replace the common law with statutory provisions on the legal duties of directors towards a company in a new Companies Act.[71] In

[66] ibid.
[67] *Re Smith & Fawcett Ltd.* [1942] Ch. 304
[68] *Aberdeen Railway Co. v Blaikie Bros* (1854) 1 Macq 461.
[69] *Cook v Deeks* [1916] 1 AC 554, PC.
[70] David Cabrelli (n 65).
[71] ibid.

their 2001 Final Report, the Company Law Review Steering Group stated that a statutory statement of directors' legal duties would provide greater clarity on what is expected of directors and make the law more accessible. It would also correct defects in the existing law, particularly in areas where it no longer aligns with accepted norms of modern business practice. This is especially relevant to the duties of conflicted directors and the powers of the company in dealing with such conflicts. Finally, the statement would define whose interests companies should serve, in a manner that reflects both modern business needs and wider expectations of responsible corporate behaviour..[72]

3.3 Duties of Directors under Ghanaian law

The companies Act, 2019 (Act 992) in the section 170(1) defines a 'director' to mean "*those persons, by whatever name called, who are appointed to direct and administer the business of the company.*" It is the role or function or duties of a person that qualifies that person to be recognised as a director of a company. So far as those persons have been "appointed to direct and administer the business of the company", they are directors in the face of the law.

Act 992 recognises directors who are not officially or duly appointed as directors but still play a role in the running of the business as if they were duly appointed directors. These people are called *de facto* directors and shadow directors, depending on the context. With regard to a de facto director, section 170(2)(a) of Act 992 provides that "*a person, not being a duly appointed director of a company, who holds out*

[72] The Great Britain Company Law Review Steering Group, *Modern Company law for a Competitive Economy: Final Report* (Department of Trade and Industry 2001) 40-41.

as a director or knowingly allows to be held out as a director of that company is subject to the same duties and liabilities as if that person were a duly appointed director of the company."[73] On the other hand, a shadow director is defined in section 170(2)(b) of the Companies Act, 2019 (Act 992) as *"a person, not being a duly appointed director of a company, on whose directions or instructions the duly appointed directors are accustomed to act, is subject to the same duties and liabilities as if that person were a duly appointed director of the company."*[74] It is important to draw this distinction because the law takes the position of ascribing duties and liabilities to all persons who purport to be directors, even if they are not officially appointed as one.

The duties of directors can be found in two main sources: the constitution of the company and legislation, in this case Act 992. Act 992 states in section 190(1) that *"A director of a company stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in a transaction with or on behalf of the company."* The expression 'fiduciary duty' is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from that consequent upon the breach of other duties.[75] In the case of *Breen v Williams,*[76] the court explained that a fiduciary relationship is one in which one person comes under a duty to act in the other person's interest.

[73] See *Re Hydrodam (Corby) Ltd*, [1994] 2BCLC 180; Commodore v Fruit Supply (GH) Ltd [1977] 1 GLR 241; *Kwapong and others v Ghana Cocoa Marketing Board and others; Amoh v Ghana Cocoa Marketing Board and others (consolidated)* [1984-86] 1 GLR 74-91.
[74] See *Re Hydrodam (Corby) Ltd* (n 112); *Re Unisoft (No.3) Group Limited (No 3)* [1994] 1BCLC 609.
[75] *Bristol & West Building Society v Mothew* [1998] Ch 1, p. 16
[76] [1997] 1 LRC 212

A director is also obligated to "*observe the utmost good faith towards the company in a transaction with or on behalf of the company.*"[77] In addition, a director has a duty to act in the interest of the company as a whole so as to preserve the assets, further the business, and promote the purposes for which the company was formed, in the manner that a faithful, diligent, careful and ordinarily skillful director would act in the circumstances.[78] A director of a company also has the duty act in accordance with the constitution of a company and only exercise powers for the purposes for which the powers are conferred.[79] Moreover, a director is mandated to exercise independent judgement.[80] A director also has the duty to avoid conflict of duty and conflict of interest.[81] A director has the duty not to compete against the company.[82]

Concerns for interaction between business and the environment and society continue to take shape globally. Although social pressure from civil society has been the primary force behind this dynamic, there is a growing trend toward integrating social and environmental concerns into the legal framework that regulates corporations.[83] Ghana in its Companies Act, 2019 (Act 992) appears to have responded to such calls by expressly broadening the considerations directors must have regard to in acting in the best interests of the company.

[77] See *Charterbridge Corporation v Lloyds Bank* [1969] 2 All ER 1185
[78] Act 992, s 190(2); ibid; *Greenhalgh v. Ardene* [1951] Ch 286.
[79] Act 992, s 190(3); see *Re Smith & Fawcett* [1942] Ch 304; *Hirsche v. Sims* [1894] AC 654, PC; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821.
[80] ibid, s 190(5).
[81] ibid, s 192(1); see *Bray v Ford* (1896) AC 44 HL 51-2; *Aberdeen v. Blaikie* [1843-60] ALL ER 249; *Bhullar v Bhullar* [2003] BCLC 241; *Commodore v Fruit Supply* (GH) Ltd [1977] 1 GLR 241.
[82] Ibid, s 192(1)(b); see *Asafu Adjaye and other v Agyekum* [1984-86] 1 GLR 382.
[83] James McConvill and Martin Joy, 'Interactions of the Directors' Duties and Sustainable Development in Australia: Setting off on the Unchartered Road' (2003) 27 Melbourne University Law Review

4. Duties of Directors and Ethical and Sustainable Business Practices under Act 179 and Act 992

In examining the provisions of Act 992 on directors' duties in this paper, the analysis is guided by the stakeholder theory of the firm, which the Act itself considers as a foundation for promoting sustainable business practices. Stakeholder theory provides the conceptual basis for assessing how directors' duties extend beyond the traditional focus on shareholders to include a wider range of interests, such as those of employees, creditors, communities, and the environment. By applying this framework, the analysis evaluates whether Act 992 effectively redefines the role of directors to balance profit-making with broader ethical, social, and environmental Under the repealed Act 179, directors had no express obligation to consider the impact of the company's operations on the environment or the society, nor the company having a reputation for high standards of business conduct. What the Act did was to give directors the opportunity to have regard for certain constituents when determining whether a transaction is in the best interest of the company. These constituents were employees of the company, members of the company, or in cases where the director is appointed by a special class of members or creditors, the director may give special consideration to the interests of that class. Even so, the said provision was drafted in permissive terms with the use of 'may', which meant that directors were not mandated. For purposes of analyses, the provisions of the two Acts on directors' duties is quoted verbatim below.

Section 203 of the Companies Act 1963 (Act 179) provided:

(1) A director of a company stands in a fiduciary relationship towards the company and shall observe the utmost good faith towards the company in any transaction with it or on its behalf.

(2) A director shall act at all times in what he believes to be the best interests of the company as a whole so as to preserve its assets, further its business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances.

(3) In considering whether a particular transaction or course of action is in the best interests of the company as a whole a director may have regard to the interests of the employees, as well as the members, of the company, and, when appointed by, or as representative of, a special class of members, employees, or creditors may give special, but not exclusive, consideration to the interests of that class.

(4) No provision, whether contained in the Regulations of a company, or in any contract, or in any resolution of a company shall relieve any director from the duty to act in accordance with this section or relieve him from any liability incurred as a result of any breach thereof.

The aforementioned provision failed to establish any binding obligation on directors to consider sustainable business practices in the performance of their duties. While the Act comprehensively outlined directors' duties, it notably omits any specific requirements regarding their role in considering the likely effects of the company's operations on the environment and society or even maintaining a reputation for high standards of business conduct.

The Companies Act, 2019 (Act 992), however, introduced reforms that explicitly include sustainable business considerations among the statutory duties of company

directors. Section 190(2) and (4) of the Companies Act, 2019 (Act 992) reflects a leaning towards the stakeholder theory in Ghanaian company law. The provision expressly requires directors, in the performance of their duties, to consider not only the interests of shareholders but also those of employees, customers, creditors, and the broader community. By doing so, the Act moves away from a purely shareholder-centric model and situates corporate decision-making within a stakeholder framework, thereby embedding sustainability and social responsibility into the governance structure of companies.

Section 190(2)&(4) of Companies Act, 2019(Act 992) provides as follows:

(2) A director shall always act in what the director believes is the best interest of the company as a whole so as to preserve the assets, further the business, and promote the purposes for which the company was formed, in the manner that a faithful, diligent, careful and ordinarily skilful director would act in the circumstances and in doing so shall have regard to

(a) the likely consequence of any decision in the long term,

(b) the impact of the operations of the company on the community and the environment, and

(c) the desirability of the company maintaining a reputation for high standards of business conduct.

(4) In considering whether a particular transaction or course of action is in the best interests of the company as a whole, a director may consider the interests of the employees, as well as the members, of the company, and, where appointed by, or as representative of, a special class of members, employees, or creditors may give special, but not exclusive, consideration to the interests of that class.

The scope of directors' duties under section 190(2) Act 992[84] has been extended particularly regarding the promotion of ethical and sustainable business practices. In acting in the best interest of the company as a whole so as to preserve the assets, further the business, and promote the purposes for which the company was formed, in the manner that a faithful, diligent, careful and ordinarily skilful director would act in the circumstances, the director is mandated to have regard to:

(a) the likely consequence of any decision in the long term,

(b) the impact of the operations of the company on the community and the environment, and

(c) the desirability of the company maintaining a reputation for high standards of business conduct.

When making decisions, a director under Ghanaian law must consider the long-term consequences, ensuring that the choices made today will benefit the company in the future. Additionally, the director must be mindful of the company's impact on the community and the environment, recognising that the operations of the company extend beyond mere financial performance to broader social and ecological effects. Finally, maintaining a high standard of business conduct is essential, as the company's reputation is a valuable asset that can influence its success and sustainability. By adhering to these principles, a director not only fulfils their legal and ethical obligations but also contributes to the overall well-being and longevity of the company.

[84] This provision is similar to the U.K Companies Act, 2006, s 172.

According to Ghartey,[85] the Companies Act 2019 marks a statutory expansion of the traditional understanding of the phrase "in the best interests of the company as a whole." In interpreting this standard, directors are now expected to take into account not only the company's long-term viability but also the impact of corporate decisions on the community, the environment, and the company's reputation. These considerations, he argues, have become integral criteria for determining what constitutes the best interests of the company under Ghanaian law.

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Recognising that corporate activities directly affect the environment—and in response to growing global advocacy for climate responsibility—Act 992 imposes an obligation on directors to consider the long-term consequences of their decisions, the impact of company operations on the community and the environment, and the importance of maintaining a strong reputation for ethical business conduct. As Ghartey observes, this approach aligns with modern expectations of the company as a "social citizen."[86] Societal demands for corporate responsibility towards communities and the environment continue to intensify, and these statutory obligations embed environmental accountability within corporate governance. In practice, this requires companies to pursue strong environmental performance, which ultimately enhances the resilience, vitality, and sustainability of their operations within the communities they serve.

[85] Kenneth Ghartey, 'Directors' Duties under the 2019 Ghanaian Companies Act' (2020) 46 (2) Commonwealth Law Bulletin 249 .
[86] ibid.

In Ghana, certain enactments in specific sectors require companies to seek environmental clearance before operating. For instance, under the Petroleum (Exploration and Production) Act, 2016 (Act 919), the Act requires companies to acquire environmental impact assessment clearance from the Environmental Protection Agency before being granted a reconnaissance licence.[87] Additionally, before undertaking exploration drilling, the company must first comply with the relevant statutory environmental requirements as prescribed in the Environmental Protection Agency Act, 1994 (Act 490).

Furthermore, under the Minerals and Mining Act, 2006 (Act 703), before undertaking an activity or operation under a mineral right, the holder of the mineral right (company) shall obtain the necessary approvals and permits required from the Forestry Commission and the Environmental Protection Agency for the protection of natural resources, public health and the environment.[88]

Charl, Vic and Chris[89] have observed that firms with strong environmental performance are better positioned to seize market opportunities arising from the growing demand for environmentally friendly goods and services.[90] They also caution that heightened societal expectations increase the risk of environment-related liabilities, citing the Exxon Oil spill in 1986 and BP's Gulf of Mexico spill in 2010, both of which saddled companies with immense financial burdens in the form

[87] Petroleum (Exploration and Production) Act, 2016 (Act 919), s. 9. A reconnaissance licence grants to the licensed person a non- exclusive right to undertake (a) data collection including seismic surveying and shallow drilling, and (b) processing and interpretation or evaluation of petroleum data in the area specified in the licence.
[88] Minerals and Mining Act 2006 (Act 703), s 18.
[89] Charl de Villiers and Vic Naiker (n 24).
[90] ibid, 4.

of clean-up costs, fines, and settlements.[91] In their view, the positive correlation between robust environmental performance and shareholder wealth, coupled with non-financial benefits such as reputational resilience, makes environmental responsibility a strategic imperative. From a stakeholder theory perspective, this insight reinforces the statutory direction of Act 992: directors must not only safeguard shareholder value but also align company operations with community and environmental expectations. By embedding environmental accountability into governance, directors reduce exposure to liability while enhancing trust and legitimacy among a wider set of stakeholders, thereby securing the company's long-term sustainability.

As indicated earlier, the Companies Act appears to cogently recognise the need for company directors to consider the needs of other stakeholders in their operations. For a corporation to achieve sustainable long-term success, it must recognise and safeguard the interests of all stakeholders impacted by its operations. Which stakeholders does Act 992 make mention of? Section 190(4) provides as follows:

(4) In considering whether a particular transaction or course of action is in the best interests of the company as a whole, a director may consider the interests of the employees, as well as the members, of the company, and, where appointed by, or as representative of, a special class of members, employees, or creditors may give special, but not exclusive, consideration to the interests of that class.

[91] ibid.

Consequently, a company's stakeholders extend beyond the local community to include shareholders, employees, and creditors—each playing a distinct role in the organization's success. Under the Act, companies must prioritise shareholders' interests as they provide capital and hold ownership rights. Similarly, employees' interests are vital because their labor and expertise enable directors to fulfill corporate objectives, while creditors must be considered due to their financial contributions through loans or credit.

Industry regulations and its regulators have also taken steps in sustainable business practices. The Minerals and Mining Act, 2006 (Act 703) and the Petroleum (Exploration and Production) Act, 2016 (Act 919). In addition to this, the Ghana Stock Exchange (GSE) requires listed companies to adhere to its Environmental, Social and Governance (ESG) Disclosures Guidance Manual, standardising sustainability reporting practices.[92] Also, the Bank of Ghana has implemented the Sustainable Banking Principles, equipping financial institutions with tools to identify and mitigate environmental and social risks.[93] Furthermore, the Bank of Ghana in May 2024, released its Climate-Related Financial Risk Directive for public consultation. The draft document, which invited stakeholder feedback prior to finalization, will become legally binding once enacted. The regulation will govern a wide range of financial entities including commercial banks, specialised deposit-taking institutions (SDIs), financial holding companies, mortgage providers, leasing

[92] Ghana Stock Exchange, *ESG Disclosures Guidance Manual* (Ghana Stock Exchange 2022) 15.
[93] Bank of Ghana, 'Sustainable Banking Principles and Sector Guidance Notes' (2019.) <Ghana-Sustainable-Banking-Principles-and-Guidelines-Book-1.pdf https://share.google/fmuHthhtVYaqCL1Ia> accessed 19 April 2024.

firms, and development finance institutions - collectively designated as 'Regulated Financial Institutions' (RFIs) under the proposed framework.

Complementing these efforts, the Securities and Exchange Commission (SEC) has introduced a regulatory framework for green bonds,[94] creating new avenues for sustainable investment while accelerating Ghana's transition toward ESG-aligned financial markets. The current Affirmative Action (Gender Equity) Act, 2024, has the objective to ensure the attainment of gender equity in the political, social, economic, educational and cultural spheres of the society.[95] The Act requires employers to take measures to ensure progressive gender equity of employees.[96]

Given these regulations, a company's directors are responsible for ensuring compliance. These rules and guidelines further demonstrate Ghana's resolve to ensure the protection of stakeholder rights.

Section 190(2) of Act 992 reflects a legislative leaning towards the stakeholder theory. By mandating directors to consider the long-term consequences of their decisions, the Act acknowledges that the company's survival and prosperity are inseparable from the wider social and ecological systems in which it operates. The express requirement to evaluate the impact of corporate operations on the community and the environment moves beyond the shareholder-primacy model, which traditionally emphasised short-term financial returns. Instead, directors are guided to adopt a broader perspective that integrates environmental stewardship,

[94] Securities Industry (Green Bond) Guidelines, 2024 (SEC/GUI/003/03/2024).
[95] Affirmative Action (Gender Equity) Act 2024 (Act 1121), s 1.
[96] ibid, s 21.

community welfare, and reputational integrity into corporate governance. This approach gives statutory force to the principle that companies derive legitimacy from their ability to balance profit-making with social responsibility, a central claim of stakeholder theory.

Section 190(4) further strengthens this stakeholder-oriented framework by explicitly permitting directors to consider the interests of employees, members, and creditors, in addition to shareholders. This provision underscores the reality that companies function within a network of interdependent relationships, where the contributions of employees, financiers, and other classes of stakeholders are essential to corporate success. While shareholders remain important, their interests no longer stand in isolation at the apex of corporate governance. Instead, Act 992 positions directors as fiduciaries of a broader constituency, responsible for harmonising competing claims in pursuit of the company's long-term viability. This statutory shift operationalises stakeholder theory by embedding plural accountability into the decision-making duties of directors, thereby promoting inclusive, ethical, and sustainable business practices in Ghana.

5. Conclusion

This paper asked whether the Companies Act, 2019 (Act 992) has altered Ghanaian company law so as to impose on directors, legal duties to manage company affairs in ways that are ethical and sustainable. Using a doctrinal, stakeholder-framed

analysis, the study finds that Act 992 materially reorients directors' duties toward stakeholder-sensitive, sustainability-aware decision-making.

Statutorily, Act 992 marks a notable departure from the earlier regime under the repealed Act 179. Whereas Act 179 contained the general common law requirement of acting in the company's "best interests", the provision failed to require directors to consider the impact of the company's operations on the environment or the community at large. Act 992, notably section 190(2) and section 190(4), requires directors to have regard to the likely long-term consequences of decisions, the impact of company operations on the community and the environment, and the desirability of maintaining a reputation for high standards of business conduct. Section 190(4) further permits directors to consider employees, creditors and other classes of stakeholders alongside members. Read together, these provisions operationalise the stakeholder theory in Ghanaian corporate law by embedding plural accountability and environmental and community considerations into the statutory fiduciary framework.

Second, the statutory shift is reinforced by the regulatory ecosystem surveyed in the paper, including sectoral environmental clearance requirements under the Petroleum and Minerals Acts, the Ghana Stock Exchange's ESG guidance, the Bank of Ghana's Sustainable Banking Principles and its draft climate directive, the Securities and Exchange Commission's green-bond guidelines, and recent affirmative-action regulation. These instruments convert the Act's normative commitments into concrete compliance expectations, signalling that directors'

sustainability obligations will be tested and enforced in multiple fora beyond private litigation.

Finally, although Act 992 answers the research question affirmatively, the paper identifies implementation gaps that temper the statutory promise: judicial interpretation of section 190 will be determinative; regulators must provide sector-specific guidance; and companies need internal governance reforms (director training, ESG committees, stakeholder engagement and reliable reporting) to operationalise the new duties. Accordingly, the paper recommends clearer regulatory guidance, mandatory disclosure standards, capacity building for directors, and stronger regulatory enforcement as complementary measures to secure the Act's objectives.

In sum, Act 992 has redefined directors' duties in Ghana by legislatively incorporating stakeholder and sustainability considerations. The statute provides a necessary legal foundation for ethical and sustainable corporate conduct. To achieve its intended benefit, the law, regulation and corporate governance practice must converge to produce measurable social and environmental outcomes.

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