A CASE FOR ADR

1. Drawbacks of Litigation
   a. It's characterised by interminable delays
      - **Adu v Kyeremeh** took 26 years to complete.
      - **Abba v Mframe** took 12 years to conclude.
   b. It's adversarial in nature, highly aggressive and confrontational. Winner takes all; thus disputants see themselves as adversaries or enemies who must be destroyed at all cost.
   c. Courtroom language can be mystifying.
   d. Court hearings are usually public with no privacy, making some people withhold information.
   e. Judges apply strict rules of evidence which are inflexible. Judges thus do not consider material details such as emotional matters.
   f. Overburdening of the courts makes justice inaccessible to a sizeable number of people.
   g. High cost of litigation limits access.

2. ADR refers to a variety of techniques for resolving disputes without resort to litigation in courts.

3. Advantages of ADR
   a. Privacy
   b. Parties are induced to voluntarily comply with their own agreements.
   c. Healthier method of dispute resolution where relationships are usually preserved.
   d. Helps to decongest the courts, enabling the justice system to be more efficient.
   e. Cuts down the cost of litigation, making justice accessible to a greater number of people.
   f. Enables emotional needs to be expressed.
   g. It empowers the individual due to party autonomy iro many of the processes.
   h. Lawyers have happier clients.
   i. Professional satisfaction to lawyers who want a broader set of problem solving skills.

4. Disadvantages
   a. Not all cases are suitable for ADR e.g. constitutional issues and criminal cases.
   b. Settlements are in personam thus where a matter is iro a novel case which requires the setting of precedent, only the courts can be resorted to.
   c. There might be some time wasting.
   d. The financial savings might not be much as neutral third parties used have to be paid by parties.

COURT – CONNECTED ADR

It's guided by the principle that, since the sole objective of a litigant is to use the services of the justice delivery system to solve his/her problem, if it's possible for the court to help the disputing parties resolve their differences by other equally desirable means without trial, whilst assuring process integrity, the court should make it possible for them to do so. The judiciary thus reduces trial case load and concentrates on matters that are too difficult to resolve by other means.

a. Legal basis
   - **S. 72, Act 459** – *any court with civil jurisdiction and its officers shall promote reconciliation, encourage and facilitate the settlement of disputes in an amicable manner between and among persons over whom the court has jurisdiction.*
   - **S. 73, Act 459** – *any court with criminal jurisdiction may promote reconciliation, encourage and facilitate a settlement in an amicable manner of any offence not amounting to a felony and not aggravated in degree, on payment of compensation or on other terms approved by the court before which the case is tried, and may, during the pendency of the settlement, stay proceedings for a reasonable time and in the event of a settlement being effected, shall dismiss the case and discharge the accused person.*

   - Commercial court rules – parties are compelled to submit to an initial ADR process before trial via the mandatory pre-trial settlement conference. Where settlement is reached at the pre-trial conference, the terms of the settlement shall be entered as a judgment of the court. Failure to settle will lead to re-assignment of the case to another judge who would then conduct a full trial.

b. Advantages
   - Helps to decongest the courts, enabling judges to have more time to handle cases.
   - Provides a healthier method for dispute resolution. Preservation of relationships.
   - Empowers the individual to take an active role in the dispute resolution process.
   - Induces parties to voluntarily comply with agreements.

c. Disadvantages
   - No right of appeal.
   - Absence of procedural protections for parties.
   - Consensual nature of the process means both parties can walk away at any time.
   - A strong and powerful opponent can bully the other into a result which may not necessarily be fair or just.
   - Absence of opportunity to measure the objectiveness of the process.

EFFECT OF AWARD IN ADR PROCEEDINGS

- Arbitration award is final and binding as between the parties and any person claiming through them [but a party has a right to set an award aside under *s. 58*] – **s. 52**.
- An arbitral award may, by leave of the court, be enforced in the same manner as a judgment of the court – **s. 57**.
- Award may be challenged by application to the HC on stated grounds in s. 58 i.e. disability/incapacity of a party to the award; applicable law to arbitration invalid; applicant not given notice of appointment of arbitrator; award is ultra vires the arbitration agreement; procedural defects; and arbitrator failed to disclose an interest in the subject matter.
- Foreign award enforceable in Ghana – **s. 59**.
- Settlement agreement in mediation is only binding when the parties agree to it and sign same – **s. 81(3)**.
- Where parties agree that mediation settlement agreement is binding, it has the same effect as an arbitral award – **s. 82**.
- An award in a customary arbitration is binding between the parties and persons claiming through and under them – **s. 109**.
- An aggrieved person may apply to DC, CC or HC to set aside customary award on grounds of breach of rules of natural justice, miscarriage of justice, or it's in contradiction with customs of area – **s. 112**.

NEGOTIATION

- It is back and forth discussion to try and reach an agreement by influencing somebody or something with the primary aim of having an interest satisfied. IOW, exercise to influence somebody/something.
- The parties to the dispute by themselves, without the intervention of a 3rd party, attempt to reach a mutually acceptable agreement.
- Goal of negotiation is to meet interests or needs in a collaborative, peaceful manner.

Theories of Negotiation

- Soft negotiation/bargaining
  - Avoids personal conflict
  - Makes concessions easily
  - More interested in preserving the relationship
  - Good for dealing with an egotistical person
  - Won't work with aggressive opponents
  - Negotiator gives up more than he should.
- Hard negotiation/bargaining
  - It's a contest of wills with the side that takes the more extreme position and holds out longer winning.
  - Seeks to achieve goals through power, pressure, fear, intimidation
  - Usually destroys relationships
  - Takes advantage of indolence of others
- Reciprocal bargaining/tit for tat
  - Cautious, adopts a wait and see attitude.
  - Requires other party to make a first move.
  - Rewards a positive or negative move equally.
  - Gives a sense of predictability, makes parties responsible for their own behaviour
  - Control may be relinquished if other side makes first move; costs can be high for waiting; no control in some cases.
- Positional bargaining
  - Asserts claim or right to object of contention.
  - It relies on positions which often mask the (hidden) interests.
  - The more one party gets, the less the other gets.
  - Can produce unwise agreement, endanger relationship, least successful.
- Integrative bargaining
  - Seeks effective consensual approaches.
  - Aimed at increasing joint gains for all parties.
  - Assumes that if disputants look at their conflict as an opportunity to learn more about each other, might create better solutions.
- Principled negotiation
  - Designed by Fisher and Ury; based on interests and needs.
  - Designed to produce wise agreement in an efficient and naturally amicable manner.
  - Both shield and sword – allows fair negotiation while protecting against those who want to take advantage of you.
  - Preserves the relationship; creates more open discussion; promotes creative solutions; builds and promotes trust.
  - Elements
    - Separate the people from the problem
    - Focus on interests not positions
    - Generate options
    - Use an objective criteria for process or result

Separate People from the problems

Negotiators are humans from different backgrounds, who see the world from their own unique perspective. To deal with others sensitively, attention has to be paid to the people problems. We tend to treat the people and the problem as one e.g. 'that's their character'. People problems fall in 3 categories:

- Perception: people react to situations differently. Put yourself in their shoes – empathically understand their viewpoint in order to influence them. Discuss perceptions explicitly and honestly. Look for opportunities to act inconsistently with the perception.
- Emotion: don't react to emotional outbursts. Agreed only one person gets angry at a time. Use symbolic gestures i.e. acts that will produce a constructive emotional impact on one side at no cost to the other side such as apology, handshake, or hug.
- Communication: decision has to be reached jointly since it's a back and forth discussion. Discuss! Give parties a stake in the outcome by making them participate in the process.
- Problems
  - Lack of or inadequate communication
  - Misunderstanding
  - Compromise [may be viewed negatively by parties]

Interests not positions

- Interests are the basic things that people need to protect or upon which they need to obtain a gain. They are the basic motivators of parties and can't be negotiated away but priority of interests can change.
- It's the 'why' people do things. It can't be quantified or measured.
- Helpful to develop an agenda setting out the substantive issues.
- Basic needs include the following
  - Basic survival – psychological needs i.e. food, clothing, shelter.
  - Safety and security needs i.e. economic stability, protection, structure, order, law, and freedom from fear.
  - Love and belonging i.e. family, partner, neighbours, country.
  - Self-esteem i.e. feel good about self, self-respect, mastery, recognition, fame, dignity, dominance, etc.
  - Self-actualisation i.e. utilising talents and ability.
  - Need to know and understand i.e. gain knowledge, research.
  - Aesthetic needs i.e. seeking and appreciating beauty.

Developing options

- Alternatives are different courses of action people can undertake if they do not reach an agreement with the other disputants.
- Options are the agreements that the disputants can reach on consent with each other's cooperation.
- Options are the possible ways that interests can be met; proposals.
- Disputants participate in a brainstorming exercise to come up with as many ideas as possible that may satisfy their interest. If they are free to brainstorm without fear that they will bind themselves to something they later regret, they are more likely to come up with creative options. Options should not be criticised while they are being generated.
- Discussions about seemingly unworkable options may lead to fruitful discussions about viable ones.

Developing objective criteria

- Use a fair standard e.g. market value, moral standard, scientific judgment, professional standards, equal treatment, etc.
- Easier to convince an opponent that a given result is fair than to convince by stubbornness.
- Helps negotiator to choose among the generated options and measure the fairness of the proposed outcome.
- Develop your BATNA – Best Alternative To Negotiated Agreement.

IS NEGOTIATION INCLUDED IN ACT 798?

Arguments against existence of negotiation in the Act

a. The long title of the Act does not include negotiation. It only provides for settlement of disputes by arbitration, mediation and customary arbitration. By virtue of the expressio unius est exclusio alterius canon of interpretation, the specific mention of a word or phrase means the exclusion of those not mentioned.
b. Conciliation, which is not included in the long title is defined but negotiation is not.
c. All ADR mechanisms mentioned in the Act involve a neutral 3rd party but negotiation does not.
d. Act provides for negotiated settlements [under customary arbitration] but not negotiation simpliciter – **s. 113**.
e. It's unclear how a settlement resulting from a negotiation will be enforced unlike for arbitral awards and mediation settlements which, with leave of the court, can be enforced as judgments of the court. Do parties have to initiate fresh action in the court to enforce?

Arguments for existence of negotiation in the Act

a. There are provisions which imply that the Act recognises negotiation even if it doesn't mention it expressly.
b. The long title adds that the Act covers 'other related matters'. Using the ejusdem generis canon of interpretation, where general words following an enumeration of words of the same class or genus, the general words will be deemed to cover other similar words of the same genus.
c. Short title is ADR and negotiation is a mechanism of ADR.
d. Definition of ADR in the interpretation section – **s. 135** – *the collective description of methods of resolving disputes otherwise than through the normal trial process*. This captures negotiation.
e. Tribunal encouraged to use mediation and 'other procedures' to encourage settlement – **s. 47**. This may include negotiation since it's an ADR mechanism.
f. Negotiation for a settlement - **s. 113**.
g. Regulations to be made by the Minister pursuant to s. 134 may cover negotiation even if the Act itself doesn't because the Act provides that the L.I. may cover "*other voluntary dispute resolution procedures*".
h. Inference from all the provisions on party autonomy deal with negotiation because in order for the parties to agree, there must be negotiation.

CAUCUSING: Multi-Party Negotiations

- It's retreatment into a private meeting to discuss unexpected objections or proposals that come up during multi-party negotiations.
- Allows team to discuss new matters raised in the negotiation.
- Allows team to monitor its own behaviour at the negotiation table.
- Ascertains whether team is maintaining consensus
- Allows team to affirm that it's taking the right track
- Allows team to take a short break and refresh themselves

DO NOT NEGOTIATE AWAY RIGHT TO HAVE SEPARATE, PRIVATE MEETINGS!

JUDICIAL CASE MANAGEMENT

- It involves the court taking ultimate responsibility for progressing litigation along a particular track for a predetermined period, during which it is subjected to select procedures which culminate in an appropriate form of resolution before a suitable experienced judge.
- Case management covers such matters as identifying the issues in a case, summarily disposing some issues, deciding in which order other issues are to be resolved, fixing timetables for parties to take particular steps.
- Traditionally the role of the judge has been viewed primarily as presiding over trials, hearing and evaluating evidence, finding facts, applying appropriate legal standards, making judgments, and dispensing justice. The judge assumes a passive role allowing the lawyers and their clients to control the progress and pace of litigation.
- Why case management?
    - Civil cases are now more complex and protracted with multiple parties.
    - Explosive growth in civil litigation due to population growth.
    - Enactment of new laws creating new rights and remedies.
    - Expansion of commerce and business opportunities.
    - Greater reliance on the courts to find solutions to variety of societal problems.
    - Existing rules of court were flouted on a vast scale; orders for costs proved to be ineffective deterrent for litigants and counsel.
- Elements of Judicial Case Management
    - Early judicial involvement in identifying the principal factual and legal issues in dispute between the parties.
    - Working with counsel and parties to plan for and manage the conduct of future proceedings to achieve the earliest and most cost effective resolution of the dispute.
    - Structure pre-trial proceedings to promote early exchange of information on key issues
- Case management conference
    - Called and administered by the court to plan the future conduct of the dispute.
    - Lawyers are required to meet, before the CMC, to discuss the nature and basis of their claims and defences and the prospects for a prompt settlement or resolution of the case
        - Exchange specified information relevant to the claims
        - Develop a discovery plan
        - Discuss dates for all future proceedings including trial.
    - After the meeting of counsel, they are required to file a case management report.
    - At the CMC the trial judge imposes deadlines that limit the time in which parties can amend pleadings, provide disclosures, complete discovery, file pre-trial motions, etc.
    - At the hearing, court can stay the proceedings so parties can try to settle the case by ADR.
    - Court considers the standard disclosure of documents

OVERVIEW OF THE ADR ACT, 2010 (ACT 798)

- Purpose of the Act per the memorandum
  - Bring the law governing arbitration into harmony with international conventions, rules and practices.
  - Provide legal and institutional framework to facilitate and encourage the settlement of disputes through ADR procedures.
  - Provide, by legislation, for the subject of customary arbitration.

- Objects of the Act [*in addition to what's provided in the Memorandum*]
  - Help ease congestion in the court by reducing the number of litigation cases.
  - Create a congenial environment for investors, who usually prefer arbitration.
  - Grant parties autonomy over the process
  - Grant authority to the arbitral tribunal with minimal intervention from the courts.

- Structure of the Act
  - 5 parts
    - Part 1: Arbitration – s. 1 to s. 62
    - Part 2: Mediation – s. 63 to s. 88
    - Part 3: Customary arbitration – s. 89 to s. 113
    - Part 4: Establishment of ADR Centre – s. 114 – s. 124
    - Part 5: Financial, admin and miscellaneous provisions – s. 125 to s. 137
  - 5 Schedules
    - Schedule 1: Reproduction of the "*Convention on the Recognition & Enforcement of Foreign Arbitral Awards 1958 (New York Convention)"*
    - Schedule 2: ADR Centre rules pursuant to s. 5(3) and s. 8(2).
    - Schedule 3: Expedited Arbitration Proceedings Rules of the ADR Centre
    - Schedule 4: Mediation rules for the ADR Centre
    - Schedule 5: Sample arbitration agreements and clauses.

- Unique features of the Act
  - Combines arbitration, customary arbitration and mediation in a single statute.
  - Puts to rest the dispute whether arbitration is an ADR process.
  - Merges domestic and international arbitration in one statute.
  - Schedule 5 provides ready guidelines for practitioners.

- Part 1 – Arbitration
  - Expansive definition of what constitutes a written arbitration agreement – s. 2.
  - Separability of arbitration agreements/clauses – s. 3.
    - Buckeye Check Cashing v Cardegna – US reaffirmed principle of separability.
  - Reference to arbitration where a court action has been instituted
    - On application by a party – s. 5
    - Court reference – s. 6
    - Serves as a stay of proceedings.
  - Power of arbitral tribunal to rule on its own jurisdiction i.e. existence, scope and validity of the arbitration agreement or the document to which it relates – s. 24.
    - **Christopher Brown case** – explanation of Kompetenz-Kompetenz principle.
    - **Rent-a-Center v Jackson** – *company sued for race discrimination and retaliation. The enforceability of the Mutual Agreement was challenged on grounds of unconscionability. Company applied to have the case dismissed and arbitration compelled and this was granted. On appeal, by a 5-4 majority, the US SC held that if after parties agree to arbitrate a dispute rather than take it to court, one side challenges the arbitration provision itself, then a court must decide the challenge. However, if the enforceability of the agreement as a whole is challenged, the challenge must be decided by an arbitrator.*
  - Party autonomy
    - Application to court for reference to arbitration – **s. 5**.
    - Agreement on place of arbitration – **s. 11**
    - Agreement on procedure to appoint arbitral tribunal – **s. 14**.
    - Agreement on procedure to challenge appointment of arbitrator – **s. 16**.
    - Procedure for revocation of arbitrator's authority – **s. 17**.
    - Agreement on matters of procedure – **s. 31**.
    - Agreement on language to be used in the proceedings – **s. 31**.
    - Agreement on the form of the award – **s. 49**.
    - Power to set aside the award on the prescribed grounds – **s. 58**.
    - Agreement to use expedited arbitration proceedings – s. 60.
    - Safeguards to ensure party autonomy not abused
      - Arbitrator determines the time for compliance with a direction – **s. 31(5)**.
      - Where parties fail to act, power is given to the tribunal or court to set in.
  - Arbitral Process
    - Arbitration management conference within 14 days of constitution of tribunal and within 7 day's written notice to parties – **s. 29**.
    - Expedited arbitration – **Schedule 3**.
  - Arbitrator as amiable compositeur
    - Acceptance by parties that disputes are not to be exclusively resolved by applicable rules of substantive law but also equity, and what the arbitrator believes to be fair and just – **s. 50** *arbitrator may within the scope of the arbitration agreement grant ANY RELIEF that the arbitrator considers just and equitable including specific performance.*
  - An arbitration award is final and binding as between the parties and their assigns – **s. 52**.
  - Arbitral award may, with leave of HC, be enforced as a judgment of the court – **s. 57**.
  - Enforcement of foreign awards – **s. 59**
    - Made by competent authority under the laws of the country where it was made
    - A reciprocal arrangement exists between Ghana and that country
    - Award was made under the NY Convention or any other ratified by Parliament
    - Production of original award + authenticated copy and the main agreement
    - No appeal pending against the award in any court.

- Part 2 – Mediation
  - Party autonomy
    - Agreement to submit dispute to mediation – **s. 63**.
    - Agreement on number of mediators – **s. 65**.
    - Appointment of mediator – **s. 66**.
    - Terminate appointment of mediator – **s. 69**.
    - Filling vacancy in mediation – **s. 70**.
    - Determine place for mediation – **s. 72**.
    - Determination of who attends the sessions – **s. 77**.
    - Joint declaration to terminate the mediation – **s. 80**.
    - Determination whether settlement is binding – **s. 82**.

        - Agree whether mediator shall act as arbitrator of same dispute – **s. 84**.
        - Agreement on how mediator is to be paid.
    - Submission to mediation may be written or oral. Where it's oral, it must be confirmed in writing unless the parties agree otherwise – **s. 63(2) & (3)**.
    - A party may, with agreement of the other party, apply to court to refer the matter to mediation, or the court may refer a dispute before it to mediation. When this is done, it serves as a stay of proceedings. Where reference leads to settlement, it shall be drawn up and filed in court. And shall be recorded as a judgment of the court and enforced as such – **s. 64**.
    - Mediator has power to conduct caucusing (i.e. separate or joint meetings with the parties); request the services of an expert – **s. 74**.
    - Settlement has the same effect as an arbitral award – **s. 82**.

- Part 3 – Customary Arbitration
    - Codification of Ollennu's principles in **Budu v Caesar**.
        - *Voluntary submission for settlement informally but on merit.*
        - *Prior agreement by both parties to accept the award*
        - *Award must not be arbitrary but must be arrived at after hearing both sides in a judicial manner.*
        - *Practice and procedure followed in the local court/tribunal of the area to be followed.*
        - *Publication of the award.*
    - Party autonomy
        - A party shall not be coerced by a person to submit to customary arbitration – **s. 90(6)**.
        - Court may, with consent of the parties, refer matter to customary arbitration – **s. 91**.
        - Parties decide number of customary arbitrators – **s. 95**.
        - Agreement on revocation of appointment of arbitrator – **s. 100**.
        - Appointment of another person to replace arbitrator – **s. 103**.
        - Agree time for making the award – **s. 107**
    - A party shall not withdraw from customary arbitration – **s. 105**
    - Customary award need not be in writing – **s. 108**.
    - Customary award need not be registered in order for it to be binding – **s. 109**.
    - Award may be registered at the DC, CC or HC and same shall be in writing – **s. 110**.
    - Customary award may be enforced in the same way as a judgment of the court – **s. 111**.
    - Power to set aside award within 3 months of publication on notice to other party – **s. 112**.

- Part 4: ADR Centre
    - Establishment of the ADR Centre

- Part 5: Finance, Admin, Misc
    - Establishment of ADR Fund for education of the public on ADR, research iro the Centre, HR development of ADR and any other purpose determined by the BOD in consultation with the Minister of Justice.

- Incorporation of ethical provisions
    - Provisions dealing with fairness & impartiality [***s. 31(1)***], confidentiality [***s. 34(5)***], conflict of interest [***s. 15***], financial arrangements are provided for.
    - ADR Centre is to provide guidelines on fees.

- Weaknesses
    - Arbitrability
        - Apart from constitutional interpretation, the other provisions in **s.1** are ambiguous and undefined.
        - Difficulties in enforcement of foreign arbitral awards relating to environment, national interest, etc.
        - Conflict with Act 459 which provides for mediation in criminal cases under victim offender mediation.
    - Exclusion of negotiation
    - Court intrusion
        - No provision to limit the interference of courts in the arbitral process.
        - Court can refer action pending before it to arbitration even in the absence of arbitration agreement – **s. 7**.
        - Power of judicial review of HC to determine arbitrator's jurisdiction – **s. 26** [*doesn't serve as stay unless agreed*]
        - Determination of preliminary points of law – **s. 40** [*not necessary if arbitrator has legal education; provision will become redundant soon*].
        - Court may set aside arbitral award on application by party – **s. 58**.
    - Stress on position of parties in mediation sessions instead of on interests.
    - Establishment of ADR Centre
        - Being a state institution, it will not give comfort to investors who have disputes with the state to submit their dispute to a centre whose chair and some board members are appointed by the President.
        - Lack of funds from the consolidated fund to support the Centre

ARBITRABILITY

- Arbitration is the voluntary submission of a dispute to one or more impartial persons for a final and binding determination – ***s. 135, Act 798***.

- Traditionally, arbitrability refers to the type of disputes which can or cannot be resolved by arbitration. it raises questions such as
  - Validity of the arbitration agreement.
  - Scope of the arbitration agreement.
  - Whether the matter is a subject to an arbitration agreement [existence].
  - Capacity/jurisdiction of arbitrator(s) to hear the matter.
- Typically, whether a matter is arbitrable or not is a question of law. Countries decide what matters they wish to exclude from arbitration.

- Generally, the following matters are not arbitrable
  - Criminal matters
  - Status of an individual or corporate entity

- Some states make matters involving the state and its agencies arbitrable – Malaysia, Algeria, Zambia, Kenya – others don't.

- In Ghana, ***s. 1, Act 798*** sets out the matters which are not arbitrable
  - National or public interest
  - The environment
  - Constitutional interpretation and enforcement
  - Any other matter which by law cannot be submitted to arbitration.

- National or public interest
  - Not defined in Act 798
  - Public interest is defined in ***Art. 295(1) of 1992 Constitution*** to "*include any right or advantage which enure to the benefit generally of the whole of the people of Ghana*"
  - National interest is defined in ***s. 98 of the Public Procurement Act, 2003 (Act 663)*** as "*a condition where the nation attaches high value, returns, benefit and consideration to the matter in question*"
  - The definitions are so broad that most transactions entered into by or on behalf of the government will be caught by it.
  - However, most government bilateral investment treaties and agreements with foreign investors contain clauses on international arbitration and same is captured in the GIPC Act [***s. 33, Act 865*** – *gov't v investor; aggrieved party may submit to arbitration if matter not settled after 6 months under UNCITRAL rules, or as agreed*] and the FZ Act [s. 32, Act 504 – licensee v gov't; .
  - The language of Act 798 however doesn't reflect the position in the GIPC Act and the FZA.

- Environment
  - Not defined
  - The scope of and rationale for the exemption is not given.
  - During the parliamentary debate, an MP stated that there had been an assurance that it would be explained in the interpretation section hence it was not dropped but although it was kept in the Act, no interpretation was provided

- Constitutional interpretation and enforcement
  - Under the Constitution, the SC has exclusive jurisdiction in all matters relating to the enforcement and interpretation of the constitution.
  - This power is only subject to powers granted to the HC under Art. 33 to enforce human rights provisions under the constitution
  - This provision generated the first controversy under the Act in the **Balkan Energy** case on whether or not a transaction to which government was a party constituted an IBT under Art. 181(5). Such a question cannot be submitted to an arbitral tribunal for an award.

- Any other matter
  - Where statute spells out clearly how a matter should be dealt with or settled, the provisions of Act 798 cannot supersede it.
  - Consequently serious criminal offences such as murder and robbery, first degree offences, cannot be settled by Act 798.
  - ***S. 73 of Act 30*** however provides that misdemeanours, offences which are not felonies and those not aggravated in degree are capable of amicable settlement by negotiation.
  - There is also no universal agreement on which resolution methods are to be classified as ADR. In the UK for instance, arbitration is not considered an ADR technique

Arguments supporting s. 1

a. Protects developing countries who enter into agreements with multinational companies who typically control most of the contracts.
b. Constitutional matters must definitely be left to the SC
c. Criminal matters cannot be arbitrators because they are offences against the state.

Comments

- There is no territorial limitation to the matters excluded under s. 1. Thus where Ghana is only the lex fori or lex loci arbitri, s. 1 may be triggered to exclude the disputed matter from arbitration, leading to jurisdictional battles before local and international courts.

- The issue of arbitrability may be raised at 3 different stages
  - Part of objection to the jurisdiction of the tribunal and prior to the first step towards a contest on the merits
  - At any time during the subsequent arbitration proceedings
  - After delivery of an arbitration award as a challenge to its enforcement or recognition

- The arbitral tribunal and the court often have consecutive sequential and concurrent jurisdiction
  - By ***s. 24 of Act 798***, parties are at liberty to decide, by agreement, who determines the question of arbitrability [default is competence-competence doctrine]
  - The power of the tribunal is to RULE on the matter of jurisdiction; it doesn't make a final decision on the matter. Thus a dissatisfied party can repeat the application before the appointing authority or the HC.
  - Act 798 doesn't expressly provide for a situation where one party applies to the appointing authority and the other responds by making the same application to the HC. The former is however subject to judicial review hence HC may win. Party agreement to bypass the tribunal and appointing authority to the HC directly may be most cost effective and speedier option.
  - If the tribunal decides that an issue of constitutional interpretation or enforcement is at stake, a further application must be brought before the HC for the issue to be referred to the SC.
  - Although jurisdictional challenges to the court is not unique, the risk of satellite litigation on jurisdictional issues would be on a much larger scale.

- The shortcomings of the local courts which the Act sought to remedy would be accentuated i.e. delays, lack of familiarity of foreign parties to local procedures, lack of confidentiality, lack of trust in the national judicial system and lengthy appeal periods.
- NB: jurisdictional challenges will not act as a stay of any arbitral proceeding unless the parties agree otherwise – s. 26(4).

- Because the provisions are ambiguous, national courts are likely to subjectively construe s. 1 to the detriment of parties who enter into agreements with GoG.

- Enforcement/recognition of awards
  - An award can be set aside because the subject-matter is not capable of settlement by arbitration under Ghana law.
  - Lack of clarity on the confines of the excluded categories may provide an opportunity to desperate parties looking for some ground to challenge, set aside or prevent the enforcement of an award.
  - The exemptions under Act 798 are so broad as to defeat the essence of incorporating the Model Law provisions into it. Adopting the Model Law must result in the alignment of domestic law with internationally acceptable principles in arbitration.

- Conclusion – options for dealing with challenges posed by s.1
  - Terms such as 'public interest', 'environment' and 'national interest' need to be expressly defined restrictively to exclude international commercial transactions involving the state and state entities and to bring the provisions of Act 798 in line with those of Act 478 and Act 504
  - Alternatively, with the exception of s. 1(d), the excluded matters could be dropped from the legislation; only SC has jurisdiction to interpret Constitution; national or public interest analogous to constitutional matters, criminal matters, etc.
  - Provide for commercial arbitration in a separate piece of legislation with specific arbitrability criteria.
  - Modern trends on arbitrability are moving towards the widening of the scope of matters that can be arbitrated.
  - Ghana's parliament focused almost exclusively on the application of the law on domestic disputes, thus insufficient attention was paid to the impact of the exclusions on the perceptions of the international business community as to the extent to which Act 798 is supportive of commercial international arbitration.

A-G v Balkan Energy & Ors.

- ❖ GoG entered into a power purchase agreement with BE to rehabilitate a barge within a period of 90 days. BE alleged that GoG breached the PPA and GoG also claimed that BE had not complied with delivering the barge within the 90 day period agreed, and so had breached that agreement.
- ❖ BE submitted the dispute to arbitration in the Netherlands. While arbitration was pending, GoG issued a writ for an injunction to restrain the tribunal from hearing the matter on the ground that it was an IBT per Art. 181(5).
- ❖ BE entered conditional appearance and asked for a stay of proceedings in order to refer the matter to arbitration. A-G claimed it was a constitutional matter hence it should be sent to the SC.
- ❖ 2 issues before SC: (a) Whether PPA is an IBT and if so, should have been submitted to parliament for approval. (b) Whether the arbitration clause had was valid.
- ❖ On first issue, held: it's an IBT, should have been submitted to parliament for approval so constitutional matter hence no arbitration.
- ❖ As regards whether the arbitration agreement is an IBT, the SS determined that the arbitration agreement was not an IBT, stating that "*An international commercial arbitration is not by itself an autonomous transaction commercial in nature which pertains to or impacts on the wealth and resources of the country. An international commercial arbitration draws its life from the transaction whose dispute-resolution it deals with. We therefore have difficulty in conceiving of it as a transaction separate and independent from the transaction that has generated the dispute it is required to resolve.* IOW, the arbitration clause is not an IBT but since it derives its validity from the PPA, it's also null.

Criticism of judgment in Balkan Energy

a. Since the court agreed that the arbitration agreement was not an IBT, on the principle of Kompetence-Kompetence in s. 24, the arbitral tribunal should have determined the validity of the PPA and not the court.
b. The SC did not take cognizance of s. 3 which provides for separability when it held that the arbitration clause was invalid because of the invalidity of PPA. Hence to that extent, the decision was per incuriam.
c. Lack of distinction between what constitutes a major and minor IBT.

ARBITRATION AGREEMENT

- Arbitration agreement is an agreement to submit present or future disputes to arbitration – **s. 135**.
- Where the parties decide to submit a dispute to arbitration after the occurrence of the dispute and proceed to draw up the arbitration agreement, that agreement is also called a submission agreement.
- Scope of arbitration agreement
  - Confer a mandate on arbitral tribunal to settle all disputes
  - Contain words which convey the intention of the parties
  - Contain mandatory words
  - Avoid ambiguous and equivocal expressions
- Elements
  - Valid and devoid of all vitiating factors
  - Number of arbitrators [uneven], and mode of appointment
  - Ad hoc rules e.g. UNCITRAL, or institutional rules e.g. ICC
  - If ad hoc, how vacancies should be filled, how to proceed if a party isn't cooperating, circumstances under which party may apply to court, etc.
  - Place or seat of arbitration i.e. lex arbitrii
  - Governing law to arbitration agreement
  - Language for arbitration
  - If arbitration preceded by negotiation, period of negotiation should be specified.

The UNCITRAL Model Laws are a guide for drafting arbitration laws and are not rules capable of bindng the parties. Thus they should not be used in the arbitration clause. They must thus adopt ad hoc rules if any.

MEDIATION

- It's a non-binding process in which the parties discuss their dispute with an impartial person who assists them to reach a resolution – **s. 135**.
- Primary aim is to heal (Latin root: "mediare"). Mediator neither makes decisions for the parties nor judge guilt or innocence, right or wrong.
- A party to an agreement may, with the consent of the other party, submit a dispute arising out of the agreement to mediation by an institution or person agreed on by the parties. Submission may be by writing, or other form of verbal communication or any electronic mode of communication and shall state the nature of the dispute. – **s. 63**.
- Mediation commences when the other party accepts the invitation for mediation. Acceptance may be verbal, written or via electronic mode of communication. Verbal acceptance shall be confirmed in writing but non-compliance shall not invalidate proceedings. Failure to accept within 14 days after receipt of invitation = rejection of invitation. – **s. 63(4- 7)**.
- A court before which an action is pending may at any stage of the proceedings, if it's of the view that mediation will facilitate the resolution of the matter, refer it or part of it to mediation – **s. 64(1)**.
- A party to an action may, with the agreement of the other party, at any time before final judgment, apply to court on notice to have the whole action or part thereof referred to mediation – **s. 64(2)**.
- Purpose
  - Vent and diffuse feelings.
  - Clear up misunderstanding
  - Determine underlying interests or concerns
  - Find areas of agreement and incorporate them into solutions devised by the parties themselves.
- Authority of mediator
  - No legal power to render judgment or award.
  - Power limited to what's given by the parties expressly or impliedly
  - Effectiveness depends on parties' trust.
- Benefits of mediation
  - Economical decisions
  - Rapid settlement
  - Mutually satisfactory outcomes
  - High rate of compliance
  - Comprehensive, customised agreements
  - Greater control and predictability of outcome
  - Personal empowerment
  - Preservation of ongoing relationships.
- Qualities of mediator
  - Understanding
  - Judgment
  - Intuition
  - Creativity
  - Trustworthiness
  - Authority
  - Empathy
  - Constructiveness
  - Flexibility
  - Independence
- Role of mediator
  - Facilitator
  - Opener of communication channels
  - Translator and transmitter of information
  - Separates interests from positions
  - Developing options
  - Agent of reality
  - Building trust and understanding
  - Using communication and other skills.
  - Allows parties to vent
  - Role reversal
  - Evaluation
  - Establishing a positive emotional climate

VICTIM-OFFENDER MEDIATION

- It's a process aimed at restoring damaged or broken relationships by providing an opportunity for the victim and the offender to meet face-to-face for the purpose of making things as right as possible and for them to decide how they will treat each other in the future.

- Each party will have a chance to narrate his/her side of the story, discussing in detail the causes and effect of the offence and, together, both the complainant and the accused will determine how to relate to each other in the future.

- Legal basis
  - S. 73, Act 459 – *promotion of reconciliation and facilitation of settlement iro offences not amounting to felonies and not aggravated in degree…*
  - S. 64(1), Act 798 – *a court before which an action is pending may at any stage in the proceedings, it if is of the view that mediation will facilitate a settlement or part of the matter in dispute, refer the matter or that part of the matter to mediation.*

- Philosophical underpinning
  - That crime is foremost a violation of individual's right; next as an infraction of social relationship and social values, before lastly, becoming an offence against the state.
  - The hurt to the complainant should be recognised.
  - The harm to the offender should be recognised.
  - Both the accused and complainant, as stakeholders, should have equal access to and participation in the system for solving their problems including selection of their 'judges'.
  - Sanction for offences should be compensatory and intended not only to restore the victim to his previous position, but goes beyond restitution and embodies an apology and atonement by the offender.
  - Punishment should seek to change forms of behaviour that society cannot accept because morality is a corporate affair that affects the whole community.

- Advantages
  - Saves parties pursuing 'trivial matters' in court; saves court time from pursuing same.
  - Secures privacy
  - Attends fully to victim [and close relations'] needs i.e. material, financial, emotional, social.
  - Helps to decongest the prisons.
  - Prevents retaliation by reintegrating offenders into the community.
  - Enables offenders to assume active responsibility for their actions
  - Creates a working community that supports rehabilitation of offenders and victims thus preventing future crimes.

HYBRID PROCESSES

- Primary ADR processes are negotiation, mediation and arbitration. They are often used sequentially.
- There are instances where more than one process can be combined based on the special requirements of the case or the parties.
- Flexibility of ADR has birthed innovations resulting in hybrids.

1. *MED-ARB*
   - Hybrid of mediation and arbitration.
   - Neutral mediates the case and if no agreement reached, neutral changes role and becomes an arbitrator, taking evidence and issuing an award.
   - Parties commit to move to arbitration if mediation is unsuccessful in advance, i.e. before the process commences.
   - Advantages
     - Parties try harder to be reasonable and resolve the matter during mediation.
     - If adjudication is required, there will be no loss of time or cost to reacquaint a new neutral with facts and issues of case.
     - Saves money as only one neutral hired.
   - Disadvantages
     - Info important for mediation may be inappropriate for arbitration.
     - Cases are presented differently in mediation and arbitration, yet all info presented in mediation can't be erased from neutral's mind, especially where large amount of info.
   - Position of Act 798
     - Parties shall not initiate, during the mediation proceedings, any arbitral or judicial proceedings iro a dispute that is the subject matter of the mediation proceedings – **s. 83**.
     - Unless otherwise agreed by the parties, the mediator shall not act as an arbitrator or as a rep or counsel of a party in any arbitral or judicial proceedings iro a dispute that is the subject matter of the mediation proceeding – **s. 84(1)**.

2. *ARB-MED*
   - Parties agree to appoint an arbitrator who may change into a mediator, and subject the matter to mediation.
   - Position of Act 798
     - Arbitrator may encourage settlement of the issue and may use mediation or other procedures at any time during the arbitral proceedings – **s. 47**.
     - Appointing authority may with the consent of the parties, at any time during arbitration process, arrange a conciliation conference[1] to facilitate the resolution of dispute except the arbitrator shall not be the conciliator[2][3] – **s. 30**.

3. *Settlement conference*
   - Annexed to a court system and requires parties to attend before trial.
   - May be conducted by judges [or experienced lawyers].
   - It's highly evaluative, and the neutral expresses an opinion as to the case odds and value.
   - More coercive than mediation.
   - Goal is to closure and freeing up court's docket.
   - Or. 58, C.I. 47 – administrator of court refers matter to a judge for pre-trial settlement; judge has 2 months within which to set down issues for trial.

4. *Neutral expert finder*
   - Where case requires expert advice and evidence, partisan experts are brought. Courts therefore have to choose between or reconcile the views of experts with opposing opinions.
   - Involves appointment of a single fact-finding expert who is not partisan and can make a neutral evaluation of facts.
   - Expert jointly selected by parties who may agree to be bound by findings or treat it as merely advisory.
   - Helps narrow the issues and promote settlement.

5. *Early neutral evaluation*
   - Respective legal teams put case, at an early point, to a neutral or group of neutrals to get a forecast of the possible judicial outcome.
   - Forces disputants to confront their case, narrow down the issues, develop a speedy disclosure process, and possibly effect settlement
   - Helps to bring clients 'back to reality'.
   - It's informal and relatively inexpensive; allows parties to reach mutually acceptable agreement other than through court system.
   - Even if settlement fails, helps parties to establish time limits for disposal of the case in a more effective and expeditious manner.

6. *Rent a judge*
   - Parties use services of a retired or former judge who, for a fee, hears the case and renders a decision.
   - Rules of evidence are followed strictly.
   - Decision is treated as a judgment of the court and subject to appeal.
   - Advantages
     - Parties pick their own judges who may have special expertise in the area of dispute.
     - Since rules of evidence apply, parties' rights are protected.

7. *Summary jury trial*
   - If disputants insist on going to court, they may use this process.
   - Parties present abbreviated evidence to an advisory jury.
   - Jury offers a non-binding advisory verdict.
   - Verdict can be used as basis for further settlement negotiation.
   - Parties can limit reference to jury to specific issues of importance.
   - Parties may question jurors about their reasoning to further the negotiation process.
   - Gives insight as to how a jury might find in a contested case.
   - Usually reserved for complex cases.
   - May not accurately predict the results in a trial.
   - May waste time and money where settlement not reached.

8. *Mini-trial*
   - Hybrid of negotiation, mediation and case evaluation.
   - Used mainly in business on principle that better to resolve disputes without protracted litigation.
   - Preservation of business relationship is key.
   - High level corporate decision maker must attend.
   - Parties and lawyers meet with expert 3rd party advisor, all sides present their 'best case', followed by direct negotiation between the parties [without the attorneys or neutral].
   - If no settlement reached within predetermined time, expert advisor provides a non-binding opinion on merits of case.
   - Executives then negotiate again.
   - If no resolution reached, neutral will act as mediator.

[1] Submission of dispute which is the subject of an arbitration to a third party who is not the arbitrator for resolution – s. 135

[2] Impartial person appointed to facilitate a conciliation conference – s. 135

[3] Mediator is an impartial person appointed by parties to assist them to resolve their disputes. Not much different from a conciliator.