ASHESI UNIVERSITY

ASHESI LAW JOURNAL

VOLUME 1 · ISSUE 1 · PAGES 1–38

Expanding the Frontiers of Arbitrability in Ghana: A Case for the Reform of Section 1 of the Alternative Dispute Resolution Act, 2010 (Act 798)

Saeed Nubalaniah Moomin

2026 Volume 1

ASHESI LAW JOURNAL

A publication of the Department of Law and Public Policy,
Ashesi University, Berekuso

VOLUME 1 · ISSUE 1 · JULY 2026

Expanding the Frontiers of Arbitrability in Ghana: A Case for the Reform of Section 1 of the Alternative Dispute Resolution Act, 2010 (Act 798)

Saeed Nubalaniah Moomin

pp. 1–38

RECOMMENDED CITATION

Saeed Nubalaniah Moomin, 'Expanding the Frontiers of Arbitrability in Ghana: A Case for the Reform of Section 1 of the Alternative Dispute Resolution Act, 2010 (Act 798)' (2026) 1(1) *Ashesi Law Journal* 1

© 2026 Ashesi Law Journal. All rights reserved. The views expressed are solely those of the author and do not necessarily reflect the views of the Ashesi Law Journal, its Editorial Board, or Ashesi University.

EXPANDING THE FRONTIERS OF ARBITRABILITY IN GHANA: A CASE FOR THE REFORM OF SECTION 1 OF THE ALTERNATIVE DISPUTE RESOLUTION ACT, 2010 (ACT 798)

Saeed Nubalaniah Moomin[1*]

Abstract

Ghana's Alternative Dispute Resolution Act, 2010 (Act 798) was enacted to promote arbitration, mediation, and customary arbitration as alternatives to litigation. Section 1 of the Act, however, excludes environmental matters from its scope. The Supreme Court's decision in ***Heiland Resources Ltd v Sinopec International Petroleum Ltd*** *has also, unjustifiably, expanded the scope of non-arbitrable matters to include fraud. This paper argues that* ***Heiland*** *is inconsistent with the text of Act 798 and the Court's own pro-arbitration jurisprudence and that the blanket statutory exclusion of environmental matters is at odds with the arbitration provisions in the Ghana Investment Promotion Centre Act, 2013 (Act 865), the Minerals and Mining Act, 2006 (Act 703), and the Petroleum (Exploration and Production) Act, 2016 (Act 919). I propose that section 1 of Act 798 be amended to ensure that commercial fraud and environmental disputes arising out of investment relationships are arbitrable under Ghanaian law.*

1 * LL.B. (GIMPA), LL.M. from the University of Pennsylvania. Lecturer in Law, Barrister-at-Law (Ghana), and Attorney (New York).

Introduction

Ghana has sought to position itself as a jurisdiction that welcomes arbitration. The enactment of the Alternative Dispute Resolution Act, 2010 (Act 798), was a major step in this direction.[2] The Act provides the legislative framework for arbitration, mediation, and customary arbitration in Ghana. It also incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as a schedule, signaling Ghana's commitment to international arbitration standards.[3] As Onyema has observed, the Act was one of the most comprehensive arbitration statutes enacted in Africa in the post-2000 period, drawing on the UNCITRAL Model Law while incorporating uniquely Ghanaian features such as customary arbitration.[4] The courts have also affirmed Ghana's pro-arbitration posture in a long line of cases. In *Republic v High Court (Commercial Division, Accra) Ex Parte Ghacem Ltd*, Dotse JSC cautioned that courts "must be very slow and cautious" in interfering with the arbitral process, "unless expressly provided for and in clear instances devoid of any controversy".[5]

Despite this, certain aspects of the law undermine Ghana's pro-arbitration credentials. Section 1 of Act 798 provides that the Act applies to all matters except those relating to (a) the national or public interest; (b) the environment; (c) the enforcement and interpretation of the Constitution; and (d) any other matter that by law cannot be settled by an alternative dispute resolution method.[6] Section 1(d) is a residual catch-all that defers to other legislation. The exclusion of environmental matters, in particular, is a blanket exclusion. It does

2 Alternative Dispute Resolution Act, 2010 (Act 798). The Act received Presidential Assent on 31 May 2010 and repealed the earlier Arbitration Act, 1961 (Act 38).

3 Alternative Dispute Resolution Act, 2010 (Act 798), First Schedule.

4 Emilia Onyema, 'The New Ghana ADR Act 2010: A Critical Overview' (2012) 28(1) Arbitration International 101.

5 *Republic v High Court (Commercial Division, Accra) Ex Parte Ghacem Ltd (AJ Fanj Construction & Engineering Ltd Interested Party)*, Civil Motion No J5/29/2018 (Supreme Court, 30 May 2018).

6 Alternative Dispute Resolution Act, 2010 (Act 798), s 1.

not distinguish between disputes arising from purely regulatory or public law matters and those arising from commercial or contractual relationships that happen to have an environmental dimension. In a country whose economy depends significantly on mining, oil, and gas, commercial disputes arising in these sectors will inevitably involve environmental questions.[7] Yet, as the law stands, these disputes cannot benefit from the advantages of arbitration.

To compound this problem, the Supreme Court in *Heiland Resources Ltd v Sinopec International Petroleum Ltd & 2 Ors* held that the High Court is "better suited" to determine allegations of fraud than an arbitral tribunal.[8] This was despite the fact that fraud is not listed among the exclusions in section 1 of Act 798. The Court did not anchor its decision in any of the specific exclusions under section 1. Instead, it made what appears to be a policy pronouncement without adequate justification. The decision, in effect, judicially expanded the scope of non-arbitrable matters beyond what Parliament had contemplated.

These two issues, the statutory exclusion of environmental matters and the judicial exclusion of fraud, together represent a significant limitation on the scope of arbitrability in Ghana. They undermine party autonomy, create uncertainty for commercial parties, and raise questions about whether Ghana's arbitration regime is as progressive as its legislative framework suggests.

This paper argues that both limitations ought to be addressed through legislative reform. In the case of fraud, Parliament should clarify that allegations of fraud arising in the contractual context do not, by themselves, oust the jurisdiction of an arbitral tribunal. In the case of environmental disputes, Parliament should amend section 1(b) to

7 Ghana is one of Africa's largest gold producers and has significant offshore petroleum production. See Ghana Extractive Industries Transparency Initiative, '2023 Annual Report' (GHEITI 2024).

8 *Heiland Resources Ltd v Sinopec International Petroleum Ltd & 2 Ors*, Civil Appeal No J4/10/2024 (Supreme Court, 11 November 2024).

permit the arbitration of commercial and investment disputes that involve environmental questions.

The arguments are grounded primarily in Ghanaian law. The text and objects of Act 798, the existing arbitration provisions in the Ghana Investment Promotion Centre Act, 2013 (Act 865),[9] the Minerals and Mining Act, 2006 (Act 703),[10] and the Petroleum (Exploration and Production) Act, 2016 (Act 919)[11] form the core of the argument. Reference is also made to the practice of international arbitral tribunals to demonstrate that environmental disputes are capable of competent adjudication by arbitral tribunals. The 1992 Constitution of Ghana and its provisions on environmental protection and the right of access to justice further support the case for reform.

The paper is structured as follows. Part 1 considers the concept of arbitrability under Ghana's ADR Act, examining section 1 and its implications. Part 2 addresses the arbitrability of fraud, with a critical analysis of the *Heiland* decision and the reasons it should not represent the settled position of the law. Part 3 makes the case for the arbitrability of environmental disputes, drawing on the inherent tension between section 1(b) of Act 798 and the arbitration provisions in Ghana's investment and extractive sector legislation. Part 4 proposes specific reforms to section 1 and considers necessary safeguards.

9 Ghana Investment Promotion Centre Act, 2013 (Act 865), s 33.

10 Minerals and Mining Act, 2006 (Act 703), s 27.

11 Petroleum (Exploration and Production) Act, 2016 (Act 919), s 10. Petroleum agreements under this section, which must be ratified by Parliament in accordance with article 268 of the 1992 Constitution and section 10(13) of the Act, typically contain international arbitration clauses.

PART 1: ARBITRABILITY UNDER GHANA'S ADR ACT

The Concept of Arbitrability

Arbitrability deals with whether a particular type of dispute can be settled by arbitration, or whether it is of a kind that can only be settled by recourse to traditional courts.12 It has also been defined as a concept which "involves determining which types of disputes may be resolved by arbitration and which belong exclusively to the domain of the courts".13 Born identifies arbitrability as one of the fundamental doctrines of international commercial arbitration, noting that its scope has expanded significantly in most developed jurisdictions over the past three decades.14 Despite similar definitions, no single international or transnational standard defines which substantive areas of law are arbitrable.15 Brekoulakis has argued that many of the persisting limitations on arbitrability rest on misconceptions about the nature and function of arbitration, rather than on sound policy considerations.16 Mistelis and Brekoulakis have further demonstrated that the boundaries of arbitrability vary considerably across jurisdictions, influenced by local conceptions of public policy, regulatory sovereignty, and the perceived competence of arbitral tribunals.17 As a result, determining arbitrability is usually left to domestic law. The governing law determines whether a dispute is arbitrable or not.

12 Ilias Bantekas, 'The Foundations of Arbitrability in International Commercial Arbitration' (2008) 27 Australian Yearbook of International Law 193.

13 Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) 122.

14 Gary B Born, *International Commercial Arbitration*, vol 1 (3rd edn, Wolters Kluwer 2021) ch 6.

15 Klára Drličková, 'Arbitrability and Public Interest in International Commercial Arbitration' (2017) 17 International and Comparative Law Review 55, 56.

16 Stavros Brekoulakis, 'On Arbitrability: Persisting Misconceptions and New Areas of Concern' (2010) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1410285 accessed 3 March 2026.

17 Loukas A Mistelis and Stavros L Brekoulakis (eds), *Arbitrability: International and Comparative Perspectives* (Kluwer Law International 2009).

This makes the provisions of Act 798 central to any discussion on arbitrability in Ghana. The Act sets the boundaries. As Oppong has noted, Ghana's arbitration framework is distinctive in that it imposes statutory arbitration obligations in certain contexts, which raises questions about the scope and constitutionality of arbitrability restrictions.[18]

Section 1 of Act 798

Section 1 of Act 798 provides that the Act applies to matters other than those that relate to: (a) the national or public interest; (b) the environment; (c) the enforcement and interpretation of the Constitution; and (d) any other matter that by law cannot be settled by an alternative dispute resolution method.[19]

The structure of section 1 is important. It does not create a general exclusion and then carve out exceptions. Instead, it starts from a position of general applicability and then lists specific exclusions, ending with a general exclusionary clause in section 1(d). The implication is that everything falls within the scope of the Act unless it can be shown to fall within one of the four enumerated categories.

This is consistent with the modern trend towards what has been described as a "presumption in favour of arbitrability".[20] It is also consistent with the object of the Act. The Memorandum to Act 798 indicates that the Act was intended to promote the use of alternative dispute resolution methods in Ghana and to reduce the burden on the courts.[21] A restrictive interpretation of section 1 would be at odds with these objects. Brako-Powers, in his evaluation of Act 798, thirteen years after its enactment, has similarly observed that the

18 Richard Frimpong Oppong, 'The Nature and Constitutionality of Statutorily-Imposed (Non-Contractual) Arbitration in Ghana' (2021) 65(2) Journal of African Law 205.
19 ADR Act (n 1) s 1.
20 Drličková (n 14) 55.
21 ADR Act (n 1), Memorandum.

exclusions under section 1 have created practical difficulties and have not kept pace with the demands of Ghana's commercial landscape.[22]

It is worth noting at the outset that the Memorandum to Act 798 does not explain why environmental matters or any of the other categories were excluded. The Memorandum addresses the broad objectives of the Act but is silent on the rationale for any of the specific exclusions in section 1. International instruments are also silent on the question. Neither the UNCITRAL Model Law on International Commercial Arbitration nor the New York Convention prescribes substantive limits on arbitrability. The Convention leaves the question to domestic law.[23] The exclusions in section 1 are therefore policy choices made by the Ghanaian Parliament without express international guidance and without express domestic justification.

Two of the four exclusions are relatively uncontroversial. The exclusion of matters relating to the enforcement and interpretation of the Constitution under section 1(c) is logical. Constitutional interpretation is a function reserved for the courts under the 1992 Constitution,[24] and there is no compelling reason to subject it to arbitration. Similarly, the residual exclusion under section 1(d), which refers to matters that by law cannot be settled by ADR, is a standard provision that defers to other legislation.

The two exclusions, which are the focus of this Paper, are more problematic. The exclusion of matters relating to "the national or public interest" under section 1(a) is broad and undefined. The exclusion of matters relating to "the environment" under section 1(b) is a blanket exclusion that does not admit of any nuance.

22 Austin Kwabena Brako-Powers, 'An Evaluation of Ghana's Alternative Dispute Resolution Act, 2010 (Act 798) Thirteen Years on' (SSRN, 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4529623 accessed 3 March 2026.

23 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38, art II.

24 1992 Constitution of the Republic of Ghana, arts 2 and 130.

The "National or Public Interest" Exclusion

The 1992 Constitution defines public interest as including "any right or advantage which enures or is intended to enure to the benefit generally of the whole of the people of Ghana".[25] The word "including" is significant. It suggests that the scope of public interest is potentially wider than the specific formulation provided.[26] The Supreme Court has confirmed this in *Nii Kpobi Tetteh Tsuru III v Attorney-General*, where Dotse JSC held that public interest should be given "a wide, broad and expanded interpretation".[27] This creates uncertainty. If public interest is an open-ended concept, then it becomes a tool through which a party can seek to oust the jurisdiction of an arbitral tribunal by arguing that the dispute is in the public interest. The danger is that almost any dispute can be made to touch on the public interest if the argument is framed broadly enough.

That said, *Nii Kpobi Tetteh Tsuru* also confirms the substantive limit of the exclusion. Public interest, on the Court's formulation, must benefit "the entire community" or be "open to members of the public".[28] A purely private dispute between two commercial parties about money owed under a contract does not meet this threshold. The dispute concerns the rights and obligations of the parties.

This does not mean that the public interest exclusion is without merit. There are disputes that, by their nature, pique interests beyond those of the immediate parties. But the current formulation does not provide sufficient guidance as to what falls within this category. This has left the courts to fill the gaps, and, as the discussion on fraud below will demonstrate, they have not always done so consistently.

25 1992 Constitution of the Republic of Ghana, art 295.

26 The word 'including' in the definition implies that what follows is illustrative, not exhaustive. This means the concept of public interest is potentially broader than the specific examples given.

27 *Nii Kpobi Tetteh Tsuru III v Attorney-General* [2010] Civil Suit No 2/2007 (Supreme Court, 23 June 2010).

28 ibid.

The Problem with the Environmental Exclusion

Section 1(b) excludes "the environment" from the scope of Act 798.[29] The provision is brief and unqualified. It does not define what "matters relating to the environment" means. It does not distinguish between regulatory disputes, such as a challenge to an EPA enforcement notice, and commercial disputes that happen to involve an environmental dimension, such as a dispute over environmental indemnification in a mining contract.

The detailed argument against the blanket environmental exclusion appears in Part 3 of this Paper, where it is also placed alongside the arbitration provisions in Ghana's sector-specific legislation. For present purposes, it is sufficient to flag two preliminary points. First, the Memorandum to Act 798 does not explain the basis for the exclusion.[30] Second, no other Ghanaian statute carves environmental disputes out of arbitration; the exclusion is statutory and limited to Act 798. The exclusion is also at odds with the arbitration provisions in the Minerals and Mining Act, 2006 (Act 703),[31] the Petroleum (Exploration and Production) Act, 2016 (Act 919),[32] and the Ghana Investment Promotion Centre Act, 2013 (Act 865).[33] Part 3 develops the legislative incoherence point in detail.

PART 2: THE ARBITRABILITY OF FRAUD IN GHANA

The Nature of Fraud Under Ghanaian Law

Fraud is treated with considerable gravity under Ghanaian law. It is considered a species of dishonesty with criminal connotations. Taylor JSC defined fraud as involving "a false representation, whether exhibited by words or conduct", adding that "a charge of fraud in law

29 ADR Act (n 1) s 1(b).
30 ADR Act (n 1), Memorandum.
31 Minerals and Mining Act, 2006 (Act 703), s 27.
32 Petroleum (Exploration and Production) Act, 2016 (Act 919), s 81.
33 Ghana Investment Promotion Centre Act, 2013 (Act 865), s 33.

can be taken to be properly made against a party who knowingly or recklessly whether by conduct or words uses unfair, wrongful or unlawful means to obtain a material advantage to the detriment of another party."[34] Kpegah JSC has similarly described fraud as a "serious sin against the administration of justice", reinforcing the maxim that "fraud vitiates everything".[35]

Because of this characterisation, Ghanaian law requires that even in civil matters, allegations of fraud must be proved beyond a reasonable doubt, which is the criminal standard of proof.[36] The courts have also held that fraud must be specifically pleaded so that the other party is given sufficient notice to prepare a defence.[37] These requirements reflect the seriousness with which Ghanaian law treats allegations of fraud.

For the avoidance of doubt, the Paper accepts that civil fraud retains certain quasi-criminal features under Ghanaian law. Civil fraud must be pleaded with particularity. It must be proved beyond reasonable doubt. The argument advanced here is not that these features should be disregarded. The argument is that these features speak to how fraud is pleaded and proved, not to the forum in which it can be adjudicated. An arbitral tribunal, applying the governing law, will apply the same pleading rules and the same standard of proof as a court. The forum and the burden of proof are distinct questions.

It is important to distinguish between the different contexts in which fraud arises. Fraud as an element of criminal offences, prosecuted by the State under the Criminal Offences Act, 1960 (Act 29),[38] is a matter of public law. The State has an interest in punishing criminal conduct, and there is no question that criminal prosecution falls outside the scope of arbitration.

34 *SA Turqui & Bros v Dahabieh* [1987-88] 2 GLR 486, 502 (Taylor JSC).
35 *Republic v High Court, Accra ex parte Aryeetey* [2003-2004] SCGLR 398, 406 (Kpegah JSC).
36 *Sasu Bamfo v Sintim* [2012] 1 SCGLR 136.
37 *Edem Afram v Bernard Owusu-Twumasi*, Civil Appeal No J4/47/2021 (Supreme Court) 32.
38 Criminal Offences Act, 1960 (Act 29), ss 131–145.

This is uncontroversial. Fraud also arises in the contractual context. A party to a commercial agreement may allege that the other party made false representations which induced it to enter into the contract. This is fraud in the civil sense, although it retains the quasi-criminal evidentiary features described above. It does not engage the prosecutorial interest of the State. It is a dispute between two private parties about the consequences of alleged dishonesty within their commercial relationship. The remedies sought are civil remedies: rescission, damages, or restitution. It is this type of fraud, fraud within the contractual context, that is the focus of this Paper.

The Decision in Heiland v Sinopec

The facts of *Heiland Resources Ltd v Sinopec International Petroleum Ltd & 2 Ors* are important.[39] The Ghana National Gas Company contracted Sinopec to build the Western Corridor Gas Infrastructure Development Project. Sinopec sub-contracted Heiland for the Lateral Line Civil Works under an agreement that included an arbitration clause at clause 16.2. A dispute arose over additional civil works performed by Heiland. Heiland alleged that Sinopec had altered the scope of work and refused to pay for the additional works. Heiland pleaded fraud in its Statement of Claim. The particulars were that Sinopec had fraudulently misrepresented the scope of work, had induced Heiland to perform additional work without intending to pay for it, had executed a sham contract with another party to evade payment obligations, and had refused to certify invoices to evade payment.[40] The pleaded fraud was, in substance, fraudulent misrepresentation arising out of a sub-contractor dispute.

Heiland first commenced arbitration but later withdrew it and filed a writ at the High Court. Sinopec applied to stay the proceedings

39 *Heiland Resources Ltd v Sinopec International Petroleum Ltd & 2 Ors*, Civil Appeal No J4/10/2024 (Supreme Court, 11 November 2024).

40 ibid, [3.2] and [11] (recording the particulars of fraud pleaded at paragraph 57 of the Statement of Claim).

and refer the dispute to arbitration. The High Court granted the application. The Court of Appeal reversed. The Supreme Court affirmed the Court of Appeal.

The Supreme Court's decision addressed three issues: whether the additional works fell within the scope of the arbitration clause; whether Sinopec had waived its right to arbitration; and whether the fraud allegations rendered the dispute non-arbitrable. The fraud issue is addressed in one short paragraph of the majority judgment. Asiedu JSC held that:

> "Indeed, fraud connotes criminality, and the law requires that such allegations, whether made in criminal or civil actions, ought to be proved beyond a reasonable doubt... We are firmly of the view that between a court of law, especially the High Court, and an arbitrator, the High Court has jurisdiction and is better suited to try and determine an allegation of fraud which amounts to an alleged commission of a crime than an arbitrator."[41]

The majority did not anchor this conclusion in any of the specific exclusions in section 1 of Act 798. It did not reference any policy consideration peculiar to fraud. It did not engage with the Court's prior jurisprudence. The pronouncement is best described as a policy assertion.

Adjei-Frimpong JSC dissented.[42] He characterised the pleaded fraud as fraudulent misrepresentation in contract law terms. He held that the usual common law remedies for such conduct (rescission, damages, or both) are remedies that an arbitrator can grant. He invoked *Fiona Trust & Holding Corporation v Privalov* and the broad pro-arbitration approach in that case. He also relied on the Memorandum to Act 798 and on the Court's earlier *dictum* in *Ex*

41 ibid, [11] (Asiedu JSC).
42 ibid (Adjei-Frimpong JSC, dissenting).

Parte Ghacem, favouring a narrow scope for judicial interference with arbitration. He concluded that the dispute was arbitrable under section 1 of Act 798 and that the Court of Appeal had erred in taking a narrow view of the arbitration clause.

Why the *Heiland* Decision is Problematic

The *Heiland* majority decision is problematic for several reasons. First, the majority did not anchor its decision in any of the exclusions listed in section 1 of Act 798. The Court did not explain which limb of section 1 fraud falls under. It did not argue that fraud relates to the national or public interest under section 1(a). It did not argue that fraud is a matter that, by law, cannot be settled by ADR under section 1(d). It simply declared that the High Court is "better suited" to hear allegations of fraud. This is a policy pronouncement, not a legal analysis of the statutory framework. Parliament, when it enacted Act 798, chose specific exclusions. Fraud was not among them. The deliberate omission of fraud from the list of exclusions in section 1 suggests that Parliament did not intend for fraud to be categorically excluded from arbitration.[43]

Second, the Court's reasoning conflates civil and criminal fraud. The assertion that "fraud connotes criminality" is an overgeneralisation. While fraud can be criminal, it is not always criminal. In the commercial context, allegations of fraud are frequently made in connection with contractual dealings. A party that alleges it was induced to enter into a contract by false representations is not alleging a crime. It is alleging a civil wrong with civil consequences. The standard of proof may be higher than the ordinary civil standard, but the nature of the claim remains civil. To treat all allegations of fraud as criminal in character, and to use that characterisation to oust the jurisdiction of arbitral tribunals, is to extend the exclusion beyond what the facts warrant.

43 This argument follows the principle of *expressio unius est exclusio alterius*. Where the legislature has specified certain exclusions, the omission of others is presumed to be deliberate.

The *Heiland* facts themselves illustrate the point. The fraud pleaded was fraudulent misrepresentation arising out of a subcontractor's payment claims. That is simply civil fraud.

Third, the decision is inconsistent with the Supreme Court's own jurisprudence. In *Ex Parte Ghacem*, Dotse JSC held that courts should be "very slow and cautious" in interfering with the arbitral process, "unless expressly provided for and in clear instances devoid of any controversy".[44] The same case interpreted section 40 of Act 798 narrowly, limiting it to the determination of preliminary legal points arising in the course of arbitration. The court warned against the "unbridled interference of the court into the workings of arbitral tribunals under Act 798". The Supreme Court has also affirmed the importance of party autonomy and the need to uphold dispute resolution clauses in agreements.[45] The *Heiland* majority does the very thing *Ex Parte Ghacem* warned against. It uses a non-textual policy pronouncement to whittle away arbitral jurisdiction.

Fourth, the decision creates a practical problem. In commercial transactions, particularly cross-border investments, allegations of fraud are common. They arise in disputes over misrepresentation, non-disclosure, and breach of warranty. If a mere allegation of fraud is sufficient to defeat an arbitration clause, then any party wishing to avoid arbitration can do so simply by alleging fraud. This opens the door to tactical litigation. A party that has agreed to arbitrate can frustrate the agreement by including a claim for fraud in its statement of case, regardless of whether the allegation has substance. The *Heiland* decision provides no safeguard against this.

Fifth, the powerful dissenting opinion of Adjei-Frimpong JSC. The dissent applied the broad approach set out by the House of Lords in *Fiona Trust & Holding Corporation v Privalov*.[46] In *Fiona Trust*, Lord

44 Ex Parte Ghacem (n 4).
45 *BCM Ghana Ltd v Ashanti Goldfields Ltd* [2005-2006] SCGLR 602, 611.
46 *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40.

Hoffmann held that an arbitration clause should be construed on the assumption that "the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal".[47] Lord Hoffmann expressly noted that this included disputes about fraud, bribery, and misrepresentation, unless the language of the clause clearly excluded them. The dissent in *Heiland* considered this approach consistent with the policy objectives of Act 798 and a "better motivation" for its implementation.

The separability point is statutorily anchored in Ghanaian law. Section 3 of Act 798 codifies the separability doctrine.[48] It provides that "an arbitration agreement which forms or is intended to form part of another agreement, shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective and shall for that purpose be treated as a distinct agreement." Allegations of fraud directed at the main contract, therefore, do not, under Ghanaian law, vitiate the arbitration agreement.[49] The arbitral tribunal retains jurisdiction over the dispute, including the fraud allegations concerning the contract.

The Public Policy Argument

One possible justification for the *Heiland* approach is policy: that fraud, even in commercial dealings, is sufficiently serious to be treated as a public matter. This argument is reasonable, but when the actual structure of Act 798 is considered, issues arise.

Parliament addressed the concern of public interest when it enacted section 1(a) of Act 798. That provision excludes matters relating to

47 ibid, [13] (Lord Hoffmann).

48 ADR Act (n 1) s 3.

49 Nicholas Pengelley, 'Separability Revisited: Arbitration Clauses and Bribery – *Fiona Trust & Holding Corporation v Privalov*' (2008) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1311070 accessed 3 March 2026.

"the national or public interest". If Parliament had intended fraud to be treated as a public interest matter and excluded on that basis, the natural drafting choice was either to list fraud expressly or to rely on section 1(a). Parliament did neither. The deliberate omission carries weight.

The public interest exclusion under section 1(a), as discussed in Part 1, is defined by reference to benefit to "the whole of the people of Ghana". A private commercial dispute about money owed under a contract does not meet that threshold. The fact that Ghanaian law treats fraud seriously and requires a higher standard of proof does not transform a private dispute into a public interest matter. Seriousness and public interest are not synonymous.

The State's public interest in punishing fraud is fully protected without excluding civil fraud from arbitration. The State retains the prosecutorial role. The Attorney-General can prosecute fraudulent conduct under the Criminal Offences Act, 1960.50 That power is unaffected by the arbitration of the civil consequences between the contracting parties. Indeed, the criminal and civil dimensions of fraud can run in parallel without conflict, just as they do in tort and contract cases generally.

Section 40 of Act 798 and the Arbitrability of Fraud

Section 40 of Act 798 deserves separate treatment because it is sometimes read as supporting the exclusion of fraud from arbitration. The reading is that since section 40 reserves "any question of law" to the High Court, Parliament must have intended that pure legal questions, including fraud, should be reserved for the courts. The reading does not survive close inspection. Section 40(1) provides that:

50 Criminal Offences Act (n 37) ss 131–145.

> "Unless otherwise agreed by the parties, the High Court may, on an application on notice to the other party by a party to arbitral proceedings, determine any question of law that arises in the course of the proceedings if the Court is satisfied that the question substantially affects the rights of the other party."[51]

Two features of section 40 defeat the broader reading. First, section 40(1) is a default rule, not a mandatory rule. Parties may "otherwise agree". This is the language of opt-out, not jurisdictional carve-out. Second, section 40(3) provides that the arbitrator "may continue the arbitral proceedings and make an award" while a section 40 application is pending.[52] A provision that allows the arbitral tribunal to continue and to render an award while the court considers the legal question is plainly a supervisory power, not a jurisdictional one. The arbitral tribunal retains its primary jurisdiction throughout. The Supreme Court has interpreted section 40 narrowly. In *Ex Parte Ghacem*, the Court held that section 40 is limited to the determination of "preliminary legal points" arising in the course of arbitration.[53] The Court held that the High Court "clearly exceeded its jurisdiction" when it went beyond a preliminary legal point. Dotse JSC stated that "the intervention of the High Court, unless expressly provided for and in clear instances devoid of any controversy, must be very slow and cautious." The Court warned that to read section 40 more broadly would "whittle away the functions of the arbitral tribunals and render nugatory the benefits that are to be derived from these arbitral proceedings as contained and provided for in Act 798."

Section 40 is also analytically distinct from the question of subject-matter arbitrability under section 1. Section 1 addresses, ex ante, which categories of disputes may be referred to arbitration at all.

51 ADR Act (n 1) s 40(1).
52 ADR Act (n 1) s 40(3).
53 Ex Parte Ghacem (n 4).

Section 40 addresses, during arbitration, whether a particular legal question affecting the rights of the parties should be determined by the High Court. They operate at different stages and serve different functions. They cannot be combined to produce a categorical exclusion of fraud.

The combined effect is clear. Section 40 does not exclude fraud from arbitration. It does not support the *Heiland* majority's conclusion. To the contrary, *Ex Parte Ghacem*'s narrow reading of section 40 supports the dissent in *Heiland*.

The Case for Reform on Fraud

The argument for making fraud in the contractual context arbitrable in Ghana does not rest on the fact that other jurisdictions have done so. It rests on the proper interpretation of Ghana's own law. The principle of party autonomy, which Fagbemi has described as the cornerstone of international commercial arbitration, demands that parties who have agreed to arbitrate should not be deprived of that agreement by the mere invocation of fraud.[54]

Section 1 of Act 798 sets out four categories of excluded matters. Fraud does not fall within any of them. It does not relate to the enforcement or interpretation of the Constitution. It does not relate to the environment. As discussed above, it does not relate to the national or public interest. There is no statute that expressly prohibits the arbitration of civil fraud claims in Ghana. The Criminal Offences Act criminalises certain types of fraudulent conduct, but that does not mean that all civil claims involving allegations of fraud are incapable of arbitration. The distinction between the criminal prosecution of fraud, which is the State's prerogative, and the civil adjudication of fraud claims between private parties, which is a matter of private dispute resolution, is a fundamental one.

54 SA Fagbemi, 'The Doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?' (2015) 6(1) Journal of Sustainable Development Law and Policy 202.

The distinction is not unique to Ghana. In India, which has perhaps the most developed jurisprudence on the arbitrability of fraud, the Supreme Court has drawn a clear line between civil and criminal fraud. In *A Ayyasamy v A Paramasivam & Others*, the Court held that "mere allegation of fraud simpliciter may not be a ground to nullify the effect of the arbitration agreement between the parties", reserving the courts' jurisdiction only for cases involving "very serious allegations of fraud which make a virtual case of criminal offence".[55] In *Rashid Raza v Sadaf Akhtar*, the Court refined this into a two-part test, asking whether the fraud alleged permeates the entire contract and the agreement to arbitrate, and whether the allegations have implications in the public domain.[56] Where the fraud touches only upon the internal affairs of the parties and has no public dimension, it is arbitrable. The Indian Supreme Court reaffirmed this approach in *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Limited*.[57]

It is important to address one feature of the Indian comparison. In India, civil fraud is proved on the balance of probabilities; in Ghana, civil fraud is proved beyond reasonable doubt. The difference matters. But it does not defeat the comparison. The *Ayyasamy* test is structural, not evidentiary. It turns on the nature of the fraud (civil character; whether it permeates the contract; whether it has a public dimension), not on the burden of proof. None of the three working criteria from *Ayyasamy* and *Rashid Raza* depends on how fraud is proved. The structural distinction is therefore exportable to Ghana even though the evidentiary threshold is higher.

The Indian position is instructive not because Ghana should follow India, but because it demonstrates that the distinction between civil and criminal fraud, which underpins this Paper's argument, is workable and judicially manageable.

55 *A Ayyasamy v A Paramasivam* (2016) 10 SCC 386, [25].
56 *Rashid Raza v Sadaf Akhtar* (2019) 8 SCC 710, [4]–[5].
57 *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd* (2021) 4 SCC 713.

To be clear about the scope of this argument: this Paper does not contend that all fraud should be arbitrable. The argument is that civil fraud arising in the contractual context should be arbitrable. Criminal fraud, fraud that goes to the validity of the arbitration agreement itself, and fraud whose adjudication has implications in the public domain should remain with the courts. The Paper proposes a structural distinction that mirrors the Indian test in substance while preserving Ghana's evidentiary standard.

The concern that arbitral tribunals are not equipped to handle fraud claims is unjustified.[58] Arbitration is a flexible process. Parties have the autonomy to appoint arbitrators with the expertise and experience necessary to determine the dispute. The governing law, which in the Ghanaian context would be Ghanaian law, would still apply. The same legal principles, the same standard of proof, and the same rules of evidence would govern the determination. The only difference is the forum. There is nothing inherent in the nature of civil fraud that makes it incapable of determination by a competent arbitral tribunal. Born forcefully makes this point, noting that the complexity or seriousness of a claim does not diminish the competence of an arbitral tribunal, particularly when the tribunal is composed of experienced lawyers and applies the same substantive law as a court would.[59]

The economic argument reinforces this position. Ghana seeks to attract foreign investment, particularly in its extractive and financial sectors. The Ghana Investment Promotion Centre Act, 2013 (Act 865) was enacted specifically to promote and encourage investment.[60] Section 33 of the Act provides for arbitration as a mechanism for resolving disputes between investors and the Government. Foreign

58 This point was made by the United States Supreme Court in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614, 633–634 (1985), where the Court observed that 'adaptability and access to expertise are hallmarks of arbitration' and that 'the anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed.'

59 Born (n 13) 945–960.

60 Ghana Investment Promotion Centre Act (n 8), Long Title and s 3.

investors value arbitration because it provides neutrality, efficiency, and enforceability.

A legal regime that allows mere allegations of fraud to defeat arbitration clauses introduces uncertainty. It discourages the very investment that Ghana seeks to attract. The practical consequence of the *Heiland* decision is that an investor who has agreed to arbitrate a dispute with a Ghanaian counterpart cannot rely on that agreement if fraud is alleged. This is a chilling signal for any investor conducting due diligence on Ghana's dispute resolution framework.

PART 3: THE ARBITRABILITY OF ENVIRONMENTAL DISPUTES IN GHANA

The Section 1(b) Exclusion

Section 1(b) of Act 798 excludes matters relating to "the environment" from the scope of the Act. Unlike the exclusion of fraud, which is a judicial creation, this exclusion is statutory. Parliament expressly decided that environmental matters should not be subject to arbitration, mediation, or customary arbitration under the Act. Any argument for reform must therefore contend with the fact that this was a deliberate legislative choice.

The deliberate enactment of the exclusion does not immunise it from criticism. Legislation is enacted in a particular context and to serve particular objectives. When the context changes or the provision creates unintended consequences that undermine the statute's broader objectives, reform becomes necessary. This Part argues that the blanket exclusion of environmental matters from arbitration has become untenable in light of developments in Ghana's investment and extractive sector legislation, the practice of international arbitral tribunals, and the evolving nature of environmental disputes in Ghana.

The Rationale Behind the Exclusion

Act 798 does not explain why environmental matters were excluded. The Memorandum to the Act does not provide specific reasons for the inclusion of section 1(b).[61] In the absence of an express rationale, two possible justifications can be inferred.

The first is that environmental protection is a matter of public interest. Article 36(9) of the 1992 Constitution directs the State to "take appropriate measures needed to protect and safeguard the national environment for posterity".[62] Article 41(k) imposes a duty on every citizen to "protect and safeguard the environment".[63] These provisions suggest that environmental protection is not merely a private concern but a constitutional imperative. On this reasoning, environmental disputes should be determined by the courts, which are public institutions accountable to the broader community, rather than by arbitral tribunals, which are private and consensual in nature.

The second possible justification is that environmental disputes often involve regulatory and public law questions that are unsuitable for arbitration. Enforcement actions by the Environmental Protection Authority, prosecutions for environmental offences, and challenges to environmental permits are all matters that involve the regulatory power of the State. These are not the types of disputes that arise between commercial parties and that arbitration was designed to resolve. Both justifications have some force. But neither supports a blanket exclusion of all matters "relating to the environment" from arbitration.

Why the Blanket Exclusion is Overbroad

The problem with section 1(b) is not that it excludes some environmental matters from arbitration. It is that it excludes all of

61 ADR Act (n 1), Memorandum.
62 1992 Constitution of the Republic of Ghana, art 36(9).
63 1992 Constitution of the Republic of Ghana, art 41(k).

them. The provision makes no distinction between the different types of disputes in which environmental issues arise.

Consider three scenarios that arise regularly in Ghana's commercial landscape. First, a mining company enters into a contract with a service provider for the disposal of mining waste. The contract contains an arbitration clause. A dispute arises over whether the service provider disposed of the waste in compliance with the contractual specifications and applicable environmental standards. The environmental dimension is incidental to a contractual dispute.

Second, a foreign investor enters into a petroleum agreement with the Ghana National Petroleum Corporation under Act 919. The agreement requires the investor to comply with environmental principles and to obtain environmental permits.[64] A dispute arises over the investor's compliance. The petroleum agreement, ratified by Parliament, provides for international arbitration.

Third, a Ghanaian company and a foreign company enter into a joint venture for a renewable energy project. The joint venture agreement contains obligations relating to environmental impact assessments and carbon credit allocation. The agreement provides for arbitration under the rules of an international arbitral institution. A dispute arises over the environmental impact assessment obligations.

In each case, the dispute arises out of a commercial relationship between parties who have agreed to arbitrate. The environmental element is part of the subject matter of the contract, not a free-standing regulatory matter. Section 1(b) appears to exclude all three from arbitration on a literal reading. Excluding these disputes from arbitration deprives the parties of the benefit of their bargain without any corresponding gain to the public interest.

64 Petroleum (Exploration and Production) Act (n 10) s 81.

It is important to be clear about where the boundary should lie. Section 1(b)'s exclusion was, presumably, directed at regulatory and prosecutorial matters. The boundary should rest there. A dispute about whether a mining operator emits toxic substances in breach of statutory standards, prosecuted by the EPA or another State actor, is not arbitrable. The State's regulatory power is exercised in the public interest and is unsuitable for private arbitration. A contractual dispute between a mining operator and its service provider about the performance of an environmental remediation obligation is different. The relationship is contractual, the obligations arise out of the agreement, and the remedies sought are civil. The State is not the prosecutor; it is, at most, a regulator with parallel enforcement options. That dispute should be arbitrable.

The Legislative Incoherence

Several Ghanaian statutes provide for the arbitration of disputes that will inevitably involve environmental questions. This creates a direct tension with section 1(b) of Act 798. Section 27 of the Minerals and Mining Act, 2006 (Act 703) provides for the arbitration of disputes between mineral right holders and the Republic.[65] Mining operations are, by their nature, environmentally sensitive. The Act itself requires mineral right holders to obtain environmental permits and to comply with environmental obligations.[66] Section 27(4) requires that "each agreement granting a mineral right shall contain provisions on the method of resolution of disputes that may arise under the agreement."[67] Section 27(3) provides that disputes between a non-citizen mineral right holder and the Republic may be submitted to arbitration "in accordance with an international machinery for the resolution of investment disputes".[68] A dispute about compliance

65 Minerals and Mining Act (n 9) s 27.
66 Minerals and Mining Act (n 9) ss 17–18.
67 Minerals and Mining Act (n 9) s 27(4).
68 Minerals and Mining Act (n 9) s 27(3).

with environmental obligations arising under a mining agreement is both a mining dispute and an environmental dispute. The Minerals and Mining Act provides for arbitration. Act 798 says it cannot.

Petroleum agreements entered under the Petroleum (Exploration and Production) Act, 2016 (Act 919) routinely provide for international arbitration of disputes arising under them. Section 81 of the same Act requires contractors to "take into account and give effect to environmental principles" prescribed in the environmental protection legislation.[69] A dispute over whether a contractor has met its environmental obligations under a petroleum agreement is both a petroleum and an environmental dispute.

Section 33 of the Ghana Investment Promotion Centre Act, 2013 (Act 865) provides for the arbitration of disputes between foreign investors and the Government.[70] Ghana's bilateral investment treaties also provide for arbitration, typically under ICSID or UNCITRAL rules.[71] Investment disputes in the extractive sector frequently involve environmental issues. Miles has traced how investment law and environmental regulation have become increasingly intertwined, particularly in the extractive sector, such that any attempt to exclude environmental matters from arbitration inevitably undermines the effectiveness of the investment arbitration regime.[72] If an investor alleges that Ghana's environmental regulations have adversely affected its investment, or if the Government raises environmental non-compliance as a defence, the dispute has an environmental dimension. Yet the parties have agreed, and the GIPC Act contemplates, that such disputes should be arbitrated. The incoherence becomes sharper still

69 Petroleum (Exploration and Production) Act (n 10) s 81.

70 Ghana Investment Promotion Centre Act (n 8) s 33.

71 Ghana has entered into bilateral investment treaties with, among others, China, Switzerland, South Africa, the United Kingdom, Germany, and the Netherlands. See UNCTAD, 'International Investment Agreements Navigator: Ghana' https://investmentpolicy.unctad.org/international-investment-agreements/countries/79/ghana accessed 3 March 2026.

72 Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press 2013) Ch 7.

when one considers section 33(3) of the GIPC Act, which provides that where there is no arbitration agreement to the contrary, the default method of dispute settlement is mediation under Act 798.[73] The GIPC Act, therefore, expressly directs investment disputes to the very statute that excludes their environmental dimension.

Parliament cannot have intended for these provisions to operate at cross-purposes. The more likely interpretation is that section 1(b) was drafted with purely regulatory environmental disputes in mind and was not intended to override the specific arbitration provisions in sector-specific legislation. But the text of section 1(b) does not reflect this. It is drafted in absolute terms. This legislative incoherence needs to be resolved. Asouzu has observed that African arbitration statutes have frequently suffered from drafting that does not reflect the commercial realities of the jurisdictions they serve, and that periodic statutory reform is necessary to ensure that arbitration frameworks remain fit for purpose.[74]

The New Environmental Protection Act, 2025 (Act 1124)

In January 2025, Ghana enacted the Environmental Protection Act, 2025 (Act 1124), which repealed the Environmental Protection Agency Act, 1994 (Act 490) in its entirety.[75] Act 1124 creates an expanded Environmental Protection Authority with broader regulatory powers, fiscal independence, and an express mandate for climate change governance.[76] The Act introduces provisions on carbon markets, a Ghana Carbon Registry, environmental performance rating systems, and advanced eco-levies.[77]

73 Ghana Investment Promotion Centre Act (n 8) s 33(3).

74 Amazu A Asouzu, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development* (Cambridge University Press 2001).

75 Environmental Protection Act, 2025 (Act 1124), assented to 30 January 2025.

76 Environmental Protection Act (n 74), Part Five (Climate Change).

77 Environmental Protection Act (n 74). The Act establishes a Ghana Carbon Registry and

The enactment of Act 1124 is significant for this discussion in two respects. First, it demonstrates that Ghana's environmental regulatory framework is evolving. The types of environmental disputes that arise today, including those involving carbon credits, climate finance, and environmental performance obligations, are far more complex and commercially oriented than the disputes that existed when Act 798 was enacted in 2010. The exclusion in section 1(b) was drafted for a different era.

Second, Act 1124 does not contain any provision on arbitration or alternative dispute resolution for environmental disputes. Parliament has therefore modernised the environmental regulatory framework without addressing the question of how commercial and investment disputes with environmental dimensions should be resolved. The silence is informative. It does not endorse the section 1(b) exclusion; nor does it remove it. The gap remains. Whether the silence reflects deliberate legislative inaction or oversight is not clear from the text of Act 1124 alone, and the Memorandum to Act 1124 has not been publicly published in a form that resolves the question. The Paper takes the silence as analytically neutral. The case for amending section 1(b) of Act 798 is not affected.

International Practice: Evidence of Arbitral Competence

The argument for reform does not depend on what other countries do. It depends on what Ghana's own legal framework requires. However, the practice of international arbitral tribunals is relevant for a different reason. It demonstrates that arbitral tribunals are capable of competently adjudicating environmental disputes. Viñuales has comprehensively documented how investment arbitral tribunals

provides for carbon markets, non-market approaches, voluntary carbon market participation, and domestic carbon pricing.

have increasingly engaged with environmental claims, both as part of the primary dispute and through state counterclaims.[78] Sands and others have similarly noted that the institutional architecture of international arbitration has adapted to accommodate environmental disputes, with specialised procedural rules and panels of arbitrators with environmental expertise.[79] This matters because one potential objection to removing the environmental exclusion is that arbitral tribunals lack the institutional capacity or expertise to handle such disputes. The objection does not hold up against the evidence.

In *Burlington Resources Inc v Republic of Ecuador*, the ICSID tribunal heard an investment claim involving oil extraction in the Ecuadorian Amazon, and also adjudicated Ecuador's environmental counterclaim on the merits.[80] In its Decision on Counterclaims dated 7 February 2017, the tribunal ordered Burlington to pay USD 41.7 million in compensation, comprising USD 39.2 million for environmental remediation and USD 2.5 million for infrastructure breaches.[81] This was the first ICSID case in which a tribunal upheld a state's environmental counterclaim and awarded environmental damages. Viñuales has described this as a watershed moment in the relationship between investment arbitration and environmental protection, demonstrating that tribunals can both protect investor rights and hold investors accountable for environmental harm.[82] It demonstrated that arbitral tribunals can assess environmental harm, apply environmental standards, and award appropriate remedies.

In the *South China Sea Arbitration*, the tribunal constituted under Annex VII of the United Nations Convention on the Law of the

78 Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012).

79 Philippe Sands and others, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2018).

80 *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5.

81 *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Counterclaims (7 February 2017).

82 Viñuales (n 77) ch 8.

Sea assessed whether China had breached its obligations to protect and preserve the marine environment under articles 192 and 194 of UNCLOS.[83] The tribunal evaluated scientific evidence of coral reef destruction, assessed compliance with environmental protection obligations, and found that China had caused "severe harm to the coral reef environment". This was a complex environmental adjudication conducted within an arbitral framework.

In the *Indus Waters Kishenganga Arbitration*, the Permanent Court of Arbitration tribunal applied customary international environmental law principles to determine that India was required to maintain a minimum environmental flow in the Kishenganga River.[84] The tribunal engaged with the no-harm rule and the concept of environmental due diligence. It also considered the precautionary principle but declined to apply it to the facts, holding that its authority extended only to mitigating significant harm. The tribunal nonetheless demonstrated that arbitral tribunals can interpret and apply international environmental law with the same rigour as traditional courts.

These are not isolated examples. The Permanent Court of Arbitration adopted its Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment in 2001.[85] The Rules provide for the appointment of arbitrators with environmental expertise, and they empower tribunals to order interim measures to "prevent serious harm to the environment falling within the subject-matter of the dispute". The very existence of the Rules is an institutional acknowledgement that environmental disputes are arbitrable and that arbitral tribunals can handle them competently.

83 *The South China Sea Arbitration (Republic of the Philippines v People's Republic of China)*, PCA Case No 2013-19, Award (12 July 2016) [983].

84 *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Partial Award (PCA, 18 February 2013) and Final Award (PCA, 20 December 2013).

85 Permanent Court of Arbitration, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment* (adopted 19 June 2001).

The International Chamber of Commerce has similarly recognised the role of arbitration in resolving environmental disputes. The ICC Commission's Report on Resolving Climate Change Related Disputes through Arbitration and ADR concluded that arbitration and ADR are "well-established in resolving environmental disputes" and provided procedural guidance for tribunals handling such cases.[86]

The proposition that arbitral tribunals cannot competently adjudicate environmental disputes is therefore unsupported by the evidence. Tribunals have done so, repeatedly, in cases of considerable complexity, applying both domestic and international environmental law.

Economic Development

Ghana's economy depends significantly on its extractive sector. Mining, oil, and gas operations are major sources of revenue, employment, and foreign investment.[87] These operations inevitably generate environmental disputes. Disputes arise over compliance with environmental permits, liability for pollution, the allocation of environmental remediation costs, and the environmental consequences of operational decisions.

When these disputes cannot be arbitrated, the parties are left with litigation in the Ghanaian courts. This has practical consequences. Court proceedings in Ghana can be protracted.[88] The commercial courts, while an improvement, still face capacity constraints. Foreign investors, who are often parties to these disputes, may lack confidence in the domestic judicial process, not because of any deficiency in

86 ICC Commission, 'Report on Resolving Climate Change Related Disputes through Arbitration and ADR' (November 2019).

87 K Kamasa, P Amoah, I Bonuedi and P Forson, 'Impact of Mining-FDI on Extractive Sector Growth and its Spillover Effect on Non-Extractive Sector Growth: The Case of Ghana' (2025) 25(1) Ghana Mining Journal 45.

88 Judicial Service of Ghana, *Annual Report 2022-2023* 16–18.

Ghanaian judges, but because of the structural advantages that arbitration offers: party-appointed decision-makers with sector expertise, procedural flexibility, confidentiality, and international enforceability of awards.

The inability to arbitrate environmental disputes in Ghana places the country at a competitive disadvantage relative to other jurisdictions in the region. Countries that permit the arbitration of commercial disputes with environmental dimensions offer a more comprehensive and attractive dispute-resolution framework. Gazzini has observed that modern bilateral investment treaties in Africa, such as the 2016 Morocco-Nigeria BIT, increasingly incorporate provisions on investor environmental obligations alongside arbitration clauses, reflecting the understanding that environmental and investment issues are inseparable in practice.[89] For an investor deciding between two jurisdictions with similar resource endowments, the availability of arbitration for all types of commercial disputes, including those with environmental elements, is a relevant consideration.

Ghana's own investment promotion framework recognises this. The GIPC Act was enacted to attract and promote investment.[90] The arbitration provision in section 33 reflects the understanding that investors value access to arbitration. The promise of arbitration is undermined if a significant category of disputes, those relating to the environment, is categorically excluded.

The Constitution

Article 36(9) of the 1992 Constitution directs the State to protect and safeguard the national environment.[91] This directive principle

89 Tarcisio Gazzini, 'The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties' (2017) Investment Treaty News.

90 Ghana Investment Promotion Centre Act (n 8) s 3.

91 1992 Constitution of the Republic of Ghana, art 36(9).

supports environmental protection. It does not follow that environmental disputes must be resolved exclusively by the courts. The Constitution does not prescribe litigation as the only permissible method of resolving environmental disputes. The directive principle speaks to the State's obligation to protect the environment, not to the forum in which disputes about that protection should be resolved.

The right of access to justice, implicit in the constitutional framework, supports the availability of multiple dispute-resolution mechanisms. Arbitration is one such mechanism. Expanding the scope of arbitrability to include commercial environmental disputes does not diminish environmental protection. It provides an additional forum for parties to enforce environmental obligations. An arbitral tribunal that holds an investor liable for environmental damage and awards compensation to the affected party advances environmental protection just as effectively as a court judgment would. The constitution, therefore, supports, rather than undermines, the case for reform.

PART 4: PROPOSALS FOR REFORM

The Need for Legislative Intervention

The preceding Parts have identified two distinct but related problems with Ghana's arbitrability framework. The first is that the Supreme Court in *Heiland* has judicially excluded fraud from arbitration without a statutory basis. The second is that section 1(b) of Act 798 imposes a blanket exclusion on environmental matters that is overbroad and inconsistent with the arbitration provisions in Ghana's investment and extractive sector legislation.

Both problems require legislative intervention. As Onyema has argued, the supervisory function of courts should complement, not supplant, the arbitral process.[92] Where statutory restrictions

92 Emilia Onyema (ed), *Rethinking the Role of African National Courts in Arbitration* (Kluwer Law International 2018).

create unnecessary barriers to arbitration, legislative reform is the appropriate remedy. In the case of fraud, a judicial reversal of *Heiland* is theoretically possible but practically unlikely in the short term. The Supreme Court would need an appropriate case, a willingness to depart from a recent decision, and a bench inclined towards the dissenting view of Adjei-Frimpong JSC. Legislative clarification is more efficient and provides greater certainty. In the case of environmental disputes, the exclusion is statutory. Only Parliament can amend section 1(b).

Proposal One: Clarifying the Arbitrability of Fraud

Parliament should amend Act 798 to include an express provision clarifying that allegations of fraud arising in the context of a contractual or commercial relationship do not, by themselves, render a dispute non-arbitrable. The amendment should track the *Ayyasamy* and *Rashid Raza* test by preserving the State's interest in cases where the fraud is essentially criminal in character, where it permeates the arbitration agreement itself, or where it has implications in the public domain.

A possible formulation would be to insert a new subsection into section 1, as follows:

> "For the avoidance of doubt, a dispute is not excluded from the application of this Act solely because it involves allegations of fraud, where the dispute arises out of or in connection with a contractual or commercial relationship between the parties, provided that the allegations (i) do not amount to a virtual case of criminal offence, (ii) do not permeate the validity of the arbitration agreement itself, and (iii) have no public interest ramifications."[93]

93 This is proposed language for illustrative purposes. The exact formulation would be a matter for

The formulation preserves the existing exclusions. It does not override section 1(a). If a particular fraud claim genuinely engages the national or public interest, the exclusion under section 1(a) would still apply. The three carve-outs in the proposed subsection mirror the *Ayyasamy* and *Rashid Raza* tests and ensure that genuinely criminal fraud, fraud directed at the arbitration agreement itself, and fraud with public implications remain with the courts. Civil fraud arising in commercial dealings between private parties, by contrast, is brought within the scope of the Act.

The Indian Supreme Court's approach, while developed in a different legal context, is instructive on why this distinction matters. In *Ayyasamy*, the Court drew a distinction between "mere allegations of fraud" which touch upon "the internal affairs of the party inter se" and "serious allegations of fraud which make a virtual case of criminal offence".[94] The former category, the Court held, is arbitrable. The latter is not. In *Rashid Raza*, the Court refined this into a two-part test, asking whether the fraud alleged permeates the entire contract and the arbitration agreement, and whether the allegations have implications in the public domain.[95] The practical effect of these decisions is that civil fraud within the contractual context is arbitrable in India, while fraud that is essentially criminal in character remains with the courts.

The distinction drawn by the Indian Supreme Court is consistent with the argument advanced in this Paper. This Paper does not argue that criminal fraud should be arbitrable. The State's prosecutorial prerogative is not in question. The argument is that allegations of fraud made by one commercial party against another, in the context of a contractual dispute, should be capable of determination by the arbitral tribunal the parties have chosen. The proposed amendment to Act 798 achieves this result without disturbing the existing public interest safeguard under section 1(a).

Parliament.

94 Ayyasamy (n 54) [25].

95 Rashid Raza (n 55) [4]–[5].

Proposal Two: Narrowing the Environmental Exclusion

The amendment to section 1(b) requires more care. The current provision excludes all matters "relating to the environment". The proposal is not to delete the exclusion entirely. There are environmental matters that should properly remain within the exclusive jurisdiction of the courts and regulatory bodies. What needs to change is the scope of the exclusion.

The exclusion should be narrowed to apply only to matters of environmental regulation and enforcement that engage the public regulatory power of the State. Disputes arising from contractual or investment relationships, even if they involve environmental obligations, should be arbitrable where the parties have agreed to arbitrate.

A possible formulation would be to amend section 1(b) as follows:

> "This Act applies to matters other than those that relate to ... (b) the enforcement of environmental regulations by a public authority or the prosecution of environmental offences but does not exclude disputes arising out of contractual or investment relationships in which environmental obligations form part of the subject matter of the agreement between the parties."[96]

The formulation achieves several things. First, it preserves the State's regulatory and prosecutorial functions. The Environmental Protection Authority, established under Act 1124, retains its enforcement powers. Prosecutions for environmental offences remain with the courts. Second, it removes the blanket exclusion that currently prevents the arbitration of commercial and investment disputes with environmental dimensions. Third, it aligns section 1(b) with the arbitration provisions already contained in the Minerals

96 As with n 93, this is proposed language for illustrative purposes.

and Mining Act (section 27) and the GIPC Act (section 33). The legislative incoherence identified in Part 3 would be resolved.

Proposal Three: Institutional Safeguards

Expanding the scope of arbitrability should not come at the expense of environmental protection or the public interest. Two safeguards should accompany the proposed amendments.

The first is a mandatory reporting obligation. Where, in the course of arbitral proceedings, evidence emerges of conduct that may constitute an environmental offence or a serious threat to public health or the environment, the arbitral tribunal should be required to notify the Environmental Protection Authority. This does not mean the tribunal must suspend proceedings or decline jurisdiction. It means the regulatory body is informed and can take whatever enforcement action it considers appropriate. The arbitral proceedings and the regulatory process can run in parallel. This safeguard ensures that the public interest in environmental protection is not sacrificed by the private resolution of the commercial dispute.

The second safeguard relates to the capacity of arbitral tribunals. If environmental disputes are to be arbitrated in Ghana, the Alternative Dispute Resolution Centre established under Part IV of Act 798 should develop a specialised panel of arbitrators with expertise in environmental law and the extractive sector.[97] The Permanent Court of Arbitration's Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment contemplate the appointment of arbitrators with environmental expertise.[98] Ghana's ADR Centre should adopt a similar approach. This would address any concern about the capacity of arbitral tribunals to handle environmental disputes and would signal institutional readiness.

97 ADR Act (n 1) ss 114–124.
98 PCA Optional Rules (n 84).

Proposal Four: Harmonisation of Dispute Resolution Provisions

Beyond amending section 1, Parliament should consider a broader harmonisation exercise. Brako-Powers has argued that one of the principal weaknesses of Act 798 is the absence of coordination between its provisions and the arbitration provisions in sector-specific legislation, resulting in uncertainty and potential conflicts.[99] The arbitration provisions in the GIPC Act, the Minerals and Mining Act, the Petroleum Act, Act 798, and other legislation should be reviewed together to ensure consistency. At present, each statute contains its own dispute resolution provisions, and the interaction between these provisions and Act 798 is unclear. A harmonisation exercise would clarify which disputes are arbitrable under which framework, reduce the potential for conflicting outcomes, and provide commercial parties with a coherent set of rules.

The exercise should also consider whether Act 798 needs to be updated more broadly. The Act was enacted in 2010. International arbitration practice has evolved significantly since then. The UNCITRAL Model Law on International Commercial Arbitration, on which many modern arbitration statutes are based, has been revised.[100] Ghana's arbitration legislation should keep pace with these developments.

Conclusion

This paper has argued that the scope of arbitrability in Ghana is unduly narrow, both as a result of the statutory exclusions in section 1 of Act 798 and as a result of the Supreme Court's decision in *Heiland*. In the case of fraud, the Supreme Court created a judicial exclusion that finds no basis in the text of Act 798. Parliament

99 Brako-Powers (n 21) 12–15.

100 UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006).

did not include fraud among the excluded categories in section 1. The Court's reasoning, which characterises all fraud as connoting criminality, conflates civil and criminal fraud. It is inconsistent with the Court's own pro-arbitration jurisprudence in *Ex Parte Ghacem*. It is inconsistent with the statutory separability doctrine in section 3. It creates an incentive for tactical litigation by parties seeking to avoid their arbitration obligations. And it sends a discouraging signal to foreign investors who rely on arbitration for dispute resolution.

In environmental disputes, the blanket exclusion under section 1(b) is a relic of an earlier era. When Act 798 was enacted in 2010, Ghana's extractive sector was less developed, and the types of environmental disputes that arose in commercial and investment contexts were less prevalent. Today, the exclusion is at odds with the arbitration provisions in the Minerals and Mining Act, the Petroleum Act, and the GIPC Act. It is also at odds with international practice. Arbitral tribunals have demonstrated, repeatedly and in cases of considerable complexity, that they are capable of adjudicating environmental disputes competently and fairly. The practice of ICSID tribunals, UNCLOS tribunals, and tribunals constituted under the PCA's environmental rules supports this conclusion.

The proposed reforms are modest. They do not seek to remove all limitations on arbitrability. They do not seek to disturb the State's prosecutorial functions or its regulatory authority over environmental matters. They seek only to ensure that civil fraud arising from commercial dealings and commercial and investment disputes involving environmental obligations are capable of being resolved through the arbitral mechanism chosen by the parties. The reforms align Ghana's arbitration framework with the practical realities of its commercial landscape, with the arbitration provisions in its own sector-specific legislation, and with the international standards to which Ghana has committed itself.