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The Approach of Ghana's Judiciary in the Enforcement of Forum Selection Agreements in International Commercial Transactions

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ABSTRACT

In international commercial transactions, parties often include a jurisdiction clause in their contracts, specifying which court should resolve any disputes that arise. This practice brings certainty, predictability and reduces the risks of parallel litigation, conflicting judgments, and additional expenses. Jurisdiction agreements can be exclusive, non-exclusive, or asymmetrical. The Hague Convention on Choice of Court Agreements is the international convention that governs these clauses. It aims to ensure the efficacy of exclusive jurisdiction agreements and manage parallel proceedings in different countries. Although several countries have adopted the convention, no African country has acceded to it, including Ghana.

In Ghana, issues with jurisdiction clauses typically arise when a lawsuit is filed in a court different from the one designated in the contract, leading to objections and requests to move the case to the designated jurisdiction. This article examines how Ghana's courts enforce these agreements, highlighting that there is no consistent approach. This undermines legal certainty and predictability. The article argues that Ghanaian courts should prioritize upholding the parties' negotiated agreements, only limiting their choice in rare cases for justice. A lack of consistent enforcement could discourage foreign investment and cross-border trade. The paper advocates for a uniform judicial approach to forum selection clauses and recommends that Ghana accede to the Hague Convention to enhance legal certainty and attract foreign investors

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Introduction

In transnational trade or commercial transactions, a common phenomenon is that the parties, during the conclusion of the contract, designate in advance the competent court that should adjudicate any dispute that will arise from their contract. This is known as a jurisdiction agreement or jurisdiction clause. Having such a clause in the contract is beneficial as it brings parties certainty, predictability and reduces the risk of parallel litigation and its attendant problems, such as duplicative litigation, significant additional expense for litigants, and susceptibility to conflicting judgments (Herrup & Brand, 2022, p. 9; Garnett, 2013). These jurisdiction agreements are enforced because the courts want parties to a contract to "abide by their contracts, and therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall otherwise be determined" (*Racecourse Betting Control Board v. Secretary of Air*, 1944, Ch. 114, p. 126).

A jurisdiction agreement can be exclusive, non-exclusive, or asymmetrical (Keyes & Marshall, 2015, p. 345). An "exclusive jurisdiction agreement" is a clause that confers jurisdiction on the chosen or designated court (Sooksripaisarnkit & Garimella, 2020–2021, p. 4). In other words, the parties are to litigate only in the designated court. A non-exclusive jurisdiction clause (Keyes, 2020, p. 5), on the other hand, is a pact by the parties that "the nominated court may be seised with jurisdiction by whichever party is claimant but does not necessarily involve an immediate promise that no other court will be asked to exercise jurisdiction" (Briggs, 2008, para. 4.09). Concerning asymmetrical jurisdiction agreement (Marshall, 2023; Fentiman, 2015), one party is bound to sue in one designated forum, while the other party is at liberty to institute a case in any available forum (Collins & Harris, 2022). This is usually common in financial transactions (Petch, 2016, p. 313). For instance, an international trade agreement may allow the seller to sue wherever it can to enable it to secure payment from the buyer, while the buyer is required to bring proceedings in a single forum, for instance, where the seller is domiciled (*Continental Bank v. Aeakos Cia Naviera SA*, 1994).

The international instrument that governs jurisdiction agreement is the Hague Convention on Choice of Court Agreement. It aims to provide "certainty and ensures the effectiveness of exclusive choice of court agreements between parties to commercial transactions" (preamble) and to address the issue of *lis pendens* – concurrent or related proceedings in different countries (Beaumont, 2009, p.133). The convention only applies to exclusive jurisdiction agreements (Hartley & Dogauchi, 2013). It came into force on 1 October 2015. The current contracting parties to the convention are the European Union, Denmark, Mexico, Singapore, the United Kingdom, Montenegro, Ukraine, Moldova, Albania and, more recently, Switzerland and North Macedonia. Sadly, including Ghana, no African country has acceded to the convention (Oppong & Okoli, 2020; Neels, 2022). To ensure that most African countries become member states to the Hague Conference on Private International (HCCH) and subsequently become contracting states to Hague Conventions, Oppong and Okoli (2020) has recommended that the HCCH must enhance its current level of engagement with Africa. Recently, the Council on General Affairs and Policy (CGAP) of the HCCH have approved for the establishment of a Regional Office for Africa, to be hosted by Morocco in Rabat. It is submitted that this is a step in the right direction and has the potential to boost the participation of most African countries in HCCH activities and becoming contracting states to Hague Conventions including the Hague Choice of Court Convention.

Issues involving jurisdiction clause typically occur where a plaintiff institutes a case in a forum different from the court chosen in the jurisdiction agreement, and the defendant then raises an objection to the court's jurisdiction, or the defendant seeks a stay of proceedings for the case to be remitted to the court designated in the contract. This paper examines the enforcement of jurisdiction agreements under Ghana's private international law. It focuses primarily on the Ghanaian court's attitude towards the prorogation effects of jurisdiction agreements in international commercial cases. In other words, it seeks to investigate the approach of Ghana's judiciary towards enforcing jurisdiction clauses either in favour of Ghana's court or in favour of the chosen foreign court. Although there is a dearth of Ghanaian reported cases when it comes to the enforcement of foreign jurisdictional clauses, this paper analyses Ghanaian decided cases that have been decided on choice of court agreement from 1957 up to 2024.

This paper contends that the Ghanaian courts have not followed a uniform pattern when dealing with forum selection agreements. In each of the times that the Ghanaian court has been faced with such a matter, each of the courts has charted a different path, and this does not augur well for the core tenets of law, which are certainty and predictability. This paper suggests that when faced with jurisdiction agreements, Ghanaian courts must prioritize legal certainty, uphold the parties' freely negotiated contract, and limit the parties' choice only in rare cases in the interest of justice. A negative judicial approach to forum selection agreement has the potential of disincentivising foreign direct investment inflows or transnational commercial activities. Consequently, this article argues for a pragmatic, uniform approach in addressing forum selection clauses. A significance of this paper is that it offers guidance to Ghana's judiciary when faced with a foreign jurisdiction clause. This helps to achieve the tenets of certainty and predictability, which will boost the confidence of foreign investors when dealing with commercial partners from Ghana.

The paper thus concludes that as a solution, party autonomy must be upheld so that effect is given to the parties' express choice. However, precise and effective exceptions need to be made, which aim to uphold the sovereignty of Ghana and meet the ends of justice. Further, Ghana should accede to the Hague Choice of Court Convention as a matter of priority.

Methodology

This article attempts to analyse the approach of Ghana's judiciary when faced with a foreign choice of court clause that commercial parties insert in their international commercial contracts. The aim is to address this uncertain area of law and provide solutions to develop this area of Ghana's private international law effectively. To achieve this objective, the article discusses all international commercial cases that have come before the Ghanaian court that has a choice of forum clause. The article then analyses the approach of the Ghanaian court, as can be gleaned from the cases discussed. The article ends with conclusion reflections and recommendations aimed at serving as a guide to the Ghanaian courts when they are faced with a choice of forum clause. This will bring certainty and predictability and ensure that Ghana's judiciary's approach aligns with international best practices.

1. The jurisprudence of the Ghanaian courts in enforcing forum selection clause

Undoubtedly, the Ghanaian courts uphold the principle of party autonomy (Nweke et al., 2024; Obiri-Korang, 2021, p. 43), giving effect to contracts freely negotiated by parties. However, there are limitations to the application of the principle (Bouwers, 2021, p. 4). Consequently, the Ghanaian court will not enforce a contract if doing so will amount to contravening the public policy of Ghana or giving effect to an illegality (Coleman, 2020, p. 19). Pursuant to party autonomy, parties to a transnational commercial contract can decide to confer jurisdiction on a country's court. The parties' legitimate expectation is that such an agreement will be enforced. However, a cursory look at judgments from the Ghanaian court reveals that when it comes to enforcing jurisdiction agreements, the courts have not followed a more precise and definite path. In all the opportunities the courts have had to adjudicate a case involving a forum jurisdiction clause, they choose a new path. To demonstrate this, this section consists of a discussion of how Ghana's judiciary approaches the issue of enforcement of foreign jurisdiction clauses.

In *C.I.L.E.V. v. Chiavelli* (1967), the plaintiff instituted an action to claim an amount of money which is deemed to be the value of the plaintiffs' goods sold by the defendants and which the defendants had made use of. The defendants filed a preliminary objection challenging the Ghanaian court's authority to exercise jurisdiction. The defendants contended that the parties had decided that issues between them would be adjudicated by only the court in Modena, Italy.

The court ruled that the parties' expressed intention should be honored if they chose to submit their disputes exclusively to the judicial authority of a specific location. Further, since the place where the contract was negotiated and the language used is closely connected to the chosen forum, the foreign court is the most suitable court to exercise jurisdiction. Thus, the case was struck out so that the Italian court could exercise jurisdiction.

It can be seen from the ruling in this case that, as a default position, the court gave effect to the parties' exclusive jurisdiction clause stipulated. However, more intriguingly, the court reasoned that this decision is made stronger by the fact that in addition to the parties selecting the Italian court, the contract was negotiated in Italy; the contract was in the Italian language; the plaintiffs are an Italian company, and the defendant Chiavelli is both a shareholder and administrator of the plaintiff-company of the plaintiff company. In other words, if the connecting factors were not closely connected to the chosen forum, it would likely weaken the court's stance on upholding the choice by the parties.

Dissatisfied with the decision by the court, the plaintiffs applied for a review of the decision, and the review case was reported as *C.I.L.E.V. v. Chiavelli* (1968). The court affirmed the decision of the trial court that the court in Modena should exercise jurisdiction. However, this time round, the court added that when parties agree that disputes between them should be referred to a foreign tribunal, the court, if it believes the parties should present their case before that tribunal, should not dismiss the case but instead order a stay of proceedings.

Another case where the Ghanaian judiciary had the occasion to consider a jurisdictional clause is *C.I.L.E. v. Black Star Line and Another* (1967). The dispute stemmed from the defendants' alleged wrongful detention of goods in Ghana. The defendants opposed the Ghanaian court's involvement in resolving a dispute arising from bills of lading, where the parties had explicitly agreed that the contract would be governed by English law and that all disputes would be adjudicated by the courts in England.

The court ruled that when parties have agreed to refer disputes to a foreign tribunal, the court where an action is filed in violation of that agreement would, in principle, stay the proceedings. Concerning the question as to whether the choice of a foreign jurisdictional clause ousts the Ghanaian court's jurisdiction, the court answered in the negative that such a provision did not oust the courts' jurisdiction. However, in a twist of events, the court stated that whether or not effect was to be given to a forum jurisdiction clause depended on each case's particular circumstances. In other words, whether or not the courts would effectuate the parties' choice is determined on a case-to-case basis. The court distinguished this instant case from the earlier case of *C.I.L.E.V. v. Chiavelli*. In this instant case, the defendants are a Ghanaian company, the national shipping line of Ghana. The dispute before the court arose from the defendants' alleged wrongful confinement of goods in Ghana, goods which are said to be collecting vast rents for Ghana every day they continue to be confiscated. Also, the defendants raised the objection after the case started, and several adjournments and calls for some evidence had been made. Thus, according to Amissah J.A., "To ask the parties to seek their remedy now in England is in effect to tell the plaintiff to forgo his rights because, by the time that action is disposed of, the rent due on the goods may be far in excess of their value."

The court drew inspiration from the seminal English case of *The Fehmarn* (1958). It concluded that despite the foreign jurisdiction clause, the case's circumstance makes it feasible for the Ghanaian court to be seised with jurisdiction. The court bolstered this position by asserting that the English law chosen under the bill of lading was not significantly different from the law of Ghana on the point. This case shows a judicial heterodoxy from the general rule that parties' jurisdictional agreement needs to be effectuated.

Another case where the Ghanaian jurdiciary needed to consider the effect of a foreign jurisdiction clause is *Polimex (Polish Export & Import) Co Ltd v. B.B.C. Builders & Engineers Co Ltd*. (1968). The parties to the contract agreed that all disputes between them were to be settled by the Arbitration Court of the Polish Chamber of Foreign Trade in Warsaw. Pursuant to the contract, the plaintiffs shipped goods from Poland to Ghana. The plaintiff brought an action against the defendant in respect of part payments for the goods. Due to the jurisdictional agreement, the defendants objected to the competence of the Ghanaian courts to hear the dispute.

The court opined that "In determining the forum of international contracts preference should be given to the country which was most closely associated with the case." According to the court, Ghana was more closely connected with the dispute than Poland: the goods were shipped from Poland by the plaintiffs to the defendants in Ghana; and the defendants are a limited liability company carrying on business in Ghana; the arbitration agreement was entered into in Ghana. Also, the bulk of the defendants' evidence is available in Ghana, and the defendants made part payment to persons in Ghana. Thus, the Ghanaian court went ahead to exercise jurisdiction, largely, due to the case more closely connected to Ghana.

A new criterion was enunciated in the case of *Fan Milk Ltd v. State Shipping Corporation* (1971). The case involved a contract between the parties outlined in a bill of lading. The plaintiff instituted an action to claim damages because the goods arrived in a damaged condition. The defendant filed a preliminary objection disputing the jurisdiction of the Ghanaian court, arguing that the parties in the bill of lading had selected the English courts as the forum for resolving disputes. The plaintiff was a Ghanaian registered company, and the defendant was a Ghanaian statutory company. The vessel transporting the goods was a Ghanaian-registered ship, flying Ghana's flag, with the goods delivered to Ghana for use within the country.

The court espoused that reasonableness is typically the standard for determining whether a jurisdiction clause should be upheld, and what constitutes reasonable is a matter of fact for the court to decide. The court stated that, since the parties were Ghanaian, the goods were delivered in Ghana, and there was no significant difference between Ghanaian and English law on the issue, this was not an appropriate case to stay the proceedings. Thus, the Ghanaian court would exercise jurisdiction. The court further opined that it would be odd for a statutory corporation owned by the State and represented by the Attorney-General's representative to insist on having this case litigated in England, especially considering the associated cost in scarce foreign currency. Thus, for the first time, among other reasons, economic reason was cited as the reason not to enforce the parties' choice. The judiciary can be seen here as protecting the public purse as it plays its paternalistic role.

Another case where the Ghanaian had an opportunity to make a determination in a case involving a foreign choice of court agreement is the case of *Paper Air-Plane Trade and Kim Sang Kyu v. Defco Investment Ltd and Stephen Kora* (2010). The parties entered into an agreement to do gold business. Pursuant to the agreement, the defendants were to supply gold to the Plaintiff. The contract had a dispute resolution which stated as follows:

"This Agreement shall be governed by and interpreted in accordance with the law of the Republic of Korea and shall be subject to the jurisdiction of the Seoul Civil District Court in Seoul of the Republic of Korea".

The defendant supplied less than the quantity demand and this made the plaintiff commence action against the defendant.

The court held that "As a settled rule of law under common law, however, parties cannot oust the jurisdiction of the High Court to examine matters contained in a contract they have entered." Thus, despite the choice of court clause, the Ghanaian court treated the choice of foreign jurisdictional clause as an ouster clause and went on to exercise jurisdiction over the case.

The Ghanaian court had another opportunity to make a determination on the effect of a choice of court clause in *Pioneer Food Cannery & Ano v. Maersk Ghana Ltd & Ors* (2017). This case involved an agreement made between the plaintiffs and the 1st defendant. The 1st defendant agreed to receive and transport 294 containers of bulk frozen tuna from the 1st Plaintiff in Ghana to the 2nd Plaintiff in Seychelles in return for payment of each container.

The plaintiffs sued the defendants for the loss occasioned by the non-delivery and/or delivery in damaged condition of the 65 containers of bulk frozen tuna. At the trial, the defendant submitted that given the terms of the contract of carriage entered by the parties, the High Court of Ghana has no jurisdiction in this matter and that based on the exclusive jurisdiction clause in the contract of carriage, only the English High Court has jurisdiction in this matter. The plaintiffs' answer was that the parties to the contract cannot agree to oust the jurisdiction of the High Court of Ghana.

In arriving at a conclusion, the court opined that the laws of Ghana permit parties to agree to submit their disputes for settlement at any place of their choice. The court further posited that, "it cannot be reasonably argued that where parties have agreed to submit their disputes for determination at a particular place the said agreement oust the jurisdiction of the court and therefore becomes unenforceable … It is almost mandatory for the court to refer disputes for settlement in accordance with the agreement of the parties." The court made reference to the English case of *Balfour Beatty Construction Northern Ltd v. Modus Corovest (Backpool) Ltd* (2008), where the English court stated that "I take it as settled law that if the parties have agreed a particular method by which their disputes are to be resolved, then the Court has an inherent jurisdiction to stay proceedings brought in breach of that agreement." The Ghanaian court subsequently asserted that the agreement of the parties ought to be respected and enforced. Consequently, the court held that the matter ought to be heard in the English High Court of Justice in London. The case was therefore dismissed. This again showcases the inconsistency of the approach by the Ghanaian court. In the *Paper Air-Plane Trade* case above, the position of the court was that the Ghanaian court cannot be ousted by reason of a choice of court clause. However, in this case where the plaintiff more specifically raised the issue of the parties' contract ousting the jurisdiction of the court, it was rejected by the court. The court went on to uphold the terms of the contract.

Another case that cements the inconsistency is *Magna International Transport Ltd v. Ghana Telecom Comm* (2019). The parties entered into a written contract termed as the Vodafone Procurement Agreement (VPA). Under clause 21 of the VPA, they agreed that the VPA is governed by, and shall be construed in accordance with the laws of England and Wales. Further, each party irrevocably submits to the exclusive jurisdiction of the courts of England and Wales, over any claim, dispute, difference arising out or in connection with the VPA (including any non-contractual dispute, controversy or claim). The plaintiff instituted a case against the defendant for breach of contract and among other things a declaration that the return of the said vehicles (which was the subject matter of the contract) entitled the plaintiff to the payment of compensation for financial and other investment losses. The defendant entered conditional appearance on the ground that pursuant to clause 21 of the VPA, the parties had agreed to submit any dispute to the exclusive jurisdiction of the courts of England and Wales.

The court posited that to the extent that the 1992 Constitution of Ghana provides that the exercise of jurisdiction over any form of justice delivery is the preserve of the judiciary, the fundamental obligation to exercise designated jurisdiction over disputes cannot be taken away from the Judiciary except by the same Constitution. The court consequently held that the choice of forum and law clause in an agreement does not oust, or exclude the jurisdiction conferred on the court by the Constitution and thus, same cannot be excluded by a private treaty or agreement between the two parties. The court ahead to exercise jurisdiction over the case. This decision by the Court of Appeal again reinforces a disturbing underpinning theme of inconsistency. It can be seen from this decision that the court returned to its familiar weapon of "its jurisdiction cannot be ousted by the agreement of parties."

More recently, a case that shows the inconsistent approach of Ghana's judiciary when it comes to express jurisdictional clause is *Cruise People Ltd v. Mohammed Ismail Sharriff* (Suit No C2/59/23). The plaintiff instituted an action against the defendant for breach of contract. The contract had a forum jurisdictional clause which stated as follows:

"This Agreement will be governed and constructed in accordance with English Law, and any legal actions or proceedings arising hereunder will be brought exclusively in the English Courts".

Due to the above clause, the defendant contended that the court should not exercise jurisdiction. The court was of the view that although the jurisdiction of the Ghanaian court cannot be ousted, "it is a cardinal principle of law that the parties have the freedom to contract and are at liberty to choose their preferred governing law, forum for dispute resolution, among other crucial terms of their crucial relations."

According to the court, Ghana's legal position on the effect of the choice of foreign jurisdiction clause is that it needs to be determined "on a case-by-case basis, taking into consideration the whole facts and peculiar circumstances of each case." In pursuance of this legal position, the court considered all the connecting factors in this case: both parties were Ghanaians; the place of performance was Greece; payment was to be made in US dollars and into the bank account of the beneficiary in Scotland. According to Sammo J., "I believe the parties chose English courts as their preferred forum because it is geographically closer to Greece, the place of the performance of the contract, the applicant's business address, and the account the consideration is to be paid into is in England." Based on the above reasoning, the court upheld the choice of foreign jurisdiction clause.

It can be gleaned from this case that the court admitted that although its jurisdiction cannot be ousted by the agreement of the parties, yet, there is the need to uphold the choice of commercial parties. Also, despite the parties' choice of a foreign forum, whether or not the court will give effect to it depends on the case's circumstances. It is submitted that such an approach is not commendable due to its uncertainty and unpredictability. The decision in the *CILEV* cases has led Ghana's jurisprudence along a narrow stream and eventually into a sea of raging storms and boisterous waves.

2. Analysis of the approach of the Ghanaian court in the treatment of foreign jurisdictional clauses

The cases above epitomize the problem of uncertainty, inconsistency, and lack of uniform approach of the Ghanaian judiciary when it comes to foreign jurisdiction clauses. This section involves an analysis of the cases discussed above.

2.1. English law and Ghana law

A matter of concern in both the *CILEV* and the *Fan Milk* case is the presumption by the court that since the law of Ghana and English law on the matter was the same, the Ghanaian court is emboldened to disregard the express intention of the parties and then exercise jurisdiction over the case. This approach is worrying for several reasons. Although Ghana, due to its colonial heritage, inherited most of its law from England, there are instances where Ghana's body of law has remained stagnant. In contrast, the UK law has been amended or developed. An example is in the area of product liability and the recognition and enforcement of foreign judgment.

Further, a lingering question is: imagine another case where the applicable law to the contract was civil law or Chinese law; would the court's position have been the same? One may be speculative about the answer to this question. Thus, it is submitted that the Ghanaian courts should proceed with caution in following such a path in their judgment, especially mindful of the fact that the doctrine of *stare decisis* is followed in Ghana (*Republic v. High Court (Criminal Division 1); Ex parte Stephen Kwabena Opuni (Attorney-General Interested Party)*, Civil Motion No. J7/20/2021, unreported decision of the Supreme Court dated 26 October 2021).

2.2. Reasonableness test

Interestingly, it can be seen in the *Fan Milk* case that the court moves away from the broad criterion of "circumstances of the case" enunciated in the cases of *CILEV*, the *Black Star Line*, and the *Black Sharriff* to a more objective criterion of "reasonableness". However, it would have been helpful if the court had laid down grounds for satisfying the "reasonableness" criterion. The absence of any benchmark or canon to guide makes the "reasonableness" criterion subjective, giving each court the liberty to determine what is reasonable: what is reasonable differs from person to person. In the absence of a precise meaning, such a test or criterion provides a veil for judicial discretion, and it is therefore recommended that extra care needs to be taken when the courts are tempted to follow such criterion. In reemphasizing the importance of the reasonableness criterion, Oppong (2017, p. 45) opines that it is "essential to examine the elements that connect the contract with the competing forums." Also, the courts should consider "the relative bargaining positions of the parties at the time the contract was concluded" (Oppong & Agyebeng, 2021, p. 53). This assistance "closes" the door left wide open by the court. The question that naturally springs up with this approach is what weight should be placed on each connecting factor and which connecting factor(s) should be deemed more important. This makes the situation murkier.

2.3. Closest or substantial connection test

Apart from the *Fan Milk* case, where the "reasonableness" test was employed, in the *CILEV*, *Black Star Line*, *Polymex* and the *Black Sharriff* cases, the Ghanaian court adopted a "case-by-case" approach and, in so doing, applied the "closest connection" test.

In the *CILEV* cases, even after the court recognized that the parties had exclusively chosen the court in Modena, Italy, it went on to highlight the factors that made the court in Modena to be the more appropriate court, which means that if the connecting factors pointed elsewhere, the court would have decided otherwise. In the *Black Star line* and the *Polymex* case, the judge highlighted the factors that made it just for the court to be seised with jurisdiction in contravention of the jurisdiction clause. Further, in the *Black Sharriff* case, despite the presence of a foreign jurisdictional clause which should have made it easy for the court to decide whether or not to decline jurisdiction, the court analysed a host of connecting factors and made a decision to decline jurisdiction grounded on the geographical nexus between the chosen court and the place of the contract's performance. This shows the firm reliance of the Ghanaian court on the "close connection" test.

Ghana is not alone regarding adherence to the "connection requirement". Kenya is one of the countries that necessitates a link between the chosen forum and the dispute or the parties (*Universal Pharmacy (K) Limited v. Pacific International Lines (PTE) Limited and Another* (2015). Despite the employment of this close connection test by some countries, it is submitted that it erodes the autonomy given to parties. Further, it is also not supported by legal scholars (Coleman, 2020). Also, the connection requirement does not represent best international practices. For instance, China formally subscribed to the doctrine of substantial connection, which required that the chosen foreign court have a connection to the dispute (Tu, 2016, p. 132). However, with the Decision of the Standing Committee of the National People's Congress on Amending the Civil Procedure Law of the People's Republic of China, which officially came into effect on 1 January 2024, no connection with the chosen court is required (Civil Procedure Law (2023 amendment). In the Indian case of *Modi Entertainment Network and Another v. W.S.G. Cricket PTE Ltd* (2003) 4 SCC 341), the parties had inserted a jurisdictional clause indicating that disputes between them would be adjudicated by an English Court and with the principles of English law. However, in contravention of the jurisdictional clause, the appellant instituted an action in India. The Supreme Court of India held that "though the English Court has no nexus with the parties or the subject-matter and is not the natural forum. But then the jurisdiction clause indicates that the intention of the parties is to have the disputes resolved in accordance with the principles of English law by an English Court. Unless good and sufficient reasons are shown by the appellants, the intention of the parties as evidenced by their contract must be given effect to."

Thus, the fact that the English court had no connection with the dispute, or the parties did not mean that the Indian Supreme Court should interfere with the forum the parties selected.

The ditching away of the connection requirement aligns with the increasing delocalisation of commercial transactions. It is also submitted that parties may choose an unconnected forum due to convenience, its neutrality, or because the court system of such country is well developed, with expert judges, and they are likely not to experience delays in the court proceedings. It is contended that the closest or substantial connection test should only be invoked in the absence of an express choice of forum by the parties involved in an international commercial dispute.

Although party autonomy is not absolute, the grounds upon which the contracting parties' choice of a foreign court may be refused include if the choice is against the public policy of the forum or violates an overriding mandatory principle of the forum (Laval, 2026, p. 37), or ousts these courts of their jurisdiction in a matter that properly belong to them or the choice was borne out of a fraudulent motive of the parties. However, in the cases discussed above, the courts did not indicate which public policy rule is being violated or which overriding principle will be violated if the court upholds the parties' choice of a foreign forum. This shows that the grounds for disregarding the parties' express intention are feeble and unjustifiable.

2.4. Changing the posts?

The judgment in the *Black Sharriff* case is directly opposite to the *Fan Milk* case. In the *Fan Milk* case, when the court applied the reasonableness test, it reasoned that one of the reasons why the court declined to uphold the jurisdiction clause was that both parties were Ghanaians. In ordering for the case to proceed to trial, the court added that since Ghana law and English law were the same, it would exercise jurisdiction. This was the same reasoning as the *Black Star Line* case.

However, in the *Black Sharriff* case, although the parties were Ghanaians and had chosen English law to govern the contract, which is not substantially distinct from Ghana's law of contract, the court declined jurisdiction. This shows that the case-by-case criterion itself does not only lead to uncertainty and unpredictability, but it also produces inconsistent decisions.

International commercial parties have special needs, including the requirement that "the decisions of the courts on commercial issues to be predictable so that they know where they stand, even possibly at the cost of abstract justice" (Fox et al, 2020, p. 9).

The case analysis above clearly shows that the Ghanaian court has not met this desire of commercial parties. It also highlights the absence of well-defined guidelines in Ghana's international commercial law concerning enforcing exclusive choice of court agreements. Thus, a need for a uniform approach by the Ghanaian courts. In the face of all these inconsistencies, it is recommended that the Ghanaian court lays down clear-cut principles to aid in determining cases which involves exclusive choice of court agreement. It is worthy of note that studies on this subject in Nigeria, Kenya, South Africa and Tanzania have also shown a similar trend of unpredictability and inconsistency in the approach of the courts when it comes to the enforcement of foreign jurisdiction clauses (Coleman, 2020; Yekini, 2023). Most often, the courts in these countries characterize a choice of foreign jurisdiction clause as an attempt to oust the jurisdiction of the local court, and this often results in "unnecessary judicial hostility" (Oppong, 2007). For instance, Yekini (2023) reports a 40 percent (%) success rate for Nigeria when it comes to enforcement of foreign jurisdiction clause. This percentage is below average and shows that most times, foreign jurisdiction clauses are not upheld and enforced. This paints a very stark picture for all these Commonwealth countries and the need for a paradigm shift in the approach of the judiciary in these countries.

3. Concluding reflections and recommendations

3.1. Judicial efficiency and economic growth

Ghana is one of the first two countries to ratify the African Continental Free Trade Agreement (AfCFTA). This continental agreement is, *inter alia*, aimed at increasing intra-African trade, facilitating cross-border investment, and attracting foreign direct investment. Ghana hosts the Secretariat of AfCTA. It is expected that Ghana will leverage this opportunity to become the new commercial capital of Africa, a regional trade hub, and an attractive investment destination. A significant booster of trade and investment is "a competent and business-minded judiciary that enforces contracts" and is effective and efficient in dispute resolution (Yekini, 2023). This is corroborated by a recent report of the World Bank that observed that:

"Economies with a more efficient judiciary, in which courts can effectively enforce contractual obligations, have more developed credit markets and a higher level of development overall…A study examining court efficiency in different provinces in Argentina and Brazil found that firms located in provinces with more effective courts have greater access to credit. Another study focusing on Mexico found that states with better court systems have larger and more efficient firms. In India, a study found that firms in industries that are contract-intensive, tend to locate in regions with good contract enforcement. Effective courts reduce the risks faced by firms and increase their willingness to invest. Firms in Brazil, Peru, and the Philippines report that they would be willing to invest more if they had greater confidence in the courts" (World Bank, 2019; Kapopoulos & Rizos, 2024, p.101; Kirovska et al., 2022, p. 21; Comi et al., 2021).

This shows a substantial nexus between judicial efficiency and economic growth. In the face of such evidence, it is imperative that Ghana's judiciary needs to be efficient in its adjudication of cases involving jurisdiction agreements. A uniform approach by the courts that breeds legal certainty, and predictability is a sure way to meet the needs of foreign investors. This will help to attract the much-needed foreign direct investment needed by Ghana. It is often said that business transactions are enhanced by legal certainty. The pronouncement of Lord Mansfield in *Vallejo v. Wheeler* (1774) is instructive, stating that "In all mercantile transactions, the great object should be certainty. And therefore, it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know what ground to go upon" (*Vallejo v. Wheeler*, 1774, p. 153). This underscores the importance of a uniform approach. Moreover, the certainty of the judicial approach will likely lure commercial partners into choosing Ghana as the designated forum, either as a neutral forum or as the preferred forum if one of the parties is a Ghanaian.

3.2. Enhancing party autonomy

Party autonomy allows commercial parties to enter into contract and determine the contract's terms, including the forum to adjudicate disputes between the parties. Regarding party autonomy's significance in international commercial transactions, Juenger remarks that "Party autonomy not only effectuates the fundamental policy underlying the law of contracts, that is, the freedom to order one's relations with others on mutually acceptable terms, but it also promotes the traditional values of certainty, predictability, and uniformity of result…" (Juenger, 1994–1995, p. 58).

It is thus recommended that as a default position, owing to party autonomy, legal certainty, and predictability, the Ghanaian court should uphold jurisdiction agreements. The parties' choice needs to be respected and enforced, whether it is a choice of a foreign court that is connected to the dispute or not. However, it also needs to be noted that jurisdiction agreements should not be enforced hook, line, and sink. It is generally accepted within the corridors of private international law that party autonomy has limitations (Fagbemi, 2015, p. 239; Schwenzer et al., 2012). Consequently, in minimal circumstances, these jurisdiction agreements should be jettisoned in the interest of justice.

Firstly, where the country has a policy or significant interest in safeguarding some parties or agreements, and this policy or interest is provided for in mandatory legislation (Yekini, 2023, p. 74) or by judicial decision. In such an instance, the Ghanaian court can disregard the choice of a foreign court.

Secondly, in situations where a significant circumstance arises that neither party could have reasonably expected when the contract was created (Yekini, 2023, p. 74). When a contract is made, both parties agree to certain terms. However, if something unexpected happens, it's not sound to force one party to continue with the agreement (Fentiman, 2018, p. 296). Thus, the Ghanaian court can exercise jurisdiction under that circumstance despite choosing the foreign jurisdictional clause.

A third instance where it is recommended that the Ghanaian court should not enforce the choice of foreign jurisdiction clause is where the enforcement would lead to unconscionable results. For example, in a scenario where both the defendant and plaintiff are habitually resident or domiciled in Ghana, and they designate the courts of Belgium in an exclusive jurisdiction clause, and the claim or anticipated claim is small when compared to the amount the parties have to spend to litigate the case in England, it will be unreasonable on the parts of the Ghanaian court to enforce such a foreign jurisdictional clause.

3.3. Accession to the Hague Choice of Court Convention

It is recommended that Ghana should accede to the Hague Choice of Court Convention. This would bring clarity and certainty to how the Ghanaian court will approach an exclusive choice of court clause. Further, most of the contracting parties to the convention, such as the United Kingdom, and the European Union are Ghana's trade partners. Consequently, when commercial parties of such countries enter into a transaction with parties from Ghana, and an exclusive choice of court clause is inserted, they are confident that the Ghanaian court will enforce the jurisdictional clause of the parties.

This represents a pragmatic response to the enforcement of the jurisdiction agreement. This ensures an effective administration of justice. It also bodes well for Ghana in its quest to attract FDI and boost international trade and commerce, and it also makes it a desirable forum for commercial parties.

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Окорлі С. Підхід судової влади Гани до забезпечення виконання угод про вибір місця розгляду справи у міжнародних комерційних правочинах. – Стаття.

У міжнародних комерційних операціях сторони часто включають до своїх договорів пункт про юрисдикцію, визначаючи який суд має вирішувати спори між ними. Така практика забезпечує визначеність, передбачуваність та зменшує ризики паралельних судових розглядів, суперечливих рішень та додаткових витрат. Угоди про юрисдикцію можуть бути виключними, невиключними або асиметричними. Гаазька конвенція про угоди щодо вибору суду є міжнародною угодою, якою урегульовано ці питання. Її спрямовано на забезпечення ефективності угод про виключну юрисдикцію та управління паралельними провадженнями у різних країнах. Низка країн приєдналися до цієї конвенції, але жодна з африканських, включаючи Гану, не зробила цього. У Гані проблеми з пунктами договорів про юрисдикцію зазвичай виникають коли позов подається до суду, відмінного від того, який визначено у договорі, що призводить до заперечень та прохань про передачу справи до вказаної юрисдикції. У цій статті розглядається практика судів Гани щодо забезпечення виконання таких угод із наголосом на відсутності послідовного та усталеного підходу, що порушує принципи правової визначеності та передбачуваності. У статті стверджується, що суди Гани мають надавати пріоритет дотриманню положень, погоджених сторонами угод, обмежуючи їхній вибір лише у деяких випадках. Відсутність послідовного застосування може перешкоджати іноземним інвестиціям та транскордонній торгівлі. У дослідженні підтримано позицію щодо одноманітного підходу судів до положень про вибір місця розгляду справи та рекомендовано Гані приєднатися до Гаазької конвенції для підвищення правової визначеності і залучення іноземних інвесторів.

Ключові слова: міжнародні комерційні договори, угода про юрисдикцію, визначеність, передбачуваність, Гаазька конвенція про вибір суду, Гана, ефективність судової влади.