

GLI GLOBAL
LEGAL
INSIGHTS

Energy

2021

Ninth Edition

Contributing Editors: **Michael Burns & Julia Derrick**

glg global legal group

CONTENTS

Preface	Michael Burns & Julia Derrick, <i>Ashurst LLP</i>	
General chapter	<i>Global Overview of the Energy Legal Market</i> Andreas Gunst, Natasha Luther-Jones & Kenneth Wallace-Mueller, <i>DLA Piper</i>	1
Country chapters		
Austria	Dr. Thomas Starlinger & Mag. Andrea Jana Gruber, <i>Schima Mayer Starlinger Attorneys at Law</i>	10
Bangladesh	Karishma Jahan, <i>The Legal Circle</i>	17
Canada	Sharon Wong & Christine Milliken, <i>Blake, Cassels & Graydon LLP</i>	27
China	Jihong Wang, Chenxi Li & Dingduo Chen, <i>Zhong Lun Law Firm</i>	36
Finland	Andrew Cotton, Santeri Järvelä & Laura Leino, <i>HPP Attorneys Ltd</i>	49
France	Jocelyn Duval, Chloé Dahéron & Noémie Lenormand, <i>Kalliopé</i>	58
Germany	Thoralf Herbold & Dr. Ilka Mainz, <i>GÖRG Partnerschaft von Rechtsanwälten mbB</i>	67
Ghana	NanaAma Botchway & Elorm Zormelo, <i>N. Dowuona & Company</i>	78
Greece	Yannis Seiradakis & Eleni Stazilova, <i>Bernitsas Law Firm</i>	85
Kazakhstan	Shaimerden Chikanayev & Lola Abdukhalykova, <i>GRATA International</i>	100
Philippines	Patricia A. O. Bunye, <i>Cruz Marcelo & Tenefrancia</i>	116
Russia	Rustam Kurmaev & Vasily Malinin, <i>Rustam Kurmaev & Partners</i>	124
South Africa	Lizel Oberholzer & Kelsey Pailman, <i>Norton Rose Fulbright South Africa Inc</i>	134
United Kingdom	Julia Derrick, Antony Skinner & Justyna Bremen, <i>Ashurst LLP</i>	143
USA	Robert A. James, Stella Pulman & Alex Peyton, <i>Pillsbury Winthrop Shaw Pittman LLP</i>	159

Ghana

NanaAma Botchway & Elorm Zormelo
N. Dowuona & Company

Overview of the current energy mix, and the place in the market of different energy sources

Ghana's energy mix consists of a combination of hydroelectric, thermal (predominantly fueled by natural gas and crude oil) and solar energy sources. Thermal and hydroelectric sources represent over 99% of the generation capacity in the country. The total power generated for 2019 was 17,886.84 Gigawatt hours (GWh), with 7,251.63 GWh (40.54 %) from hydro sources and 10, 507.80 GWh (58.74 %) from thermal sources.

Hydroelectricity is generated from three power plants: the Akosombo and Kpong Generation Stations, operated by the state-owned Volta River Authority ("VRA"); and the Bui Generation Station operated by the state-owned Bui Power Authority. Thermal power is generated from a combination of private and public sector outputs operated by VRA and a variety of Independent Power Producers ("IPPs"). Three state-owned and four privately owned plants generate energy from the eastern enclave of the National Interconnected Transmission System ("national grid") while two state-owned and three privately owned plants generate power from the western enclave of the national grid.

Solar energy generation accounts for less than 1% of total power generation in Ghana. The country is, however, taking steps to diversify and increase its reliance on solar and wind energy. The Government has committed to increasing the proportion of non-hydro renewable energy in the national energy generation mix to 1363.63 Megawatts (MW) and to accumulating carbon savings of about 11 million tonnes of CO₂ by 2030 through the implementation of a Renewable Energy Masterplan, which will rely mainly on private sector investment.

Generation capacity in Ghana significantly outweighed demand in 2019 as a result of emergency measures taken between 2014 and 2017 to address major energy shortfalls that occurred over the period. By July 2019, Ghana had an installed power generation capacity of 5,083 MW, with a dependable capacity of 4,593 MW and a peak demand of about 2,700 MW.

Changes in the energy situation in the last 12 months which are likely to have an impact on future direction or policy

PURC increase of electricity tariffs

Ghana's independent utility regulator, the Public Utilities Regulatory Commission ("PURC") announced an upward adjustment in electricity tariffs of 5.94% in the fourth quarter of 2019. An increase in the price of crude oil and gas was one of several factors cited as contributing to the Automatic Adjustment Formula, a tariff mechanism formulated by the PURC to reflect the real cost of electricity. The slump in crude oil prices in the first quarter of 2020, however, did not result in a subsequent decrease in the country's electricity tariff for the second quarter

of the year. However, the PURC has recently announced that the electricity tariff will remain unchanged for the third quarter of 2020.

Revision of national energy policy

The Minister of Energy announced in August 2019 that the Government and key stakeholders began revising the national energy policy. The revised plan is expected to take into account the technologies capable of more efficiently exploiting Ghana's energy resources, as well as promoting fairness, transparency and predictability in the nation's upstream petroleum space.

Developments in Government policy/strategy/approach

Energy Sector Reform Programme

Over the past year, the Government has sought to reduce the considerable energy sector debt. As of January 2019, net sector arrears of the energy sector totalled in excess of USD\$2.74 billion. The Government announced the Energy Sector Recovery Program ("ESRP") in May 2019.

The ESRP will be implemented in three phases. The first phase actions include the setting up of an Energy Sector Recovery Task Force to reduce shortfalls in energy sector revenue caused by inefficient management. The second phase aims to resolve the difficulties posed by the take or pay generation capacity arrangements and the oversupply of gas by matching supply and demand, completing gas infrastructure and tackling pricing and policy actions to reduce gas tariffs in the power sector. The third phase, stated to take place before 2023, will be developed by the Energy Sector Recovery Task Force over the next 18 months after the launch of the programme.

As part of the ESRP, the Government stopped all payments for the supply of energy undertaken and entered into renegotiations with the IPPs and gas suppliers to convert the agreements to take pay agreements. In June 2019, E.S.L.A. PLC, a special purpose vehicle (SPV) established with the purpose of resolving energy sector debts, announced the successful issuance of a 10-year, Ghana Cedi bond to mature in 2029. In March 2020, E.S.L.A. PLC announced the re-opening of a 12-year Ghana Cedi bond to mature in December 2031. Proceeds from the bonds are to be used to settle part of the outstanding debts and other obligations due to suppliers and other creditors within the energy sector.

The Government also imposed a moratorium on the signing of new PPAs and gas supply arrangements and suspended all ongoing negotiations on such agreements until further notice. The Government concurrently announced that the Government would no longer entertain or accept unsolicited proposals in relation to the supply of power or gas. A standardised sustainable framework for all future PPA and gas supply agreements is being developed for all new entrants in the energy sector.

Renewable Energy Master Plan

The Renewable Energy Master Plan ("REMP") was launched in 2019. It aims to achieve the following by 2030:

- Increase the proportion of renewable energy in the national energy generation mix from 42.5 MW to 1363.63 MW (with grid connected systems totaling 1094.63 MW).
- Reduce the dependence on biomass as the main fuel for thermal energy applications.
- Provide renewable energy base decentralised electrification options for 1,000 off-grid communities.
- Promote local content and local participation in the renewable energy industry.

Developments in legislation or regulation

Energy Sector Levies (Amendment) Act 2019 (Act 997)

The Government increased the energy sector levies. The Energy Sector Levies (Amendment), 2019 (Act 997) increases the rates applicable on the power generation and infrastructure support components of the Energy Debt Recovery Levy, as well as the rates of the Road Fund Levy and the Price Stabilization and Recovery Levy on petroleum products. Revenue from these increased levies is intended to mitigate risks of poor revenue mobilisation in the energy sector and enable the Government to make payments to IPPs which were not originally budgeted for in 2019.

Health, Safety, Security and Environment (“HSSE”) Manual for energy sector organisations

The Ministry of Energy, in consultation with other stakeholder institutions, has developed and launched the HSSE Manual to guide energy sector organisations in developing their HSSE systems. The HSSE Manual also aims to strengthen the safety measures in the sector particularly in the distribution and retail of Liquefied Petroleum Gas (“LPG”) and refined petroleum products in the country in order to reduce the adverse effects of energy sector activities on people, property and the environment.

Energy Commission Notice on implementation of the Energy Commission (Efficiency Standards and Labelling) (Light Emitting Diode and Self-Ballasted Fluorescent Lamps) Regulations, 2017 (L.I. 2353)

In September 2019, the Energy Commission notified importers of LED lamps of its intention to strictly apply the requirement that they submit a “Performance Test Report” to the Energy Commission for approval before importing their goods. This move is aimed at ensuring that the LED lamps being imported into the country meet the required energy efficiency, safety and environmental standards in line with Ghana’s energy efficiency policy, the National Energy Efficiency Action Plan.

Judicial decisions, court judgments, results of public enquiries

Group Five Power International (Pty) Limited v Cenpower Generation Company Limited and 2 Ors (2008/41068) [2018] ZAGPJHC 663

The High Court of South Africa gave its ruling on November 16, 2018, dismissing an application by Group Five, to interdict the payment of a retention bond and performance bond to Cenpower, after Group Five defaulted in its performance as the main contractor in the construction of the Kpone Independent Power Plant in Ghana.

Group Five, a South African construction engineering company, was hired by the Ghanaian energy company, Cenpower to construct a 340 MW IPP at Kpone in the Greater Accra Region of Ghana. HSBC Bank PLC – Johannesburg Branch and Standard Chartered Bank, the second and third respondents, issued a retention bond and a performance bond on behalf of Cenpower as security for the construction of the project. The contract completion date was 1 September 2017 and was expected to begin operations in 2018. On allegation that Group Five had defaulted by delaying the completion of the project, Cenpower terminated the contract and called on the bonds on 1 November 2018 amounting to USD\$62.7 million.

Group Five challenged the call on the bonds and instituted an action against Cenpower at the High Court in South Africa for an order to prevent Cenpower from calling on the bonds. Group Five alleged that the delay was caused by Cenpower’s failure to supply it with natural gas, one of three fuels it needed to test the power plant in order to complete the project. It further alleged that Cenpower instead supplied it with contaminated Light Crude Oil (“LCO”)

one of the other fuels to be used in the testing and that resulted in further delays. It claimed that, as a result of the delay caused by these events, it was entitled to an extension of time under the contract to complete the project. It argued that Cenpower acted fraudulently by calling on the bonds since it caused the delay. Cenpower, on the other hand, averred that the absence of the natural gas could not result in a delay and was irrelevant to the completion of the project since Group Five could have proceeded to use two other fuels and it was not responsible for the contaminated fuel.

The court held that Cenpower was entitled to call on the bonds. It stated that the contract created between Cenpower and the guarantors had no relation or effect on the relationship between Cenpower and Group Five. When the bonds were called on, the guarantors were obliged to pay in accordance with the terms of the guarantee. The underlying disputes between Group Five and Cenpower, in the absence of fraud, did not concern the guarantors. It added that the underlying dispute about the extension of time was to be resolved in accordance with the dispute resolution mechanism agreed by the parties in the contract which was arbitration. It further stated that, even if the final decision at arbitration was contrary to Cenpower's claim on the bonds, it still did not affect the duty on the banks to pay the bonds once they were called on.

The Kpone Independent Power Plant has been completed and commissioned and contributed to the expansion in generation capacity from 4,743 MW as at January 2019 to 5,083 MW in November 2019. It achieved Commercial Operation Date ("COD") in June 2019.

Although this judgment is not binding on Ghanaian courts, it provides some guidance on the energy sector on the circumstances under which performance and retention bonds may be called on in an energy construction project. This may guide contractual parties to ensure that they abide by their contractual obligations in order to avoid the potentially grave consequences of a default.

Termination of PDS concession

In July of 2019, the 20-year concession between the Electricity Company of Ghana, the main state-owned electricity distribution company, and the Power Distribution Services Ghana Limited ("PDS"), a private concessionaire, was suspended. PDS was expected to improve revenue collection, cut costs and maintain stable power. The Government alleged that there were fundamental and material breaches of the concession and terminated the concession in October 2019. Following the termination of the concession agreement, the USD\$190 million funds granted to Ghana by MCC, subject to the execution of the concession agreement, was withdrawn. The concession was part of the ECG "Financial and Operational Turnaround Project" ("FOTP"), one of six projects under a five-year economic development programme, entered into with the Millennium Challenge Corporation ("MCC") aimed at making improvements to the infrastructure of the southern distribution network, increasing reliability and power access to key markets and advancing energy efficiency programmes. The termination of the concession and the resulting impact on the MCC funds earmarked for improvements at ECG could adversely impact the planned improvements to ECG's performance and therefore the reliable supply of electricity in most of the country.

Major events or developments

Local Content and Local Participation Committee inaugurated

On May 2, 2019, the Minister for Energy inaugurated the "Local Content and Local Participation Committee" in line with the Energy Commission (Local Content and Local Participation) (Electricity Supply Industry) Regulations 2017 (L.I. 2354). The Committee

is responsible for overseeing the development and measurable growth of local content and local participation in the electricity supply industry and monitoring and coordinating local content and local participation of all persons and entities engaged in activities in the energy sector industry in accordance with L.I. 2354.

The Local Content Secretariat of the Energy Commission also conducted a baseline study to establish a clear picture of the existing suppliers, manufacturers and service providers in the electricity supply industry. To this end, 60 electricity service providers, equipment and appliance manufacturing companies, and 12 electrical engineering departments of some universities, banks, law firms and research institutions were surveyed. It is assumed that these results will aid the newly formed committee in implementing the provisions of L.I. 2354.

Coronavirus Electricity Relief Package for Ghanaian consumers

The Government of Ghana as part of the efforts to ease the economic burden on Ghanaians caused by COVID-19, announced a relief package for all electricity consumers in the country in April 2020. As part of the relief programme, the Government fully subsidised electricity bills for “lifeline consumers”, i.e. consumers who consume 0 to 50 kilowatt-hours per month. The lifeline categorisation has been defined by the Public Utilities Regulatory Commission to ensure access to electricity by low income consumers of electricity. Non-lifeline consumers enjoyed a 50% discount on electricity. The relief package was for the months of April, May and June 2020 and cost the Government approximately GHS1billion to support consumers of ECG, VRA and NEDCo. In July 2020, the Government announced as part of its mid-year fiscal policy review that it would fully subsidise electricity bills for lifeline consumers for the remainder of 2020.

Bui Power Authority completes first micro hydropower project in Volta Region

The Ministry of Energy entered into a Memorandum of Understanding in 2005 with the United Nations Industrial Development Organization (“UNIDO”) and the International Network on Small Hydro Power of China (“IN-SHP”) to undertake studies to develop the existing small hydro power potential in the country. The Tsatsadu Waterfalls, located in the Volta Region of the country, was selected to be developed as a pilot project. UNIDO subsequently donated a 30 kW generator and Turbo Turbine with associated electromechanical equipment for the project and BPA was appointed in 2016 by the Energy Ministry to develop the project on its behalf.

Pursuant to this, the first micro-hydropower plant of its kind in Ghana, known as the Tsatsadu Generating Station (“TGS”) has been commissioned after its completion in October 2019. The project is estimated to have cost USD\$400,000, which was largely funded by the Bui Power Authority and supported by the UNDP/Energy Commission Renewable Energy Technology Transfer (“RETT”). Additionally, the construction of the project was undertaken by local engineers who gained expertise from the development of the 400 kW Bui Generation Station. It is reported that a reforestation programme was implemented at the project site to restore the lost vegetation and protect the banks of the river against erosion. The development of the hydropower plant in Tsatsadu adds to the various generating plants across the country and is also in line with the Ministry of Energy’s Renewable Energy Master Plan towards achieving Sustainable Development Goals which aims at ensuring access to affordable, reliable and modern energy for all by 2030.

Proposals for changes in laws or regulations

Proposed Gas Act

The primary objective of the Gas Master Plan, developed in June 2016 by the erstwhile

Ministry of Petroleum, is to develop Ghana's natural gas resources and develop infrastructure that will contribute to the security of energy supply. In July 2019, the Government indicated that it will take steps to convert the Gas Master Plan into statutory law by enacting the Gas Act. After a review of the Gas Master Plan, the Ministry of Energy has developed terms of reference for the development of the Gas Act.

**Nana Ama Botchway****Tel: +233 30 263 2043 / Email: nanaama@dowuonalaw.com**

Nana Ama is the founder of N. Dowuona & Company. She is ranked as a leading lawyer in *The Legal 500*, *Chambers and Partners*, and the *International Financial Law Review*. She has advised on numerous significant investments and divestments in Ghana and in other parts of Africa including the USD\$ 200 million sale of Fan Milk International, the acquisition, development and divestment of the Movenpick Ambassador Hotel and Leapfrog Strategic African Investment's USD\$180 million investment in the Enterprise Insurance Group. Nana Ama is a graduate of Princeton University's Woodrow Wilson School Undergraduate Program, New York University's Stern School of Business and Columbia University School of Law.

**Elorm Zormelo****Tel: +233 30 263 2043 / Email: elorm@dowuonalaw.com**

Elorm is an associate at N. Dowuona & Company. His areas of focus are energy, corporate and commercial, and dispute resolution. His recent work with the firm includes advising a multinational energy company on renewable energy regulation and investment, advising on the proposed entry of a major oil and gas company into the Ghanaian upstream petroleum industry, and advising on the sale and acquisition of a shareholder of a publicly listed banking institution. He also advised on the establishment of joint ventures between foreign investors and local participants in the upstream petroleum industry to ensure compliance with local participation requirement. Elorm obtained his LL.B. from the University of Aberdeen and a professional certificate from the Ghana School of Law. He is admitted to practise law in Ghana.

N. Dowuona & Company

Solis House GL-056-7567, Adembra road, East Cantonments, Accra, Ghana
Tel: +233 20 201 4464 / +233 24 431 9936 / URL: www.dowuonalaw.com

www.globallegalinsights.com

Other titles in the **Global Legal Insights** series include:

AI, Machine Learning & Big Data

Banking Regulation

Blockchain & Cryptocurrency

Bribery & Corruption

Cartels

Corporate Tax

Employment & Labour Law

Fintech

Fund Finance

Initial Public Offerings

International Arbitration

Litigation & Dispute Resolution

Merger Control

Mergers & Acquisitions

Pricing & Reimbursement