

# International Comparative Legal Guides



## Project Finance 2021

A practical cross-border insight into project finance

10<sup>th</sup> Edition

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# Ghana



**NanaAma Botchway**



**Achiaa Akobour Debrah**

**N. Dowuona & Company**

## 1 Overview

### 1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

The Ghanaian project finance market continues to record a number of projects, mainly in the power, maritime and rail sectors. These projects have involved both private and public actors, and there is a growing reliance on public-private partnership mechanisms for delivering long-term infrastructure projects. Large projects are usually financed by external sources such as multilateral development banks, international development finance institutions, private equity funds, international commercial banks and export credit agencies. Recently, some local banks have demonstrated their capability to participate in financings for large-scale projects. Due to the non-availability of government guarantees, the use of alternative credit enhancement facilities, such as partial risk guarantees, is also common.

### 1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

Project Name/Description	Project Cost
<b>Tema Port Expansion Project</b> This project is being undertaken by Meridian Port Services Ltd (MPS), a joint venture between the Ghana Ports and Harbours Authority (GPHA) and Meridian Port Holdings (which has Bolloré Transport & Logistics and APM Terminals as the two main shareholders). The project, which began in 2016, is currently in its second phase and, upon completion, will treble the Tema Port's current traffic of about one million twenty-foot equivalent units (TEUs).	\$1.5 billion
<b>Takoradi Port Expansion Project</b> This project is being executed by Atlantic Terminal Services Ltd, a joint venture between the Ghana Ports and Harbours Authority (GPHA), Ibistek Ltd (an indigenous Ghanaian company) and the African Finance Corporation. Construction of the multipurpose on-dock container terminal began in December 2019 and, when completed, will scale up the cargo holding space of the Takoradi Port from the current 55,000 TEUs per year to one million TEUs per year.	\$475 million

Project Name/Description	Project Cost
<b>Amandi Energy Independent Power Project</b> This is a 192 MW combined cycle, dual-fuel power project developed in Aboadze, Ghana, as part of the US Power Africa Initiative, by Endeavor Energy (an Africa-focused independent power company), Aldwych International, (a subsidiary of Harith General Partners), Pan African Infrastructure Development Fund 2 (PAIDF2, managed by Harith General Partners) and ARM-Harith Infrastructure Fund. It became operational in 2019.	\$550 million
<b>Cenpower Kpone Independent Power Project</b> Another US Power Africa Initiative, this 350MW combined cycle gas turbine (CCGT) power project was jointly developed by Cenpower Holdings, Africa Finance Corporation, Sumitomo Corporation of Japan, African Infrastructure Investment Fund II and FMO, the Netherlands Development Finance Company. It became operational in 2019.	\$900 million
<b>Eastern Railway Line Project</b> This project involves the construction of a 340km standard-gauge railway line, running from the Tema Port to Kumasi. It is being developed by the Ghana European Railway Consortium on a Build, Operate and Transfer (BOT) basis.	\$2.2 billion

## 2 Security

### 2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

Borrowers are permitted to give asset security by means of a general security agreement. There is no requirement for a separate agreement to be executed for each type of asset used as security; however, each security is assessable to stamp duty separately, as though each were set out in a separate agreement. Security is normally created by written agreement, containing charging clauses. After execution, the agreement must be stamped and, depending on the type of asset and whether the borrower is a company, it may require registration with the Collateral Registry, Lands Commission and/or the Registrar of Companies in order to be enforceable. Under the Borrowers and Lenders Act, 2008 (Act 773), charges created by borrowers to secure credit facilities

granted by lenders must be registered with the Collateral Registry within 28 days of the creation of the charge. If the security affects land or a company's assets, it must additionally be registered with the Lands Commission and/or the Registrar of Companies. Under the Companies Act, 2019 (Act 992), any security created over a company's assets shall be void unless registered with the Registrar of Companies within 45 days of the creation of the charge; however, an extension of time to register a charge may be granted by a court. Similarly, any security affecting land, unless registered at the Lands Commission, is ineffective in creating any interest in the charge in respect of the land.

**2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?**

Security can be taken over real property, plant, machinery and equipment. This is typically done through the creation of a fixed charge over movable assets or a mortgage over real property. Under Ghanaian law, a mortgage only operates as a fixed charge on real property and does not automatically convey ownership or possession in the asset to the mortgagee. A mortgage is required to be in writing, unless excluded from such requirement by operation of law or by a specific statute. Mortgages and fixed charges are subject to the perfection requirements set out above.

**2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?**

Security may be taken over receivables, with the chargor being permitted to freely collect the receivables in the absence of a default. Security over receivables are usually created through an assignment of the receivables to the lender. The security agreement must be stamped, and if the assignor is a company, it must be registered with the Registrar of Companies. Debtors need not be notified of the creation of the security in order for it to be valid; however, an assignment of a debt shall not prejudice a debtor who has not been notified of it in writing. Further, where a debtor is not notified of the assignment of a debt and the same debt is subsequently assigned to another person, the later assignee shall take priority over the earlier assignee.

**2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?**

Cash deposited in bank accounts may be used as security for a transaction. This is normally done through the creation of a fixed charge over the account in favour of the lender. A notice of the charge is usually sent to the bank with which the account is held. The charge will specify what transactions can be made and limits on withdrawals from the account will be specified. A charge that is created over cash in a bank account is subject to the perfection requirements set out in the answer to question 2.1.

**2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?**

Security can be taken over shares in Ghanaian companies. Shares in non-listed companies are in certificated form and a share

charge created over the shares of a company usually requires the certificates to be deposited with the lender. Upon the creation of a share charge, the lender may file a stop notice at the high court requiring the company secretary or any other person to be notified of the lender's interest in the charged shares. Where a stop notice is filed, the company secretary cannot register any transfer of the charged shares without serving a notice on the lender regarding the request for registration of the transfer. The lender must then take the necessary steps within eight days of the notification to obtain a court order, directed at the company secretary, blocking the registration of the transfer of the charged shares. Shares in listed companies are held in dematerialised form with the Central Securities Depository (CSD). Shareholders of listed companies may charge their shares as security by depositing prescribed forms with the CSD to enable the details of the charged shares to be entered in a register of charges maintained by the CSD. Upon discharge of the security, the shares are transferred by the CSD from the register of charges back into the securities account of the chargor.

**2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?**

Once executed, mortgages are required to be proved to have been duly signed by the mortgagor by the oath of the mortgagor, the mortgagee or any attesting witness. The oath of proof must be certified by the registrar of lands (or by a notary public, if executed outside Ghana). Stamp duty is required to be paid on all security documents. Where more than one security is created in respect of the same financing transaction, a rate of 0.5% of the secured facility must be paid on the principal or primary security as stamp duty. Auxiliary, collateral, substituted or additional securities are charged with stamp duty at a rate of 0.25% each. Nominal registration fees are payable for registration with the Collateral Registry, Registrar of Companies and the Lands Commission.

**2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?**

Registration of security affecting real property at the Lands Commission may involve a significant amount of time. It usually takes between three to six months after stamping to register a mortgage with the Lands Commission. On the other hand, registering a security interest at the Collateral Registry can be done within a day, whereas registration with the Registrar of Companies typically takes between two to three weeks to complete. Other than stamp duty, there are no significant filing/registration expenses.

**2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?**

Other than the consent of the Lands Commission, which is required for the mortgaging of state lands and stool/skin lands (lands collectively owned by communities which are held in trust by chiefs of such communities on their behalf), no regulatory or similar consents are required with respect to the creation of security over real property, plant, machinery or equipment.

### 3 Security Trustee

3.1 Regardless of whether your jurisdiction recognises the concept of a “trust”, will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

The concept of a trust is recognised in Ghana and the role of the security trustee or agent is also recognised. The security trustee is permitted to enforce security on behalf of the lenders and apply the proceeds from the security to each of their claims.

3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

This is not applicable; security trusts, although not common, are recognised.

### 4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

Upon the occurrence of an enforcement event, a lender is permitted to take possession of a charged asset registered with the Collateral Registry if this can be done peaceably, or institute a court action to enforce the security. Before attempting to take possession, the lender must give 30 days’ notice to the borrower and a further 30 days’ notice to the Collateral Registry. Where a lender is unable to peaceably take possession of a charged asset (which in practice is often the case), an action must be instituted in court to enforce the security. The court may order the sale of the asset or the appointment of a receiver/manager upon the hearing of the application. A court-ordered sale of an asset used as security shall be by public auction, unless the court orders otherwise. Generally, there are no regulatory consents required for the enforcement of security.

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

There are no restrictions specially applicable to foreign investors or creditors.

### 5 Bankruptcy and Restructuring Proceedings

5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

Upon the commencement of bankruptcy proceedings and on application to the court by a creditor or the liquidator, the company may be prevented from disposing of any of its property prior to the commencement of the liquidation process. A secured lender may, however, institute proceedings in court to realise its security.

5.2 Are there any preference periods, clawback rights or other preferential creditors’ rights (e.g. tax debts, employees’ claims) with respect to the security?

The Corporate Insolvency and Restructuring Act, 2020 (Act 1018) permits a liquidator, during the winding-up of an insolvent company, to give notice to a person or company to return property that the insolvent company transferred to the said person or company to settle a debt, 21 days before the petition for winding-up was filed. The company would, upon receiving such notice, be required to return the property or its value to the liquidator. Additionally, where a liquidator determines that the insolvent company disposed of any of its property for less than its full value two years prior to the making of the order to wind up the company, or more than two years but less than 10 years prior to the making of the winding-up order and at a time that the company was insolvent, the liquidator shall give notice to the person or company to whom the property was disposed of, or who benefitted from its disposal, to return the property or the excess value to the liquidator. Further, in terms of the ranking of debts for payment during the liquidation of an insolvent company, debts comprising the unpaid remuneration of employees for the four months preceding the liquidation and unpaid taxes owed to the Republic or a local authority as at the date of the liquidation, have priority over debts secured by a floating charge that are owed to creditors.

5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

No entities are excluded from bankruptcy proceedings.

5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

The Borrowers and Lenders Act, 2008 (Act 773) (which applies to credit transactions involving lenders who advance loans or other credit facilities as part of their business) provides that, upon the occurrence of an enforcement event, a lender need not institute proceedings in court to enforce any security that has been registered with the Collateral Registry. Where possible, the lender may peaceably take possession of the secured assets upon 30 days’ notice to the borrower and a further 30 days’ notice to the Collateral Registry. In practice, however, securities are seldom realised without a court order.

**5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?**

Yes, under the Companies Act, 2019 (Act 992), a company may enter into a compromise with its creditors to restructure its debts. Where a majority of the members of a company and its creditors (each representing at least 75% in value of the class of members or creditors concerned) approve a compromise, a court may, upon application by the company, a member, creditor or other interested person, order an investigation into the fairness of the compromise and confirm the compromise (with any necessary modifications) upon receipt of the investigator's report. The compromise shall, upon confirmation by the court, be binding on the company and all members and creditors concerned, including any dissenters.

The Corporate Insolvency and Restructuring Act, 2020 (Act 1015) also introduces a new framework for restructuring potentially viable but distressed companies. Act 1015 facilitates the development and implementation of a restructuring plan meant to obtain better returns for creditors and shareholders which would otherwise not have been achieved from the immediate winding up of a distressed company. In the event of insolvency of a project company, the company, a secured creditor, a liquidator if the company in liquidation, or a court, may appoint an administrator for the company. The appointment of an administrator affords the company the opportunity to continue in existence as a going concern and places a temporary freeze on the rights of creditors and other claimants against the company.

During the administration of the company, a charge over the company's property cannot be enforced by a secured creditor except through a court order. In order to continue or commence proceedings in court against the company or in relation to the company's property during the company's administration, the secured creditor would need to seek leave from the court, and on terms that the court deems appropriate. Similarly, enforcement processes in relation to the company's property would require leave of the court and on such terms as the court considers appropriate. Once the court registrar is notified that a company is in administration, the registrar cannot take any action to sell the company's property under any execution process. The registrar is also prohibited from paying the proceeds of a sale of the company's property, or monies seized from the company under an execution process, to any person other than the administrator of the company. During the period of administration, the company and its creditors enter into negotiations to agree a restructuring of the company's debt.

**5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.**

Under the Corporate Insolvency and Restructuring Act, 2020 (Act 1015), directors who cause a company to continue engaging in business or trade, or to incur a debt or liability while having reasonable grounds to believe that the company is or will become insolvent, or who should have known that the company was or would become insolvent while causing the company to engage in that business or trade or to incur a debt or liability, is guilty of an offence. The offence is punishable on summary conviction to a fine of between GHS 6,000 to GHS 12,000, or to an imprisonment term of between two to five years, or both.

## 6 Foreign Investment and Ownership Restrictions

**6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?**

The Ghana Investment Promotion Centre Act, 2013 (Act 865) provides a limited number of activities in which foreigners cannot engage. With respect to businesses in which foreign participation is allowed, the foreign shareholder of the company has to satisfy the following minimum capital requirements:

- a. a minimum of \$200,000 for a joint venture between a foreign and Ghanaian shareholder;
- b. a minimum of \$500,000 for a wholly foreign-owned enterprise; and
- c. a minimum of \$1 million for a trading company.

Based on the Supreme Court's decision in *Attorney General v. Balkan Energy Ghana Limited* [2012] 2 SCGLR 998, and other cases on the interpretation of Article 181(5) of the 1992 Constitution, a foreign company or a Ghanaian company with foreign shareholders may be required to obtain Parliamentary approval for a contract with the Government of Ghana. There are different local content and local participation requirements for various regulated industries. For instance, in the upstream petroleum sector, the Petroleum Local Content & Local Participation Regulations, 2013 (L.I. 2204) require any contractor, subcontractor, licensee or allied entity engaged in petroleum activities to have a local content plan and comply with the relevant local content regulation. Local content refers to the quantum of locally produced materials, personnel, financing, goods and services rendered. In the energy sector, the Energy Commission (Local Content and Local Participation) Electricity Supply Industry Regulations, 2017 (L.I. 2354), aimed at achieving a minimum local content of 60% and local participation of 51% in the electricity supply industry, requires a company that intends to engage in wholesale power supply activities to have an initial local equity participation of at least 15% by a Ghanaian partner which must be progressively increased to at least 51% within a period of 10 years.

**6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?**

We are not aware of any bilateral investment treaties that provide protection from such restrictions.

**6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?**

The Ghana Investment Promotion Centre, 2013 (Act 865) protects companies from nationalisation or expropriation, subject to the 1992 Constitution. Under Act 865, a foreigner would not be forced to cede its shares in a company to another person. Further, in the event that the government has to acquire a project company in the national interest or for public purposes, just compensation must be paid to the shareholders.

## 7 Government Approvals/Restrictions

### 7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

These include: Cabinet; Parliament; Ministry of Finance; Ministry of Energy and Petroleum; National Petroleum Agency; Petroleum Commission; Ministry for Roads and Highways; Ministry of Railways Development; Ministry of Food and Agriculture; Ghana Ports and Harbours Authority; Ministry of Lands and Natural Resources; Lands Commission; Minerals Commission; Registrar General's Department; Ghana Investment Promotion Centre (GIPC); Public Procurement Authority; and Public Private Partnership Committee.

### 7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Under the Stamp Duty Act, 2005 (Act 689), all agreements must be stamped by the Land Valuation Division of the Lands Commission. Security agreements must also be registered with the Collateral Registry, the Registrar of Companies and/or the Lands Commission. Under the Public Private Partnerships Act, 2020 (Act 1039), a partnership agreement between a public contracting authority and a private party must also be registered with the Public Private Partnerships Office.

### 7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

Land is conveyed by a lease for a leasehold interest or by a conveyance for a freehold interest. A foreign entity does not require a special licence to own land in Ghana. Article 267 of the 1992 Constitution, however, precludes a foreigner from owning an interest in land for more than 50 years at a time. Some industries have specific requirements. For example, the Energy Commission Act, 1997 (Act 541) requires a foreigner to incorporate in Ghana to obtain a licence to transmit, wholesale-supply, distribute, or sell electricity or natural gas.

### 7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

A company must obtain a concession or right from the regulatory body in the relevant industry. Article 268 of the 1992 Constitution requires any contract or undertaking that grants a right or concession for the exploitation of any natural resource to be ratified by Parliament, unless expressly exempted. In addition to income taxes required to be paid by companies operating in the extractive industries, there may be royalties payable for the extraction of natural resources. For example, a mining lease is subject to a royalty of 5% of the total revenue of the mining operations, subject to any fiscal stabilisation clause in such agreement.

### 7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Under the Foreign Exchange Act, 2006 (Act 723), the Ghana Cedi is the sole legal tender in Ghana, and thus residents of Ghana cannot price, advertise, receive or make payments in foreign currency for goods and/or services, unless authorised by the Bank of Ghana. Residents and non-residents are permitted to maintain Foreign Exchange Accounts (FEAs) and Foreign Currency Accounts (FCAs) and foreign currency may be transferred abroad to meet valid external payment obligations. However, in relation to the operation of FEAs and FCAs, the Bank of Ghana rules provide that, among others: (a) FEAs may only be credited with funds generated from activities in Ghana; (b) FCAs may only be credited with unrequited transfers from abroad; (c) transfers from FEAs to FCAs are not permitted; (d) exporters may retain up to 60% of their export receipts in their FEAs, and the remaining 40% converted at market rates within 15 working days; (e) transfers abroad of up to \$50,000 may be made from FEAs without initial supporting documentation; however, any amounts above that threshold, or any other subsequent transfers (where documentation for the initial transfer is outstanding) must be substantiated by proper documentation; and (f) FCAs are not subject to the mandatory retention and conversion arrangements, and transfers from such accounts may be made without any restriction at the discretion of the account holder.

### 7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

The Ghana Investment Promotion Centre Act, 2013 (Act 865) guarantees the transfer of funds in convertible currency for dividends, servicing of foreign loans, payment of fees and charges for technology transfer agreements and remittance of proceeds (net of all taxes and other obligations) where the company is wound up. Generally, dividends are subject to a final withholding tax of 8%. Interest payments on foreign loans are also subject to 8% withholding tax. Transfers must be supported by proper documentation, such as the loan agreement, registered technology transfer agreement, tax clearance certificates, audited accounts, etc.

### 7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Project companies in Ghana may establish and maintain onshore and offshore FCAs, subject to the laws of Ghana, as well as the laws of the relevant offshore jurisdictions.

### 7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

Other than the requirement that a company shall not pay a dividend to its shareholders unless it is able, after the payment, to pay its debts as they fall due and that the value of the payment does not exceed the retained earnings of the company immediately before the payment of the dividend, there are no restrictions on the payment of dividends, regardless of whether the parent company is incorporated in Ghana.

**7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?**

The Environmental Protection Act, 1994 (Act 490) contains significant requirements for undertakings whose activities impact the environment. Additionally, there are various health and safety laws and regulations for different industries. The Labour Act, 2003 (Act 651) has health and safety requirements for employment conditions, such as provision of requisite training to maintain a safe working environment, and adequate toilet facilities. Some more specific requirements are built into industry practices, laws and regulations. For example, mining companies are subject to specific Environmental Protection Agency rules.

**7.10 Is there any specific legal/statutory framework for procurement by project companies?**

The Public Procurement Act, 2003 (Act 663), as amended, governs the public procurement process in Ghana. Where the project involves a partnership with the Government of Ghana or a public institution, the Public-Private Partnership Act, 2020 (Act 1039) will apply.

## 8 Foreign Insurance

**8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?**

Under the Insurance Act, 2006 (Act 724), a foreign insurance company must register and obtain a licence in Ghana to provide insurance. Also, a foreign insurance company may not provide insurance for property located in Ghana, liabilities arising in Ghana or for goods (other than personal effects) imported into Ghana. A person in Ghana, however, may apply to obtain insurance from a foreign company for specific instances such as where the required insurance policy cannot be obtained in Ghana. Also, the Income Tax Act, 2015 (Act 896) imposes a 5% withholding tax on insurance premiums paid by residents of Ghana to foreign insurance companies.

**8.2 Are insurance policies over project assets payable to foreign (secured) creditors?**

Yes, they are; subject to any laws specific to that industry that may require the foreign creditor to be registered in Ghana.

## 9 Foreign Employee Restrictions

**9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?**

In general, a foreigner must obtain a work and residence permit to work in Ghana. The project company, in its application for a work and residence permit, must provide sufficient evidence as to why it is necessary to hire a foreigner, i.e. that the skills required have not been found in a Ghanaian citizen. Companies in some industries, such as minerals and mining industries, are granted automatic

quotas for foreign employees – work and resident permits, based on these quotas, will be granted upon application. In addition, the GIPC provides automatic quotas upon registration. For example, where the project company with foreign ownership has a stated capital of up to \$250,000, it is entitled to one automatic quota. Foreign employees working in areas where professional licences are required may have to register with the relevant licensing authority.

## 10 Equipment Import Restrictions

**10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?**

Generally, all imported equipment are subject to customs duties; however, there are exemptions for specific industries, such as the agricultural and petroleum industries. Where the company registers with the GIPC or the Free Zones Board, it will enjoy various exemptions and incentives. Where the good is exempted from custom duties, it must be used solely for its intended use in the project company. If the good is later sold in Ghana, the exempted custom duty will now be payable.

**10.2 If so, what import duties are payable and are exceptions available?**

Goods imported into Ghana are classified in accordance with the Economic Community of West African States (ECOWAS) Common External Tariff system to determine the applicable taxes, which may include import duties of between 0–35%, Value-Added Tax of 12.5%, National Health Insurance and Ghana Education Trust Fund levies of 2.5% each, ECOWAS import levy of 0.5% and African Union import levy of 0.2%, unless an exemption or concession exists. Exemptions may exist for mining, oil and gas and free zone-registered entities.

## 11 Force Majeure

**11.1 Are force majeure exclusions available and enforceable?**

*Force majeure* exclusions are available and enforceable under Ghanaian law and are usually included in financing agreements. *Force majeure* exclusions typically apply to events that are beyond the reasonable control of parties and that have a material adverse effect on the ability of a party to perform its obligations under an agreement. On the occurrence of a *force majeure* event, parties are typically required under the terms of their contract to take reasonable mitigating measures. Project agreements typically provide for the termination of a project in cases of prolonged *force majeure* events. In the absence of any applicable *force majeure* provisions in a contract, a party may rely on the doctrine of frustration to avoid liability for failing to perform its obligations under a contract. A claim for frustration can be sustained where there has been an unforeseeable, unexpected and unanticipated event which makes it impossible or illegal to perform the contract or makes the contract radically different from the agreement originally entered into by the parties. Events which cause inconvenience, hardship, financial loss or delay in the performance of the contract, but do not satisfy the above requirements, will not be sufficient to support a claim for frustration of a contract.

## 12 Corrupt Practices

**12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?**

Project companies are subject to general anti-bribery and corruption laws. Bribery and corruption under Ghanaian law is limited to acts of bribery by public officers, jurors or voters. Hence, bribery or corruption committed between private persons are not recognised as criminal offences in Ghana. The Public Procurement Act, 2003 (Act 663), as amended, which regulates procurement processes for state entities, agencies and departments, enjoins entities and participants involved in a procurement process to refrain from corrupt practices as construed under the Criminal and other Offences Act, 1960 (Act 29). Under Act 29, an act of bribery or corruption is considered to be a misdemeanour and a person convicted of such offence is liable to a maximum term of imprisonment of 25 years. Foreign persons are also subject to the provisions of the Anti-Money Laundering Act, 2020 (Act 1044) and the Economic and Organised Crime Office Act, 2010 (Act 804), which authorise relevant institutions to monitor money laundering activities and empower state institutions to seize and recover the proceeds of crime and prosecute offenders.

## 13 Applicable Law

**13.1 What law typically governs project agreements?**

Generally, parties are at liberty to choose the governing law of a contract. In practice, English law is typically selected. The Public-Private Partnership Act, 2020 (Act 1039), however, requires PPP agreements to be governed by Ghanaian law.

**13.2 What law typically governs financing agreements?**

Parties to a financing agreement typically select the laws of the jurisdiction where the lenders are located.

**13.3 What matters are typically governed by domestic law?**

Security agreements are typically governed by domestic law.

## 14 Jurisdiction and Waiver of Immunity

**14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?**

A party's submission to a foreign jurisdiction is generally enforceable in a Ghanaian court, except where the court, in its discretion, determines otherwise, given the specific facts of a particular case; for instance, where the court determines that a contract is so intricately connected with Ghana that it does not make sense to subject disputes arising thereunder to determination by a foreign jurisdiction. This is, however, rare and generally the courts would uphold the parties' choice of forum for resolving disputes. Contractual waivers of immunity are binding and enforceable.

## 15 International Arbitration

**15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?**

Generally, Ghanaian courts will not assume jurisdiction over matters which the parties have agreed to resolve by arbitration. If the court is satisfied that the matter is one in respect of which there is a valid arbitration agreement and that the contract does not fall outside the scope of matters that are arbitrable under Ghanaian law, a submission to arbitration will be enforced. Arbitral awards are recognised by Ghanaian courts and may be enforced through an application to the court. Leave to enforce a local arbitral award shall be granted by a court unless it is shown that the arbitral tribunal lacked jurisdiction to render the award.

The enforcement of foreign arbitral awards requires the satisfaction of additional requirements, including showing the court that: (a) the award was made by a competent authority and under the laws of the country in which the award was made; (b) a reciprocal arrangement exists between the Republic of Ghana and the country in which the award was made, or the award was made under the New York Convention or under any other international convention on arbitration ratified by the Parliament of Ghana; (c) the original award and the agreement pursuant to which the award was made, or duly authenticated copies of both, have been produced to the court; (d) there is no appeal pending against the award in any court under the law applicable to the arbitration; and (e) no grounds for invalidating the award as provided under the Courts Act exist.

**15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?**

Ghana is a contracting state to the New York Convention.

**15.3 Are any types of disputes not arbitrable under local law?**

Under Ghanaian law, matters involving the national or public interest, the environment, the enforcement and interpretation of the Constitution, or any other matter that by law cannot be settled by an alternative dispute resolution method, are not arbitrable.

**15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?**

Under the Labour Act, 2003 (Act 651) and its regulations, the Labour Commission is mandated to resolve, by reference to compulsory arbitration, any labour dispute which remains unresolved after seven working days following a strike or lockout by employees or employers. The compulsory arbitration award is binding, unless set aside on appeal to the Court of Appeal on questions of law only.

## 16 Change of Law / Political Risk

**16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?**

In PPP transactions, lenders typically insist on direct agreements

with the governmental agencies or departments with whom the borrower/private party is partnering. Direct agreements and political risk guarantees with or from the central government are resisted by the latter, and hence, lenders typically turn to development finance institutions for partial risk guarantees for their investments. Contractual protections against change of law and material adverse governmental actions are also quite common in project financing agreements.

## 17 Tax

**17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?**

Under the Income Tax Act, 2016 (Act 896), withholding tax of 8% is deductible from interest payments on loans, except where the lender is a resident financial institution. Interest payments to individuals are also subject to a reduced rate of 1% withholding tax.

**17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?**

There are no preferential tax incentives for foreign investors or creditors. Foreign investors, however, may take advantage of general tax incentives granted to free zone companies and sector-specific businesses or businesses sited in specific locations.

## 18 Other Matters

**18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?**

The main issues to consider when structuring a project finance transaction include foreign exchange risk (especially for foreign currency financed-projects whose income is expected to be generated in Ghana Cedis), and local participation and local content laws for certain regulated industries.

**18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.**

The issuance of capital market instruments by project companies is subject to the general requirements prescribed by the Ghana Stock Exchange (GSE) for listed companies set out in the Listing Rules and the Securities and Exchange Commission's (SEC) applicable laws and regulations. To list on the GSE, a company must be a public limited liability company incorporated under

the Companies Act of Ghana. For an original listing application, the company must submit an application to the GSE, together with the draft prospectus, which also needs to be submitted to the SEC for approval. The company must appoint a licensed dealing member of the GSE to act as its sponsor, and provide the GSE with information regarding its business, capital structure, directors and key management personnel, details of long-term and funded debt, investments and assets, profit and loss accounts, and any other relevant information.

The company should also have passed a shareholders' resolution approving the issuance of the securities, the number of securities to be issued and the price per security on offer. Debt securities, other than government securities, for which listing is sought, must be created and issued pursuant to a trust deed. Once regulatory approval for the prospectus is granted and the application is approved by the GSE, a date is set for the launch of the public offer. Listed companies are required to comply with the GSE Listing Rules, which set out initial and continuing listing obligations for companies.

## 19 Islamic Finance

**19.1 Explain how *Istina'a*, *Ijarah*, *Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.**

Although the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) states that a licensed bank or specialised deposit-taking institution may provide non-interest banking services, and a few banks and micro-finance institutions do provide such services, the regulatory framework and operational structures to support Islamic financing (such as the establishment of a *Shari'ah* board) have not yet been developed or operationalised.

**19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?**

Ghanaian courts would generally respect the choice of governing law by parties to a contract. Therefore, unless any circumstances exist (for example, in respect of matters deemed contrary to public policy) that necessitate that the parties' choice be disregarded, the courts would uphold the chosen law of the parties. Under the rules of court and the Evidence Act, 1975 (NRCD 323), the party seeking to rely on the law is obliged to prove it. We are not aware of any cases on jurisdictional issues on *Shari'ah* law relevant to the finance sector.

**19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?**

The inclusion of interest payment obligations in a contract would not affect its validity and enforceability, unless such payments are penal in nature.



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