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Private Equity

Ghana
NanaAma Botchway and Akosua Achiaa Akobour Debrah
N. Dowuona & Company

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Law and Practice

Contributed by:
NanaAma Botchway and Akosua Achiaa Akobour Debrah
***N. Dowuona & Company** see p.10*

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1. Trends

1.1 M&A Transactions and Deals

Private equity activity in Ghana has continued to grow at a steady pace in recent years, as Ghana remains an attractive destination for foreign investment. Major players include emerging markets focused funds such as Actis, Amethis, LeapFrog and AfricInest; African focused funds like AFIG and I&P; and local or West-African focused funds such as Oasis, Injaro and PCM Capital.

In 2020, private equity M&A deals have been completed mostly in established businesses across a variety of industries, mainly for significant minority shareholdings. However, there appears to be a growing interest in the financial technology sub-sector, dominated by start-ups that are engaged in fundraising activities. There has been a mix of new investments in target companies, add-ons to existing investments, as well as successful exits by way of sale of the investment to other private equity funds.

Tax structuring of investments remains a key focus for private equity funds, some of whom tend to invest through SPVs established in tax-friendly jurisdictions (particularly Mauritius) as compared with direct investments into target companies. Regarding exit conditions, although most investments are governed by pre-emptives, these are rarely exercised by the remaining shareholders. Most deals are characterised by buyer or vendor due diligence activities and typically involve privately negotiated sale and purchase agreements with fairly standard provisions on warranties and indemnities.

1.2 Market Activity

There has been a decline in deal making in 2020 due to the impact of the COVID-19 pandemic on economic activities in general. Many proposed deals put on hold at the onset of the pandemic have not yet resumed. Nonetheless, activity can be seen in the banking, insurance, healthcare and pharmaceutical, fintech, FMCG and the extractive sectors.

The transactions have mostly been investments in founder or family owned companies looking for growth capital, investments by PE funds in greenfield fintech start-ups, or investments in financial service companies looking to raise capital to meet regulatory requirements or to fund expansion. Some exits by institutional investors have been seen in sectors such as the oil and gas sector, due to a change in strategy or market outlook.

2. Legal Developments

2.1 Impact on Private Equity

The Income Tax Act, 2015 (Act 896) has had the most significant impact on private equity transactions and deals in recent years. Act 896 scrapped the existing capital gains tax regime and introduced a new system where gains made on the realisation of investments are required to be computed as part of the assessable investment income of taxable persons and taxed at the underlying corporate tax rate. Although attempts were made to widen the tax net under Act 896, divestments involving less than 25% of the shares of a resident company by a non-resident shareholder are currently not subject to taxation in Ghana and hence, serves as a significant factor in determining deal sizes, along with other structuring considerations.

There has also been a growing trend of local content and local participation legislation in various sectors, most recently the energy sector, which impose minimum local shareholding requirements and/or reserve certain key activities for wholly owned Ghanaian companies and hence act as significant barriers to foreign investment in those areas.

With regards to new legislation, the passage of the Companies Act, 2019 (Act 992), which contains comprehensive provisions on mergers and merger procedures will impact private equity activity in that area, particularly, with regards to short form mergers which are not as highly regulated as standard mergers. The newly passed Corporate Insolvency and Restructuring Act, 2020 (Act 1015) is also expected to impact private equity investments in investee companies as it introduces a new framework for restructuring potentially viable but distressed companies and addresses the process of transferring assets of failed companies.

3. Regulatory Framework

3.1 Primary Regulators and Regulatory Issues

For most M&A activity in Ghana that involves the acquisition of interests in private companies there is no regulatory body that must be consulted. There is no general competition regulator for example. That said, all companies in which there is a foreign investment are required to register with the Ghana Investment Promotion Centre, but that registration is a routine one and doesn't involve a review of the structure or terms of M&A transaction.

If the target is in a heavily regulated industry such as financial services, telecommunications or any of the extractive industries, however, the primary industry regulator may need to approve a change of control, or at least be notified of it. Key industry regulators include the Bank of Ghana (BoG), the National Insurance Commission (NIC), the National Communications Authority (NCA), the Minerals Commission, the Securities and Exchange Commission, the Petroleum Commission and the National Petroleum Authority.

Some of the key regulatory issues relevant to private equity funds and transactions are as follows:

- Minimum capital requirements;
- Tax rules - deemed realisation of assets on indirect transfers;
- Thin capitalisation rules;
- Local participation rules;
- Local content requirements;
- Prohibition on equity investments in some sectors (retail pharmaceutical and segments of the downstream oil and gas sector); and
- Regulation of private equity activity.

4. Due Diligence

4.1 General Information

Typically, a full due diligence is conducted covering all areas including litigation; insurance; tax; environmental matters; real estate; pensions and employment related matters; borrowing, indebtedness and financial arrangements; information and technology systems; intellectual property; the structure of the business, assets and its material commercial agreements; corporate and governance structures; and real property owned or leased by the company. The key areas of focus tend to be around any regulatory impediments to the transaction or the proposed structure of the transaction, any taxes that may be triggered by the transaction, ensuring valid title to assets, particularly land, ensuring that all contingent liabilities are properly captured – particularly those relating to compliance lapses and law suits.

4.2 Vendor Due Diligence

Vendor due diligence is not a common feature in transactions for private equity sellers. They are typically used in regulated industries and with public companies where dissemination of information is tightly controlled and where granting buyer access to the company could be challenging or time consuming. Where they are used, the credibility of the report depends a great deal on the advisor issuing the report.

5. Structure of Transactions

5.1 Structure of the Acquisition

The acquisition of private companies is typically by a private treaty sale and purchase of shares. Asset sales are far less common due to the challenges associated with the transfer of title to certain types of assets such as land and the potentially higher transfer tax burden associated with certain direct asset transfer transactions, in connection with the payment of stamp duty.

PE funds typically invest in equity and specifically in equity shares, known as common or ordinary shares in other jurisdictions, but increasingly we are seeing more investments in preference shares, convertible debt, unsecured debt and other quasi-equity arrangements.

Acquisitions of stakes in public companies (whether listed or not), may be by private treaty sale and purchase. Acquisitions that involve a transfer of control and that trigger the mandatory takeover rules as discussed in **7.3 Mandatory Offer Thresholds**, must be made by tender offer in accordance with the Code on Takeovers and Mergers. The terms of acquisition in a privately negotiated sale and in an auction tend to be broadly similar.

5.2 Structure of the Buyer

Private equity funds typically invest through a special-purpose vehicle (SPV). The fund itself may also occasionally be party to the acquisition documentation, particularly where the SPV is a newly formed entity without any assets. The SPV is either a direct or indirect subsidiary of the fund depending on tax and other considerations.

Most of the SPVs are either incorporated in Mauritius or in Ghana, depending on tax optimisation and other regulatory considerations or requirements. Even though there is no double taxation treaty between Ghana and Mauritius, Mauritius is a popular jurisdiction for setting up SPVs for investments into Ghana because most Africa focused PE funds are based in Mauritius. In certain sectors, such as the oil and gas and energy sectors, the regulations require that investments by foreigners must be made through a company incorporated in Ghana.

SPVs formed in other jurisdictions are also used, particularly where there is an advantageous tax or investment treaty with Ghana that would help with the repatriation of dividends or the proceeds at exit. These jurisdictions include the Netherlands, Belgium, Denmark, Germany, France, Italy, the United Kingdom, South Africa and Switzerland.

5.3 Funding Structure of Private Equity Transactions

Private equity funds typically take significant minority stakes in companies. Control transactions are not common. The investments are usually fully financed with equity from the private equity fund and/or from co-investors. Quite often debt financing may be obtained by the target concurrent with the equity injection by the private equity fund but financing of the fund's investment using leverage is very unusual. The use of equity commitment letters is also not common as private equity funds are generally in a stronger bargaining position than target companies and selling shareholders due to the strong demand for growth capital and the relative illiquidity of the market.

Private equity fund transactions are typically structured as subscriptions for primary rather than acquisitions of secondary shares because of the significant demand for growth capital. Secondary deals do take place but they are less common, as private equity funds more often than not exit by means of a trade sale or sale to an industry player.

5.4 Multiple Investors

Deals involving a consortium of private equity sponsors are not common. Consortium deals most often involve development finance institutions. Similarly, co-investments are not common and when they do occur, they tend to involve passive stakes made alongside the general partner of the fund in which the co-investor is already invested and very often the fund and the co-investor will invest through a single SPV.

6. Terms of Acquisition Documentation

6.1 Types of Consideration Mechanisms

The predominant form of consideration structure in private equity transactions is the locked box structure. Completion accounts are also used but are less common. Fixed price structures are rare. Earn-outs and deferred compensation structures are increasingly used to bridge gaps in valuation between private equity buyers and target companies or sellers. They are less common with private equity sellers.

There is no clear difference between the types of consideration structures used in private equity transactions and those used in corporate M&A transactions and both private equity fund and corporate buyers provide similar levels of protection.

6.2 Locked-Box Consideration Structures

The locked-box mechanism is the most commonly used consideration mechanism in Ghana. Typically, the purchase price payable on completion of a share sale is fixed on the signature date, by reference to the target's balance sheet position (ie,on a net-debt and working capital) in the latest available audited financial statements (the "locked box date"). As such, the purchase price is fixed at, and the buyer takes the economic benefit/risk of the target company from, the locked box date.

Protection against leakage of value from the target company between the "locked box date" and closing typically takes the form of representations and warranties made by the Seller in the SPA. These are often supported by an indemnity. Representations and warranty insurance is not common but there is increasing interest in it.

6.3 Dispute Resolution for Consideration Structures

Separate dispute resolution mechanisms for locked box mechanism consideration structures are not common. Where there is a purchase price adjustment mechanism, typically, the parties agree to have an expert determine any disputes relating to the calculation of the adjustment amount.

6.4 Conditionality in Acquisition Documentation

Private equity transactions are generally conditional on mandatory and suspensory regulatory conditions, if applicable, in addition to a raft of other conditions including no material adverse event, investment committee approval, board approval and satisfactory confirmatory due diligence, particularly with relation to compliance with ESG, AML and Anti-terrorism financing, etc.

The extent of the conditions varies from deal to deal, depending on the whether the private equity fund is the buyer or the seller, the level of financial indebtedness of the target and whether or not the target is a startup or in its growth and establishment phase. Investments in companies seeking expansion capital tend to be more competitive and as such expansion capital deals tend to contain fewer conditions.

6.5 "Hell or High Water" Undertakings

In M&A transactions in more developed markets, a hell or high-water clause requires a buyer to take all action necessary, including divestitures, to secure approval from competition authorities. As indicated earlier, there is no general competition regulation and as such "hell or high water" undertakings are not generally included in M&A transaction documentation in Ghana.

6.6 Break Fees

Break fees payable in favour of the seller are extremely rare in Ghana. Reverse break fees payable by the seller to the private equity buyer are also uncommon but are used more frequently. Neither break fees nor reverse break fees are regulated and as such there is no legal limit on the amounts that may be demanded or paid. Typically, however, the break fees sought will be equal to the third-party costs incurred by the buyer.

6.7 Termination Rights in Acquisition Documentation

Subscription and sale and purchase agreements are typically drafted to limit the parties' ability to terminate to very few circumstances. Generally, the seller or the buyer may terminate if there is a material adverse event, where the conditions to completion are not met by a longstop date or where one of the parties fails to perform a material obligation at closing. There are typically provisions requiring the parties to use best or reasonable good faith efforts and the longstop date will typically be set to allow sufficient time for the conditions to be met even in the event of delays.

Disputes about whether or not a material adverse event has occurred are not common but when they do arise, are typically determined by arbitration or some sort of expedited dispute resolution mechanism.

6.8 Allocation of Risk

The allocation of risk in M&A transactions differs depending on who the parties on the buy and sell sides are. M&A transactions between private equity funds are usually concluded on an "as is" basis, as private equity sellers are usually resistant to providing warranties, other than standard warranties on title and capacity in respect of the sale shares and entry into the transaction. The risk allocation for transactions involving private equity sellers remains the same whether the buyer is a private equity fund or a corporate/industrial buyer.

However, the opposite is not true. In a transaction involving a private equity fund on the buy side, if the seller is not a private equity fund, the private equity buyer would demand more than the standard warranties on title and capacity. Additional warranties on the target's business including tax liabilities, assets, accounting records and practices, regulatory compliance issues, environmental matters and material claims or disputes involving the company, will be provided by the non-private equity seller to a private equity buyer.

A private equity seller's liability is generally limited by caps on overall liability, minimum thresholds for making claims, time limitations, and mitigation obligations, see **6.9 Warranty Protection**.

6.9 Warranty Protection

Private equity sellers generally resist giving any representations and warranties beyond the fundamental title and capacity representations and warranties. Where they give representations and warranties regarding the target's business, they are almost always subject to knowledge qualifiers, capped at a percentage of the purchase price and last for no more than 12 months. Reps and warranties insurance is not used in the market but there has been some recent interest in exploring its use.

Members of management who are not shareholders do not typically provide representations and warranties in such transactions. Where members of management are also significant shareholders, they will generally provide a broad range of representations and warranties in order to assist the private equity fund to exit or to assist a strategic buyer to enter. The representations and warranties typically including those relating to the target's accounts, statutory books and records, material contracts, tangible assets, intellectual property, real property, employment and pensions, litigation, data protection, insurance, tax, anti-money laundering and terrorism finance, anti-bribery and corruption, solvency and general compliance with all laws. They are generally subject to extensive disclosure, capped in value and limited to 12 to 15 months.

Private equity purchasers typically require extensive representations and warranties. Disclosures against the warranties are permitted but they are generally heavily negotiated and full disclosure of the data room is generally not acceptable. Knowledge qualifiers are generally permitted in the acquisition of secondary shares from minority shareholders. Typically, the purchase price is the cap on liability for liability on all representations and warranties and they typically last for 12-24 months. Indemnities are also standard.

6.10 Other Protections in Acquisition Documentation

In addition to the above protections, the parties may agree a mechanism for adjusting the purchase price in the event of the occurrence of a material adverse event between the period of signing and the date of completion. Certain covenants, such as a covenant to continue business in the ordinary course, to keep the buyer regularly informed on major decisions, not to issue any additional shares etc. may be given by the seller and/or company. As discussed in **6.9 Warranty Protection**, private equity sellers may provide warranties on a limited number of matters.

The management team of target companies rarely provide any indemnities in secondary sales. Although there is increasing interest in W&I insurance, this is not commonly used in private equity transactions in Ghana. Escrow agreements to back the obligations of a private equity seller are also not common. However, occasionally, a percentage of the purchase price may be retained in escrow to backstop the seller's obligations until the expiration of the warranty period, where a specific issue has been identified during the diligence process.

6.11 Commonly Litigated Provisions

Litigation is rare in connection with private equity transactions. Litigation is very time consuming and the courts are not very experienced in handling disputes arising out of such transactions. As such most transaction agreements provide for arbitration of disputes or determination of disputes involving calculations by an expert.

7. Takeovers

7.1 Public-to-Privates
Public-to-private transactions are rare in Ghana.

7.2 Material Shareholding Thresholds
Shareholders of listed companies are required to disclose to the public within 48 hours of the acquisition or disposal of any interest in the company that causes the shareholder's stake in the company to attain, exceed or fall below each 5% threshold starting from 10% up to 50% plus one share.

7.3 Mandatory Offer Thresholds
Under the securities laws of Ghana, a mandatory takeover shall be deemed to have been triggered when a person:

- acquires or intends to acquire more than 30% but less than 50% of the voting shares of a public company in any 12-month period;
- acquires or intends to acquire 50% or more of the voting shares of the target; or
- acquires a company that holds effective control (ie, at least 30% of the voting shares) in the target or together with the shares already held will result in acquiring effective control of the target.

7.4 Consideration
Consideration may be in the form of cash or swap of securities, or a combination of both. However, cash is more commonly used as consideration in Ghana.

7.5 Conditions in Takeovers
A takeover offer may be conditional upon:

- the acceptance of the offer by a specified minimum number of shareholders of the target company;
- the receipt of regulatory or other approval under any applicable law in or outside Ghana; and
- the maintenance of a minimum shareholding by the public to satisfy any continuous listing requirements.

A takeover offer cannot be made unless the bidder has the resources to implement the offer in full. Therefore, it cannot be conditional on the bidder obtaining financing. A takeover offer cannot also be conditional on the target approving or consenting to any payments to its directors or any related persons as compensation for loss of office or consideration for retirement from office.

7.6 Acquiring Less Than 100%
Under the Code on Takeovers and Mergers, where 90% or more of the voting shares of the target are acquired by the bidder in a takeover offer, the bidder shall offer to acquire the shares of the remaining shareholders at the prevailing market price or the takeover offer price (if higher). The remaining shareholders are entitled to either accept or reject this offer, and hence cannot be squeezed out against their will.

7.7 Irrevocable Commitments
Under the Code on Takeovers and Mergers, where 90% or more of the voting shares of the target are acquired by the bidder in a takeover offer, the bidder shall offer to acquire the shares of the remaining shareholders at the prevailing market price or the takeover offer price (if higher). The remaining shareholders are entitled to either accept or reject this offer, and hence cannot be squeezed out against their will.

7.8 Hostile Takeover Offers
Although hostile takeovers are not common, they are not prohibited under the applicable laws, which are generally not facilitative of many anti-takeover defences. For instance, under the Code on Takeovers and Mergers, the target company may not issue new shares or grant options over unissued shares if the board believes that a takeover of the company is imminent. Further, under the Companies Act, shareholders of a company may remove directors from the board at any time, and hence a person that gains control of a company through a hostile takeover is at liberty to change the entire board upon completion of the takeover. This prevents the use of such anti-takeover defences as shareholder rights plans or staggered boards.

8. Management Incentives

8.1 Equity Incentivisation and Ownership
Equity incentivisation of the management team is not a common feature of private equity transactions in Ghana, although it is permissible. Usually however, certain key members of management do hold shares in the company, particularly, in founder and family-owned businesses. Deals which provide for equity incentivisation vary in nature and there is no standard ownership level.

8.2 Management Participation
Where management participation is included in a private equity transaction, managers tend to subscribe for ordinary shares. Preferred instruments may be used, although this isn't a common feature, and there is no dominant structure for effecting such arrangements.

8.3 Vesting/Leaver Provisions
Management participation arrangements are not typical, however, where they do exist, leaver provisions for management shareholders typically distinguish between "good" and "bad"

leavers. Good leavers include those members of management whose cessation of employment with the company results from incapacity, death, retirement at old age, redundancy, etc, whereas bad leavers typically refer to managers who's employment with company is terminated for cause, who become disqualified by operation of law from acting in a managerial capacity, or a manager who is otherwise not a good leaver. Management shareholders who fall within the first category are usually entitled to retain any shares that have become vested as at the time of leaving the company, whilst forfeiting their rights to shares that have been allocated but are yet to vest in them.

Those who fall within the latter category are however required to forfeit all allocated shares, whether vested or not. Allocated shares may vest periodically according to an automatic vesting schedule, or dependent on the attainment of certain specified targets.

8.4 Restrictions on Manager Shareholders

Customary restrictions for management shareholders include non-competition and non-solicitation covenants. The general rule on non-compete agreements under Ghanaian law is that the courts will respect parties' freedom to contract by giving effect to contracts freely and voluntarily entered into, and will not intervene unless there is satisfactory evidence that the contract is in restraint of trade, monopolistic or an inducement for either party to break existing agreements with third parties and that this is unreasonable, unfair or contrary to public interest or policy. An agreement that restricts the freedom of a party to engage in any particular business is in restraint of trade and hence, prima facie, unenforceable.

Nonetheless, if it can be proven that the agreement is designed to protect a commercial interest of the person seeking to enforce it and that it is reasonable and fair, it would be considered valid and enforceable. Fairness and reasonableness are issues of fact to be determined by the court based on the particular circumstance of each case.

8.5 Minority Protection for Manager Shareholders

Management shareholders enjoy the same minority protections that all minority shareholders enjoy. Anti-dilution protection mechanisms, such as pre-emptive rights, are guaranteed under law with regards to new issues. However, transaction documentation typically confer rights of first refusal or first offer on shareholders with regards to secondary sales, as well as the right to tag along on sales by a significant or majority shareholder. Contractually negotiated veto rights may also be accorded to minority shareholders (including management shareholders) in relation to specified matters.

9. Portfolio Company Oversight

9.1 Shareholder Control

Typically, private equity funds seek the right to nominate representatives to the board of portfolio companies and require other shareholders (by way of a shareholders agreement) to vote in favour of the appointment of such nominees, as well the right to access certain documents, information, management and auditors of the company. Private equity funds also reserve the right to veto certain decisions by the board or shareholders regarding matters such as the acquisition or disposal of any subsidiaries or material assets, alterations to the constitutional documents, changes to the nature of business undertaken by the company, increase or reduction in issued shares, entry into material transactions, termination of material contracts, borrowings or financial arrangements above a specified threshold, approval of annual budgets and business plans, etc.

9.2 Shareholder Liability

As a general rule, shareholders of a company limited by shares cannot be held liable for the actions of a company. However, there are limited circumstances, typically involving fraud on the part of shareholders, under which the corporate veil may be lifted and liability for the actions and omissions of the company imposed directly on the shareholders.

9.3 Shareholder Compliance Policy

Private equity fund shareholders typically require their portfolio companies to comply with its policies on environmental, social and corporate governance matters, AML/CFT, integrity and anti-corruption, to the extent that they do not conflict with local laws.

10. Exits

10.1 Types of Exit

The typical holding period for private equity transactions ranges from two to seven years. The most common form of exit is by way of private treaty or auction sale to another private equity fund or an industry player, typically a long-term institutional investor. Although, agreements may grant a private equity shareholder the right to exit by way of an IPO, in practice, IPOs are rare and therefore private equity exits are not conducted as a "dual track" process. Private equity sellers do not typically reinvest upon exit.

10.2 Drag Rights

Shareholders' agreements between the company and its shareholders typically include drags rights to facilitate an exit by a majority shareholder, or shareholders who together hold a specified majority of shares. Nonetheless, drag mechanisms are not usually utilised by private equity sellers. Where drag rights exist, it is fairly common to link the exercise of such rights by the selling shareholder to such number of shares as is required by the buyer to enable the seller to attain a specified return on its investment.

The exercise of drag rights may also be restricted to certain shareholders only, such that the selling shareholder cannot forcibly require the excluded shareholders to sell their shares or any proportion thereof to a prospective buyer. There is no typical threshold, however the selling shareholder(s) is/are usually required to have a significant majority in the company to be able to exercise any drag rights.

10.3 Tag Rights

Tag rights in shareholder agreements are typically general in nature, and not limited to certain shareholders only. Where tag rights exist, management shareholders, and all other minority shareholders, enjoy the right to tag along on a sale by an exiting majority shareholder. Thresholds for tag rights vary depending on the industry and the types of shareholders involved.

It is common to restrict the exercise of tag rights to a sale by certain strategic shareholders only, eg, founding shareholders, even when they constitute the minority. In such cases, a pro rata sale of the shares of the founding shareholder along with a commensurate number of shares of the remaining shareholders is effected to enable the prospective buyer attain its desired percentage holding in the company.

10.4 IPO

IPO exits are not common in private equity transactions in Ghana and there is no standard practice in respect of lock-up arrangements or relationship agreements.

N. Dowuona & Company is a dynamic legal and strategic advisory firm that focuses on corporate and commercial, property and construction, energy and infrastructure, banking and finance, and dispute resolution. The team of creative and dedicated professionals has excellent local and international experience in law and business. In the nine years since the firm's inception, it has earned a reputation for being very responsive and efficient at providing the highest quality legal services in the market. The firm's senior lawyers together have more than 40 years of experience in law and business, and are regularly instructed by the top local and international companies and international law firms to act in major domestic and cross-border transactions. The team routinely advises clients on large and complex in-bound investment and divestment transactions, corporate acquisitions, and joint ventures between large local corporates and multinational companies. It also advises clients on corporate governance matters, intellectual property licensing issues, tax and regulatory matters, and provides a range of employment law advisory services.

Authors

NanaAma Botchway is the founder of the firm and has advised on numerous significant investments and divestments in Ghana and in other parts of Africa, including the USD200 million sale of Fan Milk International, the acquisition, development and divestment of the Movenpick Ambassador Hotel, and Leapfrog Strategic African Investment's USD180 million investment in the Enterprise Insurance Group. NanaAma 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.

Akosua Achiaa Akobour Debrah is a partner at the firm and routinely advises corporate clients on various matters involving corporate law and governance, commercial law, property law, tax and regulatory compliance. Her recent work includes advising a leading telecoms infrastructure company on a USD200 million term facility and a USD70 million revolving credit facility from a syndicate of bank lenders, advising the developer of a 5-star luxury hotel on the refinancing of its existing debt through a USD31 million loan facility, and advising on the development of a 1,100 km railway line from the port of Tema in Ghana to Ouagadougou in Burkina Faso on a Design Build Finance Operate and Transfer (DBFOT) basis. Achiaa obtained her LLB from the Kwame Nkrumah University of Science and Technology and holds an LLM from the University of Warwick. She is admitted to practise law in Ghana.

N. Dowuona & Company

Solis House
GL-056-7567 Adembra Road
East Cantonment, Accra
Ghana

Tel: +233 244 319936
Fax: +233 302 632046
Email: Nanaama@dowuonalaw.com
Web: www.dowuonalaw.com

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legal and strategic advisory services