THE PROJECTS AND CONSTRUCTION REVIEW

Eleventh Edition

Editor
Júlio César Bueno

THE LAWREVIEWS

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ELEVENTH EDITION

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PREFACE

La meilleure façon d'être actuel, disait mon frère Daniel Villey,
est de résister et de réagir contre les vices de son époque.

Michel Villey, *Critique de la pensée juridique modern* (Paris: Dalloz, 1976)

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association, the International Academy of Construction Lawyers, the Royal Institution of Chartered Surveyors, the Chartered Institute of Arbitrators, the Society of Construction Law, the Dispute Resolution Board Foundation, the American Bar Association's Forum on the Construction Industry, the American College of Construction Lawyers, the Canadian College of Construction Lawyers and the International Construction Lawyers Association. All these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues relating to projects and construction law practice, and I would like to thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are highly specialised areas of legal practice. They are intrinsically functional and pragmatic, and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

Although there is an increased perception that project financing and construction law are global issues, the local knowledge offered by leading experts in several countries has shown us that to understand the world, we must first make sense of what happens locally; to further advance our understanding of the law, we must resist the modern view (and vice?) that all that matters is global, and that what is regional is of no importance. Many thanks to all the authors and law firms that graciously agreed to participate.

Finally, I dedicate this 11th edition of *The Projects and Construction Review* to my mother, Natalina Passoni Bueno, on the 25th anniversary of her passing on 8 March 1996.

My mother was born in Nova Aliança, in the countryside of the state of São Paulo. Born to a family of second-generation Italian immigrants (Bento and Helena), she had two brothers (Inês and Olímpio). She married my father, Ozias Bueno, in 1960 and had two sons,

my brother Paulo Roberto and me. My mother was a seamstress, seller of graduation rings and owner of jewellery stores. Above all, she was a generous and extremely caring mother. To her, my continuous longing for you.

Júlio César Bueno
Pinheiro Neto Advogados
São Paulo
June 2021

Chapter 8

GHANA

NanaAma Botchway and Akosua Achiaa Akobour Debrah[1]

I INTRODUCTION

As a developing nation, Ghana's focus on infrastructure growth is aimed at driving socioeconomic development and enabling greater productivity within the various sectors of the economy. The annual infrastructure funding gap is estimated at US$1.5 billion for the next decade. and government and private sector participants are developing innovative ways to bridge this gap. This has increased the reliance on project financing for the development of both privately funded infrastructure and public-private partnerships (PPPs). The World Bank's Private Participation in Infrastructure database indicates that of the 30 projects that reached financial close between 1990 and 2019, only five have either been cancelled or are under duress. Multilateral agencies and development financial institutions, such as the World Bank Group and the African Development Bank, are playing a key role in this process through the provision of funding and other credit enhancement facilities, such as partial risk guarantees to private investors and lenders. Their contributions have had a significant impact on the success of many project financings in Ghana.

II THE YEAR IN REVIEW

Over the past year, several new pieces of legislation that could impact the development and financing of projects have been enacted. These include the Borrowers and Lenders Act, 2020 (Act 1052), the Land Act, 2020 (Act 1036), the Corporate Insolvency and Restructuring Act, 2020 (Act 1015), the Development Finance Institutions Act, 2020 (Act 1032) and the Public Private Partnership Act, 2020 (Act 1039). The enactment of these laws is expected to bolster the legal framework for contracting and implementing project finance transactions.

The government's plans to focus on the development and rehabilitation of transport infrastructure during the year did not pan out as expected due to the outbreak of the covid-19 pandemic. The pandemic resulted in a shift of focus to healthcare infrastructure and increased spending on covid-19 related social and business alleviation programmes. The imposition of pandemic containment measures such as social distancing also adversely affected productivity in various sectors of the economy, with significant impact on existing and new projects. Delays in supply chains, and disbursement of funds and funding approval decisions, also affected the sector.

1 NanaAma Botchway is the managing partner and Akosua Achiaa Akobour Debrah is a partner at N Dowuona & Company.

On 30 March 2020, Ghana's Finance Minister submitted a covid-19 economic impact assessment to the Parliament of Ghana, in which he outlined the possible economic impact of the covid-19 pandemic on the Ghanaian economy, highlighting projected shortfalls in revenue and trade as well as increased spending, and outlined various measures required to close the fiscal gap of 11.4 billion cedis (2.9 per cent of revised GDP). In this regard, the Bank of Ghana and the Ministry of Finance engaged local commercial banks to provide financial support to the private sector to mitigate the impact of the covid-19 pandemic. The support included a syndication facility of 3 billion cedis to support industry, especially in the pharmaceutical, hospitality, services and manufacturing sectors; granting of a six-month moratorium on principal repayments for selected businesses; and a reduction of interest rates priced off the Ghana Reference Rate by 200 basis points (2 per cent per annum).

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

Project financing transactions in Ghana are usually undertaken through a special purpose vehicle (SPV) incorporated in Ghana by the project sponsors. These SPVs are typically private companies limited by shares and may be wholly owned by one or more private sponsors, or jointly owned venture by private and state-owned entities. A few projects are entirely state-owned. Various transaction models are used, depending on the specific nature of the project, the most common being the build-operate-transfer and build-own-operate-transfer models. Different contractual arrangements are entered into by the SPV with contractors, operators, consultants and subcontractors with a view to mitigating the specific risk factors that may affect the success of a project.

ii Documentation

Typical documentation includes project agreements, operation and maintenance (O&M) contracts, security agreements, construction contracts, off-take agreements, shareholders' and equity subscription agreements, loan and other credit facility agreements, direct agreements, inter-creditor agreements, escrow agreements and government support agreements.

Project agreements (usually concessions) are entered into between the SPV and a relevant public authority under which the SPV is granted the exclusive right to develop and operate specified infrastructure for a specified period. The relationship between the project sponsors is governed by a shareholders' agreement. O&M contracts between the SPV and a technical partner (which may or may not be related to the project sponsors) are entered into in respect of the operation and maintenance of the asset. Bespoke and standard form construction contracts are entered into by the SPV and a selected contractor, who may also subcontract different aspects of the construction work to other companies. Various financing and security agreements between lenders and the SPV outlining terms of repayment, interest, fees, security arrangements and other requirements concerning the loan facility are commonly used. As part of the security package, it is also typical for lenders to sign direct agreements with various parties that provide for lenders' step-in rights in the event of a default by the SPV or assumption of the SPV's debts (or both). Lenders sometimes insist on direct agreements with central government but this is usually resisted by the latter. Government support agreements may sometimes be signed with the central government for strategic investments in key sectors of the economy, although the scope of these agreements is increasingly limited.

iii Delivery methods and standard forms

The delivery methods for construction projects in Ghana are based on a consideration of factors such as the type of project, timelines for delivery of the project, and sources of funding and procurement methods. Project sponsors often require delivery on an engineering-procurement-construction basis or on a design and build basis depending on the sponsor's experience and capacity. The International Federation of Consulting Engineers (FIDIC) suite of contracts are the most commonly used form of construction contract. The FIDIC standard form ensures a standardised approach to construction projects and offers some stability to project sponsors and lenders since there is extensive precedent to cater for any issues that may arise in practice. Bespoke construction contracts and other standard forms of construction contract, although used, are less common.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

Significant risks faced by parties involved in project finance transactions and construction contracts include the following.

Exchange rate risk

Ghana's currency, the cedi, continues to be volatile against more robust currencies such as the US dollar, the British pound and the euro. Sponsors of projects that are financed using any of the major foreign currencies, but whose income proceeds are generated in the cedi, are therefore faced with the risk of being unable to service interest payments on loans in the event of a rapid depreciation of the Ghana cedi against the relevant foreign currency. Where possible, project companies enter into hedging agreements with banks and other financial institutions to manage the risk of fluctuating foreign exchange rates. In other cases, authorisation may be procured from the Bank of Ghana to enable the project company to charge fees in a specified foreign currency. This is currently permitted only for participants in the mining and oil and gas sectors.

Market and regulatory risks

The dominance of state-owned entities in certain sectors of the economy implies that certain regulators are often unable to enforce relevant laws against state-owned entities. In some circumstances, the regulator is itself a market participant. This may result in government interference with the aim of promoting state interest at the expense of private sector participants. Market and regulatory risks are usually addressed contractually by ensuring that adequate safeguards are included in a project agreement and appropriate remedies provided in the event of the occurrence of such risks. When a government support agreement is entered into between a private party and the government, specific incentives and guarantees against such risks may also be provided.

Authorisation risk

The risk that a project agreement would be deemed void and unenforceable owing to the lack of all relevant approvals including parliamentary approval may be relevant for certain projects. Under the Constitution of Ghana, a resolution, supported by the votes of a majority of all members of Parliament, must be obtained from Parliament by the government prior

to its entry into an international business or economic transaction. This constitutional requirement affects structuring for projects in which the government is directly involved, and is especially relevant for setting timelines for the commencement of a project. To mitigate against the risk of an agreement being deemed to be void, the requirement for parliamentary approval is usually made a condition precedent to be satisfied by the public authority prior to the effectiveness of the project agreement.

Construction risks, environmental risks and O&M risks are addressed contractually and are typically allocated to the party best placed to handle them. Responsible parties then procure the relevant insurance to mitigate against the occurrence of the specified risks. Relevant agreements will usually provide remedies such as compensation or relief from, or suspension of, certain contractual obligations on the occurrence of specified risks. See also Section IV.iii, below, on political risks.

ii Limitation of liability

Parties may agree to liability caps in the event of default by one of the parties. There is no prescribed limit, and agreed caps are the product of negotiations between parties. Parties may also exclude liability for indirect or consequential losses and loss of business or profit. Force majeure exclusions are enforceable and may apply to relieve parties of their respective obligations under a contract. Force majeure events are limited to events or circumstances that are beyond the reasonable control of parties and that materially and adversely affect the ability of a party to perform its obligations under an agreement. On the occurrence of a force majeure event, parties are usually contractually required to take reasonable measures to mitigate the consequences for the project. In cases of prolonged force majeure events, the parties usually contractually agree to the termination of their agreement. In the absence of contractual force majeure provisions, under the Contracts Act, 1960 (Act 25), 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 uncontemplated event that makes it impossible or illegal to perform the contract or makes the contract radically different from the agreement originally entered into by the parties. In applying the doctrine of frustration, Ghanaian courts have held that events that cause serious inconvenience, hardship, financial loss or delay in the performance of the contract will not be sufficient to constitute frustration of the contract.

iii Political risks

Political risk may be manifested in a myriad of ways, including most often in the Ghanaian context in the form of renegotiation by a new government of the terms of existing project agreements following a change in government. Political risks may be addressed contractually through direct agreements and the provision of suitable remedies in project agreements in the event of changes in law and material adverse government actions. Parties may also obtain political risk insurance (PRI) from international PRI providers or partial risk guarantees from development finance institutions, such as the Multilateral Investment Guarantee Agency. There are also safeguards under the Constitution in respect of the property rights of foreign investors that prohibit compulsory acquisition of property without fair and adequate compensation. Additionally, project companies that are registered with the Ghana Investment Promotion Centre are also guaranteed freedom from expropriation or nationalisation of their investments, except in very limited circumstances relating to the national interest. In all such cases, the investor must be fairly and adequately compensated.

V SECURITY AND COLLATERAL

Security may be taken over a wide range of asset classes owned by the project company and its sponsors. Typical security arrangements include:

a mortgages on the project site;
b fixed or floating charges on the project assets (movables);
c fixed charges on the shares of the project company and any rights attached to them;
d fixed charges on the project company's bank accounts; and
e assignment by way of security of the receivables of the project company.

Key project documents may be assigned by way of security to enable lenders to take over the rights and obligations of the project company in the event of a default under any of those agreements. Direct agreements are also typically entered into between lenders and various counterparties, guaranteeing the lenders such step-in rights. On-demand bank guarantees or performance bonds from contractors are standard.

Security documents must be stamped, subject to the payment of the applicable duty, which is assessed based on the value of the amount secured and depending on whether the particular security is the principal or supplementary security. Depending on the type of security, registration with the Companies Registry, the Collateral Registry or the Lands Commission is required to perfect the security interest created in favour of lenders. Charges on the movable and immovable property of the project company are required to be registered with the Collateral Registry and the Companies Registry within 28 days and 45 days of their creation, respectively. The time limit for registration may be extended in appropriate cases. In addition to being registered with the Collateral Registry and the Companies Registry, mortgages on immovable property must be registered at the Lands Commission.

Registration also determines the priority of competing security interests. Generally, a fixed charge on an asset takes priority over a floating charge affecting that asset, unless the project company was prohibited by the terms on which the floating charge was granted from granting any later charge having priority over the floating charge, and the person in whose favour the later fixed charge was created had actual notice of that prohibition at the time when the fixed charge was created in its favour. Subject to the above and agreements regarding subordination of existing security interests, the general rule on the priority of competing security interests is that the first to be registered (by time and date) takes precedence, irrespective of the actual date of creation of the interest.

VI BONDS AND INSURANCE

Project companies may require contractors and subcontractors to post various types of bonds or guarantees during different phases of the project. Tender security, usually in the form bank guarantees, may be requested by a project company from bidding contractors at the tender stage of a project. Performance bonds or bank guarantees are requested by a project company from the winning bidder as security for the performance of the contract. They typically last for the duration of the contract and ensure the payment of a fixed percentage of the contract sum in the event that the contractor fails to fully perform in accordance with the terms of the contract. Advance payment guarantees are provided by banks on behalf of contractors to the project company as a guarantee that the bank will repay any advance payments made to the contractor in connection with the project in the event that the project is discontinued by

the contractor. Retention guarantees are provided to the project company to ensure that the contractor carries out all necessary work to correct defects discovered after completion of the contract and after full payment of the contract sum.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

In the event of a default under the financing agreements, a secured lender may take steps to enforce security granted by the project company. Registration of a security interest with the relevant public registries is a prerequisite to its enforcement. Under the Borrowers and Lenders Act, 2020 (Act 1052), registered charges may be enforced upon 30 days' written notice to the project company. Thereafter, the lender may take possession of the secured asset after obtaining a certificate of no objection from the Collateral Registry, following a further 30 days' notice to the Collateral Registry. If, as is often the case, this cannot be done amicably, the lender may seek to enforce the security through a court action. Lenders may seek assistance from local law enforcement under the authority of a court warrant to enforce their right of possession. A court may order the judicial sale of the asset or the appointment of a receiver or manager after hearing the lender's application to enforce the security. Where a project lender begins the process of enforcing security, it is required under the Companies Act, 2019 (Act 992) to notify the Registrar of Companies within 10 days of entry into possession or the appointment of a receiver or manager.

The Corporate Insolvency and Restructuring Act, 2020 (Act 1015) provides protections and options for company rescue and reorganisation procedures. Act 1015 enables distressed project companies to remain as going concerns by providing them with the option to restructure their debts, enter into receivership or seek administration as an alternative to liquidation.

The appointment of an administrator 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. Similarly, court proceedings cannot be commenced or continued against a company that is in administration without leave of the court. However, Act 1015 authorises the court to make any order that it considers necessary to protect the interest of the creditors of the company while the company is in administration, on the application of the Registrar of Companies or a director of the company. Act 1015 further grants secured creditors, who are affected by the appointment of an administrator, the right to apply to the court within the decision period for an order granting leave to the secured creditor to enforce the security of the secured creditor.

The commencement of official liquidation processes operates as a stay of proceedings in respect of any pending civil suits against the insolvent company. Any transfer of the shares of the company (to any person other than the liquidator) or any disposition of the property of the company during that period is void, unless otherwise directed by the court. No other person apart from a secured lender is permitted to commence or continue an action for the realisation of security without leave of the court and subject to any terms that the court may impose. A creditor holding a security may also be required to realise the security within six months of being notified by the liquidator. Failure to realise the security would lead to the security being treated as surrendered by the creditor.

During the winding up of an insolvent project company, a liquidator may give notice to a person or company to return property (or its value) that the project company transferred

to that person or company to settle a debt, if the transfer was made at least 21 days before the petition for winding up was filed. Any property disposed of by the project company for less than its full value, within the two years preceding the winding up, or between two and 10 years prior to the winding-up order being made and at a time that the project company was insolvent, may be required by a liquidator to be returned by the beneficiary, or the excess value repaid. A liquidator may also exercise clawback rights and unwind certain transactions where it appears that during the 12 months immediately preceding the commencement of the liquidation proceedings, and at a time that the company was insolvent, the company created any charges with the intention that certain creditors benefit at the expense of others.

In terms of the ranking of payments during the winding-up of an insolvent project company, Act 1015 creates eight ranks or classes of debt to be satisfied in order of priority, from class 'A' to 'H'. Class A debts comprise the remuneration or reimbursement for expenses or any other money relating to employment in the company that falls due during the business restructuring or administration proceeding but are not paid to the employees, and financings obtained during business restructurings or administration proceedings that may be secured by the company's assets that are not otherwise encumbered. They rank above all other debts and must be satisfied first. Class B debts are preferential debts comprising remuneration owed to employees during all or part of the four months preceding the date of commencement of administration or winding-up, or rates, taxes or similar payments owed to the country or a local authority that become due within the year preceding the date of the commencement of administration or winding-up. Debts secured by fixed charges are classified as Class C debts. Debts owed to directors or former directors that were incurred by the project company in the year preceding the commencement of the liquidation fall under Class D. Class E debts comprise excess benefits restored to the liquidator in respect of dispositions of the company's property for less than the full value within specified periods, and excess interest (defined as interest rates that are 5 per cent above the Bank of Ghana policy rate). Unsecured debts that do not fall within any other class are classified as Class F debts. These are followed by Class G debts, made up of debts owed to preference shareholders, and Class H debts, which are debts owed to ordinary shareholders.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

Generally, companies that engage in activities likely to have a significant impact on the environment are required to obtain a renewable permit from the Environmental Protection Agency (EPA). Different permits may be required during the construction and operational phases of the project. A project company may also be required to submit an environmental impact assessment if, in the opinion of the EPA, the activities of the company are likely to have an adverse effect on the environment. The application process involves the submission of a registration form to the EPA, with a site plan duly signed by a licensed surveyor and a zoning letter from the Town and Country Planning Department. Upon receipt of the form, the EPA may request the applicant to conduct a detailed study to fully understand the environmental impact of the proposal and how it would be mitigated. The applicant may also be required to undertake a scoping exercise, which involves widespread consultations with interested or affected parties, to identify all key issues of focus and to develop the terms of reference for the environmental impact assessment.

All reports must be submitted to the EPA for review. As part of the review, copies of the environmental impact statement are made publicly available at various places, including the EPA Library, the relevant district assembly, the EPA Regional Office and at the sector ministry responsible for the undertaking. A public notice must also be published in a national or local newspaper (or both) soliciting public comments within 21 days. A public hearing is necessary in cases where a published notice results in a serious public reaction to the commencement of the proposed undertaking; the undertaking will involve the dislocation, relocation or resettlement of communities; and the EPA considers that the undertaking could have extensive and far-reaching effects on the environment.

Depending on the outcome of the review, the applicant may be required to pay processing and permit fees, the amount of which will depend on the EPA's assessment of the building or project, before an environmental permit is issued. If an environmental impact assessment is required for the purpose of granting the permit, the fee for the permit shall be 1 per cent of the project cost. A company that is issued with an environmental permit is required to submit to the EPA an annual environmental report 12 months after the date of commencement of operations and every 12 months thereafter, in the form and containing such particulars as the EPA shall direct.

Other permits and licences relating to social and environmental matters may be required depending on the nature of the project, the specific phase of construction or operation of the project, and the industry in which the project is being undertaken. For instance, projects in the maritime industry require safety permits to be obtained from the Ghana Maritime Authority prior to construction, and the issuance of a port facility security plan following the conduct of a port facility security assessment upon the completion of the project, but before the commencement of operations. A building permit obtained from the local assembly, a fire permit from the National Fire Service, a licence from the Water Resources Commission and a Factories Inspectorate Division certificate may also be required.

ii Equator Principles

Compliance with the Equator Principles is not legally required. However, project companies may be required by lenders under the terms of the finance documents to comply with certain international standards, including the Equator Principles. To ensure that they do not breach the terms of facilities granted to them, project companies also ensure that contractors and O&M managers are subject to the same standards in their respective agreements with them.

iii Responsibility of financial institutions

There are no specific provisions under Ghanaian law that impose administrative, civil or criminal liability on lenders in respect of activities of project companies that fall short of socio-environmental standards. However, a number of banks in the market have contractual obligations to some of their shareholders, most often development finance institutions, to comply with the IFC performance standards or other DFI standards that are founded on the Equator Principles. As such, these requirements are often imposed on project companies as part of the terms of the financing agreements.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

The use of PPP arrangements in Ghana has significantly increased in recent years, particularly in sectors involving the extraction and allocation of natural resources, including power, oil and gas, and within the ports and rail sectors. Notable PPP projects include the Eastern Railway Line, the Sunon-Asogli Power Plant, the Kpone Independent Power Plant, the Tema Port Expansion and the Takoradi Port Expansion.

A new PPP law, the Public Private Partnership Act, 2020 (Act 1039, PPP Act), was passed towards the end of 2020 to regulate PPPs. Under the PPP Act, a PPP is defined as a form of contractual arrangement or concession between a contracting authority and a private party for the provision of public infrastructure or public services traditionally provided by the public sector resulting in the private party performing all or part of the infrastructure or service delivery functions of government, and assuming the defined risks over a significant period. The PPP Act sets out comprehensive obligations of contracting authorities, which include managing the phases of a partnership project, obtaining the relevant approvals for a project, and engaging the services of a consultant or transaction adviser where necessary. The Act establishes:

a the PPP Committee for the purpose of considering requests from contracting authorities to undertake PPP projects, examining and approving feasibility studies, and considering and approving bid evaluation reports, among other things; and

b the PPP Office to serve as a secretariat for the PPP Committee and to oversee the partnership procedures set out in the Act.

The new law sets the financial thresholds for the approval of a project, depending on the capital cost involved, by the relevant approval authorities. The Act also requires certain authorities to play an appraisal role in the PPP process. The various sector ministries, the offices of the regional coordinating councils and the public investment unit of the Ministry of Finance are required to appraise projects before they are considered for approval. Appraisal basically involves reviewing projects, and their feasibility study reports, and providing recommendations on a project to the relevant approval authority.

Under the PPP Act, the process for government-originated projects involves the preparation and submission of project concept notes, pre-feasibility and feasibility study reports, procurement on a competitive basis, negotiation and conclusion of the PPP agreement. Various approvals must be obtained at different stages of the process from the relevant authorities depending on the estimated project cost. PPP projects involving an estimated project cost of more than the cedi equivalent of US$200 million dollars require Cabinet approval. Any project that falls below that threshold may be approved by the PPP Committee or the general assembly of the relevant authority procuring the project. Parliamentary approval must be obtained for certain projects, such as those in respect of which tax incentives are granted or that are deemed to be international business transactions as such term is defined under the Constitution, irrespective of the estimated project cost. Parliamentary approval is also required for projects with financial commitments that will bind the government for more than one financial year or projects that will result in a contingent liability. Unsolicited proposals for the development of PPP projects will only be considered by the contracting authority if the project is not in the medium-term development plan of the contracting authority and has not already been considered by the contacting authority for implementation as part of the PPP pipeline of projects of the contracting authority.

ii Public procurement

The Public Procurement Act, 2003 (Act 663), as amended, regulates public procurement processes. All contracts involving the procurement of goods, works and services financed in whole or in part from public funds or the disposal of public stores, vehicles and equipment are subject to public procurement laws. However, a public entity is permitted, with approval from the Public Procurement Authority, to undertake procurement in accordance with established commercial practices if the entity is legally and financially autonomous and operates under commercial law; the use of public procurement processes are not suitable, considering the strategic nature of the procurement; and the proposed procurement process will ensure value for money, competition and transparency as far as possible. Further, if a contracting entity undertakes procurement with international obligations arising from a grant or concessionary loan to the government, the procurement must be undertaken in accordance with the terms of the grant or loan, subject to the review and approval of the procurement procedure by the Public Procurement Authority.

The preferred public procurement procedure is competitive tendering; however, restricted tendering and single source procurement may be used with the approval of the Public Procurement Authority. Foreign companies can participate in bids only when the contract sum requires international competitive tendering to be used or in instances where effective competition cannot be attained locally through national competitive tendering. Procurement of goods valued above 10 million cedis, works above 15 million cedis and technical services valued above 5 million cedis may be done by international competitive tendering processes. Additionally, certain sectors of the economy have local content and local participation rules that may restrict participation of foreign companies. For example, a foreign company may not be granted a petroleum licence or awarded a contract unless an indigenous Ghanaian company holds at least a 5 per cent equity interest in the company. In the energy sector, a company that intends to engage in wholesale power supply activities must have an initial Ghanaian equity participation of at least 15 per cent, which must be progressively increased to at least 51 per cent within 10 years.

The criteria for evaluating and comparing bids must be set out in the tender documents. The Public Procurement Authority has the mandate to rule on review applications in procurement proceedings. An aggrieved supplier, consultant or contractor may file a complaint with a relevant procurement entity within 21 days of becoming aware of the subject of the complaint. The procurement entity is required to make a decision within 21 days of the submission of the complaint. A review application may be submitted to the Public Procurement Authority if the procurement entity does not issue a written decision within the said period or if the complainant is simply dissatisfied with the procurement entity's decision. A right of appeal to the High Court lies against the decision of the Public Procurement Authority. An application for review by the Public Procurement Authority does not have an automatic suspensive effect on the procurement procedure. However, the Authority may order the suspension of procurement proceedings at any time before entry into force of the procurement contract, or order the suspension of performance or operation of a framework agreement that has entered into force where it is necessary to protect the interests of the complainant, unless outweighed by the public interest. A procurement entity's decision to select a particular method or to limit a national competitive tender to local companies (and exclude locally registered foreign-owned companies) or to reject tenders, proposals or quotations based on grounds specified in invitation documents and in accordance with legal procedure, is not, however, subject to administrative review.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

There is no general requirement for foreign contractors to incorporate a business entity in Ghana. However, depending on the nature of activities being undertaken and the length of time involved, registration of a local branch or representative office may be required. Companies with foreign ownership that are registered to do business in Ghana are required to also register with the Ghana Investment Promotion Centre (GIPC). The GIPC Act governs investment in many sectors of the economy, with the exception of mining, petroleum and free zone sectors. It specifies the areas of investment reserved solely for Ghanaians and establishes minimum capital requirements from foreign investors to enable them to operate in specified industries on the Ghanaian market.

Investors must satisfy a minimum capital requirement of US$200,000 for joint ventures in which a Ghanaian citizen holds at least a 10 per cent equity stake, US$500,000 for wholly foreign-owned companies or US$1 million for trading companies. Additionally, as noted above, there are specific local content and local participation requirements that must be satisfied prior to the grant of a licence by the regulator to enable the company to operate in the sector. Under the Constitution, foreign persons are not permitted to hold a freehold interest in land or to hold a leasehold interest in land for a term of more than 50 years at a time.

Foreign nationals are required to obtain work and residence permits from the Ghana Immigration Service to legally reside and work in Ghana. There are no restrictions that apply specifically to foreign investors in the event of foreclosure of a project company or related companies. There are incentives for foreign companies that register with the GIPC or the Ghana Free Zones Authority. Licensed free zone developers and enterprises are exempted from the payment of tax on profits for the first 10 years after the date of commencement of operation and thereafter are subject to a reduced corporate tax rate of 15 per cent. A licensed free zone entity is also exempted from the payment of withholding taxes on dividends and from all direct and indirect taxes and duties on imports. Free zone entities and GIPC-registered entities enjoy an automatic quota with respect to procuring work permits for expatriate employees. GIPC-registered businesses receive benefits that include tax incentives, absolute protection against nationalisation or expropriation, a quota of employer-sponsored work visas based on the company's paid-up capital, and a guarantee that capital, dividends and net profits may be transferred outside Ghana in freely convertible currency.

i Foreign exchange controls

Under Ghanaian law, no resident of Ghana, other than persons licensed by the Bank of Ghana to do so, shall price, advertise, receive or make payment in any foreign currency for goods or services. A resident for these purposes is any person who has resided in Ghana for one year or more, any company incorporated in Ghana, any company not incorporated in Ghana but whose principal place of business or centre of control and management is located in Ghana, or a local branch of a company with a principal place of business located outside Ghana. However, resident and non-resident persons may open and operate foreign currency accounts and foreign exchange accounts with duly licensed banks. Foreign currency accounts may only be fed with unrequited currency transfers, such as transfers from abroad for investment in Ghana, and are free from exchange control restrictions with regard to their operation. Foreign exchange accounts may be fed with foreign currency generated from

activities within Ghana and are subject to restrictions. Foreign exchange account holders may transfer up to US$50,000 per annum outside Ghana without restriction but may only transfer more than US$50,000 with proper supporting documentation.

ii Removal of profits and investment

Subject to compliance with the foreign exchange controls, foreign-owned companies that are registered with the GIPC are guaranteed unconditional transferability in freely convertible currency of dividends or net profits from investments, interest payments on foreign loans and remittance of proceeds in the event of the sale of the investor's interest in a project. Dividends are payable out of post-tax profits and are subject to a withholding tax of 8 per cent. Interest payments on debts are also subject to a withholding tax of 8 per cent.

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no courts that are specially set up to deal with project finance or construction disputes. However, disputes arising out of project finance transactions or under construction contracts are typically determined by the commercial division of the High Court.

ii Arbitration and ADR

Alternate dispute resolution (ADR) in Ghana is governed by the Alternative Dispute Resolution Act, 2010 (Act 798). This Act provides the legal and regulatory framework for ADR proceedings in Ghana. Act 798 specifies the rules for negotiation, mediation and arbitration that are commonly used in Ghana. Project agreements typically provide a graduated procedure for resolving disputes, with arbitration being the final step. Foreign investors and lenders usually insist on international arbitration under the rules of the International Chamber of Commerce or the London Court of International Arbitration. The Ghana Arbitration Centre is the local alternative, and experts may be appointed from such professional bodies as the Ghana Institution of Engineering or the Ghana Institution of Surveyors. Ghana has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and therefore will enforce contractual provisions and awards from nations that are also parties to the New York Convention. Ghana is also a signatory to the ICSID Convention.

International arbitration awards are enforced by way of application to the High Court of Ghana. The party seeking to enforce an award must apply to the High Court by producing the original award and the agreement pursuant to which the award was made. The Court's consideration in giving effect to the foreign award will be to consider:

a whether there is any appeal pending against the award in any court under the law applicable to the arbitration;

b whether the award was made under a competent authority under the laws of the country in which the award was made;

c whether a reciprocal arrangement exists between Ghana and the country in which the award was made; or

d whether the award was made under the New York Convention or under any other international convention on arbitration ratified by the Parliament.

Under the ADR Act, matters relating to the national or public interest, the environment, the interpretation of the Constitution and any other matter that cannot by law be settled by arbitration are non-arbitrable. Project finance and construction agreements are not automatically subject to domestic arbitration.

Additionally, the PPP Act establishes a seven member Complaints Panel to handle disputes arising out of any aspect of the PPP bidding process. Parties have a right of appeal to the High Court against the decision of the Complaint Panel. Disputes between the contracting authority and a private party arising from the partnership agreement shall be settled in accordance with the dispute settlement mechanism agreed by the parties in the partnership agreement or by default, in accordance with the Alternative Dispute Resolution Act, 2010 (Act 798).

XII OUTLOOK AND CONCLUSIONS

Despite the rise in the use of project finance for the development of public infrastructure, access to long-term funding for capital intensive projects in Ghana continues to be a challenge. To address this issue, the government in 2014 established the Ghana Infrastructure Investment Fund with the core mandate of mobilising, managing, coordinating and providing financial resources for investment in a diversified portfolio of infrastructure projects in Ghana. The current government has declared its commitment to partnering with private parties in the delivery of priority projects, particularly in the transport sector. Additionally, recent banking reforms involving a revamping of the capitalisation and liquidity requirements resulted in the improved capacity of local banks to participate in medium to large-scale project finance transactions.

A significant development is the promulgation of the PPP Act. The PPP Act establishes a comprehensive legal framework for the evaluation, development, implementation and regulation of PPP arrangements and projects between public institutions and agencies and private entities for the provision of public infrastructure and services. It makes provision for several types of PPP arrangements and establishes the Public Private Partnerships Office to take up the responsibility of promoting the efficiency and effectiveness in the development and implementation of PPP arrangements.

However, the impact of the covid-19 pandemic could erode the modest gains made by the government and the private sector in addressing financing issues for infrastructure projects in Ghana. The pandemic has led to tighter financing conditions in both the domestic and international finance markets, and the slowdown in economic activity is likely to result in debt service difficulties, especially in the aviation and hospitality sectors. The effective implementation of covid-19 containment measures such as vaccinations, and the various initiatives introduced by the government such as tax rebates for businesses operating in specified sectors and the 100 billion cedis budgeted Ghana covid-19 alleviation and revitalisation of enterprises support programme, would aid in addressing these concerns and getting the economy back on track.

Appendix 1

ABOUT THE AUTHORS

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NanaAma Botchway is the founder and managing partner of N Dowuona & Company. She is ranked as an elite leading lawyer by *The Legal 500* and is highly recommended by *Chambers and Partners* and *IFLR1000*. NanaAma's key areas of focus include construction, infrastructure and project finance. She has advised on the development and implementation of the US$1 billion National Identification System Project, the financing and development of a floating dry dock, the Volta Lake Transport Company's US$300 million Eastern Corridor Multi-Modal Transport Project, on the proposed construction of a new liquefied petroleum gas pipeline from the port of Tema to the Tema Oil Refinery, a US$100 million financing of the operations of a pan-African telecommunications infrastructure company and the financing of a containerised solar photovoltaic solutions business in Ghana. She has significant experience in advising on various aspects of construction projects, including planning, permitting and finance, and has advised local and international developers on the construction of significant real estate projects in Ghana, including the Mövenpick Ambassador Hotel, the first mixed-use hotel project of its kind in Ghana, and One Airport Square, the first certified green office building in Ghana.

Before returning to Ghana, NanaAma was an associate in the mergers and acquisitions and corporate tax departments of the New York office of Simpson Thacher & Bartlett. NanaAma received her *Juris Doctor* from Columbia University School of Law. She is licensed to practise law in Ghana.

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