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n the business world, opportunity does not just spring up - it emerges from the convergence of multiple factors. Often, it starts as a hotchpotch of challenges or scattered events and when someone begins to connect the dots, suddenly a potential opportunity becomes apparent. Taking advantage of the opportunity, however, requires action, else it lies dormant. And when it comes to taking action, speed is important, especially for those who want an early advantage. First movers get great advantages but eventually, more businesses move into the sector and the point comes when what looked like a monopoly becomes a commoditized environment; one where competitors undermine each other leading to what has been described by W. Chan Kim and Renée Mauborgne as a "red ocean" environment.

"Red ocean" is a symbolism of the bloody competition that comes with highly competitive environments. Of course, the thrust of Chan and Renee's book on strategy is about how to avoid the "red ocean" by rather looking for (or creating) uncontested market spaces. Essentially, they argue that there is no point competing in a red ocean when there are open or unoccupied spaces in the "blue ocean" (Blue Ocean Strategy – How to Create Uncontested Market Spaces and Make Competition Irrelevant, 2004).

Nature Abhors a Vacuum

In physics, empty spaces are deemed to be a deviation from the norm. Since nature abhors a vacuum, the forces of nature quickly occupy emptiness. But what is the nature of empty spaces when it comes to business?

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Are there really uncontested spaces? In what forms do they appear and is it easy to spot?

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Blue ocean studies reveal that the gaps that constitute present challenges become business opportunities when entrepreneurs make the move to fill them and when it comes to that, Africa has an infinite amount of such gaps. Now at 1.4 billion people (as of November

2022), the Africa business ecosystem reveals an unending stretch of blue ocean opportunities entrepreneurs are taking advantage of, from both traditional and unorthodox angles.



Technology, Illiteracy and Agribusiness

Apparently, examples of blue ocean gaps are not so difficult to find. Recently, even the low level of literacy among the farming community has suddenly become an opportunity. This became real when Agrixtech (Cameroon) launched an app that uses text and voice recognition technology in several local languages to equip farmers with the technical know-how to help them adopt a better crop pest and disease management strategy on their farms. The app also helps farmers through the agricultural production cycle by giving

advice and task reminders, irrespective of level of education.

Similarly, in Nigeria, Farmcrowdy has enabled access to market and finance by creating a platform that connects hundreds of thousands of participants in the food value chain to enhance their chances of tapping into crowd funding. It also guides them on how to get better yields. Another example in the agribusiness sector is revealed by Agfunder, a venture capital firm focused on food and agric tech. According to

their 2022 Africa AgriFoodTech Investment Report, in the past five (5) years, early-stage investors have pumped more than \$1 billion into African startups innovating for the food and agriculture industry and achieving a record-breaking US\$482 million in 2021 alone. That was a 250% jump year-over-year, but still

represents less than 1% of global agrifoodtech investment.

In Kenya, iProcure has introduced supply chain platforms that provide business intelligence and data-driven information on stock management, sales tracking, inventory management and procurement warehousing to last mile communities. So far, over 5,000 agro dealers in Kenya and 1,000 in Uganda have relied on this platform to reach over a million farmers.

Scale to Gain

The AfCFTA creates a continental market which naturally opens avenues for mega projects as well as a potential demand for specific commodities at scale. Indeed, since the start of the AfCFTA, "scale" has become a buzz word and a major corporate strategy option in Africa and there are many examples.

The much talked about Dangote Petrochemical Complex in Nigeria comes to mind. Ranked as the world's 7th largest integrated refinery and petrochemical project, it has a capacity of 650,000 barrels of oil per day, will meet Nigeria's petroleum product needs and has surplus supply to the rest of Africa. In addition, it will generate 12,000 Megawatts of electricity and create 30,000 direct and indirect jobs. At a Capex of US\$19 billion, the sponsors include Standard Chartered Bank, NNPC, and United States Trade and Development Agency.

That is by no means the only mega project making news on the continent. There is also the East Africa Crude Oil Pipeline (EACOP) connecting Uganda and Tanzania. It covers a 1,443km crude oil export pipeline that will transport Uganda's crude oil from Kabaale-Hoima district in Uganda to the Chongoleani Peninsula near Tanga port in Tanzania. It will have a peak capacity of 246,000 bbls/day and has already attracted US\$4 billion in FDI with massive potential for technology transfer and will generate other related investments in infrastructure. The project is led by TotalEnergies (62%), it has cross border ownership which includes Ugandan National Oil Company (15%), Tanzania Petroleum Development Corporation (15%), and CNOOC Limited (6%).

Along Africa's Economic Corridors

Another mega project is the Lamu Port-South Sudan-Ethiopia Corridor Project (LAPSSET). Conceived as part of Kenya's Vision 2030, it is designed to be an international transport corridor once completed. It is centred around value chains along the corridor and has an estimated Capex of US\$ 25 billion. The potential sponsors include the Government of Kenya and AfDB through NEPAD Infrastructure Project Preparation Facility, and it recently attracted a high-profile attendance at a side event during the 2nd Dakar Financing Summit for Africa's Infrastructure Development (held in Dakar, Senegal on 2nd and 3rd February, 2023).

The LAPSSET has further evolved with the interest of private sector partners who seek to connect the corridor westwards all the way to Cameroon. If the West Africa coast component is implemented, it will cut the time of maritime travel from the Indian Ocean to the Atlantic Ocean part of Africa by several weeks. Interestingly, it will also lead to an increase in maritime transport activity and the emergence of new logistics hubs both in the eastern and western coasts of Africa. Whilst creating additional 25

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mega projects along the corridor, the expected increase in economic activity has added to the many reasons why this project has attracted the attention of NEPAD and AUDA. Similarly, the much talked about Abidjan-Lagos corridor has recently gained momentum with the announcement of a US\$16 billion funding by AfDB as well as the publication of the Expression of Interest for the project feasibility by the ECOWAS Commission.

Moore's Law, ChatGPT and the Big Binge Theory

The jury is still on whether Moore's Law is dead or not i.e. whether computer speed is doubling every 18 months or not (as was the case over the last half century). The fact remains, however, that microchip densities continue to bring about exponential improvements in various applications of technology. As the application of AI to diverse aspects of human endeavour deepens, it puts global businesses on the threshold of a new ecosystem. For Africa, the most interesting part is that technology has become the launch pad on which the continent's

businesses may leapfrog many of its current challenges and become blue ocean enterprises.

Perhaps, the phenomenal rise of ChatGPT (it grossed over 100 million users in just two (2) months after launch) is a revelation that tech driven products may not necessarily go through the traditional product life cycle. If, as reports indicate, the search engine "Bing" is successful with voice activated search options, it may signal another shift from what we are used to. This potentially disruptive occurrence, together with other over-the-top media which provide audio and video streaming over the internet (dubbed "the Big Bing Theory" by some pundits), may offer enterprises new avenues to both distribute as well as access information which they can leverage to capture new markets in Africa.

Africa businesses which have the strategy and the requisite wherewithal may deploy relevant innovative technologies to jumpstart existing businesses by either initiating greenfield projects or transforming brownfield enterprises. At the general level, Africa's enterprises may have an enhanced capacity to increase output and to work smarter even within their traditional environment. At the time of going to press, news had just hit the wire about Microsoft's attempt to enable companies own chatbots using Open AI's ChatGPT technology. On the assumption that this becomes affordable to Africa-owned SMEs, it will enhance productivity and create opportunities to scale in many sectors.

A Volatile and Disruptive World

Disruptive technology has a way of reminding us that global volatility goes beyond war and geopolitics and straddles into how technological advancement often disrupts how we live and work. As the world emerged from Covid-19 in 2022, the Russian-Ukraine war erupted, then inflation, gas price hikes and now a looming recession in

2023. But amid all the chaos, the global population has hit 8 billion, with Africa growing from 1.2 billion to 1.4 billion. Forty per cent (40%) of Africa's population is young and many have set up innovative start-ups looking to upgrade and upscale. The convergency of these facts is potentially disruptive in terms of its ability to change the Africa business ecosystem.

Additionally, the impact of the AfCFTA in a fastintegrating continent has opened up more opportunities which may make Africa the next frontier of exponential growth. Perhaps, it is the promise of Africa that recently led to a US Government pledge of US\$55 billion in new investments, with an anticipated trip from

President Biden to Africa this year as the US seeks to catch up with China's Africa strategy.

The Opportunity in Crisis

In the pre-Covid19 era, movement of goods on Africa's trunk roads was estimated at US\$200 billion and the aviation sector was contributing US\$72 billion whilst tourism and the creative industry was projected to inch towards one (1) trillion dollars by 2030 if the AfCFTA becomes fully functional.

These projections were obviously affected by the impact of Covid19 but, as the world has gradually reopened since 2022, 2023 may see a resurgence of enterprises in most of these promising sectors in Africa. Incidentally, it is the hope of many that the end of China's zero covid policy and China's intention to roll out more projects under the Belt and Road Initiative (BRI) may further open up new opportunities.

Africa is part of the global village and much has been said of how the Russia-Ukraine war affected the supply of wheat and fertilizer to the continent. In the midst of that though, Ethiopia is now reported to have become a net exporter of wheat whilst Eritrea received massive foreign investment in the production of fertilizer from its large deposit of phosphate and may soon become a new source of intra-Africa fertilizer exports.



Sovereign Debt, Political Uncertainty and Global Recession

2023 already started with some not so good news. Apart from the IMF's prediction of a global recession, some countries especially Ghana are already experiencing sovereign debt crisis and have had to apply for an IMF bailout. Ghana's West Africa big brother neighbour, Nigeria, recently implemented a rather hurried currency redesign which has been quite chaotic to say the least. Coming close to the country's impending national election in February, where the initial sensation created by a younger candidate Peter Obi, appears to have lost a bit of momentum, the currency change has added to the unwelcome events on the continent in early 2023. Incidentally, even that unfortunate development has actually led to the recognition of electronic payment platforms in Nigeria as the way to go and promises to further stimulate Africa's emerging FINTECH boom.

Outlook 2023

From whatever angle one looks at it, the view from inside the Crystal Ball is clear - that 2023 portends the beginning of a scenario where numerous blue ocean opportunities will surface and set the stage for those who have the right strategy to dominate sectors where there are unoccupied spaces. Operating across the continent in our Pan-African offices and a network of best friend firms in 36 jurisdictions, we at AB & David Africa remain ready to guide those who desire to exploit the abundant opportunities in Africa's New Blue Ocean.



OUR NUMBERS





OUR PRACTICE



Corporate



Finance



Dispute Resolution



Employment



Technology



Telecommunications



Intellectual Property



Africa Tax



Africa Trade



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START-UPS: pitfalls to avoid

Author: Ferdinand D. Adadzi

Introduction

Start-ups are making great strides and impacting the world economy. It is estimated that there are about nine hundred unicorn start-ups (non-listed start-ups with valuations of US\$1billion and above) in the world with an estimated value of more than US\$3.5trillion, including companies like Uber, DiDi, SpaceX and Airbnb.

In Ghana, start-ups are also making impact in many sectors of the economy particularly in the transport, entertainment and fintech spaces. However, a significant number of start-ups fail. Globally, it is estimated that the failure rate of start-ups is between 50 to 60%. It is believed that the rate may be significantly higher in Africa where the systems are not in place to support the growth of start-ups. It is, therefore, important for entrepreneurs to avoid pitfalls that lead to the failure of a significant number of start-ups. Whilst obvious mention can be made of access to finance and cost of finance, the crux of the matter is the inability or failure of start-ups to get the right advice.

Definition of start-ups

Given the informal nature of our economy on the continent, it is important to clarify what constitutes startups as different from small businesses. Opening a "provisions" shop within a neighbourhood is not a start-up. Start-ups are generally newly formed businesses by entrepreneurs with a particular drive behind them, based on perceived demand for their products and services with the aim of scaling up quickly to fill a market gap. The main differentiating factor is that start-ups seek to commercialise innovative ideas to fill a market gap. As a result of the need to scale up rapidly, they are major challenges including resource constraints. Many young men and women have brilliant solutions to the myriad of problems facing the nation which can be resolved, or at least minimized, by the provision of products and services. The challenge is transforming such brilliant ideas from just ideas to sustainable profitable businesses and scaling up to fill market gaps.

Avoiding the pitfalls

Existing studies and research have catalogued the numerous problems and challenges faced by start-ups globally. These include:

· Lack of finance

- · Neglecting marketing and sales
- · Lack of planning
- · Finding the right people
- · Time management
- · The founders
- · Scaling up
- · Being in a comfort zone

In least-developed and developing economies in Africa, including Ghana, the challenges are more pronounced. In Ghana, access to finance and cost of credit have been topmost problems for businesses generally and for start-ups in particular. Even though this has been a concern for most start-ups on the continent, in advising a number of start-ups or dealing with disputes that have arisen, it has been observed that the most critical of challenges is the inability or failure of start-ups to obtain the right advice and on time at the initial stages of putting their ideas into action.

Observation over the periods shows that the failure to obtain the right advice enabling start-ups to avoid pitfalls has led to the failure of a majority of start-ups. Majority of these pitfalls can be avoided by obtaining the right advice. Start-ups must, therefore, avoid the following pitfalls through the right and timely advice.

- Starting without a proper business plan Surprisingly, a number of young entrepreneurs with innovative ideas fail to ensure they have a proper business plan to guide moving that innovative idea to products and services that are delivered to targeted clients or customers. A plan cannot be in the head of the founder. Documentation of the plan is important for startups. This requires having the right advisor to guide the preparation of the business plan with clear steps and an implementation schedule, as well as fall back positions in the event of setbacks. As is said, failing to plan is planning for failure.
- Not deciding on form of set-ups of start-ups This covers the business form to use to implement the innovative ideas of start-ups. Choosing the wrong business set-up invariably leads to future challenges and the possible demise of start-ups. In Ghana, the default position has been for start-ups to start the process without incorporating a business entity or registering a business name.

Most start-ups operate essentially as a sole proprietorship without the protection offered by registration. Even though, it is not inherently a bad idea to do so, failure to recognise the implication of operating as a sole proprietorship creates problems down the line, particularly when it comes to raising funding.

Even in instances where decision is made to have a corporate entity, choices need to be made between a firm (partnership) or the incorporation of a company (and what type of company to incorporate). The right advice or information must be obtained to inform understanding of the decision and its implications.

Unsuitable shareholding structure and governance system - It has been observed that the default position, in case of creating a corporate entity for most start-ups, after determining how to get the operation going, is to set up a private company limited by shares. In doing so, determining the right shareholding structure must be based on sound advice based on law, the business model and optimisation of funding opportunity as well as the need to

protect young founding entrepreneurs. Failure to do that has led to instances where founding entrepreneurs become employees in their own company with no ability to give direction on how the business should operate.

Related to the above is the need to have a good corporate governance system. This requires having the right

mix of expertise for board composition. Directors for start-up companies, in most cases, are not selected based on the requirements of the business, but on having a board that does what the founder dictates. It is more prudent for the success of the start-up that each member of the board brings on board some expertise required for the success of the business. This must not only be limited to technical expertise but must include having the time, business acumen and commitment to see the growth of the start-up. Principles of good corporate governance must be adopted based on:

- (a) leadership, ethics and integrity
- (b) participatory and inclusive process
- © consensus oriented
- (d) accountability and transparency
- (e) responsive, effective and efficient
- (f) equity or fairness
- (g) based on rules both legal and non-legal
- (h) clear roles and responsibilities of the various actors

There is no one size-fits-all governance system. A

governance system must be crafted for each startup taking into account particular circumstances of the founder and persons involved, business and legal requirements. This requires obtaining the right advice.

Inability to raise funding - Whilst this may be seen as the number one challenge on the continent (seen as the topmost in Ghana), there are many financial institutions and investors prepared to invest in start-ups. From observation, the underlying problem has been the preparedness of the start-ups to access such funds. Generally, initial investments are sourced from family and friends. This is mostly done on a very informal basis with no clear agreement on repayment for debts or exit of friend/family "equity" investors. This has led to many disputes when friends and family start to see potential growth of the business.

Even where the initial investment is secured and products or services are launched, the next stage of raising funding to scale up encounters challenges due to the fact that the start-up fails to have a proper contractual framework for its activities. These may cover simple issues like the

...it has been observed that the most critical of challenges is the inability or failure of start-ups to obtain the right advice and on time at the initial stages of putting their ideas into action.

> right employment contract for staff, terms of initial investment, not having the right shareholding and governance structure, improper or inadequate business plan, contractual arrangement for clients (especially where these are major clients) to secure receivables, proper documentation on title to assets including intellectual properties of the start-ups, etc. Without the right foundation, one is not able to build and scale up operations of the start-ups leading to their inevitable demise. Advice on each of these is vital for the survival and growth of start-ups.

Not dealing with founder's dilemma - Whilst the cultural setting in Ghana seems to require involvement of owners for a venture to succeed, advice on two factors is crucial. The first relates to how the founder's ideas are capitalized to become assets of the start-up with commensurate compensation – usually future consideration – to the founder. This also involves issues of knowledge transfer which must be factored into terms under which the founder works for the start-up. Secondly, how the founder is protected to maintain some level of control through the



various stages of growth of the start-up with a good transition process is key. This requires having good advice on shareholding structure, consideration for founder's shares, in-built succession plan in governance structure, among others.

Also, the recognition by the founder that he or she cannot do it alone is critical. This requires engaging the right mix of people to constitute a team that is able to deliver at the various stages of the growth of the business.

Lack of title to assets and terms of acquisition –
failing to document the assets of start-ups,
hampers the ability of the start-ups to access
credit. Proper documentation of assets requires
right advice on acquisition of title acquisition and
having an asset register. Documentation is
especially required in acquisition of immovable
property – land and buildings. It is also required
for securing occupation of office space. For

example, a start-up may rent an office without any proper tenancy agreement and once the landlord gets an insight into the operations of the start-up, he demands exorbitant rents which the start-up is unable to pay, leading to eviction and disruption of the business operations. As part of the documentation for start-ups, creation of asset register may also be very useful.

Failure of legal and tax compliance – the law affects every aspect of business operations. Operating without complying with the law only leads to adverse consequence. All the above pitfalls and challenges also have legal implications. It is, therefore, important to ensure that, right from the conception stages, one obtains the right and full legal advice on all aspects of the business operations. The tax implication should not only be understood as a requirement to pay taxes. There are tax benefits and tax breaks available to start-ups. However, these are based on compliance with legal requirements. Obtaining the right legal advice

will ensure start-ups take advantage of such benefits. The compliance requirements should not only be limited to specific jurisdictions. With the introduction of Africa Continental Free Trade Agreement (AfCFTA), seeking the right advice enables start-ups understand how they can take advantage of and be able to reach wider markets created under the AfCFTA to start-ups the scale-up or collaborate with others that may be seen as competitors.

Knowledge, they say, is power. Having the right information enables one avoid pitfalls. Start-ups, in particular, require the right information to avoid failing. Experts are able to advise and guide start-ups to overcome the numerous pitfalls they face. Whilst the issue of cost may be raised as a stumbling block for obtaining the right advice, firms have adapted and are willing to engage with entrepreneurs to provide advice and guide such start-ups at very low rates or on a pro bono basis as part of their own business development initiative to grow with the start-ups. Start-ups should, therefore, seek out such firms. The government has launched the YouStart Ghana Initiative. It is recommended

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that not only should the government be making funds available to youth entrepreneurs, it should create the ecosystem to provide full advice on the above issues.

Conclusion

In conclusion, great opportunities exist for start-ups on the continent to become unicorns. Even if they do not achieve the status of unicorns, they may grow to the likes of Chippers Case, Andela, Opay, Wave, Flutterwave, Interswitch, Esusu, Jumia and Fawry, which are leading the way to be unicorns. The key is seeking and obtaining the right advice to move brilliant ideas from the incubation stages to viable successful businesses providing products and services to fill the numerous market gaps on the continent and in Ghana in particular.

'A HAND FULL OF ACES':

INVESTMENT OPTIONS IN PRIVATE EQUITY AND VENTURE CAPITAL FIRMS FOR PENSION SCHEMES IN KENYA





By: Jacob Ochieng & Sheila Nyakundi-Marilu

Introduction

Over the recent past, there has been a notable shift by pension schemes towards seeking alternative investment options arising out of diversification considerations. This move has seen the percentage of investments in private equity and venture capital (PEVC) firms in the asset management register of pension schemes increase, indicating a positive reception of these alternative investment avenues by pension schemes.

PEVC firms offer viable investment options to individuals, companies and entities seeking to expand their portfolio. Although PEVC firms are normally used as a generic term for entities involved in investing in private equity, this misconception stems from the lack of appreciation of the different roles they play.

First, private equity firms inject capital in companies whose operations are deeply rooted in the economy, that is, mature companies with some level of established market accessibility. On the other hand, venture capital firms usually assist companies that are seeking to breakthrough at the initial stages.

Ideally, for an entity to fall within the radar of venture capital firms, it would first have to create a base, by either using seed capital and later turning to angel investors (if necessary) and finally resort to venture capital firms when growth is constant. Thus, as is discerned from the foregoing, venture capital is in fact a subset of private equity.

In Kenya, private equity firms unlike venture capital firms, are largely unregulated.

Investing Pension Funds

Pension provides some level of security upon retirement which in turn helps maintain and sustain the standard of living after retirement. Due to their very nature, pension fund assets require a high degree of management to guarantee returns for retirees. For the longest time pension funds were limited to fixed securities or government securities, which resulted in a stable return for the assets invested. However, this also meant low returns as most fixed investments usually have a low return rate.

Changing market conditions and the need to improve the range of income generating sources, have seen a diversification in the range of pension fund investment classes. Consequently, most pension schemes have started allocating a portion of the pension fund's assets to alternative investments, which are essentially investments that do not form part of the orthodox asset types such as listed equity, government securities, bonds or cash.

Unlike the traditional forms of investments, alternative investments come with an element of high risk-adjusted returns, meaning that whereas there is a higher risk in specific investments, the same comes with the possibility of better returns.

Sections 37 and 38 of the Retirement Benefits Act (RBA) lists the range of permissible investments and the restrictions in dealing with retirement funds. The said sections of the RBA provide that scheme funds shall be invested with a goal of securing market rates of return on the investment, and to do so, schemes should formulate a



provident investment policy. However, pension schemes are prohibited from using the funds in the scheme for advancing loans, or investment that goes against the guidelines prescribed by the Cabinet Secretary, National Treasury.

The RBA is supplemented by several guidelines and regulations, including the Retirement Benefits (Forms and Fees) Regulations, 2000 (the Regulations). The Regulations provide a category of permissible investments for pension schemes under Table G. PEVC firms are included under the table at part 13 and the extent of investment in percentage is also specified for such firms to be ten percent (10%) of the total scheme funds.

It is important to note that the Regulations do not provide the type of PEVC firm that a pension scheme can invest in. Therefore, it is upon the trustees of schemes to identify the most suitable PEVC firm and proceed to invest the funds to the extent of statutory limits.

The steady growth of investment in PEVC by pension

Unlike the traditional forms of investments, alternative investments come with an element of high risk-adjusted returns.

schemes is remarkable, as was noted by Charles Mwaniki when writing in the Business Daily on 2nd October 2020. With the expansion of pension funds, it is almost certain that investment in PEVC by pension schemes will similarly grow.

PEVC firms come with inherent and unique risks, hence an

investment which initially appears appealing on paper, may result in substantial loss. It is important for pension schemes to review a company's performance, financial position and portfolio and to assess the chances of a positive return on an investment.

This would create a level of predictability which aligns with the pension scheme's investment plan. However, it is noteworthy that companies are often susceptible to unforeseeable factors including market forces which may make it difficult to project the company's business performance based on previous years' financial yields.

Regulatory Framework

A look at the regulatory framework is necessary to understand the environment in which PEVCs operate in Kenya and whether the law offers enough protection to safeguard the retirement benefits of retirees.

PEVC firms are subject to several laws depending on the structure of the legal entity. If the private equity firm is a company, then the provisions of the Companies Act, 2015 and regulations thereunder will govern the conduct of business, whereas if it is a partnership, then the relevant partnership laws will apply depending on the structure of the partnership. However, there are no sector specific laws that govern private equity firms.

Venture capital firms on the other hand, have been under the regulatory ambit of the Capital Markets Authority (CMA). To operate as a registered venture capital firm, one must satisfy the eligibility requirements as set out under the Capital Markets Act (Cap 485A Laws of Kenya) (CMA Act) and the Capital Markets (Registered Venture Capital Companies) Regulations, 2007. Once the prerequisites for qualification

are met, the venture capital firm is then required to lodge an application for approval with the CMA.

It is important to note that private equity firms were recently brought under the control of the CMA. Section 30 of the Finance Act 2020 amended section 11 of the CMA Act to include PEVC firms that have access to public funds in the list of entities that must be licensed or approved by the CMA. This followed the CS National Treasury's remarks while reading out the 2020/2021 Budget Statement whereby he proposed an amendment to the CMA Act to subject PEVC firms to the oversight of the CMA due to the risk factor posed by such firms especially in relation to public funds.

Subsequently, the CMA Act was amended to provide that the CMA shall have authority to license, approve and regulate PEVC firms that have access to public funds. However, this amendment still leaves a lot to be desired as what constitutes public funds has not been defined and is therefore ambiguous.

Furthermore, there are no provisions detailing the requirements, procedure for approval and obtaining of

licences by PEVC firms that have access to public funds. It is hoped that this might become clearer upon promulgation of the relevant regulations.

PEVC stakeholders have however advised against the move to regulate PEVC in Kenya stating that the current regime is already sufficient. Speaking through their representative, the East Africa Private Equity and Venture Capital Association, PEVC firms have stated that this would amount to "overregulation", noting that pension schemes are already governed by the Retirement

It is important that a balance is struck to ensure that PEVC firms operate with the business flexibility plans that have thus far been the success of these type of alternative investments. It is also noteworthy that at a very basic level, PEVC firms are governed by the law relating to contract.

Outlook

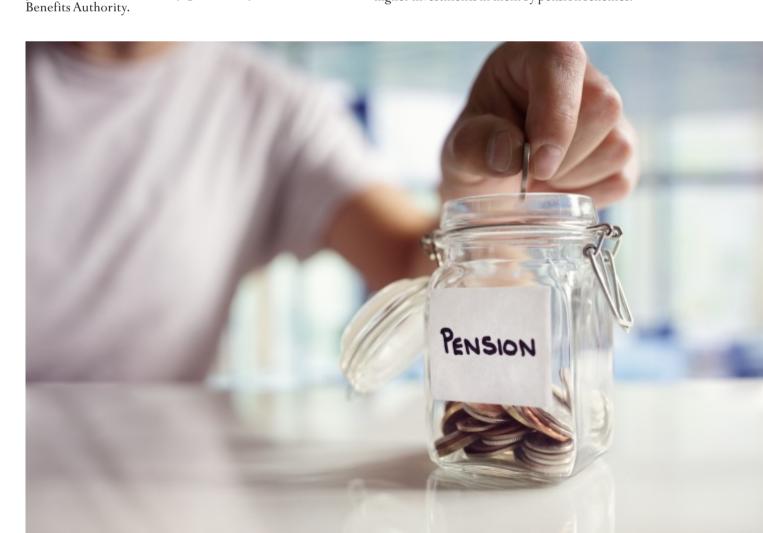
In the coming years, depending on the performance of PEVC firms and the returns made for pension schemes, the discussion is likely to move towards increasing the share of funds deposited with PEVC firms. Currently, however, the laws governing investments in PEVC by pension schemes are inadequate to facilitate proper security for pension funds while at the same time allowing diversification of investments by pension schemes.

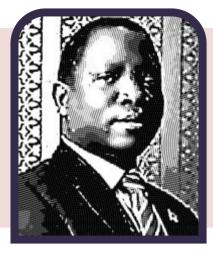
It is for this reason that there is need for better regulation on investment of pensions funds in PEVC firms in Kenya. The regulations should indicate, amongst others, what amounts to public funds, the threshold for approval for PEVC firms to handle public funds and the prerequisites to be met before the CMA issues trading licenses. This is likely

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99

to translate to increased confidence in PEVC firms and higher investments in them by pension schemes.





Competition Law and Cross-Board Membership:

Should Directors Sit on Their Competitors' Boards?

By: Thula Kaira

Introduction

The purpose of competition law is aimed at ensuring that enterprises effect their market-based decisions in an independent manner (i.e., without the overt knowledge of what other enterprises may be considering). The general theory of harm posits that sitting on competitors' boards is a recipe for receiving inside information and, thus, averting competition from occurring between the competing enterprises.

However, does competition law really prohibit competitors from sitting on each other's Boards? On the other hand, why would any competitor want to, or be allowed to, sit on a fellow competitor's board?

The Purpose/Object Clause and Functions of a Competition Authority

The purpose of competition law and the establishment of a competition authority is aimed at monitoring markets for any conduct or agreement that removes independent market decisions by market players. The preambular sections of legislation usually set the tone. For instance, the object clause to the Competition and Consumer

Protection Act No 24 of 2010 of Zambia ("CCP Act") states that the purpose of the Act is to safeguard and promote competition; and to protect consumers against unfair trade practices. Section 5 of the CCP Act clothes the Competition and Consumer Protection Commission ("CCPC") with functions to: investigate and assess restrictive agreements, abuse of dominant positions, and mergers; investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary; and do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act. Would such functions touch on interfering with who sits on a Board?

Black's Law Dictionary defines a "Board of Directors" as the "governing body of a corporation, elected by the shareholders to establish corporate policy, appoint executive officers and make major business and financial decisions." The relevant legislations provide the definition of who a director is. For instance, the Companies Act of Zambia defines a director as: "a person appointed as a member of the board of directors and includes an alternate director, by whatever name designated"

It is most likely that any competition authority would be

curious as to why and how any enterprise would allow a competitor to sit on its Board. Although it is common for Boards in a single economic unit to have interlocking directorships, it is highly questionable for independent enterprises to do the same. In this regard, are competitors prohibited from doing so in terms of competition law?

A Look at Southern Africa

On 12th September 2022, the Competition Commission of South Africa ("CCSA") published the Draft Guidelines on the Exchange of Competitively Sensitive Information under the Competition Act ("Guidelines"). The gravamen of the document deals with the exchange of "competitively sensitive information." In this respect, the Guidelines define "competitively sensitive information" as:

The subject of "collusion" is a central theme in competition law and viciously enforced under cartel or related horizontal prohibitions.

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information that is important to rivalry between competing firms and likely to have an appreciable impact on one or more of the parameters of competition (for example price, output, product quality, product variety or innovation). Competitively sensitive information could include prices, customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, research and development programmes and their results.

Looking at the definition of "competitively sensitive information", it is clear that competitors sitting on each other's Boards would be likely to violate the intent and spirit of the Guidelines.

Is sitting on a competitor's Board synonymous with a conspiracy to collude?

The subject of "collusion" is a central theme in competition law and viciously enforced under cartel or related horizontal prohibitions. While South Africa has the Guidelines indicated above, there are no similar guidelines in any of the SADC Member States, except that one should look closely at the definition of "agreement", which most legislations cover. The question would, thus, be couched:

would a director sitting on a competitor's board (with full knowledge) be deemed to have "agreed" to share "competitively sensitive information"?

The table below provides a snapshot of some of the key definitions in several SADC Member States' competition legislations:

Country Conduct	Botswana	Eswatini	Namibia	South Africa	Zambia	Zimbabwe
Agreement	Any form of agreement, whether or not legally enforceable, entered into between enterprise and is implemented or intended to be implemented in Botswana A decision by an association of enterprise A concerted practice	When used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable;	Includes a contract, arrangement or understanding, whether or not legally enforceable;	Includes a contract, arrangement or understanding, whether or not legally enforceable;	Any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Zambia and includes an oral agreement or a decision by a trade association or an association of enterprises	"Restrictive practice" means— (a) any agreement, arrangement or understanding, whether enforceable or not, between two or more persons, or (b) any business practice or method of trading; or (c) any deliberate act or omission on the part of any person, whether acting independently or in concert with any other person; or (d) any situation arising out of the activities of any person or class of persons; which restricts competition directly or indirectly to a material degree
Collusion	Not defined	Not defined	Not defined	Not defined	Not defined	Not defined
Tacit Collusion	Not defined	Not defined	Not defined	Not defined	Not defined	Not defined
Concerted Practice	Cooperative or coordinated conduct between enterprises achieved through direct or indirect contact, that replaces their independent action but does not amount to an agreement	Not defined	deliberate conjoint conduct between undertakings achieved through direct or indirect contact that replaces their independent actions	Cooperative or coordinated conduct between firms achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement	a practice which involves some form of communication or coordination between competitors falling short of an actual agreement but which replaces their independ- ent action and restricts or lessens com- petition between them	Not defined

From the foregoing, the word "agreement" is so ambiguous and extensive in its application that it is easy to infer the existence of such an agreement across the selected countries based on interlocking directorship. Notably, section 4(1)(a) of the Competition Act of South Africa is instructive in that it provides that an agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and has the effect of substantially preventing or lessening competition in a market, unless a

party to the agreement, concerted practice, or decision can prove that any technological efficiency or other procompetitive gain resulting from it outweighs that effect.

Section 4(2) of the South African Act presents the interesting presumption of the existence of an "agreement" where there is an interlocking directorship, with a qualification as indicated below:

"An agreement to engage in a restrictive horizontal

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any presumptions or defenses not expressly provided for in a specific national legislation would be a difficult plea before any such country's adjudication panel.

practice \dots is presumed to exist between two or more firms if –

- anyone of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and
- 2) any combination of those firms engages in that restrictive horizontal practice."

The presumption is however not merely, because of the interlocking directorship but rather a combination of the interlocking directorship followed by engagement in a restrictive horizontal practice. It therefore follows that interlocking directorship in and of itself is not a trigger to an assumption of the existence of a restrictive horizontal agreement until any combination of the firms in which the two or more directors engage in such conduct. There is however a possible rebuttal under section 4(3) of the same Act, which provides that:

"A presumption contemplated in subsection (2) may be rebutted if a firm, director or shareholder concerned establishes that a reasonable basis exists to conclude that the practice referred to in subsection (1)(b) was a normal commercial response to conditions prevailing in that market".

The proposition of "competitively sensitive information" will be a good test in the near future of section 4(2) in South Africa. Other than the presumption under section 4(3) (supra), the South African legislation has gone further to encapsulate defenses even where there is a noted restrictive horizontal agreement in the market place, which defenses are that:

- a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary or any combination of them; or
- b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).

the countries surveyed under this article. In almost all the legislation, the definition of "agreement" is, however, so broad as to allow for the interpretation of a competition authority, tribunal or courts to include interlocking directorships as a prohibited horizontal agreement.

In addition to South Africa, the Zimbabwean Competition Act's definition of "restrictive practice" is so

expansive that it would likely capture an interlocking directorship between competitors as an anti-competitive conduct, on the face of it. Of course, such a finding would be dependent on the evidence available to the Competition and Tariff Commission, particularly regarding the observed market decisions of the specific competing enterprises sharing a director(s) (whether in the horizontal or vertical context), and the actual behaviour of the director(s). Given the nascent stage of the development of home-grown competition law jurisprudence in a number of countries in Southern Africa, it is most likely that a number of them would follow the approach of the South African competition authorities. Caution must however be sounded that any presumptions or defenses not expressly provided for in a specific national legislation would be a difficult plea before any such country's adjudication panel.

Conclusion

It would be unwise for competitors to consciously share directors even where the law may not expressly be prohibitive of the practice or arrangement. The individual director must equally be wary of sitting on competing boards. The intent and spirit of competition law are to prevent the wanton sharing of "competitively sensitive information" amongst competitors. Equally, there would be concerns of conflict of interest regarding corporate governance ethos.

Where interlocking director arrangements do exist, enterprises are advised to seek legal counsel on how to adequately address associated risks by implementing the necessary checks and balances to avoid being framed as being part of a restrictive horizontal agreement. In other words, interlocking directorship is a red flag that clients must be made aware of. A convergence of laws across countries in southern Africa would be a good step to ensure that their integrated economies are subject to a certain predictable level of competition enforcement





AFCFTA The Vaccine To Redeem And Propel Africa Post COVID 19

By: Daniel Lubogo



s the world continues to grapple with the effects of the Covid-19 pandemic, the year 2021, has commenced with the African Continental Free Trade Agreement (AFCFTA) becoming operational. The start of the AfCFTA is one of the most important steps made by Africa in its existence and creates a new direction that shakes the long effects of colonialism and foreign exploitation. Africa matches forward with confidence on a journey to economic independence which is the final struggle to liberation. Africa has an opportunity to fully

▲ The commencement of the AFCFTA provides fresh impetus for African entrepreneurs to enter new markets and provides an opportunity for the continent to enter into a new era of industrialization.

> achieve its potential by taking full advantage of the AFCFTA by allowing Africans work with fellow Africans. The effects of Covid 19 now present Africa with an existing opportunity to redeem its self and that of its people by fully embracing the advantage created by a 2 trillion US Dollar market with 1.2bn people. The start of the AfCFTA means business opportunities for millions of our people and creates new value chains for SME's, leveraging the quest for industrialization.

The commencement of the AFCFTA provides fresh impetus for African entrepreneurs to enter new markets and provides an opportunity for the continent to enter into a new era of industrialization because trade will be duty free. Africa is in position to start trading on preferential terms with 54 countries out of 55 having signed and majority having ratified the AFCFTA to fulfill the objective of the "AFRICA WE WANT 2063 AGENDA". The starting of AFCFTA trading should now create an opportunity for us to harmonize our e commerce agenda and issues in Intellectual Property and competition law. The African trade gateway hub to be developed by the

Afriexim bank should help traders across Africa access business opportunities and conduct due diligence on business across Africa as well as access credit from the Afriexim bank to support business and cross border trade. The Afriexim bank is offering 40billion US Dollars with the start of the AFCFTA this year to support the implementation of the Africa Continental free Trade Area and will work with at least one bank to support intra African trade in each African Country. This should create opportunities for the financial sector in Uganda to support the

AFCFTA and Africa's industrialization Agenda. According to the Economic commission for Africa, the AFCFTA will accelerate intra Africa trade by 25 to 35 % equivalent to 35billion dollars which will reverse the effects of covid 19 on the continent. The call by the Economic Commission for Africa to support countries develop implementation strategies for the AFCFTA should be welcomed by the Ugandan government as soon as possible in its agenda of taking

advantage of the AFCTA.

Continued democratic inconsistences and human rights violations subjugate Africa's efforts and struggle to redeem itself from economic subjugation and the effects of colonialism. We can no longer blame foreign subjugation. The future is in our hands.

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'ADD TO CART':

THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION IN ONLINE COMMERCE





By: Noella Lubano and Eva Mukami

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imply put, e-commerce refers to the sale or purchase of goods and services conducted over computer networks by methods specifically designed for the purposes of receiving and placing orders. The spectrum of goods and services sold online is wide, encompassing goods and services delivered physically, as well as intangible digital goods such as music, films, books, software and services such as online banking.

The United Nations Conference in Trade and Development (UNCTAD) reported that as of 2017, e-commerce accounted for six percent (6%) of all purchases made in Kenya. A natural consequence of electronic trading is implications under intellectual property laws or tort such as negligence and defamation. Electronic trading may also raise issues on privacy and data protection. Majority of online transactions were in the form of business-toconsumer or consumer-to-consumer transactions as opposed to business-to-business transactions, raising the question on the need for an effective dispute resolution mechanism. Albeit a relatively emerging area, online dispute resolution (ODR) may be one of the suitable dispute resolution mechanisms for online transactions.

Several definitions have been formulated to describe ODR, for example, the American Bar Association defines ODR as follows:

"ODR uses alternative dispute resolution process to resolve a claim or dispute. ODR can be used for

disputes arising from online, e-commerce transactions, or disputes arsing from an issue not involving the internet called an "offline" dispute. It is an alternative to the traditional legal process which usually involves a court judge and possibly a jury."

Authors Kah-Wei Chong and Len Kardon in the publication E-Commerce: An Introduction describe ODR in the following manner:- "ODR uses the internet as a more efficient medium for parties to resolve their disputes through a variety of methods similar to traditional ADR. It brings parties online to participate in a dialogue about resolving their disputes."

It is clear that the term ODR is used to describe the process by which a dispute is resolved on an online platform such as the internet by means of arbitration, mediation or negotiation, all of which are alternatives to litigation or court processes.

Some of the means employed in ODR include, video conferencing, emailing, fax, virtual meetings in chat rooms, teleconferences etc. Parties may upload their written claim, evidential documents and written submissions, respond to questions from the arbitrator on email and receive the arbitrator's decision on email.

With traditional arbitration increasingly incorporating modern technology into its proceedings, the distinction between online

arbitration and traditional arbitration is becoming less clear. It is therefore imperative that legal practitioners and jurists continuously keep themselves abreast and familiarise themselves with technological developments to avoid falling on the wayside.

Why does ODR Matter?

sales.

In The World is Flat by Thomas L Friedman, the author argues that the advancement of the internet and computers has equalised the playing field in commerce. This is because a vendor located in different part of the world can sell his products to a consumer located in another part of the world without the two (2) ever physically meeting.

Indeed, it is impossible to deny the rapid rise in the number of commercial transactions that happen on an online platform. This has been further enhanced by the rise in use of the mobile phones that have internet connectivity capabilities. It is now no longer necessary to physically walk into a shop or meet a vendor before one can purchase an item. Many of the day-to-day commercial functions that we undertake are now a "click" or a "swipe" away. Only recently, it was announced that Tesla, the largest electric car dealer in the world had taken the

It is inevitable that the increase in online commercial transactions would result in an increase in disputes on the same, thereby informing the need for a quick, efficient and cost effective dispute resolution mechanism that is suited

decision to close most of its stores and shift to online-only

for online transactions.

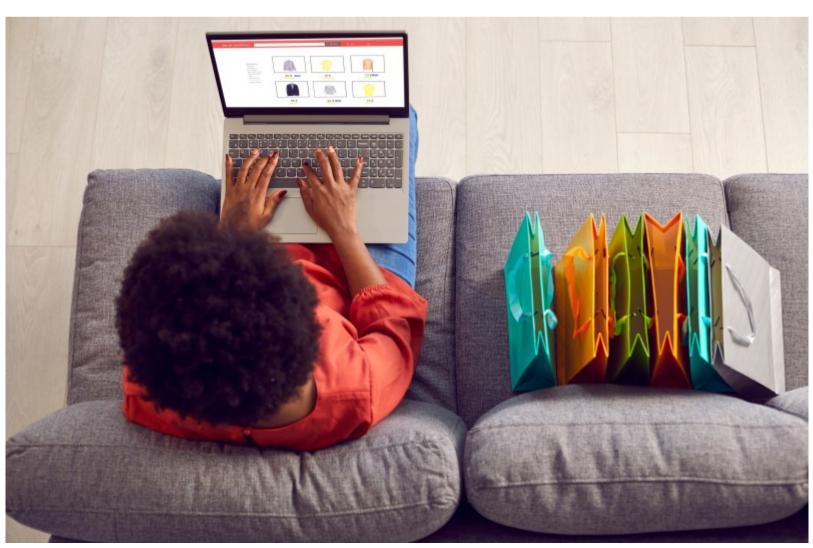
Most online purchases involve parties located in different parts of the world and are unlikely to involve large or



Most online purchases involve parties located in different parts of the world and are unlikely to involve large or significant sums of money. As a result, the traditional means of dispute resolution which primarily involve courtroom litigation may in the case of an online purchase dispute be inconvenient, impractical, time consuming and prohibitive.

significant sums of money. As a result, the traditional means of dispute resolution which primarily involve courtroom litigation may in the case of an online purchase dispute be inconvenient, impractical, time consuming and prohibitive.

Of concern therefore, is whether consumers of online purchases are sufficiently protected from injury and have an efficient, effective and cost efficient means of seeking redress for such injury.



Related to this issue is whether there is a need for the formulation of a legal framework for ODR. As things stand, there is no law in Kenya that governs or addresses ODR nor is there any indication of an intention by Parliament to pass laws to regulate ODR.

This second question must be considered against the divergent regulatory approaches of the United Kingdom and the United States with the former preferring to proactively regulate ODRs while the latter prefers a self regulatory approach which leaves the task of regulation to private actors involved or participating in ODR.

These issues are all part of and should be looked at as part of a broader discussion on the Constitutional right to access to justice and consumer protection guaranteed under Articles 48 and 46 respectively of the Constitution of Kenya.

How Does ODR Work in Practice?

The Virtual Magistrate Project (the VMAG) launched in the US in 1996 was one of the first ODR initiatives. The VMAG served as an arbitrator for online disputes submitted to it and all proceedings would be done by email and decisions transmitted within days.

However, this initiative collapsed because several complaints were not within its jurisdiction, a lack of awareness of the service, failure by parties to participate and the inability of the VMAG to enforce its decisions.

Another significant ODR initiative is the Internet Corporation for Assigned Names and Numbers (ICANN) which resolves disputes regarding domain names. As commercialisation of the internet grew, domain name registry services identified potential issues surrounding the jurisdictional nature of trademarks and their involvement in potential litigation.

At the time of registering a domain name, parties agree to be bound by the ICANN dispute resolution mechanism. What makes ICANN effective is once an arbitrator decides that a domain name should be transferred or cancelled, the decision is binding on the domain name provider who will effect the change as determined by the arbitrator. The decision is however not binding on the parties and may be referred to court. Also, the domain name is instantly suspended on the submission of a complaint. The entire process is concluded using online procedures within about two (2) months. So far ICANN has resolved over five thousand (5,000) domain name disputes.

Other ODRs are Square Trade which has partnered with among the largest online businesses such as eBay, and PayPal among others and has resolved over two hundred thousand (200,000) disputes to date. Also worth mentioning is CyberSettle which was established in 1998 uses a three-round blind bidding system to settle monetary disputes particularly insurance related and workers

compensation disputes. CyberSettle is a software technology that automatically compares the ranked bids to determine if the parties have arrived at a settlement. So far it has assisted in settling claims worth approximately USD 500,000 (KES 50 Million).

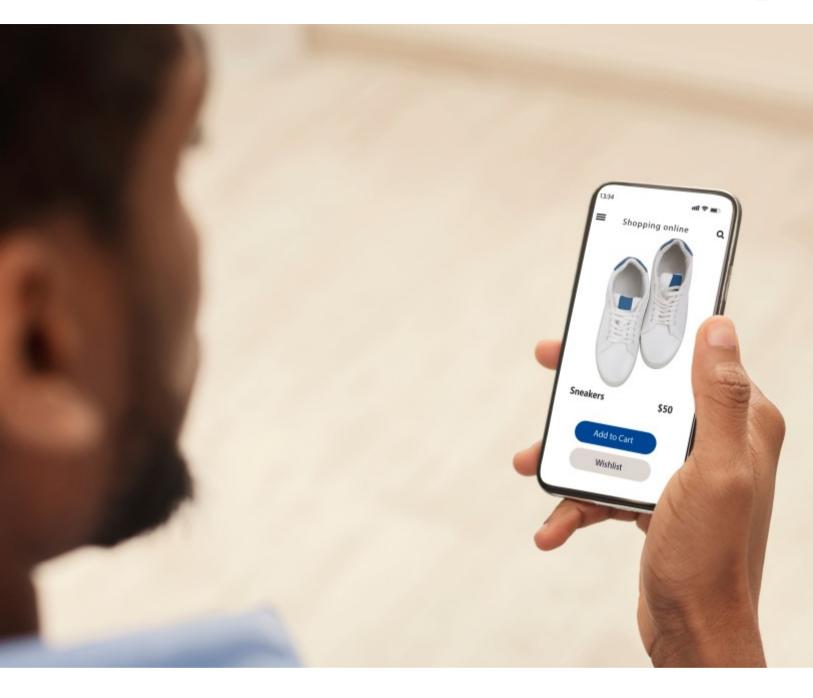
Advantages of ODR

- The following are some of the advantages of ODR that make a compelling case for its adoption as a formally recognised dispute resolution mechanism in Kenya:
- It is cost effective as it eliminates the necessity of expenses associated with printing paper, travel, accommodation, hiring meeting rooms among others
- · It is less time consuming as most claims are completed online
- It is less confrontational because of the removal of the physical presence of an opponent also, given that everything is done on
- email, it allows parties to reflect on their positions before articulating them without time pressure
- The internet provides a "neutral" forum for resolution of the dispute and denies either part a "home court advantage"
- It facilitates record keeping as the entire dispute resolution process is committed to writing which is transmitted electronically

Kenya will need to develop a regulatory framework for ODR before this initiative is overtaken by more complex online dispute resolution initiatives such as smart contracts and block chain arbitrations among others.

Disadvantages of ODR

- The impersonal nature of ODR means that the subtleties of non-verbal communication are lost and the lack of face-to-face
- interactions deprives mediators and arbitrators an opportunity to evaluate the credibility of parties and witnesses
- Inadequate security and confidentiality as the internet is susceptible to hacking thereby compromising the security of confidential documents
- · Inability of a party to verify or confirm the authenticity of the communications received and whether they originate from the
- · other party and not a third party that has



impersonated any of the parties to the dispute

- Online arbitration agreements may face validity problems on account or their failure to meet the "writing" requirement under
- various domestic laws which may give rise to problems in the enforcement of an award arising from an online arbitration
- · agreement
- ODR also presumes that parties and their counsels have unlimited access to the internet, email and other technologies involved in ODR and may also fail to appreciate that parties may not be sophisticated enough to effectively use the ODR technologies

ODR is only suited for a very limited class of disputes such as e-commerce disputes and domain disputes, in most cases, the size of a claim arising from an online transaction

will not correspond with the cost of possible litigation proceedings

Way Forward for ODR in Kenya

It has been said that when law and technology converge, change is inevitable. It is therefore doubtful that Kenya will have a choice in the matter other than to adapt to the changing faces of dispute resolution. Rather than wait for private actors to shape and develop ODR, there may be merit in a pro-active approach that is continuously and actively working to formulate regulatory legislation which has the objective of protecting online consumers and promoting their right to access to justice which are both Constitutional guarantees.

Kenya will need to develop a regulatory framework for ODR before this initiative is overtaken by more complex online dispute resolution initiatives such as smart contracts and block chain arbitrations among others.



Is Ghana's Power Sector Ready For Renewables?

Replacing traditional sources of energy completely with renewable energy is going to be a challenging task. However, by adding renewable energy to the grid and gradually increasing its contribution, we can realistically expect a future that is powered completely by green energy -Tulsi Tanti. [founder of Suzlon Energy]

By: Akua Chrappah Ayippey

Introduction

Ghana's renewable energy sector again took centre stage at the 2022 COP27 where the President of Ghana assured world leaders of Ghana's commitment to increase renewable energy in its energy mix as part of the nation's framework on energy transition. In 2010, Ghana set a target to increase the proportion of renewable energy (solar, wind, mini hydro and waste to energy) in its energy mix by 10% by 2020 under the Energy Sector Strategy and Development Plan. This led to the passing of the Renewable Energy Act (Act 832) in 2011 to provide the legal and regulatory framework for renewable energy activities in the power sector. However, according to the 2020 Energy Outlook for Ghana, by the end of 2020, Ghana had attained less than 2% renewable energy in its energy mix. The 10% target has now been pushed to 2030 under the Strategic National Energy Plan (2019). Achieving this target is heavily dependent on private sector participation in power generation. This article highlights the current state of private sector participation in the renewable energy sector and some challenges that make the sector unattractive for private investment. Some

suggestions on what can be done to improve the sector are also discussed in the article.

Status of Ghana's renewable energy sector

Ghana is endowed with abundant renewable energy potential such as solar, wind, biomass, wave and tidal energy. Act 832 defines "renewable energy sources" as renewable non-fossil energy sources like wind, solar,

geothermal, wave, tidal, hydro power, and biomass and landfill gas. Hydro was also defined as water based energy systems with generating capacity not exceeding 100MW (i.e. small scale hydro). Among these, solar energy has been the most popular due to environmental and social factors. The Energy Commission, which is the regulator of the sector, has since 2011 issued over 140 licences for the development of grid connected solar, wind, biomass, waste to energy and small scale hydro renewable projects which demonstrates interest in the sector. However, only eight (8) projects have been developed so far. This is one of the reasons the Energy Commission has since 2017 placed a moratorium on the issuance of wholesale supply licences for the renewable energy sector. There are seven (7) solar plants, four of which are owned by state owned power producers (i.e. Volta River Authority and the Bui Power Authority) and two owned by independent power producers (IPPs); one small scale hydro plant owned by Bui Power Authority and one biomass power plant owned by an IPP. The installed capacity of these seven projects is 112.1MW which constitute 2.1% of the total installed energy capacity of 5,449.1MW.

With the amendment of Act 832 in 2020, the definition of "hydro" has been amended to remove the capacity restriction and so, all hydro plants regardless of capacity are considered renewable resources. This brings the Akosombo, Kpong and Bui hydro plants (which together constitute about 28% of the installed capacity) into the renewable energy mix.

Attempts to attract private sector investment

Generally, the cost of renewable energy projects is known to be high in comparison to non-renewable projects due to factors such as the cost of the technologies, difficulty in obtaining equipment and spare parts and difficulty in finding the expertise for development, operation and maintenance. However, project costs have reduced over the years due to increased investment (public and private) in projects, technologies and capacity of the developers.

One of the major attempts by states to promote renewable energy is to create an enabling investment climate for renewable energy through its legal and regulatory framework.

One of the major attempts by states to promote renewable energy is to create an enabling investment climate for renewable energy through its legal and regulatory framework.

Ghana's Renewable Energy Act has attempted to promote investment in the sector by introducing a number of incentives. These include:

- a) a mandatory connection policy where transmission and distribution system operators are obliged to provide connection services for electricity from renewable energy;
- a renewable energy purchase obligation where distribution companies and bulk consumers are required to procure a percentage of their total purchase of electricity from renewable energy

sources;

- c) a feed-in-tariff system comprising of a tariff rate determined by the Public Utilities Regulatory Commission (PURC) which was substantially higher than tariffs for power from other sources and was guaranteed for a ten (10) year period; and
- d) the development of the Renewable Energy Fund to provide financial support for the promotion, development, and utilization of renewable energy.

However, with the amendment of the Act in 2020, the purchase obligation is now limited to only bulk consumers. Also, the feed-in-tariff system has been replaced with a competitive procurement system for the purchase of

power from renewable energy suppliers. The scrapping of the feed-in-tariff rates may be as a result of the reduction in the price of renewable energy systems and the resultant reduced cost of power generation.

Challenges

Considering the number of privately developed renewable energy projects in Ghana, it is clear that the sector has not seen

as much private sector investment as expected. Some challenges identified are discussed below.

- Access to long term affordable local funding to minimise capital costs is a major challenge faced by players in the sector. Although the Renewable Energy Fund has been set up by the Act, a cursory glance at the government budget over the years does not indicate any specific allocations to the Fund although budgetary allocations are made for renewable energy development. Related to this is the high cost of financing for power projects in Ghana due to Ghana's high risk profile for power projects stemming from the country's credit rating, history of legacy debt and potential political risks from changes in government or government's policy decisions. These risks tend to make financing more expensive. Also, since there are limited local sources of funding, most players depend on external sources of funds which are usually priced in foreign currency and expose the player to foreign exchange risks.
- b) Another challenge relates to the solicitation process for power projects. Historically, power purchase agreements (PPAs) have been procured through unsolicited proposals from IPPs. This is one of the reasons for the deemed oversupply situation in Ghana which led to the termination and re-negotiation of some PPAs by the Government of Ghana in 2018. In the absence of a transparent, competitive power procurement process which is based on a needs assessment, private players cannot risk such investments. It is worth noting that in 2019, the government issued a policy for the Competitive Procurement of Energy Supply and Service Contracts. However,

this policy is yet to be fully implemented.

c) The limited availability of experienced personnel in Ghana to construct, operate and maintain renewable energy technology is also a challenge for private players in the sector. The absence of local capacity necessitates expensive foreign expertise which increases project costs. While the Energy Commission (Local Content and Local Participation) (Electricity Supply Industry) Regulations (L.I. 2354) which was passed in 2017 intends to bridge the local capacity gap by including mandatory training and employment of locals to build local capacity over time, adequate monitoring is required to achieve local content objectives.



- d) Land acquisition is also a major challenge for renewable energy projects especially solar and wind which usually require large tracts of land. Land acquisition in Ghana is however, fraught with lack of certainty on ownership of land, multiple sales and encroachment on project sites. These challenges with land acquisition do not attract investment in the sector.
- e) Another challenge is the knowledge gaps in the potential of renewable energy. The general perception is that renewable energy is expensive due to the high initial costs and therefore, renewable energy is not regarded as an economical source of power especially for non-residential purposes. However, the costs of renewable energy technologies have reduced significantly over the years making it a cost effective source of power compared to non-renewable sources. Also, the role of renewable energy in reducing carbon emission and combating climate change makes it not only economically beneficial but environmentally sustainable.

Recommendations

A lot can be done to make our renewable energy sector more attractive.

1) First, the institutional framework must adopt a more "investor-friendly" approach. This may take the form of creating a well-resourced Renewable Energy desk at the Energy Commission which liaises with other regulators particularly, GRIDCo, the Environmental Protection Agency (EPA), Lands Commission, Ghana Investment Promotion Centre (GIPC), Ghana Immigration Service, National Fire Service and local

authorities for all the permits, licenses or any other assistance the developer may require from these institutions. Such a one stop shop for all regulatory matters will simplify the process for market entry and operation.

- 2) Also, incentives can be introduced to promote private sector participation. This may take the form of discounted prices for licence and permit applications from regulators, provision of land or support with land acquisition, assistance with access to utility and infrastructure. Also, the development of a carbon market for the trading of carbon credits can be explored as an option to incentivise companies to reduce emissions. For example, the development and utilisation of renewable energy power projects will generate carbon credits for organisations which can be traded. Certainly such a market will require some regulation and the Government of Ghana has indicated that a carbon market policy is being developed. Such incentives will encourage investment in the renewable energy sector.
- 3) Another way of enhancing participation in the sector is to develop and implement a procurement process which is open, transparent, and competitive and based on a needs assessment. Also, all state entities and agencies must be aligned with this policy to ensure uniformity across the sector. This will help to create certainty in the sector which will encourage private sector participation.
- 4) In line with the objective of the Local Content Regulations, there must be emphasis on technical training and capacity building which aligns with the needs of the renewable energy industry. This will require coordinating with the technical and academic institutions in order to ensure that the training provided by these institutions aligns with the capacity needs of the industry. Moreover, the implementation of the Local Content Regulations must balance the interests of both local and foreign players so as not to discourage foreign participation. To this end, the Energy Commission should develop a pool of qualified

- domestic players and service providers that foreign players can partner with to meet local content and local participation requirements.
- Admittedly, access to local funding is crucial and Ghana may not be in the position to provide grants from internally generated funds. However, some sources of local funding can be exploited. For example, The 2021 Guidelines on Investment of Tier 2 and 3 Pension Scheme Funds have introduced Green Bonds as part of the products which pension funds can invest in. According to the Guidelines, pension funds can invest up to 5% of the Scheme Asset under Management (AUM) in Green Bonds and this can be used to provide local funding for renewable energy project. Also, the Ghana Infrastructure Investment Fund (GIIF) and the newly set up Development Bank of Ghana (DBG) can look into creating sustainable financing products or programmes designed specifically for the sector. There are numerous external funds that Ghana can take advantage of to enhance its renewable sector. For example, Ghana has benefited from a number of grants and programmes of the African Development Bank such as the Sustainable Energy Fund for Africa (SEFA), Leveraging Energy Access Finance Framework (LEAF) and the Scaling-Up Renewable Energy Program in Low Income Countries (SREP) for investment in various aspects of the renewable energy sector. These funds must be applied judiciously towards accessible local financing either through direct government funding or incentivising local commercial banks to finance renewable energy projects.
- finally, in order to increase demand for power from renewable sources, effort must be put into creating public awareness of the need to support the sector as a way of combating climate change and its associated effects. With the combined efforts towards environmental sustainability, it can be expected that there will be increased demand for renewable energy power as a way to reduce carbon emissions. This can already be seen in the growing interest for solar systems for

homes, green offices, electric vehicles, solar powered streetlights, among others.

Conclusion

The opportunities for renewable energy exploitation in Ghana are endless. For developing countries like Ghana, the transition from conventional energy to green energy will be gradual but must be intentional. In order to see real impact, the investment climate must support private sector participation if Ghana must meet and possibly exceed its 10% renewable energy mix target by 2030.





DELVING DEEPER:

A Closer Look At Local Content In Kenya's Growing Mining Sector

Author: Cindy Oraro

Background to the legislation

Kenya intends to overhaul its mining laws currently contained in the Mining Act (Cap 306 of the Laws of Kenya) by passing the Mining Bill, 2014 that is currently being debated in Parliament. The Mining Bill, if passed in its current form, will introduce a range of new provisions among them being those on local content.

Principal objectives of local content regulations in the mining sector

Currently, the Mining Act does not make provision for local content. The rationale behind local content in the proposed Mining Bill lies in the need to develop the economy of a host nation and its surrounding region through mining activities.

(a) Local Equity Participation

The Mining Bill states that where a company whose planned capital expenditure is over the prescribed limit it shall, within 4 years after obtaining a mining licence, offload at least 20% of its equity at a local stock exchange. It should be noted, however, the Cabinet Secretary may extend the required period if he deems it fit after consulting with the National Treasury.

(b) Preference for Local Product

The Mining Bill requires for mineral right holders who are in the conduct of prospecting, mining, processing, refining and treatment operations, or any other dealings in minerals, to give preference to the maximum extent possible to:

- materials and products made in Kenya;
- services offered by Kenyan citizens; and
- companies or businesses owned by Kenyan citizens.

(c) Employment

As a general requirement, mineral right holders will be under an obligation to give preference to Kenyan citizens when it comes to employment. The Mining Bill provides that before one is granted mineral rights in Kenya, one will be required submit for approval to the Cabinet Secretary responsible for mining a detailed programme for the recruitment and training of citizens of Kenya. This is aimed at ensuring skills transfer to and capacity building for the citizens.

The Cabinet Secretary will be required to make regulations to provide for:

- · the replacement of expatriates;
- · the number of years such expatriates shall serve;
- the number of expatriates per capital investment;
- the collaboration and linkage with universities and research institutions to train citizens.

It is important to note that the Bill has categorized mining activities into large scale operations and small scale operations. Mineral rights for small scale operations will only be granted or be entitled to Kenyan citizens or a body corporate wholly owned by Kenyan citizens. On the other hand, when it comes to large scale operations, a holder of a mineral right will be required to:

 only engage non-citizen technical experts in accordance with such local standards for registration as may be prescribed in the relevant law;

The rationale behind local content in the proposed Mining Bill lies in the need to develop the economy of a host nation and its surrounding region through mining activities.

- work at replacing technical non-citizen employees with Kenyans, within such reasonable period as may be prescribed by the Cabinet Secretary in charge of mining;
- provide a linkage with the universities for purposes of research and environmental management;
- where applicable and necessary facilitate and carry out social responsibility to the local communities; and implement a community development agreement

It is important therefore that interested parties confirm from the outset whether their mining activities would fall under large scale of small scale operations in order to be in a position to ensure compliance as the requirements for approvals in each of these operations are different.

FIELD NOTES IN OIL & GAS:

Changes In The Local Content And Local Participation Regime In Ghana's Upstream Sector





By: Nana Serwah Godson-Amamoo and Antoinette Lady Arko

Introduction

In over a decade of commercial oil production in Ghana, the government and policy makers in the energy sector have been steadily working on the right formula to achieve that regulatory sweet spot where direct foreign investment converges with Ghanaian participation and content. The core objective has been to achieve the desired levels of state-of-the-art technology and technical know-how, technology and skills transfer, optimal in-country spend, value addition, job creation, and competitiveness in our upstream sector. The legal framework for Ghanaian content and participation in upstream activities started out originally as contractual commitments in petroleum agreements to employ and train Ghanaians, and to give preference to materials, services and products produced in Ghana which meet international industry standards. This has evolved into regulations - the Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I. 2204) which has recently been amended by the Petroleum (Local Content and Local Participation) (Amendment) Regulations, 2021 (L.I. 2435). The purpose of these regulations is to further enhance and expand the opportunities for Ghanaian participation and value creation in the sector via three thematic areas: a redefinition of the indigenous Ghanaian company (IGC); alternative business arrangements for collaboration with foreign entities and a defined scope of services and goods to be reserved for supply solely by IGCs. This article highlights two of these new regulatory changes and the opportunities they present to the market.

Background to Local Content and Local Participation

Regulations

The National Energy Policy 2010 (NEP 2010) highlighted "the need to build the necessary human, financial and technological capacity of Ghanaians to be able to participate fully in the petroleum industry". The aim was to stimulate accelerated economic growth, job creation, poverty reduction and general prosperity among the Ghanaian people through the oil and gas industry. The NEP 2010 further concluded that: "[t]his can be achieved through a well formulated Ghanaian local content and participation policy and regulatory environment...". This resulted in the enactment of L.I. 2204 with prescribed thresholds for local participation at the contractor level and, minimum local content and incountry spend at the supplier/subcontractor level.

Historically, the legal framework for upstream operations has always emphasised the employment and training of Ghanaians by foreign participants in the sector. However, under L.I. 2204, the indigenous Ghanaian company (IGC) was formally identified as a defined category of service provider through which the local content and local participation goals may be realised. Initially, the IGC was an entity incorporated in Ghana with a minimum of 51% Ghanaian equity holding, 80% Ghanaian executive and senior management staff and 100% Ghanaian nonmanagerial staff. To help achieve the local content and participation objectives of the NEP, L.I. 2204 afforded IGCs specific advantages over joint venture companies (JVCs) and international oil companies (IOCs) including:

- (a) entitlement to preferential treatment in the award of petroleum agreements and petroleum licenses;
- (b) the opportunity to own up to 5% in all petroleum interests granted by the State;

- (c) entitled right to a 10% price preference in the award of contracts for the provision of goods and services for upstream operations;
- (d) the right to a minimum of 10% shares in all companies authorised to supply goods and services in the sector;
- (e) the exclusive right to supply specific services in the sector such as legal, financial and insurance services.

The amendment under L.I. 2435 is intended to maximize Local Content & Local Participation in the energy sector in accordance with the National Energy Policy 2020. The key areas are the expanded Ghanaian participation in IGCs and the new mechanisms for collaboration with foreigners which have been analysed below.

a) Expanded Ghanaian Participation in IGCs

Under L.I. 2435, an IGC has been redefined to require incorporation in Ghana with a 100% Ghanaian equity holding, 80% Ghanaian executive and senior management staff and 100% Ghanaian non-managerial staff. This new regime presents a shift from majority Ghanaian ownership to full Ghanaian ownership. The IGC is now truly Ghanaian in substance and form with unprecedented access to various opportunities in the sector, notably the

exclusive right to provide an expanded range of services

and goods, including electrical equipment and materials,

industrial and domestic gases, network installation and

support services, ship chandelling, warehousing, etc. With

the recent change in the IGC shareholding structure,

former IGCs with foreign interests which hitherto could

benefit from the above listed advantages will now give way

to wholly Ghanaian owned businesses. This may lead to an

increase in participation of IGCs in the various roles as

contractor party and service provider as discussed below.



Currently, the Petroleum Commission has registered over 1600 IGCs, with approximately 600 actively operating in the service segment of the upstream sector. Under L.I. 2204, IGCs are entitled to first preference in the bidding process for the supply of goods and services. Additionally, during a bidding process, an IGC cannot be disqualified exclusively on the basis that it did not offer the lowest price. Where the difference between the total value of the bid of a qualified IGC and the lowest bid does not exceed 10% of the lowest bid, the contract must be awarded to the IGC. Essentially, an IGC should be prioritized over a JVC in a tender where the IGC's bid price is at most 10% higher than the quote from the JVC. This price preference is aimed at maximising local content in all aspects of the industry value chain to boost the capacity and competitiveness of Ghanaian owned entities in the upstream market. Today, with the new mandatory shareholding structure, many of the existing IGCs will lose their IGC status and the right to the above-mentioned statutory benefits. These advantages are now available to only Ghanaians. This will lead to the exit of former IGCs with foreign interest or their transformation into wholly owned Ghanaian entities which will create room for more wholly owned Ghanaian businesses to participate in this competitive market segment.



Historically, the legal framework for upstream operations has always emphasised the employment and training of Ghanaians by foreign participants in the sector.

Mechanisms For Collaboration with **Foreigners**

As previously stated, under L.I. 2204, foreign owned businesses may only supply goods and services in the upstream sector in association with IGCs, via a registered JVC where the IGC holds a minimum of 10% shares.

The impact of the mandatory requirement for collaboration between foreign owned businesses and IGCs in the upstream service segment has been revolutionary in promoting capacity building through knowledge and skills transfer to Ghanaian entities from their more experienced foreign partners. Although some JVCs have, for a myriad of reasons, been unsuccessful, they are in the minority. Through these collaborations, many Ghanaian entrepreneurs have seen radical growth in their capacity in their core area, as well as new insights and expertise in other emerging areas as a result of unprecedented access to greater resources, technology and finance. Many Ghanaian partners in JVCs now have access to new markets and have been able to scale up in spite of their limited capacity, giving them competitive advantage to generate economies of scalability.

In spite of the success of the JVC structure under LI 2204, experience over the 9 years of implementation has highlighted areas for improvement. The intervention by the Ministry of Energy and the Petroleum Commission with the introduction of alternative models and structures for collaboration under LI 2435 is most timely and will ensure a wider berth for knowledge and skills transfer in the upstream sector. The alternative structures provided under LI 2435 have been discussed below.

The IGC as a contractor party

Following the enactment of L.I. 2204, about 11 out of the 14 petroleum agreements awarded by the State include IGCs as contractor parties. This new IGC regime seeks to better protect Ghanaian interests and expand the opportunities for Ghanaian participation by eliminating the possibility of indirect foreign interests in the 5% participation interest reserved for Ghanaians. With this key change, Ghanaian owned businesses have an enhanced opportunity to increase their investments, build capacity, and optimize technology and skills transfer to grow the upstream sector. The change also presents an opportunity for IGCs to prepare their businesses, forge partnerships, pool resources and scale up to attract the funding required to cover the IGC share of capital expenditure required for petroleum operations.

The Alternative structures

L.I. 2435 authorizes the use of channel partnerships and strategic alliances as complementary options to the JV structure in the provision of goods and services in the upstream sector. A channel partnership is usually established between a manufacturer or producer with another company such as a reseller, service provider, vendor, retailer or agent, to market or sell their services, products or technologies. A strategic alliance on the other hand refers to an arrangement between two or more companies to share resources to undertake a specific mutually beneficial project, while each party retains their corporate independence.

With the establishment of these alternative structures, the JV ceases to be the only channel through which both an IGC and a foreign entity can collaborate to provide services in the industry. The Petroleum Commission is mandated to exercise a discretion and give the appropriate direction to enable a foreign entity or an IGC provide services in Ghana through such arrangements where it is of the opinion that "a channel partnership or strategic alliance will deepen local content and local participation and maximize technology transfer to the IGC".

The introduction of these alternative structures will allow

more flexibility and efficiency in service delivery in the upstream sector. Through channel partnerships and strategic alliances, IGCs and their foreign partners may share resources to execute defined supply/service scope while each party retains their independence with no obligation to establish and register a company. Parties in channel partnerships and strategic alliances are able to bypass the strict formal requirement for setting up a JVC such as the incorporation of Ghanaian limited liability companies by both the IGC and its foreign partner and the registration of the JVC with the Ghana Investment Promotion Centre (GIPC).

The partners are able to maintain their existing corporate structures while managing their roles and responsibilities through contractual arrangements.

These new regulations provide a tremendous improvement on the existing framework for local content and open up the upstream service/goods supply space with unprecedented opportunities for more IGCs to participate in the sector, improve their product offerings and grow their skills and capacities.

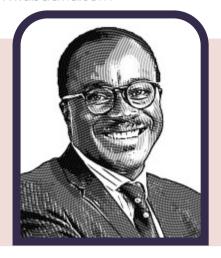
Conclusion

The new IGC requirements and the introduction of alternative structures present greater opportunities for Ghanaians to benefit from the upstream oil and gas industry. Whilst the regulations provide the framework, the full potential of this new regime will not be achieved unless Ghanaian participants adopt the right legal structures and contracts for their engagements in oil and gas operations. This will require seeking and offering the right legal advice, not only in setting up of their businesses, but in the drafting and negotiating of contracts.

Currently, the Petroleum
Commission has registered over
1600 IGCs, with approximately 600
actively operating in the service
segment of the upstream sector.
Under L.I. 2204, IGCs are entitled to
first preference in the bidding
process for the supply of goods and
services.







An Overview Of Regional Systems For IP Protection

Author: Chacha Odera

ntellectual property refers to inventions of the mind that are intangible in nature and are protected as such as trademarks, Patents, Copyrights and related rights and industrial designs.

They are a core component of most businesses in the 21st Century and valuable assets for which management efficiencies are as important as for any other asset. The dynamics of globalization and the effects that it has on strategies for every

business, whether national or multinational, require that businesses pay closer attention to opportunities that help maximize benefits to the company and reduce costs to free up resources for other strategic interests of the business.

Given its territorial nature, protection of IP has often

been undertaken by local, regional and multinational entities at national level. That means that subsidiaries or branches at national level are left to determine and follow up on protection and enforcement of IP rights in their respective jurisdictions. This in turn impacts on the cost of protection and enforcement, quality control, and ultimately the overall business strategies of the group.

A number of regional and international frameworks for IP protection however exist that can help reduce dispersed protection measures and facilitate central management and uniform strategy formulation for the group without impacting on local peculiarities of the business. Though enforcement ultimately remains territorial, these regional and multinational processes greatly contribute to better and central control of enforcement strategies and facilitate exchange of best practices.

The ARIPO System

In this edition, we provide commentary on the ARIPO System which is the key Africa region framework of significance to multinationals with Kenyan operations/interests.

ARIPO was the result of an idea mooted at a regional seminar on patents and copyright held in Nairobi in the early 1970's and the first draft agreement on the creation of a regional intellectual property organization was adopted in

Though enforcement ultimately remains territorial, these regional and multinational processes greatly contribute to better and central control of enforcement strategies and facilitate exchange of best practices.

> 1976 by a diplomatic conference - The Lusaka Agreement [also known as the draft Agreement on the Creation of the Industrial Property Organization for English-speaking Africa (ESARIPO)]. The idea was that the organization would serve mainly Anglophone countries. In practice that remains the case with very few exceptions. A number of lusophone and francophone countries have since joined ARIPO (The latest being the Republic of Sao Tome and Principe). Membership

> remains open to any member of the African Union or the Economic Commission for Africa.

> The principal idea behind the establishment of ARIPO, was the pooling of resources of member countries in industrial property matters in order to utilize to the maximum available resources in these countries to ensure effective protection of industrial property, capacity building and training of staff in their respective industrial property institutions, development and harmonization of laws and general efficiencies.

Legal Framework

The Lusaka Agreement on the Creation of the African Regional Intellectual Property Organization (ARIPO)

The Lusaka Agreement was adopted at a diplomatic conference at Lusaka (Zambia) on December 9, 1976 and establishes ARIPO at Article 1 thereof.

Pursuant to its functions and powers under the Agreement (Article VII) the Administrative Council of ARIPO has developed protocols and regulations that form the background of the legal and operational design of intellectual property protection in member states under the system. These include:

The Harare Protocol on Patents and Industrial Designs within the Framework of the African Regional Industrial Property

The Banjul Protocol on Marks;

Organization

The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.

Membership to the Lusaka Agreement does not necessarily

imply membership to the protocols. Each protocol applies to different aspects of intellectual property and membership to each is voluntary.

The Harare Protocol

The Harare protocol applies to protection of patents and Industrial designs and currently has 19 contracting States, namely; Botswana, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, Sierra Leone, Sudan, Swaziland, Tanzania, Uganda, Zambia, Zimbabwe and the Democratic Republic of São Tomé and Príncipe (the latest member as at August 19, 2014).

How the filing System works: brief overview

The Harare Protocol provides a framework for filing and protection of patents and industrial designs within member states. The Protocol is supplemented in its provisions by administrative regulations that make further and detailed provisions for the manner in which an application is treated from the date of filing to grant of patent or refusal as the case may be.

There are principally two regulations under the Harare protocol in this regard;

1. The regulations for implementing the protocol on patents and industrial designs within the framework of the African

- regional intellectual property organization ('the regulations'); and
- 2. The administrative instructions under the regulations for implementing the protocol on patents, industrial designs and utility models within the framework of the African regional intellectual property organization (the Administrative instructions)

The regulations are made by the Administrative council pursuant to section 5 of the Harare Protocol and mainly deal with substantive matters relating to the content of applications filed with the ARIPO office including on the requirements for patentability, the right of priority, Appeal procedures against decisions of patent examiners and treatment of PCT applications under the ARIPO system.

Administrative instructions on the other hand are

The ARIPO Office, on receipt of the patent application, undertakes both formality and substantive examination to ensure that the invention which is the subject of the application is patentable.

made by the office of the Director General of ARIPO pursuant to rule 2(5) (a) of the regulations and mainly deal with the day to day administrative requirements of ARIPO including the formality details in respect of applications under the protocol, filing timings, fees payable for each service, detailed steps in the filing and examination of applications up to grant, notification and communication procedures, the forms to be used for various filings etc.

Patents

In summary the ARIPO system is registration based and subject to notifications of refusal by national offices whereas the PCT system is a filing system.

An applicant for the grant of a patent for an invention or the registration of an industrial design can, by filing only one application, either with any one of the Contracting States or directly with the ARIPO Office, designate any one of the Contracting States in which that applicant wishes the invention or industrial design to be accorded protection.

The ARIPO Office, on receipt of the patent application, undertakes both formality and substantive examination to ensure that the invention which is the subject of the application is patentable (i.e. it is new, involves an inventive step and is capable of industrial application).

If the application complies with the substantive requirements, copies thereof are sent to each

designated Contracting State which may, within six months, indicate to the ARIPO Office that, according to grounds specified in the protocol, should ARIPO grant the patent that grant will not have effect in its territory.

For industrial design applications, only a formality examination is performed. If the application fulfills the formal requirements, the ARIPO Office registers the industrial design which has effect in the designated States. However, the same right to communicate to the ARIPO Office within six months that the registration may not have effect in the designated States concerned is reserved.

The Administrative Council, at its Second Extraordinary session held in April 1994, adopted amendments to the Harare Protocol and its Implementing Regulations to create a link between the protocol and the WIPO-governed Patent Cooperation Treaty (PCT). This link commenced operation on July 1, 1994, and has the following effects:

Any applicant filing a PCT application may designate ARIPO which in turn means a designation of all States party to both the Harare Protocol and the PCT; The ARIPO Office acts as a receiving office under the PCT for such States; and

The ARIPO Office may be elected in any PCT application.

All current Harare Protocol Contracting States are also signatory to the PCT.

The Banjul Protocol

The Banjul Protocol on Marks, adopted by the Administrative Council in 1993, establishes a trademark application filing system along the lines of the Harare Protocol. Under the Banjul Protocol, an applicant may file a single application either at one of the Banjul Protocol Contracting States or directly with the ARIPO Office. The application should designate Banjul Protocol Contracting States as the States in which the applicant wishes the mark to be protected once the ARIPO Office has registered it.

States currently party to the Banjul Protocol are: Botswana, Lesotho, Liberia, Malawi, Namibia, Swaziland, Tanzania, Uganda and Zimbabwe. (Total: 9 States.). Kenya is yet to accede to this treaty and so trademarks filing can only be done locally or through the Madrid system as we shall see in the next edition of the newsletter.

Since 1997, the protocol has been extensively revised in order to make it compatible with the TRIPs Agreement to make it more user-friendly.

Conclusion

The ARIPO system is highly advised for clients with regional interests. We represent a number of clients in patent applications using the system and recommend it for costs savings and efficient management of the application process (more so for bulk applications) in several member countries.

In the next edition of the newsletter, we shall provide commentary on international filing systems to give a broader perspective for multinationals operating in Africa and beyond.



GOING PAPERLESS:

Advent Of Digital Land Transactions Systems In Kenya





By: Pamella Ager & Anna Kandu

n tandem with the advent of the digital age, states and organisations are moving to adopt modern, open, datacentric and digitally enabled operations and systems. These systems offer many benefits both to the public and private sector including efficiency, cost-saving and convenience. It is on this premise that there is a distinct transition from manual to paperless and digitised records and systems.

Kenya has not been left behind. The Ministry of Lands and Physical Planning (the Ministry) has recognized the need to embark on its own transformative journey. As such, the Ministry has embarked on an initiative to digitise the Registry and the introduction of electronic land transactions systems. This initiative has been named the National Land Information Management System (the NLIMS) which we highlight in this article.

We also highlight the key features of the conversion process under the Sectional Properties Act No. 21 of 2020 (the SPA), an Act which has far-reaching effects on land ownership for developments such as apartments, units and offices.

The Digitisation of Land Records

NLIMS is a digitised land records system aimed at improving service delivery for the general public in relation to land transactions. NLIMS' objective, as pronounced by the Ministry, is to enhance efficiency, transparency and security of land records, while reducing land transaction costs and opportunities for fraud. This digitised system is set to go hand-in-hand with the other land management developments, creating a platform for the smooth transitioning of other proposed mechanisms.

Legislative Background

The recent milestones in the development of a digitised land registration framework are anchored in various laws and statutes as stipulated below:

a. The Constitution of Kenya, 2010

The Constitution of Kenya, 2010, at Chapter Five deals with



matters relating to land and the environment. Article 60 of the Constitution provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, in accordance with principles such as sustainable and productive management of land resources and transparent and cost-effective administration of land.

b. Land Act, 2012

Pursuant to section 6 (h) of the Land Act, 2012 the Cabinet Secretary is empowered to co-ordinate the development and implementation of a National Land Information System, in collaboration with the National Land Commission. This section has ushered in the advent of the digitised records at the Registry through a contemplated "one-stop shop" system.

c. Land Registration Act, 2012

The Land Registration Act, 2012 (LRA) at section 54 (5), aims at streamlining land administrative processes. It stipulates that the

Registrar shall register long-term leases and issue certificates of lease over apartments, flats, maisonettes, town houses or offices having the effect of conferring ownership, if the property comprised is properly geo-referenced and approved by the statutory body responsible for the survey of land.



In a bid to harmonise legislative provisions specifically in the LRA and SPA, the Ministry is spearheading various initiatives including the conversion of titles.

d. Sectional Properties Act, 2020

The SPA at section 13 (2), provides that all longterm sub-leases that are intended to confer ownership of an apartment, flat, maisonette, town house or an office that were registered before the commencement of the SPA, shall be reviewed to conform to section 54 (5) of the LRA highlighted above.

e. Land Registration (Electronic Transactions) Regulations,

The Land Registration (Electronic Transactions) Regulations, gazetted in July 2020 (the Regulations), provide the framework

longterm leases registered based on architectural drawings to conform to section 54 (5) of the LRA. The Notice also provides that the Ministry shall no longer register long-term leases supported by architectural drawings to confer ownership. Additionally, registration will be premised on a sectional plan with the property being geo-referenced and approved by the Director of Surveys. We shall keep abreast with any developments on this Notice post publication of this edition of the Newsletter

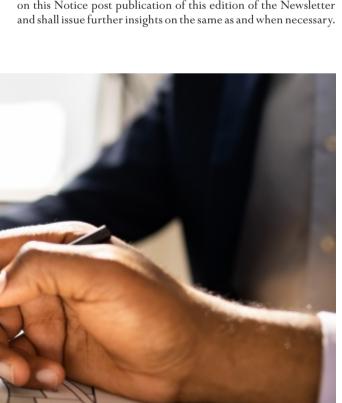
for the roll-out of an electronic land transactions system. The Regulations provide for the conduct of searches on an electronic system, valuation for payment of stamp duty online and registration of interests in land on the electronic land register. The Regulations also make provision for the execution of instruments using electronic signatures by parties.

The Conversion of Units

In a bid to harmonise legislative provisions specifically in the LRA and SPA, the Ministry is spearheading various initiatives including the conversion of titles. This is being undertaken by replacing old land reference numbers with new title numbers, created under newly established land registration units. The conversion process is set to unify the land registration systems, while conforming to sustainable land management principles.

In this regard, on 7th May 2021, the Ministry issued a Notice (the

Notice) stating that it would work towards the conversion of



Sectional Property

Some eight (8) years since the enactment of the land laws in 2012, the newly enacted SPA has come into force, replacing the earlier Sectional Properties Act of 1987. The enactment of the SPA was intended to align registration of sectional properties with current land legislation, noting that the Registered Land Act (Cap. 300) Laws of Kenya (RLA), which substantively governed sectional units under the 1987 statute, was repealed. The SPA has not departed significantly from the RLA. However, the SPA emphasises the aim of regulating and providing for the division of buildings into units that can be owned by individuals, while

66 The SPA also introduces restrictions on the by-laws of a corporation under the statute from materially changing the use or density of the common property, without the approval of the relevant county government.

providing for the use and management of common property. Some of the salient features introduced by the new SPA include:

a. Unexpired Residue of the Term on the Title

The SPA provides that it shall only apply in relation to land that is held on freehold or leasehold title with a residual term of not less than twenty-one (21) years, with an intention to confer ownership.

b. Conversion of Units and Issuance of Certificates of Lease

Where sub-leases intended to confer ownership of an apartment, flat, maisonette, town house or an office and were registered before the commencement of the SPA, the said sub-leases shall be reviewed in order to conform with the provisions of the LRA to the extent that the property is geo-referenced and approved by the Director of Surveys, in order to issue Certificates of Lease within a period of two (2) years.

c. Closure of Old Registers

The SPA also provides that the Registrar shall close the registers made under the Certificate of Title/Lease and register the sectional plan in a sectional plan register. The Registrar shall proceed to open new registers depending on the nature of interest that was in the Title/Lease that was submitted.

d. Restriction of Use and Density

The SPA also introduces restrictions on the by-laws of a corporation under the statute from materially changing the use or density of the common property, without the approval of the relevant county government.

e. Dispute Resolution Mechanisms

The SPA provides for both internal dispute resolution mechanisms through a Dispute Resolution Committee (DRC) and recourse to the Environment and Land Court (ELC) on appeal from the DRC's decision.

Procedure for Conversion

With regard to the process to be followed for conversion, firstly, all sectional plans submitted for registration will need to be georeferenced; to indicate the parcel plans, the number identifying the unit, the approximate floor area of each unit, and the user of

Thereafter, the plans must be signed by the proprietor, signed and sealed by the Director of Surveys, registered and a Certificate of Title/Lease issued for each unit.

For purposes of conversion of already registered long-term subleases, the owners of the property will be required to submit the following documents at the Registry:

A sectional plan

The original title document (i.e. head title)

The long-term lease previously registering the unit

The rent apportionment for the unit

The Registrar may dispense with the production of the original title, if the

developer is unwilling or is unavailable to surrender the title for the purposes of conversion. Upon submission of the above, the sectional plan will be registered and the original register closed. A new register will thereafter be opened for each unit, with a registered sectional plan. Finally, a Certificate of Lease shall be issued.

Way Forward

We note that digitisation of land records does not come without its fair share of challenges. Not only does the adoption of technology pose a major challenge due to a cultural heritage of "paper filing", but several rules and regulations still require approval by the relevant state agencies, to effectively implement a digitised system. Further, the digitalisation of any record management systems including that of land, requires security features that would guarantee the security of land records and boost public confidence.

Moreover, in spite of the developments, there are various concerns around the conversion process. Some aspects of the conversion procedure for instance remain unclear, while the Conversion Guide issued by the Ministry does not exhaustively address the concerns. In this regard, it is noted that the draft Sectional Property Regulations (currently undergoing stakeholder consultation) are under consideration. The Regulations, once promulgated, are set to provide clarity on the processes and documentation required for the conversion process. Until then, stakeholders and the general public remain in the dark on some of the procedures prescribed in the SPA.

Nonetheless, the Ministry must be applauded for the significant steps it has made towards the realisation of an effective land management system, as contemplated under the Constitution. It is the hope of Kenyans that the next steps taken by the Ministry will accelerate and improve the ongoing digital transformation with effective stakeholder participation, to ensure that all views are taken into account.



YES, I AGREE:

A Guidance Note On Consent In Relation To Data Protection In Kenya

Author: John Mbaluto

Introduction

In today's world, there is exponential growth in the dissemination of personal data by the average person. From registering a mobile phone number, applying for a job opportunity, enrolling in a course, or creating a social media account, the sharing of personal data is as inevitable as it is pervasive. The increasing need for data sharing raises concern over whether the data gathered is always used in a proper and lawful manner.

To effectively address this concern, the Data Protection Act, 2019 (the Act of Kenya) was passed into law. The Act provides for an obligation on the person who determines the purpose and means of processing data (Data Controller) and the person who processes data (Data Processor) to obtain consent from the person to whom the personal data relates (Data Subject) prior to obtaining and processing data.

Definition of Consent

Consent is only considered lawful when the Data Subject is offered a genuine opportunity to accept or decline the terms offered for the processing of his personal data. To that end, section 2 of the Act defines consent as any express, freely given, specific, informed indication by a Data Subject that he or she wishes for their personal data to be processed in a certain manner.

That express agreement may be given by a statement or a clear affirmative action. This definition brings out four elements of consent:

a. Choice

The Data Subject should be given a genuine choice and control over the use of their data. This is actioned by allowing them to refuse the consent without any detriment and being able to withdraw their consent easily once consent has already been given. Further, consent should not be bundled up as a condition of service unless it is necessary for that service, otherwise it will not be deemed as freely given. Any undue influence and pressure put upon the Data Subject to provide his or her consent invalidates the consent.

b. Specificity

There must not be any room for doubt as to whether the Data Subject was sufficiently informed. The request for consent should be separate from other terms and conditions, communicated clearly, simply and in plain

Consents should be reviewed and refreshed as necessary where purposes or processing activities evolve. Informed consent also covers the issue of capacity, where it is assumed that adults have the capacity to consent unless there is reason to believe the contrary.

The Data Subject must be informed of all circumstances surrounding the data processing including which data is to be processed, the duration, manner and specific purposes of processing, as well as its consequences. They must also know who is processing the data, whether the data will be transferred to third parties, the consequences of refusing consent, as well as whether consenting to the data processing is a condition for concluding the contract.

The request for consent should be separate from other terms and conditions, communicated clearly, simply and in plain language.

To ensure that specific and informed consent has been obtained, the Data Controllers and Data Processors should provide the following information as a bare minimum:

The name of the Data Controller, Data Processor and each of the third parties who will rely on the consent.

The purposes of processing the data. Separate consents should be obtained for each processing purpose as the notion of 'evolving consent' does not exist.

Separate consents should be obtained for each processing activity unless those activities are clearly interdependent.

Details of the right to withdraw consent at any time should be expressly made known to the data subject.

c. Express

Express consent refers to a clear oral or written statement confirming the granting of consent.

Where consent has been obtained orally, a record of the

script should be kept. In no circumstance would an implied consent inferred through actions be deemed to be express, even if the said actions are apparent enough to satisfy the basic definition of consent. The same must be confirmed in words.

d. Affirmative

This is an obvious indication that a Data Subject has consented to their personal data being processed and in the manner it is being processed. However, the United Kingdom's Information Commissioner's Office published a guidance on consent in which it confirmed that affirmative action leaves room for implied methods of consent. The guidance gives the example of an individual

dropping a business card into a prize draw box at a coffee shop. Though implied, it is a clear indication that the Data Subject agrees to their personal data being processed solely for the purposes of the prize draw.

Nevertheless, affirmative action is required to establish consent and it can be achieved by a deliberate and specific action

agreeing or "opting-in" to processing. This could include signing a consent statement, selecting from equally prominent yes/no options, responding to an email requesting consent or ticking a box on paper or electronically.

Silence or a failure to "opt out" is not consent as it does not involve clear affirmative action. The Court of Justice of the European Union (the CJEU) recently delivered Judgment in Bundesverband der Verbraucherzentralen und

Verbraucherverbande – Verbraucherzentrale Bundesverband eV v Planet49 (2020) 1 WLR 2248 a case which provided further clarity regarding the validity of a consent where a Data Subject failed to opt out. The case was brought to the CJEU against Planet49, an online gaming company that hosted a promotional lottery on its website. The website had consent checkboxes for use of personal data. Among the checkboxes provided, was one to obtain consent for use of web analytics cookies for the purposes of providing targeted ads to the Data Subject, which was pre-ticked. The issue for determination was whether a pre-ticked checkbox constituted valid consent.

In its Judgment, the CJEU held that there was no valid consent for the following reasons:

Separate consents should be obtained for each processing activity unless those activities are clearly interdependent.

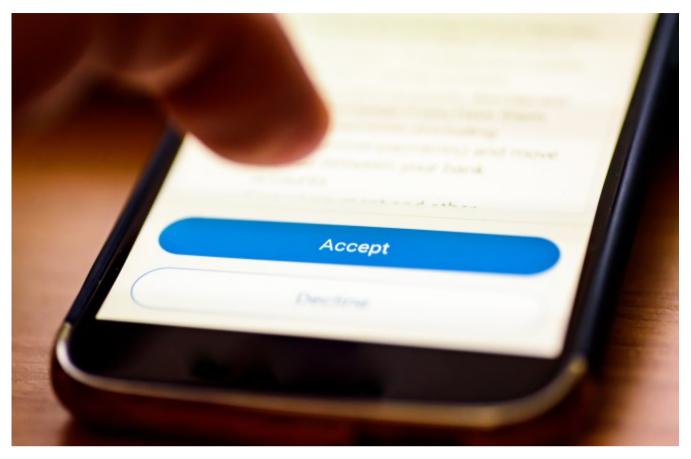
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access to information already stored in the data subject's terminal equipment was permitted by way of a pre-ticked checkbox the data subject needed to deselect to refuse his consent which does not show active behaviour on the part of the data subject.

The consent was given not separately, but at the same time as confirmation in the participation in an online lottery

The CJEU also considered whether the consent was specific and informed and noted that the duration of the operation of cookies and whether or not third parties may have access to those cookies must be provided.





Conditions for Consent

It ought to be borne in mind that a Data Controller or Data Processor bears the burden of proving that they obtained a Data Subject's consent for the use of their personal data for a specified purpose.

Further, the Data Subject has the right to withdraw his or her consent at any time. Such withdrawal shall not affect the lawfulness of processing based on prior consent before his or her withdrawal.

In order to determine whether consent was freely given, it will be considered whether the consent was provided such that, performance of a contract or provision of a service was conditional on the consent and further whether, the consent was truly necessary for the performance of that contract or service.

It is noteworthy that a Data Controller and a Data Processor should be consistent in their application of a lawful basis over another. For example, when investigating the validity of consent obtained, they cannot retrospectively utilise another lawful and favourable basis as envisaged in section 30 of the Act to justify the processing of data.

In addition, obtaining consent does not diminish the Data Controller's or Data Processor's obligations to observe the principles of processing data with regard to fairness, necessity and data quality. It is therefore important for Data Processors and Data Controllers to determine the most appropriate legal ground for processing personal data prior to obtaining the said data.

Consent by Children

Section 33 of the Act provides that a Data Controller or Data Processor shall incorporate appropriate mechanisms for age verification and only process data relating to a child where consent is given by the child's parent or legal guardian.

Recording and Managing Consent

Records of consent should be kept and retained for as long as the data is being processed based on the consent, so that compliance with the accountability obligations under the Act is demonstrated.

Records can include who consented, what they consented to, what they were told at the time, how they consented and whether consent has been withdrawn. In the event the consent has been withdrawn, the retention of personal data shall be permitted if it is strictly necessary for putting forward or defending a legal claim in accordance with the

Additionally, consents should be kept under review. As stated above, evolving consents do not exist and as such data processors and data controllers are expected to refresh consents at appropriate intervals as the purpose or processing activity evolves or changes.

Conclusion

In ending, we reiterate that it is crucial for Data Controllers and Data Processors to review and update their internal processes for obtaining, storing, and using personal data as the Act has placed an enormous burden on them to prove the legality of their said processes, especially with regard to validity of consent. In this regard, the office of the Data Commissioner has issued a guidance note on the subject, which should be referred to when navigating the issue of consent under the Act.



Finding hidden corporate owners: Beneficial ownership

disclosure

By: Vera Owusu Osei

ompanies are legal entities used by natural persons to undertake business or pursue an object. However, it is not always the case that natural persons want to use companies for lawful activities or to be identified with the company. Natural persons may use companies as fronts for unlawful activities including terrorist financing, money laundering, and tax evasion: circumventing legal compliance requirements, among others. In light of this, it is important to have full information on the persons using a company to undertake business or pursue an object.

This has led to the requirement of beneficial ownership disclosure globally. Ghana adopted the disclosure requirement in 2016 through an amendment of the now repealed Companies Act, 1963 (Act 179), and has restated the requirement in the new Companies Act, 2019 (Act 992). This article discusses beneficial ownership disclosure in Ghana.

Background to beneficial ownership disclosure

Studies conducted by the Financial Action Task Force (FATF) (an international body that sets standards for anti-money laundering and counter-terrorist financing) in 2006 revealed that the lack of adequate, accurate and timely beneficial ownership information on companies in jurisdictions, including Ghana, allow money laundering and terrorist financing to flourish in those jurisdictions.

Consequently, the FATF recommended its Recommendations 24 and 25 on transparency and beneficial ownership of companies. In parallel, the Ghana Extractive Industry Transparency Initiative (GEITI), an initiative that monitors payments by extractive industry companies to governments and government entities, initiated a beneficial ownership transparency agenda to push for transparency in payments in the industry. FATF Recommendations 24 and 25 and the GEITI served as catalysts for Ghana to consider a



beneficial ownership disclosure regime covering all companies.

Ghana implemented the requirement by amending the now repealed Act 179 through the passage of the Companies (Amendment) Act, 2016, (Act 920). Act 920 provided for a beneficial ownership disclosure regime by mandating the inclusion of names and particulars of beneficial owners in the register of members. The beneficial ownership disclosure reveals how companies are owned and controlled by their beneficial owners.

Act 920 and Act 179 were repealed by the Companies Act, 2019, (Act 992) which was passed in August 2019. However, it restated the beneficial ownership disclosure requirement and expanded on it.

Who is a beneficial owner?

A beneficial owner is a natural person who ultimately owns or significantly controls a company or materially benefits from the assets held by a company. The control can be exercised directly (holding a

significant share in the company) or indirectly (influential in the running of the business) through a legal ownership interest or a significant percentage of voting rights. Act 992 defines the beneficial owner as the natural or artificial person that has a direct or indirect significant interest in or substantial control over a company. It characterises the beneficial owner as an individual:

- 1. who directly or indirectly ultimately owns or exercises substantial control over a person or company;
- 2. who has a substantial economic interest in or receives substantial economic benefits from a company, whether acting alone or together with other persons;
- 3. on whose behalf a transaction is conducted;
- 4. who exercises significant control or influence over a legal person or legal arrangement through a formal or informal agreement;

Thus, persons who fall into any of the above categories are beneficial owners and their details must be disclosed to increase transparency in business transactions. Act 992 requires Ghanaian companies (incorporated or external company) to disclose their beneficial owner(s) to the Office of the Registrar of Companies (ORC).

When to report/disclose beneficial ownership? Act 992 establishes a Central Register ('Register') that

allows the Registrar to, in accordance with Recommendations 24 and 25 and the provisions of Act 992, obtain, verify and record beneficial ownership information. Consequently, companies have reporting obligations under the beneficial ownership regime. The following reporting requirements have been adopted under Act 992:

- 1. Filing of beneficial ownership information with the ORC during incorporation /registration of a company. This involves the completion of the relevant Beneficial Ownership Declaration Form.
- Entry of details of beneficial owners in the Register of Members, and thereafter, submitting their particulars to the ORC within 28 days.
- 3. Disclosure of beneficial owners in the annual returns forms.
- The Registrar may request for details of beneficial owners of companies when updating its Register.

The details required from the beneficial owner include the personal details, percentage of interest

The details required from the beneficial owner include the personal details, percentage of interest held, approved national identification, details of politically exposed persons and in the case of a foreign beneficial owner, their passport details.

> held, approved national identification, details of politically exposed persons and in the case of a foreign beneficial owner, their passport details. The reporting requirements help the Registrar to have records of beneficial owners to track their activities.

Should everyone report?

Act 992 does not require everyone that has or controls interest directly or indirectly or receives benefits from a company to disclose. The Act qualifies the reporting thresholds with the words 'significant' or 'substantial'. This is necessary to ensure that the Register contains details of persons who only hold significant or substantial interests. Pursuant to that, the Beneficial Ownership Declaration Forms set out the thresholds for disclosure in the Register. The thresholds are dependent on the type/sector of the company and the type of beneficial owners involved. The prescribed thresholds are as follows:

- A natural person who has a direct or indirect interest of 20 percent interest or greater.
- 2. Foreign politically exposed person in any

- company who holds 5 percent interest or greater.
- Domestic politically exposed person with any amount of shares or form of control.
- In a high-risk company (e.g., oil and gas), any person with an interest of 5 percent.

The thresholds provided under the law are to ensure that only significant and substantial ownership by beneficial owners is disclosed. This is to avoid the disclosure becoming an unnecessary burden for the acquisition of any interest or receiving any benefit, no matter how insignificant in a company.

What happens if you fail to disclose?

To ensure compliance with the disclosure requirements, Act 992 prescribes sanctions for noncompliance. Non-compliance with the reporting/disclosure requirements attract payment of a fine or a term of imprisonment not exceeding 2 years or both. The prescription of sanctions for noncompliance in Act 992 is necessary as it serves as a check on companies hiding share ownership or control.

Additionally, where persons act as 'fronts' for beneficial owners per the terms of an undisclosed agreement, allowing the beneficial owner to use various means to control the actions of the front in the company; such an agreement will have no legal effect on the basis that it is unlawful.

It is therefore important that companies take necessary steps to comply with the disclosure requirements to avoid the prescribed sanctions.

Practical issues arising with implementation

66 The thresholds provided under the law are to ensure that only significant and substantial ownership by beneficial owners is disclosed.

register

The disclosure requirement is not without faults. Concerns raised include:

There are generally technical challenges related to the verification of information obtained on beneficial owners. Consequently, it is difficult for the ORC to verify the information on beneficial owners who are publicly listed companies. This has led to delays in filings by companies (especially foreign-owned companies) who have publicly listed companies as beneficial owners. The Registrar must issue a clear directive on how to proceed in respect of this matter.

- Under the regime, it is mandatory for beneficial owners who do not have a Tax Identification Number (TIN) to procure a TIN. Beneficial owners who are nonresidents are reluctant to procure the TIN on the basis that it exposes them to tax liabilities in Ghana. Foreign beneficial owners must be made aware that tax liability does not arise just by the procurement of a TIN but only applicable on taxable activities.
- The Form allows companies to indicate if there are no beneficial owners who meet the prescribed thresholds. There is no requirement for an applicant to provide any supporting information for that statement. However, the ORC would only file such a form if it has supporting documentation. The form should be amended to include the provision of supporting information if there are no beneficial owners.

Conclusion

The beneficial ownership disclosure regime is being implemented to ensure best practices in business operations. Undoubtedly, there are issues associated with its implementation. However, businesses must comply with the requirements. For businesses to be compliant with the requirements, the following measures can be adopted:

- · Procurement of TINbeneficial owners must take steps to procure TINs. Having a TIN does not equate tax liability. Tax payment is generally triggered if the income is accrued in, derived from, and brought into Ghana.
- · Submission of completed Beneficial Ownership

Forms to the Registry (despite its non-filing by the Registry). This may reduce the compliance risk.

- Where a company does not have a natural person, listed company, or government entity as beneficial owner, provide the additional information / explanation with the application before submission.
- Registrar to develop its verification system to ensure accuracy of the data.

2022 IN PICTURES





Capacity Building on Negotiating PPAs for a client





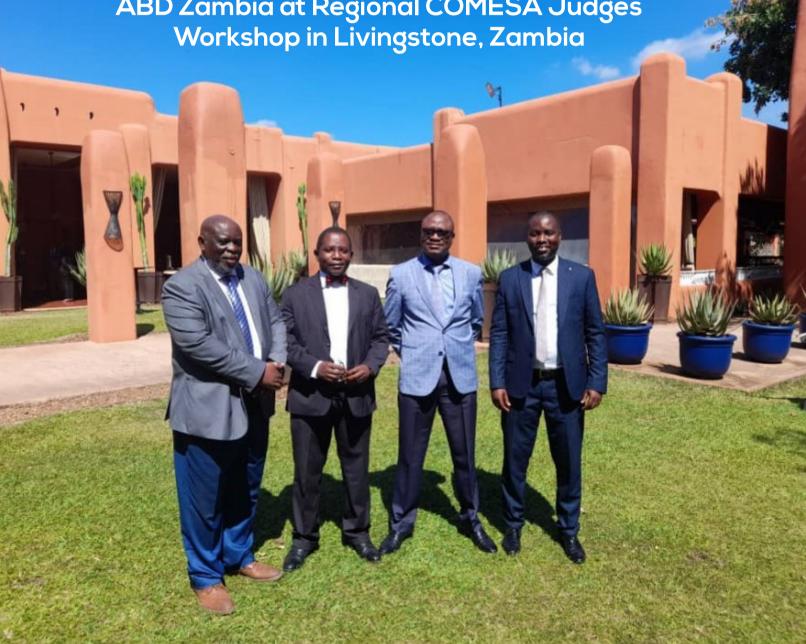




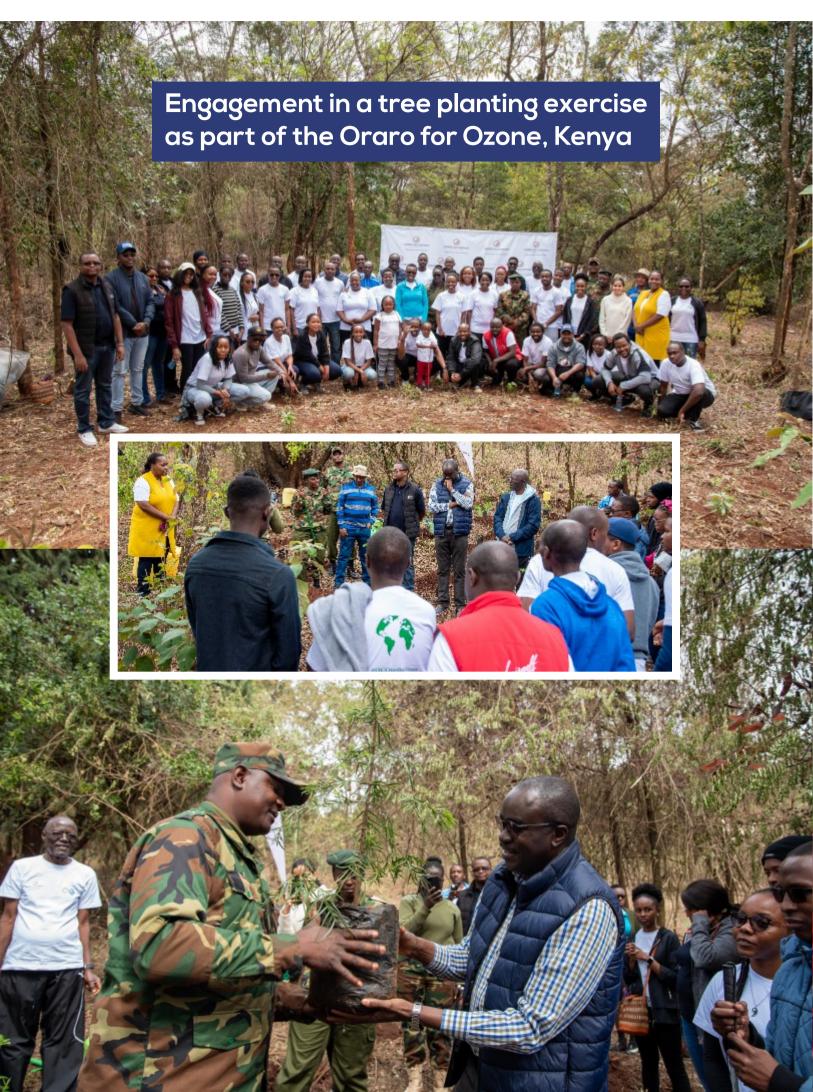
















Disclosure of Beneficial Ownership of Companies in Kenya

By: Pamella Ager

Introduction

Under the recommendation of the Financial Action Task Force on International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, members are urged to maintain adequate and timely information on the beneficial ownership and control of legal persons.

Following this recommendation, Kenya introduced section 93A of the Companies Act of 2015 in July 2019, through the Statute Law (Miscellaneous Amendments) Act. It provides that companies incorporated or registered in Kenya should keep a register of beneficial owners with the relevant information relating to such owners. Further, through a Legal Notice dated 18th February 2020, the Attorney-General published the Companies (Beneficial Ownership Information) Regulations, 2020 (the Regulations) which gives effect to section 93A of the Companies Act.

The latest development in this area of the law is a public notice issued by the Registrar of Companies advising that the beneficial ownership e-register is operational as from 13th October 2020.

The Companies Act defines a beneficial owner as "the natural person who ultimately owns or controls a legal person or arrangements or a natural person on whose behalf transactions are conducted, and includes persons who exercise ultimate effective control over a legal person or arrangement."

Definition of Beneficial Owner

The Companies Act defines a beneficial owner as "the natural person who ultimately owns or controls a legal person or arrangements or a natural person on whose behalf transactions are conducted, and includes persons who exercise ultimate effective control over a legal person or arrangement."

Under the Regulations, a beneficial owner is a natural person who directly or indirectly:

- holds at least ten percent (10%) of the issued shares of the company;
- exercises at least ten percent (10%) of the voting rights in the company;
- · holds the right to appoint or remove a director of a

company; or

exercises significant influence or control over a company.

Significant influence or control under the regulations means participation in the finances or financial policies of the company.

Salient Features of the Regulations Particulars of Information of Beneficial Owner

A company is required to enter the following particulars of the beneficial owner in the register – the full name; the birth certificate number; the national identity number and the passport number; the nationality; the date of birth; the postal address; the business address; the residential address; telephone number; the email address; the occupation or profession; the nature of ownership or control; the date the person became the beneficial owner; the date the person ceases to be a beneficial owner and any other information that may be required by the registrar from time to time.

Obligations of the Company Duty to Investigate the Beneficial Owner

The Regulations provide that a company has a duty to investigate and obtain the particulars of a beneficial owner. The first step in the investigation is the issuance of a notice to the person they believe to be the beneficial owner of the company. A person issued with this notice by the company is required to comply with the notice within twenty-one (21) days from the date that the notice was issued. In case a person fails to comply with the notice within time, the company shall issue them with a warning notice of fourteen (14) days.

Restriction of Persons Who Fail To Comply With the Warning Notice

If a person fails to comply with the warning notice within fourteen (14) days from the date of issuance, the company shall restrict the relevant interest of the person. Thereafter, the company files with the registrar a copy of the restriction issued fourteen (14) days after issuance of the restriction.

The effect of the restriction is that:

- any transfer of interest by the person shall be void;
- · the person shall not exercise his rights in respect



to the interest;

- no shares shall be issued to the person in an allotment; and
- · no payment shall be made to the person in respect of the interest he holds in the company.

Restrictions on Sharing Beneficial Ownership Information

In an effort to ensure that the officers of the company comply with the provisions of the Data Protection Act, 2019, the regulations provide that the company should not disclose the information of the beneficial owner to the public, unless the beneficial owner has consented to the disclosure.

The beneficial owner information can only be disclosed for purposes of complying with the Regulations, for purposes of communicating with the beneficial owners or in compliance with a Court Order.

A person who discloses beneficial ownership information

The beneficial owner information can only be disclosed for purposes of complying with the Regulations, for purposes of communicating with the beneficial owners or in compliance with a Court Order.

to the public risks a fine not exceeding Kenya Shillings Twenty Thousand (KES 20,000) or imprisonment for a term not exceeding six (6) months or to both.

Penalty In Case of Non-Disclosure by the Company

Under section 93A of the Companies Act, failure by a company to comply with the disclosure requirements is an offence which on conviction attracts a fine not exceeding Kenya Shillings Five Hundred Thousand (KES 500,000) payable by the company and each officer of the company in default. Further, if the non-compliance continues, the company and the officers shall be liable to an additional fine not exceeding Kenya Shillings Fifty Thousand (KES 50,000) per day.

Operationalisation of Disclosure of Beneficial Ownership Information

The Registrar of Companies announced through a Public

Notice that with effect from 13th October, 2020 the beneficial ownership e-register is operational. As such, companies are required to update their beneficial ownership e-register by 31st January 2021. Therefore, company officers are required to take attendant steps to ensure compliance with the provisions of the Act and the regulations. In summary some of the steps that company officers could take include:

- Issuance of notices to the persons that can be termed as beneficial owners as per the definition in the Act and the regulations;
- · Adherence to timelines outlined in the regulations for example, timelines on issuance of notices;
- · Updating the e-register in case of

any new information of beneficial owners;

- Updating the registrar of companies in case of any restriction measures placed on beneficial owners;
- Ensuring that the information of the beneficial owners is not disclosed to the public without their consent, contrary to the provisions of the Data Protection Act.

Nullification of the Statute Law (Miscellaneous Amendments) Act of 2019

On 29th October, 2020 the High Court of Kenya in Constitutional Petition Number 284 of 2019 (as consolidated with Petition No. 353 of 2019) declared amongst other laws that the Statute Law (Miscellaneous Amendments) Act of 2019 is unconstitutional thus null and void for failure to involve the Senate in their passage. As stated above, this particular Act introduced section 93A of the Companies Act; the main provision on disclosure of beneficial ownership information by companies in Kenya.

However, the Court in its Judgment suspended the nullification of the impugned Acts for a period of nine (9) months to enable the Respondents to comply with Article 110 of the Constitution and regularize the Acts. The suspension of the nullification of the affected statutes means that companies still have an obligation to comply with the laws and the regulations on beneficial ownership information.

Conclusion

In the absence of the above-mentioned laws and regulations, many individuals who are beneficial owners of companies remain legally anonymous. As such, money launderers and those involved in covert criminal activities and terrorism would invariable take advantage of hitherto opaque corporate structures to conceal their true ownership of assets and properties. Therefore, the disclosure of beneficial ownership information is expected to promote greater transparency within corporates in Kenya, by shedding light on true ownership structures within companies.

This alert is for informational purposes only. If you have any queries or need clarifications, please do not hesitate to contact Pamella Ager (pamella@oraro.co.ke) (Partner), or your usual contact at our firm, for advice relating to the Regulations and how the same might affect you.





Unsolicited Solutions to Public Problems

By: Naa Ayeley Komey

Introduction

It is the prime responsibility of the Government to provide public infrastructure and related services to address public needs. However, in most developing countries including Ghana, there is a huge gap between infrastructure needs and infrastructure delivery by Government. One reason for this is inadequate resources for Government to use to provide needed infrastructure. One option to deal with this is Government engaging private sector to deliver such public infrastructure and related services. Public Private Partnerships (PPPs) have become one of the most preferred options for engaging the private sector to support Government in the provision of public infrastructure and related services.

PPPs simply refer to any form of contractual arrangement by which public sector entities partner with private sector entities to deliver public infrastructure and related services usually over a long-term with the private sector partner assuming substantial risk. In order to engage a

private sector partner, Government prepares the project through the conduct of feasibility studies and prepares procurement document, then invites proposals for the projects from interested private entities using a competitive procurement process. However, private parties can also submit proposals without any request from Government to provide public infrastructure and related services through unsolicited proposals.

A good number of people reading this article may have come across a brilliant and innovative initiative by a Small or Medium-scale Enterprise (SMEs) and thought that some major national infrastructure gap or required public service would be filled or provided if the initiative was adopted by Government. However, for many of such SMEs or startups, the thought of partnering with Government is confusing and daunting.

This article breaks down the process for unsolicited proposals under the PPP Act for easy understanding and makes a case for SMEs to be proactive in solving public infrastructure problems through such unsolicited proposals.

Unsolicited Proposals

Under Ghana's PPP Act, an unsolicited proposal is a proposal made by a private party to undertake a

partnership project with a public sector and is submitted at the initiative of the private party rather than in response to a request for proposal by a public sector entity. Thus, an unsolicited proposal is considered a private sector-led proposal.

Preliminary requirements for PPP Projects Initiated by Unsolicited Proposals

There are three (3) requirements for PPP projects initiated through unsolicited proposals. These are:

- a. The PPP project must be innovative and not place an onerous obligation on Government.
- b. The PPP project must be a project that is not already part of the Medium Term Development Plan of the public institution that the private entity is seeking to partner with; and
- c. The PPP project proposed must be consistent with the overall National Infrastructure Plan.

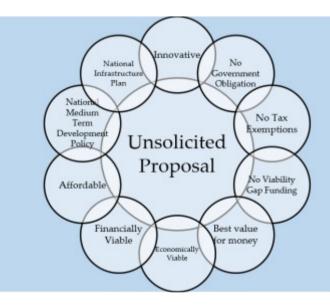


Figure 1 Summary of Preliminary Requirements

Even though dictated by law, the writer is of the view that it should be possible for unsolicited proposals to be submitted for projects in the Medium Term Plan and National Development Plan. The focus must be on the innovation that the proposed solution offers. This avoids instances where projects, though urgently needed, are never implemented for many years due to lack of resources from Government. Government should be open to consider unsolicited proposals.

Notably missing from the requirements above is the fact that the scale of the product or services rendered by the private party is not a condition precedent for consideration of a PPP project through unsolicited proposals. Thus, there is an opportunity for SMEs or startups to submit unsolicited proposals under the PPP Act.

Once the above criteria are met, the PPP Project will go through processes prescribed under the Act including a feasibility study before final approval by the relevant government entity that will undertake the project.

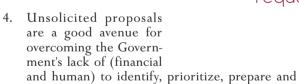
Advantages of Unsolicited Proposals

The use of unsolicited proposal to execute public projects confers a number of advantages on the private party, Government and the public including:

- 1. For the private sector, PPP projects through unsolicited proposals provide a great platform for private sector companies to see their innovative solutions to complex national problems roll out on a nationwide scale.
- Also, the private sector and public entities avoids lengthy procurement processes to implement projects more quickly. Government is able to catch up with the ever increasing demand for infrastructure and related services through the adoption of a faster procurement process that is well balanced with ensuring value for money and related issues.
- 3. For Government, the projects that Government does not have the needed resources to implement, can be implemented through unsolicited proposals especially those of a commercial nature for

which user changes make economic sense. The Government is able to focus its limited resources on other projects mostly of a social and noncommercial nature.

procure projects.



- 5. Unsolicited proposals enable the Government to address its inability to plan and fund necessary infrastructure development.
- Government is able to tap into the private sector's innovation and knowledge to identify value-formoney project solutions through the adoption of unsolicited proposals.
- 7. The public gets the needed infrastructure and related services with all its attendant economic and social benefits.

Challenges with Unsolicited Proposals

In spite of the many benefits of unsolicited proposals to both Government and the private sector, PPP projects initiated through unsolicited proposals come with challenges including:

- 1. Perception of Corruption: Perhaps, the most notable among such challenges especially in this part of the world, is the challenge of balancing the need to address infrastructure needs with the private sector's motive to make profit and the attendant adverse perception of corruption.
- 2. Unsolicited projects can divert government attention from systematically planning infrastructure, especially in developing countries where there is a plethora of infrastructure needs each screaming for immediate attention. This is because, while Government may have a holistic approach to infrastructure plans, a private entity has no such objective.
- 3. There is also the possibility of not getting value for money since the process for unsolicited proposals is less competitive compared with a Government invitation to interested parties to submit proposals
- 4. Due to profit motive of the private sector, the high rate of return may affect financial viability of projects. To deal with this, the private party may request for viability gap funding, tax exemption and other government financial support.

Under Ghana's PPP Act, an unsolicited proposal is a proposal made by a private party to undertake partnership project and is submitted at the initiative of the private party rather than in response to a request for proposal by a public sector entity.

5. User Affordability: related to the above, user charges proposed by the private party may be high and above acceptable levels for the general public or users of the infrastructure and related services.

Recommendations

To overcome the challenges, the following are recommended:

1. Government's clear policy for unsolicited proposals must provide steps and timelines for management of unsolicited proposals, covering minimum submission requirements; reimbursement and protection of intellectual property; procedures for introducing competition and reward systems and eligibility and types of Government support, if any. The PPP 2020, Act 1039 has attempted to address this by providing various checks and balances with respect to the procedure for the approval of unsolicited proposals. However, there is an absence of clear

guidelines for PPP projects based on international best practices. Hopefully, the enactment of the PPP regulations would fill this gap.

Government must build institutional capacity particularly for public sector agencies with the requisite skill for managing unsolicited proposals sector entity propose similar PPP projects, the proposals must be vetted objectively. It is expected that the Public Private Partnership Regulations would outline a procedure for unsolicited proposals that will balance the need to strictly vet unsolicited proposals with the goal of encouraging innovative projects from the private sector to address national issues.

Conclusion

Unsolicited proposals offer a great opportunity for private sector entities to propose and undertake projects that not only fill the infrastructure gap but also accelerate development.

including; conducting feasibility; designing and implementing clear guidelines for the assessment of fiscal risks and liabilities; evaluating proposals, drafting and negotiating PPP contacts as well as monitoring implementation. Where the required expertise is absent in-house, transaction advisors should be engaged.

A fast paced development is dependent on both private sector initiative and government effort. The private sector has been touted as the engine of growth. Unsolicited proposals offer a

3. Government agencies must ensure that they are getting value for money. If more than one private great opportunity for private sector entities to propose and undertake projects that not only fill the infrastructure gap, but also accelerate development. While government must embrace this option and build institutional capacity and provide clear guidelines that encourage private sector parties to take up the opportunities, the private sector must proactively begin to put their innovations to use by proposing solutions to public entities and implementing those proposed solutions in partnership with public entities not only for their mutual benefit, but for a broader public good and development.





SAVE ME!:

Rescue Options Available For Distressed Companies Under Kenya's Insolvency Act, 2015

By: Noella Lubano

nsolvency is arguably one of the most daunting outcomes for a company. However unfathomable it may be, it cannot be completely written off as companies are prone to financial difficulties which may be attributed to cut-throat competition, reduction in demand of the product coupled with an increase in the cost of production, increase in bad debts, among a host of other reasons.

For a long time, the only recognised outcome for insolvent and distressed companies in Kenya was winding up and in rare cases, receivership. However, the Insolvency Act, 2015 (the Insolvency Act) ushered a move away from these draconian outcomes and introduced the concept of rescue procedures.

To this end, the Insolvency Act has placed emphasis on maintaining companies as going concerns for the benefit of all concerned through various rescue procedures including but not limited to company voluntary arrangements, administration, and administrative receivership.

Administration

Administration commences with the appointment of an administrator who may be appointed by the company or its directors, the Court, or the holder of a floating charge. The objectives of administration are to maintain the company as a going concern, to obtain a better outcome for the company's creditors than what would have been if the company was liquidated, and to realize the property of the company so as to distribute the same to secured or preferential creditors.

Once an administrator is appointed, a moratorium comes into play. During the existence of the moratorium, proceedings and execution against the company are stopped and creditors may only exercise their rights against the company with the consent of the Court or administrator.

The main difference between an administrator and an administrative receiver is that the latter is available to a debenture holder in respect of a debenture that was created before the coming into force of the Insolvency Act. However, the roles and obligations of an administrative receiver are, in essence, no different from an administrator appointed under the Insolvency Act since he or she is required to be a qualified insolvency practitioner, a designation with specific obligations under the Insolvency Act.

The main attraction of administration is the protection it affords a company by deflecting any liquidation attempts by creditors. This gives the company time to turn around its financial affairs. On the flipside, administration bears some downsides such as the ceding of controlling rights over the company from the directors to an insolvency practitioner. In addition, being a public process, administration is in the public domain and this may act to deter suppliers, affect investor confidence, and reduce employee morale.

The main attraction of administration is the protection it affords a company by deflecting any liquidation attempts by creditors.

Company Voluntary Arrangement

A company voluntary arrangement (CVA) is, on the other hand, a scheme where the company's directors propose a plan to settle the debts of the creditors. If the plan is approved, the company will continue trading on a more flexible repayment schedule. A CVA is usually managed by an insolvency practitioner who is either selected by the directors and confirmed by the creditors or appointed directly by the creditors. Once a CVA is approved, a moratorium comes into place and prevents any debt recovery proceedings or action against the company unless with the approval of the Court.

Unlike administration, CVA's are rarely in the public domain and as such, the process enjoys some privacy. Moreover, due to the informality of the process, it gives greater latitude to stakeholders to come up with ideal solutions tailored specifically to the difficulties facing the company. Of noteworthy is the fact since CVA's are largely controlled by creditors, unless most of the creditors approve the process and for the duration of it, it may well collapse should the creditors not fully buy into the process.

Corporate Restructuring

The Companies Act, 2015 (the Companies Act) also contains rescue procedures such as compromises, arrangements, reconstructions, and amalgamations, all

of which permit a company that is in distress to initiate negotiations with its creditors to obtain a favourable outcome for all concerned parties.

The umbrella term for the above processes is corporate restructuring which may be commenced by a company, its directors, members, creditors, and insolvency practitioners. There are no defined parameters for corporate restructuring and it may include reorganization of a company's shares, an amalgamation of two or more companies, compromises with creditors, or any act that alters the company's financial position.

A restructuring takes effect once approved by the Court and the stakeholders in a meeting. It comes with several advantages as the arrangement is predicated on making the business more profitable with the idea of obtaining a positive result for the creditors.

Corporate restructuring is generally a good response for a company with a declining business as it helps revive it thereby increasing the value of the company. However, if not done properly, a restructuring may result in increased losses being incurred by the company due to substantial costs and expenses attendant to the restructuring process such as consultation fees, professional fees and legal compliance costs.

As highlighted above, companies in distress in Kenya have a range of options available to them under both the Insolvency Act and the Companies Act which, when properly applied, can improve the financial position of the company and delay, or avoid liquidation altogether.

The Courts in Kenya have also been supportive of rescue arrangements and have been

reluctant to interfere with entities that are pursuing corporate rescue procedures. Prominently, there was an attempt by some creditors to stop the debt restructuring that had been commenced in respect of Kenya Airways in 2017 in the case, Equity Bank Kenya Limited v Kenya Airways PLC & 11 others (2017) eKLR. The applicants argued that there were no legal provisions that permitted the restructuring process that was happening at the time.

The Court, however, in rejecting this position, stated that the said restructuring was undertaken pursuant to section 926 of the Companies Act, which permits companies to enter such arrangements, and pronounced itself as follows:

"It is common ground that the 1st respondent is in the process of restructuring in an effort to secure additional capital that will see it continue as a going concern. The Companies Act provides a mechanism under which a company may enter into a scheme of arrangement with its creditors. Under section 926 of the Act, a company may present a compromise or arrangement to the Court for sanction where a majority of the creditors, or the members voting at a meeting, convened in accordance with section 923 have agreed with the compromise or arrangement."

Under the said provision of the law, companies experiencing financial difficulties may opt to enter any arrangement that will help alleviate their financial situation and these may include ceding entitlements by creditors, trading reorganization, use of derivatives (where applicable), debt to equity swaps, share capital restructuring, mergers and acquisitions and halting proceedings against the company.

Conclusion

A distressed company should act early to avoid going into liquidation. Whereas there is a wide range of options available to a company in distress, these options may be limited if an insolvency situation is left unaddressed rather than dealt with immediately. Some of the subtle signs of

A restructuring takes effect once approved by the Court and the stakeholders in a meeting.

99

impending insolvency that companies can look out for include cases where the business is expanding too fast, missing forecast targets consistently, entry of competition into the market amongst others.

Finally, it is important to note that a selected statutory rescue procedure can only achieve its intended goal if the relevant stakeholders are involved and cooperate. These stakeholders include financiers, suppliers, employees and landlords who must lend support to the selected rescue procedure for the same to be successfully implemented.



A 'DICEY' MATTER:

The Fate Of Employees In Mergers And Acquisitions







By: Jacob Ochieng, Sandra Kavagi & Sheila Nyakundi

here has been a rise in mergers and acquisitions transactions (M&A Transactions) in Kenya even as business entities grapple with tough economic times and the ability to stay afloat in the evolving business market. The recent acquisition of National Bank of Kenya Limited by KCB Bank PLC, the merger of NIC Group PLC and Commercial Bank of Africa Limited, the acquisition of Quick Mart and Tumaini Self Service Supermarkets by Sokoni Retail Kenya to form a single retail operation and the proposed acquisition of one hundred percent (100%) of the issued share capital of De La Rue Kenya Limited (a subsidiary of De La Rue PLC) by American firm HID Corporation Limited are some of the notable M&A Transactions that have taken

place in Kenya in 2019. All these recent M&A Transactions have brought to the fore, among other issues, the fate of employees in the merging entities. In most instances, a high number of employees are declared redundant and thereafter, have to wait for fresh advertisements of positions by the merged or acquiring entity and apply to be recruited.

Employment and labour law considerations feature highly during M&A Transactions. More often than not, such transactions lead to loss of employment due to the restructuring of the target company, or the change in character and identity of the transferring entity. Unlike other contracts involving assets and liabilities of the transferor, contracts of employment are currently not assignable to the acquiring entity under Kenyan law.

Apart from setting out the basic conditions of employment and addressing the legal requirements for engagement and termination of employees, both the Employment Act, 2007 and the Labor Relations Act, 2007 are silent on the effect of M&A Transactions on employees. In practice, the contracts of employment are terminated on account of redundancy subject to compliance with the conditions as set out under section 40 of the Employment Act.

With respect to the dismissal of employees immediately prior or subsequent to an M&A Transaction, the proposed amendment as currently framed might open a pandora's box as it may operate as a blanket protection to all employees.

> In some instances, the Competition Authority of Kenya (the Authority) established under the Competition Act, 2010 undertakes a public interest assessment to ascertain the extent to which the M&A Transaction will cause a substantial loss of employment and impose conditions to mitigate such as has been in case of the acquisition of

National Bank of Kenya Limited by KCB Bank PLC where the Authority approved the merger on condition that KCB Bank PLC retains ninety percent (90%) of the employees from National Bank of Kenya Limited for a period of at least eighteen (18) months. This was also seen in the merger between NIC Group PLC and Commercial Bank of Africa Limited where the Authority approved the merger on condition that both entities retain all the employees for a period of at least one (1) year.

Proposed Law

The Kenya Law Reform Commission, a statutory body established under the Kenya Law Reform Commission Act, 2013 with the mandate to review all the laws of Kenya to ensure that they are modernised, relevant and harmonised with the Constitution of Kenya, 2010, recently prepared a

draft Employment (Amendment) Bill, 2019 (the Bill) which amongst other provisions, proposes to amend the principal Act (being the Employment Act, 2007) by introducing a new section 15A which provides for the transfer of employees during M&A Transactions.

Failure to comply with these obligations attracts penalties and sanctions to the employer.

even closer home, in neighbouring Uganda.

The proposed section 15A provides that such transfer of employees shall not operate to terminate or alter the terms and conditions of service as stipulated in the original contracts of the employees. It also creates an obligation on the transferor to notify and consult with the affected employees or their representatives regarding the anticipated transfer, the implications of such

The Bill borrows heavily from the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE Regulations) as amended by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014 applicable in England and Wales. TUPE Regulations are aimed at protecting the rights of employees in M&A

transfer and the measures that the transferor envisages will be taken to mitigate such implications. Further, the Bill provides that any dismissal taking place prior or subsequent to the transfer shall amount to summary dismissal if such dismissal is premised on the transfer.

Essentially, the Bill seeks to eliminate the difficulties

occasioned during M&A Transactions by ensuring that the

employees are not left out in the cold when their employer is bought out. It also creates an obligation for the transferor

to inform and consult with the employees who shall be affected in an M&A Transaction. This has been the practice

in other jurisdictions such as the United Kingdom and





Transactions in England and Wales by imposing obligations on employers to inform and, in other cases, consult with representatives of affected employees. Failure to comply with these obligations attracts penalties and sanctions to the employer.

Critique

While the proposed law could be seen as a relief for employees who are mostly losers in M&A Transactions, it brings with it several challenges and may potentially make M&A Transactions even more complex and strenuous, particularly on the part of the transferee.

Firstly, all the transferor's rights, powers, duties and liabilities in connection with any employment contract shall be transferred to the transferee. Further, the transferee shall be liable for all the employees' dues dating back to the commencement of the employment contract. This also means that the transferee shall shoulder all the liabilities that arose from the transferor's engagements with its employees, including but not limited to cases initiated by and against the transferor.

Secondly, the proposed amendment as currently drafted may subject the parties in M&A Transactions to unnecessary costs and restrictions. It may not be practical to place the transferee under an obligation to automatically retain all the employees of the transferor without any loss of benefits or contractual dues. Such a provision shall defeat the purpose of M&A Transactions, as most of them are geared towards restructuring the business for purposes of reducing operational costs.

With respect to the dismissal of employees immediately prior or subsequent to an M&A Transaction, the proposed amendment as currently framed might open a pandora's box as it may operate as a blanket protection to all employees including those whose contracts may be terminated for valid reasons during the transition period. The proposed amendment as drafted protects employees against redundancy processes while creating a higher standard of proof against the transacting parties with regards to any termination disputes arising in the course of an M&A Transaction.

Further, the proposed amendment fails to appreciate the contractual rights and obligations of parties with respect to employment and M&A Transactions. There should be provision to allow the transferee to freely negotiate alternative arrangements and contractual obligations with the transferor's employees and maybe set the standards that should guide this process. By doing so, the parties would have a better chance to make agreements that are favourable to all.

Conclusion

While the issue of how to deal with employees and employment contracts remains a challenge in M&A Transactions in Kenya, the proposed amendments to the Employment Act will no doubt come as a sigh of relief for many employees who have long viewed themselves as collateral damage in M&A Transactions. However, the proposed amendment is likely to increase the cost of undertaking M&A Transactions in Kenya which may well end up being counterproductive as regards the rationale for which the M&A Transaction was carried out in the first place.



Some thoughts on the ban of exports of raw Base Minerals from Zimbabwe

By: Patrick Jonhera

n 6th January 2023, we woke up to the news that the Minister of Mines and Mining Development, Winston Chitando, had made an order banning the export of unbeneficiated base mineral ores. The order is contained in Statutory Instrument 5 of 2023 (Base Minerals Export Control (Un-beneficiated Base Mineral Ores) Order, 2023. The effect of this latest intervention from the Minister is contained in section 3 of the instrument which limits the export of un-beneficiated base minerals except in terms of a permit issued by the Minister of mines.

The permit is issued on an application by the miner or his/its representative. The applicant must satisfy the Minister on one or the other of the two grounds, namely; that;

- a) "The export of any unbeneficiated base mineral ore in respect of which the applicant produces compelling reasons to the Minister showing that no such ore is capable of being beneficiated to any extent within Zimbabwe; or
- b) The export of samples of any un-beneficiated base mineral ore for essaying outside Zimbabwe, upon production of satisfactory proof to the Minister that such assay cannot be satisfactorily done in Zimbabwe, and that the quantity to be exported for that purpose is necessary for that purpose."

The intervention effectively makes export of unbeneficiated base mineral ores subject to an exercise of a Ministerial discretion.

Although, the statute has not stated in clear terms the extent of beneficiation which is required, it is submitted that a reading of section 3 (a) gives an impression that 'any extent' of beneficiation which increases value of the ores should be sufficient. The provisions are so wide such that one can read clause 3 (a) to mean that not only physical impossibility is

intended, but economic factors such as the fact that the mineral ores cannot be processed economically locally should be sufficient to discharge "the compelling reasons" mentioned in clause 3. It appears that the provisions were deliberately made vague in order to give the Minister wide powers to decide applications on a case

by case basis.

It also worth noting that there is no guarantee that the Minister will grant the export permit after submitting an application with the "compelling reasons" contained in part (a) and (b) of Section 3. There has not been guidance on what will constitute 'compelling reasons' leaving the Minister with the latitude to decide applications on a case by case basis. The Minister is still entitled to exercise a judicious discretion after an application is made in terms of section 3. In the event that the Minister exercises his discretion unreasonably or brings other considerations to bear, then such a decision can be vacated on application to the court on the basis of the grounds set out in section 3 of the Administrative Justice Act.

The wave to beneficiate minerals in host states is not new. For example Article 85 of Law No 2007-2002 of 11^{th} July 2002 enacting the Mining Code in the DRC provided that;

[s]ubject to the provisions of the previous paragraph, mining products originating from the exploitation areas can be marketed freely. The holder of an exploration Permit can sell its products to the customers of its choice at freely negotiated prices. However, the Minister's authorisation is required for the export of minerals in their raw state for processing outside of the National Territory. This authorisation will only be granted if the requesting holder demonstrates that; a) there is no possibility for processing in the National Territory at a price that is economically viable for the mining project; b) the advantages for the Democratic Republic of Congo in the event that export authorisation is granted]' (free English Translation)

Guinea, Article 139 (I) of Law No. L/2013/N 053/CNT of 8 April 2013 Amending Law No.2011/006/CNT of 9 September 2011 enacting the Mining Code:

The economic benefits of beneficiation cannot be understated. An integrated project involving exploration to transformation enables the state to maximise the profits generated by the exploitation of natural resources. Transformation in situ of the extracted ores can also represent a considerable advantage for the private operator / investor, especially in our own circumstances as a landlocked country coupled with high transport costs

[t]he holder of mining rights, or any other Guinean or foreign investor is urged to set up in the Republic of Guinea installations of packaging, processing, refining and transforming mineral or quarry substances, including the production of metals and alloys, and concentrates or primary derivatives of these mineral substances, in regulations in force. [(Free english translation).

Difference in the interventions ranges from an absolute ban to a qualified ban on export. The DRC, Article Article 85 permits consideration of economic factors such as the cost of beneficiation in the application for an export permit.

The motivations and timing of the interventions are also strikingly similar. Most of these interventions are associated with the election cycle when the fever for resource nationalization peaks.

The economic benefits of beneficiation cannot be understated. An integrated project involving exploration to transformation, enables the state to maximise the profits generated by the exploitation of natural resources. Transformation in situ of the extracted ores can also represent a considerable advantage for the private operator / investor, especially in our own circumstances as a landlocked country coupled with high transport costs. Investors will not have to export heavy ores which can be transformed locally. However, the country is not endowed with sufficient infrastructure to beneficiate minerals. This will create threats and opportunities for investors and Artisanal and small scale Miners alike.

Threats, to investors who acquired mineral rights and went into production before the intervention. These are now faced with two choices, either construct beneficiation plants which had not been budgeted for at the time of investment or consign the ores to the nearest beneficiation plant.

This creates opportunities for investors to invest in the mining value chain by constructing beneficiation plants The intervention may, however, lead to some unintended consequences. For small scale miners without capacity to construct beneficiation plants, the market for ores has now been severely curtailed. Most of small scale miners depend on a 'spot market' and might not have the comfort to beneficiate the minerals before seeking a foreign market with better prices. This may inevitably lead to the creation of a 'market' of plant owners purchasing ores from ASM and possibly lead to the creation of mineral beneficiation cartels severely impeding price discovery. Further, the intervention may also backfire.

Beneficiation depends on investment in related infrastructure to service the beneficiation plants as well as conducive macro- economic enablers such as a reliable railway system, reliable electricity supply as well as trained labour force. At the moment that country is reeling from incessant power cuts and a growing electricity import bill. Mining companies are having to source for electricity from neighbouring countries or built own plants. In the absence of these, the intervention may only have served to heighten the risk the country's investment risk premium. Time will tell where the dice will fall.

The preferred scenario would have been a staggered implementation of the ban rather than an abrupt intervention which aids negative perception arising from policy inconsistency. The staggered approach might have taken an initial requirement for mineral rights holders to fund research and development (R&D) in production of by-products such as Lithium batteries in the country as well as a tax regime which enables discovery of the resource endowment before finally implementing a total ban on exports. This approach would have given investors sufficient time to build beneficiation plants.

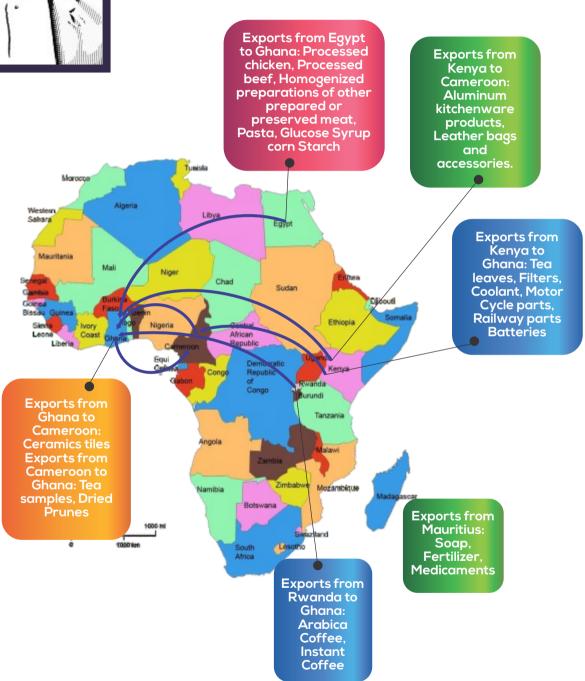
The preferred scenario would





TRADE (SHIPMENTS) EXECUTED UNDER THE AFCFTA GUIDED TRADE INITIATIVE

By: The AB & David Africa
Trade & Competition Practice Team



From the seven (7) State Parties that expressed interest and participated in the pilot phase of the Initiative, a total of over 100 potential trades were realized.

ORIGIN CRITERIA CODES UNDER THE AfCFTA EXPLAINED

Origin Criteria Code	Origin Criteria Description
WP	This code is designated for goods that are wholly obtained within the AfCFTA pursuant to Article 5 of Annex 2 on the Rules of Origin.
SV	This code is designated for goods that have undergone value addition resulting in substantial transformation within the AfCFTA pursuant to Article 6.1(a) of Annex 2 on the Rules of Origin.
SM	This code is designated for goods that are produced with the requisite proportions of foreign materials during its substantial transformation within the AfCFTA pursuant to Article 6.1(b) of Annex 2 on the Rules of Origin.
SX	This code is designated for goods that are classified as having been substantially worked on within the AfCFTA based on having met the threshold under the Change in Tariff Heading criterion pursuant to Article 6.1(c) of Annex 2 on the Rules of Origin.
ST	This code is designated for goods that are classified as having been substantially worked on within the AfCFTA based on having met the threshold under the Change in Tariff Sub-Heading criterion.
SP	This code is designated for goods that are classified as having been substantially worked on because the required process was used in their manufacture pursuant to Article 6.1(d) of Annex 2 on the Rules of Origin.
SC	This code is designated for goods that are classified as having been substantially worked on within the AfCFTA because their raw materials and /or semi-finished input were procured within the free trade area, and they passed the test of culmination pursuant to Article 8 of Annex 2 on the Rules of Origin.

Figure 3

How Ghana as a host country plans to and can take the lead, show leadership and courage regarding the AfCFTA

Ghana's AfCFTA Trade Policy

- To increase Ghana's exports to other AfCFTA markets.
- Incorporate AfCFTA rules and regulations into the laws of Ghana by implementing AfCFTA obligations in Ghana.

Trade Information

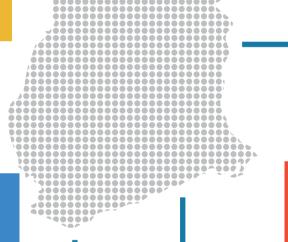
- To coordinate and improve existing trade information platforms to enhance access to information for intra- African trade.
- To stimulate demand for Made in Ghana goods and services across the Continent
- To provide timely and accurate information on market trends for Ghanaian businesses.

Trade Facilitation

- To ensure speedy and efficient cargo clearance processes at Ports and Border Posts in a safe and secure environment.
- To ensure Non-Tariff Barriers and Technical Standards do not constrain Ghana's trade with Africa.

Trade Infrastructure

- To provide appropriate production infrastructure including Special Economic Zones, Industrial Parks and Logistics Parks to enhance productive capacity for export to Africa.
- To improve access to raw materials and other critical inputs for strategic sectors in such quality and quantity at strategic prices
- To support the adoption and deployment of modern technology and machinery to enhance productivity in strategic sectors.
- To improve availability and quality of managerial and entrepreneurial skills in strategic sectors.
- To provide reliable, accessible and competitively priced energy for businesses trading under AfCFTA.
- Io establish a world-class inter-modal transport and logistics hub to facilitate incountry and sub-regional connectivity across Africa
- To provide appropriate market infrastructure including Export Trade Houses, Warehouses, Storage and Distribution Facilities to enhance trade with Africa. Enhancing Productive Capacity
- To provide targeted support for increased value addition for Ghanaian exports to the rest of Africa.



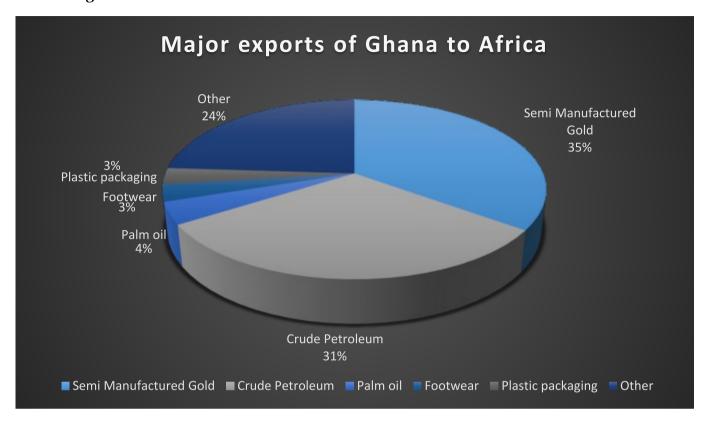
Trade and Development Finance

- To develop innovative financing mechanisms for production and trading under AfCFTA.
- To facilitate crossborder payment to support Ghana's trade with the rest of Africa.
- To ensure availability of finance for production of tradeable goods and services, and for Ecommerce and Digital Trade Factor

Market Integration

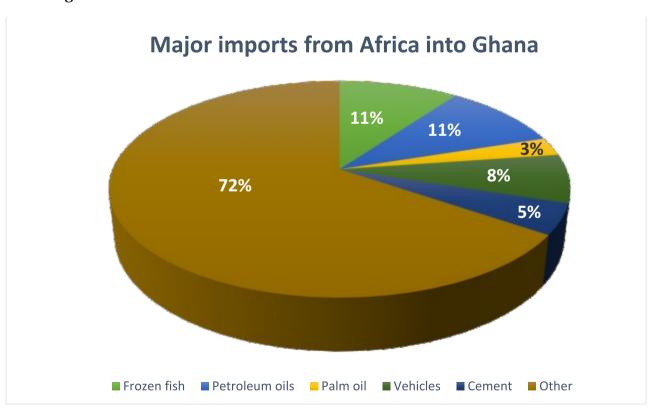
- To conclude and implement agreements on mutual recognition of qualifications.
- To harmonize and align relevant national laws with the relevant Protocols on Free Movement of Persons, Right of Residence and Right of Establishment.

Figure 4 a



Culled from Ghana's National AfCFTA Policy Framework And Action Plan Section 2.3.1.

Figure 4 b



Culled from Ghana's National AfCFTA Policy Framework And Action Plan Section 2.3.1.

MOST OBVIOUS BUSINESS OPPORTUNITIES UNDER THE AFCFTA

In terms of concrete investment and business opportunities under AfCFTA if fully implemented, it is projected that by 2030:

Africa can produce 5 million new vehicles every year, beyond the current 1 million

Demand for intra-African freight will increase by 28%

2

Rail services to increase from 0.3% to 7% of all modes of transportation, representing 23 times the current levels

Africa would require about 2 million additional freight trucks, over 100,000 rail wagons, 250 aircrafts, and more than 100 vessels for sea freight

4

Aircraft demand to support trade flows within West Africa will increase by 13.2%

Trade between North and West Africa would increase demand for aircraft by 12.9% while demand within Southern Africa will increase by 12.2%

6





Nairobi Legal Awards, Kenya

John Mbaluto, the deputy managing partner of Oraro & Company Advocates (an affiliate member of AB & David Africa) received the Pupil Master of the Year Award at the 2022 Nairobi legal Awards.



FALAS Award

AB & David Africa was presented with the Legal Inspiration Award by the Federation of African Law Students (FALAS) for its efforts towards nurturing talent among young lawyers in Africa

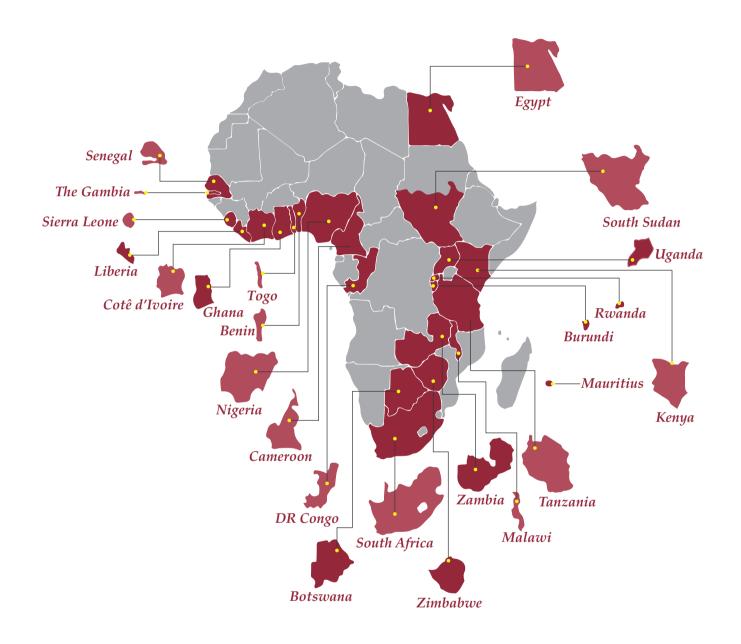


IAWL Award

AB& David Africa was presented with an award by the Institute for African Women in Law (IAWL) at their Excellence in Law and Leadership Awards for supporting and promotion gender equality in law.

LOCATIONS

Ghana | Kenya | Mauritius | Uganda | Zambia | Zimbabwe



NETWORK OF BEST FRIENDS:

- Algeria
- Angola
- Benin
- Botswana
- Burkina Faso
- Darkina i asc
- Burundi
- Cameroon
- Cote D'Ivoire

- DR Congo
- Egypt
- Equatorial Guinea
- Ethiopia
- Gabon
- Guinea
- Liberia
- Madagascar

- Malawi
- Mali
- Mozambique
- Namibia
- Niger
- Nigeria
- Rwanda
- Senegal

- Sierra Leone
- South Africa
- South Sudan
- Tanzania
- The Gambia
- Togo
- Tunisia



One Continent, One Law Firm

Global Perspective



AB & David

Africa Fun **Facts** ACROSS 2. Capital of South Sudan 5. Capital of Botswana 8. Major language in Kenya 11. World's oldest university 13. This island is one of the few remaining tracts of ancient rainforest in West Africa 17. Desert with land mass than the whole of USA 18. Accounts for \$616M of Kenya's exports 20. Lilongwe is here 21. Volta basin passes through ... countries in Africa 23. Largest population in Africa 24. Capital of Madagascar 25. 'Warrior King' in the Soninke language 28. They just joined the exclusive club of gas exporters 29. Smallest African country 31. Highest point in West Africa 34. The shortest war in history was fought 36. The easternmost part of Africa 38. The Cradle of Humankind 39. 95% of their exports comprise petroleum, natural gas and ammonia 40. The most innovative economy among low-income countries

DOWN

- 1. Had a space program in the 1960's
- 3. African Country that has never been colonised
- 4. Claimed to be the largest market in West Africa
- 6. 9th African Country- in alphabetical order
- 7. This fox specie is a national animal of Algeria
- 9. Only continent that beats Africa in size
- 10. The pearl of Africa
- 12. Venice of Africa
- 14. Traditional bread in Somalia
- 15. Largest exporter of cocoa beans

- 16. Men are banned here
- 19. No longer needs to import wheat to meet its needs
- 22. The African Galapagos
- The ruler of the kingdom of Mali from 1312 C.E. to 1337 C.E.
- 27. Home to most pyramids
- 30. Grammy-winning musician from Benin
- 32. Sudan's national park
- 33. World's hottest place
- 35. Niger's capital
- 37. World's hottest desert

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18th January

CRYSTAL BALL AFRICA 2024

POWERED BY





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Kenya Nairobi



Mauritius Ebenè



Uganda Kampala



Zambia Lusaka



Zimbabwe Harare

NETWORK OF BEST FRIENDS

- Algeria
- Angola
- Benin
- Botswana
- Burkina Faso
- Burundi
- Cameroon
- Cote D'Ivoire

- DR Congo
- Egypt
- Equatorial Guinea
- Ethiopia
- Gabon
- Guinea
- Liberia
- Madagascar

- Malawi
- Mali
- Mozambique
- Namibia
- Niger
- Nigeria
- Rwanda
- Senegal

- Sierra Leone
- South Africa
- South Sudan
- Tanzania
- The Gambia
- Togo
- Tunisia

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