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Securitisation 2023

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GHANA

Law and Practice

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1. Structurally Embedded Laws of General Application

1.1 Insolvency Laws

In Ghana, Insolvency is governed by the Corporate Insolvency and Restructuring Act (CIRA), 2020 (Act 1015). Under the CIRA, when insolvency occurs, the company may explore the option of administration, restructuring or liquidation. The objective of the CIRA is to give a distressed company the chance to recover from insolvency and survive as a going concern. The CIRA does not apply to companies carrying on the business of banking, insurance, or any other business which is subject to sector-specific legislation, except where the legislation does not provide for a rescue provision (CIRA S1(3)).

There are no specific provisions for securitisation as it relates to insolvency in Ghana. Accordingly, the general insolvency laws contained in the CIRA may apply alongside the sector-specific legislation applicable to the company in question.

Stay of Proceedings

- If a company undergoes administration, a creditor is not permitted to start or continue legal proceedings or an enforcement process against the company and its property. This may extend the timeframe within which a creditor may retrieve, claim or access any property or collateral.
- In restructuring, the restructuring agreement may provide a moratorium period during which creditors will not sue the company.
- If liquidation is explored, there is a stay of legal proceedings (see CIRA S32, S33 and S87).

The stay of proceedings may protect an originator in a securitisation transaction or an insolvent Special Purpose Entity (SPE) from overwhelming creditor claims or enforcements.

Restoration Rule

A creditor who received money or property regarding a debt that the company owes them may be required to pay it back to the liquidator. The creditor in this case must have received the money or property within 21 days before the winding-up petition was filed.

This restoration rule does not include payments:

- made by the company if the payment is later made by the bank to meet cheques drawn by the company;
- regarding a debt incurred during the 21-day period;
- regarding a secured debt; or
- regarding the enforcement (against a third party) of a guarantee, indemnity, mortgage, charge or lien on the third party's property.

A liquidator is also at liberty to reverse a transaction entered into:

- in the ten years preceding the winding up order (while the company was insolvent); or
- in the two years preceding the winding up order (while the company was solvent or insolvent) (CIRA S122 and S123).

1.2 Special Purpose Entities (SPEs)

The primary feature of an SPE in securitisation is the bankruptcy remoteness attached.

SPEs in securitisation transactions that have occurred in Ghana may be listed on the Ghana Stock Exchange (GSE). The SPEs are therefore subject to the Companies Act, 2019 (Act 992), Securities Industry Act, 2016 (Act 929) as amended, Securities and Exchange Commission

(SEC) Regulations 2003 (LI 1728), Securities and Exchange Commission (Amendment) Regulations, 2019 LI 2387, the GSE listing rules and the SEC Corporate Governance Code.

Some features of SPEs of this nature are highlighted as follows.

- The SPE would ordinarily be incorporated as a Public Company limited by shares under the Companies Act (see GSE Listing Rules 4(6)(a)).
- Ideally, there should be between five and 13 board members. Where this is not the case the board should explain why the number is appropriate in an annual report. Notwithstanding, the minimum number of directors is two with at least one being ordinarily resident in Ghana.
- The board shall have a majority of non-executive directors who are mostly independent. At the very least, two directors (25%) should be independent, one of whom may be the board chair (GSE Listing Rules 11).
- Independent external auditors.
- There should be no restriction on the transferability of shares or the number of shareholders and debenture holders.

Where an SPE seeks to issue securities to the public, SEC approval(s) is always required. The parties to the securitisation transaction present their proposed structure and transaction documents for review by the SEC to obtain the necessary approval(s).

To protect investors, the SEC reviews the transaction to ensure there are measures in place such that the insolvency of the originator is unlikely to affect the SPE. By extension, these measures minimise the risk of the SPE and the originator being consolidated in insolvency proceedings.

Some of these measures include:

- structuring the transaction to prevent the corporate veil being lifted to construe the originator and issuer as one;
- restricting the powers of the board to commence voluntary liquidation;
- incorporating clauses in agreements with third parties that restrict liquidation petitions; and
- the effective transfer of financial assets considering the arm's length principle.

1.3 Transfer of Financial Assets

Depending on the financial asset being transferred, steps must be taken to file the transfer with the relevant regulatory authority. For example, regarding share certificates, the registrar of companies may have to be notified. Where the financial asset is cash, however, possession may suffice as an indication of a valid transfer of ownership.

The records of the collateral registry must also be updated, where applicable, to reflect the change in ownership of the asset.

Some options available to effect the transfer include:

- novation – the transferee assumes the rights and obligations of the transferor regarding the financial asset;
- legal assignment – the transferor assigns its rights to the transferee; and
- declaration of trust – the transferor acts as a settlor and establishes the trust with the transferee as the beneficiary.

In Ghana, novation and legal assignment appear to be the most explored option of transfer in securitisation transactions.

Where the property sold is overvalued and the company enters insolvency within the next 12 months, the liquidator would have the power to reverse the transaction (CIRA S124).

The transferor must deal with the transferee at arm's length, charging market price (Income Tax Act, 2016 (Act 896) S31).

It must be noted that the transaction documents would have to be duly stamped or they may be inadmissible as evidence in court or for any purpose except in criminal proceedings (see Stamp Duty Act 2005 (Act 689) S32(6)).

Ultimately, the agreement and the terms stipulated may be used to determine whether a true sale is being effected. Where this is not the case, the SEC is unlikely to grant approvals to proceed with the securitisation in the interest of investors.

1.4 Construction of Bankruptcy-Remote Transactions

Securitisation in Ghana has not yet been extensively explored. Currently, the SEC is open and hopeful that more diverse modes of constructing bankruptcy remote transactions will be explored, such as the use of derivatives. This may insulate the SPE against exposure that may exist in an actual transfer of the underlying asset.

2. Tax Laws and Issues

2.1 Taxes and Tax Avoidance

Capital Gains Tax by Originator

The main tax that may arise in relation to the transfer is capital gains tax. Under Ghanaian tax law, any person who makes a gain from the sale or disposal of an asset is mandated by law to declare and pay capital gains tax (see S5(2)(a)(iii) and S35, Income Tax Act, 2015 (Act 896)). The tax is payable on assets sold at a profit. Thus, any profit the originator makes from the transfer of assets to the SPE is subject to this tax if a gain is made.

2.2 Taxes on SPEs

Capital Gains Tax by the SPE

The SPE may make gains on the securitisation of the underlying asset. Despite any gains made, the law provides that in a mortgage or similar asset-backed debt security, the issuer is not deemed to have realised the asset. On the books, the security issued will appear as a secured debt – a liability. The SPE would therefore not be liable to pay Capital Gains Tax on the issued debt security (see S48, Act 896).

2.3 Taxes on Transfers Crossing Borders

Where the SPE is incorporated within Ghana, its chargeable income is subject to applicable taxes in Ghana notwithstanding the location or residence of the originator or investor. Incomes that trace their source to Ghana are taxable unless the law grants an express exemption.

The following payments are recognised as having a source in the country:

- dividends paid by a resident company; and
- interest paid:
  - (a) where the debt obligation giving rise to the interest is secured by real property located in Ghana; and
  - (b) by a resident person (S105, Act 896).

A company is resident for tax purposes if it is incorporated in Ghana (see S101(4), Act 896).

There may however be some peculiar tax arrangements applicable if the country of residence of the transfer recipient has a Double Taxation Agreement with provisions that apply to the taxes payable within a specified context.

2.4 Other Taxes

In respect of the incorporated companies, they will be required to pay corporate income tax on the chargeable income of the business (S5, Act 896). Other related taxes that may apply are the Pay As You Earn (PAYE), withholding tax, and value added tax for incidental services rendered by or to the company.

2.5 Obtaining Legal Opinions

Legal opinions are not required, however a legal opinion may be obtained.

3. Accounting Rules and Issues

3.1 Legal Issues With Securitisation Accounting Rules

Due to the novelty of securitisation as an area in Ghana, legal issues have not yet been raised relating to applicable accounting rules.

3.2 Dealing With Legal Issues

Legal opinions on such areas are not required, but may be explored.

4. Laws and Regulations Specifically Relating to Securitisation

4.1 Specific Disclosure Laws or Regulations

There are no securitisation-specific disclosure laws and regulations.

4.2 General Disclosure Laws or Regulations

Disclosure by the SPE

The SEC Regulations 2003 (LI 1728) (see S50–62) provides regulations for disclosure by issuers. This has been further incorporated in the GSE Listing Rules. Effectively, the SPE as an issuer has a duty to:

- maintain high standards of disclosure;
- fully disclose information needed to make informed investment decisions to the public;
- secure the immediate release of information, reasonably expected to have a material effect on the market activity and price of its listed securities;
- ensure the maintenance of a fair and orderly market in its securities; and
- help to ensure that investors have simultaneous and equal access to the same information.

The SPE would not be required to disclose its internal estimates or projections of its earnings. If it opts to disclose this, it has a duty to ensure that the information prepared is thorough, factual and realistic with appropriate qualifications, and subsequent developments that vary should be promptly reported with the reasons for the variance adequately explained.

The SPE is required to promptly announce the following:

- non-payment of interest on the “due date” on account of debt securities;
- non-payment of capital on the redemption date on account of debt securities;
- a joint venture, merger, acquisition, or takeover;
- a decision on whether or not to declare a dividend;

- any decision to change the capital structure of the SPE including a rights issue or a bonus issue;
- a change in company officers or control of the business;
- change of address of the registered office of the SPE or of any offices at which the register of the securities of the SPE is kept;
- a call of securities for redemption;
- penalties imposed on the SPE by a regulatory authority;
- an event or occurrence which has the potential of materially affecting the business or revenue or profits of the company and efforts to minimise its effect;
- alteration or amendment of the rights and privileges of any unlisted securities issued by the SPE;
- a tender offer for another entity's securities;
- a new product or discovery;
- the public or private sale of additional securities;
- a change in capital investment plans; and
- a labour dispute or dispute with subcontractors or suppliers.

The above must be communicated to the SEC in writing.

In some cases, the SPE can withhold information, for instance: where immediate disclosure would prejudice the ability of the SPE to pursue its corporate objectives. However, where there is any question of whether or not to disclose, the SPE should disclose.

Additionally, before the SPE lists its securities, it is required to submit the Trust Deed pursuant to which the securities are being listed for the approval of the SEC.

The SPE would be required to register its securities with the SEC. The SEC would then issue a certificate of registration in respect of securities registered. This applies to all public issuance of securities except securities with a maturity of one year. The SPE must also inform the SEC of a cancellation or redemption of the securities within 21 days of the event (S145, Act 929).

Disclosure by the Originator

An originator, on the other hand, has a duty to file its audited financial statements with the registrar of companies annually. It also has a duty to file any changes in the company's particulars contained in the Companies Register (Companies Act, 2019 (Act 992)).

Beyond this, the transaction documents may provide for peculiar disclosure requirements.

4.3 Credit Risk Retention

There are no specific laws in Ghana on credit-risk retention. However, in order to tackle credit risk, the SPE may mark to market to assess the current financial situation of the SPE. This is especially important where the SPE explores innovative measures such as the use of derivatives in its dealings with the originator to promote bankruptcy remoteness.

4.4 Periodic Reporting

Annual Reporting

For compliance, all companies are required to file their audited financial statements and annual report with the Registrar of Companies for each financial year (S127, Act 992). There is also a requirement for the SPE to circulate them to the SEC, GSE, its shareholders and bondholders within three months after each financial year. The financial statements must comply with Ghana National Accounting Standards issued by the

Institute of Chartered Accountants (Ghana) (Regulation 54, LI1728).

Quarterly Reporting

The SPE is required to provide the SEC, shareholders, bondholders and GSE with quarterly financial statements on its corporate securities listed within a month after each quarter. However, if the SPE circulates its annual report within two months after a financial year, it will be exempted from circulating the fourth quarter financial statements (Regulation 55, LI1728). Failure to comply with this attracts a penalty of GHS200 for each day of default (Regulation 62, LI1728).

4.5 Activities of Rating Agencies

Rating Agencies (RAs) require licences from the SEC to operate.

The SEC maintains a register of the holders of current licences, which specifies the particulars of the RAs. Where an RA carries on business without a licence, the SEC is empowered to reprimand or disqualify it.

Where the SEC is satisfied that an RA has obtained money without a licence or contrary to the terms of the licence of the person, the SEC has the power to instruct that RA to repay all the money obtained and the profits accruing to that person; return assets acquired as a result of the illegally obtained moneys or deposits; or pay any interest or other amounts which may be owed by that person in respect of those moneys, to the respective persons from whom the moneys where obtained (S123 and S216, Act 929).

4.6 Treatment of Securitisation in Financial Entities

In Ghana, financial entities are highly regulated. Apart from the generally applicable security industry laws, institutions in the financial sector of Ghana may be subject to Banks, the Bank of Ghana in accordance with the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930), Non-Bank Financial Institutions Act, 2008 (Act 774), Payment Systems and Services Act, 2019 (Act 987), the Borrowers and Lenders Act 2020 (Act 773), Foreign Exchange Act, 2006 (Act 723), the Development Finance Institutions Act, 2020 (Act 1032), Insurance Act, 2021 (Act 1061) and/or the National Pensions Act, 2008 (Act 766) as amended.

The various laws provide for respective capital and liquidity requirements. In the absence of any direct law on securitisations, the general rules apply and there is no special treatment or concession for securitisation transactions on the backdrop of the peculiar sector rules.

4.7 Use of Derivatives

Ghana's financial system has not evolved to incorporate the extensive use of derivatives.

The SEC and the GSE are presently working on a comprehensive legal and regulatory framework that would make the development of a derivatives market possible.

4.8 Investor Protection

The general laws that afford investor protection within the context of issued securities are the Companies Act, 2019, (Act 992), Securities Industry Act, 2016 (Act 929) as amended, SEC Regulations 2003 (LI 1728) and the GSE Listing Rules.

In Ghana, investors have the right to be informed of the material facts, risks and costs associated with any investment recommended or sold by the market operator, a representative or an investment advisor.

The penalties for non-compliance generally include the imposition of restrictions, imposition of administrative penalty units, or the suspension or revocation of a market operator's licence by the SEC. Additionally, transactions that violate Act 929 may be declared by the Courts to be void or voidable and may give rise to both private and public enforcement, guaranteed unconditional transfer of dividends and profits (S39(2)(d), CIRA).

4.9 Banks Securitising Financial Assets

There are no direct laws on banks that securitise a bank's financial assets. The Bank of Ghana has regulatory authority over banks pursuant to the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930). Beyond this, a bank that participates in the securities sector of Ghana would also be subject to the regulation of the SEC under the Securities Industry Act, 2016 (Act 929) as amended, SEC Regulations 2003 (LI 1728).

Depending on the role played by the bank in a securitisation, the bank may require a licence or approvals. In acting as an originator, SEC approvals are required. However, a bank that intends to do business in the capital market other than the business of trustee, custodian, primary dealer, nominee, registrar, issuing house and underwriter, is required to incorporate a subsidiary company and apply for the relevant licence from SEC (see S114, Act 929).

4.10 SPEs or Other Entities

Due to the non-existence of direct laws on securitisation in Ghana, there is room for flexibility regarding the form of the SPE. For the purposes of listing on the GSE however, it is important to note that the SPE would have to be incorporated as a PLC (GSE Listing Rules 4(6)(a)).

Generally, in securitisation transactions, an SPE is usually (but not always) established as an orphan entity which is not part of the same corporate group as any other transaction party. To achieve this orphan status, the equity in the SPE is often settled on a charitable trust.

In settling on the ideal form of the SPE, it is important to consider the fact that the corporate veil may be pierced pursuant to the provisions of legislation or under equitable grounds as decided by the Supreme Court in Morkor v Kuma [1999-2000] 1 GLR 72. Therefore, the court may disregard the separate legal personality principle where the separateness of the SPE and its holding company has not been sufficiently established or where their affairs are so entangled that upholding the separate personality principle would cause injustice to all creditors. Being a discretionary remedy, some factors that guide the court in applying this remedy include, inter alia, the following:

- the parent company and the SPE have common directors or officers;
- the parent corporation finances the SPE;
- the directors or executives of the SPE are subject to the control of the parent corporation;
- the formal legal requirements of the subsidiary as a separate and independent corporation are not observed; and
- there is a commingling of assets and business functions.

Where the veil is pierced, the originator and the SPE may be construed as a unit and transfer pricing concerns may arise in relation to the transfer of the financial asset (see S31, Act 896).

4.11 Activities Avoided by SPEs or Other Securitisation Entities

Where the SPE seeks to make invitations to the public to purchase securities, the SEC has oversight in respect of securitisation transactions. It is therefore difficult for companies of this nature to avoid the regulation of the SEC.

If the SPE fails to seek the necessary approvals to issue to the public, a penalty is imposed and it is liable to pay the SEC an administrative penalty of GHS12,000 (see S206(2)(b), Act 929).

4.12 Material Forms of Credit Enhancement

There is very little exploration of securitisation transactions in Ghana, however, the most explored credit enhancement method in the transactions that have occurred is over-collateralisation.

4.13 Participation of Government-Sponsored Entities

Currently, the only known government-sponsored SPEs engaged in securitisation are:

- Daakye Trust PLC – the underlying assets used in this securitisation are the levies paid in respect of the Ghana Education Trust Fund (GetFund); and
- ESLA PLC – the aim of this transaction was to resolve energy sector debts due to banks and trade creditors. The underlying asset in this transaction are the Energy Sector levies.

In the case of Daakye Trust, the SPE secured the general approvals for the transaction. However, the arrangers of the transaction saw no apparent need to secure a rating. This is attributable to the fact that the underlying assets were government cash flows, the originator was the Government of Ghana and the Ministry of Finance issued a guarantee. The investor reaction to the transaction was synonymous with government securities issued, with a perceived minimum risk attached.

4.14 Entities Investing in Securitisation

Generally, institutions involved in the financial sector invest in securitisations: pensions, banking, insurance and the securities sector. Specifically, banks, insurance companies, pension companies, mutual funds, unit trusts and the like are the kind of entities that undertake such investments. Beyond these entities, there may be some high net worth individuals that explore investment in securitisation.

Rules for Investment by Pension Scheme

The National Pension Regulatory Authority (NPRA) Investment Guidelines for Pension Schemes provide that in investing in corporate debt securities, a pension scheme may not exceed a total allocation of 35%, a maximum of 5% per issuer and a maximum of 5% per issue. This has been put in place to protect the pensions paid to the pension schemes and to ensure a diverse portfolio.

5. Documentation

5.1 Bankruptcy-Remote Transfers

The agreements that are relevant to a bankruptcy remote transfer largely depend on the type of underlying asset, however, an asset purchase agreement may be explored in this instance. As set out above, to avoid transfer pricing issues, there must be adequate consideration commensurate with the value of the asset in line with the arm's length theory. Additionally, there must be a reflection of a true sale in its entirety. For instance, in an effective transfer of the asset, the originator must not continue to exercise control

over the asset in the capacity of an owner. In the absence of specific legislation, the SEC is open to tailor-made terms that express the concept of securitisation.

5.2 Principal Warranties

The principal warranties that may be included in securitisation documentation are as follows:

- an assurance that the asset is free from encumbrance;
- an assurance that the originator has perfect title to the asset and has the capacity to transfer it;
- an assurance of complete regulatory compliance and due authorisations; and
- any other peculiar warranties that the parties may wish to include.

Regarding enforcement of the warranties given, parties may include a clause by which the SPE may be indemnified upon breach of the warranties provided. Usually, parties provide for a dispute resolution clause which gives the disgruntled party an avenue to remedy a breach of the terms of an agreement.

5.3 Principal Perfection Provisions

Perfection is contingent on the nature of the asset being transferred. Generally, some principal perfection provisions that may be included are as follows:

- delivery of the title documents to the transferee;
- delivery of possession/control; and
- provisions on filing the changes in title with the regulatory authorities.

5.4 Principal Covenants

As described above, the nature of the agreement largely depends on the type of financial asset. However, regarding covenants, parties will include terms relating to the obligations of each party. This covers payment obligations, delivery mechanism, notice required, reporting obligations, collateral obligations, if any, and any other covenants as permitted by the SEC.

In relation to enforcement, the dispute resolution clause would provide for the agreed process to make claims.

5.5 Principal Servicing Provisions

Principal servicing provisions will reflect the obligations of the servicer, reporting obligations, notices and information to be given. There may be timelines provided for the delivery of required reports.

5.6 Principal Defaults

Defaults in securitisation documentation may take the following forms.

- General defaults by parties – in this case there may be a general breach of the agreement or a breach of specified events of default such as the insolvency of the SPE, which may instigate a sequence of events for the claiming of remedies from the defaulting party.
- Early amortisation – certain events may trigger the claim of investors for a payout, irrespective of when the maturity date of the bond issued may be. Some instances that may pre-empt such occurrences include the decline in underlying assets, which may be cashflows, and an increased rate in default by debtors where the underlying asset may be loans.

In the case of general events of default, the most likely avenue would be the exploration of the dispute resolution clause for enforcement.

In relation to early amortisation, investors will be at liberty to make their claims. However, due to the liquidity issues that this may pose for the SPE and the likelihood that some investors may encounter a loss on their investments, the SEC may have to be involved in the process.

5.7 Principal Indemnities

The parties may include indemnity clauses for defaults owing to the acts or negligence of a party. Due to the absence of direct laws and regulations, the parties are at liberty to structure such clauses to meet their preferences, subject to the approval of the relevant regulators.

6. Roles and Responsibilities of the Parties

6.1 Issuers

"Issuer" refers to a person or any other entity that issues, has issued, or is going to issue securities. In this case, it refers to the SPE.

Issuers are restricted in their business objectives and largely focused on the securitisation transaction. Where an issuer issues securities to the public, it is tasked with complying with regulatory requirements.

6.2 Sponsors

Sponsors are also referred to as the originator. They are responsible for generating the financial asset. This role has been predominantly played by the government of Ghana in majority of the securitisation transactions that have occurred in the country.

6.3 Underwriters and Placement Agents

These are corporate bodies that buy securities outright from an issuer and sell them to open-market investors (S109, Act 929). An underwriter may be a bank, however, where it is a bank, it is referred to as an issuing house. In order to act as an underwriter, the company must be duly licensed by the SEC. Underwriters may take the form of Licenced Dealing Members (LDM) who operate through Authorised Dealing Officers.

In order to issue a bond on the GSE, the issuer is required to appoint an LDM to sponsor its application to list. The LDM would be required to file all the application documentation with the GSE (GSE Listing Rules 20).

6.4 Servicers

Servicers are generally tasked as the originator's representative to ensure compliance by the SPE. This role has not been designated within the structures explored in Ghana, however, it may be said that the role of a servicer is in some parts played by the following parties working together:

- lead managers/arrangers structure the transaction and ensure that parties participate and play their respective roles;
- debt-service bank provides banking services to the SPE. In the transactions that have occurred in Ghana so far, due to the nature of the financial assets, the debt-service bank has also been tasked with the collection and proper distribution of cash flows; and
- manager of the SPE, which is predominantly a corporate body, based on the transactions that have occurred. They handle the day-to-day activities of the SPE and ensure that all roles and obligations of the SPE on both ends of the transaction are satisfied.

6.5 Investors

Investors are key parties to the securitisation transaction. They purchase the securities issued and where the security is a bond, they would receive coupons and the face value of

the bond at maturity. Regarding investors, the main responsibility of the SEC as a regulator is to ensure investor protection. The investor may therefore not have responsibilities beyond the payment for the security.

On the contrary, the investor may have rights that exist under the trust deed based on which the bonds are issued.

These investors may be institutional or otherwise.

6.6 Trustees

The bond trustee acts as a representative of investors in the transaction. The role played is to ensure that the interest of bondholders is protected. Apart from a government debt security, any other debt security must be issued subject to a trust deed approved by the SEC (GSE Listing Rules 7).

7. Synthetic Securitisation

7.1 Synthetic Securitisation Regulation and Structure

Due to the fact that synthetic securitisation has not been attempted or regularised within Ghana, there is no express indication of whether or not it would be permitted. However, the position of the SEC has been a flexible one led by the dictates of the sector participants and the market.

8. Specific Asset Types

8.1 Common Financial Assets

Currently, there have been three main securitisation transactions approved by SEC. In those transactions, the financial assets used are categorised as follows:

- cash flows – levies paid to the government (GetFund and Energy Sector Levy); and
- consumer loans issued to public sector employees (Controller ABS plc).

8.2 Common Structures

The most commonly used form of securitisation is the Future Flow Securitisation (FFS). The structure applied in this case is the traditional structure. In this, the government leverages on its levies and taxes to be received in the future. The originator (in this case the government of Ghana) transfers its right to cash flows to an SPE. The SPE (incorporated as an independent public liability company) issues bonds backed by the cash flows. Investors invest in the bonds providing immediate proceeds paid upfront to the originator and the cash flows are used to pay off the bonds.

Due to the absence of any dedicated securitisation laws, the following laws and documents apply to the securitisation transactions:

- Companies Act 2019 (Act 992);
- Securities Industry Act 2016 (Act 929), as amended;
- SEC Regulations 2003 (LI 1728);
- Securities and Exchange Commission (Amendment) Regulations 2019 LI 2387;
- Energy Sector Levy Act 2015 (Act 899);
- Ghana Education Trust Fund (GetFund) Act 2000 (Act 581), as amended;
- Listing Rules of the Ghana Stock Exchange; and
- The Corporate Governance Code of the Securities and Exchange Commission.

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B&P Associates is a law firm located in Accra, Ghana (Labone). It has a 17-member team that guides its clients to navigate the legal and regulatory landscape, and conducts training and consultancy for international organisations on the Ghanaian investment landscape. The team is made up of internationally trained lawyers qualified to practice in multiple jurisdictions. The firm's practice areas include investment law, M&A, corporate and commercial, project and project finance, restructuring and insolvency, employment and immigration, dispute resolution and debt recovery, technology, IP and telecommunications. Its clients cut across diverse sectors and it has provided them with a myriad of services including conducting sector due diligence, rendering legal advice on company financing and advising financial institutions on investment issues, among others. It also provides business support services for the benefit of its clients.

The firm would like to acknowledge Audrey Nana Oye Addy for her contribution to the preparation of this publication.

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Trends and Developments

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Capital Markets in Ghana

The importance of capital markets in the development of a country cannot be overemphasised. They are deemed to be one of the most powerful drivers of economic growth and wealth creation. A well-organised capital market is crucial for mobilising both domestic and international capital. For this reason, most states have, over the years, put measures in place – statutory or otherwise – to ensure the development of their capital markets.

Introduction to Capital Markets in Ghana

A capital market is a platform for trading in securities. Capital markets can be classified as either primary or secondary. New issues of securities are sold to the public on the primary market and the issuers receive the proceeds directly. A primary market issue may be an initial public offer (IPO) (the first public sale of shares by a company) or may be a subsequent issue by a listed company returning to the market to raise new capital through a rights issue.

The secondary market opens once all the stocks in the initial offering are sold. Here, investors buy and sell already-issued securities. All proceeds go to the selling investors and not the issuers.

In Ghana, the main exchange for trading in securities is the Ghana Stock Exchange (GSE). The GSE has been duly licensed by the Securities and Exchange Commission (SEC) to act as an exchange. The GSE has two listing categories. These are the official list and the Ghana Alternative Market (GAX). The GAX has more flexible requirements and rules for listing and is aimed at small and medium-sized enterprises (SMEs).

The main types of securities listed on the exchange in the two categories are shares (preference or equities), corporate bonds (and notes), municipal bonds (and notes), government bonds (and notes) (usually referred to as treasury bills and bonds), and close-end collective investment schemes.

The Regulatory Framework

Ghana has an extensive collection of legislations and rules that govern the operation of entities in its capital markets space. These include the:

- Securities Industry Act, 2016 (Act 929);
- Banks and Specialized Deposit-Taking Institutions Act, 2016 (Act 930);
- Non-Bank Financial Institution Act, 2008 (Act 774);
- SEC Regulations, 2003 (LI 1728);
- SEC Compliance Manual for Broker-Dealers, Investment Advisers and Representatives;
- Ghana Stock Exchange Rule Book;
- Ghana Alternative Market (GAX) rules; and
- Central Securities Depository Act, 2007 (Act 733).

Act 929 regulates the licensing and operation of entities that operate in the securities industry and the activities of deposit-taking businesses including entities involved in the issuance of loans and other advances of money.

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To complement these statutes, the GSE rule book contains the listing rules, the dealing membership rules and the trading and settlement rules for the GSE. The GAX rules also set out the criteria for listing, and provide for continuing listing obligations and the enforcement of these obligations.

These rules are designed to ensure that investors continuously have confidence in the market and that issuing and marketing of securities are conducted in a fair, open and orderly manner. The rules also ensure that potential investors and the public are given adequate information to make an informed evaluation of an applicant and of the securities for which admission is sought.

The financial sector of Ghana has four key regulators: the National Insurance Commission, the SEC, the Bank of Ghana (BOG), and the National Pensions Regulatory Authority. There is usually an overlap in the roles of the various regulators in relation to financial entities. Other sector-specific regulators may also play a key role when the issuer is a regulated entity. Across the board, however, the Office of the Registrar of Companies (ORC) plays a key role in the operations of businesses set up in Ghana. The regulatory functions of these agencies have a direct and indirect impact on the Capital Markets of Ghana.

SEC

The SEC is the primary regulator of the capital markets in Ghana. It was established by the Securities Industry Act, 2016 (Act 929) with the objective of regulating and promoting the growth and development of an efficient, fair and transparent securities market in which investors and the integrity of the market are protected. Per its statutory functions spelt out in Act 929, the SEC exercises an oversight responsibility over Ghana's securities industry which includes mutual funds and equity investment companies. Thus, in all their dealings, these companies need to ensure that they act under the supervision and regulation of the SEC.

Bank of Ghana

The Bank of Ghana has an overall supervisory and regulatory authority in all matters relating to banking and non-bank financial business, making its role in the Ghanaian capital market very crucial. Also, the approval of the Bank of Ghana is required where an equity issuance or share transfer will result in a person acquiring 10% of the issued shares of a bank.

Relevance of the Capital Market

Capital markets provide a viable alternative to raising debt and equity financing. These markets possess advantages over conventional private equity and debt financing.

Apart from the ultimate benefit of local retention as a result of the capital market encouraging mobilisation and retention of funds in the local economy, there are other advantages which are spelt out below.

- There is a better governance culture because the transparency and disclosures required foster good decision-making, good corporate governance and investor confidence in the issuer. The scrutiny from investors and analysts helps the issuer to take better decisions.
- There is a broader pool of retail and institutional investors.
- Both equity and debt securities can be easily traded in the secondary market, making them attractive to sophisticated investors.
- Gains from selling listed debt and equity securities are exempt from capital gains tax.

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- Documentation involved in trading on capital markets contains less stringent covenants, representations and warranties.
- They make long-term financing possible.
- Issuers provide terms that are subject to market consultations.
- Information about issuers is usually more credible.

The Ghana Capital Market Master Plan (2020-2029)

The SEC has come up with the Ghana Capital Master Plan that sets out a proposed path for the development of Ghana's capital market over the ten-year period (2020-2029). At the end of this duration, the SEC aims at achieving the following key objectives.

- The market will be firmly established with a commitment of participants to improve and promote the implementation of international standards of regulation and infrastructure.
- It will offer a wide range of investment opportunities, including different sectors and different types of instruments. There will be stability and transparency.
- It will boost economic growth, by mobilising resources for businesses.
- It will be one of the main channels for financing innovation and entrepreneurship in the country.
- It will encourage domestic and foreign investment.

The Master Plan will effectively serve as a guide for the future of the capital market of Ghana. The SEC introduced this plan as part of its mandate of regulating, innovating, and promoting the growth and development of the securities market in which investors and the integrity of the market are protected. Effective and efficient implementation of the Master Plan will widen the scope of opportunities within the market and ultimately boost the economy.

The Current State of the Ghanaian Capital Market

Prior to the COVID-19 pandemic, Ghana's capital market began to play a pivotal role in attracting long-term capital financing for economic activities. The pandemic, however, intensified uncertainties in international financial markets, causing a downturn in bond prices.

In 2021, Ghana ranked fourth out of 23 countries on Absa's Africa Financial Markets Index created by the Official Monetary and Financial Institutions Forum in association with Absa Group Limited. This was deemed an improvement from the previous 13th place in 2019.

There has been a global decline in economic growth. This is partly attributable to Russia's invasion of Ukraine and the ripple effect of the COVID-19 pandemic. Currently, short-term to medium-term investments are no more sought after, owing to the recent downturn of the Ghanaian economy which has been further fuelled by inflation and the cedi's poor performance against the dollar.

In October 2022, the SEC issued a directive to its market operators to adopt the mark-to-market value method to calculate the total monetary value of the assets held in their investment portfolio, which has caused an uproar among investors. This was aimed at providing consistency in the valuation of assets and portfolios in the securities industry, ensuring that the portfolios reflect market values, and also protecting investors of Collective Investment Schemes.

Furthermore, in November 2022, the Ministry of Finance announced the likelihood of the gov-

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ernment rolling out a debt operation as part of efforts to decrease the pressure on the government's budget and to generate more sustainable means of managing Ghana's debt. This operation will, among others, be characterised by the reduction of outstanding interest payments and in some instances, the retainment of bonds payable to investors.

Impact of SEC's Directive

On 20th October 2022, the SEC issued a Directive to entities engaged in the securities industry, directing them to use the Fair Value through Other Comprehensive Income ("Mark-to-Market") valuation method to value their portfolio.

The Fair Value through Other Comprehensive Income valuation method popularly known as the Mark-to-Market valuation method refers to an accounting method that is used to measure the value of assets based on current market conditions. It seeks to determine the real value of assets based on the current market price.

The reality on the ground is that, considering the current economic environment, the value of investment reduces with the use of the Mark-to-Market value.

This move by the SEC is geared towards discouraging investors from withdrawing their investments to protect investment banks and financial institutions against the economy.

According to the SEC, this move is also in the best interest of investors as it is intended to protect their investments. However, due to the apprehension caused, an appreciable number of investors have taken steps to withdraw their investments.

Government's Debt Operation Programme

Ghana's Minister of Finance, Hon. Ken Ofori-Atta ("the Minister"), during the presentation of the 2023 budget on 24 November 2022, announced that the government was to roll out a debt operation programme as part of its efforts to decrease the pressure on the government's budget and to generate more sustainable means of managing Ghana's debt.

He disclosed that this will be characterised by the suspension or reduction of outstanding interest payments for domestic bondholders and in some instances, the retainment of bonds payable to investors as well as an imposition of a 30% haircut on foreign bonds.

Following the presentation of the Budget Statement to Parliament, the Minister announced on 4 December 2022, that the government was set to launch Ghana's Domestic Debt Exchange programme ("the Programme").

The Invitation to Exchange was launched on 5 December 2022 and later amended on 23 December 2022 by the Amended and Restated Exchange Memorandum.

This programme, which is in line with negotiations with the International Monetary Fund (IMF), is geared towards restoring macroeconomic stability in the shortest possible time and enabling investors to realise the benefits of the Debt Exchange.

The Minister stated categorically that without this debt programme, Ghana's debt cannot be brought to sustainable levels, making it impossible for the government to access an IMF programme.

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Key Features of the Programme:

- Domestic bondholders may submit offers to the Republic of Ghana to exchange their Eligible Bonds for New Bonds.
- Eligible holders include holders of the government of Ghana notes and bonds and E.S.L.A. Plc and Daakye Trust Plc bonds; individuals who also hold bonds are considered eligible holders.
- Eligible bonds due 2023 will be exchanged for seven New Bonds maturing one per year consecutively from, and including, 2027 through, and including, 2033.
- Eligible bonds due after 2023 will be exchanged for 12 New Bonds maturing one per year consecutively from, and including, 2027 though and including 2038.
- Although treasury bills are exempted from the current Domestic Debt Exchange, they may be subject of other exchanges as the Republic of Ghana may determine from time to time.
- To ensure that regulated financial institutions are able to meet their obligations to clients as they fall due, the Ministry of Finance proposes the establishment of a Financial Stability Fund (FSF) which will provide ultimate liquidity support (if required) to regulated financial institutions in Ghana participating in this Invitation to Exchange.

Conclusion

The effects of this debt exchange programme will be great on the Ghanaian capital market. Investors may be discouraged from investing in government-issued securities.

However, extensive stakeholder engagement may restore investor confidence in government-issued securities.

The SEC is working actively to increase its reach by attracting investment and new entrants, as well as by further diversifying offerings.

It is worth highlighting in conclusion, the prospects of improvement in light of the Capital Market Master Plan (CMMP) launched in May 2022. This may inspire the expansion of Ghana's capital market.

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B&P Associates is a law firm located in Accra, Ghana (Labone). It has a 17-member team that guides its clients to navigate the legal and regulatory landscape, and conducts training and consultancy for international organisations on the Ghanaian investment landscape. The team is made up of internationally trained lawyers qualified to practice in multiple jurisdictions. The firm's practice areas include investment law, M&A, corporate and commercial, project and project finance, restructuring and insolvency, employment and immigration, dispute resolution and debt recovery, technology, IP and telecommunications. Its clients cut across diverse sectors and it has provided them with a myriad of services including conducting sector due diligence, rendering legal advice on company financing and advising financial institutions on investment issues, among others. It also provides business support services for the benefit of its clients.

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