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Ink to Pixels: Emphasizing the Legitimacy of Digital Signatures in Ghana

Nana Akua Ayarkwa Baah and Naa Aku Shika Anum

Introduction

In an era marked by the relentless march of technological advancements, the traditional practice of signing documents with wet ink is facing an unprecedented challenge from the digital frontier. In the realm of document authentication, the traditional stroke of wet ink on paper has long stood as a symbol of validity and commitment. This article delves into the evolving landscape of signatures, the escalating prevalence of digital signatures and their recognition as a valid and legally binding method of authenticity in Ghana. As we navigate through the intersections of tradition and innovation we will unravel the implications, benefits, exceptions and potential challenges associated with this paradigm shift in the realm of document authentication.

Legal Framework of Signatures in Ghana

In Ghana, wet ink refers to the use of ink signatures on legal documents. Wet ink signatures are considered valid and legally binding. There is no specific legislation in Ghana that mandates the use of wet ink signatures. However, the general practice is to use wet ink signatures on important legal documents to ensure authenticity and prevent fraud. In today's tech-savvy world, signing documents goes beyond grabbing a pen. We now have e-signatures, digital alternatives that challenge the classic method of using wet ink.

In Ghana, the use of e-signatures has been recognized and accepted as a valid form of authentication for electronic records. The Electronic Transactions Act does not expressly define the term "e-signature". It however defines the term "digital signature". "Digital signature", according to **the Electronic Transactions Act**[1], means "data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature".

Section 10(1) of the Electronic Transactions Act recognizes digital signatures as valid for authenticating a person's signature, satisfying legal requirements. However, it is essential

1 Electronic Transactions Act, 2008 (Act 772).

to ensure that the electronic signature was not obtained under duress or undue influence. Consequently, contractual parties are free to opt for electronic signatures in their agreements without legal restrictions on the choice of software types or specifications as per the current legal framework in Ghana. There are various softwares that can be used to help individuals and organizations prepare and sign documents online. These include Docusign, Adobe Sign, PandaDoc, Dropbox Sign, amongst others.

The impact of Section 10 of the Electronic Transactions Act was explained in the case of **International Rom Limited v. Vodafone Limited & Anor**[2], as follows:

> *"It is trite law that the essential requirement of signing is affixing either by writing with a pen or pencil or by otherwise impressing on the document one's name or signature so as personally to authenticate the document. If a party creates and sends an electronically created document, then he will be treated as having signed it to the same extent that he would in law be treated as having signed a hard copy of the same document. The fact that the document is created electronically as opposed to as a hard copy can make no difference."*

It was again held in the same case, that an email with a sender's name can qualify as a digital signature and does not need further authentication under the Evidence Act. It is important to note that the law generally holds parties bound by their signatures, even if they did not read or understand the document they signed. In the instant case, the name of the sender of the e-mail, 'N. B. Auckbarally' qualified as a digital signature within the meaning of Section 10 of the Electronic Transactions Act.

A person can also affix their signature by either attaching a personal digital signature or employing any other acknowledged, secure, and verifiable method of signing, as is mutually agreed upon by the involved parties or recognized by the industry as secure, reliable, and acceptable[3].

Any instrument that is executed by way of an e-signature shall have the same legal effect as handwritten signatures[4] however, the burden to authenticate a digital signature lies on the person seeking to rely on the digital signature[5].

The acknowledgment of various secure and verifiable methods, including personal digital signatures and industry-recognized alternatives, reflects the legal acceptance and validation of electronic records, ushering in a more flexible and technologically advanced approach to document authentication in the country.

Generally, once a person attaches his or her signature to a document, regardless of whether it is an e-signature or a wet ink signature, he or she shall be bound by the contents of the document subject to certain exceptions. This position was affirmed in the Supreme Court case of **Oppong v. Anarfi,**[6] wherein the Court stated as follows:

> *"The law was settled that a party of full age and understanding would normally be bound by his signature whether he read and understood it or*

2 International Rom Limited v Vodafone Limited & Anor (2015) JELR 66293 (CA).

3 Section 12 of the Electronic Transactions Act, 2008, Act 772

4 Section 11 of the Electronic Transactions Act, 2008, Act 772

5 Section 13 of the Section Electronic Transactions Act, 2008, Act 772

6 Yaw Oppong v Charles Anarfi [2011] SCGLR 556.

> *not, particularly in the absence of requisite evidence that the other party had misled him. Therefore, where parties had embodied the terms of their contract in a written document extrinsic evidence or oral evidence would be inadmissible to add to, vary or contradict the terms of the written contract".*

This principle was reiterated in the cases of ***Broadview Capital V. Bigma Enterprise***[7] **a**nd ***Kommanditgeselschaft V. Soltrec Ghana Ltd***[8]**.**

Exempted Documents

Section 4 of the Electronic Transactions Act provides certain instances in which the Act does not apply. Given that the legal validity of digital signatures is contingent upon the Electronic Transactions Act, it follows that when the Act explicitly exempts certain instruments or documents from its application, the utilization of digital signatures on such documents becomes impermissible. These instruments include:

- Negotiable instruments under the Bills of Exchange Act;
- Powers of attorney;
- Trusts;
- Wills;
- Bills of lading;
- Documents crucial for company, partnership, or sole proprietorship registrations; and
- Swearing affidavits or statutory declarations before a Commissioner for Oaths or Notary Public

This provision also includes contracts for the sale or conveyance of immovable property or any interest in same, as being excluded from the Act's application. This has however since been impliedly repealed by **Section 73 of Land Act 2020 Act 1036** which allows the transfer of land or an interest in land through electronic conveyance. The Land Act further states that any electronic conveyance executed in accordance with the Act must, inter alia, bear the electronic signature of each party involved in its authentication. Additionally, each electronic signature on the conveyance must be certified in compliance with the provisions outlined in the Electronic Transactions Act.

The Electronic Transactions Act further acknowledges the dynamic nature of legal norms, allowing for the exclusion of any class of documents or transactions that may be specifically notified through the Gazette as being an exception to the use of digital signatures.

Time for Realigning the Electronic Transactions Act

While the primary aim of the Electronic Transactions Act is to establish and streamline electronic communications and associated transactions in the public interest, with the overarching goal of eliminating barriers to such interactions, the inclusion of exceptions in Section 4 introduces a certain hindrance or stumbling block. Rather than advancing the overall objective, these exceptions seem to pose challenges and constraints that impede the complete realisation of the Electronic Transactions Act's intended purpose.

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7 Broadview Capital V Bigma Enterprise and Another (2017) JELR 67795 (HC).

8 Kommanditgeselschaft Mti-Vetribs Geselschaft Mbh & Co V Soltrec Ghana Ltd (2017) Jelr 108139 (HC).

There are several reasons why it is imperative that these exceptions be revised especially as we are in a digital age. Firstly, the elimination of these exceptions will streamline the signing process, saving time and resources by doing away with the need for physical paperwork. Further, it will provide convenience as it will enable remote signing of documents using digital devices from any location with internet connection. Consequently, individuals, particularly people with mobility and health limitations, will be able to create and sign all kinds of documents remotely.

Additionally, electronic signature platforms employ robust security measures, such as encryption and authentication which ensure integrity and the protection of signed documents against tampering or unauthorized alterations. Finally, the use of electronic signatures on power of attorney documents, wills and other instruments are increasingly recognized as valid and legally binding in many jurisdictions such as the United States of America, Australia and Portugal provided they meet relevant standards and requirements. This exemption in Ghana remains a relic of the past rather than a step towards the future.

Conclusion

Due to digital advancements, the adoption and integration of e-signatures are on the rise, and this was further accelerated by the COVID-19 pandemic. The convenience, efficiency, and cost-effectiveness of e-signatures is undeniably a contributory factor to the sustained growth of businesses in the post-COVID-19 era.

02

Is Gyan v. Gyan Reopening the Doors to Child Marriages in Ghana?

Kofi Ajeasi Ampah

Introduction

In a recent High Court case, Asamoah Gyan vs Gifty Gyan[9], the presiding judge rendered a perplexing decision concerning child marriage. The judge determined that a marriage involving a 17-year-old is not inherently void but merely voidable. This critique aims to delve into the potential issues arising from the decision, specifically examining how it may undermine the State's endeavours to eradicate child marriages and how it may be deemed repugnant to public policy and interest. The discussion will begin with a concise overview of the case facts, an exploration of the judge's reasoning, and conclude with an alternative perspective on how the judge could have approached the case.

Facts of the Case

In the case of Gyan vs Gyan[10], Mr Asamoah Gyan petitioned to annul his ten-year marriage to Gifty Gyan. The foundation of Mr. Gyan's claim rested on the assertion that, prior to their marriage, Gifty Gyan was already legally married to one Eugene Odame Antwi under ordinance. Consequently, their subsequent marriage would be null and void.

Gifty Gyan admitted that she had indeed been married to Eugene Odame Antwi before meeting Mr. Asamoah Gyan. However, she contended that she was 17 years old at the time of this marriage, making the marriage void. This became the main issue for the court.

Decision of the Court

The presiding judge, Her Ladyship, Hafisata Amaleboba, despite establishing as a matter of fact that at the time of the Respondent's marriage, she was a year below the legal age for marriage, held that her marriage to Eugene Odame Antwi was merely voidable and not void.

9 Asamoah Gyan vs Gifty Gyan [2020] HC DM 0263/2018.

10 See Fn. 9

The reasoning was that, marriage, viewed as a contractual agreement, should only be deemed void if a statute explicitly stipulates a condition precedent and expressly renders the marriage void in the absence of meeting that condition. Citing the authority of ***Ernestina Boateng V. Phyllis Serwah***[11], the judge leaned on the principle that, as a general principle in contract law, a mere violation of statutory provisions does not ipso facto render a contract void unless nullification is explicitly outlined in the statute.

Quoting from the Boateng case[12], Her Ladyship emphasized:

> *"As a general principle of the law of contract, except clearly provided for in a statute, the fact that a contract violates provisions of a statute does not automatically make it void. Where there is no nullifying provision in the statute, the legal consequence of the violation of a provision is a matter of construction by a court but it would not be ipso facto void."*

In her exhaustive review of the relevant legislation on marriage under the ordinance, including the Children's Act, 1998 (Act 560), and the Marriages Act 1884–1985 (CAP 127), the judge contended that no nullifying provision was identified that explicitly rendered a marriage to a minor void. Consequently, she held that lacking such specific statutory guidance, the marriage in question was deemed voidable rather than void. This formed the bedrock of Her Ladyship's verdict on the legal status of the marriage in question. She delivered herself thus:

> *"I have carefully considered the Marriages Act and find no provision in the said enactment which renders a marriage void, for the reason one party to the marriage was a minor at the date of the marriage or lacked capacity to contract a marriage. ...Section 74 (3) of the Marriages Act reinforces this position of the law by providing that unless specifically stated in the said section, no marriage under PART THREE of the Marriages Act, shall be declared invalid after its celebration. As troubling as it may seem, marriages with minors or children, are not provided for under the said provision. If the Children's Act had provided for marriages with minors to be void, it would be deemed to have amended section 74 of the Marriages Act, as provided for by section 125 of the Children's Act. There are, however, no such nullifying provisions in the Children's Act.*

Upon the foregoing, the marriage between the Respondent and Eugene Odame cannot be declared void or invalid on the ground that the Respondent was a minor or child at the date of the said marriage[13]."

Misconstruction of the Principle in Boateng vs Serwah[14]

It is asserted that Her Ladyship misconstrued this principle. The essence of the principle is that when a contract violates a statute without a nullifying provision, it becomes a matter of judicial construction to determine its legal consequences. The principle does not imply that the absence of nullifying clauses renders a contract voidable, as interpreted by the court.

The Court's duty extended beyond the search for nullifying provisions in the legislation. A simple review of the case of ***Abadwam Stool v. Akrokerri Stool***[15], would have provided guidance on

11 Ernestina Boateng V Phyllis Serwah & Ors [2020] SC J4/08/2020.

12 See Fn. 11

13 See Fn. 9

14 See Fn. 11

15 Abadwam Stool & Ors v Akrokerri Stool [2017–2018] 1 SCLRG (Adaare) 1

what steps to take in the absence of nullifying provisions. In this case, Pwamang JSC offered comprehensive guidance, stating:

> *"Thus, where, as in this case, parliament sets out in a statute, conditions for the exercise of legal authority but does not spell out the legal consequences of non-compliance on the rights of persons affected by the exercise of the authority, it is for the courts to decide in a particular case, taking into consideration the concrete facts what the legal consequences of non-compliance shall be. The courts do this by construing the provision in question in the context of the purpose of the enactment as a whole so as to give effect to the intention of the legislature or the rule maker as the case may be."*

Thus, when a contract is formed in violation of a statute, and the said statute is silent on the consequences of such violations, the court is entrusted with the responsibility of comprehensive statutory interpretation. This involves an examination of the statute as a whole, in alignment with its underlying purpose. The overarching goal is to discern whether the violation inherently renders the contract void or if other consequences apply. (See the case of C.C.W. Limited V. Accra Metropolitan Assembly[16].

In light of the aforementioned legal authorities, Her Ladyship was duty-bound to undertake an interpretative journey. This journey simply was to discern whether non-compliance with Section 14(2) of the Children's Act[17] was envisaged by the legislature to have nullifying effects.

Construction of Section 14(2) of the Children's Act

Before the passage of the Children's Act, section 59 of the Marriages Act[18], made it possible for consent to be sought from specified persons such as parents, a justice of the high court, or the Attorney General for children below 21 years to legally get married. This was however modified by the passage of the Children's Act which provides in Section 14 that the mandatory age for marriage in Ghana, is 18 years and above.

Now, the central issue that arises for interpretation is whether or not the violation of Section 14(2) should have nullifying effects.

The rules governing Statutory interpretation will apply since the Children's Act is a statute. It is trite that the preferred approach to statutory interpretation is the purposive interpretation approach. See (Abu Ramadan v. EC and A-G[19]).

The Children's Act (the "Act") must be perused to ascertain the intendment of the lawmaker concerning child marriages. The long title is set out at the head of the statute and gives a full description of the general purpose of the Act. According to Section 13 of the Interpretation Act[20] the long title forms a part of the Act and is intended to assist in explaining the intent and object of the Act. The Supreme Court has also explained in CEPS v. NLC[21] that in interpreting a statute one may consider the preamble or the long title to that Act. Implicit in this comprehensive mandate is the overarching objective to protect children, uphold their rights, and foster their well-being through avenues such as education and development. A close examination suggests

16 CCW Limited V Accra Metropolitan Assembly [2007] SC J4/5/2007.

17 Children's Act, 1998, Act 560 amended by Children's Amendment Act, 2016, Act 937.

18 Marriages Act 1884–1985, CAP 127

19 Abu Ramadan and Nimako v EC and A-G [2013–2014] 2 SCGLR 1654.

20 Interpretation Act 2009, Act 792.

21 Customs, Excise and Preventive Service v National Labour Commission and Attorney General [2009] SCGLR.

that any practice, inconsistent with these noble goals would be inherently repugnant to the spirit and intent of the Children's Act.

This is further emphasized in Section 2 of the Act[22] which establishes the welfare principle. In essence, this section crystallizes the commitment to prioritize the well-being and best interest of the child above all else. It imposes a duty on every entity involved in matters concerning children, including courts, individuals, institutions, and other bodies, to place the child's best interest at the forefront of their considerations.

The above provisions in Sub-part 1 are capped by Section 15 of the Act[23] which criminalizes any violation of any part of Sub-part 1 which includes Section 14(2). The inclusion of a penalty underscores the gravity with which the legislature views contravention of these provisions.

The language of Sub-Part 1 reflects a clear legislative intent to prioritize the well-being, education, and autonomy of children. The explicit prohibition of forced marriages in Section 14, coupled with the age restriction in the same section, suggests a policy stance against any form of child marriage.

Child marriages inherently involve a vulnerable party, being the child. Recognizing the power dynamics and potential coercion in such unions, the legislative framework seeks to shield children from being subjected to decisions that may jeopardize their rights and hinder their development. The inclusion of penalties in section 15 of the Act[24] underscores the seriousness attached to any contravention. By this, the legislature aims not only to penalize wrongdoers but also to deter individuals and entities from engaging in activities that run afoul of the protective provisions.

Further, the Children's Act aligns with international standards, such as the Convention on the Rights of the Child[25], which emphasizes the need to protect children from exploitation and harmful practices to which Ghana is a signatory.

The examination of both the long title and the provisions encapsulated in Sub-part 1 of the Children's Act, reveals an unequivocal legislative position against child marriage. The comprehensive safeguards and assurances contained in Sub-part 1 for the welfare of children would, in essence, be rendered futile if one were to assert that child marriages possess validity until affirmative steps are taken to annul it.

Indeed, it defies reason to conceive that the legislature, in guaranteeing a myriad of rights to children, would simultaneously endorse the notion that a marriage contract involving a 6-year-old, for instance, is not null and void but valid until a party to that marriage takes steps to repudiate it. Such an interpretation not only clashes with the fundamental principles of justice but also contradicts the very essence of the legislator's intent.

In light of the clear legislative intent regarding child marriages, it is fervently hoped that this decision is swiftly reconsidered by higher courts. The legal position as articulated in Gyan v Gyan[26] stands as a potential threat to the robust protection of children's rights and the broader legal framework governing marriages. Any delay in rectifying this legal position could perpetuate a concerning precedent that undermines the fundamental rights and well-being of children.

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22 Children's Act, 1998, Act 560 amended by Children's Amendment Act, 2016, Act 937

23 See Fn. 22

24 See Fn. 22

25 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

26 See Fn. 9

03

Transfer Pricing and Safe Harbours In Ghana

Michael Tandoh and Winnifred Arthur

Introduction

In 2001, Ghana introduced transfer pricing legislations into its tax regime by adopting the Arm's Length Principle which is the Globally Accepted Standard by the Organization for Economic Cooperations and Development ("OECD") and the United Nations (UN) for determining acceptable transfer price.

After several years of tax controversies, the Transfer Pricing Regulations 2012, (L.I 2188) was introduced in 2012 to guide the implementation of the anti-avoidance provisions. However, L.I 2188 has since been repealed and replaced with the Transfer Pricing Regulations 2020, (L.I 2412) to align with OECD principles and make the legislative landscape more acceptable to investors, Multinational Enterprises ("MNEs"), and other tax administrators in other jurisdictions[27].

The arm's length principle for pricing considers the price that would be used if unrelated third parties undertook the same transaction.[28] MNEs often adjust the price of goods and services transferred among associated entities and this is commonly referred to as Transfer Pricing.[29]

According to section 31 (1) of Ghana Income Tax Act 2015 (Act 896) and Regulations 2 of Transfer Pricing Regulations, 2020, L.I. 2412, persons in a controlled relationship must calculate their income and tax payable at arm's length.

Like all other tax regulations, the Ghana Revenue Authority ("GRA") is responsible for enforcing transfer pricing rules and ensuring compliance among taxpayers. It has a Transfer Pricing Unit ("TPU") within the Large Taxpayers Office ("LTO") that assists the Government in formulating policies to curb transfer pricing abuse, undertake taxpayer education on transfer pricing, and

27 I. Asare, 'History of Transfer Pricing and Transfer Pricing in Ghana (2)' (January 17, 20230) <https://thebftonline.com/2023/01/17/history-of-transfer-pricing-and-transfer-pricing-in-ghana-2/#google_vignette> accessed 22 July 2024.

28 H. Rogers and L. Oats, 'Transfer Pricing: Changing Views in Changing Times' (2022) 46 Accounting Forum 83.

29 S.R. Agrawal, 'Understanding Transfer Pricing Rules and Regulations in Canada' <https://www.linkedin.com/pulse/understanding-transfer-pricing-rules-regulations-canada-agrawal/> accessed 22 July 2024.

conduct transfer pricing audits,[30] among others.

Maintaining a contemporaneous documentation as a taxpayer for the first time could be challenging judging from the extensive effort required in developing such a report. The process can be complex, time-consuming, and costly.[31]

It becomes even more challenging when, despite all the effort, the GRA may review their work and arrive at a different conclusion, resulting in additional tax liabilities. Safe harbour rules therefore help to solve this problem, particularly for Small and Medium Enterprises.[32]

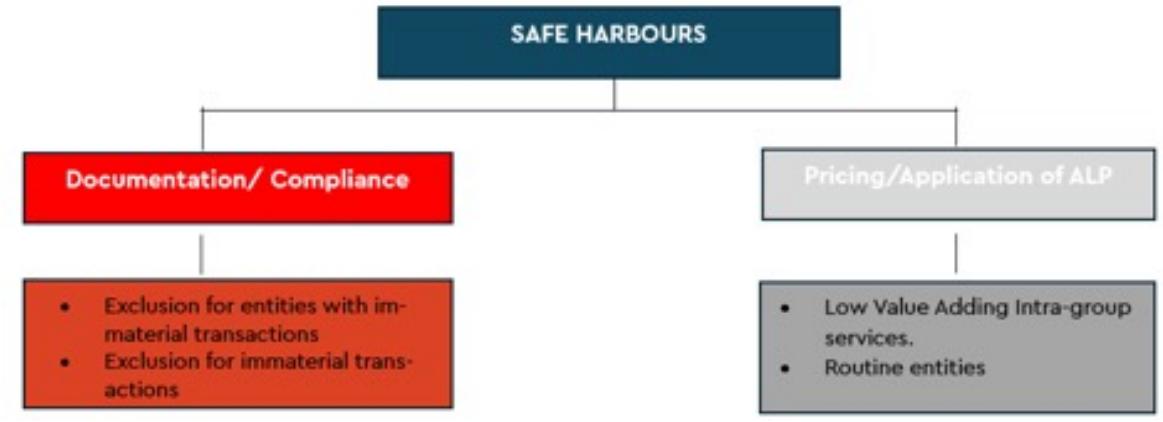
Safe Harbours

A safe harbour is a provision that applies to a defined category of taxpayers or transactions, exempting eligible taxpayers from certain obligations typically imposed by a country's general transfer pricing rules. In addition, the application of a safe harbour is at the discretion of the taxpayer but once applied, it is binding on tax administrations.

The guiding reasons for the introduction of safe harbour regimes in countries are to reduce the compliance costs and burdens on taxpayers, as well as to ease the enforcement burden on tax authorities. In Ghana, this approach similarly enhances and ensures the collection of corporate income tax.[32]

It is worth noting that in the past, the use of safe harbours was explicitly prohibited. However, the OECD now recognises that in some circumstances relating particularly to small taxpayers and/or less complex transactions, the use of safe harbours can be justified.[33]

There are two common types of safe harbours utilised by most countries namely; documentation/ compliance and pricing/application of the arm's length principles as shown in the figure below.



Instead of requiring the preparation of voluminous and complex information covering all transactions below the threshold of US$200,000 or its equivalent in Ghana Cedis, the new Transfer Pricing rules allow taxpayers to opt for a simplified approach to Transfer Pricing documentation of low value-adding services (which attract a mark-up of not more than 3% of the relevant costs).

30 'Transfer Pricing' (Ghana Revenue Authority) <https://gra.gov.gh/domestic-tax/transfer-pricing/> accessed 22 February 2024.

31 V. Solilová and D. Nerudova, Transfer Pricing in SMEs: Critical Analysis and Practical Solutions (Springer 2017).

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33 B. Ulanenko, 'Safe Harbours in Transfer Pricing' (22 October 2020) <https://www.startaxed.com/blog/safe-harbours> accessed 23 February 2024.

The same applies to transactions covered by Technology Transfer Agreements ('TTA') approved by the GIPC where royalties, know-how and management/technical fees, do not exceed 2% of net profit (i.e., profit after tax, interest, depreciation and amortisation but excluding the charge for technology transfer) per transaction.

While this is good news, the chances are that this may not apply to many TTAs, as a significant number of these are priced as a percentage of sales/revenue and this amount, in most cases will be higher than the 2% of net profit threshold.

Entities that opt for the simplified approach to Transfer Pricing documentation would be required to keep other specified documentation under LI 2412 and will not be able to opt out of this arrangement for a period of three (3) years unless with the prior approval of the Commissioner General of GRA.

Filings and Mandatory disclosures

Just like the old Regulations, L.I 2188, the current transfer pricing rules require affected taxpayers to submit an annual transfer pricing return four (4) months after the end of each fiscal year.

In situation where the taxpayer has applied for exemption from maintaining contemporaneous documentation for low value adding intra-group services, the law requires taxpayers to file notice with the Commissioner-General, 30 days after entering into such transactions.

An Ultimate Parent Entity of a Multinational Enterprise Group that is resident for tax purposes in Ghana shall file with the Commissioner-General a Country-by-Country Report (CbCR) with respect to its fiscal reporting, 12 months after the end of the fiscal year where the consolidated group revenue is or above GHC 2.9 billion. The current OECD Guidelines for Tax Administrators and Multinational Enterprises recommends equivalent of €750 million.

Benefits Of Safe Harbours

The basic benefits of Ghana having safe harbours in the existing transfer pricing regime include:

a. The simplification of compliance procedures and reduction in compliance costs;

b. The guarantee that price charged or paid on controlled transactions will be accepted by the tax administrations provided the taxpayer has met the eligibility conditions and complied with the safe harbour provisions;

c. The ease of the burden on tax authorities, enabling them to focus their administrative resources on examinations of more complex or riskier transactions and taxpayers;[34] and

d. The provision of compliance relief to taxpayers. For instance, when dealing with low value-added services, a benchmarking study is not mandatory if a mark-up of 3% or less is applied as an arm's length measure.[35]

Notwithstanding the above, disputes may still arise as GRA could contest the classification of certain services as "low value adding".[36] There is also the potential to create inappropriate tax planning opportunities including double non taxation of income or double taxation due

34 See Fn. 31

35 See Fn. 33

36 OECD, 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2022' <https://www.oecd-ilibrary.org/content/publication/0e655865-en>.

to potential conflicts between safe harbours, the arm's length principle, and the practices of other countries.

In the event the application of safe harbour rules causes taxpayers to report income above arm's length level, the jurisdiction providing the safe harbour receives a benefit in the form of a higher taxable income while the other jurisdiction generates a loss in the form of less taxable income.[37]

Conclusion

The import of Safe harbour rules in Ghana and the world at large is aimed at reducing compliance burden on the part of the taxpayer and also afford the Revenue Authority, the opportunity to maximize the allocation of scarce resources in high-risk and complicated transactions.

As far as the transaction prices or rates falls within the safe habour parameters as specified in Regulations 2412, it will be deemed acceptable by the Revenue Authority and treated with minimal acceptable scrutiny. This in effect, will largely enhance compliance among small taxpayers and subsequently reduce the overall effects of transfer pricing adjustments, risks and controversies.

In general, the safe habour rules impactfully contributes to lowering the overall cost of doing business in Ghana and fosters investor confidence.

37 See Fn. 33

04

Funds Transfer and Exchange Control Regime in Ghana

Boatemaa Ohene-Agyekum

Introduction

In today's interconnected global economy, nations are increasingly cautious about controlling the flow of foreign currency across their borders. To maintain economic stability and prevent illicit financial activities, countries often implement robust exchange control mechanisms.[38] These regulations do not only oversee the trading and transfer of foreign currency but also restrict its buying and selling, adding a layer of complexity to international financial transactions.

Ghana, like many other countries, has employed exchange control mechanisms to tackle the unfavourable balance of payments[39], regulate capital outflows, manage the exchange rate, and support economic growth. This article will explore the fundamentals of Ghana's exchange control policies, analyze the current regulatory regime, examine the impact of these controls on businesses and individuals, and recommend solutions to identified challenges associated with exchange control in Ghana.

History of Exchange Control

Ghana's exchange control system has undergone significant evolution overtime. Historically, the country faced a balance of payment crisis which provoked hostile terms of trade shock and expansionary change in demand policies.[40] This was compounded by Ghana's exchange rate being overvalued by 3000 percent, prompting the Government to implement a complex set of trade and exchange restrictions to control foreign trade.[41] During this period, the Exchange Control Act 1961, (Act 71) was introduced to standardize foreign currency usage by resident and non-resident persons in the country. This legislation established the foundational principles of

38 CFI Team, 'Exchange Control' <https://corporatefinanceinstitute.com/resources/economics/exchange-control/> accessed 23 February 2024.

39 Wallstreetmojo Team, 'Exchange Control' (29 January 2024) <https://www.wallstreetmojo.com/exchange-control/> accessed 31 July 2024.

40 D.S. Younger, 'Exchange Rate Management in Ghana' <https://pdf.usaid.gov/pdf_docs/pnabq007.pdf>.

41 See Fn. 40

exchange control in the county. It was further supported by subsequent enactments such as the Exchange Control (Amendment) Decree 1973 (NRCD 220), Exchange Control (Amendment) Decree 1977 (SMCD 99), Exchange Control (Amendment) Law 1986 (PNDCL 149), and Exchange Control Regulations, 1961 (L. I 133). These statutory frameworks remained in effect until they were repealed by Ghana's current Foreign Exchange Act, 2006 (Act 723).

Regulatory Framework

The Bank of Ghana is vested with regulatory authority to license and supervise authorized dealers such as banks and other financial institutions involved in foreign exchange transactions. The Foreign Exchange Act, 2006, Act 723 (the "Act") mandates that all foreign currency payments to or from Ghana be processed through a bank,[42] a person licensed to carry out the business of money transfers, or any dealer authorized to conduct foreign exchange transfers.[43]

Where the Bank of Ghana suspects or detects any violation of the Act, it may require a bank to obtain its prior permission before processing any foreign exchange payments.[44] The Bank of Ghana has wide powers to make regulations on foreign currency, the maintenance of bank accounts within or outside Ghana, the settlement of payments by both residents and non-residents[45] as well as the conditions required for the business of foreign exchange transfers.[46]

As part of the mechanisms put in place to correct the balance of payment deficit, the Act empowers the Bank of Ghana to impose restrictions on the importation and exportation of foreign exchange. The Bank of Ghana does this by issuing notices on restrictions on the importation or exportation from the country bank notes, bank coins, travelers' cheques, electronic units of payment, and securities in the denomination of local currency or the currency of another country.[47] The Governor of the Bank of Ghana has the discretion to impose temporary exchange controls beyond set restrictions under exceptional circumstances.

Where the country is experiencing a severe deterioration in its balance of payment causing dire consequences on the economy, the Governor, in consultation with the Minister of Finance may restrict payments between residents and/or non-residents[48] and restrict the frequency at which the acts of purchase and sale of foreign exchange may be effected in the country.[49] The rules established by the Governor in consultation with the Minister are to remain in force for not more than three (3) months, though this period may be extended.[50]

Impact of Exchange Control on Businesses and Individuals

Exchange control mechanisms impact businesses and individuals by influencing import costs and the availability of foreign currency. One of the main objectives of exchange control is to regulate the amount of foreign currency in the economy, serving as a measure to neutralize the balance of payments and stabilize inflation. These regulations may also affect the repatriation of export proceeds into the country. While residents are allowed to hold foreign currency

42 Section 15(1) of the Foreign Exchange Act, 2006, Act 723.
43 Section 15(2) of the Foreign Exchange Act, 2006, Act 723
44 Section 16(1) of the Foreign Exchange Act, 2006, Act 723
45 Section 17(1) of the Foreign Exchange Act, 2006, Act 723.
46 Section 19(1) of the Foreign Exchange Act, 2006, Act 723
47 Section 18 of the Foreign Exchange Act, 2006, Act 723
48 Section 20(1) of the Foreign Exchange Act, 2006, Act 723.
49 Section 20(1) of the Foreign Exchange Act, 2006, Act 723.
50 Sections 20(2) and 20(3) of the Foreign Exchange Act, 2006, Act 723 .

accounts, they may face restrictions imposed by the Bank of Ghana. The imposed limitations on foreign exchange for travel and capital controls can affect investment decisions.

Empowered by the Foreign Exchange Act, 2006, Act 723, the Bank of Ghana in consonance with the Anti-Money Laundering Act, 2008, Act 749 has made rules to govern the importation of foreign exchange. The amount an individual can carry when arriving or departing from Ghana without declaration has been capped at US$10,000.00 or its equivalent in any other monetary instruments by the Bank of Ghana.[51] However, an obligation has been placed on any individual who seeks to carry any amount above US$10,000.00 to declare the source and purpose of carrying the specified amount using the Currency Declaration Form ("CDF")[52].

Furthermore, companies, institutions, and individuals cannot engage in foreign exchange business without acquiring a licence from the Bank of Ghana. Further, without written authorization from the Bank of Ghana, companies, institutions, and individuals are prohibited from pricing, advertising, receipting, or making payments for goods and services in foreign currency in Ghana.[53] Non-compliance with these rules set by the Bank of Ghana attracts repercussions.

Conversely, the Bank of Ghana has increased the threshold for transporting of imports to US$ 200,000.00 per transaction for importers.[54] Though the Act proposes some exchange control mechanisms, that is not enough to cover all the sectors that require exchange control. Residents and non-residents are both permitted to set up Foreign Exchange Accounts with local banks in Ghana. There is also the operation of foreign exchange bureaus throughout Ghana.[55] However, according to the International Monetary Fund (IMF), only countries with transitional economies are eligible to apply exchange controls.[56]

Under the current regime, non-resident investors can invest in the country's market with no prior exchange control approval. Additionally, the original capital, all capital gains, and related holdings can be remitted in foreign exchange freely.[57] Consequently, these measures may not be ideal for a transitioning economy like ours. Though there are taxes put in place to ensure exchange control such as capital gains taxes, withholding tax on dividends, gift tax, and other taxes, they are not enough to capture illegitimate transactions or prohibited cross-border flows. Proper mechanisms which include processes and procedures must be put in place in that regard. Ghana can amend the Foreign Exchange Act to allow for more capital mobility and address issues with financial stability. Nonetheless, the recommended amendment should seek to balance the advantages of capital mobility with the requirement for economic stability through a focus on systemic risk management.[58]

Challenges of Exchange Control

The effective implementation of exchange control poses significant challenges. This system may inadvertently promote black market activities, inclusive of currency smuggling as individuals may seek to circumvent the formal regulations. Balancing these legal controls with the principles of a free-market economy is a major problem for most countries.

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51 'Bank of Ghana, Notice to the General Public, Importation and Exportation of Foreign Currency (Cash Couriers), Notice No. BG/GOV/SEC/2019/05' <https://www.bog.gov.gh/wp-content/uploads/2019/07/Importation-and-Exportation-of-Foreign-Curency.pdf>.

52 See Fn. 51

53 'Bank of Ghana, Notice to the General Public, Prohibition of Pricing, Advertising, Receipting and/or Making Payments for Goods & Services in Foreign Currency in Ghana, Notice No. BG/GOV/SEC/2022/04' <https://www.bog.gov.gh/wp-content/uploads/2022/04/BOG-Notice-BG-GOV-SEC-2022-04-Prohibition-of-Pricing-Advertising-Receipt-and-or-Making-Pmts-for-Gds-and-Services-in-Foreign-Currency-in-Ghana-1.pdf>.

54 'Bank of Ghana, Notice to the General Public, Guidelines on Advance Payment for Imports of Goods and Services, SF/BK/32/2024/05'.

55 'Ghana – Foreign Exchange Controls' <https://www.privacyshield.gov/ps/article?id=Ghana-Foreign-Exchange-Controls>.

56 CFI Team, 'Exchange Control' <https://corporatefinanceinstitute.com/resources/economics/exchange-control/> accessed 31 July 2024.

57 'Rules & Regulations – Ghana Stock Exchange' (2023) <https://gse.com.gh/rules-regulations/> accessed 23 February 2024.

58 H.S. Shin, 'Global Banking Glut and Loan Risk Premium' (2012) 60 IMF Economic Review 155.

Tackling challenges of Exchange Control

To address the challenges associated with the exchange control system, researchers suggest that macroprudential regulation must be highlighted to control the systematic risks related to capital flows.59 Effective and operational laws must be enacted to empower capital mobility and address issues with financial stability. The negative effects of exchange control in countries can be lessened by balancing the advantages of capital mobility with the requirement for economic stability through a focus on systematic risk management.60

Embarking on International cooperation and policy coordination can manage the issues connected with exchange controls.[61] Concerted efforts from the international sphere can alleviate possible negative spillovers and manage cross-border capital flows more skillfully. Additionally, international cooperation can attenuate the negative effects of unilateral exchange control measures and help countries align their policies, enhancing global financial stability.[62]

Having robust financial institutions in the country is necessary for the efficient management of currency risks.[63] A country must have strong banking systems and legal frameworks that give companies access to financial products such as hedging tools. Equipping these organizations can reduce the negative effects of exchange controls on enterprises and the overall economy as well as help moderate exchange rate volatility.[64]

Conclusion

The pitfalls of exchange control cannot be over-emphasized. There is a need to strike a balance between these controls and liberalization as Ghana's exchange control system continues to evolve. It is advisable that the exchange control system must be balanced with economic growth. It has become essential for the various stakeholders in the economy to collaborate in establishing a balanced exchange control mechanism in the country.

59 Fn. 58

60 Fn 58.

61 M. Obstfeld and A.M. Taylor, Global Capital Markets : Integration, Crisis, and Growth (Cambridge University Press 2004).

62 See Fn. 61

63 C.M Reinhart and K.S. Rogoff, This Time Is Different : Eight Centuries of Financial Folly (Princeton University Press 2009).

64 See Fn 63

05

Legislative Updates

Bills to Watch Out for

- **Affirmative Action (Gender Equality) Bill (passed)**

This bill aims to ensure gender equality in Ghana by implementing policies to address imbalances in political, social, economic, and educational spheres. It establishes a Gender Equality Committee to monitor compliance, promotes gender equity in public service, security services, judiciary, and Parliament, and mandates gender-responsive budgeting. The bill also incentivizes private sector compliance and sets guidelines for grievance resolution.

- **Chartered Institute of Restructuring and Insolvency Practitioners, Ghana Bill (passed)**

This bill transforms the Ghana Association of Restructuring Insolvency Advisors into the Chartered Institute of Restructuring Insolvency Practitioners. It provides for the regulation of insolvency practitioners and the proper administration of insolvency proceedings. It also highlights the membership and qualification guidelines for the Institute, the licensing requirements for the public practice of insolvency, and the associated offences with the practice.

- **Ghana Civil Aviation Bill (passed)**

This bill reviews and consolidates Ghana's civil aviation laws, establishing the Ghana Civil Aviation Authority to regulate aviation safety, security, and compliance with international standards. It mandates the State Safety Programme, oversees the economic aspects of air transport, manages aircraft operations, addresses aviation offenses, and governs the protection and disclosure of aviation data.

- **Ghana Shippers' Authority Act (passed)**

This enactment establishes the Ghana Shippers' Authority to regulate the commercial activities of shippers and shipping service providers in the shipment, storage, and delivery of international

trade cargo by sea, air, and land and to provide for related matters. The Act also promotes local participation in the shipping and logistics industry, ensuring fair pricing and effective regulation.

- **National Roads Authority Bill (passed)**

This bill establishes the National Roads Authority to plan, develop, maintain, and manage road networks in the county and to provide for related matters. The Bill seeks to eliminate the inefficiencies and coordination challenges by unifying the responsibilities currently spread across multiple agencies, including the Ghana Highway Authority, the Department of Urban Roads, and the Department of Feeder Roads.

- **National Service Authority Bill (passed)**

The National Service Authority Bill creates the National Service Authority to manage and reform Ghana's national service program. It repeals the Ghana National Service Scheme Act of 1980 and introduces a one-year service with six weeks of essential skills training. It also extends eligibility for service to all Ghanaians under 40 with tertiary education, with options for deferrals and exemptions. The Bill further establishes regional and district offices for better local administration and constitutes a Board that will oversee governance, and emphasize protection for service personnel, especially those with disabilities.

Recent Statutory Legislations

- **Contracts (Amendment) Act, 2023, Act 1114**

The Contracts (Amendment) Act introduces key provisions regarding authorized signatories for Government contracts, specifying that only the relevant Minister, their authorized representatives, or other legally designated individuals can sign on behalf of the Government of Ghana. Additionally, it prohibits the use of compound interest on sums due and payable under contracts with the Government, requiring that only simple interest be applied. Contracts that do not comply with this requirement are deemed illegal, with penalties including fines and imprisonment for violation of this legal provision.

- **Ghana Anti-Doping Act, 2024, Act 1116**

This Act establishes the Ghana Anti-Doping Agency, implements the United Nations Educational, Scientific and Cultural Organisation Convention Against Doping in Sports, and promotes clean sports. It also introduces financial penalties for athletes who engage in doping, making the use of prohibited substances both illegal and financially burdensome.

- **Wildlife Resources Management Act, 2023, Act 1115**

This Act consolidates and revises the laws relating to wildlife and protected areas and provides for the implementation of international conventions on wildlife to which Ghana is a signatory and related matters. The Act also provides restrictions on the keeping of wild animals as well as the establishment of private zoological gardens and private wildlife sanctuaries.

- **National Petroleum Authority (Amendment) Act, 2023, Act 1105**

This Act amends the National Petroleum Authority Act, 2005 (Act 691) to provide for Ghanaian content and Ghanaian participation in the petroleum downstream industry.

Firm News

WTS Trains Data Protection Supervisors

On 24–28 June 2024, WTS Ghana trained 12 participants on the Certified Data Protection Supervisor (CDPS) training. The Data Protection Supervisor course is a licenced programme by the Data Protection Commission. WTS Nobisfields is licenced to provide such training on behalf of the Commission. The course was attended by officers of companies nominated to be responsible for Data Protection issues within their companies.

Participating in the course were candidates from Gold Fields Ghana Limited, Takoradi International Company, the Apostolic Church-Ghana, Standard Chartered Bank Ghana PLC, Complete Farmer, WEMA Microfinance Ltd, Democracy International, The Ninani Group (Innova DDB Ghana), Clydestone Ghana PLC, Webber Mill Limited, RayCom Technologies and Ghana Deposit Protection Corporation. Section 58 of the Data Protection Act 2012, Act 843 makes it

mandatory for data controllers to appoint a Data Protection Supervisor for the data controller. The data protection supervisor has statutory duties to be performed within a company. The course provides the requisite training to enable the data protection supervisor to perform those duties and also be licenced by the Data Protection Commission.

The course facilitators are Richard Amo-hene and Seth Kwarteng of WTS Nobisfields who both Certified Trainers by The Data Protection Commission.

The Certified Data Protection Supervisor trainings will be held at Ellking Hotel, East Legon at the following dates:

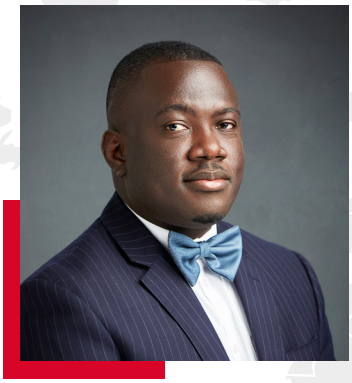
DATE	TIME	TRAINING MODE
9th September to 13th September 2024	9am – 5pm	In-person
14th October to 18th October 2024	9am – 5pm	In-person
11th November to 15th November 2024	9am – 5pm	In-person
9th December to 13th December 2024	9am – 5pm	In-person

New Publication: "Doing Business in Ghana" Guide!

In July 2024, WTS published its comprehensive "Doing Business in Ghana" guide. This essential resource offers detailed insights into the setting up and operation of businesses in Ghana, covering legal requirements, taxation, employment laws, and sector-specific advice. It also addresses issues that entrepreneurs, investors, consultants, advisors, and businesses typically experience.

The official book launch is slated for **27 August 2024.**

Contact



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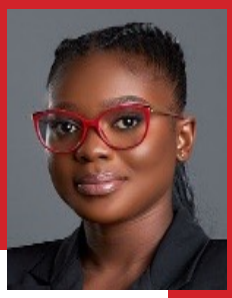

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