Interplay between Contract and Public law: Implications for Major Construction Contracts and Transparency

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Abstract

The relationship between infrastructure project owners and their contractors is generally governed by contract law. However, where the project owner is a State, there are often additional requirements from public law to be complied with. The challenges posed by the interplay between public law and private contractual relationships in such context have been highlighted by litigation concerning the effect of a constitutional requirement that any international business and economic transaction to which the Government of Ghana (GoG) is a party is not to become operational without parliamentary approval. Through analysis of five decisions of the Supreme Court of Ghana on the interpretation of this constitutional provision, this piece highlights the devastating consequences that inattention to public law could have on parties who contract with the GoG and its agencies. It also examines the extent to which the judicial interpretation of the constitutional requirement really furthers the interests of transparency and openness that it was intended to promote.

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Introduction

Construction contracts involve a project owner and a contractor. The relationship between parties to such transactions has generally been governed by contract law.[1] This is the case for

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[1]S. Arrowsmith, *The Law of Public and Utilities Procurement* (2nd edn. Sweet and Maxwell, London, 2005), p. 9.

private parties. In the case of construction transactions involving the State or public entities, although the ordinary law of contract generally applies, there is what has been referred to as 'an extra layer of law' that applies in addition to the principles of contract law.[2] The public nature of such contracts often warrants the application of public law principles which seek to achieve public accountability and proper use of public resources.[3] The role of public procurement legislation and regulations and their impact on major construction contract formation presents probably the best, and perhaps the most familiar, example of the interplay between contract law and public law. What is less discussed, however, is that the interplay goes beyond procurement legislation and raises issues in constitutional law which tends to be glossed over in the literature. Based on scrutiny of five decisions of the Supreme Court of Ghana,[4] this paper aims to highlight how interactions between public and private law in Ghana have been managed in the context of infrastructure procurement and the extent to which the public law requirements have enhanced the quest for openness and transparency. The relevance of this subject extends beyond the boundaries of Ghana for three reasons. Firstly, major infrastructure projects in most developing countries such as Ghana are often undertaken by foreign contractors from the Americas, Europe and Asia. It is important for entities contracting with Ghana and their legal advisers to know the likely implications of a violation of a public law principle on their transactions. Secondly, the issue of how to balance interests where breaches of public law principles affect private rights is one of interest in many countries. Ghana's experiences in the context of infrastructure procurement provide insights into how the

[2] N. Seddon, *Government Contracts: Federal, State and Local* (Federation Press, New South Wales, 2009), p. 2.

[3] *ibid*; C. Turpin, "Government Contracts: A Study of Methods of Contracting" (1968) 31(3) *M LR* 241-256.

[4] *A-G v Faroe Atlantic Company Limited (the Faroe Atlantic Case)* [2005-2006] SCGLR 271; *A-G v Balkan Energy (Ghana) Limited & Ors (the Balkan Energy Case)* [2012] 2 SCGLR 998; and *Martin Amidu v A-G & 2 Ors (The Waterville Case)* Suit Number J1/15/2012, judgment of 14 June 2013 – not yet reported; Klomega v Attorney-General & 3 0thers (19 July 2013, Supreme Court, Writ No; J1/10/2012 (Unreported)); Amidu v Attorney-General & 2 Others (Isofoton Case) (21 June 2013, Supreme Court (Unreported)).

interplay has been addressed. Thirdly, and perhaps more importantly, the issue of corruption in international business is a global problem which has attracted the attention of many nations and has seen major international efforts to combat it.[5] These international efforts are only as strong as domestic efforts to combat the menace. Ghana's efforts to ensure transparency in public procurement in the major construction sector offer an example to other developing countries with similar challenges.

The paper begins with an overview of the relevant aspects of the public law of Ghana and the policy rationale that informed their promulgation. The second and third sections cover, respectively, an outline of the decisions of the Supreme Court of Ghana and discussion of the key legal issues considered by the Court. The implications for major construction contracts in Ghana are then explored together with the extent to which the constitutional provisions and the judicial decisions further public accountability and transparency. The paper concludes with some suggestions for improvements in the current state of the law and advice to policy makers and public institutions involved in the procurement of projects and the international construction industry.

Overview of relevant public law requirements in Ghana

There are two key sources of public law requirements relating to the procurement of major infrastructure assets in Ghana, namely the Constitution of Ghana (hereinafter referred to as the 1992 Constitution) and the Public Procurement Act, 2003 (Act 663). The 1992 Constitution, as the supreme law of Ghana, sets out clearly rules on the structure of the State of Ghana,[6] the

[5] See the United Nation Convention Against Corruption, 2003 (doc. A/58/422) adopted by the General Assembly of the United Nations on 31 October, 2003 and entered into force on 14th December, 2005; the Organisation for Economic Cooperation and Development's(OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,1997; OECD Recommendations for Further Combating Bribery of Foreign Public Officials; African Union Convention on Preventing and Combating Corruption (AU Convention), 2003; The Economic Community of West African States (ECOWAS) Protocol on the Fight Against Corruption,2001

[6] The Constitution of Ghana 1992, Articles 4&5

government,[7] the relationship between the organs of government,[8] the rights and obligations of individuals occupying public office as well as the relationship between the State and its citizens.[9] It guarantees equal rights and makes the Government liable to claims in contract and tort like a private individual albeit subject to certain limitations.[10] The Government's right to enter into contracts is subject to both administrative and procedural qualifications.[11]

Additionally, this vibrant legal system regulates interactions between individuals in various areas of endeavour including business, trade, investment and construction. The common law constitutes the primary source of contract law. Statutory interventions in contract are few and far between and affect concepts such as consideration, privity of contract and sale of goods.[12] Increasingly, the scope of the State's interaction with individuals in the area of contract is broadening. One area where the State is actively involved is in the procurement of infrastructure. The State, represented by public institutions (often as project owners), enters into contracts with foreign contractors to deliver major infrastructure such as roads, thermal plants, dams and water supply systems. Such transactions are governed primarily by contract law. However, the involvement of the State as represented by public institutions often introduces a public law dimension to such transactions.

The Public Procurement Act, 2003 (Act 663) provides a legal and administrative framework for procurement of goods, works and services by the State and public institutions.[13] It has nine parts which cover issues such as the establishment of procurement authority and

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[7] *ibid*, Chapters 8,9&11

[8] *ibid*

[9] *ibid* ,chapter 5

[10] *ibid*, Article 293; State Proceedings Act 1998 (Act 555), ss. 2 and 3.

[11] See the State Property and Contract Act 1960 (C.A.6), ss. 20-25. See also the procurement rules under the Public Procurement Act 2003 (Act 663)

[12] See the Contract Act 1960 (Act 25), ss. 5, 6 and 8-13; the Sale of Goods Act 1962 (Act 137).

[13] Act 663 was one of the outcomes of several years of procurement reforms facilitated by the World Bank through various country procurement assessment reports (CPAR) (e.g. CPAR, 1985 and 1996) and financial support. The aim of the reforms included addressing deep seated public procurement deficiencies through the enactment of a comprehensive legal framework for public procurement. The legislation established a procurement authority, made administrative and institutional arrangements for public procurement and codified the existing law on procurement contained in some thirteen or more different statutes. See, World Bank, Country Procurement Assessment Report –Ghana, Vol. 3 of 5), p.84.

structures,[14] general rules on procurement,[15] methods of procurement,[16] and tendering procedures.[17] There are separate rules on engaging services of consultants.[18] The law applies to all procurement of goods, works and services financed in whole or in part from public funds, loans obtained or guaranteed by the State and foreign aid. The need to comply with requirements under Act 663 in addition to private contract law demands is crucial as violation of the statutory requirements can affect the validity of a transaction. The policy rationale at the heart of both the 1992 Constitution and the legislation on procurement in the current context is that transactions involving public bodies and officials using national resources must reflect respect for the rule of law, probity, accountability, transparency and judicious use of state resources.[19] Consequently, it is required that transactions culminating in the signing and implementation of contracts for the procurement of major infrastructure involving the State and public entities comply with the constitutional and legislative framework in place to operationalize these concepts.

The issues at the centre of all the judicial decisions concern the relevance of Article 181 of the 1992 Constitution to contracts for the procurement of major infrastructure. Articles 181(1) – (5) state:

> (1) Parliament may, by a resolution supported by the votes of a majority of all the members of Parliament, authorise the Government to enter into an agreement for the granting of a loan out of any public fund or public account.
>
> (2) An agreement entered into under clause 1 of this article shall be laid before Parliament and shall not come into operation unless it is approved by a resolution of Parliament.
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> (3) No loan shall be raised by the Government on behalf of itself or any other public

[14] The Public Procurement Act 2003 (Act 663), Pts 1and 2
[15] *ibid*, Pt 3
[16] *ibid*, Pt 4
[17] *ibid*, Pt 5
[18] *ibid*, Pt 6
[19] See the Constitution,1992, the Preamble and the Public Procurement Act, 2003 (Act 663),s.2.

institution or authority otherwise than by or under the authority of an Act of Parliament.

(4) An Act of Parliament enacted in accordance with clause (3) of this article shall provide,

(a) that the terms and conditions of a loan shall be laid before Parliament and shall not come into operation unless approved by a resolution of Parliament; and

(b) that any monies received in respect of that loan shall be paid into the Consolidated Fund and form part of that Fund, or into some other public fund of Ghana either existing or created for the purposes of the loan.

(5) This article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan. [20]

The historical background to these provisions of the Constitution is essential for full appreciation of the impact of the three judicial decisions. Its history, outlined in the *Faroe Atlantic* case, can be traced back to the 1969 Constitution of Ghana. Concern with the accumulation of huge national debt detected after the overthrow of the first President of Ghana in 1966 led the framers of the 1969 Constitution to advocate for the need to make lending and borrowing by the Government subject to parliamentary approval and authorization.[21] Article 133 of the now abrogated 1969 Constitution of Ghana therefore required parliamentary scrutiny as a pre-requisite for lending and borrowing by Government. It made lending by the State subject to the approval of two-thirds majority of Members of Parliament. In the case of borrowing by the State, Parliament was required to enact legislation authorizing such a transaction. Underlying these measures were the principles of transparency and public accountability. The 1969 Constitution was abrogated in 1972 after a military coup d'état. Between 1972 and 1978, Ghana was ruled by successive military regimes wielding both executive and legislative powers. The 1979 Constitution restored Article 133 of the 1969

[20] See the Constitution, 1992, Article 181(1) –181 (5).

[21] The Proposals of the Constitutional Commission for a Constitution for Ghana, 1968, 158.

Constitution and ushered in a new civilian government but it was also abolished barely two years into its existence by the Provisional National Defence Council (PNDC), a military regime which took over the reins of government in 1981.

Under section 42 of the Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law, 1982 (PNDCL 42), a Public Agreements Board (PAB) was established. The PAB was a centralized institution set up, essentially, to review all draft contracts by Government ministries, departments and agencies (MDAs) prior to execution. The PAB was constituted by persons of different disciplines and backgrounds. One of its main roles was to examine the provisions of agreements by the MDAs prior to signature. Members of the PAB were required to scrutinize every contract from their various professional perspectives with the aim of identifying provisions which were not in the national interest. During its sittings, representatives of a sponsoring Ministry would address the PAB on issues relating to, among others, the purpose of such contracts and the project it related to, funding arrangements, and modalities for repayment and how the project was to be executed. Beyond the briefing sessions, the PAB would review such transactions and give its approval for the transaction to proceed. Ultimately, the essence of the PAB's activities was to ensure accountability and transparency in public contracting. With the coming into force of the current Constitution in 1992, the PAB was scrapped with the repeal of PNDCL 42.

As part of the process of returning Ghana to civilian rule, a Committee of Constitutional Experts was mandated to produce a report which eventually became the basis of the 1992 Constitution. In the said report,[22] the Committee recommended the reinstatement of the provisions of Article 133 of the 1969 Constitution on loans contracted or granted by the State. Moreover, it proposed the addition of a new clause on another category of contracts, namely

[22] Report of the Committee of Experts (Constitution) on Proposals for a Draft Constitution of Ghana (1991), Appendix M, Clause 17(5).

international business or economic transactions to which the Government of Ghana is a party.[23] The new clause was accepted by the Consultative Assembly, the body which deliberated on the Proposals for a Draft Constitution, and eventually became embodied in Article 181(5) of the 1992 Constitution. Thus, for the first time, through Article 181(5) of the 1992 Constitution, the parliamentary approval requirement for borrowing by government was extended to cover 'international business or economic transactions' to which GOG is a party.

But, the Report on the Proposals for a Draft Constitution of Ghana provided no policy rationale for subjecting this category of contracts to the same provisions as loan agreements. Again, the Report was silent on why only 'international business or economic transactions' was singled out for this special treatment. However, it appears that the focus on international business and economic transactions rather than all businesses and economic transactions to which the Government of Ghana is a party, was dictated by the perception that such transactions were more often than not susceptible to corrupt practices. In the *Faroe Atlantic case*, the Supreme Court concluded that, by analogy, Article 181(5) of the 1992 Constitution shared common purposes with the original provisions applicable to loan agreements, namely, to ensure transparency, openness and parliamentary consent.[24]

The rationale underpinning Article 181(5) of the 1992 Constitution takes on even greater significance when viewed against the backdrop of recent concerns about corruption in infrastructure procurement in developing countries.[25] According to Transparency International's 2011 Bribe Payers Index Survey which captured the views of three thousand business executives all over the world, there was strong perception that companies from

[23] Ibid, Appendix M, Clause 17(5)

[24] *A-G v Faroe Atlantic Company Limited (the Faroe Atlantic Case)* [2005-2006] SCGLR 271 at 296

[25] N. Standsbury (2005) "Exposing the Foundations of Corruption in Construction" in Transparency International (ed) *Global Corruption Report*, 2005; C. Kenny, "Construction, corruption, and developing countries" (2007) World Bank Policy Research Working Paper 4271; P.A. Bowen, P.J. Edwards, and K. Cattell "Corruption in the South African construction industry: a thematic analysis of verbatim comments from survey participants" (2012) 30 (10) Construction Management and Economics 885-901.

twenty-eight countries contributing 80% of total goods, services and investment in the world were likely to pay bribe to officials of host nations.[26] Furthermore, reports on perception of bribery across business sectors by Transparency International have revealed that public works and the construction sector have been consistently ranked the most bribery-prone.[27] Two reasons offered for this outcome are the huge investment in the sector and the involvement of government officials.[28] With over ninety per cent of countries in Sub-Saharan Africa having serious problems with corruption, efforts by Ghana to curb the menace will be of interest to other countries.[29] Even before corruption in construction and the involvement of foreign companies in bribery gained the current international attention,[30] Article 181(5) envisaged that international business and economic transactions to which the Government of Ghana is a party offered opportunities for corruption and therefore subjected such transactions to parliamentary scrutiny in the hope that such step will ensure openness and transparency.

Nonetheless, the framers of the 1992 Constitution must have been aware that 'international business or economic transactions' was too broad in terms of the type and size of transactions covered and enjoined Parliament to provide clarity on scope and operational procedure by specific legislation. This had not been done by the time the cases outlined hereafter came before the Supreme Court.

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[26] D. Hardoon and F. Heinrich, *Bribe Payers Index* (Transparency International, 2011), pp 4-12.

[27] N. Standsbury (2005) "Exposing the Foundations of Corruption in Construction" in Transparency International (ed) *Global Corruption Report*, 2005; D. Hardoon and F. Heinrich, *Bribe Payers Index* (Transparency International, 2011),pp 14-20. See also C. Kenny, "Construction, corruption, and developing countries" (2007) World Bank Policy Research Working Paper 4271

[28] D. Hardoon and F. Heinrich, *ibid*, p. 14.

[29] Transparency International, *Corruption Perception Index 2013* (2014) p.7

[30] See the United Nation Convention Against Corruption, 2003 (doc. A/58/422) adopted by the General Assembly of the United Nations on 31 October, 2003 and entered into force on 14th December, 2005; the Organisation for Economic Cooperation and Development's(OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,1997; OECD Recommendations for Further Combating Bribery of Foreign Public Officials; African Union Convention on Preventing and Combating Corruption (AU Convention), 2003; The Economic Community of West African States (ECOWAS) Protocol on the Fight Against Corruption,2001

The Faroe Atlantic case

In this case, Faroe Atlantic (the Respondent in the Supreme Court proceedings), a UK registered limited liability company entered into a power purchase agreement (PPA) with GoG for the supply of electricity. Pursuant to the said agreement, Faroe Atlantic renovated its generating plant to increase power production capacity. However, disagreements ensued regarding delivery schedules and amendment of the PPA. As a result, the Government did not provide the required bank guarantees under the PPA. Faroe Atlantic commenced proceedings in the High Court against the Government for specific performance of the agreement or, in the alternative, damages for breach of contract. It then obtained summary judgment against the Government for specific performance. The Government did not appeal against the summary judgment. Subsequently, Faroe Atlantic applied to have the alternative relief of damages for breach of contract granted and assessed. Without ruling on Faroe Atlantic's application, the High Court proceeded to hear evidence on damages and made assessment in its favour.

Aggrieved by the outcome of the process, the Attorney-General, acting on behalf of the State, appealed to the Court of Appeal against the High Court's assessment of damages in favour of the Respondent. However, the summary judgment remained unchallenged. At this stage, the Appellant in a reply to the Respondent's Statement of Case raised, for the first time, the issue of non-compliance with Article 181(5) of the 1992 Constitution. The Court of Appeal dismissed the appeal. The Court rejected the claim that the PPA did not comply with Article 181(5) of the 1992 Constitution on the bases that the submission was not founded on any ground of appeal and was also raised too late in the proceedings.[31] The Appellant appealed to the Supreme Court. As was the case before the Court of Appeal, the Appellant failed to state the issue of non-compliance with Article 181(5) of the 1992 Constitution as a ground of appeal but raised it during the hearing. In response to the Appellant's argument, the Respondent

[31] This issue was considered at great length by the Court but is outside the scope of this paper.

contended that the Supreme Court was estopped, *per rem judicatam*, from questioning the constitutionality of the PPA. It contended further that the issue of non-compliance with Article 181(5) of the 1992 Constitution had not been set down as a ground of appeal. [32]

Concerning the application of Article 181(5) to contracts for the procurement of construction and engineering projects, the Supreme Court considered three issues. First, was Article 181(5) of the Constitution rendered ineffective by virtue of Parliament's failure to enact the necessary supporting legislation? The Court interpreted the constitutional requirement for modifications as only for purpose of greater clarity and that, therefore, the omission by Parliament to provide such legislation did not have this effect. Secondly, was the PPA an international business transaction within the meaning of the constitutional provision and therefore required parliamentary approval. The Court speaking through Date-Bah, Justice of the Supreme Court (JSC), stated as follows:

> In my view, the Power Purchase Agreement was clearly an international business transaction and therefore needed to comply with the obligations imposed in relation to it by Article 181. The Plaintiffs [Respondent] are described in their Statement of Claim as "a limited liability company incorporated in the United Kingdom and carry on business as suppliers or sellers of electrical power or energy and other goods and services." The agreement of this United Kingdom company to generate and supply electricity to the Government of Ghana in Ghana was clearly a transnational transaction which qualifies for characterisation as an "international business transaction" to which the Government of Ghana is a party, within the meaning of Article 181.[33]

In arriving at the conclusion that the transaction in question was an 'international business transaction', the Court had no reason to elaborate the confines of this nebulous clause. It appeared simple; the PPA was a business transaction and the parties involved in the transaction were GoG and an international company. These features made the conclusion that the business was an international economic transaction a straight forward one. The Court simply applied the

[32] This issue was also considered at great length by the Court but is also outside the scope of this paper.
[33] *A-G v Faroe Atlantic Company Limited (the Faroe Atlantic Case)* [2005-2006] SCGLR 271, 297

nationality of the party criterion. Having decided that the PPA was an international business transaction, the Court asserted that the contract ought to have been approved by a resolution of Parliament.[34] The third issue concerned the consequences of the non-compliance with Article 181(5). The Court concluded that the effect was that the contract was null and void and unenforceable on constitutional grounds and that advance payment already made should be refunded to the Government.[35]

For nearly eight years, the *Faroe Atlantic* decision remained the most authoritative on the issue regarding what transactions are subject to the requirements of Article 181(5) of the 1992 Constitution and the effect of non-compliance until an agreement between GoG and a company ostensibly Ghanaian in origin threw up a different challenge in the *Balkan Energy Case*, which is discussed next.

The Balkan Energy case

This case also involved a PPA signed in 2007. Under intense pressure to generate more energy following a power crisis, GoG signed a memorandum of understanding with Balkan Energy LLC, a company incorporated in Texas, United States of America for the refurbishment and commissioning of a 125 megawatt dual fired power barge. To meet domestic legal requirements, Balkan Energy (Ghana) Limited was incorporated in Ghana with Balkan Energy (UK) Limited, a company wholly owned by Balkan Energy LLC, as the sole shareholder. A PPA was subsequently signed between GoG acting through the Minister of Energy and Balkan Energy (Ghana) Limited for the refurbishment and commissioning of the barge and for the supply of power. The latter had the responsibility, *inter alia,* to bring the generating capacity of the barge on stream within 90 working days. The Government, on the other hand, had the

[34] *ibid* , 294

[35] The overall decision of the court (reversal of the decision of the Court of Appeal) also turned on the jurisdictional error made by the High Court in assuming jurisdiction in a matter over which it had become *functus officio*.

duty, *inter alia*, to supply electricity required by the other party for the refurbishment of the barge and to facilitate the procurement of permits and approvals.

Each party alleged breaches of provisions of the PPA by the other party. Balkan Energy (Ghana) Limited commenced international arbitration proceedings against GoG. In an interim hearing before the arbitral tribunal, GoG questioned the validity of the PPA on the basis that it offended Article 181(5) of the 1992 Constitution.[36] Subsequently, the Government, represented by the Attorney-General (AG), pursued this claim in the High Court, Accra against Balkan Energy (Ghana) Limited, Balkan Energy LLC and one of its directors (the Respondents). For purposes of determining civil suits, the superior courts in Ghana are hierarchically arranged. There is the High Court, the Court of Appeal and the Supreme Court in ascending order. Under Article 130 of the 1992 Constitution, the Supreme Court has exclusive original jurisdiction in: (a) all matters relating to the enforcement or interpretation of the provisions of the Constitution; and (b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under the Constitution.

The Plaintiff (GoG represented by the AG) requested that key issues before the High Court (set out below) be referred to the Supreme Court for interpretation in accordance with the provisions of Article 130[37] of the 1992 Constitution. This request was refused by the High Court. Proceeding under the general supervisory jurisdiction of the Supreme Court, the Plaintiff applied to the Court requesting that the Court refers the constitutional matters to itself for interpretation. The questions before the Supreme Court were as follows:

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[36] In the Matter of Arbitration before a Tribunal constituted under the authority of the Power Purchase Agreement between Ghana and Balkan Energy (Ghana) Limited under the UNCITRAL Rules of Arbitration,1976 administered by the Permanent Court of Arbitration, The Hague, Netherlands, PCA Case No. 2010-7.

[37] Article 130 (2) of the 1992 Constitution provides that where an issue arises in any proceedings before a court other than the Supreme Court, that relates to the enforcement or interpretation of the provisions of the Constitution or a claim that an enactment was made in excess of the powers conferred on Parliament or any other authority, that court must stay proceedings and refer the question of law involved to the Supreme Court. The court which was originally seised with jurisdiction is obliged to dispose of the case in accordance with the Supreme Court's decision.

1. Whether or not the PPA dated 27th July 2007 between the GoG and Balkan Energy (Ghana) Limited constitutes an international business transaction within the meaning of Article 181 of the Constitution.
2. Whether or not the arbitration provisions contained in clause 22.2 of the Power Purchase Agreement dated 27th July 2007 between the Government of Ghana and Balkan Energy (Ghana) Limited constitutes an international business transaction within the meaning of Article 181 of the Constitution.

The Supreme Court upheld the request, quashed the earlier High Court decision and assumed jurisdiction to determine the two questions of constitutional interpretation.

In its submission, the Plaintiff argued that the word 'international' in Article 181(5) should be interpreted using two main criteria namely the nature of the business or economic transaction criterion and the nationality or habitual residence of the parties (or in the case of corporate entities, the place of central control and management) criterion. In the view of the Plaintiff, where a transaction entails foreign elements or the parties involved are nationals of or habitually resident in another country, such a transaction should be regarded as 'international' in character. The Plaintiff relied on analogies from international arbitration where both the 'party' and the 'nature of the dispute' criteria have been employed to establish the international nature of arbitration.[38] Regarding what constitutes 'international business' in the context of Article 181(5), the Plaintiff, whilst acknowledging that this is a transaction that crosses national boundaries, argued that the nature of modern international business transactions is such that it was possible for a Ghanaian legal entity to enter into an international business or economic transaction with GoG. This was particularly so as there is neither constitutional nor statutory prohibition against such transactions.

[38] See A. Redfern, M. Hunter, N. Blackaby, and C. Partasides, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, London, 2004) pp.12-16

The Plaintiff further argued that the PPA in issue met both the 'nature of business or economic transaction' and 'party' criteria. It contended that, notwithstanding its incorporation as a domestic company, the first Defendant was a wholly foreign-owned entity with its central management and control outside Ghana. On the nature of the PPA, the Plaintiff argued that the agreement had characteristics which exposed GoG to obligations and liabilities in other jurisdictions, hence, it constituted an international business transaction. In response to the Plaintiff's submissions, counsel for the Defendants, argued that Article 181(5) could come into effect only when Parliament had made the necessary modifications required under the provision. In their view, it was difficult to envisage that the essence of Article 181(5) was to have every transaction with a foreign element placed before Parliament for its approval. It was for this reason that Parliament was required to modify the provision so as to determine its confines. The defendants argued that since this condition precedent had not been fulfilled, the constitutional provision could not be applied.

Again, the respondents urged the Court to consider three criteria when interpreting Article 181(5). To them, a transaction comes under the purview of the Article only if it satisfies all three criteria. Firstly, there should be a transaction to which the Government is a party. Secondly, the transaction should be business or economic in nature. The Defendant defined 'business or economic transaction' as a transaction which is commercial in nature, or relates to or has a bearing on the wealth and resources of the country.[39] Finally, the transaction should also be 'international' in character. On the meaning of 'international', they argued, based on conclusions drawn from some international conventions,[40] that a transaction meets this requirement only if it meets one or more of the following three criteria: Firstly, if it is between two or more countries; secondly, if it involves parties with different nationalities or residence;

[39] *A-G v Balkan Energy (Ghana) Limited & Ors (the Balkan Energy Case)* [2012] 2SCGLR 998 at 1024-1025

[40] The Convention for the Unification of Certain Rules Relating to International Carriage by Air, 1929 (Warsaw Convention) ; The Convention on International Civil Aviation, 1944; The Convention on the Contract for the International Carriage of Goods by Road,1956; United Nations Convention on Contracts for the International Sale of Goods, 1980.

and finally, if it involves crossing national borders. To the respondents, the PPA met none of the above criteria. The respondents disputed the plaintiff's assertion that the first Respondent's central management and control was out of Ghana. They insisted that the first Respondent was a Ghanaian registered company and no grounds existed for the corporate veil to be lifted.

On the first issue regarding the status of the PPA in the context of Article 181(5), the Court held that the agreement constituted an international business transaction. The Court was of the view that the complexity of modern international business and economic transactions is such that it will be implausible to hold that only transactions between GoG and entities resident abroad come within the scope of the Article. The Court maintained that in determining the meaning of 'international' in the context of Article 181(5), the two criteria proposed by the Plaintiff – the 'nature of business or economic transaction' and the 'parties' criteria – should be combined to formulate a test. The Court speaking through Date-Bah JSC stated the test in the following words:

> What then is the meaning of "international" in this context? We think that a business transaction is "international" within the context of Article 181 where the nature of the business which is the subject-matter of the transaction is international in the sense of having a significant foreign element or the parties to the transaction (other than the Government) have a foreign nationality or reside in different countries or, in the case of companies, the place of their central management and control is outside Ghana.[41]

The first prong of the test requires assessment as to whether the subject matter of the transaction possesses a 'significant foreign element'. The court provided some guidance on what constitutes a significant foreign element thus:

> The word "significant" is used in the above definition to denote the fact that the foreign elements or contacts that lead to a judgment of internationality in relation to a transaction have to be

[41] *The Balkan Energy Case, op cit* p.1034.

subjected to a qualitative assessment before reaching that judgment. The significance is in relation to the purpose of Article 181.[42]

The Waterville case

In this case, a former Attorney-General of Ghana brought an action under Articles 2[43] and 130[44] of the Constitution invoking the original jurisdiction of the Supreme Court to declare unconstitutional, among other transactions, two contracts between the Executive and Waterville Holdings (BVI) Limited.[45] These contracts which were for the rehabilitation of three stadia and related services as part of preparations towards the hosting of the 2008 African Cup of Nations were subsequently terminated. Consequently, the Contractor made a claim and secured payment, through mediation led by the Attorney-General then in office, for work done prior to the termination of the contracts. The Applicant sought a declaration that the said contracts never received parliamentary approval prior to execution and thus contravened Article 181(5) of the 1992 Constitution. He further sought an order directed at the contractor to refund all payments made by the State to it pursuant to the signing of the two contracts.

The second Defendant, Waterville Holdings (BVI) Limited, argued that it had responded to an international tender, gone through the process and was validly chosen. It insisted that having fully complied with all requirements under the Public Procurement Act, 2003 (Act 663) and received the necessary approvals from the Central Tender Board, the Government owed an

[42] *ibid*

[43] Article 2 of the 1992 Constitution allows any person who alleges that an enactment or an act or omission by a person is inconsistent with or contravenes a provision of the Constitution to bring an action in the Supreme Court for a declaration to that effect.

[44] Under Article 130 of the 1992 Constitution, the Supreme Court has exclusive original jurisdiction over: (a) all matters relating to the enforcement or interpretation of the provisions of the Constitution; and (b) all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under the Constitution.

[45] The two contracts: (i) Contract for the Rehabilitation (Design, Construction, Fixtures, Fittings and Equipment) of a 40,000 seating Capacity Baba Yara Sports Stadium in Kumasi, Ghana entered into on 26th April 2006 between the Republic of Ghana and Waterville Holdings (BVI) Limited of P. O. Box 3444 Road Town Tortola, British Virgin Islands; and (ii) Contract for the Rehabilitation (Design, Construction, Fixtures, Fittings and Equipment) of a 40,000 Seating Capacity Ohene Djan Sports Stadium and the Upgrading of the El Wak Stadium in Accra, Ghana" entered into on 26th April 2006 between the Republic of Ghana and Waterville Holdings.

obligation to enter into the procurement contract with it under section 65 of Act 663. The 2nd Defendant argued further that, the mediation which resulted in payments to it was based on *quantum meruit* under the law of restitution and not the void contracts. It relied on the Court's earlier decision in City *& Country Waste Ltd. v Accra Metropolitan Assembly* (*the CCWL Case*).[46]

Affirming its earlier decision in *the Faroe Atlantic* case, the Supreme Court held that international business or economic transactions to which the Government is a party which do not receive parliamentary approval are null and void. For the first time, the Court was faced with the issue as to whether parties who have fully or partly performed under contracts which are void by virtue of non-compliance with a constitutional provision had any restitutionary rights. In the view of the Court, to allow for restitution in such cases will be clearly against public policy. The Court distinguished its earlier decision in *City & Country Waste* from the current case where the issue at stake was that of unconstitutionality of contract. Elaborating on this distinction, Date- Bah JSC stated:

> Clearly there should be less room to award a restitutionary remedy where the breach is of a constitutional provision. A contract which breaches article 181(5) of the Constitution is null and void and therefore creates no rights. (See *The Attorney-General v Faroe Atlantic Co. Ltd*. [2005-2006] SCGLR 271 and The *Attorney-General v Balkan Energy Ghana Ltd. 2 Ors.* Unreported, 16

[46] [2007-2008] 1 SCGLR 409. In that case, the plaintiff , a limited liability company incorporated under the laws of Ghana entered into a seven year agreement with the defendant, a statutory body established under the Local Government Act,1993 (Act 462) to carry on the business of waste collection and disposal and to provide landfill services. The defendant terminated the contract two years into its performance on the grounds, among others, that the contract was entered into without the knowledge and advice of the District Tender Board and the approval of the District Assembly contrary to the provisions of sections 39, 87 and 88 of Act 462, section 2 of the Local Government (District Tender Boards) (Establishment) Regulations 1995 (L.I. 1606) reproduced under section 67 of the Standing Order of the Assembly. Aggrieved by the decision of the Defendant, the plaintiff brought an action in the High Court against the Defendant for cost of services rendered and breach of contract among other reliefs. The High Court held that the contract was illegal but allowed restitution under the 'illegal contract'. On appeal by the Defendant, the Court of Appeal reversed the High Court decision on the illegality of the contract and upheld the decision on restitution. On further appeal to the Supreme Court, it was held that the service contract was illegal. However, the Court proceeded to exercise its discretion to grant restitution after taking into account principles such as the seriousness of the illegality involved, the plaintiff's knowledge of the illegality and the purpose of the rule which rendered the contract illegal.

> May 2012). It should not be legitimate to evade this nullity by the grant of a restitutionary remedy.[47]

Thus, the Court made a clear distinction between situations where the illegality is as a result of a violation of a statute and where it is a constitutional violation. In the case of the latter, there was a need for a lot more rigidity. The Court was not oblivious of concerns and arguments about unjust enrichment that failure to allow for restitution may occasion. It was quick to juxtapose such concerns with the need to uphold the supremacy of the Constitution. In the Court's view, the latter principle must take precedence. The core of the Court's argument in support of its position was as follows:

> Although one accepts the cogency of the argument that there is need to avoid unjust enrichment to the State through its receipt of benefits it has not paid for, there is the higher order countervailing argument that the enforcement of the Constitution should not be undermined by allowing the State and its partners an avenue or opportunity for doing indirectly what it is constitutionally prohibited from doing directly. The supremacy of the Constitution in the hierarchy of legal norms in the legal system has to be preserved and jealously guarded. Thus the flexibility that the Supreme Court introduces in the CCWL case is to be exercised sparingly in the case of breaches of the Constitution. The requirement that international business contracts to which the Government is a party should be approved by Parliament has a purpose and it should be made clear to Government and its partners that non-compliance with the requirement, directly or indirectly, will have consequences. We are accordingly inclined to the view that, where article 181(5) has been breached, a restitutionary remedy would be in conflict with the Constitution and therefore not available.[48]

The above excerpt from the Court's decision underscores its readiness to uphold the purpose of Article 181(5) of the Constitution, namely ensuring transparency and accountability above any other principle which is likely to undermine the effectiveness of the provision.

***Klomega* and *Isofoton* Cases**

[47] *Martin Amidu v A-G & 2 Ors* Suit Number J1/15/2012, judgment of 14 June 2013 – not yet reported,16
[48] *ibid*, 16 per Date-Bah JSC

It is also worth pointing out that since the decisions in the three cases examined above, the Supreme Court has had two additional opportunities to examine further aspects of Article 181(5) of the 1992 Constitution such as the meaning of 'Government' within the context of the clause[49] and the question as to whether construction or project contracts entered into pursuant to loan agreements which have previously received parliamentary scrutiny and approval ought themselves be subject to parliamentary approval under Article 181(5) of the Constitution.[50] In *Klomega*, the Plaintiff invoked the original jurisdiction of the Supreme Court seeking, among other things, a declaration that a Concession Agreement between a government agency, the Ghana Ports and Harbours Authority (GHAPOHA) and a UK and Ghanaian companies was null and void for failure to obtain parliamentary approval as per Article 181(5) of the Constitution. The question for determination, among others, was whether the word 'Government' should be interpreted to include state entities or government agencies? The court construed the meaning of 'Government' narrowly as referring to 'the central government and not the operationally autonomous agencies of Government'. In the view of the court, to give the word any other interpretation in the current context, such as defining the word to include government agencies, will pose operational difficulties to Parliament and simply make Parliament's responsibilities in this regard unsustainable. This could not be the intention of the framers of Article 181(5) of the 1992 Constitution. In the view of the Court, for transactions involving government agencies with separate legal personalities, it is expected that there will be ministerial oversight under the existing procurement laws. The court was quick to add that it was not laying down an absolute rule; where the facts suggest that a statutory entity is serving as the *alter ego* of the central government, the court may consider whether any resulting transactions should be subject to Article 181(5).

[49] See Klomega v Attorney-General & 3 0thers (19 July 2013, Supreme Court, Writ No; J1/10/2012 (Unreported))
[50] Amidu v Attorney-General & 2 Others (Isofoton Case) (21 June 2013, Supreme Court (Unreported))

In the *Isofoton* case, the Supreme Court rejected the argument of the respondents that there should be no further requirement for parliamentary approval under Article 181(5) for construction/project contracts where the loan agreement from which they derive has already received parliamentary approval. The court reasoned that the rationale of ensuring openness, transparency and parliamentary consent required for loan agreements is equally required for project agreements entered into pursuant to loan agreements.

Discussion

All the five Supreme Court decisions outlined concern the scope of Article 181(5) of the 1992 Constitution, its relevance to construction contracts and the consequences of non-compliance with it. It was common ground that, for a transaction to come within its scope, it had to meet three essential requirements: (i) it is an international transaction; (ii) it is a business or economic transaction; (iii) the GoG is party to the transaction. However, some issues concerning its application to the particular transactions were contested. Firstly, by what test is it to be determined whether a transaction meets the requisite 'international' character? Secondly, what are the essential attributes of a 'business or economic' transaction? The third requirement, that the GoG is party to the transaction, was in issue in the case of *Klomegah v Attorney-General and 3 others* and has been examined briefly above to assess the full scope of the Article, considering the multiplicity of state organs and institutions with some procurement responsibility. The defence to enforcement of the Article was run that, even if all the three requirements are met, it does not come into effect until Parliament legislates to provide the necessary modifications as expressly required by the Constitution. The Court's view on this is therefore also discussed. Finally, the Court considered the consequences of non-compliance with the Article.

Transactions of international character

The decisions in *the Faroe Atlantic* and *Balkan Energy* cases outlined the criteria to be used to assess whether or not a transaction is 'international' within the context of Article 181(5). In the view of the Court in the *Faroe Atlantic case,* a transaction to which the GoG is a party is 'international' if it is transnational.[51] In that case the other contracting party was a company incorporated in a foreign country. This interpretation was therefore hardly disputed as it accords with the normal usage of the term. Instead, the arguments centred on the absence of the legislative modifications envisaged within the Constitution and the effect of failure to obtain the requisite approval by Parliament.

The internationality question was far more challenging in the *Balkan Energy* case because the transaction in that case was between the GoG and a locally incorporated company. In the course of the judgment the Court formulated two criteria by which a transaction may be regarded as 'international'. The first criterion focuses on the party with which the GoG has contracted. By this criterion a transaction is international if that party has foreign nationality or resides in countries other than Ghana or, in the case of a company, is incorporated or has its place of central management and control outside Ghana. The second approach, referred to here as the 'significant foreign elements' criterion, requires the court to carry out a qualitative assessment of any foreign elements possessed by the transaction. A transaction is international if the court concludes that the transaction possesses a significant foreign element. The fact that the corporate entity contracted with is incorporated in Ghana would be a factor to consider but is by no means decisive. Factors which, when considered cumulatively, may lead to a determination that the transaction with an ostensibly local company entails significant foreign elements and thus requires parliamentary approval include: (a) real ownership of the company is in foreign hands; (b) pre-negotiations leading to the transaction are with foreign parties; (c)

[51] *The Faroe Atlantic Case, op. cit.* p.297

the parties resort to some international mechanism for dispute resolution in the agreement; and (d) the transactions' agreement subjects it to some foreign investment protection clauses.[52]

The overall approach of the Court to the question of the international character of a transaction is in line with well-established practice by courts in other jurisdictions, in appropriate circumstances, to look beyond the place of incorporation to the place of a company's central management and control to determine its nationality for certain purposes.[53] Countries in the European Union, for instance, have utilized two main theories to determine the nationality or personal law (*lex societatis*) of corporate bodies. These are the theory of incorporation[54] generally followed by countries such as the United Kingdom, Ireland, Denmark and Norway and the theory of the real seat (the *siège social* doctrine) generally adhered to by continental European jurisdictions such as Germany, Spain and France.[55] The theory of incorporation determines the nationality of a company by reference to its place of incorporation. This widely accepted concept, which is familiar among common law practitioners, has been endorsed by the European Court of Justice in many judicial decisions including the famed *Centros Ltd v Erhvervs- og Selskabsstyrelsen.*[56]

The theory of the real seat, on the other hand, states that the law applicable to a corporate entity is to be determined not on the basis of its place of incorporation but its real seat (main office or place of business).[57] The determination of a company's real seat is a matter of facts and therefore does not lend itself to clearly agreed and delineated common criteria.[58] The

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[52] *ibid*, 297

[53] See *Daimler Co Ltd* v *Continental Tyre & Rubber Co (Great Britain) Ltd* [1916] 2 AC 307 HL

[54] See *Centros Ltd* v *Erhvervs- og Selskabsstyrelsen* [1999] E.C.R. I-1459 ECJ. See also *Seat of Company as Basis for Jurisdiction, Re (II ZR 28/10) Bundesgerichtshof (Germany)* [2012] I.L.Pr. 28

[55] H. Xanthaki, "Centros: is this really the end for the theory of the siege reel?" (2000) 22 (1) Company Lawyer 2-8. See also M. Siems, "Convergence, competition, Centros and conflicts of law: European company law in the 21st century" (2002) 27(1) European Law Review 47-59.

[56] [1999] E.C.R. I-1459. See also *Registration in Austria of a Branch of an English Company (6 Ob 124/99z), Re* [2001] 1 C.M.L.R. 38; *Uberseering BV v Nordic Construction Co Baumanagement GmbH (NCC) (C-208/00)* [2005] 1 W.L.R. 315; *Cartesio Oktato es Szolgaltato bt (C-210/06)*[2009] Ch. 354; [2009] 3 W.L.R. 777; [2009] All E.R. (EC) 269

[57] Xanthaki, *op.cit*. p.3

[58] *ibid*

incorporation theory and the *siège social* theory also form the basis for determination of nationality of parties under the International Centre for the Settlement of Investment Dispute (ICSID) Convention.[59] The criteria applied by the Court in arriving at its decisions thus reflect current international practices which cover both incorporation and the theory of the real seat.

Business or economic transaction

The second key criterion for determining if a transaction comes within the scope of Article 181(5) of the 1992 Constitution is that it must be a 'business or economic transaction'. In the *Balkan Energy case*, the Court agreed with the Respondents' submission that, to be considered a 'business or economic transaction', the transaction must be commercial in nature.[60] Alternatively, it must impact on the resources of the country. It is difficult to imagine any transaction with any government that does not concern the natural or human resources of the state in question. Having determined that the 'economic transaction' criterion was met, the court did not define the term 'commercial transaction'. It is submitted that it may cover an equally wide range of transactions with the GoG.[61]

The Government is a party to the transaction

The third criterion to consider in determining whether or not a transaction is within the scope of Article 181(5) is that the GoG is a party to the transaction. The central Government was the party to the transactions in issue in each of the three decisions. The Supreme Court did not therefore have to address what the phrase 'to which the Government is a party' in Article 181(5) means. However, it is a common practice for major transactions of Government to be carried

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[59] Convention on the Settlement of Investment Disputes Between States and Nationals of other States, 1965 (the ICSID Convention), Article 25. See also L.A Mistelis (ed.) *Concise International Arbitration* (Kluwer Law International, The Netherlands, 2010), pp.72-73.

[60] *The Balkan Energy Case, op cit* p.1035

[61] See notes on Article 1 of the UNCITRAL Model Law on International Commercial Arbitration (United Nations documents A/40/17, annex I and A/61/17, annex I) (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) which suggests a wide interpretation of the word 'commercial' to include any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

out by government agencies with distinct legal personalities, thus raising the question as to whether such economic or business transactions between government agencies and foreign entities come within the scope of Article 181(5). In other words, is the allusion to 'Government' in the constitutional provision a reference to only the central Government or its agencies as well? The Supreme Court answered this question in the case of *Klomegah v A-G and 3 others*.[62] Government, it held, referred to the central government and not its agencies with distinct legal personalities. Notwithstanding the exception made by the Supreme Court on the basis of the alter ego doctrine, the question still remains as to whether the interpretation excluding transactions between government agencies and foreign entities from the scope of Article 181(5) defeats the purpose of the provision, which is to ensure transparency, probity and accountability. Many public infrastructure projects are carried out by government agencies with distinct legal personalities. To exclude these agencies from the definition of 'Government' is essentially to provide the government an alternative route to complying with the constitutional provision.

Major/minor international business/economic transaction

The volume of transactions with GoG that meet the internationality and business/economic requirements must be huge. This extract from the Defendant's statement of case in *Balkan Energy* highlights the absurdity of subjecting every international business or economic transaction to which GoG is party to the requirement for Parliamentary approval:

> "My Lords, therein lies, and with utmost respect to the Plaintiff, the inherent contradictions of its arguments before this Honourable Court. Taken to the extreme, the Plaintiff would be contending that even though British Airways is registered as an external company in Ghana, the Government of Ghana cannot purchase a ticket from that airline for the President or any public official to travel on the airline's plane, unless there has been specific parliamentary approval of the ticket purchase.

[62] See *Klomegah*, n49 above

> What is worse, even the purchase of a ticket to fly a Government official from Accra to Kumasi would be an 'international business transaction' if the local airline has foreign shareholders"[63]

The Court accepted that such blanket cover could not have been the intention of the framers of the Constitution and held that only 'major' international business or economic transactions to which the Government is a party' need to be subject to parliamentary approval.[64] Whilst the court admitted that the scope of what is a major international business or economic transaction is to be determined by Parliament, it had to deal with how this determination is to be made in the interim pending Parliament's modification of the law. It held that the Attorney-General's certification that a transaction constitutes a major international business or economic transaction should be accorded great weight by the courts but will not be conclusive.[65] It is submitted that it is unlikely that construction projects of the kind often entered into between the Government and foreign construction companies can escape the application of Article 181(5) of the Constitution. In the *Isofoton* case, the court held that the transactions involved were 'major' and must therefore comply with the constitutional requirements.

Effect of Parliament's failure to enact the necessary modifications

In *Faroe Atlantic* the Court stated that the mandate given to Parliament to make statutory modifications to Article 181(5) was intended only to provide clarity and that, therefore, the delay in producing the modifications did not have the effect of rendering the Article inoperative. That this was a purposive interpretation was articulated more explicitly in *Balkan Energy* in which the Court pointed out that a contrary interpretation would have the effect of enabling Parliament, through dereliction of duty, to undermine achievement of the objective of probity, accountability and transparency of the Executive's international business deals.

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[63] Accra, the largest city and capital of Ghana, is on the coast to the Atlantic. Kumasi is the second largest city located about 170 miles north of Accra.

[64] *The Balkan Energy Case, op cit* p.1032

[65] *ibid*

Consequences of non-compliance

Failure to comply with Article 181(5) of the Constitution has two serious consequences. Firstly, it vitiates all contracts and transactions for unconstitutionality. Secondly, the Court is able to make consequential orders pursuant to Article 2(2) of the 1992 Constitution including orders for refund of monies paid under the unconstitutional transaction. The two consequences are examined briefly. Article 1(2) of the 1992 Constitution states that the Constitution is the supreme law of Ghana and that any law which is found to be inconsistent with its provisions is void to the extent of the inconsistency. The Court has a responsibility under Article 2(1) and (2) of the Constitution to uphold the supremacy of the Constitution. Under these constitutional provisions, the Court is mandated to declare any law or act or omission which is inconsistent or in contravention of the Constitution void. In *Faroe Atlantic* , the Supreme Court stated that the effect of this provision was that the non-compliance with Article 181(5) results in a void transaction. Speaking for the court, Date Bah JSC said:

> Thus, if even statute law is void, if in conflict with the Constitution, *a fortiori*, contracts breaching the Constitution should not be enforced … This constitutional provision, in my view, is a peremptory norm that has to be heeded by this Court. To borrow from the language of public international law, it may be viewed as analogous to *ius cogens* whose enforcement cannot be impeded by the normal rules. This Court, to my mind, is thus entitled to refuse to award any damages for the breach of what was an unconstitutional contract, even though the appellant has been adjudged to be in breach of it.[66]

The Court has consistently maintained this stance in all five decisions on the interpretation of Article 181(5). In addition to the justifications provided by the court itself, its stance could also be justified on the basis of the significance of the purpose of the relevant constitutional provision. Ensuring transparency and openness through parliamentary scrutiny is a critical step towards the fight against corruption. A liberal and flexible interpretation will stand the risk of

[66] *The Faroe Atlantic Case, op cit* p.298.

defeating the purpose of the provision. Consequently, transactions or agreements which fail to satisfy this constitutional requirement are void.

Secondly, where necessary, the court has exercised its powers under Article 2(2) of the Constitution to make consequential orders. In *Faroe Atlantic*, the Court ordered the private party to refund all advanced payments it had received pursuant to the void contract.[67] Similar decisions were made by the Court in *Waterville* and *Isofoton.* Possible questions on unjust enrichment and restitution were both addressed and dismissed by the Court in *Faroe Atlantic* and *Waterville*.. In *Waterville,* the concept of restitution received considerable attention but the court came to the conclusion that restitution could not be applied to justify payment made for work carried out on the strength of a contract void for unconstitutionality. Reading the decisions as a whole, it is conclusive that the decisions on refunds and interest were made pursuant to the constitutional power of the court under Article 2(2) of the Constitution and not on the basis of the common law. In the *Balkan Energy Case,* the Court left the matter of application of its interpretation of the constitutional provision to the High Court. Considering the doctrine of *stare decisis*, it would be a most surprising result if the High Court were to declare the transaction as anything but void.

Implications for major construction contracts

In view of the Supreme Court's pronouncements on what constitutes 'major international business or economic transactions to which the Government is a party', major construction and engineering transactions in Ghana are likely to fall within the scope of Article 181(5). The Government is often the client for such projects whilst the contractors are either foreign organisations or locally registered companies under essentially foreign control. *Balkan Energy* suggests that the fact that an essentially foreign contracting entities set up local companies to handle such transactions in Ghana would not necessarily preclude the transactions from the

[67] Ibid, 292&302

requirement for parliamentary scrutiny and approval.[68] Indeed, when the 'significant foreign element' criterion is applied, many construction and engineering transactions involving locally registered contractors could be adjudged to have significant foreign elements even where the central management and control of the company is also exercised locally. The shareholding structures of these entities are often substantially foreign whilst the procurement processes leading to the award of contracts are often spearheaded by foreign entities. For many of these major construction and engineering projects, international arbitration is the standard dispute resolution clause. It is therefore fair to conclude that most major construction transactions would fall within the scope of Article 181 (5).

If in doubt, the prudent thing to do would be to insist on the transaction receiving parliamentary approval prior to commencement. Cutting corners with the connivance of public servants and powerful interest groups in power would be unwise as the non-compliance with public procurement law could surface many years after the transaction has closed and the vested interest power groups are out of office. Policy makers and legislators in Ghana would also do well to comply with the requirements of Article 181(5) as failure to comply with this provision can lead to unsavoury consequences.

To the management of Government MDAs involved in procurement of major infrastructure projects, there is the need to take greater account of not only the implications of Article 181(5) but also the decisions of the Supreme Court. The ramifications cover the procurement process and timetables imposed for the execution of such contracts by the Public Procurement Act 2003 (Act 663) and international forms of contract such as those of the FIDIC[69] family. Section 30 of Act 663 distinguishes between procurement by tender and other procurement routes for the purposes of identifying when the procurement contract will enter

[68] See above, fn 41 above.

[69] FIDIC is an acronym for Fédération Internationale Des Ingénieurs-Conseils, the international federation of national associations of consulting engineers. It publishes the standard form contracts most commonly used (with or without amendments) for international construction and engineering projects.

into force. In the case of procurement by tender, section 65 of Act 663 requires notice of acceptance of the tender to be served within thirty days of the acceptance. Thereafter the contract execution must be within thirty days after the dispatch of the notice of acceptance of the winning tender.[70] The contract comes into force on the commencement date indicated in it. For other procurements which are not by tender, section 30 of Act 663 stipulates that the manner of the entry into force shall be notified to contractors at the time those offers, proposals or quotations are requested. For international business or economic transactions to which the Government is a party, the effect of Article 181(5) would be to strike down any conflicting elements in these rules in the procurement legislation and the standard form contract used.

Judicial Interpretation of Article 181(5) and Openness and Transparency

To what extent does this exercise in judicial interpretation further the concepts of openness, transparency and accountability? In a country where state institutions are struggling to deal with the issue of corruption, the Supreme Court's efforts to interpret and enforce the constitutional provision on parliamentary scrutiny and openness in infrastructure procurement is encouraging. Through the five decisions discussed above, the Court has provided the much needed judicial elucidation, demonstrating a determination to bring to life the principles of probity, transparency and openess which form the basis of Article 181(5) of the Constitution. But, there are still issues with the extent to which the judiciary could go in furthering these principles. The Court can only intervene when a violation is brought before it. Thus, violations which do not come before the Court may pass without any consequence. Consequently, Article 181(5) will remain a critical anti-corruption tool only to the extent that all stakeholders including the Executive, Parliament, citizens[71] and the Judiciary are willing to ensure compliance.

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[70] See Act 663, s. 65(2).

[71] Remarkably, three of the five cases on Article 181(5) (namely the Waterville, Isofoton and Klomegah cases) were initiated by citizens of the State under Article 2(1)(a)&(b) of the Constitution,1992.

Further, the logistical demands that compliance with this constitutional mandate will place on Parliament may very well add another layer of bureaucracy. Then there is the issue of technical capacity to scrutinize the various transactions brought before it. Coupled with the sheer number of transactions that the Legislature may have to deal with and notwithstanding that the Supreme Court has read into the provision the word ‘major’, there is a likelihood that it will take a longer period for transactions to be concluded unless streamlined administrative systems and procedures are in place to achieve expeditious conclusion of the parliamentary processes.

For countries which share similar concerns with corruption and lack of transparency, the example from Ghana provides a point for reflection. Appropriately crafted laws and a determined judiciary could be drivers of openness and accountability.

Conclusions

Starting from Ghana’s 1969 Constitution, all successive constitutions during civilian governments and military decrees during military regimes have sought to ensure probity, accountability and transparency in international economic or business transactions to which the Government of the day is a party. The principal mechanism for furthering this interest has survived as Article 181(5) of the 1992 Constitution now in force. It requires parliamentary approval of all such transactions.

Three main areas of uncertainty remain even after the elucidation provided by the Supreme Court. Firstly, although it may be easy to determine whether or not the internationality requirement is met for transactions between the GoG and a company incorporated outside Ghana, the same cannot be said for many other transactions. For such other transactions it has to be determined whether or not the particular transaction possesses ‘significant foreign elements’. Secondly, the Court recognised that imposing the parliamentary approval rule on all transactions meeting the requirements for an ‘international business or economic transaction’

would be unworkable because Parliament would be swamped with the necessary approval processes. The court's solution to this problem was to limit the transactions requiring approval to only 'major' transactions but with very little guidance on the boundary between major and minor transactions. Thirdly, the court has decided that government agencies with separate legal personality do not come under the expression 'Government' in the context of Article 181(5) but left room for an exception under the alter ego doctrine. The question still remains as to the circumstances under which the alter ego doctrine will apply to a transaction between a government agency and a foreign entity. It is to these areas of uncertainty that Parliament needs to direct its attention when a decision is eventually taken to perform the duty imposed on it by the Constitution. The onus put on Parliament to develop modifications to Article 181(5) must have been the consequence of awareness on the part of the framers of the 1992 Constitution of the need for more detailed statutory guidance to make the Article more workable. Parliament is yet to perform this function despite the repeated entreaties from the Supreme Court going back for nearly a decade. This failure has produced the grossly unacceptable spectacle of the Executive, through its agencies, going through the complex processes of initiating international procurement of asset of considerable value and being allowed by the law to walk away without paying for the work done. Cynics may be forgiven for treating these unfortunate episodes as just instances of deliberate inaction by vested interests within the Executive aimed at producing an environment permissive to the unsavoury practices in international construction. It is an irony that the interest of Ghanaians in probity, accountability and transparency, which has found expression in Article 181(5), should result in such a serious risk to the reputation of their country within the international construction industry. Policy makers and legislators need to address promptly the remaining uncertainty in the law. For government procurement agencies, there is the need to take into account the full effect of Article 181(5) of the 1992 Constitution

highlighted by these cases when making decisions on the procurement of major infrastructure projects.

Standard form contracts for the international procurement of construction projects are often seen as transnational law governing the relationship between the parties to the contract, thus avoiding surprises from local law. This paper provides stark illustration of how the national law of the project owner could have devastating consequences for contractors and providers of related professional services where attention is not paid to the public law aspects. It may be irrelevant that the obligation to comply with such constitutional or administrative requirements may be on the project owner. Parties to major construction transactions, especially foreign contractors would therefore do well to ensure that both private and public law requirements are met.