ENERGY POLICY MEETS ARBITRATION

1. The hackneyed reasons in favour of arbitration as an effective process, over litigation in national courts, stand: transparency, fairness, speed, neutrality of procedural rules and cost. All this, despite the obvious fact that in Ghana the removal of important commercial disputes from the national courts has diminished the opportunities to calibrate and advance the national jurisprudence in contract, corporate and commercial law.

2. However, relevant to the power sector in Ghana, the recent Final Award dated 26.01.21 from the registry of the Permanent Court of Arbitration in *GPGC Limited v the Government of Ghana* was a ruthless display of arbitration's efficiency in tackling the raft of likely arguments that arise from, in my view, many power purchase agreements struck between the private sector and Government or State entities in Ghana. As in this case, some power purchase agreements are at times drafted with excess and with inconsistent and / or impossible clauses. This results in an excited display of argument on the existence of an effective contract, fulfilment and the interplay between conditions precedent and subsequent, frustration and termination.

3. The Tribunal awarded GPGC *"a total of US$ 134,348,661 in respect of its Early Termination Payment claim."*

4. With a decision set out over 194 pages, this arbitration, undertaken pursuant to the 2013 Arbitration rules of the United Nations Commission on International Trade law, the Tribunal found that the Government was in breach of the Emergency Purchase Agreement entered into between GPGC and Government of Ghana, which had been ratified by the Parliament of Ghana on 23.07.15.

5. The facts of the dispute were:

> *"147. By early 2015, GoG was faced with an electricity supply crisis in that demand outstripped domestic supply. In February 2015, GPGC and GoG entered into negotiations for the provision by GPGC of a fast-track power generation solution involving the relocation of two existing GE LM 6000 aero derivative gas turbine combined-cycle power plants from Italy to Ghana (the "Project"), capable of providing GoG with an emergency power supply of up to 107 megawatts ("MW") for a guaranteed term of four years (the "GPGC Equipment").*
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> *148. Following the identification of a potential site for the power plants in Ghana at Aboadze, GoG and GPGC entered into the EPA at the centre of this dispute on 3 June 2015. The EPA between GPGC and GoG was one of a number of such PPAs entered into by GoG. The EPA was a tolling agreement; 6 GPGC was to bear all of the costs of dismantling the plants in Italy, transporting them to Ghana and installing, operating and maintaining them there to the point that the plants achieved commercial operation and they were ready to earn tariff revenues.*
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> *149. In the course of June 2015, a GoG team, led by Mr Francis Dzata, the Technical Advisor to the Minister of Power ("Mr Dzata"), undertook a technical inspection of the power plants in Italy and approved their use for the Project. Work to dismantle the plants in Italy began in April 2016 and they were shipped to Ghana in November 2016.8*
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> *150. Following a General Election in Ghana in December 2016 and a change of government in January 2017, the incoming government was concerned that the commitments into which its predecessor had entered would result in a substantial excess supply to the National Grid.*
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> *151. Unbeknownst to GPGC at the time, a committee had been established by the Ministry of Power prior to the change of government to conduct a review of the PPAs into which GoG*

had entered (the "PPA Committee"). It had continued its work after the election and had submitted a final draft report, the PPA Committee Report, in April 2017.9 Thereafter, on 28 August 2017, the Attorney-General of Ghana submitted her own Review of the PPAs to the Minister of Energy for consideration by the Cabinet (the "A-G's Advice").

152. In November 2017, the Minister of Energy reported to Parliament that the PPA Committee Report had recommended that four PPAs with a combined capacity of 1,810MW be deferred until 2018-2025, three PPAs with a combined capacity of 1,150MW be deferred beyond 2025 and 11 PPAs with a combined capacity of 2,808MW, among them the GPGC EPA, be terminated."

6. The intrigue in this dispute is increased because the performance of the contract straddled a change of political party in government, and an accompanying change in political policy toward power generation.

7. The new Government had taken the commercial decision that it would be cheaper to terminate certain existing power contracts with settlement pay outs, than pay the liabilities over the life of the contracts. The Government put the estimated cost for the terminations at $402.39 million, compared to an average annual capacity cost of $586 million each year or a cumulative cost of $7.619 billion from 2018 to 2030.

8. As the Tribunal found, the purported termination of the EPA by the Government came after the Government's decision to terminate the contract for reasons of costs. The Attorney-General's Advice was simply an exercise in searching for reasons to terminate the contract. This resulted, helpfully for learning purposes, in the Government of Ghana relying on a number of legal points arising from perceived moments of inaction or stasis.

9. Arbitration was an ideal forum.

10. The need for a neutral and impartial body to determine a commercial dispute arising from a significant political decision is abundantly clear. The genuine reason for the purported termination of the contract was at the heart of the claim. It is clear from the decision that the Tribunal cut the Government no slack on adherence to the arbitration management timetable. For example, on the question of costs and chasing fees, the Tribunal did so relentlessly and effectively, despite pleas premised on the delay inherent within Government's processes. Procedurally, the Tribunal successfully maintained the preparation and movement of the arbitration, another obvious advantage over national courts.

11. The Tribunal made an order as to specific disclosure, and was faced with the Government of Ghana's application to limit disclosure (as it did) to a heavily redacted PPA Committee report and Attorney-General of Ghana's Advice, and not disclose the Cabinet Memorandum and Cabinet Decision on grounds of *"confidentiality"*, submitting that:

    298. […] "To compel the Respondent or its counsel to disclose a report from a lawyer, the Attorney-General and the Government's chief legal advisor, to its client, or draw adverse inference from such disclosure will do untold damage to this time-honoured principle and near-absolute principle and will, not only undermine a principle which forms one of the cornerstones of the practice of law and of the legal profession, but also the legal system of Ghana."

12. The Tribunal did not grant the application to limit disclose and invited submissions on the drawing of adverse inferences from the failure to disclose.

13. I suggest that the equal treatment of the parties by the Tribunal was actively preserved, alongside the notion of continuity of government and its liabilities, especially arising from commercial

agreements governed by arbitration. In this decision, an arguably meritorious political judgment to change policy and impact existing contracts, proved insufficient to challenge the sanctity and certainty of contract.

14. Again of interest within the EPA was the interpretation of the Conditions Precedents, and their interplay with the Conditions Subsequent. In this regard the Tribunal made the important point that on interpretation of the contract GPGC's Condition Precedent did rely on the fulfilment of other Conditions Precedent or Subsequent – which had required the Government's co-operation.

    "366.[…] the ability of either Party to fulfil all of the Conditions Precedent for which it was responsible was not a matter necessarily within the sole control of that Party; in some cases, it was dependent upon the prior fulfilment of a Condition Precedent (or a Condition Subsequent or other contractual obligation) imposed on the other – [The Tribunal then considered certain fact specific examples.]

    367. On the basis of this analysis alone, it is evident that GoG's submission that:

    ".... without the prior fulfilment of the conditions precedent, there cannot be conditions subsequent at all to be satisfied."

    is unsustainable.

15. There is a clear need to be extremely cautious about the content of any clauses containing conditions precedent or subsequent. From experience, the turgid and unwieldy nature of these clauses is not uncommon, and often founds the basis of any challenge as to performance of the contract.

16. The decision on its facts works through many natty arguments from the existence of the contract to its plethora of breaches and termination. Anyone with a power purchase agreement in Ghana must highlight this decision as notice of potential hazards ahead.

17. However, on any reading of the decision, the power of the arbitral process in successfully managing and determining this important commercial dispute for Ghana abounds.

18. The continued growth of arbitration within Ghana to cover both national and international disputes will certainly continue to grow.

By Kweku Aggrey-Orleans (Barrister, 12 King's Bench Walk)