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Revitalising Gower’s Legacy: Reforming Company Law in Ghana

Justice S. K. Date-Bah*

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This paper discusses some of the reform proposals put forward in a draft Companies Bill currently under consideration by the Cabinet of the Government of Ghana. As a background to this legislation, this paper begins with an overview of its genesis, the country's preceding companies legislation, and the dynamics of the current reform process.

I. INTRODUCTION AND BACKGROUND—PROF. GOWER'S 1963 GHANA COMPANIES ACT—APPOINTMENT OF THE 2008 BUSINESS LAW REFORM COMMITTEE OF EXPERTS

The Companies Ordinance, 1907 was the first companies legislation to be enacted in the Gold Coast, as Ghana was then called.¹ The legislation was based on the 1862 English Companies Act,² which, even in 1907, was regarded as obsolete and was on the verge of being repealed and re-enacted, with substantial changes, as the Companies (Consolidation) Act, 1908 in England. Professor L.C.B. Gower, then of the London School of Economics and Political Science, who was commissioned half a century later to reform the Ghanaian legislation, observed in this regard in his well-known Report that, "It was nearly 50 years behind the times when enacted; it is now out -of-date."³ Professor Gower undertook his commission by the Government of the newly independent State of Ghana in 1958 to inquire into the working and administration of the existing company law and to make recommendations for its reform. These recommendations resulted in the Ghana Companies Act 1963. It has taken almost another half-century for major reforms to Ghana's companies legislation to be proposed.

The legislation enacted on the recommendation of Professor Gower placed Ghana on the company law map of Commonwealth jurisdictions. Professor Gower's report, which preceded the enactment of the new legislation, has served since then as virtually a textbook on the Act and has acquired an enviable reputation, not only in Ghana, but elsewhere, and has been used in several universities as a book of instruction. The Ghana Companies Code, 1963 (Act 179) (later to be known as an Act, pursuant to the Laws of Ghana (Revised Edition) Act, 1988 (Act 562)), has also inspired reform in other Commonwealth jurisdictions.

Among the innovations that Professor Gower introduced into Ghanaian law were the following:

1. See SEC No-Action Letter, *AngloGold Limited*, 2004 WL 111629 at 22.
2. 1862 English Companies Act 25 & 26 Vict. C. 89. See SEC No-Action Letter, *AngloGold Limited*, 2004 WL 111629 at 22.
3. See FINAL REPORT OF THE COMMISSION OF ENQUIRY INTO THE WORKING AND ADMINISTRATION OF THE PRESENT COMPANY LAW OF GHANA (COMMISSIONER: L.C.B. GOWER) 2 (1961).

- the law stated as a Code, restating much of the case-law;
- introduction of the single-document constitution to replace the traditional memorandum and articles;
- abolition of the ultra vires doctrine (at least of its worst aspects);
- the single-member company;
- compulsory no-par-value shares and the abolition of authorised capital;
- rationalisation of the law on pre-incorporation contracts;
- authorisation of the repurchase of shares;
- abolition of the doctrine of constructive notice of registered documents;
- a statutory statement of directors' duties; and
- dissolution without going through the full winding-up procedure.

In spite of the forward-looking nature of many of its provisions, the Companies Act, 1963 is now ripe for review. Other Commonwealth jurisdictions with English-derived companies legislation have reviewed their legislation during the period that the Ghanaian Companies Act has been in force. Among these Commonwealth jurisdictions are: Australia, Canada, Mauritius, New Zealand, South Africa and the United Kingdom. Lessons learnt from such reviews are available to inform an update of the current Ghanaian legislation.

Nevertheless, the excellence of Gower's original work has put a particular responsibility on any reformer wishing to build on his work. Such a reformer should eschew change for the sake of change. In other words, there should be clearly discernible policy rationales for all the changes recommended. Reform should be based on practical problems that have been encountered by practitioners in the actual operation of the Act or on needed practical conceptual advance, such as that enacted in other relevant jurisdictions, such as those mentioned above.

It is in this context that a Business Law Reform Committee of Experts was established by the Attorney-General of Ghana in April 2008 to offer independent advice on the reform of the business law of Ghana. The theme adopted by the Government for this reform programme was: "Improving the Ease of Doing Business." The Committee has an interesting multidisciplinary membership, drawn from both the private and public sectors. Its membership includes the Managing Partner of PriceWaterhouseCoopers, who is a chartered accountant;⁴ the Chief Executive of the Ghana National Chamber of Commerce, who is both a

4. Mr. Felix Addo.

lawyer and an economist;⁵ the Dean of the Business School of Cape Coast University, a company law specialist who is also in legal practice;⁶ a Chief State Attorney in the Attorney-General's Department;⁷ a senior member of the Bar, with considerable experience of company law matters;⁸ two other Chief State Attorneys assigned to the Registrar-General's Department (which is currently the Government agency responsible for administering the Companies Act);⁹ and a former President of the Association of Ghana Industries, also both an economist and a lawyer.¹⁰ I have had the privilege of chairing this group.

The Committee decided, in conformity with its terms of reference, to make the reform of company law its first priority. A major element in the approach adopted for its work was to hold extensive stakeholder consultations on the existing Companies Act, 1963. Among the stakeholders consulted were: the Securities and Exchange Commission of Ghana, the Ghana Stock Exchange, the Ghana Association of Restructuring and Insolvency Advisors (or GARIA, for short), the Office of the Registrar-General, the Bank of Ghana, the Internal Revenue Service of Ghana, and the Department of Social Welfare of Ghana. Individual lawyers were also consulted either by way of memoranda they submitted to the Committee or by personal appearance before it. The culmination of these consultations was the National Stakeholders' Consultative Conference that the Committee organized at a convention centre in Ghana's capital, Accra, on July 17, 2008, and the three further conferences/workshops that the Committee convened subsequently in the regional capitals of Tamale and Kumasi, and again in Accra. The Committee's work has also been facilitated by the input of Professor Peter McKenzie QC of New Zealand, who was engaged as the Committee's external consultant.

II. PROPOSALS FOR REFORM: MAIN CHANGES PROPOSED IN THE DRAFT COMPANIES BILL 2010

Following the extensive consultative process outlined above, the Committee reached policy decisions, later endorsed by the Attorney-General, which have formed the basis for drafting instructions for a Bill to enact a new Companies Act for Ghana. Below is a selection of the proposals embodying these policy decisions.

-
5. Mr. Salathiel Amegavie.
 6. Prof. Bondzi-Simpson.
 7. Mrs. Naana Dontoh.
 8. Mr. Felix Ntrakwah.
 9. Nana Ohene-Obeng and Mrs. Jemima Oware.
 10. Mr. Oteng-Gyasi.

The Proposals

1. Change from Regulations to Constitution and Abolition of the Need to File a Constitution as Part of Incorporation Process

The single constitutive instrument of a company, which under the existing law is called “the Regulations” of the company, is now to be called the “constitution.” Moreover, the proposals remove the need to register a constitution in order to incorporate a company. Where the promoters of a company do not register a constitution for the company, the Second Schedule of the Act is deemed to be the default constitution of the company, if it is a private company. The Third Schedule is the deemed constitution, if it is a public company. Finally, the Fourth Schedule is the deemed constitution, if it is a company limited by guarantee. A company limited by guarantee is, in the legislation derived from the United Kingdom of Great Britain and Ireland, one in which the members promise to contribute a guaranteed sum of money when the company is liquidated. It is a vehicle for not-for-profit activities.

2. Full Abolition of the Doctrine of *Ultra Vires*

The Committee and the Bill propose a complete abrogation of the *ultra vires* doctrine. Although the Companies Act, 1963 abolished the worst aspects of the doctrine of *ultra vires*, it in fact retained the *ultra vires* rule in a restricted form. Professor Gower recommended that a company should have as regards third parties the same powers as an individual, but that an objects clause should continue to operate as a contract between the company and its members as to the powers that the directors can exercise. (An objects clause, as is well-known in Commonwealth jurisdictions, is one which specifies the objects that the company may lawfully pursue.) The draft Companies Bill, 2010 goes further to provide that a company may be incorporated without an objects clause and in fact makes this the default situation. This implies that, for such a company, the doctrine of *ultra vires* becomes completely irrelevant. There are no objects in relation to which there can be a determination of excess of powers. The company then has the capacity of a natural person *simpliciter*.

3. Suffixes to Company Names

Under the Companies Act, 1963, there was only one abbreviation required to be the last word of the name of a company limited by shares. This was the word “limited” or Ltd. The draft Bill under consideration

introduces new requirements regarding the last words of the registered names of companies. These are as follows: plc for public companies limited by shares; Ltd. for a private company limited by shares; and Lbg for companies limited by guarantee.

4. Major Transactions Requiring Authorization of Shareholders

In order to increase the influence of shareholders, certain transactions, characterised as “major,” will require a special resolution before a company can validly enter into them. These are transactions involving:

- The acquisition or an agreement to acquire assets worth more than 75% of the value of the company before the acquisition or the agreement to acquire;
- The disposition or an agreement to dispose of assets worth more than 75% of the value of the company before the disposition or the agreement to dispose;
- A deal that has or is likely to have the effect of the company acquiring rights or interests, or incurring obligations or liabilities, whose worth is more than 75% of the value of the company.

The definition of a “major” transaction does not, however, include an agreement by the company to give a charge, secured over assets of the company, representing more than 75% repayment of money or the performance of an obligation. The major transaction provision does not apply also to the appointment of a receiver under a charge instrument covering the whole or a substantial part of the property of the company.

The effect of this proposal is to remove from the board of directors the authority to enter into such major transactions without the authorisation of the majority of shareholders. It therefore strengthens shareholder democracy.

5. “Buy-out” Remedy for Dissenting Minority Shareholders

The proposals adopt for minority shareholders a remedy that exists under Canadian and New Zealand legislation. It is the remedy of “buy-out.” There are provisions in the draft Bill which confer on shareholders who have opposed particular transactions of a company, but have been outvoted, the right to demand to have their shares bought out. This remedy provides an outlet for minimising dissent in a company and an additional relief against oppression of minority shareholders. The Business Law Reform Committee considered that Ghanaian law would

be well served by its adoption. The right is triggered in relation to certain transactions which need, under the draft Bill, the approval of shareholders by special resolution, or, in the case of variation of rights, the written agreement of 75% of the shareholders. The transactions concerned are as follows:

- Approving a “major transaction,” within the meaning earlier explained;
- Variation of class rights;
- Altering the company’s constitution so as to vary or dispense with the objects or stated business activities of the company; and
- Approving an arrangement, merger or both under the provisions of the draft Bill.

A shareholder who has voted against these transactions, but in respect of which the approval has gone through, is entitled to request that the company should purchase his shares at a fair value. The fair value is to be settled either by agreement between the company and the shareholder, or by arbitration in accordance with the provisions of the draft Bill. The courts are given power to grant an exemption from the obligation of the company to purchase shares where a purchase of the shares of a dissenting shareholder would impose a disproportionately damaging obligation on the company. Also, the courts may grant an exemption where the company cannot reasonably be required to finance the purchase, or where it would not be just and equitable to compel the company to purchase the shares concerned. The draft Bill makes provision for the reinstatement of shares if, within one year from the date of passing of the special resolution complained of by the dissenting shareholder, the company has been unable to carry out the proposed objects or any of the business activities contemplated under the special resolution.

6. Creation of the Office of the Registrar of Companies

Professor Gower had anticipated that the Registrar of Companies would take charge of the administration of the Companies Act, 1963, after a brief interim period during which the Registrar-General of Ghana would be in charge. However, this interim arrangement has persisted until today. The new draft Bill endorses Gower’s original idea by making provision for the establishment of a new statutory body to be known as the Office of the Registrar of Companies to administer the new Act, when passed. The Committee was of the strong view that the new

Act should be administered by a Registrar dedicated exclusively to business units and their administration, in the interest of greater efficiency and the easing of doing business. The new body's proposed functions include the registration and regulation of all types of businesses: companies, incorporated private partnerships, and registered business names. The body is also to be responsible for the appointment of inspectors under the new Act and will assume the functions of the Official Liquidator under the Bodies Corporate (Official Liquidations) Act, 1963. Furthermore, it is to undertake public education programmes on the operation of companies.

7. Electronic or Digital Means of Registration, Communication and Service

The draft Bill gives power to the Registrar of Companies to authorise the performance electronically, through an electronic system approved by the Registrar, of any of the following acts:

- the incorporation or the registration of a company;
- payment of any fees; and
- submission of annual returns and the filing of any notice or document.

8. Financial Statements

The draft Bill updates the accounting terminology contained in the 1963 Act. Thus, "financial statements" is used instead of "accounts" and "income statement" instead of "profit and loss account." Companies are now to be required to include a statement of cash flows in their financial statements. Financial statements and auditors' reports are to be prepared in accordance with International Financial Reporting Standards approved by the Institute of Chartered Accountants of Ghana.

9. Retention of the Prospectus Provisions Pending Their Inclusion in a Separate Securities Industries Statute

Originally, it had been the intention of the Business Law Reform Committee to remove the prospectus provisions from the proposed new Companies Act and to incorporate it in an amendment Act to the Securities Industry Act, 1993, which regulates securities in general.¹¹ It

11. Securities Industry Act of 1993 PNDCL (Provisional Defence Council Law) 333.

was clear that several Commonwealth jurisdictions (such as, Canada, New Zealand and Mauritius) had taken the initiative to remove prospectus provisions from their companies legislation and had rather embodied such provisions in their securities legislation. This is a logical reform since it is not only companies that are authorised to offer securities to the public. Other entities, such as statutory corporations, including local governments, trusts or partnerships, can offer securities to the public and should be subject to prospectus provisions on the same footing as companies. However, it transpired that the Securities and Exchange Commission of Ghana was working on a comprehensive revision of the Securities Industry Act. The Business Law Reform Committee therefore thought that it would be inappropriate to enact an amendment Bill on only one issue ahead of the comprehensive new legislation. At the same time, the Committee did not want to delay the enactment of the proposed new Companies Act. Accordingly, the Committee abandoned its initial position to recommend removal of the prospectus provisions from the new Companies Act. This will now have to be done by amendment contained in the comprehensive securities legislation, when enacted. In the meantime, a Companies Act still retaining the prospectus provisions would not be all that anomalous since several Commonwealth jurisdictions, including Australia, Singapore, South Africa and the U.K., that have recently revised their companies legislation have kept prospectus provisions in their Companies Act.

10. Derivative Actions

The draft Bill introduces new provisions enabling shareholders to enforce the rights of their company through derivative actions. Under this procedure, shareholders are enabled to apply to the court for leave to bring an action in the name, and on behalf, of the company. The court has discretion to grant such leave. This procedure is additional to the representative action provided for in Gower's original proposals, and it strengthens the capacity of shareholders to hold the directors accountable. As is well known, under the rule in *Foss v Harbottle*,¹² courts operating under English-derived companies legislation have not entertained actions by individual shareholders seeking a remedy for a wrong committed against the company by directors. The derivative action is a derogation from the rule in *Foss v Harbottle* in the interest of the protection of minority rights. Where the company is controlled by directors or majority shareholders who are set on preventing the company from seeking a remedy for a wrong done to it, the derivative

12. See *Foss v Harbottle* (1843) 67 ER 189.

action is a useful option to have. The derivative action enforces the company's rights, distinct from the personal rights of the shareholders.

CONCLUDING REMARKS

This account of the endeavour to revitalise the legacy of Professor Gower is offered to update colleagues on developments in the company law field in Ghana and to generate a discussion on what reform is appropriate in a jurisdiction such as the Ghanaian. As law reform is always a complex, nuanced matter, a critique of this Ghanaian initiative would be most welcome. Providing a conducive framework for the conduct of business is an important aspect of the relationship between law and development. This project on company-law reform therefore needs to be viewed in this context as an important measure affecting the development of Ghana. Of course, facilitating the use of the corporate form carries a downside risk to consumers of products and services of companies. Unscrupulous entrepreneurs may use the corporate form to dupe and defraud. The response to this risk should be the promulgation of strengthened consumer-protection laws, rather than maintaining restraints on the ease of incorporation and the doing of business through companies.