

# LOCAL CONTENT IN THE UPSTREAM PETROLEUM INDUSTRY IN GHANA THE LAW & PRACTICE

## INTRODUCTION

In 2007, Ghana discovered oil in commercial quantities in deep water offshore. The first commercial production however began in December 2010. The discovery of oil in commercial quantities was expected to create a burst of activities in the petroleum industry in Ghana.

Generally, the petroleum industry is divided into three major sectors. Upstream, midstream and downstream. The upstream sector typically covers exploration, production, development and decommissioning activities associated with the find and production of oil and natural gas. This article focuses on the upstream sector and Ghana's local content law.



For offshore deep water discoveries as is the case in Ghana so far, Floating Production Storage and Offloading (FPSO) facilities have become the preferred means for the production and processing of oil and gas resources. FPSO facilities which are converted oil tankers or in other instances, facilities built from scratch are transported to and moored at the designated area for production of oil and gas.

## LOCAL CONTENT LEGISLATION

Lurking in the background of commercial discovery of oil is the oft mentioned resource curse-the inability of countries to take the full benefit of their natural resources to improve public welfare needs among others.

One pragmatic step taken to break the resource curse is the enactment of Petroleum (Local Content and Local Participation) Regulations, 2013 (L.I. 2204). Some authors and international law cases suggest that local content requirements by various countries are contrary to international law. Nonetheless, the object of Ghanaian legislation is to among others promote job creation through the use of local expertise and to develop local capacities in the petroleum industry. The Petroleum Commission as established by the Petroleum Commission Act, 2017 (Act 821) regulates, promotes and among other duties, oversee the implementation of the local content and local participation in the upstream petroleum industry.

Local content has been defined in L.I 2204 as the quantum or percentage of locally produced materials, personnel, financing, goods and services rendered in the petroleum industry value chain and which can be measured in monetary terms. Failure to comply could result in criminal liability. Some of the key features of L.I. 2204 in respect of local content are the following requirements:

1. Non-indigenous Ghanaian companies are to incorporate a joint venture company (JVC) with an indigenous Ghanaian company and afford that indigenous Ghanaian company an equity participation of at least 10 percent
2. Submission of a plan specifying the role and responsibilities of the indigenous Ghanaian company
3. Submission of a plan specifying the strategy for the transfer of technology and know-how to the indigenous Ghanaian company
4. Preparation and submission of annual local content plans for approval,
5. Insurable risks relating to petroleum activity in the country are to be insured through an indigenous brokerage firm or where applicable, a reinsurance broker
6. Legal services required in the country are to be obtained from a Ghanaian legal practitioner
7. Financial services in relation to petroleum activity are to be obtained from a Ghanaian financial institution.

### **IN PRACTICE**

In practice, an International Oil Company (IOC) typically enters into a petroleum agreement with the Republic of Ghana and the Ghana National Petroleum Corporation (GNPC) to engage in activities in the upstream petroleum industry. For the purpose of local content, the IOC which has entered into the petroleum agreement is said to be the contractor for the activities under the petroleum agreement. The contractor may subcontract some or all of the activities to various subcontractors. The agreements entered into between the contractor and subcontractors are often referred to as service agreements. It is also common to find various services further subcontracted by the subcontractors.

Some of the common service agreements associated with the production of oil and gas through FPSO facilities are Engineering, Procurement, Construction, and Installation (EPCI) agreements, Charter agreements and Operation & Maintenance agreements.

To bid for and provide such services or engage in petroleum activities, a non-indigenous Ghanaian company (usually comprising a foreign company or a company incorporated in Ghana which does not have at least 51% of its equity owned by a citizen(s) of Ghana) is required to incorporate a JVC in Ghana. This implies that a foreign company must first incorporate a company in Ghana and use that company incorporated in Ghana to form the JVC. It is either an indigenous Ghanaian company or such JVC's formed by a non-indigenous Ghanaian company which can bid for and provide services to a contractor, subcontractor, allied entity or GNPC. In providing these services, the quantum or percentage of local content among others must be met.

### **PRACTICAL AND CONCEPTUAL CHALLENGES**

One stark practical and conceptual challenge emanating from the local content legislation is the requirement for non-indigenous Ghanaian companies to form joint venture companies (which

constitute separate legal entities) with indigenous Ghanaian companies to execute or provide services.

By law, the parties to the joint venture are required to state their roles and responsibilities in the joint venture company. The parties to the joint venture company are also required to share profits and losses. The parties are also expected to have joint control and rights to the net assets of the joint venture company.

A critical examination of the law and practice would seem to reveal a mix-up of two types or concepts of joint venture. The requirement for the formation of a company clearly implies the creation of a separate legal entity owned by the joint venture parties. The assets of the JVC are its own assets without the joint venture parties owning any of them. The joint venture parties own only shares in the JVC. The liabilities of the JVC should in the usual corporate sense not be the liabilities of the joint venture parties.

The requirement for the joint venture parties to continue to show (after the formation of the JVC) the different roles played by each of them, the sharing of profits and losses, joint control over net assets of the JVC are conceptually problematic. This is because not only do those requirements fit better under a different type or concept of joint venture (the pulling of resources together by the joint venture parties through an agreement for the execution of a project) but also in conflict with the well-established principle of the creation of a separate legal entity after incorporation.

#### **RECOMMENDATION AND CONCLUSION**

It is recommended that the type or concept of joint venture which requires the formation of a separate legal entity should be reconsidered when the opportunity arises for a review. If the objective of the law is to monitor the specific roles played by the joint venture parties and for them to share profits and losses then the formation of a company resulting in the creation of a separate legal entity may not be the solution. The solution may then lie in the other type of joint venture which based on a joint venture agreement and does not result in the formation of a new company.

It is the authors' hope that this short article will provide a basic understanding of what the local content legislation in Ghana is about and how it applies in practice in the upstream petroleum industry.

Dated the 29<sup>th</sup> day of November 2017

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