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INSOLVENCY AND BUSINESS RESTRUCTURING GUIDE FOR AFRICA

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Introduction

About LEX Africa

Doing business in Africa is associated with diverse opportunities, challenges and risks and must accordingly be founded on a strong legal base.

LEX Africa is an Alliance of leading African law firms founded in 1993 with over 600 lawyers in 32 African countries. LEX Africa effectively covers the entire African continent and has a more than 30 year track record of assisting and advising clients on their African business and other activities. Each member is a full service business law firm with expert knowledge and experience in both local law and the local business, political, cultural and economic environment. LEX Africa accordingly provides a “one stop shop” and Pan African legal team for cross border and domestic African legal solutions to clients wherever they wish to do business in Africa.

We are proud to launch this updated Guide on African Insolvency and Business Restructuring. Many thanks are due to all our contributors and editors.



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Preface

Welcome to the sixth edition of the Insolvency and Business Restructuring Guide for Africa. As head of the Insolvency, Business Rescue and Restructuring practice group at Werksmans, it is a pleasure to bring you this publication which is published in collaboration with our LEX Africa member firms which cover 32 jurisdictions across the continent.

Over the years the guide has proved to be a useful resource for those clients/law firms that are looking for representation in insolvency and restructuring matters in the various jurisdictions. The purpose of the guide is to share pertinent data and information which will provide you with a better understanding of each of the relevant jurisdictions' approach to insolvency and restructuring, and the mechanisms available for dealing with distress.

This publication will continue to be updated (every few years) with further contributions from existing and additional contributors from the various members of Lex Africa, and will hopefully keep you abreast of the latest legal frameworks and developments affecting this area of practice.

With the current adverse impact on world economies caused by a myriad of factors, being able to understand the workings of available insolvency regimes is critical. There are diverse challenges and risks which any investor, financial institution or international corporate might face in investing in any jurisdiction around the world. Particularly, in emerging markets like those found in Africa, it is important to understand the limitations, scope and efficacy of the insolvency regimes applicable in each jurisdiction and the ability to foreclose and extract value in a distressed debt situation.

As can be seen, there have been certain legislative reforms in various African jurisdictions in the insolvency space. Although there are significant and crucial differences between individual African jurisdictions in the realm of insolvency legislation, current reforms appear to reflect an attempt to harmonise insolvency and restructuring regimes across the continent.

Many of these legislative enhancements have been imported from international and domestic insolvency regimes which have been adapted to bring local regimes into line with international best practice.

This edition of the Insolvency and Business Restructuring Guide sets the tone for the African continent and establishes a guideline which is both informative and useful. There is no doubt that the key issues raised in the guide will assist in gaining a better understanding of the various applicable insolvency regimes operative across the continent. It is hoped that our insight into these issues will continue to be both informative and practical.



Preface continued

LEX Africa is the oldest and largest African legal alliance with a long history of assisting clients across the continent. Lex Africa has been ranked consistently in Band 1 by the Chambers & Partners Legal Directory and is a highly respected and influential African alliance of top end law firms.

I would like to take this opportunity to acknowledge and thank those of my colleagues both within Werksmans and the LEX Africa Alliance who contributed their time and specialist expertise to assist in the production of this publication. In particular, I would like to thank Celeste Oates of Lex Africa, Kaymana Han and Clio Patricios of Werksmans for their effort and input in editing and updating the publication.

We hope this guide, which is unique in both its content and reach, will be used to your benefit in the years to come.

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ANGOLA | FBL ADVOGADOS

COUNTRY INFORMATION

Republic of Angola, located on the West Coast of Africa.

TYPE OF GOVERNMENT

Presidential Republic

POLITICAL SYSTEM

Democratic system.

LEGAL SYSTEM

Roman-Germanic matrix, based on a written Constitution.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. Liquidation?)

Insolvency proceedings are applicable to natural persons, commercial entities, associations and foundations and adjacent inheritance. Insolvency is not applicable to public entities, except companies in the public domain and with minority public holdings and banking and non-banking financial institutions linked to currency and credit, insurance activity, the stock market and which provide services involving the holding of funds or securities of third parties and undertakings for collective investment.

Before Law No. 13/21 of 10 May, bankruptcy and insolvency were only dealt with in the 1961 Code of Civil Procedure, which were out of line with the national and international socio-economic context.

What are the tests for financial distress (i.e. business rescue or administration?)

The recovery process can be extrajudicial or judicial.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

The insolvency process is a universal execution process whose appraisal and decision is the responsibility of the Court. The process usually commences with an application

from the insolvent entity or from any creditor and is followed by a hearing (for which the debtor is notified). Following an application to Court, an insolvency administrator is appointed, who must be named to represent the insolvent estate.

Formal restructuring procedures

The formal restructuring procedure in Angola is known as judicial recovery. The objective of judicial recovery is to overcome the difficult economic situation in which the debtor finds itself, by drawing up a Judicial Reorganization Plan. Judicial recovery can be requested by the debtor who, at the time of the request, has been regularly carrying out its activities for more than 12 months. The initial petition is filed with the Court. After acceptance of the request and after the appointment of the trustee, the Court orders the suspension of all actions and executions against the debtor, orders the citation of creditors and the requirement for giving public notice. The judicial reorganization plan is presented by the debtor, to the Court, within 45 days of the publication of the decision that commences judicial recovery, and any creditor may challenge the judicial reorganization plan within 30 days from the publication of the list of creditors.

Informal insolvency or restructuring procedures

Angolan law only provides for extrajudicial recovery, which is the recovery of a debtor in financial difficulty, who commits to the payment of creditors. Such a process should only be initiated when the company can overcome its financial problems and can, with a high degree of probability, remain in business after the conclusion of an agreement. Creditors representing 10% of unsubordinated claims may, by written communication, propose the negotiation of an extrajudicial recovery plan, which must comply with various requirements and be approved by 3/5 of the creditors' represented. The extrajudicial recovery plan may or may not be homologated. In so far as informal restructuring is concerned, homologation refers to a court endorsement, whose judgment is enforceable. The extrajudicial recovery plan can only be challenged within 30 days from the date of the last publicity act.

LIQUIDATION

What is the aim of liquidation?

The main aim of liquidation is to close the company and cease its commercial activity in order to allocate the assets of the company to the payment of the debts and thereafter to distribute the remainder of the assets to the shareholders of the company.

Process required to commence a liquidation

The liquidation process may be regulated by the Articles of Association of a company and, if so, would commence in accordance with such provisions.

Alternatively, a resolution could be passed by the shareholders of a company for the commencement of a voluntary liquidation or the Court, when approached, can place a company in liquidation.

Liquidation can also occur when - after the decision declaring insolvency becomes final and after the meeting for the appraisal of the report has been held - the insolvency administrator proceeds to sell all seized assets of the insolvent estate.

Banking financial institutions, on the other hand, may be dissolved by decision of the shareholders or by virtue of the revocation of authorization from the National Bank of Angola. Upon dissolution, financial institutions are immediately placed in liquidation.

At what point does the liquidation process commence?

The liquidation process commences from the moment the shareholders pass a resolution to commence with the insolvency process (or an agreement is concluded to this effect) or when an application is made to Court.

Duration of the liquidation process

The insolvency process must be closed within a maximum period of 1 year, determined from the date of the meeting to assess the report, or at the end of each subsequent period of 6 months.

Extent of court involvement in the liquidation process

The Court declares the judicial liquidation of the company and its assets. Thereafter, the Court is not typically involved in the process, unless approached on an ad hoc basis to resolve certain disputes.

Management of the company whilst in liquidation

The management of the company whilst in liquidation is placed in the hands of the insolvency administrator, who assumes the functions of the management of the company and has an obligation to act in the best interests of the company.

Filing of claims

Creditors may submit proof of their claims to the insolvency administrator after the insolvency process commences and request payment of their claims. After the declaration of insolvency, all the assets of the company are under the control of the insolvency administrator, who will promote the

sale of the assets and thereafter distribute payments to the creditors in a particular order of preference.

Factors which influence the period of the administration in a liquidation

Some of the factors that may delay the winding-up process include:

- assets of the company being concealed;
- assets having been sold by the insolvent entity; or
- legal transactions concluded after the declaration of insolvency by the Court (even though such actions are ineffective).

Effect of liquidation on employees

Upon the commencement of the insolvency, employment contracts automatically terminate. However, the claims of employees must be paid first place.

Effect of Liquidation on contracts

Contracts that are in force as at the date of the commencement of insolvency can be ratified by the insolvency administrator if they are beneficial to the insolvent entity. In the absence of ratification, the creditor shall request compensation as a result of the termination of the agreement.

Effect of liquidation on shareholders

If there is surplus cash, after all creditors have been paid, the remaining assets (or proceeds from the assets) are distributed among the shareholders.

Effect of liquidation on creditors

Creditors may submit proof of their claims to the insolvency administrator and are paid from the proceeds of the sale of assets in a particular order of preference.

Pending claims, litigation and arbitration

Once insolvency is declared, all pending judicial and arbitration proceedings in relation to the company's assets are pending, unless they are subject to appeal. The aforementioned does not apply to processes where the insolvent entity is the claimant.

How is the liquidation process terminated?

Once the insolvency is declared, notification of the insolvency is published in the official Gazette and in the most read newspaper in the district. The process is terminated following the sale of all assets and rights of the insolvent entity to its assets. The deregistration process arises following the winding-up process.

Director or officer liability

Directors may be held personally liable for their acts or omissions in relation to a company.

Consequences of director or officer liability

A director or officer may be subject to civil and criminal liability for damage that he or she has caused to the insolvent's assets.

Civil consequences

A director or officer of a company may be held personally liable for any damages suffered by the company, the shareholders and/or the creditors as a result of his or her acts or omissions.

Criminal consequences

If a director or officer commits an act such as fraud, provides false information or misappropriates assets, he or she can be held criminally liable.

JUDICIAL RECOVERY

What is the aim of judicial recovery?

The judicial recovery process does not reach the liquidation stage. This is because it aims to facilitate the recovery of the company through the formulation of a recovery plan.

Process required to commence judicial recovery

The company is placed in judicial recovery at the instance of the company itself, the remaining shareholders, or by creditors who hold 10% of the non-subordinated credits of the company.

At what point does judicial recovery commence?

It begins with the institution of a petition, accompanied by:

- i) a detailed exposition of the concrete causes of the debtor's patrimonial situation and the reasons for the difficult economic situation in which the company finds itself; and
- ii) accounting statements for the last two fiscal years.

Duration of the judicial recovery process

In the decision to grant judicial recovery, the judge sets the period for execution of the judicial recovery plan, which must not exceed 1 year.

Extent of court involvement in the judicial recovery process

After the judicial recovery is granted, the judge is only involved if there is a breach by the company of its obligations in terms of the judicial recovery plan or if the obligations in the judicial recovery plan are fulfilled and the Court declares, by sentence, the end of the judicial recovery process.

Management of the company whilst in judicial recovery

The management of the company whilst in judicial recovery is placed in the hands of the administrator, who assumes the functions of the management of the company and has an obligation to act in the best interests of the company.

Filing of claims

If any creditor contests the judicial recovery plan, the judge calls a general meeting of creditors to resolve on the recovery plan. If the plan is rejected at the general meeting of creditors, the judge has the power to declare the insolvency of the company.

Factors which influence the period of the administration in a judicial recovery

In the judicial recovery process, anything that prevents the administrator from obtaining reliable information necessary to monitor the company's activities can delay the process.

Effect of judicial recovery on employees

The complete list of workers must be included in the initial petition for judicial recovery, including the respective functions, salaries, compensation and other remuneration to which they are entitled, with an indication of the month to which they relate and a breakdown of the amounts pending payment.

Effect of liquidation on contracts

The administrator may enter into new contracts when necessary, if approved by a judge, in order to assist in the exercise of his functions. Existing contracts are reviewed and included in the judicial reorganisation plan.

Effect of liquidation on shareholders

Shareholders have the obligation to provide information to the administrator and abide by the provisions of the judicial recovery plan.

Effect of liquidation on creditors

A creditors' commission is constituted which is an advisory body that exercises a supervisory and/or advisory function over the judicial body that administrator, the execution of the reorganization plan, progress of the process and compliance with the law.

Pending claims, litigation and arbitration

The suspension of all legal actions and executions, including in respect of taxes, against the company is ordered.

Voidable transactions

Every act which may affect the insolvent entity's assets is automatically ineffective unless it is ratified by the Judicial Administrator. It will only be ratified if there is a benefit to the insolvent entity's assets.

How is the judicial recovery process terminated?

Judicial recovery ends with the fulfilment of overdue obligations. The judge declares, by sentence, the end of the judicial recovery and determines the payment of the administrator's fees, the determination of the balance of the judicial costs, presentation of the judicial administrator's report, dissolution of the creditors' committee and communication to the commercial registry office.

Director or officer liability

Directors may be held personally liable for their acts or omissions in relation to a company.

Consequences of director or officer liability

A director or officer may be subject to civil and criminal liability for damage that he or she has caused to the insolvent's assets.

Civil consequences

A director or officer of a company may be held personally liable for any damages suffered by the company, the shareholders and/or the creditors as a result of his or her acts or omissions.

Criminal consequences

If a director or officer commits an act such as fraud, provides false information or misappropriates assets, he or she can be held criminally liable.

SECURITY

Types of security

There are two types of security, with different levels of seniority available in Angola - personal security and security in rem. The in rem guarantees would, in an order of preference, prevail over personal guarantees. The most common of the in rem guarantees is the mortgage over real estate and the commercial pledge, which is often used to take over shares in a company.

The personal guarantees, on the other hand, that are

commonly used are bails, guarantee deposits and bank guarantees.

Taking of security

In order to take a mortgage over real estate, the law requires the granting of a public deed (i.e. formalizing the mortgage before a notary by way of a written document signed by the parties) and thereafter the registration of the deed in the Land Registry Office. A pledge over shares or over any movable property will require an agreement between the parties. With regard to a pledge over shares, such security must be registered in the Commercial Registry Office.

Security trustees and special purpose vehicles

Security trustees and special purpose vehicles are not used in Angola.

Most robust form of security available to lenders

A mortgage over real estate and a pledge over shares is the most common and robust form of security available in Angola.

Registration of security

Securities in Angola need to be registered. Registration is done depending on the nature of the security or of the secured asset, the Land Registry Office (real estate), the Commercial Registry office (company related matters), by the Vehicles Registry Office (vehicles) or even by the Central Registry Securities Office - CRGM - Central de Registo das Garantias Mobiliárias – entity responsible for registration of all other types of securities which are not registered by the previous registry offices whatever their name, nature of the secured asset and way of constitution. Eventually, in future, CRGM will be the sole registry office congregating all registry offices in one, with different departments.

Stamp duty

Stamp duty is payable in respect of security taken in terms of Angolan law, but the costs depend on the nature of the security taken and the duration of its existence. As such, security with a duration of less than 1 year attracts stamp duty of 0.3% and security with a duration equal to or above 1 year attracts stamp duty of 0.2%. Security without any duration or with a duration equal to or above 5 years attracts stamp duty of 0.1%. Such tax rates are applied to the total value of the security. The duty is payable to the tax authority by the beneficiary of the security, until the end of the following month in which the security was taken.

Registration costs

The registration costs for security vary as such costs are dependent on the value of the loan that is being secured. The cost of registering security is payable when the documents are submitted to the relevant registry.

Requirements for the assignment or transfer of security

In order to transfer or assign real security to another person or entity, a public deed needs to be completed, and an irrevocable power of attorney is generally executed authorizing a person to give effect to the transfer and registration in the Land Deeds Registry. Movable property or shares, on the other hand, can be transferred or assigned pursuant to an agreement to that effect concluded between the parties together with re-registration, in the case of shares, in the Commercial Deeds Registry.

Instances in which security might be vulnerable to attack

Angolan law creates an order of preference in respect of security taken. It provides that senior security (Privilégios Creditórios) in favour of the Government and/or Local Authorities (e.g. General Tax Authority), or in favour of other third parties (e.g. employees), ranks ahead of in rem guarantees that are granted in favour of third parties. Thereafter, personal security is ranked (i.e. bails and guaranteed deposits).

Methods of enforcement of security

Security is enforced in Angola by making application to Court. No form of security can be enforced outside of Court.

Problems experienced when enforcing security

The main concern surrounding the enforcement of security in Angola relates to the bureaucracy in the public service coupled with the lack of knowledge of persons employed in the relevant offices and Courts regarding the procedures for the enforcement of security.

Financial assistance requirements

If a company wishes to grant security to another company, approval from its competent corporate bodies (which can be the shareholders and/or the board of directors) is necessary.

- There must be no doubt about the authenticity of the document and the decision made in such judgment;
- The judgment must be final and not subject to appeal or retrial, according to the applicable foreign law;
- The judgment must have been decided by a Competent Court according to the Angolan law on conflicts of jurisdiction;
- The same case must not have been pending before or decided by an Angolan Court (except where the enforcement of a foreign judgment is being sought when an Angolan Court has recognized that such foreign Court or arbitral tribunal has jurisdiction);
- The defendant to the proceedings must have been duly notified directly or indirectly, save where Angolan law would exempt such notification;
- The judgment must not contain decisions contrary to Angolan public policy principles; and
- Such judgment must not contravene Angolan private law, should such law be found to be applicable pursuant to Angolan provisions on the law of conflicts.

Requirements for the recognition of a foreign trustee, business rescue practitioner or an insolvency practitioner

No provision exists in Angolan law for the recognition of a foreign trustee, business rescue practitioner or insolvency practitioner.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Foreign judgments may be recognized in Angola. To do so, the foreign judgment would need to be analysed by the competent Angolan Supreme Court, whereafter, if it deems it fit, it can confirm the judgment.

Requirements for recognition of a foreign judgment

In order for a foreign judgment to be recognized in Angola, the following requirements will need to be satisfied:





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BOTSWANA | ARMSTRONGS ATTORNEYS

COUNTRY INFORMATION

Botswana is a country on the border of South Africa. The languages spoken in the country are English and Setswana.

TYPE OF GOVERNMENT

Botswana is a stable multiparty democracy.

POLITICAL SYSTEM

Parliamentary multiple party democracy.

LEGAL SYSTEM

The legal system of Botswana is a mixture of Roman-Dutch and English common law principles. There are also local systems of tribal law and custom in rural districts which govern everyday disputes and property relations but are subordinate to statutory law. The Superior Courts in Botswana are the Court of Appeal, the High Court and the Industrial Court.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. Liquidation?)

In terms of the Companies Act CAP 42:01 (Act), a company will be deemed to be insolvent where:

- A creditor to whom the company is indebted in the sum exceeding P1000.00 has served on the company a demand requiring it to pay such sum and the company has for 3 weeks thereafter neglected to pay such sum or to secure or compound for it to the reasonable satisfaction of the creditor;
- The execution of any other process issued on a judgment by a Competent Court in favour of a creditor, against the company, is returned by the sheriff or messenger with the endorsement that no assets can be found to satisfy the debt; and/or
- It is proved to the satisfaction of the Court that the company is unable to pay its debts and in determining whether the company is unable to pay its debts the Court will take into account the contingent and prospective liabilities of the company.

What are the tests for financial distress (i.e. business rescue or administration?)

A company may be placed under judicial management where:

- the company, because of its management or due to any other cause, is unable to pay its debts or is unable to meet its obligations; or
- the company has not become, or has been prevented from becoming, a successful concern and there is a reasonable possibility that if the company is placed under judicial management it will be able to pay its debts, or meet its obligations, or become a successful concern.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

In Botswana, there are two formal processes available to a company that is either insolvent or experiencing financial difficulties - liquidation or judicial management, each of which is initiated by way of an application to Court.

Formal restructuring procedures

In terms of Part XV of the Act, a board, liquidator or any creditor or shareholder (with the leave of the Court) may propose a compromise if it has reason to believe that the company is, or will be, unable to pay its debts.

In addition, Part XVI of the Act provides for schemes of arrangement, which allow a company to enter into a compromise or arrangement with its creditors or members (or any class thereof). Such schemes require approval by the requisite majority of the affected creditors or members and sanction by the High Court, after which the arrangement becomes binding on all parties within the relevant class.

Informal insolvency or restructuring procedures

At common law, a company can enter into a compromise agreement or arrangement with its creditors and provided that it is accepted by each and every person to whom it is proposed, it will be binding on all creditors.

LIQUIDATION

What is the aim of liquidation?

The purpose of liquidation is to remove the management

of a company's affairs from the directors, freeze the rights of creditors in order to prevent certain creditors from being preferred and/or enhancing their position at the expense of others, to appoint a liquidator whose duties are to ascertain, realise and distribute the assets to all creditors and finally to put an end to the company's corporate existence by the formal process of dissolution.

Process required to commence a liquidation

The liquidation of a company is commenced by way of an application to Court, prepared on notice to the company. Such application takes the form of a petition and can be brought by a creditor or shareholder of the company or by the company itself.

At what point does the liquidation process commence?

The liquidation process commences upon the lodging of the winding up application with the High Court.

Duration of the liquidation process

The length of the entire winding up process depends on the size of the company, the number of assets that need to be realised, the number of claims that need to be proved and whether or not there are any disputes between the liquidator, creditors and/or any third party claiming against the estate. Proceeds to creditors can generally only be paid after confirmation of the liquidation and distribution account which is only prepared and lodged by the liquidator once assets are realised and once cash is available for distribution.

Extent of court involvement in the liquidation process

The High Court is initially involved in the liquidation process at the application stage. However, once a final winding up order is granted the Court does not play a significant role in the process, save for supervising the liquidator, through the office of the Master of the High Court, or save for sanctioning or approving certain actions of the liquidator that require the sanction of the Court.

Management of the company whilst in liquidation

Upon a winding up order being granted, the board of directors and shareholders are divested of all management powers and play no further role in the management or control of the company. In a winding up, all the property and management of the company is deemed to be in the custody and under the control of the Master of the High Court until a provisional liquidator has been appointed and has assumed office. Upon the appointment of a liquidator, the company's property and the management thereof vests in the liquidator and the liquidation process is controlled and managed by such person subject, however, to any directions of the creditors given to the liquidator in formal meetings.

Filing of claims

In a winding up, creditors must prove their claims against the company at a creditors' meeting called by the liquidator. A claim can be proved at any time before the final distribution of the estate. Every such claim shall be proved by affidavit as nearly as may be in the forms prescribed in the Insolvency Act CAP 42:02 and the affidavit must be made by the creditor, or any person fully cognisant of the claim, and must set out full particulars of the claim. The affidavit and supporting documents must be delivered to the office of the Master of the High Court no later than 24 hours before the authorised time of the creditors' meeting. The Master of the High Court or liquidator may examine the claim. Once a claim has been proved against the estate, it shall be delivered by the Master of the High Court to the liquidator who has a right to dispute such claim, and if so, must give notice to both the Master of the High Court and creditor of such dispute and the reasons why the claim should be expunged. The creditor has a right of reply, which must be delivered to the Master of the High Court. The Master of the High Court must decide whether or not to expunge the claim.

Factors Which Influence the Period of the Administration in a Liquidation

- Delays in court processes - delays are often experienced with the bringing of winding up applications due to the backlog in case hearings at the High Court; and
- Disputes - between the liquidator and third parties claiming against the estate can often delay the winding up process because distributions cannot technically be made until the liquidator files a liquidation and distribution account with the Master of the High Court. If there are, however, contingent liabilities which cannot or have not been resolved, this will often result in the liquidator holding off on the filing of a final account and/or the distribution of assets until such liabilities are quantified, settled or resolved.

The size of the company and the number of assets that are to be realised and distributed amongst creditors can also delay the process.

Effect of liquidation on employees

Employees are preferential creditors insofar as the first 3 months of their salaries are concerned. With respect to their employment, such employment can be determined by the liquidator and no special process is required to be followed to terminate their employment.

Effect of Liquidation on contracts

The liquidator has the power to set aside any transaction in terms of which immovable property was purchased by or from the company, the transfer of which has not been effected in favour of the company or terminate any lease entered into by the company as lessee provided that such

cancellation will not affect any claim by the lessor against the company for damages he may have sustained by reason of the non-performance of the terms of the lease. Technically all other contracts cannot be terminated and if terminated will give rise to a claim for damages that would need to be proved by the creditor at a meeting of creditors.

Effect of liquidation on shareholders

Shareholders are dispossessed of any control over the company and they rank behind the concurrent creditors for the purpose of receiving any distribution in respect of any claim that arises out of a loan made by them to the company. Any transfer of shares or alteration in the status of the company's shareholding made after the commencement of the winding up will, unless sanctioned by the Court, be void.

Effect of liquidation on creditors

When a company is placed in liquidation, the order of preference in which creditors rank is as follows:

- Liquidation costs;
- Secured creditors - payment is made to secured creditors from the proceeds of a sale of the secured assets. Where a secured creditor's claim is not secured in full, the unpaid balance is treated as a concurrent claim;
- Preferent creditors - these are creditors who do not hold security for their claims but rank above the claims of concurrent creditors. They are paid from the proceeds of the unencumbered assets in a pre-determined order. Preferent creditors include employees and the Botswana Unified Revenue Services; and
- Concurrent creditors - these are creditors who are paid from the proceeds of unencumbered assets (the free residue) that remains after preferent creditors have been paid in full. They are paid in proportion to the amounts owed to them.

Freezing of Claims

The rights of creditors as at the date of liquidation are suspended in order to prevent creditors from being preferred and/or enhancing their position at the expense of others. They cannot execute against the assets of the company nor can they proceed with, or commence with, any action against the company without the sanction of the High Court.

Control of the Company

The liquidator controls and manages the company for the duration of the liquidation, subject to the reasonable directions of the creditors, which are given to the liquidator at formal meetings called for this purpose.

Pending claims, litigation and arbitration

No proceedings shall be proceeded with or commenced with against the company except with the leave of the Court and subject to such terms as the Court may impose following a winding up. Any attachment or execution put in force against the assets of the company after the commencement of the winding up is void.

Voidable Transactions

The following dispositions of property are voidable and may be set aside by a liquidator:

- Any disposition which is made for no value - the liquidator must prove that the insolvent made the disposition and that it received no value for it. If the disposition was made more than 2 years before the liquidation, it can only be set aside if the liquidator proves that immediately after the disposition was made, the liabilities of the insolvent exceeded its assets. However, if the disposition occurred within 2 years of the liquidation, it will be set aside, unless the person claiming under, or who benefited from, the disposition proves that immediately after it was made, the assets of the insolvent exceeded its liabilities;
- Dispositions that have the effect of preferring one creditor over another - the High Court may set aside a disposition made by the insolvent within 6 months of the sequestration or liquidation of its estate, which had the effect of preferring one creditor above another and where, immediately after the disposition was made, the liabilities of the insolvent exceeded the value of its assets;
- Dispositions which are intended to prefer one creditor above another - the High Court may set aside a disposition made by the insolvent at any time before liquidation where he or it made the disposition with the intention of preferring one of his or its creditors above another and when made, its liabilities exceeded its assets;
- Dispositions made in collusion with another person and having the effect of prejudicing its creditors or preferring one above another - the High Court may set aside a transaction entered into by an insolvent before liquidation in terms of which the insolvent, in collusion with another person, disposed of its property in a manner which had the effect of prejudicing its creditors or of preferring one of its creditors above another. To establish a collusive dealing, the liquidator must prove that the insolvent and the person knew that (i) the debtor was insolvent; and that (ii) the disposition would have the result of prejudicing its creditors or preferring one creditor above another; and
- Dispositions in fraud of creditors - in terms of the common law, creditors have a right to set aside a disposition which has been made in fraud. The relevant action at common law is known as the *actio paulina*. The test under the common law, to determine whether or not the transaction was fraudulent, is simply whether the object of the transaction

was to give one creditor unfair advantage over the others on the liquidation of the company.

How is the liquidation process terminated?

When the affairs of the company have been completely wound up, the High Court may, upon the application of the Master, make an order that the company be dissolved from the date of the order. Upon the granting of the dissolution order, the Registrar of the High Court transmits a copy of the order to the Master of the High Court and the Registrar of Companies. The Registrar of Companies then records the dissolution of the company in the register and publishes notice of the dissolution in the Government Gazette.

Director or officer liability

In terms of section 439 of the Act CAP 42:01, when a company has acquired a business or property from the services of a director within 3 years of the date on which a company has been liquidated, the liquidator may recover from such director any amount by which the value of the consideration given for the acquisition of the business property or services, exceeded the value of the business, property or services at the time of the acquisition.

In terms of section 439 of the Act CAP 42:01, when a company has disposed of a business or property, or provided services or issued shares to a director within 3 years of the liquidation, the liquidator may recover from such director any amount by which the value of the business property, or services for the value of the shares at the time of the disposition, exceeded the value of any consideration received by the company.

In terms of section 441 of the Act, if a company in liquidation has failed to comply with the accounting and/or financial record sections of the Act and the High Court holds that such failure contributed to the company's inability to pay all of its debts or to its insolvency, the Court may, on application of the liquidator, declare that any one or more of the directors is, or are, personally responsible, without limitation of liability, for all or any part of the debts and other liabilities of the company as the Court may direct.

In terms of section 481 of the Act, if during the course of a winding up it appears that any business of the company was being carried on recklessly or with intent to defraud creditors of the company or for any fraudulent purpose, the High Court may, on the application of the liquidator, or any creditor, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, to be personally responsible, without any limitation of liability, for all or any of the debts of the company, as the court may direct.

In terms of section 160 of the Act, a director of the company who was knowingly a party to the contracting of a debt by the company and, had at the time the debt was contracted, no reasonable or probable expectation that the company

would be able to pay the debt, will on the application of the liquidator be liable for the whole or any part of any loss suffered by the creditor to whom the debt was incurred.

Consequences of director or officer liability

Criminal Consequences

In terms of section 479 of the Act, any director who absents himself without a valid excuse from attending a meeting of the creditors in a winding up of the company after having been required in writing to attend such meeting by the office of the Master of the High Court or the liquidator, will be guilty of an offence and liable to a fine not exceeding BWP2000 or to imprisonment for a term not exceeding 6 months or to both.

In terms of section 480 of the Act, any officer or director of the company who conceals, destroys, mutilates or falsifies, or is privy to such actions in respect of any book or document relating to the property or affairs of the company, or conceals any part of the property of the company which ought, by law, to be divided amongst the creditors, or causes or permits any property of the company which it has obtained on credit, and which has not been paid for, to be pledged, mortgaged or disposed of, otherwise than in the ordinary course of the company's business, will be guilty of an offence and liable to imprisonment not exceeding 3 years.

In terms of section 480 of the Act, any officer or director of a company that causes or knowingly permits an undue preference, or causes or knowingly permits any debt/s to the aggregate amount of BWP1000.00 or more to be contracted by the company without any reasonable expectation that the company will be able to discharge it, and the company is thereafter wound up, will be guilty of an offence and liable to imprisonment for a period not exceeding 1 year.

In terms of section 480 of the Act, when a company is wound up and any officer or director who when making any statement either verbally or in writing in regard to the business or affairs of the company, conceals any liability present or future, certain or contingent, which the company may then have contracted, or mentions as if it were any asset of the company, any right or property which at the time is not an asset or in any way conceals or disguises or attempts to conceal or disguise any loss which the company has sustained, will be guilty of an offence and liable to imprisonment for a term not exceeding 3 years.

In terms of section 480 of the Act, a director shall be guilty of an offence and liable to imprisonment for a term not exceeding 2 years where, at any time during the winding up, such director failed to inform the liquidator of any false debt proved against the company or failed to disclose to the liquidator to the best of his knowledge all the property of the company of any kind, and the manner in which such property was disposed of, or failed to deliver to the liquidator all books, documents, papers and writings in his custody or under his control relating to the property or affairs of the company, or

prevents the production or delivery of any such books.

In terms of section 480, a director will be guilty of an offence and liable to imprisonment for a term not exceeding 6 months, if he or she under examination at a meeting of creditors fails to account for, or to disclose, what has become of any property of the company which is proved to have been in his possession or to his knowledge in the possession of the company, before the commencement of the winding up.

JUDICIAL RECOVERY

Process required to commence judicial recovery

The judicial management process is commenced by an application brought to the High Court by any shareholder or creditor of the company. Normally the Court first grants, or the applicant first seeks, a provisional order for judicial management and thereafter such provisional order is confirmed at a subsequent hearing. This allows time for meetings of the creditors and shareholders to be held at which meetings these parties may be informed of the company's circumstances and asked to recommend whether the company should be placed under final judicial management.

At what point does judicial recovery commence?

The judicial management process commences upon an application being lodged with the High Court for judicial management.

Duration of the judicial recovery process

The judicial management process will continue until the purpose of the order has been fulfilled or where it is undesirable for the order to remain in force. In other words, the judicial management order will remain in place until the company has become a successful concern or is no longer exposed to the threat of liquidation or insolvency. If, however, there are no prospects of the company achieving either of the aforesaid objectives or purpose, an application can be brought to the High Court to cancel the judicial management order and thereafter to liquidate the company.

Extent of court involvement in the judicial recovery process

The Court is initially involved in the judicial management process through the Court's granting of the judicial management order. Once the judicial management order has been granted there is very little involvement by the Court in the process, save for the Master of the High Court's supervision of the judicial manager and/or where judicial sanction is required under the Act for any matter. The High Court is involved in the judicial management process at the conclusion thereof on the basis that judicial management is terminated by way of an application to the High Court.

Management of the company whilst in judicial recovery

When a company is placed under judicial management, the directors are divested of all powers and management responsibility, with respect to the management of the company and such powers and responsibility devolve upon the judicial manager.

A judicial management order has the effect of vesting the management of the company in the judicial manager's hands subject to the Court's supervision. In this respect the judicial manager has the following duties, to:

- Assume the management of the company;
- Manage the company in a way that he considers most economical and beneficial for the members and creditors of the company;
- Recover and reduce into his possession, assets of the company, both movable and immovable;
- Comply with any direction of the Court made in the judicial management order or any variation thereof;
- Once a year, transmit to the registrar of companies a return containing all information as is required with respect to annual returns furnished by companies in terms of the Act;
- Keep such books of account, and prepare a balance sheet and profit and loss account, and all expenses as would have been the duty of the directors of the company in the ordinary course of business; and
- To convene, during the period that the company is under judicial management, the annual general meeting of members and furnish to such members a report containing such information as is required.

The judicial manager, for instance, cannot, without the leave of the High Court, sell or otherwise dispose of any of the company's assets except in the ordinary course of the business of the company and as required by the Act including any reports of directors, together with all duly audited accounts of the company.

Filing of claims

Creditors wishing to vote at any creditors' meeting with respect to a company under judicial management must prove their claims at such meeting in the same manner as prescribed for liquidations.

Factors which influence the period of the administration in a judicial recovery

- The state and condition of the company - the more dire the condition of the company, the longer it will take to convert the company into a going concern or remove the risk of liquidation;
- The attitude of the creditors - if creditors are hostile towards the judicial management process, this can result in applications being brought against the judicial manager and/or the company, which in turn may either end the

process or prolong it whilst such actions and/or applications are being defended; and

- Delays with the High Court - backlogs at the High Court will affect the timing of any application brought to place the company into judicial management or any application brought against the judicial manager or company.

Funding of the Company Whilst in Judicial Management

The company will fund itself during the judicial management process unless the creditors voluntarily agree to fund the operations of the company during this period.

Effect of Judicial Management on Employees

There is no effect on employees as they continue to be employed by the company during the judicial management period and in this respect are entitled to their full salaries.

Effect of Judicial Management on Contracts

Judicial management has no effect on contracts to which the company is a party, as the company continues to operate and carry on its business. Suppliers and/or creditors are, however, generally prohibited as a result of the order handed down by the High Court, from taking any action against the company during the judicial management period.

Effect of Judicial Management on Shareholders

Upon the grant of a judicial management order, the management and control of the company vest in the judicial manager, and the powers of the board of directors are effectively displaced. Shareholders are therefore divested of their ability to control the affairs of the company through the board, although they retain their proprietary interest in their shares. The judicial manager does not override the powers of shareholders and matters which the Companies Act, or the constitution of the company require to be approved by shareholders continue to require such approval.

Effect of Judicial Management on Creditors

The commencement of judicial management has very little effect on creditors save that they are normally prevented from proceeding with attachment or any other process against the company.

Pending Claims, Litigation and Arbitration

The consequences identified for this in relation to the liquidation section will similarly apply to judicial management.

Effects of the Moratorium

The consequences identified for this in relation to the liquidation section will similarly apply to judicial management.

Voidable Transactions

The consequences identified for this in relation to the liquidation section will similarly apply to judicial management.

How is the Process Terminated?

The judicial management process is terminated by way of an application to the High Court brought at the instance of the judicial manager or any interested person to terminate the judicial management order.

What is the Status of the Company after Judicial Management?

Upon the cancellation of a judicial management order, the High Court shall in giving such order, give directions as may be necessary for the resumption of the management and control of the company by the directors. Such directions may include directions for the holding of a general meeting of the shareholders for the election of directors. In short, the company will have the same status as it did before the granting of the judicial management order and will operate in the normal course.

Director and Officer Liability

The consequences identified for this in relation to the liquidation section will similarly apply to judicial management.

SECURITY

Types of security

- Mortgage Bonds - security over immovable property can only be obtained by a special mortgage over immovable property as set out in the Deeds Registry Act. A mortgage bond does not transfer title in the mortgaged immovable property to the lender. It confers a limited real right on the lender to have the immovable property sold in execution and the proceeds of that sale applied to settle or reduce the debts secured by the mortgage bond. A special mortgage of immovable property is created by a mortgage bond. A mortgage bond is affected by registering it at the Deeds Registry where the immovable property is registered
- Pledge - a pledge is a charge or mortgage over movable property given by a borrower in favour of a lender. For a pledge to be valid and effective the pledged movable must be transferred to, and controlled by, the lender. There are no registration requirements.
- General Notarial Bond - a general notarial bond is a mortgage by a borrower over all of its tangible movable property, and in favour of a lender. A general notarial bond does not however (in the absence of an attachment of the property before insolvency) make the lender a secured creditor of the borrower and consequently it is not a true

mortgage of the property but is rather a means of obtaining a limited statutory preference above the claim of concurrent creditors in the borrower's insolvent estate. A notarial bond must be registered in terms of the Deeds Registry Act in order to be effective.

- Cession by Way of Security - security over intangible movable property is created by the debtor granting security by way of cession over such assets in the creditor's favour. It can be structured as either a cession in securitatem debiti where title to the property remains with the cedent; or an out and out cession, where title to the property is transferred to the cessionary, subject to the cedent's right to have the property ceded back to it by the cessionary once the debt and/or other obligations that it secures, are discharged. There are no registration requirements.

Deeds of Hypothecation

Tangible movables can be secured through a deed of hypothecation in terms of the Hypothecation Act CAP 46:05 (Hypothecation Act). A deed of hypothecation is a statutory pledge and must be affected in the form prescribed by the Hypothecation Act. In order to be effective, a deed of hypothecation is required to be registered in terms of the Hypothecation Act at the Deeds Registry. A deed of hypothecation is not available unless the creditor is an authorised creditor. In order to become an authorised creditor, application must be made to the Minister of Trade and Industry and if approved then a regulation to this effect is published in the Government Gazette.

Guarantees/Suretyship

This is not real security in Botswana and gives rise only to personal rights.

Security trustees and special purpose vehicles

Botswana law generally requires that security be granted in favour of a creditor to whom the underlying secured obligation is owed. This requirement has historically created uncertainty as to whether security may validly be granted in favour of a trustee or agent acting on behalf of a syndicate of lenders. In practice, syndicated financing transactions are structured to address this difficulty. It is common for the security to be held through alternative arrangements such as a special purpose vehicle or other structures designed to ensure that the entity holding the security is itself a creditor in respect of the secured obligations. These structures enable lenders participating in a syndicated financing to share in the benefit of the security while ensuring that the security arrangements remain enforceable under Botswana law.

Most robust form of security available to lenders

The most robust form of security available is a special mortgage over immovable property and a deed of hypothecation over movables. With respect to intangibles, an out and out security cession is the most robust form of

security as it removes ownership of the secured asset from the debtor and consequently can technically be disposed of outside the liquidation process.

Stamp Duty

There are no stamp duty requirements in Botswana.

Registration Costs

The cost of registering a mortgage bond or deed of hypothecation is regulated by a tariff prescribed under the Deeds Registry Act CAP 33:02.

Requirements for the assignment or transfer of security

- Mortgage bonds and Notarial Bonds - transfer of a mortgage bond or notarial bond must be effected by way of a cession registered by the Registrar of Deeds in terms of the Deeds Registry Act; and
- Deed of Hypothecation - it is not clear from the Hypothecation Act whether a deed of hypothecation can be transferred or assigned. The prevailing view is that it can be, provided the cession or transfer is to an authorised creditor and the cession is registered with the Deeds Registry.

The party responsible for paying the registration charge or fee is the mortgagor. There are no registration costs for pledges or cessions.

Instances in which security might be vulnerable to attack

Voidable transactions can be set aside where a company is placed in liquidation or under judicial management.

Methods of enforcement of security

For mortgage bonds or general notarial bonds, the secured creditor must obtain a Court order directing the sheriff of the High Court to attach the relevant asset. The secured creditor can then procure a sale of the assets and apply the proceeds of the sale to discharge the principal obligation.

With respect to a pledge, the pledgee must realise its security through a Court order authorising the sale and execution of the secured asset.

A deed of hypothecation is enforced through an expedited Court process. The creditor files a statement with the Registrar of the High Court setting out the breach, describing the property for attachment and attaching the deed of hypothecation. A copy of the said statement is also sent to the debtor by registered post. The said statement once filed has the effect of a civil judgment. A notice is thereafter issued to the debtor notifying him that a writ of execution is to be issued by the Court unless he can demonstrate that he is not in breach. A writ of execution may thereafter be issued, after 14 days of the lodging of the statement, unless

the debtor has demonstrated that he is not in breach.

In some cases, however, the secured creditor can simply agree with the borrower that the secured assets are sold without the need for judicial execution. This is known as parate executie (the right of a creditor to realise a borrower's property without first obtaining a Court order). An agreement of parate executie concerning movables pledged and delivered to the secured creditor is valid provided there is no prejudice to the security provider. However, an agreement of this nature is invalid in relation to security over immovable property and secured assets not in the possession of the secured creditor at the time it wishes to enforce its rights.

Problems experienced when enforcing security

The following problems may be experienced regarding the enforcement of security:

- Competing secured claims which require their priority or ranking to be determined by a Court;
- Delays in obtaining Court orders for attachment as a result of the backlogs at the High Court;
- Delays in Court messengers or deputy sheriffs attaching and executing on sales because of the lack of officials relative to the workload or poor administrative systems; and/or
- Property having been disposed of prior to attachment (especially with movables).

Financial assistance requirements

A company is permitted to provide financial assistance directly or indirectly to any person for the purpose of, or in connection with, the acquisition of its own shares provided such assistance is compliant with section 76 of the Act. For the purposes of section 76, a company may give financial assistance where the board has resolved that:

- The giving of the assistance is in the best interest of the company; and
- The terms and conditions on which the assistance is given are fair and reasonable to the company and to any shareholder not receiving such assistance.

Where, however, financial assistance approved by the board exceeds 10% of the company's stated capital, the company shall not give financial assistance until it first obtains from its auditor a certificate stating that such auditor has enquired into the state of affairs of the company and is not aware of anything that indicates that the opinion of the board is unreasonable in all the circumstances.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Botswana Courts will, in general, accept and enforce a judgment of a foreign Court through a registration process under the Judgments (International Enforcement) Act. The Judgments (International Enforcement) Act extends to countries, which are recognised by the President by way of a statutory instrument. Section 4(1) records that the Judgments (International Enforcement) Act extends to every country to which the United Kingdom Judgments Act applied immediately before the commencement of the Judgments (International Enforcement) Act. The Judgments (International Enforcement) Act commenced on 25 September 1981.

Although the Judgments (International Enforcement) Act provides for the enforcement of foreign judgments through the process of registration, that process (by virtue of administrative inefficiencies at the Court) is not that effective. The preferred method for enforcing foreign judgments is by way of an action instituted (either by way of provisional sentence or summary judgment).

Requirements for recognition of a foreign judgment

Under the Judgments (International Enforcement) Act, registration by the Court is subject to the following conditions:

- The foreign Court that issued the judgment must have been the Superior Court of the relevant country;
- The judgment must be final and be for a sum of money;
- Substantial reciprocity must exist between the country in which the judgment was pronounced and Botswana (meaning that a judgment given by the High Court of Botswana would be enforced in that country) - such countries include England, Wales and South Africa, but not the United States of America;
- The judgment must not have been obtained through fraudulent means; and
- The judgment must not be contrary to Botswana's public policy.

There are also certain minimum standards that must be adhered to, such as the impartiality of the Court, reasonable notice and an opportunity having been given to the person/s affected, to defend the action.

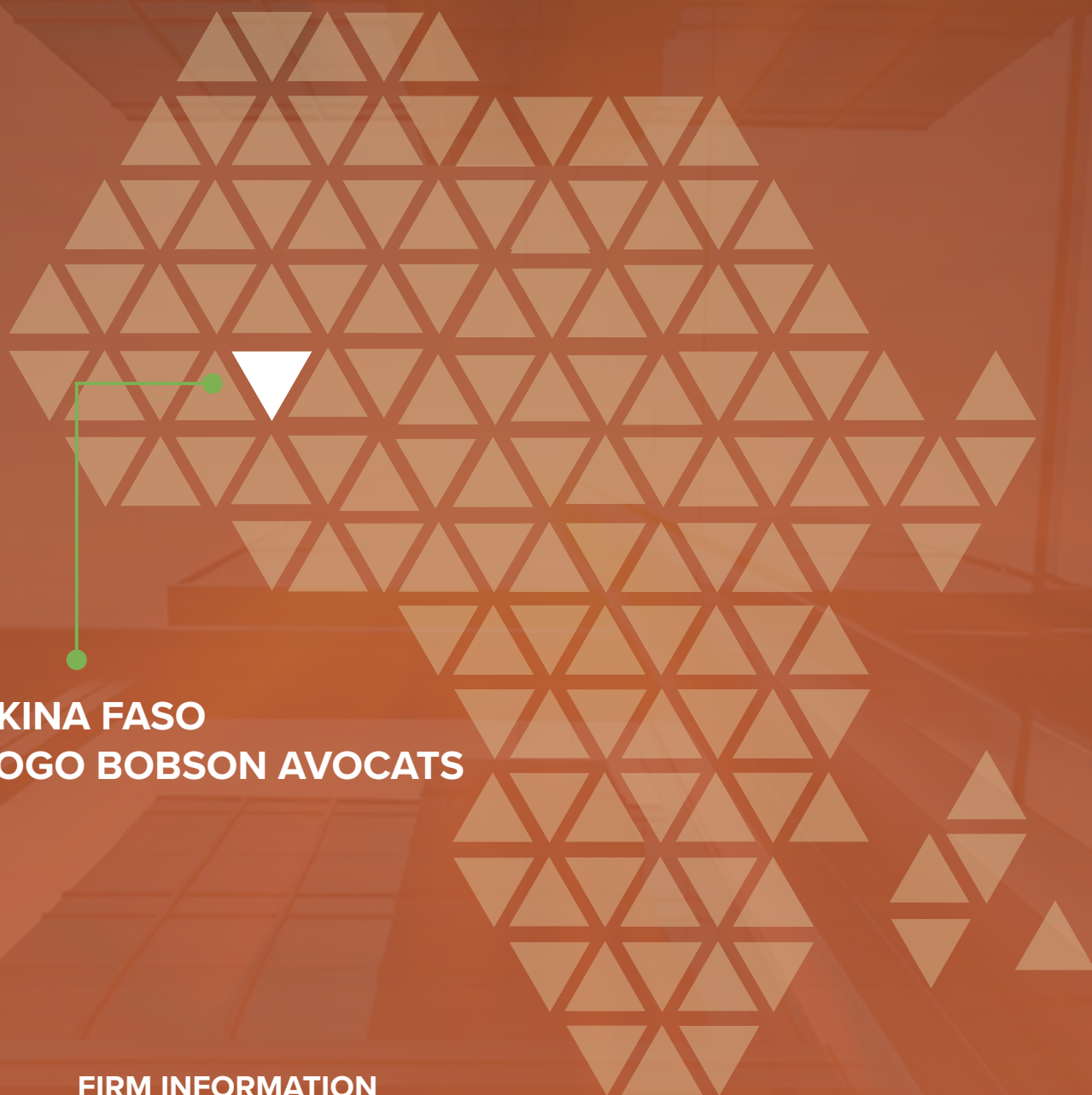
Where the judgment emanates from a country that does not have the necessary reciprocity arrangement with Botswana, the judgment can be enforced by way of an original action, by way of summons, with the judgment as the cause of action.

Requirements for the recognition of a foreign trustee, business rescue practitioner or an insolvency practitioner

The position regarding the recognition of foreign trustees, business rescue practitioners or insolvency practitioners is

regulated by the common law as there is no cross-border insolvency or liquidation legislation in force in Botswana. In terms of the common law, a foreign liquidator would need to make application to the High Court for recognition in the form of a declaration, declaring that he or she is entitled to deal with Botswana assets in the same way as if he or she were within the jurisdiction of the country where he or she was appointed. This will always be subject to the High Court's imposition of conditions, for the purpose of protecting local creditors, or in recognition of the requirements of Botswana law.





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TYPE OF GOVERNMENT

The Constitution of Burkina Faso establishes a semi-presidential Government with a Parliament.

POLITICAL SYSTEM

The Head of State is the President of the Faso during the transitional period, which runs for a period of sixty (60) months from July 2, 2024. He determines the major orientations of national policy and ensures the continuity of the State.

The legislative power during the transition is exercised by the Legislative Assembly of the Transition (ALT), which acts as the transitional parliament. It has 71 members who are not elected by universal suffrage but are designated in accordance with the provisions of the Transition Charter adopted on October 14, 2022 and modified on May 25, 2024.

Under the Constitution of Burkina Faso adopted by referendum on June 2, 1991, and whose latest amendment is made by law No. 033-2024/ALT of October 29, 2024, the President is elected through universal suffrage, for a term of 5 years, renewable once. The Parliament consists of one chamber called the National Assembly which has 127 seats with members elected by direct universal suffrage for a 5 years term. The Parliament may be dissolved by the President of the country. However, during the transition period, this constitutional electoral mechanism is suspended. There is a Constitutional Chamber of 10 members. There is also an Economic and Social Council whose role is purely consultative.

LEGAL SYSTEM

The legal system is the French Civil Law system. The judicial system is made up of two branches: the judicial branch and the administrative branch. At the top of the judicial branch is the "Cour de cassation". Beneath it are the Courts of Appeal at Ouagadougou, Bobo-Dioulasso and Fada N'Gourma and 27 tribunaux (tribunaux de grande instance). At the same level are the tribunaux de commerce (tribunals of commerce) in Ouagadougou and Bobo-Dioulasso that handle cases involving commercial law and the tribunaux du travail (labor tribunals) in Ouagadougou, Bobo-Dioulasso and Koudougou. At the top of the administrative branch is the "Conseil d'Etat". Beneath the Conseil d'Etat are 27 "tribunaux administratifs" that handle cases involving administrative law.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. Liquidation?)

Burkina Faso is a member of OHADA (Organisation for the Harmonization of Business Law in Africa) States. As such, insolvency is regulated by the OHADA Uniform Act on Collective Proceedings for the Clearing of Debts. According to this Act, a debtor is insolvent when it is unable to meet his/its due debts with his/its available assets as it results from the debtor's own statement or from a court decision.

What are the tests for financial distress (i.e. business rescue or administration?)

The Uniform Act on Collective Proceedings for the Clearing of Debts draws no distinction between liquidation and administration. Therefore, the criterion for commencing administration is the same as liquidation-an inability to satisfy due debts with available assets.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

Liquidation may be commenced by the insolvent debtor, the Court, the public prosecutor or the creditors. The Commercial Court where the debtor has his/its principal place of business or registered office is the Court with jurisdiction to handle matters relating to insolvency.

Formal restructuring procedures

Administration proceedings commence in the same way as liquidation.

Informal insolvency or restructuring procedures

informal liquidation or administration procedures.

LIQUIDATION

What is the aim of liquidation?

Liquidation aims to realize the debtor's assets in order to satisfy its debts.

Process required to commence a liquidation

The insolvent debtor must lodge a declaration of insolvency to commence liquidation. Should the debtor not do so, the Court, the Public Prosecutor or the debtor's creditors may

lodge liquidation proceedings against the debtor. The insolvency declaration of the debtor must be accompanied by documents, including the company's financial statements, the statement of cash flow, the list of assets and liabilities, the list of creditors and debtors and the list of workers, to substantiate the debtor's financial position.

At what point does the liquidation process commence?

Liquidation proceedings must be commenced by the debtor within 30 days following the date of insolvency.

Duration of the liquidation process

The liquidation process may run for a maximum of 2 years, starting from the opening of the procedure.

Extent of court involvement in the liquidation process

The liquidation procedure in Burkina Faso is judicial which means that the Court is extensively involved in the process. The procedure is opened and closed by the Court. In between, there is a supervising judge appointed to supervise the process. The supervising judge is vested with important power to make decisions on issues arising during the process. The decisions made by the supervising judge may be taken on appeal to Court.

Management of the company whilst in liquidation

The debtor is removed from the administration process and in relation to the disposal of its assets. It is represented by the liquidator for all such acts.

Filing of claims

Creditors existing as at the date of the liquidation judgment, form a masse represented by the liquidator who acts in their collective interests. Creditors must make a declaration in writing of receivables, accompanied with supporting documents, for verification by the liquidator starting from the date of the liquidation judgment until 60 days from the date of the second publication of the liquidation judgment in the newspaper. Creditors who do not reside in the national jurisdiction of the liquidation proceedings benefit from an extension of the 60 days to 90 days.

Factors Which Influence the Period of the Administration in a Liquidation

The Court fixes the period in which the termination of the liquidation must be examined. That period must not exceed 18 months. Should the closing of the liquidation not be ordered at the expiry of this period, the Court may extend this period once for a limited period of 6 months, after liquidator provides the Court with the reasons why there is a need to extend the liquidation period.

Effect of liquidation on employees

As of the commencement of liquidation, contracts of employment can be terminated by the liquidator. Employees are privileged creditors for employment contract related claims.

Effect of Liquidation on contracts

The liquidator may require the continued performance of ongoing contracts in the interests of the debtor.

Effect of liquidation on shareholders

The effect of liquidation on shareholders depends on the legal form of the company. The Uniform Act has created various types of companies with either limited liability or unlimited liability. In companies like société à responsabilité limitée (SARL) or société anonyme (SA) shareholders bear losses only in proportion to their contribution to the share capital. In others legal forms like a société en nom collectif (SNC), a société en commandite simple (SCS), the liability of shareholders is unlimited. Therefore, the opening of the liquidation is extended to them, and they themselves are placed in administration or liquidation depending on their financial position. In addition, once the liquidation proceedings are opened, shareholders who are officers or directors of the company are no longer allowed to sell their shares.

Effect of liquidation on creditors

The judgment that orders liquidation interrupts all legal action, recovery procedures or enforcement measures by creditors. Instead a masse of creditors is formed against the debtor.

Pending claims, litigation and arbitration

The judgment that orders liquidation interrupts all legal action, recovery procedures or enforcement measures by creditors. Instead a masse of creditors is formed against the debtor.

Voidable Transactions

The Uniform Act on Collective Proceedings for the Settlement of Liabilities provides for a period of time called the "suspect period". This is the date between the insolvency of the company and the date of the liquidation judgment. Depending on their nature, transactions performed by the debtor during this suspect period must, or may, not be held to be valid against such creditors.

How is the liquidation process terminated?

Liquidation is normally terminated when the winding-up process is complete. In this case, the liquidator gives a final accounting to the supervising judge who minutes the

completion of the winding-up process. This is transmitted to the tribunal which declares the liquidation to be terminated. The liquidation process may also be terminated if there are insufficient funds to satisfy the winding-up operations. In this case, the tribunal, of its own accord, may decide, or any interested party may request the tribunal to declare, that the liquidation has terminated.

Director or officer liability

The Uniform Act provides various instances in which the management of a company in liquidation may be held liable, including, but not limited to, liability for the company's debts where management fault contributed to the asset deficiency. In these cases, the extension of liquidation proceedings to the managers of a company on the basis of personal bankruptcy, and/or fraudulent bankruptcy is possible.

Consequences of director or officer liability

Under some conditions:

- the tribunal may decide that the company's debts must in whole or in part be borne by the management;
- the members of the management may be placed under personal bankruptcy or fraudulent bankruptcy.

BUSINESS RESCUE/ADMINISTRATION

Process required to commence judicial recovery

Like liquidation, administration proceedings may be commenced with respect to any individual or corporate body that is in a state of insolvency.

At what point does judicial recovery commence?

Administration proceedings commence in the same way as liquidation proceedings.

Duration of the judicial recovery process

The maximum duration for the administration procedure is 9 months.

Extent of court involvement in the judicial recovery process

The administration process is judicial and the Court therefore plays an important role in the process.

Management of the company whilst in judicial recovery

In administration proceedings, the debtor's activities continue with the assistance of an administrator. However, the debtor may validly carry out many actions in the ordinary course of business such as the acts of conservancy and the day-to-day management of the company without the administrator, subject to reporting to the administrator. Major administrative

and disposal acts require the administrator involvement, and some measures require judicial authorization.

Filing of claims

Like in liquidation, in administration proceedings, creditors existing as of the date of the administration judgment form a masse represented by the administrator who acts in their interests. Creditors must make a declaration in writing of their receivables accompanied by supporting documents for verification by the administrator commencing from the date of the administration judgment until 60 days following the second publication of the administration judgment in a newspaper. Creditors who do not reside in the national jurisdiction of the administration proceedings, benefit from an extension of the 60 days to 90 days.

Factors which influence the period of the administration in a judicial recovery

In principle, the procedure should take 6 months starting from the judgment that opens the procedure. However, this period may be extended for a limited period of 3 months either by the Court, on its own initiative, or on the request of the debtor or administrator.

Funding of the Company Whilst in Judicial Management

Funding of a company whilst in administration proceedings is allowed.

Effect of Judicial Management on Employees

Placing a company into administration does not in itself result in the termination of employment contracts. Employment contracts may however be terminated on economic grounds if required. Employees are privileged creditors in relation to employment contract related claims.

Effect of Judicial Management on Contracts

The Uniform Act on Collective Proceedings supports the continuation of ongoing contracts. Therefore, the opening of administration proceedings in itself does not result in contracts terminating. However, the administrator and the other party to the contract may request contract termination subject to some conditions set forth by the Uniform Act on Collective Proceedings for the Settlement of Liabilities.

Effect of Judicial Management on Shareholders

The effect of administration on shareholders depends on the legal form of the company. In companies where the liability of shareholders is unlimited, the opening of administration is extended to them, and they are themselves placed in administration or liquidation depending on their financial situation. In addition, once the administration proceedings have opened, shareholders who are also officers or directors of the company can sell their shares but only with the authorization of the supervising judge.

Effect of Judicial Management on Creditors

The administration judgment creates a masse of claims arising as at the date of its commencement and the creditors are represented by the administrator who acts in their collective interests. These creditors are no longer allowed to undertake any individual legal action, recovery procedures or enforcement measures against the debtor.

Pending claims, litigation, arbitration and effects of the moratorium

The administration judgment creates a masse of claims arising as at the date of its commencement and the creditors are represented by the administrator who acts in their collective interests. These creditors are no longer allowed to undertake any individual legal action, recovery procedures or enforcement measures against the debtor.

Voidable Transactions

Uniform Act on Collective Proceedings for the Settlement of Liabilities provides for a period of time called the “suspect period” between the date of insolvency and the date of the administration judgment. According to their nature, transactions performed by the debtor during this period must or may be held not to be valid against creditors.

The administration plan

In administration proceedings, the debtor is required, either together with the insolvency declaration, or within 60 days of the opening of the administration procedure to make a draft composition agreement (concordat) showing that the company is economically and financially viable. The composition agreement must be serious, that is to say, its implementation should lead to the restoration of the economic and financial health of the debtor and the payment of its debts, with the view to its continued survival. The creditors and the administrator are informed of the proposal contained in the composition agreement.

Voting on the plan

Voting on the plan is coordinated by the tribunal. If the majority of the creditors in number whose claims have been finally or provisionally admitted, representing at least 50% of the total value of such claims vote in favour of the plan, the plan will be ratified.

Cram down on creditors

Once the composition agreement has been ratified, it is binding on all creditors existing as of the date of the decision that opened the administration proceedings.

Implementation of the plan

The composition agreement is implemented in accordance with its terms. Creditors with special real security are bound by the reduction in debt and the grace period/s that they may have agreed with the debtor. However, if the composition agreement provides for a grace period not exceeding 2 years, this grace period may be challenged by the secured creditor if the grace period granted to them was less. In addition, some administrative bodies that are under a statutory obligation not to grant reductions or grace periods are not bound by the composition agreement.

Discharge of debt

The composition agreement may reduce debt and/or provide a grace period to the debtor. Creditors that have granted reductions are not entitled to seek enforcement of the reduced amount against the debtor.

Effect on Suretyships

In general, creditors holding guarantees do not lose the benefit of the guarantee during the administration procedure. But they may realize them only if the composition agreement (business rescue plan) is nullified, which means that the administration may affect the duration of the guarantees. In addition, should the composition agreement involve the divestiture of the assets of the debtor, it may affect the base of real securities.

How is the process terminated?

The administration procedure is terminated with the ratification of the composition agreement or with the conversion of the administration to liquidation. In the case of the ratification of a composition agreement, the administration process continues with the implementation of the composition agreement.

What is the status of the company after the administration?

If a composition agreement is ratified and implemented in accordance with its terms, the company will continue an ongoing business. If the composition agreement is rejected, the company will be placed in liquidation.

Director and officer liability

The civil and criminal liability of directors or officers of a company is the same as that of a company placed in liquidation.

SECURITY

Types of security

In Burkina Faso there are various types of security divided into personal security and real security. Personal security are undertaken by a person or an entity to guarantee an obligation of another person or entity. There are two types of personal securities the security bond (le cautionnement) and the independent guarantee (la garantie autonome). Real securities may be taken over movable or immovable properties namely, the right of retention, the retention of title and property assigned as guarantee, a pledge over movable assets, a pledge over intangible assets, preferential rights and a mortgage.

Taking of security

Securities in Burkina Faso may be taken through an agreement or by order of Court.

Security trustees and special purpose vehicles

The revised uniform act on the organization of securities adopted on December 15, 2010 in Lomé and published in the OHADA Official Journal No. 22 of 02/15/2011 provides for a security agent who may represent a creditor for the constitution, registration and enforcement of one or more securities. As far as mortgages are concerned - which need to be notarized the notary represents the creditor for the constitution and the registration formalities.

Most robust form of security available to lenders

The most robust form of security in Burkina Faso is the mortgage. Given, however, that its enforcement may be interrupted or suspended in the event of liquidation or administration, it is advisable to support it with an independent payment guarantee provided by a financial institution, payable on demand.

Registration of security

Personal securities are not subject to registration formalities. All securities over movable assets are subject to registration at RCCM (Trade Registry) and mortgages are registered with the land registry. Securities over movable assets may be registered on request of the debtor, security agent or creditor. Mortgages are registered on the request of creditors.

Stamp Duty

Securities are subject to registration with the tax office and therefore subject to stamp duty in the amount of CFA 400 per sheet. The registration duties represent the fixed amount of CFA 6000.

Registration Costs

The registration cost for securities over movable assets is 1% of the amount guaranteed. Payment is made at the RCCM (Trade Registry) at the time of registration. The payment must be testified by a receipt delivered by the tribunal's clerk in charge of the RCCM. As far as mortgages are concerned, the registration cost includes: 1,05% of the amount of the mortgage for the publication with the land registry. Payment is made at the land registry when the mortgage is registered. Payment is testified by a receipt delivered by land registry officer, the notary's fees which vary according to the amount of the mortgage from 0.5% to 3%. The debtor bears the cost of registration.

Instances in which security might be vulnerable to attack

Through the registration of securities, third parties are informed about the security. If a security is not registered, the creditor who has taken it does not have priority over third parties including the debtor's other creditors. Therefore, enforcement against third parties may be successfully challenged by them. In addition, insolvency proceedings suspend or interrupt enforcement action. Finally, taking a mortgage does not prevent Government expropriation for public interest.

Methods of enforcement of security

The method for enforcing security depends on whether the security is personal or real. As far as personal securities are concerned, on default, the secured creditor requests that the defaulted obligation be satisfied by the guarantor. For real securities, in the event of default, the secured creditor arranges for the forced sale of the secured property by public auction. The enforcement procedures are regulated by the Uniform Act on Simplified Recovery Procedures and Enforcement Measures adopted on October 17, 2023, and published in the OHADA Official Journal on November 15, 2023.

Problems experienced when enforcing security

A common problem arising when enforcing securities is that the enforcement may be challenged by any person having an interest in the proceedings, including the debtor, the guarantor and third parties.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Foreign judgments are enforceable in Burkina Faso if they have been declared enforceable after an exequatur procedure, subject to co-operation treaties in judicial matters.

Requirements for recognition of a foreign judgment

To be recognized or declared enforceable in Burkina Faso, the foreign judgment must have been rendered by an internationally Competent Court. The foreign Court is internationally competent, if there is no exclusive jurisdiction of the Burkina Courts in the matter, if the dispute is closely connected to the State of which the judge has been seized, and the choice of the foreign Court has not been fraudulent. In addition, the foreign judgment must:

- be final according to the laws of the State of origin;
- not be contrary to Burkina Faso public policy;
- have been rendered in accordance with the adversarial principle;
- be dispute between the same parties with the same object and must not be pending before the Burkinabe Courts previously seized or already been tried or given rise to a judicial decision in another State provided that this decision can be recognized in Burkina Faso.

Requirements for the recognition of a foreign trustee, business rescue practitioner or an insolvency practitioner

The Uniform Act on Collective Proceedings for Clearing of Debts provides for the recognition of foreign insolvency procedures, subject to the submission of an application to the Competent Court by the foreign business rescue or insolvency practitioner. The recognition application must be accompanied by:

- A certified copy of the decision opening the collective procedure;
- A certificate of the Court certifying the opening of the collective procedure;
- In the absence of the above-mentioned documents, anything acceptable to the Court that evidences the opening of the collective procedure and the appointment of the practitioner.





CAMEROON
D. MOUKOURI AND
PARTNERS

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CAMEROON | D. MOUKOURI AND PARTNERS

COUNTRY INFORMATION

Republic of Cameroon, located in Central Africa.

TYPE OF GOVERNMENT

The Constitution of Cameroon establishes a semi-presidential Government with a Parliament.

POLITICAL SYSTEM

Cameroon is a bilingual decentralised unitary state consisting of ten regions. The President of the Republic is elected by direct universal suffrage for a renewable seven-year term.

Executive power is shared between the President of the Republic and the Prime Minister, who is the head of government.

The President of the Republic is not accountable to Parliament, but the Prime Minister is.

Parliament consists of two chambers: the Upper House (Senate), consisting of 100 members, 70 of whom are elected by indirect universal suffrage and 30 appointed by the President of the Republic; and the Lower House (National Assembly), consisting of 180 members, all elected by direct universal suffrage, for a renewable five-year term.

French and English are the two official languages.

LEGAL SYSTEM

The Cameroonian legal system is based on two sources: civil law and common law.

It is organised on the basis of two levels of jurisdiction, characterised by the courts of first instance, for the first level of jurisdiction (First Instance and High Courts), and the courts of appeal, for the second level of jurisdiction.

The Supreme Court is responsible for ensuring that lower courts comply with the law.

Alongside these courts there are special courts, which are either punitive (Military Court, Special Criminal Court, High Court of Justice) or non-punitive (Constitutional Council).

Beside these so-called modern courts, Cameroon has traditional courts, whose names depend on whether they are located in a civil law or common law area.

In the former case, there are the courts of first instance and the customary courts (tribunal coutumier) and in the latter case, there are Customary Courts and Alkali Courts (the latter are specifically responsible for settling disputes involving Muslims).

These traditional courts are remnants of the period of French and British mandate and trusteeship that governed Cameroon between 1920 and 1960-1961.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. Liquidation?)

Insolvency is the state of cessation of payments by a company. It is defined as the inability of a company to honour its liabilities with its available assets.

What are the tests for financial distress (i.e. business rescue or administration?)

Business rescue is applicable when the company, despite its state of cessation of payments, proposes a plausible plan to pay its liabilities.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

The friendly liquidation and a judicial liquidation are the formal procedures available. There is also a simplified judicial liquidation which provides for simple mechanisms adapted to small companies.

Formal restructuring procedures

These are the legal restructuring and the simplified legal restructuring (the latter procedure adapted to small companies).

Informal insolvency or restructuring procedures

There are no informal insolvency or restructuring procedures in Cameroon.

LIQUIDATION

What is the aim of liquidation?

The purpose of liquidation is to discharge the debts of the company from the proceeds derived from a sale of the company's assets.

Process required to commence a liquidation

The debtor (who is in a state of cessation of payments) must make a declaration for the purpose of opening the liquidation procedure within 30 days following the cessation of payments. The declaration must be lodged at the registry of the Competent Court.

The debtor must further lodge, within 30 days, the documents relating to the debtor's affairs - the financial statements, the security rights, the debtor's property inventory, the employees and the employee representatives, the partners, and those wishing to consent to new contributions. The liquidation may be initiated by a creditor, regardless of the nature of their claim, provided that it is certain, liquid and due.

The Competent Court may initiate proceedings ex officio and in particular, on the basis of information provided by a representative of the Public Prosecutor's Office, by the auditors of moral persons governed by private law, by shareholders of such moral persons or from institutions representing the personnel.

At what point does the liquidation process commence?

The liquidation process begins when the Competent Court pronounces the opening of the liquidation procedure.

Duration of the liquidation process

The Competent Court shall fix the period within which the closure of the proceedings shall be examined, provided that such period is no more than 18 months after the initiation of the procedure.

Extent of court involvement in the liquidation process

The Court plays an active role in the liquidation procedure in the sense that its participation starts from the opening of the procedure to the decision regarding its closure, and it ensures the efficiency of the proceedings. In addition, the Competent Court designates the various bodies responsible for ensuring the smooth running of the procedure and its involvement promotes the speedy progress of the liquidation at the various stages.

Management of the company whilst in liquidation

The powers of the board of directors or the executive officers end when the Court makes its decision for the liquidation of the company. A liquidator will represent the company, is

vested with extensive powers to liquidate the assets, is mandated to pay the creditors and to distribute among the shareholders the available assets.

Filing of claims

From the moment a decision is made to open a liquidation, and within 60 days of the date on which a second legal notice is published, creditors are required to file their claims with the liquidator under penalty of foreclosure. The deadline is extended to 90 days for creditors domiciled outside the country. In the case of secured creditors, the time limit for the filing of claims runs from the date of personal notice served by the liquidator, by registered letter with acknowledgment of receipt, or by any means with proof of a written record. Known creditors must be notified by the liquidator if they have not filed their claims within 15 days of the first insertion of the opening decision in an official newspaper to publish legal information. The warning takes the form of a bearer's letter against a receipt or a registered letter with acknowledgment of receipt or any means that provides proof by way of a written record.

Factors Which Influence the Period of the Administration in a Liquidation

The administrative difficulties associated with litigation brought by or against the business, and the change in the mode of administration by the replacement of the directors of the company or by the liquidator, are factors which may influence the period of administration of the business during the liquidation process.

Effect of liquidation on employees

Claims arising from employment or apprenticeship contracts enjoy the status of super privilege.

Effect of Liquidation on contracts

Contracts can be maintained or terminated in the discretion of the liquidator.

Effect of liquidation on shareholders

The shareholders will be paid from any available proceeds after payment to creditors.

Effect of liquidation on creditors

Once liquidation commences, the body of creditors is represented by the liquidator, who acts in the name and in the collective interest of the general body of creditors. Creditors may submit their claims to the liquidator, which are classified as secured and unsecured. They will be paid in full or in part, depending on the assets realized.

Pending claims, litigation and arbitration

Once a decision is granted to open the liquidation process, all enforcement proceedings brought by creditors in respect of the movable and immovable property of the company as well as, any distribution procedure which did not prove beneficial before the opening decision, is prohibited and precluded. Proceedings which are in process are interrupted until the creditor has filed its claim. They are then automatically taken over, with the liquidator duly summoned, but concern only the establishment of a claim and the fixing of its amount.

Voidable Transactions

Several transactions made during the distress period are unauthorized and unenforceable against the body of creditors. These transactions would be considered void and would include donations, the payment of debts and securities taken in respect of a debtor's goods. The distress period starts from the date of cessation of payments and ends on the date of the decision to open the judicial reorganisation or the liquidation of assets. Transactions that resulted in prejudice to the creditors are also void.

How is the liquidation process terminated?

When the company has paid its liabilities, and the remaining assets have been distributed to the shareholders, the liquidation process is deemed to be terminated. The Competent Court pronounces the end of the liquidation process. It may also pronounce the liquidation :

- when the liquidation operations are well completed;
- when there are insufficient assets to undertake the liquidation process; and
- when there are no more pending liabilities, the Competent Court may pronounce the closure based on the extinction of liabilities as evidenced by the report of the official receiver.

Director or officer liability

The Uniform Act provides various instances in which the management of a company in liquidation may be held liable, including, but not limited to, liability for the company's debts and the extension of liquidation proceedings to the managers of a company on the basis of personal bankruptcy, fraudulent bankruptcy and/or criminal bankruptcy

Liability may be incurred civilly and criminally. A director convicted by a civil judge may be prosecuted before a criminal judge for fraudulent bankruptcy.

Consequences of director or officer liability

Consequences of the civil liability of directors and officers becomes applicable in the circumstances where the asset shortfall of a company is due to mismanagement by the directors. The Court may decide that the debts of the company are supported by the managers through an action

to cover the liabilities. In addition, the directors can be the subject of an extension of the collective procedures, but also of the extra-patrimonial sanction of personal bankruptcy.

On the criminal side, managers can be guilty of bankruptcy and other offenses affiliated with it (simple bankruptcy and fraudulent bankruptcy).

BUSINESS RESCUE/ADMINISTRATION

Process required to commence judicial reorganisation

The debtor in a state of cessation of payments must make a declaration, within 30 days of the cessation, and lodge it at the registry of the Competent Court against a receipt for the purpose of obtaining the opening of a judicial reorganization procedure. Within 30 days, the debtor must lodge the documents relating to the debtor's activity, the financial statements, the security rights, the inventory of the debtor's property, details of the employees and employee representatives, the partners, people wishing to consent to new contributions, and if necessary, a draft concordat (or restructuring agreement).

At what point does judicial reorganisation commence?

The process is triggered by the opening decision from a Competent Court. The Court pronounces the opening of the judicial recovery if it appears that the debtor has proposed a plausible concordat (or restructuring agreement) or can demonstrate that a concordat can be achieved or that a global assignment of the assets is possible.

Duration of the judicial reorganisation process

From the opening judgment, the recovery process has a period of 6 months, renewable once for a period of 3 months. At the end of the period, the Competent Court may convert the process into liquidation.

Extent of court involvement in the judicial reorganisation process

The Court plays an active role in the reorganization proceedings by fixing the date of insolvency and pronouncing the opening of the procedure. Like in the liquidation procedure, the role of the Court starts as soon as the decision to open the judicial restructuring is pronounced, until the financial situation of the company returns to normal. Consequently, the Competent Court appoints the bankruptcy judge who is responsible for ensuring that the procedure is carried out expeditiously, that the deadlines are met and that the malpractices of the bodies involved are punished. The Court may appoint a judge or any relevant individual in order to be provided with information about the debtor's financial situation.

Management of the company whilst in judicial reorganisation

From the date of the decision of the judicial reorganization until the homologation of the concordat for the judicial reorganization of assets, all acts concerning the administration and disposal of the assets of the directors are subject to compulsory assistance, on pain of the unenforceability of these acts. However, the debtor may carry out, alone, the consultative acts and those of current management which are part of the usual activities of the company, in accordance with the practices of the profession, provided that it reports them to the receiver.

Filing of claims

From the moment a decision is made to open a judicial reorganisation, and within 60 days of the date on which a second legal notice is published, creditors are required to file their claims with the liquidator under penalty of foreclosure. The deadline is extended to 90 days for creditors domiciled outside the country. In the case of secured creditors, the time limit for the filing of claims runs from the notification of the notice that is personally given by the liquidator, by registered letter with acknowledgment of receipt, or by any means with proof of a written record. Known creditors must be notified by the liquidator if they have not filed their claims within 15 days of the first insertion of the opening decision in a legal notice newspaper. The warning takes the form of a bearer's letter against a receipt or a registered letter with acknowledgment of receipt or any means that provides proof by way of a written record.

Factors which influence the period of the administration

Litigation brought against or by the company coupled with the fact that the decisions of directors are subject to the approval of the liquidator. In principle, the procedure should take 6 months starting from the judgment that opens the procedure, as said before. However, this period may be extended for a limited period of 3 months either by the Court, on its own initiative, or on the request of the debtor or administrator.

Funding of the Company Whilst in Judicial Reorganisation

There are no restrictions on this, save for the fact that loan agreements must be approved by the official receiver.

Effect of Administration on Employees

Employment contracts may, however, be terminated on economic grounds, if required. As in liquidation, claims arising from employment or apprenticeship contracts are secured by the employee's super privilege.

Effect of Judicial Reorganisation on Contracts

These contracts continue during business rescue, according to the Uniform Act on Collective Proceedings.

Effect of Administration on Shareholders

The shareholders are limited in the exercise of their functions.

Effect of Administration on Creditors

Current proceedings are interrupted until the creditor has filed its claim. They are then automatically taken over, with the receiver duly summoned, but concern only the establishment of a claim and the fixing of the amount. The costs of legal and contractual interest, and the late payment of all claims secured by security or not, are also fixed.

Pending claims, litigation, arbitration

The decision to open the company's business rescue prohibits or interrupts any legal action by the creditors to enforce any claim they may have against the debtor to pay a sum of money or in relation to enforcement proceedings relating to movable or immovable property.

Effects of the moratorium

Any time limit imposed for creditors to proceed with legal proceedings is suspended for the duration of the proceedings.

Voidable Transactions

Several transactions made during the period prior to the opening of the process of the company are unauthorized and unenforceable against the body of creditors. These transactions include donations, the payment of debts and securities. period must or may be held not to be valid against creditors.

The administration plan

The manner in which a company will be rescued is contained in the administration plan, the concordat, which provides:

- the terms of the continuation of the business;
- a partial or total transfer of assets with a precise indication of which assets need to be sold;
- the persons required to execute the composition and all subscribed commitments necessary for the business rescue,
- the arrangements for maintaining and financing the enterprise;
- the employment prospects and any necessary dismissal of employees for economic reasons; and
- the replacement of managers.

Voting on the plan

The report of the receiver on the status of the process is submitted to the vote. For approval, it must be supported by the majority in number of creditors admitted permanently or provisionally, representing at least half of the total amount of the receivables. The plan may be voted on by correspondence or through a proxy.

Cram down on creditors

The Court may declare that the plan is binding on all creditors.

Implementation of the plan

The plan will be implemented in accordance with its terms.

Discharge of claims

The discharge of claims is not provided for by law but may be contained in the plan.

Implementation of the plan

The composition agreement is implemented in accordance with its terms. Creditors with real security are bound by the reduction in debt and the grace period that they may have agreed with the debtor. However, if the composition agreement provides for a grace period not exceeding 2 years, this grace period may be challenged by the secured creditor if the grace period granted to them was less. In addition, some administrative bodies that are under a statutory obligation not to grant reductions or grace periods are not bound by the composition agreement.

Discharge of debt

The composition agreement may reduce debt and/or provide a grace period to the debtor. Creditors that have granted reductions are not entitled to seek enforcement of the reduced amount against the debtor.

Effect on Suretyships

In general, creditors holding guarantees do not lose the benefit of the guarantee during the administration procedure. But they may realize them only if the composition agreement (business rescue plan) is nullified, which means that the administration may affect the duration of the guarantees. In addition, should the composition agreement involve the divestiture of the assets of the debtor, it may affect the base of real securities.

How is the process terminated?

The process is terminated either by the success of the recovery plan or by its conversion into liquidation.

What is the status of the company after the administration?

If a composition agreement is ratified and implemented in accordance with its terms, the company will continue to trade. If the composition agreement is rejected, the company will be placed in liquidation.

Director and officer liability

The civil and criminal liability of directors or officers of a company is the same as that of a company placed in liquidation.

SECURITY

Types of security

There are two types of securities in Cameroon, namely personal securities and real securities. They may be conventional or forced.

Taking of security

Securities are taken by way of an agreement (conventional) or by Court order (forced).

Security trustees and special purpose vehicles

Any security for the performance of an obligation may be created, registered, managed, and carried out by a national or foreign financial institution or credit institution acting on its behalf and acting as a security agent for the benefit of the creditors. The security trustee is an agent responsible for the constitution, the inscription and the realization of one or more securities or any other guarantee in respect of the execution of an obligation. The security trustee has the power to represent the creditors and defend their interests.

Most robust form of security available to local and/or international lenders

Mortgage is the most robust form of security. Given, however, that its enforcement may be interrupted or suspended in the event of liquidation or administration, it is advisable to support it with an independent payment guarantee provided by a financial institution, payable on demand.

Registration of security

Registration must be done in the Trade and Personal Property Credit Register, also known as RCCM (Registre de commerce et de crédit mobilier).

Stamp Duty

Stamp duty is levied on all papers intended for civil and judicial acts and writings that can be produced in Court as authentic. There are no exceptions other than those

specifically mentioned in the General Tax Code or in another law.

Registration Costs

The costs depend on certain factors, including the value of the security recorded.

Requirements for the assignment / transfer of the registered security

This requires registration with the tax authorities and the RCCM, except for a personal guarantee and a letter of guarantee. As for mortgages, they must be registered in the land register.

Instances in which securities might be vulnerable to attack

There should be no concern if the security is legally registered.

Methods of enforcement of security

The security may be sold on public auction where the debtor and the creditor are unable to reach an agreement for the realization of the security. The sale by a public auction rises following the grant of an enforceable judgement.

Problems experienced when enforcing security

In practice, objections may be raised by the debtor, the guarantor or a third party, or any person who has an interest in the proceedings.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

According to applicable exequatur rules, a foreign judgment that is enforceable against a person or company domiciled in Cameroon may be recognized after an exequatur procedure, carried out before the President of the competent Court of First Instance.

Requirements for recognition of a foreign judgment

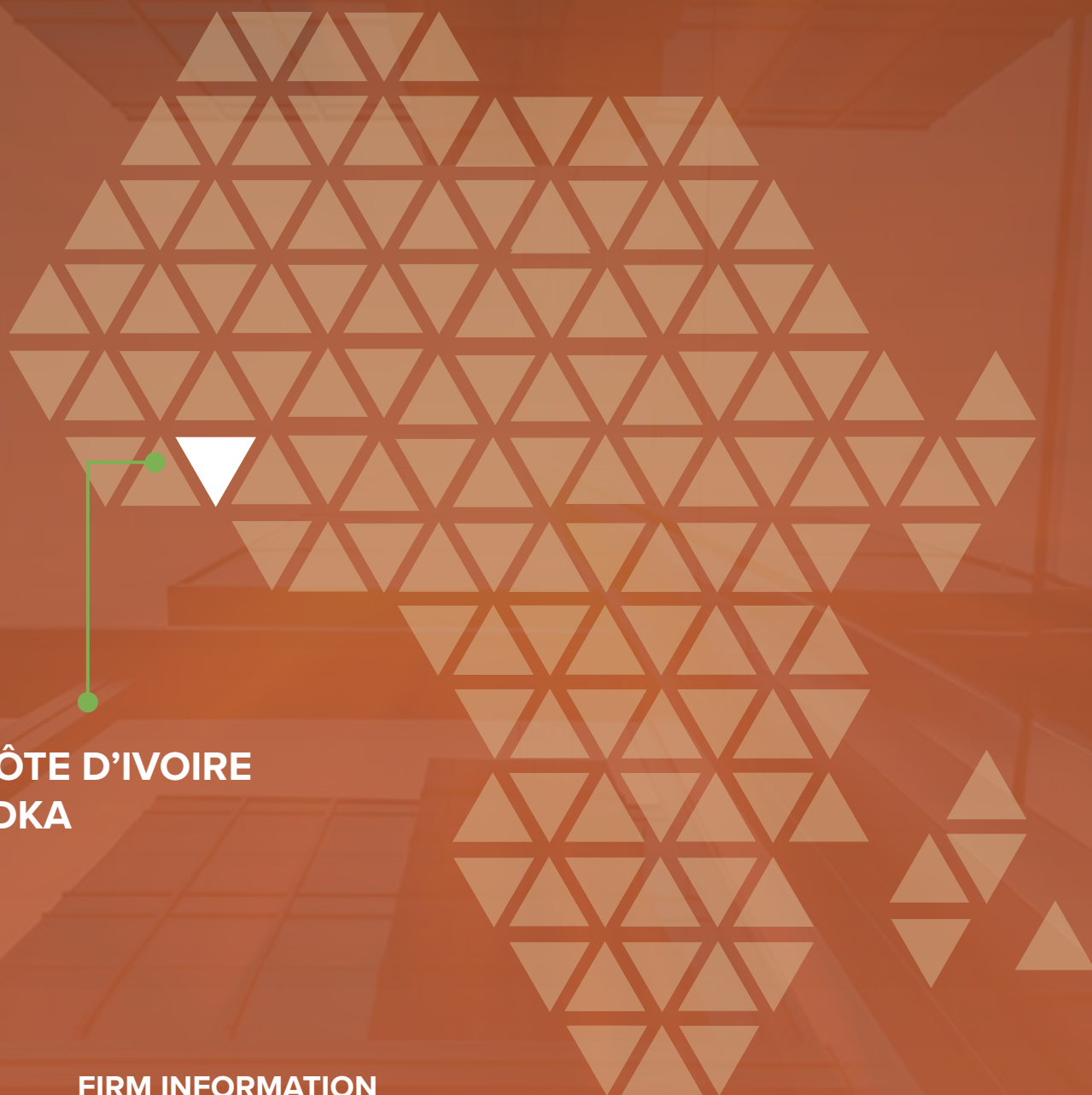
Cameroonian law governing exequatur provides for four conditions:

- The decision was issued by a competent court in its country of origin;
- The parties were duly summoned, represented and declared in default;
- The decision is enforceable in its country of origin; and
- The decision is not contrary to Cameroonian public policy or to a final judicial decision rendered in Cameroon.

Requirements for the recognition of a foreign trustee, business rescue practitioner or an insolvency practitioner

There is no Cameroonian law provision on this issue, but the Uniform Act on Collective Proceedings for Clearing of Debts provides for the recognition of foreign insolvency procedures, subject to the submission of an application to the Competent Court by the foreign business rescue or insolvency practitioner.





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CÔTE D'IVOIRE | FDKA ASSOCIATION D'AVOCATS

TYPE OF GOVERNMENT

The Government of the country is a democracy.

POLITICAL SYSTEM

Côte d'Ivoire opted for a presidential regime, characterized by the separation of executive, legislative and judicial powers. Multiparty politics have also been introduced into the system since 1990.

LEGAL SYSTEM

Inspired by French law, the Ivorian judicial system is organized by the Constitution.

The judicial system groups first and second level Courts with the Courts of First Instance and Courts of Appeal. These jurisdictions are under the control of the Supreme Court that covers the Court of Cassation and the Council of State. There are also the Court of Accounts, the Council of State, and the Constitutional Council. To these Courts is added the Cour Commune de Justice et d'Arbitrage, a common higher court that controls the application of the OHADA Uniform Acts (including the Uniform Act governing the organization of collective insolvency proceedings) by the Ivorian first and second level Courts.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. Liquidation?)

Insolvency is the state of cessation of payments by a company. It is defined as the inability of a company to honour its liabilities with its available assets.

What are the tests for financial distress (i.e. business rescue or administration?)

Business rescue is applicable when the situation of the company, despite its state of cessation of payments, is not irretrievably compromised, and the company proposes a plausible plan to pay its liabilities.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

The friendly liquidation and judicial liquidation are the formal procedures available. There is also a simplified judicial liquidation, which provides for simple mechanisms adapted to small companies.

Formal restructuring procedures

These are the legal restructuring and the simplified legal restructuring (the latter procedure adapted to small companies).

Informal insolvency or restructuring procedures

Not applicable.

LIQUIDATION

What is the aim of liquidation?

The purpose of liquidation is to discharge the debts of the company from the proceeds derived from a sale of the company's assets.

Process required to commence a liquidation

The debtor (who is in a state of cessation of payments) must make a declaration for the purpose of opening the liquidation procedure within 30 days following the cessation of payments. The declaration must be lodged at the registry of the Competent Court.

The debtor must further lodge, within 30 days, the documents relating to the debtor's affairs- the financial statements, the security rights, the debtor's property inventory, the employees and the employee representatives, the partners, and those wishing to consent to new contributions.

The liquidation may be initiated by a creditor, regardless of the nature of his/its claim, provided that it is certain, liquid and due.

The Competent Court may initiate proceedings ex officio, and in particular on the basis of information provided by a representative of the Public Prosecutor's Office, by the auditors of legal persons governed by private law, by the members of such legal persons or from institutions representing the personnel.

At what point does the liquidation process commence?

The liquidation process begins when the Competent Court pronounces the opening of the liquidation procedure.

Duration of the liquidation process

The Competent Court shall fix the period within which the closure of the proceedings shall be examined, provided that such period is no more than 18 months after the initiation of the procedure.

Extent of court involvement in the liquidation process

The Court plays an active role in the liquidation procedure in the sense that its participation starts from the opening of the procedure to the decision regarding its closure, and it ensures the efficiency of the proceedings. In addition, the Competent Court designates the various bodies responsible for ensuring the smooth running of the procedure and its involvement promotes the speedy progress of the liquidation at the various stages.

Management of the company whilst in liquidation

The powers of the board of directors or the executive officers end when the Court makes its decision for the liquidation of the company. A liquidator will represent the company and is vested with extensive powers to realize assets and is mandated to pay the creditors and to distribute among the partners, the available assets.

Filing of claims

From the moment a decision is made to open a liquidation, and within 60 days of the date on which a second legal notice is published, creditors are required to file their claims with the liquidator under penalty of foreclosure. The deadline is extended to 90 days for creditors domiciled outside the country. In the case of secured creditors, the time limit for the filing of claims runs from the notification of the notice that is personally given by the liquidator, by registered letter with acknowledgment of receipt, or by any means with proof of a written record.

Known creditors must be notified without notice by the liquidator if they have not filed their claims within 15 days of the first insertion of the opening decision in a legal notice newspaper. The warning takes the form of a bearer's letter against a receipt or a registered letter with acknowledgment of receipt or any means that provides proof by way of a written record.

Factors Which Influence the Period of the Administration in a Liquidation

The administrative difficulties associated with litigation brought by or against the business, and the change in the mode of administration by the replacement of the directors of the company, by the liquidator, are factors which may

influence the period of administration of the business during the liquidation process.

Effect of liquidation on employees

Claims arising from employment or apprenticeship contracts enjoy the status of super privilege.

Effect of Liquidation on contracts

Contracts can be maintained or terminated at the discretion of the liquidator.

Effect of liquidation on shareholders

The shareholders will be paid from any available proceeds after payment to creditors.

Effect of liquidation on creditors

Once liquidation commences, the body of creditors is represented by the liquidator, who acts in the name, and in the collective interest, of the general body of creditors. Creditors may submit their claims to the liquidator and are classified as secured and unsecured. They will be paid in full or in part, depending on the assets realized.

Pending claims, litigation and arbitration

Once a decision is granted to open the liquidation process, all enforcement proceedings brought by creditors in respect of the movable and immovable property of the company, as well as any distribution procedure which did not prove beneficial before the opening decision, is prohibited and precluded. Proceedings which are in process are interrupted until the creditor has filed its claim. They are then automatically taken over, with the liquidator duly summoned, but concern only the establishment of a claim and the fixing of its amount.

Voidable Transactions

Several transactions made during the suspect period are unauthorized and unenforceable against the body of creditors. These transactions, would be considered void and would include donations, the payment of debts and securities taken in respect of a debtor's goods. The suspect period starts from the date of cessation of payments and ends on the date of the decision to open the judicial reorganisation or the liquidation of assets. Transactions that resulted in prejudice to the creditors are also void.

How is the liquidation process terminated?

When the company has paid its liabilities, and the remaining assets have been distributed to the shareholders, the liquidation process is deemed to be terminated. The Competent Court pronounces the end of the liquidation process. It may also pronounce the liquidation:

- when the liquidation operations are well completed;
- when there are insufficient assets to undertake the liquidation process; and
- when there are no more pending liabilities, the Competent Court may pronounce the closure based on the extinction of liabilities as evidenced by the report of the official receiver.

Director or officer liability

Liability may be incurred civilly and criminally. A director convicted by a civil judge, may be prosecuted before a correctional judge for fraudulent bankruptcy.

Consequences of the civil liability of directors and officers becomes applicable in the circumstances where the asset shortfall of a company is due to mismanagement by the directors. The Court may decide that the debts of the company are supported by the managers through an action to fill the liabilities. In addition, the directors can be the subject of an extension of the collective procedures, but also of the extra-patrimonial sanction of personal bankruptcy.

On the criminal side, managers can be guilty of bankruptcy and other offenses affiliated to it (simple bankruptcy and fraudulent bankruptcy).

BUSINESS RESCUE/ADMINISTRATION

Process required to commence judicial reorganisation

The debtor in a state of cessation of payments must make a declaration within 30 days of the cessation and lodge it at the registry of the Competent Court against a receipt, for the purpose of obtaining the opening of a judicial reorganization procedure. Within less than 30 days, the debtor must lodge the documents relating to the debtor's activity, the financial statements, the security rights, the inventory of the debtor's property, details of the employees and employee representatives, the partners, people wishing to consent to new contributions, and if necessary, a draft concordat (or restructuring agreement).

At what point does judicial reorganisation commence?

The process is triggered by the opening decision from a Competent Court. The Court pronounces the opening of the judicial recovery if it appears that the debtor has proposed a plausible concordat (or restructuring agreement) or can demonstrate that a concordat can be achieved or that a global assignment of the assets is possible.

Duration of the judicial reorganisation process

From the opening judgment, the recovery process has a period of 6 months, extendable once for a period of 3 months. At the end of the period, the Competent Court may convert the process into liquidation.

Extent of court involvement in the judicial reorganisation process

The Court plays an active role in the reorganization proceedings, by fixing the date of insolvency and pronouncing the opening of the procedure. Like in the liquidation procedure, the role of the Court starts as soon as the decision to open the judicial restructuring is pronounced, until the financial situation of the company returns to normal. Consequently, the Competent Court appoints the bankruptcy judge who is responsible for ensuring that the procedure is carried out expeditiously, that the deadlines are met and that the malpractices of the bodies involved are punished. The Court may appoint a judge or any relevant individual in order to be provided with information about the debtor's financial situation.

Management of the company whilst in judicial reorganisation

From the date of the decision of the judicial reorganization until the homologation of the concordat for the judicial reorganization of assets, all acts concerning the administration and disposal of the assets of the directors are subject to compulsory assistance, on pain of the unenforceability of these acts. However, the debtor may carry out, alone, the consultative acts and those of current management which are part of the usual activities of the company, in accordance with the practices of the profession, provided that it reports them to the receiver.

Filing of claims

From the moment a decision is made to open a judicial reorganisation, and within 60 days of the date on which a second legal notice is published, creditors are required to file their claims with the liquidator under penalty of foreclosure. The deadline is extended to 90 days for creditors domiciled outside the country. In the case of secured creditors, the time limit for the filing of claims runs from the notification of the notice that is personally given by the liquidator, by registered letter with acknowledgment of receipt, or by any means with proof of a written record. Known creditors must be notified without notice by the liquidator if they have not filed their claims within 15 days of the first insertion of the opening decision in a legal notice newspaper. The warning takes the form of a bearer's letter against a receipt or a registered letter with acknowledgment of receipt or any means that provides proof by way of a written record.

Factors which influence the period of the administration in a judicial reorganisation

Litigation brought against or by the company coupled with the fact that the decisions of directors are subject to the approval of the liquidator.

Funding of the Company Whilst in Judicial Reorganisation

There are no restrictions on this, save for the fact that loan agreements must be approved by the official receiver.

Effect of Judicial Reorganisation on Employees

Employees may be dismissed for economic reasons. As in liquidation, claims arising from employment or apprenticeship contracts are secured by the employees' super privilege.

Effect of Judicial Reorganisation on Contracts

These contracts continue during business rescue.

Effect of Judicial Reorganisation on Shareholders

The shareholders are limited in the exercise of their functions.

Effect of Judicial Reorganisation on Creditors

Current proceedings are interrupted until the creditor has filed its claim. They are then automatically taken over, with the receiver duly summoned, but concern only the establishment of a claim and the fixing of the amount. The costs of legal and contractual interest, interest and the late payment of all claims secured by security or not, are also fixed.

Pending claims, litigation, arbitration

The decision to open the company's business rescue prohibits or interrupts any legal action by the creditors to enforce any claim they may have against the debtor to pay a sum of money or in relation to enforcement proceedings relating to movable or immovable property.

Effects of the moratorium

Any time limit imposed for creditors to proceed with legal proceedings is suspended for the duration of the proceedings.

Voidable Transactions

Several transactions made during the period prior to the opening of the process of the company are unauthorized and unenforceable against the body of creditors. These transactions include donations, the payment of debts and securities.

The concordat plan

The manner in which a company will be rescued is contained in the plan, the concordat, which provides -

- the terms of the continuation of the business,
- a partial or total transfer of assets with a precise indication of which assets need to be sold,

- the persons required to execute the composition and all subscribed commitments necessary for the business rescue,
- the arrangements for maintaining and financing the enterprise,
- the employment prospects and any necessary dismissal of employees for economic reasons, and
- the replacement of managers.

Voting on the concordat

The report of the receiver on the status of the process is submitted to the vote. For approval, it must be supported by the majority in number of creditors admitted permanently or provisionally representing at least half of the total amount of the receivables. The plan may be voted on by correspondence or through a proxy.

Cram down on creditors

The Court may declare that the plan is binding on all creditors.

Implementation of the plan

The plan will be implemented in accordance with its terms.

Discharge of debt

The discharge of claims is not provided for by law but may be contained in the plan.

How is the process terminated?

The process is terminated either by the success of the recovery plan or by its conversion into liquidation.

Director and officer liability

The director and officer liability as set out under the liquidation section is applicable here.

SECURITY

Types of security

These are -

- personal securities, with suretyship and stand-alone guaranties,
- movable sureties, with the right of retention, property withheld or assigned as security, a pledge of tangible movable property, a pledge of intangible property and liens, and
- mortgages, conventional or forced.

Taking of security

Securities are taken by way of an agreement or by Court order.

Security trustees and special purpose vehicles

Any security for the performance of an obligation may be created, registered, managed, and carried out by a national or foreign financial institution or credit institution acting on its behalf and acting as a security agent for the benefit of the creditors of the secured obligation (or obligations) to designate it for that purpose. The security trustee is an agent responsible for the constitution, the inscription and the realization of one or more securities or any other guarantee in respect of the execution of an obligation. The security trustee has the power to represent the creditors and defend their interests.

Most robust form of security available to lenders

This is the mortgage.

Registration of security

Registration must be done in the Trade and Credit Register, also known as RCCM (Registre de commerce et de crédit mobilier).

Stamp Duty

Stamp duty is levied on all papers intended for civil and judicial acts and writings that can be produced in Court as authentic. There are no exceptions other than those specifically mentioned in the General Tax Code or in another law.

Registration Costs

The costs depend on certain factors, including the value of the security recorded.

Requirements for the assignment / transfer of the registered security

This requires registration with the tax authorities and the RCCM, except for a personal guarantee and a letter of guarantee. As for mortgages, they must be registered in the land register.

Instances in which securities might be vulnerable to attack

There should be no concern if the security is legally registered.

Methods of enforcement of security

The security may be sold on public auction where the debtor and the creditor are unable to reach agreement for the

realization of the security. The sale by a public auction rises following the grant of an enforceable judgement.

Problems experienced when enforcing security

In practice, objections may be raised by the debtor, the guarantor or a third party.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

According to applicable exequatur rules, a foreign judgment that is enforceable against a person or company domiciled in Côte d'Ivoire may be recognized by the Ivorian court.

Requirements for recognition of a foreign judgment

Several conditions should be present such as -

- the foreign Court must have had jurisdiction to hear the case;
- the documents declaring the judgment must be authentic,
- the rights of the defendant must have been respected,
- the decision must have become res judicata under the law of the country in which it was made, and
- the judgment must not be contrary to Ivorian public order.

Requirements for the recognition of a foreign trustee, business rescue practitioner or an insolvency practitioner

There is no Ivorian law provision on this issue.





DRC
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COUNTRY INFORMATION

The Democratic Republic of Congo ("DRC") is located in Central Africa. To the north, it borders the Central African Republic and South Sudan. To the east, it borders Uganda, Rwanda, Burundi, and Tanzania. To the south, it borders Zambia and Angola and the Republic of Congo and the Atlantic Ocean to the west. The DRC is the second-largest country in Africa and the 11th largest in the world. With a population of over 75 million people, the DRC is the most populous French-speaking country, the 4th most populous nation in Africa, and the 19th most populous country in the world.

TYPE OF GOVERNMENT

A Democracy and Semi-Presidential Government.

POLITICAL SYSTEM

The Constitution, promulgated on 18 February 2006 as amended by the Law No 11/002 of January 2011, established the institution of the Third Republic which introduced a democratic system and a semi-presidential system into the DRC with a bicameral Parliament.

LEGAL SYSTEM

The Congolese legal system is primarily based on Belgian law. This is as a result of the colonial past and occupation of the DRC by Belgian colonialists, who influenced the legal system of the DRC. The Constitution endorsed the doctrine of separation of powers, which emphasizes the independence of the judiciary, legislature, and government executive bodies. The judiciary is composed of the Constitutional Court, the Civil and Military Courts under the control of the Court of Cassation, the Council of State and the Administrative Courts. Specialised Courts may also be established ad hoc, such as Juvenile Courts.

TESTS FOR INSOLVENCY

The test for insolvency (i.e. liquidation)

Insolvency law in the DRC is governed by the Uniform Act on the organization of collective proceedings and the

discharging of debt dated 10 September 2015 (Uniform Act on collective proceedings or UACP). Collective procedures established by the UACP are open to all individuals who conduct an independent professional activity – this includes self-employed individuals, private legal entities as well as any state-controlled entity formed as a private legal entity. The activities are not only restricted to commercial activities but also include civil, handicraft, or agricultural activities¹.

Conciliation, preventive settlement, judicial redress and liquidation procedures shall apply to legal entities governed by private law that carry out an activity subject to a special regime, unless otherwise provided for in the specific regulations governing that activity. Activities subject to a special regime within the meaning of this Uniform Act and the texts governing them include, in particular, those of credit institutions within the meaning of banking law, microfinance institutions and financial market participants, as well as those of insurance and reinsurance companies of the States parties to the OHADA Treaty.

A company may be placed in liquidation if it is unable to pay its debtors or if it has lost its share capital². Insolvency means the suspension of payments (cessation des paiements), which is the trigger allowing a party to initiate curative insolvency proceedings. It is defined as the state in which the debtor is unable to pay its outstanding liabilities with its current assets, but excluding from outstanding liabilities, credit reserves or payment terms which the debtor enjoys from its creditors, and which allow it to meet its outstanding liabilities³.

However, it should be noted that key concepts such as an "irremediably compromised situation" (which is the pivotal point between judicial recovery and the liquidation of assets) and "serious financial or economic difficulties" (which is the trigger allowing the debtor to initiate preventive settlement) are not specified in the UACP and have only been defined through case law.

The test for financial distress (i.e. business rescue or administration)

Business rescue is applicable when a company is unable to pay its debts with its available assets⁴. A Competent Court will order the commencement of business rescue proceedings if it appears that the debtor has proposed a genuine composition with its creditors. Failing which, the Court will make an order for the liquidation of the company. The Court may, at any time during business rescue proceedings, place the company in liquidation if the Court believes that the debtor is not offering, or is no longer able to offer, a genuine composition with creditors⁵.

¹ Article 1-1 of the UACP

² Articles 2 and 25 of the UACP

³ Article 1-3 of the UACP

⁴ Article 25 of the UACP

⁵ Article 33 of the UACP

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

In the DRC, there are 3 formal insolvency procedures for a company, namely, precautionary regulation, judicial redress and liquidation procedures. The precautionary regulation is a pre-insolvency rescue procedure designed to avoid the cessation of payments or the cessation of the activities of the company and allows for the discharging of the debts of the company by way of a preventive agreement⁶. Judicial redress aims to safeguard the company and discharge its debts by way of an agreement of redress. As for the liquidation procedure, its purpose is the realization of the assets of the debtor to discharge its debts.⁷

New procedures have been created for companies facing actual or foreseeable difficulties, but which are not yet insolvent, with a view to avoiding suspension of payments and safeguarding the relevant debtor, by concluding an amicable agreement with its main creditors and counterparties. It is a consensual and confidential procedure.

The Uniform Act, which accounts for entrepreneurs, also covers “every natural person exercising an independent professional activity whether civil, commercial, handicraft or agricultural”⁸. The resulting effect is that it applies to farmers, craftsmen, business starters, freelance professions, whether regulated or not.

The Uniform Act provides for a conciliation procedure. It gives exclusive jurisdiction on collective proceedings to any Competent Court in Member States⁹. The Uniform Act provides for the rules to ensure the regulation and supervision of legal representatives in a bid to professionalize the trades of bankruptcy administrators and preventive settlement experts. Certainly, the role of bankruptcy administrators in ensuring that collective proceedings run smoothly and efficiently cannot be overemphasized. This regulation is considered an essential factor in ensuring the achievement of the objectives of the Uniform Act. Thus, if bankruptcy administrators are found to be technically incompetent, of bad character, careless regarding the rules of conduct of proceedings or if they embezzle funds generated from the proceedings, the company will not be rescued, nor will its creditors be paid.

There are two preventive proceedings in insolvency matters where the company has not yet suspended payment(s).

These are :

- i. Conciliation, which is a completely new procedure; and
- ii. Preventive settlement, which has innovated only in some aspects.

One of the innovations of the Uniform Act is the establishment of a conciliation procedure with a strong amicable dimension, in the sense that its commencement does not affect the rights of creditors or those of the debtor. A conciliator who is appointed is a mere facilitator in finding an agreement between the parties, i.e. he/she is an intermediary between the debtor and creditors.¹⁰

Although preventive settlement proceedings have not been substantially modified, important amendments were made to enhance its efficiency and ensure better protection for creditors.

The conciliation overarching objective is to find an amicable agreement with major creditors and co-contractors of the debtor in order to relieve him of his difficulties. Regarding the conditions for the commencement of a preventive settlement procedure, the debtor must not be in suspension of payment and must also prove severe financial or economic difficulties. Among the documents to be furnished by the debtor in support of his/her claim, there must be a proposed agreement with creditors. It is in view of this proposed agreement and its seriousness that the procedure may be instituted through an order of the President of a Competent Court, which shall also appoint an expert in such matters. It is worth noting that the Uniform Act on collective proceedings provides for specific rules to ensure the independence and impartiality of the President of the Competent Court and allows the debtor and any creditor to request for his/ her replacement if neither impartiality or independence are met.¹¹

Regarding creditors, a “new money” privilege has been instituted for people who grant new loans or supply services or goods to companies facing difficulties. Before approving the preventive settlement, the Competent Court must verify that the conditions for granting this privilege are met and shall mention this fact as well as the amount in its decision to avoid subsequent disputes. A new simplified preventive settlement procedure is also provided. This variant of preventive settlement is meant for small businesses and remains optional. When they meet the conditions for a preventive settlement procedure, the parties have the choice to commence the procedure or not.

Formal precautionary regulation procedures

A debtor company may approach a Court regarding precautionary regulation procedures. It would be required to indicate its financial position, the prospects of it recovering, and the extent to which its liabilities will be settled. The request is sent to the President of the Competent Court having jurisdiction.¹²

⁷ Article 2 of the UACP.

⁸ Article 1-2 of the UACP.

⁹ Paragraph 1 and 2 of article 3 of the UACP.

¹⁰ Chapter 1 of Title II of the UACP.

¹¹ Chapter 2 of Title II of the UACP

¹² Article 5-2 of the UACP

The debtor's request must be accompanied by the following documents, which must be dated, signed, and certified by the applicant, and must be dated less than thirty (30) days prior -

a certificate of registration, enrolment, or declaration of activity in a professional register or association or, failing that, any other document proving the regularity of the activity carried out by the debtor;

i. summary financial statements including the balance sheet, income statement, a financial table of resources and uses, the attached statement and, in any event, the amount of turnover and profits or losses for the last three (03) financial years or, failing that, any other document that can establish the financial and economic situation of the debtor;

ii. a statement of cash flow and a statement of receivables and payables, indicating the names, capacities, and addresses of creditors and the due dates or, failing that, any other document establishing the debtor's ability to meet its current liabilities with its available assets;

iii. a document indicating the number of employees and the amount of wages and payroll expenses on the date of the application or, failing that, any other document that can be used to identify and count the debtor's employees and estimate the amount of wages and payroll expenses;

iv. a statement from the debtor declaring on his honor that he is not in a state of insolvency;

v. a detailed statement of the personal and real securities given or received by the company and its officers;

vi. a statement from the debtor indicating that they are not currently subject to a conciliation agreement and, in any event, that they are not subject to any ongoing preventive settlement, judicial restructuring or liquidation proceedings;

vii. an inventory of the debtor's assets, indicating any movable assets subject to claims by their owners and those subject to a retention of title clause or, failing that, a provisional inventory if the petition is filed by a debtor that meets the definition of a small business;

viii. a document listing the names, first names, and addresses of the employee representatives;

ix. in the case of a legal entity, a list of the members who are jointly and severally liable for its debts, indicating their surnames, first names, and addresses, as well as the names and addresses of its directors;

x. if the debtor proposes a person to be appointed as an expert in preventive settlement, a document indicating the full name, qualifications, and domicile of that person and a statement from that person specifying that they meet the

conditions set out in the Uniform Act under review;

xi. where applicable, a document indicating the surnames, first names, positions, and addresses of the persons who intend to make a new cash contribution or provide a new good or service, with an indication of the amount of the contribution or the value of the good or service;

xii. a draft preventive agreement; and

xiii. where applicable, a document indicating the surnames, first names, and addresses of the creditors joining the debtor's application, and the amount of their claims and any security attached to them.

No application for the opening of preventive settlement proceedings may be filed by the debtor: (i) if a preventive or reorganization agreement is still in force; (ii) before the expiry of a period of three (03) years from the approval of a previous preventive agreement; and (iii) before the expiry of a period of eighteen (18) months from the end of a preventive settlement that did not result in a preventive agreement.

Within 30 days of filing a petition with the Court, the company must make an offer to its creditors indicating the measures and conditions envisaged for the recovery of the company, including -

- arrangements for the continuation of the business;
- the people required to run the company and all commitments needed to rescue the company;
- the terms for maintaining and financing the company to ensure the implementation of a plan;
- the identification and retrenchment of redundant employees; and
- the replacement of the executives of the company.

If the draft composition agreement appears to be serious, the president of the competent court opens the proceedings and appoints a preventive settlement expert to report on the financial and economic situation of the debtor company and the prospects for recovery, taking into account the delays and discounts granted or likely to be granted by creditors and any other measures contained in the draft composition agreement.

The appointed expert shall be subject to the provisions and requirements of this Uniform Act. (Provide every guarantee of independence, neutrality, and impartiality in all collective proceedings. He must not have or derive any personal, moral, or financial interest in the mandate entrusted to him). He shall be informed without delay of his assignment by the president of the competent court by letter delivered by hand against receipt or by registered letter with acknowledgment of receipt or by any other means leaving a written record. The president of the competent court may, in his decision appointing the expert, grant him an advance on his remuneration.

The debtor or any creditor may, at any time, request the president of the competent court to replace an expert who

falls under any of the incompatibilities set out in this Uniform Act or who does not act diligently in the performance of his duties. In this case, the president of the competent court, upon receiving an objection, shall hear, in a closed hearing, the explanations of the applicant(s) and the expert. His decision, pronounced in open court, shall be accompanied by provisional enforcement by operation of law. It may be appealed within fifteen (15) days of its pronouncement.

It is important to note that the decision to initiate preventive settlement suspends or prohibits all individual proceedings seeking payment of debts incurred prior to said decision for a maximum period of three (03) months, which may be extended by one (01) month under the conditions below -

It is important to note that the decision to initiate preventive settlement suspends or prohibits all individual proceedings seeking payment of debts incurred prior to said decision for a maximum period of three (03) months, which may be extended by one (01) month, upon a specially reasoned decision by the President of the competent court at the request of the expert or the debtor.¹³

Within 3 months of the date on which the Competent Court is approached (or on an extended time as sanctioned by the President of the Court), an expert (appointed to assess the affairs of the debtor and broker an agreement with the creditors and the company) will submit a copy of its report, which contains the preventive agreement proposed by the debtor with its creditors, to the debtor and file two copies with the registry of the Competent Court¹⁴. The expert is required to comply with these deadlines, failing which he or she may be held liable to the debtor or creditors. After the filing of the report, the President of the Competent Court will summon the debtor, without delay and at least 3 days before the hearing, to be heard in a non-public hearing and may call the expert or one or more creditors¹⁵. The debtor may bring the matter before the competent court himself. The preventive settlement continues to have effect, in particular with regard to the suspension of individual proceedings by creditors, until the court rules. If the court is not seized of the matter under the conditions mentioned above or if it does not rule within thirty (30) days of being seized of the matter, the preventive settlement shall automatically terminate, with creditors regaining the exercise of all their rights and the debtor regaining full administration of his assets.

The Court can make a ruling on the matter immediately or at the latest within 30 days from the date on which the case was brought¹⁶. The Court will either determine that the company be rescued (with the security of a moratorium on claims against it), or the company be placed in liquidation.

If the competent court finds that the debtor has ceased payments, it shall, ex officio, rule on the judicial reorganization or liquidation of the assets. Where the debtor's situation so warrants, it shall approve the preventive agreement, noting

the terms and concessions granted by the creditors and acknowledging the measures proposed by the debtor for the reorganization of the business. The payment terms and discounts granted by creditors may vary. The competent court shall approve the preventive agreement if: (i) the conditions for the validity of the composition agreement are met; (ii) no grounds based on the collective interest or public policy appear to prevent the composition agreement; and (iii) the payment terms granted shall not exceed three (03) years for all creditors and one (01) year for wage creditors.

The approval of the preventive agreement makes it binding on all creditors prior to the decision to initiate preventive settlement proceedings, whether their claims are unsecured or secured by collateral under the terms and conditions of payment and discounts they have granted to the debtor. The approval of the agreement also makes it binding on persons who are jointly liable or who have granted a personal security interest or assigned or transferred property as security when they have paid the debtor's debts incurred prior to that decision.

The decision of the competent court approving the preventive agreement terminates the expert's assignment and the preventive settlement procedure.

The decisions of the competent court relating to the preventive settlement are provisionally enforceable. Decisions rejecting the application to initiate preventive settlement proceedings or terminating preventive settlement proceedings, or rejecting the approval of a preventive composition agreement, may be appealed by the debtor before the court of appeals within fifteen (15) days of their pronouncement. The decision to initiate preventive settlement proceedings may be appealed by creditors and the public prosecutor before the court of appeals within fifteen (15) days of the first publication if they believe that the company is insolvent. The decision approving the preventive agreement may be appealed by the public prosecutor and creditors before the court of appeals within fifteen (15) days of its pronouncement for the former and from the date of the first publication for the latter. The appeal shall be lodged with the court of appeals within fifteen (15) days of the pronouncement of the decision or, in the case of the latter, from the date of the first publication.

The court of appeal shall rule within thirty (30) days of the case being referred to it. If the court of appeal finds that the debtor has ceased payments, it shall provisionally set the date of cessation and order the reorganization or liquidation of the assets and shall refer the proceedings to the court competent to rule, in particular on the appointment of a bankruptcy judge. Within three (03) days of the decision of the court of appeal, the clerk of that court shall send an extract thereof to the clerk of the court of first instance, which shall publish it.

¹³ Article 9 and 13 of the UACP

¹⁴ Article 13 of the UACP

¹⁵ Article 14 of the UACP

¹⁶ Article 14 of the UACP

Informal Insolvency or Restructuring Procedures

There are no informal insolvency or restructuring procedures for a company in the DRC.

LIQUIDATION

What is the aim of liquidation?

The aim of liquidation is to provide lenders with a higher degree of confidence that when a business is unable to pay its debts, appropriate procedures will be followed to maximize the value of the business.

Process required to commence liquidation

When a debtor is unable to meet its liabilities with its available assets, it must make a declaration of insolvency to commence insolvency proceedings.

The reorganization and assets liquidation proceedings may be opened at the request of a creditor (irrespective of the nature of its claim, provided that it is certain, of a fixed amount and due), ex officio by the competent court (namely based on information furnished by the representative of the public prosecutor, auditors of legal entities governed by private law) and by the public prosecutor¹⁷.

- 1) The following documents, dated less than thirty (30) days prior, must be attached to this declaration: a certificate of registration, enrollment, or declaration of activity in a professional register or association or, failing that, any other document proving the regularity of the activity carried out by the debtor.
- 2) the summary financial statements including the balance sheet, income statement, a financial table of resources and uses, the attached statement and, in any event, the amount of turnover and profits or losses for the last three (03) financial years or, failing that, any other document that can establish the financial and economic situation of the debtor if the declaration is made by a debtor that meets the definition of a small company.
- 3) a financial statement and a statement of receivables and payables, indicating the names, capacities, and addresses of creditors and the due dates
- 4) A detailed statement of the assets and liabilities, personal and real securities given or received by the company and its managers.
- 5) an inventory of the debtor's assets, indicating any movable assets subject to claims by their owners and those subject to a retention of title clause or, failing that, a provisional

inventory of the debtor's assets if the application is filed by a small business debtor.

- 6) the list of workers with an indication of the amount of unpaid wages and payroll taxes on the date of the request or, failing that, any other document that allows the debtor's workers to be identified and counted and the amount of unpaid wages and payroll taxes to be estimated if the declaration is made by a debtor of a small company.
- 7) A document indicating the names, first names, and addresses of the employee representatives.
- 8) a statement from the debtor indicating that they are not subject to a conciliation agreement currently in force or a composition agreement currently in force and, in any event, that they are not subject to any preventive settlement, receivership, or liquidation proceedings that have not yet been concluded; where applicable, if the debtor has benefited from a conciliation agreement or a composition agreement, the amount of the claims remaining due to creditors benefiting from the privilege, as well as their names and addresses.
- 9) if it is a legal entity, a list of the members who are jointly and severally liable for its debts, indicating their names and addresses, as well as the surnames, first names, and addresses of its directors.
- 10) where applicable, a document indicating the names, positions, and addresses of the persons who intend to make a new cash contribution or provide a new good or service, with an indication of the amount of the contribution or the value of the good or service.
- 11) where applicable, a draft concordat for judicial reorganization.

This declaration may also be made by a creditor, provided that the debt is certain, liquid, and due¹⁸. This declaration must be made within 30 days of the suspension of payments and must be lodged with a Competent Court¹⁹. The Court will order the liquidation of the assets of the company when a composition or rescue of the business is not possible.

Where a trustee (syndic) has knowledge of facts that may justify personal bankruptcy, he/she shall immediately inform the public prosecutor and the receiver and submit a report thereon to them within 10 days²⁰. The receiver shall forward the report to the President of the Competent Court, failing which, the receiver may himself make a report to the President of the Competent Court. As soon as the report is submitted to the President of the Competent Court, he shall immediately have the Court Registrar summon by extrajudicial act, at least 8 days in advance, the debtor or the top executives of the legal entity to appear before the Court

¹⁷ Article 29 UACP

¹⁸ Article 28 of the UACP

¹⁹ Article 25 of the UACP

²⁰ Article 200 of the UACP

on a certain day in order to be heard by the Competent Court behind closed doors. This hearing will be in the presence of the trustee after he/she has been duly summoned by the Court Registrar by hand-delivered letter against a receipt, by registered letter with acknowledgement of receipt or by any means leaving a written record. A copy of the report shall be appended to the summons under penalty of nullity²¹.

The accused debtor or top executives of the legal entity shall appear before the Court in person. In instances where they are unable to appear on grounds deemed duly plausible, they may be represented by a proxy with a power of attorney enabling him/her to represent the parties before the Court. Where the debtor or the top executives of the legal entity do not appear before the Court or are not represented, the Competent Court shall again summon them to appear in the same form and set time limits²². In case of a repeated default, the Competent Court shall give an adverse ruling against them²³.

Independent of information provided in the criminal record, decisions pronouncing personal bankruptcy shall be entered in the Register of Commerce and Securities. With regard to top executives of non-commercial legal entities, such decisions shall be entered into the Registry as well as on the margin of the entry stating the reorganization or assets liquidation. Such decisions shall, furthermore, be published by the Court Registrar in the newspaper empowered to publish legal notices within the jurisdiction of the Court that gave the ruling under the conditions set forth by the Uniform Act²⁴.

The point at which the liquidation process commences

The liquidation process commences on the date on which the Competent Court makes an order to place the company in liquidation²⁵.

The competent court, which concludes that there is indeed insolvency, shall decide on the opening of judicial assets liquidation proceedings if the following two conditions are not met (i) if it appears that the debtor has proposed a sustainable composition within the meaning of Article 27 above or that such an arrangement may likely succeed; and (ii) Or, where an overall insolvency is realistically foreseen.

In any case, at the expiry of the six (06) month-period from the decision to open the reorganization proceedings, which may be extended for a duration of three (03) months, the court shall convert the reorganization into assets liquidation, ex officio or at the request of any interested party.

In the decision to open the reorganization or assets liquidation proceedings, the competent court shall appoint

the receiver among the sitting judges of the court hearing the case, excluding its president, unless the latter is a single judge. It may also, if it deems necessary, appoint a deputy receiver.

The competent court shall also appoint no more than three (3) trustees. The appointed expert for preventive settlements of a debtor may not be appointed trustee²⁶.

Once the liquidation order has been made, the creditors shall form a union. The Trustee (Syndic) shall, within 30 days of taking office, submit to the receiver a statement drawn up based on available information containing an assessment of available or realizable assets, unsecured debts, and debts guaranteed by real special security or a privilege with, in case of legal entity, all information on possible pecuniary liabilities of its top executives(s)²⁷.

When the judgment decrees the conversion of reorganization to assets liquidation proceedings, the trustee (syndic) shall commence the liquidation operations while he/she completes, where appropriate, the verification of claims and establishes the order of creditors. He shall continue activities commenced before the decision to open the assets liquidation proceedings²⁸.

Duration of the liquidation process

Under the Uniform Act, the competent court shall set the time period at the end of which the closing of the proceedings is examined provided that such time period may not exceed eighteen (18) months from the opening of the procedure. If the closing of the proceedings cannot be ruled at the end of such period, the competent court may extend the term by six (06) months only once by a specially reasoned decision, after hearing the justifications of the trustee. Passing this deadline, the competent court shall order the completion of the asset's liquidation, ex officio, or at the request of any interested party²⁹.

The extent of the court's involvement in the liquidation process

The Court is involved in the liquidation process from the date on which the decision is taken to place the company in liquidation.

In fact, the competent court shall appoint the receiver among the sitting judges of the court hearing the case, if it is necessary, appoint a deputy receiver. The competent court shall also appoint no more than three (3) trustee(s).

Under the authority of the competent court, the receiver shall ensure regular and rapid progress of assets liquidation

²¹ Article 200 of the UACP

²² Article 200 of the UACP

²³ Article 201 of the UACP

²⁴ Article 202 of the UACP

²⁵ Article 32 of the UACP

²⁶ Article 35 of UACP

²⁷ Article 146 of the UACP

²⁸ Article 146 of the UACP

²⁹ Article 33 of the UACP

proceedings, protection of the interests at stake and achievement of the objectives pursued. The competent court may, at any time, replace the receiver and the trustee³⁰.

Management of the company whilst in liquidation

The receiver shall ensure, under the authority of the competent court, regular and rapid progress of liquidation proceedings, protection of the interests at stake and achievement of the objectives pursued.

The Trustee(s), Controllers and the public prosecutor shall assist the trustees in the performance of their duties and the receiver in his mandate to oversee the implementation of the reorganization or assets liquidation proceedings and to further the interests of the creditors.

The trustee's mission during the liquidation proceedings shall be overseen by the receiver.

The receiver shall keep the public prosecutor informed on the progress of the reorganization or assets liquidation proceedings. He may, at any time, require transmission of all deeds, books or documents related to the proceedings³¹.

In the event that a liquidation proceeding is opened following completion of a preventive insolvency proceeding or where a judicial recovery is converted into liquidation a proceeding, proceeds from liquidation of the relevant debtor will be allocated first to the "new money" creditors, including in priority to the cost of judicial proceedings and before "super-privileged" employees³².

Filing of claims

All creditors in the body, except creditors of maintenance claims shall, under penalty of foreclosure, lodge their claims with the trustee from the date on which the decision to open liquidation proceedings was taken and up to the expiry of a period of sixty (60) days following the second publication of the decision in a newspaper empowered to publish legal notices³³.

Creditors residing outside the national territory where the proceedings have been opened shall enjoy a time limit of ninety (90) days to file their claims.

Where creditors do not file their claims within the period set forth in articles 78 and 79 above and were not released from their foreclosure, they shall not be included in the distributions and dividends. Defaulting creditors may only be released from foreclosure by a reasoned decision of the receiver insofar as the claims status has not been determined and lodged³⁴.

Upon expiry of the deadline described above, in the absence of a challenge or dispute, or the time limit, where there has been a challenge or dispute, the trustee shall prepare a statement of claims containing his proposals for final or provisional acceptance or rejection of claims, with an indication as to whether they are unsecured or secured, guaranteed by a security and the nature thereof. The statement of claims shall be deposited at the court registry after verification and signature by the receiver³⁵.

Within 3 days of the commencement of liquidation, the company must provide the trustee with its books of account, and a list of creditors is created³⁶. Creditors are required to submit their claims to the trustee. To do this, they are required to provide the trustees, directly or by registered post, with a statement indicating the amount of the debt due at the date of the commencement of liquidation and that which may become due on any maturity dates. The creditor would also need to prove the existence and amount of the debt, the origins of the debt, any security that underpins the claim, whether such claim is liquid and/or the subject of any litigation³⁷.

In view of the above, every creditor mentioned on the balance sheet and whose security is duly published or whose claim has been filed shall be admissible, during a period of fifteen (15) days with effect from the date of the publication in a newspaper empowered to publish legal notices or of receipt of the notice provided, to formulate their opposition.

The opposition shall be formed directly at the court registry or by an extrajudicial act addressed to the court registry by any means proving actual receipt by the addressee, sent to the court registrar against the decision of the receiver. This opposition shall have no admissibility if it is filed by a creditor whose claims or security has been discussed or disputed and who did not provide any explanations to the receiver.

Factors which influence the period of administration in a liquidation

The administrative difficulties presented by liquidation instituted by or against the company are a factor that may delay the finalization of the liquidation process.

Effect of liquidation on employees

In the DRC, as at the date of the commencement of liquidation, contracts of employment are immediately terminated, and employees are given preferential treatment for their claims.

Where dismissals for economic reasons are urgent and essential, the trustee may be authorized to proceed with them by the receiver, notwithstanding any provision to the contrary, but without prejudice to the right to prior notice

³⁰ Article 39 of the UACP

³¹ Article 47 of the UACP

³² Articles 5-11, 166 and 167 of the UACP

³³ Article 78 of the UACP

³⁴ Article 83 of the UACP

³⁵ Article 86 of the UACP

³⁶ Article 55 of the UACP

³⁷ Article 80 of the UACP

and to compensation relating to the termination of the employment contract.

In the first instance, it is proposed to dismiss the workers with the least professional aptitude for the jobs retained and, in the event of equality of professional aptitude, the workers with the least seniority in the debtor company, seniority being calculated in accordance with the provisions of applicable labor law.

Effect of liquidation on contracts

Notwithstanding any statutory provision or contractual clause or indivisibility, the mere opening of asset liquidation proceedings shall not cause the abrogation or termination of a running contract³⁸. When a company is placed in liquidation, the liquidator may decide to either terminate or maintain certain contracts. The liquidator will make such decision with his sole discretion.

Effects of liquidation on shareholders

The shareholders are kept informed of the state of the company by the liquidator for the duration of the liquidation. However, where the assets liquidation of a legal entity shows insufficient assets, the top executives liable, in whole or in part, for the debts of the legal entity, may be compelled by the competent court to assign their equity interests, capital securities or securities giving access to capital thereof or order compulsory assignment by the trustee, where necessary, after valuation.

Effects of liquidation on creditors

The decision to open judicial recovery or liquidation proceedings gives rise to a body of creditors represented by the trustee (the Syndic) who, alone, acts on its behalf and in the collective interest, and can bind it.

Creditors submit claims to the liquidator and are paid out in full or in part depending on the amount for which the assets of the company are realized.

Pending claims, litigation and arbitration

Actions for the recovery of property may be revived or instituted only where the claimant has not complied with the formalities and deadlines provided for by the law. Claims accepted by the receiver, the official receiver, or the Competent Court shall be enforced within 3 months of the date on which notice for the revival or institution of any such action is given or from the date on which the Court accepts the claim. The liquidator may elect to proceed, settle or withdraw any pending liquidation or arbitration proceedings that was initiated at the instance of the company. The same applies to pending proceedings brought against the company.

The decision to open a liquidation of assets interrupts or prohibits any legal action on the part of all creditors making up the general body of creditors, with a view to³⁹:

- ordering the debtor to pay a sum of money;
- to rescind a contract for non-payment of a sum of money.

The decision to open an insolvency proceeding also stops or prohibits all enforcement proceedings by these creditors on both movable and immovable property, as well as any distribution procedure that did not produce an attributive effect prior to the opening decision.

The time limits imposed on creditors under penalty of forfeiture, prescription or cancellation of their rights are consequently suspended for the duration of the suspension of proceedings.

The decision to open a judicial recovery procedure suspends any action against natural persons who are co-obligated or having granted a personal surety or having assigned or transferred an asset as security as of the said judgment and during the execution of the judicial recovery agreement.

However, creditors benefiting from these guarantees may take protective measures.

The decision to open the liquidation proceedings renders debts that have not yet fallen due payable only in the event of liquidation of assets, and only in respect of the debtor.

Voidable transactions

The Court has the power to set aside any transaction occurring within a period prior to the commencement of liquidation or any transaction that is unlawful⁴⁰.

In this case, the following transactions shall be unenforceable against the body of creditors 1) gratuitous transfer of deeds of personal and real property; 2) any commutative contract in which the obligations of the debtor exceed significantly those of the other party; 3) any payment, irrespective of the method, of debts not due, except it is a payment of a trade negotiable; 4) any payment of due debts, made otherwise than in cash, trade negotiables, transfer, levy, payment card or credit card or legal, judicial or conventional set-off of debts having a connection between them or any other ordinary payment method or commonly accepted in business exchanges in the sector of activity of the debtor; 5) any real conventional security pledged as a collateral security for a debt previously contracted, unless it replaces a prior security interest of a nature and extension at least equivalent or that it is granted in pursuance of a previous agreement in insolvency; 6) Any provisional registration of a court-ordered conservatory mortgage or conservatory pledge.

³⁸ Article 107 of the UACP

³⁹ Article 75 of the UACP

⁴⁰ Article 63.9 of the UACP (This article concerns the management of a company)

How the liquidation process is terminated

A notice of termination of liquidation signed by the liquidator is published, at the instance of the liquidator, in the newspaper in which such liquidator's appointment was published or in an official Government publication.

In particular, at the end of the assets liquidation operations the following formalities must be completed: (i) the trustee, in the presence of debtor or after he has been duly summoned by the court registrar by hand-delivered letter against a receipt or by registered mail with acknowledgement of receipt or by any means in writing, shall submit his accounts to the receiver; (ii) the receiver shall draw minutes to record the end of the liquidation operations; (iii) the minutes shall be forwarded to the competent court which shall decree the end of the assets liquidation and, at the same time, settle disputes related to the accounts of the trustee filed by the debtor or the creditors; (iv) the court registrar shall immediately forward an extract of the decision to close the assets liquidation to the public prosecutor; (v) the decision to close the assets liquidation shall be published under the conditions set out as follows -

- the registry of the competent court shall make an entry of the decision of commencement of bankruptcy proceedings in the Registry of Commerce and Securities ("RCCM"), without delay;
- the decision to the end of liquidation proceedings shall be published, at the behest of the registrar of the competent court, in a newspaper authorized to publish legal notices distributed at the location of the registered office of the competent court. An additional publicity may also be carried out in all other media outlets;
- such publicity shall, in addition, feature in a newspaper authorized to publish legal notices at the location of each secondary establishment of the debtor if the newspaper empowered to publish legal listings is not distributed in the area the registered office is located;
- it shall contain the following information: (i) the name of the debtor; (ii) its domicile or registered office; (iii) its incorporation number in the RCCM or number of activity statement; (iv) the date of the decision to open the proceedings and the type thereof; (v) the name and address of the trustee with whom creditors must file their claims, the time limit for filing such claims and a full reproduction of Article 78 above; and
- a second publicity shall be carried out, under the same conditions, at the behest of the registrar of the competent court, as soon as within fifteen (15) days and no later than thirty (30) days from the date on which the first publicity formality was performed; and

- the trustee shall verify that the statements and publicity above described have been completed.

Liability of the director(s) or officer(s)

The directors or the managing director could be held to be jointly or severally liable to the company or to third parties either for contraventions of any laws and regulations applicable to public limited companies, the management of the company or any contravention of the Articles of Association of the company⁴¹.

Civil Consequences

Where directors have mismanaged a company, they could be held liable for the debts of the company. In addition, they may be required to contribute to the assets of the company, disqualified from being involved in managing any companies in the future, and deprived of their right to stand for public office.

Criminal Consequences

Criminal sanctions arise in criminal bankruptcy cases when there has been a misuse of assets, falsification of information, and fraudulent behaviour. On conviction, one may receive imprisonment or a fine⁴².

COLLECTIVE PROCESS

Process required to commence judicial reorganisation

At the commencement of the collective procedure, a 'Judge Administrator' ("juge-commissaire") will be nominated. The judge appoints one or more, but not more than 3 trustees⁴³. The judge may also appoint one or more auditors (a maximum of 3) to be chosen by the creditor/s. The judge, placed under the authority of the Competent Court, oversees the proceedings and ensures that they are conducted in a speedy manner. They also gather all the information deemed necessary. They may hear the debtor, the officer of the corporation, their employees, creditors, or any other person and have the power to rule on requests, claims, and disputes within their jurisdiction. Controllers may assist the judge in the oversight of the conduct of the insolvency proceedings and ensure that the interests of creditors are protected⁴⁴. The trustee is responsible for ensuring the diligent and successful conclusion of the proceedings⁴⁵. The representative of the Public Ministry is informed of the progress of the proceedings by the judge. He may, at any time, request disclosure of all documents or books relating to the proceedings.

⁴¹ See Article 3-1 and 232 of the UACP

⁴² See Articles 234-239 of the UACP

⁴³ Article 35 of the UACP

⁴⁴ Article 49 of the UACP

⁴⁵ See Articles 43-46 of the UACP

The point at which collective proceedings commence

Business rescue proceedings commence when a company is unable to pay its debts with its available assets.

It depends on the type of collective proceedings -

- (i) conciliation: before the payment failure, intended to shun the debtor company's payment failure in order to restructure, in whole or in part, its finances or operations so as to save it;
- (ii) Preventive settlement: before the insolvency by the debtor, designed to avoid insolvency by the debtor company and to allow the discharge of its debts through an arrangement;
- (iii) Reorganization: from the insolvency by the debtor, procedure for the rescue of the debtor company in insolvency, but which situation is not irremediably compromised, and whose debts settlement is performed through a composition; and
- (iv) The assets liquidation: when situation is irremediably compromised and impossible to wipe off its debts, procedure for the realization of the assets of the insolvent debtor company.

Duration of collective proceedings

The duration depends on the types of insolvency proceedings initiated depending on the debtor's situation:

- conciliation: maximum 4 months (3 months from order of the president of competent court. This period may be extended by (1) one month);
- preventive settlement: 2 years and 5 months (5 months before the decision of the competent court confirming the arrangement shall terminate the mandate of the expert and the preventive settlement procedure and 2 years after the court order confirming the arrangement;
- reorganization: maximum 9 months; and⁴⁶
- Assets Liquidation: maximum 23 months.

The extent of the court's involvement in collective proceedings

The judge, under the authority of the Competent Court, shall ensure the expeditious conduct of the proceedings in Court. The Court may hear the debtor or officer of the corporation, their employees, creditors or any other person. The judge shall report to the Competent court on all disputes arising from the rescue proceedings. The Competent Court may, at any time, replace the Judge-Administrator.

⁴⁶ Article 33, 9, of the UACP

⁴⁷ Article 32 of the UACP

The management of the company whilst in collective

The President of the Competent Court may appoint a sitting judge or any person it deems qualified to gather information about the company and prepare and submit a report, within 1 month⁴⁷. It may also be necessary to appoint an expert. If the views of such experts⁴⁸ are disputed, the Court may be approached for direction and order.

See more details above

Management of the company whilst in liquidation

Filing Claims

Within 3 days of the commencement of the procedure, the debtor must provide the trustee (syndic) with his books of account⁴⁹. The trustee (syndic) prepares an inventory of all creditors and debtors of the company, and the creditors submit their claims and all documents necessary to support their claims.

Notwithstanding the other claims described above, the receiver shall collect the claims of the debtor or creditors who request the removal of the trustee and the appointment of his replacement. The receiver shall rule within eight (08) days from the date the request is filed. His order shall be accompanied by provisional enforcement. The receiver's decision may be objected within eight (8) days from the date thereof.

Factors which influence the period of collective

Litigation brought against or by the liquidators can be a factor that may delay the finalization of the business rescue process in the DRC.

Funding of the company whilst in collective

The law does not make any provision for the funding of a company in such a situation. The liquidation of assets shall put an end to the business activity of the debtor company.

However, several mechanisms have been set up in the judicial composition to maintain an economic activity, jobs relating thereto and to pay off debts as follows: (i) The total or partial assignment of assets may concern all or a number of tangible or intangible or movable or immovable property; (ii) The assignment of a company or institution

The effect of collective on employees

All contracts concluded by the company with employees prior to the commencement of business rescue continue to remain in force unless they are terminated on legal grounds.

⁴⁸ Article 8 of the UACP

⁴⁹ Article 55 of the UACP

The effect of collective on contracts

All contracts concluded by the company prior to the commencement of business rescue continue and remain effective and in full force⁵⁰.

Only the trustee shall have the option to demand the execution of running contracts.

In addition, the decision to open reorganization or assets liquidation proceedings shall stop the accruing of legal and contractual interests, all interests and service charges for late payment of all claims whether they are secured or not. However, with regards to interests from loan agreements entered into for a duration equal to or longer than one (1) year or loan agreements with a deferred payment of one year or more, interest shall continue to accrue during the reorganization proceedings⁵¹.

The effect of collective on shareholders

Shareholders are engaged throughout the process. Commitments made by shareholders or partners or by new subscribers shall be subordinated in their execution to the confirmation of the judicial composition by the competent court.

Shareholders or partners who contribute to the share capital increase provided in the proposed judicial composition may be eligible for compensation up to the amount of their approved claims and within the limits of reductions to which they are subject to the proposed.

The effect of collective on creditors

Business rescue suspends or prohibits enforcing rights against the company.

Pending claims, litigation and arbitration

As far as the Preventive settlement: All judicial actions already instituted against the company remain in effect and of full force, with the exception of the individual lawsuits for the purpose of obtaining payment of claims contracted prior to the said decision for a maximum period of three (03) months and the enforcement proceedings and precautionary measures⁵².

As far as Reorganization and assets liquidation: The decision to initiate reorganization or assets liquidation proceedings shall stay or prohibit individual lawsuits from all creditors who are part of the body that may: (i) order the debtor to pay sums of money; (ii) Terminate the contract due to a failure to pay a sum of money.

The current lawsuits shall be interrupted until the pursuing creditor has filed his claim. They shall then be recorded automatically but shall only determine the claims and fix their amount with the trustee being duly called upon.

The effect of a moratorium

In order to provide the company and its creditors with sufficient time to reach an agreement, a Court will grant a moratorium and request an insolvency practitioner to report to the Court, within 2 months of the date of the commencement, on the progress of the parties in reaching an agreement.

In addition, as far as assets liquidation exceptionally, if the public interest or that of creditors so requires, the competent court may authorize, in the judgment ordering the liquidation of assets, a provisional continuation of the business for a maximum of sixty (60) days. It can renew that period once (01), for the same duration, at the request of the trustee and after receiving the opinion of the public prosecutor⁵³.

Voidable transactions

The Court has the power to set aside any transaction occurring within a period prior to the commencement of liquidation or in respect of any transaction that is unlawful.

As far as Preventive settlement, unless the president of the competent court grants a reasoned authorization, the decision to initiate the preventive settlement shall prohibit the debtor, on pain of becoming null and void: (i) from paying, in whole or in part, claims incurred prior to the decision of opening; (ii) from undertaking something foreign to the normal operation of the company or to grant a security provision.

It shall also be prohibited to the debtor to pay off joint debtors and individuals who have granted personal security or assigned or transferred property as collateral when they paid claims incurred prior to the opening decision.

As far as the Reorganization, the following acts shall be unenforceable against the body of creditors: 1) gratuitous transfer of deeds of personal and real property; 2) any commutative contract in which the obligations of the debtor exceed significantly those of the other party; 3) any payment, irrespective of the method, of debts not due, except it is a payment of a trade negotiable; 4) any payment of due debts, made otherwise than in cash, trade negotiables, transfer, levy, payment card or credit card or legal, judicial or conventional set-off of debts having a connection between them or any other ordinary payment method or commonly accepted in business exchanges in the sector of activity of the debtor; 5) any real conventional security pledged as a collateral security for a debt previously contracted, unless it replaces a prior security interest of a nature and extension at least

⁵⁰ Article 107 of the UACP

⁵¹ Article 77 of the UACP

⁵² Article 9 of the UACP

⁵³ Article 113 of the UACP

equivalent or that it is granted in pursuance of a previous agreement in insolvency; 6) Any provisional registration of a court-ordered conservatory mortgage or conservatory pledge.

Collective process plan

A business rescue plan detailing the status of the company, the formalities that have been completed, the transactions that have been concluded, and the outcome if the company were to continue in business is compiled during proceedings. As far as Preventive settlement: The proposed arrangement shall stipulate measures envisioned for the restructuring of the company, including: 1) terms for continuing the company business such as the request for time extensions and debt reduction, partial assignment of assets with a specific indication of assets to be assigned; 2) assignment or lease-management of a branch of activity forming business assets; assignment or lease-management of part or the entire company, without these terms being restrictive and exclusive on each other; 3) the full names, titles and addresses of individuals mandated to execute the arrangement and all their undertakings for the restructuring of the company; 4) terms for maintaining and financing the company, settlement of claims contracted prior to the decision to open a preventive settlement as well as, where applicable, collateral securities provided to ensure execution; these undertakings and collateral securities may consist, inter alia, of subscriptions for an increase of share capital by new or former partners, debt-for-equity swaps, appropriations by banking or financial institutions or by any other person, including any new cash or service contributions under the conditions set forth in article 11-1 hereinafter as well as the amount of the contribution or the value of the goods or services; continuation of the execution of contracts entered into prior to the petition, provision of securities; 4) level and job prospects, as well as layoffs for economic reasons which should be exerted within the conditions set forth in the provisions of the Labor Law; 5) Replacement of top executives.

As far as the reorganization: The competent court shall ratify the proposed judicial composition only where: 1) the conditions of validity of the composition are met; 2) there is no ground to believe that the common interest or public policy will likely hinder the composition; 3) in case of reorganization of a legal entity, it shall no longer be managed by its top executives whose replacement is proposed in the proposed composition or by the trustee or against executives whom personal bankruptcy has been pronounced; 4) the composition shall offer substantial opportunities for the debtor company restructuring, debt settlement and adequate collateral securities for its execution; 5) The conditions set forth in article 33-1 above are met where individuals benefit from a privilege provided for in this Uniform act and secured amounts are expressly stated.

Voting on a plan

A business rescue plan will be passed if a majority in number, representing at least half of the total debt in value, supports the plan⁵⁴.

A copy of the proposed composition shall be sent to each creditor by registered mail with acknowledgement of receipt or by any means which leaves a written record.

Creditors with general privileges shall take part in the vote under the same conditions as unsecured creditors, but without losing the benefit of their liens⁵⁵.

A financial statement drawn up at the close of the last day of the elapsed month shall be appended to the report. The statement shall state the available or realizable assets, the unsecured debts and those guaranteed by a special secured debtor as a general lien.

As far as the preventive settlement, the competent court shall bring the matter to a vote after submission of the report of the trustee. Mail ballots and proxy voting shall be admitted.

Cramdown on creditors

A restructuring plan will be adopted and implemented if it receives the requisite votes from the creditors.

The trustee shall build upon such deadlines for filing and verifying claims to reconcile the positions of the debtor and creditors on the development of the proposed composition and to carry out the economic and social assessment. In this context, he shall transmit to the receiver, prior to convening the bankruptcy meeting, a report outlining, for each creditor, if he was actually contacted and on what date, whether he agrees with the proposed.

The proposed judicial composition shall be voted by the majority in number of creditors definitively or provisionally admitted representing, at least, half of the total number of claims.

The competent court shall prepare minutes of the deliberations and decisions taken during the meeting; the signature by the creditor or his representative, the ballot papers appended to the minutes shall be equivalent to the signature of the minutes.

Establishment by the competent court of the fulfillment of all the conditions provided for in Article 125 above shall be equivalent to ratification of the judicial composition. Otherwise, the decision shall record the rejection of the composition and shall convert the reorganization into assets liquidation without prejudice to the application of Article 33 and 119 above.

⁵⁴ 125, 6, of the UACP

⁵⁵ Article 121, 2, of the UACP

Regarding the preventive settlement, in case creditors reportedly refused to extend the deadlines and reduce the debt of the debtor, the president of the competent court shall lend his good offices to the creditors and the debtor. He shall hear their grounds for refusal and initiate negotiations between the parties to enable them to reach an agreement.

Where despite the good offices of the president, the parties fail to reach an agreement and in case the arrangement provides for only one time extension not exceeding two (02) years, the competent court may make this enforceable against creditors who refused any time extension.

Discharge of debt

The Judge Administrator shall, where applicable, order a distribution of funds among the creditors⁵⁶.

The total or partial asset assignment price shall be paid into the debtor's assets.

Proceeds from the sales of immovable property shall be distributed according to a ranking.

Where the proceeds are insufficient to fully pay off the creditors of any creditors have equal rank, the funds shall be distributed proportionately to their total debts.

The effect on suretyships

Where the creditor holder of commitments jointly and severally subscribed by the debtor and other joint debtors in a situation of reorganization or assets liquidation has received an advance on his claim before the decision to open the proceedings, he shall be included in the union of creditors only after deduction of such payment and shall retain, on the balance due to him, his rights against the joint debtor or guarantor⁵⁷.

A creditor with subscribed, confirmed or guaranteed commitments jointly and severally by two (2) or more joint debtors who have stopped payments may file claims in all the creditors' unions up to the full amount of his receivables and participate in distributions until full payment of his claim where he has not received any partial payment thereof before the opening of the bankruptcy proceedings of the debtor and his joint debtors.

Regarding the preventive settlement, Creditors with a general privilege, a special property lien, a pledge, a suretyship or a mortgage shall not lose their collateral securities. However, they may only realize them in case of annulment or cancellation of the composition to which they consented, or which has been imposed.

⁵⁶ Article 164 of the UACP

⁵⁷ Article 92 of the UACP

How the collective is terminated

The business rescue process will be terminated when the company is rescued and able to continue to trade following the implementation of the terms of the rescue plan. If the plan is not successfully implemented, the company will need to be placed in liquidation.

See more details above.

The status of the company after collective

Where an agreement is approved, the provisions of the agreement will be implemented with the assistance of the trustee, for an definite described above period or unless otherwise directed by a judge.

Liability of the director(s) and officer(s)

The director and officer liability as set out under the liquidation section above is applicable here⁵⁸.

Civil consequences

The civil consequences set out under the liquidation section above are applicable here.

Criminal consequences

The criminal consequences set out under the liquidation section above are applicable here.

SECURITY

Types of security

In the DRC, there are two types of securities, namely, personal securities and property securities. Personal securities relate to commitments given by one or more persons or entities on behalf of another and in favor of a third party (i.e., bonds or warranties and autonomous counter-guarantees). Property securities relate to liens and pledges.

Bond

A bond is an agreement in terms of which a guarantor undertakes to perform a present or future obligation incurred by the debtor if the debtor does not satisfy the debt. This agreement may be entered into without the consent of the debtor⁵⁹. The bond may be lawful, judicial, or conventional. It is proved by a certificate bearing the signature of the guarantor and the creditor and the words written in the guarantor's handwriting in words and figures, of the maximum amount covering the principal, interest, and other accessory amounts. The guarantor may take action for

⁵⁸ See footnote 30

⁵⁹ Article 13 of the Uniform Act Organizing Securities dated 15 December 2010

payment against the principal or request the preservation of his rights in the assets of the debtor. The action may be taken even before paying the creditor, when the debtor is insolvent and/or where the debtor has not discharged the debt within the agreed time or when the debt is due in accordance with the terms of the agreement.

Warranty and autonomous counter-guarantee

An autonomous guarantee is a commitment in terms of which a guarantor undertakes to pay a specified amount to the beneficiary on the first request or as mutually agreed⁶⁰. Natural persons may not underwrite a warranty and autonomous counter-guarantee. They create separate autonomous commitments, agreements, deeds and facts likely to constitute the basis of a claim. The warranty and autonomous counter-guarantee are not presumed, i.e., they must be recorded in writing, failing which they will be invalid. Lien

A creditor who legitimately owns the movable property of the debtor may retain it until full payment of that which is due is paid, regardless of whether there is any other security securing the debt unless such property is the subject of a prior lien. The lien can only be exercised if the claim of the holder is certain, liquid, and due.

Withholding property or transferred as collateral

Ownership of movable property may be held as collateral until full payment of the obligation that it secures is satisfied. The retention of title must be recorded in writing no later than the date of the delivery of the goods, failing which it will be invalid. This security can regulate both present and future obligations between the parties.

Pledge of tangibles

This pledge arises pursuant to a contract in terms of which a grantor gives a creditor the right to be paid in preference to tangible personal property, or present or future tangible or movable property, owned by the company. The pledge agreement must be reduced to writing and must contain the name of the secured debt, the assets so pledged, and their species or nature, failing which it shall be invalid.

Mortgages

A mortgage is the assignment of a fixed or ascertainable building, constituting a guarantee of one or more present or future claims, provided they are certain or ascertainable. The assets that may be subject to a mortgage are movable or immovable property, their improvements, and additional structures related to such property or buildings. A mortgage can only exist if it is registered on the certificate of the immovable or real property right which it encumbers⁶¹. A mortgage must be registered according to the national

laws of the place where the collateral is located, and the registration of such security must be regularly published.

What is the most robust form of security available to lenders?

A mortgage is the most robust form of security available to lenders.

Security trustees or special purpose vehicles

This is not used in the DRC.

Stamp duty

Stamp duties are not applicable in the DRC. Instead, Authentication or notarial service is necessary for the validity of certain guarantees.

Registration of securities

Securities must be registered with the 'Register of Commerce and Personal Property Credit Register' (RCCM) and with the land registry

Registration costs

The cost of registering a security is UD\$300 (plus US\$10 for banking charges).

Requirements for the assignment or transfer of security

The transfer or assignment of security is done by way of re-registration.

Instances in which securities might be vulnerable to attack by third parties

The law makes no provision for specific instances in which a security might be vulnerable to attack.

Methods of enforcement of securities

All securities or other guarantees for the performance of an obligation can be granted, registered, filed, managed and enforced by a national foreign financial institution or credit institution acting in its own name or for the benefit of secured creditors. The enforcement of securities arises from either a forced sale of the pledged assets at an auction, resulting in the satisfaction of the secured debt from the proceeds thereof (with any surplus being remitted to the pledger), or following a petition to the Court for the attribution of the assets to the pledgee, following an evaluation by an expert of the pledged assets. Any contractual clause authorizing either the sale or the attribution of the pledged asset in the absence of such formalities will be considered null and void.

⁶⁰ Article 39 of the Uniform Act Organizing Securities

⁶¹ Article 264 of the law n° 73-021 of July 20, 1973 relating to the general regime of property, the regime of land and buildings and the regime of securities as modified and completed by the law n° 80-008 of July 18, 1980

Problems experienced when enforcing securities

The practical implementation of the new law in the DRC could cause problems. The delays experienced in obtaining Court orders for the attachment of assets and sales in execution ordinarily delays the enforcement of securities.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

If the foreign judgment is enforceable against a person or a company domiciled in the DRC, to be enforced, it must acquire the quality of an enforceable title after its exequatur by the Competent Courts. An exequatur is an authority from the Court to recognize and enforce the foreign judgment.

Requirements for the recognition of a foreign judgment

For a foreign judgment to be recognized, the following conditions must be fulfilled⁶²:

- it must not be contrary to the Congolese public order;
- it must have acquired the force of res judicata under the law of the country where the decision was made;
- the documents recording the judgment must be authentic;
- the rights of the defendant must have been respected; and
- the foreign Court does not have jurisdiction solely on the basis of the nationality of the applicant.

An application would be brought to the High Court, supported by an authenticated original judgment, certified copies of the pleadings in respect of the matter, a certified translation of the judgment (if it is not written in French), and proof of payment of the Court fees, required by Congolese law.

Requirements for the recognition of a foreign trustee, business rescue practitioner, or insolvency practitioner

This is not typically considered in the DRC. Nevertheless, it is worth noting that foreign representatives and foreign creditors can have access to the Competent Courts. The foreign representative may be authorized to communicate directly with a Court, and upon recognition of a foreign bankruptcy proceedings, the foreign representative shall be empowered to participate in any bankruptcy proceedings in relation to the debtor⁶³.

⁶² Article 119 of the Law 13/001B dated April 11th, 2013

⁶³ Articles 256-8 et seq of the UAPC





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TYPE OF GOVERNMENT

Egypt adopts a democratic republican form of government.

POLITICAL SYSTEM

The Arab Republic of Egypt has a semi-presidential political system in which the political systems' powers are distributed between the executive authority represented by the President and the legislative authority (Parliament).

LEGAL SYSTEM

Egypt's legal system is primarily based on the civil law tradition derived from the French legal principles, while also incorporating elements of Islamic law.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. Liquidation?)

Under Egyptian Companies Law No.159 of 1981, if a company's losses exceed 50% of its paid-in capital, the board of directors must convene an extraordinary general assembly to decide whether the company should continue its activities or be dissolved.

If the shareholders resolve to liquidate the company, the general assembly appoints a liquidator who conducts the liquidation process under its supervision.

The Restructuring, Preventive Composition and Bankruptcy Law No. 11 for the year 2018 (the "Bankruptcy Law") which entered into force on 22 March 2018, adopts a cash flow test to determine bankruptcy namely the debtor's failure to honour its commercial obligations when they fall due.

An application for bankruptcy may be filed by the debtor, any creditor, or the public prosecution. However, a fully secured creditor may not petition for bankruptcy unless the value of the collateral is insufficient to cover the outstanding debt.

What are the tests for financial distress (i.e. business rescue or administration?)

The Bankruptcy Law introduced a new restructuring system for companies experiencing financial distress. The purpose of this system is to develop a plan to reorganise the company's financial and administrative structure in order to enable the company to settle its debts and continue its operations. Accordingly, instead of declaring bankruptcy or

proceeding with liquidation, traders and viable companies may apply for restructuring.

Egyptian law does not provide a specific statutory definition of financial distress. However, the concept is addressed within the framework of restructuring under the Bankruptcy Law.

Restructuring is defined as a set of procedures aimed at assisting the trader in overcoming financial and administrative distress.

Under the Bankruptcy Law, any trader with a minimum capital of EGP 1 million, who has not committed any fraudulent acts and whose business has been operating for at least two years prior to submitting the restructuring application, may apply for a restructuring plan.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

Egyptian law provides three main formal insolvency procedures are available to businesses that have ceased paying their commercial due to financial distress

- Restructuring - a procedure aimed at preparing a plan to reorganise the company's financial and administrative structure in order to enable it to repay its debt and continue its business.
- Preventive Composition (applicable in cases of threatened bankruptcy), a procedure aimed at reaching an agreement between the debtor and its creditors for the settlement or restructuring of the debtor's financial obligations, following a request submitted by the debtor to the competent court
- Supervised Mediation, a mechanism intended to limit recourse to the Courts and facilitate amicable settlement of disputes between the debtor and its creditors, while preserving the debtor's commercial reputation.
- For this purpose, a specialised department known as the **Bankruptcy Administration** was established within each Economic Court.

The Bankruptcy Administration is responsible for conducting the mediation process and has broad discretion in managing it. It may request the assistance of experts, hold joint meetings with all parties or meet them separately. Representatives of the parties may attend the mediation sessions. If the parties reach an agreement that is drafted setting out the procedures and the agreed terms of the settlement.

Once ratified by the competent judge, the settlement agreement becomes binding and enforceable as a judicial decision.

Formal restructuring procedures

The restructuring procedure is available for traders whose capital is not less than EGP 1 million. Companies undergoing liquidation or preventive composition are not eligible to apply for restructuring. The restructuring process will be conducted by a restructuring committee composed of experts listed in the Bankruptcy Expert Schedule at the Economic Courts. The restructuring committee may re-evaluate the company's assets, restructure its debts (including debts owed to governmental entities), increase its capital, enhance internal cash flow, reduce expenditure, and implement administrative restructuring measures.

The restructuring committee must submit a report to the competent judge within 3 months setting out the reasons for the company's financial and administrative distress, the feasibility of restructure and the proposed restructuring plan. In all cases, the implementation of the restructuring plan may not exceed five years.

In order to be binding, the restructuring plan needs to be signed by the concerned parties and ratified by the competent judge. The judge has the authority to appoint an assistant to the restructuring expert to help the company in implementing the plan and negotiating with the creditors as well as to provide technical and consultancy support.

Following ratification of the restructure plan, creditors are subject to a standstill period during which they may not initiate legal proceedings or enforce their claims against the debtor until the completion of the restructuring process.

Informal insolvency or restructuring procedures

Not applicable.

LIQUIDATION

What is the aim of liquidation?

The Egyptian Companies Law No. 159 of 1981 provides that a company enters into liquidation upon its dissolution, the expiry of its term, or its termination for any reason, except where the company ceases to exist as a result of a merger or division.

Process required to commence a liquidation

Under Egyptian Companies Law No. 159 of 1981, liquidation is generally initiated by a resolution of the extraordinary general assembly of the company. The board of directors convenes the extraordinary general assembly meeting, which decides on the dissolution of the company and the

commencement of the liquidation process.

At this meeting, the shareholders appoint a liquidator and determine the liquidator's powers, remuneration, the reasons for the liquidation and the timeframe for completing the liquidation process. The resolution must then be registered with the competent authorities.

Alternatively, a company can be placed into liquidation by a Court order where a company is dissolved or declared invalid by a judicial decision. In such cases, the Court determines the method of liquidation, appoints the liquidator and fixes his remuneration.

At what point does the liquidation process commence?

Under Egyptian Companies Law No. 159 of 1981, the liquidation process commences upon the dissolution of the company by a resolution of the extraordinary general assembly. The shareholders resolve to dissolve the company and appoint a liquidator to carry out the liquidation process.

Alternatively, a company may be placed into liquidation by a Court where the company is dissolved or declared invalid by a judicial decision.

Duration of the liquidation process

The liquidator must complete the liquidation within the period in the resolution appointing the liquidator. If no period is specified, any shareholder or partner may request the Court to determine the duration of the liquidation. The liquidation period may be extended by a resolution of the general assembly or the partners after considering the liquidator's report and the reasons for the delay in completing the liquidation. Where the liquidation period has been fixed by the Court, it may not be extended except by a further Court order.

Extent of court involvement in the liquidation process

If the liquidation period is not specified, any shareholder or partner may apply to Court to determine the duration period. Where the period of liquidation is fixed by the Court, it may not be extended except by a further Court order. The Court also has jurisdiction over claims filed by shareholders or partners against each other before the lapse of 5 years from the date of completion of the liquidation as well as claims filed by third parties against shareholders or partners within the same period.

Management of the company whilst in liquidation

The company's corporate organs remain in place during the liquidation process. However, their powers are limited to matters that do not fall within the power and responsibility of the liquidator. Immediately following the appointment of liquidator, the liquidator, together with the board of directors, must prepare an inventory of all the company's assets and liabilities. The liquidator must maintain a record of the

liquidation process, and such records must comply with the provisions of the law governing commercial registers.

The liquidator shall exercise all powers necessary to preserve the company's assets and rights. The liquidator must also take all necessary actions to collect the company's receivables and enforce its rights against third parties. Any amounts collected by the liquidator must be deposited into a bank account opened in the name of the company in liquidation. The liquidator may not sell the company's assets without the approval of the general assembly or partners as the case may be.

The liquidator must perform all the duties necessary to complete for the liquidation process including in particular:

- Paying all the company's debts.
- Selling the company's assets whether movable or immovable, by public auction or in any other method unless the instrument appointing the liquidator specifies a particular.
- Representing the company before the Courts.
- Submitting a provisional account to the general assembly or the partners detailing the progress of the liquidation process. The liquidator must also respond to requests for information from shareholders or partners, provided that such disclosure does not prejudice the interests of the company or the conduct of the liquidation.
- Submitting a final account of the liquidation to the general assembly or the partners.

The liquidation process is concluded upon the approval of the final account. The liquidator must publish the termination of the liquidation in the Commercial Register and request the deletion of the company from the Commercial Register.

Filing of claims – form, timing, adjudication and process

Within 15 days of the publication of the invitation to the creditors, all the creditors, including secured creditors, must submit a statement of their claims together with the supporting documentation evidencing the debt.

Within 40 days from the commencement of proceedings, the trustee must compile and file a list of creditors' claim with the Court and publish this list in a widely circulated daily newspaper. creditors from the date of publication of the list to challenge any claims recorded therein. The court then adjudicates the disputed claims. The Court's decision in this regard may be subject to appeal in accordance with the applicable procedures.

Effect of liquidation on employees

Upon completion of the liquidation process, the entity loses its legal personality and can no longer act as an employer. During the liquidation process, employees are considered preferential creditors for any amount and anything due to them.

Effect of Liquidation on contracts

During the liquidation process, the company retains its legal personality to the extent necessary for the purposes of liquidation. However, the company may not enter into a new. However, the company may not enter into new contracts except where such contracts are necessary for completing the liquidation process. The liquidator is responsible for taking all necessary actions to collect the company's receivables, enforce its rights, and settle the company's outstanding obligations.

Effect of liquidation on shareholders

The powers of directors are limited with the appointment of the liquidator. The power of the shareholders or partners remains in place throughout the liquidation process until the liquidation is completed and the company is formally dissolved.

Effect of liquidation on creditors

Immediately upon the appointment of the liquidator the liquidator, in coordination with the board of directors, must prepare an inventory of the company's assets and liabilities and proceed with settling the company's debts owed to creditors. Creditors are required to submit claims to the liquidator within the prescribed period. They may also challenge the admission or rejection of claims before the competent court.

Pending claims, litigation and arbitration

Upon the commencement of liquidation, creditors are required to submit their claims to the liquidator. Pending claims, litigation or arbitration proceedings involving the company may continue during the liquidation process, and the liquidator represents the company in such proceedings in order to protect the company's rights and settle its obligations.

Voidable Transactions

During liquidation, the company retains its legal personality to the extent necessary for the purposes of completing the liquidation process. The company's corporate organs remain in place their powers are limited to matters that do not fall within the authority of the liquidators.

However, the liquidator may not commence new business activities except where necessary to complete existing

transactions. Accordingly, transactions entered into prior to liquidation are not automatically set aside solely as a result of the liquidation.

Under the Bankruptcy Law, certain transactions carried out after the date of cessation of payments may be declared void if they prejudice the interests of creditors. These may include:

- granting donations;
- payment of debts before its maturity dates;
- payment of debts in a manner different from that originally agreed ;
- any mortgage or security interests over the debtor's assets to secure existing debt;
- any other transactions that are detrimental to the interests of creditors.

How is the liquidation process terminated?

The liquidator must submit a final account of the liquidation to the general assembly or the partners. This liquidation process is concluded upon the approval of the final account. The liquidator must then publish the termination of the liquidation and register it with the Commercial Register. Following the completion of the liquidation. The liquidator must request the deletion of the company from the Commercial Register.

Director or officer liability

Members of the board of directors and company officers may incur civil or criminal liability if they engage in fraudulent or negligent conduct, including in particular the following acts: Concealing, altering , or destroying the company books and records;

- Embezzling or concealing the company's assets with the intention of harming creditors;
- Falsely acknowledging debts of the company or making fraudulent statements regarding the company's financial position, whether orally, in writing, or through financial statements;
- Engaging in fraudulent conduct that leads to the company's bankruptcy or contribute to the cessation of payment of its debts;
- Committing acts of gross negligence as provided the Egyptian Trade law;
- Failing, in bad faith, to comply with the legal requirements relating to the publication or registration of the company's incorporation documents; and
- Participating in acts that breach the company's Articles of Association.

Consequences of director or officer liability (criminal and civil consequences)

The Court may hold members of the board of directors or company officers liable where their gross negligence or misconduct results in serious disruption to the company's business or contributes to the cessation of payment of its debts.

In such cases , the Court may also order the directors, or officers concerned to pay part or all of the company's debts, if the company's debts are insufficient to satisfy at least 20% of the creditors' claims. . unless this director proves that he exercised reasonable care.

Where a director or officer commits acts constituting fraudulent bankruptcy, criminal penalties may apply, including imprisonment for a period ranging from 3 to 5 years in addition to a fine ranging from EGP 50,000 to EGP 500,000.

BUSINESS RESCUE/ADMINISTRATION

Process required to commence a business rescue or administration

Under Egyptian law, restructuring and preventive composition are the primary procedures available to assist traders facing financial and administrative distress and to prevent bankruptcy.

In restructuring proceedings, a restructuring committee prepares a restructuring plan aimed at reorganising the trader's financial and administrative affairs. The proposed plan is submitted to the competent court for approval after consultation with the concerned creditors.

Preventive composition proceeding may be initiated by a trader facing financial difficulties who seeks to avoid bankruptcy. The trader must submit an application to the competent court within 15 days from the date of cessation of payments.

At what point does the business rescue or administration process commence?

In restructuring proceedings, the restructuring committee must submit its report to the competent court within 3 months from the date of submission of the restructuring Court. In preventive composition proceedings, the process formally commences once the competent court issues a judgment opening the preventive composition proceedings. The Court judgment provides for the following

- the appointment of a judge to supervise the composition proceedings; and
- the appointment of one or more trustees to undertake to administer and oversee the preventive composition process.

Duration of business rescue/administration process

The restructuring committee must submit a report to the bankruptcy judge within 3 months from the date of submission of the restructuring application. The report should include the committee's assessment of the causes of the trader's financial and administrative distress, the feasibility of restructuring, and the proposed restructuring plan.

The court may grant an extension of up to an additional 3 months upon request. In all cases, the implementation of the restructuring plan should not exceed 5 years.

Extent of court involvement in the business rescue/administration process

The Bankruptcy Department within each Economic Court is responsible for receiving applications for restructuring, preventive composition, bankruptcy declarations and mediation proceedings. The bankruptcy judge plays a central role throughout the restructuring and preventive composition procedures.

For instance, the judge reviews and ratifies the restructuring plan submitted by the restructuring committee once it has been approved by the concerned parties. Any interested party may submit petitions to the bankruptcy judge in relation to matters arising from the restructuring plan. The judge may terminate the restructuring plan upon the completion of its implementation, if such execution becomes impossible or if it is breached upon the request of any concerned party.

With respect to preventive recomposition the application is submitted to the head of the Bankruptcy Department within the Competent Court. The applicant must set out the reasons for the trader's financial distress, the composition proposals, and the guarantees for its implementation. The Court examining the application may order any necessary measures to preserve the debtor's assets pending its decision on the application. The Court may take such proceedings any steps necessary to assess the debtor's financial position and the causes of its financial distress.

If the judge admits the preventive composition application, the court will issue a judgment opening the composition proceedings. Following the verification of claims, the composition judge will determine a date for a meeting of creditors to consider the composition proposals. Minutes of the meeting are signed by the composition judge, the composition trustee, the debtor and the attending creditors.

Management of the company whilst in business rescue/administration – the role, responsibility and powers of the board or directors and the business rescue practitioner

The debtor remains in control of the management of the company during restructuring proceedings. However, such management is subject to the supervision of the restructuring committee and the bankruptcy judge.

The Court may decide to restrict or remove certain powers of the board of directors if it determines that the directors have engaged in gross misconduct that contributed to the company's financial distress.

Filing of claims

Within 40 days from the commencement of preventive composition proceedings, the trustee must submit to the court a list of creditors' claims and publish it in a widely circulated daily newspaper. Creditors shall have 10 days to dispute any claims recorded on the list and the Court shall decide on any disputed claims. Following the court's review of the list of claims, the Court shall call for a meeting of creditors by publication in a daily newspaper.

At least five days prior to the meeting, the trustee must submit a report outlining the debtor's current financial status and the trustee's opinion on the proposed composition plan. If the composition plan is approved by the creditors' meeting, the Court will allow creditors a period of 10 days to submit before deciding whether to ratify the plan. Once ratified by the court, the plan becomes binding on all creditors, including those that did not participate in the proceedings or voted against the plan.

In restructuring proceedings, the application is submitted to the restructuring committee designated by the Competent Court. The restructuring committee submits a report to the Court within 3 months of the date of submission of the application including assessment of the feasibility of restructuring and the proposed restructuring plan.

The Court may approve the restructuring plan submitted by the committee once it has been accepted by creditors. The restructuring plan is binding on the creditors who have agreed to it.

Factors which influence the period of business rescue

- in certain circumstances, the bankruptcy judge may dismiss the restructuring request which will, consequently, affect the term of the procedure;
- failure of the parties to reach agreement on restructuring plan;
- failure of the trader to submit the required documents and information accompanying the restructuring application within the prescribed period. Failure of the trader to pay the costs and expenses necessary for the restructuring procedures, including the assistant's fees of the appointed assistant, or where the trader's assets are insufficient to cover such costs;
- where the reasons that led the trader to submit a restructuring application no longer exist;
- where the restructuring procedures are deemed unsuitable to the trader's business, based on the documents

submitted with the application or the report prepared by the restructuring committee; and

- in the case of a deceased trader, where the heirs collectively do not agree on the restructuring.

Funding of the company whilst in business rescue/administration

The objective of restructuring is to develop a plan aimed at reorganising the company's financial and administrative affairs in order to overcome financial distress and enable the company to meet its obligations to creditors. The restructuring plan may include proposed sources of funding and operational measures designed to restore the company's financial stability.

Such measures may include re-evaluating the company's assets, restructuring the debts, including state debts, capital increase, increasing the internal cash flow, decreasing expenditure and implementing an administrative restructure.

In preventive composition proceedings, once the court issues a judgment opening the composition proceedings, the debtor may not enter into settlement a grant of security interests or transfer ownership of assets outside the ordinary course of business without obtaining prior approval from the composition judge.

Effect on employees

Employees are generally not directly affected by restructuring or preventive composition proceedings. However, in situations of financial distress, the employer may restructure its workforce including reducing the number of employees, in accordance with applicable labour laws and while preserving employees' statutory rights and entitlements.

Effect on contracts (supply agreements, leases, instalment sale agreements, facility agreements)

During the implementation of the restructuring plan, the company remains responsible for performing its obligations under existing contracts entered into before or after the ratification of the restructuring plan, provided that such contracts do not conflict with the terms of the approved plan.

Effect on shareholders

During preventive composition proceedings, the debtor may not take actions that prejudice the interests of creditors, such as disposing of assets outside the ordinary course of business, making donations, granting loans, providing guarantees or sureties, or creating pledges or other security interests over its assets in a manner that conflicts with the terms of the restructuring or composition plan.

Moreover, upon the issuance of the judgment opening the composition proceedings, all court actions and enforcement measures initiated against the debtor are stayed.

However, legal action initiated by the debtor and the enforcement proceedings commenced by the debtor remain valid, provided the composition trustee is joined in such proceedings.

Effect on creditors

In restructuring proceedings, once the ratification plan has been ratified, no court action may be initiated between the trader and the creditors who are party to the restructuring plan in relation to the plan or its implementation. In addition, the limitation period relating to claims, lawsuits and debts are suspended until the completion the restructuring plan.

In preventive composition proceedings, once the court issues the judgment opening the composition proceedings, the debtor may not enter into settlements, grant pledge other security interests, or transfer ownership of assets outside the ordinary course of business, without the prior approval of the composition judge.

Without prejudice to the rights of the bona fide third parties, any acts carried out in violation of these restrictions shall not be enforceable against the creditors.

Effect on pending claims, litigation, arbitration and the moratorium

In a restructuring proceeding, once the restructuring plan has been ratified, no Court action may be initiated between the trader and the creditors who are party to the restructuring plan in relation to the plan or its implementation.

Limitation periods relating to lawsuits, claims and debts are suspended until the completion of the restructuring plan.

In preventive composition proceedings, all Court actions and enforcement measures initiated against the debtor are stayed upon issuing the judgment for opening the composition proceedings.

However, legal actions initiated by the debtor and the enforcement proceedings commenced by the debtor remain valid.

Voidable Transactions

Voidable transactions are transactions that prejudicial the interests of creditors. These may include, for example, the disposal of assets outside the ordinary course of business, the granting of donations or other gratuitous transfers, the granting of loans, or the provision of guarantees, sureties, pledges or other security interests over the company's assets.

The plan

A restructuring plan is prepared which sets out the measures and procedures through which the company's financial and administrative position will be reorganised in order to enable the company to overcome financial distress and continue its business operations.

Voting on the plan

A company may apply for preventive recomposition only after obtaining approval from the majority of partners, or the general assembly of shareholders, as the case may be.

On the other hand, the bankruptcy judge ratifies the restructuring plan submitted by the restructuring committee upon the approval of the signatory parties.

Upon ratification by the court, the restructuring plan becomes binding on the parties that have agreed to it.

Cram down on creditors

The Court may determine the order and priority of the repayment of debt, in accordance with the restructuring plan and the applicable legal provisions.

Implementation of the plan

The preventive composition agreement must be signed during the hearing in which voting on the composition takes place, otherwise, it shall be considered null and void.

If the required majorities are not achieved, the deliberation shall be postponed for a period of 10 days, without further extension.

Creditors who attended the first meeting or who were represented therein and signed the minutes of the composition, may choose not to attend the second meeting.

In such a case, their approval given at the first meeting shall remain valid unless they attend the second meeting unless they attend the second meeting and withdraw their approvals or if the debtor introduces a material change to the composition proposal.

Discharge of debt

Once the restructuring plan has been fully implemented, the debts shall be discharged from the debts addressed under the plan in accordance with its terms.

Effect on suretyships

During the implementation of the restructuring plan, limitation periods relating to claims and lawsuits associated with the debtor's debts are suspended; however, guarantees and suretyships remain valid.

In the preventive composition plan all suretyships, mortgages and privilege rights must be declared to the judge and may not be enforced against the debtor.

How is the process terminated?

The restructuring process is terminated upon completion of the restructuring plan or by a decision of the Court where the implementation of the plan becomes impossible or is materially breached. In preventive composition proceedings, the composition agreement becomes binding upon ratification by the court.

What is the status of the company after the rescue process?

Upon successful implementation of the restructuring plan, the company continues its business operations in accordance with the reorganised financial and administrative structure set out in the plan. In preventive composition proceedings, the debtor resumes normal business activities following the implementation of the composition agreement.

Director and officer liability (civil consequences and criminal consequences)

Board members and/or managers may be held jointly and severally liable for all or part of the company's debts and where the company's assets are insufficient to satisfy at least 20% of these debts of such debts and where their gross negligence or misconduct contributed to the company's financial distress.

SECURITY

Types of security

Common forms of security in Egypt include pledges over shares, bank accounts, immovable property (land and buildings), contractual rights, insurance proceeds, licences and authorisations, intellectual property rights, movable property and other tangible assets, as well as aircraft and vessels.

Taking of security

Security interests may be created either by agreement between the parties or by operation of law pursuant of court judgment.

Security trustees / special purpose vehicles (e.g. in multiple lender scenarios etc.)

Egyptian law does not expressly recognize the concept of a security trustee. However, the appointment of a security agent is common in financial transactions especially in syndicated loan agreements. The role, duties and rights of the security agent are governed by contractual arrangements between the parties.

Most robust form of security available to local and/ or international lenders in connection with a local borrower's loan/debt obligations

The most effective form of security depends on the nature of the transaction and the assets available. In practice, lenders often rely on a combination of security interests, such as mortgages over real estate, pledges over shares and bank accounts, and assignments of receivables.

Registration of security

Security interests over real estate must be documented in writing and registered with the competent Real Estate Registration Office in order to be valid and enforceable against third parties.

For a real estate mortgage to be registered, the ownership of property must be registered with the Real Estate Registry.

Stamp Duty

Stamp duty is generally payable on loan agreements at a rate of approximately 0.4% of the loan amount annually.

Registration Costs

Registration fees vary depending on the type of security and the relevant registration authority.

Requirements for the assignment / transfer of the registered security

Under the Civil Code a debt may be assigned to a third party for consideration. Notice of the assignment must be given to the debtor. However, the debtor's consent is not required unless otherwise agreed or where the assignment involves additional contractual rights.

Security and guarantees associated with the transferred debt cannot be assigned except if the:

- the underlying contracts creating them such security or guarantees permit the assignment; and
- the required procedures with the relevant Governmental authorities have been completed in order to transfer the benefit of such security. This does not apply where the security consists of a purely contractual guarantee whose terms expressly allow the transfer of rights from the assignor to the assignee.

Instances in which securities might be vulnerable to attack by third parties, including the government

Security interests may be vulnerable to challenge where the legal formalities required for their creation or registration have not been properly complied with.

Methods of enforcement of security

A secured creditor may apply to the competent court to enforce the security interest in accordance with the terms of the security agreement and the applicable enforcement procedures.

Upon obtaining a judgment, enforcement is carried out through the competent enforcement authorities.

Problems experienced when enforcing security

In practice, enforcement proceedings may take time, particularly where the debtor fails to comply voluntarily with the court's judgment, requiring enforcement through the competent enforcement authorities.

Financial assistance requirements

Not applicable

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

In terms of Egyptian procedural law, judgments and orders issued by foreign countries may be enforced in Egypt on the basis of reciprocity and subject to the same conditions applicable to the enforcement of Egyptian judgments in the foreign jurisdiction.

An application for exequatur must be submitted to the Competent Court of first instance in accordance with the procedures applicable for filing a claim before the Court.

Requirements for recognition of a foreign judgment

An application for exequatur will only be admitted before the Egyptian courts after verifying the following conditions:

- Egyptian Courts do not have jurisdiction over the dispute which is the subject of the foreign judgment;
- The parties were properly summoned and duly notified of the proceedings;
- The foreign judgement is res judicata under the law of the issuing court; and
- The foreign judgement does not conflict with Egyptian public order, public policy or morality.

Requirements for the recognition of a foreign trustee, business rescue practitioner or an insolvency practitioner

This is not applicable.





EQUATORIAL GUINEA CLARENCE ABOGADOS & ASOCIADOS

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EQUATORIAL GUINEA | CLARENCE ABOGADOS & ASOCIADOS

TYPE OF GOVERNMENT

Presidential Republic.

POLITICAL SYSTEM

Presidential system with a bicameral legislature and a civil law judiciary.

LEGAL SYSTEM

Civil Law. Based on CEMAC and OHADA Uniform Acts and national legislation.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. Liquidation?)

Under the OHADA Uniform Act on Collective Proceedings for the Settlement of Debts (the “Uniform Act”), insolvency is primarily assessed through the concept of cessation of payments (“suspension of payments”) as defined in Articles 1–3 and 25:

- Cessation of Payments / Suspension of Payments: Occurs when a company cannot meet its current liabilities with available assets, including cash, liquid bank deposits, receivables, or short-term realizable assets.
- Total Insolvency: Exists when the total liabilities exceed total assets, and the company is incapable of meeting all obligations, even after liquidating long-term or fixed assets.
- Practical Test: Determining insolvency may include reviewing:
 - o Overdue supplier debts;
 - o Bank loans and callable debts;
 - o Tax and social security obligations; and
 - o Shareholder loans upon demand

A company meeting these conditions may be mandatorily subject to liquidation.

What are the tests for financial distress (i.e. business rescue or administration?)

Financial distress, short of full insolvency, is assessed under the Uniform Act preventive procedures, such as conciliation and preventive settlement:

- Predictable Difficulty Test: The company foresees that it will be unable to meet obligations in the near future but has not yet reached cessation of payments.

- Business Viability Test: The company has continuing operations that could be preserved with restructuring measures or external support.

- Indicators of Distress:

- o Declining cash flows;
- o Difficulties in meeting debt service;
- o Loss of market share or operating inefficiencies; and
- o Inability to access regular financing.

Companies meeting these tests can voluntarily initiate preventive procedures without entering full insolvency.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

1. Liquidation of Assets (Article 1(d), Uniform Act)

- Mandated for companies unable to recover viability.
- Court-supervised process ensuring equitable distribution of assets.

2. Judicial Receivership / Business Rescue (Articles 25–32, Uniform Act)

- Reorganization under court oversight.
- Aimed at preserving the business and preventing cessation of payments.

Formal restructuring procedures

1. Preventive Settlement (Article 6, Uniform Act)

- Judicially approved plan to restructure liabilities.
- Protects the company from reaching cessation of payments.

2. Conciliation (Article 5, Uniform Act)

- Confidential negotiation between debtor and creditors with court supervision.
- May result in a formal agreement without entering full judicial receivership.

Informal insolvency or restructuring procedures

1. Private Negotiation with Key Creditors

A debtor may negotiate repayment plans or debt rescheduling.

2. Voluntary Asset Transfers / Debt Rescheduling:

Adjustments made to operations or finances without court involvement.

3. Limitations

These informal mechanisms rely on creditor cooperation and are not binding on dissenting creditors.

LIQUIDATION

What is the aim of liquidation?

- To **liquidate the assets of the company** in an orderly manner.
- To **pay creditors in accordance with priority rules**, including secured and preferential claims.
- To **dissolve the company** once debts are settled, protecting the rights of employees, creditors, and shareholders.

Process required to commence a liquidation

- Declaration of cessation of payments filed by directors or creditors with the Commercial Court (Articles 25–26, Uniform Act).
- Submission of:
 - Financial statements.
 - Cash flow statements.
 - List of creditors and debts.
 - Explanation of missing or incomplete documents.

At what point does the liquidation process commence?

- Liquidation commences upon the court order opening the proceedings, following verification of cessation of payments.
- Filing deadlines: within one year of cessation of payments, cessation of trading, or removal from the Trade and Personal Property Credit Register (Article 31, Uniform Act).

Duration of the liquidation process

- Variable depending on:
 - Complexity of the company's financial structure.
 - Number of creditors and claims.
 - Realization of assets.

- In practice, this may range from 6 months to several years, particularly if disputes or claw-back actions arise.

Extent of court involvement in the liquidation process

- The Commercial Court oversees:
 - Appointment of liquidators (syndics).
 - Verification of claims.
 - Approval of asset sales.
 - Supervision of distributions to creditors.
- Court involvement is continuous but not day-to-day operational management.

Management of the company whilst in liquidation

Transferred to a liquidator (syndic):

- Directors lose management powers (Articles 36–38, Uniform Act).
- Liquidator manages assets, resolves claims, and reports to the court.

Filing of claims

- All creditors must file claims with the liquidator:
 - Within 60 days for domestic creditors.
 - Within 90 days for foreign creditors.
- Late claims may be excluded.

Factors Which Influence the Period of the Administration in a Liquidation

- Number and complexity of creditors.
- Nature of assets and realizability.
- Pending litigation or disputes.
- Claw-back or avoidance actions.

Effect of liquidation on employees

- Employees enjoy super-priority claims for wages, benefits, and indemnities (Article 95, Uniform Act).
- Employee-shareholders retain employment claims; shareholder claims do not enjoy priority.

Effect of Liquidation on contracts

- Executory contracts may be terminated unless assumed by liquidator.
- Leases, service agreements, and ongoing contracts may require court approval for continuation.

Effect of liquidation on shareholders

- Shareholders are last in the priority order after all creditor claims.

- Dividend claims are unlikely if liabilities exceed assets.

Effect of liquidation on creditors

- Secured creditors are paid according to their security ranking.
- “New money” creditors enjoy preferential treatment if contribution was to preserve the company.
- Ordinary unsecured creditors receive pro-rata payments from remaining assets.

Pending claims, litigation and arbitration

- Suspended upon commencement of liquidation (stay of individual actions).
- The liquidator assumes responsibility to pursue or defend litigation on behalf of the collective estate.

Voidable Transactions

- Transfers during the “suspect period” (cessation of payments to opening of liquidation) may be challenged:
 - Gratuitous transfers.
 - Onerous or unbalanced contracts.
 - Payments to related parties.
 - Unregistered security interests.

How is the liquidation process terminated?

- Upon completion of asset realization and payment of creditors.
- Court issues final discharge and dissolution of the company.

Director or officer liability

Civil Consequences

- Personal liability for company debts if failure to file is proven.

Criminal Consequences

- Falsifying accounts, concealment of assets, or fraudulent insolvency (Articles 390–397, Crim. Proc. Code).
- Penalties: fines up to XAF 20,000,000, imprisonment 3–10 years.

BUSINESS RESCUE/ADMINISTRATION

Process Required to Commence a Business Rescue

- Filing of conciliation or preventive settlement request with the Commercial Court.
- Submission of financial documents and proposed recovery plan.

At What Point Does Business Rescue Commence

- Upon court approval of the conciliation or preventive settlement petition.

Duration of Business Rescue

- Flexible; determined by:
 - o Complexity of restructuring.
 - o Negotiations with creditors.
 - o Implementation of recovery plan.

Extent of Court Involvement in the Business Rescue

- Court supervises:
 - o Appointment of conciliator or administrator.
 - o Monitoring negotiations and plan approval.
 - o Approving extensions and modifications.

Management of the Company Whilst in Business Rescue

- Directors retain operational control under supervision.
- Administrators or conciliators monitor decisions affecting creditors’ interests.

Filing of claims

- Creditors must submit claims to conciliator or court-appointed administrator.

Factors which influence the period of business rescue

- The number of creditors.
- The market conditions and liquidity.
- The complexity of operational or financial restructuring.

Funding of the Company Whilst in Business Rescue

- Voluntary contributions by shareholders or third parties.
- Potential court-approved “new money” injections.

Effect of Business Rescue on Employees

- Employee claims continue to be protected.
- Moratorium prevents termination solely due to insolvency.

Effect on Contracts

- Executory contracts may continue under supervision.
- Essential contracts may be assumed; others may be rejected.

Effect on shareholders

- Equity may be preserved if rescue plan approved.
- Dilution may occur if capital restructuring is required.

Effect on creditors

- The moratorium prevents individual enforcement actions.
- Claims are verified and may be restructured under approved plan.

Pending Claims, Litigation and Arbitration

- Stay of proceedings applies until plan approval or rescue termination.

Effects of the Moratorium

- Prevents creditor enforcement, asset seizure, and execution of debts.

Voidable Transactions

- Similar to liquidation, transfers during the suspect period can be annulled.

The Business Rescue Plan

- Plan negotiated with creditors, possibly including:
 - Debt rescheduling.
 - Partial forgiveness.
 - Asset restructuring.

Voting on the plan

- Requires approval by **majority of creditors representing requisite claim percentage.**

Cram down on creditors

- Court-approved plan binds dissenting creditors if majority approves and plan is fair.

Implementation of the plan

- Administrator supervises execution, ensures compliance with agreed terms.

Discharge of debt

- Approved plan may discharge pre-rescue claims to the extent agreed.

Effect on suretyships

- Guarantees may remain enforceable unless explicitly restructured.

How is the process terminated?

- Court issues formal closure after successful plan implementation.

What is the Status of the Company after Business Rescue?

- Continues trading with restructured debts and operations.
- Directors may resume full powers if plan successful.

Director and Officer Liability

Civil Consequences

- Liability for failing to act in good faith or comply with court oversight.

Criminal Consequences

- Fraud or concealment of assets may still trigger criminal sanctions.

SECURITY

Types of security

- Mortgages on real estate.
- Pledges over movable assets.
- Assignment of receivables.
- Floating charges over circulating assets.

Taking of security

- Requires formal agreement and proper documentation.
- Court may supervise perfection if insolvency is anticipated.

Security Trustees or Special Purpose Vehicles

- Allowed; commonly used in syndicated lending or structured finance.

Most Robust Form of Security Available to Lenders

- Judicially enforceable mortgage over immovable property with priority registration.

Registration of security

- Required in **Commercial and Movable Property Credit Registry** for enforceability.

Stamp Duty and Registration Costs

- Nominal fees depending on asset value; varies per type of security.

Requirements for Assignment or Transfer of Security

- Written assignment agreement.
- Registration with competent registry.
- Consent of secured creditor if necessary.

Instances in Which Securities Might Be Vulnerable to Attack

- Fraudulent transfers during suspect period.
- Non-registration prior to insolvency proceedings.
- Transactions with related parties.

Methods of enforcement of security

- Judicial execution (foreclosure, seizure).
- Private sale if permitted under contract.
- Appointment of receiver for collateral.

Problems experienced when enforcing security

- Judicial delays.
- Lack of clarity on priority ranking.
- Corruption or inefficiency in enforcement.

Financial assistance requirements

- Not strictly required; third-party funding permitted under OHADA Uniform Act.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

- Where judgment is final and enforceable in origin country.
- Not contrary to public policy of Equatorial Guinea.
- Properly served on defendant.

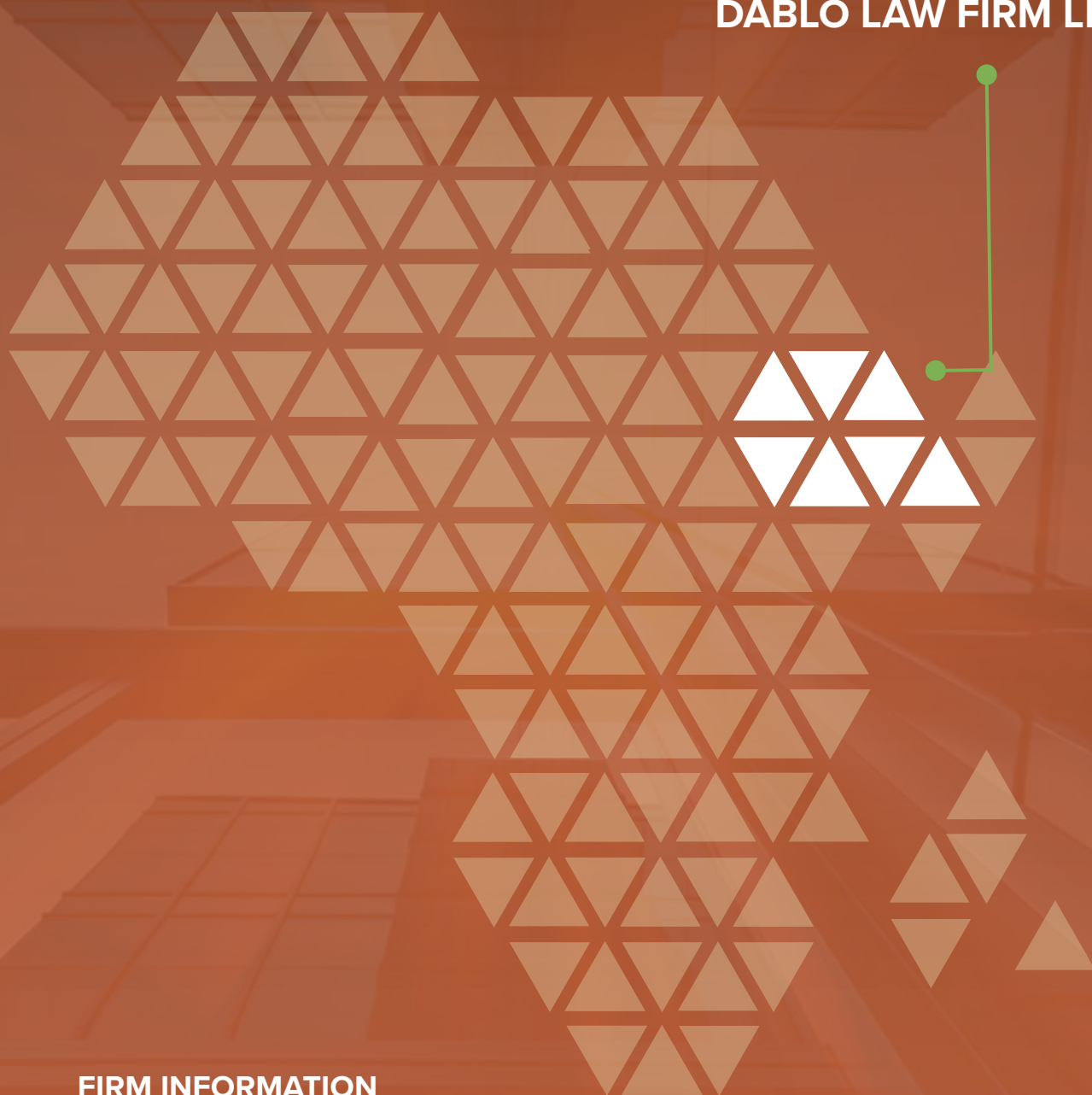
Requirements for recognition of a foreign judgment

- Certified copy of judgment.
- Translation into Spanish by certified translator.
- Evidence that defendant had opportunity to be heard.
- No conflict with domestic law or prior Equatorial Guinea judgment.





ETHIOPIA DABLO LAW FIRM LLP



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ETHIOPIA | DABLO LAW FIRM LLP

TYPE OF GOVERNMENT

Ethiopia adopts a Federal Parliamentary Republic form of government.

POLITICAL SYSTEM

Ethiopia operates under a parliamentary system, where the Prime Minister leads the government. Power is shared through a federal system that grants significant autonomy to regional states. The bicameral parliament, consisting of the House of People's Representatives and the House of Federation, further ensures that diverse regions and groups have a voice in governance.

LEGAL SYSTEM

Ethiopia's legal system is primarily based on civil law traditions, heavily influenced by the French legal system. Additionally, the legal framework incorporates elements of customary and religious laws, especially in personal status matters, reflecting the country's diverse cultural and ethnic landscape.

TESTS FOR INSOLVENCY

What are the tests for insolvency?

The Commercial Code of Ethiopia addresses insolvency as the cessation of payment by traders. One needs to show the debtor's actual or imminent inability to pay debts.

What are the tests for financial distress?

Financial distress occurs when there is a cessation of payment for debts that are due and payable using liquid assets or when a limited liability company has lost three-quarters of its capital.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Ethiopian insolvency law comprises three types of formal insolvency procedures available to businesses that have discontinued paying their commercial debts:

Preventive Restructuring Proceeding, Reorganization Proceeding, and Liquidation. Liquidation is used only when there is a suspension of payment, while the first two can

be initiated if the cessation of payments is a likely future possibility.

The Preventive Restructuring Proceeding (PR) is a novel addition to the Ethiopian insolvency framework, designed to allow businesses to implement rescue measures at an early stage. This proceeding offers an optimal opportunity for companies to negotiate and enter into debt restructuring agreements. Initiation of this process is undertaken by the debtor who must not have ceased payments or must have been in cessation for fewer than 45 days and is experiencing economic difficulties.

The Reorganization Proceeding is a process that takes place between Preventive Restructuring (PR) and bankruptcy, aimed at restructuring debts to pay creditors and save the debtor's business.

Bankruptcy represents a final option for debtors experiencing severe financial distress. In contrast to preventive restructuring and reorganization processes, bankruptcy results in the debtor losing control over business operations once proceedings are initiated.

LIQUIDATION

What is the aim of liquidation?

The purpose of liquidation is to organize the debtor's business liquidation in a timely, efficient, and effective manner. This can be done through piecemeal liquidation or the sale of the business, with the objective of maximizing the value of assets available for creditor recovery.

Process required to commence a liquidation

The process of liquidating a company due to insolvency begins with an application to the Court to place the company under liquidation. This may only be initiated where there is cessation of payments within 45 days due to severe financial problems or upon the failure of preventive restructuring and reorganization proceedings.

At what point does the liquidation process commence?

The liquidation process commences on the date on which the Competent Court declares the debtor bankrupt at first hearing or, where appropriate, on receiving the report from the investigator to place the company in liquidation.

Duration of the liquidation process

The duration of the liquidation process depends on several factors, including the nature and complexity of disputes

between shareholders, the composition and complexity of assets or liabilities, and potential court delays. This process may take 12 to 24 months or longer.

Extent of court involvement in the liquidation process

The court plays a crucial role in the bankruptcy process, starting with the initiation of proceedings. It verifies payment cessation, declares bankruptcy, and supervises trustee actions. The court also hears appeals from the trustee's order, confirms business sales, addresses ongoing contracts, determines liability, oversees the distribution of proceeds and other related matters.

Management of the company whilst in liquidation

The judgment opening bankruptcy proceedings results in the automatic removal of the management, including the Board of Directors (BOD). The trustee is then given control of the company's management. The debtor is required to provide a list of customers, clients, and other related documents necessary to facilitate decision making.

Filing of claims

Creditors shall submit pre-insolvency claims within 4 months from the judgement opening bankruptcy proceeding, specifying the amount of the claim and other details. The creditor also needs to provide supporting documents. Creditors such as employees, government organs claiming tax and creditors with total amount of claim less than 1000 ETB are exempted from submitting pre insolvency claims.

Factors Which Influence the Period of the Administration in a Liquidation

Various factors can influence the duration of liquidation administration, including unpaid shareholder subscriptions and the continuation of business operations for the benefit of creditors or the public interest.

Effect of liquidation on employees

Employees who claim unpaid salary or any payment arising from employment contract are considered as creditors but are exempted from submitting pre-insolvency claims.

Effect of Liquidation on contracts

There are two types of post-bankruptcy contracts: ordinary contracts and contracts with providers of new financing. The latter takes priority over ordinary post-bankruptcy contracts but is subordinate to new financing granted in the framework of reorganization or PR proceedings. Post-bankruptcy, ordinary contracts with creditors, including suppliers and service providers, are fulfilled only after the obligations to providers of new financing have been met.

Effect of liquidation on shareholders

When a company undergoes liquidation, shareholders typically lose their investment as the company's assets are sold to pay off creditors. Shareholders are the last in line to receive any remaining funds after all debts and obligations have been settled. In many cases, there may be little to no funds left for shareholders, resulting in a total loss of their investment.

Effect of liquidation on creditors

When a liquidation proceeding begins, an automatic stay is put in place. This stay halts all collection actions by creditors.

Pending claims, litigation and arbitration

The opening of bankruptcy puts on hold all ongoing cases and arbitrations about debts that existed before bankruptcy, unless the creditor has already filed their claim in the bankruptcy process. Proceedings that do not concern payment of pre-insolvency claims or termination of contracts for non-payment are not affected, specifically criminal proceedings, declaratory actions, enforcement of governmental regulatory powers, and tax audits or investigations other than tax collection.

Voidable Transactions

Transactions made during the suspect period, defined as up to 18 months before the start of bankruptcy proceedings, can be declared void.

How is the liquidation process terminated?

Liquidation proceedings can be terminated for three main reasons. First, an orderly completion of the proceedings and final distribution of assets results in the discharge of the debtor. Second, if there are no claims against the estate and the debtor pays all credits after the proceedings begin, the court will set aside the judgment. Finally, if there are insufficient assets to cover the administration costs, the proceedings may be terminated from the start if this is known from the outset.

Director or officer liability

Where the manager is at fault and has contributed to the insufficiency of assets of the company, the court may order that one or more de facto or de jure managers of a company bear all or part of the debts of the company.

Civil Consequences

The debtor's management and shareholders acting as Defacto managers might be jointly and severally liable as a civil consequence arising from bankruptcy proceedings.

Criminal Consequences

Criminal liability arises from negligent or fraudulent bankruptcy. The trustee and the supervisory judge will also be criminally liable if they abuse their office. In addition to penalties of imprisonment or fines, debtors found liable for fraudulent bankruptcy will be disqualified or deemed unworthy to hold certain offices for a period ranging from 6 months to 5 years.

BUSINESS RESCUE/ADMINISTRATION

In Ethiopia, business rescue/administration is handled in two structures: Preventive Restructuring and Reorganization Proceeding.

Process Required to Commence a Business Rescue

A debtor must be unable to pay due debts with available liquid assets, excluding debts under grace periods or standstill arrangements. The court confirms and sets the date of cessation of payments. Preventive restructuring can begin if the debtor is in financial difficulty but not yet in cessation, requiring submission of financial statements, a memorandum, and cash-flow projections. In reorganization, creditor approval is needed for both the plan and any business sale.

The Federal High Court, based on the debtor's main business location, has jurisdiction. If the debtor's center of main interest is in Ethiopia, the court may open main proceedings with universal effect or territorial proceedings limited to local assets. A court-appointed supervisory judge oversees the reorganization, manages key decisions, and ensures proper creditor treatment. The supervisor is paid based on case complexity and reimbursed from the estate.

At What Point Does Business Rescue Commence

In Preventive Restructuring, the process commences upon the application of the debtor facing financial difficulties no later than 45 days after cessation of payments. In Reorganization Proceedings, preventive restructuring may be converted to reorganization for various reasons, including the failure to agree upon the restructuring plan. It may also commence at the request of the debtor, creditor or public prosecutor filed to the appropriate court.

Duration of Business Rescue

In preventive restructuring, the plan must be concluded within 4 months with affected creditors. While the court may grant an extension if unanimous acceptance is likely, the total duration, including extensions, cannot exceed 8 months. In the reorganization proceedings, there shall be an initial observation period, which is 4 months. This timeline may be extended to a maximum limit of 12 months. In simplified reorganization proceedings, the court fixes the duration of the proceeding.

Extent of Court Involvement in the Business Rescue

The court is substantially involved in both preventive restructuring and business reorganization, with the degree of involvement higher in the latter case. The court receives applications for both proceedings, appoints changes and removes experts, approves the remuneration of experts, sets timelines for the period of proceedings.

Management of the Company Whilst in Business Rescue

During preventive restructuring, the debtor keeps control and can make decisions related to normal business activities. For decisions outside the normal course, like selling major assets or creating security interests, the debtor needs approval from a restructuring expert. In Business Reorganization, the debtor does not have the powers under preventive restructuring, the supervisor in reorganization, appointed controllers and the supervisory judge are the parties who make significant decisions regarding the management of the company.

Filing of claims

Creditors must submit pre-insolvency claims within four months of the court's reorganization judgment, with limited extensions allowed. Claims are sent to the supervisor by registered mail or electronically with proof of receipt. The supervisor verifies the validity, amount, and timing of each claim, with the debtor providing necessary documents. Contested claims must be responded to within eight days, after which the supervisor decides on admission.

A verified list of claims is submitted to the court registrar and made accessible to involved parties. Disputes are resolved by the supervisory judge within ten days, and contested claims may be referred to court. Appeals can be filed within fifteen days. The final claim list is published, and rejected creditors are notified and may object within ten days. Claims must detail the amount, legal basis, creditor information, and any preferential rights or guarantees, with supporting documents. Exceptions apply for unpaid wages, government tax claims, and claims under 1,000 ETB. Late claims may still be accepted within one year but are excluded from distributions if not filed in time.

Factors which influence the period of business rescue

The only factor that can influence the period of the business rescue is an extension granted by the court upon application. As mentioned in various sections, the court may grant different periods of extension for the different stages of a business rescue but, apart from such extensions, the process must be carried out as per the timeline approved by the court.

Funding of the Company Whilst in Business Rescue

The concept of new financing is introduced in Ethiopian business rescue laws. New financing is when existing or new creditors decide to finance the business rescue.

The company may also use any assets to facilitate such a process. New financing should be included in the plan and approved by the court.

Effect of Business Rescue on Employees

Employees receive special protection and priority. Their salaries and employment-related payments are safeguarded throughout the observation period and cannot be terminated, even though enforcement actions are halted. Employees are also exempt from filing pre-insolvency claims for unpaid wages, simplifying the process.

If employee claims are affected by the reorganization plan they are classified separately from other creditors, ensuring their interests are addressed independently and possibly with preference. In business sales, bidders must indicate which employees they will retain. If the business isn't sold as a going concern, non-transferred employees will be laid off.

Effect of Business Rescue on Contracts

Pre-insolvency claims arise before proceedings; post-insolvency claims come from ongoing contracts. Contracts don't end automatically due to insolvency but can be terminated by the supervisor if performance is impossible or harmful. Creditors can ask for continuation—silence for 15 days means termination. Disputes are resolved quickly with appeals allowed. Early rent demands are restricted and landlords can't claim beyond secured or prepaid amounts. Leases can be reassigned with court approval. Special rules apply to employment, banking, and similar contracts.

The Federal High Court and supervisory judge oversee rescue matters, including claims, asset protection, and key decisions. Enforcement is paused during observation, with limited exceptions. Most legal proceedings pause, except tax, regulatory, and criminal cases. Sellers can withhold unpaid goods and must refund undelivered ones. Debtors must submit an asset inventory within 15 days.

Effect of Business Rescue on Shareholders

Shareholders of a debtor cannot be appointed as supervisors in reorganization or trustees in bankruptcy, ensuring that those overseeing restructuring remain impartial and free from conflicts of interest.

The court must approve restructuring plans, verifying that third-party interests are protected and the plan has a reasonable chance of preventing bankruptcy and maintaining business viability. If shareholder approval is required, it must follow the Commercial Code.

Shareholders, despite not being creditors, form a separate class in the restructuring process. In small and medium-sized enterprises (SMEs), shareholders may not be treated separately from creditors, reducing their influence in some cases.

The court ensures that no shareholder is worse off under reorganization than they would be in bankruptcy.

Shareholders can bid for the business as a going concern, but they must seek authorization from the supervisory judge.

Effect of Business Rescue on Creditors

Creditors can't enforce claims or alter contracts due to restructuring, and contract decisions lie with the supervisor or trustee, though creditors may challenge them. Creditors retain participation rights, including voting on plans and attending hearings. Enforcement is paused during a 12-month observation period. Pre-insolvency claims must be filed within four months. Creditors may propose plan modifications and challenge unfair transactions.

Secured creditors must consent to business sales involving their collateral, but courts may override refusals with compensation. Plan approval requires support from two-thirds of creditors. Courts ensure bidders can sustain the business and that asset sales are liability-free. Excluded assets are liquidated. Dissenting creditors can appeal for plan annulment or damages. Simplified reorganization is possible if preventive efforts have broad support. If the plan fails proceedings end.

Pending Claims, Litigation and Arbitration

For the duration of the observation period, all pending legal proceedings, including arbitration, shall be suspended provided that the pre-insolvency claim has not been submitted. Once the pre-insolvency claim is accepted, the supervisor becomes part of the proceedings, which will focus solely on determining the claim's amount.

Proceedings unrelated to the payment of pre-insolvency claims or the termination of contracts due to non-payment, excluding setoffs from ongoing contracts, will not be affected by reorganization. This includes criminal actions, declaratory actions, enforcement of government regulations, and tax audits and investigations (excluding tax collection).

Effects of the Moratorium

Debts under moratorium are not deemed due, affecting assessments of payment cessation. Once proceedings begin, creditors are temporarily barred from enforcing claims or altering contracts, giving debtors space to reorganize. Contracts are preserved unless the supervisor or trustee terminates them due to feasibility concerns.

Creditors cannot demand pre-insolvency payments or take legal action, including enforcement by secured creditors, as these are automatically stayed. The debtor continues operations under supervision and negotiates with creditors in a protected environment. These protections last for the duration of the restructuring or reorganization process, unless the court lifts the stay for specific claims.

Voidable Transactions

Voidable transactions in Ethiopian law allow certain acts or payments before cessation of payments to be invalidated to protect the debtor's estate and ensure fairness among creditors. These include asset transfers without compensation, underpriced sales, and payments for debts not due. Transactions may also be voided if a creditor knew or should have known the debtor was in financial trouble and the transaction unfairly favored one creditor.

If the supervisor fails to act, creditors or controllers can initiate legal action. Invalidated transactions are retroactive, requiring restitution at market value, ensuring fairness and equity in the restructuring process.

The Business Rescue Plan

The Business rescue plan has two phases, the first in the preventive restructuring process and the next in the business reorganization process. In preventive restructuring, the debtor creates a plan with expert help, subject to creditor and court approval. It may involve debt or equity changes, with new financing prioritized. Once approved, the plan is binding, and appeals are time limited. If the debtor defaults, the plan can be annulled, leading to insolvency. Approved plans can be amended by agreement without court approval. In business reorganization, the debtor, with the supervisor's help, prepares a plan that may involve rescheduling, waiving, or converting claims, issuing debt, altering capital, or selling assets. It must pass the best-interest-of-creditors test and define creditor classes. Creditors vote, needing two-thirds approval in each class, but it can pass with debtor approval and majority creditor support. The court ensures no party receives more than their claim. Amendments to the plan require debtor consent and creditor unanimity. Failure to execute may lead to bankruptcy.

Voting on the plan

The supervisor organizes the vote, with each class of creditors voting on the plan. For approval, at least two-thirds of claims in each class must agree. If this majority isn't met, the plan may still proceed if the debtor and a majority of affected creditors approve. If no classes are formed, a general creditors' meeting is held, and two-thirds of claims must vote in favor.

Once approved, the supervisor submits the plan to the court, which checks its fairness, legal compliance, and its potential to avoid bankruptcy. If rejected, the business may be sold as a going concern, with the supervisor overseeing the process and obtaining creditor approval for the sale. The supervisor plays a key role in ensuring transparency and fairness throughout the process.

Cram down on creditors

The cram-down concept allows a reorganization plan to be approved even if not all creditor classes agree. The plan

requires a two-thirds majority in each class, but if this is not met, it may still proceed with approval from a majority of affected classes. If no majority is reached, the plan can still pass if at least one creditor class votes in favor (excluding equity holders or classes receiving nothing in liquidation).

The cross-class cram-down allows the court to approve the plan over dissenting classes, ensuring they are satisfied before lower-ranking classes receive payments. The court can also modify strict priority rules if necessary to achieve the reorganization goals, if it doesn't unfairly harm creditors.

Implementation of the plan

In preventive structuring, the plan shall be concluded with the affected creditors within four months. An extension may be granted if it is apparent that the creditors will unanimously agree. In general, once the restructuring or reorganization plan has been approved by the court, the carrying out of the plan by the debtor is not regulated by the court or the law. If the debtor fails to carry out the plan according to the approved terms, affected parties may bring their claims to court.

Discharge of claims

The plans shall include the manner of discharge if claims include waiver, rescheduling, conversion and/or settlement.

Effect on suretyships

The debtor, under the supervision of the supervisor in reorganization, shall prepare, within fifteen days from the opening of reorganization proceedings, the inventory of all its assets, including personal guarantees. During the observation period, all individual enforcement actions by all creditors shall, as a matter of law, be automatically stayed, without any need for the debtor or the supervisor in reorganization to request a stay of individual enforcement actions. However, natural persons as guarantors may invoke the benefit of the stay of individual enforcement actions in reorganization proceedings. Personal guarantees by natural persons also constitute their own separate class of creditors.

How is the process terminated?

Preventive restructuring can be converted into reorganization or bankruptcy proceedings if no agreement is reached on the plan or if a plan is rejected or set aside. The debtor may request conversion or the court may initiate it, especially if a business sale offer as a going concern is received.

In simplified reorganization, the court ends the process if the required majority of creditors do not approve the plan. If the debtor fails to implement the plan, the supervisor, creditor, controller, or public prosecutor can request conversion to bankruptcy. Similarly, if there are insufficient creditors to approve the plan, or if an investor for the business cannot be found, the process may shift to bankruptcy.

Once a business is sold or the reorganization plan is rejected, the court converts the proceedings to bankruptcy. If the debtor cannot meet post-reorganization payment obligations bankruptcy proceedings may also be initiated.

What is the Status of the Company after Business Rescue?

If the business rescue is successful, the company will get back into operations. If not, bankruptcy will be filed, and the liquidation process will commence.

Director and Officer Liability

The restructuring expert, acting independently to identify creditors, assists with drafting and negotiating the restructuring plan and leads creditor meetings. The expert oversees the debtor's conduct during negotiations, reports to the court, and prepares for a potential sale of the business. The expert can also request financial information and appoint independent experts to assess the debtor's financial position.

The supervisor in reorganization oversees the debtor's operations, ensuring compliance with procedures. They gather information about the debtor's estate from relevant authorities and assist with the preparation of the reorganization plan. The supervisor helps form creditor classes, organizes business sales, and ensures funds are deposited in a designated estate account. They are responsible for recommending the admission or rejection of pre-insolvency claims and preparing reports on the debtor's affairs. The supervisor also presides over creditor meetings and may request independent audits of the debtor's financial status. A comprehensive report is required within thirty days of completing their duties or the proceedings.

Civil Consequences

Failure to maintain the confidentiality of the process can result in civil liabilities. In general, however, any action by all parties involved can result in civil and criminal liabilities if it is found that their acts are contrary to the relevant laws.

SECURITY

Types of security

Securities are classified into two main types: personal security and real (in rem) security. Personal security involves a third-party guarantor to satisfy the debtor's obligation in the event of default, while real security involves collateral, which can be movable or immovable. Unlike personal security, which depends primarily on the creditworthiness of the guarantor, real security attaches to the secured asset itself and affords the creditor priority and enforceability against third parties.

Taking of security

Within both the reorganization and restructuring plans, the court verifies that third parties' interests are adequately protected, particularly with respect to the taking of security interests. First, it requires identifying the secured asset, which can be either movable or immovable. Next, a security agreement must be drafted to clearly define the obligations and remedies for all parties involved. Finally, registration is necessary if required by law to perfect the security interest and ensure its enforceability.

Security Trustees or Special Purpose Vehicles

Ethiopian law does not expressly recognize the common-law concept of a security trustee holding collateral on trust for multiple lenders. In practice, similar arrangements are typically structured through contractual agency or mandate mechanisms under the Civil Code. Likewise, while special purpose vehicles may be incorporated under Ethiopian commercial laws, their use as dedicated security-holding or bankruptcy-remote entities is not specifically regulated and remains limited in local financing practice.

Most Robust Form of Security Available to Lenders

The most secure form of security in Ethiopia is a registered mortgage over immovable property, as it grants priority over unsecured creditors, direct enforceability through foreclosure and Stronger legal protection compared to movable security, as it offers stronger legal certainty and predictability in enforcement.

Registration of security

Security interests over immovable property must be registered with the notary. Security over movable property is registered under the Movable Collateral Registry (MCR).

Stamp Duty

Stamp duty is levied as a 1% flat rate on security deeds and 2% on register title to property.

Registration Costs

Mortgage registration at the Land Registry involves higher fees, while movable security registration at the Movable Collateral Registry is lower. Fees may be fixed or a percentage of the asset's value. Non-registration risks loss of priority.

Requirements for Assignment or Transfer of Security

In Ethiopia, transferring security requires a formal agreement between creditors and notification to the debtor. Registration with the appropriate authority (e.g., Land Registry or Movable Collateral Registry) is often needed to preserve enforceability and priority. Failure to register may invalidate the security or affect its rank.

Instances in Which Securities Might Be Vulnerable to Attack

Security interests may be challenged in cases of fraudulent transactions, non-registration, insolvency of the debtor, and non-compliance with legal formalities.

Methods of enforcement of security

Lenders can enforce security through judicial foreclosure by filing a court case to sell secured assets out-of-court enforcement (if contractually agreed), and repossession (for movable security under self-help remedies).

Problems experienced when enforcing security

Challenges include delays in court proceedings, difficulties in selling secured assets, debtor resistance or legal appeals, and regulatory restrictions on foreign lenders enforcing security.

Financial Assistance Requirements in Ethiopia

Any new financing requires court approval. New financing shall have priority over unsecured creditors if bankruptcy occurs later. It ranks below financing given in preventive restructuring proceedings. The court can allow new financing to be secured by unencumbered assets, giving it priority similar to that of secured creditors.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Foreign judgments are recognized in Ethiopia if they respect public order, uphold procedural fairness, are free from fraudulent activities in their obtainment, and are issued by a jurisdictionally competent court. The judgment must comply with international treaties signed by Ethiopia, and no similar insolvency proceedings should be pending in Ethiopia against the same debtor. It must not conflict with an existing Ethiopian judgment involving the same parties. Once recognized through exequatur, its effect is limited to the debtor's assets in Ethiopia. The judgment must be enforceable where issued and must not interfere with Ethiopian insolvency proceedings or related orders.

Requirements for recognition of a foreign judgment

To apply for the recognition and enforcement of a foreign insolvency-related judgment, the applicant must submit a certified copy of the foreign judgment and documents proving that the foreign judgment has effect and is enforceable in the originating State. If the above documents are unavailable, any other evidence acceptable to Ethiopian courts.





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COUNTRY INFORMATION

Ghana, a country on the West African coast, is a developing democracy. It shares boundaries with Togo to the east, La Cote d'Ivoire to the west, Burkina Faso to the north and the Gulf of Guinea to the south. Ghana is a significant petroleum and natural gas producer and one of the world's largest gold and cocoa producers.

TYPE OF GOVERNMENT

The Republic of Ghana is a Constitutional Democracy.

POLITICAL SYSTEM

Ghana is a multi-party, constitutional democracy. The 1992 Constitution recognises the concept of separation of powers between the executive, the legislature and the judiciary. It declares and promotes fundamental human rights and freedoms.

LEGAL SYSTEM

Ghana's legal system is based on the common law.

TESTS FOR INSOLVENCY

What are the tests for insolvency (ie liquidation)?

The Corporate Insolvency and Restructuring Act, 2020 (Act 1015) as amended by the Corporate Insolvency and Restructuring Act, 2020 (Act 1031) (Corporate Insolvency and Restructuring Act) provides that where -

- a creditor to whom the company owes more than GHS10,000 (approx. USD 848.90) serves a written demand on the company to pay the amount, and the company, for 30 days after the demand, neglects to pay the money or to secure or compound for it to the creditor's reasonable satisfaction; or
- execution in the country of a judgment of the High Court in favour of a creditor of a company wholly or partly fails; or
- it is proved to the satisfaction of the Registrar of Companies (Registrar) that the company is unable to pay its debts, the company will be held to be insolvent.

What are the Tests for Financial Distress?

There is no concept of financial distress in Ghanaian law.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

Liquidation is the only formal insolvency procedure available in Ghana.

Formal Restructuring Procedures

The formal restructuring procedures available to a company in Ghana are:

- (a) administration;
- (b) a scheme of arrangement or merger, with or without Court approval; and
- (c) the acquisition of minority shareholders shares.

Informal Insolvency or Restructuring Procedures

The insolvency procedures in Ghana are formal and set out in Ghanaian law, as set out above.

Restructuring Procedures

Administration

A company may be placed in administration if the company is unable to pay its debts or current obligations as the debts or obligations fall due even if the total assets of the company exceed the total liabilities of the company; or the company has a negative net worth. Administration arises when an administrator is appointed by (i) the company; (ii) the liquidator, where the company is in liquidation; (iii) a person holding a charge over the whole or substantially the whole of the property of the company or the receiver appointed by that person; or (iv) the Court.

Scheme of Arrangement or Merger

A scheme of arrangement or merger without Court approval arises when members pass a special resolution to put the company into voluntary liquidation and authorise the liquidator to sell all or part of the undertaking or assets to another entity in exchange for fully paid shares, debentures or other like interests in that entity and to distribute those shares, debentures or other like interests in specie among the members of the company in accordance with their rights in the liquidation.

A scheme of arrangement or compromise with Court approval arises when an arrangement or compromise is proposed and the company, a creditor, a member, the administrator where an administration order is still in force, the liquidator, or any other person interested in the matter applies to the Court requesting the Court to order a meeting of its members and creditors in order for them to vote on the proposal.

Acquisition of the Minority Shares of a Company

A merger by acquisition of the minority shares of the company arises when a body corporate, upon the satisfaction of certain conditions, compulsorily acquires all the shares of the minority shareholders of the company.

LIQUIDATION

What is the aim of liquidation?

To wind up the affairs of the company, distribute its assets, settle its debts and provide for any other related matters.

Process Required to Commence a Liquidation

There are two types of liquidations in Ghanaian law - an official liquidation and a private liquidation. An official liquidation may be commenced by a -

- special resolution passed by the members of a company;
- petition addressed to the Registrar by a creditor, member or contributory of a company; petition to the High Court by the Registrar, creditor, member, contributory or (where the business or objects of the company are unlawful; the company is operated for an illegal purpose; or the business being carried out by the company is not authorised by its constitution) the Attorney-General;
- conversion from a private liquidation to an official liquidation by the Registrar if the liquidator gives notice under a private liquidation in accordance with the Companies Act, 2019 (Act 992) (Companies Act) alleging that the company may not be able to pay the debts of the company in full within the period stated in the declaration of insolvency; or
- conversion from administration or restructuring of the company to an official liquidation by an application made to the High Court by the Registrar when the administrator gives notice that the administration has been converted into an official liquidation.

Private liquidation commences when the directors of the company declare an affidavit of solvency and the members of the company pass a special resolution to wind up the company by private liquidation.

At What Point Does the Liquidation Process Commence?

An official liquidation commences -

- (a) on the passing of a resolution for the winding-up of the company;
- (b) on the making of a winding-up order by the Court; or
- (c) on the passing of a winding up order by the Registrar.

A private liquidation commences at the time that the company (through its members) passes a special resolution to wind up the company by private liquidation.

Duration of the Liquidation Process

There is no specified duration for the liquidation process. The Corporate Insolvency and Restructuring Act merely requires the liquidator, where the official winding up continues for more than 1 year, to summon a general meeting of the company and a meeting of the creditors at the end of the first year from the date of the commencement of the winding-up, and of each succeeding year, or at the first convenient date within 3 months from the end of the year or a longer period that the liquidator may allow.

Extent of Court Involvement in the Liquidation Process

The Court's involvement in the liquidation process depends on the manner in which the process is commenced, the nature of the affairs of the company and the position of the various stakeholders of the company. A Court may -

- order the liquidation of the company where -
 - the company does not commence the business which the company is authorised by the constitution of the company to carry on, or suspends business for a year within a year after the incorporation of the company;
 - the company does not have members;
 - the business or objects of the company are unlawful;
 - the company is operated for an illegal purpose;
 - the company is unable to pay the debts of the company; or
 - the Court is of the opinion that it is just and equitable that the company should be wound up.
- appoint the registrar to exercise the powers of a liquidator;
- order a person to comply with the liquidator's requirements on the application by the liquidator where a person refuses or fails to comply with a requirement by the liquidator;
- direct the liquidator in respect of the carrying out of his functions on the application of a person aggrieved by an act done by the liquidator;
- direct the transfer of the balance of the company's assets to the fees account of the company within the Liquidation Fund and give directions for the disposal of an asset not converted into money, after payments to the creditors are made; and/or
- order the termination of an official liquidation on an application by the liquidator to terminate the liquidation proceedings after the completion of the winding-up of a

company and the drawing up of the financial statements which have been approved by an auditor appointed by the creditors.

Management of the Company whilst in Liquidation

During liquidation the powers of the board of directors of the company cease upon the liquidator's appointment and vest in the liquidator who assumes a fiduciary position to the company. On the written request of a liquidator, a person who was a director of the company at the commencement of the winding-up shall submit and verify by affidavit the statement of affairs of the company. The liquidator, during the liquidation procedure, may -

- bring or defend legal proceedings on the company's behalf;
- carry on the company's business as is necessary for the beneficial winding up of the company;
- pay any class of creditors in full;
- appoint a legal practitioner or any other professional to assist the liquidator in the performance of the functions of the liquidator;
- make a compromise or an agreement, with creditors or persons claiming to be creditors of the company (to have present or future claims, certain or contingent, ascertained or sounding only in damages against the company) or whereby the company may be rendered liable subject to the Companies Act;
- take security for the discharge of the calls, debts, liabilities or claims and give complete discharge in respect of any of them;
- sell the company's property or assets by public auction or private contract;
- execute deeds, receipts and other documents on behalf of the company and using the company's seal where necessary;
- prove and rank claims in the bankruptcy and insolvency of a contributory for a balance against the estate of the contributory, and may receive dividends in the bankruptcy or insolvency regarding the balance, as a separate debt due from the bankrupt or insolvent and proportionately with the other separate creditors;
- make a compromise on calls and liabilities to calls, debts and liabilities of the company capable of resulting in debts, present or future claims (certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist) between the company and a contributory or alleged contributory, or any other debt or person apprehending liability to the company, and the questions relating to or affecting the assets or the winding-up of the company on the terms that may be agreed;
- draw, accept, make and endorse a bill of exchange or promissory note in the name and on behalf of the company;
- raise money on the security of the company's assets;
- take out letters of administration of a deceased contributory and perform in the name of the liquidator or do any other act necessary to obtain payment for money due from the contributory or the estate of the contributory which cannot conveniently be done in the name of the

company, and in those cases the money due shall for the purposes of enabling the liquidator to take out the letters of administration or recover the money, be deemed to be due to the liquidator; and

- do anything necessary to liquidate and distribute the company's assets.

Filing of Claims

A creditor may present the liquidator with a statement, 'a proof of debt' containing brief particulars of the values and due dates of provable debts, securities and obligations alleged by the creditor to be outstanding in his favour and the details of the transactions from which those debts and obligations arose.

The liquidator gives a copy of the proof of debt to the company and each creditor mentioned in the statement of affairs of the company or who, not being so mentioned, personally lodges a proof of debt; and the company notifies the liquidator if it knows or thinks the proof is false.

The liquidator examines the proof of debt and if satisfied, notifies the creditor that he admits the proof of debt subject to verification. Conversely, if after examining the proof of debt lodged with the liquidator, the liquidator considers the representations made by the company or any other creditor and it appears to the liquidator that (a) an item is improperly included, (b) a value is incorrectly stated, or (c) the proof is otherwise incorrect, the liquidator must give notice of the objection to the creditor who may lodge an amended proof within the period specified in the notice or the period that the liquidator may permit.

The liquidator must give notice to the creditor if the liquidator rejects the proof of debt where a creditor fails to lodge an amended proof of debt or a further amended proof of debt within the period permitted and the liquidator maintains that the previous proof of debt is incorrect.

The liquidator may by notice in the Companies Bulletin fix a time within which creditors should prove their claims or debts or be excluded from the benefits of any distributions made before those debts are proved.

The liquidator must call a first meeting of creditors for a date within 6 weeks after the appointment of the liquidator, give notice of the meeting to each creditor who (i) is mentioned in the statement of affairs of the company, or (ii) not being so mentioned, has lodged a proof of debt, and publish the notice in the Companies Bulletin and a national newspaper. Each creditor will also receive a copy of the company's statement of affairs and of any proposals for an arrangement with creditors. An arrangement with creditors must be approved by at least 51% of the votes cast at the meeting. Each creditor with an admitted proof of debt is entitled to be heard in person or by a proxy. The meeting should be closed not later than 8 weeks after the appointment of the liquidator.

On the commencement of liquidation, the liquidator must in relation to each debt which ranks for dividend, ascertain into which class the whole or a part of such debt falls. The order of priority for creditors, classified in decreasing order is as follows -

- a) Class A - post-commencement financing ranks first and has priority over all creditor claims, including secured and preferential class of creditors and shall be paid in full;
- b) Class B - preferential debts (such as outstanding employee remuneration for the whole or part of the 4 month period preceding the winding-up, taxes, pension contributions and other debts owed to the State or local authority within the year preceding the date of commencement of administration or winding-up);
- c) Class C - secured debts which are secured by way of a fixed charge against the assets of the company;
- d) Class D - debts which within the year preceding the winding up, is or was owed to a director or former director of the company and does not fall within Class E;
- e) Class E - refers to debts or part of a debt being excess benefit restored to the liquidator following the reversal of a transaction involving the disposition of company property under section 123 of the Corporate Insolvency and Restructuring Act; or excess interest that is a portion of a debt representing interest at a rate in excess of 5% above the Bank of Ghana policy rate;
- f) Class F - unsecured debts which are not secured by a charge of any kind over an asset of the company and do not fall within any other class;
- g) Class G - debt in respect of preference shareholders; and
- h) Class H - debt in respect of ordinary shareholders.

Subject to fees and outgoings to be paid in respect of the liquidation, the liquidator shall, from time to time, and as early as practicable, declare and distribute dividends to creditors in accordance with the classes into which the debts fall.

Factors Which Influence the Period of the Administration in a Liquidation

Court processes, such as an application by an aggrieved person, a member of the company, the company or the liquidator to the High Court for the rectification of the register of members, may contribute to the delays in the liquidation process.

Other Court processes that may also affect the duration of the liquidation process include the summoning before the High Court by the liquidator of an officer of the company or a person known or suspected of possessing company property, indebted to the company or considered capable of giving information about the promotion, formation, trade,

dealings, affairs or property of the company.

Where the liquidator, a creditor, member or contributory of the company, applies to the Court to stay liquidation proceedings, this will also affect the duration of the liquidation process.

Effect of Liquidation on Employees

Remuneration owed to an employee (i) during the business restructuring or administration proceedings of the company, which is not paid to the employee; or (ii) in respect of employment during the whole or a part of the 4 months preceding the commencement of the winding-up is prioritised as a class A and class B debt, respectively and must be paid when the first dividends are declared.

Effect of Liquidation on Contracts

The company ceases to carry on the business of the company except where the company is required to do so for the beneficial winding-up of the company. The corporate status and corporate powers of the company continue until dissolution. The liquidator, therefore, has to terminate contracts that are not beneficial if it so wishes or requires.

Effect of Liquidation on Shareholders

Shareholders retain their shareholding in the company. A transfer of their shares after the commencement of any winding-up is void unless the transfer is made to the liquidator or with the approval of the Court.

Effect of Liquidation on Creditors

The debts of the company are ranked in an order of priority, and creditors are paid dividends accordingly. A secured creditor can commence or proceed with an action against the company for the realisation of its security without the leave of the Court. The remainder of the creditors await the receipt of any dividend which is paid in accordance with the order of priority that arises by operation of the law.

Pending Claims, Litigation and Arbitration

On the commencement of winding-up, civil proceedings against the company, other than proceedings by a secured creditor for the realisation of that secured creditor's security, shall not commence or proceed, except with leave of the High Court and subject to the terms that the Court may impose.

Voidable Transactions

The following transactions may be set aside by the liquidator and the proceeds recovered into the liquidated estate of the company -

- a floating charge created on the undertaking (that is, the business of the company) or over property belonging to the

company within 12 months before liquidation commences, unless it is proved that the company was solvent immediately after the creation of the charge. However, a floating charge created over cash paid to the company (at the time of, or subsequent to, the creation of that charge) in consideration for that charge, together with interest on that amount at the yearly interest rate applicable to the 91 day Government treasury bill, shall not be set aside as void;

- money paid, property transferred, mortgage or charge payment, judgments or obligations incurred by the company to a creditor within the 12 months ending with the commencement of the winding-up and at a time when the company was insolvent with the intent that any of the creditors should benefit at the expense of others;
- money paid or property transferred to a person in the period beginning 21 days before the presentation of the petition to the Court to wind up the company and ending when the winding up order is made except with respect to a payment or any other transfer of property (a) made by the company to the banker of the company in so far as the payment has been subsequently made by the bank in meeting cheques drawn by the company, (b) made regarding a debt incurred during the relevant period, (c) made in respect of a secured debt, or (d) made on the enforcement against a third party of a guarantee or indemnity or of a mortgage, charge or lien on the property of that party;
- dispositions of property to settle any debt due or an obligation incurred by the company otherwise than for full value (a) during the 2 years before the winding up order, or (b) between 2 and 10 years before the making of the order and at a time when the company was insolvent; and
- money paid or allowed by the company during the 10 years before the winding up order in respect of a loan, in circumstances where the High Court would have ordered the lender to repay the company.

How is the Liquidation Process Terminated?

An official liquidation terminates after the winding-up process is complete and once the final financial accounts have been approved by the auditor appointed by the creditors of the company and the liquidator applies to the High Court for an order terminating the liquidation proceedings. If satisfied with the application by the liquidator, the Court will grant the application and the Registrar of the Court sends a copy of the Court order to the Registrar for registration.

Private liquidations, on the other hand, terminate when the Registrar is satisfied that the winding up process is complete and strikes the company's name off the register and publishes the record of the strike-off in the Companies Bulletin. The company is dissolved as at the date of the publication of the notification in the Companies Bulletin.

Director or Officer Liability

A director or officer of a company will be liable for contravening a duty that is imposed on him/her by the Corporate Insolvency and Restructuring Act. Where, in the

course of the official winding-up of a company, it appears that the business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person or for a fraudulent purpose, the Court may, on the application of (a) the liquidator, (b) a creditor, or (c) a member or contributory of the company declare that the persons who were knowingly parties to any fraudulent conduct of the business are personally responsible, without limitation of liability, for the debts or any of the debts or any other liabilities of the company that the Court may direct.

A past or present officer or member of the company may be prosecuted by the Attorney General (AG) where -

- a) in the course of winding up it appears to the Court that a past or present officer or member of the company has committed an offence in relation to the company for which that officer or member of the company is criminally liable, and the Court on its own motion or on the application of an interested person, refers the matter to the AG or directs the liquidator to make the report to the AG; or
- b) in the course of an official winding-up of a company the liquidator considers that a past or present officer or member of the company has committed an offence in respect of the company for which that officer or member is criminally liable, and the liquidator (a) reports the matter to the AG, (b) furnishes the AG with the information, and (c) gives the AG access to the facilities for inspection and obtaining copies of documents, in the possession or under the control of the liquidator that relate to the matter in question that the AG may require.

The AG must in the circumstances of (a) and (b) provided above investigate the matter and may apply to the Court for the grant of the powers under the Companies Act to investigate the affairs of the company. If the AG considers that the case is one for which prosecution ought to be instituted, the AG must prosecute the past or present officer or member of the company.

Consequences of Director or Officer Liability

Civil Consequences

Personal responsibility, without a limitation of liability, for the debts or any of the debts or liabilities of the company, that the Court may direct may arise if the officer is found to have been knowingly a party to the business' fraudulent activities. A director may be disqualified from acting as a director for 5 years.

Criminal Consequences

Where the business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person or for a fraudulent purpose, the officers of the company who were knowingly party to any fraudulent conduct of the business shall be deemed to have committed

an offence and be found liable on summary conviction to a fine of not less than 500 penalty units (GHS 6000, approx. USD 509) and not more than 1000 penalty units (GHS 12,000, approx. USD 1018.68) or to a term of imprisonment of not less than 2 years and not more than 5 years or to both the fine and imprisonment.

A director who causes a company to engage in any form of business or trade or incur a debt or liability where that director (a) has reasonable grounds to believe that the company is insolvent, or will become insolvent; or (b) ought to have known at the time of causing the company to engage in the business or trade or incur the debt or liability that the company was insolvent or would become insolvent as a result of incurring that debt commits an offence and is liable on summary conviction to a fine of not less than 500 penalty units (GHS 6000, approx. USD 509) and not more than 1000 penalty units (GHS 12,000, approx. USD 1018.68) or to a term of imprisonment of not less than 2 years and not more than 5 years or to both.

A director or officer of a company may be liable for a fine not less than 300 penalty units (GHS 3600, approx. USD 305) and not exceeding 750 penalty units (GHS 9000, approx. USD 1763.16) or a term of imprisonment of not less than 18 months and not exceeding 3 years or to both the fine and imprisonment for contravening a duty imposed on that person by the Corporate Insolvency and Restructuring Act.

BUSINESS RESCUE/ADMINISTRATION

There is no USA Chapter 11-style business rescue process in Ghana. The following answers are therefore based on -

- a. the administration procedures provided in the Corporate Insolvency and Restructuring Act; and
- b. an adaptation of the arrangement and merger provisions under the Companies Act.

Administration

A company may be placed in administration if the company is unable to pay its debts or current obligations as the debts or obligations fall due, even if the total assets of the company exceed the total liabilities of the company; or the company has a negative net worth.

What is the Aim of Administration?

To manage the business, property and affairs of a distressed company in a manner that provides an opportunity for the company to continue in existence as a going concern; to place a temporary freeze on the rights of creditors and other claimants against a distressed company; and to develop and implement a restructuring plan which results in a better return for the creditors and shareholders of the company than would result from the immediate winding-up of a distressed company.

Process Required to Commence Administration

Administration commences when an administrator is appointed by (i) the company; (ii) the liquidator, where the company is in liquidation; (iii) a person holding a charge over the whole or substantially the whole of the property of the company or the receiver appointed by that person; or (iv) the Court.

Duration of Administration

A specific timeline has not been prescribed for the entire administration process. The Corporate Insolvency and Restructuring Act provides specific timelines for various procedures during the administration of a company as provided below -

- The administrator is required within 21 days of appointment to investigate the affairs of the company and form an opinion as to whether it will be in the interest of the creditors for the company to execute a restructuring agreement, end the administration or appoint a liquidator.
- The administrator must call the first meeting of creditors to establish a committee of creditors where necessary; or determine whether to replace the administrator within 10 days after the date on which the administration begins.
- The administrator must convene a watershed meeting within 28 days from the date of the appointment of the administrator (convening period), or any other date if the period is extended by the Court.
- The administrator shall not less than 7 days before convening the watershed meeting, give written notice of the watershed meeting to the creditors of the company and publish the notice of the watershed meeting in a daily newspaper of national circulation.
- The watershed meeting shall be held within seven days after the convening period or extended convening period, as the case may be.
- Where the creditors resolve in a watershed meeting that the company should execute a restructuring agreement, it should be executed within 21 days unless the Court extends the period.

Preparation and Content of Restructuring Agreement

The restructuring officer shall prepare a document that sets out the content of the restructuring agreement. The document shall specify -

- who the restructuring officer is;
- funding of the restructuring agreement;
- the property of the company that will be available to pay creditors;
- whether the property is owned by the company at the time when the company executes the agreement;
- the nature and duration of any moratorium period for which the agreement provides;
- the extent to which the company will be released from the liabilities of the company;

- the conditions for the agreement to come into operation;
- the circumstances in which the agreement terminates;
- the order in which the proceeds of realisation of the property of the company will be distributed among creditors who are bound by the agreement; and
- the day, on or before which claims of the creditors must have arisen if the claims are to be admissible under the restructuring agreement which shall not be later than the day when the administration began.

The document shall be deemed to include the provisions prescribed under sections 2 to 78 of the Corporate Insolvency and Restructuring Act, except the provisions that the document expressly excludes. A restructuring agreement shall include post-commencement financing.

Extent of Court Involvement in the Administration Process

The Court may make any order that the Court considers appropriate in respect of the administration of a company.

On the application of the company, a creditor of the company, the administrator, restructuring officer, Registrar or any other person with an interest in the administration of the company, the Court may terminate an administration where the Court is satisfied that -

- the company is solvent;
- the provisions on the administration of companies are not being complied with; or
- for some other justifiable reason, the administration should end.

The Court may make an order regarding the proceedings of the meetings of creditors on the application of a dissatisfied creditor or administrator. In that regard, where the Court is satisfied that -

- a resolution at a meeting of creditors was passed, rejected, required to be decided by a casting vote, as the case may be, and such resolution would not have been passed, rejected or required to be decided by a casting vote if the vote cast by a particular related creditor was disregarded; and
- the passing of the resolution, or the failure to pass the resolution (i) is contrary to the interests of the creditors or a class of creditors as a whole, or (ii) has prejudiced or is likely to prejudice, the interests of the creditor that voted for or against the resolution to an extent that is unreasonable, the Court may -

- order that the resolution be set aside;
- order that a new meeting be held to consider and vote on the resolution;
- order that a specified related creditor shall not vote on the resolution or on a resolution to vary or amend the resolution; or
- make any other order that the Court considers appropriate.

The Court may grant leave to a secured creditor to enforce security against the company during the administration of a company, where the Court considers that serious prejudice will be caused to that secured creditor if the application is not granted, which outweighs the prejudice to other creditors.

The Court may, on the application of the Registrar or a director of a company, make an order to protect the interests of the creditors of a company in administration.

An administrator or restructuring officer may apply to the Court for directions in respect of the performance or exercise of any of their functions and powers and in relation to the operations of, or for giving effect to the restructuring agreement.

Management of the Company during Administration

Once administration commences, the company must suspend its business except where the company is required to do so for the beneficial administration of the company.

During the administration of a company, the administrator -

- shall have control of the business, property and affairs of the company;
- is required to investigate the affairs of the company and consider possible ways of salvaging the business of the company in the interests of creditors, employees and shareholders;
- is required to carry on the business of the company and manage the property and affairs of the company with the object of salvaging the business of the company in the interests of creditors, employees and shareholders;
- may terminate or dispose of the whole or part of the business of the company, and may dispose of any of the properties of the company; and
- may perform any other function, and exercise any other power, that the company or any of the officers of the company could perform or exercise if the company were not in administration.

The administrator is required to prepare a report on the affairs of the company as well as a financial statement of the company and submit copies to the directors of the company for each of the following periods -

- the period of 6 months or shorter as the administrator may determine with effect from the date on which the administrator was appointed;
- each subsequent period of 6 months during which the administrator holds office; and
- such additional period until the administrator vacates office.

The administrator shall file the financial statements and report with the Registrar within 28 days after the end of the periods specified above and shall be in the prescribed form and showing for each period the receipts and payments of the administrator.

A payment made, transaction entered into, or any other action taken, in good faith, by or with the consent of the administrator of a company in administration is valid and effectual for the purpose of the Corporate Insolvency and Restructuring Act and shall not be set aside, if the company is placed in liquidation.

Filing of Claims

The Corporate Insolvency and Restructuring Act does not provide a mechanism for the filing of claims of creditors during the administration of a company.

Factors which Influence the Period of Administration

Court processes such as an application for directions by an administrator or restructuring officer regarding the management of the company; applications by secured creditors to enforce security over the property of the company; or the conduct of proceedings at creditors meetings may delay the administration process.

Funding of the Company

There is no specific provision in the law which regulates how a company is to be funded whilst in administration. This should be provided for in and regulated by the restructuring agreement executed by the company in administration and the restructuring officer.

Effect of Administration on Employees

The commencement of administration does not automatically terminate an employment contract between employees and the company. The administrator is required to pay the accrued salary of employees during the administration of the company, arising from any contract of employment entered into by the company before the appointment of the administrator unless the administrator has given due notice of the termination of the contract within 21 days after the appointment of the administrator. On application by the administrator, the Court may extend the 21-day period for issuance of the notice of termination of the employment contract. If the administration results in loss of employment or the workers suffer a diminution in the terms and conditions of employment, the workers are entitled to be paid a redundancy pay.

Effect of Administration on Contracts

During the course of administration, a transaction or dealing by a company or by a person on behalf of the company, affecting any property of the company is void unless the transaction or dealing was entered into by the administrator on the company's behalf; with the prior written consent of the administrator; or pursuant to a Court order. A payment made by a bank out of an account kept by the company with the bank will not be void if the payment is made in good faith and in the ordinary course of the business of the bank and

on or before the day which the bank was notified in writing by the administrator that the administration had begun or before the bank had reason to believe that the company was in administration, whichever was earlier.

Effect of Administration on Shareholders

During the course of administration, shareholders are prohibited from transferring their shares or altering the rights and liabilities attached to their shares. However, where the administrator is satisfied that the transfer of shares is in the best interests of the shareholders and creditors of the company, the administrator may consent to the transfers of shares of the company in administration.

The Court may order the transfer of shares where the administrator refuses or fails to respond within 14 days of a request for consent of a transfer of shares. The Court may also order the alteration of the rights and liabilities of a shareholder in a company in administration.

Effect of Administration on Creditors

A secured creditor may apply to the Court within 14 days of the commencement of administration for leave to enforce its security over the property of the company. The grant of an application for a secured creditor to enforce a security will depend on whether the Court considers that serious prejudice will be caused to the secured creditor if the application is not granted and that outweighs the prejudice caused to other creditors.

If a company enters into a restructuring agreement, the creditors will be bound by it and will be required to refrain from doing anything inconsistent with the agreement, except with the leave of the Court.

Pending Claims, Litigation and Arbitration

During the administration of a company, a person shall not commence or continue proceedings in a Court against the company or in relation to any property of the company or commence or continue an enforcement process against the company's property except with leave of the Court and on terms that the Court considers appropriate.

Effect of the Moratorium

The restructuring agreement will provide for the nature and duration of any moratorium period.

Voidable Transactions

Transactions concluded prior to the commencement of an administration are not susceptible to being set aside. However, during the course of administration, a transaction or dealing by a company or by a person on behalf of the company, which affects any property of the company is void unless the transaction or dealing was entered into by the

administrator on the company's behalf; with the prior written consent of the administrator; or pursuant to a Court order.

The Administration Plan

The administration plan includes -

- the appointment of an administrator;
- investigation into the company's affairs by the administrator;
- submission by the directors of the financial statements of the company within 7 days of the appointment of the administrator or such further extension granted by the administrator;
- submission of a report of the company by the administrator to the Registrar that shall specify any matter that, in the opinion of the administrator, should be brought to the notice of the Registrar. The administrator shall report to the Registrar as soon as practicable, where the administrator believes that -
 - a past or present officer or shareholder of the company may have committed an offence involving dishonesty or an offence in contravention of the Companies Act; or
 - a person who has taken part in the formation, promotion, administration, management or liquidation of the company (i) may have misapplied or retained or become liable or accountable for the money or property of the company in Ghana or elsewhere; or (ii) may have been guilty of negligence, default or breach of duty or trust in relation to the company.
- convening of the first creditors meeting and any other meeting required by the creditors;
- convening of the watershed meeting to decide if the company should execute a restructuring agreement, end the administration process or be liquidated; and
- where the creditors resolve that the company should execute a restructuring agreement, a restructuring officer is appointed (if the creditors so wish, unless the administrator is maintained as the restructuring officer) to prepare and oversee the execution and implementation of the restructuring agreement.

Voting on the Administration and Restructuring

Creditors may adopt a resolution at their meetings provided it is supported by the votes of creditors or class of creditors holding at least 51% of the value of the debt owed to the creditors or class of creditors voting in person or by proxy vote or by postal vote. The administrator or its nominee shall chair the meeting of the creditors and has a casting vote.

At the watershed meeting, decisions may be made by the creditors by a resolution supported by 51% of the votes representing the value of the debt owed to the creditors or class of creditors voting in person or by proxy vote or by postal vote cast. The directors of the company are also required to pass a resolution to authorise the execution of the restructuring agreement by the company or on the company's behalf.

Cram Down on Creditors

There are no express cram down provisions in the Corporate Insolvency and Restructuring Act. Provided that 51% majority of the creditors resolve that the company should execute a restructuring agreement, the dissenting creditors shall be bound by the restructuring agreement except to the extent that the Court orders otherwise.

Implementation of the Plan

Once administration and restructuring has been proposed and the requisite approvals from creditors, directors, members and/or the Court have been obtained, the plan is implemented by the company in accordance with its terms.

Discharge of Claims

The discharge of claims of a company in administration is not provided for or regulated by the Corporate Insolvency and Restructuring Act.

Effect on Suretyships

This should be provided for in the restructuring agreement executed by the company if the creditors resolve that the company should do so; but where the assets and liabilities of the company are transferred to another company, the transferee company would inherit the suretyships.

How is the Process Terminated?

The administration of a company may be terminated where -

- a restructuring agreement is executed by the company and the restructuring officer;
- the creditors of the company resolve that the administration should end;
- the creditors of the company appoint a liquidator by a resolution passed at the watershed meeting;
- the Court orders the administration to end because the Court is satisfied that the company is solvent or for some other specified reason and the administration ends on the date specified in the order or, if no date is specified, when the order is made;
- the convening period expires without the watershed meeting having been held and no application has made to extend the period;
- the Court refuses to extend the convening period after an application has been made to it;
- a watershed meeting ends without a resolution that the company execute a restructuring agreement;
- the company fails to execute a proposed restructuring agreement within 21 days after a watershed meeting has approved the restructuring agreement or within such further period ordered by the Court; or
- the Court appoints a liquidator.

Director and Officer Liability

A director who fails to submit the financial statements of a company in administration within the required time frame to the administrator would be liable to pay to the Registrar an administrative penalty of 250 penalty points (GHS3,000, approx. USD 254.7).

A director and officer of the company in administration may be found liable for committing offences involving dishonesty or an offence in contravention of the Companies Act.

Civil Consequences

Depending on the aforesaid act or omission, a director or officer could be personally liable for part of or the whole of the debts or liabilities of the company, or to a fine or to both a fine and imprisonment.

Criminal Consequences

Depending on the aforesaid act or omission, a director or officer may be liable to a term of imprisonment or to both imprisonment and a fine.

Scheme of Arrangement

Process Required to Commence a Scheme of Arrangement

A scheme of arrangement or merger without Court approval arises when members pass a special resolution to put the company into voluntary liquidation and authorise the liquidator to sell all or part of the assets of the company to another entity in exchange for fully paid shares, debentures or other like interests in that entity. A scheme of arrangement or compromise with Court approval arises when an arrangement or compromise is proposed and the company, a creditor, a member, the liquidator itself in the case of a company being wound up, the administrator where an administration order in relation to the company is still in force, or any other person interested in the matter applies to Court to order a meeting of its members and creditors in order for them to vote on the proposal.

At what point does the Scheme of Arrangement Commence

Without Court approval, it commences when the special resolution is passed. With Court approval, it commences when the Court makes an order confirming the arrangement or compromise, which is binding on the company, its members and creditors.

Duration of a Scheme of Arrangement

A specific timeline has not been prescribed for either process. The Court process may take about 6 weeks, depending on whether or not an interested party steps in to oppose the application. However, the pre- and post-Court procedures do not have any stipulated timelines.

Extent of Court Involvement in the Process

The Court may make an order confirming an arrangement or compromise. In the order or by a subsequent order, the Court may also make provision for all or any of the following matters -

- the transfer to the transferee company of the whole or a part of the undertaking, assets and liabilities of the transferor company;
- the allotting or appropriation by the transferee company of the shares, debentures or other like interests in that company which, under the arrangement or compromise, are to be allotted or appropriated by that company to or for a person;
- the continuation by or against the transferee company of legal proceedings pending by or against a transferor company;
- the dissolution, without winding up, of the transferor company;
- that provision be made for persons who, within the time and in the manner that the Court directs, dissent from the arrangement or compromise; and
- the incidental, consequential and supplemental matters that are necessary to ensure that the arrangement or compromise is fully and effectively carried out.

The Court may, on an application made by the company or with the leave of the Court, a member or creditor of a company, order that an arrangement, compromise, merger or division is binding on the company and any persons or class of persons as the Court may specify. Any such order may be made on the terms and conditions that the Court considers appropriate.

Management of the Company

There is no provision in the Companies Act that regulates the manner in which a company is managed during an arrangement. This should be provided for in the scheme of arrangement.

Filing of Claims

Again, the law does not provide a mechanism for the filing of claims of creditors. This should be provided for in and regulated by the scheme of arrangement.

Factors Which Influence the Period of Arrangement

The period of arrangement may be affected by either of the following matters:

- where a dissenting shareholder applies to Court for redress;
- where a dissenting shareholder gives written notice of dissent from the arrangement in respect of all of the shares held by that shareholder to the liquidator, within 28 days after the resolution is passed- the liquidator shall abstain from carrying the resolution into effect or purchase the member's shares at an agreed price or at a price agreed

upon during arbitration in accordance with the Alternative Dispute Resolution Act, 2010 (Act 798).

Funding of the Company

There is no specific provision in the law which regulates how a company is to be funded whilst in arrangement. This should be provided for in and regulated by the scheme of arrangement.

Effect of a Scheme of Arrangement on Employees

If the arrangement or merger results in loss of employment or the workers suffer a diminution in the terms and conditions of employment, the workers are entitled to be paid a redundancy pay.

Effect of a Scheme of Arrangement on Contracts

This should be provided for in the scheme. In an arrangement or merger where the assets and liabilities of the company are transferred to another company, the transferee company would inherit the contracts.

Effect of a Scheme of Arrangement on Shareholders

In an arrangement/merger, the shareholders may lose their shares in the company and gain shares, debentures or other like interests or cash in the transferee company.

Effect of a Scheme of Arrangement on Creditors

Generally, the scheme of arrangement will provide for how creditors should be treated. Further, under an arrangement or compromise with Court approval where the whole or part of the company's assets are to be transferred to another company, the liabilities of the company, including its debts will be transferred to the transferee company.

Pending Claims, Litigation and Arbitration

Pending claims, litigation and/or arbitration will be provided for in the scheme of arrangement. But in the case of a transfer of assets from the distressed company to another, the liabilities of the company, including litigation, will be transferred to the transferee company.

Effect of the Moratorium

No such moratorium arises by operation of the law and is not regulated or provided for in a scheme of arrangement.

Voidable Transactions

Transactions concluded prior to the commencement of an arrangement are not susceptible to being set aside.

The Scheme of Arrangement Plan

A scheme of arrangement would include a plan on how the claims of creditors will be settled, how the company will continue in existence on its own or as a consequence of a merger or transfer of its assets and any other related matters.

Voting on the Scheme of Arrangement

In an arrangement or merger without Court approval, the vote of not less than three-fourths (75%) of the members of the company concerned is required to pass the special resolution required. In an arrangement or compromise with Court approval, the votes of 75% of each class of members concerned and 75% of each class of creditors concerned is required to approve the arrangement or compromise.

Cram Down on Creditors

The Court can make an order confirming an arrangement or compromise (approved by a majority in number representing 75% in value of each class of members concerned and 75% in value of each class of creditors concerned) with or without modifications that shall be binding on all creditors of the company and its validity shall not be subsequently impeachable in any proceedings. Therefore, where the Court grants such an order, the arrangement or compromise will be binding on any minority group of creditors that may have voted against the proposals.

Implementation of the Plan

Once a scheme of arrangement has been proposed and the requisite approvals of creditors, members and/or the Court have been obtained, the plan is implemented by the company in accordance with the implementation provisions in the scheme of arrangement.

Discharge of Claims

The discharge of claims is not provided for or regulated by law but instead should be provided for in the scheme of arrangement.

Effect on Suretyships

This should be provided for in the scheme of arrangement, but where the assets and liabilities of the company are transferred to another company, the transferee company would inherit the suretyships.

How is the Process Terminated?

The manner in which the arrangement process is terminated should be provided for in the scheme.

What is the Status of a Scheme of Arrangement?

This will depend on the type of arrangement or merger that is undertaken. The company may end up liquidated with its assets sold to another body corporate or the shareholding of the company may change hands if its shares are bought by a transferee company.

Director and Officer Liability

For either of the following matters that occur during an arrangement, a director or officer of a company may be liable-

- where a director of the company and of a trustee for debenture holders of the company does not notify the company of his or her material interests and the effect of such interest on the arrangement or compromise;
- where the company or its officer (including a liquidator or trustee of a deed securing debentures of the company) does not send the statement explaining the effect of the arrangement or compromise to its members or creditors or include in the statement, a notification of the place and manner in which the members or creditors may obtain copies of the statement;
- where the Court makes an order to facilitate the arrangement, compromise, merger or division, and the company does not deliver a copy to the Registrar within 14 days after the order was made; and
- where the Court makes an order confirming the arrangement/ amalgamation and the company does not annex a copy of the order to every copy of the company's regulations issued by the company after the order has been made;
- where the company is put into voluntary liquidation, a liquidator may exercise his powers of summoning before the Court, an officer of the company who is known or suspected of possessing company property, indebted to the company or considered capable of giving information about the affairs of the company.

For either of the following acts or omissions that occur before an arrangement, directors may also incur contractual liability -

- where the company continues to trade/conduct business when the directors have realised that the company will be unable to pay its debts as they fall due;
- where a director gives a personal guarantee to a contract entered into by the company;
- where the company transacts business, exercises a borrowing power or incurs indebtedness, except that which is incidental to its incorporation or to obtaining subscriptions to or payments for its shares, before it has met the minimum capital requirements; and/or
- where the company does not pay a judgment debt obtained by the creditor against the company.

Civil Consequences

Depending on the aforesaid act or omission, a director or officer could be personally liable for part of or the whole of the debts or liabilities of the company, or to a fine or administrative penalty or to both a fine and imprisonment.

Criminal Consequences

Depending on the aforesaid act or omission, a director or officer may be liable to a term of imprisonment or to both imprisonment and a fine.

SECURITY

Types of security

Security may be a fixed or floating charge, mortgage, pledge of title documents, outright conveyance, trust for sale on condition, lease, hire-purchase, conditional sale or sale with a right of repurchase or a lien.

Taking of Security

Generally, a charge can be created on any asset of the borrower. Security may be taken against the movable property, immovable property or the intangible assets of the chargor. Thus shares, accounts, intellectual property rights, land, receipts, receivables, goods and book debts may all be the subject matter of security.

Security Trustees or Special Purpose Vehicles

Security trustees are usually employed in multiple lender situations such as syndicated loans. The appointment of a security trustee is a contractual matter between the parties to the agreement. Special purpose vehicles are recognized and utilised under Ghanaian law.

Most Robust Form of Security Available to Lenders

The most robust form of security available to a lender is a fixed charge on an asset. A fixed charge has priority over a floating charge affecting the same asset unless the terms on which the floating charge was granted prohibiting the company from granting a later charge having priority over the floating charge and the person in whose favour that later charge was granted had actual notice of that prohibition at the time when the charge was granted to that person.

Registration of Security

- A lender in whose favour a security interest is created must register the security interest with the Collateral Registry of the Bank of Ghana within 28 days after the security interest is created. The Registrar then issues an acknowledgement within 3 days of the registration of the security interest to the lender. The lender must also deliver a copy of the

acknowledgement to the borrower within 15 days after receipt of the acknowledgement. The production of the acknowledgement in proceedings before a Court is prima facie evidence of the effective registration of the security interest in the collateral specified in the acknowledgement.

- Office of the Registrar of Companies - in addition to the Collateral Registry, the particulars and original or certified copies of a security instrument created by a company should also be registered with the Registrar within 45 days after creation, otherwise, the charge is void. This does not apply to a pledge of, or possessory lien on, goods, or to any charge, by way of pledge, deposit, letter of hypothecation or trust receipt, of bills of lading, dock warrants or any other documents of title to goods, or of bills of exchange, promissory notes or any other negotiable securities for money.
- Lands Commission- where the charge is in respect of land, the borrower or lender should also register the instrument at the Lands Commission. A mortgage does not have any effect unless it is registered in accordance with the Land Act, 2020 (Act 1036). When a mortgage is registered as a charge over a registered land or an interest in land, the mortgage instrument must be filed with the Lands Commission.

Stamp Duty

The Stamp Duty Act, 2005 (Act 689) as amended by the Stamp Duty (Amendment) Act, 2023 (Act 1109 (Stamp Duty Act)) requires all agreements to be stamped within 2 months of being executed, either as chargeable or as exempt from stamp duty. An unstamped agreement is not available for any purpose (except in criminal proceedings) in a Ghanaian Court unless the unpaid duty and any penalty for late stamping is paid.

The penalty for late stamping is GHS 30 (approx. USD 2.6). Where the unpaid duty exceeds the equivalent in value of GHS 30 (approx. USD 2.6), there is an additional penalty by way of interest on the unpaid duty at 5% per annum from the day on which the agreement was first executed up to the time when the interest is equal in amount to the unpaid duty.

The Stamp Duty Act does not prescribe which party is responsible for payment of the stamp duty, but in practice, with respect to a charge, stamp duty is usually paid by the person granting the charge. The stamp duty is payable to the Land Valuation Division of the Lands Commission. Calculation of duty is ad valorem. Stamp Duty of 0.5% and 0.25% is paid on principal and ancillary security, respectively.

With respect to land, on an assignment of a lease or where there is consideration payable on the grant of a lease, additional to rent, the applicable stamp duty payable will be as follows -

VALUE OF CONSIDERATION	RATE
Less than GHS10,000	0.25%
More than GHS10,000 but less than GHS50,000	0.5%
More than GHS50,000	1.0%

The applicable stamp duty payable for the grant of a lease is as follows -

TERM OF LEASE	RATE
Not more than 50 years	0.5%
Term of more than 50 years	1%

Stamp duty is usually paid by the acquirer of the interest in the property. The Land Valuation Division may vary the assessment if it considers that the property has been undervalued in the deed. In such an instance, the Land Valuation Division may visit the land, re-value it and/or reassess the stamp duty that should be paid.

Registration Costs

- Registration at the Collateral Registry costs GHS 20.00 (approx. USD 1.70) and is processed online. The costs are payable online at the time of registration and can be undertaken by either the borrower or the lender. The Collateral Registry sends a confirmatory email to acknowledge payment.
- Registration at the Office of the Registrar of Companies costs GHS 100.00 (approx. USD 8.5). Payment is made physically at a payment point on the premises, and a receipt is issued. Registration may be undertaken by either the company which creates the charge or the lender.
- Registration of mortgages at the Lands Commission costs GHS115.00 (approx. USD 9.8) and may be undertaken by the borrower or the lender. Payment is made physically at a payment point on the premises.

Requirements for the Assignment or Transfer of Security

Security can be transferred and/or assigned by virtue of an agreement to that effect. The assignment or transfer agreement should be stamped and registered in the relevant public office, depending on the nature of the security.

Instances in which Securities might be Vulnerable to Attack

- Where the security interest has not been stamped or registered, stamped and registered interests are more robust.
- Where a third party has an interest in the secured property, the third party can initiate an interpleader action in Court to prevent the security from being realised.

Methods of Enforcement of Security

Where a borrower fails to pay an amount secured by a charge, the lender may:

- sue the borrower on any covenant to perform under the credit agreement; or
- where the security is registered under the Borrowers and Lenders Act, 2020 (Act 1052) (the Borrowers and Lenders Act), realise the security over the property charged without initiating proceedings in Court, with notice to the Collateral Registry; or
- appoint a receiver or manager in accordance with the provisions of the credit agreement or apply to Court for the appointment of a receiver or manager to (i) take possession of and protect the property; (ii) collect rents and profits derived from the property; and (iii) realise the security on behalf of the lender.

A lender who intends to realise security without a Court order must register a notice of that intention with the Collateral Registry. The Borrowers and Lenders Act requires the lender to first give the borrower written notice requesting the borrower to pay the amount due within 30 days. However, the lender is not required to give the borrower notice where the collateral is perishable. If the borrower fails to pay or make satisfactory arrangements to pay the amount outstanding to the creditor within 30 days after receiving the notice, the lender may enforce the security by any of the means provided above. Where all requirements are met, the Registrar shall certify the realisation process and issue a Memorandum of No Objection to the lender. The Memorandum of No Objection will remain valid until the collateral is sold, retained by the lender or until debts have been settled and the collateral redeemed.

Where a lender is unable to exercise a right of possession in a peaceful manner, it may upon a warrant issued by a Court, use the services of the police to remove the collateral or evict the borrower where the collateral is immovable property, subject to the rights of third parties or other persons in possession of the collateral.

The security can also be realised by making an application to Court to request a judicial sale of the property or taking possession of the assets over which one has security.

Problems Experienced when Enforcing Security

The following problems may be experienced when one attempts to enforce one's security -

- interpleader - where the lender initiates action in Court to enforce the security, a third party claiming an interest in the property may initiate interpleader proceedings in Court in order to be joined as a defendant or substituted for the defendant in the action;
- where the property is already subject to other encumbrances with priority of time;

- where the proceeds from the judicial sale of the property are exhausted before they can satisfy all of the encumbrancers;
- where the property has already been disposed of or is otherwise unavailable; and
- delays in the Court process.

Financial Assistance Requirements

The Companies Act prohibits a company from providing financial assistance, directly or indirectly, for the purchase of its shares or the shares of its holding company. However, a company may voluntarily acquire its own shares on its conversion to a company limited by guarantee. Also, the prohibition against financial assistance does not prevent -

- (a) the payment of commission or brokerage to a person in consideration of that person subscribing or agreeing to subscribe or procuring or agreeing to procure subscriptions for any shares in the company where the payment of commission or brokerage is authorised by the company's Constitution (previously Regulations) and does not exceed 10% of the price at which the shares are issued or a lesser rate as may be specified in the Constitution; or
- (b) where the lending of money is part of the ordinary business of the company, although the money may be used for the subscription or purchase of shares in the company or its holding company; or
- (c) the provision by a company of money for the purchase or subscription of shares to be held for the benefit of the company's employees or employees of an associated company including a director holding a salaried employment in the company or an associated company; or
- (d) the advancing by a company of loans to persons, other than directors, genuinely employed by the company or an associated company with a view to enabling those persons to purchase or subscribe for shares to be held by themselves beneficially and not as nominees for the company or any other person; or
- (e) the payment by a company of a lawful dividend on its shares although the dividend received by a shareholder is used to discharge a liability on that shareholder's shares or to repay money borrowed for the purpose of subscribing or purchasing shares; or
- (f) in the case of a public company some or all of whose equity shares are dealt with on an approved stock exchange or in respect of which an application has been made to an approved stock exchange for permission to deal in those shares, the payment of commissions, fees, costs and expenses and the giving of indemnities and warranties in each case to a person arranging or otherwise involved in an underwriting, placing or sale of securities in the company or any other similar transaction, provided that -
 - (i) an application for permission to deal in those securities has been or is to be made to an approved stock exchange, and
 - (ii) the financial assistance given is in good faith in the interests of the company.

Under the Companies Act, unless a company's Constitution provides otherwise, the directors of a company need an ordinary resolution of the company to exercise the company's power to borrow money or to charge any of its assets, where the amounts to be borrowed or secured, together with the amount remaining undischarged of moneys already borrowed or secured (apart from temporary loans obtained from the company's bankers in the ordinary course of business), will exceed the stated capital of the company. Therefore, where the amounts will not exceed the stated capital, a board resolution would suffice. However, for the sake of prudence, shareholder approval is sought even when it is not essential.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which the high court of Eswatini will recognise a foreign judgment

The Courts in Ghana will recognise a foreign judgment when a judgment is final and conclusive and obtained in the superior Courts of the countries listed under the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement Instrument) 1993 (LI 1575) and once the judgment has been registered in the High Court of Ghana.

Requirements for Recognition of a Foreign Judgment

- The judgment should be final and conclusive.
- A foreign judgment may be final and conclusive although an appeal may be pending against it or it may be subject to appeal in the country of the original Court.
- It should have been obtained in a superior Court of the foreign country.
- The foreign country should be listed in the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement Instrument) 1993 (LI 1575). The applicable countries for which a Ghanaian Court will recognize a judgment are Brazil, France, Israel, Italy, Japan, Lebanon, Senegal, Spain, United Arab Emirates and the United Kingdom. This is on the basis of reciprocity.
- The judgment should be registered in the High Court of Ghana by the judgment creditor.
- The application for registration of the foreign judgment should be made within 6 years after the date of the judgment or where there has been an appeal, after the last judgment given in those proceedings.

Requirements for the Recognition of a Foreign Trustee, Business Rescue Practitioner or Insolvency Practitioner

Under the Corporate Insolvency and Restructuring Act, the following categories of persons may practice as insolvency practitioners -

- a receiver or manager under the Companies Act;
- an administrator or restructuring officer under the Corporate Insolvency and Restructuring Act; or

- a trustee in bankruptcy under the Insolvency Act, 2006 (Act 708).

A person is qualified to practice as an insolvency practitioner if -

- that person is a chartered accountant, a lawyer or a banker and that person is in good standing with the Institute of Chartered Accountants, the Ghana Bar Association or the Chartered Institute of Bankers, respectively;
- that person is a member of the Chartered Institute of Restructuring and Insolvency Practitioners, Ghana; and
- at the relevant time, a security or professional indemnity policy for the proper performance of the duties of that person is in force.

A professional person can only act as an insolvency practitioner if that person takes out an insurance policy for indemnity against any act or omission on the part of that person as an insolvency practitioner.

A person is not qualified to practice as an insolvency practitioner if the person -

- is a minor;
- is a body corporate;
- has been declared an undischarged bankrupt;
- is declared by a Court of competent jurisdiction to be of unsound mind;
- is the subject of a prohibition order under the Corporate Insolvency and Restructuring Act;
- is disqualified under the Companies Act for fraudulent trading or is disqualified from holding an office under the Companies Act;
- has been convicted in the preceding five years of an offence under the Corporate Insolvency and Restructuring Act or a crime involving dishonesty or moral turpitude;
- is disqualified from acting as a liquidator, administrator, receiver, trustee or supervisor under the Corporate Insolvency and Restructuring Act or any other law; or
- is subject to disciplinary proceedings or punishment under any law.





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TYPE OF GOVERNMENT

Democratic Republic

POLITICAL SYSTEM

Multiparty Democracy

LEGAL SYSTEM

Common Law Based

BACKGROUND

Insolvency is now governed by the Insolvency Act No. 18 of 2015 (Insolvency Act) which is designed to consolidate the laws relating to the insolvency of natural persons and incorporated and unincorporated bodies, and to provide for matters relating to insolvency in greater detail. The Insolvency Act contains a framework for the administration of companies as an alternative to liquidation. Certain institutions (notably banks and other financial institutions licensed by the Central Bank of Kenya, insurance companies, and financial intermediaries licensed by the Capital Markets Authority) are subject to special insolvency legislation under the specific Acts of Parliament which regulate the licensing of the institutions in question.

TESTS FOR INSOLVENCY

What are the tests for insolvency (ie liquidation)?

Under the Insolvency Act the test for insolvency is the company's inability to pay its debts. The threshold of outstanding debts warranting the liquidation of a company has however been significantly increased from Ksh. 1000 to Ksh. 100,000. Under the Insolvency Act, a company will be deemed incapable of paying its debts and therefore suitable for liquidation under the following circumstances:

- where a creditor owed Ksh. 100,000 or more demands, in writing, payment of the indebtedness and the company fails to comply within 21 days either by settling the debt, securing or compounding it to the creditor's satisfaction;
- where a judgment or decree against the company remains unsatisfied either in whole or in part; and/or
- where it is proved to the court's satisfaction that the company is unable to meet its debts as they fall due and payable; and/or

- where it is proved that the value of a company's assets is less than the amount of both its contingent and prospective liabilities.

What are the tests for financial distress?

While there are no specific statutory provisions regarding financial distress under Kenyan law, the Insolvency Act provides that the Court may make an administration order in relation to a company if it is satisfied that:

- the company is or is likely to become unable to pay its debts; and
- the administration order is reasonably likely to achieve an objective of administration:
 - to maintain the company as an ongoing concern;
 - to achieve a better outcome for the company's creditors as a whole than would be likely if the company was liquidated (without first being under administration);
 - to realise the property of the company in order to make a distribution to one or more secured or preferential creditors.

The High Court in some decisions has emphasized that it will not proceed with insolvency proceedings where the debt is disputed. The Insolvency Act also contains elaborate provisions on voluntary arrangements by a company. This includes a composition or scheme of arrangement.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

There are two ways to liquidate a company under the Insolvency Act, namely:

- Voluntary liquidation - where the period fixed for the duration of a company expires or on the occurrence of an event which would lead to a dissolution of the company under the company's Articles of Association.
- Compulsory liquidation - by the Court.

Formal restructuring procedures

The Insolvency Act contains elaborate provisions on voluntary arrangements by a company. This includes a composition or scheme of arrangement. A proposal for voluntary arrangement may be made by the directors, an administrator or a liquidator to the company and the creditors of the company to enter into a composition in satisfaction of its debts or a scheme for arranging its financial affairs. An authorized insolvency practitioner may be appointed to supervise implementation of the voluntary arrangement.

The proposed scheme of arrangement must be approved by a majority of members present at the members' meeting or by a majority in number and value of the creditors at a meeting of creditors. A member or creditor may also make an application to the Court for an order approving the proposed scheme of arrangement. A company will be deemed to be under voluntary arrangement the day after the date on which it is approved by the Court and would then be binding on the members and creditors of the company. The Insolvency Act also contains extensive provisions for the administration of a company, further details of which are set out further below.

Informal insolvency or restructuring procedures

Informal restructures and workouts are uncommon in Kenya except when the enforcement of securities is done through the appointment of a receiver and manager. In the financial sector, a number of institutions (e.g. banks and insurance companies) have been placed under statutory management under the legislation applicable to those institutions.

LIQUIDATION

What is the aim of liquidation?

The main purpose of liquidating a company is to bring the operations of the company to a close, to realise its assets, and distribute its proceeds amongst its creditors and contributories in accordance with their rights and interests. This would be followed by dissolution of the company.

Process required to commence a voluntary liquidation

There are two kinds of voluntary liquidation i.e. members voluntary liquidation and creditors voluntary liquidation.

• Members voluntary liquidation

- The period (if any) fixed for the duration of the company by the Articles of Association expires, or the event (if any) occurs, on the occurrence of which the Articles of Association provide that the company is to be dissolved and the company in general meeting has passed a resolution providing for its voluntary liquidation; or
- A company resolves by special resolution that the company be wound up voluntarily.

• Creditors voluntary liquidation

- This is initiated by the creditors of the company where the company is unable to pay its debts. The first step is a meeting of creditor's convened by the company within 14 days of a meeting at which a voluntary liquidation is to be proposed. Notice of this creditors' meeting should be sent out to the creditors not less than 7 days before the meeting date. The notice to creditors should also be published in the Kenyan Gazette (a weekly Government publication), in at least 2 newspapers circulating in the area in which the company has its principal place of business in Kenya, and on the company's website (if

any). At their respective meetings, the creditors and the company may nominate a liquidator for purposes of liquidating the company's affairs and distributing its assets. Such liquidator must be an authorized insolvency practitioner under the Insolvency Act.

In both cases, before passing a resolution for voluntary liquidation, the company is required to give notice of the resolution to the holders of any qualifying floating charge in respect of the company's property. The resolution for voluntary winding up can only be passed after the expiry of 7 days from the date of the notice to the holders of any qualifying floating charge or if the person to whom the notice was given has consented in writing to the passing of such resolution. Within 14 days after the company has passed a resolution for its voluntary liquidation, it shall publish a notice setting out the resolution in the Kenyan Gazette, in at least 2 newspapers circulating in the area in which the Company has its principal place of business in Kenya, and on the Company's website (if any).

Liquidation by the court

A company may be liquidated by the court if -

- The company has by special resolution resolved to be liquidated by the Court;
- Having been originally registered as a public company, the company has not been issued with a trading certificate under the Companies Act and more than 12 months have lapsed since it was registered. Liquidation on this ground may only be done upon an application by the Attorney General;
- The company fails to commence its business within 12 months of its incorporation or suspends business for a whole year;
- The number of members is reduced below 2 in the case of a non-private company;
- The company is unable to pay its debts;
- A voluntary arrangement made with one or more creditors does not take effect;
- The Court is of the opinion that it is just and equitable for the company to be liquidated;
- On grounds of public interest, it is just and equitable to do so, upon application by the Attorney General where a report is obtained from the capital markets authority, from an investigation or inspection of documents produced under the Companies Act or from information provided by the Companies Registrar indicating that it would be in the public interest to liquidate the company. This may also be done as a result of the company or its directors having been convicted of an offense involving fraudulent conduct.

The process commences when an application for winding up is made to the Court by any or all of the following -

- The company or its directors;
- Creditors (including any contingent or prospective creditor or creditors);
- Contributories where the number of members is reduced below 2 or the relevant shares were originally allotted to

the contributory or have been held in his name for at least 6 months in the preceding 18 months or have devolved to him following the death of a former holder;

- A provisional liquidator or administrator of the company;
- The liquidator where the company is in voluntary liquidation.

At what point does the liquidation process commence?

With a voluntary liquidation, the process is deemed to have commenced at the time of passing the resolution for liquidation. The liquidation of a company by the Court is deemed to commence when the liquidation order is made.

Duration of the liquidation process

Under the previous regime, it was difficult to estimate the duration to complete the liquidation process as this varies so widely. We expect this to remain the same but may be aggravated by the uncertainty of some of the provisions of the Insolvency Act. The liquidation process continues until all the assets have been realised and distributed.

Extent of court involvement in the liquidation process-

Liquidation by the court

The Courts will be involved at every stage of liquidation by the Court. This includes -

- Confirmation of compliance with advertisement procedures;
- Hearing of the liquidation application;
- Granting the liquidation order;
- Appointment of the official receiver and supervision of its functions; and
- Collection and distribution of the company's assets.

Voluntary liquidation

Subject to any application being made to the Court, the Courts would usually not be involved in a voluntary liquidation. The Court may appoint a liquidator if for any reason there is no liquidator or the liquidator is unable to act.

Management of the company whilst in liquidation

When a company is in liquidation, the board of directors are displaced from their office, and in their stead the affairs of the company is placed in the hands of a liquidator. The Insolvency Act extensively provides for the powers of a liquidator which are exercisable with approval. The powers exercisable without approval include:

- Power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company's seal;
- Power to sell any of the company's property by public auction or private contract;
- Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;

- Power to appoint an agent to do any business that the liquidator is unable to do personally; and
- Power to take all other action that may be necessary for the beneficial liquidation of the company.

Filing of claims

- Creditor Voluntary Liquidation - in practice, debts may be proved by delivering an affidavit verifying the debt.
- Liquidation by the Court - the Court may fix a time or times within which creditors are to prove their debts or claims or to be excluded from the benefit of any distribution made before those debts are proved. A claim is sent to the liquidator or official receiver (not the Court) with a verifying affidavit. The liquidator or official receiver may allow or disallow the claim.

Factors which influence the period of a liquidation

The following are some of the factors that cause delays during the liquidation process:

- In the case of liquidation by the Court, the Court's diary;
- Challenges by the company, creditors or contributories in respect of the liquidation process;
- The level of cooperation among the parties; and
- The cost of appointing a liquidator especially in cases of voluntary liquidation where a company does not have significant assets.

Effect of liquidation on employees

All employees of a company stand to be automatically dismissed at the commencement of liquidation. Employees would enjoy preferential payments (being second priority claims) as follows:

- Wages or salaries payable to employees in respect of services provided to the company during the 4 months before the commencement of the liquidation;
- Any holiday pay payable to employees on the termination of their employment before, or because of, the commencement of the liquidation;
- Any compensation for redundancy that accrues before or due to commencement of the liquidation;
- Amounts deducted by the company from the wages or salaries of employees in order to satisfy their obligations to other persons (including amounts payable to the Kenyan revenue authority in accordance with the Income Tax Act);
- Any reimbursement or payment provided for or ordered by the Employment and Labour Relations Court under the Labour Institutions Act to the extent that the reimbursement or payment does not relate to any matter specified in the Labour Relations Act in respect of wages or other money or remuneration lost during the 4 months before commencement of the liquidation provided that the total amount may not, in the case of any one employee, exceed KES. 200,000 as at the commencement of the liquidation and will be subject to the relevant adjustments.

Effect of liquidation on contracts

Once liquidation commences, the company ceases to carry out business except in so far as is necessary for the liquidation. In line with this, existing contracts would continue only to the extent as may be necessary for the beneficial winding up of the company. It is, however, usual for commercial agreements to provide that the commencement of liquidation proceedings would constitute an event of default enabling the counterparty to terminate the contract. During the process of liquidation, the Court has the power to rescind a contract entered into by a company in liquidation as it considers appropriate upon application.

Effect of liquidation on shareholders

Subject to the satisfaction of all of the expenses of liquidation and the company's liabilities, the company's property is to be distributed among members according to their rights and interests in the company.

Effect of liquidation on creditors

Creditors are entitled to be paid out of the assets of the company after expenses of the liquidation and payments due to employees have been satisfied with secured creditors having preference over unsecured creditors.

Pending claims, litigation and arbitration

At any time after the presentation of a liquidation order to Court, and before a liquidation order has been granted, pending proceedings against the company may be stayed (if the proceedings are pending in the Court) or restrained (if the proceedings are pending in another Court) on application by the company, a creditor or contributory. When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the Court and subject to such conditions as the Court considers appropriate.

Voidable transactions

In the case of a liquidation ordered by Court, any dispositions of a company's property and any transfer of shares made by a company after commencement of liquidation are void unless the Court otherwise orders. The Court may also void any preferences as it deems just where the preference was intended to defeat the effects of a possible liquidation. Any transaction that can be shown to have been entered into to favour some creditors at the expense of others or to defraud creditors may also be set aside.

How is the liquidation process terminated?

Liquidation by the Court

When the affairs of the company have been completely liquidated, the Official Receiver is required to lodge a notice with the Registrar of Companies to the effect that the liquidation by the Court is complete. Upon receipt of the notice, the Registrar is required to register the notice. Upon expiry of 3 months after the date of registration of the notice, the company is deemed to have been dissolved. Where an order for the liquidation of a company has been made by the Court and the Official Receiver is the liquidator of the company, the Official Receiver may apply to the Registrar for the early dissolution of a company.

Creditors Voluntary Winding Up

As soon as practicable after the liquidation of the company's affairs has been completed, the liquidator is required to prepare an account of the liquidation and provide an explanation showing how the liquidation has been conducted and how the company's property has been disposed of. Within 30 days of preparing the account, the liquidator is also required to convene a meeting of the company and a meeting of the creditors to have the accounts presented and the explanation considered. Within 7 days of the meetings being held the liquidator is required to lodge a copy of the account together with a return giving details of the meetings. After receiving the accounts and returns, the Registrar registers the accounts and on expiry of 3 months from the date when the accounts and returns are registered, the company is deemed dissolved.

Director or Officer Liability

If a liquidation commences within 12 months after the date on which payment was made out of capital in respect of the redemption or purchase by a company of any of its own shares, the directors who prepared the statement that the company will be able to continue to carry on business as a going concern for purposes of the redemption or purchase, shall, to the extent necessary to satisfy the insufficiency, be liable to contribute to the company's assets except a director who shows that the director had reasonable grounds for forming the opinion set out in the declaration. The Insolvency Act also provides for comprehensive offences that would be committed by officers of a company (which includes directors) during a liquidation. These include:

- fraudulent acts in anticipation of liquidation;
- transactions to defraud creditors of a company in liquidation;
- misconduct committed in the course of the liquidation of company;
- falsification of documents in relation to a company in liquidation;
- making of material omissions from a statement relating to financial position of company in liquidation;
- making of false representations to creditors of a company in liquidation.

Consequences of director or officer liability

An officer found guilty of the offences listed above is liable, on conviction, to a fine, imprisonment or both. The Court also has the power to make various orders against delinquent directors and liquidators, officers of the company and other persons found to have participated in fraudulent trading by a company in liquidation and officers of a company engaging in wrongful trading.

BUSINESS RESCUE/ADMINISTRATION

Certain institutions (notably banks and other financial institutions licensed by the Central Bank of Kenya, insurance companies, and financial intermediaries licensed by the Capital Markets Authority) are subject to special insolvency legislation under specific Acts of Parliament which regulate the licensing of the institutions in question. The Insolvency Act has introduced extensive provisions in respect of voluntary arrangements and administrations of insolvent companies that provide a regime for business rescue. An application to the court for an administration order in respect of a company may be made by a company or its directors, one or more creditors and any other person of a class prescribed by the insolvency regulations. On the making of an administration order in respect of a company, there will be a moratorium on insolvency proceedings and legal proceedings against the company. Under the voluntary arrangement provisions, when a proposal takes effect as a voluntary arrangement, the supervisor becomes responsible for implementing the arrangement in the interests of the company and its creditors and monitoring compliance by the company with the terms of the arrangement. If the directors of an eligible company wish to make a proposal for a voluntary arrangement, they would be able to apply to obtain a moratorium for the company.

Instances in which securities might be vulnerable to attack

The Insolvency Act confers wide powers on the Court to conduct an inquiry into an insolvent company's dealings on application by the official receiver or a liquidator. In relation to companies under administration or in liquidation, the Court has powers to set aside transactions that were entered into at a relevant time if such transactions gave preference to a person which places such persons in a better position during insolvency than they would otherwise have been. The order by the Court may require the release or discharge (in whole or in part) of any security given by the company. The relevant time for purposes of this section includes:

- During the 2 years immediately preceding the onset of insolvency;
- The period between the making of an administration application in respect of the company and the making of an administration order; or
- The period between lodgement with the Court of a copy of a notice of intention to appoint an administrator and the making of the appointment.

Requirements for the recognition of a foreign trustee, business rescue practitioner or insolvency practitioner

The Insolvency Act requires insolvency practitioners to be authorised. A person acts as an insolvency practitioner in relation to a company if the person acts as the liquidator, provisional liquidator, administrator or a supervisor of a voluntary arrangement. A person who wishes to act as an insolvency practitioner is required to apply to the Official Receiver for authorisation to act as an insolvency practitioner. While the Insolvency Act and Insolvency Regulations provide for persons who would be qualified to act as an insolvency practitioner, there are no provisions on the recognition of foreign practitioners.

Provisions on cross border insolvency

Certain aspects of the Model Law on Cross-Border Insolvency (adopted by the United Nations Commission on International Trade Law) are applicable in Kenya, including where:

- assistance is sought in Kenya by a foreign Court or a foreign representative in connection with a foreign insolvency proceeding;
- assistance is sought in a foreign State in connection with a proceeding under the Insolvency Act, and any other written law relating to insolvency in Kenya;
- a foreign proceeding and a proceeding relating to Insolvency in Kenya in respect of the same debtor are taking place concurrently; or
- creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participation in, proceedings under law relating to insolvency in Kenya.





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KINGDOM OF ESWATINI | ROBINSON BERTRAM

TYPE OF GOVERNMENT

Eswatini is an independent monarchy whose current Head of State is His Majesty King Mswati III (since 25 April 1968). Quite recently, the country has changed its name from Swaziland to the Kingdom of Eswatini. The Kingdom practices a Tikhundla (constituencies) based electoral system of Government. This system is a democratic participatory system which emphasizes devolution of power from central Government to Tikhundla areas and individual merit as a basis for election and appointment to public office. The country is led by the King and has a unique system of governance based on the Westminster Parliamentary System.

POLITICAL SYSTEM

According to section 79 of the Constitution of the Kingdom of Eswatini, the system of Government is democratic and participatory based on the Constituencies. Individual members of Parliament are elected on the different constituencies (a total of 55 Constituencies). Certain members of parliament are then appointed into the executive arm of Government which is led by the Prime Minister who in turn is appointed by His Majesty the King.

LEGAL SYSTEM

Eswatini has a dual legal system. On the one hand, there exists the Roman-Dutch Common Law which is highly regulated by the Constitution and other pieces of legislation. On the other hand, there is also Swazi Customary Law which is not codified. The former is highly litigated in the civil courts and other tribunals such as the Conciliation, Mediation and Arbitration Commission (CMAC). The latter is applied in Swazi Courts established in terms of the Swazi Courts Act. However, the High Courts of the land retain supervisory powers over all subordinate Courts which include the Swazi Courts.

TESTS FOR INSOLVENCY

What are the tests for insolvency (ie liquidation)?

Insolvency is highly regulated by the Insolvency Act, 1955 and the Companies Act, 2009. The main test for insolvency, in relation to a company, is the inability to pay debts. In terms of section 288 of the Companies Act, a company is deemed to be unable to pay its debts when-

- the company is indebted to a creditor in a sum not less than E5 000-00 and the company has failed to pay the debt within 21 days of receipt of a demand;

- when a judgment has been issued against the company and the sheriff or messenger of Court filed a nulla bona return to the effect that there are no sufficient assets to satisfy the judgment debt; and
- if it is proved to the satisfaction of the Court that the company is unable to pay its debts.

What are the tests for financial distress (i.e. business rescue or administration)?

The equivalent for the concept of business rescue in Swaziland is judicial management. Section 365 of the Companies Act provides that the Court may grant an order for judicial management of a company if the following requirements are established -

- the company is unable to pay its debts or is probably unable to meet its obligations; or
- has not become or is prevented from becoming a successful concern and there is a reasonable probability that if placed under judicial management, it will be able to pay its debts or meet its obligations or become a successful concern.

Once the order for judicial management is granted, the affairs of the company are then placed in the hands of the provisional judicial manager who shall be appointed by the Court. Such judicial manager, inter alia, is vested with such rights and powers to raise money in any way without the authority of the shareholders of the company with the main aim of resuscitating the financial capacity of the company or to make it a successful concern.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

A company may elect to either voluntarily apply to be declared insolvent or any of its creditors may apply to Court for the company to be declared insolvent. Voluntary surrender is usually by way of petition and creditors move by way of application. Before a petition or application is made, security has to be paid to the Master of the High Court for payment of all fees and charges necessary for the prosecution of all winding-up proceedings and all costs of administering the company in liquidation until a provisional liquidator has been appointed. The petition in Court has to be accompanied by a certificate issued by the Master of the High Court to this effect. A court seized with an application for liquidation issues an interim order which places the company under provisional liquidation. The provisional liquidation order calls upon any person (creditors) to file their objections, if any, for the winding up of the company. This is the reason why the provisional order has to be published in the local media and Government Gazette.

Once the final order for liquidation has been issued, the company is effectively placed in the hands of the liquidator who is appointed by the Court (such a liquidator has to be qualified and have the necessary skill and expertise). Amongst other duties, the liquidator has the following responsibilities -

- take the company in his control and immediately open a current account in the name of the company;
- shall provide the Master with sufficient security for the proper performance of his duties as liquidator and the Master shall appoint him as liquidator by issuing a certificate of appointment;
- shall thereafter open a current account in the name of the company and shall, from time to time, deposit therein to the credit of the company all moneys received by him on behalf of the company;
- investigate and examine the affairs and transactions of the company before winding-up to ascertain whether the directors or officers or past directors or past officers of the company have contravened any provision of the Companies Act;
- prepare a report detailing, inter alia, the amount of capital issued by the company and the estimated value of its assets and liabilities, if the company has failed, the reason and causes of the failure and whether or not any director or officer appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company. This report is prepared for the creditors of the company and to be presented at the general meeting for the creditors;
- prepare a liquidation and distribution account for the inspection of both the Master and other creditors of the company and lodge such account with the Master within 6 months of his appointment;
- to make an arrangement with creditors on how to liquidate outstanding balances due by the company, and to distribute the assets of the company in accordance with the arrangement; and
- to lodge with the Master the receipts for dividends paid or other proof of their payment and a report stating that the company has been wound-up.

Formal restructuring procedure

A court seized with an application to place a company under judicial management issues an order appointing a provisional judicial manager of the company. The provisional judicial manager of the company shall -

- assume the management of the company and recover and reduce into possession all the assets of the company;
- after 7 days of his appointment, lodge with the Registrar of Companies a copy of the letter of his appointment;
- prepare an account for the general state of affairs of the company and a statement detailing why the Company is unable to pay its debts or what prevents the company from becoming a successful concern;
- a statement of the assets and liabilities of the company;

- a list of all the creditors and prospective creditors of the company;
- particulars as to the source from which money has been or is to be raised for purposes of carrying on the business of the company; and
- the considered opinion of the provisional judicial manager as to the respects of the company becoming a successful concern and of the removal of the facts or circumstances which prevent the company from becoming a successful concern

This information is thereafter furnished to the Court on the return date for the Court to give further direction on the management of the Company. The Court will then also appoint a final judicial manager of the company. The final judicial manager has the duty, inter alia -

- to take over the management of the company from the provisional judicial manager;
- to conduct such management subject to the orders of the Court and in such a manner as he may deem most economic and in the best interests of the members and creditors of the company;
- lodge with the Registrar of Companies a copy of the judicial management order and a copy of a letter of his appointment;
- enter into an investigation to determine if any of the directors of the company is liable for damages and compensation to the company and to file a report with the Master's office;
- examine the affairs and transactions of the company pre-commencement of the judicial management;
- determine the prospects of prospective winding-up of the company or that the company may be revived; and
- do any other matter which he deems necessary for the company.

A moratorium is placed on the company's debts and the creditors are prevented from calling up their claims and/or placing the company under liquidation whilst the company is under judicial management.

Informal Insolvency or Restructuring Procedures

The company's board of directors may, lodge with the Master, a special resolution to have the company wound up and liquidated. This process, however, is not commonly used in Swaziland. There is no informal process for restructuring. However, there is no law barring a company from entering into negotiations with creditors and reaching a compromise in relation to payment for all or some of the company's liabilities.

LIQUIDATION

What is the aim of liquidation?

The main aim of liquidation is to bring the company to an end. A company under liquidation is administered by either the Master of the High Court or an appointed liquidator whose

main aim is to close down the company. The liquidator has to locate all the assets of the company, realise the assets and then pay all the creditors in accordance with their order of preference. Thereafter, he ought to distribute the residue to the shareholders of the company in accordance with their rights.

Process required to commence liquidation

The process of liquidating a company as a result of insolvency starts with an application to Court for the company to be placed under liquidation. The application may be moved by either -

- the company itself (by way of petition);
- one or more of its creditors (by way of application);
- one or more of its members; or
- jointly by any or all the parties mentioned above.

At what point does the liquidation process commence?

Section 291 provides that a winding-up of a company by the Court shall be deemed to commence at the time of the presentation to the Court of the application for the winding-up. Section 294, on the other hand, provides that a voluntary winding-up of a company shall commence at the time of the lodgement of the special resolution of the directors of the company authorizing the winding-up.

Duration of the liquidation process

The Companies Act provides that the liquidation process has to be finalised within a period of 6 months. However, it is permissible to apply for the extension of this period. In practical terms, the entire liquidation process can take up to a year or more to finalize.

Extent of court involvement in liquidation process

Once the Court has granted the final order for liquidation, it has little to no involvement after that time. The liquidator works largely hand-in-hand and from time-to-time with the Master of the High Court who monitors the entire process. However, there are certain instances where the involvement of the Court is required such as sanctioning and implementing a management scheme, the removal of errant liquidators and the settlement of any disputes which may arise during the liquidation process.

Management of the company whilst in liquidation

In most cases, the role of the board of directors in running the company comes to an end once the company is placed under liquidation and in the hands of a liquidator. The board of directors will only be called to submit the statement of affairs of the company. The directors also have a duty to attend all meetings called by the liquidator. The liquidator, on the other hand has, inter alia, the following roles, responsibilities and powers -

- to take the company under his control;
- to summon meetings of creditors;
- to institute and defend any legal proceedings instituted by or against the company;
- to carry on or discontinue any part of the business of the company in so far as may be necessary;
- to agree to any reasonable offer of composition made to the company by any debtor and to accept payment of any part of a debt due to the company in settlement thereof;
- to draw up a comprehensive liquidation and distribution account;
- to sell any movable and immovable assets of the company by either public auction or private treaty; and
- To do any such powers as may be conferred upon him by either the Court or the Master of the High Court which are not contrary to any provisions of the Companies Act

Filing of claims

Claims under liquidation are filed before the final liquidation and distribution account is drawn and, in a form, prescribed in terms of the Companies Act which is accompanied by an affidavit in proof of the claim. Such affidavit shall be made by the creditor or by any person fully cognisant of the claim. After all claims have been submitted, there shall be a meeting of creditors. The officer presiding at any such meeting of creditors may of his own motion or at the request of other creditors call upon any person present at the meeting who wishes to prove his claim to take an oath and submit to interrogation by the said officer and other creditors in order to prove his claim. After the meeting of creditors, the officer who presided thereat, if not the liquidator, shall deliver to the liquidator every claim proved against the company and the liquidator shall examine all available books and documents relating to the company for purposes of ascertaining whether the company indeed owes the claimant. If any claim is disputed by the liquidator, he shall write to the Master and state the reasons why the claim is disputed. The Master shall confirm the claim, reject the claim or reduce the claim and thereafter notify the claimant in writing.

Factors which influence the period of the administration in a liquidation

There are various factors which may influence the period of liquidation. This ranges from the appointment of the liquidator, the competency of the liquidator and also the meetings of creditors – whether they are productive or not. One of the major factors that delays liquidation in the Kingdom is the competency of liquidators. Individuals have the tendency of accepting positions as liquidators when they do not have the requisite expertise.

Effect of liquidation on employees

Liquidation of a company results in the automatic termination of any employment contract. In terms of section 100 of the Insolvency Act, an employee shall be entitled to a salary or wages even though he has not proved his claim, but the

liquidator may require such employee to submit an affidavit in support of his claim for such salary or wages. The secured amount which an employee is entitled to is not more than E400-00.

Effect of liquidation on contracts

In relation to supply agreement, the supplier is entitled, after delivery of certain goods which have not been paid for in full, after the sequestration of the company's estate, to reclaim that property if within 30 days after delivery thereof he has given notice in writing to the purchaser or the liquidator or to the Master that he reclaims his property. A lease entered into by any company as lessee shall not be determined by the liquidation process, but the liquidator of the insolvent company may determine the lease by notice in writing to the lessor. If the liquidator does not within 3 months of his appointment notify the lessor that he desires to continue with the lease on behalf of the company, he shall be deemed to have determined the lease at the end of such three months. The rent due by then shall be included as liquidation costs.

Effect of liquidation on shareholders

The shareholders are entitled to claim the residue after the company has been liquidated and distribution has occurred.

Effect of liquidation on creditors

Once creditors become aware that a provisional order for liquidation has been issued by the Court, they have may object to the order being made final. If the order is subsequently made final, creditors have a duty to examine the liquidation and distribution account and also to lodge their claims with the liquidator and attend all meetings and participate in the liquidation of the company so that their debts are cleared.

Pending claims, litigation, arbitration

The liquidator has the power to elect either to enforce pending claims or oppose the enforcement of pending claims. Any legal proceedings that were instituted against the company before it was liquidated become suspended and any pending attachment is declared void.

Voidable transactions

Section 283 of the Companies Act provides that a disposition by a company of its property which, if made by an individual, could, for any reason be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay its debts. The provision further provides that any cession or assignment by a company of any of its property to trustees for the benefit or purported benefit of all its creditors shall be void.

How is the liquidation process terminated?

When the affairs of the company have been completely wound-up, the liquidator shall report this to the Master who shall, in turn, transmit to the Registrar of Companies a certificate to that effect and send a copy to the liquidator. The liquidation process shall be deemed to have been terminated and the Registrar shall cause to be published in the government gazette and local media the fact that the company has been dissolved.

Director or officer liability

If it appears, whether it be in winding up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company, the Court may, on the application of the Master, or liquidator or any other creditor, declare that any person who knowingly was a party to the carrying on of the business in such manner, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

Consequences of the Companies Act

In terms of section 360, where it is held that a director or officer or member of the company is personally liable for certain damages to the company, such director, or officer or member of the company may be ordered to repay or restore the money or property or any part thereof with

Financial assistance requirements

The situation regarding financial assistance by one company to another has not been judicially determined in the Kingdom of Eswatini. However, where financial assistance is to be given by one entity to another, this can only be done by a holding company assisting one of its subsidiaries. Such assistance can be by way of a special resolution of the company in a general meeting.

BUSINESS RESCUE/ADMINISTRATION

The applicable legislation in Eswatini, being the Companies Act as well as the Insolvency Act, do not recognise the concept of business rescue. Instead, the Companies Act recognises the concept of judicial management. Inasmuch as it is by far one of the dormant areas of our jurisprudential dispensation, judicial management is applicable and Courts do have the power to grant an order for judicial management of a company if by reason of mismanagement or for any other cause: (a) is unable to pay its debts or is probably unable to meet its obligations; and (b) has not become or is prevented from becoming a successful concern and there is a reasonable probability that, if placed under judicial management, it will pay its debts or meet its obligations or become a successful concern.

The main aim for judicial management is to rescue the business. Failing this, the business has to be placed under liquidation. Under judicial management, the process is commenced by an application to Court and upon satisfaction, the Court may grant an order for judicial management and effectively the company is placed in the hands of a provisional judicial manager who manages the affairs of the company.

The entire process for judicial management mirrors that of liquidation save for the fact that with judicial management, the main aim is to resuscitate the company and make it a going concern or successful. However, the powers of a liquidator and that of a judicial manager are almost the same. For instance, just as a liquidator is expected to investigate what may have caused the downfall of the company to a point of winding-up, a judicial manager is also tasked to investigate if any of the directors of the company may have been the reason for the downfall of the company or why it is unable to become a successful concern.

SECURITY

Types of security

In terms of the Insolvency Act of 1955, security is the right of a creditor in relation to the assets of an insolvent estate - a preferent right by virtue of any special mortgage, landlord's hypothec, pledge or right of retention such as a lien.

Statutory prescribed forms of security

In Eswatini there are a few statutory prescribed securities. These include the mortgage bonds and notarial bonds which are regulated in terms of the Deeds Registry Act as well as deeds of hypothecation which are regulated by the Financial Institutions Act. Other securities are governed by the provisions of the common law.

Taking of security

Securities such as notarial bonds, mortgage bonds and deeds of hypothecation are supposed to be registered with the office of the Registrar of Deeds. However, the securities that are governed by the common law do not need prior registration before they can confer real rights on the holder of such security.

Most robust form of security

The most robust form of security is the registered security. In relation to immovables, the most robust security is the mortgage bond. In relation to movables, the most robust form of security is the notarial bond. Both these types of bonds are normally registered with the Registrar of Deeds.

Registration of security

The registration of a security requires the debtor to execute a power of attorney which authorises a conveyancer to appear and register the security at the office of the Registrar of Deeds. This is in relation to security which is in the form of immovable property. In relation to movables, the power of attorney is executed in favour of a notary public and/or conveyancer and a notarial bond is thereafter prepared and registered with the office of the Registrar of Deeds. Stamp duty and transfer duty, in relation to immovable security, are payable at the office of the Accountant General, calculated on a gazetted tariff sliding scale depending on the value of the security.

Stamp duty

As of December 2018, there was an amendment to the stamp duty payable on registration of any bond by the credit receiver. The stamp duty is payable prior to execution at the office of the Registrar of Deeds and payment is made with the Accountant General. The stamp duty payable is calculated on a sliding scale as follows -

- where the total amount of the debt secured does not exceed E300 000-00, 0.85% is charged for every E10 000-00 or part thereof;
- where the total amount of debt secured exceeds E300 000- 00 but does not exceed E1 000 000-00, 0.95% is charged for every E10 000-00 or part thereof; and
- where the total amount of the debt secured exceeds E1 000 000-00 1% is charged for every E10 000-00 or part thereof.

Registration Costs

The costs for registration are borne by the credit receiver. These costs are reflected in the table. These costs are paid through the conveyancer or notary by the credit receiver to the Accountant General and must be paid prior to execution. Proof in a form of a transfer duty receipt is produced by the Registrar Of Deeds. In addition, there are deeds office levies in the sum of E30-00. This payment is also made simultaneously with the payment of stamp duty before execution.

Methods of enforcement of security

The ordinary method of enforcing security is by obtaining a Court order for the attachment of the property (or through the perfection of the landlord's hypothec) or by way of summons. Immovable property cannot be realised without an order of Court. The Court subsequently issues a writ of execution which authorises the creditor to realise the property and perhaps dispose of it by public auction in a transparent and fair manner or even by private treaty.

Requirements for the assignment / transfer of security

In order to assign or transfer registered security, the parties need to consent to the transfer, and this has to be in writing. The deed of assignment is thereafter prepared by a conveyancer or notary public. Thereafter, the deed is executed by the conveyancer through the Registrar of Deeds.

Instances in which securities might be vulnerable to attack

The registration of security has the effect of conferring a real right in favour of the creditor. The security cannot be easily attacked unless there is evidence of fraudulent transactions or collusive dealings by the directors of the company prior to liquidation.

interest at such rate as the Court thinks just. Where a director has been found to have committed a criminal act within his duties as director, he may be liable criminally and if found guilty, liable on conviction to a fine not exceeding E100-00 or in default of payment thereof to imprisonment not exceeding 6 months or both.

Problems experienced when enforcing security

One of the major problems with enforcing security is the period that has to be followed before there is an order authorising the credit provider to foreclose and dispose of the property in order to recover the judgment debt. Another problem arises when the security is of a specific nature, highly specialised, and cannot be easily disposed of – especially if one has to find buyers who are in the similar field as the debtor. Another problem arises during the public auction. You find that the owners of the credit receiver have agents in the auction who are there to delay and frustrate the entire process. They place the highest bids and when the time for payment comes, they renege on their obligations.

Also, there have been challenges in Court by credit receivers who complain that the reserve price for the property is way below market value and hence it may not cover the debt owed and/or that they will not receive any residue for the sale. They normally produce valuation reports which may depict a different amount from that stated as the reserve price.

Financial assistance requirements

The situation regarding financial assistance by one company to another has not been judicially determined in the Kingdom of Eswatini. However, where financial assistance is to be given by one entity to another, this can only be done by a holding company assisting one of its subsidiaries. Such assistance can be by way of a special resolution of the company in a general meeting.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which the high court of Eswatini will recognise a foreign judgment

In Eswatini, we have the Reciprocal Enforcement of Judgments Act, 1922. It advocates for the both the recognition and enforcement of foreign judgments. Certain requirements have to be met in terms of the Act before the foreign judgment can be recognised and enforced. Upon the complete fulfilment of these requirements, the Court grants an order recognizing the foreign judgment and the judgment will thereafter have the same status as a judgment granted by the High Court of Eswatini.

Requirements for recognition of a foreign judgment

The requirements as listed by the Act are as follows-

- firstly, it has to be demonstrated that the foreign court that issued the judgment was seized with the pre-requisite jurisdiction to entertain the matter and issue that judgment;
- secondly, it has to be demonstrated that the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of such court;
- thirdly, the judgment debtor, being the defendant in the proceedings, was duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of such court or agree to submit to the jurisdiction thereof;
- judgment was not obtained by fraud;
- judgment debtor does not satisfy the court either that an appeal is pending, or that he is entitled and intends to appeal against that judgment; and
- the judgment was with respect to a cause of action which for reasons of public policy or for some other similar reason, could not have been entertained by the court.

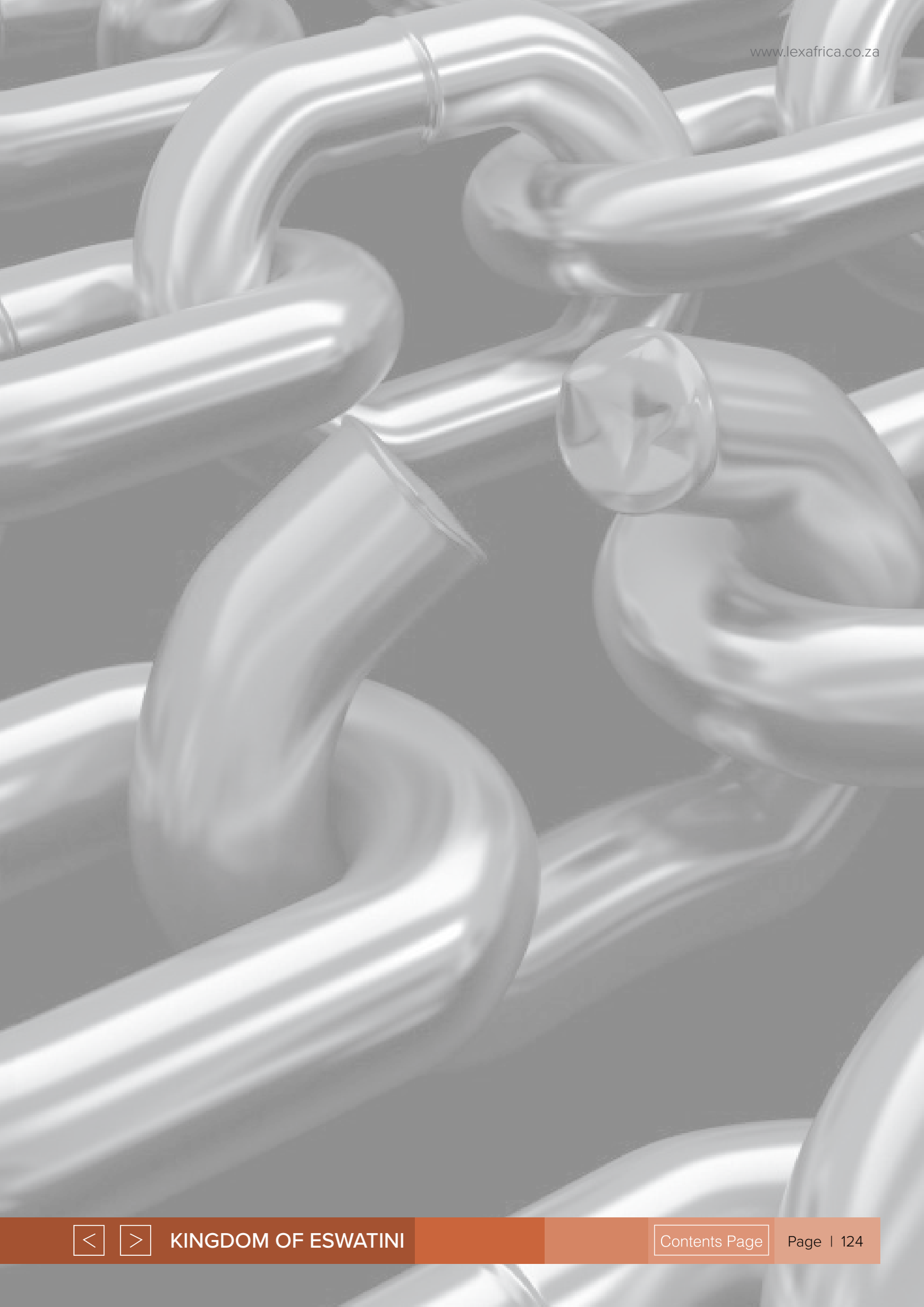
The normal process is to make an application to Court accompanied by an affidavit that comprehensively demonstrate the above factors.

Requirements for the recognition of foreign trustees, business rescue practitioner or an insolvency practitioner

The recognition of a foreign trustee or foreign liquidator is governed by the Recognition of External Trustees and Liquidators Act No. 51 of 1932. In terms of the Act, the High Court may order the recognition of any external trustee or external liquidator who has -

- determined in writing a place in Eswatini as his domicilium citandi;
- produced to the Court his or her letter of appointment as an external trustee or liquidator.

Thereafter, the property in Eswatini belonging to the insolvent company will vest in the hands of the external trustee or liquidator. Once the High Court has granted the recognition, the Registrar of the High Court is obliged to transmit a copy of the order to the Master of the High Court, the Registrar of Deeds and the Registrar of Mining Rights. Thereafter, the recognised trustee or liquidator would realise the company assets in Eswatini under the supervision of the Master of the High Court.





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TYPE OF GOVERNMENT

Democracy / Kingdom.

POLITICAL SYSTEM

Parliamentary constitutional system influenced by the Westminster model.

LEGAL SYSTEM

Roman Dutch Law.

TESTS FOR INSOLVENCY

What are the tests for insolvency (ie liquidation)?

In terms of section 5 of the Insolvency Act, 2022 (Act No. 9 of 2022), a debtor (including a company) is insolvent if—

- it is unable to pay its debts as they fall due; or
- its liabilities exceed the value of its assets.

Section 5(2) further creates a statutory presumption of insolvency where a debtor fails to satisfy a written demand for payment of at least M15,000 within 21 days.

What are the tests for financial distress (ie business rescue or administration)?

Lesotho now has a formal corporate rescue regime introduced under the Insolvency Act, 2022.

Part VIII of the Act provides for Corporate Rescue proceedings aimed at rehabilitating financially distressed companies where there is a reasonable prospect of rescue.

Judicial management under the Companies Act, 2011 has been superseded in substance by the corporate rescue framework.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

The Insolvency Act, 2022 which came into force by publication of a Government Gazette in 2024, provides for liquidation as the primary formal insolvency procedure for companies, initiated by application to the High Court or in accordance with the Act. Importantly, part 8 of the Act did not

come into force. Part 8 deals with the Insolvency Regulator. No regulations were passed as yet either. This non- liquet leaves great uncertainty where the Regulator does not exist yet in law.

- It is uncertain how functions or appointments that Part 8 assigns to the Regulator can be exercised, until commencement of part 8 and/or insolvency regulations being passed to deal with the lacuna.

Formal restructuring procedures

The Insolvency Act, 2022 introduces Corporate Rescue as a formal restructuring mechanism.

Corporate Rescue proceedings are conducted under the supervision of a Corporate Rescue Practitioner appointed in accordance with Part VIII of the Act.

Statutory constraint:

If liquidation proceedings have already been commenced, corporate rescue may be unavailable unless permitted by the Court under section 151 of the Act. This creates a timing-critical limitation not present under the prior regime.

Informal insolvency and restructuring procedures
Informal creditor compromises remain possible by agreement but, the Insolvency Act, 2022 now also provides for formal compositions (see below)

LIQUIDATION

What is the aim of liquidation?

It is a process used to close a business and sell what it owns in order to pay its debts for the benefit of its creditors.

Process required to commence a liquidation

Liquidation is initiated in accordance with the Insolvency Act, 2022, by application to the High Court by a creditor, the debtor company, a director, shareholder, or other qualifying party as defined in the Act.

At what point does the liquidation process commence?

Liquidation commences upon the granting of a liquidation order by the Court, or as otherwise provided for under the Insolvency Act, 2022

Duration of the liquidation process

The duration of the liquidation process depends on the magnitude of the company and usually takes about a year to complete, from start to finish. Ultimately, it is fact-dependent.

Extent of court involvement in the liquidation process

The Insolvency Act, 2022 introduces enhanced regulatory oversight, including the appointment of an Insolvency Regulator responsible for licensing and supervising insolvency practitioners.

Management of the company whilst in liquidation

Substantively unchanged, subject to practitioner regulation under Part VIII of the Insolvency Act, 2022.

Filing of claims

Claims are submitted and adjudicated in accordance with the procedures set out in the Insolvency Act, 2022 and directives issued by the Insolvency Regulator.

Factors influencing duration

The magnitude of the company, coupled with any litigation brought against or by the liquidators, are factors that may delay the finalization of the liquidation process.

Effect of liquidation on employees

Employee preference rights are governed by the Insolvency Act, 2022. The statutory cap applicable to preferential employee claims has been revised, but the precise monetary threshold must be confirmed from the Act and regulations.

Effect of Liquidation on contracts

The liquidator may decide to either terminate or maintain certain contracts. It is within the liquidator's discretion. The liquidator should consider if it is in the best interests of creditors to terminate or maintain contracts.

Effect of liquidation on shareholders

Shareholders may vote at the creditors' meetings and may make proposals at meetings of creditors and shareholders. Shareholders can make proposals on any matter.

Effect of liquidation on creditors

Creditors may vote at the creditors' meetings and may make proposals at meetings of creditors and shareholders. The creditors may make proposals in respect of the distribution of the proceeds of the estate.

Pending claims, litigation and arbitration

The liquidator may elect to proceed, settle or withdraw any pending litigation or arbitration proceedings that were initiated at the instance of the company. The same applies to pending proceedings brought against the company.

Voidable Transactions

Voidable transactions are regulated under the Insolvency Act, 2022, which retains avoidance provisions relating to dispositions without value, preferences, and transactions concluded while insolvent.

How is the liquidation process terminated?

Liquidation is terminated in accordance with the Insolvency Act, 2022 upon final distribution and deregistration or by Court order.

Director or officer liability

Director and officer liability is preserved and expanded under the Insolvency Act, 2022, including civil liability for reckless or fraudulent trading and criminal sanctions for misconduct.

COMPOSITIONS AND COMPROMISES

The Insolvency Act, 2022 introduces statutory compositions:

- Pre-liquidation compositions (section 136)
- Post-liquidation compositions (section 142)

These mechanisms permit structured compromises with creditors subject to statutory approval thresholds and Court oversight.

JUDICIAL MANAGEMENT

Judicial management under the Companies Act, 2011 has effectively been replaced by Corporate Rescue under the Insolvency Act, 2022. References to judicial management should be read as historical only and replaced with Corporate Rescue where applicable.

SECURITY

This section remains substantially accurate.

- SIMPA 2020 remains in force and effective;
- Security types unchanged; and
- Enforcement principles unchanged.

No substantive amendment required.

RECOGNITION OF FOREIGN JUDGMENTS

For a foreign judgment to be recognized, an application would need to be brought to the High Court. Certified copies of the pleadings in respect of the matter and a certified copy of the judgment would need to be attached to the application

to Court. A judgment of any Court of competent jurisdiction whether domestic or foreign may be sued on in the Lesotho High Court.

provided that the judgment is final, the foreign judgment must not be repugnant to Lesotho law and the foreign Court must be a Court of competent jurisdiction according to Lesotho law.

RECOGNITION OF FOREIGN INSOLVENCY PRACTITIONERS

The recognition of foreign insolvency practitioners remains subject to High Court approval, now read together with the practitioner regulation framework under Part VIII of the Insolvency Act, 2022.

A wooden gavel with a dark head and a lighter handle rests on a wooden surface. In the foreground, a dark rectangular sign with a white border is tilted, displaying the word 'INSOLVENCY' in white, uppercase, sans-serif letters.

INSOLVENCY



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MALAWI | SACRANIE, GOW & CO.

TYPE OF GOVERNMENT

Malawi is a Presidential Republic.

POLITICAL SYSTEM

Malawi is a multiparty democracy.

LEGAL SYSTEM

Malawi's legal system follows the English Common Law system. The sources of law include: the Constitution, Legislation, Common Law, Customary Law, Religious Law, International Law, Doctrines of Equity and Conventions.

TESTS FOR INSOLVENCY

What are the tests for insolvency (ie liquidation)?

The Insolvency Act ("IA") provides for two tests of insolvency: the cashflow or commercial solvency test -where the company is unable to pay its debts; and the liabilities-vs-assets test where the value of the company's assets is less than the amount of its liabilities taking into account its contingent and prospective liabilities. A company's inability to pay debts is demonstrated by -

- The company's failure to comply with a statutory demand within 28 days;
- An execution issued against the company in respect of a judgment debt being returned unsatisfied;
- A person entitled to a security interest over the whole or substantially the whole of the property of the company appointing a receiver under the instrument creating the security interest; or
- An arrangement between a company and its creditors being put to a vote and not being approved.

What are the tests for financial distress (i.e. business rescue or administration)?

The Insolvency Act, 2016 uses the term "Company Reorganisation" and the test is that the company is or is likely to become unable to pay its debts as they fall due and that the company reorganisation order is reasonably likely to rescue the company as a going concern thus restoring the company to solvency; and realizing property in order to make a distribution to one or more secured or preferential creditors. The tests for insolvency above also applies to a reorganisation when determining that a company is or is likely to be unable to pay its debts as they fall due.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

There are 3 formal insolvency procedures in Malawi namely -

- Winding-up
- Receivership
- Bankruptcy

Formal restructuring procedure

The formal restructuring processes is the Company Reorganisation. This is aimed at restoring the company to solvency and thereby preserving the company and its business operations as a going concern; or achieving a better result for the company's creditors as a whole than would be likely if the company were wound-up without first being placed in company reorganisation, which may include a sale or a transfer of any business of the company as a going concern; or realizing property in order to make a distribution to one or more secured or preferential creditors.

Informal Insolvency or Restructuring Procedures

They include the following procedures -

- Government Bail Out: This includes tax waivers, capital injection, provision of soft loans, provision of guarantees and provision of assets or offers of Government tenders.
- Contractual Restructuring: This involves changing the composition and/or structure of assets and liabilities of a company in financial distress. For example, rescheduling of debt repayments, roll-overs, conversion of the currency in which the debts are denominated, alteration of interest rates, forbearance of penalties in loan agreements, equity swaps, partial or total debt write-offs, asset sales, hive downs and special purpose vehicles.
- Arrangement: includes a reorganisation of the share capital of the company by consolidation of shares of different classes or by the division of shares of different classes or by both those methods.
- Compromise and Reconstructions: compromise means a compromise between a company and its creditors, including a compromise (a) cancelling all or part of a debt of the company; or (b) varying the rights of its creditors or the terms of a debt; (c) relating to an alteration of a company's constitution that affects the likelihood of the company being able to pay the debt. It can be made on a motion of not less than 75% in value of the creditors and the final result of which would be a compromise agreement that is

binding on all creditors, the company itself, the liquidator, if appropriate and the contributories of the company.

- Mergers, Divisions and Reconstructions: where two or more companies amalgamate and continue as one company, which may be one of the amalgamating companies, or may be a new company.

LIQUIDATION

What is the aim of liquidation?

The Insolvency Act, 2016 uses the term 'winding-up'. The aim of winding-up a company is to bring the company's existence to an end and to distribute the proceeds from a sale of the company assets fairly amongst the entitled persons, creditors and shareholders.

Process required to commence liquidation

Winding-up of a company may be effected by way of (a) winding-up order made by the Court; or (b) voluntary winding-up commenced by resolution passed by the company. A voluntary winding-up may be (a) a creditors' voluntary winding-up where the company is insolvent and the liquidator is appointed by a meeting of creditors; or (b) a shareholder's voluntary winding-up where the company is solvent and the liquidator is appointed by a shareholders' meeting.

The law provides an alternative mode of commencement of voluntary winding-up where it appears to the directors that the company is insolvent. In this case, prior to holding the meeting for the passing of the resolution to wind up, the directors are required to lodge with the Director of Insolvency and Registrar of Companies a declaration and deliver a copy of it to the Official Receiver stating that the company cannot continue its business by reason of its liabilities and a creditor's meeting has been scheduled to table the issues of the company with its members. Then the directors ought to appoint a provisional liquidator who exercises all powers of a liquidator in a creditors' winding-up. It is only up to that point that a provisional liquidator is appointed that the process of winding-up is considered to have commenced prior to the meeting where the resolution to wind up as a creditor's voluntary winding-up is held.

Under the IA, the choice of process of voluntary winding-up to proceed under is based on the directors' consideration of the affairs of the company and in their judgment, they can then either make a declaration of solvency¹ so as to set in motion a member's voluntary winding-up in which the creditors are assured of getting paid.

¹ Section 143(1), IA

At what point does the liquidation process commence?

The winding-up process commences from the time a resolution to wind up is passed; or from the time a petition for winding-up is presented to Court. The duration of the liquidation process depends on how complicated the company's affairs are and on the size and nature of the company.

Extent of court involvement in liquidation process

The extent of Court involvement is determined by the actions of the affected parties, for instance the Court is involved -

- If the winding-up is initiated by way of petition or if the Court is invited to supervise the liquidation process;
- To stay proceedings, set aside voidable transactions or overcome process impasse;
- To set aside a statutory demand; and
- To terminate the liquidation.

The Court plays the role of regulator of the liquidation process from commencement to conclusion. The petition for liquidation, whether a members or creditors liquidation, is filed with the Court and upon his appointment, the liquidator files a notice of his appointment to the Court. The liquidator is answerable to the Court for his actions carried out on behalf of the company while in reorganisation and the Court can demand an account of his conduct of affairs in the liquidation process at any stage of the process. Creditors and sufficiently interested parties can equally apply to the Court for various orders against or regarding the conduct of the liquidator in performing his duties as such.

The IA seeks to uphold the company's members' determination of their affairs by their own management without recourse to court orders. However, the court may only be involved where a liquidator applies to the court challenging a resolution for his removal and the court directs otherwise.² Besides the said involvement of the court, the company retains its control of the office of the liquidator (not his operations) even filling of vacancies in the office.

Management of the company whilst in liquidation

The liquidator has custody and control of the company's assets. The directors remain in office but cease to have powers, functions or duties, other than those required or permitted to be exercised by the Insolvency Act.

Principally, a liquidator is required to act in a reasonable and efficient manner so as to take possession of, protect, realize and distribute the assets or the proceeds of the realization of the assets, of the company to its creditors in accordance with the IA.

The liquidator is independent of the company's members' control except to the extent that he is allowed to form his

² Section 144(4), IA

own opinion of the company's ability to pay its debts in full even if his opinion differs from the director's declaration of insolvency made under Section 143, IA. Where the liquidator forms such a contrary opinion that the company will not be able to pay its debts in full within the prescribed period, he is empowered to summon a creditor's meeting and lay before them a statement of the assets and liabilities of the company. At that point, the winding-up continues as a creditors' winding-up as the management thereof becomes creditor driven and focused, beginning with the creditor's power to appoint their own liquidator or maintain the one appointed by the directors as well as the appointment of a liquidation committee at a creditors' meeting.

Filing of claims

Filing of claim and adjudication process are governed by S. 275 of the IA. Recognizable claims against a company in liquidation are only those in respect of a provable debt. Creditors prove their claims by submitting a written claim with the liquidator together with the relevant supporting documentation. A provable debt is a present, future, certain or contingent debt or liability which a creditor may prove in a bankruptcy or winding-up and that a debtor owes at the time of adjudication, or in the case of a company, on commencement of winding-up. The creditors bear their own costs for proving their claims. The liquidator can decline proof of debt in which case the creditor can appeal the decision of the liquidator in Court. .

Factors which influence the period of the administration in a liquidation

They include -

- Complications in the form of multiple suits, injunctions and restraining orders during the liquidation process;
- The extent of assistance from the former management of the company;
- The manner in which the business was traded or conducted prior to the commencement of liquidation, and
- The cooperation amongst the company, the liquidator and the creditors.

Effect of liquidation on:

- **Employees** - Once a company is placed in liquidation, the employees are required to fully disclose to the liquidator the details relating to the company's property. The employees' wages/remuneration, overtime pay, holiday pay, severance pay, commission and compensation for unfair dismissal or termination of their employment are preferential debts payable after the payment of the liquidator's costs.
- **Contracts** - Contracts are not automatically terminated by the commencement of liquidation unless they contain provisions to that effect.

- **Shareholders** - No shares can be transferred after the commencement of winding-up. An alteration cannot be made to the rights or liabilities of a shareholder of the company. The shareholders cannot exercise their powers under the Memorandum and Articles of Association. They are also required to fully disclose to the liquidator details relating to the business, accounts, property and other affairs of the company.

- **Creditors** - A secured creditor has the right to take possession of, and realize or otherwise deal with, property of the company over which that creditor has a security interest. When enforcing the debt, if there is a shortfall, the creditor becomes an unsecured creditor for the balance and if there is a surplus the creditor must account for it to the liquidator. Other creditors present their claims to the liquidator and are treated according to their level of preference.

- **Pending claims, litigation and arbitration** - Unless the liquidator agrees or the Court orders otherwise, a person cannot commence or continue legal proceedings against the company or in relation to its property; or exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company.

Voidable transactions

A transaction by the company may be set aside by the Court on the application of the liquidator where it is a voidable preference; and was made within 2 years immediately before commencement of the winding-up. A voidable preference is a transaction by the debtor company that is made at a time when the debtor is unable to pay its debts; and enables another person to receive more towards satisfaction of a debt by the debtor than the person would receive, or would be likely to receive, in liquidation. Any transaction that is made within 6 months immediately before the commencement of the winding-up is presumed, unless the contrary is proved, to be made at a time when the debtor is unable to pay his due debts and hence voidable.

How is the liquidation process terminated?

Under winding-up by Court, the liquidator may apply to the Court for an order that he be released and that the company be dissolved after realizing all property of the company; distributing a final dividend, if any, to the creditors; adjusted the rights of members among themselves; and distributing a final return, if any, to the members. The Court may release the liquidator and dissolve the company.

Under voluntary winding-up, at the conclusion of the winding-up, the liquidator calls a general meeting of the company, or in the case of a creditors voluntary winding-up, a meeting of the company and of its creditors and lays the account before the meeting. The company is dissolved on the expiry of the prescribed period after the notice has been lodged and if the quorum is reached when a copy of the notice has been delivered to the official receiver.

Director or officer liability

Directors or officers of the company, are liable for any -

- failure to publish notice of their resolution to liquidate;
- failure to preside over a creditors' meeting pursuant to a creditors' voluntary liquidation;
- failure to comply with a liquidator's demand for information;
- absconding from the country during the liquidation process;
- failure to disclose all relevant information relating to company property and to deliver up company property under the director's control; and
- act intended to defraud creditors of the business or some other wrongful or illegal act.

Consequences of the Companies Act

A director or officer is guilty of an offence if he/she acted with intent to defraud creditors of the business or committed some other wrongful or illegal act which is punishable by 10 years imprisonment and a fine.

BUSINESS RESCUE/ADMINISTRATION

Process required to commence a reorganisation

The process is commenced by making an application to Court for a re-organization order. The application may be made by the company, directors of a company, one or more creditors of the company or a combination of the company, directors and creditors. In the application an administrator is proposed. A person may be appointed as administrator only if he is qualified to act as an insolvency practitioner in relation to the company. When the company is in liquidation by virtue of winding-up by the Court, the liquidator of the company may make an application for the reorganisation of the company. The application is filed together with a sworn statement and the proposed administrator's consent to act.

At what point does reorganisation commence?

Re-organization commences when appointment of the administrator takes effect.

Duration of the reorganisation process

The company reorganisation takes a maximum of 6 months. However, the time can be extended by order of Court.

Extent of court involvement in the reorganisation process

The Court is involved in the process by -

- giving orders in relation to the landlord's exercise of a right of forfeiture by peaceable re-entry in relation to premises let to the company;
- giving orders in relation to legal processes against the company, such as legal proceedings, execution or distress;

- making interim orders;
- giving orders in relation to the creation, perfection and enforcement of security interests in respect of company property;
- terminating the company's reorganisation;
- extending the period of the company's reorganisation;
- giving directions to the administrator in connection with any aspect of his management of the company's affairs, business or property; and
- discharging the winding-up order to pave the way for the company's reorganisation.

Management of the company whilst in reorganisation.

During the company's reorganisation, directors' powers are limited to facilitating the administration process by providing information and other required assistance to the appointed administrator and by assisting the administrator with any other role assigned to him or her by the administrator.

The administrator is required to -

- exercise the powers ordinarily exercised by the directors and secretary of the company;
- take custody and control of the company's property and operations;
- investigate the company's business, property and financial circumstances;
- call for creditors meetings;
- prepare a proposal;
- remove and/or appoint directors of the company;
- raise finance for the company in the form of loans, or other finance facilities
- prepare and distribute periodic reports to creditors;
- facilitate the survival of the company; and
- achieve the advantageous realization of the company's assets than would arise from a liquidation.

Filing of claims

The company reorganisation deals with creditors already known to the company.

Factors which influence reorganisation

The duration of the process is dependent on the complexity of the affairs, and nature, of the company. The factors that may influence the duration of the process include the relationship between the company, the administrator and the creditors as well as the extent to which the former management of the company assists the administrator.

Funding of the company whilst in reorganisation

The company is funded by its ordinary revenue streams. The company can also be funded through loan facilities or other credit facilities.

Effect of re-organization on:

- **Employees** - IA is silent on the effect that a company reorganisation has on employees. The practice has been that employees continue to discharge their duties unless they are retrenched.
- **Contracts** - IA is silent on the effect that a company reorganisation has on contracts concluded by the company prior to the commencement of the company's re-organization. The practice is that contracts continue to subsist unless automatically terminated or terminated by the administrator.
- **Shareholders** - IA is silent on the effect that the company's reorganisation has on shareholders.
- **Creditors** - Any property belonging to the company, and that is subject to a charge, cannot be disposed of during the administration process without the consent of the secured creditor or the sanction of the Court.
- **Pending claims, litigation and arbitration and effects of the moratorium** - When the company reorganisation starts, a moratorium arises and no litigation or arbitration proceedings may be commenced or continued with against the company without the consent of the administrator or the permission of the Court, including liquidations and receiverships. No steps may be taken to create, perfect or enforce any security interest without the consent of the administrator or permission of Court. Landlord's rights of forfeiture by peaceable re-entry in relation to property let to the company can only be exercised with the consent of the administrator or with the permission of the Court.

Voidable transactions

IA is silent on voidable transactions.

The re-organization proposal

The administrator's proposal contains the proposals for achieving the purpose of the company's reorganisation.

Voting on the proposal

The administrator calls for a creditors' meeting to consider the proposal. The proposal may be approved without modification or with modification to which the administrator consents. The proposal is deemed approved if voted for by a majority in value of those creditors present and voting, in person or by proxy. The proposal is deemed not approved if voted against by more than half in value of the creditors to whom notice of the meeting was sent and who are not, to the best of the chairman of the meeting's belief, persons connected with the company.

Cram down on creditors

All decisions in respect of the company's reorganisation are made by the creditors at meetings and are made by way of a simple majority. There is no express cram down provisions in Malawian legislation.

Implementation of the proposal

The administrator implements the proposal to achieve the objectives of the company's reorganisation.

Discharge of debts

IA is silent on the discharge of debt during the company's reorganisation.

Effect of suretyships

IA is silent on the effect of company's reorganisation on suretyships.

How is the process terminated?

The company's reorganisation is terminated at the instance of the administrator, creditor or liquidator (if the company is to be placed in liquidation) by making an application to Court to terminate the process.

What is the status of the company after re-organization?

If the company re-organization process is successful, the business will continue to trade as a going concern. If the company re-organization is unsuccessful, then liquidation proceedings are initiated.

Director and officer liability (civil consequences and criminal consequences)

The directors and officers of the company who used the company operations to defraud creditors or to do some wrong/ illegal act may be held personally liable for the debts, liabilities and obligations of the company.

SECURITY

Types of security

The type of securities recognized in Malawi are usual commercial securities recognised by common law countries including mortgages, security agreements (fixed (other than land) or floating), insurance policies, documentary credits also known as letters of credit and negotiable securities.

Security trustees/special purpose vehicles

Security Trustees/Agents usually hold the secured assets for multiple secured lenders.

In the case of –

1. Insolvency, however, IA provides a similar security trusteeship through an appointment of a receiver or manager to manage the secured property under several instruments such as security agreements (debentures), mortgages, pledges, accounts charge for the secured party. The Court may also appoint a receiver or a manager on application of a secured party or any other person and on notice to the company where the Court is satisfied that the company has failed to pay a debt due to the secured party or has otherwise failed to meet any obligation to the secured party; the company proposes to sell or otherwise dispose of the secured property in breach of the terms of any instrument creating the security interest; or it is necessary to do so to ensure the preservation of the secured property for the benefit of the secured party.
2. Mortgaged or charged properties, where the mortgagor or chargor is in default of payment of the principal sum or of any interest or any other observance in the mortgage/charge agreement, the mortgagee or chargee can also appoint a receiver under the mortgage or security document regulated under the Law of Property and Conveyancing Act/ the Registered Land Act in the case of a security agreement under the Personal Property Security Act. The appointment of a receiver under the mortgage or security agreement is different from receivership in insolvency proceedings.
3. Special purpose vehicles, there is no specific legal framework that regulates it. However, with regard to its formulation and management, the Companies Act Cap 46:03 of the Laws of Malawi would be applicable.

Most robust form of security

The most robust form of security in Malawi for personal property is security over moveable property registered under the Personal Property Security Act and a charge over land and buildings. These are the most recommended forms of securities. They are simple to create, register and enforce.

Registration of security

Personal property

Registration of security interests in personal property is governed by the Personal Property Security Act No. 8 of 2013. Personal property as defined in the Act includes chattel paper, documents of title, goods, intangibles, investment securities, money and negotiable instruments other than land and buildings.

The registration process starts with a secured party filing a financing statement with the Personal Property Security Registry (PPSR). The financing statement states the particulars of the loan, the debtor, the secured party and the security. Stamp duty is payable on the financing statement (0.6% of the amount secured). Once stamp duty

has been paid, the Registrar of the PPSR provides a copy of the verification statement to the debtor with a registration number. The financing statement is deemed to have been registered at the time that a registration number, date and time are assigned to it, and it shall not be effective against a third party until it becomes publicly searchable.

This registration process is also used for registering a debenture, pledge agreement and all securities that are issued to a lender in respect of personal property.

Real property

Registration of security interests in real property is governed by the Land Act Cap 57:01, the Registered Land Act Cap 58:01, and the Deeds Registration Act Cap 58:02 of the Laws of Malawi.

The registration process for a mortgage/charge involves, in the case of leasehold property owned by the Government, consent from the Regional Commissioner's office as provided for in section 36 of the Land Act as well as the lease, execution of the instrument of mortgage/charge and the payment of stamp duty (0.6% of the amount secured) and registration fees. Thereafter, the mortgage/charge instrument is registered with the Deeds Registry and assigned a deed number and in the case of a charge registered in the section of the title in the land registry, given an application number.

Stamp duty

Stamp duty is payable on all security instruments. The stamp duty payable on personal property, mortgages and charges is 0.6% of the amount secured. This amount is payable to the Malawian Government.

Registration Costs

Registration fee in the PPSR is MK10,000 (approximate equivalent of \$14). The renewal fee is MK2,000 (approximate equivalent of \$3). Registration fee for mortgages and charges is MK5,000.00 (approximate equivalent of \$7). This fee is payable at the Lands Registry.

Requirements for the assignment / transfer of security

The requirement for the assignment and/or transfer of security is determined by the terms of the instrument or agreement.

Instances in which securities might be vulnerable to attack

Securities may be vulnerable to attack by third parties where it is a requirement that a particular step be taken during the process and when such step is not taken. For instance, if the security relates to a mortgage or charge on leasehold land and the required consent is not obtained prior to execution, then such transaction or security may be vulnerable to attack.

by third parties. Further, if the security is not registered, registered out of time, not renewed if required, then it may be vulnerable to being attacked by third parties. All securities are perfected and take priority from the date of registration. If a security is not registered, then that security is not perfected and a third party may have rights to the secured property if that third party had perfected the security first.

METHODS OF ENFORCEMENT OF SECURITY

Enforcement under the Personal Property Security Act No. 8 of 2013

Pursuant to judicial process or without judicial process, in the case of default on the part of the debtor, the secured party may take possession of the collateral or render the collateral unusable if the collateral is of a kind that cannot be readily moved from the debtor's premises and may dispose of the said collateral on the debtor's premises.

The secured party may proceed without judicial process if the debtor does not resist the removal of the collateral.

The commencement of enforcement requires registration of the enforcement form in the PPSR which shall identify the debtor, the secured party, and the collateral against which enforcement is sought.

A prior notice to the debtor is not required for the secured party to repossess or render the collateral unusable.

Enforcement under the Registered Land Act Cap 58:01 of the laws of Malawi

In case of a charge, if there is a default on the part of the chargor in payment of the principal sum, interest or any other periodical payment, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement. If the chargor does not comply within 3 months of the date of service, with a notice served on him, the chargee may appoint a receiver of the income of the charged property or sell the charged property. The chargee may also lease the charged land or take possession of the charged land.

Problems experienced when enforcing security

The following are some of the problems that one may experience when enforcing one's security:

- challenges to the enforcement through litigation which usually takes longer timeframes
- recovery of a lesser sum upon sale of property due to undervaluation or devaluation.

Financial assistance requirements

The Companies Act Cap 46:03 of the Laws of Malawi sets out requirements that must be met before a company is permitted to grant financial assistance. The general requirement is that there must be board approval in order to offer such assistance.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Malawian courts will recognize foreign judgments from the UK without a trial under The British and Commonwealth Judgments Act which mandates Malawi to recognise British judgments or awards.

Requirements for recognition of a foreign judgment

Judgments that are recognized through pieces of legislation and agreements are firstly registered in Malawian Courts on application to the High Court. For those judgments that are from countries which have no specific arrangements with Malawi on the enforcement of foreign judgments, these are registered by filing a claim by a way of summons in the High Court based on common law principles.

Requirements for the recognition of foreign trustees, business rescue practitioner or an insolvency practitioner

A foreign trustee, foreign business rescue practitioner or foreign insolvency practitioner must be authorized to carry out their profession in Malawi (they must have a valid business visa or work permit). The Insolvency Act makes reference to a foreign representative. A foreign representative is a person or a body authorized in a foreign proceeding to administer the reorganisation and liquidation of a debtor's assets or affairs. This foreign representative is the equivalent of an insolvency practitioner under the Insolvency Act. A foreign representative, when in Malawi, may with permission of Court intervene in any proceedings in which a debtor is a party.



MALI SATIS PARTNERS

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TYPE OF GOVERNMENT

The governmental form of the country is a democracy.

POLITICAL SYSTEM

The Republic of Mali opted for a presidential regime, characterised by the separation of executive, legislative and judicial powers. It has also instituted multiparty politics since 1990.

LEGAL SYSTEM

Inspired by French law, the Malian judicial system groups first and second level courts, with the Courts of First Instance and Courts of Appeal. These fall under the control of the Supreme Court.

TESTS FOR INSOLVENCY

What are the tests for insolvency (ie liquidation)?

A company is insolvent when it ceases payments to creditors and the company has not presented an agreement to its creditors for the restructuring of its debt.

What are the tests for financial distress?

When the company encounters financial difficulties, the business rescue process will commence in order to save the company and allow it to continue trading.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

Friendly liquidation and judiciary liquidation (bankruptcy).

Formal restructuring procedure

Business rescue.

Informal Insolvency or Restructuring Procedures

Not applicable.

LIQUIDATION

What is the aim of liquidation?

Liquidation is a procedure aimed at realising the assets of the debtor in order to discharge its liabilities.

Process required to commence liquidation

A debtor who is insolvent must make a declaration for the purpose of opening the liquidation procedure, regardless of the nature of its debts. The declaration must be made by the debtor within 30 days following the cessation of payments, and it must be deposited at the registry of the Competent Court against proof of receipt. The liquidation may also be initiated at the request of a creditor, regardless of the nature of their claim, provided that it is certain, liquid and due. To this end, the creditor's application must specify the nature and amount of the claim and refer to the title on which it is based.

At what point does the liquidation process commence?

The liquidation process begins with the pronouncement of the opening procedure by the Competent Court. Duration of the liquidation process The Competent Court shall fix the period within which the closure of the proceedings shall be examined, which period shall not exceed more than 18 months after the initiation of the procedure. However, such Court may extend the term by 6 months once only, on the justification provided by the trustee (syndic) and by a specially reasoned decision.

Extent of court involvement in liquidation process

Other than to open the procedure, the Court is not involved in the liquidation process.

Management of the company whilst in liquidation

Once the Court orders the liquidation, the powers of the board of directors or the executive officers cease on that date. As for the liquidator, he represents the company and administers the liquidation. The liquidator is vested with extensive powers to realise assets. The Liquidator is entitled to pay creditors and to distribute surplus proceeds from the sale of assets among the partners.

Filing of claims

From the opening decision and within 60 days after the second insertion of a legal notice in a newspaper, creditors are required to file their claims with the trustee under penalty of foreclosure. The deadline is extended to 90 days for creditors domiciled outside the country.

In the case of secured creditors, the time limit for the filing of claims runs from the date of the notification of the notice (which is to be personally given by the liquidator, the debt to be produced by a bearer's letter against a receipt, by registered letter with acknowledgment of receipt, or by any means leaving a written record). Known creditors must be notified by the trustee if they have not filed their claims within 15 days of the first insertion of the opening decision with a legal notice in a newspaper. The warning takes the form of a bearer's letter against a receipt, or a registered letter with acknowledgment of receipt or by any means that leaves a written record.

Factors which influence the period of the administration in a liquidation

The administrative difficulties associated with litigation brought by or against the business, or the change in the mode of administration, which is henceforth entrusted to the trustee, may be factors influencing the period of administration of the business during the liquidation.

Effect of liquidation on:

- **Employees** - The claims resulting from employment or apprenticeship contracts enjoy preference as a super lien on wages. However, employees may be dismissed for economic reasons, when it is urgent and indispensable.
- **Contracts** - Contracts can be maintained or terminated according to the decision of the liquidator.
- **Shareholders** - Shareholders will be paid from any surplus proceeds from the sale of assets and after payment to the creditors.
- **Creditors** - From the opening decision, the creditors are gathered in a body of creditors represented by the trustee, who acts in the name and in the collective interest of the body of creditors. They submit their claims to the liquidator and are classified as secured and unsecured. They will be paid in full or in part, depending on the assets realised.

Pending claims, litigation and arbitration

The decision to open the liquidation order shall prohibit or preclude any enforcement proceedings by creditors in respect of movable and immovable property, as well as any distribution procedure which has not produced an attributive effect before the opening decision. Proceedings in process are interrupted until the creditor has filed its claim. They are then automatically taken over, the trustee duly summoned, but concern only the establishment of the claim and the fixing of the amount.

Voidable transactions

Several transactions made during the suspect period (beginning on the date of cessation of payments and ending

on the date of the opening decision and for a maximum duration of 18 months) are unauthorized and unenforceable against the body of creditors. These transactions, which would be considered void, refer to donations, the payment of debts and securities.

How is the liquidation process terminated?

The liquidation ends following a decision of the Competent Court. The Competent Court may declare the closing of operations as a result of insufficient assets.

Director or officer liability

Directors and officers may be held liable civilly or criminally. If a director mismanages a company or misappropriates the company's assets, the company may hold the director civilly liable. The embezzlement of company assets constitutes a criminal offence for which a director may be held criminally liable.

Consequences of the Companies Act

The civil liability of directors and officers arises in circumstances where the asset shortfall of a company is due to the fault of the directors. The Court can decide that the debts of the company are supported by the managers through an action to fill the liabilities. In addition, the directors can be the subject of an extension of the collective procedures, but also of an extra-patrimonial sanction with personal bankruptcy. On the criminal side, managers can be guilty of bankruptcy and other offences affiliated to it.

BUSINESS RESCUE/ADMINISTRATION

Process required to commence a business rescue

The company must be insolvent. The business rescue must be declared 30 days after the declaration of insolvency and the declaration must be filed with the competent officer of the Court with documents to justify the financial situation of the company (documents include an extract from the Register of Commerce, turnover of the company, financial statements, cash flow statements, debts and receivables statements and inventory of all of the company assets).

At what point does business rescue commence?

First, the debtor has to propose an offer of fair composition within 60 days after the declaration of insolvency. If the composition is accepted, the relevant Court must pronounce the opening of the procedure. The relevant Court pronounces the commencement of the business rescue process if it notes the insolvency and if it accepts that the debtor proposed a fair composition (detailing the measures for the recovery of the company, the payment plan of receivables and the guarantees of execution of the Concordat).

Duration of the business rescue process

From the opening judgment, the recovery process has a duration of 6 months, extendable once for a period of 3 months. At the end of the period, the Competent Court may convert it into a liquidation.

Extent of court involvement in the business rescue process

The Court plays a role in the reorganization proceedings, by fixing the date of insolvency and pronouncing the opening of the procedure.

Management of the company whilst in business rescue.

The company is managed by the trustee during the business rescue process. The management continues to participate in the management of the business, unless the Competent Court decides otherwise.

Filing of claims

Information as set out under the liquidation section is applicable here.

Factors which influence business rescue

These factors are similar to those arising from the liquidation procedure.

Funding of the company whilst in business rescue

There is no provision which regulates funding during business rescue at law.

Effect of business rescue on:

- **Employees** - They may be dismissed for economic reasons.
- **Contracts** - Contracts remain in force and effect during the business rescue.
- **Shareholders** - Shareholders are engaged throughout the process.
- **Creditors** - The decision to open the company's business rescue prohibits or interrupts any legal action by the creditors to enforce any claim they may have against the debtor, the resolution of a contract for non-payment, or enforcement proceedings relating to movable or immovable property.

Pending claims, litigation and arbitration and effects of the moratorium

All proceedings are suspended. The approval of the moratorium renders it binding on all the creditors, whatever the nature of the claims

Voidable transactions

Several transactions made during the period (beginning on the date of cessation of payments and ending on the date of the opening decision and for a maximum duration of 18 months) prior to the liquidation of the company are unauthorized and unenforceable against the body of creditors. Transactions that would be considered void include donations, the payment of debts and securities.

The business rescue (administration plan)

A rescue plan (concordat) will provide -

- The terms for the continuation of the business;
- The details about a partial or total transfer of assets;
- The persons required to execute the composition and all their obligations;
- The arrangements for maintaining and financing the business;
- The employment prospects and any necessary dismissals of employees for economic reasons; and
- The replacement of the managers.

Voting on the plan

The plan will be approved if the majority in number of creditors admitted permanently or provisionally representing at least half of the total amount of the receivables, support the plan. The plan may be voted on by correspondence or by way of proxy.

Cram down on creditors

The plan must be supported by a vote of creditors before it is adopted and implemented.

Implementation of the proposal

The plan will be implemented in accordance with its terms.

Discharge of debts

A distribution of funds between creditors can be determined by the Judge in order to discharge debts.

Effect of suretyships

In the event of business rescue, the decision to initiate the process suspends any enforcement proceedings by the body of creditors, including those with security interests. However, that decision has no suspensive effect on surety agreements.

How is the process terminated?

The process is terminated either by the success of the recovery plan or by the conversion of the process into liquidation.

What is the status of the company after the business rescue?

The company should revert to an optimal financial situation. Otherwise, it will be liquidated.

Director and officer liability (civil consequences and criminal consequences)

The director and officer liability as set out under the liquidation section is applicable here.

SECURITY

Types of security

- Personal guarantees: a guarantee and/or a letter of guarantee.
- Property guarantees: a right to hold the debtor's assets, lien, retained or transferred property as a guarantee and/or a pledge.
- Mortgages: either by agreement or by a Court order.
- Statutory Prescribed Forms of Security.

Taking of security

Save for personal guarantees, any other security is taken by agreement or by Court order.

Security trustees/special purpose vehicles

The security trustee is an agent responsible for the constitution and realisation of one or more securities or any other guarantee for the execution of an obligation. The security trustee has the power to represent the creditors and defends their interests.

Most robust form of security

The mortgage over real estate property is the most robust form of security.

Registration of security

Registration of security must be done with the Trade and Credit Register, also known as RCCM (Registre du Commerce et du Crédit Mobilier).

Stamp duty

In the case of bankruptcy, the required process does not require stamp duty.

Registration Costs

The acts drawn up in execution of the laws relating to bankruptcies and judicial liquidations, namely, declarations regarding the cessation of payments, balance sheets,

balance sheet filings, posters and certificates of insertion relating to the declaration of bankruptcy or to the summonses of creditors, deeds of filing of inventories, transactions and other deeds, minutes of meetings, statements, observations and deliberations of creditors, statements of presumed claims, deeds of proceeds; petitions addressed to the official receiver, orders and decisions of the magistrate, reports and accounts of the receivers; statements of distribution; minutes of verification and affirmation of debts, compositions or postponements shall be exempt from the formality of registration.

Requirements for the assignment / transfer of security

The security must be registered with the tax authorities and the Register of Commerce, save for a personal guarantee and letter of guarantee. Mortgages over property must be registered with the land register.

Instances in which securities might be vulnerable to attack

If the security is legally registered, there should be no concern with regard to its enforcement.

Methods of enforcement of security

The security may be sold on public auction where there is a failure to reach a friendly settlement on the enforcement of the security. The public auction is based on an enforceable judgement.

Problems experienced when enforcing security

In practice, objections may be raised by the debtor, the guarantor or a third party.

Financial assistance requirements

Not applicable.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

A foreign judgment that is enforceable against a person or company domiciled in Mali may be recognized by the Malian Court.

Requirements for recognition of a foreign judgment

Several conditions should be present such as-

- The foreign Court must have jurisdiction to hear the case;
- The documents declaring the judgment must be authentic;
- The rights of the defendant must have been respected;

- The decision must have become res judicata under the law of the country in which it was made; and
- The judgment must not be contrary to public order.

Requirements for the recognition of foreign trustees, business rescue practitioner or an insolvency practitioner

This is not generally considered.





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COUNTRY INFORMATION

Mauritius is one of the countries in Africa that has set the pace in the ease of doing business. Mauritius was ranked 13th out of 190 countries according to the World Bank Ease of Doing Business Report 2020 and amongst African countries, it is ranked first. Now, the World Bank Ease of Doing Business Report 2020 has been replaced with the Business Ready Report 2025. In addition to providing an efficient platform to invest from, Mauritius is well regarded when it comes to good governance and economic democracy. Mauritius ranks 2nd in Africa for the Mo Ibrahim Index of African Governance 2023.

Mauritius is a beacon of political, social and economic stability. With its wide network of Double Taxation Avoidance Agreements and Investment Promotion and Protection Agreements (IPPAs), Mauritius offers investors a conducive environment for doing business which guarantees predictability, certainty and security. Mauritius has a low rate of filings for liquidation.

The Mauritius tax regime was reviewed by the Organisation for Economic Co-operation and Development (OECD) which in its 2023 report on Peer Review Results released on 16th December 2024 mentioned that Mauritius meets all the international requirements of the BEPS Action 5 and does not have any harmful practices in its tax regime.

Mauritius' regime against money laundering and the financing of terrorism is compliant with the Financial Action Task Force's standards since 21 October 2021, and Mauritius is now cleared from all international lists of non-compliant jurisdictions. It is to be noted that Mauritius keeps on updating its laws in relation to money laundering and the financing of terrorism in that the most recent amendment dates back to 2024 (vide The Anti-Money Laundering and Combatting the Financing of Terrorism and Proliferation (Miscellaneous Provisions) Act 2024). The recent amendment has as purpose to strengthen the compliance of Mauritius with FATF standards, in prevision for 2027 Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) assessment.

SECURITY

Types of security

Under Mauritian law, security can largely be sub-divided into 2 categories, which stem from the Mauritian Civil Code (of French origin) and the Code de Commerce:

- personal guarantee and corporate guarantee - "cautionnement" - where a guarantor undertakes to pay the debt of a debtor in case of default by the latter;

- real guarantee - "garantie réelle" - where property, whether movable or immovable, is used to guarantee the repayment of a debt;
- fixed and floating charges;
- pledges of movables, like share pledges and transferable rights and interests;
- liens and privileges over bank accounts and transferrable rights and interests; and
- mortgages or hypothecations ("hypothèque conventionnelle").

Taking of security

In the case of movable property, a pledge ("gage" or "nantissement"), which can be without deprivation of property ("gage sans déplacement") or with deprivation of property ("gage avec déplacement") is used. In the case of immovable property, fixed or floating charges are commonly used. Also, with regard to immovable property, a creditor can also hold the property in custody ("antichrèse"), even if it is not what lenders mostly rely on in practice nowadays.

FORMAL AND INFORMAL INSOLVENCY PROCESSES

Out-of-court Restructuring Guidelines

There are 8 principles that may be followed for informal restructuring. The principles, as set out by the Insolvency Service, can be summarised as follows:

- Cooperation amongst creditors and between creditors and the debtor is required with a view to proposing solutions to resolve the debtor's financial difficulties during a "standstill period";
- During the "standstill period", all relevant creditors should agree not to take any steps to enforce their claims against the debtor;
- During the "standstill period", the debtor should not take any action that would adversely affect the prospective returns of the relevant creditors;
- In complex cases, coordination may be facilitated by the formation of one or more representative coordination committees and by the appointment of professional advisers to advise and assist such committees;
- During the "standstill period", the debtor should provide all relevant information regarding its assets, liabilities, business and future prospects;
- Proposals contained in a restructuring plan for resolving the financial difficulties of the debtor must comply with both the applicable law as well as reflect the relative positions of the relevant creditors at the commencement of the "standstill period";

- Any information obtained for the purposes of the restructuring process, dealing with the assets, liabilities and business of the debtor should, unless already in the public domain, be treated as confidential; and
- If additional funding is provided to the debtor during the “standstill period”, or as part of any restructuring proposal. The repayment of such additional funding should, in so far as is practical, be accorded priority status as compared to other indebtedness or claims of the relevant creditors.

COMPROMISE

The Mauritius Companies Act 2001 (Companies Act) provides for a compromise mechanism which is defined as a compromise between a company and its creditors, including a compromise to cancel all or part of a debt of the company, vary rights of its creditors or terms of a debt, or alter the terms of the company’s constitution to improve its ability to pay its debts. The proposal for a compromise can be initiated by the company’s board of directors, a receiver, a liquidator, or, with the Court’s leave, any creditor or shareholder where such person has reason to believe that the company is, or is likely to be, unable to pay its debts. The proponent (who is the person who proposes a compromise) must compile a list of affected creditors, detailing the amounts owed and the number of votes each creditor is entitled to cast. Notice of the meeting to vote on the compromise and detailed information about the proposal must be given to all known creditors, the company, any receiver or liquidator, and the Registrar of Companies (ROC) and must include prescribed information such as terms of proposed compromise and reasons for it.

For a compromise to be binding, it must be approved by the creditors or a class of creditors at a duly convened meeting. When a resolution proposing a compromise (including any amendments) is voted on by multiple classes of creditors, it is assumed that the approval by each class is dependent on the approval by every other class voting on the resolution and the proponent must give written notice of the result of the voting to each known creditor, the company, any receiver or liquidator, and the ROC.

BANKRUPTCY, ADMINISTRATION, LIQUIDATION AND RECEIVERSHIP

Formal insolvency procedures

The formal insolvency procedures that are covered by the Insolvency Act 2009 (the Act) are bankruptcy, administration, liquidation and receivership.

Statutory Demand

A statutory demand is usually served on a debtor (company) by a creditor or a contingent or prospective creditor

as a preliminary step before insolvency or winding up proceedings. The prerequisite conditions for a statutory demand are namely: (i) in respect of a debt that is due and is not less than Rs 250,000; (ii) in the prescribed form as set out in the Insolvency (Prescribed Forms) Regulations 2012; (iii) served on the company; and (iv) require the company to pay the debt, or enter into a compromise, or otherwise compound with the creditor, or give a charge over its property to secure payment of the debt, to the reasonable satisfaction of the creditor, within one month of the date of service, or such longer period as the Court may order.

The company may make an application to the Bankruptcy Division of the Supreme Court to have the statutory demand set aside. The application shall be made, and served on the creditor, within 14 days of the date of service of the statutory demand on the company (vide the recent case of Madagascar Oil Limited v Outrider Master Fund LP [2025 SCJ 196]). The grounds on which the company can rely to have the statutory demand set aside are namely: (i) there is a substantial dispute whether or not the debt is owing or is due; (ii) the company appears to have a counterclaim, set-off or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off or cross-demand is less than the prescribed amount; or (iii) the demand ought to be set aside on other grounds. The pertinent cases for the setting aside of a statutory demand are inter alia Kiddyland (Indian Ocean) & Co Ltd v Landscape (Mauritius) Ltd [2018 SCJ 10]; Green Bags Limited v Rasapearn Reconditioning Centre Ltd [2023 SCJ 35]; Services Development et Communications Ltee & Anor v Societe Mohamed Investment Holdings [2025 SCJ 209]; Yu Din Metal Works (Mtius) Ltd v Keystone Project Management Ltd [2025 SCJ 237].

In case of failure by the company to comply with the statutory demand, the creditor will have to enter a winding up petition within one month after the last date for compliance with the statutory demand.

Bankruptcy

A debtor will be held to be bankrupt where (a) a creditor of the debtor petitions the court for a bankruptcy order; or (b) the debtor petitions the court himself. Of note, bankruptcy applies only in respect of natural persons who can be declared bankrupt.

Liquidation

Liquidation may arise as a result of a court order handed down to that effect at the instance of an application brought by either the company, a contributory or any person who is the heir of a deceased contributory, a shareholder, a creditor including a contingent or prospective creditor, a liquidator, the Director of the Insolvency Service or the Financial Services Commission where the company is a licensee thereof, and also an administrator and the Registrar of Companies following amendments brought to the Act in 2015, as a result of the company’s own decision where the company is solvent

and the liquidator is appointed by a shareholders' meeting; or as a result of a decision of creditors made at a meeting appointing a liquidator when the company is insolvent.

Formal restructuring procedures

The formal restructuring procedures that are covered under the Act are administration and receivership.

Administration

The administration process may be commenced without the intervention of the courts, although a number of formalities must be adhered to. The primary objective of administration is to rescue the company as a going concern. Administration can be initiated by the company itself, its directors, or one or more creditors through a court application. Additionally, an out-of-court process is available, where the company or its directors can appoint an administrator directly, provided the company is or is likely to become unable to pay its debts.

Upon the initiation of administration, an administrator is appointed and must be a licensed insolvency practitioner. An administrator, once appointed, assumes control of the company's affairs, business, and property. The administrator's primary duty is to act in the interests of the creditors as a whole. They possess the authority to manage the company's business, sell property, and make distributions to creditors.

Receivership

Receivership is a procedure in terms of which a receiver is appointed by a lender who holds a charge over some or all of the company's assets. The main responsibilities of the receiver are to ensure that the appointing lender is paid off. A receiver may also be appointed by a way of an order of court following an application made by a chargee or any other interested person and on notice to the company where the court is satisfied that (a) the company has failed to pay a debt due to the charge or has otherwise failed to meet any obligation to the charge, or that any principal money borrowed by the company or interest is in arrears for more than 21 days; (b) the company proposes to sell or otherwise dispose of the secured property in breach of the terms of any instrument creating the security or charge; or (c) it is necessary to do so to ensure the preservation of the secured property for the benefit of the charge.

COMMENCEMENT OF PROCESS

Process required to commence a liquidation

A company may, whether or not it is being wound up voluntarily, be wound up by an order of court. A petition to wind up by a company may be presented by:

- The company (a special resolution will be required);

- A contributory or any person who is the heir of a deceased contributory or the trustee in bankruptcy of the estate of a contributory;
- A shareholder;
- A creditor, including a contingent or prospective creditor, of the company;
- A liquidator;
- An administrator;
- The Director of the Insolvency Service;
- The Registrar of Companies; or
- The Financial Services Commission, where the company is a licensee thereof.

A voluntary winding up may be (a) a creditors' voluntary winding up where the company is insolvent and the liquidator is appointed by the creditors at a meeting of creditors; or (b) a shareholders' voluntary winding up where the company is solvent and the liquidator is appointed by the shareholders at a shareholders' meeting.

In the case of a shareholders' voluntary winding up, the company shall, within 7 days, lodge with the Director of the Insolvency Service of the Registrar of Companies a copy of the winding up resolution and within 10 days, give notice of the winding up resolution in one daily newspaper and in the Government Gazette.

At what point does the liquidation process commence?

This liquidation process commences either through the passage of a winding-up resolution or through a winding-up order by the court.

Administration

Process required to commence administration

In Mauritius, the procedure most similar, but not identical, to business rescue is administration. The process begins with the appointment of an administrator. The latter shall not be appointed unless he has consented in writing to accept such appointment and that such consent is filed with the Registrar of Companies. The administrator may be appointed by the company (a board and shareholders' resolution is required), a liquidator (if the company is in liquidation), a secured creditor holding a charge over the whole or substantially the whole of the company's property, or by the Court.

At what point does the administration process commence?

The administration process commences at the time when the administrator is appointed.

MORATORIUM

Administration

Proceedings in a court against the company or in relation to any of its property shall not be commenced except with

the administrator's written consent or with the permission of the court; and an enforcement process in relation to the company's property shall not be commenced or continued except with the permission of the court.

Liquidation

Once a company is in liquidation, unless the liquidator agrees or the court orders otherwise, a person shall not:

- (i) commence or continue legal proceedings against the company or in relation to its property; or
- (ii) exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company.

TIMING

Duration of administration process

There is no prescribed time limit for the administration process. The Court has the power to order the conclusion of an administration when it is satisfied that the company is solvent. It also has the power to appoint a liquidator whilst the company is in administration.

Duration of the liquidation process

The Act does not provide for any prescribed period of time for the completion of the liquidation process, however, based on our experience, the duration depends on the complexities of the company. The liquidation of a company may take from 12 to 18 months to conclude, and longer with more complex companies.

INSOLVENCY PRACTITIONER AND MANAGEMENT

Administration

Management of the company

Whilst the company is in administration, the administrator:

- has control over the company's business, property and affairs;
- is required to investigate the company's affairs and consider possible ways of salvaging the company's business in the interests of creditors, employees and shareholders;
- may terminate or dispose of all or part of the business of the company if same is required, and may dispose of any of the property of the company; and
- may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not in administration.

The appointment of an administrator does not however remove the directors of the company from office. It simply means that the directors of a company may not exercise

or perform, or purport to exercise or perform, a function or power as an officer of the company except with the prior, written approval of the administrator or as expressly permitted by the Insolvency Act 2009.

Extent of court involvement in the administration process

The Court has the power to order the conclusion of an administration when it is satisfied that the company is solvent. It also has the power to appoint a liquidator whilst the company is in administration. The Court also has powers regarding creditors' meetings. It may, for example, order, on the application of the administrator or of a creditor, that the creditors' resolution be set aside, that a new meeting be held or even order that a specified creditor may not vote on the resolution. More generally, the Court may, on the application of a creditor, a shareholder or the Director of the Insolvency Service, make any order it thinks appropriate where it is satisfied that an administrator's management of the company's business, property or affairs is prejudicial to the interests of some or all of the company's creditors or shareholders.

Liquidation

Management of the company

Whilst in liquidation, the directors of a company, with effect from the commencement of the liquidation of a company, shall remain in office but cease to have powers, functions, or duties other than those required or permitted to be exercised by the Act.

As regards the liquidator, he shall have custody and control over the company's assets. He shall have the power to, inter alia, commence, continue or discontinue legal proceedings, appoint a lawyer, enter into a compromise or arrangement with creditors, sell or otherwise dispose of the property of the company with the approval of the committee of inspection, act in the name and on behalf of the company and enter into deeds, contracts and arrangements in the name and on behalf of the company, borrow money whether with or without providing security over the company's assets and call a meeting of creditors or shareholders.

Extent of court involvement in the liquidation process

A liquidator may also apply to Court for directions in relation to any particular matter arising during or from the winding up of the company. The Court may, for example, following the application by a liquidator, order a person to produce any record or document relating to the business, accounts, or affairs of the company that is in that person's possession or under that person's control.

The Court may also intervene in any matter relating to the procedure for the appointment of the liquidator for the purposes of ensuring compliance with the Act.

More generally, the Court shall have regard to the conduct of every liquidator and, where a liquidator does not faithfully

perform his duties and observe the requirements of the Court or where there is a failure to comply with a relevant duty, or where a complaint is made to the Court by a creditor, contributory or committee of inspection, or by the official receiver, or Registrar of Companies or the Director of Insolvency, the Court shall inquire into the matter and make such order as it thinks fit.

EFFECT ON STAKEHOLDERS

Administration

Effect of administration on employees

The Act states that the appointment of an administrator does not automatically terminate an employment agreement to which the company is a party. Furthermore, the administrator will not be personally liable for any obligation of the company under an employment agreement to which the company is a party, unless the administrator expressly adopted the agreement in writing, or is personally liable for payment of wages or salaries that, during the administration of the company, accrues under a contract of employment with the company that was entered into before the administrator's appointment, unless the administrator has lawfully given notice of the termination of the contract within 21 days of appointment.

Effect of administration on shareholders

Whilst the company is in administration, the shares of the company cannot be transferred and the rights and liabilities of the shareholders cannot be altered under the Act. The administrator may, however, consent to the transfer of shares in a company (subject to the consent of the relevant shareholder/s) where he is satisfied that the transfer is in the best interests of the company's shareholders.

Effect of administration on creditors

Following his appointment, the administrator shall call a first creditors' meeting for the appointment, if any, of a creditors' committee. The committee may not, however, give directions to the administrator, but the administrator shall report to the committee about matters relating to the administration of the company as and when the committee reasonably requires.

Liquidation

Effect of liquidation on employees

After paying the claims related to amounts due to government and its agencies, the receiver or liquidator must next pay, to the extent that they remain unpaid, all wages or salaries of any employees of the debtor, whether or not earned wholly or in part by way of commission, and whether payable for time or for piece work, in respect of services provided to the debtor

during the period of 1 month before the commencement of the winding up. The maximum amount that may be paid to any one employee is Rs 30,000 or such other sum as may be prescribed.

Effect of liquidation on shareholders

A sum due to a shareholder by way of dividend, profit or otherwise shall not be a debt of the company payable to that shareholder in a case of competition between himself and any other creditor who is not a member, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories amongst themselves. Where a company is wound up, every present and past shareholder shall be liable to contribute to the assets of the company in an amount sufficient for the payment of its debts and liabilities and the costs, charges and expenses of the winding up and for the adjustment of the rights of the contributories among themselves. A past shareholder shall, however, not be liable where he has ceased to be a member for 1 year or more before the commencement of the winding up and unless it appears to the Court that the existing shareholders are unable to satisfy the contributions required to be made by them.

Effect of liquidation on creditors

The liquidator may propose a compromise to the creditors of the company where he has reason to believe that a company is, or is likely to be, unable to pay its debts. Such compromise, if approved by the creditors, is binding on the company and the creditors. The Court may fix a date on or before which creditors are to prove their debts or claims, after which date they will be excluded from the benefit of any distribution made before those debts are proved. More generally, every creditor shall prove his debt as soon as may be after the commencement of a winding up. As regards priority of payments for the distribution of the debtor's assets, the principle is that the receiver or the liquidator shall pay, out of the money received by him from the realisation of the property of a debtor, the preferential claims set out in the Fourth Schedule to the Act, to the extent and in the order of priority set out in that Schedule, i.e. (i) costs of liquidator, (ii) wages or salaries due to employees, (iii) amounts due to government and its agencies (iv) costs of compromise with creditors, (v) payments made *pari passu* with first ranking fixed and floating charges and mortgages inscribed for more than 3 years, (vi) rent, (vii) first ranking fixed and floating charges and mortgages inscribed for less than 3 years, (viii) claims of victims of an accident, (ix) other privileges, securities and creditors, (x) amounts due to Government and its agencies for amounts due and unpaid for over 3 months, and (xi) all other unsecured creditors who have proved their claims in bankruptcy or winding up proceedings.

TERMINATION

How is the administration process terminated?

The administration will end where:

- a deed of company arrangement is executed by the company and the deed's administrator (the most recent judgment of the Court of Civil Appeal in the case of *Wong Hee J. & Anor v. The Mauritius Development Investment Trust Company Ltd* [2026 SCJ 1] is pertinent on the issue of Deed of Company Arrangement (DOCA) - The Supreme Court of Mauritius (Court of Civil Appeal) held that, under section 269(2) of the Insolvency Act 2009, the release of a company's debt under a Deed of Company Arrangement (DOCA) does not discharge the liability of its guarantors. Accordingly, despite the company having paid 30% of its debt under the DOCA and being released, the appellants remained jointly and severally liable for the outstanding balance as personal guarantors.);
- the company's creditors resolve that the administration should end; and
- the company's creditors appoint a liquidator by a resolution passed at a watershed meeting.

The administration may also end where, inter alia;

- the Court orders that the administration end because it is satisfied that the company is solvent;
- the convening period expires without a watershed meeting having been held or without an application having been made to extend it;
- a watershed meeting ends without a resolution that the company execute a deed of arrangement;
- the company fails to execute a proposed deed of company arrangement within the time allowed by the Act; or
- the Court appoints a liquidator or an interim liquidator and the administration ends at the time when the order is made.

How is the liquidation process terminated?

Court Winding-Up - the liquidator may apply to the Court for an order that he be released and the company be dissolved where he has:

- realised all the property of the company or so much as can, in his opinion, be realised without needlessly protracting the liquidation;
- distributed a final dividend, if any, to the creditors;
- adjusted the rights of the contributories among themselves; and
- made a final return, if any, to the contributors.

Voluntary winding-up - where the affairs of a company have been fully wound up, the liquidator shall as soon as possible:

- draw up an account showing how the winding up has been conducted and the property of the company has been disposed of; and

- call a general meeting of the company, or in the case of a creditors' voluntary winding up, a meeting of the company and the creditors, and lay the account before the meeting.

The liquidator shall, within 7 days of calling the abovementioned meeting by advertisement published in at least one daily newspaper, lodge a notice of the holding of the meeting and of its date together with a copy of the account with the Director of Insolvency, and deliver a copy of the notice to the receiver. The company shall be dissolved on the expiry of 3 months after the notice has been lodged.

CIVIL AND CRIMINAL LIABILITY

Director or officer liability

Under the Companies Act 2001, if a director fails to appoint a liquidator or an administrator at the time when the company is unable to pay its debts as they fell due and the company is subsequently placed in liquidation, the Court may, on the application of the liquidator or creditor of the company, make an order that the director is liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade. Under the Companies Act 2001, a past or present director may be found liable or accountable for money or property of the company, or be guilty of negligence, or default or breach of duty or trust in relation to the company.

Consequences of Director or Officer Liability

Civil consequences

Under the Companies Act 2001, where in the course of the winding up, it appears to the Court that a past or present director of the company has misapplied or retained or become liable or accountable for money or property of the company, or is guilty of negligence, default, breach of duty or trust in relation to the company, the Court may on the application of the liquidator, a creditor, shareholder or director (i) inquire into the conduct of the director; and (ii) order that he repays or restores the money or property or any part of it with interest, to the assets of the company by way of compensation as the Court thinks just, or transfer the money or property or any part of it with interest, as the Court thinks fit, to the creditor.

Criminal consequences

A past or present officer of a company will be said to have committed an offence and shall, on conviction, be liable to a fine not exceeding Rs. 2,000,000 and to imprisonment not exceeding 5 years. The Court may order that the person convicted shall not for a period not exceeding 5 years from the date of the order, be a director of a company or be directly or indirectly involved in the management of a company, in certain situations such as:

- where he does not truly and fully disclose to the liquidator all the property of the company;
- where he has dealt with company property fraudulently; or
- where, within 12 months preceding the commencement of winding up, or any time thereafter, he has attempted to account for any part of the property of the company by fictitious losses or expenses.

Administration:

Director and officer liability

As in a liquidation, the Companies Act 2001 provides that if a director fails to appoint a liquidator or an administrator at the time when the company was unable to pay its debts as they fell due and the company is subsequently placed in liquidation, the Court may, on the application of the liquidator or of a creditor of the company, make an order that the director shall be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade. Further, a company officer who purports, on the company's behalf, to enter into a transaction that is void, or is in any other way knowingly concerned in, or party to, the void transaction or dealing whether by an act or omission, whether directly or indirectly, shall be said to have committed an offence.

IMPEACHABLE TRANSACTIONS

Administration

Voidable transactions

A transaction or dealing by a company in administration or by a person on behalf of the company, that affects the company's property is void unless the transaction or dealing was entered into

- (i) by the administrator on the behalf of the company;
- (ii) with the prior written consent of the administrator; or
- (iii) by an order of Court. It should be noted that the Act specifically provides that the above does not apply to a payment made by a bank out of an account kept by the company with the bank, made in good faith and in the ordinary course of the bank's banking business, and on or before the date on which the bank was notified in writing by the administrator that the administration had begun.

Liquidation

Voidable preference

A "voidable preference" is a transaction by the debtor that is made at a time when the debtor is unable to pay his due debts; and enables another person to receive more towards satisfaction of a debt by the debtor than that person would receive, or would be likely to receive, in liquidation.

A transaction by a debtor may be set aside by the Court on the application by the receiver or the liquidator where it is a "voidable preference" and was made within 2 years immediately before commencement of the winding up.

A charge over any property or undertaking of a debtor may be set aside by the Court on the application of the receiver or liquidator where the charge was given within 2 years immediately before the date of the debtor's adjudication or the commencement of the winding up and if immediately after the charge was given, the debtor was unable to pay his due debts.

Every alienation of property made by the debtor within 5 years immediately before the commencement of the winding up of the debtor with intent to defraud a creditor may be set aside by the Court on the application of the official receiver or a liquidator.

A gift by a debtor to another person may also be set aside by the Court on the application of the official receiver or the liquidator where the debtor made the gift within 2 years immediately before the adjudication or the winding up and the debtor was unable to pay his or its due debts immediately after making the gift.

CROSS BORDER INSOLVENCY

There are two main sources of law regarding cross border insolvency, pursuant to which the Mauritius Court may recognise and give assistance to a foreign insolvency proceeding.

The first is Part VI of the Insolvency Act 2009 of Mauritius (the Insolvency Act 2009) (effective as from the 25 July 2019) by presidential proclamation on 11 October 2019. Part VI of the Insolvency Act 2009 is based on the 1997 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency and regulates cross-border insolvency proceedings (the "Model Law").

The second is the common law. The common law sits alongside the Model Law and they are often seen pleaded as alternative grounds of relief. There is debate about whether the common law also sits alongside Model Law. The main principle of the common law on cross border insolvency is the principle that there should be a uniform insolvency proceeding in the court of the insolvent entity's domicile, which receives worldwide recognition and should apply uniformly to all the insolvent entity's assets.

Under the applicable regime, it is possible for a foreign insolvency practitioner to apply to the Mauritian Court to obtain recognition of an insolvency process being undertaken abroad provided that the State of the insolvency practitioner has adopted insolvency rules substantially similar to the UNCITRAL Model Law. It is also possible to obtain recognition if the insolvency process is a foreign main proceeding or a foreign non-main proceeding (depending

on whether the insolvency process is taking place in a state where the debtor has its 'centre of main interests' or 'establishment').

LEGAL DEVELOPMENTS

There has been a proposed amendment to the Companies Act 2001 which requires administrators of winding-up limited life companies to comply with the Insolvency Act 2009. This change aims to address a gap in the Companies Act, which currently does not mandate that administrators follow a specific insolvency regime, unlike the Insolvency Act for registered Insolvency Practitioners. The amendment seeks to standardize the winding-up process, ensuring administrators make necessary filings and public notices, thereby enhancing protection for creditors, shareholders, and other stakeholders.





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MOROCCO | I&I LAW FIRM

COUNTRY INFORMATION

I&I Law Firm is a multi-disciplinary law firm that has been assisting clients for over 48 years, both in Morocco and abroad. The firm provides comprehensive advisory and litigation services in business law, ensuring continuity and coherence in the solutions offered to clients.

TYPE OF GOVERNMENT

Morocco is a constitutional monarchy with an elected parliament. Executive power is shared between the King and the government, but the King holds extensive powers, including the authority to appoint the Head of Government from the party that wins the most seats in parliamentary elections, as well as key ministers, ambassadors, and governors. He also chairs the Council of Ministers and the Superior Council of the Judiciary.

POLITICAL SYSTEM

The 2011 Constitution defines Morocco as a constitutional, democratic, parliamentary, and social monarchy.

LEGAL SYSTEM

Moroccan law is based on the French civil law tradition. It has evolved since 1913, transitioning from a system heavily influenced by religious law to one increasingly shaped by positive law. The primary sources of Moroccan law include the Constitution, royal decrees (Dahirs), and legislation enacted by Parliament.

TESTS FOR INSOLVENCY

Under Moroccan law, restructuring and insolvency procedures may be initiated when a company experiences serious financial, economic, legal, or social difficulties. The central trigger for insolvency proceedings is the company's cessation of payments ("cessation de paiement").

What are the tests for insolvency (i.e. liquidation)?

Judicial liquidation may be initiated upon a finding of cessation of payments combined with severe financial difficulties that render the company ineligible for restructuring.

What are the tests for financial distress (i.e. business rescue or administration)?

Two main procedures exist:

- "Sauvegarde judiciaire" (safeguard procedure) may be requested by a company experiencing difficulties, even in the absence of cessation of payments.
- "Redressement judiciaire" (judicial reorganization) requires a finding of cessation of payments within the last 30 days.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal Insolvency Procedure

Judicial liquidation is the primary formal insolvency procedure in Morocco.

Formal Restructuring Procedures

Two judicial restructuring procedures exist:

- Sauvegarde judiciaire (safeguard procedure)
- Redressement judiciaire (judicial reorganization)

Informal Restructuring Procedures

While Morocco does not have a formal out-of-court restructuring regime in the strict sense, two pre-insolvency amicable procedures are available under Moroccan law:

- Conciliation
- Ad hoc Mandate (Mandat ad hoc)

These mechanisms allow financially distressed companies that are not yet insolvent to seek negotiated solutions with creditors, under the supervision of the Commercial Court.

Extent of the Public Prosecutorin collective proceedings

The circular of June 23, 2025, issued by the Office of the Public Prosecutor and addressed to the Attorney Generals and Public Prosecutors at the commercial courts, aims to ensure an optimal implementation of the prosecution's role in insolvency proceedings by requiring its systematic presence at hearings, active monitoring of cases, oversight of trustees, the imposition of sanctions against directors in cases of violations, and the exercise of legal remedies provided by law, in order to guarantee the regularity of proceedings and economic security.

Mandatory tax reporting in collective proceedings

Since 2026, the General Tax Code (CGI) requires any company initiating a safeguard, reorganization, or judicial liquidation procedure to first declare its tax situation electronically. For procedures not initiated by the company, it must still inform the tax authority within 30 days of the judgment's publication. Failure to comply with this obligation renders the statute of limitations for the period prior to the opening of the procedure unenforceable against the tax administration.

LIQUIDATION

What is the aim of liquidation?

The primary goal of liquidation is either:

- To rescue the business through its sale to a third party, preserving jobs and investment (macroeconomic objective), or
- To maximize repayment to creditors through the sale of the company's assets.

Process required to commence a liquidation

Liquidation may be requested by the debtor, a creditor, the public prosecutor, or ordered by the court ex officio. The court initiates liquidation upon determining that the company is insolvent and beyond recovery.

At what point does the liquidation process commence?

Liquidation begins upon issuance of a judgment opening the procedure.

Duration of the liquidation process

The duration of the judicial liquidation process in Morocco is not fixed by law and depends on the complexity of each case. On average, liquidation can take between 1 and 5 years, and sometimes longer in complex or contentious cases. The timeline is influenced by factors such as the number of creditors, the type and value of assets to be sold, and any litigation involved. In cases where there are no significant assets, the court may close the procedure earlier due to insufficient assets.

Extent of court involvement in the liquidation process

The court is involved in initiating, supervising, and terminating the procedure.

Management of the company whilst in liquidation

Upon commencement, management authority is transferred to the court-appointed liquidator. Directors lose control of the company's operations and assets.

Filing of claims

Creditors are required to declare their claims, including any guarantees and amounts already received. The standard deadline for known creditors to submit their claims is typically two months from the date they are notified of the liquidation. For unknown creditors, this deadline starts from the publication of the liquidation notice in the Official Bulletin. Creditors residing abroad are usually granted an additional two-month extension to file their claims. Late submissions may be subject to approval by the court.

Factors Affecting the Duration of Liquidation

The liquidation period depends on the complexity of assets, number of creditors, presence of disputes or litigation, cooperation from involved parties, and court efficiency.

Effect of Liquidation on Employees

During liquidation, employment contracts are terminated, typically considered economic dismissals. Employees are entitled to compensation and indemnities as provided by the labour law.

Effect of Liquidation on Contracts

The liquidator has the authority to either continue or terminate ongoing contracts based on their relevance and benefit to the liquidation process.

Effect of Liquidation on Creditors

Shareholders lose their investment, as all proceeds from asset sales are used first to cover creditors' claims and administrative expenses. In judicial liquidation, there is generally no surplus distributed to shareholders.

Pending claims, litigation and arbitration

Secured creditors are paid according to the ranking of their security interests. Unsecured creditors receive payment from remaining funds and usually incur losses. Litigation and enforcement actions against the debtor are suspended, though courts may allow claims against directors if misconduct is proven.

Voidable Transactions

The opening of liquidation triggers a "suspect period" during which transactions that unfairly disadvantage the estate or favor certain creditors can be voided.

How is the Liquidation Process Terminated?

The liquidation process ends either when all debts have been fully paid, meaning all creditors have been satisfied, or when there is an insufficiency of assets, making it impossible to pay some or all creditors.

Director or Officer Liability

Directors and officers may be held liable when liquidation occurs due to their failure to fulfill their duties properly. If the company's financial distress results from misconduct or negligence by a director, they can face both civil and criminal liabilities.

Civil Consequences

Civil liability may include:

- Legal actions against the director's personal assets to cover losses caused.
- Commercial disqualification for a minimum of 5 years, prohibiting the director from managing, directing, or controlling any commercial business or company engaged in economic activities, whether directly or indirectly.
- This disqualification also bars them from holding any elective public office during that period.

Criminal Consequences

The main criminal penalty related to bankruptcy is imprisonment from one to five years and/or a fine ranging between 10,000 and 100,000 dirhams.

- This penalty applies not only to directors but also to accomplices involved in fraudulent bankruptcy activities.
- For directors of listed companies, penalties are doubled due to the higher responsibilities involved.

SECURITY

Types of security

Creditors may secure their claims over a debtor's assets through different types of security interests. The type of security depends on the nature of the asset: a pledge is used for movable assets, while a mortgage is appropriate for immovable property.

Taking of security

For movable assets, the debtor must own the asset. The security interest must be registered in the National Electronic Register of Security Interests over Movables (RNESM) to be enforceable.

For immovable assets, the grantor must be the legal owner. The mortgage must be executed by private deed and registered on the land title at the Land Registry to be valid.

Security Trustees or Special Purpose Vehicles

Creditors may appoint a security agent to handle the creation, registration, management, enforcement, and realization of their security rights.

Most Robust Form of Security Available to Lenders

The strongest security for movable assets is a pledge with delivery, which requires transfer of possession. For immovable assets, the mortgage remains the most reliable form of security.

Registration of security

A mortgage is only effective once registered on the land title and must be registered within 30 days of execution.

A pledge over movables must be registered in the RNESM to be enforceable against third parties.

Stamp Duty

Stamp duty is 5 dirhams per document (2 pages of 50 lines per page) for each extract or copy of the registration.

Registration Costs

- Mortgage registration: The mortgage deed is subject to a proportional registration duty of 1.5% of the secured amount, with a minimum of 100 dirhams, in accordance with the Moroccan Registration and Stamp Act. In addition, the inscription of the mortgage at the Land Registry is subject to proportional land registry fees, generally around 1% of the secured amount.
- Pledge registration (movable assets): Registration of a pledge in the National Electronic Register of Security Interests over Movables (RNESM) is subject to a fixed fee of 50 dirhams.

Requirements for Assignment or Transfer of Security

To assign or transfer a mortgage or pledge, subrogation must be expressly stated in both the loan agreement and payment receipt. The debtor must also explicitly accept the subrogation. The transfer must be duly registered.

Instances in Which Securities Might Be Vulnerable to Attack

A security interest does not prevent the asset from being sold, but gives the creditor a right of pursuit and preference. If multiple creditors are secured over the same asset, they are paid according to the priority of registration.

Methods of enforcement of security

For a pledge to be enforceable, the creditor must take possession of the asset. This perfects the pledge and allows the creditor to exercise a right of retention.

For mortgages, enforcement requires prior registration. The ranking of the mortgage determines the order of payment when the asset is sold.

Problems experienced when enforcing security

With pledges, the creditor must preserve the asset and bear related costs, including for damage or deterioration.

With mortgages, enforcement is subject to registration ranking, which can affect the creditor's recovery.

Financial Assistance Requirements

A company may not grant overdrafts or guarantees on behalf of directors or third parties unless such operations are in the best interests of the company. Financial assistance that violates this rule may be void.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Moroccan courts may recognize foreign insolvency proceedings under two categories:

- Foreign main proceedings, if initiated in the country where the debtor has the centre of main interests (COMI);
- Foreign secondary proceedings, if initiated in a country where the debtor maintains an establishment or conducts economic activity.

Requirements for recognition of a foreign judgment

A foreign representative may apply to the competent Moroccan court for recognition. The application must include a certified copy of the foreign judgment opening the insolvency proceedings and a declaration identifying all known foreign proceedings concerning the debtor. The representative must also inform the court of any substantial changes or additional proceedings as they arise.

BUSINESS

RESCUE



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MOZAMBIQUE
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COUNTRY INFORMATION

Mozambique has a 2.470 kilometres coastline and a total land area of 801.590 square kilometres. It is a tropical country with two seasons, a hot and wet season from October to March, and a dry season from April to September. The country's official language is Portuguese. The official currency is the Metical but the U.S. Dollar, the South Africa Rand and the Euro are widely used and accepted in business transactions.

TYPE OF GOVERNMENT

Democracy is exercised through elected representatives.

POLITICAL SYSTEM

Multiparty Democracy.

LEGAL SYSTEM

Mozambique's legal system is based on Roman and German Law. The Courts have exclusive jurisdiction to settle disputes by judicial means unless the parties have agreed to submit a dispute to arbitration. The state Courts operate according to the principle of the separation of powers and are classified as sovereign bodies under the Constitution of Mozambique. The law differentiates between judicial Courts, administrative Courts and other special Courts. The Courts include the Supreme Court, the Supreme Appeal Courts, the Provincial Courts and the District Courts.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. liquidation)?

A debtor company will be held to be insolvent if it is experiencing financial difficulties and believes that it will not be granted a judicial business rescue. Namely, a company will be declared insolvent if:

- it does not pay on maturity, without justification, a net obligation which has materialized;
- having been ordered to pay any net amount, it does not, within the legal timeframe, pay, deposit or list, for attachment purposes, sufficient assets to cover the debt;
- it practices any of the following acts, except if they form part of a rescue plan:
 - proceeds with a hasty liquidation or resorts to ruinous or fraudulent means to make payments;

- performs, or attempts to perform, in order to delay payments, or to defraud creditors, a simulated/false transaction or disposal, partial or totally, of its assets to a third party, whether such third party is a creditor or not;
- simulates the transfer of its principal business for the purposes of defrauding the law or in order to harm a creditor;
- gives or strengthens security granted to a creditor, without keeping sufficient free and clear assets to pay its liabilities;
- becomes absent, without leaving a legal representative with enough resources to pay the creditors, abandons its business establishment or tries to hide from its domicile, place of registered office or main business establishment; and/or
- fails to comply, within the prescribed period, with an obligation imposed on it in respect of any rescue plan.

What are the tests for financial distress?

A debtor company will be held to be in financial distress (and accordingly judicial business rescue would be appropriate) if the company is experiencing a financial crisis but nonetheless complies with all requirements necessary for the commencement of business rescue, namely, it:

- is not insolvent, and if it was, its obligations arising therefrom have been declared extinct by a final judgment;
- has not obtained, within the previous 2 years, the concession for a rescue;
- has not been convicted, or is not in the process of being convicted, as director or dominant shareholder, of an offence in respect of Mozambican law.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

Judicial insolvency (i.e. liquidation) is instituted in the jurisdiction of the Court where the company is domiciled, has its principal place of business or, if it has a registered office outside of Mozambique, where the company has its branch office in Mozambique. A judicial insolvency is instituted before the Court by the debtor company itself, the surviving spouse, any heir of the debtor or the estate's administrator ("cabeça-de-casal"), the shareholders of the debtor company in terms of the law or in terms of the Articles of Association of the company and/or any creditor of the company.

Formal restructuring procedures

In terms of the insolvency and rescue legislation in Mozambique, there are 2 distinct approaches. A company, although it is experiencing financial difficulty, is deemed to

be “rescuable” through the creation of a rescue plan. This may arise judicially, with a judicial business rescue, or extra-judicially, by agreement among the creditors. A judicial business rescue is initiated at the instance of the debtor who, at such moment, exercises its activity regularly for more than 12 months and who:

- is not currently insolvent or, if it was insolvent, the liabilities have been declared extinct by final judgment;
- for 2 years preceding the request for judicial business rescue, has not been granted a judicial business rescue; and
- has not been convicted, or does not have as its administrator or controlling shareholder, a person convicted of an insolvent crime.

Informal insolvency or restructuring procedures

Extra-judicial business rescue is possible in Mozambique. It may be initiated by the debtor company if the debtor company fulfils the requirements for a judicial business rescue and provided the creditors agree to it. This procedure is conducted in terms of the rules for conciliation, mediation and arbitration in Mozambique. However, an extra-judicial business rescue process only binds the company and the creditors that have agreed to it, which means that any other creditor may seek a declaration of insolvency in Courts even though the company is in a process of informal business rescue.

LIQUIDATION

What is the aim of liquidation?

The aim of liquidation is to ensure the efficient promotion, in social and economic terms, of the liquidation of the assets of the insolvent company and to thereafter distribute the proceeds obtained from a sale of the company’s assets to the creditors. Further, it allows for the discontinuation of the activities of the debtor in order to preserve and optimize the property, assets and productive resources, including any intangible assets, belonging to the company.

Process required to commence a liquidation

The insolvency process commences upon the submission to Court of a request for the declaration of insolvency by:

- the debtor company itself;
- the shareholder of the debtor company; and/or
- by any creditor of the debtor company.

At what point does the liquidation process commence?

As soon as the judge declares the insolvency and the insolvency administrator is nominated, the insolvency process is said to have commenced. It should be noted that the judge fixes the legal term of the insolvency and may make

it retroactive up to 90 days from the date that the application for insolvency is submitted.

Duration of the liquidation process

The law does not provide for a specific timeline for the completion of the liquidation process. Such timeline is determined by the judge who orders the insolvency.

Extent of court involvement in the liquidation process

The Mozambican Court is involved in every aspect of the liquidation and generally in respect of insolvency procedures.

Management of the company whilst in liquidation

The management of the company whilst in liquidation is handled by the insolvency administrator. The board of directors relinquish their responsibilities except to the extent that they are required to assist the liquidator in the winding-up of the affairs of the company. Further, from the moment insolvency is declared or the assets have been seized, the debtor loses the right to manage or dispose of its assets, although maintaining the right to supervise the administration of the company and seek assistance for the preservation of its rights or seized assets.

Filing of claims

Upon publication of the decree of insolvency in the Government Gazette, creditors have 10 days, commencing from the date of such publication, to prove any claim that such creditor believes it has against the company. Claims must be submitted before the insolvency administrator in writing and with all documents supporting such claims. The insolvency administrator will, within 30 days, publish a notice indicating the place, time as well as the deadline in terms of which anyone may oppose a creditor’s claim.

Factors Which Influence the Period of the Administration in a Liquidation

There are no specific factors which influence the duration of the administration of a liquidation. Each matter is dependent on the facts and circumstances of the company.

Effect of insolvency on employees

The claims of employees maintain priority ranking over other creditors. Furthermore, employment claims that are of a compensatory nature and which became due within 3 months preceding the date of the decree of insolvency are paid, but limited to a maximum amount of 5 months wages, are payable as soon as cash is available.

Effect of insolvency on contracts

Bilateral contracts are not terminated as a result of the commencement of insolvency. They may be complied with

by the insolvency administrator, subject to authorization from a committee of creditors (comprised of members elected by the general assembly of creditors) if compliance preserves or reduces the liability of the insolvent estate or the assets of the company. The contracting party may, within 90 days of the date of the commencement of the insolvency administrator's term of office, request the insolvency administrator to declare, within 10 days of the date of such request, if he intends to honour the contract. Non-compliance with bilateral contracts gives rise to a right to compensation by the creditor. Unilateral contracts may, however, subject to authorization from the creditors' committee, remain in place and be honoured by the insolvency administrator if compliance preserves or reduces the liability of the insolvent estate or the assets of the company.

Effect of insolvency on shareholders

Despite the insolvency of a company in Mozambique, the shareholders retain their shareholding. In Mozambique, there are companies with limited liability (where the shareholders limit their liability to the subscribed share capital of the company) and those with unlimited liability (where shareholder liability is not limited). When companies with unlimited liability are declared insolvent, the shareholders themselves are similarly declared insolvent and become liable for the debt of the company. The personal liability of shareholders of limited liability companies is determined by the Court that declares the insolvency.

Effect of insolvency on creditors

A declaration of insolvency requires creditors to exercise their rights in respect of the debtor company's assets in accordance with the prescripts of insolvency law. When the debtor company is declared insolvent by a Court, the judge that issues the insolvency order will order that the declaration of insolvency be published in the Government Gazette. This notice will contain the important aspects of the order as well as a list of known creditors. Within 10 days from the date that the declaration of insolvency is published, the creditors must present their claims or objections to the list published, to the insolvency administrator. The insolvency administrator will verify the claims of the creditors by having regard to the accounting records of the company. Further, the decree of insolvency suspends any rights that a creditor may have to retain assets belonging to the company and these must be returned to the insolvency administrator.

Pending claims, litigation and arbitration

The judgment declaring the insolvency of the debtor company must, among other things, order the suspension of any and all claims and executions against the insolvent company with the exception of claims instituted or executed by employees, which remain in force.

Voidable/ineffective transactions

The law determines which acts are deemed ineffective, namely:

- payments by the debtor company of debts which are not due for payment;
- the payment of debts due and payable, within their legal term, in any manner not provided for in the contract;
- the practice of acts, free of charge, within a period of 2 years prior to the decree of insolvency;
- the repudiation of an inheritance or legacy within a period of 2 years prior to the decree of insolvency;
- the sale or transfer of the business of the company without the express consent of, or payment to, all creditors; and/or
- the registration of a real right and the transfer of ownership thereafter, or the endorsement on immovable property, made after a decree of insolvency.

The ineffectiveness of the above mentioned acts may be declared ex officio by the judge, or following a claim during the proceedings.

Any act committed by the company prior to the commencement of insolvency, done with the intent to harm creditors, is revocable, provided it has been done in collusion with the creditor or third party and has the effect of prejudicing the insolvent company's estate.

How is the liquidation process terminated?

Having realized all the assets and distributed the proceeds among the creditors, the insolvency administrator submits a preliminary report to the judge. Thereafter, the insolvency administrator submits a final report which details the value of the assets and the proceeds realized from a sale of such assets, the value of the liabilities of the insolvent company and the payments made to the creditors and the responsibilities that will continue to be incumbent on the insolvent estate. After receiving the final report, the judge terminates the liquidation by handing down a judicial sentence which is published by edict in the Government Gazette.

Director or officer liability

In terms of the Mozambican Commercial Code, the directors of a company will be liable to the company for damages caused by acts or omissions in breach of their legal and statutory duties unless they can prove that they acted without fault. Any proceedings initiated by the company need the support of a simple majority of the shareholders and need to be brought within a period of 3 months from the date on which the decision has been taken. If the proceedings are not brought by the company itself, they can be brought by the shareholders (of an unlimited liability company) or by the shareholders holding at least 10% of the share capital of the company. In terms of creditors, the directors will be liable if they neglect a legal or statutory provision which affects the protection ordinarily available to creditors or when

the net assets of the company become insufficient for the satisfaction of the creditors' claims. Whenever the company or the shareholders have not instituted proceedings, the creditors may do so, provided they have enough evidence to show that there has been a reduction in the company's net assets. This is also applicable to the managers and representatives of the company.

Within the scope of insolvency or rescue processes, the following acts carried out by directors will result in them being held liable and may, give rise to criminal charges:

- defrauding creditors (falsification of documents, inaccurate accounting, simulation, concealing of documents, creation or aggravation of losses or profits), whether this occurred before, during or after the insolvency or rescue process – is punishable as a crime of theft;
- illicit disposition, dissipation or encumbrance of patrimonial assets, during the insolvency or rescue process – punishable as crime of theft;
- appropriation, dissipation, concealment of assets, during the insolvency or rescue process – are punishable as crime of theft;
- the lack of organized and adequate commercial bookkeeping, before or after the insolvency or rescue process, is punishable by imprisonment.

On the other hand, it should be noted that, for example, in the case of judicial rescue in which the administrators normally remain in office, they are dismissed if, in addition to the above, they have performed any of the following acts:

- made personal expenses manifestly excessive in relation to the financial situation of the company;
- made expenses that are unjustified by their nature or value, in relation to the capital or type of business, the movement of operations and other similar circumstances;
- unjustifiably decapitalized the company or carried out operations that were detrimental to its regular operation;
- simulated or omitted credits;
- refuses to provide the information requested by the Insolvency Administrator or members of the Committee;
- has its withdrawal provided for in the judicial reorganisation plan.

Therefore, it can be said that any of the above situations may result in the director being liable for the insolvency of the company (with due reservation to the provisions of the Commercial Code, which 104 stipulates that a director is not responsible for an act based on a shareholder's decision, save if such shareholder decision was made under a proposal made by the directors). Note, however that liability of directors, in the context of insolvency proceedings, will be determined by the insolvency Court itself.

CONSEQUENCES OF DIRECTOR OR OFFICER LIABILITY

Civil Consequences

Without prejudice to any right that a party has to be compensated in accordance with the law, if a director or officer of a company is convicted of a crime that is prohibited by insolvency law, such person may be

- disqualified from being a director of any company or from running a business; and/or
- precluded from managing any company under any mandate or business management.

Criminal Consequences

Depending on the nature of the crime committed, the consequence of such crime ranges from a range of fines to a range of prison sentences.

BUSINESS RESCUE/ADMINISTRATION

Process Required to Commence a Business Rescue

A business rescue may be petitioned by the debtor company through its board of directors (alternatively by the heirs, executor or remaining shareholders of the company, if any) who, at the time of the petition, conducted the business of the company for more than 12 months and which company cumulatively meets the following requirements:

- is not insolvent, and if it was insolvent, its responsibilities have been declared extinct by final judgment;
- has not obtained, within the previous 2 years, the concession for business rescue; and
- has not been convicted, or is not in the process of being convicted, as director or dominant shareholder, of an offence in respect of Mozambican law.

At What Point Does Business Rescue Commence

A judicial business rescue commences when the judge orders that the company be placed in business rescue.

Duration of Business Rescue

The business rescue process should continue for no longer than 2 years from the date that the business rescue is approved by the judge.

Extent of Court Involvement in the Business Rescue

The Court is barely involved in the extra-judicial business rescue process (informal procedure) as this process is conducted by the Centre of Arbitration. The Court is only involved in this process when it receives the agreement agreed to by affected parties. With a judicial business rescue,

the Court is more involved although it does not participate in every step in the process. The process is conducted by the insolvency administrator together with directions received from the creditors' committee.

Management of the Company Whilst in Business Rescue

The management of a company is placed in the hands of the insolvency administrator whilst the company is in business rescue. The insolvency administrator is appointed for his competence in:

- supervising the activities of the debtor and implementing the provisions of the rescue plan;
- requesting a declaration of insolvency from the Court in the event that the rescue plan does not succeed;
- submitting a monthly report about the debtor's activities to the judge; and
- submitting a report about the execution of the rescue plan to the judge upon termination of the rescue process.

During the business rescue process, the debtor or its directors are expected to conduct the business under the supervision of the creditor's committee, if any, and under the supervision of the insolvency administrator.

Filing of claims

If the judge accepts the request for business rescue, a notice of such acceptance is sent to the creditors by letter and the same notice is published in the Government Gazette and in a newspaper with wide circulation in the place where the judicial business rescue is petitioned. The creditors, thereafter, have 10 days within which to submit their claims, or objections, to the insolvency administrator. Creditors may also contest the commencement of business rescue and the rescue plan itself (within 30 days of the date on which the notice, enclosing the rescue plan and creditors' list, is published).

Factors which influence the period of business rescue

A number of factors may influence the rescue process, including, but not limited to, any opposition instituted in respect of the provisions of the rescue plan, removing the board of directors or members of the board of directors and appointing an insolvency administrator.

Funding of the Company Whilst in Business Rescue

Provided agreement is sought from the creditors' committee and the insolvency administrator and that provision is made for it in the rescue plan, the company may be funded through, among others, an increase in the share capital of the company, a sale of some of the assets of the company, a transfer of shares and a novation of the debt of the company.

Effect of Business Rescue on Employees

The rescue plan must ensure that payments due to employees arising from labour legislation or work-related incidents are made within a period of 1 year from the date of the commencement of the business rescue. Moreover, the business rescue plan may not, in respect of the payment of the minimum of 5 month's salary as is applicable, delay payment to such employees for a period in excess of 3 months.

Effect of Business Rescue on Contracts

After submission of the request to the Court for judicial business rescue, the debtor company is not allowed to transfer or encumber any assets or rights of its permanent estate. Exception is made for those contracts, transfers or encumbrances already contemplated in the rescue plan.

Effect of Business Rescue on Shareholders

Shareholders retain their shareholding in the company; however, such shareholding may be affected by the terms of the business rescue plan. In terms of Insolvency Law, the business rescue plan may contemplate the division, incorporation, merger, transformation of the company, transfer of shares (provided shareholders' rights are complied with) as well as the increase in the share capital of the company and issuance of securities. These may affect the shareholding structure.

Effect of Business Rescue on Creditors

Creditors of the debtor in business rescue retain all their rights and liens against all liable parties. In the case of creditors holding fiduciary titles of ownership over immovable or movable assets, or being an owner or promissory seller of immovable assets, and which contracts contain irrevocable clauses, including accessions of real estate or ownership in contracts with the retention of ownership titles, the property and/or assets and the contractual terms, prevail for all purposes.

Pending Claims, Litigation and Arbitration

When judicial business rescue commences, creditors and claimants may not continue with or institute legal proceedings in any forum, including arbitrations, against the company. The extra judicial business rescue process, on the other hand, does not give rise to the suspension of rights, actions or execution procedures against the debtor company and does not prevent the creditors from applying to Court to declare the company insolvent.

Effects of the Moratorium

When judicial business rescue commences, it suspends, for an irrevocable period of 180 days, the course of all pending claims and all actions and executions against the debtor company.

Voidable Transactions

Upon the submission of the request for business rescue to the Court, the debtor may neither dispose of, nor encumber, its assets or the rights of its permanent estate, unless there is a clear benefit for doing so, which is recognized by the judge after hearing the views of the creditors' committee and the insolvency administrator. Exception is made for transactions concluded during the business rescue period which transactions cannot be set aside if the company is later declared insolvent. There is no time period, prior to commencement of business rescue, in respect of which transactions will be set aside upon the commencement of business rescue.

The Business Rescue Plan

The Business rescue plan has two phases, the first in The rescue plan is submitted by the debtor company to the Court, by the insolvency administrator, within 90 days of the date of the publication of the decision to accept the filing for business rescue. The rescue plan must contain

- (a) a detailed statement of the recovery procedures to be employed and their justification;
- (b) a demonstration of the economic viability of the company; and
- (c) the economic-financial report and valuation of the debtor's assets (signed by a suitably qualified person).

The judge must order that a notice be published to the creditors advising that the rescue plan has been submitted to the Court for information and contestation purposes. Interested parties, and creditors, may inspect the plan and lodge any formal objections that they have within 30 days as of publication of the plan.

Voting on the plan

If the rescue plan is submitted to the creditors for approval, all classes of creditors must approve the rescue plan. With regard to

- (i) creditors holding ordinary rights, with special privileges, general privileges or with subordinate privileges; and
- (ii) creditors holding real rights, the rescue plan must be approved by creditors that represent more than half of the total value of the credit submitted to the general assembly of creditors and cumulatively, by a simple majority of the creditors present at the general assembly session. In respect of creditors holding rights arising from labour legislation or from accidents occurring at work, the rescue plan must be approved by a simple majority of the creditors present at the creditors' general assembly session, regardless of the value of their credits or claims.

Cram down on creditors

The judge may declare that a plan is binding on all creditors even if it has not been approved by all classes of creditors in the same general assembly of creditors, if the:

- affirmative vote of creditors representing more than half the value of all claims submitted to the assembly, regardless of the classes, supported the plan;
- approval of the plan was received from 2 classes of creditors or, if there are only 2 classes of creditors, approval was received from at least 1 of them; and
- in respect of any class that rejected the plan, an affirmative vote of more than one third of the creditors supported the plan.

Implementation of the plan

The rescue plan is implemented by the debtor company under the supervision of the creditors committee (if there is one) and the insolvency administrator.

Discharge of claims

Once the rescue plan is submitted to the Court, the claims of creditors will not be discharged or waived unless express consent is given for such discharge or waiver by all creditors. In other words, the claims of creditors are not waived unless provided for in the plan.

Effect on suretyships

If a creditor's claim has been discharged or waived, the creditor may not pursue its claim against a guarantor or surety as they are subsidiary to the debtors.

How is the process terminated?

Two years from the date on which a judge orders the commencement of business rescue, and once all obligations in the rescue plan have been fulfilled, the judge hands down a judgment in which he declares that the business rescue process has been terminated and orders the:

- payment of the fees of the insolvency administrator;
- determination of the balance of the legal fees to be charged;
- presentation of a detailed report from the insolvency administrator (within 15 days from the date of the judgment);
- dissolution of the creditors' committee and the termination of the mandate of the insolvency administrator; and
- communication to the Registry of Legal Entities that business rescue has been terminated.

What is the Status of the Company after Business Rescue?

If business rescue is successful, the company continues to trade in the ordinary course. If business rescue is unsuccessful, the company will be declared insolvent at the instance of the insolvency administrator or by decision of the assembly of the creditors.

Director and Officer Liability

In addition to the civil and criminal consequences listed below, the general assembly of the creditors (which approves or

rejects the rescue plan) may submit to the judge a proposal for destitution of the debtor's administrators who contributed to the financial distress of the debtor. In addition to the civil and criminal consequences that directors or officers of a company may face, arising from the law, a creditor may apply to Court to hold a director or officer liable for having led the company into the financial position in which the company finds itself.

Within the scope of insolvency or rescue processes, the following acts carried by directors will result in their being liable and may also give rise to criminal charges:

- fraud to creditors (falsification of documents, inaccurate accounting, simulation, concealing of documents, creation or aggravation of losses or profits), whether this occurred before, during or after the insolvency or rescue process – punishable as crime of theft;
- illicit disposition, dissipation or encumbrance of patrimonial assets, during the insolvency or rescue process – punishable as crime of theft;
- appropriation, dissipation, concealment of assets, during the insolvency or rescue process – punishable as crime of theft;
- the lack of organized and adequate commercial bookkeeping, before or after the insolvency or rescue process, is punishable by imprisonment;

On the other hand, it should be noted that, for example, in the case of judicial rescue in which the administrators normally remain in office, they are dismissed if, in addition to the above, they have performed any of the following acts:

- (i) make personal expenses manifestly excessive in relation to financial situation of the company;
- (ii) make expenses that are unjustified by their nature or value, in relation to the capital or type of business, the movement of operations and other similar circumstances;
- (iii) unjustifiably decapitalize the company or carry out operations that are detrimental to its regular operation;
- (iv) simulate or omit credits;
- (v) refuses to provide information requested by the Insolvency Administrator or other members of the Committee;
- (vi) has their removal provided for in the judicial recovery plan.

Civil Consequences

Without prejudice to any right that a person or entity has to be compensated for damages in accordance with the law, if a director or officer of a company is convicted of a crime that is prohibited by law, it will result in such person being

- (a) disqualified from being a director or running the administration of a company or a business; and/or
- (b) unable to manage any company under and in terms of any mandate or by way of business management.

Criminal consequences

Depending on the nature of the crime committed, the consequence of such crime could be a range of fines and a range of imprisonment terms.

SECURITY

Types of security

There are 2 types of security available in Mozambique - real rights such as a mortgage or pledge and personal securities such as suretyships or promissory notes. Real guarantees over immovable assets located in Mozambique must be constituted in terms of Mozambican law and are subject to the Mozambican Courts. All other guarantees that do not constitute real rights over immovable or movable assets and/or means of transportation may be constituted and governed by the laws and subject to the jurisdiction that the parties choose.

Taking of security

Real rights must be subjected to Mozambican law and made by public deed (in the case of mortgages) or through private instruments (in the case of pledges). Perfection of such security is affected by registration in the relevant public office or other forms of publicity stipulated by the law.

Security Trustees or Special Purpose Vehicles

Although the trustee arrangements are not specifically foreseen for purposes of taking security, it is a commonly understood and frequently utilised structure in Mozambique.

Most Robust Form of Security Available to Lenders

A mortgage is the most robust form of security as it is made by public deed, it is real security, legally required to be registered in order to be perfected and it must describe the asset being secured. Also, it subsists until its registration is either changed or until it is deregistered.

Registration of security

Securities are typically registered by the beneficiary. Registration is effected before the relevant registry (for example, a mortgage over immovable property is registered in the Real Estate Registry, whereas a mortgage over an aircraft must be registered in the Civil Aviation Registry). Registration is given effect to by submitting the security contract, names and domicile of the parties to the contract, in particular the debtor and creditor, and a certificate in respect of the relevant asset that is secured, to the beneficiary of the security. Security taken over immovable assets or movable assets subject to registration (e.g. vehicles, vessels and aircrafts) must be made by public deed.

It should be noted however that the Law on Movable Securities was promulgated in Mozambique in 2019 and its respective regulations in force in 2020 (together referred to “Legislation on Movable Securities”). Under this new legislation any security over a movable asset – including, but not limited to, any security over shares of a company – is subject, in addition to the specific regulations applicable to such asset (e.g., security over shares is also regulated by the Mozambican Commercial Code), to the Legislation on Movable Securities.

The Legislation on Movable Securities establishes that perfection of any security constituted over a movable asset is obtained through its registration at the Movable Securities Registration Centre or, in case of bank accounts, financial titles and assets (including book-entry shares) or intermediated financial assets, by a Control Agreement.

Stamp Duty

Stamp duty is calculated on the value of the contract and, for some forms of security, determined by the time in respect of which the guarantee or security is to remain in place. A mortgage, pledge or other security incorporated for a period longer than 5 years or with no period established attracts duty at a rate of 0.3% of the value of the contract. All other security that is not a mortgage, pledge or that has been constituted for a period of less than 5 years attracts duty at a rate of 0.02% and 0.2% if it is greater than 1 year but less than 5 years. Stamp duty is payable from the moment that the security is constituted at the Tax Authorities or with the Notary that assists the execution of the security agreement. An exemption of stamp duty over the security may apply if it is executed simultaneously with the financing agreement to which it serves as collateral.

Registration Costs

The calculation of registration costs depends on the actual security being registered and the maximum secured amount by the security.

Requirements for Assignment or Transfer of Security

Security may be transferred or assigned as long as the assignment and transfer follows the same form as that utilized when the security was created and registered. In addition, one may only transfer or assign security with the consent of the creditor holding the security.

Instances in Which Securities Might Be Vulnerable to Attack

Securities incorporated fraudulently and illegally are subject to being contested and declared invalid. There is no provision in Mozambican law which states that security granted just before the company is declared insolvent or under business rescue should be set aside.

Methods of enforcement of security

A pledge may be enforced extra-judicially if the debtor agrees to it. If not, the Court may only enforce the security as Mozambican law does not permit self-help measures. A mortgage may only be enforced by a Court.

Problems experienced when enforcing security

Other than the instances in which securities might be vulnerable to attack, there are no problems experienced when enforcing all forms of security.

Financial assistance requirements

Under the Commercial Code, a company may not provide personal or real security in respect of a third parties' obligations, save if the company has an interest in granting such security, which must be justified in writing by the directors of the company, or when the security is granted between group companies. If the financial assistance is to be made by way of a loan, such act must be, depending on the type of company and the provisions in the Articles of Association, approved by a resolution of shareholders and/or board of directors.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Any judgment obtained outside of Mozambique (a foreign judgment) must be recognized by the Supreme Court. The Supreme Court will not look at the merits of the case and will not change any of the rulings contained in the judgment.

Requirements for recognition of a foreign judgment

A foreign judgment will, in principle, be recognized by the Supreme Court and will be enforced by the Mozambican Courts if such judgment complies with the following requirements for the recognition of foreign judgments, that:

- there is no doubt about the authenticity of the document bearing the sentence or regarding the correctness of the decision;
- the judgment has been executed in accordance with the laws of the country in which it was delivered;
- judgment was handed down by a competent Court according to the rules of conflict in Mozambique;
- the exception of double jeopardy may not be invoked, except if the foreign Court determined the jurisdiction;
- the accused was duly summoned, save if it is a cause for which the Mozambican law would dispense with the initial summons, and if the accused was immediately convicted due to lack of opposition to the request, that the summons was delivered to the actual person;

- it does not contain decisions contrary to the Mozambican principles of public order; and
- having been delivered against a Mozambican, it does not offend the provisions of Mozambican law when the matter should have been resolved in accordance with the Mozambican rules of conflict of laws.

Requirements for the recognition of a foreign trustee, business rescue practitioner or insolvency practitioner

Trustees are not recognized in Mozambique. Local business rescue practitioners or insolvency practitioners would need to be engaged. It is worth mentioning that in July 2016 the Mozambican Association of Insolvency Administrators (AMAIN) was officially created to ensure the administration of the Insolvency Assets and Business Rescue. The Insolvency Administrator must cumulatively meet the following requirement:

- suitable professional, preferably a lawyer, economist, business administrator, accountant, with at least 5 years of professional experience;
- be a Mozambican Citizen or Mozambican legal person specialized in one of the professional activities mentioned above, or, if a foreigner, have permission to work in the country, be part of a duly registered Insolvency Administrator company (a Mozambican company);
- participate in specific training program/s; and
- pass the entrance exam.

The Insolvency Administrator must be a competent, trustworthy person, preferably a lawyer, economist, business manager or accountant, having practiced as such for a minimum period of 5 years and who is mandatorily certified and registered with the Regulatory Authority.





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NAMIBIA | CRONJE INC

COUNTRY INFORMATION

Namibia is a vast country in Southern Africa, bordered by South Africa, Botswana, Angola and Zambia, with a coastline along the Atlantic Ocean. It covers approximately 824 000 km². Namibia's population is unevenly distributed, with the most populous regions including the central Khomas region and several northern regions such as Ohangwena, Omusati and Oshikoto, reflecting demographic concentrations in both central and northern Namibia. The capital city, Windhoek, has a population of approximately 486 000.

TYPE OF GOVERNMENT

Namibia is a multi-party democracy with a presidential system of government. The President of Namibia is both the Head of State and the Head of Government. The President serves a term of five (5) years and may serve a maximum of two terms. The Government of Namibia consists of three independent branches, namely the executive, the legislature, and the judiciary.

POLITICAL SYSTEM

Namibia has maintained a stable multi-party democratic system since attaining independence in 1990, and the South-West Africa People's Organisation (SWAPO) has been the dominant political party since independence.

LEGAL SYSTEM

The Constitution of the Republic of Namibia is the supreme law of the land. Namibia has a mixed legal system, with its substantive law largely derived from the Roman Dutch civil law tradition and its procedural law influenced predominantly by common law principles. Namibia also recognises and applies aspects of customary law, particularly where such customary law is consistent with the Constitution and statutory law.

INTRODUCTION

In Namibian insolvency law, the two main legal processes used when a debtor can no longer pay its debts are sequestration and liquidation. Sequestration applies to a natural person (an individual), and results in the insolvent person's estate being placed under control of a trustee, who collects and sells the debtor's assets for distribution among creditors, under supervision of the Master of the High Court ("Master"). Liquidation, on the other hand, applies to a

juristic person, such as a company or close corporation, and involves the winding-up of that entity's affairs, the realisation of its assets, and the payment of creditors in accordance with the prescribed order of preference.

The date of sequestration is generally the date on which the High Court grants the final order of sequestration. From that date, the insolvent estate is treated as being under sequestration and important legal consequences follow, including restrictions on the debtor's ability to deal with assets and the regulation of claims by creditors. The date of liquidation is generally the date on which the liquidation application was filed with the High Court provided that the liquidation is confirmed with a final order of liquidation. From that date, the company or close corporation is regarded as being in liquidation and its affairs are administered for the benefit of creditors under the supervision of the Master and the appointed liquidator.

TESTS FOR INSOLVENCY

In Namibia, the test for insolvency depends on whether the debtor is a natural person (an individual) or a juristic person, such as a company or close corporation. Sequestration of individuals is regulated primarily by the Insolvency Act 24 of 1936, while liquidation of companies and close corporations is regulated by the Companies Act 28 of 2004, read with the relevant winding-up provisions of the Companies Act 61 of 1973, as applied in Namibia, and the Close Corporations Act 26 of 1988.

Natural Persons: Sequestration under the Insolvency Act

In the case of a natural person, a creditor may apply for sequestration in terms of Section 9 of the Insolvency Act. The creditor must generally establish that the debtor has committed an act of insolvency as contemplated in Section 8, or that the debtor is in fact insolvent. The most commonly relied upon acts of insolvency include a nulla bona return following an unsuccessful attempt to execute against the debtor's assets, and a written notice by the debtor indicating that he or she is unable to pay the debt.

A nulla bona return must comply with strict requirements. The Deputy Sheriff/Messenger must demand payment from the debtor, and the debtor must indicate that he or she is unable to pay. The debtor must also fail to point out sufficient attachable assets that could satisfy the judgment debt, and the Deputy Sheriff/Messenger must conduct a diligent search for assets independently. The Deputy Sheriff/Messenger must further explain the nature and purpose of the document being served. In the case of a natural person, service must be effected personally to support the nulla bona return and the act of insolvency relied upon.

Companies and Close Corporations: Liquidation and Statutory Demand

In the case of a company, liquidation may be pursued where the company is unable to pay its debts, as contemplated in the Companies legislation. A common basis for establishing inability to pay is a statutory demand in terms of Section 350 of the Companies Act 28 of 2004. A close corporation is treated similarly, with the relevant winding-up provisions applying by virtue of Section 69 of the Close Corporations Act 26 of 1988.

For purposes of Section 350 and Section 69, the debt must be liquidated, must exceed N\$100 and the demand must be served by the Deputy Sheriff/Messenger at the entity's registered address. A company has 15 days from service of the demand to pay, secure, or compound the debt, failing which it may be deemed unable to pay its debts. A close corporation has 21 days to do so. A creditor may also rely on a nulla bona return against the entity as proof that it is unable to pay its debts.

Commercial Insolvency vs Actual Insolvency

In relation to companies and close corporations, insolvency may be established on the basis of either commercial insolvency or actual insolvency. Actual insolvency refers to a situation where the liabilities of the entity exceed its assets. Commercial insolvency, which is more commonly relied upon, refers to an inability to pay debts as and when they fall due in the ordinary course of business. In liquidation proceedings it is generally sufficient for a creditor to prove commercial insolvency, even if the entity may appear asset-rich on paper.

Judicial Management and the Absence of Business Rescue

Namibian company law provides for judicial management as a potential remedy aimed at rehabilitating a financially distressed company under court supervision. Judicial management may be considered where there is a reasonable prospect that the company may be restored to a successful business operation. Importantly, Namibia has not adopted the South African business rescue regime, and business rescue proceedings are not available under Namibian law. Creditors and debtors must therefore rely on liquidation, sequestration, compromise arrangements, or judicial management where applicable.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Insolvency Procedure

Formal insolvency proceedings are instituted by way of an application to the High Court of Namibia for the winding-up

of a company in terms of Section 351 of the Companies Act 28 of 2004. The application is brought in the ordinary motion court format by means of a notice of motion supported by a founding affidavit and the relevant annexures. Several interested parties may apply for the winding-up of a company, including the company itself, one or more of its members, or one or more creditors. Where the application is brought by a creditor, it is commonly referred to as a compulsory winding-up, while an application brought pursuant to a resolution of the company is commonly referred to as a voluntary winding-up.

Section 68 of the Close Corporations Act 26 of 1988 provides for the winding-up (liquidation) of a close corporation by the High Court. A close corporation may be wound up by the Court if the members have passed the required resolution, if the corporation has not commenced business or has suspended its business for a continuous period of one year, if it is unable to pay its debts, or if it is just and equitable that the corporation be wound up. In practice, the most commonly relied upon grounds are that the close corporation is unable to pay its debts (Section 68(c)) or that it is just and equitable to wind it up (Section 68(d)). Although Section 68 does not expressly list all categories of applicants, an application is typically brought by an interested party with locus standi, most commonly a creditor, the close corporation itself, or one or more of its members, depending on the circumstances and the basis upon which liquidation is sought.

Restructuring Procedure

Chapter 12 of the Companies Act 28 of 2004 regulates compromises and arrangements between a company and its members and/or creditors. Where a compromise or arrangement is proposed between a company and its creditors (or any class of them) or between a company and its members (or any class of them), an application may be brought to Court for an order convening a meeting of the relevant creditors or members in the manner directed by the Court. Such application may be made by the company, any creditor or member of the company, or, where the company is being wound up, by the liquidator, and where the company is subject to a judicial management order, by the judicial manager. If the proposed compromise or arrangement is approved by the required statutory majority and is subsequently sanctioned by the Court, it becomes binding upon the company and all creditors or members (as the case may be), including those who voted against it. The Court order has no effect until a certified copy thereof has been lodged with and registered by the Registrar.

In addition to the above formal statutory mechanisms, companies in financial distress may attempt to restructure their debts through informal arrangements negotiated with creditors. This may take the form of a written debt restructuring or repayment agreement, in terms of which creditors agree to revised payment terms, instalments, reduced interest, or other concessions designed to avoid liquidation proceedings. Such informal arrangements are

contractual in nature and generally bind only those creditors who agree to the restructuring. For this reason, it is advisable for the agreement to include an undertaking by participating creditors not to institute winding-up proceedings while the debtor complies with the agreed repayment terms.

LIQUIDATION

Aim of liquidation

Liquidation serves to bring all creditors into a single process so that enforcement steps against the company or close corporation are channelled through the winding-up, and the entity's assets can be realised and distributed in accordance with the statutory ranking of claims. In addition to distribution, liquidation provides a mechanism to scrutinise the entity's pre-liquidation dealings and, where appropriate, to challenge dispositions that may be set aside under insolvency principles. The Companies Act expressly provides for this importation of insolvency-law setting-aside principles in relation to dispositions by entities (including corporations) that are unable to pay their debts and regulates the validity of certain dispositions made before the date of liquidation.

How liquidation is commenced (overview)

A company may be wound up by the Court or voluntarily, and voluntary winding-up may be either members' or creditors' voluntary winding-up. A voluntary winding-up is initiated by a special resolution (Section 354) and is only effective once the resolution has been registered as required (including the additional requirements applicable to a members' voluntary winding-up, such as security unless dispensed with). A court winding-up is pursued by application in the ordinary motion procedure; where such application is granted, the Court will ordinarily issue a provisional order with a rule nisi calling upon interested persons to show cause why a final order should not be granted and will direct publication.

Similar to a company, a close corporation may be wound up either voluntarily or by order of Court. Voluntary winding-up is commenced where the members adopt a resolution to wind up the close corporation, and the winding-up takes effect once the resolution has been duly registered. A close corporation may also be wound up by the High Court upon application in terms of Section 68 of the Close Corporations Act.

Commencement of liquidation

For a winding-up by the Court, commencement is deemed to occur upon presentation of the application, provided the order is made final. For voluntary winding-up, commencement is deemed to occur upon registration of the required resolution.

Duration of the liquidation process

While liquidations should be finalised as expeditiously as reasonably possible, the key practical milestone is that the liquidator must lodge a liquidation and distribution account (unless extended) not later than six months after appointment (after the liquidation order is made final), and thereafter at least every six months if the account is not final. The timeline in practice often depends on asset realisation, disputes, investigations and litigation.

Extent of court involvement in the liquidation process

The Court has the discretion to grant or dismiss a liquidation application filed in respect of any entity. After the winding-up order is made, i.e. the application being granted, the administration of the winding-up proceeds through the liquidator under the supervision of the Master, with meetings and claims processes being driven through the statutory machinery (including the Master's functions and the liquidator's duties). The Court's role is not necessarily "finished" after the final order, but the day-to-day conduct of the winding-up proceeds primarily through the Master/liquidator structure, with recourse to Court where the Act provides.

Management of the entity whilst in liquidation

Once a liquidator is appointed, the liquidator has the duty to manage and control the affairs of the entity on its behalf. The role of the directors/managers/members is therefore limited.

In a winding-up of an entity due to inability to pay debts, directors or members (as the case may be) and officers of the entity have statutory duties to participate in creditors' meetings. In particular, they must attend the first and second meetings of creditors (unless excused in writing) and must attend later meetings when required in writing by the liquidator or by the Master.

Filing of claims

Soon after a final winding-up order (or registration of a creditors' voluntary winding-up), the Master must summon meetings of creditors and members via publication in the Government Gazette. Meetings are generally categorised as "first meeting", "second meeting", or "general or special meeting".

The purpose of this first meeting is for creditors to prove their claims against the entity, to consider the statement of the affairs of the entity lodged with the Master and for the receipt of nominations for a person to be appointed as liquidator. After this meeting, the Master will convene a second meeting with the same purpose as the first meeting, except that a liquidator has by that time already been appointed. General and special meetings may be convened thereafter and may be called for specific purposes. The Master of the High Court generally presides over the meetings.

Factors Which Influence the Period of the Administration in a Liquidation

The duration of liquidation proceedings may vary significantly from matter to matter and is influenced by a number of practical and administrative factors. These include, inter alia, the number of creditors who submit and prove claims, the complexity of the claims and any disputes arising therefrom, and the time required to convene statutory meetings and provide notice thereof, including publication in the Government Gazette. The nature and size of the entity's business also play an important role, including the extent of its assets and liabilities, the existence of employees, and whether the liquidator is required to realise specialised assets or conclude outstanding business affairs. In addition, the speed at which the liquidation progresses may be affected by the administrative workload of the Master's Office, including the volume of liquidations and other estates under administration at any given time.

Effect of liquidation on employees

In terms of section 32 of the Labour Act 11 of 2007, a contract of employment terminates automatically one month after the date on which the employer is wound up, where the employer is a juristic person, unless earlier notice of termination is given by the liquidator in accordance with the Act. Despite the termination of employment arising from liquidation, an employee whose contract is terminated in these circumstances is regarded as a preferent creditor in respect of any remuneration due or monies payable to the employee in terms of the employee's employment agreement and provisions of the Labour Act

Effect of liquidation on contracts

Liquidation does not automatically terminate all contracts concluded by a juristic person prior to liquidation. In general, agreements which are still incomplete at the commencement of liquidation remain in existence, and the liquidator is ordinarily entitled to elect whether to abide by such contracts or to terminate them, subject to the nature of the contract and any statutory provisions applicable thereto. Leases are similarly not automatically terminated by liquidation. The liquidator may, however, elect to cancel or terminate the lease, subject to the rights of the lessor and the requirements of the relevant legislation and common-law principles. In respect of certain agreements for the supply or sale of movable property, special rules may apply where goods have been delivered but have not been paid for. In such circumstances, the seller may in appropriate cases be entitled to reclaim the goods, provided the requirements for reclamation are met. Where movable property is sold under an instalment sale agreement, liquidation may afford the creditor a form of statutory security or preference in respect of the outstanding balance due under the agreement.

Effect of liquidation on shareholders

Upon liquidation, shareholders rank behind all creditors. Accordingly, shareholders will only be entitled to receive any distribution if, after the realisation of all assets, the entity's liabilities and the costs of liquidation have been paid in full, and a surplus remains available for distribution.

Effect of liquidation on creditors

Liquidation results in a concursus creditorum, meaning that creditors' claims are brought together into a single collective process and dealt with in accordance with the statutory order of preference. Secured creditors and preferent creditors are paid first from the proceeds of the entity's assets, while concurrent creditors share in any remaining balance, proportionately to their proven claims. Only creditors who have properly proved their claims at a duly convened meeting of creditors, to the satisfaction of the presiding officer, are entitled to participate in dividends distributed in the liquidation.

Effect on pending claims, litigation and arbitration

In terms of Section 363, after a winding-up application has been presented but before an order has been granted, the company, a creditor or a member may apply to stay or restrain proceedings involving the company. Once a winding-up order has been made (or a special resolution for voluntary winding-up has been registered), all civil proceedings by or against the company are suspended until the appointment of a liquidator. A party who wishes to continue existing proceedings, or to institute proceedings in respect of a claim arising prior to commencement of winding-up, must within 20 days after the liquidator's appointment give the liquidator not less than 15 days' written notice of the intention to proceed. If such notice is not given, the proceedings are deemed abandoned unless the Court directs otherwise.

How is the liquidation process terminated?

The liquidation process is generally finalised once the liquidator has prepared and lodged a final liquidation and distribution account, such account has been confirmed, and all assets available for distribution have been distributed in accordance therewith. Once the liquidator has completed the administration of the estate and carried out the distribution, the liquidator may apply to the Master for the issuing of a certificate of completion of duties.

Director/member and officer obligations and liability

Once liquidation has commenced, directors/members and officers of the entity are subject to statutory duties aimed at assisting the liquidator in the administration of the estate. The Court may, at any time after the winding-up order has been granted or a voluntary winding-up resolution has been registered, order any director/member or officer to deliver or transfer to the liquidator any money, property, books or documents to which the entity is entitled.

Directors/members are further required to prepare and lodge a statement of the entity's affairs with the Master within 14 days after the winding-up order is made (or after registration of the voluntary winding-up resolution, as applicable). They must also notify the liquidator of any change of address. In addition, in a winding-up of a entity unable to pay its debts, every director/member and officer must attend the first and second meetings of creditors and must attend any further meeting when required to do so in writing by the liquidator, unless excused in writing by the Master after consultation with the liquidator.

In terms of Section 429 of the Companies Act, delinquent directors may on application by the Master, the liquidator or any creditor be ordered by the Court to repay any monies of the company that was misapplied or retained by him or her in breach of his or her duty of good faith. In terms of Section 430, any director may be held personally liable if the business of the company was carried on fraudulently, recklessly or with intent to defraud creditors and may also be criminally prosecuted therefor. Should the State refuse to prosecute, creditors may institute private prosecutions under Section 431 of the Companies Act. This applies mutatis mutandis to corporations.

VOIDABLE DISPOSITIONS

In the event a natural person, or juristic person, ("a person") is unable to pay his/her/its debts, Namibian law permits certain transactions concluded before sequestration/liquidation to be challenged and set aside for the benefit of creditors. In terms of Section 345 of the Companies Act, any disposition by an entity which could have been set aside under insolvency law if made by a natural person may similarly be set aside in the liquidation of an entity. The purpose of these provisions is to prevent a person from preferring certain creditors, stripping assets, or prejudicing the general body of creditors prior to sequestration/liquidation:

Dispositions without value:

A disposition without value occurs where a person disposes of property or grants a benefit for no value or for insufficient value, thereby diminishing the estate available for creditors. There must be a disposition of property or rights, the person must have received no value or substantially inadequate value, and the disposition must fall within the applicable statutory period prior to sequestration/liquidation. If set aside, the recipient must restore the asset or its value to the estate, subject to possible defences available under insolvency principles.

Voidable preference:

This arises where the person, while insolvent, makes a disposition that has the effect of preferring one creditor above others shortly before sequestration/liquidation. A disposition must have been made in favour of a creditor,

the disposition must have had the effect of preferring that creditor, the person must have been insolvent at the time, and the disposition must have occurred within the statutory period prior to sequestration/liquidation. The transaction may be set aside, and the preferred creditor may be compelled to repay the benefit received, with the creditor then proving a concurrent claim in the sequestration/liquidation.

Undue preferences:

An undue preference is a disposition made with the intention of preferring a particular creditor over the general body of creditors. A disposition must have been made, the person must have intended to prefer the particular creditor, and the disposition must have been made while the person was unable to pay his/her/its debts. Once set aside, the creditor loses the advantage obtained and must restore the benefit to the estate.

Collusive dealings:

A collusive dealing occurs where the person, in collusion with another person, enters into a transaction intended to prejudice creditors or to confer an improper advantage. An agreement or disposition between the person and another party must exist with the intention to collude (a dishonest agreement or common purpose) and an intention to prejudice creditors or prefer a particular party unlawfully. Collusive transactions may be set aside, and the colluding party may be ordered to restore the value received. Such conduct may also have criminal or punitive consequences and no claim for the value so restored may be submitted as a claim.

In both liquidations and sequestrations, any disposition of estate property made after the commencement of liquidation or sequestration is generally void, unless authorised in terms of the relevant legislation or validated by the Court.

Where a transaction is successfully impeached, the asset (or its value) is restored to the insolvent estate. This increases the pool of assets available for distribution among creditors in accordance with the statutory ranking of claims. The party who benefited from the impeached disposition may, depending on the circumstances, still be entitled to prove a claim in the insolvent estate for any lawful debt owing.

JUDICIAL MANAGEMENT

Business rescue proceedings, as developed in South African law, are not formally recognised in Namibia. Instead, Namibian company law provides for judicial management as a court-supervised mechanism aimed at rehabilitating financially distressed companies.

Process required to commence judicial management

In terms of Section 433(1) of the Companies Act, the High Court may place a company under judicial management where, due to mismanagement or for any other reason, the company is unable to pay its debts or is probably unable to meet its obligations, and has not become, or is prevented from becoming, a successful concern. The Court must further be satisfied that there is a reasonable probability that, if the company is placed under judicial management, it will be enabled to pay its debts or meet its obligations and become a successful concern, and that it is just and equitable to grant such order.

An application for a judicial management order may be brought by any person who is entitled to apply for the winding-up of a company in terms of Section 351, including the company itself, a creditor, or a member. The application is brought in the ordinary motion court format by way of notice of motion supported by a founding affidavit, together with such further affidavits as may be necessary.

Commencement of judicial management

Judicial management commences when the High Court grants a judicial management order. The Court may grant either a provisional judicial management order with a return day or may grant a final judicial management order where appropriate. A provisional judicial management order places the company under the management of a provisional judicial manager, subject to the supervision of the Court, and may also include a stay of legal proceedings against the company unless leave of the Court is obtained.

Judicial management is not subject to a fixed statutory period. Where a provisional judicial management order is granted, the return day must be set for a date not later than 60 days after the date of the order, although the Court may extend the return day on good cause shown.

On the return day, the Court may, after considering the wishes of creditors and members, the provisional judicial manager's report, and reports from the Master and Registrar of Companies, grant a final judicial management order, discharge the provisional order, or make any other appropriate order.

The duration of judicial management is therefore largely dependent on the progress of the company and remains subject to the continuing supervision of the Court.

Extent of Court involvement

Judicial management is a court-supervised process. The Court has the power to impose conditions, stay proceedings, vary the terms of the order, or discharge the provisional order at any time. Following the granting of a provisional judicial management order, the company's property is deemed to be in the custody of the Master, and the Master must appoint

a provisional judicial manager without delay. Ultimately, the Court determines whether judicial management should be confirmed by granting a final order, or whether the company should instead be discharged from judicial management or placed into liquidation.

Management of the company whilst in judicial management

Once a company is placed under judicial management, the management and control of the company vests in the judicial manager, subject to the supervision of the Court and the terms of the judicial management order. The powers of the board of directors are substantially curtailed, as the judicial manager assumes control of the company's affairs and conducts its business for the benefit of creditors and members.

The duties and powers of a judicial manager are set out in Section 439 of the Companies Act. In general, the judicial manager is required to take over and assume the management of the company and to conduct such management, subject to the Court's directions, in a manner that promotes the interests of both creditors and members. The judicial manager must comply with the Court order and is further required to lodge with the Registrar of Companies a copy of the judicial management order as well as the Master's letter of appointment. The judicial manager must keep proper accounting records and prepare annual financial statements and is empowered to convene meetings of creditors where necessary.

In addition, the judicial manager must investigate the company's affairs and prior transactions to determine whether there have been any contraventions of the Companies Act by directors or officers. The judicial manager is required to submit reports to the Master within the prescribed period. Where it becomes apparent that judicial management will not enable the company to become a successful concern, the judicial manager is obliged to apply to Court for the cancellation of the judicial management order and for the winding-up of the company.

Filing of claims

The Companies Act does not prescribe a detailed formal procedure for the proof and filing of claims in judicial management comparable to liquidation proceedings. Judicial management is fundamentally distinct from liquidation: whereas liquidation is directed at winding-up the company and distributing its assets to creditors, judicial management is intended to avoid liquidation and to enable the company, under court supervision, to continue trading and regain solvency through proper management.

Factors which influence the period of judicial management

The duration of judicial management depends largely on the circumstances of the particular company and is influenced by

factors such as the size and complexity of the business, the extent of its liabilities, the availability of working capital, the ability to generate income during the judicial management period, and the prospects of restoring the company to a successful concern.

Funding of the company whilst in judicial management

A judicial manager may take such steps as are reasonably necessary to continue the operations of the company and to secure its rehabilitation. This may include negotiating credit facilities or financing arrangements on behalf of the company. The judicial manager may also, where necessary and subject to the terms of the judicial management order and the supervision of the Court, dispose of assets in order to raise funds or restructure the company's affairs.

Effect of judicial management on employees

The Companies Act does not expressly regulate the position of employees during judicial management. Employment relationships generally continue, subject to the operational requirements of the company. Depending on the financial position of the company and the prospects of rehabilitation, retrenchments may become necessary, in which event such terminations must be effected in accordance with the Labour Act 11 of 2007, including the requirements relating to retrenchment procedures.

Effect of judicial management on contracts

The Act does not contain detailed provisions dealing with the treatment of contracts during judicial management. In practice, the judicial manager may elect to continue, renegotiate, or discontinue certain contractual obligations, depending on the financial viability of the company and the requirements of the rehabilitation process, subject to the company's legal obligations and any applicable court directions.

Effect of judicial management on shareholders

Judicial management does not necessarily suspend shareholders' rights, but the company's operations and finances are controlled by the judicial manager. In practice, profits are ordinarily not distributed while the company remains under judicial management, as available funds are generally applied towards stabilising the company's operations and addressing creditor obligations.

Effect of judicial management on creditors

During judicial management, the judicial manager is required to administer the company's affairs in accordance with the judicial management order and under the supervision of the Court. Funds available to the judicial manager may be applied towards the costs of judicial management, the continued conduct of the company's business, and, insofar as circumstances permit, the payment of claims of creditors

which arose prior to the granting of the judicial management order. The costs of judicial management and the treatment of creditor claims are, to the extent applicable, dealt with mutatis mutandis in accordance with the principles governing the administration of insolvent estates.

In addition, creditors may resolve that liabilities incurred by the judicial manager during the period of judicial management be treated as enjoying preference over other liabilities, thereby facilitating the continued operation of the company during the rehabilitation process.

Pending claims, litigation and arbitration

Judicial management may have the effect of creating a temporary moratorium on legal proceedings. The Companies Act does not impose an automatic stay of proceedings merely by virtue of the granting of a judicial management order. However, the Court may direct in the order that actions, proceedings, and the execution of writs or other processes against the company be stayed, unless leave of the Court is obtained. Judicial management has therefore been described as a "form of moratorium", depending on the terms of the order granted.

Where the Court orders a stay of proceedings, creditors are generally prevented from enforcing claims individually against the company and are required to engage with the judicial management process as a collective mechanism aimed at rehabilitation. This preserves the company's assets and allows the judicial manager an opportunity to stabilise the company's affairs with a view to restoring it to solvency.

Voidable transactions

During judicial management, dispositions made by a company while unable to pay its debts may be challenged in accordance with insolvency principles. The provisions of insolvency law relating to voidable dispositions, including voidable and undue preferences, apply mutatis mutandis where a disposition of property by a company is set aside by the Court at the instance of the judicial manager.

Judicial management plan, creditor approval and implementation

The Companies Act does not make provision for a formal judicial management plan comparable to a business rescue plan, nor does it prescribe a specific procedure for the adoption, voting upon, or implementation of such a plan. Instead, the rehabilitation of the company is managed under Court supervision and is primarily driven through reports submitted during the judicial management process.

In practice, any proposed restructuring measures or rehabilitation strategy are usually contained in the provisional judicial manager's report, which is considered by the Court on the return day together with the wishes of creditors and members, as well as the reports of the Master and the

Registrar of Companies. The Court may thereafter confirm judicial management, discharge the provisional order, extend the return day, or make such other order as it deems appropriate.

Judicial management does not create an express statutory “cram down” mechanism. However, creditors are generally required to engage with the judicial management process as a collective remedy and are subject to the supervision of the Court and any directions contained in the judicial management order.

Termination and consequences of judicial management

The costs of judicial management and the claims of creditors are, with the necessary changes, dealt with in accordance with the principles applicable to insolvent estates, as if the costs were costs of sequestration and the claims were claims against an insolvent estate.

The Companies Act does not contain specific provisions dealing with the effect of judicial management on suretyships. In the absence of any contrary direction in the judicial management order or agreement between the parties, suretyships and guarantees given in favour of creditors generally remain enforceable.

Judicial management may be terminated by an order of Court. If, at any time, on application by the judicial manager or any person having an interest in the company, it appears to the Court that the purpose of the judicial management order has been fulfilled, or that it is undesirable for the order to remain in force, the Court may cancel the judicial management order and the judicial manager will thereupon be divested of his or her functions. When cancelling the order, the Court must issue such directions as may be necessary to restore control of the company to its management, including directions for the convening of a general meeting of members for the election of directors.

Following termination of judicial management, the company may resume ordinary operations under its directors if it has been successfully rehabilitated. If rehabilitation proves unsuccessful, the company may ultimately be placed into liquidation.

Civil consequences

To the extent that the Companies Act imposes civil liability on directors and officers for misconduct, breach of fiduciary duties, reckless or fraudulent trading, or contraventions of statutory obligations, such provisions remain applicable during judicial management. The judicial manager may investigate the company's affairs and transactions and, where appropriate, take steps to recover assets or enforce claims for the benefit of the company and its creditors.

Criminal consequences

The criminal offence provisions of the Companies Act applicable to directors and officers likewise remain enforceable during judicial management. Where the judicial manager uncovers conduct amounting to a contravention of the Act, the matter may be reported and prosecuted in the same manner as in liquidation proceedings.

Applicability of judicial management to corporations

Judicial management is a remedy created by the Companies Act 28 of 2004 and applies specifically to companies. The Close Corporations Act 26 of 1988 does not contain an equivalent judicial management procedure for close corporations, and its incorporation provisions largely relate to the application of company winding-up principles to close corporations. Accordingly, while a close corporation may be wound up in terms of the Close Corporations Act (with reference to the relevant winding-up provisions), judicial management is generally not available as a formal restructuring mechanism for close corporations in Namibia.

SECURED CREDITORS AND THE RANKING OF CREDITORS

In insolvency proceedings, the classification of creditors is fundamental, as it determines the order in which claims are paid and the extent to which a creditor may recover its debt. Creditors are generally divided into secured creditors, preferent creditors, and concurrent creditors. The existence and nature of security is often decisive, as secured creditors are entitled to claim payment from the proceeds of the specific asset over which they hold security, subject to the costs of realisation and any statutory preferent claims that may rank ahead.

Secured creditors

A secured creditor is a creditor whose claim is supported by real security over specific property of the debtor, entitling the creditor to be paid from the proceeds of that asset in priority to other creditors.

Common examples include:

- (a) Mortgage bondholders, who hold a registered mortgage bond over immovable property. The creditor enjoys a real right enforceable against the property and ranks as a secured creditor in respect of the bonded property.
- (b) Notarial bondholders, who hold a registered notarial bond over movable property. A notarial bond may be general or special. Depending on its nature and compliance with legal requirements, it may provide real security over specified movable assets.

- (c) Pledgees, where movable property is delivered into the possession or effective control of the creditor as security for payment of a debt. A pledge constitutes real security, and the pledgee ranks as a secured creditor in respect of the pledged property.
- (d) Landlords who may rely on a landlord's hypothec, which provides a form of security over certain movable property situated on leased premises in respect of unpaid rental.
- (e) Creditors under instalment sale agreements, where the seller retains a statutory form of protection or preference over goods sold on instalment until the purchase price has been paid in full. Such creditors may enjoy a secured or quasi-secured position depending on the nature of the transaction and the applicable insolvency rules.

Secured creditors must prove their claims in the insolvency process and must disclose and value the security held, as their recovery is limited to the proceeds of the secured asset, with any shortfall becoming a concurrent claim.

Preferent creditors

A preferent creditor is a creditor who does not necessarily hold real security over a specific asset, but who enjoys statutory preference in the distribution of the insolvent estate. Preferent claims are paid before concurrent claims and often before any surplus is available for distribution.

Preferent claims commonly include, inter alia, costs of administration and liquidation (including the Master's fees, the liquidator's remuneration, and costs incurred in the realisation of assets), as well as certain statutory claims arising from the employment relationship. In liquidation, employees whose contracts terminate as a result of winding-up are recognised as preferent creditors in respect of remuneration and other amounts payable under the Labour Act.

In addition, certain claims by the State and statutory authorities may enjoy preference, including tax-related claims such as PAYE deductions, VAT, and other amounts collected or withheld on behalf of the revenue authority. Preferent status may also apply to specific statutory contributions, levies, or charges imposed by legislation. These claims are generally paid before concurrent creditors, but after the costs of liquidation and administration, depending on the nature of the preference and the applicable statutory ranking.

Preferent creditors are still required to prove their claims in the prescribed manner before they may share in any distribution.

Concurrent creditors

Concurrent creditors are unsecured creditors who hold no real security and enjoy no statutory preference. They rank last in the distribution of the insolvent estate and are only entitled to share in any remaining balance after secured creditors have been paid from their secured assets (subject to costs and preferences) and after preferent claims have been satisfied. Concurrent creditors share proportionally in

any dividend declared, based on the value of their proved claims.

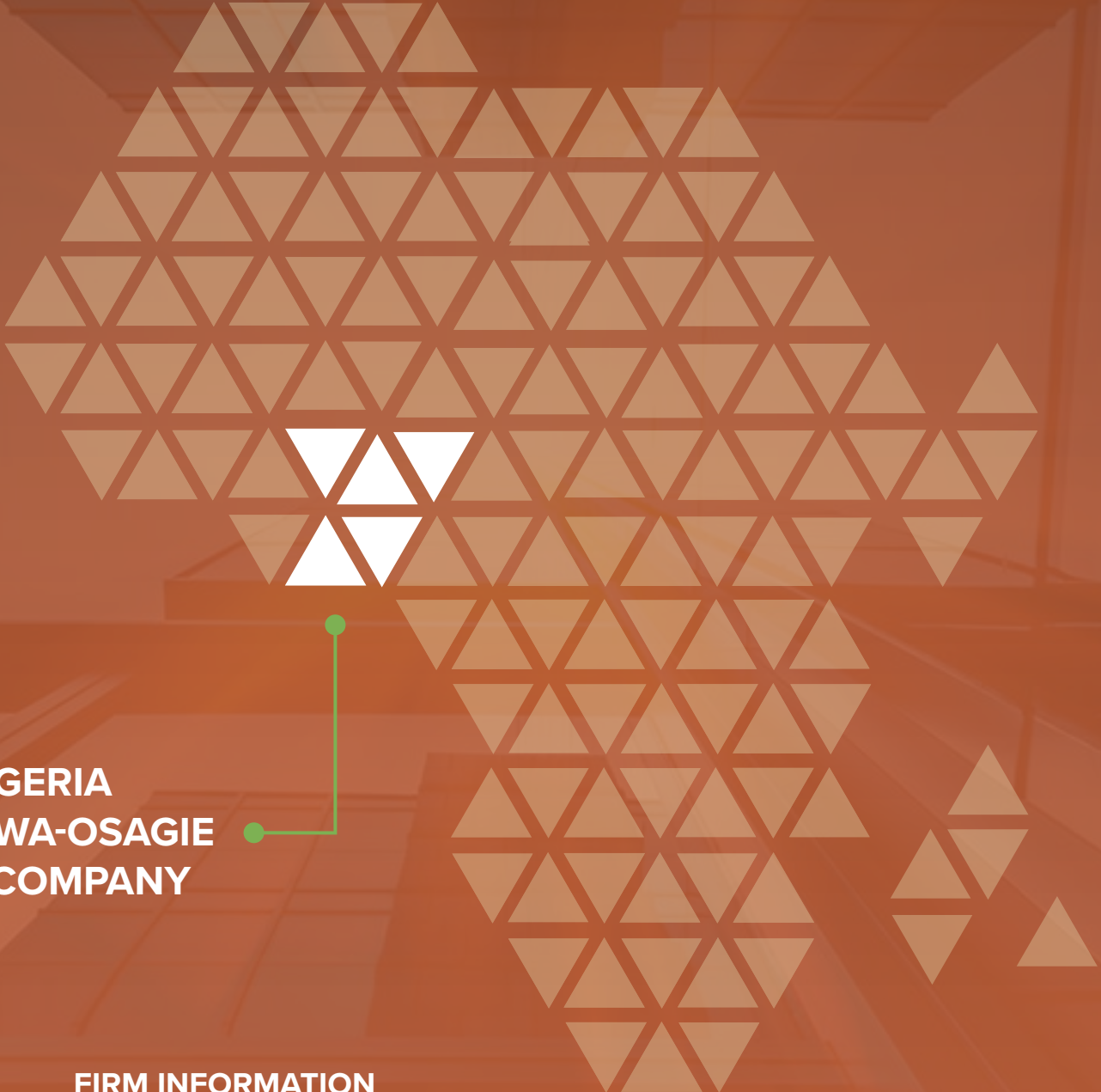
CROSS BORDER INSOLVENCY AND FOREIGN INSOLVENCY REPRESENTATIVES

Cross-border insolvency issues arise where a debtor has assets, creditors, or business operations in more than one jurisdiction. Namibia does not currently have a comprehensive statutory framework equivalent to the UNCITRAL Model Law on Cross-Border Insolvency. As a result, foreign insolvency proceedings and foreign insolvency representatives are generally not automatically recognised in Namibia, and foreign creditors or officeholders may be required to approach the Namibian courts for appropriate relief.

Foreign insolvency-related court orders may also become relevant where a creditor seeks to enforce a foreign judgment or insolvency order in Namibia. Namibia provides a statutory mechanism for enforcement of certain foreign civil money judgments in terms of the Enforcement of Foreign Civil Judgments Act 28 of 1994, although this regime applies only to designated countries and South Africa is currently the only designated country. In other cases, foreign orders and judgments may be recognised or enforced in Namibia through common-law procedures, subject to the Namibian court being satisfied that the foreign court had jurisdiction, that the order is final, and that enforcement would not be contrary to public policy.

Recognition of foreign trustees and insolvency practitioners

In Namibia, trustees (in sequestrations) and liquidators (in company liquidations) are appointed by the Master. Namibian legislation contains residency requirements which generally prevent the appointment of trustees or liquidators who do not reside in Namibia. Notwithstanding this, Namibian courts may, depending on the circumstances, recognise the authority of a foreign trustee, liquidator or insolvency representative, particularly where a foreign insolvency has assets, creditors or legal consequences within Namibia under common law principles. Currently, the practice is that the foreign trustee or liquidator will be recognised, provided that a Namibian agent, co-trustee or co-liquidator is appointed.



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COUNTRY INFORMATION

Nigeria became an independent nation in 1960. Following nearly 16 years of military rule, a new constitution was adopted in 1999, and a peaceful transition to a civilian government was completed. Nigeria is currently experiencing its longest period of civilian rule since independence. It is ranked 52nd in the world in terms of nominal GDP and 19th in terms of purchasing power parity and is the largest economy in Africa. It is also on track to become one of the 20 largest economies in the world.

TYPE OF GOVERNMENT

Nigeria is a Federal Republic modelled on the system in the United States of America, with executive powers exercised by the President and with overtones of the Westminster System model in the composition and management of the upper and lower houses of the bicameral legislature.

POLITICAL SYSTEM

The President's powers are checked and balanced by the House of Senate and the House of Representatives, which are combined in a bicameral body called the National Assembly.

LEGAL SYSTEM

There are seven distinct systems of law in Nigeria, being:

- The 1999 Constitution of the Federal Republic of Nigeria [as amended] which is the grundnorm in Nigeria;
- English law (common law, doctrines of equity, statutes of general application and statutes and subsidiary legislation on specific matters) derived from Nigeria's colonial past and developments post-independence;
- Customary law derived from indigenous traditional norms and practices;
- Islamic/Sharia law, used only in the predominantly Muslim north of the country;
- Legislation/Statutory law, derived from statutes and laws made by the legislative arm of Government;
- Case law or judicial precedents (decisions made by the Courts become law); and
- International law

The country has a judicial arm of Government and the highest Court of law is the Supreme Court of Nigeria.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. liquidation)?

The tests for insolvency as prescribed by section 572 of the Companies and Allied Matters Act (CAMA) 2020 and the Business Facilitation (Miscellaneous Provisions) Act, 2022 in Nigeria are:

- a company's inability to pay a debt in a sum as determined by a regulation of the Corporate Affairs Commission after a demand for payment has been made;
- the execution or other process issued on a judgment, act or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or a court's determination that the company is unable to pay its debts after taking into account any contingent or prospective liabilities of the company.

What are the tests for financial distress (business rescue or administration)?

There are no specific provisions under Nigerian law to test for when a company is financially distressed. However, CAMA 2020 provides for steps that can be taken to rescue a financially distressed company. Under CAMA, the options available to financially distressed companies are administration, receivership, liquidation, and arrangement and compromise. Whilst receivership is geared towards the recovery of debt through secured assets, liquidation primarily seeks the dissolution of a company.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

In Nigeria, in addition to liquidation, a receiver or manager may be appointed by the Court or privately by a trustee, debenture holders of the same class or debenture holders having more than half of the total amount owing in respect of all debentures of the same class. The Court can appoint a receiver on the application of a trustee for a debenture holder. All receivers or managers appointed in that manner shall exercise their vast powers subject to any order made by the Courts. Under the new Companies and Allied Matters Act (CAMA) 2020, a proper structure has been established for insolvency procedures in Nigeria.

Under sections 704-705 of CAMA 2020, a person acts as an insolvency practitioner if such person acts as a liquidator, provisional liquidator or official receiver; administrator or administrative receiver; receiver and manager, or as nominee or supervisor of a company's voluntary arrangement.

The CAMA also provides for persons who are qualified to be insolvency practitioners in Nigeria and they include: legal practitioners, accountants or such relevant discipline, a person who holds a minimum of 5 years post qualification experience in matters relating to insolvency; a person authorised to so act by virtue of a certificate of membership issued by the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), or his membership of any other professional body recognised by the Commission, being permitted to act by or under the rules of that body; and a person who holds an authorisation granted by the Commission.

Formal restructuring procedures

Section 715 of CAMA deals with Arrangements and Compromise.

Where a compromise or arrangement is proposed between a company and its creditors or any class of them, an application can be made to the court, in a summary manner, by the company or any of its creditors or members or, in the case of a company being wound up, the liquidator, to order a meeting of the creditors or class of creditors, or of the members of the company, or class of members, as the case may be, to be convened in a manner determined by the Court. A majority representing at least three quarters in value of shares of the members, or of a class of members, or of the interest of the creditors, or of a class of creditors, as the case may be, being present and voting either in person or by proxy at a meeting is required to agree to any compromise or arrangement which may be referred by the Court to the Securities and Exchange Commission. The Securities and Exchange Commission would thereafter appoint one or more inspectors to investigate the fairness of the said compromise or arrangement and to make a written report thereon to the Court within a time specified by the Court. The Court would thereafter sanction the arrangement or compromise if it is satisfied as to its fairness and it shall become binding on all the creditors, or class of creditors, or on the members or the class of members, as the case may be. A certified true copy of the Court order must be delivered by the company to the Securities and Exchange Commission for same to have any effect. A copy of the Court order will subsequently be annexed to every copy of the Memorandum of Association of the company issued after the order has been made.

CAMA also provides for a company's voluntary arrangement. The directors of a company may make a proposal to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs. Such a proposal may be made where an administration order is in force in relation to the company, by the administrator; and where the company is being wound up, by the liquidator. The nominee shall, within 28 days (or such longer period as the Court may allow) after he is given notice of the proposal for a voluntary arrangement, submit a report to the Court stating if in his opinion, the meeting should be held and the Court will make an order based on that report. The meetings will then be

held and a report will be given to the Court.

Furthermore, the new CAMA 2020 provides for the option of administration. An administrator may be appointed by the company, the directors of the company, holders of a floating charge or by an order of the Court. The Act spells out the objectives of administration to include:

- a) rescuing the company, the whole or any part of its undertaking, as a going concern;
- (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up, without first being in administration; or
- (c) realising property in order to make a distribution to one or more secured or preferential creditors.

Where a company is in administration, a resolution cannot be passed for the winding up of the company, neither can an order be made for winding up of the company, except on the grounds of public interest, or where the application for winding up is made for regulated entities in the financial industry.

The Act further provides for a moratorium on legal processes. Therefore, where a company is in administration, enforcement steps, legal proceedings, execution, distress and diligence may not be commenced or instituted against the company without the consent of the administrator, or permission of the Court as the case may be.

Informal insolvency or restructuring procedures

There are no specific provisions under CAMA for informal insolvency or restructuring procedures. However, based on an agreement between creditors and a debtor company, a business could be restructured informally, without any regulation or oversight by legislation or the Courts respectively. Such agreements may be, or may not be, filed at the Court but will usually involve negotiations between the parties. Such negotiations may result in a waiver of a creditor's interest in a claim, an extension of time for the repayment of any debt, the enhancement of the management team, the restructuring of the composition of the board and/or debt to equity conversions.

LIQUIDATION

What is the aim of liquidation?

The aim of liquidating a company is to wind-up the affairs of a company and have its assets or properties administered for the benefit of its creditors and members. By this process, the life of the company is brought to an end.

Process required to commence a liquidation

This depends upon the mode of liquidation. Where it is a winding up by the Court, liquidation is deemed to commence

upon the presentation of a petition to the Federal High Court. However, if it is a voluntary winding up, liquidation commences at the passing of the resolution for voluntary winding up.

Voluntary winding-up could occur in the following instances:

- when the period fixed by the Articles of Association for the company's duration expires;
- on the occurrence of any event which the articles provide shall lead to the dissolution of the company and the company has at a general meeting, passed a resolution for the company to be wound up voluntarily; and
- if the company passes a special resolution that it be wound up voluntarily. This may occur, for instance, where a segment of the members of the company are unfairly treated or there is a deadlock in the management of the company - section 620 of CAMA 2020.

At what point does the liquidation process commence?

A members' voluntary winding up is deemed to commence at the time of the passing of the resolution for voluntary winding up. Where it is proposed to voluntarily wind up a company, the directors of the company will make a "statutory declaration of solvency", stating that, after enquiry into the affairs of the company, in their opinion the company will be able to pay its debts in full within such period, not exceeding 12 months from the start of the winding up. Under this situation, the members of the company can choose who the liquidator of the company will be.

In the case of a creditors' voluntary winding up, no declaration of solvency is made and separate meetings of the creditors and the members of the company are held. Though the members and the creditors are entitled to nominate liquidators at their separate meetings, the creditors' nominee is accepted, where the members and the creditors nominated different persons as liquidators. However, any member, director or creditor of the company may apply to the Court, within 7 days after the creditors have made their nomination, for an order for the members' nominee to be accepted instead of, or jointly with, the creditors' nominee.

Duration of the liquidation process

There is no specified duration for a liquidation process. However, in a members' voluntary winding up, the company is deemed wound up, 3 months after the approval of its final accounts by the Corporate Affairs Commission.

Extent of court involvement in the liquidation process

In Nigeria, the cases in which a company may be wound up by Court include where the company has passed a special resolution to that effect, where the Court is of the opinion that it is just and equitable that the company should be wound up, the number of members is below 2 (except in cases of

private companies), the company is unable to pay its debts, the condition precedent to the operation of the company has ceased to exist; and default is made in delivering the statutory report to the Commission or in holding the statutory meeting.

Also, a receiver, manager or liquidator appointed during the liquidation process, may be appointed by the Court or privately. The Court can appoint a receiver on the application of a trustee for a debenture holder. All receivers or managers appointed under the aforesaid manner shall exercise their vast powers subject to any order made by the Courts. Upon the request of a debenture holder, the Court has the power to appoint an official receiver or an interested person. An official receiver for the purpose of a winding up by the Court can either be the Deputy Chief Registrar of the Federal High Court or an officer designated for the purpose by the Chief Judge of the Federal High Court. The Court may also additionally appoint a receiver as a manager. While liquidators can be appointed by the Court, they may also be appointed by the company, its creditors, or members, depending on the type of winding up. The Court's involvement in the liquidation process depends on the type of liquidation. In some cases, the Court is limited to determining questions or powers arising from the winding up of the company, while in others, the Court plays an integral role in the liquidation process. The Court is also involved in a creditor's voluntary winding up, and a winding up under the supervision of the Court.

Management of the company whilst in liquidation

The liquidator is responsible for winding up the company. Upon his appointment either by the company or by the Court, the powers of the directors of the company cease.

In a winding up by the Court, the liquidator is empowered to, amongst others, take into his custody, or under his control, all the property and choses in action to which the company is or appears to be entitled. He has the power, with the sanction of the Court or the committee of inspection, to: carry on the business of the company so far as may be necessary for the company's beneficial winding up; bring or defend an action on behalf of the company; pay any class of creditors in full or make any compromise or arrangement with the creditors.

The liquidator also has the power to do all acts and to execute, in the name and on behalf of the company, all deeds, receipts and other documents; he may sell the company's assets; appoint an agent, legal practitioner or any professional to assist him in the performance of his duties; raise money against the security of the assets of the company.

The powers exercised by the liquidator in this case shall be subject to the control of the Court and any of the creditors/contributories may apply to Court in respect of any exercise or proposed exercise of power by the liquidator.

In a voluntary winding up by the company, the liquidator's role is mainly to conduct the winding up of the company,

distributing the assets of the company, paying off the debts of the company, and without sanction, exercising any of the other powers of the liquidator in a winding up by the Court as provided under the CAMA 2020. The liquidator is required to hold meetings with creditors and the company and provide periodic accounts of his acts and dealings until the debts of the company are fully paid off. The liquidator is discharged after submission of the accounts to the Corporate Affairs Commission.

On the other hand, a receiver or manager may also be appointed if a company is placed in liquidation.

The receiver is responsible for taking possession of, and protecting, the property, receiving rents and profits and discharging all out-goings in respect thereof and realising the security for the benefit of those on whose behalf he is appointed, subject to prior encumbrances. Unless he is an appointed manager, he does not have the power to carry on any business or undertaking. A person appointed as a manager of the whole or any part of the undertaking of a company shall manage the company with a view to the realisation of the security of those on whose behalf he is appointed.

From the date of the appointment of the receiver, the powers of the liquidators and directors, to deal with the property of the company over which the receiver is appointed, cease, until the receiver is discharged. The floating charges in relation to the company crystallize and become fixed charges and the company can no longer deal with the assets without the consent of the receiver.

Filing of claims

Claims relating to a liquidated estate are filed at the Federal High Court, commenced by way of a petition. There is no statutory time limit to file such a claim, reasonable time will be required where steps are required to be taken. The course of action may also be limited depending on the nature of the claim. For example, a claim on simple contract has a 6-year limitation period. Each creditor must prove his debt by delivering or sending through the post, an affidavit verifying the debt. The affidavit must contain or refer to a statement of account showing the particulars of the debt and whether the creditor is a secured creditor.

Factors which influence the period of the administration in a liquidation

The process of administration may be influenced by whether or not there are dissenting shareholders or if an action has been instituted in the Courts against the process.

Effect of liquidation on employees

Employee claims that may arise are not with respect to wrongful termination, but rather with respect to non-payment of employee's full benefits or non-payment in preference

to all other claims. Where employee pension plans or schemes exist, claims for deficiencies in such plans will have priority in liquidation because pensions are now a statutory requirement and in practice, where unpaid, the employee may have recourse to the Court to enforce the same.

Furthermore, the Act provides that in considering whether a particular transaction or course of action is in the best interests of the company as a whole, a manager appointed out of Court may have regard to the interests of the employees, as well as the members of the company.

Effect of liquidation on contracts

Most contracts provide for termination in the event of liquidation and the termination is without prejudice to the liabilities incurred prior to termination.

Effect of liquidation on shareholders

During the winding-up process, the assets of the company are realised, sold and applied to pay off its debts and whatever is left as the surplus is distributed among the shareholders in accordance with the provisions of the Memorandum and Articles of Association.

Effect of liquidation on creditors

Generally, secured creditors rank in priority over unsecured creditors, also a registered security ranks above an unregistered security interest. The remedies available to unsecured creditors are to apply to Court for an order for the judicial sale of the assets of the company in order to recover any and all debts, to apply to Court for the appointment of a receiver in order to recover the debts of the company or to commence recovery of the principal debt and interest following an order of Court. After judgment is obtained, it may be enforced on the moveable and immovable assets of the debtor through attachment, garnishee proceedings and/or sequestration proceedings. Pre-judgment attachments may be obtained by a creditor's interlocutory application to the Court showing the reason why such moveable property should be attached, pending the determination of a matter. This application may be granted by the Court where it is shown that the moveable property may be dissipated before the determination of the suit, thereby making the judgment nugatory. An unsecured creditor of a public company may claim rescission, damages or compensation where there is a tort of deceit or false statement as contained in CAMA.

Pending claims, litigation and arbitration

Where a winding up petition has been presented and action or other proceedings against a company are instituted or pending in Court, the company or any creditor, or contributory may, before the making of the winding order, apply to the Court concerned for an order staying proceedings, and the Court concerned may, with or without imposing terms, stay or restrain proceedings, or if it thinks fit, refer the case to the Court hearing the winding-up petition. Accordingly, litigation

or arbitration proceedings may be stayed following the commencement of liquidation proceedings subject to the aforesaid.

Section 580 of CAMA 2020 provides that if a winding-up order is made or a provisional liquidator is appointed, no action or proceeding shall proceed with or commence against the company except by leave of the Court given on such terms as the Court may impose.

Voidable transactions

Transactions may be invalidated in the following circumstances:

- a floating charge created within 3 months of the commencement of winding-up proceedings (avoidance period), unless it is proved that the company was solvent immediately after the charge was created;
- Transactions made by a company unable to pay its debts, in favour of any creditor or to any person in trust from that creditor to give that creditor preference over other creditors during the avoidance period are void (fraudulent preference). These transactions include:

- conveyances;
- mortgages;
- the delivery of goods;
- payments;
- executions

Where a floating charge is created over the assets of a debtor for genuine concurrent money made available to the debtor during the avoidance period, the security will not be invalid as a preference if it can be proved that:

- the company was solvent immediately after the creation of the charge; and
- new money was advanced contemporaneously with or subsequent to the creation of the charge. While there are no statutory rules relating to transactions concluded at below their value, there is precedent to suggest that a Nigerian Court may likely construe such a transaction as a fraudulent preference and declare same void, to the extent that the transaction was meant to overreach the company's other creditors. Where a company gives a guarantee for below value, that guarantee will also be affected by the avoidance period.
- any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy to be a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of it being wound up, to be a fraudulent preference in respect of its creditors, and accordingly be held to be invalid.

Furthermore, any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

How is the liquidation process terminated?

A final meeting is held and the company is dissolved upon the termination of a liquidation process. As soon as the affairs of the company are fully wound-up, the liquidator shall prepare an account of the winding-up, showing how the winding-up has been conducted and the liquidator shall call a general meeting of the company for the purpose of laying the account before the meeting. On approval of the accounts by the members of the company, and within 7 days of such approval, the liquidator will send a copy of the accounts to the Corporate Affairs Commission. The Corporate Affairs Commission, on receiving the account shall register the accounts, and on the expiration of 3 months from the registration thereof, the company shall be deemed to be dissolved.

Director or officer liability Section

672 of CAMA provides for personal liability of any person, including directors, responsible for all or any debts or other liabilities of a company where in the course of winding up, it appears that the business of the company had been handled in a reckless manner or with intent to defraud creditors. Section 674 of CAMA provides for the power of the court to assess damages in respect of delinquent directors.

CONSEQUENCES OF DIRECTOR OR OFFICER LIABILITY

Civil Consequences

A director or officer of a company may be liable in damages for every act of default or failure to comply with the statutory obligations imposed on the director by CAMA.

Criminal Consequences

Nigerian law makes provisions for the imposition of criminal sanctions which give rise to either the payment of fines and/or imprisonment.

BUSINESS RESCUE/ADMINISTRATION

CAMA allows for business rescue and administration procedures. Under section 434 of CAMA, the directors of a company may make a proposal for a voluntary arrangement to ultimately preserve the company. The law also provides for the appointment of an administrator by

- an order of Court ;
- holder of a floating charge ; or
- the company or its directors

The objectives of the administrator include amongst others to rescue the company, achieve a better result for creditors

and realise property to distribute to secured or preferential creditors. The Act goes further to emphasize that the rescue of the company is the primary objective of the administrator in the performance of his functions, except where he is of the opinion that it is not reasonably practicable or a better result can be achieved for the company's creditors by pursuing some other course in order of priority as specified under section 444(2) of CAMA 2020.

Directors of a financially distressed company may also commence an arrangement and/or compromise pursuant to section 711 of CAMA. Section 717(1) places a moratorium on creditors' enforcement actions where the company has commenced a process of arrangement/or compromise with its creditors.

Business rescue/administration may be informal and could be based on an agreement between creditors and the debtor company. Such agreements may be, or may not be, filed with the Court but will usually involve negotiations between the parties. Business rescue/administration may take the form of an out-of-court debt restructuring involving a change to the composition and/or structure of the assets and/or liabilities of a company in financial distress, without resorting to a full judicial intervention and with the objective of restoring the growth of the company and minimising the costs associated with the company's financial problems.

INSOLVENCY PROVISIONS UNDER THE INVESTMENTS AND SECURITIES ACT (ISA) 2025

Application to Capital Market transactions

The Investments and Securities Act (ISA) 2025, which came into effect in March 2025, introduced targeted insolvency provisions for financial market infrastructures (FMIs) which include systemically important capital market participants, trade repositories, securities exchanges, central counterparties, central clearing houses, central securities depositories, and securities settlements systems. The provisions diverge from general corporate insolvency rules by modifying general bankruptcy laws to prioritize market stability during failures, ensuring trades are settled without chaos. Section 45 of the ISA 2025 explicitly modifies the application of insolvency laws to FMIs, exempting market contracts, clearing actions, and collateral transfers from general rules like priority payments.

By the provisions of Section 47 of the ISA 2025, no conflicting order can be made under any law dealing with bankruptcy in Nigeria in respect of the operations and activities of FMIs. This ensures that the rules and settlement processes of an FMI take precedence over general insolvency proceedings that might otherwise freeze or reverse financial transactions.

Furthermore, Section 49 of the Act mandates that any person in control of the assets of a defaulter (a person against whom an FMI has taken an action under its default arrangement) provide assistance including information, access to records, or other cooperation when an FMI requires same to manage risks or resolve a crisis in respect of its default proceedings.

Section 51 of the ISA 2025 prevents specific actions taken by financial market infrastructures (FMIs), like stock exchanges, clearing houses, and payment systems, from being challenged or reversed during insolvency or bankruptcy proceedings. The provision ensures that routine operations such as settling trades, processing payments, or enforcing collateral rules continue smoothly even if a participant goes bankrupt.

SECURITY

Types of securities

There are two broad categories of security available in Nigeria - personal security and real security.

Personal security, such as a guarantee, arises when a guarantor or the surety undertakes to answer for the present or future obligations of a debtor in the event of its default. Personal security is created by contract. Examples of personal security are guarantees, indemnities and a letter of comfort that is legally binding.

Real security, on the other hand, affords a creditor certain right over property which has been appropriated to meet the debt or other obligations of the debtor. Real security may be created by contract or may arise by operation of the law. In the former case, the security may take the form of a mortgage, charge, pledge and/or hypothecation, while in the latter case it takes the form of a general lien or right of set-off.

Taking of security

In Nigeria, security is taken for a number of reasons which include the following:

- the desire to make the business of money lending satisfy the needs of commerce and industry in terms of minimising the interest rate;
- from the creditor's viewpoint, the essence of real security is priority and the assurance of payment in the event of a debtor's death, bankruptcy or insolvency;
- avoidance of the challenges of initiating legal proceedings to enforce payment where the debt is unsecured or the security is only personal in nature;
- security is crucial if a lender is unwilling to rely solely on his debtor's personal credit for the discharge of the latter's obligations, but is desirous of having something more than a mere contractual remedy against a defaulting debtor; and

- the need for control in the sense that if a creditor takes security over a specific asset of the borrower, then the latter relinquishes exclusive control over the asset.

Security Trustees or Special Purpose Vehicles

It is uncommon for lenders in Nigeria to only take security over a Special Purpose Vehicle (SPV) without assets. What is achievable is a structure that involves a highly leveraged parent company setting up an SPV, usually a wholly owned subsidiary, as the borrower. The assets of the SPV are put up as security for lending. This is usually further enhanced by a guarantee from the parent company, secured by a charge on the shares of the parent company in the SPV and/or security from a sister company. Where the parent company targets an off-balance sheet financial transaction, the proceeds from projects and assets of the SPV can be used as security. There are also loan syndications by banks whereby a trustee is appointed by the lender to hold security on behalf of the lenders.

Most robust form of security

All assets, debentures, incorporating a charge on the fixed and floating assets of a company are considered robust forms of security. In addition, guarantees issued by local and international financial institutions are also commonly used to safeguard lending.

Registration of security

The registration requirements depend on the type of security. Generally, personal security is not required to be registered since it does not transfer any proprietary interest to the lender and notice to other prospective lenders is therefore unnecessary. With respect to real security, the registration requirements are based on its classification as illustrated below, namely where:

- the creditor obtains proprietary rights over the subject matter of the security but may not obtain possession of such property. An example of this is a legal mortgage or charge. A legal mortgage on land requires registration at the appropriate Land Registry where the land is located after obtaining the relevant consent from the particular authority to the mortgage transaction. Furthermore, if a company mortgages or charges its assets by way of a fixed or floating charge or a combination of them, registration is required at the Corporate Affairs Commission, which is the regulatory agency for corporate entities in Nigeria. In the case of the shares of a limited liability company, the mortgage or assignment must be filed with the particular company by way of notice, while in the case of companies quoted on the Nigerian Stock Exchange, in addition to notice to the company, the mortgage must be filed with the Central Securities Clearing System, a clearing agency in the Nigerian capital market. Finally, where a borrower intends to create a mortgage over personal chattels, a bill of sale is envisaged by statute and the document of transfer must comply with the provisions of the applicable bills of sale

regarding its form and registration. A bill of sale must be registered at the Bill of Sale Registry to be valid;

- the creditor does not obtain a proprietary right over the property, but rather the right to possession. Examples of this are possessory liens, rights of set-off, charges on specific credit balances and pledges. The law does not require registration for these security devices but such security clauses can be included in a substantive document such as a loan agreement/ charge on the fixed and floating assets of a company for filing at the Corporate Affairs Commission; and
- the creditor obtains neither a conveyance of title nor possession. This is generally referred to as non-possessory real security and examples are hypothecation, trust receipt and non-possessory liens which are generally not registrable. However, they could be registered in terms of the provisions of a substantive security as pointed out above.

The Secured Transactions in Moveable Assets Act 2017 (Collateral Registry Act)

The CRA affords Micro and Small Medium Enterprises (MSMEs) the opportunity of acquiring loans from financial institutions (financiers) with movable assets. Businesses without interests in landed properties or real estate can now approach financial institutions for loan facilities. Under the CRA, movable assets are to be registered at the National Collateral Registry (Registry), a body under the Central Bank of Nigeria with the responsibility of collating and registering all movable assets/collaterals, which are to be used to obtain loan facilities from iNS financiers. This purpose is to ensure that the interest of the creditor in this case, a financial institution, is secured against a reluctant borrower who might decide to abscond with the security earlier given.

The Registry also stores information on security interests created over movable assets and provides unrestricted access to persons or corporate bodies who may seek any information on the security interest. The secured creditor may perfect the security on the asset by filing the prescribed forms and provide other relevant information, which must be the particulars of the asset at the Registry.

The CRA allows the secured creditor to take physical possession of the security upon default or liquidation. The CRA also permits a secured creditor to attach all identifiable and traceable proceeds of the assets (collateral) of the obligor/debtor and not only the secured assets.

Stamp Duty

Section 4(1) and (2) of the Stamp Duties Act empowers the Federal and State Government to impose, charge, and collect stamp duties in different circumstances. The Federal Government has the sole authority to impose, charge and collect stamp duties in respect of documents relating to

matters between a company and an individual, group or body of individuals. Stamp duty is paid at the Stamp Duties Office of the Federal Internal Revenue Service. Stamp duty paid may be evidenced on a document in various forms as permitted by law which include adhesive stamps, postage stamps, impressed or embossed by means of a die stamp (i.e. plate tool or instrument). These impressions usually appear on the face of the document. Except where express provisions are made in the Stamp Duties Act (such as documents that must be stamped before execution e.g. insurance policies) any unstamped or insufficiently stamped instruments may be stamped within 40 days from its first execution. One exception to this rule is the case of instruments chargeable by ad valorem duty which has a time limit of 30 days. Some instruments attract duty at flat or fixed rate, while other instruments attract duties according to their value. It is not a different duty; it is another way of calculating the stamp duty that is owed.

Registration Costs

The registration costs are calculated in terms of the regulations issued by the Corporate Affairs Commission (CAC). The current 2025 Schedule of fees issued by the CAC provide that for public companies, private companies and companies limited by guarantee, the registration cost for charges is 25,000 or 0.35% of the amount secured by the charge whichever is higher. Furthermore, under the Schedule of fees, the cost for the registration of accredited agents/ professionals is N10,000.00, while the cost for the registration of insolvency practitioners is N50,000.00.

Requirements for Assignment or Transfer of Security

The consent of the parties to the secured transaction will ordinarily be required for security to be transferred together with the notification of the relevant parties and relevant registry's office.

Instances in Which Securities Might Be Vulnerable to Attack

If security is taken in breach of any applicable rules or regulations or if it is not perfected, it may be attacked and in turn set aside. The failure to register a deed of charge with the Corporate Affairs Commission within 90 days after its creation would render the charge void and the debt becomes payable immediately. Furthermore, the failure to obtain the governor's consent for a legal mortgage as well as compulsory acquisition of a mortgaged property by the Government may also render one's security liable to be set aside.

Methods of enforcement of security

The methods for the enforcement of security depend on the nature of the security taken—that is, whether it is personal or real security. Personal security enforcement requires Court action for the realisation of the security and the recovery of

the debt that such security secures. However, if the security is real, enforcement may not require Court action where the contract creates a legal interest as against an equitable interest. In the case of real security that creates a legal interest, the assets secured can be realised by the lender by complying with the terms and conditions stipulated in the security document which will ordinarily not include obtaining a judicial order for sale.

Some of the methods of enforcement of security are:

- foreclosure in the case of a legal mortgage on land following an application to the Nigerian Courts;
- taking possession of the mortgaged property;
- appointing a receiver or manager for the company to release the security and pay the debt secured by the security;
- sale of the mortgaged or charged property with the consent of the Court or without the consent of the Court in the case of a legal mortgage;
- set-off;
- appropriation in relation to security over bank accounts; and
- a petition for the winding up of the company in the case of an equitable charge or an unsecured credit transaction.

Problems experienced when enforcing security

The technical legal problems experienced when executing judgments and Court orders are:

- frivolous injunctions filed by debtors to delay enforcement;
- delays experienced in the administration of justice through protracted legal proceedings;
- stay of execution of judgments or appeals to a higher Court by a judgment debtor;
- inadequate documentation of the secured credit transaction and ambiguities in the security instruments which may jeopardise any recovery action;
- defence of excessive and unreasonable interest charges by banks;
- failure by a bank to comply with the conditions precedent to enforcement as may be specified in the security document;
- the defence of lack of capacity on the part of the borrower and the failure to obtain corporate approvals for borrowing; and
- problems experienced in resolving competing claims arising from the multiple registration of security instruments.

Financial assistance requirements

There are no statutory requirements for financial assistance in Nigeria. The following factors are, however, considered amongst others, before a company grants financial assistance to another company, namely:

- the viability of the business;
- the availability of security for the loan or assistance;
- the ability to repay the loan or financial assistance; and

- applicable laws and regulations related to the granting of loans or security which include directives from the Central Bank of Nigeria and legislation passed by the National Assembly.

On a related point, financial assistance provided by a company for the acquisition of its own shares is prohibited. CAMA prohibits a company or any of its subsidiaries from giving any financial assistance to a person for the acquisition of shares in the company. There are however certain exceptions which include:

- lending in the ordinary course of business; and
- loans to employees, except for directors, to enable them to purchase fully paid-up shares of the company or its holding company in their own right.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognise a foreign judgment

There are two federal laws that are relevant for the recognition and enforcement of foreign judgments - namely, the Reciprocal Enforcement of Judgments Act, 1958 and the Foreign Judgments (Reciprocal Enforcement) Act, Cap. F 35, Laws of the Federation 2004.

The Reciprocal Enforcement of Judgments Act, 1958 (the 1958 Ordinance) deals with the registration of judgments obtained in Nigeria and the United Kingdom and other parts of Her Majesty's dominions and territories. It is pertinent to note that the Foreign Judgments (Reciprocal Enforcement) Act (the 2004 Act) did not specifically repeal the 1958 Ordinance. The 1958 Ordinance and the 2004 Act have separate spheres of application. While the 1958 Ordinance applies to Commonwealth countries, the 2004 Act applies to judgments in respect of which the Minister of Justice has made an order to that effect pursuant to section 3(1) of the Foreign Judgments (Reciprocal Enforcement) Act. Such an "order", however, can only be made to cover a country which offers reciprocal treatment to the judgments of Nigerian Courts.

Requirements for recognition of a foreign judgment

According to the Foreign Judgments (Reciprocal Enforcement) Act, a judgment must meet the following conditions to be enforceable in Nigeria:

- pronounced upon by a superior Court of the country of origin;
- it must be a money judgment;
- It must be a final and conclusive judgment. The onus to prove this rests on the party who asserts the claim;
- can be in respect of arbitral awards; and
- can be in respect of judgments given in criminal proceedings for the payment of money in respect of compensation or damages.

Requirements for the recognition of a foreign trustee, business rescue practitioner or insolvency practitioner

Existing legislation on insolvency in Nigeria does not provide for recognition of a foreign trustee. Section 705 provides for the qualification of an Insolvency Practitioner. CAMA 2020 defines an insolvency practitioner to be "a legal practitioner within the meaning of the Legal Practitioners Act or a member of the Institute of Chartered Accountants of Nigeria or such other professional bodies of accountants as are established by an Act of the National Assembly."

Section 443 of CAMA 2020 provides for appointment of an administrator (business rescue practitioner). It goes further to state in section 444 that an administrator has the primary function of rescuing the company, the whole or any part of its undertaking, as a going concern except where he is of the opinion that it is not reasonably practicable or a better result can be achieved for the company's creditors by pursuing some other course in order of priority.

Under the administration procedure for business rescue, the law provides that where an administrator is appointed out of Court and it is an administration that has a cross-border element, an application ex parte shall be made to the Court for approval.





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REPUBLIC OF GUINEA | THIAM & ASSOCIÉS

GENERAL INFORMATION ABOUT THE COUNTRY

The Republic of Guinea is a country in West Africa with soil and subsoil rich in natural resources such as iron, diamonds, and gold. It holds one-third of the world's bauxite reserves.

COUNTRY INFORMATION

Guinea is a constitutional presidential republic. Following the general elections held on December 28, 2025, and the inauguration of President Mamadi Doumbouya on January 17, 2026, executive power is vested in the President of the Republic, who serves as the Head of State for a seven-year term. The President appoints the Prime Minister, who acts as the Head of Government. The government is responsible for implementing any national policy and is accountable to both the President and the National Assembly.

POLITICAL SYSTEM

The political system is a multi-party representative democracy under the Fifth Republic. The transition period that began in September 2021 concluded with the installation of the newly elected civilian administration in January 2026. The political landscape is now governed by the new constitution, which ensures the separation of powers between the executive, legislative and judiciary branches of government. This return to constitutional order has solidified Guinea's institutional stability and its international standing.

LEGAL SYSTEM

The legal system is based on French civil law and customary law. Law L/2015/019/AN on the judicial organization of the Republic of Guinea governs the Guinean judicial system. It is organized into two branches: ordinary courts and special courts.

Ordinary courts:

- 24 Courts of First Instance (TPI);
- 2 Courts of Appeal (Kankan and Conakry);
- 12 Justices of the Peace (a traditional system of dispute resolution at the village and local level, to be transformed into TPI); and
- the Supreme Court.

Special courts:

- the Court of Auditors;
- the Commercial Court;
- the Military Court (for criminal cases involving military personnel);
- Children's Courts (one per PCT, except for the special zone of Conakry, which has only one for its three PCTs);
- Labor Courts; and
- the State Security Court.

In addition, the Court for the Suppression of Economic and Financial Offenses (CRIEF) judges economic and financial crimes.

The Criminal Code guarantees the presumption of innocence, equality of citizens before the law, the right to a lawyer, and the right to appeal.

INSOLVENCY CRITERIA

What are the criteria for insolvency (i.e., liquidation)?

Guinea is a member of the Organization for the Harmonization of Business Law in Africa (OHADA). Collective insolvency proceedings are therefore governed by the Uniform Act on Collective Debt Settlement Procedures (AUPC), as amended on September 10, 2015.

According to this act, these proceedings are open to any debtor in the event of cessation of payments, i.e., when a company can no longer meet its debts with its available assets, excluding situations where credit reserves or payment terms granted to the debtor by its creditors enable it to meet its current liabilities.

In addition, the competent court opens liquidation proceedings when:

- The debtor has not proposed a serious judicial settlement with its creditors, or if such a settlement appears doomed to failure; or
- A total transfer of the company is impossible.

What are the criteria for financial difficulty (reorganization or administration)?

According to the AUPC, a judicial reorganization procedure may be opened when a debtor is in a situation of cessation of payments. The competent court opens this procedure:

- If the debtor has proposed a serious judicial settlement or if it is likely that such an agreement can be reached, or
- If a total transfer of the business is possible.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

There are two formal procedures:

1. **Judicial reorganization:** reserved for viable companies and intended to put a debtor back in charge of their business.
2. **Liquidation of assets** – intended for economically unviable companies. The assets are then used to pay off the liabilities.

Formal restructuring procedures

Two preventive measures are provided for by the AUPC:

1. **Conciliation** – aimed at reaching an amicable agreement with the main creditors to resolve financial difficulties.
2. **Preventive settlement:** a collective procedure aimed at avoiding cessation of payments through a preventive composition plan.

Informal procedures

There are no informal insolvency or restructuring procedures commonly used in Guinea.

LIQUIDATION

Purpose of liquidation

The purpose is to allocate the assets of the debtor company in bankruptcy to settle payments whose situation is irretrievably compromised and clear its liabilities.

Procedure for initiating liquidation

The debtor company must declare its insolvency to the competent court (the court of the debtor's registered office or domicile) within 30 days of its occurrence. If the court finds that it is impossible to continue the business, it will order liquidation.

Start of liquidation

It begins on the date on which the competent court issues a winding-up order.

Duration of the liquidation process

The court sets a maximum period of 18 months for the conclusion of the proceedings. A single extension of 6 months is possible, subject to a reasoned decision after hearing the liquidator.

Role of the court

The court plays an essential role in the administration, appointment of liquidators, and settlement of disputes related to the proceedings.

Management of the company during liquidation

The debtor is relieved of all management or disposal of its assets. The liquidator alone exercises all acts, rights, and actions on behalf of the debtor. The liquidator is remunerated, civilly liable, and must act **independently**.

Filing of claims

Once liquidation has been declared, the creditors form a union. A legal period of three months is observed, during which no individual action may be taken. After that, creditors with guarantees may resume their rights of action if the liquidation has not been completed.

Factors influencing the duration of liquidation

Several factors may prolong the procedure, including:

- The conduct of the judicial or extrajudicial bodies responsible for managing the liquidation;
- The measures necessary to protect and identify assets; and
- The identification of creditors and the verification of their claims.

Effects of liquidation on employees

Claims arising from employment or apprenticeship contracts benefit from super-privileged status.

The liquidator, upon a judge's decision, pays these claims as a priority within 10 days of the decision to open liquidation after deducting any advances already paid. In the absence of available funds, payment is made from the first receipts before any other fees.

Effects of liquidation on contracts

The opening of liquidation does not automatically terminate existing contracts.

The liquidator may, at his sole discretion, require the performance of these contracts. If the contract is maintained, the other party is required to fulfill its obligations despite the debtor's previous defaults.

The creditor may give the liquidator formal notice to obtain a response on whether or not the contract will continue. The liquidator has one month to respond. Failure to respond shall constitute termination.

Effects on shareholders

Shareholders are only remunerated after all creditors have been paid. They then receive any remaining balances.

Effects on creditors

The **order of payment** depends on the status of the creditor (secured or unsecured).

If there are sufficient assets, all creditors are paid in full. Otherwise, payment is made according to priority.

Effects on outstanding shares, litigation, and Arbitration

Claims for property may only be brought or resumed if the legal deadlines and formalities have been complied with.

Claims recognized by the liquidator, the bankruptcy judge, or the court must be settled within three months of:

- the resumption or initiation of the action;
- or the acceptance of the claim by the court.

The liquidator may settle or withdraw from any proceedings in progress.

Acts that may be set aside

The court may set aside:

- Any transaction entered into before the opening of the liquidation; or
- Any unlawful act.

The judge sets a time limit for determining the operations that caused the company's difficulties. Acts prejudicial to creditors may be declared null and void.

Closure of liquidation

Liquidation ends:

- When there are no more debts and the assets have been distributed;
- If there are no more assets to be liquidated;
- Or when the liabilities are extinguished.

A court decision confirms the closure, followed by an official publication.

Liability of directors

Directors may be held jointly or severally liable to the company or third parties:

- In the event of a breach of laws, regulations, or articles of association; and/or
- In the event of mismanagement.

Civil and criminal penalties

- Civilly, they may be ordered to contribute to the liabilities or to reconstitute the assets;
- Criminal penalties include prosecution for bankruptcy, misappropriation of assets, falsification, or fraudulent maneuvers, with sentences ranging from 5 to 10 years in prison.

BUSINESS RESCUE/ADMINISTRATION

Steps to initiate reorganization or judicial administration

The competent court is asked to assess:

- The economic and financial situation of the company;
- The prospects for reorganization; and
- The possibility of settling liabilities through a preventive composition plan.

The judge appoints:

- One or more judicial administrators (maximum 3);
- An expert; and
- One or more auditors (maximum 3).

The judge gathers all the necessary information, may hear the debtor, its managers, employees, creditors, or any other person concerned, and rules on disputes within its jurisdiction.

The public prosecutor is informed of the progress of the proceedings and may request the disclosure of any documents relating to the proceedings.

When do the proceedings begin?

The proceedings begin when:

- The company is in difficulty, but not irretrievably compromised;
- The debtor declares cessation of payments; and
- It proposes a composition plan at the time of the declaration or within 60 days of the opening of the proceedings.

The court declares the proceedings opened within 30 days if it finds that:

- The cessation of payments is effective; and
- that the proposed plan is fair.

Duration of the procedure

- Initial duration: 6 months; or
- Possible extension: 3 additional months (once only).

Role of the court

The court plays a central role:

- It sets the date of insolvency;
- It opens the reorganization procedure;
- It may appoint a judicial representative; and
- It appoints the bankruptcy judge, experts, administrators, and auditors.

Management of the company during the procedure

Between the opening judgment and:

- Either the approval of the composition plan;
- Or conversion to liquidation.

The debtor (including the board of directors) is assisted by the judicial administrator in any act of disposal or essential management decision.

However:

- the debtor may perform acts of preservation and day-to-day management alone, provided that he reports to the administrator;
- Acts of disposal require the mandatory assistance of the administrator.

Declaration of claims

Two legal publications inform creditors.

Creditors must declare their claims to the insolvency administrator:

- Within 60 days (local creditors); or
- Within 90 days (creditors outside the jurisdiction).

Factors that may delay the procedure

Disputes between the bodies involved in the procedure or between creditors may extend the duration of the reorganization.

Financing during the procedure

Several options are available:

- Capital increase;
- Partial or total sale of assets
- Discontinuation of unprofitable activities;
- Redundancies in accordance with labor law; or
- Partial or total transfer of the business.

NB: Guinean law does not provide for public aid for business rescue.

Effects on employees

All contracts signed before the proceedings were initiated are maintained.

However, they may be terminated on economic grounds.

Effects on contracts

Contracts signed before the proceedings were initiated remain in force unless they are terminated under the conditions provided for.

Effects on shareholders

Shareholders remain involved throughout the process.

In accordance with the articles of association, they remain liable for debts up to the amount of their contributions.

Effects on creditors

Creditors may not take individual action against the company during the proceedings.

Pending actions, disputes, Arbitration and moratorium

All pending legal actions are maintained.

The court may grant a moratorium to allow the parties to reach an agreement with an expert report within two months of the start of the proceedings.

REORGANIZATION PLAN/ADMINISTRATION

Reorganization plan (administration plan)

An administration plan is drawn up and must detail:

- The situation of the company;
- The formalities already completed;
- The transactions concluded; and
- And the expected results if the business were to continue.

Vote on the plan

The plan is adopted if a majority of creditors, representing at least half of the total amount of claims, support it.

Cram down

Once approved by the required majority, the plan is imposed on all creditors, even those who voted against it or abstained. Implementation of the plan

The plan is implemented according to the terms of the approved composition.

Extinction of debts

The competent judge may, where appropriate, order the distribution of funds among creditors in accordance with the plan.

Effects on guarantors

The rights of guarantors are generally not addressed in recovery plans.

How does the process end?

The process ends when:

- The company can resume its activities usually after implementation of the plan; or
- if the plan fails, the company is then placed in liquidation

Status of the company after recovery

If an agreement is approved, its provisions are enforced by the judge for a maximum of three years.

Liability of directors

The civil and criminal liability of directors applies, as indicated in the section on liquidation:

- Civil liability for mismanagement or breaches of the articles of association; and
- Criminal liability in the event of fraud or bankruptcy

SECURITY

Types of securities

In Guinea, there are two types of security:

- 1. Personal security:** commitments made by one or more persons in favor of a third party to guarantee a debtor's obligation (e.g., surety, independent guarantees, or counter-guarantees);
- 2. Real security:** relating to tangible or intangible assets (movable or immovable).

Forms provided for by law

1. The surety

A contract by which a person (the surety) undertakes to a creditor to perform the obligation of the debtor if the latter fails to do so.

2. The independent guarantee and the independent counter-guarantee

Commitment is whereby the guarantor undertakes to pay an agreed sum to the beneficiary upon simple request by the latter.

Natural persons may not enter into these guarantees and must be established in writing; otherwise, they are null and void. They constitute independent commitments.

3. The privilege

When a creditor legitimately holds movable property, they may retain it until their claim has been paid in full, even if other securities exist (unless there is a prior privilege).

The privilege only applies if the debt is certain, liquid, and due.

4. Retention of title or transfer as security

The seller may retain ownership of the movable property until the secured debt has been paid in full.

The retention of the title clause must be set out in writing on the date of delivery. Otherwise, it is void.

5. Pledge of tangible property (pledge)

A contract whereby the grantor gives the creditor the right to be paid from present or future tangible movable property belonging to the company.

The pledge agreement must be in writing and specify:

- The secured claim;
- The assets concerned; and
- Their nature or type.

Otherwise, it is null and void.

6. Pledge of intangible assets

This type of pledge relates to present or future intangible assets, such as:

- Claims;
- Bank accounts;
- Social rights;
- Business assets; and
- Intellectual property rights.

7. Mortgage

A security interest in real estate, whether built or unbuilt, including improvements and appurtenances.

The mortgage must be registered in accordance with the national legislation of the place where the property is located and must be published.

Security interest

The security may be constituted:

- By **agreement** between the parties; or
- By **court order**.

The most solid form of security for lenders

The mortgage is the most robust form of security available to creditors.

Fiduciary transfer of security

This is the fiduciary transfer of a sum of money whereby a grantor transfers funds to secure an obligation.

Registration fees

- Stamp duty is applicable in Guinea;
- The security is registered with the Registre du Commerce et du Crédit Mobilier (RCCM);
- No legal rate is set; the cost is determined on a flat-rate basis by the chief clerk; and
- The security instrument is registered with the tax authorities for a fee of 1% to 2% of the value of the instrument.

Assignment or transfer of a security

A new registration is required for the transfer or assignment to be valid.

Attacks on securities

Neither third parties nor the State may attack or challenge a security validly created in Guinea.

Enforcement of security

Enforcement is effected:

- Either by the sale of the secured assets, with the authorization of the court; or
- by a legal action to have the assets handed over to the beneficiary.

The **proceeds of the sale** are used to settle the secured debts. Any **surplus** shall revert to the debtor.

Practical problems of enforcement

Enforcement may be slowed down by:

- Legal delays in obtaining orders; and/or
- The slowness of enforcement proceedings before Guinean courts.

Requirement for financial assistance

There are no specific requirements for financial assistance in Guinea.

RECOGNITION OF FOREIGN JUDGMENTS

In what cases does a Guinean court recognize a foreign judgment?

The territorially competent Court of Appeal (in the area where the judgment is to be enforced) has sole jurisdiction to recognize and enforce a foreign judgment.

Conditions for recognition of a foreign judgment

The following conditions must be **met** for a foreign judgment to be recognized in Guinea:

- It must not be contrary to Guinean public policy;
- It must have acquired the force of *res judicata* under the law of the country of origin;
- The documents establishing the judgment must be authentic;
- The rights of defense must have been respected; and
- The foreign court must have had jurisdiction to hear the case.

Recognition procedure

For a foreign judgment to be recognized, an **application for recognition** must be filed with the competent court.

This application must be accompanied by:

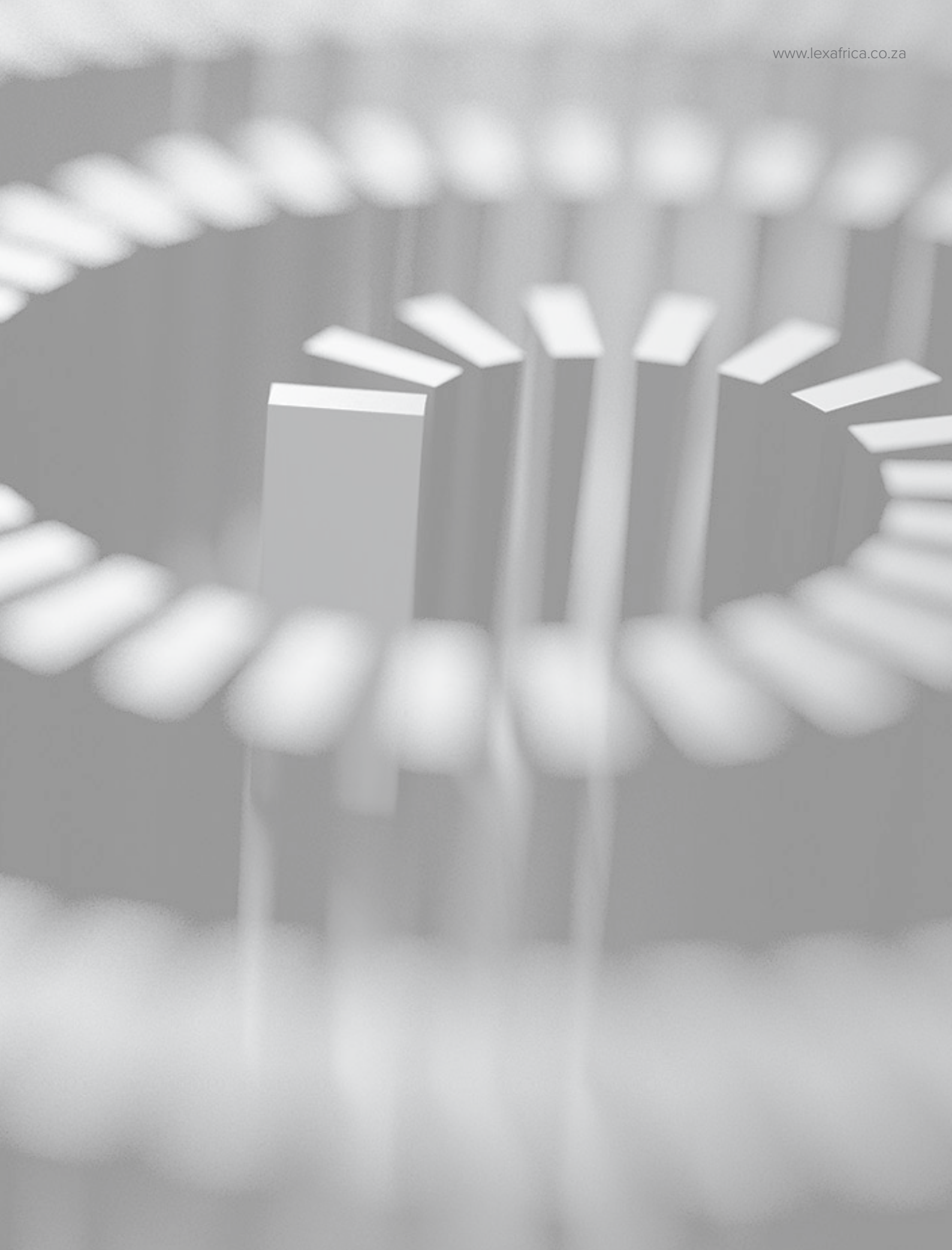
- A certified copy of the decision to open the foreign collective proceedings, as well as the appointment of the foreign representative;
- A certificate issued by the foreign court attesting to the opening of the proceedings and the appointment of the representative; or
- any other evidence of the opening of the proceedings and the appointment of the representative, accepted by the Guinean court.

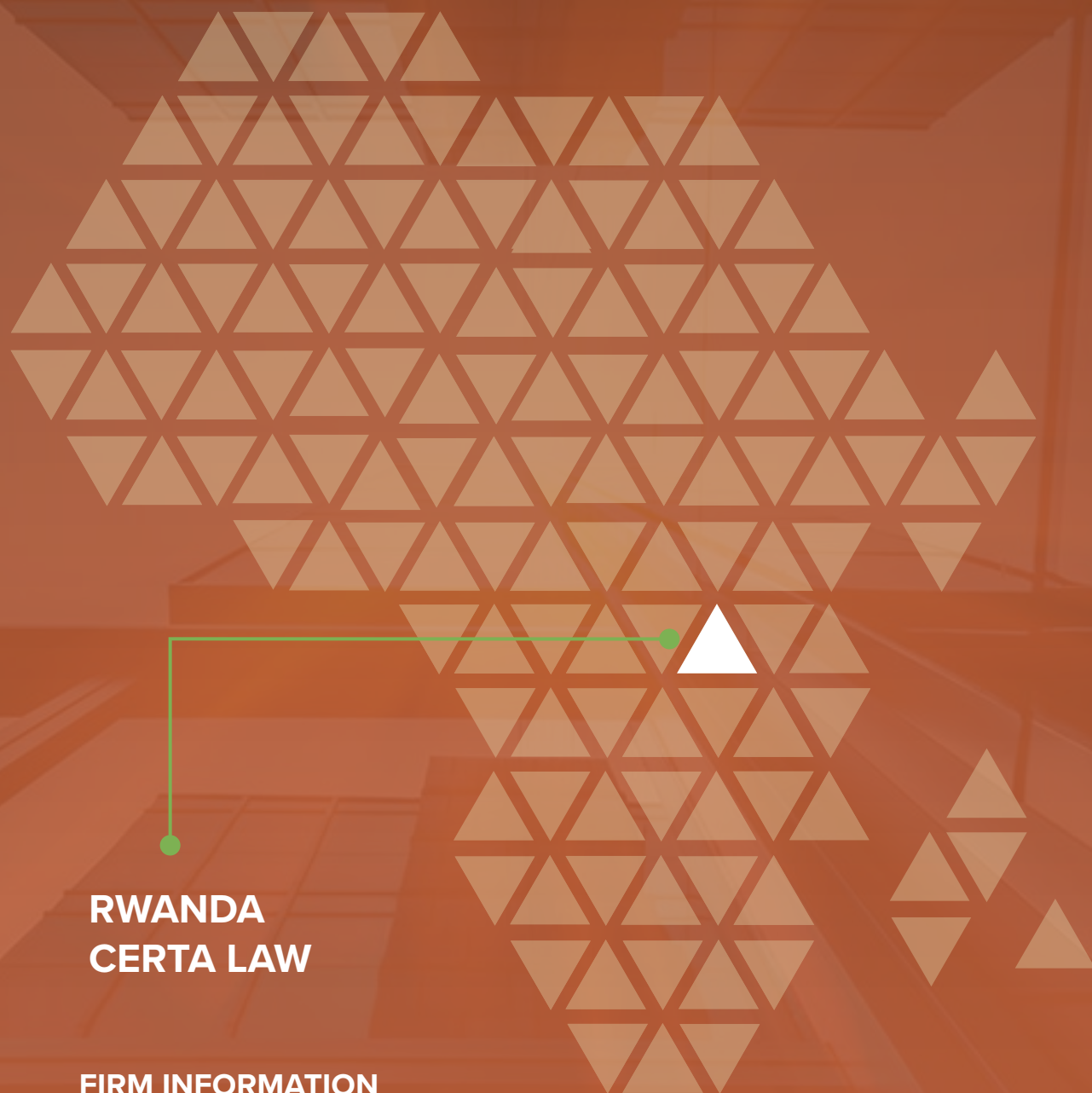
Required language

All documents must be written or translated into French.

Recognition of an administrator, insolvency practitioner, or foreign representative

Guinean law is **silent** on this subject: there are no specific provisions concerning the recognition of these foreign actors in insolvency proceedings.





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RWANDA | CERTA LAW

COUNTRY INFORMATION

Rwanda is a country situated in Central Africa, bordered to the North by Uganda, to the East by Tanzania, to the South by Burundi, and to the West by the Democratic Republic of Congo. The following are details relating to the country.

Name: Republic of Rwanda
 Capital City: Kigali
 Currency: Rwandan Francs (FRW)
 Time Zone: UTC +2 (Central Africa Time)
 Altitude (Above sea level): 1000m - 4500m
 The total surface area is 26,338 Km²
 Temperature: 21°-27°
 The lowest point: 950 m
 The highest point: 4,507m
 Population density is estimated to be 578 - 604 people per km².
 Life expectancy: 68.2 years
 GDP per capital (Nominal): \$1,028 - \$1,070
 GDP growth per annum: 7.5% – 8%

POLITICAL SYSTEM

Rwanda is an independent, sovereign, democratic Republic led by the President of the Republic who is also the Head of State. The President of the Republic is the defender of the Constitution and the guarantor of national unity. The President of the Republic is elected for a five (5) year term and may be re-elected once. Rwanda is a multiparty republic.

The Government of Rwanda has three branches: the executive, the legislature, and the judiciary. The three branches are separate and independent from each other but are all complementary. The Cabinet is composed of the Prime Minister, Ministers, State Ministers, and other members who may be determined by the President of the Republic where deemed necessary. The Cabinet implements national policies agreed upon by the President of the Republic and the Cabinet meeting. It is accountable to the President of the Republic and the Parliament.

Legislative power is exercised by a bicameral parliament, which consists of the Chamber of Deputies and the Senate. Deputies serve five-year terms. About two-thirds are directly elected. The rest of the deputies are indirectly elected: two are elected by the National Youth Council; one is elected by the Federation of the Association of the Disabled; and the remaining seats are allocated to female representatives elected by local government bodies.

The judiciary of Rwanda is composed of Ordinary and Specialized Courts and is entrusted with the mission of protecting rights and freedom. Rwanda's Judiciary is independent and exercises financial and administrative

autonomy. The judiciary is under the authority of the High Council of Judiciary, which is chaired by the Honorable Chief Justice who is also the President of the Supreme Court. Each court is led by a President. The courts are supported by the Administration staff under the Secretary General's Services

LEGAL SYSTEM

The Rwandan legal system is a structured framework rooted in the Constitution of the Republic of Rwanda of 2003, which underwent significant revision in 2015. The system follows a formal legislative process where laws are adopted by the Parliament (specifically the Chamber of Deputies) and are subsequently sanctioned and promulgated by the President of the Republic.

A defining characteristic of Rwanda's modern legal evolution represents a particularly interesting case of post-conflict legal evolution, having transformed from a purely civil law framework into an innovative hybrid system that deliberately incorporates civil law, common law, and traditional elements. This evolution reflects both practical necessity and Rwanda's intentional effort to construct a legal system suited to its unique circumstances.

Rwanda's legal system was established during colonization under German rule (1899-1918) and then Belgium (post-World War I through independence in 1962), which meant it was historically grounded in German and Belgian civil law traditions. The system was based on German and Belgian civil law models along with customary law. Like other civil law systems, this approach emphasized comprehensive legal codes developed by legislators, with courts applying these codes rather than creating binding precedent through case law.

A foundational moment came with the adoption of a new Constitution in May 2003, which established the supreme law of the land and declared that any law or custom in conflict with it was invalid. The 2003 Constitution emphasized rule of law, human rights, and equality before the law. This document triggered a wave of legal reforms, including modifications to the penal code, criminal procedure, law of evidence, and numerous other statutes designed to align with constitutional principles.

Central to this transformation has been the adoption of common law practices that were previously foreign to Rwanda's civil law tradition. Most notably, in a major step toward integrating common-law practices, Rwanda introduced the use of precedent. This represents a fundamental conceptual shift: rather than treating judicial decisions merely as applications of written law, Rwanda's courts now recognize that precedent—the doctrine of stare decisis—can guide future judicial decisions. Notably,

Rwanda's courts now publish jurisprudence (case law). The Supreme Court's website provides access to judicial decisions, marking a significant departure from civil law tradition where such accessibility was less emphasized.

What distinguishes Rwanda's evolution is that it was not accidental but intentional. In 2019, Rwanda became the first former colony to repeal all colonial-era laws and adopting a hybrid legal system. New legislation follows common-law principles, especially in Commercial/Corporate Law. Another significant driver of this shift came through Rwanda's joining the Commonwealth in 2009, after which the country gradually shifted its legal system towards a hybrid system comprising aspects of both common law and civil law.

Rwanda's hybrid approach is further enriched by the integration of traditional dispute resolution mechanisms. Rather than attempting to replace these with purely Western legal frameworks, Rwanda examined homegrown legal and justice approaches, such as Gacaca, Abunzi, and Imihigo, introduced to deal with legal problems that could not be dealt with using the western legal system in post genocide Rwanda. Gacaca courts operated as community justice mechanisms for lower-level genocide-related crimes, while Abunzi committees serve as local conflict resolution bodies in contemporary Rwanda, and Imihigo represents a system of community-based performance contracts.

This hybrid system allows Rwanda to benefit from multiple legal traditions simultaneously. The civil law foundation provides systematic, comprehensive legal codes accessible to citizens. Common law elements enable flexibility, judicial innovation, and responsiveness to novel legal problems. Traditional mechanisms ensure cultural legitimacy and accessibility for rural populations. Together, they create a legal framework intentionally designed for post-conflict reconciliation, economic development, and regional integration (particularly with East African Community and Commonwealth standards).

Rwanda's modernized legal system also interact effectively with global jurisdictions. The framework provides for direct communication and cooperation between Rwandan courts and foreign judicial or administrative authorities. This includes the ability to recognize foreign proceedings and grant relief based on decisions made in foreign states, which reflects a shift toward international legal harmonization.

TESTS FOR INSOLVENCY

DISTRESS

What are the tests for insolvency? (i.e., liquidation)

Under Rwandan law, insolvency is tested through both cash flow and balance sheet criteria.

According to Article 7, insolvency proceedings commence when: "1° the debtor is unable to pay its debts when they fall due in the normal course of business; 2° the assets of the debtor are less than its liabilities plus its stated capital".

What are the tests for financial distress in insolvency? (i.e., business rescue or administration)

While "financial distress" is not explicitly defined as a standalone term, the test for initiating Provisional Administration under Article 42 requires proof that "there is reason to believe that the company is or will be unable to pay its debts". For Reorganization, Article 84 requires a certificate "certifying that there is a reason to believe that there is a prospect for rescuing the business".

FORMAL AND INFORMAL PROCEDURES

Formal insolvency procedures

The Law provides for two primary formal insolvency (terminal) procedures:

- **Liquidation of companies and partnerships:** The process of collecting, realizing, and distributing assets of an insolvent entity (Article 102). A company is put into liquidation by the appointment of a liquidator. A liquidator must be an insolvency practitioner.
- **Bankruptcy:** Specifically for the insolvency of individuals, (Article 166). The court makes a bankruptcy order in respect of an individual by the appointment of a trustee who must be an insolvency practitioner. The court appoints a trustee if the individual is unable to pay his or her debts. The bankruptcy commences and takes effect on the date on which the trustee consents in writing to the appointment.

Formal restructuring procedures

Formal restructuring mechanisms include:

- **Administration:** A process where a practitioner manages assets to ensure company survival or better realization for creditors (Article 60). An administration commences to be executed within the period provided for by the administration deed. An effective administration of a company commences upon approval of administration deed and it must be executed within the prescribed period. The appointment of the administrator takes effect on the execution of the administration deed.
- **Reorganization:** A court-supervised rescue process based on a formal plan (Article 84). The application for reorganization of a company must include a certificate signed by the applicant certifying that there is a reason to believe that there is a prospect for rescuing the business. Any person who is likely to be affected by the application for reorganization of a company is notified of such an

application. Persons who may apply for re-organization include a debtor, directors of a company, a creditor, the Registrar General and the regulatory authority.

a. Compromise with Creditors: A proposal for restructuring debts between a company/partnership and its creditors (Article 31). The persons who have the power to propose a compromise plan include a debtor, insolvency practitioner and a company's or partnership's creditor. The plan must contain all information relating to the basis and its effects, which must be considered by the creditors during examination and for its confirmation. The compromise order is binding and has to be communicated to each known creditor and the general public (art. 24 & 39). A Supervisor is appointed, and the Registrar General is informed of each step of the process.

b. Debt Arrangement by an Individual: A proposal by an individual debtor to restructure debts, approved by the court (Article 15 & 16). A debtor may make a proposal for an arrangement with one or more of his or her creditors in respect of the payment or restructuring of his or her debts. The arrangement is approved by the court on application made by a debtor or trustee. A debtor's proposal for arrangement with creditors must state why, in the debtor's opinion, an arrangement with creditors is desirable. The arrangement order is binding and has to be communicated to each known creditor and the general public (art. 24 & 39). A Supervisor is appointed and the Registrar General is informed of each step of the process.

Informal Insolvency or Restructuring procedures.

The Law acknowledges "voluntary mechanisms used by a company, a partnership or an individual to avoid insolvency" under Article 2(1st). These often-private negotiations may later be formalized through a Compromise (Article 31) or Administration Deed (Article 57).

LIQUIDATION

Aim of liquidation

As per Article 113, the liquidator's primary duties are to collect, realize and distribute assets or the proceeds of the assets of the company; to take custody and control of all the company's assets; to keep the company's money, separate from other money which he or she holds or is under his or her control. Liquidation is also meant to keep, in accordance with generally accepted accounting procedures and standards, full accounts and other records of all receipts, expenditure and other transactions relating to the company and retain the accounts and records of the liquidation of the company for not less than ten (10) years after the liquidation ends. Finally, to permit the accounts and records of the company to be inspected by any committee of inspection, unless the

liquidator believes on reasonable grounds that inspection would be prejudicial to the liquidation or to be inspected by any creditor or shareholder if the court so orders.

How liquidation is commenced (overview)

Liquidation can be initiated in three ways under Article 103: First, by shareholders by a special resolution, secondly by the directors or any other person, if the company's incorporation document requires or permits, and by the court.

Commencement of liquidation

Article 102 states that a company is put into liquidation by the appointment of a liquidator and the process commences on the date of appointing a liquidator.

Duration of the liquidation process

The Law does not set a hard deadline for completion but requires interim reporting. Article 111 mandates a report after the end of each period of six (6) months following the commencement. The process concludes when the liquidator delivers a final report and accounts to the Registrar General (Article 109).

Role of the court

The court has broad supervisory powers under Article 134, including the ability to "give orders in relation to any matter arising in connection with the liquidation," "confirm, reverse or modify any act or decision of the liquidator," and "fix the remuneration of the liquidator".

Management of the company during liquidation

Upon commencement, Article 107 stipulates that "the liquidator takes custody and control of the company's property" and "the company's officers remain in office but cease to have any powers... other than those required or permitted to be exercised by this Law".

Filing of claims

Article 207 states that "an unsecured creditor may make a claim without formality" unless a formal claim is required, in which case they must "submit a claim verified by statutory declaration setting out full particulars". The liquidator (Article 209) verifies claims.

Factors influencing the duration of liquidation

Factors include the complexity of realizing assets, the duration of reporting periods (Article 111), and any delays in resolving "disputed claims" or "claims of uncertain amount" (Articles 198, 205).

Effects of liquidation on employees

As per Article 14, all contracts of employment or labor legislation must be observed during the insolvency proceedings. Unpaid wages for up to six months are ranked as preferential claims under Article 212(5°).

Effects of liquidation on contracts

Article 14 allows the liquidator to “terminate a contract which has not been fully performed by both parties,” making the counterparty an unsecured creditor for damages. Additionally, Article 116 permits the liquidator to “disclaim any onerous property,” including unprofitable contracts.

Effect of liquidation on shareholders

Under Article 107(4°), “no share of the company may be transferred” and “no shareholder may be allowed to exercise any power under the company’s incorporation document” without liquidator consent.

Effect of liquidation on creditors

Execution against assets is stayed. Article 107(3°) states: “no enforcement of court order, other legal process may be commenced or continued... except with the liquidator’s written consent or with the order of the court”. However, this does not affect the right of a secured creditor to take possession of and realize any property.

Effect on pending claims, litigation and arbitration

Such claims are generally stayed under the general effects of commencement (Article 11) which includes “the commencement or continuation of individual actions or proceedings concerning the debtor’s assets”, as well as the execution of judgments related to the assets of the debtor’s property

How is the liquidation process terminated

Liquidation is complete when the liquidator delivers to the Registrar General a final report, final accounts, and a statement confirming all assets are realized and proceeds distributed (Article 109).

Director/member and officer obligations and liability

Directors and Officers have a duty to discover fully and truly, to the liquidator all the property of the company and details of the disposal of any property by the company other than in the ordinary course of business. They also deliver to the liquidator in accordance with the liquidator’s directions all property of the company in or under his or her custody or control (Article 117).

Civil consequences

Directors may be ordered to repay money or restore property if found liable for “misappropriation” or “breach of trust” during insolvency proceedings (Article 219).

Criminal consequences

Offenses include “absconding and appropriating assets” (Article 264), “failure to keep proper accounts” (Article 266), and “misappropriation” of property (Article 269). Penalties include imprisonment and fines - imprisonment for a term of not less than six (6) months but not exceeding two (2) years with a fine of not less than five hundred thousand Rwandan francs (FRW 500,000) but not exceeding two million Rwandan francs (FRW 2,000,000) or to one of these penalties.

VOIDABLE DISPOSITIONS

The Law identifies three types:

- **Voidable Preferences:** Transfers made within one year of commencement that allow a creditor to receive more than they would in liquidation (Article 215).
- **Transactions at Undervalue:** Transactions within one year where the value received was significantly less than provided (Article 216).
- **Voidable Charges:** Certain securities created over assets for antecedent debt within six months of insolvency (Article 217).

BUSINESS RESCUE/ADMINISTRATION

Process required to commence a business rescue

The Registrar General or the Court appoints a provisional administrator upon request from the debtor, directors, creditors, or shareholders (Article 41).

At what point does a business rescue commence

Provisional Administration takes effect upon the filing of the appointment notice and consents with the Registrar General (Article 43).

Duration of business rescue

In Provisional Administration, the administrator must convene a creditors’ meeting within 5 working days to consider the appointment (Article 44) and present proposals within 20 working days (Article 54).

Extent of court involvement in the business rescue

The court supervises administrators, fixes their remuneration (Article 77), and may terminate administration for cause (Article 82).

The management of the company whilst in business rescue

The administrator “takes custody and control of all the property” and performs the functions of directors (Article 65). Directors’ powers are suspended unless the administrator approves their exercise (Article 70).

Filing of Claims for business rescue

Claims are admissible if they arose on or before the day specified in the Administration Deed (Article 57). The filing and verification process mirrors that of liquidation (Articles 207-209).

Funding of the company whilst in business rescue

A debtor may seek Business Rescue Finance (Article 97). These “post-commencement” claims are “paid in priority over other unsecured debts” (Article 100).

Effects of business rescue on employees

Employees’ contracts must be observed (Article 14). Their unpaid wages for the 6 months prior are treated as preferential claims (Article 212).

Effects of business rescue on contracts

Counterparties generally cannot terminate contracts due to the administration (Article 11). However, the administrator may terminate non-performed contracts (Article 14).

Effects of business rescue on shareholders

Shareholders are bound by the Administration Deed (Article 62). Their power to transfer shares or exercise governance rights is suspended (Article 107, applicable mutatis mutandis).

Effects of business rescue on creditors

All individual actions and executions are stayed (Article 11). Article 12 provides a stay on secured claims for up to 6 months if the debtor intends to reorganize.

Pending claim, litigation and arbitration

Under Article 11, the commencement of insolvency proceedings, which includes formal business rescue mechanisms like administration or reorganization, results in an automatic stay. As per Article 11(1°), this stay applies to “the commencement or continuation of individual actions or proceedings concerning the debtor’s assets, rights, obligations or liabilities”. In the context of reorganization specifically, Article 87 mandates that “no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or continued”.

Effects of the moratorium in business rescue

The moratorium establishes a comprehensive protective shield over the debtor’s estate. According to Article 11, the primary effects include the suspension of “the execution of judgments related to the assets of the debtor’s property” and the prohibition of the debtor’s “right to transfer, mortgage or otherwise dispose of any assets”. Furthermore, Article 11(3°) restricts the “right of counterparty to terminate any contract with the debtor” solely due to the insolvency proceedings. For reorganization, Article 87 extends this stay to all property “lawfully in its possession”. The stay prevents any “other proceedings, execution or other legal process” against the company without the administrator’s consent or court order (Article 53).

Voidable transactions

The same provisions for preferences, undervalue transactions, and voidable charges apply as in liquidation (Articles 215-217)

Voting on the plan

A plan is approved if voted for by “at least seventy-five percent (75%) of votes of all creditors having taken part in the vote” (Article 35 for Compromise, Article 91 for Reorganization).

Cram down on creditors

A plan approved by the required 75% majority and sanctioned by the court is “binding on the company... and on all creditors” (Article 39). This binds dissenting creditors (Article 56).

Implementation of the plan

The plan (or Administration Deed) is executed by the company and the administrator (Article 58).

Discharge of claims

The discharge of claims is governed by the terms of the formal rescue plan. Article 57(3°) stipulates that an administration deed must specify “the extent to which the company is to be released from its debts”. Additionally, upon the conclusion of a provisional administration, Article 162(2°) provides that the court may direct that “any payment made by the administrator to any creditor... is considered full satisfaction of the liabilities of the company to that creditor... and the creditor’s claims... are considered extinguished”.

Effects of suretyship

The rescue of a principal debtor does not automatically release third-party guarantors. Article 162 (last paragraph) explicitly states: “Nothing in Paragraph One of this Article operates so as to affect or extinguish any right or remedy of a creditor against any other person, including any surety of the protected cell company”. This principle applies generally

across the Law, ensuring that the discharge of the debtor under a rescue plan does not prejudice the creditor's rights against a surety.

How is the process terminated

Administration terminates by court order (Article 81), by resolution of creditors to end it (Article 59), or upon execution of the plan (Article 96).

What is the status of the company after business rescue

The company may be restored to health, or if the rescue fails, transition to liquidation under Article 79.

Director and officer liability

Directors and officers face strict liability and criminal sanctions for misconduct during business rescue. Article 264 makes it an offense to “abscond and appropriate assets during insolvency proceedings,” which includes “concealing or removing property with the intention of preventing or delaying the assumption of custody or control by the trustee”. Furthermore, under Article 270, a director commits an offense if they “continue in business or exercise the managerial power having full knowledge of the appointment of an insolvency practitioner”.

Civil consequences

Civil consequences often arise from the reversal of prohibited transactions. Under Article 219, if a transaction is set aside, the court may order a person to “pay to the liquidator or trustee a fair sum in respect of benefits received” or require that “property transferred as part of the transaction be restored to the company”. The court may also issue an order “releasing, in whole or in part, a charge given by the company”.

SECURITY

Types of securities

The Law recognizes “secured claims” held by “secured creditors” (Article 3). This typically includes mortgages and charges on movable or immovable property (Article 208).

Taking of security

Security is defined under Article 3(11°) as a “security in respect of a debt or obligation” held by a “secured creditor”. The taking of security typically involves the creation of a “charge over any property or undertaking of a company or individual” (Article 217). This security must be formally executed to be recognized in insolvency proceedings.

Security trustees or special purpose vehicles

While the Law does not explicitly define a “security trustee” as a standalone entity, it recognizes the broader concept of “foreign representatives” under Article 3(17°), which can be a “person or body” authorized to “administer the reorganization or liquidation of the debtor’s assets”. Within the domestic framework, Article 49 allows for a “creditors’ committee” to support and monitor the administrator’s management of assets.

Most robust form of security available to lenders

The most robust form of security is a Registered Secured Claim. According to Article 208, a “secured creditor... shall be entitled to separate satisfaction or retention of secured assets”. The strength of this security is derived from registration; as stated in Article 208, “The preferential right to payment from a secured asset depends on the date of registration of the security and not on the date upon which the debt came into existence”.

Registration of security

Priority depends on the registration date. Article 208 states: “The preferential right to payment from a secured asset depends on the date of registration of the security and not on the date upon which the debt came into existence”.

Stamp duty

The Insolvency Law does not prescribe specific stamp duty rates, as these are typically found in Rwanda’s tax and land registration legislation. However, the Law identifies “Government taxes” as a high-priority preferential claim under Article 212(7°), following the payment of secured creditors and administrative costs.

Registration costs

Under Article 212(1°), the “costs of maintaining, conserving and sale of the asset” are given the highest priority for payment from sale proceeds. This category includes any necessary registration costs or fees incurred by the administrator or liquidator to formalize the realization of assets during the insolvency process.

Requirements for the assignment or transfer of security

In the event of insolvency, the transfer of security interests is restricted. Article 107(4°) mandates that “no share of the company may be transferred or other alteration made in the rights or liabilities of any shareholder” without the liquidator’s consent or a court order. Any assignment of security must respect the registration priorities established under Article 208.

Instances in which securities might be vulnerable to attack

Securities are vulnerable if they are Voidable Charges under Article 217 (e.g., given within 6 months of insolvency for an antecedent debt).

Methods of Enforcement of Security

Secured creditors generally have the right to “separate satisfaction” (Article 208). However, this is subject to a 6-month stay if a reorganization plan is submitted (Article 12).

Problems experienced when enforcing security

The primary challenge is the Statutory Stay. Under Article 12, if a debtor submits a reorganization plan, all “secured claims and rights of retention are stayed effective from the date of application” for a period of up to six months. While a creditor can petition the court to lift the stay for “justifiable cause” under Article 12, this remains a significant procedural hurdle.

Financial assistance requirement

The Law provides for “Business Rescue Finance” under Chapter V. According to Article 97, a debtor may seek financing “for the purposes of maintaining his or her business activities”. This process requires convening a “creditors’ meeting to consider the proposed post-commencement finance” (Article 98) and obtaining approval by a “majority of the votes validly cast” (Article 99). Such finance is granted high priority, being “paid in priority over other unsecured debts” under Article 100.

CROSS BORDER INSOLVENCY AND FOREIGN INSOLVENCY REPRESENTATIVES

Instances in which Rwandan court will recognize a foreign judgment.

Rwanda has adopted the Cross-Border Insolvency Regime (Chapter XII). Foreign creditors have the same rights as other creditors in Rwanda regarding the commencement of, and the participation in general insolvency proceeding. This does not affect the ranking of claims in a proceeding under the insolvency law, foreign claims will be ranked as equivalent claims in Rwanda. Recognition is granted if the proceeding qualifies as a “foreign main proceeding” or “foreign non-main proceeding” (Article 248). Recognition of a “foreign main proceeding” (where the debtor has its main interests) results in an automatic stay on the debtor’s right to transfer or dispose of assets in Rwanda.

The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known. Such notification is made to the foreign creditors individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate.

Requirements for recognition of a foreign judgment in Rwanda

Recognition of a foreign proceeding is granted if it satisfies the requisite criteria for recognition as a foreign main insolvency proceeding or foreign non-main insolvency proceeding, the applicant qualifies as a foreign representative, the application complies with the prescribed requirements for recognition, and the application is properly submitted to the competent court.

The foreign representative must apply to the court with:

- A certified copy of the decision commencing the foreign proceeding.
- A certificate from the foreign court affirming the proceeding’s existence.
- Identification of all known foreign proceedings involving the debtor (Article 246).
- In the absence of evidence referred to above, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.





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SENEGAL | MAME ADAMA GUEYE & PARTNERS

COUNTRY INFORMATION

The Republic of Senegal is a constitutional democracy with a President who is elected every 5 years. The Government coordinates the nation's politics under the direction of the President since the abolition of the position of Prime Minister. However, on 10 December 2021, the National Assembly re-established the position of Prime Minister.

The Republic of Senegal is a multi-party presidential republic. The President of the Republic, who is the Head of State, holds most of the executive authority, while the Prime Minister, as Head of Government, is responsible for coordinating governmental action under the President's authority.

Legislative power is vested in the National Assembly, which is responsible for enacting laws and overseeing government action.

The judiciary is independent from both the executive and legislative branches, in accordance with the constitutional principle of separation of powers enshrined in the Constitution of Senegal.

POLITICAL SYSTEM

Multiparty Democracy.

LEGAL SYSTEM

Civil law system based on French law.

TESTS FOR INSOLVENCY

What are the tests for insolvency (ie liquidation)?

If the receiver cannot rescue the company, the activities of the company cease and liquidation will commence.

What are the tests for financial distress (i.e. business rescue or administration)?

When the company encounters financial difficulties, the business rescue process will commence in order to save the company and allow it to continue trading.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

Friendly liquidation and judiciary liquidation (bankruptcy) are regulated by the Uniform Act OHADA relating to Commercial Companies and Economic Interest Groups (AUSCGIE) and the Uniform Act on the Organization of Collective Procedures for the Discharge of Liabilities (AUPC), respectively.

Formal restructuring procedures

There are two kinds of rescue procedures in Senegalese law:

1. Preventive settlement (règlement préventif):

This procedure is aimed at preventing the insolvency or cessation of payments (cessation de paiement) (the inability of the debtor to pay due debts with available assets of the company) and enabling the company to clear its debts. The Court will appoint an expert to audit the position of the debtor and to determine whether the debtor can continue to operate based on the settlement agreement it may have with any creditor. The commencement of this procedure prohibits all legal proceedings from being initiated against the debtor. Based on the report of the expert and acceptance of a payment plan proposed by the debtor, the debtor will be able to continue to operate its business. Should it fail to comply with the plan, anyone who has an interest can request that the debtor be placed under receivership or liquidation.

2. Receivership: The debtor can submit a petition to Court to be placed receivership. This procedure is aimed at ensuring the continuation of the company and the clearing of its debts. The court will appoint an administrator who will assist the debtor in the operation of the business and the insolvency judge (juge commissaire).

Informal insolvency or restructuring procedures

Not Applicable

LIQUIDATION

What is the aim of liquidation?

There are two types of liquidations: a friendly liquidation and a judicial liquidation in terms of AUSCGIE and AUPC. Both of them aim to realise the assets of the company in order to pay creditors.

Process required to commence a liquidation

Friendly liquidation: the process begins when the company takes a decision to wind itself by way of a resolution taken at a shareholders' extraordinary meeting. The resolution will appoint one or more liquidators to proceed to liquidate the company.

Judicial liquidation (bankruptcy): the process commences with a petition for liquidation submitted to the Court by the debtor itself, the creditors, the public prosecutor, the Court itself or any person who may have an interest. The petition will result in a decision of the Court that will pronounce the liquidation, appoint the liquidators, the insolvency judge, and confirm the suspect period which cannot be more than 18 months prior to the cessation of payments.

At what point does the liquidation process commence?

The process commences with the submission of a petition for liquidation to the Court. But the debtor will be declared to be in liquidation only once a judgment pronouncing such liquidation is handed down by the Court.

Duration of the liquidation process

With a friendly liquidation, in terms of AUSCGIE, the duration of the liquidation process cannot exceed 3 years starting from the effective date of the winding up of the company. However, in practice, the 3-year period is often extended. For the judiciary liquidation in terms of AUPC, the duration of the process is 18 months which can be extended for 6 months but provided the aggregate period does not exceed 24 months.

Extent of court involvement in the liquidation process

In friendly liquidations, the Court is not involved in the process. Its involvement is limited to publishing the liquidation decision with the registry of commerce (which is held at the Court) and ensuring that the company complies with the 30 days' notice period wherein potential creditors are permitted to challenge the liquidation decision. If there is any objection to the friendly liquidation, the Court is tasked with attending to it. For judiciary liquidation, the Court's involvement includes the granting of the liquidation order and the appointment of liquidators to supervising judge and to deal with and settle any dispute related to the liquidation.

Management of the company whilst in liquidation

The role, responsibility and powers of the board of directors and the CEO/managing director shall terminate from the date that the Court grants an order for the liquidation of the company. From that date, the liquidator shall assume the role, responsibilities and powers related to the company. In general, the liquidator is limited to selling the company's assets, in order to pay the creditors and to distribute any outstanding balance to the shareholders.

Filing of claims

Two legal announcements informing creditors of the liquidation must be placed in a newspaper and in the Government Gazette (for secured creditors). All creditors, except creditors with maintenance claims, shall lodge their claims with the liquidator within 60 days of the date of the second publication of the liquidation decision in a newspaper, failing which, such claims will be rejected. The deadline is extended to 90 days for creditors resident outside of the jurisdiction. Known creditors (including those on the balance sheet) and secured creditors that have not submitted their claims, shall be notified in person by registered mail or by way of any other written notice.

Factors which influence the liquidation period

Judicial liquidation can be delayed by the requirement to consider rescuing the business. When an entity is in a cessation of payments, prior to judicial liquidation, rescue is considered first. This procedure may last 6 or 9 months before the process is converted to judicial liquidation. The decision to convert the business rescue into judicial liquidation may be subject to an appeal which may delay the liquidation period further.

Once the procedure is opened, judicial liquidation can also be delayed for the following reasons:

- a lack of diligence on the part of the receiver;
- recourse of creditors after filing the claims with the receiver;
- diligence of the insolvency judge in validating claims;
- creditors' appeals may affect the decision of the insolvency judge;
- the procedures to sell the assets;
- the procedure to recover assets from third parties; and
- failure to publish the opening of judicial liquidation in the newspaper and in the Trade and Personal Property Credit Register and in the land journal if the debtor owns real estate.

Effects of liquidation on employees

All employee contracts are terminated either by mutual agreement or through dismissal on the basis that the company will cease to trade. Employees must be paid their severance pay, allowances and any benefit due to them as at the date of termination.

Effects of liquidation on contracts

Unless their continuation of any contract is beneficial for the liquidation process, all contracts are to be terminated. Effect of liquidation on shareholders If available, shareholders will be paid from the proceeds derived from a sale of the assets once creditors have been paid.

Effect of liquidation on creditors

Creditors are classified as secured and unsecured creditors. Creditors are paid based on an order of preference. If there are sufficient assets to pay creditors, all creditors will be paid in full. If there are insufficient assets to pay all the creditors, creditors get paid in proportion to their debts.

Pending claims, litigation and arbitration

These proceedings are suspended

Voidable transactions

The judge usually determines the period in which transactions that caused the company's financial difficulties are to be declared void. These transactions include donations, the payment of debts and securities taken in respect of a debtor's assets. Further, if such transactions were prejudicial to the creditors, they will also be deemed to be void. For example - gratuitous transactions completed in the 6 months prior to insolvency or onerous transactions.

How is the liquidation process terminated?

The liquidation process terminates when the company pays off its liabilities and distributes all the remaining assets/proceeds realised from a sale of the assets to the shareholders. The insolvency judge records this termination.

DIRECTOR OR OFFICER LIABILITY

Civil consequences

A Court can pronounce the personal bankruptcy of the officers of a company who committed serious offenses. This may include officers who have not declared certain social liabilities within a period of 30 days from the liquidation of the company.

Criminal consequences

There are two types of bankruptcy: simple bankruptcy and fraudulent bankruptcy. Sentences for directors and officers might include 5 to 10 years jail sentence for fraudulent bankruptcy.

BUSINESS RESCUE / ADMINISTRATION

Preventive settlement

Process required to commence a business rescue

The company shall file a petition alone, or with one or several of its creditors, with the Competent Court.

At what point does business rescue commence?

The company is required to submit several documents, including a fair composition, to the Court. The fair composition sets out the measures planned for the restructuring of the company. Where the fair composition appears reasonable to the President of the Court, the preventative settlement procedure commences and an expert is appointed to facilitate the process

Duration of business rescue

AUPC provides that the fair composition will be approved by the Court if the measures put in place to rescue the company do not exceed 3 years for all creditors and 1 year for salaried creditors.

Extent of court involvement in the business rescue

The Court is very involved in the process. It is responsible for declaring the procedure, designating a judge or any qualified person to obtain all the information on the financial position of the company and the composition and for appointing an insolvency judge or receiver (responsible for ensuring the expediency of the procedure) and/or one or more receivers (to represent the creditors).

Management of the company whilst in business rescue

The debtor remains in charge of the management of the company.

Filing of claims

The law is silent about the way claims should be filed in a preventive settlement. Furthermore, the preventive settlement is initiated by the debtor who refers to the claims of the creditors in the petition. The debtor or the expert can produce the claims. The production of receivables may be made ex officio by the debtor.

Factors which influence the period of business rescue

The preventive settlement can be delayed by the finalisation by the expert of his/her work and report, the acceptance of the plan by the creditors and a judgment of homologation of the composition.

Funding of the company whilst in business rescue

During the preventive settlement process, the company may be funded through a capital raise, a debt for equity swap or through loans advanced by banking or financial institutions or individuals. Legal and natural persons who loan (in terms of the composition agreement) new money to the company with a view to ensuring the continuation of the company, receive preferential repayment. Legal and natural persons who supply, under the same conditions, new goods or service with a view to ensuring the continuation of the

company also receive preferential treatment. This does not apply to contributions made as part of an increase in the debtor's share capital.

Effect of business rescue on employees

The commencement of the proceedings does not terminate the contracts of employees. However, redundancies for economic reasons can occur.

Effect of business rescue on contracts

The fair composition must provide the continuation of contracts entered into prior to the petition.

Effect of business rescue on creditors

The commencement of a preventive settlement suspends all procedures aimed at obtaining the payment of claims for a maximum period of 3 months, which may be extended by 1 month (save for claims for wages or maintenance). This does not, however, apply to actions for the recognition of disputed rights or claims, or legal actions against the signatories of bills of exchange other than the beneficiary of the suspension of individual lawsuits.

Pending claims, litigation and arbitration

All procedures are suspended

Effects of the moratorium

The approval of the fair composition shall be binding on all creditors, whether their claims are unsecured or secured. The moratorium shall also apply to persons who are co-obligated or who have granted personal guarantees or assigned property as security when they have paid the debtor's debts.

Voidable transactions

Unless the President of the Competent Court provides otherwise, the decision to initiate the preventive settlement shall prohibit the debtor, on penalty of becoming null and void (i) from paying, in whole or in part, claims incurred prior to the decision of operating; (ii) from doing anything which is out of the ordinary course of the business of the company or granting security. It shall also be prohibited from settling joint debtors and individuals who have granted personal security, or who assigned or transferred property as collateral, when they paid claims incurred prior to the opening decision.

Voting on the plan

No voting takes place. Instead, the receiver in the preventive settlement engages with the debtor and the creditors and facilitates negotiations between them so as to reach an agreement, based on the fair composition proposed by the debtor. The receiver will prepare a report in which he records whether each creditor has been contacted and on

which date; has consented to a debt reduction or extension of time for payment and, where applicable, how much or how long; and has declined to grant time for the extension of a payment and debt reduction and the reasons thereof.

Cram down on creditors

After approval, the plan is binding on all creditors.

Implementation of the plan

The plan will be implemented in accordance with its terms.

Discharge of claims

Claims may be discharged in accordance with the terms of the approved composition plan.

Effect on suretyships

Except for natural persons, sureties cannot benefit from the deadlines and discounts provided for in the plan (concordat).

How is the process terminated?

The process terminates when the fair composition is approved by the judge.

What is the status of the company after business rescue?

There are 2 possible outcomes: the company may revert to an optimal financial position or if the process fails, it will be placed either in receivership or judiciary liquidation.

DIRECTOR AND OFFICER LIABILITY

Civil Consequences

A Court can pronounce the personal bankruptcy of the officers that committed serious offenses.

Criminal consequences

There are two types of bankruptcies: simple bankruptcy and fraudulent bankruptcy. Sentences for directors and officers might include 5 to 10 years jail sentence for fraudulent bankruptcy.

RECEIVERSHIP

Process required to commence a business rescue

The company must be insolvent. 30 days after the declaration of insolvency, a declaration must be filed with the Court together with documents supporting the financial position of the company (an extract from the Register of Commerce,

turnover of the company, financial statements, cash flow statements, debts and receivables statements and inventory of all of the company's assets).

At what point does business rescue commence?

The debtor must propose an offer of fair composition 60 days after the declaration of insolvency. If the composition is accepted, the Court must pronounce the opening of the procedure within 30 days. The Court will pronounce the commencement of the process if it confirms that the company is or will be insolvent (18 months after the pronouncement of the decision of opening) and if it accepts that the debtor has proposed a fair composition (detailing the measures for the recovery of the company).

Duration of business rescue?

Receivership should take 6 months, but this can be extended for 3 additional months.

Extent of court involvement in the business rescue

The Court fixes the date of insolvency and pronounces the opening of the procedure. The Court can designate a judge or any qualified person to obtain all the information on the financial position of the debtor and its composition. The Court will appoint an insolvency judge or receiver (responsible for ensuring the expediency of the procedure) and/or one or more receivers (who represent the creditors).

Management of the company whilst in business rescue

The management continues to manage the company with the assistance of the receiver.

Filing of claims

Two legal announcements informing creditors of the receivership must be published in a newspaper and in the Government Gazette (for secured creditors). Within 60 days of the second publication of the decision in a newspaper, all creditors in the group, except creditors for maintenance claims, shall lodge their claims, failing this, claims will be rejected. The deadline is 90 days for creditors living outside of the jurisdiction. Known creditors (including those on the balance sheet) and secured creditors who have not submitted their claims, shall be notified in person by registered mail or by way of any other written notice.

Factors which influence the period of business rescue

Delays may arise from the company acting under the supervision of the receiver and insolvency judge in all matters, save for conservatory acts. Actions taken by the company without the assistance of the receiver are unenforceable.

Funding of the company whilst in business rescue

There is no restriction concerning the funding of the company in business rescue, save for loan agreements which must be declared to the insolvency judge. The creditors may also grant funding to the company. Creditors who agreed in the plan (concordat) to provide the company with new financial resources have preference with regard to repayment. They are privileged creditors.

Effect of business rescue on employees

The contracts of employees remain intact. However, redundancies for economic reasons can occur.

Effect of business rescue on contracts

Contracts remain in force during receivership and are not automatically terminated with the commencement of the process.

Effect of business rescue on shareholders

Following the opening of the process, all stocks, shares and securities owned by shareholders are blocked. They can only be transferred with the approval of the insolvency judge and are recorded with the Register of Commerce.

Effect of receivership on creditors

All proceedings are suspended for all creditors (whether secured or unsecured). Further, any action against natural persons who are joint debtors or who have granted personal security or who have assigned or ceded an asset as collateral security, are suspended. However, creditors benefiting from such collateral securities may take conservatory measures. Legal and contractual interest as well as all interest and service charges for the late payment of all claims whether they are secured or not is suspended except for interest arising from loan agreements entered into for a duration equal to or longer than 1 year or loan agreements with a deferred payment of 1 year or more. Creditors, whether or not they have a security interest and whether or not they are domiciled in the national territory, must lodge their claims with the receiver within a limited period of time.

Pending claims, litigation and arbitration

All proceedings are suspended.

Effects of the moratorium

The approval of the moratorium renders it binding on all the creditors. Creditors with secured claims and employees are entitled to object to extensions for repayment exceeding 2 years.

Voidable transactions

The judge usually determines the period in which transactions that caused the company's financial difficulties are to be declared void. These transactions include donations, the payment of debts and securities taken in respect of a debtor's assets. Further, if such transactions were prejudicial to the creditors, they will also be deemed to be void. For example - gratuitous transactions completed in the 6 months prior to insolvency or onerous transactions.

The business rescue

The fair composition is set out in a plan (Concordat) and contains (i) terms for the continuation of the company's business; (ii) precise indication of which assets are to be sold; (iii) persons entitled to execute the composition and all subscribed commitments necessary for the business rescue; (iv) terms of maintenance, financing and settlement of liabilities that existed prior to the decision of opening; (v) employee redundancies that must be attended to; and (vi) replacement of the directors.

Voting on the plan

The insolvency judge must approve the fair composition plan, which he will do if he believes that its terms are realisable. The receiver presents a report concerning the process and the assets and liabilities of the company and provides his opinion about the composition. After submission of the report, creditors are afforded an opportunity to vote on the plan. Voting by correspondence and proxy are accepted.

Cram down on creditors

The Court can enforce the plan on the creditors.

Discharge of claims

Claims may be discharged in accordance with the terms of the approved composition plan.

Effect on suretyships

A composition will have no effect on suretyships, which remain unchanged and of full force and effect.

How is the process terminated?

The process terminates when the recovery of the company becomes effective, failing which the procedure is converted to liquidation.

What is the status of the company after business rescue?

There are 2 possible outcomes: the company may revert to an optimal financial position or if the receivership fails, the company will be placed in liquidation.

DIRECTOR AND OFFICER LIABILITY

Civil Consequences

The same consequences with liquidations are applicable here.

SECURITY

Types of security

1. Personal securities: personal guarantees and first demand guarantees (garantie autonome).
2. Securities over movable property - possessory liens, assets held or transferred as security, pledges over tangible assets, intangible assets (which include receivables, bank accounts, transferable securities, stock, intellectual property rights, business property (fond de commerce) and the preferential rights of the vendor of business property.
3. Securities over immovable property: Mortgages

Taking of security

In general, securities are acquired through agreement or by way of an order of Court. In addition, a creditor who has a claim may ask the Court for authorization to carry out a precautionary seizure on the debtor's assets - movable property or claims held by third parties on behalf of the debtor.

Security receivers or special purpose vehicles

The security receiver is an agent responsible for the constitution, registration and enforcement of one or more securities or guarantees held in respect of the execution of an obligation. The security receiver has the power to represent and defend the interests of creditors.

Most robust form of security available to lenders

The most robust form of security available to lenders is a mortgage over real estate property/immovable property.

Registration of security

Judicial security:

No registration is required for security granted by order of Court.

Conventional security:

The registration of the agreement is mandatory with the Trade and Personal Property Credit Register in order to be enforceable against third parties. The agreement is subject to the payment of registration fees.

Pledge of bank account/receivable:

These pledges are commonly used and both require notification to all relevant parties including creditors and financial institutions.

Stamp duty

The stamp duty of 2000 FCFA per page is then payable to the tax administration.

REGISTRATION FEES	SUBSCRIPTION FEES
PLEDGE OF BANK ACCOUNTS	
- Fixed fees: 5000 FCFA - Stamp duty: 2000 FCFA per paper - Schedule (after signature page): 5000 FCFA.	- 5 to 500 000 000 F CFA: 1 % - 500 000 000 to 1 000 000 000 FCFA: 0,5 % - More than one billion FCFA: 0,25 %
PLEDGE OF RECEIVABLES	
- Fixed fees: 5000 FCFA. - Stamp duty: 2000 FCFA per paper - Schedule (after signature page): 5000 FCFA.	- 5 to 500 000 000 F CFA: 1 % - 500 000 000 to 1 000 000 000 FCFA: 0,5 % - More than one billion FCFA: 0,25 %
PLEDGE OF SHARES	
- Fixed fees: 5000 FCFA. - Stamp duty: 2000 FCFA per paper - Schedule (after signature page): 5000 FCFA	- 5 to 500 000 000 F CFA: 1 % - 500 000 000 to 1 000 000 000 FCFA: 0,5 % - More than one billion FCFA: 0,25 %
PLEDGE OF BUSINESS ASSETS	
- Fixed fees: 5000 FCFA. - Stamp duty: 2000 FCFA per paper - Schedule (after signature page): 5000 FCFA.	- 5 to 500 000 000 F CFA: 1 % - 500 000 000 to 1 000 000 000 FCFA: 0,5 % - More than one billion FCFA: 0,25 %
INVENTORY PLEDGE	
- Fixed fees: 5000 FCFA. - Stamp duty: 2000 FCFA per page. - Schedule (after signature page): 5000 FCFA.	No fees.
MORTGAGE	

- Fixed fees: 5000 FCFA. - Stamp duty: 2000 FCFA per page. - Schedule (after signature page): 5000 FCFA.	No fees.
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Registration costs

The calculation of the cost payable depends on many factors, such as the amount of the secured obligation. The amount of the registration cost is capped to 50.000.000 FCFA. The fees are normally payable by the debtor in the case of a security agreement and by the creditor in the event of security given under a Court order.

The costs are different depending on securities they are as follows:

Requirements for the assignment or transfer of security

The transfer is subject to the drafting of a deed of assignment. This must be published/registered with the authorities as the initial security.

Instances in which Securities might be Vulnerable to Attack

If the security is legally registered, there should be no concern regarding its enforcement.

Methods of enforcement of security

Following receipt of a Court order permitting a sale, and failing a private sale, security may be sold at a public auction.

Problems experienced when enforcing security

Objections can be raised either by the debtor, the guarantor or a third party who may have an interest in preventing the enforcement of the security.

Financial assistance requirements

Not applicable.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Subject to exequatur, any final judgment for a specific sum, including an award of damages, given by a foreign Court, may be enforced in Senegal.

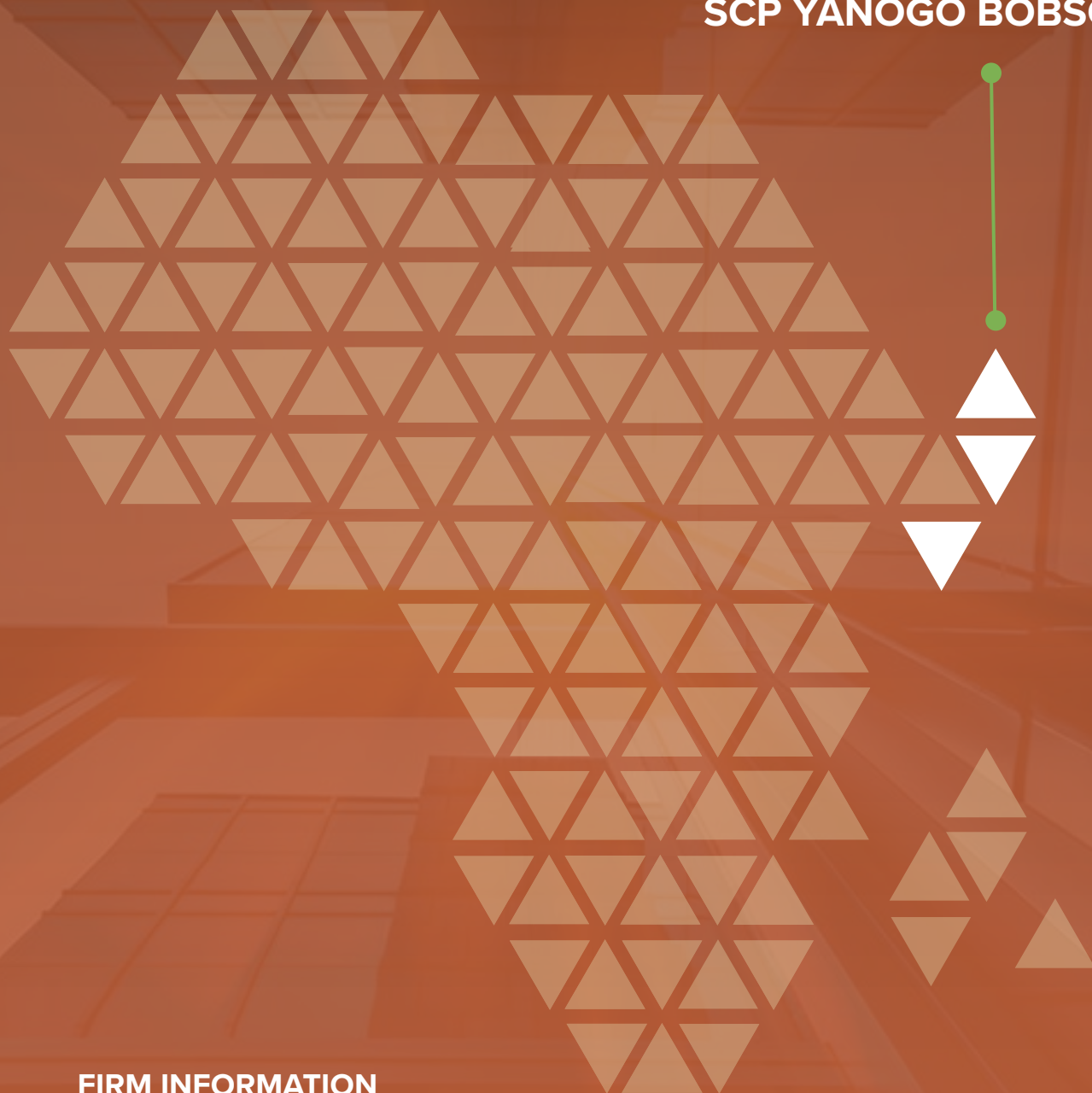
Requirements for recognition of a foreign judgment

A foreign judgment would be recognised and accepted by the Courts of Senegal without re-trial or examination of the merits of the case, unless it is shown that (i) the foreign Court did not have jurisdiction in accordance with its jurisdiction rules, (ii) the party against whom the judgment of such foreign Court was obtained had no notice of the proceedings, or (iii) the judgment was obtained through collusion or fraud or was based on a clear mistake of law or fact, or (iv) the judgment was contrary to public policy applicable in Sénégal.





SOMALIA SCP YANOBO BOBSON



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SOMALIA | JUST LEGAL SERVICES (JLS)

EDITORIAL NOTE

This chapter is intended to provide a clear view of the current legal position and the practical enforcement environment in Somalia. The chapter deliberately avoids overstating the existence of modern rescue or administration mechanisms where such mechanisms are not yet established under Somali law.

Somalia does not presently have a single modern, consolidated insolvency statute equivalent to the South African business rescue framework, the United Kingdom administration process, or United States Chapter 11 proceedings. The relevant legal position is assembled from provisions of the Somali Civil Code 1973, the Companies Act 2019, company regulations, civil procedure rules, contract and security principles, sector-specific legislation, banking regulation, and developing court and commercial practice.

The position is also affected by practical realities: the availability and quality of corporate records, enforceability of security documentation, court capacity, asset location, regional administration of registries, the role of negotiated settlements, and the nature of the creditor. In Somalia, creditor recovery often depends as much on enforceable documentation and practical asset control as on formal insolvency procedure.

FIRM INFORMATION

Just Legal Services (JLS) is a leading law firm advising domestic and international clients on corporate, regulatory, transactional, employment, dispute resolution, project development and creditor enforcement matters. The firm's work includes cross-border mandates, regulatory advisory work, commercial structuring and legal opinions for international clients operating in Somalia and the wider Horn of Africa region.

TYPE OF GOVERNMENT

Somalia is a federal republic. Governmental authority is exercised through federal institutions and federal member state structures.

POLITICAL SYSTEM

Somalia is a federal constitutional republic operating under a multi-tier system of government comprising the Federal Government and Federal Member States. The political framework is based on the separation of powers between the executive, legislative and judicial branches. Executive

authority is vested in the President and the Council of Ministers, while legislative authority is exercised by the bicameral Federal Parliament consisting of the House of the People and the House of Senates. Judicial authority is exercised by the courts, and the judicial system is headed by the Supreme Court and comprises the federal courts and Federal Member State courts.

LEGAL SYSTEM

Somalia's legal system is hybrid in nature. It draws on civil law principles, Sharia principles, customary norms and statutory legislation. The formal court system and most written legislation are primarily based on civil law traditions, while Sharia principles form a foundational source of law and influence judicial interpretation and legal practice. Customary law (Xeer) also continues to play a role in traditional and community-based dispute resolution.

TESTS FOR INSOLVENCY

What are the tests for insolvency (ie liquidation)?

Somalia does not presently maintain a codified cash-flow or balance-sheet insolvency test equivalent to those found in mature insolvency jurisdictions. In practice, insolvency is assessed by reference to a debtor's inability to satisfy obligations as they fall due, material deterioration in financial condition, insufficiency of available assets, creditor enforcement pressure and inability to maintain payment commitments.

The Somali Civil Code provides important insolvency-related indicators. Article 269 permits the judge to fix a reasonable time for performance where the obligation is only to be performed when the debtor is able or has the means to perform, taking into account the debtor's actual and future resources. Article 270 provides that a debtor forfeits the benefit of the term if declared bankrupt in accordance with law, if the debtor diminishes special security given to the creditor, or if the debtor fails to provide promised security. Article 271 allows a creditor, even before maturity, to take protective measures and request security where the creditor reasonably fears that the debtor may become bankrupt or insolvent.

What are the Tests for Financial Distress (ie Business Rescue or Administration)

There is no statutory test for financial distress linked to a formal business rescue or administration regime. Somalia does not presently have a modern corporate rescue framework equivalent to South African business rescue, English administration, or United States Chapter 11 proceedings.

In practice, financial distress is identified commercially rather than through a codified statutory test. Common indicators include payment default, sustained cash-flow pressure, inability to service financing obligations, creditor demands, deteriorating security, operational losses, inability to pay employees or suppliers, enforcement exposure and loss of creditor confidence.

Where the debtor is a licensed bank or regulated financial institution, the Financial Institutions Law provides a separate framework. It addresses regulatory administration, closure, resolution and compulsory liquidation. This regime should be distinguished from ordinary corporate insolvency analysis applicable to non-bank commercial entities.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

Somalia does not presently have a single consolidated insolvency statute governing all commercial entities. Formal procedures are therefore best described as judicial dissolution proceedings, creditor enforcement mechanisms, debt recovery proceedings, attachment and execution measures, and corporate termination procedures rather than a fully codified insolvency process.

For companies, the Companies Act 2019 is relevant to corporate existence, company registration, governance, filings and dissolution-related mechanisms. It should be treated as a corporate law framework and not as a comprehensive insolvency statute. For banks and regulated financial institutions, the Financial Institutions Law applies and creates a separate Central Bank-led intervention and resolution structure.

In practice, creditor enforcement and negotiated settlement often play a larger role than formal insolvency procedure. A creditor's position will depend heavily on the quality of contracts, available security, documentary evidence, asset location and the debtor's willingness to engage in settlement.

Formal Restructuring Procedures

Formal restructuring, where it occurs, is usually achieved through contractual arrangements, refinancing, shareholder recapitalisation, negotiated settlements and court-based compromise of disputes. The enforceability of such arrangements depends on ordinary contract principles and, where necessary, judicial enforcement.

Informal Insolvency or Restructuring Procedures

Informal restructuring is highly important in practice. Distressed companies commonly seek negotiated standstill arrangements, debt rescheduling, partial settlements, revised repayment terms, shareholder support, refinancing, asset sales or consensual arrangements with major creditors.

This practice reflects the developing nature of the formal insolvency framework. Commercial parties often prefer negotiated solutions because they may be faster, less expensive and more commercially predictable than contested judicial enforcement. However, such arrangements require careful drafting, clear authority, reliable documentation and a realistic assessment of available security.

LIQUIDATION

What is the aim of liquidation?

The aim of liquidation or dissolution proceedings is the orderly collection and realisation of assets, settlement of liabilities and termination of the legal existence of the company or debtor entity. In Somalia, the term liquidation should be used carefully because the statutory framework is not a single modern insolvency code; in many cases, the more accurate description is judicial dissolution, creditor enforcement or asset realisation.

The practical objective is to preserve value, prevent dissipation of assets, identify creditor claims, resolve priority disputes and distribute available proceeds according to applicable law and enforceable security rights.

Process Required to Commence a Liquidation

The commencement route depends on the nature of the debtor and the basis for the proceedings. A solvent or shareholder-driven termination may proceed through corporate dissolution mechanisms under company law. A creditor-driven process may arise through debt recovery, attachment, execution or judicial applications seeking asset preservation or satisfaction of claims.

Where insolvency concerns exist, creditors may rely on general civil law principles, contractual rights and judicial enforcement. Articles 270 and 271 of the Civil Code are particularly relevant where security has deteriorated, promised security has not been provided, or the creditor has reasonable grounds to fear insolvency and seeks protective measures.

At What Point Does the Liquidation Process Commence

The liquidation or dissolution process should be regarded as commencing when the relevant corporate, judicial or enforcement step is formally initiated. This may be the filing of a court application, commencement of attachment or execution, adoption of a corporate dissolution resolution, or initiation of a regulator-led process in a regulated sector.

For licensed banks, a different position applies. The Financial Institutions Law allows Central Bank intervention, administration, closure, resolution and compulsory liquidation of banks, and this bank-specific regime should not be conflated with ordinary commercial liquidation.

Duration of the Liquidation Process

The duration of the process depends on the complexity of the debtor's affairs, availability and quality of records, existence of secured creditors, creditor disputes, asset location, judicial workload, enforcement conditions and whether parties pursue settlement.

In practice, straightforward corporate dissolution or uncontested asset realisation may proceed more efficiently than contested creditor proceedings involving disputed ownership, unclear security, competing claims or assets located across different jurisdictions.

Extent of Court Involvement in the Liquidation Process

Court involvement is generally significant where liquidation is contested, where creditor enforcement is required, where asset ownership is disputed, where attachment or execution is sought, or where judicial dissolution is necessary. Courts may also be involved where a creditor seeks protective measures, additional security or enforcement of contractual rights.

Where the matter is purely consensual, such as a voluntary corporate winding-down with no creditor dispute, court involvement may be more limited. However, in insolvency-related matters, judicial involvement is often necessary to protect creditor rights and ensure enforceability.

Management of the Company Whilst in Liquidation

Management's authority may become restricted once formal dissolution, creditor enforcement or court-supervised asset realisation begins. Directors and officers remain under duties to preserve company assets, avoid preferential or fraudulent conduct, maintain records and avoid actions that prejudice creditors.

In practice, where no formal liquidator system is operating, management may remain involved in preserving books, identifying assets and assisting settlement, but their powers should be treated as constrained by creditor rights, court orders and applicable corporate law.

Filing of Claims

Claims are generally asserted through judicial proceedings, debt recovery processes, enforcement applications, settlement negotiations or, where applicable, corporate dissolution processes. Creditors should support claims with contracts, invoices, acknowledgements of debt, security documents, correspondence, account statements and evidence of default.

Because Somalia does not presently maintain a modern codified claims-adjudication process for general corporate insolvency, claim strength is often closely linked to documentary quality and the creditor's ability to prove the debt in court or in negotiations.

Factors Which Influence the Period of the Administration in a Liquidation

The period required to administer a liquidation or dissolution process may be influenced by the number of creditors, disputes over assets, unclear ownership records, enforcement resistance, availability of records, regional enforcement issues, asset tracing difficulties, court workload and the existence of secured creditor claims.

Where security documentation is clear and assets are identifiable, recovery may be more effective. Where documentation is weak or assets are movable, disputed or outside direct control, enforcement may be slower and more uncertain.

Effect of Liquidation on Employees

Employees may have claims for unpaid wages, accrued benefits and termination entitlements. The practical treatment of employee claims depends on available assets, contractual terms, applicable labour law, court determinations and any negotiated settlement.

From a risk-management perspective, employers and creditors should treat employee claims as sensitive because unresolved wage and employment liabilities may affect settlement, asset transfers, reputational exposure and regulatory engagement.

Effect of Liquidation on Contracts

Liquidation or dissolution does not automatically produce a uniform result for all contracts. The effect depends on contractual terms, the nature of the contract, default provisions, termination clauses, force majeure provisions, security arrangements and any applicable court order.

In practice, counterparties often seek to terminate, renegotiate or suspend performance where the debtor is insolvent or unable to perform. Contractual drafting is therefore critical, particularly default clauses, acceleration provisions, set-off provisions, retention of title, step-in rights and security enforcement provisions.

Effect of Liquidation on Shareholders

Shareholders rank behind creditors and generally receive value only after secured and unsecured creditor claims have been satisfied. In an insolvent situation, shareholders should not expect distributions unless liabilities have been fully settled and residual assets remain.

Shareholders may also be required to approve dissolution steps, support recapitalisation or provide documentation depending on the company's constitutional documents and applicable company law requirements.

Effect of Liquidation on Creditors

Creditors are affected according to the nature and strength of their rights. Secured creditors generally have stronger recovery prospects because they may enforce against specific assets, subject to the validity and practical enforceability of their security. Unsecured creditors depend on the residual asset pool and may experience limited recovery where assets are insufficient.

The practical recovery position depends on documentation, security perfection, asset traceability, court process, debtor cooperation and whether other creditors assert competing claims. Creditors should therefore structure transactions with clear security, guarantees, documentary evidence and enforcement rights from the outset.

Pending Claims, Litigation and Arbitration

Pending claims, litigation and arbitration may continue unless stayed by court order, settled by the parties or affected by a specific enforcement process. Somalia does not presently maintain a general statutory restructuring moratorium applicable to ordinary companies.

Where arbitration clauses exist, their practical effect will depend on the enforceability of the arbitration agreement, the seat of arbitration, the governing law and the ability to obtain recognition or enforcement locally. Local advice should be obtained before assuming that foreign arbitration outcomes will be swiftly enforceable against Somali assets.

Voidable Transactions

Transactions intended to prejudice creditors, fraudulent transfers, concealment of assets, sham transactions, undervalue transfers and dissipation of property may be challenged under general civil law principles, fraud principles and judicial authority.

The Civil Code provisions on creditor protection, particularly Articles 270 and 271, reinforce the principle that creditors may seek protective measures where insolvency or deterioration of security threatens their rights. In practice, challenges to suspect transactions require clear evidence and careful litigation strategy.

How is the Liquidation Process Terminated

Liquidation or dissolution proceedings terminate once assets have been realised, liabilities addressed, creditor claims resolved or adjudicated, required court approvals obtained and the company's existence terminated or deregistered where applicable.

Where the matter has proceeded through negotiated settlement rather than formal judicial dissolution, the process terminates through performance of settlement

terms, releases, withdrawal of proceedings and any required corporate filings.

Director or Officer Liability

Directors and officers may incur liability where they act fraudulently, conceal assets, misrepresent the financial condition of the company, misappropriate property, prefer connected parties in bad faith, dissipate assets or otherwise prejudice creditors. Liability may arise under general civil law, company law, criminal law and contractual principles.

Because Somalia's insolvency framework is not fully codified, the safest practical approach is for directors of distressed companies to preserve records, avoid related-party transfers, communicate accurately with creditors and obtain legal advice before disposing of assets or entering settlements.

Civil Consequences

Civil consequences may include damages, compensation, restitution, attachment, enforcement proceedings, reversal of prejudicial transactions, loss of contractual protections and personal liability where misconduct is established. Creditors may also seek protective measures, additional security, acceleration of payment obligations or enforcement of guarantees depending on contractual terms and applicable law.

Criminal Consequences

Criminal consequences may arise where insolvency-related conduct involves fraud, misappropriation, falsification of records, concealment of assets, intentional deception of creditors or other criminal conduct. The availability and outcome of criminal proceedings will depend on the facts, evidence and applicable criminal law provisions. The guide should not suggest that every failed business produces criminal liability. The risk arises primarily where there is dishonesty, bad faith, fraudulent concealment or deliberate creditor prejudice.

BUSINESS RESCUE / ADMINISTRATION

Process required to commence a business rescue

Somalia does not presently maintain a formal statutory business rescue or administration process for ordinary commercial companies. There is therefore no statutory procedure equivalent to appointing a business rescue practitioner, administrator or debtor-in-possession representative.

In practice, distressed businesses commence restructuring by approaching creditors, shareholders, lenders or strategic investors to negotiate standstill arrangements, repayment

rescheduling, refinancing, asset disposals, capital injections or settlement agreements.

At What Point Does Business Rescue Commence

Because there is no formal statutory business rescue procedure, business rescue does not commence by operation of a statutory filing or resolution in the manner seen in jurisdictions with developed rescue regimes. Commercially, restructuring begins when the debtor and its principal stakeholders enter negotiations to preserve the business or avoid enforcement.

The point of practical commencement is often triggered by payment default, creditor demand, loss of liquidity, inability to meet payroll or supplier obligations, breach of loan covenants or threatened enforcement.

Duration of Business Rescue

The duration of an informal restructuring depends on creditor cooperation, urgency of enforcement pressure, refinancing availability, debtor transparency, shareholder support and commercial viability of the business.

Short consensual standstills may be agreed quickly, while complex restructurings involving multiple creditors, asset sales or new financing may take significantly longer and may fail if creditor confidence is lost.

Extent of Court Involvement in the Business Rescue

Court involvement is generally limited in purely consensual restructuring. Courts become relevant where enforcement proceedings are filed, creditor disputes arise, security is contested, asset preservation is sought, or parties require judicial determination of contractual rights.

There is no ordinary corporate rescue court supervising a rescue plan or imposing creditor class votes. Any court involvement is therefore usually dispute-specific or enforcement-related rather than part of a codified rescue architecture.

Management of the Company Whilst in Business Rescue

Existing management typically remains in control during informal restructuring unless creditors, shareholders or the court intervene. Management should preserve company assets, maintain records, avoid misrepresentation and ensure that any restructuring negotiations are conducted transparently and with proper authority. Where lenders or investors provide rescue finance, they may require enhanced reporting, cash controls, negative covenants, security enhancements or observer rights as contractual conditions.

Filing of Claims

Claims are identified and validated through creditor statements, contractual documentation, settlement

negotiations or court proceedings where disputes arise.

For a credible restructuring, the company should prepare a creditor schedule, ageing analysis, secured debt schedule, employee liabilities, tax exposures, contingent liabilities and asset list. Even where not legally prescribed, these are essential for negotiations and creditor confidence.

Factors which Influence the Period of Business Rescue

The period of restructuring is influenced by liquidity runway, creditor pressure, quality of financial information, availability of new funding, tax and employment liabilities, asset sale prospects, secured creditor leverage and whether major creditors are willing to stand still.

In Somalia, documentary quality and practical enforceability are particularly important. Poor records, unclear title, weak security documentation or disagreement among creditors may significantly delay or prevent successful restructuring.

Funding of the Company Whilst in Business Rescue

Funding during distress usually comes from shareholders, related parties, trade creditors, private lenders, asset sales, refinancing or strategic investors. Somalia does not presently maintain a statutory debtor-in-possession financing regime granting rescue finance automatic super-priority status.

Any rescue financing should therefore be carefully documented and supported by contractual security, repayment terms, governance controls and clear use-of-proceeds covenants.

Effect of Business Rescue on Employees

In an informal restructuring, employee contracts generally remain in force unless varied, terminated or settled in accordance with applicable employment law and contract terms. Labour liabilities may materially affect restructuring feasibility, especially where wage arrears exist.

A credible restructuring should identify employee arrears, accrued benefits and future payroll obligations early, because employee claims can create operational, legal and reputational pressure.

Effect of Business Rescue on Contracts

Contracts generally remain governed by their terms. There is no statutory rescue mechanism that automatically suspends contract enforcement or prevents termination for default. As a result, contractual counterparties may exercise termination, acceleration or enforcement rights unless they agree to a standstill or waiver.

For distressed companies, renegotiating key contracts may be central to survival. This often includes suppliers, landlords, financiers, government counterparties and major customers.

Effect of Business Rescue on Shareholders

Shareholders may be required to inject capital, accept dilution, approve asset disposals, restructure ownership or support new financing. Where the business is deeply insolvent, shareholder economic value may be significantly impaired or eliminated.

Because Somalia does not have a statutory cram-down system, shareholder restructuring is usually contractual and depends on company documents, investor agreements and negotiation leverage.

Effect of Business Rescue on Creditors

Creditors are not automatically stayed by a formal rescue process. Their rights remain governed by contract, security documentation and court process unless they agree to a standstill, restructuring agreement or settlement. Secured creditors are typically in the strongest position. They may use enforcement leverage to obtain repayment, improved security, revised covenants or negotiated settlement terms. Unsecured creditors usually depend on the debtor's viability and the commercial value of cooperation.

Pending Claims, Litigation and Arbitration

Pending claims, litigation and arbitration are not automatically suspended by informal restructuring. Suspension requires agreement, court order or procedural step within the relevant proceedings.

As a practical matter, a debtor seeking restructuring should engage major litigating creditors early and seek standstill arrangements to avoid value-destructive parallel enforcement.

Effects of the Moratorium

Any moratorium-like protection must arise from a court order, negotiated standstill, contractual waiver or settlement arrangement.

This is a major difference between Somalia and jurisdictions with developed rescue regimes. Creditors remain capable of pursuing enforcement unless they voluntarily agree not to do so or are restrained by a competent court.

Voidable Transactions

Fraudulent, sham or creditor-prejudicial transactions may be challenged under general civil law and fraud principles. For lenders and investors, this means due diligence must focus on asset title, prior transfers, related-party dealings, corporate authority and existing security interests.

The Business Rescue

In Somalia, business rescue should be understood as a commercial workout rather than a statutory proceeding. A successful rescue generally requires a credible financial plan, creditor support, transparent disclosure, viable cash flow, enforceable settlement terms and, where needed, new financing.

A practical restructuring plan should identify the debtor's assets, liabilities, creditor classes, payment proposals, security arrangements, operational restructuring measures, governance controls and consequences of default.

Voting on the Plan

There is no statutory creditor class voting process for ordinary company restructuring. Any voting or approval process is contractual and depends on the terms of the restructuring agreement, financing documents, shareholder agreements or settlement framework.

Where multiple creditors are involved, parties may voluntarily adopt approval thresholds, but such thresholds are contractual and do not bind non-consenting creditors unless supported by enforceable legal arrangements.

Cram Down on Creditors

Somalia does not presently maintain a statutory cram-down mechanism allowing a restructuring plan to be imposed on dissenting creditor classes. Non-consenting creditors generally retain their legal rights unless compromised by agreement or court determination in specific proceedings. This makes early creditor engagement important. A restructuring that depends on universal creditor support may be vulnerable if a single material creditor refuses to participate and pursues enforcement.

Implementation of the Plan

Implementation occurs through contracts, settlement agreements, revised payment schedules, security amendments, corporate approvals, refinancing documents and any necessary filings or court steps.

The plan should include clear default consequences, representations, authority confirmations, releases, security provisions, payment mechanics and dispute resolution clauses.

Discharge of Claims

Claims are discharged through payment, settlement, release, refinancing, novation, judicial determination or contractual compromise. There is no general statutory discharge of claims through a business rescue plan for ordinary companies. Creditors should therefore ensure

that any release or discharge is expressly documented and conditional upon agreed performance.

Effect on Suretyships

Suretyships and guarantees generally remain enforceable according to their terms unless expressly released, varied or discharged by settlement or judicial determination. A restructuring of the principal debtor does not automatically release guarantors unless the guarantee or settlement provides otherwise.

Lenders should preserve guarantee rights expressly in any restructuring documentation.

How is the Process Terminated

An informal restructuring terminates when settlement terms are implemented, refinancing is completed, creditor arrangements are performed, the business returns to viability or the restructuring fails and creditors pursue enforcement.

Termination events should be expressly documented in the restructuring agreement, including payment default, breach of covenants, misrepresentation, insolvency events and failure to provide agreed security.

What is the Status of the Company after Business Rescue

If restructuring succeeds, the company continues operating under revised financial and contractual arrangements. Its legal status is not altered by operation of a statutory rescue process because no such general process presently exists. If restructuring fails, the company may face enforcement, asset realisation, negotiated sale, judicial dissolution or other creditor action.

Director and Officer Liability

Directors and officers remain subject to general duties and liability principles during distress. They should not mislead creditors, dissipate assets, prefer related parties in bad faith, conceal liabilities or continue trading dishonestly.

Good practice requires preservation of records, accurate creditor communication, careful approval of asset disposals and timely legal advice where solvency becomes doubtful.

Civil Consequences

Civil consequences may include damages, enforcement proceedings, personal liability where misconduct is established, reversal of prejudicial transactions and loss of contractual rights.

Directors may also face claims from creditors, shareholders or counterparties where their conduct causes loss or involves bad faith, fraud or misrepresentation.

SECURITY

Types of security

Security commonly used in Somalia includes mortgages over immovable property, pledges over movable assets, contractual charges or liens, assignments of receivables, guarantees, indemnities, security over shares or contractual rights and asset-specific security structures.

Security effectiveness depends heavily on documentation, asset identification, registration where available, possession where relevant and practical enforceability.

Taking of Security

Taking security requires careful due diligence on ownership, authority, asset description, existing encumbrances, corporate capacity, approvals and registration requirements. Security documents should be clear, specific, properly executed and supported by evidence of title or control.

For cross-border transactions, lenders should obtain legal advice before assuming that foreign-law security documents will be sufficient against assets located in Somalia. Local documentation may be required.

Security Trustees or Special Purpose Vehicles

Security trustee and special purpose vehicle structures may be used in syndicated or cross-border financing, particularly where international lenders require centralised security holding. Their effectiveness depends on contractual drafting, recognition of agency/trust concepts in the transaction structure and local enforcement strategy.

Where uncertainty exists, parallel debt, agency provisions, direct guarantees or locally governed security arrangements may be considered.

Most robust form of Security available to Lenders

The most robust form of security is generally fixed security over clearly identifiable immovable property supported by reliable ownership documentation, proper authority and enforceable local-law security documents. Guarantees from creditworthy obligors and assignments of receivables may also provide meaningful protection where properly documented.

Movable asset security can be useful but may present greater practical enforcement risk where assets are mobile, difficult to trace, not registered or subject to competing possession claims.

Registration of Security

Registration requirements vary depending on the type of asset and the relevant authority. Real property interests may require land or local authority documentation. Company-

related filings may involve the company registry. Certain sector assets may require regulator involvement.

Somalia does not presently maintain a fully centralised, comprehensive and modern collateral registry covering all types of movable and immovable security. This increases the importance of title due diligence, contractual representations, possession controls and creditor monitoring.

Stamp Duty

Stamp duty and documentary charges may apply depending on the nature of the transaction, the instrument and the authority before which the document is registered or used. Specific advice should be obtained for each transaction because administrative practice may vary.

Lenders should budget for notarisation, translation, registration, filing, legalisation and administrative costs where relevant.

Registration Costs

Registration costs depend on the asset type, authority, transaction value and required filings. For company registry matters, the Companies Regulations provide fee schedules for certain corporate filings, but security-specific costs require transaction-specific confirmation.

Failure to account for registration or documentation costs may delay perfection or enforcement. Requirements for the Assignment or Transfer of Security

The Somali Civil Code recognises assignment principles. Article 300 provides that a creditor may assign a right to a third party unless prohibited by law, agreement or the nature of the obligation. Article 302 provides that assignment is not effective against the debtor or third parties unless accepted by the debtor or notified to him, with further requirements concerning established date for third-party validity.

Accordingly, assignments of receivables or contractual rights should include proper notice, debtor acknowledgement where possible, clear identification of assigned rights and evidence of authority.

Instances in which Securities might be Vulnerable to Attack Security may be vulnerable where the grantor lacked title or authority, documentation is defective, the asset is inadequately described, registration or notice requirements were not satisfied, the security was granted to prejudice creditors, or the transaction involved fraud, sham arrangements or undervalue transfers.

Security may also be practically vulnerable where ownership records are unreliable, assets are movable or difficult to locate, or competing creditors assert possession or priority claims.

Methods of Enforcement of Security

Security may be enforced through negotiated recovery, court proceedings, attachment and execution, possession arrangements, sale of secured assets, enforcement of guarantees, assignment collection mechanisms or settlement agreements.

The preferred method depends on the security type, asset location, debtor cooperation, documentation strength and urgency. Negotiated enforcement may be commercially preferable where court enforcement would be slow or contested.

Problems Experienced when Enforcing Security

Common enforcement challenges include documentary defects, unclear title, competing claims, difficulty locating movable assets, court delays, regional enforcement variation, lack of a centralised collateral registry, debtor resistance and practical asset-realisation constraints.

International lenders should therefore structure security packages conservatively, require reliable documentation, monitor collateral value, obtain guarantees where possible and include robust default and information covenants.

Financial Assistance Requirements

Transactions involving company assets, shareholder benefit, guarantees or related-party support should be assessed for corporate authority, director duties, creditor prejudice, fraudulent conduct and commercial purpose.

Where a company grants security for another party's obligations, board and shareholder approvals, benefit analysis and solvency considerations should be carefully documented.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Recognition of foreign judgments is not automatic in Somalia. A foreign judgment generally requires local recognition or enforcement steps before it can be used to recover against assets located in Somalia.

Somali courts may consider jurisdiction of the foreign court, finality of the judgment, procedural fairness, proper notice, absence of fraud, compatibility with Somali public policy, reciprocity and consistency with Somali law and Sharia principles.

Requirements for Recognition of a Foreign Judgment

A party seeking recognition should expect to provide a certified copy of the judgment, evidence that the judgment

is final and enforceable in the issuing jurisdiction, proof of service or participation, translations where required, authentication or legalisation where necessary and evidence supporting the foreign court's jurisdiction.

Even where recognition is legally available, practical enforcement may depend on identifying assets, obtaining local court orders, navigating procedural requirements and dealing with debtor resistance. International creditors should not assume that a foreign judgment will be enforced automatically or quickly.





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REPUBLIC OF SOUTH AFRICA | WERKSMANS ATTORNEYS

TYPE OF GOVERNMENT

The Republic of South Africa is a constitutional democracy with a nationwide election held every five years. The president of the Republic is elected by majority vote of Parliament, but has historically been the leader of the ruling party. The President is limited to two terms in office.

POLITICAL SYSTEM

MULTI-PARTY DEMOCRACY

The Constitution of the Republic of South Africa Act 108 of 1996 (Constitution) is one of the most progressive in the world and entrenches a Bill of Rights which guarantees property rights, equality, socio-economic rights and individual rights. The Constitution also makes provision for an independent judiciary and the right to freedom of expression.

LEGAL SYSTEM

South Africa has its own independent executive, legislature and judiciary. The supreme law of the Republic is the Constitution, and any law inconsistent with its provisions is unenforceable. The common law runs secondary to the Constitution which is founded on Roman-Dutch law with important English law influences.

TESTS FOR INSOLVENCY

What are the tests for insolvency (ie liquidation)?

A company will be said to be insolvent if its liabilities either exceed its assets (factual insolvency) or if it cannot pay its debts as and when they fall due (commercial insolvency). The latter is the more appropriate test (and the test used to determine the status of a company or corporation) for companies in that very often a company will be factually insolvent but not commercially insolvent.

What are the tests for financial distress (i.e. business rescue or administration)?

A company will be financially distressed within the meaning of the Companies Act 71 of 2008 (2008 Act) when it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months (impending commercial insolvency) or it appears to be reasonably likely that the company will become insolvent (i.e. with its liabilities exceeding its assets) within the immediately ensuing six months (impending factual insolvency). The test

for financial distress is thus a six-month forward-looking test. It contemplates the situation in which the company will find itself in the ensuing six months.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

If a company is insolvent, it should be placed in liquidation. The provisions of Chapter 14 of the Companies Act 61 of 1973 (1973 Act) still regulate the liquidation process for insolvent companies notwithstanding the repeal of the majority of the provisions of the 1973 Act. The liquidation process is well established in South African law and has been deliberated on by our judiciary for many years.

Formal restructuring procedures

Chapter 6 of the 2008 Act introduced business rescue for financially distressed companies to the South African landscape. This is essentially a form of administration and is akin to the administration process in the United Kingdom and Chapter 11 proceedings in the United States.

South African companies that are financially distressed have an opportunity to restructure their businesses as business rescue proceedings are aimed at facilitating the rehabilitation of a company that is financially distressed by providing for -

- the temporary supervision of the company, and the management of its affairs, business and property, by a business rescue practitioner;
- a temporary moratorium (stay) on the rights of claimants against the company or in respect of property in its possession; and
- the development and implementation, if approved, of a business rescue plan to rescue the company by restructuring its business, property, debt, affairs, other liabilities and equity.

The aim of business rescue is to restructure the affairs of a company in such a way that either maximises the likelihood of the company continuing in existence on a solvent basis or results in a better return for the creditors of the company than would ordinarily result from the immediate liquidation of the company.

Furthermore, South African law also offers companies a process known as a compromise with creditors in terms of section 155 of the 2008 Act. In some instances, a company may wish to enter into a compromise with its creditors or a certain class of creditors as an alternative to business rescue and liquidation. It provides a proactive step that the company

can take to restructure the company's financial affairs. The company must provide a detailed proposal (akin to a business rescue plan proposed to creditors in a business rescue scenario) to its creditors and follow the process set out in section 155 of the 2008 Act. For a compromise to be successful, the proposal must be accepted by creditors representing at least 75% in value of the company's creditors present and voting at the meeting convened for the approval of the proposal.

Informal insolvency or restructuring procedures

An informal restructuring requires a company to work with some or all its creditors outside of a formal process in order to come to a negotiated solution where the company can return to financial health. The company can informally convene a meeting of its creditors and attempt to reach an agreement to compromise their debt. Such an agreement would need to be accepted by all of the creditors of the company for it to be binding on all creditors and meaningful. A company would also need to obtain undertakings from the creditors not to make application to court to place the company into liquidation or business rescue during the process.

LIQUIDATION

What is the aim of liquidation?

When a company (or corporation) is no longer able to trade as a consequence of it being insolvent, the company's assets are liquidated – that is, sold either by way of private treaty or by way of public auction in order to pay costs incurred in the winding-up as well as a dividend to the creditors of the company, should there be sufficient assets available to cover the liabilities of the company and the costs of liquidation. Any residue is thereafter divided amongst the former shareholders of the company in accordance with their rights and interest in the company.

Process Required to Commence a Liquidation

In South African law, as it currently stands, a distinction must be drawn between insolvent companies and solvent companies. Insolvent companies are regulated by the provisions of the 1973 Act, whilst the liquidation of solvent companies are regulated by the provisions of the 2008 Act. Some provisions of the 1973 Act, relating to the administration of a liquidated estate and the position and powers of the liquidator, are regulated by the 1973 Act.

Insofar as an insolvent company is concerned, an insolvent company may be liquidated -

- voluntarily by the board of directors passing of a resolution to that effect (driven by the shareholders of a company) and by thereafter filing such resolution and various other forms and documents with the companies' office known as the

Companies and Intellectual Property Commission of South Africa (CIPC); or

- a formal application having been made to court by a creditor, the company itself or one or more of its shareholders.
- insofar as a solvent companies are concerned, a solvent company may also be wound-up by -
 - o voluntarily by the board of directors passing of a resolution to that effect; or
 - o winding-up by court order in the event that the company is unable to effect a voluntary winding-down due to for example, deadlock on the board.

At what point does the liquidation process commence?

For insolvent companies, the 1973 Act provides that a voluntary winding-up commences when the resolution passed, which initiates the process, is registered with the South African companies' office. For a compulsory liquidation, initiated by an application to court, the liquidation shall be deemed to commence at the time of the presentation to the court of the application for the winding-up, once the court has granted a final liquidation order.

Insofar as solvent companies are concerned, the 2008 Act provides that a voluntary liquidation will similarly commence when the resolution is filed with CIPC and that a compulsory liquidation will commence when the court grants the order for the final liquidation of the company.

Duration of the liquidation process

Once a company is in liquidation, the liquidator is appointed to administer the estate and wind it down. Liquidation and the winding-up proceedings, from start to finish, can take anything from 6 months to 5 years depending on the size of the estate, the nature and complexity of the transactions with which the company was involved in and the efficiency of the Master of the High Court's office (public office mandated to assist with deceased estates, liquidations, trusts etc.).

Extent of court involvement in the liquidation process

Compulsory liquidations require the involvement of the courts for their initiation, whilst voluntary procedures do not. The courts, will however, have a role to play in the winding-up process if, for instance, there is any litigation that the company was involved in prior to the commencement of the liquidation of the company, and which the party to the litigation wishes to pursue, or if the liquidator needs to recover assets disposed of by the company when they should not have been disposed of, the liquidator may utilise court proceedings for this purpose.

Management of the company whilst in liquidation

When a company is placed in liquidation, the company remains a corporate and legal entity and retains all its powers but will, from the date of the commencement of the winding-up, cease to carry on its business except in so far as

may be required for the winding-up of the company. From the date of the commencement of a voluntary winding-up, all the powers of the directors of a company cease except in so far as their continuance is sanctioned (a) by the liquidator or the creditors in a creditors' voluntary winding-up; or (b) by the liquidator or the company in general meeting in a members' voluntary winding-up.

As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered with CIPC, the Master of the High Court may appoint any suitable person as provisional liquidator of the company and who shall hold office until the appointment of a liquidator. Liquidators, both provisional and final, are appointed by creditors based on -

1. The number of votes submitted by creditors for a particular liquidator to be appointed. For example, 6 out of 10 creditors voted in favour of a particular liquidator being appointed; and
2. The highest value of a creditor's claim that voted in favour of a particular liquidator being appointed. For example, creditor ABC Trading (Pty) Ltd holds the largest claim against the liquidated company and has voted for a particular liquidator.

Filing of claims

In liquidation proceedings, creditors' claims are filed on affidavit and supported with documentary evidence to indicate that the company is in fact indebted to the creditor. A creditor must file his or her claim with the liquidator prior to the first or second meeting of creditors. Thereafter, if the creditor wishes to file a claim, he may ask to convene a special meeting at which meeting he or she will file his or her claim. The costs of convening such meeting will be for that creditor's account. Only creditors who have proved their claims will benefit from a distribution and can vote for a particular liquidator to be appointed, as set out above.

Factors which influence the period of the administration in a liquidation

Administrative issues remain a major issue for expediting liquidation proceedings. Delays in the appointment of a liquidator, the realisation of assets, the conduct of meetings of creditors and the lodgement and approval of the liquidation and distribution accounts by the Master of the High Court adds to the delay in the liquidation process. Furthermore, the liquidator may need to institute legal proceedings for the recovery of assets that were disposed of by the company at a time when the company should not have disposed of such asset or assets. These legal proceedings can take anything from 6 months to 2 years, depending on the form used for the initiation of such proceedings and the manner in which the litigation unfolds.

Effect of liquidation on employees

In liquidation proceedings, employment contracts are immediately suspended for a period of time and may in time be cancelled by a liquidator after he or she has given due consideration to appropriate measures to prevent the cancellation of employment contracts and in turn, retrenchments. All suspended contracts, not already terminated by the liquidator, will be automatically terminated 45 days after the date of the final appointment of the liquidator. Employees are not obligated to render services to the company once it has commenced liquidation and the company is not required to remunerate such employees for any services so rendered. Insofar as payments to employees are concerned, employees will have a limited, but preferent claim for a portion of their salary and wages, leave, maternity leave, severance (retrenchment) pay as well as the contributions that were to be made by the liquidated company towards any pension, provident, medical aid, sick pay, holiday, unemployment training scheme or fund, or similar fund and a concurrent claim for what remains due to them over and above their preferent claim.

Effect of liquidation on contracts

Generally speaking, in the absence of an express statutory provision to the contrary, all contracts concluded with the company remain in effect when the company is placed in liquidation. The liquidator will need to make a decision, within a reasonable period of time, whether or not he or she intends to continue with such contract.

Effect of liquidation on shareholders

Once a company has been liquidated, the shareholders will have no rights as the company no longer exists. Any residue left after satisfying all the company's debts is paid to the shareholders.

Effect of liquidation on creditors

Creditors' claims are ranked and are paid out in accordance with an order of preference determined by South African legislation. Once all the costs of winding up have been paid, creditors will be entitled to their proportionate share of the residue of the company's estate. Preferent creditors are creditors who are entitled to be paid first by law from the free residue. An example of a preferent creditor are employees. Preferent creditors are paid before concurrent creditors. Secured creditors are those who hold security for their claims and they are paid from the proceeds of a sale of the security that they hold. Concurrent creditors (which would include preferent and secured creditors whose claims are not satisfied in full) are paid out of the free residue of the estate and are the last of the creditors to be paid.

Pending claims, litigation, arbitration

When the court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered with CIPC (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void. Every person who, having instituted legal proceedings against a company which is suspended by a winding-up, intends to continue with such litigation, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, must within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings. If no notice is given, the proceedings shall be considered to be abandoned unless the court otherwise directs.

Voidable transactions

Any transaction entered into by the debtor company before liquidation whereby it has disposed of property belonging to it for no value or in a manner that has the effect or intention of prejudicing creditors or preferring one above the other is a voidable or undue preference transaction and may be set aside.

The Insolvency Act allows the court to set aside dispositions made by an insolvent debtor in the following cases:

Dispositions without value

Where the liquidator can prove that it falls within one of the following categories: (i) dispositions of property made more than two years before the liquidation of the insolvent debtor's estate, (ii) immediately after making the disposition, the liabilities of the insolvent debtor exceeded its assets; and (iii) the disposition was not made for value.

Voidable preferences

The court can set aside a disposition where all the following apply: (i) it is made by an insolvent debtor within six months before the date of liquidation; (ii) it has the effect of preferring one creditor over another; and (iii) immediately after the disposition, the liabilities of the insolvent debtor exceeded the value of its assets. The setting aside of a disposition can be prevented where the person who benefitted from the disposition can prove that it was (i) made in the ordinary course of the debtor's business; and (ii) was not intended to prefer one creditor over another.

Undue preference to creditors

The court can set aside a disposition of property made by a debtor as an undue preference where all the following apply:

(i) the debtor's liabilities exceed its assets; (ii) it was made with the intention of preferring one creditor over another; and (iii) the debtor's estate is subsequently liquidated.

Under common law, once insolvency procedures have commenced, and a disposition is not set aside for any of the reasons stated above, a creditor holding movable or immovable property as security cannot realise that security itself but must deliver it to the liquidator for realisation. The secured creditor must give notice to the Master of the High Court and the liquidator, that it holds the security before the second meeting of creditors. However, a secured creditor can realise movable property itself provided certain procedures set out in the Insolvency Act, 1936, are followed.

Section 88 of the Insolvency Act, 1936, further states that certain mortgages are invalid, whether special or general, where they are passed for the purpose of securing the payment of a debt not previously secured, which was incurred more than two months prior to the lodging of the bond with the registrar of deeds concerned for registration or for the purpose of securing the payment of a debt incurred in novation of or substitution for any such first-mentioned debt. The bond shall not confer any preference if the estate of the mortgage debtor is sequestrated within a period of six months after such lodging.

How is the liquidation process terminated?

Once the affairs of a company have been wound up and if the liquidator has complied with all the requirements of the Master of the High Court, the liquidator may apply in writing to the Master of the High Court for a certificate to that effect. The Master of the High Court shall, when he issues the certificate, state that he consents to the reduction of the security by the liquidator to a stated amount or to its cancellation. The liquidation and winding-up proceedings at this point would be terminated and the company's name removed from the register of companies.

Director or officer liability

A director, including an alternate director, a prescribed officer or a person who is a member of a committee of a board of a company, or of the audit committee of a company is prohibited from trading a company recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. If either of the aforesaid trades a company in this manner, they could be held personally liable for the debts of the company. The aforesaid conduct can also constitute a criminal offence for which a person may be liable for a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment.

BUSINESS RESCUE / ADMINISTRATION

Process required to commence a business rescue

A company can be placed in business rescue voluntarily by the board of directors adopting and filing a resolution to commence business rescue and to place the company under the supervision of a business rescue practitioner. Thereafter, a number of forms and documents would need to be submitted to CIPC for filing. A formal application can also be made to court by affected persons (creditors, employees, shareholders) to place a company in business rescue (this is known as compulsory business rescue).

Once the company is placed under business rescue, all affected persons must be notified of this. A voluntary business rescue application cannot be filed if a compulsory business rescue application has been initiated or if liquidation proceedings have already been initiated by or against the company.

At what point does the business rescue or administration process commence?

A voluntary business rescue commences when the requisite documents are filed with CIPC. A compulsory business rescue, arising from an application made to court where no liquidation proceedings have been instituted against such company, commences once the papers have been lodged with the court. Where liquidation proceedings have been instituted, business rescue proceedings will commence once a court makes such order placing the company under supervision.

Duration of business rescue

In accordance with the provisions of the 2008 Act, business rescue proceedings are designed to last for a period of 3 months from start to finish. However, in practice, business rescue proceedings are extended from time to time with the support of the majority of creditors and can take anything from 6 months to 2 years, depending on the complexities of the business.

Extent of court involvement in the business rescue

Compulsory business rescue applications require the involvement of the courts to a limited degree, whilst voluntary procedures do not. A compulsory business rescue is initiated following an order of the court. Unless there is general litigation pertaining to a business that has been placed under business rescue, other than the initiation of a compulsory business rescue, the court should have no further involvement in the matter.

Management of the company whilst in business rescue

During business rescue proceedings, the business rescue practitioner has full management control of the company and the directors, though not exonerated from their duties

and responsibilities (and corresponding liabilities) are answerable to the business rescue practitioner. Any action taken by a director whilst the company or corporation is in business rescue which requires the approval of the business rescue practitioner will be void.

Filing of claims

Claims in a business rescue need not be submitted on affidavit. In practice, business rescue practitioners either compile their own claim forms for the submission of creditors' claims, creditors, or legal advisors, prepare the necessary claim forms. There is no legal time period prescribed by law within which a business rescue practitioner may receive claims. Typically though, claims are submitted at the first meeting of creditors and can be received up until such time as the business rescue plan is published by the practitioner, for the consideration of all affected persons. The practitioner may, however, determine a date by which all claims must be submitted. In some instances, and following a consideration of the books and accounts of the company, practitioners take into account the position of all creditors, whether or not they prove their claims, when preparing the business rescue plan.

Factors Which Influence the Period of Business Rescue

Factors which necessitate the continuation of business rescue, beyond the 3 month period, include but are not limited to (i) the business rescue practitioner attempting to procure a purchaser for the business or assets; (ii) the need to obtain regulatory approvals in respect of a plan that has been adopted with the requisite support; and (iii) the fulfilment of any conditions precedent, following the adoption of a plan; or (iv) even a general lack of cooperation from creditors or shareholders.

Funding of the company whilst in business rescue

During business rescue, the company may obtain post-commencement finance which is either new money provided to the company following the commencement of business rescue or services rendered by employees or suppliers of the company for the duration of the business rescue. Post-commencement finance will rank in preference to the claims of unsecured and pre-commencement creditors. Post-commencement financiers may also take security for their funding but only over unsecured assets belonging to the company in business rescue. They are also afforded voting rights in the approval or rejection of business rescue plans, whereby all post-commencement financier votes must be included in the tallying of voting results.

Effect of business on employees

Employees continue to be employed by the company on the same terms and conditions, unless different terms are agreed upon between the employees and the company or unless changes occur in the ordinary course of attrition. Any retrenchments contemplated by the business rescue practitioner will be subject to South African labour legislation.

Effect of business rescue on contracts

Generally speaking, contracts concluded with the company (unless they contain an event of default clause, of which business rescue is one such event), prior to the commencement of business rescue, remain extant. The business rescue practitioner may suspend (entirely, partially or conditionally), any agreement to which the company is party to without the sanction of the court, however, the other party to the contract may assert a claim for damages against the company. If the business rescue practitioner wishes to cancel a contract, he or she may only do so with the sanction of the court.

Effect of business rescue on shareholders

There can be no alteration to the classification or status of a company's issued securities unless this is done in the ordinary course of business, by way of an order of court or in pursuance of the provisions of the business rescue plan. Further, shareholders retain their shareholding in the company, notwithstanding the commencement of business rescue.

Effect of business rescue on creditors

The historic position, and claims of creditors, is crystallised as at the date of the commencement of business rescue. Creditors are entitled to submit claims to the business rescue practitioner but may not enforce any claims against the company by way of the institution or commencement of legal proceedings. This is so as a consequence of the "stay" on legal proceedings against the company known as the general moratorium.

Pending claims, litigation, arbitration and the effects of the moratorium

The commencement of business rescue proceedings gives rise to the operation of a general moratorium on the rights of creditors to enforce their claims against a company or in respect of property belonging to the company or lawfully in its possession. A creditor may also not continue with enforcement action against a company (i.e. execution of a writ). In certain instances, proceedings may be brought against a company with the written consent of the business rescue practitioner or with the leave of the court. If a claim is subject to a time limit, the claim will not prescribe during the period in which the company is in business rescue. Prescription will be interrupted.

Voidable transactions

The business rescue provisions in our law do not deal specifically with voidable transactions. Instead, they place an obligation on the business rescue practitioner to investigate any voidable transaction, though these are not specified. However, any action taken by a creditor without the approval of the business rescue practitioner will be void.

The business rescue plan

The business rescue process culminates in the preparation of a business rescue plan by the business rescue practitioner. The business rescue practitioner will consult with all affected persons, creditors and the management of the company when preparing the plan. Broadly speaking the plan will set out details relating to the background of the company, any proposal made for the rescue or rehabilitation of the company and any assumptions or conditions upon which the plan is based. The plan will also include how the assets, liabilities, contracts and employees will be treated following the adoption of the plan.

Voting on the plan

The business rescue practitioner must convene and preside over a meeting of the creditors within 10 business days of the publication of the plan. At this meeting, the plan must be introduced, the employees' representatives may address all persons at the meeting and a discussion is held on the proposed plan. The practitioner will then procure a vote for the approval of the plan. A plan will be accepted if at least 75 per cent of the creditors' vote in favour of the plan and 50 per cent of such votes must be from independent creditors' voting in favour of the plan (i.e. not entities related to the company in business rescue). If the plan affects the rights of shareholders or securities holders, a separate vote of the shareholders or securities holders affected must be procured. A simple majority vote is required for a plan to be supported by shareholders and/ or securities holders. If a plan is rejected, affected persons or the business rescue practitioner can apply to court to set aside the vote on a plan or procure a vote from creditors to draft a revised plan, failing which the plan will be held to have been rejected.

Cram down on creditors

Once the business rescue plan has been approved, it is binding on all creditors regardless of whether or not the creditors were present at the meeting, voted in favour or against the plan or abstained from voting.

Implementation of the plan

Once the plan has been substantially implemented, the business rescue practitioner must file a notice of substantial implementation of the plan with CIPC.

Discharge of claims

If a business rescue plan that is approved by creditors and shareholders, if need be, compromises the claims of creditors, such creditors are not entitled to enforce the remainder of their claims against the company unless the business rescue plan provides otherwise. In such an instance, the company will continue to trade with a "clean bill of health".

Effect on suretyships

If the company that is in business rescue gave a surety or guarantee to a third party, such party cannot enforce such surety or guarantee against the company in business rescue as a result of the operation of the moratorium. Such a party would need to submit a claim in the business rescue. However, if a third party stood surety for, or guaranteed the obligations of, the company in business rescue, such third party could be liable for the remainder of the debt that the company is not able to pay, unless the principal claim is discharged. If the principal claim is discharged, the suretyship claim will fall away but the guarantee, provided it is drafted as an independent guarantee, will remain extant.

How is the process terminated?

Business rescue proceedings end when (a) the court sets aside the resolution or order that began the business rescue proceedings or when the court converts business rescue proceedings into liquidation proceedings; (b) the business rescue practitioner files a notice of termination of business rescue proceedings with CIPC; and (c) business rescue plan has been proposed and rejected and no affected person has acted to extend the proceedings in any manner contemplated by the 2008 Act or a business rescue plan has been adopted and the business rescue practitioner has subsequently filed a notice of substantial implementation of the plan.

What is the status of the company after the business rescue?

If a business rescue plan is adopted and implemented in accordance with its terms, the company will continue to trade and will graduate from business rescue. If a plan is rejected, and steps are not taken to implement a revised plan, the practitioner will need to make application to court to place the company in liquidation. A similar result may ensue if the conditions precedent to a plan are not fulfilled.

Director and officer liability

The civil and criminal liability of directors or officers of a company that is placed in business rescue is the same as that which arises if a company is placed in liquidation.

Compromise in terms of section 155 of the 2008 Act

This is an arrangement governed by section 155 of the 2008 Act between the company and its creditors, or certain classes of creditors. The section applies to a company, irrespective of whether or not it is financially distressed, but not in circumstances where the company is under business rescue proceedings.

The board of a company, or the liquidator of such a company if it is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors,

or to all of the members of any class of its creditors, by delivering a copy of the proposal, and notice of meeting to consider the proposal to every creditor of the company, or every member of the relevant class of creditors (whose name or address is known to, or can reasonably be obtained by the company), and CIPC.

No moratorium arises by operation of the law with this compromise procedure. It may however be incorporated as a provision of the compromise proposal.

A proposal must contain all information reasonably required to facilitate creditors in deciding whether or not to accept or reject the proposal and must be divided into three parts.

Part A sets out the company background. This must include at the very least -

1. a complete list of all the assets of the company, as well as an indication as to which assets are held as security by creditors as of the date of the proposal;
2. complete list of the creditors of the company as of the date of the proposal, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;
3. the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
4. complete list of the holders of the company issued securities, and the effect that the proposal would have on them, if any; and
5. whether the proposal includes a proposal made informally by a creditor of the company.

Part B should set out -

1. the nature and duration of any proposed debt moratorium;
2. the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;
3. the treatment of contracts and the ongoing role of the company;
4. the property of the company that is proposed to be available to pay creditors' claims;
5. the order of preference in which the proceeds of property of the company will be applied to pay creditors if the proposal is adopted; and
6. the benefits of adopting the proposal as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation.

Part C should set out the assumptions and conditions of the proposal including -

1. a statement of the conditions that must be satisfied, if any, for the proposal to come into operation and be fully implemented;

2. the effect, if any, that the plan contemplates on the number of employees, and their terms and conditions of employment; and
3. a projected balance sheet for the company and statement of income and expenses for the ensuing three years, prepared on the assumption that the proposal is accepted.

To be effective, the proposal must be supported by a majority in number, representing at least 75% in value, of the creditors (or each relevant class of creditor/s) present and voting in person or by proxy, at a meeting called for that purpose.

A court may sanction the compromise as set out in such proposal if it considers it “just and equitable to do so” having considered, inter alia, the number of creditors present and voting. There is no obligation on the company to seek court approval though such approval would be prudent.

SECURITY

Types of security

Security can be taken over immovable, movable assets, intellectual property as well as financial instruments i.e. shares and debt securities.

IMMOVABLE PROPERTY

Mortgage bonds

Security over immovable assets is obtained through the registration of a mortgage bond as set out in the Deeds Registry Act 47 of 1937 (“Deeds Registry Act”). The mortgage bond does not transfer the title to the mortgagee but confers a limited real right on to the mortgagee to have the immovable property sold in execution and the proceeds used to settle the secured debt.

Movable property

The most common forms of security for movable or intangible assets are pledges, a cession in security (including a cession in securitatem debiti and an out-and-out cession), general notarial bonds, special notarial bonds and a landlord’s hypothec.

Pledge

A pledge is a type of mortgage of movable property given by a pledger in favour of a pledgee as security for an obligation. It is created by an agreement between the parties and is perfected by the delivery of the pledged asset to the pledgee or an appointed agent. The pledgee maintains possession of the pledged asset, but does not acquire ownership unless a default occurs.

Cessions

A cession in security is a way of granting security over incorporeal movable property (including shares in companies and mineral rights), through an agreement to grant security by a cession of rights in favour of the cessionary.

Cessions can take two different forms namely

- a cession in securitatem debiti, where title to the property remains with the cedent (this is the preferred and most commonly used form); or
- an out-and-out cession, where the cedent agrees to transfer the title to the property to the cessionary, subject to a right of the cedent to have the property transferred back to it by the cessionary once the obligation secured is discharged.

Security over financial instruments is typically created by a pledge or a cession in security, however it is recommended that a combination of the two is utilised. In practice where the shares or any financial instrument is evidenced through a certificate i.e. share certificates, the certificates are usually delivered with a transfer form to perfect the security.

General Notarial bonds

A general notarial bond is a mortgage by a mortgagor of all of its movable property in favour of a mortgagee as security. In the absence of attachment of the property before insolvency, a general notarial bond is merely a means of obtaining a limited statutory preference above the claims of concurrent creditors in the insolvent estate of the mortgagor.

Special Notarial bonds

A special notarial bond is a bond registered after the commencement of the Security by Means of Movable Property Act over tangible movable property where the property has been described so that it is readily recognisable. The title to the movable property remains with the mortgagee subject to the mortgagor security interest.

Landlord’s hypothec

A Landlord’s hypothec is a form of security that comes into effect automatically where rent has become due and payable by the Lessee and has not been paid. The Lessor has a hypothec that provides him or her with a real right of security allowing him to attach and execute the Lessee’s property to satisfy payments of the arrears. The Lessor’s share of public utility services, such as rates and taxes, electricity, water, sanitation and sewer charges that become overdue during the business rescue period and are paid by the Landlord to third parties will be regarded as post-commencement finance.

Guarantees

Guarantees are a form of security generally used in lending transactions where a Guarantor undertakes to pay or perform

another person's debt or obligation in the event of a default by the person primarily responsible for it. The Guarantor, who is not the debtor, guarantees these obligations by granting a security interest in favour of the secured Creditor. In turn the debtor will usually give the Guarantor an indemnity, which is a form of security that exempts the Guarantor from any legal responsibility. These concepts are discussed in more detail below.

STATUTORY PRESCRIBED FORMS OF SECURITY

Aircraft

The Recognition of Rights in Aircraft Act, 1993 prescribes that security over shares in an aircraft can only be created by a deed of mortgage in the prescribed form and can only be enforced by third party creditors to the extent that the asset is located in South Africa. A general notarial bond or special notarial bond cannot be created or registered over an aircraft.

South African ships

Security can only be created by a mortgage in the prescribed form according to the Ship Registration Act, 1998. A general notarial bond or special notarial bond cannot be created or registered over a ship.

Intellectual property

- Trademarks may be hypothecated by a deed of security. The deed of security must be recorded against the relevant mark in the Trade Marks Register;
- the Designs Act, 1993 prescribes that the security that can be taken over registered designs or applications for designs can be taken by a hypothecation by cession in security. Security over unregistered designs is granted by a cession in security;
- Security over patents or application for patents can be taken by a hypothecation according to the Patents Act, 1978 or by a cession in security. Security over unregistered patents is granted by a cession in security;
- Security over copyright is created by a cession in security;

Commercial Security or Quasi-Security

The following forms of transactions are ordinarily not classified as security in the ordinary sense, however, because of the consequences the transactions have they can be classified as a form of commercial security or quasi-security.

Briefly examples of these transactions are -

- Sale and leaseback;
- Factoring;
- Hire purchase;
- Instalment sales;
- Finance leases; and
- Repurchase agreements.

In general, there are no specific formalities to be complied with in relation to these transactions. These structures are also unlikely to be re-characterised as security interests if the parties genuinely intended the contracts to have the intended effect.

Taking security

There are two common ways for a lender to take security in South Africa namely through the establishment of a Security Special Purpose Vehicle ("Security SPVs") or the appointment of Security Trustees.

1. Security SPVs

Security SPVs are the most popular method by which secured creditors take security where there are multiple lenders and have been utilised since the late 1980s. The security SPV is established and usually takes the form of a ring-fenced shelf company, it then grants a guarantee to the secured creditors for the obligations of a debtor under a loan agreement. The debtor in turn provides an indemnity to the security SPV and secures its obligations under the indemnity by granting security to the security SPV. The shares in the security SPV are usually held by an owner trust or other administrative party.

The owner trust or administrative party is ordinarily required to grant a cession and pledge to the secured creditors over the shares it holds in the security SPV. This structure is preferred not only because it is accessible to multiple lenders but also because it is an insolvency remote structure.

2. Security trusts

A security trustee is an entity which holds the various security interests created in trust for the various creditors, such as banks or bondholders. This structure is, however, not favoured as it is uncertain whether security can validly be created in favour of a security trustee acting as trustee for a group of lenders. A security trustee can be seen as an agent for the lenders in relation to the security, with the result that the security was therefore not validly created. However, if the lenders intend taking security in the form of mortgage or notarial bonds, this will not be possible under this structure as the registration of mortgage bonds and notarial bonds where security is granted in favour of an agent for a principal is prohibited by the Deeds Registry Act.

Registration and registration costs of security

- Mortgage bonds, general notarial bonds, special notarial bonds, aircraft mortgages, ship mortgages and hypothecations relating to trade marks, designs and patents must be registered as discussed above and there are registration fees payable for the registration.
- Conveyancers and notaries in relation to registration of bonds draw up the necessary documentation, on the instruction of the mortgagee, and are entitled to charge

fees for preparing bonds according to a recommended tariff, which calculates fee based on the sum secured by the bond on a sliding scale, payable by the party giving the security.

- The legal rights associated with the mortgage bond come into effect only after the mortgage bond has been registered in the relevant Deeds Office. An endorsement is made on the Title Deed of the mortgaged property, recording the details of the mortgage bond.
- Where transfer duty is payable, the rate is determined on a sliding scale based on the value of the property. The mortgagor is liable for transfer duty.
- There are no documentary taxes payable in connection with the granting or taking of any other forms of security.

Requirements for the assignment or transfer of registered Security

Secured debt is frequently traded in South Africa, usually by the cession of the transferring creditor's rights in the security.

To be able to transfer or assign registered security, where the security is a bond, the consent of the bondholder may be required. The cession must also be registered at a relevant Deeds Registry. This is because mortgage bonds are ranked in order of preference and a bondholder holds first preference from the proceeds of the sale of the property in the event of insolvency of the property owner.

If a security SPV structure has been used, the guarantee granted by the security SPV usually stipulates that it is granted for the benefit of all holders of the debt for which the guarantee was granted, including any and all transferees.

Methods of enforcement of security

Secured creditors can generally enforce their security on the happening of a default in connection with the principal obligation. The following general principles apply in relation to security conferred by -

- a cession in securitatem debiti, a pledge and a special notarial bond, the secured creditor can, without prior judgement against the security provider, procure the sale of the secured assets and apply the proceeds to satisfy the principal obligation; and
- a mortgage bond and a general notarial bond, the secured creditor is first required to perfect the security by taking possession of the secured assets, usually by way of attachment, pursuant to a court order, by the sheriff of the relevant High Court. After this, the secured creditor can procure the sale of the assets and apply the proceeds to discharge the principal obligation.

An agreement of parate executie may be entered into by the parties where they agree that the secured assets will be sold without the need for judicial execution provided there is no prejudice to the security provider.

This type of agreement is, however, invalid in relation to security over immovable property or secured assets not in the possession of the secured creditor at the time it wishes to enforce its rights.

Instances in which securities might be vulnerable to attack by third parties, including the government

The most prominent instances where security becomes vulnerable are where expropriation by the Government occurs. Expropriation is governed by the Expropriation Act, 1975, pending the proclamation of the Expropriation Act, 2024. According to the Expropriation Act, 1975, where ownership of property is expropriated in terms of the act on the date of expropriation, the property is released from all mortgage bonds (if any) but if such property is land, it shall remain subject to all registered rights (except mortgage bonds) in favour of third parties with which it is burdened, unless or until such rights have been expropriated from the owner thereof in accordance with the provisions of the act. Expropriation is a genuine threat as it attacks what is considered to be the most secure form of security being mortgage bonds leaving the secured creditor with no recourse to the underlying asset or the debtor.

Lenders of security in the form of mortgage bonds should also be cognisant of section 88 of the Insolvency Act as discussed above under the topic of voidable dispositions – undue preference to creditors. In terms of section 88, should a mortgage bond be registered for the purposes of securing the payment of a debt which was previously not secured and should such unsecured debt have been incurred more than two months prior to the lodgement of the mortgage bond in the applicable deeds registry, such mortgage bond shall not confer any preference in favour of the lender should the borrower be sequestrated (or the borrowing entity be liquidated in the case where the mortgagor is an entity) within a period of six months after lodgement of the mortgage bond.

Problems experienced when enforcing security

The most common problems faced by a secured creditor when attempting to enforce security include exchange control approval and competition laws.

Financial assistance requirements

The securing of any debt or obligation by a creditor will constitute the provision of financial assistance under the Companies Act where a debtor and/or guarantor/security provider are related or inter-related persons. The Companies Act states that a juristic person is “related” to another juristic person if -

- either of them directly or indirectly controls the other or the business of the other;
- either is a subsidiary of the other; or
- a person directly or indirectly controls each of them or the business of each of them.

An “inter-related person”, when used in respect of three or more persons, means persons who are related to one another in a linked series of relationships, such that two of the persons are “related” (as defined above), and one of them is related to the third in any such manner, and so forth in an unbroken series.

The guarantee/security may also constitute a “distribution” as it entails the incurrance of a debt or other obligation by the South African entity for the benefit of another company within the same group of companies i.e. the Borrower.

Accordingly, in terms of both section 45 and section 46 of the Companies Act, inter alia, a special resolution of the debtor’s shareholders will be required and the board of directors be required to be satisfied that the debtor will meet the requirements of the solvency and liquidity test as set out in the 2008 Act. This will not apply in instances where a holding company grants financial assistance to or for the benefit of a subsidiary company.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

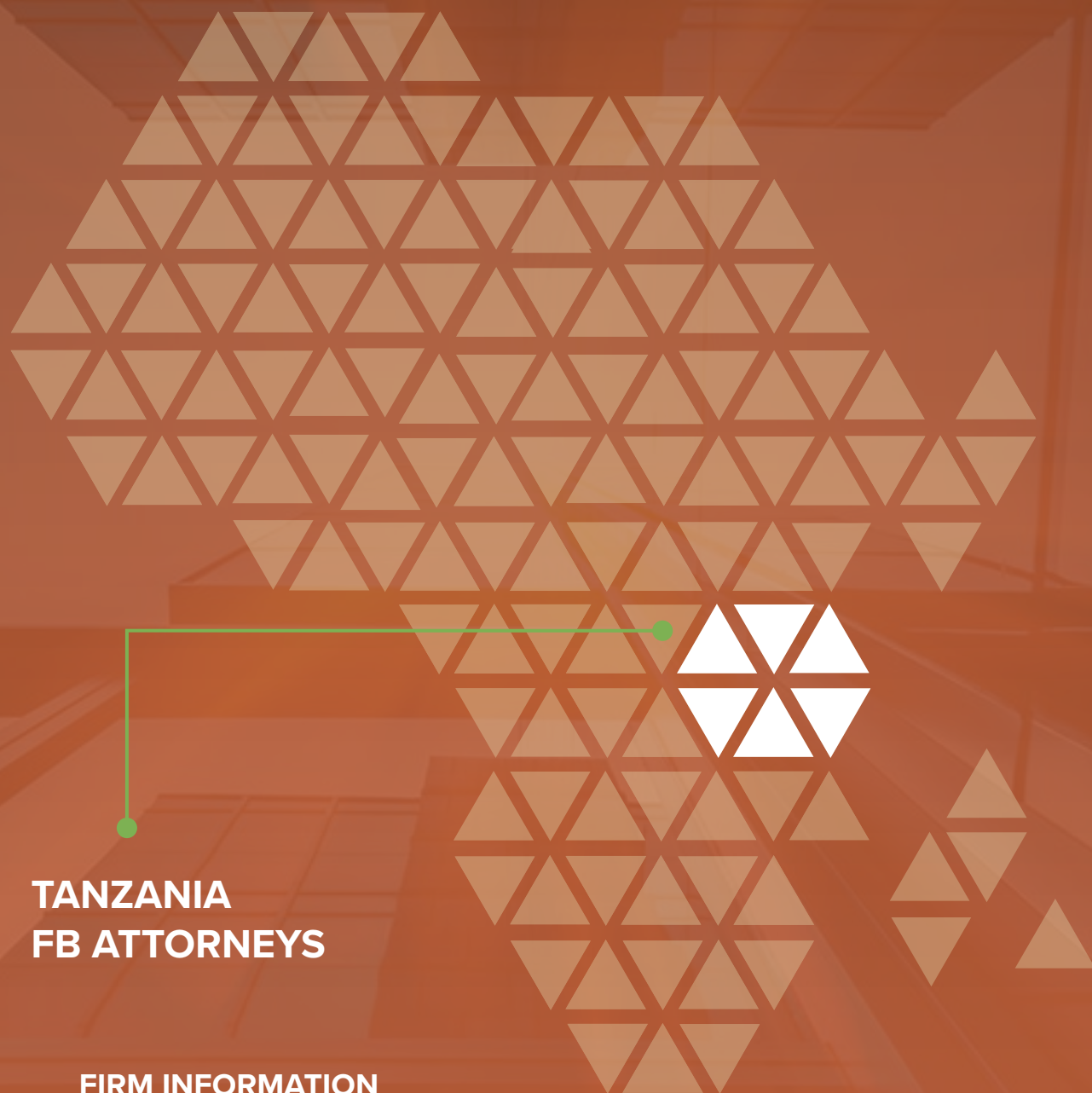
A judgment duly obtained in a court of a foreign jurisdiction is enforceable in South Africa provided it accords with the ordinary procedures applicable under South African law for the enforcement of foreign judgments.

Requirements for recognition of a foreign judgment

For a court to enforce a foreign judgment, the foreign court’s judgment must be final and conclusive in that it is unalterable by the court which pronounced on it; the foreign court must have had jurisdiction to hear the matter before it in accordance with its laws and the laws governing the jurisdiction of South African courts and the recognition of the foreign judgment must not be contrary to public policy or to the laws of natural justice and the foreign judgment must accord with section 1 of the Protection of Businesses Act 1999 of 1978.

Requirements for the recognition of a foreign trustee, business rescue practitioner, or an insolvency practitioner
When a foreign representative, such as a liquidator, trustee or receiver, wishes to deal with assets in South Africa, such an individual must first be recognized by a court of law in South Africa before he is entitled to act. Our law does, and has accordingly, recognized foreign representatives.





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TANZANIA | FB ATTORNEYS

TYPE OF GOVERNMENT

Presidential Republic.

POLITICAL SYSTEM

The country has a multiparty system.

LEGAL SYSTEM

The legal system of Tanzania is based on Common Law but also accommodates Islamic and Customary Law.

TESTS FOR INSOLVENCY

DISTRESS

What are the tests for insolvency? (i.e., liquidation)

The test for insolvency under the Companies Act of Tanzania is if the company is unable to pay its debts. A company is deemed unable to pay its debts and therefore subject to winding up/ liquidation under the following circumstances:

- if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding TZS 50,000 (approximately USD 18.62) then due has served on the company, by leaving at the registered office of the company, a written demand requiring the company to pay the sum so due and the company has for 21 days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
- if execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due; or
- if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities, taking into account the contingent and prospective liabilities of the company.

What are the tests for financial distress (i.e. business rescue or administration)?

The Companies Act, Cap 212 does not specifically provide for financial distress but provides for administration by order of the Court, if the Court is satisfied that the company is or

is likely to become unable to pay its debts. The tests for administration orders are as follows:

- If the Court is satisfied that a company is or is likely to become unable to pay its debts; and
- considers that following an administration order it would be likely that the company will achieve one or more of the below purposes -
 - the survival of the company, and the whole or any part of its undertaking, as a going concern;
 - sanctioning a compromise or arrangement between the company and its creditors; and
 - a more advantageous realisation of the company's assets than would be effected on a winding up;

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

Under the Companies Act, there are two ways under which a company can be wound up.

Voluntary winding up

A company can be voluntarily wound up when the period, if any, fixed for the duration of the company by the Articles of Association expires, or the event, if any, occurs, on the occurrence of which the Articles of Association provide that the company is to be dissolved, and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.

Winding up by court

This is where the Court makes an order for winding up of a company.

Formal restructuring procedures

The restructuring procedure is what is termed under the Companies Act of Tanzania as arrangements and reconstructions. Where a compromise or arrangement is proposed between a company and its creditors or between the company and its members, the Court may, on application (in a summary way) by the company or by any creditor or member of the company, or, in the case of a company being wound up, by the liquidator, order a meeting of the creditors, or of the members of the company, (as the case may be), in such manner as the Court directs.

If a majority in number representing three-fourths in value of the creditors or members (as the case may be), present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the Court is binding on all creditors or on the members (as the case may be), and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

Informal insolvency or restructuring procedures

Insolvency and restructuring in Tanzania is a formal procedure which must be conducted in accordance with the Companies Act.

LIQUIDATION

What is the aim of liquidation?

The aim of liquidation is to wind up the company i.e. bring it to an end and pay off or discharge all company liabilities. According to the Companies Act liquidation operates in favour of all the creditors and all the contributories of the company.

Process required to commence a liquidation

In Tanzania there is voluntary winding up and winding up by Court.

Voluntary winding up

For a voluntary winding up, the directors must call an extraordinary general meeting and issue a notice to all shareholders of not less than 21 days from the date of the meeting and all the shareholders or representatives of the shareholders should attend unless otherwise unable. Procedures as per the Memorandum and Articles of Association of the company should be adopted. The extraordinary members' meeting should discuss the voluntary winding up and not less than 75% of the members should vote for the winding up and pass a special resolution for voluntary winding up. The shareholders must also appoint a liquidator(s) to wind up the affairs of the company, to distribute the assets and fix the remuneration to be paid to the liquidator.

Once the special resolution for voluntary winding up is passed, it must be filed with the Registrar of Companies within 14 days. Further, within 30 days from the passing of the resolution for winding up of a company, the directors must make a declaration which must be in a prescribed form that they have made a full inquiry into the affairs of the Company, and that, having so done, they are of the opinion that the Company will be able to pay its debts in full within such period not exceeding twelve months from the commencement of the winding up.

Voluntary winding up by creditors of the company starts with a meeting of creditors which has to be called on 21 days' notice (simultaneously with sending the notices of the general meeting of the company). The creditors appoint the liquidator in that meeting. If the creditors and company nominate different persons, then the person nominated by the creditors shall be the liquidator.

Winding up by Court

Presentation of the petition for winding up of a company to Court which may be presented by the members, creditors or contributories is the start of the process.

At what point does the liquidation process commence?

- A voluntary winding up is deemed to commence at the time of passing the resolution for voluntary winding up.
- The winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for the winding up to the Court. If a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution.

Duration of the liquidation process

Liquidation ends as soon as all the company's affairs are wound up according to the procedures provided under the Companies Act. There is no set duration for liquidation. It therefore depends on the extent and complexity of the companies' liabilities and/or affairs.

Extent of court involvement in the liquidation process

In winding up by Court, the Court is involved from the beginning to the end and has powers to -

- hear winding up petitions
- dismiss or give interim orders
- stay proceedings antecedent to the winding up order
- appoint an official receiver
- issue and enforce any orders relevant to the liquidation suo motto or upon application

During the process of voluntary winding up, the Court can be involved to the below extent -

- If a vacancy occurs by death, resignation or otherwise in the office of the liquidator appointed by the company, a general meeting may be convened by any contributory or, if there were more liquidators than one, by any continuing liquidator for appointment of the liquidator to fill the vacancy. On application by any contributory or, by the continuing liquidators, the manner for conducting such meetings shall be determined by the Court.

- On the application of the liquidator or of any other person who appears to the Court to be interested, the Court may make an order deferring the date at which the dissolution of the company is to take effect for such time as the Court thinks fit.

Management of the company whilst in liquidation – the role, responsibility and powers of the board of directors and the liquidator

Upon appointment of the liquidator, all powers of the directors shall cease except insofar as it is agreed otherwise by a resolution. The liquidator assumes full control of the company's affairs until they are finally wound up.

Filing of claims – form, timing, adjudication and process

All debts and claims must be proved against the company. The claimants will issue a proof to the liquidator. In the creditor's proof of debt, the following must be disclosed -

- the creditors' name and address
- the total amount of his claim at the date of liquidation
- whether the debt is a preferential debt
- particulars of how and when the debt was incurred
- information of the securities held
- any witnesses to the claims in winding up by Court, the Court may fix a time within which creditors are to prove their debts or claims or are to be excluded from the benefit of any distribution made before those debts are proved.

Factors which influence the period of the administration in a liquidation

- Complexity of the company affairs
- The number of claims and proving of the said claims
- Opposition or objections by contributories, creditors or the company.
- The Courts diary

Effect of liquidation on:

• Employees

Employees stand to be dismissed at the time of commencement of the liquidation process. In terms of the Companies Act, the wages and salaries of employees who are not directors in respect of services rendered to the company in the 4 months before the commencement of the liquidation, are considered preferential debts. Preferential debts are those debts which are paid in priority to all other debts and include all Government taxes, local rates and customs and excise duties due from the company at the relevant date and having become due and payable within 12 months before that date, all Government rents not more than 1 year in arrears and the above-mentioned employees' wages and salaries.

• Contracts

The Court may on the application of any person who is entitled to the benefit of a contract made with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the nonperformance of the contract or otherwise as the Court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up.

• Shareholders

In the event of a company being wound up, every present and past shareholder is liable to contribute to the assets of the company in an amount sufficient for payment of its debts and liabilities, and the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves. A past shareholder is not liable to contribute if he has ceased to be a shareholder for one year or more before the commencement of the winding up. Further, a past shareholder is not liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a shareholder.

• Creditors

Creditors are paid out of the assets of the company and after payment of the preferential debts.

• Pending claims, litigation, arbitration

On application by the company, creditor or contributory after the liquidation process has commenced or after the liquidation/winding up order has been issued, the proceedings in Court against the company may be stayed.

Voidable transactions

Where the company has 2 years prior to commencement of winding up entered into a transaction with any person under value, the Court may make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction, on application to the Court.

A company will be said to have entered into a transaction with a person at undervalue if -

- a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or
- b) the company enters into a transaction with that person for a consideration the value of which is significantly less than the value of the consideration provided by the company.

How is the liquidation process terminated?

With a voluntary winding up, once the liquidator disposes of the assets of the company and winds up the business of the

company, the liquidator makes up an account of the winding up, showing how the winding up has been conducted and how the assets of the company have been disposed of. After the liquidator prepares an account, he should call a members' meeting and at the meeting the liquidator must table the account of how the assets of the company were disposed. After the members' meeting, the liquidator must submit the statement of account to the Registrar within 14 days from the date of the said meeting and once the Registrar receives the account, he shall register it and within 3 months from the date of filling the account, the company shall be deemed dissolved.

With a winding up by Court, when the affairs of a company are completely wound up, the Court, if the liquidator makes an application, makes an order that the company be dissolved from the date of the order, and the company is dissolved accordingly. A copy of the order must, within 14 days from the date thereof be delivered by the liquidator to the Registrar of Companies for deregistration.

Director or officer liability

When a company is ordered to be wound up by the Court, any person being a past or present director or officer of the company will be deemed to have committed an offence where, within 12 months immediately preceding the commencement of the winding up, such director or officer -

- concealed any part of the company's property or debt due to or from the company
- fraudulently removed any part of the company's property
- concealed, destroyed, mutilated or falsified any book or paper affecting or relating to the company's property or affairs
- made false entry in any book or paper affecting or relating to the company's property or affairs
- fraudulently parted with, altered or made any omission in any document affecting or relating to the company's property or affairs
- pawned, pledged or disposed of any property of the company which has been obtained on credit and which has not been paid for (unless the pawning, pledging or disposal was in the ordinary course of the company's business)

Further, when a company is ordered to be wound up by the Court, an officer or director of the company is deemed to have committed an offence unless he proves that, at the time of the conduct constituting the offence, he had no intent to defraud the company's creditors, if he has -

- by false pretences or by fraud induced any person to give credit to the company
- made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the levying of any execution against, the company's property
- concealed or removed any part of the company's property since, or within 2 months before, the date of any unsatisfied judgment or order for the payment of money obtained against the company.

Misconduct by a director or officer at the time the company is being wound up can amount to an offence.

Under the Act, the director will be committing such offence if he -

- does not, to the best of his knowledge and belief, fully and truly disclose to the liquidator all the company's property, and how and to whom and for what consideration and when the company disposed of any part of that property (except such part as has been disposed of in the ordinary course of the company's business)
- does not deliver to the liquidator (or as he directs) all of the company's property as is in his custody or under his control, and which he is required by law to deliver
- does not deliver to the liquidator (or as he directs) all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver
- knowing or believing that a false debt has been proved by any person in the winding up, fails to inform the liquidator as soon as practicable
- after the commencement of the winding up, prevents the production of any book or paper affecting or relating to the company's property or affairs.
- such a person commits an offence if after the commencement of the winding up he attempts to account for any part of the company's property by fictitious losses or expenses; and
- he is deemed to have committed that offence if he has so attempted at any meeting of the company's creditors within the 12 months immediately preceding the commencement of the winding up.

Consequences of director or officer liability (criminal and civil consequences)

A person guilty of an offence under the above-mentioned offences can be liable to imprisonment or a fine, or both.

BUSINESS RESCUE/ADMINISTRATION

Process required to commence a business rescue

As per the Companies Act, administration is commenced by way of an application to Court for an administration order. The application is made by way of a petition and affidavit which may be lodged by the company, directors or creditors.

At what point does the administration process commence?

The administration process commences upon the presentation of a petition to Court for an administration order.

Duration of administration process

There is no set duration for the administration process under the law. This depends on the extent and complexity of the companies' liabilities and/or affairs.

Extent of court involvement in the administration process

The Court is involved from the outset of the administration process and is the one empowered to make an administration order. Prior to making the administration order and on hearing a petition for an administration order, the Court may dismiss it, adjourn the hearing conditionally or unconditionally, or make an interim order or any other order that it thinks fit. The Court can appoint an administrator or fill his vacancy upon death, resignation or otherwise. On application by the administrator the Court may discharge or vary the administration order.

Management of the company whilst in administration

After appointment, the administrator of a company may do all such things as may be necessary for the management of the affairs, business and property of the company.

Filing of claims

Where an administration order has been made, the administrator shall, within 3 months (or such longer period as the Court may allow) after the making of the order, send to the Registrar and (so far as he is aware of their addresses) to all creditors, a statement of his proposals for achieving the purpose/s specified in the order, and lay a copy of the statement before a meeting of the company's creditors summoned for the purpose on not less than 14 days' notice. The administrator shall also, within 3 months (or such longer period as the Court may allow) after the making of the order, either: send a copy of the statement (so far as he is aware of their addresses) to all members of the company, or publish in the prescribed manner a notice stating an address to which members of the company should write for copies of the statement to be sent to them free of charge.

Factors which influence the period of administration

- The complexity of the company's affairs
- The complexity of the proposed plan

Funding of the company whilst in administration

The administrator has powers provided under the Companies Act to raise or borrow money and grant security over the property belonging to the company during the administration process. Effect of administration on -

• Employees

Depending on the proposed rescue plan, the treatment of employees remains regulated by existing employment and labour laws. If the company is restructured, and if employees are retrenched, they will need to be retrenched in accordance with their contracts and the applicable employment and labour laws.

• Contracts

This will vary depending on the kind of contract entered into and the proposed rescue plan. If the contract contains

a termination clause upon administration, then they will terminate upon the commencement of the administration process. The administrator may choose to uphold certain contracts that may aid the rescue plan.

• Shareholders

Shareholders will be provided with the administration plan by the administrator and if at any time they think the administrator is handling the company's affairs, business and property in a manner which is unfairly prejudicial to the interests of all shareholders or part of the shareholders, they can apply to Court for necessary orders against the administrator.

• Creditors

An administrator must convene a creditors' meeting with sufficient notice. The meeting will afford the creditors an opportunity to review and possibly modify the proposed plan. The Companies Act imposes a duty on the administrators to ensure that creditors are furnished with the company's statement of affairs within 3 months of the issuance of the administration order. For protection of their interests, creditors can at any time while administration order is in place, apply to the Court by petition for an order on the ground that the company's affairs, business and property are being or have been managed by the administrator in a manner which is unfairly prejudicial to the interests of its creditors or members generally, or of some part of its creditors or members.

Pending claims, litigation, arbitration and effects of the moratorium

At any time when an administration order is in force, no proceeding or legal process may be commenced or continued with against the company or in respect of its property save with the leave of the Court or the consent of the administrator.

Where the company has, 2 years prior to commencement of the administration process, entered into a transaction with any person at under value, the Court may make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction on application to Court. A company will be said to have entered into a transaction with a person at under value if -

- the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration, or
- the company enters into a transaction with that person for a consideration the value of which is significantly less than the value of the consideration provided by the company.

The plan

Where an administration order has been made, the administrator shall, within 3 months (or such longer period as the Court may allow) after the making of the order send

to the Registrar and (so far as he is aware of their addresses) to all creditors a statement of his proposals for achieving the purpose or purposes specified in the order, and lay a copy of the statement before a meeting of the company's creditors summoned for the purpose on not less than 14 days' notice. The meeting may approve the proposals of the administrator as it is or with modifications subject to the approval of administrator.

Implementation of the plan

The administrator shall implement the plan and if the creditors are of the opinion that the administrator has been managing the company in a manner which is unfairly prejudicial to the interests of its creditors or members or that any actual or proposed act or omission of the administrator is or would be so prejudicial, can apply to Court for necessary orders and the Court can make such order as it thinks fit for giving relief in respect of the matters complained of.

How is the process terminated?

If the proposed plan is successful, the administrator releases himself upon application to the Court followed by publication in the Government Gazette.

What is the status of the company after administration?

After release of the administrator, the company can resume its undertaking. However, if the scheme is abandoned, creditors may petition the Court for a winding up of the company.

Director and officer liability (civil consequences and criminal consequences)

The directors must at all times act honestly and in good faith and in what they believe to be in the best interests of the company.

If found guilty of any offence before or after the issuance of an administration order, can be liable to imprisonment or to a fine, or both.

SECURITY

Types of securities

- Legal charge over landed property
- Debenture over fixed and/or floating assets of a company
- Deed of assignment (assignment of receivables)
- Share pledge
- Personal or corporate guarantee
- Chattel mortgage over property owned by individuals

Statutory prescribed forms of security

Land Forms No. 29 (notification of a disposition), Land form

No. 30 (application for approval of disposition) 40 (mortgage of a right of occupancy) Company Form No. 96, spouse consent.

Taking of security

- Legal charge over landed property – execution of a mortgage of a right of occupancy agreement and the land forms or company form for a property issued by a company
- Debenture – execution of the debenture and the relevant forms
- Assignment (assignment of receivables) – execution of the deed of assignment
- Share pledge - execution of the share pledge agreement
- Personal or corporate guarantee - execution of the guarantee
- Chattel mortgage over property owned by individuals – execution of the chattel mortgage agreement

Security trustees/special purpose vehicles

The law allows for security trustees which can be arranged or agreed by the lenders.

Most robust form of security

Mortgage of a right of occupancy over landed properties

Registration of security

- Debenture – must be registered by the Registrar of Companies within 42 days from the date of execution.
- Charge of a landed property – if issued by a company it must be registered by the Registrar of Companies within 42 days from the date of execution. Thereafter it should be registered by the Registrar of Titles at the Ministry of Lands and Human Settlement Developments. If it is issued by an individual it is only registered by the Registrar of Titles.

Stamp Duty and Registration Costs

Document	Official Fee (USD)	Stamp Duty
Mortgage of a right of occupancy	USD 74.35 200000	USD 4.07
Mortgage of a right of occupancy by a Company	USD 74.35 (at the company registry)	USD 4.07
Debenture	USD 8.18	USD 5.17
Chattel Mortgage	USD 29.74	USD 1
Guarantee	USD 14.87	USD 1
Other agreements and security documents	SD 14.8	USD 1

Each extra copy is charged stamp duty in the amount of USD 0.19. TZS 2,663 is equal to USD 1.

Instances in which securities might be vulnerable to attack by third parties

The application for renewal of leasehold land (where the maximum term is 99 years) must be made by the registered owner. When the term expires while the property is charged in favour of a lender as security, owners tend not to make the application and the property reverts to the President as trustee of all land. Upon the issuance of statutory notices for default and intentions to sell charged property, most debtor companies make application to Court for injunctive orders to prohibit the realization of security.

Methods of enforcement of security

Public auction and private sale.

Problems experienced when enforcing security

Issuance of injunctive orders by Courts to prohibit the realization of security.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which the court will recognize a foreign judgment.

The position of the law in Tanzania is that foreign Judgments can be enforced in two different ways: direct enforcement approach or by way of action, depending on whether their countries of origin have reciprocal arrangements with Tanzania or not. First, by way of action, which applies when there is no reciprocal arrangement between Tanzania and the foreign country from which the foreign Judgment sought to be recognized and enforced in Tanzania emanates. In this regard, the foreign judgment creditor institutes a fresh suit in the competent court in Tanzania attaching the foreign judgment in his suit and thereby bringing it to the attention of the Tanzanian court that there exists an obligation by the Defendant as expressed in the attached foreign judgment which obligation remains unfulfilled and thus the plaintiff is suing the defendant on the basis of his failure to fulfil his obligations under the foreign judgment.

Second, direct enforcement applies where the country of origin of the foreign Judgment is one with which Tanzania has a reciprocal arrangement for mutual recognition and enforcement of their judgments. According to the Reciprocal Enforcement of Foreign Judgments Act Cap. 8 R.E 2019, A foreign judgement will be recognised if -

- It is a judgement by a Superior Court of a foreign country that enjoys the benefits under the Reciprocal Enforcement of Foreign Judgments Act or is a judgement made after an order directing that the Reciprocal Enforcement of Foreign Judgments Act shall apply in that country.
- Seeks to satisfy a specified or liquidated sum arising from criminal or civil proceedings.

- Is final and conclusive
- Is not wholly satisfied or executed.
- Is made by a Court with competent jurisdiction to try the matter given the circumstances of the case.
- Fairly obtained between the parties i.e. foreign ex parte orders due to failure to properly serve the defendant are not recognized.
- Is not contrary to public policy.
- Is not res judicata.
- Was not obtained fraudulently.
- Is registered with the High Court of Tanzania according to the provisions of the Reciprocal Enforcement of Foreign Judgements Act.

Requirements for recognition of a foreign judgment

The judgment holder has to make an application to the High Court of Tanzania to have the judgment registered at any time within 6 years after the date of the judgment. The respondent has a right to challenge the application. On registration, the judgment has the same force and effect (reciprocity) as if it had been originally given and delivered by the High Court of Tanzania.

Requirements for the recognition of a foreign trustee, business rescue practitioner, or an insolvency practitioner

There are no provisions in the Companies Act for recognition of foreign practitioners.





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UGANDA | KATENDE, SSEMPBWA & CO. ADVOCATES

COUNTRY INFORMATION

The Republic of Uganda, is a landlocked country situated in East-Central Africa and bordered to the East by Kenya, to the North by South Sudan, to the West by the Democratic Republic of the Congo, to the South-West by Rwanda, and to the South by Tanzania. The official languages of the country are English and Swahili.

TYPE OF GOVERNMENT

Uganda is a Presidential Republic. This means that the President of Uganda is both the Head of State and Head of Government. Executive power is exercised by the Government and legislative power is vested in both the Government and the National Assembly. The system of Government is a democratic parliamentary system with universal suffrage for all citizens over 18 years of age.

POLITICAL SYSTEM

Political party activities were restricted from 1986 in the non-party movement system, but in July 2005 a constitutional referendum cancelled this 19-year ban on multi-party politics. Membership of the Parliament of Uganda is comprised of a majority membership elected by popular vote with certain categories of seats reserved for established special interest groups, such as women, army members, disabled persons, elderly and the youth.

LEGAL SYSTEM

Uganda's legal system follows the English Common law tradition and the doctrine of Equity. The Judicature Act Cap 16 lays forth the laws applicable in Uganda and include: written law, common law (precedents from decided cases), doctrines of equity and any established and current custom or usage. The Ugandan judiciary operates as an independent branch of Government and consists of Magistrates Courts, the High Court, Court of Appeal/Constitutional Court and the Supreme Court. Judges for the High Court and Justices of the Court of Appeal are appointed by the President and approved by the Legislature.

TESTS FOR INSOLVENCY

What are the tests for insolvency? (i.e., liquidation)

The test for insolvency in Uganda's commercial law is evidenced by the company's inability to pay its debts as and

when they fall due. This is demonstrated in the following ways:

- The failure of the company, within 20 working days, to comply with a statutory demand;
- An execution order issued against the debtor company in respect of a judgment debt remaining unsatisfied; or
- The receivership or attachment of all, or substantially all, of the debtor's property.

What are the tests for financial distress (i.e. business rescue or administration)?

The Insolvency Act, Cap 108 does not use the term 'financial distress', in Ugandan law, but an administration process may be commenced when the board opines that the business is or will be unable pay its debts in the same manner as set out above.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

There are 3 formal insolvency procedures available in Uganda – bankruptcy, liquidation and receivership. The bankruptcy procedure secures a formal declaration of inability by an individual to pay his/her debts. Liquidation can be initiated by the Court, by the company or its directors (i.e. voluntary), or its creditors or subject to Court supervision. The receivership process is aimed at enabling a secured creditor to recover its money.

Formal restructuring procedures

The formal restructuring processes in Uganda include the following:

- Compromise or Arrangement. This is provided for under section 230 of the Companies Act. It may be approved by a majority in number representing three-fourths in value of the creditors (or class) present and voting at a meeting ordered by Court and, if sanctioned by Court, the compromise or arrangement is binding on all creditors (or the class), the company and, where applicable, the liquidator and contributories;
- Court annexed Alternative Dispute Resolution;
- Provisional Administration. This is a rescue mechanism by which a company can forestall its slide into receivership or liquidation. A provisional administrator is appointed by a special resolution and a notice in writing on the date the interim protective order is made; and
- Administration. This commences on the execution of an administration deed by a company in a general meeting.

Informal insolvency or restructuring procedures

The law does not particularly provide for informal insolvency procedures, but a party can nevertheless opt for it to avoid or mitigate the consequences of insolvency. They include the following:

- **Government Bail Out:** This can be done by way of tax waivers, capital injection, provision of soft loans, provision of guarantees, and provision of assets or offer of Government tenders. In Uganda, these are mainly obtained through negotiations with the Government, and are typically implemented on a case-by-case basis, subject to the applicable public finance, tax and procurement requirements; and
- **Contractual Restructuring.** This involves changing the composition and/or structure of assets and liabilities of a debtor in financial difficulty. Restructuring may take the form of rescheduling of debt repayments, roll-overs, conversion of the currency in which the debts are denominated, alteration of interest rates, forbearance of penalties in loan agreements, equity swaps, partial or total debt write offs, asset sales, hive downs and special purpose vehicles.

LIQUIDATION

What is the aim of liquidation?

The aim of liquidation is to bring the company's existence to an end and to distribute the proceeds from a sale of the company's assets fairly amongst the entitled persons (i.e. creditors and thereafter shareholders).

Process required to commence a liquidation

A voluntary liquidation is commenced when the company resolves by special resolution to liquidate. This voluntary liquidation is either a members or creditors voluntary liquidation.

At what point does the liquidation process commence

The liquidation is deemed to commence at the time the relevant resolution is passed, or (where a petition is presented first) at the time the petition is presented to Court.

Duration of the liquidation process

This depends on the complexity of the case and the size and nature of the company. It may take anything between 1 year or as long as 10 years.

Extent of court involvement in the liquidation process

The extent of Court involvement is determined by the actions of the affected parties, for instance:

- there is direct involvement by the Court if the liquidation is initiated by way of petition or if the Court is invited to supervise the liquidation process;
- recourse to Court may also be had in order to set aside voidable transactions or overcome process impasses;
- recourse to Court may be had to set aside a statutory demand for payment so as to forestall the liquidation process;
- recourse to Court may be had by a claimant, liquidator or trustee, if an uncertain amount subject to a contingency is being claimed, in order for the Court to determine the exact amount payable; and
- during liquidation, a decision by the liquidator to accept shares (or similar interests) as consideration for the sale of company property requires the relevant statutory approval (including a special resolution and, in some cases, court/committee approval).

Management of the company whilst in liquidation

Upon commencement of liquidation, the officers of the company remain in office but cease to have any powers, functions or duties other than those required or permitted under the Insolvency Act.. The liquidator's duty is to collect, realize and distribute the assets or proceeds of the assets of the company in accordance with the provisions of the Insolvency Act. In so doing the liquidator shall take custody of company assets, register the liquidator's interest in all assets, keep company money separate from other money held by the liquidator and keep full accounts and records of receipts, expenditure and other transactions.

Filing of claims

A creditor proves its claim by submitting a written statement of claim with the insolvency practitioner in charge of the liquidation. The particulars of the statement of claim may be verified by way of statutory declaration and accompanied by relevant supporting documentation. The time period in which the claim must be proved is set by the insolvency practitioner in charge of the liquidation. The Insolvency Regulations of 2013 prescribe a general form for proof of debt.

Factors which influence the period of the administration in a liquidation

Factors influencing the duration of liquidation proceedings include:

- complications in the form of multiple suits, injunctions and restraining orders during the liquidation;
- assistance (or lack thereof) from the former management of the company;
- the manner in which the business was traded or conducted prior to the commencement of liquidation, and
- the state of the goodwill between the company, the liquidator and the creditors.

Effects of liquidation on employees

Once a company is placed in liquidation, the employees may be required to fully disclose to the liquidator the details relating to the company property. The Insolvency Act provides that all wages or basic salary for a period of 4 months are preferential debts payable after payment of the liquidator's costs.

Effect of liquidation on contracts

The liquidator has the power to disclaim onerous contracts (including any unprofitable contract). Contracts are not automatically terminated by the commencement of liquidation unless they contain provisions to that effect.

Effect of liquidation on shareholders

The commencement of liquidation prevents share transfers and freezes the rights, liabilities, and powers of the shareholders under the Memorandum and Articles of Association. A shareholder is also, following the commencement of liquidation, required to fully disclose to the liquidator details relating to the business, accounts and other affairs of the company. Any transfer of shares (unless made to or with the sanction of the liquidator) and any alteration in the status of members after commencement of voluntary liquidation is void.

Effect of liquidation on creditors

A secured creditor may realize any asset subject to a charge if it is entitled to do so. After an asset is sold, if there is a shortfall, the creditor becomes an unsecured creditor for the balance and if there is a surplus the creditor must account for it to the liquidator. A secured creditor may also surrender a charge for the general benefit of creditors and claim as an unsecured creditor for the whole debt. A secured creditor's claim will take priority in the insolvency process where the assets of the insolvent are sufficient. Preferential debts are paid in priority to other debts, subject to the rights of secured creditors.

An unsecured creditor's claim is paid in full unless the assets of the insolvent company are insufficient to meet such claims. Where this occurs, they abate in equal proportions.

Pending claims, litigation and arbitration

No litigation can be commenced or continued with in respect of pending claims and any litigation or arbitration proceedings are stayed from the date of commencement of liquidation.

Voidable Transactions

A transaction is voidable if:

- it was entered into within 1-year preceding liquidation;

- the consideration received was significantly less than that provided by the company;
- it created obligations for which the company's resources were inadequate;
- as a result, the company became unable to pay its due debts;
- it was aimed at placing an asset beyond the reach of creditors;
- it created a charge over any property in the year preceding the commencement of liquidation; or
- it was characterized by insider dealing.

How is the liquidation process terminated?

With voluntary liquidation, at the conclusion of the liquidation process, the liquidator calls a final meeting of the shareholders of the company in the event of a members' voluntary liquidation, or a general meeting of the company and a meeting of the creditors in the event of a creditors' voluntary liquidation, by publishing a notice in the Gazette and a newspaper of wide circulation. This notice specifies the time, place and object(s) of the meeting(s) at least 30 days before the meeting(s). The liquidator presents an account of the liquidation to the meeting(s), showing how the liquidation was conducted and how the property of the company was disposed of. Within 14 days after the meeting (or, where the meetings are not held on the same day, after the later meeting), the liquidator sends a copy of the account to the Official Receiver and files a return of the meeting(s) and the date(s) of the meeting(s) with the Official Receiver, and upon expiry of three months from registration of the return(s), the company is taken to be dissolved unless court orders otherwise.

Director or officer liability

Officers of the company, including directors are liable for:

- their failure to publish notice of their resolution to liquidate (civil liability);
- their failure to preside over a creditors' meeting pursuant to a creditors' voluntary liquidation (civil liability);
- their failure to comply with a liquidator's demand for information (criminal liability);
- absconding from the country during the liquidation process (criminal liability); and
- failing to disclose all relevant information relating to company property and to deliver up company property under the director's control (criminal liability).

If the directors acted with intent to defraud creditors of the business or committed some other wrongful or illegal act, then they may be held personally liable for debts, obligations, and liabilities of the company.

Consequences of Director or Officer Liability

Civil consequences

A penalty is levied against a director for failing to preside over a creditors' meeting or a fine not exceeding 50 currency points (UGX 1,000,000 or USD 268).

Criminal consequences

A director may be liable for a penalty for failing to publish a resolution or for his or her non-compliance with the liquidator's requirements for the provision of information, subject to no more than 24 currency points or imprisonment not exceeding 1 year. A director could also be liable for absconding from the country and subject to imprisonment not exceeding 7 years. There is also a general penalty for which a director may be liable for his or her having contravened a provision of the Insolvency Act – a fine not exceeding 24 currency points (UGX 480,000 or USD 128) to imprisonment for a period not exceeding 2 years, and the latter coupled with a default fine.

BUSINESS RESCUE/ADMINISTRATION

Process required to commence a business rescue

The company passes a special resolution declaring the need to enter into a settlement with its creditors. The company thereafter petitions the Court for an interim protective order. If a protective order is granted, the company proceeds to appoint a provisional administrator. To finalize the appointment of the provisional administrator, the company obtains written consent for the appointment from the provisional administrator to act and from any secured creditor. The written consent is by a secured creditor holding a charge over the whole or substantially the whole of the property and undertaking of the company. There must be a notice appointing the provisional administrator. The provisional administrator is thereafter registered with the official Receiver and Registrar of Companies. Thereafter, the provisional administrator calls a creditors' meeting to approve the proposals put forward by the provisional administrator. The creditors at this meeting may resolve that the company execute an administration deed, that provisional administration ends or that the company be liquidated.

At what point does the administration process commence?

Provisional administration begins when an interim protective order is granted by Court. The administration process begins upon the execution of an administration deed.

Duration of the administration process

The provisional administration terminates:

- after the period specified in the interim protective order lapses, which may not exceed 30 days;

- upon execution of an administration deed; or
- after the provisional administrator gives public notice of the termination of the provisional administration (by giving the notices required under the Act). The duration of administration is derived from the terms of the administration deed.

Extent of court involvement in the administration process

The Court may be involved in the administration process in one or more of the following ways, by:

- issuing the interim protective order to commence the provisional administration;
- handing down compliance orders when officers of the company defy the provisional administrator;
- permitting the enforcement of a charge over property or the disposal of property subject to a charge, during the administration process;
- extending the period of provisional administration following an application made to Court by the provisional administrator;
- limiting or extinguishing the personal liability claims of the provisional administrator;
- extending the period for execution of the administration deed;
- examining a company officer regarding allegations levied against him or her in respect of unlawful behavior;
- giving directions on any matter concerning the functions of the provisional administrator or administrator; and
- cancelling or confirming variations made to the administration deed.

Management of the company whilst in administration

The role of the board of directors during the administration process is limited to facilitating the administration process by providing information, documents, the company seal and other required assistance to the appointed administrator and by assisting the administrator with any other role assigned to him or her by the administrator.

During the administration process, the administrator is required to:

- exercise the powers ordinarily exercised by the directors and secretary of the company;
- to take custody and control of the company's property and operations;
- to investigate the company's business, property and financial circumstances;
- to supervise the implementation of the administration deed;
- to prepare and distribute periodic reports to creditors;
- to facilitate the survival of the company;
- to attend to the approval of the administration deed;
- to achieve the advantageous realization of the company's assets that would be effected in a liquidation.

Filing of claims

The provisional administrator calls upon known creditors to submit documentation in support of their claims.

Factors which influence the period of administration

The duration of the administration process is dependent on the complexity of the case and nature of the company. The factors that may influence the duration of the administration process include the relationship between the company, the administrator and the creditors as well as the extent to which the former management of the company assist the administrator.

Funding of the company whilst in administration

Funds are derived from ongoing trading, realisations and any permitted financing/arrangements under the process/deed. A provisional administrator has an obligation to keep company money separate from other money held by or under the control of the provisional administrator. The provisional administrator is also expected to keep records of receipts, expenditure and other transactions and retain the accounts and records for not less than 6 years after the administration ends.

Effect of administration on employees

The Insolvency Act does not expressly terminate employment. The provisional administrator takes control of the business and may continue operations, and employment issues then follow the applicable contracts/labour law and the administrator's decisions in managing the company.

Effect of administration on contracts

The Insolvency Act is silent on the powers of the administrator in relation to contracts concluded by the company prior to the commencement of administration. It should be noted that in Uganda a company in distress, in lieu of outright liquidation, ordinarily resorts to informal means of compromising and settling with its creditors.

Effect of administration on shareholders

Under the Insolvency Act, an administration deed binds the company, its directors and secretary, the administrator, creditors and shareholders. Accordingly, shareholders remain members of the company, but their practical control over the company's affairs is constrained during the process because the company is managed in accordance with the administration arrangements and the statutory powers of the administrator. Any arrangement reached with creditors (including any variation of the administration deed) may therefore affect shareholders' positions to the extent set out in the deed. Further, creditors may resolve to reject the proposed administration arrangement and the company may then proceed to liquidation in accordance with the Act.

Effect of administration on creditors

Any property belonging to the company, and that is subject to a charge, cannot be disposed of during the administration process without the consent of the secured creditor or the sanction of the Court. A creditor who is bound by an administration deed is barred from making an application for the liquidation of the company or from proceeding with an application. A creditor is also barred from commencing or continuing with execution proceedings or other legal processes or from levying distress against the company or its property.

Pending claims, litigation and arbitration

From the date on which the administration process commences, a moratorium arises and no litigation or arbitration proceedings can be commenced with or continued. Administration also forestalls the commencement or continuation of liquidations and receiverships. No steps may be taken to enforce any charge over company property unless the proceedings were commenced prior to administration. Some of these limitations can be lifted by Court order.

Effects of the moratorium

The commencement of the administration process gives rise to a moratorium which prohibits the commencement of liquidations, receiverships, the enforcement of charges, the commencement or continuation of litigation and the disposal of company property subject to a charge. Any moratorium under an administration deed must be specified in the deed. Some of these limitations may be lifted by Court order. The administrator has the power to dispose of company property if the disposal is in the ordinary course of the company's business. However, property subject to a charge may only be disposed of after the secured creditor consents to the disposal.

Voidable transactions

Transactions which concern the disposal of property which is subject to a charge, without the consent of the concerned creditor, will be set aside by the Court on application by the concerned creditor.

The administration plan

The administration proposal developed by the provisional administrator must specify the identity of the proposed administrator, the available property, the nature and duration of any moratorium, the extent to which the company will be relieved from its debt, the conditions precedent to which the plan is subject, the proposed distribution plan for the distribution of proceeds to creditors and/or shareholders and the circumstances leading to the termination of the administration process.

Voting on the plan

The provisional administrator is required to call a creditors' meeting within 10 days of the provisional administration process having commenced in order to procure a vote on the plan. The provisional administrator's proposals are considered at a creditors' meeting convened for that purpose, and the notice of that meeting must be sent to every known creditor and accompanied by the proposals. At the meeting, creditors may resolve that the company execute an administration deed, that provisional administration ends, or that the company be liquidated.

Cram down on creditors

All decisions in respect of the administration process are made by the creditors at meetings and are made by way of a simple majority. There are no express cram down provisions in Uganda legislation.

Discharge of claims

An administration deed may provide that a creditor who has agreed to the partial discharge of a debt owing to it by the company may lose the right to enforce the part so discharged against the company. The discharge of a creditor's claim is therefore dependent on the provisions of the deed. For clarity, Creditors' claims are addressed to the extent and on the terms stated in the administration deed, including any stated release from debts and distribution order, and the administrator supervises implementation of the deed.

How is the process terminated?

The administration process is terminated by virtue of the administrator, creditor or liquidator (if the company is to be placed in liquidation) making application to Court to terminate the process or where the circumstances which are specified in the deed for terminating it occur.

What is the status of the company after administration?

If the administration process is successful, the business will continue to trade as a going concern. If the administration is, however, unsuccessful, liquidation proceedings are initiated and the business is would up.

Director and officer liability

The directors and officers of the company who used the company operations to defraud creditors or to do some wrong/illegal act may be held personally liable for debts, liabilities and obligations of the company.

SECURITY

Types of securities

The securities recognized in Uganda include mortgages over land, debentures and other company charges (fixed and floating), and security interests over movable property (e.g., equipment, receivables, inventory) that may be perfected by registration or other methods permitted by law. Charges among others include charges over uncalled share capital, book debts, and a floating charge over the undertaking or property

Security trustees or special purpose vehicles

The Insolvency Act does not provide for such an arrangement. The Insolvency Act only provides for the appointment of a receiver under several security instruments such as debenture deeds but such a receiver only acts in the interests of the appointing authority who usually is a single creditor/lender and not multiple lenders.

Most robust form of security

A debenture creating a charge over company property is a recommended form of security. It is simpler to enforce than a mortgage, easier to create and covers a wide range of the borrower's property. Nonetheless, it is advisable to couple a debenture with a mortgage instrument as security for the same loan facility. The mortgage is registrable as an encumbrance over the borrower's immovable property and prevents it from being alienated without recognizing the lender's interest.

Registration of security

The procedure for registration of a debenture or pledge involves the execution of the security documentation, the payment of stamp duty and the payment of the registration fees at an approved bank. Thereafter, the security must be registered with the company's registry within 42 days of its creation. In the case of a mortgage, the instrument with supporting documentation must also be registered with the land registry. Thereafter, a registration certificate is issued which is conclusive evidence of compliance. The registration of the security is usually undertaken by the lender. For mortgages, the instrument is registered at the land registry. For movable property security, perfection may be achieved by registering a notice in the SIMPA register (or by possession/control, as applicable).

Stamp duty

The due and payable stamp duty rates are as follows:

- documentary credits – UGX 15,000 (approximately USD 5);
- negotiable securities – cheques attract NIL stamp duty while bills of exchange that are not a bond, bank note or currency note attract stamp duty of UGX 15,000 (approximately USD 5);

- insurance policies – UGX 35,000 (approximate equivalent of USD 10);
- debenture – NIL;
- legal mortgage – NIL;
- equitable Mortgage- NIL;
- pledge – NIL.

Payment of stamp duty is usually undertaken by the borrower. There will be a Stamp Duty charge of 15,000 per copy of each security document for barcoding purposes.

Registration costs

A registration fee of UGX 50,000, equivalent to approximately USD 14, must be paid for any instrument creating a charge over company property if the instrument is to be registered with the company's registry.

Requirements for the assignment or transfer of security

The requirement for the assignment and/or transfer of security is determined by the terms of the instrument or agreement, and may also require registration steps (e.g. amendments/transfers for SIMPA-registered security interests; registration of transfers for mortgages where applicable).

Instances in which securities might be vulnerable to attack

If the security relates to family land and the necessary consents were not obtained prior to execution, such transaction or security may be vulnerable to being attached by third parties. If the security was not registered, registered out of time or not renewed if required then it may be vulnerable to being attached by third parties, where a movable security interest is left unperfected, or where the security is susceptible to avoidance/clawback in insolvency (e.g., as a preference/voidable transaction depending on timing and circumstances).

Methods of enforcement of security

The enforcement of security is governed by the terms of the relevant instrument or contract. For mortgages, the mortgagee serves a notice on default requiring rectification within forty-five working days. If the mortgagor does not comply, the mortgagee may exercise remedies including appointing a receiver, leasing, taking possession, or selling the mortgaged land. A mortgagee may exercise the power of sale after the time for rectification lapses, and must serve a notice to sell and wait twenty-one working days before completing a sale contract. For movable security under SIMPA, after default the secured creditor may take possession (subject to conditions), and sale is by auction with prescribed notice requirements (including at least ten working days' notice before disposition).

Problems experienced when enforcing security

The following are some of the problems that one may experience when enforcing one's security:

- prior over-valuation of the property may result in recovery of a far lesser sum upon sale;
- long timeframes for enforcing mortgages; and
- delays in the litigation process.

Financial assistance requirements

The Companies Act, Cap 106 sets out board approvals that must be acquired before a company is permitted to grant security or create a charge over its assets. A company should ensure proper corporate authority (typically board approval in accordance with its governance documents) before executing security, and must comply with statutory registration requirements for charges under the Companies Act. (Note: 'financial assistance' provisions, where applicable, generally relate to assistance for acquisition of shares and are distinct from charge creation/registration.)

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

The law of Uganda assures the enforceability of judgments of foreign jurisdictions provided that the judgment was issued by a superior court of a country declared by the Minister to have reciprocal arrangements with Uganda. In the absence of a ministerial order, enforcement may still proceed at common law by suing upon the judgment as a debt.

Requirements for recognition of a foreign judgment

Recognition requires that:

- the judgment was final and conclusive;
- the court had competent jurisdiction;
- the judgment is not contrary to public policy, fraud, or natural justice; and
- reciprocity is established under a Ministerial Order. Where no order exists, an action may be filed in Uganda to enforce the judgment at common law.

If reciprocity is not already established, this will require an application to the Minister of Justice and Constitutional Affairs to satisfy him or her that there is substantial reciprocity of treatment accorded to Ugandan judgments in the foreign jurisdiction. As a general rule, judgments of Courts in the territories of the Commonwealth are enforceable in Uganda.

Requirements for the Recognition of a Foreign Trustee, Business

Rescue practitioner or insolvency practitioner

A foreign trustee, foreign business rescue practitioner or foreign insolvency practitioner must be authorized to carry out their profession in Uganda (i.e. must have a valid business visa or work permit) whereafter Ugandan law will recognize such person for the purpose of carrying out any functions in Uganda. The Insolvency Act envisages a foreign a foreign representative (being a person or body authorized in a foreign proceeding to administer reorganization or liquidation of a debtor's assets or affairs) may apply to the High Court for recognition of the foreign proceedings. Upon recognition, the foreign representative may, with leave of court, intervene in any Ugandan proceedings in which the debtor is a party or seek relief under the Act.

A foreign representative, when in Uganda, may with leave of Court intervene in any proceedings in which a debtor is a party. There are two pre-requisites namely:

- There must be recognition of the foreign proceedings; and
- The requirements of the law of Uganda must be met.
- The requirements under the law of Uganda which must be complied with are:
- The foreign representative must be a lawyer, accountant or chartered secretary and a duly registered member of the relevant professional body or a registered member of any other professional body as the Minister may prescribe; and
- There is a professional indemnity in force at the relevant time for the proper performance of his or her duties.



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ZAMBIA | CORPUS LEGAL PRACTITIONERS

COUNTRY INFORMATION

Zambia has a population of approximately 22.3 million (2026). Lusaka is the capital city. Other major cities

include Kitwe, Ndola, Livingstone and Chipata. Due to the Covid-19 Pandemic, Zambia had an economic recession that significantly affected the economy. However, as of January 2026, Zambia's economy has reached a significant turning point, marked by a return to single-digit inflation or the first time in over three years. This stabilization is supported by a strengthening of the Zambian currency, the Kwacha, and increased copper revenues. The Bank of Zambia equally reduced the Policy Rate by 75 basis points to 13.5% in early February 2026, citing the sharp drop in inflation and an improved outlook on the strength of the Kwacha.

With respect to trade, Zambia recorded a trade surplus of ZMW1 billion in December 2025, continuing a trend of surpluses driven by robust refined copper export earnings. In terms of GDP growth projection, the International Monetary Fund projects real GDP growth of 6.4% for 2026, a significant increase from the 5.2% estimated for 2025.

TYPE OF GOVERNMENT

The Government is headed by the President who is the head of the Executive and the State.

POLITICAL SYSTEM

Zambia has a multi-party democratic system. It is a unitary State headed by a President who is elected by universal suffrage for a term of 5 years. The President's cabinet is chosen from members of Parliament. All laws are subject to the Constitution of Zambia which is the supreme law of the land and contains all the fundamental freedoms of a modern democracy.

LEGAL SYSTEM

Zambia has a dual legal system. The first system is statutory law which consists of laws enacted by the Zambian Parliament as well as subsidiary legislation. This system is largely modelled on the English legal system and is based on common law. It also relies on many of the English civil procedures and practices. The second system is customary law which consists of unwritten practices of various Zambian tribal groups. It is administered by the local Courts to the extent that it does not contradict any written law and is not repugnant to natural justice.

TESTS FOR INSOLVENCY

What are the tests for insolvency? (i.e., liquidation)

Insolvency means having liabilities that exceed the value of assets, having stopped paying debts in the ordinary course of business or being unable to pay one's debts as they fall due. Under the Corporate Insolvency Act, No. 9 of 2017 ("Insolvency Act"), a company will be held to be unable to pay its debts if:

- (1) the company owes a creditor a prescribed amount (yet to be prescribed); and
 - (i) the creditor has, more than thirty days previously, served the company a written demand requiring the company to pay the amount due; and
 - (ii) the company has failed to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor; and
- (2) execution or other process issued on a judgment, decree or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (3) the company is unable to pay its debts as they fall due.

What are the tests for financial distress (i.e., business rescue)?

Under the Insolvency Act, a company is financially distressed if it is likely to be insolvent within the immediately ensuing 6 months. Notably, it is possible under Zambian law for a company in financial distress to enter into a compromise or arrangement with its creditors or any class of its creditors and its members or any class of its members in which an arrangement is made to pay off the full, or a partial amount, of a creditor's or member's claim.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

Formal insolvency procedures under the Insolvency Act include receivership and winding up procedures.

Formal restructuring procedures

In Zambia, a restructuring may be effected through a scheme of arrangement and business rescue proceedings provided for in terms of the Insolvency Act.

Informal Insolvency or Restructuring Procedures

Informal insolvency procedures or restructuring procedures are available for distressed companies. Informal

insolvency procedures or restructuring procedures include compromises, debt rearrangement, informal agreements with creditors, and alternative dispute resolution. Advantages of informal workouts compared to formal proceedings include: timing, cost and confidentiality.

LIQUIDATION

What is the aim of liquidation?

Liquidation is aimed at taking the management of a company's affairs out of the hands of its directors and placing it in the control of the liquidator. The company's assets are collected and realised, its liabilities discharged and the net surplus (if any) is distributed in accordance with the provisions of the Insolvency Act and the company's Articles of Association. Such proceeds are used to settle a company's liabilities which generally fall into 3 categories (in descending order of priority) - preferential debts, secured debts and unsecured debts. The law tries to maintain equality between creditors of the company so that the assets are distributed proportionately according to the size of each creditors' claim. In essence, the aim of a liquidation is to enable the creditors to recover the full or partial amount of any debt owed to them by the company.

Process required to commence a liquidation

For the commencement of a voluntary winding up, a full inquiry must be conducted into the business and affairs of the company. Further, the directors must make a written declaration that they are satisfied that the company meets the solvency test. To note that this declaration shall only have effect if it is made at a meeting of the directors, is made at least 30 days before the passing of the resolution to wind up the company by the shareholders, and lodged with the Registrar of Companies on or before the date on which the notice of the meeting at which the resolution is to be passed is issued. A statement of the company's assets and liabilities must be prepared by the directors and attached to the declaration. The significance of preparing a statement is that it constitutes an assurance, largely to a company's creditors, that its assets are sufficient to meet its liabilities. This is shown by demonstrating the ratio of a company's total assets to liabilities. A statement of solvency or insolvency must also be prepared by the board of directors of the company. Thereafter, a resolution is passed at an extraordinary general meeting of the company by the shareholders pursuant to which a liquidator may be appointed.

At what point does the liquidation process commence?

With respect to a Court-ordered liquidation, the liquidation commences when the petition is presented to the Court. However, where a resolution is passed for a voluntary winding up, liquidation is deemed to have commenced at the date of the passing of the resolution in accordance with the Insolvency Act.

Duration of the liquidation process

The liquidation and winding-up procedure takes approximately 6 to 9 months, depending on the speed with which hearing dates are granted by the Court. This time estimate also takes into account the fact that it takes approximately 21 days for a notice to be published in the Government Gazette. However, an application to abridge time with respect to the Court hearing dates can be made to the Court, though approval of the same is at the Court's discretion.

Extent of Court involvement in the liquidation process

The Court is largely involved in the liquidation process, especially with respect to an involuntary winding up, in which the proceeding is initiated by filing a petition with the Court. The Court is also responsible for granting a winding up order after hearing the petition. Further, the Court in its order may also appoint a liquidator. It also has the power to grant an order vesting all or any of the property belonging to a company or vested in its trustees, in the liquidator.

Management of the company whilst in liquidation

A liquidator may be appointed by an order of Court or by resolution of the company. Once a liquidator has been appointed, the powers of the directors of the company cease, unless the liquidator (or the members, by ordinary resolution, with the consent of the liquidator) requires the directors to continue exercising their powers in specified circumstances. The liquidator's role is to realise all the property of the company or so much thereof as can in his opinion be realised without protracting the liquidation process. The liquidator also has the power to distribute a final dividend to the creditors, if any and adjust the rights of the members among themselves and pay a final return to the members, if any. Shares generally grant rights which differ in terms of scope or priority. Therefore, the liquidator may elect to terminate the preferential treatment of certain shares or narrow down the scope of rights conferred by shares.

Filing of claims

In general terms, claims by creditors are proved by adducing any evidence of an instrument creating liability. Ordinarily, therefore, a debt may be proved by delivering or sending through the post in a prepaid letter to the liquidator, an affidavit verifying the debt. The affidavit referred to may be made by the creditor himself, or by some person authorised by or on behalf of the creditor. The affidavit will generally contain, among others, a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which it can be substantiated. Apart from the affidavit, a claim may, in this regard, be submitted as soon as may be reasonably practicable, and there is no standard claim form which is prescribed for this purpose. Therefore, it would appear that any inscription disclosing, among others, the particulars of a debt would suffice for purposes of proving a debt.

Factors which influence the period of the administration in a liquidation

The length of the liquidation process is dependent upon the speed with which hearing dates and Court orders can be granted by the Court. In addition, it may also be influenced by delays in debtors paying up a debt once called upon to do so by the liquidator.

Effect of liquidation on employees

When a company goes into liquidation and ceases to continue to trade as a going concern, the contracts of employment concluded between the company and its employees may be terminated. The general position is that employment contracts terminate upon commencement of the liquidation process unless the liquidator determines otherwise. For instance, where the employment contracts are necessary for the interim management of the company for the purposes of winding up, the liquidator may require that the contracts of employment not terminate. Any money recoverable by the employees will be treated as a debt in the liquidation recoverable in accordance with the order of priority as provided in the Insolvency Act.

Effect of liquidation on contracts

The liquidator may cancel any unprofitable contracts and may continue with those contracts entered into by the company before the liquidation commenced in as far as they are necessary for the beneficial winding up of the company.

Effect of liquidation on shareholders

Upon winding up of a company limited by guarantee, an unlimited company and a company having shares which are not fully paid up, every member at the time of winding up shall be liable to contribute to the assets of the company for the payment of its debt and liabilities. For a public company or a private company with limited shares, a member's liability will be limited to any unpaid amounts on the shares held by that member. In a company limited by guarantee, the liability of the member is limited to the amount guaranteed. Further, in an unlimited company the member is liable for the full extent that the company is unable to settle its debts. The liability of a member gives rise to a debt that is payable when calls are made for enforcing the liability.

Effect of liquidation on creditors

Creditors are paid out in order of priority, based on a strict legal hierarchy. Priority shall be given to secured debts (those creditors who have taken security or a lien over the company's property) over unsecured debts (those that have not obtained security over any of the company's property) in terms of payment. A creditor that has issued execution against property of the company or has attached any debt due to the company, and where the company is subsequently wound up, shall not be entitled to execute such property unless the

execution was completed before the commencement of the winding up.

Pending claims, litigation and arbitration

After the commencement of a winding up process, no action or proceedings shall be proceeded with or commenced against the company except with the leave of the Court. Where any action or proceeding against the company is pending at the time of a winding-up, an application may be made by the company, a creditor, a member, or any other person with standing, to the Court to stay or restrain further proceedings in respect of the action or proceeding. Further, any attachment, sequestration, distress or execution put in force against the estate or effects of the company after the commencement of the creditors' voluntary winding-up shall be void.

Voidable Transactions

Any act relating to the property of a company, done by or against a company, which, had it been done by or against an individual, would be void or voidable in bankruptcy law, would, if the company is wound-up, be void or voidable in the same way. Further, any disposition of property belonging to the company including things in action (i.e.: non-tangible assets) and any transfer of shares or alteration of the status of the members made after the commencement of the winding up shall be void unless the Court otherwise orders.

Transactions entered into prior to insolvency that may be challenged or voided include:

- A transfer or assignment by a company of all its property to trustees with the intention to defraud the company's creditors is void.
- Where the acquisition of property or an undertaking by a company, within the period of 2 years before the commencement of the winding up, from -
 - person who, at the time of the acquisition was a director of the company; or
 - another company which, at the time of the acquisition, had a director who was also a director of the first company, and a valuation report shows that the consideration given in respect of the acquisition exceeded the value of the property. The liquidator will recover the difference from the director or company.
- Where the property of a company consists of -
 - an estate or interest in land which is encumbered with onerous covenants;
 - shares in a corporate that are subject to restrictions on transfer;
 - unprofitable contracts; or
 - property that cannot be sold, or is not readily saleable, because it binds the possessor to the performance of an onerous act, or to the payment of a sum of money,
- the liquidator may with the leave of the Court or the consent of committee in writing, disclaim the property at any time within 12 months after the commencement of the

winding-up, or within such extended period as allowed by the Court.

- a floating charge on property of a company, created within one year before the commencement of the winding-up, is void, unless it is proved that the company, immediately after the creation of the charge, was solvent.

How is the liquidation process terminated?

With regard to a winding-up by Court, where the Court makes an order that a company be dissolved, the Registrar of Companies must, on lodgement of a copy of the order, strike the name of the company off the register and cause a notice of this to be published in the Government Gazette, and the company will be dissolved as at the date of the Court order. With regard to a members' voluntary winding-up and creditors' voluntary winding up, once the affairs of the company are fully wound up, the liquidator prepares a report indicating how the winding up has been conducted. A general meeting of the company, or a meeting of the creditors of the company, respectively, is then convened at which this report is explained. In the case of a creditors' voluntary winding-up, the meeting of the company must be held within 1 month after the meeting of creditors. Within 21 days after the meetings above, the liquidator must lodge a return in the prescribed form with the Registrar of Companies and the official receiver. The Registrar then strikes the name of the company off the register and publishes notice in the Government Gazette thereof. The company shall stand dissolved as of the date of publication of the notice in the Government Gazette.

Director or officer liability

Directors may be liable for their failure to fully reveal to the liquidator all the real and personal property of the company, and when, how, to whom and for what consideration the company disposed of the same (except such property as has been disposed of in the ordinary way of business of the company); failure to deliver up to the liquidator all the real and personal property of the company under their control or custody and all the books and documents in their custody or under their control and which belongs to the company.

In addition, they may be liable for making any material omission in any statement relating to the affairs of the company; failing to inform the liquidator of a false claim proved by any person; preventing the production of any book or paper affecting or relating to the company; accounting for the property of the company stating fictitious losses or expenses; and other offences relating to fraud and fraudulent representations in respect of the company or winding up and other proceedings, for purposes of obtaining the consent of the creditors or a party to an agreement as provided for under the Insolvency Act.

Directors could be both civilly and criminally liable even prior to the commencement of the liquidation process.

Consequences of Director or Officer Liability Civil consequences

Civil liability may accrue to a director in the course of the winding up, receivership or business rescue proceedings or in any other proceedings against a company, if a Court is satisfied that a person was knowingly a party to the carrying on of any business of the company for a fraudulent purpose. The director may be held personally responsible without limitation of liability, for the debts or other liabilities of the company or for such of those debts or other liabilities as the Court directs.

Further, directors and officers transacting on behalf of the company may be held liable for trading while the company is in financial difficulty. Directors or officers may be liable for fines ranging from ZMW 80,000 to 150,000 (approximately US\$ 4,186 to US\$ 7,849, as at the average exchange rate on 18 February 2026), or to imprisonment for periods ranging from two years to five years, or to both. Such director or officer may also be found to be personally liable without any limitation for the debts or other liabilities of the company; and such liability may be a charge on any obligation due from the company to such person.

Criminal consequences

Generally, a director may be criminally liable for fraudulent, dishonest, or negligent actions that exacerbate the company's financial distress. While corporate insolvency itself is not a criminal offense, actions taken by directors that lead to or worsen the insolvency can result in fines and imprisonment. These offences include fraudulent or reckless trading, false declaration of solvency, misconduct during the course of the winding up and non-compliance with corporate insolvency laws. Penalties include fines as well as imprisonment for up to two years, or both.

Further, where an offence under the Insolvency Act is committed by a company or unincorporated body, and where the penalty for an offence is specified, and the director, manager or shareholder of that entity is suspected to have committed the offence and is charged with that offence, that director, manager or shareholder of the company or unincorporated body is liable, upon conviction, to the penalty specified for the offence, unless the director or manager proves to the satisfaction of the Court that the act constituting the offence was done without the knowledge, consent or connivance of the director or manager or that the director or manager took reasonable steps to prevent the commission of the offence.

BUSINESS RESCUE

The Insolvency Act provides that the members may by special resolution, resolve that the company voluntarily begins business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe

that the company is financially distressed; and there appears to be a reasonable prospect of rescuing the company; and there is a need to maintain the company as a going concern; and there is a need to achieve a better outcome for the company's creditors as a whole than is likely to be the case if the company were to be liquidated; or to realise the property of the company in order to make a distribution to one or more secured or preferential creditors.

To commence business rescue proceedings, an affected person including a regulator, shareholder, member, director, creditor or an employee, a former employee of a company, registered trade union representing employees of the company and the Registrar, may apply to the Court for an order to place the company under supervision and begin business rescue proceedings, unless a company has adopted a resolution to commence business rescue proceedings.

During business rescue proceedings there is a general moratorium on legal proceedings against the company. Further, during business rescue proceedings, the transfer of securities other than during the ordinary course of business will be invalid.

Regarding administration, a business rescue administrator may be appointed to administer assets of a company on behalf of debenture holders. On the appointment of a business rescue administrator, the directors' powers to control the company are significantly curtailed. While the directors remain in office, the exercise of their powers is subject to the authority and direction of the appointed business rescue administrator. A receiver appointed on behalf of the company's debenture holders is entitled to take possession of all assets over which they hold security. This right prevails over that of a judgment creditor who has taken goods in execution but has not actually sold them.

SECURITY

Types of security

The types of security available in Zambia include a mortgage, a fixed charge, a floating charge, an assignment by way of security, a pledge, letters of hypothecation or a bill of sale.

Taking of security

Security may be taken over various assets which include fixed and floating assets, intangible movable assets as well as immovable assets. This usually avoids the need for litigation, may ensure priority over other creditors, and will almost certainly hasten the recovery of debt.

Security trustees or special purpose vehicles

Special purpose vehicles may be set up in Zambia for a specific purpose and are therefore regulated by general

company law as well as sector specific legislation governing the field in which they operate.

Most robust form of security

The most robust form of security in Zambia is a mortgage. It does not operate as a transfer or lease of the estate or interest thereby mortgaged. But the mortgagee shall have, and shall be deemed always to have had, some protection, powers and remedies (including the power to sell the asset mortgaged) as if the mortgage had so operated as a transfer or lease of the estate or interest mortgaged.

Registration of security

Security interests are generally registered at 2 public registries in Zambia: The Collateral Registry which is operated by the Patents and Companies Registration Agency (PACRA) and the Lands and Deeds Registry. At the Collateral Registry, a mortgage or charge obtained from any institution is required to be registered with it in the prescribed forms.

Stamp duty

Stamp duty is no longer applicable in Zambia following the repeal of the Stamp Duty Act, Chapter 664 of the Laws of Zambia in 1994. However, there are various registration fees payable at the Government registries such as PACRA and the Lands and Deeds Registry. The party responsible for payment of the registration fee is normally the party borrowing. However, this is subject to the agreement reached between the parties.

Registration costs

The registration fee for a mortgage, debenture or other charge at PACRA is 1 per cent of the amount being borrowed, with a maximum cap of ZMW 4,500 (approximately US\$ 235.48 as at the average exchange rate on 18 February 2026). At the Lands and Deeds Registry, the registration fee for a mortgage is one per cent of the total value, with a maximum fee of ZMW 4,000 (approximately US\$ 209.31 as at the average exchange rate on 18 February). The party responsible for payment of the registration fee is normally the party borrowing. However, this may be subject to agreement between the parties.

Requirements for the assignment or transfer of security

Registered security may be transferred or assigned by agreement between the parties. The security documents will normally provide whether it is transferable or not and if it is, whether consent of either the borrower or the lender is necessary. Once the conditions agreed upon by parties to the registered security have been satisfied, the security is transferable by way of an agreement which must be registered with the Collateral Registry and/or the Lands and Deeds Registry, as the case may be.

Instances in which securities might be vulnerable to attack

Under the Lands Acquisition Act, Chapter 189 of the Laws of Zambia, the President is empowered to compulsorily acquire any property of any description whenever he is of the opinion that it is desirable or expedient in the interests of the Republic to do so.

In this respect, property that is subject to a security agreement may be vulnerable. However, the Lands Acquisition Act, Chapter 189 of the Laws of Zambia does not indicate what constitutes 'public purpose'.

The other instances in which one's security may be vulnerable to attack include:

- a floating charge created within 12 months of the commencement of liquidation is presumed invalid, unless it is shown that the company was solvent immediately after the creation of the charge; and
- every right acquired under a charge on property, or obligation incurred thereon by any person unable to pay his debts as they become due, having a preference over other creditors shall be deemed fraudulent and therefore null and void against the liquidator, as the case may be, if such a person taking, making, paying or incurring an obligation is held to be bankrupt or insolvent on presentation of the petition for bankruptcy or insolvency, presented before, or within 6 months after the date of acquiring such a right or incurring an obligation. However, this will not affect the rights of any person acquiring rights or incurring an obligation in good faith and for valuable consideration through or under the creditor.

Methods of enforcement of security

One method to enforce security is through the statutory power of sale (for mortgages). Security may also be enforced by foreclosure proceedings in which the mortgagee or chargee as the case may be confiscates the mortgagors or chargor's interest in the property. Another form of enforcement is that of taking over possession of the security. A receiver may also be appointed with management powers to collect rentals and profits. Lastly, as with any other contract where money is lent and there is a default, the mortgagee or chargee, as the case may be, may sue for the money lent.

Problems experienced when enforcing security

Where a creditor has issued execution against the goods or land of a company or has attached any debt due to the company, and the company is subsequently wound up, he is not entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution before the winding up commences.

Financial assistance requirements

A company or any of its subsidiaries is prohibited from giving direct financial assistance to a person acquiring or proposing to acquire any shares in a company. This prohibition also extends to the giving of financial assistance for the purpose of reducing or discharging liability incurred by reason of shares acquired in a company. However, the restrictions on the provision of financial assistance do not extend to the lending of money by a company in the ordinary course of its business, if the lending of money is part of the ordinary business of the company or the making, by a company, of loans to persons, other than directors, employed in good faith by the company, with a view to enabling those persons acquire fully paid-up shares, other than as nominees of the company. Financial assistance may only be given if it is an incidental part of some larger purpose of the company and if the assistance is given in good faith and in the interests of the company. Financial assistance must be preceded by a shareholders' resolution and there are generally no prescribed tests applicable in this regard.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

Foreign judgments may be enforced using two principal methods in Zambia. Firstly, the Insolvency Act provides for the recognition of foreign proceedings. Secondly, the Foreign Judgments (Reciprocal Enforcement) Act, Chapter 76 of the Laws of Zambia (the "Foreign Judgements Act") provides for the registration of a foreign judgment. Recognition outside these Acts is limited to mere evidence of a claim or defence which is to be re-litigated in Zambia.

Requirements for recognition of a foreign judgment

Under the Insolvency Act, an insolvency practitioner may apply to the Court, in the prescribed manner, for an order for recognition of a foreign proceeding. An application for an order for recognition of a foreign proceeding must be accompanied by an order of the foreign Court confirming the existence of the foreign proceeding before the foreign Court, and appointment of the foreign representative. An application for recognition must also be accompanied by a statement, made in the prescribed manner, of all foreign proceedings in respect of a debtor that are known to the foreign representative.

Under the Foreign Judgements Act, an application for registration of a foreign judgment may be made to the Court by the judgment creditor within 6 years of the date of the original judgment. Further, the judgment must not be wholly satisfied at the time of the application and must not be capable of execution in the country of the original Court.

Requirements for the recognition of a foreign trustee, business rescue practitioner or insolvency practitioner

An individual who wishes to perform the functions of an insolvency practitioner in Zambia, which includes the Official Receiver or a person who is qualified to be appointed as a receiver, receiver manager or judgment receiver, a liquidator, or a business rescue practitioner, may apply for accreditation with the Registrar of Companies in the prescribed form. However, a person will not be eligible for accreditation in Zambia unless that person meets the qualifications for appointment as provided for in the Insolvency Act. A person will not be eligible for appointment as an insolvency practitioner in Zambia if that person, among other things, is not resident in Zambia, is prohibited or disqualified from so acting by an order of a Court of competent jurisdiction, is a body corporate, is not qualified to be appointed as a director of a company, or is no longer in good standing with that person's recognised professional body, as a result of professional misconduct. Furthermore, the person must be either a qualified accountant (under the Accountants Act No. 13 of 2008) or a legal practitioner (under the Legal Practitioners Act, Chapter 30 of the Laws of Zambia) with at least 7 years of practice.





ZIMBABWE SCANLEN AND HOLDERNESS LEGAL PRACTITIONERS

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ZIMBABWE | SCANLEN AND HOLDERNESS LEGAL PRACTITIONERS

TYPE OF GOVERNMENT

West Minister with an executive President

POLITICAL SYSTEM

Multiparty democracy

LEGAL SYSTEM

Roman Dutch Law with commercial law heavily influenced by English law.

TESTS FOR INSOLVENCY

What are the tests for insolvency and financial distress?

In terms of Section 3 of the recently enacted Insolvency Act, Chapter 6:07 (Act), a debtor shall be deemed to be insolvent if –

- a Court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute the judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment; or
- the debtor's liabilities exceed the value of the debtor's assets after having been served a statutory demand by the creditor for payment of the amount which is due and payable, the debtor fails to make such payment or to give security to the reasonable satisfaction of the creditor for such amount, or to enter into a compromise therefor, and the debtor has for 21 days thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor.

In terms of Section 121 (f) of the Insolvency Act, a company is deemed to be "financially distressed" if:

- It appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or
- It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Provisions relating to Compromise and Restructuring are contained in Part XXIII of the Insolvency Act under the general theme of Corporate Rescue Proceedings.

Power to Compromise with Creditors and Members

The board of a company, or the liquidator of such a company if it is being liquidated, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors, by delivering a copy of the proposal, and notice of meeting to consider the proposal, to—

- every creditor of the company, or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by, the company; and
- the Registrar of Companies.

A proposal contemplated in this section will have been adopted by the creditors of the company, or the members of a relevant class of creditors, if it is supported by a majority in number, representing at least 75 percent in value of the creditors or class, as the case may be, present and voting in person or by proxy, at a meeting called for that purpose.

If the above proposal is adopted:

- the company may apply to Court for an order approving the proposal; and
- the Court, on an application, may sanction the compromise as set out in the adopted proposal, if it considers it just and equitable to do so, having regard to— (i) the number of creditors of any affected class of creditors, who were present or represented at the meeting, and who voted in favour of the proposal; and (ii) in the case of a compromise in respect of a company being liquidated, the report of the Master.

An order made shall have no effect until a copy of the order certified by the Registrar of the Court, together with a copy of the deed of compromise or arrangement, as the case may be, has been delivered to the Registrar for registration and a copy of every such order shall be annexed to every copy of the Memorandum of the company issued after the order has been made.

LIQUIDATION

A company which satisfies the test of insolvency (explained above) in terms of Section 3 of the Insolvency Act can be liquidated. A company or private business corporation can also be liquidated in terms of section 5 if -

- the directors are deadlocked in the management of the company, and the members are unable to break the deadlock, and;
- irreparable injury to the company is resulting, or may result, from the deadlock; or
- the company's business cannot be conducted to the advantage of members generally, as a result of the deadlock; or
- the members are deadlocked in voting power, and have failed for a period that includes at least 2 financial years to elect successors to directors whose terms have expired; or
- the directors, members, prescribed officers or other persons in control of the company or private business corporation are acting in a manner that is fraudulent or otherwise illegal; or
- the company or private business corporation's assets are being misapplied or wasted; or
- it is otherwise just and equitable for the company or private business corporation to be liquidated;
- the company or private business corporation, its directors, members or prescribed officers or other persons in control of the company or private business corporation are acting or have acted in a manner that is fraudulent or otherwise illegal, as determined by an investigation conducted by the Registrar of Companies in terms of the Companies and Other Business Entities Act (Chapter 24:31);
- if default is made in lodging the statutory report or in holding the statutory meeting in terms of the Companies and Other Business Entities Act [Chapter 24:31];
- if the company or private business corporation does not commence its business within a year from its incorporation or suspends its business for a whole year;
- if the company or private business corporation ceases to have any members;
- if 75% of the paid-up share capital of the company has been lost or has become useless for the business of the company;
- a corporate rescue practitioner of a debtor appointed during corporate rescue proceedings applies for liquidation under the provisions of Part XXIII, on the grounds that there is no reasonable prospect of the company being rescued.

What is the aim of liquidation?

The aim of liquidation is to divest directors and shareholders of their control of the company and to vest it in a liquidator who will realise the assets and ensure that creditors are paid from the available assets of the company. Secured creditors are paid first and unsecured creditors receive a pro rata share from the residue of the assets of the company in liquidation.

Process required to commence a liquidation

The process of liquidation is commenced by a resolution to that effect by the company (voluntary liquidation of companies) or generally, when an application is made to Court for the liquidation of a debtor (either by the creditors of the debtor or by the debtor).

At what point does the liquidation process commence

In terms of section 12 of the Insolvency Act, the voluntary liquidation of a company shall be deemed to commence 4 weeks after the resolution for the company's voluntary liquidation was passed, and where the Minister has appointed a liquidator to investigate the company's affairs, 8 weeks after the liquidator's appointment, or upon the conclusion of any arbitral proceedings where there is a dispute between the company and its employees regarding benefits and any payments due to the employees. For compulsory liquidation, the process commences upon the granting of the first liquidation order by the Court, which order can either be a provisional liquidation order or final liquidation order. Usually, the Court grants a provisional liquidation order, which is either confirmed or discharged on the return date. If confirmed, it becomes a final order.

Extent of court involvement in the liquidation process

Only a Court can issue a liquidation order, be it the provisional liquidation order or the final liquidation order. In addition, the Court has the power to order any continuance of proceedings against the debtor prior to the commencement of the liquidation process and it can do anything that is just and equitable for the protection of the creditors and any other interested party during the liquidation process. The Master of the High Court accepts, where sufficient, or rejects security for the payment of all costs in respect of the application that might be awarded against the applicant and all costs of the liquidation of the estate that may be incurred until the appointment of a liquidator, appoints the liquidator, is consulted in relation to the time and place of the first creditors meeting, and can order a valuation of the debtor's assets and where there is no liquidator or the latter becomes incapacitated the Master of the High Court is the custodian of the debtor's estate. Consequently, the Court is very much involved in the liquidation process.

Management of the company whilst in liquidation

The directors are divested of their powers and responsibilities during the liquidation process. They however must be available to answer questions from the liquidator and they may be summoned to appear before a creditors' meeting for questioning. The company is managed by the liquidator in consultation with the creditors and contributories (if any) as well as the Master of the High Court. After the final order has been issued, a first meeting of creditors will be called at which creditors will have an opportunity of appointing a liquidator and proving claims. The liquidator will then produce a report on the affairs of the company. After the issue of the report, a second meeting of creditors will be called. To avoid a contribution towards the costs of liquidation, most creditors will prove their claims at the second creditors' meeting after examining the liquidator's report to see whether or not there is a danger of the liquidation costs exceeding the value of the assets of the company. This can cause a contribution by creditors who have proved their claims.

Filing of claims

A claim against an insolvent estate must be admitted at a meeting of creditors of the estate if it has been proved to the satisfaction of the presiding officer on the face of the claim form, documents in connection with the claim submitted by the creditor or another person, if any, and on the evidence, if any, by the creditor. Every claim must be proved on affidavit in a form corresponding substantially with the forms provided for in the First Schedule of the Act and, as a general rule, no oral evidence may be received in support of any claim. The affidavit contemplated above, and all documents submitted in support of the claim or a copy thereof must be lodged with the person who is to preside at the meeting of creditors before the time of day advertised for the commencement of the meeting on or before the second working day before the date of the meeting, failing which the claim may not be admitted at that meeting unless the presiding officer is of the opinion that the creditor had a reasonable excuse for his or her failure to lodge the claim timeously.

Factors which Influence the period of administration in liquidation:

- The size of the company and the extent of the assets to be realised
- Disputes over the validity or otherwise of claims
- Disputes over the appointment of the liquidator
- Disputes over assets and monies due to the company in liquidation
- Co-operation from former directors of the company in liquidation

Effect of liquidation on employees

In terms of section 40 of the Insolvency Act, the contracts of service of employees whose employer has been liquidated are terminated with effect from the date of liquidation. An employee whose contract of service has been terminated is entitled to claim compensation from the insolvent estate of his or her former employer for loss suffered by reason of the termination of a contract of service prior to its expiration or any other benefits accruing in terms of the Labour Act.

Effect of liquidation on contracts

In terms of section 39 of the Insolvency Act, a lease of movable or immovable property is not terminated by the liquidation of the estate of the lessee, but the liquidator of the insolvent estate may, without prior notice, terminate the lease by standard notice to the lessor with the approval of the Master or in terms of a resolution of creditors taken at a meeting of creditors of the insolvent estate. Supply agreements, instalment sale agreements and facility agreements are terminated unless the liquidator elects to continue with them.

Effect of liquidation on shareholders

Shareholders remain as shareholders. They make a contribution in respect of shares not paid for. They lose control of the company in liquidation. They receive a residue, if any, after creditors are paid.

Effect of liquidation on creditors

Creditors have to prove their claims. They are paid in accordance with an order of preference. Where the assets are insufficient, they are paid a pro rata portion of their claims. Where the assets are insufficient to meet the liquidation costs, creditors contribute towards the costs of liquidation on a pro rata basis.

Pending claims, litigation and arbitration

All civil proceedings are stayed when liquidation commences. However, the proceedings can continue with the leave of the Court or the liquidator. Any new proceedings thereafter, will require the approval of the Court. This is to the exclusion of legal proceedings instituted against the debtor (who is a natural person) by the liquidator, calling upon the debtor to appear at a hearing before a Magistrate to give evidence on, and supply proof of, all assets or income received by the debtor or his or her dependents from any source whatsoever, and his or her estimated expenses for his or her own support and that of his or her dependents.

VOIDABLE TRANSACTIONS

Dispositions without value

Dispositions without value, voidable preferences and collusive transactions are liable to be set aside by the Court in terms of sections 24, 26 and 27 of the Insolvency Act. Subject to the Act and in terms of section 24, every disposition of property not made for value may be set aside by the Court if –

- such disposition was made by the debtor within two years before the presentation of the application for liquidation of his or her estate to the Registrar, or
- within three years before the presentation of the application for liquidation to the registrar if the disposition was made in favour of an associate,

provided that if it is proved by someone opposing the setting aside of the disposition that the liabilities of the debtor at any time after the making of the disposition exceeded his or her assets by less than the value of the property disposed of, the disposition may be set aside only to the extent of such excess. Generally, a disposition of property not made for value, which has been set aside or which was not completed by the debtor does not give rise to any claim in competition with the creditors of the debtor's estate.

Voidable preferences

Every disposition made by a debtor which has the effect that any one of his or her creditors receives a benefit to which he or she would not have been entitled had the debtor's estate been under liquidation at the time of the making of the disposition may be set aside by the Court if:

- the debtor's liabilities exceeded the value of his or her assets immediately after the making of the disposition; and
- the disposition was made within six months before the presentation of the application for liquidation of the debtor's estate to the Registrar, or within 12 months before the said presentation in the case where the disposition was made to an associate of the debtor; unless the person for whose benefit the disposition was made proves that it was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above the other, and if he or she is an associate of the debtor, also proves that he or she was not aware and had no reason to suspect that the debtor's liabilities would exceed the value of his or her assets immediately after the making of the disposition.

It is to be presumed, unless the contrary is proved, that a disposition was not made in the ordinary course of business if:

- a) it was made by way of payment of a debt that was not due and payable or not legally enforceable;
- b) it embodied payment in an unusual form or a form other than that originally agreed upon.

Any disposition of his or her property by a debtor at a time when his or her liabilities exceed his or her assets, made with the intention of preferring one of his or her creditors above another, may be set aside by the Court if the application for the liquidation of the estate of the debtor is presented to the Registrar within three years after the making of the disposition. For purposes of voidable preferences, a surety of a debtor, or a person by law in a position analogous to that of a surety, is deemed to be a creditor of the debtor.

Every disposition of property made under a power of attorney, whether revocable or irrevocable is, for the purposes of voidable preferences, deemed to have been made at the time at which the transfer or delivery or mortgage of such property took place.

Collusive dealings

Every transaction entered into by a debtor before liquidation in collusion with another, for the disposal of any property belonging to the debtor which had the effect of prejudicing its creditors or of preferring one creditor above another, may be set aside by a Court if the estate of the debtor is thereafter liquidated.

Any person who was a party to a collusive transaction shall:

- be liable to make good any loss caused to the insolvent estate in question and shall pay for the benefit of the estate a penalty as the Court may fix, not exceeding the amount by which it would have benefited by such dealing if it had not been set aside; and
- if it is a creditor, forfeit its claim against the estate.

How is the liquidation process terminated?

The liquidation process is terminated by Court order or by the final winding up of the company.

Director or officer liability

If at any time it appears that any business of a company was being carried on:

- recklessly; or
- with the intention to defraud creditors of the debtor or any other person; or
- for any fraudulent purpose

the court may, on the application of the Master of the High Court, the liquidator, any creditor, shareholder, member or contributory of the debtor, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, is responsible, without any limitation of liability, for such of the debts or other liabilities of the debtor as the Court may direct, irrespective of whether the debtor can pay the debts or other liabilities. If a debtor is liquidated the Court may, upon application, declare that any person responsible for the management of the debtor who caused or allowed the debtor to incur a debt at a time when he or she knew or had reasonable grounds to suspect that the debtor would not be able to pay such debt as well as its other debts as they fell due, is liable for such of the debts or other liabilities of the debtor as the Court may direct.

CORPORATE RESCUE

The new Insolvency Act provides for corporate rescue previously referred to as judicial management in the amended Companies Act (Chapter 24:03).

Commencement of corporate rescue

A company is placed under corporate rescue either by resolution of the directors or by a Court order following an application. Where it is placed under corporate rescue compulsorily by a Court order, creditors, employees or shareholders may apply for such an order. A Court order placing a company under corporate rescue should be notified to all affected persons. A Court can also make an order placing a company under supervision during the course of liquidation proceedings, when there is proof that

corporate rescue proceedings are a better alternative to liquidation or for purposes of enforcing a security interest in terms of the Insolvency Act.

Commencement of corporate rescue

Compulsory corporate rescue commences when the corporate rescue application is filed with the Court whereas voluntary corporate rescue commences when the resolution to that effect is filed.

Corporate rescue practitioner

A corporate rescue practitioner takes control of the company. Directors are answerable to him or her and have a duty to assist the practitioner. All decisions made in connection with the affairs of the company require the approval of the corporate rescue practitioner to be valid.

Proof of claims

Creditors are expected to prove their claims at meeting of creditors. The first meeting of creditors is to take place within 15 days after the appointment of the practitioner.

Consequences of corporate rescue Corporate Rescue –

- gives rise to a general moratorium on rights of creditors to enforce their claims against the company or property of the company;
- the claims of the creditors are crystallized as at the date of commencement of corporate rescue;
- shareholders retain their rights in the company. There may be no change in the shareholding except in the ordinary course of business or in pursuance of the plan or a Court order.;
- contracts entered into by the company prior to corporate rescue remain valid although the corporate rescue practitioner has suspension rights in respect of obligations arising therefrom; and
- contracts of employment remain valid. Variation can only take place in the event of agreement. Labour laws continue to bind the company under corporate rescue.

Corporate rescue plan

The plan is at the centre of corporate rescue proceedings. It is divided into 3 parts as follows:

Part A: Background, which must include at least –

- a complete list of all the material assets of the company, as well as an indication as to which assets were held as security by creditors when the corporate rescue proceedings began;
- a complete list of the creditors of the company when the corporate rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of

insolvency, and an indication of which of the creditors have proved their claims;

- the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
- a complete list of the holders of the company's issued securities;
- a copy of the written agreement concerning the corporate rescue practitioner's remuneration.; and
- a statement whether the corporate rescue plan includes a proposal made informally by a creditor of the company.

Part B: Proposals, which must include at least –

- the nature and duration of any moratorium for which the corporate rescue plan makes provision;
- the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;
- the ongoing role of the company, and the treatment of any existing agreements;
- the property of the company that is to be available to pay creditors' claims in terms of the corporate rescue plan;
- the order of preference in which the proceeds of property will be applied to pay creditors if the corporate rescue plan is adopted;
- the benefits of adopting the corporate rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation; and
- the effect that the corporate rescue plan will have on the holders of each class of the company's issued securities.

Part C: Assumptions and Conditions, which must include at least –

- A statement of the conditions that must be satisfied, if any, for the corporate rescue plan to - A. come into operation; and
- be fully implemented;
- the effect, if any, that the corporate rescue plan contemplates on the number of employees, and their terms and conditions of employment;
- The circumstances in which the corporate rescue plan will end;
- A projected;
 - balance sheet for the company; and
 - statement of income and expenses for the ensuing 3 years, prepared on the assumption that the proposed corporate plan is adopted.

The corporate rescue plan must be published by the company within 45 business days after the date on which the corporate rescue practitioner was appointed, or such longer time as may be allowed by the Court, on application by the company; or the holders of a majority of the creditors' voting interests. Within 10 business days after publishing a corporate rescue plan, the corporate rescue practitioner must convene and preside over a meeting of creditors and

any other holders of a voting interest, called for the purpose of considering the plan.

The plan has to be voted on by creditors. Acceptance is by 75% in value of the creditors voting in favour of the plan and the votes in support of the proposed plan must include at least 50% of the independent creditors' voting interests, if any, that were voted.

Terminations

Section 125 of the Insolvency Act prescribes that corporate rescue proceedings end when:

(a) the Court:

- sets aside the resolution or order that began those proceedings; or
- has converted the proceedings to liquidation proceedings; or

(b) the corporate rescue practitioner has filed with the Master of the High Court a notice of the termination of corporate rescue proceedings; or

(c) a corporate rescue plan has been:

- proposed and rejected in terms of the Act and no affected person has acted to extend the proceedings as allowable in terms of the Act; or
- Adopted in terms of the Act, and the corporate rescue practitioner has subsequently filed a notice of substantial implementation of that plan.

Where the corporate rescue proceedings last for over 3 months, the practitioner can make an application for extension.

Liquidations in the event of failure

Where the corporate rescue fails or conditions precedent to the plan are not fulfilled, the company may be placed under liquidation.

SCHEME, ARRANGEMENT OR COMPROMISE

Process required to commence a scheme of arrangement or compromise

To commence a compromise the board of a company, or the liquidator of such a company if it is being liquidated, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors, by delivering a copy of the proposal, and notice of meeting to consider the proposal, to:

- every creditor of the company, or every member of the

relevant class of creditors whose name or address is known to, or can reasonably be obtained by, the company; and

- the Registrar of Companies.

Thereafter, the proposal will have to be adopted by the creditors of the company, or the members of a relevant class of creditors, if it is supported by a majority in number, representing at least 75 percent in value of the creditors or class, as the case may be, present and voting in person or by proxy, at a meeting called for that purpose. An application must then be made to the Court for the approval of the compromise.

Duration of a scheme of arrangement

A scheme will last for the duration of the resolution creating it or until terminated by a Court order.

Extent of court involvement in the process

In a scheme, the role of the Court is limited to ensuring increased scrutiny of the meeting of shareholders or members as the case may be.

Filing of claims

Under a scheme a resolution of the creditors or a Court order, as the case may be, will determine whether the claims are acceptable or not.

Effect of corporate rescue and schemes of arrangement

Management of the Company whilst in Corporate Rescue or Subject to a Scheme of Arrangement

Under corporate rescue, the powers and authority of the directors are suspended. They are exercised by the practitioner. In a scheme, the powers, authority and responsibilities of the directors will be determined by the resolution of members or creditors as the case may be.

Factors which influence the period of corporate rescue judicial management or a scheme of arrangement

These include whether or not there are legal disputes, the extent of the company's problems and the nature of the solutions chosen by the creditors or the liquidator.

Funding of a company

In a scheme, the persons sponsoring the scheme will negotiate with the funders of the company to ensure continued funding. In a corporate rescue, the practitioner will do so. The principal source of relief in a scheme is the agreed measures and in corporate rescue proceedings it is the stay of execution against the company.

Effect of corporate rescue proceedings on employees

During a company's corporate rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that—

- changes occur in the ordinary course of attrition; or
- the employees and the company, in accordance with applicable labour laws, agree different terms and conditions. Any retrenchment must be conducted in terms of the Labour Act (Chapter 28:01).

Effect of corporate rescue and scheme of arrangement on contracts

Contracts remain valid to the extent that the practitioner may find them beneficial.

Effect of a scheme of arrangement and corporate rescue on shareholders

During corporate rescue proceedings an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business, is invalid except to the extent:

- that the Court otherwise directs; or
- contemplated in an approved corporate rescue plan.

Furthermore, the board of the company will be deemed to be dissolved, and each director of the company:

- may no longer exercise the functions of director; and

- may only exercise a management function within the company in accordance with the express instructions or direction of the corporate rescue practitioner, to the extent that it is reasonable to do so.

Each director of the company at the time the corporate rescue proceedings commenced must attend to the requests of the corporate rescue practitioner at all times, and provide the corporate rescue practitioner with any information about the company's affairs as may reasonably be required. If, during a company's corporate rescue proceedings, one or more directors of the company at the time the corporate rescue proceedings commenced purports to take any action on behalf of the company, that action is void unless approved by the corporate rescue practitioner.

Effect of a corporate rescue and scheme of arrangement on creditors

Creditors have to prove their claims at meetings convened by the Master of the High Court. During corporate rescue proceedings, each creditor is entitled to— (a) notice of each Court proceeding, decision, meeting or other relevant event concerning the corporate rescue proceedings; and (b) participate in any Court proceedings arising during the

corporate rescue proceedings; and (c) formally participate in a company's corporate rescue proceedings; and (d) informally participate in those proceedings by making proposals for a corporate rescue plan to the corporate rescue practitioner.

Pending litigation, claims and arbitration

During corporate rescue proceedings, no legal proceedings, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except: with the written consent of the practitioner; or

- with the leave of the Court and in accordance with any terms the Court considers suitable; or
- as a set-off against any claim made by the company in any legal proceedings, irrespective of whether those proceedings commenced before or after the corporate rescue proceedings began; or
- criminal proceedings against the company or any of its directors or officers; or
- proceedings concerning any property or right over which the company exercises the powers of a trustee; or
- proceedings by a regulatory authority in the execution of its duties after written notification to the corporate rescue practitioner.

Effect of the moratorium

The moratorium is determined by the resolution in the scheme and in corporate rescue the moratorium provides for a stay of execution against the company that has been placed under corporate rescue.

Voidable transactions

Voidable transactions are dealt with in the same way as if the company is placed in liquidation.

The plan

The plan is implemented in terms of the scheme resolution and in corporate rescue proceedings, in terms of the corporate rescue plan.

Effect on suretyships

Suretyships are called up after exhausting all remedies against the 164 principal debtor unless they have agreed to be surety in solidum.

SECURITY

Types of security

Various forms of security are recognised by Zimbabwean law.

They include:

- mortgage bonds over immovable property;
- general notarial covering bonds over movables;
- cessions to secure a debt;
- pledges; and
- deeds of suretyships

Tokens of security

Mortgage bonds are registered at the Deeds Office.

Security trustees or special purpose vehicles

Security trustees or special purpose vehicles are recognised.

Most robust form of security

The most robust form of security is a mortgage bond over immovable property.

Registration of security

Only a registered conveyancer may act as an agent in registering security at the Deeds Office. Only mortgage bonds require registration.

Stamp duty

Stamp duty and conveyancer's costs for the registration of bonds are calculated as follows: Conveyancer's fee

- First US\$250 000 of value - 3% = US\$7500
- Second US\$250 000 of value - 2% = US\$5000
- Third US\$500 000 of value - 1% = US\$5000
- Over 1 million of value - 0.5%
- VAT on that @15.5%

Stamp duty

- At US\$4 for every 1000 USD of value of bond;
- Plus US\$50 registration fee; and
- Post and Petties roughly US\$100 VAT US\$15.5

Requirements for the assignment or transfer of security

The cession and assignment of rights and obligations under a mortgage bond requires registration at the Deeds Office.

Instances in which securities might be vulnerable to attack

Mortgage bonds are compromised by Government acquiring the land on which the bonds are registered. The only way in which other third parties may attack security is through the law relating to voidable preferences, undue preferences, dispositions without value and other impeachable transactions under the Insolvency Act.

Methods of enforcement of security

A creditor can call up a mortgage bond. In instances of insolvency, a creditor holding a bond enjoys preference. A creditor holding property in pledge is entitled to release same to the Sheriff or Deputy Sheriff or liquidator subject to a condition that on distribution in liquidation or after a sale in execution, he/she will enjoy the preference afforded by the security.

Problems experienced when enforcing security

The major problem experienced in enforcing security is changes in property values which affect the value of security. Another problem is the current liquidity crunch in the Zimbabwean economy. Only a limited number of people can afford to buy property. Obviously, that has a negative effect on the value of security.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

The Courts will recognise a foreign judgement, subject to the requirements below.

Requirements for the recognition of a foreign judgment

Under the common law, the general requirements for the recognition and enforcement of foreign judgments may be summarised as follows:

- the foreign Court must have the requisite international jurisdiction or competence according to our law;
- the judgment must be final and have the effect of res judicata according to the law of the forum in which it was pronounced;
- the judgment must not have been obtained by fraudulent means;
- it must not entail the enforcement of penal or revenue law of the foreign State;
- it must not be contrary to public policy in Zimbabwe; and
- the foreign Court must have observed the minimum procedural standards of justice in arriving at the judgment.

Requirements for the recognition of a foreign trustee, corporate rescue practitioner or insolvency practitioner

Upon recognition of foreign proceedings, the foreign representative may participate in proceedings regarding the debtor under the laws of the Zimbabwe relating to insolvency. Foreign proceedings are recognized upon an application being made to the High Court, which application must be made by the foreign representative and must be accompanied by (a) a certified copy of the decision commencing the foreign proceedings and appointing the foreign representative; or (b) a certificate from the foreign

Court affirming the existence of the foreign proceedings and of the appointment of the foreign representative; or (c) in the absence of evidence referred to in paragraphs (a) and (b), any other evidence acceptable to the Court of the existence of the foreign proceedings and of the appointment of the foreign representative. An application for recognition must also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.





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