MALAWI
SACRANIE, GOW & CO.

FIRM INFORMATION

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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 solvency[1] so as to set in motion a member's voluntary winding-up in which the creditors are assured of getting paid.

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. 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

[1] Section 143(1), IA

[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.