

# Insolvency and Restructuring Guide for Africa 2015



LEX AFRICA  
Guide to Insolvency and  
Restructuring in Africa  
2015

## PREFACE

Welcome to the inaugural edition of the Insolvency and Business Restructuring Guide for Africa 2015. As head of the Insolvency, Business Rescue and Restructuring practice group at Werksmans, it is a pleasure to bring you this publication which is being launched in collaboration with all of our LEX Africa member firms in over 20 jurisdictions across the continent.

The purpose of the guide is to share pertinent data and information with all of you which will provide you with a better understanding of each of the relevant jurisdictions' approach to insolvency and restructuring matters. We hope this guide, which is unique in both its content and reach, will be used to your benefit in the years to come. This publication is the first of its kind and uniquely covers insolvency regimes in Africa.

It is our intention to continuously update this publication with further contributions from additional African jurisdictions as well as keep you abreast of the latest legal frameworks and developments affecting this area of practice.

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.

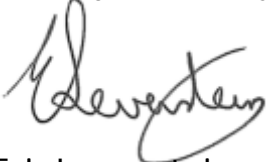
The purpose of the publication is to gain a better understanding of what makes up the various insolvency and rescue regimes in each one of the relevant African jurisdictions. As can be seen, certain legislative reforms are occurring in various African jurisdictions in the insolvency space. Although there are significant and crucial differences remaining 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 domestic insolvency regimes which have been adapted to bring local regimes into line with international best practice. An example of this is the new South African Business Rescue regime introduced by Chapter 6 of the South African Companies Act, 2008. In the South African jurisdiction, business rescue has taken three years to bed itself down. It appears that there is now significant traction that has taken place in both rescuing financially distressed companies as well as providing opportunities for investors to acquire valuable assets from companies in financial distress. Precedent is being set in the South African High Courts in respect of both the interpretation of the Act and assisting Business Rescue Practitioners in the proper implementation of the restructuring and rescue of companies in the South African jurisdiction.

This 2015 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.

LEX Africa is the first and largest African legal alliance with a long history of assisting clients across the continent. It is hoped that our insight into these issues will be both informative and practical.

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 Lauren Becker, Khathu Neluheni and Natalie Scott of Werksmans who played a major role in getting this publication off the ground.

I hope you will enjoy reading it as much as we enjoyed compiling it.



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## MESSAGE FROM CHAIRMAN OF LEX AFRICA

LEX Africa was formed in 1993 as the first Pan African legal alliance. Since 1993, LEX Africa has established a 22 year track record of advising and assisting business in Africa and currently covers 24 African countries with over 400 lawyers. It is rated by Chambers & Partners as a band 1 leading regional law firm network. Having regard to the increasing interest in African investment and business opportunities and the need for specialist legal skills, LEX Africa has established various cross border practice groups to advise and assist clients. We are proud to publish this Guide as part of our ongoing commitment to our clients and the development of the African continent.



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# ANGOLA

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## GENERAL INFORMATION

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### Country Information

The 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 (ie Liquidation)

Insolvency proceedings are applicable to persons while bankruptcy proceedings are applicable to traders and commercial entities.

There are three types of bankruptcies in Angola - fraudulent, culpable and causal.

A bankruptcy is deemed to be fraudulent when the bankrupt entity commits, intentionally or by an omission, a fraud. In general, a fraudulent bankruptcy would occur where there are simulated acts, with statements of false dates or when through some other means, lacking in good faith, actions were conducted by the bankrupt entity causing damage to creditors.

Culpable bankruptcy occurs when the bankrupt entity acts negligently, recklessly and with manifest prodigality and has failed to fulfil any duty in compliance with any legal provision.

Causal bankruptcy occurs when compliance with an entity's obligations becomes impossible as a result of an event that is beyond the entity's control, notwithstanding the diligent and honest

management of the commercial activity of the company.

### What are the Tests for Financial Distress (ie Business Rescue or Administration)

There is no process in Angola for the rescue or recovery of ailing companies.

## INSOLVENCY AND RESTRUCTURING PROCEDURES

### Formal Insolvency Procedures

The process usually commences with an application from the bankrupt entity or any creditor, and it is followed by a hearing (for which the debtor is notified) within 48 hours. Judgment is handed down 8 days from the receipt of the petition or from the expiry of the deadline fixed for the response of the debtor.

### Formal Restructuring Procedures

Angolan law does not provide any formal rescue or recovery procedures but does have means aimed at preventing bankruptcy. These means include the process known as composition (where a moratorium is granted following an agreement among the creditors). Financial institutions that cannot afford to pay their liabilities must inform the supervisory organization responsible for that industry (which may be the Angolan National Bank or the Commission of Capital Markets) whether they are banking or non-banking financial institutions. The supervisory organization may impose stricter measures to rectify the situation and restructure the financial institution.

### Informal Insolvency or Restructuring Procedures

No informal insolvency or restructuring procedures have developed in Angola.

## 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, of its own accord, when approached, can place a company 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 bankruptcy (or an agreement is concluded to this effect) or when application is made to court.



### Duration of the Liquidation Process

The duration of the bankruptcy may vary, but usually, judicial liquidation proceedings take anything from 2 to 3 years to conclude.

### Extent of Court Involvement in the Liquidation Process

The court declares the judicial liquidation of the company and appoints a liquidator. Thereafter, the court is not typically involved in the process, unless approached on an ad hoc basis to resolve disputes.

### Management of the Company Whilst in Liquidation

The management of the company whilst in liquidation is placed in the hands of the liquidator, 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 liquidator after the bankruptcy commences and request payment of their claims. After the declaration of bankruptcy, all the assets of the company are under the control of the liquidator, 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

These are some of the factors that may delay the winding-up process, namely:

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

### Effect of Liquidation on Employees

Upon the commencement of bankruptcy, employment contracts automatically terminate. However, employees will be entitled to compensation in an amount of 50% of their salary according to their seniority.

### Effect of Liquidation on Contracts

Contracts that are in force as at the date of the commencement of bankruptcy can be ratified by the liquidator if they are beneficial to the bankrupt entity. In the absence of ratification, the creditor shall request compensation for the damage incurred 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 liquidator

after the bankruptcy commences and request payment of their claims.

### Pending Claims, Litigation and Arbitration

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

### Voidable Transactions

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

### How is the Liquidation Process Terminated

Once bankruptcy is declared, the Public Prosecutor's Office is notified and such information is registered in the relevant public office. Thereafter, notification of the bankruptcy is published in the official gazette and in the most read newspaper in the district. Notices are also affixed at the headquarters of the bankrupt entity, at its principal place of business and on the court's door. The process is terminated following the sale of all assets and rights of the bankrupt 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 bankrupt'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, such conduct would attract criminal liability. With fraudulent bankruptcy, a director may be detained for anything from 2 to 8 years. A culpable bankruptcy carries with it a detention of up to 2 years.

## 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 in Angola is the mortgage over real estate and the commercial pledge, which is often taken over shares in a company. The personal guarantees, on the other hand, that are commonly used in Angola 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 (ie. 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

Not all security in Angola needs to be registered. Only certain security requires registration. A mortgage over real estate requires registration in the Land Registry Office. With a pledge of shares, this must be registered in the Commercial Registry Office. No other forms of security have registration requirements.

#### 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%, security with a duration equal to or above 1 year attracts stamp duty of 0.2%, and 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 over 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 on which the security was taken. With respect to the proof of payment, the law requires the submission, on an annual basis, of a statement regarding the stamp duty already paid. Such statement must be submitted on the year that follows the granting of the security, on the last working day of March.



#### Registration Costs

The registration costs for security vary as it is dependent on the value of the loan that is being secured. The cost of registering a form of 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 further registration in the Land Deeds Registry is required. 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 Securities 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 (eg taxes), or in favour of other third parties, rank ahead of in rem guarantees that are granted in favour of third parties. Thereafter, personal security is ranked (ie bails and guaranteed deposits)

#### Methods of Enforcement of Security

Security is enforced in Angola by making an 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 a 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.

### RECOGNITION OF FOREIGN JUDGMENTS

#### Instances in Which Your Court Will Recognize a Foreign Judgment

Foreign judgments are recognized in Angola. To do so, the foreign judgment would need to be analyzed by the competent Angolan Supreme Court, whereafter such court, if it deems it fit, 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:

- 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.

# BOTSWANA

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### County Information

Botswana is a country on the border of South Africa. The Language spoken in the country is English.

### 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 (ie 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 three weeks thereafter neglected to pay such sum or to secure a 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 (ie Judicial Management)

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 that person or entity has reason to believe that the company is, or will be, unable to pay its debts.

### 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 aim or 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 by way of a 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 they 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 of any creditor seeking to prove a 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 then 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.
- 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 three 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 or payment 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

Ranking - 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;

- preference 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. Preference 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 preference 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, Arbitration

No action 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 will be 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 two years before the sequestration or 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 two years of the sequestration or liquidation, it will be set aside, unless the person claiming under, or who benefited by, 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 six 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 sequestration or 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 sequestration or 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 shall, upon the application of the Master of the High Court make an order that the company be dissolved from the date of the order and the company shall thereafter be dissolved accordingly. The last step in the winding up process is for a copy of the said order to be transmitted by the Registrar of the High Court, to the Master of the High Court and to the Registrar of Companies (and the latter shall make a minute in its books of the dissolution of the company and publish notice thereof 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 is 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 3 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 MANAGEMENT

##### Process Required to Commence a Judicial Management

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 the Judicial Management Process Commence

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

#### Duration of Judicial Management 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 Management Process

The court is initially involved in the judicial management process through the court's granting the judicial management orders. 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 Management

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 a Judicial Management

- *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.
- *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

The shareholders are divested of management and/or control of the company but remain involved with respect to dividends and annual general meetings.

#### 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 other any processes against the company.

#### Pending Claims, Litigation and Arbitration

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

#### Effects of the Moratorium

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

#### Voidable Transactions

The consequences identified for each of these 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 cancel 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 46:03 ("Hypothecation Act"). A deed of hypothecation is a statutory pledge and must be effected 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 or Special Purpose Vehicles

It is uncertain whether security can validly be created in favour of a trustee acting as a trustee for a group of lenders. This is because for security to be lawful, a valid principle obligation must be owed to the grantor of that security and a security trustee arrangement lacks this requirement. In terms of the Deeds Registry Act the grant of a security in favour of an agent is expressly prohibited.

#### 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 the Registered 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.
- *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 Securities 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 judgement. 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 work load 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 the Court Will Recognise 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 judgement 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 judgement 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.

# DEMOCRATIC REPUBLIC OF THE CONGO (DRC)

EMERY MUKENDI WAFWANA & ASSOCIÉS

## GENERAL

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### Country Information

The Democratic Republic of the Congo (DRC) is located in Central Africa. It borders the Republic of Congo, Central African Republic and South Sudan to the North, Uganda, Rwanda, Burundi and Tanzania to the East, Zambia and Angola to the South and the Atlantic Ocean to the West. It is the second largest country in Africa and the eleventh largest in the world. With a population of over 75 million, the DRC is the most populous Francophone country, the fourth most populous nation in Africa and the nineteenth most populous country in the world.

### Type of Government

A Democracy and Semi-Presidential Government.

### Political System

The Constitution promulgated on 18 February 2006 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. The general characteristics of the Congolese legal system are similar to those of the Belgian legal system because the DRC received its law from the Belgian colonialists. The Constitution reaffirms the independence of the judiciary from the legislative and the executive bodies.



## TESTS FOR INSOLVENCY

### What are the Tests for Insolvency (ie Liquidation)

Insolvency law in the DRC is governed by the Uniform Act of 10 April 1998 for the organization of collective proceedings and the discharging of debt (UAOP). Collective procedures established by UAOP are open to traders and natural or legal persons experiencing financial difficulties. A company may be placed in liquidation if it is unable to pay its debtors or if it has lost its share capital.

### What are the Tests for Financial Distress (ie Business Rescue or Administration)

Business rescue is applicable when a company is unable to pay its debts with its available assets. The competent court would order the commencement of a rescue procedure if it appears that the debtor has proposed a genuine composition with its creditors. Otherwise, the court will pronounce upon the liquidation of the company. The court may, at any time during a rescue process, 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 creditors.

## INSOLVENCY AND RESTRUCTURING PROCEDURES

### Formal Insolvency Procedures

In the DRC, there are three formal insolvency procedures for a company, namely the precautionary regulation, the judicial redress and the liquidation procedure. 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 concordat, whereas judicial redress aims to safeguard the company and discharge its debts by way of a concordat of redress. As for the liquidation procedure, its purpose is the realisation of the assets of the debtor to discharge its debts.

### Formal Precautionary Regulation Procedures

A court would be approached by a debtor company, which would 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. Within 30 days of filing a petition with the court, the company must make an offer to the creditors of the company 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.

Within two 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 its report to the Registry containing the preventive concordat proposed by the debtor with its creditors. Within eight days of filing the report, the President of the competent court will summon the debtor to be heard in a non-public hearing and may call the expert or one or more creditors. Within one month, the competent court shall decide on the request for precautionary regulation. The court will either determine that the company be rescued (with the security of a moratorium on claims against it) or the company will be placed in liquidation.

#### 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 secure the payment of the claims of creditors as far as is possible.

#### Process Required to Commence a Liquidation

When the debtor is unable to meet its liabilities with its available assets, it must make a declaration of insolvency in order to commence insolvency proceedings. This declaration may also be made by a creditor or group of creditors, or at the instance of the Crown, the auditors or partners of the company. This declaration must be made within thirty days of the suspension of payments and must be lodged with the competent court. The court will order a liquidation of the assets of the company when a composition or rescue is not possible.

#### At What Point Does the Liquidation Process Commence

The liquidation process commences on the date on which the competent court makes an order to place the company in liquidation.

#### Duration of the Liquidation Process

In the DRC, there is no fixed duration for the liquidation process. The duration is dependent on the magnitude of the company.

#### Extent of Court 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.

#### Management of the Company Whilst in Liquidation

When the liquidation of a company is initiated by the shareholders, one or more liquidators will be appointed. However, the directors of the company remain in office but cease to maintain the powers, functions or duties that they

would ordinarily have to manage the company from the date of the liquidation.

#### Filing of Claims

Within three days of the commencement of liquidation, the company provides the trustee with its books of account and a list of creditors is created. 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 as 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 or not such claim is liquid and/or the subject of any litigation.

#### Factors Which Influence the Period of Administration in a Liquidation

The administrative difficulties presented by litigation 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.

#### Effects of Liquidation on Contracts

When a company is placed in liquidation, the liquidator may decide to either terminate or maintain certain contracts. The liquidator will make such decision in 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.

#### Effects of Liquidation on Creditors

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 realised.

#### Pending Claims, Litigation and Arbitration

Actions for the recovery of property may be revived or instituted only where the claimant has 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 three 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 were initiated at the instance of the company.



The same applies to pending proceedings brought against the company.

#### Voidable transactions

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

#### How is the Liquidation Process 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.

#### Director or Officer Liability

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 company.

#### 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 fine.

### BUSINESS RESCUE/ADMINISTRATION

#### Process Required to Commence Business Rescue

At the commencement of the collective procedure, a Bankruptcy Judge will be nominated. The Bankruptcy Judge appoints one or more, but not more than 3 trustees. The Bankruptcy Judge may also appoint one or more auditors chosen by the creditors, but a maximum of three. The Bankruptcy Judge is placed under the authority of the competent court, oversees the proceedings and ensures that they are conducted in a speedy manner. He also gathers all the information that he deems necessary. He may hear the debtor, or officer of the corporation, their employees, creditors or any other person and he has the power to rule on requests, claims and disputes within his jurisdiction. Supervisors assist the official Bankruptcy Judge in its oversight of the conduct of the insolvency proceedings and ensure that the interests of creditors are protected. The trustee is responsible for ensuring the

diligent and successful conclusion of the business rescue proceedings. The representative of the Public Ministry is informed of the progress of the business rescue proceedings by the Bankruptcy Judge. He may, at any time, request disclosure of all documents or books relating to the insolvency proceedings.

#### At What Point Does Business Rescue Commence

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

#### Duration of Business Rescue

The duration of business rescue is largely dependent on the circumstances of each company. There is no fixed duration.

#### Extent of Court Involvement in the Business Rescue

The judge under the authority of the competent court shall ensure the expeditious conduct of the proceedings in court. The court may, in particular, 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 Bankruptcy Judge.

#### Management of the Company Whilst in Business Rescue

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 a specified period of time. It may also be necessary to appoint an expert. If the views of such expert are disputed, the court may be approached for direction and an order.

#### Filing Claims

Within three days of the commencement of the procedure, the debtor must provide the trustee with his books of account. The trustee 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.

#### Factors Which Influence the Period of Business Rescue

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

#### Funding of the Company Whilst in Business Rescue

The law does not make any provision for the funding of a company in such situation.

#### Effect of Business Rescue on Employees

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



### Effects of Business Rescue on Contracts

All contracts concluded by the company prior to the commencement of business rescue continue and remain of full force and effect.

### Effects of Business Rescue on Shareholders

Shareholders are engaged throughout the process.

### Effects of Business Rescue on Creditors

Business rescue suspends or prohibits any individual from enforcing its rights against the company.

### Pending Claims, Litigation and Arbitration

All judicial actions already instituted against the company remain.

### Effects of the Moratorium

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

### Voidable transactions

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

### Business Rescue Plan

A plan is compiled 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.

### Voting on Plan

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

### Cram Down on Creditors

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

### Discharge of Debt

The Bankruptcy Judge shall, where applicable, order a distribution of funds among the creditors.

### Effects on Suretyships

The rights of sureties are not ordinarily dealt with in rescue plans for the company.

### How is the Process Terminated

The rescue process will terminate 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.

What is the status of the Company after Business Rescue  
Where an agreement is approved, the provisions of the agreement will be implemented with the assistance of the trustee, for an indefinite period of time or unless otherwise directed by a judge.

### Director and Officer Liability

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

### Civil Consequences

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

### Criminal Consequences

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

## SECURITY

### Types of Security

In the DRC, there are two types of security: personal security and property security. Personal security relates to commitments given by one or more person or entity on behalf of another and in favour of a third party (ie Bonds or Warranty and Autonomous Counter-Guarantees). Property security includes liens and pledges.

### Taking of Security

#### 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 debtor. 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 payment against the principal or request the preservation of his rights in the assets of a debtor, even before paying the creditor, when the debtor is insolvent; 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

The autonomous guarantee is a commitment in terms of which a guarantor undertakes to pay a specified amount to the beneficiary on first request from the latter, or as mutually agreed. The warranty and autonomous counter-guarantee may not be underwritten by natural persons.



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. They must be recorded in writing, failing which they will be invalid.

#### Lien

A creditor who legitimately owns 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.

#### Pledge of Intangibles

This pledge gives rise to the assignment of intangible personal property or a set of intangible future or present assets to secure one or more present or future claims that are certain or ascertainable. The subject matter of such pledge may include claims, bank accounts, rights associated with securities, intangible business assets and intellectual property rights.

#### Mortgages

A mortgage is the assignment of a fixed or ascertainable building, constituting a guarantee of one or more present or future claims, provided that they are certain or ascertainable. The assets that may be subject to a mortgage are built or non-built property, their improvements and additional structures related to such property or buildings. 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.

#### Registration of security

Security must be registered with the Register of Commerce and "Personal Property Credit Register" (RCCM).

#### Registration Costs

The costs of registering security is UD\$50 (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 is silent on specific instances in which security might be vulnerable to attack.

#### Methods of Enforcement of Security

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 a secured creditors. The enforcement of security 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 court for the attribution of the assets to the pledgee, following an evaluation by an expert of the pledged assets. Any contractual clause authorising either the sale or the attribution of the pledged asset in the absence of such formalities will be considered to be null and void.

#### Problems Experienced when Enforcing Security

The practical implementation of the new law in the DRC can cause problems. The delays experienced in obtaining court orders for the attachment of assets and sales in execution, ordinarily delays the enforcement of security.

#### RECOGNITION OF FOREIGN JUDGEMENTS

##### Instances in Which Your Court Will Recognize a Foreign Judgment

If the foreign judgement is enforceable against a person or a company domiciled in the DRC, the DRC courts may recognize such judgment.

Requirements for the Recognition of a Foreign Judgment  
In order for a foreign judgment to be recognized, the following conditions must be fulfilled:

- 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 must have had jurisdiction to hear the matter.

An application would be brought to the High Court, supported by an authenticated original judgement, 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.



# GHANA



BENTSI-ENCHILL, LETSA & ANKOMAH

## GENERAL INFORMATION

### Firm Information

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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, which is currently undergoing review, recognises the concept of a 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

In Ghanaian law, where:

- a creditor to whom the company owes more than GHC100,000 serves a written demand on the company to pay the amount and the company, for 21 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 registrar's satisfaction 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 procedure available to a company in Ghana is that of a scheme of arrangement or amalgamation, with or without court approval and the acquisition of minority shareholder's shares.

### Informal Insolvency or Restructuring Procedures

The insolvency procedure under Ghanaian law is formal, as set out above.

### Restructuring Procedures

A scheme of arrangement or amalgamation 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 to another entity in exchange for shares in that entity.

A scheme of arrangement or amalgamation with court approval arises when an arrangement or amalgamation is proposed and the company, a creditor, a member or the liquidator 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.

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 liquidation in Ghanaian law - an official liquidation and a private liquidation. An official liquidation commences when a:

- special resolution by the members of a company is passed;
- petition to registrar by a creditor, member or contributory of company is made;
- petition to High Court is made by the registrar, creditor, member, contributory or attorney-general; or
- conversion is made from a private liquidation to an official 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, or (b) on the

making of a winding-up order by the court. 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 Bodies Corporate Act merely requires that the liquidator 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 three months from the end of the year or a longer period that the Minister 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 be involved in the liquidation process in any of the following ways. A court may:

- order the liquidation of the company;
- appoint the registrar to exercise the powers of a liquidator;
- order a person to comply with the liquidator's requirements;
- direct the liquidator in respect of the carrying out of his functions;
- direct the transfer of the balance of the company's assets to the fees account of the company and give directions for the disposal of property not converted into money, after payments to the creditors are made; and/or
- order the termination of official liquidation.

#### 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 liquidator unless (a) the company in general meeting or the liquidator sanctions their continuance; or (b) it is necessary to enable the directors to prepare statements and accounts. 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 liquidation process;
- pay creditors;
- sell the company's property or assets;
- execute deeds, receipts and other documents using the company's seal;
- prove and rank claims in the bankruptcy, insolvency or sequestration of a contributory;
- draw, accept, make and endorse a bill of exchange or promissory note;
- raise money on the security of the company's assets; and

- do anything necessary to liquidate and distribute the company's assets.

#### Filing of Claims

As soon as possible after the winding-up order is made, the liquidator should settle a list of contributories unless he finds it unnecessary to do so. 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 to the company and each creditor; and the company notifies the liquidator if it thinks the proof is false. The liquidator examines the proof and if satisfied, notifies the creditor that he admits the proof of debt subject to verification.

The liquidator may by notice in the Gazette fix a time within which creditors should prove their claims or be excluded from the benefits of any distributions made before those debts are proved.

The liquidator calls a first meeting of creditors for a date not later than six weeks after the publication of the winding-up order to discuss pertinent issues or any arrangements the company has proposed to which the creditors may reject or approve with at least three-quarters of the votes cast. Each creditor with an admitted proof is entitled to be heard. The meeting should be closed not later than eight weeks after the publication of the winding-up order.

Regarding debts which rank for dividend payments, the liquidator should ascertain the class into which the whole or a part of the debt falls as provided by the Bodies Corporate (Official Liquidation) Act. Class A debts have priority over the claims of holders of debentures under a floating charge credited by the company and should be paid accordingly out of the property comprised in or subject to that charge.

#### Class A debts are:

- remuneration not exceeding GHC6,000 owed to an employee of the company in respect of employment during the whole or a part of the four months preceding the commencement of the winding-up; and
- rates, taxes or similar payments owed to the Republic or to a local authority which have become due and payable within the year preceding the date of the commencement of the winding-up.

The liquidator should 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 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 and considered capable of giving information about the affairs of the company which may affect the duration of the liquidation process. Where a member of the company, or where the liquidator, applies to the court to stay liquidation proceedings, this may also affect the liquidation process.

## Effect of Liquidation on Employees

Remuneration not exceeding GHC 6000 owed to an employee in respect of employment during the whole or a part of the four months preceding the commencement of the winding-up is prioritised as a class A debt and paid when the first dividends are declared.

## Effect of Liquidation on Contracts

The company ceases to carry on business except that which is beneficial for the liquidation process but the corporate existence and corporate powers of the company continue until dissolution. The liquidator therefore has to terminate unbeneficial contracts if it so wishes or requires.

## Effect of Liquidation on Shareholders

Shareholders retain their shareholding in the company but cannot transfer their shares without the liquidator's sanction.

## 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. 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

Section 412 of the Act provides that where a winding-up petition has been presented and an action or other proceedings against a company is instituted or pending in court (in this section referred to as "the court concerned"), the company or any creditor, or contributory may before the making of the winding-up 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.



From the foregoing, litigation or arbitration proceedings may be stayed upon commencement of liquidation proceedings subject to the requirements stipulated in the aforementioned section of the Act

## 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;
- money paid or property transferred to a creditor 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;
- dispositions of property otherwise than for full value or to settle any debt due (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 the 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 accounts have been passed by the Auditor-General, the liquidator applies to the High Court for an order terminating the liquidation proceedings. If satisfied, the court grants the application and sends a copy of the 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 so strikes the company's name off the register and notifies the strike-off in the Government Gazette. The company is dissolved as at the date of the publication in the Government Gazette.

## Director or Officer Liability

A director or officer of a company will be liable for contravening a duty that is imposed on them by the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180). The officers who were knowingly party to any fraudulent conduct of the business are personally responsible for the debts or any of the debts or any other liabilities of the company that the court may direct.

## 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.

## Criminal Consequences

A director or officer of a company may be liable for a fine not exceeding 750 penalty units or a term of imprisonment not exceeding 3 years or to both the fine and imprisonment for contravening a duty imposed on that person by the Bodies Corporate (Official Liquidations) Act.

## BUSINESS RESCUE / ADMINISTRATION

There is no USA Chapter 11-style business rescue process in Ghana. The following answers are therefore based on an adaptation of the arrangement provisions under the Companies Act, 1963 (Act 179).

### Process Required to Commence a Scheme of Arrangement

A scheme of arrangement or amalgamation 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 shares in that entity. A scheme of arrangement or amalgamation with court approval arises when an arrangement or amalgamation is proposed and the company, a creditor, a member or the liquidator itself 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 amalgamation. This order 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 six 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 recommended timelines.

### Extent of Court Involvement in the Process

The court may make an order confirming an arrangement or amalgamation. In the 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 amalgamation, 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 amalgamation; and
- the incidental, consequential and supplemental matters that are necessary to ensure that the arrangement or amalgamation is fully and effectively carried out.

### Management of the Company

There is no provision 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 things:

- where a dissenting shareholder applies to court for redress;
- where a dissenting shareholder gives a written notice of his dissent to the liquidator, within 28 days after the resolution is passed- the liquidator will 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.

### 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/amalgamation 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 amalgamation 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 amalgamation, the shareholders may lose their shares in the company and gain shares, debentures of 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 amalgamation 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.

#### Effects 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 –either on its own or as a consequence of an amalgamation or transfer of its assets and any other related matters.

#### Voting on the Scheme of Arrangement

In an arrangement or amalgamation without court approval, the vote of not less than three-fourths (75%) of the members of the company is required to pass the special resolution required. In an arrangement or amalgamation with court approval, the votes of 75% of each class of members and 75% of each class of creditors is required to approve the arrangement or amalgamation.

#### Cram Down on Creditors

No such cram down arises by operation of the law and is not regulated or provided for in a scheme of arrangement.

#### 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 amalgamation 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 things that occur during an arrangement, a director or officer 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 amalgamation;
- where the company or its officer (including a liquidator or trustee of a deed) does not send the statement explaining the effect of the arrangement/amalgamation 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 or amalgamation, and the company does not deliver an office copy to the registrar within 28 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 not exceeding GHC12,000 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 not exceeding 5 years 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 intangibles of the chargor. Thus shares, accounts, intellectual property rights, land, receipts, receivables, goods and book debts may all be the subject matter of a 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 a property. A fixed charge has priority over a floating charge affecting the same property 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

- Collateral Registry of the Bank of Ghana - a borrower must register a certified copy of a charge or collateral created by the borrower in favour of a lender with the Collateral Registry within 28 days after the charge is created. The registrar then issues a certificate which is evidence, in the absence of a copy of the document on the charge, that security is registered over such

property.

- Registrar - General's Department - 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 of Companies within 28 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.
- Land Registry - where the charge is in respect of land, the borrower should also register the instrument at the Land Registry. Any instrument other than a will and a judge's certificate has no effect unless it is registered.
- Land Title Registration - a mortgage does not have an effect unless it is registered in accordance with the Land Title Registration Act. When a mortgage is registered as an interest in land, the mortgage instrument must be filed with the registry.

#### Stamp Duty

The 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 including admissibility in civil proceedings in a Ghanaian court unless the unpaid duty and any penalty for late stamping is paid. The stamp duty should be paid by the person granting the charge and is payable to the Land Valuation Board of the Lands Commission. Calculation of duty is ad valorem. Duty of 0.5% and 0.25% is paid on principal and ancillary security respectively. The Stamp Duty Act provides guidelines on the calculation of stamp duty on property. The Lands Commission may vary the assessment if it considers that the property has been undervalued in the deed. In such an instance, the commission may visit the land, re-value it and/or reassess the stamp duty that should be paid.

#### Registration Costs

The registration cost of charges on the assets of a company is calculated in line with the regulations issued by the Corporate Affairs Commission. The current regulation 2012 which was issued pursuant to Sections 16, 585 and 609 of the Companies and Allied matters Act CAP C20, LFN 2004 (The Act) provides for the following rates:

- For public companies, N20,000.00 (Twenty Thousand Naira) per one million of the consideration;
- For private companies, N10,000.00 (Ten Thousand Naira) per one million Naira of the consideration.

The following penalties are applicable to late registration of charges on a company's assets:

- For a public company, N10,000.00 (Ten Thousand Naira);
- For a private company, N5,000.00



(Five Thousand Naira).

If a mortgage or charge is on a parcel of land, registration cost is regulated by various States in the Federation and currently for Lagos State it is N5,000.00(Five Thousand Naira) per one million of the consideration. It should be noted that before a mortgage or charge on land can be registered, payment of Governor's consent fee is required and for Lagos state it is currently 0.25% of the consideration.

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, he 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
- realise the security in the property charged on notice to the person in possession of the property.

The Borrowers and Lender's Act requires the creditor to first give the borrower written notice requesting the borrower to pay the amount due within 30 days. 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 creditor may sue the borrower on any covenant to perform under the credit agreement, or realise the security in the property charged on notice to any person in possession of the property. The security can be realised by making application to court to request a judicial sale of the property or taking possession of the assets over which one has security.

In the exercise of a right of possession to property that is subject to a charge to secure a borrower's obligations under a credit agreement, a lender is not obliged to initiate proceedings in court to enforce the right of possession and if it is unable to enforce the right in a peaceful manner, it may use the services of the police to evict the borrower or other person in possession of the secured property, pursuant to a warrant issued by a court.



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 encumbrance;
- 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. Under the Companies Act, unless a company's regulations otherwise provide, 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, just a board resolution would suffice. However, for the sake of prudence, shareholders' approval is sought even when it is not essential.

## RECOGNITION OF FOREIGN JUDGMENTS

Instances in Which Your Court Will Recognize 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 six 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

The law does not have specific requirements for the recognition of a foreign trustee, business rescue practitioner or insolvency practitioner.



# KENYA

KAPLAN & STRATTON, ADVOCATES

## GENERAL INFORMATION

### Firm Information

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### Type of Government

Democratic Republic

### Political System

Multiparty Democracy

### Legal System

Common Law Based

### Background

Insolvency law in Kenya is based on the Kenya Companies Act (Chapter 486, Laws of Kenya) (Act) which closely follows the English Companies Act, 1948. The Act provides for the winding up (liquidation) and dissolution of insolvent companies. 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)

A company may be wound up if it is unable to pay its debts.

A company is deemed to be unable to pay its debts if:

- a creditor who is owed more than KES 1,000 has not been paid within 3 weeks after making a demand in accordance with the provisions of the Act; or
- execution or other process levied by a judgement creditor is returned unsatisfied; or
- the court is otherwise satisfied that the company is unable to pay its debts.

### What are the Tests for Financial Distress (ie Business Rescue or Administration)

There are no applicable statutory tests for financial distress under Kenyan law.



## INSOLVENCY AND RESTRUCTURING PROCEDURES

### Formal Insolvency Procedures

- *Compulsory Winding Up* - The company, any creditor, or a contributory (this term refers to the present members and certain past members of the company) petitions the court to wind up the company on the grounds specified under the Act, usually that the company is unable to pay its debts.
- *Creditors' Voluntary Winding Up* - the shareholders of the company pass an ordinary resolution in which it provides that it cannot, by reason of its liabilities, continue its business and that it is advisable to wind the company up.

### Formal Restructuring Procedures

The Act contains provisions designed to facilitate schemes of arrangements involving both creditors (including separate classes of creditors) and contributories (shareholders). A scheme of arrangement may be proposed by the debtor or by any creditor. An application is made to court for the convening of a meeting to consider the scheme. If the scheme is approved by 75% of the creditors (or class of creditors in question), it becomes binding upon the remaining creditors.

### Informal Insolvency or Restructuring Procedures

Informal restructurings 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 (eg 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, such being followed by dissolution of the company.

### Process Required to Commence a Liquidation

#### *Compulsory Winding Up by the Court*

The company, any creditor, or a contributory may petition the court to wind up the company on the grounds specified under the Act. In the case of a winding up petition filed by a creditor, the petition must first be served on the debtor company. The petitioning creditor is then required to advertise the petition (in the Kenya Gazette – a weekly Government publication – and a newspaper in general circulation) within 7 days.

#### *Creditors Voluntary Winding Up*

The shareholders of a company may resolve by a special

resolution that the company be wound up voluntarily. Notice of the passing of the resolution to wind up the company must be advertised by the debtor company (in the Kenya Gazette and a newspaper in general circulation) within 14 days. The Act also allows for the voluntary winding up of a solvent company by its shareholders passing a special resolution in a general meeting (members' voluntary winding up). In this instance, the directors are required to make a statutory declaration stating that the company is solvent and will be able to pay its debts in full within 12 months.

#### At What Point Does the Liquidation Process Commence

In the case of a voluntary winding up, the process is deemed to have commenced at the time of passing of the resolution by the shareholders to wind up the company. Winding up a company by way of a petition to the court is deemed to commence at the time of the presentation of the petition for the winding up.

#### Duration of the Liquidation Process

It is difficult to estimate the duration to complete the liquidation process as this varies so widely. The liquidation process continues until all the assets have been realised and distributed.

#### Extent of Court Involvement in the Liquidation Process

##### *Compulsory Winding Up by the Court*

The courts will be involved at every stage of a compulsory winding up. These stages include:

- presenting the winding up petition;
- confirmation of compliance with advertisement procedures;
- making of the winding up order;
- appointment of the official receiver and supervision of its functions; and
- collection and distribution of the company's assets.

##### *Creditors Voluntary Winding Up*

Subject to any application being made to the court, the courts would usually not be involved in a creditors' voluntary winding up.

#### Management of the Company Whilst in Liquidation

As from the commencement of the winding up of a company, the board of directors is displaced from their office, and in their stead the affairs of the company are placed in the hands of a liquidator. The liquidator has the power, with the sanction of the court (on a compulsory winding up) or of a committee of inspection (on a creditors voluntary winding up), to carry on the business of the company so far as may be necessary for its beneficial winding up.

#### Filing of Claims

*Compulsory Winding Up 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.

*Creditors Voluntary Winding Up* - debts may be proved by delivering an affidavit verifying the debt.

#### Factors Which Influence the Period of the Administration in a Liquidation

The following factors are instrumental in any delays occasioned during the process:

- the court's diary in relation to a compulsory winding up by the court;
- challenges by the company, creditors or contributories in respect of the winding up; and
- the level of cooperation among the parties.

#### Effect of Liquidation on Employees

Employees would enjoy preferential payments as follows:

- employees' (other than directors') wages or salaries for four months prior to the relevant date (date on which winding up is commenced), all workman's or labourer's wages for services rendered and retirement benefit contributions, not exceeding KES 20,000 per individual claimant;
- amounts due by way of workmen's compensation; and
- amounts due in respect of contributions payable during the period of twelve months immediately preceding the relevant date under the National Social Security Fund Act.

#### Effect of Liquidation on Contracts

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 and entitle the counterparty to terminate the contract.

#### Effect of Liquidation on Shareholders

Subject to the payment of the creditors and the costs of winding up, the assets in a winding up are distributable amongst the shareholders (contributories) in accordance with their rights and interests.

#### Effect of Liquidation on Creditors

Subject to the circumstances under which securities may be set aside (described below), pre-existing security interests will entitle a creditor, during the liquidation, to:

- rely on such security and not prove a claim for such debt; or
- realise such security and prove a claim for the balance; or
- value such security and prove a claim for the deficiency after the deduction of the assessed value; or
- surrender such security and prove a

claim for the whole debt.

#### Pending Claims, Litigation and Arbitration

At any time after the presentation of a winding-up petition to court, and before a winding-up order has been granted, pending proceedings against the company may be stayed on application by the company, a creditor or contributory.

#### Voidable Transactions

Any transfer, conveyance, mortgage or charge, delivery of goods, payment, execution or any other act relating to property made or done by or against a company 6 months before the commencement of the winding up with a view to favouring a creditor against or over other creditors, may constitute a fraudulent preference and be liable to be set aside. Charges which are not properly registered under the Act will also be void against a liquidator. A floating charge created within 12 months of the commencement of the winding up may also be invalid.

#### How is the Liquidation Process Terminated

##### *Compulsory Winding up by the Court*

When the affairs of the company have been completely wound up, the court shall, on application by the liquidator, order that the company be dissolved from the date of the order and the company shall be dissolved accordingly. A copy of the order is thereafter delivered by the liquidator to the Registrar of Companies.

##### *Creditors Voluntary Winding Up*

As soon as the affairs of the company are fully wound up, the liquidator draws up an account of the winding up and calls a general meeting of the company and creditors. Within 14 days of the date of such meeting, the liquidator delivers to the Registrar of Companies a copy of the account and returns for registration. On expiry of 3 months from the date of the registration, the company is deemed to be dissolved.

#### Director or Officer Liability

In general terms, the directors (and other officers) may become personally liable if they permit a company to trade in insolvent circumstances. If in the course of the winding up of a company, it appears that any business of the company has been carried on with intent to defraud creditors or for any fraudulent purpose, any persons who were knowingly party to the carrying on of such business may be held personally responsible, by the court, for all or any of the debts or other liabilities of the company as the court may direct. Such persons may be liable to imprisonment for a term not exceeding 2 years or to a fine not exceeding KES 10,000, or to both. The court may also order that such persons cannot be concerned with, or take part in, the management of the company for a period not exceeding 5 years.



#### Consequences of Director or Officer Liability

In addition to the above, there are a number of specific offences where a company is being wound up or is subsequently wound up. It should be noted that they apply to any officer (which includes any manager or secretary). They include:

- if an officer has within 12 months before the commencement of the winding up, or at any time thereafter, by any false representation or other fraud, obtained any property for and on behalf of the company on credit, which the company does not subsequently pay for; or
- if an officer has within 12 months before the commencement of winding up or at any time thereafter, under the false pretence that the company is carrying on its business, obtains on credit, for or on behalf of the company, any property which the company does not subsequently pay for; or
- if an officer has within 12 months before the commencement of the winding up been privy to the carrying on of the business of the company knowing that the company was unable to pay its debts; or
- if an officer has been privy to the contracting by the company of any debt provable in the liquidation without having at the time when the debt was contracted any reasonable or probable ground to believe that the company would be able to pay that debt.

Offending officers are liable to imprisonment for a term not exceeding in the case of point 2 above, 5 years and in all the other cases, 3 years. It is, however, a good defence if an officer proves that he had no intent to defraud.

It is also an offence if any officer of a company which is subsequently wound up, has by false pretences or by means of any other fraud induced any person to give credit to the company. The offence is punishable by imprisonment for a term not exceeding 2 years.

#### 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. Other than schemes of arrangement under the Act there are no other laws, practices or procedures which facilitate the business rescue/rehabilitation, workout or restructuring of companies or modern corporate recovery alternatives.

#### SECURITY

##### Types of Security

The following securities are available in Kenya:

- debentures creating fixed and floating charges;
- legal charges over real property;
- chattels mortgages creating charges over personal property by individuals; and
- collateral security provided by shareholders.

#### Taking of Security

- Debentures - evidenced by the instrument of debenture creating fixed and floating charges.
- Charge over land - evidenced by a legal charge in accordance with the registration system under applicable law.
- Chattels mortgage - evidenced by the chattels mortgage instrument completed in accordance with applicable law.
- Collateral security provided by shareholders – evidenced by a shareholders memorandum of deposit/pledge.

#### Security Trustees or Special Purpose Vehicles

Kenyan law does not restrict the use of security trustees for example in the case of multiple lender scenarios.

#### Most Robust Form of Security Available to Lenders

Debentures and legal charges over real property are the most robust form of security that one can take.

#### Registration of Security

- *Debenture* – the debenture should be registered at the Companies Registry within 42 days of its creation. It is the duty of the company to effect the registration, however, this may be effected at the instance of the application of any interested person. In practice, the registration is made by the lender.
- *Charge over land* – all charges must be registered at the appropriate Lands Registry. In practice, this registration is done by the lender. Charges issued by companies also require separate registration at the Companies Registry (a similar process to the registration of debentures).
- *Chattels mortgage* – the chattels mortgage should be registered at the Companies Registry within 21 days of its execution. In practice, registration is made by the lender.

#### Stamp Duty

The security instruments are required to be stamped with stamp duty within 30 days of execution of the instrument. Stamp duty is payable to the collector of stamp duty/ Kenya Revenue Authority at the following rates:

- debentures and charges over land – 0.1% of the amount secured; and
- chattels mortgage – KES 200.

#### Registration Costs

*Lands Registry* – a simple application form is prepared and submitted with the documents to the appropriate Lands Registry. The filing fee is KES 1,000 per document usually payable by the lender.

#### Companies Registry:

- Debentures/charges – particulars of the security are submitted on a prescribed form. The filing fee is KES 1,100, usually payable by the lender to the Registrar of Companies; and
- Chattels mortgages – a filing fee of KES 150 is payable usually by the lender to Registrar of Companies.

#### Requirements for the Assignment or Transfer of Security

- *Debentures* - there is no statutory provision for the assignment of debentures. In practice, the parties execute a deed of transfer and thereafter notify the Registrar of Companies of the assignment.
- *Legal Charges* - the new Land Act allows for the transfer of a charge by an instrument in the prescribed form submitted to the relevant Lands Registry. Presently, no forms have been prescribed under the new land laws.
- *Chattels mortgages* - the Chattels Transfer Act allows for the transfer of a chattels mortgage instrument in a prescribed form. The transfer of the instrument may be registered at any time after execution in the same manner as the registration of the instrument.

#### Instances in which Securities might be Vulnerable to Attack

Any transfer, conveyance, mortgage or charge, delivery of goods, payment, execution or any other act relating to property made or done by or against a company 6 months before the commencement of the winding up with a view to favouring a creditor against other creditors may constitute a fraudulent preference and be liable to be set aside. A floating charge created within 12 months of the commencement of the winding up may also be invalid.

Certain unsecured creditors of a company would enjoy preference or priority by reason of law in the event of insolvency. These include (to the extent limited under applicable law):

- all government taxes, local rates and rents;
- employees' (other than directors') wages or salaries, all workmans' or labourers' wages for services rendered and retirement benefit contributions, not exceeding KES 20,000 per individual claimant;
- amounts due by way of workmen's compensation; and
- amounts due in respect of contributions payable under the National Social Security Fund Act.

#### Methods of Enforcement of Security

- *Debentures* - contractual appointment of a professional receiver and manager under debenture provisions. No court application is required.
- *Legal charges over real property* - statutory power of sale.
- *Chattels mortgages* - power of sale.

#### Problems Experienced when Enforcing Security

The creation and enforcement of



creditors' rights is severely hampered by the following principal factors:

- the costs of taking security (stamp duty and legal fees);
- the existence of several disparate land registration systems;
- the chaotic state of Government Registries;
- the expense of court proceedings, the backlog of cases in the courts and erratic court decisions;
- the difficulty of enforcing security over land in rural areas; and
- the lack of a consolidated insolvency law and modern corporate recovery alternatives.

Changes introduced by the new land laws also impose significant restrictions on the exercise of remedies by the security holder including the power of sale in the event of default. It is expected that any enforcement of the security will be both time-consuming and potentially subject to interference by the courts. The forms of notice which will be required for the purposes of any enforcement have also not yet been prescribed.

#### Financial Assistance Requirements

Subject to specific exceptions, the Act prohibits the provision of financial assistance (including by means of a loan, guarantees, and the provision of security) by a company for the purchase of, or subscription for its own, or its holding company's, shares.

## RECOGNITION OF FOREIGN JUDGMENTS

### Instances in Which Your Court Will Recognise a Foreign Judgment

The Foreign Judgments (Reciprocal Enforcement) Act (Chapter 43 Laws of Kenya) provides for the enforcement of judgments given in countries which accord reciprocal treatment to judgments given in Kenya. This includes judgments given by the superior courts of Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the U.K. and the Republic of Rwanda.

### Requirements for Recognition of a Foreign Judgment

Under the Act, a judgment for a definite sum of money or for the delivery of movable property given by a court in a reciprocating country (Applicable Decision) would be recognised and enforced by the High Court of Kenya without re-trial or examination of the merits of the case provided that:

- the Applicable Decision has been registered with the High Court of Kenya within six years of the date of the applicable decision or, where there have been proceedings by way of appeal against the applicable decision, within six years of the date of the last judgment or award in the proceedings;
- the High Court of Kenya is satisfied that papers relating to such proceedings have been served on the

person against whom the judgment was given (Judgment Debtor);

- the High Court of Kenya is satisfied that the Judgment Debtor received notice of such proceedings in sufficient time to enable him or her to defend the proceedings;
- the Applicable Decision is not contrary to the public policy of Kenya;
- the Applicable Decision does not relate to the recovery of any penalty or penalty interest (albeit that amounts may be recoverable to the extent that they do not relate to any penalty or penalty interest); and
- the Applicable Decision was not obtained by fraud.

In order to enforce an Applicable Decision, the relevant party will need to apply to the High Court in Kenya to have that judgment registered.

Requirements for the Recognition of a Foreign Trustee, Business Rescue Practitioner or Insolvency Practitioner  
Not applicable under Kenyan law.



# LESOTHO

WEBBER NEWDIGATE FIRM OF ATTORNEYS

## GENERAL INFORMATION

### Firm Information

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### Type of Government

Democracy

### Political System

Based on the English system

### Legal System

Roman Dutch Law

## TESTS FOR INSOLVENCY

### What are the Tests for Insolvency (ie Liquidation)

In terms of section 125 of the Companies Act of Lesotho 18/2011 (Act), if a company is unable to pay its debts or if 75% of the issued share capital has been lost, the company may be placed in liquidation.

### What are the Tests for Financial Distress (ie Business Rescue or Administration)

Lesotho does not have financial distress procedures in place but has a judicial management system. In terms of section 156 of the Act, if it appears to the court that by reason of mismanagement it is desirable to issue such an order the court will place the company under judicial management.

## INSOLVENCY AND RESTRUCTURING PROCEDURES

### Formal Insolvency Procedures

Lesotho has one formal insolvency procedure for a company, namely liquidation which is initiated by way of an application to the High Court.

### Formal Restructuring Procedures

There are no formal restructuring procedures per se in Lesotho. The closest restructuring procedure that is available is that of judicial management which is initiated by way of an application to the High Court. This procedure is used as a result of the mismanagement of the company, and if there are prospects to trade the company out of its difficulties.

Informal Insolvency and Restructuring Procedures  
Although not commonly used in practice, it is possible to follow an informal distribution plan if all creditors are willing to co-operate.

## 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

A liquidation in Lesotho is initiated by way of an application to the High Court brought by either the Registrar of Companies, the company itself (acting through its board of directors), a shareholder, any director of the company or a creditor of the company. The company through its board of directors should pass a resolution of the ordinary majority for an application to be brought. This procedure is set out in section 125 of the Act.

### At What Point does the Liquidation Process Commence

In terms of section 125(4) of the Act, the liquidation process commences on the date on which the court makes an order to place the company in liquidation.

### 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.

### Extent of Court Involvement in the Liquidation Process

After the order is granted by the court to place the company into liquidation, the court plays no further role in the liquidation process. From this point onwards, the Master of the High Court becomes involved in the process.

### Management of the Company whilst in Liquidation

According to section 128(1)(a) of the Act the liquidator maintains custody and control over the company's assets. However, and in terms of 128(1)(b) of the Act, the directors of the company remain in office but cease to maintain the powers, functions or duties that they would ordinarily have to manage the company other than those powers, functions or duties required, or permitted to be exercised, in terms of the liquidation provisions of the Act. The directors must, however, deliver the books, records and documents of the company to the liquidator within a reasonable time and if it is not delivered the liquidator can bring an application to court to compel compliance.

### Filing of Claims

Formal claim forms are to be presented to the Master of the High Court 48 hours



before the first meeting of creditors, at which meeting the claims are adjudicated.

#### Factors which Influence the Period of the Administration in a Liquidation:

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

As at the date of the commencement of liquidation, contracts of employment are immediately terminated. Employees are given preferential treatment for their claims to the extent of M100.00 only. For the remaining amount due they have a concurrent claim.

#### Effect of liquidation on Contracts

The liquidator may decide to either terminate or maintain certain contracts. It is within the liquidator's discretion.

#### 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. A creditor may make a proposal regarding the proper distribution of the proceeds.

#### 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 on the proper distribution of the proceeds

#### Pending Claim, Litigation and Arbitration

The liquidator may elect to proceed, settle or withdraw any pending liquidation or arbitration proceedings that were initiated at the instance of the company. The same applies to pending proceedings brought against the company.

#### Voidable transaction

Section 140 and 141 of the Act set out the instances in which transactions concluded prior to the commencement of liquidation may be set aside. This arises when the transaction was entered into a year prior to liquidation, when the company received no consideration or benefit for such transaction, when the company was unable to pay its debts, when the transaction was entered into when an obligation was incurred knowing that the company was unable to perform the obligation or if the company became unable to pay its debts as a result of the transaction.



#### How is the Liquidation Process Terminated

Section 152 of the Act states that liquidation proceedings will have been completed when the liquidator files a

final account with the Registrar of Companies. Further, the court can also decide to terminate liquidation proceedings following an application made to court by a prospective buyer of the company in which a dividend is paid to creditors (if it is accepted by creditors).

#### Director or Officer Liability

Directors and officers will be held personally liable for fraudulent transactions up to the value of the transaction or up to the damages suffered by the company as a result of the fraudulent transaction. A director or officer will be civilly liable through a civil action to the court.

#### Consequences of Director or Officer Liability

##### Civil Consequences

If a director received any advantage from a transaction that he or she concluded on behalf of the company at a time when he or she was a director of the company, an application can be brought to court by shareholders, the liquidator or any other person who suffered loss, to cancel any such transaction. Although the act does not make provision for the consequences relating to the cancellation of the transactions, a civil action would have to be instituted against the director. Where the director did not fulfill his fiduciary duty, he may also be held personally liable. In terms of section 63(3) of the Act, the directors, including former directors, may be individually liable to the company, its shareholders and any other person, for any loss suffered by the company.

##### Criminal Consequences

Part XX of the Act makes provision for offences and penalties. Where a director makes false or misleading statements or fraudulently conceals or destroys any property of the company, he commits an offence and may be subject to a fine of M500 000.00 or to imprisonment for 20 years, or both. Where a director intends to defraud or deceive another person he or she commits an offence and is liable on conviction to a fine of M20 000.00 or to imprisonment for a term of 3 years, or both.

## JUDICIAL MANAGEMENT

#### Process Required to Commence Judicial Management

An application may be made to court by a shareholder, director or creditor to place a company under judicial management.

#### At What Point does the Judicial Management Process Commence

The judicial management process commences when an order to that effect is granted by the court.

#### Duration of the Judicial Management Process

The duration of the judicial management process is largely dependent on the circumstances of each company. The Act

does not make provision for a specific time frame for the judicial management process to be completed. However, the Master of the High Court in consultation with the creditors requires the process to be completed within a reasonable time, failing which the creditors may bring an application to court for the liquidation of the company.

#### Extent of Court Involvement in the Judicial Management Process

The court is not that involved in the judicial management process. The court places the company under business administration and appoints the judicial manager and thereafter the Master of the High Court is responsible for overseeing the administration process.

#### Management of the Company while under Judicial Management

According to section 128(1)(a) of the Act, the judicial manager has custody and control over the company's assets. Furthermore, in terms of section 128(1)(b), the directors remain in office but cease to have the powers, functions or duties that they would ordinarily have, other than those required or permitted to be exercised in terms of the provisions of the Act. The directors must, however, co-operate with the judicial manager and deliver the books, records and documents of the company to the judicial manager. The time period for the delivery of such books and records is the same as with a liquidation.

#### Filing of Claims

There is no formal process determined by the law for the filing of claims in a judicial management process. The process is informal - claims can (but do not need to) be submitted to the judicial manager, in any form, provided they are supported with documents which indicate that a claim exists. If claims are submitted, the judicial manager will either accept or reject the claim. If a claim is not submitted, the judicial manager will determine what the claims are against the company.

#### Factors Which Influence the Period of Judicial Management

The Act does not make provision for the time period in which the judicial management process should be complete and for this reason there are no factors which influence the time period of the judicial management procedure.

#### Funding of the Company whilst under Judicial Management

For the duration of the judicial management process, the company is funded by the income that it generates. In terms of Lesotho's laws, a judicial manager is not permitted to borrow money for the purpose of funding the company whilst it is under judicial management, unless he or she obtains the approval of the court.

#### Effect of Administration on Employees

Employment contracts remain in place and continue to run. The employees do not have a preference for their claims during this period because their employment contracts are not automatically terminated.

#### Effect of Administration on Contracts

All contracts that were concluded by the company prior to the commencement of judicial management continue and remain of full force and effect. The judicial manager steps into the shoes of the directors and he or she does not have greater powers than what the board of directors had before the company was placed into judicial management.

#### Effect of Administration on Shareholders

The commencement of the judicial management process has no effect on the shareholding of the company. The shareholders retain their shares in the company and they are free to sell them as they would be entitled to in the ordinary course of the company's business.

#### Effect of Administration on Creditors

Creditors can submit historic claims to the judicial manager. These would then be paid, either in part or in full, as agreed to between the creditor and the judicial manager. Creditors cannot enforce their claims against the company by way of any legal proceedings.

#### Pending Claims, Litigation and Arbitration

All judicial actions already instituted against the company are stayed.

#### Effects of the Moratorium

During a company's judicial management, no creditor or person can act legally against the company without the permission of the court. The permission of the court must be obtained by way of an application to court.

#### Voidable Transactions

Application can be brought to court by the judicial manager to cancel a transaction concluded within one year prior to the commencement of judicial management.

#### Administration Plan

A judicial management plan must be submitted to the Master of the High Court and the judicial manager must advise the court within 6 months of the date on which the judicial management plan is submitted to the Master of the High Court, whether or not he or she believes that the company can be revived.

#### Voting on Plan

During judicial management, the judicial manager formulates a plan so that the company can continue to trade and the plan is not voted on by any of the stakeholders of the company. It is merely submitted to the Master of the High





Court, and if approved by the Master of the High Court, it is implemented by the judicial manager.

#### Cram Down on Creditors

On the basis that no vote is cast in respect of the judicial manager's plan, there is no cram down on creditors per se. However, the terms of the plan are binding on the creditors of the company whether they agree with the terms or not.

#### Implementation of the Plan

A payment schedule is submitted to the Master of the High Court for approval where after the judicial manager gives effect to the plan.

#### Discharge of Claims

The claims of creditors are paid out in accordance with the schedule submitted to the Master of the High Court. Whether or not the claims of creditors are paid in full, pursuant to the plan, the creditors are not entitled to enforce any remainder of their claim that is due to them, against the company.

#### Effect on Suretyships

Suretyship agreements remain intact and are not affected by the plan. The judicial management provisions of the Act contain no provision preserving a creditor's right against the surety and therefore the common law would have to be applied.

#### How is the Process Terminated

The judicial management process is terminated after application is made to court and with the court granting an order for the termination of the proceedings, or if the company is subsequently placed in liquidation.

#### What is the Status of the Company after Judicial Management

If the judicial manager pays out the claims of creditors in accordance with the schedule of payment and the court hands down an order terminating the judicial management process, the company will continue to trade.

#### Director or Officer Liability

Directors and officers will be held liable for fraudulent transactions. The same provisions (as set out above) that are applicable to director and officer liability pursuant to liquidations are applicable during judicial management.

#### Consequences of Director or Officer Liability

##### Civil Consequences

If a director received any advantage from a transaction that he or she concluded on behalf of the company at a time when he or she was a director of the company, an application can be brought to court by shareholders, the judicial manager or any other person who suffered loss by the company to

cancel any such transaction. The same provisions (as set out above) that are applicable to director and officer liability pursuant to liquidations are applicable during judicial management.

#### Criminal Consequences

A director may be charged with fraud or offences provided for in the Act. The same provisions (as set out above) that are applicable to director and officer liability pursuant to liquidations are applicable during judicial management.

### SECURITY

#### Types of Security

In Lesotho, mortgage bonds, pledges, general notarial bonds and cessions as well as guarantees and suretyships are available to lenders as security for their loans.

#### Taking of Security

##### ■ Mortgage Bonds

Security over immovable property can only be obtained by way of a special mortgage bond registered over immovable property. The procedure for registration is set out in the Deeds Registry Act and it must be registered in the Deeds Registry. A mortgage bond does not transfer title of the mortgaged property to the mortgagee. The mortgagee only has a limited right over the immovable property. When the mortgagor defaults on payments of the mortgage bond, the mortgagee may sell the property in execution and the proceeds that were recovered may be applied to reduce the outstanding debt.

##### ■ Pledge

A pledge is a mortgage over movable property given by a borrower in favour of a lender. For a pledge to be valid and effective the pledged movables must be delivered to, the lender. No registration is required.

##### ■ General Notarial Bond

A general notarial bond is a mortgage by a borrower over all its tangible movable property in favour of a lender. A general notarial bond does not make the lender a secured creditor. The general notarial bond confers a limited statutory preference above the claims of concurrent creditors. In order to be effected the notarial bond must be registered in terms of the Deeds Register Act.

##### ■ Cession by way of Security

Security over intangible movable property is created by way of a cession over such assets in favour of a creditor. A cession can either take up the form of:

- 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. No registration is required.

#### ■ Guarantee or Suretyships

This is not real security and one only creates a personal right.

#### Security Trustees or Special Purpose Vehicles

It is uncertain whether security can validly be created in favour of a trustee acting as a trustee for a group of lenders. This is not commonly used in Lesotho.

#### Most Robust Form of Security Available to Lenders

The most robust form of security available to lenders is a special or general notarial bond over movable property. An out and out security cession is the most robust form of security when intangibles are applicable. It removes ownership of the secured asset from the debtor and can be disposed of outside the liquidation process.

#### Stamp Duty

Stamp duties are applicable in Lesotho and the tariffs are regulated by the Stamp Duty Act as amended from time to time.

#### Registration Costs

The costs for the registration of mortgage bonds are regulated by tariffs as prescribed under the Deeds Registry Act and the Regulations thereto.

#### Requirements for the Assignment or Transfer of Security

The transfer of a mortgage bond or a notarial bond is done by way of cession and registered by the Registrar of Deeds in terms of the Deeds Registry Act. The party responsible for paying the registration fee is the mortgagor. There are no registration costs applicable when it comes to pledges or cessions.

#### Instances in which Securities might be Vulnerable to Attack

Voidable transactions can be set aside by the liquidator or judicial manager when a company is placed into 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 proceed with a sale of the assets, and apply the proceeds of the sale to discharge the principal obligation. The pledgee must realise his/her security through a court order authorising the sale and execution of the secured asset. In some cases, the secured creditor can agree with the borrower that the secured assets are sold without the need for judicial execution (known as *parate executie*). An agreement of *parate executie* over movables that were pledged and delivered is valid, but there should

be no prejudice to the secured provider. An agreement of *parate executie* over immovable property is invalid. However, it is not advisable to execute in this manner, one should rather approach the court for the execution of movable property.

#### Problems Experienced when Enforcing Security

The following problems are experienced when enforcing security in Lesotho:

- competing secured claims which require their priority or ranking to be determined by a court;
- delays in obtaining court orders for attachment due to backlogs at the High Court and the unavailability of judges;
- delays in court messengers or deputy sheriffs attaching and executing on sales because of the lack of an official relative to the work load and as a result of poor administrative systems; and/or
- property having been disposed of prior to attachment (especially with movables).

#### Financial Assistance Requirements

A company may provide financial assistance either directly or indirectly to a person for the purpose of the acquisition of its own shares.

#### RECOGNITION OF FOREIGN JUDGEMENT

##### Instances in which your Court will Recognize a Foreign Judgment

If the foreign judgment is applicable to a person or company domiciled in Lesotho, the courts of Lesotho may recognize such a judgment.

##### Requirements for Recognition of a Foreign Judgment

In order 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.

Requirements for the Recognition of a Foreign Trustee, Business Rescue Practitioner or Insolvency Practitioner  
The process to recognize a foreign trustee, business rescue practitioner or insolvency practitioner is the same as that for the recognition of a foreign judgment.

# MALAWI

SACRANIE, GOW & CO.

## GENERAL INFORMATION

### Firm Information

Website address: [www.sacgow.com](http://www.sacgow.com)

Telephone: +265 1 840 311/593/678

Fax: +265 1 840 750

### Political System

Multiparty Democracy since 1994.

### Legal System

Based on English Common Law.

### Inflation Rate

24.6% (2014).

## TESTS FOR INSOLVENCY

### What are the Tests for Insolvency (ie Liquidation)

Insolvency is regulated by the Companies Act. A company is deemed to be unable to pay its debts in the following cases:

- a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding one hundred Kwacha then due has served on the company a written demand under the creditor's hand requiring the company to pay the sum so due, and the company has for twenty-one days thereafter neglected to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor;
- 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
- it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.

### What are the Tests for Financial Distress (ie Business Rescue or Administration)

A company will be in financial distress if it is unable to pay its debts within the meaning of the Companies Act of the laws of Malawi or is deemed unable to pay its debts as they fall due or admits in writing its inability to pay its debts as they fall due or any insolvency or bankruptcy proceedings



being taken in respect of the Company.

## LIQUIDATION

### What is the Aim of Liquidation

The aim of liquidation is to identify and realise a company's property and assets in order to pay off its debts. Any surplus will be distributed among the company's members in accordance with their entitlement under the memorandum or articles of association.

A company may also have to be liquidated as part of a scheme for corporate transformation or because either the company is unable to pay its debts or it is just and equitable that it be wound up or it has less than the required minimum number of members.

### Process Required to Commence a Liquidation

A company can be wound up either voluntary or by a court order. The latter is also referred to as compulsory liquidation. According to Section 212(1) of the Companies Act, a company can be wound up upon a court order follows its own application or on petition by any of its creditors. The order may be made even where the company is already in voluntary liquidation if the court is satisfied that this type of winding up will not be in the interest of the company's creditors or members.

### Winding Up by Court order

The court may order the winding-up of a company in the following cases:

- the company has by special resolution resolved that it be wound up by the court;
- the company does not commence its business (if any) within a year from its incorporation or suspends its business for a whole year;
- the number of members is reduced below two;
- the company is unable to pay its debts;
- the period, if any, fixed for the duration of the company by the memorandum or articles expires or the event, if any, occurs on the occurrence of which the memorandum or articles provide that the company is to be dissolved; or
- the court is of opinion that it is just and equitable that the company be wound up.

The court may order the winding-up of a company on the petition by the Attorney General if the court is of the opinion that the business or objects of the company or any of them are unlawful or that the company is being operated for any illegal purposes or has persistently failed to comply with any of the provisions of the Companies Act.

After an order has been made, a copy of the order is to be registered within seven days after the making of such winding up order. The petitioner must deliver a copy of the order to the Registrar for registration and a copy is served upon the secretary of the company or upon any person

that the court directs.

Within fourteen days after the receipt of a copy of a winding-up order the registrar causes notice of the order to be published in the Gazette.

#### Voluntary Liquidation

Upon the passing of a resolution for the voluntary winding-up of a company, the company is required within seven days to deliver a copy of the resolution to the registrar for registration and within fourteen days thereafter cause notice thereof to be published in the Gazette.

#### At what Point does the Liquidation Process Commence

Where before the presentation of a petition for winding up, a resolution has been passed by the company for voluntary winding-up, the winding-up of the company is deemed to have commenced at the time of the passing of the resolution, and, unless the court deems it fit otherwise to direct, all proceedings taken in the voluntary winding-up are deemed to have been validly taken. Whilst in compulsory liquidation the winding-up is deemed to have commenced at the time of the presentation of the petition for the winding-up.

#### Duration of Liquidation Process

In any liquidation, whether compulsory, voluntary or under supervision, if not concluded within one year, the liquidator must send to the Registrar of Companies a statement of account dated from the last statement, in duplicate, twice each year the first at the expiration of 30 days from the end of the first year, during which the liquidation proceedings have been pending, and the succeeding statements at intervals of half a year, until the winding up is concluded. The High Court, on application by the liquidator, may extend the time in any particular case for special reasons.

#### Extent of Court Involvement in the Liquidation Process

The court is involved throughout the liquidation until the company has been deregistered. On hearing a winding-up petition, the court may dismiss it. The court also provides directions on notices, or any steps to be taken and how evidence is to be taken. The court also has the power to direct a speedy hearing or trial of the petition or to determine any issue or matter, or allow the petition to be amended or withdrawn.

The court also has the power to appoint a provisional liquidator to exercise all the functions and powers of a liquidator subject to limitations and restrictions as may be prescribed until he or another person becomes the liquidator. The court may additionally give directions as to the appointment of a liquidator by the members or creditors of a company. The court also has the power to stay or restrain proceedings against the company if such an application has been made after the presentation of the winding-up and before a winding up order has been made.

In exercising its powers the court promotes the overriding objectives in the winding up to ensure there are increased returns to creditors in the order of priority according to law. It also ensures that every winding up is conducted in a cost effective manner and that costs and expenses of the liquidation are proportionate to the value of assets realised or to be realised, for distribution to the creditors. The court also ensures that a winding up is conducted expeditiously and in order to ensure that a possible depreciation of assets is avoided before realisation and also that every step taken in the winding up is in the interest of creditors.

#### Management of the Company whilst in Liquidation

Once the liquidator or provisional liquidator is appointed, the directors' control of the company ceases. The liquidator with the authority either of the court or of the committee of inspection is mandated to carry on the business of the company so far as is necessary for the beneficial winding-up thereof. The liquidator takes into his custody or under his control all the company's property to which the company is or appears to be entitled. The liquidator can make an application to court that all or any part of the property of whatsoever description belonging to the company or held by trustees on its behalf, vest in the liquidator. The liquidator has the responsibility within 14 days of obtaining the order as stated above, to apply for the registration of property vested in him.

#### Filing of Claims

Once the company is placed in liquidation, creditors can file proof of their claims with the liquidator.

#### Effect of Liquidation on Employees

The contracts of employment of its employees will automatically come to an end. Section 34(1) of the Employment Act, provides that employment contracts terminate one month from the date of insolvency or winding up of the employer's business. This has an effect of limiting the notice period to one month.

#### Effect of Liquidation on Contracts

The Companies Act provides that the court may, on the application of a person who is, as against the liquidator, entitled to the benefit, or subject to the burden of, a contract made with the company, make an order rescinding the contract on such terms as to payment or damages for non-performance of the contract.

#### Effect of Liquidation on Shareholders

The shareholders are required to contribute the outstanding amount if any, which remains unpaid on the shares in respect of which one is liable as a member. Shareholders will be entitled to any surplus funds remaining at the conclusion of the liquidation process.

### Effect of Liquidation on Creditors

In a compulsory liquidation, the court fixes a date on or before which creditors are to prove their debts or claims or after which they will be excluded from the benefit of any distributions made before those debts are proved. On the other hand, in a voluntary liquidation, once the liquidator has been appointed, he will notify the general public by a notice published in any newspaper of general circulation in the country and request those who are owed money by the company (creditors) to submit their claims to him.

The second schedule to the Bankruptcy Act provides the manner in which the debts must be proved. It stipulates that every creditor must prove its debts as soon as possible after the commencement of the winding up by sending to the liquidator an affidavit verifying each debt. If a creditor fails to prove its debt until after a final distribution of the company's assets, the debt is not payable by either the company or its contributories.

Secured creditors are entitled to payment out of their securities in priority to all the other creditors.

### Pending Claims, Litigation and Arbitration

Claims will all proceed as normal except that all process will be conducted through the liquidator and by leave of the court. In the event that an outcome is not satisfied, such claims will rank on the list of unpaid creditors accordingly.

### How is the Liquidation Process Terminated

When the liquidator has realised all the property of the company, or so much as can be realised, and has distributed a final dividend, if any, to the creditors, and adjusted the rights of the members among themselves and made a final return if any to the members, he may apply to the court for an order that he be released and that the company be dissolved.

When the court grants the order, a copy of the order is to be delivered by the liquidator to the Registrar of Companies for registration within twenty-one days after the making of the order.

The Registrar of Companies after being presented with the order that the company be dissolved, will strike the name of the company off the register and notify same in the Gazette. The company is dissolved as at the date of publication of the notification in the Gazette.

### Consequences of Director or Officer Liability

Every person who, being a past or present officer or a past or present member of a company which is being wound up and does not, to the best of his knowledge and belief, fully and truly declare to the liquidator all the property (real and personal) of the company, and how and to whom and for

what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary course of the business of the company; does not deliver up to the liquidator, or as he directs, all the property of the company in his custody or under his control and all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver up, will be liable to imprisonment for two years.

If within twelve months before the commencement of the winding-up or at any time thereafter any officer:

- has concealed any part of the property of the company to the value of twenty Kwacha or upwards, or has concealed any debt due to or from the company;
- has fraudulently removed any part of the property of the company;
- has concealed, destroyed, mutilated or falsified, or has been privy to the concealment, destruction, mutilation or falsification of, any book or paper affecting or relating to the property or affairs of the company;
- has made or has been privy to the making of any false entry in any book or paper affecting or relating to the property or affairs of the company;
- has fraudulently parted with, altered or made any omission in, or has been privy to the fraudulent parting with, altering or making any omission in, any document affecting or relating to the property or affairs of the company;
- by any false representation or other fraud, has obtained any property for or on behalf of the company on credit which the company has not subsequently paid for;
- has obtained on credit, for or on behalf of the company, under the false pretence that the company is carrying on business, any property which the company has not subsequently paid for; or
- has pawned, pledged or disposed of any property of the company which has been obtained on credit and has not been paid for, unless such pawning, pledging or disposing was in the ordinary course of the business of the company;
- makes any material omission in any statement relating to the affairs of the company;
- knowing or believing that a false debt has been proved by any person fails for a period of one month to inform the liquidator thereof;
- has attempted to account for any part of the property of the company by fictitious losses or expenses;
- has been guilty of any false representation or other fraud for the purpose of obtaining the consent of the creditors of the company or any of them to an agreement with reference to the affairs of the company or to the winding-up
- shall be liable to imprisonment for two years and to a fine.

There is further liability for contracting debt. If in the course of the winding-up of a company or in any



proceedings against a company, it appears that an officer of the company who was knowingly a party to the contracting of a debt had, at the time the debt was contracted, no reasonable or probable ground of expectation, after taking into consideration the other liabilities, if any, of the company at the time, of the company being able to pay the debt, the officer shall be liable to imprisonment for three months and to a fine.

Prosecution of delinquent officers and members is also dealt with. If it appears to the court that in the course of a winding-up by the court, that any past or present officer, or any member, of the company has been guilty of an offence in relation to the company for which he is criminally liable, the court may, either on the application of any person interested in the winding-up or of its own motion, direct the liquidator to refer the matter to the Attorney General.

## BUSINESS RESCUE / RECEIVERSHIP

**Process Required to Commence a Business Receivership**  
The Companies Act makes reference to receivership. However, there is no scheme for corporate rescue along the lines of English administration.

**At what point does the Receivership Commence**  
Receivership commences when a holder of a charge over the company's property appoints a receiver in terms of security held or with court authority where he can prove that such security is in jeopardy. One of the remedies of a debenture holder is the appointment of a receiver whose function it is to realise property given as security for the debenture holder on whose behalf he is appointed. Usually the debenture will contain a provision which empowers the holder to appoint a receiver on the occurrence of certain events. Where the debenture does not contain any power to make the appointment, the holder can apply to the court to appoint a receiver.

### Duration of Receivership

There is no provision as to how long the process will have to be undertaken. This will depend on the ability of the receiver appointed to rescue the company accordingly, or alternatively if after assessing the affairs of the company he is of the opinion that there is no reasonable prospect for the company to be rescued, he will inform the court, the company, and all persons affected accordingly, and liquidation proceedings can commence.

### Extent of Court Involvement

Where the debenture holder makes an application to court for the appointment of a receiver, the court has power to exercise its power under the Companies Act, and will appoint a receiver, even though the charge has not, in terms of the debenture, become enforceable.

The court is involved in satisfying itself that events have occurred or are about to occur which render it

unreasonable in the interest of the debenture holder that the company should retain power to dispose of its assets. Where the charge is created over specific and ascertainable property, the court can only appoint an ordinary receiver.

Apart from appointing a receiver, the court has the power to give directions in relation to any matter arising in connection with the performance of the functions of a receiver (only when such receiver is appointed out of court).

### Management of the Company whilst in Receivership

The effect of the appointment of a receiver, is that directors' powers of management are suspended during the period of receivership. Should the receiver manage to pay off the debenture holder's debt, he will vacate his office and the company's directors will resume control. The position of a receiver appointed out of court under a provision in the debenture will depend on the wording of that provision. A receiver of any property appointed out of court under a power in any instrument is in a direct relationship with that property as agent and officer of the company, and not by those by whom or on whose behalf he is appointed. In other words, he will be an agent of the company. However, he can also apply to court for directions in relation to any matter arising in connection with the performance of his functions. On the other hand, a receiver and manager appointed by the court is the agent neither of the debenture holder nor of the company, which cannot control him. He is an officer of the court and is obligated to discharge his duties as prescribed by the order appointing him. The company remains in existence but loses its title to control its assets and affairs.

### Filing of Claims, Timing and Adjudication

The filing of claims is not done with a receivership.

### Factors which Influence the Period of Receivership

There are no specific factors which influence the duration of receiverships. Each matter is case specific.

### Funding of the Company whilst in Receivership

No funding is granted to a company in Receivership.

### Effects of Receivership on Employees

Contracts of employment will come to an end within 30 days after the receiver's appointment, unless he immediately re-employs them.

### Effects of Receivership on Contracts

All other types of contracts which do not involve personal performance of the company will continue being in force, unless the receiver takes steps to terminate the pre-existing contractual relationship between the company and third parties.



## Pending claims, Litigation and Arbitration

The fact that a company is in receivership does not destroy its corporate personality. As a result, it can bring a legal action in its own name to enforce its rights but with authority of the receiver.

## Effects of the Moratorium

No moratorium arises from the commencement of a receivership.

## Voidable Transactions

There are no specific transactions said to be voidable from the moment a company is placed under receivership.

## The Business Rescue Plan(Administration Plan)

This is not applicable to receiverships.

## Voting on the Plan

This is not applicable to receiverships.

## Cram down on Creditors

This is not applicable to receiverships.

## Implementation of the Plan

This is not applicable to receiverships.

## Discharge of Claims

This is not applicable to receiverships.

## Effect on Suretyships

A receivership has no bearing on personal security.

## How is the Process Terminated

Should the receiver manage to pay off the debenture holder's debt, he will vacate his office and the company's directors will resume their control and the company will continue. However, if the company is insolvent, it will have to be wound up and a liquidator appointed to realise all the property of the company, pay off all its debts and distribute any surplus remaining thereafter to the company's shareholders. Within one month or such longer period as the registrar may allow, after one ceases to act as a receiver, he is required to deliver to the registrar for registration an abstract showing his receipts and payments during the period from the end of the twelve months to which the last abstract, if any, related, and the aggregate of his appointment.

## What is the Status of the Company after the Receivership

Should the receiver manage to pay off the debenture holder's debt, he will vacate his office and the company's directors will resume their control and the company will continue as before. Should the company be insolvent, the liquidation process will commence and the company will be dissolved accordingly.



## SECURITY

### Types of Security

The following security is available in Malawi:

- debenture
- assignment
- bill of sale
- mortgage
- charge
- bonds
- pledges

### Taking of Security

This involves the creation and enforcement of proprietary rights to secure the payment of a monetary liability. Before taking security the lending institution conducts a search upon payment of a search fee to ensure the property is not encumbered. If it is a company offering security, its board minutes and resolution for the approval of the company's entry into a loan arrangement should be furnished. If it is an individual, such person's consent to create a charge over the leasehold land will be sought from the lessor/landlord, otherwise no consent is required.

In Malawi there are three landlords namely Malawi Housing Cooperation, The City or District Assembly and the Ministry of Lands. Depending on the type of land subject to the transaction, the appropriate lessor's consent will have to be sought. Authorisation will be granted to proceed with the taking of security upon payment of a fee.

### Security Trustees or Special Purpose Vehicles

The special purpose vehicle framework as a legal entity created to fulfil narrow, specific or temporary objectives does not exist in our jurisdiction.

### Most Robust Form of Security Available to Lenders

The most common form of security available to lenders are debentures, charges, mortgages, bills of sale, assignment of proceeds and in the case of commodity trading, pledges.

### Registration of Security

The Companies Act requires certain charges over company property to be registered under the Act. This includes every non-possessory charge securing the issue of a series of debentures, every floating charge created on the undertaking or property of the company and any other charge on land, uncalled capital, calls made but not paid, a ship, an aircraft, shares of any other company, book debts, goodwill, a patent, a trade mark and a copyright.

Within 21 days after the creation of a registrable charge the company creating it must send to the registrar for registration, particulars of the charge together with any certified copies of the instrument by which the charge is created or evidenced.

After an application for registration is made and the registrar is satisfied that it complies with the Act, the registrar issues a certificate of registration showing the date of registration and if applicable, the amount secured. The certificate is conclusive evidence that the requirements of the Act for the registration have been complied with.

For a bill of sale to be valid it must be attested to and registered within 14 days from the date of execution and must also set forth the consideration for which it is given. Failure to comply with these requirements renders the bill of sale void. The bill of sale must also contain a schedule containing an inventory of the personal chattels comprised in the bill of sale. The registration of a bill of sale is renewable once every 5 years.

The Bills of Sale Act requires registration of security created under it not only for record purposes, but also for the validity of the charge.

The duty to apply for the registration is on the company which creates the charge/security.

#### Stamp Duty

Stamp duty is regulated by the Stamp Duties Act, which provides guidance in its schedule on the rate chargeable in respect of instruments presented for stamping. The Minister, by order published in the Gazette, amends the schedule, imposing new stamp duties or granting exemptions.

The duty is payable to the Malawi Government and the cheques to be presented are issued in favour of the Government accordingly. Every instrument, unless it is written on duly stamped material, is required to be duly stamped with proper duty before the expiration of 30 days after it is first executed, or it has been first received in Malawi where it is first executed at any place outside Malawi.

The duty is payable upon presentation of the instrument for stamping at the Registrar's General Office. The registrar verifies the amount payable by his independent calculations and if satisfied, stamps the security documents endorsing its presentation for stamping. The Malawi Government issues a general receipt and records the amount being paid into its accounts entry book and then the cheque is deposited with the bank agent stationed at the registrar's office which issues a receipt as well. Receipts issued from the Malawi Government and the banks are enough for proof of payment.

The party offering security is responsible for the payments.

#### Registration Costs

Charges, caution and mortgages are registered with the Malawi Government through the Ministry of Lands. The

calculations are based on the fourth schedule in the Registered Land Act and the cost is nominal. The registrar will only register the instrument when satisfied that there are no outstanding rates due. Debentures and all other instruments are registered with the Malawi Government through the Registrar General's offices. The costs are payable to the Malawi Government and the party offering security is responsible for the payment. The general receipt issued during payment is valid proof of payment.

**Requirements for the Assignments or Transfer of Security**  
Where any instrument upon sale is transferred to, or vested in a purchaser there is an *ad valorem* duty which does not exceed the duty equal to the value of the property.

Where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security, the conveyance is charged with *ad valorem* duty in respect of the value of the stock or security. Where the security is not marketable, the conveyance is charged with *ad valorem* duty in respect of the amount due on the date thereof for principal and interest upon the security.

The transfer is completed by registration and by filing the instrument.

**Instances in which Security might be Vulnerable to Attack**  
Where the presentation for stamping does not comply with the time of stamping as provided by the law, such securities might be open to attack. If the instrument has been stamped out of time the document cannot be used as evidence unless and until it has been stamped with the appropriate penalty.

A charge created in writing over unregistered land is null and void if not registered under the Deeds Registration Act.

For a bill of sale to be valid it must be attested to and registered within 14 days from the date of execution and must also set forth the consideration for which it is given. Failure to comply with these requirements renders the bill of sale void.

#### Methods of Enforcement of Security

If default is made in payment of the principal sum or any periodical payment, notice is served on the debtor. If there is a failure to observe and perform in terms of the agreement, the security holder may appoint a receiver in respect of the income of the charged property or sell the charged property.

The power of sale in the case of a mortgage may only be exercised after 3 months from the date of service of a notice unless the period has been





abridged by agreement. The mortgagor is entitled to seek relief from court.

The holder of security such as debentures and pledges can exercise power of sale and enforce the security without any court order.

Repossession is one remedy available in the case of moveable property and the seized property can be sold off without any court order.

#### Problems Experienced when Enforcing Security

In spite of the existence of a charge over a debtor's property, the debtor still retains possession of the property. It would be a fraud if the debtor attempts to use the property to secure another loan from a different person without the latter knowing that it is already encumbered. This becomes a problem if the value of the property is not sufficient to cover the settlement of both loans.

#### Recognition of Foreign Judgement

##### Instances in Which Your Court will Recognise a Foreign Judgement

In principle, the Malawi courts accept the right of parties to transactions to freely agree to particular governing law and the exclusive jurisdiction of their choice unless it is against public policy. Therefore, where the parties have expressly agreed on a foreign law or jurisdiction to govern transactions then in principle such choice will be respected by the Malawi courts and be valid and binding on the parties. The Malawi courts would recognise a foreign judgement.

Where parties include resolution by foreign arbitrators in commercial transactions, such clauses are valid and binding on the parties as well, and the court will recognise an award made thereunder.

##### Requirements for Recognition of a Foreign Judgement

Judgments of the English Courts and arbitral awards are enforceable locally by merely registering them (administratively without further litigation) and the judgment will be treated as if it had been obtained in Malawi.

For a foreign judgement to be recognised in Malawi and enforced in accordance with ordinary procedures applicable under Malawian law the following requirements must be met:

- the judgment must be final and conclusive, and not obtained by fraud or in any manner opposed to natural justice;
- the enforcement thereof must not be contrary to public policy and the foreign court in question must have jurisdiction and competence

according to the applicable rules on conflict of laws; and

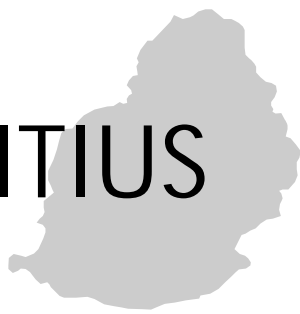
- a foreign judgment will not be recognised in Malawi if the foreign court exercised jurisdiction over the defendant solely by virtue of an attachment to found jurisdiction or on the basis of domicile alone.

The courts of Malawi will not enforce foreign revenue or penal laws or where it would be against public policy. For instance, in contracts of employment the court would not enforce a contract governed by foreign law and will therefore exercise jurisdiction notwithstanding that the contract is governed by foreign law or foreign jurisdiction. If any provision is held to be illegal or unenforceable, the judgment will not be recognised.

Requirements for the Recognition of a Foreign Trustee, Business Rescue Practitioner or Insolvency Practitioner  
This is not applied in Malawi.



# MAURITIUS



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## GENERAL INFORMATION

### Firm Information

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### Country Information

Mauritius is an island nation situated in the Indian Ocean about 2,000 km off the southeast coast of the African continent.

### Type of Government

Having been a British colony from 1810, until 12 March 1968 (being the date at which the island acceded to independence) the country's government system is mostly modeled on the Westminster Parliamentary System. In 1992, the country became a Republic known as the Republic of Mauritius. The current prevailing government system is thus that of a Parliamentary Republic.

### Political System

As a Republic, the President is the Head of the State and the Prime Minister is the head of the Government. The latter is assisted by the Council of Ministers. The executive power lies in the Government whereas the Legislative power lies with both the Government and the National Assembly. Finally, as guaranteed under the Constitution of Mauritius, elections are held every 5 years in order to renew this unicameral parliament.

### Legal System

The Mauritian Legal System is peculiar in the sense that it is a mixture of the English and French systems. Company law, trust law, constitutional and administrative law, maritime law and employment law have been imported from the English legal system. Private international law, however, is based on French private international law.

## TESTS FOR INSOLVENCY

### What are the Tests for Insolvency (ie Liquidation)

The test for deciding whether a company is deemed to be insolvent is a two-tier test set out in the Companies Act 2001 ("Companies Act"):

- whether the company is unable to pay its debts as they become due in the normal course of business; and
- whether the value of the company's assets is less than the sum of (a) the value of its liabilities and (b) the company's stated capital.

For the purposes of determining whether the value of the company's assets is less than the value of its liabilities as set out in the definition of Solvency Test in the Companies Act, the board of directors of the company may take into account the most recent financial statements of the company and a valuation of the assets or estimates of liabilities that are reasonable in the circumstances.

Furthermore the Insolvency Act 2009 (Act) under section 178 sets out the definition of "inability to pay its debts". A company is presumed to be unable to pay its debts as they become due in the ordinary course of business where:

- the company has failed to comply with a statutory demand;
- execution issued against the company in respect of a judgment debt has been returned unsatisfied;
- a person entitled to a charge over all or substantially all of the property of the company has appointed a receiver under the instrument creating the charge; or
- a compromise between a company and its creditors has been put to a vote in accordance with Part XVII and Part XVIII of the Companies Act but has not been approved.

What are the Tests for Financial Distress (ie Business Rescue or Administration)

The tests for deciding whether a company should be placed into administration are as follows:

- having regard to the business, property and affairs of the company, will the company be able to continue in existence after having been placed into administration;
- would the administration process result in a better return for the company's creditors and shareholders than what would result from the immediate winding-up of the company.

The administration procedure is designed to hold a business together while plans are made, either to enable a financial restructuring to rescue the company, or to sell the business and/or its assets, in order to produce a better result for the company's creditors than would be obtained through a liquidation.

## INSOLVENCY AND RESTRUCTURING PROCEDURES

### Formal Insolvency Procedures

The formal insolvency procedures that are covered by the Act are bankruptcy and liquidation.

### 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.

### 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 Insolvency Service or the Financial Services Commission where the company is a licensee thereof; 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.

#### 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.

#### Informal Insolvency or Restructuring Procedures

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.

## LIQUIDATION

#### What is the Aim of Liquidation

The main purpose of liquidation is, through the appointment of a liquidator, to take possession of, protect, realise, and distribute the assets, or the proceeds derived from the realisation of the assets, of the company to its creditors, in a manner which is fair to the creditors. Thereafter, the liquidator will apply to the court to have the company removed from the register of companies and dissolved.

#### 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;
- the Director of the Insolvency Service; 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 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

Before the presentation of a petition to court, if a resolution has been passed by the company for the voluntary winding up of the company, pursuant to section 137(8) of the Act, the winding up of the company shall be deemed to have commenced and where a provisional liquidator is appointed under section 137(4) of the Act before a winding up resolution is passed, at the time when a declaration is lodged, and in every other case of a winding up by the court, the winding up shall be deemed to have commenced at the time of the making of the winding up order.

#### 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.

#### Extent of Court Involvement in the Liquidation Process

On hearing a petition to wind up a company, the court may, in its discretion grant the petition and make a winding up order, dismiss the petition, adjourn the hearing conditionally or unconditionally, adjourn the petition in the case of a company in administration, or make such interim or other order that it thinks fit.

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.

#### Management of the Company Whilst in Liquidation

Regarding the directors of a company, with effect from the commencement of the liquidation of a company, the directors 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.

#### Filing of Claims

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.

#### Factors Which Influence the Period of the Administration in a Liquidation

There are various factors which influence the length of administration and they include, the number of creditors, the complexity of the case, the outcome of creditors' meetings, including the first creditors' meeting, the watershed meeting or any other creditors' meetings that may be required during the administration and the intervention of the court if same is required at any point during the administration etc.

#### Effect of Liquidation on Employees

After paying the claims related to amounts due to government and its agencies, the Official 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 one 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 Contracts

Liquidation does not necessarily bring a contract to an end and it is not necessarily a ground for the other party to terminate the contract (although there will often be provisions to this effect in an agreement). The liquidator is not obliged to ensure that the company continues its performance if he considers this would not benefit the company. The Act gives the liquidator the right to disclaim onerous property even though he has taken possession of it, tried to sell it, or exercised rights of ownership in relation to it. A disclaimer shall bring to an end, on and from the date of the disclaimer, the rights, interests and liabilities of the



company in relation to the property disclaimed, but does not, except insofar as is necessary to release the company from a liability, affect the rights or liabilities of any other person. Under the Act, 'onerous property' includes an unprofitable contract.

#### 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 to 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 one 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.

#### Pending Claims, Litigation and Arbitration

After the commencement of a winding up, no action or proceeding shall be proceeded with against the company except with the leave of the court and subject to such terms as the court thinks appropriate. At any time after presentation of a winding up petition and before a winding up order is made, the company may, where any action or proceedings against the company is pending, apply to the court to stay and restrain further proceedings, and the court may do so on such terms as it thinks fit.

#### Voidable Transactions

A transaction by a debtor may be set aside by the court on the application by the official receiver or 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 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 charge over any property or undertaking of a debtor may be set aside by the court on the application of the official 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.

#### 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 contributories.

*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 official receiver. The company shall be dissolved on the expiry of 3 months after the notice has been lodged.

#### Director or Officer Liability

Under the Act, 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 Act, a past or present director may be found liable or be 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 Act, 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.

### BUSINESS RESCUE / 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 the administrator is appointed.

#### Duration of Administration Process

There is no prescribed time limit for the administration process.

#### 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.

#### Management of the Company Whilst in Administration

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 Act.

## Filing of Claims

Any claims to be filed against a company in administration have to receive the prior consent of either the administrator or the court. A secured creditor who is affected by the appointment of an administrator may, within 14 days of such appointment, apply to the court for an order granting leave to him to enforce his security. On the day of the application, notice must be given to the administrator who shall, within 7 days of receiving the application, file with the court a notice advising whether the administrator supports or opposes this application. The court shall, within 7 days of that notice, conduct a hearing.

## Factors Which Influence the Period of Administration

There are various factors which influence the length of administration and they include, the number of creditors, the complexity of the case, the outcome of creditors' meetings, including the first creditors' meeting, the watershed meeting or any other creditors' meetings that may be required during the administration and the intervention of the court if same is required at any point during the administration etc.

## Funding of the Company Whilst in Administration

Any funding shall be subject to the approval of a deed of company arrangement following a watershed meeting. The deed of company arrangement shall specify the property of the company (whether or not it is already owned by the company when it executes the deed) that will be available to pay creditors. It shall also specify to what extent the company will be released from its debts and the order in which the proceeds arising from the realisation of property will be distributed among creditors who are bound by the deed.

## 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 salary 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 Contracts

The company's contracts do not automatically terminate when it enters administration and the Act does not provide the administrator (unlike the liquidator) with express powers to disclaim a contract as "onerous".



However, as stated above, the administrator takes control of the company's business, property and affairs. It thus enables him to carry on the business and manage the property and affairs with the objective of either (i) salvaging the company's business in the interests of creditors, employees and shareholders; or (ii) terminate or dispose of all or part of the business, and to dispose of any property. He may therefore decide not to perform a contract if such non-performance would help achieve the aims of the administration. During administration, the owner or lessor of property that was used or occupied by, or is in the possession of, the company shall not take possession of the property or otherwise recover it, except with the administrator's written consent or with the permission of the court.

## 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.

## Pending Claims, Litigation, Arbitration

Whilst the company is in administration, proceedings in a court against the company or in relation to any of its property, shall not be commenced, or continued, with unless it has either been approved with the prior written consent of the administrator, or the permission of the court has been obtained on terms that the court thinks appropriate.

## Effects of the Moratorium

The duration of any moratorium period shall be fixed by a deed of company arrangement executed by creditors following a watershed meeting. Such moratorium does not affect the substantive rights of the contracting parties but it does prevent the enforcement of those rights without the consent of the administrator or the permission of the court.

## 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.

#### The Administration Plan

The administration plan shall be decided upon at a watershed meeting. Such meeting shall be convened by the administrator within 28 days of his appointment. Prior notice should be given to the company's creditors with a report of the company's state of affairs, a statement setting out the administrator's opinion about whether it would be in the creditors' interests to execute a deed of company arrangement and the details of any such proposed deed. The deed shall specify who is the deed administrator, the property of the company that will be available to pay creditors, the nature and duration of any moratorium period, to what extent the company will be released from its debts, the conditions for the deed to come into operation and the circumstances in which the deed terminates.

#### Voting on the Plan

The plan is adopted if a majority in number representing 75% in value of the creditors or class of creditors voting in person, or by proxy, vote or by postal vote, vote in favour of the plan.

#### Cram Down on Creditors

A deed of company arrangement releases the company from a debt only insofar as the deed provides for the release and the creditor concerned is bound by the deed. Where a proposed deed of company arrangement is not fully approved at a meeting, the administrator shall draft the complete deed and circulate it to the creditors within 14 days after the meeting. The court may extend this period on an application by the administrator by up to 10 days. The court also rules on the validity of the deed, but does not have powers to vary the contents of the deed in the sense of a cram down on creditors.

#### Implementation of the Plan

The deed of company arrangement is executed by the company in administration and by the administrator. The deadline for the execution of the deed is 21 days after a watershed meeting has approved the deed. The company may not execute the deed unless the board of the company has, by resolution, authorised the deed to be executed by the company or on its behalf.

#### Discharge of Claims

A deed of company arrangement releases the company from a debt only insofar as the deed provided for the release and the creditor concerned is bound by the deed. Also, a person who is bound by a deed of company arrangement shall not, while the deed is in force, except

with the court's permission, begin or continue proceedings against the company or in relation to any of its property, or begin or continue an enforcement process against the company's property.

#### Effect on Suretyships

The release of the company from a debt, as a result of a deed of company arrangement, shall not discharge or otherwise affect the liability of a guarantor of the debt or a person who has indemnified the creditor concerned against default by the company. Indeed, if the principal debt falls away, the accessory debt falls away as well.

#### How is the Process Terminated

The administration will end where:

- a deed of company arrangement is executed by the company and the deed's administrator;
- 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.

#### What is the Status of the Company after the Administration

When a deed of company arrangement has been successfully completed and its terms met, the company then reverts to its former status with all debts covered by the deed being discharged. However, should the deed be incapable of performance in its current form, it may be terminated or varied by the creditors. Should the creditors decide to terminate the deed, they may also resolve that the company then proceed to be placed into liquidation.

#### Director and Officer Liability

As in a liquidation, the Companies Act 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.

## SECURITY

### Types of Security

Under Mauritian law, security can largely be sub-divided into two categories, which stem from the Mauritian Civil Code (of French origin):

- *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 pledge of shares for example. In 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*").

### Security Trustees or Special Purpose Vehicles

There is nothing under Mauritian law, more specifically under the Mauritian Trusts Act 2001, which prohibits the use of a security trustee or security agent. Indeed, many security trustees are used for the purposes of collective security in the case of syndicated loans and/or inter-creditor loans. The appointment of such a security trustee will be governed by the law of contract. The laws of Mauritius allow the use of bankruptcy remote structures and off balance sheet transactions such as Special Purpose Vehicles (SPVs) in the form of corporate and/or trust structures to segregate assets of one entity from another. The use of SPVs in global/offshore business activities is very common.



Most Robust form of Security Available to Lenders

As regards property, fixed or floating charges are generally considered as strong safeguards to lenders, whether local or international. The drafting of a

fixed charge agreement or a floating charge agreement (or a fixed and floating charge agreement) is usually done in such a way so as to provide sufficient guarantees to the lender in the case of default. For instance, the debtor will not be able to assign, pledge or mortgage the said property without the express approval of the creditor. Also, while such agreements are made through private deeds, the latter have to be registered and inscribed with the Conservator of Mortgages of Mauritius.

### Registration of Security

According to the Civil Code, any creditor applying for the inscription of a privilege or mortgage shall, either in person or by some other person on his behalf, produce to the Conservator of Mortgages, two original deeds or judgments or certified copies of the judgment giving rise to the privilege or mortgage, within 8 days of the date of the deed, save for global business companies licensed under the Financial Services Act.

Every company shall, within 28 days of the creation by the company of any charge or the issue of debentures charged on, or affecting, any property of the company, file with the Registrar of Companies, a statement of particulars and a certificate of the instrument of charge in a form approved by the Registrar of Companies. The particulars required to be given in the statement are the date of the creation of the charge, the amount secured by the charge, a description sufficient to identify the property charged, the name of the person entitled to the charge and any prohibition or restriction contained in the instrument creating the charge.

### Stamp Duty

Such payment is made at the Registrar General, in return for which the debtor obtains receipt as proof of payment. There exists no prescribed fee payable as stamp duty. Such sum is calculated as a percentage of the amount secured or that of the debt witnessed by the document, whichever is higher.

### Registration Costs

Registration costs are borne by the debtor where there is no contrary agreement that they are to be borne by the creditor as per the Civil Code. They are paid to the Registrar General. The costs are as follows:

- less than 300,000 rupees the costs are Nil
- less than 300,000 rupees but not exceeding 500,000 rupees the costs are Nil
- less than 500,000 rupees but not exceeding 1,000,000 rupees the costs are Nil
- less than 1,000,000 rupees but not exceeding 5,000,000 rupees the costs are 30,000
- exceeding 5,000,000 rupees the costs are 50,000

Requirements for the Assignment or Transfer of Security  
Security can be assigned by way of an assignment agreement, with notice (signification) given to the debtor under the Civil Code. The Conservator of Mortgages must

also be duly notified.

Instances in which Securities might be Vulnerable to Attack

Security may be vulnerable to attack by third parties, including the Government where:

- the charge has not been duly registered at the Conservator of Mortgages;
- the charge is defective in law;
- the charge has been taken in bad faith;
- the charge is immoral;
- the charger is not the owner of the charged property;
- where the Government is a statutory creditor ("Créancier super-privilegié") or
- upon reaching the 10 year deadline, the charge has not been renewed.

Methods of Enforcement of Security

Regarding immovable property, no judicial intervention is required for the enforcement of a fixed charge as it is executable upon an event of default. The Sale of Immovable Property Act, however, provides that such sale be conducted before the Master and Registrar of the Supreme Court. For a floating charge, it needs to be crystallised into a fixed charge before any property can be put up for sale before the Master and Registrar of the Supreme Court. The purpose of this is to perfect the charge into a fixed charge. Creditors will often agree among themselves to rank on a *pari passu* basis. As for movable property, this may be disposed of by an auctioneer and very often court intervention will be required for pledges, guarantees and liens, save for a special pledge in favour of a bank.

Problems Experienced when Enforcing Security

During the administration of a company for example, an enforcement process in relation to a company's property shall not be commenced or continued with except with the permission of the court and on terms that the court thinks appropriate. A secured creditor shall apply to the court for leave to enforce its security and to give notice to the administrator. The latter may oppose such application. The court shall determine the issue and may give an order limiting the enforcement of the security to specified property. Very often the debtors or obligors themselves may oppose the enforcement of security on the grounds that no event of default has occurred, the charge is defective or certain procedures in relation to the enforcement are defective.

## RECOGNITION OF FOREIGN JUDGMENTS

Instances in Which Your Court Will Recognise a Foreign Judgment

A court of law in Mauritius applying the Laws of the Republic of Mauritius will give effect to a foreign judgment without any further review on its merits, provided that:

- either the procedure to register the said judgment pursuant to the Foreign Judgments (Reciprocal

Enforcement) Act 1961 is made; or

- it is made executory in Mauritius by way of exequatur under article 546 of the "Code de Procédure Civile" of Mauritius, where the Act is not applicable, inclusive of the proper depositing in Mauritius of any foreign power of attorney from the foreign judgment creditor or his agent at the Supreme Court of Mauritius before proceedings.

Requirements for Recognition of a Foreign Judgment

The judgment pronounced in the original court must satisfy the following criteria to be recognised in Mauritius:

- the judgment must be final and conclusive between the parties;
- the judgment must be in respect of a sum of money not being a sum payable in respect of taxes or of other charges of a like nature or in respect of a fine or other penalty;
- at the date of the application for registration, the judgment must not have been wholly satisfied;
- it must be a judgment that could be enforced by execution in the country of the original court;
- the judgment debtor, being the defendant in the proceedings in the original court must have received notice of those proceedings in sufficient time to enable him to defend the proceedings and to appear;
- the judgment must not have been obtained by fraud and must not be against public interest; and
- the rights under the judgment are vested in the person by whom the application for registration was made.

Requirements for the Recognition of a Foreign Trustee, Business Rescue Practitioner or Insolvency Practitioner

A foreign representative is entitled to apply directly to the Supreme Court of Mauritius. Such an application does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of Mauritius for any purpose other than the application. The foreign practitioner is entitled to apply to commence a Mauritius insolvency proceeding if the conditions for commencing such a proceeding are satisfied. Also, upon recognition by the Supreme Court of a foreign proceeding, the foreign representative is entitled to participate in a Mauritius insolvency proceeding regarding the debtor.

# MOZAMBIQUE

COUTO, GRAÇA & ASSOCIADOS, LDA

## GENERAL INFORMATION

### Firm Information

Website address: [www.cga.co.mz](http://www.cga.co.mz)

Telephone: +258 84 33 33 340

Fax: +258 21 486 441

### Country Information

Mozambique has a 2.470 kilometers coastline and a total land area of 801.590 square kilometers. 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 (ie 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, 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 (ie Business Rescue)

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 obligation 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 (ie 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 fulfills 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.

## 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 liquidation 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 liquidation process is said to have commenced.

#### 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 relinquishes 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 Liquidation on Employees

The claims of employees maintain a 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, payable as soon as cash is available.

#### Effect of Liquidation 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 Liquidation 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 Liquidation 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 continue in force.

#### Voidable Transactions

The law determines which acts are revocable 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.

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 require 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.

#### 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 (a) disqualified from being a director of any company or from



running a business; and/or (b) 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 range from a range of fines and/or a range of prison sentences.

### BUSINESS RESCUE

#### 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 the Business Rescue Process 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 was 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 any 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 creditors' 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 must be 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, save for that which is authorized after the judge has heard the views of the creditors' committee and the insolvency administrator. Exception is made for



those contracts, transfers or encumbrances already contemplated in the rescue plan.

#### Effect of Business Rescue 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 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

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 report and lodge any formal objections that they have.

#### Voting on the Plan

If the rescue plan is submitted to the creditors for approval, all classes of creditors must approve the said 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 a 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 one 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 the 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 of any creditor.

### 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.

### 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 two 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. Perfection of such security is affected by registration in the relevant public office.

### Security Trustees or Special Purpose Vehicles

This is not available or used 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 must be made by public deed.

### Stamp Duty

Stamp duty is calculated from 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



department.

#### Registration Costs

The calculation of registration costs depends on the actual security being registered and the value of the security.

**Requirements for the 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, applicable to all security, experienced when enforcing 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 as 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 law.

**Requirements for the Recognition of a Foreign Trustee, Business Rescue Practitioner or Insolvency Practitioner**  
It is not legally possible for a foreign business rescue practitioner or insolvency practitioner to practice in Mozambique. Local business rescue practitioners or insolvency practitioners would need to be engaged. Trustees are not recognized in Mozambique.

# NAMIBIA



## KOEP & PARTNERS

### GENERAL INFORMATION

#### Firm Information

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#### Country Information

Namibia is a vast country in Southern Africa surrounded by South Africa, Botswana, Angola, Zambia and Zimbabwe, and covers some 824 000 km<sup>2</sup> with a population of only approximately 2,3 million, of which about 70% lives in the northern part of the country. The capital of Namibia, Windhoek, has a population of about 330 000.

#### Type of Government

Namibia is a multi-party democracy with a presidential representative democratic elected government. The President in Namibia is both head of state and of the government. The President serves for a period of five years and is limited to re-election twice. The government of Namibia has three different branches consisting of the Executive, Legislature and the Judiciary.

#### Political System

Namibia has a stable multi-party democratic system and since independence in 1990 SWAPO has been the dominant political party.

#### Legal System

Namibia's legal system is a mixed legal system. The Constitution is the supreme law of the land. Namibia also recognizes civil common law based on Roman Dutch law as well as some of the customary laws of the indigenous people.

### TESTS FOR INSOLVENCY

#### What are the Tests for Insolvency (ie Liquidation)

Namibian insolvency law requires that before liquidation proceedings can be instituted it must be established that the company is commercially insolvent. The test for commercial insolvency is whether or not the company is unable to pay its debt as they become due in the ensuing six months.

#### What are the Tests for Financial Distress (ie Business Rescue or Administration)

There is no provision in the Namibian Companies Act 28 of

2004 (Companies Act) or the Insolvency Act 24 of 1996 (Insolvency Act) for business rescue proceedings. It is, however, possible to apply to the High Court of Namibia for a company to be placed under judicial management with a court-appointed judicial manager. This is done in terms of the Companies Act.

### INSOLVENCY AND RESTRUCTURING PROCEDURES

#### Formal Insolvency Procedures

Formal insolvency procedures are instituted by means of an application to the High Court of Namibia in terms of section 348(1) of the Companies Act. The ordinary application is in the form of a notice of motion with an accompanying founding affidavit signed by the applicant. The winding-up of a company unable to pay its debts may be either a voluntary winding where its members or a creditor of the company apply to court for the company to be wound-up, or it may be a compulsory winding-up by the court.

#### Formal Restructuring Procedures

Formal restructuring proceedings are instituted by the creditor/s of the company bringing an application to the High Court of Namibia to restructure a company's debt/s. This application should consist of a notice of motion and a founding affidavit in support of the application. The court may then adjudicate on the manner in which the formal restructuring procedure should be followed.

#### Informal Insolvency or Restructuring Procedures

Informal insolvency or restructuring procedures in Namibia may be agreed upon by the troubled company and its creditor/s. The parties can conclude a debt restructuring/repayment agreement. This agreement is usually in writing and allows for the debt to be restructured in such a way that will prevent formal insolvency proceedings against the company. This agreement is binding on all parties until either party breaches this agreement.

### LIQUIDATION

#### What is the Aim of Liquidation

The purpose of liquidation is to:

- create a *concursum creditorium* (coming together of creditors to freeze the company's estate);
- create an equitable distribution of the company's assets for the benefit of the creditors;
- ensure that the equitable distribution of the company's assets is conducted in an orderly pre-determined manner; and
- investigate possible impeachable transactions (voidable preferences) entered into by the company with the view of setting aside dispositions, preferences or collusive dealings in



terms of sections 26, 29, 30 and 31 of the Insolvency Act and sections 345 and 346 of the Companies Act.

#### Process Required to Commence a Liquidation

Section 348(1) of the Companies Act recognizes the following two ways in which to commence the liquidation process:

- liquidation proceedings commenced by the court; or
- liquidation proceedings voluntarily commenced by the creditors or members of the company.

The liquidation of a company commences by bringing an ordinary application to the High Court of Namibia in the form of a notice of motion and a founding affidavit. The notice of motion should seek an order for the final liquidation of the company. The founding affidavit sets out the facts necessary to support the final liquidation of the company.

#### At What Point Does the Liquidation Process Commence

Section 353 of the Companies Act provides that the winding up of the company is deemed to have commenced at the time of the presentation of the application for liquidation to court.

#### Duration of the Liquidation Process

The liquidation process should, according to the Companies Act, be completed as soon as is reasonably possible, but the Master of the High Court usually sets a date within 6 months for the filing of the first liquidation and distribution account. However, in practice the duration of the liquidation process could take longer.

#### Extent of Court Involvement in the Liquidation Process

Namibia's legal system is adversarial in nature. This means that the court's involvement in liquidation proceedings is simply to grant or refuse a liquidation application. The court normally first grants a provisional order of liquidation with a *rule nisi* calling on the company and all interested parties to show cause why the company should not be finally liquidated on the return date. After the High Court has granted its final order, the administration of the liquidation process rests with the Master of the High Court whilst the realization of assets, the settlement of debts and the distribution of dividends after settling all debts rests with the liquidator.

#### Management of the Company Whilst in Liquidation

Once a liquidator is appointed, he/she has the duty to manage and control the affairs of the company on its behalf. In terms of section 420 of the Companies Act, every director and officer of a company unable to pay its debts must attend the first and second meeting of creditors and any subsequent meeting which the liquidator in writing requested the director or officer to attend, unless the Master of the High Court has, after consultation with the liquidator, in

writing, authorized such director or officer to be absent from a meeting.

#### Filing of Claims

The creditor/s have the onus of proving their claim/s, such security as they may rely on and to place a value on such security.

As soon as possible after the High Court has granted the liquidation order, the Master of the High Court will notify the creditor/s by the publication of a notice in the Government Gazette of the convening of a first creditors meeting. The purpose of this first meeting is for creditors to prove their claim/s against the company, to consider the statement of the affairs of the company lodged with the Master of the High Court and for the receipt of nominations for a person to be appointed as liquidator. After this meeting, the Master of the High Court 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. The Master of the High Court or other officer appointed for this purpose presides over the meetings. The form of these meetings is at the discretion of the Master of the High Court or any other presiding officer.

#### Factors Which Influence the Period of the Administration in a Liquidation

The following factors have an impact on the overall duration of the process:

- the total number of creditors with valid claims against the company;
- the general administration process at the Master's Office to notify the creditors of the relevant meetings via publication in the Government Gazette;
- the nature of the company's business, the overall size of the company including its assets, employees and liabilities; and
- the number and efficiency of staff in the Master's Office and the volume of liquidations and other work assigned to the Master's Office that the latter has to process.

#### Effect of Liquidation on Employees

The employment contracts concluded with a company are automatically terminated on the liquidation of a company in terms of section 32 of the Labour Act 11 of 2007.

#### Effect of Liquidation on Contracts

Leases are not automatically terminated by the commencement of liquidation but may be terminated by the liquidator. Supply agreements which provide for the purchase price to be paid upon delivery of the property to the purchaser, and which have not been paid against delivery, may be reclaimed by the seller within 10 days after delivery. The effect of liquidation on moveable

property sold under an installment sale is that a hypothec is created over that property in favour of the creditor whereby the amount still due to him or her under the transaction is secured. In general, incomplete contracts are not automatically terminated in the event of liquidation, but may be terminated at the liquidator's election.

#### Effect of Liquidation on Shareholders

Dividends are only paid to shareholders if and when all liabilities have been paid in full.

#### Effect of Liquidation on Creditors

Liquidation creates a *concurso creditorum* (pooling of creditors to create an equitable distribution of the company's assets). Secured claims and preferent claims are paid before the unsecured claims of concurrent creditors. Only creditors who have proved their claims to the satisfaction of the person presiding over creditors' meetings will be able to share in the distribution.

#### Pending Claims, Litigation and Arbitration

After bringing an application for the winding-up of the company, but before a winding-up order has been made, the company, or a creditor, or member of the company may apply for the stay of any proceedings involving the company. All pending claims, litigation or arbitration proceedings against a company are suspended pending the appointment of the liquidator. Should a person wish to continue with legal proceedings, he or she must, within 20 days after the appointment of the liquidator, give the liquidator at least 15 days written notice of his or her intention to proceed with such legal proceedings. If the person fails to give notice, the proceedings are deemed to be abandoned.

#### Voidable Transactions

In terms of section 345 of the Companies Act, every disposition by a company of its property which could have been set aside because of its insolvency in the case of an individual, may be set aside if the company is unable to pay all its debts. Every disposition of assets by a company after liquidation has commenced is void unless a court on application orders otherwise.

#### How is the Liquidation Process Terminated

The liquidation process is terminated once the final liquidation and distribution account has been lodged by the liquidator of the company and all assets available for distribution have been distributed according to the liquidation and distribution account. Once this is done, the liquidator may apply to the Master of the High Court for a certificate of completion of his or her duties.

#### Director or Officer Liability

The director/s may at any time after liquidation has commenced be ordered to deliver the company's assets to the liquidator. Directors are obliged to prepare a statement

of the company's affairs and lodge same with the Master of the High Court within 14 days after the liquidation order. They are also obliged to notify the liquidator of any change of address and are obliged to attend the first two meetings of creditors and every subsequent meeting of creditors if notified in writing by the liquidator to do so.

In terms of section 429 of the Companies Act, delinquent directors may on application by the Master of the High Court, the liquidator or any creditor be ordered by the court to repay any money 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.

#### Civil and Criminal Consequences

Apart from being held personally liable for fraudulent or reckless business transactions, directors may also be criminally prosecuted under sections 430 and 431 of the Companies Act and should the State refuse to prosecute, creditors may institute private prosecutions under section 431 of the Companies Act.

### JUDICIAL MANAGEMENT

Business rescue proceedings are not formally recognized in Namibia.

#### Process Required to Commence a Judicial Management

Namibia does not recognize business rescue proceedings. In terms of the Companies Act, a company might be placed under judicial management if it is unable to pay its debts or meet its obligations, has not become a successful concern or is prevented from becoming a successful concern as a result of mismanagement. Any person (including the company itself) who is entitled to make an application to court for the winding-up of a company may also bring an application to court for the judicial management of a company. The application must be brought by notice of motion with supporting affidavit/s.

#### At What Point Does Judicial Management Commence

Judicial management commences when the court grants either a provisional judicial management order or, where no provisional order is granted, a final order.

#### Duration of Judicial Management

There is no fixed period. The provisional judicial management order has a return day of 60 days, thereafter the court will consider the opinions and wishes of the creditors, the provisional judicial manager's report, the Master's report and Registrar of Companies' report. After such consideration, the court will then make a final judicial management order, discharge the provisional order,



extend the return day and/or liquidate the company. The duration is therefore in the discretion of the courts.

#### Extent of Court Involvement in Judicial Management

The court supervises the whole judicial management process. The court is involved in hearing the evidence on the progress of the judicial management, once the matter comes back to court upon the return date. The court in addition has the power to appoint the judicial manager and decide on the final steps of the judicial management process.

#### Management of the Company Whilst in Judicial Management

The management of the company vests, subject to the supervision of the court, in the final judicial manager/s. The board of directors and directors of the company under judicial management take the role of spectator.

The Companies Act sets out in detail the responsibilities of the judicial manager. For example, a judicial manager must, subject to the memorandum and articles of the company concerned, in so far as they are not inconsistent with any direction contained in the relevant judicial management order, take over and assume the management of the company; conduct the management subject to the orders of the court, in a manner which he or she considers most economic and most promoting of the interests of the members and creditors of the company. He or she must also comply with any direction of the court, lodge with the Registrar of Companies a copy of the judicial management order and the Master's letter of appointment. He or she must keep accounting records and prepare annual financial statements and may convene meetings of the creditors of the company. He or she must examine the affairs and transactions of the company before the commencement of the judicial management in order to ascertain whether any director has contravened the Companies Act. Within 6 months, he or she must submit to the Master of the High Court the necessary reports. If it transpires that the continuation of the judicial management will not enable the company to become a successful concern, the judicial manager must apply to the court for the cancellation of the relevant judicial management order and for the issue of an order for the winding-up of the company.

#### Filing of Claims

No specific procedure is provided for in the Companies Act. It should be noted that judicial management is the opposite of liquidation: whereas liquidation is aimed at winding-up the company and bringing about its dissolution, judicial management is aimed at avoiding liquidation where there is a possibility that the company might overcome its difficulties by proper management.



#### Factors Which Influence the Period of Judicial Management

The size of the company, extent of its debt, availability of funds and assets and a number of other factors may influence the period for which the company is under judicial management.

#### Funding of the Company Whilst in Judicial Management

The judicial manager may procure bank loans on behalf of the company. With the consent of the court, he or she may also sell company assets.

#### Effect of Judicial Management on Employees

The Namibian Company Act does not make provision for the effect that judicial management will have on employees. However, depending on the progress of the judicial management process, the possibility of retrenching some of the employees exists. In such case, this would need to be done in accordance with the Labour Act 11 of 2007.

#### Effect of Judicial Management on Contracts

No specific provision is made regarding contracts. The judicial manager may, however, decide not to proceed with some of the agreements concluded by the company prior to the commencement of judicial management.

#### Effect of Judicial Management on Shareholders

No dividends are declared during judicial management.

#### Effect of Judicial Management on Creditors

All moneys of the company available to the judicial manager may only be used towards paying the costs of the judicial management and in the conduct of the company's business in accordance with the judicial management order and so far as the circumstances permit in the payment of the claims of creditors which arose before the date of the order. The costs of the judicial management and the claims of creditors must be paid *mutatis mutandis* in accordance with the law relating to insolvency as if those costs were costs of the sequestration of an estate and those claims were claims against an insolvent estate. Pre-judicial management creditors may resolve that all liabilities incurred or to be incurred by the judicial manager be paid in preference to all other liabilities.

#### Pending Claims, Litigation and Arbitration

All actions, proceedings, the execution of all writs, summons and other processes against the company are stayed and can only be proceeded with, with the leave of the court.

#### Effects of the Moratorium

No explicit moratorium is created by the commencement of judicial management.

#### Voidable Transactions

The provisions of the law of insolvency relating to voidable

and undue preferences apply *mutatis mutandis* where a disposition of property, if made by a company unable to pay its debts, is set aside by the court at the instance of the judicial manager.

#### The Judicial Management

No specific provision is made for the preparation of a judicial management plan.

#### Voting on the Plan

No specific provision is made for voting on a judicial management plan.

#### Cram Down on Creditors

Creditors are bound by the decisions of the judicial manager, unless a court otherwise dictates.

#### Implementation of the Plan

No specific provision is made for the implementation of a judicial management plan.

#### Discharge of Claims

The costs of the judicial management and the claims of creditors of the company must, with the necessary changes, be paid in accordance with the law relating to insolvency as if those costs were costs of the sequestration of an estate and those claims were claims against an insolvent estate.

#### Effect on Suretyships

No specific provision is made for suretyships in respect of the judicial management process.

#### How is the Process Terminated

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 a judicial management order has been fulfilled or that for any reason it is undesirable that that order should remain in force, the court may cancel that order and the judicial manager would be divested of his or her functions. In cancelling a judicial management order, the court must give any directions as is necessary for the resumption by the management of control of the company, including directions for the convening of a general meeting of members for the purpose of electing directors of the company.

#### What is the Status of the Company after the Judicial Management

The results of a judicial management order can be one of two things: either the company becomes a successful concern again, or the company is liquidated.

#### Director and Officer Liability

#### Civil Consequences

The same provisions discussed above in respect of liquidations apply to judicial management.

#### Criminal Consequences

The same provisions discussed above in respect of liquidations apply to judicial management.

### SECURITY

#### Types of Security

Namibia recognises various forms of real and personal security. Real security refers to security taken over the property of the debtor (or any other person) and enforceable against that property as security for a debt. Examples of real security are mortgage bonds, notarial bonds and pledges. Personal security, on the other hand, refers to security enforceable against a specific individual. Examples of personal security include cessions, sureties and guarantees.

#### Taking of Security

Our response to this point is incorporated below.

#### Security Trustees or Special Purpose Vehicles

Namibia recognises the concept of a "trust", which is dealt with in terms of the common law. Security trustees are often used in project financing transactions. It is however standard procedure to rather use a company as a Special Purpose Vehicle (SPV) than to act as the holder of the security company. The objects of the Security SPV are ring-fenced and limited to the holding, realising and distribution of the security on behalf of, and for the benefit of, the lenders. All security is normally registered in favour of the SPV and the SPV (acting as the security trustee or security company) will enforce the security and apply the proceeds from the security to the claims of all the lenders according to the terms of an inter-creditor or security sharing agreement entered into between the SPV and the lenders.

#### Most Robust Form of Security Available to Lenders

Mortgage bonds, notarial bonds, a pledge in security of movables and a cession in security of incorporeal rights, are the most effective and commonly used forms of security.

#### Registration of Security

The registration of mortgage bonds is dealt with in terms of the Deeds Registries Act 47 of 1937 (Deeds Registries Act). A mortgage bond has to be prepared by a legal practitioner admitted as a conveyancer and has to be executed in the presence of the Registrar of Deeds either by the owner of the property or by a conveyancer duly authorised thereto by power of attorney granted by the owner of the property. The Registrar of Deeds will attest to the bond in the presence of the conveyancer or owner. The Deeds Registries Act specifically states in section 50(5) that debts or obligations owing to more than one creditor and arising from different causes may not be

secured by one mortgage bond. It is also possible to secure future debts by means of a mortgage bond, in which case the bond is called a covering bond.

In the case of movable property, the movables may be taken in pledge as security. An attorney will typically draft a pledge agreement and, at the execution thereof, the pledger (debtor) is required to hand over the pledged property to the pledgee (creditor). It is important for delivery of the property to take place, as the pledge will not be valid without delivery. Actual delivery of the goods may be difficult due to the nature of the goods in which case symbolic delivery is also possible. What is important, however, is that the pledgee is given effective control over the pledged property.

If delivery of the secured property is not feasible or possible, it is possible to register a notarial bond over the movables. A creditor may either register a general notarial bond over all the movables of the debtor, or a specific notarial bond over specified movable assets of the debtor. A notarial bond is a bond over movables prepared by a legal practitioner admitted as a notary public. Notarial bonds are dealt with in terms of the Deeds Registries Act. All notarial bonds have to be executed at the Deeds Registry by the owner or duly authorised conveyancer and the Registrar will attest to the notarial bond.

The normal rule is that secured creditors (in this case mortgagees or pledgees) outrank normal creditors. Bonds (whether mortgage or notarial) rank in the order in which they were executed. It is possible, however, to waive preference in the ranking in order to give a subsequent mortgagee preferential ranking or equal ranking (*pari passu*).

#### Stamp Duty

Stamp duties on security is payable in terms of the Stamp Duties Act 15 of 1993. Stamp duties on bonds are calculated at a rate of N\$5 for every N\$1,000 of the amount of the debt secured. For every other document of security, stamp duty is payable at a rate of N\$1 for every N\$1,000 of the amount of debt secured, up to a maximum of N\$50.

#### Registration Costs

The amount of the notarisational fees, registration costs and other fees will depend on the value of the transaction or assets involved in the transaction. These amounts are statutorily prescribed and are determined on a sliding scale according to the value of the security.

#### Requirements for the Assignment or Transfer of Security



The assignment or transfer of security is normally dealt with in terms of the document creating the security (or security agreement). If this document is quiet as to the assignment or transfer of

security, the common-law rules of contract will apply.

Instances in which Securities might be Vulnerable to Attack  
Regulatory requirements may make some forms of security vulnerable and may require governmental approval before security can be realised. Examples are commercial agricultural land, which require a waiver from the governments pre-emptive right before agricultural land may be sold in execution and the transfer of the licence or any interest in a licence granting mineral rights to the holder thereof.

#### Methods of Enforcement of Security

Most security instruments in Namibia have to be enforced by means of a court order. An agreement for *parate executie* (summary execution) in a mortgage bond or notarial bond which purports to empower the mortgagee to sell the property out of hand or to otherwise dispose of it without an order of court on such terms and conditions, and for such price as he or she may determine, is invalid.

A clause in a pledge agreement that amounts to *parate executie* is not per se void, since it does not take away the debtor's right to turn to the courts for help. Furthermore, it does not entitle the creditor to self-help (take the law into his own hands), and neither does it empower the creditor to seize the property, since it is already in his possession. The debtor may, however, still seek recourse in a court if he can show that, in the carrying out of the agreement and effecting of the sale, the creditor has acted in a manner which has prejudiced him in his rights. *Parate executie* in respect of a pledge is, however, open to challenge as being unconstitutional. It is advisable to still give reasonable notice to the debtor, even if *parate executie* is available. All other real security has to be enforced through the courts.

#### Problems Experienced when Enforcing Security

Because security has to be enforced by means of a court order, the enforcement of security is often costly and time-consuming.

#### RECOGNITION OF FOREIGN JUDGMENTS

##### Instances in Which Your Court Will Recognize a Foreign Judgment

Foreign judgments of designated countries can, in terms of the Enforcement of Foreign Civil Judgments Act 28 of 1994, be recognized in Namibia. At this stage, however, only South Africa is a designated country. Nothing, however, precludes a judgment creditor, even a South African one, from availing himself of the common-law procedure in terms whereof provisional sentence may be granted by the High Court of Namibia on a foreign judgment (section 9 of the Enforcement of Foreign Civil Judgments Act 28 of 1994), which is considered to be a liquid document, provided that such judgment appears *ex facie* the record to be final and has not become superannuated. The onus is

on the plaintiff to prove that the foreign court from which the judgment emanates, had jurisdiction according to the principles recognised by Namibian law with reference to foreign judgments and that the judgment was final.

#### Requirements for Recognition of a Foreign Judgment

Foreign civil judgments enforced in terms of the Enforcement of Foreign Civil Judgments Act 28 of 1994 are registered by the Clerk of the Magistrates Court. A certified copy of the judgment (in English) must be lodged, together with an affidavit setting out the amount of interest due, the rate of interest, how interest is calculated and whether any amounts have been paid and deducted. Once it is registered, the Clerk of the Court must inform the debtor of the judgment and the amount due, plus interest and taxed costs in respect thereof.

#### Requirements for the Recognition of a Foreign Trustee, Business Rescue Practitioner or Insolvency Practitioner

A trustee (for sequestration of natural persons) and a liquidator (for liquidation of companies) are appointed by the Master of the High Court. However, section 55(d) of the Insolvency Act and section 379(1)(h) of the Companies Act prohibit the appointment of a trustee or liquidator who does not reside in Namibia. Namibia may, however, recognise the powers of a foreign trustee.



# NIGERIA

GIWA-OSAGIE & CO.

## GENERAL INFORMATION

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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 orientated government was completed. Nigeria is currently experiencing its longest period of civilian rule since independence. It is ranked 26th in the world in terms of GDP and is the largest economy in Africa. It is also on track to become one of the 20 largest economies in the world by 2020.

### Type of Government

Nigeria is a Federal Republic modelled on the United States system, 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 a Senate and a House of Representatives, which are combined in a bicameral body called the National Assembly.

### Legal System

There are three distinct systems of law in Nigeria, the:

- common law, derived from Nigeria's colonial past and developments post-independence;
- customary law, derived from indigenous traditional norms and practices; and
- sharia law, used only in the predominantly Muslim north of the country.

The country has a judicial branch, the highest court of which 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 the Company and Allied Matters Act (CAMA) in Nigeria are:

- a company's inability to pay a debt exceeding N2,000.00 within three weeks after a demand for payment has been made;
- a wholly or partially unsatisfied court process issued in respect of a judgment debt;
- a court's determination after taking into account any contingent or prospective liabilities of the company that the company is unable to pay its debts; and
- where the company's liabilities exceed its assets.

What are the Tests for Financial Distress (Business Rescue or Administration)

There are no specific provisions under Nigerian law that regulate financially distressed, as opposed to, insolvent companies.

## 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.

### Formal Restructuring Procedures

The Companies and Allied Matters Act, Cap C20, Laws of the Federation of Nigeria 2004 deals with Arrangements and Compromise.

Application can be made, 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 of not less than 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 the fairness of same 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.

#### 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 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 for the duration of the company 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

#### At What Point Does the Liquidation Process Commence

With a members' voluntary winding up, members will propose a winding up and make a statutory declaration of "solvency", stating that, after enquiry into the affairs of the company that 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 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.

#### Extent of Court Involvement in the Liquidation Process

In Nigeria, 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 in 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. 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

From the date of the appointment of the receiver, the powers of the liquidator and directors, to deal with the property of the company over which the receiver is appointed, cease, until the receiver is discharged. Upon the appointment of the receiver, the floating charges crystallise and become fixed charges, thus 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 by the limitation period of

6 years for civil cases. 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

The employee claims that may arise are not with respect to wrongful termination but rather with regard to where employees' full benefits are not paid or are not paid in preference to all other claims. Where employee pension plans or schemes exist, claims for deficiencies in such plans will have priority in a 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.

#### Effect of Liquidation on Contracts

Most contracts provide for termination in the event of a 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

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-up 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.

#### Voidable Transactions

Transactions may be invalidated in the following circumstances:

- a floating charge created within three 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; and
  - 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 506 of CAMA provides for personal liability for any person, including directors, responsible for all or any debts or other liabilities of a company where it appears that the business of the company had been handled in a reckless manner or with intent to defraud creditors. Section 507 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

The Nigerian Companies and Allied Matters Act does not have any specific provisions aside from the insolvency and restructuring procedures discussed earlier. It is, however, important to note that 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.

#### 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 rights 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 view point, 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. 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 Available to Lenders

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.

#### Stamp Duty

Sections 4(1) & (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 duties paid may be evidenced on a document in various forms as permitted by law which include adhesive stamps, postage stamps, impressed or embossed by the 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 duties 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 cost are calculated in terms of the regulations issued by the Corporate Affairs Commission. The current 2012 Regulation provides for the following rates:

- for public companies, N20,000.00 (twenty thousand Naira) per one million of the consideration; and
- for private companies, N10,000.00 (ten thousand Naira) per one million Naira of the consideration.

The following penalties are applicable when registration costs are paid late:

- for a public company, N10,000.00 (ten thousand Naira); and
- for a private company, N5,000.00 (five thousand Naira).

If a mortgage or charge is on a parcel of land, registration cost is regulated by various States in the Federation and currently for Lagos State it is N5,000.00 (Five Thousand Naira) per one million of the consideration. It should be noted that before a mortgage or charge on land can be registered, payment of Governor's consent fee is required and for Lagos state it is currently 0.25% of the consideration.

**Requirements for the 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 offices.

#### 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. 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 as 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 the 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 when 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, business rescue practitioner or an insolvency practitioner.

# SENEGAL

MAME ADAMA GUEYE & ASSOCIÉS

## GENERAL INFORMATION

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### Type of Government

The government coordinates the nations politics under the direction of the first Minister. He is accountable to the President and the Parliament.

### 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 ceases and the liquidation will then commence.

### What are the Tests for Financial Distress (ie 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).

### Formal Restructuring Procedures

Business rescue

### 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. Both of them aim to sell the

assets of the company in order to pay the liabilities of creditors.

### Process Required to Commence a Liquidation

Friendly liquidation - the process begins with the company's decision to wind up and liquidate the company (resolution taken through a shareholder's extraordinary meeting). The resolution will appoint one or more liquidators to proceed to liquidate the company.

With a judicial liquidation (bankruptcy) - when a company is bankrupt, this means that it has financial issues and cannot pay off its liabilities. If this occurs, any creditor, the company or the court can apply for the liquidation of the company. The liquidation can also result from the failure of a "réglement préventif" (a situation aimed at avoiding the insolvency or the cessation of the activity of the company).

### At What Point Does the Liquidation Process Commence

The company commences with liquidation once the dissolution is effective, no matter the kind of liquidation concerned.

### Duration of the Liquidation Process

According to the law, 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, it may happen that the 3 year period is not observed and is extended.

### Extent of Court Involvement in the Liquidation Process

Unless there is an express convention between the parties or it is a friendly liquidation, the liquidation will be effected in terms of Chapter II of the AUSGIE. Art. 223. The decision to place the company into liquidation and the appointment of the liquidator will be in the discretion of the Judge. Moreover, the court decision that orders the liquidation shall also appoint one or more liquidators for a 3 year mandate which is renewable.

### Management of the Company Whilst in Liquidation

The role, responsibility and powers of the board of directors, the CEO/managing director shall terminate from the date of the court decision ordering the liquidation. From that date, the liquidator shall assume the role, responsibilities and powers related to the company. In general, the role, responsibilities and powers of the liquidator are to sell the company's assets, in order to pay the creditors and if any, distribute the outstanding balance to the shareholders.

### Filing of Claims

Two legal announcements informing the creditors of the liquidation must be made in a newspaper and in the Government Gazette (for secured creditors) and within a period of 30 days following the second announcement. In





this period all secured and unsecured creditors must provide the liquidator with their claims. Failing this, these claims will be rejected. The deadline is 60 days for creditors resident outside of the jurisdiction. Known creditors (including those on the balance sheet) and secured creditors that have not provided their claims, shall be notified in person by registered mail or any other written notice.

#### Factors Which Influence the Period of the Administration in a Liquidation

The liquidators replace the directors in managing the company in the liquidation process which could be a factor contributing to any delays in the process.

#### Effect of Liquidation on Employees

As the company ceases to trade as soon as the liquidation is effective, all the employees are dismissed.

#### Effect of Liquidation on Contracts

Unless otherwise stated, all contracts are terminated.

#### Effect of Liquidation on Shareholders

If available, shareholders will be paid from the outstanding proceeds of the assets after payment to the creditors.

#### Effect of Liquidation on Creditors

These are classified between secured and unsecured creditors. Payment of creditors is effected in accordance with their position in the classification of creditors. If there are sufficient assets to pay the creditors, all creditors will be paid in full. However, if the assets are insufficient to pay all the creditors, such creditors will get paid in proportion to their debts.

#### Pending Claims, Litigation and Arbitration

These proceedings are suspended, save for the claims of secured creditors.

#### Voidable Transactions

Usually the judge determines a period within which transactions that caused the financial difficulties for the company are to be declared void. Thus several transactions that had been signed in that period would be considered void. These transactions are as follows: donations, payment of debts and securities taken in respect of a debtor's goods. Moreover if those transactions caused prejudice to the creditors, they are also considered void. Examples would be gratuitous transactions completed in the 6 months prior to the insolvency and would include certain 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 to the

shareholders. The bankruptcy judge records this termination.

#### Director or Officer Liability

##### Civil Consequences

A court can pronounce the personal bankruptcy of the officers that committed serious offenses. This might include those officers that 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 of a jail sentence for fraudulent bankruptcy.

#### BUSINESS RESCUE / ADMINISTRATION

##### Process Required to Commence a Business Rescue

The company must be in an insolvent state. 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 15 days after the declaration of insolvency. Then, if the composition is accepted, the relevant court must pronounce the opening of the procedure before the expiration of a period of 30 days after such referral. The relevant court pronounces the commencement of the business rescue process if it notes the insolvency (18 months after the pronouncement of the decision of opening), 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 Business Rescue

18 months after the decision opening the procedure.

##### Extent of Court Involvement in the Business Rescue

The relevant court actively participates in the attempts to rescue the business by fixing the date of insolvency and pronouncing on the opening of the procedure. The court can designate a judge or any qualified person to obtain all the information on the financial situation of the debtor and the composition of the recovery that he proposes. The court will appoint a bankruptcy judge (responsible for ensuring the expediency of the procedure) and/or one or three receivers (in charge of representing the creditors).

**Management of the Company Whilst in Business Rescue**  
The receiver will assist the company in the business rescue process in order to allow the company to reach a normal financial situation.

#### Filing of Claims

Two legal announcements informing the creditors of the business rescue must be made in a newspaper and in the Government Gazette (for secured creditors) and after a period of 30 days following the second announcement, all secured and unsecured creditors must provide the business rescue practitioner with their claims. Failing this, these claims will be rejected. The deadline is 60 days for creditors living out of the jurisdiction. Known creditors (including those in the balance sheet) and secured creditors that have not provided their claims, shall be notified in person by registered mail or any other written notice.

#### Factors which Influence the Period of Business Rescue

During the process of business rescue, the receiver assists the directors. Directors cannot take any decision or act of alienation without the consent of the receiver.

#### Funding of the Company Whilst in Business Rescue

There is no restriction concerning the funding of the company in business rescue, save for the loan contracts that must be declared to the bankruptcy judge.

#### Effect of Business Rescue on Employees

The aim of the opening of collective proceedings is not to terminate the working contracts of employees. However redundancies for economic reasons can occur.

#### Effect of Business Rescue on Contracts

These continue in business rescue (supply agreements, leases, instalment sale agreements and/or facility agreements).

#### Effect of Business Rescue on Shareholders

Following the opening of the business rescue, all stocks, shares and securities owned by shareholders are blocked. They can be transferred only with the approval of the bankruptcy judge. The transferability of the social rights of the officers will be recorded with the Register of Commerce.

#### Effect of Business Rescue on Creditors

The decision of opening of the business rescue procedure suspends all of the creditor proceedings. Time is needed to identify the rights and claims against the company. The suspensions of the individual proceedings also apply to the creditors, which claims are secured by a general privilege or special security.

#### Pending Claims, Litigation and Arbitration

All these proceedings are suspended.

#### Effects of the Moratorium

The approval of the moratorium renders it binding on all the creditors whatever the nature of the claims.

#### Voidable Transactions

Usually the Judge determines a period within which transactions that caused the financial difficulties for the company are declared void. Thus, several transactions that had been signed in that period are considered void. These transactions are as follows: donations, payment of debts, and securities taken in respect of the debtor's goods. Moreover if those transactions caused prejudice to the creditors, they would also be considered void. Examples would be gratuitous transactions completed in the 6 months prior to the insolvency and would include certain onerous transactions.

#### The Business Rescue

The fair composition is set out in a plan (Concordat) and is composed as follows:

- terms for the continuation of the company's business;
- partial transfer of assets with precise indications of assets that need to be sold;
- persons entitled to execute the composition and all subscribed commitments necessary for the business rescue;
- terms of maintenance, financing and settlement of liabilities that existed prior to the decision of opening;
- employee redundancies that must be attended to; and
- replacement of the directors.

#### Voting on the Plan

The bankruptcy judge must give approval for the fair composition plan if he believes that its terms are realisable. The receiver presents a report on the state of the business rescue and presents a report on the situation in respect of the state of assets and liabilities of the company and his opinion on the composition. After submission of the report, creditors can vote on the plan. The vote by correspondence and procuration are admitted.

#### Cram Down on Creditors

The court can impose the plan on the creditors.

#### Implementation of the Plan

The plan will be implemented in accordance with the terms of the composition.

#### Discharge of Claims

As indicated in the approved composition.

#### Effect on Suretyships

A composition will have no effect on the suretyships that will remain unchanged and with full effect.



### How is the Process Terminated

The process terminates when the recovery of the company becomes effective, otherwise the procedure is converted into liquidation.

### What is the Status of the Company after Business Rescue

There are 2 possible outcomes: The company may recover to a normal financial situation or in the event of failure of the business rescue the process is converted into liquidation.

### Director and Officer Liability

#### Civil Consequences

The same consequences as applies to liquidations is applicable here.

## SECURITY

### Types of Security

Personal guarantees: guarantee and/or a letter of guarantee.

Property guarantees: 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.

### Taking of Security

Save for the personal guarantees, any other securities are taken through an agreement or a court order.

### Security Trustees or Special Purpose Vehicles

The security trustee is an agent responsible for the constitution, the inscription and the realisation 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; he also defends their interests.

### Most robust form of Security available to Lenders

It is the mortgage over real estate property.

### Registration of Security

The registration of tangible security is done on the request of the creditor, or the securities agent or the constituent with the Register of Commerce.

The registration of the general preferential of the public treasury, of the customs administration and the institution of social welfare, is done at the behest of the public accountant of the creditor's administration.



For the inscription of securities, the security trustee, the constituent or the public accountant must present to the court officer/office in charge of holding the trade registry, a registration form

containing details of the identification and the domicile of the parties, the nature and the date of the title generator of the security, the duration of the registration, the maximum amount of the secured debt and the designation of the encumbered assets.

Mortgages on real estate property are registered with the land register.

### Stamp Duty

Stamp duty: 2000 FCFA for the competent court office, inscription done by the security trustee, the constituent or the public accounting.

### Registration Costs

The calculation of the cost payable shall depend on many factors, such as the amount of the secured obligation. 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.

### Requirements for the Assignment or Transfer of Security

The security must be registered with 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 regarding its enforcement.

### Methods of Enforcement of Security

Based on an enforceable judgement, the security shall be sold on public auction where there is a failure to have a friendly settlement on the enforcement of the security.

### Problems Experienced when Enforcing Security

Objections can be raised either by the debtor, the guarantor or a third party that 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 court of the State of New South Wales, as the case may be, under the Transaction Documents may be enforced in Sénégal by suit on the judgment.

### Requirements for Recognition of a Foreign Judgment

A foreign judgment would be recognised and accepted by the courts of Sénégal 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 clear mistake of law or fact, or (iv) the judgment was contrary to public policy applicable in Sénégal.

# SOUTH AFRICA

WERKSMANS INC

## GENERAL INFORMATION

### Firm Information

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### Type of Government

The Republic of South Africa is a constitutional democracy with a nationwide election held every five years. The leader of the ruling party becomes the President of the Republic. The President is limited to two terms in office.

### Political System

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 rendered 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 for payment (commercial insolvency). The latter is the more appropriate test (and the test used to determine the status of a company or corporation) that very often a company or corporation will be factually insolvent but not commercially insolvent.

### What are the Tests for Financial Distress

A company will be financially distressed within the meaning of the Companies Act 71 of 2008 (New 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 (ie 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 attempts to contemplate 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 (Old Act) still regulate the liquidation process for insolvent companies notwithstanding the recent repeal of the Old 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

In terms of the New Act, a new procedure called business rescue has been introduced into our law for companies or corporations that are financially distressed. It is akin to the administration process in the United Kingdom and Chapter 11 proceedings in America. Furthermore, South African law also offers companies and corporations a process known as a compromise. In some instances, a company may wish to enter into a compromise with its creditors as an alternative to liquidation. This procedure is set out in section 155 of the New Act.

### Informal Insolvency or Restructuring Procedures

A company or corporation with a small number of manageable creditors can informally convene a meeting of its creditors and attempt to reach an agreement with them 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. 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.

## 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, charges and expenses incurred in the winding-up as well as a dividend to the creditors of the company. 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 Old Act, whilst the liquidation of solvent companies, is by and large regulated by the provisions of the New Act. Some provisions of the Old Act, relating to the administration of a liquidated estate and the position and powers of the liquidator are regulated by the Old Act. Insofar as an insolvent company is concerned, a company may be liquidated:

- voluntarily by the board of directors passing a resolution to that effect and by thereafter filing such resolution and various other forms and documents with the companies' office; or
- pursuant to a formal application having been made to court by (among others) a creditor, the company itself or one or more of its shareholders.

Insofar as a solvent companies are concerned, a solvent company may be dissolved by:

- a voluntary winding-up initiated by the company and conducted either by (a) the company; or (b) the company's creditors, as determined by the resolution of the company; or
- winding-up and liquidation by court order.

#### At What Point Does the Liquidation Process Commence

For insolvent companies, the Old 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 New Act provides that a voluntary liquidation will similarly commence when the resolution is filed with the companies office and that a compulsory liquidation will commence, in most instances, 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 thereafter winding-up proceedings, from start to finish, can take anything from 6 months to 2 years depending on the size of the estate and the nature and complexity of the transactions in which the company or corporation was involved.

#### 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 is required to recover assets disposed of by the company in circumstances where, inter-alia, they were not disposed of for value, 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 body 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

- by the liquidator or the creditors in a creditors' voluntary winding-up; or
- 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 the companies' office, 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.

#### Filing of Claims

In liquidation proceedings, creditors' claims are filed on affidavit and supported with evidence to indicate that the company is in fact indebted to the creditor. A creditor must file his or her claim with the liquidator at the first or second meeting of creditors. Thereafter, if the creditor wishes to file a claim he may ask to convene a 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.

#### 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 lodgment and approval of the liquidation and distribution accounts by the Master of the High Court serves to delay 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  
With 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 cancellation of employment contracts and in turn retrenchment. 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 is 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 the executory contracts.

#### 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

Creditor's 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 entitled to be 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 residue of the estate and are the last of the creditors to be paid.

#### Pending Claims, Litigation and 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 the companies office

- all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and

- 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 4 weeks after the appointment of the liquidator give the liquidator not less than 3 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.

#### 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.

#### 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 or close corporation 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 the companies' office for filing. A formal application can also be made to



court by affected persons (creditors, employees, shareholders) to place a company in business rescue (compulsory business rescue). Once the company is placed under business rescue, the order of the court must be provided to all affected persons notifying them of the commencement of business rescue. 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

A voluntary business rescue commences when the requisite documents are filed with the companies office. A compulsory business rescue, arising following an application made to court, commences once the papers have been lodged with the court.

#### Duration of Business Rescue

In accordance with the provisions of the New 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 or creditors, or legal advisors, prepare the necessary claim forms. There is no specific time period 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:

- the business rescue practitioner attempting to procure a purchaser for the business or assets;
- the need to obtain regulatory approvals in respect of a plan that has been adopted with the requisite support; and
- the fulfillment of any conditions precedent, following the adoption of a plan, or even a general lack of co-operation 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 injected into 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 creditors. Post-commencement financiers may also take security for their funding but only over unsecured assets belonging to the company in distress. Secured creditors retain their security during business rescue, which security can only be sold without the creditor's consent if the creditors claim is paid in full or with the creditor's consent if the claim will not be paid in full.

#### Effect of Business Rescue 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

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, 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 unilaterally with the sanction of the



court. Such cancellations should occur on an urgent basis and shortly after the practitioner is appointed.

#### Effect of Business Rescue on Shareholders

There can be no alteration to the classification or status of a company's issued securities unless same 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. If their rights are affected by a rescue plan, they get to vote on the plan.

#### 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 of legal proceedings. This is so as a consequence of the moratorium on legal proceedings against the company.

#### 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 (ie 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 on 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. 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' voting at value and 50 per cent of the independent creditors' in general vote in favour of the plan. If the plan affects the rights of shareholders, a separate vote of the shareholders is procured. A simple majority vote is required for a plan to be supported by shareholders. If a plan is rejected, affected persons or the practitioner himself can take steps to implement the plan (ie 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, 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 the companies' office.

#### Discharge of Debt

If a business rescue plan which 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 or guaranteed the obligations of a 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 compromised and where such claim is not preserved. If the principal claim is compromised on the suretyship, the suretyship claim will fall away unless it is drafted in such a way that it remains extant.



## How is the Process Terminated

### Business rescue proceedings end when

- 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;
- the business rescue practitioner files a notice of termination of business rescue proceedings with the companies office; and
- the business rescue plan has been proposed and rejected and no affected person has acted to extend the proceedings in any manner contemplated by the New 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 Business Rescue

If a business rescue plan is adopted and implemented in accordance with its terms, the company will continue to trade and will terminate its business rescue process. 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.

## SECURITY

### Types of Security

Security can be taken over immovable property, movable assets, intellectual property as well as financial instruments (i.e. shares and debt securities).

### 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 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 pledgor 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 (i.e. perfection of the bond) 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. If perfected, however it confers a secured right on the mortgagee.

### 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's security interest. This bond in and of itself creates a secured right for the mortgagee.

### 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 against the lessee's property to satisfy payment of the arrear.

#### Guarantees

Guarantees are a form of security generally used in lending transactions where a guarantor undertakes to answer for the payment or performance of 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

##### Aircrafts

The Recognition of Rights in Aircraft Act, 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 a special notarial bond cannot be created on 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. A general notarial bond or special notarial bond cannot be created or registered over a ship.

##### Intellectual Property

- trade marks 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, 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 applications for patents can be taken by a hypothecation according to the Patents Act, or by a cession in security. Security over unregistered patents is granted by a cession in security; and
- security over copyright is created by a cession in security.

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.

#### Security SPVs

Security SPVs are commonly used, and considered the most robust form of security available to secured creditors, where there are multiple lenders. 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.

#### 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



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

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 the 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.

#### Stamp Duty

Duty is payable for the registration of a mortgage, special notarial and general notarial bonds, which duty is dependent on the value of the asset and is prescribed by tariff. However, conveyancers may offer a discount to the recommended rate, particularly where the value of the asset is significant.

**Requirements for the Assignment or Transfer of 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 the 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

The most prominent instances where security becomes vulnerable are where expropriation by the Government occurs, where compromise is reached between a company and its creditors in terms of the New Act, business rescue proceedings are instituted and insolvency procedures are commenced.

According to the Expropriation Act, where ownership of property is expropriated in terms of the act on the date of exportation, 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.

The Insolvency Act allows the court to set aside dispositions made by an insolvent debtor in certain instances. In addition the Insolvency Act, 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.

#### 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.

#### Exchange Control

Payments to foreign creditors arising from loan agreements or security documents require exchange control approval by the South African Reserve Bank (SARB) at the time the loan is granted, or the security is given. Where exchange control approval has been granted, an authorised dealer in foreign exchange will permit the offshore distribution of the proceeds of any appropriate realisation. Approval generally takes three to four weeks from the date of submission of the application, provided, of course, that the SARB is satisfied that full disclosure has been made and that all local exchange control requirements have been met. It is possible to obtain a response from the SARB within a few days should an urgent application for approval be required, however, cogent reasons for such urgency would need to be furnished

#### Competition

Competition approval may be necessary where the secured creditor and debtor are required to notify the transaction if it falls within the thresholds set out in the Competition Act, and the enforcement of security may result in the competitors engaging in collusive conduct or where one competitor becomes dominant in that market. It is therefore necessary, when considering which security is accepted or requested by the secured creditor to consider if it may necessitate any competition law approvals or notifications.

#### Financial Assistance Requirements

The securing of any debt or obligation by a creditor will constitute the provision of financial assistance under the New Act where a debtor and/or guarantor/security provider are related or inter-related persons. The New 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 an 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 New Act, *inter alia*, a special resolution of the debtor's shareholders will be required and the board of directors will be required to be satisfied that the debtor will meet the requirements of the solvency and liquidity test as set out in the Act.

#### RECOGNITION OF FOREIGN JUDGMENTS

##### Instances in Which Your Court Will Recognise 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.

##### Requirements for the Recognition of a Foreign Trustee, Business Rescue Practitioner or 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 recognised by a court of law in South Africa before he is entitled to act. Our law does, and has accordingly, recognised foreign representatives.

# SWAZILAND

CLOETE/HENWOOD-ASSOCIATED

## GENERAL INFORMATION

### Firm Information

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### Country Information

Swaziland is an independent monarchy led by King Mswati the 3rd together with a parliament which enacts and prescribes all laws and customs. The Kingdom of Swaziland covers 17,363 square kilometres and is nestled between South Africa on its north west and southern borders and Mozambique to the east. Swaziland has a unique system of governance based on the Westminster Parliamentary System of governance.

### Type of Government

The system of government for Swaziland is a democratic participatory Tinkundla based system which emphasises devolution of state power from the central government to Tinkundla areas and individual merit is a consideration for election to public office.

### Political System

Swaziland is a constitutional monarch modelled on the Westminster Parliamentary System of Government. The legislature, executive and judiciary each play separate roles. Members of parliament are appointed through an intricate process of elections at Tinkundla centres and through appointment by the monarch.

### Legal System

Swaziland's legal system is based on a constitution which was promulgated on 8 February 2006 and in terms of the constitution, the Roman Dutch Common Law is the law which applies in Swaziland. Certain principles of Swazi Customary Law are recognised, adopted and applied as part of the law of Swaziland in so far as such laws are not contrary to public policy or contra bonos mores.

## TESTS FOR INSOLVENCY

### What are the Tests for Insolvency (ie Liquidation)

The major test for insolvency, and a ground for which a company may be placed into liquidation, is if the company is unable to pay its debts. A company is solvent if it has sufficient assets to cover its liabilities in full, and a

company is insolvent if it has insufficient assets to cover such liabilities. A creditor may on that ground apply for such company's liquidation.

In terms of Section 288 of the Companies Act No. 8/2009 (Companies Act) a company is deemed unable to pay its debts if one or more of the following occurs:

- a creditor to whom the company is indebted in a sum not less than E5,000.00 has served on the company, at its registered office, a demand requiring the company to pay the sum so due and the company after 21 days has failed to pay the sum to the satisfaction of the creditor; or
- a judgement of a court has been issued in favour of a creditor and is returned by the sheriff of the court with the endorsement that the sheriff has not found sufficient assets to satisfy the judgement debt; or
- if it is proven to the satisfaction of the court, by any other means, that the company is unable to pay its debts.

### What are the Tests for Financial Distress

Swaziland does not recognise the concept of business rescue or administration. However Chapter XV of the Companies Act recognises the concept of judicial management. In that regard where a company, by reason of mismanagement or any other cause:

- is unable to pay its debts or meet its obligations; and
- has not become a successful concern although there is a reasonable probability, that if placed under judicial management it will be able to pay its debts or meet its obligations and become a successful concern, the High Court may grant a judicial management order in respect of that company.

In terms of such order the court appoints a provisional judicial manager who, inter alia, assumes management control of the company and seeks to recover and reduce into his or her possession all the assets of the company, all of which is conducted under the supervision of the Master of the High Court.

## INSOLVENCY AND RESTRUCTURING PROCEDURES

### Formal Insolvency Procedures

Insolvency is normally commenced by an application to the High Court for a provisional order for the winding up the company and for the appointment of a provisional liquidator. The court would then issue an order calling upon any interested persons to show cause on a specific date why the order confirming that the liquidation and the appointment of the liquidator should not be made final. The provisional order is served upon the company, the Registrar of Companies and the registrar of Deeds and it is also published in the Government Gazette and a newspaper circulating in Swaziland. Once the order has been



made final, the liquidator then applies to the Master of the High Court to determine the amount of security to be furnished. Once the security has been determined and put up by the liquidator, the liquidator then has the general duty of recovering and taking into possession all the assets and property of the company, realise same, pay all the creditors and distribute the balance (after payment) to the creditors who are entitled to payment.

#### Formal Restructuring Procedures

In Swaziland, a company which is experiencing temporary financial difficulties can be placed under judicial management. In terms of this procedure an attempt is made, by replacing the existing management of a company with a judicial manager, to overcome the problems of 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 into liquidation whilst the company is under judicial management. Judicial management is for a specific period which normally lasts 60 days unless extended by the High Court. To date there has not been any company that has been placed into judicial management and the use of this procedure is thus rare.

#### Informal Insolvency or Restructuring Procedures

There are no recognised informal insolvency or restructuring procedures in Swaziland, although there is nothing to stop a company from entering into negotiations with his creditors. Creditors are, however, cautioned when adopting this approach as it would be tantamount to an act of insolvency in terms of section 8 of the Insolvency Act.

### LIQUIDATION

#### What is the Aim of Liquidation

The aim of liquidation is to bring the company to an end. The company's affairs are administered prior to its dissolution by locating its assets, realising them and applying them, firstly to the payment of creditors of the company in accordance with their order of preference and thereafter distributing the residue (if any) among the shareholders of the company in accordance with their rights. A liquidation would normally result in the realisation and distribution of the company's assets. During the course of the liquidation, a scheme of arrangement may be put in place to compromise the claims of creditors. Such scheme, if approved by the creditors, the Master of the High Court and the High Court itself, would result in a takeover or restructuring of the company in liquidation.

- the company itself;
- one or more of its creditors;
- one or more of its members; or
- jointly by any or all of the parties mentioned above.

#### At What Point Does the Liquidation Process Commence

A liquidation commences upon presentation of the application to the High Court in terms of Section 291 of the Companies Act.

#### Duration of the Liquidation Process

A liquidation, in terms of the Companies Act should be finalised within a period of 6 months but in practice this does not happen and often liquidations take anything between one year to 5 years to complete. However, at the end of the initial 6 month period the liquidator is obliged to apply for an extension of time from the Master of the High Court to continue with the liquidation process.

#### Extent of Court Involvement in the Liquidation Process

Once the court has granted an order for the liquidation of a company, there is very little involvement of the court thereafter. The liquidator concludes the winding up process under the supervision of the Master of the High Court. However, any party is at liberty to approach the court at any time should it be aggrieved with any decision of the liquidator and/or Master of the High Court. However, there are certain instances where the involvement of the court is required, such as the sanctioning and implementation of a scheme of arrangement, the removal of errant liquidators and the settlement of any disputes which may arise within the liquidation and winding-up process.

#### Management of the Company Whilst in Liquidation

Whilst under liquidation, the entire management of the company is placed under the control of the liquidator. The board of directors of the company ceases to play a role in the management of the company. However, the directors are obliged to co-operate with the liquidator and to provide him all such information that he requires. A failure to do so would be visited with criminal sanction.

#### Filing of Claims

All creditor's claims must be lodged in the format as set out in the Companies Act and proven by affidavit. All creditors must lodge their claims prior to the holding of the first meeting of creditors. Any creditor who has not proven its claim at the first meeting will still be entitled to do so at the second meeting of creditors. Creditors meetings are crucial for the administration of the liquidated estate. At the creditors meeting, creditors are provided with an opportunity to prove their claims and once proven, the creditors are then entitled to participate in the liquidation process and to vote on any decision put forward for adjudication by the liquidator, a creditor or the Master of the High Court. The first meeting of creditors is normally convened as soon as possible after the grant of the

#### Process Required to Commence a Liquidation

A liquidation based on insolvency is always commenced by an application to court. That application may be launched by either:



liquidation order. The meeting is called on not less than ten days' notice. The second and any subsequent meetings are held at any time whenever so required, duly called by the Master of the High Court or if partitioned by a creditor or creditors representing one fourth of the value of all claims proven against the estate. All meetings of creditors must be called by notice in the Government Gazette, publication in one of the two newspapers circulating in Swaziland. The meeting must be held in a place that is accessible to the public.

#### Factors Which Influence the Period of the Administration in a Liquidation

The major factor that influences administration of a liquidation in Swaziland is the delays occasioned by the office of the Master of the High Court. All meetings must be carried out with the approval of the Master of the High Court and often the calling of meetings of creditors and the obtaining of approvals in turn takes extremely long.

#### Effect of Liquidation on Employees

The liquidation of the company results in the automatic termination of contracts of employment. As a consequence thereof, employees are entitled to lodge claims for any unpaid salary and a portion thereof (E400.00) is secured and preferred. The balance is unsecured.

#### Effect of Liquidation on Contracts

Unless regulated by statute, a liquidation does not cause a contract to be terminated. Upon the *concurso creditorium* coming into existence, the liquidator is given a choice to continue with the contract or to terminate it. However, the other party is not entitled to hold the liquidator to the contract but can only give the liquidator a period, of normally six weeks, to make a decision whether or not he intends to be bound by the contract. A lease agreement, in particular, is not terminated by the liquidation of the company, however, the liquidator is bound to act timeously and give notice as to whether or not he intends to meet his obligations in terms of that contract. Where the company is a lessee and, the contract is prematurely terminated, the creditor/lessor is entitled to lodge a claim as a concurrent creditor.

#### Effect of Liquidation on Shareholders

Shareholders would be entitled to claim any residue of the funds that remain after assets have been realised and the secured and preferent claims paid.

#### Effect of Liquidation on Creditors

All creditors are obliged to lodge a claim with the liquidator by affidavit in the required form. Any claim not filed in its proper format would not be recognised as a proven claim. A creditor's legal position vis-a-vis the insolvent estate would be that as determined prior to the *concurso creditorium*. Any claim secured by a mortgage bond or any other real right of security would rank as such in the

liquidation.

#### Pending Claims, Litigation and Arbitration

The liquidator has in terms of his general powers the right to elect either to proceed with the opposition or enforcement of such claim, compromise them or bring them to a conclusion in one way or another. The liquidator steps into the shoes of the directors of the company and is effectively the controlling mind of the company subject to the directions of the creditors and the Master of the High Court.

#### Voidable Transactions

##### Dispositions Without Value

Every disposition without value may be set aside by the court if it was made by an insolvent company:

- more than two years before the liquidation and it can be proved that the liabilities of the company exceeded its assets immediately after the disposition was made; or
- within two years prior to the liquidation of a company if the person who benefited is unable to prove that the company's assets exceeded its liabilities immediately after the disposition was made.

##### Voidable Preference

Every disposition of property made by the company not more than six months before the liquidation which has the effect of preferring one creditor above another may be set aside by the court if the insolvent company's liabilities exceeded the value of its assets immediately after the disposition was made.

##### Undue Preference

Where the company disposes of property belonging to it at a stage where its liabilities exceed its assets and with the intention of preferring one creditor above another, should the company be placed into liquidation, and upon an examination of the transaction, the High Court may set aside such disposition.

##### Collusive Dealing

Any act by the company prior to its liquidation, whereby it, in collusion with another person, disposed of property belonging to it in a manner which had the effect of prejudicing its creditors or preferring one creditor above another can be set aside by the High Court.

##### Voidable Sale of Business

In terms of section 34 of the Insolvency Act where a company alienates or disposes of a business belonging to it and the company is placed into liquidation within a period of six months of such alienation, the alienation shall be void and may be set aside at the instance of the liquidator unless a notice has been published in two issues of a newspaper



circulating in Swaziland and the Government Gazette informing the public that the disposition will occur within a period of not less than ten days and not more than thirty days after such publication.

#### Debt Set Off

Where a set off has occurred and a company is placed into liquidation within a period of 6 months of that set off with another entity, the set off can be set aside at the instance of the liquidator. Where a mortgage bond, subject to certain exceptions, is passed for the purpose of securing a previously unsecured debt and was incurred more than two months prior to the lodging of the bond for registration, such mortgage bond shall not confer any preference if the company is placed into liquidation within a period of 6 months from the date of the lodgement of that mortgage bond.

#### How is the Liquidation Process Terminated

As soon as the liquidator has lodged his account with the Master of the High Court and that account has been approved, the liquidator must distribute the company's assets in the prescribed order of preference. If there are contributions payable by creditors who have proved their claims, these must be collected by the liquidator. The liquidator must then give notice in the Government Gazette of the confirmation of his account and must state in the notice whether a dividend is being paid without a contribution. Once a distribution has been made in terms of the account the liquidator then seeks release of his duties by the Master of the High Court.

#### Director or Officer Liability

##### Consequences of Director or Officer Liability

##### Civil Consequences

A director can be held personally liable for any damage that the company may suffer arising from any act of negligence, default, breach of duty or breach of trust by that director. In terms of section 360 to 364 of the Companies Act, where in a winding up it is determined that a director has misapplied, retained or become liable or accountable for any money or property of the company or has been found guilty of a breach of faith in relation to the company, the High Court, may on application of the Master of the High Court, order that director to repay or restore the money or property together with interest upon terms as the court thinks just. Where a director is found to have carried on the business of the company recklessly or with intent to defraud creditors a court may on application of the Master of the High Court or the liquidator, order that person to be personally responsible for the debts of the company as the court may direct.

##### Criminal Consequences

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 may be liable on conviction to a fine not exceeding E100.00 or in default of payment thereof to imprisonment not exceeding six months or both.

#### BUSINESS RESCUE / ADMINISTRATION

Swaziland legislation (the Companies Act and the Insolvency Act) does not recognise the concept of business rescue. However, the Companies Act recognises apart from a winding up, that there is also the possibility of placing a company which is experiencing temporary financial difficulties, under judicial management.

Judicial management is a procedure whereby an attempt is made to enable a company which has suffered a temporary setback because of mismanagement or other special circumstances, to overcome these problems and hopefully become successful once again. The process entails an application to court which has the effect of replacing the existing management of the company with a judicial manager whose task is then to attempt to assist the company to trade out of its financial difficulties. A moratorium is placed on the company's debt and the creditors are prevented from instituting legal proceedings including winding up proceedings whilst the company is under judicial management.

#### SECURITY

##### Types of Security

There are various types of securities which can be taken in Swaziland. By security in this context we mean property of the insolvent estate under which a creditor has a preferent right. The types of security are:

- mortgage bonds;
- land lord's legal hypothec;
- pledge; and/or
- right of retention or lien.

Any security that a creditor would have against a company in liquidation must be taken (and if need be registered) prior to the liquidation order being granted. Special care must be taken with regard to mortgage bonds which must be registered at least 6 months prior to the liquidation order, failing which it will not secure a preference right.

##### Taking of Security

In the ordinary course, in order to confer a real right, security must be registered at the office of the registrar of deeds. Only certain securities such as the landlords legal hypothec and a right of retention such as a lien, which arise by operation of law, do not require the prior registration of the security. However, in all such instances where the security arises by operation of law the security itself must, *inter-alia*, be in the possession of the creditor.

Most robust form of Security available to Lenders

The most robust form of security in Swaziland is a mortgage bond in respect of immovable property and deeds of hypothecation in respect of movables. In order to confer a preference, these securities must be registered at the office of the registrar of deeds prior to the company falling into liquidation.

#### Registration of Security

The registration of a security requires the credit receiver to execute a power of attorney, which authorises a conveyancer to appear and register the security at the office of the registrar of deeds. The credit receiver would then sign the pledge or mortgage bond documents which are then lodged for registration at the deeds registry. Stamp duty and transfer duty are payable to the Swaziland Revenue Authority, calculated on a gazetted tariff sliding scale depending on the value of the security.

#### Stamp Duty

Stamp duty is payable on the registration of any mortgage bond, pledge or deed of hypothecation by the person giving or passing the bond (the credit receiver). The stamp duty is payable at the time of execution at the office of the registrar of deeds and payment is made to the revenue office. The stamp duty payable is calculated on a sliding scale as follows:

- where the amount of the debt does not exceed E4,000.00 (0.4%), E0.40c for every E100.00 or part thereof;
- where the total amounts of the debts secured exceeds E4,000.0 but does not exceed E6,000.00, E0.60c (0.6%) for every E100.00 or part thereof; and
- where the total amount of the debt secured exceeds E6,000.00 (0.75%), E0.75c for every E100.00 or part thereof;

#### Registration Costs

The costs of registration of security are normally borne by the credit receiver. These costs are, on a sliding scale, and are detailed at the end of this chapter.

These costs are paid for by the credit receiver to the Swaziland Revenue Authority and must be paid for prior to the registration. Proof in the form of a transfer duty receipt must be produced to the registrar of deeds. In addition, there are deeds office levies in the sum of E100.00. All costs are payable to the Swaziland Revenue Authority and proof of payment needs to be provided before registration can be effected.

#### Requirements for the Assignment or Transfer of Security

In order to assign or transfer registered security, the

parties need to consent thereto in writing and a formal deed of assignment/transfer prepared by a conveyancer or notary public needs to be signed. Thereafter, the document is executed and registered at the deeds office by a conveyancer.

#### Instances in which Securities might be Vulnerable to Attack

The registration of a mortgage bond or real security confers real security in favour of the credit provider. Once registered, the security cannot be attacked unless there is an allegation of fraud or collusive dealing by the directors in the company prior to it falling into liquidation. The Constitution of Swaziland recognises parties' rights to own property and the government has recognised the protection of registered security as one of the pillars to guarantee a stable economy.

#### Methods of Enforcement of Security

The ordinary manner of enforcing security is by way of an application to court seeking an order perfecting that security and authorising the execution thereof. Under no circumstances can security which secures immovable property be realised without an order of court. In certain circumstances where the parties have agreed, it is possible to realise security over movable property without an application to court. In such circumstances the debtor would sign a voluntary surrender form, hand that form to the credit provider and the credit provider would then be in a position to realise the asset. The disposal of that asset must be done on an arms-length basis and in a transparent manner (ie by public auction or private treaty).

#### Problems Experienced when Enforcing Security

One of the problems experienced when enforcing security is the length of time that it often takes to obtain an order authorising the sale of security, particularly where the debtor raises spurious defences. This can result in a number of delays in the court process. Another problem arises when the security is of a specific nature, highly specialised and cannot be disposed of easily. These result in delays in disposing of the security and these delays then result in further costs such as storage costs being incurred. Another problem that can be experienced by a foreign credit provider (although this is rare but has happened) is where the credit receiver hides or disposes of the security. This may result in the security being "lost" in the sense that the credit receiver cannot find the



security in order to take possession of it and realise it. It is imperative therefore that the credit provider makes sure that its security is kept safe.

#### Financial Assistance Requirements

The situation regarding financial assistance by one company to another has not been judicially determined in Swaziland. However, where financial assistance is to be given by one entity to another, this can only be done in circumstances where the company granting financial assistance is the holding company and the company being assisted is a subsidiary. Such financial assistance can only be done by way of a special resolution taken by the shareholders.

### RECOGNITION OF FOREIGN JUDGMENTS

#### Instances in which Your Court Will Recognise a Foreign Judgment

The High Court of Swaziland will in all instances, subject to certain requirements, recognise a judgment or order of a foreign court. Upon recognition of such order or judgment, such order or judgment can be executed upon in Swaziland and has the status of an order of judgment of the High Court of Swaziland.

#### Requirements for Recognition of a Foreign Judgment

In order for the Swaziland courts to recognise a foreign judgment, it must be demonstrated to the court that:

- the foreign court that issued the order was seized with jurisdiction (ie that it had the appropriate jurisdiction over the parties and the issues when the proceedings were instituted in that forum and that it could validly issue the judgment that it issued); and
- the order or judgment is final and has not been appealed against nor is there any review or other proceedings in motion, the effect of which is to challenge or set aside that judgment.

The normal manner of enforcing a foreign judgment in the Swaziland courts is either by way of an application to court or a provisional sentence summons.

governed by the Recognition of External Trustees and Liquidators Act No. 51 of 1932. In terms of this Act, the High Court may order the recognition of any external trustee or external liquidator who has:

- determined in writing a place in Swaziland as his *domicilium citandi*;
- produced to the court his or her letter of appointment as an external trustee or liquidator.

Thereafter, the property in Swaziland belonging to the insolvent company will vest in that external trustee or liquidator. Once the High Court has ordered the recognition of the external trustee or liquidator, the Registrar of the High Court is obliged to transmit a copy of that order to the Master of the High Court, the Registrar of Deeds and to the Registrar of Mining Rights. Thereafter the recognised liquidator or trustees would realise the company's assets in Swaziland, under the supervision of the Master of the High Court.



Requirements for the Recognition  
of a Foreign Trustee, Business  
Rescue Practitioner or Insolvency  
Practitioner  
The recognition of a foreign trustee is

Registration Costs (e.g. the calculation of the costs payable, to whom the costs are payable, when and where the costs are payable, proof of payment, the party responsible for the payment etc.)

The costs of registration of security are normally borne by the credit receiver. These costs are, on a sliding scale, as follows:

COLUMN A	COLUMN B	COLUMN C
Purchase Price of Value Property or Amount of Bond	Fee for Conveyance of Immovable Property	Fees for Mortgage Bonds
E400 or less	E/R 234.00	E/R 156.00
Over 400 up to and including E1,000.00	273.00	210.00
Over E1,000 up to and including E2,000.00	351.00	120.00
Over E2,000 up to and including E4,000.00	429.00	136.50
Over E4,000 up to and including E6,000.00	507.00	312.00
Over E5,000 up to and including E8,000.00	646.00	351.00
Over E8,000 up to and including E10,000.00	585.00	380.00
Over E10,000 up to and including E12,000.00	624.00	429.00
Over E12,000 up to and including E14,000.00	663.00	468.00
Over E14,000 up to and including E16,000.00	702.00	506.00
Over E16,000 up to and including E18,000.00	741.00	546.00
Over E18,000 up to and including E20,000.00	740.00	585.00
Over E20,000 up to and including E25,000.00	858.00	644.80
Over E25,000 up to and including E30,000.00	939.00	702.00
Over E30,000 up to and including E35,000.00	1014.00	761.00
Over E35,000 up to and including E40,000.00	1092.00	819.00
Over E40,000 up to and including E45,000.00	1170.00	878.80
Over E45,000 up to and including E50,000.00	1248.00	936.00
Over E50,000 up to and including E60,000.00	1326.00	995.40
Over E60,000 up to and including E70,000.00	1404.00	1053.00
Over E70,000 up to and including E80,000.00	1482.00	1112.80
Over E80,000 up to and including E90,000.00	1560.00	1170.00
Over E90,000 up to and including E100,000.00	1638.00	1229.40
Over E100,000 up to and including E150,000.00	1833.00	1346.80
Over E/R150,000 up to including E/R200,000	2028.00	1463.40
Over E200.000	2028.00	1463.80
	For the first E200,000 plus E300.00 per E100,000	For the first E200,000 plus E300.00 per E100,000

These costs are paid for by the credit receiver to the Swaziland Revenue Authority and must be paid for prior to the registration. Proof in the form of a transfer duty receipt must be produced to the registrar of deeds. In addition, there are deeds office levies in the sum of E100.00. All costs are payable to the Swaziland Revenue Authority and proof of payment needs to be provided before registration can be effected.

# TANZANIA

MKONO & CO ADVOCATES

## GENERAL INFORMATION

### Firm Information

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### Country Information

The Republic of Tanzania, is located on the East Coast of Africa.

### Type of Government

Democratic Republic.

### Political System

Multiparty System.

### Legal System

Common Law.

## TESTS FOR INSOLVENCY

### What are the Tests for Insolvency

The test for insolvency in Tanzanian law is determined by the inability of a company to pay creditors.

### What are the Tests for Financial Distress

In Tanzania, a company will be held to be financially distressed if the company is likely to become unable to pay its liabilities as and when they fall due for payment.

## INSOLVENCY AND RESTRUCTURING PROCEDURES

### Formal Insolvency Procedures

In Tanzania, there are two insolvency procedures available - liquidations, which necessitate the appointment of a liquidator or receivership, which necessitates the appointment of a Receiver by a secured creditor/s. Liquidation can be commenced voluntarily at the instance of creditors or shareholders or involuntarily upon an application to court.



### Formal Restructuring Procedures

The only formal restructuring procedure available in Tanzania is that of administration which entails the appointment of an administrator by the High Court.

### Informal Insolvency or Restructuring Procedures

There are no such informal procedures practiced in Tanzania though nothing prohibits a debtor from engaging in a compromise with its creditors.

## LIQUIDATION

### What is the Aim of Liquidation

The point of liquidating a company in Tanzania is to convert all the non-liquid assets of the company into cash, to determine the precise liabilities of the company and to distribute the liquid assets of the company to creditors and thereafter wind up the business and affairs of the company. A receiver is appointed to protect and collect the assets of an insolvent company that is secured under a charge such as a debenture or mortgage and thus it applies in favor of secured creditors and preferential creditors.

### Process Required Commence Liquidation

*Involuntary liquidation* - a petition is presented to the High Court for the commencement of liquidation. If the court orders the liquidation, the court would appoint the liquidator. Usually the petitioner to the court does not name a liquidator in the papers who is then appointed by the court but during the course of the hearing he may propose a suitable person to be considered, amongst others, by the court. The liquidator thereafter reports to the court at all stages of the liquidation process.

*Voluntary liquidation* - by creditor, a meeting of creditors of the company is convened and at such meeting a resolution is passed to liquidate the company. The creditors (through a creditors committee) appoint or nominate the liquidator in the resolution. With regard to a member's voluntary liquidation, a special meeting of members is convened to resolve to liquidate the company by a liquidator appointed by the members and who is accountable to the members for the final proceeds of the realization of company assets and the distribution of proceeds to preferential and non-preferential creditors.

### Process Required to Commence a Receivership

Receivership is commenced by secured creditors. Upon default, creditor/s will serve a notice of default on the borrower. A receiver is appointed through a deed of appointment. Soon after appointing a receiver and not beyond one calendar week, a notice of appointment has to be filed with the Registrar of Companies and immediately served on the borrower. The notice of appointment ought to be advertised in selected widely read newspapers. The receiver takes over secured assets as soon as possible after

his appointment.

#### At What Point Does the Liquidation Process Commence

The liquidation process in Tanzania, no matter how it is initiated, commences on the date on which a liquidator is appointed.

#### Duration of the Liquidation Process

There is no specific duration determined by law for the liquidation as it may last anything from a few months to a year or a few years depending on the complexity of company assets that require disposal, the difficulty experienced in recovering the debts of the company and any pending litigation processes. The same applies to receiverships.

#### Event of Court Involvement in the Liquidation Process

The court is involved in involuntary liquidation only and not in voluntary liquidation. However, in the event of a dispute arising in the process of a liquidation or receivership the disgruntled party may seek interference of the court for guidance or even to order removal of a liquidator or receiver and replacement thereof or otherwise as the court may deem fit in the interests of upholding the law.

#### Management of the Company Whilst in Liquidation

Once a liquidator or receiver is appointed, he steps into the shoes of the directors and the directors cease to function as directors. They may, however, at the request of the liquidator, assist the liquidator in winding up the affairs of the company either for, or for no, charge.

#### Filing of Claims

The Companies Act, Chapter 212, of the Laws of Tanzania (Chapter 1V) provide for proof and the ranking of claims in every mode of winding up. On the other hand the insolvency regulations in Tanzania regulate the filing of claims, the timing for such and the adjudication process for the proof of claims. Claim forms are distributed by the liquidators during or immediately after the first creditors' meeting following the announcement in any number of newspapers as the liquidator or receiver may prefer and the Government Gazette, of the appointment of a liquidator for such company. The forms have to be filled out with precision, they must describe the nature of the claim and it must be supported by documentary proof. The acceptance of a claim, and the payment of a dividend, is determined by the liquidator in accordance with the law on the ranking of creditors and the availability of funds. A creditor who is not satisfied with any decision of a liquidator may apply to court, and if successful, the court may reverse a decision or order a different payment. In the case of receiverships, the Companies Act Chapter 212 of the Laws of Tanzania provides for the ranking of claims. Unlike liquidators who are empowered to rank and pay all

creditors as ranked, receivers are only empowered to pay preferential and secured creditors.

#### Factors Which Influence the Period of the Administration in a Liquidation

There are a number of factors that may influence the duration of the liquidation or receivership process, including the complexity involved in the disposal of an asset, the availability of buyers and cash flow of the business, the recovery of debts from debtors, and any litigation continuing between the liquidator and creditors or debtors of the company, for instance.

#### Effect of Liquidation on Employees

The employment agreement with employees is terminated from any date following the appointment of liquidator or receiver and hence from the commencement of the liquidation process as the liquidator or receiver in his wisdom may determine. Once appointed the receiver is only bound to pay salaries and emoluments for work done, after his appointment, statutory notice and repatriation of the staff to their places of recruitment. The rest of the employees' claims such as untaken leave pay and overtime payments have to await realization of the assets. The receiver or liquidator will pay employee claims according to the ranking of claims as provided for by the Companies Act. Employees have certain preferential payments over other non-preferential claims that are in respect of all wages or salaries for services rendered to the company four months prior to the appointment date.

#### Effect of Liquidation on Contracts

The commencement of liquidation or receivership in itself gives the appointed receiver or liquidator the right to terminate any agreement the directors or management may have entered into such as supply agreements, leases, installment sale agreements, facility agreements and utility contracts. However, the receiver or the liquidator has a discretion as to whether or not to terminate a contract and if so, when.

#### Effect of Liquidation on Shareholders

Shareholders lose their investment in the company and their claims are subordinated to those of the secured creditors of the company. In liquidation, shareholders are entitled to a dividend on a pro rata basis, like all unsecured creditors. Dividends are not available in receiverships where only preferential and secured claims are payable.

#### Effect of Liquidation on Creditors

Recovery of amounts due to creditors in receiverships and liquidations is solely dependent on the realization of the company's assets and the order in which the claims of creditors rank in accordance with the law.

## Pending Claims, Litigation and Arbitration

Insofar as pending claims, litigation and arbitration proceedings are concerned, the liquidator becomes the defendant, plaintiff, claimant or respondent in such matters. The claim of a creditor, which is dependent on the outcome of the litigation, if an order is awarded in its favour, becomes an unsecured creditor. The liquidator or receiver has a discretion as to whether or not he wishes to continue with any litigation in which he is the plaintiff or claimant.

## Voidable Transactions

Certain transactions may be declared to be void by the liquidator unless they are proved by the relevant party to be worthy of being affirmed. The liquidator may apply to court for declaratory orders to determine whether or not a transaction should be declared void or affirmed.

## How is the Liquidation Process Terminated

Notification to the Registrar of Companies that the company has been fully wound up by presentation of final receipts and accounts to the Registrar of Companies so that the Registrar can publish that the company has been wound up in the Government Gazette and deleted from the register of companies.

## Director or Officer Liability

Recoverable by the liquidator like other debts.

## Consequences of Director or Officer Liability

### Civil Consequences

Voluntary payment or they are sued for recovery.

### Criminal Consequences

Reported to relevant government authorities for requisite action.

## BUSINESS RESCUE / ADMINISTRATION

### Process Required to Commence an Administration

An application is brought before the High Court for the issuing of an administration order.

### At What Point Does the Administration Process Commence

When the company is likely to fail or has failed to pay its liabilities.

### Duration of Administration Process

There is no specific period but the court may prescribe a specific time limit.



### Extent of Court Involvement in the Administration Process

The court is involved at application stage

and if requested for guidance from time to time.

Management of the Company Whilst in Administration  
Rescue practitioner assumes the functions of the directors and the functions of the directors become dormant.

## Filing of Claims

This is not applicable in an administration of the company.

## Factors Which Influence the Period of Administration

A rescue would be influenced by a scheme of arrangement among creditors, the likelihood of the company operations recovering and the ability to pay creditors.

## Funding of the Company Whilst in Administration

During an administration, a company can obtain loans either through financial institutions or members.

## Effect of Administration on Employees

The retrenchment of excess workforce may arise.

## Effect of Administration on Contracts

Agreements may be terminated except for facility agreements which may be restructured.

## Effect of Administration on Shareholders

Shareholders need to consult closely with the administrator during the administration process.

## Effect of Administration on Creditors

Creditors' portfolios are restructured.

## Pending Claims, Litigation and Arbitration

An amicable settlement or negotiated moratoria can be concluded.

## Effects of the Moratorium

The effects of the moratorium are negotiable.

## Voidable Transactions

Any transaction concluded prior to the commencement of administration may be annulled or validated at the discretion of rescue practitioner or court order.

## The Administration Plan

The administrator may present a plan or scheme of arrangement for approval by court.

## Voting on the Plan

A majority of creditors would need to support a plan.

## Cram Down on Creditors

The cram down on creditors is negotiable.

## Implementation of the Plan

In implementing the plan, the administrator is subject to

the guidance of the court.

#### Discharge of Claims

The claims of creditors may be discharged through mediation or if that fails, following a determination by the court.

#### Effect on Suretyships

The effect on suretyships will be determined by the court order.

#### How is the Administration Process Terminated

In terms of the Companies Act, Chapter 212 of the Laws of Tanzania and Insolvency Rules made thereunder, the administration of a company is a process to protect shareholders and creditors in order to ensure that their respective value in the company is not diminish further. Administration is ordered and supervised by the High Court with a view to resuscitating an ailing company with the hope of it becoming a profitable venture. The administrator is bound to develop a proposal to turn around the company (which could include the restructuring of loans with creditors, the sale of some of the shares of the company to new shareholders or the injection of new capital and/or the retrenchment of part of the labour force). In so doing, he will seek approval from the shareholders and then file the plan with the court and seek an order to implement the plan. Once the administrator has implemented the plan and turned around the company he is required to report to the court. The court will order the payment of his final fees, discharge the administrator from his duty and further order that the management of the company revert to its directors and shareholders.

#### What is the Status of the Company after Administration

A company under administration is in the brink of involuntary liquidation under court supervision. If the administrator manages to turn around the company it revert its ordinary course of business, continuing to trade as a going concern. Conversely, if the administrator fails to turn around the company and reports this to the court, the company is then placed in liquidation, which is supervised by the court and subsequently wound up.

#### Director and Officer Liability

#### Civil Consequences

The same consequences as set out under the liquidation section are applicable to this section.

#### Criminal Consequences

The same consequences as set out under the liquidation section are applicable to this section.

## SECURITY

#### Types of Security

Debentures, mortgages on real property (immovable property), sea vessels and aircraft, uncalled share capital, book debts of the company, calls made but unpaid, pledges, sureties and guarantees can be taken as security in Tanzania.

#### Taking of Security

The taking of security in Tanzania is governed by different pieces of legislation depending on the nature of the security. Common to all types of security, however, is that all are typically reduced to writing and signed, where appropriate, by the necessary parties. In some instances a written agreement is a requirement by law and in others a matter of convenience for record and dispute purposes.

#### Security Trustees or Special Purpose Vehicles

Security trusts or special purpose vehicles are available and used in Tanzania.

#### Most Robust Form of Security Available

The most robust form of security available in Tanzania is a debenture over fixed and floating assets and to lenders mortgage over immovable property.

#### Registration of Security

Certain security does require registration with the relevant deeds registry. Debentures are registered with Registrar of Companies, mortgages on landed (i.e. immovable) property are registered with the Registrar of Titles of the Ministry for Lands, sea vessels are registered with the registrar of ships and aircraft are registered with the Civil Aviation Authority.

#### Stamp Duty

Stamp duty payable for the registration of securities in Tanzania is currently less than US\$10 per transaction and it is payable at the respective registry.

#### Registration Costs

The registration fees for the registration of various securities is currently less than US\$10 per transaction and is payable at the respective registry.

Requirements for the Assignment or Transfer of Security  
Security can be transferred pursuant to an assignment agreement and deed of amendment of security to that effect.

#### Instances in which Securities Might be Vulnerable to Attack

Security may be vulnerable to attack if there is, for instance, an absence of corporate authority bestowed on the





borrower to borrow, lend or create security and the absence of spousal consent for non-corporate mortgages and also for charges created within twelve months of the company being placed in receivership, liquidation or administration.

#### Methods of Enforcement of Security

In Tanzania, a creditor may enforce its security by appointing a receiver to recover the proceeds of the security held by the creditor, sell the mortgaged assets and/or make application to court to order enforcement of the charge or security instrument. A receiver has powers, without seeking any court assistance, to advertise for sale and sell the charged assets, following which he would pay preferential and secured creditors only. Once all preferential and secured creditors have been paid the receiver will account for the balance of the proceeds of the sale and unsold assets to the directors of the company and file a notice of ceasing to act as receiver, with the Registrar of Companies.

#### Problems Experienced when Enforcing Security

There are a host of legal and practical issues that may arise when a creditor wishes to enforce its security. This ranges from actions instituted by creditors to derail recovery processes, the absence of corporate and spousal consent for individuals, rendering the security vulnerable and the delays occasioned by the court process.

#### Financial Assistance Requirements

The Companies Act outlaws the giving of any financial assistance for the purchase of shares of the company. The law is silent on other forms of financial assistance or security granted in favor of creditors or in the interests of another company. In any case, companies in Tanzania are regulated by accounting principles applicable to corporate bodies and as such, when a company wishes to grant financial assistance to another company, the board or shareholders would need to consider the solvency and liquidity test before granting financial assistance or security.

### RECOGNITION OF FOREIGN JUDGMENTS

#### Instances in Which Your Court Will Recognize a Foreign Judgment

Tanzanian law will recognize a foreign judgment but only where there is a Reciprocal Enforcement of Judgments Agreement in place with such foreign country.

#### Requirements for the Recognition of a Foreign Judgment



In order for a foreign judgment to be recognized in Tanzania, such judgment must be filed, by way of an application to the High Court. The court will recognize the foreign judgment unless the judgment is challenged on the basis of

jurisdiction or illegality.

Requirements for the Recognition of a Foreign Trustee, Business Rescue Practitioner or Insolvency Practitioner  
There are no provisions in Tanzanian law that regulate the recognition of a foreign trustee, business rescue practitioner or insolvency practitioner.

# UGANDA

KATENDE, SSEMPEBWA & COMPANY ADVOCATES

## GENERAL INFORMATION

### Firm Information

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### Country Information

The Republic of Uganda is a landlocked country and takes its name from the Buganda kingdom which encompasses a large portion of the south of the country including the capital Kampala. The official languages are English and Kiswahili. Luganda, a central language, is also widely spoken across the country. The current president is Yoweri Kaguta Museveni who came to power in 1986.

### Type of Government

Uganda is a Presidential Republic. This means that the president of Uganda is the Head of State and Head of Government. There is a multi-party system. 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 and the youth.

### Legal System

Uganda's legal system follows the English common law tradition and the doctrine of Equity. The Judicature Act, however, establishes the primacy of written law meaning that the statutes of Parliament and instruments issued by the Executive are primary sources of law. Customs and usages do also receive judicial recognition in certain instances.

## TESTS FOR INSOLVENCY

### What are the Tests for Insolvency (ie Liquidation)

The test for insolvency in Ugandan commercial law is evidenced by a company's inability to pay its debts as

demonstrated by either:

- the failure of the company, within 20 days, to comply with a statutory demand;
- an execution order issued against the debtor company remaining unsatisfied; or
- the receivership or attachment of all, or substantially all, of the debtor's property.

What are the Tests for Financial Distress (ie Business Rescue or Administration)

The Insolvency Act of 2011 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 three formal insolvency procedures available in Uganda - bankruptcy, liquidation and receivership. The bankruptcy procedure secures a formal declaration of inability by the company to pay its debts. Liquidation can be initiated by the court, by the company or its directors (ie voluntary) or subject to court supervision. The receivership process is aimed at enabling a secured creditor to recover its money.

### Formal Restructuring Procedures

The administration procedure in Uganda aims to rescue the company and preserve it as a going concern.

### Informal Insolvency or Restructuring Procedures

There are no informal insolvency procedures, but restructuring may be informally arranged between the company and its creditors.

## 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 assets fairly amongst the entitled persons (ie creditors and thereafter shareholders).

### Process Required to Commence a Liquidation

A voluntary liquidation is commenced by the company and/or its creditors passing a resolution to place the company into liquidation. An involuntary liquidation is commenced by the service of a statutory demand on the company by a creditor followed by a petition if the statutory demand is not satisfied within 20 days.

### At What Point Does the Liquidation Process Commence

The liquidation process commences from the time a resolution to that effect is passed or from the time a petition for



liquidation is presented to court, whichever occurs earlier.

#### 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 impediments;
- 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 as consideration for the sale of company property must be sanctioned by the court.

#### Management of the Company Whilst in Liquidation

With a members' voluntary liquidation, upon appointment of a liquidator, the powers of the directors ordinarily cease unless their continuance is sanctioned by the company or liquidator. With a creditors voluntary liquidation, upon appointment of a liquidator the powers of the directors ordinarily cease unless their continuance is sanctioned by the Committee of Inspection or creditors. The liquidator's duty is to collect, realise 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 may take custody of company assets, register the liquidator's interest in all assets, keep company money separate from other money held by liquidator and keep full accounts and records of receipts, expenditure and other transactions.

#### Filing of Claims

A creditor proves their claims 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, but may not be less than fourteen working days.



The Insolvency Regulations of 2013 do prescribe a general form for proof of a 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.

#### 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 property. Employees' claims for unpaid wages and benefits are preferential and rank ahead of unsecured creditors, if funds are available.

#### Effect of Liquidation on Contracts

The liquidator has the power to disclaim onerous contracts. 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.

#### Effect of Liquidation on Creditors

A secured creditor may realise 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. Concurrent creditors present their claims informally to the liquidator, but due to their low priority it is not often that they see a dividend.

#### 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 characterised by insider dealing.

#### How is the Liquidation Process Terminated

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 meetings of both shareholders and creditors in the event of a creditors' voluntary liquidation by publishing a notice in the Government Gazette and the/a national newspaper. 14 days after the meeting, the liquidator sends a copy of the account and return of the final meeting to the registrar.

With a liquidation by court, the liquidator delivers to the official receiver, a final report, final accounts of the company and a statement indicating that all known assets have been disclaimed, all proceeds distributed and that the company should be removed from the register.

#### 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 made 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).

##### 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 Republic 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 or to imprisonment for a period not exceeding 2 years, and the latter coupled with a default fine.

#### BUSINESS RESCUE / ADMINISTRATION

##### Process Required to Commence Administration

The company passes a special resolution declaring the need to enter into a settlement with its creditors. The company then petitions the court for an interim protective order. If a protective order is granted, the company proceeds to appoint a provisional administrator. To finalise the appointment of the provisional administrator, the company obtains consent for the appointment from the provisional administrator and the secured creditors. Thereafter, the company holds a creditors' meeting to approve the proposals put forward by the provisional administrator and if approved, the administration deed is executed.

##### At What Point Does the Administration Process Commence

Provisional administration begins when the interim protective order is granted. 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;
- after execution of an administration deed; or
- after the provisional administrator gives public notice of the termination of the administration process.

##### 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 being 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 behaviour; 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 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 and to facilitate the survival of the company and to attend to the approval of administration deed and/or the advantageous realisation of company assets.

#### Filing of Claims

A provisional administrator calls upon known creditors to submit documentation in support of their claims during the first 10 days of the provisional administration. The claims must be proved before the provisional administration ends after a maximum of 30 days.

#### 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 the company's ordinary revenue streams. No provision is made in our law for funding to be generated from a source outside of the company and for such funds to receive any form or preference over other creditors of the company.

#### Effect of Administration on Employees

The Insolvency Act is silent on the effect that an administration has on employees, however, presumably (and provided provision is made for this in the employment contract), the employees will continue to discharge their employment duties towards the company for the duration of the administration process and beyond it, as the case may be.



#### 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. To our knowledge, the administration process has never been utilised.

#### Effect of Administration on Shareholders

The Insolvency Act is silent on the effect that the administration process has on shareholders, but presumably the shareholding could not be substantially altered without the approval of the creditors in accordance with the terms of the administration deed. Company assets can be disposed of without shareholder consent because creditors have the power to reject the proposed administration arrangement and compel immediate liquidation.

#### 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.

#### 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 continue. Administration also forestalls 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. Some of these limitations may be lifted by court order. The administrator has 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

This 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, any 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.

## 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 Ugandan legislation.

## Implementation of the Plan

The implementation of the provisions of the administration plan are supervised by the administrator and implemented by the employees and officers of the company.

## 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 dependant on the provisions of the plan.

## Effect on Suretyships

The discharge of a primary obligation may result in the discharge of the guarantor's/surety's obligations. In circumstances where the doctrine of estoppel applies the discharge of a primary obligation does not discharge the surety.

## 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.

## 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, then liquidation proceedings are initiated and the business is wound 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 Security

The securities recognised in Uganda are documentary credits, negotiable securities, insurance policies, debentures, mortgages, pledges and charges (fixed or floating).

### 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 available to Lenders

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 recognition of 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 companies 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. The registration of the security is usually undertaken by the lender.

### Stamp Duty

The due and payable stamp duty rates are as follows:

- documentary credits – 1% of the loan value;
- negotiable securities – 1% of the loan value;
- insurance policies – UGX 5 000 (approximate equivalent of USD 2);
- debenture – 0.5% of the loan value;
- mortgage – 0.5% of the loan value; and
- pledge – 1% of the loan value.

Payment of stamp duty is usually undertaken by the borrower.

### Registration Costs

A general fee must be paid for any



instrument creating a charge over company property if the instrument is to be registered with the companies registry. In an amount of UGX 37 000/= approximately equivalent to USD 17.

#### Requirements for the Assignment or Transfer 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

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 attacked by third parties. If the security was not registered, registered out of time, not renewed if required then it may be vulnerable to being attacked by third parties.

#### Methods of Enforcement of Security

The enforcement of security is governed by the terms of the relevant instrument or contract. The usual modes by which securities are enforced is through the appointment of a receiver, litigation or seizure and sale.

The enforcement of mortgages, however, is also regulated by the Mortgage Act which sets out the enforcement procedures. The mortgagee must address a written demand to the company when a default arises. Following the lapse of 30 days from the date of default, the mortgagee may require the mortgagor to pay all monies owed under the mortgage; appoint a receiver; lease the mortgaged land; take possession of the mortgaged land and/or sell the mortgaged land. The mortgagee may also institute legal proceedings to recover the monies owed (after the lapse of 45 days from the date of service of notice of default).

#### 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 2012 sets out board approvals that must be acquired before a company is permitted to grant security or create a charge over its assets.

enforceability of judgments made by Ugandan courts.

#### Requirements for Recognition of a Foreign Judgment

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 authorised to carry out their profession in Uganda (ie must have a valid business visa or work permit) where after Ugandan law will recognise such person for the purpose of carrying out any functions that he is required to in Uganda.

## RECOGNITION OF FOREIGN JUDGMENTS



#### Instances in Which Your Court Will Recognise a Foreign Judgment

The law of Uganda assures the enforceability of judgments of foreign jurisdictions that in turn recognise the

# ZAMBIA

## CORPUS LEGAL PRACTITIONERS

### GENERAL INFORMATION

#### Firm Information

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#### Country Information

Zambia has a population of 13.9 million (2012). Lusaka is the capital city. Other major cities include Kitwe, Ndola and Livingstone.

#### 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 five 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 the 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 (ie Liquidation)

Bankruptcy or insolvency is defined as a condition under which an individual or firm's liabilities exceed its assets. Under the Companies Act, Chapter 388 of the Laws of Zambia (Companies Act), a company will be held to be unable to pay its debts if the company owes any creditor an amount exceeding 50 monetary units and the company is

unable to pay such debt or secure it, to the reasonable satisfaction of the creditor, after having been served with a letter of demand in which payment or security is requested within 21 days of the company receiving such letter.

#### What are the Tests for Financial Distress (ie Business Rescue or Administration)

There is no statutory test for financial distress in Zambia and there is no concept or regime such as business rescue. However, 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 Companies Act include receivership and winding up procedures. A receiver may be appointed by the court or by a secured creditor under an instrument creating a security in which his powers will be laid down in the instrument. The winding up of a company commences with the presentation of a petition to the High Court of Zambia by either the company, the creditors of the company or any other person who would have standing or an interest in bringing such proceedings. This is known as an involuntary winding up. A company may also be wound up voluntarily by a special resolution being passed by its members. Generally, a voluntary winding up is at the initiative of the shareholders. It only becomes a creditors' voluntary winding up where the shareholders decide to voluntarily wind up a company but the directors cannot guarantee that the assets are sufficient to meet all creditors' claims (through a declaration of solvency). Generally, creditors can only instigate a compulsory/mandatory winding up. Insolvency procedures are also provided for under other sector specific laws.

#### Formal Restructuring Procedures

In Zambia, a restructuring may be affected through a scheme of arrangement provided for in terms of the Companies Act. Such a procedure allows for the reorganisation of the share capital of the company. It further provides for the reconstruction and in some instances the amalgamation of one or more companies.

#### Informal Insolvency or Restructuring Procedures

Informal insolvency procedures are not practised in Zambia.

### 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) distributed in accordance with the provisions of the Companies Act and its articles of association. Such proceeds are used to settle a company's liabilities which generally fall into three categories (in ascending order of priority) - preferential debts, secured debts and unsecured debts. The law effectively 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 liquidation is to enable the creditors to recover the full or partial amount of any debt owed to them.

#### 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 and a statement of the company's assets and liabilities must be prepared by the directors at the board meeting prior to the general meeting at which it is proposed to move a motion to wind a company up. 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. As at the date of the passing of a resolution, the winding up is deemed to have commenced. An involuntary winding up, on the other hand, commences when a petition is filed with the court.

#### At what Point does the Liquidation Process Commence

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.

#### Duration of the Liquidation Process

The liquidation and winding-up procedure takes approximately 20 to 25 weeks, 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 for an expedited procedure can be made at a higher cost through the Commercial Registry of the Court.

#### 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. 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); 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 the same 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 it is called up 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, unless the liquidator determines otherwise, for instance where the employment contracts are necessary for the interim management of the company for the purposes of the winding up. 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 Companies 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 will not be required to contribute any amount towards the liabilities of the company in excess of the amount unpaid in respect of the shares and for which such member is liable. 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 to prove their debts or claims before the court, after which they will be excluded from the benefit of any distribution made. 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 with 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, the creditor or any member of the company 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 conveyance, mortgage, payment, execution or other act relating to property made or done by or against a company which, had it been made or done against an individual, would in his bankruptcy under the law of

bankruptcy be voidable. Further, any disposition of property belonging to the company including things in action (ie 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.

#### How is the Liquidation Process Terminated

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 is then convened at which this report is explained. Within seven days after the meeting, the liquidator lodges 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 thereof.

#### Director or Officer Liability

Directors may be liable for their failure to deliver up to the liquidator all the real and personal property of the company under their control or custody; 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 and other offences relating to fraud under the Companies Act. Directors could be both civilly and criminally liable even prior to 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 of 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.

##### Criminal Consequences

A director may be criminally liable upon conviction and liable to a fine not exceeding 2000 monetary units or to imprisonment for a period not exceeding 2 years, or to both.

#### BUSINESS RESCUE / ADMINISTRATION

There is no specific legislation in Zambia dealing with business rescue or administration except for specialised sectors such as the banking and financial services sector. However, a receiver may be appointed to administer assets of a



company on behalf of debenture holders. On the appointment of a receiver, the directors' power to control the company ceases and the employees of the company are automatically dismissed. However, the receiver may re-employ any employees so dismissed. 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 and tangible movable assets and 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

SPVs 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 the SPV operates.

### Most Robust Form of Security Available to Lenders

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 registerable at two public registries in Zambia: the Patents and Companies Registration Agency ("PACRA") and the Lands and Deeds Registry. At the Companies 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. 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 may be subject to agreement between the parties.

### Registration Costs

The registration fee for a mortgage, debenture or other charge at PACRA is one per cent of the amount being borrowed but in no case will the fees be less than ZMW295 and in no case will it be more than ZMW 2,045. 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. 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 Companies 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:

- where there are insufficient funds to cover preferential debts, security given as part of a floating charge can be resorted to, in order to settle the deficit (Section 346(5) of the Companies Act);
- 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 (section 348 of the Companies Act); 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 (section 47 of the Bankruptcy Act).

#### 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. 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 Recognise a Foreign Judgment

Foreign judgments may be enforced using two principal methods in Zambia. Firstly, the Foreign Judgments (Reciprocal Enforcement) Act provides for the registration of a foreign judgment. Secondly, recognition outside the Act is limited to mere evidence of a claim or defence which is to be re-litigated.

#### Requirements for Recognition of a Foreign Judgment

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 liquidator in Zambia may apply for accreditation with the registrar of companies in the prescribed form. However, a person will not be eligible to act as a liquidator of a company in Zambia if the person is not eligible to be appointed as a receiver under the Companies Act. One of the requirements for appointment of a receiver is that he or she must be resident in Zambia. Therefore, in order for a foreign liquidator to be recognised in Zambia, he must be resident in Zambia and then apply for accreditation before the registrar. The registrar will then issue an accreditation certificate. The same would not be applicable for a business rescue practitioner, as such office does not exist in Zambia.

# ZIMBABWE

SCANLEN & HOLDERNESS

## GENERAL INFORMATION

### Firm Information

Scanlen & Holderness

Email: moyos@scanlen.co.zw

Telephone: +263 4 799636-42 / 702561-8

### 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.

## TEST FOR INSOLVENCY

What are the Tests for Insolvency and Financial Distress

In terms of section 11 of the Insolvency Act Chapter 6:04(Act), a debtor shall be deemed to have committed an act of insolvency if:

- he leaves Zimbabwe or, being out of Zimbabwe, remains absent therefrom or departs from his dwelling or otherwise absents himself with intent by so doing to evade or delay the payment of his debts; or
- a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that 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 he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another; or
- he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another; or
- except as provided in the Act, he agrees or offers to assign his estate for the benefit of his creditors or any of them or makes or offers to make any arrangement with his creditors for releasing him wholly or partially from his debts; or
- he gives notice to any of his creditors that he has suspended or is about to

suspend payment of his debts or if he has suspended payment of his debts; or

- he makes default in publishing the notice required by section one hundred and fifty-two or if his creditors have declined the assignment of his estate; or
- being a trader, he gives notice and is unable to meet the liabilities of his business; or
- a notice of assignment having been published (relating to the sale of a business), he omits to lodge his statement of affairs as by law required or his statement of affairs does not fully disclose his debts or property and that omission is material.

The acts of insolvency are also tests for financial distress.

## INSOLVENCY AND RESTRUCTURING PROCEDURES

Sections 191 and 193 of the Companies Act Chapter 24:03 contain provisions relating to Restructuring and Schemes of Arrangement

### Power to Compromise with Creditors and Members

Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, 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 summoned in such manner as the court directs.

If a majority in number representing in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting, either in person or by duly authorised agent or proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or class of creditors or on the members or class of 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.

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.

### Provisions for Reconstruction and Amalgamation of Companies

Where an application is made to the court for the sanctioning of a compromise or arrangement proposed between a company and any such amalgamation of



persons as are mentioned in that section and it is shown to the court that the compromise or arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies and that under the scheme the whole or any part of the undertaking, or the property of any company concerned in the scheme, in this section referred to as "a transferor company", is to be transferred to another company, in this section referred to as "the transferee company", the court may, either by the order sanctioning the compromise or arrangement or by any subsequent order, make provision for all or any of the following matters:

- the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;
- the allotting or appropriation by the transferee company of any shares, debentures, policies or other like interests in that company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person;
- the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;
- the dissolution, without winding up, of any transferor company;
- the provisions to be made for any persons who, within such time and in such manner as the court directs, dissents from the compromise or arrangement; and
- such incidental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company and, in the case of any property, if the order so directs, freed from any pledge or hypothecation which is, by virtue of the compromise or arrangement, to cease to have effect.

The transfer under this subsection of any immovable property or mining claims shall be made in accordance with any law governing the transfer thereof.

## LIQUIDATION

A company which commits acts of insolvency can be liquidated in terms of the Companies Act.

Liquidation is commenced by an order of court which can be obtained by the company itself, by a creditor or judicial manager.

### What is the Aim of Liquidation

The aim of liquidation is to divest directors and

shareholders of their control of the company in liquidation and 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 required to commence liquidation is a court order. It is initially issued as a provisional liquidation order. On the return day, it will either be confirmed or discharged by the court. If confirmed, it becomes a final order.

### At what Point does the Liquidation Process Commence

The liquidation process commences as soon as the provisional order is issued. The liquidation process will remain in force until the liquidator's final liquidation account has been confirmed by the court and the liquidator has distributed the assets and has been released by the court as a liquidator.

### Extent of Court Involvement in the Liquidation Process

The court issues the liquidation order, appoints the liquidator, discharges the liquidator, supervises the liquidator, convenes creditors meetings and the Master of the High Court chairs all creditors' meetings. Proof of claims are submitted to the court. The Master of the high court accepts or rejects claims submitted by creditors. Consequently, the court is very 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.

At the issue of the provisional liquidation order, the court will appoint a provisional liquidator. The appointment will be confirmed when the final liquidation order is issued. 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

The claims and supporting documents are filed with the Master of the High



Court. They are scrutinised. At the creditors meeting, the Master of the High Court will indicate whether or not a claim is accepted. In so doing he relies on assessments made by the liquidator.

#### 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.
- Cooperation from former directors of the company in liquidation.

#### Effects of Liquidation on Employees

Employees remain employees of the company in liquidation and are taken over by the liquidator. They become creditors in respect of unpaid salaries and wages. At the end of the liquidation process, the liquidation terminates the contracts of employment.

#### Effects of Liquidation on Contracts

Supply agreements, leases, instalment sale agreements and facility agreements are terminated unless the liquidator elects to continue with them.

#### Effects 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 will have been paid.

#### Effects 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, they contribute towards the costs of liquidation on a pro rata basis.

#### Pending Claims, Litigation and Arbitration

All claims, litigation and arbitration are stayed by operation of law. No claims or litigation may be instituted against a company in liquidation without the leave of the court.

#### Dispositions Without Value

Dispositions without value, undue preferences and collusive transactions are liable to be set aside by the court in terms of sections 42 to 44 of the Insolvency Act.



Subject to the Act, every disposition of property not made for value may be set aside by a court if such disposition was made by an insolvent:

- more than 2 years before the

liquidation and it is proved that, immediately after the disposition was made, the liabilities of the insolvent exceeded the value of the assets; or

- within 2 years of the liquidation and the person claiming under or benefited by the disposition is unable to prove that, immediately after the disposition was made, the value of the assets of the insolvent exceeded the liabilities.

Provided that it is proved that the liabilities of the insolvent at any time after the making of the disposition exceeded its assets by less than the value of the property disposed of, it may be set aside only to the extent of such excess.

A disposition of property not made for value which has been set aside or which was uncompleted by the insolvent shall not give rise to any claim in competition with the creditors of the estate of the insolvent.

#### Voidable Preferences

Every disposition of property made under a power of attorney, whether revocable or irrevocable, shall be deemed to be made at the time at which the transfer or delivery or mortgage of such property takes place.

Subject to this section, every disposition of property made by a debtor within the period of six months immediately preceding the liquidation of the company. Which has the effect of preferring one of its creditors above another may be set aside by a court if, immediately after the making of the disposition, the liabilities of the debtor exceeded the value of its assets.

A disposition shall not be set aside if the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.

#### Undue preference

Every disposition of property made under a power of attorney, whether revocable or irrevocable, shall be deemed to be made at the time at which the transfer or its delivery or mortgage of such property takes place.

Every disposition of property made by a debtor at a time when its liabilities exceeded its assets with the intention of preferring one creditor above another may be set aside by a court if the estate of the debtor is thereafter liquidation.

#### 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 liquidation.

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 for 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

This is provided for in section 318 of the Companies Act.

If at any time it appears that any business of a company was being carried on:

- recklessly; or
- with gross negligence; or
- with intent to defraud any person or for any fraudulent purpose;

the court may, on the application of the Master of the High Court, or liquidator or judicial manager or any creditor of or contributory to the company, if it thinks it proper to do so, declare that any of the past or present directors of the company or any other persons who were knowingly part to the carrying on of the business in the manner or circumstances aforesaid shall be personally responsible, without limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

Without prejudice to any other criminal liability incurred, where any business of a company is carried on with such intent or for such purpose, every director of the company or other person who was knowingly a party to the carrying on of the business in manner aforesaid shall be guilty of an offence and liable to a fine or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

#### BUSINESS RESCUE

There are, basically, three types of business rescue in Zimbabwe. One is by the creditors or members of the company in distress arranging a scheme of arrangement or a compromise or assignment. The other is by judicial management, that is to say, a judicial manager appointed by the court. In 2004, the Government of Zimbabwe introduced a statute dealing with the reconstruction of state indebted companies. That reconstruction process begins with an administration order by the Minister of Justice.

#### Process Required to Commence a scheme of Arrangement or Compromise

The process required to commence an arrangement or compromise assignment is a resolution by members or

creditors made under the scrutiny of the court in the sense that the court appoints a chairperson who will ensure that the meeting of creditors or members as the case may be is conducted in terms of the law and the court order authorising the convening of a scheme meeting. The chairperson will report to the court after the meeting has been convened and the court will issue an order sanctioning resolutions made at the scheme meeting. The resolution becomes effective and binding only after registration by the Registrar of Companies.

#### Process Required to Commence a Judicial Management

The judicial management process is commenced by an application by a party with a real and substantial interest in the matter applying to the High Court for an order placing the company under judicial management on the basis that the company is viable but its distress emanates from mismanagement. If placed under a judicial manager, it can be turned into a viable concern. Judicial management is made effective by the issue of an order of court placing the company under judicial management.

#### Duration of a Scheme of Arrangement or Judicial Management

A scheme will last for the duration of the resolution creating it and judicial management will last until terminated by a court order terminating the judicial management or placing the company under liquidation.

#### Extent of Court Involvement in the Process

In a scheme, the role of the court is to ensure increased scrutiny of the meeting of shareholders or members as the case may be. In a judicial management, the court appoints, dismisses and supervises the judicial manager. It also approves courses of action proposed by the judicial manager. It vests him with the authority to act in place of the board of the company.

#### Management of the Company whilst in Judicial Management or Subject to a Scheme of Arrangement

Under judicial management, the powers and authority of the directors are suspended. They are exercised by the judicial manager. In a scheme, the powers, authority and responsibilities of the directors will be determined by the resolution by members or creditors as the case may be.

#### Filing of Claims

Under judicial management, claims will be proved to the Master of the High Court who will be assisted by the judicial manager in verifying same. 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.

#### Factors which Influence the Period of Judicial Management or Scheme of Arrangement

The factors which influence the period of





rescue are varied. They 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 judicial management, the judicial manager will do so. The principal source of relief in a scheme is the agreed measures and in a judicial management it is the stay of execution against the company.

#### Effect of Judicial Management and a Scheme of Arrangement on Employees

A retrenchment arrangement has to be made with the employees if it is desirable to reduce costs by reducing the size of the workforce.

#### Effect of Judicial Management and a Scheme of Arrangement on Contracts

Contracts remain valid to the extent that the judicial manager may find them beneficial. Shareholders are divested of their control which is determined by the resolution in a scheme and vests with the judicial manager.

#### Effect of Judicial Management and a Scheme of Arrangement on Creditors

Creditors have to prove their claims at meetings convened by the Master of the High Court.

#### Pending Litigation, Claims and Arbitration

The execution process is stayed and litigation requires the prior approval of the court.

#### Effects of the Moratorium

The moratorium is determined by the resolution in the scheme and in a judicial management, the only real moratorium is the stay of execution against the company under judicial management.

#### Voidable Transactions

Voidable transactions are dealt with in the same way as in liquidation if the company is in distress.

#### The Plan

The plan is implemented in terms of the scheme resolution and in a judicial management in terms of the judicial management order.

#### Effects on Suretyships

Suretyships are called up after exhaustion of the principal debtor unless they will 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 Available to Lenders

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%
- Stamp duty at US\$4 for every 1000 USD of value of bond
- Plus US\$20 registration fee
- Post and Petties roughly US\$100 VAT US\$15

Requirements for the Assignment or Transfer of Security  
Cession and assignments of rights and obligations under mortgage bonds require 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 as a 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 will enjoy 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 being experienced 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 JUDGEMENTS

#### Instances when your Court will Recognise a Foreign Judgement

Our 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 in question must have the requisite international jurisdiction or competence according to our law;
- the judgment concerned 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 a 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, Business Rescue Practitioner or Insolvency Practitioner

A foreign trustee or judicial manager will require a local registration to be able to effectively perform his functions.