GUIDE TO INSOLVENCY AND BUSINESS RESTRUCTURING IN AFRICA

2017/2018

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LEX AFRICA

INSOLVENCY AND BUSINESS RESTRUCTURING GUIDE

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INTRODUCTION

About LEX Africa

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

LEX Africa is an alliance of leading law firms in over 20 African countries which was founded in 1993 and was the first legal alliance focussing solely on Africa. Only African law firms join the Alliance subject to strict performance and selection criteria to ensure world class standards of legal practice.

Each member is an independent law firm whose key specialist focus is on general, corporate and commercial law as well as litigation and dispute resolution.

LEX Africa effectively covers the entire African continent and provides a valuable resource for businessmen and investors in Africa. LEX Africa has a more than 20 year track record of assisting and advising clients on their African business activities. Each member is a full service business law firm with expert knowledge and experience in both local law and the local business, political, cultural and economic environment. LEX Africa accordingly provides a "one stop shop" and Pan African legal team for cross border and domestic African legal solutions to clients wherever they wish to do business in Africa.

Member firms share similar values and commit to the highest professional, ethical and service delivery standards. A lawyer exchange program and specialist LEX Africa practice and industry sector groups have been established.

Our Mission

To collaborate with member firms to drive business growth in Africa through best legal practice by attracting, developing and promoting world-class professional skills for the continuing success of our network and the broader African continent.

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PREFACE

Welcome to the third edition of the **Insolvency and Business Restructuring Guide for Africa 2017/2018**. As head of the Insolvency, Business Rescue and Restructuring practice group at Werksmans, it is a pleasure to bring you this publication which is published in collaboration with 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.

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

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

This edition of the **Insolvency and Business Restructuring Guide** sets the tone for the African continent and establishes a guideline which is both informative and useful. There is no doubt that the key issues raised in the guide will assist in gaining a better understanding of the various applicable insolvency regimes operative across the continent.

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.

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ALGERIA
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TYPE OF GOVERNMENT

Algeria is a constitutional presidential Republic, in which the President is the head of State while the Prime Minister is the head of government. Executive power is exercised by the government. Legislative power is vested in both the government and the two chambers of Parliament, namely the People's National Assembly and the Council of the Nation.

POLITICAL SYSTEM

Algeria is a multi-party democracy.

LEGAL SYSTEM

Algeria has a civil law system based on French law.

TESTS FOR INSOLVENCY

What are the tests for insolvency (i.e. liquidation)?
Pursuant to the Algerian Commercial Code ("ACC"), insolvency arises from a failure to make payments of due debts. This concept is not clearly defined in the ACC. The concept of bankruptcy applies where a company has failed to make payment and has simultaneously committed fraudulent acts. An act shall be deemed to be fraudulent when the bankrupt entity has infringed accounting and/or managing rules.

What are the tests for financial distress?
The ACC draws no distinction between insolvency and financial distress but only refers to the concept of a failure to make payment of due debts.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures
When a company is unable to meet its current liabilities from its available assets, it must file a declaration to commence insolvency proceedings within 15 days following the failure to make payments of its due debts. Insolvency proceedings may also be initiated by a creditor or directly by the court *ex officio*.

Formal restructuring procedures
The ACC draws no distinction between insolvency and restructuring procedures.

Informal insolvency and restructuring procedures
No informal insolvency or restructuring procedures have been developed in Algeria.

LIQUIDATION

What is the aim of liquidation?
A company is liquidated after the decision for the dissolution of the company is adopted. The company may be dissolved:
- Conventionally following an agreement between the company's partners or shareholders or
- Further to a court decision, ordinarily where the number of shareholders is below the minimum requirement for more than a year or the company has lost more than 75% of its share capital.

The aim of liquidation is to pay the liabilities owed to the creditors of the company and, if possible, share the liquidation surplus among partners or shareholders of the company. It is important to note that following the failure of a company to make payments of its due debts, the company is not automatically placed in liquidation.

Process required to commence a liquidation
The liquidation process may be regulated by the Articles of Association of a company. If the liquidation is regulated by the Articles of Association, the liquidation process would commence in accordance with such provisions. In the absence of provisions in the Articles of Association, the liquidation process is regulated by the ACC. In order to commence liquidation, a liquidator should be appointed by the partners, the shareholders or the court. The liquidator is, among other things, in charge of compiling an inventory of the company's assets and debts and taking measures required to protect the interests of the company, including selling the company, the business or isolated assets.

At what point does the liquidation process commence?
The liquidation process commences on the date of dissolution of the company. However, the dissolution is only enforceable against third parties after its publication on the trade register.

Duration of the liquidation process
Pursuant to the ACC, the duration of the liquidation process cannot exceed 3 years. However, the mandate of the liquidator may be extended by the shareholders or the President of the competent court. In practice, and in our experience, the duration of a liquidation process takes 2 years on average.

Extent of court involvement in the liquidation process
The court is typically involved at the beginning and at the end of the liquidation process. In between, the court is not actively involved in the process, unless approached to resolve disputes or authorize certain operations.

Management of the company whilst in liquidation
The liquidator has wide powers and is in charge of the management of the company whilst the company is in liquidation. The liquidator has an obligation to act in the best interests of the company.

Filing of claims
From the date on which the liquidation commences, the creditors may submit their claims, and the related proof supporting such claims, to the liquidator.

Factors which influence the period of the administration in a liquidation
Delays in the liquidation of the company may be experienced due to disputes between the company and third parties (e.g. tax claims or claims against creditors/debtors) and the size of the company and the extent of the assets that are to be realized and distributed amongst creditors.

Effect of liquidation on employees
At the date of the commencement of liquidation, contracts of employment can be terminated by the liquidator. Employees are considered, by law, as privileged (preferential) creditors in relation to their claims.

Effect of liquidation on contracts
Contracts that are in force as at the date of the commencement of the liquidation are normally terminated by the liquidator. The creditors may request compensation for the damage incurred as a result of the termination of any contract.

Effect of liquidation on shareholders
The personal patrimony of shareholders can be affected by the liquidation. The liability regime in Algeria is as follows:

- In a joint-stock company, shareholders bear losses only in proportion to their contribution;
- In a limited liability company, the partners' liability is limited to their contribution ;
- In a limited partnership, active partners' liability is unlimited and limited partners' liability is limited to their contribution ; and
- In a limited partnership with shares, general partners' liability is unlimited and limited partners' liability is limited to their contribution.

In any company, if there is a liquidation surplus, 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 are classified as secured and unsecured creditors. Payment of creditors is effected in accordance with 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 claims and in accordance with their priority.

Pending claims, litigation and arbitration
These proceedings are not suspended after the liquidation commences.

How is the liquidation process terminated?
A shareholders' meeting is called by the liquidator in order to end the liquidation process. If the shareholders do not agree to terminate the liquidation, the court shall declare the termination of the liquidation. A notice terminating or closing a liquidation is signed by the liquidator and published in the official journal.

RECEIVERSHIP AND BANKRUPTCY

The ACC draws no distinction between insolvency and financial distress and only refers to the concept of a company's failure to make payment of its due debts. Failure to make payments of due debts may lead either to receivership or to a declaration of bankruptcy.

Process required to commence a receivership
When a company is unable to meet its current liabilities with its available assets, it must file a declaration to commence receivership proceedings within 15 days following the company's failure to pay any debt.

At what point does receivership commence?
The court ensures the debtor has failed to pay its debt when it fell due and is not merely experiencing temporary financial difficulties. The court may order any investigation to determine this. The court also determines the actual date of the failure to make payment of due debts which may be dated up to 18 months prior to the date of the court's decision to open the failure to make payment of due debts proceedings (the so-called "suspect period"). The court then initiates the insolvency proceedings under one of the two available procedures: either receivership or bankruptcy.

Duration of receivership
There is no fixed duration in the ACC. In practice, however, receiverships take approximately 2.5 years.

Extent of court involvement in the receivership
In addition to the determination of the date of the failure to make payment of due debts, the court is responsible for the appointment of a judge-commissioner as well as a trustee. The judge-commissioner is in charge of the entire proceedings on behalf of the court. His main duty is to supervise and control the implementation of the proceedings and, in some cases, approve the transactions proposed by the administrator. The judge-commissioner reports to the court. The administrator

acts as an administrative receiver during receivership. The administrator has a fundamental role to play in insolvency proceedings, and Algerian law has provided him with extensive management powers as well as specific powers, under the control and supervision of the judge-commissioner, who also has jurisdiction over the administrator's decisions. Besides the administrator, who is primarily in charge of checking the company's debts and drawing up a creditors list, the judge-commissioner may decide to appoint one or two supervisors who are responsible for auditing the company's financial records and assisting the judge-commissioner with the task of reviewing the actions taken by the administrator. These supervisors are appointed by the creditors and will therefore *de facto* protect the creditors' interests.

Management of the company whilst in receivership

As from the opening of the proceedings, the insolvent company is automatically assisted by the administrator whose rights will depend on the type of proceedings. During receivership, the insolvent company remains entitled to take conservatory measures in order to protect its assets and/or business but is no longer entitled to sell any assets, without the administrator's assistance. The court may decide to place the company's assets under seal to avoid any assets being stolen or misused until an inventory of the company's assets is drawn up.

Filing of claims

The commencement of receivership proceedings renders all debts of the company due and payable which enables those creditors whose debts have not yet fallen due at the date of the commencement of the proceedings to declare such debt to the administrator while establishing the creditors' list for the purpose of allocating the proceeds realised from the receivership proceedings.

Factors which influence the period of receivership

The duration of the period of receivership may be influenced by disputes between the company and third parties (e.g. tax claims or claims against creditors/debtors); the size of the company and the number of assets that are to be sold and distributed amongst creditors.

Funding of the company whilst in receivership

Theoretically, there is no provision in the ACC that prevents the funding of the company placed in receivership. In practice, however, it is difficult for a company placed in receivership to obtain a loan from a financial institution.

Effect of receivership on employees

The commencement of receivership proceedings does not necessarily lead to the automatic termination of employment contracts.

Effect of receivership on contracts

Contracts are not automatically interrupted or terminated when receivership proceedings commence.

Effect of receivership on shareholders

If at the end of receivership, there are insufficient assets to pay the debts which are due to creditors, the personal patrimony of shareholders may be affected. Please refer to the liquidation section above regarding the liability of shareholders in Algeria.

The same is applicable here. If there is a surplus after liquidation (*boni de liquidation*), after all creditors have been paid, the remaining assets (or proceeds from the assets) are distributed among the shareholders.

Effect of receivership on creditors

The commencement of receivership proceedings under Algerian law triggers the suspension of the creditors' individual enforcement right. As a result, any court action for the enforcement of a creditor's right is suspended except for the rights of certain secured creditors. The legal actions lodged by certain secured creditors are not suspended as the latter benefit, pursuant to the ACC, from a preferential right towards the debtor. This applies to existing legal claims as well as new ones.

Pending claims, litigation, arbitration and effects of the moratorium

Any court action for the enforcement of a creditor's right shall be suspended, except regarding legally privileged and certain secured creditors. The operation of the moratorium is binding on all the creditors whatever the nature of their claims.

Voidable transactions

Under the ACC, a number of transactions entered into by a company during the clawback period are subject to cancellation by the court if they are not held to be in the interests of the company (e.g. favouring one creditor over others or transferring movable assets or real estate to third parties without due consideration). Furthermore, any payments made during the suspect period may be declared void by the court if the receiving party was aware that the company was insolvent.

Receivership plan

In the context of receivership, the company can enter into an agreement with the creditors whose debts were declared and confirmed by the court under the supervision of the latter. Under this agreement, the company undertakes to pay its debts to the creditors. Alternatively, creditors may grant the company additional time for the payment of their debts (or in rare occasions waive their claims) in order to allow the company to pursue its activities.

Voting on plan

The agreement between the company and the main creditors has to be approved at a general meeting of the company by the majority of the creditors representing two thirds of the debts. Thereafter, the agreement between the company and the main creditors must be ratified by the court.

Cram down on creditors

An agreement between the company and the main creditors will be implemented vis-à-vis all creditors if the majority of the creditors representing two thirds of the debts approve it.

Implementation of the plan

Once an agreement between the company and the main creditors has been approved by the creditors and the court, it

becomes binding and has to be implemented by the company.

Discharge of claims

If creditors agree, the agreement between the company and the main creditors may provide for a discharge of claims.

Effect on suretyships

Even if a *concordat* is approved, the creditors remain entitled to lodge claims against a surety.

How is the process terminated?

Three scenarios are possible:

- *An agreement between the company and the main creditors in the context of receivership*: the administrator's duties cease immediately and the company recovers its powers in terms of business management;
- *Termination of the proceedings for extinction of liabilities:* at any time during the proceedings, whether under receivership or bankruptcy, the court ends the proceedings when all the creditors have been paid and no debt is outstanding or when there are sufficient available assets to pay the debts which remain due; or
- *Termination of the proceedings for lack of assets:* at any time during the proceedings, whether under receivership or bankruptcy, the court may decide, on the basis of a report provided by the judge-commissioner, to close the proceedings as a result of an insufficient amount of assets. All creditors are at such point able to pursue their claims against the company through the courts. The procedure is then converted into liquidation.

Director and officer liability

Civil consequences

The ACC extends civil liability to any *de facto or de jure* director of a company, whether or not remunerated as director, when such a director has:

- Carried out commercial activities, through that company, in his personal interest or has misused corporate assets; or
- Abusively carried on, in his personal interest, a loss-making business which could only lead to the failure to make payment of due debts.

In these events, corporate creditors will be entitled to sue such directors personally and seek enforcement, through bankruptcy, over their personal assets.

Criminal consequences

The ACC condemns fraudulent bankruptcy and levels imprisonment of two months to two years as punishment in the event of a simple bankruptcy or one to five years in the event of a fraudulent bankruptcy. The court may also pronounce additional sentences such as the prohibition to carry out commercial activities for a maximum of five years.

SECURITY

Types of security

- Suretyship (*cautionnement*) – whereby a person binds himself for another already bound, either in whole or in part for his debt, default or miscarriage.
- Mortgage (*hypothèque*) – taken through an agreement or a court decision.
- Pledge (*nantissement*) – security that conveys possessory title to assets owned by a debtor (the pledgor) to a creditor (the pledgee) to secure repayment of a debt or obligation.
- *Privilege* - a preferential right granted by law to certain creditors over the assets of the debtor and that supersedes certain other security.

Taking of security

Securities are taken through an agreement (which has to be notarised in some cases) and by a court decision.

Security trustees or special purpose vehicles

The concept of a security trustee is not recognised under Algerian law. There can only be a security agent (i.e. acting in the name and on behalf of the secured creditors).

Most robust form of security available to lenders

The most robust form of security available to a lender is the mortgage over real estate property.

Registration of security

A mortgage should be registered at the Land Registry. A pledge should be registered at the Trade Registry.

Stamp duty

The cost of stamp duty payable for the registration of a security depends on the nature of the security taken. The cost of stamp duty for a mortgage bond or a pledge is limited and does not exceed a few hundred euros.

Registration costs

The registration costs payable for the registration of security depends on the nature of the security taken. By way of example, the registration costs for a mortgage bond or a pledge is DZD 3.000 (approximately EUR 30).

Requirements for the assignment or transfer of security

Subject to publication formalities with the relevant registries, under the accessory principle a security is, in principle, automatically transferred with the related debt.

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

Mortgages and pledges over the company's assets constituted during the so-called clawback period (i.e. any security taken 18 months prior to the date of the court's decision to open the failure to make payment of due debt proceedings) are not enforceable.

Methods of enforcement of security

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

Problems experienced when enforcing security

The duration of the procedure for obtaining a court order may delay the enforcement of security.

RECOGNITION OF FOREIGN JUDGEMENTS

Instances in which your court will recognize a foreign judgment

If the foreign judgment is enforceable against a person or a company domiciled or registered in Algeria, the Algerian courts may recognise such judgment.

Requirements for the recognition of a foreign judgment

Foreign judgments can be enforced before Algerian courts through the exequatur proceedings provided under the Algerian code of civil procedure. In order for a foreign judgment to be recognized, the following conditions must be fulfilled:

- The jurisdiction rules must not be breached;
- The judgment must be final;
- There must be no contradictions with another judgment handed down in Algeria; and
- The foreign judgment must not be contrary to public order or morality.

Requirements for the recognition of a foreign trustee, receivership and bankruptcy practitioner or insolvency practitioner

Algerian law makes no provision for the recognition of a foreign trustee, receiver, bankruptcy practitioner or insolvency practitioner.

ANGOLA
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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 the following terms:

- Big companies: base salary x maximum of 5 years + 50% of the base salary x more than 5 in case the employee has worked to the company for more than 5 years;
- Medium companies: base salary x maximum of 4 years + 40% of the base salary x more than 4 in case the employee has worked to the company for more than 4 years;
- Small companies: 2 base salaries x 30% + base salary x more than 2, in case the employee has worked to the company for more than 2 years;

Micro companies: 2 base salaries x 20% + base salary x more than 2, in case the employee has worked to the company for more than 2 years.

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

Security trustees and special purpose vehicles

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

Most robust form of security available to lenders

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

Registration of security

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 duration of less than 1 year attracts stamp duty of 0.5%, security with a duration equal to or above 1 year attracts stamp duty of 0.4%, and security without any duration or with a duration equal to or above 5 years attracts stamp duty of 0.3%. 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 (e.g. taxes), or in favour of other third parties, ranks ahead of in rem guarantees that are granted in favour of third parties. Thereafter, personal security is ranked (i.e bails and guaranteed deposits)

Methods of enforcement of security

Security is enforced in Angola by making 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 analysed 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

ARMSTRONGS ATTORNEYS

FIRM INFORMATION

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COUNTRY 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 or compound for it to the reasonable satisfaction of the creditor;
- The execution of any other process issued on a judgment by a competent court in favour of a creditor, against the company, is returned by the sheriff or messenger with the endorsement that no assets can be found to satisfy the debt; and/or
- It is proved to the satisfaction of the court that the company is unable to pay its debts and in determining whether the company is unable to pay its debts the court will take into account the contingent and prospective liabilities of the company.

What are the tests for financial distress (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
When a company is placed in liquidation, the order of preference in which creditors rank is as follows:

- Liquidation costs;
- Secured creditors - payment is made to secured creditors from the proceeds of a sale of the secured assets. Where

a secured creditor's claim is not secured in full, the unpaid balance is treated as a concurrent claim;

- Preferent creditors - these are creditors who do not hold security for their claims but rank above the claims of concurrent creditors. They are paid from the proceeds of the unencumbered assets in a pre-determined order. 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 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 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;*above another* - the High Court may set aside a disposition made by the insolvent at any time before liquidation where he or it made the disposition with the intention of preferring one of his or its creditors above another and when made, it liabilities exceeded its assets;
- *Dispositions which are intended to prefer one creditor above another* - the high court may set aside a disposition made by the insolvent at any time before liquidation where he or it made the disposition with the intention of preferring one of his or its creditors above another and when made, its liabilities exceeded its assets;
- *Dispositions made in collusion with another person and having the effect of prejudicing its creditors or preferring one above another* - the high court may set aside a transaction entered into by an insolvent before liquidation in terms of which the insolvent, in collusion with another person, disposed of its property in a manner which had the effect of prejudicing its creditors or of preferring one of its creditors above another. To establish a collusive dealing, the liquidator must prove that the insolvent and the person knew that (i) the debtor was insolvent; and that (ii) the disposition would have the result of prejudicing its creditors or preferring one creditor above another; and
- *Dispositions in fraud of creditors* - in terms of the common law, creditors have a right to set aside a disposition which has been made in fraud. The relevant action at common law is known as the actio paulina. The test under the common law, to determine whether or not the transaction was fraudulent, is simply whether the object of the transaction was to give one creditor unfair advantage over the others on the liquidation of the company.

How is the liquidation process terminated?

When the affairs of the company have been completely wound up, the High Court 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 ctonsequences

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

Management of the company whilst in judicial 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 bought 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 any other process against the company.

Pending claims, litigation and arbitration

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

Effects of the moratorium

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

Voidable transactions

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

How is the process terminated?

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

What is the status of the company after judicial management?

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

Director and officer liability

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

SECURITY

Types of security

- *Mortgage Bonds* - security over immovable property can only be obtained by a special mortgage over immovable property as set out in the Deeds Registry Act. A mortgage bond does not transfer title in the mortgaged immovable property to the lender. It confers a limited real right on the lender to have the immovable property sold in execution and the proceeds of that sale applied to settle or reduce the debts secured by the mortgage bond. A special mortgage of immovable property is created by a mortgage bond. A mortgage bond is affected by registering it at the Deeds Registry where the immovable property is registered
- *Pledge* - a pledge is a charge or mortgage over movable property given by a borrower in favour of a lender. For a pledge to be valid and effective the pledged movable must be transferred to, and controlled by, the lender. There are no registration requirements.
- *General Notarial Bond* - a general notarial bond is a mortgage by a borrower over all of its tangible movable property, and in favour of a lender. A general notarial bond does not however (in the absence of an attachment of the property before insolvency) make the lender a secured creditor of the borrower and consequently it is not a true mortgage of the property but is rather a means of obtaining a limited statutory preference above the claim of concurrent creditors in the borrower's insolvent estate. A notarial bond must be registered in terms of the Deeds Registry Act in order to be effective.
- *Cession by Way of Security* - security over intangible movable property is created by the debtor granting security by way of cession over such assets in the creditor's favour. It can be structured as either a cession in securitatem debiti where title to the property remains with the cedent; or an out and out cession, where title to the property is transferred to the cessionary, subject to the cedent's right to have the property ceded back to it by the cessionary once the debt and/or other obligations that it secures, are discharged. There are no registration requirements.

Deeds of hypothecation

Tangible movables can be secured through a deed of hypothecation in terms of the Hypothecation Act CAP 46:03 ("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 Judgements (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 Judgements (International Enforcement) Act extends to every country to which the United Kingdom Judgments Act applied immediately before the commencement of the Judgements (International Enforcement) Act. The Judgements (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)
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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 September 2015 for the organisation of collective proceedings and the discharging of debt (UAOP).Collective procedures established by UAOP are open to all individuals who conduct an independent professional activity, not only commercial but also civil, craft or agricultural. A company may be placed in liquidation if it is unable to pay its debtors or if it has lost its share capital. Insolvency means suspension of payments (cessation des paiements) – which is the trigger allowing a party to initiate curative insolvency proceedings – is now defined as the state in which the debtor is unable to pay its outstanding liabilities with its current assets, but excluding from outstanding liabilities credit reserves or payment terms which the debtor enjoys from its creditors and which allow it to meet its outstanding liabilities.

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

What are the tests for financial distress (i.e business rescue or administration)?
TBusiness 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.
New procedure created for companies facing actual or foreseeable difficulties but which are not yet insolvent, with a view to avoiding suspension of payments and safeguarding

the relevant debtor, by concluding an amicable agreement with its main creditors and counterparties. It is a consensual and confidential procedure.
The new Uniform Act takes into account business starters (entrepreneurs). Its scope covers "every natural person exercising an independent professional activity whether civil, commercial, craft or agricultural". The resulting effect is that it applies to farmers, craftsmen, business starters, freelance professions, whether regulated or not.

The new Uniform Act provides for a conciliation procedure in article 3, paragraph 1, while paragraph 2 gives the jurisdiction on collective proceedings matters to the competent court in Member States exclusively. The new Uniform Act provides for the rules to ensure the regulation and supervision of legal representatives, in a bid to professionalize the trades of bankruptcy administrators and preventive settlement experts. Indeed, the role of bankruptcy administrators in the smooth conduct of collective proceedings cannot be overemphasized. This regulation is considered an essential factor to ensure the achievement of objectives. Of course, if bankruptcy administrators are technically incompetent, of bad character, or are careless regarding the 4 conduct of proceedings, if they embezzle funds generated from the proceedings, the company will not be rescued nor will creditors be paid.

They are two preventive proceedings in number. Their common feature is that the company is not yet in cessation of payment. They are: (i) conciliation, which is a completely new procedure and; (ii) preventive settlement, which has innovated only in some respects. One of the innovations of the new Uniform Act is the establishment of a conciliation procedure with a strong amicable dimension, in the sense that its commencement does not affect the rights of creditors or those of the debtor. A conciliator who is appointed is a mere facilitator in finding an agreement between the parties; he is an interface between the debtor and creditors.
Although preventive settlement proceedings have not been substantially modified, important amendments were made so as to enhance its efficiency and ensure better protection of creditors. Regarding the conditions for commencing a preventive settlement procedure, the debtor must not be in cessation of payment and must also prove serious financial or economic difficulties. Among the documents to be furnished by the debtor in support of his claim, there must be a proposed agreement with creditors and it is in view of this proposed agreement and its seriousness that the procedure may be opened by an Order of the President of the competent court who also appoints an expert. It is worthy of note that the new text provides for specific rules to ensure the independence and impartiality of the President and allows the debtor and any creditor to request for his replacement. Regarding creditors, a "new money" privilege has been instituted for people who grant new loans or supply services or goods to companies facing difficulties. Obviously, before approving the preventive settlement, the competent court must verify that the conditions for granting this privilege are met and shall mention this fact as well as the amount in his decision so as to avoid subsequent disputes. A totally new simplified preventive settlement procedure is also provided. This variant of preventive settlement, which is meant for small businesses, is optional. They can therefore decide to commence or not, even if they meet the conditions.

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

LIQUIDATION

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

Process required to commence 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.
Where the trustee (syndic) has knowledge of facts that may justify personal bankruptcy, he shall immediately inform the public prosecutor and the receiver and submit a report thereon to them within ten (10) days. The receiver shall forward the

report to the president of the competent court. Failing that, the receiver may himself make a report to the president of the competent court. As soon as the report of the trustee or the receiver is submitted to the president of the competent court, he shall immediately have the court registrar summon by extrajudicial act at least eight (8) days in advance, the debtor or the top executives of the legal entity to appear before the court on a certain day in order to be heard by the competent court behind closed doors in the presence of the trustee or after he has been duly summoned by the court registrar by hand-delivered letter against a receipt or by registered mail with acknowledgement of receipt or by any means leaving a written record. A copy of the report shall be appended to the summons under penalty of nullity.

The accused debtor or top executives of the legal entity shall appear before the court in person; in case they are unable to appear on grounds deemed duly plausible, they may be represented by a proxy with a power of attorney enabling him to represent the parties before the court seized. Where the debtor or the top executives of the legal entity do not appear before the court or are not represented, the competent court shall again summon them to appear in the same forms and time limits as those provided in Article 200 above. In case of repeated default, the competent court shall give an adverse ruling to them.

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

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.

Once the judgment on assets liquidation is pronounced, the creditors shall form a union. The Trustee (Syndic) shall, within one (1) month of taking office, submit to the receiver a statement drawn up based on available information containing an assessment of available or realizable assets, unsecured debts and debts guaranteed by a real special security or a privilege with, in case of legal entity, all information on possible pecuniary liability of its top executives(s). When the judgment decrees the conversion of reorganization to assets liquidation proceedings, the trustee (syndic) shall commence the liquidation operations at the same time that he completes, where appropriate, the verification of claims and establishes the order of creditors. He shall continue activities commenced before the decision to open the assets liquidation proceedings.

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.

In the judicial recovery procedure: 1 month to obtain the report on economic and social situation of the debtor, 15 days to bring an appeal against the judicial decision in relation to a claim challenge, 30 days for the trustee (syndic) to respond to an asset claim.

It should be noted that the innovation consists principally of new deadlines for procedures for which no deadlines were provided under the previous 1998 Uniform Act.

Except for simplified proceedings (e.g. closing of the simplified liquidation of assets must occur within 120 days following its opening vs. 18 months for the standard proceedings), existing deadlines have globally not been reduced and in some cases have even been extended (e.g. the deadline for the existing creditors to submit their claims in the proceeding has been extended from 30 days to 60 days following the second publication of the opening judgement).

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

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 (syndic) with his books of account. The trustee (syndic) prepares an inventory of all creditors and debtors of the company and the creditors submit their claims and all documents necessary to support their claims.

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

At what point does business rescue commence?
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 (i.e 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

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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 (ie liquidation)?
A company (that is, a body corporate formed and registered under the Companies Act, 1963 (Act 179 or an existing company)) may be wound-up if, -

- A creditor to whom the company owes more than GH10,000.00serves 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
- The 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.

A body corporate other than a company or a corporation solely in the nature of an incorporated office may be wound-up if the body corporate is unable to pay its debts.

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 shareholders' 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 is passed by the members of a company;
- Petition is made to the registrar by a creditor, member or contributory of company;
- 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 on the passing of a resolution for the winding-up of the company or on the making of a winding-up order by the court or the Registrar. A private liquidation commences at the time that the company (through its members) passes a special resolution to wind up the company by private liquidation.

Duration of the liquidation process

There is no specified duration for the liquidation process. The Bodies Corporate Act (Official Liquidations) Act, 1963 (Act 180) 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 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;
- stay civil proceedings against the company on the commencement of winding-up proceedings; 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 the 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;
- Appoint a legal practitioner to assist the liquidator in the performance of the liquidator's duties;
- Make compromises with creditors of the company;
- 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 6,000 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

On the commencement of a winding-up, civil proceedings against the company, other than proceedings by a secured creditor for the realisation of that secured creditor's security, shall not commence or proceed, except with leave of the High Court and subject to the terms that the Court may impose.

Voidable transactions

The following transactions may be set aside by the liquidator and the proceeds recovered into the liquidated estate of the company:

- A floating charge created on the undertaking (that is, the business of the company) or over property belonging to the company within 12 months before liquidation commences;
- 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.
- Any (a) payment made or property transferred, (b) mortgage or other charge paid or (c) judgment or other obligation suffered by the company during the 6 months period preceding the winding-up and at a time that the company was insolvent (with the dominant intent that any of the company's creditors should benefit at the expense of others).

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 strikes the company's name off the register and publishes 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 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 a company, by special resolution resolves that the company be put into members' voluntary liquidation and authorises the liquidator to sell all or part of the assets of the company to another entity in exchange for fully paid shares, debentures or other like interests in that entity. A scheme of arrangement or 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 opposes 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

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:

- An application made by a dissenting shareholder to court for redress;
- A written notice of dissent given by a dissenting shareholder 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 the 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 or other like interests or cash in the transferee company.

Effect of a scheme of arrangement on creditors

Generally, the scheme of arrangement will provide for how creditors should be treated. Further, under an arrangement or 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 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. 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 from the 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 effect 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 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 to possess 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 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 charger. Thus shares, accounts, intellectual property rights, land, receipts, receivables, goods and book debts may all be the subject matter of security.

Security trustees or special purpose vehicles

Security trustees are usually employed in multiple lender situations such as syndicated loans. The appointment of a security trustee is a contractual matter between the parties to

the agreement. Special purpose vehicles are recognized and utilised under Ghanaian law.

Most robust form of security available to lenders

The most robust form of security available to a lender is a fixed charge on 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 prohibit 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 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

- Registration at the Collateral Registry costs GHC10.00 and is processed online. The costs are payable online at the time of registration and should be done by the borrower. The Registry sends a confirmatory email to acknowledge payment.
- Registration at the Registrar-General's Department costs GHC 60.00. Payment is done physically at a payment point on the premises and a receipt is issued. Registration is done by the company which creates the charge.
- Registration at the Land Registry costs GHC 70.00. Payment is done at a payment point on the premises by the person creating the charge and a receipt is issued.
- Registration of mortgages at the Lands Commission costs GHC70.00 and should be done by the borrower. Payment is done physically at a payment point on the premises.

Requirements for the assignment or transfer of security

Security can be transferred and/or assigned by virtue of an agreement to that effect. The assignment or transfer agreement should be stamped and registered in the relevant public office, depending on the nature of the security.

Instances in which securities might be vulnerable to attack

Where the security interest has not been stamped or registered. Stamped and registered interests are more robust.
Where a third party has an interest in the secured property, 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 encumbrances;
- Where the property has already been disposed of or is otherwise unavailable; and
- Delays in the court process.

Financial assistance requirements

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 county.
- 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

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TYPE OF GOVERNMENT

Democratic Republic

POLITICAL SYSTEM

Multiparty Democracy

LEGAL SYSTEM

Common Law Based

BACKGROUND

Until recently, insolvency law in Kenya was based on the Kenya Companies Act (Chapter 486, Laws of Kenya) which closely followed the English Companies Act, 1948 ("Old Companies Act"). The Companies Act provided for the winding up (liquidation) and dissolution of insolvent companies. The Companies Act has been repealed by the new Companies Act, 2015 which does not provide for insolvency. Insolvency is now governed by the Insolvency Act - Act No. 18 of 2015 ("Insolvency Act") which is designed to consolidate the laws relating to the insolvency of natural persons and incorporated and unincorporated bodies, and to provide for matters relating to insolvency in greater detail. The Insolvency Act has contains a framework for the administration of companies as an alternative to liquidation.

The Insolvency Act was promulgated on 27 June, 2016 through Legal Notice No. 119 of 2016. The Insolvency Regulations, 2016, which are regulations passed to give effect to the Insolvency Act, 2015 commenced on 22 March 2016.

The Insolvency Act as drafted has some significant inconsistencies and appears erroneous in some instances. For instance, the definition of a company under the Insolvency Act does not include companies registered under the Old Companies Act. The Insolvency Act provides that the relevant parts of the Act dealing with liquidation of companies will only apply to the liquidation of companies registered under the Companies Act, 2015. In re Winding Up of Blue Bird Aviation Limited [2016] Eklr (Winding up cause 7 of 2016) he Kenyan High Court has recently considered this issue and held that whilst section 2(1) of the Insolvency Act defined a company as one registered under the Companies Act 2015, the said Companies Act 2015 defined a company to include an existing company formed prior to the enactment of the Companies Act 2015 and by extension therefore, reference to a company under the Insolvency Act, should be deemed to include such existing 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?
Under the Insolvency Act the test for insolvency is the company's inability to pay its debts. The threshold of outstanding debts warranting the liquidation of a company has however been significantly increased from Ksh. 1000 to Ksh. 100,000.

Under the Insolvency Act, a company will be deemed incapable of paying its debts and therefore suitable for liquidation under the following circumstances:

- Where a creditor owed Ksh.100,000 or more demands, in writing, payment of the indebtedness , and the company fails to comply within 21 days either by settling the debt or compounding it to the creditor's satisfaction;
- Where a judgment or decree against the company remains unsatisfied either in whole or in part; and/or
- Where it is proved to the court's satisfaction that the company is unable to meet its debts as they fall due and payable; and/or
- Where it is proved that the value of a company's assets is less than the amount of both its contingent and prospective liabilities.

What are the tests for financial distress?
While there are no specific statutory provisions on financial distress under Kenyan law, the Insolvency Act provides that the court may make an administration order in relation to a company if it is satisfied that:

- The company is or is likely to become unable to pay its debts; and
  - To maintain the company as an ongoing concern;
  - To achieve a better outcome for the company's creditors as a whole than would likely to be the case if the company was liquidated (without first being under administration);
  - To realise the property of the company in order to make a distribution to one or more secured or preferential creditors.

- The administration order is reasonably likely to achieve an objective of administration i.e:

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

There are two ways to liquidate a company under the Insolvency Act, namely:

- Voluntary liquidation –where the period fixed for the duration of a company expires or on the occurrence of an event which would lead to a dissolution of the company under the company's articles.
- Compulsory liquidation - by the court.

Formal restructuring procedures

The Insolvency Act contains elaborate provisions on voluntary arrangements by a company. This includes a composition or scheme of arrangement. A proposal for voluntary arrangement may be made by the directors, an administrator or a liquidator to the company and the creditors of the company to enter into a composition in satisfaction of its debts or a scheme for arranging its financial affairs. An authorized insolvency practitioner may be appointed to supervise implementation of the voluntary arrangement.

The proposed scheme of arrangement must be approved by a majority of members present at the members' meeting or by a majority in number and value of the creditors at a meeting of creditors.

In the event the motion for the proposed scheme of arrangement, a member or creditor may also make an application to the court for an order approving the proposed scheme of arrangement. A company will be deemed to be under voluntary arrangement by the day after the date on which it is approved by the court and would then be binding on the members and creditors of the company.
The Insolvency Act also contains extensive provisions for the administration of a company, further details of which are set out further below.

Informal insolvency or restructuring procedures

Informal restructures and workouts are uncommon in Kenya except when the enforcement of securities is done through the appointment of a receiver and manager. In the financial sector, a number of institutions (e.g. banks and insurance companies) have been placed under statutory management under the legislation applicable to those institutions.

LIQUIDATION

What is the aim of liquidation?

The main purpose of liquidating a company is to bring the operations of the company to a close, to realise its assets, and distribute its proceeds amongst its creditors and contributories in accordance with their rights and interests. This would be followed by dissolution of the company.

Process required to commence a liquidation

Voluntary liquidation

There are two kinds of voluntary liquidation i.e. members voluntary liquidation and creditors voluntary liquidation.

- ***Members voluntary liquidation***
  A company may be liquidated voluntarily when:

- ***Creditors voluntary liquidation***
  This is initiated by the creditors of the company where the company is unable to pay its debts. The first step is a meeting of creditor's convened by the company within 14 days of a meeting at which a voluntary liquidation is to be proposed. Notice of this creditors' meeting should be sent out to the creditors not less than 7 days before the meeting date. The notice to creditors should also be published in
  - The period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved;
  - A company resolves by special resolution that the company be wound up voluntarily.

  the Kenyan Gazette (a weekly Government publication), in at least two newspapers circulating in the area in which the company has its principal place of business in Kenya, and on the company's website (if any). At their respective meetings, the creditors and the company may nominate a liquidator for purposes of liquidating the company's affairs and distributing its assets. Such liquidator must be an authorized insolvency practitioner under the Act

In both cases of voluntary winding up, before passing a resolution for voluntary liquidation, the company is required to give notice of the resolution to the holders of any qualifying floating charge in respect of the company's property. The resolution for voluntary winding up can only be passed after the expiry of 7 days from the date of the notice to the holders of any qualifying floating charge or if the person to whom the notice was given has consented in writing to the passing of such resolution.

Within 14 days after the company has passed a resolution for its voluntary liquidation, it shall publish a notice setting out the resolution in the Kenyan Gazette, in at least two newspapers circulating in the area in which the Company has its principal place of business in Kenya, and on the Company's website (if any).

Liquidation by the court

A company may be liquidated by the court if:

- The company has by special resolution resolved to be liquidated by the court;
- Having been originally registered as a public company, the company has not been issued with a trading certificate under the companies act and more than 12 months have lapsed since it was registered. Liquidation on this ground may only be done upon an application by the attorney general;
- The company fails to commence its business within 12 months of its incorporation or suspends business for a whole year;
- The number of members is reduced below two in the case of a non-private company;
- The company is unable to pay its debts;
- A voluntary arrangement made with one or more creditors does not take effect;
- The court is of the opinion that it is just and equitable for the company to be liquidated;
- On grounds of public interest, it is just and equitable to do so, upon application by the attorney general where a report is obtained from the capital markets authority, from an investigation or inspection of documents produced under the companies act or from information provided by the companies registrar indicating that it would be in the public interest to liquidate the company. This may also be done as a result of the company or its directors having been convicted of an offense involving fraudulent conduct.

The process commences when an application for winding up is made to the court by any or all of the following:

- The company or its directors;
- Creditors (including any contingent or prospective creditor or creditors);
- Contributories - where the number of members is reduced below two or the relevant shares were originally allotted to the contributory or have been held in his name for at least 6 months in the preceding 18 months or have devolved to him following the death of a former holder;
- A provisional liquidator or administrator of the company;
- The liquidator where the company is in voluntary liquidation

At what point does the liquidation process commence?

With a voluntary liquidation, the process is deemed to have commenced at the time of passing the resolution for liquidation. The liquidation of a company by the court is deemed to commence when the liquidation order is made.

Duration of the liquidation process

Under the previous regime, it was difficult to estimate the duration to complete the liquidation process as this varies so widely. We expect this to remain the same but may be aggravated by the uncertainty of some of the provisions of the Insolvency Act. The liquidation process continues until all the assets have been realised and distributed.

Extent of court involvement in the liquidation process

Liquidation by the Court

The courts will be involved at every stage of liquidation by the court. This includes:

- Confirmation of compliance with advertisement procedures;
- Hearing of the liquidation application;
- Granting the liquidation order;
- Appointment of the official receiver and supervision of its functions; and
- Collection and distribution of the company's assets.

Voluntary Liquidation

Subject to any application being made to the court, the courts would usually not be involved in a voluntary liquidation. The court may appoint a liquidator if for any reason there is no liquidator or the liquidator is unable to act.

Management of the company whilst in liquidation

When a company is in liquidation, the board of directors are displaced from their office, and in their stead the affairs of the company is placed in the hands of a liquidator. The Insolvency Act extensively provides for the powers of a liquidator which are exercisable with approval without approval. The powers exercisable without approval include:

- Power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company's seal;
- Power to sell any of the company's property by public auction or private contract;
- Power to draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company; and
- Power to take all other action that may be necessary for the beneficial liquidation of the company.

Filing of claims

Creditor voluntary liquidation - in practice debts may be proved by delivering an affidavit verifying the debt.

Liquidation by the court - the court may fix a time or times within which creditors are to prove their debts or claims or to be excluded from the benefit of any distribution made before those debts are proved. A claim is sent to the liquidator or official receiver (not the court) with a verifying affidavit. The liquidator or official receiver may allow or disallow the claim.

Factors which influence the period of a liquidation

The following are some of the factors that cause delays during the liquidation process:

- In the case of liquidation by the court, the court's diary;
- Challenges by the company, creditors or contributories in respect of the liquidation process;
- The level of cooperation among the parties; and
- The cost of appointing a liquidator especially in cases of voluntary liquidation where a company does not have significant assets.

Effect of liquidation on employees

All employees of a company stand to be automatically dismissed at the commencement of liquidation. Employees would enjoy preferential payments (being second priority claims) as follows:

- Wages or salaries payable to employees in respect of services provided to the company during the 4 months

before the commencement of the liquidation;

- Any holiday pay payable to employees on the termination of their employment before, or because of, the commencement of the liquidation;
- Any compensation for redundancy that accrues before or due to commencement of the liquidation;
- Amounts deducted by the company from the wages or salaries of employees in order to satisfy their obligations to other persons (including amounts payable to the Kenyan revenue authority in accordance with income tax act);
- Any reimbursement or payment provided for, or ordered by the Employment and Labour Relations Court under the Labour Institutions Act, 2007 to the extent that the reimbursement or payment does not relate to any matter specified in the Labour Relations Act, 2007 in respect of wages or other money or remuneration lost during the 4 months before commencement of the liquidation provided that the total amount may not, in the case of any one employee, exceed KES. 200,000 as at the commencement of the liquidation and will be subject to the relevant adjustments.

Effect of liquidation on contracts

Once liquidation commences, the company ceases to carry out business except in so far as is necessary for the liquidation. In line with this, existing contracts would continue only to the extent as may be necessary for the beneficial winding up of the company. It is, however, usual for commercial agreements to provide that the commencement of liquidation proceedings would constitute an event of default enabling the counterparty to terminate the contract. During the process of liquidation, the court has power to rescind a contract entered into by a company in liquidation as it considers appropriate upon application.

Effect of liquidation on shareholders

Subject to the satisfaction of all of the expenses of liquidation and the company's liabilities, the company's property is to be distributed among members according to their rights and interests in the company.

Effect of liquidation on creditors

Creditors are entitled to be paid out of the assets of the company after expenses of the liquidation and payments due to employees have been satisfied with secured creditors having preference over unsecured creditors.

Pending claims, litigation and arbitration

At any time after the presentation of a liquidation order to court, and before a liquidation order has been granted, pending proceedings against the company may be stayed (if the proceedings are pending in the court) or restrained (if the proceedings are pending in another court) on application by the company, a creditor or contributory.

Voidable transactions

In the case of a liquidation ordered by court, any dispositions of a company's property and any transfer of shares made by a company after commencement of liquidation are void unless the court otherwise orders

The court may also void any preferences as it deems just where the preference was intended to defeat the effects of a possible liquidation. Any transaction that can be shown to have been entered into to favour some creditors at the expense of others or to defraud creditors may also be set aside.

How is the liquidation process terminated?

Liquidation by the court

When the affairs of the company have been completely liquidated, the Official Receiver is required to lodge a notice with the Registrar of Companies to the effect that the liquidation by the court is complete. Upon receipt of the notice, the Registrar is required to register the notice. Upon expiry of three months after the date of registration of the notice, the company is deemed to have been dissolved.

Where an order for the liquidation of a company has been made by the court and the Official Receiver is the liquidator of the company, the Official Receiver may apply to the Registrar for the early dissolution of a company.

Creditors voluntary winding up

As soon as practicable after the liquidation of the company's affairs has been completed, the liquidator is required to prepare an account of the liquidation and provide an explanation showing how the liquidation has been conducted and how the company's property has been disposed of. Within 30 days of preparing the account, the liquidator is also required to convene a meeting of the company and a meeting of the creditors to have the accounts presented and the explanation considered. Within 7 days of the meetings being held the liquidator is required to lodge a copy of the account together with a return giving details of the meetings.

After receiving the accounts and returns, the Registrar registers the accounts and on expiry of 3 months from the date when the accounts and returns are registered, the company is deemed dissolved.

Director or officer liability

If a liquidation commences within 12 months of after the date on which payment was made out of capital in respect of the redemption or purchase by a company of any of its own shares, the directors who prepared the statement that the company will be able to continue to carry on business as a going concern for purposes of the redemption or purchase, shall, to the extent necessary to satisfy the insufficiency, be liable to contribute to the company's assets except a director who shows that the director had reasonable grounds for forming the opinion set out in the declaration.

The Insolvency Act also provides for comprehensive offences that would be committed by officers of a company (which includes directors) during a liquidation. These include offences:

- Involving commission of fraudulent acts in anticipation of liquidation;
- Involving transactions to defraud creditors of company in liquidation;
- Involving misconduct committed in course of the liquidation of company;

- Involving the falsification of documents in relation to a company in liquidation;
- Involving the making of material omissions from a statement relating to financial position of company in liquidation;
- Involving the making of false representations to creditors of a company in liquidation.

Consequences of director or officer liability
An officer found guilty of the offences listed above is liable, on conviction, to a fine, imprisonment or both. The court also has the power to make various orders against delinquent directors and liquidators, officers of the company and other persons found to have participated in fraudulent trading by a company in liquidation and officers of a company engaging in wrongful trading.

BUSINESS RESCUE / ADMINISTRATION

Certain institutions (notably banks and other financial institutions licensed by the Central Bank of Kenya, insurance companies, and financial intermediaries licensed by the Capital Markets Authority) are subject to special insolvency legislation under specific Acts of Parliament which regulate the licensing of the institutions in question.

The Insolvency Act has introduced extensive provisions in respect of voluntary arrangements and administrations of insolvent companies that provide a regime for business rescue.

An application to the court for an administration order in respect of a company may be made by a company or its directors, one or more creditors and any other person of a class prescribed by the insolvency regulations. On the making of an administration order in respect of a company, there will be a moratorium on insolvency proceedings and legal proceedings against the company.

Under the voluntary arrangement provisions, when a proposal takes effect as a voluntary arrangement, the supervisor becomes responsible for implementing the arrangement in the interests of the company and its creditors and monitoring compliance by the company with the terms of the arrangement. If the directors of an eligible company wish to make a proposal for a voluntary arrangement, they would be able to apply to obtain a moratorium for the company.

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 Companies Act 2015 provides for the registration of a debenture at the Companies Registry within 30 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/ Kenyan 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 500 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 dependent on the secured amount and it ranges from KES 2,500 to 14,000 payable to the Registrar of Companies; and
- Chattels mortgages —a filing fee of KES 50 is payable usually by the lender to Registrar of Companies.

Requirements for the assignment or transfer of a 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
The Insolvency Act confers wide powers on the court to conduct an inquiry into an insolvent company's dealings on application by the official receiver or a liquidator. In relation to companies under administration or in liquidation, the court has powers to set aside transactions that were entered into at a relevant time if such transactions gave preference to a person which places such persons in a better position during insolvency than they would otherwise have been. The order by the court may require the release or discharge (in whole or in part) of any security given by the company. The relevant time for purposes of this section includes:

- The two years immediately preceding the onset of insolvency;
- The period between the making of an administration application in respect of the company and the making of an administration order; or
- The period between lodgement with the court of a copy of a notice of intention to appoint an administrator and the making of the appointment.

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

- The chaotic state of government registries;
- The expense of court proceedings, the backlog of cases in the courts and erratic court decisions.

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
The Companies Act 2015 now provides for the acquisition by a limited company of its own shares.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which Kenyan courts 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
The Insolvency Act requires insolvency practitioners to be authorised. A person acts as an insolvency practitioner in relation to a company if the person acts as the liquidator, provisional liquidator, administrator or a supervisor of a voluntary arrangement. A person who wishes to act as an insolvency practitioner is required to apply to the Official Receiver for authorisation to act as an insolvency practitioner. While the Act provides for persons who would be qualified to act as an insolvency practitioner, there are no provisions on the recognition of foreign practitioners. We would expect the specific requirements for authorisation to be provided for under regulations which are yet to be passed.

Provisions on cross border insolvency
Certain aspects of the Model Law on Cross-Border Insolvency (adopted by the United Nations. Commission on International

Trade Law) are applicable in Kenya, including where:-

- assistance is sought in Kenya by a foreign court or a foreign representative in connection with a foreign insolvency proceeding;
- assistance is sought in a foreign State in connection with a proceeding under the Insolvency Act, and any other written law relating to insolvency in Kenya;
- a foreign proceeding and a proceeding relating to Insolvency in Kenya in respect of the same debtor are taking place concurrently; or
- creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participation in, a proceedings under law relating to insolvency in Kenya.

LESOTHO

WEBBER NEWDIGATE FIRM OF ATTORNEYS

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"), a company will be said to be insolvent if the company is unable to pay its debts or if 75% of the issued share capital has been lost.

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 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. If the books, records and documents are not delivered within a reasonable time, 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 24 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 in respect of the distribution of the proceeds of the estate.

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

Voidable 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 fulfil 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 within which the judicial management process should 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 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 is 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 or to be 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 made to court by the judicial manager to cancel a transaction concluded within one year prior to the commencement of the 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 the bond 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 over 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 and 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 a 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 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 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.

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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 modelled 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 the 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 (i.e. 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 the Insolvency Service or the Financial Services Commission where the company is a licensee thereof, and also an administrator and the Registrar of Companies following amendments brought to the Act in 2015, as a result of the company's own decision where the company is solvent and the liquidator is appointed by a shareholders' meeting; or as a result of a decision of creditors made at a meeting appointing a liquidator when the company is insolvent.

Formal restructuring procedures

The formal restructuring procedures that are covered under the Act are administration and receivership.

Administration

The administration process may be commenced without the intervention of the courts, although a number of formalities must be adhered to.

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;
- an administrator;
- the Director of the Insolvency Service;
- the Registrar of Companies; or
- the Financial Services Commission, where the company is a licensee thereof.

A voluntary winding up may be (a) a creditors' voluntary winding up where the company is insolvent and the liquidator is appointed by the creditors at a meeting of creditors; or (b) a shareholders' voluntary winding up where the company is solvent and the liquidator is appointed by the shareholders at a shareholders' meeting.

In the case of a shareholders' voluntary winding up, the

company shall, within 7 days, lodge with the Director of the Insolvency Service of the Registrar of Companies a copy of the winding up resolution and within 10 days, give notice of the winding up resolution in one daily newspaper and in the Government Gazette.

At what point does the liquidation process commence?
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.

A petition to wind up may also be presented where the company or its officers have persistently defaulted in complying not only with the Act but also with the Companies Act.

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.

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 in an amount sufficient for the payment of its debts and liabilities and the costs, charges and expenses of the winding up and for the adjustment of the rights of the contributories among themselves. A past shareholder shall, however, not be liable where he has ceased to be a member for 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. As regards priority of payments for the distribution of the debtor's assets, the principle is that the Official Receiver or the liquidator shall pay, out of the money received by him from the realisation of the property of a debtor, the preferential claims set out in the Fourth Schedule to the Act, to the extent and in the order of priority set out in that Schedule, i.e. (i) costs of liquidator, (ii) amounts due to the government and its agencies, (iii) wages of employees, (iv) costs of compromise with creditors, (v) payments made pari passu with first ranking fixed and floating charges and mortgages inscribed for more than three years, (vi) rent, (vii) first ranking fixed and floating charges and mortgages inscribed for less than three years, (viii) claims of victims of an accident, (ix) other privileges, securities and creditors, (x) amounts due to government and its agencies for amounts due and unpaid for over three months, and (xi) all other unsecured creditors who have proved their claims in bankruptcy or winding up proceedings.

Following amendments to the law in 2015, the aforementioned order of priority is slightly jostled since the Official Receiver or liquidator will have to exclude from the property of the company any amount deducted pursuant to the Income Tax Act or the Value Added Tax Act to the extent that such amount remains unpaid to the Mauritius Revenue Authority. The Official Receiver or liquidator shall set aside such money, and before payment of any preferential claims, remit to the Mauritius Revenue Authority the amount set aside.

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 the 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

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 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.

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 salaries that, during the administration of the company, accrues under a contract of employment with the company that was entered into before the administrator's appointment, unless the administrator has lawfully given notice of the termination of the contract within 21 days of appointment.

Effect of administration on 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. Where the creditors at a watershed meeting have passed a resolution that the company execute such a deed, and the company fails to do so, the administrator shall (a) apply to the Court for the appointment of a liquidator to the company; or (ii) if the company is already in liquidation, apply to the Court for the liquidation to resume.

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-privilégié") 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 (defined under the Act as a person or body, including one appointed to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding) is entitled to apply directly to the Supreme Court of Mauritius in order to have access to insolvency proceedings in Mauritius.

If the foreign representative has been appointed during foreign proceedings, he may apply to the Supreme Court for recognition of the foreign proceedings. Such an application shall be accompanied by –

- a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
- a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
- in the absence of the aforementioned, any other evidence acceptable to the Supreme Court.

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. From the time of filing for an application for recognition until the application is decided upon, the Supreme Court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including –

- staying execution against the debtor's assets; or
- entrusting the administration or realisation of all or part of the debtor's assets located in Mauritius to the foreign representative or another person designated by the Supreme Court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; or
- suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor; or
- providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's affairs, rights, obligations or liabilities.

MOZAMBIQUE

COUTO, GRAÇA & ASSOCIADOS, LDA

FIRM INFORMATION

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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 (i.e liquidation) is instituted in the jurisdiction of the court where the company is domiciled, has its principal place of business or, if it has a registered office outside of Mozambique, where the company has its branch office in Mozambique. A judicial insolvency is instituted before the court

by the debtor company itself, the surviving spouse, any heir of the debtor or the estate´s administrator ("cabeça-de-casal"), the shareholders of the debtor company in terms of the law or in terms of the articles of association of the company and/or any creditor of the company.

Formal restructuring procedures

In terms of the insolvency and rescue legislation in Mozambique, there are 2 distinct approaches. A company, although it is experiencing financial difficulty, is deemed to be "rescuable" through the creation of a rescue plan. This may arise judicially, with a judicial business rescue, or extra-judicially, by agreement among the creditors. A judicial business rescue is initiated at the instance of the debtor who, at such moment, exercises its activity regularly for more than 12 months and who:

- is not currently insolvent or, if it was insolvent, the liabilities have been declared extinct by final judgment;
- for 2 years preceding the request for judicial business rescue, has not been granted a judicial business rescue; and
- has not been convicted, or does not have as its administrator or controlling shareholder, a person convicted of an insolvent crime.

Informal insolvency or restructuring procedures

Extra-judicial business rescue is possible in Mozambique. It may be initiated by the debtor company if the debtor company fulfils the requirements for a judicial business rescue and provided the creditors agree to it. This procedure is conducted in terms of the rules for conciliation, mediation and arbitration in Mozambique.

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.

It should be noted that the judge fixes the legal term of the insolvency and may make it retroactive up to 90 (ninety) days from the date that the application for insolvency is submitted.

Duration of the liquidation process

The law does not provide for a specific timeline for the completion of the liquidation process. Such timeline is determined by the judge who orders the insolvency.

Extent of court involvement in the liquidation process

The Mozambican court is involved in every aspect of the liquidation and generally in respect of insolvency procedures.

Management of the company whilst in liquidation

The management of the company whilst in liquidation is handled by the insolvency administrator. The board of directors 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 be 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 is approved by the judge.

Extent of court involvement in the business rescue

The court is barely involved in the extra-judicial business rescue process (informal procedure) as this process is conducted by the Centre of Arbitration. The court is only involved in this process when it receives the agreement agreed to by affected parties. With a judicial business rescue, the court is more involved although it does not participate in every step in the process. The process is conducted by the insolvency administrator together with directions received from the creditors´ committee.

Management of the company whilst in business rescue

The management of a company is placed in the hands of the insolvency administrator whilst the company is in business rescue. The insolvency administrator is appointed for his competence in:

- supervising the activities of the debtor and implementing the provisions of the rescue plan;
- requesting a declaration of insolvency from the court in the event that the rescue plan does not succeed;
- submitting a monthly report about the debtor´s activities to the judge; and
- submitting a report about the execution of the rescue plan to the judge upon termination of the rescue process.

During the business rescue process, the debtor or its directors are expected to conduct the business under the supervision of the creditor´s committee, if any, and under the supervision of the insolvency administrator.

Filing of claims

If the judge accepts the request for business rescue, a notice of such acceptance is sent to the creditors by letter and the same notice is published in the Government Gazette and in a newspaper with wide circulation in the place where the judicial business rescue is petitioned. The creditors, thereafter, have 10 days within which to submit their claims, or objections, to the insolvency administrator. Creditors may also contest the commencement of business rescue and the rescue plan itself (within 30 days of the date on which the notice, enclosing the rescue plan and creditors' list, is published).

Factors which influence the period of business rescue

A number of factors may influence the rescue process, including, but not limited to, any opposition instituted in respect of the provisions of the rescue plan, removing the board of directors or members of the board of directors and appointing an insolvency administrator.

Funding of the company whilst in business rescue

Provided agreement is sought from the creditors´ committee and the insolvency administrator and that provision is made for it in the rescue plan, the company may be funded through, among others, an increase in the share capital of the company, a sale of some of the assets of the company, a transfer of shares and a novation of the debt of the company.

Effect of business rescue on employees

The rescue plan must ensure that payments due to employees arising from labour legislation or work related incidents are made within a period of 1 year from the date of the commencement of the business rescue. Moreover, the business rescue plan may not, in respect of the payment of the minimum of 5 month's salary as is applicable, delay payment to such employees for a period in excess of 3 months.

Effect of business rescue on contracts

After submission of the request to the court for judicial business rescue, the debtor company is not allowed to transfer or encumber any assets or rights of its permanent estate, 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 plan
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 has been executed in accordance with the

laws of the country in which it was delivered;
- judgment was handed down by a competent court according to the rules of conflict in Mozambique;
- the exception of double jeopardy may not be invoked, except if the foreign court determined the jurisdiction;
- the accused was duly summoned, save if it is a cause for which the Mozambican law would dispense with the initial summons, and if the accused was immediately convicted due to lack of opposition to the request, that the summons was delivered to the actual person;
- it does not contain decisions contrary to the Mozambican principles of public order; and
- having been delivered against a Mozambican, it does not offend the provisions of Mozambican law when the matter should have been resolved in accordance with the Mozambican rules of conflict of laws.

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

It is not legally possible for a foreign business rescue practitioner or insolvency practitioner to practice in Mozambique. Trustees are not recognized in Mozambique. Local business rescue practitioners or insolvency practitioners would need to be engaged. It is worth mentioning that in July 2016 the e Mozambican Association of Insolvency Administrators ("AMAIN") was officially created to ensure the administration of the Insolvency Assets and Business Rescue

NAMIBIA

KOEP & PARTNERS

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 km² 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 democratically 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 independent 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

The Constitution is the supreme law of the land. Namibia's legal system is a mixed legal system, with its substantive law predominantly based on civil law and its procedural law predominantly common law. Namibia also recognizes some of the customary laws of the indigenous people.

TESTS FOR INSOLVENCY

What are the tests for insolvency (ie liquidation)?
In terms of the Companies Act 28 of 2004 (Companies Act), a company in Namibia may be liquidated when it is unable to pay its debts. Section 350(1) of the Companies Act sets out different scenarios where a company is deemed unable to pay its debts. First, a company is deemed unable to pay its debts if a creditor with a claim of at least N$100 against the company has demanded payment of the claim (if due) and the company fails to satisfy the claim within 15 days. The demand must be served on the company by leaving it at the company's registered office. There must be no bona fide dispute in connection with the validity of the claim.

The second instance where a company will be deemed unable to pay its debts is if any process issued on a judgment or court order in favour of a creditor is returned by the deputy-sheriff or messenger with a note that no disposable property has been found or that the disposable property attached and sold was not sufficient to satisfy the judgment or order (i.e a nulla bona return). It is not sufficient merely for someone to state on behalf of the company that there are no disposable property or sufficient disposable property. It is also not sufficient for it to appear from the return that no sufficient disposable property has been found. The return must expressly contain an averment that the deputy-sheriff or messenger did not find any or sufficient disposable property. There is, however, no duty on the deputy-sheriff or messenger to search for disposable property; mere failure to find any or sufficient disposable property is enough.

Finally, a company is deemed unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts. To prove that a company is unable to pay its debts, it may be proved that that the company's liabilities exceed the company's assets (ie the company is factually insolvent) or that the company is unable to pay its debt as they become due in the normal course of business (ie the company is commercially insolvent). A company can therefore be commercially insolvent while at the same time being factually solvent.

What are the tests for financial distress (ie business rescue or administration)?
There is no provision in the Companies Act or the Insolvency Act 24 of 1996 (Insolvency Act) for business rescue proceedings. The concept of business rescue is unfamiliar in Namibia. 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 Chapter 15 of the Companies Act. Judicial management is discussed in more detail below.

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 351 of the Companies Act. The ordinary application is in the form of a notice of motion with an accompanying founding affidavit deposed to by the applicant. Several interested parties may apply for the winding-up of the company, including one or more member, one or more creditor (including contingent creditors), or the company itself.

Formal restructuring procedures

Chapter 12 of the Companies Act deals with compromises, arrangements and amalgamations. Where a company proposes to enter into a compromise or arrangement with its members, creditors, group of members or creditors or combination of group of members or creditors, application must be made to the court to sanction the compromise or arrangement. Application may be made by the company, any creditor or member of the company or the liquidator or judicial manager of the company.

Informal insolvency or restructuring procedures

Informal insolvency or restructuring procedures in Namibia may be agreed upon by the troubled company and its creditors. 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. All creditors must agree to the restructuring or repayment agreement. It is advisable to include in the agreement an undertaking by the creditors not to apply for the winding-up of the company.

LIQUIDATION

What is the aim of liquidation?

The purpose of liquidation is first to create a concursus creditorium (coming together of creditors to freeze the company's estate). Secondly, the purpose is to create an equitable distribution of the company's assets for the benefit of the creditors. Thirdly, liquidation of a company seeks to ensure that the equitable distribution of the company's assets is conducted in an orderly pre-determined manner. Finally, liquidation proceedings aim to investigate possible impeachable transactions (voidable preferences) entered into by the company with the view of setting aside dispositions, preferences or collusive dealings (as dealt with in 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

In terms of section 348 of the Companies Act, a company may be wound-up either by the court or by means of a voluntary winding-up of the creditors or the members. In cases of voluntary winding-up by the member's – instituted in cases other than insolvency – the process of winding-up commences with a special resolution by the members to wind-up the company, as required in terms of section 354. Similarly, a creditors' voluntary winding-up also requires a special resolution by the members of the company in terms of section 356, provided the resolution specifically states that it is a creditors' voluntary winding-up. In cases of a winding-up of the company by the court, the liquidation and winding-up of a company requires the bringing of an ordinary application to the High Court of Namibia in the form of a notice of motion and a founding affidavit.

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 to the court of the application for liquidation. In cases of voluntary winding-up, the process commences upon registration of the special resolution (section 357).

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 of 6 months for the filing of the first liquidation and distribution account. However, in practice the duration of the liquidation process could take longer depending on the complexity of the liquidation.

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. The role of the directors / managers is therefore limited. 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 creditors have the onus of proving their claims, the security they 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 creditors 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 claims 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 another 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 must process.

Effect of liquidation on employees

In terms of section 32 of the Labour Act 11 of 2007, employment contracts are automatically terminated one month after the date on which the company is wound up. An employee whose contract of employment is terminated by the winding-up of the employer is a preferent creditor in respect of any remuneration due or monies payable to the employee.

Effect of liquidation on contracts

In general, incomplete contracts are not automatically terminated in the event of liquidation, but may be terminated at the liquidator's election. 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 instalment 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.

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 *concursus 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, a creditor or a 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 liquation 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 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 intend 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. Instead, Namibia still follows a process of judicial management.

Process required to commence a judicial management
Namibia does not recognize business rescue proceedings. In terms of section 433(1) of the Companies Act, the Court may place a company under judicial management if:

- the company is unable to pay its debts or is probably unable to meet its obligations and has not become or is prevented from becoming a successful concern; and
- there is a reasonable probability that, if placed under judicial management, it will be enabled to pay its debts or meet its obligations and become a successful concern; and
- it is just and equitable to do so.

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 a founding affidavit and, where applicable, supporting affidavits.

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. The board of directors of the company under judicial management take the role of spectator. Section 439 of 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, insofar as they are not inconsistent with any direction contained in the relevant judicial management order, take over and assume the management of the company and 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 section 34 of the Labour Act 11 of 2007.

Effect of judicial management on contacts
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
Judicial management in effect amounts to a type of moratorium. All actions, proceedings, the execution of all writs, summons and other processes against the company may be stayed if so stated in the judicial management order.

Effects of the moratorium
No explicit moratorium is created by the commencement of judicial management. However, since it is possible for a court order to contain directions for the stay of proceedings, a judicial management order has been called a "sort of moratorium".

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. If the court order does not deal with this, it is deemed that all suretyships remain in place.

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 rather to 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 notarisation 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 agricultural land (which requires a waiver from the governments pre-emptive right before it may be sold in execution) and claims and licences in respect of minerals and petroleum.

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

Namibia is not a party to the New York Convention. 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.

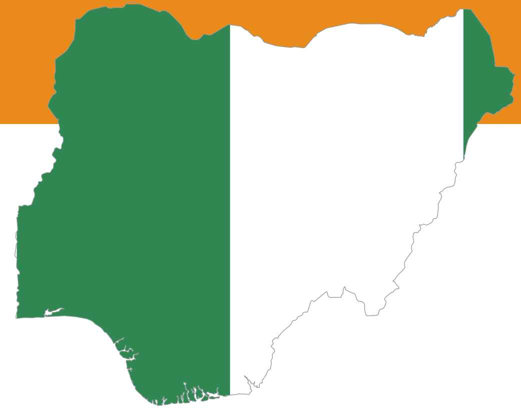
Requirements for recognition of a foreign judgment

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 & COMPANY



FIRM 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 seven distinct systems of law in Nigeria, the:

- the Constitution (The 1999 Constitution of the Federal Republic of Nigeria as amended), this is the grundnorm in Nigeria;
- English law (common law, doctrines of equity, statutes of general application and statutes and subsidiary legislation on specific matters), derived from Nigeria's colonial past and developments post-independence;
- Customary law, derived from indigenous traditional norms and practices;
- Islamic/Sharia law, used only in the predominantly Muslim north of the country;
- Legislation /Statutory law, derived from statutes and laws made by the legislative arm of government;
- Case law or judicial precedents (decisions made by the Courts become law); and
- International law.

The country has a judicial 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 Companies 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 the court, liquidation is deemed to commence upon the presentation of a petition to the Federal High Court. However, if it is a voluntary winding up, liquidation commences at the passing of the resolution for voluntary winding up. Voluntary winding-up could occur in the following instances:

- when the period fixed by the articles 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 would 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 the aforesaid manner shall exercise their vast powers subject to any order made by the courts.

Upon the request of a debenture holder, the court has the power to appoint an official receiver or an interested person. An official receiver for the purpose of a winding up by the Court can either be the Deputy Chief Registrar of the Federal High Court or an officer designated for the purpose by the Chief Judge of the Federal High Court. The court may also additionally appoint a receiver as a manager. While liquidators can be appointed by the court, they may also be appointed by the company, its creditors, or members, depending on the type of winding up. The court's involvement in the liquidation process depends on the type of liquidation. In some cases, the court is limited to determining questions or powers arising from the winding up of the company, while in others, the court plays an integral role in the liquidation process.

The court is also involved in a creditor's voluntary winding up and a winding up under the supervision of the court.

Management of the company whilst in liquidation

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 employee's 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;
  - conveyances;
  - mortgages;
  - the delivery of goods;
  - payments; and
  - executions.
- 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).
  - 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.

These transactions include:

- 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 :
- 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 registered. 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 costs 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 for every one million naira or part thereof of the consideration; and
- for private companies, N10,000.00 for the first one million Naira or part thereof and N5,000 for the subsequent million/s of the consideration.

The following penalties are applicable when registration costs are paid late:
- for a public company, N10,000.00; and
- for a private company, N5,000.00.

If a mortgage or charge is on a parcel of land, the registration cost is regulated by various States in the Federation and currently for Lagos State it is N5,000.00 per one million of the consideration. It should be noted that before a mortgage or charge on land can be registered, the payment of the 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.

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 for the compulsory acquisition of 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 a 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

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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 MULTI-PARTY DEMOCRACY

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.

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, 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 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
TThe 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 the 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 are 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
The 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.

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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 MULTI-PARTY DEMOCRACY

The Constitution of the Republic of South Africa Act 108 of 1996 (Constitution) is one of the most progressive in the world and entrenches a Bill of Rights which guarantees property rights, equality, socio-economic rights and individual rights. The Constitution also makes provision for an independent judiciary and the right to freedom of expression.

LEGAL SYSTEM

South Africa has its own independent executive, legislature and judiciary. The supreme law of the Republic is the Constitution, and any law inconsistent with its provisions is 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 (commercial insolvency). The latter is the more appropriate test (and the test used to determine the status of a company or corporation) for companies or corporations in that very often a company or corporation will be factually insolvent but not commercially insolvent.

What are the tests for financial distress (ie business rescue or administration)?
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 contemplates the situation in which the company will find itself in the ensuing six months.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures
If a company is insolvent it should be placed in liquidation. The provisions of Chapter 14 of the Companies Act 61 of 1973 (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. This is essentially a form of administration. 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 and meaningful. A company would also need to obtain undertakings from the creditors not to make application to court to place the company into liquidation or business rescue during the process.

LIQUIDATION

What is the aim of liquidation?
When a company (or corporation) is no longer able to trade as a consequence of it being insolvent, the company's assets are

liquidated – that is, sold either by way of private treaty or by way of public auction in order to pay costs, 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 (i) voluntarily by the board of directors passing of a resolution to that effect (driven by the creditors or shareholders of a company) and by thereafter filing such resolution and various other forms and documents with the companies' office; or (ii) 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 (i) a voluntary winding-up initiated by the company and conducted either (a) the company; or (b) the company's creditors, as determined by the resolution of the company; or (ii) 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 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 5 years depending on the size of the estate and the nature and complexity of the transactions with 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 needs to recover assets disposed of by the company when they should not have been disposed of, the liquidator may utilize 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 (a) by the liquidator or the creditors in a creditors' voluntary winding-up; or (b) by the liquidator or the company in general meeting in a members' voluntary winding-up.

As soon as a winding-up order has been made in relation to a company, or a special resolution for a voluntary winding-up of a company has been registered with 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 realization 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 adds to the delay in the liquidation process. Furthermore, the liquidator may need to institute legal proceedings for the recovery of assets that were disposed of by the company at a time when the company should not have disposed of such asset or assets. These legal proceedings can take anything from 6 months to 2 years, depending on the form used for the initiation of such proceedings and the manner in which the litigation unfolds.

Effect of liquidation on employees

In liquidation proceedings, employment contracts are immediately suspended for a period of time and may in time be cancelled by a liquidator after he or she has given due consideration to appropriate measures to prevent

the cancellation of employment contracts and in turn retrenchments. All suspended contracts, not already terminated by the liquidator, will be automatically terminated 45 days after the date of the final appointment of the liquidator. Employees are not obligated to render services to the company once it has commenced liquidation and the company is not required to remunerate such employees for any services so rendered. Insofar as payments to employees 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, medial 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 contract.

Effect of liquidation on shareholders

Once a company has been liquidated, the shareholders will have no rights as the company no longer exists. Any residue left after satisfying all the company's debts is paid to the shareholders.

Effect of liquidation on creditors

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, 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 (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void. Every person who, having instituted legal proceedings against a company which is suspended by a winding-up, intends to continue with such litigation, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, must within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings. If no notice is given the proceedings shall be considered to be abandoned unless the court otherwise directs.

Voidable transactions

Any transaction entered into by the debtor company before liquidation whereby it has disposed of property belonging to it for no value or in a manner that has the effect or intention of prejudicing creditors or preferring one above the other is a voidable or undue preference transaction and may be set aside.

How is the liquidation process terminated?

Once the affairs of a company have been wound up and if the liquidator has complied with all the requirements of the Master of the High Court, the liquidator may apply in writing to the Master of the High Court for a certificate to that effect. The Master of the High Court shall, when he issues the certificate, state that he consents to the reduction of the security by the liquidator to a stated amount or to its cancellation. The liquidation and winding-up proceedings at this point would be terminated and the companies name removed from the register of companies.

Director or officer liability

A director, including an alternate director, a prescribed officer or a person who is a member of a committee of a board of a company, or of the audit committee of a company is prohibited from trading a company recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. If either of the aforesaid trades a company in this manner, they could be help 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 or administration

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 or administration process commence?

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 (i) the business rescue practitioner attempting to procure a purchaser for the business or assets; (ii) the need to obtain regulatory approvals in respect of a plan that has been adopted with the requisite support; and (iii) the fulfillment of any conditions precedent, following the adoption of a plan, or (iv) 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 provided to the company following the commencement of business rescue or services rendered by employees or suppliers of the company for the duration of the business rescue. Post-commencement finance will rank in preference to the claims of unsecured creditors. Post-commencement financiers may also take security for their funding but only over unsecured assets belonging to the company in distress.

Effect of business on employees

Employees continue to be employed by the company on the same terms and conditions, unless different terms are agreed upon between the employees and the company or unless changes occur in the ordinary course of attrition. Any retrenchments contemplated by the business rescue practitioner will be subject to South African labour legislation.

Effect of business rescue on contracts

Generally speaking, contracts concluded with the company (unless they contain an event of default clause, of which business rescue is one such event), prior to the commencement of business rescue, remain extant. The business rescue practitioner may suspend (entirely, partially or conditionally), any agreement to which the company is party, 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.

Effect of business rescue on shareholders

There can be no alteration to the classification or status of a company's issued securities unless this is done in the ordinary course of business, by way of an order of court or in pursuance of the provisions of the business rescue plan. Further, shareholders retain their shareholding in the company, notwithstanding the commencement of business rescue.

Effect of business rescue on creditors

The historic position, and claims of creditors, is crystallized as at the date of the commencement of business rescue. Creditors are entitled to submit claims to the business rescue practitioner but may not enforce any claims against the company by way of the institution or commencement of legal proceedings. This is so as a consequence of the "stay" on legal proceedings against the company.

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. Broadly speaking the plan will set out details relating to the background of the company, any proposal made for the rescue or rehabilitation of the company and any assumptions or conditions upon which the plan is based. The plan will also include how the assets, liabilities, contracts and employees will be treated following the adoption of the plan.

Voting on the plan

The business rescue practitioner must convene and preside over a meeting of the creditors within 10 business days of the publication of the plan. At this meeting, the plan must be introduced, the employees' representatives may address all persons at the meeting and a discussion is held on the proposed plan. The practitioner will then procure a vote for the approval of the plan. A plan will be accepted if at least 75 per cent of the creditors' voting at value and 50 per cent of the independent creditors' vote in favour of the plan. If the plan affects the rights of shareholders or securities holders, a separate vote of the shareholders or securities holders affected is procured. A simple majority vote is required for a plan to be supported by shareholders and/or securities holders. If a plan is rejected, affected persons or the 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 claims

If a business rescue plan that is approved by creditors and shareholders, if need be, compromises the claims of creditors, such creditors are not entitled to enforce the remainder of their claims against the company unless the business rescue plan provides otherwise. In such an instance, the company will continue to trade with a "clean bill of health".

Effect on suretyships

If the company that is in business rescue gave a surety or guarantee to a third party, such party cannot enforce such surety or guarantee against the company in business rescue as a result of the operation of the moratorium. Such a party would need to submit a claim in the business rescue. However, if a third party stood surety for, or guaranteed the obligations of, the company in business rescue, such third party could be liable for the remainder of the debt that the company is not able to pay, unless the principal claim is compromised. If the principal claim is compromised, the suretyship claim will fall away but the guarantee, provided it is drafted as an independent guarantee, will remain extant.

How is the process terminated?

Business rescue proceedings end when (a) the court sets aside the resolution or order that began the business rescue proceedings or when the court converts business rescue proceedings into liquidation proceedings; (b) the business rescue practitioner files a notice of termination of business rescue proceedings with CIPC; and (c) business rescue plan has been proposed and rejected and no affected person has acted to extend the proceedings in any manner contemplated by the 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 the business rescue?

If a business rescue plan is adopted and implemented in accordance with its terms, the company will continue to trade and will graduate from business rescue. If a plan is rejected, and steps are not taken to implement a revised plan, the practitioner will need to make application to court to place the company in liquidation. A similar result may ensue if the conditions precedent to a plan are not fulfilled.

Director and officer liability

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

SECURITY

Types of security

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

Immovable property –

Mortgage bonds

Security over immovable assets is obtained through the registration of a mortgage bond as set out in the Deeds Registry Act 47 of 1937 ("**Deeds Registry Act**"). The mortgage bond does not transfer the title to the mortgagee but confers a limited real right on to the mortgagee to have the immovable property sold in execution and the proceeds used to settle the secured debt.

Movable property

The most common forms of security for movable or intangible assets are pledges, a cession in security (including a cession in securitatem debit and an out-and out cession), general notarial bonds, special notarial bonds and a landlord's hypothec.

Pledge
A pledge is a type of mortgage of movable property given by a pledger in favour of a pledgee as security for an obligation. It is created by an agreement between the parties and is perfected by the delivery of the pledged asset to the pledgee or an appointed agent. The pledgee maintains possession of the pledged asset, but does not acquire ownership unless a default occurs.

Cessions
A cession in security is a way of granting security over incorporeal movable property (including. shares in companies and mineral rights), through an agreement to grant security by a cession of rights in favour of the cessionary.

Cessions can take two different forms namely –
- a cession in *securitatem debiti*, where title to the property remains with the cedent (this is the preferred and most commonly used form); or
- an out-and-out cession, where the cedent agrees to transfer the title to the property to the cessionary, subject to a right of the cedent to have the property transferred back to it by the cessionary once the obligation secured is discharged.

Security over financial instruments is typically created by a pledge or a cession in security, however it is recommend that a combination of the two is utilised. In practice where the shares or any financial instrument is evidenced through a certificate i.e. share certificates, the certificates are usually delivered with a transfer form to perfect the security.

General notarial bonds
A general notarial bond is a mortgage by a mortgagor of all of its movable property in favour of a mortgagee as security. In the absence of attachment of the property before insolvency, a general notarial bond is merely a means of obtaining a limited statutory preference above the claims of concurrent creditors in the insolvent estate of the mortgagor.

Special notarial bonds
A special notarial bond is a bond registered after the commencement of the Security by Means of Movable Property Act over tangible movable property where the property has been described so that it is readily recognisable. The title to the movable property remains with the mortgagee subject to the mortgagor security interest.

Landlord's hypothec
A Landlord's hypothec is a form of security that comes into effect automatically where rent has become due and payable by the Lessee and has not been paid. The Lessor has a hypothec that provides him or her with a real right of security allowing him to attach and execute the Lessee's property to satisfy payments of the arrears.

Guarantees
Guarantees are a form of security generally used in lending transactions where a Guarantor undertakes to pay or perform another person's debt or obligation in the event of a default by the person primarily responsible for it. The Guarantor, who is not the debtor, guarantees these obligations by granting a security interest in favour of the secured Creditor. In turn the debtor will usually give the Guarantor an indemnity, which is a form of security that exempts the Guarantor from any legal responsibility. These concepts are discussed in more detail in 2.2 below.

Statutory prescribed forms of security

Aircrafts
The Recognition of Rights in Aircraft Act, 1993 prescribes that security overs shares in an aircraft can only be created by a deed of mortgage in the prescribed form and can only be enforced by third party creditors to the extent that the asset is located in South Africa. A general notarial bond or special notarial bond cannot be created or registered over an aircraft.

South African ships
Security can only be created by a mortgage in the prescribed form according to the Ship Registration Act, 1998. A general notarial bond or special notarial bond cannot be created or registered over a ship.

Intellectual property
- 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, 1993 prescribes that the security that can be taken over registered designs or applications for designs can be taken by a hypothecation by cession in security. Security over unregistered designs is granted by a cession in security;
- Security over patents or application for patents can be taken by a hypothecation according to the Patents Act, 1978 or by a cession in security. Security over unregistered patents is granted by a cession in security;
- Security over copyright is created by a cession in security;

Commercial security or quasi-security
The following forms of transactions are ordinarily not classified as security in the ordinary sense, however, because of the consequences the transactions have they can be classified as a form of commercial security or quasi-security.

Briefly examples of these transactions are –
- Sale and leaseback;
- Factoring;
- Hire purchase;
- Instalment sales;
- Finance leases; and
- Repurchase agreements.

In general, there are no specific formalities to be complied with in relation to these transactions. These structures are also unlikely to be re-characterised as security interests if the parties genuinely intended the contracts to have the intended effect.

Taking security
There are two common ways for a lender to take security in South Africa namely though the establishment of a Security

Special Purpose Vehicle ("**Security SPVs**") or the appointment of Security Trustees.

1. **Security SPVs**
   Security SPVs are the most popular method by which secured creditors take security where there are multiple lenders and have been utilised since the late 1980s. The security SPV is established and usually takes the form of a ring-fenced shelf company, it then grants a guarantee to the secured creditors for the obligations of a debtor under a loan agreement. The debtor in turn provides an indemnity to the security SPV and secures its obligations under the indemnity by granting security to the security SPV. The shares in the security SPV are usually held by an owner trust or other administrative party. The owner trust or administrative party is ordinarily required to grant a cession and pledge to the secured creditors over the shares it holds in the security SPV. This structure is preferred not only because it is accessible to multiple lenders but also because it is an insolvency remote structure.
2. **Security trusts**
   A security trustee is an entity which holds the various security interests created in trust for the various creditors, such as banks or bondholders. This structure is, however, not favoured as it is uncertain whether security can validly be created in favour of a security trustee acting as trustee for a group of lenders. A security trustee can be seen as an agent for the lenders in relation to the security, with the result that the security was therefore not validly created. However, if the lenders intend taking security in the form of mortgage or notarial bonds, this will not be possible under this structure as the registration of mortgage bonds and notarial bonds where security is granted in favour of an agent for a principal is prohibited by the Deeds Registry Act.

Registration and registration costs of security

- Mortgage bonds, general notarial bonds, special notarial bonds, aircraft mortgages, ship mortgages and hypothecations relating to trade marks, designs and patents must be registered as discussed above and there are registration fees payable for the registration.
- Conveyancers and notaries in relation to registration of bonds draw up the necessary documentation, on the instruction of the mortgagee, and are entitled to charge fees for preparing bonds according to a recommended tariff, which calculates fee based on the sum secured by the bond on a sliding scale, payable by the party giving the security.
- The legal rights associated with the mortgage bond come into effect only after the mortgage bond has been registered in the relevant Deeds Office. An endorsement is made on the Title Deed of the mortgaged property, recording the details of the mortgage bond.
- Where transfer duty is payable, the rate is determined on a sliding scale based on the value of the property. The mortgagor is liable for transfer duty.
- There are no documentary taxes payable in connection with the granting or taking of any other forms of security.

Requirements for the assignment or transfer of registered security

Secured debt is frequently traded in South Africa, usually by the cession of the transferring creditor's rights in the security.

To be able to transfer or assign registered security, where the security is a bond, the consent of the bondholder may be required; the cession must also be registered at a relevant Deeds Registry. This is because mortgage bonds are ranked in order of preference and a bondholder holds first preference from the proceeds of the sale of the property in the event of insolvency of the property owner.
If a security SPV structure has been used, the guarantee granted by the security SPV usually stipulates that it is granted for the benefit of all holders of the debt for which the guarantee was granted, including any and all transferees.

Methods of enforcement of security

Secured creditors can generally enforce their security on the happening of a default in connection with the principal obligation. The following general principles apply in relation to security conferred by –

- a cession in *securitatem debiti*, a pledge and a special notarial bond, the secured creditor can, without prior judgement against the security provider, procure the sale of the secured assets and apply the proceeds to satisfy the principal obligation; and
- a mortgage bond and a general notarial bond, the secured creditor is first required to perfect the security by taking possession of the secured assets, usually by way of attachment, pursuant to a court order, by the sheriff of the relevant High Court. After this, the secured creditor can procure the sale of the assets and apply the proceeds to discharge the principal obligation.

An agreement of *parate executie* may be entered into by the parties where they agree that the secured assets will be sold without the need for judicial execution provided there is no prejudice to the security provider.

This type of agreement is, however, invalid in relation to security over immovable property or secured assets not in the possession of the secured creditor at the time it wishes to enforce its rights.

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

The most prominent instances where security becomes vulnerable are where expropriation by the Government occurs, where compromise is reached between a company and its creditors in terms of the Companies Act, 2008, business rescue proceedings are instituted and insolvency procedures are commenced.

Expropriation

According to the Expropriation Act, 1975, 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.

Compromise

This is an arrangement (governed by section 155 of the Companies Act 71, 2008, (the "**Companies Act**") between the company and its creditors, or certain classes of creditors. The board of a company or a liquidator can propose an arrangement or a compromise of the financial obligations of the company to all of its creditors or to all of the members of a class of its creditors. The proposal will be adopted if it is supported by a majority in number representing at least 75% in value of the creditors or class of creditors who are present and voting at a meeting called for that purpose.

Business rescue proceedings

These proceedings are used where a company is financially distressed (ie the company's liabilities exceed its assets), including where a company anticipates being unable to pay its debts in six months' time. Business rescue proceedings may be commenced by filing a resolution at the Companies Office. Once business rescue proceedings have commenced, a moratorium is imposed on all claims (secured and unsecured). If a shareholder or creditor applies to the court to have the company placed under business rescue, the moratorium applies as soon as the application is issued. The company must appoint a business rescue practitioner. The practitioner can both, suspend (entirely, partially or conditionally), for the duration of business rescue, obligations of the company arising from any pre-commencement contracts (even if that obligation arises post-commencement) and apply urgently to a court to cancel (entirely, partially or conditionally), on any terms that are just and reasonable in the circumstances, any agreement to which the company is a party.

Insolvency

The Insolvency Act allows the court to set aside dispositions made by an insolvent debtor in the following cases –

Dispositions without value

Where the liquidator can prove that it falls within one of the following categories: (i) dispositions of property made more than two years before the liquidation of the insolvent debtor's estate, (ii) immediately after making the disposition, the liabilities of the insolvent debtor exceeded its assets; and (iii) the disposition was not made for value.

Voidable preferences

The court can set aside a disposition where all the following apply: (i) it is made by an insolvent debtor within six months before the date of liquidation; (ii) it has the effect of preferring one creditor over another; and (iii) immediately after the disposition, the liabilities of the insolvent debtor exceeded the value of its assets. The setting aside of a disposition can be prevented where the person who benefitted from the disposition can prove that it was (i) made in the ordinary course of the debtor's business; and (ii) was not intended to prefer one creditor over another.

Undue preference to creditors

The court can set aside a disposition of property made by a debtor as an undue preference where all the following apply: (i) the debtor's liabilities exceed its assets; (ii)it was made with the intention of preferring one creditor over another; and (iii) the debtor's estate is subsequently liquidated.

Under common law, once insolvency procedures have commenced, and a disposition is not set aside for any of the reasons stated in 7.4.1 to 7.4.3 above, a creditor holding movable or immovable property as security cannot realise that security itself, but must deliver it to the liquidator for realisation. The secured creditor must give notice to the Master of the High Court and the liquidator, that it holds the security before the second meeting of creditors. However, a secured creditor can realise movable property itself provided certain procedures set out in the Insolvency Act, 1936, are followed.

Section 88 of the Insolvency Act, 1936, further states that certain mortgages are invalid, whether special or general, where they are passed for the purpose of securing the payment of a debt not previously secured, which was incurred more than two months prior to the lodging of the bond with the registrar of deeds concerned for registration or for the purpose of securing the payment of a debt incurred in novation of or substitution for any such first-mentioned debt. The bond shall not confer any preference if the estate of the mortgage debtor is sequestrated within a period of six months after such lodging.

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, 1998 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 Companies Act where a debtor and/or guarantor/security provider are related or inter-related persons. The Companies Act states that a juristic person is "related" to another juristic person if –

- either of them directly or indirectly controls the other or the business of the other;
- either is a subsidiary of the other; or
- a person directly or indirectly controls each of them or the business of each of them.

An *"inter-related person"*, when used in respect of three or more persons, means persons who are related to one another in a linked series of relationships, such that two of the persons are *"related"* (as defined above), and one of them is related to the third in any such manner, and so forth in an unbroken series.

The guarantee/security may also constitute a *"distribution"* as it entails the incurrence of a debt or other obligation by the South African entity for the benefit of another company within the same group of companies i.e. the Borrower.

Accordingly, in terms of both section 45 and section 46 of the Companies Act, *inter alia*, a special resolution of the debtor's shareholders will be required and the board of directors be required to be satisfied that the debtor will meet the requirements of the solvency and liquidity test as set out in the Act.

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment
A judgment duly obtained in a court of a foreign jurisdiction is enforceable in South Africa provided it accords with the ordinary procedures applicable under South African law for the enforcement of foreign judgments.

Requirements for recognition of a foreign judgment
For a court to enforce a foreign judgment, the foreign court's judgment must be final and conclusive in that it is unalterable by the court which pronounced on it; the foreign court must have had jurisdiction to hear the matter before it in accordance with its laws and the laws governing the jurisdiction of South African courts and the recognition of the foreign judgment must not be contrary to public policy or to the laws of natural justice and the foreign judgment must accord with section 1 of the Protection of Businesses Act 1999 of 1978.

Requirements for the recognition of a foreign trustee, business rescue practitioner, or an insolvency practitioner
When a foreign representative, such as a liquidator, trustee or receiver, wishes to deal with assets in South Africa, such an individual must first be recognized by a court of law in South Africa before he is entitled to act. Our law does, and has accordingly, recognized foreign representatives.

SWAZILAND
FOR MORE INFORMATION

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FIRM INFORMATION

Henwood and Company is a general business law firm which provides legal advice and support in all areas of civil law with specific emphasis on commercial law. Our major practice areas in law include all aspects of commercial law, employment law, mergers and acquisitions, competition law , mining, trademarks telecommunications, banking and finance, employment law as well as general commercial and civil practice.

COUNTRY INFORMATION

Swaziland is an independent monarchy led by His Majesty King Mswati the III together with 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.

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. In terms of the Constitution, the Roman Dutch Common Law as amended from time to time by statute is the law which applies in Swaziland. Certain principles of Swazi Customary Law are recognised, adopted and applied as part of the domestic law of Swaziland in so far as such norms are not contrary to public policy or *contra bones 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 (the 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 (ie business rescue or administration)?
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 (i) is unable to pay its debts or meet its obligations; and (ii) 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 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.

In that regard, we innumerate the particular duties of the Liquidator hereunder –

- provide the Master of the High Court with all information which is necessary to enable him to perform his duties in terms of the Companies Act;
- open a current account in the name of the company and deposit all monies received on behalf of the company from time to time;
- examine the affairs of the company for the period before its winding up and establish whether any of the directors or officers of the company contravened any of the provisions of the Companies Act, committed any offence or whether there are grounds for disqualification of such persons by the court;
- submit a report to the general meeting of creditors and contributories of the company as soon as possible regarding the following matters –
- to lodge a liquidation and distribution account within six months after his appointment unless an extension has been granted;
- to distribute the assets/proceeds from a sale of the assets or collect the contributions immediately after the confirmation of the various accounts; and
- to lodge with the Master the receipts for dividends paid or other proof of their 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

- the issued share capital of the company and the estimated amount of its assets and liabilities;
- if the company has failed, the reasons for its failure;
- whether he has submitted or intends to submit a report to the Master of the High Court regarding offences committed by directors and officers of the company;
- whether a director or officer appears to be personally liable for damages or compensation to the company for any debts or liabilities of the company;
- information about any legal proceedings by or against the company;
- whether further enquiry regarding the formation or failure of the company is desirable in his opinion;
- whether the company has kept its accounts and records and if not in what respects the relevant provisions of the Companies Act have not been complied with;
- the progress and prospects of the winding up;
- any other matter which he thinks fit or in regard to which he may desire the directions of the creditors or the contributories.

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 sixty days unless extended by the High Court. In our experience, however, 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 effectively 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 for 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.

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 –

- 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. In circumstances where the court finally grants a liquidation order the date of operation of the order is back dated to the date of presentation of the Application.

Duration of the liquidation process
A liquidation, in terms of the Companies Act should be finalised within a period of six months but in practice this does not happen and often liquidations take anything between one year to five years to complete. However, at the end of the initial six 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 liquidator has the power to –

- bring or defend any legal actions of a civil nature in the name and on behalf of the company;
- agree to any reasonable offer of compromise made to the company , to accept part payment of a debt in full settlement thereof and to grant an extension of time for the payment of such debt;
- to compromise or admit any claim against the company including any unliquidated claims;
- to submit any dispute concerning the company to arbitration;
- to carry on or discontinue the business of the company in so far as it may be necessary for its beneficial winding up;
- to sell any movable or immovable property of the company by public auction, public treaty or contract and delivery thereof;
- to exercise any power for which he is not expressly required by the Companies Act with the permission of the Master of the High Court. 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 with all information that he requires. A failure to do so would be visited with criminal sanction.

Filing of claims
All creditors' 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 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 salaries and a portion thereof (E400.00) is secured and preferred. The balance is unsecured.

Contracts
Unless regulated by statute, a liquidation does not cause a contract to be terminated. Upon the concursus 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.

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.

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 visa-a-vis the insolvent estate would be that as determined prior to the concursus 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, 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 six 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 six 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) do 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 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;
- landlords 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 six months prior to the liquidation order, failing which it will not secure a preferent 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, as follows –

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

Purchase Price of Value Property or Amount of Bond	Free for Conveyance of Immovable Property	Fees for Mortgage Bonds
	E/R	E/R
E400 or less	234.00	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 Over E200.000	E 2028.00 2028.00 For the first E200,000 plus E300.00 per E100,000	E 1463.40 1463.80 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.

Requirements for the assignment / transfer 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

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 judgement or order of a foreign court. Upon recognition of such order or judgement, such order or judgment can be executed upon in Swaziland and has the status of an order of judgement 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 where instituted in that forum and that it could validly issue the Judgement that it issued); and
- the order or judgement 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 Judgement.

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

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

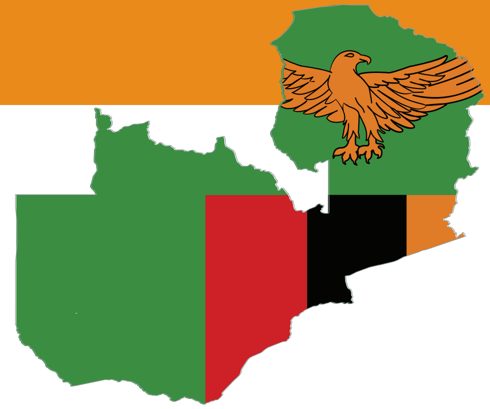
The recognition of a foreign trustee is governed by the Recognition of External Trustees and Liquidators Act No. 51 of 1932. In terms of this Act, the High Court may order the recognition of any external trustee or external liquidator who has –

- 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.

ZAMBIA

CORPUS LEGAL PRACTITIONERS



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COUNTRY INFORMATION

Zambia has a population of approximately 13.9 million. 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 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 (equivalent to ZMW 50.00 or US$ 4.50) 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 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 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 descending 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 and adjust the rights of the members among themselves and pay a final return to the members, if any. Shares generally grant rights which differ in terms of scope or priority. Therefore, the liquidator may elect to terminate the preferential treatment of certain shares or narrow down the scope of rights conferred by shares.

Filing of claims

In general terms, claims by creditors are proved by adducing any evidence of an instrument creating liability. Ordinarily, therefore, a debt may be proved by delivering or sending through the post in a prepaid letter to the liquidator, an affidavit verifying the debt. The affidavit referred to may be made by the creditor himself, or by some person authorised by or on behalf of the creditor. The affidavit will generally contain, among others, a statement of account showing the particulars of the debt, and shall specify the vouchers, if any, by which 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 called upon to do so by the liquidator.

Effect of liquidation on employees

When a company goes into liquidation and ceases to continue to trade as a going concern, the contracts of employment concluded between the company and its employees may be terminated. The general position is that employment contracts terminate upon commencement of the liquidation process unless the liquidator determines otherwise. For instance, where the employment contracts are necessary for the interim management of the company for the purposes of the winding up the liquidator may require that the contracts of employment not terminate. Any money recoverable by the employees will be treated as a debt in the liquidation recoverable in accordance with the order of priority as provided in the 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's liability will be limited to any unpaid amounts on the shares held by that member. In a company limited by guarantee, the liability of the member is limited to the amount guaranteed. Further, in an unlimited company the member is liable for the full extent that the company is unable to settle its debts. The liability of a member gives rise to a debt that is payable when calls are made for enforcing the liability.

Effect of liquidation on creditors

Creditors are 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 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, will 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 the commencement of the liquidation process.

Consequences of director or officer liability

Civil consequences

Civil liability may accrue to a director in the course of the winding up 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 (equivalent to ZMW 2,000 or approximately US$ 180) 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 cease 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, intangible movable assets and 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 registered 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 is subject to the agreement reached 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 more than ZMW 4,166 (approximately US$ 362). At the Lands and Deeds Registry, the registration fee for a mortgage is one per cent of the total value, with a maximum fee of ZMW 4,000 (approximately US$ 347). 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 ones 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

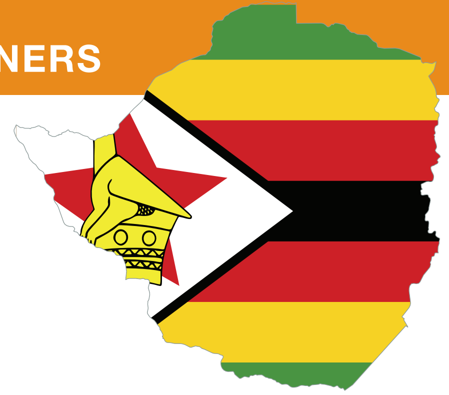
Application for registration of a foreign judgment may be made to the court by the judgment creditor within 6 years of the date of the original judgment. Further, the judgment must not be wholly satisfied at the time of the application and must not be capable of execution in the country of the original 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 AND HOLDERNESS LEGAL PRACTIONERS



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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 75% 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 are 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, creditors 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 liquidated.

Any person who was a party to a collusive transaction shall –

- Bbe liable to make good any loss caused to the insolvent estate in question and shall pay for the benefit of the estate a penalty as the court may fix, not exceeding the amount by which it would have benefited by such dealing if it had not been set aside; and
- if it is a creditor, forfeit its claim against the estate.

How is the liquidation process terminated?

The liquidation process is terminated by court order or by the final winding up of the company.

Director or officer liability

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 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 party 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 rescues 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. The 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 of 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.

Effect of judicial management and a scheme of arrangement on shareholders

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 if the company is placed in liquidation.

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 exhausting all remedies against the principal debtor unless they have agreed to be surety in solidum.

SECURITY

Types of security
Various forms of security are recognised by Zimbabwean law. They include:
- mortgage bonds over immovable property;
- general notarial covering bonds over movables;
- cessions to secure a debt;
- pledges; and
- deeds of suretyships.

Tokens of Security
Mortgage bonds are registered at the Deeds Office.

Security Trustees or Special Purpose Vehicles
Security trustees or special purpose vehicles are recognised.

Most Robust Form of Security 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
The cession and assignment of rights and obligations under a mortgage bond requires registration at the Deeds Office.

Instances in which securities might be vulnerable to attack
Mortgage bonds are compromised by Government acquiring the land on which the bonds are registered. The only way in which other third parties may attack security is through the law relating to voidable preferences, undue preferences, dispositions without value and other impeachable transactions under the Insolvency Act.

Methods of enforcement of security
A creditor can call up a mortgage bond. In instances of insolvency, a creditor holding a bond enjoys preference.

A creditor holding property in pledge is entitled to release same to the Sheriff or Deputy Sheriff or liquidator subject to a condition that on distribution in liquidation or after a sale in execution, he 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 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.