LEXOLOGY
Getting The Deal Through

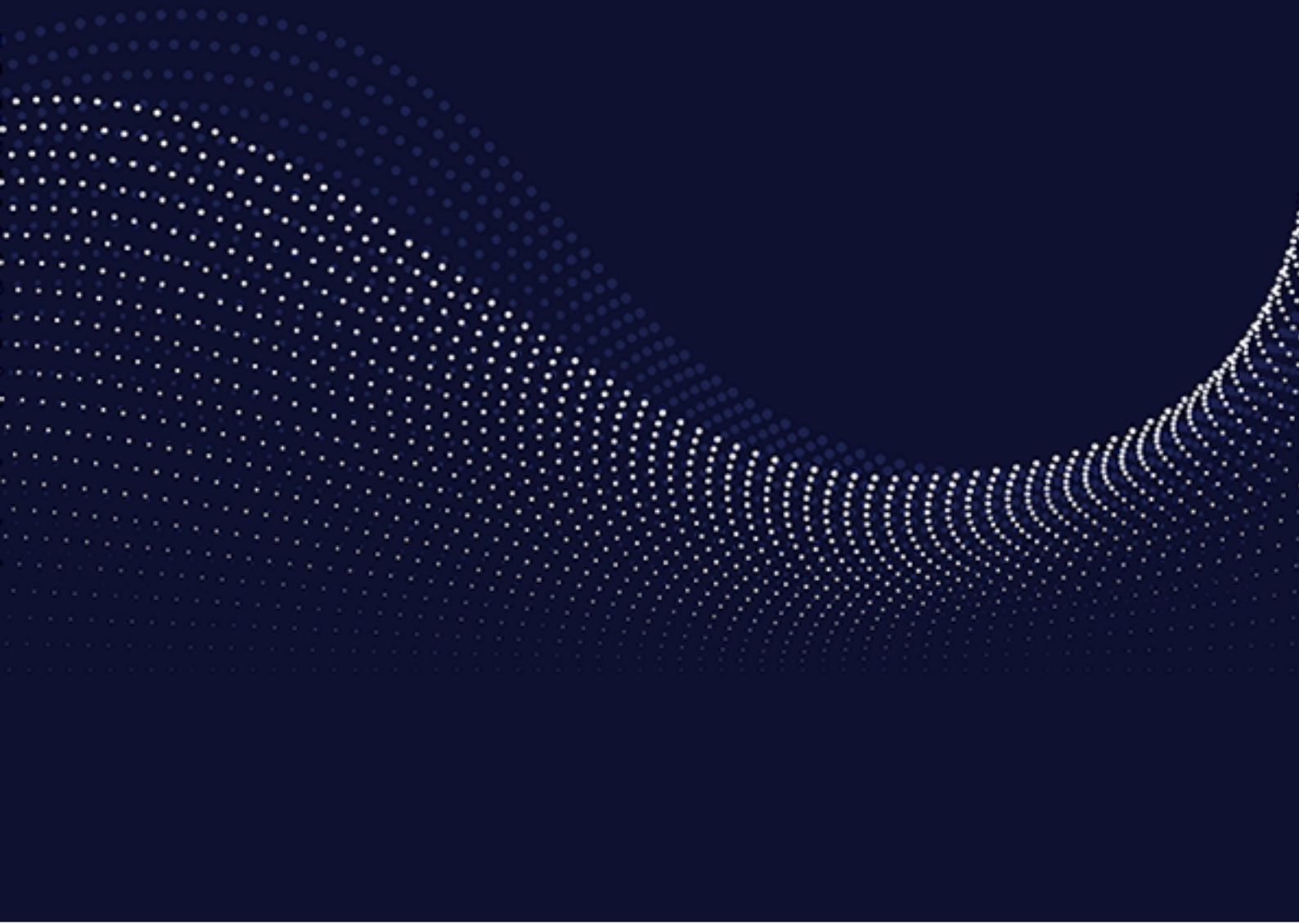
RESTRUCTURING & INSOLVENCY

Ghana

Contributing Editors

Catherine Balmond and **Katharina Crinson**

Freshfields Bruckhaus Deringer



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GENERAL

Legislation
What main legislation is applicable to insolvencies and reorganisations?

The main applicable legislation is:

- the Corporate Insolvency and Restructuring Act 2020 (Act 1015) (CIRA);
- the Corporate Insolvency and Restructuring (Amendment) Act 2020 (Act 1031) (the CIRA Amendment);
- the Companies Act 2019 (Act 992) (CA);
- the High Court (Civil Procedure) Rules 2004 (CI47), as amended (HCCPR); and
- the Court of Appeal Rules 1997 (CI19), as amended (CAR).

However, there is some sector-specific legislation that applies:

- the Insurance Act 2021 (Act 1061) (IA);
- the Borrowers and Lenders Act 2020 (Act 1052) (BLA); and
- the Banks and Specialised Deposit-Taking Institutions Act 2016 (Act 930) (BSDTIA).

Excluded entities and excluded assets
What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

The CIRA does not apply to companies that are subject to special legislation except where the special legislation does not provide rescue provisions (section 1(3) of the CIRA). Incorporated private partnerships are excluded from liquidation under CIRA (section 146 of the CIRA).

Insurance companies and banks and specialised deposit-taking institutions (SDTIs) are regulated by the IA and the BSDTIA, respectively.

Public enterprises
What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

Pursuant to the Corporations (Conversion of Companies) Act 1993 (Act 461), certain statutory corporations have been converted into companies under the CA. These state-owned enterprises, therefore, undergo the same insolvency procedures as incorporated companies, and creditors will have the same remedies.

Protection for large financial institutions

Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

Although there is no special legislation to address financial difficulties in large institutions, the CIRA may apply to these companies where the relevant sector-specific legislation does not provide for rescue. The BSDTIA provides for voluntary liquidation and receivership processes for banks and SDTIs (section 139 of the BSDTIA).

Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

The High Court of Ghana has jurisdiction in insolvency proceedings (section 169 of the CIRA and Ordinance 60 of the HCCPR). Decisions of insolvency practitioners may be appealed at the High Court after serving a notice of appeal.

A further appeal lies at the Court of Appeal as of right (article 137 of the 1992 Constitution of Ghana). The appellant must pay a sum and give security by bond with one or more sureties as security for cost. The amounts are determined by the High Court Registrar (Rule 12 of the CAR).

TYPES OF LIQUIDATION AND REORGANISATION PROCESSES

Voluntary liquidations

What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

Voluntary liquidation is regulated by the Companies Act (section 274) and commences with the following steps:

- company directors must depose to an affidavit that the company is solvent at least for the next 12 months from the commencement of liquidation and must propose that the company be privately liquidated (section 275 of the CA); and
- within five days of the affidavit of solvency, the shareholders should resolve by special resolution that the company be privately liquidated and appoint a liquidator (section 276 of the CA).

The effects are that:

- a director who makes an affidavit of solvency without reasonable grounds commits an offence (section 275(3) of the CA);
- the powers of the board of directors vest in the liquidator unless the liquidator otherwise decides (section 282 of the CA);

- no action can be commenced against the company; and
- upon successful completion, the company is struck off the Companies Register.

Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

Administration

The administration of a company begins when an administrator is appointed (section 1(2) of the Corporate Insolvency and Restructuring Act (CIRA)). The company may voluntarily appoint an administrator where its directors resolve that the company is insolvent or likely to become insolvent (section 3(7) of the CIRA). The administrator must call a first meeting of creditors within 10 days to establish a creditors' committee and determine whether the administrator should be replaced. After 28 days, the administrator must call a watershed meeting to determine whether the company needs to execute a restructuring agreement, appoint a liquidator or end administration (section 28 of the CIRA).

Arrangement and compromises

Where an arrangement is proposed, any interested person may apply for court approval. Members and creditors must approve the proposed arrangement with 75 per cent majority of each affected class of members and creditors. The approval is subsequently referred to the registrar who recommends to the court that a reporter be appointed, and a certified true copy of the order must be delivered to the registrar who will register and publish the order in the Companies Bulletin.

A confirmed arrangement is binding and unimpeachable. However, where the arrangement involves the transfer of the company's assets, the court may sanction it (section 240 of the Companies Act (CA)).

Where the arrangement results in redundancies, affected workers may be entitled to redundancy pay (section 65 of the Labour Act 2006 (Act 651) (LA)).

Mergers and acquisitions

The directors of each of the merging companies propose a merger and resolve that it is in the best interest of the companies and that the other merging company will be solvent after the merger. All required documents are given to members and secured creditors of the merging companies for approval at least 28 days before the merger (section 243 of the CA). The approval is by 75 per cent majority of the members of each class of the merging companies and relevant documents are delivered to the registrar (section 245 of the CA).

Other industry-specific procedures exist for mergers and takeovers. The IA requires a joint application of parties to a merger scheme for the prior approval of the National Insurance Commission (NIC) (section 88 of the IA).

Each of the merging companies' assets and liabilities become vested in the transferee company. Merging companies except the transferee company are dissolved (section 249 of the CA).

Successful reorganisations

How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability and, if so, in what circumstances?

The CIRA makes provision for two classes of creditors, namely secured and unsecured creditors (section 169 of the CIRA). The restructuring agreement provides for the order in which creditors bound by that agreement will have their claims satisfied (section 44(2)(i) of the CIRA). The release of the company from a debt in a restructuring agreement does not discharge or affect the liability of a guarantor of the debt, or a person who has indemnified the creditor concerned against default by the company in relation to the debt (section 53 of the CIRA).

Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

An official liquidation process can be commenced by a special resolution of the company, a petition to the registrar or to the court by creditors or a conversion from a private liquidation, administration or restructuring of the company (section 81(1) of the CIRA). Each mode of liquidation has a unique process.

The effect is that:

- on commencement of proceedings, civil proceedings against the company will be stayed and any transfer of shares of the company within that period is void (section 87 of the CIRA);
- the functions of the directors vest in the liquidator who assumes fiduciary position to the company (section 90 of the CIRA);
- the company ceases to carry on its business except where it must do so for the beneficial liquidation of the company. The corporate status and powers of the company continue until the company is dissolved (section 91 of the CIRA);
- the property or assets of the company vest in the liquidator and the liquidator must take into custody the property and things in action to which the company is or appears to be entitled (section 92 of the CIRA); and
-

prohibition of proceedings with or commencing civil action against the company may occur other than proceedings by a secured creditor to be done by leave of the court and subject to the terms that the court may impose (section 93 of the CIRA).

Involuntary reorganisations

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Administration may be commenced (section 2 of the CIRA) by an application of a creditor or the liquidator to the court to appoint an administrator where the court is satisfied that:

- the company is or may become insolvent;
- the survival of the company as a going concern is achievable in the event of an administrator's appointment;
- a more advantageous realisation of the assets of the company and any related company may be achieved than on an immediate winding-up; or
- it is just and equitable to do so (section 3 of the CIRA).

A secured creditor or receiver, or a private liquidator, may also appoint an administrator where the company is or is likely to be insolvent.

Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

Not applicable.

Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

An arrangement or merger by sale is defeated if:

- within one year of:
    - the date of the passage of the special resolution proposing the arrangement, an order is made against the company on grounds that the affairs of the company have been or are being conducted in an unfairly prejudicial or oppressive manner; or
    - the date of the resolution to restructure, an order is made to officially liquidate the company;

- restructuring is not sanctioned by the court; and
- a member of the company, by notice in writing addressed to the liquidator within 28 days after the passage of the resolution to restructure by arrangement by sale, dissents from the arrangement in respect of all of the shares held by that member (section 238 of the CA).

Where creditors at a watershed meeting resolve to execute a restructuring agreement but fail to do so within the deadline, the restructuring officer must apply to the court for leave to convert the administration to an official liquidation (section 48 of the CIRA). The court may also terminate a restructuring agreement on application by an interested party where there is a fundamental breach, information breach or the agreement cannot be complied with without injustice or undue delay (section 57 of the CIRA).

Administration comes to an end when the convening period expires without a watershed meeting being held. Again, if the watershed meeting ends without a resolution to execute a restructuring agreement, administration may end (section 2(3) of the CIRA). The above instances may be deemed to be a defeat for the administration and restructuring process as the intended outcome was not derived.

Corporate procedures

Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

In private liquidation, the procedures required include:

- the declaration of solvency by the directors of the corporation (section 275 of the CA);
- the passing of a special resolution to dissolve the corporation (section 276 of the CA); and
- the appointment of a liquidator (section 278 of the CA).

Official liquidation necessarily involves companies that are insolvent. This requires a petition to the court or the registrar or conversion from a private liquidation (section 81 of the CIRA).

Another means of dissolution is dissolution without full liquidation (section 289 of the CA). The registrar enquires in writing as to whether the company is carrying on business. Where the registrar does not receive an answer after two written communications, within two months of the date of the second enquiry, a notice will be published in the Companies Bulletin to strike the name of the company off the register (section 289(5) of the CA).

Conclusion of case

How are liquidation and reorganisation cases formally concluded?

Liquidation is formally concluded when the Registrar of Companies strikes the name of the company off the register and publishes this in the Companies Bulletin and in a newspaper of national circulation (section 288 of the CA and section 135 of the CIRA).

An arrangement, compromise, merger or acquisition is concluded when the necessary approvals are obtained from the court and regulators, and any change in shareholding structure has been regularised with the Registrar of Companies.

INSOLVENCY TESTS AND FILING REQUIREMENTS

Conditions for insolvency

What is the test to determine if a debtor is insolvent?

A company is insolvent when it has a negative net worth or cannot pay its debts as they fall due even if its total assets exceed total liability (section 169 of the Corporate Insolvency and Restructuring Act (CIRA)). The CIRA mandates the Minister to make regulations stipulating thresholds to determine the inability of a company to pay its debts or meet its obligations (section 167(1)(b) of the CIRA).

In the case of official liquidation, a company is deemed unable to pay its debts where:

- the company owes a creditor less than 120,000 cedis, although a demand notice has been served on the company at least 30 days prior; or
- an execution or process from a judgment in favour of a creditor is returned unsatisfied (section 83 of the CIRA).

Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

A company must begin insolvency processes where a liquidation order is made by the court following a petition by the Attorney General, the Registrar of Companies or a member or a creditor of the company (section 84(1) of the CIRA).

Regulators may compel a company to commence insolvency proceedings in specified circumstances. For instance, in banking, upon the revocation of a licence for insolvency, the Bank of Ghana may appoint a receiver (section 123 of the Banks and Specialised Deposit-Taking Institutions Act).

DIRECTORS AND OFFICERS

Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Generally, no liability is imposed on officers to commence insolvency proceedings when the company is insolvent. It is at the discretion of the members, the registrar or creditors to petition for official liquidation (section 83 of the Corporate Insolvency and Restructuring Act

(CIRA)). However, every director has a duty to prevent insolvent trading (section 119 of the CIRA). Where a director knowingly causes an insolvent company to engage in any form of business or incur a liability, the director commits an offence (section 119 of the CIRA).

During an official winding-up, where it appears that a company's business has been carried on with intent to defraud creditors or for a fraudulent purpose, any director involved is liable to be disqualified from acting as a director for five years (sections 117 and 118 of the CIRA).

Directors' liability – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

Where a company officer signs, endorses or authorises the signing on behalf of the company of a negotiable instrument or order for money, goods or services in which the name of the company is not accurately mentioned, that officer is personally liable to discharge the obligation incurred unless the obligation is discharged by the company (section 125 of the Companies Act (CA)).

Where a director exceeds the powers conferred by the company constitution without approval, or contravenes the duty to exercise powers granted by the constitution, the director is personally liable to pay the amount of money lost or the monetary value of the damages caused (section 191 of the CA).

Where a company officer, after the passage of a resolution for official liquidation, disposes of company assets without court approval and outside the normal course of business, that person commits an offence (section 82 of the CIRA).

A company officer who wilfully conceals the name of a creditor entitled to oppose the confirmation of a resolution to wind up the company, or wilfully misrepresents the nature or amount of the claim of a creditor or aids, abets or is privy to a concealment or misrepresentation commits an offence and is personally liable to pay the amount of the creditor's claim to the extent to which it is unpaid by the company (section 82 of the CA).

A director who makes an affidavit declaring that a company is solvent without having reasonable grounds commits an offence (section 275 of the CA).

Directors' liability – defences

What defences are available to directors and officers in the context of an insolvency or reorganisation?

Directors' defences are available if:

- they were unaware of the fraudulent way in which the company's business was conducted (section 147 of the CA);
- they acted in their usual capacity (section 147 of the CA); or
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they acted as a reasonably diligent and skilful manager, consulted, used or worked with other professionals and followed due process in their activities; that is, if the director acted in what the director believed was the best interest of the company as a whole so as to preserve the assets (section 190 of the CA).

Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Duties of directors do not shift to the creditor or any other person until an insolvency practitioner is appointed, and these duties often vest in the insolvency practitioner (section 80 of the CIRA).

Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

On the appointment of a liquidator for private liquidation, the powers of the board of directors vest in the liquidator and the powers of every director cease, unless the company in general meeting or the liquidator sanctions their continuance or it is necessary to enable the directors to prepare statements and accounts (section 282 of the CA). In an official liquidation, the functions of directors of the company vest in the liquidator who assumes a fiduciary position to the company (section 90 of the CIRA).

The appointment of an administrator does not result in the removal of the directors of the company from office. However, the directors must not exercise a power, perform a function or be responsible for managing the affairs of the company as company officers without the prior, written approval of the administrator, or subject to the CIRA (section 12 of the CIRA). This requirement is deemed to be incorporated into a restructuring agreement unless expressly excluded (section 44(3) of the CIRA).

MATTERS ARISING IN A LIQUIDATION OR REORGANISATION

Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

On the commencement of liquidation, civil proceedings against the company are stayed.

Enforcement orders in favour of the company cannot dispose of the company property during liquidation. A creditor may obtain relief by an application to the court to dispose of

assets of the company in satisfaction of the debt (section 87 of the Corporate Insolvency and Restructuring Act (CIRA)).

The law also does not permit the commencement of any civil action against the company other than proceedings by a secured creditor for realisation of the security of that secured creditor except by leave of the court (section 93 of the CIRA).

During administration, a charge over the company property is unenforceable except by a court order (sections 30 and 37 of the CIRA). Furthermore, the owner of a property may not repossess a property in the company's possession without a court order (section 31 of the CIRA). Leave of the court is required for commencement, continuation of proceedings or enforcement (sections 32 and 33 of the CIRA).

A restructuring agreement must also include the nature and duration of a moratorium period prescribed (section 44(2)(e) of the CIRA).

Doing business

When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

When liquidation commences, the company must cease carrying on business except so far as may be required for beneficial liquidation (section 274(2) of the Companies Act (CA)). All assets of the company come into the immediate control of the liquidator after the resolution to liquidate is passed. Unless approved by court or in the usual course of business, no one is permitted to dispose of company assets. Failure to comply with this is a criminal offence (section 82 of the CIRA).

An administrator, in the course of administration, must carry on the business of the company and manage its property and affairs with the object of salvaging the business of the company (section 10(c) of the CIRA).

The CIRA provides for post-commencement financing that includes financing obtained by the company, including trade financing and venture capital during administration or restructuring. It may be secured to the lender using an unencumbered company asset (section 169 of the CIRA). Post-commencement financing takes priority over all other creditor claims and must be paid in full (section 107(3) of the CIRA).

Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

Yes, post-commencement financing may be secured to the lender by using an unencumbered company asset (section 169 of the CIRA). It takes priority over all other creditor claims including secured and preferential class and must be paid in full (section 107 of the CIRA).

Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

A company may, with a view to effecting an arrangement or merger, resolve by special resolution that the company be put into a voluntary liquidation and the liquidator be authorised to sell the whole or part of the undertaking or assets of a company to another body corporate, called the transferee company, in consideration of shares.

Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

Not applicable.

Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

A liquidator reserves the right to reverse a transaction of a company that disposes of property for less than full value (section 123 of the CIRA).

A liquidator may reject proof of debt where the liquidator is satisfied that it is incorrect, values are incorrectly stated or an item is improperly included (section 111 of the CIRA).

Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

A licensor and licensee's rights and obligations are outlined in the intellectual property (IP) agreement. IP agreements will determine whether a licensor or owner may terminate a debtor's right to use the intellectual property on liquidation or reorganisation.

Personal data

Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

A person who processes personal data must ensure that the personal data is processed without infringing on privacy rights. Therefore, the prior consent of the data subject is required unless the purpose for processing is:

- necessary for a contract to which the data subject is a party;
- authorised by law;
- required to protect a legitimate interest of the data subject;
- necessary for the proper performance of a statutory duty; or
- necessary to pursue the legitimate interest of the data controller (section 20 of the Data Protection Act 2012).

The data subject may object to the processing.

Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

The CIRA does not make specific provision for arbitration as a mode of dispute settlement. Certain types of disputes cannot be arbitrated (section 1 of the Alternative Dispute Resolution Act 2010 (Act 798)). Disputes that arise after a liquidation or reorganisation commences can be arbitrated on an ad hoc basis with the parties' consent.

CREDITOR REMEDIES

Creditors' enforcement

Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Yes. In the event of a default by a debtor where the security interest or collateral is registered with the Collateral Registry, the creditor may realise the security interest without court proceedings, 30 business days after the service of a default notice on the debtor.

A creditor who realises a registered security interest without court proceedings must register a notice of the intention with the Registry. Upon submission of the notice, the registrar must certify the realisation process by issuing a memorandum of no objection. The memorandum is valid until the security interest has been sold, retained by the creditor or redeemed by the debtor. The creditor can realise the security interest by auction, public tender, private sale or any other means per the agreement (section 62 of the Borrowers and Lenders Act 2020 (Act 1052) (BLA)).

A creditor in whose favour a security interest is created may also upon default appoint a receiver or manger to realise the security interest. The creditor must within five days of the appointment submit a notice to that effect to the Registry. The Registry will then enter and relate the notice of appointment with the relevant registration(sections 74 and 75 of the BLA) (section 90(2)(a) of the Companies Act).

A mortgagee can exercise their right to possession of mortgaged property, without the court, on the default of the mortgagor (section 17 of the Mortgages Act 1972 (NRCD 96)).

Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

Unsecured creditors may be covered by a binding restructuring agreement that would indicate the order in which proceeds of the realisation of the property of the company will be distributed among creditors (section 44 of the Corporate Insolvency and Restructuring Act (CIRA)).

The court may, on the application of the registrar or a director of a company, make an order that the court considers necessary to protect the interests of creditors, including unsecured creditors, of the company in administration (section 65 of the CIRA).

During liquidation, unsecured creditors may, with leave of the court, commence an action against the company (section 93 of the CIRA).

The time frame for the processes depends on factors including the nature of the case, applications filed and the caseload of the court, among others.

Pre-judgment attachments may be granted by the court following a petition to the court for winding-up (section 84(4) of the CIRA).

CREDITOR INVOLVEMENT AND PROVING CLAIMS

Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

Two meetings are mandated to be held by the administrator with the creditors, although other meetings with creditors can also be held (section 20 of the Corporate Insolvency and Restructuring Act (CIRA)). The first meeting of creditors must be held within 10 days of the appointment of the administrator. The administrator must give notice of the meeting to creditors and publish the same in a newspaper of national circulation at least seven days before the meeting (section 21 of the CIRA).

The second meeting is a watershed meeting held 28 days after the administrator's appointment to determine whether to proceed with the proposed restructuring or end the administration (sections 24 and 28(1) of the CIRA).

During liquidation, a liquidator is mandated to call a first meeting of creditors within six weeks of the appointment. Notices must be published in a newspaper of national circulation or in the Companies Bulletin (section 112 of the CIRA).

The liquidator must provide each creditor with a copy of the statement of affairs of the company and of the proposals for an agreement with creditors lodged by the creditors together with the observations on the proposals that the liquidator intends to make before the meeting date (section 112(2) of the CIRA).

Creditor representation

What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

A creditor committee of three to five members is formed during administration or liquidation. A creditor committee member must be a creditor of the company, or an agent of a creditor under a power of attorney or authorised in writing by a creditor. The creditors determine the conditions of appointment (section 23 of the CIRA).

They are responsible for:

- advising the administrator on matters that relate to the administration;
- receiving and considering administrator's reports; and
- approving the administrator's remuneration and other terms of engagement.

They are also responsible for approving transactions that substantially affect the committee's interest including payments out of assets, dispositions and contracts (sections 22 and 114 of the CIRA).

Expenses incurred in performing duties of the committee are part of the cost of administration or liquidation (section 114(4) of the CIRA). There are no provisions preventing a committee from retaining advisers.

Enforcement of estate's rights

If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

The CIRA is silent on this. The circumstances of the case will determine whether creditors may pursue the estate's remedies.

Claims

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

A creditor's claim is made by lodging a proof of debt (section 111 of the CIRA). Liquidators are authorised to fix a time frame for creditors to prove claims or be excluded from the benefits of a distribution made before debts are proved. Creditors are notified of the time limits by publication in the Companies Bulletin (section 111(10) of the CIRA).

A creditor's proof of debt may be rejected where:

- an item is improperly included;
- a value is incorrectly stated; or
- the proof is incorrect.

The creditor may lodge an amended proof within the period specified in the notice of objection, failing which the liquidator will notify the creditor of a final rejection (sections 111(7) and 111(9) of the CIRA). An aggrieved creditor may appeal to the High Court (the High Court (Civil Procedure) Rules, O60 R2).

A liquidator may recognise contingent or future claims (section 97 of the CIRA). In distributing dividends to creditors, interest may not be accrued after the commencement of liquidation (section 130 of the CIRA).

There are no provisions allowing claims acquired at a discount to be enforced for their full-face value or otherwise.

While there are no clear provisions that allow a creditor to claim interest accrued after the commencement of an insolvency case, amendment of an admitted proof of debt for interest accruing after the commencement of the winding-up order is disallowed (section 106(1) of the CIRA).

Set-off and netting

To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

A creditor can exercise set-off rights where it involves pre-application obligations and where the debtor company was not rendered insolvent immediately after the set-off or the transaction was in the ordinary course of business (section 105(1) of the CIRA).

Creditors can be deprived of set-off rights where the transaction is fraudulent.

Creditors can enforce netting agreements in liquidation to the extent of the contract. A netting agreement is not a creditor claim and it cannot affect the ranking of claims during insolvency (sections 166 and 165(3) of the CIRA).

Modifying creditors' rights

May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

There are no provisions to that effect.

Priority claims

Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Apart from employee-related claims, the major privileged and priority claims in liquidations and reorganisations that have priority over secured creditors are post-commencement financing debts (Class A debts) (section 107(3a) of the CIRA).

Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

Where a company undergoes an arrangement, amalgamation or close-down and it causes the severance of the legal relationship of worker and employer as it existed immediately before, and the severance causes that worker to become unemployed or suffer any diminution in the terms and conditions of employment, the worker may be entitled to a redundancy pay (section 65(2) of the Labour Act).

Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

The law establishes a three-tier pension scheme, two of which are mandatory for employers to pay for their employees (section 1 of the National Pensions Act 2008 (Act 766)). Failure to pay such monthly contributions is a criminal offence. Any person who assumes responsibility over a company undergoing liquidation is responsible for the payment of contributions for employees (the Basic National Social Security Regulations 2011 (LI 1989)).

Where a company is a judgment debtor and has its property attached, the Social Security and National Insurance Trust (SSNIT) may apply to the court to obtain outstanding employer contributions from the proceeds of the attached property. In this case, SSNIT's claim ranks in priority to the judgment creditor (section 87 of Act 766 and Regulation 19 of the LI 1989).

Environmental problems and liabilities

Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Where a company commits an offence under the Environmental Protection Agency Act 1994 (Act 490) (EPAA), every company officer who knowingly or without exercising due diligence failed to prevent the commission of the offence is personally liable for the offence (section 59 of the EPAA).

An administrator is indemnified out of company property for liabilities incurred in the performance of their duties (section 63 of the CIRA).

Liabilities that survive insolvency or reorganisation proceedings

Do any liabilities of a debtor survive an insolvency or a reorganisation?

After insolvency proceedings, the registrar strikes the name of the company off the Register and no liability survives the company (section 135 of the CIRA).

Under reorganisation, where companies are merged, the liabilities of the merging companies are transferred to the transferee company. Therefore, the liabilities of the merging company that is dissolved survives it.

Distributions

How and when are distributions made to creditors in liquidations and reorganisations?

A liquidator must realise all the non-cash assets of the company at their full values. The liquidator must then verify all the admitted proof of debts and rank them. Distributions follow subsequently (sections 103 and 107 of the CIRA).

SECURITY

Secured lending and credit (immovables)

What principal types of security are taken on immovable (real) property?

Mortgages and equitable charges are taken on immovable property (sections 1(3) and 2(1) of the Mortgages Act 1972).

Secured lending and credit (movables)

What principal types of security are taken on movable (personal) property?

Pledges, hypothecation, liens and charges are security on movable property. However, the most commonly used are the pledges, liens and charges (the Stamp Duty Act 2005).

CLAWBACK AND RELATED-PARTY TRANSACTIONS

Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

A transaction to set off is deemed fraudulent if it occurs after an application for winding-up or made in circumstances where the creditor knew or ought to have known that the company was insolvent. It will be set aside if there is fraud and collusion (section 105 of the Corporate Insolvency and Restructuring Act (CIRA)).

A sale under an execution process conducted six months prior to administration or restructuring of the company will be set aside if, at the date of commencement, the person had not made full payment for the property into court and had not met all the terms of the sale (section 34(7) of the CIRA).

Any transaction by a company in administration that affects the property of the company that is not entered into by the administrator or with the administrator's consent on behalf of the company, or in pursuance of a court order, is void (section 14 of the CIRA).

Transfer of shares of the company or disposition of company property on the commencement of liquidation proceedings will be set aside unless the transfer is made to the liquidator or with the approval of the court (sections 87 and 94 of the CIRA).

Where the property of a company is assigned to trustees for the benefit of creditors, it is void (section 125 of the CIRA).

In administration, the transfer of a share in a company or alteration of the rights or liabilities of a shareholder will be annulled (section 15 of the CIRA).

Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Generally, there are no restrictions. However, the court may order that the resolution be set aside, a new meeting be held to vote, a specified related creditor not vote on the resolution or on a resolution to vary or amend the resolution or make any other order that the court considers appropriate on the application of a creditor or the administrator (sections 25(2) and 25(4) of the CIRA) where the court is satisfied that a creditors' resolution was:

- passed;

- rejected;
- required to be decided by a casting vote and the resolution would not have been passed; or
- required to be decided by a casting vote if the vote cast by a particular related creditor was disregarded, and passing or otherwise of the resolution:
    - is contrary to the interests of the creditors; or
    - has prejudiced or is likely to prejudice the interests of the creditor that voted for or against the resolution to an unreasonable extent.

Lender liability

Are there any circumstances where lenders could be held liable for the insolvency of a debtor?

Although a creditor may not be held liable for the insolvency of a debtor where, between the making of a winding-up order and the end of the liquidation, it appears to the liquidator that during the 10 years ending with the making of the winding-up order a sum of money was paid or allowed by the company in respect of a loan in circumstances in which the court would have ordered the lender to make a repayment to the company, the liquidator may give notice to the lender requiring the lender, within a period specified in the notice, to make a like payment to the liquidator (section 124 of the CIRA).

GROUPS OF COMPANIES

Groups of companies

In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

A parent company and a subsidiary company are distinct legal entities. The only circumstances under which a parent corporation can be held responsible for the liabilities of a subsidiary are:

- where there is an express agreement between the two companies to that effect; and
- where the corporate veil is lifted to hold members of the subsidiary company liable.

Combining parent and subsidiary proceedings

In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

It constitutes a misjoinder if in proceedings involving corporate groups, the parent and its subsidiaries are joined in one suit. The two are distinct and separate legal entities. Unless the claimant is lifting the corporate veil to saddle the parent company with liability, it is not allowed that the two are combined in one suit (Ordinance 4, Rule 3(3) of the High Court (Civil Procedure) Rules).

INTERNATIONAL CASES

Recognition of foreign judgments

Are foreign judgments or orders recognised, and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

Foreign judgments are recognised and enforced based on principle of reciprocity under the following circumstances:

- it must be a judgment of a superior court of a foreign country to which the statutory provisions regulating foreign judgments apply;
- the judgment must be final and conclusive;
- it must be consistent with Ghana's public policy; and
- it must order payment of a sum of money (section 81 of the Courts Act 1993 (Act 459)).

Ghana is not a signatory to any international treaties on international insolvency or the recognition of foreign judgments. Recognition and enforcement of foreign judgments is regulated by:

- the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument 1993 (LI 1575);
- section 81 of Act 459;
- the High Court (Civil Procedure) Rules; and
- judicial precedents.

UNCITRAL Model Laws

Have any of the UNCITRAL Model Laws on Cross-Border Insolvency been adopted or is adoption under consideration in your country?

Yes, it has been adopted (the Corporate Insolvency and Restructuring Act (CIRA) Schedule).

Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

A foreign creditor has the same rights as a Ghanaian creditor, but this status does not affect the ranking of claims in an insolvency proceeding in Ghana or the exclusion of foreign tax and social security claims from the proceeding (paragraph 10 of the CIRA Schedule).

Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

There are no specific provisions for foreign transfers of assets in administration. However, where the court is satisfied that the interest of creditors will be protected, the court may upon recognition of a foreign proceeding and, at the request of the foreign representative, entrust the distribution of the whole or part of the company assets located in Ghana to the foreign representative or another person (paragraph 18 of the CIRA Schedule).

COMI

What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

Unless otherwise proved, the registered office of the debtor is presumed to be the debtor's centre of main interests (paragraph 13(3) of the CIRA Schedule).

Cross-border cooperation

Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

Yes, the courts must cooperate as much as possible with foreign courts or representatives (paragraph 22 of the CIRA Schedule). This may be implemented by the following means:

- the appointment of a person or body to act at the court's direction;
- the communication of information by any means considered appropriate by the court;
- the coordination of the administration and supervision of the debtor's assets and affairs;
- the approval or implementation by courts of agreements concerning the coordination of proceedings; and
- the coordination of concurrent proceedings regarding the same debtor (paragraph 24 of the CIRA Schedule).

The law permits a foreign representative (insolvency practitioner) to apply to the court for an order to recognise a foreign proceeding. The application must be accompanied by:

1. a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;
2. a certificate from the foreign court confirming the existence of the foreign proceeding and the appointment of the foreign representative; or
3. any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative, in the absence of (1) and (2) (paragraphs 22 and 24 of the CIRA Schedule).

Cross-border insolvency is a new concept in Ghana introduced by the CIRA and yet to be tested out in the courts. However, the caveat for recognition of a foreign proceeding is that:

- the foreign proceeding is taking place in the debtor's COMI;
- the foreign representative is the insolvency practitioner in the reorganisation or the liquidation or acts as a representative of the foreign proceeding; and
- the application is successfully submitted to the court with all the required documents (paragraph 14 of the CIRA Schedule).

Cross-border insolvency protocols and joint court hearings

In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

The courts in Ghana have not entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries. No joint hearings with courts in other jurisdictions have as yet been held.

Winding-up of foreign companies

What is the extent of your courts' powers to order the winding-up of foreign companies doing business in your jurisdiction?

A foreign company may be liquidated under the CIRA even if it has ceased to exist in its country of incorporation (section 147(1) of the CIRA). The courts can liquidate a foreign company following a petition if:

- the company is dissolved, has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs;
- the company is unable to pay the debts of the company;
-

the court is of the opinion that the business or objects of the company are unlawful, or the company is being operated for an illegal purpose or is carrying on unauthorised business per its constitution; or

- the court deems it just and equitable that the company winds up (sections 148 and 149 of the CIRA).

The court has the power to order:

- that any branch of that company in Ghana be treated as a separate company;
- that the assets and liabilities situate in Ghana be treated as the assets and liabilities of that company for the purposes of the winding-up, and
- that the transaction by or with that branch be deemed to be validly done although that transaction occurred after the date when the body corporate was dissolved or otherwise ceased to exist under or by virtue of the laws of the country under which that body corporate was incorporated (section 147 (2) of the CIRA).

UPDATE AND TRENDS

Trends and reforms

Are there any emerging trends or hot topics in the law of insolvency and restructuring? Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

The Corporate Insolvency and Restructuring Act 2020 (CIRA) was passed at the height of covid-19 pandemic, ushering a rescue culture into the Ghanaian legislative framework for the first time and introducing concepts of administration and restructuring of insolvent companies and related matters such as cross-border insolvency.

The CIRA empowers the Minister for Justice to create regulations that would provide for matters necessary for its implementation (section 167 of the CIRA). These regulations are currently in the works.

The Minister for Justice is also authorised to create regulations that would regulate the exercise by the registrar of any of the powers and directions conferred on the Registrar by the Companies Act (section 381 of the Companies Act). These regulations are also being formulated.

The Chartered Institute of Restructuring and Insolvency Practitioners, Ghana Bill 2022, which seeks to provide for the regulation of insolvency practitioners and the proper administration of insolvency proceedings, is also pending before the parliament.