The Right of Creditors During Insolvency Proceedings in Ghana

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Abstract: ***The Corporate Insolvency and Restructuring Act, (2020) Act 1015 signaled a paradigm shift in insolvency proceedings in Ghana to offer protection to distressed companies. According to current legislation, a company in distress has the option to go through administration and restructuring before the commencement of winding up. A rescue culture serves the public good by preserving jobs, sustaining local economies, protecting livelihoods, maximizing asset value, and balancing competing interests. Though a process many years in the making, Ghana has recognized the public interest in preserving viable businesses and livelihoods by rehabilitating insolvent companies. In the same vein, creditor rights have gained much prominence with a host of options available to creditors during administration. This paper shall examine the insolvency regime in Ghana with a particular focus on its conformity or otherwise with modern insolvency practices and the protection of the rights of the creditors during the insolvency proceedings in a bid to ascertain how CIRA aids decision-making of creditors and whether its content is in accordance with best practices in modern insolvency law.***

Keywords: Insolvency Law, Creditor's Rights, Corporate Restructuring, Ghana Legal System, Business Rescue

1. Introduction

In Ghana, the Bodies Corporate (Official Liquidation) Act, 1963 (Act 180), hereinafter referred to as "BCOLA", had long upheld winding up as the primary remedy for corporate insolvency. Under the BCOLA, when it was proved either to the Registrar of Companies or the Court that the company was unable to pay its debts, a winding up order was issued, and a liquidator was appointed to finally wind up the affairs of the company [1]. Under BCOLA, a declaration of insolvency was seen as a "point of no return" from which the affairs of a company could not be salvaged. The BCOLA employed a two-fold test to determine whether a company is unable to pay its debt. The failure to meet the "Cash Flow" Test and "Prospective and Contingent Liabilities" test sounded the death knell for the demise of the Company [2]. This study is significant as it provides a comparative analysis of Ghana's insolvency reforms against global practices, highlighting its potential to influence creditor protection and business survival.

The BCOLA was obsolete right from the onset due to its failure to contemplate or make provision for the barest possibility of rescue of ailing companies, whether through reorganization, restructuring, debt composition or rescheduling. While it did leave room for creditors to enter into arrangements of some sort with the company, the end result was almost always complete dissolution. [3] The BCOLA also shed very little light on the treatment of creditors in the unlikely event that a Court would refuse to wind up a company under the two-tier test. It appears that creditors were left to fend for themselves by the age-old "survival of the fittest" race for the assets of the company, a phenomenon which the BCOLA had been designed to prevent.

A change of regime occurred upon the enactment of the Corporate Insolvency and Restructuring Act 2020 (Act 1015) [4] hereinafter referred to simply as "CIRA". CIRA represents a significant departure from the provisions of the repealed Bodies Corporate (Official Liquidation) Act, 1960 (Act 180) by introducing a business rescue culture into Ghana's insolvency regime in harmony with modern best practices. The enactment of the Corporate Insolvency and Restructuring Act 2020, (Act 1015) has introduced a paradigm shift, moving away from a liquidation-centric culture towards one that seeks to extend a helping hand to companies in distress and ultimately prioritize the rescue and rehabilitation of viable businesses, where possible. Under the Act, companies have the option of appointing an administrator or restructuring officer who shall helm the "sinking ship" that is the company and put its affairs and assets in order to salvage the business and keep it afloat. This much-needed transition brings the legal framework of Ghana at par with current and dynamic trends in corporate insolvency.

Under CIRA, liquidation is no longer an ominous and imminent guillotine hanging over failing companies. Now, companies have the option of undergoing administration and restructuring to revive the company. In the spirit of a rescue culture, the public good in saving private companies lies in preserving jobs, supporting local economies, protecting the livelihoods of those dependent on the enterprise and maximizing asset value. Though a process many years in the making, Ghana has recognized the need to preserve viable businesses by offering insolvent companies a path to go through rehabilitation. In the same vein, Creditor rights have gained much prominence with a host of options available to creditors during administration. This paper shall examine the insolvency regime in Ghana with a particular focus on its conformity or otherwise with modern insolvency practices and the protection of the rights of the creditors during the insolvency proceedings in a bid to ascertain how CIRA aids decision-making of creditors and whether its content is in accordance with best practices in modern insolvency law.

The paper is divided into six sections. After the introduction section, the paper deals with the development of the laws affecting insolvency in Ghana. In part three, the paper discusses the rights of creditors generally to ascertain best practices. The next part then discusses creditors' rights under Ghanaian law. In part five, the paper synthesizes the Ghanaian position on the rights of creditors against some international best practices. The final part then draws conclusions and offers some recommendations to strengthen the law on creditors' rights during insolvency in Ghana.

2. Development of Insolvency Law in Ghana

At the heart of its enactment, insolvency legislation seeks to resolve the indebtedness of failed or failing companies and provide restitution or compensation for creditors. In Ghana, the most significant insolvency legislation until 2020 was the Bodies Corporate (Official) Liquidation Act, 1963 (Act 180) (BCOLA). The BCOLA was derived from principles of English law, with a few amendments to suit the Ghanaian context. Under the BCOLA, one of the circumstances under which a company would be deemed to be unable to pay its debt was if a creditor, by assignment or otherwise, to whom the company was indebted in a sum exceeding fifty pounds then due, had served on the company, a written demand requiring the company to pay the sum so due and the company had for twenty one days thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor [5].

This petition would trigger the process for the appointment of a liquidator by the Registrar of Companies or the court. In determining whether a company was unable to pay its debts, a creditor (petitioner) would have to prove to the Registrar or court in the first instance that the company did not have enough funds to service its debts, even if the company did have assets which could be realized to defray its debts. In this scenario, a creditor could still demand liquidation of the company despite the possibility of realization of assets. Secondly, once this threshold was met, the court was also bound to consider the contingent or prospective liabilities of the company as the second test before making a winding-up order. Nonetheless, BCOLA failed to provide a definition of what constituted contingent and prospective liabilities against the assets of the company. However, a determination that the company was unable to pay its debt did not necessarily mean that it would be wound up. In the case of **BILLY V. KUWOR** [6], Benin J. declined to wind up a company by stating that

> *Under the Draft Proposals of the Companies Code, it was proposed that a company may be wound up by the court, if among others, it is proved to the satisfaction of the court that it is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company. Although section 247 of Act 179, as eventually enacted, does not contain this proposal, I think in considering a winding up order a court should not fail to take these factors into consideration, for it is my view that the court must look at the business realities of the situation and should avoid taking a narrow legalistic view that because a company is owing, it should be wound up.*

Despite this commendable proposition and thinly veiled rescue proposition made by the court, it was undeniable that under BCOLA, the law weighed heavily in favour of the protection of creditor rights, with liquidation as the first option. Nevertheless, there were still difficulties that could be encountered, as there remained a lacuna with respect to creditor rights and interests if a petitioner failed under the two-fold test. For a period of more than 60 years, BCOLA remained the substantive insolvency law of Ghana, weathering the storms of the rapid development and reforms on insolvency law in other jurisdictions, including the United Kingdom, the source of inspiration for its creation, which had largely shifted towards a rescue-focused approach to insolvency.

2.1 Enactment of the Corporate Insolvency and Restructuring Act

The COVID-19 pandemic severely impacted the operations and performance of companies on a global scale. Businesses that reaped high profits pre-pandemic had to contend with falling demand, supply chain disruptions and liquidity challenges [7]. Ghana was not immune to the global shock that resulted in large-scale financial disruptions, with many companies declaring bankruptcy.

Although discussions were far advanced within the business community about the need to reform the insolvency regime, the crises gave the country the urgency and perfect opportunity to revisit and reform its insolvency regime. This led to the enactment of the Companies Act, 2019 (Act 992) [8] and the Corporate Insolvency and Restructuring Act, 2020 (Act 1015) in response to the constantly evolving economic landscape.

The intendment behind the enactment of Act 1015 derived from the memorandum to the Corporate Insolvency Bill 2019 stated that the proposed insolvency law was vital "due to the changing environment of doing business and the significant change in insolvency practice", "the absence of legislation to deal with corporate insolvency reveals a huge loophole in our commercial laws" [9].

In furtherance of this goal, the Corporate Insolvency and Restructuring Act, 2020 (Act 1015) as stated in one of its purposes seeks to "provide a legal regime for…. the administration of the business, property and affairs of a distressed company in a manner that provides an opportunity for the company to as much as possible continue in existence as a going concern" [10]. Act 1015 thus officially marks Ghana's expansive effort to establish statutory options for financially distressed institutions through Administration and Restructuring. Administration under Act 1015 is only the official iteration and dedicated stipulation on this remedy in our insolvency regime, but certainly not the first of its kind. The inclusion of the proposal and approval of a restructuring agreement, which is expected to bind creditors and members of the company, is the most significant inclusion that places Ghana within the precincts of a rescue culture as practised globally.

2.2 Statutory Options during Insolvency

A company is considered to be in financial distress when it is declared insolvent, meaning that it has a negative net worth [11] or cannot pay debts even if its assets exceed its total liability as the debts or obligations fall [12]. Although the term financial distress is not stipulated in the Corporate Insolvency and Restructuring Act, it is a term commonly used by financial economists to refer to the conditions experienced by a firm which is having difficulty in paying its creditors or to refer to a condition of firm which is in substantial default on its debt obligations [13]. A declaration of insolvency triggers the processes of insolvency, being administration, restructuring or liquidation as provided under Act 1015. Prior to the commencement of either process, a company will be declared insolvent where (a) a creditor to whom the company owes more than ten thousand currency points [14] serves a written demand on the company to pay the amount and the company, for thirty (30) days after the demand, neglects or fails to pay the money or to secure or compound for it to the creditor's reasonable satisfaction [15]; (b) by an execution or any other process issued on a judgment or order of the court in favour of a creditor of a company is returned unsatisfied in whole or in part [16]; (c) it is proved to the satisfaction of the Registrar of Companies that the company is unable to pay its debts [17].

Currently, a company in distress in Ghana may find itself in administration either in preparation for restructuring or before it ends up in liquidation. Liquidation concerns the total winding up of the affairs of the company, settlement of its debt, distribution of residual assets and dissolution of the company by removing its name from the register of companies. Liquidation can be either voluntary (private) or official. 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; a conversion from a private liquidation, conversion from administration or restructuring of the company [18].

For instance, in the case of the **REGISTRAR OF COMPANIES V. DOWJAYS INVESTMENT LTD** [19], the Registrar of Companies filed a petition for the official winding up of Dowjays Investment fund which was incorporated in 2015 and licensed by the Securities and Exchange Commission (SEC) as a result of regulatory breaches and operating without a valid license despite numerous notifications to do so. Aside from regulatory infractions, the company had also allegedly conducted improper placement of client funds and guaranteed returns that it could not meet. The Registrar of Companies had argued about winding up on the basis that it was just and equitable to do so for the protection of investors and the public. The court considered the evidence before it and held that the license of the company had been validly revoked. The court agreed with the petitioner and held that the petitioner had the power to bring the application for winding up and ordered the winding up of the respondent entity.

Private liquidation, on the other hand, occurs when the directors of a company depose to an affidavit of solvency stating that the company would be able to pay its debts within the next twelve months. On the strength of the affidavit of solvency, the shareholders can then pass a special resolution for the winding up of the company through private liquidation. In a similar fashion, an official liquidation can commence through the passing of a resolution of the shareholders of the company for the winding up of the company. Alternatively, it can commence on the making of a winding-up order by the Court or the passing of a winding-up order by the Registrar. [20]

Once the liquidation process commences and a liquidator is appointed, the directors of the company become functus officio and the liquidator assumes a fiduciary position to the company [21]. The powers of the liquidator to manage the functions are aided by the establishment of a liquidation fund as well as the vesting of any property owned or appearing to be the entitlement of the company in the liquidator during this process [22]. Additionally, the company ceases business operations except for any business that is ancillary to and beneficial to the winding up of the company. In furtherance of this, the company must send notices to clients and trading partners regarding the cessation of business [23]. However, the corporate status and corporate powers of the company shall continue until the company is dissolved. The liquidator during this process performs a great deal of functions including; (a) instituting and defending legal proceedings on the company's behalf; (a) paying the creditors in full irrespective of the class; (c) making a compromise or agreement with creditors or persons claiming to be creditors of the company (to have present or future claims, certain or contingent, ascertained or sounding only in damages against the company) or whereby the company may be rendered liable subject to the Companies Act; (d) take security for the discharge of the calls, debts, liabilities or claims and give complete discharge in respect of any of them; (e) selling of company properties by auction; (f) executing deeds, receipts and other documents among other relevant functions.

Upon appointment, a liquidator is obligated to call a meeting within six (6) weeks to give notice to each creditor who (i) is mentioned in the statement of affairs of the company or (ii) not being so mentioned has lodged proof of debt. The liquidator's notice must be published in the Companies Bulletin and a newspaper of national circulation. Each creditor is given a fair hearing individually in person or by a proxy. It is important to note that once the liquidation process commences, all pending legal actions are stayed during the liquidation process unless otherwise determined by a Court of Law. The process of liquidation is formally concluded upon the striking off the name of the company on the Register of Companies and publishing of the same in the Companies Bulletin and a newspaper of national circulation [24].

Once a company is held insolvent, the administration process can commence in accordance with the provisions of the Act. "Administration" according to Section 169 of Act 1015 refers to the process of enabling the rehabilitation of a company that is financially distressed beginning when an administrator is appointed to perform duties necessary to achieve the objects laid out in subsection (1) of Section 1 and ending as set out in subsection (2) of section 2. The aim of administration is to appoint an official to manage the business, property and affairs of a distressed company in a manner that provides an opportunity for the company to continue in existence as a going concern. It places a temporary freeze on the rights of creditors and other claimants against a distressed company, and to develop and implement a restructuring plan which is aimed at a better return for the creditors and shareholders of the company than would result from the immediate winding up of a distressed company.

The process officially commences when an administrator is appointed by (i) the company; (ii) the liquidator, where the company is in liquidation; (ii) a person holding a charge over the whole or substantially the whole of the property of the company or the receiver appointed by that person; or (iv) the Court [25]. The Administrator is required within 21 days of the appointment to investigate the affairs of the company and form an opinion as to whether it would be in the interest of the creditors for the company to execute a restructuring agreement, end the administration or appoint a liquidator. Like the liquidation process, a company must suspend its business during administration, except where necessary for the beneficial administration of the company. However, that is where the similarity ends as under Administration, the Administrator shall; (a) control the business, property and affairs of the company; (b) investigate the affairs of the company and consider possible ways to salvage the business of the company in the interests of creditors, employees and shareholders; (c) carry on the business of the company and manage the property and affairs of the company with the object of salvaging the business of the company in the interests of the creditors, employees and shareholders; (d) terminate or dispose of the whole or part of the business of the company and may dispose of any of the properties of the company and (e) perform any other function and exercise any other power that the company or any of the officers of the company could perform or exercise if the company were not in administration. [26]

The Administrator must also convene a watershed meeting within twenty-eight (28) days from the date of appointment or any other date if the period is extended. [27] Prior to this meeting, a written notice of the meeting shall be published in a daily newspaper of national circulation. At the watershed meeting, the creditors determine whether a restructuring agreement should be executed. Unlike US Chapter 11, there is no express provision for cramdown under the Corporate Insolvency and Restructuring Act, 2020, but once the resolution passes with a 51% majority of the creditors, the dissenting creditors shall be bound by the restructuring agreement except as otherwise ordered by the Court.

Once the administration and restructuring plan has received the requisite approvals from the creditors and the company, the plan is implemented by the company in accordance with the terms. The Corporate Insolvency and Restructuring Act does not provide a mechanism for the filing of claims of creditors during the administration of a company. Generally, the process of administration is terminated once the restructuring agreement has been executed by the company, the creditors or the restructuring officer. However, administration can also end in other circumstances. For instance, it can end when the creditors resolve that it should end, through the appointment of a liquidator by the creditors at the watershed meeting or through an order of the court.

3. Rights of Creditors During Insolvency Proceedings (Generally)

Creditors represent a crucial lifeline for businesses due to the financial resources they provide for the business operations of corporate entities. When money is lent to corporate bodies, there is a legitimate expectation that debtor companies will repay the loans as they fall due. Where a corporate debtor defaults on its debts, thereby becoming financially distressed, the exercise of the power of creditors to enforce their claim to corporate property leads to an inefficient scramble to collect, with a resulting dismemberment of the debtor's business [28]. Corporate insolvency law seeks to introduce some organization through relevant categorizations of creditors and their entitlements during insolvency proceedings.

Insolvency procedures are primarily concerned with the rights of creditors of a company. Previously, it was a fundamental proposition of corporate insolvency law that creditors ranked equally in a debtor's insolvency [29]. This came to be known as the *pari passu* (or equal ranking) principle [30]. However, there are some exceptions to this general principle, mainly the *par condicio creditorum* or equal treatment of creditors and the pro rata or ratable payment principles. Under the former proposition, if a debtor takes certain actions which invariably favour some creditors over others in the lead-up to insolvency, such actions are nullified. Under the latter principle, the net proceeds of a debtor's assets are to be used to meet creditor claims based on proportionality. However, as time went on, the preeminence of secured transactions as an exception to the *pari passu* principle came to be established. Thus, despite the *pari passu* principle which seeks to establish some form of equality in distribution of assets by holding that, in a winding up, unsecured creditors shall share ratably in those assets of the insolvent company that are available for residual distribution, the classification of creditors is essential to determining the actual distribution of assets [31]. While creditors are primarily categorized based on the security offered upon the grant of funds, some classifications are based on the nature of the creditor. The rights of a creditor are determined by a number of different laws.

Although there are different kinds of creditors, they can primarily be categorized into three main groups: preferential creditors, secured creditors and unsecured creditors. The Corporate Restructuring and Insolvency Act, 2020 (Act 2020) extends this categorization by including a fourth category of creditors known as post-commencement financing creditors. [32] Preferential creditors usually represent employees or government institutions who are owed remuneration, tax, rate, levy or social security benefits. Preferential creditors rank just below post-commencement financing and are paid as a matter of priority before claims secured against the assets of a debtor company.

A secured creditor is any creditor or lender associated with an issuance of a credit product that is backed by collateral, which is forfeited to the creditor upon the default on the payment of a secured loan by the debtor [33]. The collateral of a creditor can be secured with a fixed charge or a floating charge. This security interest is usually established in a formal agreement such as a debenture or a mortgage. A secured creditor holds a priority ranking status in terms of debt repayment by an insolvent company above and beyond unsecured creditors. It is a longstanding principle of insolvency that a secured creditor is entitled to receive the full amount of his secured claim-back by collateral, before any unsecured claims are paid out [34].

The charge held by a secured creditor must be registered at the Collateral Registry in Ghana for it to be valid. [35] Ordinarily, a secured creditor can enforce its rights under the terms of the security immediately it falls due when the company declares bankruptcy. However, this right is constrained during administration as secured creditors cannot institute an action for seizure and auction of the secured assets. Secured creditors are most commonly institutional lenders such as banks and lending institutions, and debenture holders. Unlike other classes of creditors, secured creditors have the power to appoint a receiver to manage or sell a secured asset if the borrower defaults without court intervention. This grants them the ability to recover their debt independently. However, this right can be restrained during administration as indicated above.

Below, secured creditors are a class of unsecured creditors. Unsecured creditors are creditors whose credit was not secured with a charge over company assets or any collateral for the repayment of the credit. They lack the protection afforded by collateral security exchanged for the value of the amount given to the company. Unsecured creditors typically give out their funds to borrowers for higher interest payments because of the risks that come with such investments. Therefore, during insolvency, the amount received by unsecured creditors is dependent on the money generated from the sale of company assets and the value of secured and preferential creditor claims. Unsecured creditors rank equally within the category, and no priority claim can be made unless otherwise defined within a statute giving definition to the class of unsecured creditors [36].

The distinction between secured and unsecured creditors makes a world of difference in determining whether unsecured creditors will be paid or when such payments will be made. During insolvency, realized assets of the company are applied first to settle the liquidation costs. Thereafter, payments would be made to preferential creditors (priority payments) and secured creditors. What remains, if any, is then applied to settle the claims of unsecured debtors. Thus, during liquidation, unsecured creditors may receive little or nothing after the assets of the company have been realized.

However, despite being relatively low on the priority list for distribution of funds, unsecured creditors have a right to participate in the selection of the liquidator and/or administrator. This involvement is crucial as it allows creditors to influence who will manage the insolvency process in question, ensuring that their interests are represented and respected. Unsecured creditors also have the right to attend and vote at the meetings of creditors. At these meetings, where various matters such as fixing the insolvency practitioner's remuneration and other critical decisions regarding the insolvency process are taken, unsecured creditors can express their opinions and vote on issues that can affect the recovery of their funds invested in the company.

Although insolvency practitioners are bound to issue regular reports on their activities to creditors, as part of the committee of creditors, unsecured creditors can also appoint a membership of an inspection committee, typically comprised of three to five members, to oversee the actions of the insolvency practitioner and provide guidance where necessary. They can also request meetings with the insolvency practitioner and receive regular updates on the progress of the insolvency process, including asset sales and distribution.

All creditors have a right to receive information about the insolvency process. Fundamentally, all creditors are required to file notice of their claim together with particulars of their interests attached to the insolvency practitioner within a set number of days. However, should a claim be rejected by the insolvency practitioner, unsecured creditors, much like every other class of creditor, have a right to appeal this decision for resolution by the courts. In some circumstances, unsecured creditors have a right to claim interest on a debt owed up to the liquidation date depending on the nature of the contract between them and the company, if interest was payable at a certain time under a written instrument, if a written demand for payment of the principal had been sent including interest and same was refused. Unsecured creditors can also pursue a claim for goods held by the company belonging to the creditor. However, proof of ownership must be submitted together with the claim for an assessment by the insolvency practitioner who will make a determination concerning the return of the goods or reimbursement in lieu of a return [37].

4. Rights of Creditors During Insolvency Proceedings Under Ghana Law

In Ghana, the Rights of Creditors during insolvency are primarily governed by CIRA, which provides an enabling mechanism for protecting creditors while balancing the need for corporate rehabilitation. As indicated above, although there are classifications of creditors under general corporate insolvency law, this is subject to the hierarchy established by the legislature in the operating law governing the sector. CIRA provides a classification of debt system that stipulates the order in which debts are to be settled during liquidation, According to Section 107 of CIRA, there are several classes of debt in order of priority, which must be ascertained at the commencement of insolvency and according to which assets and funds are to be distributed during liquidation. They are;

1) ***Class A Debt**: This consists of post-commencement financing which holds priority over all other claims below it. Creditors in this class are entitled to full repayment before any other debts are settled.*
2) ***Class B Debt**: This consists of preferential debts which includes employee remuneration for services rendered*

in the four months preceding insolvency or rates, taxes or similar payments owed to government authorities which have fallen due within the year preceding the date of the commencement of insolvency. These debts rank equally and must be paid in full unless the remainder of the estate is insufficient to meet the preferential debt in which case the preferential debt shall be paid in equal proportions.

3) ***Class C Debt**: This consists of secured debts which are back by fixed charge over specific assets of the company.*
4) ***Class D Debt**: This includes debts owed to directors or former directors of the company that do not qualify as secured debts.*
5) ***Class E Debt**: This covers debts related to excess benefits returned to the liquidator or excess interest on debts exceeding 5% above the Bank of Ghana's policy rate.*
6) ***Class F Debt**: This includes an unsecured debt that is not secured by a charge of any kind over an asset of the company and does not fit in any of the above-mentioned classes.*
7) ***Class G Debt**: This consists of payments to preference shareholders*
8) ***Class H Debt**: This final category refers to ordinary shareholders who are the last in line for payment of dividends after all other classes have been settled.*

The above classification facilitates an orderly resolution of debt repayment. It also enhances the protection of creditor rights and establishes a basis for the claims that certain classes of creditors can make. The rights and protections afforded to creditors depend on their classifications as indicated above. The various rights afforded to creditors under CIRA include;

4.1 Power to initiate Insolvency Proceedings:

The provisions of Act 1015 make it clear that one of the conditions for the commencement of administration is if a company, upon a written demand for the payment of debt, is unable to do so. The process of administration may be initiated by both secured and unsecured creditors in different ways. Secured creditors have greater options of commencing Administration by direct appointment of an administrator or by application to the court. [38] An unsecured creditor, however, does not have the right to commence administration other than by application to the court. [39]

4.2 Power to appoint and remove an administrator or liquidator:

Creditors are empowered by CIRA to actively participate in the administration process to ensure that their rights are safeguarded. This includes the ability to appoint and remove administrators. Secured creditors holding a charge over the whole or substantially the whole of the property of the company or the receiver appointed by that person may appoint an administrator [40]. However, this power of appointment can only be exercised prior to liquidation, as secured creditors are constrained from appointing an administrator where the company is already in liquidation [41]. As indicated earlier, unsecured creditors do not have the right to appoint an administrator directly and can only do so upon an application to the court. The court will determine such an application upon giving due consideration to the factors outlined under Section 3(12) of Act 1015. It is important that the administrator must give his or her consent in writing to the appointment [42]. Conversely, creditors (be it secured or unsecured) can remove an administrator upon application to the court [43], if the company is already in liquidation or the registrar, by passing a resolution of creditors at the first meeting of creditors [44] or by passing a resolution at a meeting convened to considered whether to remove a replacement administrator [45]. The removal of an administrator is effected upon giving due notice of at least 14 days to the administrator and an opportunity for the administrator to present his/her case during the meeting [46]. The resolution for the removal must also include the appointment of a new administrator, ensuring continuity in the insolvency process [47]. The proposed new administrator must submit a signed consent to act and a statement of interest prior to the meeting [48].

4.3 Submission of claims

To have a share in the distribution of assets and funds, creditors are obliged to submit a claim of debt for verification when insolvency proceedings are initiated. However, this is only a mechanism established during liquidation and does not apply to administration as an insolvency process under CIRA. Creditors, whether secured, unsecured or preferential, must submit their claims to the appointed insolvency practitioner or liquidator during the pendency of the insolvency proceeding. The insolvency practitioner is bound to verify the claim based on the documentation provided, including evidence of the security interest (if any) [49]. This is also important for the purpose of verifying the ranking of debts to ensure equitable distribution of the proceeds realized from the sale of assets [50].

4.4 Right of Enforcement of Secured creditors:

Generally, the rights of secured creditors are twofold: the first is that they are entitled to enforce the debtor's contractual promise to repay a debt owed or perform an obligation arising from a security agreement. Secondly, secured creditors are entitled to realize their security. In effect, this is the right of a secured creditor to take control of and sell the property subject to the security interest and apply the proceeds to satisfy any sum outstanding [51]. As a general principle of insolvency under CIRA, proceedings to enforce a security over the property of an insolvent company [52] or to recover possession of property held or used by a company are automatically stayed except upon leave sought from the Court [53]. The rights of creditors to even institute actions in relation to the property of the company are effectively frozen.

However, the provisions of CIRA do not necessarily and completely constrain the right of secured creditors to protect their interests prior to or during administration. Prior to the appointment of an administrator and before the commencement of administration, a secured creditor can appoint a receiver to manage the assets of a company with a charge over them. A secured creditor maintains the right to realize an asset with a security over it or pursue recovery of property by entering into possession or assuming control of the property used, occupied or in the possession of the company [54] or exercise any other power in relation to the property, in order to enforce a right of the owner or the lessor of the property to take possession of the property or otherwise recover the property [55].

Once an administrator is appointed, an insolvent company enjoys a temporary freeze on the enforcement rights of creditors and other claimants. However, secured creditors may apply to the court within a limited period to enforce their security. This period known as the "decision period" refers to the period that; (i) begins when notice of the appointment of an administrator is given to the charge holder under section 72 or in any other case, on the day when the administration begins and (ii) ends at the close of the 14th day after the notice of the administration began [56]. During this 14-day period, a secured creditor is given freedom to apply for the grant of leave to enforce the security of the secured creditor [57]. The application must be on notice to the administrator who has the right to file an affidavit in support or opposition to the application, as well as a report on the assets and liabilities of the company [58]. The Court may permit a secured creditor to enforce their security over a company's property if it determines that not granting the application would cause serious prejudice to the secured creditor and this prejudice outweighs the potential harm to other creditors resulting from the enforcement [59].

Thus, in the case of **REPUBLIC V. HIGH COURT (COMMERCIAL DIVISION) EXPARTE ALFREDINA OFORI AND NIKABS GRANDE (UNREPORTED)** [60]**,** the Court pronounced on the effect of Section 17 of the Bodies Corporate (Official Liquidation) Act, 1963 (Act 180) which has been retained as Section 93 of Act 1015 and noted that "the provisions of section 17 of Act 180 were clear and unambiguous. It provided that

> *On the commencement of a winding up, no civil proceedings against the company, other than proceedings by a secured creditor for the realization of this security, shall be proceeded with or commenced save by leave of the Court and subject to such terms as the Court may impose". **The Court further pronounced that the meaning of this in simple language was that upon commencement of a winding up only secured creditors were allowed as of right to sue or continue with pending civil proceedings for the realization of their security. Any other person who had a cause of action against a company being wound up could sue as of right but could do so only with the prior leave of the High Court**. Similarly, an unsecured creditor who has pending civil proceedings cannot continue with them without leave of the High Court. So, the applicants in this case who are not secured creditors were within their rights to apply for leave to continue with their case and the Judge acted in accordance with the law in granting same (emphasis added)*'

4.5 Right of Enforcement of Unsecured Creditors:

Being lower on the scale of priority, unsecured creditors are severely restricted in their ability to institute actions to protect their interests. After submitting their claim and proof of debt for verification, unsecured creditors typically do not have a right to repossess or sell any of the company's assets directly. Their remedy is provided for under section 93 of CIRA, which allows unsecured creditors to institute an action against the debtor company with the leave and conditions of the Court. In the case of **THE REPUBLIC V. HIGH COURT, WA EXPARTE OFFICIAL LIQUIDATOR DKM DIAMOND MICROFINANCE LTD & ORS (UNREPORTED)** [61], the Wa High Court affirmed the right of unsecured creditors to apply for leave under section 93 of Act 1015 to maintain a case against a creditor.

4.6 Power to Set Remuneration and Terms of Engagement of an Administrator

CIRA also establishes that even though an administrator is entitled to charge reasonable remuneration, this is contingent upon obtaining approval from the committee of creditors [62]. This stipulation is significant because the administrator's fees are drawn from the assets of the financially troubled company, which directly impacts the creditors' interests in those assets. By granting creditors the authority to approve the administrator's remuneration, the committee of creditors has oversight and can manage expenses incurred during the administration process. This mechanism helps prevent the unnecessary depletion of the company's assets, thereby allowing for better management of the company's resources and enhancing the likelihood that it can meet its obligations to creditors. Thus, creditors play a critical role in determining the financial terms under which the administrator operates.

4.7 Power to attend, participate and vote at meetings:

Upon the commencement of administration proceedings under Act 1015 as amended, the administrator is mandated to convene a first meeting of creditors. These meetings serve as a platform for presenting the company's current state and discussing restructuring proposals. This meeting must be called within ten (10) days of the commencement of administration, and all creditors must be informed and involved in the process [63]. All creditors possess the right to attend and participate in such meetings. This provision is crucial as it empowers creditors to influence the administration process directly, allowing them to assess the proposed restructuring plans and determine the future course of action for the distressed company. The voting process requires a resolution to be supported by at least fifty-one per cent of the value of the debts owed by the creditors present, either in person or by proxy, thereby ensuring that decisions reflect the collective interests of the creditor body [64].

Moreover, creditors have the option to establish a committee of creditors [65]. This committee plays a vital role in receiving reports from the administrator and providing feedback, acting as a liaison between the creditors and the administrator. While the committee's functions are advisory and do not extend to directing the administrator, it enhances communication and ensures that creditors remain informed throughout the administration process. This is particularly important in scenarios with numerous creditors or those located outside the jurisdiction, as it facilitates timely access to information. The ability to participate in meetings facilitates transparency, control, collective decision-making and aids in protecting the rights of creditors and preventing unnecessary depleting of company assets as they can scrutinize, and challenge proposed expenses.

5. A Synthesis of the Ghanaian Position against International Best Practices

The Corporate Insolvency and Restructuring Act, 2020 (Act 1015) as amended represents the first groundbreaking foray of Ghana's legislature into corporate rehabilitation of distressed companies. This Act seeks to align the country's corporate insolvency laws with the best international practices through the introduction of novel provisions that facilitate timely, efficient and impartial administration. Of particular significance is the introduction of the concept of corporate administration and restructuring, which were not present in previous legislation. Ghana's legislation prior to this had largely been focused on liquidation. However, recognizing the public good in retaining the existence of certain companies, administration and restructuring were introduced in conformity with changing trends across the globe. The process of administration and restructuring gives the distressed company the opportunity to deal with the distressed situation and prevent liquidation.

5.1 The Process of Administration and Eligibility of Companies

The process of administration and restructuring is similar to Chapter 11 of the United States Bankruptcy Code and the process of restructuring in the United Kingdom's Corporate Insolvency and Governance Act 2020 on Corporate Insolvency Law, though much simpler in form. The corporate insolvency processes in both the United States (US) and the United Kingdom (UK) contemplate a plan of reorganization to keep businesses alive and ensure payment of creditors over time. Ghana's corporate insolvency law, in terms of content and structure, conforms much more with the UK Corporate Insolvency and Governance Act than the US Bankruptcy Code. A critical point of distinction is the fact that the US Bankruptcy Code contains a greater list of eligible entities for relief under the code, including sole proprietorships, partnerships and companies [66]. However, the Corporate Insolvency Act and UK Corporate Insolvency Laws are focused entirely on companies.

5.2 Creditor Participation and Involvement

A key component that is embedded in the provisions in CIRA and reflective of best practices in corporate insolvency law is the provision for creditor participation and involvement in several ways. Under CIRA, creditors of all classes (whether secured, unsecured or preferential) have the right to attend meetings and vote, receive reports from the administrator [67] and set up a committee [68] that is accountable to the entire body of creditors. The creditor's committee is a relevant link between the creditors and the administrator, even though they largely advise the administrator and cannot directly command or instruct the administrator. Similarly, Chapter 11 of the US Bankruptcy law provides for the appointment of a committee of creditors holding unsecured claims as soon as practicable by the US trustee after the Chapter 11 filing. This committee typically consists of the seven largest unsecured creditors. This committee consults with the debtor in possession on case administration, investigates the debtor's conduct and operation and participates in formulating a plan.

Similar provisions are made in the UK Corporate Insolvency Law in that the office holder appointed to oversee the insolvency process can invite creditors to form a committee to aid in discharging his or her duties. [69] There is a required minimum number of three unsecured creditors who must be members of the committee. [70] The maximum number must, however, be five. [71] It is worthy of note, however, that in this particular instance, CIRA goes a step further in providing extensive provisions on creditor participation compared to the US and UK, which have fewer provisions. Regardless, CIRA ensures that its provisions are in keeping with best practices by providing for creditor committees to represent the interests of creditors during the insolvency process.

5.3 Provision for Automatic Stay

The concept of an automatic stay of proceedings is common in general corporate insolvency law across various jurisdictions. [72] However, even in this regard, the nature and application of the automatic stay of proceedings are different across the three jurisdictions on Corporate Insolvency. Under CIRA, the appointment of an administrator and the attendant commencement of administration causes an automatic but temporary freeze on the enforcement of rights of the creditors and other claimants by operation of law to enable the company to develop and execute a restructuring or reorganization plan within a defined period. This also includes pending actions against the company or any of its properties. The only exception to this constraint is when secured creditors with the leave of the court maintain an action against the company. The provision for an automatic stay of proceedings is in conformity with international best practices, although this stipulation is not as expansive in form compared to other jurisdictions. It is noteworthy that the automatic stay of proceedings on the enforcement of rights of creditors is not territorially limited, meaning that the order can be extended to cover the overseas properties of the debtor company. The stay also remains in effect until the end of the administration period. This is similar to the automatic stay provided under the US Bankruptcy code, which freezes all judgments, collection activities, foreclosures and repossessions of property that arose before the filing of the bankruptcy petition. [73] However, the filing of a petition does not operate as a stay for certain types of actions such as governmental actions, eviction proceedings, tax assessments and notices, criminal proceedings, child support, setoff rights and others [74]. CIRA does not have comparable exceptions to the automatic stay aside from that of secured creditors who can apply for leave. Thus, as opposed to the US Bankruptcy code, actions by preferential creditors, being governmental agencies in Ghana for taxes and levies, are also automatically suspended upon the commencement of administration. This may be the case in Ghana because, perhaps, the reorganization and restructuring of the company is given priority over all other claims.

The automatic stay under CIRA is markedly different from the period of moratorium provided under the UK Corporate Insolvency and Governance Act. Under this Act, a moratorium is a director-led process which leaves the directors in situ to trade the company with an insolvency practitioner acting in the role of a monitor to supervise the company's affairs [75]. Under the Act, this period is limited to 20 days of protection from certain creditor action [76]. There is, however, a provision for an extension for a further period of 20 days without consent. A moratorium under the UK insolvency law is similar to an automatic stay under CIRA and the US Bankruptcy Code in that it includes restrictions on insolvency proceedings, enforcement of security and forfeiture. A major difference, however, is that during the moratorium, the company is bound to keep making payments for certain categories of debt, including newly incurred liabilities, payments for new supplies, rent in respect of the moratorium period, payments due to employees, and debts under financial contracts, including lending contracts. Should the company default in making such payments, the moratorium period is deemed to have ended. [77]

5.4 Debtor in Possession and Management Retention

The provisions of CIRA establish that once an independent administrator is appointed, management of the company is transferred to the administrator. [78] The appointment of an administrator effectively renders the directors functus officio and they may only perform functions in relation to the affairs of the company or purport to do so unless expressly permitted by the Act or with the prior, written approval of the administrator [79]. Despite this state of affairs, directors still have a role to play in that they can receive reports on the progress of the administration, attend watershed meetings [80] and authorize the execution of the restructuring agreement, among other functions [81]. The same state of affairs occurs in relation to winding-up, where upon commencement of winding up, the functions of the directors of the company shall vest in the liquidator, who assumes a fiduciary position in the company [82]. It is important to establish that persons who have been directors within the previous two years of the company being in liquidation or under liquidation or of any associated company are not eligible to act as an administrator (insolvency practitioner) [83].

The provision for an administrator is unique compared to the insolvency laws in the US and the UK, which are tilted more in favour of management retention rather than the appointment of an independent administrator. This is similar to the provisions under the UK Insolvency and Governance Act, which also provides for the appointment of an administrator. However, it is important to note that during the period of moratorium, control of the distressed company is retained in the hands of the directors during the 20-day period under the supervision of a monitor appointed by the court. [84] Directors require permission from a monitor to carry out certain actions, including disposing of assets or incurring new debts. It is important to note that, compared to the role of Directors under CIRA, administrators hold significant power, but directors retain a greater degree of control. [85]

Contrary to CIRA and the UK Insolvency Act, under Chapter 11 of the US Bankruptcy, the debtor is placed "in possession" and continues to operate the business [86]. The debtor in possession acts in the position of a fiduciary vested with all the rights and powers of a trustee. This means that apart from the investigative functions, the debtor possesses all the functions and duties of a trustee. These duties highlighted in the Bankruptcy Code and Federal Rules of Bankruptcy procedure, include examining and objecting to claims, accounting for property and filing an informational report [87].

The US trustee, however, plays a role in monitoring the progress of a Chapter 11 case and supervising its administration. There is therefore no specific administrator role, and the process is remarkably less expensive since there is no need to pay fees to appoint an external official, thereby potentially reducing the amount available to creditors. However, due to the retention of the same management that brought about the occurrence of financial distress, the debtor-in-possession system can lead to a conflict of interest, particularly if management is perceived as prioritizing their interests over those of creditors. Although the retention of control fosters continuity, there is always the danger of biased decision-making.

Although these differences have their value, the relevance of the appointment of an independent administrator under CIRA was to introduce some form of neutrality, security and an assurance of fair treatment to creditors as opposed to the debtor in possession feature prominent under the UK Bankruptcy Code who despite knowing the business best, had up to that point, ran the business into the ground. The administrator, being a professional in good standing and with experience, has professional indemnity and is considered better placed to manage the affairs of the company.

5.5 Financing During Insolvency Proceedings

CIRA does not expressly address the issue of financing during administration. While CIRA makes provision for funds to enable the administrator to proceed with administration, it does not make specific provisions for obtaining priority financing during the administration process. Presumably, the expenditures to be made by the administrator are to be sourced from the coffers of the company and any revenue generated from the sale of company assets. However, a restructuring agreement may include financing provisions if approved by creditors. [88] Under the US Bankruptcy Code, the company is permitted to seek support from lenders during the insolvency period to fund the insolvency process. [89] However, it must be established that the credit is necessary to preserve the affairs

of the company, and that the company will be unable to obtain credit elsewhere on equal terms. [90] Here, priority may be granted by the court, or liens on company property may be allowed upon leave to secure the debt. [91] This incentivizes lenders to provide credit on favourable terms despite the distressed nature of the company. The ability to source funds increases the likelihood of the rescue of the company and a subsequent reorganization.
In the case of CIRA, it can be argued that although rescue is the main goal, there is yet to be incorporated financial provisions that makes it flexible to obtain additional debts to assist in the rescue of the company.

5.6 Provision for "Cram Down"

Furthermore, a distinct feature of US and UK insolvency law, which is yet to find its way into CIRA, is the provision for cram down. Generally, under Chapter 11 of the US Bankruptcy Code, a reorganization plan must be approved by a majority of the creditors and the bankruptcy court [92]. In this regard, a cramdown occurs when a court ignores the objections of the creditors to a restructuring/reorganization plan and approves it so long as the plan is fair and equitable. Thus, should the court find the reorganization plan to be acceptable, but a creditor does not, the court can compel the creditors to accept the terms. This is known as a cram down.

However, for a court to disregard the rejection of a reorganization plan, the debtor must prove that it was fair, equitable and did not discriminate against a class of creditors. Cram down is also a significant feature of the UK Corporate Insolvency and Governance Act, which allows a court to sanction a restructuring plan even if one or more classes of creditors voted against it provided the dissenting class would not be worse off under the plan than they would be in a liquidation. [93]

In Ghana, CIRA does not provide for cram down. Under CIRA, a restructuring agreement must be executed by a company within 21 days after a watershed meeting approving the agreement. Though this period may be extended, the directors of the company must authorize the execution of the agreement by the company after its approval by the creditors [94]. However, CIRA further provides that upon the failure of the company to execute the restructuring agreement before or within the deadline for execution, the restructuring officer shall apply to the Court for leave to convert the administration of the company into official liquidation. Aside from a failure to execute a restructuring agreement, it may also be terminated by the court upon an application by the company, a creditor, the restructuring officer or any other person with an interest in the termination of the agreement upon grounds such as material breach of the agreement, injustice or undue delay in execution, unfair discrimination or oppression [95].

Thus, the court does not interfere nor purport to do so by overriding the decision of the company to refrain from executing a restructuring agreement. The decision is left entirely in the hands of the creditors and the company, and once they fail to execute the agreement, the next recourse is official liquidation. In Ghana, cram down may therefore be the ultimate rescue to help a company avoid liquidation.

6. Conclusion and Recommendation

Aside from introducing the rescue culture into Ghana's insolvency regime, the Corporate Insolvency and Restructuring Act, 2020 (Act 1015), as amended, also seeks to ensure that creditors do not end up on the losing end in the name of rehabilitating companies. The Act strikes a fair balance between the interests of creditors and the company. It represents a significant step forward for Ghana in aligning its insolvency practices with modern best practices. The Act introduces several key features common to insolvency legislation in most developed economies, such as the US and UK, which protect creditors and allow them greater control and participation in the insolvency process. To further improve the administration process, safeguard the interests of creditors, the following improvements are necessary.

1) Concerning the process of administration and eligibility of companies.
    a) It is necessary to establish clear and detailed criteria on eligibility for companies to enter administration. In addition, the process of administration could also be extended to other entities such as partnerships and sole proprietorships that are earning a certain threshold of revenue and providing particular services which ought to be salvaged for the public good.
    b) It is also important to establish a mechanism for monitoring and evaluating the performance of administrators to ensure that they are acting in the best interests of the company and its stakeholders, particularly due to the minimal control and supervision that creditors and management have in the process of administration.
2) In relation to enhancing creditor participation, it is recommended that clear and adequate provisions ought to be put in place to ensure that the creditor committee is representative of the diverse interests of creditors, including secured, unsecured and preferential creditors. Inspiration can be taken from the US Bankruptcy Code, which provides for a minimum level of involvement of unsecured creditors who usually fall on the lower ranks of priority in terms of distribution and whose participation in dividends at the end of the insolvency process is largely uncertain.
3) Concerning the provision for automatic stay of proceedings, CIRA could be further strengthened with a defined scope and duration for the automatic stay of proceedings. This places some level of pressure on administrators to perform their obligations in a timely manner. Further, modern best practices have established that, inasmuch as a temporary freeze is essential during administration, provision can be made for certain exceptions regarding a process for creditors to apply for relief from the stay.
4) In relation to financing during insolvency proceedings, it is recommended that an administrator, with the consent of the company and the creditors, should be allowed to borrow as part of the efforts to rescue the company. Such borrowed funds should have priority over existing creditors to incentive lending to distressed companies. CIRA can be further amended to include clear guidelines on the terms and conditions under which such financing can be obtained. This will enhance the ability of

Paper ID: SR25423173808 DOI: https://dx.doi.org/10.21275/SR25423173808

insolvency practitioners to keep the distressed company afloat.

5) To promote a greater chance of saving the distressed company, CIRA should adopt a cram down policy. Where a restricting agreement is in the best interest of the parties in an insolvency proceeding, a court of law should be able to allow same to stand despite the objections of the company and/or creditors.

In conclusion, the Corporate Insolvency and Restructuring Act represents the first step in bringing the insolvency laws of Ghana into harmony with modern best practices. There is still room for further refinement. Addressing the recommendations above and continuous review and improvement is the way forward toward creating a robust and effective insolvency regime that achieves the express purpose of supporting the rehabilitation of viable companies, protecting the interests of creditors and contributing to the overall economic growth of the country.

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[92] United States Bankruptcy Code, 11 U.S.C. SS.1129
[93] United Kingdom Companies Act 2006, s. 901G
[94] Corporate Insolvency and Restructuring Act, 2020 (Act 1015) as amended, Section 45.
[95] Corporate Insolvency and Restructuring Act, 2020 (Act 1015) as amended, Section 57.