

# Restructuring & Insolvency

*Contributing editors*

**Catherine Balmond and Katharina Crinson**



2018

GETTING THE  
DEAL THROUGH

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*Contributing editors*

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**Freshfields Bruckhaus Deringer**

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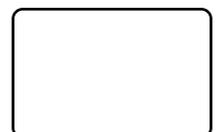


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# Kenya

Jomo K Nyaribo, Angela C Cheroni and Edel Ouma

Muthaura Mugambi Ayugi & Njonjo Advocates

## General

### 1 Legislation

**What main legislation is applicable to insolvencies and reorganisations?**

In Kenya, the Insolvency Act No. 18 of 2015 (the Act) consolidated and amended the various laws relating to the insolvency of natural persons, incorporated and unincorporated bodies. Subsidiary legislation, the Insolvency Rules, 2016, supplements the provisions of the Act.

### 2 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 Act applies to natural persons, partnerships, limited liability partnerships, companies and other corporate bodies established by any written law. This application is inclusive and encompasses entities and bodies established under statute laws, incorporated and unincorporated entities.

Excluded assets for companies include assets where the company has no beneficial interest, assets held or obtained by way of bailment or hire purchase and assets held in trust for third parties. With regard to insolvency of natural persons, excluded assets include the bankrupt's necessary tools of trade; necessary household furniture and personal effects (including clothing) for the bankrupt and the bankrupt's relatives and dependants; and a motor vehicle valued at 1 million Kenya shillings.

### 3 Public enterprises

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

There are no specific insolvency procedures for government-owned enterprises in Kenya. The customary insolvency procedures under the Act apply. However, the dissolution of the state corporation is an executive decision subject to the advice of the State Corporations Advisory Committee under the State Corporations Act No. 25 of 2015. The creditors of government-owned enterprises have the same remedies as are available in the customary insolvency proceedings.

### 4 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'?**

Notably, Kenya has no specific legislation to deal with institutions that are considered 'too big to fail'. The government's financial bailout of such institutions is often discretionary, pegged on political and economic factors and is never guaranteed. Kenyan industry legislation has gradually moved to remove factors that make certain entities large and powerful enough to hold the state economy to ransom. These subsidiary laws provide for uniform regulations and restrictions that ensure industry players operate in a level playing field, promoting fair competition.

### 5 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 Kenya (Commercial & Admiralty Division) handles bankruptcy and insolvency proceedings. Appeals from the High Court lie in the Court of Appeal in some instances with leave of the court and in some instances, without leave of the court – depending on the specific decision being challenged. The Court of Appeal requires that the appellant posts security of costs that are assessed based on the value of the appeal and the nature of the reliefs sought.

## Types of liquidation and reorganisation processes

### 6 Voluntary liquidations

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

Voluntary liquidation procedures may be commenced by the company's members, directors or creditors. When the majority of directors of the company make a statutory declaration under section 398 of the Act, it is deemed to be a members' voluntary liquidation. Voluntary liquidation under the Act should be sought: when a period fixed by the articles for the company's existence expires or when the articles prescribe that in the occurrence of a certain event the company is to be dissolved and such an event occurs, and the company in general meetings has passed a resolution providing for its voluntary liquidation; and if the company by way of special resolution resolves to be voluntarily liquidated.

The debtor must pass the resolution to undergo the voluntary liquidation. The requirement to pass the resolution is that the company must give notice to all members eligible to participate passing in the resolution and must notify any holder of any qualifying floating charge in respect of the company's property. The meeting where such resolution is passed must fulfil certain conditions: a notice period of seven days must pass from the date the notice of the meeting is issued; the persons receiving the notice must give written consent to passing of the resolution; and the decision must be made by a special resolution constituting of majority of not less than 75 per cent of the members (a class of members).

### 7 Voluntary reorganisations

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

The voluntary arrangement procedure for companies may be commenced by several persons (the proposers); the directors of the company, the administrator of a company under administration or the liquidator of a company under liquidation. The proposers when making such a proposal must propose a supervisor to oversee the voluntary arrangement. They must publish notice of the meeting where the proposal is to be presented to the creditors or members in a newspaper of wide circulation as well as notifying the proposed supervisor specified in the proposal. They must also provide the proposed supervisor with the document setting the terms of the proposal and the financial statement of the company.

The effect of the voluntary arrangement is that it binds every creditor or member of the company who is entitled to vote at the meeting of creditors or members including persons who would have voted had they received the notice of the meeting of the proposed arrangement.

## 8 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?**

There is no provision for distinct classification of creditors in a successful reorganisation that is not done for the purposes of reorganisation. However, the secured and preferential creditors must give their written consent. The approval of the proposal for reorganisation as afore-mentioned is subject to the court's approval as per section 630 of the Act. Reorganisations depend on the terms specified in the proposal. Arrangements such as compromise may release non-debtor parties from liability. A compromise agreement in this context referring to where the creditors agree to terms that have the effect of fully and absolutely extinguishing the debt owed in its entirety, irrespective of whether the actual amount set in the terms is less than the actual debt owed.

## 9 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?**

A creditor must prove to the court that the company owes them at least 400,000 Kenya shillings and that they served a statutory demand. If the creditor is a holder of an execution or other process in respect of debt on a judgment or order of court that execution or process must have been returned wholly or partly unsatisfied. The material difference between the involuntary liquidations and voluntary liquidations is that the creditor institutes the involuntary proceedings and such proceedings must be based on the inability of the company to pay debt owed to which a statutory demand has been issued.

## 10 Involuntary reorganisation

**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?**

Involuntary reorganisation of companies by creditors is not provided for under the Act.

## 11 Expedited reorganisations

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

Expedited reorganisations are only available to natural persons under Part IV, division 1, subdivision 2 of the Act. The procedure is available when the debtor is an undischarged bankrupt; the official receiver is specified in the proposal as the provisional supervisor in relation to the proposal; and no application for an interim order for voluntary arrangement has been made as per section 304 of the Act.

## 12 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?**

A dissenting creditor to the proposed organisation can challenge the proposal by making an application in court under section 629(4) of the Act. The application should be lodged within 30 days of the day of the meeting of the company and the creditors. What the court considers is whether the proposal was approved by a majority of the secured creditors' group; whether the proposal discriminates among the members of the dissenting group or groups of creditors to an extent that they will be no worse off than they would have been if the company had been

liquidated; and whether the proposal respects the priorities of preferential creditors over unsecured creditors.

## 13 Corporate procedures

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

The Act outlines corporate procedures for the dissolution of corporations and such procedure differs from bankruptcy proceedings in several ways. Dissolution of corporations is under the office of an official receiver and must be supervised by an appointed liquidator. Decision-making process during dissolution must be by way of resolution, which must be lodged for registration at the companies' registry. The Registrar of Companies must also be served with all court orders relating to the bankruptcy of the corporations for registration. Bankruptcy proceedings on the other hand are conducted by the bankruptcy trustee and decision-making majority vote.

## 14 Conclusion of case

**How are liquidation and reorganisation cases formally concluded?**

Insolvent companies may be placed under administration under a qualified professional in the industry for the purpose of guiding the entity to financial turnaround. In circumstances where it is fair and just to wind up the insolvent company, the court can make a winding-up order against the company. This order is then required to be submitted to the Registrar of Companies who in turn enters the name of the company in the register of wound-up companies, thus bringing the process to a close.

## Insolvency tests and filing requirements

### 15 Conditions for insolvency

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

A debtor is deemed to be insolvent when they are unable to pay their debts as they fall due and upon issuance of a statutory demand or where value of assets is proven to be less than its liabilities (including prospective and contingent liabilities).

### 16 Mandatory filing

**Must companies commence insolvency proceedings in particular circumstances?**

There are no mandatory requirements in law to commence insolvency proceedings and certain entities continue to conduct business albeit balance sheet or cash flow insolvency.

## Directors and officers

### 17 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?**

Company directors and officers are not customarily held personally liable for the obligations of the company unless they are found to have made decisions in breach of their fiduciary duties towards the company; have participated in fraudulent trading; or wrongful trading; or where they have given personal guarantees. If found liable by court, directors may be ordered to compensate the company or third parties. The new Act has, however, enhanced personal direct liabilities of directors.

**18 Directors' liabilities – 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?**

The Act outlines offences relating to conduct before and during liquidation and criminal proceedings relating to those offences. These offences include, but are not limited to, concealing property of the company; concealing and falsifying any company document; fraudulent removal of any part of the company's property; disposing, pledging or pawning property of the company. Civil suits to recover company property or assets can also be instituted against the directors and officers of a company.

**19 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?**

No. The director duties to the company are paramount during a company's insolvency and reorganisation and at no time do they shift to creditors.

**20 Directors' powers after proceedings commence**

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

The powers of the directors vest in the liquidator or provisional liquidator when court makes the liquidation order against a company and the directors cannot make decisions over the affairs of the company. They do, however, retain a residual right to challenge the liquidation process.

**Matters arising in a liquidation or reorganisation****21 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?**

Pursuant to section 428 of the Act, at any time after the making of a liquidation application, and before a liquidation order has been made, any creditor may, if legal proceedings against the company are pending in the court, apply to the court for the proceedings to be stayed; and if proceedings relating to a matter are pending against the company in another court, apply to the court to restrain further proceedings in respect of that matter in the other court.

A moratorium on the other hand can be obtained by a debtor on debt payments when a company's directors propose voluntary arrangement. Notably, a company that is in liquidation is ineligible to obtain a moratorium.

**22 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?**

The debtor, through the liquidator, can carry on business for the purpose of winding up the business of the debtor. Creditors who supply goods or services after the filing have priority over other creditors as their cost is a cost or expense borne by the liquidator. The court and the creditors have supervisory powers to query, through motions filed in court, business activities of a liquidator.

**23 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?**

A debtor in a liquidation or reorganisation may not obtain secured or unsecured loans or credit. Under the Act the liquidator, with the creditor's approval, however, has power to borrow money for the beneficial realisation of the company and give security for the borrowing over whole or part of the property comprised in that estate's assets. Such a loan or credit shall be prioritised under the preferential creditors group.

**24 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?**

The Act provides for power of the liquidator to sell any of the company's property by public auction or private treaty with power to transfer the whole of it to any person or sell the same in parcels. Ordinarily, the purchaser acquires the assets 'free and clear' of all claims. However, in a voluntary arrangement where the property being disposed is subject to a security or held under credit purchase transaction, the transfer shall be as if it was not subject to the security but only if the holder of the security consents or if the court approves.

**25 Negotiating sale of assets**

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

Under the Act, the liquidator has the power to sell any of the company's property as stated in question 24. The sale procedures are not provided for in the Insolvency Act. The sale procedure, therefore, is at the liquidator's discretion by virtue of the said powers vested upon him or her and as such is at liberty to employ the 'stalking horse' bids or credit bidding in the sales procedure.

**26 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?**

Under the Act the debtor has no right to reject or disclaim an unfavourable contract. Contracts that have been fully performed are incapable of being rejected as there are no outstanding obligations. Further, the Act provides that the bankruptcy trustee may disclaim onerous property. Onerous property has been defined as: an unprofitable contract; property of the bankrupt that is unsaleable, or not readily saleable, or that may give rise to a liability to pay money or perform an onerous act; and a litigation right that, in the opinion of the bankruptcy trustee, has no reasonable prospect of success or cannot reasonably be funded from the assets of the bankrupt's estate.

Within 14 days after the disclaimer, the bankruptcy trustee shall send a notice of the disclaimer to every person whose rights are, to the bankruptcy trustee's knowledge, affected by it.

The Act provides that effect of the disclaimer is such that it terminates, on and from the date of the disclaimer, the rights, interests, and liabilities of the bankruptcy trustee and the bankrupt in relation to the property disclaimed; and does not affect the rights, interests, or liabilities of any other person, except in so far as is necessary to release the bankruptcy trustee or the bankrupt from a liability.

Where the debtor breaches a contract after the insolvency case is opened, the affected party may claim breach of contract and pursue damages in the liquidation.

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## 27 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?**

In the event of liquidation or re-organisation the licensor or owner of the intellectual property may terminate the debtor's right to intellectual property, but this will, however, depend on the terms of the licence agreement between the licensor and the debtor.

In liquidation of a company, intellectual property may be rendered as onerous property by the liquidator. In this regard, the Act provides that the liquidator may disclaim any onerous property and the disclaimer operates so as to terminate the rights, interests and liabilities of the company or in respect of the property disclaimed.

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## 28 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?**

The Act does not provide for restrictions to the use of personal information or customer data collected or their transfer to purchaser by a company in liquidation or reorganisation. Kenya does not have data protection legislation in place. There may however be a limit in use of the date on the basis of terms and conditions under which those data was collected in the first place.

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## 29 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 use of arbitration in liquidation is not that common and may feature in certain matters relating to disputes arising from the purchase of members' shares. All disputes are subject to arbitration with consent of parties or by order of the court.

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## Creditor remedies

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### 30 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?**

Commencement of liquidation proceedings does not bar creditors secured by charges from enforcing their securities.

In the Act, a landlord who claims rent arrears as against a debtor may levy distress for the recovery of rent. The landlord shall be successful in this manner if the landlord has distrained the goods or effects of the bankrupt during the 30-day period before commencement of the bankruptcy.

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### 31 Unsecured credit

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

Unsecured creditors can pursue their claims through the normal court process, which is time consuming, costly and in most cases, uncertain. Pre-judgment attachments are available through the Civil Procedures applicable in Kenya, but only if certain conditions are met.

Pursuant to the Act a liquidator shall make available for the satisfaction of unsecured debts such portion of the company's net assets where a floating charge relates to the company's property.

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## Creditor involvement and proving claims

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### 32 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?**

The Act provides that where a company has passed a resolution for its voluntary liquidation, a notice shall be published setting out that resolution. Thereafter, the company that is in the course of liquidation shall convene a meeting of the company's creditors. There are two kinds of creditors' meetings: first meeting of creditors and subsequent creditors' meeting.

In the case of liquidation by the court, the official receiver may appoint a qualified person as liquidator instead. The official receiver shall send a notice of the appointment of the liquidator to the company's creditors.

The directors of the company in the course of liquidation shall prepare a statement setting out the financial position of the company that shall specify the details of the company's assets, debts and liabilities, names and addresses of the company's creditors, the securities held by them respectively, and the dates when the securities were given.

The liquidator shall lay before each of the creditors' meetings an account of the liquidator's acts and dealings, and of conduct of liquidation during the preceding year. The liquidator has a duty to share information and the creditors have a right to access information in the hands of the liquidator by, if necessary, moving to court to compel the liquidator to share the information.

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### 33 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?**

The creditors on the first meeting, if they think appropriate, appoint a liquidation committee of not more than five members who shall inspect the accounting records, the company's financial statement and carry out the necessary inquiries on behalf of the creditors. The representatives are selected by consensus of creditors, but normally the value of the debt plays a role in the vote that the creditor has. The creditors may retain advocates or certified public accountants to inspect the documents on their behalf. The remuneration of those experts is recoverable under the Insolvency Act, if the amount is incurred in protecting, preserving the value of, or recovering those assets.

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### 34 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 creditors may contribute towards or pursue a claim on behalf of the liquidator from the estate. Although the power to assign rights to pursue a claim are not expressly provided for under the Third Schedule of the Act, the liquidator may assign such right or where the company may not have funds to pursue the claim under provisions 13 and 14, power to appoint an agent to do any business that the liquidator is unable to do personally and power to take all other action that may be necessary for the beneficial liquidation of the company. The fruits of the remedies belong to the company and shall be vested in the liquidator for the benefit of the creditors and can be assigned to third parties as long as such assignment is for the benefit of the liquidation of the company.

**35 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 (including a creditor who has a preferential claim) who wishes to claim in the bankruptcy shall submit a creditor's claim to the bankruptcy trustee before the deadline for submitting claims. The deadline is either the time specified by the bankruptcy trustee in a notice given to the creditor or the time specified in an advertisement published by the bankruptcy trustee in a newspaper widely circulating in the area in which the creditor normally resides or carries on business.

On the hearing of an application by the official receiver, the bankrupt or a creditor on the grounds that the bankruptcy trustee improperly allowed a creditor's claim, the court may make an order cancelling the creditor's claim or reducing the amount claimed, if it considers that the claim was improperly allowed or was improperly allowed in part.

If a creditor's claim is subject to a contingency or the amount of the claim is uncertain, the bankruptcy trustee may estimate the amount of the claim.

The debtor has to disclose transfers that were effect just before liquidation to avoid mischief.

**36 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?**

Under the Act, the court may in the case of an unlimited company allow to the contributory as a set-off money due to the contributory or the estate that the contributory represents from the company on any independent dealing or contract with the company (but not money due to the contributory as a member of the company in respect of a dividend or profit). If, in the case of a company (whether limited or unlimited), all the creditors have been paid in full (together with interest at the official rate), money due on an account to a contributory from the company may be allowed to the contributory as a set-off against any subsequent call. There are no statutory provisions for circumstances when then the creditors' right of set-off is deprived.

**37 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?**

Pursuant to the provisions of the Act, if the court makes an order against officers of the company and others found to have participated in fraudulent trading by the company in liquidation, it may direct that the whole or any part of any debt owed by the company to that person, and any interest on the debt ranks in priority after all other debts owed by the company and after any interest on those debts.

**38 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, other major privileged and priority claims in liquidations and reorganisations, as provided in the Act, include: the expenses of the liquidation such as the liquidator's remuneration; costs for the person who applied to the court for an order placing the company under liquidation; and amount of costs incurred by that creditor in protecting, preserving the value of or recovering those assets (this has priority over the secured creditors), and outstanding taxes due to the Kenya Revenue Authority.

**39 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?)**

The employee claims that may arise where employee contracts are terminated during a restructuring or liquidation include any compensation for redundancy. For termination on account of redundancy the following conditions as stipulated under the Employment Act, 2007 must be met:

- where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
- where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
- the employer has, in the selection of employees to be declared redundant, had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy, the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- the employer has, where leave is due to an employee who is declared redundant, paid off the leave in cash;
- the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and
- the employer has paid to an employee declared redundant severance pay at the rate of not less than 15 days' pay for each completed year of service.

Employee claims are likely to be increased where large numbers of employees' contracts are terminated.

**40 Pension claims**

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

Section 615(6)(e) of the Act provides that the occupational pension schemes from company's property have priority over holders of floating charges. This is because it is classified under liability arising under a contract of employment adopted by the former administrators or predecessors before the termination or adoption and the salaries and wages due under such contracts that unpaid contributions to occupational pension schemes. In effect if there is a deficiency in the occupational pensions scheme of a company immediately before the insolvency of such company, it is a preferential debt ranking ahead of the holders of floating charges of the company. The priority in employee claims under plans and schemes during liquidation and restructuring, however, depends on the type of scheme in question.

Actuarial variations of pension schemes are provided for under the Retirement Benefits Act, Number 3 of 1997. The Retirement Benefits Authority requires that defined contribution schemes to be valued by an actuary from time to time unless all benefits are secured by an insurer or if all benefits equal to an accumulated contribution. The said Authority ensures regulation of pension schemes to reduce pension liabilities and promote accountability and good faith by employers. Therefore, claims arising from defined contribution schemes can be brought against the insurance or the employer will rank as a secured debt during insolvency. The Retirement Benefits (Minimum Funding Level and Winding Up Of Schemes) Regulation 2000 provide that members of a scheme (employees) in liquidation and insolvency shall be treated as deferred creditors in their claims as members and shall not be settled until after the debts of the ordinary creditors have been settled during restructure and liquidation. They have the same remedies as those of unsecured creditors in customary insolvency procedures.

**Update and trends**

Insolvency regulations were recently passed to operationalise the new statute. In view of the substantive nature of the statute, it is expected that the courts will be inundated with requests to apply and interpret the new regulations (and the statute) in the coming months. Indeed, only recently one of the biggest retailers in Kenya and East Africa generally, Nakumatt, sought protection from creditors by seeking 'bankruptcy protection' citing the new law, a first in Kenya.

**41 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?**

The liability arising from environmental problems may be civil or criminal in nature. Where there are environmental problems within the company's premises, the 'polluter pays' principle shall apply meaning that liability is imposed on the party who caused the pollution. Therefore, if the company is found responsible, resulting from its operations, it shall be liable to remediate the damage caused as appropriate, whether it is by paying penalty or undertaking a clean-up process. This obligation falls on the liquidator once he or she is in place, as environmental damage is usually a continuing injury.

If a secured creditor enforces a mortgagee and becomes a mortgagee he or she shall be liable for the environmental liabilities accruing thereto. Where the environmental problem is caused by a third party, they shall be held personally liable.

**42 Liabilities that survive insolvency or reorganisation proceedings**

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

No further claim can be brought against a debtor once a liquidation process has been concluded. An example of such a liability is a person seeking to execute a judgment or award that is issued once a winding-up order has been granted.

**43 Distributions**

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

The distribution is made by the liquidator once debts have been proven and the liquidator has recovered funds from sale of assets of the debtor. The liquidator of course has to take into account the order of priority as set out under the Act. In reorganisations, the payments are made as per the terms of the scheme of arrangement as approved by the court.

**Security****44 Secured lending and credit (immoveables)**

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

The principal securities on immoveables are equitable mortgages (are also known as charges) and legal mortgages.

**45 Secured lending and credit (moveables)**

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

The principal securities on moveables are liens (a possessory right to retain the debtor's asset until the debt is repaid), fixed charges (providing security over a particular asset, for example, bank accounts or insurance proceeds) and an equitable mortgage.

**Clawback and related-party transactions****46 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 that is undervalued can be annulled. This is when a company makes a gift to a person or otherwise enters into a transaction with a person on terms that provide for the company to receive no consideration or a company enters into a transaction with the person for a consideration the value of which in money or money's worth is significantly less than the value in money or money's worth of consideration provided by the company.

An extortionate credit transaction can be annulled. This would be a situation where the insolvency office holder notes that a credit was overpriced or a transaction was entered into during the three years immediately preceding the date on which the company entered administration or where a liquidator was appointed in respect of the company.

A transaction may be annulled if it is based on certain preferences. For example if the person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities or the company does not act or allows an act to be done that (in either case) has the effect of placing the person in a position that if the company were insolvent liquidation is better than the position the person would have been in had the act not been done.

The court or a creditor can challenge any such transaction. The application must be made without unreasonable delay and the end result if successful is that the entire transaction is reversed.

**47 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?**

The Act provides for what is referred to as first priority claims and it then follows that there are restrictions on claims by related parties or non-arm's length creditors as the first priority claims take precedence.

**Groups of companies****48 Groups of companies**

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

This would be applicable in instances where the corporate veil is lifted but is in very exceptional circumstances. This lifting of the corporate veil means a situation in which the courts put aside the limited liability and hold a corporation's shareholders or directors personally liable in the corporation's actions or debts.

It should be noted this would also apply in cases where fraud is proved and also in instances where there is or it is shown there was a direct or deliberate intention to put assets beyond the reach of the creditors by the parent or affiliated corporation.

**49 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?**

No and it would not be in the best interests of the company to combine the assets in one pool for distribution.

**International cases****50 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?**

Yes, foreign judgments or orders are recognised. There is a law in Kenya that is the Foreign Judgments (Reciprocal Enforcement) Act, which allows enforcement of judgments given in countries outside Kenya that accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith. In the absence of the reciprocal arrangement, a foreign judgment is enforceable in Kenya as a claim in common law.

The countries known to enjoy this reciprocal arrangement are Australia, Malawi, the Republic of Rwanda, Seychelles, Tanzania, Uganda, the United Kingdom and Zambia. It should be noted that the same law does allow the Minister in charge at the time of foreign affairs to extend application of the Act to other countries that have made or will make reciprocal arrangements for the enforcement of Kenyan judgments.

**51 UNCITRAL Model Law**

**Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?**

Yes, the UNCITRAL Model Law adopted by the United Nations International Trade Law on 30 May 1997 and approved by the General Assembly of the United Nations on 15 December 1997 has been adopted in Kenya.

**52 Foreign creditors**

**How are foreign creditors dealt with in liquidations and reorganisations?**

With the adoption of the UNCITRAL Model Law by Kenya, which simply provides for internationally recognised and accepted guidelines on cross-border insolvency and also provides for cooperation and coordination between jurisdictions, the Insolvency Act 2015 allows foreign creditors to access foreign courts in Kenya.

The foreign creditor would therefore apply to commence insolvency proceedings in Kenya and would equally be allowed to participate in the proceeding under the law as creditors in Kenya would.

**53 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?**

An administrator is usually appointed to manage the company affairs and property of the insolvent company. The law provides that an administrator may take any action that contributes to or is likely to contribute to the effective and efficient management of the affairs and property of the company.

The assets may therefore be transferred if the administrator has determined that the asset did not or does not form part of the company's property. It should be noted also that because the objective of the administrator is to ensure the best return to creditors, they cannot consent to transfer without evidence that the asset did not form part of the company's property or that there was a sale of assets for value.

**54 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?**

In Kenya, there is no test to determine the COMI provided in the legislation governing insolvency, however, as the COMI concept forms part of the UNCITRAL Model Law, which Kenya has adopted, it may be an option for parties to consider forum shopping to move the COMI of a debtor company to a jurisdiction with a more favourable restructuring or insolvency regime.

**55 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, Kenya provides a system for recognition of foreign insolvency proceedings. The law provides that an application may be made in court for recognition of the foreign proceeding in which the foreign representative has been appointed.

It should be noted that the application may, however, be rejected on the following grounds:



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- if a certified copy of the decision commencing the foreign proceeding is not attached to the application;
- if a certificate from the foreign court affirming the existence of a foreign proceeding and the foreign representative is not attached to the application;
- if any other evidence that is acceptable to the court of the existence of the foreign proceeding is not attached to the application; or
- if there is no statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

#### **56 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?**

Kenya is yet to enter into cross-border insolvency protocols as there first needs to be harmonisation in terms of cooperation and communication of interests between states before this area of law can become a reality, though it would be important to note that with the enactment of the Insolvency Act No. 18 of 2015 Kenya can be said to be moving in the right direction.

## Getting the Deal Through

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Advertising & Marketing  
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Air Transport  
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Anti-Money Laundering  
Appeals  
Arbitration  
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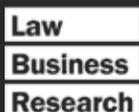
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Public Procurement  
Real Estate  
Real Estate M&A  
Renewable Energy  
Restructuring & Insolvency  
Right of Publicity  
Risk & Compliance Management  
Securities Finance  
Securities Litigation  
Shareholder Activism & Engagement  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
Structured Finance & Securitisation  
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