CORPORATE INSOLVENCY BILL, 2019

MEMORANDUM

The purpose of this Bill is to provide a legal framework for corporate insolvency in order to address some areas that are in need of reform. The Bill seeks to provide for a statutory restructuring procedure to assist companies to remain as going concerns, re–enact the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180) to incorporate an enhanced dimension of the liquidation of companies and postulate the regulation of insolvency practitioners to ensure that there is appropriate oversight of private insolvency practitioners for the proper administration of insolvency proceedings, accountability and efficiency. In this regard, the Bill relocates provisions on the liquidation proceedings of companies under Act 180 in the Bill. The Bill when passed into an Act, will co-exist with the reformed Companies Act and complement the regime of winding up of companies under the Companies Act, 1963 (Act 179).

In the 1960's, the corporate laws of Ghana notably the Companies Act, 1963 (Act 179) and the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180) were considered to be some of the progressive pieces of legislation passed within the English Commonwealth. Despite this, developments in Ghana and elsewhere have elucidated some shortcomings of the law due to the changing environment of doing business and the significant change in insolvency practice. No purposeful effort has been made to reform the corporate insolvency regime by legislation to conform to international best practices.

This Bill is an important piece of legislation because it seeks to promote private enterprise in Ghana. The Bill forms part of the processes of legal reform initiated by the Ministry of Justice and is aimed at improving the quality of the legal regime for corporate bodies and their administration when they become insolvent. The absence of legislation to deal with corporate insolvency reveals a huge loophole in our commercial laws. It is a bane to economic growth and development and a handicap to many businesses. Companies with good prospects must be given the opportunity to start afresh when they are on the brink of no longer being going concerns.

The passage of the Insolvency Act, 2006 (Act 708) established a comprehensive legal framework for personal insolvency matters. Even though

there appears to be some piecemeal efforts to address issues related to the administration of insolvent companies, there is no comprehensive piece of legislation that addresses these issues holistically. For example, the Insurance Act, 2006 (Act 724) and the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) contain some provisions on the administration of corporate entities in distress and their administration. The current regime is emphatic on liquidations and receiverships but lacks the provision for corporate restructuring to provide a range of solutions for distressed but viable companies.

The Bodies Corporate (Official Liquidations) Act, 1963 (Act 180) provides for the official liquidation of companies and attendant liquidation proceedings. The Bill therefore repeals the winding up and liquidation proceedings in Act 180 and seeks to relocate them in this Bill and so provides for their re-enactment.

A workshop on corporate insolvency held under the auspices of the Private Enterprises Foundation in September 2009 opened the door for consultations with stakeholders to discuss a draft report prepared by the Ghana Association of Restructuring and Insolvency Advisors (GARIA). The workshop solicited the views of the general public on the proposals contained in the report. Consequently, the recommendations made in response to the concerns and the recommendations contained in the report have to a large extent provided some basis for the preparation of legislation to give support to the legislative framework for the corporate insolvency regime.

The primary object of the Bill is to raise the present standard of business ethics. It seeks to promote private enterprise in Ghana. Emanating from this object, the Bill seeks to provide a framework for restructuring viable businesses and closing and transferring assets of failed businesses. In effect it facilitates the access to timely, efficient and impartial insolvency proceedings. Furthermore there is a reduction of the burden of insolvency through higher and equitable distribution of assets of a company to creditors.

Clauses 1 to 78 introduce the legal framework for the corporate restructuring process. Corporate restructuring is the process by which a

distressed company restructures its business or assets to bring it back to profitability. The rationale for corporate restructuring is the promotion of business and the preservation of jobs. The process is similar to the judicial management procedure under sections 99 to 113 of the Insurance Act, 2006 (Act 724). The formal corporate restructuring mechanisms are not intended to assist unviable companies or shield debtors from their obligations to creditors but rather to facilitate negotiations between the company and its creditors or ensure the orderly realisation of the assets of the company when restructuring is not feasible. The formal restructuring procedures seek to balance the right of creditors to enforce their security and the public interest in ensuring the survival of viable businesses for the benefit of employees, creditors and the economy in general.

The thrust of *clauses 1 to 78* of the Bill is reflected in *clause* 1 of the Bill. The provisions in *clauses 1 to 78* demonstrate the novel approach to the management of insolvent corporate bodies within a legal framework. *Clause 1* states the purpose of sections 2 to 78 to be to provide for the administration of the business, property and affairs of a company in a manner that provides an opportunity for the company or as much as possible of its business, to continue in existence as a going concern; provides for the temporary management of the affairs, business and properties of the distressed company; places a temporary freeze on the rights of creditors and other claimants against the company; and allows the development and implementation of a restructuring plan which results in a better return for the creditors and shareholders of the company than would result from the immediate winding-up of the company. Excluded from the application of this clause are companies carrying on the business of banking, insurance or any other business which is subject to special regulation. A company may be placed in administration or restructuring if the company is unable to pay the debts or current obligations of the company as they fall due even if the total assets of the company exceed the total liabilities of the company or the company has a negative net worth.

Clause 2 states the duration of the administration of a company. It commences when a company appoints an administrator. The *clause*

enumerates the various circumstances when the administration of a company ends or may end. A company is to, from the commencement of administration, cease to carry on the business of the company except where the company is required to do so for the beneficial administration of the company.

Clause 3 makes provision for the appointment of an administrator. The clause indicates persons who may be appointed the administrator, the circumstances in which an administrator may be appointed and the circumstances where an administrator cannot be appointed.

Clause 4 provides for the appointment of two or more administrators. In these circumstances, the functions of an administrator may be exercised by any one of them. *Clause* 5 empowers the Court to review or fix the remuneration of an administrator at a reasonable level. *Clause* 6 specifies the circumstances under which the office of the administrator becomes vacant. *Clause* 7 deals with the resignation and removal of an administrator.

Clause 8 empowers the appointer of an administrator to appoint a person to fill the vacancy that occurs where the office of the administrator becomes vacant.

Clause 9 provides the creditors of a company with the opportunity to remove and replace a replacement administrator. The *clause* sets a time frame within which a meeting for this purpose may be held.

Clauses 10 to 29 deal with the effect of the appointment of an administrator. *Clause* 10 describes the role of the administrator. Of significant note is the duty to carry on the business and manage the property and affairs of the company with the objective of salvaging the business of the company in the interests of creditors, employees and shareholders. Apart from this, the administrator is required to file an account with the Registrar and copies of the account with the directors for specific periods indicating receipts and payments made in relation to the company.

Clause 11 spells out the powers of the administrator. Included in these powers is the power to appoint an agent to act on behalf of the

administrator. *Clause* 12 precludes a director of a company that is in administration from exercising a power or performing a function as an officer of the company without the prior written approval of the administrator or as expressly permitted in the Bill.

Clause 13 deals with the effect of the appointment of an administrator on employees. The administrator is bound by existing contracts of employment entered into by the company before the appointment of the administrator unless the administrator gives notice of the termination of the contract within twenty-one days after the appointment. The Court may extend the twenty-one day period on application by the administrator.

Clause 14 requires each transaction or dealing by a company in administration to be entered into by the administrator, with the consent of the administrator or under an order of the Court. A transaction or dealing which is contrary to *subclause* (1) may be validated by the Court under *subclause* (2). The transactions excluded from the application of this principle are spelt out in *subclause* (3).

Clause 15 generally preserves the status of shares in a company in administration and in effect proscribes their transfer unless the administrator is of the view that the transfer is in the best interests of the shareholders of the company. In the same vein the rights and liabilities of a shareholder in a company in administration are preserved.

Clause 16 places a preliminary duty on the administrator when appointed to investigate the business, property, affairs and financial circumstances of the company to form an opinion on whether it will be in the interest of the creditors for the company to execute a restructuring agreement, for the administration to end or for a liquidator to be appointed. Similarly, *clause* 17 places a duty on the directors to furnish the administrator with a statement about the business, property, affairs and financial circumstances of the company within seven days after the administration of the company commences or within a period agreeable to the administrator. A director who fails to submit a statement as specified is liable to pay to the Registrar, an administrative penalty of two hundred and fifty penalty units.

Clause 18 brings the administrator at par with the liquidator in relation to the power to access documents and information. *Clause* 19 empowers the administrator to lodge a report with the Registrar of Companies on a specific matter that relates to dishonesty, financial mismanagement and other fraudulent activity, negligence or breach of duty on the part of an officer or shareholder of the company, promoter of the company or liquidator of the company. The Court on the application of an interested person may compel the administrator to make the necessary report.

Clause 20 requires the administrator to call the first meeting of creditors for the appointment of a committee of creditors, a watershed meeting and other meetings of creditors required by the committee of creditors or the administrator. The *clause* makes provision for the procedure at meetings of creditors including joint meetings of creditors of related companies. It must be noted that the active participation of creditors in the liquidation is important since this provides the creditors the opportunity to approve decisions that substantially affect their interest like payments out of assets, dispositions and major contracts. This is an improvement to the existing law which does not give creditors the leeway to play an active role in the liquidation.

The reasons for the first meeting of creditors that the administrator is required to call are contained in *clause* 21. By this *clause,* the administrator is required to call a meeting of creditors to determine whether to establish a committee of creditors or whether to replace the administrator. The relevant time frames for holding the meeting and communicating notices are contained in the *clause.* It must be noted that it is at this meeting that the administrator is obliged to present an interests statement to disclose any relationship the administrator may have with the company in administration, its officers, shareholders or creditors. The interests' statement underscores the need for the protection of the integrity of proceedings and to ensure the independence of the administrator.

Clauses 22 and 23 provide for the functions of the committee of creditors and the membership of the committee of creditors respectively. *Clause* 24 deals with the watershed meeting which must be convened by the administrator within a convening period. The *clause* states the procedural steps of the meeting.

Clause 25 affords a creditor or administrator, the opportunity to apply to court for an order if that creditor or administrator is dissatisfied with the outcome of proceedings as regards a meeting of creditors.

Clause 26 empowers the Court to make an order to categorise pooled property owners as a separate class. Pooled property owners are bound by a restructuring agreement as if each voted in favour of the resolution passed at the watershed meeting to determine the various matters stated in *subclause* (2) of the clause.

Clause 27 states the limited period within which a watershed meeting may be adjourned which is forty-two days unless the Court orders otherwise. *Clause* 28 spells out the types of decisions that may be taken at a watershed meeting.

Where a proposed agreement is not fully approved at a watershed meeting, *clause* 29 mandates the administrator to take the steps set out in *clause* 48.

Clauses 30 to 35 deal with the protection of company property. The enforcement of a charge over the property of the company is not permitted except by order of the Court, *clause 30.* This principle to support the preservation of company property is subject to *clauses* 37, 38, 60 and 80.

Clauses 31 and 32 also present other scenarios for the preservation of company property. *Clause* 32 prohibits the recovery of property that a company occupies or is in possession of if the administration of that company is ongoing: *Clause* 32 precludes the commencement or continuation of proceedings in a court against the company during the administration of the company. Similarly, *clause* 33 disallows an enforcement process to commence or continue except with the leave of the Court and on the terms that the Court considers appropriate.

Clause 34 spells out the various duties of a court officer in relation to the property of a company. A court officer cannot take action to sell property or transact any payments in relation to the sale of property of the company under an execution process or take action in relation to the attachment of a debt due to the company if the company is in administration. However, the clause takes cognisance of the person who buys

property in good faith to have good title against the company and the administrator.

Clause 35 prohibits the enforcement of a guarantee of a liability of the company against the director of the company, the spouse or relative of the director and any related company.

Clauses 36 to 38 shift the focus of the Bill to the rights of secured creditors. *Clause 36* defines words and expressions used in *clauses* 37 and 38 of the Bill. Under *clause* 37, a secured creditor affected by the appointment of an administrator may apply to Court to enforce the security of the secured creditor. The procedure for liaising between the administrator and the Court and the hearing by the Court and its determination are part of the content of *clause* 37. An exception for immediate enforcement of a security before the conduct of a hearing or making of an order by the Court is made for perishable property.

Clause 38 clearly states the position as regards the recovery of property before administration.

Clauses 39 and 40 make provision for the appointment of a restructuring officer and the vacancy in that office respectively. *Clause* 41 deals with the remuneration of the restructuring officer.

Where a restructuring officer wishes to sell existing shares in the company, *clause* 42 requires that the restructuring officer obtain the written consent of the shareholder or permission of the Court.

Clauses 43 to 59 deal with the restructuring agreement. *Clause* 43 deals with the application of *clauses* 44 to 59 of the Bill. *Clause* 44 places a responsibility on the restructuring officer to prepare a document that sets out the terms of the agreement. The *clause* details the content requirements of the agreement.

Clause 45 indicates when a restructuring agreement takes effect. It also provides for the deadline for the execution of the agreement which is subject to a resolution by the directors.

Clause 46 outlines a procedure for the case where the creditors at a watershed meeting resolve that the company executes a restructuring agree-

ment but the proposed agreement is not fully approved at the meeting. *Clause* 47 states the acts that a creditor is prohibited from doing if that creditor is bound by an agreement already executed.

A company's failure to execute a restructuring agreement invokes *clause* 48 which mandates the administrator to apply to the Court for leave to convert the administration of the company into an official liquidation.

Clause 49 indicates the persons bound by a restructuring agreement to be the creditors of the company, the company, the officers and shareholders of the company and the restructuring officer. The extent to which a restructuring agreement binds creditors including secured creditors is expressed in *clause* 50.

Clause 51 enumerates the acts prohibited by a person who is bound by a restructuring agreement while the agreement is in force. *Clause* 52 empowers the Court to make an order subject to its terms for the enforcement of a charge or recovery of property where creditors have resolved at a watershed meeting that a restructuring agreement be executed.

Clause 53 states the effect of a restructuring agreement on the debt of a company. The *clause* provides that the release of a company from a debt does not discharge or affect the liability of a guarantor of the debt or a person who has indemnified the creditor against default by the company in relation to the debt.

On an application made by the restructuring officer, shareholder or creditor of the company or the Registrar to determine the validity of the restructuring agreement, the Court may under *clause* 54 declare the restructuring agreement void, vary it with the consent of the restructuring officer or validate the agreement.

Clause 55 provides creditors with the option to vary a restructuring agreement by a resolution passed at a meeting convened under *clause* 58. There are limitations to this variation. Firstly, the variation must not be materially different from the proposed variation set out in the notice of the meeting. Secondly, the Court may cancel or confirm the variation conditionally on application by a creditor of a company in administration.

Clauses 56, 57, 58 and 59 relate to the termination of a restructuring agreement. *Clause* 56 indicates the mode of termination and *clause* 57 indicates how the Court may terminate the restructuring agreement. The consideration of a proposed variation or termination may be done in accordance with *clause* 58 by the creditors of the company if the restructuring officer convenes a meeting for that purpose. *Clause* 59 empowers the creditors to terminate an agreement if a material breach of the agreement has occurred which has not been rectified.

Clause 60 absolves the administrator from liability for acts done or consent given in good faith. These acts shall not be set aside in the liquidation of the company.

Clause 61 states the extent of the liability of an administrator for debts, rents and other payments. *Clause* 62 absolves an administrator from liability for any period for which a non-use notice is in force for specific matters. However the restriction on the liability may in particular circumstances be revoked by the administrator by written notice.

Clause 63 makes provision for the indemnity of the administrator which subject to *clause* 64 has priority over each unsecured debt of the company and for that matter a lien on the company's property.

Clauses 64 and 65 provide the Court with general powers and specific powers respectively. In essence the Court may make an order for the mode of operation of an administration, termination of an administration or the protection of the interests of a creditor during administration of a company.

Additional powers of the Court are provided in *clauses* 66 to 71. These powers relate to the Court ruling on the validity of the appointment of the administrator and Court directives for the performance or exercise of the functions or powers of the administrator or restructuring officer in *clauses* 66 and 67 respectively. The Court may make an order to supervise the administrator or restructuring officer or to remedy a default under *clauses* 68 and 69 respectively. The Court may also make orders under *clause* 70 when the office of an administrator or restructuring officer is vacant and under *clause* 71 a prohibition order as regards an administrator.

Clauses 72 to 77 deal with various notices. These notices relate to the notice of appointment of an administrator, the execution of a restructuring agreement, notice of failure to execute a restructuring agreement, notice of termination by creditors of a restructuring agreement, notice of fact of administration and notice of change of name of the company. *Clause 78* states the effect of the contravention of *clauses* 72 to 77 on notices. The contravention will not affect the validity of anything done under these clauses unless the Court orders otherwise.

Clauses 79 to 88 deal with the commencement of official liquidation of companies. *Clause* 79 enumerates the purpose of clauses 80 to 149. *Clause* 80 relates to the appointment of a liquidator to a company in administration. The appointment may be made by the Court or by a resolution of the creditors at a watershed meeting or a meeting convened under *clause* 58. The *clause* further empowers the Court to adjourn an application for the appointment of a liquidator where the Court is of the opinion that the company should be in administration rather than be placed in liquidation.

Clause 81 enumerates the different modes by which the official winding-up of a company may commence. These are namely by a special resolution of the company, a petition addressed to the Registrar, a petition of the Court, a conversion from private liquidation, or a conversion from administration. *Clause* 81 states that the provisions of *clauses* 82 to 147 of the Bill apply with respect to the winding-up of a company in any of the modes of winding-up.

The Bill retains the entry mechanism with respect to special resolution. However, to avoid the misuse of this procedure and the defrauding of creditors, the provision on the procedure on resolution as contained in Act 180 is modified in *clause* 82 of the Bill. In effect it provides for a notice for the meeting at which the special resolution to wind up the company shall be passed to be served on the Registrar of Companies or the representative of the Registrar, thereby creating an opportunity for either person to attend the meeting. Further modifications require the official liquidator to take immediate control of the assets of the company pending the appointment of a liquidator by creditors. Furthermore, the directors, officers and a liquidator are

precluded from disposing of the assets of the company without the approval of a court unless it is in the normal course of business.

Clause 83 outlines the procedure on petition to the Registrar for the official winding-up of a company. This *clause* replicates a similar provision in Act 180. Persons eligible to present petitions to the Registrar include a creditor of a company and a member or contributory of a company. In the case of a company with shares, the member is not entitled to present a winding-up petition except in particular cases which are indicated in the clause. *Clause* 83 also places limitations on petitions presented by contingent or prospective creditors. The instances in which a company can be considered as unable to pay debts are indicated in this clause. However, the additional consideration of the Registrar taking into account the contingent and prospective liabilities of the company is of great importance.

Clause 84 delineates the procedure for a petition to the Court and the response of the Court to this. This petition may be made by a creditor of the company, a member or contributory of the company or by the Attorney-General on grounds of illegal objects or the illegality of a business by a company or the operation of a company outside the ambit of its constitution.

Clause 85 empowers the Registrar to make a winding-up order to convert a private liquidation into an official winding-up when the liquidator gives notice under a private liquidation in accordance with the Companies Act, 1963 (Act 179).

Clause 86 provides for the Registrar to, by an application to the Court, make a winding-up order to convert the administration of a company into an official winding-up where the administrator gives notice that the administration of a company has been converted into official liquidation. This *clause* introduces a new mode of winding-up absent in the Bodies Corporate (Official Liquidations) Act, 1963 (Act 180).

Clause 87 precludes civil proceedings against a company when winding-up proceedings have commenced. It also proscribes the transfer of shares of the company. In effect the Court may stay proceedings in that regard

during the interval between the presentation of a petition for an official winding-up and the commencement of the winding-up.

Clause 88 places the cost of an application for liquidation on the liquidator where a person successfully applies to the Court for the winding-up of the company. This includes the costs between legal counsel and the client in procuring the order. The rules of Court will provide the guide for determining the quantum of the costs. This provision is novel and seeks to support the rationale that successful applicants must be reimbursed for the cost of an application for liquidation. Treating the cost of a successful application as an administrative expense is justifiable on the grounds that it initiates proceedings for the collective benefit of creditors therefore absolving the creditor who makes the application from bearing the full cost of the application when the liquidation is ordered. On the other hand the unsuccessful applicant will be solely responsible for the cost of application for liquidation.

Clauses 89 to 94 relate to the effects of the commencement of official liquidation. *Clause* 89 states the period of an official winding-up to commence on the passage of a resolution for the winding-up of the company or on the making of a winding-up order. *Clause* 90 assigns the functions of directors to the liquidator on the commencement of a winding-up.

Clause 91 supports the change in the status quo on the commencement of a winding-up with the provision for the cessation of the business of a company except where it is required to do so for the beneficial winding-up of the company. Despite this, the corporate status remains until the company is dissolved.

Clause 92 preserves the status quo in respect of the property of a company during winding-up proceedings unless otherwise directed by the liquidator who may take custody or control of the property and things in action to which the company is or appears to be entitled. The *clause* states the presumption of property in possession of the company within six months before the commencement of a winding-up, to be vested in the company unless the contrary is shown. The liquidator is by this *clause*

empowered further to require a member, contributory, trustee, receiver, banker, agent or officer of the company to pay, deliver, convey, surrender or transfer to the liquidator after the commencement, money, property, books and papers to which the company is entitled.

Clause 93 precludes a person other than a secured creditor from commencing an action or civil proceedings against a company for the realisation of security unless the Court grants leave to do so in accordance with the terms that the Court may impose.

Clause 94 makes the transfer of shares void if made after the commencement of a winding-up unless it is a transfer made to the liquidator or with the approval of the liquidator.

Clause 95 makes provision for the nomination and appointment of a liquidator by creditors of a company. The *clause* indicates persons who may or may not be appointed as liquidator. The *clause* further provides that where the creditors are unable to appoint a liquidator, the creditors are to, within seven days, notify the Registrar who is the official liquidator, to be the liquidator. *Clause* 96 describes the status of the liquidator in an official winding up. *Clause* 96 requires the Registrar to stand in a fiduciary relationship to the company as if in the position of a director. Provisions on directors under the Companies Act, 1963 (Act 179) are applied in this regard. *Clause* 97 spells out the powers of the liquidator. *Clause* 98 provides for the delegation of functions of the liquidator.

Clause 99 empowers the Court to make orders to redress the grievances of persons affected by acts done by the liquidator, to compel any person to comply with any requirement made by the liquidator and finally to direct the liquidator when in doubt as to a matter in connection with the functions of the liquidator.

Clause 100 establishes the Liquidation Fund into which moneys received by the liquidator are to be paid and from which moneys may be disbursed by the liquidator. The Liquidation Fund has a component namely the Fees Account into which moneys received by the liquidator by way of fees and other charges are to be paid.

Clauses 101 to 107 constitute the group of clauses on the general duties of the liquidator in the administration of the property of a company. *Clause* 101 places a responsibility on the liquidator to secure the payment to the liquidator of a debt owed to the company or any other discharge of debts and obligations the right to which has passed to the liquidator in connection with the custody of the property of the company, as provided in *clause* 92.

In view of the fact that property vests in the liquidator on the commencement of a winding up, the liquidator has the duty under *clause* 102 to notify the public of this status by publication in the *Companies Bulletin*. Furthermore, the liquidator may bring or defend acts or any other legal proceedings which relate to the property of the company and which are necessary for effecting the winding-up of the company and recovery of its property.

The liquidator has additional duties under *clauses* 103,104, 106 and 107 to realise assets, verify debts ranking for dividends, amend admitted proofs and ascertain priority of debts respectively. Subsection (2) of section 39 of Act 180 allows parties to set-off mutual debts without providing safeguards against abuse. It is important that some limits are placed on the exercise of this right given the fact that set-offs place some unsecured creditors in a more advantageous position than others and is therefore open to abuse. -Act 180 does not provide provisions on set-off rights in financial agreements. This is essential to protect the stability of the financial markets, that is, reduce the exposure of parties to similar agreements to a net sum. *Clause* 105 is a novel provision and introduces the concept of set-offs. The *clause* enumerates the circumstances where a set-off is permitted. It also indicates the fraudulent circumstances where a transaction for the purpose of set off will not be allowed.

Clauses 108 to 119 are the group of clauses that relate to the investigation into the affairs of the company. *Clause* 108 mandates the preparation of a statement as regards the affairs of the company in a form approved by the liquidator within a time frame of fourteen days or other period set by the liquidator. The statement is required to be accompanied with an affidavit which shall contain particulars relevant to the total

assets of the company, contact details of the creditors of the company, details of securities held, reasons for the insolvency of the company and other relevant information. *Clause* 108 further provides penalties for false statements and non compliance with the requirements of the *clause.*

Clause 109 deals with the settlement of the list of contributories. The *clause* requires the liquidator to settle a list of contributories unless it is not necessary to make calls on or adjust the rights of contributories. On the other hand, in settling the list of contributories, the liquidator must distinguish between persons who are contributories in their own right and persons who are contributories as being representatives of or liable for the debts of others. *Clause* 109 further makes provision for personal representatives, or trustees in bankruptcy to assume the responsibility of due payment of moneys in the event of the death of a contributory or a contributory becoming bankrupt. In the course of a company being wound up, the books and papers of the company and of the liquidator are substantial evidence as between the contributories of the company of the veracity of the matters recorded in the books and papers.

Clause 110 makes provision for the rectification of the register of members on application to Court by an aggrieved person, a member of the company, the company or the liquidator.

Under *clause* 111, a creditor of the company may lodge with the liquidator a proof of debt indicating the values and due dates of provable debts alleged by the creditor to be outstanding in favour of the creditor against the company, the values and due dates of the obligations outstanding in the favour of the company against the creditor, the nature and value of securities held by the company regarding the outstanding obligations, the total values of the debts, obligations and securities and details of the transactions from which the debts and obligations arose. The *clause* further makes provision for the amendment of the proof of debt within a particular time frame in the absence of which event the proof of debt will be excluded from the benefits of a distribution.

Clause 112 introduces the subject of meetings of creditors after the appointment of the liquidator. This meeting is the first meeting of creditors which has to be called at a date not later than six weeks after the appointment

of the liquidator. The *clause* provides for the quorum for the meeting, closure of the meeting and the computation of debts owed to creditors.

Clause 113 creates an opportunity for the liquidator to mediate between creditors and members of a company. In these circumstances the liquidator is required to report to the creditors at intervals of not more than six months on the progress of the liquidation, consult the creditors on matters arising in proceedings which substantially affect their interest and to give effect to the views expressed by the creditors in relation to the realisation and distribution of assets. The channel of communication for the liquidator with the creditors is meetings. *Subclauses* (6) to (13) of *clause* 112 apply to this clause.

Clause 114 introduces the concept of the committee of creditors. The composition, conditions of appointment of members and the functions of the committee are incorporated in this *clause*.

Clause 115 empowers the Court to carry out a private examination of persons summoned by the liquidator including officers of the company to produce documents or answer questions as regards property of the company, indebtedness related to the company and the general state of affairs of the company.

Clause 116 is on the application that can be made to a court for inquiry into the conduct of a person in relation to the company. *Clause* 117 deals with an order against fraudulent or delinquent persons. On application by the liquidator, creditor, a member or contributory of the company, the Court may declare persons personally responsible if the Court finds them to be persons who are knowingly carrying on a business of the company with intent to defraud the creditors of the company or any other person. The liquidator has the opportunity to give evidence or call witnesses regarding the hearing of a matter by the Court. *Clause* 117 also provides a definition for the word "assignee". It further provides a yardstick to determine the circumstances when there is an intention to defraud creditors.

Under *clause* 118, where a business is carried on with the intent and for the purpose of fraudulent activity, provision is made for a penalty of not less than five hundred penalty units but not more than one thousand

penalty units or a term of imprisonment of not less than two years but not more than five years. Furthermore, a director who carries on the business of a company with intent to engage in fraudulent activity is disqualified from acting as a director for five years.

Clause 119 on the other hand provides for the duty of a director to prevent insolvent trading. Thus a director who causes a company to engage in any form of business or trade or incur a debt or liability where that director had reasonable grounds to believe that the company is insolvent, or would become insolvent; or ought to have known at the time of causing the company to engage in the business or trade or incur the debt or liability that the company was insolvent or would become insolvent as a result of incurring that debt commits an offence and the sanction is accordingly indicated in *clause* 119.

The group of *clauses* on the assets available for winding-up are *clauses* 120 to 127. *Clause* 120 mandates the liquidator to make available property of the company for the purposes of the official winding-up. *Clause* 121 requires preferred creditors or creditors singled out by the liquidator during the six months ending with the commencement of winding-up and at a time when the company was insolvent for payments, disposition of property or the benefit of rights to restore to the liquidator the same.

Clause 122 makes further provision for the restoration of property to the liquidator by any person who on the commencement of a winding-up and during the period of twenty-one days before the presentation of the first petition on which the winding-up order was made received payment of money or other transfer of property regarding a debt owed to that person by the company. The *clause* further provides for exceptions to the required payment of money or transfer of property.

Clause 123 requires the repayment of money or the transfer of property by a person who has benefited in relation to any transaction effected during the two year period ending with the making of the winding-up order or more than two years but less than ten years before the making of the winding-up order at a time when the company was insolvent.

The *clause* tends to modify the previous position in Act 180 on the repayment of money or the transfer of property. Act 180 makes no provision for these exemptions but the *clause* exempts transactions made at an undervalue if made in good faith for the purpose of carrying on the business of the company and made at a time when there were reasonable grounds for believing that the transaction would benefit the company. However, a transaction is not exempt if made at a time when the directors were aware that the company was insolvent or the transactions themselves led to the insolvency of the company. The *clause* also makes provision for excess benefit restored to be treated as a provable debt. The use of the term 'undervalue' instead of 'gift' is more appropriate since the *clause* deals with transactions that are made at less than market value and this is the standard terminology in insolvency law.

Money lenders are also required to restore money paid to them during the ten years ending with the making of the winding-up order. *Clause* 124 empowers the liquidator to give notice to a lender to this effect.

Clause 125 makes the conveyance or assignment by a company of its property to trustees for the benefit of its creditors void. *Clause* 126 empowers the liquidator to make calls on any of the contributories to make payments and for the adjustment of rights of the contributories among themselves. Payment due from a contributory, purchaser or other person to the company may be paid into a bank account specified by the liquidator instead of to the liquidator. The *clause* underscores the importance of the call of the liquidator and gives it the effect of an order of the Court.

Clause 127 mandates the liquidator to open an account for each company within the Liquidation Fund established under *clause* 100 of the Bill. The account is the Official Account of the company which the liquidator must credit with moneys received by the liquidator in respect of the company, payments made to the liquidator regarding the company to increase the assets available for dividends and the repayments in respect of excess dividends made under *subclause* (3) of *clause* 130. The *clause* takes cognisance of the loss of assets and makes provision in *clause* 127 for this to be reconciled.

Clauses 128 to 133 represent the group of *clauses* on the distribution of assets. *Clause* 128 gives the liquidator the prerogative to disclaim property vested in the liquidator if the property will not benefit the creditors. The liquidator can only do this if no application has been made to the liquidator to elect whether the liquidator disclaims the property or not. The disclaimer may only operate to determine as from the date of the disclaimer, the rights, interests and liabilities of the company and the property of the company in or in respect of the property disclaimed.

Clause 129 provides for the management of fees and outgoings in respect of the property. In effect, the liquidator may transfer moneys from the Official Account of the company to the Fees Account depending on the circumstances. The liquidator may also withdraw moneys to satisfy fees of the liquidation from the property of the company.

The payment of dividends to creditors according to the relevant rankings of debts is dealt with in *clause* 130. The *clause* makes provision for the payment by the creditor or liquidator of any difference between the amount of the dividend and the amount which should have been paid in the light of an amendment of an admitted proof. Furthermore, a creditor is entitled to apply to court to lodge a proof of debt or to incorporate a provable debt in a proof of debt during the liquidation. Payments by the liquidator are to be drawn from the Official Account of the company. The *clause* also gives the creditor the choice to receive property as payment if the property has not been converted into money.

Clause 131 requires the application of the property of a company to satisfy its liabilities simultaneously and equally on its official winding up. In line with this principle of equity, the property is required to be distributed among the members of the company according to their rights and interests in the company unless otherwise provided by the constitution of the company.

Clause 132 makes provision for the disposal of unclaimed assets. This is to be done in accordance with the directives of the Court if there is a balance remaining in the Official Account of the company after required payment and transfer of property.

Clause 133 indicates the criteria for the disbursement of money from the Official Account of the company and the Fees Account. Disbursements out of the Official Account are to service payments as regards any action taken by the liquidator in relation to a company but costs awarded against the liquidator and costs related to the supply of goods, services or the performance of an obligation for which unreliable assurance was given shall be disbursed out of the Fees Account.

Clauses 134 to 137 relate to the termination of liquidation proceedings. *Clause* 134 empowers the Court to grant an order for the termination of liquidation proceedings on the application of the liquidator after the completion of the winding-up of a company and the drawing up of the final accounts approved by an auditor appointed by the creditors.

By *clause* 135, a company stands dissolved after the official winding-up if the Registrar strikes the name of the company off the register and notifies that fact in the *Companies Bulletin*.

The books and papers of the company and of the liquidator are by virtue of *clause* 136 required to be kept for a period of five years after the dissolution of the company and then destroyed unless the Registrar otherwise directs. *Clause* 137 makes provision for the restoration of a company by a court order within two years after the date of the dissolution of the company. The application for restoration may be made by the Registrar, a former officer, member or creditor of the company or a person claiming through the same. The restoration of the name of a company on the register affects the reinstatement of any person in the same position as nearly as possible as if the name of the company had never been struck off.

Supplementary provisions to the official winding up of a company are contained in *clauses* 138 to 144. *Clauses* 138 and 139 deal with the stay of winding-up proceedings and the arrest of persons who abscond respectively. *Clause* 140 is on offences. The *clause* spells out the penalty to

be prescribed for the contravention of a duty imposed on a person oth
than the liquidator. *Subclause* (2) also empowers the Court to punish a pers
for contempt of court or for an offence under the Criminal Offences A
1960 (Act 29). *Clause* 141 provides extensively for the prosecution
fraudulent or delinquent persons.

Clause 142 creates the opportunity for creditors, members or cc
tributories to inspect the books and papers of the company. *Clause* 1
places an obligation on officers of a company that is being wound up
indicate the status of the company on relevant invoices, orders and bu
ness letters. *Clause* 144 enumerates assets of a company as well as doc
ments related to the proceedings of the winding-up that are exempt fr
stamp duty.

The Bill provides in *clauses* 145 to 149 for the winding-up of certa
categories of bodies corporate. *Clause* 145 indicates the categories, nam
bodies corporate which have or have had an office or place of business
Ghana or have assets situated in Ghana. *Clause* 146 excludes from
categories in *clause* 145 a body corporate which is a firm incorpora
under the Incorporated Private Partnership Act, 1962 (Act 152) or a bc
corporate formed by or under an enactment in Ghana which ma
specific provision for the winding-up of bodies corporate formed by
under it.

Clause 147 applies the provisions of the Bill to the winding-up
foreign bodies corporate despite the fact that the foreign body corpor
has been dissolved or otherwise ceased to exist under or by virtue of
laws of the country under which it was incorporated.

Clause 148 underscores the significance of the role of the Court
winding-up of bodies corporate. A petition to the Court is a *sine qua*
for winding-up proceedings. *Clause* 149 enumerates the grounds on wh
the Court may order the official winding-up of a body corporate o
petition. It must be noted that this *clause* stands apart from the grou
required to be proved under *subclause* (2) of *clause* 84 as regards
procedure to be followed on a petition to the Court for the winding
of a company.

Clauses 150 to 152 relate to cross-border insolvency. The purpose of *clauses* 151 and 152 is stated in *clause* 150 to be the provision of effective mechanisms for cross-border insolvency proceedings in order to promote, among other things, co-operation between the courts and competent authorities of the State and foreign States involved in cases of cross-border insolvency.

Clause 151 enumerates instances where *clauses* 150 and 152 will apply. A bank or financial institution licensed under the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930) is, however, excluded from the scope of application, *subclause* (2).

Rules and procedure are dealt with under *clause* 152 under insolvency proceedings subject to the rules of court. The *clause* also enumerates the kind of rules the Rules of Court Committee may make in relation to cross-border insolvency proceedings.

Clauses 153 to 164 of the Bill deal with the regulation of insolvency services. The Bill makes provision for the establishment of a special division within the Office of the Registrar of Companies to be known as the Insolvency Services Division under *clause* 153. It must be noted that the Registrar as the official liquidator is given the responsibility to regulate insolvency practitioners. In effect the Insolvency Services Division established as a component of the Office of the Registrar of Companies represents the focal point for oversight responsibility of private insolvency practitioners. The duties of the Division are indicative of this. The *clause* spells out the functions of the Division.

Clause 154 provides the meaning for 'insolvency practitioner' by enumerating a class of persons eligible to act as insolvency practitioners. These persons include a receiver and manager under the Companies Act, 1963 (Act 179), an administrator, a supervisor of a voluntary arrangement and a trustee in bankruptcy under the Insolvency Act, 2006 (Act 708). The official liquidator is excluded from this class of persons.

Due to the fact that standards are required to protect the integrity of the insolvency process and the interests of stakeholders, the Bill sets a standard for private insolvency practitioners. The qualifications to act

as an insolvency practitioner are indicated in *clause* 155. *Clause* 15 prescribes a penalty for acting as an insolvency practitioner without quali fication. *Clause* 157 provides conditions under which a person may b disqualified from acting as administrator.

The Registrar is permitted by *clause* 158 to keep under review th conduct and performance of insolvency practitioners. In this regar *clause* 159 permits the Registrar to apply to the Court for a prohibitio order under *clause* 71 or 160 if there is reasonable ground to believe th an insolvency practitioner is unfit to act as one due to failure on the pa of the insolvency practitioner to comply with the provisions of this Bi or misconduct or incompetence shown by the insolvency practitioner.

A prohibition order against an insolvency practitioner is provide for under *clause* 160. The *clause* expressly states that a prohibition ord shall not be for more than five years or as the Court considers fit. person in respect of whom a prohibition order is made is required *subclause* (3) to cease to act as an insolvency practitioner with immedia effect.

Clause 161 is on the register of insolvency practitioners and *cla* 162 relates to disclosure of information to the Registrar and consultati with the Registrar. An agent for debenture holders, trustee for securi holders and an auditor of a public company are mandated under *cla* 162 to disclose to the Registrar information, obtained in the course holding that office, which relates to the affairs of the company where their opinion the disclosure is likely to assist or be relevant to the exerci of powers conferred on the Registrar under *clause* 162. *Subclause* requires an auditor or agent for debenture holders or trustee for secur holders to take reasonable steps to inform the company concerned of t intention to disclose information and the nature of the information befo disclosing any information to the Registrar.

The appointment of two or more insolvency practitioners is de with under *clause* 163. Two or more persons appointed as insolver practitioners are permitted by this *clause* to exercise the same pow together unless the appointing document provides otherwise.

An insolvency practitioner is granted qualified privilege in respect of proceedings for defamation which relates to any matter included in a report or any other document prepared under this Bill, *clause* 164.

Clause 165 provides for netting agreements in *subclause* (1) to the effect that parties to a qualified financial contract shall, where a party becomes insolvent, treat the qualified financial contract in accordance with the Bill, the Securities and Exchange Commission Act, 2016 (Act 929) and the Banks and Specialised Deposit-Taking Institutions Act, 2016 (Act 930). However, *subclause* (1) does not apply to a qualified financial contract where the qualified financial contract contains a netting agreement.

Clause 166 provides for the enforcement of netting agreements.

Miscellaneous matters are provided for in *clauses* 167 to 169. *Clause* 167 provides for the Minister to make Regulations for particular matters. *Clauses* 168 and 169 are on interpretation and repeal and savings respectively.

GLORIA AFUA AKUFFO (MISS)
Attorney-General and Minister for Justice

Date: 1st March, 2019