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Restoring the economy: the role of the new corporate insolvency and restructuring law

“Restructuring” has become a household word in Ghana these days and for good reason. Most informed readers are aware of the current economic crisis facing the country and the engagement with the International Monetary Fund (IMF) for an Extended Credit Facility of about \$3 billion. A key conditionality of the IMF Facility is the restructuring of our debt burden to a “sustainable” level.

Perhaps, the least known and unheralded tool available to businesses in financial distress is the Corporate Insolvency and Restructuring Act, 2020 (Act 1015) or CIRA for short. This Act, which repealed the Bodies Corporate (Official Liquidations) Act 1963 (Act 180), was signed into law on April 30, 2020 and has features which could go a long way to assist businesses not only to survive the current crisis but also to recover.

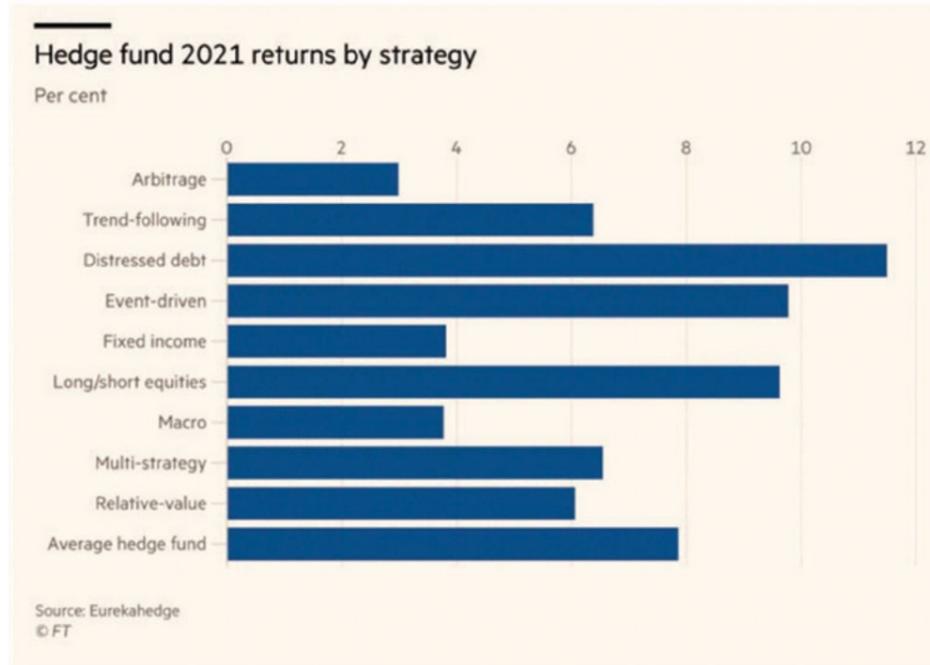
CIRA applies to all businesses registered under the Companies Act, 2019 (Act 992) with a few exceptions; namely, banks, insurance or any other business which is subject to special legislation, except instances where the special legislation does not provide a rescue provision such as the Securities Industries Act, 2016 (Act 929).

Administration (restructuring)

This article discusses Administration (Restructuring) which is the principal tool for enabling companies in distress to restructure under CIRA.

Under CIRA, a company which is faced with liquidity problems can appoint an “Administrator” who must be a natural person and be a qualified Insolvency Practitioner (IP), where the directors resolve that the company is insolvent or is likely to become one and that an Administrator should be appointed. Other appointing authorities of an administrator include the liquidator, where the company is in liquidation, a substantial secured creditor (or his Receiver) or the Court.

CIRA, requires an independent “Administrator” be appointed to execute the Administration and the eventual restructuring in order to protect the creditors. In other words, the law does not allow the same management team under whose watch the company became distressed, to carry on under cover of the



protection of the law. The opportunity for abuse would be too great.

An IP must be a chartered accountant, a lawyer or a banker in good standing with their professional association, certified as a restructuring and insolvency practitioner (IP) and who has professional indemnity for the proper performance of the duties of the IP.

Once the Administrator is appointed, the company enjoys a temporary freeze on the enforcement of rights of creditors and other claimants in order to enable the company develop and execute a restructuring or reorganization plan within a defined period. Secured creditors, however, may apply to the court within a limited period to enforce their security. The court may grant or refuse such application, applying criteria spelt out by CIRA.

The Administrator convenes a creditors committee where the company's decision to go into administration is confirmed. Given the distressed status of the company and the need to make urgent decisions, no special resolutions are required. The creditors' decisions are carried by the votes of creditors or class of creditors holding at least fifty-one percent of the value of the debt owed to the creditors, or class of creditors, voting in person or by proxy vote or by postal vote.

Once the decision to restructure is agreed upon by the creditors, the company executes a restructuring agreement with the Administrator, now designated as Restructuring Officer (RO). The RO has the responsibility

for implementing the Restructuring Agreement (RA) with appropriate notifications to the creditors of record and the Registrar of Companies (Registrar) for publication in the Companies Bulletin. The RO must also publish a notice of the execution of the agreement in a daily newspaper of national circulation. A copy of the RA is filed with the Registrar. It should be noted that on the initial appointment of the Administrator, the Registrar is also notified and this appointment is also published in the Companies Bulletin.

First, the RO is given control of the business, property and affairs of the company in the course of the administration. Secondly, the RO is required to investigate the affairs of the company and consider possible ways of salvaging the business of the company in the interests of creditors, employees and shareholders. Thirdly, the RO carries on the business of the company to achieve the turnaround; including terminating or disposing of parts or whole of the business; Fourthly, the RO may perform any function or exercise powers of the company or of any of the officers of the company as necessary as if the company were not in administration.

The RO in the course of the execution of the Restructuring Agreement (RA) shall file financial statements and reports with the Registrar and submit copies to the directors of the company at, generally, six-month intervals.

Key features of the restructuring

agreement

The Restructuring Agreement (RA) is in effect the Business Plan for the period the distressed company is in restructuring. The Act provides that the RA must have specific funding arrangements; must identify company properties which will be available to pay creditors; should stipulate the nature and duration of any moratorium; must identify the extent to which the company will be released from the liabilities of the company; should stipulate the conditions precedent for the RA to come into force; and the order in which proceeds of realisation will be distributed among the creditors bound by the agreement.

The Act (Section 44 (4)) indicates that the RA should include post-commencement financing which is defined as unpaid remuneration or reimbursement for expenses relating to employment and financing obtained by the company including trade

financing and venture capital during the Administration or restructuring period. The Act does not preclude shareholder injection of fresh capital and this could be part of the RA with appropriate debt or equity arrangements. Finally, another likely source of financing may come from asset disposals. Post-commencement financing takes a super priority position of a Class A debt, which is a debt which takes priority over all other creditor claims, including secured and preferential class.

Employees are given a special consideration under RAs. One of the goals of the Administration is to preserve jobs to the extent possible. Consequently, the Administrator would seek to work with the “optimal” number of employees as would be stipulated in the RA for an efficient turn around.

Company Officers continue to hold office during the RA. The appointment of an Administrator does not result in the removal of directors from office; however, a director of a company in Administration generally shall not exercise any power without the prior written approval of the Administrator.

Challenges

The biggest challenge so far in the implementation of the law appears to be the need for

sensitization of the key players on this new law. First and foremost, companies need to be alerted to the availability of the rescue provisions in the law and encouraged to use this tool. Second, financing houses (including banks, insurance companies, savings and loans, venture funds, hedge funds, private equity, etc) also need to be alerted to the possibilities of this risk, balanced potentially with high returns investment vehicle of Post Commencement Financing. Finally, our judges also need sensitization on this law. To some extent our Rules of Court also need to be adjusted to reflect the need for urgency inherent in a rescue or turnaround situation.

According to the Financial Times of August 25, 2021, distressed debt finance (essentially PCF) had the highest returns. See chart

Conclusion

In conclusion, despite the storm which Ghana has experienced, the timing of CIRA, which enables the restructuring of distressed companies, could not have been more timely. Companies should take advantage of the possibilities this new law offers, especially for our stressed companies, to make the necessary structural adjustments before they end up on the chopping block.

• This article is an updated version of a previous publication in the “Daily Graphic” in 2021

• See: “IMF Reaches Staff-Level Agreement on a \$3 billion, three years Extended Credit Facility with Ghana” (<https://www.imf.org/en/News/Articles/2022/12/12/pr22427-imf-reaches-staff-level-agreement-on-a-3-billion-three-years-ef-with-ghana>) (Retrieved 27/01/2023)

• Ibid Section 3 • Ibid Section 33 • See ss17(5) and (6) • See Section 107 (3)(a)

• GARIA has since the enactment of this law and with the financial support of its key sponsors, such as the Office of the Registrar of Companies, Ministry of Trade and Industries, Bank of Ghana, International Financial Corporation (IFC), World Bank Group (WB), Judicial Training Institute (JTI), and GARIA Foundation Members, has been sensitizing the key players but much more needs to be done and urgently.

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