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Ghana

RESTRUCTURING & INSOLVENCY

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This country-specific Q&A provides an overview of restructuring & insolvency laws and regulations applicable in Ghana.

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GHANA
RESTRUCTURING & INSOLVENCY

1. What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?

There are different ways to safeguard property, including charge, mortgage, lien, pledge, trust, guarantee, and assignment. Each method has its own set of prerequisites and outcomes.

When it comes to granting security over property, two formalities are usually required to be fulfilled. These include registering the security at the appropriate registry and stamping the security document. It is essential to comply with these formalities to avoid the security being declared void or unenforceable.

If a company provides a mortgage, they are required to submit the mortgage details along with an original or certified copy of the mortgage instrument to the Office of the Registrar of Companies within a period of forty-five (45) days. In the event of the company's failure to do so, the mortgage would no longer serve as a security on the property owned by the company. It is also crucial for the company to register the particulars of the mortgage with the collateral registry within 28 days. In order for the mortgage to be valid, it is necessary to register the mortgage instrument with the Lands Commission

It is crucial for the company to ensure that the mortgage instrument is stamped by the Ghana Revenue Authority or its authorized agent. Failure to do so renders the instrument unusable as evidence in any proceeding or for any other purpose.

2. What practical issues do secured creditors face in enforcing their security package (e.g. timing issues, requirement for court involvement) in out-of-court and/or insolvency proceedings?

To enforce their security package outside of court, a creditor must register their security interests in the collateral registry. This requires fulfilling the necessary registration requirements and providing the required notices within the specified timelines set by the law.

Security enforcement mechanisms are utilized during insolvency proceedings. When a company is in administration, a secured creditor must obtain court permission to enforce security within fourteen (14) days from the start of administration or receipt of administration notice.

If a company is going through a restructuring process, the court or restructuring agreement must authorize creditors before they can enforce their security. On the other hand, during official liquidation, a secured creditor can take legal action to enforce their security.

Secured creditors often face various practical challenges, such as:

1. As a secured creditor, complying with the notice and reporting requirements of the law can be quite burdensome. Furthermore, waiting for a memorandum of no objection could cause additional delays in the enforcement process.
2. In cases where insolvency proceedings have begun, secured creditors must seek court approval to enforce their security within a designated timeframe. This legal procedure may cause a delay in the enforcement process.

3. What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how

is a restructuring plan approved and implemented? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play?

In Ghana, businesses can voluntarily negotiate and undergo restructuring processes such as arrangements, compromises, or mergers. When companies encounter financial challenges, they have the option of pursuing either administration or restructuring.

When a company is unable to pay its debts or meet its current obligations on time, it becomes necessary to put it under administration or restructuring. It is important to note that this still applies even if the company's total assets exceed its total liabilities, or if the company has a negative net worth. Negative net worth means that the company's liabilities, including contingent and prospective liabilities, exceed the value of its assets.

Administration

A company enters administration when an administrator is appointed. This can happen voluntarily or involuntarily. When a company's directors determine that the company is insolvent or at risk of becoming insolvent, they may choose to enter administration voluntarily and appoint an administrator company.

When a liquidator, a secured creditor with a charge over the majority of the company, or the court appoints an administrator, a company is forced into administration.

When a company is in liquidation, the power to appoint an administrator rest with the liquidator rather than the secured creditor. The liquidator may choose to make this appointment if they determine that the company is insolvent or is likely to become insolvent.

In certain circumstances, the court has the authority to designate an administrator, including, where:

1. the company is or may become insolvent.
2. the company and its assets can survive if an administrator is appointed.
3. selling the company's assets and those of any related company could result in a better outcome than immediately winding up the company.
4. appointing an administrator may lead to a more advantageous or speedy resolution of a duty or liability owed to the company or any related company.
5. it is just and equitable to do so.

When a company undergoes administration, management is no longer responsible for operating the business. Instead, the administrator takes over the day-to-day operations of the company. Therefore, an administrator has the authority to carry out any task and exercise any power that the company or its officers could carry out or exercise if the company was not undergoing administration.

During the administration of a company, the court has an important role to play. Interested parties such as creditors, administrators, or the company itself may submit an application to the court for necessary orders related to the administration of the company. The court supervises the administrator and can protect creditors' interests, validate the administrator's appointment, and direct the administration process.

In the event that an administrator defaults, interested parties such as shareholders, creditors, or the Registrar of Companies may apply to the court to order the administrator to remedy the situation. In certain circumstances, the court may end the administration of a company. These circumstances include when the company is financially stable, when the provisions of administration are disregarded, or when there are valid reasons for termination. It is within the court's power to extend the administration period and to restrict certain persons from serving as administrators.

It is within the authority of the company's creditors to appoint or terminate an administrator. As part of their role, a committee of creditors can provide advice to the administrator, review reports, and approve their compensation and terms of engagement. They also have the power to terminate the administration process or choose to implement a restructuring agreement. Furthermore, creditors hold the right to appoint a liquidator if needed.

Restructuring

When a company under administration agrees to restructure, it is said to be undergoing a restructuring process.

At a watershed meeting, creditors can determine the company's fate. They can either choose to end the administration or move forward with a restructuring agreement. The administrator arranges the watershed meeting to determine whether the company should pursue a restructuring plan or opt for liquidation. During the watershed meeting, a resolution is deemed successful when it garners the approval of no less than fifty-one per cent (51%) of the creditors' votes.

The agreement for restructuring can be signed either at

the watershed meeting or within 19 days after the meeting. In the case of the latter, the administrator will provide the creditors with the restructuring agreement to review before it is executed.

The restructuring agreement can only be executed after being authorized by the directors and involves the company and the restructuring officer as parties.26 All parties involved, including the company, its officers, shareholders, creditors, and the restructuring officer, are bound by the executed restructuring agreement.

In the process of restructuring, the restructuring officer takes over the management of the company and runs its operations. During the restructuring process, the restructuring officer is granted the same level of authority and power as the company or its officers would have had if the company was not undergoing restructuring.

Throughout the restructuring process, the court plays several crucial roles. One of its primary responsibilities is to evaluate the legitimacy of a restructuring agreement when requested by the restructuring officer, creditor, shareholder, or Registrar of Companies.

If any concerned party, including the company, restructuring officer, or creditors, requests it, the court has the power to terminate a restructuring agreement. The court plays a crucial role in validating the appointment of a restructuring officer and providing necessary guidance to ensure the successful implementation of the restructuring agreement. Additionally, it exercises general supervision over the company's restructuring process.

In the event of a default by the restructuring officer, interested parties such as shareholders, creditors, the Registrar of Companies, or any concerned individual may file an application with the court to address the issue. Additionally, the court holds the power to forbid any individual from acting as a restructuring officer.

Creditors play a critical role in the restructuring process as they initiate the company's entry into restructuring through their decision. Moreover, they have the power to appoint a restructuring officer. Creditors hold significant power in the appointment of a restructuring officer and can fill any vacancies in this position. The remuneration of the restructuring officer is approved by the committee of creditors. Additionally, creditors have the authority to modify or cancel any changes made to the restructuring agreement, and can terminate the agreement by passing a resolution to that effect.

4. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

A debtor must secure fresh funding for their trade or working capital needs when undergoing restructuring proceedings. As per legal regulations, this form of funding is called post-commencement financing and is obligatory. According to the law, post-commencement financing is considered a Class A debt that takes priority over the claims of all other creditors

5. Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

It is important to note that claims against non-debtor parties cannot be released through a restructuring proceeding. However, if a party wishes to enforce a guarantee related to the company's liability during administration proceedings, they must first obtain permission from the court.

6. How do creditors organize themselves in these proceedings? Are advisory fees covered by the debtor and to what extent?

In these proceedings, creditors have the option to form a committee that carries out specific tasks such as approving the compensation for an administrator and restructuring officer and reviewing their reports. Although the law does not specify whether the company is responsible for advisory fees, it is customary for the company to bear the cost of advisory services obtained by the creditor committees to fulfill their obligations.

7. What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency proceedings upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

By law, a company is considered insolvent when it becomes incapable of settling its debts as they become due. In the case of an official liquidation, a company is considered unable to pay its debts if either of these two conditions apply:

1. The company owes a creditor no more than ¢10,000 after the creditor has issued a written demand to the company at least 30 days prior.
2. An execution or process resulting from a judgment in favour of a creditor is returned unsatisfied.

The directors or officers of a company do not have a legal obligation to commence insolvency proceedings. However, they do possess the authority to address financial distress by appointing an administrator and placing the company under administration.

8. What insolvency proceedings are available in the jurisdiction? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?

In Ghana, insolvency proceedings can take three forms: administration, restructuring, and official liquidation. The length of each process varies based on the specific case. Administration typically lasts at least ninety (90) days, unless the court terminates it. Restructuring continues until the court terminates the agreement, creditors pass a resolution to end it, or the specified termination circumstances outlined in the agreement occur.

Under the section titled “Local Restructuring Proceedings,” the responsibilities of directors, the court, and other stakeholders in administration and restructuring procedures are thoroughly examined.

The official liquidation marks the end of insolvency proceedings and involves the closure of a company that cannot meet its financial obligations. During this phase, the liquidator takes over the management of the business from the company’s directors. If a company is in the process of official liquidation, it may only be allowed to continue operating if doing so would aid in the liquidation process.

In official liquidation, creditors have a restricted role, which includes initiating a petition for winding-up, selecting a liquidator during a crucial meeting, and forming a committee of creditors.

The court plays an important role in the winding-up process. A company can be required to liquidate by court order, which can be requested by the Registrar of Companies, a creditor, a shareholder, a contributory, or the Attorney-General. In the winding-up process, the court offers recourse to individuals who have been harmed by the actions of a liquidator. Finally, once the company has completed the winding-up process, the court will conclude the liquidation proceedings

9. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors’ claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

While in administration, all legal proceedings are halted and no individual is authorized to commence or pursue a case without the approval of the court. Similarly, no enforcement actions can be taken against a company’s assets during administration.

During a restructuring process, the agreement outlines the length and type of moratorium period involved. The terms of this agreement are legally enforceable for all parties involved, including the company’s creditors, officers, shareholders, and the restructuring officer.

When a debtor goes into official liquidation in Ghana, all civil proceedings against them are put on hold. The court can order the suspension of legal proceedings from the moment a winding-up petition is submitted until the winding-up process begins. It is possible for a secured creditor to request approval from the court to take necessary actions for the realization of their security. If a creditor has legitimate reasons, they have the option to request the court to halt the winding-up procedures.

10. How do the creditors, and more generally any affected parties, proceed in such proceedings? What are the requirements and forms governing the adoption of any reorgnisation plan (if any)?

If a company is facing financial difficulties, its creditors are legally allowed to seek court intervention and place the company under administration. At a watershed meeting during administration, the creditors may resolve to execute a restructuring agreement, appoint a liquidator, or end the administration process. The restructuring agreement contains a plan to restructure or reorganize the operations of a distressed company.

The restructuring agreement needs to be signed within

21 days after a watershed meeting unless the court grants an extension. The restructuring agreement involves the restructuring officer and the company, authorized by the directors. When a restructuring agreement is executed, it legally binds the creditors, officers, shareholders, and the company itself, along with the restructuring officer.

11. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities, DIP financing)? Could the claims of any class of creditor be subordinated (e.g. recognition of subordination agreement)?

When starting the liquidation process, the liquidator is responsible for determining the classification of every debt. Below is a list of debts ranked in order of priority, from highest to lowest.

Class A debt refers to debt related to post-commencement financing. Post-commencement financing refers to the funds that a company owes to its employees during business restructuring or administration proceedings, as well as any financing obtained by the company, such as trade financing and venture capital, during these proceedings. The lender may secure the financing by utilizing an asset of the company that is not already encumbered. According to the law, Class A debt holds the highest priority among all creditor claims, including secured and preferential classes, and must be fully paid off.

Class B debt is a preferential debt and must be paid in full unless the estate is insufficient in which case the preferential debt is paid in equal proportions. This type of debt comprises of the compensation earned by employees within four months prior to the start of the company's administration, as well as taxes, rates, and payments owed to the government that became due within a year before the start of administration or winding-up. Class B debt is placed at an equal ranking with other preferential debts when it comes to the company's estate.

Class C debt represents a secure obligation with a fixed charge on a company's asset.

Class D debt refers to a debt owed to a director or former director of the company within the year prior to the winding-up, which does not fall under the category of Class E debt.

In the context of financial liquidation, Class E debt refers to the restoration of excess benefits to the liquidator. Additionally, it includes excess interest that exceeds five percent above the Bank of Ghana policy rate and is considered a portion of the debt.

Class F debt refers to unsecured debt that does not fit into any other class.

Class G debt refers to debt related to preference shareholders.

Class H debt is a debt in respect of ordinary shareholders.

12. Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

If a debtor engages in pre-insolvency transactions that are fraudulent or that unfairly favour one creditor over others, these actions can be challenged and possibly rescinded. The liquidator, creditors, members, or contributors of the company have the right to apply for this measure. Such liability will have no limitation. Third parties can seek legal remedies for losses incurred due to fraudulent business practices by taking legal action against the responsible parties.

The law specifies that conferring preferential benefits on one creditor at the expense of others is not allowed. In cases where a company is insolvent and has knowingly made payments, transferred assets, paid off mortgages or incurred obligations within a year before beginning the winding-up process to favour specific creditors, the liquidator is entitled to request that the preferred creditor return the benefits received to the company. The preferred creditor will be given a specific deadline by the liquidator to fulfil the request. This request can only be made by the liquidator during the period between the issuance of the winding-up order and the completion of the company's liquidation process.

In the event that a creditor receives payment or property transfer from the company as repayment for debt during the relevant period, they are obligated to return the property or its value to the liquidator upon receiving notification. The period in question starts 21 days before the presentation of the petition that leads to the winding-up order, or the first of multiple petitions. It concludes with the issuance of the winding-up order. At the start of the official winding-up process, the liquidator

has the ability to make this particular request. Please note that the aforementioned conditions do not pertain to the following payments or transfers:

1. Payments made by the company to its banker, provided that the bank has utilized these funds to cover company cheques.
2. Payments made towards debts incurred during the relevant period.
3. Payments made for secured debts.
4. Payments made while enforcing a guarantee, indemnity, mortgage, charge, or lien on a third party's property.

In case the liquidator discovers that the company has sold off its assets at a lower value or incurred an obligation without receiving complete value in return during the two years leading up to the winding-up order or when the company was insolvent between two and ten years before the winding-up order, the liquidator has the power to inform the recipient or beneficiary. They will be required to return the extra benefit they received compared to the value they provided within a specified time. The return can be made through payment, transfer of property, or relinquishing rights to the company.

Undervalued transactions may be allowed if they meet certain criteria. Firstly, they must be made in good faith to ensure the continuation of the company's operations. Secondly, they must be based on a reasonable belief that the transaction would benefit the company. Lastly, such transactions must not be made when the directors know the company was insolvent or when they caused insolvency.

In addition, if the liquidator discovers that the company made a payment or loan within ten years of the winding-up order that would have required the court to order the lender to repay the company, the liquidator must inform the lender to make a similar payment to the liquidator within a specific timeframe during the liquidation process.

It is worth noting that when a company is under administration or restructuring, any payment, transaction, or action done in good faith with the approval of the administrator or restructuring officer is considered valid and cannot be reversed during the liquidation process.

13. How existing contracts are treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any ability for either party to disclaim the contract?

When administration and restructuring proceedings begin, existing contracts remain unaffected as an administrator or restructuring officer can manage them.

When a company undergoes official liquidation proceedings, it operates differently. The company essentially stops all operations, except in cases where it is necessary for the winding up process. Consequently, the liquidator is expected to have the power to terminate any existing agreements.

During the administration and restructuring of a company, the provisions regarding termination, retention of title, and set-off in a contract are still applicable and enforceable.

In cases of official liquidation, a set-off can be enforced only if certain conditions are met. Firstly, the set-off must involve pre-application debt obligations by both the creditor and the debtor company. Additionally, the debtor company must not have become insolvent immediately after the set-off. Secondly, the transaction must not have been entered into after an application for winding-up, or in situations where the creditor was aware or should have been aware of the company's insolvency. There is no specific legal framework regarding the implementation of termination and retention of title clauses in the context of official liquidation.

14. What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

In the event of an administration or restructuring, the administrator or restructuring officer may sell assets or the entire business. This can be done with the approval of creditors (or a secured creditor if the asset is secured) or with court authorization. When a company undergoes liquidation, its properties are transferred to the liquidator who has the authority to sell them through either public auction or private agreement.

The law does not expressly prohibit credit bidding or pre-

packaged sales. Thus, in appropriate circumstances, these may be possible.

15. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor and if so can they be covered by insurances?

As per their fiduciary duty, directors are obligated to act in the best interest of the company and maintain integrity in any dealings they conduct on behalf of the company. Directors have a crucial responsibility to act in the best interest of the company as a whole. Their actions should aim to protect the company's assets, enhance the business, and uphold its purposes. Directors must carry out their duties with fidelity, diligence, care, and skill, as any prudent director would in similar circumstances.

In times of insolvency, it is the directors' responsibility to fulfil their obligations to the creditors and manage the company's assets and affairs in a way that safeguards their interests.

The law, therefore, places liability on directors for carrying on business with intent to defraud. Directors are also legally obligated to prevent insolvent trading. If a company director knowingly causes their company to engage in business or incur debt while the company is insolvent or likely to become insolvent, they are committing an offence and will be held liable. This applies even if the director should have known about the company's financial situation at the time.

In the event of an official liquidation, a director can be held responsible (with no limits to their liability) if they knowingly conducted business with the intention of defrauding the company's creditors or any other individual or for any fraudulent motives. Directors who engage in criminal activities may face serious consequences, including imprisonment for a minimum of two years and a maximum of five years. Additionally, they may be prohibited from holding any directorial positions in the future.

Whether insurance can cover these liabilities is determined by the specific terms of the director's or officer's insurance policy for directors' and officers'.

16. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions? In which context could the liability of the directors be sought?

It is important to note that insolvency proceedings do not absolve directors and other stakeholders from responsibility for their past actions and decisions.

As previously mentioned, if a business operates fraudulently or trades while insolvent, its directors may be held liable.

17. Will a local court recognise foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Does recognition depend on the COMI of the debtor and/or the governing law of the debt to be compromised? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

The UNCITRAL Model Law on Cross-Border Insolvency has been adopted by Ghana. Thus, it is possible for a High Court in Ghana to acknowledge and give recognition to a foreign restructuring or insolvency process involving a debtor located in Ghana.

To initiate the recognition of foreign insolvency proceedings, a foreign representative is required to apply to the High Court. A foreign representative refers to an individual or entity designated to serve as a representative in a foreign proceeding.

According to the law, when filing a High Court application, you will need to provide either: (a) a certified copy of the decision that initiated the foreign proceeding and appointed the foreign representative, (b) a certificate from the foreign Court verifying the existence of the foreign proceeding and the appointment of the foreign representative, or (c) any other acceptable evidence that proves the existence of the foreign proceeding and appointment of the foreign representative, if evidence from (a) and (b) is not available.

Under the law, the court applies the following tests to recognize foreign restructuring or insolvency proceedings:

1. The foreign proceeding takes place in the State where the debtor has the centre of the main interests of the debtor.
2. The foreign representative applying for recognition is a person or body required to administer the re-organisation or the liquidation of the assets or affairs of a debtor or to act as a representative of the foreign proceedings.
3. Either of the documents stated above accompanies the application.

Based on the aforementioned tests, it is evident that the acknowledgment of foreign restructuring or insolvency proceedings is contingent on the principal location of the debtor's primary interests.

18. For EU countries only: Have there been any challenges to the recognition of English proceedings in your jurisdiction following the Brexit implementation date? If yes, please provide details.

N/A

19. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction? What are the eligibility requirements? Are there any restrictions? Which country does your jurisdiction have the most cross-border problems with?

If the necessary qualifications for initiating an insolvency proceeding are met, a foreign agent is eligible to apply for it in Ghana. A foreign representative from any country may be eligible to apply to begin an insolvency proceeding in Ghana. It is important to note that the approval of the application may be dependent on Ghana's public policy considerations.

20. How are groups of companies treated on the restructuring or insolvency of one or more members of that group? Is there scope for cooperation between office holders? For EU countries only: Have there been any changes in the consideration granted to groups of companies following the transposition of Directive 2019/1023?

In Ghana, there is no specific process for restructuring or insolvency of a group of companies. This is because each company within the group is considered a separate legal entity. As a result, the insolvency laws in Ghana apply to individual members of the group as distinct legal entities.

In certain cases, when a subsidiary company is fully controlled by its parent company and operates as the parent's representative, the court can ignore the subsidiary's separate legal entity and hold the parent company accountable for its debts in bankruptcy cases.

21. Is your country considering adoption of the UNCITRAL Model Law on Enterprise Group Insolvency?

No.

22. Are there any proposed or upcoming changes to the restructuring / insolvency regime in your country?

As of now, there are no planned modifications to the insolvency regulations in Ghana.

23. Is your jurisdiction debtor or creditor friendly and was it always the case?

Ghana's legal regime now allows for distressed companies to be rescued, making it more debtor-friendly than before. Before the enactment of the Corporate Insolvency and Restructuring Act in 2020, financially struggling businesses were forced to go through immediate liquidation. The current legal framework guarantees the safeguarding of creditors' concerns while attempting to revive struggling companies.

24. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the State play in relation to a distressed business (e.g. availability of state support)?

Various sociopolitical elements can impact the insolvency process in Ghana. The administrator, restructuring officer, or liquidator is obligated to prioritize the benefits of creditors, shareholders, and employees. Consequently, external forces such as labour unions, civil societies, or, in exceptional cases, the government can affect the approach taken in an insolvency proceeding.

In Ghana, companies that are owned or affiliated with the government may receive financial aid from the government in case of financial struggles. However, companies in which the government has no ownership or stake are less likely to receive such support.

25. What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

Throughout the insolvency proceedings, the court holds a crucial role in various stages. The law grants several stakeholders the right to request specific court orders, such as an extension of time to fulfil their duties. Unfortunately, the delays and inefficiencies within the court system inevitably impact the progress of insolvency proceedings. Presently, there are no plans to address this issue through reform.

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