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Protecting Employees' Rights During Insolvency in Ghana: A Critical Analysis

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ABSTRACT: The increasing number of corporate insolvencies in Ghana has significant implications for employees, who often face uncertainty and vulnerability in the event of their employer's insolvency. This research aims to analyse the current legal framework governing employee rights during insolvency proceedings in Ghana. The paper then identifies gaps and challenges in protecting employee rights with a view to proposing recommendations for reform and improvement. The study reveals that while Ghanaian law provides some protections for employees, such as priority payment of wages and benefits, there are significant gaps and challenges in the current framework. The paper argues that a more comprehensive and effective regime is needed to safeguard employees' rights during insolvency. In this regard, the paper calls for a mixed approach to employee protection during insolvency proceedings. The paper concludes that to enhance the protection of employees during insolvency, there should be bankruptcy priorities as well as a combination of employer mandates, private insurance and government backed guarantee funds.

KEYWORDS: Ghana, Employees’ Rights, Employee Protection, Corporate Insolvency.

1. INTRODUCTION

The phenomenon of corporate insolvency has become an unfortunate reality in today's business landscape.[1] When a company becomes insolvent, the consequences are far-reaching, affecting various stakeholders, including employees. The rights of employees during insolvency proceedings are often overlooked, leaving them vulnerable to exploitation and uncertainty. This paper examines the legal framework governing employee rights during insolvency proceedings, highlighting the tensions between creditor interests and employee protections.

In Ghana, the Corporate Insolvency and Restructuring Act, 2020 (Act 1015) provides a framework for managing insolvency, but its provisions regarding employee rights are limited. This research aims to analyse the current legal framework governing employee rights during insolvency proceedings in Ghana. The paper then identifies gaps and challenges in protecting employee rights with a view to proposing recommendations for reform and improvement. From the above, the research questions guiding this study are: How are employees protected during insolvency proceedings in Ghana? How can international best practices in employee protection assist in enhancing the protection of employees in Ghana during insolvency proceedings? What challenges do employees face in enforcing their rights during insolvency proceedings? What reforms are necessary to strengthen employee protections? The aim of the paper is to contribute to the ongoing discourse on insolvency law and labour rights, providing insights for policymakers, legal practitioners, and stakeholders.

2. THE EMPLOYMENT RELATIONSHIP

The employment relationship is fundamentally contractual.[2] However, there have been statutory inroads in the employment relationship to guarantee minimum rights and protection for both the employer and the employee. In Ghana, the relationship between an employer and employee is primarily governed by the Labour Act, 2003 (Act 651), which implies certain rights and obligations in any employment contract. This section focuses on the rights that employees are entitled to before, during, and after the employment relationship.

2.1. Before and during the commencement of the employment relationship

Under Act 651, where an employment is to last for a period exceeding six months, or for a number of working days equivalent to six months or more, the contract shall be secured by a written contract of employment which expresses in clear terms the rights and obligations of the parties.[3] The employer is also required, within two months after the commencement of the employment, to furnish the employee with a written statement of the particulars of the main terms of the contract of employment.[4] Act 651 also prohibits the inclusion of certain conditions of employment. An employer cannot require an employee to participate or refrain from participating in trade union activities,[5] or offer a benefit to entice the employee to refrain from participating in such activities.[6] An employer cannot also refuse to employ a person based on their membership in a trade union,[7] or discriminate against the person on grounds of gender, race, colour, ethnic origin, religion, creed, social or economic status, disability or political affiliation.[8]

Under Section 10 of Act 651, additional rights are provided for the employee. These rights include safe and healthy working conditions, equal pay for equal work, rest and leisure, reasonable limitation of working hours, a period of holiday and remuneration for public holidays.

2.2. After the commencement of the employment relationship

Act 651 guarantees two main rights of the employee after the commencement of the employment relationship. The employee is protected from unfair termination and protection during redundancy. Each will be discussed in turn.

2.2.1 Protection from Unfair Termination of Employment

An employer has the right to terminate the employment of an employee.[9] However, termination of employment by the employer must be fair. Under Act 651, a termination of employment is fair if done on the following grounds: incompetence or lack of qualification in relation to the work for which the worker was employed; proven misconduct; redundancy; and legal restrictions imposed on the worker prohibiting him from doing the work for which he was employed.[10]

A termination is deemed unfair if the reason for the termination is that the worker intends to join a trade union or has ceased to join a trade union, or that the worker has participated in proceedings against the employer. The termination is also deemed unfair if it is based on race, colour or religion. In the case of a pregnant woman, it will be unfair to terminate her employment as a result of the pregnancy or absence from work on maternity leave. In the same way, it is unfair to terminate the employment of a worker for the following reasons. The worker has a disability; the worker has refused to perform duties normally required of him as a result of a lawful strike; the worker is injured, among others.[11] A termination may also be unfair if the employer fails to prove that the termination was fair or that the termination was done in accordance with a fair procedure provided under Act 651. [12] Thus, even though the employer has the right to terminate employment under section 8 of Act 651, the termination may still be unfair if the right procedure had not been followed.[13]

Act 651 also provides for “constructive” unfair termination. If a worker terminates employment due to ill treatment of the worker by the employer, or because the employer has failed to act on repeated claims of sexual harassment of the worker at the workplace, then the termination of the employment of the employee would be deemed unfair on the part of the employer.[14]

Where a worker claims that their employment has been unfairly terminated, Act 651 allows the worker to present a complaint to the Labour Commission.[15] If the Commission finds that the termination is unfair, it may order that the worker be reinstated from the date of termination; order that the worker be reemployed either in the same role or a suitable role on the same terms and conditions as before; or order that the worker be paid compensation.[16]

2.2.2 Redundancy

Redundancy refers to a situation where an employee loses his or her position in the workplace because a particular position or role is no longer required at the workplace. Here, the employment of the employee is terminated because the position or role of the employee is redundant. Termination by redundancy is deemed fair if it is done in accordance with the provisions of Act 651.[17]

Under Act 651, redundancy arises where an employer contemplates the introduction of major changes in production, programme, organisation, structure or technology of an undertaking that are likely to entail terminations of employment of workers in the undertaking.[18] Act 651 further states that redundancy also arises where an undertaking closes down or undergoes an arrangement or amalgamation which results in the severance of the employment relationship as it existed, leading to either the unemployment of the worker or a diminution in the terms and conditions of employment.[19]

Where redundancy is contemplated, Act 651 provides that the employer must notify the Chief Labour Officer no later than three months prior to the contemplated events that cause the redundancy situation. The employer is then obligated to take necessary steps to ameliorate the effect of redundancy on the affected employees. This will include the payment of redundancy pay.[20] The specific amount to be paid and the conditions of payment are subject to the negotiation of the employer or its representative on the one hand, and the employee or trade union concerned on the other.[21]

3. INSOLVENCY PROCEDURES UNDER THE CORPORATE INSOLVENCY AND RESTRUCTURING ACT, 2020 (ACT 1015)

The Corporate Insolvency and Restructuring Act, 2020 (Act 1015) provides for two main insolvency procedures. These are official liquidation and administration. Apart from these two procedures, Act 1015 also provides for restructuring. Administration and restructuring are innovations to insolvency proceedings in Ghana, as they did not exist under the repealed Bodies Corporate (Official Liquidations) Act, 1963 (Act 180).[22] It is worthy of note that the Companies Act, 2020 (Act 992) also provides for private liquidation and receivership, but they are not the focus of this paper.[23]

3.1. Official Liquidation

There are five ways by which official liquidation may commence:

i. a special resolution of the company;
ii. a petition addressed to the Registrar of Companies;
iii. a petition to the Court;
iv. a conversion from a private liquidation, or
v. a conversion from the administration or restructuring of the company.[24]

A company may commence official liquidation by a special resolution stating that it officially be wound up, and a copy of the resolution shall be sent to the Registrar of Companies (Registrar), who will publish it in the Gazette.[25]Once the resolution is passed, the liquidator takes control over the company's assets. Following the passage of the special resolution, the assets cannot be disposed of by any individual, including the liquidator, without the approval of the Court unless the disposal is in the usual course of business.[26]

Official liquidation may also be commenced by a petition presented by a creditor or member of the company to the Registrar for the official liquidation of the company.[27] For a member to qualify to present the petition, the shares of that member must have been originally allotted to that member, or must have been held by and registered in the name of that member for at least six months preceding the date of the petition.[28] If the Registrar is satisfied that the company is not able to pay its debts, the Registrar may then make the order for the official liquidation of the company.[29]

A petition to the Court may be brought by the Registrar, a creditor, a member or the Attorney-General. Under Act 1015, the Court may grant the petition for official liquidation under any of these circumstances:

(a) where the company does not commence the business authorised by the company's constitution;
(b) where the company suspends business for a year within the year after the incorporation of the company;
(c) where the company does not have members;
(d) where the business or objects of the company are unlawful;
(e) where the company does not have members;
(f) where the company is operated for an illegal purpose;
(g) where the business being carried out is not authorised by the company's constitution; where the company is unable to pay the company's debts; or
(h) where the Court is of the opinion that it is just and equitable that the company should be wound up.[30]

The Registrar is empowered by Act 1015 to make an order to convert a private liquidation into an official liquidation if the liquidator gives notice to the Registrar that the company may not be able to pay its debts, contrary to the affidavit of solvency.[31] The Registrar may, by application to the Court, also make an order for the conversion of the administration of a company into an official winding-up if the administrator gives notice that the administration has been converted into official liquidation.[32]

3.2. Administration

Administration is a novel procedure under Ghanaian law. It was introduced by the Corporate Insolvency and Restructuring Act, 2020 (Act 1015) to bring Ghana in conformity with global trends in insolvency practice. The Act defines administration as "*a process of enabling the rehabilitation of a company that is financially distressed beginning when an administrator is appointed to perform duties necessary to achieve the objects laid out in subsection (1) of section 1 and ending as set out in subsection (2) of section 2.*"[33] The objects referred to in the definition above are (a) providing an opportunity for the company to as much as possible continue in existence as a going concern; (b) temporary management of the affairs, business and property of a distressed company; (c) the placing of a temporary freeze on the rights of creditors and other claimants against a distressed company; and (d) the development and implementation of a restructuring plan which results in a better return for the creditors and shareholders of the company that would result from the immediate winding-up of a distressed company.[34]

Administration begins with the appointment of an administrator.[35] The administrator may be appointed by the company itself, the liquidator (if the company has already commenced liquidation), a person who holds a charge over the whole of the property of the company or a receiver appointed by that person, or the court.[36] When a company is already in administration, an administrator may only be appointed by the creditors, as a replacement administrator for an administrator that the creditors have removed; or the appointer of the first administrator, if that administrator has died, resigned or become disqualified.[37]

Under Act 1015, the administration of a company ends when:

(a) a restructuring agreement is executed by the company and the restructuring officer; when the creditors of the company resolve that the administration should end;
(b) the creditors of the company appoint a liquidator by a resolution passed by a watershed company;
(c) the Court orders for the administration to end because it is satisfied that the company is solvent or for any other sufficient reason; or
(d) the convening period expires without a watershed meeting having been held or without an application having been made to extend the work.[38]

Once administration commences, the administrator has total control over the property and affairs of the company, including the employees of the company.[39] The directors of the company remain in office but cannot exercise any power or perform any function as officers of the company without the prior written approval of the administrator, unless that power or function is expressly permitted by the Act.[40] However, the directors are required to submit financial statements of the company to the administrator within seven days after the appointment of the administrator.[41]Any transaction by or on behalf of the company after administration has begun that affects company property is void unless the transaction was done by or with the consent of the administrator, or in accordance with a Court order.[42] The transfer of shares or any modifications in the rights of a shareholder of the company are also restricted once administration begins, however, this is subject to certain conditions that are beyond the scope of this paper.[43]

Act 1015 imposes several duties on the administrator. Under Act 1015, the administrator is required to investigate the affairs of the company and form an opinion as to whether it is in the best interest of the creditors to end the administration, appoint a liquidator or execute a restructuring agreement. The investigation must be done within twenty-one days after his appointment.[44]The administrator is also required to determine possible ways by which the business of the company can be salvaged in the interests of creditors, employees, or shareholders, and is to manage the business of the company with that objective in mind.[45]

As noted above, the introduction of administration as part of insolvency is novel to insolvency proceedings in Ghana. One of the important outcomes of the period of administration is the restructuring of the distressed company pursuant to a restructuring agreement. The idea of administration is therefore to give an opportunity to a financially distressed company to restructure its operations with the view to avoiding liquidation.

3.3.1 Restructuring Agreement

A restructuring agreement is one of the potential outcomes of administration. It is an agreement executed by a company and the creditors of the company to provide for payments towards the debts of the creditors.[46] It is done at the end of the period of administration of the company.[47]

A restructuring agreement may be executed where the creditors at a watershed meeting resolve that the company execute such an agreement.[48] A restructuring agreement is drawn up by a restructuring officer[49] and binds the creditors of the company, the company, the officers and shareholders of the company, and the restructuring officer.[50] The creditors, however, are only bound regarding claims that arise on or before the day specified in the agreement.[51]

The restructuring agreement is to be executed within either twenty-one days after a watershed meeting has approved it, or a period specified by a court order on an application by the restructuring officer for extension of time.[52] The agreement must contain several terms, including how it is to be funded, the conditions for the agreement to come into operation, and postcommencement financing.[53]

4. PROTECTION OF EMPLOYEES' RIGHTS DURING INSOLVENCY PROCEEDINGS AND INTERNATIONAL STANDARDS

4.1. Justifications for the Protection of Employees' Rights

Insolvency proceedings often cause disruptions in the affairs of the company. Employees are often at the receiving end of the insolvency proceedings. It is triggered by other entities and not employees. Employees do not have any right as to whether the company should go through liquidation or not (unless the employees are also creditors). Employees have limited to no rights to complain when the company is being run badly. However, they are part of the group that is affected when the company becomes insolvent. It is for this reason that several attempts have been made to justify special protection of employees in the event of insolvency. This section will attempt a brief of the justifications to set the stage for a discussion on the protection of wages.

The fundamental principle that a worker's remuneration is sacrosanct is seriously threatened by the insolvency of the employer.[54] To protect this fundamental principle, special protection is required for the wages of workers, and this may be justified on several grounds.

In most cases, workers depend solely on their wages to support their families, thus, the suspension of payments due to the insolvency of the employer threatens the subsistence of not only the workers but their families as well.[55]Secondly, the employer's obligation to pay wages only arises after the work has been done. This implies that the worker is essentially advancing his services to the employer without a corresponding guarantee of payment and therefore has a far less advantageous position than creditors, who often demand guarantees as a condition for granting credit.[56]

Furthermore, unlike other creditors who have a diversified portfolio, the worker as a "creditor" has just one "debtor", the employer, on whom he depends for both his wages and his employment.[57] This puts the employee in a very precarious position if the employer falls into insolvency. The employee also does not have the ability or opportunity to assess the financial risks of working with their employer as a creditor, and often does not have the same capacity as creditors to absorb losses.[58] It has been argued further that employees do not normally share in the profits of the company and therefore should not be made to suffer for the losses of the company.[59] Finally, most employees are not directly involved in the management of the company. Thus, allowing the employee to suffer the consequences of insolvency means that the employee is being punished for mismanagement even though he has little or no part in it.[60]

The priority to be given to the protection of employees has also been discussed by the various theories on what the objectives of insolvency law should be. For theorists such as Jackson and Warren, creditors are the main focus of insolvency law. According to Jackson, insolvency law has only one goal: the maximisation of creditors' returns.[61] Jackson argued that insolvency law simply reflects a hypothetical bargain between the creditors and the debtor company that would have been reached if they had negotiated prior to the financial distress of the company. [62] Since several creditors will try to recover their interests from the debtor company in the event of a financial crisis, insolvency law should be aimed at maximising the value of the pool of assets from which the creditors will be paid.[63]

Warren also contended that a major objective of insolvency is to increase the value of a firm that is failing and thus reduce the losses suffered by parties who have dealings with the debtor company.[64] She maintained that the law facilitates this through the promotion of collective creditors' action, while simultaneously ensuring that the company does not engage in "strategic behaviour" which may rather end up wasting the remaining assets.[65] The law also achieves this objective by giving the company a chance to either undergo organised liquidation or restructuring as a going concern, which will help retain the value of the firm.[66]

On the other side of the spectrum, a more holistic approach is proposed. The communitarian theory, for instance, states that the impact of insolvency is not solely felt by the company and creditors, and therefore any insolvency procedures must consider a wide range of interests in the community at large. The implication of this theory is that insolvency law must not be quick to kill off entities if they are still able to contribute to the economic life of the community. It is an inclusive theory which seeks to look beyond the interests of creditors and consider other interests, such as those of employees.

Finally, there is the Team Production theory, which was developed by Lynn LoPucki. This theory asserts that shareholders are not the only contributors to the production process of a firm.[67] Other parties, such as employees, all combine to get the end product of the firm.[68] Therefore, in the event of insolvency, every contributor's interests should be considered as part of a group, and not individually. This theory is an inclusive one, as it advocates for the redistribution of both benefits and losses among all team members, even if it involves alterations to pre-insolvency entitlements.[69]

The report of the Review Committee on Insolvency and Law Practice (popularly named the Cork Report, after the chairman of the Committee, Sir Kenneth Cork) brought out what is now considered an authoritative list of the aims of insolvency law. Among the stated aims of insolvency law is "*To recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome, and to ensure that these public interests are recognised and safeguarded.*"[70]The Cork report, while acknowledging the rights of creditors, also called for the protection of other groups vitally affected by the insolvency of the entity, which includes employees.

Furthermore, the adoption of the Protection of Wages Convention, 1949, and the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992, which are discussed in the next section, are also indicative of the position that employee entitlements are to be given special protection even at the expense of creditors.

4.2. International Framework

Prior to any assessment of the national framework for the protection of employee entitlements during insolvency, it is essential to look at international instruments affecting the protection of employees. The International Labour Organisation (ILO) in 1949 adopted the Protection of Wages Convention, 1949 (No. 95) to address the effects of insolvency on the wages and entitlements of employees. Article 11 of the Convention provided as follows

1) *In the event of the bankruptcy or judicial liquidation of an undertaking, the workers employed therein shall be treated as privileged creditors either as regards wages due to them for service rendered during such a period prior to the bankruptcy or judicial liquidation as may be prescribed by national laws or regulations, or as regards wages up to a prescribed amount as may be determined by national laws or regulations.*
2) *Wages constituting a privileged debt shall be paid in full before ordinary creditors may establish any claim to a share of the assets.*
3) *The relative priority of wages constituting a privileged debt and other privileged debts shall be determined by national laws or regulations.*

Thus, in the event of insolvency, the Convention mandated that employees are treated as privileged creditors. However, the Convention went on to provide two options for the settlement of employee entitlements: (1) wages that are due over a prescribed period, or (2) wages that do not exceed a prescribed amount. The Convention did not contemplate the payment of all employee entitlements in the event of corporate insolvency. Furthermore, the Convention granted a lot of discretion to individual states in respect of the relative priority of wages, the specific amount to be protected, and the specific protected period. In this regard, the convention also made the consideration for the payment of wages during insolvency subject to national laws.

However, in 1992, the ILO adopted the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173) to improve on the framework set up by the 1949 Convention. The adoption of this Convention was made necessary by, *inter alia,* “significant developments… which have improved the protection of workers’ claims in the event of insolvency of their employer”[71] and recognition of the fact that, where possible, efforts should be made to “rehabilitate enterprises and safeguard employment”.[72]

Part II of the 1992 Convention provides for the protection of workers' claims by means of a privilege. Article 5 reiterates the principle in Article 11(2) of the 1949 Convention and provides that “*In the event of an employer's insolvency, workers' claims arising out of their employment shall be protected by a privilege so that they are paid out of the assets of the insolvent employer before non-privileged creditors can be paid their share.*”

The Convention goes on to provide that the privilege referred to in Article 5 shall cover at least:

a. workers’ claims for wages relating to a period of three months or more prior to the insolvency or termination of employment;
b. workers’ claims for holiday pay due as a result of work performed that year and the year before;
c. workers’ claims for amounts due for other types of paid absences relating to a period of three months or more before the insolvency or termination; and
d. severance pay due to workers upon the termination of their employment.[73]

National laws are to provide employee entitlement with a higher level of privilege than most other privileged claims, and in particular, claims of the State and the social security system.[74] This is a significant improvement from the provisions in the 1949 Convention, which left the rank of privilege to the discretion of the individual states.

Some discretion is still given to individual states in the protection of the privilege of workers’ claims in Article 7 of the Convention, which provides as follows

1. *National laws or regulations may limit the protection by privilege of workers' claims to a prescribed amount, which shall not be below a socially acceptable level.*
2. *Where the privilege afforded to workers' claims is so limited, the prescribed amount shall be adjusted as necessary so as to maintain its value.*

It must be noted that Article 7 included a new limitation to the discretion of individual states by insisting that the prescribed amount must not be “below a socially acceptable level”. While this indicates the intention of the Framers of the Convention to provide more protection to workers even in the face of the discretion given to states, it is a vague limitation which lends itself to a very subjective interpretation.

Part III of the Convention provides for the protection of workers’ claims by means of a guarantee fund. Article 9 states that the payment of workers’ claims against their employer arising out of their employment shall be guaranteed through a guarantee institution when payment cannot be made by the employer because of insolvency. This is a mechanism that was not provided for in the 1949 Convention. The Convention allows states which make use of guarantee institutions to give workers’ claims a lower rank of privilege than claims of the State and the social security system.[75]

The workers' claims protected by Part III of the Convention include:

a. workers' claims for wages relating to a period of eight weeks or more prior to the insolvency or termination of employment,
b. workers' claims for holiday pay due as a result of work performed that year and the year before,
c. workers' claims for amounts due for other types of paid absences relating to three months or more before the insolvency or termination, and
d. severance pay due to workers upon the termination of their employment.[76]

Under the Convention, the protection offered by a guarantee institution is similar to the protection offered by a privilege. However, a key difference is that the minimum period to be covered by the former is significantly less (eight weeks). This may be construed as an attempt to reduce the fiscal burden placed on either the company or the state, depending on who is required to finance the guarantee institution under national law.

It is also noteworthy that under the Convention, if States adopt the use of guarantee funds, then they are allowed to grant a lower priority status to employee entitlements in the ranking of claims.[77]

4.3 Models of Protection of Employee Entitlements

To address the protection of employee entitlements in the event of corporate insolvency, States have devised various methods in line with the international standards set by the ILO. These methods can generally be classified into four principal models as follows:

a. The pro-employee approach;
b. The bankruptcy priority – no guarantee fund approach;
c. The guarantee fund – no bankruptcy priority approach; and
d. The bankruptcy priority/guarantee fund hybrid approach;[78]

4.3.1. The Pro-Employee Approach

This approach elevates the interests of workers to absolute priority by utilising an insurance scheme that covers not just entitlements owed to employees during the insolvency period for a limited period.[79] Full insurance from unemployment is provided, which allows the employee, in some cases, to get up to 80% of the minimum wage for as much as a two-year period.[80]

China adopts this approach by adopting a compulsory unemployment insurance scheme that goes beyond the cost of owed wages, although it does not cover all employees.[81] This insurance scheme is financed by both employers and employees. Belarus adopts a similar model that both compensates for the salary in case of insolvency and insures against unemployment.[82] In addition to treating employee entitlements as priority claims,[83] Austria has also implemented a sector-specific training program that assists displaced workers in finding employment or starting their own businesses.[84] In the United States, about eleven states have adopted laws that mandate advance notice of dismissal and payment of insurance during insolvency as part of the efforts to ameliorate the effect of insolvency on employees.[85]

The main criticism of this approach is the cost involved in its implementation. A pro-employee approach imposes a significant burden on whoever finances it, whether it is the State, the employer, or the employee. This may lead to situations where entities would be reluctant to declare bankruptcy. In China, for instance, state-run companies were reluctant to declare bankruptcy to avoid creating extra costs for the State.[86]

4.3.2. The Bankruptcy Priority – No Guarantee Fund Approach

Under this model, employee entitlements are regarded as debts and are granted privileged treatment. Employee entitlements are classified as a priority claim for the distribution of the company's assets without the added protection of a guarantee fund in the event that the company's funds are insufficient. Employees may be given ordinary priority, where their claims are ranked together with other secured creditors. Some countries also opt for the "super preference" approach, where owed wages are given priority above all other payments, sometimes including taxes owed to the state.[87]

4.3.3. The Guarantee Fund – No Bankruptcy Priority Approach

With this model, workers' claims regarding an insolvent company are simply settled by a guarantee fund established for that purpose. The fund is financed by either the State through taxes or by the employer through mandatory contributions that have accumulated over time. In Austria, for example, a guarantee fund has been established, which is primarily financed by a premium payable by employers on their annual unemployment insurance contributions under the Labour Market Policies Funding Act. Germany also makes use of a wage protection fund, which pays the net wages for the three months preceding the commencement of insolvency proceedings.[88] The fund is financed by the employers' associations in the various industries, who demand payments from the individual companies.

This approach is advantageous because it does not affect the priority of claims in insolvency, thus providing assurance to creditors that their claims will be paid as much as possible. It also offers employees maximum security for their wage claims, as the payment of their claims is not dependent on whether the company's assets are sufficient. Employees in this model also receive prompt payment and do not need to wait for the conclusion of insolvency proceedings. In addition, unlike the Australian approach, here the State and taxpayers do bear little or no cost to employee claims during insolvency.[89]

4.3.4. The Bankruptcy Priority/Guarantee Fund Hybrid Approach

This approach seeks to combine the best of both worlds by granting priority to wage claims in the event of insolvency while complementing the priority with a guarantee fund. The purpose of this mixed approach is to ensure that the insolvent company pays employee entitlements if the assets are sufficient, but if the assets are insufficient, wages will still be provided by the fund.[90] This is the approach used by countries such as the United Kingdom, France, Sweden and Ireland.[91] This approach has gained popularity due to recognition of the fact that multiple strategies may be required to adequately protect the interests of employees in the event of insolvency. As stated earlier, one disadvantage of the guarantee fund system is that employers may be tempted to settle creditors first, as a means to reduce costs, because the employees will be covered by the guarantee fund. However, the granting of a preference in addition to the fund will allow workers to recover their wages from the insolvent company on a priority basis while still benefiting from the fund if the assets are insufficient or the insolvency proceedings are delaying.[92] Thus, employers will not be able to circumvent the employee entitlements without being in breach of the law.

However, this model is not without its flaws. The insufficiency of the company's assets as a requirement for benefiting from the guarantee fund may create a situation where employees do not receive their owed wages promptly due to delays in insolvency proceedings. To address this issue, some countries mandate that employee claims are paid within a specified period after the commencement of insolvency proceedings.[93]

5. THE GHANAIAN APPROACH TO THE PROTECTION OF EMPLOYEES' RIGHTS DURING INSOLVENCY PROCEEDINGS

5.1. Approach under the Bodies Corporate (Official Liquidation) Act

The repealed Bodies Corporate (Official Liquidations) Act, 1963 (Act 180) employed the Bankruptcy Priority method to safeguard employees' wage claims. The relevant provision in the Act stated as follows:

41. Ascertaining priority of debt

(1) On the commencement of a winding-up, the liquidator shall, in relation to each debt which ranks for dividend, ascertain into which class the whole or a part of the debt falls.

(2) The classes are,

(a) Class A, that is to say, a debt or part of a debt which answers either of the following descriptions:

(i) remuneration not exceeding sixty million cedis owed to an employee of the company in respect of employment during the whole or a part of the four months preceding the commencement of the winding-up;

(ii) rates, taxes or similar payments owed to the Republic or a local authority which have become due and payable within the year preceding the date of the commencement of the winding-up;

Thus, under Act 180, wage claims were classified as a Class A debt, the same class as rates and taxes payable to the State. However, the Act imposed a cap on the amounts recoverable as wages and restricted the protected period of employment to four months. The Act also failed to specify how the assets would be distributed if the company's assets could not satisfy both Class A debts. Were the assets to be divided equally between the employees and the State? Were the employees to take a larger percentage or vice versa?

It is noteworthy that there was no option for administration under Act 180. The implication was that section 41 was the only provision to safeguard employees' rights if the company went into financial distress and had to trigger insolvency proceedings.

5.2. Approach under the Corporate Insolvency and Restructuring Act, 2020 (Act 1015)

As already mentioned, Act 1015 provides for administration as an alternative to liquidation when a company is in financial distress. This is in line with international trends that have shifted from winding up to rehabilitating distressed businesses. One of the best ways of maximising employee rights in a distressed company is for the company to come out of insolvency without employees losing their employment. This section examines the protection of employee rights under both procedures.

5.2.1. Administration

In line with the best international practices, Act 1015 recognises the importance of employee rights during insolvency proceedings. In this regard, the law requires the administrator to consider possible ways of salvaging the business of the company in the interests of employees.[94] The administrator is also required to manage the property and affairs of the company with the aim of saving the company in the interests of employees.[95]Thus, the Act considers the protection of the interests of employees as one of the objectives of administration.

Act 1015 further safeguards the rights of employees by providing that the appointment of an administrator does not automatically terminate an employment agreement.[96] The administrator is also required to pay the wages that have accrued during the administration of the company to an employee who was hired prior to the appointment of the administrator.[97] However, this protection is not absolute. The administrator is not required to pay those wages if the administrator gives due notice of the termination of the employment within twenty-one days after the appointment of the administrator.[98] This notice period may be extended upon an application by the administrator to the Court.[99]

Under Act 180, the absence of administration as a procedure meant that every case of insolvency led to the closure of the company and the termination of employment. It was therefore unnecessary to focus on the protection of wages after liquidation proceedings had begun. However, the introduction of administration as a procedure brings with it the possibility of employment after administration has commenced. This is reinforced by the protection given to employment during administration proceedings by Act 1015.[100] Hence, there is a need to extend privileged protection to wage claims in respect of periods after administration has commenced.

In consideration of the above, Act 1015 has introduced further protection to employees of a company in administration through the introduction of Post-Commencement Financing, which is defined as[101]:

(a) remuneration or reimbursement for expenses or any other amount of money relating to employment that becomes due and payable by a company to an employee during the business restructuring or administration proceedings of the company but that is not paid to the employee; and

(b) financing obtained by the company including trade financing and venture capital during the administration or restructuring proceedings of the company and may be secured to the lender by utilising an asset of the company that is not otherwise encumbered

Post-Commencement Financing is classified as a Class A debt under Act 1015, taking precedence over all other debts and must be paid in full.[102] Utmost priority is therefore given to employee entitlements in respect of services rendered after administration has commenced. However, this protection is only available when the administration has been converted into liquidation.

5.2.2. Liquidation

Wage claims of employees of a company undergoing litigation are protected by the Bankruptcy – No Guarantee Fund approach. In other words, these claims are given privileged treatment relative to other creditor claims. Under Act 1015, wages are classified as Class B debt. The Act in section 107(3)(b) provides as follows:

(b) Class B is a preferential debt which

(i) ranks equally between other preferential debts against the estate of the company;

(ii) shall be paid in full unless the remainder of the estate is insufficient to meet the preferential debt in which case the preferential debt shall be paid in equal proportions; and

(iii) is debt or part of a debt which answers to either of the following descriptions:

(aa) remuneration owed to an employee of the company regarding employment during the whole or a part of the four months preceding the date of commencement of administration or winding-up; or

(bb) rates, taxes or similar payments owed to the Republic or a local authority which have become due and payable within the year preceding the date of the commencement of administration or winding-up;

This preferential treatment under Act 1015 addresses one of the weaknesses in Act 180 identified earlier in this paper. Under Act 180, there was no stipulation as to how the assets of the company were to be shared if they could not satisfy both debts classified as Class A. Act 1015 resolves this issue by stating that if the remainder of the company's assets are insufficient, the two claims categorised as Class B must be paid in equal amounts.

However, Act 1015 gives wage claims a lower priority than Act 180 by categorising it as a Class B debt, subordinate to Post-Commencement Financing, which is required to be paid in full.[103]

6. ASSESSMENT OF THE PROTECTION OF EMPLOYEES' RIGHTS GHANAIAN LAW

Is the protection offered to employees by Act 1015 in line with best practice and international standards? This section shall assess the protection of employee entitlements in the event of the administration and liquidation of the employer company.

6.1. Administration

As stated above, employment contracts do not automatically terminate upon the appointment of the administrator.[104] However, the administrator is not required to pay employees' wages if he gives due notice of termination of the employment within twenty-one days after his appointment, and this period may be extended upon application to the Court.[105]

It is submitted that this caveat given to the administrator of the company weakens the position of the employees of the company in administration. Act 1015, in effect, grants the administrator absolute discretion in terminating contracts of employment. This leaves the employees with no guarantee that they will be retained by the company, or that their wages already earned will be paid if their employer enters administration. Although the Act 1015 gives the power to the Administrator, on due notice to terminate the employment of the employee without paying outstanding wages, the law is silent on the posttermination benefits to the employee. Under section 65 of Act 651, an employee can be terminated by reason of redundancy when the company (employer) undertakes restructuring as part of rehabilitating the company. Section 65 of Act 651 provides further that where an employee is terminated by reason of redundancy, the employee is entitled, among other things, to redundancy pay. The question that arises is, can an employee who has been terminated by an administrator under section 13 of Act 1015 claim to have been terminated by reason of redundancy and therefore be entitled to redundancy pay? Here, the answer will lie in the ability of the employee to prove redundancy. The basic principle of law is that he who alleges must prove.[106] In this case, it will be up to the employee to prove that although he had been terminated by the administrator under section 13 of Act 1015, the termination amounts to a redundancy under section 65 of Act 651. Whatever the situation is, it leaves the employee vulnerable to the vagaries of administration. The steps needed to be taken to declare redundancies are clearly spelt out under section 65 of Act 651. They are steps that the employee has little or no control over, and an employee will have an uphill task proving that indeed the employer has fulfilled the conditions of redundancy. Although the employee can still argue that his employment had been terminated by reason of redundancy under the principle that the law looks to substance rather than form[107], it is still an uphill task when the law has clear stipulations as to the steps needed to declare redundancies.

It is interesting to note that before the administrator contemplates giving due notice for the termination of employment, the law affords some protection to employees. Section 10 of Act 1015 imposes a duty on the administrator to (1) "to investigate the affairs of the company and consider possible ways of salvaging the business of the company in the interests of" among others, the employees. (2) to "carry on the business of the company and manage the property and affairs of the company with the object of salvaging the business of the company in the interests of" among others, the employees. It is trite learning that where a duty is imposed on another, there is a corresponding right that is created on the person to whom the duty is owed.[108] In this case, an employee will have the right to ensure that the decisions taken by the administrator in the course of administration, on balance, are beneficial to the employee. The employee shall then have the right to challenge the decisions of the administrator, including the decision to issue notice under section 13 of Act 1015 for the termination of employment of the employee.

6.2. Liquidation

In the event of liquidation, Act 1015 grants priority to remuneration owed to employees regarding employment during the whole or a part of the four months preceding the date of commencement of administration or winding up.[109] This is in line with the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992, which recommends three months or more as the protected period.

However, under the Convention, wages are to be given the highest priority. Under article 8 of the Convention,

"*1. National laws or regulations shall give workers' claims* ***a higher rank of privilege than most other privileged claims, and in particular those of the State and the social security system.***

2. However, where workers' claims are protected by a guarantee institution in accordance with Part III of this Convention, the claims so protected may be given a lower rank of privilege than those of the State and the social security system." (Emphasis added)

Thus, the provision under the Convention mandates that employees' wages should be given an even higher priority than payments owed to the State and the social security system. The rationale for this stipulation is straightforward: the State has a much greater ability than the employees to absorb any losses caused by the insolvency of the company. Thus, while payments to the State should remain a priority, employees should be granted greater protection due to their vulnerability and lack of security.

However, under Act 1015, wages of employees are not given the highest priority, but are ranked below PostCommencement Financing.[110] They are also given the same rank as rates and taxes owed to the State[111], which is clearly contrary to the provisions of the Convention as stated above. Not only are wages given the same rank as payments due the State, but Act 1015 further requires that if the assets of the company are insufficient, then both debts shall be paid in equal proportions.[112] This undermines the protection of employees as envisaged by the Convention.

The approach taken by Act 1015 in the protection of employee entitlements does not adequately cater for situations where the assets of the company may not be sufficient to fully repay the entitlements of employees. Therefore, if the company does not have enough assets to settle the debts owed to the State and employees in full, employees would only be entitled to a portion only of what is owed by the company.

Furthermore, Act 1015 does not provide timeframes within which the entitlement of employees is to be paid. The liquidation process may take several months, and if one considers potential challenges to the liquidation process in court and associated appeals, employees may be left in limbo for an inordinate time waiting for their legitimate claims. This may affect the timeliness of payments to employees at a time when they are most vulnerable financially, creating problems for the employees and their families. Such a delay may also result in a decrease in the real value of the wages whenever the wages are eventually paid.

7. CONCLUSION AND RECOMMENDATION

Act 1015 in protecting employee entitlements follows the bankruptcy priority – no guarantee fund model. However, as already demonstrated, this approach does not offer the best protection for employees in insolvency.

To provide better protection for employees, it is recommended that the mixed system should be adopted, where a guarantee fund operates side-by-side with the existing bankruptcy priority protection under Act 1015. This approach is supported by the UNCITRAL Legislative Guide to cross border insolvencies, where it was stated that *"[s]ome priorities are based on social concerns that may be addressed more readily by law other than the insolvency law, such as social welfare legislation, than by designing an insolvency law to achieve social objectives that are only indirectly related to questions of debt and insolvency. Providing a priority in the insolvency law may at best afford an incomplete and inadequate remedy for the social problem, while at the same time rendering insolvency proceedings less effective."*[113] The European Union also shows a preference towards the use of funds, as illustrated by the Directive on Employees' Protection[114], according to which Member States are to put in place mechanisms that guarantee the payments of employee entitlements by establishing "guarantee institutions".

In Australia, in 2001, the government established the General Employee Entitlements and Redundancy Scheme (GEERS), which was funded directly by the State.[115] GEERS was designed to provide limited protection for employee entitlements during corporate insolvency.[116] However, this model has been severely criticised. One, a guarantee fund of this nature means that taxpayers would be providing money for insolvent companies. Two, using taxpayer money will mean that companies and their management will not be responsible for their obligations to provide for employees during insolvency. In fact, it may breed misconduct and encourage risky behaviour on the part of directors as the company will be provided with a bailout in the event of insolvency. In addition, it would be most unfair for taxpayers to contribute to the cost of corporate failure without the contribution of the company.

Although the criticisms are well-founded, the point still remains that employees remain vulnerable to corporate insolvency. In fact, employees who are victims of corporate insolvency may still be at the mercy of taxpayers, as they will turn to social programs to make ends meet. Perhaps private insurance programs may provide the necessary guarantees to ensure that employees are protected during insolvency proceedings. Insurance programs as a way to create a guarantee fund was considered as an alternative to the GEERS program in Australia.[117] In this regard, companies and employees may be mandated to subscribe to an insurance policy against corporate insolvency.

In addition, part of national pension schemes may be repurposed to serve as additional funds that may be drawn by qualifying employees in the event of loss of wages during insolvency. In Ghana, under the National Pensions Act, 2008 (Act 766), the national pension scheme receives 13.5% of the pension contribution, and a private pension scheme receives 5% of the pension contribution towards retirement benefits of the employee. There can be an additional 1% contribution that would be channelled to create a fund to finance employee benefits during corporate insolvencies.

With the combination of mandated private insurance and government-backed funds through pension funds, employee entitlements can remain a Class B priority debt in insolvency proceedings without sacrificing the security of employee benefits.[118] This mixed approach is in line with current global trends, as countries are beginning to shift from the use of only bankruptcy priorities to secure employee entitlements.

This mixed approach has been adopted in the United Kingdom. Employees' entitlements are granted a higher priority than other unsecured creditors, but lower than fixed secured creditors. However, employee protection is offered through Social Security.[119]If an employer becomes insolvent, the National Insurance Fund, which is funded through contributions of both employees and employers, contributes to the payment of debts owed to employees in relation to a specified period. [120] The fund is subrogated to the rights of employees and is entitled to the same preferential status.

Until the suggested reforms are effected, employees remain vulnerable during insolvency. In the interim, therefore, in order to enhance the protection given to employees during insolvency, section 107 of Act 1015 should be amended to classify employee wages as Class A priority debts and above taxes and rates payable to the State. This will strengthen employee protection, since it better addresses the problem of insufficient funds of the employer by ensuring that wages are paid first before other debts are considered. This amendment will also bring Act 1015 into close conformity with the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992.

Further, it is important that clear timelines are stated in Act 1015 to mandate insolvency practitioners to pay employee entitlements in a timely manner. The current practice of no timelines has the potential to severely disadvantage employee rights, as late payment not only denies employees timely access to their entitlements, but it also affects the value of entitlements at the time of payment. Once the guarantee fund is set up, Act 1015 may mandate that, in the event of delayed payments from the company during insolvency, the fund may provide timely payments against payments to be made directly by the company.

The main purpose of this paper has been to assess Ghana's framework for the protection of employee entitlements during insolvency. In doing so, the paper has looked at some best practices around the world. Although there are no perfect models for protecting employees during insolvency, there are clearly some models that offer greater protection to employees. The paper has argued that the mixed approach, which offers bankruptcy priority as well as a combination of employer mandates, private insurance and government-backed guarantee funds, appears to offer the most protection for employees during insolvency. In this regard, the necessary amendments as outlined above should be effected to Act 1015 and Act 766 to start the process of implementing the mixed model to protect employees during insolvency.

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21) Act 651, s 65(4).
22) The Corporate Insolvency and Restructuring Act, 2020 (Act 1015) repealed the Bodies Corporate (Official Liquidation) Act,
23) 1963 (Act 180)
24) Private liquidation is the voluntary liquidation of companies that does not involve insolvency. The directors of the company must first swear to an affidavit of solvency indicating that they will be able to pay all the debts of the company including the wages owed to employees within twelve months of the commencement of the liquidation process.
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29) Ibid.
30) Ibid.

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32) Act 1015, s 85.
33) Act 1015, s 86.
34) Act 1015, s 169.
35) Act 1015, s 1.
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