

REPUBLIC OF GUINEA

THIAM & ASSOCIES



FIRM INFORMATION

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COUNTRY INFORMATION

Republic of Guinea, also known as “Guinea-Conakry” is a West African country which soil and subsoil is rich in natural resources such as iron, diamond, gold and one-third of the world’s bauxite reserves.

TYPE OF GOVERNMENT

Guinea is a republic with a presidential regime in which the President of the Republic is the Head of the State. It appoints a Prime Minister which is the Head of the Government.

The Government coordinates national policy under the leadership of the Prime Minister which is accountable to the President and Parliament.

POLITICAL SYSTEM

Guinea is a democratic republic.

JUDICIAL SYSTEM

The transition process resulting from the Ouagadougou agreements on 15 January 2010 has taken decisive steps towards restoring constitutional order in Guinea, in particular the enactment of a new constitution. Such constitution brings innovations with the creation of new Guinean judicial institutions, including the Constitutional Court, the Supreme Court and the High Court of Justice. Guinea has a civil law system based on French law.

TESTS FOR INSOLVENCY

What are the tests for insolvency? (i.e. liquidation)

Guinea is one of the State members of the Organization for the harmonization in Africa of the Business Law (“OHADA”). Collective insolvency proceedings is therefore governed by the Uniform Act relating to Bankruptcy (“UABP”) as amended on 10 September 2015.

According to the UABP such proceedings shall be opened to any debtor in a situation of suspension of payments, i.e. where a company is unable to pay its debts with its available assets.

In addition to such condition, the competent court which establishes the situation of suspension of payments shall open the liquidation proceedings:

- If the debtor has not proposed a serious judicial composition with creditors or if such composition has no chance of being obtained; or
- If a global assignment is not possible.

The key concept here is the situation in which the economic situation of the company is irremediably compromised.

What are the tests for financial distress (i.e. business rescue or administration)?

According to the UABP such proceedings shall be opened to any debtor in a situation of suspension of payments, i.e. unable to pay its debts with its available assets.

In addition to such condition, the competent court which establishes the situation of suspension of payments shall open a business rescue or administration proceedings:

- If the debtor has proposed a serious judicial composition with creditors or if such composition has a chance of being obtained; or
- If a global transfer is possible.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

There are two formal insolvency procedures - (i) rescue and (ii) liquidation of assets.

Rescue is reserved for viable companies and is intended to put the debtor back at the head of its company.

The liquidation of assets is planned for companies that are economically condemned. The assets of such companies are assigned for the payment of their liabilities.

Formal restructuring procedures

Two preventive measures are provided for by the UABP:

- The conciliation, that aims to reach an amicable settlement with the debtor’s main creditors and co-contractors in order to put an end to the company’s financial difficulties; and



- The preventive settlement, which is a collective preventive procedure designed to avoid the situation of suspension of payments by the debtor company and to enable its liabilities to be settled by means of a preventive composition agreement.

Informal insolvency or restructuring procedures

There is no informal insolvency or restructuring proceedings in Guinea.

LIQUIDATION

What is the aim of liquidation?

The aim of the liquidation is to assign the assets of the debtor whose situation is such that it no longer gives rise to any hope of recovery. The funds obtained from the assignment of the debtor's assets will be dedicated to the payment of its creditors.

Process required to commence a liquidation

The debtor who is in a situation of suspension of payments must make a declaration no later than 30 days following the occurrence of such situation to the competent court in order to obtain the opening of liquidation proceedings. He must attach to its declaration a number of required documents. If it appears to the competent court that the company has no possibility of continuing its activities, it shall declare the liquidation of the assets.

At what point does the liquidation process commence?

The liquidation process commences on the date on which the competent court makes an order to place the company in liquidation.

Duration of the liquidation process

In the decision declaring the liquidation of assets, the competent court shall set the time limit at the end of which the closure of the proceedings shall be examined. Such time limit cannot exceed 18 months after the opening of the proceedings. If the closure of the proceedings cannot be ordered at the end of that period, the competent court may extend the period by six months by a specially reasoned decision, only once, after hearing the evidence of the liquidator, by a specially reasoned decision. At the end of such period, the court shall declare the liquidation of the assets closed.

Extent of the court involvement in the liquidation process

Among the judicial bodies, the court plays an essential role in the actual administration of the proceedings, appointment of liquidators but also has a function of centralizing all disputes arising from the proceedings.

Management of the company whilst in liquidation

The debtor is relieved of the administration and disposal of its property for the benefit of the liquidator. The acts, rights and actions of the debtor or the board of directors shall be performed or exercised throughout the liquidation by the liquidator(s) acting alone on behalf of the debtor.

They shall be remunerated agents and shall be civilly liable for their misconduct under ordinary law, without prejudice to their criminal liability.

Their status must ensure its independence in the exercise of its function as an agent of justice.

Filing of claims

As soon as the liquidation of property has been pronounced, the creditors are constituted in a state of union.

A legal period of three months is provided for following the cessation of liquidation of property during which individual proceedings are prohibited. After this period, if the liquidator has not been able to liquidate all the company's assets, creditors with securities may resume exercising their individual right of action.

Factors which influence the period of administration in a liquidation

Several factors can influence the period of administration in the liquidation.

The judicial or the non-judicial bodies responsible of the management of the proceedings influence the relevant period throughout their conduct.

The occurrence of a protective measure on the debtors' assets that aims to have a good identification of all of the assets of the debtors.

The distinction of the assets of the creditors whether or not there are members of the body of creditors.

Effect of liquidation on the employee

Claims resulting from the employment contract or apprenticeship contract are secured in the event of liquidation proceedings by the super wage privilege. Upon the decision of the relevant judge, the liquidator shall pay all the workers' super-priority claims less any advance payments already received. In the event that the necessary funds for such payment are not available, such payment shall occur at the first receipts of funds, before any other receivables.

Effect of liquidation on contracts

No termination or rescission of an existing contract may result solely from the opening of liquidation proceedings.

The trustee has the right to demand the execution of current contracts, at its sole discretion.

However, the contracting party may be required to take a stand on the continuation of current contracts. Such formal notice shall start a period of 30 days from the date of receipt by the trustee.

Where the trustee requires the continuation of a current contract, it shall provide the service promised to the other party and the latter shall fulfil its obligations despite the failure of the debtor to fulfil its commitments prior to the decision that initiated the bankruptcy proceedings.



Effect of liquidation on shareholders

After the payment of all the creditors, the shareholders will be paid with the remaining proceeds of the liquidation.

Effect of liquidation on creditors

The ranking of payment of creditors depends on whether they are secured or unsecured creditors. If there are sufficient assets to pay all the creditors, all of them shall be paid in full. However if the assets are not sufficient to pay all creditors, the payment shall be made on the basis of their ranking.

Effect of liquidation on pending claims, disputes, arbitration

Actions for property may only be reinstated or instituted if the applicant has complied with the formalities and deadlines provided for by law. Claims accepted by the receiver, the bankruptcy judge or the competent court must be enforced within 3 months of the date on which notice of resumption or institution of such action is given or of the date on which the court accepts the claim.

The liquidator may choose to settle or withdraw any pending liquidation or arbitration proceedings initiated by, or against the company.

Voidable transactions

The court has the power to cancel any transaction that occurred before the commencement of the liquidation or any illegal transaction.

The judge sets a period during which the transactions that caused the company's financial difficulties must be declared null and void. Several transactions that were signed during this period may be declared null and void, especially if they have caused prejudice to creditors.

How is the liquidation process terminated?

The liquidation process shall end when the company pays its debts and distributes all remaining assets to shareholders. In such case a notice of liquidation shall be published.

The liquidation shall also end in the event of insufficient assets or in the event of the extinguishment of liabilities. In such cases, the competent court shall take the appropriate decision that shall acknowledge the termination and shall be subject to publication.

Director or officers liability

The directors or the managing director could be held jointly or severally liable towards the company or third parties, either for violation of the laws and regulations applicable to companies, to the management of the company, or for any violation of the company's articles of association.

Consequences of directors or officer liability**Civil consequences**

When directors have mismanaged a company, they may be called upon to contribute to the company's debts. In addition, they may be required to contribute to the company's assets.

Criminal consequences

Criminal sanctions are provided for in cases of criminal bankruptcy where there has been misuse of property, falsification of information and fraudulent behavior. A convicted person may be sentenced to prison terms ranging from 5 to 10 years.

BUSINESS RESCUE / ADMINISTRATION**Process required to start a business rescue or administration**

The competent court shall be seized by a request setting out the economic and financial situation of the company and presenting the prospects for recovery and discharge of liabilities through a preventive composition agreement. The judge shall appoint one or several trustee(s) (no more than three), an expert as well as one or several auditor(s) (no more than three). It shall collect all the information it deems necessary. It may hear the debtor or officers of the corporation, its employees, creditors or any other person and has the power to rule on claims, demands, complaints and disputes within its jurisdiction. The commissioners, experts and trustees assist the judge in his mission and ensure that the interests of creditors are protected. The representative of the public prosecutor's office is informed by the judge of the progress of the company rescue procedure. It may, at any time, request disclosure of all documents or books relating to the insolvency proceedings.

At what point does the business rescue or administration process commence?

The process begins when a company is in a difficult economic and financial situation but not irreversibly compromised.

The debtor has to declare its cessation of payments. It has to propose an offer of fair composition at the same time than the declaration and no more than 60 days after the decision of opening the rescue proceeding. If such composition is agreed, the relevant court must pronounce the opening of the procedure before the expiration of a period of 30 days after such referral.

The relevant court pronounces the commencement of the business rescue process if it notes the effectiveness of the insolvency, and if it considers that that the debtor proposed a fair composition.

Duration of business rescue / administration process

The duration of the rescue is 6 months from the decision that open the rescue proceeding. Such duration shall be extended once for a new duration of 3 months.

Extent of court involvement in the business rescue or administration process

The court has a very dedicated role in the rescue proceeding.

It is in charge of fixing the date of insolvency and deciding the opening of the rescue proceeding. The court can designate a



judge or any other qualified person to obtain all the information on the financial situation of the debtor and the composition of the recovery proposed by such debtor. The court is also in charge of appointing the bankruptcy judge, any required expert, trustee and controller.

Management of the company whilst in business rescue / administration

In the event of a rescue proceeding, from the judgment until the date of the judgment approving the composition or the judgment converting the rescue proceeding into liquidation proceeding, the debtor itself, including its board of directors and management bodies, must be assisted by the trustee to perform all acts of administration or disposal of the assets of the company.

However, the debtor may perform the conservatory acts and those of current management alone, provided that he reports to the trustee. On the other hand, the acts of disposal require the assistance of the trustee.

Filing of claims

Two legal announcements shall be made in order to inform the creditors of the existence of the business rescue. After the period of 60 days following the announcement, all the creditors shall provide, in the specific form provided by the law, the trustee with their claims and all the documents necessary to support such claims. The time limits is 90 days for the creditors living out of the jurisdiction.

Factors which influence the period of business rescue

Disputes brought against or by the insolvency bodies may be a factor that may delay the completion of the rescue process in Guinea.

Funding of the company whilst in business rescue / administration

Capital increase, partial or total sale of assets, cessation of certain activities deemed unprofitable are several ways to fund the company during the business rescue proceeding.

The company may also carry out redundancies which will take place under ordinary law conditions, or carry out a partial or global transfer of assets.

The Guinean law does not provide for government assistance to rescue companies.

Effect of business rescue / administration on employees

All contracts concluded by the company with employees before the starting of the rescue of the company shall be maintained and shall remain in full force and effect. They may be terminated for economic reasons.

Effect of business rescue / administration on contracts

All contracts concluded by the company before the starting of the rescue of the company shall continue and remain in full force and effect.

Effect of business rescue / administration on shareholders

Shareholders are involved throughout the process and remain liable for debts up to the amount of their contributions in accordance with the company's articles of association.

Effect of business rescue / administration on creditors

The creditors are forbidden to initiate any individual claims against the company.

Pending claims, litigation, arbitration and effects of the moratorium

All legal actions already initiated against the company are maintained. In order to give the company and its creditors sufficient time to reach an agreement, the court may grant a moratorium and ask an expert to report to the court, within two months of the commencement date of the rescue proceeding, on the progress made by the parties in reaching an agreement.

Voidable transactions

The court has the power to cancel any transaction made during a period prior to the commencement of the liquidation or any transaction that is illegal.

Business rescue (administration plan)

An administration plan is established, detailing the status of the company, the formalities that have been completed, the transactions that have been concluded and the result if the company were to continue its activities.

Voting on the plan

A rescue plan is adopted if a majority in number, representing at least half of the total debt by value, supports the plan.

Cram down on creditors

A plan is adopted and implemented if it receives the required vote from creditors.

Implementation of the plan

The plan shall be implemented under the terms of the composition.

Discharge of debt

The competent judge shall, where appropriate, order a distribution of funds among the creditors.

Effect on suretyships

The rights of sureties are generally not addressed in the company's rescue plans.

How is the process terminated

The process ends when the company is able to continue its business activities after the implementation of the terms of the rescue plan. If the plan is not successfully implemented, the company is put into liquidation.



What is the status of the company after the business rescue?

When an agreement is approved, the provisions of the agreement are implemented with the assistance of the relevant judge, for a period not exceeding 3 years.

Directors and officer liability

The civil and criminal liability of directors and officers shall apply as set out in the section on liquidation.

THE SECURITY

Types of security in guinea

There are two types of security in Guinea: personal and real. Personal securities refer to commitments made by one or more persons on behalf of another person or entity and in favor of a third party (i.e. autonomous guarantees or guarantees and counter-guarantees). Real security relates to tangible and intangible assets.

Forms prescribed by law

The bond

It is a contract by which the guarantor undertakes towards the creditor who accepts, to perform a present or future obligation contracted by the debtor, if the latter does not fulfil it itself. This commitment may be entered into without the debtor's order.

Warranty and autonomous counter-guarantee

The autonomous guarantee is an undertaking under which a guarantor undertakes to pay a specified amount to the beneficiary at the latter's first request, or as mutually agreed. The guarantee and the autonomous counter-guarantee cannot be subscribed by natural persons. They create separate autonomous commitments, agreements, acts and facts that may form the basis of a claim. The guarantee and the autonomous counter-guarantee are not presumed. They must be in writing, otherwise they will not be valid.

Privilege

A creditor who legitimately owns movable property, the debtor may retain it until the claim is paid in full, whether or not there are other security interests securing the claim, unless the property is subject to a prior lien. The privilege may only be exercised if the holder's claim is certain, liquid and due.

Retention of ownership of property or transfer by way of security

Ownership of movable property may be held as security until the obligation it guarantees has been fully paid. The retention of title must be recorded in writing at the latest on the date of delivery of the goods, otherwise it will be void. This guarantee may govern present and future obligations between the parties.

Pledge of tangible assets

This pledge results from a contract under which a grantor gives a creditor the right to be paid in preference to current or future tangible movable property belonging to the company. The pledge contract must be in writing and must contain the name of the secured claim, the assets subject to the pledged and their species or nature, failing which it is void.

Pledge of intangible assets

This pledge gives rise to the transfer of an intangible asset or a set of future or present intangible assets to secure one or more certain or ascertainable present or future receivables. The purpose of such a pledge may include receivables, bank accounts, securities rights, commercial intangible assets and intellectual property rights.

Mortgages

A mortgage is the assignment of a fixed or verifiable property, constituting the guarantee of one or more present or future claims, provided that they are certain or verifiable. The assets eligible for a mortgage are built or unbuilt buildings, their improvements and additional structures related to these buildings. A mortgage must be registered in accordance with the national laws of the place where the security interest is located and the registration of that security interest must be published regularly.

Taking of security

The securities shall be taken under the forms prescribed by law for each securities, an agreement or court order.

What is the most robust form of collateral available to lenders

The mortgage is the most solid form of security available to lenders.

Fiduciary transfer of a security

It is the fiduciary transfer of a sum of money by which a grantor transfers funds to secure the performance of an obligation.

Stamp duty

Stamp duties are applicable in Guinea.

Registration of the security

The security must be registered in the Trade and Personal Property Credit Register (RCCM).

Registration fees

There is no legal provision providing for a rate in Guinea. Therefore, the cost of registration with the RCCM is fixed on a flat-rate basis by the Chief Registrar.

However, the registration of the deed is made at the national tax office against payment of a tax of between 1 and 2% of the value of the deed.

Requirements for the assignment or transfer of a security interest

The transfer or assignment of a security interest is made by a new registration.

Instances in which securities might be vulnerable to attack

Third parties and the Government may not exercise or attack a security interest in Guinea.



Methods of enforcement of security

All securities for the performance of an obligation may be granted by a foreign domestic financial institution or a credit institution acting in its own name or for the benefit of a secured creditor. The enforcement of the security interest results either from a sale, after authorization by the competent court, of the assets subject to the security. The funds obtained from such sale are dedicated to pay the guaranteed debts. The excess proceeds are returned to the secured creditor.

The security may also be enforced by an application to the court for the assets to be delivered to the beneficiary, after an expert valuation of the assets subject to the security.

Problems encountered when applying security

The practical implementation of the new law in Guinea may pose problems. Delays in obtaining court orders for garnishment of assets and the enforcement proceeding itself may delay the enforcement of securities.

Financial assistance requirements

None in Guinea.

RECOGNITION OF FOREIGN JUDGMENTS**Instances in which a Guinea court will recognize a foreign judgment**

The Court of appeal in whose jurisdiction the enforcement shall be implemented is the one that is competent.

Requirements for the recognition of a foreign judgment

The following conditions must be met for the recognition of a foreign judgment:

- It must not be contrary to Guinean public policy;
- It must have acquired the authority of res judicata under the law of the country where the decision was rendered;
- The documents establishing the judgment must be authentic;
- The defendant's rights must have been respected; and
- The foreign court must have jurisdiction to hear the matter.

Requirements for the recognition of a foreign judgment

For a foreign judgment to be recognized, an application for recognition must be made to the Court. This request must be accompanied by:

- A certified true copy of the decision to open the foreign collective proceedings and appointment of the foreign representative;
- A certificate from the foreign court attesting to the opening of the foreign collective proceedings and the appointment of the foreign representative; or
- Any other evidence of the opening of foreign collective proceedings and the appointment of the foreign representative that may be accepted by the competent court.

Documents must be written or translated into French.

Requirements for the recognition of a foreign trustee, company rescue practitioner or insolvency practitioner
Guinean law remains silent on this point.

