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A Creditor's Gamble?: An Appraisal of Creditor Protection in Liquidation Proceedings in Ghana

EZEKIEL OSEI[1]

ABSTRACT

This paper assesses Ghana's insolvency regime and the extent to which it protect creditors during winding-up. It argues that Ghana's insolvency framework constitutes a calculated gamble on the final distributional outcome in liquidation proceedings, deprioritising creditors' interests. For secured creditors, the traditional efficacy of security is less evident under the Corporate Insolvency and Restructuring Act 2020 (Act 1015), as the Act not only diminishes the potential value of the security but fundamentally alters its legal character. Likewise, for unsecured creditors, the pari passu distribution regime under Act 1015 is less promising. Indeed, pre-liquidation procedures such as the statutory moratorium in administration and the implementation of restructuring agreements do not merely delay enforcement; they actively subordinate pre-insolvency private bargains to a new, collective, public policy objective. These mechanisms, therefore, can actively diminish the asset pool and disrupt the established hierarchy of claims that would otherwise prevail in a straightforward winding-up. Further, the value of the distributable estate is diminished through the erosion of priority by statutory preferential debts, the existence of quasi-security interests, and the pre-liquidation conduct of directors, whose actions in the "twilight zone" of insolvency can dissipate assets through voidable transactions. Ultimately, the paper contends that Act 1015 fails to strike a fair balance between its competing policy objectives and creditor protection, thus disproportionately shifting the economic risk of corporate failure onto creditors, thereby making their recovery in liquidation an increasingly precarious and unpredictable venture.

I. INTRODUCTION

The process of distributing the assets of a failed company is not merely a technical exercise in accounting; it is a complex and often contentious affair that lies at the very heart of corporate

[1] Author is a recent Master of Law (LLM) graduate of the University of Cambridge (England, United Kingdom), and currently, an adjunct lecturer at the Ghana Institute of Management and Public Administration (GIMPA) Law School (Accra, Ghana). He is also an Associate with SBA Legal Consult, Kumasi, Ashanti, Ghana, and a Research Assistant to Professor Louise Gullifer, Chair of the Faculty of Law, University of Cambridge.

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insolvency law.[2] This distributive process represents the forum in which the competing claims of secured and unsecured creditors, employees, and the state are finally adjudicated, and where the fundamental policy choices underpinning the entire insolvency regime are laid bare.[3] At its core, corporate insolvency law is a field defined by the collision of competing normative goals and economic theories.[4] This is not merely a conflict between stakeholders, but a fundamental tension regarding the very purpose of the law: is it a private debt-collection mechanism designed to efficiently enforce *ex ante* bargains, or is it a public law economic policy tool designed to manage the social consequences of corporate failure? It is, as Vanessa Finch aptly argues, a process laden with political, social, and economic choices about who should bear the losses when a commercial enterprise collapses, forcing a resolution between parties with deeply entrenched and conflicting claims.[5] Indeed, the design of any insolvency system reflects a choice between various conceptual models, whether it be a contractarian vision that seeks to uphold the pre-insolvency bargain of the parties, often articulated through the creditors' bargain theory, a utilitarian approach aimed at maximising the collective economic good, or a more communitarian framework that considers the interests of a wider range of stakeholders, including employees and the community.[6] The fundamental challenge, therefore, is not merely technical but deeply philosophical: how to allocate risk and reward in a manner that is perceived as fair, efficient, and conducive to a healthy economic environment.[7] This inherent tension is brought into sharp relief by the modern "rescue culture," a philosophy that regards the liquidation of a potentially viable business as an economic failure to be avoided.[8] This pursuit of rehabilitation, however, necessitates a collectivist approach, requiring the suspension of individual creditor remedies for a perceived greater good—the survival of the enterprise.[9] This creates a forum where private contractual rights, which form the bedrock of commercial credit, are subordinated to public policy goals, fundamentally altering the risk profile for creditors and challenging traditional conceptions of insolvency law as a simple debt-collection device.[10]

This paper discusses creditor protection in insolvency distribution in liquidation proceedings in

[2] Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, CUP 2009) 29.
[3] Finch (n 2) 45; David Milman, 'Priority Rights on Corporate Insolvency' in A. Clarke (ed.), *Current Issues in Insolvency Law* (Stevens & Sons, London, 1991) 78.
[4] See Finch (n 2) 45; P Shuchman, 'An Attempt at a "Philosophy of Bankruptcy"' (1973) 21 UCLA Law Rev 403.
[5] Finch (n 2) 45. See also Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986) 7–19, which provides a foundational text for the creditors' bargain theory.
[6] Finch (n 2) 32–37, where Finch elaborates on the creditors' bargain theory as a dominant, though contested, model for conceptualising insolvency law. See also Kristin Zwieten (ed), *Goode's Principles on Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018), para 1–01.
[7] Shuchman (n 4) 403–405.
[8] Zwieten (n 6) para 3–01; Finch (n 2) 35.
[9] Finch (n 2) 36.
[10] ibid 40–41.

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Ghana. It argues that Ghana's insolvency and restructuring framework, ushered in by the Corporate Insolvency and Restructuring Act (CIRA), 2020 (Act 1015), constitutes a calculated gamble on the final distributional outcome, a process that increasingly appears to deprioritise creditor protection. It is a gamble where the 'house'—the legislative framework itself—has weighted the odds in favour of social and political stakeholders, directly at the expense of commercial creditors. Thus, the traditional efficacy of security—the primary legal instrument of creditor protection—is no longer guaranteed.[11] Indeed, its value and enforceability are now frequently undermined by pre-liquidation procedures like the statutory moratorium in administration and the implementation of restructuring agreements. These mechanisms do not merely delay enforcement; as this paper will demonstrate, they can actively diminish the asset pool and disrupt the established hierarchy of claims that would otherwise prevail in a straightforward winding-up.[12] Furthermore, the value of the distributable estate in a liquidation is diminished through several other avenues, which collectively weaken the creditor's position. The priority of a secured creditor, particularly the holder of a floating charge, can be severely eroded by statutory preferential debts that are given precedence in the distribution scheme, representing a significant derogation from the foundational *pari passu* principle of equal treatment.[13]

The pool of assets may also be affected by the existence of quasi-security interests, such as retention of title clauses, which allow certain creditors to "jump the queue" by reclaiming assets, effectively removing them from the estate available to the general body of creditors.[14] Finally, and perhaps most critically, the pre-liquidation conduct of directors, particularly in the "twilight zone" of insolvency where their duties pivot from shareholders towards creditors' interests, can dissipate assets of the insolvent company.[15] Although the liquidator could in theory claw-back these assets through the voidable transactions framework (preferences, transactions at an undervalue, etc.),[16] the process is in practice costly, uncertain, and thus provides little practical comfort to the creditor who has seen the value of their claim or security diminish. This is not a

[11] Finch (n 2) 245.
[12] ibid 36. See also *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38, where the United Kingdom Supreme Court discussed the public policy against contracting out of insolvency legislation.
[13] Zwieten (n 6) para 12–01; Finch (n 2) 560–561. For a detailed discussion of the policy justifications and criticisms of preferential debts, see David Milman, 'Priority Rights on Corporate Insolvency' in A Clarke (ed), *Current Issues in Insolvency Law* (Stevens & Sons, London, 1991) 78.
[14] Alice Belcher and Wayne Beglan, 'Jumping the Queue' (1997) JBL 1, 1–2.
[15] See Andrew Keay, 'The Director's Duty to Take into Account the Interests of Company Creditors: When Is It Triggered?' (2001) 25 MULR 315; Andrew Keay, 'Directors' Duties and Creditors' Interests' (2014) 130 LQR 443, 443–445; Rosemary Teele Langford and Ian Ramsay, 'The Contours and Content of the 'Creditors' Interest Duty' (2021) 21(1) JCLS 85–108.
[16] Corporate Insolvency and Restructuring Act (CIRA), 2020 (Act 1015), ss 121–123.

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straightforward administrative act; it is full-blown, adversarial litigation. The liquidator, operating with a depleted estate, must first fund this costly litigation—often requiring legal and forensic accounting expertise to even establish a prima facie case. This, as I will demonstrate, creates a significant "catch-22": the very funds needed to pursue a claim are often unavailable precisely because of the asset dissipation being challenged. Furthermore, the legal hurdles are substantial. The liquidator may bear a very high evidentiary burden of proving insolvency at the time of the transaction, and potentially the director's subjective intent to prefer. And even if the liquidator is successful in obtaining a judgment, the victory may be pyrrhic; the assets may be irrecoverable, having been dissipated by the recipient, or the recipient themselves may be a person of straw with no means to satisfy the judgment. This trifecta of high cost, profound legal uncertainty, and the unlikelihood of ultimate recovery means that for most creditors, the theoretical power of claw-back is a hollow remedy that does little to mitigate the real-world damage caused by directorial misconduct in the twilight zone or during the liquidation of the company.

The paper proceeds in four parts, with Part I being this introduction. In Part II, the paper discusses the policy underpinnings and theoretical framework of the CIRA (Act 1015). Following this, Part III shall examine the provisions of the CIRA and show how they undermine the protection of creditors during liquidation. Finally, Part IV concludes the paper.

II. THE POLICY UNDERPINNINGS AND THEORETICAL FRAMEWORK OF CIRA

A. The Legislative Intent and Policy Objectives of Act 1015

To properly appraise the position of creditors in liquidation under Ghana's new insolvency regime, it is essential to first understand the legislative and theoretical foundations upon which the CIRA is built. The Act was not created in a vacuum; it was a deliberate response to the perceived failings of its predecessor and a conscious attempt to align Ghana with modern global insolvency trends. The Bodies Corporate (Official Liquidations) Act, 1963 (Act 180) was a product of its time, reflecting a legal philosophy where corporate failure was viewed primarily as a terminal event necessitating an orderly burial through liquidation. Rooted in English insolvency framework from the mid-20th century, its approach was inherently rigid. The regime was widely seen as outdated and inefficient because its primary, and often sole, objective was the piecemeal collection and sale of a company's assets to pay its debts in a strict order of priority before dissolving the entity. Its procedures were cumbersome and heavily court-driven, leading to protracted liquidations during which asset values would continue to erode. The core deficiency was its failure to provide any mechanism to distinguish between businesses that were

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truly non-viable and those that were merely facing temporary liquidity crises but possessed a fundamentally sound underlying business. The 1963 Act offered only one blunt instrument—liquidation—for all forms of corporate distress. By funnelling most distressed companies down this single path, the old law actively facilitated the destruction of "going concern" value—the synergistic value inherent in an operating business, which includes its workforce, customer relationships, and market position.

The legislative drive towards Act 1015 was thus animated by a confluence of policy objectives, heavily influenced by international models that have increasingly prioritised corporate rehabilitation over premature dissolution. At the forefront was the ambition to introduce a "rescue culture" into Ghanaian corporate law, a paradigm shift seen across the globe in jurisdictions like the United Kingdom following its Enterprise Act 2002.[17] This represents a fundamental reorientation of insolvency policy away from a purely creditor-centric, debt-collection model towards a more value-preservation approach. The drafters sought to create mechanisms, such as administration and restructuring, that would allow viable but financially distressed companies to be rehabilitated. The underlying economic rationale is that the value of a company as a going concern—which encompasses not just its tangible assets but also its intangible value, such as goodwill, a skilled workforce, and established market presence—is often far greater than its value when broken up and sold in a liquidation.[18] A liquidation sale frequently results in a fire-sale discount, destroying this synergistic value. This objective is not merely an implicit policy goal but is expressly codified within the CIRA itself. Section 1(1)(a) of CIRA, which outlines the objectives of the administration procedure, states that its primary purpose is to provide for the management of a company in a manner that aims "at maintaining the company as a going concern". It is crucial to note, however, that "rescue" in this context has a dual meaning: it can mean the rehabilitation and survival of the corporate entity itself, but it can also mean the rescue of the business (as a collection of assets and operations) through a going-concern sale to a new owner, which still results in the liquidation of the original company. This procedure is distinct from a piecemeal liquidation, as it aims to achieve a better financial realisation. This statutory directive empowers the administrator to prioritise the survival of the

[17] The United Kingdom Enterprise Act 2002 is widely regarded as the legislative embodiment of the "rescue culture." It significantly curtailed the ability of floating charge holders to appoint administrative receivers (a creditor-centric enforcement procedure) and established administration as the primary collective rescue mechanism. The Act's overarching goal was to promote company rescue and collective solutions over the piecemeal dismemberment of businesses for the benefit of a single secured creditor. See generally Gerald McCormack, *Corporate Rescue Law — An Anglo-American Perspective* (Elgar Publishing 2008); Shajib Alam, 'The Enterprise Act 2002: Past, Present & Future' (25 June 2014)<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2458327>accessed 21 July 2025.

[18] Rizwaan Jameel Mokal, *Corporate Insolvency Law: Theory and Application* (OUP 2005) 24–28.

business as a whole, rather than the immediate satisfaction of individual creditor claims, thereby operationalising the rescue philosophy at the heart of the new regime.

This substantive shift towards rescue was necessarily underpinned by a parallel objective: the modernisation of insolvency procedures to align with international standards. A rescue culture cannot function effectively within a cumbersome and unpredictable legal framework. Consequently, there was a clear intent to streamline the insolvency process, making it more efficient and transparent, in line with the principles articulated in the UNCITRAL Legislative Guide on Insolvency Law.[19] By adopting these principles, the CIRA sought to enhance legal certainty for both domestic and foreign investors, signalling that Ghana's insolvency framework is robust and aligned with the standards expected in a globalised economy.

Ultimately, the pursuit of both corporate rescue and procedural modernisation culminated in the most philosophically significant objective: the rebalancing of competing stakeholder interests. The reform process explicitly recognised the need to consider a wider range of stakeholders than the old law had contemplated, including not only secured and unsecured creditors but also the pressing interests of employees, the state, and the general community. This represents a fundamental shift from a conception of insolvency law as primarily a debt-collection tool to a process for managing the complex social and economic consequences of corporate failure. It is this third objective that is most critical to the thesis of this paper. In seeking to create this new, delicate balance, the legislature made specific choices that inevitably impacted and, in some cases, subordinated the pre-existing rights and expectations of creditors. Granting statutory preference to employee claims[20] or imposing a restriction on the enforcement of security and recovery of property during the pendency of an administration or a restructuring agreement[21] are not neutral administrative acts; they are deliberate reallocations of risk and value away from certain creditors and towards other stakeholders or the collective enterprise itself.[22] This statutory reallocation of economic risk, moving it from employees and the state (who are made preferential) onto the shoulders of commercial creditors, is the fulcrum of the entire CIRA philosophy and the source of the 'gamble' this paper critiques.

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[19] See United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (United Nations 2005)<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf>accessed 12 July 2025.

[20] See CIRA, s 103(2) & Sch. 2, para 1(a).

[21] When an administration or restructuring agreement is in force, a creditor cannot, except by a court order, enforce a security or recover possession of company's property. See CIRA, ss 30–33 & 51–52.

[22] cf. AB and David, 'An Overview of Creditors' Rights and Protection in Corporate Administration in Ghana' (*Marcopolis*, 13 July 2022)<https://marcopolis.net/ab-and-david-an-overview-of-creditors-rights-and-protection-in-corporate-administration-in-ghana.htm>accessed 20 July 2025.

B. The Theoretical Framework: Locating Act 1015 in Insolvency Philosophy

The policy choices embedded in Act 1015 can be understood by locating them within the broader theoretical debates that dominate insolvency law scholarship, which generally revolve around the tension between two competing philosophies. On one side of this debate is the contractarian view, championed by scholars like Thomas Jackson[23] and Douglas Baird.[24] This perspective argues that insolvency law should, as far as possible, respect the pre-insolvency entitlements of the parties. It conceives of insolvency law not as a tool for social engineering, but as a hypothetical contract—a collective, mandatory debt-collection procedure that creditors would have agreed to amongst themselves *ex ante* had they been able to negotiate. The "creditors' bargain" theory, central to this view, posits that insolvency law should simply provide an orderly procedure for enforcing these bargains, thereby preventing a value-destroying "grab race" where individual creditors race to seize assets.[25] This view prioritises certainty, predictability, and the robust protection of property rights, particularly those of secured creditors, whose *in rem* rights are seen as fundamental pre-insolvency entitlements.[26] The economic justification for this position is that legal stability ultimately lowers the cost of credit for all; if lenders are confident that their security and priority will be respected in insolvency, they will be willing to lend more money at lower interest rates.[27] A purely contractarian regime would thus have a very limited role for preferential claims and would be deeply reluctant to subordinate secured creditor rights to broader social goals, viewing such moves as a form of *ex post* wealth redistribution that undermines the sanctity of contracts and distorts the price of credit.[28]

In contrast, the communitarian viewpoint sees insolvency as a matter of public interest that extends beyond the private interests of creditors.[29] This view challenges the contractarian notion of the company as a mere "nexus of contracts," arguing instead that it is a social and economic institution with a life of its own.[30] Its failure, therefore, creates significant negative externalities—costs borne by parties who were not part of the original bargain—that ripple through society. These include not only the direct loss of jobs but also the knock-on effects on

[23] See Jackson (n 5).
[24] See Douglas G Baird, *Elements of Bankruptcy* (6th edn, Foundation Press 2014).
[25] Jackson, *The Logic and Limits of Bankruptcy Law* (n 5) 12–19. See also Robert K Rasmussen, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy' (1992) 71 TLR 51.
[26] Finch (n 2) 40–43; Rizwaan Jameel Mokal, 'What Liquidation Does For Secured Creditors, And What It Does For You' (2008) 71(5) MLR 699, 706.
[27] Ian Fletcher, *The Law of Insolvency* (3rd edn, Sweet & Maxwell 2002) 20–22; Vanessa Finch, 'The Recasting of Insolvency Law' (2005) 68 MLR 713, 715.
[28] See *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) Ch. 32–33.
[29] Finch (n 2) 641–48.
[30] ibid 696–98; Fletcher (n 27) 438–40.

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local suppliers, the erosion of the tax base, and the social costs associated with unemployment.[31] From this perspective, insolvency law is justified in intervening to reallocate value to protect vulnerable stakeholders, particularly employees, who are often seen as involuntary, undiversified, and firm-specific creditors with significant human capital invested in the enterprise.[32] It also justifies advancing public policy goals, such as collecting tax revenue to fund public services. This approach thus conceives of the insolvency process not merely as a private debt collection mechanism, but as a public forum for managing the social and economic costs of corporate failure in a manner that is deemed fair and equitable by the broader community.

When analysed through this lens, it becomes clear that the CIRA represents a decisive shift away from a purely contractarian model towards a more communitarian framework. The explicit prioritisation of employee wages and state tax claims over the security of fixed and floating charge holders[33] is the most potent and unambiguous evidence of this legislative philosophy. Here, the CIRA makes a conscious decision that in the event of failure, the social contract with employees and the fiscal needs of the state are more pressing than the contractual security held by a certain class of commercial lenders. This statutory subordination fundamentally alters the nature of the floating charge, transforming it from a robust security interest into one that is contingent upon the satisfaction of non-contractual, social claims. The Act's treatment of the fixed charge, as we shall see, is even more radical. While the CIRA still protects the robust proprietary rights of fixed charge holders in some respects—a nod to the enduring importance of certain contractual entitlements—its differential treatment of floating charges (and, in critical instances, fixed charges) reveals a nuanced policy choice. Moreover, the CIRA's wholehearted embrace of rescue mechanisms in the nature of administration moratorium[34] and restructuring agreement[35] that inherently delay creditor enforcement,[36] serves

[31] See Douglas G Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108 YLJ 573, 577–80; Karen Cross, 'The Need to Take Community Interests into Account in Bankruptcy: An Essay' (1994) 72 WULQ 1031; Karen Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System* (Yale University Press 1997) 194–98.

[32] John Armour, 'The Law and Economics of Corporate Insolvency: A Review' (2001) CBR Working Paper 197, University of Cambridge<https://www.jbs.cam.ac.uk/wp-content/uploads/2023/05/cbrwp197.pdf>accessed 5 July 2025; Robert M Ackerman and Lance Cole, 'Making Corporate Law More Communitarian: A Proposed Response to the Roberts Court's Personification of Corporations' (2016) 81 BLR 895.

[33] CIRA, s 107(2)(3).

[34] See CIRA, ss 2–38.

[35] See CIRA, ss 44–59.

[36] James Routledge, 'The Decision to Enter Voluntary Administration: Timely Strategy or Last Resort?' (2007) 6(2) JLFM 8–12. See also Sarah Peterson, 'Restructuring Moratoriums through an Information-Processing Lens' (2023) 23(1) JCLS 37–67; Sophia Sena Berdie and Akua Serwaah Agyapong, 'Key Highlights of the Corporate Insolvency and Restructuring Act, 2020 (Act 1015) – Part I' (*Bentsi-Enchill, Letsa & Ankomah Blog Publication*, July 2024)<https://bentsienchill.com/key-highlights-of-the-corporate-insolvency-and-restructuring-act-2020-act-1015/>accessed 19 June 2025.

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as a second pillar of this communitarian approach. Thus, the moratorium forces individual creditors, including secured ones, to forbear from exercising their contractual remedies for the potential collective good of enterprise survival.[37] This combination of distributional subordination and procedural restraint signals a clear preference for a model that accommodates broader, non-contractual interests. Consequently, it is this foundational policy choice, which subordinates and delays established creditor rights in favour of wider social and economic goals, that sets the stage for the "creditor's gamble."

It must be conceded, of course, that this legislative gamble is not, in theory, entirely without a potential upside for creditors. The central economic premise of the "rescue culture"—a premise that carries considerable weight—is that the preservation of a business as a going concern can yield a far greater collective value than a piecemeal liquidation. A successful administration, therefore, could theoretically result in a larger distributable estate, ultimately benefiting even those secured creditors whose enforcement rights are temporarily stayed by the moratorium. A fire sale of assets destroys synergistic value, whereas an orderly administration (or a going-concern sale within administration) might preserve it. However, to concede the theoretical possibility of a successful outcome is not to endorse the specific legislative architecture that facilitates it. The critical question, which the remainder of this paper is dedicated to answering, is whether the specific mechanisms within Act 1015 are sufficiently calibrated to make this potential payoff a realistic prospect for creditors, or whether they, in fact, create a poorly structured venture where the odds of a positive return are unacceptably low for both secured and unsecured creditors.

III. THE CREDITOR'S GAMBLE IN PRACTICE – HOW THE CIRA DEPRIORITISES CREDITOR PROTECTION IN LIQUIDATION PROCEEDINGS

A. The Position of Secured Creditors in Liquidation

At its heart, a system of commercial credit rests on a crucial premise: that the law provides creditors with robust and effective mechanisms to protect their investments should a debtor fail.[38] Indeed, these protective mechanisms, principally security, ensure certainty and predictability, allowing creditors to price risk and allocate capital efficiently.[39] Security

[37] cf. Jennifer Payne, 'An Assessment of the UK Restructuring Moratorium' (2021) LMCLQ 454, 464–69.
[38] The World Bank, *Principles for Effective Insolvency and Creditor/Debtor Rights Systems* (Revised 2015) <https://documents1.worldbank.org/curated/en/557581467990960136/Principles-for-effective-insolvency-and-credit-debtor-rights-systems.pdf>accessed 10 August 2025; Samuel Biresaw, Mia Rahim and Michael Adams, 'Corporate Creditor Protection Rights Worldwide: Towards a Convergence of Strategies' (2024) 25(1) CJIL 8.
[39] Alan Schwartz, 'Security Interests and Bankruptcy Priorities: A Review of Current Theories' (1981) 10(1) JLS 1.

provides an ordinary creditor with a proprietary right over an asset belonging to the debtor, offering protection against default, especially in the event of insolvency. This right of recourse allows the creditor to enforce their claim against the specific asset or its proceeds, effectively falling outside the collective insolvency process to the extent of their security.[40] Without such security, a creditor would be subsumed into the general pool of unsecured creditors, sharing *pari passu* in any remaining "free assets" after secured claims and statutory priorities have been met.[41] The institution of security is often justified on broad efficiency grounds, though its impact on unsecured creditors and the potential for inefficiency are acknowledged.[42] The rationale for taking security is primarily to mitigate the consequences of a debtor's default, ensuring that the creditor's claim is met from the designated asset, rather than being subjected to the uncertainties of the general insolvency estate.[43] Likewise, securing credit reduces the costs of financial distress and to enable access to capital at lower rates, thereby enhancing value for the firm in the short and long run.[44]

Primarily, in the debtor-creditor relationship, a loan to a company may be secured by fixed charge or floating charge.[45] A fixed charge is an equitable proprietary security interest that significantly restricts the debtor's ability to deal with the charged property.[46] Thus, where a fixed charge is created over an asset, a debtor cannot, without the consent of the charge holder use the asset.[47] This prevents the charged asset from being dissipated before the charge becomes enforceable, thereby enhancing creditor protection.[48] Unlike floating charges, a fixed charge typically attaches to a specific, identifiable asset from the moment it is created. For instance, a fixed charge can be taken over specific land, machinery, or even financial instruments like shares and insurance policies.[49] This immediate and definite attachment is what provides its strength as a protective device. In liquidation, assets subject to a valid fixed charge are treated as not forming part of the insolvent debtor's assets available for unsecured creditors, except for

[40] See Mokal (n 18) 92–132; Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, CUP 2017) 470.
[41] Belcher and Beglan (n 14) 22.
[42] Vanessa Finch, 'Security, Insolvency and Risk: Who Pays the Price?' (1999) 62 MLR 633; Mokal (n 18) 171.
[43] Alan Schwartz, 'A Normative Theory of Business Bankruptcy' (2005) 91(5) VLR 1199.
[44] John Armour et al., 'How Do Creditor Rights Matter for Debt Finance? A Review of Empirical Evidence' in Frederique Dahan (ed), *Research Handbook on Secured Financing in Commercial Transactions* (Edward Elgar 2015) 3–25.
[45] See Companies Act, 2019 (Act 992), s 89(1)(2).
[46] *Agnew and Anor v Commissioner of Inland Revenue and Anor* [2001] BCC 259 (PC); *National Westminster Bank plc v Spectrum Plus Limited and others* [2005] UKHL 41 (Lord Scott) (HL); *Re JD Brian Ltd* [2015] IESC 62.
[47] *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, 295 (Romer LJ); Stephen Atherton and Rizwaan Mokal, 'Charges Over Chattels – Issues in the Fixed/Floating Jurisprudence' (*SSRN*, 28 September 2004)<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=593448>accessed 12th July 2025.
[48] ibid.
[49] J Thorne and D Prentice (eds), *Butterworths Company Law Guide* (4th edn, Lexis Nexis, London 2002) 180.

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any surplus value once the secured liability is discharged.[50] This is because a fixed charge creates a proprietary right for the holder, thus allowing them to enforce their security independently of the liquidation process.[51]

In contrast to a fixed charge, a floating charge is a security over a fluctuating class of assets, such as stock, cash, or receivables, which the company is free to deal with in the ordinary course of business until a specified event, known as "crystallisation".[52] Upon crystallisation, the floating charge converts into a fixed charge over the assets then held by the company. Consequently, a floating charge is ambulatory and shifting in nature, hovering over a class of present and future assets but not attaching to any specific asset until the occurrence of a "crystallisation" event—most commonly, the commencement of liquidation.[53] This flexibility allows the company to operate without constant interference from the charge holder, a feature that distinguishes it from a fixed charge.[54] The protection offered by a floating charge is therefore inherently more contingent than that of a fixed charge. It is a gamble on the state of the company's assets at the very moment of its collapse. The value of the security is not fixed at the outset but is dependent on the assets that happen to be within the specified class at the point of crystallisation,[55] a moment when the asset pool is likely to be at its most depleted. As Finch notes, its flexibility is also its weakness; it offers robust protection when the company is a solvent, going concern but reveals its inherent frailties when insolvency looms—the very moment its protection is most needed.[56] Indeed, it is this structural ambivalence that renders the floating charge holder uniquely vulnerable to the legislative interventions that follow. Nonetheless, floating charges still provide some protection to creditors during corporate liquidation by establishing proprietary rights over specific assets on the occurrence of an event of crystallisation. It is this fundamental distinction between the specific, *in rem* right of the fixed charge holder and the contingent, ambulatory right of the floating charge holder that makes the CIRA's treatment of both so conceptually problematic.

The CIRA, however, in its explicit prioritisation of a "rescue culture," systematically deprioritises and undermines the interests of secured creditors during liquidation. Although insolvency law, in its classical character, functions as a collective debt-enforcement

[50] Finch and Milman (n 40) 543.
[51] ibid.
[52] Act 992, s 90(1)(2).
[53] *Illingworth v Houldsworth* [1904] AC 355.
[54] See *National Westminster Bank plc* (n 46).
[55] See Paul Davies and Sarah Worthington, *Gower's Principles of Modern Company Law* (10th edn, Sweet and Maxwell 2016), 1107–110.
[56] Finch (n 2) 310.

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mechanism,[57] the CIRA, as noted, consciously subordinates this function. Rather, it elevates the broader, more socially and economically oriented goals of corporate rehabilitation—such as the preservation of employment, the continuation of productive enterprise, and the protection of supply chains—above the enforcement of pre-insolvency contractual bargains. The result is a fundamental transformation of the creditor's position from one of predictable, rights-based enforcement within a collective framework to a high-stakes gamble on the outcome of a rescue attempt. And this gamble is not a single bet but a series of interconnected risks, where the inherent frailties of security are compounded by legislative priorities, directorial misconduct, and, crucially, by pre-liquidation procedures that can fundamentally alter the landscape before a winding-up even commences. It is thus safe to say that the primary cost of the CIRA has been disproportionately allocated to secured creditors, whose primary tool of protection have been systematically weakened, deprioritising their interest in insolvency distribution during liquidation.

The assault launched by Act 1015 on secured creditors during liquidation, thus deprioritising their interest, are multifaceted. Although well-intentioned, these legislative initiatives could potentially operate to diminish the value of security and distributable assets in the winding-up process. First, prior to liquidation, a company may enter into administration with the view of rescuing it. During this period, a secured creditor cannot enforce its security against the company. Section 30 of Act 1015 provides that '[a] person shall not enforce a charge over the property of the company during the administration of that company except by an order of the Court.'[58] This provision aims to create a "breathing space" and halt the chaotic and value-destroying "race to the courthouse" that often characterises the onset of insolvency—where creditors rush to enforce their claims, leading to the piecemeal dismemberment of what might be a viable business. By imposing a temporary freeze, the moratorium allows the administrator to assess the company's position and formulate a rescue plan without the immediate threat of asset seizure.[59] From the perspective of a secured creditor, however, the moratorium represents a profound procedural handicap that fundamentally alters their risk profile. It neutralises their single most important contractual right: the ability to take control of their collateral in the event of default and realise its value independently. The creditor is forced into a state of passive

[57] See Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Elgar Publishing 2016) 3–32; Nicolaes Tollenaar, *Pre-Insolvency Proceedings: A Normative Foundation and Framework* (OUP 2019) 8–37.

[58] This is further amplified by section 33 of Act 1015 which provides that: 'During the administration of a company, a person shall not commence or continue an enforcement process in relation to the property of the company except with leave of the Court and on terms that the Court considers appropriate.'

[59] cf. Anthony O Nwafor, 'Moratorium in Business Rescue and the Protection of Company's Creditors' (2017) 13(1) *Corporate Board: Role, Duties & Composition* 59–67.

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forbearance, exposed to a host of risks over which he has little to no control. In effect, the secured creditor is transformed into an involuntary, uncompensated, post-petition financier of the rescue attempt, forced to bear the cost of capital while its contractual remedies are suspended. The most immediate risk is the depreciation of their collateral, which can be particularly acute in the case of perishable goods, rapidly obsolescing technology, or assets subject to market volatility. Moreover, the very costs and expenses of the administration itself—including the administrator's professional fees—are paid out of the company's assets,[60] creating a super-priority claim that can steadily erode the value of the property over which the creditor holds security in the event of liquidation. Furthermore, while the administrator owes general duties to all creditors, his primary statutory objective is to maintain the distressed company as a going concern.[61] This creates an inherent tension, as the administrator's decisions, such as continuing to trade or incurring new debt, may not align with the secured creditor's interest in a swift and certain recovery. The moratorium thus transforms the creditor's position from one of active control to one of uncertain waiting, gambling not only on the success of the rescue but also on the commercial judgment of an administrator whose priorities are, by legislative design, collective rather than individual.

Secondly, the most direct assault on secured creditors during liquidation is the subordination of their claims to preferential debts.[62] According to section 107(3)(b) of Act 1015, certain preferential debts—primarily encompassing arrears of employee remuneration, social security contributions, and taxes owed to the state—must be paid out of the proceeds of assets subject to a security *before* a fixed or floating charge holder receives any payment.[63] This provision is perhaps the most radical and 'creditor-averse' innovation in the entire Act, representing a stark departure from insolvency frameworks in other common law jurisdictions, such as the United Kingdom, where such preferences typically rank only behind fixed charges and ahead of floating charges.[64]Act 1015, in a profound legislative levelling, makes no such distinction. By catapulting social claims (employees) and fiscal claims (the state) ahead of even the holder of a fixed charge, the law fundamentally rewrites the nature of fixed security. This is not a mere reordering of priorities amongst unsecured creditors; it amounts to a legislative expropriation of the holder's proprietary interest considering that the creation of a fixed or floating charge over an asset creates a proprietary interest for the charge holder.[65] It fundamentally alters the

[60] See CIRA, ss 62–63(1)(a)(b).
[61] CIRA, s 1(1)(a)(b).
[62] See CIRA, s 107(3)(c).
[63] See CIRA, s 107(3)(c).
[64] See UK Insolvency Act 1986 (as amended).
[65] See Chike Emedosi, 'The Evolution of Floating Charges in Ghana, Kenya and Nigeria' in Alisdair MacPherson

commercial logic of secured lending, forcing the creditor to underwrite the risk of the state and the workforce. The security, which was taken on the basis of the value of the company's assets, is transformed into a devalued and uncertain instrument whose worth is contingent on the quantum of preferential claims, a figure entirely outside the creditor's control. This legislative choice reflects a decisive shift away from the "creditor's bargain" model of insolvency law and towards a model that prioritises the protection of vulnerable stakeholders. Even though the policy justification is understandable—to protect employees who are involuntary creditors[66] and often the most immediate victims of corporate collapse—the mechanism chosen directly targets the security of the very lenders whose capital is essential for corporate activity. It turns the enforcement of a fixed and floating charge into a gamble, not on the commercial viability of the debtor company, but on the extent of its other, statutorily prioritised, liabilities. The rippling effect, beyond undermining secured creditors in liquidation, is that it fundamentally reshapes the risk profile of secured lending in Ghana, arguably increasing the cost of credit and making it less accessible for businesses, thereby creating a tension with the Act's overarching goal of promoting a "rescue culture."

Thirdly, Act 1015 subordinates the individual commercial discretion of a secured creditor to a collective decision-making process governed by the liquidator, thereby fundamentally altering the nature of the security interest itself. Section 113(1) of Act 1015 imposes a dual obligation on the liquidator to not only "consult the creditors"[67] but, more significantly, to "give effect, to the views expressed by the creditors in relation to the realisation and distribution of assets."[68] This latter requirement is particularly consequential as it effectively transforms a secured creditor's proprietary right over a specific asset—an *in rem* right—into a mere participatory voice within a collective. In established insolvency practice, a cornerstone of a secured creditor's position is the right, derived from their security agreement, to control the enforcement process over their collateral. This autonomy allows them to act decisively to preserve value. Act 1015, by compelling the liquidator to effectuate the collective will of the *entire body* of creditors, creates an inherent conflict of interest. The general body of unsecured creditors, facing a minimal or zero return, has a strategic incentive to favour high-risk, high-reward strategies, such as delaying a sale in the speculative hope of a market upturn. For them, the downside of delay—such as asset depreciation or mounting holding costs—is borne almost

and Caroline Rapatz, *Floating Charges in Comparative Perspective* (Elgar Publishing 2025) 109–150.

[66] See Lynn M LoPucki, 'The Unsecured Creditor's Bargain' (1994) 80 VLR 1887, 1896–897; Steve Knippenberg, 'The Unsecured Creditor's Bargain: An Essay in Reply, Reprisal or Support' (1994) 80 VLR 1967–1987; Finch and Milman (n 40) 539–45.

[67] CIRA, s 113(1)(b).

[68] CIRA, s 113(1)(c).

exclusively by the secured creditor. This could create a perverse incentive structure where the unsecured majority can vote to 'gamble' with the secured creditor's collateral. The liquidator, bound by Section 113(1), is placed in a position where they may be legally compelled to adopt this collective gamble, directly opposing the secured creditor's commercially sensible preference for a swift realisation. The liquidator is therefore statutorily positioned as an arbiter caught between a secured creditor's desire to preserve value and an unsecured creditor's gamble for a miraculous recovery, backed by the tyranny of the majority. This statutory mandate, therefore, represents a significant abrogation of the proprietary character of the security interest, transforming a right of control into a mere right to be consulted within a broader constituency whose interests are not only different but often inimical to those of the secured party. The long-term implication is an increase in the risk profile of secured lending, which may, in turn, lead to higher costs of credit for all corporate borrowers.

Finally, and in a more direct financial sense, Act 1015 curtails the secured creditor's contractual entitlement to full recovery by imposing a statutory limitation on post-commencement interest,[69] effectively rewriting the commercial bargain *ex post facto*. The provision stipulating that "interest is not allowed regarding a period after the commencement of the winding-up"[70] represents a significant departure from the foundational principle that a secured creditor may look to their collateral for the satisfaction of the entire secured debt.[71] Contractual interest is not an ancillary penalty; it is the fundamental price of credit, compensating the lender for the time value of money and the assumption of risk. By imposing a hard stop on its accrual at the date of winding-up, Act 1015 statutorily caps the secured creditor's claim, irrespective of the sufficiency of their collateral. Consequently, even if the realised asset yields proceeds sufficient to cover the principal debt and all contractually accrued interest, this provision prevents the creditor from receiving their full bargained-for return. This constitutes a tangible financial loss, directly undermining the economic value of the security. The possibility that a distribution of statutory interest might be permitted from a surplus asset after all proved debts are paid is, in the vast majority of insolvencies, a commercially unrealistic and therefore illusory remedy; a surplus is an exceptionally rare outcome. The limitation on post-commencement interest therefore severs the contractual link between the debt and its ongoing interest component, eroding the fundamental commercial expectations that underpin the entire market for secured

[69] See CIRA, s 130(2)(e).
[70] CIRA, s 130(2)(e).
[71] cf. Thomas H Jackson and Anthony T Kronman, 'Secured Financing and Priorities among Creditors' (1979) 88 YLJ 1143–1182; Rodrigo Olivares-Caminal, 'Creditor Equality, Secured Transactions, and Systemic Risk: A Complex Trilemma' (2018) 81 *Law and Contemporary Problems* 87–107.

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lending and creating a statutory shortfall.

B. The Woes of Unsecured Creditors in Liquidation

1. Pari Passu to the Rescue?

The *pari passu* principle stands as a cornerstone in corporate insolvency law, particularly in its implications for unsecured creditors. This foundational principle mandates that in the collective process of liquidation, all creditors of the same class should share rateably in the available assets of the insolvent company.[72] This is a widely recognised tenet across jurisdictions, often considered to be amongst the most, if not the most, fundamental principle of insolvency law.[73] It ensures that losses are borne equally among similarly positioned unsecured creditors. At its core, the *pari passu* principle is indeed a doctrine deeply rooted in a conception of collective and procedural fairness, meticulously designed to prevent the chaotic and inequitable scramble for assets that would otherwise ensue.[74] Prior to the onset of insolvency, individual creditors are free to pursue their claims with a "race of the diligent" mentality, where the swiftest often secure satisfaction at the expense of others.[75] However, the advent of liquidation brings this individualistic race to an abrupt halt.[76] Insolvency law, through its collective enforcement proceedings, replaces this free-for-all with a mandatory, orderly, and collective distribution scheme that treats all like claims alike.[77] This collective discipline is a necessary precondition for the *pari passu* rule, as it ensures the estate is preserved and managed for the benefit of all creditors, preventing the premature dismemberment of the debtor's business.[78] For ordinary, unsecured creditors like tort victims, unskilled employees, and less commercially savvy trade creditors, who frequently lacks the bargaining power to demand specific security over a debtor's assets, this principle represents a central and organising promise within insolvency law.[79] It is not, of course, a guarantee of full recovery, which is seldom a realistic outcome given the typical depletion of assets in insolvency.[80] Rather, it offers a promise of equitable participation in the

[72] Finch and Milman (n 40) 511; Zwieten (n 6) para 8-02; Matthew Stubbins, 'The Liquidation Process and Unsecured Creditors' (2016) 19(2) JIBFL 261.
[73] Andrew Keay and Peter Walton, 'The Preferential Debts Regime in Liquidation Law: In the Public Interest?' [1999] CFILR 84, 93; Reinhard Bork, *Principles of Cross-Border Insolvency Law* (Intersentia Ltd 2017), para 4.6.
[74] Finch and Milman (n 40) 513; Michael Bridge, 'The Quistclose Trust in a World of Secured Transactions' (1992) 12 OJLS 333, 340.
[75] Zwieten (n 6) para 8-02; Armour (n 32).
[76] Mokal (n 18) 92–96.
[77] Sandra Frisby, 'The Enterprise Act 2002 – A Brave New World for Corporate Rescue?' (2004) 67 MLR 247, 269.
[78] Royston M Goode, *Principle of Corporate Insolvency Law* (2nd edn, Sweet & Maxwell 1997) 142.
[79] Rizwaan Jameel Mokal, 'The Authentic Consent Model: Contractarianism, Creditor's Bargain, and Corporate Liquidation' (2001) 21 *Legal Studies* 400, 413.
[80] See Rizwaan Jameel Mokal, 'Priority as Pathology: The Pari Passu Myth' (2001) 60(3) CLJ 581, 589; Philip R Wood, *Principles of International Insolvency* (Sweet & Maxwell, London, 1995), para 1–14 ("In practice even

debtor's diminished estate and a commitment to an orderly process in the face of inevitable loss.[81] This protection is particularly vital for more vulnerable creditors, such as many unsecured trade creditors, who are often less able to adjust credit terms or protect themselves against insolvency risks, and who stand to lose the most if their claims are frustrated.[82] The *pari passu* rule, therefore, aims to ensure that no creditor gains an unfair advantage, reinforcing commercial morality and providing a measure of justice in the challenging landscape of corporate financial distress.[83]

Prima facie, though not expressly stipulated, the CIRA purports to operate a *pari passu* distribution regime in relation to unsecured creditors. This is because the core objective of the CIRA in respect of liquidation is 'the maximisation of the realisation of the estate of the insolvent company and the distribution of the [insolvent] estate having regard to the equitable treatment of stakeholders in the company.'[84] However, a critical analysis of Act 1015 reveals that this regime is largely illusory. The primary instrument through which the Act displaces the *pari passu* principle and marginalises unsecured creditors is the statutory order of priority for distribution, commonly referred to as the "statutory waterfall." This hierarchy, as codified for under Act 1015 is not a neutral administrative ordering but a series of deliberate legislative policy choices that create a multi-layered structure of priority, at the bottom of which sit the unsecured creditors.[85] Their claims can only be addressed after several higher-ranking classes of claimants have been paid in full, meaning the pool of assets available to them is systematically depleted at each preceding stage. The first depletion occurs under section 107(3)(a), which stipulates that the costs and expenses of the liquidation must be paid in priority to all other claims. While pragmatically necessary to fund the process itself, this provision immediately diminishes the gross value of the estate before any creditor receives a "*pesewa*", ensuring that the distributable estate is the net value after the often-significant fees of the liquidator have been deducted.

Following this initial reduction, priority is given to the specific preferential debts.[86] It is here that the true extent of the unsecured creditor's subordination is revealed. Particularly, section 107(3)(b) of Act 1015 grants preferential status to "all wages and salaries of the employees of

the most cursory examination of bankruptcy internationally shows that the *pari passu* rule is nowhere honoured").
[81] Donald Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 TLR 541, 551.
[82] Mokal (n 79) 607.
[83] See David A Skeel, 'The Empty Idea of Equality of Creditors' (2017) 166 UPLR 699, 701–14.
[84] CIRA, s 79(1).
[85] CIRA, s 107(3)(f).
[86] See CIRA, s 107(3) (a)–(e).

the company" due within the four months preceding the liquidation.[87] While the social justification for protecting employees—often viewed as involuntary creditors—is compelling, the economic consequence falls squarely on unsecured creditor, as this preference creates a large and unpredictable super-priority claim that drains the available assets. Furthermore, Act 1015 elevate claims for social security contributions and taxes to preferential status,[88] effectively allowing the government to use its legislative power to "jump the queue." Unlike a commercial creditor who voluntarily assumes risk, the state as a tax creditor is involuntary; however, by granting itself priority, it shifts the risk of non-payment from the public purse onto the company's private, commercial creditors. After this significant diversion of funds to preferential claimants, Act 1015 interposes two other barriers: the payment of debts owed to secured creditors,[89] and the salary of a former director of the company.[90] It is only after these three preceding layers of claims have been satisfied in full that the Act 1015, under section 107(3)(f), finally considers the general body of unsecured creditors. This relegation is functionally equivalent to the last. Consequently, by the time the distributional focus turns to the unsecured creditors, the insolvent estate would have typically been exhausted. It goes without saying that the *pari passu* principle is 'nothing more, and has little relevance [for unsecured creditors], other than to act as a convenient default principle,'[91] whose fruits may never be eaten by the general body of unsecured creditors.

Beyond the statutory waterfall, the asset pool available for unsecured creditors is further diminished by two other powerful forces that operate outside the formal priority structure: quasi-security interests and the lingering effects of pre-liquidation directorial conduct. These phenomena effectively allow certain parties to remove assets from the common pool before the *pari passu* principle even has a chance to apply, reinforcing the notion that the principle is more theoretical than real. First, the integrity of the insolvent estate may be challenged by the existence of quasi-security interests, most notably retention of title (ROT) clauses. Through an ROT clause in a supply contract, a seller retains legal ownership of goods until they have been fully paid for.[92] In the event of the buyer's liquidation, the supplier can simply reclaim their goods, as those goods never legally became part of the buyer's property. Although commercially sensible from the supplier's perspective, this device functions as a powerful form of non-registrable security that directly subverts the collective nature of insolvency proceedings.

[87] CIRA, s 107(3)(b)(iii)(*aa*).
[88] CIRA, s 107(3)(b)(iii)(*bb*).
[89] CIRA, s 107(3)(c).
[90] CIRA, s 107(3)(d).
[91] Keay and Walton (n 72) 94 (emphasis added).
[92] See *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676.

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These clauses, in effect, create a shadow insolvency system that operates parallel to, and in defiance of, the statutory collective regime. Hence, assets that other creditors might have reasonably believed to belong to the company, and which may have formed part of the basis for their decision to extend credit, are summarily removed from the estate. This fragments the asset pool and creates a class of "super-priority" creditors who escape the collective discipline of liquidation entirely, leaving the general body of unsecured creditors to share in a significantly smaller pot. Secondly, the asset pool is often depleted long before liquidation commences due to directorial misconduct in the "twilight zone"—the period when a company is sliding towards insolvency. In this phase, directors may engage in voidable transactions that dissipate company assets to the detriment of the general creditor body. These fall into two main categories: preferences and transactions at an undervalue. A preference occurs when a director, knowing the company is insolvent, chooses to pay one unsecured creditor ahead of others (often a connected party, such as another company controlled by the director, or a creditor who has provided a personal guarantee).[93] A transaction at an undervalue involves the company selling an asset for significantly less than its true market worth.[94] While Act 1015 grants the liquidator the power to challenge these transactions and "claw back" the dissipated assets for the benefit of the estate, this remedy is fraught with difficulty. The process of identifying, investigating, and litigating such claims is expensive, time-consuming, and uncertain. Furthermore, the utility of a successful claw-back claim may be contingent on the solvency of the counterparty. Accordingly, a judgment against a preferential creditor who is, himself, insolvent is a pyrrhic victory. This practical limitation is compounded by the notorious difficulty of enforcing the *in personam* directors' duties to creditors that are meant to police this twilight zone behaviour, leaving claw-back as a flawed and often impractical *ex post* cure. Lastly, a liquidator, facing a scarcity of funds in the estate, may be reluctant to pursue costly litigation with no guarantee of success. For unsecured creditors, therefore, the theoretical possibility of clawback offers little practical comfort. They are left to gamble on the liquidator's willingness and ability to reverse pre-liquidation damage, a prospect that further underscores the precariousness of their position.

2. The Problem of Power and Informational Asymmetries

The position of unsecured creditors during liquidation is further eroded by power and information asymmetries, inherent within framework of Act 1015. These asymmetries ensure that even where residual assets exist, the ability of diffuse and less-resourced unsecured creditors to influence the process and hold the liquidator to account is severely limited. Firstly,

[93] cf. CIRA, s 121.
[94] See CIRA, s 123(1).

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the provisions in CIRA governing creditor consultation, while facially protective, harbour ambiguities that could facilitate the marginalisation of unsecured creditors. Section 113(1)(b)-(c) of Act 1015 states that the liquidator "shall consult the creditors on the matters arising in proceedings which substantially affect their interest" and "give effect, to the views expressed by the creditors in relation to the realisation and distribution of assets." Although consultation is required, the Act is silent on the critical issue of how competing creditor interests ought to be reconciled, nor does it prescribe a methodology for determining which creditors' "views" should prevail in the event of a conflict. In practice, absent specific mechanisms for aggregation and representation, the notion of "the creditors" often defaults to the will of the majority, which is typically dominated by larger, financially sophisticated, and frequently secured, institutional creditors.[95] While CIRA provides for a "Committee of creditors", it is silent on the composition, mandate, or its capacity to ensure the equitable representation of unsecured creditors.[96] This legislative lacuna creates a fertile ground for the marginalisation of the diffuse unsecured creditor base, whose economic interests may be diametrically opposed to those of dominant financial creditors.[97] And this provides no guarantee of equitable representation for smaller, unsecured trade creditors or tort claimants. Instead, it creates a fertile ground for their marginalisation, as their collective economic interests—which may favour a quicker, less expensive liquidation—can be easily overridden by dominant creditors pursuing different strategies.

Also, the statutory reporting requirements, intended to promote transparency, may be insufficient to empower unsecured creditors. The liquidator is obligated to 'report to the creditors at intervals of not more than six months on the progress of the liquidation.'[98] While this sets a minimum standard, a six-month interval can be an eternity in a dynamic liquidation process. During this period, crucial decisions regarding asset sales, litigation, and cost incurrence can be made with little to no real-time oversight from the general creditor body. Furthermore, the Act does not specify the content or level of detail required in these reports. A liquidator could technically comply with this provision by providing a high-level, unilluminating summary. For a small trade creditor without the resources to hire legal or financial advisors, such a report would not furnish the timely and comprehensible information

[95] See Gerald McCormack, 'Control and Corporate Rescue – an Anglo-American Evaluation' (2007) 56(3) ICLQ 515, 529–33.
[96] See CIRA, s 114.
[97] cf. Sarah Paterson, 'Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards' (2014) 14(1) JCLS 333–365; Alfonso Nocilla, 'Asset Sales and Secured Creditor Control in Restructuring: A Comparison of the UK, US and Canadian Models' (2017) 26(1) IIR 60–81.
[98] CIRA, s 113(1)(a).

necessary to meaningfully monitor proceedings or challenge the liquidator's conduct. This informational deficit reinforces the power imbalance, leaving unsecured creditors as passive observers in a process where they have the most to lose, further cementing their participation in liquidation as a gamble on the diligence and fairness of an appointee over whom they exercise little effective control.

IV. CONCLUDING REMARKS

This paper has contended that the enactment of Act 1015 represents a fundamental recalibration of the risks associated with corporate failure, a recalibration that disproportionately shifts the economic burden onto creditors. While the legislative pivot towards a modern "rescue culture" and a more communitarian framework is aligned with contemporary global insolvency trends and laudable in its objectives, its practical implementation has transformed the creditor's position into a precarious gamble. The core argument advanced is that in its attempt to balance the competing interests of a wider range of stakeholders, the Act systematically weakens the traditional legal mechanisms designed to protect both secured and unsecured creditors, thereby undermining the predictability and certainty that are foundational to a robust credit economy.

The analysis has demonstrated that this deprioritisation is not the result of a single provision, but rather the cumulative effect of a series of legislative choices. For the secured creditor, the supposed certainty of their proprietary interest is significantly eroded by procedural and substantive interventions. The statutory moratorium imposed during administration neutralises their right to enforcement, exposing them to the risks of asset depreciation and the costs of a rescue process over which they have limited control. More profoundly, the subordination of both fixed and floating charges to a broad category of preferential debts constitutes a direct legislative override of pre-insolvency contractual bargains, turning the security interest into a contingent right dependent on the satisfaction of non-contractual social and fiscal claims. For unsecured creditors, the promise of equitable treatment under the *pari passu* principle has been shown to be largely illusory. Relegated to the bottom of a multi-layered statutory waterfall, their prospect of recovery is typically extinguished long before their turn for distribution arrives. This is further compounded by the pre-emptive removal of assets from the common pool through quasi-security devices like retention of title clauses and the practical difficulties faced by liquidators in clawing back assets dissipated through voidable pre-liquidation transactions.

Ultimately, the framework of Act 1015 creates a significant policy paradox. In its noble pursuit of preserving viable businesses and protecting vulnerable stakeholders such as employees, the law may inadvertently generate adverse economic consequences. By diminishing the efficacy

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of security and diluting the potential for recovery, the Act increases the risk profile of lending. This heightened risk is likely to be priced into the cost of credit, potentially making finance more expensive and less accessible for the very businesses the Act seeks to save. The central challenge, therefore, is one of balance. The current regime, in its zealous embrace of corporate rescue, appears to have created an imbalance that leaves creditors in a position of considerable uncertainty.

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