

# Innovations and Salient Features of the Insolvency Act, 2011

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# Introduction

- ❑ The Kenneth Cook Report – United Kingdom.
- ❑ The Tyler Committee Report – Hong Kong
- ❑ Uganda Law Reform Commission
  - ❑ The Reid and Priest
  - ❑ Claire Manuel
  - ❑ Kalenge, Bwanika Kimuli & Co. Advocates



# The Need for Reform

- Provide an orderly management of an insolvent's estate
- Increase value of the insolvent's estate for the benefit of the general body of creditors
- Rehabilitation of an insolvent
- Modernisation and harmonisation



# The Innovations

## 1. Codification of Insolvency law and Creation of Single Insolvency Code (the Insolvency Act, 2011)

- Common Law Principles
- Judicial Precedents
- The Bankruptcy Act
- The Deeds of Arrangement Act
- Parts VI, VII and IX of the Companies Act cap 110, Laws of Uganda



# The Innovations

## 2. Regulation and Professionalization of Insolvency Practice (s.203 of Act)

- Enhancement of skills and integrity of I.P to protect the value of insolvent estates for the benefit of the general body of creditors
- Protection of stakeholders e.g. employees, employment, suppliers etc
- Increased Accountability for Insolvency Practitioners
- I.P now required to have Security or Professional Indemnity for proper performance of duties



# The Innovations

- **Qualification of an Insolvency Practitioner in Uganda: (s.204)**
  - Should be an **Advocate, accountant or chartered secretary** registered with relevant professional body
  - at least 25 years;
  - Not be a body corporate;
  - Not be an undischarged bankrupt;
  - Shouldn't be a person declared by court to be of unsound mind;
  - Shouldn't be a person subject of a prohibition order (an order given by court prohibiting a practitioner from acting as a receiver, liquidator, etc) – s. 209
  - Shouldn't be a person disqualified from holding an office under the Companies Act, 2012 for fraudulent trading etc
  - Shouldn't be a creditor in respect of a debtor over whose estate he is to preside
  - Shouldn't have been a shareholder, director auditor or receiver in previous two years
  - Not have been convicted in the preceding 5 years of any offence under the Act or of any crime involving dishonesty or moral turpitude;
  - Shouldn't be a subject of disciplinary proceedings or punishment under any law



# The Innovations

## Key duties of an Insolvency Practitioner in Uganda (S. 29, 180)

- Give notice of his/her interest in all property that may not have come into his control.
- Keep in accordance with **generally acceptable accounting procedures and standards full accounts and records** of receipts, expenditure and other transactions of the company;
- Keep accounts and records of the receivership of the company under his management for a period not less than six years after the receivership;
- Possess **security or professional indemnity for proper performance of duty**
- Prepare and **submit to the Official Receiver regular reports** on the state of affairs of the property in receivership
- A receiver **has the right to register his/her name on any asset of the company including land forming part of the receivership estate notwithstanding any transfers and dealings** in respect of the same after the commencement of the insolvency.



# The Innovations

## 3. Increased Powers of the Official Receiver (s. 199)

- Investigate the conduct of insolvent companies for purposes of establishing any impropriety and fraud
- Investigate the promotion, formation **failure** and **conduct of business** of insolvent companies
- Prosecute any person including **insolvency practitioners , directors, and any other officials** of an insolvent company or debtor including **professional advisors** for offences committed under the Act or discovered to have a case to answer as a result of his investigations
- Mandatory for every receivers, liquidators etc to submit reports to the Official Receiver and advise him of any fraud and acts of impropriety for his investigation and possible prosecution
- Act during the vacancy of an Insolvency Practitioner





# The Innovations

- **Establishment of Specialized Insolvency Court?**
  - Jurisdiction in winding up matters vested in the High Court (s.218 of the Companies, Act cap. 110)
  - After making of winding up order, High Court empowered to direct that all subsequent proceedings be transferred to magistrate's court. (s.219 of the Companies Act, cap. 110).
  - Jurisdiction on bankruptcy matters vested in High Court. However, Chief Justice empowered to issue a Statutory Order delegating all or any part of jurisdiction in bankruptcy to any Magistrate's court. (s.95 of the Bankruptcy Act. Cap 67).
  - **Jurisdiction in respect of corporate insolvencies and cross border insolvencies vested in the High Court (s.254 (1) & (2))**
  - **Jurisdiction in respect of personal bankruptcy whose subject matters below Shs.50,000,000/- now vested in Chief Magistrates. (S.254 (3))**



# The Innovations

## 4. Ease of Commencement of Bankruptcy (Part III – Sections 3 & 4 of the Act)

- No Need to Prove Acts of Bankruptcy
- Statutory notice and obtainment of a judgment
- Individual arrangements and Corporate rescue mechanisms



# The Innovations

## 5. De- Stigmatisation of Bankruptcy (S. 27,31,44,45)

- all properties vested in the bankrupt's estate is formally vested in the official receiver without any conveyance or transfer. The debtor however may retain **his matrimonial home and other property of a value to be prescribed that the court may exempt**, property held in trust for other persons, **a portion of his salary as may be determined by Court**; tools, books and equipment necessary for his business or vocation;
- Disqualification for a period of 5 years from the date of discharge from holding office of **Judge, President, Member of Parliament, Local Government, Council, Board, Authority or any other government body and public office (s.45)**



# The Innovations

## 6. Protection against Bankruptcy – Parts V and VI of the Act

- Arrangements in Respect of Individuals
  - Interim Order
  - Arrangement Order
- Arrangements in Respect of Companies
  - Provisional Administration
  - Administration



# The Innovations

- Arrangements in Respect of Individuals (s.119-137)
  - Allows a debtor to apply to Court for an Interim Protection Order against enforcement by any creditors as he makes a proposal to his general body of creditors.
  - Interim Protection Order lapses after 14 working days but may be extended. This Order protects the debtor from:
    - Commencement of bankruptcy proceedings;
    - Creditor's enforcement of a charge e.g. appointment of receiver
    - Commencement of execution proceedings;
    - Levying distress on his property



# The Innovations

- Court will grant the Order if satisfied that:
  - The applicant has named an Insolvency Practitioner willing to act as **Supervisor** of his proposed arrangement;
  - Supervisor has been appointed to study the proposal and advise Court and Creditors;
  - The applicant has not made a previous application in the last preceding 12 months;
  - Making the order is appropriate for the purpose of facilitating the consideration and implementation of the debtor's arrangement



# The Innovations

- Supervisor required upon appointment to study the proposed arrangement and advise Court whether the proposal should be considered by creditors.
- Where Court directs for holding of a creditor's meeting,
  - Meeting to be called with 14 working days
  - Notice of meeting to be written to each known creditor, advertised in the gazette and news paper
  - Protection order may be extended
- Creditors may approve the proposal with or without modifications or reject it. If rejected, the debtor is given one more opportunity to make another proposal.
- Where the proposed modifications affect the rights of a preferred lender or secured lender, creditors shall not approve proposal without the consent of the secured lender or preferred creditor concerned.



# The Innovations

- **The Arrangement Order (S.125,127,129,132)**
  - Court may make ancillary orders as it thinks fit to give effect to the Arrangement Order
  - It binds the debtor, Supervisor and all creditors as at the day specified in the Order.
  - Creditors bound under the order shall not commence enforcement of debts without leave of court
  - Secured lender shall not be prevented from realising his security except in so far as he/she he agreed and voted in favour of the resolution leading to the arrangement order.
  - Arrangement may be varied on an application by any person bound in the order
  - Supervisor may call a creditor's meeting anytime during the arrangement





# The Innovations

- Termination of the Order (S.133,134)
  - If debtor provided false or misleading information material in the considerations of the creditors;
  - If debtor concealed information relevant for consideration by creditors;
  - A person bound by the order has failed to comply with the arrangement;
  - Arrangement is oppressive, unfair, prejudicial, discriminatory against one or more creditors;
  - Contrary to interests of creditors as a whole.
  - as may be agreed in the arrangement



# The Innovations

- The Supervisor
  - To employ necessary skill and acumen to ensure that the creditors approve the proposal.
  - Supervise and ensure the successful implementation of the arrangement



# The Innovations

- **Arrangements in Respect of Companies (S.139)**
  - **Provisional Administration**
    - Company applies to court for **Interim Protection** as it presents a settlement proposal to its creditors.
    - The company Petitions court for the Order after passing a **Special resolution** acknowledging that the company needs to make a settlement with creditors.
    - Order if granted does not exceed 30 days



# The Innovations

- **Provisional Administrator** appointed by Special resolution by the company on the date of the Interim protective order.
- Provisional Administrator is appointed to study the company's affairs and make recommendations then call a meeting of creditors
- Provisional Administrator must secure the consent of the secured lender holding a charge over the whole or substantially whole of the assets of property and undertaking of the company
- Provisional administrator is confirmed in his position by a vote at a creditor's meeting he must call within 5 days of commencement of the administration



# The Innovations

- Provisional administrator must also call another creditor's meeting within 10 days of commencement to consider the proposal.
- Creditors may resolve to
  - Execute an **administration deed**
  - To end the Provisional administration
  - To liquidate the company



# The Innovations

- Effect of appointment of Provisional Administrator (s.143)
  - No commencement of liquidation proceedings
  - No enforcement of security instruments
  - functions and powers of any liquidator or receiver already appointed are suspended
  - Freeze any dealings in the company's property
  - Freeze on any legal proceedings against the company
  - Freeze on execution and distress against the company's assets



# The Innovations

- Administration (s.149,150, 162, 165)
  - Commences when creditors approve the company's proposals and an **administration deed** is executed.
  - An **Administrator** is appointed to oversee the implementation of the administration deed.



# The Innovations

- As Provisional Administrator, the Practitioner may
  - Carry on the management of the business of the company;
  - Change the company's registered office;
  - Remove and appoint directors;
  - Call a meeting of shareholders and creditors of the company;
  - Perform any such function or exercise any such power of the company or its director or secretary





# The Innovations

## 7. Protection of the Insolvent's estate

- **Voidable Transactions**

- **Preference – S.15**

- Presumption of preference in respect of transfer of property within one year preceding bankruptcy

- **Under value transactions – S. 16**

- These are transactions entered into within a year proceedings bankruptcy whose value of consideration received by the company is significantly less than the value of the consideration provided by the company or individual.**



# The Innovations

- **Insider dealings – S.18**

**Specifically targets transactions entered into with spouses, siblings, children and persons of close social close proximity to the insolvent, or his/her employees, professional advisors or service providers twelve months before commencement of insolvency.**

- **Voidable Charges – S. 17**

charges created within one year preceding commencement of liquidation or bankruptcy



# The Innovations

- **Limitation of Commencement of Civil Suits, Caveats and caveat emptor notices – S.184**
  - Requirement to prove a prima facie case and furnish security for costs
  - Ex parte injunctions to lapse after 14 days
  - Suspensions of rules of procedure where necessary
  - Caveats registered on land to lapse after 30 days
  - Compensation and imprisonments for publication of caveat emptor notices without sufficient cause



# The Innovations

- **Establishment of Specialized Insolvency Court?**
  - Public Court registry
  - Cause lists of cases
  - Suspension of rules of procedure?
  - Peculiar knowledge of procedures at the Official Receiver's Office.



# The Innovations

## 8. Support for Cross Border Insolvency

- Reciprocity
- recognition of foreign proceedings and relief



*Thank You*