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A CRITICAL EVALUATION OF THE EFFECTIVENESS OF THE CORPORATE RESCUE PROCEDURE IN UGANDA: A COMPARATIVE ANALYSIS

THESIS SUBMITTED BY

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IN FULFILLMENT OF THE REQUIREMENT FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

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SUPERVISOR: PROFESSOR MOTSEOTSILE CLEMENT MARUMOAGAE

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ABSTRACT

This thesis evaluates the effectiveness of the corporate rescue framework in Uganda. This is done by tracing the historical development of insolvency law in Uganda, which was influenced by the English insolvency law. The reforms in Uganda's insolvency law, which introduced corporate rescue regime in Uganda are discussed in this thesis. This thesis further examines the importance of introducing corporate rescue measures in Uganda and assesses the role of these measures in saving companies that ought not to be liquidated.

Part VI of the Insolvency Act introduced administration as a rescue procedure while Part V of the Companies Act Cap 106 provides for arrangements and compromises as rescue procedures. This thesis demonstrates that the rescue procedures adopted in Uganda aim to give the company a lifeline and prevent it from sliding further into a complete financial crisis and eventual collapse. It demonstrates that despite the introduction of corporate rescue in the Insolvency Act, companies have continued to be liquidated, and the objective of rescue has not been achieved.

Available research shows that there are apparent weaknesses with the current legislative framework, which are highlighted in this thesis and recommendations for law reform are made. Drawing on the corporate rescue frameworks of the United Kingdom, Canada, Singapore, and South Africa, the thesis explores lessons that Uganda can learn from these jurisdictions to improve its corporate rescue regime.

DECLARATION

I, GRACE FLAVIA LAMUNO, hereby declare that the work presented in this thesis is my original work except as indicated in the references and acknowledgments and this work or any part of it has not been submitted before for another degree or examination in this or any other university.

SIGNATURE: 

DATE: 13.10.2025

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DEDICATION

This study is dedicated to entrepreneurs who, despite challenges, have exhibited strength and perseverance, remained resilient, and stayed afloat. May the legal reforms recommended here create a strong and effective framework for corporate rescue where companies are supported to be rescued, so that they flourish, and continue to contribute to the country and drive unprecedented economic growth.

This thesis is also dedicated to my family, and my friends, in appreciation of their support, encouragement, and love. Above all, this thesis is dedicated to God Almighty.

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I thank the Almighty God for giving me the strength, grace, wisdom and life to undertake this thesis to a successful completion.

I thank my supervisor, Professor Motseotsile Clement Marumoagae, for his extraordinary support, guidance, and patience throughout the entire journey. I will forever be indebted to him for his invaluable guidance, encouragement, and constructive feedback. Without his guidance and advice, this PhD journey would not have been accomplished. His wisdom has been instrumental in shaping the direction and quality of this study. I appreciate him.

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I am thankful to my siblings by birth and marriage, for constantly checking on me, and for their immeasurable love and support. I am confident that they are proud of me. I hope this thesis serves as an encouragement for others to follow.

To the love of my life and my greatest cheerleader, Billy Birungi, thank you for being a strong pillar of support, for constantly hyping me, and for helping me take those baby steps that eventually paid off. Thank you for the many unselfish sacrifices you have made to help me achieve this milestone – without your support, this would not have been possible.

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Finally, to everyone who contributed, no matter how small, it has played a significant role in shaping this study, and for that, I am deeply grateful.

ACRONYMS AND ABBREVIATIONS

ACRA	Accounting and Corporate Regulatory Authority
BIA	Bankruptcy and Insolvency Act
BR	Business Rescue
BRP	Business Rescue Practitioner
CBCA	Canada Business Corporations Act
CCAA	Companies' Creditors Arrangement Act.
CIGA	Corporate Insolvency and Governance Act 2020
COBE	Census of Business Establishments
COD	Cash-on-delivery
COMI	Centre of its main interests
CR	Corporate Rescue
CVA	Company Voluntary Arrangement
DIP	Debtor-in-possession
GDP	Gross Domestic Product
GEM	Global Entrepreneurship Monitor
ILO	International Labour Organisation
IP	Insolvency Practitioner
IRDA	Insolvency Restructuring Dissolution Act
ILRC	Insolvency Law Review Committee
JIEB	Joint Examination Insolvency Board
JM	Judicial Management
LIT	Licensed Insolvency Trustee
LPEs	Local Public Entities
LTD	Limited
MMA	Montréal, Maine & Atlantique Canada Co
MSCs	Medium and Small companies
MSMEs	Micro, Small and Medium Enterprises
NOI	Notice of Intention
OCW	Out-of-court workouts
OIC	Order-in-Council
OR	Official Receiver
OSB	Office of the Superintendent of Bankruptcy

PIP	Practitioner in possession
PPA	Pension Protection Act
SA	SA
SoA	Scheme of Arrangement
SDRP	Simplified Debt Restructuring Programme
SMEs	Small and Medium Companies
UCL	The Uganda Company Limited
UDC	Uganda Development Corporation
UEN	Unique Entity Number
UK	UK
ULRC	Uganda Law Reform Commission
URSB	Uganda Registration Services Bureau
WEPP	Wage Earner Protection Program
41R	Fourth Industrial Revolution

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CHAPTER ONE

CORPORATE RESCUE IN UGANDA: A CONTEXTUAL FRAMEWORK OF THE STUDY

1.1 INTRODUCTION TO THE STUDY

This study evaluates the effectiveness of the corporate rescue procedure in Uganda. It discusses corporate rescue measures in Uganda and their effectiveness in averting company failure. It examines how Uganda has crafted its corporate rescue system to identify some of the weaknesses that lead to the failure of companies that could be saved. Most significantly, the study evaluates how the rescue measures developed in Uganda could be improved. It undertakes a comparative analysis of corporate rescue procedures in the United Kingdom (hereafter UK), Canada, Singapore, and South Africa (hereafter SA) to identify international best practices and propose reforms to improve Uganda's CR legal framework.

In the context of the current study, a company is an integral part of the community in which it operates, and through its employees, suppliers, and distributors, it has a direct impact on the community's social and economic well-being.[1] Companies face various challenges in conducting business, one of which is 'financial distress', which can lead to the company's failure.[2] This failure more often than not leads to liquidation. Liquidation serves the basic purpose of winding up an ailing company through orderly collection and realisation of assets for the benefit of the claimants.[3] The collapse of a company affects many stakeholders, including: creditors, company managers, employees, and shareholders.[4] These stakeholders suffer losses when a company cannot meet its obligations. The company will cease trading, and its employees may lose their jobs. Creditors may not recover monies owed to them, and customers may have to look at other companies for goods. Communities may lose an important contributor to their quality of life, and a country may lose a source of tax revenue.[5] It is increasingly recognised that corporate insolvency laws have a significant impact on entrepreneurship and economic growth; hence, several countries attempt to identify best

[1] Anneli Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (Unpublished LLD, University of SA, 2010) 1.
[2] Param Pandya 'Corporate Insolvency Law & Corporate Rescue in India: An Economic Analysis' (2015) 1 at 3.
[3] Bo Xie *Corporate rescue – the new orientation of insolvency law* (2016) 3.
[4] Goode R *Principles of Corporate Insolvency Law* 4 ed (2011) 68.
[5] Jadesola Tiwalola Faseluka *A Critical Analysis of the Effectiveness of Corporate Rescue in Retail Sector Insolvency Cases* (Unpublished PhD, The University of Leeds, 2022) 11.

practices that allow them to boost their domestic economies by attempting to rescue viable companies.[6] The 2008 global financial crisis and the financial distress caused by the COVID-19 pandemic highlighted the importance of such initiatives.[7] These initiatives are generally referred to as 'corporate rescue'.

'Corporate Rescue' (hereafter CR) is 'a major intervention necessary to avert eventual failure of the company'.[8] Recently, some countries have introduced corporate rescue mechanisms for financially distressed but viable companies.[9] These corporate rescue mechanisms include formal and informal measures that can be adopted to improve companies' financial conditions.[10] This enables these companies to be rehabilitated and restored to solvency to avoid liquidation. This chapter provides a contextual understanding of what this thesis seeks to achieve and outlines the literature and legislative gaps it aims to fill by articulating the research problem and the questions explored in this thesis.

1.2 RESEARCH PROBLEM

In Uganda, Part VI of the Insolvency Act Cap 108[11] provides mechanisms for corporate rescue for financially distressed companies. This Act introduced the concept of 'administration' as a means of re-organising companies to restore them to profitability. Despite these legislative provisions, many companies continue to be liquidated raising concerns about the effectiveness of the corporate rescue procedures in Uganda. The mortality rate of businesses is high. Additionally, for every new business being established, another is closed within one year of its operation and only about 8% survive beyond 15 years.[12] The statistics show a recurring pattern of company liquidations in Uganda, with numbers rising from 6 in 2018/2019 to 15 in 2019/2020.[13] This pattern showed 28 in 2020/2021, 20 in 2021/2022,[14] 53 in 2022/2023, and 85 in 2023/2024.[15] This reflects frequent and steadily growing liquidations over the years. The

[6] Horst Eidenmüller 'Comparative Corporate Insolvency Law' (2016) 1 at 6.
[7] Jennifer Payne 'An Assessment of the UK Restructuring Moratorium' (2021) 454.
[8] Alice Belcher *Corporate Rescue* (1997) 12.
[9] See the Companies (Amendment) Act 2017 which was introduced in Singapore. See also the Restructuring Directive adopted by the European Parliament in 2019. See also the Corporate Insolvency and Governance Act 2020 that came into force on 26 June 2020 in UK.
[10] Pandya op cit note 2 at 3.
[11] The Insolvency Act Cap 108.
[12] Ministry of Trade, Industry and Cooperatives '*State of Entreprenuership in Uganda – 2024 Report'* at 106 available at*Uganda-Entreprenuership-Index-report_Final.pdf* accessed on 1 September 2025.
[13] Uganda Registration Services Bureau (URSB), Annual Report 2019/2020 available at *https://ursb.go.ug/* 34.
[14] Ibid Annual Report 2021/2022 available at *https://ursb.go.ug/* 24.
[15] Ibid Annual Report 2023/2024 available at *https://ursb.go.ug/* at 41.

frequent liquidation of companies has far-reaching social and economic consequences including rising unemployment, increased poverty and crime, and reduced tax revenue.[16] While the regulatory framework of administration is aimed at preventing these negative effects, companies have largely been unable to benefit from these rescue mechanisms due to a myriad of challenges. The statistics reveal a persistently low uptake of administration in Uganda, with only 2 companies filing in 2020/2021 (an 80% drop from 10 in 2019/2020), a slight rise to 3 in 2021/2022, and no reported filings in 2022/2023.[17] A key challenge in Uganda is that the corporate rescue framework is largely a transplant of foreign law from the UK adopted without sufficient modification to suit local conditions. This is the case although, unlike in developed countries such as the UK, Uganda's business operations are highly informal and predominantly SMEs requiring simple and low-cost procedures. As such, several weaknesses that hinder the effectiveness of the current corporate rescue regime are discussed below.

The Ugandan corporate rescue procedure lacks a definition of administration leading to ambiguity in interpretation and meaning. It is currently not particularly clear which companies can benefit from corporate rescue measures in Uganda. Without clear provisions regarding the applicability of corporate rescue laws to different types of companies, there may be inconsistencies in how these laws are applied across various sectors. More so, only directors and creditors are allowed to initiate the procedure leaving other stakeholders without recourse where the directors fail to act. Additionally, there are no sanctions for directors who fail to invoke administration in deserving cases, reducing their incentive for timely intervention.

It is also concerning that the commencement procedure is cumbersome. This procedure involves petitioning the courts which are already burdened with a huge case backlog.[18] The absence of *ipso facto* protection further jeorpadises company survival by allowing suppliers and service providers to terminate critical contracts upon the commencement of administration. Another limitation is the lack of an automatic moratorium coupled with a weak moratorium which fails to adequately shield companies from secured creditor enforcement. This undermines the company's rescue efforts since its assets are being channeled to settle creditor claims. There is inadequate regulation and oversight of administrators, coupled with

[16] David O Mbat & Eyo I Eyo 'Corporate Failure: Causes and Remedies' (2013) 2 Business and Management Research 19.
[17] Uganda Registration Services Bureau (URSB) op cit note 13 Annual Report 2020/2021; 33.
[18] The Judiciary Annual Performance Report FY 2023/2024 (2024) indicates that overall, courts closed with a pending caseload of 161,838 cases of which 42,588 were backlog 43 available at *https://www.judiciary.go.ug/* accessed on 1 September 2025.

their limited expertise and knowledge in corporate rescue. The law imposes a rigid thirty-day timeframe for provisional administration with any extensions requiring court approval.[19]

Under the Companies Act, Cap 106, company voluntary arrangements and schemes of arrangements are provided as alternatives to liquidation. These procedures remain under-utilised due to the complexity of the procedures which require court involvement, the high costs, and the lack of moratorium. The above-mentioned flaws in Uganda's insolvency framework threaten the rescue of distressed companies that could potentially recover.[20] In light of these weaknesses, this study comprehensively evaluated the corporate rescue procedures in Uganda.

1.3 RESEARCH QUESTIONS

The study sought to answer the following questions:

1.3.1 Is the corporate rescue regime in Uganda better suited to create a workable platform that can lead to companies that ought not to be liquidated being saved?

1.3.2 What lessons, if any, can be drawn from the corporate rescue regimes of the United Kingdom, Canada, Singapore, and South Africa to reform the Ugandan corporate rescue regime?

1.4 AIMS AND OBJECTIVES

This study aimed to evaluate whether the corporate rescue regime in Uganda is effective and affords financially distressed companies that can be saved an opportunity to be rescued. It further aimed to examine and analyse the corporate rescue procedures provided for in Uganda to determine their effectiveness as rescue models and the requirements for their effective administration. To improve the Ugandan corporate rescue legal framework, the study examined the corporate rescue approaches of the United Kingdom, Canada, Singapore, and South Africa to identify lessons that Uganda can learn from these jurisdictions to strengthen its corporate rescue regulatory framework.

[19] The Insolvency Act op cit note 11 s 147.
[20] Waiswa Abudu Sallam *An Evaluation of the Strengths and Weaknesses of South Africa's Corporate Rescue Regime as a Potential Benchmark for Uganda* (unpublished PHD thesis, University of South Africa 2022) 9.

1.5 RESEARCH METHODOLOGY

This was a desktop research that involved 'a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation.'[21] The desktop research method examines a legal issue through an examination of the meaning of legal rules, principles, doctrines, and judicial statements relating to the issue.[22] I reviewed and discussed primary and secondary sources of law. The sources I drew upon included legislation, case law, policies, reports of government, working papers, white papers, committee reports, relevant electronic sources such as websites of various organisations, textbooks, dissertations and theses, journal articles, newspaper articles, magazine articles and relevant electronic/internet sources such as websites for various local and international bodies as well as reports from leading research and regulatory bodies.

1.6 BACKGROUND TO THE STUDY

1.6.1 Overview

The corporate rescue mechanism is a legislative initiative that assists financially distressed companies in remaining financially viable. It offers a structured approach aimed at revitalising operations and restoring solvency to prevent the company's eventual failure.[23] Naidoo, Patel, and Padia stated that corporate rescue aims to revive financially distressed companies and offer them an alternative path to liquidation.[24] Unlike liquidation, corporate rescue focuses on re-organisation and recovery, allowing the business to continue as a going concern. By prioritising rehabilitation over liquidation, corporate rescue initiatives can help maintain jobs, support local economies, and give creditors a better chance of recovering their investments.[25] This approach aims to balance the company's and its creditors' needs, offering a more sustainable solution than liquidation.

[21] Faseluka op cit note 5 at 16.
[22] Ibid.
[23] Belcher op cit note 8 at 12.
[24] Talira Naidoo, Adnan Patel & Nirupa Padia 'Business rescue practices in South Africa: An explorative view.' (2018) *11*(1) *Journal of Economic and Financial Sciences* 1.
[25] Jennifer LL Gant 'The role of social policy in corporate rescue and restructuring: A Messy Business.' in Jennifer L L Gant and Paul J Omar (eds), *Research Handbook on Corporate Restructuring* (Edward Elgar Publishing 2021) ch 25; 16.

Corporate rescue involves undertaking proceedings to facilitate the rehabilitation of a financially distressed company. This is done by allowing it to re-organise its affairs and have room to fix the issues affecting the business to survive.[26] The process typically begins when a company identifies financial difficulties and seeks protection under specific legal provisions.[27] This may involve appointing an administrator or a licensed insolvency practitioner who will assess the company's financial situation, negotiate with creditors, and develop a recovery plan.[28] The plan may include debt restructuring, operational changes, and new financing arrangements aimed at restoring the company's profitability and long-term viability. It also includes a temporary moratorium on the rights of the creditors against the company or its property, a process generally referred to as breathing space. It provides a platform to put measures in place to save companies. The primary goal of corporate rescue is to provide a company with an opportunity to restructure its operations, reduce debt, and improve its overall financial health, thereby preserving its value as a going concern.[29]

1.6.2 Corporate Rescue in Uganda

The primary legislation governing insolvency in Uganda is the Insolvency Act Cap 108.[30] This Act regulates formal insolvency procedures such as administration,[31] receivership,[32] liquidations,[33] and cross-border insolvency proceedings.[34] The Insolvency Act Cap 108 is supported by the Insolvency Regulations 2013.[35] It provides detailed rules for managing insolvency proceedings. The other relevant legislation is the Companies Act Cap 106,[36] which includes provisions that deal with corporate insolvency and financial distress such as

[26] Donald Nyakairu and Tracy Kakongi 'A 101 guide to insolvency and business rescue in Uganda' available at *https://www.mondaq.com/insolvencybankruptcy/973362/a-101-guide-to-insolvency-and-business-rescue-in-uganda*-accessed on 25 March 2021.
[27] Marius Pretorius and Wanya Du Preez 'Expectations of a business rescue plan: international directives for Chapter 6 implementation.' (2014) *18*(2) *Southern African Business Review* 108 at 113.
[28] Marius Pretorius 'Tasks and activities of the business rescue practitioner: A strategy as practice approach.' (2013) 17 (3) *Southern African Business Review* 1 at 6.
[29] Maphiri Mikovhe Comfort *Business rescue in South Africa and its practical application to SME's (small to medium enterprises)* (unpublished LLM thesis, University of Cape Town, 2015) 64.
[30] The Insolvency Act Cap 108.
[31] Ibid ss 140-178.
[32] Ibid ss 179-201.
[33] Ibid ss 56-118.
[34] Ibid Part IX, ss 216-243.
[35] Statutory Instrument No 36 of 2013 and Statutory Instrument No. 76 of 2023.
[36] The Companies Act Cap 106.

compromises and arrangements,[37] reconstructions and amalgamation,[38] and voluntary winding-up.[39] Other insolvency procedures will not be discussed due to the focus on corporate rescue.

There is a dearth of research in Uganda on corporate rescue. For example, regarding the best approach to insolvency, Nyombi[40] argues that future reforms in Uganda should not be streamlined towards a particular objective rather than a general approach to insolvency regulation and that a balance of various objectives serves the purpose of a modern insolvency law system. Additionally, Nsubuga[41] notes that there is a need for Uganda's insolvency framework to include special provisions on the treatment of Local Public Entities in distress to support and facilitate their rehabilitation and rescue endeavours as they play a key role in the functioning of localities and the economy at large. Similarly, Ssekaana[42] argues that insolvency proceedings should not be commenced before exhausting other modes of execution nor should they be used as a debt collection tool. Waiswa[43] compares the law and practice of corporate rescue in SA and Uganda, with specific focus on identifying the strengths in the SA legal regime as a potential benchmark for addressing the weaknesses in the Uganda legal system. Nkundabanyanga, Mugabe, Niringiye, Kabuye, Opiso & Wakwabubi[44] discuss the causes of corporate insolvency in Uganda. They note that key among these are management ineptitude, poor decision-making by the management team, delayed detection of the early indicators of enterprise collapse, and taking on initiatives that are too big for the organisation.

Additionally, Nsubuga,[45] regarding why corporate rescue as a policy objective of Uganda's insolvency law has yet to achieve its intended objectives argues that some developed jurisdictions, such as the UK and the EU, have taken initiatives to reform their corporate insolvency and restructuring laws and processes to provide businesses/debtors with debtor-friendly and recovery-focused frameworks. However, some developing jurisdictions, such as

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[37] Ibid ss 230-231.
[38] Ibid ss 232-242.
[39] Ibid Part IX ss 266-270.
[40] Chrispas Nyombi 'The objectives of corporate insolvency law: lessons for Uganda' (2018) 60 (1) *International Journal of Law and Management* 2-18 generally.
[41] Hamissi Junior Nsubuga 'Local public entities in distress: an analysis of the Ugandan approach.' in Coordes, L. & Vaccari, E. (Eds.), When Liquidation is not an Option – A Global Study on Local Public Entities in Financial Distress (2022) London, UK: INSOL International 128-138 generally.
[42] Hon. Justice Ssekaana Musa presentation Paper –Countering Abuse of Insolvency Processes: A Judge's Perspective, URSB Insolvency Training of Judicial Officers on 24th March 2023 available at: *https://ssekaana.com/blogs/the-layman-s-guide-to-law/posts/6931166/countering-abuse-of- insolvency-processes-a-judge-s-perspective* accessed on 20 May 2023.
[43] Waiswa op cit note 20 generally.
[44]Stephen K. Nkundabanyanga, Mugabe Robert, Rachel Niringiye, Frank Kabuye & Julius Opiso 'The causes of corporate insolvency in Uganda: Perceptions of executives, managers, insolvency practitioners, and academicians' (2024) 2 (1) *The Insolvency Journal of Uganda* 13-44 generally.
[45] Nsubuga HJ 'Reinvigorating corporate rescue in developing economies - a Ugandan perspective' *(*2021), 34(4) *Insolvency Intelligence* 95-102 generally.

Uganda have yet to take action. Waiswa[46] is of the view that the Fourth Industrial Revolution (hereafter 4IR) technologies have the potential to support business rescue processes on two fronts. First, by helping business and company owners and managers to improve their operational efficiencies and hence avoid sliding into financial distress. Additionally, post-entry into corporate rescue procedure, insolvency practitioners, including provisional administrators and administrators, can utilise 4IR technologies to improve and efficiently discharge their statutory duties and powers, and hence increase their chances of success in rehabilitating the hitherto distressed companies.

Nyombi, Kibandama & Bakibinga[47] provide a comprehensive assessment of the motivations behind corporate insolvency law reform in Uganda rather than a description of existing statutory rules and case law. They argue that it is important that insolvency law developments have a sense of purpose geared towards serving the needs of multiple national constituents. A lack of a clear vision and purpose is likely to leave this area of law marked by inconsistencies in application, abuse of procedural rules, and a failure of policy objectives. Elsewhere, Nyombi[48] explores the development of corporate rescue laws in Uganda and those in the UK to inform legal reformers in Uganda on the motivations behind insolvency law reforms in the UK and the lessons they can learn from these reforms. He posits that Uganda has been observant of insolvency law reforms in the UK and this is reflected in the new Insolvency Act.

While all these authors discuss insolvency, none of them addresses the extent to which the corporate rescue procedures in Uganda have been effective in preventing unnecessary liquidations and promoting rescue. Additionally, none comparatively examines how the effectiveness of the corporate rescue procedures compares to the UK, Canada, Singapore, and SA. This is the focus of the current study. Most significantly, this study not only recommends law reform, but also suggests the process of this reform regarding what should be included in the Insolvency Act.

1.6.2.1 Administration

[46] Waiswa Abudu Sallam '4IR Technologies: The New Hope for rescuing distressed Companies in Uganda' (2024) 2 (1) *The Insolvency Journal of Uganda* 67-89 generally.
[47] Chrispas Nyombi, Alexander Kibandama and David Justin Bakibinga 'The Motivations behind the Uganda Insolvency Act 2011' (2014) 8 *Journal of Business Law* 652-667 generally.
[48] Chrispas Nyombi 'The development of corporate rescue laws in Uganda and the UK' (2015) 57 (2) *International Journal of Law and Management* 174-201 generally.

Part VI of the Insolvency Act provides for administration in respect of companies. The Insolvency Act and the Regulations are silent on the meaning of the concept of 'administration'. Generally, 'administration' may be defined as the 'substantive formal corporate rescue procedure that a company enters into following the creditors' approval of the provisional administrator's proposal and the passing of a creditors' resolution authorising the company and the proposed administrator to execute an administration deed'.[49] The concept of 'administration' enables re-organising companies and restoring them to profitability.[50] Administrators, who must be insolvency practitioners, handle the administration process. This procedure provides a moratorium for the potential economic recovery of the company. The moratorium aims to give the administrator a breathing space to save the company without litigation being brought against the company during the period of administration.[51] The Insolvency Act introduced specific procedures for corporate rescue, notably provisional administration and administration.[52]

1.6.2.1.1 Provisional Administration

Before a company appointing a provisional administrator, a company must, by special resolution, agree that it needs to make a settlement. Once the company has agreed to this, it shall petition the court for an interim order.[53] Administration imposes a freeze or moratorium on all creditor actions and legal proceedings against the company through an interim protective order.[54] When the court grants the interim protective order, a provisional administrator of a company is appointed by a special resolution of the board. The provisional administrator is mandated to act to 'rescue the company as a going concern'[55] and in the alternative, 'achieve a more advantageous realisation of the company's assets than would be effected in a liquidation'.[56] The provisional administrator has to produce a statement of proposals for achieving the objectives of the administration and call a creditors' meeting to consider the proposals.[57] At the meeting, the creditors may resolve that the company executes an administration deed, or that the provisional administration ends or that the company goes into

[49] Waiswa op cit note 20 at 289-290.
[50] Ibid.
[51] Ibid.
[52] The Insolvency Act Cap 108 Part VI ss 140–178.
[53] Ibid s 141(3)-(4).
[54] Ibid Part VI s 145(1)*(f)* s166 (2)*(b)*(i)*(ii)*.
[55] Ibid s 142 (1) *(b)(i).*
[56] Ibid s 142 (1) *(b)(iii).*
[57] Ibid s 149 (1).

liquidation.[58] In *Uganda Telecom Limited v Ondoma Samuel t/a Alaka and Company Advocates*,[59] Mubiru J held: '… Under section 148(3) of the Act, a creditors' meeting may resolve that the company executes an administration deed as specified in the resolution. This acts as a binding agreement between the company and its creditors about payment of all, or part of, its debts over an agreed period, designed to either salvage the company or distribute the company's assets…'.[60] If an administration deed is approved,[61] the company will enter formal administration.

1.6.2.1.2 Administration

A company in a general meeting executes an administration deed to commence administration. Upon execution, the appointment of the administrator takes effect.[62] Upon commencement of administration, the administrator must notify creditors, the public, and the official receiver.[63] The administrator must then manage the company following the requirements of the administration deed. The deed is binding on the company, its directors, secretary, shareholders, the administrator; and all its creditors concerning claims arising on or before the day specified in the deed.[64] Administration imposes a moratorium on all enforcement, execution, and other legal processes against the company by all persons bound by the deed though secured creditors can enforce charges over company property.[65] An administrator, with creditor approval, may borrow funds and grant security over company property.[66] However, such financing must not exceed the value of the company's unencumbered assets at the time the administration deed is executed.[67] The administrator may call a creditors' meeting at any time during the administration or also when requested in writing by creditors.[68] An administration deed may be varied by a resolution passed at a creditors' meeting.[69] Administration terminates either by

[58] Ibid s 150 (3).
[59] High Court Misc. Application No.0012 of 2018.
[60] Ibid para 25.
[61] The Insolvency Act Cap 108 ss 140*(b)(ii)*; 147, 148, 149, 150.
[62] Ibid s 164.
[63] Ibid s 165.
[64] Ibid s 166 (1).
[65] Ibid s 166 (2).
[66] Ibid s 167 (1).
[67] Ibid s 167 (2).
[68] Ibid s 169.
[69] Ibid s 170.

court order or circumstances specified in the deed for terminating it.[70] Upon termination, the administrator shall notify the public, creditors; shareholders registrar; and official receiver.[71]

1.6.2.2 Arrangements and Compromises

To manage its imminent financial distress, a company may try to reach a compromise or an arrangement with its creditors, shareholders or members.[72] The Companies Act Cap 106 provides for Company Voluntary Arrangements (hereafter CVAs) and schemes of arrangement as alternative remedies to liquidation.

1.6.2.2.1 Company Voluntary Arrangements (CVAs)

A CVA is a contract between a company in financial difficulty and certain of its creditors. It enables a company to restructure and compromise its debts and liabilities. It also enables it to generate a better financial return and better prospects for the business than if the company entered into a formal insolvency procedure, such as liquidation.[73] A CVA is commenced by company directors who want to enter into a compromise or arrangement with its creditors or members.[74] The company, creditors, or members apply to the court to request a meeting.[75] On the date of the meeting, the majority in number representing three-fourths in value of the creditors or members must vote in favour of the compromise or arrangement.[76] Upon sanction by the court, the compromise or arrangement is binding on the company, all the creditors and members, or a class of creditors or members.[77] The terms of a CVA determine how long it will last. Once the terms of a CVA have been carried out, it terminates. Corporate rescue may be achieved through the CVA wherein distressed companies are saved in whole or in part with the agreed composition of their debts by their unsecured creditors to allow companies to continue their businesses and retain their employees.[78]

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[70] Ibid s 171.
[71] Ibid s 173.
[72] The Companies Act 2012 Cap 106 Part V ss 230, 231, 232.
[73] Juliette Challenger 'The Changing Face of the CVA and Schemes of Arrangement' available at *https://glas.agency/whitepaper/changing-face-of-cva-and-schemes-of-arrangement/* accessed on 20 March 2023.
[74] The Companies Act 2012 Cap 106 Part V s 234(1).
[75] Ibid s 234(1).
[76] Ibid s 234(2).
[77] Ibid s 234(2).
[78] Peter Walton & Chris Umfreville Lézelle Jacobs 'A snapshot of company voluntary arrangements: Success, failure and proposals for reform' (2020) 29 (2) *International Insolvency Review* 267 at 273.

1.6.2.2.2 Schemes of Arrangement

Arrangement is a 'reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes by both or by both methods'.[79] It is an agreement, between a company in financial distress and its creditors, to assist the company in fulfilling its debt obligations. A scheme of arrangement works by restructuring the company's debts and varying creditors' rights. Arrangements comprise such various schemes such as conversion of debt into equity, reconstruction, or amalgamation.[80] The Scheme is also commonly used for takeover or merger transactions.[81] The objective of the Scheme is to arrive at a binding compromise or arrangement with the creditors and/or, with its members.[82] A scheme of arrangement is commonly used in corporate terrain to secure compromises with creditors of a company in financial trouble. It envisages the concept of restructuring of the mutual rights and obligations of the members and the company.[83] An application for sanction of a compromise or arrangement proposed between a company and its creditors or members is made to the court. The applicant must show that the proposed compromise or arrangement is in connection with a scheme for the reconstruction of a company or amalgamation of two or more companies. If satisfied, the court will order its sanction.[84]

These insolvency mechanisms under the Companies Act apply to companies that are liable to be wound up and are designed to benefit creditors or members and are not typical rescue procedures. When developing the administration deed, the Administrator may use a CVA or scheme of arrangement to achieve the survival of the company. Tribe notes that a CVA is meant to be a mechanism that 'helps facilitate recovery in conjunction with other mechanisms'.[85] Neuberger, LJ (as he then was) observed in *Commissioners of Inland Revenue v The Wimbledon Football Club Ltd* and others that '…the CVA regime is intended to be an

[79] The Companies Act Cap 106 Part V s 234(5).
[80] Roy Goode, *Principles of Corporate Insolvency Law* 3 ed (2005) 26- 27.
[81] Ruzita Azmi *A Comparative Study of Corporate Rescue in the UK and Malaysia* (Unpublished PhD Thesis, University of Aberdeen 2008) 183.
[82] C Mallon & S A Willcock *PLC Cross Border Restructuring and Insolvency Handbook* (2005) 140.
[83] Neeti Shikh 'Takeover through Scheme of Arrangement: A Changing Trend in UK' (2013 January 1) 87 at 88.
[84] The Companies Act Cap 106 Part V s 232 (1).
[85] John Paul Tribe 'Company Voluntary Arrangements and Rescue: A New Hope and a Tudor Orthodoxy' (2009) *Journal of Business Law (UK)* 454 at 463.

additional, and particularly flexible option in the case of corporate insolvency, in addition to liquidation, administration, and administrative receivership…'.[86]

Despite the existence of such provisions, companies in Uganda have continued to fail. Most of them have not been successfully rescued. In 2014, Uganda was the third highest-ranked entrepreneurial nation in the Global Entrepreneurship Monitor (hereafter GEM), with 28% of adults owning or co-owning new businesses. However, the GEM report shows that Uganda also suffers from some of the highest business discontinuation rates in the world - 21%.[87] Companies in Uganda often fail due to a mix of internal and external factors, with the lack of management skills and poor corporate governance being major reasons. Poor financial management, weak strategic planning, and inadequate leadership can significantly limit a company's effectiveness and ability to compete.[88] This skill gap, combined with insufficient corporate governance practices, leads to inefficient use of resources, bad decision-making, and a struggle to adapt to market changes.[89]

Externally, issues like economic instability, changing exchange rates, and high inflation can harm profitability. Regulatory challenges, such as complicated tax rules and bureaucratic processes further hinder growth and innovation in Uganda. Many businesses face limited access to affordable financing, making it hard for them to invest in necessary improvements or adjust to changing conditions. The lack of management skills and poor corporate governance contribute significantly to the high failure rate of businesses in Uganda.[90] Failure to build a significant and successful body of entrepreneurs is a deterrent to wealth creation in emerging economies. This impacts the opportunities for employment creation and income generation.[91]

1.6.3 Overview of Uganda's Corporate Rescue Regime

Uganda has witnessed many companies being liquidated. The financial sector has also not been spared with National Bank of Commerce and Crane Bank Limited being taken over by the

[86] *Commissioners of Inland Revenue v The Wimbledon Football Club Ltd and others* (2004) EWCA Civ 655 para 53.
[87] Global Entrepreneurship Monitor 2014 Global Report at 35 and 81, available at *http://www.gemconsortium.org/report/gem-2014-global-report* accessed on 6 September 2025.
[88] Charles Tushabomwe Kazooba 'Causes of small business failure in Uganda: A case study from Bushenyi and Mbarara towns.' (2006) 8 (4) *African studies quarterly* 27 at 32.
[89] Simeon Wanyama, Bruce Burton and Christine Helliar 'Stakeholders, accountability and the theory-practice gap in developing nations' corporate governance systems: Evidence from Uganda.' (2013) *13*(1), *Corporate Governance: The international journal of business in society* 18 at 28-29.
[90] Jamiah Mayanja *Business Ethics in Ugandan Small and Medium-Sized Enterprises* (Unpublished PhD Thesis, the Nelson Mandela Metropolitan University, 2016) 4.
[91] Ibid at 72-73.

Bank of Uganda (BoU) on the grounds of financial constraints and insolvency while Global Trust Bank (Uganda) Limited's licence was revoked because of insolvency.[92] The law on corporate rescue in Uganda has not achieved the objective for which it was created, something that has raised questions regarding its effectiveness. One challenge affecting the success of the corporate rescue is that it is a mere transplant of a foreign law without considering Uganda's unique cultural and economic conditions. The appropriateness of any legal procedures must be looked at not in terms of what is internationally known to be workable or better, but whether they promote the welfare and larger interests of the majority of the people they are meant to serve.[93] There is a need to realign the corporate rescue procedures in Uganda by introducing procedures that suit the business culture, economy, and people of Uganda which will no doubt see more companies be successfully rescued, as this study will show in later chapters.

Importantly, the Insolvency Act does not contain a definition of either corporate or business rescue or administration. One of the tenets of legislative drafting is that a law should be clear, precise, and unambiguous. The first step in the legislative drafting process is identifying the objectives to be achieved and the policies to be implemented.[94] For the law to achieve the objective of corporate rescue, its provisions need to be unambiguous. A precise legal definition is essential for guiding the actions of all parties involved in corporate rescue proceedings, ensuring that they understand their rights, obligations, and the processes to follow.[95] This clarity is vital not only for compliance, but also for fostering confidence in the legal system among businesses facing financial distress.

In Uganda, most of the businesses are not operated formally. They are inadvertently left out of the ambit of the law on corporate rescue. The International Labour Organisation (hereafter ILO) estimates that more than 66% of total employment in Sub-Saharan Africa is in the informal sector.[96] In Uganda, the informal sector accounts for 81.7% of the economy, and up to 50% of the Gross Domestic Product (hereafter GDP) is attributed to it.[97] Given that the law on corporate rescue limits its applicability to companies formally incorporated, this

[92] Isaac Khisa 'How DFCU beat other investors to take over crane bank' (2017) *The Independent Magazine*, Issue No 455 03- 09 Feb 2017 accessed on 20 March 2021.
[93] Mark Evan Segal *Legislative Drafting: Principles and Materials* (2011) 31.
[94] Ibid at 6.
[95] Ibid at 99-100.
[96] Angus Morgan Kathage 'Understanding the informal economy in African cities: Recent evidence from Kampala' available at *https://www.howwemadeitinafrica.com/understanding-informal-economy-african-cities-recent-evidence-kampala/61105/* accessed on 15 April 2021.
[97] Uganda Bureau of Statistics 2019/2020 Census of Business Establishments (COBE) Report at 11 available at *https://www.ubos.org/2019-2020-census-of-business-establishments-cobe-report/* accessed on 07 Septemeber 2025.

automatically leaves out businesses that are operating informally. Considering the significant importance of these businesses to the economy, there is a need to put in place rescue procedures that regulate both formal and informal businesses to achieve the objective of keeping business as a going concern.

Generally, scholars have shown that there are creditor-oriented regimes where the final decision of the rescue lies in the hands of the creditors and then the other regimes are wider stakeholder oriented where the final decision lies in the hands of all stakeholders.[98] In this regard, Tribe[99] argues that concerning company rescue there are a variety of options available for different circumstances, liquidity levels, and objectives and he discusses Company Voluntary Arrangements. Amour, Hsu, and Walters[100] argue that there are formal and informal procedures for corporate rescue. The scholars focus on receivership and administration. Franken[101] analyses creditor and debtor-oriented corporate bankruptcy regimes. In Uganda, the rescue regime under Part VI of the Insolvency Act, Cap 108 is creditor-oriented where the decision for the company to proceed with the rescue lies with the creditors. However, creditors will frustrate or even fail any attempts by the company toward rescue. They will seek to selfishly recover their money from the company to the detriment of other stakeholders like employees and members of the company. There is a need to have a multifaceted corporate rescue approach to guard against such hindrances towards company rescue and ensure that the interests of all stakeholders are properly balanced.

The Insolvency Act in Uganda provides for rescue aimed at the survival of the company and the whole or any part of its undertaking as a going concern without stating the process of achieving this.[102] It also does not provide the yardstick to use when opting for the chosen option.[103] The decision is ultimately left to the administrator. Notably, where the law promotes going concern sales in insolvency proceedings, the law must address the intricate governance problems raised thereby. Corporate rescue and insolvency often arise where there are poor corporate governance standards. Arguably, corporate insolvency and good corporate

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[98] Faisal Mukasa 'Protection and Enforcement of Clients' Rights: Corporate Rescue Vis-à-vis Liquidation' paper presented at the Uganda Law Society Continuing Legal Education Training on 'Understanding Insolvency Law and Practice' at the Gold Course Hotel Kampala on 3st January 2012.

[99] Tribe op cit note 85 generally.

[100] John Armour Audrey Wen-Hsin Hsu & Adrian Walters A 'Corporate Insolvency in the UK: The Impact of the Enterprise Act 2002' (June 2008) 5 (2) *European Company and Financial Law Review* 148-171 generally.

[101] Franken Sefa Franken S 'Creditor- and Debtor-Oriented Corporate Bankruptcy Regimes Revisited' (2004) *European Business Organization Law Review* 645-676 generally.

[102] Insolvency Act op cit note 11 s 142 (1) (b) *(i).*

[103] Sylvester Henry Wambuga *Corporate Rescue in Uganda: A critical assessment of the need for a corporate rescue culture* (Unpublished LLM Thesis, Makerere University, 2012) 49.

governance are often the opposite sides of the same coin.[104] To achieve a successful corporate rescue, there should be a holistic approach that takes into account measures to address corporate failure.

Eidenmüller,[105] Tribe,[106] Jensen,[107] and Payne[108] have argued that 'the sooner a rescue procedure is invoked, the greater the chances of a successful rescue.' Intervention at a sufficiently early stage, once a company encounters financial difficulties, is a key issue in the success of a rescue procedure.[109] For example, in the case of *Welman v Marcelle Props*[110], the court held that, '…business rescue proceedings are not for terminally ill close corporations, nor are they for the chronically ill. They are for ailing corporations, which given time will be rescued and become solvent'. In *Uganda Telecom Limited vs Ondoma Samuel t/a Alaka and Company Advocates*, Justice Mubiru noted that '…the procedure is designed primarily to deal with situations when there is an urgent need to protect the value of a business from enforcement action by unpaid creditors...'.[111] In Uganda, corporate rescue proceedings appear to be initiated at a time when the company is already insolvent. Ideally, a company should be allowed to initiate corporate rescue proceedings at the first signs of financial problems. Where the law stipulates that the company must first get to the level where it is financially distressed and unable to pay its debts, this presupposes that the company must be insolvent.[112]

The period of thirty days[113] within which the administrator is required to conclude the corporate rescue procedure under administration is short. It is inconceivable to imagine that a financially distressed company can be turned around in just one month. Although the period may be extended, the procedure for its extension is not only expensive, but is time-consuming and onerous since it involves a court sanction. This is a deterrent to companies seeking to initiate corporate rescue. Currently, it remains to be seen whether the period provided in the

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[104] Roman Tomasic **'**Between a Rock and a Hard Place - A Post-Northern Rock Regime for the Rescue of Failing Banks' (2008) 1 (5) 141-143 *Corporate Rescue and Insolvency* generally.
[105] Eidenmüller op cit note 6 at 6.
[106] John Paul Tribe 'Companies Act Schemes of Arrangement and Rescue: The Lost Cousin of Restructuring Practice?' (2009) *Journal of International Banking and Financial Law (JIBFL)* 386-392 generally.
[107] Michael C Jensen 'Active Investors, LBOs, and the Privatization of Bankruptcy' (1989) 2 (1) *Journal of Applied Corporate Finance* 77-85 generally.
[108] Jennifer Payne 'An Assessment of the UK Restructuring Moratorium' Electronic copy available at: *https://ssrn.com/abstract=3759730* accessed on 5th March 2021 generally.
[109] Vanessa Finch '*Corporate Insolvency Law – Principles and Perspectives'* 2 ed (2009).
[110] 193 CC JDR 0408 (GST).
[111] Miscellaneous Application No 0012 of 2018.
[112] The Insolvency Act Cap 108 s141 (2) which provides that the notice appointing a provisional administrator shall include a certificate signed by the appointer certifying that, at the time of the appointment, there is reason to believe that the company is or will be unable to pay its debts.
[113] Ibid s147 (1) *(a)* and s147 (3) provisional administration terminates when; the period specified in the interim order lapses and the period shall not be more than thirty days and on application made by the provisional administrator, court may in exceptional circumstances extend the period.

Act will be sufficiently valuable for companies, particularly those contemplating complex restructurings.

The person responsible for handling the corporate rescue procedure under administration is the administrator. The Insolvency Act defines an 'administrator' as a person specified as administrator in an administration deed.[114] An 'insolvency practitioner' means 'a person who acts as a receiver; a provisional administrator; an administrator; a provisional liquidator; a liquidator; a proposed supervisor of a voluntary arrangement; a supervisor of a voluntary arrangement; or a trustee in bankruptcy'.[115] However, there is no clear definition of who an administrator is under the law. There is a need for clarity regarding this given the important role that they play in seeking to rescue financially struggling companies. Since the practitioner can exercise management powers and is responsible for developing rescue proposals, their expertise and competence are crucial.[116] This area is still nascent in Uganda. Many insolvency practitioners lack experience in this field and many of them do not have experience in running companies, there is, therefore, a need to develop a centralised licensing, regulatory, and skill set for IPs to ensure uniformity. There is a need to build capacity in this area to see a successful corporate rescue of companies.

In Uganda, once the court grants an interim protective order, the company is allowed to restructure its business with the aim that it does not end up being liquidated. *In the Matter of Sunshine Agro Products Limited (In Administration)*[117] Justice Ssekaana stated, '…Provisional administration provides breathing space to achieve a turnaround or structured exit and is designed to hold a business together …'. However, not many companies have taken advantage of this 'breathing space'. Some companies have been choked by the many claims filed against them by creditors, ultimately plunging them into liquidation. It is therefore important to establish why corporate rescue is not being successfully achieved and to address any hindrances to this in the legal framework to realise the objective of rescue.

1.7 COMPARATIVE STUDY

The current study also reflects on the law regulating corporate rescue in the UK, Canada, Singapore, and SA. The UK was chosen as it follows the common law tradition, in which

[114] Ibid s 1.
[115] Ibid s 207 (1).
[116] Ibid s 208; Statutory Instruments no 36 of 2013 Part XII regs 193-197.
[117] Miscellaneous Application 344 of 2019 (Arising from Company Cause No. 25 of 2018) 5.

Uganda's corporate rescue regimes find their origin. Canada and Singapore, having historical ties to the British Empire, incorporated the UK principles to varying extents, making them relevant to this comparative study.[118] They were also chosen for their adoption of United States insolvency principles, which diverge from the UK regime.[119] SA was selected because, despite being an emerging economy, it has registered significant success in its rescue regime. Corporate insolvency regimes vary substantially across countries and in different respects.[120] It is appreciated that the stages of development, systems of law and regulation, and overall institutional frameworks are very different in almost all jurisdictions and can greatly affect how well a given jurisdiction's insolvency system works. Nevertheless, differences should not hinder learning from other jurisdictions since the purposes of insolvency law are similar.[121] Consequently, it is appropriate to do a comparative analysis of the insolvency rules, that is, the laws that perform similar functions in this regard in different jurisdictions.[122]

1.8 SUMMARY OF THE CHAPTERS

Chapter Two traces the historical development of corporate insolvency law in Uganda. It illustrates how Uganda's insolvency framework has been influenced by English insolvency law and briefly examines the history of English insolvency law. It also illustrates how Uganda adopted English insolvency law. It discusses the insolvency legislative framework that was promulgated in Uganda to regulate corporate insolvency highlighting its impact and shortcomings. This led to the need for insolvency reforms to introduce corporate rescue in Uganda which is briefly discussed.

The third chapter provides a detailed analysis of the regulatory framework of corporate rescue in Uganda. It starts by highlighting the importance of companies and explains some of the challenges that lead to corporate failures and the need for corporate rescue. It evaluates the corporate rescue procedures in Uganda and the existing inadequacies, challenges, and strengths are revealed and the next chapters explore how best they can be addressed.

Chapter four discusses the corporate rescue frameworks in selected foreign jurisdictions that have a long history of corporate rescue: the UK, Canada, Singapore, and SA. These

[118] Brian M Hunt and Rish Handa 'A Critical Comparison between Australian and Canadian Creditor Protection Regimes: Voluntary Administration and CCAA' (2005) *Corporate Finance: Valuation* 3.
[119] Ibid.
[120] Zweigert and Kötz *An Introduction to Comparative Law* 2 ed (1987) 6.
[121] Fancy Chepkemoi Too *A comparative analysis of corporate insolvency laws: what is the best option for Kenya?* (unpublished PhD thesis, Nottingham Trent University 2015) 9.
[122] Ibid.

jurisdictions represent the latest corporate rescue developments internationally. The chapter demonstrates global trends regarding rescue procedures, and provide a deeper appreciation of and better understanding of the strengths and weaknesses of each system. This chapter also reviews CR procedures in these jurisdictions to evaluate what Uganda can learn therefrom.

The final chapter outlines the lessons learned from the foreign jurisdictions discussed in this thesis. From these lessons, this chapter makes proposals and recommendations for law reform which are aimed at improving Uganda's corporate rescue system.

1.9 CONCLUSION

This chapter has shown that administration aims at providing financially distressed companies with an opportunity to restructure and regain viability while safeguarding the interests of creditors and stakeholders. However, it has had limited success in the Ugandan context. Additionally, companies have continued to be liquidated and have not benefited from the rescue procedures under the law. The official figures in the 2023/2024 annual report by Uganda's official receiver indicated that 85 companies were officially liquidated, a 60% increment compared to 53 companies in 2021/2022.[123] In 2021/2022, 20 companies were officially liquidated, a -28% reduction compared to 28 companies in 2020/2021.[124] In 2019/2020, 15 companies were officially liquidated a 150% increment compared to 6 companies in 2018/2019.[125] The persistent failure of companies,[126] despite the introduction of Administration as a corporate rescue mechanism in the Insolvency Act, raises critical questions about the effectiveness of this law in achieving sustainable business recoveries.[127] Although there exists scholarship on corporate rescues in Uganda, it limits itself to issues like local public entities.[128] There is therefore a need to evaluate the effectiveness of the law regarding corporate rescues in Uganda. The subsequent chapter provides a historical overview of corporate rescue in Uganda.

[123] URSB op cit note 13 Annual Report 2023/2024 available at *https://ursb.go.ug/* 41.
[124] Ibid Annual Report 2021/2022 available at *https://ursb.go.ug/* 24.
[125] Ibid Annual Report 2019/2020 available at *https://ursb.go.ug/* 34.
[126] Robert Karuhanga, Olutayo Kadmiel Osunsan, Martin Wilfred Kawiso, Samuel Pule, Moses Muhwezi, & Christine Kabasinguzi 'Correlates of opportunity recognition, design thinking, and financing decisions on entrepreneurial success among SME owners in Kampala Central Division, Uganda' (2022) 1(1) *Journal of Social Sciences and Management* 2-3.
[127] Nsubuga op cit note 45 at 16.
[128] Nsubuga op cit note 41 at 8.

CHAPTER TWO

HISTORICAL OVERVIEW OF CORPORATE RESCUE IN UGANDA

2.1 INTRODUCTION

This chapter examines the historical development of corporate insolvency law in Uganda. It traces the regulation of insolvent companies in Uganda and the role of English law in the development of corporate insolvency law in Uganda. The chapter also outlines the history of English corporate insolvency law and its adoption in Uganda. It further demonstrates the impact and shortcomings of the corporate insolvency legislation in Uganda. The chapter contextualises the need to reform the regulation of corporate rescue in Uganda to include corporate rescue as an alternative measure to liquidation.

2.2 BACKGROUND OF CORPORATE INSOLVENCY IN UGANDA

2.2.1 Overview

Initially, Uganda did not have a law that regulated companies.[1] Most businesses existed as sole proprietorships or informal partnerships in Uganda.[2] The first recorded company that was registered in Uganda is the Uganda Company Limited (hereafter UCL). This company was registered in 1903 as a limited liability company with European subscribers.[3] In 1952, another notable company was registered, the Uganda Development Corporation (hereafter UDC).[4] UDC Ltd was incorporated as a strategic public corporation through the Uganda Development Act Cap 326 Act of 1952 to facilitate the country's industrial and economic development with the state guaranteeing the initial risk capital.[5] However, UDC began to face serious political

[1] Winifred Mary Tarinyeba *Company law: a guide to the Companies Act no. 1 of 2012 of Uganda* (2015) 9.
[2] Ibid.
[3] Patrick B. Birungi, Mildred Barungi, Tasha Balunywa, Pauline Among and Obey Twinomujuni 'The Journey of Uganda Development Corporation as a Statutory Body Responsible for Industrializing Uganda' (2022) UDC Working Paper No.2 a publication of UDC 6 available at *https://www.udc.go.ug/wp-content/uploads/2023/09/UDC-HISTORY_WORKING-PAPER-2.pdf* accessed on 20th March 2023.
[4] Marios Obwona, Isaac Shinyekwa, Julius Kiiza, and Eria Hisali 'The evolution of industry in Uganda' Working Paper No. 9; 2 available at *https://www.brookings.edu/wp-content/uploads/2016/07/L2C_WP9_Obwona-et-al.pdf* accessed on 20th March 2023.
[5] Birungi et al op cit note 3 at 8.

and economic challenges in the early 1970s, leading to its winding up in 1998.[6] During this time, there was no statutory framework that could be utilised to try to rescue this company.

2.2.2 Influence of English Law

The historical development of insolvency law in Uganda has been influenced by its colonial history. In 1894, the British Government declared Uganda a British Protectorate.[7] By the founding legal instruments, Uganda came to apply mainly common law. It also followed some of the statutes that were promulgated in England such as the Order-in-Council of 1902 (hereafter OIC).[8] Article 12 of the OIC empowered the Commissioner to make ordinances for the administration of justice, the raising of revenue, and for the 'peace, order and good government of all persons in Uganda.' The OIC also applied all the existing laws prevailing in the UK at the time. This is known as the 'Reception Clause.'[9] The UK Companies Act, along with all prevailing laws in the United Kingdom and certain laws from India, was imported into Uganda through the Uganda Order in Council on 11 August 1902.[10] The importation of English corporate law into Uganda paved the way for the development of Ugandan corporate insolvency law.

2.2.3 THE HISTORICAL DEVELOPMENT OF ENGLISH INSOLVENCY LAWS

In this section, an overview of the historical development of English insolvency laws is provided.

2.2.3.1 The UK's Early Beginnings and Medieval Period

The insolvency law in England can be traced to medieval times.[11] Insolvency law during this period was rudimentary. Debtors who could not pay their debts faced harsh penalties, including imprisonment and confiscation of property. There was no formal legal framework for dealing

[6] Ibid at 11.
[7] George W Kanyeihamba *Constitutional and Political History of Uganda from 1894 to present 2010* 2ed (2010) 6.
[8] Oloka-Onyango, Joe 'An Overview of the Legal System in Uganda' (June 2, 2020) 1.
[9] Ibid.
[10] Ibid.
[11] Chrispas Nyombi, Alexander Kibandama and David Justin Bakibinga 'The Motivations behind the Uganda Insolvency Act 2011' (2014) 8 *Journal of Business Law* 652 at 654.

with insolvency.[12] Nevertheless, documentary evidence indicates that creditors made an effort to recover their accounts using available means under the ordinary court process.[13] Essentially, there was no collective mechanism for the administration of an insolvent estate. A disgruntled creditor could seize his debtor's property and also his person.[14] This individualist and largely chaotic administration of the insolvent's estate brought unfairness and inefficiency.[15]

Before 1283, there was no process in the English common law where a person could pledge his body or liberty for payment of a debt.[16] Consequently, legislation in 1283 and 1285 was passed providing for the imprisonment of the debtor after acknowledgment of a debt and a failure to pay.[17] Honest or dishonest, refractory or unfortunate, the debtor was to be instantly imprisoned.[18] In 1311 it was clarified that this law only applied to tradesmen.[19] Regrettably, this did not mean that insolvent non-traders were in a better position. Although it seemed harsh, imprisonment was considered a necessary and effective way of forcing a debtor to cooperate expeditiously with his creditors.[20] However, there was a growing recognition that creditors should be treated equally, and rehabilitation rather than punishment should be given to the debtor.[21]

2.2.3.2 Bankruptcy law during the Tudor and Stuart Period

It was not until the reign of Henry VIII that the 1542 Statute of Bankrupts was enacted in England.[22] This occurred in 1542 with the introduction of an Act against such persons as do make bankrupt.[23] The Act was directed to persons 'as do make bankrupt' by 'chiefly obtaining into their hands great substance of other men's goods and do suddenly flee to parts unknown or keep their houses.'[24] The Act deemed such conduct as acts of bankruptcy. The Act was

[12] The Hon T F Bathurst, 'The Historical Development of Insolvency Law' (2014) 4 available at *https://supremecourt.nsw.gov.au/documents/Publications/Speeches/Pre-2015-Speeches/Bathurst/bathurst_20140903.pdf* accessed on 20 March 2023.
[13] Fancy Chepkemoi Too *A Comparative Analysis Of Corporate Insolvency Laws: Which Is The Best Option For Kenya?* (Unpublished PhD Thesis, Nottingham Trent University September 2015) 195.
[14] Roy Goode *Principles of Corporate Insolvency* 4 ed (2011) 9.
[15] Nyombi et al op cit note 11.
[16] Bathurst op cit note 12 at 8.
[17] Statute of Acton-Burnell (1283) 11 Edw I and Statute of Merchants (1285) 13 Edw I.
[18] Louis Edward Levinthal 'The Early History of English Bankruptcy' (1919) 67 *University of Pennsylvania Law Review* 1 at 8.
[19] Bathurst op cit note 12 at 16.
[20] Ibid.
[21] Ibid at 11.
[22] John Michael Wood *Corporate Rescue: A Critical Analysis of its Fundamentals and Existence* (Unpublished PhD Thesis, The University of Leeds May 2013) 45.
[23] Statute of Bankrupts 34 & 35 (Henry VIII, 1542 c.4); see also Bathurst op cit note 12 at 8.
[24] Bathurst op cit note 12 at 8.

intended to 'govern proceedings against absconding or concealed debtors amongst the merchants'.[25] From an administrative point of view, the 1542 Act was also significant because it granted the power to summon and examine persons suspected of concealing debts.[26] The Act enabled the aggrieved creditors to 'procure the seizure and sale and a rate able distribution of the debtor's property amongst his creditors'.[27]

Some commentators have been critical of the Act's practical effect as, despite the introduction of fundamental insolvency principles, the Act did not specify how and by what powers the Chancellor and officials were allowed to 'take over' the insolvent estates.[28] Another criticism was the glaring absence of any method for discharging the bankrupt. This did not re-emerge, and even then only in highly curtailed circumstances, until the 1700s.[29]

The 1542 Act was followed by two Acts in 1571, the Statute of Elizabeth and the Fraudulent Conveyances Act.[30] The Fraudulent Conveyances Act rendered transactions conducted with the intent to defraud or delay creditors to be void unless the purchaser acted bona fide.[31] The Statute of Elizabeth specifically confined the operation of the bankruptcy laws as commenced by the 1542 Act to tradesmen/merchants.[32] It also introduced the concept of bankruptcy as a legal status and listed the 'acts of bankruptcy.'[33] To oversee each bankruptcy, it established the position of commissioners of bankrupts who were appointed by the chancellor.[34] It was subsequently confirmed by the courts that the commissioners' powers extended to seizing property acquired after the debtor became bankrupt and that the spirit of the legislation rendered void transactions in which the declared bankrupt paid one creditor over the others. This marked the commencement of the doctrine of unfair preferences which was to continue to be forced through the common law and without statutory articulation until 1869.[35] Despite the general development of principles, bankruptcy law in the Tudor and Stuart periods was still focused on creditor recovery rather than debtor rehabilitation.[36] In 1551, Chief Judge

[25] Statute of Bankrupts, 34 & 35 Henry VIII.
[26] Bathurst op cit note 12 at 8.
[27] Statute of Bankrupts 34 & 35 (Henry VIII, 1542 c.4); see also op cit note 13 at 195.
[28] Levinthal op cit note 18 1 at 15.
[29] Bathurst op cit note 12 at 10.
[30] An Act Touching Orders for Bankrupts (1571) 13 Eliz 1 c.7 and An Act against Fraudulent Deeds, Alienations (1571) 13 Eliz 1 c.5.
[31] Bathurst op cit note 12 1 at 10.
[32] Too op cit note 13 at 196.
[33] Allsop and Dargan 'The History of Bankruptcy and Insolvency Law in England and Australia' in Gleeson, Watson and Peden (eds) *Historical Foundations of Australian Law* (2013) 415 at 426.
[34] Too op cit note 13 at 196.
[35] *Smith Vs Mills* (1590) 2 Co Rep 25a; 76 ER 441 and Bankruptcy Act 1869 (UK) (32 & 33 Vic, c 71) s.92; see also Bathurst op cit note 12 at 10.
[36] Murray and Harris *Keay's Insolvency Personal and Corporate Law and Practice* 7 ed (2011) 1 at 7.

Montague articulated the attitude of the times when commenting on a debtor who had borrowed £40.00 and failed to repay. He stated:

> '…neither the plaintiff nor the sheriff is bound to give him meat or drink, no more than if one distrains cattle…he ought to live off his own goods…and if he has no goods he shall live off the charity of others, and if others will give him nothing, let him die in the name of God…and impute the cause of it to his own fault, for his presumption and ill behaviour brought him to that imprisonment'.[37]

Despite the harsh treatment of entrepreneurs facing severe risks to their lives and health if their businesses failed, fraudulent bankruptcies increased. This reality led to reforms for better provisions for suppressing them and to establish clear procedures for declaring one bankrupt.[38]

In the seventeenth century, three statutes were enacted namely: The Bankruptcy Act of 1604, The Bankruptcy Act of 1623, and The Bankruptcy Act of 1662. Generally, these statutes clarified aspects of the Bankruptcy Act 1571 and addressed particular issues, such as new acts of bankruptcy or the exclusion of certain categories of debtors from the legislation as well as the need to help creditors.[39]

These reforms were done as a continuing effort to stem the tide of bankruptcies.[40] In this vein, the Parliament continued to expand the Commissioner's powers to investigate fraud under the Bankruptcy Act of 1604.[41] Generally, the notion that bankrupts were persons who practiced deceit led to bankruptcy reforms, which increased the rights and remedies of the creditors and the notion of punishing bankrupts remained a key characteristic of the enacted laws.[42] The need to help creditors was demonstrated in the preamble of the 1604 Act which stated that 'An Act for better relief of creditors against such as shall become bankrupt'.[43] Equally, the 1623 Act reflected similar sentiments as it was also described as an 'Act for the Further Description of a Bankrupt and Relief of Creditors against Such as Shall Become Bankrupts and for Inflicting Corporal Punishment upon the Bankrupts in Some Special

[37] *Dive Vs Maningham* (1551) 75 ER 96, 108-109 see also Bathurst op cit note 12 at 11.
[38] Levinthal op cit note 18 at 1.
[39] Too op cit note 13 at 198.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Bankruptcy Act of 1604 1 Jac 1, c 15.

Cases.'[44] It is notable that under this Act, a debtor indicted for fraudulent transfers was also subject to punishment by Pillory and the loss of an ear.[45]

The legislators were dealing with a reality that the number of bankruptcies had increased, as well as levels of fraud and deceit, as the debtors invented new practices to circumvent penalties entrenched in the laws.[46] Between 1678 and 1698, at least thirteen separate bills were presented in parliament, many of which were designed to provide the unfortunate insolvent with an attractive alternative to the bankruptcy laws.[47]

The eighteenth century marked the start of a shift in focus from the protection of creditors' rights to a greater reflection of the debtor's interest.[48] A major reform was brought by the Bankruptcy Act of 1705, which allowed honest insolvent tradesmen to be discharged.[49] The legislation provided that discharge be granted if the bankrupts obtained 4/5th of the creditor's consent.[50] Nonetheless, fraudulent bankruptcy remained a capital offense and was statutorily defined as such.[51] Further reforms were brought in with the enactment of the Bankruptcy Act of 1732, which was substantively similar to the 1705 Act, although procedurally much more detailed.[52] The conditions precedent for a discharge was spelled out in the 1732 Act, as was the method for enforcing the discharge. The statute incorporated prior elements in laws, such as discharge and the felony provisions, and thereafter capital punishment for fraudulent bankruptcy remained a part of English law until 1820.[53]

The subsequent circle of reforms in the eighteenth century, starting from the 1732 Act, which codified the whole respective legal body revolved around the question of how the debtors should be treated.[54] Whereas some debtors were secretive and crafty, others were honest and deserving of sympathy.[55] Generally, the developments reflected the recognition in society at the time that extending credit inherently involved risk, and debtors using credit were doing a service to the burgeoning British Empire.[56] For insolvent non-traders, discharge, and relief from imprisonment were still a long way off. Society still considered it to be an

[44] Bankruptcy Act of 1623 21 Jac 1, c 19.
[45] Bathurst op cit note 12 at 11.
[46] Too op cit note 13 at 199
[47] Emily Kadens, 'The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law' (2010) 59 7 *Duke Law Journal* 1229 at 1250.
[48] Too op cit note 13 at 199.
[49] (1705) 4 & 5 Anne, c 17 and (1711) 10 Anne c 15.
[50] (1706) 5 Anne c.22
[51] Too op cit note 13 at 200.
[52] Ibid at 201.
[53] Ibid.
[54] Ibid at 202.
[55] Ibid at 202.
[56] Bathurst op cit note 12 at 11.

unjustifiable practice for any person but a trader to encumber himself with debts of any considerable value.[57]

2.2.3.3 Bankruptcy reforms during the nineteenth and twentieth Century Period

From the late eighteenth and early nineteenth century, there was a concerted effort to reform bankruptcy law. Reform was probably the result of both a gradual increase in bankruptcies and also a gradual awareness of the horrors attendant upon debtors who were imprisoned.[58] The series of reforms in this period laid the foundations of the modern law of bankruptcy as it is today. An initial statute of note is the Insolvent Debtors Act of 1813, which established the Insolvent Debtors' Court whose main purpose was to release honest insolvent non-traders after three months from the conclusion of proceedings and satisfaction of the court.[59] Still, the debtor was not discharged and future property remained liable.[60] Further reforms were brought in by the Bankruptcy Act of 1824 and consolidated in the Bankruptcy Act 1825. The Bankruptcy Act of 1825 permitted the debtor to initiate their bankruptcy, in agreement with creditors.[61]

The pressure for the de-personalisation of business led to the enactment of the Joint Stock Companies Act 1844, which established a company as a distinct legal entity with unlimited liability for the shareholders and made it possible to make a company bankrupt just like an individual.[62] In addition, corporate insolvency was dealt with through special statutory provisions such as the Joint Stock Companies Winding Up Acts 1848 and 1849, which envisaged a separate procedure to bring a company to an end and liquidate the assets.[63]

Initially, corporate insolvency had aligned its identity with bankruptcy law and did not assume a distinct status until the initiation of limited liability for members of a company with the enactment of the Limited Liability Act of 1855.[64] The Limited Liability Act gave members limited liability for the debts of the joint stock company. Thus, any credit agreement entered into by an individual member rather than through a corporate entity was not subject to limited liability.[65] The separate entity doctrine was affirmed by the 1897 decision of the House of Lords

[57] Ibid at 12.
[58] Ibid.
[59] Too op cit note 13 at 202.
[60] Bathurst op cit note 12 at 13.
[61] Too op cit note 13 at 203.
[62] Joint Stock Companies Winding Up Act 1844 s 1.
[63] Too op cit note 13 at 203.
[64] Wood op cit note 22 at 45.
[65] Nyombi et al op cit note 11 at 655.

in *Salomon v Salomon & Co Ltd*,[66] that an incorporated company was separate from its members. Equally important was the enactment of the Bankruptcy Act 1861, which abolished the distinction between traders and non-traders; providing the foundation for a uniformed insolvency system to emerge.

The first piece of legislation that can be described as containing the first modern company law statute was the Companies Act 1862, which, amongst other things, contained the first detailed winding up provisions, including a provision of *pari passu* distribution.[67] Other notable provisions in the following years include section 10 of the Judicature Act 1875 which aligned rules as proof of debt in company liquidation with those applicable to bankruptcies; sections 4-6 of the Companies Act 1883 established categories of preferential debt for winding up and bankruptcy; Preferential Payments In Bankruptcy Acts 1888 and 1879, with the last Act establishing that claims secured by floating charge were subordinated to preferential debts.[68]

The second half of the 19th century experienced a wave of reforms which can be described as generally 'representing a validation of the change towards a positive outlook in respect of bankrupts with a focus on the rehabilitation of the debtor'.[69] The Bankruptcy Act of 1914 aimed to consolidate the law on insolvency[70] by among others reinforcing the harsh treatment of debtors. The 1914 Act demanded the debtor file for bankruptcy in a public court leading to the debtor's embarrassment since the public learned of the debtor's bankruptcy application and exposed details about their financial position[71] The 1914 Act was, however, highly technical and completely out of touch with the needs and concerns of the time.[72]

Corporate insolvency laws in the UK were further reformed with the enactment of the Companies Acts of 1908, 1929 and 1948. These were prompted by societal advancement and commercialisation in the 20th century to consolidate the earlier Acts.[73] Corporate insolvency was governed by a unified regime under the Companies Act 1948. This 1948 Act provided procedures for voluntary liquidation initiated by the company and/or its shareholders as well as an involuntary liquidation initiated by creditors. There was also a procedure available whereby a compromise or arrangement could be made between the company and its creditors, in a similar form to the informal deed of arrangement and a precursor to the modern Scheme

[66] *Salomon v Salomon & Co Ltd* [1897] A.C. 22 HL.
[67] Wood op cit note 22 at 46.
[68] Ibid.
[69] Too op cit note 13 at 204.
[70] Wood op cit note 22 at 46.
[71] Too op cit note 13 at 205.
[72] Wood op cit note 22 at 46.
[73] Too op cit note 13 at 205.

of Arrangement.[74] The bankruptcy and rescue law systems were 'weak and incapable of supporting companies, enabling them to rehabilitate in the face of a high volume of enterprise distress and long term economic recession'.[75] Nevertheless, despite the law having many shortcomings it was not until pressure mounted in the form of the European Economic Community Draft Bankruptcy Convention in 1970 that law reform began to look likely.[76]

Eventual reform came in the form of the Insolvency Act 1985, which when it came into force was replaced by the Insolvency Act 1986 – a consolidating enactment that repealed and re-enacted the Insolvency Act 1985 and the Insolvency provisions of the Companies Act 1985.[77] The 1986 Act represented an attempt to address the flaws regarding corporate insolvency law up until that point and introduced a new procedure called administration, as a concept that could properly address rescue strategies aimed to prevent companies' needless entering liquidation.[78] Additionally, alternative measures such as the CVA's which were introduced in the 1986 Act proved to be ineffective as a rescue mechanism as the initiation of the procedure did not trigger a moratorium. This marked the start of a shift in opinion and a decision was taken in principle that all insolvency proceedings should be collective in character.[79]

Later, the Insolvency Act, 2000, and the Enterprise, Act 2002 were passed. Both Acts modified the IA 1986 by replacing certain of its provisions with new sections and schedules that were focused on promoting the rescue culture and reducing the stigma associated with bankruptcy. The Insolvency Act, 2000, brought in new provisions on voluntary arrangements and moratoria while the Enterprise Act, 2002, substantially revised and enhanced the administration procedure. The Enterprise Act 2002 improved on the insolvency procedures available to troubled corporations and aimed at rejuvenating the broader rescue culture.[80] The Enterprise Act, 2002, encouraged 'pre-emptive strategies to prevent the onset of financial distress; placing the obligation of ensuring that the financially distressed company seeks help at the right time firmly on the shoulders of those in charge of the company'.[81] It prohibited the appointment of an administrative receiver by a floating charge holder.[82]

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[74] Paul J Omar & Jennifer Gant 'Corporate Rescue in the UK: Past, Present and Future Reforms' (2016) 24 *Insolvency Law Journal* 40 at 43.
[75] Too op cit note 13 at 206.
[76] Wood op cit note 22 at 46.
[77] Ibid at 47.
[78] Ibid.
[79] Ibid.
[80] Wood op cit note 22 at 12.
[81] Rebecca Parry *Corporate Rescue* (2008) 1 at 14.
[82] Wood op cit note 22 at 47.

The Insolvency (Amendment) Rules 2010 and 2015 updated the procedural rules to reflect modern business practices and improve the efficiency of the insolvency process. During the Covid-19 pandemic, the Corporate Insolvency and Governance Act, 2020, was enacted and came into force on June 26, 2020, to provide temporary and permanent changes to insolvency law, including a new moratorium procedure and protection for businesses against creditor actions. The current rescue procedures in the UK include administration, CVAs, schemes of arrangement, Restructuring plans, and Part A1 Moratorium. Generally, the current insolvency framework in the UK continues to evolve to address emerging challenges and align it with international best practices. These rescue procedures, highlighted in the various legislations governing insolvency in England, are further examined in Chapter 4.

2.2.4 THE HISTORICAL DEVELOPMENT OF CORPORATE INSOLVENCY LAW IN UGANDA

2.2.4.1 Overview

The first legislation in Uganda relating to corporate entities was the Indian Companies Act 1882, which applied owing to ties in trade and industry with India.[83] The Act did not contain any provisions on corporate insolvency. After colonising Uganda, the British government imported the English corporate law into Uganda paving the way for the development of Ugandan corporate insolvency law. Thus, the history of insolvency law in Uganda and England is connected.

2.2.4.2 Colonial and Post-Independence Era (1960s - 1980s)

At the turn of the 20th century, legal reforms in the field of company and insolvency law were made in line with the laws of Britain.[84] This process began when the Indian Companies Act of 1882 was repealed by the Companies Ordinance of 1922 which was the first colonial local legislation. The Companies Ordinance of 1922 was a replica of the English Companies Consolidation Act of 1908. The Companies Ordinance of 1922 provided for several insolvency procedures that financially ailing companies would pursue. It introduced compromises and arrangements. ‘A compromise or arrangement was proposed between a company and its

[83] Uganda Law Reform Commission, ‘A Study Report on Company Law’, ULRC Publication No.35 (2004) 7.
[84] Nyombi et al op cit note 11 at 656.

creditors or between the company and its members and where the majority in number representing three-fourths of the creditors or members agreed to any compromise or arrangement, and if sanctioned by the court, would be binding on all the creditors or on the members'.[85]

The Companies Ordinance of 1922 also provided for the appointment of receivers or managers. Where a receiver or manager of the property of a company was appointed, notice of that appointment had to be made to the registrar of companies who would enter the fact in the register of mortgages and charges.[86] Every receiver or manager had to once in every half year while he remained in possession, and also on ceasing to act as receiver or manager, file with the registrar of companies an abstract of his receipts and payments during the period to which the abstract relates.[87]

Additionally, The Companies Ordinance of 1922 provided for the winding up of companies. The winding up of a company would be either by the court; voluntary; or subject to the supervision of the court.[88] A company would be wound up by the court for some reasons including the inability of the company to pay its debts.[89] A company was deemed to be unable to pay its debts where inter alia a creditor, to whom the company was indebted in a sum exceeding one thousand Uganda shillings then due, had served on the company, a demand requiring the company to pay the sum so due, and the company had for three weeks thereafter neglected to pay the sum.[90] To conduct the proceedings in winding up a company the court would appoint a liquidator or liquidators.[91] The liquidator had several powers including the power to carry on the business of the company, so far as may be necessary for the beneficial *winding*-up thereof.[92]

Under the Companies Ordinance 1922, a company would be wound up voluntarily for some reasons including the company passing an extraordinary resolution to the effect that it could not because of its liabilities continue its business, and that it was advisable to wind up.[93] A voluntary winding up was deemed to commence at the time of the passing of the resolution authorising the winding up.[94] When a company was wound up voluntarily the company ceased

[85] Companies Ordinance of 1922 s 120.
[86] Ibid s 94(1).
[87] Ibid s 95(1).
[88] Ibid s 122(1).
[89] Ibid s 129(1).
[90] Ibid s 130.
[91] Ibid s 149(1).
[92] Ibid s 151(1).
[93] Ibid s 182.
[94] Ibid s 183.

to carry on its business, except so far as may be required for the beneficial winding up thereof.[95] When a company resolved by special or extraordinary resolution to wind up voluntarily, it gave notice of the resolution by advertisement in the Gazette.[96]

Under the Companies Ordinance 1922, when a company by special or extraordinary resolution resolved to wind up voluntarily, the court would make an order that the voluntary winding up would continue but subject to such supervision of the court, and generally on such terms and conditions as the court thinks just.[97] Where an order was made for a winding up subject to supervision, the court would by the same or any subsequent order appoint any additional liquidator.[98] A liquidator appointed by the court had the same powers as if he had been appointed by the company.[99]

The Companies Ordinance of 1922 was later modified by the Companies Ordinance of 1935.[100] The latter Ordinance was a replica of the English Companies Consolidation Act of 1929. The Companies Ordinance of 1935 was enacted to regulate trading companies and other associations. It came into force on 31st December 1935. This ordinance maintained the provisions concerning compromises and arrangements as provided under the 1922 ordinance.[101] Additionally, this law introduced the procedure of reconstructions and amalgamations. The Ordinance provided for reconstruction and amalgamation under sections 155 and 156. 'Where an application was made to the court for the sanctioning of a compromise or arrangement proposed between a company and its creditors or members, and it was shown to the court that the compromise or arrangement had been proposed for or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme was to be transferred to another company, the court would, by order sanction the compromise or arrangement'.[102]

The ordinance also provided for receivership and management.[103] The provisions were essentially similar as those contained in the 1922 ordinance. In addition, this ordinance of 1935 introduced provisions to do with notification by the company of the appointment of a receiver

[95] Ibid s 184.
[96] Ibid s 185.
[97] Ibid s 199(1).
[98] Ibid s 202(1).
[99] Ibid s 202(2).
[100] Companies ordinance of 1935 no. 12 of 1935 Cap 33 of the Laws of the Uganda Protectorate.
[101] Ibid s 154.
[102] Ibid s 155(1).
[103] Ibid Part VII.

or manager.[104] The ordinance also maintained the same provisions to do with winding up as had been provided under the 1922 ordinance. The winding up of a company would be either by the court,[105] voluntary,[106] or subject to the supervision of the court.[107] The insolvency provisions of compromises and arrangements, receivership, and winding up in the 1922 Companies Ordinance and 1935 Companies Ordinance were inadequate in fostering an appropriate corporate rescue culture. They were more focused on liquidation which was viewed as the only viable option for financially distressed companies.

The Companies Ordinance of 1935 remained in place until it was replaced by the Companies Ordinance of 1958.[108] The Companies Ordinance of 1958 was a replica of the 1948 English Companies Act, and came into effect on January 1st 1960. In addition to it, some subsidiary legislation was also enacted and came into effect on the same day.[109] The Companies Ordinance of 1958 was later re - numbered as Cap 85 laws of Uganda 1964 Edition. Later, the Companies Act, Cap 85 was revised and consolidated by the Law Reform Commission of Uganda bringing into existence the Companies Act Cap 110.

The Companies Act Cap 110, in its preamble 'amended and consolidated the law relating to the incorporation, regulation, and winding up of companies and other associations and to make provision for other related and connected matters'. It maintained the previous provisions on arrangements and reconstructions as provided for under sections 207-210. The provisions were essentially the same as provided in the preceding ordinances of 1922 and 1935. The provisions of section 207 and section 208 were strictly interpreted.[110] Consequently, the order requested thereunder could not be given by the court if those provisions had not been complied with. Under these provisions, the company was allowed to enter into an arrangement with its creditors where the creditors would be paid under specific terms over a given period of time. Alternatively, the company would enter into a compromise with its creditors where the creditors would agree to be paid less than what was owed to them. These efforts were aimed at ensuring that the company bounces back to profitability and is not brought to an end due to financial difficulties.

The Companies Act Cap 110 also provided for the reconstruction and amalgamation under sections 209 and 210. These provisions were again essentially the same as the ones

[104] Ibid s 292.
[105] Ibid Part VI (i).
[106] Ibid Part VI (iii).
[107] Ibid Part VI (i) s157.
[108] Companies Ordinance No. 1 of 1958.
[109] Legal notices 218, 266 and 267 all of 1960.
[110] D J Bakibinga *Company Law in Uganda* (1993) 427.

provided for under the UK Companies Act.[111] Reconstruction was undertaken by transferring the assets of the company to a new company. This was done under an arrangement whereby the shareholders of the transferor company received shares or other interests in the transferee company. Essentially the process entailed the amalgamation of two companies into one of them or a third formed for that purpose.[112] The use of reconstructions was one of the avenues for corporate rescue provided for under the law available to companies faced with financial difficulties. This procedure would be used by companies struggling financially in a bid to be restored to profitability and hence avoid liquidation. As such, there were efforts made towards corporate rescue although they were not typical rescue procedures. Amalgamation, on the other hand, would lead to the dissolution of a company and a rescue of the business that would continue to be carried on by the new company. The corporate entity would in effect not be rescued but the business would be rescued which can be construed more or less as a corporate rescue attempt.

The Companies Act Cap 110 introduced a new procedure known as Schemes of Arrangement under section 304 between a company and its creditors where the company was about to be, or was in the course of being wound up. Such arrangement bound the company if sanctioned by an extraordinary resolution and the creditors if acceded to by three-fourths in number and value of the creditors. Any creditor or contributory, who was not satisfied, would appeal to court within three weeks of completion thereof. The court would then amend, vary, or confirm the arrangement. Under this section, an arrangement could only be made between the company and its creditors and not with members and the company had to be about to be wound up or was in the course of being wound up. The process leading up to a scheme of arrangement or compromise was such that the company, its members, creditors, or liquidator had to prepare a draft scheme of arrangement or compromise and then make an application to court for a meeting to be summoned. If the court was satisfied that the scheme was generally suitable for consideration as a scheme of arrangement, it would order that a meeting or meetings be held to consider it. Following this, the draft scheme of arrangement or compromise would then be approved in the meeting with amendments where necessary by three-quarters of the creditors or members. The order had to be filed with the registrar of companies before it took effect. The provisions in the Companies Act Cap 110 were a replica of the provisions relating to arrangements and compromise, reconstruction, and amalgamation found in the UK

[111] The Companies Act of 1948 ss 206, 207, 208 & 209.
[112] Bakibinga op cit note 110 at 428.

Companies Act of 1948. In particular, concerning arrangements and reconstructions, the lack of a moratorium between the time of proposing the arrangement or compromise and the sanctioning of the court rendered the whole process nugatory. The secured creditors were at liberty to realise their security the moment the company tried to propose an arrangement or compromise.[113]

The Companies Act Cap 110 also provided for receivership and management under Part VII. The provisions on receivership and management were essentially the same as those in the preceding ordinances.[114] Additionally, this law introduced provisions to do with statements as to the affairs of the company which showed particulars of the company's assets, debts, and liabilities, the names, postal addresses, and occupations of its creditors, the securities held by them respectively, which had to be submitted to the receiver or manager.[115] Where a business experiences financial problems such as the consistent inability to meet due obligations to creditors, it may be possible to place that firm or group of firms under receivership.[116] The first duty of a receiver was to make a preliminary decision on the real financial status of the company. Under this role, the receiver would be able to determine the state of affairs of the company by putting together a schedule of its assets vis-à-vis its liabilities to determine the level of indebtedness of the company.[117] At this point, the receiver had not formally commenced any management of the company but was merely assessing its state in order perhaps to decide whether the company could be resuscitated. It was assumed that the receiver was able to make this decision based on the information provided in the statement on the affairs of the company.[118] If the decision was that the state of the company precluded the possibility of its being rescued and all creditors being paid, then the receiver would recommend to the court for the liquidation.[119]

On the other hand, where the receiver determined that the financial problems being experienced by the company were temporary, and the business could be saved, the receiver would recommend to be allowed to manage the company to enable it to repay its debts.[120] The Companies Act thus permitted contractual receivership and it had some elements of corporate

[113] Ibid.
[114] Companies ordinance of 1935 no. 12 of 1935 Part VII.
[115] The Companies Act Cap 110 s 356(1).
[116] Kwame Owino 'Shifting the Receivership Process Towards Business Recovery' *The POINT* Issue No. 46 July 2001 1 at 3.
[117] Ibid.
[118] Ibid.
[119] Owino op cit note 116 at 4.
[120] Ibid.

rescue.[121] Under receivership, a floating charge holder, over part or the entire undertakings of the company, was allowed to appoint a receiver on petition to the court.[122] However, the parties had the option to stipulate in a debenture that the chargee would be entitled to appoint a receiver out of court. The receiver would then be deemed an agent of the company and liability for any actions of the receiver would fall upon the company rather than the appointing creditor.[123] Consequently, the receiver could cause the company to break agreements with other creditors. This would serve the interests of the floating charge holder since the receiver would be handling viable parts of the business free from loss-making contracts.[124] Despite that, the receiver owed neither the appointing creditor nor the company any duty to seek an optimal outcome.[125]

However, receivership acted as a form of rescue procedure in instances where the company's remaining assets, once realised, could not cover the claims of the floating charge holder.[126] In such rare cases, the receiver would have to continue trading and restore the company rather than conduct a sale of the business assets.[127] However, in cases where the business was sold as a going concern, the company would be left as an empty shell and destined for insolvent liquidation.[128] Thus, in rare cases where the receivers achieved a restructuring and avoided the sale of viable business assets to satisfy the claims of the receiver, a company could be rescued.[129] The concept of receivership or management was therefore one aimed at ultimately rehabilitating a company in financial distress. The assumption was that when such companies were placed under receivership, the receiver or manager would be expected to manage the assets of the company as well as the incomes therefrom and see to it that creditors were paid their debts and any residue was injected into the company hence ensuring that the company continued to trade as a going concern.

The Companies Act Cap 110 also contained insolvency provisions relating to company winding up and provided for voluntary winding up which occurred when a resolution had been passed by the company.[130] Voluntary winding up took two forms; members' voluntary winding up and creditors' voluntary winding up. The main characteristic of members' voluntary

[121] Nyombi et al op cit note 11 at 659.
[122] I. Mitchkovska and S. Worthington 'Floating Charges: The Current State of Play' (2008) *Journal of International Banking and Finance Law* 467.
[123] Nyombi et al op cit note 11 at 659.
[124] Ibid.
[125] Ibid.
[126] Ibid
[127] Ibid
[128] Ibid
[129] Ibid.
[130] The Companies Act Cap 110 s 276.

winding up was that members appointed a liquidator and filed a declaration of solvency that the company would be able to pay its debts within 12 months of the commencement of winding up.[131] The effect of appointing the liquidator was that all the powers of directors ceased except where they were allowed to continue with his permission.[132] A creditors' voluntary winding up arose where no declaration of solvency had been filed with the Registrar. The company was required to summon a meeting of its creditors fixed for the day the resolution for winding up was proposed. The purpose of the meeting was to receive a full statement by the directors of the position of the company's affairs together with a list of the company's creditors and the estimated amount of their claims, appoint a liquidator, and a committee of inspection.[133] The effect of voluntary winding up was that the powers of directors ceased except where they were allowed to continue with his permission.[134] After the commencement of voluntary winding up, if it was sufficiently proved that some members would be prejudiced by the voluntary winding, the court would order a voluntary winding up with the supervision of the court.[135]

The Companies Act Cap 110 also provided for winding up by court where a petition would be lodged by either the company, creditors, contributories or the Attorney General.[136] A liquidator would be appointed to control the company's property in the process winding up.[137] Where the winding up of the company was not concluded within a year, the liquidator had to furnish the registrar with the details of liquidation. When the affairs of the company had been wound up, the court would, on the application of the liquidator, make an order dissolving the company.[138]

In most jurisdictions, an effective corporate insolvency regime is seen to be one that should be able to provide a system to enable the winding up of companies where there is no prospect of the business becoming profitable and viable with the least possible cost and delay.[139] Similarly, an effective corporate insolvency regime should be able to provide mechanisms to rehabilitate companies and rescue them from being wound up.[140] The corporate

[131] Ibid ss 281-283; once a liquidator was appointed, notice of appointment had to be gazetted within fourteen days of appointment and served on the Registrar of Companies.
[132] Ibid s 283(2).
[133] Ibid ss291-293.
[134] Ibid s 294(2).
[135] Ibid s 308.
[136] Ibid ss 222-224.
[137] Ibid ss 237, 242, 244, 245.
[138] Ibid s 272.
[139] Sylvester Henry Wambuga *Corporate Rescue in Uganda: A critical assessment of the need for a corporate rescue culture* (Unpublished LLM Thesis, Makerere University, 2012) 49.
[140] Secretariat to the Corporate Law Reform Committee Companies Commission of Malaysia 'Reforming the Corporate Insolvency Regime' 2 available at *https://www.ssm.com.my/pages/publication/clrc/articles/clrcart* accessed 27 January 2025.

insolvency regime must be facilitative in that it should provide for the efficient winding-up process of that company.[141] Companies that have resolved to wind up voluntarily are not open to seeking rescue of the business. The presumption is that such companies have probably contemplated all avenues for corporate rescue and have come to the conclusion that it is not commercially viable to continue operating the business. It is thus impossible to consider corporate rescue when a company is under voluntary liquidation. It is however possible to rescue a company that is undergoing a compulsory liquidation.

Additionally, The Companies Act Cap 110 did not provide a mechanism for the corporate rescue of a company under compulsory liquidation. It had no provision empowering the courts to discharge a winding-up order that had been made. Furthermore, the Act did not empower the court to order a stay of winding up after the winding up was made. In effect, once a compulsory winding up commenced it could neither be reversed nor stayed to give chance to rescue.[142] Notably, the Act empowered the official receiver to investigate the affairs of the company in case of a winding-up order, the intention was not to determine whether a rescue could be pursued. The purpose of the provision was to ascertain the cause of the company's failure and whether any fraud was committed by the company since its formation.[143] This was only intended to ensure that the directors and other officers of the company responsible for the failure or involved in the fraud were prosecuted or made personally liable for the debts.[144]

By the time Uganda gained independence in 1962, there was a strong body of insolvency and company law that reflected the commercial development at the time.[145] Unfortunately, legal development in Uganda went downhill after independence. There was no major attempt to reform insolvency legislation until when the Insolvency Act was passed. The insolvency legislation of Britain on which the Uganda's legislation was based had been overhauled several times over by amending and implementing legislation to keep abreast of changes in that society.[146] Insolvency laws in Uganda were over 80 years old and did not represent the commercialisation and market developments that had intensified since the end of the Second World War.[147]

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[141] Ibid.
[142] Wambuga op cit note 139 at 50.
[143] The Companies Act Cap 110 ss 324-329.
[144] Ibid ss 324-329.
[145] Nyombi et al op cit note 11 at 656 see also J.D. Bakibinga 'Company Law and Business Development in Uganda' (2004) 2 *Uganda Living Law Journal* 31.
[146] Bakibinga op cit note 110 at 4.
[147] Nyombi et al op cit note 11 at 656.

2.2.4.3 The Need for reform: 1990s – Early 2000s

By the time Uganda gained independence in 1962, the law governing corporate insolvency was the Companies Act Cap 85 of the laws of Uganda. Uganda continued to rely on legal frameworks designed and implemented during the colonial era.[148] Companies in Uganda continued to be served by a collection of outdated laws. For example, a lack of cross-border insolvency provisions since the insolvency provisions under the Companies Act Cap 85 were drafted before the growth in globalisation.[149] The insolvency administration process facilitated by the outdated insolvency legislation was chaotic and largely individualist. The company was also given limited options under the insolvency law to escape the widening jaws of liquidation. In most cases, financial recovery rather than corporate rescue was the outcome.[150] Thus, from the colonial times to the time of attainment of independence, Uganda's corporate law statutes offered little in terms of corporate rescue as seen from the above discussion.

The commercial law reform process began thirty-four years after Uganda obtained independence in 1996. The Government through the Uganda Law Reform Commission[151] (hereafter ULRC) retained Reid & Priest LLP, to provide consultancy services for the reform of commercial and related laws.[152] The team reviewed the laws under their terms of reference including the Companies Act, and Bankruptcy Act, and proposed amendments to the laws.[153] Their final report was issued on 26th June 1998. The key proposed amendments concerning corporate rescue included providing for voluntary arrangements and administrative orders. They also proposed that provisions be made for the insolvent to remain in possession of his or her property while a moratorium on enforcement of debts is in force. This would allow the debtor some breathing space to analyse and collect, his or her assets to prepare a plan to re-organise or liquidate. Based on the proposals made by Reid and Priest LLP, it can be seen that attempts were made towards providing for corporate rescue and rehabilitation of companies than was previously provided for in the law.[154]

[148] Ibid at 658.
[149] Uganda Law Reform Commission, *A Study Report on Insolvency Law* Law Com Pub No.13 (2004)106 para 4.1 p 47.
[150] Nyombi et al op cit note 11 at 657.
[151] ULRC is a government boy mandated to study and keep under constant review the Acts and other laws of Uganda with the view of making recommendations for their systematic improvement, development, modernisation and reform.
[152] Reid & Priest LLP was a firm of Attorneys from Washington DC, USA which was contracted by the Uganda Government (Institutional Capacity Building Project) to provide consultancy services on the Reform of commercial and related laws that affect private sector Economic Development in Uganda.
[153] *A Study Report on Company Law* op cit note 83 at xiii.
[154] Ibid.

Uganda also engaged Clare Manuel to provide a consultation paper on key proposals for reform of insolvency law. She produced a draft bill and report based on the reforms in other jurisdictions particularly in the UK and New Zealand.[155] Regarding corporate insolvency and more specifically, corporate rescue, she recommended the procedure for voluntary administration of companies be introduced in Uganda which would not involve lengthy court proceedings and would be simple and cheap. Drawing from the experiences and procedures from other jurisdictions, she noted that the features of these proceedings would be such that companies that declared themselves to be in financial difficulty would appoint an administrator to take over the running of the company to assess its viability; there would be an immediate 28 day moratorium on enforcement of debts while that process took place and that at the end of the administration period, creditors would decide either to present a winding up petition, end the administration or accept a deed of company arrangement administered by a registered insolvency practitioner.[156]

In 1999, the ULRC was commissioned by the Government to review, examine and make recommendations on the possibility of formulating a comprehensive insolvency system, the law and practice relating to receiverships, insolvency, liquidation, and bankruptcy, and the harmonisation and integration of existing insolvency procedures.[157] The ULRC continued with the reform process building on the Reid and Priest LLP and Clare Manuel's reports. Companies in Uganda were still reliant on corporate rescue laws enacted during the colonial era. The ULRC noted that there was a need to update Uganda's insolvency law in light of local needs and major developments in other jurisdictions for instance, the UK where the current laws of Uganda had their origin and the fact that since then those laws had been modernised to suit prevailing conditions in the UK.[158]

ULRC proposed an overhaul of corporate rescue laws in Uganda in a bid to increase the survival rate of firms in difficulties. According to the commission, the economy of a country is affected if many companies are wound up. The effects on the economy may become manifested in the form of unemployment, falling prices, poor tax revenue collections, and a resultant negative effect on companies that are still in business. This may eventually result in

[155] Ibid.
[156] Ibid.
[157] Ibid para 3 at 9.
[157] Ibid at 7.
[158] *A Study Report on Insolvency Law* op cit note 149 para 2.

a loss of confidence in the economic sector. ULRC argued that an up-to-date insolvency law would help to ameliorate this effect.[159]

The ULRC realised the need for the law on insolvency to be aimed at rehabilitating, rather than punishing and stigmatising the debtor. This would help the insolvent to be given a fresh start and restored to a productive role in the economy. However, the debtor would also be adequately punished where it was found that he or she was responsible for his or her insolvency with a view of providing a deterrence.[160] Through its system of corporate rescue and rehabilitation, a good insolvency law would ably identify and save viable businesses that are in financial trouble from absolute collapse and appropriately liquidate those that are irredeemable.[161] This would have a stabilising effect on the economy since through corporate rescue and rehabilitation, jobs would be saved and commerce and trading would be protected from the harm likely to be suffered from the loss of a trading company. ULRC also noted that when successfully rehabilitated, the saved company would trade on a much better footing and become a much better player in the economy.[162]

Additionally, ULRC proposed the adoption of the procedure of obtaining an administration order following the provisions of the Insolvency Act of 1986 of England. ULRC recommended firstly that Uganda borrow and adopt the above procedure to suit its circumstances. ULRC also recommended that a 30-day moratorium period be recommended in the case of making an administration order. Further, ULRC recommended that the management stayed in control in cases of a company voluntary arrangement, it further proposed that this control had to be severely restricted and subjected to the strict supervision of the supervisor.[163] Summarily, ULRC introduced the concept of 'administration' into corporate law procedures in Uganda as a means of managing the company's business during the period before the appointment of a receiver to re-organise the company and restore it to profitability.[164] ULRC also recognised the need to bring about a unified insolvency code. Insolvency law was scattered in a range of legislation; for example, the Bankruptcy Act 1931, the Companies Act 1961,[165] and the Deeds of Arrangements Act 1931. As a result, the ULRC recommended that both statutory and common law rules should be brought together into a single Insolvency Act. The ULRC took the view that the amalgamation of insolvency laws would overcome protracted

[159] Ibid at para 3 at 15.
[160] Ibid at para 6 at 15.
[161] Ibid.
[162] Ibid at para 3 at 15.
[163] Ibid at para 3 at 15.
[164] Nyombi op cit note 11 at 659-660.
[165] The Companies Act Cap 110 ss 207, 208, 211 and 212.

litigation and simplify insolvency law. The Government believed that the new insolvency regime would not only promote ease of use and administration, it would also save costs in practice.[166]

The ULRC's final report was published in 2004, when corporate failure in Uganda was relatively high. The report's recommendations were made for the reform of Ugandan company and insolvency law. Its review of insolvency law culminated in the enactment of the Insolvency Act and Companies Act.

2.2.4.4 Introduction of Corporate Rescue

Following the ULRC reforms, two new Acts introduced several reforms to the corporate insolvency legal framework key among which was corporate rescue. The Insolvency Act Cap 108 implemented the main recommendations of the ULRC and brought together, in one Act, all the statutory provisions relating to personal bankruptcy and corporate insolvency. The Insolvency Act Cap 108 repealed parts VI[167], VII[168], and IX[169] of the Companies Act. It also introduced the concept of administration as a rescue procedure for financially distressed companies. It emphasised the benefits that flow from a corporate rescue rather than asset realisation, in particular, the interests of the company and unsecured creditors rather than powerful security holders.[170] The new Insolvency legal regime also saw the enactment of supporting regulations which include the Insolvency Regulations enacted for the better execution of the purposes of this Insolvency Act,[171]

Several regulations have created certainty, and helped professionalise insolvency practice in Uganda as persons with specialist knowledge in the field are registered and held accountable for their actions. These include, for example Insolvency Practitioners Regulations, which provide for registration and regulation of insolvency practitioners with the Official Receiver.[172] Another example is the Insolvency (Investigations and Prosecutions) Regulations, which provide for the procedure for investigation and prosecution of insolvency practitioners, directors, shareholders, and contributories, and all present and past members of the insolvent

[166] The Insolvency Bill 2009 Pt IV and sch 4.
[167] Contained provisions related to companies incorporated outside Uganda.
[168] Contained General provisions relating to receivers and managers. The provisions of corporate receivership hitherto under the Companies Act were incorporated under Part VII of the Insolvency Act.
[169] Contained provisions to do with voluntary winding up.
[170] Nyombi et al op cit note 11 at 660.
[171] Statutory Instrument No 36 of 2013.
[172] Statutory Instrument No 55 of 2017.

company or company under insolvency proceedings.[173] Similarly, the Insolvency Fees (Amendment) Regulations prescribe the fees payable in insolvency matters as provided for under the Insolvency Act.[174] .

In addition to administration, the ULRC recommended company voluntary arrangements and schemes of arrangement as rescue mechanisms. These were subsequently given statutory force by the Companies Act Cap 106. The Companies Act, Cap 106 provides for Company Voluntary Arrangements and schemes of arrangement as alternative remedies to liquidation which can be considered mechanisms through which companies can be rescued.[175] The provisions are couched in a more detailed manner similar to the provisions in the UK Companies Act 2006. However, they do not provide for a moratorium.

2.3 CONCLUSION

This chapter has discussed the history of corporate rescue in Uganda. It has drawn on the history of the UK corporate rescue laws to show similarities and or differences in approach. The chapter has shown that in Uganda, the ULRC recommendations produced several significant reforms in Uganda's corporate insolvency and can be deemed the foundation of modern corporate insolvency law in Uganda.[176] Owing to these reforms, corporate rescue finally gained significance within Uganda's insolvency culture, by allowing companies to be rescued at the earliest stage to minimise potential casualties, however, companies that are unable to survive any formal or informal insolvency arrangement may end up being liquidated. Uganda continues to work towards aligning its insolvency laws with international standards and best practices. It however remains to be seen the extent to which these procedures offer an alternative to liquidation of a company. Having laid this historical background, the next chapter will examine the various rescue mechanisms, identify their weaknesses, and propose reforms to enhance their effectiveness.

[173] Statutory Instrument No 4 of 2018.
[174] Statutory Instrument No 5 of 2018.
[175] The Companies Act Cap106 ss 234-246.
[176] Ibid.

CHAPTER THREE

LEGAL AND REGULATORY FRAMEWORK FOR CORPORATE RESCUE IN UGANDA

3.1 INTRODUCTION

This chapter evaluates the effectiveness of corporate rescue procedures in Uganda. The first part of this chapter highlights the importance of companies and explains some of the challenges that lead to the failure of companies. These challenges led to the realisation that it is not always necessary to liquidate companies, particularly those that create jobs and positively contribute to the country's economy. This led to the adoption of a legislative framework that allows companies that can be saved to be rescued. The chapter then discusses the rationale and objectives for corporate rescue. This chapter also evaluates the corporate rescue procedures in Uganda to assess their strengths and inadequacies to recommend law reform.

3.2 CHALLENGES THAT LEAD TO THE FAILURE OF COMPANIES IN UGANDA

In this secton, the challenges that lead to the failure of companies in Uganda are discussed.

3.2.1 Overview

Companies in Uganda are the lifeblood of the economy, driving job creation, generating government revenue, and fostering overall development.[1] The 2019/2020 Uganda Bureau of Statistics Report on the Census of Business Establishments (hereafter COBE) shows that Uganda had 686,700 businesses, reflecting a 49.9 per cent growth from 458,106 businesses in 2010/11, with 27.8 per cent classified as micro, 16.8 per cent as small, 55.1 per cent as medium, and only 0.3 per cent as large enterprises.[2] Sole proprietorship remains the dominant form of ownership at 84.8 per cent.[3] SMEs contribute about 75 per cent towards the country's Gross

[1] Bakashaba Rennie *Entrepreneurial income and barriers to firm growth: a study of rural small and medium enterprises in Uganda* (Unpublished PhD thesis, University of Reading, 2019) 1.
[2] Uganda Bureau of Statistics 2019/2020 Census of Business Establishments (COBE) Report at ii and 24 available at *https://www.ubos.org/2019-2020-census-of-business-establishments-cobe-report/* accessed on 07 Septemeber 2025.
[3] Ibid.

Domestic Product, assist in the eradication of poverty and creation of employment[4] and generate over 60 per cent of the country's revenue.[5] Although Uganda is among the most entrepreneurial countries in the world, the rate of company failure in Uganda is the second highest in the world.[6] Studies on SMEs in Uganda indicate that 90% of SMEs do not live to see their first birthday. Of those that survive beyond one year, less than 60% live to see their fifth birthday.[7] The number of companies that are winding up continues to rise, according to the Uganda Registration Services Bureau (URSB).[8] For example, between 2020 and 2022, forty six companies were officially liquidated following formal liquidation proceedings and only five companies officially filed for administration proceedings.[9]

3.2.2 Contributing Factors to Company Failure

Considering the symbiotic link between corporate rescue and financial distress, it is impossible to discuss corporate rescue without examining the causes of financial distress, which is crucial for an effective corporate rescue.[10] Several barriers hinder the survival rate of companies in Uganda,[11] emanating from both exogenous and endogenous factors.[12] The primary causes of corporate failure are internal, and are termed endogenous risk factors.[13] Over 80% of companies are failing not because of external factors but due to poor management.[14] In Uganda, the causes of corporate insolvency are largely endogenous. They include management ineptitude, poor decision-making by the management team, delayed detection of the early

[4] Ministry of Trade, Industry and Cooperatives *'State of Entrepreneurship in Uganda-2024 Report'* 2024; 106 *https://www.mtic.go.ug/wp-content/uploads/2019/09/Uganda-entrepreneurship-index-report_final.pdf* accessed on 6th September 2025.
[5] Jamiah Mayanja *Business Ethics in Ugandan Small and Medium-Sized Enterprises* (Unpublished PhD Thesis, the Nelson Mandela Metropolitan University, 2016) 30.
[6] Ibid at 32.
[7] Bakashaba op cit note 1 at 2.
[8] Uganda Registration Services Bureau (URSB), Annual Report 2019/2020 & 2020/2021; See also 'Company closure increases – URSB' The Daily Monitor November 08, 2018 also available at *https://www.monitor.co.ug/uganda/business/commodities/company-closure-increases-ursb-1788610*: In that article, an excerpt was taken from the speech made during the Insolvency Conference Programme in Kampala in 2018, by Mr Mustapher Ntale, the URSB manager liquidation, who said: 'I do not have the exact figures but I can tell you the number is increasing.
[9] Uganda Registration Services Bureau Annual Report 2020/2021 and Uganda Registration Services Bureau (URSB), Annual Report 2021/2022 available at *https://ursb.go.ugaccessed*, on 10 March 2022.
[10] John Michael Wood *Corporate Rescue: A Critical Analysis of its Fundamentals and Existence* (Unpublished PhD Thesis, The University of Leeds May 2013) 29.
[11] Mayanja op cit note 5 at 30.
[12] Natalia Outecheva *Corporate Distress: An empirical Analysis of Distress Risk* (Unpublished PhD Thesis University of St. Gallen 2007) 19.
[13] Ibid 19.
[14] Ibid at 20.

indicators of enterprise collapse, and taking on initiatives that are too big for the organisation.[15] Most endogenous risks are caused by acts and omissions of management.[16] These include: the poor handling of financial, organisational, and human resource matters and include inter alia poor record keeping, tax problems, theft/corruption.[17] Ineffectual or poor management can lead to errors in formulating and executing a strategic plan, with over 90% of corporate failures attributed to such mistakes.[18] Effective management capable of making strategic decisions can keep the company afloat amidst all sorts of conditions.[19] Unfortunately, even in developed economies, most company directors are untrained and unqualified[20] and fail to realise that the company is failing and in need of expert advice to properly diagnose and fix the source of trouble before it is too late.[21] Ultimately, management is in a position to make or break a company; the managers are the ones who run the company and make the key decisions on how that company should operate.[22]

The lack of good corporate governance structures also contributes to financial distress.[23] Studies have argued that corporate insolvency and good corporate governance are often the opposite sides of the same coin.[24] In Uganda, reports indicate that poor corporate governance is the leading cause of insolvency with the biggest problem being people who want to run businesses as if they are running their own homes, without proper separation of ownership from management.[25]

On the other side are exogenous factors which arise from external circumstances and often affect all companies in the market[26] and include conditions like economic slowdown,

[15] Stephen K. Nkundabanyanga, Mugabe Robert, Rachel Niringiye, Frank Kabuye & Julius Opiso 'The causes of corporate insolvency in Uganda: Perceptions of executives, managers, insolvency practitioners, and academicians' (2024) 2 (1) *The Insolvency Journal of Uganda* 13 at 34.
[16] Outecheva op cit note 12 at 20.
[17] John P Hayes, Sudhir K Chawla and Yunus Kathawala 'A Comparative Study of Problems Encountered in The Development of Small Businesses in The U.S. And Mexico.' *The Journal of Developing Areas* (2015) 49 (3) at 395 at 396.
[18] Wood op cit note 10 at 29.
[19] K. H. Wruck, 'Financial Distress, Reorganisation and Organisational Efficiency', (1990) 27 *Journal of Financial Economics* 419 at 424.
[20] Vanessa Finch and David Milman *Corporate Insolvency Law: Perspective and Principles* 3 ed (2017) 126.
[21] Waiswa Abudu Sallam *An Evaluation of the Strengths and Weaknesses of South Africa's Corporate Rescue Regime as a Potential Benchmark for Uganda* (unpublished PhD thesis, University of South Africa 2022) 71.
[22] Wood op cit note 10 at 30.
[23] Roman Tomasic 'Raising Corporate Governance Standards in Response to Corporate Rescue and Insolvency' (2009) 2(1) *Corporate Rescue & Insolvency* 1.
[24] Ibid.
[25] Nkundabanyanga op cit note 15 at 34.
[26] Outecheva op cit note 12 at 19.

evolving customer preferences,[27] high interest rates, inflation,[28] and changing market and economic conditions.[29] Relatedly, onerous regulatory burdens may trigger financial distress, especially for small companies unable to comply with statutory compliance costs.[30] Unexpected natural calamities may also trigger financial distress.[31] The exogenous factors may be sudden and with little warning thus, the natural answer to this would be for the management to adapt quickly to the situation. However, if it is at an unprecedented level and managers lack real experience in dealing with such an occurrence, it will prove a difficult task that may expose the company to financial troubles far greater than it should have been.[32] If it is the case that the company cannot survive such exposure, the company will inevitably fail. Exogenous shocks are independent of managerial skills.[33] Nonetheless, well-managed companies, with experienced and versatile teams, tend to cope with macroeconomic shocks, and their companies usually survive, demonstrating the importance of good management to predict and mitigate economic stresses.[34] Corporate failure has wide-ranging implications for creditors, management, employees, shareholders,[35] tax authorities, suppliers, and society at large.[36] Corporate failures destabilise the economic system in various ways such as increasing levels of unemployment, poverty, and crime and decrease in revenue collection.[37] These and other challenges led to debates for insolvency reform regarding the adoption of corporate rescue initiatives that could be used to save companies.

3.3 OBJECTIVES OF CORPORATE RESCUE

Corporate insolvency law provides two avenues through which a distressed company can resolve its problems: liquidation and corporate rescue. Both routes provide a joint process of

[27] Subhash Sharma and Vijay Mahajan 'Early Warning Indicators of Business Failure' (1980) 44(4) *Journal of Marketing* 80 at 83.
[28] Jim Everett and John Watson 'Small Business Failure and External Risk Factors' (1998) 11 (4) *Small Business Economics* 371 at 383.
[29] Finch & Milman op cit note 20 at 131.
[30] Ibid at 133.
[31] Ibid at 134.
[32] Wood op cit note 10 at 31-32.
[33] Gordon V Karels and Arun J 'Praksah Multivariate Normality and Forecasting of Business Bankruptcy' 1987 JBFA 573 at 577.
[34] Finch & Milman op cit note 20 at 131.
[35] Roy Goode, *Principles of Corporate Insolvency Law* 4 edn (2011) 68.
[36] Elizabeth Warren 'Bankruptcy Policymaking in an Imperfect World' (1993) *Michigan LR* 336 at 355.
[37] David O Mbat & Eyo I Eyo 'Corporate Failure: Causes and Remedies' (2013) 2 (4) *Business and Management Research* 19.

dealing with the company's problems when such problems cannot be resolved via the avenue of negotiating with creditors.[38] However, these routes do not yield the same results when attempting to solve the problems. The main objective of liquidation is realising the assets of the company and selling the same for the benefit of the creditors when there is no possibility of rehabilitating/saving the company. However, corporate rescue aims to give the company somewhat a second chance to attempt restructuring by reaching compromises or arrangements with its creditors to enable the company to continue trading as a going concern.[39] Justifications have been adduced by both the courts and commentators in different jurisdictions for the statutory preference to rescue instead of liquidation of companies.[40]

The advent of the concept of corporate rescue was a recognition that companies are like humans and can be treated.[41] This can save the company from sliding further into actual insolvency and eventual collapse of the company, with all its concomitant effects, like job losses.[42] Consequently, provision must be made for the preservation of viable companies capable of making a useful contribution to the country's economic life.[43]

Corporate rescue primarily aims to facilitate the recovery of companies in times of financial crisis and stimulate the rehabilitation of insolvent companies and businesses as going concerns. It also aims at balancing the interests of different groupings and protecting the interests of the public and employees in the face of financial failures.[44] In *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd*[45] Binns-Ward J, of the South African High Court, observed:

> '…The legislature has recognised that the liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is in the public interest that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations in cases in which there is a reasonable prospect of salvaging the business of a company

[38] Bo Xie, *Comparative Insolvency Law: The Pre-Pack Approach in Corporate Rescue* (Edward Elgar Publishing Ltd 2016) 1 at 3.
[39] Ibid.
[40] Anthony O Nwafor 'The goal(s) of corporate rescue in company law: A comparative analysis' (2017) 13(2) *Corporate Board: role, duties and composition* 20 at 21.
[41] Waiswa op cit note 21 at 151.
[42] Ibid at 152.
[43] Ibid at 107.
[44] Bo Xie *Corporate rescue – the new orientation of insolvency law* (Edward Elgar Publishing Ltd 2016) 3 at 19.
[45] 2012 (2) SA 378 (WCC) para 14.

> in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation…'.

In the UK, the Cork Committee had, while recommending a corporate rescue approach in the UK Insolvency Act of 1986, stated that:

> '…a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees, and the community that it must not be overlooked…'.[46]

Corporate rescue prevents or limits job losses. The preservation of employment for the employees (operational creditors) seems to be a more viable target than any other interests in the corporate scheme including the business of the corporation as a going concern. It is axiomatic that only the revival of the sick company will guarantee the continuous payment of the workers' entitlements. The sustaining of the workers' employment can only in that context be seen as ancillary to the goal of corporate rescue.[47]

Additionally, corporate rescue helps financially distressed companies to maintain value for their businesses and assets. This benefit is predicated on the economic theory that 'greater value may be obtained from keeping the essential components of a business together rather than breaking them up and disposing of them in fragments.'[48] Corporate rescue procedures also protect the value of the intangible assets of companies such as goodwill and encourage foreign investments.[49] Successful rescue of companies in financial distress is therefore preferable to preserve going concern value instead of piece-meal liquidation of the company.[50] Additionally, it is generally geared at ensuring the sustainability of the corporate enterprise. The realisation of the importance of corporate entities to the economic development of nations and the

[46] Report of the Review Committee on Insolvency Law and Practice (Cork Committee Report, 1982 (Cmnd 8558)) para 204, quoted in Alan Dignam & John Lowry, *Company Law* 9 ed (2016) 425-426.
[47] Nwafor op cit note 40 at 26.
[48] Waiswa op cit note 21 at 153.
[49] Ebenezer T. Yebisi and Taiye J. Omidoyin 'Corporate rescue law to the rescue of businesses in trauma in Nigeria' (2018) 73 *Journal of Law, Policy and Globalisation* 44 at 47.
[50] Tim M. Verdoes and A.M. Verweij 'A Critical Consideration of the Corporate Rescue Culture; an Analysis from the Perspective of Complexity Economics' (2014) in R. Parry (ed.), 2015 1 at 2.

'spiraling adverse impacts of a company's demise on the stakeholders and the society at large' are the keys to this new trend[51] of the pursuit of the rescue culture as opposed to liquidation.

3.4 LEGAL AND REGULATORY FRAMEWORK FOR CORPORATE RESCUE

The Insolvency Act of Cap 108 is the principal legislation governing insolvency in Uganda. It should be read with various regulations that have been issued for the monitoring and enforcement of this legislation.[52] The Companies Act, Cap 106 provides for insolvency procedures to a limited extent.[53] Insolvency procedures include: administration,[54] compromises and arrangements,[55] winding up,[56] and administrative receivership.[57] The Insolvency Act, Cap 108 introduced the concept of administration as an alternative to liquidation aimed at rescuing companies that can be saved. The Companies Act, Cap 106 makes provision for the concept of compromises and arrangements as alternative remedies to liquidation. Compromises and arrangements as well as administration are generally also regarded as 'rescue' procedures.[58]

3.4.1 Corporate rescue procedures under the Insolvency Act Cap 108

3.4.1.1 Overview

The Insolvency Act introduced the administration procedure which seeks to encourage corporate rescue of financially distressed but viable companies rather than their liquidation. Despite its introduction, companies have continued to be liquidated. The official figures in the 2022/2023 annual report by Uganda's official receiver indicated that 172 companies had officially filed insolvency resolutions a 95% increment from 88 companies that had filed the same in 2021/2022.[59] In 2022/2023, 53 companies were officially liquidated, a 165% increment compared to 20 companies in 2021/2021.[60] The application of administration came with some

[51] Nwafor op cit note 40 at 30.
[52] Statutory Instrument No 36 of 2013, Statutory Instrument No 55 of 2017, Statutory Instrument No 4 of 2018, and Statutory Instrument No 5 of 2018.
[53] The Companies Act, Cap 106 provides for Company Voluntary Arrangements and schemes of arrangement see ss 231-232.
[54] The Insolvency Act Cap 108 Part VI; ss 140- 178.
[55] The Companies Act op cit note 53 Part V ss 230-232.
[56] Ibid Part IX ss 266 -270, Insolvency Act Cap 108 Part IV ss 56 – 118.
[57] Ibid ss 179- 201.
[58] Sandra Frisby 'Of rights and rescue: a curious confluence' (2019) *Journal of Corporate Law Studies* 1 at 4.
[59] Uganda Resgistration Services Bureau op cit note 8 Annual Report for 2022/2023 at 43.
[60] Ibid Annual Report for 2022/2023 at 43.

limitations which have affected its usage. Data from URSB indicates that the usage and popularity of the administration procedure has been extremely low. In 2020/2021, only 2 companies filed for administration, a -80% reduction compared to 10 companies in 2019/2020.[61] In 2021/2022, only 3 companies filed for administration, a 50% increase compared to 2 companies in 2020/2021.[62] No data was availed by URSB in the 2022/2023 annual report of any companies that had filed for administration. This shows that there is a low uptake of administration as a corporate rescue procedure. There are many unclear provisions, as well as certain disadvantages and weaknesses, associated with this procedure. This section evaluates this procedure of administration with a particular focus on its weaknesses to identify opportunities for improvement to enhance its effectiveness as a rescue procedure.

3.4.1.2 Definition of Administration

The Insolvency Act entitled 'An Act to provide for receivership, administration, liquidation, arrangements, bankruptcy, the regulation of insolvency practitioners and cross-border insolvency and for related matters' brought about administration as a corporate rescue procedure. Neither the Act nor the Insolvency Regulations define or explain what the procedure means. One of the basic components of legislation is the definition of key terms.[63] Key terms should be defined when necessary and consistently used in accordance with a single definition.[64] Terms should be defined to promote clarity, consistency and precision.[65] Without clarity, the term will be open to interpretation undermining confidence in the legal system and insolvency process. This potentially leads to varying interpretations of the law, resulting in inconsistent applications and unpredictable outcomes in administration proceedings.

Definitions are especially necessary when particular meanings of terms are required for correct application of the legislation.[66] Inaccurate or poorly drafted definitions can significantly affect the meaning of legislation and become a source of confusion and legal uncertainty.[67] Ambiguity in the law can cause delays in insolvency proceedings as courts and practitioners spend additional time determining the appropriate procedures and interpretations. This creates uncertainty about what they mean and what they seek to achieve. A lack of a clear definition

[61] Ibid Annual Report for 2020/2021 at 33.
[62] Ibid Annual Report for 2020/2021 24.
[63] Mark Evans *Legislative Drafting: Principles and Materials* (2011) 71.
[64] Ibid at 83.
[65] Ibid at 100.
[66] Ibid at 99.
[67] Ibid at 100.

and purpose is likely to leave this area of law marked by inconsistencies in application, abuse of procedural rules, and a failure of policy objectives.[68]

3.4.1.3 Entities to which Administration Applies

Both local and foreign-registered companies, as well as existing companies and re-registered companies, can utilise administration.[69] The statutory rescue procedure typically applies to all companies. The rescue procedure adopts a 'one-size-fits-all' approach that makes little distinction between the size and complexity of companies. They must ably handle both the corporate re-organisations of a multibillion-dollar international company and that of a small, rural grocery store.[70] It is increasingly recognised that formal insolvency regimes tend to be designed with large businesses in mind which do not work well for micro, small, or medium-sized enterprises.[71] The insolvency law framework is complex, slow, expensive, and not fit for purpose. It has long been evident that given the cost and complexity of corporate insolvency laws, many companies are abandoned rather than put through an insolvency process.[72] This procedure is particularly onerous and costly for small companies since they normally lack enough resources and expertise to efficiently pursue the said procedure.[73] The majority of Ugandan companies are MSMEs making the procedure unsuitable.[74]

3.4.1.4 Cost of Administration

While administration is available to all companies who wish to use it, the cost of implementing it may serve as a barrier for small companies already facing financial difficulty.[75] Cost is undoubtedly a consideration in any process, but becomes increasingly important when insolvency is imminent. The administration system has been criticised due to the high costs

[68] Chrispas Nyombi, Alexander Kibandama and David Justin Bakibinga 'The Motivations behind the Uganda Insolvency Act 2011' (2014) 8 *Journal of Business Law* 652 at 653.
[69] Insolvency Act op cit note 53 ss 1, 140.
[70] Jason Harris and Michael Murray, 'Insolvency Law Failing Small Business' (2020) University of Sydney Law School available at: *https://www.sydney.edu.au/law/news-and-events/news/2020/08/06/insolvency-law-failing-small-business.html* accessed on 20 March 2023.
[71] Jennifer Payne 'An Assessment of the UK Restructuring Moratorium' (2021) 454 at 461.
[72] Harris & Murray op cit note 70.
[73] Ibid.
[74] Ibid.
[75] Sebastian Ellice 'Is Voluntary Administration Failing Companies? An Investigation into the operation of Voluntary Administration in New Zealand from inception to 2019' (2021) 52 *Vuwlr* 29 at 46.

and its propensity to cannibalise small businesses.[76] The costs associated with administration are rather prohibitive to very small companies with limited assets.[77] In Uganda, corporate rescue proceedings cannot take place without the appointment of an accredited insolvency practitioner.[78] Often, such a requirement makes the process more burdensome for SMEs because most experienced 'good standing professionally accredited professionals' come with their own designated consultation fees and other related administration charges.[79] Priority is given to the administrator to secure their expenses before the creditors are paid.[80] A provisional administrator is entitled to the remuneration agreed upon; or remuneration fixed by the court.[81] Consequently, otherwise salvageable and useful corporate entities fail because they cannot afford rescue.[82] In Uganda, there is no scale which is applied by IPs to bill clients in performing their work. As such, fees are charged arbitrarily. Coupled with this are other associated costs required to process financial audits as well as legal and court fees which don't come cheap. All these costs take a huge toll on an already financially struggling company.

The predominance of MSMEs raises questions about the cost effectiveness of the current insolvency regimes.[83] This means that the cost of administration is a barrier to these companies. For these small companies, liquidation may be a more cost-efficient option, as the liquidator will shut down the business quickly or continue to trade for only a short amount of time.[84] A potential reason why administration has been used less frequently than other insolvency procedures may be due to the number of small businesses in Uganda.

3.4.1.5 Eligibility and the Test for Administration

The test used to determine whether a company should be placed in administration is whether or not the company can pay its debts. An administration can only begin when the insolvency

[76] Williams C Iheme & Sanford U Mba 'Coping with the Covid-19 Pandemic: A Comparative Study of the Capabilities of the Kenyan and Nigerian Insolvency Frameworks' (2020) 6 (2) *Journal of Corporate and Commercial Law & Practice* 112 at 124.
[77] Jenny Fu & Roman Tomasic 'The Use of Non Court-Based Corporate Rescue: Does the Australian Voluntary Administration Procedure Provide a Model for China?' (2017) 26 *International Insolvency Review* 153 at 165.
[78] The Insolvency Act op cit note 54 s 208.
[79] Mikovhe Maphiri 'The Suitability of South Africa's Business Rescue Procedure in the Reorganization of Small-To Medium-Sized Enterprises: Lessons from Chapter 11 of the United States Bankruptcy Code' (2018) 8 (1) *Michigan Business & Entrepreneurial Law Review* 101 at 125.
[80] The Insolvency regulations r152.
[81] The Insolvency Act op cit note 54 s 174.
[82] Maphiri op cit note 79 at 117.
[83] Ellice op cit note 75 at 29.
[84] Ibid.

condition is satisfied.[85] In *Bahadukali Mohammed Ali Viran Versus Springs International Hotel Ltd*,[86] Justice Ssekaana stated that a company becomes insolvent when it is no longer able to meet its debts and/or when liabilities exceed its assets.[87] Section 2 of the Insolvency Act provides that a debtor is presumed to be unable to pay its debts, 'if the debtor has failed to comply with a statutory demand,[88] or, the execution issued against the debtor in respect of a judgment debt has been returned unsatisfied in whole or in part'. [89] Additionally, 'where all or substantially all the properties of the debtor are in the possession or control of a receiver or some other person enforcing a charge over that property', the debtor is presumed to be unable to pay their debts.[90]

In *Mian Aqeel Ashraf, Ashraf Mian Rohail Vs Exim Bank (U) Limited*,[91] Justice Margaret stated that 'it is trite that the moment the principal debtor fails to comply with the statutory demand, the presumption is that he or she is unable to pay their debts.[92] The Act defines a statutory demand to mean 'a demand made under section 3 of the Act'.[93] In *Springs International Hotel Ltd v Hotel Diplomate Ltd and Boney M Katatumba*[94] Justice Ssekaana of the High Court of Uganda held among others that 'a statutory demand is not merely a document like an ordinary letter. It has far-reaching consequences and could lead to initiation of winding up proceedings against the company if not responded to within twenty (20) working days'.[95]
A statutory demand shall be made in respect of a debt that is not less than the prescribed amount and in the case of a debt owed by a company is ascertained.[96] The prescribed amount is UGX 2,000,000 (Two million Ugandan shillings),[97] In *Omer Farming Company Limited Versus Rehoboth Agricultural Management Services Ltd*,[98] Justice Ssekaana stated that 'a debt can only be ascertained by both parties agreeing to the same or having a common position to it. A

[85] The Insolvency Act op cit note 54 s139 (2); see also op cit note 52 reg 135 (2)(a); which provides that a petition for an interim protective order is verified with an affidavit and must contain a statement by the petitioner on whether the company is or is likely to be unable to pay its debts and justification for the belief - op cit note 52 reg 136 (1) (a) (b).
[86] Company Cause No.005 of 2019.
[87] Ibid at 5.
[88] The Insolvency Act op cit note 54 s 2 (1)(a).
[89] Ibid s 2 (1)(b).
[90] Ibid s 2 (1)(c).
[91] Miscellaneous Application No. 497 of 2017.
[92] Ibid at 16.
[93] The Companies Act op cit note 53 s 2.
[94] High Court Misc. case no. 42 of 2015.
[95] Ibid at 5.
[96] The Insolvency Act op cit note 54 s 3(2)(a) (i) (ii). In addition, it must be in the prescribed form and except where the debt is a judgment debt, it must be verified by a statutory declaration attached to the demand.
[97] Ibid s 3 and sched 2 to the Act. This is approximately 9,700 ZAR.
[98] Miscellaneous Cause No.21 of 2019.

debt cannot be certain if one of the parties is disputing the same.[99] Further, once a debt is not yet ascertained then it means that a right has not yet been established to trigger the Insolvency proceedings by way of issuing a statutory demand'.[100]

Therefore, a trade creditor or any other person who is owed an established debt above the prescribed amount may choose to serve the defaulting company a statutory notice, without first having to go to court to prove the claimed debt. This partly explains why insolvency proceedings are still used by some creditors as 'a debt collection tool in Uganda',[101] with some commentators arguing that insolvency proceedings are 'one of the sharpest tools available in any debt collector's armoury'.[102] If the company 'does not settle, compound, secure, or otherwise compromise the debt within the statutory period of twenty working days or apply to set aside the statutory notice within ten working days of receipt of the notice',[103] such a debtor will be legally presumed to be unable to pay his or her debts in Uganda and 'insolvency proceedings can be commenced against him or her within twenty working days after the last date for compliance with the demand'.[104]

The court may, on the application of the debtor, set aside a statutory demand.[105] The grounds for setting aside are; a substantial dispute whether the debt is owing or is due, the debtor has counterclaims, set-offs, or cross-demands, the creditor holds property related to the debt, and the security's value is equivalent to or exceeds the full debt amount.[106] In *Omer Farming Company Limited Versus Rehoboth Agricultural Management Services Ltd*,[107] Justice Ssekaana held that a statutory demand ought to be set aside if there are triable issues to go to trial. The court allowed the application and set aside the statutory demand since there was a substantial dispute about whether there was debt or whether the debt was owing or was due.[108]

Additionally, a company is deemed insolvent where 'execution issued against the debtor in respect of a judgment debt has been returned unsatisfied in whole or in part'. This is probably the most direct ground for proving inability to pay debts. Lord Hoffmann observed in *Re a Company 12209 of 1991*[109] that 'a company's non–compliance with a statutory demand,

[99] Supra at 7.
[100] Ibid.
[101] Waiswa op cit note 21 at 82.
[102] Ibid at 92.
[103] The Insolvency Act op cit note 54 ss 3(2)(e) and 4.
[104] Ibid s 3(2) (e) of the Act.
[105] Ibid s 4; the application shall be made within ten working days (court may extend this time if there is sufficient cause. The application is by notice of motion-regulation 6 of the Insolvency regulations.
[106] Ibid s 4(4).
[107] Miscellaneous Cause No.21 of 2019.
[108] Ibid at 9.
[109] (1992) BCLC 865.

or failure to satisfy execution of a judgment debt are matters that can be proved quite simply, usually in a single short witness statement. In such a case, all that the petitioning creditor will have to adduce in court is documentary evidence of the unsatisfied judgment, and once this is proved, the court would, ordinarily be inclined to presume the debtor to be unable to pay debts'.[110] In *Bahadukali Mohammed Ali Viran Versus Springs International Hotel Ltd*,[111] in deciding whether the respondent was unable to pay its debts, Justice Ssekaana held that 'where the debt arose out of court proceedings, the successful party i.e., the judgment creditor should attach a return of court of the unsatisfied claim'.[112] He further stated that Judgment creditors should not rush to take up bankruptcy/insolvency proceedings immediately upon default of payment by debtors but should look to bankruptcy as a last resort for debt recovery and only after all other avenues for recovery have failed or proven unsuccessful.[113] He dismissed the petition.

A company is also deemed insolvent where 'all or substantially all the property of the debtor is in possession or control of a receiver or some other person enforcing a charge over the company property'.[114] This provision was introduced in Uganda through the Act. It reflects the fact that in Uganda, unlike countries such as the UK,[115] the law permits a creditor to 'appoint a receiver to take over any or all the assets of a debtor as a form of debt enforcement procedure'.[116] A creditor may also place a debtor under receivership as a mode of execution of a court decree.[117] The provision represents a practical recognition that receivership, by its nature, 'is a legal procedure through which a secured creditor can enforce his or her security'.[118] The appointment of a receiver is usually occasioned by default in the settlement of an ascertained debt.[119] It is expected that if a debtor is indeed able to pay his or her debt or disputes the debt on genuine grounds, he or she would either pay the debt or object to the appointment of a receiver.[120] The law rightly presupposes that the action of appointment of a receiver is a symptom of a debtor's inability to pay debts. Hence, if a creditor can prove to the court that the same company that owes him or her money above the prescribed amount of UGX 2,000,000

[110] Supra at 868.
[111] Company Cause No.005 of 2019.
[112] Supra at 7.
[113] Ibid.
[114] The Insolvency Act op cit note 54 s 2 (1) (c).
[115] UK Enterprise Act 2002 abolished the institution of administrative receiverships.
[116] The Insolvency Act op cit note 54 Part VII of the Act.
[117] Civil Procedure Rules s 1 71–1 Order 42.
[118] Goode op cit note 35 at 315.
[119] Uganda Law Reform Commission, *A Study Report on Insolvency Law* Law Com Pub No.13 (2004)106 at 15.
[120] Waiswa op cit note 21 at 93.

(Two million Ugandan shillings) is under receivership or its property is in possession or control of a receiver, then such a creditor can commence insolvency proceedings against the debtor on account of inability to pay debts.[121]

It was hoped that prescribing a statutory meaning to the phrase 'inability to pay debts' would give a clear indication of the various ways through which a company may be presumed to be unable to pay its debts and when it may be exposed to the risk of being subjected to insolvency proceedings.[122] Unfortunately, the statutory definition in the Act is not a definition in a strict sense. It only provides a list of factors, which if proved, can form the basis for the court's decision to presume that one is indeed unable to pay his or her debts.[123] Arguably, the scope of 'inability to pay debts' in Uganda is quite wide. The scope of meaning of inability to pay debts is further broadened by section 2(3) of the Act. The provision stipulates that someone's inability to pay debts can be proved by other means than those specifically listed in section 2(1) of the Act. Therefore, besides the specific indicators of inability to pay debts, a creditor can still use other tests such as the cash flow and balance sheet tests to prove that a debtor is unable to pay his or her debts. This is further buttressed by the provisions of subsection (4) which adds that in determining whether a debtor is unable to pay the creditor, contingent and prospective debts may be considered.

The prescribed amount of UGX 2,000,000 (Two million Ugandan shillings)[124] is low and does not effectively determine a company's insolvency. Setting the threshold at UGX 2,000,000 may disproportionately affect MSME's which predominantly exist in Uganda's economy and which typically operate on thin margins. This will lead to premature liquidations, rising unemployment, and economic instability. This low threshold will also encourage abuse by creditors who will prematurely pursue insolvency proceedings against these companies resulting in unnecessary liquidations, negative publicity, and stigma for these companies.

3.4.1.6 Initiation of Administration

The Insolvency Act restricts initiation of administration to the directors and creditors of the company.[125] The Act does not allow for other stakeholders to initiate the procedure where

[121] Ibid at 93.
[122] Nyombi et al op cit note 68 at 665.
[123] Wee Meng Seng 'Misconceptions on the "unable to pay its debts" ground of winding up' (2014) 130 *Law Quarterly Review* 1.
[124] The Insolvency Act op cit note 54 s 3 and sch 2.
[125] Ibid ss 141 & 178.

directors or creditors are reluctant or unwilling to initiate the rescue. Neither shareholders, employees nor the regulator of the sector can cause a company to directly enter into administration.[126] This restriction hinders successful rescue since these directors, who are in most cases responsible for the company's financial distress are not willing to take proactive steps to address the company's insolvency. Directors who want to prolong their employment at a company for example, while they seek new job opportunities will be disinclined to precipitate action by the administrator.[127] Instead they may seek to preserve uncertainty about the company's position and future prospects so that the company is induced to delay taking decisions.[128]

This delay enables companies to continue operating while insolvent thereby exacerbating the company's financial difficulties, reducing the chances of the company's rescue and increasing the risk for creditor losses. Where the likelihood of insolvency exists, directors have obligations to take immediate steps to minimise loss for stakeholders and to take reasonable steps to avoid insolvency.[129] However, the Act does not provide sanctions for directors who don't fulfil this obligation. It is therefore unlikely that directors will be compelled in any way to initiate administration. On the other hand, creditors may not be able to initiate the procedure in a timely manner since they are external parties who may not have access to information about the company's financial woes. Creditors may also not act in good faith which results in making wrong decisions to the detriment of the company.

Since administration is intended to provide specialised care of troubled companies under the administrator; it is necessary that the entry procedure be seamless and flexible.[130] It should be conducted by a wide range of parties with a legitimate interest in the recovery and wellbeing of the troubled company, in the same way, any concerned person is allowed to rush a sick person to hospital for treatment.[131] Arguably, allowing many stakeholders to initiate administration is not only in line with international best practices, it also prevents directors and creditors from abusing their power to delay or avoid rescue.

3.4.1.7 Timing of Initiation of Administration

[126] Waiswa op cit note 21 at 317.
[127] Douglas G Baird and Morrison, Edward R 'Bankruptcy Decision Making' (2001) 17 *Journal of Law Economics and Organisation* 1 at 18.
[128] Ibid.
[129] Peter Walton, Chris Umfreville, Lézelle Jacobs 'A snapshot of company voluntary arrangements: Success, failure and proposals for reform' *Int Insolv Rev.* (2020) 267 at 278.
[130] Waiswa op cit note 21 at 317.
[131] Ibid at 317

Unless a company can demonstrate that it is faced with actual or imminent risk of inability to pay its debts,[132] it is not eligible to pursue provisional administration.[133] It is therefore ironic that the company must wait till it can prove that it is insolvent before it can propose rescue.[134] It should be able to take advantage of the rescue procedure early enough otherwise it would carry on until forced into the formal procedure by its main lender.[135] At that stage, the company's viability would be diminished and its opportunity to save its business would be fettered, both by the lenders' control and by its insolvency.[136] Delays in initiating the administration proceedings significantly diminish the prospects of a successful rescue.

Clearly, in this regard, timing is paramount. The longer a financially distressed company takes to initiate corporate rescue proceedings, the lower its chances of successful rehabilitation. The actions of a director determine the viability of any rescue attempt.[137]Directors should not only be able to identify any threats to the company's well-being but also, if required, to take all the necessary proactive steps to ensure that the correct professional help is sought at the earliest opportunity.[138] This is not to say that directors are prohibited from attempting to trade the company out of its difficulties; they must simply not endeavour to indulge in these actions to any degree if they had assessed the situation and concluded that there was no reasonable prospect that the company was going to avoid going into insolvency liquidation.[139] The difficulty with maintaining this position is that even if the director had acted in what would be generally described as diligent and in a manner that was consistent with what would be deemed as reasonable, this can only be determined by the court after they have deliberated over the actions taken in conjunction with the threat posed to see whether the actions were sufficient.[140] This vagueness has caused considerable confusion and frustration among directors.[141] They face growing concerns in trying to ascertain whether they are operating within the legal boundaries when they are trying to save the company, and

[132] The Insolvency Act op cit note 54 s141 (2).
[133] Waiswa op cit note 21 at 270
[134] Bolanle Adenike Adebola *Corporate Rescue and the Nigerian Insolvency System* (Unpublished PhD thesis, University College London 2012) 253.
[135] Ibid.
[136] Ibid.
[137] Wood op cit note 10 at 108.
[138] John Armour and Sandra Frisby, 'Rethinking Receiverships' (2001) 21 (1) *Oxford Journal of Legal Studies* 94.
[139] Wood op cit note 10 at 108.
[140] Ian Fletcher *The Law of Insolvency* 4 edn, (2009) 859.
[141] Andrew Keay and Michael Murray, 'Making Company Directors Liable: A Comparative Analysis of Wrongful Trading in the UK and Insolvent Trading in Australia', (2005) 14 (1) *International Insolvency Review* 27 at 45.

determining when the correct time to ask for help is.[142] However those who continue to trade without seeking professional advice are at risk of being disqualified from acting as a director in the future.[143]

There should be an emphasis on early intervention and taking pre-emptive measures to avert potential danger.[144] Business rescue should be regarded as an independent corporate procedure to assist companies in financial difficulties, preferably before actual or commercial insolvency has set in.[145] In *Welman v Marcelle Props,*[146] it was held that 'business rescue proceedings are not for the terminally ill close corporations; but for the ailing corporations, which given time, can be rescued, and become solvent'.

3.4.1.8 Commencement procedure

3.4.1.8.1 Special Resolution

A decision to place a company under provisional administration must first be considered and approved by a majority of the company members.[147] Thereafter, the members of the company must by special resolution agree that the company needs to settle with its creditors.[148] A special resolution requires statutory notice of 21 days before the meeting date and must be passed by a majority of not less than three-fourths of such members entitled to vote directly or by proxy.[149] The ailing company must wait for at least 21 days before its members can pass a special resolution authorising its directors to appoint a provisional administrator and to petition the court for an interim protective order. For a financially distressed company, time is of the essence. Requiring a special resolution and all the attendant procedures related to that can cause significant delays potentially allowing the company's financial situation to deteriorate further. This significantly reduces the chances of a successful rescue. This also requires the use of significant resources including money which drains the already financially struggling company. This resolution is then filed at the Uganda Registration Services Bureau (hereafter

[142] Wood op cit note 10 at 108.
[143] Ibid at 109.
[144] Vanessa Finch, 'Corporate Rescue Processes: The Search for Quality and the Capacity to Resolve' (2010) *The Journal of Business Law* 502 at 506.
[145] Anneli Loubser 'Business Rescue in South Africa: A Procedure in Search of a Home?' (2007) 40 *Comparative and International Law Journal of South Africa* 49.
[146] 193 2012 JDR 0408 GSJ 12.
[147] The Insolvency Act op cit note 54 s 141 (3).
[148] Ibid s 141 (3).
[149] The Companies Act op cit note 53 s 144.

URSB) which operates an open registry. This requirement leads to publicity of the company's financial struggles. This potentially leads to panic among creditors who will scamper to recover what they can from the company leading to the dissipation of the company's assets.

3.4.1.8.2 Petition to High Court

After filing the resolution at URSB, the financially ailing company must petition the High Court,[150] for an interim protective order. The court must be involved in many aspects of the rescue procedure under the present insolvency regime. This can offer an excellent supervisory structure and several benefits when implemented properly and effectively. On the contrary, court based administration increases the workload of the judiciary and the company costs. Unfortunately, the judiciary is burdened with a loss of public confidence and trust, due to rampant corruption, inefficiency, and incompetence.[151] With such a negative image, there is little expected as far as supporting the insolvency processes and boosting investors' confidence is concerned.[152] In addition, it struggles with a backlog of cases, causing delays. With the case backlog in Ugandan courts,[153] one cannot possibly predict how long it would take before the court can entertain the petition. It can be argued that this is one of the most important drawbacks of administration mainly because of the general apathy against the court proceedings as well as the high costs associated with the court proceedings.[154] It is difficult to convince a company faced with the risk of closure due to insolvency, to again spend more money on the court proceedings.[155] Cost is a factor in any procedure, and is especially relevant when insolvency is looming. Therefore, by involving court, the procedure opens up the door to unnecessary costs which is a deterrent to companies struggling financially. Rescue procedures that are heavily court reliant have been criticised for being costly, in terms of both time, legal fees, and uncertainty.[156] For example, the requirement for court confirmation/approval of a plan/proposal adds another step to what is already a lengthy procedure.[157] Every court appearance, whether

[150] Ibid s 141 (4).
[151] The Judiciary Strategic Plan V FY 2020/21 - 2024/25 Strengthening Administration of Justice (2021) 28 available at *https://www.judiciary.go.ug/* accessed on 25 March 2023.
[152] Fancy Chepkemoi Too *A Comparative Analysis of Corporate Insolvency Laws: Which is the best option for Kenya*? (Unpublished PhD Thesis Nottingham Trent University 2015) 137.
[153] The Judiciary Strategic Plan V op cit note 151.
[154] Waiswa op cit note 21 at 168.
[155] Ibid.
[156] G. Dal Pont and L Griggs 'A Principled Justification for Business Rescue Laws: A Comparative Perspective (Part II]' (1999) 5(1) *International Insolvency Review* 47 at 75.
[157] Ibid.

for confirmatory or supervisory purposes, requires the presence of legal representatives, and opens the door to legal fees subverting any value to be obtained in curial proceedings.[158] Moreover, the greater the resort permitted to the court both prior and after plan confirmation, the greater the likelihood that court appearances will be utilised as a tactical manoeuvre.[159]

Nevertheless, court control may be desirable as a safeguard to protect the non-creditor interests, and guard against abuse of process.[160] Ideally, business rescue laws should encourage court intervention only where this is strictly necessary for the protection of interests deserving of protection but which, apart from curial intervention, would be denied it.[161] Court processes, no doubt are costly ones that take away resources from a company that is already struggling financially. The lack of a set deadline for the court to decide whether or not to accept a reorganisation application is a major issue here. It is an omission that will undoubtedly result in an extended delay by the court. Since there is no interim moratorium to cover this time period, the longer the application stage drags on, the slimmer the likelihood of saving the struggling company becomes.

Even when the court sits to hear the petition, the law clothes many parties with locus standi to appear and either support or oppose the grant of the interim protective order.[162] These include a receiver, where one was already appointed in respect of any of the company property,[163] and a petitioner or provisional liquidator, where one was appointed in respect of the company.[164] It also includes any enforcement officer with the execution of any legal process against the company or its property.[165] This leaves the window wide open for any interested party to appear and either support or oppose the petition for an interim order, including creditors.[166]

The court then proceeds to hear and determine the application and it is not automatic that the court will always grant an application for an interim protective order and allow the company to commence provisional administration.[167] The company must convincingly demonstrate to the court that the decision to place the company under provisional administration is made in good faith and for the benefit of the general body of creditors,

[158] Ibid.
[159] Ibid at 76.
[160] Ibid.
[161] Ibid.
[162] The Insolvency Regulations Statutory Instrument No 36 of 2013 reg 138.
[163] Ibid reg 137(1)(a).
[164] Ibid reg 137(1)(b).
[165] Ibid reg 137(1)(d).
[166] Ibid regs139 and 142.
[167] Waiswa op cit note 21 at 275.

otherwise, the court may decline to grant the order.[168] The company should demonstrate how the outcomes of provisional administration as enshrined in section 142 (1) (b) will be achieved.[169] In *Sunshine Agro Products Limited and In The Matter of The Insolvency Act*,[170] the petitioner company having been served with a statutory demand by its creditors, filed an exparte petition to the court seeking an interim protection order. The petitioner argued that it had been served with a statutory demand, could not pay its debts, had agreed by special resolution to make a settlement with creditors, and had appointed a Provisional Administrator who had consented to the appointment.[171] Justice Ssekaana held that the petitioner had satisfied court that it was necessary to appoint a provisional administrator to save the company from liquidation and protect the interests of the creditors and allowed the petition.[172] By granting the petition, the court allowed the insolvent company to re-organise itself and continue trading as opposed to liquidation due to its inability to pay its debts.

Provisional administration only takes effect after the court grants the interim protective order.[173] Uganda operates an open/public court registry where any matter that is filed is accessible to any member of the public. Creditors can learn that the company has commenced administration when a petition is filed. As such, the administration application could be easily blocked by a creditor before the court makes an administration order. The creditors also know that once the order is granted, they will not be able to recover the debt owed to them easily. Therefore, between the time it takes from filing the petition to the court hearing and the grant of the petition when the company gets protection, the company is virtually exposed. Creditors can take advantage during this window to frustrate a company from being rescued.

3.4.1.9 Negative Publicity

The administration procedure attracts negative publicity emanating from the statutory requirement of filing an application to the court and giving public notice to the creditors and the public.[174] The public notice is published in the Uganda Gazette. Once this is done, the entire public is made aware of a company's financial woes. The administration process does perhaps offer a pragmatic solution to a distressed company whose board and shareholders desire it to be saved but fear that any publicity of its financial troubles may further contribute to the

[168] Ibid; see also The Insolvency Act op cit note 54 s 142(1)(b).
[169] Ibid s 142(1)(b).
[170] Company Cause No. 25 of 2018.
[171] Supra at 4-5.
[172] Supra at 5.
[173] The Insolvency Act op cit note 54 s 144(1).
[174] Ibid ss 141(4), 146, 148.

company's demise.[175] Commencement of administration brings with it the negative perception that the company is no longer credit-worthy.[176] By publishing public notices, the public is made aware of the financial struggles of a company and this can lead to loss of reputation and goodwill.

This negative publicity further erodes the prospect of rehabilitation and invokes the fear of creditors who intend to trigger individual debt enforcement. Arguably, a company in corporate distress would have a better chance of surviving if it could avoid adverse publicity.[177] In Company Cause No.005 of 2019, Justice Ssekaana stated that '…The institution of insolvency proceedings against a company…can have devastating effects on an entity's overall reputation in the marketplace and stifle the conduct of its business operations…'[178] Negative publicity has far-reaching consequences and can irreparably damage a company's reputation. Externally, the company's relationship with its suppliers and clients will be strained. Internally, employee morale will reduce due to job insecurity with some choosing to leave the company for fear of looming liquidation. This will further worsen the company's financial situation, hampering any restructuring efforts.

3.4.1.10 Stigma caused by entry into administration

Another weakness of the rescue procedure is the stigma that comes along with failure of the company. Despite the recent high volume of insolvency law reforms throughout the world, in most countries, the stigma of financial failure persists in some form today.[179] The inability to meet one's financial obligations has been interpreted at various times by many groups in society as a breach of trust and lack of financial self-restraint.[180] Stigma is relevant since it can impede the proper functioning of rescue mechanisms within insolvency laws and reduce the opportunities for a 'fresh start'.[181] Stigma associated with administration can discourage companies from seeking help when needed resulting in unnecessary liquidations and job losses, undermining the rescue culture.

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[175] Wood op cit note 10 at 189.
[176] Waiswa op cit note 21 at 322.
[177] Saquib M Shadman 'The Legal Framework of Corporate Rescue Procedure: A Brief Overview' (2013) IV *The Northern University Journal of Law* ISSN 2218-2578; 57 at 59.
[178] *Bahadukali Mohammed Ali Viran Versus Springs International Hotel Ltd* at 8.
[179] Catherine Bridge 'Insolvency – a second chance? Why modern insolvency laws seek to promote business rescue' (2013) *Law in transition* 28 at 36.
[180] Ibid.
[181] Ibid.

Traditionally, stigma has been associated with personal bankruptcy and corporate insolvency.[182] It does not help that very few companies which enter administration emerge intact as the same entity.[183] Stigma is a mark of shame or disgrace and the stigma of financial failure is particularly severe.[184] Stigma is also a strong lack of respect for a person or a group of people or a bad opinion of them because they have done something society does not approve of, however, acceptance of the separate identity of corporate entities, independent from their owners, has likely helped to reduce the stigma of insolvency for companies.[185] In jurisdictions with underdeveloped insolvency systems, the absence of robust rescue culture and the stigma associated with it often thwarts the continuation of the business activity and ends up frustrating chances of business recovery and value preservation.[186]

While the stigma associated with insolvency proceedings is a problem for all types of firms, it becomes even more pronounced in the context of MSMEs due to the close association of the shareholders/managers with the business.[187] Stigmatising companies in administration results in reluctance of companies to seek help for fear of reputational damage, making it harder for companies to be rescued. Overall, stigmatising companies in administration has a negative effect on entrepreneurship and resultantly on the economic development of the country. If the company collapses, it may end up harming the character of the owners/shareholders/managers. Individuals in particular face the risk of social stigma.[188] Individual stigma for those associated with the company affects their confidence and self-esteem leading to anxiety and stress. This impacts on their mental health and well-being. Unless deliberate measures are taken to address this problem, it is likely to continue jeopardising the potential for recovery from administration.

3.4.1.11 Culture

The issue of culture has affected peoples' attitude and reception of administration as a rescue procedure. Culture is defined as the attitudes, behaviour, opinions of a particular group of people within society,[189] and these cultural factors are very important in

[182] Roman Tomasic, Peter Little, Angus Francis, Kam Kamarul and Kui Hua Wang 'Insolvency Law Administration and Culture in Six Asian Legal Systems' (1996) *AJCL LEXIS* 140 at 152.
[183] Alexandra Szekely 'Chapter 11: one size fits all?' (2008) 9 *JIBFL* 457.
[184] Bridge op cit note 179.
[185] Bridge op cit note 179.
[186] Waiswa op cit note 21 at 322.
[187] Gurrea-Martínez A 'Implementing an Insolvency Framework for Micro and Small Firms' *International Insolvency Review* (2021) 30(s1) s46 at s58-s59.
[188] Bridge op cit note 179.
[189] Tomasi et al op cit note 181 at 34.

relation to administration.[190] Various cultural traditions such as the non-confrontationist or harmonious approach seem to have a great impact upon business relations.[191] This leads to the use of negotiation and compromise as a way of handling insolvency problems.[192] As a result, the use of litigation in dealing with insolvency is fairly uncommon.[193] This is because there is a culture of compromise and seeking to work out a settlement instead of going to court.[194] In Uganda, many entrepreneurs who incorporate companies are gamblers, illiterate, cannot grasp financial matters and lack management skills to run their companies.[195] They have a poor management culture and limited and inadequate entrepreneurial skills, which greatly contribute to corporate failure.[196]

A survey of Ugandan SMEs revealed that many SMEs managers display exploitative behaviour such as: deception, opportunism, corruption, lack of confidentiality, breaching of promises, evading taxes, illicit businesses participation, favouritism, embezzlement, exaggeration, manipulation of communication, misleading customer trends and needs, inappropriate use of business resources, unfair treatment of employees, producing substandard goods; and fraud.[197] Such unethical practices by entrepreneurs discourage them from pursuing legal remedies in the courts of law and have potentially contributed to their high failure rates. Despite the enactment of the law that provides for rescue, there is still a disconnect between the law and perception or culture of the people towards the law. Culturally, seeking help in the form of administration will be perceived as a sign of company and individual failure, rather than a proactive and positive step toward survival of the company. Company owners have not fully embraced this procedure. They have continued to prefer liquidation or opted for informal out of court settlements.

3.4.1.12 Displacement of internal management

The existing management is not allowed to stay in place once administration proceedings are started and instead an Insolvency Practitioner (hereafter IP), specifically an administrator is

[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Ibid.
[194] Ibid at 35.
[195] Mayanja op cit note 5 at 64.
[196] Ibid.
[197] Ntayi M, Eyaa S & Semukono, F.J. 'Perceived enforcement of informal buyer-supplier contractual arrangements in Ugandan Small and Medium Enterprises (SMEs)' (2012) 12(8) *Global Journal of Management and Business Research* 43 at 46.

appointed to manage the company.[198] This is referred to as practitioner in possession (hereafter PIP) regime. Administration suspends the exercise of powers, duties and functions by the company, its directors and secretary[199] and in lieu thereof, vests all such powers, functions and duties into the hands of the person appointed as administrator.[200] The suspension of the company directors' powers and duties during administration is premised on the general belief that the company and its directors are usually responsible for its financial challenges.[201] It should, as such, give way to the impartial insolvency practitioner to take charge of the management of the company. The administrator has the power on behalf of the company to manage the affairs, business and property of the company.[202] Such a broad grant of power to the practitioner may be counterproductive.[203]

A difficulty with a PIP regime is that it offers directors only limited encouragement on this front.[204] If the company's managers anticipate that any formal procedure will involve their giving up the reins of office they will tend to delay commencement of entry into such a procedure beyond the point when the situation calls for external involvement.[205] Such delays will likely diminish the value of the assets available for distribution to creditors and in doing so, will prejudice any rescue operations and force the company into liquidation.[206] When control is diverted from the people involved in the day-to-day management of the company, they may lose motivation to help it become profitable again.[207] During such a troubled period, moreover, the company directors are likely to take unjustifiably large business risks in the hope, not merely of rescuing the company from its troubles, but of clinging on to their offices.[208] Administration does appear at odds with what appears logical, in the sense that surely the management is in the best position with its specialised knowledge to continue the firm's operations, as opposed to another person/body who gains control after an interruption in the affairs.[209] This poses another problem in that is it a wise decision to leave those in charge who

[198] The Insolvency Act op cit note 54 ss 141(1) and 164(2).
[199] Ibid s 157.
[200] Ibid s 155.
[201] John H Farrar 'Directors' duties and Corporate Governance in troubled Companies' (2001) 8 *Canterbury Law Review* 99; 99 at 106.
[202] The Insolvency Act op cit note 54 s 155.
[203] Maphiri op cit note 79 at 117.
[204] Vanessa Finch 'Control and Coordination in Corporate Rescue' (2005) 25 (3) *The Journal of the society of Legal Scholars* 374 at 384.
[205] Ibid.
[206] Ibid.
[207] Maphiri op cit note 79 at 117.
[208] Finch op cit note 204 at 388.
[209] The Honorable Richard A Posner, 'Foreword' in Jagdeep S. Bhandari, Lawrence A. Weiss (eds.) *Corporate Bankruptcy: Economic and Legal Perspectives* (1996) xi.

potentially caused the problems in the first place? The administration process aims to restore confidence in the company by discarding the old management, at least for a while.[210]

However, much debate has focused on whether debtor-in-possession (hereafter DIP) systems produce more desirable rescue processes than PIP arrangements that give control to a professional.[211] A danger in such polarised discussions, however, is that they tend to simplify scenarios and exaggerate the degree to which the debtor company's directors or the IPs are really in charge of all the activities that are involved in promulgating a potential rescue.[212] The key evaluative question is 'not whether DIP or PIP gives preferable processes and outcomes but the degree to which a given system, with its multiple actors and inputs its particular hybrid nature is successful in delivering all of the elements that we would demand of a rescue regime'.[213]

As most businesses in African countries are family-owned, the best type of rescuer would be the one who owns the business; it is safer to assume that the causes of financial distress were unlikely to be embezzlement, corruption, and conscious mismanagement.[214] Thus, an administrator with a law or accountancy degree but without any hands-on experience is unlikely to possess the requisite skills to manage the different types of businesses there are, and is further unlikely to be emotionally invested in the business, let alone to swiftly resuscitate it.[215] While it is reasonable to suspect that an administrator will be more interested in his fees than in reviving the business; the owner of business has no reasonable incentive to think this way and is therefore more likely to be fully committed to the idea of rescue.[216] Therefore, a rescue regime that not only ousts the current management upon commercial distress but also severely punishes them for misconduct during the administration of the company is detrimental to achieving the rescue goal. In this regard, policy makers may have to employ a unique approach that can coax and not threaten the managers so as to take action early but still be able to change the management if its enhances better results.[217] Arguably, a regime that implements a hybrid approach of combining elements of DIP and PIP may be more attractive. This is because the ouster of the company's management will be avoided. Additionally, they will work together with an administrator who will focus on restructuring the company.

[210] Wood op cit note 10 at 75.
[211] Finch op cit note 204 at 384.
[212] Ibid.
[213] Ibid.
[214] Iheme & Mba op cit note 76 at 127.
[215] Ibid.
[216] Ibid.
[217] Too op cit note 152 at 126.

3.4.1.13 Optimising the role of Insolvency practitioners

3.4.1.13.1 Qualifications and Experience

A person is ineligible to be appointed to act as an insolvency practitioner[218] unless they are a lawyer, an accountant, or a chartered secretary registered with the relevant professional body. They should have offered adequate security or professional indemnity for the proper performance of their duties as an insolvency practitioner in Uganda.[219] These requirements are intended to secure professionalism and to protect the creditors and the company against general professional negligence, including losses caused in the management of the insolvency process by the appointed insolvency practitioner.[220] Whereas the company and its creditors are afforded discretion to appoint a person to act as the provisional administrator[221] and administrator,[222] the law limits their choice to only the licensed insolvency practitioners. This ensures that only qualified persons are appointed to discharge the functions of a provisional administrator or administrator.[223] The minister can prescribe additional qualifications for professionals seeking to practice insolvency in Uganda, which includes evidence of insolvency training by certified insolvency training institutions.[224] This ensures professionalism in the insolvency practice of Uganda. Further, the global best practices have transitioned to require well-equipped innovative professionals for efficient handling of insolvency matters and this can be achieved through continuous training and practice of professional insolvency processes by qualified persons.[225]

With the responsibility to determine the fate of a company, there are questions raised regarding the suitability of these professionals to identify and deal with all of the issues that may be presented in a distressed company.[226] Simply being an accountant who only bases conclusions on statistical data is inadequate.[227] Wider issues such as the ability to interpret legal

[218] The Inoslvency Act op cit note 54 ss 207, 208.
[219] Ibid s 208; see also Insolvency regulations op cit note 51 reg 200.
[220] Ibid reg 196; see also Waiswa op cit note 20 at 304.
[221] The Insolvency Act op cit note 54 ss 141(1) and 164(2).
[222] Ibid ss 208 (3) and 209.
[223] Ibid s 208; see also Waiswa op cit note 20 at 305.
[224] Ibid s 208 (2).
[225] Mercy K. Kainobwisho 'The Insolvency (Amendment) Act No. 20 of 2022 and its effect on the Jurisprudence of Uganda's Insolvency Law' (2024) 2 (1) *The Insolvency Journal of Uganda* 4 at 7.
[226] Wood op cit note 10 at 114.
[227] Ibid.

provisions and possessing the necessary interpersonal skills to manage the affairs of all parties involved demonstrates the need for a high level of skill to be expected of the IP and this is demonstrated in the qualifications that are now required of people wanting to work in this profession.[228] A distinction has to be drawn between expertise in insolvency procedures and expertise in business and corporate affairs.[229] The extent to which the debtor's company can be preserved depends on the competence of the management team during reorganisation.[230]

In *The Matter of Uganda Telecom Limited (In Administration) and in the Matter of an Application by Uganda Communications Employees' Contributory Pension Scheme (Uceps) to Vary the Deed of Administration of Uganda Telecom Limited/Replace the Administrator,*[231] the applicant sought for the replacement of the Official Receiver, as the administrator of UTL, and have him replaced by an administrator of their choice. Justice Mugambe found that the Applicant's choice of administrator fell short of the requisite grounding in insolvency practice and experience.[232] She considered and appointed a senior counsel who is a founding partner in one of Uganda's largest insolvency practice law firms. This practitioner had extensive legal and leadership experience, which required making critical decisions as the competent replacement of the official receiver.

Nothing in the statutory qualifications of administrators in the insolvency legislation makes them exceptionally more qualified to replace the existing directors or management whose bespoke experience regarding the operations of the distressed company is integral to the company's resuscitation.[233] Apart from prescribing the academic and professional qualifications that one must possess, the law does not require one to have any proven experience in management before one can be appointed to act as an insolvency practitioner.[234] Arguably, lawyers and accountants based on their professional training, may not always possess the requisite and sophisticated rescuing skills required for effective administration.[235] The concept of corporate rescues requires someone with hands on (industry) experience.[236]

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[228] Ibid.
[229] Finch op cit note 204 at 390.
[230] D Hahn, 'Concentrated Ownership and Control of Corporate Reorganisations' (2004) 4 *Journal of Corporate Law Studies* 117 at 146.
[231] Company Cause No. 30 of 2019.
[232] Supra at para 10.
[233] Gerard McCormack 'Control and corporate rescue – an Anglo-American evaluation' (2007) 56 *International and Comparative Law Quarterly* 515 at 522.
[234] Waiswa op cit note 21 at 436.
[235] Iheme & Mba op cit note 76 at 125.
[236] The story of the failed Nakumatt Supermarket is testamentary to the general inefficiency of administration for African countries. See D Miriri 'Kenyan retailer Nakumatt to close as creditors back liquidation' Reuters (7 January 2020), available at *https://www.reuters.com/article/us-kenya-nakumatt/kenyan-retailer-nakumatt-toclose-as-creditors-back-liquidation-idUSKBN1Z610M*, accessed 7 May 2020.

Currently, in Uganda consideration is only given to those who qualify as lawyers or accountants whose qualifications and experience may not be sufficient to discharge the functions of an administrator.

There is a need to build capacity on the technical competence of administrators through training and acquiring knowledge in business, management and corporate governance aspects on which the administrator will be technically assessed before qualifying to be licensed as such. In Company Cause No. 30 of 2019,[237] Justice Mugambe observed and remarked that insolvency practice is largely still on the low end in this country. This means that several of the practitioners on the list may not have actual sound insolvency practice experience.[238] No doubt as the Judge rightly observed, insolvency practice is still a relatively new area. Of the 6224 licensed advocates,[239] and over 190 licensed accounting firms[240] the register holds only slightly over 100 registered insolvency practitioners. The Official Receiver licensed 100 insolvency practitioners in the calendar year 2023, a substantial increase from 60 licensed in 2022.[241]

3.4.1.13.2 Regulation

The IA requires all insolvency practitioners to be regulated and sanctioned in cases of professional misconduct.[242] Having insolvency practitioners professionally regulated and subject to certain Codes of Practice and Conduct combats abusive practices and arbitrary use of power, enhances professional competence, accountability and compliance within the insolvency field.[243] The current system allows for segregated regulation of the IPs by the responsible regulatory body.[244] When one ceases to meet that criterion, he/she ceases to be licensed to act as such, who would be responsible for notifying the regulator, URSB, if such a member was no longer in good standing with the profession remains a big question.[245] The Act

[237] *In the Matter of The Insolvency Act 2011 And In The Matter of Uganda Telecom Limited (In Administration) And In The Matter Of An Application By Uganda Communications Employees' Contributory Pension Scheme (Uceps) To Vary The Deed Of Administration Of Uganda Telecom Limited/Replace The Administrator.*
[238] Supra at para 9.
[239] *https://www.judiciary.go.ug/data/ladvoactes/106/Licenced_Advocates.html* accessed on 25 February 2023
[240] *https://www.icpau.co.ug/member-resources/practicing-certificate* accessed on 25 February 2023.
[241] Kainobwisho op cit note 225 at 7.
[242] The Insolvency Act op cit note 54 s 203(d).
[243] Hamiisi Junior Nsubuga 'Reinvigorating corporate rescue in developing economies - a Ugandan perspective' (2021) 34 (4) *Insolvency Intelligence* 1 at 7.
[244] Ibid; currently the legal profession is regulated by the Uganda Law Council while the accounting profession is regulated by the institute of certified public accountants of Uganda (ICPAU) and the chartered secretaries are regulated by the institute of chartered secretaries and administrator (ICSA).
[245] Ibid.

assumes that these professional bodies are adequately equipped to assist in regulating their members who in turn will be appointed as IPs.

Effective regulation of insolvency practitioners would require a clearly defined relationship between these professional bodies and the URSB.[246] Currently, the Official Receiver, the URSB under the leadership of the director-general and director of insolvency and receivership is empowered with the supervisory role over Insolvency practitioners.[247] The current system falls short of establishing a completely distinct professional body to regulate IPs.[248] URSB deals with all matters related to company registration, enforcement, intellectual property rights, et cetera, and does not mainly serve the insolvency sector independently.[249]

3.4.1.13.3 Remuneration

The absence of clear legislative guidance on the criteria for determination of the remuneration payable to persons appointed to serve as insolvency practitioners was one of the gaps that the ULRC recommended the legislature to address.[250] Notably, the lack of clear guidelines for the determination of fees payable to office holders exposed insolvent companies to the risk of extortion through paying exorbitant fees and expenses to insolvency practitioners.[251] This risk was addressed when Parliament incorporated remuneration provision into the Insolvency Act. It provides that a provisional administrator or administrator is entitled to 'the remuneration agreed upon by the parties,[252] or remuneration fixed by the court on application for taxation and assessment of costs and fees of the administrator or provisional administrator where the parties do not agree'.[253] These modes of fixing remuneration lack transparency and consistency. Administrators may also seek to prioritise their own remuneration over the interests of the creditors, company and other stakeholders, jeorpardising successful rescue efforts. The parties or the court may fix remuneration based on different criteria potentially leading to inconsistent and unfair outcomes. This erodes confidence in the regime and creates uncertainty for stakeholders.

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[246] Ibid.
[247] Ibid.
[248] Rezen Papaya 'Are Business Rescue Practitioners adequately regulated?' (2014) 2014 No. 548 *De Rebus* 30.
[249] Nsubuga op cit note 243 at 7.
[250] *A Study Report on Insolvency Law* op cit note 119 recommendations 23, 28–29.
[251] Ibid.
[252] The Insolvency Act op cit note 54 s 174(1) (a).
[253] Ibid s 174(1) (b).

3.4.1.14 Moratorium

Certain creditors may decide to pursue legal action against a financially struggling company. However, during administration, a moratorium is granted to curb against that. A moratorium is a stay on the enforcement of creditors' claims against a company and its assets.[254] The policy objective behind the statutory moratorium is that 'it helps to preserve the assets in the insolvent estate from the risk of piecemeal dismemberment by creditors who are often understandably anxious to enforce their contractual remedies against the debtor'.[255] In *Uganda Telecom Limited vs Ondoma Samuel t/a Alaka and Company Advocates*[256], Justice Mubiru noted that the administration procedure '…puts an immediate ring fence around the company and its assets so that no creditor can start or continue any action to recover their debts.[257]

A moratorium restricts legal action against the company unless consented to by the administrator or authorised by a court order.[258] In *Uganda Telecom Limited vs Ondoma Samuel t/a Alaka and Company Advocates,*[259] Justice Mubiru noted that 'except with the provisional administrator's written consent or with the leave of the court and in accordance with such terms as the court may impose, proceedings, execution or other legal process cannot be commenced or continued and distress cannot be levied against the company or its property.'[260]

A broad statutory stay of this kind 'provides the company with breathing space within which to try to conclude a restructuring agreement with its creditors, preventing individual creditors from instituting enforcement actions against the company during the first stages of a restructuring, when negotiations are taking place'.[261] *In the Matter of Sunshine Agro Products Limited (In Administration)*[262] Justice Ssekaana stated:

> '…Provisional administration provides breathing space to achieve a turnaround or structured exit and is designed to hold a business together while plans are formed either

[254] Ibid s141 (4) and 145.
[255] Kubianga Michael Udofia *A Comparative study of the UK And US Insolvency Law Regimes* (Unpublished PhD Thesis University of Nottingham 2014) 134.
[256] Miscellaneous Application No 0012 of 2018.
[257] Supra at 3.
[258] The Insolvency Act op cit note 54 ss 143(1) (f) and 164(2) (b).
[259] Miscellaneous Application No 0012 of 2018.
[260] Supra at 3.
[261] Jennifer Payne 'Debt Restructuring in English Law: Lessons from the US and the Need for Reform' (2013) *Legal Research Paper Series Paper No 89/2013* 1 at 3.
[262] Miscellaneous Application 344 of 2019 (Arising from Company Cause No. 25 of 2018).

> to put in place a financial restructuring to rescue the company, or to sell the business and assets to produce a better result for the creditors than a liquidation…'.[263]

This moratorium on all activities against the company under administration redresses the bargaining power of all creditors and encourages an organised redistribution of resources where necessary.[264] This means that creditors cannot engage in the chaotic race to protect their interests.[265] The rationale of a moratorium is to sacrifice the immediate and partial repayment of creditors for the long-term objective of corporate turnaround and a high rate of recovery to creditors. The interests of a few parties, especially the secured creditors who hold strong power, may need to suffer from the freezing on their claims in order to achieve a better outcome for all the stakeholders than that might be effected in an immediate liquidation.[266]

Whereas the Insolvency Act provides some moratorium to companies in administration, the protection provided requires significant improvement. There is no provision for an automatic moratorium. An automatic moratorium is one that is imposed immediately upon the filing of an administration petition and does not require a court order. The automatic stay is important because it allows the corporate debtor to focus on reorganisation of its assets and liabilities without worrying about competing creditors closing in.[267] Without the injunctive force of the automatic stay, the corporate debtor's filing a bankruptcy case would be the beginning of the end.[268] Currently, to obtain protection, a petition has to be filed in court for the grant of an interim protection order which creates a moratorium for the company against all legal action.[269] The filing of the case would alert the corporate debtor's creditors that it has insufficient funds to pay all its debts in full, and each creditor—operating in self-interest and knowing that not all creditors will receive payment on their claims—would get in line to be the first one paid.[270] The creditors would have even more motivation to be aggressive in collection, seizing property, and seeking liens as quickly as possible, which will harm the overall value of the corporate debtor's estate. As each creditor chips away at the corporate debtor's assets, none

[263] Supra at 5.
[264] Too op cit note 152 at 108.
[265] Ibid.
[266] D Milman, 'Moratoria on enforcement rights: revisiting corporate rescue' (2004) 68 *Conveyancer and Property Lawyer* 68 at 90.
[267] David S. Stevenson 'Grab the Fire Extinguisher: Comparing UK Schemes of Arrangement to U.S. Corporate Bankruptcy After Jevic' (2019) 68 *Clev. St. L. Rev.* 73; 73 at 77.
[268] Ibid.
[269] The Insolvency Act op cit note 54 ss 141(4) and 145(1).
[270] Ibid.

of them is focused on maximising the value of the overall estate, or 'making the pie bigger'; they are primarily, if not solely, focused on making sure that they 'get their slice of the pie'—that is, payment on the claims they hold in the corporate debtor's assets.[271]

Between the time the company files the petition and the court granting the order, the company is vulnerable to creditor action. Creditor action can disrupt business operations and loss of company property making it harder to achieve a successful rescue. The longer the court delays granting the order, the more the company is exposed to fending off creditor lawsuits and other enforcement actions against it. The automatic stay prevents this tragedy of the commons by preventing all creditors from proceeding to collect on the corporate debtor's assets for the duration of the bankruptcy case, enabling the debtor to work together with its creditors to maximise the value of the bankruptcy estate and thus the amount of all creditors' total recovery on their claims.[272]

The scope and protection given to companies by the moratorium under the Act is lacking in a number of ways. The moratorium accorded to companies in administration only binds the parties to the administration deed, namely the company, the company directors, shareholders and creditors.[273] Third parties are not bound by the moratorium. This affords inadequate protection to the company as they are susceptible to action from these third parties. Disruptive proceedings may come from parties such as customers, employees, regulators or other government agencies who may not necessarily be creditors but capable of triggering wrecking proceedings against the company during administration and end up disorienting the administrator.[274] Limiting the scope of the moratorium to the parties who signed the administration deed is a big weakness in Uganda's rescue framework.[275]

Additionally, the Insolvency Act Cap 108 allows the continued exercise of the power of enforcement of a charge over property where the power was exercised before the commencement of provisional administration.[276] This creates an apparent weakness in the shield provided to companies since the law provides that provisional administration commences when an interim protective order is made by the court.[277] Creditors in Uganda therefore can safely pre-empt the moratorium by exercising their enforcement power before

[271] Ibid.
[272] Ibid.
[273] The Insolvency Act op cit note 54 s 166.
[274] Waiswa op cit note 21 at 395.
[275] Ibid.
[276] The Insolvency Act op cit note 54 Part VI s 145(2).
[277] Wasiwa op cit note 21 at 395.

the interim protective order is made.[278] Allowing such enforcement effectively validates actions taken before administration thereby undermining the administration process. It promotes inequality among the creditors which disrupts the parity principle aimed at ensuring collective and equal treatment of all creditors. The net effect is that once a company applies to obtain the interim protective order, aggressive creditors can exploit the window before the interim protective order is made, to invoke their enforcement rights under whatever security instruments they may have obtained from the company.[279] The legal provisions on the nature and scope of the moratorium should be automatic and drafted in wide terms to apply to cover all legal and enforcement proceedings by all persons, and not just creditors, the company and its officials.

3.4.1.15 Access to finance

Rescue finance is the lifeblood of corporate rescue.[280] It is central to any business rescue process like a moratorium.[281] After corporate rescue procedures commence, the financially troubled debtor must have access to enable it to obtain sufficient funds for continued trading.[282] The additional funding obtained after filing the petition can help the struggling companies cover their debts and continue operating. The income from the trading enables the debtor to pay debts of existing creditors, obtain the indispensable supplies of goods and services, and spend on other necessities to ensure the operation of its business activities.[283] If there is no funding available all the rescue procedures will remain largely academic exercises.[284] The absence of rescue finance was one of the apparent weaknesses in Uganda's corporate rescue framework. However, following the recent amendments to the IA, an administrator may, with the consent of the creditors, obtain or borrow finances and grant security over the property of the company to implement the administration deed.[285] The post administration financing shall not exceed the value of the company's unencumbered assets at the time of executing the

[278] Ibid.
[279] Ibid at 396.
[280] Farouk Cassim, Moleka, Femido Cassim, Rehono Cassim, Richard Jooste, Joanne Shev, Jacqueline Yeats *Contemporary Company Law* 2 ed (2011) 882.
[281] Ibid.
[282] Yebisi op cit note 49 at 53.
[283] Ibid.
[284] Mei Yang & Xiaobing Li 'The History of Corporate Rescue in the UK' (2012) 8 (13) *Asian Social Science* 21 at 25.
[285] The Insolvency Act op cit note 54 s167 (1).

administration deed.[286] Although this provision enables access to rescue finance, it raises practical challenges.

This requirement creates an unrealistic expectation that financially distressed companies have readily available assets to pledge as security. It also potentially reduces the company's access to finance as lenders are unwilling to provide credit without sufficient collateral. Lenders will not easily warm up to assist, because when a company is in actual or impending insolvency, in most cases there will be no supplies, or not enough, assets that can be used to provide security for further borrowing.[287] Financial institutions may be reluctant to take risks to lend in unsecured or under-secured situations where the full repayment will usually depend on the successful turnaround of the borrower.[288] Furthermore, typical financiers of post-commencement finance would want to conduct investigations to establish their confidence in the future viability of the company under reorganisation.[289] This poses major concerns to SMEs in financial distress because the ability to successfully raise post-commencement finance can determine whether the business rescue is successful.[290]

Another challenge is that securing post commencement capital from banks is not easy because most banks do not have specialist business rescue units or special business rescue products.[291] Applications for rescue finance are subjected to the same rigorous credit checks as other loan acquisition criteria.[292] This often leads to delays in approval or outright rejection of the loan applications, since in most cases, the company in distress may not have healthy financial records to attract lending.[293] Banks may also increase the interest rate due to the perceived high risk worsening the company's financial difficulties and affecting its rescue prospects.

The lack of incentives to lenders who provide rescue finance is another weakness in the IA regarding post administration finance. One critical incentive is super priority. This is a statutory provision where certain creditors are allowed to receive payment ahead of other creditors, including secured creditors in the event of a borrower's insolvency. It is granted to creditors who provide rescue finance for a company that is restructuring. It is given super priority because of the high risk in lending money to a financially distressed company. The

[286] Ibid s167 (2).
[287] Yebisi op cit note 49 at 53.
[288] Ibid.
[289] Maphiri op cit note 79 at 120-121.
[290] Ibid at 121.
[291] Marius Pretorius & Wanya Du Preez 'Constraints on decision making regarding post-commencement finance in business rescue' (2013) 6 *SAJESBM* 168 at 174.
[292] Waiswa op cit note 21 at 138.
[293] Ibid.

borrower's claim ranks higher than other creditors ensuring they are paid first. The lack of incentives for banks to provide rescue finance is a significant concern. Unless the law expressly provides super priority rights or priority to the rescue funders, it is difficult to convince a lender to commit funds into a company that is on its death bed.[294] Without a set of post- petition financing provisions which clearly define the hierarchy of priorities for potential post-petition lenders, other great efforts to cast an effective rescue regime may prove fruitless.[295]

3.4.1.16 Duration of the Administration process

The period for provisional administration is thirty days.[296] It has been argued that the stricter period underpinning business rescue laws is to be preferred on both policy and practical grounds.[297] The shorter the period in which the reorganisation is completed or at least some form of definitive action is determined, the lower the costs and uncertainty attending the procedure.[298] Nonetheless, the strict timelines act as a deterrent to the rescue of companies. The company may not have all its records relating to accounts, and contracts, properly stored which information is critical for the administrator to develop good proposals. The timeframe required to obtain all of the relevant information is dependent on the relationship that exists between the administrator and the directors, as they will be in the best position to know what is going on with the business and report this back to the administrator.[299] This strict time frame leads to rushed decision-making resulting in inefficient and inadequate outcomes for the company. It leads to premature termination of the administration process resulting in unnecessary liquidations and job losses.

Besides, any extension of time must be confirmed by the court. This is another cost that has to be borne by an already financially distressed company. Moreover, even the possibility of an extension of the period is not automatic, the provisional administrator must prove the existence of exceptional circumstances in the application to court before a judge can grant or refuse the extension.[300] This period and the procedure for its extension are a big distraction to the provisional administrator in restructuring the company.

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[294] Ibid.
[295] Ibid at 334
[296] The Insolvency Act op cit note 54 s 147 (1) (a).
[297] Pont & Griggs op cit note 156 at 78.
[298] Ibid at 77.
[299] Wood op cit note 10 at 74.
[300] Waisw op cit note 21 at 285.

Strict timelines do not take into consideration the unique circumstances of each company, especially regarding complexity, size, and industry. A strict time limit is unviable in the case of larger companies, or indeed in smaller complex situations. It is impossible to complete complex restructuring negotiations with creditors, employees, and other stakeholders within a 30-day timeline. For example, in the case of UTL, one of the largest telecom companies in Uganda; it entered into administration in May 2017. In February 2022, the administrator initiated an Asset Purchase Agreement (APA), fronting Uganda Telecommunications Corporation Limited (UTCL) as the purchaser of UTL's assets in a deal worth UGX 256 billion and $15m (UGX 56.1 billion).[301] The execution of the APA signaled an end to nearly five years under administration. No doubt, time is of the essence as far as rescue is concerned, however, companies must be allowed to go through the process without undue pressure which may in effect lead to a rushed and hurried process that is not successful and in effect frustrating the objecting of rescue.

3.4.1.17 *Ipso facto* protection

The absence of adequate statutory restrictions in the Insolvency Act in Uganda on the right of counterparties to invoke ipso facto contractual clauses to terminate executory contracts entered into with companies in rescue is a major hurdle to a successful rescue.[302] Ipso facto protection is necessary for facilitating the restructuring of insolvent companies. Ipso facto clauses are contractual provisions that allow one party to terminate or modify a contract on the occurrence of a trigger event.[303] Quite often, trigger events are defined in the contract to include 'the occurrence of insolvency and/or other analogous events such as the appointment of an administrator, liquidator, a receiver, or commencement of business rescue proceedings in respect of the other contractual party'.[304] This is premised on the argument that 'it would be unfair and disruptive for an innocent party to continue to be bound to a contract with an insolvent counterparty who may not be able to perform its obligation'.[305] The ipso facto clause offers an automatic remedy for the creditor without the time and expense of judicial

[301] C Muhwezi Will revived UTL survive competition? Daily Monitor Friday, December 30, 2022 *https://www.monitor.co.ug/uganda /business/finance/will-revived-utl-survive-competition--4070776* accessed on 7 February 2023.
[302] Waiswa op cit note 21 at 142.
[303] Chong Yi Hao Clayton 'S.440 of the Insolvency, Restructuring and Dissolution Act 2018: Restrictions on Ipso facto Clauses' (2019) 27 *Singapore Academy of Law Journal* para 1.
[304] Waiswa op cit note 21 at 139.
[305] Harwood, 'Restructuring: Ipso facto clauses, distressed debt market update and DIP/rescue Finance' (2018) 1 at 2.

enforcement proceedings as the creditor can demand accelerated payments or terminate the contract, thus saving transaction costs associated with default.[306] The parties that could have entered into contracts with the company prior to the commencement of administration can 'freely exercise their contractual right to terminate executory contracts with the company in administration on account of commencement of administration, even if it is obvious that the survival of the company depends on such contract'.[307]

Parties often include ipso facto clauses in executory contracts 'to allow each other the possibility to rely on the actual or likely insolvency of the other party to be treated as evidence of anticipatory breach and rescind the contract and mitigate further loss.'[308] The existence of a situation of insolvency may incentivise lenders, suppliers, and employees to terminate their contractual and business relationships with the firm, preventing the company from continuing its operations.[309] This uncertainty extends to customers and suppliers wary of a company whose future appears uncertain, and also to managers whose position is insecure and duties unclear.[310] Whilst exercising 'the right to unilaterally terminate a contract on the insolvency of the other contractual party may be commercially justifiable, extending the scope of these clauses to include the commencement of rescue proceedings as one of the trigger events may be extremely disruptive to rescue effort. This is especially because rescue proceedings are not strictly insolvency proceedings.'[311] The continuation of contracts that are beneficial or essential to the debtor's business, 'with the potential to contribute value to the estate is very crucial to the success of any rescue proceedings.'[312] Allowing parties to terminate executory contracts because of the commencement of rescue proceedings may 'grossly inhibit the efforts of companies seeking to restructure since the appointment of an administrator or business rescue practitioner as the case may be, may trigger the termination of key contracts[313] and end up pre-determining the fate of companies in financial distress and ultimately undermine their ability to be saved as going concerns.'[314]

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[306] Janis Sarra, Jennifer Payne & Stephan Madaus 'The promise and perils of regulating ipso facto clauses' (2022) 31 *International Insolvency Review* 45 at 47.
[307] Waisswa op cit note 21 at 321.
[308] Ibid at 140.
[309] Gurrea-Martínez, Aurelio, 'Implementing an Insolvency Framework for Micro and Small Firms' (2021) International Insolvency Review s46 at s48.
[310] Pont & Griggs op cit note 156 at 77.
[311] Eric Levenstein *An Appraisal of the New South African Business Rescue Procedure* (Unpublished LLD Thesis, University of Pretoria 2015) at 199.
[312] UNICTRAL 'Legislative Guide on Insolvency Law' 2004 121 para 112.
[313] Michael J. Blazic *Rehabilitation Regime or Corporate Graveyard: Practitioners' Perspectives of the Australian Part 5.3A Voluntary- Administration Legislation* (Unpublished PhD thesis University of Wollongong) 42.
[314] Ibid at 43.

Ipso facto clauses 'strike at the heart of restructuring attempts because they dramatically increase the leverage that the counterparty has against the company attempting to restructure.'[315] They pose acute difficulties for companies attempting to restructure their debts, since a company's restructuring efforts may be undermined if key suppliers or service providers terminate their contracts immediately after the company commences business rescue proceedings. Arguably, the lack of ipso facto protection has significant unintended consequences on business operations and impedes restructuring. A constraint on ipso facto clauses can be beneficial to companies in financial distress, and to the creditors generally, particularly if the constraint promotes the rescue of the company or its business.[316] Without the prospect of contract continuation (in whatever form), any option to restructure, but also any value maximising going concern sale in liquidation, is off the table.[317] This is because the viability of a business depends on the continuation of its essential contracts at least as much as on a successful business idea. Without an essential licence, energy, goods supply and a workforce or a lease, the debtors' business simply cannot continue.[318] The termination of contracts – by force of law or based on a contractual clause – due to the commencement of restructuring or insolvency proceedings must, therefore, be carefully considered.[319]

3.4.1.18 Balancing Stakeholder interests

A stakeholder is defined as 'any group or individual who can affect or is affected by the achievement of the organisation's objectives.'[320] The objective of a reorganisation procedure is to either enable the distressed firm to return to profitable trading or to preserve its business as a going concern, even if the company gets liquidated. This is because, unlike liquidation, which creates value only for the recipients of the liquidation proceeds, reorganisation creates value for all stakeholders and the economy in general.[321] The impact of the reorganisation on

[315] Jason Harris & Christopher Symes 'Be Careful What You Wish For! Evaluating the Ipso Facto Reforms' (2019) *Australian Journal of Corporate Law* 84.
[316] Sarra et al op cit note 306 at 14.
[317] Bob Wessels & Stephan Madaus 'Business Rescue in Insolvency Law in Europe: Introducing the ELI Business Rescue Report' (2018) 27 (2) *International Insolvency Review* 255 at 266.
[318] Ibid.
[319] Ibid.
[320] Clement Marumoagae 'The Rights of Affected Persons as Stakeholders During Business Rescue Proceedings in South Africa' (2018) 4 (2) *Journal of Corporate and Commercial Law & Practice* 117 at 119.
[321] Rajeswari Sengupta and Anjali Sharma 'Corporate Insolvency Resolution in India: Lessons from a Cross-country Comparison' (APRIL 9, 2016) 15 (15) *Economic and Political Weekly* 37 at 41.

all stakeholders should be beneficial.[322] In Company Cause No. 30 of 2019,[323] Justice Mugambe stated that the purpose of administration is to manage the affairs of the company in distress and take account of the interests of all stakeholders- including all creditors, with the view of turning the affairs of the company back to normal and profitability.'[324] Whereas the law makes the administrator the primary driver for the rescue agenda, they cannot single-handedly achieve the objectives of administration without recognising and respecting the rights of other key stakeholders including creditors, employees, directors, and shareholders.

3.4.1.18.1 Creditors

Generally, creditors are the primary stakeholders during administration. When a company is insolvent, the interest of creditors becomes the primary concern of the managers.[325] Fundamentally, it is the duty of the administrator to consider the interests of the creditors as a whole.[326] The law bestows several rights to creditors. First, the creditors must approve the provisional administrator's proposal before a company can be authorised to execute an administration deed.[327] The law further empowers the creditors to require the administrator to call a creditors' meeting at any time.[328] They may demand to be provided with reports on the progress of the administration from the administrator.[329] Variation to the administration deed requires a resolution passed at a creditors' meeting.[330] Similarly, where the administrator fails to satisfy the interests of the creditors, the law empowers 'any single creditor of the company, without necessarily obtaining concurrence from other creditors, to apply to the court for the termination of administration.'[331] Unless the administrator respects their rights and interests, and works towards the attainment of their collective interests, administration cannot succeed.

[322] S. Conradie & C. Lamprecht 'Business rescue: How can its success be evaluated at company level?' (2015) 19 (3) *Southern African Business Review* 1 at 18.
[323] Supra note 237.
[324] Ibid at para 7.
[325] The Hon. Ssekaana Musa 'Analysing the Role of the Court in Balancing Stakeholder interests in insolvency and restructuring proceedings in Developing Economies – a Ugandan Perspective' a paper presented at a conference in Abuja, Nigeria held on 6-8 July 2022 under the theme Debt and Insolvency Law in Africa: National and Transnational Issues; organized by the Commercial Law Research Network Nigeria (CLRN) and African Sovereign Debt Justice Network (AfSDJN).
[326] Vanessa Finch 'The Recasting of Insolvency Law' (2005) 68(5) *Modern Law Review* 735.
[327] The Insolvency Act op cit note 54 s150.
[328] Ibid s169.
[329] Ibid s169 (4).
[330] Ibid s 170.
[331] Ibid s 172 (1)(b).

Creditors wield a lot of power during administration and the administrator must work diligently to satisfy their interests.

On the contrary, the Insolvency Act failed to moderate the rights of secured creditors against the wider objective of promoting corporate rescue of financially distressed companies in Uganda. The Insolvency Act gives 'secured creditors opportunities to frustrate rescue efforts by the administrators. First, by requiring the administrator to obtain written consent from every secured creditor before his or her appointment can be registered by the official receiver'.[332] Practically, it is inconceivable that a secured creditor can give consent to a process that directly threatens his or her chances to recover his or her debt.[333] This can potentially, be a ground upon which administration can be terminated by the court for non-compliance with this mandatory legal requirement.[334] Secondly, the Act 'does not prevent secured creditors from commencing or continuing to exercise their power to enforce rights arising from charges created by the company before entry into administration.'[335] Without their voluntary support for the rescue effort, resuscitating financially distressed companies is bound to remain a herculean task in Uganda. Uganda should urgently review the provisions of the Insolvency Act to deliberately moderate the rights and powers of secured creditors during corporate rescue.[336]

3.4.1.18.2 Employees

The advancement of creditors' interests does not mean that the other stakeholders' interests will not be considered as part of the process.[337] There are other creditors, such as employees or former employees who are hit harder by suffering a write-off on their claims in the course of an insolvency process.[338] Their limited capacity to suffer losses has prompted a special treatment of these stakeholders.[339] However, the Insolvency Act does not provide special

[332] Ibid s 144(2)(c).
[333] Waiswa op cit note 21 at 405.
[334] The Insolvency Act op cit note 54 s 169; see also Waiswa op cit note 21 at 405.
[335] Ibid.
[336] Ibid.
[337] S. E. Etukakpan, 'Business Rescue and Continuity of Employment: Analysing Policy through the lens of Theory', (2011) *Company Lawyer* 103.
[338] Wessels & Madaus op cit note 317 at 269.
[339] Ibid.

protection to employees once the company goes into administration. It does however, make provision for the status of employees of a company under provisional administration.[340] When a company is under provisional administration, the provisional administrator is required to adopt contracts of employment and is liable for salaries under such adopted contracts and in respect of services rendered after the adoption of the contract.[341] The Act does not give further guidance on what the provisional administrator must do to adopt the employment contracts effectively.

The logical conclusion is that unless expressly terminated (as was the case for UTL's managing director and company secretary), then it is business as usual for employees.[342] Since an administration usually flows from a provisional administration, the assumption is that the status of employees during provisional administration will continue as is when the company transitions to administration.[343] Following the execution of the APA between UTL and UTCL, it was agreed that UTCL inherit the company with all its old staff on a contract of six months. Thereafter, they would be required to prove their worthiness within that period to be considered for long-term contracts.[344] Uganda's Insolvency Act is silent on the rights of the company employees during administration. Additionally, it does not give any manner of protection to employees. To many employees in Uganda, entry of their employers into administration is a clear signal of impending termination or redundancy. The desire to preserve employees' rights is one of the primary reasons why countries are excited about nurturing the rescue culture.[345] There is general recognition that 'when an employer becomes insolvent, employees and their families directly suffer more than other creditors, both in terms of losing employment and a source of livelihood'.[346] The current structure of the Insolvency Act leaves a lot to be desired. It completely ignores the fact that employees significantly contribute to the success or failure of an enterprise.[347] Recognising the rights of employees and enhancing security of their tenure during administration might be a 'worthwhile motivation for them to work even harder during

[340] The Inoslvency Act op cit note 54 s 160(1).
[341] Ibid.
[342] Rehema Nakirya Ssemyalo and Phillip Karugaba 'What does the administration of Uganda Telecom Limited mean for creditors and other stakeholders?' July 5 2017 ENSafrica - *https://www.lexology.com/library/detail.aspx?g=3f021a3c-7283-48da-af7c-f73bf9cf1133 accessed* on 7 February 2023.
[343] Ibid.
[344] 'UCTL inherits UTL with liabilities worth Shs165 billion' Daily Monitor Monday, November 21, 2022 *https://www.monitor.co.ug/uganda /news/national/uctl-inherits-utl-with-liabilities -worth-shs165-billion-4027250* accessed on 7th February 2023.
[345] Cassim et al op cit note 280 at 884.
[346] Waiswa op cit note 21 at 309.
[347] Ibid.

administration to see their employer out of danger'.[348] Being the 'key internal stakeholder with inside information about the operations of the company, the administrator ought to give employees a reasonable opportunity to give their views on proposed rescue plan and strategies on the implementation of the administration deed'.[349]

3.4.1.18.3 Directors, secretary and shareholders of the company

The Insolvency Act does not sufficiently recognise the role of directors, the company secretary and shareholders of the company during administration. The Act provides that 'every director and secretary of the company in administration shall make available to the administrator the company seal, documents and information relating to the company and give all necessary assistance to the administrator as may be necessary'.[350] It also provides that 'where the director or secretary fails to cooperate with the administrator, a court may make an appropriate compliance order as it may be deemed necessary'.[351] The Act also fails to recognise the role of these key stakeholders in the rescue process. The law ought to have gone further to establish clear obligations resting on the administrator to consult with the directors, secretary and even shareholders about the proposed rescue plan and measures.

The law is also lukewarm on the role of shareholders during administration. The only role that shareholders play throughout the entire process of provisional administration and administration is 'passing a special resolution that the company needs to reach a settlement with its creditors prior to the appointment of a provisional administrator and to participate in the general meeting where the administration deed is executed by the company'.[352] Shareholders are not given any other powers during administration. It has been argued that 'the decision to lock out shareholders, directors and other company officials from rescue process is premised on the general perception that they are responsible for leading the company into financial distress from which the administrator might be trying to save the company'.[353] However, 'as the group with immediate knowledge about the affairs of the company and as the residual owners of the company (in case of shareholders), the value of their input during business rescue cannot be underestimated'.[354] Excluding such critical stakeholders from

[348] Ibid.
[349] The Insolvency Act op cit note 54 s 152(1).
[350] Ibid s 157(2).
[351] Ibid s 158.
[352] Ibid s 141 (3).
[353] Waiswa op cit note 21 at 311.
[354] Ibid.

involvement in the administration process is crucial oversight that demands correction through legal reform.

3.4.1.19 Legal Transplantation

Another hindrance to the successful use of the administration procedure is that it was transplanted from the UK to Uganda without taking into consideration the local conditions of Uganda. Legal transplantation entails 'the moving of a rule or a system of law from one country to another, or from one people to another'.[355] Most African countries borrowed their legal systems, including their lawmaking style from the UK as the byproduct of colonisation.[356] Similarly, African countries' lawmakers are notorious for transplanting laws which do not fit properly with their own local conditions.[357] Reforms must be sensitive to local conditions and should take account of different implementing environments. Legal concepts 'tend to behave differently in different countries, and the importation of a new concept may have unintended consequences for the rest of the body of law'.[358] Although one should not preclude the possibility of borrowing from other countries, a good fit of foreign with domestic law would be enhanced by the meaningful adaptation of imported laws to local conditions.[359]

The transplantation of the English law-styled Administration was a serious mistake by the parliament because they did not objectively consider its compatibility with the local conditions.[360] One important condition is that a significant number of corporate businesses in Africa are largely informal, predominantly SMEs and family-owned, and are unlikely to successfully shoulder the heavy weight of administration.[361] The Micro, Small, and Medium, Enterprises (hereafter MSMEs) are the engine of growth for the economic development of Uganda and indeed the world at large.[362] They contribute close to 90% of private sector production.[363] The MSME sector plays a significant role in the economy in terms of

[355] A Watson Legal Transplants *An Approach to Comparative Law* 2 edn (1993) 21.
[356] Iheme & Mba op cit note 76 at 134.
[357] Ibid.
[358] Wan, Wai Yee and Watters, Casey and McCormack, Gerard 'Schemes of Arrangement in Singapore: Empirical and Comparative Analyses' (2020) 94 (3) *American Bankruptcy Law Journal* 463 at 470.
[359] Ibid.
[360] Iheme & Mba op cit note 76 at 126.
[361] Ibid.
[362] Uganda Micro, Small And Medium Enterprise (MSME) Policy Ministry of Trade, Industry and Cooperatives (MTIC) June 2015 at 1 *https://ugandainvest.go.ug/wp-content/uploads/2016/02/Final-MSME-Policy-July-2015.pdf* accessed on 14 February 2022.
[363] Corti Paul Lakuma1, Robert Marty and Fred Muhumuza 'Financial inclusion and micro, small, and medium enterprises (MSMEs) growth in Uganda' (2019) 8 (15) *Journal of Innovation and Entrepreneurship* 1 at 2.

employment and income or source of livelihood that drives economic growth (with over 20% contribution to GDP).[364] Accordingly, any distortion in the MSME space has far-reaching effects on the entire economy.[365] The closure of any of small business is disastrous to other related small businesses'.[366] The administration procedure is largely designed for large, formal businesses and is not suitable for Uganda's largely informal sector with a high predominance of MSMEs. The procedure is complex, involves court and is costly. It is argued that Uganda requires a context-specific approach to insolvency that addresses its unique and local socio-economic conditions which administration does not offer and/or cater for.

3.4.2 Corporate Rescue Procedures under the Companies Act Cap 106

3.4.2.1 Overview

The Companies Act provides for mechanisms of corporate rescue through compromises and arrangements.[367] A compromise involves some settling of the amounts owed to creditors, while arrangement includes any plan for re-organising the affairs of the company.[368] Both arrangements and compromises involve some component of give and take and some component of accommodation on each side to be successful.[369] Practically, the distinction between compromise and arrangement is of little significance as there are no statutory restrictions on the structure or content of the Plan. The compromise or arrangement procedures include Company voluntary arrangements and schemes of arrangement. Although these procedures are meant to be attractive due to their flexibility, they have hardly been used in practice. There is no data at URSB to show that companies have applied the provisions of CVAs and schemes towards corporate rescue. This is attributed to the fact that they are too formal and over regulated making them rigid and unattractive.

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[364] Ibid.
[365] Ibid at 3.
[366] Alon Mwesigwa 'MSMEs in Uganda far from being resilient – EPRC Study' available at *https://eprcug.org/press-releases/msmes-in-uganda-far-from-being-resilient-eprc-study/* accessed on 28th July 2022*; interview of* Dr. Francis Mwesigye, EPRC Senior Research Fellow by Alon; Dr. Francis Mwesigye, said 'When you close a school, it is interdependent on very many other actors around it e.g., suppliers of stationery, financial institutions that give schools loans, the transporters, the food market.'
[367] The Companies Act op cit note 53 ss 230 231-232.
[368] 'You are owed money-The Companies' Creditors Arrangement Act-Office of the Superitendant of Bankruptcy Canada' available at *https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02284.html* accessed on 25th June 2021.
[369] Ruzita Azmi *A Comparative Study of Corporate Rescue in the UK and Malaysia* (Unpublished PhD Thesis, University of Aberdeen 2008) 183.

3.4.2.2 Company Voluntary Arrangements

Before a compromise or arrangement can be deemed binding on creditors, the court must sanction it.[370] It is not automatic that when the application is made to the court, the proposed compromise or arrangement will be approved. The court must be satisfied that 'the proposed compromise or arrangement is reasonable and fair. The compromise or arrangement must also adequately ensure that no minority group is disregarded by the majority, that each class of creditors is reasonably represented in the meeting, that the majority who voted in favour of the compromise acted in good faith, that the procedure followed before the adoption of the arrangement was proper and that the requisite notices were sent out to all parties entitled to receive such notices'.[371] In Uganda, there is no record of any compromise or arrangement that has been attempted or achieved.[372] This is probably because of the cumbersome approval procedure, which significantly waters down the informality otherwise expected in this procedure.

The greatest advantage with CVAs is that once sanctioned by the court, they are binding on all the creditors, class of creditors, members or class of members and the company.[373] It is more valuable for the company if it does not have to obtain the approval of every creditor, but if, instead, the reorganisation can go forward with the approval of a majority of creditors, that is, some form of cram down of creditors is possible.[374] A cram down enables the restructuring to be imposed on dissenting creditors.[375] With CVAs, the incumbent management retains control of the company. By retaining management in control, companies will be more incentivised to pursue CVAs. This is one of the incentives by directors to address matters of insolvency in a timely manner to avoid liquidations. CVAs are not advertised in the newspapers and the official record is not made available to the public to protect its confidentiality.[376] This allows the company to maintain its reputation and goodwill which boosts its prospects of being rescued. CVA is least expensive than Administration, even though the procedure's cost is still considered high for most small enterprises.[377]

[370] The Companies Act op cit note 53 s 230 (2).
[371] Nelson Nerima *Uganda Insolvency Law Handbook* (2018) 59.
[372] Ibid at 60.
[373] The Companies Act op cit note 53 s 230 (2).
[374] Payne op cit note 261 at 3.
[375] Ibid.
[376] D Milman and F Chittenden 'Corporate Rescue: CVAs and the Challenge of Small Companies' (ACCA, London 1995) *ACCA Research Report 44* Chartered Association of Certified Accountants 1 at 7.
[377] Ruzita op cit note 369 at 225.

A CVA is a flexible procedure which allows directors to use their skills and experience to negotiate an acceptable proposal that will satisfy all parties involved.[378] Such arrangement can be tailor made to suit the needs of the companies since there is no specific requirement for the arrangement. There are far-reaching ways to conclude arrangements that include, amongst others, compromises or a composition of the company's debt with the creditor. When deciding to use CVAs, there is no need to establish that the company is insolvent or unable to pay its debts at the time the proposal is made. Directors may take heed of an early warning and resort to the CVA.[379] It can be utilised by a company in an attempt to avert a threatened, or predictable, insolvency before it actually occurs.[380]

The major disadvantage of the CVA is that there is no moratorium during the process. Creditors might take companies to court making it more challenging to effect a rescue. Secured creditors are at liberty to realise their security the moment the company tries to propose an arrangement or compromise.[381] A CVA is a complex procedure, time consuming and expensive to operate.[382] *In the Matter of The Companies Act and In The Matter of Pro-Pride Limited and In the Matter of an Application For an Order of a Creditors Meeting* Justice Musota stated:

> '…what comes out clearly under that section is that certain things must be in place in order for Court to order a meeting under section 235 (1) of the Companies Act 2012, and these are: there must be a proposed compromise or arrangement…the proposal must clearly show whom it intends to affect because once approved it is binding on all creditors…A list of Creditors or Members with whom the proposed compromise is intended would be necessary and very helpful…there must be an application by; the Company, any Creditor, Member or the Liquidator….'.[383]

The judge found that the application for a creditor's meeting was not competent due to insufficient information and limited disclosure by the applicant and dismissed it. This requirement makes the procedure very expensive to operate and unappealing to financially struggling companies.

CVAs require intervention of the court. While carrying out its review of the company and insolvency laws, ULRC noted regarding arrangements and reconstructions that a company

[378] Ibid.
[379] St Clair & D Young, 'The Law of Corporate Insolvency' 3 edn (2004) 205.
[380] Fletcher op cit note 140 at 429.
[381] Nyombi et al op cit note 68 at 663.
[382] Yebisi op cit note 49 at 46.
[383] Company Cause No.040 of 2016.

could enter an arrangement to settle its debts with its creditors through the intervention of the court. However, they found out that the provisions of the law had not been used in Uganda in over thirty years.[384] Nevertheless, the provisions were retained under the Company's Act of 2012. These rescue procedures are quite costly since they are heavily reliant on court involvement which is not a favorable option for financially struggling companies, little wonder that there is no evidence of its usage.

Additionally, CVAs do not attract rescue finding. Without rescue finance, it can be difficult for financially stressed companies to continue operations. For the companies to get long-term finance in a rescue scheme, they must be able to convince the creditors or other interested parties that they have a good cash flow to allow the company to continue trading in a voluntary arrangement. In this situation, it will be an advantage if ailing companies have core business and a niche market so that financing can be obtained from several sources like banks, finance companies, venture capitalists, and business angels.[385]

CVAs also lack secondary legislation comparable to administration regulations, where the content and procedures for effecting the CVA are explained and that renders its procedures more transparent. *In the Matter of The Companies Act and In The Matter of Pro-Pride Limited and In the Matter of an Application For an Order of a Creditors Meeting* Justice Musota stated '… before I take leave of this matter, I must observe that there appears to be no regulations on how to go about applications of this nature even if the section itself guides on what is expected. It is necessary and I propose that the Registrar of Companies and the Minister responsible for justice come up with rules to guide the process in such applications...'[386]

In addition, the Act is so clearly deficient in the elements required for a proposal to creditors to be made and therefore vague.[387] There is also no clear distinction between CVAs and schemes of arrangement. The two procedures seem to be used interchangeably. There is therefore need to clearly separate the two procedures under the law for clarity of what each of them entails. A clear distinction between the two procedures gives clarity to the company and stakeholders about the requirements and implications for each such that stakeholders can make informed decisions on what to pursue.

Another drawback of the CVA is the directors' lack of knowledge and experience. The CVA procedure is less known or understood by directors, and directors delayed action to take

[384] *Study report on Insolvency Law* op cit note 119 para 2 p 14.
[385] Ruzita op cit note 369 at 227.
[386] Company Cause No. 040 of 2016 at 8.
[387] The Companies Act op cit note 53 ss 230 and 232.

professional advice has caused many companies to deteriorate too far to enable them to be placed into the CVA.[388] This lack of expertise hampers the early use of this procedure to rescue financially distressed companies.

The niche of a CVA is that it could be utilised as an appropriate option for rescue when the company is facing unexpected or threatened short-term financial problems.[389] Despite statutory involvement, the underlying nature of the arrangement is essentially contractual in nature. Such contractual relationship will always be associated when negotiations take place among creditors outside any formal rescue proceedings.[390] Data from URSB shows no record of the use of CVAs the assumption one can draw is that there is a traditional preference for resorting to private non-statutory mechanisms compared to formal ones. Sufficient incentives are needed for companies to embrace the objective of the CVA.

3.4.2.3 Schemes of arrangement

A Scheme of arrangement (hereafter scheme) is initiated by company directors who want to enter into a compromise or arrangement with its creditors or members.[391] An application is then made to the court.[392] Where the application is for a compromise or arrangement for the purposes of a scheme for the reconstruction of any company or the amalgamation of any two or more companies the court may by order sanction the compromise or arrangement.[393] The scheme must be approved by the requisite majority of creditors of each class at separate meetings.[394] One of its advantages is that the Scheme upon approval may change the rights of shareholders and creditors without their consent and is binding to all parties (include the dissenters) and not only to those who approved it and those who were notified of the process.[395] Where such scheme has been successfully negotiated, creditors would normally agree to curtail their rights to enforce their claims against the company during the agreed period.[396] Another advantage of the scheme is that 'there is no requirement for an IP in the negotiation and implementation of the scheme. Instead directors retain control of the company and their

[388] Ruzita op cit note 369 at 227.
[389] Ibid.
[390] Ibid.
[391] The Companies Act op cit note 53 s 232.
[392] Ibid s 232.
[393] Ibid s 232 (1).
[394] Ibid s 232(2).
[395] Ibid s 232(2) see also op cit note 368 at 192.
[396] Ibid s 232(2); see also op cit note 368 at 183.

management of the company is not out in the open for outside inspection'.[397] This may be an advantage from the point of view that 'the company can maintain its reputation and goodwill, and the cost of the scheme may be lower as no IP is required'.[398] Furthermore, the task of turning around the company is in the hands of the current management team and it could be an incentive for the directors to take action earlier and propose a scheme that may be tailored to corporate needs that could resolve the company's dilemma.[399]

Additionally, the scheme is advantageous because of its flexibility. The scheme is adaptable in several forms and can be structured to meet the needs and requirements of the company and creditors.[400] If the majority of creditors agree, 'the basic terms and condition of agreement between the company and the creditors can be changed to help make the scheme a success'.[401] A scheme can be utilised with liquidation to reach a compromise with creditors or as an alternative to liquidation.[402] Moreover, the scheme can be used as a mechanism for effecting diversity of mergers and takeovers. It is pointed out that some takeovers or mergers will count as rescues; this may take place when the company in distress is subjected to a takeover and the better management which follows could rescue the company or business. Cases in point in Uganda are DFCU limited acquired the assets of Crane Bank limited, ABSA bank Uganda Limited acquired 100% stake in Barclays Bank Uganda Limited, as part of the group effort to streamline the African operations of Barclays and ABSA, Shell Uganda Ltd acquired all the fuel stations and interests of Uganda Petroleum Limited (UPET) and GAPCO Uganda Limited on the acquisition of all the assets of Esso Petroleum in Uganda. Meanwhile mergers can be seen as relevant to rescue when a combination of two or more companies in distress have more benefits as the combined entity and operations as compared to the prospects of the company or companies which would have been closed down.[403]

A scheme is also available for an insolvent company including all windings up, administrations and receivership. It is also available to a solvent company in need of 'restructuring or arrangement and compromise' with its creditors before the company actually becomes insolvent.[404] Accordingly, the Scheme may be formulated and approved without any

[397] David Brown *Corporate Rescue: Insolvency Law in Practice* (1996) 642.
[398] Ibid.
[399] The Companies Act op cit note 53 s 232(2); see also Ruzita op cit note 369 at 193.
[400] Ibid s 232(2) see also op cit note 368 at 183.
[401] Vanessa Finch *Corporate Insolvency Law: Perspective & Principles* (2002) 326.
[402] The Companies Act op cit note 53 s 232(2) see also Ruzita op cit note 369 at 192.
[403] Alice Belcher *Corporate Rescue* (1997) 31-33.
[404] Ruzita op cit note 368 at 426.

requirement that there be an impending insolvency and early attention to corporate difficulties and timely responses to problems may be instituted.[405]

Despite such promising benefits for the companies, the scheme has been used on relatively few occasions mainly due to its drawbacks. One of the disadvantages of the Scheme is that until the scheme becomes effective, the court has no power to stay proceedings against the company since the proposal for a scheme does not attract a moratorium.[406] Accordingly, during the fragile duration between the negotiations of the scheme until the arrangement takes effect, any creditors are able to take action against the company and this could jeopardise the success of the scheme.[407] To overcome such a flaw, it is quite normal for the company to enter administration or to file a winding up petition and then go for negotiations/arrangements under the scheme. By entering administration, the company has the benefit of a statutory moratorium on the enforcement of creditors' rights. Under liquidation, the company has the advantage of obtaining a stay of proceedings against the company to procure approval of the scheme if there is application to the court by the liquidator.[408]

One of the major disadvantages of the scheme is the formality and complexity of the process. The scheme is to be 'best avoided wherever possible',[409] partly due to the complex and cumbersome procedure, which may consume more time to conclude a good deal.[410] Such a drawback in particular also appeared to diminish the 'tactical advantage' by the company for takeover and merger within the Scheme. It is said that due to the lengthy process 'certainly in a contested bid situation a party relying on a scheme is at a disadvantage to a rival using the takeover offer provisions.'[411]

Furthermore, due to the stages of court involvement, the cost of the process rises and could be detrimental to small companies. The main feature of the scheme is court initiated. It can be seen that the court is extensively involved in the scheme procedures. The first court appearance is to call upon the required meetings of creditors and members with whom the company wishes to negotiate the scheme.[412] Secondly, there is an application to sanction the scheme once the required statutory majority is obtained in the meetings.[413] Yet, it seems that further involvement of the court is inescapable when the application for approval of the scheme

[405] Finch op cit note 401 at 326.
[406] Ruzita op cit note 369 at 194-195.
[407] Ibid at 195.
[408] Roy Goode *Principles of Corporate Insolvency* (2005) 406.
[409] Ibid.
[410] Ibid.
[411] Ruzita op cit note 369 at 194.
[412] The Companies Act op cit note 53 s 232 (1).
[413] Ibid s 232 (2).

is filed. An extensive review of information has to be given to the court while any modifications on the scheme are also supervised by the court.[414] Where an order is made sanctioning the scheme, it becomes binding and once a scheme has been sanctioned it becomes a statutory scheme, has a quasi-statutory force, and cannot be changed by agreement. The terms of the agreement can only be changed by another court order after meetings of creditors to endorse the changes.[415] This rescue procedure is quite costly since it is heavily reliant on court involvement which is not a favorable option for financially struggling companies.

Another drawback of the scheme is the difficulties for its promoters to accurately define a 'class' of members or creditors and each class must similarly agree to the scheme.[416] The court is known to be protective of minority interests and the court will not approve the scheme unless they are convinced that the interests of all parties involved are met.[417] It appears that it is complicated for those promoting a scheme to identify what constitutes appropriate classes for these purposes.[418] The court does not give guidance on what the appropriate classes of creditors or members are, thus the decision rests with the applicant with the risks that if the 'classes' are wrongly selected, the court may refuse to sanction a scheme even when no-one objects to it.[419] Yet, different kinds of shareholding make different classes, and preferential, secured and unsecured creditors will further be distinctly grouped, and if such classes are not correctly founded from the beginning the entire scheme may fail.[420] In practice, at the preliminary stage it is impossible to obtain the approval of the Court to the classes selected for meetings of creditors. The applicant therefore takes the risk on the matter and any creditor can appear at the final hearing for the sanctioning of the scheme-weeks after the scheme was launched - to object that the classes were not correctly selected and to oppose the scheme on this ground.[421] If there is a different state of facts existing among different creditors which may differently affect their minds and their judgments,[422] then these should be divided into separate classes of creditors or members, and it is important to make certain that separate meetings take place for each different class of member or creditor affected by the proposed scheme.[423] The

[414] Ibid s 231; see also Finch op cit note 401 at 328; the information includes the details of the company's capital, business and financial background, the terms of the scheme and the effects of the scheme on each relevant class of creditor or contributory.
[415] Ruzita op cit note 369 at 190.
[416] Finch op cit note 401 at 327.
[417] Ruzita op cit note 369 at 196.
[418] Finch op cit note 401 at 327.
[419] Ruzita op cit note 369 at 186.
[420] Ibid.
[421] Ibid.
[422] John St Clair & D Young *The Law of Corporate Insolvency in Scotland* 3 edn (2004) 214.
[423] Ibid.

classic test of what constitutes a separate class was delivered in the case of *Sovereign Life Assurance Co. v Dodd,* Bowen L.J. stated: 'It seems plain that we must give such a meaning to the terms 'class'... and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.'[424] The legislation should include a definition of 'class' to make it easier for the promoters of schemes to categorise the classes.

In terms of flexibility of the scheme, the absence of specific statutory-prescribed contents to be imposed might be a weakness of such scheme. Little guidance is given to the company or others as to the substantive and adjectival law surrounding the scheme.[425] As noted before, there is also an unclear distinction between CVAs and schemes; in fact, the two procedures are used interchangeably under the law. There is therefore need to clearly separate the two procedures under the law for clarity of what each of them entails. Another drawback of the scheme is lack of expertise on the part of the directors. The success of the scheme heavily depends on the capabilities or qualities of the directors as they are required to participate, give input and be involved in the decision making, and are the ones who are supposed to steer the company to profitability.[426] Arguably these qualities are frequently missing in companies facing financial difficulties.[427] It is noted that the scheme may initiate and conclude rescues more effectively, expertly, accountably, and fairly than a process involving external practitioners.[428] Directors should be encouraged to improve their management skills, and if they do so, in a case where there are signs of financial problems, capable directors can act at an early stage to initiate turnaround before it is too late.[429] If implemented on early warning of financial stress, the scheme can improve the chances of survival of the company.[430]

The scheme endures difficulties due to its high level of court involvement, no moratorium prior to court sanction and ambiguity as to the definition of requisite 'classes.' Still, one should not underestimate the scheme's potential as one of the instruments for a corporate rescue. This could be due to several reasons: directors who take heed of an early warning and resort to the scheme may save the company and thus avoid liabilities for the failure of the company; the scheme can be tailored to suit the situation, as there is no specific requirement for the scheme.

[424] (1892) 2 QB 573.
[425] Brown op cit note 397 at 642.
[426] Ruzita op cit note 369 at 198.
[427] Ibid.
[428] Finch op cit note 401 at 356.
[429] Ruzita op cit note 369 at 198.
[430] Finch op cit note 401 at 356.

3.4.3 LIMITED OPTIONS

The corporate rescue legal regime in Uganda offers limited options to companies in financial distress to be rescued. Restricted options, whether in number or in substance (such as the stage when restructuring is allowable or the efficiency of non-judicial processes vis-à-vis court processes) can obstruct the achievement of the ultimate goal of dealing with failing companies constructively, particularly when considering the divergent features that may vary the facts and circumstances of each debtor in distress.[431] While the current rescue procedures may serve the interests of large companies, they are unattractive to SMEs. Ultimately, any procedure developed or amended to address the needs of enterprises in financial difficulty needs to be beneficial on some distinguishable level (from other enterprises and/or other debtors and/or other procedures) in proposing either liquidation or rehabilitation measures for SMEs.[432] MSMEs represent about 95% of businesses and more than 60% of employment worldwide.[433] Generally, the value of businesses that are diminutive in size, as opposed to larger corporation type of enterprises, has become notable for its economic contribution to a nation's prosperity and expansion.[434] They play an essential role in most countries around the world and even more in emerging markets.[435] While this is a problem for any country, including advanced economies, it becomes particular harmful for emerging economies due to the importance of MSMEs in these countries.[436] With a few exceptions, most insolvency jurisdictions around the world subject MSMEs to the same insolvency framework existing for large companies.[437] Traditional insolvency proceedings 'can be particularly costly for MSMEs, especially taking into account the fact that many of these firms might not even have assets to fund the costs of the procedure'.[438] Therefore, initiating an insolvency proceeding is 'a luxury that many

[431] Andre Boraine & Jani Van Wyk 'Various Aspects to Consider with Regard to Special Insolvency Rules for Small and Medium-Sized Enterprises in South Africa' (2015) 24 (3) *International Insolvency Review* 1 at 9.
[432] Ibid.
[433] World Bank, "Report on the Treatment of MSME Insolvency" (2017), 5 available at: *https://documents.worldbank.org/curated/en/973331494264489956/Report-on-the-treatment-of-MSME-Insolvency*.
[434] Boraine & Wyk op cit note 431; 1 at 2.
[435] Aurelio Gurrea-Martínez 'Insolvency Law in Emerging Markets' (2020) *Ibero-American Institute for Law and Finance Working Paper No. 3*; 1 at 22.
[436] Ibid.
[437] Myanmar and, to a lesser extent, India, and Laos have implemented special insolvency rules for micro and small firms. Likewise, as a response to the COVID-19 pandemic, Colombia has adopted new insolvency rules for small firms. Singapore has also adopted a simplified insolvency programme for MSMEs.
[438] Gurrea-Martínez op cit note 435 at 22.

MSMEs cannot afford'.[439] However, they face a second problem: 'the insolvency procedure may not be suitable for them'.[440] The traditional insolvency proceedings existing in most countries around the world can be very burdensome, rigid, and complex for MSMEs.[441]

The unattractiveness of the insolvency framework for MSMEs can generate various costs for society.[442] Ex post, it can 'hamper the reorganisation of many viable MSMEs and the rehabilitation of honest but unfortunate entrepreneurs'.[443] Likewise, the assets of non-competitive MSMEs cannot be used for more productive activities. Therefore, an unattractive insolvency framework for MSMEs can end up destroying wealth, jobs, and growth.[444] Ex ante, 'the lack of an attractive exit for both companies and honest but unfortunate entrepreneurs may discourage entrepreneurship, responsible risk taking, and the use of debt'.[445] As a result, an unattractive insolvency framework for MSMEs can ultimately 'harm entrepreneurship, innovation, and access to finance'.[446] Additionally, as the debtor's assets are not going to be efficiently allocated ex post, an unattractive insolvency framework for MSMEs may make lenders become more reluctant to extend credit from an ex ante perspective.[447] Hence, this situation will exacerbate the problems already faced by many MSMEs to obtain external finance.[448]

3.5 CONCLUSION

This chapter has shown that while the Insolvency Act has been around for more than ten years, it has not effectively achieved its intended policy objectives of promoting corporate rescue and the rescue culture in Uganda. It has also been shown through data from URSB that liquidation continues to be the most used formal insolvency procedure in Uganda. It is suggested that there are factors that exist both within and without the law which have hampered the effectiveness of achieving corporate rescue under the current law. Uganda's private sector is largely dominated by Micro, Small and Medium Enterprises (MSMEs) which account for approximately 90 per cent of the entire private sector. There are less incentives for MSMEs to

[439] Ibid.
[440] Gurrea-Martínez op cit note 309 at 4.
[441] Ibid.
[442] Ibid.
[443] Ibid.
[444] Ibid.
[445] Ibid.
[446] Ibid.
[447] Ibid.
[448] Ibid.

undertake formal insolvency processes or restructuring regimes to support their rehabilitation efforts when they are faced with financial challenges. Uganda being an emerging economy, there is need to reform the insolvency law to introduce procedures that suit the local conditions of Uganda. It is therefore important to see how other jurisdictions legislate issue of insolvency. The corporate rescue regimes of the UK, Canada, Singapore, and SA are the subject of the subsequent chapter. The analysis of these corporate rescue regimes aims to provide lessons to propose law reform to make Uganda's corporate rescue regime more attractive.

CHAPTER FOUR

CORPORATE RESCUE REGULATORY FRAMEWORKS OF THE UNITED KINGDOM, CANADA, SINGAPORE, AND SOUTH ARICA

4.1 INTRODUCTION

This chapter discusses the corporate rescue procedures in the United Kingdom, Canada, Singapore, and South Africa. The UK was chosen because it follows the common law tradition in which Uganda's corporate rescue regime originates. Having evolved from colonies of the British Empire, Canada, and Singapore also adopted principles from the UK to varying degrees, making them relevant to this comparative study. They were further chosen because they also adopted insolvency principles from the United States, which diverge from the UK regime. The UK, Canada, and Singapore were chosen because they represent the latest developments in corporate rescue internationally. SA was chosen because, despite being an emerging economy, it has registered great success in its rescue regime. This comparative analysis enables a deeper appreciation of and better understanding of the strengths and weaknesses of each system. The comparative analysis examines whether Uganda can learn lessons to improve how it handles companies in distress.

4.2 UNITED KINGDOM

The UK's corporate insolvency system is among the world's oldest and most advanced systems.[1] The formal legal procedures for corporate rescue are found in the Insolvency Act 1986,[2] Enterprise Act 2002,[3] Companies Act 2006,[4] and the Corporate Insolvency and Governance Act 2020.[5] They include administration, company voluntary arrangements, scheme of arrangement, restructuring plan, and Part A1 Moratorium.

4.2.1 ADMINISTRATION

[1] David S. Stevenson 'Grab the Fire Extinguisher: Comparing UK Schemes of Arrangement to U.S. Corporate Bankruptcy After Jevic' (2019) 73 at 87-88.
[2] Insolvency Act 1986 Chapter 45.
[3] Enterprise Act 2002 Chapter 40.
[4] Companies Act 2006 Chapter 46.
[5] Corporate Insolvency and Governance Act 2020 Chapter 12.

The Administration procedure facilitates a company's rescue or the better realisation of its assets. It allows an insolvent company to continue to trade with protection from its creditors through a statutory moratorium.[6] The Insolvency Act does not define administration but outlines its nature and purpose. This is a lacuna which leads to ambiguity and interpretation issues. Administration is available to both the UK and foreign-registered companies[7] except certain companies.[8]

Administration cannot begin unless it can be first demonstrated that the company is, or is likely to become, unable to pay its debts.[9] A company is deemed unable to pay its debts if it fails to pay a debt of at least £750 within three weeks, execution by a judgment creditor is returned unsatisfied, can't pay its debts as they fall due, or has assets less than liabilities.[10] This criterion is intended to ensure that the procedure is applied in situations where a company's financial difficulties are severe enough to justify intervention by an administrator. However, waiting until the company is unable to pay its debts reduces the chances of rescuing the company. Secondly, the court must also assess the likelihood of an administration order achieving the intended purpose.[11] In *Auto Management Services Ltd v Oracle Fleet UK Ltd*, the Chancery Division explained that the court did not have to be satisfied that the objective would be achieved on a balance of probabilities, but only that there was a reasonable prospect.[12]

The administration process allows for flexibility through either a court process[13] or an out-of-court route.[14] The court can appoint administrators through applications by the company, its directors, creditors, designated officers,[15] or a combination of these persons.[16] An out-of-court procedure is available to directors or shareholders[17] and qualifying floating charge holders (hereafter QFCH).[18] At the hearing, several parties may appear or be represented, including the applicant, the company, its directors, any administrative receiver, petitioners for winding-up, the proposed administrator, any member, liquidator, QFCHs, any CVA supervisor,

[6] The Insolvency Act op cit note 2 sch B1 paras 42-3.
[7] Ibid sch B1 para 111(1A).
[8] The Companies Act op cit note 4 s 249(1). These are companies established and governed by the following statutes which provide their own special administration regimes: the Water Industry Act 1991 (c 56); the Railways Act 1993 (c 43); the Channel Tunnel Rail Link Act 1996 (c 61); the Transport Act 2000 (c 38); the Greater London Authority Act 1999 (c 29) and the Building Societies Act 1986 (c 53).
[9] The Insolvency Act op cit note 2 sch B1 paragraph 11.
[10] Ibid s 123 and sch B1 para 111(1).
[11] Ibid sch B1 para 11(b).
[12] [2008] BCC 761.
[13] The Insolvency Act op cit note 2 sch B1 paragraphs 11, 12 (1).
[14] Ibid sch B1 paras 22 & 14.
[15] exercising the power conferred by section 87A of the Magistrates' Court Act.
[16] The Insolvency Act op cit note 2 sch B1 paragraphs 11, 12 (1).
[17] Ibid sch B1 para 22.
[18] Ibid sch B1 para 14.

and others with court permission.[19] Although it is important to allow all affected parties an opportunity to be heard this makes the procedure time-consuming and causes delays which is harmful to a company in urgent need of rescue.

An out-of-court appointment takes effect after filing documents with the court,[20] while a court appointment starts per the court order or upon its issuance.[21] The administrator must seek to implement a hierarchy of objectives: in the first instance, to rescue the company as a going concern.[22] Preserving the company, on its own, does not result in 'rescue'. It may only mean that the date of its ultimate failure has been moved further along.[23] However, the addition of the words 'as a going concern' was intended to 'make it clear that it is the business that is of value and should be saved where possible, even if it means stripping the company into an empty shell'.[24] The second objective is 'to achieve a better return for the creditors as a whole than in liquidation'.[25] This provision firmly places the interests of creditors first, even before those of employees or shareholders who would benefit more from a rescue of the company itself, in that a rescue of the corporate entity need not be pursued if it would be to the detriment of the creditors.[26] The third objective is 'to realise collateral for the benefit of secured and preferential creditors'.[27] This objective can be seen as part of the trade-off 'to compensate creditors holding a floating charge over the company's assets for depriving them of their traditional remedy of appointing a receiver or administrative receiver'.[28] However, the pursuit of this objective is more regulated than the others since, where applicable, the administrator is required to explain in his administration proposals why he believes that the other objectives cannot be achieved.[29]

[19] The Insolvency (England and Wales) Rules 2016 rule 3.12.
[20] The Insolvency Act op cit note 2 sch B1 paras 19, 31 & 29 (1).
[21] Ibid sch B1 para 13(2).
[22] Ibid sch B1 Para 3(1)(a).
[23] Bolanle Adenike Adebola *Corporate Rescue and the Nigerian Insolvency System* (unpublished PHD thesis, University College London 2012) 84.
[24] Anneli Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (Unpublished PhD Thesis, University of South Africa 2010) 182.
[25] The Insolvency Act op cit note 2 sch B1 Para 3(1)(b).
[26] Roy Goode *Principles of Corporate Insolvency* (2005) 327, the vast majority of administrations have in practice achieved this purpose.
[27] The Insolvency Act op cit note 2 para 3(1) *(a(b)(c).*
[28] Loubser op cit note 24 at 184.
[29] Ibid.

The Administrator must be licensed,[30] and consent to act as such.[31] Only qualified individuals, either members of a professional body[32] or authorised by a competent authority,[33] are eligible to be licensed. The standards for licensing, practice, and setting fees are well-defined and monitored by seven professional bodies that also act as Self Regulating Organisations (SRO).[34] Using several recognised professional bodies as well as the Secretary of State (through the Insolvency Service) 'to execute this regulation has the advantage of a wide regulation of all the activities of insolvency practitioners, such as their conduct as accountants and lawyers, as well as their activities as insolvency practitioners'.[35] Although 'a single regulator could perhaps lead to more consistency and transparency, and provide a single body to which the public could address complaints, the existing system was still preferable because of the dual scrutiny to which it subjected most insolvency practitioners'.[36]

To ensure that the same standards of competence are maintained by all the various authorising professional bodies and the Secretary of State, all applicants need to pass a qualifying exam administered by the Joint Insolvency Examination Board (JIEB).[37] The JIEB exam follows a centralised testing model, ensuring that the knowledge and skills tested are consistently present in every business rescue practitioner.[38] This 'creates uniformity and allows companies to maintain an expectation of all practitioners that they will have the necessary expertise to deal with whatever may come their way. This is pivotal in creating confidence and reliance on the procedure'.[39] Applicants must meet the authorising body's insolvency experience requirements,[40] as set out in provisions detailing the prescribed minimum number of cases or hours of insolvency work in a specific time.[41] Applicants are also required to have completed a specified minimum number of hours of continuing professional development.[42]

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[30] Insolvency Act op cit note 2 s 390(1) - Acting as an insolvency practitioner without being qualified to do so is an offence for which the offender can be imprisoned or fined or both.
[31] Insolvency regulations op cit note 19 rule 3.2 details what is contained in the proposed administrator's statement and consent to act.
[32] Insolvency Act op cit note 2 ss 390(2)(a), s391(3).
[33]Ibid s 390(2)(b); The Secretary of State is the competent authority unless he has designated another body or person.
[34] Rajeswari Sengupta & Anjali Sharma 'Corporate Insolvency Resolution in India: Lessons from a Cross-country Comparison' (2015) 1 at 10.
[35] Loubser op cit note 24 at 200.
[36] Ibid at 201
[37] Sengupta & Sharma op cit note 34 at 11.
[38] John Michael Wood *Corporate Rescue: A Critical Analysis of its Fundamentals and Existence* (Unpublished PhD Thesis, The University of Leeds May 2013) 45.
[39] Ibid.
[40] Vanessa Finch *Corporate Insolvency Law Perspectives and Principles* 2 ed (2009) 336; see also Sengupta et al op cit note 34 at 11.
[41] Loubser op cit note 24 at 200.
[42] Ibid.

The UK maintains a very strict regulatory system that is seen to qualify administrators to the highest standards between all four countries.

The appointment of an administrator displaces the board of directors from their existing management functions. The administrator has wide powers to manage the affairs, business, and property of the company,[43] and can seek court direction.[44] The presumption in the UK seems to be that an external administrator is fundamental to the restructuring procedure. This is in part due to the perception that the directors are primarily responsible for a company's insolvency.[45] Directors who contributed to the financial difficulties of a company rarely have the ability, objectivity, or lack of self-interest to take the necessary remedial action.[46] This, however, does not mean that the directors are automatically removed from office. Both the board of directors and the members in general meeting retain their powers as organs of the company[47], but 'their powers are severely restricted by paragraph 64(1), which forbids a company or any of its officers from exercising a management power without the consent of the administrator'.[48] They are, however, not precluded from their statutory duties, such as filing annual returns and convening the annual general meeting.[49]

The nature of the administrator-in-control/PIP model has been criticised.[50] Chapple and Routledge have argued that the stigma and reputational damage ('identity loss') to directors associated with the immediate loss of corporate control is a strong disincentive for them to invoke the administration procedure promptly, thus missing the optimal opportunity for restructuring.[51] Harris has pointed out that the loss of corporate control can be even harder for owner-managers of SMEs who are likely to have their assets and reputation tied to the business.[52] That notwithstanding, it may not be appropriate in all circumstances to let the incumbent board manage the company in reorganisation.

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[43] The Insolvency Act op cit note 2 sch B1 paras 59(1), 60, 67 - some specific powers are listed in Schedule 1 to the Act, such as the power to continue the company's business and raise or borrow money.
[44] Ibid sch B1 para 63.
[45] Hunt Brian M & Handa Rish 'A Critical Comparison between Australian and Canadian Creditor Protection Regimes: Voluntary Administration and CCAA' (2005) *Corporate Finance: Valuation* 14.
[46] Ibid.
[47] Loubser op cit note 24 at 204.
[48] The Insolvency Act op cit note 2 sch B1 para 64(1).
[49] Loubser op cit note 24 at 204.
[50] Jenny Fu & Roman Tomasic 'The Use of Noncourt-Based Corporate Rescue: Does the Australian Voluntary Administration Procedure Provide a Model for China?' (2017) 26 *Int. Insolv. Rev.,* 153 at 165.
[51] Larelle Chapple & James Routledge, 'External administration in corporate insolvency and reorganisation: the insider alternative' (2015) 23 *Insolvency Law Journal* 69.
[52] Jason Harris, 'From corner shop to large multinational: should voluntary administration remain a one-size-fits-all procedure? Do we need a fast track system for small business rescue?' (27 August 2015) 1 at 10 available at SSRN: *https://ssrn.com/abstract=2652552* or *http://dx.doi.org/10.2139/ssrn.2652552*.

The Administrators are officers of the court whose main function is to carry out the purpose of the administration.[53] The administrator's core duty is to draft proposals for achieving the purpose of administration.[54] Once approved by the creditors at their meeting,[55] the administrator has to act in terms of these proposals,[56] failure of which creditors and members can challenge him in court.[57] There is no automatic cram down of debt. However, the Administrator's proposals may, in effect, lead to this for unsecured creditors – while secured creditors can only be made to accept a reduction in the amounts they are owed with their agreement or through a Scheme of Arrangement.[58]

The lnsolvency Act provides for two types of administration moratorium, a moratorium for the period during which the company is in administration[59] and an interim moratorium pending either the disposal of an application for an administration order or the coming into effect of an out-of-court appointment of an administrator.[60] The interim moratorium is imposed before the commencement of the administration and the duration is shorter.[61] Relief from the interim moratorium can only be sought from the court as no administrator is usually in office at the relevant time.[62] The moratorium gives the administrator breathing space to plan and perform his statutory responsibilities without interference from creditors and their assignees.[63] In the UK case of *AES Barry Ltd v. TXU Europe Energy Trading*[64] Patten J. noted that 'the moratorium … is primarily concerned to avoid the assets of the company from being removed by creditors whilst the administrators continue to attempt to achieve the statutory purposes for which the administration order was made.'[65]

[53] The Insolvency Act op cit note 2 sch B1 paras 5, 3(1) - administrators are officers of the court (whether or not appointed by the court) and act as the company's agent; have very extensive management powers; investigatory and enforcement powers.
[54] Ibid sch B1 para 49; op cit note 19 rules 3.35 & 3.36.
[55] Ibid sch B1 para 51; Ibid Rules 2016 rule 3.38.
[56] Ibid sch B1 para 68(1).
[57] Ibid sch B1 paras 74 and 75.
[58] Keith Wilson and Alper Deniz 'A Short Guide to UK Insolvency Law: Administration' 1 at 4 available at *https://www.paulhastings.com/insights/client-alerts/a-short-guide-to-uk-insolvency-law-administration* accessed on 20 June 2023.
[59] The Insolvency Act op cit note 2 sch B1, paras 42, 43, 44; see also Kubianga Michael Udofia A Comparative study of the UK And US Insolvency Law Regimes (Unpublished PhD Thesis University of Nottingham 2014) 144.
[60] Ibid sch B1, Para 44; Ibid at 144.
[61] Ibid at 144.
[62] The Insolvency Act op cit note 2 sch B1 paras 44(5) 44(7).
[63] Ian Fletcher & John Higham *Corporate Administrations and Rescue Procedures* 2 ed (2004) 50; see also Udofia op cit note 59 at 135.
[64] 887 F.2d 165 C.A.8 (S.D. 1989).
[65] 887 F.2d 165 C.A.8 (S.D. 1989) 168.

Final moratoriums, prevent winding up,[66] any enforcement of security over the company's property,[67] repossession of goods under a hire-purchase agreement,[68] landlord's right of forfeiture,[69] and any other legal process against the company[70] while the company is in administration[71] without administrator consent or court permission. Regarding the prohibition on enforcement of security, it is pre-emptive as it transcends the mere enforcement of security, and includes preparatory acts to enforce security.[72] It is settled under the UK insolvency law regime that the moratorium on repossession of goods equally applies to the property of the debtor in the physical possession of a third party. In *Re Atlantic Computer Systems Plc.,*[73] the Court of Appeal ruled that computer equipment that had been sub-let (and which was still in the physical possession of the sub-lessees) was in possession of the lessee for the purpose of the moratorium.[74] Nicholls L.J. reasoned that repossession from the sub-lessee amounted to repossession from the lessee/debtor and that the provision was concerned with relations between the lessor and the lessee/debtor. Consequently, the latter had possession of the goods regardless of whether it was on its premises or not, entrusted by the company to others for repairs or sublet.[75]

Similarly, it is settled that property which does not belong to the debtor but is in its possession under a hire-purchase or lease agreement is subject to the moratorium.[76] In *Bristol Airport Plc. v. Powdrill and ors*[77] where the debtor airline held aircraft under the terms of leases, it was held that the aircraft were 'property' of the debtor airline for the purpose of the moratorium. A potential difficulty with the present restraint is determining with certainty which actions will constitute steps or acts to repossess goods.[78] The provisions of the Insolvency Act are unhelpful, as they offer no guidance in this regard. It has been suggested that the prohibition under the Act will only restrain acts that interfere with the debtor's enjoyment of its property or the property in its possession or inhibit the administrator's use of such property in the conduct of the business.[79] The moratorium is not absolute, as it allows certain legal processes

[66] The Insolvency Act op cit note 2 sch B1 para 42.
[67] Ibid sch B1 para 43(2).
[68] Ibid sch B1 para 43(3).
[69] Ibid sch B1 para 43(4).
[70] Ibid sch B1 para 43(6).
[71] Ibid sch B1 para 43.
[72] Udofia op cit note 59 at 146.
[73] (1992) Ch. 505.
[74] (1992) Ch. 505 at 532
[75] (1992) Ch. 505 at 532.
[76] Udofia op cit note 59 at 154.
[77] [1990] Ch. 744, 759, 760, 761, 762 - 763- 764, 767; ibid at 154.
[78] Ibid at 155.
[79] Ibid.

against the company.[80] Set-off rights are self-executing and are consequently not suspended or interfered with by the moratorium.[81] Hence it constitutes one of the so-called true exceptions to the pari passu principle. Accordingly, the factual effect of a set-off claim is that it confers a preference on the creditor who holds the right. Prima facie this runs counter to the two policy objectives of the statutory moratorium: asset preservation and ensuring a collective procedure.[82] The moratorium applies for the duration of the administration proceedings and terminates one year after the date the appointment took effect.

Legislative efforts towards corporate rescue funding are tied to the administration process which makes provision for an administrator to borrow funds and grant security over the company's property.[83] The law lacks explicit incentives required to encourage fresh lending as can be found in jurisdictions like Canada.[84] However, the Insolvency Act 1986 gives priority to the payment of the administrators' remuneration and expenses[85] and also authorises the administrator to do all such things that are necessary for the management of the affairs, business and property of the company[86] including the power to grant security.[87] This gives the impression that Administrators have some authority to enter into loan agreements with post-petition lenders.

What is lacking is the incentive to encourage lenders to advance funds.[88] However, if borrowing money is necessary for the continued running of the business during the rescue, the administrator has the power to do so and lenders who advance the funds would enjoy priority payments.[89] Though the Insolvency Act 1986 provides for priority financing within the purview of the administration expenses, there are no provisions for style super-priority financing which would encourage new and pre-existing lenders to extend credit to the company.[90] The danger in introducing this sort of priority in the UK lies in the fact that the jurisdiction is more creditor-focused and the rescue is managed by an administrator. If rescue funding is made to enjoy super-priority, 'it may have a far-reaching effect on continued trading during the rescue process because it would rank ahead of important trading expenses and this may result in parties being

[80] The Insolvency Act op cit note 2 sch B1 para 43(7).
[81] Fletcher & Higham op cit note 63 at 57.
[82] Udofia op cit note 59 at 160.
[83] The Insolvency Act op cit note 2 sch B1 para 60.
[84] Akpareva Aruoriwo 'Financing Corporate Rescues, Where Does the UK Stand?' (2014) 1(2) *IALS Student Law Review* 10.
[85] The Insolvency Act op cit note 2 sch B1 para 99 (4).
[86] Ibid sch B1, para 59.
[87] Ibid sch 1, paras 14 &15.
[88] Aruoriwo op cit note 84 at 13.
[89] The Insolvency Act op cit note 2 sch B1, para 99(3), (4)-(6).
[90] Aruoriwo op cit note 84 at 14-15.

less willing to continue to trade with the company'.[91] Additionally, administrators may be reluctant to take up appointments if they feel their fees may be in jeopardy as a result of super-priority finance.[92]

Administration can be expensive, particularly due to the fees of administrators and legal professionals. The fees for administrators and legal professionals can be substantial, particularly for smaller companies with limited resources. These costs can diminish the value of the company's assets and may, in some cases, undermine the viability of the restructuring efforts.

Creditors are the primary stakeholders during rescue proceedings. Unless the administrator respects their rights and interests and works towards the attainment of their collective interests, administration cannot succeed.[93] UK's legislation is silent on the rights of the company employees during rescue proceedings. Administration itself does not terminate or amend the employment contracts of employees.[94] In such circumstances, employees' wages, salary (including holiday pay), and contributions to occupational pension schemes will become a priority claim ranking above even the Administrator's fees and expenses.[95] If the Administrator chooses to terminate contracts of employment, the employee will be entitled to statutory compensation and any contractual compensation due but these will each rank only as unsecured claims.[96] Furthermore, both the board of directors and the members in general meeting retain their powers as organs of the company.[97] However, their powers are severely restricted since the law forbids a company or any of its officers from exercising a management power without the consent of the administrator.[98]

Until the enactment of the Corporate Insolvency and Corporate Governance Act 2020 (hereafter CIGA), the UK had only minimal constraints on the use of ipso facto clauses.[99] For example, the Insolvency (Protection of Essential Supplies) Order 2015 ensured the continuity of essential services to companies undergoing formal rescue procedures.[100] Essential supplies under Section 2 of the Order include gas, electricity, water, communication services, and IT-

[91] Ibid at 17.
[92] Ibid
[93] Waiswa Abudu Sallam *An Evaluation of the Strengths and Weaknesses of South Africa's Corporate Rescue Regime as a Potential Benchmark for Uganda* (unpublished PHD thesis, University of South Africa 2022) 306.
[94] The Insolvency Act op cit note 2 sch B1 para 99 (5) of Schedule B1; op cit note 58.
[95] Ibid.
[96] Ibid.
[97] The Insolvency Act op cit note 2 sch B1 paras 61 and 62.
[98] Ibid sch B1 para 64(1); op cit note 24 at 204.
[99] Janis Sarra, Jennifer Payne & Stephan Madaus 'The promise and perils of regulating ipso facto clauses' (2022) 31 *International Insolvency Review* 45 at 54.
[100] Waiswa op cit note 93 at 430.

related goods such as terminals, computer hardware and software, information technology, data storage processing, and website hosting. It invalidates any contract terms allowing withdrawal of these supplies upon insolvency once the company enters administration or voluntary arrangement.[101] The scope of this protection was further enhanced by the CIGA.[102]

CIGA introduced a new section 233B into the Insolvency Act 1986, which significantly expanded these provisions and introduced a broad and far-reaching constraint on ipso facto clauses[103] to support business rescues.[104] S.233B provides that any provision that allows for the termination of a contract for the supply of goods and services[105] or for a party to do 'any other thing' when a counter-party enters into a relevant insolvency procedure ceases to apply once the counterparty enters into that relevant insolvency procedure.[106] The provision has two main effects: 'first, a supplier's contractual right to terminate on the grounds of insolvency is permanently removed from the date of the relevant insolvency procedure. Second, a supplier's contractual right to terminate on the grounds of any pre-insolvency events of default is temporarily suspended until the relevant insolvency procedure comes to an end'.[107] This aims at ensuring that companies continue to receive critical goods and services. Continuous access to necessary services allows the administrator to develop and implement a restructuring plan without immediate operational threats. The constraint applies 'if a company enters an "insolvency procedure" which include a moratorium, including therefore the restructuring moratorium introduced by CIGA, administration, a Company Voluntary Arrangement, liquidation, or a restructuring plan'.[108] The inclusion of liquidation in this list arguably looks odd given the purpose of this provision is 'to aid the rescue of a company as a going concern or of its business'.[109]

The prohibition is on termination or 'any other thing' because of insolvency. The reference to 'any other thing' is extremely broad and includes exercising any other contractual rights triggered by or exercisable upon the commencement of an insolvency procedure and includes any provision requiring higher payments or payments on default, for example, default

[101] Insolvency (Protection of essential supplies) order 2015 s 4.
[102] The Insolvency Act op cit note 2 sch 12.
[103] Sarra et al op cit note 99 at 55.
[104] Sarra et al op cit note 99 at 55.
[105] The Insolvency Act op cit note 2 s 233B - Essential services include utilities (electricity, gas, water), communication services (phone and internet), and IT services (data storage, software licenses).
[106] Ibid.
[107] Sarra et al op cit note 99 at 57.
[108] The Insolvency Act op cit note 2 s 233 (2).
[109] Sarra et al op cit note 99 at 56.

interest or acceleration of unpaid payments.[110] Clearly, the principle of freedom of contract can be constrained for policy reasons that extend beyond corporate rescue.[111] However, suppliers will retain the right to terminate or 'do any other thing' concerning any non-insolvency-related events contained in the contract, where the event occurs after the commencement of the insolvency procedure. These rights may include, for example, non-payment.[112]

Nevertheless, a measure of creditor protection is built into the UK provisions. One means of achieving this protection is through the Prompt Payment Code where the supplier can expect payments for continuing to supply goods or services to the debtor.[113] Introduced in 2008, this industry code commits businesses to timely payments. Since 2018, suppliers on public projects must comply with it to remain eligible to supply the government. Non-compliant suppliers can be suspended from government contracts.[114] A further form of protection that is commonly utilised is the ability of the supplier to terminate the contract in certain circumstances despite the general ban.[115] In the UK, there are three such exceptions where termination by a supplier on account of an insolvency event will be permitted: 'first, with the consent of an office holder or the company itself, if it is subject to debtor-in-possession proceedings, secondly, with the approval of the court, where continuation of the contract would cause the supplier hardship; and thirdly, if a post-insolvency event of default occurs, giving rise to a new event of default, such as non-payment'.[116] In practice, it is this second exception, based on creditor hardship, which is likely to be the focus for creditors seeking to terminate the contract despite the ban. The concept of 'hardship' is not defined within the legislation and it will therefore be for the courts to establish this threshold.[117] This is the same terminology as adopted in Canada and most of the cases in the Canadian courts have revolved around the hardship provisions.[118]

The prohibition of termination based on insolvency covers contracts for the supply of goods and services other than contracts excluded.[119] This constraint on ipso facto clauses is narrower than the constraints elsewhere like Canada, which generally applies to all executory

[110] Ibid at 14.
[111] Ibid at 13.
[112] Ibid at 14.
[113] Waiswa op cit note 93 at 444.
[114] Ibid.
[115] Sarra et al op cit note 99 at 57.
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] The Insolvency Act op cit note 2 sch 4ZZA.

contracts subject to carve-outs.[120] The UK constraint on ipso facto clauses is subject to carve-outs for certain kinds of creditors. The categories of suppliers and categories of contracts that are excluded are set out in Schedule 4ZZA of the Insolvency Act 1986. There are also exclusions where the termination clause forms part of a contract involving financial services.[121] Therefore, 'loan agreements, hedging arrangements, and other types of financial contracts are carved out of the application of section 233B; and certain entities for example deposit-taking and investment banks and insurance companies are excluded from the effects of the section, regardless of whether they are the insolvent entity or the supplier. There is also a carve-out for any set-off, netting arrangements, or capital market investments. Excluded contracts largely relate to financial services, and the changes to the law introduced by CIGA will, consequently, largely affect trade creditors. There is some sense to the exclusion of financial creditors'.[122] In the absence of this carve-out, 'financial creditors may have been prompted to incorporate earlier triggers into financial documentation to enable them to withdraw from the company working capital necessary for the company's ongoing operation at a point when insolvency is reasonably likely, to avoid the effects of the ipso facto ban, an outcome which could be more detrimental to a distressed company than excluding the financial creditors from the ambit of these provisions'.[123]

An administrator's term automatically concludes a year after the appointment.[124] However, it can be extended for a specified period through a court application or up to one year with creditors' consent.[125] The short period of administration is because 'administration is a temporary measure that grants the company a period of relief during which the foundations for its actual rescue are laid, rather than being the rescue measure itself'.[126] The administrator may, however, apply to the court for an extension for a specified period by consent of all creditors for a period not exceeding one year.[127] He may apply to the court for early termination of his appointment where the purpose of administration cannot be achieved, or where the company should not have entered administration.[128] The court can permit continued administration if it benefits the company and creditors.[129] The administration procedure can be complex and time-

[120] Sarra op cit note 99 at 14.
[121] Ibid at 15.
[122] Sarra op cit note 99 at 58.
[123] Ibid.
[124] The Insolvency Act op cit note 2 sch B1 para 76(1); Insolvency regulations op cit note 19 rule 3.55.
[125] Ibid sch B1 para 76(2); ibid rule 3.54.
[126] Loubser op cit note 24 at 213
[127] The Insolvency Act op cit note 2 sch B1 para 78(4).
[128] Ibid sch B1 para 79(1) and (2); Insolvency regulations op cit note 19 rule 3.57.
[129] Edward Bailey and Hugo Groves *Corporate Insolvency: Law and Practice* 4 ed (2014) 428.

consuming. This complexity can lead to delays and increased administrative burden, which may detract from the primary objective of rescuing the company in a timely manner. The need for detailed reporting, extensive documentation, and compliance with various rules and regulations also slows down the process and increase costs.

4.2.2 COMPANY VOLUNTARY ARRANGEMENTS

The Insolvency Act, amended in 2000 introduces two types of Company Voluntary Arrangements (hereafter CVA) procedures: with[130] and without a moratorium.[131] A CVA is a financial restructuring process enabling struggling companies to negotiate with creditors, proposing debt restructuring based on majority preferences.[132] It aims to allow financially distressed companies to propose creditor compromises or arrangements with the court's sanction.[133] This is not an insolvency procedure, although its provisions are within the Insolvency Act 1986.[134] Unlike Administration, insolvency is not a pre-requisite for entry into a CVA, which is a positive quality and allows earlier restructuring, in line with both Cork and Finch's arguments about the timeliness of entry.[135] The regime was intended to provide a mechanism to allow companies to mount a rescue attempt before the onset of insolvency.[136] Directors propose voluntary arrangements,[137] while administrators and liquidators make proposals during administration or winding up.[138]

4.2.2.1 The CVA procedure – without a moratorium

CVAs apply to companies[139] as defined in the Companies Act 2006.[140] The directors propose a voluntary arrangement to the company and its creditors and appoint a nominee.[141] The nominee submits a report to the court stating whether the proposed voluntary arrangement is

[130] IA 1986 and the IA 2000 which introduced a new Schedule A1 into the IA 86
[131] The Insolvency Act op cit note 2 Part I and the IA 2000
[132] Yang Chen 'A Proposal to Reform English Company Voluntary Arrangement Moratorium Regime: Insights from Us Automatic Stay' (2020) 41 *University of Pennsylvania Journal of International Law Online* 4.
[133] John Paul Tribe 'Company Voluntary Arrangements and Rescue: A New Hope and a Tudor Orthodoxy' (2009) *Journal of Business Law (UK)* 1 at 10.
[134] The Insolvency Act op cit note 2 Part 1.
[135] Jennifer Payne 'The Future of UK Debt Restructuring' (2016) 1 at 3.
[136] Tribe op cit note 133 at 9.
[137] The Insolvency Act op cit note 2 Part 1 s 1(1).
[138] Ibid part 1 s 1(3).
[139] Ibid part 1 s 1(4).
[140] Ibid s 1(4) - These would be companies formed and registered under s 1(1) of the Companies Act 2006.
[141] Ibid part 1 s 1(1).

viable and will be approved and implemented and whether a meeting of the company and its creditors should be convened to consider the proposal and proposed meeting details.[142] The nominee must be more than a mouthpiece of the directors of the company, and should apply their independent judgment to what goes into his report, with the prospect of creditors approving the proposal resting on their faith in his skill and independent judgment.[143]

4.2.2.2 The CVA procedure – with a moratorium

Initially, without a moratorium, the CVA was combined with costly administration. Section 1A of the Insolvency Act 1986 introduced CVA with a moratorium. Eligible small companies,[144] meeting small company criteria[145] can get a moratorium for voluntary arrangements.[146] Exclusions apply,[147] including specific company types and those in recent insolvency or rescue procedures in the past 12 months[148] or with an ongoing moratorium.[149] Directors submit to the nominee a report justifying the moratorium,[150] who then submits an opinion on whether the proposed voluntary arrangement will be approved and implemented, whether the company has sufficient funds during the moratorium, and if meetings of the company and its creditors should be summoned to consider the proposed voluntary arrangement.[151]

Upon receipt of a favourable report from the nominee, the directors of a company file with the court the proposed voluntary arrangement, a statement of the company's affairs in the prescribed form,[152] eligibility for the moratorium, consent from the nominee to act, a statement from the nominee confirming the viability and funding of the proposed voluntary arrangement and the need for meetings.[153] As Fletcher has opined, 'the guiding principle of this procedure would be that only viable businesses, adequately financed, should be accorded access to this

[142] Ibid part 1 s 2(2).
[143] Ruzita Azmi *A Comparative Study of Corporate Rescue in the UK And Malaysia* (Unpublished PhD Thesis, University Of Aberdeen 2008) 216.
[144] The Insolvency Act 2000 Chapter 39 s1 A and schedule A1.
[145] Ibid sch A1 para 3 - turnover under £6.5 million, balance sheet total under £3.26 million with less than 50 employees.
[146] The Companies Act op cit note 4 s 382(3)-(6).
[147] The Insolvency Act op cit note 2 sch A1 para 2(2) - Such as insurance companies, banks, companies operating in the financial market and other institutions protected by the Banking Act 1987.
[148] Ibid sch A1 para 4(1).
[149] The Insolvency Act op cit note 144 sch A1 para 4(1)(f).
[150] Ibid sch A1 Part II s 6 (1).
[151] Ibid sch A1 Part II s 6 (2) (3).
[152] Ibid sch A1 Part II s 7 (3).
[153] Ibid sch A1 Part II s 7 (1) (2).

mode of rescue.'[154] The requirements for the nominee to issue statements to the director on the viability, funding, and meetings on the voluntary arrangement make it costly and time-consuming yet crucial since at this stage, the nominee exercises professional judgment to filter non-viable proposals.[155]

A moratorium lasting 28 days starts when the necessary documents are filed with the court.[156] It ends at the end of the day on which the meetings summoned to consider the voluntary arrangement are first held unless extended.[157] A moratorium, prevents the grant of winding up, administration or administrative receivership orders,[158] any enforcement of security over the company's property,[159] repossession of goods under a hire-purchase agreement,[160] landlord's right of forfeiture,[161] and any other legal process against the company[162] without the leave of the court.[163]

Introducing a moratorium for stand-alone CVAs was a meritorious addition to the procedure.[164] However, this reform did not lead to an appreciable uptake in usage for some reasons including the eligibility criteria which restricts the CVA with a moratorium to small companies, pushing medium and large companies into administration if they wish to undertake a CVA with the benefit of a moratorium.[165] The restricted terms of access to this procedure greatly diminish its practical value.[166] Finch argued that there is no good reason for restricting the moratorium to small companies but it should be available to all companies.[167] Compliance costs are also burdensome, which means that the adoption of a consensual, non-moratorium-based CVA may be advantageous to the rescue culture ethos.[168]

Regardless of whether it is a CVA, with or without a moratorium, in both cases, the main event concerning such a voluntary arrangement process is the meeting of the members and creditors of the company to consider and approve the proposal.[169] The substance of the proposal can be wide and varied. Guidance can be found in rules 1.3(1) and (2) which stipulates

[154] Tribe op cit note 133 at 13.
[155] Ruzita op cit note 143 at 209.
[156] The Insolvency Act 2000 op cit note 144 sch 1 Part II s 8 (1).
[157] Ibid sch 1 Part II s 8 (2).
[158] Ibid sch 1 Part II s 11 (2)(a)(b)(c)(d)(e).
[159] Ibid sch 1 Part II s 11 (2)(g).
[160] Ibid sch 1 Part II, s 11 (2)(g).
[161] Ibid sch 1 Part II, s 11 (2)(f).
[162] The Insolvency Act op cit note 2 sch B1 para 43(6).
[163] The Insolvency Act 2000 op cit note 144 sch 1 Part III s 12(h).
[164] Tribe op cit note 133 at 16.
[165] Ibid.
[166] Ibid at 17.
[167] Finch op cit note 40 at 491
[168] Tribe op cit note 133 at 17.
[169] The Insolvency Act op cit note 2 Part 1 s 3(1).

that the proposal must include the directors' opinion as to the efficacy of the proposal, the company's assets and their value, details of assets charged in favour of creditors, the nature and amount of the company's liabilities, the duration of the CVA, dates of distributions to creditors, remuneration of the nominee and supervisor, and the officeholder's functions.[170] As Patten, J observed, '…the proposal also contains detailed provisions setting out the functions and powers of the supervisors under the CVA….'[171]

If the proposal for a voluntary arrangement is approved, it binds every person.[172] For binding approval, the arrangement requires support from a majority of creditors exceeding[173] three-quarters in value.[174] A form of cram-down is possible, although a significant limitation is that it cannot bind secured creditors or preferential creditors without their consent.[175] If more than half in value of the creditors,[176] whose votes are not to be left out of account[177] and who are not, connected with the company,[178] vote against approval of the proposal, the resolution is invalid.[179] This double requirement is intended to prevent minority creditors from being forced into an arrangement by majority creditors who are closely connected to the company.[180] More than half in value of the votes of members present in person or by proxy and voting is required for proposal approval.[181] If 'a different decision from the one taken by creditors is taken by the members, a member may within 28 days apply to the court for relief'.[182] The court 'may order that the decision taken by the members, and not the one taken by the creditors, should have effect or make any other order it deems fit'.[183] Creditors largely determine implementation, prioritising their interests over members' desire to rescue the company.[184] Despite the

[170] Insolvency Rules 1986 Rule 1.19; Rule 1.3(1) (2); Tribe op cit note 133 at 15.
[171] *Re Ultra Motorhomes International Ltd* [2006] EWHC 3415 (Ch), [2007] BPIR 214, at para 12.
[172] Insolvency Act op cit note 144 s 5(2)(b).
[173] This differs from the more usual requirement of just 75 per cent voting in favour of a resolution.
[174] Insolvency rules op cit note 170 rules 1.19; 1.17(3).
[175] The Insolvency Act op cit note 2 s 4(3).
[176] Bailey and Groves Corporate Insolvency at 272 state that it is unclear why importance is attached to notice of the meeting having been sent.
[177] Insolvency rules op cit note 170 rule 1.19(3).
[178] Insolvency Act p cit note 2 s 249 as a director or shadow director, or associate of such persons or associate of the company. Op cit note 2 s 435 contains a complete list of who will be regarded as an associate, and includes the husband, wife or civil partner of an individual or a relative of one of them, a partner, employer or employee of the individual or a person who controls a company.
[179] Insolvency rules op cit note 170 rule 1.19(4).
[180] Bailey & Groves op cit note 176 at 271.
[181] Insolvency rules op cit note 170 rule 1.20
[182] The Insolvency Act op cit note 2 s 4A(3) and (4).
[183] Ibid s 4A(6).
[184] Loubser op cit note 24 at 229-230.

limitations on members' rights, including them ensures the binding nature of the arrangement on them.[185]

Creditors can apply to the court to challenge the CVA on the grounds of unfair prejudice or material irregularity.[186] Where the court is satisfied, it will revoke or suspend the approvals of the scheme and/or give direction for the summoning of further meetings to consider any revised proposals or reconsider the original proposals.[187] In *Debenhams*, Norris J was unconvinced of the case for unfairness where landlords suffered a compromise while trade creditors were unimpaired. In its evidence, the company focused on 'contagion risk': attempts to compromise trade creditors leading to concerns over supply; tighter credit terms; poor customer experience; and brand damage.[188] Counsel for the landlords argued that many of the unimpaired creditors were not trade creditors who were crucial to the business.[189] It is worth quoting Norris J's response in full:

> '… in my judgment both the directors and the nominees were entitled to look at the matter in the round having regard to the likely reaction of the 1600 suppliers of goods and services, rather than to single out a small number of individual suppliers for separate treatment where such separate treatment would make a wholly immaterial contribution to the outcome. As counsel indicated in cross-examination, the question was not whether their supplies were critical to the business but whether their treatment was critical to the success of the CVA…'.[190]

In *Prudential Assurance Co. Ltd v PRG Powerhouse Ltd*, Etherton, J. held that the CVA was unfairly prejudicial to Luctor and Prudential (applicants) in their capacity as creditors of Powerhouse; they were the class of creditors that would suffer least, if at all, on an insolvent liquidation of Powerhouse, but were most prejudiced by the CVA when their claims against Powerhouse and PRG as surety were to be compromised by payment of a dividend that placed no value on those guarantees, and that was held to be an illogical and unfair result.[191]

[185] Ibid at 23.
[186] The Insolvency Act op cit note 2 s 6; Insolvency Act op cit note 144 sch 1, Part V, s 38 (4).
[187] Ibid s 6; Ibid sch 1, Part V, s 38 (4).
[188] *Discovery (Northampton) Ltd v Debenhams Retail Ltd* (2019) EWHC 2441 (Ch), (2020) BCC 9; 106.
[189] Supra note 188 at 107
[190] Ibid.
[191] [2007] EWHC 1002 (Ch); op cit note 143 at 220.

The nominee, now the supervisor, executes the arrangement,[192] seeking court directions if needed.[193] They also apply for company winding up or administration order.[194] The nominee's core duty is to monitor the company's affairs and advise on whether the proposed arrangement will be approved and implemented, and whether the company has sufficient funds to continue business.[195] To do this, the directors submit to the nominee any information[196] that he relies on to advise unless he has reason to doubt its accuracy.[197] One commentator argued that the nominee's role in investigating the company and the proposed viability of a CVA has given rise to confusion about the perceived lengths the nominee should go to in investigating the company's affairs. If investigations are wide-ranging, the corollary increase in costs will no longer make the remedy cost-effective.[198] In practice, however, the insolvency practitioner will advise the debtor on how to resolve its financial difficulties and will be intimately involved in determining how best to address those difficulties and whether the CVA might offer a solution.[199] Although a director-led initiative, fear of provisions contained within an Insolvency Act has been cited as a possible cause of the low uptake by directors.[200]

The supervisor manages assets on agreed terms[201] without displacing directors' authority.[202] Concerns about handing control of the company to an external manager may have the effect of disincentivising directors from initiating a restructuring.[203] The nominee must withdraw his consent to act if, the proposed voluntary arrangement is no longer viable, the company has insufficient funds to continue business, the company is ineligible, or the directors fail to meet their obligations.[204] If any person affected by the moratorium is dissatisfied with the nominee or supervisor's actions, he may apply to the court[205] during or after the moratorium ends.[206] The court may confirm, reverse, or modify the nominee or supervisor's decisions, give directions, or make other necessary orders,[207] including bringing the moratorium to an end.[208]

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[192] The Insolvency Act op cit note 2 s 7(2); Insolvency Act op cit note 144 sch 1 Part V s 39 (2).
[193] Ibid s 7(4)(a); ibid sch 1 Part V s 39 (5).
[194] Ibid s 7(4)(b); ibid sch 1 Part V s 39 (5).
[195] Ibid sch 1 Part IV, s 24 (1).
[196] Ibid sch 1 Part IV, s 24 (2).
[197] Ibid sch 1 Part IV, s 24 (3).
[198] Tribe op cit note 133 at 23.
[199] Sarah Paterson & Adrian Walters 'Selective Corporate Restructuring Strategy' (2021) 1 at 19-20.
[200] Vanessa Finch *Corporate Insolvency Law: Perspectives and Principles* (2002) 333; Tribe op cit note 133 at 13.
[201] Insolvency Rules 1986 op cit note 170 rule 1.23(1).
[202] Len Sealy & David Milman *Insolvency Legislation* 7 ed (2004) 22.
[203] Payne op cit note 135 at 3.
[204] The Insolvency Act op cit note 144 sch 1 Part IV, s 25 (2).
[205] Ibid sch 1 Part IV s 26 (1); op cit note 2 s 7(2).
[206] Ibid sch 1 Part IV s 26 (2).
[207] Ibid sch 1 Part IV s 26 (3).
[208] Ibid sch 1 Part IV s 26 (4); op cit note 2 s 7(2).

The duration of a CVA depends on its terms. A voluntary arrangement ends prematurely when it ceases to have effect or if it is not fully implemented for all parties bound by it.[209] If it has not been terminated prematurely, it is completed once the supervisor has fully implemented the proposal as approved by the meetings.[210] 28 days after its completion, the supervisor notifies all the members and creditors, the registrar of companies, and the court.[211] No formalities are required to terminate the voluntary arrangement officially.

Keay & Walton have suggested that the CVA provisions display, 'a distinct lack of detail.'[212] It could be argued that this is one of the statute's great strengths as a substance-over-form approach enables the avoidance of a rule-based system, this factor in a commercial setting helps facilitate, rather than hamper rescue.[213] Summarily, CVA is a less costly procedure compared to Administration, is flexible, requires a limited amount of court involvement compared to schemes, has no insolvency requirement, and requires the use of professional IPs. However, it is not without disadvantages in that there is a lack of funding and the procedure attaches a stigma to it as its provisions are found in the Insolvency Act.

4.2.3 PART A1 MORATORIUM

The CIGA 2020 introduces a new standalone restructuring moratorium under Part A1 of the Insolvency Act 1986.[214] It is not a precursor to an insolvency process, although it can be used in that way.[215] As with administration, the stigma of insolvency is likely to attach to this procedure.[216] A moratorium is a legal intervention designed to promote the rescue of a company or business.[217] It protects the company from adverse creditor action for a short period whilst the directors attempt to restructure and rescue the business.[218]

The CIGA is available to eligible companies unless excluded as laid down in schedule ZA1.[219] It is not available to banks, insurance companies, investment firms, and large

[209] Ibid Part 1 s 7B.
[210] Ibid s 7.
[211] Insolvency rules op cit note 170 rule 1.29(3).
[212] Andrew Keay & Peter Walton *Insolvency Law: Corporate and Personal* (2003) 127.
[213] Tribe op cit note 133 at 14.
[214] CIGA op cit note 5 chapters 1-8 and schs 1-8, which introduces new provisions into the Insolvency Act 1986 (for Great Britain).
[215] Jennifer Payne 'An Assessment of the UK Restructuring Moratorium' (2021) 454 at 458.
[216] Ibid.
[217] Ibid.
[218] Ibid.
[219] Insolvency Act op cit note 2 sch ZA1, paras 2 -18 & CIGA op cit note 5 cap 1, para A2 provides a list of excluded companies.

corporations with capital market debts exceeding £10 million.[220] These exclusions limit moratorium usage primarily to SMEs.[221] The inability of certain entities to access the Part A1 Moratorium might affect the overall efficacy of the restructuring regime, particularly if these entities play a crucial role in the economy or community.

To qualify for the Part A1 Moratorium, the eligible company must be unable to pay its debts or be likely to become so i.e. is already insolvent on a cash flow basis, but it must still be capable of being rescued.[222] The inclusion of cash-flow insolvent companies in the CIGA brings its challenges, from the creditors' point of view the concern is likely to be that a moratorium will lead to potential abuse as directors delay the commencement of insolvency proceedings.[223] Regarding the part of the test that focuses on companies being 'likely' to become unable to pay their debts, much will depend on how the courts interpret this phrase. Getting this wrong could lead to the exclusion of financially troubled companies, which might benefit from a moratorium without there being any real prospect of abuse.[224]

Where there is no outstanding winding-up petition against the company, the moratorium can commence without a court application by directors filing relevant documents with the court.[225] Where the company is subject to a winding-up petition or is an overseas company and not subject to a winding-up petition, the directors of a company can obtain a moratorium by court application for a court order.[226] The relevant documents include inter alia a notice of intent to obtain a moratorium and a statement from the proposed monitor that a moratorium would likely result in the rescue of the company.[227] It is unclear how much work the monitor is expected to undertake to form the view that the moratorium is likely to result in the rescue of the company as a going concern. The boundaries of this test will likely need to be established by the court.[228] Although the impetus behind this requirement is laudable, there is a danger that this requirement will set a high bar.[229] The court grants the moratorium if it benefits creditors more than winding-up would.[230]

[220] Ibid sch ZA1, paragraphs 2 -18 & ibid cap 1, para A2.
[221] Payne op cit note 215 at 472.
[222] CIGA op cit note 5 cap 2, para A6, 1(d).
[223] Payne op cit note 215 at 472-473.
[224] Ibid.
[225] CIGA op cit note 5 cap 2, A3.
[226] Ibid cap 2, A4 & A5
[227] Ibid cap 2, A 6.
[228] Payne op cit note 215 at 473.
[229] Ibid.
[230] CIGA op cit note 5 cap 2, A 4 (4) (5).

The moratorium is activated by filing court documents[231] or obtaining a court order.[232] The restructuring moratorium is debtor-in-possession and allows directors to continue to run a company, subject to the supervision of a licensed insolvency practitioner - the monitor,[233] who is an officer of the court.[234] The monitor oversees the company's affairs to determine if the moratorium will likely rescue the company as a going concern.[235] The term 'likely' in this context remains uncertain and lacks significant judicial scrutiny.[236]

The monitor can end the moratorium where inter alia the moratorium cannot result in the rescue of the company; the objective of rescue has been achieved, by filing a notice in court.[237] Actions of a monitor or company directors may be challenged any time[238] on grounds of unfair harm to the applicant,[239] or remuneration charged by the monitor,[240] and where directors' actions have unfairly harmed the interests of its creditors or members.[241] The ability of creditors and others to challenge the moratorium is a potentially important form of protection.[242] The court has broad powers to make any order, including bringing the moratorium to an end.[243] The restructuring moratorium ''imposes both a constraint on the ability of creditors to assert their debt claims against the company and a constraint on initiating insolvency proceedings[244] and enforcement or other legal processes.[245] These restrictions can be overcome with the court's permission, except for pre-moratorium debts to which the payment holiday applies or to crystallise a floating charge.[246] Unlike in administration, the monitor cannot consent to such proceedings during the moratorium.[247] Several other restrictions include restrictions on the grant of security without the monitor's consent,[248] prohibition on entering market contracts,[249] restrictions on the payment of certain pre-

[231] Ibid cap 2, A 3.
[232] Ibid cap 2, A 4, A 5 & A7(1); this applies to companies that are subject to winding petitions or are overseas companies.
[233] Ibid cap 5, A35, cap 2, A7(2).
[234] Ibid cap 5, A34.
[235] Ibid cap 5, A35.
[236] Paul Bagon, Will Beck and Kate Watson: 'A year in review: the Part A1 moratorium' available at *https://www.financierworldwide.com/a-year-in-review-the-part-a1-moratorium* accessed on 26 February 2024.
[237] CIGA op cit note 5 cap 5, A 38(1).
[238] Ibid cap 6, A42 (3).
[239] Ibid cap 6, A42 (1) (2).
[240] Ibid cap 6, A43.
[241] Ibid cap 6, A44 (1) (2).
[242] Payne op cit note 215 at 472.
[243] CIGA op cit note 5 cap 6 s A 42(4)(5); A44(3)(4).
[244] Ibid cap 4, A20.
[245] Ibid cap 4, s A23, s A21 (1).
[246] Ibid cap 4, A21(2)(3).
[247] Payne op cit note 215 at 466.
[248] CIGA op cit note 5 cap 4, A26.
[249] Ibid cap 4, A27.

moratorium debts,[250] restrictions on disposal of hire-purchase property,[251] and restrictions on disposal of property.[252]

Unlike moratoria adopted elsewhere in recent years, the UK restructuring moratorium can only affect all creditors and does not have the option of excluding certain creditors, for example, smaller creditors, those in financial difficulties, or creditors on whom the burden of the moratorium might fall disproportionately.[253] It also fails to account for debt restructurings carried out via a scheme or restructuring plan involving only a subset of creditors.[254] The restructuring moratorium is thus relatively inflexible, and this inflexibility will limit its potential usefulness to companies in financial distress.[255] For this reason, amongst others, negotiating standstill arrangements with the subset of sophisticated creditors involved in a scheme may well remain a more valuable option for companies than this moratorium.[256]

The practical use of the moratorium has been limited due to the limitations embedded within the legislation which include specific eligibility criteria for the types of companies that can use the moratorium and restrictions on the types of debts that are covered by the moratorium.[257] A company's debt is divided into three categories: pre-moratorium debts with a payment holiday; pre-moratorium debts without a payment holiday; and moratorium debts.[258] The latter two of these categories must continue to be paid throughout the moratorium and could result in significant payments having to be made by the distressed company in question and this may not in reality provide a distressed company with sufficient breathing space to implement a restructuring or refinancing.[259] Additionally, the obligation to pay debts or liabilities under financing contracts is critical, allowing lenders that don't support the moratorium to accelerate payments and end the moratorium.[260] The obligation to continue to pay such potentially large amounts throughout the moratorium may not in reality provide a distressed company with sufficient breathing space to implement a restructuring or refinancing.

[250] Ibid cap 4, A28.
[251] Ibid cap 4, A30.
[252] Ibid cap 4, A29.
[253] Payne op cit note 215 at 465.
[254] Ibid.
[255] Ibid.
[256] Ibid.
[257] Bagon op cit note 236.
[258] CIGA op cit note 5 cap 4 generally.
[259] Bagon op cit note 236
[260] Ibid

The change in creditor priority during a moratorium continues to be a significant concern, potentially hindering its adoption.[261] This change could lead to scenarios deemed 'absurd', like unsecured lenders surpassing floating charge holders in priority.[262] This disruption has made insolvency practitioners cautious about recommending a moratorium in situations where subsequent administration or liquidation is possible.[263] There were only a handful of moratoria applications in 2023, a decline in numbers compared to 2022.[264] To promote moratorium use and prevent creditor manipulation for super-priority, there is a compelling case for reviewing and restoring the traditional order of liability priority in post-moratorium insolvency proceedings.[265]

A stay on creditor action promotes the survival of the company, maximising returns for creditors, and benefiting other stakeholders, such as employees, who depend on the continued operation of the business.[266] However, these benefits occur at the expense of party autonomy since the minority creditors are then prevented from exercising their contractual and other rights.[267] A balance is required between the benefits to the company and the creditors/stakeholders as a whole on the one hand and the rights of the individual creditors on the other.[268]

The moratorium automatically ends twenty (20) business days after it comes into force.[269] However, it can be extended automatically by a further twenty (20) business days without the creditor's consent, and up to twelve (12) months with the creditor's consent and/or a court order.[270] In addition, the court[271] and the monitor must end the moratorium if the company fails to pay certain debts or the moratorium is no longer likely to result in the rescue of the company as a going concern.[272] The initial period of twenty (20) business days is very short for a company to implement a substantive restructuring, therefore, most moratoria last at

[261] Tim Carter & Helen Martin; 'CIGA Report March 2022: Assessing the Impact of the New Insolvency Provisions' 1 at 132 available at *https://www.stevens-bolton.com/site/insights/articles/ciga-report-march-22-assessing-the-impact-of-the-insolvency-prov* accessed on 26 February 2024.
[262] Ibid.
[263] Ibid.
[264] Squire patton boggs 'Restructuring Plans' available at *https://www.squirepattonboggs.com/-/media/files/insights/publications/2023/05/restructuring-plans/restructuring-plan-placemat-v10.pdf?rev=b3ffd123ba1b4acd9919bf47cdbc7bf5* accessed 29th March 2024.
[265] Carter & Martin op cit note 261.
[266] Payne op cit note 215 at 456.
[267] Ibid.
[268] Ibid.
[269] The Insolvency Act op cit note 2 part A1, cap 3, s. A9.
[270] Ibid, Part A1, cap 3, ss A10-A13, & ss A14-A16)
[271] The Insolvency Act op cit note 2 Part A1, cap 5, ss. A42, A44.
[272] Ibid Part A1, Chapter 5, ss. A38.

least forty (40) business days.[273] It remains to be seen whether the period provided in the 2020 Act will be sufficiently valuable for companies, particularly those contemplating complex restructurings.[274]

4.2.4 RESTRUCTURING PLAN

The CIGA 2020 introduced a new restructuring plan (hereafter RP) as a permanent procedure and just like the scheme, sits in the Companies Act 2006 rather than the Insolvency Act 1986.[275] The Part 26A restructuring plan procedure is closely modeled on the Part 26 scheme of arrangement but with significant design differences intended to fill gaps in the scheme as a corporate restructuring tool.[276] An RP is a formal arrangement between a company and its creditors and/or its shareholders. It may take many forms including; a compromise in the amount of the debt, a debt for equity swap, resetting of covenants, and rescheduling debt repayments, the terms of each restructuring plan can be tailored to the relevant circumstances.[277] The first such RP, used in the financial restructuring of Virgin Atlantic Airways (VAA), was sanctioned by the High Court on 2 September 2020 representing a new landmark in the UK restructuring landscape.[278]

RPs exclude companies providing financial services[279] and are generally available to English and Wales and any foreign companies that have a sufficient connection with England and Wales.[280] Similar to a Scheme, an RP that compromises English law debt is widely recognised in other jurisdictions based either on private international law or other cross-border frameworks bringing the UK's toolkit for dealing with restructuring and insolvencies much closer to the US Chapter 11 framework.[281]

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[273] Payne op cit note 215 at 469.
[274] Ibid.
[275] Baker Mckenzie 'The New UK Restructuring Plan: an Overview' available at *https://restructuring.bakermckenzie.com/wp-content/uploads/sites/23/2020/09/Restructuring_Plan_under_the_UK_Corporate_Insolvency_and_Governance_Act_2020.pdf* accessed on 29th August 2023
[276] CIGA op cit note 5 sch 9, inserting Part 26A s 901A- 901L into the Companies Act 2006.
[277] Lee Causer 'What is a Restructuring Plan and when would you use one?' available at *https://www.bdo.co.uk/en-gb/insights/advisory/business-restructuring/what-is-a-restructuring-plan-and-when-would-you-use-one* accessed on 29 August 2023.
[278] David Ampaw & David Manson 'The New UK Restructuring Plan - The "Super Scheme"' available at *https://www.dlapiper.com/en-gb/insights/publications/2020/10/restructuring-global-insight/restructuring-plan* accessed 29 August 2023.
[279] CIGA op cit note 5 sch 9 Part 26A s 901B.
[280] Ibid sch 9 Part 26A s 901A (4) (a)(b).
[281] Ampaw & Manson op cit note 278.

An RP can be initiated by the debtor/the company, creditors, shareholders, or the administrator or liquidator.[282] Allowing for these stakeholders to initiate the procedure shows a high level of flexibility and inclusivity in the process allowing their involvement in proposing a plan. The use by creditors may be quite limited given the significant resourcing requirements that typically need debtor/shareholder input to put together a realistic and credible RP modelled on existing business performance.[283]

The RP is available to companies that 'have or are likely to encounter, financial difficulties that are affecting, or may affect, their ability to carry on business as a going concern,[284] or 'where a compromise or arrangement is proposed between the company and its creditors or members whose purpose is to eliminate, reduce or mitigate the financial difficulties'.[285] In this respect, it differs critically from a Scheme by introducing upfront a requirement that the business has or is likely to experience financial volatility and stress.[286]

The process commences with a company proposing a plan to one or more classes of creditors and by the company or its administrators or liquidators, a creditor or a member applying to the court for approval to convene meetings of creditors and members.[287] There is an initial court hearing at which the court will consider jurisdiction and class composition only.[288] A class will likely be confined to 'those persons whose rights are not so dissimilar as to make it impossible for them to consult with a view to their common interest, as per the current rules on schemes of arrangement'.[289] Later, the court will order meetings of creditors and shareholders who will then vote on the plan. At least 75% in value of each relevant class of creditors must vote in favour of the RP for it to proceed to sanction.[290] This raises the question of whether creditors can be excluded from voting on the plan where their rights will be unimpaired by it.[291] No definition of 'affected' is offered. In *Hurricane Energy,* Zacaroli J adopted a relatively broad reading, so that shareholders whose shares were untouched formally but who were to be heavily diluted by the plan were 'affected by it' and therefore required to be included in the vote.[292] In the convening hearing for *Virgin Atlantic,* Trower J noted the

[282] Ibid sch 9 Part 26A s 901C (2).
[283] Ampaw & Manson op cit note 278.
[284] CIGA op cit note 5 9 Part 26A s 901A (1) (2).
[285] Ibid sch 9 Part 26A s 901A (1) (3).
[286] Ampaw & Manson op cit note 278.
[287] CIGA op cit note 5 sch 9 Part 26A s 901C.
[288] Boggs op cit note 264.
[289] Ibid.
[290] CIGA op cit note 5 sch 9 Part 26A s 901F (1).
[291] Jennifer Payne 'Debt Restructuring in English Law: Lessons from the US and the Need for Reform' (2014) *Oxford Legal Studies Research Paper No. 2013/89*, 1 at 21-22.
[292] Re Hurricane Energy Plc (2021) EWHC 1418 (Ch) at 27-34.

exclusion from the plan of more than 1,000 creditors with claims of under £50,000 for reasons of 'logistical difficulties'.[293] At the sanction stage, Snowden J agreed that all of these creditors had been excluded for 'respectable commercial reasons'.[294] He focused, particularly, on the logistical burden of bringing numerous creditors with small claims into the plan and, specifically, the company's explanation in the explanatory statement that ' … the cost savings to be borne by including those below £50,000 are outweighed by the practical time and cost of including them'.[295]

If stakeholders vote in favour, the matter returns to court to sanction the plan.[296] The court has the discretion to sanction and cram the plan down on a dissenting class if two conditions are satisfied.[297] The first condition is that the court is satisfied that none of the members of the dissenting class would be any worse off if the court were to sanction the compromise or arrangement than they would be in the event of the relevant alternative.[298] The relevant alternative is what the court considers most likely to occur if the restructuring plan is not sanctioned.[299] While liquidation will often be the relevant alternative, it will not always be the case.[300] Identifying the contours of the relevant alternative will often not be a straightforward matter.[301] In *Hurricane Energy* all parties agreed that the relevant alternative involved the continuation of trading for at least a year.[302] The company argued that this would take the form of a controlled wind-down leading to a distribution below par to bondholders and no return for the company's shareholders.[303] This was fiercely disputed by some of the company's shareholders who argued that it ignored several alternative possibilities, including better-than-forecast performance; trading for more than a year; refinancing; or a bond buyback. Ultimately, Zacaroli J was unpersuaded by the company's evidence and declined to sanction the plan.[304] The concern, is that the company and certain of its major creditors may have an incentive to paint a pessimistic picture, washing off debts owed to certain creditors to take the surplus value for themselves.[305]

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[293] Re Virgin Atlantic Airways Ltd (2020) EWHC 2191 (Ch) at 11.
[294] Re Virgin Atlantic Airways Ltd [2020] EWHC 2376 (Ch) at 67.
[295] Supra note 294 at 65-66.
[296] CIGA op cit note 5 sch 9 Part 26A s 901F (3).
[297] The restructuring plan includes a 'cross-class cram down' mechanism that will allow dissenting classes of creditors or members to be bound to the restructuring plan.
[298] Companies Act op cit note 4 s 901G (3).
[299] CIGA op cit note 5 sch 9 Part 26A, s 901G (4); ibid s 901G (4).
[300] Bo Xie op cit note 44; 3.
[301] Sarah Paterson 'Judicial Discretion in Part 26A Restructuring Plan Procedures' (2022) 436 at 453.
[302] Re Hurricane Energy Plc (2021) EWHC 1759 (Ch).
[303] Supra note 302 at 54-55.
[304] Supra note 302 at 56.
[305] Patterson op cit note 301.

Notwithstanding the undoubtedly complex task of determining both what the relevant alternative is and what dissenting classes would receive under it, it is only once the judge is satisfied that the dissenting class is no worse off than it would be in the event of the relevant alternative that a question of discretion arises.[306] Until this point, the judge must make findings of fact prescribed by the legislation. The Explanatory Notes suggest that once these findings of fact have been made, the judge can still decline to sanction the compromise or arrangement if they consider it 'just and equitable to do so'.[307] If this is right, it is a classic example of a judicial discretion in the sense in which Lord Bingham used it when he said: 'According to my definition, an issue falls within a judge's discretion if, being governed by no rule of law, its resolution depends on the individual judge's assessment of what is fair and just to do in the particular case.'[308] The judge must establish the relevant alternative and how creditors or members would fare under it to sanction the restructuring plan. Once satisfied, the judge must determine whether they have the discretion to decline sanctioning and how to exercise that discretion.[309] The discretion exists precisely because a plan may not be fair for a dissenting class even if that dissenting class is no worse off under it than it would be in the event of the relevant alternative.[310] The second condition for cram down is that at least one class, which would receive a payment or have a genuine economic interest in the company in the event of the relevant alternative, has voted to approve the plan.[311]

Court-sanctioned compromises are binding on creditors, members, the company, liquidator, and contributories,[312] taking effect after publication in the Gazette or delivery to the registrar,[313] without direct impact on employees.[314] Like with a scheme, a restructuring plan does not create an automatic moratorium so they may be used in tandem with administration which does provide a moratorium or the new Part A1 moratorium procedure.[315] Concerning company contracts, *ipso facto* protection automatically applies from the date the court makes an order to convene creditor meetings to vote on the restructuring plan.[316] Directors retain control over the process without involving an insolvency practitioner potentially motivating

[306] Ibid at 5.
[307] Ibid.
[308] Ibid.
[309] Ibid.
[310] IIbid at 10.
[311] Companies Act op cit note 4 s 901G (5).
[312] CIGA op cit note 5 sch 9 Part 26A s 901F (5).
[313] Ibid sch 9 Part 26A s 901F (6).
[314] Ibid sch 9 Part 26A s 901F (7).
[315] Ibid sch 9 Part 26A s 901F (8).
[316] CIGA op cit note 5 sch 9 Part 26A, s. 901C.

them to take early action and propose compromises.[317] The restructuring plan is concluded as per its terms, and the company returns to its previous status.[318] The cost of an RP is a significant barrier to its usage and is thought to have largely prevented the SME sector from engaging with the procedure. During 2023, the court sanctioned 11 RPs – perhaps not the leap in numbers many had expected but still twice as many as in 2022.[319] According to the CIGA 2022 report, the turnover of companies applying for an RP has varied from £27m to £3bn, with the majority having a turnover of over £100m.[320] Arguably, dispensing with the convening hearing in favour of a single sanction hearing or having a 'two-track' process with only a single hearing required in straightforward cases, would reduce cost and be more appropriate for smaller companies.[321] However, it seems more likely that any reduction in costs will instead be driven by increasing efficiencies in drafting and simplified documentation.[322] The difficulty and expense of challenging an RP is also seen as an issue, potentially disenfranchising all but the largest of creditors and meaning that in many cases an RP is effectively 'unchallengeable'.[323] The report notes a lack of clear framework on which to exercise discretion leading to arbitrariness and a perceived problem with asymmetry of information, making it hard for creditors to put forward an alternative.[324]

4.2.5 SCHEMES OF ARRANGEMENT

A scheme of arrangement (hereafter scheme) is a formal statutory procedure under Part 26 of the Companies Act 2006 under which a company may enter into a compromise or arrangement with its members or creditors or any class of them.[325] The CA 2006 defines 'arrangement' to include 'a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both of those methods and is silent on the definition of 'compromise'.[326] The fact that they exist outside insolvency legislation is one of their great strengths because it reduces stigma and increases

[317] Ampaw & Manson op cit note 278.
[318] Boggs op cit note 264.
[319] Boggs op cit note 264.
[320] Carter & Martin op cit note 261.
[321] Ibid.
[322] Ibid.
[323] Ibid.
[324] Ibid.
[325] Companies Act op cit note 4 part 26 s 895 – 901; Ashley Katz & Devi Shah 'Scheme of Arrangement: An English Law Cram Down Procedure' 1 available at *https://www.mayerbrown.com/public_docs/Scheme_of_Arrangement.pdf* accessed 29 August 2022.
[326] Companies Act op cit note 4 part 26 s 895.

certainty.[327] Schemes are not typical rescue proceedings, but since they facilitate financial restructuring, they can also be characterised as a rescue procedure.[328]

Schemes are available to local and foreign companies which have a sufficient connection with England and Wales.[329] In *Re Stripes US Holdings Inc.*, a Delaware corporation, filed a scheme. Zacaroli J, stated that the scheme met the 'sufficient connection' test as its credit facility was governed by English company law and sanctioned it.[330] A scheme application can be initiated by the company, a creditor, member of the company the liquidator, or the administrator.[331] The test for a company to use a scheme is that the company must be liable to be wound up but not insolvent,[332] which is an attractive feature as compared to other procedures that require this pre-condition.[333] The requirement may discourage early intervention as companies may not obtain the benefit of the procedure until their financial situation worsens. Early intervention is critical in restructuring and such a requirement hinders the same.

The company proposing the scheme of arrangement must seek a court order convening creditor and/or member meetings to vote on the proposed scheme.[334] In the initial hearing, issues of correct identification of classes, class fairness, and meeting procedures are addressed, not the merits of the scheme.[335] One of the drawbacks of the scheme is the lack of definition of a class. It is therefore complicated for those promoting it to identify what constitutes appropriate classes for these purposes.[336] If the 'classes' are wrongly selected, the entire scheme may fail and the court may refuse to sanction it even when no one objects to it.[337] The classic test of what constitutes a separate class was delivered in the case of *Sovereign Life Assurance Co. v Dodd* Bowen L.J. stated, 'It seems plain that we must give such a meaning to the terms 'class'...and that it must be confined to those persons whose rights are not so

[327] Sarah Paterson 'Reflections on English Schemes of Arrangement in Distress and Suggestions for Reform' (2017) 472 at 474.
[328] John Armour, Audrey Wen-Hsin Hsu & Adrian Walters 'Corporate Insolvency in the UK: The Impact of the Enterprise Act 2002' (June 2008) 5 (2) *European Company and Financial Law Review* 148 at 156.
[329] Companies Act op cit note 4 part 26 s 895 (2).
[330]In the Matter of Stripes US Holdings Inc (The 'Company') And in the Matter of the Companies Act 2006 (2018) EWHC 3098 (ch) available at *https://www.casemine.com/judgement/uk/5cb02e812c94e02c1b892d6f* accessed on 28 May 2023.
[331] Companies Act op cit note 4 part 26, s. 896 (2)- liquidator or administrator can apply if the company is being wound up or an administration order is in force in relation to it.
[332] Sarah Paterson & Adrian Walters 'Selective Corporate Restructuring Strategy' (2021) 1 at 7.
[333] John Paul Tribe 'Companies Act Schemes of Arrangement and Rescue: The Lost Cousin of Restructuring Practice?' (2009) Butterworths *Journal of International Banking and Financial Law (JIBFL)* 1 at 10.
[334] Companies Act op cit note 4 part 26 s 896.
[335] Paterson & Walters op cit note 332 at 7.
[336] Vanessa Finch *Corporate Insolvency* (2002) at 327; Ruzita op cit note 143 at 186.
[337] Ruzita op cit note 143 at 186.

dissimilar as to make it impossible for them to consult together with a view to their common interest.'[338] Nevertheless in *Re Hawk Insurance Co Ltd*,[339] the scheme was approved by the court where a single meeting of all the creditors had been held, even though the creditors appeared to have dissimilar rights. The court felt that there was enough similarity between the different creditors involved that they could therefore be treated as a single class. However, *In the Matter of the British Aviation Insurance Company Limited*,[340] the court held that the single scheme meeting that took place was too broad, and different classes should have been asked to vote separately on the proposed scheme. Resultantly, the meeting failed to identify proper different classes and the court had no jurisdiction to sanction the Scheme.[341]

A scheme requires approval by at least 75% in value of each class of the members or creditors who vote on the scheme, being also at least a majority in number of each class.[342] Related party creditors, or creditors with 'special interests', do not have their votes discounted merely because they are related to the scheme company, instead, the focus is on whether the classes were 'fairly represented'.[343] The creditors whose votes are to be discounted must have an interest adverse or contrary to the interests of the class of creditors.[344] There must also be a strong and direct causative link between the creditor's decision to support the scheme and the creditor's adverse interest such that the adverse interest drove the creditor's voting decision.[345] In this regard, the court in *Apcoa Parking Holdings GmbH & Ors* laid down the 'but for' test, namely that the person challenging the relevant vote must show that an intelligent and honest member of the class without those collateral interests would not have voted in the way he or she did.[346] In *Re Lehman Brothers*,[347] the court held that a special interest that merely provides an additional reason for a creditor to support the scheme does not undermine the representative nature of the vote.[348] In that case, the court noted that the special interest identified was 'adverse' to the interests of the rest of the class.[349] However, the court declined to accept that

[338] (1892) 2 QB 573.
[339] (2001) 2 BCLC 480.
[340] (2006) BCC 14
[341] Ruzita op cit note 143 at 187.
[342] CIGA op cit note 5 part 26 s 899 (1).
[343] Meiyen Tan, Keith Han, Angela Phoon, Zephan Chua 'Recent Developments in Singapore's restructuring regime' available at *https://globalrestructuringreview.com/review/asia-pacific-restructuring-review/2021/article/recent-developments-in-singapores-restructuring-regime#:~:text=This%20chapter%20discusses%20certain%20recent%20developments%20and%20issues,by%20the%20covid-19%20pandemic%20have%20not%20spared%20Singapore* accessed on 20 May 2023.
[344] Ibid; Lehman Brothers International (Europe) (In Administration) (2018) EWHC 1980; 89.
[345] Ibid; supra note 344 at 91.
[346] Apcoa Parking Holdings GmbH & Ors (2014) EWCA 3849 at 129–130.
[347] Supra note 344.
[348] Supra note 344 at 89.
[349] Ibid at 128.

this was a dominant or causative reason for their support of the scheme. The court further noted that even after excluding the Wentworth Group, 93.9 per cent in number and 62.2 per cent in value of the creditors had voted in favour of the scheme.[350] This supported the view that the dominant reason for the Wentworth Group to support the scheme was the principal objective of the scheme as a whole instead of the special interest.

Challenges may arise over creditors' inclusion or treatment within the scheme, or allegations of coercion by a majority with differing interests.[351] In *Sea Assets*,[352] a case in which trade creditors and procurement contract creditors were left outside the scheme and therefore unimpaired, Gibson LJ stated, 'If the creditors within the Scheme think the proposal unfair to them and unduly favourable to those left outside the Scheme, they can vote against the Scheme. If the majority vote in favour of the Scheme, then a minority creditor has the opportunity to seek to persuade the court that the Scheme is unfair and should not be sanctioned'.[353] Even if no challenges are raised at the hearing, the court carefully reviews the scheme before sanctioning it.[354] The protection for minority creditors is two-fold. First, those whose rights are being affected by the scheme meet in classes to consider and vote upon it.[355] Secondly, there is a significant level of court involvement, both in determining the correct class composition and ensuring that creditors receive adequate information,[356] and, crucially, in sanctioning the scheme.[357]

If the statutory majority is achieved in each class, a second court hearing initiated by the company, creditors, members, liquidator or administrator for scheme sanction.[358] The court can refuse sanction if procedural requirements aren't met. In *Re Stripes US Holdings Inc.*,[359] Zacaroli found that the scheme was appropriate and met all requirements for approval under section 896 of the Companies Act.[360] However, the court cannot sanction unless every class approves it. The 'cram-down' here is limited. This is perhaps the most significant benefit of a

[350] Ibid at 131.
[351] Paterson & Walters op cit note 332 at 7.
[352] *Sea Assets v Perushaan Perseroan (Persoe) PT Perusahaan Penerhanagen Garuda Ltd* (2001) EWCA Civ 1696.
[353] Supra note 353 at 45.
[354] Paterson op cit note 327 at 476.
[355] The approval level is 'a majority in number representing 75% in value' of the creditors or class of creditors: Companies Act op cit note 4 s 899(1).
[356] Companies Act op cit note 4 s 896.
[357] Ibid s 899(1). The scheme must be sanctioned by the court, and the court's order becomes effective once a copy of it is delivered to the Registrar of Companies – ibid s 899(4).
[358] Companies Act op cit note 4 part 26 s 899 (1) (2).
[359] In the Matter of Stripes US Holdings Inc op cit note 330.
[360] Ibid - the judge determined that the scheme creditors were fully represented and acted bona fide, the court had juridcition to sanction the scheme.

scheme of arrangement: it can bind dissenting creditors notwithstanding their objections and without a formal insolvency proceeding.[361] A cram-down undermines the rights of creditors by forcing them to accept terms they voted against which include reduced financial recoveries. Once sanctioned and filed, challenging the scheme is rare unless fraud impacted the outcome.[362] Court-sanctioned compromises are binding on all parties,[363] upon delivery to the registrar,[364] affecting articles if applicable.[365] The English scheme of arrangement will bind secured lenders who have agreed in the transactional documents that the English courts would have exclusive jurisdiction and that their claims would be governed by English law. This would either be based on private international law, or under common law, as a matter of comity.[366] This will be particularly attractive where the local law does not have a mechanism like a scheme of arrangement available to effect a restructuring.[367]

Company contracts are generally undisturbed by a scheme, and ipso facto protection isn't applicable during scheme proposals or entry.[368] Directors retain control under the scheme, encouraging early action to prevent financial difficulties. This may be an advantage because the company can maintain its reputation and goodwill, and the scheme's cost may be lower as no IP is required, and an incentive for the directors to take action earlier and propose a scheme that may be tailored to corporate needs that could resolve the company's dilemma.[369]

The scheme lacks a court-authorised moratorium. However, companies can seek protection through the Part A1 moratorium procedure, parallel use with administration, or discretionary stays.[370] In *Sea Assets Limited v PT Garuda Indonesia & Ors*[371] the court granted a stay of execution to protect a scheme of arrangement. As Moss notes, the judgment is important as it highlights 'one of the weaknesses of the scheme procedure '…it lacks the protection of a general mandatory stay on creditors' remedies.'[372] The court did not have any Companies Act powers available to it to stop SEA Assets Ltd from executing. Instead, the court relied on its general jurisdiction to grant a stay.[373] Arguably, the court had the objective sense

[361] Stevenson op cit note 1 at 29.
[362] Paterson op cit note 327 472 at 476.
[363] The parties include; all creditors, members, the company, liquidator, and contributories.
[364] Companies Act op cit note 4 part 26 s 899 (4).
[365] Ibid Part 26 s 901 (2).
[366] Katz & Shah op cit note 325 at 2.
[367] Ibid at 3.
[368] CIGA op cit note 5 s 233B.
[369] Ruzita op cit note 143 at 195.
[370] Payne op cit note 215 at 5.
[371] Tribe op cit note 333 at 10; (Unreported 1999 Folio 1090, High Court of Justice Chancery Division, 27 June 2001, 2001 WL 1251844).
[372] Ibid.
[373] Ibid at 11.

to see how the scheme would benefit a wide range of creditors and interested parties.[374] If the court could see the commercial efficacy in coming to an agreement, why could other parties not likewise foresee a similar outcome?[375] Indeed, on some occasions, the sole purpose of the scheme is to impose a moratorium on enforcement action by creditors to provide an opportunity for restructuring negotiations, and the courts have accepted that this is a valid use of a scheme.[376]

Generally, the complexity of the scheme procedure where each of the steps represents a distinct hurdle that the proponent of the scheme of arrangement must clear to get the scheme approved, and the requirement for two court hearings, means that this period will be a minimum of 6-8 weeks[377] and complicated schemes of arrangement may take much longer.[378] This is potentially a long period for the company to be unprotected from creditor enforcement procedures.[379] Despite the significant cost and complexity of the approval process for schemes of arrangement, their popularity suggests that the benefits outweigh the costs in some applications.[380] The scheme's duration is defined by its terms, concluding upon successful completion, and the company reverts to its previous status.[381]

Schemes are flexible since there is no specific statutory requirement of the Scheme. They are adaptable in several forms and can be structured to meet the needs and requirements of the company.[382] However, the absence of specific statutory prescribed contents to be imposed might be a weakness of such Schemes. Compared to the CVA there is no secondary legislation like Insolvency Rules, therefore it is less rigid in terms of content and procedure for effecting the Scheme where the court is given more discretion.[383] Notably, the drawback of not having a transparent procedure for effecting the Scheme made such Schemes fall into disuse early on, mostly due to scams, assets being concealed, creditors being manufactured, and arrangements generally not producing the returns that they had promised, and compared to the CVA, the procedures are more transparent with the prescribed proposal to give a precise picture of the company's existing state of affairs.[384]

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[374] Ibid.
[375] Ibid.
[376] Payne op cit note 215 at 5.
[377] Payne op cit note 135 at 5.
[378] Stevenson op cit note 1 at 26.
[379] Ruzita op cit note 143 at 194.
[380] Stevenson op cit note 1 at 26.
[381] Katz & Shah op cit note 325 at 2.
[382] Ruzita op cit note 143 at 199.
[383] Ibid at 197.
[384] Ibid.

4.3 CANADA

Canadian corporate bankruptcy law under the Companies Creditors Arrangement Act (CCAA), the Bankruptcy and Insolvency Act (BIA),[1] the Companies Creditors Arrangement Act (CCAA),[2] and Canada Business Corporations Act (CBCA)[3] offers three formal legal paths for financially distressed corporations interested in a turnaround, plans of arrangement or compromises.

4.3.1 PLANS OF ARRANGEMENT OR COMPROMISE UNDER THE CCAA

The CCAA facilitates compromises and arrangements between companies and their creditors to avoid insolvency.[4] It applies to insolvent debtor companies[5] with more than CAD5 million in debt.[6] A debtor company will qualify if it is insolvent on a cash-flow basis[7] or a balance sheet test.[8] A debtor may be considered insolvent if the debtor faces a 'looming liquidity crisis' even if it is currently meeting its obligations as they become due.[9] It also applies to all local and foreign companies[10] with the exclusion of banks, insurance companies, and companies to which the Trust and Loan Companies Act applies.[11] In *Montréal, Maine & Atlantique Canada*,[12] the company experienced massive financial loss and several claims following a disastrous railway accident. Despite the BIA and CCAA excluding railway companies from their description of eligible debtors,[13] the court granted it protection under the CCAA. The Court observed that the restricted insolvency provisions in the Canada Transportation Act[14] created a lacuna[15] and exercised its inherent jurisdiction to protect creditors including the

[1] Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3).
[2] Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36).
[3] Canada Business Corporations Act (R.S.C. 1985, c. C-44).
[4] CCAA op cit note 2 preamble.
[5] Ibid Part I, s 2(1).
[6] Ibid Part I, s 3(1).
[7] unable to meet its obligations generally as they become due.
[8] has liabilities that exceed the value of its assets.
[9] Blake, Cassels & Graydon LLP 'Overview of the Companies' Creditors Arrangement Act' 2 available at *https://www.blakes.com/getmedia/86aa4a01-4667-40a0-a0d2-22ab72fa9ed4/CCAA-Overview-2025-AODA.pdf* accessed 16th February 2025.
[10] foreign incorporated company is one with assets in Canada or conducting business in Canada.
[11] CCAA op cit note 2 Part I, s.2(1).
[12] *Montréal, Maine & Atlantique Canada Co*, Re, 2013 QCCS 4039 [*Re MMA*].
[13] BIA op cit note 1 s 2.
[14] R.S.C 1996, c-10, which governs insolvent railway companies at sections 106 to 110.
[15] Supra note 12 at para 18.

accident victims.[16] The decision signifies that substance will prevail over form when the facts demand a practical, timely, and equitable solution.[17]

CCAA proceedings can be initiated by either an application by a creditor, the debtor, trustee, or liquidator to the court.[18] Directors are not obligated to initiate insolvency proceedings but will do so to avoid personal liability.[19] The exparte application,[20] with limited notice to key stakeholders, is made to the court where the head office or chief place of business is located.[21] Initial orders usually contain a 'comeback' clause allowing stakeholders that did not receive the opportunity to seek to vary or amend the terms of the initial order.[22] Comeback provisions have been treated somewhat inconsistently by courts, especially concerning the burden born by parties on a comeback motion.[23] Longer-term relief is now deferred to a subsequent hearing. These amendments may broadly impact the sequencing and speed of Canadian restructuring proceedings.[24]

If the application is accepted, the Court issues an initial order that gives the company 10 days' protection from its creditors - stay of proceedings.[25] The duration of the stay is too short to achieve the restructuring goals intended by the law. The reality of insolvency and restructuring is that most businesses would require a longer period to gain financial stability and continue as a going concern. The shortened stay would not allow the insolvent companies to do so conveniently.[26] The stay may be extended with leave of court from time to time without fixed periods or creditor approval, making the process costly and time-consuming.[27]

The Initial Order prohibits all creditors (both secured and unsecured) from taking any further steps to pursue any existing or future claims against the debtor and its directors and officers, without the prior consent of the debtor and the monitor and leave of the court.[28] The

[16] *Ibid* at paras 24, 25.
[17] DJ Miller 'Canada's Flexible Restructuring Framework' in Law Business Research (eds) *Americas Restructuring Review* 3 ed (2020) 55 at 58.
[18] CCAA op cit note 2 ss 4, 5.
[19] Clifton P. Prophet, Thomas Gertner, David F.W. Cohen, Kate Yurkovich, Virginie Gauthier 'Guide to Insolvency in Canada 2023: Law and practice' (December 2023) 1 at 2.
[20] CCAA op cit note 2 s 10(1)-by way of originating summons or notice of motion.
[21] Ibid s 9(1).
[22] Ibid s 11.
[23] Waël Rostom, Jeffrey Levine, Stephen Brown-Okruhlik 'Amendments to the CCAA, BIA and CBCA Now in Force' 1 at 2 available at *https://mcmillan.ca/insights/amendments-to-the-ccaa-bia-and-cbca-now-in-force/* accessed on 23 February 2023.
[24] Norton Rose Fulbright 'Practical implications of the recent amendments to the CCAA' (2020) 26.
[25] Prophet et al op cit note 19 at 6.
[26] Chioma Ezinne Adiele 'DIP Financing in Canada in Light of the Recent Amendments to the CCAA' (2020) 1 at 5.
[27] Janis Sarra 'Entre Loup et Chien: Restructuring under Canadian Insolvency Law and Proposals for Legislative Reform' (2003) 12 *Int. Insolv. Rev.* 83; 83 at 91.
[28] CCAA op cit note 2 Part I, s11.02.

stay is subject to certain prescribed limits. It cannot restrict the exercise of remedies under eligible financial contracts.[29] It cannot prevent any investigation or proceeding by a regulatory body against a debtor.[30] There are restrictions on the length of stay for 'aircraft objects' - airframes, aircraft engines, and helicopters. It cannot prohibit a person from requiring immediate payment for goods and services delivered after the filling date[31] or payment for the use of leased property or licensed property.[32]

The debtor remains in control of their business subject to the monitor's scrutiny while the monitor reports to the court and creditors.[33] A monitor is a Licensed Insolvency Trustee (LIT)[34] appointed by the Court in the initial order.[35] The monitor acts as the 'eyes and ears of the court' in the course of the restructuring. The monitors are normally accounting firms.[36] The monitor's basic duties are set out in the CCAA, but can be expanded by court order.[37] This flexible restructuring tool allows judges to determine the monitor's role on a case-by-case basis.[38] Generally, the monitor plays both a supervisory and an advisory role in the proceedings.[39] Monitors must perform with integrity and care, free of influence and interest.[40] Courts have also used creative orders to give the CCAA monitor powers to litigate on behalf of different groups during the process.[41] However, in 'exceptional circumstances' it may be appropriate for the monitor to serve as a complainant in an oppression action.[42] The broad range of possible powers a court can give to a monitor is an important innovation in CCAA proceedings.[43]

Monitors assist the debtor in developing the plan of arrangement to facilitate negotiations with creditors.[44] This may involve compromising the debt, exchanging equity for

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[29] Ibid s 11.08
[30] Ibid ss. 11.1(1), (2) and (3)-although monetary fines and administrative orders framed in regulatory terms but which are determined by a court to be monetary claims in substance can be stayed.
[31] Ibid s 34(4)
[32] Ibid ss 11.01 and 34(4)(a) and (b)- (pursuant to a true lease as opposed to financing lease).
[33] Ibid s 23; see also Yaad Rotem 'Contemplating a Corporate Governance Model for Bankruptcy Reorganizations: Lessons from Canada' (2008) 3 *Virginia Law & Business Review* 1 at 19.
[34] BIA op cit note 1 s 2(1)-licensed by the Office of the Superintendent of Bankruptcy (OSB).
[35] CCAA op cit note 2 s 11.7(1)- The person so appointed must be a trustee, within the meaning of subsection 2(1) of the Bankruptcy and Insolvency Act. BIA s 2(1) defines a trustee or licensed trustee to mean a person who is licensed or appointed under this Act.
[36] Miller op cit note 17 at 62.
[37] CCAA op cit note 2 s 23.
[38] Rotem op cit note 33 at 18.
[39] CCAA op cit note 2 s 23 generally.
[40] Janis Sarra 'Ethics and Conflicts, The Role of Insolvency Professionals in the Integrity of the Canadian Bankruptcy and Insolvency System' (2004)13 *Int. Insolv. Rev* 167 at 170.
[41] Miller op cit note 17 at 62.
[42] *Ernst & Young v Essar Global Fund Limited, 2017 ONCA 1014 [Essar Global]* para 120.
[43] Miller op cit note 17 at 63.
[44] Sarra op cit note 27 at 92.

debt, issuance of new shares, or shifts in control of the company.[45] A compromise or arrangement may deal with most claims that relate to debts or liabilities, present or future, incurred before the day the CCAA proceedings were commenced.[46] However, certain claims may not be dealt with, unless the creditor specifically agrees, including court-imposed fines, penalties, and restitution orders, and debts arising from fraud, embezzlement, or misappropriation.[47] In a plan, the debtor may assign the creditors to different classes.[48] Creditors may be included in the same class if their interests or rights are sufficiently similar.[49] The CCAA sets out several mandatory provisions that a compromise or arrangement must contain, including, if the debtor is an employer, payment to employees,[50] full payment to the government of various statutory employee deductions;[51] and payment of any pension plan amounts, if applicable.[52] The plan developed can also compromise claims against the directors that arose before the CCAA proceeding.[53]

The plan must be filed with the court by the date of the initial order. The debtor will apply to the court for a 'plan procedures order'. The monitor or debtor must send copies of the plan procedures order, the plan, an information circular, proxy, and voting letter to creditors.[54] Plan approval requires a two-thirds majority of the creditors, present and voting in person or by proxy, for each class.[55] A creditor who is related to the debtor may vote against, but not for, the compromise plan.[56] Upon creditor approval, the plan is submitted for court sanction.[57] If the Court determines that the Plan is not feasible, it can refuse to sanction it although it has been accepted by the required majority of creditors.[58] When sanctioned by the court, it gives the restructuring plan legal effect,[59] and is binding on all classes of creditors subject to the plan,

[45] CCAA op cit note 2 Part I, s 8; see also Sarra op cit note 27 at 92.
[46] CCAA op cit note 2 s 19(1).
[47] Ibid s 19(2).
[48] Ibid s 22(1).
[49] Ibid s 22(2)
[50] Ibid s 6(5)- for services rendered during the six months preceding the date the proceedings were commenced, to the extent of $2,000 per employee, and all wages or other compensation for services rendered after the filing date.
[51] Ibid s 6(3).
[52] CCAA op cit note 2 s. 6(6).
[53] Ibid Part ss. 5.1(1) - (3)- and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations
[54] Stephanie A. F. Grace 'Proceedings under Canada's Companies' Creditors Arrangement Act' (2011) XXX (1) *ABI Journal* 1 at 3.
[55] CCAA op cit note 2 s 6(1).
[56] Ibid s 22(3).
[57] Ibid s 6(1).
[58] Office of the Superintendent of Bankruptcy 'You are Owed Money—The Companies' Creditors Arrangement Act (canada.ca)' available at *https://ised-isde.canada.ca/site/office-superintendent-bankruptcy/en/you-are-owed-money/you-are-owed-money-companies-creditors-arrangement-act* accessed 23 February 2023.
[59] CCAA op cit note 2 Part I s 11.

whether secured or unsecured, and on the debtor.[60] The debtor company, under the supervision of the monitor, implements the restructuring plan.[61] Where the debtor defaults in performing the plan, the proper procedure is to seek an order declaring the compromise or arrangement void. However, this does not render the debtor bankrupt.[62]

Section 11 of the CCAA has been amended to promote transparency and empower the Court, on application *by any interested person,* to order another party 'to disclose any aspect of their economic interest' in the debtor. The party's 'economic interest' would include a claim, eligible financial contract, or security interest, *as well as the consideration paid* for the interest.[63] In considering an application for such disclosure, the Court will consider the CCAA monitor's position on the proposed disclosure, whether disclosure would enhance the possibility of a successful compromise or arrangement, and material prejudice to any interested party.[64] This new mechanism for compelling disclosure of economic interests is a powerful tool potentially subject to tactical abuse by parties in CCAA proceedings.[65]

There is no prescribed time limit for CCAA proceedings but typically they are completed in less than a year.[66] After the making of the Initial Order, the debtor is granted up to 10 days of protection but the debtor can apply to court for an extension. The lack of codified requirements under the CCAA gives the parties and the court the flexibility to craft constructive and timely workout plans to preserve the business.[67] If the restructuring fails, the company may proceed to liquidation under the Bankruptcy and Insolvency Act.

Additionally, under the CCAA procedure, the interests of the monitor differ from a classic trustee. The monitor's presence, backed by the court, prevents the governance regime from becoming a pure DIP system, leading to the development of the monitor model in Canada.[68] This makes the Canadian experience relevant for lawmakers worldwide.[69] Studies show Canadian firms are nearly eight times more likely to survive reorganisation than those under the U.S. Chapter 11, with small and large firms having equal success. The Canadian process provides a rapid solution to financial distress and benefits creditors more than liquidation.[70]

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[60] Ibid s 6(1).
[61] Ibid Part I s 8.
[62] Grace op cit note 54 at 3.
[63] Rostom op cit note 23 at 2.
[64] Ibid at 2-3.
[65] Ibid at 3.
[66] Prophet et al op cit note 19 at 6.
[67] Sarra op cit note 27 at 93.
[68] Rotem op cit note 33 1 at 6.
[69] Ibid at 7.
[70] Ibid.

4.3.2 PROPOSALS UNDER THE BIA

The BIA provides procedures for distressed companies to re-organise through proposals. A proposal is defined in the BIA as including a proposal for a composition, and/or a scheme of arrangement in terms of alteration of debt and equity structure.[71] It applies with the exclusion of certain entities to all Canadian companies and individuals[72] with more than $1 million in debt.[73] It is more commonly used for smaller businesses. To voluntarily initiate the procedure, a debtor must be insolvent and have debts exceeding $1000.[74] An 'insolvent person' is one unable to pay their debts, has stopped paying their debts, or has insufficient property to pay their debts.[75]

The proposal may be made by a receiver, liquidator, trustee, bankrupt or insolvent person.[76] The inability of creditors to make proposals is a negative feature of the BIA scheme.[77] In contrast, 'the CCAA allows creditors to develop and propose plans of arrangement or compromise, thus facilitating the collaboration of stakeholders in devising a viable workout plan'.[78] Proceedings for a proposal are commenced when the debtor files either a proposal with a licensed trustee[79] or a notice of intention (NOI) to file a proposal with the official receiver.[80] In practice, a debtor typically files a notice of intention first, as this gives it more time to prepare a proposal. This notice contains the debtor's intention to make a proposal, the particulars of the trustee, and the names of creditors with claims exceeding $250,000.[81] Within 10 days of submitting a notice of intention to file a proposal, the debtor must lodge with the official receiver a projected cash flow statement and report.[82] Failure to file a cash flow statement or proposal in time deems the debtor to have made an assignment in bankruptcy.[83]

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[71] BIA op cit note 1 2(1).
[72] Ibid Part I Division II.
[73] Ibid Part I s 2(1) defines a debtor to include an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt.
[74] Prophet et al op cit note 19 at 6.
[75] BIA op cit note 1 s 2(1).
[76] Ibid s 50(1).
[77] Sarra op cit note note 27 at 87.
[78] Ibid.
[79] BIA op cit note 1 s 50(2).
[80] Ibid s 50.4(1)
[81] Ibid s 50.4(1)
[82] Ibid s 50.4(2)
[83] Ibid s 50.4(8).

After the debtor files a proposal or NOI, a trustee is appointed by the court to supervise the process although the debtor remains in control of its assets and operations during this time.[84] A trustee must be licensed,[85] not related to the company,[86] and must comply with the prescribed Code of Ethics.[87] The trustee investigates the affairs of the debtor to ascertain the cause of the financial difficulties and its financial situation.[88] The trustee must assist the debtor in developing a proposal.[89] The creditors may, 'at any meeting by special resolution, appoint or substitute another licensed trustee for the trustee named in an assignment, a bankruptcy order or a proposal, or otherwise appointed or substituted'.[90] If the BIA proposal proceedings transition into a bankruptcy, the debtor will cease to carry on business and the trustee in bankruptcy will take possession and control of the debtor's property and assets.[91]

The filing of a proposal or a NOI automatically triggers an initial 30-day stay against all creditors, both secured and unsecured with some exceptions,[92] before any court hearing.[93] Thus, insolvent persons can enjoy the benefit of a stay of proceedings without having to file a definitive proposal, which may prove beneficial and less costly if a brief reorganisation occurs and the insolvent person can resume.[94] The fact that the stay is automatic means that 'the debtor corporation does not incur the cost of seeking court approval and does not need the support of creditors at the outset of the process.'[95] The stay prohibits any creditor, including a secured creditor, from exercising any remedy against the debtor or its property, or commencing or continuing any action, execution or other proceeding for the recovery of a claim provable in bankruptcy.[96] While the initial stay is automatic, the court does have an important supervisory role throughout the proposal proceedings.[97] Upon application by the debtor the court may grant extensions of the stay, each not exceeding 45 days, for up to five months after the expiration of the initial 30-day period if it is satisfied that, on each application, the debtor is acting in good faith and with due diligence, is likely to make a viable proposal if the extension were granted

[84] Ibid s 13.3(1).
[85] Ibid ss 13(1), 13.1, 13.2. license may be suspended or cancelled by the Superintendent where the trustee is found guilty of an indictable offence impairing the trustee from performing his or her fiduciary duties, fails to comply with license conditions, ceases to act as a trustee; or at the request of the trustee- RSC 1985 s 13.2(5).
[86] Ibid s 13.3 (1).
[87] Ibid s 13.3 (5).
[88] Ibid ss 50(5) and 50(6).
[89] Ibid s 50.5.
[90] Ibid s 14.
[91] Prophet et al op cit note 19 at 7.
[92] Sarra op cit note 27 at 87.
[93] BIA op cit note 1 s 69.
[94] Sarra op cit note 27 at 87.
[95] Ibid.
[96] Prophet et al op cit note 19 at 6.
[97] Sarra op cit note 27 at 88.

and that an extension would not materially prejudice any creditor.[98] The initial stay period should be longer than 30 days, with recommendations ranging from 45 days to 90 days, with 60 days most frequently suggested.[99]

Within 21 days of a proposal filing,[100] the trustee calls a creditors' meeting where all creditors decide to accept or refuse it.[101] The proposal must be approved by at least two-thirds in value.[102] Once accepted, the proposal is binding.[103] A lack of support for the proposal results in automatic bankruptcy.[104] In practice, a 'straw vote' often precedes an official vote, allowing renegotiation[105] and preventing automatic bankruptcy after an unsuccessful 'official vote.'[106] Rejection by a class of secured creditors doesn't lead to bankruptcy, and they can exercise security rights.[107] Although not required, secured creditors' approval is often crucial and proposal approval may be conditional on it because the enforcement of security by significant secured creditors can make a proposal unfeasible.[108] In a bankrupt company, inspectors must approve a proposal to annul bankruptcy and revest the property. [109]

Within five days of the proposal acceptance, the trustee must apply to the court for approval of the proposal.[110] The legislation specifies certain criteria that the court must be satisfied of before granting the said approval.[111] The court must be satisfied that the proposal meets the statutory requirements, is in the interests of the creditors and the public,[112] and provides for payment of preferred claims and trustee fees.[113] It must also provide for payment of claims under the Income Tax Act, the Canada Pension Plan, the Employment Insurance Act, and similar Acts, unless the Crown has otherwise consented.[114] Failure to meet the statutory requirements or discovery of fraud may lead to annulling a proposal by the court.[115]If the court

[98] BIA op cit note 1 s 50.4(9).
[99] Janis P. Sarra 'Micro, Small and Medium Enterprise (MSME) Insolvency in Canada' (2016) 1 at 48.
[100] BIA op cit note 1 s 51(1); at least ten days before a meeting, a debtor must send a notice, asset-liability summary, creditor list (claims of $250 or more), proposal copy, and prescribed blank forms for proof of claim, secured claim (for relevant creditors), and proxy, along with a prescribed voting letter to every known creditor and the official receiver.
[101] Ibid s 54(1).
[102] Ibid s 54(1), (2)(d).
[103] Ibid s 54(2)(d).
[104] Ibid s 57.
[105] Sarra op cit note 27 at 88.
[106] Ibid.
[107] Ibid.
[108] Ibid.
[109] BIA op cit note 1 s 50(7), 61(1).
[110] Ibid s 58.
[111] Ibid s 59(1).
[112] Ibid ss 59(2), 198, 199, 200.
[113] Ibid s 60(1), (1.3), 136.
[114] Ibid s 60(1.1); Income Tax Act s 224 (1.2).
[115] Ibid s 63(1).

disapproves of or annuls the proposal, or the creditors refuse to approve the proposal the debtor is deemed to have entered bankruptcy.[116]

While the proposal provisions under the BIA are a mechanism that allows expeditious development and approval of a viable business plan for the insolvent corporation, its rule-driven features reduce flexibility in the workout process.[117] The BIA process is viewed as cost-effective because of fewer court appearances and clear procedures making it preferred by creditors, SMEs, and large corporations alike who are confident that there will either be a proposal or a bankruptcy within six months.[118] Judicial oversight is key to ensuring that creditors' rights are impaired as little as possible during the period that their ability to realise their claims is suspended.[119] If one were to eliminate the requirement for court approval for an extension, if unopposed, it would allow that business a chance to survive. Currently, the court does not have the authority to extend the statutory period.[120] Trustees observed that costly court extensions coupled with the six-month limit impede restructuring for complex companies and recommended extensions.[121]

Upon court approval, the debtor implements the proposal under the trustee's guidance who ensures that it is strictly adhered to. Although accepted or approved, a proposal may be annulled by court order upon request of the trustee or creditor whenever the debtor is afterward convicted of any offence under the BIA. Upon annulment, the debtor shall be deemed to have made an assignment into bankruptcy.[122] Where a proposal is fully performed, the trustee shall give a certificate to that effect, in the prescribed form, to the debtor, and the official receiver.[123]

The court, in exercising its discretion to grant an extension, must be satisfied that 'the insolvent corporation has acted in good faith and with due diligence; that it would likely be able to make a proposal if an extension is granted; and that no creditor would be materially prejudiced by the granting of an extension'.[124] The court does not have the flexibility that it has under the CCAA to grant longer or more flexible stay periods. A disadvantage is that the rigid time frame can result in negotiations with only the largest creditors, to satisfy the minimum statutory requirement for creditor support.[125]

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[116] Ibid ss 57, (59) (2).
[117] Sarra op cit note 27 at 89.
[118] Sarra op cit note 27 at 89.
[119] Ibid.
[120] Sarra op cit note 99 at 52.
[121] Ibid at 52-53.
[122] BIA op cit note 1 ss 50.6., 65.4.
[123] Ibid s 65.3.
[124] Ibid s 50.4(9), BIA
[125] Sarra op cit note 27 at 88.

4.3.3 COMMONALITY BETWEEN THE CCAA AND BIA

Canada endorsed the goal of achieving consistency and alignment of the restructuring rules in the CCAA and BIA, producing a high degree of commonality between the two restructuring regimes.[126] The policy of convergence reached its zenith with the coming into force of the 2009 amendments to the BIA and CCAA where new provisions that governed a wide variety of matters were added to both statutes.[127]

Both the CCAA and BIA require that all interested persons in insolvency proceedings act in good faith.[128] The statutes now give courts unfettered discretion to craft an appropriate remedy where this obligation is breached.[129] The term 'interested person' is not explicitly defined, but it generally includes participants or those affected by the proceedings, creating a broad duty owed by a wide range of persons to another wide range of persons.[130] There are no specific requirements to meet the 'good faith' standard, which is likely to be problematic.[131] CCAA and BIA permit DIP financing on a priority basis.[132] DIP lenders are given a DIP charge, often ranking ahead of other secured creditors.[133] Under both statutes, the court evaluates factors such as creditor prejudice, debtor management, major creditors' support, benefits, assets, the monitor/trustee report, and the proceedings' proposed length in deciding whether to make an order.[134] Canada uses a 'balance of prejudices' test which appears wider, less tightly controlled, and less respectful of existing securities.[135] The courts can evaluate the benefits and risks of DIP financing and, based upon that, determine whether the financing is appropriate, without having to ensure any protection for the existing creditors.[136] The court can only order DIP financing for the initial 10-day stay period thus limiting the funds which is crucial at this time and forcing the company to seek additional orders thereby hampering the restructuring.[137]

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[126] Roderick J Wood 'Come a Little Bit Closer: Convergence and its Limits in Canadian Restructuring Law' (2021) 10 *Journal of insolvency in Canada* 1.
[127] CCAA op cit note 2 ss 11.2, 11.3, 11.5, 11.52, 32, 36 and 44-61; BIA op cit note 1 ss 64.2, 50.6, 64, 65.11, 65.13, 84.1. In 2019, parallel amendments concerning the requirement that interested persons shall act in good faith were enacted- op cit note 2 s 18.6; op cit note 1 s 4.2.
[128] CCAA op cit note 2 s 18.6 (1) (2); BIA op cit note 1 s 4.2(1).
[129] Ibid Part I s 18.6 (1) (2); BIA op cit note 1s 4.2(1); Rostom op cit note 23.
[130] Adiele op cit note 26 at 10.
[131] Rostom op cit note 23 at 2.
[132] CCAA op cit note 2 Part II s 11.2; BIA op cit note 1 s 50.6.
[133] Ibid Part II s 11.2 (2); ibid s 50.6(1)(3);
[134] Ibid Part II s 11.2 (4); ibid s 50.6(5).
[135] Gerald McCormack 'Corporate Rescue Law in Singapore and the appropriateness of Chapter 11 of the US Bankruptcy Code as a Model' (2008) 20 *SAcLJ* 396 at 433.
[136] Ibid.
[137] Adiele op cit note 26 at 8.

Although the CCAA and BIA are flexible, they contain some limitations, including a prohibition on granting security for an obligation that arose before the financing order.[138] Canadian insolvency legislation authorises the court to 'make orders, for security or charge, where appropriate, for fees and expenses for financial, legal, or other experts engaged by the debtor company for purposes of the proceeding'.[139] This allows the debtor corporation which doesn't have the resources to cover such costs,[140] access to the professional services of the monitor, workout experts, and lawyers who can assist with a successful workout.[141] If interim financing is required in a CBCA proceeding, the parties address this contractually in advance as part of a support agreement. The CBCA does not specifically provide for the granting of priority charges.[142]

The CCAA and BIA provisions prevent a contract counterparty from enforcing an ipso facto clause solely because the debtor company is insolvent or has commenced insolvency proceedings.[143] The public policy reason is that ipso facto clauses should not be used to defeat the company where it can devise a going-concern restructuring plan that is acceptable to creditors and is approved by the court.[144] Under both the CCAA and BIA, 'a lessor may not terminate or amend the lease by reason only that proceedings have commenced, that the company is insolvent or that the company has not paid rent in respect of any period before the commencement of those proceedings'.[145] Any contractual provisions that have the effect of providing for, or permitting, anything that, is contrary are of no force or effect.[146] Thus, overall, 'if a contract, security agreement or other agreement specifies that it can be terminated or payments accelerated because of insolvency and the filing of a proposal or NOI, the provisions of the agreement cannot be enforced until a restructuring proposal is resolved'.[147] The amendments clarified the scope of protection against the impact of ipso facto clauses.[148] Other

[138] CCAA op cit note 2 Part II s 11.2; BIA op cit note 1 s 50.6(5).
[139] Ibid s 11.52; ibid s 64.2.
[140] Jennifer Payne & Janis Sarra 'Tripping the Light Fantastic: A Comparative Analysis of the European Commission's Proposals for New and Interim Financing of Insolvent Businesses' (2018) 27 *Int. Insolv. Rev* at 178 at 197.
[141] Sarra op cit note 27 at 95.
[142] Joseph Pasquariello, Andrew Harmes & Brennan Caldwell; 'Canada Chapter' in International Comparative Legal Guides (eds) *Restructuring & Insolvency* 17 ed (2023) 41 at 44.
[143] CCAA op cit note 2 Part II s 34(1); BIA op cit note 1 s 65.1(1);
[144] Janis Sarra, Jennifer Payne & Stephan Madaus 'The promise and perils of regulating ipso facto clauses' (2022) 31 *International Insolvency Review* 45 at 73.
[145] CCAA op cit note 2 Part II s 34(2); BIA op cit note 1 s 65.1(2);
[146] CCAA Part II, s 34(5); op cit note 1 s 65.1(5);
[147] Sarra et al op cit note 144 at 49.
[148] Ibid.

than EFC excluded pursuant to regulation,[149] all suppliers and contract counterparties are included in the stay on enforcement of ipso facto clauses.

There are several counter-balancing measures to the prohibition on enforceability of ipso facto clauses on insolvency in Canada. First, the statutes 'allow counterparties to require payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of proceedings'.[150] Thus, while the counterparty to the contract cannot terminate the contract and must continue to supply the debtor, 'it can demand that it be paid on a cash-on-delivery (COD) basis for all goods and services supplied going forward'.[151]

The court may grant an order declaring a person a critical supplier if the goods or services supplied are critical to the company's continued operation,[152] and require the person to supply any goods or services specified by the court to the company.[153] The court will further declare that all or part of the property of the company is subject to security or charge in favour of the critical supplier.[154] The court may monitor payments to critical suppliers weekly, protecting them and the creditors being primed.[155] This oversight by the court is viewed in Canada as 'a positive feature of the statutory provisions, in terms of monitoring both the benefits and prejudice to pre-filing creditors. In reality, suppliers will continue to supply goods and services to the debtor or the insolvency professional on credit if they have a reasonable expectation of payment ahead of pre-filing unsecured creditors.'[156] However, codification of this charge avoids preference or avoidance claims by pre-filing creditors.[157] The recent decision of Justice Fitzpatrick in *Re Soccer Express Trading Corp*[158] confirms this position. In 2019, Soccer Express and Kahunaverse experienced financial problems compelling Adidas to demand security for a debt of $1.89 million. Both companies filed NOIs under the BIA and tried to negotiate with Adidas unsuccessfully who declined to supply them without a court order. To obtain broader relief, the companies sought an order to continue the BIA proceedings under the CCAA enabling the court to declare Adidas a critical supplier ordering continuity of

[149] CCAA Op cit note 2 Part II s 34(7); BIA op cit note 1 s 65.1(7).
[150] Ibid Part II s 34(4); ibid s 65.1(4).
[151] Sarra op cit note 144 at 50.
[152] CCAA op cit note 2 s 11.4 (1).
[153] Ibid s 11.4 (2).
[154] Ibid s 11.4 (3)
[155] Payne & Sarra op cit note 140 at 195.
[156] Ibid at 195.
[157] Ibid.
[158] 2020 BCSC 749, 80 C.B.R. (6th) 133 (B.C. S.C.) [Soccer Express].

supply.[159] The court also imposed a critical supplier charge and, with the consent of the interim lender, ranked it second only to the administration charge.[160] The debtor companies were not locked into their initial selection since the CCAA permits the continuation of BIA restructuring proceedings under the CCAA.[161] The case highlights how companies can transition from BIA to CCAA where the former proves inadequate.

Furthermore, the co-party can apply for relief based on significant financial hardship.[162] Thus, if the party to the agreement can satisfy the court that the operation of ipso facto would cause significant financial hardship, the court can modify the order.[163] The premise underlying these provisions is that 'a debtor's ability to re-organise and survive as a going concern may be hampered if the non-defaulting party refuses to supply goods and services vital to the debtor's business.'[164] Considering that the provisions have been in place for three decades, there are remarkably few judgments, in large measure because they are generally considered in Canada to fairly balance the rights of creditors and debtors.[165] The fairness to debtors is that 'the provisions encourage the timely filing of restructuring proceedings because creditors cannot accelerate payment or terminate executory contracts only for the reason that they filed. It therefore encourages early resolution to insolvency with the assistance of professionals, collectivising the process.'[166]

The stay pursuant to the BIA proposal provisions and the CCAA plan of arrangement provisions gives the debtor company 'breathing room' to try to negotiate with all creditors where a viable going-forward business plan may be possible. It thus assists in avoiding premature liquidation. The fairness to creditors is that 'it prevents sophisticated or powerful creditors from being able to use ipso facto clauses to accelerate payment, which diminishes the value of the insolvency estate if the debtor is unable to get creditor acceptance and court approval of a proposal or restructuring plan and must liquidate. It is essentially another means of preventing a race to the assets or allowing a creditor to jump the queue in terms of its entitlements.'[167]

Canadian legislation balances the interests of stakeholders, including creditors and employees, in insolvency proceedings. For example, in *Hongkong Bank of Canada v. Chef*

[159] Supra note 161 at paras 64-68.
[160] Supra note 161 at paras 92-96.
[161] CCAA op cit note 2 s 11.6.
[162] Ibid Part II s 34(6); BIA op cit note 1 s 65.1(6).
[163] Sarra et al op cit note 144 at 51.
[164] Ibid.
[165] Ibid.
[166] Ibid.
[167] Ibid.

Ready Foods, the court held that there are devastating social and economic effects of bankruptcy and liquidation because shareholder investments are destroyed, unemployment creates hardships on workers, and creditors recover little of their claims.[168]

Creditors have more leverage than shareholders in a restructuring, as a CCAA plan or a BIA proposal requires approval by each class of affected creditors by a double majority, being 50% plus one of the total number of creditors voting, representing roughly 66.6% in the total value of claims voting in the class.[169] While there is no statutory requirement for stakeholder approval of a CBCA plan, courts typically require approval by at least 66.6% of each class of affected stakeholders voting on the plan.[170]

Restructuring proceedings, on the other hand, do not have any automatic effect on the employment of the debtor's employees.[171] Among other things, the CCAA and BIA both prohibit a debtor from terminating collective bargaining agreements.[172] A court cannot sanction a CCAA plan or approve a BIA proposal that purports to compromise these priority claims, and absent payment of all employee wages, salaries, commissions or compensation for services rendered after the commencement of the applicable restructuring proceedings.[173] Employees of an employer that is subject to restructuring or insolvency proceedings also benefit from the Wage Earner Protection Program (WEPP).[174] WEPP is a federal programme that enables terminated employees who are owed eligible wages – including salary, commissions, vacation pay, and severance or termination pay – that were earned or arose during the six-month period before the restructuring or insolvency proceeding to receive a one-time payment from the federal government for such amounts, in an amount of up to seven times the maximum weekly insurable earnings under the *Employment Insurance Act* - CA$8,507.66 for 2024. Eligibility is now extended to employees whose former employer is subject to CCAA or BIA proposal proceedings where all of the restructuring company's employees in Canada have been terminated (other than as needed to assist with a wind-down) and a court order has been granted determining that such prescribed eligibility criteria are satisfied. Canada passed new legislation in 2023 that amends CCAA and BIA to expand protection for members of defined benefit plans. The Pension Protection Act (PPA) gives claims in respect of unfunded liabilities or

[168] Sarra op cit note 27 at 90.
[169] CCAA op cit note 2 Part I s 6(1); BIA op cit note 1 s 54.1; see also Pasquariello et al op cit note 142 at 43.
[170] Pasquariello et al op cit note 142 at 43.
[171] BIA op cit note 1 s 84.
[172] CCAA op cit note 2 Part III s 33(1); BIA op cit note 1 s 65.12(1).
[173] Ibid Part I ss 5, 6; ibid s 60(1.3).
[174] Pasquariello et al op cit note 142 at 47.

solvency deficiencies of pension plans super-priority in insolvency.[175] The PPA provides for a four-year transitional period and will not come into force until 27 April 2027.[176]

The CCAA and BIA are available to foreign companies if certain conditions are met. Any company wherever incorporated may seek to restructure under the CCAA as long as it has assets or does business in Canada and meets the CCAA's other technical requirements. Courts have avoided applying a *de minimis* standard when considering whether a company has assets or is carrying out business in Canada such that having only nominal assets in Canada enables a foreign corporation to access the CCAA.[177] Furthermore, the statutes authorise a Canadian court, on the application of a 'foreign representative,'[178] to make an order recognising a 'foreign proceeding,'[179] which is a judicial or administrative proceeding in a jurisdiction outside Canada in which a debtor's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganisation.[180] The court will determine whether the foreign proceedings are 'foreign main proceedings' or 'foreign non-main proceedings'.[181] Foreign main proceedings are foreign proceedings in a jurisdiction where the debtor company has the centre of its main interests (COMI)[182] while foreign non-main proceedings are foreign proceedings, other than a foreign main proceeding.[183] Canadian courts have traditionally been open to the concept of comity and the recognition of properly constituted foreign insolvency proceedings.[184] *In The Matter of a Plan of Compromise or Arrangement of Lydian International Limited, Lydian Canada Ventures Corporation, and Lydian U.K. Corporation Limited* where Geoffrey B. Morawetz, J, having established that it was necessary for justice to assist with implementation of the Plan, requested the assistance of the Royal Court of Jersey to assist the Ontario Court regarding the proceedings.[185]

In the case of either foreign main proceedings or foreign non-main proceedings, the BIA and the CCAA confer broad discretion on the court to make any order it considers appropriate where it is satisfied that it is necessary to protect the debtor company's property or

[175] Pasquariello et al op cit note 142 at 48.
[176] Ibid; see also Clause.
[177] Ibid.
[178] CCAA op cit note 2 s 45; BIA op cit note 1 s 268.
[179] CCAA op cit note 2 s 46; BIA op cit s 270(1).
[180] Ibid s 45; ibid s 268.
[181] Ibid s 46; ibid s 270(2).
[182] Ibid s 45; ibid s 268.
[183] Ibid s. 45; ibid s 268.
[184] Stikeman Elliot 'Canada: Insolvency and Restructuring Law Overview' available at *https://stikeman.com/-/media/files/kh-guides/dbic/se-canada---insolvency-and-restructuring-law-overview.ashx* accessed on 20 March 2023 M2 at M6.
[185] Court File No. CV-19-00633392-00CL at para 8.

the interests of a creditor or creditors.[186] In exercising a wide discretion to recognise and enforce a foreign bankruptcy order, Canadian courts have considered a variety of factors including the compatibility of the foreign jurisdiction's insolvency rules with the Canadian regime.[187] Courts have increasingly appointed information officers in recognition proceedings as a means of ensuring the court is kept informed of developments in foreign proceedings.[188] The information officer is akin to the monitor in a CCAA proceeding.

Despite the above common provisions in both the CCAA and BIA, there were two important exceptions. First, new rules governing critical suppliers were added only to the CCAA and not to the BIA restructuring provisions. Secondly, courts in CCAA proceedings were given the power to make any order that it considers appropriate,[189] while no equivalent conferral of general judicial power was included in the BIA.[190] It is necessary to understand that the CCAA places more reliance on court supervision and greater flexibility. This makes it more suitable for use in connection with larger businesses.[191] Restructuring under the BIA is directed towards small- and medium-sized entities where there is often less need for flexibility.[192] The policy of convergence that promotes the use of a common set of rules or principles in both restructuring systems reaches its limit when different treatment is needed to preserve the faster and cheaper characteristics of BIA restructuring proceedings.[193]

4.3.4 ARRANGEMENTS UNDER THE CBCA

Where an out-of-court restructuring is unachievable, a debtor corporation can restructure under the CBCA to achieve a fundamental change like an 'arrangement' where such change is not practicable under any other provision of the CBCA. The CBCA enables a debtor corporation to restructure through arrangements like amendments, amalgamations, divisions, transfers, and liquidation.[194] In a CBCA restructuring, the debtor will typically negotiate a plan of arrangement with its most significant debt-holders and seek an interim court order calling a meeting of the affected security holders to consider and vote on such a proposed plan.[195]

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[186] Pasquariello et al op cit note 142 at 47.
[187] Elliot op cit note 184.
[188] CCAA op cit note 2 s 52; BIA op cit note 1 s 275.
[189] Ibid s 11.
[190] Ibid ss 11.2, 11.3, 11.5, 11.52, 32 and 36; op cit note 1 ss 64.2, 50.6, 64, 65.11, 65.13 and 84.1.
[191] Roderick op cit note 126 at 15.
[192] Ibid.
[193] Ibid at 16.
[194] CBCA op cit note 3 Part XV s192 (1).
[195] Pasquariello et al op cit note 142 at 41.

Although the CBCA is non-bankruptcy legislation it has been used to facilitate expedited restructuring proceedings.[196] A corporation can apply to the court for approval to propose an arrangement. An applicant shall give the director notice of the application and the director has a right to be heard in person or by counsel.[197] Upon hearing an application the court may make any interim or final order it thinks fit.[198] The interim order also typically grants a stay of proceedings to prevent affected stakeholders from enforcing rights against the debtor while it seeks to have the plan approved and implemented.[199] After an order has been made, the articles of arrangement are sent to the director,[200] who issues a certificate arrangement.[201] The debtor remains in possession of its assets during this process and implements the reorganisation plan under the terms approved by the court. The court retains supervisory jurisdiction to ensure compliance with the arrangement and address any issues that may arise during implementation.[202] The CBCA was amended to specify certain stakeholder interests that a director or officer may consider when exercising their fiduciary duty to the corporation they serve. Directors and officers are required to act 'honestly and in good faith in the best interest of the corporation'.[203] With the new changes, the CBCA now specifies that directors and officers may consider the interests of stakeholders such as shareholders, employees, retirees and pensioners, creditors, consumers and governments, the environment, and the long-term interests of the corporation. The explicit addition of retirees and pensioners to the list in the statute may cause the directors and officers of troubled CBCA companies to give greater consideration to the implications of an insolvency proceeding for these stakeholders. The change should offer management some comfort that they are protected when exercising their powers with those interests in mind.[204] CBCA restructurings involve the least amount of court involvement with approvals generally involving two appearances before the court.[205] The CBCA does not require ongoing attendance at court or the appointment of a monitor; the management of the debtor maintains a high level of control.

[196] Jassmine Girgis 'The Evolution of Corporate Rescue in Canada and the United States' (2021) 45.
[197] Ibid s192 (5).
[198] Ibid s192 (4).
[199] Pasquariello et al op cit note 142 at 41.
[200] CBCA op cit note 3 Part XV s 192 (6).
[201] Ibid Part XV s 192 (7).
[202] Girgis op cit note 196 at 45.
[203] CBCA op cit note 3 s 122(b).
[204] Rostom op cit note 23 at 3.
[205] Pasquariello et al op cit note 142 at 44.

Conclusively, Canada is a relatively debtor-friendly jurisdiction. The restructuring options that exist are broad, flexible and respond to even the most unusual of circumstances.[206] The CCAA is Canada's most prevalent restructuring tool for mid-sized and large companies in financial difficulty.[207] Canada provides a model of efficiency, flexibility, and creativity for restructuring solutions.[208] The statutory framework is also supported by a well-developed body of jurisprudence that reflects the willingness of Canadian judges to be responsive to the 'real-time' nature of insolvency proceedings and to grant appropriate relief that fits the unique facts of a particular case.[209] The BIA's proposal regime is a more rules-based restructuring framework that offers a more expedient and often less costly means of restructuring.[210] Smaller companies prefer the BIA regime because it is cheaper and more predictable in its operation. In addition, a debtor corporation can restructure under the CBCA to achieve a fundamental change in the nature of an 'arrangement' and has been used to effect restructurings giving distressed companies, opportunity to restructure in the event that CCAA and BIA are not applicable.

4.4 SINGAPORE

The statutory provisions governing Singapore's insolvency regime were consolidated under IRDA. This repealed the Bankruptcy Act and relevant provisions of the Companies Act.[1] The procedures are judicial management,[2] a scheme of arrangement,[3] and the simplified debt restructuring programme.[4]

4.4.1 JUDICIAL MANAGEMENT

Judicial management (hereafter JM) is a method of debt restructuring where an independent manager is appointed to oversee a distressed company's affairs temporarily shielded from legal

[206] Miller op cit note 17 at 56.
[207] Pasquariello et al op cit note 142 at 43.
[208] Miller op cit note 17 at 56.
[209] Ibid.
[210] Pasquariello et al op cit note 142 at 43.
[1] Junxiang Koh & Prakash Pillai 'Commencement of Singapore's Insolvency, Restructuring and Dissolution Act' available at *https://www.mondaq.com/insolvencybankruptcy/980352/commencement-of-singapores-insolvency-restructuring-and-dissolution-act* accessed on 23 March 2023.
[2] Insolvency, Restructuring and Dissolution Act 2018, Part 7
[3] Insolvency, Restructuring and Dissolution Act 2018, Part 5; Companies Act Cap 50 2006 Part VII.
[4] Insolvency, Restructuring and Dissolution Act 2018, Part 5A

proceedings, allowing for rehabilitation.[5] It aims at the survival of the company as a going concern, approval of a compromise or an arrangement; or a more advantageous realisation of assets than in a liquidation.[6] Both local and foreign companies with Singapore ties, qualify for JM.[7] However, smaller companies might find the process costly and complex.[8]

JM entry is contingent on a company's actual or imminent insolvency[9] and a reasonable prospect of achieving the statutory objectives.[10] A company is deemed unable to pay its debts if it neglects to settle a debt of at least SGD 15,000 within three weeks of a demand notice, or if there is an unsatisfied judgment, decree, or order against it.[11] In *Sun Electric Power Pte Ltd v. RCMA Asia Pte Ltd,*[12] the court stated that, *'...*The timeframe should not be set too rigidly but should be sufficiently flexible to take into account debt and income which would be due in the reasonably near future to avoid absurd and illogical outcomes.'[13] The court further stated that '…current assets' and 'current liabilities' refer to assets that will be realisable and debts which will fall due within a 12-month timeframe, as this is the standard accounting definition for those terms.[14] In *Sun Electric Power Pte Ltd v. RCMA Asia Pte Ltd*, the Court of Appeal held that the cash flow test should be the 'sole and determinative test' for deemed insolvency and that the balance sheet test was inapplicable.[15]

A company can enter into judicial management by applying to the High Court's General Division.[16] The applicant nominates a judicial manager[17] who must be a licensed insolvency practitioner and is not the company's auditor.[18] The court may make an order for judicial management if it is satisfied that the company is or is likely to become unable to pay its debts; or where placing the company under JM would be likely to achieve at least one of the statutory purposes.[19] The court is not precluded from making an interim order or instituting a procedure on public interest grounds.[20] In *Re Cosmotron Electronics (Singapore) Pte Ltd*, the court held

[5] Wai Yee Wan, Casey Watters & Gerard Mccormack 'Schemes of Arrangement in Singapore: Empirical and Comparative Analyses' (2020) 94 (3) *American Bankruptcy Law Journal* 463 at 475-478.
[6] IRDA op cit note 2 Part 7 s 89(1).
[7] Ibid Part 7 s 88.
[8] Casey Watters & Paul J Omar 'The Evolution of Corporate Rescue in Singapore' 1 at 13.
[9] Companies Act Cap 50 2006 Part VII s 227B (1).
[10] IRDA op cit note 2 ss 90, 89, 91(1) 94(1) & Op cit note 9 Part VIII A s 227A.
[11] Ibid Part 8 Division 2 s 125(2); Ibid Part X Division 3 s 254(2) which provides for $10,000.
[12] [2021] SGCA 60.
[13] Supra note 12 Para 67 at 26.
[14] Ibid para 65 at 24-25.
[15] Ibid para 56 page 21, para 58, page 22, para 62 page 23.
[16] IRDA op cit note 2 Part 7, s 90; Companies Act op cit note 9 Part VIII A s 227B (1).
[17] Ibid s 91(3)(a) and who must not be an auditor of the company; Ibid Part VIII A s 227B (3).
[18] Companies Act op cit note 9 Part VIII A s 227B (3)(a).
[19] IRDA op cit note 2 s 91(1); Companies Act op cit note 9 Part VIII A s 227B (1)(a)(b).
[20] Ibid s 91(10); Ibid Part VIII A, s 227B (10).

that the court has an overriding power to grant a judicial management order even if the statutory purposes are unlikely to be achieved if it is in the public interest.[21]

Additionally, a company can enter into judicial management through an out-of-court process,[22] decided by a majority resolution at a creditors' meeting.[23] The company must give 7 days' notice to appoint an interim judicial manager.[24] The judicial manager must be an officer of the court,[25] a licensed insolvency practitioner, and not the company's auditor.[26] Clothing only creditors with power to commence JM limits the rights of other parties to act when a company is faced with imminent insolvency.

Filing a judicial management application or appointing an interim manager triggers an interim automatic moratorium to restrain certain actions from being taken against the company.[27] These actions include instituting law suits against the company[28] or proceedings to wind up the company,[29] and the enforcement of charges on, or security over, the company's property.[30] It stops all collection efforts, harassment, and foreclosure actions permitting the debtor to attempt a repayment or reorganisation plan.[31]

A JM order, displaces the board and transfers management and control to a judicial manager.[32] This displacement operates as a great disincentive to petition for such an order and is taken as a last resort, by which time it may be too late for any realistic chance of rehabilitation via reorganisation.[33] A licensed[34] judicial manager may be appointed by court or creditors.[35] Only qualified persons including solicitors, public accountants; or chartered accountants[36] are eligible to be licensed.[37] These qualifications are quite limiting since they do not provide for any criteria as far as experience is concerned as applicable in the UK and SA. In carrying out

[21] [1989] 1 SLR(R) 121 at 22.
[22] IRDA op cit note 2 s 94 generally.
[23] Ibid s 94 (1).
[24] Ibid s 94(2).
[25] Ibid s 94 (4).
[26] Ibid s 94 (5), (12).
[27] IRDA op cit note 2 Part 7, s 95 (1) (4); Companies Act op cit note 9 Part VIII A, s 227D generally.
[28] Ibid s 95(1) (b, (c) (d); ibid Part VIII A, s 227D (4).
[29] Ibid s 95(1)(a); ibid Part VIII A, s 227D (4) (a) (b).
[30] Ibid s 95(1) (b, (c) (d); Ibid; Part VIII A, s 227D (4)(d) generally; enforcement of any security over any property of the company, or repossessing any goods under any hire-purchase agreement, chattels leasing agreement or retention of title agreement is not possible.
[31] Gerard McCormack 'Corporate Rescue Law in Singapore and the appropriateness of Chapter 11 of the US Bankruptcy Code as a Model' (2008) 20 *SAcLJ* 396 at 408.
[32] IRDA op cit note 2 s 91(2); Companies Act op cit note 9 Part VIII A s 227B (2).
[33] Tracey Evans Chan 'Schemes of Arrangement as a Corporate Rescue Mechanism: The Singapore Experience' (2009) 1 *International Insolvency Review* 37 at 40;
[34] IRDA op cit note 2 Part 3 Division 4 ss 48 (1)(2).
[35] Ibid s 88 (3), 91, 94.
[36] Ibid Part 3 Division 4 s 50 (1), (3).
[37] Ibid Part 3 Division 4 s 48 (1).

their functions, judicial managers are given wide powers outlined in the First Schedule,[38] including managing charged property[39] and seeking court directions.[40] The essential function of the judicial manager is to formulate proposals on how he intends to achieve the purposes for which the judicial management order was made.[41] A meeting for the creditors is summoned to decide whether to approve the proposals. If more than 50% in number and value of creditors approve, the approved proposals are binding on all creditors[42] while rejection may end judicial management.[43] The judicial manager is obliged to manage the company's affairs, business, and property following the proposals.[44]

When the company enters judicial management, there arises a temporary moratorium on certain activities such as the winding up;[45] appointment of receivers and/or managers;[46] starting or continuing of any lawsuits against the company;[47] enforcement of any security over the company's property;[48] and re-entry of, or forfeiture of the company's leases over, any premises except with the judicial manager's consent, or with the court's permission and subject to any of its terms.[49] The order also renders void any disposals of the company's property amounting to a preference.[50] However, creditors may still enforce their right to set off what they owe the company against what the company owes them.[51] The moratorium lasts until the order is discharged or lapses.[52]

In performing their functions, the judicial manager has to balance the interests of all stakeholders. He must manage the company in the interests of all creditors[53] and summon creditors' meetings.[54] A creditor or member of the company may apply to the Court for an order challenging the actions of the judicial manager as being prejudicial.[55] Where the employees are members of a trade union that is recognised by the company under the Industrial Relations

[38] Ibid s 99(4) & First schedule.
[39] Ibid s 99(3); see also s100 that gives the judicial manager power to deal with property; Op cit note 9 Part VIII A s 227K, 227V.
[40] Ibid s 99(5).
[41] Ibid s 107 (1) (2); Companies Act op cit note 2 Part VIII A s 227M.
[42] Ibid s 108 (1) (2) (3); Companies Act op cit note 9 Part VIII A s 227N.
[43] Ibid s 108 (5).
[44] Ibid s 110 (1).
[45] Ibid s 96(4)(a).
[46] Ibid s 96(4)(b).
[47] Ibid s 96(4)(c).
[48] Ibid s 96(4)(d) (e).
[49] Ibid s 96(4)(f).
[50] Companies Act op cit note 9 s 227T; Watters et al op cit note 8 at 8.
[51] IRDA op cit note 2 s 96(5).
[52] Ibid Part 7, s 96 generally specifies the extent of the moratorium.
[53] Ibid s 89(2).
[54] Ibid s 99(7).
[55] Ibid s 115(1); Op cit note 9 Part VIII A, s 227R.

Act, the trade unions can represent employees in meetings and court applications regarding employment contract matters.[56] This is critical as employees are considered important stakeholders whose interests need to be protected, failing which may lead to high levels of unemployment and its attendant consequences. In JM, management takes a secondary role, and shareholders have limited voting rights.[57]

The IRDA restricts certain contractual rights triggered during restructuring, like ipso facto clauses.[58] Parties cannot rely on ipso facto contractual clauses to terminate or modify a contract by reason only of the insolvency or the commencement of proceedings for judicial management and schemes of arrangement.[59] While the *ipso facto* restrictions are a major step in the right direction, there are significant limitations on what they can achieve. In particular, the duration of the *ipso facto* protection only extends for the duration of the relevant proceedings, leaving it open for a counterparty to exercise its termination rights *after* the conclusion of the proceedings.[60] The *ipso facto* restrictions do not invalidate *ipso facto* termination clauses but merely put a temporary stay to prevent their exercise.[61] The combined effect of these legal principles is that a counterparty or lessor of the debtor could, unless a consensual agreement is reached, exercise their termination rights or rights of forfeiture post-judicial management, which would significantly undermine the intended rehabilitation of the debtor's business. Counterparties to contracts with such a company may still be able to terminate the contract on other grounds, for example, where the company fails to perform its contractual obligations.[62] Further, the right of set-off remains even if the company enters into judicial management or a scheme of arrangement. This does not prevent anyone from demanding payment in cash for goods, services, leased property use, or other valuable considerations provided after the proceedings begin. It also does not prevent requiring additional money or credit to be advanced.[63] Ipso facto provisions do not apply to eligible financial contracts, licences, permits, or approvals issued by the Government;[64] contracts

[56] Ibid s 116(2).
[57] Chan et al op cit note 33; see generally Companies Act p cit note 9 Part VIII A s 227N, 227R.
[58] IRDA op cit note 2 Part 22 s 440.
[59] Ibid Part 22 s 440 (1).
[60] IRDA op cit note 2 Part 22 s 440.
[61] Meiyen Tan & Keith Han 'A Comparative look at the Ipso Facto regime' (2021) *SAL Prac* 1 at 5.
[62] Ibid at 5.
[63] IRDA op cit note 2 Part 22 s 440 (2).
[64] or a statutory body

affecting the national or economic interest of Singapore, commercial charter of a ship; aircraft equipment agreements;[65] or treaties involving Singapore.[66]

A judicial manager has the power to obtain rescue finance,[67] necessary for the company's survival with Court's approval.[68] Rescue funding can be obtained in the case of a scheme of arrangement upon application by the company, and in the case of a judicial management upon application by the judicial manager.[69] The court application notice is sent to creditors,[70] who may oppose it.[71] The order for rescue finance once approved is lodged with the Registrar of Companies.[72] Rescue funding refers to financing that is essential for a company's survival, better asset realisation; and/or in the case of a scheme of arrangement, financing that is necessary for the Court's approval of a scheme of arrangement involving that company.[73] The IRDA provides for super-priority financing.[74] Additionally, the company must establish that financing is unavailable without the enhanced claim status before the court may grant priority equal to or above existing security interests.[75] The first reported case on rescue financing, denied enhanced status as the company couldn't prove that funding couldn't be obtained without enhanced priority.[76] Generally, it is only where there is some evidence that the company cannot otherwise get financing that it would be fair and reasonable to reorder the priorities on winding up, giving the rescue financier the ability to get ahead in the queue for assets.[77] The evidentiary requirement that a debtor demonstrate that it sought financing without enhanced status may impact the structure of negotiations with lenders, leading to increased transaction costs.[78] This case highlighted some of the difficulties involved when hybrid rules

[65] within the meaning of the Convention as defined in section 2(1) of the International Interests in Aircraft Equipment Act 2009
[66] IRDA op cit note 2 Part 22 s 440 (5).
[67] Ibid s 99(4) & First schedule (c), 101(1) (c) (d); by borrowing money and providing security over a company's property.
[68] Ibid s 101(10).
[69] Ibid s 67 and s101.
[70] Ibid s 101(2).
[71] Ibid s 101(3).
[72] Ibid s 101(9).
[73] Ibid s 67(9) and s101(10).
[74] Companies Act op cit note 9 s 211E (9). - There are four levels of priority status permitted which include treating the rescue financing as an expense of the winding up in any subsequent winding up, giving the claim priority over unsecured and preferential claims in any subsequent winding up, granting a secured interest against the debtor's property that is subordinate to any existing security against that property or providing the rescue financing a secured status equal to or higher than an existing secured interest on the debtor's property
[75] Ibid s 211E (1)(d).
[76] Re Attilan Group Ltd [2017] SGHC 283 at para 62.
[77] Supra note 76 at 61.
[78] Casey G Watters 'Standards for rescue financing under Singapore schemes of arrangement: Re Attilan Group Ltd' 1 at 2.

are created that are not wholly consonant with previous domestic practice.[79] The judgment has shown that care needs to be taken in how the courts interpret provisions, not solely in light of the evident examples of foreign law and practice available to follow, but also on whether adopting these interpretations or others will serve to enhance local law and practice.[80] The first successful reported case of super-priority financing was granted in April 2019 to Asiatravel.com.[81] It afforded super-priority status and clarified that the support need not only be in the form of cash but also in-kind.[82]

In *Re-Design Studio Group Ltd,* the High Court approved a 'roll-up' rescue-financing package for the first time and granted super-priority over the rescue finance. A 'roll-up' is when new funds are injected by a financier into a company post-petition to pay off some or all of the lender's pre-existing debt such that the pre-existing debt is effectively rolled-up into the super-priority post-petition debt owing to the financier.[83] The court held that there was no general prohibition of 'roll-ups', and 'roll-ups' can constitute rescue financing provided they meet the requirement of what constitutes rescue financing.[84] Justice Aedit further stated that 'roll-ups' similarly achieve the purpose of incentivising rescue financiers to aid ailing companies by allowing even the rescue financier's previous debt to be accorded super-priority. This would hence encourage and facilitate even more rescue financing and is in line with the legislative intent.[85] This is a significant decision for Singapore as it paves the way for 'roll-up' rescue financings to feature more prominently in Singapore's restructuring landscape and will be a welcome development for lenders and distressed companies alike.[86]

This decision leaves the door open for cross-collateralisation which are similar to debt roll-ups in that they both result in elevating the priority of pre-petition debts.[87] However, instead of granting super-priority to pre-petition debt, cross-collateralisation involves the debtor granting a pre-petition lender a security interest in assets to secure both pre-petition and

[79] Watters op cit note 8 at 16.
[80] Ibid.
[81] Wan et al op cit note 5 at 43.
[82] Ibid at 44.
[83] [2020] SGHC 148 para 7 p 4.
[84] Supra note 83 para 49 p 22
[85] Ibid para 44 page 21
[86] Kei-Jin Chew & Clare Lee 'Recent case law developments in Singapore's restructuring and insolvency laws show balancing between pro-rehabilitation policies and pro-creditor policies' available at *https://www.nortonrosefulbright.com/en/knowledge/publications/d16a13d1/singapore* accessed on 20 March 2023.
[87] Meiyen Tan, Keith Han, Angela Phoon &Zephan Chua 'Recent developments in Singapore's restructuring – Global restructuring review'*https://globalrestructuringreview.com/review/asia-pacific-restructuring-review/2021/article/recent-developments-in-singapores-restructuring-regime#:~:text=This%20chapter%20discusses%20certain%20recent%20developments%20and%20issues,by%20the%20covid-19%20pandemic%20have%20not%20spared%20Singapore* accessed on 20 March 2023.

post-petition debt.[88] Similar to debt roll-ups, cross-collateralisations are highly controversial as they disrupt the pari passu principle.[89] Yet, the availability of cross-collaterisation may help convince an investor to inject new monies in circumstances where the investor would otherwise be unwilling or unable to invest.[90] Based on the previous approaches taken by the Singapore Court, the Court is likely to very closely scrutinise any claims that rescue financing will otherwise not be available unless cross-collaterisation is given.[91] The development in Singapore case law on rescue financing thus far has shown that the Singapore Court is flexible and open to different forms of rescue financing, provided that the process is not abused.[92] This bodes well for the creation of a more vibrant distressed financing and secondary debt market, which is an important element of any debt restructuring regime.[93]

Judicial management automatically ends after 180 days from the date of the judicial management court order, or of the approval of the judicial management's appointment by creditors by way of a creditors' resolution, unless that order or resolution provides otherwise.[94] However, the judicial manager may apply for an extension of time from the court or creditors where necessary.[95] Judicial management can also end where the judicial manager applies to court to be discharged, either because he has achieved his purposes or because he believes that the purposes can no longer be achieved.[96]

4.4.2 SCHEME OF ARRANGEMENT

A Scheme of arrangement (hereafter scheme) is a statutory mechanism for securing agreement between a company and its creditors, members or shareholders in respect of an arrangement or compromise, which requires approval of a majority in number representing 75% in value of those voting in a meeting of each class of creditors, members or class of members at a scheme meeting.[97] They are widely preferred over judicial management.[98]

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[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid.
[93] Ibid.
[94] IRDA op cit note 2 s 111 (1) (2).
[95] Ibid s 111 (3) (4) (5) (6); extension is granted only for a period not exceeding 6 months; only once; only if the Court has not previously granted or dismissed an application and only before the expiry of that term of office.
[96] Ibid s 112.
[97] Mohan Gopalan 'Creditor Schemes of Arrangement and Dissenting Creditor Protection' (2018) 30 *SAcLJ* 902; 902.
[98] Wai Yee Wan, Casey Watters & Gerard Mccormack 'Schemes of Arrangement in Singapore: Empirical and Comparative Analyses' (2020) 94 (3) *American Bankruptcy Law Journal* 463.

Schemes apply to companies liable to be wound up, with the exclusion of those prescribed by the minister.[99] It is not an insolvency procedure,[100] so it has no insolvency stigma.[101] It is also not intended for use when a company is at the point of insolvency, although increasingly this has been the case.[102] It is activated by an exparte court application initiated by the company's creditors, shareholders, or the liquidator to convene meetings to approve the scheme.[103] The scheme consists of five stages, that is, the preparatory stage, the convening hearing, the sending of explanatory statements and giving notice of the meetings, the meetings, and the sanction hearing.[104] Before the convening hearing, the company must decide on the number of creditor meetings and which creditors will attend; indeed, this is one of the most important decisions in the scheme.[105] Classifying creditors for voting in a SoA has posed challenges.[106] The Court of Appeal in *The Royal Bank of Scotland NV and others v TT International Ltd and another* emphasised the 'dissimilarity principle.'[107] Creditors whose rights are altered by the scheme are grouped into classes with creditors holding similar legal rights.[108] But which legal rights are to be compared and in what situations?[109] Court has held that if a creditor's position will improve or decline to such a different extent vis - à -vis other creditors simply because of the terms of the scheme and not because of its unique circumstances, then it should be placed in a different voting class from the other creditors.[110]

After the preparatory stage, an application is made to the court to order a convening meeting of creditors and, if necessary, shareholders.[111] At the leave stage, the company must disclose sufficient information to facilitate the courts' determination on a variety of issues, including those about the classification of creditors and the prospects of a successful reorganisation.[112] The courts are generally inclined to order that a meeting take place if: the scheme proposed is bona fide with sufficient disclosure in compliance with the relevant

[99] IRDA op cit note 2 s 63 (2); Companies Act op cit note 9 Part VII s 210(11), s 210(4A) excludes banks and insurance companies incorporated in Singapore.
[100] Meng Seng Wee & Hans Tjio 'Singapore as International Debt Restructuring Center: Aspiration and Challenges' (February 22, 2021) *NUS Law Working Paper No. 2021/004* 1 at 12.
[101] IRDA op cit note 2 Part 5 s 64(2); Wan et al op cit note 5; 1 at 2.
[102] Watters et al op cit note 8; 1 at 6 - an example is the English and Jersey case of Re Drax Holdings Ltd [2004] 1 BCLC 10, where the entity was of doubtful solvency.
[103] Companies Act op cit note 9 s 210(1).
[104] Wee & Tjio op cit note 100 at 15.
[105] Ibid at 14.
[106] Mark Lee 'Company in Financial Distress - Liquidation Inevitable? Corporate Rescue Mechanisms in Singapore' available at *www.wmhlaw.com.sg* accessed on 23rd February 2023.
[107] [2012] SGCA 9.
[108] Wan et al op cit note 5 at 2.
[109] Lee op cit note 106.
[110] Supra note 107.
[111] Companies Act op cit note 9 Part VII, s 210(1).
[112] *Pathfinder Strategic Credit v. Empire Capital Resources* SGCA 29 (2019) 50.

statutory provisions, the scheme is not futile and the voting classes are fair.[113] When making an order, the Court will direct the company to submit to it, the company's financial affairs to enable the company's creditors to assess the feasibility of the intended or proposed compromise or arrangement.[114]

In *Wah Yuen Electrical Engineering v Singapore Cables Manufacturers*,[115] the Court of Appeal held that, apart from statutory authority, it is an independent principle of law that the creditors should be put in possession of such information as is necessary to make a meaningful choice.[116] In *TT International (No 2)*,[117] this basic principle on disclosure was expanded slightly so that scheme creditors are rightfully entitled to expect to receive accurate information which would allow them to make a holistic assessment as to whether the proposed scheme manager and/or the proposed terms of the scheme are appropriate for the Company both in the short and long run.[118] While the disclosure standard is less stringent than at the subsequent 'sanction' stage, inadequate disclosure may lead to denial.[119] A finalised restructuring plan isn't mandatory at the 'leave' stage, a proposal with 'sufficient particulars' suffices.[120]

After obtaining the requisite orders to convene the meetings, the law requires disclosure of a statement explaining the effect of the proposal on the parties concerned as well as disclosure of any material interest the directors may have in the scheme to accompany any notice inviting shareholders and/or creditors to meetings.[121] The disclosure requirements lack specific guidance and subsidiary legislation.[122] Therefore, courts apply principles ranging from 'full information' to 'all information reasonably necessary'[123] to ensure creditors have sufficient information.[124] Practitioners argue that demanding 'full' disclosure is impractical and may hinder companies from implementing schemes due to the associated time and expenses.[125] *Re Pheon Pty Ltd* emphasises the company's duty for 'full and fair disclosure of all material facts known to them or reasonably accessible.'[126] Even with deficient disclosure, the court may

[113] IRDA op cit note 2 s 64 (4).
[114] Ibid s 64(6)
[115] [2003] SGCA 23, [2003] 3 SLR 629.
[116] Supra note 115 at 24.
[117] *The Royal Bank of Scotland NV v TT International Ltd (No 2)* [2012] SGCA 53, [2012] 4 SLR 1182.
[118] Supra note 117 at 21.
[119] Wai Yee Wan, Casey Watters & Gerard Mccormack 'Schemes of Arrangement in Singapore: Empirical and Comparative Analyses' (2020) 94 (3) *American Bankruptcy Law Journal* 1 at 40.
[120] Ibid.
[121] Companies Act op cit note 9 Part VII, s 211 (1).
[122] Chan op cit note 33; 1 at 39.
[123] *Re Halley's Department Store Pte Ltd* [1996] 2 S.L.R. 70 at para 13.
[124] Chan op cit note 33; 1 at 39.
[125] Ibid.
[126] (1986) 11 ACLR 142 at 155.

overlook it if it wouldn't have changed a consenting claimant's view.[127] The disclosure requirements under Schemes are extensive and potentially onerous based on the proposed scheme's timing.[128]

Upon High Court approval, a date is set for the Scheme meeting.[129] This meeting is the initial safeguard before judicial review and scheme sanctioning.[130] The company must provide 'sufficient information' for meaningful creditor votes at the meeting.[131] Singapore case law has held that an informed voting process can only take place if all material information a creditor might need to determine how to vote is made available.[132] Failure to disclose may lead to court refusal to sanction the scheme.[133] The meeting(s) that are summoned are required to approve the proposal by a majority in number representing three-fourths in value of the creditors present and voting.[134] Where there are related-party creditors, the question arises in respect of how their votes should be treated. Case law has held that the votes of creditors related to the company may be discounted by the court as their interests (as distinct from rights) may differ from ordinary, independent, and objective creditors of the same class.[135] There is a real risk that an approach that wholly discounts related party creditors' votes purely because of their relationship with the company may end up impeding effective restructurings.[136]

An approved Scheme is legally binding on liquidators, contributories, creditors, members, and shareholders.[137] Companies can apply to the court for an order to cram-down the dissenting class. Thus, the Scheme will be approved despite the objections of the dissenting class.[138] A company applying for cram-down must first show that a majority in number of creditors representing three-fourths in value, and who were present and voting, have agreed to be bound by the scheme.[139] The high approval threshold for the cram-down has set a high bar for cram-down to be exercised.[140] Secondly, the Scheme must not discriminate unfairly between two or more classes of creditors.[141] It must also be fair and equitable to each dissenting

[127] In *Re Heron International NV* [1994] 1 BCLC 667 at 673.
[128] Chan op cit note 33 at 41.
[129] Companies Act op cit note 9 Part VII s 211 (1).
[130] Wan et al op cit note 5 at 40.
[131] *Pathfinder Strategic Credit v. Empire Capital Resources* [2019] SGCA 29 at 47.
[132] Supra note 107 para 77.
[133] *Wah Yuen Electrical Engineering v Singapore Cables Manufacturers* [2003] 3 SLR 629 at 638.
[134] Companies Act op cit note 9 Part VII s 210(3AA).
[135] Supra note 107 at 26.
[136] Chan op cit note 33 at 7.
[137] Companies Act op cit note 9 Part VII s 210(3AA).
[138] IRDA op cit note 2 Part 5 s 70.
[139] Ibid Part 5 s 70(3)(a)(b); Companies Amendment Act 2017 s 211H (3)(a)(b).
[140] Companies Amendment Act 2017 s 211H.
[141] IRDA op cit note 2 Part 5 s 70(3)(c); op cit note 140 s 211H (3)(c).

class.[142] While the companies' legislation does not explicitly define 'fair and equitable', generally a plan can only be found fair and equitable for a dissenting class if two requirements are met.

First, the best interests of the creditors test requires that creditors in the dissenting class receive at least what they would in liquidation.[143] Additionally; the absolute priority rule which ensures that the dissenting classes receive full payment of their claims before any allocation to subordinate classes of creditors.[144] Together, these tests protect dissenting creditors and ensure that they are not disadvantaged by the adoption of the restructuring plan while simultaneously permitting the sanctioning of a scheme over the objections of a minority of creditors.[145] The availability of cram-down limits the ability of a creditor to hold out for better treatment and also permits viable businesses to re-organise even if a few creditors object strenuously.[146] Notably, there has been no reported case and no known case of cram down of dissenting creditors since the hybrid scheme was introduced.[147] Singapore followed the robust approach to classification of creditors enunciated by the English Court of Appeal in *Re Hawk Insurance Co Ltd*,[148] which was designed to prevent the minority holdup of deserving schemes.[149]

If approved at the meeting(s), a second application will be filed for a court sanction of the scheme,[150] subject to conditions.[151] Court sanction will depend on whether there was proper adherence to the statutory procedure; the meetings being truly representative of the interests they are supposed to reflect; and whether the proposal is one recognised as a proper arrangement or reconstruction with a commercial purpose.[152] The Court may approve the scheme, in the absence of a creditors meeting.[153]

The management of the company remains in control and drives the reorganisation and negotiations of a scheme,[154] which encourages earlier intervention, and mitigates stigma.[155] A company can apply for a moratorium when a scheme is proposed between the company and its

[142] IRDA op cit note 2 Part 5 s 70(3)(d); Companies Amendment Act op cit note 140 s 211H (3)(c).
[143] Companies Amendment Act op cit note 140 s 211H (4)(a).
[144] Ibid s 211H (4)(b).
[145] Wan op cit note 5 at 18.
[146] Wee & Tjio op cit note 100 at 18.
[147] Ibid.
[148] [2001] EWCA Civ 241; [2001] 2 BCLC 480, (23)-(52); ibid.
[149] Ibid.
[150] Companies Act op cit note 9 Part VII s 210(3AB)(c).
[151] Ibid Part VII s 210(4).
[152] Watters et al op cit note 8 at 5.
[153] IRDA op cit note 2 Part 5 s 71(1); Companies Amendment Act op cit note 140 s 211I(1).
[154] Chan op cit note 33 at 4.
[155] Ibid at 10.

creditors[156] or where it intends to propose a scheme.[157] Certain pre-conditions must be met for a moratorium to be granted, including providing; notice of such an application,[158] evidence of creditor support,[159] and a brief description of the intended SA.[160] Respectfully, the statutory requirement is challenging to understand and apply.[161] In *IM Skaugen*,[162] the High Court held that the test for evidence of creditor support is whether on a broad assessment, there was a reasonable prospect of the proposed or intended scheme working and being acceptable to the general run of creditors, and that the court should refrain from undertaking a vote count.[163] This interpretation avoids the difficulty and pitfalls of securing creditor support at a very early stage when things may be very unstable and evolving rapidly by effectively transferring the decision to the court. However, it raises questions about the court's ability to determine the scheme's feasibility and acceptability to creditors at large.[164]

An automatic 30-day moratorium comes into force from the date of the company's application for a moratorium or until the application is decided by the court, whichever is earlier.[165] A moratorium order restrains the passing of a winding up resolution,[166] the appointment of a receiver or manager;[167] the commencement or continuation of any legal proceedings,[168] the issuance, continuation, or execution of any enforcement order;[169] enforcement of security,[170] repossession of goods held by the related company,[171] enforcement of any right of re-entry or forfeiture.[172] The hybrid scheme, however, presents a dilemma. While it can be exploited by companies to the detriment of unsecured creditors, secured creditors can prevent access by appointing a receiver before the company applies for a moratorium.[173] A company in receivership cannot enter into a scheme with creditors. IRDA lacks an explicit requirement to notify secured creditors before a moratorium application,

[156] IRDA op cit note 2 Part 5 s 64(4), (8).
[157] Companies Act op cit note 9 Part VII s 210(10); op cit note 2 Part 5 s 64 generally.
[158] IRDA op cit note 2 Part 5 s 64 *(3*).
[159] Ibid Part 5 s 64 *(4)(a)*.
[160] Ibid Part 5 s 64 *(4)(b)*.
[161] Ibid Part 5 s *64(4)(b)*.
[162] *IM Skaugen SE and Other Matters* [2018] SGHC 259; [2019] 3 SLR 979.
[163] Supra note 162.
[164] Wee & Tjio op cit note 100 at 16.
[165] IRDA op cit note 2 Part 5 s *64(14)*.
[166] Ibid Part 5 s *64(1)(a)*.
[167] Ibid Part 5 s *64(1)(b)*.
[168] Ibid Part 5 s *64(1)(c)*.
[169] Ibid Part 5 s *64(1)(d)*.
[170] Ibid Part 5 s *64 (1)(e)*.
[171] Ibid Part 5, s *64(1)(e)*.
[172] Ibid Part 5 s *64 (1)(f)*.
[173] Wee & Tjio op cit note 100 at 17.

potentially leading to hasty receiver appointments.[174] The tension between the hybrid scheme and the receivership illustrates Singapore's dilemma.[175]

If the application is successful, the automatic moratorium will be replaced with a court-ordered moratorium whose scope may extend as far as the automatic moratorium,[176] and which is extendable on application multiple times without any statutory limit on the totality of its duration.[177] In the case of *Hyflux Limited*, the Court granted a moratorium for more than 2 years before creditors applied to place the company into judicial management.[178] There is evidence that Singapore courts have been prepared to make blanket stay orders of all present and future proceedings against the company whilst the Scheme is being put together for consideration by the various classes of creditors.[179] This is crucial in allowing management to focus on negotiations with creditors and shareholders, without being bogged down resisting enforcement, repossession or winding up proceedings as and when they emerge.[180] The protection currently offered by IRDA's statutory provisions to creditors appears relatively weak and insufficient, but there is scope for judicial development of measures to protect the creditors.[181] For example, a creditor is required to apply to the court to restrain the company from disposing of its property other than in good faith and the ordinary course of the company's business.[182] This will increase the costs of the hybrid scheme, but such costs may be unavoidable and well-spent in deserving cases.[183]

Another key feature of the moratorium is its ability to facilitate group restructurings. Where an order for a moratorium has been made concerning a company, its subsidiaries or holding company may also apply for similar moratoria to be made to facilitate group restructuring efforts.[184] Indeed, the Singapore High Court in *Re IM Skaugen SE and other matters* recognised the importance of making available moratorium relief to related companies of the applicant if those companies play a necessary and integral role in the compromise of the applicant.[185] The applicant must also prove that if the moratorium is not granted, the

[174] Ibid.
[175] Ibid.
[176] IRDA op cit note 2 Part 5, s 64(1).
[177] Ibid Part 5, s 64(7).
[178] Anna Maria Romero 'High Court approves Hyflux liquidation; 34,000 retail investors likely to walk away empty-handed' available at *https://theindependent.sg/high-court-approves-hyflux-liquidation-34000-retail-investors-likely-to-walk-away-empty-handed/* accessed on 20 May 2023.
[179] Chan op cit note 33; 1 at 5 see also *Re Econ Corp Ltd* [2004] 1 SLR 273 at para.
[180] Ibid.
[181] Wee & Tjio op cit note 100 at 16.
[182] IRDA op cit note 2 Part 5 s 66(1)(a).
[183] Wee & Tjio op cit note 100 at 16.
[184] IRDA op cit note 2 Part 5, s 65.
[185] Supra note 162 at [63]; op cit note 2 Part 5 s *65(2)(c)*.

compromise or arrangement will be frustrated.[186] The court must ensure creditors of the related company are not unfairly prejudiced by the order.[187] The provision was deemed necessary as the result of the complexity resulting from insolvent members of corporate groups and the risk a restructuring could 'potentially be frustrated if creditors can take action against related corporate entities that are a necessary and integral part of the restructuring plan'.[188] The requirement that a related company play an integral part of the plan will require clarification in subsequent case law and it is unclear why related companies seeking protection via a moratorium are not themselves required to propose a scheme.[189]

However, the approach is consistent with other jurisdictions extending the stay if the insolvent entity, as a co-defendant, would be a necessary party in litigation or where the failure to extend the moratorium would have an 'immediate adverse economic impact' on the debtor.[190] It may therefore be possible for foreign entities of a group to seek moratorium orders in Singapore as part of the group restructuring efforts and then seek to enforce them in their own jurisdiction, with Singapore recognised as the foreign main proceeding.[191] In an unreported decision, the UK's High Court of Justice Business and Property Courts of England and Wales recognised the moratorium granted by the Singaporean court to H&C S Holdings Pte Ltd as a foreign main proceeding under the UNCITRAL Model Law.[192]

The moratorium also has some extraterritorial effect and allows the Singapore Courts to restrain the commencement of proceedings in foreign jurisdictions as long as the Singapore Court has *in personam* jurisdiction over the party seeking to be enjoined.[193] A foreign company must demonstrate a 'substantial connection with Singapore.' Examples include having assets or substantial business in Singapore, using Singapore law for business transactions, submitting to the jurisdiction of Singapore Courts for business disputes, or having Singapore as the company's center of main interests (COMI).[194]

The list of factors is inexhaustive and are potentially broad enough to allow a wide variety of foreign companies to rely on these provisions as long as they have some commercial

[186] IRDA op cit note 2 Part 5 s *65(2)(d)*.
[187] Ibid Part 5, s *65(2)(e)*.
[188] Watters et al op cit note 8 at 14.
[189] Ibid.
[190] Wan et al op cit note 5 at 14.
[191] Ajinderpal Singh & Lynn P. Harrison III 'Singapore's new insolvency law:a status report on the progress of the new regime' *https://dentons.rodyk.com/en/insights/alerts/2021/june/23/singapore-new-insolvency-law-a-status-report-on-the-progress-of-the-new-regime* accessed 30 June 2023.
[192] Ibid.
[193] Ibid.
[194] IRDA op cit note 2 Part 5 s *246(3)*.

nexus to Singapore.[195] By showing a substantial connection to Singapore, the foreign company can then take advantage of Singapore's debtor-friendly restructuring laws, potentially the most attractive being the automatic and potentially global moratorium (that can be extended by order of the court) that gives a distressed company breathing space to strategise and negotiate a restructuring with its creditors.[196] In the case of *Re PT MNC Investama TBK,*[197] the Singapore High Court held that an Indonesian company listed on the Indonesian stock exchange had the requisite standing to apply for an extension of a moratorium. The High Court found that the fact that the company's debts were traded on the Singapore Stock Exchange indicated a substantial connection with Singapore.[198] It indicated that the company had substantial business activity in Singapore that was not merely transient.[199] The fact that it was subject to Singapore's regulations or laws in the listing of its securities was also a strong indicator of a company's substantial connection to Singapore.[200]

However, that the decision leaves the door open for foreign companies to argue in future cases that the 'substantial connection' test is satisfied based on many of the other criteria used in other jurisdictions.[201] A wider jurisdictional ambit for foreign companies to avail themselves of the court-supervised restructuring regime in Singapore would accord with Singapore's stated goal of becoming a restructuring hub.[202] Nevertheless, it would appear that the Singapore Court will still require, at minimum, companies to be involved in activities of some degree of permanence in Singapore.[203]

The IRDA introduced pre-packaged schemes, which in theory, 'reduce the administrative costs of undertaking a scheme by streamlining the process, including removing the formal meeting of creditors that is called by the court.'[204] The court, however, must be satisfied that if a meeting is called, the requisite number of creditors would have approved the scheme.[205] The statutory language does not specify how the company must meet the burden of satisfying the court, and there is no doubt that the gap will be filled by case law. Some guidance

[195] Singh op cit note 191.
[196] Morgan Lewis Singapore's Restructuring and Insolvency Regime Is a Tool for Local and International Companies available at *https://www.morganlewis.com/pubs/2022/08/singapores-restructuring-and-insolvency-regime-is-a-tool-for-local-and-international-companies* accessed 30 June 2023.
[197] *Re PT MNC Investama* TBK [2020] SGHC 149.
[198] Supra note 197 para 7 at 3.
[199] Supra note 197 para 13, pages 5-6.
[200] Supra note 197 para 13, page 6.
[201] Tan et al op cit note 87.
[202] Ibid.
[203] Ibid.
[204] Watters et al op cit note 8 at 7
[205] Companies Amendment Act op cit note 140 s 211I.

can be seen from the cases.[206] In January 2018, the Singapore High Court sanctioned the nation's first pre-packaged scheme.[207] A second pre-pack was approved in April 2019.[208] In the former case, the company did not hold a creditors' meeting but required the creditors to return the ballot forms. In the latter case, the creditors voted at the relevant creditors' meetings (which were not court-ordered meetings that would be otherwise required for non-pre-pack schemes), which would have compressed the time-table for the pre-pack to take effect.[209] Singapore had preferred to follow the US approach to pre-packs, rather than the UK, in requiring court approval. This was on the ground of the greater protection afforded to dissenting creditors.[210] As such, the court should approach Singapore's pre-packs with a higher level of scrutiny to ensure the rights of minority creditors are protected.[211] This approach is important in reducing the costs associated with a scheme of arrangements, both to preserve value and potentially to make schemes a viable option for medium-sized enterprises that otherwise may not avail themselves of the option.[212]

Companies under a Scheme can obtain rescue financing also often referred to as super-priority financing similar to that under JM.[213] The IRDA restricts certain contractual rights triggered during restructuring, like ipso facto clauses, similar to that under JM.[214] The duration of the scheme depends on its complexity and terms.[215] Upon conclusion, the debtor company typically either continues to run its business as a going concern or is wound up under the terms of the Scheme.[216] Following amendments to the scheme by infusing elements of US Chapter 11 into the English scheme established a hybrid model that has greatly improved Singapore's legal framework for restructuring. The central role of the judiciary reduces the risk that parties will abuse the legal tools while permitting flexible standards.[217] However, the flexibility that is a benefit of the hybrid system has led to unclear standards that have been a source of criticism.[218]

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[206] Wan et al p cit note 5 at 20.
[207] Ibid.
[208] Ibid; *Tan v. TT International* SGCA 69 (2018).
[209] Wan et al op cit note 5 at 20-21.
[210] Ibid at 21.
[211] Watters et al op cit note 8 at 7.
[212] Ibid at 7.
[213] IRDA op cit note 2 s 99(4) & First schedule (c), 101(1)(c) (d).
[214] Ibid Part 22 s 440.
[215] Angelia Thng & Esther Lim, Braddell Brothers LLP 'Restructuring and Insolvency in Singapore: Overview' available at *https://uk.practicallaw.thomsonreuters.com/w-010-9476* accessed on 23rd February 2023.
[216] Ibid.
[217] Watters et al op cit note 8 at 7.
[218] Ibid.

4.4.3 SIMPLIFIED DEBT RESTRUCTURING PROGRAMME

The rescue procedures of JM and schemes are designed for companies with substantial assets, hence not suitable for distressed micro and small companies (MSCs). Singapore adopted a Simplified Debt Restructuring Programme (SDRP) to temporarily assist MSCs in restructuring their debts to rehabilitate their business, especially in the COVID-19 pandemic aftermath.[219] It offers a streamlined process for eligible companies to restructure their debts through a compromise or arrangement with creditors.[220]

To qualify for SDRP, a company must meet specific eligibility criteria.[221] These include an annual sales turnover under $10 million, fewer than 30 employees, and no more than 50 creditors, with total liabilities not exceeding $2 million.[222] Additionally, the company must not presently be undergoing winding up or judicial management, pending legal applications, or requiring significant resources for administration, have one-third in value or more of its creditors object to the SDRP, existing provisional liquidators, or the presence of a trustee for debenture holders.[223] The company must make an online application to the Official Receiver (hereafter OR) to be accepted into the SDRP.[224] The OR may appoint a qualified person[225] who consents to the appointment[226] as a Restructuring Advisor to assist the company throughout the SDRP process.[227] If the company's application to enter the SDRP is successful, the company will be notified of its acceptance into the SDRP.[228] The company will then be required to pay a deposit of $18,750 to be used to cover the costs incurred by the OR in appointing and paying Restructuring Advisors to act for the company.[229]

While a company is in the SDRP, it is protected by a moratorium which, inter alia, restrains the commencement of proceedings against the company, the appointment of a receiver or manager over any property or undertaking of the company, and the enforcement of security over any property of the company, except with leave of court.[230] However, creditors may still

[219] Ministry of Law 'Simplified Insolvency Programme to be Revamped and Made Permanent to Support Financially Distressed Companies' available at *https://www.mlaw.gov.sg/simplified-insolvency- programme-revamped-and-made-permanent-to-support-financially-distressed-companies/* accessed on 26 January 2025.
[220] IRDA op cit note 2 Part 5A s 72C.
[221] Ibid Part 5A s 72F (1).
[222] Ibid Part 5A s 72F (2).
[223] Ibid Part 5A s 72F (3).
[224] Ministry of law op cit note 219.
[225] IRDA op cit note 2 Part 5A s 72D (7).
[226] Ibid Part 5A s 72D (2) (4).
[227] Ibid Part 5A s 72D (2).
[228] Ibid Part 5A s 72J.
[229] Ibid Part 5A ss 72G (6), 72I (1) (2).
[230] Ibid Part 5A s 72K (1).

enforce their right to set off what they owe the company against what the company owes them.[231] To enjoy the benefits of the SDRP, the company must apply for the approval of a pre-packaged scheme of arrangement.[232] Once the scheme is approved, it will be lodged with the Accounting and Corporate Regulatory Authority (ACRA) and will be binding on all the company's creditors.[233] If the court finds a breach of any term of a compromise or an arrangement, it may reverse actions, issue corrections, or modify decisions upon application by the company or affected creditors.[234]

A company is discharged from the simplified debt restructuring programme at the expiry of 90 days after the day that the notice of acceptance was issued.[235] A company can request an extension of its discharge period by submitting a form to the OR.[236] The OR may grant a one-time extension, not exceeding 30 days beyond the default period's end, or longer if justified, but only if requested before the default period expires.[237] After granting an extension, the company is discharged at the end of both the default period and the extension.[238] At this point, the moratorium on legal proceedings ends. Once a company is admitted into the SDRP, debtors enjoy a simplified restructuring procedure which is mainly based on the pre-pack scheme existing under the IRDA.[239] Since the pre-pack scheme only requires one court application to sanction the scheme, the use of this mechanism provides MSCs with a more affordable and expedited restructuring procedure.[240]

The SDRP is more flexible than the pre-pack scheme in so far as a reorganisation plan can be approved with a majority of at least two-thirds in value of creditors (a pre-pack scheme requires a majority in number and 75% in value).[241] It also provides additional protection for creditors through the mandatory appointment of a restructuring advisor to monitor the procedure and formulate the reorganisation plan.[242] The fact that the remuneration of insolvency practitioners is partially subsidised by the Government under the SIP is something relatively unique among the insolvency responses to MSMEs observed around the world.[243]

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[231] Ibid Part 5A s 72K (2).
[232] Ibid Part 5A s 72M.
[233] Ibid Part 5A s 72M including those that did not consent to the scheme.
[234] Ibid Part 5A s 72P (2).
[235] Ibid Part 5A s 72Q (1).
[236] Ibid Part 5A s 72Q (2).
[237] Ibid Part 5A s 72Q (3).
[238] Ibid Part 5A s 72Q (4).
[239] Aurelio Gurrea Martinez & Dr Kai Luck 'Developments in Singapore's Insolvency & Restructuring Regime' (2021) *Australian Restructuring Insolvency & Turnaround Association Journal* 18 at 20.
[240] Ibid.
[241] Ibid.
[242] Ibid.
[243] 'Developments in Singapore's Insolvency & Restructuring Regime' op cit note 239 at at 21.

This is critical to incentivise appointments where there are few assets available for distribution – an issue that remains problematic in many other jurisdictions.[244] The adoption of the SIP has been very well received by the legal and business industry. As at 25 October 2024, a total of 116 applications for the existing SIP were submitted, and 77 of these were accepted. Of these, 60 MSCs in severe financial distress were successfully assisted. The existing SIP is set to cease on 28 January 2026. In an effort to bolster Singapore's insolvency framework and support for financially distressed companies, the Ministry of Law introduced the Insolvency, Restructuring and Dissolution (Amendment) Bill ("Bill") in Parliament to permanently integrate this scheme into the IRDA.[245]

This section has shown that Singapore has developed a reputation as a leading restructuring hub due to several factors, including an attractive insolvency framework, a sophisticated judiciary, a qualified body of insolvency professionals, and a close collaboration between regulators, academics, and industry.[246] Singapore has done reasonably well in the insolvency system, which ranks at 74.3 on insolvency distance to frontier, and recovery rates for secured creditors are at 88.7 cents to the dollar which is one of the highest in the world.[247] In particular, the 2017 reforms were regarded as making it a more conducive place to do business, judging from the emphasis in the World Bank report.[248] It was ranked 2nd out of 190 economies with a score of 86.2.[249]

4.5 SOUTH AFRICA

South Africa embraced corporate rescue through judicial management in 1926.[1] Realising the need for reform in 1982, it benchmarked from the UK and US regimes[2] to align with modern international corporate rescue trends.[3] In August 2005, drafting began, and a Bill was published in April 2006 for public comment. This culminated in the Companies Bill 2008, adopted on 19

[244] Ibid.
[245] Ministry of Law 'Simplified Insolvency Programme to be Revamped and Made Permanent to Support Financially Distressed Companies' available at *https://www.mlaw.gov.sg/simplified-insolvency- programme-revamped-and-made-permanent-to-support-financially-distressed-companies/* accessed on 26 January 2025
[246] Op cit note 239 at 18.
[247] Wan et al op cit note 5 at 11.
[248] Ibid at 12.
[249] World Bank, Doing Business 2020, available at *http://www.doingbusiness.org/en/reforms/overview/economy/singapore* (Mar. 21 2020). Doing business 2020 worldbank group at page 4.
[1] Eric Levenstein *An Appraisal of the New South African Business Rescue Procedure* (unpublished LLD thesis, University of Pretoria 2015) 261.
[2] Ibid at 268.
[3] Ibid at 261.

November 2008.[4] The Companies Act, assented to by the President on 8 April 2009, became effective on 1 May 2011.[5] Committing a whole chapter to 'business rescue and compromise with creditors,' the Act seeks to efficiently rescue financially distressed companies, balance stakeholders' interests, and prevent the winding up of viable companies.[6] Following the presidential assent, significant amendments were introduced into the Companies Act through the Companies (Amendment) Act 16 of 2024 and the Companies (Second Amendment) Act 17 of 2024, both of which took effect on 27 December 2024. The provisions of chapter 6 remain unchanged save for providing for post-commencement finance for unpaid amounts that are due to the landlord during business rescue proceedings.[7]

4.5.1 BUSINESS RESCUE

Business rescue (hereafter BR) are proceedings to facilitate the rehabilitation of a financially distressed company.[8] The Act does not define what 'rehabilitation' means,[9] with some scholars arguing that this creates vagueness.[10] The primary objective of business rescue is to return the company to solvency and in the alternative, guarantee creditors and shareholders a better return than liquidation.[11] In *Oakdene Square Properties (Pty) Ltd, Educated Risk Investments 54 (Pty) Ltd, Dimetrys Theodosiou And Antonys Theodosiou V Farm Bothasfontein (Kyalami) (Pty) Ltd, Nedbank Limited And Imperial Holdings Limited*, Brand JA emphasised that business rescue means to facilitate 'rehabilitation' and achieving either goal under section 128(1)(b) of the Act qualifies as a business rescue.[12] Business rescue proceedings exclusively apply to companies and close corporations, it does not cover partnerships, trusts, and sole proprietorships.[13] The procedure designed with companies in mind should be limited to

[4] Tshepo Mongalo *Modern Company Law for a Competitive SAn Economy* (2010) xxiv.
[5] Waiswa Abudu Sallam *An Evaluation of the Strengths and Weaknesses of South Africa's Corporate Rescue Regime as a Potential Benchmark for Uganda* (unpublished PHD thesis, University of South Africa 2022) 174.
[6] Richard Bradstreet 'The Leak in the Chapter 6 Lifeboat: inadequate regulation of business rescue practitioners may adversely affect lenders' willingness and the growth of the economy' (2010) 22 *South African Mercantile Law Journal* 195 at 198.
[7] Companies Amendment Act 2024 Act No. 16 of 2024 s 135(1A) inserted by s 17(a) of Act 16 of 2024.
[8] Companies Act 71 of 2008 s 128 (1) (b).
[9] Piet A Delport *Henochsberg on the Companies Act 71 of 2008* (2016) 449.
[10] Levenstein op cit note 1 283.
[11] Companies Act o cit note 8 s 1281(b) *(ii) (iii).*
[12] 2013 (4) SA 539 (SCA) para 26.
[13] Companies Act op cit note 8 Part B, s 8 and s 1.

companies to avoid using a far too onerous, complicated, and expensive method for close corporations.[14]

Business rescue can be initiated voluntarily, through a board resolution, or compulsorily through a court order obtained by any affected parties.[15] Voluntary commencement enables a company's board to resolve to initiate business rescue[16] without shareholder approval.[17] This offers a fast and cost-effective process, [18] minimising delays and costs[19] and providing protection and crucial breathing space for rescue efforts.[20] The rationale for this voluntary route is that 'the board of a company is best placed to know when a company is financially distressed and best equipped to timeously pass a resolution to place it under business rescue.'[21] Granting shareholders such powers is unnecessary as it is time-consuming and publicises the company's financial situation before moratorium protection.[22]

After adopting a resolution placing it under business rescue, the company must within five business days publish a notice of it accompanied by an affidavit detailing the grounds of the resolution[23] to all affected persons.[24] In *Griessel Quintin Jaco and Zeman, Ronald Frank v Lizemore, Edward Henry, Schlechter, Matheus Johannes, Mining And Slurry Technologies (Pty) Ltd, and The Companies And Intellectual Property Commission*,[25] Spilg J held that 'there must be a legitimate business purpose before deciding to place a company under business rescue.'[26] Failure to comply with this procedure nullifies the resolution.[27] This is crucial as it enables affected persons to continuously monitor directors' conduct and ensure compliance with the Act,[28] and gives the board the necessary incentive to ensure that the practitioner complies with this duty.[29]

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[14] Anneli Loubser *Some Comparative Aspects of Corporate Rescue in South African Company Law* (Unpublished LLD thesis, University of South Africa, 2010) 335. This is because there is a rescue procedure available to close corporations in the Close Corporations Act itself.
[15] Companies Act op cit note 8 ss 129 and 131 respectively.
[16] Ibid s 129.
[17] Zolani P Buba *the Balancing of Creditor Interests in Business Rescue Provisions of the Companies Act 2008* (Unpublished PhD thesis University of Cape Town 2017) 82.
[18] Companies Act op cit note 8 s 129(1).
[19] Farouk Cassim, Moleka, Femido Cassim, Rehono Cassim, Richard Jooste, Joanne Shev & Jacqueline Yeats *Contemporary Company Law* 2 ed (2011) 866.
[20] Loubser op cit note 14 at 51.
[21] Waiswa op cit note 5 at 183.
[22] Loubser op cit note 14 at 50.
[23] Companies Act op cit note 8 s 129(3)(a).
[24] Ibid s 129(3)(a).
[25] 2015/24751[2015] ZAGPJHC.
[26] Supra at para 83 at 33.
[27] Companies Act op cit note 8 s 129(5)(a).
[28] Clement Marumoagae 'The Rights of Affected Persons as Stakeholders during Business Rescue Proceedings in South Africa' (2018) 4 (2) *Journal of Corporate and Commercial Law & Practice* 117 at 131.
[29] Loubser op cit note 14 at 342.

A resolution can be set aside by a court order initiated by an affected party before a rescue plan is adopted.[30] Giving affected persons this power for almost the entire duration of the procedure is unnecessary since the business rescue practitioner can terminate the procedure where rescue is not possible.[31] Court may set aside the resolution on specific grounds[32] including where it is just and equitable to do so.[33] This just and equitable ground creates a significant degree of uncertainty[34] as different courts are influenced by different aspects and any factor, even one unrelated to the procedure itself, could lead a court to this view.[35] A court should not have the power to terminate the rescue proceedings at an early stage, on the application of any affected party even though the practitioner believes that it may succeed.[36]

Any affected party, including shareholders, creditors, trade unions, or employees, can initiate business rescue proceedings through a court application.[37] This is in line with the international best practice and recommendations by leading international bodies such as UNCITRAL[38] and IMF,[39] which emphasise that 'a good rescue system should allow the rescue procedure to be kick-started by many stakeholders, not just the debtor(s).'[40] On the other hand, the number of persons to apply for a business rescue order seems unduly high, raising possibilities for abuse.[41] The company and its directors are not authorised to make such applications.[42] To be eligible to maintain an application as an affected person, one needs 'to prove that he or she is either a shareholder, creditor, or trade union representing a group of company employees or a single employee who may not be a member of a trade union.'[43] The Act neither defines who qualifies as a creditor leaving the floodgates worryingly open, with the risk that a frivolous person can make up evidence and file an application for business rescue for no legitimate reasons.[44]

[30] Companies Act op cit note 8 s 130(1).
[31] Loubser op cit note 14 at 344.
[32] Companies Act op cit note 8 s 130(1).
[33] Ibid s 130(5).
[34] Loubser op cit note 14 at 345.
[35] Ibid at 345.
[36] Ibid at 345.
[37] Companies Act op cit note 8 s 131 (1) and s 128 (1) (a)
[38] Ibid s 131 of the Companies Act 2008. UNCITRAL, Legislative Guide on Insolvency 2005; available at *https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/05-80722_ebook.pdf* at 64 recommendation 14 accessed on 29 March 2023.
[39] Bradstreet op cit note 6 at 393.
[40] Ibid.
[41] Loubser op cit note 14 at 336.
[42] Companies Act op cit note 8 s 128(1)(a).
[43] Ibid s 128(1)(a).
[44] Bradstreet op cit note 6 at 187.

The applicant must serve a copy of the application on the company, the Commission, and notify each affected person,[45] who has a right to participate in the hearing of an application.[46] This creates an unnecessary complication since 'the court should be able to decide the matter on the evidence provided by the applicant, the directors, and, in particular, the practitioner who should provide an independent and professional opinion.'[47] Notification to every affected person leads to dire consequences for the company with creditors taking enforcement action against the company while it is still possible for it to be rescued since the moratorium is not yet in effect.[48] This not only dwindles the company's assets but limits its access to capital making it impossible to continue running its business.[49] After hearing an application, the court may make an order commencing business rescue proceedings,[50] dismiss the application, or order liquidation.[51]

BR can be initiated first where the company is financially distressed.[52] Additionally, where there appears to be a reasonable prospect of rescuing the company,[53] the company has failed to pay its obligations;[54] or where it is otherwise just and equitable to do so for financial reasons.[55] A company is financially distressed if it's unlikely to pay debts within six months[56] or is expected to become insolvent within six months.[57] The first leg of this test appears to be factually based, placing the company's directors, having access to the financial records, in a better position to decide whether the company is financially distressed.[58] An affected person can apply to court to set aside the directors' resolution where they can demonstrate that the directors' prediction about the company's ability to pay its debts is not factually based.[59] However, this may not be easy since the affected persons do not have access to the financial records of the company.[60]

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[45] Companies Act op cit note 8 s 131 (2).
[46] Ibid s 131(3).
[47] Loubser op cit note 14 at 70.
[48] Ibid at 77-78.
[49] Ibid at 78.
[50] Companies Act p cit note 8 s131 (4) (a) if the court is satisfied that— (i) the company is financially distressed; (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company
[51] Ibid s131 (4) (b).
[52] Ibid s129 (1) (a) by board resolution & s131 (4) (a) *(i)* by order of court.
[53] Ibid s129 (1) (b) by board resolution & Companies Act s 131 (4) (a) *(iii)* by order of court.
[54] Ibid s131 (4) (a) *(ii)* under public regulation, or contract, or with respect to employment-related matters.
[55] Ibid s131 (4) (a) *(iii).*
[56] Ibid s 128(1)(f)*(i)*; see also Waiswa op cit note 5 at 52.
[57] Ibid s 128(1)(f)*(ii).*
[58] Marumoagae op cit note 28 at 128.
[59] Ibid at 129.
[60] Ibid.

The second leg of the test deals with insolvency, and it is not clear whether the legislature had factual or commercial insolvency in mind.[61] Initiating proceedings at the first signs of financial trouble is crucial for a successful rescue.[62] Business rescue, as emphasised by Tsoka J in *Anthonie Welman v Marcelle Props 193 CC and Investec Bank*, is designed for ailing corporations that can potentially recover.[63] A period of six months is 'too short to protect a company from a financial risk or impending crisis that is foreseeable more than six months before its occurrence.'[64] In other jurisdictions with a comparable requirement, no future period is specified but as this has led to uncertainty, a specified period is probably preferable.[65] Since the financial planning of a company is annual, a period of 12 months seems more appropriate.[66]

Business rescue proceedings can be initiated secondly where there seems to be a reasonable prospect of rescuing the company. The phrase 'reasonable prospect' is not defined in the Act, despite it being central to the interpretation and understanding of various provisions in chapter 6 of the 2008 Act.[67] This effectively makes the decision to place the company under business rescue vulnerable to judicial review.[68] The board is expected to 'have reasonable grounds for believing and the court must be satisfied that there is a reasonable prospect that the company can be rescued if placed under business rescue.'[69] A mere speculative suggestion is not enough. In *African Banking Corporation of Botswana Ltd V Kariba Furniture Manufacturers (Pty) Ltd, and others*, the Supreme Court of Appeal in SA stated that 'directors voting in favour of a business rescue must truly believe that the prospects of rescue exist, and such a belief must be based on a concrete foundation.'[70] Therefore, if the prospect of rescuing the company is not based on reasonable grounds, not only can there be an objection to the proposed business rescue but also an application to set aside the decision to place the company under business rescue.[71] Caution must, therefore, be exercised before presenting an application for business rescue, especially because an unsuccessful application has the potential of leading

[61] Ibid.
[62] R M Goode *Principles of Corporate Insolvency Law* 4 ed (2011) 248.
[63] 339558/2011 [2012] ZAGPJHC para 28.
[64] Loubser op cit note 14 at 58.
[65] Ibid at 58.
[66] Ibid at 58.
[67] Marumoagae op cit note 28 at 129.
[68] Ibid.
[69] Companies Act op cit note 8 s 129(1)(b).
[70] 228/2014 [2015] ZASCA 69; 2015(5) SA 192(SCA); [2015] 3 ALL SA 10 (SCA) para 30.
[71] Companies Act op cit note 8 s 130(1)(a)(ii) of the 2008 Act.

to the company being placed under liquidation[72] with all its associated implications on all the stakeholders.[73]

Additionally, an application for business rescue can also be filed if a company fails to meet obligations under public regulations or employment contracts,[74] particularly regarding contributions to entities like medical aid funds, pension funds, the SA Revenue Services, and the Workmen's Compensation Fund.[75] The provision addresses situations where cash-strapped companies may withhold these contributions to alleviate their problem.[76] The application can be based on a single default which is harsh.[77] Non-payment must persist for at least three months, with at least two consecutive missed payments before becoming grounds for rescue proceedings.[78]

Furthermore, an application for business rescue can also be filed if 'it is otherwise just and equitable to do so for financial reasons'.[79] The Act does not define this vague ground or the circumstances under which it applies.[80] It has been argued: 'The … words just and equitable are intended to be elastic in their application to allow the courts to intervene to relieve against an injustice or inequity'.[81] It has been argued that this ground should be removed because it is vague, and unclear and will lead to interpretational problems.[82]

The commencement of BR proceedings temporarily protects the company from legal proceedings by its creditors and other claimants.[83] The 'moratorium provided to companies in business rescue in SA is generally extensive and adequate.'[84] It 'protects companies in business rescue against all legal proceedings, including both court proceedings and other quasi-legal proceedings, and also provides immunity in respect of the property of the company against enforcement actions.'[85] Not all actions by creditors of the company, based on existing contracts with the company are covered by the moratorium.[86] This would 'strip creditors of all vestiges

[72] Ibid ss 131(4)(b); 130(5)(a), 130(5)(c)(i).
[73] Cassim et al op cit note 19 at 875.
[74] Companies Act op cit note 8 s 131(4)(a)(ii).
[75] Loubser op cit note14 at 60.
[76] Ibid.
[77] Cassim et al op cit note 19 at 847.
[78] Loubser op cit note 14 at 61 & 338.
[79] Companies Act op cit note 8 s131 (4) (a) (iii).
[80] Loubser op cit note 14 at 61.
[81] Tc Maloka & S Muthugulu-Ugoda 'The Deadlock Principle as a Ground for the Just and Equitable Winding Up of a Solvent Company: Thunder Cats Investments 92 (Pty) Ltd v Nkonjane Economic Prospecting Investment (Pty) Ltd 2014 5 SA 1 (SCA)' 2016 (19) *PER / PELJ* 4.
[82] Loubser op cit note 14 at 338.
[83] Companies Act op cit note 8 s 133(1).
[84] Cassim et al op cit note 19 at 879.
[85] Anthony O Nwafor 'The goal(s) of corporate rescue in company law: A comparative analysis' (2017) 13(2) *Corporate Board: role, duties and composition* 60.
[86] Ibid at 61.

of protection in all contractual relationships with the company during the subsistence of the moratorium.'[87] Exceptions include: set-offs, criminal proceedings,[88] and actions related to the company's property or rights.[89] Indeed, the courts have guided the scope of cover provided under section 133 of the Companies Act.

In *Cloete Murray No and Mabutho Louis Mhlongo No V Firstrand Bank Ltd,* the court emphasised that 'from a linguistic perspective, the protection against enforcement action as envisaged in section 133(1) does not include protection of the company against cancellation of an agreement entered into by the company before the commencement of business rescue.'[90] Tolmay J in *Madodza (Pty) Ltd v ABSA Bank Limited*,[91] stated that 'section 133 requires that for the asset to be protected by the moratorium, it must either be the property of the company or in the lawful possession of the company. Where the property is not in the lawful possession of the company, the practitioner may consent that the owner of the property may exercise his or her rights against the property, or the owner may seek leave of the court to do so.'[92]

It is generally difficult for a third party to obtain release of property that is in possession of the company from the scope of the moratorium due to restrictions on the exercise of rights by third parties against such property.[93] In *Koen v Wedgewood Village Golf and Country Estate (Pty) Ltd,* Binns-Ward J stated that 'the mere institution of business rescue proceedings materially affects the rights of third parties to enforce their rights against the subject company.'[94] Some commentators have labeled these restrictions 'as expropriatory and an affront to the constitutional right to own property.'[95] Although sections 133 and 134 of the Companies Act 2008 might seem to be abrasive to the rights of third parties, they reflect a firm step that was taken to address the negative effects of uncoordinated enforcement actions by creditors and other claimants against the company in business rescue.[96] A third party who feels unfairly impeded can request consent from the practitioner or apply to the court to get back his or her asset,[97] and the practitioner must not unreasonably withhold consent.[98]

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[87] Ibid.
[88] Companies Act op cit note 8 s 133(1) (c) (d).
[89] Ibid s 133(1) (e) (f).
[90] 2015 (3) SA 438 (SCA) para 33.
[91] (2012) ZAGPPHC 165 para 8.
[92] Companies Act op cit note 8 s 134(2).
[93] Bradstreet op cit note 6 at 202-203.
[94] 2012 (2) SA 378 (WCC) para 10.
[95] Nwafor op cit note 85 at 63.
[96] Waiswa op cit note 5 at 204.
[97] Companies Act op cit note 8 s 133(1)(b).
[98] Ibid s 134(2).

A company can obtain financing[99] which is secured by unencumbered company assets.[100] Some scholars[101] have questioned the adequacy of this provision, especially because it appears to only allow the practitioner 'to use the unencumbered assets of the company' yet usually, by the time a company enters business rescue, it will barely have any unencumbered assets to pledge. The reservations and the practical challenges notwithstanding, the legislature recognised post-commencement finance as critical. Therefore, providing for it is a positive step[102] and in tandem with the recommended model of an efficient rescue regime.[103]

Business rescue proceedings aim to protect the company against disruptive processes to restructure its affairs.[104] During the business rescue, several consequences arise. First, a business rescue practitioner can suspend obligations under agreements during rescue proceedings[105] allowing for strategic decisions and avoiding commitments that may impede the rescue process.[106] However, indefinite suspension is not allowed,[107] and the other party can claim damages for foregone benefits.[108] Whereas the practitioner has the discretion to suspend contracts on his own, for cancellation, the practitioner must obtain court consent.[109] This is meant to moderate the actions of the practitioner and provide the requisite safeguard against the risk of abuse of power by the practitioner.[110] The Act does not stop the counterparty from also exercising their contractual rights against the company, by, for instance, withholding the provision of services to the company after the suspension of the contract.[111] This provision if used well, can save the practitioner from onerous contracts. However, if abused, it can also trigger more trouble. The business rescue practitioner must, therefore, 'exercise due care before invoking this power to cancel, vary, or suspend contracts'.[112]

Additionally, the commencement of business rescue proceedings does not automatically affect the rights of employees. In *The Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd and Solar Spectrum Trading 83 (Pty) Ltd*, the court held that 'by introducing the provisions on business rescue under the Companies Act, the legislature

[99] Ibid s 135(2).
[100] Ibid s 135 (2) (a) (b) and (3).
[101] Waiswa op cit note 5 at 229.
[102] Ibid.
[103] Principles 64-66 of the UNICTRAL 'Legislative Guide on Insolvency law' (2004) 113–119.
[104] Levenstein op cit note 1 at 377.
[105] Companies Act op cit note 8 ss 136(2) and 136(2A) of the Companies Act.
[106] Levenstein op cit note 1 at 469.
[107] Loubser op cit note 14 at 88.
[108] Companies Act op cit note 8 s 136 (3).
[109] Ibid s 136(2).
[110] Waiswa op cit note 5 at 212.
[111] Ibid at 212.
[112] Ibid at 213.

demonstrated a shift from creditors' interest to an attempt to balance a wider range of often competing interests, noting that the stakeholders whose interest require a careful balancing would be creditors, shareholders, and employees'.[113] Unlike liquidation, business rescue proceedings do not automatically terminate employees' contracts[114] which leaves them with only the right to claim unpaid wages.[115] Employees remain employed under the same terms, except for changes in ordinary attrition or labor laws.[116] In *National Union of Metalworkers of SA and Another v South African Airways and Others*,[117] Van Niekerk J held: '…the commencement of business rescue proceedings does not in itself prejudice an employee's condition of service, including his or her work security…',[118] '…unless an event that qualifies as a change of terms and conditions of employment either by the ordinary course of attrition or by the employee's consent, there is complete protection of employees during business rescue proceedings… .'.[119]

Employees are recognised as affected persons[120] as well as not just as creditors, but as key stakeholders upon whom a myriad of rights and powers are bestowed including, the right to notice of court proceedings, decisions, or meetings[121] to participate in court proceedings,[122] to be consulted during the development of the and consideration of the rescue plan,[123] to vote with other creditors to approve a proposed business plan.[124] Payments to employees, including remuneration, are classified as part of post-commencement finance, giving employees a super-preferential right for payment ahead of other secured and unsecured creditors.[125] Arguably, section 136 of the Companies Act conforms to one of the predominant underlying objectives of business rescue, which is 'to preserve employment and to ensure that the attainment of creditor's wealth maximisation does not override the interests of employees.'[126] This creates a good motivation for employees to advocate for placing distressed companies under business

[113] (2011) 6418 para 9.
[114] Companies Act op cit note 8 s 136(2A).
[115] Waiswa op cit note 5 at 149.
[116] Companies Act op cit note 8 s 136(1).
[117] case no. J424/2020.
[118] *National Union of Metalworkers of South Africa and Another v South African Airways (SOC) Ltd and Others* case no. J424/2020 para 29.
[119] Supra note 118 para 31.
[120] Companies Act op cit note 8 s 128(1)(a).
[121] Ibid s 144(3)(a).
[122] Ibid s 144(3)(b).
[123] Ibid s 144(3)(d).
[124] Ibid s 144(3)(f).
[125] Ibid ss 135(1), 135(3) (a).
[126] Cassim et al op cit note 19 at 885.

rescue, rather than resorting to liquidation or winding up, which would automatically suspend all employment contracts.[127]

In *The Employees of Solar Spectrum Trading 83 (Pty) Ltd v Afgri Operations Ltd and Solar Spectrum Trading 83 (Pty) Ltd*,[128] the employees of Solar Spectrum Trading 83 (Pty) Ltd applied for the business rescue of their employer, after one of its creditors (Afgri Operations Ltd) had applied for liquidation of the company. Based on the information that the employees placed before the court to demonstrate that their employer had prospects of improving, the court granted an order to commence business rescue. This naturally suspended the application for liquidation of the company and over 75 jobs were saved. This clearly shows that the 'business rescue procedure recognises employees as key stakeholders in the rescue process and this is one of the reasons why the SA rescue regime is revered as a model law on corporate rescue.'[129] If one compares the rights of employees of companies that are immediately placed under liquidation to the ones that are placed under business rescue, the benefits derived by employees from companies undergoing business rescue become abundantly clear.[130]

Furthermore, as the beneficial owners of the company, shareholders are regarded as affected persons[131] and are restricted from altering securities without a court order or an approved rescue plan.[132] This restriction is intended to ensure order and maintenance of the status quo. This allows the 'business rescue practitioner to independently address and work around the revival of the company without undue pressure from shareholders who might keep altering the status quo through the creation of additional securities on their shares and/or interests in the company.'[133] They are 'entitled to receive notices of court proceedings and participate in all meetings and discussions about the business rescue proceedings.'[134]

Directors continue to exercise their functions[135] and powers[136] while being accountable to the business rescue practitioner. The rationale for this approach is the belief that 'directors are the most familiar with information about the company affairs and their role in the

[127] Waiswa op cit note 5 at 206.
[128] (2011) 6418.
[129] Bradstreet op cit note 6 at 150.
[130] Mikovhe Maphiri 'The Suitability of South Africa's Business Rescue Procedure in the Reorganization of Small-To Medium-Sized Enterprises: Lessons from Chapter 11 of the United States Bankruptcy Code' (2018) 8 (1) *Mich. Bus. & Entrepreneurial L. Rev* 101 at 118.
[131] Companies Act op cit note 8 s 128(a) (i).
[132] Ibid s 137(1).
[133] Waiswa op cit note 5 at 213.
[134] Cassim et al op cit note 19 at 887.
[135] Companies Act op cit note 8 ss 137(2) (a), 137 (4).
[136] Ibid s 137 (2).

formulation of the business rescue strategy cannot be over emphasised.'[137] Where the director becomes uncooperative, the practitioner can remove him via a court order.[138] This is intended to allow the business rescue practitioner sufficient discretion to determine whether any director is a valuable member of the rescue team.[139] Considering that business rescue is a short-term procedure, the practitioner needs to 'minimise friction with the directors and work towards cultivating a good working relationship with them such that they can support him in putting together a formidable business rescue plan that can effectively deliver the company from its financial despair to financial salvation.'[140]

To become a business rescue practitioner in SA, one needs to be a licensed[141] reputable member of a legal, accounting, or business management profession, demonstrating good character and relevant education and experience.[142] Different levels of management experience requirements are created for persons who can be appointed as practitioners in respect of companies.[143] Persons eligible to be appointed are classified in three categories, that is senior Practitioner,[144] experienced Practitioner,[145] and Junior Practitioner.[146] Companies undergoing rescue are classified in three categories which include large companies,[147] Medium Companies,[148] and Small companies.[149] A junior practitioner can be appointed for small companies and an assistant for medium or large companies.[150] An experienced practitioner can handle medium companies and assist a senior practitioner for large companies.[151] A senior practitioner can be appointed practitioner for any company.[152]

[137] Cassim et al op cit note 19 at 887
[138] Companies Act op cit note 8 s 137 (5)
[139] Waiswa op cit note 5 at 214.
[140] Ibid.
[141] Companies Act op cit note 8 s 138 (2).
[142] Ibid s 138 (2); op cit note 14 at 97-98.
[143] Companies Regulations, 20 reg 127.
[144] Ibid reg 127 (2) (c) (i) means a person has actively engaged in business turnaround practice before the effective date of the Act, or as a business rescue practitioner in terms of the Act, for a combined period of at least 10 years.
[145] Ibid reg 127 (2) (c) (ii) being a person has actively engaged in business turnaround practice before the effective date of the Act, or as a business rescue practitioner in terms of the Act, for a combined period of at least 5 years;
[146] Ibid reg 127 (2) (c) (iii) means a person not previously engaged in business turnaround practice before the effective date of the Act, or acted as a business rescue practitioner in terms of the Act; or has actively engaged in business turnaround practice before the effective date of the Act, or as a business rescue practitioner in terms of the Act, for a combined period of less than 5 years.
[147] Ibid reg 127 (2) (b) (i).
[148] Ibid reg 127 (2) (b) (ii).
[149] Ibid reg 127 (2) (b) (iii),
[150] Ibid reg 127 (3).
[151] Ibid reg 127 (4).
[152] Ibid reg 127 (5).

Business rescue practitioners have substantial managerial and investigative powers, enabling them to oversee and control a company's assets.[153] A practitioner assumes full management control of the company, replacing the board and pre-existing management.[154] This was intended to facilitate unhindered movement towards the resuscitation of the ailing company.[155] The practitioner can delegate management power or function excluding those rescue related[156] to any former director preexisting management,[157] implying that directors do not automatically retain any management powers.[158] The Act does not stipulate who is responsible for those unrelated rescue management duties such as convening the annual general meeting, as a result of the uncertainty it is also unclear whether these routine tasks also form part of the practitioner's duties.[159] The Act is silent regarding the circumstances under which the practitioner may delegate and neither does it require the practitioner to exercise such powers in consultation with any other person.[160] Whilst this wide discretion is to enable the practitioner to independently manage the rescue process, it may sometimes be counterproductive, especially where the person appointed is not well experienced.[161]

It is also possible that a practitioner may abuse their powers or functions and end up exposing the process to a risk of failure.[162] It is critical to have a clear set of guidelines stipulating how the practitioner is expected to exercise his discretion during the business rescue to guard against any conflict of interest.[163] The second set of powers enjoyed by a business rescue practitioner is the investigative powers. A practitioner must investigate the company's affairs, to ascertain the prospect of rescue.[164] The practitioner's other primary responsibility is to develop and implement a business rescue plan.[165] This is arguably the most important function of the business rescue practitioner.[166] The law provides that the practitioner must prepare the plan after consulting with the creditors, other affected persons, and the management of the company.[167] As per *Hlumisa Investment Holdings Ltd v Van der Merwe NO and Others,*

[153] Companies Act op cit note 8 s 140.
[154] Ibid s 140(1)(a).
[155] Cassim et al op cit note 19 at 893.
[156] such as the drafting and implementation of the rescue plan.
[157] Companies Act op cit note 8 s 140 (1) (b).
[158] Delport op cit note 9 s 137 (2) but they have only the powers specifically delegated to them by the business rescue practitioner.
[159] Loubser op cit note 14 at 114-115.
[160] Companies Act op cit note 8 s 140(1)(a) and (b); op cit note 5 at 240.
[161] Waiswa op cit note 5 at 240.
[162] Ibid.
[163] Ibid.
[164] Companies Act op cit note 8 s 141.
[165] Ibid s 140(1)(d).
[166] Cassim et al op cit note 19 at 896.
[167] Companies Act op cit note 8 s 150(1).

where the respondents did not dispute that there was no consultation with the applicants as contemplated under section 150(1) of the Companies Act, but they insisted that they informed all creditors and shareholders of what was happening; Thobane J ruled that 'there is a clear distinction between informing and consulting and that the applicants, being affected persons, had a right to be consulted during the preparation of the business rescue plan.'[168] The judge granted the application and postponed the holding of the meeting for consideration of the subject business plan until after 'the applicants had been sufficiently consulted and provided with the required information.'

The approval of the proposed plan requires 'more than 75 percent of the creditors' voting interests that were voted and at least 50 percent of the independent creditors' voting interests that were voted.'[169] A plan that has been adopted by the creditors is 'binding on the company, on each creditor and every holder of securities of the company, whether such person was present at the meeting and voted in favour or against the adoption of the plan.'[170] The right to cram-down dissenting creditors is a 'critical feature in any effective rescue framework, without which it becomes difficult for the rescue expert to overcome objections from selfishly uncooperative creditors, who may, for no collective objectives, choose to oppose the proposed business rescue plan.'[171]

Business rescue practitioners' remuneration is determined through agreements between the practitioner and the company or a committee of creditors, or by a resolution passed by creditors,[172] or tariffs,[173] with charges based on company classification.[174] Business rescue practitioners charge varying tariffs based on the company's size.[175] However, the standard tariffs set out under the regulations are high and cannot be afforded by Small and Medium Enterprises (SMEs).[176] Although the Company regulations tried to mitigate this risk by structuring the fees in such a way that the hourly rate payable depends on 'whether the company is a small, medium-sized or large or state-owned, it is argued that this did not solve this

[168] Case no. 77351/2015 [2015] ZAGPPHC 1055 para 22; see also Companies Act op cit note 8 s 150 (1).
[169] Companies Act op cit note 8 s 152(2).
[170] Ibid s 152(4).
[171] Levenstein op cit note 1 at 239.
[172] Companies Act op cit note 8 ss 143(2) and 145(1)(a).
[173] Ibid s 143(1) and (6); op cit note 143 reg 128.
[174] Ibid reg 128 - the tariffs chargeable by practitioners depend on whether the company is classified as a small, medium, large, or state-owned company.
[175] Ibd reg 128, for small companies, up to R1250 per hour with a daily maximum of R15625 including VAT; for medium companies, up to R1500 per hour with a daily cap of R18750 including VAT; and large companies or state-owned entities, up to R2000 per hour with a daily limit of R25000 including VAT.
[176] Maphiri op cit note 130 at 243.

problem. The rates are still high for the SMEs[177] and many otherwise salvageable and useful SMEs are silently dying from preventable causes, just because they cannot afford the cost of entry into business rescue.'[178]

In addition, practitioners can propose an agreement for contingency-based remuneration.[179] The contingency could be adopting a business rescue plan, attainment of any specific result or including certain matters in the plan.[180] In the case of *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd*[181] (Caratco), the court had to determine whether an agreement for the payment of a special fee for the remuneration of a business rescue practitioner outside of what is provided for under section 143 of the Companies Act is void for lack of legality and/or contrary to public policy. Cachalia JA found that 'the special fee agreement was not invalid, illegal, or otherwise contrary to public policy and dismissed a further application for leave to appeal.'[182] Subjecting the fees payable to the occurrence of a contingency event or action may appear complex because 'it is speculative, but one of its justifications is that it provides the practitioner with an added incentive to successfully implement a business rescue plan.'[183] Where the 'practitioner's remuneration and expenses are not fully paid, the practitioner's claim ranks in priority over all other creditors.'[184] Unless they are well remunerated and their claims secured, rescue efforts might be jeopardised to the detriment of many.[185]

Business rescue proceedings end when the court sets aside the resolution or order that began those proceedings; converts the proceedings to liquidation, the practitioner files a termination notice, rejection of a business plan, or substantial implementation of that plan.[186] If not ended within three months the practitioner prepares and delivers a progress report to each affected person, court, or Commission.[187] In *South African Bank of Athen Ltd v Zennies Fresh Fruits CC and Another,* Kusevitsky AJ held, … 'although the Act does not directly specify the length a company can be under business rescue, section 132(3) provides a guide under which the legislature envisaged companies to remain under business rescue... .'[188] It is expected that

[177] Ibid.
[178] Waiswa op cit note 5 at 243.
[179] Companies Act op cit note 8 s 143(2).
[180] Ibid s 143(2)(a) and (b); op cit note 1 at 423.
[181] Case no. 982/18[2020] ZASCA 17.
[182] Case no. 982/18[2020] ZASCA 17 paras 23, 31, 32.
[183] Waiswa op cit note 5 at 225.
[184] Companies Act op cit note 8 s 143(5).
[185] Waiswa op cit note 5 at 243.
[186] Companies Act op cit note 8 s 132 (2).
[187] Ibid s 132 (3).
[188] [2018] ZAWCHC 11 para 34.

within that short time, the company will develop a robust rescue plan to reverse its financial challenges. Nevertheless, three months is short for the business rescue practitioner to reverse the company's troubles. [189]

4.5.2 COMPROMISE WITH CREDITORS

The Companies Act provides for a creditor compromise procedure.[190] It is an alternative to business rescue proceedings and comparable to company voluntary arrangements in England.[191] A creditor compromise applies to a company, irrespective of whether or not it is financially distressed unless it is undergoing business rescue proceedings.[192] This aims to provide a solution before their financial difficulties lead to actual financial distress.[193] This procedure is also available to companies in liquidation.[194] A creditor compromise is initiated and proposed by a board resolution, or a liquidator[195] to creditors.[196] The board/liquidator must notify the commission about the proposal.[197] A copy of the proposal accompanied with a notice to consider it is sent to all creditors and the commission.[198] No specific time for the notice is given which may lead to the court's refusal to sanction the proposal due to insufficient prior notice.[199]

A proposal must contain all information reasonably required for creditors to make informed decisions[200] and is divided into three Parts;[201] background,[202] proposals[203] and assumptions.[204] The contents are almost identical to those for a business rescue plan thus complicating a procedure that should ideally be straightforward, informal, and flexible.[205] The director certifies the plan, confirming that it is accurate, comprehensive, and current and that projections are made in good faith.[206] The almost identical requirements set for the contents of a

[189] Waiswa op cit note 5 at 199.
[190] Companies Act op cit note 8 Part E s 155.
[191] Loubser op cit note 14 at 149.
[192] Companies Act op cit note 8 Part E s 155(1).
[193] Loubser op cit note 14 at 151.
[194] Companies Act op cit note 8 Part E s 155(2).
[195] Ibid Part E s 155(2).
[196] Ibid.
[197] Ibid.
[198] Ibid s 155(2).
[199] Loubser op cit note 14 at 159.
[200] Companies Act op cit note 8 Part E s 155(3).
[201] Ibid.
[202] Ibid s 155(3) (a).
[203] Ibid s 155(3) (b).
[204] Ibid s 155(3) (c).
[205] Loubser op cit note 14 at 152.
[206] Companies Act op cit note 8 Part E s 155(5).

compromise proposal as for a business rescue plan 'are inappropriate since a compromise is not a formal rescue procedure and is specifically intended to be flexible, informal, and fast.'[207] Ideally, the directors should be able to 'provide most of the information that the creditors need since the directors themselves will be responsible for the implementation of the compromise.'[208] This will also save time and costs and prevent too much prior publication of the company's financial problems and plans.[209]

A proposal is adopted by a majority in number, representing at least 75% in value of the creditors present and voting in person or by proxy, at a meeting.[210] If adopted, the company may apply to the court for an approval order.[211] Although the Act retained the requirement for the company to apply for a court order to sanction the proposed compromise or arrangement, this requirement is not mandatory.[212] Where 'the creditors or members unanimously approve the proposed compromise or arrangement, no court sanction is necessary.'[213] The court may sanction the compromise 'if it considers it just and equitable to do so.'[214] It is unclear why the sanction of the court should be 'required to make an agreement reached between a substantial majority of affected creditors and the company, binding on the parties.'[215] The publicity caused by the application will also be 'detrimental to the reputation and creditworthiness of the company, and what could have been an informal, inexpensive, and fast out-of-court settlement between the company and its creditors, is now an onerous and cumbersome procedure that will probably be inaccessible to smaller companies.'[216]

A court-sanctioned compromise is binding on all creditors.[217] Once sanctioned by the court, the order is filed with the CIPC within five days,[218] and attached to every copy of the company's memorandum of incorporation.[219] It is unlikely that the new compromise will be as popular since its contents are so strictly prescribed that it will not be as adaptable or flexible.[220] Furthermore, the SA procedure does not provide for a 'moratorium against enforcement actions

[207] Loubser op cit note 14 at 384.
[208] Ibid at s 385.
[209] Ibid.
[210] Companies Act op cit note 8 s 155(6).
[211] Ibid s 155(7).
[212] Companies Act op cit note 8 Part E s 155(7) (a).
[213] Ibid Part E s 155(8).
[214] Loubser op cit note 14 at 161.
[215] Ibid.
[216] Ibid.
[217] Companies Act op cit note 8 Part E s 155(8)(c).
[218] Ibid s 155(8) (a).
[219] Ibid s 155(8) (b).
[220] Loubser op cit note 14 at 163.

by creditors in the period between the delivery of a proposal and its approval by the court.'[221] The failure to provide for any form of moratorium is a serious weakness of the procedure and removes one of its main advantages over an unregulated common-law compromise with creditors.[222] Additionally, the procedure is not quite an out-of-court one as it should ideally have been, and excludes shareholders whose cooperation may be essential in some cases.[223] However, the compromise with creditors is advantageous because the board of directors is in charge of the whole procedure and not an outsider whose fees and expenses invariably add to the costs of the procedure.[224] The Act does not stipulate when the procedure concludes and its duration hinges on its terms.

This section has shown that in the SA legal system, business rescue is a major improvement of judicial management and has been embraced by ailing companies. The statistics from the CIPC show that between May 2011 and 31 October 2020, a total of 1521 companies had entered business rescue compared to only 446 companies that had entered into liquidation during the same period.[225] The strengths of the procedure account for the impressive rate at which SAn companies are entering business rescue compared to liquidation.[226] The compromise with creditors procedure repealed the hitherto compromise under s.311 of the Companies Act of 1973. This procedure intended to be cheap and flexible still contains weaknesses as discussed above. The absence of a moratorium coupled with the overly prescriptive contents will undoubtedly hinder the successful implementation of this procedure.

[221] Ibid at 150.
[222] Ibid at 383.
[223] Ibid at 163.
[224] Ibid at 151.
[225] The Companies and Intellectual Property Commission 'Business Rescue Proceedings Status Report October 2020' 1 available at *http://www.cipc.co.za/files/3616/0490/5024/Status_of_Business_Rescue_Proceedings_in_Sout h_Africa-as_at_31_October_2020_v1.0.pdf* accessed on 17 Aug 2021.
[226] Waiswa op cit note 5 at 39.

CHAPTER FIVE

PROPOSALS TO REFORM THE CORPORATE RESCUE FRAMEWORK IN UGANDA

5.1 INTRODUCTION

One of the prominent policy objectives of the reformation of Insolvency law in Uganda was the need to promulgate a new law that prioritises corporate rescue as opposed to liquidation of insolvent companies.[1] The concept of 'administration' was introduced in Uganda to re-organise companies and restore them to profitability.[2] Since 2011, very few companies in Uganda have utilised the administration procedure. The first recorded administration case handled by the Uganda Registration Services Bureau (URSB) was Uganda Telecom Limited (UTL), placed under administration on 22 May 2017.[3] In 2019/2020, ten companies filed for administration, but this number dropped sharply to only two companies in 2020/2021, representing an 80% reduction.[4] In 2021/2022, three companies filed for administration, a modest 50% increase from the previous year, while no administration cases were reported in the financial years of 2022/2023 and 2023/2024.[5] A significant number of companies have also been liquidated in Uganda. Data from URSB indicates that 6 companies were liquidated in 2018/2019 rising to 15 in 2019/2020,[6] then 28 in 2020/2021, 20 in 2021/2022,[7] and further increasing to 53 in 2022/2023 and 85 in 2023/2024.[8] An effective insolvency regime is necessary to ensure an efficient process to settle debts and, where appropriate, provide individuals with a fresh start and businesses with an opportunity for financial rehabilitation.[9]

There is a notable paucity of scholarly work in Uganda dealing with corporate rescue and this thesis is aimed at contributing towards addressing that gap. The current study's findings and recommendations are intended to inform policy and regulatory reforms aimed at

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[1] The Uganda Law Reform Commission 'Study report on Insolvency law' ULRC Publication No.13 (2004) 9.
[2] Chrispas Nyombi, Alexander Kibandama & David Justin Bakibinga 'The Motivations Behind the Uganda Insolvency Act 2011' (2014) 8 *Journal of Business Law* available at SRN: *https://ssrn.com/abstract=2644966* 652 at 660.
[3] Uganda Registration Services Bureau (URSB), Annual Report 2016/2017 available at *https://ursb.go.ug/* at 24.
[4] Ibid Annual Report 2020/2021 available at *https://ursb.go.ug/* at 33.
[5] Ibid Annual Report 2020/2021 available at *https://ursb.go.ug/* at 24.
[6] Ibid Annual Report 2019/2020 available at *https://ursb.go.ug/* at 34.
[7] Ibid Annual Report 2021/2022 available at *https://ursb.go.ug/* at 24.
[8] Ibid Annual Report 2023/2024 available at *https://ursb.go.ug/* at 41.
[9] Fresh Start: A Review of Canada's Insolvency Laws Cat. No. Iu173-6/2014E-PDF ISBN 978-1-100-25276-6:. Industry Canada Statutory Review of Insolvency Laws at 3 *http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00870.html* accessed on 20 March 2023.

strengthening Uganda's corporate rescue framework and enhancing its ability to support distressed companies. This chapter provides recommendations for corporate rescue law reform in Uganda. It will be shown how these recommendations will enhance Ugandan corporate rescue law's ability to support distressed companies.

5.2 INSOLVENCY FRAMEWORK REFORM

5.2.1 The Role of MSMEs

There is a dearth of literature about the origin and rationale for the introduction of provisional administration in Uganda.[10] The procedure was transplanted from the UK into Uganda without taking into consideration the peculiar socio-political and economic climate of Uganda. Moreover, no deliberate effort was made to take into account the improvements that were introduced in the English rescue procedure through the Enterprise Act 2002 and the other subsequent legislative measures.[11] The Insolvency Act does not adequately provide for a corporate rescue system that can effectively limit the consequential high rate of business mortality in the country.[12] It does not recognise the fact that a significant number of corporate businesses in Africa are SMEs and family-owned, and are unlikely to successfully shoulder the heavy weight of administration.[13]

In Uganda, Micro, Small, and Medium Enterprises (MSMEs) form the backbone of the economy, accounting for over 90% of private sector firms and contributing significantly to employment, productivity, and competitiveness.[14] While administration is available to all companies that wish to use it, the cost of implementing it may serve as a barrier for small companies already facing financial difficulty.[15] For these small companies, liquidation may be a more cost-efficient option, as the liquidator will shut down the business quickly or continue to trade for only a short amount of time.[16] Although liquidation might be a more cost-effective option, it is undesirable, owing to the socio-economic consequences of shutting down small

[10] Waiswa Abudu Sallam *An Evaluation of the Strengths and Weaknesses of South Africa's Corporate Rescue Regime as a Potential Benchmark for Uganda* (unpublished PHD thesis, University of South Africa 2022) 392.
[11] Ibid.
[12] Ibid.
[13] Williams C Iheme & Sanford U Mba 'Coping with the Covid-19 Pandemic: A Comparative Study of the Capabilities of the Kenyan and Nigerian Insolvency Frameworks' (2020) 6 (2) *Journal of Corporate and Commercial Law & Practice* 112 at 126.
[14] Ministry of Trade, Industry and Cooperatives State of Entreprenuership in Uganda – 2024 available at *Uganda-Entreprenuership-Index-report_Final.pdf* accessed on 6th September 2025.
[15] Waisswa op cit note 10 at 244.
[16] Ibid.

businesses which contribute so much to the private sector production on the GDP. The predominance of MSMEs raises questions about the cost effectiveness of the current insolvency regimes.[17]

For a regime of rescue to be successful, 'deliberate structural reforms that seek to align the Insolvency Act with the widely recognised international principles of an effective corporate rescue framework must be instituted.'[18] It is recommended that Uganda needs to adopt a split-framework insolvency model designed to accommodate large companies and MSMEs. Due consideration should be given to special rules for the treatment of insolvency issues relating to MSMEs. Current rescue procedures may serve the interest of large companies but are not attractive to MSMEs, necessitating tailored solutions. Traditional insolvency proceedings can be 'particularly costly for MSMEs, especially taking into account the fact that many of these firms might not even have assets to fund the costs of the procedure.'[19] The traditional insolvency proceedings existing in most countries around the world can be 'very burdensome, rigid, and complex for MSMEs.'[20] An unattractive insolvency framework for MSMEs can end up 'destroying wealth, jobs, and growth, and can ultimately harm entrepreneurship, innovation, and access to finance.'[21]

Since the COVID-19 pandemic started, many other jurisdictions, including Singapore, have adopted permanent or temporary insolvency frameworks for SMEs.[22] Uganda needs to learn from Singapore which adopted a simplified insolvency programme for SMEs to cater to the unique needs of SMEs which are predominant and play a critical role in the economy.[23] Uganda should develop a simplified restructuring procedure specifically for MSMEs which aims at reducing the formalities for commencement, costs, and length of the procedure. Fast and cheap insolvency proceedings result in the speedy return of businesses to normal operation and increased returns to creditors.[24] To prevent abuse and exploitation of this simplified procedure by companies stringent eligibility criteria must be established to ensure that only genuine MSME's qualify like it is done in Singapore. In addition, oversight mechanisms

[17] Ibid.
[18] Waisswa op cit note 10.
[19] Aurelio Gurrea-Martínez 'Implementing an Insolvency Framework for Micro and Small Firms' (2021) *International Insolvency Review* s46 at s48 -s49.
[20] Ibid.
[21] Ibid.
[22] Ibid at 6.
[23] Overview of SMEs in Singapore available at *https://www.singaporecompanyformation.com.sg/small-and-medium-sized-enterprises-smes-in-singapore/* accessed on 20 February 2025; see also Insolvency, Restructuring and Dissolution Act 2018 (IRDA), Part 5A, s 72F.
[24] Andre Boraine& Jani Van Wyk 'Various Aspects to Consider with Regard to Special Insolvency Rules for Small and Medium-Sized Enterprises in South Africa' (2015) 24 (3) *International Insolvency Review* 228 at 236.

including mandatory reporting to a designated regulatotory authority, periodic inspections and review of the restructuring plan can be put in place to deter any abuse.

5.2.2 Rescue Options

Another shortcoming of the law in Uganda is the limited options available to companies in financial distress to be rescued. Restricted options, whether in number or substance can obstruct the achievement of the ultimate goal of dealing with failing companies constructively, particularly when considering the divergent features that may vary the facts and circumstances of each debtor in distress.[25] There are limited options for rescuing companies in financial distress in Uganda, hindering the rescue of financially distressed companies. The same administration procedure applies to all entities bearing the title 'company' whether large or small.[26] Different companies face different types and degrees of economic distress. It is recommended that different rescue proceedings tailored to the specific circumstances of each company which would increase the chances of successful restructuring should be introduced in Uganda. The UK approach of embracing an array of rescue options provides a valuable lesson to Uganda. To enable financially distressed companies to be rescued, providing a range of procedures is vital, as limiting the options can impede rescue. By adopting a diverse set of rescue options, Uganda can effectively and constructively address financially troubled companies.

Another significant lesson for Uganda is to adopt the Canadian style of tailoring different procedures for big and small companies. As stated already, formal insolvency regimes are often designed for large businesses and are not suitable for MSMEs, making it hard for them to benefit from the procedures. A one-size-fits-all approach is unsuitable in Uganda. Restructuring procedures may be formal and involve the courts or may be less formal and conducted by parties with minor or no institutional involvement or supervision. Chapter three demonstrated that court reliance poses several challenges that have affected the uptake of these rescue procedures. To address this challenge, there is a need for additional structural reform which aims at a reduction of court reliance. To develop an efficient and robust insolvency framework, regulators, practitioners, and policymakers need to promote the use of

[25] Ibid.
[26] G. Dal Pont & L Griggs 'A Principled Justification for Business Rescue Laws: A Comparative Perspective (Part II]' (1999) 5(1) *International Insolvency Review* 68 at 72.

informal/out-of-court restructuring procedures also known as private restructurings or workouts. Ugandans culturally shun court process and prefer to handle matters outside of the legal system.

5.2.3 Out-of-court workouts

Despite the enactment of the law that provides for rescue, there is still a disconnect between the law and the perception or culture of the people towards the law. Company owners have not fully embraced this procedure and have continued to prefer liquidation or opted for informal out-of-court settlements. There is a consensus within Uganda's upstream corporate sector to generally prefer to restructure financially struggling but viable businesses through consensual out-of-court workouts.[27] This preference is premised on the notion that debtor-creditors workouts/agreements are usually faster to conclude and are a more cost-effective means of restructuring a company compared to administration that would involve a two-stage process.[28]

A workout is a non-statutory agreement between a debtor and creditors to ease the debtor's debt-servicing burden so that it can maintain its business activities and value. Out-of-court workouts (hereafter 'OCW') have no judicial involvement.[29] OCWs focus on preserving the debtor entity rather than requiring its liquidation or lengthy court processes and outputs may include: resetting financial covenants, re-scheduling payment obligations, converting accrued into repayable principal, or converting debt into equity.[30] Additional mechanisms to promote workouts may include the adoption of tax benefits for any debt forgiveness ('haircut'), as well as other tax advantages provided to creditors subject to a haircut.[31]

An OCW regime is not structured by formal rules and modes of participation and is driven by the players and their needs, outside of the formal court system.[32] All stakeholders

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[27] Hamiisi Junior Nsubuga 'Reinvigorating corporate rescue in developing economies - a Ugandan perspective' (2021) 34 (4) *Insolvency Intelligence* 95 at 100.
[28] Ibid.
[29] A Toolkit for out of court workouts World Bank Document at 27 available at *https://openknowledge.worldbank.org/server/api/core/bitstreams/fe677054-054b-5cdc-b3a1-1f715c6c8e0f/content* accessed on 20 November 2024.
[30] The Hon. Justice Ssekaana Musa 'Analysing the Role of the Court in Balancing Stakeholder interests in insolvency and restructuring proceedings in Developing Economies – a Ugandan Perspective' a paper presented at a conference in Abuja, Nigeria held on 6-8 July 2022 under the theme *Debt and Insolvency Law in Africa: National and Transnational Issues*; organized by the Commercial Law Research Network Nigeria (CLRN) and African Sovereign Debt Justice Network (AfSDJN).
[31] Federico J Díez, R. Duval, Jiayue Fan, Jose Garrido, S. Kalemli-Ozcan, Chiara Maggi, Soledad Martinez-Peria, & Nicola Pierri, 'Insolvency Prospects Among Small and Medium Enterprises in Advanced Economies: Assessment and Policy Options' *(2021/002) International Monetary Fund Publication* 25 accessed on 20th March 2023.
[32] World bank toolkit op cit note 29 at 27.

who are to be bound by the terms of the restructuring plan need to be persuaded that the plan is in their best commercial interests.[33] The adoption of this requirement creates several benefits including, *inter alia*, saving the significant costs associated with the commencement of an insolvency proceeding, and a reduction in the number of insolvency proceedings managed by the judiciary.[34] OCW is fast, flexible, informal, and confidential thereby not attracting any stigma.[35] Conducting an OCW does not need to involve establishing specific institutions or mechanisms.

Many countries have chosen a consensual approach to OCWs through the issuance and dissemination of nonbinding OCW guidelines for parties to follow when conducting an informal restructuring.[36] The consensual approach is inspired largely by the so-called London Approach,[37] the product of extensive experiences with multiparty OCWs in the UK.[38] To promote workouts, regulators and practitioners should enact good practices for out-of-court restructuring. In Singapore, the Association of Banks has promulgated a set of principles for facilitating out-of-court workouts through its Principles & Guidelines for Restructuring of Corporate Debt ('ABS Guidelines').[39] In 2016, the World Bank Group developed 'a Toolkit for Out-of-Court Workouts' to provide policy makers with tools to develop a corporate restructuring framework and culture in their country; and to help stakeholders implement informal corporate restructuring principles to try to rescue failing enterprises.[40] The Toolkit generally examines different models for restructuring, in the understanding that there is no such thing as a 'one size fits all' approach, and countries can develop flexible and varied solutions to meet their specific financial sector needs.[41] The attempt to reach a workout can even be required as a condition for the initiation of a simplified insolvency procedure, to promote its use.

These examples can all serve as a valuable guidance to Uganda in developing rules, good practices, and guidelines for workouts. In addition to enacting good practices and

[33] Ibid.
[34] Gurrea-Martínez op cit note 19 at s538.
[35] World bank toolkit op cit note 29 at 27.
[36] Ibid at 29.
[37] In the UK, the British Bankers' Association advocated for the use of the so-called 'London Approach', which consists of a non-statutory and informal framework introduced in the 1970s in London supported by the Bank of England for dealing with companies or groups in financial difficulties - John Armour and Simon Deakin, 'Norms in Private Insolvency: The 'London Approach' to the Resolution of Financial Distress' (2001) 1 *Journal of Corporate Law Studies* 21.
[38] World bank toolkit op cit note 29 at 29.
[39] Principles & Guidelines for Restructuring of Corporate Debt ('ABS Guidelines'), available at: *https://www.abs.org.sg/docs/library/spore_approach.pdf* accessed on 20th March 2024.
[40] World bank toolkit op cit note 29.
[41] Ibid at 2.

guidelines for workouts, regulators, and practitioners, should make sure that these good practices and guidelines are disseminated not only among the insolvency and restructuring industry but also among the entire business community. The promotion of education and awareness should also be part of the overall strategy to facilitate the efficient resolution of financial distress.

5.2.4 Hybrid Model

In this section, I explain the hybrid model and how it works in the context of insolvency legislation.

5.2.4.1 Hybrid Procedure

It is concerning that non-judicial / informal restructuring tends to use formal insolvency law procedures. Practitioners appear to prefer more practical and simplified procedures that provide quick resolution. This is so although a majority of informal workouts are usually unrecorded/registered by the official government insolvency regulator—the (URSB) for records/audit purposes.[42] There is a need for Uganda to reform its regulatory framework by introducing a hybrid procedure that can cater to both informal and formal procedures to address the needs of financially distressed companies. Rather than having to choose one procedure over another, it should be possible to have a hybrid model that has a formal and informal stage. A hybrid procedure generally provides debtors with some of the advantages associated with informal workouts like flexibility, confidentiality, and low stigma while offering some of the tools traditionally available in formal reorganisation procedures, such as a moratorium or a majority rule.[43] A hybrid procedure may mirror the scheme of arrangement used in Singapore and the new restructuring procedures adopted in the UK and the European Union.[44]

Notably, the adoption of hybrid procedures is not novel.[45] During the Asian Financial Crisis, these mechanisms became very popular due to 'the weaknesses of many insolvency systems in Asia and the need to provide companies with a quick and effective restructuring procedure that could minimise the involvement of courts.'[46] The rise of hybrid procedures was

[42] Nsubuga op cit note 27.
[43] Aurelio Gurrea- Martínez 'The future of insolvency law in a post-pandemic world' 1 at 8.
[44] Ibid at 10.
[45] Ibid at 9.
[46] Ibid.

also observed in Europe, especially after the 2008 financial crisis. These hybrid procedures generally 'consisted of workouts supported by various tools traditionally found in insolvency proceedings, such as the appointment of an independent professional to oversee the restructuring and a moratorium to provide the company being restructured with some breathing space.'[47] Finally, the modernisation of the scheme of arrangement in Singapore and the approval of the EU Directive on Preventive Restructuring Frameworks have probably represented the most important steps towards the consolidation of hybrid procedures in the international insolvency community. Unlike other hybrid procedures, the restructuring framework adopted in Singapore and the European Union includes most of the features existing in the United States of America, Chapter 11 reorganisation procedure.[48]

The COVID-19 crisis accelerated the implementation of hybrid procedures in several countries. In the early stages of the COVID-19 crisis, the UK adopted a restructuring plan that resembles the hybrid procedure introduced in Singapore.[49] In the following years, it is expected that more countries will follow this trend because either they are required to do so or because, due to the weaknesses, inefficiencies, or stigma associated with formal reorganisation procedures, the adoption of hybrid procedures can be a more desirable strategy than improving their formal insolvency framework.[50] It is strongly recommended that Uganda introduce a hybrid procedure.

5.2.4.2 Hybrid Governance

In addition to a hybrid procedure, it is also recommended that Uganda adopts a hybrid governance model. There are two typical types of governance regimes in restructuring; a classic trustee regime which entails the removal of the incumbent management and the appointment of an outside professional to assume control of the company. This is also known as the PIP regime. In contrast, the classic debtor in possession (DIP) regime allows incumbent management to continue and exercise its control of the firm.[51]

Advocates of the DIP Model have argued that 'the incumbent management is already familiar with the ins and outs of the firm's production unit, a quality that makes incumbent

[47] Ibid.
[48] Ibid.
[49] Martínez op cit note 43 at 10.
[50] Ibid at 11.
[51] Yaad Rotem 'Contemplating a Corporate Governance Model for Bankruptcy Reorganizations: Lessons From Canada' (2008) 3 *Virginia Law & Business Review* 1 at 9.

management the best candidate to run the firm during the reorganisation.'[52] Some commentators argue that 'the immediate replacement of management with a trustee increases the indirect costs of conducting a reorganisation, since the trustee would be unable to focus on the firm's business affairs until he has familiarised himself with the firm.'[53] Further, the displaced managers might refuse to cooperate with the trustee and decline to supply required information.[54] In other words, the DIP regime is less disruptive to the firm.[55]

However, opponents of the DIP Model have contended, 'that allowing the incumbent management to operate as a DIP means allowing the firm to be managed by the same team that led the firm into financial distress in the first place.'[56] Even if the incumbent management is regarded as indispensable, it has been argued that 'this does not preclude the appointment of a trustee. After all, the trustee can re-employ the displaced management.'[57] Some commentators have argued that 'certain firms do not require their managers to possess firm-specific expertise to successfully fill their role; for such firms, any competent trustee with general managing skills can replace the old management.'[58]

Both the classic Trustee Model and the DIP Model hold to an all-or-nothing approach. Chapter three sought to demonstrate that there are several disadvantages attributed to this rigidity. A consensus has begun to form among scholars regarding the need to display creativity by constructing hybrid governance regimes, which combine elements from both the Trustee Model and the DIP Model rather than adhering to either the classic PIP or DIP Models.[59] Adams recommended a 'bifurcated governance regime, according to which the firm's daily business decisions are to be struck by the firm's incumbent management, but bankruptcy decisions as Adams calls them, meaning decisions on whether to re-organise or liquidate, are to be made by a court-appointed official.'[60] Hahn proposes that 'the incumbent management and a court-appointed trustee would share the control over the firm and issue all decisions together, with the trustee enjoying veto power over all decisions made by the firm's board of directors.'[61] Proposals leaning towards the corporate reorganisation model that is hybrid which

[52] Ibid at 10.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid at 11.
[57] Ibid.
[58] Ibid.
[59] Ibid at 5.
[60] Edward S Adams 'Governance in Chapter 11 Reorganizations: Reducing Costs, Improving Results' (1993) 73 *B. U. L. REV*. 581 at 621.
[61] David Hahn 'Concentrated Ownership and Control of Corporate Reorganizations' (2004) 4 *J. CORP. L. STUD.* 117.

combine elements from the Trustee and DIP Models are more convincing. This approach will avail the corporate reorganisation process with the advantages of each model while attempting to overcome each model's shortcomings.

Several important lessons can also be drawn from the Canadian experience that I discussed in Chapter Four. Canada offers its unique practical experience with implementing a hybrid model. The presence of the Monitor in the reorganisation scene, coupled with the court's endorsement, prevents the governance regime from becoming a pure DIP regime. Hence, the 'Canadian Monitor regime comprises a third corporate reorganisation governance model: the Monitor Model.'[62] Uganda could reform its regime to a hybrid one taking into account Adam's bifurcated governance regime where the management focuses on the company's daily business while the IP focuses on restructuring the company. A hybrid governance model seems more accurate, advantageous, and attentive to the various reorganisation problems than the classic models.

5.2.5 The challenge of Stigma and Culture

Chapter Three demonstrated that one of the hindrances to the success of the rescue procedure is stigma and lack of awareness. Stigma is relevant since it can impede the proper functioning of rescue mechanisms within insolvency laws and reduce the opportunities for a 'fresh start'.[63] In their study of bankrupt firms, both Sutton and Callahan and Semadeni *et al* found stigma to be damaging not only to the entrepreneurial ventures through lost relationships and renegotiated exchange relationships but also to the individual business leaders who report being hurt and embarrassed.[64] Regulators can reduce the stigma of insolvency proceedings by implementing several 'nudges'.[65] For example, in Canada, the legislators decided to use the word 'debtor' rather than 'bankrupt' to refer to insolvent companies. In the UK, Singapore, and other countries around the world, the term 'restructuring law' is starting to be used for reorganisation and pre-insolvency procedures.[66] Another solution potentially adopted to reduce the stigma associated with insolvency proceedings may consist of promoting education and

[62] Rotem op cit note 51 at 6-7.
[63] Catherine Bridge 'Insolvency – a second chance? Why modern insolvency laws seek to promote business rescue' (2013) *Law in transition* 28 at 36.
[64] Robert I Sutton, & Anita L Callahan 'The stigma of bankruptcy: Spoiled image and its management' (1987) 30(3) *The Academy of Management Journal* 405 at 406.
[65] Gurrea-Martínez op cit note 43 at s59.
[66] Gurrea-Martínez op cit note 19 at s59.

awareness in the insolvency space.[67] Companies may be ignorant of the available rescue options. Ignorance coupled with stigma can also prevent companies from engaging in rescue procedures, exacerbating their financial problems. In Uganda, the official statutory bodies such as the official receiver's office, have not raised enough awareness of the role and impact of formal corporate rescue and restructuring mechanisms and their effectiveness in terms of rescue on company insolvencies.[68]

The ability of Part VI of the Insolvency Act to successfully restructure companies as a matter of course is hindered in practice by the underlying negative cultural sentiments. What is needed it is a cultural change which is a reflection of society, not just a reflection of business practice or a sub-section of the economy.[69] There is a need for some explicit policy mandate that actually positively encourages cultural change around its use, which would give the administration procedure the potential to achieve its objectives.[70]

Moreover, it is also important to change the way insolvency law has been traditionally taught and understood.[71] Instead of seeing insolvency law as 'an area exclusively dealing with financially distressed companies, it should be analysed as an essential part of the entrepreneurial system.'[72] Since the way insolvency law is designed 'may affect how debtors and creditors make business decisions from an ex-ante perspective, insolvency legislation can be more relevant for solvent than for insolvent firms.'[73] Even in the absence of a situation of financial distress, insolvency law can affect the levels of entrepreneurship, innovation, access to finance, and economic growth in a country.[74] It is proposed that legislators, regulators, and academicians draw lessons from Canada, the UK, and Singapore to reform insolvency laws by developing policies aimed at destigmatising and decriminalising corporate failure. The official receiver ought to raise more awareness on matters relating to company administration and insolvency such that the policy objectives the office intends to pursue are well articulated to sector actors.[75] In addition, stakeholders like the High Court Commercial Division, Insolvency

[67] Ibid.
[68] Nsubuga op cit note 27 at 99.
[69] Michael J. Blazic *Rehabilitation Regime or Corporate Graveyard: Practitioners' Perspectives of the Australian Part 5.3A Voluntary- Administration Legislation* (Unpublished PhD thesis University of Wollongong 2014) 217.
[70] Ibid.
[71] Gurrea-Martínez op cit note 19 at s59.
[72] Aurelio Gurrea-Martínez 'Role of Corporate Insolvency Law in the Promotion of Economic Growth' (Singapore Global Restructuring Initiative 2020), available at: *https://cebcla.smu.edu.sg/sgri/blog/2020/07/01/role-corporate-insolvency-law-promotion-economic-growth* accessed on 20 March 2023.
[73] Gurrea-Martínez op cit note 19 at s59.
[74] Horst Eidenmüller 'Comparative Corporate Insolvency Law' (2016) *European Corporate Governance Institute Law* Working Paper No. 319; 6.
[75] Nsubuga op cit note 27 at 99.

Practitioners of Uganda, Enterprise Uganda, and Private sector foundation can take proactive steps to raise awareness of the role and impact of formal corporate rescue and restructuring mechanisms. This can be achieved through regular workshops, seminars, and online resources. Government agencies and industry bodies can launch awareness campaigns, publish reports and case studies, integrate modules on corporate insolvency and rescue procedures into business school curricula, collaborate with professional associations, and publish articles and features in business magazines, newspapers, and online platforms.

5.2.6 Rescue Finance Model

In this section, I discuss the rescue finance model. I begin with bail outs. I then explain the corporate rescue fund.

5.2.6.1 Bail Outs

A financially distressed company is one that is on the brink of insolvency meaning it is struggling to meet its financial obligations. One of the ways to address this challenge is to invoke the rescue procedure which in turn allows such companies to obtain rescue finance. The challenges with companies accessing finance have been dealt with under Chapter Three. To address this, the government can develop a well-structured and non-discriminatory stimulus support policy – a bailout that can be used to assist financially distressed companies. This is an internationally recognised model of rescuing businesses. A stimulus support policy or bailout is where the government injects resources into private companies to rescue them from financial troubles to avert any negative consequences the company's failure shall have on the economy. The government has in the past offered stimulus support albeit in a haphazard manner which has seen many would-be eligible companies being left out.

Recent research indicates that the reasons advanced for not receiving government stimulus support are lack of awareness (56 per cent), so many bureaucracies in accessing this support or any government stimulus (25 per cent), aware of the support but not aware of the procedure of accessing the support (10 per cent).[76] Responses such as 'my enterprise was not considered' and 'interventions were not appropriate for my enterprise' were also cited by 6 and

[76] Corti Paul Lakuma, Nathan Sunday, Brian Sserujogi, Rehema Kahunde & Ambrose Ogwang 'The effect of COVID-19 on the operations of agro-processing MSMEs in Uganda' (2021) *Economic Policy Research Centre; Policy Note: 5, Issue 3* July 2021; 4.

4 per cent, respectively, of the surveyed firms.[77] There is an urgent need to rethink the approach used to reach MSMEs with support.[78] In addition, there is a need to deal with the red tape and bureaucracies associated with receiving public support.[79] The policy should be clear in terms of eligibility and guidelines for its access to promote equality of access. This will ensure the neediest companies receive assistance, reduce bias, and increase trust.

The funds that the government uses to bail out companies are taxpayers' money. Companies must be obligated to repay the bailout funds with interest. The government can also take an equity stake in the company to protect its interest and ensure a return on these funds. These companies can also be obligated to improve their corporate governance practices and reduce board and management expenditures to prevent a recurrence of financial distress. All these measures will guard against abuse of these funds.

5.2.6.2 Corporate Rescue Fund

In addition to implementing provisions for post-commencement finance/stimulus support, the government should introduce a special corporate rescue fund in lending institutions like the Uganda Development Bank, Uganda Development Corporation, or the Uganda Microfinance Support Centre. This would allow access to rescue financing with the condition that these funds are categorised as administration costs and payable ahead of other creditors. This makes it easier to subject administrators to external scrutiny, ensuring accountability for the use of funds. This strategic approach could encourage financial institutions to design specific loan packages for companies in provisional administration and administration, thus promoting the corporate rescue agenda in Uganda.

5.2.7 Early warning tools and Alert Procedures

The initiation requirement that provides that the rescue procedure is available to insolvent companies should be revised as the procedure is invoked too late making it difficult to revive the company. It is proposed that early warning tools and incentives be put in place. Any restructuring starts with the insight that something needs to change, therefore, lawmakers should provide for and support early warning mechanisms that detect a deteriorating business

[77] Ibid.
[78] Ibid.
[79] Ibid at 5.

development and signal the respective urgency to act.[80] The current positioning of investigations is reactive, in many cases when it is too late and the fallout has become very costly.[81] To have an effective corporate rescue, the focus should be on the root cause, behavioural and risk-based investigations.

Additionally, the policy and legal reform should be considered by putting in place early warning tools and alert procedures which are out-of-court, confidential legal mechanisms aimed at the prompt detection of signs of financial distress of an enterprise, including the loss of business continuity, as well as quick adoption of the most suitable remedies to overcome the crisis and restore the going concern.[82] The early warning tools can be activated externally through written notices sent by URSB which is the supervisory body of companies or external auditors, or certain qualified public creditors namely, URA and the National Social Security Fund. Internally, directors, often best placed to detect early signs of distress, should be encouraged to take proactive steps, including placing the company into administration when necessary, without fear of personal liability.

The UNCITRAL Legislative Guide on Insolvency Law explicitly mentions and recommends a list of appropriate operating steps that directors might take to avoid insolvency or, where it is unavoidable, to minimise the extent of insolvency.[83] These steps include evaluating the current financial situation of the company and ensuring proper accounts are being maintained and that they are up-to-date; being independently informed as to the current and ongoing financial situation of the company; and seeking professional advice, including insolvency or legal advice, so that any decisions taken can withstand objective and independent scrutiny.[84] These parties with relevant information should be incentivised or even obliged under the law governing their duties to flag any relevant negative development of a debtor's business.[85] This obligation or duty plays a crucial role in facilitating the prevention and/or the

[80] Bob Wessels & Stephan Madaus 'Business Rescue in Insolvency Law in Europe: Introducing the ELI Business Rescue Report' (2018) 27 (2) *International Insolvency Review* 255 at 262.
[81] Déan Friedman 'root-cause-corporate-failures' available at *https://www.sablog.kpmg.co.za/2016/06/root-cause-corporate-failures/*KPMG SA Blog accessed on 10 March 2022.
[82] Alessandra Zanardo 'Impact of the Italian Business Crisis and Insolvency Code on Organizational Structures in MSMEs' (2020) 27 *U. Miami Int'l & Comp. L. Rev* 308.
[83] UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 'Legislative Guide on Insolvency Law. Part Four: Directors' Obligations in the Period Approaching Insolvency' 2 ed (2020) available at *https://uncitral.un.org/en/texts/insolvency/legislativeguides/insolvency_law* accessed 20 March 2023.
[84] Ibid.
[85] Wessels & Madaus op cit note 80 at 262.

prompt detection of a financial crisis and preventing a business's slide into insolvency or its insolvent position worsening.[86]

5.2.8 Internal Company Management

Chapter Three has shown that the primary cause of corporate failure is poor management. The nexus between corporate rescue and corporate failure is critical. To ensure the successful management of companies, care has to be taken regarding proper management of companies. One of the key actors is the board of directors. Currently, there are no restrictions on becoming a director under the Companies Act.[87] Directors, in smaller companies particularly, are not adequately aware of their directors' duties, which is a concern not only for directors but also for broader stakeholders.[88] The quality of directors is a key driver of whether a company will identify distress and signs of insolvency, and seek external advice promptly.[89] Director's reluctance to recognise and acknowledge the state of the company's operations and level of distress is an inhibitor to seeking a timely solution.[90] This can be improved by requiring a formal and measured level of competency for all persons seeking to be appointed as company directors.[91] This helps to protect the individuals as directors, and also those that they deal with in the business community.[92] In addition, there is a need for the education of directors around their responsibilities and duties as a director, to provide them with the tools needed as companies grow in size and complexity.[93] This will allow the directors to focus their minds on the importance of seeking assistance and advice earlier, and to remove the stigma of failure often associated with seeking this type of help.[94]

[86] Alessandra Zanardo 'Impact of the Italian Business Crisis and Insolvency Code on Organizational Structures in MSMEs' (2020) 27 *U. Miami Int'l & Comp. L. Rev*. 306 at 308.
[87] Companies Act Cap 106 Part V s 188.
[88] Blazic op cit note 69 at 181.
[89] Ibid at 178.
[90] Ibid at 181.
[91] Ibid at 182.
[92] Ibid.
[93] Ibid.
[94] Ibid at 183.

5.3 PROPOSED AMENDMENTS TO THE UGANDAN CORPORATE RESCUE STATUTORY FRAMEWORK

5.3.1 Overview

In Chapter three I demonstrated that there are several weaknesses and inadequacies in the in the legal and regulatory framework governing corporate rescue in Uganda. These weaknesses hinder the ability to support financially distressed companies leading to the liquidation of more companies. There is a need for law reform to address these weaknesses. This section proposes amendments to the Insolvency Act and Companies Act based on lessons learnt from the comparative chapter of this thesis. The recommended amendments will be accompanied by commentary aimed at contextualising each suggested provision.

5.3.2 Definition and Purpose of Administration

Chapter three demonstrated that the Insolvency Act and its regulations do not define administration nor provide clearly on which companies are eligible for this procedure. Failure to define this term creates uncertainty about which companies are eligible to be placed under administration and the overall aim of this process. It is recommended that the Act must be amended to define the term administration as well as specify the purpose of administration. It is proposed that section 1of the Insolvency Act be amended by inserting the definition of the phrase 'administration' as follows:

'"administration" means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—
(a) the temporary supervision of the company, and the management of its affairs, business, and property;
(b) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
(c) the development and implementation, if approved, of a deed to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the

company's creditors or shareholders than would result from the immediate liquidation of the company'.[95]

This proposed definition of administration to the Insolvency Act is influenced by the SA Companies Act of 2008.[96] It offers a comprehensive definition of administration which is lacking in the UK Insolvency Act. This definition aims at providing clarity on what administration entails, eventually attracting more people to embrace it as a better alternative to liquidation. It is submitted that this definition should be the starting point for considering administration applications.

It is also proposed that the purpose of administration be categorically stated in the Act. This can be done by inserting section 140A into the Insolvency Act as follows:

'140A Purpose of Administration
The purposes of administration are—
(a) to rescue the company as a going concern, or
(b) the approval of an administration deed;
(c) to provide a more advantageous realisation of the company's assets than would be effected in a liquidation or
(d) to realise property in order to make a distribution to one or more secured or preferential creditors'.[97]

This proposed provision stipulating the purpose of administration in the Insolvency Act is based on the purposes of administration and judicial management in the UK and Singapore respectively.[98] In doing this, the Act will provide clarity on the purpose of the procedure. Currently, the purpose of administration is combined with the duties of the administrator.[99] The purpose of administration and the duties of an administrator are two distinct concepts that serve different purposes. It is recommended that this overlap be removed by separating the two. This provides a clear structure of the law and places equal emphasis on the purpose and duties of the administrator.

[95] Companies Act 2008, Act No. 71 of 2008 s 128.
[96] Ibid.
[97] Insolvency Act 45 of 1986 sch B1 para 3 and IRDA 2018 Part 7 s 89.
[98] Ibid.
[99] Insolvency Act Cap 108 Part VI s 142.

It is further proposed and recommended that when a provision has been made for the purpose of administration, section 142 (1) (b) *(i)(ii)(iii)* which provides for outcomes of administration should be repealed to avoid repetition.

5.3.3 A dual commencement procedure

Findings in Chapter Three showed that the Insolvency Act provides for both provisional administration and administration. Chapter three also demonstrated that the procedure for entry into provisional administration is tedious, costly, and involves court.[100] It is recommended that the separation between provisional administration and administration be done away with and that section 141 be replaced with two new sections introduced in Part VI of the Insolvency Act providing for voluntary and compulsory administration respectively. This follows the approach of jurisdictions like the UK, Canada, Singapore, and SA, which allow corporate rescue proceedings to be initiated voluntarily by the company or through a court petition as shown in Chapter Four. Under the proposed amendment, affected parties, besides the company itself, can petition the High Court to place a company under administration. This would streamline the process for financially distressed companies to enter administration voluntarily. Additionally, these amendments are necessary to make it easier, quicker, and cheaper for companies to access the procedure and encourage prompt and timely action on the part of directors to seek to enter administration. The first provision that should be inserted should address voluntary commencement into administration. This can be drafted as follows:

'141A Company resolution to begin Administration proceedings
(1) The board of a company may resolve that the company voluntarily begin administration proceedings and place the company under supervision if the board has reasonable grounds to believe that—

> *(a) the company is, or is likely to become, unable to pay its debts; and*
> *(b) there is a reasonable probability of achieving one or more of the purposes of administration in the proposed new section 140A.*

(2) A resolution contemplated in subsection (1)
(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

[100] Refer to discussion under Chapter three 3.4.1.8.

(b) has no force or effect until it has been filed.

(3) The resolution contemplated in subsection (1) must be accompanied by a statutory declaration made by the board—

(a) that the company is or is likely to become unable to pay its debts,

(b) that the company is not in liquidation, and

(c) to such additional effect, and giving such information, as may be prescribed.

(4) A statutory declaration under sub-section (3) must—

(a) be in the prescribed form, and

(b) be made during the prescribed period.

(5) A person commits an offence if in a statutory declaration under sub-section (3) he makes a statement—

(a) which is false, and

(b) which he does not reasonably believe to be true.

(6) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), the company must—

(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded;

(b) lodge the notice of the resolution with the Official Receiver and the Registrar of Companies; and

(c) appoint an administrator who satisfies the requirements of section 208, and who has consented in writing to accept the appointment.

(7) A notice under this section must—

(a) identify the proposed administrator, and

(b) be in the prescribed form.

(8) The administrator must be a licensed insolvency practitioner who is not related to the company.

(9) An administrator must not be appointed under this section —

(a) if a petition for the winding up of the company has been presented and is not yet disposed of,

(b) if an administration application has been made and is not yet disposed of, or

(c) an administrative receiver of the company is in office.

(10) Upon the appointment of the administrator under subsection (6), the company must

(a) within 3 days after the appointment of the administrator, cause a written notice of the appointment to be served on each affected person and to be lodged in the prescribed form with the Official Receiver and the Registrar of Companies; and

(b) within 7 days after the lodgment of the notice under subsection (6), cause a notice of the appointment to be published in the Gazette and in at least one newspaper of nationwide circulation.

(11) The notice appointing an administrator shall include a certificate signed by the appointer certifying that,

(a) at the time of the appointment, there is reason to believe that the company is or will be unable to pay its debts within the meaning of section 2;

(b) that in his opinion the purpose of administration is reasonably likely to be achieved, and

(c) giving such other information and opinions as may be prescribed.

(12) If a company fails to comply with any provision of subsections (3), (4) and (5)—

(a) its resolution to begin administration proceedings and place the company under supervision lapses and is a nullity; and

(b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an ex parte application, approves the company filing a further resolution.

(13) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings unless the resolution has lapsed in terms of subsection (12), or until the administration proceedings have ended as determined in accordance with section 147(1).

(14) If the board of a company has reasonable grounds to believe that the company is or is likely to become, unable to pay its debts, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, its reasons for not adopting a resolution contemplated in this section.

(15) In this Part— 'affected person', in relation to a company, means—

(a) a shareholder or creditor of the company;

(b) any registered trade union representing employees of the company; and

(c) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.'[101]

[101] Insolvency Act 45 of 1986 sch B1 paras 25, 26, 27 & Companies Act 2008, Act No. 71 of 2008 s 129.

This proposed new section 142A of the Insolvency Act is a blend of the provisions contained in the UK Insolvency Act and the Companies Act of SA.[102] It aims at enabling financially distressed companies to commence the procedure voluntarily. The voluntary commencement will offer a fast and cost-effective process thereby minimising delays and costs to an already financially struggling company. To address the potential abuse of voluntary provisional administration by company directors, the Insolvency Act should be amended to introduce a clear procedure for challenging or opposing a company's decision to enter administration voluntarily. Unlike the Singapore legislation that provides for voluntary judicial management, the law does not provide for any aggrieved party to challenge the process. Arguably, lessons can be drawn from the SA law which allows for challenges to the voluntary commencement. It is recommended that section 141 be further amended by inserting section 141B which provides for objections to voluntary company resolutions. I propose that it read as follows:

141B. 'Objections to company resolution

(1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 141A, until the adoption of an administration deed in terms of section 150, an affected person may apply to a court for an order—

(a) setting aside the resolution, on the grounds that—

(i) there is no reasonable basis for believing that the company is, or is likely to become, unable to pay its debts;

(ii) there is no reasonable prospect for rescuing the company; or

(iii) the company has failed to satisfy the procedural requirements set out in section 141A;

(b) setting aside the appointment of the administrator, on the grounds that the administrator—

(i) does not satisfy the requirements of section 208;

(ii) is not independent of the company or its management; or

(iii) lacks the necessary skills, having regard to the company's circumstances; or

(c) requiring the administrator to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and any affected persons.

(2) An affected person who, as a director of a company, voted in favour of a resolution contemplated in section 141A may not apply to a court in terms of—

[102] Ibid.

(a) subsection (1)(a) to set aside that resolution; or

(b) subsection (1)(b) to set aside the appointment of the administrator appointed by the company, unless that person satisfies the court that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false or misleading.

(3) An applicant in terms of subsection (1) must—

(a) serve a copy of the application on the company, Official Receiver and the Registrar of Companies; and

(b) notify each affected person of the application in the prescribed manner.

(4) Each affected person has a right to participate in the hearing of an application in terms of this section.

(5) When considering an application in terms of subsection (1)(a) to set aside the company's resolution, the court may—

(a) set aside the resolution—

(i) on any grounds set out in subsection (1); or

(ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so;

(b) afford the administrator sufficient time to form an opinion on whether or not—

(i) the company is, or is likely to become, unable to pay its debts; or

(ii) there is a reasonable prospect of rescuing the company,

and after receiving a report from the administrator, may set aside the company's resolution if the court concludes that the company is not, or is not likely to become, unable to pay its debts, or there is no reasonable prospect of rescuing the company; and

(b) if it makes an order under paragraph (a) or (b) setting aside the company's resolution, may make any further necessary and appropriate order, including—

(i) an order placing the company under liquidation; or if the court has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable,

(ii) an order of costs against any director who voted in favour of the resolution to commence administration proceedings, unless the court is satisfied that the director acted in good faith and on the basis of information that the director was entitled to rely upon.

(6) If, after considering an application in terms of subsection (1)(b), the court makes an order setting aside the appointment of an administrator—

(a) the court must appoint an alternate administrator who satisfies the requirements of section 208, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court; and
(b) the provisions of subsection (5)(b), if relevant, apply to the administrator appointed in terms of paragraph (a)'.[103]

It is submitted that the inclusion of this provision would offer robust protection against potential abuse of provisional administration by undeserving companies while providing genuine companies with a straightforward path to corporate rescue.
I propose that the second section regarding compulsory administration be drafted as follows:

141C 'Appointment of Administrator by Court
(1) The court may make an administration order in relation to a company only if satisfied—
(a) that the company is or is likely to become unable to pay its debts, and
(b) that the administration order is reasonably likely to achieve one or more of the purposes of administration in the proposed new section 140A
(2) An application to the court for an administration order in respect of a company (an 'administration application') may be made only by—
(a) the company,
(b) the directors of the company,
(c) the shareholders of the company,
(c) one or more creditors of the company,
(d) any registered trade union representing employees of the company; and
(e) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;
(f) a combination of persons listed in paragraphs (a) to (e).
(3) As soon as is reasonably practicable after the making of an administration application—
(a) notice of the application must be published in the Gazette and in at least one newspaper of nation-wide circulation, and a copy of the notice must be sent to the official receiver and the Registrar of companies; and
(b) notice of the application must be given to —
(i) any person who has appointed an administrative receiver of the company,

[103] This is drawn from Companies Act 2008 Act 71 of 2008 s 130.

(ii) any person who is or may be entitled to appoint an administrative receiver of the company,

(iii) to the company, in a case where a creditor is the applicant; and

(iv) such other persons as may be prescribed.

(4) An administration application may not be withdrawn without the permission of the court.

(5) On hearing an administration application the court may—

(a) make the administration order sought;

(b) dismiss the application;

(c) adjourn the hearing conditionally or unconditionally;

(d) make an interim order;

(e) treat the application as a winding-up petition;

(f) make any other order which the court thinks appropriate.

(6) If the court makes an order in terms of subsection (5)(d), the court may make a further order appointing as interim administrator a person who satisfies the requirements of section 208, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 148.

(7) An appointment of an administrator by administration order takes effect—

(a) at a time appointed by the order, or

(b) where no time is appointed by the order when the order is made.

(8) An interim order under sub-section (5)(d) may, in particular—

(a) restrict the exercise of the power of the directors or the company;

(b) make provision conferring discretion on the court or on a person qualified to act as an insolvency practitioner in relation to the company.

(9) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until—

(a) the court has adjudicated upon the application; or

(b) the administration proceedings end, if the court makes the order applied for.

(10) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.

(11) A company that has been placed under supervision in terms of this section may not adopt a resolution placing itself in liquidation until the administration proceedings have ended.
(12) Upon court granting the administration order under subsection (6), the company must —
(a) within 5 business days, cause a written notice of the appointment to be served on each affected person and to be lodged in the prescribed form with the Official Receiver and the Registrar of Companies; and
(b) within 7 days after the lodgment of the notice under subsection (10) (a), cause a notice of the appointment to be published in the Gazette and in at least one newspaper of nationwide circulation.
(13) The costs and expenses of any unsuccessful application for an administration order made under this section must, unless the Court otherwise orders, be borne by the applicant and, if the Court considers that the application is frivolous or vexatious, the Court may make such orders, as the Court thinks just and equitable, to redress any injustice that may have resulted.
(14) Nothing in this section precludes a Court —
(a) from making an administration order and appointing an administrator, if the Court considers that the public interest so requires; or
(b) from appointing, at any time between the making of an application for an administration order and the making of the administration order or the determination of the application, an interim judicial manager'.[104]

This proposed provision combines the provisions in the UK Insolvency Act, SA's Companies Act, and Singapore's IRDA.[105] The UK and SA allow for a wide range of stakeholders to initiate the rescue procedure. By adopting these amendments, a robust rescue system allowing for initiation by various stakeholders, not just the debtor(s) and creditors as is currently the case will be implemented which is in line with international best practices recommended by UNCITRAL and the IMF.

5.3.4 Eligibility for Administration

I also demonstrated in chapter three that the administration proceedings cannot begin unless the insolvency condition is satisfied. The current threshold for insolvency assessments is UGX

[104] Insolvency Act 45 of 1986 sch B1 paras 11, 12, 13; Companies Act 2008 Act 71 of 2008 s 131 and IRDA 2018 Part 7 s 91.
[105] Ibid.

2,000,000 approximately US$ 545 for all companies in Uganda. Using a single monetary threshold for all companies is inadequate and insufficient for businesses, particularly larger ones especially for an economy mostly comprised of MSMEs. It is recommended that companies vary in many ways and it is better to use a different threshold for different company depending on size, business, or industry. This is the practice in Canada and Singapore. In Singapore, the same distinction is seen with MSCs and large companies as shown in chapter four. To address this challenge, it is proposed that Schedule 2 of the Insolvency Act be amended to allow for a tiered threshold to determine insolvency. It is propose that the schedule be drafted as follows:

Second Schedule (Sections 2, 3)
Prescribed amount
The prescribed amount for the purposes of section 3 is
(a) Two thousand five hundred currency points in the case of a large company;
(b) One thousand seven hundred fifty currency points in the case of a medium company;
(c) One thousand currency points in the case of a small company;
(d) One hundred currency points in the case of a micro company.

By adopting this proposal, the one size fits all approach to determine insolvency will be removed thereby allowing for a tiered approach to apply to different companies of different sizes.

5.3.5 Improve on the Moratorium

The importance of a moratorium in rescue proceedings cannot be over emphasised. Chapter three has demonstrated how weak and inadequate the moratorium provided for under the Insolvency Act is. To address this challenge, two new provisions should be introduced in Part VI of the IA. The first provision that should be inserted should provide for the automatic interim moratorium. Currently, under the Insolvency Act, the moratorium arises upon court issuance of an interim protective order. Between the time it takes from the commencement of the court process to the time the company gets protection, the company is virtually exposed, and creditors can take advantage during this window to frustrate a company from being rescued. The filing of the case would alert the corporate debtor's creditors that it has insufficient funds to pay all its debts in full, and each creditor would get in line to be the first one paid, as they

are primarily focused on making sure that they 'get their slice of the pie'.[106] The interim automatic stay would prevent all creditors from proceeding to collect on the corporate debtor's assets for the duration of the bankruptcy case, enabling the debtor to work together with its creditors to maximise the value of the bankruptcy estate and thus the amount of all creditors' total recovery on their claims.[107]

The second provision should address expansion of the ambit of the moratorium. Chapter three has discussed the limitations currently prevailing with the moratorium. It is recommended that sections 145 and 166 of the Insolvency Act be amended. I propose that the provisions be drafted as follows:

145 'Automatic Moratorium

(1) Subject to subsection (2), in any case where a company makes an application for an Administration order under section 141C, or files a Company resolution to begin Administration proceedings under section 141A, during the automatic moratorium period —

(a) no order may be made, and no resolution may be passed, for the winding up of the company;

(b) no step may be taken to enforce any security over any property of the company, or to repossess any goods under any hire-purchase agreement, chattels leasing agreement or retention of title agreement, except with the permission of the Court and subject to such terms as the Court may impose;

(c) no other proceedings may be commenced or continued against the company, except with the permission of the Court and subject to such terms as the Court may impose; and

(d) no enforcement order or other legal process may be issued, continued or executed, and no distress may be levied, against the company or its property, except with the permission of the Court and subject to such terms as the Court may impose.

(2) Subsection (1) does not affect any of the following:

(a) the exercise of any legal right under any arrangement (including a set-off arrangement or a netting arrangement) that may be prescribed by regulations;

(b) the commencement or continuation of any proceeding that may be prescribed by regulations.

(3) In this section, 'automatic moratorium period' means —

[106] David S Stevenson 'Grab the Fire Extinguisher: Comparing UK Schemes of Arrangement to U.S. Corporate Bankruptcy After Jevic' (2019) 68 *Clev. St. L. Rev. 73*; 73 at 77.
[107] Ibid.

(a) in any case where a company makes an application for an administration order, the period starting on the date on which the application is made, and ending on the date on which the application is decided by the Court; or the application has been granted but the administration order has not yet taken effect, or

(b) in any case where a company files a Company resolution to begin Administration proceedings, the period starting on the date of filing the resolution and ending on the earliest of the following dates:

(i) the date of the appointment of an administrator;

(ii) the period of five business days beginning with the date of filing expires without an administrator having been appointed'.[108]

The above provision is based on the UK Insolvency Act and IRDA provisions.[109] This amendment aims at protecting the company pending the commencement of the procedure. I also propose that the second provision regarding the expansion of the moratorium be drafted as follows:

145A 'Final Moratorium

(1) When a company enters Administration —

(a) any receiver, or receiver and manager, must vacate office; and

(b) any application for the winding up of the company must be dismissed.

(2) Where any receiver, or receiver and manager, has vacated office under subsection (1)(a), the following must be charged on and, subject to subsection (4), paid out of any property which was in the custody or under the control of the receiver, or receiver and manager, at the time the company enters judicial management, in priority to any security held by the person by or on whose behalf the receiver, or receiver and manager, was appointed:

(a) the remuneration of, and any expenses properly incurred by, the receiver, or receiver and manager;

(b) any indemnity to which the receiver, or receiver and manager, is entitled out of the assets or property of the company.

[108] Insolvency Act 45 of 1986 sch B1 para 44 and IRDA 2018 Part 7 s 95.
[109] Ibid.

(3) A receiver, or receiver and manager, of a company who vacates office under subsection (1)(a) is not required, on or after so vacating office, to take steps to comply with any duty imposed on the receiver, or receiver and manager, by sections 183 and 184.

(4) During the period in which a company is in administration —

(a) no order may be made, and no resolution may be passed, for the winding up of the company;

(b) no receiver or manager may be appointed over any property or undertaking of the company;

(c) no other proceedings may be commenced or continued against the company, except —

(i) with the consent of the administrator; or

(ii) with the permission of the Court and subject to such terms as the Court may impose;

(d) no enforcement order or other legal process may be issued, continued or executed, and no distress may be levied, against the company or its property except —

(i) with the consent of the administrator; or

(ii) with the permission of the Court

(e) no step may be taken to enforce any security over any property of the company, or to repossess any goods under any hire-purchase agreement, chattels leasing agreement or retention of title agreement, except —

(i) with the consent of the administrator; or

(ii) with the permission of the Court

(f) no right of re-entry or forfeiture under any lease in respect of any premises occupied by the company may be enforced, except —

(i) with the consent of the administrator; or

(ii) with the permission of the Court

(5) Where the court gives permission for a transaction under this section it may impose a condition on or a requirement in connection with the transaction.

(6) Subsection (4) does not affect any of the following:

(a) the exercise of any legal right under any arrangement (including a set-off arrangement or a netting arrangement) that may be prescribed by regulations;

(b) the commencement or continuation of any proceedings that may be prescribed by regulations

(c) criminal proceedings against the company or any of its directors or officers;

(d) proceedings concerning any property or right over which the company exercises the powers of a trustee; or

(e) proceedings by a regulatory authority in the execution of its duties after written notification to the insolvency rescue practitioner.
(7) During administration proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances'.[110]

The above provision is based on the provisions of the UK Insolvency Act, Singapore's IRDA and SA's Companies Act.[111] The proposed sections have a two-fold aim; the first is to allow for an interim automatic stay. The fact that the stay is automatic means that the debtor corporation does not incur the cost of seeking court approval and does not need the support of creditors at the outset of the process. The second is to expand the protection of the company. This will stop all legal actions, collection efforts, harassment, and foreclosure actions thereby giving the company breathing space to attempt a reorganisation plan. This would contribute to the attractiveness of the procedure and the overall achieve the goal of corporate rescue.

5.3.6 Improve aspects on Rescue Finance

New financing in post-commencement has been recognised as a crucial factor for a rescue attempt by insolvency law reforms, which may consider conferring priority or providing security to encourage a lender to advance new funds.[112] It logically follows that one of the most important factors to business rescue proceedings in bringing about a successful rehabilitation is thus that of post commencement finance.[113] In Chapter Four, I showed that the UK Insolvency Act 1986 makes provisions for priority financing within the purview of the administration expenses. However, there are no provisions for style super-priority financing to encourage new and pre-existing lenders to extend credit to the company. In Canada, both the CCAA and BIA legislation permit rescue financing on a priority basis. In Singapore, a Judicial Manager can obtain rescue finance on a priority basis with court approval. As Chapter Three showed, the Insolvency Act allows insolvent persons to obtain or borrow finances not

[110] Insolvency Act 45 of 1986 sch B1 para 44, IRDA 2018 Part 7 s 95 and Companies Act 2008, Act No. 71 of 2008 s 133.
[111] Ibid.
[112] Ebenezer T Yebisi & Taiye J Omidoyin 'Corporate rescue law to the rescue of businesses in trauma in Nigeria' (2018) 73 *Journal of Law, Policy and Globalisation* 47.
[113] Calitz Juanitta 'Is post-commencement finance proving to be the thorn in the side of business rescue proceedings under the 2008 Companies Act?' (2016) *De Jure* at 266.

exceeding the value of the unencumbered assets with creditor consent and court approval. Nevertheless, it is practically impossible to actualise this legislative provision since companies usually do not have sufficient assets available when they are experiencing financial difficulties to use as collateral. Relatedly is the absence of super priority funding which is an incentive to lenders. It is recommended that Uganda consider legislative amendments in the IA to incentivise lenders to finance companies during rescue proceedings. It is critical for the legislation to be carefully crafted to incorporate the super priority for such post-commencement of restructuring lenders as well as incentives for financial institutions or other lenders to effectively fund rescue efforts. This will lead to the success of seeing financially struggling and viable companies rescued. This provision should be drafted as follows:

167A 'Post Commencement financing

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make one or more of the following orders-

(a) an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement. The security or charge may not secure an obligation that exists before the order is made;

(b) an order that the debt arising from any rescue financing to be obtained by the company is to be secured by —

(i) a security interest on property of the company that is not otherwise subject to any security interest; or

(ii) a subordinate security interest on property of the company that is subject to an existing security interest, if the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is secured in the manner mentioned in this section;

(c) an order that the debt arising from any rescue financing to be obtained by the company is to be secured by a security interest, on property of the company that is subject to an existing security interest, of the same priority as or a higher priority than that existing security interest, if —

> *(i) the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is secured in the manner mentioned in this section; and*

(ii) there is adequate protection for the interests of the holder of that existing security interest.

(d) an order that if the company is wound up, the debt arising from any rescue financing obtained, or to be obtained, by the company is to be treated as if it were part of the costs and expenses of the winding up;

(e) an order that if the company is wound up, the debt arising from any rescue financing obtained, or to be obtained, by the company is to have priority over all the preferential debts and all other unsecured debts, if the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is given the priority mentioned in this section;

(2) For the purposes of subsection (1)(c)(ii), there is adequate protection for the interests of the holder of an existing security interest on the property of a company, if

(a) the Court orders the company to make one or more cash payments to the holder, the total amount of which is sufficient to compensate the holder for any decrease in the value of the holder's existing security interest that may result from the making of the order under subsection (1)(d);

(b) the Court orders the company to provide to the holder additional or replacement security of a value sufficient to compensate the holder for any decrease in the value of the holder's existing security interest that may result from the making of the order under subsection (1)(d); or

(c) the Court grants any relief (other than compensation) that will result in the realisation by the holder of the indubitable equivalent of the holder's existing security interest.

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(4) Where a company that has 2 or more super priority debts is wound up, the super priority debts —

(a) rank equally in priority between themselves; and

(b) are to be paid in full or, if the company has insufficient property to meet them, are to abate in equal proportions between themselves.

(5) Where a company that has any super priority debt or debts is wound up, the super priority debt or debts constitute one class of debts and, —

(a) the super priority debt or debts are to be paid in priority to all the preferential debts and all other unsecured debts; and

(b) if the property of the company available for the payment of the super priority debt or debts is insufficient to meet the super priority debt or debts, the super priority debt or debts —

(i) have priority over the claims of the holders of any debentures of the company secured by a floating charge (which, as created, was a floating charge); and

(ii) are to be paid out of any property comprised in or subject to that floating charge.

(6) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the administrator's proposal referred to in section 147, as the case may be.

(7) In this section — 'post commencement financing' means any financing that satisfies one or more of the following conditions:

(a) the financing is necessary for the survival of a company that obtains the financing, or of the whole or any part of the undertaking of that company, as a going concern;

(b) the financing is necessary for the Court's approval of a compromise or an arrangement involving a company that obtains the financing;

(c) the financing is necessary to achieve a more advantageous realisation of the assets of a company that obtains the financing, than on a winding up of that company;

'security interest' means any mortgage, charge, pledge, lien or other type of security interest recognised by law;

'super priority debt' means a debt, arising from any rescue financing obtained or to be obtained by a company, that is to have priority, pursuant to an order under subsection (1)(b), over all the preferential debts and all other unsecured debts, if the company is wound up.'[114]

The proposed amendment is based on the provisions of the CCAA and BIA in Canada, Singapore's IRDA, and SA's Companies Act.[115] The Ugandan administration process falls

[114] Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36) s 11.2, Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3) s 50.6, IRDA s 101 and Companies Act 2008, Act No. 71 of 2008 s 135.
[115] Ibid.

short of providing banks and other potential lenders with enough incentives to advance a loan to help a distressed enterprise get back on track. The proposed section 167A will not only provide financially distressed companies an opportunity to obtain rescue finance but will also give clarity on the conditions to be followed to obtain the same. It is hoped that this will encourage lenders to extend credit to the debtor for restructuring without concerns as the law clearly defines the hierarchy of priorities for potential post-petition lenders thereby enhancing rescue of companies.

5.3.7 Provision to suspend application of *ipso facto* clauses

Ipso facto clauses are contractual provisions that allow one party to terminate or modify a contract on the occurrence of insolvency or commencement of rescue proceedings in respect of the other contractual party. Continuous access to necessary services allows the administrator to develop and implement a restructuring plan without immediate operational threats. Without the prospect of contract continuation, any option to restructure is difficult. The termination of contracts by force of law or based on a contractual clause due to the commencement of restructuring or insolvency proceedings must be carefully considered.[116] Chapter three acknowledged the lack of protection from enforcement of *ipso facto* clauses as one of the weaknesses in Uganda's rescue framework. Similarly, Chapter four showed that in the UK, this constraint on *ipso facto* clauses excludes contracts involving financial services, is subject to carve-outs for certain kinds of creditors, and is narrower than the constraints in Canada. In Canada, other than EFC excluded under regulation, all suppliers and contract counterparties are included in the stay on enforcement of *ipso facto* clauses.

I also demonstrated that there are several counter-balancing measures to the prohibition on the enforceability of *ipso facto* clauses on insolvency in the UK, Canada, and Singapore. In Canada and Singapore, the statutes allow counterparties to require payments to be made in cash for goods, services, use of leased property, or other valuable consideration provided after the commencement of proceedings. In the UK, Canada, and Singapore, the co-party can apply for relief based on significant financial hardship. To enhance successful rescue efforts in Uganda, it is proposed that statutory restrictions be introduced under part X of the Insolvency Act. This will help to prevent counterparties from invoking contractual termination clauses when

[116] Op cit note 76 at 267.

companies enter rescue proceedings. Legislators may address concerns like infringement of freedom of contract by designing the scope of the *ipso facto* clause law carefully, as regards the circumstances in which the constraints will operate, the nature of those constraints, and the types of contracts that will be affected. I propose that this provision be drafted as follows:

244A 'Certain contractual rights limited
(1) This section applies where a company becomes subject to a relevant insolvency procedure.
(2) A company becomes subject to a relevant insolvency procedure for the purposes of this section where—
(a) the company enters administration,
(b) an administrative receiver of the company is appointed
(c), the approval of the Court in relation to any compromise or arrangement takes effect in relation to the company
(d) the company goes into liquidation,
(e) a provisional liquidator of the company is appointed (otherwise than in succession to another provisional liquidator), or
(f) a court order is made under section 230(2) of the Companies Act Cap 106 in relation to the company
(3) No person may, at any time after the commencement, and before the conclusion, of any relevant insolvency procedure by a company —
(a) terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement (including a security agreement) with the company; or
(b) terminate or modify any right or obligation under any agreement (including a security agreement) with the company, by reason only that the proceedings are commenced or that the company is insolvent.
(4) Nothing in this section is to be construed as —
(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of the proceedings; or
(b) requiring the further advance of money or credit.
(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.
(6) On an application by a party to an agreement, the Court may declare that this section does not apply, or applies only to the extent declared by the Court, if

(a) the office-holder consents to the termination of the contract,

(b) in any other case, the company consents to the termination of the contract, or

(c) the court is satisfied that the continuation of the contract would cause the supplier significant financial hardship and grants permission for the termination of the contract.

(7) The supplier shall not make it a condition of any supply of goods and services after the time when the company becomes subject to the relevant insolvency procedure, or do anything which has the effect of making it a condition of such a supply, that any outstanding charges in respect of a supply made to the company before that time are paid

(8) Subsection (3) does not apply in respect of any legal right under —

(a) any eligible financial contract as may be prescribed;

(b) any contract that is a licence, permit or approval issued by the Government or a statutory body;

(c) any contract that is likely to affect the national interest, or economic interest, of Uganda, as may be prescribed; or

(f) any agreement that is the subject of a treaty to which Uganda is party, as may be prescribed.

(9) In this section —

'company' means any corporation liable to be wound up under this Act;

'national interest' includes national defence, national security, public security and the maintenance of any essential service.'[117]

The proposed amendment is based on the provisions of the UK Insolvency Act and CIGA, Canada's CCAA and BIA and Singapore's IRDA.[118] This proposed provision will provide a clear framework to restrict parties from invoking *ipso facto* contractual provisions against companies that enter into any insolvency procedure. The import of the law is to provide for a stay, and not to completely remove the rights of the counterparties to enjoy their contractual rights. The stay should only be available during the period when the company is undergoing any insolvency proceedings, and the law should provide for the counterparty to apply to court for leave to exercise his or her rights, where applicable on condition that that will not affect the rescue efforts. Introducing this kind of restriction in the law will provide the company with a stable environment to restructure and continue its operations thereby enhancing rescue of financially distressed companies.

[117] Insolvency Act 45 of 1986 s 233B, CIGA s 14, Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36) s 34(1), Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3) s 65.1 IRDA 2018 Part 22 s 440.

[118] Ibid.

5.3.8 Restriction on withdrawal of essential goods and services to companies in Administration

Discontinuation of the supply of essential services is one of the common challenges that companies often face when they enter into insolvency procedures, including corporate rescue procedures. Providers of essential services, such as utilities, IT and Telecom services, are often impatient with customers who may not be able to make timely or upfront payments for services consumed.[119] Although no statistics are readily available, there is no doubt that the withdrawal of essential supplies to a financially distressed company only exacerbates the company's entry into liquidation. Chapter four demonstrated that in the UK, the Insolvency (Protection of Essential Supplies) Order 2015 restrains providers of essential goods and services from withdrawing supplies due to the customer's insolvency without a court order. In Canada, the CCAA has a critical supplier clause requiring him to supply any goods or services specified by the court to the company. It has been shown in chapter three that the current legislation on corporate rescue in Uganda is devoid of such protection to companies which not only disrupts a company's operations but may affect its chances of rescue. To address this challenge, Uganda should consider amending the Insolvency Act by introducing clear provisions that guarantee the supply of essential goods and services to companies that enter any insolvency procedure. The proposed provision should be drafted as follows:

244B 'Restriction on supplier of essential goods and services
(1) Section 244A (1) and (2) apply to this section
(2) Except as provided in subsection (3) of this section, a supplier of essential goods and services shall not alter, refuse, or discontinue service to, or discriminate against a company in administration on the basis of its financial status or on account of non-payment of the pre-commencement debt.
(3) A supplier of essential goods and services who intends to alter, refuse, discontinue service or discriminate against a company in administration shall:
(a) First give notice to the administrator of his or her intention to alter, refuse, discontinue supply of goods and services or discriminate against the Company.

[119] Waiswa op cit note 5 at 429.

(b) Upon receipt of the notice in subsection 2(a), the administrator, shall within seven (7) working days assess the likely effect of the intended alteration, refusal or discontinuation of supply service or goods or discrimination on the rescue of the company. If the administrator confirms that the intended alteration, refusal or discontinuation of service or discrimination is likely to negatively affect the rescue efforts, the administrator shall respond to the supplier informing him or her of the findings and require the supplier not to proceed with his or her intended action against the company.

(c) Where the supplier is dissatisfied with the administrator's decision, he or she may apply to court for leave to alter, refuse, or discontinue service to the company or discriminate against the company. The court may grant leave to a supplier only if satisfied that the alteration, refusal, discontinuation of supply or discrimination against the company will not cause undue difficult and economic hardship to the company and will not materially undermine the objective of administration.

(d) A supplier who is denied permission to alter, refuse or discontinue supply of essential services or goods to a company under administration shall be entitled to claim for payment in respect of services or goods supplied before and after administration in accordance with the Act.

(4) For purposes of this section, essential goods and services mean goods or services that are critical to the company's continued operation.'

By introducing clear provisions that guarantee supply of essential goods and services to companies that have entered an insolvency procedure, it is hoped that by designating certain contracts as essential the law will compel the supplier to continue to supply such goods and services. By so doing, the company's operations will continue to run smoothly thereby increasing the chances of rehabilitation of companies in financial distress.

5.3.9 Improve employees' rights during corporate rescue

I argued in Chapter three that the Insolvency Act of Uganda does not protect the right of employees as provided for in section 160(c). This is couched in the same terms as the UK legislation making it silent on the rights of the company employees during rescue proceedings. Employees are critical stakeholders and there is a need for the legislation to provide that, whenever employees are likely to be affected by a restructuring plan, a representative should have a right to represent and to protect their interest by participating in formal restructuring

and liquidation proceedings like is the case in Singapore and SA. The employment contracts should not end automatically upon the commencement of formal insolvency proceedings. In addition, the legislation should, in principle, provide for severance payments, protection of as many unpaid salary claims as possible, and allow for timely payment to employees and the protection of pension entitlements as is the case in Canada.

As I demonstrated in Chapter four, a court cannot sanction a CCAA plan or approve a BIA proposal that doesn't protect employees after the commencement of the applicable restructuring proceedings and most recently, the PPA mandates an insolvent company to prioritise payment of certain pension obligations in full before it can address any of its other financial liabilities. Additionally, in SA, employees are among the key stakeholders of corporate rescue enjoying a lot of rights and protection. It is therefore critical that Uganda amends its legislation to allow for improvement of the rights of employees as affected persons. To address this challenge, Uganda should consider repealing section 160(c) of the Insolvency Act, and in lieu thereof introduce a specific section on the rights of employees by benchmarking from the Canada and SA legislations. This is critical as employees are considered important stakeholders whose interests need to be protected, failing which may lead to high levels of unemployment and its attendant consequences. I propose that this provision should be drafted as follows:

157A 'Effect of Administration on employees and contracts

(1) Despite any provision of an agreement to the contrary—

(a) during a company's administration proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that—

(i) changes occur in the ordinary course of attrition; or

(ii) the employees and the company, in accordance with applicable labour laws, agree different terms and conditions; and

(b) any retrenchment of any such employees contemplated in the administrator's proposal is subject to the provisions of the employment Act, and other applicable employment related legislation.

(2) During a company's administration proceedings any employees of the company who are—

(a) represented by a registered trade union may exercise any rights set out in this part

(i) collectively through their trade union; and

(ii) in accordance with applicable labour laws; or

(b) not represented by a registered trade union may elect to exercise any rights set out in this part either directly, or by proxy through an employee organisation or representative.

(3) No proposal in respect of an employer shall be approved by the court unless

(a) it provides for payment to the employees and former employees, immediately after court approval of the proposal, of amounts at least equal to the amounts that they would be qualified to receive if the employer became insolvent as well as wages, salaries, commissions or compensation for services rendered together with disbursements properly incurred by them in and about the insolvent's business during the same period; and

(b) the court is satisfied that the employer can and will make the payments as required under paragraph (a).

(4) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company's administration proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor of the company for the purposes of this part.

(5) A medical scheme, or a pension scheme including a provident scheme, for the benefit of the past or present employees of a company is an unsecured creditor of the company for the purposes of this part to the extent of—

(a) any amount that was due and payable by the company to the trustees of the scheme at any time before the beginning of the company's administration proceedings, and that had not been paid immediately before the beginning of those proceedings; and

(b) in the case of a defined benefit pension scheme, the present value at the commencement of the administration proceedings of any unfunded liability under that scheme.

(6) During a company's administration process, every registered trade union representing any employees of the company, and any employee who is not so represented, is entitled to—

(a) notice, which must be given in the prescribed manner and form to employees at their workplace, and served at the head office of the relevant trade union, of each court proceeding, decision, meeting or other relevant event concerning the administration proceedings;

(b) participate in any court proceedings arising during the administration proceedings;

(c) form a committee of employees' representatives;

(d) be consulted by the administrator during the development of the administration deed, and afforded sufficient opportunity to review any such plan and prepare a submission contemplated in sections 149 and 150;

(e) be present and make a submission to the meeting of the holders of voting interests before a vote is taken on any proposed administration deed, as contemplated in section 150;

(f) vote with creditors on a motion to approve a proposed administration deed, to the extent that the employee is a creditor, and

(g) if the proposed administration deed is rejected, to—

(i) propose the development of an alternative administration deed, in the manner contemplated in section 149 and 150 or

(ii) present an offer to acquire the interests of one or more affected persons.

(7) The rights set out in this section are in addition to any other rights arising or accruing in terms of any law, contract, collective agreement, shareholding, security or court order.'[120]

The proposed amendment is based on the provisions of Canada's CCAA and BIA and SA's Companies Act.[121] The proposed section of the Insolvency Act is aimed at aligning it to one of the predominant underlying objectives of corporate rescue, which is to preserve employment thereby creating a good motivation for employees to advocate for placing distressed companies under administration, rather than resorting to liquidation or winding up, which would automatically suspend all employment contracts.

5.3.10 Insolvency Practitioners

Insolvency practitioners require a specific skill set and expertise to effectively carry out their duties. They should also be paid for their work. It was shown in chapter four that the critical qualification that an individual must pass before he/she can carry out any insolvency-related work is the Joint Examination Insolvency Board (JIEB), which is a practical exam that tests the knowledge and skills that IPs will rely upon whilst completing his or her work. The SA approach imposes restrictions on who can be appointed as business rescue practitioners based on their level of management experience. This approach classifies companies undergoing rescue into categories such as large, medium and small and practitioners into categories like senior, experienced, and junior. In SA, Business rescue practitioners' remuneration is determined through various ways; agreements between the practitioner and the company or a committee of creditors, or by a resolution passed by creditors, or tariffs or based an agreement for contingency-based remuneration.

[120] Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36) s 6 (5) (6), Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3) s 60 (1.3) (1.4) (1.5) and Companies Act 2008, Act No. 71 of 2008 ss 136, 144.
[121] Ibid.

As shown in chapter three, the success of rescue efforts largely depends on the skill and expertise of the practitioner appointed to manage the rescue process, and, ideally, the person assigned such an important task is not only qualified, but also possesses practical experience in managing businesses or companies. Section 208 of the Insolvency Act provides the qualifications which one must possess as an insolvency practitioner, however, it does not require one to have any proven practical experience in management before they can be appointed to act as insolvency practitioners. Section 174 (1) provides that administrators' remuneration may be agreed upon by the parties or fixed by the court, making it unclear for the financially distressed to have a basis on which to arrive at the appropriate remuneration.

To address the above challenges, it is recommended that two new provisions, 193A and 193B be introduced in Part XII of the Insolvency Regulations, 2013; by benchmarking the SA approach which imposes restrictions on persons who can be appointed to practice as business rescue practitioners as well as providing a tariff for payment of IPs. This will ensure that IPs have relevant practical experience in company management thereby increasing the rescue prospects of financially distressed companies. It will also ensure that arbitrary fees are not charged, as there will be a tariff to guide this. I propose that the provisions be drafted as follows:

193A 'Restrictions on practice

See s. 208 of the Insolvency Act

This regulation applies to any person who is eligible to be appointed as an Insolvency practitioner in terms of section 208.

For the purposes of this regulation, and in Regulation 193B—

'business turnaround practice' means activities of a professional nature engaged in before the effective date, that are comparable to the functions of an Insolvency practitioner in terms of the Act;

(b) Companies undergoing administration proceedings are classified in the following four groups:

> *(i) 'large companies' being any company, employing over 100 and has total assets of more than UGX 360 million;*
>
> *(ii) 'medium companies' being— any company employing between 50 and 100 and has total assets of more than UGX 100 million but not exceeding UGX 360 million;*
>
> *(iii) 'small companies' being any company, employing between 5 and 49 and has total assets between UGX 10 million but not exceeding UGX 100 million;*

(iv) 'micro companies' being any company employing not more than 5 and has total assets not exceeding UGX 10million and

(c) Persons eligible to be appointed as Insolvency practitioners are classified in the following three groups:

(i) 'senior practitioner' means a person who is qualified to be appointed as an insolvency practitioner in terms of section 208 and who, immediately before being appointed as a practitioner for a particular company, has actively engaged in business turnaround practice before the effective date of the Act, or as an insolvency practitioner in terms of the Act, for a combined period of at least 10 years.

(ii) 'experienced practitioner' being a person who is qualified to be appointed as an insolvency practitioner in terms of section 208 and who, immediately before being appointed as an insolvency practitioner for a particular company, has actively engaged in business turnaround practice before the effective date of the Act, or as an insolvency practitioner in terms of the Act, for a combined period of at least 5 years;

(iii) 'junior practitioner' means a person who is qualified to be appointed as an insolvency practitioner in terms of section 208 and who, immediately before being appointed as a practitioner for a particular company, has either—

(aa) not previously engaged in business turnaround practice before the effective date of the Act, or acted as an insolvency practitioner in terms of the Act; or

(bb) has actively engaged in business turnaround practice before the effective date of the Act, or as an insolvency practitioner in terms of the Act, for a combined period of less than 5 years.

(3) A junior insolvency practitioner—

(a) may be appointed as the insolvency practitioner for any particular small company; but

(b) may not be appointed as the insolvency practitioner for any medium or large company, or for a state-owned company unless as an assistant to an experienced or senior insolvency practitioner.

(4) An experienced insolvency practitioner—

(a) may be appointed as the insolvency practitioner for any particular small or medium company; but

(b) may not be appointed as the insolvency practitioner for any large company, or for a state-owned company unless as an assistant to a senior practitioner.

(5) A senior insolvency practitioner may be appointed as the insolvency practitioner for any company.'[122]

The proposed amendment is based on the provisions of SA's Companies Regulations of 2011.[123] Currently, no single professional appointed from either the legal and accounting professions possesses all the skills required to undertake business rescue proceedings. By including this provision, the element of practical experience will ensure that beyond academic qualifications, Insolvency practitioners have the requisite practical skills to achieve turn around for a financially distressed company.

I propose that the second amendment on remuneration be drafted as follows:

193B. 'Tariff of fees for insolvency practitioners

See s. 174

(1) The basic remuneration of an insolvency practitioner, as contemplated in section 174 (1), to be determined at the time of the appointment of the insolvency practitioner by the company, or the court, as the case may be, may not exceed—

(a) seven and a half currency points per hour, to a maximum of one hundred twenty five currency points per day, (inclusive of VAT) in the case of a micro company.

(b) twelve and a half currency points per hour, to a maximum of one hundred seventy five currency points per day, (inclusive of VAT) in the case of a small company.

(c) fifteen currency points per hour, to a maximum of two hundred currency points per day, (inclusive of VAT) in the case of a medium company; or

(d) twenty currency points per hour, to a maximum of two hundred fifty currency points per day, (inclusive of VAT) in the case of a large company.

(2) In addition to the remuneration determined in accordance with section 174 (1), and this regulation, an insolvency practitioner is entitled to be reimbursed for the actual cost of any disbursement made by the insolvency practitioner, or expenses incurred by the insolvency practitioner to the extent reasonably necessary to carry out the insolvency practitioner's functions and facilitate the conduct of the company's administration proceedings'.[124]

The proposed amendment is based on the provisions of SA's Companies Regulations of 2011.[125] If adopted, this provision will create confidence and clarity as far as fees is concerned

[122] Companies Regulations 2011 reg 127.
[123] Ibid.
[124] Companies Regulations 2011 reg 128.
[125] Ibid.

thereby enhancing the quality of service provided by practitioners and increase the success rate of rescued companies in Uganda.

5.3.11 CVA and Schemes of Arrangement

Chapter three also showed that there are no statistics on the use of CVAs and schemes of arrangement in Uganda. Furthermore, the two procedures are used interchangeably with no clear legislative separation for each. CVAs and Schemes of arrangement are distinct procedures. There is a need to separate them under the law for clarity of what each of them entails. To address these challenges, it is recommended that two new provisions be introduced in Part V of the Companies Act by benchmarking the UK, Singapore and SA approach whose legal framework on the CVAs and schemes of arrangement is well articulated. This will ensure that the two procedures in Uganda are distinct. The procedural requirements will also be clear. I propose that the first provision on CVAs be drafted as follows:

231A 'COMPANY VOLUNTARY ARRANGEMENTS

(1) This section applies to a company, liable to be wound up under this Act.

(2) The directors of a company may make a proposal under this Part to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs (from here on referred to, in either case, as a 'voluntary arrangement') by delivering a copy of the proposal, and notice of the meeting to consider the proposal, to—

(a) every creditor of the company, or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by, the company; and

(b) the Registrar of Companies.

(3) Such a proposal may also be made—

(a) where the company is in administration, by the administrator,

(b) where the company is being wound up, by the liquidator.

(4) A proposal for a voluntary arrangement contemplated in subsection (2) must contain all information reasonably required to facilitate creditors in deciding whether or not to accept or reject the voluntary arrangement, and must be divided into three Parts, as follows:

(a) Part A—Background, which must include at least—

> *(i) a complete list of all the material assets of the company, as well as an indication as to which assets are held as security by creditors as of the date of the proposal;*

(ii) a complete list of the creditors of the company as of the date of the proposal, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;

(iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;

(iv) a complete list of the holders of the company issued securities, and the effect that the proposal would have on them, if any; and

(v) whether the proposal includes a proposal made informally by a creditor of the company.

(b) Part B—Proposals, which must include at least—

(i) the nature and duration of any proposed debt moratorium;

(ii) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;

(iii) the treatment of contracts and ongoing role of the company;

(iv) the property of the company that is proposed to be available to pay creditors' claims;

(v) the order of preference in which the proceeds of property of the company will be applied to pay creditors if the proposal is adopted; and

(vi) the benefits of adopting the proposal as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation.

(c) Part C—Assumptions and conditions, which must include at least—

(i) a statement of the conditions that must be satisfied, if any, for the proposal to—

(aa) come into operation; and

(bb) be fully implemented;

(ii) the effect, if any, that the plan contemplates on the number of employees, and their terms and conditions of employment; and

(iii) a projected—

(aa) balance sheet for the company; and

(bb) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposal is accepted.

(5) The projected balance sheet and statement required by subsection (4)(c)(iii)—

(a) must include a notice of any significant assumptions on which the projections are based; and

(b) may include alternative projections based on varying assumptions and contingencies.

(6) A proposal must conclude with a certificate by an authorised director or prescribed officer of the company stating that any—

(a) factual information provided appears to be accurate, complete, and up to date; and

(b) projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.

(7) A voluntary arrangement contemplated in this section will have been adopted by the creditors of the company, or the members of a relevant class of creditors, if it is supported by a majority in number, representing at least 75% in value of the creditors or class, as the case may be, present and voting in person or by proxy, at a meeting called for that purpose.

(8) If a voluntary arrangement is adopted as contemplated in subsection (7)—

(a) the company may apply to the court for an order approving the voluntary arrangement; and

(b) the court, on an application in terms of paragraph (a) may sanction the compromise as set out in the adopted voluntary arrangement, if it considers it just and equitable to do so.

(9) The company and its creditors may adopt the proposed voluntary arrangement with or without modifications.

(10) The modifications shall not include any modification by virtue of which the proposal ceases to be a proposal such as is mentioned in sub-section 2.

(11) Neither the company nor its creditors may approve any proposal or modification that affects the right of a secured creditor of the company to enforce his security, except with the concurrence of the creditor concerned.

(12) Subject to this section, an application to the court may be made, by any of the persons specified below, on one or both of the following grounds, namely—

(a) that a voluntary arrangement unfairly prejudices the interests of a creditor, member, or contributory of the company;

(b) that there has been some material irregularity at or in relation to the meeting of the company, or in relation to the relevant qualifying decision procedure.

In this section—

the 'relevant qualifying decision procedure' means the qualifying procedure in which the company's creditors decide whether to approve a voluntary arrangement;

references to a decision made in the relevant qualifying decision procedure include any other decision made in that qualifying decision procedure.
The persons who may apply under subsection (1) are—
a person entitled, in accordance with the rules, to vote at the meeting of the company or in the relevant qualifying decision procedure;
a person who would have been entitled, in accordance with the rules, to vote in the relevant qualifying decision procedure if he had had notice of it; and
if the company is being wound up or is in administration, the liquidator or administrator.
(13) A copy of an order of the court sanctioning a voluntary arrangement
(a) must be filed by the company within five business days;
(b) must be attached to each copy of the company's Memorandum of Incorporation that is kept at the company's registered office, or elsewhere; and
(c) is final and binding on all of the company's creditors or all of the members of the relevant class of creditors, as the case may be, as of the date on which it is filed.
(14) A voluntary arrangement contemplated in this section does not affect the liability of any person who is a surety of the company.
(15) (1) If, for the purpose of obtaining the approval of the members or creditors of a company to a proposal for a voluntary arrangement, a person who is an officer of the company—
(a) makes any false representation, or
(b) fraudulently does, or omits to do, anything, he commits an offence.
(2) A person guilty of an offence under this section is liable to imprisonment for a term not exceeding 12 months or a fine not exceeding 300 currency points, or both.
(16) For the purposes of this Part, a voluntary arrangement the approval of which has taken effect comes to an end prematurely if, when it ceases to have effect, it has not been fully implemented in respect of all persons bound by the arrangement'.[126]

The proposed amendment on CVAs is based on the provisions of the UK's Insolvency Act of 1986, Insolvency Act of 2000, and SA's Companies Act.[127] If adopted, these provisions will create clarity as far as the CVA procedure relates and increase its usage by financially distressed companies to achieve successful rescue rates. I propose that the second provision on Schemes of arrangement be drafted as follows:

[126] Insolvency Act 2000 chapter 39, ss 1,2,3,4, Insolvency Act 1986 Part 1, Chapter 8, Companies Act 2008 s155.
[127] Ibid.

'SCHEME OF ARRANGEMENT

231B Power to compromise with creditors, members and holders of units of shares

(1) Where a compromise or an arrangement is proposed between —

(a) a company and its creditors or any class of them;

(b) a company and its members or any class of them; or

(c) a company and holders of units of shares of the company or any class of them, the Court may, on the application in a summary way of any person referred to in subsection (2), order a meeting of the creditors, the members of the company, the holders of units of shares of the company, or a class of such persons, to be summoned in such manner as the Court directs.

(2) The persons referred to in subsection (1) are —

(a) in the case of a company being wound up, the liquidator;

(b) in the case of a company under administration, by the administrator, and

(c) in any other case —

(i) the company; or

(ii) any creditor, member or holder of units of shares of the company.

(3) A meeting held pursuant to an order made under subsection (1) may be adjourned from time to time if the resolution for the adjournment is approved by a majority in number representing three-fourths in value of —

(a) the creditors or class of creditors;

(b) the members or class of members; or

(c) the holders of units of shares or class of holders of units of shares, present and voting either in person or by proxy at the meeting.

(4) If the conditions set out in subsection (5) are satisfied, a compromise or an arrangement shall be binding —

(a) in the case of a company in the course of being wound up, on the liquidator and contributories of the company;

(b) in the case of a company in the course of administration, on the administrator of the company; or

(c) in the case of any other company, on the company and on all —

(i) the creditors or class of creditors;

(ii) the members or class of members; or

(iii) the holders of units of shares or class of holders of units of shares, as the case may be.

(5) The conditions referred to in subsection (4) are as follows:

(a) unless the Court orders otherwise, a majority in number of —

(i) the creditors or class of creditors;

(ii) the members or class of members; or

(iii) the holders of units of shares or class of holders of units of shares, present and voting either in person or by proxy at the meeting or the adjourned meeting agrees to the compromise or arrangement;

(b) the majority in number referred to, or such number as the Court may order, under paragraph (a) represents three-fourths in value of —

(i) the creditors or class of creditors;

(ii) the members or class of members; or

(iii) the holders of units of shares or class of holders of units of shares, present and voting either in person or by proxy at the meeting or the adjourned meeting, as the case may be; and

(c) the compromise or arrangement is approved by order of the Court.

(6) The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just.

(7) An order under subsection (5)(c) shall have no effect until a copy of the order is lodged with the Registrar of Companies, and upon being so lodged, the order shall take effect on and from the date of lodgment or such earlier date as the Court may determine and as may be specified in the order.

(8) Subject to subsection (7), a copy of every order made under subsection (5)(c) shall be annexed to every copy of the memorandum and articles of the company issued after the order has been made.

(9) The Court may, by order, exempt a company from compliance with the requirements of subsection (8) or determine the period during which the company shall so comply.

(9) Every company which makes default in complying with subsection (7) or (8) and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding four hundred currency points.

(10) In this section —

'arrangement' includes a reorganisation of the share capital of a company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both these methods;

'company' means any company liable to be wound up under this Act;

'holder of units of shares' does not include a person who holds units of shares only beneficially.

231C Information as to compromise with creditors, members and holders of units of shares of company

(1) Where a meeting is summoned under section 231B, there shall —

(a) with every notice summoning the meeting which is sent to a creditor, member or holder of units of shares of the company, be sent also a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors, whether as directors or as members, creditors or holders of units of shares of the company or otherwise, and the effect thereon of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons; and

(b) in every notice summoning the meeting which is given by advertisement, be included either such a statement or a notification of the place at which and the manner in which creditors, members or holders of units of shares of the company entitled to attend the meeting may obtain copies of such a statement.

(2) Where the compromise or arrangement affects the rights of debenture holders, the statement shall give the like explanation with respect to the trustee for the debenture holders as, under subsection (1), a statement is required to give with respect to the directors.

(3) Where a notice given by advertisement includes a notification that copies of such a statement can be obtained, every creditor, member or holder of units of shares of the company entitled to attend the meeting shall on making application in the manner indicated by the notice be furnished by the company free of charge with a copy of the statement.

(4) Where default is made in complying with any requirement of this section, the company and every officer of the company who is in default shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five hundred currency points or to imprisonment for a term not exceeding 12 months.

231D Approval of compromise or arrangement by Court

Where an application is made to the Court under this Part for the approval of a compromise or arrangement the Court may approve the compromise or arrangement subject to such alterations or conditions as it thinks just.

231E Power of Court to restrain proceedings, etc., against subsidiary or holding company

(1) Where a company proposes or intends to propose, a compromise or an arrangement between the company and its creditors or any class of those creditors, the Court may, on the application of the company, make one or more of the following orders, each of which is in force for such period as the Court thinks fit:

(a) an order restraining the passing of a resolution for the winding up of the company;

(b) an order restraining the appointment of a receiver or manager over any property or undertaking of the company;

(c) an order restraining the commencement or continuation of any proceedings against the company, except with the permission of the Court and subject to such terms as the Court imposes;

(d) an order restraining the issuance, continuation or execution of any enforcement order or other legal process, or the levying of any distress, against any property of the company, except with the permission of the Court and subject to such terms as the Court imposes;

(e) an order restraining the taking of any step to enforce any security over any property of the company, or to repossess any goods held by the company under any chattels leasing agreement, hire-purchase agreement or retention of title agreement, except with the permission of the Court and subject to such terms as the Court imposes;

(f) an order restraining the enforcement of any right of re-entry or forfeiture under any lease in respect of any premises occupied by the company except with the permission of the Court and subject to such terms as the Court imposes.

(2) The company may make the application under subsection (1) only if all of the following conditions are satisfied:

(a) no order has been made and no resolution has been passed for the winding up of the company;

(b) the company makes, or undertakes to the Court to make as soon as practicable

(i) an application for the Court to order to be summoned a meeting of the creditors or class of creditors in relation to the compromise or arrangement mentioned in subsection (1); or

(ii) an application to approve the compromise or arrangement mentioned in subsection (1);

(3) When the company makes the application under subsection (1) to the Court —

(a) the company must publish a notice of the application in the Gazette and in at least one newspaper of nationwide circulation and send a copy of the notice published in the Gazette to the Registrar of Companies; and

(b) unless the Court orders otherwise, the company must send a notice of the application to each creditor meant to be bound by the intended or proposed compromise or arrangement and who is known to the company.

(4) The company must file the following with the Court together with the application under subsection (1):

(a) evidence of support from the company's creditors for the intended or proposed compromise or arrangement, together with an explanation of how such support would be important for the success of the intended or proposed compromise or arrangement;

(b) in a case where the company has not proposed the compromise or arrangement to the creditors or class of creditors yet, a brief description of the intended compromise or arrangement, containing sufficient particulars to enable the Court to assess whether the intended compromise or arrangement is feasible

(c) a list of every secured creditor of the company;

(d) a list of all unsecured creditors who are not related to the company or, if there are more than 20 such unsecured creditors, a list of the 20 such unsecured creditors whose claims against the company are the largest among all such unsecured creditors.

(5) An order of the Court under subsection (1) —

(a) may be made subject to such terms as the Court imposes; and

(b) may be expressed to apply to any act of any person in Uganda or within the jurisdiction of the Court, whether the act takes place in Uganda or elsewhere.

(6) The provisions of Section 231E regarding a company (called in this section the subject company), shall apply to a subsidiary, a holding company, or an ultimate holding company of the subject company (called in this section the related company), for such period as the Court thinks fit.

(7) The related company may make the application under subsection (1) only if all of the following conditions are satisfied:

(a) no order has been made and no resolution has been passed for the winding up of the related company;

(b) the order under section 231E(1) made in relation to the subject company is in force;

(c) the related company plays a necessary and integral role in the compromise or arrangement relied on by the subject company to make the application for the order under section 231E(1);

(d) the compromise or arrangement mentioned in paragraph (c) will be frustrated if one or more of the actions that may be restrained by an order under subsection (1) are taken against the related company;

(e) the Court is satisfied that the creditors of the related company will not be unfairly prejudiced by the making of an order under subsection (1).

(8) When the related company makes the application under subsection (1) to the Court —

(a) the related company must publish a notice of the application in the Gazette and in at least one newspaper of nationwide circulation and send a copy of the notice published in the Gazette to the Registrar of Companies; and

(b) unless the Court orders otherwise, the related company must send a notice of the application to each creditor of the related company who will be affected by an order under subsection (1) and who is known to the related company.

231E Super priority for post commencement financing

(1) Where a company has made an application under section 231B(1) the Court may, on an application by the company under this subsection, make one or more of the following orders:

(a) the company may obtain post commencement financing and—

(i) the debt arising from any post commencement financing obtained, or to be obtained, by the company is to have priority over all the preferential debts and all other unsecured debts, if the company would not have been able to obtain the post commencement financing from any person unless the debt arising from the post commencement financing is given the priority mentioned in this paragraph;

(ii) all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement.

(2) A company that makes an application under subsection (1) must, unless the Court orders otherwise, send a notice of the application to each creditor of the company.

(3) In this section

'rescue financing' means any financing that satisfies either or both of the following conditions:

(a) the financing is necessary for the survival of a company that obtains the financing, or of the whole or any part of the undertaking of that company, as a going concern;

(b) the financing is necessary to achieve a more advantageous realisation of the assets of a company obtains the financing, than on a winding up of that company.'[128]

The proposed amendment to the Scheme is based on the provisions of the UK's Companies Act, and Singapore's IRDA and Companies Act.[129] If adopted, these provisions will revolutionarise the schemes in Uganda. This is because the aspects of moratorium and rescue finance are explicitly embedded in the procedure. These have been major hindrances to this

[128] Companies Act 2006 Chapter 46 ss 895-901, IRDA 2018 ss 63-72, Companies Act 2006 Chapter 50 ss 210-212.

[129] Ibid.

procedure as demonstrated in chapter three. By implementing this proposal, the scheme procedure will appeal to financially distressed companies and in turn achieve the objective of corporate rescue.

5.4 CONCLUSION

Conclusively, the current legal and regulatory framework does not adequately encourage corporate rescue in Uganda. The provisions in the current legal and regulatory framework are weak and inadequate to realise optimal corporate rescue. Although the current corporate rescue framework has the potential to save financially distressed companies, significant reforms unique to Uganda's challenges and economy are needed to make it more effective. The proposed amendments to the Insolvency Act and Companies Act, as well as policy and legal reforms to the Insolvency framework, are aimed at providing the potential for Uganda to adopt best practices from its other jurisdictions, paving the way for more efficient and successful corporate rescues in the future. Arguably, the extent to which a country's legal framework reduces the rate of liquidation of businesses and thereby preserves the country's levels of employment is one of the most natural indicators of how supportive such a regime is to corporate rescue.[130] Corporate rescue should really be a culture in every country.

[130] Conradie S and Lamprecht C 'Business Rescue: How Can Its Success Be Evaluated at Company Level' (2015) *South African Business Review* 22.

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