Analysing the Role of the Court in Balancing Stakeholder interests in insolvency and restructuring proceedings in Developing Economies – a Ugandan Perspective

By Ssekaana Musa[1]

Introduction

The absence of orderly and effective insolvency procedures can exacerbate economic and financial crises. Without effective procedures that are applied in a predictable manner, creditors may be unable to collect on their claims, which will adversely affect the future availability of credit. Similarly, without orderly procedures, the rights of debtors (and their employees) may not be adequately protected and different creditors may not be treated equitably. Therefore, the consistent application of orderly and effective insolvency procedures plays a critical role in fostering growth and competitiveness and may also assist in the prevention and resolution of financial crises: such procedures induce greater caution in the incurrence of liabilities by debtors and greater confidence in creditors when extending credit or rescheduling their claims.

A regularized system of credit should be supported by mechanisms that provide efficient, transparent and reliable methods for recovering debt, including seizure and sale of immovable and movable assets and sale or collection of intangible assets, such as debt owed to the debtor by third parties. An efficient system for enforcing debt claims is crucial to a functioning credit system, especially for unsecured credit. A creditor's ability to take possession of a debtor's property and to sell it to satisfy the debt is the simplest, most effective means of ensuring prompt payment. It is far more effective than the threat of an insolvency proceeding, which often requires a level of proof and a prospect of procedural delay that in all but extreme cases make it not credible to debtors as leverage for payment.

The legal framework should provide for the creation, recognition and enforcement of security interests in all types of assets—movable and immovable, tangible and intangible, including inventories, receivables, proceeds and future property, and on a global basis, including both possessory and non-possessory interests. The law should encompass any or all of a debtor's obligations to a creditor, present or future and between all types of persons. In addition, it should provide for effective notice and registration rules to be adapted to all types of property, and clear rules of priority on competing claims or interests in the same assets.

Where an enterprise is not viable, the court should be swift and efficient to allow a liquidation process in order to maximize recoveries for the benefit of creditors. Liquidations can include the preservation and sale of the business, as distinct from the legal entity. On the other hand,

[1] ***Hon. Justice Ssekaana Musa*** Head Civil Division-High Court of Uganda.LL.B (Hons) Makerere University-Kampala, Diploma in Legal Practice, LL.M (University of The West Indies-Barbados) www.ssekaana.com

where an enterprise is viable, meaning it can be rehabilitated, its assets are often more valuable if retained in a rehabilitated or restructured business than if sold in a liquidation. The rescue of a business preserves jobs, provides creditors with a greater return based on higher going concern values of the enterprise, potentially produces a return for owners and obtains for the country the fruits of the rehabilitated enterprise.

The courts should facilitate the rescue of a business by promoting both formal and informal procedures. Rehabilitation and/or restructure should permit quick and easy access to the process, protect all those involved, permit the negotiation of a commercial plan, enable a majority of creditors in favor of a plan or other course of action to bind all other creditors (subject to appropriate protections) and provide for supervision to ensure that the process is not subject to abuse. Modern rescue procedures typically address a wide range of commercial expectations of different stakeholders in dynamic markets**.**

Insolvency after all conjures images of creditors who are simply attempting to recover an investment that unfortunately turned bad. A thorough examination of the dynamics of insolvency however reveals that insolvency is not just about debt collection. It is a complex process that also implicates interests and stakes beyond the interest of banks and other creditors. The court should play such a leading role and balance the interests in ensuring such stakes are protected.

Legal framework of Insolvency in Uganda

The Insolvency Act of 2011 is the principal legislation governing insolvency in Uganda which is supported by the Insolvency Regulations-2013, Insolvency Practitioners Regulations-2017 and Insolvency (Investigation & Prosecution) Regulations;2018.

The Insolvency Act provides for liquidations, receivership, administration, bankruptcy, arrangements and cross-border insolvency.

The Companies Act, 2012 has provisions for compromises with creditors, arrangements, amalgamation and voluntary winding-up.

Administration is an insolvency procedure designed to help a company survive and is an ideal solution as opposed to liquidation. During this process, the company is given breathing space within which to re-organise its affairs with an aim of turning around the business to profitability and achieving a better result to the creditor.

The insolvency legal regime provides for provisions and processes that facilitate corporate rescue by way of administration initially through provisional administration and interim protective orders to preserve the bankruptcy estate. The Insolvency Act is transitioned in a sequential manner in which a company moves from Provisional administration, Administration and later Liquidation.[2]

[2] Sections 119-124;139-147;162-170; 150-153;92-116; 117-118 of the Insolvency Act 2011

Stakeholders in Insolvency proceedings

A stakeholder is defined as "any group or individual who can affect or is affected by the achievement of the organization's objectives."[3] There are more stakeholders that courts need to be taken into account other than debtors and creditors. The following stakes are recognised: owners, financial community, activist groups, customers, customer advocate groups, unions, employees, trade associations, competitors, suppliers, government (taxes & NSSF), political groups.

Stakeholder literature is however presumed to be looking at corporations from a strategic point of view which in turn presumes that it is solvent or liquid. But since the classic definition talks of achieving corporate objectives, it can be said that the stakeholder idea also holds true even in the case of insolvent corporations whose objective at the point of insolvency may either be to restore its financial health or otherwise go into an orderly liquidation.

In insolvency, shareholders can no longer be said to be the primary stakeholder for whom the corporation through its managers owe their utmost loyalty. When a company is in the vicinity of insolvency or has in fact become insolvent, the interest of creditors becomes the primary concern of the managers. This is consistent with established corporate law principles that the duty shifts to the creditors in the event of insolvency because they become the new residual claimants of the corporate assets. The stakeholders of corporations may indeed shift depending on the environment where it operates as well on the current financial state it is in.

Who are the stakeholders of an in insolvent corporation? One account proposes an "expanded" definition of stakeholder of an insolvent company that goes beyond the creditors. This view holds that an insolvent corporation includes community interests as legitimate stakeholders. It covers the state, local trade suppliers, and tort claimants as stakeholders on account of public interest. The expanded interests may also be referred to as non-market stakeholders.[4]

However, it is criticized to have an expanded list of stakeholders since judges will have difficulty considering the communities into the equation because their interest cannot be valued and that the wider definition of stakeholders involves choices are policy choices that should not burden judges.

This is further encapsulated in the argument that:
Judges are "disinterested arbiters" whose only task is to control the parties' conflicting interests and to ensure the transparency and integrity of the bankruptcy procedure. By remaining disinterested, judges allow the parties to "make their own decisions and thereby choose their own destinies."

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[3]Andrew L. Friedman and Samantha Miles, *Stakeholders : Theory and Practice,*Oxford : Oxford University Press, 2006,

[4] *Creditor Rights and the Public Interest, Restructuring Insolvent* Corporations, University of Toronto Press 2003, at p.106.

Courts ought therefore to be allowed sufficient discretion in considering not only the usually myopic interests of creditors but even the interest of, a “distant group, including the public at large, the government, and even global social and political entities, with their broader economic and environmental interests.” No hard law is therefore necessary for judges to be able to take into consideration community interest in their determination of insolvency rescue plans. This does not mean however that a judge need only use intuition or rely on “faith” in analyzing the implication of the options presented before them. On this point, a judge may well seek the help of *amicus curiae* which ironically must necessarily be an economist in order to fully appreciate the implications of different scenarios.

The Role of the Courts in Insolvency Proceedings

Since the adjudication of disputes is a judicial function, insolvency proceedings should be conducted under the authority of a court of law where judges will, at a minimum, be required to adjudicate disputes between the parties on factual issues and, on occasion, render interpretations of the law. The court will only be able to fulfill this function if it is made up of independent judicial officers with particularly high ethical and professional standards.

A well-functioning and predictable insolvency court provides for the quick disposition of insolvency cases, preserving assets and maximizing their value. It also provides incentives for parties to attempt out-of-court workouts before seeking judicial relief.26 In most jurisdictions the judiciary fulfills oversight and dispute resolution functions through general jurisdiction courts, commercial courts or specialized bankruptcy courts.

The law empowers the court to have a general, non-intrusive, supervisory role in the rehabilitation process. The court or regulatory authority should be obliged to accept the decision reached by the creditors that a plan be approved or that the debtor be liquidated. In a rehabilitation/restructuring proceeding, a court must ensure that the process is efficiently conducted. The court should apply the clear time-bound procedures for events that afford some flexibility but avoid delay. In this regard, the court acts as a case manager to move the process forward. In addition, the court should ensure that the process is conducted fairly and in accordance with proper procedures. This requires that creditors or others who claim that they have been prejudiced or affected by the nonobservance of proper formalities and rules have the right to apply to the court for appropriate redress.

One of the main functions of the court will be to resolve problems or disputes that develop. Even the most detailed of legislative procedures cannot hope to provide for every eventuality or avoid problems in application or interpretation of applicable law. Court acting sensibly can avoid or overcome technical and non-material problems and difficulties by way of court supervision[5]. Finally, the court presides over the plan process to determine whether a plan

[5] Sections 51, 117, 136, 173 and 195 of the Insolvency Act, 2011 give Court supervisory powers over insolvency office holders and the court may give directions on any matter arising during the course of the insolvency; confirm,

meets the criteria established in the law for approval and to investigate abuses by parties in the process. In this regard, the court's role provides a balance of power for creditors that may wish to challenge a plan or attack the means by which it was procured (for example, by the influence of fraud or 'insider' votes).

Exercise of Discretion

The laws on insolvency are not adequate enough to address all anticipated situation and therefore there is need to allow courts exercise some latitude of discretion to address the grey areas of the law. Insolvency laws tend to provide guidance as to how a court should exercise its discretion when making a determination on matters that involve economic or commercial issues. The exercise of discretion by courts in insolvency matters should be limited when determinations are made regarding the viability of the enterprise. The court should exercise its discretion with great circumspection if it is to overrule the creditors' views in respect of insolvency and restructuring proceedings and especially where there is consent by all the creditors.

Because an insolvency proceeding is a judicial proceeding, there are, however, important limits to how much the court's role can be diminished. The court is empowered to inquire into the affairs of the insolvent.[6] A party in interest cannot be denied an opportunity to appear before the court if it feels that its rights are not being adequately protected. Moreover, there are certain key decisions (e.g., the decision to commence proceedings) that can only be made by the court. Accordingly, if the capacity of the court is constrained, efforts will need to be made to improve it; rather than to circumvent it as this will be a recipe for disaster to the whole insolvency proceedings. The courts should be able to exercise greater latitude of discretion to make or revoke insolvency orders once made in order to balance the stakeholder interests.[7]

Efficiency

The courts should be mindful that an insolvency proceeding is a dynamic process. Unlike many other adjudicative proceedings, which involve an inquiry into historical events, an insolvency proceeding takes place in "real time": delays in a court's adjudication can have an adverse effect on the value of the assets or the viability of the enterprise. It is therefore critical that procedures be put in place to ensure that hearings can be held quickly and that decisions are rendered soon thereafter. The delay by an insolvency court may result in unintended consequences for the entire insolvent estate and interests of the different stakeholders.[8]

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reverse or modify any act or decision of the insolvency office holder, order an audit of the accounts; and review or fix the remuneration of the liquidator.

[6] Section 22 & 23 of the Insolvency Act 2011
[7] Sections 20, 92(2), 120 Insolvency Act-2011(Insolvency orders are only made if court is satisfied). Sections 44, 134 and 169 of the Insolvency Act-2011(Insolvency orders can be annulled, revoked, set aside or modified)
[8] In the matter of Petition of Nakumatt Uganda Limited Company Cause 31 of 2017

The court should encourage consensual resolution of cases prior to final court determination. Alternative techniques such as Arbitration or Mediation can also resolve disputes. This approach can conserve resources, expedite case disposition, foster compromise and cooperation, ameliorate the adversarial nature of disputes and moderate the risk of failure of enterprise rescues.

Judicial decision making should be separate, distinct and defined to distinguish it from that of other parties involved in insolvency. Consistent decisions facilitating predictable disposition of cases are invaluable in establishing an effective court. Whether by using cases as precedent, by disseminating judicial opinions or simply by striving for continuity in decision making, important goals can be achieved such as increasing prospects for negotiated settlements in lieu of litigation, making better use of scarce judicial resources and reducing the cost and delay of court intervention, trials and formal dispute resolution.

The court while applying the insolvency law should carefully balance the legal and commercial rights of creditors in a way that preserves legitimate commercial expectations, to foster predictability in commercial relationships.

Interim Protective Measures

The court should be able to secure all assets in which the debtor has an ownership interest by a 'stay' to prevent the unsecured creditors from (i) attaching, selling, or taking possession of assets as a means of enforcing their claims, or (ii) initiating legal proceedings to recover debts incurred before the liquidation proceedings were commenced. While the stay should apply to secured creditors for a limited period, important limitations need to be imposed with respect to the coverage of these creditors. The court should be able to prevent to prevent improper disposition of assets by the debtor to avoid instances where the debtor or its management seek to engage in wrongful or fraudulent transfers of assets to the detriment of creditors. There should be a moratorium imposed on repayment of debts, though there may be exceptions for setoff rights, netting of financial contracts and other important interests.

Similarly once a petition for commencement has been filed the court should grant interim measures to protect the debtor's assets pending a determination of commencement by the court. The range of measures should normally include full or partial divestiture of the debtor's control over the assets, the appointment of an interim administrator, and the imposition of a stay on the ability of creditors to attach assets. Generally, the court will impose such measures at its discretion or upon a creditor's or debtor's request.

For reasons of principle, policy and pragmatism there must be some restraint on the debtor and creditors if a fair and orderly administration is to result and if fundamental objectives and policies of the insolvency law are to be upheld. Accordingly, the commencement of proceedings should have two main effects. First, it should impose a moratorium on the disposition of the debtor's assets (including repayment of debts that arose before the filing of the petition) except as authorized by the court. Second, it should enjoin actions by creditors to enforce claims against the enterprise's assets through collection efforts, adjudication, execution or otherwise. Both effects inhibit the disposition or removal of assets in a way that would undermine the ability to maximize asset values, and both promote equitable distribution among creditors and encourage the rehabilitation of viable businesses.[9]

1. Protection Against the Debtor

Once the insolvency proceedings have commenced the debtor is normally divested of all rights to manage and operate the business and a liquidator is appointed to assume all responsibilities divested by the debtor, including the right to initiate and defend legal actions on behalf of the estate and the right to receive all payments directed to the debtor. Upon the commencement of the proceedings, the court should direct the debtor to disclose all of its assets and liabilities and any questionable transactions. Violations of this rule should give rise to penalties and sanctions by the court.

The court should in exercise of its discretion be able to assess and evaluate the case and be able to determine whether to allow the debtor to continue in operations of the business or enterprise in the best interest of all the creditors.

2. Protection Against Creditors

The court should further be allowed to impose a stay order against creditors from enforcing their rights through legal remedies during the period of the liquidation proceedings. Such a stay is necessary not only to provide the liquidator with adequate time to avoid making a forced "fire sale" that fails to maximize the value of the assets being liquidated, but also to provide the liquidator with an opportunity to sell the enterprise as a going concern for the benefit of all creditors or stakeholders.

The courts must be able to balance the immediate benefits that accrue to the stakeholders by having a broad stay with comprehensive powers given to the liquidator, on the one hand, and the longer-term benefits that are derived from limiting the degree to which this stay interferes with contractual relations with creditors, on the other hand.

3. Protection Against the Liquidator

The law gives the court wide discretionary powers to give directions on any function of an Administrator. This is rooted in the fact that the court may not be able anticipate the challenges the Administrator will face and as a consequence, the Administrator should always seek guidance and direction on unclear issues in order to protect the administrator from allegations of acting improperly or unreasonably. The Court remains with the duty to

[9] **In Re: Uganda Telecom Ltd** High Court Misc Cause No. 173 of 2017 (Civil Division)

guide the administration or liquidation process and the directions may be sought to ensure that the Administrator or Liquidator acts or is guided by the law.[10]

Given the broad powers that are conferred upon the liquidator, the court should protect the interests of the stakeholder's' against abuse or incompetence by the liquidator. This may include court supervision, creditor or court approval, and personal liability.[11]

Verification of Claims & Interpretation of Administration Deed

The court should give directions and allow the provisional administrator or liquidator to verify the claims of the creditors of the debtor. This involves not only an assessment of the underlying legitimacy and amount of the claim, but also a determination of the category within which this claim fits for distribution purposes (e.g., secured versus unsecured, pre-petition versus post-petition). The court should be able to give directions and guidance on the treatment of some claims. If the liquidator challenges any aspect of a creditor's claim or interpretation of an administration deed, this dispute will need to be adjudicated by the relevant court.[12]

Governance: management.

In insolvency and restructuring proceedings, the court should ensure that the management is replaced by a qualified court-appointed official (administrator) with broad authority to administer the company business in the interest of creditors. Control of the company should be surrendered immediately to the administrator except where management has been authorized to retain control over the company.

The clearest case for replacing management exists in the context of a liquidation proceeding, which is a terminal proceeding. The ultimate objective of such proceedings is to maximize asset value and pay creditors as much as possible while shifting assets to more efficient market participants. Where the enterprise's assets are to be owned and operated by someone else, the only reason for management to remain in place is to facilitate the sale of assets and the business.

Treatment of secured creditors.

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[10] *Re: UTL-An application by Ruth Sebatindira (Administrator UTL)* Misc. Application No. 783 of 2020; *Ruth Sebantindira(Administrator UTL in administration) v URA & 6 Others* Misc. Application No. 1164 of 2020

[11] In Aya **Bakery & Anor v Roko Construction Ltd** (MA 661 of 2010) I overturned a receivership because the lawyer so appointed as a Receiver did not know how to file a statement of Affairs of the company under receivership. In other cases receiverships were given to court bailiffs who ended up mismanaging the whole exercise leaving little room for corporate rescues. See also ***Ranchodhai Patel v Mukwano Enterprises Ltd & Sylvester H. Wambuga*** *(Liquidator African Textile Mills Ltd) S.C.C.A No. 06 of 2017*, the Supreme Court held that the liquidator's actions were fraudulent, unlawful and in breach of his legal duty of care to ATM Ltd. Court removed the liquidator from office and directed the shareholders to appoint another liquidator.

[12] *In the matter of an Application by Ruth Sebatindira in respect of verification of claims by UCOM, LAP GREENN & LPTIC* Misc. Application No. 1162 of 2020: *In the matter of an application by Ruth Sebatindira (Administrator UTL)* Misc. Application 784 of 2020

The court should recognize the priority of secured creditors in their collateral. Where the rights of secured creditors are impaired to promote a legitimate insolvency policy, the interests of these creditors in their collateral should be protected to avoid a loss or deterioration in the economic value of their interest at the commencement of the case.

While the debtor is solvent, security is of limited significance because, assuming that the debtor has not removed its assets from the reach of its creditors, they can secure satisfaction by obtaining a judgment and enforcing it against those assets. It is when the debtor goes insolvent that the creditor has a particular need for recourse to the security.

Thus it is of prime importance that the court should respect the secured creditors and give them priority over other creditors as regards rights over the collateral. The justification for such priority is to be found in the concepts of bargain, value and notice.

The court should be able to balance the extent of priority of the secured creditors over the general body of unsecured creditors. The contest is between the interest of a creditor who has bargained for security in exchange for value that reflects the reliance on it and the interest of unsecured creditors in the avoidance of precipitate action. The secured creditor merely seeks to take out of the estate that which it put in, while the interest of unsecured creditors is to prevent the devaluation of the business by the removal of those essential to running the business. This concern is particularly relevant in the context of a rehabilitation proceeding, where removal of assets will likely prevent the reorganization to the detriment of all creditors.

***Stay protection*.** In cases where the stay applies to secured creditors, it should be of limited specified duration, strike a proper balance between creditor protection and insolvency objectives, and provide for the possibility of orders being made on the application of affected creditors or other persons for relief from the stay. In liquidation the emphasis is on selling assets, in whole or in part, so that creditors can be repaid from the proceeds as quickly as possible. Maximizing value is an overriding objective in liquidations. The difficult balance is between the competing interests of secured creditors with collateral rights and the interests of general unsecured creditors. More often than not, the secured creditors will hold a secured interest on the business's most important assets. Arguably, in a liquidation, where the interest in preserving enterprises does not exist, the balance of interests should tilt strongly in favor of upholding the contracted rights, subject to respecting the *pari passu* principle. In other words, there should be a strong interest in protecting secured rights and allowing such creditors to recover their collateral. Because such creditors have rights that are senior to or different than those of unsecured creditors, special treatment of such rights does not violate the *pari passu* principle as among unsecured creditors. At the same time, the interest in protecting secured rights should be balanced against the strong interest in maximizing value in the liquidation of the business. This often means, in the first instance, attempting to sell the enterprise assets collectively rather than piecemeal where the collective value is higher than the breakup value. It may also mean ensuring that any equity or unencumbered value in the collateral is preserved for the benefit of the estate.

Treatment of unsecured creditors.

Following distributions to secured creditors and payment of claims related to costs and expenses of administration, proceeds available for distribution should be distributed pari passu to remaining creditors unless there are compelling reasons to justify giving preferential status to a particular debt.

The court should ensure that public interests generally are not be given precedence over private rights. The Court must recognize the varying degrees and the priority of certain categories of unsecured debt, such as taxes and unpaid wages.

Treatment of employees.

The special circumstance or role that employees play in relation to the firms that employ them or to the economy in general is likewise widely recognized. Employees are considered "much more closely integrated within the debtor's business than creditors whose claims against the debtor arise by way of goods supplied but not paid for or by way of loans to the debtor that are still outstanding." This particular circumstance thus justifies the preferential treatment in the distribution of the insolvent's assets. It also justifies the participation rights granted to employees. Gould discusses this special status of employees:

> *"We can also observe that within the corporation, employees have a special place among stakeholders. One reason is that the other groups who may be regarded as part of the economic organization of the corporation usually have a considerably greater ability than employees do to exit from the organization. Possessing "exit," they need "voice" less than do the employees. Although it is tempting to regard employees as free agents who may choose to work for anyone, this applies mainly to those possessing highly valuable skills. For the others, there is clearly the potential for a coercive element in obedience to management guidelines – namely, they must do so on pain of losing their employment. Indeed, they may be hard pressed to find another"*[13]

Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors. In liquidation, where the fate of the enterprise is terminal, one cannot reasonably make a case for preserving jobs at the expense of a defunct enterprise. Insolvency is generally viewed as a process of financial adjustment in the relationships among lenders and borrowers or creditors and debtors—a view that could be interpreted to overlook or marginalize the significance of employees and their rights. As a class, workers fall between the extremes of shareholders or managers and lenders or creditors. There is typically an implicit commitment between workers and the firm. If the worker continues to work effectively, the firm will continue employment and pay wages commensurate with the employee's abilities and efforts. This commitment is necessarily qualified: if the firm's financial fortunes decline precipitously, the worker, as well as the firm's shareholders, bears some of the risk. The commitment is typically not explicit, simply because it is impossible to write down all

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[13] Carol C. Gould, *Global Democracy and Human Rights*, (Cambridge, 2004), pp. 219- 234.

the relevant conditions. Many legal systems recognize these implicit commitments. Thus in insolvency proceedings a payment due to workers for work already performed is given seniority over other unsecured creditors holding a priority or preference in payment.

Treatment of equity interests.
As a general rule, the owners of the business are not entitled to a distribution of the proceeds of assets until the creditors, who are senior in priority, have been fully repaid. Accordingly, it is only in the rare liquidation case that the equity interests or owners may realize any recovery from their investment in the enterprise.

In a rehabilitation proceeding, the same rule should apply, and its application quite often poses obstacles to workouts and voluntary commencement of proceedings that owners know will ultimately result in the demise of their ownership. This outcome is extremely hard to accept when owners or a family have devoted their life's earnings and hard labor to growing the business. Accordingly, rehabilitation procedures, which adopt the same general rule on priorities, sometimes allow equity interests to negotiate to retain a stake in the enterprise.

The court should be able to take into consideration the special status of the owners depending on the circumstances of the case and especially where they have not been involved in running down of the company through mismanagement.

Courts' Powers to set aside voidable transactions: *fraudulent or preferential transactions.*

The court should scrutinize all transactions prior to commencement of insolvency proceedings in order to weed out fraudulent and preferential transactions completed when the enterprise was insolvent or that resulted in its insolvency. The transfers covered by this principle fall into two categories: fraudulent and preferential. Fraudulent transfers are those made by the debtor's management with an intent to defraud creditors, while preferences are typically payments made in the usual course of affairs but which violate the *pari passu* principle by preferring some creditors over others who go unpaid during the period of insolvency leading up to the filing.[14]

The fundamental requirements qualifying a transaction as preferential are that it prejudices other creditors of the debtor (who receive a lower dividend in the bankruptcy by virtue of the payment made to other creditors), occurs while the debtor is insolvent or renders the debtor insolvent and occurs in a suspect period prior to the formal opening of insolvency proceedings.

Court may make an order requiring a person to pay to the liquidator, receiver or trustee, in respect of benefits received by that person as a result of the transaction, the sums which fairly represent those benefits or requiring property transferred as part of the transaction to be restored to the company or the bankrupt's estate.

[14] Section 15-18 of Insolvency Act-2011 *Voidable transactions include preferential transactions, transactions at under value, voidable charges created within a year preceding the liquidation and insider dealings.*

Countering Abuse of Insolvency Process

The Courts have an overriding duty to promote justice and prevent injustice and should not entertain insolvency proceedings if they would amount to an abuse of the process of the court. The law provides a number of mechanisms and tools to aid a Judicial Officer in preventing abuse of the insolvency processes.

Abuse of insolvency proceedings generally refers to the institution of insolvency proceedings in bad faith and can be manifested in different ways: Commencing insolvency proceedings before exhausting other modes of execution. Insolvency proceedings should not be used as a debt collection tool. Bankruptcy/Winding up orders should only be granted after other modes of execution have been exhausted:[15] Debtors /Borrowers who don't want to settle their obligations and apply insolvency orders to defeat creditors' claims should be restrained and such applications be dismissed;[16]Secured Creditors selling debtors' assets at undervalue and later claiming for the balance of the debt from the liquidator: Commencing Insolvency Proceedings with the aim of benefiting a single creditor. Insolvency proceedings are not intended as a means for a single creditor to enforce his debt. They must benefit the general body of creditors[17].

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Out of Court Restructuring & Alternative Dispute Resolution

The court should be able to recognize that there are other available and cheaper means of resolving insolvency issues through alternative dispute resolution mechanisms such as ***"Workouts"*** *or* ***"Voluntary restructuring negotiations****"*

A work out is a process where a debtor experiencing or which will imminently experience financial difficulties negotiates relief in the form of contractual amendments or waivers from creditors without or with limited judicial intervention.

Workouts focus to preserve the debtor entity rather than requiring its liquidation or lengthy court processes and outputs may include:

1. Resetting financial covenants
2. Re-scheduling payment obligations
3. Converting accrued into repayable principal or
4. Converting debt into equity

[15] In *Re A Company* (No. 001573 of 1993 [1983] B. L. C 492

[16] *Tibeingana Deox v Vijay Reddy High Court* Misc. Cause no. 286 of 2019

[17] *Chan Siew Lee Jannie vs Australia and New Zealand Banking Group Ltd* [2016] 3 SLR 239

Such processes sometimes allow the debtor to remain in possession of the company and such matters will always remain unreported since they end up in consent judgments.[18]

CONCLUSION

The courts should apply the Insolvency laws by balancing the rights and interests of creditors and society by reapportioning the risks of insolvency in a way that suits a country's economic, social and political goals. There is no universal standard because insolvency laws in different countries vary significantly in their application and background, as do their aspirations on security interests, recordation, property and contract rights, remedies and enforcement procedures.

Courts should be able to assess status of the company in order to make an informed decision of either saving it or killing it: Therefore, the Court should not provide a safe haven for moribund enterprises. Enterprises that are beyond rescue should be liquidated as quickly and efficiently as possible.

The court's role is to ensure that the insolvent company is administered for the benefit of all affected parties. The court in exercise of discretion should make decisions that embody goals and priorities consistent with the values of the society. The nature of decisions will help in the creation of such a framework and its integration with the wider legal process that will be vital to maintaining social order and stability. All stakeholders need to be able to anticipate their legal rights in the event of a debtor's inability to pay, or to pay in full, what is owed to them. This allows both creditors and equity investors to calculate the economic implications of default by the debtor, and so estimate their risks.

Because society is constantly evolving, insolvency law cannot be static. The courts should be able to apply the law in the changed circumstances and ensure that it meets current social needs. A Proceeding may be perfectly legal yet opposed to sound commercial principles.[19]

Court should evaluate with greater depth whether Re-organisation/ restructure or liquidation is the appropriate approach to managing an insolvency estate. Enterprises that have a chance to reorganize should be allowed to do so under the supervision of the court

It is of paramount importance that there is developed a profession cadre of insolvency practitioners to help courts administer entities that are failing with a view to saving those which can be saved and liquidating equitably entities that cannot be saved.

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[18] *Eagle investments Ltd v DFCU HCCS* 667 of 2005:*Kisubi High School v Barclays Bank* HCCS 0160 of 2007

[19] *Verner v Gen and Commercial invest. Trust* **[**1894] 2 CH 239 at 264