Reinvigorating Corporate Rescue in Developing Economies – a Ugandan Perspective

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Abstract

This paper analyses the concept of corporate rescue in Uganda as an emerging economy. It explores Uganda's evolutionary roadmap to a modern insolvency framework and its quest for corporate rescue as sought by the Insolvency Act 2011. The paper then examines why corporate rescue as a policy objective of Uganda's insolvency law has yet to achieve its intended objectives and offers some avenues on how corporate rescue could be reinvigorated.

Introduction

The concepts of "corporate rescue" and "rescue culture" (the idea that a financially struggling but viable company/business ought to be given a second chance at survival) can be understood in many different ways by academics, judges, policy-makers and extant stakeholders depending on a particular jurisdiction.[1] This may be due to differences in the approaches and purposes of corporate insolvency law and rescue processes prescribed by a particular jurisdiction in response to companies in financial difficulties.[2] In emerging economies, these are a relatively new phenomena, unlike the position in developed economies/jurisdictions such as the US and the UK where these concepts have been embraced and consolidated into their legal systems.[3]

While rescue culture is a concept attuned to the idea that business activities with calculated risks should be encouraged and upon failure, a system is available to guide and regulate affected stakeholder interests, corporate rescue provides for processes and procedures that can be

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[1] See for example, A Belcher, *Corporate Rescue* (London, Sweet and Maxwell, 1997), 12, on the definition of corporate rescue; R. Parry, *Corporate Rescue* (London, Sweet & Maxwell, 2008) Ch.1.

[2] Bo Xie, *Comparative Insolvency Law* (Cheltenham, Edward Elgar, 2016) Chapter 1: Corporate rescue – the new orientation of insolvency law.

[3] L. Qi, "Managerial Models during the Corporate Reorganisation Period and their Governance Effects: The UK and US Perspective" (2008) *Company Lawyer*, 131; G McCormack, *Corporate Rescue Law: An Anglo-American Perspective* (Cheltenham, Edward Elgar, 2008); R. Parry, *Corporate Rescue* (London, Sweet & Maxwell, 2008).

adopted by associated actors to deal with financial distress.[4] However, the unwillingness to be associated with corporate failure in emerging economies has the potential to constrict the policies and processes that are designed to support financially struggling but viable businesses to recover.

Therefore, while legislation has been enacted by emerging economies with provisions to guide and regulate company directors, officers and insolvency practitioners (IPs) in dealing with companies in financial difficulties, the public's perception of insolvency and the stigma associated with a company in financial distress can adversely impact the role of such legislation and the policy objectives such legislation seeks to pursue. As a consequence, corporate rescue as a policy objective of insolvency law fails to achieve its intended purposes/objectives. From this perspective, questions are asked as to how then, do we reinvigorate corporate rescue to achieve legislation's intended objectives, especially in an emerging economy?

This paper analyses the concept of corporate rescue in Uganda as an emerging economy in Sub-Saharan Africa. The paper examines Uganda's insolvency laws and formal corporate rescue procedures upon which its insolvency framework is designed and the role (if any) the rescue processes have played in supporting financially struggling but viable businesses navigate their financial difficulties. The paper begins by looking at Uganda's evolutionary roadmap to a modern insolvency framework designed in 2011. The paper then examines why corporate rescue as a policy objective of Uganda's insolvency law has yet to achieve its intended objectives and offers some avenues on how corporate rescue could be reinvigorated in Uganda to meet these objectives.

The roadmap to corporate rescue in Uganda

Since Uganda's independence from the British rule in 1962, the main legislation that dealt with corporate insolvency and bankruptcy issues were the Bankruptcy Act 1931 and Companies Act 1961 until 2011when a more modern Insolvency Act 2011 (IA 2011) was enacted to deal with insolvency law and related matters. The Bankruptcy Act 1931 was a total replica of the English Bankruptcy Act 1914.[5] This Act had provisions that mandated for English insolvency law to be adopted and applied in Uganda where necessary.[6] This was because as a British protectorate,

[4] Xie, (n 2).

[5] Bankruptcy Act 1914 (4 & 5 Geo V, c 59).
[6] Bankruptcy Act 1931, s.2.

Uganda was under the direction of Britain as its colonial sovereign and legal, social, political and economic structures were based on British rules and policies.

The other formal legislation was the Companies Act 1961 which was enacted to deal with corporate legal issues in Uganda. This Act was seen as an improvement on corporate laws of Uganda as it replaced the Indian Companies Act 1882 which had been enacted to regulate business and trading agreements between Uganda and Indian traders but it had no provisions on corporate insolvency.[7] The Companies Act 1961 was also a replica of the English Companies Act 1948 but had provisions on corporate insolvency and company winding up.[8]

However, these provisions on insolvency and company winding up did not represent modern developments in the world of business and commerce and there was a need to improve Uganda's insolvency and company laws to match international trends and developments. The need for reform was further amplified by the impact and aftermath of the global economic recession of 2007/2008 which further highlighted Uganda's insolvency framework's inefficiencies in dealing with and supporting companies in financial difficulties.[9]

Therefore, the Ugandan government commissioned the Uganda Law Reform Commission (ULRC) to review its laws in these areas and to make recommendations for reform. The ULRC recommendations led to the tabling of the Insolvency Bill 2009[10] before the parliament in 2009 and these led to the enactment of the Insolvency Act 2011.

The birth of modern insolvency law and rescue culture

In 2011, Uganda enacted the Insolvency Act 2011 to upstream its insolvency and bankruptcy laws.[11] The aims and objectives of the IA 2011are summarised as:

> "[A]n Act to provide for receivership, administration, liquidation, arrangements, bankruptcy, the regulation of insolvency practitioners and cross border insolvency; to amend and consolidate the law related to receiverships, administration, liquidation, arrangement and bankruptcy; and to provide for other related matters."[12]

[7] Uganda Law Reform Commission, "A Study Report on Company Law", ULRC Pub. No.35 (2004), p.7.
[8] J. D. Bakibinga, "Company Law and Business Development in Uganda" (2004) 2 *Uganda Living Law Journal*, 31.
[9] C. Nyombi, "The Development of Corporate Rescue Laws in Uganda and UK" (2015) (57) (2) *International Journal of Law and Management* 214.
[10] Insolvency Bill 2009 (Bill No. 11, 3 July 2009).
[11] Uganda Law Reform Commission: *A Study Report on Insolvency Law*, (Law Com Pub No. 13 of 2004).
[12] IA 2011, Preamble.

These aims and objectives were largely drawn from the famous 1982 Cork Report,[13] which at the time the ULRC was reviewing Uganda's insolvency and bankruptcy laws was considered the most normative guidance on designing a modern insolvency model/system. Key amongst these aims and objectives drawn from the Cork Report were; the need to provide a strong insolvency law framework that is simple and easily understood, and free from anomalies and inconsistencies, but one which is flexible enough to cope with social and economic changes; to enable the preservation of viable commercial enterprises; to fully and sufficiently investigate the cause of insolvency and to discourage unscrupulous or undesirable actions by the board of directors, members, creditors or any other stakeholders.[14]

Therefore, the Insolvency Act 2011 formed the bedrock for Uganda's modern insolvency framework. However, a decade since its passage, its impact, especially on shaping Uganda's corporate rescue and rescue culture remains to be seen. Hundreds of businesses and companies have collapsed in the years prior to the outbreak of the COVID19 pandemic and many are projected to collapse due to financial/economic impact of the global COVID19 pandemic.[15]

Uganda's insolvency framework and the quest for corporate rescue

Uganda's insolvency framework is drawn from the Insolvency Act 2011 which prescribes processes, such as provisional administration,[16] administration,[17] voluntary arrangements,[18] receivership,[19] liquidation[20] and cross-border insolvency proceedings.[21] The IA 2011 is supplemented by the Insolvency Regulations 2013 (IR 2013) that regulate and guide insolvency proceedings. The other legislation is the Companies Act 2012 which prescribes provisions that deal with creditor compromises and arrangements,[22] reconstructions and amalgamation[23] and voluntary winding-up.[24]

[13] Sir Kenneth Cork, *Report of the Review Committee on Insolvency Law and Practice* (1982), Cmnd 8558 (*Cork Report*).
[14] *Cork Report*, para. 198(h) – (i); paras. 203 – 4; 235 – 238.
[15] Lydia Wamono, "Save that business on the brink of collapse" *Daily Monitor* (Kampala, 20 April 2021) <https://www.monitor.co.ug/uganda/business/prosper/save-that-business-on-the-brink-of-collapse-3370144> (accessed 2 June 2021).
[16] IA 2011, Part VI, ss.139 – 161.
[17] IA 2011, ss.140 – 162.
[18] IA 2011, ss. 125 – 137.
[19] IA 2011, Part VII, ss. 180 – 197.
[20] IA 2011, ss. 56 – 124.
[21] IA 2011, Part IX, ss. 212 – 252.
[22] CA 2012, s.234.
[23] CA 2012, ss. 236 – 245.
[24] CA 2012, Part XI, ss.268 – 272.

Among the provisions and corporate rescue processes that the IA 2011 introduced was the administration procedure as a measure to improve insolvency proceedings in financially struggling but viable businesses. This was in addition to an agenda to tailor a so-called rescue culture as sought by the ULRC's recommendation instigated by the Cork report. The overall imperative of the rescue culture was to boost survival rates of financially struggling but viable businesses. This would counter high company liquidation rates premised on processes, such as receivership which were mainly driven by creditor enforcement and recovery fundamentalism rather than rehabilitation and rescue.[25] Therefore, much emphasis was placed on collective insolvency procedures, such as administration and CVA as opposed to liquidation.[26]

Administration as a catalyst for a rescue culture

Administration as introduced by the IA 2011 is a two-stage procedure consisting of provisional administration[27] and formal administration.[28] Provisional administration is an initial stage taken to consider the viability of the company. This is to assess whether the company has sufficient business assets to instigate insolvency proceedings while formal administration proceedings are initiated to administer the administration deed executed by the company in agreement with creditors.[29]

Provisional administration is administered by a provisional administrator who is appointed out of court via a resolution by the company directors with intent to reach agreement/settlement of debts with creditors.[30] The provisional administrator is mandated to pursue three hierarchical objectives once appointed. These include: (i) the survival of the company and the whole or any part of its undertaking as a going concern; (ii) the approval of an administration deed under section 150; and (iii) a more advantageous realisation of the company's assets than would be effected in a liquidation.[31]

The procedure may last up to thirty days[32] during which agreement must be reached between the company/provisional administrators and creditors, and an administration deed executed to

[25] IA 2011, s.140.
[26] C. Nyombi, A. Kibandama & D. Bakibinga, "The Motivation Behind Uganda's Insolvency Act 2011" (2014) (8) *Journal of Business Law*, 651, 666.
[27] IA 2011, Part VI, ss. 138 – 161.
[28] IA 2011, Part Vi, ss. 162 – 174.
[29] IA 2011 s.162.
[30] IA 2011 s.139(1).
[31] IA 2011, s.140(1)(b).
[32]IA 2011 s.145(1)(a).

initiate formal administration proceedings.[33] Where the administration deed is approved, the company formally enters into formal administration proceedings. The administrator is then mandated to manage the affairs of the company pursuant to the administration deed but subject to any variation or discharge order granted by court upon application by a dissenting creditor(s).[34]

A key feature of the administration procedure is that, once initiated either, through the resolution of the company's board of directors (out of court route)[35] or via court order,[36] a moratorium is triggered. A moratorium is a statutory stay on all creditor enforcement actions or any legal proceedings against the company during the administration process.[37] The moratorium affords the financially struggling company time and protection to pursue its rehabilitation endeavours without interruptions from creditors.

This would support the appointed administrator to pursue the main hierarchical objectives of administration set out under s.140 of the IA 2011 with the main objective being the rescue of the company as a going concern.[38] Other objectives include achieving the best outcome for creditors as whole than winding up[39] or realising property to distribute to one or more secured or preferential creditors.[40]

However, despite these initiatives, administration as a collective procedure has not been fully embraced and used by the business/corporate sector as its adoption and usage, and those of other formal corporate rescue processes has been relative low.[41] There has been a particular preference from financially struggling businesses and professional insolvency practitioners to favour receivership and administrative receivership over administration yet most receivership proceedings result in liquidations.[42]

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[33] IA 2011 s.148.
[34] IA 2011 s.167.
[35] IA 2011, s.139 (i).
[36] IA 2011, s.139 (ii).
[37] IA 2011, s.139 (4); s.164.
[38] IA 2011, s.140 (b) (i). Please note that the term 'going concern' is used in this context to refer to the value of the company as a going entity for the foreseeable future as opposed to being liquidated. See also, Edith Penrose, *The Theory of the Growth of the Firm* (Basil Blackwell, Oxford 1959).
[39] IA 2011, s. 140 (b) (ii).
[40] IA 2011, s.140 (b) (iii).
[41] C. Nyombi, "The Objectives of Corporate Insolvency Law: Lessons for Uganda" (2018) 60 (1) *International Journal of Law and Management* 2, 18.
[42] D. Nyakairu and T. Kakongi, "Guide To Insolvency And Business Rescue In Uganda" *Mondaq* (13 August 2020)<https://www.mondaq.com/insolvencybankruptcy/973362/a-101-guide-to-insolvency-and-business-rescue-in-uganda-> (accessed 30 June 2021).

A particular interest in receivership/ administrative receivership

The IA 2011 introduced the concept of administrative receivership, a process that creditors – holders of a floating charge may utilise in order to recover their debt.[43] The IA 2011 also provides for receivership where the secured creditor may appoint a receiver as a means of a debt collection/enforcement of security. Under receivership, a receiver may be appointed based on the debenture (loan agreement),[44] appointed by the court,[45] or by a government regulator, such as the central bank in relation to banks and financial institutions or the government official receiver in relation to matters of company insolvencies. However, this sections will focus more on administrative receivership – courtesy of security created by a floating charge.[46]

Administrative receivership is initiated through the appointment of an administrative receiver who must be a qualified insolvency practitioner.[47] Upon appointment, the administrative receiver is under obligation to prepare a preliminary report on the asset(s) subject to the charge and projected income from such asset(s) and how such income would be distributed to all creditors within forty working days of taking office.[48] The administrative receiver must also give notice of receivership to the registrar and the general public within fourteen working days of taking office[49] among other duties and obligations.[50]

The main objective of the administrative receiver is to enforce the security of the appointor and recover the debt owed. This may entail taking charge and control of all company assets subject to the charge, and may dispose of such assets where doing so would recover the appointor's debt with less regard to the collective interests of other creditors to the company.[51] Upon realisation of the assets subject to the charge, the administrative receiver would honour the appointor's interest in full and his/her expenses followed by a distribution to other creditors before vacating office.[52]

The administrative receiver is afforded wider powers[53] in dealing with the assets subject to the charge which may include power to dispose of such assets and ability to continue running the

[43] IA 2011, Part VII, ss.175 – 196.
[44] IA 2011, s.176(2).
[45] IA 2011, s.176.
[46] Generally, see, IA 2011, Part VII, ss.175 – 197.
[47] IA 2011, s. 203. See further, s.204 which sets out qualification requirements for insolvency practitioners.
[48] IA 2011 s.189.
[49] IA 2011 s.178.
[50] See further, IA 2011, ss. 179, 180 and 181 on duties, powers and obligations of the receiver.
[51] IA 2011 s.179(1)(2).
[52] IA 2011 s.181(2).
[53] See generally, IA 2011, s.181.

business assets on a going concern basis. This may further support the company to adopt other rescue processes, such as a CVA or administration when s/he vacates office. However, the concern is that following the satisfaction of the appointor's debt, administrative receivership typically leads to the sale of the business; particularly where the charge cover the entirety of the assets. This is unlike the position under other formal rescue procedures, such as administration where collective creditor interests consideration are key priorities that could augment the company's rescue endeavours.

Therefore, for Uganda to fully embrace the role and benefits of corporate rescue, there is a need for the insolvency framework within which businesses are operated and regulated to facilitate stakeholders' understanding of shared interests on corporate insolvency. This may ensure, at least, that policy and procedural choices regarding the debtors, their creditors and other wider stakeholders interests are balanced.[54]

Reinvigorating corporate rescue in Uganda

As noted above, Uganda's current insolvency framework was largely influenced by the Cork Report's recommendations and some of the key principles of a good modern insolvency model/framework were adopted by the ULRC's recommendations and later implemented in the current IA 2011. However, it could be argued that what was largely missed by the ULRC in its for recommendations, were some of the changes effected by the UK Enterprise Act 2002 (EA 2002)[55] to UK insolvency law and processes that further supported the UK's claim to a so-called modern insolvency model/framework.

Among the changes instigated by the EA 2002 was the restrictions on the power of the qualifying floating charge holder to appoint an administrative receiver based on debentures created after 15 September 2003,[56] by with a streamlined administration regime/procedure.[57] However, administrative receivership is mainly used as a key remedy/debt recovery tool by secured creditors/debenture holders in Uganda, rather than as an insolvency procedure.

[54] On this aspect, see broadly; V. Finch, "The Dynamics of Insolvency Law: Three Models of Reform" (2009) 3 *Law and Financial Markets Review* 438.
[55] Enterprise Act 2002, c.40.
[56] See, particularly, EA 2002, Part 10, s.250. Please also note that the restrictions are subject to exceptions under the IA 1986, ss.72A – 72H.
[57] EA 2002, Part 10, s.248.

Despite the effects and shortcomings of administrative receivership and receivership in general being comprehensively debated by extant scholars, practitioners and policy-makers,[58] the procedure is being mostly preferred in Uganda, yet in a majority of receivership cases liquidation is the end product. The concern is that whilst the debenture holder/secured creditor may recover some or all of the outstanding debt, other unsecured creditors are usually left out of pocket with their only hope vested in a usually empty/half-empty asset pool unable to satisfy remaining creditors interests.[59]

The EA 2002 also introduced the creation of the "prescribed part" by the insolvency practitioner from the financially struggling company's asset pool to cater or satisfy unsecured creditors interest/debts.[60] The prescribed part is formed of assets subject to a floating charge, subject to statutory maximum.[61] This was to ensure a fair distribution to general unsecured creditors who would otherwise go empty-handed should the law allow secured debenture holders to unjustly receive a windfall at the expense of unsecured creditors.[62]

In developing economies, such as Uganda, secured creditors such as banks are usually in a better financial position to withstand financial losses as they're able to bargain for better security for their interests at the time of contractual negotiations. They may be able to diversify their losses compared to other stakeholders, such as employees and small unsecured service providers with interests in the financially struggling company.[63] The restrictions on administrative receivership, the introduction of a prescribed part and a new streamlined administration procedures with out-of-court appointment of IPs by the company further consolidated UK's accession to a so-called rescue culture. However, some of these tools were not considered by the ULRC prior to the passage of the IA 2011 yet they might have provided a balancing tool to creditor interests and perhaps furthered the policy objectives of a rescue culture.

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[58] See for example; J. Armour and S. Frisby, "Rethinking Receivership" (2001) 21 *Oxford Journal of Legal Studies,* 73; G. Stewart, "Administrative Receivership: Abolition or Reform?" (2002) 17(1) *Butterworths Journal of International Banking and Financial Law*,16; A. Katz and M. J. Mumford, "Comparative Study of Administration and Administrative Receivership as Business Rescue Vehicles" (2003) *ICAEW* 1; R. Goode and K. Van Zwieten*, Goode on Principles of Corporate Insolvency Law* (London, Sweet & Maxwell, 2018), Ch.10.

[59] See further, Armour and Frisby (n 66).

[60] EA 2002, s.252.

[61] See, Insolvency Act 1986 (Prescribed Part) Order 2003 (SI 2003/2097), art.2.

[62] M. Simmons, "Some Reflections on Administrations, Crown Preference and Ring-Fenced Sums in the Enterprise Act" (2004) *Journal of Business Law*, 423; K. Akintola, "The Prescribed Part for Unsecured Creditors: a Pithy Review" (2017) 30(4) *Insolvency Intelligence* 55.

[63] On this notion, see; Hamiisi J. Nsubuga, "Corporate Insolvency and Employment Protection: A Theoretical Perspective" (2016) 4(1) *Nottingham Insolvency and Business Law e-Journal*, 4.

Promoting the rescue culture

To support business continuity as one of the objectives of corporate rescue, debtors ought to be given the opportunity to make a fresh start – a so-called second chance culture (discharge) and opportunities to restructure potentially viable businesses. Unfortunately, this is largely missing in Uganda's insolvency framework.

In addition to a slow adoption of formal rescue processes by mainstream business/corporate sector in Uganda, other official statutory bodies such as the official receiver's office, the High Court of the Republic Uganda – Civil Division which has the mandate to hear all cases relating to insolvency and related matters and the Insolvency Practitioners of Uganda (IPU) have not raised enough awareness on the role and impact of formal corporate rescue and restructuring mechanisms and their effectiveness in terms of business rescue on company insolvencies.

The official receiver is mandated under s.198 of the IA 2011 to take charge of company registration and all matters relating to insolvency both corporate and personal.[64] The official receiver's duties and powers include *inter alia*; duty to investigate the promotion, formation, failure and conduct of business of an insolvent company; prosecute any person for offences committed; investigate the conduct of insolvency practitioners and to prosecute them for any offences committed among other duties.[65] To enforce such power or influence, the office of 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.

However, a search on the official receiver's website for networking and training events related to insolvency and receivership in the year 2020-21 could only return a single event held in April 2021. No other social media or training engagements related to insolvency and receivership with the public and commercial sector at large could be found.

The need for preventive restructuring frameworks

Since the global financial crisis of 2007/2008, there have been many developments at national, regional and international levels on how best to deal with the impact of the financial crisis and avenues that could be adopted to curb subsequent crises. Particular focus has been vested in the importance of legislative and statutory corporate rescue processes, restructuring tools,

[64] See particularly, IA 2011, Part VIII ss.198 – 200.
[65] IA 2011, s.199.

consensual creditor out-of-court restructuring mechanisms and preventive restructuring frameworks to support business continuity.[66]

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 Uganda have yet to take action. Financially struggling and distressed businesses and their associated stakeholders would benefit from swift access to effective and efficient preventive restructuring frameworks and formal restructuring and rescue procedures to protect the going concern value on the one hand and providing an opportunity for a return to successful operation on the other hand.[67]

In addition, business and financial sectors in developed jurisdictions, especially in the EU, have responded to the evolving market trends and developments, especially, the shift from bank to capital market financing of large corporations swiftly.[68] This has impacted/influenced trends for the resolution of corporate financial distress by embarking on debtor-friendly corporate rescue oriented legislative changes,[69] which is largely missing in most emerging economies, such as Uganda.

The passage of Directive 2019/1023/EU on preventive restructuring frameworks (PRD)[70] as a measure to enhance the rescue culture within the EU, introduced a broader scope of the DIP model that may instigate a paradigm shift in the role and participation of the debtor in insolvency and restructuring proceedings across the EU.[71] Some EU Member States such as

[66] S. Frisby, "Of rights and rescue: a curious confluence?" (2020) 20 (1) *Journal of Corporate Law Studies*, 39, 72; G. McCormack, "The European Restructuring Directive – a general analysis" (2020), 33(1), *Insolvency Intelligence*, 11, 22.

[67] R. Phelan and O. Tama, "The use of DIP financing as a mechanism to control the corporate restructuring process" (2011) 44 *Texas Journal of Business Law*, 15–27; S. Paterson, "Debt restructuring and notions of fairness" (2017) 80(4) *Modern Law Review*, 600, 623

[68] I. Mevorach and A. Walters, "The Characterization of Pre-insolvency Proceedings in Private International Law" (2020) 21 *European Business Organisation Law Review*, 855, 894.

[69] S. Paterson, "Rethinking Corporate Bankruptcy Theory in the Twenty-First Century" (2016) 36(4) *Oxford Journal of Legal Studies*, 697, 701; Hamiisi J. Nsubuga, "The Debtor-in-Possession Model in EU Insolvency and Restructuring Law – a Domino Effect?" *Journal of Business Law* (forthcoming 2022).

[70] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132, [2019] OJ L 172/18-55.(*Hereafter*, PRD).

[71] G. McCormack, "The European Restructuring Directive – a General Analysis" (2020) 33(1) *Insolvency Intelligence* 11 –22.

France[72] and Germany[73] have made provisions to transpose this Directive into their domestic insolvency and restructuring laws and have enacted pre-insolvency restructuring laws and processes that affords financially struggling debtor company access to preventive tools to navigate their financial difficulties.

The UK has also responded through the passage of the Corporate Insolvency and Governance Act 2020 (CIGA 2020)[74] that introduced mechanisms, such as a new "standalone" moratorium on creditor enforcement of claims against a company,[75] a new flexible "restructuring plan" procedure,[76] and new restrictions on (*Ipso facto*) termination clauses on supply contracts[77] that all seek to support financially struggling businesses navigate those difficulties.

As Uganda's legal history and structures are based on the English common law system, these are some of the legislative changes it has to adopt in a bid to reinvigorate its corporate rescue and rescue culture to move in tandem with international developments and trends. Prior to the outbreak for the global COVID19 pandemic, there had been plans tabled by the URSB to make some amendments to the IA 2011 to simplify the liquidation process and to the CA 2012 to simplify the registration and administration of companies.[78] For both statutes, Regulatory Impact Assessments (RIAs) were conducted and the reports were submitted to the First Parliamentary Counsel (FPC) for further processing. However as of 31 July 2021, no progress has been made in this regard.

Solving problems with informality in insolvency filing

Another key aspect that can boost the reinvigoration process of Uganda's corporate rescue is solving problems with informal insolvency restructuring proceedings. There is a general consensus within Uganda's upstream corporate sector to generally prefer to restructure financially struggling but viable businesses through consensual out-of-court workouts. This preference is premised on the notion that debtor-creditors workouts/agreements are usually

[72] E. Ghio, "Transposing the preventive restructuring directive 2019 into French insolvency law: Rethinking the role of the judge and rebalancing creditors' rights" (2020) 30(1) *International Insolvency Review*, 54, 74.
[73] Stephan Madaus, "A Giant Leap for German Restructuring Law? The New Draft Law for Preventive Restructuring Procedures in Germany" *Oxford Business Law Blog*, (Online, 26 Oct 2020) <https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/giant-leap-german-restructuring-law-new-draft-law-preventive> (accessed 30 April 2021).
[74] Corporate Insolvency and Governance Act 2020, c. 12.
[75] Generally, see, CIGA 2020, ss. A3(2) and A6 on the required documentation for obtaining the moratorium.
[76] CIGA 2020, s.7 and Sch. 9 and CA 2006, Part 26A, s.901A.
[77] CIGA 2020, s.14 that inserts a new s.233B into the IA 1986.
[78] Uganda Registration Services Bureau, *URSB ANNUAL REPORT 2019/2020* at 5. <https://ursb.go.ug/wp-content/uploads/2021/01/URSB-ANNUAL-REPORT-2020-fn.pdf >(accessed 30 June 2021).

faster to conclude and are a more cost-effective means of restructuring a company compared to administration that would involve a two-stage process.[79]

Compromises between debtors and creditors are the most adopted ones as these can be proposed and agreement reached (in a time-saving manner) where three quarters of the value of creditors agree to such compromise or arrangement.[80] The agreements then become binding on all creditors, the company itself, the liquidator and other stakeholders of the company.[81] However, the concern is that non-judicial/informal restructurings tend to inhibit usage or/ adoption of formal insolvency laws and procedures and at times, practitioners prefer to use more practical and simplified procedures that enhance a quick resolution than formal routes, yet, a majority of these informal workouts are usually unrecorded/registered by the official government insolvency regulator – the (URSB) for records/audit purposes. This makes the study and analysis of corporate insolvency and restructurings trends a challenging one.[82]

Ugandan's upstream private sector is largely dominated by Micro, Small and Medium Enterprises (MSMEs) which account for approximately 90 percent of the entire private sector.[83] However, there are less incentives for these MSMEs when faced with financial difficulties to consider formal insolvency proceedings or restructuring regimes to support their rehabilitation endeavours. There exists misconceptions that formal insolvency and restructuring processes are expensive, time-wasting and involve protracted procedural and judicial hearings that are expensive and provide insolvency practitioners a window of opportunity to financially exploit an already ailing business so they prefer the informal routes.[84]

Mustapher Ntale, the director of insolvency and receivership at the official receiver's office stated in April 2021 that:

> "…[D]rastic decisions to close businesses may not be viable, especially if informally conducted out of panic as businesses and companies can be granted

[79] For the two-stage administration process see, (sections 2.3 and 3.1) above.
[80] See generally, CA 2012, ss.234 – 236.
[81] CA 2012, s.234(2).
[82] A. Mpanga Advocates, *Law and Practice: Uganda*, (Chambers Global Insolvency Guide, 2nd edn, 2019) at 7.
[83] Uganda Business Impact Survey 2020: Impact of COVID-19 on Formal Sector Small and Medium Enterprises (UNCDF, Kampala, April 2020) <https://www.uncdf.org/article/5634/uganda-business-impact-survey-2020#:~:text=In%20April%202020%2C%20UNCDF%20in%20collaboration%20with%20Makerere,on%20the%20private%20sector%20and%20accelerate%20economic%20recovery> (accessed 1 June 2021). (Business Impact Survey 2020), at 3.
[84] See generally; B. Mukalazi ''Why Ugandan businesses fail'' *Daily Monitor* (Kampala, 20 February 2020) <https://www.monitor.co.ug/uganda/oped/commentary/why-ugandan-businesses-fail-1872940> (accessed 01 July 2021).

> opportunities to float and thrive in their difficult times through formal corporate rescue mechanisms…..there is, therefore, a need for companies/businesses to adopt corporate rescue mechanisms under the insolvency laws of Uganda as an alternative to liquidation that keep financially distressed companies afloat to avert their eventual failure.''[85]

The official figures in the 2019/2020 annual report by Uganda's official receiver indicated that 91 companies had officially filed insolvency resolutions. Among these, 10 companies filed for formal administration proceedings, 15 companies underwent liquidation proceedings and 66 filed for receiverships despite hundreds of companies reported as going out of business each year.[86]

According to the figures I received via email from the Director of Insolvency and Receivership at the official receiver's office, in the year 2020-21, 26 companies were officially liquidated following formal liquidation proceedings and only 2 companies officially filed for administration proceedings.[87] However, these figures/statistics do not include commenced insolvency proceedings in courts as the office of the official receiver and the courts keep separate records.[88] There is currently no formal centralised database between the official receiver and the court system for insolvency reporting for statistical and policy imperatives.

Enhancing the role and involvement of IPs

At the time the ULRC was reviewing Uganda's insolvency law, it underlined an urgent need to have all professional insolvency practitioners professionally registered and regulated by professional bodies to command a degree of professional accountability and competence, and to counter concerns over professional misconduct and negligence.[89] This was because Uganda's insolvency and company laws at the time, (both Bankruptcy Act 1931 and the Companies Act 1961) did not prescribe a certain degree of skillset or qualification threshold

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[85] Lydia Wamono, "Save that business on the brink of collapse" *Daily Monitor* (Kampala, 20 April 2021) <https://www.monitor.co.ug/uganda/business/prosper/save-that-business-on-the-brink-of-collapse-3370144> (accessed 2 June 2021).

[86] Uganda Registration Services Bureau (URSB), *Annual Report 2020*, pg 34, at 3.5 <https://ursb.go.ug/wp-content/uploads/2021/01/URSB-ANNUAL-REPORT-2020-fn.pdf> (30 accessed May 2021).

[87] These figures were received via email as the official 2020-2021 URSB annual report with statistics on insolvency and receivership filings has yet to be officially published as Uganda's financial year ends 30 June 2021.

[88] Please note that under Section 254 (1) of the IA 2011, the High Court of the Republic Uganda is mandated to have jurisdiction over all matters concerning companies including insolvency and liquidation proceedings.

[89] Insolvency Bill 2009, Pt IV.

for acting as an insolvency practitioner which was reflected in the quality of service provided by practitioners.

This recommendation was adopted and consolidated in the IA 2011.[90] The IA 2011 now requires all insolvency practitioners to be fully licenced practitioners and subject to a regulatory body which may guide, regulate and sanction practitioners in cases of professional misconduct.[91] The class or category of people allowed to register and work as professional insolvency practitioners are those that are members of professional bodies or organisations such as certified accountants, auditors or advocates.[92] This is to ensure fairness, honesty, transparency and compliance within the insolvency process and the financial system at large.

It was also envisaged that having insolvency practitioners professionally regulated and subject to certain Codes of Practice and Conduct would enhance professional competence, accountability and compliance within the insolvency field. This would combat abusive practices and arbitrary use of power in enforcing substantive stakeholder interests on the one hand, and the coordination of the enforcement processes by the insolvency practitioners on the other hand in both private and public business sectors.[93]

However, despite the fact that all IPs in Uganda are professionals in different categories, and are affiliated to certain professional bodies, there still exists a lack of professional connectedness between IPs and the business/corporate world. There is a need to have an umbrella insolvency practitioner body/authority that provides centralised supervisory and regulatory services to insolvency practitioners and other actors in the sector.

This would create more awareness and insight into the work of IPs and would also demystify some misconceptions within the business/corporate sector about the services of IPs, especially around insolvency practitioners' fees and other charges. Currently, the registration and supervision of IPs is undertaken by the government official receiver – the URSB under the leadership of the director-general and director of insolvency and receivership. However, the URSB deals with all matters related to company registration, enforcement, intellectual property rights etc., and does not mainly serve the insolvency sector independently.

[90] IA 2011, Part VIII, s.203.
[91] IA 2011, Part VIII, ss.203 – 209.
[92] IA 2011, ss. 198 – 211.
[93] C. Nyombi, "The Development of Corporate Rescue Laws in Uganda and UK" (2015) (57) (2) *International Journal of Law and Management* 214.

Conclusion

On 23 September 2021, Uganda marks the 10th anniversary of its Insolvency Act 2011 which was enacted following the ULRC's recommendations for a single insolvency statute to deal with insolvency and related matters in the country's legal system. The IA 2011 introduced formal corporate processes such as administration and CVAs that were collective in nature and geared towards promoting corporate rescue of financially struggling but viable businesses as opposed to liquidations.

However, a decade into its existence, it is such an ominous task to provide an assessment as to whether the IA 2011 has achieved its intended policy objectives of promoting corporate rescue and the rescue culture. Although the IA 2011 provides the text of the law to be adopted and used by companies in financial difficulties with their respective actors such as directors, officers, and insolvency practitioners, its usage and popularity within Uganda's corporate and financial sectors has been relatively low.

There's therefore, a need to reinvigorate Uganda's corporate rescue policy objectives if the country and its legal system is to achieve the intended policy objectives of the IA 2011. This paper has outlined the key factors to be considered which include; the adoption of a so-called second chance culture as a form of promoting corporate rescue, the need for the adoption of preventive restructuring frameworks within Uganda's insolvency model, solving problems with informality in insolvency filing and enhancing the role and involvement of IPs in the country's insolvency system. It is envisaged that once taken on-board and assimilated into Uganda's insolvency framework, the policy objectives or corporate rescue and the rescue culture at large, would be achieved.