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WORLD BANK GROUP
Trade & Competitiveness

Africa Roundtable
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Jobs in Africa: How insolvency regimes impact economic growth

Kampala Serena Hotel
Kampala, Uganda
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Background to the initiative

There are currently fewer insolvency reforms across Africa than in any other region of the world. In many African countries, the insolvency laws are antiquated and restructuring law does not exist. Doing Business 2011 data demonstrates that recovery in Sub-Saharan Africa averages 23.2 cents on the dollar, compared to 69.1 cents on the dollar in OECD countries.\(^1\) Clearly, there are many different issues facing countries in the region and the solutions are complex. There are inadequate mechanisms to prevent the stripping of assets of companies in financial difficulty heading towards insolvency, which means that a business rescue culture is minimal. Many directors lack accountability. The insolvency profession is neither institutionalised nor regulated. Delays in finalising cases by courts negatively affect the efficiency of the system. Non-court based methods are underdeveloped and out-of-court restructuring is not prevalent. The skills of stakeholders including the judiciary and insolvency practitioners need to be developed, and countries need to focus on both institutional and infrastructural reforms that will seek to preserve value in financially distressed businesses.

It is important that countries recognise that with there being a direct correlation between insolvency and the business environment, a sound insolvency system has a direct impact on economic performance. Consequently, insolvency reform should be seen as being part of a wider reform programme to include the little touched credit environment where the system is, in many countries, under-developed. Across Africa, access to credit can be low and the cost high with, in the main, commercial banks being the principal source of credit. There may be a lack of effective competition in the credit system and, in many instances the personal guarantee of promoters being required to obtain credit. Therefore, reforms of personal insolvency law also assume importance.

INSOL International has a significant membership base in Africa. INSOL members, insolvency practitioners, judges and other stakeholders from the region participating in INSOL activities have demonstrated keen interest in learning from the experience of other countries. INSOL and other international bodies have received requests for assistance to work towards the improvement of the insolvency systems in the various countries in the region.

Africa is a vast region with diverse legal systems and practices. Some multilateral bodies are already engaged in insolvency reforms in some countries and others carry a keen interest in working for the benefit of the insolvency industry in the region. The knowledge, experience and resources available within these global institutions and bodies can be optimised by way of a coordinated regional effort, aimed at addressing the needs of the insolvency industry. The Forum for Asian Insolvency Reforms and the Forum for Insolvency Reforms in MENA are two inspiring models of cooperation by international and regional organisations. It was for these reasons that INSOL established the Africa Roundtable: to provide a platform for international bodies, regional institutions, policymakers and stakeholders from the continent, as well as experts in the field from other, and sometimes more mature jurisdictions, to come together and adopt a coordinated approach towards reforms and capacity building in the region.

\(^1\) [http://www.doingbusiness.org/data/exploretopics/closing-a-business](http://www.doingbusiness.org/data/exploretopics/closing-a-business)
The Africa Roundtable initiative was established at a meeting organised by INSOL International in Dubai, February 2010. The objectives of the Africa Roundtable were threefold:

- to have a high level dialogue with both private practitioners and public policymakers regarding insolvency reform in Africa, thereby encouraging reform experiences to be shared and challenges to be discussed in an open and frank forum;

- to elevate insolvency reform on the African policy agenda; and,

- to encourage insolvency policymakers and professionals to establish an annual forum to stimulate discourse and learning across the region.

The first INSOL Africa Roundtable on insolvency reform took place on September 30 in Abuja, Nigeria. This one-day event was jointly organised by INSOL International and the World Bank Group, with support from International Monetary Fund, bringing together insolvency experts from a number of African countries (Ghana, Kenya, Nigeria, South Africa, Uganda and Zambia). In addition, the Senior Advisor on insolvency reform in the 17 West African OHADA countries was also present.

Institutions and organisations involved in the region welcomed and extended their support and cooperation to this important INSOL initiative. It was agreed that a coordinated regional approach would be an efficient and effective way of optimising the use of the knowledge, experience and resources available with the participating global institutions and bodies and others which can contribute to this initiative. The work of the Africa roundtable could lead to regional and country level projects which could be taken up jointly or individually by the supporting institutions.

It was noted that in many countries legislative changes are required to update the law and introduce restructuring mechanisms to help rescue financially viable businesses. Institutional reforms are another area in need of priority attention. Improvement in infrastructure, in particular that of the court systems is a vital area. Simultaneously, out of court restructuring regimes can be developed to reduce the burden on the courts and promote flexible responses. There is an urgent need to ensure that the quality of practitioners and the judiciary is in line with internationally accepted standards. Capacity building of judges and practitioners through training can help in improvement of their skills and capacity.

Following on from and building upon the success of the Abuja session, it was decided to hold the next meeting in September 2011 in Cape Town, South Africa. The sessions were expanded upon and focused upon various aspects of the theme of the roundtable, namely “preserving value in distressed businesses”.

The third Africa Roundtable was held in Nairobi in September 2012 under the theme “Insolvency Best Practices: A Roadmap for Reform in Africa”. The objective of this conference was for policy makers, regulators and private practitioners to focus on specific current challenges that are hindering the development of insolvency regimes in Africa; and to develop a toolkit that would have maximum impact in strengthening these regimes. In effectively leveraging the full range of best practice standards, innovative technologies and flexible tools, it was hoped that viable assets would continue to retain their productive value in the economy, stakeholder returns would increase whilst entrepreneurship and job creation would be stimulated.
The 2013 Africa Roundtable was held in Lusaka, Zambia. Over 70 delegates took part representing 16 African countries. Judges, practitioners, lenders, regulators and policy-makers attended. The theme was “Building Africa’s Credit Environment for Growth: How insolvency regimes can improve the cost and availability of credit”, with a focus on the intersection of creditor rights and an improved restructuring and insolvency regime.

A full report of the past roundtable events can be found on the INSOL web site www.insol.org.

Although it has been over five years since the global financial crisis, many countries are continuing to experience poor economic growth and high levels of business distress. The 2014 Africa Roundtable will explore how insolvency reform can contribute to economic development by saving viable businesses and thereby preserving jobs, encouraging entrepreneurship through more efficient liquidation proceedings and promoting foreign investment through procedural coordination with other jurisdictions. The theme is “Jobs in Africa: How insolvency regimes impact economic growth”.

The roundtable is being organised in partnership with the World Bank Group, which is working closely with many governments in Africa to assist in strengthening their insolvency and restructuring regimes.

**INSOL Africa Roundtable 2014 - Main Organising Committee**

Adam Harris, Bowman Gilfillan, INSOL Executive Committee, South Africa (Chair)
Prabha Chinien, Registrar of Companies, Mauritius
Ruta Darius, Uganda Registration Services Bureau
Anthony Idigbe, Punuka Attorneys & Solicitors, Nigeria
Hon. Justice Geoffrey Kiryabwire, Court of Appeal, Uganda
Antonia Menezes, World Bank Group
Fidelis Oditah QC, South Square, UK and Oditah Legal Practitioners, Nigeria
Nitesh Patel, PwC, Zambia
Mahesh Uttamchandani, World Bank Group

**Africa Roundtable Curriculum Vitae - Moderators/speakers**

**Professor Jan Adriaanse, Leiden University and Turnaround PowerHouse, The Netherlands**

Jan Adriaanse is a professor in turnaround management at Leiden University. He is engaged in research projects in the interdisciplinary field of financial distress, turnaround management and insolvency law. He is an author on these subjects and a regular speaker at international conferences. As founder and CEO of global training institute Turnaround Powerhouse® he is providing turnaround and workout services as well as training programs to a wide range of companies focusing on larger SMEs and multinational companies. In December 2005 he defended his doctoral thesis called ‘Restructuring in the Shadow
of the Law. Informal Reorganisation in the Netherlands’. He is a fellow of INSOLAD, the Dutch professional body of insolvency professionals, and a member of INSOL Europe, as well as the Turnaround Management Association (Dutch chapter). In the Global Insolvency Practice Course of INSOL International he arranges the so-called Workout Clinic.

Judge Eberhard Bertelsmann, High Court of Pretoria, South Africa
1966 – 1968: BA (Law), University of Stellenbosch
1969-1971: LL B University of South Africa, Junior lecturer in law faculty
1972: Public Prosecutor, Magistrate’s Court, Pretoria
October 1972 – 2000: Member Pretoria Bar
Senior Counsel (SC) 1988
Member Bar Council 1989 – 1999; four terms as Vice-Chairperson, three terms as leader of the Bar
1991 – 1999: Member Executive, General Council of the Bar of South Africa
1988 – 2000: Founder member, Lawyers of Human Rights, several terms on local and national executive; Joint chairperson Pretoria Branch of the Society for the Abolition of the Death Penalty; Member and member of committees of the International Bar Association, the Commonwealth Lawyers’ Association, the International Society for the Improvement of the Criminal Law, the British-South African Lawyers’ Association, the Christian Lawyers Association; acted as judge of the High Court on four occasions
2000: Appointed as judge to the High Court, Pretoria; June 2010 – November 2010: acting appointment in the Supreme Court of Appeal, Bloemfontein, South Africa
1995: Represented South Africa at the Lord Chancellor’s Breakfast
Co-author of Practical Guide to Criminal Law in the Magistrates Court; 9th edition of Mars on Insolvency
Qualified trainer of advocacy and advanced advocacy and of advocate trainers; attended advocacy training course at Keble College, Oxford 2005.
Extraordinary professor for both Criminal Procedure and Insolvency Law at the Universities of South Africa and Pretoria respectively and a member of the INSOL Judicial Colloquium on Cross Border Insolvency Issues. Also acted recently in the Land Claims Court created for post-apartheid land restitution claims.

David Burdette, World Bank Group
Nottingham Law School, Nottingham Trent University, UK
David Burdette is a graduate of the University of South Africa (BJuris, LLB) and the University of Pretoria (LLD), South Africa. He joined Nottingham Trent University in Nottingham, England, in September 2007 as a Professor of Insolvency Law from the Faculty of Law at the University of Pretoria. He is co-author of the leading insolvency textbook in South Africa, Meskin, Insolvency Law and its operation in winding-up (Butterworths LexisNexis, loose-leaf edition) and a contributor to the new edition of Henochsberg on the Companies Act 71 of 2008 in South Africa (Butterworths LexisNexis, loose-leaf edition). The proposals made in his LLD thesis have been included in draft legislation for the introduction of a unified Insolvency Act in South Africa. In 2007/2008 he was appointed to the King III Committee on Corporate Governance (South Africa) as convenor of the subcommittee on corporate rescue. David is a Senior Consultant for the World Bank in the field of restructuring and
insolvency law, and was the INSOL Scholar for the Europe, Middle East and Africa region during 2006/2007. In 2011 David was appointed Director of the Nottingham Law School’s Centre for Business and Insolvency Law.

Juanitta Calitz, University of Johannesburg, South Africa
Juanitta Calitz is an Associate Professor of Law at the University of Johannesburg. She specialises in insolvency law and presents undergraduate and postgraduate courses in corporate insolvency law and corporate rescue. She is currently the Head of Department of Public Law and is also a member of the Board of Trustees of The South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC). She is a member of the Academic Steering Committee of INSOL International; serves on the Editorial Board of INSOL World and also serves as a national councillor and honorary member of SARIPA (the South African Restructuring and Insolvency Practitioners Association). Juanitta graduated from the University of Pretoria with a LLD degree in 2009 and the objective of her LLD thesis, “A Reformatory Approach to State Regulation of Insolvency Law in South Africa”, had been to investigate certain aspects of state regulation with the view ultimately to propose a framework within which the legislator could pursue legal reform based on comprehensive policy objectives in this field of law.

Richard Chesley, DLA Piper, USA
Rick Chesley practices in the areas of corporate restructuring, with an emphasis on bankruptcy transactions both in the United States and internationally. He has served as restructuring counsel in a number of chapter 11 proceedings, including the recently completed chapter 11 cases of Orchard Supply Hardward Stores, Velti plc, PJ Finance, Inc. and Trident Microsystems, Inc. and its subsidiaries in Asia and Europe. He has served as debtors’ counsel in a number of other chapter 11 proceedings, including Kaiser Aluminum Corporation, National Century Financial Enterprises, Federated Department Stores, Elder-Beerman Stores, Montgomery Ward, Purina Mills, The Loewen Group, PFF Bankcorp, Contech LLC, Morton Industrial Group, Vermillion, Inc, Fairfield Residential and its subsidiaries and East West Resort Development. Rick also led a number of out-of-court restructurings, including Norwood Promotional Products, Examination Management Services Inc. and Educational Media Publishing Group. Chambers USA recognizes Rick as a top Bankruptcy and Restructuring Lawyer. Chambers reported: “He is commended for his ability to defuse tense situations: ‘Throughout heated negotiations and tricky lender discussions he ensured that both sides understood the issues,’ reveals a source,” with “superb ability to quickly and effectively resolve issues.” In 2012, he was noted as having “very deep bankruptcy and restructuring experience” and being “very attentive to client needs.” Chambers sources also describe him as a “very tough negotiator” and praise him for his astute financial and business understanding. Rick has been named to the BTI Client Service All-Star Team for Law Firms; cited in Legal 500 for his Corporate Restructuring practice; and recognized as an Illinois Super Lawyer.

Jenny Clift, Senior Legal Officer, ITLD/OLA, United Nations
Ms Clift is a Senior Legal Officer with the International Trade Law Division, United Nations Office of Legal Affairs, which functions as the Secretariat for the United Nations Commission on International Trade Law (UNCITRAL). She has been secretary of UNCITRAL’s insolvency working group since December 2000, during which time the Working Group has completed:

- The UNCITRAL Legislative Guide on Insolvency Law (2004);
• The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009);
• Parts three and four of the Legislative Guide dealing with the treatment of enterprise groups in insolvency (2010) and directors’ obligations in the period approaching insolvency (2013);
• The UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective (2011, updated in 2013), a guide for judges; and
• The Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, a 2013 revision of the text adopted in 1997.

In February 2010, Ms Clift received INSOL International’s Scroll of Honour and in 2011 became a Fellow of the American College of Bankruptcy. She holds a BA. LLB (Hons) and an LLM from Australia.

Ruta Darius, Uganda Registration Services Bureau
Current employment and responsibilities are as Manager of Insolvency Services, Uganda Registration Services Bureau, a position Ruta Darius has held for the last seven years.

Uganda Registration Services Bureau is a statutory body under the Ministry of Justice and Constitutional Affairs. The Bureau is responsible for administering laws on; business registration, liquidation of companies, intellectual property rights and civil registration of vital events of Uganda.

Ruta Darius has five years of legal practice as Legal Assistant (Mukiibi Sentamu & Company Advocates), State Attorney of the Ministry of Justice and Constitutional Affairs. In his work experience he has carried out very important assignments for which he was personally responsible/liable. The most challenging ones being Official Receiver/Liquidator of some of the biggest Government parastatals like Lint Marketing Board, Produce Marketing Board, Uganda Airlines Holdings Limited, Reconstruction and Development Corporation, Uganda Consolidated Properties Limited, Coffee Marketing Board, Uganda Electricity Board, Uganda Tea Authority and Uganda Tea Growers Corporation.

Glen Davis QC, South Square, UK
Glen Davis QC is an English barrister who has been a member of South Square, Gray’s Inn, the UK’s leading insolvency set, since 1993. He was appointed Queen’s Counsel in 2011. He has also been called to the Bar of the Eastern Caribbean Supreme Court in the British Virgin Islands, and is licensed to practice in the Courts of the Dubai International Financial Centre. His practice centres on insolvency and commercial issues complicated by insolvency, particularly in the fields of banking, finance and financial services, insurance and shipping. Much of his practice has a cross-border or international dimension. He has acted for the UK’s Financial Services Authority (in MF Global and other cases) and for regulators of various other jurisdictions. Recent experience includes investment banking collapses and capital markets disputes, acting for the liquidators of two Gibraltar-regulated insurance companies, major restructurings, and a developing interest in sovereign debt issues.

He served as a member of the English statutory Insolvency Rules Committee 2002-2012, and has been involved with reform of the insolvency laws of Gibraltar and a number of other countries. Since 2007, he has chaired the Africa Committee of COMBAR (the English Commercial Bar Association), and is an elected member of the COMBAR executive. He edits the Butterworths Insolvency Law Handbook (the comprehensive collection of legislation affecting insolvencies in the UK).

Bernice W. Gachegu is an advocate of the High Court of Kenya having a vast experience in commercial law, with a specialty in company and copyright law. She is also well-versed in insolvency matters and has administered numerous bankruptcies and company liquidations.

For the past 29 years, Ms. Gachegu has worked for the State Law Office in various capacities and has risen through the ranks to the position of Registrar General. In this regard, she is charged with overseeing the registration of companies, societies, marriages, coat of arms, books and newspapers amongst others. Her position has required a mastery of a wide range of legislation including the Companies Act, Bankruptcy Act, Marriage Act, and other related laws. During this period, she has diligently served the Government and people of Kenya and under her leadership, the Registrar General’s office has been transformed as exemplified by noted awards for innovative practice, excellent performance, and improved service delivery in registration matters. In particular, she has taken the lead in transforming the company’s registry into a customer-focused operation through business process re-engineering and capacity building.

In addition, Ms. Gachegu has represented Kenya in various engagements internationally, including the debates on copyright and traditional knowledge. Her involvement in this global discussion led to the formation of the Taskforce on Traditional Knowledge whose mandate was to develop a policy on the protection of traditional knowledge under copyright, making Kenya one of the few African countries to have a policy on the same.

Ms. Gachegu’s tenure in public service has allowed her to nurture strong leadership skills that have proven useful in fulfilling her duties. In addition, she has honed management skills that have allowed her to successfully supervise and guide activities of over 150 staff members. Her administrative duties have seen her manage annual budgets of approximately KSh. 20 million and ensure proper execution of related work plans. Leading by example, she has enabled her staff to continually improve their performance and ability to deliver services to the public. Ms. Gachegu’s reputation for upholding the authority of the appointment bestowed by her position has also inspired confidence in the Office of the Registrar General and its staff. Ms. Gachegu has demonstrated a commitment to the values of integrity, equity, fairness, justice, and adherence to rule of law by initiating processes that would render this office a corruption-free zone and a true embodiment of the principals of servant leadership.

Ms. Gachegu continues to be involved in community service efforts through mentorship activities for young women, involvement in her church membership, and participation in leadership of professional associations as well as the Kenya Christian Lawyers’ Fellowship of which she is a founding member. Some of the activities in which she has been involved include speaking engagements around the country as both mentor and expert.

Adam Harris, Bowman Gilfillan, INSOL Executive Committee, South Africa

Adam Harris is a practising attorney, and is a Director of Bowman Gilfillan Africa Group, based in Cape Town. He commenced practice in 1985 and specialises in insolvency, business restructuring and related fields. Adam is a member of the INSOL Executive Committee. He was for many years a National Councillor of SARIPA (the South African Restructuring and Insolvency Practitioners Association), one of the member associations of INSOL. Adam also previously chaired the Law Society of South Africa Insolvency Committee.

In the course of his practice, Adam represents lenders and creditors and other institutions such as professional indemnity insurers, as well as business rescue and
insolvency practitioners in various aspects relating to the administration of business rescue matters, insolvent estates (personal bankruptcies), and the restructuring or winding-up of companies. Adam has attended to some of the leading cases in South Africa on different aspects of insolvency and restructuring such as the constitutionality of interrogations, impeachable transactions, procedural aspects of liquidation applications, liquidators’ remuneration and business rescue as opposed to winding-up. He is one of the co-authors of the latest edition of Mars, a leading insolvency reference work in South Africa.

Justice Idris, Federal High Court, Nigeria
Mohammed Baba Idris is a judge of the Federal High Court in Nigeria and is a Fellow of the Chartered Institute of Arbitrators. He received a PhD from the European American University, his LLM from the University of Lagos, an LLB from the Usmanu Danfodio University Sokoto, and the Barrister in Law Certificate from the Nigerian Law School in Lagos. He was counsel in leading law firms in Nigeria.

Hon. Justice Kiryabwire, The Court of Appeal, Uganda
Justice Geoffrey Kiryabwire is a Judge of the Court of Appeal/Constitutional Court of Uganda and former head of the Commercial Court of Uganda. He studied law at the Makerere University Uganda. He obtained a Masters of Law degree in International Economic Law from The University of London. He has also trained in the areas of financial law and ADR. He started work in the Attorney General’s Chambers in Uganda and rose to the rank of Senior State Attorney and Legal Advisor to The Attorney General. He joined the private financial sector and worked as Company Secretary/General Legal Counsel for Pan World Insurance Company Limited and rose to the rank of CEO. He was appointed a member of the Insurance regulatory body and served as Chairman of the Uganda Insurance Association. He has published various papers and works in the areas of commercial and corporate and ADR.

Antonia Menezes, Senior Private Sector Development Specialist, World Bank Group
Antonia Menezes is from Zimbabwe, and takes a keen interest in assisting in the development of the INSOL Africa Roundtable to address the region’s needs. She is currently a Senior Private Sector Development Specialist in the Trade and Competitiveness Global Practice of the World Bank Group. She specializes in Debt Resolution initiatives, advising Governments in the fields of insolvency, restructuring, debt enforcement and Alternative Dispute Resolution reforms, primarily in Africa and the Middle East. Prior to joining the World Bank Group, she worked as a lawyer at two international law firms in Paris and London. She holds an LL.B. from the London School of Economics, an LPC from the Oxford Institute of Legal Practice and an LL.M. from McGill University.

David Mpanga, A.F. Mpanga, Advocates, Uganda
Born in the United Kingdom on 26th November 1970 and a holder of a law degree from Exeter University, he was called to the Bar of England and Wales in 1993. He was called to the Ugandan Bar in 2000 and appointed a Commissioner for Oaths and Notary Public in November 2010. David worked in the chambers of John Mathew QC at 5 Paper Buildings in the United Kingdom where he handled criminal litigation. David returned to Uganda in 1998 and worked with Mugerwa & Masembe, Advocates up to September 2003. In October 2003, David set up A.F. Mpanga, Advocates now locally and internationally.
acknowledged as a leading law firm in Uganda and a member of the Bowman Gilfillan Africa Group.

David has cultivated a specialization in financial institutions law, international commercial transactions, mergers and acquisitions as well as oil & gas. He also has experience handling public interest cases in the Constitutional Court and has appeared in a number of landmark cases.

David is the Attorney General and Minister of Local Government in the Buganda Government, a cultural institution headed by the Kabaka of Buganda.

He is married to Phiona Muhwezi Mpanga, with three children.

**Fidelis Oditah QC, SAN, Nigeria and UK**

Fidelis Oditah QC, SAN was educated at the Universities of Lagos and Oxford. He practices at the English and Nigerian Bars in a broad range of areas. In England, he practices as a barrister specialising in chancery and commercial work, with emphasis on insolvency and restructuring work. He has acted and/or advised on virtually all major corporate insolvencies in the UK in the last two decades. His London Chambers – South Square Chambers – is widely acknowledged as the first port of call for all major corporate insolvencies and restructuring. In Nigeria, his practice encompasses energy, projects, companies and general commercial law. He has advised and acted for the Federal Government of Nigeria, the DPR, various Ministries, some state governments and major and minor multi national companies. He has extensive commercial arbitration practice and also sits frequently as an arbitrator in a broad range of commercial disputes.

He is a Queen's Counsel in England, a Senior Advocate of Nigeria, a Bencher of Lincoln’s Inn, and a Visiting Professor at the University of Oxford.

**Major General Khainda Otafiire, Minister of Justice & Constitutional Affairs**

Major General Kahinda Otafiire is a Ugandan politician and military officer. He is the current Minister of Justice & Constitutional Affairs in the Ugandan Cabinet. He was appointed to that position of 27 May 2011.[1] He is also the Member of Parliament (MP) for Ruhinda County, Mitooma District in the Ugandan Parliament.

Kahinda Otafiire first worked as a Youth Officer from 1975 until 1976. He then worked as a Foreign Service Officer in the Ministry of Foreign Affairs from 1976 until 1980. In 1981, he joined Yoweri Museveni in the National Resistance Army (NRA) guerrilla organisation, where he served as the Chief Political Commissar from 1981 until 1984. Between 1984 and 1986, the title of his job was called National Political Commissar, also in the NRA. Just prior to the NRA capturing power from the military junta in Kampala in 1986, he served as Commissioner, Internal Affairs Interim Administration, in the areas under NRA administration from 1985 until 1986.


From 1994 until 1995, he served as a delegate to the Constituent Assembly which drafted the 1995 Uganda Constitution. He then served as Minister of State for Security from 1994 until 1995. From 1996 until 2001, Kahinda Otafiire served as Minister of State for Local Government. He was elected to Parliament in 1996. Between 1998 and 2001, he served as the political head of the Uganda Military Expedition into the Democratic Republic of the Congo. In 2001, he was appointed Minister of State for Regional Cooperation, a position he served in until 2003. In that year he was appointed Minister of Land, Water and the Environment. He served in that capacity until 2006. Otafiire has also served as Minister for Local Government,
prior to becoming Minister of Trade and Industry in February 2009. He served in that capacity until he was appointed Uganda’s Justice Minister in May 2011.

Nitesh Patel, PwC, Zambia
Nitesh is a Chartered Accountant with substantial audit, tax and insolvency experience. Having started a career in the UK as an auditor, then into tax and some insolvency, on returning back to Zambia, Nitesh pursued his interest in corporate insolvency.
Nitesh has been involved in insolvency work for the last 20 years with PwC undertaking both execution and advisory work, including restructuring and business turnaround and leading optimised exits. He has dealt with both large public and private sector insolvencies which includes managing the two largest public sector liquidations in Zambia in the energy and transport sectors.
Nitesh has held several executory appointments and traded out sizeable number of receiverships which were eventually sold off as going concerns. In 2010 and during the Global Financial Crisis, and at the request of the Government of the Republic of Zambia, Nitesh was involved in a conversion of debt to equity trade-off with fresh injection of new equity to resuscitate a huge farming estate employing close to 1,000 employees.
In addition to dealing with both large public and private sector insolvencies, he has also worked in Ghana, Kenya, Nigeria, Tanzania and South Africa.
Nitesh has contributed to the process of Insolvency Reforms in Zambia and is a key member of the Technical Committee set up by the Zambia Institute of Chartered Accountants to review and make recommendations on the proposed changes to insolvency legislation. Nitesh also holds an MBA from Warwick University.

Stefan Smyth, PwC South Africa
Stefan Smyth is a Director at PwC South Africa and is the Territory leader for PwC Restructuring in Southern Africa, having started the South African Restructuring practice some 5 years ago. Prior to this he held a number of corporate roles in the UK focused on the turnaround of underperforming businesses and in developing strategic options/solutions, ranging from exit/sale through to restructuring.
He is currently engaged on the Curatorship of African Bank Limited, leading a multinational PwC team specialising in Bank and Financial Services restructuring and resolution. His team provide specialist advice to lenders, shareholders and companies directly in all industry sectors from automotive through to FMCG, determining viability and developing restructuring solutions to restore the company performance.
Stefan is a recognised Business Rescue Practitioner (under Chapter 6 of the Companies Act, 2008) and is currently engaged as such on a matter in the mining sector. He is a regular speaker on the national circuit for all matters pertaining to Restructuring, in particular complex aspects surrounding Chapter 6 Business Rescue and is a frequent contributor to articles and Thought Leadership in the business press.

Peter Spratt, PwC
Peter specialises in assessing and restructuring underperforming businesses for their stakeholders. He has specific expertise in dealing with cross-border insolvencies and restructuring matters having led assignments in Asia, North America, South America and Europe. Peter has led a number of strategic reviews of companies in varying stages of difficulty, including restructurings and insolvencies of high profile, global companies.
Peter became a partner in PwC’s restructuring department in 1992 and for the period 2005-2013 was leader of PwC’s global Restructuring practice. Four of those
years he spent in New York where he was President of PwC’s Corporate Advisory and Restructuring LLC.
In the years 2011-2013 Peter was a member of the Executive Committee of Allied Irish Banks Plc and was heavily involved in the turnaround of that bank. Currently, Peter is engaged as Special Adviser to the Board of African Bank Investments Ltd.

James H.M. Sprayregen, INSOL President, Kirkland & Ellis LLP

James H.M. Sprayregen is a Restructuring partner in the Chicago and New York offices of Kirkland & Ellis LLP and serves on Kirkland’s worldwide management committee. Mr. Sprayregen is recognized as one of the outstanding restructuring lawyers in the United States and around the world. Mr. Sprayregen has extensive experience representing major U.S. and international companies in restructurings out of court and in court around the world. He also has extensive experience advising boards of directors, and generally representing debtors and creditors in workout, insolvency, restructuring, and bankruptcy matters worldwide. He has handled matters for clients in industries as varied as manufacturing, technology, transportation, energy, media, and real estate. Chambers & Partners has described Mr. Sprayregen as a “great clients’ lawyer, admired for his ‘unflustered ways.’” Chambers said that clients it spoke to noted that he is “probably the best restructuring lawyer in the world.” Most recently, in 2014, Mr. Sprayregen was described by Chambers as “the godfather of restructuring” and “one of the major stars of the industry.” In March 2010, Mr. Sprayregen was selected by The National Law Journal as one of “The Decade’s Most Influential Lawyers.” In 2013, Mr. Sprayregen was named “Global Insolvency & Restructuring Lawyer of the Year” by Who's Who Legal Awards, receiving more votes from clients and peers than any other individual worldwide. In October 2013, Mr. Sprayregen was inducted into the TMA Turnaround, Restructuring, and Distressed Investing Industry Hall of Fame.

Mr. Sprayregen joined Kirkland in 1990 and built its international Restructuring Group. He joined Goldman Sachs in 2006 where he was co-head of Goldman Sachs’ Restructuring Group and advised clients in restructuring and distressed situations. He rejoined Kirkland three years later. In the 2009 edition of Chambers USA, Mr. Sprayregen was listed as a first tier lawyer practicing in the bankruptcy/restructuring category, and was described as having an “outstanding reputation for complex Chapter 11 cases.” The 2011 edition of Chambers USA, America’s Leading Lawyers for Business recognized Mr. Sprayregen as a key individual, noting that sources refer to him as “a restructuring genius and one of the best strategists in the country.” In the 2012 edition of Chambers USA, Mr. Sprayregen was praised for his “incredible work ethic and skill” and for his ability to “bring a mastery of the law to practical application.” In 2014, Chambers Global named Mr. Sprayregen as “one of the leading practitioners in the industry.” Clients look to him as someone who is “providing leadership and strategic guidance on the big issues.” “Tireless and very creative,” Mr. Sprayregen is described as “very good in complicated and difficult situations” and clients are “impressed by his boundless energy to work on issues.” Sources in the 2014 edition of Chambers USA noted there is “not a question or a nuance that I can ask him that he won’t know about.”

Mr. Sprayregen is a frequent lecturer and speaker, and has published numerous articles on insolvency, fiduciary duty, and distressed M&A issues. He has served as an Adjunct Professor at the University of Chicago Booth School of Business, New York University School of Law, and University of Pennsylvania Law School. In May 2013, Mr. Sprayregen was appointed to serve a two year term as the President of INSOL International, the leading insolvency association in the world.

Bemanya Twebaze, Registrar General, Uganda Registration Services Bureau
Mr. Bemanya is the Registrar General, Uganda Registration Services Bureau (URSB) a post he assumed in March 2012, having been Ag. Registrar General from December 2011. He is also the Official Receiver. He is currently a Board Member of Capital Markets Authority and also Uganda Registration Services Bureau. He is the current Chairman of Administrative Council Africa Regional Intellectual Property Organization (ARIPO). He is also Chairman Board of Governors of Nyakinoni S.S.S. He has previously served as Director and Secretary to a number of companies. Mr. Bemanya has represented Uganda on both National and International conferences, seminars and workshops giving keynote addresses and presentations relevant to Business Registration, Insolvency, Intellectual Property and Civil Registration. He has on a number of occasions led the Government of Uganda delegation to the sessions of Working Group V on Insolvency Law at the United Nations.
Mr. Bemanya holds an Honors Degree in Law from Makerere University Kampala, a Post Graduate Diploma in Legal Practice from the Law Development Centre Kampala and several certificates in Legal issues, Administration and Management from National and International training institutions.
Mr. Bemanya has a broad legal background with more than 20 years’ experience in the field of Commercial Law, Business Registration, Insolvency, Intellectual Property and Civil Registration. Mr. Bemanya has a wealth of experience in legal practice and has a history of successfully managing and concluding the liquidation of some of the largest Uganda Government parastatals.
Mr. Bemanya has re-aligned URSB’s operations with emphasis on use of technology to support registration operations. Under his leadership, URSB registered notable success stories in service delivery and revenue collection. He is currently spearheading the development of a simplified, efficient and transparent regulatory framework to govern URSB’s registration activities.

Mahesh Uttamchandani, Global Product Leader, Debt Resolution and Business Exit, World Bank Group
Mahesh Uttamchandani is the Global Product Leader for the World Bank Group’s Debt Resolution & Insolvency Technical Assistance Program, advising governments around the world on the development of insolvency systems. Prior to this, Mahesh was a Senior Counsel in the World Bank’s Legal Vice-Presidency and led the World Bank’s Insolvency & Creditors’ Rights ROSC Initiative. Prior to joining the Bank, Mahesh was Insolvency Counsel to the European Bank for Reconstruction and Development (EBRD), where he led the reform of insolvency systems throughout Eastern Europe and central Asia.
Mahesh is a Canadian lawyer who practiced for several years exclusively in the area of insolvency & creditors’ rights at a leading Canadian law firm and has published and lectured extensively in North America, Europe and Asia. He is a board member of the insolvency-related legal journal, International Corporate Rescue, as well as an Adjunct Professor of Law in the St. John’s University Law School LL.M in Insolvency.
Judge Albert Wood, Supreme Court, Zambia
Mr. Justice Wood graduated from the University of Zambia with an LLB Degree in 1983 and was called to the Bar in Zambia in 1984. He practiced Law for 24 years specializing in commercial law, company law, tax law, insolvency, trademarks and patents until his appointment as a Judge of the High Court in March 2008. He served as a Judge on the Commercial List from 2008 to March 2014 when he was appointed as a Judge of the Supreme Court of Zambia where he presides over criminal, general civil and commercial appeals.
He served as chairperson of the Revenue Appeals Tribunal in Zambia, is a member and an accredited tutor of the Chartered Institute of Arbitrators. While in private practice he acted as honorary legal advisor to the British High Commission in Zambia and the Zambia Institute of Certified Accountants. He was a member of the Compensation Fund of the Securities and Exchange Commission in Zambia and also served as a member of the Survey Control Board. He is a former Vice-Chairman of the Law Association of Zambia. He has had practical experience as a liquidator of a once thriving farming enterprise.

Kristin van Zwieten, Finance and Law Programme, Oxford University, UK
Kristin is the Clifford Chance Associate Professor of Law and Finance at Oxford University, and a fellow of Harris Manchester College. She holds law degrees from the University of NSW and Oxford (BCL, M Phil in Law, D Phil in Law). She has been a visiting scholar at Columbia Law School and at the University of Melbourne’s Asian Law Centre. At Oxford, Kristin convenes and teaches on the postgraduate corporate insolvency law course. Her research interests include corporate insolvency law, and law and financial development in emerging markets. Kristin's doctoral project was on Indian corporate insolvency law. Her current research projects include the European Law Institute’s project on business rescue (for which she is a Reporter), and a two-year project on law, finance and development in the BRIC economies (in which she is a co-investigator). Kristin sits on the UK Insolvency Lawyers’ Association’s Technical Committee, and previously qualified as a solicitor in Australia.
Agenda

Thursday 16th October 2014
Victoria Gallery, Kampala Serena Hotel

7:00-9:00pm Welcome cocktail reception hosted by Uganda Registration Services Bureau and Ligomarc Advocates

Friday 17th October 2014
Katonga Hall, Kampala Serena Hotel

8:00-8:30am Registration – Katonga Hall foyer, 1st Floor, Conference centre, Kampala Serena Hotel

8:30-8:45am Welcome and introduction to the Africa Roundtable initiative
James H.M. Sprayregen, President, INSOL International
Mahesh Uttamchandani, World Bank Group
Bemanya Twesigye, Uganda Registration Services Bureau


9:15–11:00am Peer to peer workshop
Moderators: Adam Harris, Bowman Gilfillan, INSOL Executive Committee, South Africa
Antonia Menezes, World Bank Group

A regional overview of insolvency law reforms and trends in Africa including the OHADA region.

11:00 -11:20am Coffee Break – Achwa room

11:20am -12:45pm Economic perspectives: how do insolvency regimes impact economic growth
Moderator: Mahesh Uttamchandani, World Bank Group
Nitesh Patel, PwC, Zambia
Kristin van Zwieten, Finance and Law Programme, Oxford University

Different elements of insolvency law can foster entrepreneurship (such as with the concept of a “fresh start” in personal bankruptcy regimes) and preserve existing jobs (for instance, via strong reorganization frameworks). This session will examine the literature that shows the economic advantages of such concepts.
12:45–2:00pm  Lunch sponsored by PwC Africa – Addis room

2:00–3:15pm  The role of the judge in insolvency regimes
Moderator: Fidelis Oditah QC, South Square/Oditah Legal Practitioners, UK/Nigeria
Justice Eberhard Bertelsmann, High Court of Pretoria, South Africa
Justice Idris, Federal High Court, Nigeria
Justice Geoffrey Kiryabwire, Court of Appeals, Uganda
Justice Albert Wood, Commercial Court, Zambia

The efficient business exit of non-viable firms allows productive assets to be redistributed to other viable businesses in the economy. Judges play a key role in helping rather than hindering insolvency systems, particularly through effective administration and organizational processes e.g. case-management systems, quick judgments, etc. This session will examine the role of the judge in strengthening insolvency systems.

3:15-3:30pm  Coffee break – Achwa room

3:30–5:00pm  How post-commencement financing can encourage business rescue
Moderator: David Burdette, World Bank Group/Nottingham Trent University
Rick Chesley, DLA Piper, USA
Stefan Smyth, PwC, South Africa

Post-commencement financing (or “DIP financing” in the U.S.) is a form of financing provided to debtors that are involved in insolvency proceedings. As finding new investors, precisely when a company becomes insolvent, can prove challenging, modern insolvency laws commonly grant senior priority to post-commencement financing, whether for capital injected, or for trade and other creditors which supply the company, or employees who render services post-commencement. This session explores the importance of reforms on this topic and how post-commencement financing can encourage business rescue of viable firms.

5:00pm  Close

7:00 –10:00pm  Cocktails and dinner hosted by Bowman Gilfillan Africa Group
Drinks from 7.00pm
Sit down for dinner at 7.30pm
Venue: Mist Gardens, Kampala Serena Hotel
Saturday 18th October 2014

8:55am  Welcome back

9:00-10:30am  Foreign creditors and debtors: Intricacies with cross-border insolvency
Moderator: Glen Davis QC, South Square, UK
Jenny Clift, UNCITRAL
James H.M. Sprayregen, INSOL President, Kirkland & Ellis LLP, US
Peter Spratt, PwC, UK

This session will explore some issues that are specific to cross-border insolvency proceedings, including the two competing schools of territoriality versus universalism, and will review guiding frameworks including the UNCITRAL Model Law on Cross-Border Insolvency.

The next part of the session will involve panellists staging fictitious oral arguments in the form of a debate, relating to the issues likely to be encountered including the concept of COMI ("center of main interest"), in order to highlight cross-border concerns.

10:30-11:00am  Coffee break – Achwa room

11:00am-12:00am  Insolvency practitioner regulation
Moderator: David Mpanga, A.F. Mpanga, Uganda
David Burdette, World Bank Group/Nottingham Trent University
Juanitta Calitz, University of Johannesburg, South Africa
Bernice Gachegu, Official Receiver, Kenya

This session will highlight the different skills required of insolvency practitioners for administering business reorganisations versus liquidations.

12:00-1:30pm  Lunch sponsored by PwC Africa – Addis room

1:30-4:00pm  Work-out simulation
Prof. Jan Adriaanse, Leiden Law School, Leiden University, The Netherlands

As the Round Table winds up, it is time for the participants to put their knowledge and negotiation skills into practice. This session will be a case study game, based on a real situation. Participants will be asked to conduct a workout with the goal of restructuring the business. Professor Jan Adriaanse will lead the session.
Coffee break during the work-out.
4:00-4:30pm  **Appreciating ART-work: Leveraging our Regional Network of Experts**
Moderators: Adam Harris, Executive Committee, INSOL International
Antonia Menezes, World Bank Group
Mahesh Uttamchandani, World Bank Group

Brainstorming and taking practical steps to improve the interaction and co-operation of policy makers, insolvency practitioners and legal practitioners within the region. Next steps and wrapping up.

Including a report by Prof. David Burdette on the INSOL/Nottingham Trent University Insolvency Law in Africa Project.

4:30pm  **Close**
Friday 17th October 2014

Peer to Peer Workshop
We asked those jurisdictions participating in Africa Roundtable to answer three questions in respect to their insolvency legislation. The following country summaries have been submitted.

Burundi

How old is your current legislation?

The current legislation on insolvency in Burundi is 8 years old. In fact, there are two laws governing or pertaining to insolvency. These are Law N°1/07 of 15 March 2006 on bankruptcy and Law N°1/08 of 15 March on legal settlement of ailing company (company in difficulty).

Do you have recent reform initiatives or amendments to share?

In the perspective of improving the legal and regulatory framework of business in Burundi, some initiatives have been recently introduced in the insolvency regime of the country. The milestones in this respect are:

a. The ratification of the New York Arbitration Convention (on the Recognition and Enforcement of Foreign Arbitral Awards). This ratification was done by the Parliament Act (Law) N° 1/16 of 9/5/2014. However, Burundi expressed one (minor) reserve about this convention. This reserve relates to the scope of the convention where Burundi stated that it will apply it only in matters meeting the definition of commercial matters under the Burundi legislation. The instrument of ratification was submitted at the same day (9/5/2014).

b. the creation of a special commercial chamber of the Court of Appeal (just an appellate court in our system) in Bujumbura. This chamber is dedicated to settling commercial disputes/conflicts at the appellate level (from the Commercial courts). The reason why this chamber was created only in Bujumbura is that the majority of business is still conducted within the Capital City (Bujumbura). The said Special chamber was established by the Ministerial Ordinance N° 550/720 of 8/5/2014.

It is also worth mentioning that in 2012 (6 years after the laws on Bankruptcy and legal settlement were enacted), important measures were issued by the government to implement the laws on legal settlement of ailing company and on bankruptcy (2 Decrees of 29/5/2012) and to regulate some aspects of insolvency practitioners (2 Ministerial orders of 30/5/2012).

What is the reform agenda going forward?

A major reform of the insolvency regime is underway in Burundi. A draft Insolvency Law was adopted by the Cabinet (Government) on 9/4/2014 and tabled in the Parliament. It is due to be adopted by the Legislator in the forthcoming October (Parliamentary) Session. This reform is mainly aimed at filling the gap of the existing legislation in the area of Cross-border/International insolvency (which is not yet provided for), assembling all the provisions relating to insolvency in one Act (for ease of reference) and harmonising the insolvency regime of Burundi with the insolvency laws of the other East African Community Partners (Kenya, Rwanda, Tanzania and Uganda) by incorporating international and regional best practices in this domain.

Another reform worth mentioning is the introduction of the law on Credit Reference Bureau which, even if it does not directly deal with insolvency, will have an impact on it. The law on Credit Reference Bureau is still under preparation.
Ethiopia

How old is your current legislation?

The Ethiopian law of “Bankruptcy and Schemes of Arrangement” is one of the five major books incorporated in the 1960’s Commercial Code of the country. Although it is regarded by many as a modern law for its time, it is now a more than half a century old law. As old as it is, the law has parts that deal with the recovery of the bankrupted estate by putting forward provisions of “composition” and “schemes of arrangement”.

Do you have recent reform initiatives?

With the aim of modernizing its commercial laws, the government of the Federal Democratic Republic of Ethiopia has taken few steps to amend the books/provisions of this 54 years old Commercial Code. The book of Bankruptcy and Schemes of Arrangement, which is one of the five books of the Code, is subject to amendment like all others. The technique committee tasked with the preparation of the policy paper that will be used as a guideline for the amendment of the Commercial Code has finished and submitted its final drafting instruction. The drafting instruction/policy guideline is currently under revision by the main committee composed of the Ministers of relevant Ministries of the country.

What is the reform agenda going forward?

The aforementioned technique committee, during the preparation of the policy document (drafting instruction) regarding the “Bankruptcy and Schemes of Arrangement” part, has done its best to give the policy document the shape of a modern insolvency law. Inter alia, the committee have tried to see the experiences of other countries and has also used UNCITRAL’s Legislative Guide on Insolvency Law as a reference point.

Kenya

How old is your current legislation?

Our current legislation is the ‘The Bankruptcy Act of 1930 for bankruptcy and the Companies Act of 1962 for winding up of companies’

Do you have recent reform initiatives?

The new insolvency law bill is currently before Parliament. It consolidates bankruptcy and winding up of companies into one law and repeals the old laws.
Malawi

How old is your current legislation?

Insolvency law in Malawi is governed under two statutes. For personal insolvency, there is the Bankruptcy Act that was enacted in 1967 and still remains in force. Corporate Insolvency provisions are in the Companies Act, 1984. There has been a new Companies Act passed in 2013. This new Companies Act does not contain any insolvency provisions as these will now be dealt with under a new Insolvency Act that is now before Parliament. Common law provisions also do apply to some aspects of insolvency, for example, the recognition and enforcement of foreign insolvency judgments and orders.

Do you have recent reform initiatives?

As stated above, there are initiatives currently in progress to reform the insolvency law in Malawi. The Insolvency Bill, 2014 will repeal the Bankruptcy Act, 1967 and the part of the Companies Act, 1984 dealing with corporate insolvency. The Insolvency Bill, 2014 will be a self-contained all-encompassing legislation that will deal with both individual and personal insolvency. The Bill is progressive in several respects. It covers company reorganisation, a thing which the Companies Act, 1984 did not deal with. It also has a chapter on receivers with the powers and duties of the receivers adequately spelt out. It creates a cadre of insolvency practitioners and spells out their duties and qualifying criteria. Most importantly, it has a full chapter on Cross-Border Insolvency, something that was lacking in the Companies Act, 1984 such that reliance in cross-border insolvency cases was being placed solely on the common law. The Chapter on Cross-Border Insolvency fully adopts, with very slight modifications, the UNCITRAL Model Law on Cross-Border Insolvency.

Nigeria

How old is your current legislation?

Our current legislation on insolvency is the Companies and Allied Matters Act (CAMA). It was first promulgated in 1968 as the Companies Act 1968 and upgraded in 1990 after a stakeholders workshop that reviewed the new draft. The 1990 Act was consolidated in the 2004 Laws of the Federation of Nigeria. A Companies Winding Up Rules has been made pursuant to CAMA 1990. Another law that affects insolvency is the Investment and Securities Act 2007 which has provisions on mergers and acquisitions. The Asset Management Company of Nigeria Act 2010 provided olive branch for resolution of insolvency in the banking sector by the creation of AMCON which purchases eligible toxic assets from banks. The AMCON Act is not generally applicable so impact on insolvency regulation has been limited to banking sector.

Do you have recent reform initiatives?

There is a draft Insolvency Bill which has been exposed to stakeholders and is now before the Federal Minister of Trade who is pursuing approval of the Federal Executive Council so it can be forwarded to the National Assembly for promulgation as a government bill. The draft Bill is basically the work of BRIPAN.

What is the reform agenda going forward?
We intend to continue with agitation for passage of the Insolvency Bill. Further reform depends very much on the new bill becoming law but BRIPAN is working on capacity building and institutional reforms within existing law to improve business rescue.

**OHADA**

**Le droit des procédures collectives, d’apurement du passif de l’Organisation pour l’Harmonisation en Afrique du Droit des Affaires (OHADA)**


L’adoption de l’A.U.P.C a enrichi le droit de l’insolvabilité de nouvelles procédures. Il reste que plus de dix ans après l’entrée en vigueur, une évaluation s’imposait afin d’envisager des améliorations susceptibles de répondre aux besoins actuels des opérateurs économiques et de satisfaire aux conditions nécessaires pour le développement du secteur privé dans les États membres.

Le diagnostic qui a été effectué par les Experts, les observations portant sur l’A.U.P.C apportées par le Groupe Insolvency de la Banque Mondiale, et les discussions engagées avec les opérateurs économiques sur le terrain, ont convaincu que la réforme du droit des procédures collectives d’apurement du passif OHADA était nécessaire.

L’AUPC a fait l’objet d’un audit le 16 novembre 2013 qui a consisté en une évaluation juridique, judiciaire et économique. L’audit a été approuvé par le Conseil des Ministres de l’OHADA2.

Aussi, le constat a été fait que certaines dispositions de l’AUPC font l’objet d’un détournement de procédure (règlement préventif), ou ne sont pas appliquées (pièces justificatives), voire mériteraient un texte complémentaire.

Ainsi, il a été suggéré des modifications significatives de l’A.U.P.C qui renforceront la protection et le contrôle des différents acteurs tout en assurant une plus grande efficacité des procédures tant en termes de sauvegarde des entreprises viables que de liquidation rapide des entreprises insolvables. En vue de combler des vides juridiques ou des lacunes législatives. Il est proposé de s’inspirer du Guide législatif sur l’insolvabilité de la CNUDCI ainsi que des principes et directives régissant le traitement de l’insolvabilité et la protection des droits des créanciers de la Banque Mondiale.

Les principaux objectifs de la révision de l’AUPC ont trait d’une part à la sécurisation du marché pour promouvoir la stabilité et la croissance économiques. Le projet qui sera proposé doit faciliter la restructuration des entreprises viables ainsi que la liquidation et le transfert efficaces des actifs des entreprises en faillite. L’apport de financement pour le

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1/Rapport audit AUPC, Pr F.M SAWADOGO, le 16 novembre 2013
2/ L’audit a été approuvé par le Conseil des Ministres de l’OHADA, lors de sa réunion tenue à Ouagadougou (Burkina Faso) le 30 janvier 2014.
redressement d'entreprises devra être également facilité tout en permettant d’évaluer le risque de crédit de manière rationnelle, au niveau tant interne qu’international. Une bonne prévisibilité de la situation et du traitement juridique d’une entreprise en difficulté dans la zone OHADA relève en effet de la sécurité juridique et donc de l’attractivité de la zone.

La révision permettra d’autre part de maximiser la valeur des actifs. Cette situation devra inciter les participants à la procédure collective à apporter une plus value à la valeur des actifs, en répartissant un montant plus important entre l’ensemble des créanciers afin de réduire la charge de la procédure. Il conviendrait de trouver un juste équilibre entre liquidation et redressement. Le choix de la sauvegarde de l’activité, par une procédure ou par une autre, devra être encouragé au détriment de la liquidation lorsqu’il permettra de maximiser la valeur de l’entreprise pour la société en général (aspects économiques et sociaux) et les créanciers en particulier. Le projet proposé devra garantir aux créanciers ayant les mêmes droits qu’ils seront traités équitablement et que leurs créances seront remboursées en fonction de leur rang et de leurs droits réels.

Il permettra en outre le règlement rapide, efficace et impartial de l’insolvabilité. Ainsi les nouvelles dispositions devront favoriser le traitement des entreprises en difficulté selon des procédures ordonnées, rapides et efficaces, afin de ne pas compromettre les intérêts du débiteur et en réduisant au minimum leurs coûts. Une administration rapide et efficace contribuera à maximiser la valeur des actifs, tandis que l’impartialité favorisera un traitement équitable.

Le projet d’Acte uniforme prône la transparence et la prévisibilité, ce qui permettra aux créanciers et prêteurs potentiels de comprendre le déroulement des procédures collectives et de mesurer les risques liés à leur statut de créanciers en cas d’insolvabilité. Il permettra également de renforcer la stabilité des relations commerciales et favorisera la baisse des primes de risque associées aux prêts et aux investissements. La transparence et la prévisibilité permettront aussi aux créanciers de clarifier les priorités, préviendront les conflits en offrant un cadre dans lequel pourront être déterminés les droits et risques relatifs et aideront à définir les limites de tout pouvoir discrétionnaire.

Il devra en outre encourager l’accès aux informations afin de permettre à ceux qui sont chargés d’administrer et de superviser les procédures collectives et aux créanciers d’évaluer la situation financière du débiteur et de déterminer la solution la plus appropriée.

Il contient enfin des règles sur l’insolvabilité internationale, notamment sur la reconnaissance des procédures étrangères, ce qui favorisera la coordination entre les pays et facilitera la fourniture d’une aide dans l’administration des procédures d’insolvabilité ouvertes à l’étranger.

**South Africa**

**Introduction**

South African restructuring and insolvency law is regulated by three principal pieces of legislation, namely the Companies Act 71 of 2008 (“New Act”), the Companies Act 61 of 1973 (“Old Act”) and the Insolvency Act 24 of 1936 (“Insolvency Act”). Whilst the New Act came into force on 1 May 2011, the Old Act remains applicable to certain insolvency procedures not yet catered for by the New Act. The most recent legislation in the insolvency and business rescue space is the New Act which was promulgated in 2008 and became operative in our law in 2011.
**Business Rescue**

**How old is your current legislation**

The legislation regulating business rescue proceedings is contained in Chapter 6 of the New Act. On the basis that the New Act became operative in South African law on 1 May 2011, business rescue legislation in South Africa is still in its infancy having been around for just over 3 years.

"Do you have recent reform initiatives or amendments" and "What is the reform agenda going forward"

There are no formal amendments that have been proposed to the business rescue provisions of the New Act. The Companies and Intellectual Property Commission ("CIPC"), being the statutory entity responsible for the administration of business rescues in South Africa, has commissioned a team to review the current business rescue landscape, consider the pitfalls in the legislation and propose reforms which may become necessary following the outcome of the research. One such area in which the CIPC has previously advised that they are paying attention, is to the appointment of business rescue practitioners and the manner in which the equivalent persons are appointed in foreign jurisdictions, in order to determine the most effective manner in which to appoint business rescue practitioners. Furthermore, there have been approximately 50 judgments, of which we are aware, handed down by the South African courts to date in respect of business rescue and these judgments have been informative in paving the way for the efficient application of the business rescue provisions in our law. None have yet resulted in formal amendments to the law but may in the future.

**Insolvency**

**How old is your current legislation**

The Insolvency Act regulates the sequestration of natural persons. The Insolvency Act became operative on 1 July 1936, and it is therefore 78 years old.

The winding-up of solvent companies are regulated by the New Act, and by the Old Act to the extent necessary to give full effect to the provisions of the New Act.

On the other hand, in terms of item 9 of schedule 5 of the New Act, the winding-up of insolvent companies are regulated by the Old Act. The Old Act in turn provides that the Insolvency Act will be applicable to insolvent companies in relation to matters for which the Old Act itself makes no provision.

The Old Act became effective on 1 January 1974, making it 40 years old. The 3 year old New Act became effective on 1 May 2011.

Mention must also be made of the Cross-Border Insolvency Act 42 of 2000, which became operational on 28 November 2003. This Act is, however, not effective as the Minister of Justice has not designated any foreign states in respect to which this Act may apply. That is, cross-border insolvency is regulated by our common law and the statutes mentioned above.
"Do you have recent reform initiatives or amendments" and "What is the reform agenda going forward"

South African Law Commission and the Standing Advisory Committee on Company Law made proposals to the Department of Justice and Constitutional Development for uniform legislation that deals with all corporate and individual insolvencies.

As a consequence, during the consultation process surrounding the enactment of the New Act, the Department of Trade and Industry was made aware of proposals within the Department of Justice and Constitutional Development to develop uniform insolvency legislation which would possibly overlap and could conflict with the regime set out in the Old Act for dealing with and winding-up insolvent companies. As a consequence, the New Act provides for transitional arrangements that retains Chapter 14 of the Old Act, on an interim basis until such time as any new uniform insolvency law may be enacted and brought into operation.

Tanzania

The revolution in telecommunication and information technology has facilitated the globalization of the world economy. Led by transnational economic actors, particularly transnational corporations, an integrated cross-border organization of economic activity including production, trade, investment, financial flows and technology transfer is increasing and expanding. As business becomes increasingly international, with more and more enterprises conducting their affairs across national boundaries, so too does the international aspect of insolvency law and practice continue to grow in importance. Insolvencies involving a foreign element such as debtors’ assets and liabilities situated in other jurisdictions are increasingly becoming common with their consequences being felt in transitional and developing economies like Tanzania. An efficient insolvency regime therefore matters because it preserves business value of debtor enterprise; reduce time and cost for restructuring; increases stakeholder returns and creates increased entrepreneurship.

Legislative reforms on the insolvency regime are therefore important in helping improving credit environment by creating more efficient regimes for banks and businesses to recover debts and for businesses to leverage collateral. It also helps failed businesses to “exit” the market efficiently and effectively hence returns assets and entrepreneurs to productive use as soon as possible and fast track options for SMEs. The other important aspect is that it also preserves jobs by improving the regulatory environment for rescuing viable businesses.

In Tanzania prior to the Companies Act, 2002("the Companies Act"), when a company became insolvent it went directly to the Court for winding up proceedings. There were three grounds for a winding-up order, including voluntary winding-up, winding-up by the Court and winding-up under the supervision of the Court. Under the prevailing Companies Act, there are only two grounds for winding-up, including voluntary winding-up and winding-up by the Court. Further, under the Companies Act in the event a company becomes insolvent, it will be able to seek shelter under the new protective insolvency provisions which speak of the proceedings related to company voluntary arrangements with creditors (rescue based approach empowering directors to make proposals), putting a company into administration (court appointed administrators manages the affairs of the company, alternative to liquidation) and receivership (managing the liquidation of a company). The crux of the Companies Act in this respect is that it affords an orderly and fair process for insolvent companies and their creditors. The Companies Act is supplemented by Insolvency Regulations, 2005. Apart from the Companies Act, there are special procedures provided for
banks and insurance companies under the Banking and Financial Institutions Act, 2006 and Insurance Act, 1996 respectively.

Briefly, these insolvency procedures can be described as follows:

- **Receiver and manager route** (sections 405 to 415 of the Act) allows the creditor to seize the assets of debtor out of court proceedings. Receiver and manager can be appointed by a creditor under the terms of the debenture.

- **Administrative Receiver** (sections 416 to 423 of the Act) is a special status of a receiver and manager appointed over the whole or substantially the whole of the company’s property. Unlike receiver and manager whose primary objective is to collect debts, the statutory objective of the administrative receiver is to enable the business to be sold as a going concern. Like receiver and manager procedure, administrative receivership also allows the creditor to seize the assets of debtor out of court proceedings.

- **The voluntary arrangements** (sections 240 to 246 of the Act) apply to any composition in satisfaction of debts or to a scheme of arrangement of company’s affairs. The purpose of the arrangement is to enable a scheme to be effected with minimal involvement by the court. The principal feature of this procedure is that a voluntary arrangement must be voted upon by creditors and must be reviewed, endorsed and administered by an insolvency practitioner.

- **Scheme of arrangement** can be promoted and sanctioned under sections 229 to 232 of the Act. Section 229 provides that if a compromise or arrangement is proposed between a company and its members or creditors, or any class of them, is approved by a majority in number representing 75 per cent in value of those present in person or by proxy at meetings of each class of member or creditor, and is subsequently sanctioned by the court, it shall be binding upon all members or creditors, or upon the class of members or creditors, and upon the company.

- **Administration** (sections 247 to 266 of the Act) is a court sanctioned corporate restructuring procedure equivalent to Chapter 11 of US Bankruptcy Code. The Act prescribes a number of purposes for which the order can be sought, and there must be an expectation that the order will achieve one or more of them.

- **Liquidation** is a process by which life of a company is brought to an end and its property administered for the benefit of its members and creditors. Liquidation or winding-up begins either by court order (compulsory liquidation) or by members passing a resolution to wind-up. The process of liquidation is described under section 274 to 404 of the Act.

The key changes introduced under the Companies Act for companies operating in Tanzania are indeed largely driven by a recognised need to clarify the existing law, though they do offer additional protection for those dealing with Tanzanian companies, and for the company itself (and indeed for its creditors) in the event it finds itself in financial difficulty. Tanzania has made resolving insolvency easier through the rules clearly specifying the professional requirements and remuneration for insolvency practitioners, promoting reorganization proceedings and streamlining insolvency proceedings.

The Government plans to table in Parliament a new law to regulate insolvency and bankruptcy issues in the country. Enactment of the new law will, among others, bring in clear and specific legal framework to address insolvency issues. It is expected that the law will replace the Companies Act and Bankruptcy Act, 1930 to suit new demands in line with the
country's economic reforms. As this process is still at initial stage, details about the reforms intended to be introduced under the new law will be made available in due course.

Uganda

How old is our current legislation?

The Insolvency Act, 2011 was enacted on 23rd September, 2011 and came into force on the 1st day of July 2013.

Insolvency regulations made thereunder - the Insolvency Regulations, No. 36 of 2013 were made on 13th June, 2013.

Regulations for Insolvency practitioners are in final draft awaiting passing by the Minister and the gazetting. These regulations will operationalize Part VIII of the Insolvency Act, 2011.

Similarly, Regulations for Cross-Border Insolvency Practice are in final draft and are before the Chief Justice's Rules Committee.

Are there recent reform initiatives or amendments to share?

No, the Act is still new and is just being implemented/tested. There are no reform initiatives or proposed amendments at the moment. There is, however, a proposal from practitioners for setting up a specialised Insolvency Court. This proposal came up during a Judges' colloquium on Cross Border Insolvency Regulations held on 18th September, 2014.

What is the reform agenda going forward?

At the moment, there is none. The law on Insolvency in Uganda is still being appreciated. Uganda Registration Services Bureau/the Official Receiver is spearheading a campaign to sensitise the public about it. Once the Act has been appreciated and tested, then the need for reform will arise and be managed appropriately.
Economic Perspectives:
How do insolvency regimes impact economic growth
Debt Resolution and Business Exit

Insolvency Reform for Credit, Entrepreneurship, and Growth

The willingness of banks and investors to support new businesses depends a great deal on the rules that govern failing businesses. Effective insolvency regimes save struggling firms when possible, or reallocate assets of failing firms more productively. These procedures—focused on the end of the business life cycle—have a profound impact on the beginning. Banks and investors are more willing to lend when they know they can recover at least some of their investment. Entrepreneurs are more willing to enter the market when they are not putting their entire personal fortunes at risk. This Viewpoint examines literature that quantifies the impact of effective insolvency regimes.

Need for insolvency reform

The World Bank Group Enterprise Survey of businesses in 135 emerging markets shows that almost 60 percent of businesses require a loan at some point, while only just over one-third of businesses have a loan or line of credit. Well-designed insolvency laws are one of the factors that can help businesses access these crucial loans. A number of published studies associate effective insolvency reform with a lower cost of credit, increased access to credit, improved creditor recovery, strengthened job preservation, promotion of entrepreneurship, and other benefits for small businesses. Countries that implement sound insolvency regimes reduce the cost of credit and increase overall economic stability. In contrast, in countries with weak insolvency regimes, struggling companies and their assets often languish unproductively, limiting creditor recovery. In countries where unincorporated businesses such as sole traders are subject to personal bankruptcy regimes, owners of struggling small businesses often face the threat of a lifetime of debt. Banks worried about their ability to recover loans may limit their lending to those borrowers that present the least risk, or they may impose extensive collateral requirements that small entrepreneurs cannot meet.

Given that market exit is an integral part of the business life cycle, particularly in times of crisis, even developed economies with more efficient insolvency regimes are faced with addressing business failure. More than five
years from the onset of the global financial crisis, many wealthier countries continue to flounder, with weak financial markets and many indebted firms. The Credit Reform Economic Research Unit reported that between 2010 and 2011 corporate insolvencies increased by 6.4 percent in Belgium, 18.7 percent in Spain, and 7 percent in Ireland. Reorganizations of multinationals such as U.S.-based General Motors, where at least 1.2 million jobs in the automotive supply chain were at stake, and Eurotunnel with 2,300 employees and 800,000 shareholders, emphasize the far-reaching and cascading effects of business distress and subsequent business rescue on jobs, business supply chains, and bank reserves. The financial crisis has shown that even countries with more established and orderly insolvency procedures are looking at ways to make their economies more resilient through improvements in their debt resolution systems.

**Benefits of effective insolvency frameworks**
The World Bank Development Report 2014 states that “Bankruptcy law and the depth of resale markets are particularly important to liberate productive resources from an unproductive enterprise and to ensure that creditors and potential investors in other enterprises are protected if a business fails.” Insolvency law provides an orderly process for the reorganization or liquidation of insolvent entities in a collective manner. It serves as an important safety net for business activity, ensuring that when businesses face financial difficulties, mechanisms are available to either rescue them or maximize the value realized from their assets through their deployment to more productive firms. It also ensures an orderly payment process, avoiding a chaotic race by creditors to collect. Unlike bilateral debt enforcement, all creditors participate in insolvency proceedings, and effective insolvency regimes aim to provide a balance of both debtor protection and creditor recovery. Finding this balance is one of the main challenges that policymakers face when designing an insolvency law.

The best approaches will be tailored to meet the particular needs, characteristics, and economic and social goals of a given country. The literature shows that effective insolvency regimes preserve jobs by facilitating the survival of distressed but viable businesses, reduce credit risk, and attract venture capital and associated high-quality innovation, particularly vis-à-vis smaller firms.

### I. Effective insolvency regimes are associated with a lower cost of credit
Credit opens markets to entrepreneurs and promotes expansion of successful businesses. Credit lines help to ease liquidity shortfalls inevitable to business. Constrained credit supplies, on the other hand, limit growth as liquidity concerns reduce lenders’ willingness to take risk. A 2007 study in China showed that after the enactment of credit and property rights reforms, firms could more readily invest in growth opportunities, with less sensitivity to cash flow.

The World Bank Group World Development Indicators have shown that access to credit is a constraint in many parts of the world. Table 1 shows that in many countries, domestic credit provided by banks as a percentage of GDP is below 50 percent.

<table>
<thead>
<tr>
<th>Region</th>
<th>Domestic credit as a percentage of GDP for 2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Least developed countries: UN classification</td>
<td>29.9%</td>
</tr>
<tr>
<td>Middle East &amp; North Africa</td>
<td>37.4%</td>
</tr>
<tr>
<td>Europe &amp; Central Asia</td>
<td>62.6%</td>
</tr>
<tr>
<td>South Asia</td>
<td>71.1%</td>
</tr>
<tr>
<td>Latin America &amp; Caribbean</td>
<td>73.6%</td>
</tr>
<tr>
<td>East Asia &amp; Pacific</td>
<td>141.5%</td>
</tr>
<tr>
<td>European Union</td>
<td>156.0%</td>
</tr>
<tr>
<td>OECD members</td>
<td>205.8%</td>
</tr>
</tbody>
</table>

Source: World Bank Development Indicators (Financial Indicators)
countries documents that access to a bank loan or line of credit is restricted in developing regions—particularly Africa—in relation to the number of firms requiring such financing. Table 2 shows that more than half of firms in developing regions need a loan, but in none of these regions are more than half the firms able to access credit, with access acutely tight in the Middle East.

Insolvency laws directly affect the willingness of lenders to extend credit, and the terms on which they are prepared to lend. A study across France, Germany, and the United Kingdom showed that banks price loans based on their rights in case of default, and price them higher to mitigate creditor-unfriendly aspects of the bankruptcy law. The study sampled similar small and medium enterprises (SMEs) that had defaulted on bank loans. The authors examined whether differences in the level of creditor rights in bankruptcy in the different jurisdictions had an impact on lending terms. After adjusting for other factors, they found that French banks required more collateral, and specific forms of collateral, than in the other two countries because of provisions in the French bankruptcy code, which were unfavorable to creditors. The study also found that France, the least 'creditor friendly' country among the three, had a significantly lower rate of business recovery than in Germany or the United Kingdom. Limiting the availability of credit enabled French banks to mitigate, but not fully avoid, the costs of "unfriendly" bankruptcy laws.

Reforming an insolvency regime can help lower interest rates, making credit more affordable. A 2012 study examined Italy’s 2005 reform of its reorganization and liquidation procedures under the bankruptcy law. The study separately analyzed the impacts on the cost of credit to SMEs of reorganization and liquidation reforms. Supplementing their analysis of loan-level data with firm-level data on borrowers, the authors found that the liquidation reform led to a decrease in interest rates, although the reorganization reform had the opposite effect. In particular, firms with higher numbers of bank creditors saw the most pronounced reduction in interest rates due to the enhanced coordination provided by the bankruptcy law.

II. Effective insolvency regimes are associated with increased availability of credit

Effective insolvency systems enhance predictability and thus lender confidence in loan recovery upon default, which encourages more lending and leads to financial inclusion for more businesses.

A 2012 study of Brazil’s 2005 bankruptcy law reform compared accounting data pre- and post-reform from 698 publicly traded firms in Brazil, Mexico, Argentina, and Chile to evaluate the impact of the reform on loan terms and levels of debt. The authors put their firm-level data in context by considering aggregate data on credit market development in Brazil as compared with the other countries. The authors reported a statistically significant increase in the Brazilian private credit market after the 2005 reform, an increase not replicated in the other jurisdictions that had not implemented insolvency reform. At the firm level, the authors reported a 10- to 17-percent increase in total debt and a 23- to 74-percent increase in long-term debt, although with no evidence of change in short-term debt. The authors attributed a significant fall in trade credit to the increased availability of other forms of debt financing. They also reported a

<table>
<thead>
<tr>
<th>Economy</th>
<th>Percentage of firms with a bank loan/line of credit</th>
<th>Percentage of firms not needing a loan</th>
</tr>
</thead>
<tbody>
<tr>
<td>East Asia and Pacific</td>
<td>37.7</td>
<td>44.9</td>
</tr>
<tr>
<td>Eastern Europe and Central Asia</td>
<td>41.2</td>
<td>46.4</td>
</tr>
<tr>
<td>Latin America and Caribbean</td>
<td>47.6</td>
<td>42.1</td>
</tr>
<tr>
<td>Middle East and North Africa</td>
<td>6.0</td>
<td>38.1</td>
</tr>
<tr>
<td>South Asia</td>
<td>34.8</td>
<td>40.3</td>
</tr>
<tr>
<td>Sub-Saharan Africa</td>
<td>23.8</td>
<td>34.1</td>
</tr>
</tbody>
</table>
7.8- to 16.8-percent reduction in the cost of debt financing for the Brazilian firms. In short, the study found that the reform helped make credit more available, and on better terms.

Just as an effective insolvency system promotes access to credit, a weak system inhibits it. A 2008 study comparing 88 countries found that failure to enforce debt contracts, including inefficient bankruptcy proceedings, reduced the amount and quality of available credit at the macro level. The World Bank Group Doing Business report for 2014 uses a resolving insolvency indicator to measure the time, cost, and outcome of insolvency proceedings involving a financially distressed small domestic company. The methodology for measuring the recovery rate for creditors—the percentage of their original investment they recover in a liquidation or reorganization proceeding—depends on these three variables. If a distressed company emerges from the proceedings as a going concern, the recovery rate tends to be higher than when a failed company’s assets are sold piecemeal. Figure 1 shows a strong correlation between the indicator’s recovery rate and the availability of domestic credit from a country’s banking sector (measured as a percentage of GDP). The correlation coefficient between the Doing Business 2014 recovery rate and the percentage of domestic credit by the banking sector is 0.70. The correlation is significant even at the 1 percent level. More developed insolvency systems that have a variety of tools to address financial distress are positively associated with higher levels of credit and, conversely, less developed systems with lower aggregate credit levels have lower recovery rates.

It is interesting to note that a 2014 study tested the effect of 38 selected indicators on seven measures of the regulatory and institutional environment. Among the 38 indicators, the study identifies the recovery rate of the resolving insolvency indicator of the Doing Business report as the single most valuable measure.

III. Effective insolvency reforms are associated with increased returns to creditors

Studies have shown that insolvency reforms improve creditor returns in cases of loan default. A 2007 study in Mexico showed that the enactment of a new corporate insolvency law, which was designed to reduce delay and ensure better filtering of non-viable from viable debtors, increased the average recovery rate for secured creditors from 19 cents on the dollar to 32 cents on the dollar, and shortened the duration of proceedings from an average of 7.8 years to 2.3 years.

A 2012 study of 348 formal insolvencies in the United Kingdom showed that giving unsecured creditors more control in insolvency through the new administration procedure increased gross levels of returns. The study examined the effects of abolishing the use of receivership, whereby, a creditor with security over the whole of a company’s assets could appoint a receiver to assume control over the debtor and conduct a “private liquidation.” Administration, introduced greater accountability to unsecured creditors through a combination of improved voting rights and fiduciary duties. In addition to increasing the gross level of returns, administration also reduced the duration of cases from a median of 602 days under the receivership procedure to 358 days for the administration procedure. The study showed that the financial gains in returns from using the administration procedure were partially offset by an increase in the costs, because
of more court appearances and procedural requirements.19

The Doing Business report’s resolving insolvency indicator for 2014 illustrates that economies that combine developed insolvency systems with effective reorganization frameworks produce higher recovery rates for creditors compared to countries that have not updated their insolvency procedures (see Figure 2).

IV. Effective insolvency reforms are associated with job preservation through reorganization and business rescue

Businesses in severe financial distress, such as a cash-flow crisis, sometimes have no option but to liquidate and close. If well managed, this can result in the redeployment of assets to more productive firms and improved economic efficiency. However, it can also lead to significant job losses and diminished value for owners and creditors. A business that can overcome financial difficulties will be able to preserve jobs, keep supply chains intact, and retain asset value. Formal insolvency tools have been shown to be effective in encouraging the healthy recovery and rehabilitation of financially distressed firms. A corporate reorganization code in Colombia enacted in 1999 dramatically improved the efficiency of reorganization proceedings. The duration of the proceedings fell from an average of 34 months to 12 months. The authors of a study of the code found that, post-reform, liquidating firms were unhealthier than before and reorganizing firms were healthier. They concluded that the reform allowed for self-selection of healthy firms to opt for reorganization rather than liquidation, and to do so sooner. After controlling for macroeconomic conditions, the authors found that reorganized firms were able to recover faster under the new law, and achieved greater equity value.20

Effective reorganization in countries such as Colombia and Belgium can allow a company’s workforce to remain employed and productive. This outcome can also be achieved through formal procedures that facilitate the sale of the company’s business on a going concern basis. Recent studies in the United Kingdom21 showed that of all the sales of businesses as going concerns during receivership or administration proceedings, 65 percent concluded with the new owner preserving the entire work force. For prepackaged sales, full retention of the work force was achieved in 92 percent of the cases.22 Even where some job loss occurred, job retention was still significant. In 73 percent of the cases where business sales resulted in some job loss, the new owner was able to retain at least three-quarters of the work force. For prepackaged sales involving some job loss, 95 percent concluded with at least three-quarters of the work force still on the job.23 These numbers demonstrate the ability of a well-functioning insolvency regime to preserve jobs on a meaningful scale.

V. Effective personal insolvency reforms support entrepreneurship

Entrepreneurship creates jobs, increases productivity, and promotes innovation.24 Recent studies show that start-ups and newly established firms produce multiplier effects that can increase long-term employment growth rates at companies throughout an entire region.25 Venture capital funding provides valuable support to entrepreneurship and innovation. A 2004 study of the United States and 10 European countries found a correlation between debtor-friendly personal bankruptcy regimes and levels of venture capital funding. The authors speculated that greater protections for personal assets, with more “forgiving” bankruptcy regimes,
made entrepreneurs more willing to commit their own resources and better able to attract other venture capital.26

At the level of bank lending to businesses, effective insolvency laws strengthen creditor rights and promote access to credit and growth. At the level of the individual entrepreneur or consumers, laws that are more debtor-friendly can also encourage growth. Entrepreneurs often have to commit personal assets to start a business, and personally guarantee loans to the new venture. A safety net provides a certain level of protection through personal insolvency laws, and appears to encourage the risk-taking necessary for entrepreneurship and innovation.27

Several studies have shown a connection between a country’s personal insolvency law and entrepreneurship. A 2003 survey compared asset exemptions during insolvency proceedings (for the residential home, personal effects, retirement accounts, and other personal assets) among U.S. states. The survey of 20,000 families found that there are more entrepreneurs in those states with higher asset exemptions.28 A 2008 study that compared self-employment in 15 countries in Europe and North America between 1990 and 2005 found that more forgiving personal bankruptcy laws, measured particularly in reference to the time a bankrupt individual has to wait to be discharged from pre-bankruptcy debts, combined with ready access to limited liability protections, enhance entrepreneurial activity.29 A 2009 study, again comparing U.S. states and their bankruptcy exemptions for personal property, found that the probability of starting a business is 25 percent higher in states with higher exemptions.30

VI. Effective insolvency reforms are associated with benefits for small firms

Small and micro businesses. The reform involved three major changes:

- Introduction of a new court-supervised reorganization procedure.
- Implementation of an early warning system for financial distress by the establishment of special units in charge of monitoring firms’ financial health.
- Amendments to the liquidation procedure to ensure the recognition of retention of title interests, thereby strengthening property rights.

The authors reported a lower failure rate in the post-reform period than in the period immediately preceding reform. After controlling for various factors, they found that the reduced failure rates occurred in small and micro businesses in two sectors in particular—manufacturing and trade.31 They attributed the improvement to the strengthened recognition of proprietary interests in liquidation.

Small and medium enterprises were most affected by Italy’s 2006 insolvency reforms. In a study comparing interest rates pre- and post-reform, “riskier” SMEs, those more likely to default, were shown to have lower interest rates after the liquidation reform. The authors of the study used loan-level data on 202,964 SMEs and 1,097 banks to prove their assumption that improved creditor control during liquidation raised the liquidation value of firms, which led to lower interest rates for the SMEs in the riskier group.32 In China, a 2013 study of reforms that made it easier for secured creditors to foreclose on collateral and restricted expropriation of private property held by local government found that the changes enabled firms to respond to growth opportunities due to greater access to credit with less sensitivity to cash flow.33

Conclusion

Effective insolvency regimes have a dual aim: to save viable businesses and to ensure that non-viable businesses can quickly exit the market, allowing the deployment of assets to more productive firms. In achieving these dual goals, strong insolvency regimes aim to balance creditor and debtor rights, maximizing recovery, providing a safety net for financially distressed debtors and impacting...
numerous economic indicators including credit, job preservation, and entrepreneurship. Moreover, the quality of an insolvency regime affects the willingness of investors, banks, companies, and entrepreneurs to take risks and invest in growth. As the studies described here demonstrate, an effective insolvency system can enhance all of these measures and promote economic growth. Empirical evidence points to the importance of developing effective and efficient insolvency systems through thoughtful, targeted reform, and the results can be felt economy-wide, in improved investment climate, economic growth, and job creation.

Notes
1. This Viewpoint was prepared under the World Bank Group Debt Resolution & Business Exit (DRBE) program, under the leadership of Mahesh Uttamchandani. The DRBE program is part of the World Bank Group’s Trade & Competitiveness Global Practice Business Regulation work, led by Najy Benhassine. The author wishes to gratefully acknowledge the contributions to this viewpoint by Angana Shah, Andres Martinez and Fernando Dancausa.
2. Creditreform Economic Research Unit
3. Sean P. McAlinden, Debra Maranger Menk, “The Effect on the U.S. Economy of the Successful Restructuring of General Motors”, CAR Research Memorandum, Center for Automotive Research, December 5, 2013, describing the effects of a scenario where General Motors was not rescued, and suppliers were bankrupted in a cascading effect, with estimated job losses of 1.2 million.
5. The nature of the ‘protection’ required will of course vary depending on whether the debtor is an individual person or a legal entity such as a limited liability corporation.
7. D. Berkowitz, C Li, and Yin Ma 2013
10. 338 (around half) Brazilian firms, 108 Mexican, 82 Argentine and 170 Chilean.
11. Depending on which model was used: Araujo, Ferreiro and Funchal 2012
12. Funchal 2009
16. M. Gamboa-Cavazos and F Schneider, 2007)
17. Mean was 627 days
18. Mean was 357 days
19. Armour, Hsu and Walters 2012
20. Gine and Love 2010
22. i.e. sales negotiated in anticipation of the commencement of the formal proceedings, and executed on entry into those proceedings.
23. Ibid.
27. Uttamchandani and Menezes 2010
28. Fan and White 2003
29. Armour 2009
30. Mathur 2009
31. N Dewaelheyns and C van Hulle 2008
32. Rodano, Serrano-Velarde, Tarantino (2012)
33. Part II, Berkowitz, C Lin & Y Ma 2013
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How post-commencement financing can encourage business rescue
PRINCIPLES OF DEBTOR-IN-POSSESSION FINANCING IN THE UNITED STATES

DEBTOR-IN-POSSESSION FINANCING

Purpose - Provide proper incentives for lenders to extend credit to financially distressed debtors in a court supervised process, while simultaneously preserving property of the debtor’s estate.

Statutory Overview - Section 364 of the Bankruptcy Code

Unsecured Credit with a Section 503(b)(1) Administrative Expense Priority

- Section 364(a): If the trustee is authorized to operate the business of the debtor . . . the trustee may obtain secured credit and incur unsecured debt in the ordinary course of business . . . as an administrative expense.

Section 364(c)(1) priority over Section 503(b) and 507(b) Administrative Expenses

- Section 364(c)(1): If the trustee is unable to obtain unsecured credit allowable under Section 503(b)(1) . . . the court, after notice and a hearing, may authorize the obtaining of credit or incurrence of debt - with priority over any or all administrative expenses.

Section 364(c)(2), Section 364(c)(3) and Section 364(d) liens

- Section 364(c)(2): If the trustee is unable to obtain unsecured credit allowable under Section 503(b)(1) . . . the court, after notice and a hearing, may authorize the obtaining of credit or incurrence of debt - secured by a lien on property that is not otherwise subject to a lien.

- Section 364(c)(3): If the trustee is unable to obtain unsecured credit allowable under Section 503(b)(1) . . . the court, after notice and a hearing, may authorize the obtaining of credit or incurrence of debt - secured by a junior lien on property that is subject to a lien.

- Section 364(d): The court after notice and a hearing may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if - (A) the trustee is unable to obtain such credit otherwise and (B) there is adequate protection for
the holder of the lien or the property which such senior or equal lien is proposed to be granted.

Section 364(d) - Specific Issues

Courts typically find adequate protection in one of three ways: (1) when the debtor's DIP is used to pay down the pre-petition lender's outstanding debt; (2) when the debtor agrees or is ordered to make monthly payments to the lender; and (3) when the court finds that the lender is protected by the existence of an equity cushion.

Use of Cash Collateral

Purpose – The Bankruptcy Code balances the need to protect a secured lender's interest in its collateral with the debtor's need to use such cash collateral.

Statutory Overview - Section 363 of the Bankruptcy Code

Section 363(c) - Use of Cash Collateral

- Section 363(c)(1) and (2): Generally permits the trustee or a debtor in possession to use cash collateral in the “ordinary course of business”, provided that either (i) each entity that has an interest in such cash collateral consents or (ii) the court, after notice and a hearing, authorizes the use of such cash collateral.

- Section 363(c)(4): Requires the trustee or a debtor in possession to segregate and account for any cash collateral in its possession.

Section 363(e) - Adequate Protection for Secured Lenders

- Section 363(e): Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold or leased, or proposed to be used sold or leased, by the trustee, the court with or without a hearing, shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such security interest.

- Carve-out – Carve-out is the allocation of DIP proceeds to pay for restructuring costs. While there is no provision in the Bankruptcy Code that requires a “carve-out”, many courts will require a carve-out before approving a DIP financing because, without a carve-out, it will be considerably more difficult for the
debt or to attract competent counsel and other professionals.

**TYPES OF DIP LENDING**

**Defensive DIP Lending** - Credit is extended to a debtor-in-possession by existing prepetition lenders to protect or improve their pre-petition credit position.

**Roll Up** – Bankruptcy courts may allow a lender to utilize post-petition financing to pay secured pre-petition debt. The result of a roll-up is that the DIP lender may receive “backwards cross-collateralization” and “cross-superprioritization,” meaning that the lender would have a new superpriority lien on all of the assets of the debtor as they existed on the filing date. A bankruptcy court is more likely to grant a roll-up where the prepetition secured debt is over-secured and the likelihood of a successful reorganization high.

**Case Study – Orchard Supply Hardware:** Prior to the bankruptcy filing, Orchard Supply, a regional chain of hardware stores, were obligors under a revolving asset-backed loan facility and a term loan. The lenders had senior and junior liens on substantially all of the debtor's assets, with the exception of certain valuable real estate. The term loan lenders had interest in credit bidding to purchase the debtor's assets in a section 363 bankruptcy sale. In the days and weeks prior to the bankruptcy filing, a new potential suitor, big box retailer Lowe's Home Improvement emerged. Due in part to the Company's desire to sell its assets to a strategic buyer rather than its lenders, the bankruptcy court approved the terms of a full roll-up of the DIP facility, whereby the term loan lenders provided a small supplemental DIP facility. Significantly, this facility provided the DIP lenders with superpriority liens on the previously unencumbered real estate, which essentially eviscerated any remaining value to unsecured creditors.

**Offensive DIP Lending** - An “offensive” or “new money” DIP often occurs where a prepetition secured lender declines to provide DIP financing, often in the context of a partially completed construction project. The third party lender often seeks to make the loan, primarily for the potential profitability of the transaction and the opportunity to provide exit financing. The lender may also seek to acquire the debtor or the assets from the debtor, as described in the “loan to own” section, below. An offensive DIP is most likely to be made by private equity investors or hedge funds, and they would typically receive liens on a *pari passu* basis with the existing senior secured lenders or, in other cases, on a priming basis.

**Case Study:** As noted previously, DIP loans are often provided by existing lenders in a distressed company’s capital structure. Although a distressed company is required to shop DIP financing from outside
parties, the recent trend is to obtain financing from within the existing capital structure. To obtain financing from outside of the capital structure, the DIP loan would need to be used to either refinance the first lien debt or “prime” the first lien lenders, which can only be done by obtaining their consent or litigating the issue of whether they are adequately protected. Neither of these options are appetizing or realistic as the leveraged loan market remains severely constrained and so called “priming” fights are difficult to win. Although a number of financial firms provided third-party DIPs in the years leading up to the 2008 recession, for the reasons set forth above, such offensive DIPs are now relatively rare. Now, such third party DIP financing may come from the U.S. government, as a loan of last resort. This occurred in both the GM and Chrysler bankruptcies.

Loan to Own DIP Financing – Although sometimes a “loan to own” strategy takes the form of a third party DIP, more likely is a scenario where a third party purchases debt prior to the bankruptcy filing for the purpose of converting the debt into equity of the restructured debtor.

Case Study – Barnes Bay Development: The Barnes Bay bankruptcy related to a luxury resort, the Viceroy Anguilla Resort and Residences, comprising 134 private residences and 32 dedicated hotel suites. Approximately six months prior to the bankruptcy filing, Starwood Capital acquired the construction loan at a discount, and subsequently invested approximately $12 million to finish construction and operate the property. As part of the bankruptcy process, Starwood Capital provided DIP financing and an additional several million dollars to pay unsecured creditors. Starwood Capital acted as the stalking-horse bidder at an auction for the debtor’s assets, and the sale to Starwood Capital was ultimately approved by the bankruptcy court and consummated.

“Exit” Financing – Credit is extended to a reorganized company in connection with confirming a plan of reorganization and the emergence of such company from bankruptcy protection. The exit facility is usually used to, among other things, pay off the DIP loans.

KEY CONSIDERATIONS IN DIP LENDING

Quick Response Necessary To Be Competitive – A debtor often needs immediate access to working capital and the DIP lender may be called upon to make very quick decisions to accommodate a debtor’s special financing needs.

Short Timeline To Finalize DIP Financing – DIP financings will typically be negotiated and finalized in an extremely short timeframe prior to the filing of a bankruptcy case.
Limited Due Diligence – The timing pressures generally allow for limited due diligence on the debtors’ financial and operational situation. Of course, this provides a significant advantage for existing pre-petition lenders over third parties with little or no prior dealings with the debtor.

Risks – The most significant risk to the DIP lender is that the restructuring is not successful. In these cases, the lender would recover only the liquidation value of the debtor. In addition, in certain situations, despite having court approval of post-petition liens, creditors may seek to challenge pre-petition liens.

Benefits – DIP lending may not only be financially lucrative (with interest rates exceeding prime rate by 8-12%), but can provide a lender with substantial ability to improve its collateral position and control a debtor’s assets. The DIP lender can obtain a lien package that can include (i) a priming lien which primes all existing liens; (ii) a lien on unencumbered assets; (iii) a junior lien on assets encumbered by existing liens; and (iv) replacement liens (in a defensive DIP), as a form of adequate protection. Of course, the DIP lender has significant leverage and, in many cases, controls much of the decision-making during the course of a bankruptcy case.

Cross-Collateralization – In certain circumstances, post-petition estate property can be used to secure pre-petition lenders’ claims, which would act to substantially protect pre-petition lender rights. For instance, in one case, a DIP lender was able to obtain liens over pre-petition assets that, prior to the filing of the bankruptcy case, were unencumbered. This type of scenario is a significant enhancement to the lender, and which may act to diminish or altogether destroy any remaining value that would otherwise inure to the benefit of unsecured creditors.
Post Commencement Finance – key themes and case study

South African perspective:

Designation of PCF in Business Rescue (“BR”) per the Act

PCF is one of the most talked about and hotly debated issues in articles and discussions around Chapter 6 Business Rescue proceedings which were introduced some 3 years ago – from a definition point of view, s.135 determines the following:

- Any remuneration, reimbursement of other money owing to employees that becomes due and payable during rescue but is not paid is deemed PCF
- Any financing obtained during rescue (can be secured or not) is PCF

Preference is firstly to any practitioner’s remuneration and expenses, following which employee deemed PCF and then secured/unsecured finance.

In the event that a BR is superseded by liquidation then the preference conferred above remains except for any claims arising out of the cost of liquidation.

Key themes

Below is a list of the main areas that tend to arise in relation to PCF, this is not definitive but reflects the predominant topics of conversation arising on this subject:

- Who are the main (potential) providers of PCF
  - Existing lenders
  - Shareholders
  - Customers
  - Unions
  - Suppliers
  - Development Finance Institutions
  - Specialist Funds/Hedge Funds
  - Trade finance (working capital) providers
- What are the normal terms/instruments
  - Term debt/RCF
  -Convertible instruments
  - Vendor finance
  - Consignment stock (replaces PCF need in some instances)
- When to raise PCF
  - Before filing
  - Once filed and requirements known
  - When potential buyers are identified - “loan to own" strategies
- How does secured PCF differ from unsecured
- What returns for risk of PCF and what raising fees can be charged by BRP?
- What is the preference conveyed – when will it be repaid?
• What is defined as PCF? Support by Trade Creditors or only institutional finance?

• What are the main challenges
  ▪ Availability of distressed funding
  ▪ Lack of a secondary debt market
  ▪ Uncertainty in legislation and case law on ranking/preference
  ▪ Intergroup challenges on lending during BR
  ▪ Complexity around BRP needing to seek consent for convertible instruments
  ▪ Conflicting terminology/sections of the Act – including a risk that a BRP compromises in a rescue plan the PCF they themselves raised (clearly not contemplated but could arise)
  ▪ Risks to PCF around the ‘nullity’ provisions in BR

• How will this experience translate to other (African) countries embarking on Rescue equivalent legislation
  ▪ Greater clarity from legislation on ranking and preference
  ▪ Decision as to whether to follow DIP financing (highly codified in legislation) or UK Admin where key principles exist or SA where a middle ground of definition exists.
  ▪ Nullity provisions are to date unique to SA so unlikely to be adopted elsewhere

Case Study (will have more detail at the ART event – handout)

The example relates to a matter that PwC South Africa dealt with a year ago – the rescue was of a group of companies consisting of a holding company and a series of entities, each comprising of the trading operations per geographic location/city – under SA Chapter 6 legislation, there is no ‘group’ provision so it was necessary for 13 separate sets of Business Rescue proceedings to be launched (1 per entity) – PwC were appointed as the BRP on each matter and effectively ran a group sale process and therefore needed to raise PCF to fund the business and BR fees whilst an accelerated sale was pursued.

Timing of raising PCF - on filing for BR, PwC were advised that the businesses (highly seasonal) were about to enter into their peak season and therefore would be cash positive from the date of filing or soon after – it was soon clear that this was true of certain entities but not of others but due to the lack of group rescue provisions there was no way to lend surplus cash intra group despite this having been the way the group treasury had operated. As a result we needed to raise PCF on a group wide basis whereby it could be consumed for working capital shortfalls in whichever entity needed it.

Provider of PCF - the PCF was provided by one of the potentially interested parties who wanted exclusivity on the transaction, however, we as BRPs declined this as it would not have allowed a competitive process to have been run in the interest of creditors. Accordingly we agreed for a ‘best and final’ offers approach on the basis that if the PCF provider really
wanted the transaction they could secure it – failing which their security was best served by the highest offer from another party being attained and thus resulting in a pay down of their PCF on a preferred basis out of the purchase consideration.

Interest rates – these were agreed at Prime (which is JIBAR plus 3.5% approximately – with JIBAR being similar to LIBOR in its calculation)

Security – the business was ‘asset light’ and as such there were few (unencumbered) assets of any material value, we secured the PCF against a cession of cash generated in rescue. This itself was a matter of debate with the existing group lenders who held a prior cession of cash balances, however, we negotiated that this to a satisfactory position.

Repayment – following our accelerated sale process we concluded a transaction for 5 of the 8 entities and the brands and this resulted in repayment of the PCF in each location with only one drawn PCF balance being a secured (super senior) claim in liquidation as a result of being one of the 3 businesses that was not sold. Ultimately the PCF provider did not secure the winning bid to buy the businesses, but had this happened then rather than a repayment of their PCF occurring their balance of drawn PCF would have been a pre-payment for the purchase consideration.
Saturday 18th October

Foreign Creditors and Debtors: Intricacies with cross-border insolvency

Background Assumed Law

It is 2020. Azania has implemented a new Insolvency Act which includes provisions based on the UNCITRAL Model Law on cross-border insolvency but has a requirement for reciprocity. To date, it has entered into only one relevant treaty, with Uganda. Azania’s Insolvency Act also contains a framework for a business’s reorganisation similar to chapter 11 in the United States, and provides for the proposal of a Scheme of Arrangement allowing a 75% majority of creditors to approve a compromise binding on the minority, but the framework is largely untested to date.

Butania, on the other hand, has a very limited insolvency law, essentially restricted to a form of voluntary liquidation. There is the possibility for the Butanian court to appoint a receiver to safeguard the interests of a judgment creditor.

The United States has implemented the UNCITRAL Model Law, with no requirements for reciprocity.

Facts

From humble beginnings as a farming business, the Pachyderm Group has expanded into various businesses with assets in a number of countries.

Over the years the group has borrowed money from a number of banks secured on specific assets.

For tax reasons, a parent company and fund-raising vehicle, Pachyderm Holdings (“PH”), has been established in Mauritius. PH has successfully raised capital through the issue of a corporate bond in New York, secured by a pledge of PH’s equity interests in the group’s operating companies. This money has been passed through a complex series of inter-company loans within the group, and invested in two main businesses:

- Pachyderm Agribusiness (“PA”), incorporated in Azania, owns land in Azania and Butania. PA exports coffee, fruit, and flowers to various countries, including the United States. At any time, PA will have stores waiting to be shipped in Azania and Butania, book debts from local importers in Azania and Butania, and cargo in transit around the world.

- Pachyderm Mining (“PM”) is a mining and exploration company incorporated in Butania and run day-to-day from an office in Pictoria, capital of Butania. It operates one small copper mine in that country,
from which ore is shipped to Azania for processing. PM also has exploration rights at various, very promising sites.

There are common directors of all the group companies who have only ever met in Tarzana, the capital of Azania, where the group maintains its small head office. The group’s accountants are based in Azania. The group has used local lawyers and lawyers in New York for various transactions.

For a combination of reasons, creditors commence proceedings against Pachyderm entities in both Azania and in Butania, and obtain judgments which they are seeking to enforce against assets wherever they can be found.

As a result, it appears inevitable that PA will enter insolvency proceedings in Azania. It may be possible to save parts of the businesses. The group’s operations are generally strong and the Butanian exploratory sites seem to hold great promise, but the group cannot support its large debt burden and satisfy the judgments awarded in Azania and Butania.

In Butania a receiver is appointed by the court, and PH also enters insolvency proceedings in Mauritius.

Although nothing has yet been proved, there are rumours and serious allegations that the management of Pachyderm Group has known about the financial problems for some considerable time, and has been making large transfers out of the companies in the group. The CEO is believed to be in the United States, the Finance Director is thought to be in Uganda, and they have taken documents with them.

One of the directors and shareholders, Mr Jumbo, is at the centre of the misconduct allegations swirling around Pachyderm. He flies to London where, after booking into a 5-star hotel, he is driven to the High Court and presents his own bankruptcy petition on the basis that the English Court has personal jurisdiction over him. The English Court grants a bankruptcy order.

There are thought to be substantial deposits of money in various bank accounts in Azania, Butania, and possibly other jurisdictions. There will be competing claims to those deposits, and individual creditors of different Pachyderm entities will seek to attach them if they can. No one at Pachyderm is aware of any assets existing in the United States.

To complicate matters, there is a substantial tax debt owed by Pachyderm in Uganda as a result of various transactions there. Uganda’s tax authorities would wish to enforce that claim against any assets in Uganda, because foreign tax claims would not be admissible in insolvency proceedings in other jurisdictions. There are no other creditors in Uganda and the present indications are that the Ugandan assets are unlikely to satisfy the entire tax claim.
The ART 2014 Informal Workout Game

Let’s rescue the Uganda Hotel-Casino Group. Or not...?

This case is based upon an existing situation. Details are as accurate as possible yet made anonymous. The case is written for EDUCATIONAL PURPOSES and CLASS ROOM USE ONLY and is NOT INTENDED FOR PUBLIC DISCLOSURE
A workout challenge...

October 2014, somewhere in Kampala, Uganda

Welcome to the ART 2014 Informal Workout Game! You are invited to participate in an exciting classroom gameplay. Moreover, you have the challenging task to save a well-known company from Uganda, that employs around 1,500 people. Also, the company is very important for the touristic industry of the country and wider region. Still, you have your own obligations and responsibilities towards the company you work for. This afternoon, the stakeholders are:

- Owners Uganda Hotel-Casino Group company
- Lender-company A
- Lender-company B
- Lender-company C
- Lender-company D
- Trade creditors (consortium of two large suppliers)

[If all goes well, you will know by now for which company you work]

Game rounds

This game consists of 3 rounds:

Round 1: Gather with your subgroup and read the case together. Discuss what your position is and what you feel should be the best way forward. You have 30 minutes for that.

Round 2: After 30 minutes you are invited to join a meeting with all other relevant stakeholders to discuss the situation of the Uganda hotel-casino company and to express your feelings and ideas about how to move forward. The purpose of the meeting is to come to a standstill agreement. There are 30 minutes available to come to such an agreement including the standstill terms upon which to agree (see the appendix of this case for the INSOL Statement of Principles that might serve as a guideline and help).

Round 3: Upon agreement of the standstill agreement, a period of 90 minutes is available to come to a final (written) informal workout agreement between all parties that should help save the company from going down. If an agreement is not reached after these 90 minutes, company management is forced to go to court to file for judicial reorganisation or liquidation proceedings as cash by then has almost dried up... (and director’s liability claims should be prevented).

Please bear in mind that all relevant stakeholders are in principle of good faith to come to an informal workout agreement. Still, all parties should keep a close eye on their legal and financial positions at all times.

Are you able and willing to save this company...?

Good luck!
Case: Uganda Hotel-Casino Group

Introduction

The Uganda Hotel-Casino Group (hereafter called: “Uganda Group” or “The Company”) is facing a challenging financial situation. With changing market dynamics, the Company’s assets, their three hotel-casinos in Uganda, are losing market share and have started to make substantial losses. Limited financial resources have prevented the Company from making large-scale renovations necessary to compete with new entrants or attract customers from hotel-casino alternatives emerging throughout Uganda and the region. As a result, the Company is in financial distress and does not have sufficient funds to cover current and future obligations.

The problem

Uganda Group currently generates positive EBITDA. However, the Company is loss making in terms of Net Profits and remains burdened by a high debt load. Current projections show that the Company will not generate sufficient cash to meet both interest and debt repayment expenses, and its planned Capital Expenditure (Capex). However, an underlying assumption in the projections analysis is that the management team will make headway in improving the Company’s operational and financial health. As such, the projections show gradual operational improvements in the Company’s performance. Specifically, these estimates assume greater efficiency and profitability in day-to-day hotel-casino operations and a positive impact from the Company’s investment in property renovations.

The company is equally owned by a family of three (father, son, daughter) who together represent company management (CEO, CFO, COO).

A workout or bankruptcy proceedings? That’s the question...

Despite the projected improvements, the Company is not able to meet its current interest and debt repayment obligations to lenders. Therefore alternatives need to be considered also because some of the loan agreements will expire in 2015 which basically means refinancing. A workout is necessary soon, otherwise the company needs to file for bankruptcy as cash will dry up and suppliers as well as employees can then not be paid anymore. Besides that, if nothing happens, some of the secured creditors will probably start judicial insolvency proceedings themselves, in order to seize the secured assets (the hotel-casinos) and have them sold piecemeal (whether or not in a “going concern” sales transaction).

Alternatives

Ideally, restructuring solutions should increase value for stakeholders, or to put it differently, it should decrease value destruction for all. Some possible workout possibilities are presented below each having pros (benefits) and cons for parties involved given the current situation: (not limited)

<table>
<thead>
<tr>
<th>Workout possibility</th>
<th>Considerations/dilemmas</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Equity Financing</td>
<td>▪ Current shareholders are not able to inject additional cash</td>
</tr>
<tr>
<td></td>
<td>▪ Current shareholders want to keep the company within the family and do not like the idea of external shareholders</td>
</tr>
<tr>
<td>New Debt Financing</td>
<td>▪ Company is not able to provide first lien securities for such financing as all assets are already secured by (some of the) current lenders</td>
</tr>
</tbody>
</table>
Debt-equity swap
- Current shareholders will (partly or fully) lose ownership and with that management control
- Upon agreement, the risk profile increases for secured lenders (‘from risk-avoiding capital to risk-bearing capital’)
- Return of investment can be substantial for agreeing creditors if the company manages to make a successful turnaround and resumes making profits

Debt write-off ("Haircut") by lenders; partial or full
- Secured creditors will probably favour a liquidation procedure in bankruptcy as their claims seem 100% secured in most scenarios. In other words, no “appetite for a haircut” with them

Sale of specific properties
- Current management will probably not favour such idea as operational economies of scale ("synergies") are then weakened

Sale of entire company to a new legal entity ("newco") owned by current creditors based on respective economic positions
- Shareholders lose their company so they will probably not favour such option.
- Current lenders will only agree when new position ("prospective return") is not weaker than current one

Bankruptcy court
In case an informal workout agreement cannot be reached within the current timeframe, there is always the possibility to step into a judicial reorganisation process (“Chapter 11-like process”). Some considerations and dilemmas regarding such alternative in this situation:

Judicial reorganisation procedure
- Current stakeholders lose control over situation as judges step in to decide on course of proceedings.
- A public procedure will have a negative effect on the corporate brand-image and will probably lead to substantial cancellations by corporate clients ("events and conferences") and other hotel guests/tour operators. This negative effect can lead to a permanent loss of sales amounting to 30% to 50% of current turnover.
- The Uganda gaming commission has the legal right to immediately terminate casino licences in case of judicial reorganization or liquidation procedures, unless there is a reasonable prospect that the company can be saved (and that won bets by gamblers can be paid out).
- Based on Uganda law, courts can only decide to grant a request for judicial reorganisation, including a so-called automatic stay ("moratorium"), if company management is able to show a reasonable probability that the business can be saved, and that rescuing is a more preferable option for all stakeholders as compared to immediate liquidation of the company.

SWOT Analysis
A SWOT analysis for the Company’s current operations, recently made by company management, is outlined below.

<table>
<thead>
<tr>
<th>SWOT Analysis</th>
<th>Strengths</th>
<th>Weaknesses</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Strong brand recognition</td>
<td>Balance sheet limitations</td>
</tr>
<tr>
<td></td>
<td>Prime locations</td>
<td>Operational inefficiencies versus peers</td>
</tr>
<tr>
<td></td>
<td>Experienced management team who are owners themselves</td>
<td>Deteriorating market share</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Aging buildings in need of renovation</td>
</tr>
</tbody>
</table>
- Long established history in Uganda
- Recent upgrades
- Land reserve

<table>
<thead>
<tr>
<th>Opportunities</th>
<th>Threats</th>
</tr>
</thead>
</table>
| ▪ Scarcity of hotel rooms
▪ Upgrade buildings to attract more high-end customers
▪ Expansion into new locations
▪ Margin improvement potential | ▪ New entrants into the Uganda market
▪ Change in regulatory environment
▪ Economic downturn
▪ Higher cost of debt (“penalties”) due to current financial situation

**Financial situation**

Below some information can be found regarding the financial situation and debt structure of the Company as well as expectations (E) regarding profit and cash flow developments for the coming years. Projections are based on a moderate positive scenario. In a worst case scenario the expected turnover should probably be calculated x0.7 (about 30% less than expected in current scenario). The valuation of the company’s assets (the 3 hotel-casino properties) was recently done by an independent appraiser. “Holding” includes typical head office activities for all hotels, like HR, accounting, purchasing and ICT.

<table>
<thead>
<tr>
<th>CONSOLIDATED (USD * 1.000)</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014E</th>
<th>2015E</th>
<th>2016E</th>
</tr>
</thead>
<tbody>
<tr>
<td>Turnover consolidated</td>
<td>13.000</td>
<td>11.000</td>
<td>9.000</td>
<td>8.000</td>
<td>10.000</td>
<td>13.000</td>
</tr>
<tr>
<td>EBITDA</td>
<td>1.300</td>
<td>900</td>
<td>700</td>
<td>400</td>
<td>1.100</td>
<td>1.800</td>
</tr>
<tr>
<td>Net profit</td>
<td>316</td>
<td>-18</td>
<td>-137</td>
<td>-389</td>
<td>88</td>
<td>574</td>
</tr>
<tr>
<td>Gross margin/sales</td>
<td>70%</td>
<td>69%</td>
<td>68%</td>
<td>67%</td>
<td>69%</td>
<td>72%</td>
</tr>
<tr>
<td>Net profit margin</td>
<td>2%</td>
<td>0%</td>
<td>-2%</td>
<td>-5%</td>
<td>1%</td>
<td>4%</td>
</tr>
<tr>
<td>Cashflow from operating activities</td>
<td>939</td>
<td>658</td>
<td>531</td>
<td>337</td>
<td>833</td>
<td>1.324</td>
</tr>
<tr>
<td>Cashflow from investment activities</td>
<td>-700</td>
<td>-600</td>
<td>-500</td>
<td>-400</td>
<td>-800</td>
<td>-1000</td>
</tr>
<tr>
<td>Cashflow from financing activities</td>
<td>-249</td>
<td>-255</td>
<td>-260</td>
<td>-260</td>
<td>-260</td>
<td>-260</td>
</tr>
<tr>
<td>Net cashflow</td>
<td>-10</td>
<td>-198</td>
<td>-229</td>
<td>-324</td>
<td>-228</td>
<td>64</td>
</tr>
<tr>
<td>Solvency (%)</td>
<td>22%</td>
<td>20%</td>
<td>20%</td>
<td>17%</td>
<td>20%</td>
<td>22%</td>
</tr>
<tr>
<td>Current ratio</td>
<td>37%</td>
<td>33%</td>
<td>32%</td>
<td>29%</td>
<td>33%</td>
<td>41%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>HOLDING (USD * 1.000)</th>
<th>2011</th>
<th>2012</th>
<th>2013</th>
<th>2014E</th>
<th>2015E</th>
<th>2016E</th>
</tr>
</thead>
<tbody>
<tr>
<td>Turnover consolidated</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>EBITDA</td>
<td>-312</td>
<td>-268</td>
<td>-217</td>
<td>-198</td>
<td>-232</td>
<td>-302</td>
</tr>
<tr>
<td>Net profit</td>
<td>-393</td>
<td>-381</td>
<td>-330</td>
<td>-320</td>
<td>-344</td>
<td>-394</td>
</tr>
<tr>
<td>Gross margin/sales</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Net profit margin</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Cashflow from operating activities</td>
<td>-368</td>
<td>-354</td>
<td>-303</td>
<td>-291</td>
<td>-314</td>
<td>-364</td>
</tr>
<tr>
<td>Cashflow from investment activities</td>
<td>-35</td>
<td>-30</td>
<td>-25</td>
<td>-20</td>
<td>-40</td>
<td>-50</td>
</tr>
<tr>
<td>Cashflow from financing activities</td>
<td>-249</td>
<td>-255</td>
<td>-260</td>
<td>-260</td>
<td>-260</td>
<td>-260</td>
</tr>
<tr>
<td>Net cashflow</td>
<td>-652</td>
<td>-639</td>
<td>-588</td>
<td>-571</td>
<td>-614</td>
<td>-674</td>
</tr>
</tbody>
</table>
### HOTEL MASTER (USD * 1.000)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>EBITDA</td>
<td>819</td>
<td>695</td>
<td>857</td>
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<td>868</td>
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<td>Gross margin/sales</td>
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<td>79%</td>
<td>85%</td>
<td>78%</td>
<td>81%</td>
<td>88%</td>
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<td>7%</td>
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<td>563</td>
<td>676</td>
<td>481</td>
<td>693</td>
<td>1.051</td>
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<tr>
<td>Cashflow from investment activities</td>
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<td>-200</td>
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<td>Net cashflow</td>
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<td>476</td>
<td>321</td>
<td>373</td>
<td>651</td>
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### HOTEL OAK (USD * 1.000)

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Turnover consolidated</td>
<td>4.420</td>
<td>3.960</td>
<td>3.240</td>
<td>2.800</td>
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<tr>
<td>EBITDA</td>
<td>455</td>
<td>467</td>
<td>306</td>
<td>194</td>
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<tr>
<td>Net profit</td>
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<td>176</td>
<td>65</td>
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<td>Gross margin/sales</td>
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<td>71%</td>
<td>68%</td>
<td>69%</td>
<td>71%</td>
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<tr>
<td>Net profit margin</td>
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<td>4%</td>
<td>2%</td>
<td>-1%</td>
<td>4%</td>
<td>6%</td>
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<td>Net cashflow</td>
<td>133</td>
<td>182</td>
<td>103</td>
<td>65</td>
<td>109</td>
<td>163</td>
</tr>
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### HOTEL GOLD (USD * 1.000)

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Turnover consolidated</td>
<td>3.900</td>
<td>3.190</td>
<td>2.520</td>
<td>2.240</td>
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<td>3.900</td>
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<td>EBITDA</td>
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<td>-246</td>
<td>-164</td>
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<td>94</td>
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<tr>
<td>Net profit</td>
<td>123</td>
<td>-118</td>
<td>-294</td>
<td>-247</td>
<td>-129</td>
<td>-71</td>
</tr>
<tr>
<td>Gross margin/sales</td>
<td>61%</td>
<td>55%</td>
<td>46%</td>
<td>50%</td>
<td>52%</td>
<td>53%</td>
</tr>
<tr>
<td>Net profit margin</td>
<td>3%</td>
<td>-4%</td>
<td>-12%</td>
<td>-11%</td>
<td>-4%</td>
<td>-2%</td>
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<tr>
<td>Cashflow from operating activities</td>
<td>285</td>
<td>57</td>
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<td>-58</td>
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<tr>
<td>Cashflow from investment activities</td>
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<td>-160</td>
<td>-200</td>
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<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Net cashflow</td>
<td>145</td>
<td>-63</td>
<td>-220</td>
<td>-138</td>
<td>-95</td>
<td>-76</td>
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### Current debt structure

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Term loan</th>
<th>Outstanding Oct. 1, 2014</th>
<th>Expiration date</th>
<th>Arrears in interest payments</th>
<th>Arrears in debt repayment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Secured senior debt Lender A</td>
<td>6.937</td>
<td>1 July 2015</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>Secured senior debt Lender B</td>
<td>5.946</td>
<td>1 July 2015</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
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<tr>
<td>Unsecured junior debt (working capital) Lender C</td>
<td>991</td>
<td>1 December 2014</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unsecured debt lender D</td>
<td>793</td>
<td>1 July 2020</td>
<td>No</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>Secured debt provided by shareholders</td>
<td>2,000</td>
<td>No expiration date</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>Trade creditors (unsecured)</td>
<td>N/A</td>
<td>4,851</td>
<td>Company currently pays on average after 90 days</td>
<td>Payment shall be net 30 days from date of invoice according to contract terms</td>
<td></td>
</tr>
</tbody>
</table>

The two trade creditors that are at the negotiation table today can be considered crucial for the company's operations as they supply food & beverages (F&B) and daily cleaning services. It is hardly possible to switch to other such suppliers within 30 to 60 days as current suppliers (who represent about 50% of current trade debt) can be considered monopolists in the high-end hotel-casino industry. Also, new suppliers will probably demand substantial guarantees or cash-on-delivery.

Valuation of the Company's assets (3 hotel-casino properties)

The valuations are based on the assumption that the hotel-casino properties can be sold relatively quick to e.g. a strategic or financial investor. Whether that is the case in practice remains to be seen and is also dependent on the negotiation skills and business connections of the seller.

<table>
<thead>
<tr>
<th>BEST CASE SCENARIO</th>
<th>Out-of-court restructuring (going concern scenario)</th>
<th>Bankruptcy reorganisation proceeding (going concern scenario)</th>
<th>Liquidation (going concern scenario)</th>
<th>Liquidation (piecemeal sale of assets)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Group</td>
<td>27,000</td>
<td>21,600</td>
<td>17,550</td>
<td>13,500</td>
</tr>
<tr>
<td>Hotel Master</td>
<td>16,546</td>
<td>13,236</td>
<td>10,755</td>
<td>8,273</td>
</tr>
<tr>
<td>Hotel Oak</td>
<td>7,560</td>
<td>6,048</td>
<td>4,914</td>
<td>3,780</td>
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<tr>
<td>Hotel Gold</td>
<td>1,123</td>
<td>899</td>
<td>730</td>
<td>562</td>
</tr>
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<table>
<thead>
<tr>
<th>WORST CASE SCENARIO</th>
<th>Out-of-court restructuring (going concern scenario)</th>
<th>Bankruptcy reorganisation proceeding (going concern scenario)</th>
<th>Liquidation (going concern scenario)</th>
<th>Liquidation (piecemeal sale of assets)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Group</td>
<td>20,250</td>
<td>16,200</td>
<td>13,163</td>
<td>10,125</td>
</tr>
<tr>
<td>Hotel Master</td>
<td>12,409</td>
<td>9,927</td>
<td>8,066</td>
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<td>4,536</td>
<td>3,686</td>
<td>2,835</td>
</tr>
<tr>
<td>Hotel Gold</td>
<td>842</td>
<td>674</td>
<td>548</td>
<td>421</td>
</tr>
</tbody>
</table>
Appendix

INSOL International Statement of Principles for a Global Approach to multi-creditor workouts

First Principle
Where a debtor is found to be in financial difficulties, all relevant creditors should be prepared to co-operate with each other to give sufficient time (‘stand still period’) to the debtor for information about the debtor to be obtained and evaluated and for proposals for resolving the debtor’s financial difficulties to be formulated and assessed, unless such a course is inappropriate in a particular case.

Second Principle
During the standstill period all relevant creditors should agree to refrain from taking any steps to enforce their claims against or reduce their exposure to the debtor but are entitled to expect that during the standstill period their position relative to other creditors and each other will not be prejudiced.

Third Principle
During the standstill period the debtor should not take any action which might adversely affect the prospective return to relevant creditors (either collectively or individually) as compared with the position at the standstill commencement date.

Fourth Principle
The interests of relevant creditors are best served by coordinating their response to a debtor in financial difficulty. Such co-ordination will be facilitated by the selection of one or more representative co-ordination committees and by the appointment of professional advisors to advise and assist such committees and, where appropriate, the relevant creditors participating in the process as a whole.

Fifth principles
During the standstill period the debtor should provide, and allow relevant creditors and/or their professional advisers reasonable and timely access to all relevant information relating to its assets, liabilities, business and prospects, in order to enable proper evaluation to be made of its financial position and any proposals to be made to relevant creditors.

Sixth principle
Proposals for resolving the financial difficulties of the debtor and, so far as practical, arrangements between relevant creditors relating to any standstill should reflect applicable law and the relative positions of relevant creditors at the standstill commencement date.

Seventh Principle
Information obtained for the process concerning the assets, liabilities and business of the debtor and any proposal for resolving its difficulties should be made available to all relevant creditors and should be treated as confidential.

Eighth principle
If additional funding is provided during the standstill period or under any rescue or restructuring proposals, the repayment of such additional funding should, so far as practical, be accorded priority status as compared to other indebtedness or claims of relevant creditors.
About the authors

Jan Adriaanse is professor of turnaround management at Leiden Law School. He is also founder of global training and advisory institute Turnaround Powerhouse® based in Rotterdam, The Netherlands. Arnoud Griffioen is a former CFO in the hotel industry and currently active as turnaround specialist and lecturer.

www.tri-leiden.eu

www.turnaroundpowerhouse.com
STATEMENT OF PRINCIPLES
FOR
A GLOBAL APPROACH TO MULTI-CREDITOR WORKOUTS
I am delighted to introduce the first published edition of the INSOL Global Principles for Multi-Creditor Workouts. The Principles represent the culmination of almost 5 years work on the part of the INSOL Lenders Group and they are to be congratulated on producing what will be a major contribution to the reorganisation of financially troubled companies.

We are honoured that the World Bank, Bank of England and British Bankers Association feel able to endorse the Principles as the enclosed letters show. Additionally INSOL International, in collaboration with UNCITRAL will participate in a three year Asian Development Bank regional technical assistance project commencing in 2001 that will encourage the development of, and strengthen existing, informal restructuring practices in the Asian region. The Principles will be a valuable resource material in this work.

We would be pleased to receive comments on the Principles and suggestions for any ways in which they could be made more useful to the business community.

Neil Cooper
President
INSOL International
October 2, 2000

Mr. Neil Cooper  
President  
INSOL International  
2-3 Philpot Lane  
London EC3M  8AQ  
England

Dear Mr. Cooper:

**ILG Principles for Multi-Bank Workouts**

On behalf of the Bank, I would like to thank you for the opportunity to review the recently completed *Principles for Multi-Bank Workouts* developed under the auspices of INSOL International by the INSOL Lenders Group.

The World Bank has been addressing the problems of corporate financial distress on a systemic level throughout the transition experience in Central and Eastern Europe and in the more recent financial crisis context in emerging markets. The Bank places paramount importance on these issues as being fundamentally important to sustain and promote effective markets and growth in developing countries and to maintain stability within financial systems. In this regard, the Bank has been working in collaboration with INSOL, the International Bar Association and international financial institutions to develop principles and guidelines for effective insolvency systems in developing countries. The INSOL *Principles* are an important complement to that broader initiative and other global efforts in this field.

INSOL is to be commended for this timely contribution to the evolving debate regarding the design and operation of insolvency systems and for its long standing commitment to the global enhancement of awareness and best practice within the international professional community.

Sincerely,

Ko-Yung Tung

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The Bank of England welcomes this initiative by the INSOL Lenders Group to develop a set of Principles for Global Corporate Workouts. Past experience suggests that a collective approach by creditors to a debtor company in financial difficulty can help preserve value, to the benefit of the creditors as a whole and of others with an interest in the company.

The Rt. Hon. Sir Edward George
6 October 2000

Dear Mr Cooper

**ILG Principles for Multi-Bank Workouts**

The members of the British Bankers’ Association, comprising as they do some 320 banks from more than 60 countries, have been involved in the great majority of multi-bank workouts which have been undertaken over recent decades, not just in the UK but around the world.

They recognise the value of the principles, which have now been published by INSOL. Indeed, as a member of the INSOL Lenders’ Group, the BBA has been an active participant in their development.

We therefore commend them to the international community, as a statement of best practice which we believe can make a major contribution to financial stability.

Yours sincerely,

Tim Sweeney
Director-General
Lovells and Bingham Dana are delighted to have been given the task of drafting the enclosed principles and commentary and working with the INSOL Lenders Group and the many institutions that have contributed their comments and thoughts to the process. It is our hope that we have produced a balanced treatment of the issues and that we have reflected faithfully the views of the many participants in the process.

Lovells

Nicholas Frome
Chris Hanson

Bingham Dana LLP

Barry G. Russell
Richard A. Gitlin
ACKNOWLEDGEMENT

INSOL International would like to thank the INSOL Lenders Group and all others who have been involved in this project.

The Statement of Principles for a Global Approach to Multi-Creditor Workouts is the product of a number of meetings and conferences and much correspondence among a large group of interested persons over an extended period of time. In all, representatives from over 150 institutions have been involved in one stage or another of this project, whether as panelist, working group member, commentator or conference participant, including many of the largest banking institutions, insurance companies, institutional investors, hedge funds, secondary market and distressed debt purchasers, investment bankers and insolvency and finance professionals, plus Government representatives and regulatory authorities in many countries. The list is far too long to acknowledge each contributor individually, but suffice to say that the Principles are truly the product of a global effort by the people who deal with these issues on a daily basis.

The work of the INSOL Lenders Group has been led successively by Eddie Theobald (then of Barclays Bank Plc), David Havelock (then of National Westminster Bank Plc) and currently Adrian Marriette of HSBC and Terry Bond of Barclays Bank Plc.

They have been helped enormously by Richard Gitlin and Barry Russell of Bingham Dana LLP, New York and Nicholas Frome and Christopher Hanson of Lovells, London, who have undertaken the legal drafting of the Principles.

The INSOL Lenders Group Steering Committee has included many senior lenders in the last five years. The members of the Steering Committee as at October 2000 comprise

Adrian Marriette, Chairman
Terry Bond, Vice Chairman
Steven Barningham
Geoff Cruickshank
Rene Poisson
Peter Ryan
John Short
Peter Stevens
John Thirlwell

HSBC
Barclays Bank Plc
Royal Bank of Scotland
National Westminster Bank Plc
J P Morgan
The Industrial Bank of Japan
Deutsche Bank
Credit Agricole Indosuez
British Bankers Association

In addition, INSOL International owes a debt of gratitude to Richard Gitlin and John Lees for convening many of the meetings at which the Principles were developed.
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<td>EIGHTH PRINCIPLE</td>
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INTRODUCTION

The eight principles (the “Principles”) set out in this report should be regarded as statements of best practice for all multi-creditor workouts. This document also contains a commentary on the Principles generally and on each Principle separately.

While the Principles should be equally applicable in all jurisdictions which have developed insolvency laws, the commentaries should not be taken as definitive or necessarily appropriate in all respects to all jurisdictions. They are, nevertheless, intended to help with the interpretation of the Principles and their application in practice. Both the Principles and the commentaries may be supplemented locally as circumstances dictate.
PART I
THE PRINCIPLES

FIRST PRINCIPLE: Where a debtor is found to be in financial difficulties, all relevant creditors should be prepared to co-operate with each other to give sufficient (though limited) time (a “Standstill Period”) to the debtor for information about the debtor to be obtained and evaluated and for proposals for resolving the debtor’s financial difficulties to be formulated and assessed, unless such a course is inappropriate in a particular case.

SECOND PRINCIPLE: During the Standstill Period, all relevant creditors should agree to refrain from taking any steps to enforce their claims against or (otherwise than by disposal of their debt to a third party) to reduce their exposure to the debtor but are entitled to expect that during the Standstill Period their position relative to other creditors and each other will not be prejudiced.

THIRD PRINCIPLE: During the Standstill Period, the debtor should not take any action which might adversely affect the prospective return to relevant creditors (either collectively or individually) as compared with the position at the Standstill Commencement Date.

FOURTH PRINCIPLE: The interests of relevant creditors are best served by co-ordinating their response to a debtor in financial difficulty. Such co-ordination will be facilitated by the selection of one or more representative co-ordination committees and by the appointment of professional advisers to advise and assist such committees and, where appropriate, the relevant creditors participating in the process as a whole.
FIFTH PRINCIPLE: During the Standstill Period, the debtor should provide, and allow relevant creditors and/or their professional advisers reasonable and timely access to, all relevant information relating to its assets, liabilities, business and prospects, in order to enable proper evaluation to be made of its financial position and any proposals to be made to relevant creditors.

SIXTH PRINCIPLE: Proposals for resolving the financial difficulties of the debtor and, so far as practicable, arrangements between relevant creditors relating to any standstill should reflect applicable law and the relative positions of relevant creditors at the Standstill Commencement Date.

SEVENTH PRINCIPLE: Information obtained for the purposes of the process concerning the assets, liabilities and business of the debtor and any proposals for resolving its difficulties should be made available to all relevant creditors and should, unless already publicly available, be treated as confidential.

EIGHTH PRINCIPLE: If additional funding is provided during the Standstill Period or under any rescue or restructuring proposals, the repayment of such additional funding should, so far as practicable, be accorded priority status as compared to other indebtedness or claims of relevant creditors.
PART II
COMMENTARIES

General

During the last thirty years there has been a growing recognition amongst the world’s financial institutions that, as creditors, they can achieve better returns through supporting an orderly and expeditious rescue or workout of a business in financial difficulty than by forcing it into formal insolvency. This realisation has coincided with efforts by certain regulatory and official authorities to encourage financial institutions to co-operate with each other when dealing with debtors to whom they are collectively exposed, particularly in cases involving large exposures.

In some parts of the world, local regulatory or official authorities have, for a number of reasons, helpfully supported initiatives designed to encourage financial creditors to take a collective approach to debtors in difficulty. These include their wish to avoid the social and economic impact of major business failures where viable alternatives exist, to limit the damage to financial institutions that can result from unexpected and major debtor defaults (both directly and to lenders to those financial institutions) and generally to assist in the avoidance of more widespread economic damage.

While the advantages to be gained from a co-ordinated response by creditors to debtors in financial difficulty have been most apparent in periods of economic recession (when successive business failures can place very severe strains, not only on the financial institutions but also on the affected national economies), the methods used have gained more general acceptance. If nothing else, the co-ordinated response gives time to help manage the impact of debtor defaults, but most importantly such approaches create an opportunity to explore and evaluate the options for consensual agreement outside a formal insolvency process.
Although there is a growing international trend in the development of local insolvency laws to facilitate the rescue and rehabilitation of companies and businesses in financial difficulty (as opposed merely to closing them down through liquidation), it is a truism that, no matter how debtor-friendly and “rescue”-orientated local insolvency régimes may be, there are often material advantages for both creditors and debtors in the expeditious implementation of informal or contract-based rescues or workouts (particularly in cases of debtors having cross-border businesses or complex capital structures), compared with the unpredictable costs and uncertainties of a formal insolvency.

It should be noted that the Principles will be most successful in facilitating rescues and workouts if an appropriate legal, regulatory and governmental policy framework supports them. The existence and prospective implementation on a consistent basis of a well-designed insolvency law, by providing financial creditors with effective means of recourse against unco-operative debtors, encourages debtors to co-operate with financial creditors with a view to negotiating an agreement outside a formal insolvency in an acceptable timeframe. In addition, the effective implementation of laws that allow for the creation and enforcement of security and for priority agreements between creditors can provide an important means of encouraging the availability of new financing during the workout process. In the regulatory area in many countries, by virtue of requirements that public companies provide frequent, transparent and internationally consistent information, financial creditors are better placed to reach more rapid and sensible workout decisions.

Finally, and most importantly, time is crucial in rescues and workouts. When a debtor is experiencing financial difficulties, delay prolongs commercial uncertainty, increases the costs of the process and potentially erodes value. The Principles are designed to expedite rescues, and therefore increase the prospects for success, by providing guidance based on hard-earned experience, so that the debtor and the creditors can move the process to a resolution speedily and in a relatively structured manner.
FIRST PRINCIPLE: Where a debtor is found to be in financial difficulties, all relevant creditors should be prepared to co-operate with each other to give sufficient (though limited) time (a “Standstill Period”) to the debtor for information about the debtor to be obtained and evaluated and for proposals for resolving the debtor’s financial difficulties to be formulated and assessed, unless such a course is inappropriate in a particular case.

Commentary:

All relevant creditors: Although the main impetus and interest in developing a global approach to multi-creditor restructurings has come from the financial community, regulators and other official bodies, the approach advocated by the Principles can be applied to creditors other than financial institutions (eg, major customer or supplier creditors) in appropriate cases.

The main objective of the global approach is to assist in the process of rescue or orderly workout. Accordingly, the approach should ideally be applied to all creditors whose co-operation is needed in order to make any attempted rescue or workout succeed. On the other hand, there is usually merit in limiting the number of participants to the minimum necessary to see that objective achieved. Taking these two ideals together, it is necessary first to identify the classes of creditors which need to be included in the process and then to decide which creditors in the affected classes are to be included.

With banks and other financial institution creditors, it is usual to include all the financial creditors in the class regardless of the size of their exposure or the nature of their facilities (unless their exposure is so negligible that it is clear that their inclusion would serve no practical purpose or their position is such that they are not required to assist, and cannot frustrate, the process).
One rationale for including all financial creditors is that, even though in a particular case one financial creditor might be less exposed than others and therefore have less interest in any rescue attempt, this relative position might be reversed in another case. Accordingly, the long-term and mutually beneficial advantages to be gained by financial creditors supporting and co-operating with each other with regard to a co-ordinated approach to debtors in difficulty are reasonably clear. Financial creditors should, as a matter of principle, be prepared to support other financial creditors’ attempts to rescue businesses unless it is to their commercial disadvantage to do so.

Where it is proposed to include creditors who fall outside the traditional categories of financier in the rescue process, the argument for including all creditors within a class diminishes and it is usually simply a question of deciding whether or not the particular non-financial creditor has to be included to enable the rescue to progress.

Where bonds or traded debt are involved in the rescue process it is seldom possible to involve all the bond or debt holders. Quite often ad hoc committees are formed by some of the debt holders. As these debt holders usually have the same economic interest as other holders their views are likely to be representative and they are therefore able to make an important and helpful contribution to the process. Where in the Principles or the Commentaries reference is made to “all relevant creditors”, this should in the case of rescues involving bond holders or other tradable debt issues, be construed as a reference only to those of the bond or debt holders that participate actively in the rescue process.

With the increasing use of credit insurance and credit derivatives, it is not uncommon to discover that, in addition to the creditors of record, there are other parties whose consent or involvement will be necessary
for any rescue or workout proposal to succeed. Wherever practical, an early disclosure of such situations should be made by the creditors of record to the other relevant creditors.

Where the identity of relevant creditors changes during the process (eg. through the trading of debt) the successors should participate in and be included in the process in the same way as the original creditor.

**Giving time to the debtor (the Standstill Period):** Where a debtor is in financial difficulties, its creditors tend to have two main strategies. The first is to press the debtor for immediate repayment of the debt or the provision of security in the hope of removing or reducing the exposure. In some jurisdictions, attempts by a creditor to pressurise a debtor close to insolvency into giving it favourable treatment compared to other creditors can be open to legal challenge on the basis of preference. In others, however, pressurising a debtor in this way protects the creditor from a preference challenge and therefore, if a creditor is successful in persuading a debtor to pay it off or to give it security, it may well be able to keep the benefit deriving from its tactics.

The problem with the “each creditor for itself” approach is that, even if such a strategy can in theory benefit the creditor in a way which avoids subsequent legal challenge, the likelihood is that it will, either by itself or by provoking other creditors into following a similar approach, result in the debtor being forced into formal insolvency, thereby destroying any prospective advantage the creditor was seeking to gain.

This reality has caused the experienced financial creditors to conclude that their interests will usually be better served by a co-ordinated and measured response to the debtor in difficulty. It has also led debtors and their advisers to realise that giving in to pressure by one creditor usually destroys any chance of persuading the other creditors to hold off and give time for a rescue attempt.
During the Standstill Period, the creditors, with the co-operation of the debtor, should obtain and evaluate information about the debtor, its business operations and its capital structure and, if there is a commercial case for doing so on the basis of the information that has been obtained, formulate and assess proposals for resolving the debtor’s financial difficulties (see commentary on the **Fifth Principle**).

**The Standstill Period - Commencement:** One of the more problematic areas is the determination of the date from which the Principles are to begin to operate and the standstill arrangements commence ("Standstill Commencement Date").

It is quite common for the relevant creditors to choose as the Standstill Commencement Date the date on which the financial creditors as a group (or at least some significant group or class of their number) were first notified by the debtor or by another financial creditor of a meeting called to allow the debtor to explain its position to the relevant creditors. Although a financial creditor has no duty to inform other financial creditors if it believes a debtor is in difficulty, it is not uncommon for this to occur and quite frequently one financial creditor will press the debtor to make a presentation to all its financial creditors so that standstill arrangements can be put into effect.

In some cases, one or more financial creditors may have anticipated the problems of the debtor and managed down their exposure to a significant extent before other creditors have realised the potential difficulties and before any meeting of financial creditors has been called. Such a creditor may well benefit in the short term, but, particularly in cases where dramatic changes have occurred in its exposure over a relatively short period, it may experience difficulty in persuading others to lend their support to a rescue.
The Standstill Period – Duration: The length of the Standstill Period will vary from case to case, depending on the complexity of the information to be gathered and the nature of any restructuring proposals, but should be no longer than necessary for the carrying out of the above process in each particular case, since any unnecessary delay is likely to prejudice the prospects of a successful outcome. It is customarily for an initial period of weeks or months, usually with a capacity for extension if all relevant creditors so agree. Sometimes the Standstill Period will be agreed for a period of, say, three months, but on the basis that the relevant creditors can, by a predetermined majority (e.g., a majority in number or a majority in both number and value of claims) elect to terminate the Standstill Period prematurely, either at their discretion or following agreed events of default.

Although having a Standstill Period capable of premature termination at the discretion of a majority of the relevant creditors may appear to provide less assurance to the debtor, it has the advantage of flexibility and overcomes the difficulties of drafting and agreeing events of default which are suitable in a situation where the debtor is on the brink of collapse and the extent of its financial difficulties are such that “usual” event of default triggers would be inappropriate. Equally, while the relevant creditors may as a matter of principle be prepared to lend their support to the attempt at rescue or orderly workout, they will be concerned to ensure that, if the position deteriorates to their apparent disadvantage, they should be free to protect themselves and should not be locked into a deteriorating position. In practice, the approach adopted to this issue tends to depend upon the nature and degree of the difficulties facing the debtor.
Unless such a course is inappropriate etc: The suggested approach to multi-creditor workouts does not mean that the relevant creditors will in all cases agree to give time to a debtor to pursue the possibility of rescue or workout. Not all companies or businesses can be saved. In some cases, it may be obvious that no rescue or workout is feasible; in others, the debtor’s management may have acted fraudulently and thereby have lost the trust and confidence of the relevant creditors.

If a creditor has reasonable grounds for preferring formal insolvency to any attempted rescue or workout, it is entitled, and can be expected, to elect for formal insolvency. If, however, giving time for the position to be properly evaluated has no apparent disadvantage for the creditor concerned, it should not refuse to co-operate simply to be obstructive. What will constitute reasonable grounds for a creditor refusing to give time to a debtor will depend on the circumstances of each case.

A creditor wishing to press for formal insolvency and unwilling to give time for any evaluation of the position should be encouraged to explain its reasoning to other creditors (assuming the debtor lifts any confidentiality restrictions which would otherwise prevent communication between creditors) and should at least consider representations from other financial creditors before reaching a final conclusion.

Reluctance on the part of a financial institution creditor to participate in a co-ordinated approach due to the relative size or nature of its exposure or a desire on its part to terminate the relationship with that debtor is not regarded as legitimate justification for its exclusion.
SECOND PRINCIPLE: During the Standstill Period, all relevant creditors should agree to refrain from taking any steps to enforce their claims against or (otherwise than by disposal of their debt to a third party) to reduce their exposure to the debtor but are entitled to expect that during the Standstill Period their position relative to other creditors and each other will not be prejudiced.

Commentary:

**Refrain from taking any steps etc:** The initial objective of any attempted rescue or workout is to achieve stability. To attempt a rescue or restructuring against a backdrop of instability (eg, political, general economic or creditor instability) is extremely difficult. While certain jurisdictions provide for a statutory moratorium which allows “breathing space” to a debtor before the onset of formal insolvency, in many jurisdictions a statutory moratorium on creditors’ claims is available only as part of a formal insolvency process.

Even in jurisdictions which provide for a statutory pre-insolvency moratorium on creditor claims, there is often still advantage to both creditors and the debtor in adopting an informal or contract-based approach so as to avoid the costs and publicity associated with any formal process.

The confirmation of a “standstill” provides some reassurance to the debtor’s management that their attempts to achieve a rescue or orderly workout through the provision of information about the debtor to its creditors and their advisers and negotiation with them will not be immediately undermined by enforcement actions by those creditors; and also to the relevant creditors to the effect that the others of them are prepared to proceed on a co-ordinated basis while the evaluation process occurs.
In many jurisdictions, the “standstill” of the relevant creditors will be the subject of an agreement between the relevant creditors and the debtor. Typically such standstill agreements will include undertakings by the relevant creditors:-

(a) Not to press for repayment of the amounts due to them or issue or pursue proceedings against the debtor during the Standstill Period;

(b) Not to try to improve their individual positions relative to other creditors by obtaining or enforcing security or seeking additional financial rewards or preferential treatment during the Standstill Period; and

(c) To continue during the Standstill Period to allow utilisation of existing credit lines and facilities, at least at the exposure levels existing at the Standstill Commencement Date.

While the continuation of facilities by relevant creditors is usually an essential feature of standstill arrangements, in some cases the termination of certain open derivative contracts may assist the rescue process by removing the volatility associated with such contracts. In other cases the continuation of swaps or hedges may be necessary to preserve value in the business concerned. Each case will need to be considered on its merits in this regard.

In certain jurisdictions, an agreement by the debtor with all or some of its creditors which provides for a moratorium on the payment of debts will itself trigger formal insolvency. In such cases it may still be possible for the creditors to agree between themselves (rather than with the debtor) to operate a moratorium
on their claims against the debtor and for the debtor separately to agree not to take steps which might prejudice the relevant creditors during an agreed period.

As stated, debt trading does not infringe this Principle. It is more fully discussed in the commentary on the Seventh Principle.

**Their position relative to other creditors and each other will not be prejudiced:** One of the main objectives of standstill arrangements is to try to ensure that, during the Standstill Period, the relevant creditors are not prejudiced relative to each other or relative to their position at the commencement of the process. While the issue of the eventual outcome for creditors may be uncertain at this stage, the standstill arrangement will usually contain a number of covenants and warranties which are designed to ensure that the position of the relevant creditors does not deteriorate, at least due to any deliberate acts or omissions on the part of the debtor during the Standstill Period (see commentary on the Third Principle).

Of more complexity and subtlety tend to be the arrangements between the relevant creditors themselves, which are designed to try to ensure that their relative exposures do not change during the Standstill Period. To this end, the more sophisticated standstill agreements (or separate linked inter-creditor agreements) will contain provisions which seek to address fluctuations in exposure that often occur during the Standstill Period where loan facilities provided by one or more relevant creditors are revolving or fluctuating in nature. In relation to such loan facilities, the relevant creditors may agree (under so-called “loss-sharing” provisions) to make balancing payments to each other in the event of a
collapse, such as are necessary to redress any relative gain or loss to relevant creditors resulting from such fluctuations as compared to the position at the Standstill Commencement Date.

Even greater difficulties arise in relation to facilities which are contingent in nature. There is a growing trend amongst financiers to seek to value their exposures under contingent facilities (eg, foreign exchange facilities, interest rate and currency swaps and other forms of derivatives) by means of “marking them to market”, often on a daily basis. Standstill agreements quite often seek to address the issue of fluctuations in exposure based on “marked to market” calculations under these types of facilities in a similar way to those on revolving loan facilities, although the potential volatility in exposures can require very sophisticated arrangements in order to limit the effect of such volatility on arrangements amongst the creditor group. Such loss-sharing provisions also seek to rectify variations in comparative exposure, although in many cases this issue will not be covered until a formal restructuring proposal is agreed and only limited adjustment mechanisms (if any) will be agreed at the standstill stage of the process.

Additional difficulties may arise because of the nature of the debt obligations subject to such loss-sharing arrangements. For example, where an issue of widely-held public debt is involved, it may not be practical to obtain the agreement of the requisite number of holders. All parties should recognise that efforts should be made by those parties involved in the negotiations to devise arrangements, to the extent possible, to give all holders of debt the benefit of such loss-sharing arrangements, so as to facilitate ultimate agreement on a consensual restructuring.
In certain cases, one or more of the creditors may enjoy an existing advantage compared to other participating creditors, either in the form of security or by virtue of the comparative number of companies in the debtor group against which it has recourse (whether by way of direct claims, guarantees or indemnities). Once again, the inter-creditor arrangements entered into at the standstill stage will often allow for the retention of these advantages. (Other forms of advantage which individual creditors may enjoy include set-off rights, liens, the benefit of documents of title associated with trade finance or bill purchase facilities, guarantees and insurance from third parties). The ultimate treatment of these advantages will typically be addressed in an inter-creditor agreement forming part of a contractual restructuring and is often the subject of extensive negotiation among the creditors.

When the claims of relevant creditors are denominated in a number of different currencies, movements in exchange rates during the Standstill Period can affect the relative position of creditors. Standstill arrangements often use assumed fixed exchange rates to determine certain inter-creditor issues (eg. voting and risk sharing) although realisations may still be shared by reference to actual exchange rates and end of day balancing adjustments may be required to cover exchange rate fluctuations.
THIRD PRINCIPLE: During the Standstill Period, the debtor should not take any action which might adversely affect the prospective return to relevant creditors (either collectively or individually) as compared with the position at the Standstill Commencement Date.

Commentary:

In return for support from the relevant creditors, the debtor should agree not to take any action which will disadvantage relevant creditors during the Standstill Period, apart from paying employees and trade and other (non-relevant) creditors in the ordinary course of business. Examples of such prejudicial action would be offering security in the form of charges, mortgages, liens, guarantees or indemnities to non-participating creditors, transferring assets or value away from the companies to which participating creditors have recourse, selling assets to third parties at an undervalue or to creditors who, because they are already owed money, will not pay for them, or otherwise running down or shifting value from its business so that the prospects of repayment to the relevant creditors are diminished. Incurring new additional borrowings or credit from persons who are not relevant creditors can also be an issue of sensitivity, as can the use of techniques such as factoring or leasing to raise new finance.

In some cases, the relevant creditors will insist that security be given to them at this stage for their collective benefit in return for their support during the Standstill Period. This is usually a topic for negotiation in connection with the standstill. If at this stage, however, additional funding (ie, in excess of existing levels) is requested by the debtor from relevant creditors, the granting of security for such additional funding would be quite usual (see commentary on the Eighth Principle).
FOURTH PRINCIPLE: The interests of relevant creditors are best served by co-ordinating their response to a debtor in financial difficulty. Such co-ordination will be facilitated by the selection of one or more representative co-ordination committees and by the appointment of professional advisers to advise and assist such committees and, where appropriate, the relevant creditors participating in the process as a whole.

Commentary:

Although in some cases the number of relevant creditors involved in an attempted rescue is sufficiently small that a steering committee is unnecessary and a single co-ordinator may suffice, in most cases the result of a proliferation of borrowings by the debtor and/or the difficulty of identifying or making contact with, say, individual bondholders will be that the use of a co-ordination committee will greatly assist the process of attempted restructuring.

To assist with the co-ordinated approach, it is usual for the relevant creditors to appoint one or more representative committees to progress dialogue with the debtor and to help manage the evaluation process and the standstill arrangements.

Where bond or other tradable debt issues are involved, ad hoc committees are often formed by a number of bond or debt holders whose views may be expected to be representative of the bond or debt holders as a class.

Co-ordination committees (or the relevant creditors themselves) may select one of their number to act as the main co-ordinator. Such a co-ordinator will take first line responsibility for much of the administrative burden of the process and will also normally chair the meetings of the co-ordination committee.
The responsibilities and purposes of co-ordination committees and co-ordinators (hereafter together referred to as “co-ordinators”) will be determined by the relevant creditors.

Co-ordinators do not usually represent the relevant creditors in the sense of having authority to commit them to any particular course of action. Co-ordinators will also not wish to incur legal liability to the relevant creditors or to the debtor by assuming a representative role.

Co-ordinators are best described as facilitators of the negotiation process and co-ordinators of the provision of information to the relevant creditors (with appropriate professional advice). The appointment of co-ordinators should, in any case, be for the convenience of the parties and the efficiency of the process.

Co-ordinators can help resolve disputes or disagreements between the relevant creditors by facilitating discussions among those concerned. The co-ordination committees act as sounding boards, not only to the co-ordinator (if any) but also to enable the debtor to obtain an indication of the likely reaction of the relevant creditors to developments and to any proposals which the debtor may be thinking of making.

All parties should bear in mind that the role of the co-ordinator and the co-ordination committee is to facilitate the process, not to make commercial decisions on the part of others.

The advantages and efficiencies of channelling communications between the debtor and relevant creditors through co-ordinators are considerable but the process can be time-consuming, both for
the creditor representatives on the co-ordination committee and particularly for the co-ordinator. For this reason it is usual for the co-ordinator and co-ordinating committee members to receive appropriate recompense, not only to reflect the time they are likely to have to spend in discharging their role but also for travel, accommodation and other disbursements they incur. These expenses will be for the debtor’s account initially, perhaps prefunded by the debtor or covered by a loss-sharing or similar negotiated agreement among the relevant creditors as a group.

The co-ordinators are often given delegated authority to instruct outside professionals such as accountants, lawyers and valuers to provide advice for the benefit of the relevant creditors as a whole. Where practicable, the choice of such professionals will be discussed and approved with all the relevant creditors. It is important that such advisers have the relevant experience and skills and will be able to provide impartial advice for their collective benefit. Such professionals will assist in the preparation and evaluation of information and documentation relevant to the process in all its various stages. Once again the costs of such professionals will be for the account of the debtor, but pre-funding or a loss-sharing or similar negotiated agreement may be required as a back-up.

Another advantage of using co-ordinators is that it helps to ensure that all the relevant creditors receive the same information and advice during the rescue process. A single set of shared advisers for the relevant creditors as a whole is often preferable from a debtor’s perspective and may work in some cases, but often creditors who are parties to different forms of credit facilities
(such as bank loans, privately-placed notes and public bonds) will require that separate legal advisers be retained to represent the interests of relevant creditors of a particular class. Because workouts often present inter-creditor issues, not just issues between the debtor and the relevant creditors as a group, and because different creditor classes typically have different legal, regulatory, policy and other issues to address, it would be unusual for a single legal adviser to be able to represent all the relevant creditors with respect to all the issues involved. Even in such cases, however, it is often possible for the main burden of information-gathering, processing, evaluation and due diligence to be borne by accountants and lawyers acting for or representing the interests of the relevant creditors as a whole. All advisers should be independent of the debtor.

Where the relevant creditors agree that there is no material difference of interest between them, but individual creditors still wish to have the benefit of separate advice (eg, on the impact of any proposals upon their individual positions in contrast to others), the cost of such separate advice will usually have to be borne by the creditor concerned and cannot be passed on either to the debtor or the other relevant creditors.

Importantly, each of the relevant creditors will be expected to make its own assessment and decisions regarding any information, advice or proposals it receives either directly or via co-ordinators with regard to matters related to the restructuring process. Co-ordinators will have no duty or liability to other creditors or the debtor with regard to the accuracy or completeness of such information or advice or with regard to any
proposals or their acceptance or rejection of them. It is important, however, that co-ordinators ensure that information they receive is disclosed to all relevant creditors and that they do not assume liability or responsibility to other relevant creditors either expressly or by any course of conduct (see commentary on Seventh Principle).

While co-ordinators can expect the identified costs and expenses they incur relating to the restructuring process to be recoverable from the debtor or, in the event of the debtor’s default, covered by pre-funding or a loss-sharing or similar agreement with the relevant creditors as a whole, open-ended and general indemnities are likely to be resisted by the relevant creditors. It is increasingly common for co-ordinators to require that the nature of their position and role be defined in writing with the relevant creditors and the debtor.

In some cases, the differing interest groups amongst the financial creditors can be accommodated within a single co-ordination committee by ensuring that the co-ordination committee is sufficiently representative of the different interest groups within the relevant creditors as a whole. In such a case, its composition should reflect the individual types and classes of creditors and, if possible, include the true beneficial owners of the facilities involved, rather than the nominal owners or holders of legal title only. However, in situations where a relevant creditor class does not have an agent (for example, an issue of private notes or public debt securities), the representative of that class may be a designee such as an attorney or accountant who in turn has been appointed by an ad hoc group of holders of private notes or public debt securities.
In other cases, the extent and nature of the different interests can mean that a single co-ordination committee will not be appropriate and in this event, two or more co-ordination committees may be appropriate with each having its own co-ordinator who will work with the other co-ordinator(s) to progress the process while at the same time being representative of their separate constituencies.

The choice of co-ordinator is made by the constituency from which the committee is selected. Very often the co-ordinator will be a representative of the financial creditor which has the greatest or one of the greatest exposures to the debtor, and will be an individual with relevant experience, skills and seniority. In rare cases, creditors may prefer that the co-ordinator be an independent person.

The obvious advantage of the co-ordinator being a creditor with significant exposure to the debtor is that the reaction of a co-ordinator to proposals is likely to be indicative of the reaction of relevant creditors generally. On the other hand, a self-interested co-ordinator may in some cases have significant differences of view from other creditors, which may harm the process. The choice should lie with the relevant creditors.

Co-ordination committees usually operate on the basis of consensus rather than majority voting, particularly as they have no actual authority to bind the relevant creditors as a group.
FIFTH PRINCIPLE: During the Standstill Period, the debtor should provide, and allow relevant creditors and/or their professional advisers reasonable and timely access to, all relevant information relating to its assets, liabilities, business and prospects, in order to enable proper evaluation to be made of its financial position and any proposals to be made to relevant creditors.

Commentary:

Reasonable and timely access to all relevant information:
During the Standstill Period, the debtor should allow relevant creditors and/or professional advisers appointed to represent them access to all relevant information regarding its assets, liabilities, business and prospects. This is important, not only to enable the relevant creditors to assess the financial position of the debtor at the Standstill Commencement Date and during the Standstill Period, but also to enable them to evaluate any proposals which the debtor may wish to make for its rescue, workout or reconstruction.

The relevant creditors will need to receive information which they can place reliance upon and have evaluated by their advisers. For this reason the information will have to be obtained, or at least be capable of due diligence, by independent advisers acting for the relevant creditors. The advisers to the relevant creditors can in some cases work from information provided by the debtor or its advisers but issues of reliance and liability can cause difficulty in this regard and, where asset valuations are needed, it will usually be necessary for the relevant creditors to commission such valuations themselves. The location and nature of assets can necessitate special due diligence techniques.
The debtor should accept that the advisers to the relevant creditors will be expected to review the accuracy of accounts, projections, forecasts and business plans related to any proposals for rescue or reconstruction and also to estimate the consequences of the relevant creditors refusing to agree to the proposals being put to them. The relevant creditors will also wish to gain reassurance that, as between themselves, their relative positions have not and will not be prejudiced by any proposals which are being made.

**Any proposals to be made to relevant creditors:** The nature of the proposals which the debtor may wish to make for its rescue, restructuring or workout will of course depend on the circumstances. They may only involve the provision of temporary additional liquidity, but in other cases debt write-offs, exchange offers for bonds, debt to equity conversions or asset for debt exchanges may be necessary to restore balance sheet solvency to the debtor. In some cases, the proposed arrangements can be effected by contractual arrangements between the debtor and the relevant creditors alone. In others, the proposals will need the sanction of the courts (eg, in the case of schemes of arrangement or chapter 11 reorganisations) and in such cases it is usual for the debtor and relevant creditors to try to ensure that, so far as practicable, the outcome of any formal procedure is known in advance.
SIXTH PRINCIPLE: Proposals for resolving the financial difficulties of the debtor and, so far as practicable, arrangements between relevant creditors relating to any standstill should reflect applicable law and the relative positions of relevant creditors at the Standstill Commencement Date.

Commentary:

The objective of the information-gathering, due diligence and evaluation processes during the Standstill Period is to enable the relevant creditors to evaluate the debtor’s position, to assess any proposals which the debtor may put to them and to satisfy themselves that they are receiving equitable treatment relative to the other relevant creditors.

Inevitably they will wish to compare what may be offered to them with what they might expect from a formal insolvency or from other options open to them (eg, the sale of their debt). This comparison may simply be based on their individual assessment of likely realisations in an insolvency or upon professional accounting and legal advice.

It is common for the accountants or other financial advisers acting for the relevant creditors to provide comparative advice of this nature and the accountants very often base their advice on insolvency models they produce in respect of the debtor or the debtor group which operate by reference to certain stated legal and accounting assumptions (eg, as to the validity of security, guarantees, rights of recourse, rights of set-off etc.) and are based on the information produced through the due diligence process.
Such insolvency models should take account of all relevant claims and entitlements (eg, the claims of the relevant creditors and other creditors, inter-company and subrogated claims and dividend entitlements) which would be counted in any insolvency of the debtor and of all relevant insolvency laws.

Insolvency models can either be used simply to identify where realisations are likely to go in the event of an insolvency (applying usual insolvency principles) or can be more sophisticated and seek to predict the likely return to creditors in an insolvency using assumed realisation values and assuming a contemporaneous liquidation and asset realisation by all companies in the debtor group. Because of the assumptions as to value and time used in these models they only serve as estimates but they are nevertheless helpful as a basis for both negotiation and evaluation.

When applied to groups of companies, insolvency models will consider the position of each debtor company separately and then aggregate the result on a group basis and by reference to each relevant creditor so that the net expected return to each relevant creditor can be determined.

In the case of larger groups, the insolvency models can be extremely complex and will need to take account of differences in the various insolvency régimes of the different jurisdictions involved.

The output from the insolvency models can, amongst other things, be used to identify the claims that relevant creditors may have against each debtor company; to estimate the likely return to such creditors from their claims and to estimate the proportion of the indebtedness due to relevant creditors which appears to be
covered by assets (as opposed to uncovered). These calculations can in turn be used when considering such issues as debt to equity conversion or debt write-offs.

Because the benchmark for the approach advocated under the Principles tends to be the position as at the Standstill Commencement Date, relevant creditors will also wish the insolvency model and the assumptions upon which it is based to have regard to issues such as the validity of claims of relevant creditors, the validity of any security they may hold, the validity of any exposure reductions which occurred in the period prior to the Standstill Commencement Date and the advantages which the holders of guarantees may enjoy by virtue of their ability to make claims against both principal debtors and guarantors. For this reason the due diligence exercise carried out on behalf of relevant creditors quite often applies not only to the debtor but also to the claims and entitlements of the relevant creditors.
SEVENTH PRINCIPLE: Information obtained for the purposes of the process concerning the assets, liabilities and business of the debtor and any proposals for resolving its difficulties should be made available to all relevant creditors and should, unless already publicly available, be treated as confidential.

Commentary:

Confidential Information: It is essential that during the rescue process all relevant creditors are provided with the same information regarding the assets, liabilities and business of the debtor and see all the proposals put by the debtor. This should be so even where differing proposals are being put to differing constituencies within the relevant creditor group as a whole and even if differences in the position between the relevant creditors mean that separate professional advice is required for separate constituencies.

In the case of a group of relevant creditors that comprises only banks, it is quite common for all of them (with the agreement of the debtor) to receive the same information at the same time, even in cases where the co-ordinator first processes information so that it is put into a form suitable for evaluation by each of the relevant creditors. This is partly linked to the fact that the banks, under many legal jurisdictions, have either contractual or implied duties of confidence to their debtor customers and those banks are accustomed to receive and hold price-sensitive and confidential information. Even so, the use of formal confidentiality agreements is becoming widespread.
Where relevant creditor groups include holders of debt which either are not subject to express or implied duties of confidence or cannot accept confidential information without prejudicing their ability to trade debt (which in the case of debt-traders and many bondholders will be unacceptable except for relatively short and defined periods), the position can be more complicated and special arrangements will need to be made. If debt-traders or bondholders are involved, it is not uncommon for the confidential information to be evaluated by an ad hoc group formed from their number who are prepared to be restricted from trading and by professionals acting for them (such as their legal advisers) until proposals have been fully formulated and it is either possible to publish the information or for the information to be passed to the intended recipient on the basis that it will be published within an agreed period whether or not the rescue proposal is approved. By this method the confidential and price-sensitive information is “cleansed” in the sense that publication will enable debt-traders or professional bondholders then to trade the debt which they were not able to do while they held confidential information which was not available to the rest of the market.

**Debt Trading:** Debt trading is increasingly favoured by many financial institutions as a mechanism for managing their credit exposures and realising the values associated with their lendings. In many jurisdictions the trade in secondary debt is a well established practice and secondary debt trading has become an important feature of the financial marketplace.
The issue of debt trading in the context of multi-creditor rescues is one of complexity and, to a significant extent, linked to the issue of confidential information. The Principles neither prohibit nor prescribe rules for debt trading and leave the issue to be resolved as the relevant creditors think appropriate in each case.

The main perceived benefit of permitting relevant creditors to trade their debt is that it can provide an exit to those who, for one reason or another, do not wish to participate in the rescue process. It should also be appreciated that, where the original debt is in the form of a bond or other tradable instrument, any attempt to restrict or control the trading of that debt during the rescue process is likely to be unacceptable to the holders.

The main sensitivities associated with debt trading are that it can lead to an increase in the number of, and a change in the identity of, creditors who have to be involved in the rescue process and thereby increase the burden of co-ordinating the process. It can also allow into the process new participants who for commercial gain may seek to destabilise or block the rescue.

The use of professional advisers and co-ordinating committees to progress negotiations with the debtor and to receive and analyse confidential information relating to the debtor may reduce the sensitivity associated with debt trading by obviating the need to transmit confidential information to the main body of relevant creditors until the rescue proposal has been fully formulated and the implementation mechanism initiated. This technique tends to be of most assistance when the rescue proposal is to be implemented using some form of scheme of arrangement or
reorganisation which requires publication of the proposal and court approval. It is of less help where it is necessary to gain the voluntary agreement of each debt holder to the proposal.

Where the relevant creditor group consists only of banks and the intention is to avoid any formal procedure to implement the proposal and/or to keep the details of the proposal confidential, it is not uncommon for the relevant creditors to include in the standstill arrangements some mechanism for regulating the trading of debt during the Standstill Period.
EIGHTH PRINCIPLE: If additional funding is provided during the Standstill Period or under any rescue or restructuring proposals, the repayment of such additional funding should, so far as practicable, be accorded priority status as compared to other indebtedness or claims of relevant creditors.

Commentary:

If additional funding is provided: During the Standstill Period and/or in the immediate aftermath of any rescue or restructuring, additional funding (often referred to as “New Money”) is often required. While other ways may be found of providing such funding or of easing the debtor’s financial pressures (eg, through the release of asset disposal proceeds), New Money may also be necessary to enable the debtor to overcome a temporary shortfall. The relevant creditors will normally wish to be satisfied both that any New Money funding is genuinely necessary and that repayment is adequately provided for. They may therefore be reluctant to see New Money funding of material amounts in advance of some assurance about the debtor’s financial position.

As noted in the commentary on the Second Principle, the standstill arrangements are intended to preserve the relative position of relevant creditors as between themselves. The benchmark for comparison will be the position as at the Standstill Commencement Date.

Where a debtor requires New Money funding, relevant creditors will be concerned that such New Money will, so far as practicable, be given priority of repayment compared with other debts in the event of the failure and insolvency of the debtor.
The simplest method of ensuring the priority of repayment for New Money is usually by the obtaining of security for its repayment over assets of the requisite value. In some cases, however, negative pledges in favour of third parties or other legal complications will either prevent the granting of security for New Money or render the benefit which will result from such security uncertain. While there are various techniques for ameliorating such problems (eg, asset purchase arrangements, placing assets into newly formed and “ring-fenced” borrowing entities and sale and leaseback arrangements) in some cases relevant creditors will have no option but to fall back on loss-sharing arrangements between themselves designed to ensure that the New Money will be accorded priority of repayment status (eg, by agreeing to “pool” recoveries from any insolvency of the debtor and to apply them in repayment of the New Money first or, in certain jurisdictions, by the use of subordination agreements).

Identifying New Money is, as indicated in the commentary on the Second Principle, not limited simply to the provision of additional loan facilities. It can also apply to other forms of increase in exposure levels (eg, under derivative or contingent facilities) when compared to the position as at the Standstill Commencement Date. The treatment of such increased exposure levels will be a matter for commercial negotiation among the relevant creditors.

The provision of New Money (including increases in exposure which are to receive New Money treatment) can impact upon the position of relevant creditors. This is because its priority treatment may affect the prospects of other non-prioritised debt being repaid.
Ideally, where appropriate, all relevant creditors participating in the process should be given the opportunity to participate in the provision of, and should accept the risks associated with, the provision of New Money on a proportionate basis (ie, proportionally to the perceived exposures which each of them has to the debtor as at the Standstill Commencement Date). Banks and other financial institutions may be able to provide New Money funding directly (either on a bilateral or syndicated basis) but other relevant creditors may only be able to underwrite such New Money exposures and some only to a limited degree.

Some relevant creditors may not be able to agree to any increase in their overall exposure and will only be able to support the provision of New Money either by subordinating their existing lending to its repayment (this technique may not work in all jurisdictions) or by agreeing to share dividends or other recoveries so as to give the New Money priority of repayment (ie, a form of loss-sharing provision).

The basis on which benefits associated with the provision of New Money will fall to be shared between relevant creditors where only some of them are able to provide the New Money lending to the debtor directly will be the subject of commercial negotiation between the relevant creditors.

New Money lending will generally be provided on the same basis so far as demand or cancellation is concerned as other facilities (eg, such demand may only be made during the Standstill Period with the agreement of a majority of the relevant creditors). In many jurisdictions, however, a lender of New Money (or indeed a
provider under any other facilities) should not be obliged to lend further amounts after a petition for liquidation or bankruptcy has been lodged against the debtor unless such additional lending has been approved by the courts, as otherwise it may not be recoverable in a subsequent liquidation or bankruptcy.
INSOL International Mission Statement

INSOL International is a world-wide association of national associations of accountants and lawyers who specialise in turnaround and insolvency. There are currently 41 Member Associations with over 10,000 professionals participating as members of INSOL International. Individuals who are not members of a member association join as individual members.

INSOL also has ancillary groups that represent the judiciary, regulators, lenders and academics. These groups play an invaluable role within INSOL and provide valuable forums for discussions of mutual problems.

INSOL was formed in 1982 and has grown in stature to become the leading insolvency association in the world. It is a valuable source of professional knowledge, which is being put to use around the world on diverse projects to the benefit of the business and financial communities.

INSOL’s Mission

INSOL with its Member Associations will take the leadership role in international turnaround, insolvency and related credit issues; facilitate the exchange of information and ideas; encourage greater international co-operation and communication amongst the insolvency profession, credit community and related constituencies.

Our Goals:

- To work with and involve our Member Associations in our activities
- To implement research into international and comparative turnaround and insolvency issues
- To participate in Government, NGO and intergovernmental advisory groups and to liaise with these institutions on relevant issues
- To assist in developing cross-border insolvency policies, international codes and best practice guidelines
- To provide a leadership role in international educational matters relating to turnaround and insolvency topics
- To facilitate the exchange of knowledge amongst our Member Associations through our conferences and publications

For further information on INSOL International please contact:

Jelena Sisko, Membership Manager, 6-7 Queen Street, London, EC4N 1SP Tel: (+44) (0) 20 7248 3333 Fax: (+44) (0) 20 7248 3384
E-mail: Jelena@insol.ision.co.uk
The Group of Thirty-Six features some of the most prominent and influential firms within the insolvency and turnaround profession. The aim of the Group of Thirty-Six is to work with INSOL to develop best practice guidelines and develop legislation to enhance the ability of practitioners globally to save businesses throughout the world.

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Member Associations

American Bankruptcy Institute
Asociación Argentina de Estudios Sobre la Insolvencia
Asociación Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales
Association of Business Recovery Professionals - R3
Association of Restructuring and Insolvency Experts
Australian Restructuring, Insolvency and Turnaround Association
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
Canadian Association of Insolvency and Restructuring Professionals
Canadian Bar Association (Bankruptcy and Insolvency Section)
China University of Politics and Law, Bankruptcy Law and Restructuring Research Centre
Commercial Law League of America (Bankruptcy and Insolvency Section)
Especialistas de Concursos Mercantiles de Mexico
Finnish Insolvency Law Association
Ghana Association of Restructuring and Insolvency Advisors
Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
Hungarian Association of Insolvency Practitioners
INSOL Europe
INSOL India
INSOL New Zealand
INSOLAD - Vereniging Insolventierecht Advocaten
Insolvency Practitioners Association of Malaysia
Insolvency Practitioners Association of Singapore
Instituto Brasileiro de Estudos de Recuperação de Empresas
Instituto Brasileiro de Gestão e Turnaround
Instituto Iberoamericano de Derecho Concursal
International Association of Insurance Receivers
International Women’s Insolvency and Restructuring Confederation
Japanese Federation of Insolvency Professionals
Law Council of Australia (Business Law Section)
Malaysian Institute of Certified Public Accountants
Nepalese Insolvency Practitioners Association
Non-Commercial Partnership Self-Regulated Organisation of Arbitration Managers “Mercury” (NP SOAM Mercury)
Recovery and Insolvency Specialists Association (BVI) Ltd
Recovery and Insolvency Specialists Association (Cayman) Ltd
REFor – The Insolvency Practitioners Register of the National Council of Spanish Schools of Economics
Russian Union of Self-Regulated Organizations of Arbitration Managers
Society of Insolvency Practitioners of India
South African Restructuring and Insolvency Practitioners Association
The Association of the Bar of the City of New York
Turnaround Management Association (INSOL Special Interest Group)