City Research Online

City St George's, University of London

Citation: Nsubuga, H. J. (2022). Local public entities in distress: an analysis of the Ugandan approach. In: Coordes, L. & Vaccari, E. (Eds.), When Liquidation is not an Option – A Global Study on Local Public Entities in Financial Distress. (pp. 128-138). London, UK: INSOL International.

This is the accepted version of the paper.

This version of the publication may differ from the final published version. To cite this item please consult the publisher's version.

Permanent repository link: https://openaccess.city.ac.uk/id/eprint/31364/

Copyright and Reuse: Copyright and Moral Rights remain with the author(s) and/or copyright holders. Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge, unless otherwise indicated, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way. For full details of reuse please refer to City Research Online policy.

City Research Online: http://openaccess.city.ac.uk/ publications@citystgeorges.ac.uk

Local Public Entites in Distress: An Analysis of the Ugandan Approach

Hamiisi Junior Nsubuga*

Introduction

In Sub-Saharan Africa, few countries have provisions in their legal frameworks for dealing with municipal or local public entities (LPEs) in distress.[1] Uganda is one of those countries lacking comprehensive rules in the area.

Pursuant to the Ugandan insolvency framework, there are no special rules applicable to LPEs in distress or insolvency. Insolvency and bankruptcy proceedings only apply to individuals and companies. Nevertheless, some of these procedures could apply to what could be termed as hybrid LPEs, as will be evidenced later in this chapter.

This chapter explores and analyses the subject of LPE insolvencies in Uganda's legal system, and especially its insolvency framework, the provisions for the governance and regulation of LPEs in financial difficulties, and more in general the challenges that the subject presents to the legal system and extant stakeholders.

1. General Context of Insolvency Law

1.1 Existing insolvency law framework

The principal legislation governing insolvency in Uganda is the Insolvency Act 2011,[2] which regulates formal insolvency procedures such as administration,[3] voluntary arrangements,[4] receivership,[5] liquidation[6] and cross-border insolvency proceedings.[7] The Insolvency Act 2011 is supplemented by the Insolvency Regulations 2013, which provide a series of administrative rules for running insolvency proceedings. The other legislation in the area is the Companies Act 2012,[8] which includes provisions that deal with corporate insolvency and financial distress. For example, the Companies Act 2012 includes rules on creditor compromises and arrangements,[9] reconstructions and amalgamation,[10] and voluntary winding-up.[11]

In addition, the Financial Institutions Act 2004 (FIA 2004)[12] (as amended) deals with banks and financial institutions experiencing financial difficulties. The procedures under the FIA 2004[13] may include a purchase of assets and assumption of liability (P&A) transaction,[14] or a statutory takeover by appointment of a statutory manager to oversee to the rescue proceedings.[15]

* PhD (Law), LLM, MA, LLB, FHEA. Lecturer in Law, School of Law, Middlesex University London, UK.

[1] M. Glasser, "Municipal Bonds in Three Countries: India, South Africa and the United States, (2020) 4 (1) *Journal of Comparative Urban Law and Policy*, 96-132; Matthew D. Glasser and Johandri Wright, "South African municipalities in financial distress: what can be done?" (2020) 24 *Law, Democracy, and Development*, 413, 441.

[2] Insolvency Act 2011 (Act 14 of 2011).

[3] IA 2011, ss.140 – 162.

[4] IA 2011, ss. 125 – 137.

[5] IA 2011, Part VII, ss. 180 – 197.

[6] IA 2011, ss. 56 – 124.

[7] IA 2011, Part IX, ss. 212 – 252.

[8] Companies Act 2012 (Act 1 of 2012).

[9] CA 2012, s.234.

[10] CA 2012, ss. 236 – 245.

[11] CA 2012, Part XI, ss.268 – 272.

[12] Financial Institutions Act 2004, c.54

[13] FIA 2004, Part IX, s.82 – s.93.

[14] FIA 2004, s.89(1) and (2).

[15] FIA 2004, s.88. See further on this aspect: Hamiisi J. Nsubuga, "The Role of the Central Bank in Financial Distress Management and Resolution in Developing Economies" (2020) 35(5) *Journal of International Banking Law and Regulations*, 208 – 214.

These statutes are also complemented by some other regulations pertinent to insolvency proceedings that aim to professionalise and improve transparency and efficiency in the insolvency field. These regulations include:

- The Insolvency Practitioners Regulations (No 55 of 2017), which provide for registration and regulation of insolvency practitioners with the Official Receiver;
- The Insolvency (Investigations and Prosecutions) Regulations (No 4 of 2018), which set out the procedure for investigating and prosecuting insolvency practitioners, directors, shareholders and contributories, and all present and past members of the insolvent company involved in insolvency proceedings;
- The Insolvency Fees (Amendment) Regulations (No 5 of 2018), which prescribe the fees payable in insolvency matters as provided for under the Insolvency Act 2011.

Uganda's insolvency system may be described as being debtor-friendly and adopts a fragmented approach.[16] One of the reasons for this debtor-friendly approach is the lack of statutory requirements for filing for insolvency. For instance, section 58 of the Insolvency Act 2011 allows but does not mandate the debtor to file for voluntary liquidation upon a special resolution by its shareholders provided that the company cannot continue to operate by reason of its liabilities. However, company directors may be sanctioned for failure to cease trading where a company is insolvent and the sanction carries a disqualification from assuming office as a director for a period of three years.[17]

Beside liquidation procedures, most rescue processes prescribed by the Insolvency Act 2011 and the Companies Act 2012 are perceived as more protective towards the debtor than its creditors. For example, the administration procedure, although seen as an inclusive procedure as it considers creditor interests as a whole, affords significant protections to the debtors through mechanisms such as a moratorium on executory actions from the creditors for a certain period of time.[18] Receivership on the other hand, favours the interests of those creditor(s) holding qualifying floating charges against the debtor's assets. However, receivership is not a collective procedure. Voluntary arrangements are also debtor-driven, with provisions to bind creditors and classes of creditors where certain resolutions are passed with the majorities prescribed by the law.[19] Liquidation proceedings also tend to favour the debtor as most powers are left to the debtor.[20]

1.2 Current insolvency law reforms

Currently, there are no ongoing general insolvency law reforms on either corporate and/or municipal insolvencies or personal insolvencies. In 2016, the Government earmarked $300 million for the bailout of distressed companies that were considered viable and capable of contributing to the economy. However, this initiative was labelled as being 'politically motivated' and insufficient to address the problems of the economy.[21]

2. Local Public Entities in Context

2.1 Generic definitions or *ad hoc* mission statements on LPEs

In Uganda's main insolvency laws, the Insolvency Act 2011 and Companies Act 2012, there are no specific sections, statements or references to public entity or local public entity (LPE) insolvency. This is

[16] On this aspect see generally, Hamiisi Junior Nsubuga, "Reinvigorating Corporate Rescue in Developing Economies – a Ugandan Perspective" (2021) 34(4) *Insolvency Intelligence*, 95, 102.
[17] CA 2012, s.199(1)(r).
[18] IA 2011, s.139 (4); s.164.
[19] CA 2012, s.234.
[20] See, for instance, IA 2011, s.25 and s.70.
[21] DW "Uganda Company Bailouts Politically Motivated" (28 July 2016) <https://www.dw.com/en/uganda-company-bailouts-politically-motivated-critics-allege/a-19432023> <accessed 28 June 2021).

because insolvency or bankruptcy law only apply to individuals and companies. Subject to minor exceptions, the following entities are exempted from insolvency procedures:[22]

- Local Governments/cities/municipalities.
- Non-Governmental Organisations (NGOs).
- The Government itself.
- National/Social Security Funds.
- Public Trusts/ and Public-Private Partnerships.
- National Para-statal entities (with minor exceptions to Statutory Corporations).

There's no doubt that the enactment of the Insolvency Act 2011 and the Companies Act 2012 introduced much-needed reforms to Uganda's corporate and insolvency law. The existing laws at the time (the Bankruptcy Act 1931 and Companies Act 1961) were enacted in early 1940s and 1960s. They were modelled on the English Bankruptcy Act 1914 and the English Companies Act 1948 respectively. Therefore, reform of the law was long overdue to match modern international trends.[23]

The introduction of simplified corporate insolvency mechanisms, such as provisional administrations[24] with moratorium,[25] a simplified CVA procedure,[26] receiverships,[27] and the insertion of a schedule on cross-border insolvency law provisions in the Insolvency Act 2011[28] have been hailed as welcome changes. However, the subject of municipal insolvency was totally missed. To date, no laws regulate the treatment of LPEs in financial difficulties.

It is envisaged that an efficient modern insolvency model would provide a sense of purpose geared towards serving the needs of LPEs in financial difficulties, alongside corporate and personal insolvencies. The absence of a clear vision and purpose in Uganda's current insolvency framework on the treatment of LPEs in financial difficulties remains a concern. There is, therefore, scope for the Insolvency Act 2011 or the Companies Act 2012 to be revised to include a schedule on the treatment of LPEs in distress in order to safeguard extant stakeholder interests.

3. Dealing with Local Public Entities (LPEs) in Distress

3.1 The Legal Framework

Uganda's legal framework does not prescribe a "stand-alone" system for dealing with LPEs in distress. LPEs in Uganda are corporations operating in both the private and public sector that are either totally or partially owned, or otherwise supported by the Government, with a mandate to provide certain public services. Examples of these include municipalities, councils, cities and other public utility entities such as the National Water and Sewerage Corporation, the Uganda Post Office, Uganda Telecom, and Uganda Railways Corporation.

These LPEs are excluded from filing for insolvency proceedings themselves. Where such entities are financially struggling, the Government has the mandate to intervene by either taking over these entities and placing them under statutory receivership, or by converting their debts into equity. This is analysed further in section 4 of this chapter.

---

[22] These are corporations established by a government statutory instrument with a special purpose mandate. They are either owned partly, or supported by the government with a government mandate to provide certain public services.
[23] C. Nyombi, A. Kibandama and D. Bakibinga, "The Motivation Behind Uganda's Insolvency Act 2011" (2014) (8) *Journal of Business Law*, 651, 666.
[24] IA 2011, Part VI, ss.139 – 161.
[25] IA 2011, s.139 (4); s.164.
[26] IA 2011, ss. 125 – 137.
[27] IA 2011, Part VII, ss. 180 – 197.
[28] IA 2011, Part IX, ss. 212 – 252.

3.2 Differences between LPE and "general" corporate insolvency framework
The ultimate objective of insolvency law is to support corporate rescue and to avoid unnecessary or avoidable liquidations. In Uganda, LPEs are treated differently from other corporations. While general corporate rescue laws provisions and processes are clearly provided for in legislation,[29] provisions on LPEs in distress and their rescue objectives are not. However, the Government has the power to intervene in LPE insolvency and use procedures, such as administration,[30] receivership or as a last resort liquidation to offer an orderly process that is fair to all stakeholders.[31] Additionally, the Government has the power through the Official Receiver to appoint professional insolvency practitioners, such as administrators, receivers or statutory managers to run the financially struggling LPE to enable it back to solvency.

3.3 Liquidation of LPEs
Ultimately, LPEs are allowed to be liquidated under liquidation provisions in the Insolvency Act 2011 and Companies Act 2012 where attempts at rescue are unsuccessful. Any decision in the area needs to get the preliminary approval from the Government. Where there is a need for liquidation, proceedings are initiated via court on application by the insolvency practitioner (IP) under the supervision and oversight of a Government-appointed official receiver. It is the role of the official receiver to appoint the liquidator into office to oversee the liquidation proceedings. However, LPEs can also be restructured through the appointment of the administrator by the Official Receiver office, and the administrator has to observe the duties and objectives as established for administration proceedings in the Insolvency Act 2011.[32]

3.4 State oversight and financial assistance with LPEs
Unlike other developed jurisdictions of the world, the topic of municipal insolvency has so far received little attention in developing jurisdictions such as Uganda.[33] Perhaps, this topic is considered to bear little practical importance to attract the attention of insolvency scholars, practitioners, policymakers and politicians in Uganda. This may partially be attributed to the fact that although these LPEs in Uganda can enter into private contractual undertakings with extant stakeholders, these contractual undertakings are mainly born by the State as LPEs are under the regulation and oversight of the Ugandan Government. As such, these contracts may be viewed as being based on the theoretical underpinnings of the principle of agency. The LPE is considered an agent of the State in negotiating and entering into contractual undertakings on behalf of the State, the principal in this equation. The State then bears liabilities arising out of these contracts.

Perhaps, Picker and McConnell's exploration of the topic of municipal bankruptcy can shed some light on Uganda's treatment of LPEs in distress. According to Picker and McConnell, a municipality or city can be viewed as a political subdivision of the sovereign State or as the agent of the private citizens who inhabit it.[34] They contend that if viewed as an arm of the State, municipal bankruptcy should be treated as an occasion for consolidating the distressed municipality into larger units of Government. For larger units, the State should bear some responsibility for the debts incurred by the entity.[35]

---

[29] See for example: IA 2011, Part IV, ss.56 – 118 on all provisions on liquidation, Part V, ss.119 – 135 on Arrangements, Part VI, ss.138 – 174 on Administration proceedings and Part VI, ss.175 – 195 on Receivership. For CA 2012, see: ss.234 – 250 on Arrangements and Reconstruction and Part IX, ss.268 – 272 on Winding-up provisions.
[30] Isaac Khisa, "UTL on Route to Recovery following Administration" *The Independent* (Kampala, Uganda), 20 November 2017 < https://www.independent.co.ug/utl-route-recovery/> (accessed 22 June 2021).
[31] Ronald Mugabe, "URSB takes charge of UTL" *New Vision* (29 April 2017) <https://www.newvision.co.ug/news/1452214/ursb-takes-charge-utl> (accessed 25 June 2021)
[32] IA 2011, s.140.
[33] On this aspect, see; David L. Dubrow, "Chapter 9 of the Bankruptcy Code: A Viable Option for Municipalities in Fiscal Crisis?" (1992) 24 *Urban Law* 539; E. Vaccari, "Municipal Bankruptcy Law: A Solution Which Should Not Become a Problem" (2017) 5 *Nottingham Insolvency and Business Law e-Journal*, 1.
[34] Randal C. Picker & Michael W. McConnell, "When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy" (1993) 60 *University of Chicago Law Review* 425, 427.
[35] Ibid, at 427.

Alternatively, if viewed as the agent of its private citizens, the bankruptcy framework should allow for the dissolution of the municipal corporation or LPE into its constituent parts, followed by voluntary reorganisation into more efficient and effective units. The former viewpoint of an LPE or Municipality as an agent of the State, suits better the socio-political structure of Uganda's centralised approach. In Uganda, the Government has the utmost mandate to intervene in the insolvency of cities, municipalities, districts and corporations through the official receiver, since LPEs cannot file for insolvency proceedings on their own initiative.

3.5 Influence by international organisations: the World Bank, UNCITRAL and the EU

International organisations, such as the World Bank and UNCITRAL, have played some influence in shaping Uganda's insolvency law. For example, while drafting its current insolvency Act in 2011, Ugandan legislators and policy makers were influenced by the UNCITRAL Model Law on Cross-Border Insolvency 1997 (the Model Law) and the Model Law's provisions on cross-border insolvency were adopted into the Insolvency Act 2011. Specifically, Part IX of the Act[36] sets out these cross-border provisions by mandating the Minister to make a declaration on reciprocating States that have enacted laws for reciprocity in insolvency which have the same effect as those under Part IX of IA 2011. Where this is the case, the Minister may by statutory instrument declare such a State to be a reciprocating State and any court having jurisdiction on insolvency issues will be a reciprocating court for purposes of the Insolvency Act 2011.[37]

3.6 Parties in LPEs restructurings and insolvencies

3.6.1 The Official receiver

The Insolvency Regulator in Uganda is the Official Receiver of the Government of Uganda whose appointment is mandated under s.198 of the IA 2011. The official receiver is the custodian and holder of the official receiver's seal that certifies, commissions and authenticates official deeds in insolvency proceedings in the country.[38]

The powers and functions of the official receiver are outlined under s.199 of the Insolvency Act 2011, and these include *inter alia*:

(a) Power to investigate all forms of directorial or shareholder impropriety, fraud and similar acts committed by past and present officers, directors, and shareholder in relation to the company undergoing insolvency proceedings;

(b) Power to investigate insolvency practitioners and to prosecute where offences are committed during proceedings;

(c) Power to take all necessary steps and actions considered fit for the enforcement of the provisions under this Act (the Insolvency Act 2011).[39]

The official receiver also plays a key role in cross-border insolvency proceedings, if they are taking place in a "reciprocating" State. For instance, the official receiver in Uganda has the power to ask the official receiver in a reciprocating State, such as Kenya or Tanzania, to act as their agent and undertake all of the duties that the official receiver in Uganda would have undertaken. This may include agreeing on creditor settlements or taking possession of assets or properties subject the relief/discharge.[40]

3.6.2 Court Jurisdiction in LPEs in distress

In both domestic and cross-border procedures, courts play a key role. However, since LPEs are not subject to special rules, no specialist court is mandated to deal with proceedings involving LPEs.

---

[36] IA 2011, Part IX, ss.213, 214.

[37] See further, Hamiisi Junior Nsubuga, "The Call for Harmonisation of Cross-border Insolvency Laws to enable Cross-border Filing and Litigation in the East African Community" (2019) 30 (12) *International Company and Commercial Law Review*, 659, 665.

[38] IA 2011, s.200.

[39] See, IA 2011, s.199 for a full list of the powers and functions of the Official Receiver.

[40] IA 2011, s. 218, s.224.

Therefore, the court jurisdiction for LPEs in distress is the same as for general insolvency matters. Under section 254 (1) of the Insolvency Act 2011, the High Court of the Republic of Uganda is given the mandate to have jurisdiction over all matters concerning company insolvency proceedings. The same court is afforded absolute discretion to make the necessary orders for cross-border insolvency proceedings involving companies with foreign creditors.[41]

Where an LPE enters into insolvency, a Government-appointed regulator in that sector, such as the Uganda Communications Commission (Regulating all communication and broadcasting companies including private/ public and other national parastatals and statutory companies) can apply to court to have a receiver appointed to take over the management of the financially struggling LPE.

In addition, during liquidation proceedings involving LPEs, the court has the power to appoint or remove a liquidator,[42] confirm or amend a creditor arrangement where it is just to do so,[43] and approve a company resolution for voluntary liquidation[44] among other things. The court also plays a key role in the supervision of liquidation proceedings. For instance, on the application of the liquidator, the court may; (a) give directions on any matter arising during the course of the liquidation; (b) confirm, reverse or modify any act or decision of the liquidator; or (c) order an audit of the accounts of the liquidation.[45] In addition, the court also has the power to supervise or enforce the liquidators' duties and in any case of non-compliance. Finally, the court has the power to either call the liquidator to order or sanction the liquidator's removal from office.[46]

In administration proceedings, once formal insolvency proceedings are initiated by the financially struggling company or LPE,[47] the court plays a key role in hearing and granting protection against the creditors' executory actions. A successful claim for a moratorium affords the financially struggling company with the breathing space needed to execute its rehabilitation endeavours.

3.6.3 Directors and creditors in LPE proceedings

The directors' powers of an LPE in distress are significantly restricted upon filing formal insolvency proceedings. The directors and senior officers can no longer exercise managerial powers, which are transferred to the appointed IP. However, they may be called upon by the IP to offer advice, opinions or assistance reasonably required by the IP in carrying out their functions.

Creditors in LPE insolvencies are treated like in general formal insolvency proceedings. Where the procedure aims at rescuing the company, such as in administration and voluntary arrangements, creditors are entitled to lodge a claim against the debtor and the general rules on insolvency practitioners and automatic stay apply.[48] However, where no formal insolvency procedures are opened, the creditors may revert to private law remedies to seize the debtors' assets or obtain other contractual remedies such as liens to recover their debts.

If the court granted permission to seize their assets, LPEs would be treated as a mere quasi-private corporate entity. This may be regardless of the entity being fully or only partially owned by the State. LPEs which carry out business activity are usually seen as being no different from any corporations, thus enjoying the benefits of the doctrine of separate legal personality.

This debt enforcement and recovery mechanism (of asset seizure) may be contrary to one of the pillars of insolvency law, the principle of collectivity.[49] Pursuant to this principle, the interests of the creditors

[41] IA 2011, Part IX, s.235, s.245 (on cross-border insolvency proceedings).
[42] IA 2011, s.81.
[43] IA 2011, s.83.
[44] IA 2011, ss.87, 89, and 93.
[45] IA 2011, s. 117 (1).
[46] IA 2012, s.118.
[47] IA 2011, s.139 (ii).
[48] See generally; IA 2011, Parts VI and VIII respectively.
[49] Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge, Harvard University Press, 1986); D. R. Korobkin, "Contractarianism and the Normative Foundations of Bankruptcy Law" (1993) 71 *Texas L. Rev.* 98;

should be given equal weight and consideration, and individual enforcement actions should be prohibited. This is because individual enforcement mechanisms may dissipate value that may otherwise be available to all creditors as a group.[50] However, the absence of a special regime to regulate insolvent LPEs has the effect of diminishing the importance of the collectivity principle in insolvency.

Through liens, a creditor to an LPE may be able to obtain a garnish order (such as obtaining a lien on the debtor's future income) from the court. This could aid the recovery of the creditor's debt at the expense of other creditors. This is, for instance, what happened in the recent administration procedure involving Uganda Telecoms Ltd.[51]

In this case, an application was made by UTL (while in administration) under section 164 (1) Insolvency Act 2011 against its former lawyers, for an order to set aside a Garnishee Order Nisi. The purpose of the request was to obtain a declaration that the respondent lawyers were bound by UTL's administration deed and costs. The respondent lawyers claimed that UTL had engaged them to undertake legal work during its insolvency proceedings but had failed to honour the request for payment. They were seeking to recover their debt by way of garnishee proceedings. However, the application for a Garnishee Order Nisi was set aside by the judge and the claim was held to be bound by UTL's administration deed and cost. This was pursuant to section143 (1) (f) (ii) of the IA 2011 that immediately ringfences the company and its assets upon filing for administration proceedings such that no creditor can commence or continue any action to recover their debts.

In addition, a creditor can pursue a cross-border arbitral award arising from breach of contract where the LPE or has gone into insolvency proceedings. A good example of this instance was when UTL (an LPE in Uganda) was able to pursue a cross-border claim against an Australian corporation during an arbitral procedure and while undergoing administration proceedings.[52]

In this case, Foster J presided over a hearing for a claim for enforcement of a foreign award made for breach of contract by a Ugandan Court/Centre for Arbitration and Dispute Resolution in Kampala, pursuant to an arbitration agreement contained in a telecommunications contract between Uganda Telecom Ltd and Hi-Tech Telecom Pty Ltd (an Australian corporation). In this case, an order was made for UTL to be paid $140,000 by Foster J for recognition and enforcement of an arbitral award.[53]

3.7 The role of State in LPE insolvencies

In developing economies, especially in Sub-Saharan Africa, municipal bankruptcies or LPE in distress are a relatively new phenomenon. In Uganda as a country, local-public services are delegated to local authorities (comprising of City Councils, Municipal Councils and District Councils) who provide services such as road maintenance, public health, local hospitals and health centres, local schools, markets etcetera. Funding is provided by the Government to the LPEs through the central Government's financial allocation scheme, which is sometimes supplemented by local revenue raised by means of local tax levies. Therefore, when these LPE experience financial difficulties, they do not have a formal legal framework within which to initiate restructuring or recovery mechanisms. They can only rely on the Government's intervention, usually in the form of recapitalisation or transfer of additional/supplementary funds.

An example of such approach is the establishment of the Kampala Capital City Authority (KCCA) in 2010, courtesy of Kampala Capital City Authority Act 2010.[54] The City Authority is the governing body of the Capital City and has the mandate to administer the affairs of the Capital City under the direct supervision of the central Government. The central Government appoints the executive director,

---

Hamiisi J. Nsubuga, "Corporate Insolvency and Employment Protection: A Theoretical Perspective" (2016) 4(1) *Nottingham Insolvency and Business Law e-Journal*, 4.

[50] Randal C. Picker, "Security Interests, Misbehaviour, and Common Pools" (1992) 59 *U. Chi. L. Rev.* 645; V. Finch, "Corporate Rescue: A Game of Three Halves" (2012) 32(2) *Legal Studies*. 302–324.

[51] *Uganda Telecom Limited v Ondama Sammuel t/a Alaka & Co (Miscellaneous Application No. 12 of 2018)*.

[52] Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd [2011] FCA 131.

[53] *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131, at paras. 138, 140.

[54] Kampala Capital City Authority Act 2010, (Act 1 of 2011).

who answers to the Minister of Kampala Capital City Authority alongside a politically elected City Mayor.

The City Authority is a legal entity and has *locus standi* to enter into contractual undertakings. It can sue and be sued, acquire properties, and exercise similar powers. However, all contractual undertakings, social or economic, including but not limited to tenders for residential and commercial waste collection, maintenance of roads, to social employment contracts, are not taken or controlled by the City Authority. They are governed/controlled by the Government's Public Service Commission (PSC). From this perspective, the City Authority, although a body corporate, may be seen as non-independent entity but an agency to the central Government.

Liabilities arising from these contracts, although enforceable against the City Authority as a corporate entity, are usually borne by the central Government. The central Government stands *in loco parentis* and is responsible for any legal remedies, such as damages, arising from the contracts signed by the local authority. Therefore, where an LPE faces financial difficulties, it is not important whether they can file for insolvency procedures. The central Government has the mandate to intervene by either taking over these entities and placing them under statutory receivership or by converting their debts into equity.

3.8 Technical Rules/Procedure in LPE insolvencies

3.8.1 General rules on IPs and automatic stay on enforcement actions

Following the enactment of the Insolvency Act 2011, it is now a requirement under this Act that all insolvency practitioners, such as administrators, are licenced practitioners and subject to a regulatory body which may guide and sanction practitioners in cases of professional misconduct.[55] The people allowed to register and work as professional insolvency practitioners include those that are members of professional bodies or organisations such as certified accountants, auditors or lawyers.[56] IPs are regulated by the Official Receiver of the Government of Uganda, which has the mandate to prosecute all cases of professional misconduct and procedural impropriety. The Insolvency Practitioners Regulations (SI 55-2017) that came into force on 22 June 2017 provide for the Official Receiver to maintain an updated register of the insolvency practitioners that is open to public inspection and enquiries.

4. Dealing with Local Public Entities (LPEs) in Distress – Case Studies

This section covers the treatment of two Ugandan LPEs established with a mandate to provide certain local public services. Both LPEs experienced serious financial difficulties.

4.1 Case Study 1: Uganda Telecom Limited (UTL)

Uganda Telecom Limited (UTL) is a government-owned information and communication technology and network corporation. It is a government para-statal entity formed following the enactment of the Communications Act 1997. This Act also led to the formation of the Uganda Communications Commission (as the official regulator) of the communications industry.

To improve the services it provided, UTL was privatised in 2000 when the Ugandan Government sold 51 percent of the shareholding to a foreign consortium led by Ucom, while retaining a 49 percent stake in the company.[57] As of July 2011, UTL became a joint venture between LAP Green of Libya, which owned 69 percent of the company, and the Ugandan Government, which owned the remaining 31 percent.

However, between 2011 and 2016, reports of UTL's financial difficulties hit the media platforms.[58] Following these media reports, internal management changes were undertaken and although signs of

---

[55] IA 2011, Part VIII, ss.203 – 209.

[56] IA 2011, ss. 198 – 211.

[57] Stephen Odeu, "UTL Clarifies Orascom Telecom Sale Of 80% Stake" *New Vision* (Kampala, Uganda), 20 August 2001 < https://www.newvision.co.ug/news/1028200/utl-clarifies-orascom-telecom-sale-80-stake > (accessed 21 August 2021).

[58] E. Angumya, "UTL in Turnaround Restructuring" *The Observer*, (Kampala, Uganda), 14 May 2013 < https://observer.ug/index.php?option=com_content&view=article&id=25274&catid=38&Itemid=96 > (accessed 20 September 2021).

instability remained, UTL continued to operate until 2017 when severe financial difficulties were once again reported by the media, thus prompting a second Government intervention.[59]

In May 2017, UTL was placed in administration. The Official Receiver was appointed by the Government to act as its administrator to supervise the implementation of the procedure and to steer UTL back to solvency. By this time, UTL's total debt was over 709bn Shillings (eq. to US $ 197m) with estimated asset value of 148bn Shillings (eq. to US $41m). The Official Receiver's office acted as the company's administrator. They invoked protection against executory actions from the creditors[60] in a bid to save the financially struggling company.

As creditors' meetings and negotiations took place, it also transpired that other Government agencies that supplied utilities such as water and electricity were among the largest creditors in the procedure. Additionally, it emerged that UTL failed to make any statutory payments such as employee pension contributions and other tax bills to the Uganda Revenue Authority. The growing demands for debt settlements made it clear that more financial support was needed from the Government as the main objective of administration - rescuing UTL as a going concern - was becoming inreasingly unlikely to achieve.[61] Therefore, the Government decided to stop other Government agencies from recovering their debts and bills from UTL. The Government mandated the Official Receiver to convert these debts into equity shares as a way of temporarily off-setting them.[62]

The administrator, with the support of the Government, secured new investment for UTL thanks to a Nigerian company, Taleology Holdings GIB Limited. This company accepted to own a 67 percent share in UTL for the following twenty years as part of a deal reached with the Government in October 2018.[63] However, Taleology failed to secure the funding necessary, and the deal collapsed. The collapse also meant that UTL's administration proceedings failed and the UTL was put into receivership by the Official Receiver.[64] In January 2020, the government, on recommendation of the Official Receiver, and the Financial Intelligence Agency, mandated Justice Lydia Mugambe of the Civil Division of the High Court of the Republic of Uganda to appoint Ruth Sebatindira as receiver. At the time of writing (October 2021), UTL remains in receivership.

The case of UTL's administration proceedings was the first involving an LPE in Uganda since the enactment of the Insolvency Act 2011. It further highlights the difficulties caused by the lack of a streamlined insolvency framework to regulate and govern LPEs in financial difficulties. It may be argued that UTL's administration failed due to its large debt structures and absence of a formal insolvency framework with mechanisms such as a scheme of arrangement. In other countries, these mechanisms have proven successful in dealing with insolvency restructurings of corporations with large debts.[65]

4.2 Case Study II. Uganda Commercial Bank

Uganda Commercial Bank (UCB) was established by an Act of Parliament (the Uganda Commercial Bank Act, 1965) to fill the void created by the collapse of Uganda Credit and Savings Bank in the early 1960s. Throughout the 1970s to the 1990s, UCB provided banking, saving and investment

---

[59] R. Mugabe, "URSB Takes Charge of UTL" *New Vision*, (Kampala, Uganda), 29 April 2017 <https://www.newvision.co.ug/news/1452214/ursb-takes-charge-utl> (accessed 20 June 2021).

[60] IA 2011, s.139 (4); s.164.

[61] IA 2011, s.140 (b) (i). Please also note that the term "going concern" is used in this context to refer to the value of the company as a going entity for the foreseeable future as opposed to being liquidated. See also, Edith Penrose, *The Theory of the Growth of the Firm* (Basil Blackwell, Oxford 1959).

[62] Y. Mugerwa, "Museveni Writes off Shs200b UTL Debts" *Daily Monitor*, (Kampala, Uganda, 29 January 2018). <https://www.monitor.co.ug/News/National/Museveni-Shs200b-UTL-debts-MTN-Huawei-Nokia-Umeme/688334-4282460-8hhalj/index.html (accessed 19 June 2021).

[63] T. Butagira and M. Kahungu, "Nigerian Company Buys UTL at Shs268 billion" *Daily Monitor* (Kampala, Uganda, 15 October 2018) < https://www.monitor.co.ug/News/National/Nigerian-company-UTL-Shs268-billion-Anite-Taleology/688334-4806418-14kmvk3z/index.html (accessed 22 July 2021).

[64] J. Businge, "Back to the Drawing Board - UTL's Prospective Investor Fails to Raise Capital" *The Independent*, (Kampala, Uganda), 19 February 2019 < https://www.independent.co.ug/back-to-the-drawing-board-utls-prospective-investor-fails-to-raise-capital/ (accessed 22 June 2021).

[65] Jennifer Payne, "Schemes of Arrangement, Takeovers and Minority Shareholder Protection" (2011) 11(1) *Journal of Corporate Law Studies*, 67 – 97.

services to millions of Ugandans, especially in rural areas, implementing a business model relying on local branches spread across the country. However, in early 1990s, the Ugandan Government embarked on a privatisation scheme known as the Private Sector Development Scheme (PSD). The purpose of the scheme was to privatise some State-owned corporations while retaining a controlling stake in these entities. UCB was part of the scheme.[66]

In late 1997, UCB experienced financial difficulties and in a bid for turnaround, a 51 percent stake in the bank was sold to a Malaysian conglomerate, Westmont Land Asia Bhd. However, the new buyer failed to raise the funds needed to complete the sale, which led to the collapse of the deal. Further attempts to rescue the bank resulted in the sale of 81 percent of its shares to a South-African based investment bank, Standard Bank.[67] In 2001, Standard Bank merged its newly acquired UCB with its existing bank, Stanbic Bank Uganda Ltd, to complete the takeover.

4.2.1 Absence of formal insolvency proceedings

The sale was completed without the need to use formal insolvency procedures. The Government relied on their executive powers to sanction the sale. This may be due to a variety of reasons, including the lack of a modern insolvency framework capable of dealing efficiently with financially struggling LPEs in Uganda. The fact that the UCB was prevented from filing formal insolvency proceedings did not facilitate the restructuring process.

At the time of the sale of the UCB, the main legislation dealing with insolvency issues was the Bankruptcy Act 1931. The main procedure available to companies in distress was receivership. Alternatively, UCB could have relied on the schemes of arrangement regulated by the Companies Act 1961. However, both statutes had been transplanted from the English legal system due to Uganda's colonial ties with the UK.[68] For example, s.2 of the Bankruptcy Act 1931 provided that English Insolvency law should be adopted and applied in Uganda where necessary.[69]

The lack of experienced professionals capable of effecting a merger or reorganisation by means of a scheme led the parties to look for alternative solutions, namely the Government's intervention described above.[70] Moreover, the statutes were also outdated. Therefore, the case suggested the urgency of implementing statutory reform, which mirrored best international trends.[71]

5. Concluding Remarks

These two case studies and the other challenges analysed in this chapter highlight the need for Uganda's insolvency framework to include special provisions on the treatment of LPEs in distress. This regulation would support and facilitate their rehabilitation and rescue endeavours. This chapter also shows the urgent need to regulate other constituents that provide public services. The treatment of LPEs in distress should be legislatively regulated as they play a key role in the functioning of localities and the economy at large.

---

[66] M. Brownbridge, "Resolving Bank Failures in Uganda: Policy Lessons from Recent Bank Failures" (2002) 20 (3) *Development Policy Review*, 279 - 291.

[67] BBC Word News, "Uganda's Largest Bank for Sale" *BBC News Online* (17 October 2001) <http://news.bbc.co.uk/1/hi/business/1604100.stm > (accessed 21 October 2021).

[68] C. Nyombi, A. Kibandama & D. Bakibinga, "The Motivation Behind Uganda's Insolvency Act 2011" (2014) (8) *Journal of Business Law*, 651, 666.

[69] Bankruptcy Act 1931, s.2.

[70] Uganda Law Reform Commission, *A Study Report on Company Law*, ULRC Pub. No.35 (2004), p.7.

[71] J. D. Bakibinga, "Company Law and Business Development in Uganda" (2004) 2 *Uganda Living Law Journal*, 31; C. Nyombi, "The Development of Corporate Rescue Laws in Uganda and UK" (2015) (57) (2) *International Journal of Law and Management* 214.