

## **How involved should the court be in balancing stakeholder interests in insolvency? A spotlight on African emerging economies**

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National legal systems have provisions that empower courts, especially, commercial courts to regulate matters related to business and commercial affairs, including insolvency related matters or disputes. These courts make strategic decisions, such as deciding whether a company faced with financial difficulties is worthy of a chance to restructure its debts/capital structures as opposed to being liquidated. However, [the role of the court in this context is often either misunderstood or underestimated due to divergent theoretical perspectives](#) on the role that they ought to play in an insolvency setting. In this short blog, I explore how involved should a court be in balancing stakeholder interests in insolvency and debt restructuring proceedings, especially in African emerging economies?

Debates on the role of the court in insolvency settings are dominated by theoretical ideals advanced by two leading insolvency theoretical schools; the [traditionalists](#) and [proceduralists](#). These ideals further transcend to other theoretical movements, such as the [contractarianism](#), and [communitarianism](#) in informing how such theoretical ideals may influence the role and/or approaches of the courts in balancing stakeholder interests in insolvency and debt restructuring frameworks. This is because, a theory is a factual concept or framework describing a given phenomenon, the way it is, or it ought to. Hence, [insolvency law theories provide the basis](#) upon which substantive insolvency laws and policies in different jurisdictions are prescribed or evaluated.

According to the Proceduralists theoretical ideals, the role of the court in insolvency proceedings must be approached as that of a disinterested arbiter. They believe that the court's task is to control parties' conflicting interests and to ensure transparency and integrity in the insolvency process. They contend that the judge should allow creditors to make their own decisions and influence the outcome they seek by directing and controlling competing stakeholders' collection processes and not to seek a particular outcome for the parties. Traditionalists, however, are of the view that a judge should play a key role in insolvency proceedings, especially on aspects of statutory interpretation and application of the law to facts presented by competing parties. Traditionalists believe in the exercise of judicial discretion because each case is different and is based on different facts and parties. Therefore, the law should not prescribe a "one size fits all" legal framework or system to address competing stakeholders' legal disputes.

In light of these competing perspectives, I argue that unlike in most advanced insolvency systems, such as those in the United Kingdom (UK) or the United States of America (USA) where there are designated specialist insolvency and bankruptcy courts, whose main jurisdiction is to deal with insolvency and/or bankruptcy related matters, courts in African developing economies lack specialist insolvency/bankruptcy courts. As a consequence, non-specialist insolvency judges preside over insolvency related disputes.

The dearth of specialist insolvency/ bankruptcy judges in African developing economies, places the role of the court as central, in balancing stakeholder interests as advocated by the traditionalists. This is to ensure that issues, such as [heavy reliance on insolvency practitioners](#) in driving the insolvency process, the potential imposition of restructuring plans on dissenting/minority creditors, unfair application of mechanisms, such as creditor cross-class cramdown do not create a degree of imbalance on creditor protection in insolvency. Moreover, a successful rescue process involves several players, such as the

company itself, and other stakeholders, including creditors, insolvency practitioners, and the courts that would require a custodian oversight to regulate and guide the process.

Therefore, my conclusion is that indeed, the court has a central role to play in balancing stakeholder interests as advocated by the traditionalists. This is because, insolvency proceedings require a coordination and balancing of various stakeholder interests, of which, a majority of them are born out of private contractual obligations between the debtor company and the interest holder, yet these are impacted on corporate insolvency. [Therefore, in African emerging economies, where local lending markets and debt structures are not as sophisticated as those in developed jurisdictions like the US or the UK](#), balancing creditor interests would be key to achieving insolvency law's distributive imperatives of fairness and equality of treatment.

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