INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF UGANDA

REVIEW OF THE INSOLVENCY ACT NO. 14 OF 2011

Proposals by ICPAU

SECTION	OBSERVATION	COMMENT
Section 2 Interpretation	The definition of the provisional liquidator seems to restrict such a person as to the role and purpose enshrined under section 94 beyond which the term provisional liquidator may not apply; yet we see the same being used in other sections other than section 94. For example under section 195(2)(c), 196(1)(c), 197(1), 203(1)(d) among others	**Our proposal** We propose to redefine the term "provisional liquidator" as follows; **"Provisional liquidator" means a provisional liquidator appointed under this Act;"** **Justification** To ensure clarity.
Section 59 (1) Notice of resolution for voluntary liquidation.	The section requires a resolution for voluntary liquidation, to be published in the *Gazette* and in a newspaper in the official language with a wide national circulation within fourteen days after the resolution being passed. There are however, mixed interpretations on the phrase 'a newspaper in the official language with a wide national circulation' when it comes to what may amount to an adequate circulation. For example; (a) If a notice was written in English but published in a vernacular media, would it be adequate? (b) What about if the publication was within the online version of a major newspaper?	**Our proposal** We propose that Section 59(1) be amended to clarify on items (a) and (b) identified under the Observation column. **Justification** To ensure clarity.

SECTION	OBSERVATION	COMMENT
Section 62 Power of a company to appoint and fix remuneration of Liquidators.	Under this section, the power to appoint and fix remuneration of liquidator is with the company. Section 85 makes costs of a voluntary liquidation like remuneration of the liquidator a priority to all other assets and section 12(4)(a) considers the remuneration expenses among the preferential debts. The danger with all this is that the entire process may be clothed with the risk of insider dealing that may reduce the assets available for sharing and hence acting to the detriment of creditors of the company as this position does not offer protection to creditors in instances of unreasonable remuneration.	**Our Proposal** We propose inclusion of a clause that provides for petitioning against remuneration of the liquidator if it is perceived to be unreasonable in circumstances where a Committee of Inspection has not been appointed under sec. 71. The new section 62(3) would read as follows; **Sec. 62(3) "A creditor who claims that the remuneration fixed to be paid to the liquidator is unreasonable, may petition court."** **Justification** To protect the creditors' interests.
Section 67 (6) Final Meeting and Dissolution	The section requires that a company be fully removed from the register upon the expiration of three months (after 90 days) from the date of filing of the final return.	**Our Proposal** We propose that this should be reduced to one month (30 days). Section 67(6) should be redrafted to read as follows; **"Upon the expiration of one month from the date of registration of the return, the company shall be taken to be dissolved unless the court, on the application of the liquidator or any other person who appears to the court to have an interest in the company, makes an order deferring the date on which the dissolution of the company is to take effect, for such time as the court may consider fit."** **Justification** To protect the public from unscrupulous individuals who might still want to conduct business illegally.

SECTION	OBSERVATION	COMMENT
Section 139 (1) Appointment of a provisional administrator	Section 139(1) of the Insolvency Act and Regulations 135(1) of Insolvency Regulations provide that a provisional administrator shall be appointed by a *special resolution of the board.* We note that, reference should either be made to a Board resolution or a Special resolution (passed in a members meeting), because there is no special resolution of the board in company law or in the Companies Act. Section 148(1) of the Companies Act, 2012 defines a special resolution as a resolution passed by a majority of not less than three fourths of such members as, being entitled so to do, vote in person or, where proxies are allowed, by proxy, at a general meeting of which notice specifying the intention to propose the resolution as a special resolution has been duly given.	**Our proposal** We propose that section 139(1) be redrafted to read as follows: **Section139 (1) "A provisional administrator of a company shall be appointed by a resolution of the Board and a notice in writing under this Part on the date of the interim protective order."** Similarly, Regulation 135(1) should be redrafted to read; **Regulation 135(1) "A company which by resolution of the board agrees to make a settlement with its creditors and appoints a provisional administrator under section 139 of the Act shall within fourteen working days after the resolution petition the court for an interim protective order to be made by the court in respect of the company."** **Justification** To provide for clarity.
Section 143(b) Effect of provisional administration.	Whereas section 143 gives in principle the effects of a provisional administration, that is, what should be and what should not be done during this period, subsection 143(b) seems to have been intended to be crafted in the negative to enable a company continue in provisional administration if this is in the interest of the company's creditors.	**Our Proposal** We propose to insert the word "NOT" immediately after the word may for the subsection to read as follows: **Section143(b) "an order for the liquidation of the company may not be made if the court is satisfied that it is in the interests of the company's creditors for the company to continue in provisional administration"**

SECTION	OBSERVATION	COMMENT
		Justification To allow an entity continue in provisional administration if this is in the best interest of the creditors.
Section 143(c) Effect of provisional administration.	This subsection seems redundant and or in conflict with the entire spirit of provisional administration. By principle, liquidation should be a latter procedure that comes when all other rescues mechanisms have failed. In essence a liquidator cannot be appointed when an entity is under provisional administration and as such a liquidator's functions and powers cannot be suspended if the liquidator is not yet appointed.	**We propose to delete subsection 143 (c)**
Section 145 (1) (b) Duration of provisional administration.	Section 145(1) (b) makes reference to an administration deed executed under section 148 instead of 149.	**Our proposal** We propose to amend subsection 145(1)(b) as follows; **145(1) A provisional administration shall terminate when -** **(a) ……** **(b) an administration deed is executed under section 149;** **Justification** To harmonise the reference.
145 (1) (c) Duration of provisional administration.	The subsection makes reference to a provisional liquidator yet the title of the section makes reference to provisional administration. If the section proceeds as is, it would create confusion by giving an implication that a provisional administration is henceforth same as a provisional liquidator	**Our proposal** We propose to amend section 145(1)(c) by replacing the word **provisional liquidator** with **provisional administrator** for the section to read as follows: **145(1)(c) "the provisional administrator gives the notices required under section 151."**

SECTION	OBSERVATION	COMMENT
		Justification To harmonise and clarify on the sections.
Section 146(3) Creditors' meeting to consider appointment of a provisional administrator	The Section provides that the meeting should be conducted in accordance with the Third Schedule of the Act. The Third Schedule provides for proceedings at meetings of creditors where each creditor is entitled to cast a number of votes proportionate to the value which the amount of the debt bears to the aggregate of the debts owing to all creditors. In practice, the creditors' meeting is usually held before debts are verified. When creditors are allowed to cast votes in this manner there is a danger/tendency that creditors will cast more votes than what the actual amount would be upon verification.	**Our Proposal** We propose that Sec. 146(3) and Clause 4 of the Third Schedule be harmonized.
Section 147(2) Notice of creditors' meeting	This section requires a provisional liquidator to give public notice of not less than 5 working days to each known creditor, while the Third Schedule (paragraph 2(1)) provides for a notice period of not less than 10 working days.	**Our proposal** We propose that the notice period for the meetings of creditors under Clause 2(c) of the Third Schedule also be set at not less than 5 working days as it is in Section 147(2). **Justification** To harmonise the provisions.
Section 179 Fundamental duty of a receiver.	Section 179(1) provides for the fundamental duty of a receiver as that of exercising his or her powers in a manner which he or she believes on reasonable grounds to be in the best interests of **all persons** in whose interests the receiver is appointed.	**Our proposal** We propose to delete section 181(3).

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	However, section 181(3) is to the effect that a receiver in exercising his or her powers is taken to act as the grantor's agent. This contradiction seems to add on to the confusion within the discourse of common law on what receivership should aim at and to whom should the receiver pay allegiance.	**Justification** The ultimate effect is that even where a security instrument may clearly guide on appointment of a receiver and hence an explicit understanding between the grantor (lender) and the receiver, the receiver is expected to owe a fiduciary duty to other persons like the borrower and hence expected to have a duty of care.