Promoting Professionalism in Accountancy

INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF UGANDA

CORPORATE RECOVERY & INSOLVENCY GUIDELINES

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Disclaimer

These Guidelines are based on a review of selected provisions of the Insolvency Act, 2011 (the Act) and the Insolvency Regulations, 2013.

Please note that the paper may not be a comprehensive summary of the Act. It includes information on matters which are relevant to ICPAU members. The paper is not intended to be exhaustive and should not be viewed as a substitute for reading the Act and the Regulations under the Act. The information contained in this paper does not constitute legal advice and should be treated with caution.

Although ICPAU has consulted widely on contentious issues, it is possible that a different view may ultimately be followed in practice. ICPAU recommends that any decision or actions being considered in relation to the Act be checked with appropriately qualified legal advisors.

Whereas every care has been taken in the preparation of these Guidelines, the ICPAU disclaims any responsibility or liability that may occur, directly or indirectly, as a consequence of the use and application of the Guidelines.

ABOUT ICPAU

The Institute of Certified Public Accountants of Uganda (ICPAU) was established under an Act of Parliament, now the Accountants Act, 2013.

The functions of the Institute, as prescribed by the Act, are to regulate and maintain the standard of accountancy in Uganda and to prescribe and regulate the conduct of accountants in Uganda. Under its legal mandate, the Institute prescribes professional standards to be applied in the preparation and auditing of financial reports in Uganda.

Vision

To be a world class professional accountancy institute.

Mission

To develop and promote the accountancy profession in Uganda and beyond.

Core Values

1) Professional Excellence.
2) Integrity.
3) Commitment.
4) Good Governance.
5) Social Responsiveness.

International Affiliations

The Institute is a member of the International Federation of Accountants (IFAC), the Pan African Federation of Accountants (PAFA) and the Association of Education Assessment in Africa (AEAA).

1.0 INTRODUCTION

These Guidelines have been prepared to assist accountants in complying with their obligations, arising from Insolvency legislation in Uganda, in relation to receivership, administration, liquidation, arrangements, bankruptcy and cross border insolvency among others, as required by the Act.

The Institute has developed Guidelines with the aim of providing guidance for practicing accountants on how to manage and handle insolvency work.

The Guidelines should also be read in conjunction with the wider fundamental principles embodied in the Insolvency Act, 2011, the attendant Regulations and the Code of Ethics for Professional Accountants.

Insolvency describes a situation where a person or a company gets into financial difficulty. A business may owe more than it owns, or it may have run out of cash and be unable to pay bills. The law (mainly the Insolvency Act, 2011) sets out a number of procedures which aim to deal with insolvent persons.

Bankruptcy refers to a court order against a person (not a company) made under the Insolvency Act, 2011.

There are two forms of insolvency: cash-flow insolvency and balance-sheet insolvency.

Cash-flow insolvency is when a person or company has enough assets to pay what is owed, but does not have the appropriate form of payment. For example, a person may own a large chunk of farmland and a valuable car, but not have enough liquid assets to pay a debt when it falls due. Cash-flow insolvency can usually be resolved by negotiation. For example, the bill collector may wait until part of that land or car is sold and the debtor agrees to pay a penalty.

Balance-sheet insolvency is when a person or company does not have enough assets to pay all of their debts. The person or company might enter bankruptcy, but not necessarily. Once a loss is accepted by all parties, negotiation is often able to resolve the situation without bankruptcy.

2.0 HISTORICAL DEVELOPMENT OF INSOLVENCY LAW IN UGANDA

In Uganda, the years after independence witnessed application of several laws inherited from our colonial masters. Among them included such principal legislations governing insolvency like the Companies Act Cap 110, the Bankruptcy Act Cap 67 and the Deeds of Arrangements Act.

Other laws closely aligned to insolvency included the Mortgage Act, the Civil Procedure Act, Registration of Titles Act, the Charters Transfer Act, the Income Tax Act, Limitation Act, 1959, Debts Summary Recovery Act, 1937.

The Companies Act, Cap 110 provided for corporate insolvency and the Bankruptcy Act governed personal insolvency. Both of these laws were antiquated being of 1948 and 1914 respectively. Generally, the law was scattered in different legislations. Therefore it was

necessary to have a single legislation. The Uganda Law Reform Commission spearheaded reform and published a draft for insolvency law in Uganda which culminated into the Insolvency Act 2011.
This piece of legislation marked the core of a new Insolvency regime in Uganda. It is an exciting development for the Insolvency Practitioners, Financial Institutions and other key business and commercial players.

3.0 LAW ON INSOLVENCY

3.1 Objectives of the Insolvency Act, 2011

The essential objective of an effective insolvency system is the establishment of a protective mechanism to ensure that the value of the estate's assets is not diminished by the actions of various parties involved.

The Act has the following objectives;

(a) To secure an equitable distribution of the property of the debtor among creditors according to their respective rights against the debtor;
(b) To relieve the debtor of liability to the creditors and to enable the debtor make a fresh start in life free from the burden of debts and obligations;
(c) To protect the interests of the creditors and the public by providing for the investigation of the conduct of the debtor's affairs and for the imposition of punishment where there has been fraud or other misconduct on the part of the debtor.

3.2 Features of the Insolvency Law

The Insolvency Act, 2011 interalia provides for receivership, administration, liquidation, arrangements, bankruptcy the regulation of insolvency practitioners and cross border insolvency.

The significant features introduced by the Act include:

(a) Creation of Single Insolvency Code and increased specialisation driven by strict regulatory framework;
(b) Improved corporate governance;
(c) Introduction of a new aspects relating to regulation of Insolvency Practitioners, their qualifications and uniform training;
(d) Clarification the role of the Official Receiver and increased powers of the Official Receiver;
(e) Provisions on Receivership;
(f) Cross-Border Insolvency and cross border transactions;
(g) Protection against bankruptcy in respect of individuals in the form of interim and Arrangement Orders and also for Companies in the form of Administration; and
(h) Protection of the Insolvent's estate among others.

Under, Section 204, an accountant who is a registered member of the ICPAU is a qualified person to act as an insolvency practitioner.

The Insolvency Regulations, 2013 provide procedures for bankruptcy, arrangements, administration, liquidation and receivership.

4.0 LEGAL AND REGULATORY FRAMEWORK

This section explores different ways in which the Act mordernised and consolidated Uganda's outdated Insolvency and Bankruptcy laws into a single law, that permits fresh recourses for creditors and debtors that are more in line with the current global practices.

4.1 Role of the Official Receiver

The Official Receiver under the Insolvency Act means a person appointed under Section 198 of the Act. Section 198 provides that the Official Receiver shall be appointed by the Minister to perform the functions of the official receiver under the Act. The Registrar General was thus appointed as the Official Receiver by the Minister of Justice and Constitutional Affairs to carry on the same.

The powers and functions of the Official Receiver under the Section 199 include:

(a) Investigating the directors, shareholders, contributories and all present and past officers of an insolvent company or of a company which being wound up or liquidated, for the purpose of establishing any fraud of impropriety.

(b) Investigating the promotion, formation, failure and conduct of business of an insolvent company.

(c) Prosecute any person for offences committed under the Act or discovered to have a case to answer as a result of the investigations carried out.

(d) Investigating the conduct of Insolvency Practitioners and to prosecute them for any offences committed under the Insolvency Act.

(e) Act during the vacancy in the office of an insolvency practitioner. This provision seems to empower the Official Receiver to take over the functions of a Receiver/Manager even in the case of a creditor's enforcement initiated without recourse to court.

(f) Taking all necessary steps and Actions considered fit for the official receiver to fulfill provisions of the Act.

Under section 20(3), on making the bankruptcy order, the Official Receiver is usually appointed as the interim receiver of the estate for the preservation of the estate of the bankrupt.

Section 27 states that the bankrupt's estate shall, vest first in the official receiver and then in the trustee, without any conveyance, assignment or transfer.

Under Section 20(4) gives the Official Receiver powers to sell or otherwise dispose of any perishable and any other goods, the value of which is likely to diminish if they are not disposed of unless the court limits the powers or places conditions on the exercise.

Section 22 (4) makes it mandatory for the official receiver to take part in the public examination of the debtor under individual insolvency and may employ an advocate if he or she desires.

The Official Receiver is also required in fulfilling his duty of investigating the affairs of the bankrupt to make a report to the court if he or she thinks fit e.g. Section 42(2) in making the Discharge Order, the court considers a bankrupt's application for discharge, takes into consideration the official receiver's report on the bankruptcy.

Section 59 (2), requires the resolution for voluntary liquidation to be registered with the registrar and a copy sent to the official receiver within seven days from the date of passing the resolution.

4.2 Role of Courts in Insolvency Proceedings

Since insolvency proceedings aim at a judicially approved and supervised rehabilitation or liquidation of the estate of an insolvent, the proceedings must be initiated in a court having the necessary judicial powers.

Section 254 (1) of the Act gives authority to the High Court of Uganda to have jurisdiction over all matters concerning companies.

Part IX of the Act (Cross Border Insolvency), the High Court has absolute discretion to make the necessary orders for cross border insolvency proceedings.

Court presided over by a chief magistrate shall have jurisdiction over all insolvency matters against individuals the subject matter of which does not exceed fifty million shillings.

The court under Section 19 has the authority to set aside voidable transactions described in Sections 16-18 and where the transaction is set aside, court may make more orders such as;

(a) requiring a person to pay to the liquidator, receiver or trustee, in respect of benefits received by that person as a result of the transaction, the sums which fairly represent those benefits;
(b) requiring property transferred as part of the transaction to be restored to the company or the bankrupt's estate;
(c) requiring property to be vested in the company or the trustee if it represents in a person's hands the application, either of the proceeds of sale of property or of money, so transferred;
(d) releasing, in a whole or in part, a charge given by the company or individual;
(e) requiring security to be given for the discharge of an order made under this section; or
(f) specifying the extent to which a person affected by the setting aside of a transaction or by a declaration or order made under this section is entitled to claim as a creditor in the liquidation or bankruptcy.

4.2.1 Corporate Insolvency

Under Section 81, the court has power to appoint and remove liquidator in voluntary liquidation. The court may, as it thinks just, amend, vary or confirm an arrangement on appeal of a creditor or contributory within three weeks from the completion of the arrangement (Section 83(2).

Subject to Section 87, where a company passes a resolution for voluntary liquidation, the court may make an order that the voluntary liquidation shall continue, subject to the supervision of court and with the liberty for the creditors, contributories or other interested persons, to apply to court and generally on such terms and conditions as the court may think just.

Subject to Section 89(1), where an order is made for liquidation subject to supervision, the court may by that order or any subsequent order appoint an additional liquidator.

Courts also play a crucial role in Liquidations by court under Section 93 where liquidation of a company by the court shall be taken to commence at the time of presentation of the petition for Liquidation.

Under Section 115(4), Court has a duty of reviewing the decision of the liquidator to decline a request to call a creditors' or shareholders' meeting on the application of the creditors or shareholders.

Under Section 115(6), Court has the authority to make a decision where there is a difference between the decisions of meetings of creditors and meetings of shareholders on the question of appointing a committee of inspection; or the membership of a committee of inspection.

4.2.2 Court supervision of liquidation

Under Section 117 (1), on the application of the liquidator, any committee of inspection, the official receiver, or, with the leave of the court, any creditor, shareholder or director of a company in liquidation, 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;
(c) order an audit of the accounts of the liquidation;
(d) order the liquidator to produce the accounts and records of the liquidation for audit and to provide the auditor with information concerning the conduct of the liquidation as the auditor may request;
(e) in respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances and where an amount retained by the liquidator is found by the court to be unreasonable in the circumstances, order the liquidator to refund the amount;
(f) declare whether or not the liquidator was validly appointed or validly assumed custody or control of any property; or
(g) make an order concerning the retention or the disposal of the accounts and records of the liquidation or of the company.

Under Section 118, court has a duty of enforcing of liquidator's duties. Where the liquidator fails to comply with any of the duties of a liquidator, the court may, on such terms and conditions as it considers fit—

(a) relieve the liquidator of the duty to comply, wholly or in part;
(b) without prejudice to any other remedy which may be available in respect of a breach of duty by the liquidator, order the liquidator to comply to the extent specified in the order; or
(c) remove the liquidator from office.

4.2.3 Cross-border Insolvency and East African Community Issues

Courts operate in a cooperative manner to resolve any dispute relating to individual or corporate insolvency in cases where the insolvent has properties in both jurisdictions. They enhance co-operation with reciprocating states to efficiently adjudicate insolvency proceedings.

Section 245 (1) requires court to cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a trustee or liquidator, in applications for recognition of foreign proceedings in section 235 of the Insolvency Act.

Cross-Border issues are becoming increasingly common in restructuring and Insolvency. Insolvencies generally involve companies with operations in several jurisdictions.

The significant differences in Insolvency Regulation and procedure among nations and increased globalization of business activities has led to a need for a clearer understanding of applicable law between countries and some level of parity of the legal parameters of Cross-Border Insolvency.

Insolvency Laws in Uganda have not kept pace with commercial and financial trends. They are generally ill-equipped to deal with cases of Cross - Border nature. In response to this need and rapid expansion of global economic Activities, Uganda undertook the task of harmonizing the insolvency processes across national borders by adopting the United Nations Commission on International Trade Law (UNCITRAL) model on Cross-Border Insolvency whose main purpose is to promote:

(a) Co-operation between courts and other competent authorities of this state and foreign states involved in cases of Cross-Border insolvency;

(b) Greater legal certainty for trade and investment;

(c) Fair and efficient administration of Cross-border insolvencies that protects the interests of all creditors and other interested persons including the debtor;

(d) Protection and maximization of the value of the debtor's assets; and

(e) Facilitation with the hope to rescue financially troubled businesses, thereby protecting investment and preserving employment.

The adoption of the UNCITRAL model law on cross-border Insolvency would provide an effective means of achieving this.

4.3 Receivership and Liquidation provisions under some of the laws

(a) Part VI —Winding up under the Companies Act, 2012 provides for the modes of winding up a company, jurisdiction to wind up companies registered in Uganda, cases in which a company may be wound up by the court, circumstances in which company may be wound up by the court, petition for winding up and effects thereof, Consequences of winding up order among others.

(b) Part X of the Financial Institutions Act, 2004, gives the Central Bank powers to close a Financial Institution, place it under receivership and become the receiver of the closed Financial Institution.

(c) Part VIII—Dissolution of a Registered Society of the Cooperative Societies Act provides for the appointment of a liquidator appointed under section 62. Section 64 gives powers to the registrar and he or she can rescind or vary any order made by a liquidator and make whatever new order is required; remove a liquidator from office and appoint a new liquidator; call for all books, documents and assets of the society; by order in writing, limit the powers of a liquidator; require accounts to be rendered to the registrar by the liquidator at the registrar's discretion; procure

the auditing of the liquidator's accounts and authorise the distribution of the assets of the society.

5.0 INDIVIDUAL INSOLVENCY

5.1 Stages of Bankruptcy Proceedings

The following are some of the stages of bankruptcy:

(a) Bankruptcy petition

Every bankruptcy starts with a bankruptcy petition presented either by a creditor or the debtor themselves (Section 20).

The amount owed has to be an unsecured, liquidated sum. In order to show that the debtor is unable to pay their debts, a creditor usually relies upon either the debtor's failure to comply with a statutory demand for payment or else upon their failure to honour a court's order to pay a debt.

(b) Court hearing

At the hearing, the court will determine whether to make a bankruptcy order or not.

(c) Appointment of an Official Receiver

On the making of a bankruptcy order, the court will appoint an Official Receiver to take control of the debtor's property.

(d) Submission of statement of affairs (Section 21)

The debtor has to submit a statement of affairs to the Official Receiver within 21 days of the making of a bankruptcy order. Based on the statement of affairs, the Official Receiver will decide whether it is necessary to call a meeting of creditors to enable them to appoint an insolvency practitioner of the creditors' choice as the trustee in bankruptcy.

(e) Public Examination of the debtor

Where a petition for a bankruptcy order is presented to the court under section 20 of the Act, the court shall direct that a public examination be held on a day appointed by the court and the debtor shall attend on that day and be publicly examined on his or her affairs, dealings and property.
The examination shall be held as soon as conveniently practicable after the expiration of the time given by the court for the submission of the debtor's statement of affairs under section 20.

(f) Creditors' meeting

A creditors' meeting will be held at the discretion of the Official Receiver or at the request of creditors who make up at least one quarter in value of the bankrupt's creditors. A trustee in bankruptcy can be appointed at the creditors' meeting.

(h) Vesting of debtor's property

All of the debtor's personal property would be treated as vested in the trustee in bankruptcy on the date of the bankruptcy order. The debtor is only allowed to retain the basic essentials for their trade and living.

(g) Distribution of assets

The trustee in bankruptcy will convert the debtor's property into money, and use that money to pay the bankrupt's debts.

(h) Secured creditor

An unsecured creditor will not depend on the trustee in bankruptcy for repayment of the debts due to them. They can realise the asset over which they have security interest and keep the sales proceeds in discharge or reduction of the debts owed to them.

If the sale does not produce funds sufficient to cover the debt, the creditor can claim the balance as an unsecured creditor. If, on the contrary, the proceeds of sale exceed the sum owed to them, they have to pay over the excess to the trustee in bankruptcy for distribution among other creditors.
The money realised from sale of the bankrupt's assets will be distributed as required by the law.

(i) Cost of bankruptcy

The expenses incurred as a result of bankruptcy, including the professional charges of the trustee in bankruptcy.

(j) Ordinary unsecured creditors including postponed creditors
Certain debts can only be paid once all the ordinary unsecured creditors' debts have been paid in full.

(k) Termination of bankruptcy

Bankruptcy terminates;

(i) when a bankrupt is discharged from bankruptcy;
(ii) when the bankruptcy order is annulled; or
(iii) upon withdrawal of a bankruptcy petition with leave of court.

However, Court shall not grant any application for withdrawal if it is proved to the satisfaction of the court that rights and interests of other creditors are likely to be prejudiced.

5.2 Discharge of the bankrupt

A bankrupt shall be discharged from bankruptcy, when the court, on an application by the bankrupt makes an order discharging the bankrupt.

The court shall, while considering a bankrupt's application for discharge, take into consideration the official receiver's report on the bankruptcy and the conduct of the bankrupt during the bankruptcy proceedings and any other matters court may consider pertinent.

When the bankruptcy order is discharged, the bankruptcy comes to an end and the bankrupt is released from most of their previous debts and freed from most of the disqualifications that affect a bankrupt. Any property that has vested in the trustee in bankruptcy remains so, and is not returned to the debtor.

Any property acquired by the debtor after discharge of the bankruptcy order does not vest in the trustee in bankruptcy but belongs to the ex-bankrupt.

5.3 Duties of a trustee

Where a trustee is appointed before conclusion of an examination; he or she may take part in the examination (Section 22).

The fundamental duty of a trustee is to collect, realise as advantageously as is reasonably possible and distribute, the bankrupt's estate in accordance with Part I and Part II of the Act.

A trustee shall—

(a) take custody and control of the bankrupt's estate;
(b) register in his or her names all land and other assets forming part of the bankrupt's estate at the making of the bankruptcy order notwithstanding any transactions that may have taken place and any other law;
(c) keep the bankrupt's estate's money separate from other money held by or under the control of the trustee;
(d) keep, in accordance with generally accepted accounting procedures and standards, full account and other records of all receipts, expenditures and other transactions relating to the bankruptcy and retain the accounts and records of the bankruptcy for not less than six years after the bankruptcy ends;
(e) permit those accounts and records to be inspected by—
    (i) any committee of inspection unless the trustee believes on reasonable grounds that inspection would be prejudicial to the bankruptcy; or
    (ii) if the court so order, any creditor; and
    (iii) perform any other function or duty specified in the Act.

5.4 Official name of trustee

The official name of a trustee in bankruptcy is the trustee of the property of a bankrupt, with an insertion of the name of the bankrupt and by that name; the trustee exercises any of the trustee's functions, powers and duties.

Where a person does not comply with a requirement of the trustee under section 33, the court may, on the application of the trustee, order the person to comply and may make ancillary orders as it thinks fit.

5.5 Failure to keep proper accounts of business

Where a bankrupt has been engaged in any business within two years before the petition, he or she commits an offence if he or she has not kept accounting records that give a true and fair view of the business' financial position and explanations thereon.

The bankrupt does not commit an offence under subsection (1), if he or she proves that in the circumstances in which he or she carried on business, the omission was honest and excusable.

5.6 Consequences of bankruptcy

Where a debtor is adjudged bankrupt, he or she is disqualified from—

(a) being appointed or acting as a judge of any court in Uganda; or
(b) being elected to or holding or exercising the office of the President, a member of Parliament, Minister, a member of a local government, council, board, authority or any other government body. Under S. 26 of the Accountants Act, 2013, a person is not qualified to be enrolled as a member of the Institute or to continue to be a member of the Institute if he or she is an undischarged bankrupt.

Where a person holding the office of justice of the peace or any other public office is adjudged bankrupt, the office immediately becomes vacant.

The disqualifications to which a bankrupt is subject to, do not apply where—

(a) The adjudication of bankruptcy against the individual is annulled;
(b) A period of five years elapses, from the date of discharge of the bankrupt; or
(c) The individual obtains from the court his or her discharge with a certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his or her part.
(d) Court grants or withholds the certificate as it thinks fit, but any refusal to grant the certificate is subject to appeal.

5.7 Arrangement with respect to individuals

A debtor who intends to make any arrangement with his or her creditors may apply to court for an interim protective order.

During this period, a debtor—an application for bankruptcy relating to the debtor does not proceed and a receiver of any property of the debtor is not appointed.

An interim order ceases to have effect at the end of fourteen working days after making an order.

The debtor shall have the following duties among others;

(a) Documenting proposals setting out the terms of the arrangement; and
(b) Preparing a statement of his or her affairs containing—
  (i) particulars of the debtor's creditors, debts and assets; and
  (ii) any other prescribed information

6.0 CORPORATE INSOLVENCY

Corporate insolvency should be approached with a rescue culture. A company becomes insolvent if it does not have enough assets to cover its debts and/or it cannot pay its debts on the due dates.

It is the directors' responsibility to know whether or not the company is trading while insolvent to avoid a legal responsibility for continuing to engage in **wrongful trading**. The decision to appoint **receivers, liquidators** and **administrators** is the responsibility of the appropriate parties i.e. banks and lending institutions, creditors, the courts, the directors or the company itself.

6.1 Procedures open to an insolvent company

These fall into five main categories. The first three provide the potential for the rescue of the company or its business, while the last two do not:

- **Administrations**
- **Administrative receiverships**
- **Company voluntary arrangements**
- **Creditors' voluntary liquidations**
- **Compulsory liquidations**

A company can be placed into a formal insolvency procedure by its directors, shareholders, creditors or the court. This is done depending on the facts of each case and the procedure involved under the control of an appointed insolvency practitioner (IP) who is professionally qualified and licensed.

a. Administration: This is a collective corporate rescue procedure run for the benefit of all creditors, under which the company's assets are protected by virtue of a statutory 'moratorium', or stoppage, of any forms of creditor action. Administrators have the power to trade on the insolvent business and may look to find a buyer for it.

b. Administrative receivership: Is a process initiated by a secured creditor (normally a lender) who has doubts regarding a company's ability to repay the sums owed.
An administrative Receiver is an official appointed by a court or a lender (under the terms of a secured debenture) who takes control of all, or substantially all, assets of a company in receivership and is mandated to pay off the company's debts, if possible, without liquidating it.

Administrative receivers have no authority to pay unsecured creditors. Doing this requires a subsequent liquidation, although administrators can also make such payments with the approval of court.

c. Company Voluntary Arrangement (CVA): This is a binding form of agreement between a company and its creditors which is legally regulated. Under a CVA, creditors will typically agree to a reduced or rescheduled debt arrangement which will allow the company to survive. CVAs are sometimes used in conjunction with the administration procedures.

d. Scheme of arrangement: This is a compromise or arrangement between a company and its creditors or members. It is similar to a CVA in many respects, although it must be approved by a court.

The process is more complicated than a CVA, and only be used on large companies and those with a significant number of classes of creditor or shareholder. Whether unsecured creditors can be repaid where a company enters into a CVA or scheme of arrangement is determined by the related documentation. These arrangements rarely interfere with secured creditors' rights.

e. **Compulsory Liquidation:** This is the collective process by which a company is ended by converting all of its assets into their cash value and distributing them to shareholders if the company is solvent or creditors if the company is insolvent. The liquidator must also examine the directors' conduct, and take action if appropriate.

6.2 The Liquidation Process in Uganda

The liquidation of a company may be by:

- by the court;
- voluntary; or
- Subject to the supervision of the court.

The Insolvency Practice Regulations, 2013 make provisions for:

- Appointment of the liquidator
- Conduct and experience of the liquidator
- General powers of the liquidator
- Rights of creditors and shareholders
- Supervision and enforcement by the court
- Reporting requirements

6.3 Appointment of an administrator

An administrator must be a professional 'insolvency practitioner'. During administration, directors must hand over control of the company and everything it owns (its 'assets') to the administrator. The administrator's fees are paid by the company.

Administrator can be appointed in a number of ways, either by:

- The company, through an officer of the company other than a director;
- The Directors;
- One or more secured creditors, or
- One or more unsecured creditors;

The aim of placing a company under administration is to either rescue the company as a going concern or achieve a better result for the creditors than if a company is wound up.

6.3.1 Broad objectives and Outcome of administration

Under section 140 are to:

(a) to investigate the company's business, property, affairs and financial circumstances; and
(b) to exercise his or her powers in a manner which he or she believes on reasonable grounds to be likely to achieve one or more of the following outcomes—

(i) the survival of the company and the whole or any part of its undertaking as a going concern;
(ii) the approval of an administration deed under section 150; and
(iii) a more advantageous realisation of the company's assets than would be effected in a liquidation.

6.3.2 How administration works

The administrator writes to the creditors and regulators informing them of his or her appointment. A notice of the appointment is published in the Gazette.

The administrator will try to stop the company being wound up ('liquidated'). If he or she cannot, he or she will try to pay as much of the company's debts as possible from the company's assets.

The administrator could decide to:

(a) negotiate a Company Voluntary Arrangement (CVA) so your company can keep trading.
(b) sell your business as a 'going concern' to another company - meaning the business can carry on, e.g. by keeping its clients, workforce or orders
(c) sell the company assets as part of a creditors' voluntary liquidation, pay creditors from any money raised and close the company
(d) close the company if there's nothing to sell

For as long as the company is in administration, the administrator will run the business and has control over all operations of the business during administration.

6.3.3 Administration Period

The company's administration ends when either:

(a) the administrator decides the purpose of administration has been achieved, e.g. a CVA has been agreed with the creditors
(b) the administrator's contract ends

Note that, there is no protection against any legal action the creditors take once administration has ended.

6.4 Claims Settlement Process

When a company is placed under administration or liquidation, creditors are repaid in the following descending order of priority depending on the amount of cash available:

(a) secured creditors' claims (fixed charge realisations);
(b) expenses relating to the administration or liquidation;
(c) Insolvency Practitioners' fees;
(d) preferential creditors' claims, including employee claims;
(e) secured creditors (floating charge realisations);
(f) unsecured creditors' claims – usually distributed by a liquidator; and
(g) shareholders – very unusual, otherwise the company would not be insolvent.

6.5 Receivership

This is the situation in which an institution or enterprise is being held by a **receiver.**

A receiver is appointed through:

(a) Court

- Appointment specified in the court order.
- Court will direct the indemnity of the Receiver.

(b) An instrument

- This takes effect when receiver accepts appointment in writing.
- Where the Indemnity is through the appointer.

6.5.1Types of Receiverships

There are several types of receiver appointments:

(a) Appointed by a government regulator
(b) Privately appointed receiver
(c) Court-appointed receiver

6.5.2 Duties of a receiver

(a) Runs the company in order to maximize the value of the company's assets, sell the company as a whole, or sell part of the company and close unprofitable divisions.
(b) Secures the assets of the company and/or entity.
(c) Realizes the assets of the company and/or entity.
(d) Manages the affairs of the company in order to resolve debts owing.

6.5.3 Directors' Duties

Directors pay close attention to the company's financial situation. When a company becomes insolvent, the directors' primary duty shifts to the creditors of the company rather than its shareholders, and directors can face a variety of sanctions if they allow an insolvent company to continue to trade to the detriment of its creditors.

6.5.4 Insolvency procedures best fist to enforce debt recovery

A **creditor** has a limited range of **insolvency** tools to enforce recovery – comprising court action against a **debtor's** assets and/or **liquidation** of the company or bankruptcy of the individual.

In many cases this action can be counterproductive by forcing a business to cease trading and depressing the realisable value of the assets. It is often preferable to ensure a business keeps trading to preserve value and future customers.

This is dependent upon the directors cooperating in recognising financial difficulty and implementing a rescue procedure such as **administration** or **company voluntary arrangement.**

This requires persuasion and negotiation with the **creditor**, who will sometimes use a threat to wind up the company as a lever. It is possible for a **creditor** to apply to court for an **administration** order against the directors' wishes.

7.0 THE PROCESS OF WINDING UP A COMPANY IN UGANDA

This depends on the 3 types of winding up of companies:-

1. Creditors winding up.
2. Members voluntary winding up.
3. Compulsory winding up – under supervision.

7.1 Creditors Winding Up

Procedure:

1. File an extraordinary resolution to wind up an account of the inability of the company to meet its liabilities.
2. File a resolution appointing a liquidator and members of a committee of inspection
3. The winding – up resolution and notice of the liquidator's appointment are Advertised in the Gazette and filed with the Registrar
4. The Liquidator assumes control of the Company's assets, makes calls upon the contributories (if necessary), discharges the Company's liabilities (paying the preferential debts first, and claiming the proceeds of assets subject to floating charges, if necessary) and distributes any surplus among shareholders according to their rights
5. The Liquidator must file twice yearly the final accounts with the Registrar a statement of receipts and expenditures
6. The Liquidator then files the final accounts with the Registrar
7. Three months after, the Company is automatically dissolved

7.2 Member's Voluntary Winding Up

Applicable Laws are:

- The Companies Act No.1 of 2012
- The Insolvency Act, 2011

Procedure:

1. A company may within 30 days before the passing of the resolution to wind up, deliver to the Registrar and the Official Receiver a Statutory Declaration of Solvency, which includes a statement of company's assets and liabilities.
2. Members pass a special resolution to wind up the company which is filed with the Registrar of Companies and the winding up commences at passing of the resolution.
3. A Copy of the registered resolution is sent to the Official Receiver.
4. File, Notice of the Resolution in the gazette and a newspaper of wide circulation within 14 days.
5. Advertise appointment of a Liquidator in the Gazette within 14 days of appointment-Form 12 of Insolvency Regulations 2013.
6. Register with the Registrar a copy of the Gazette Notice and deliver a copy to the Official Receiver.
7. Liquidator to File a Statement of Affairs for the Company-Form 20 of Insolvency Regulations.

8. Liquidator summons a general meeting at the end of each year.
9. The liquidator gives a public notice of the preliminary or interim report of liquidation using Form 25.
10. When winding-up is completed, the liquidator calls for a final meeting of the company by at least 30 days notice in the Gazette and newspaper and submits final accounts. The Return of Final Accounts is filed in Form 26 of Insolvency Regulations 2013.
11. File with the Registrar, a Return of the meeting in Form 105 of Insolvency Regulations 2013.
12. Three months later the company is automatically dissolved.

7.3 Compulsory Winding – up under Supervision

This starts with a petition

1. Where a Company is being wound up voluntarily, any person who would have been entitled to petition for compulsory winding up may petition instead of the voluntary winding up to be continued subject to the supervision of court.
2. The Petitioner must prove that voluntary winding up cannot continue with fairness to all concerned parties.
3. Court may then appoint an additional Liquidator or continue with the existing Liquidator to give security
4. The Liquidator must file with the Registrar every three months a report of the progress of the liquidation

8.0 INSOLVENCY PRACTITIONERS

An insolvency practitioner means an insolvency practitioner under section 203 of the Act. An IP is someone who is licensed and authorised to act in relation to an insolvent individual, partnership or company.

8.1 Qualifications to act as an Insolvency Practitioner

A person is not qualified to be appointed or act as an insolvency practitioner unless—

(a) he or she is a lawyer, an accountant or a chartered secretary who is a registered member of the relevant professional body or is a registered member of any other professional body as the minister may prescribe; and
(b) there is in force at the relevant time, security or professional indemnity for the proper performance of his or her duties in accordance with the prescribed requirements.

Acting as insolvency practitioner without qualification is an offence.

The following persons are not permitted or allowed act as liquidators, provisional liquidators, provisional administrators or administrators—

(a) A creditor of the company in liquidation or under administration or of an associated company; or
(b) A person who has, within the previous two years been a shareholder, director, auditor or receiver of the company in liquidation or under liquidation or of any associated company.

The following persons cannot be appointed or act as a receiver—

(a) A chargee of the property under receivership;
(b) A person who has, within the two years immediately preceding the commencement of the receivership, been a shareholder, director or auditor of any chargee of the property in receivership; or
(c) A person who is disqualified from acting as a receiver by the appointing document.

A creditor of an individual may not be appointed or act as a supervisor of an Individual's arrangement or as trustee of his or her estate.

Court may make a prohibition order where it is proved to the satisfaction of a court that a person is unfit to act as an insolvency practitioner by reason of—

- persistent failure to comply;
- the seriousness of a failure to comply; or
- any other sufficient cause.

8.2 Responsibilities of an Insolvency Practitioner

An insolvency practitioner should not act in any matter unless he or she has obtained a valid license from the official receiver.

An insolvency practitioner is required to keep and maintain proper records for at least six years.

Insolvency practitioners must follow the law and their work is monitored by regulators to make sure that they perform as required and that they continue to be fit to carry out insolvency work.

Insolvency practitioners are appointed to sort out difficult situations. An insolvency practitioner is able to advise on, and undertake appointments in, all formal insolvency procedures including, liquidations, company voluntary arrangement, administration, receiverships, and bankruptcy and individual voluntary arrangements.

If that is not possible, the insolvency practitioner aims to:

- sell the assets of the person or company who owes money (the debtor);
- collect money due to the debtor;
- agree creditors' claims (if there is enough money to go round); and
- distribute the money collected after paying costs.

The insolvency practitioner is not personally liable for any money owed to creditors. In most cases, this also applies to money owed to creditors who have traded with a business after the insolvency process has started.

The insolvency practitioner must follow the Insolvency Act and other relevant laws. The law sets out the powers and duties of the Insolvency Practitioner. The Insolvency Practitioner's responsibilities include reporting on the conduct of the directors of a failed company. This report is confidential.

In some cases, the insolvency practitioner gives advice to a debtor immediately before a formal insolvency process begins. In a voluntary liquidation (one which does not involve a

winding-up process through the courts), an insolvency practitioner helps the directors of the company to meet their legal duties – for example, calling meetings of the shareholders and creditors to place the company into liquidation and appoint a liquidator.

In voluntary arrangements, the insolvency practitioner acts as the '**nominee**' for the proposed arrangement. This means that the debtor has asked the insolvency practitioner to supervise the arrangement. As the nominee, the insolvency practitioner has to make sure that creditors receive all the details they need to make a decision at the meeting held to vote on the proposal for a voluntary arrangement.

In receiverships and administration cases, the insolvency practitioner may advise the directors or a major creditor on the different insolvency options available.

8.3 Involvement of creditors

Creditors will usually be invited to a meeting early in the process. In some cases, they meet to appoint the Insolvency Practitioner. In others, the meeting is held to pass on information to creditors. Sometimes, the insolvency practitioner reports to creditors each year. In other cases, such as bankruptcies, this does not apply.

Creditors can help the insolvency practitioner by providing information, for example, to help the IP trace and collect assets. Creditors may also form a committee to work with the Insolvency Practitioner.

8.4 Fees and charges

The fee usually relates to the time the Insolvency Practitioners and their staff spend working on the case. Sometimes, the Insolvency Practitioner's fee may be a percentage of the amounts they collect and distribute to the creditors. This fee is paid out of the funds the IP collects before any money is paid to the creditors.

8.5 Ethical Requirements

An insolvency practitioner owes duties to the public, including those who retain or employ him, to the profession of which he is a member, to fellow practitioners and, where relevant, to his partners. In carrying out his or her duties he or she should remember at all times the responsibility which has been placed upon him by law and ICPAU as his or her Professional Body.

A practitioner should be prepared and be able to demonstrate to ICPAU that he or she has administered his practice in a manner such as to satisfy a reasonable person's view as to his proper conduct.

Before accepting any appointment the practitioner should consider the implications of such an appointment, in the light of the Code of Ethics for Professional Accountants. Clear written evidence of the matters considered and the conclusion reached should be recorded with the Practitioner's papers.

The practitioner should not accept appointment unless he is satisfied that he has sufficient resources to perform his duties. He or she should be able to demonstrate the thinking behind

allocation of resources to each aspect of the cases administered. The practitioner should have arrangements in place to progress his cases in the event of his prolonged incapacity.

The practitioner should maintain a permanent and on-going record of training of practitioners and staff levels in a form such as to enable ICPAU, if it so requires, to review the extent, degree and adequacy of training and of keeping personnel up to date with changes in legislation and good insolvency practice.

The practitioner should maintain adequate records for the methods by which each case is controlled and progressed through both commercial decisions and legal requirements. It is anticipated that this will require the establishment and maintenance of a system of permanent files with supporting progress checklists. As part of that system, practitioners should maintain adequate records to show that appropriate investigations have been carried out to satisfy the legal requirements

Section 41 of the Accountants Act provides for disciplinary action against errant accountants.

8.6 Complaints against the services of an Insolvency Practitioner

Before making a complaint about an Insolvency Practitioner to the regulators, it is advisable that the complainant contact the insolvency practitioner directly.

Concerns often arise as a result of misunderstandings about the insolvency practitioner's role and it is always best to try to raise these with the insolvency practitioner. If the insolvency practitioner is not able to solve the complaint, one may then take the complaint further with the regulatory authority.

9.0 SALIENT ISSUES REGARDING INSOLVENCY PRACTICE IN UGANDA

The following are some of the specific salient issues accountants should bear in mind.

- General duties of a liquidator (Section100), shall among other duties, keep in accordance with **generally acceptable accounting procedures and standards full accounts and records** of receipts, expenditure and other transactions of the company; keep accounts and records of the receivership of the company under his management for a period not less than six years after the Insolvency Proceedings; prepare and **submit to the Official Receiver regular** reports on the state of affairs of the property.
- **Insider dealings (Section 18)**, specifically targets transactions entered into with spouses, siblings, children and persons of close social close proximity to the insolvent, or his/her employees, professional advisors or service providers twelve months before commencement of insolvency.
- All properties vested in the bankrupt's estate (Section 31) are formally vested in the official receiver without any conveyance or transfer. The debtor however my retain **his matrimonial home and other property of a value to be prescribed that the court may exempt**, property held in trust for other persons, **a portion of his salary as may be determined by Court**; tools, books and equipment necessary for his business or vocation;
- **Protection of the Insolvent's estate**, **under voidable transactions**, **Preference (Section 15).** Within one year preceding bankruptcy. Presumption of preference in respect of transfer of property. **Under value transactions (Section16),** these are transactions entered into within a year proceedings bankruptcy whose value of consideration received by the company is significantly less than the value of the consideration provided by the company or individual.

- Wages & Salaries of employees of an Insolvent (**Section 48** of the Employment Act and **Section 12 (5)** of the Insolvency Act) require that, notwithstanding any other law to the contrary, on the bankruptcy or winding-up of an employer's business, the claim of an employee or those claiming on his or her behalf, wages and other payments to which he or she is entitled to under this Act shall have priority over all other claims which have accrued in respect of the 26 weeks immediately preceding the date on which the declaration of bankruptcy or winding-up is made.

9.1 Tax Matters

- **Priority of Taxes** (Section 315 of Cap 110 & Section 36 of the Bankruptcy Act)
  Require that, in the winding up of a company, there shall be paid in priority to all other debts.
  All taxes and local rates due from the company at the relevant date and having become due and payable within 12 months next before that date not exceeding in the whole one year's assessment.
- The Receiver must notify Uganda Revenue Authority of his or her Appointment (Section 109 (1) ITA & Section 41 VAT Act).
- The Receiver is prohibited from parting with asset without prior written permission of the commissioner (Section 109 (3) of the ITA).
- Upon disposing off an asset, set aside and pay to Uganda Revenue Authority the amount required (Section 109 (4) of ITA).
- The Receiver is personally liable to pay tax if he or she doesn't set aside and pay to Uganda Revenue Authority (Section 109 (5) of ITA).
- **Preferential Debts** (Section 12); the amount of any tax withheld and not paid over to the Uganda Revenue Authority for 12 months prior to the commencement of insolvency, Section 12 (6) of Insolvency Act.
  - ❖ PAYE (Section 116 of ITA)
  - ❖ Interest Payments
  - ❖ Dividends
  - ❖ Professional Fees
  - ❖ Purchase of an Asset by a resident from non- resident (Section 118B ITA 2013)
  - ❖ Payments on winnings from sports or pool betting
  - ❖ Premium for Re- Insurance by resident to non-resident (Section 118D ITA 2014).

9.2 Challenges

Challenges may be encountered in some of the following main areas:

(a) Fee pressure: The issues concerning disclosure of fees at the outset of an appointment, does not assist the insolvency practitioner later down the line on a case where further work is required.
(b) We operate in a litigious society now where a lot of people complain because they think they will get something out of it, and so much time is taken up dealing with complaints and going through the correct process of dealing with each of them.
(c) Compliance may be a challenge; not only all the know your customer and money laundering paperwork, checks and disclosures, but the ongoing monitoring and annual external compliance checks that must be carried out.

10.0 CONCLUSION

The objectives of the modern insolvency regime are to provide an equal, fair and orderly procedure in handling the affairs of insolvents ensuring that creditors receive an equal and equitable distribution of assets of the debtor's estate. This is rooted in the "pari passu" (equal sharing) principle of insolvency which has been recognized as the most fundamental principle of insolvency.

Insolvency practitioners when dealing with insolvent and bankrupt entities must follow the laws and the code of ethics relating to the professional service.