IS THERE A CASE FOR UNITED STATES CHAPTER 11 BANKRUPTCY PROTECTION LEGISLATION IN ZAMBIA?

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An Obligatory Essay submitted to the University of Zambia, School of Law, in partial fulfillment to the requirement for the award of the degree of Bachelor of Laws (LL.B)

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April 2010
DECLARATION

I Mwimanenwa Mark Libakeni, Identity No. 25051717, do declare that I am the author of this
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And I further declare that this dissertation represents my own work and that due acknowledgements
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I therefore bear the full responsibility for the contents, errors, defects and any omissions therein.

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Supervisor................................................................. Date 08.04.2010

Mrs. L Mushota
ABSTRACT

Since the early 1990s, following the change from a single party democratic system to a multi-party system, Zambia has adopted a liberalised economy which is driven by the forces of demand and supply rather than state control. A free market system is based on competition and risk and consequently both the debtor and creditor need adequate protection at the point of insolvency. This study examined to what extent the current Zambian law protects the debtor and what gaps exist, particularly when compared to International standards of Insolvency Law related to debtor protection. The study shows that in fact the current Zambian Insolvency law does not meet international standards in respect of protecting a financially troubled but viable company from liquidation. It is proposed that the Law be revised in this key area to provide for a reorganisation of viable companies and that such legislation should be modelled after United States Bankruptcy code Chapter 11 styled insolvency legislation.
DEDICATION

Dedicated to Musonda Charity Libakeni for all the encouragement and support.
ACKNOWLEDGEMENTS

I wish to thank my supervisor Mrs L Mushota for her guidance and understanding as I wrote this obligatory essay.

I would also like to sincerely thank my wife, Musonda Charity (to whom this work is dedicated) and our daughters Mubiana and Chishimba and my parents for their support over the years since I embarked on my LLB degree through evening studies at UNZA.

To my colleagues at UNZA, Daniel Maimbo, Ian Malilwe, Andrew Chisala, Scrivner Mulenga, I am grateful for their unwavering support.

A special thank you to Mrs Pricilla Isaac for encouraging me to soldier on when I felt like giving up.

I am also grateful to all the individuals that I was able interview for my research.

Last but not the least I would like to thank the members of staff in the School of Law whom I have interacted with for their cooperation and assistance whenever it was required.

Above all, I thank God for giving me the opportunity to complete my law degree and to him I am eternally grateful.
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CHAPTER ONE: INTRODUCTION

1.0 Introduction

The recent economic malaise that has rocked the world in the recent past following the banking failures in the United States of America as well as Europe has shaken the very fabric of capitalism and the concept of the free market. The world has seen failures of major corporations that many considered could never fail and go into bankruptcy\(^1\), for example General Motors Corporation of the US, one of the world’s largest companies (and even bigger than the economies of some African countries), filed for bankruptcy protection\(^2\) to protect it from its creditors under Chapter 11 of the US Bankruptcy code.

These crises have resulted in many scholars studying the legislation to try and identify what went wrong and legislation may protect world economies in the future. The shift by many developing nations from a state run economy to one where the Government plays a significantly reduced role\(^3\) has also led to studies of insolvency laws around the world. Globalisation has meant that cross border investment has increased significantly with the result that there is a growing need by many investors for a unified insolvency code.

The studies have been sponsored mainly by the two institutional development organizations: the World Bank and International Monetary Fund (IMF). The thrust of these studies has been to understand the cause of financial failures and what laws need to exist to address any systemic corporate failure in an economy, irrespective of its developmental stage. The attempts to institute and refine bankruptcy mechanisms around the world have led to a broader re-evaluation of the goals of the insolvency mechanism in a market economy\(^4\).

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\(^1\) For example, Lehman Brothers in the United States.


Professor Kenneth Mwenda has urged the reform of corporate insolvency laws in many of the African countries that follow the English common Law, including Zambia\(^5\). He identifies nine areas\(^6\) that need change: one of these is the need for African countries to enact legislation that provides for the rehabilitation of insolvent companies\(^7\). He states that it should not always be the case that a company that is insolvent should end up in liquidation. He asserts that the legal regime should strike a balance between secured creditors and the debtor company itself as well as other stakeholders such as unsecured creditors and statutorily mandated preferential creditors in order that secured creditors would not have an upper hand and look after their own interests\(^8\). At a national level, most national law development commissions\(^9\) have also conducted many studies into the reform of their corporate insolvency laws to address some of the shortcomings noted by Mwenda\(^10\).

Hussain and Wihlborg identify four stakeholder orientations that is the stakeholder group that the insolvency legislation relatively favours at the point of insolvency, that underpin most insolvency legislation in the world\(^11\). The four orientations are creditor, shareholder, management and employee\(^12\). This orientation of the insolvency laws and procedures affect incentives of the various stakeholders at the time debt contracts are entered into. Shareholder and management oriented legislation is characterized by the


\(^6\) These are: The need to professionalise the function of an insolvency practitioner; The need for commonwealth African countries to enact legislation that provides for the rehabilitation of insolvent companies; the need for commonwealth African countries to enact legislation to deal with cross border insolvencies; The need for commonwealth African countries to strengthen the institutional capacity and efficiency of land registries and company securities registries; The need for some commonwealth African countries to improve their land titling system since land is often used as collateral in secured transactions; The need for Commonwealth African countries to consider introducing credit rating agencies; The need for some Commonwealth African countries to move away from models of insolvency law based on the English Companies Act, 1948; The need for Commonwealth African countries to develop capacity in the Judiciary and among Insolvency practitioners regarding matters of insolvency law and secured transactions; and the need for Commonwealth African countries to address the legal frameworks covering the insolvency of banks and statutory boards/companies.


\(^12\) Q Hussain and C Wihlborg, “Corporate Insolvency Procedures and Bank Behaviour: A study of selected Asian economies” A working paper of the International Monetary Fund (WP/99/135), p7-8
existence of some form of debt forgiveness during financial restructuring or reorganization where a company is allowed to continue its operations. The US chapter 11 bankruptcy code is one of the leading examples of shareholder/management oriented insolvency legislation.

Studies that have focused on Zambian insolvency law and its relative balance between protecting debtor and creditor are not many as noted above. The results of this study will therefore help identify gaps in the existing law that need revision. A study of this aspect of insolvency law should benefit the country in that provisions in the law will meet international standards and therefore provide confidence to business organizations (both foreign and local) that operate in Zambia.

1.1 Statement of the Problem

The election of Fredrick Chiluba heralded a significant shift in the management of the economy away from a socialist leaning to one where it was considered that Government had no business running companies and industry\(^\text{13}\). The economy was thus liberalized and companies that operated in monopolistic environments were thus exposed to competition. This fundamental shift found that these businesses were in no position to survive on their own. The view of the Government was that companies either adapted to the changed environment or closed down. This was exemplified by President Chiluba's statement to the donor community in 1991, when he stated:

"As far as the privatization program is concerned there is no sacred lamb. In other words, the government is committed to total privatization of the parastatal sector."\(^\text{14}\)

No transitional measures were available to the management of these companies to protect them during this economic transition from increased competition and their disappearing market share as they tried to restructure their operations in order to survive the new economic environment. Consequently companies such as the Zambia Industrial and Mining Corporation Limited (ZIMCO), United Bus Company of Zambia and Zambia


Airways Corporation were liquidated\textsuperscript{15}. Indeed, some of these entities employed hundreds of people who were thus left in the cold. The era of liquidations was thus born in Zambia. A question that has subsequently been debated is whether some of the former parastatals that were liquidated could have in fact been reorganized to redeem those that had the potential to turn around.

The shift to a capitalist driven economy has meant any increased business growth has led to increased dependency on private financing to fund any business expansion. The content of the Insolvency laws therefore have a bearing on the cost of this lending as well as its availability as the laws define how the creditor will be able to recover the loans advanced in a situation where the debtor company fails to honour its debt repayments as and when they fall due. Should the country’s insolvency laws reflect this changed economic focus and specifically protect debtors as exists in the United States of America (USA), the largest capitalist nation and other common law jurisdictions? This study will examine whether there is a case for the enactment of United States Chapter 11 bankruptcy protection laws similar to that obtaining in the United States i.e. will its enactment improve the existing body of Zambia’s insolvency legislation?

1.2 Research Objectives

A capitalist system is based on competition and risk and both the debtor and creditor need adequate protection. This study will examine to what extent the current law protects the debtor and whether any gaps in the legislation may be addressed by United States Bankruptcy code Chapter 11 styled insolvency legislation.

1.3 Rationale

Zambia, since the 1990s has adopted a free market economy with the resultant focus on capitalism and risk. The significant shift from a state controlled economy to the free economy saw the liquidation of many state owned enterprises which were not profitable and ridden with debt such as Zambia Airways Corporation Limited. These companies were shielded from competition and risk while they were under the control of the Government. However, when this shield was withdrawn, the enterprises were not in a

\textsuperscript{15} Auditor General for Zambia, Report on the Liquidation of Parastatal Organisations, 2001
position to adapt and the only avenue available under the insolvency laws was liquidation. It has been suggested that the overall objectives of insolvency laws are\(^\text{16}\): -

- the allocation of risk among participants in a market economy in a predictable, equitable, and transparent manner; and
- to protect and maximise value for the benefit of all interested parties and the economy in general

Without effective procedures that are applied in a predictable manner, creditors may be unable to collect on their claims, which will adversely affect the future availability of credit. The law should recognize the interest of secured creditors over those that may be unsecured such as employees. Similarly the rights of debtors (and their employees) may not be adequately protected and different creditors may not be treated equitably. The capitalist run economy will thus not foster growth and competition and will result in increased risk. As a consequence, this may lead to economic failure and financial crisis as the world has recently experienced.

Insolvency laws the world over are undergoing much reform\(^\text{17}\) with a large number of the reforms focusing on reorganisations or rescue of the ailing entity rather than its liquidation\(^\text{18}\). With the focus by the Government on encouraging and promoting entrepreneurial activity\(^\text{19}\), the shift from liquidation to reorganisation does tend to spur new businesses to be set up as the fear of liquidation is lessened. Further the Government also wants to increase the number of foreign investors that invest in Zambia and having a body of modern and up to date laws is a competitive advantage.

In view of the foregoing, the study becomes a necessity both from the legal and the socio-economic point of view in order to ascertain whether the debtor protection in our body of laws\(^\text{20}\) needs to follow the extent and focus of US Chapter 11 bankruptcy laws.

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\(^{16}\) International Monetary Fund, Orderly and Effective Insolvency Procedural Principles: Key Issues, 1999, Washington DC

\(^{17}\) For example Republic of China recently enacted a reformed body of insolvency laws

\(^{18}\) The United Kingdom, Germany and China are examples of countries whose restructuring/reorganisation legislation under the body of insolvency legislation is modelled around the US Chapter 11 bankruptcy code

\(^{19}\) The Government enacted the Citizen Economic Empowerment (CEE) Act on 12\(^{\text{th}}\) and 19\(^{\text{th}}\) May 2006 respectively, based on a belief that a country's long term economic as well as political growth should be driven by its citizenry who need to be economically empowered.

\(^{20}\) This refers to generally the Companies Act, Chapter 388, The Bankruptcy Act, Chapter 82 and The Deed Arrangement Act, Chapter 84 of the Laws of Zambia.
1.4 Specific Research Questions

The following legal research questions will be addressed:-

1. Are the existing Zambian corporate insolvency laws adequate in relation to international standards? Do they adequately protect the debtor?
2. What is the role of the Zambian judiciary in corporate insolvency?
3. Is the US chapter 11 bankruptcy law the best model for use as a basis of protecting the debtor? Are there any alternatives?
4. What is the impact of existing related laws (Company law, privatisation law, banking law etc) and public administrative processes on the proposed change to the corporate insolvency laws?
5. Had a body of law modelled around the US Chapter 11 bankruptcy code existed, would a company like Zambia Airways have been saved from liquidation?

1.5 Research Methodology

The study will be a desktop study, reviewing relevant literature to the subject matter in issue, interviews with key institutions such the Zambia Development Agency, The Citizens Economic Empowerment Commission, Financial institutions, Business Associations, Liquidators, Receivers, former Parastatal heads as well as prominent Researchers and consultants etc.

1.6 Organisation of the Study

The research is comprised of six chapters, the first of which frames the area of interest and outlines the problem investigated. The research questions are presented and the selected methodology is generally discussed. The second chapter critically evaluates the existing corporate insolvency laws in Zambia with particular emphasis on the extent of debtor protection provided. The third chapter discusses the role of the Zambian judiciary in the efficacy of corporate insolvency laws in Zambia. The fourth chapter critically reviews the US Chapter 11 bankruptcy laws and their suitability as a model for adoption for Zambia. The fifth chapter then discusses the impact of existing related laws and public administrative processes on the proposed changes to the corporate insolvency laws- in
particular the corporate laws, privatization laws and banking laws. The sixth and final chapter concludes the research and presents the study’s recommendations.
CHAPTER TWO: CRITICAL EVALUATION OF EXISTING CORPORATE INSOLVENCY LAWS IN ZAMBIA

2.0 Introduction

Availability of credit is critical for any economic activity and this credit is usually satisfied by entities such as banks and microfinance institutions. In lending to business enterprises, banks will either provide secured or unsecured lending. Secured lending is when the borrower is required to provide collateral as security for the lending in case of default. When a debtor is unable to pay its debts and other liabilities as they become due or when or when its liabilities exceed the value of its assets the debtor is termed insolvent.\(^{21}\) Most legal systems provide a legal mechanism to address the collective satisfaction of the outstanding claims from assets (whether tangible or intangible) of the debtor company\(^ {22}\). Clearly there are a number of stakeholders with various interests that such a legal mechanism needs to take into account such as the debtor, the lenders (creditor) who may be secured or unsecured, employees, tax authorities etc.

The society in general also has a stake in this matter. The legal mechanism chosen then must strike a balance not only between the different interests of these stakeholders, but also between these interests and the relevant social, political and other policy considerations that have an impact on the economic and legal goals of insolvency proceedings\(^ {23}\). The mechanism will thus provide varying levels of protection to these stakeholders. In Zambia, the legal mechanism instituted for corporate debtors, with whom this study is concerned, is to be found in the Companies Act, Chapter 388 of the Laws of Zambia. The aim of this chapter is to critically evaluate the existing corporate insolvency laws in Zambia with particular emphasis on the extent of debtor protection provided.

I begin firstly by looking at the historical background of our current body of corporate insolvency law and then I critically evaluate its efficacy by benchmarking it against International standards as promulgated in the United Nations Commission On International Trade Law (UNCITRAL)'s Legislative Guide on Insolvency Law\(^ {24}\) and the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems\(^ {25}\).

\(^{21}\) UNCITRAL's Legislative Guide on Insolvency Law, p5

\(^{22}\) For example the UK's Insolvency Act, 1986

\(^{23}\) UNCITRAL's Legislative Guide on Insolvency Law

\(^{24}\) Published in 2005

\(^{25}\) Originally issued in 2001
The conclusions in this chapter are thus based on the results debtor, creditor and insolvency practitioner interviews and review of the applicable legislation. As noted in the introductory chapter to this study, the focus of this study is around the level of protection proffered by the insolvency laws to the debtor company.

2.1 Background

Unlike countries like the United Kingdom and South Africa\textsuperscript{26} that have their insolvency laws consolidated into one single Act, Zambia’s insolvency laws are to be principally found in the Companies Act, chapter 388 (for corporate bodies) and the Bankruptcy Act chapter 95 (for individuals) of the Laws of Zambia. Certain aspects of corporate insolvency laws such as the rules relating to fraudulent trading are imputed to the companies’ legislation from the Bankruptcy Act. This study focuses principally around the insolvency legislation found in the Companies Act which deals with corporate insolvency and in particular with the provisions that protect the debtor company from liquidation.

The Zambian Companies legislation can be traced to pre colonial times as Professor Patrick Mvunga outlined when debating the amendment to the Zambian Companies Act in 1995. He stated that the Zambian Company Law “has very archaic origins dating back to 1908, 1920 and 1948”\textsuperscript{27}. As with many other commonwealth countries, the Companies Act in general and the insolvency provisions in particular are modelled principally around the English Companies Act 1948\textsuperscript{28}. As Professor Mwenda stated:

“The English Companies Act 1948 is an outdated law. In fact, the UK has a separate Companies Act 1985 (amended in 1989) and a separate Insolvency Act 1986 (amended in subsequent years). Yet, a number of African countries have retained the version of repealed English Companies Act 1948 for their own Companies Acts.”

To illustrate this point, the provisions of section 234 of the current Zambian Companies Act are the same as those of section 206 of the English Companies Act 1948. The insolvency provisions have not undergone any amendments to reflect the changed economic and social landscape of Zambia. This is despite the Government recognising the need for reform as ably stated by Hon. Dipak Patel, the then Minister in his address to parliament when presenting the Companies Act Bill 1994. He stated:

\textsuperscript{26} For example the UK’s Insolvency Act 1986
\textsuperscript{27} Zambia, National Assembly, Debates (21 January-17 March 1994), p. 1566
“Our Company law has never received any significant review since independence. Its origins can be traced to the 1948 Companies Act and yet company law remains the most significant legal framework for economic and business development. To sustain the impetus and enthusiasm generated by the unfolding scenario it is important that the same is backed up by a legal instrument to ensure efficiency and flexibility of a company system for organising aggregation and use of capital”

However, despite this recognition as outlined by the then Minister of Commerce, no reform around the substantive provisions of corporate insolvency has been undertaken.

2.2 Zambia’s Corporate Insolvency law

As I have already stated in Chapter 1 of this study, Zambia, since the 1990s has adopted a free market economy with the resultant focus on capitalism and risk. The economic growth is predicated on entities being able to borrow money from the market to finance their enterprise. This comes with risk of business failure with the resultant inability of an enterprise to repay its debts. The laws that help deal with this scenario are therefore extremely important not only in sustaining economic activity, but also providing the confidence of both borrower and lender alike. Against this background, what is the efficacy of the existing corporate insolvency provisions in relation to a debtor in financial distress apart from liquidation? It has been suggested that the overall objectives of insolvency laws are:

a. the allocation of risk among participants in a market economy in a predictable, equitable, and transparent manner; and

b. to protect and maximise value for the benefit of all interested parties and the economy in general.

One major consideration under these overarching objectives is the need to ensure a balance between liquidation and reorganisation. Liquidation has been defined as proceedings to sell and dispose of assets (of the debtor) for distribution to creditors in accordance with the insolvency law. Reorganisation, on the other hand is defined as the process by which the financial well-being and viability of a debtor’s business can be

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30 International Monetary Fund, Orderly and Effective Insolvency Procedural Principles: Key Issues, 1999, Washington DC
31 UNCITRAL’s Legislative Guide on Insolvency Law, p5
restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern\textsuperscript{32}. These two aspects represent the two varying ends in which a debtor may find itself under the insolvency laws. Clearly then, from the point of view of the debtor, reorganisation would present a more favourable outcome than liquidation. On the other hand, liquidation might appeal to a secured creditor where the security is sold.

Achieving that balance may have implications for other social policy considerations, such as encouraging the development of an entrepreneurial class and protecting employment.\textsuperscript{33} If a balance is to be achieved, both elements would be expected to form part of an insolvency law recognising that a debtor may not be able to turn around its fortunes and thus liquidation represents the best option available. At the heart of this balance should be selecting the option that best presents, for the debtor and creditor, the preservation and maximisation of value of the assets of the insolvent company. From a debtor view point, reorganisation would thus represent the best protection for a company failing to pay its debts as and when they fall due.

According to the UNCITRAL's legislative guide on Insolvency Law, reorganisation proceedings are designed to give a debtor some breathing space to recover from its temporary liquidity difficulties or more permanent over-indebtedness and, where necessary, provide it with an opportunity to restructure its debt and its relations with creditors\textsuperscript{34}. The guide goes on to make it clear that reorganisation, however, does not imply that all of the stakeholders must be wholly protected or that they should be restored to the financial or commercial position that would have obtained had the event of insolvency not occurred.

Further, it does not imply that the debtor will be completely restored or its creditors paid in full or that ownership and management of an insolvent debtor will maintain and preserve their respective positions\textsuperscript{35}. These are important considerations when evaluating how effective the existing body is in protecting the insolvent debtor company. Where reorganisation is possible, generally it will be preferred by creditors if the value derived from the continued operation of the debtor's business will enhance the value of their claims.\textsuperscript{36}

\textsuperscript{32} UNCITRAL's Legislative Guide on Insolvency Law, p7
\textsuperscript{33} UNCITRAL's Legislative Guide on Insolvency Law, p11
\textsuperscript{34} p27
\textsuperscript{35} UNCITRAL's Legislative Guide on Insolvency Law, p27
\textsuperscript{36} Interview: Nitesh Patel, Joint Receiver and Manager, Kasama Coffee Limited, 13/01/2010
Reorganisation may include a simple agreement between the debtor and creditor where a creditor may accept to receive a percentage of the outstanding debt as full and final settlement of the outstanding amount\textsuperscript{37}. On the other end of the scale is a complex reorganisation where debts are restructured by varying the tenure of the loan, deferring payment of interest or converting some of the debt to equity. Additionally, assets may be sold such a non-profitable division.\textsuperscript{38} The choice of the way in which reorganisation is carried out is typically a response to the size of the business and the degree of complexity of the debtor’s specific situation.

The Companies Act, Chapter 388 does not have specific reorganisation provisions that are corner stone of today’s modern insolvency legislation such as the administrative provisions the United Kingdom’s Insolvency Act, 1986 or Chapter 11 of the United States bankruptcy Act. However, two avenues are available for reorganisation of an insolvent debtor company in practice in Zambia. This is either through scheme of arrangements under Part XI or receiverships under Part V of the Companies Act, Chapter 388.\textsuperscript{39}

### 2.2.1 Scheme of Arrangement

Part XI of the Companies Act states that:

"where a compromise or arrangement is proposed between a company and its creditors or any class of its creditors the court may, on the application of the company or of any creditor or member of the company, or, in the case of a company being wound-up, of the liquidator, order a meeting of the creditors, the class of creditors, the members or the class of members, as the case may be, to be convened, held and conducted in such manner as it thinks fit to consider the compromise or arrangement."\textsuperscript{40}

The words compromise or arrangements have not been defined by the Act but as can be deduced, this provides a mechanism for a wide form of company re-arrangements such as mergers\textsuperscript{41}. The Author of Charlesworth’s Company Law states that the word arrangement has a very wide meaning which is wider than the word compromise. They add that an arrangement may involve for example, debenture holders giving an extension of

\textsuperscript{37} An example of this is the re-organisation of Maamba Collieries Limited, where its creditors were offered payment of a percentage of existing debt as full and final settlement.

\textsuperscript{38} General Motors of the United States sold its SAAB motor division as part of its complex reorganisation. See http://news.bbc.co.uk/2/hi/8481621.stm

\textsuperscript{39} Interview: Nitesh Patel, Joint Receiver and Manager, Kasama Coffee Limited, 13/01/2010

\textsuperscript{40} Companies Act, Chapter 388 of the Laws of Zambia, s.234.

\textsuperscript{41} See s.234
time for payment, accepting a cash payment less than the face value of their debentures, giving up their security in whole or in part and indeed exchanging their debentures for shares in the company.\textsuperscript{42} As can be seen, the ultimate result is the variation of rights of the creditors and/or members.

How then does the scheme of arrangement provisions measure to the required minimum requirements of reorganisation provisions that meet international standards? The UNCITRAL Legislative Guide to Insolvency Laws identifies the following key elements of effective and efficient reorganisation provisions of insolvency laws\textsuperscript{43}:

(a) Submission of the debtor to the proceedings (whether on its own application or on the basis of an application by creditors), which may or may not involve judicial control or supervision;
(b) Automatic and mandatory stay or suspension of actions and proceedings against the assets of the debtor affecting all creditors for a limited period of time;
(c) Continuation of the business of the debtor, either by existing management, an independent manager or a combination of both;
(d) Formulation of a plan that proposes the manner in which creditors, equity holders and the debtor itself will be treated;
(e) Consideration of, and voting on, acceptance of the plan by creditors;
(f) Possibly, the judicial approval or confirmation of an accepted plan; and
(g) Implementation of the plan.

We critically evaluate the current scheme of arrangement provisions’ efficacy using the above elements as a yardstick.

(a) Submission of the debtor to the proceedings (whether on its own application or on the basis of an application by creditors), which may or may not involve judicial control or supervision

The current scheme of arrangement provisions provide that the process can be initiated by the debtor company, its members or its creditors by making an application to the Court\textsuperscript{44}. This means that a debtor company can submit to the process at its own volition

\textsuperscript{42} Charlesworth’s Company Law, Seventeenth edition (Sweet and Maxwell), page 662
\textsuperscript{43} UNCITRAL’s Legislative Guide on Insolvency Law, pp28-29
\textsuperscript{44} Companies Act, Chapter 388 of the Laws of Zambia, s.234
by applying to Court. This is in line with international requirements. However, this procedure presents its own difficulties as discussed later in relation to the ability of the debtor company to get agreement of a wide spectrum of creditors (whether secured or not). The secured creditors may not see the benefit of an arrangement as would unsecured creditors, given their very different legal positions in the context of enforcing their rights.

(b) Automatic and mandatory stay or suspension of actions and proceedings against the assets of the debtor affecting all creditors for a limited period of time.

In any event of insolvency, a debtor company usually faces extreme pressure from creditors who use all mechanisms at their disposal to realise the assets they hold as collateral (normally both movable and immovable property) even when a business is still potentially viable. The assets of the debtor company may be sold off thus reducing the full potential value of the debtor company had it remained with its assets. Therefore financially troubled but potentially viable businesses need legal protection from its various creditors. The law should provide it with time to evaluate its options without the pressure from the creditors. However, such provisions should also provide adequate protection to the secured creditor during the period of evaluation of the reorganisation plan to ensure that the assets against which the debt is secured does not detioriate and thus affect the ultimate value that will be received on disposal. In respect of the scheme of arrangement provisions, no such protection is exists and therefore falls short of expected standards in this aspect.

(c) Continuation of the business of the debtor, either by existing management, an independent manager or a combination of both.

Generally a scheme of arrangements approved by the Court will result in the continuation of the business of the debtor, normally through the existing management. This is in line with the objectives of the scheme that seeks to usually reach agreement with creditors so as the business to continue in operation. In addition, under section 236 (9) of the Companies Act, the Court may prescribe such terms as it thinks fit as a condition of its approval. This would suggest that a Court may order that an independent manager take

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45 Interview: Chintu Mulendema, Liquidator of Union Bank Zambia Limited, 2/02/2010
charge of a debtor company as it executes the approved scheme of arrangement or composition.

(d) Formulation of a plan that proposes the manner in which creditors, equity holders and the debtor itself will be treated

As noted above, a debtor company or its creditor may propose a scheme of arrangement or compromise plan that may then be presented to Court for approval. The arrangement or compromise plan will normally outline the proposed variations to the rights of the creditors in respect to amounts owed to them.

(e) Consideration of, and voting on, acceptance of the plan by creditors

Section 234(6) provides that a meeting of creditors as well as other stakeholders such as the members of the debtor company may by extraordinary resolution, agree to any compromise and this resolution shall bind all the creditors or the class of creditors, or members or class of members and the company when approved by the Court and lodged with the Registrar of Companies.

(f) The judicial approval or confirmation of an accepted plan as well as implementation

As noted above, arrangements and compositions need the approval of the Court once agreed upon by both the debtor company and its creditors under section 234. Once the order is made, all parties are bound to the terms of the arrangement or composition.

While the provisions for scheme of arrangements may present some form of avenue for a debtor company to protect itself from potential liquidation when its directors considers that the business is still viable irrespective of its financial troubles, it may only be efficient to use where the number of creditors is limited. This is because, it significantly depends on reaching agreement with its creditors and the more creditors that exist with varying interests, and the more difficult it is to reach a suitable agreement. Further, the incidence of negotiation makes the process fairly costly as the debtor company seeks to

46 Interview: with Nitesh Patel, Joint Receiver and Manager, Kasama Coffee Limited, 13/01/2010 and Chintu Mulendema, Liquidator of Union Bank Zambia Limited, 2/02/2010
convince its creditors of the benefits of the proposed plan prior to its presentation to the Courts.

Also, while the possibility of appointing an independent administrator exists under a scheme of arrangement through section 236 (b) (v) of the Companies Act, this is not specifically considered and therefore the debtor company may continue to be managed by the same management, particularly where the financial difficulty can be attributed to mismanagement. Often however, financial distress arises from the way the lending is structured\(^\text{47}\). For example, a bank may lend money to a farmer to acquire land and expect the loan to be repaid in a period of say 5 years. The amount does not take into account the need for working capital and the nature of the business. Ultimately, the farmer finds that he is unable to repay the loans.

2.2.2 Receivership

The second avenue for reorganisation of a financially distressed company under the Companies Act is that through receivership. Receiverships and liquidations are in essence the two mechanisms recognised from the perspective of Zambian insolvency laws. Section 182 of the Companies Act states as follows:

(1) When a charge over property of a company has become enforceable, the court may, on the application of the chargee, appoint-

(a) A receiver who is not also a manager; or

(b) A receiver and manager;

of the property

A receiver therefore is appointed in respect of enforcing a debenture held by the creditor. This essentially means that the role of the receiver is to secure the interests of the debenture holder\(^\text{48}\) (i.e. realise the assets secured under the debenture for the benefit of the secured creditor). He therefore has no responsibility to the other stakeholders in respect of the assets. It is not the task of the Receiver to attempt to turnaround the company. When the Receiver believes more value will be achieved if the company is maintained as a going concern, this is usually done purely to achieve the maximum value for the debenture holder.

\(^{47}\) Interview: Nitesh Patel, Joint Receiver and Manager, Kasama Coffee Limited, 13/01/2010 and Chintu Mulendema, Liquidator of Union Bank Zambia Limited, 2/02/2010

\(^{48}\) Magnum (Zambia) Limited v Basit Quadri (Receiver/manager) & Grindlays Bank International Limited (981) ZR 141
rather than see the company rehabilitated per se\textsuperscript{49}. Quite clearly then the interests of the company to be rehabilitated under a receivership will only be made to the extent that it preserves the value of the assets under the debenture.

The interests of the other stakeholders are not a main concern of the Receiver. This therefore means that a debtor company can not initiate this mechanism as an avenue to protect itself from potential liquidation. In addition, as the receivership is essentially in place to protect and enforce the rights of the debenture holder under which the receiver has been appointed, the creditor is most unwilling to invest more money in the debtor company that is required to turn it around. Another obstacle is that the receiver is usually one with very little experience with turning around a financially distressed company.\textsuperscript{50} It is important to note that the provisions of the Companies Act only address matters concerning the appointment rights and obligations of the receiver. As discussed earlier, an effective insolvency law needs to provide for all necessary aspects to aid a debtor company that is potential viable to reform.

2.3 Conclusion

This chapter sought to evaluate the existing legal provisions under the Zambian insolvency laws that are available to protect a debtor company. Using UNCITRAL’s Legislative Guide to Insolvency Laws, I have been able to determine that the current provisions in use fall short of the expected international standards particularly with respect to the lack of provisions that are specifically drafted to encourage and provide for the rehabilitation of a financially distressed corporate entity. Given the changed economic dispensation, it is important for the law to recognise that not all debtors that experience serious financial difficulty in a competitive marketplace should necessarily be liquidated. The legal provisions should exist to protect a debtor with a reasonable prospect of survival (such as one that has a potentially profitable business) from the pressure of creditors as it seeks to demonstrate its viability which should result in the maximisation of value for both debtor and creditor. In the next chapter I look at the role and impact of the Court system in corporate debtor protection when a debtor is financially distressed.

\textsuperscript{49} Interview: Nitesh Patel, Joint Receiver and Manager, Kasama Coffee Limited, 13/01/2010 and Chintu Mulendema, Liquidator of Union Bank Zambia Limited, 2/02/2010

\textsuperscript{50} Interview: Nitesh Patel, Joint Receiver and Manager, Kasama Coffee Limited, 13/01/2010 and Chintu Mulendema, Liquidator of Union Bank Zambia Limited, 2/02/2010
CHAPTER THREE: THE ROLE OF THE ZAMBIAN JUDICIARY IN THE
EFFICACY OF CORPORATE INSOLVENCY LAWS IN ZAMBIA

3.0 Introduction

The majority of insolvency law systems around the world operate through the
Courts and Zambia is no exception. Consequently the efficacy of these systems is
significantly influenced in the way the Courts apply and administer the laws. It is thus
important in this study to review the judiciary of Zambia.

The word “Judiciary” has been defined as “the judges of a country collectively” as
well as a “system of law courts in a country”\(^{51}\). Article 91 of the Zambian Constitution
identifies the courts as the Supreme Court of Zambia, the High Court for Zambia, the
Industrial Relations Court, the Subordinate courts; local courts and such lower courts as
may be prescribed by an act of parliament. The Supreme Court is the final court of appeal
for the country and has jurisdiction and powers as conferred by the Zambian
Constitution.\(^{52}\) It has the jurisdiction to hear and determine appeals in civil and criminal
matters as well as original jurisdiction.\(^{53}\) The High Court for Zambia has unlimited and
original jurisdiction to hear and determine any civil or criminal proceedings.\(^{54}\) The
subordinate courts also play a role.

The study begins by looking at the operation of the courts in the insolvency law
system and assesses the criticisms levelled against the courts that impact the effective role
of the courts in the efficacy of corporate insolvency laws.

3.1 Operation of the Courts in the Corporate Insolvency law system

The Zambian court system follows the common law system, drawing significantly
from English common law system\(^{55}\). Local statutory enactments as well as aspects of
customary laws also contribute to the form of the Zambian Court system. The principles of
judicial precedent and stare decisis as well as the practice of the adversary system are the

\(^{52}\) Constitution of Zambia, Chapter 1 of the Laws of Zambia, Art. 92
\(^{53}\) Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia, s.7
\(^{54}\) Constitution of Zambia Chapter 1 of the Laws of Zambia, Art. 94
UNZA Press, at page 17
hallmarks of this system. Precedent therefore forms a very important aspect of judicial decisions. Judicial powers of the Courts are however below the legislative powers of parliament by virtue of the supremacy of the Constitution. The consequence of this is that any decision of the law can be overridden by subsequent Parliamentary enactments.

The recovery of unsecured and secured debts is regulated by statute. As noted in earlier chapters, the principal body of insolvency laws for both the individual person and incorporated company lie in the Companies Act, the Bankruptcy Act and the Deeds of Arrangement Act. However it is important to note that Banks and other financial institutions registered under the Banking and Financial Services (BFSA) Act are subject to the insolvency, dissolution and liquidation provisions of that act. Section 85 of the BSFA provides that the Act shall to the extent of any inconsistency prevail over any other law.

Under the rules of the High Court, a writ of summons accompanied by a statement of claim commences an action for recovery of unsecured debts. An unsecured creditor with a claim for liquidated debt not exceeding K50 million may also commence action in the Subordinate courts by way of default writ supported by an affidavit attesting to the amount being claimed. A secured creditor may enforce its security under a mortgage through the appointment of a Receiver and Manager under the Companies Act upon application to the Court. A receiver may also be appointed under a power contained in any instrument. The Receiver of any property or undertaking of a company appointed by the court shall be an officer of the court and shall be deemed, in relation to the property or undertaking, to act in accordance with the directions and instructions of the court. Where the appointment is under the security instrument, the Receiver is deemed to be an agent and officer of the company and not an agent of the persons by or on behalf of whom he is appointed and shall act in accordance with the instrument under which he is appointed and with any directions of the court made.

By virtue of Section 234 (2), the court may on the application of the company or any creditor or member of the company or the liquidator order a meeting of creditors or

56 Chapter 388 of the Laws of Zambia
57 Chapter 82 of the Laws of Zambia
58 Chapter 84 of the Laws of Zambia
59 Chapter 386 of the Laws of Zambia
60 Under section 2 of the Companies Act, ‘court’ is defined as meaning the High Court for Zambia
61 Companies Act, Chapter 388 of the Laws of Zambia, s.113(1)
62 Companies Act, Chapter 388 of the Laws of Zambia, ss. 112-113
63 Companies Act, Chapter 388 of the Laws of Zambia, s.113(1)
class of creditors etc to consider the compromise or arrangement. Such compromise or arrangement is only binding if it has been approved by order of the court\textsuperscript{64}.

The Court may appoint a liquidator or may give directions as to the appointment of a liquidator as it thinks fit.\textsuperscript{65} By section 269\textsuperscript{66}, the court has jurisdiction to wind up a body corporate incorporated in Zambia as well as a body corporate incorporated in a foreign country and registered as a foreign company or having any business or undertaking or assets in Zambia. The Court may order the winding up of a company if it is unable to pay its debts. By Section 272 (3),\textsuperscript{67} a company is unable to pay its debts if:

“(a) there is due from the company to any creditor (including a creditor by assignment) an amount exceeding fifty monetary units, and-
(i) the creditor has, more than twenty-one days previously, served on the company a written demand under his hand requiring the company to pay the amount so due; and
(ii) the company has failed to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor; or
(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
(c) the company is unable to pay its debts as they fall due.”

Further evidence of the role of the Court in winding up of a company as part of the insolvency laws is demonstrated by section 401\textsuperscript{68}:

“401. The Chief Justice may make Rules of Court governing the practice and procedure for the winding-up of companies in Zambia and with respect to the procedure in any application to the court under this Act, and enabling all or any of the powers and duties conferred and imposed on the court in respect of the winding-up of companies to be exercised or performed by the Registrar or by the official receiver, or by the liquidator as an officer of the court and subject to the control of the court.”

In exercise of this power, the Chief Justice promulgated the Companies (winding up) rules\textsuperscript{69} which apply to any winding-up proceeding or judicial management under the Companies Act, Chapter 388 of the Laws of Zambia

\textsuperscript{64} Companies Act Chapter 388 of the Laws of Zambia,s.234(6)
\textsuperscript{65} Companies Act Chapter 388 of the Laws of Zambia,s.282
\textsuperscript{66} Chapter 388 of the Laws of Zambia
\textsuperscript{67} Chapter 388 of the Laws of Zambia
\textsuperscript{68} Chapter 388 of the Laws of Zambia
\textsuperscript{69} Statutory Instrument No 86 of 2004
3.2 Critique of the Zambian Judiciary

As has been demonstrated in the preceding paragraphs, the court system plays a pivotal role in the insolvency system of the country and does thus affect the efficacy in the operation of the established insolvency laws. Two major criticisms of the Zambian courts are levelled against the courts. Firstly the wheels of justice take far too long to turn which in turn means that court cases take inordinately long to dispose off. Indeed this criticism is best illustrated by the case of Miyanda and the High Court. In that case, the applicant was a plaintiff litigant in a civil suit which was pending in the High Court in which, it was alleged, the reserved judgement has been pending for 8 or more months. Being dissatisfied with the seemingly long delay or failure in the disposal of his action by the High Court, the applicant applied to the Supreme Court for leave to apply for an order of mandamus to compel the learned High Court judge seized of the suit to determine the action and deliver a judgement. Secondly, the nature of judgements is unpredictable. It is argued that the courts view creditors as the “oppressor” and the debtor as the “oppressed” and this is given as the reason for the court system’s seeming willingness to entertain debtors’ abuse of court process as they seek to delay the process.

Indeed these criticisms are not new. In 1992, the Law Association of Zambia initiated a special committee to look into the problem of delays in the administration of justice and delivery of judgements. There are a number of reasons that can be advanced for this criticism:

3.2.1 Lack of adequate infrastructure

The country faces inadequate court infrastructure particularly court rooms. This means that there are very few courtrooms that are available in relation to the ever increasing demand on the judicial system from the citizens of Zambia. For example, Zambia only has five High Courts at Livingstone, Lusaka, Kabwe, Ndola and Kitwe. The

70 SCZ Judgement No 5 of 1984
71 SCZ Judgement No 5 of 1984 at page 1
72 Interview: Nitesh Patel, Joint Receiver and Manager, Kasama Coffee Limited, 13/01/2010 ; Chintu Mulendema, Liquidator of Union Bank Zambia Limited, 2/02/2010 and Lydia Chilumba, Stanbic Bank Zambia Limited Legal Counsel, 19/03/2010
73 Interview: Nitesh Patel, Joint Receiver and Manager, Kasama Coffee Limited, 13/01/2010, Chintu Mulendema, Liquidator of Union Bank Zambia Limited, 2/02/2010 and Lydia Chilumba, Stanbic Bank Zambia Limited Legal Counsel, 19/03/2010
low number of courtrooms and the strain that each must face was aptly illustrated by the
Chief Justice Ernest Sakala during the Ndola High court jubilee celebrations. The Chief
Justice stated the following:

"The Ndola High Court presently services Mufulira, Luanshya, Masaiti, Mpongwe
Districts and Ndola itself. It also caters for civil and criminal cases in Luapula and
Northern Provinces. Judges travel to Mansa and Kasama four times in a year to
hear cases. The population of the jurisdictional area serviced by Ndola High Court
has substantially increased over the years. The infrastructure, however, has
remained as it was when it was constructed in 1959.

The increased workload has necessitated the number of Judges to be
increased from two in 1959 to five as of to-day. This has created a problem of
office space for both the adjudicators and the support staff. This building [the
Ndola High Court building] was built to accommodate two Judges. The current
establishment of five Judges means that the three additional Judges have to operate
from improvised Chambers. This scenario is not peculiar to Ndola High Court
alone but to the entire Judiciary physical infrastructure."\(^{75}\)

The increases in the Zambian population and the liberalisation of the economy,
amongst other factors have led to an increase in the number of cases being litigated before
the courts. This has therefore caused increased load on the court system. This situation has
had the consequence of affecting the smooth operations of the courts. Chief Justice Sakala
acknowledged this when he further noted:

"I would like to submit that physical facilities of any court system play a major role
in ensuring judicial autonomy and independence for effective smooth
administration of justice. In the widest sense, physical facilities must include court
buildings, housing, equipment, transport and support staff. To secure these
facilities, the judicature often has to compete with the needs and requirements of
other departments and so justify its own needs to the Treasury. Under sourcing,
therefore, tends to be a common complaint. Indeed, in the end the quality of justice
delivery is affected as the judges become demotivated".\(^{76}\)

The lack of adequate infrastructure has been acknowledged by the Government\(^{77}\) and in
response it has instituted the 2009 Judiciary Strategic Plan and Development Programme
(SPDP)\(^{78}\). Further the Government is increasing the number of High court judges.
President Rupiah Banda observed the following:

\(^{75}\) Speech by the Chief Justice Ernest Sakala at the Ndola High Court Jubilee celebrations, 4 December 2009
\(^{76}\) Speech by the Chief Justice Ernest Sakala at the Ndola High Court Jubilee celebrations, 4 December 2009
\(^{77}\) Speech by His Excellency the President of the Republic of Zambia at the Ndola High Court Jubilee
celebrations 4 December 2009.
\(^{78}\) Speech by His Excellency the President of the Republic of Zambia at the Ndola High Court Jubilee
celebrations 4 December 2009
“Allow me to reiterate that government is committed to building capacity in the judiciary. For this reason, the judiciary needs to recruit more qualified adjudicators and support staff. Additionally there is need for appropriate office equipment and transport to enhance justice delivery. In the last session of parliament, my government introduced an amendment to the Supreme and High court (Number of Judges Act) in order to expand the establishment of the High court and Supreme court. The Supreme Court establishment has now been increased from nine to eleven judges, while that of the High court will now have fifty puisne judges. The increased establishment should now allow the judiciary to establish full time High court in provincial centres especially in Mansa, Kasama, Solwezi Chipata and Mongu, which are currently serviced by a circuit High court. While the circuit High court system has served us well thus far, it has its own severe short comings which result in the delayed dispensation of justice.”

The introduction of the Small claims Court whose jurisdiction is limited to liquidated claims of not more than four thousand fee units as well as the move to encourage the public to use alternative dispute resolution avenues to resolve matters is expected to help reduce the current demand on the court system. Under the High Court (Amendment) Act of 1999, a judge may refer parties to mediation or arbitration.

3.2.2 Lack of specialisation by the judges

The judges of both the Supreme Court and the High court handle both civil and criminal matters of various types. Civil cases such as those relating to divorce and commerce for example are handled by the same judges which results in non specialisation. The judges fail therefore to fully appreciate the need to act expeditiously in matters relating to commerce in general and insolvency in particular. There is also no specialised insolvency court that has been created like for example, the Industrial Relations Court that has original jurisdiction in all industrial relations matters. However, in recognition of the need for commercial cases to be dealt with in a timely manner and the need for judges to specialise, a commercial list was established through the High Court (Amendment) Act of 1999. Commercial action in the amendment act means “any cause arising out of any transaction relating to commerce, trade, industry or any action of a business nature.” The result of this is that any insolvency actions would fall under the jurisdiction of the

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79 Speech by His Excellency the President of the Republic of Zambia at the Ndola High Court Jubilee celebrations 4 December 2009
80 Small Court Claims Act, Chapter 47 of the Laws of Zambia, s.5
81 Interview with Lydia Chilumba, Legal Counsel, Stanbic Bank Zambia Limited, 19/03/2010
82 S.7
83 Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, s.84
84 Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, s.85(1)
85 High Court (Amendment) Act of 1999, s.2
86 High Court (Amendment) Act of 1999, s.1
commercial list as it would ordinarily arise from a transaction relating to commerce. The Chief Justice has the power to designate judges that are dedicated to the commercial list.\textsuperscript{87} The amendment Act further provides for the creation of a user committee whose purpose is to provide a forum for the exchange of ideas or views, and for making recommendations for improving the operations of the commercial list\textsuperscript{88}. Section 12 of the amendment act defines the membership of the committee as consisting of:

(a) The judge in charge of the commercial list as Chairperson
(b) Judge of the commercial list
(c) One representative from the Law Association of Zambia
(d) One representative from the Zambia Association of Chambers of Commerce and Industry.
(e) The chief administrator of the Judiciary
(f) The Registrar of the commercial list, as Secretary and
(g) Two members of the public appointment by the Chief Justice

3.3 Conclusion

As has been shown above, the judiciary is an important component of insolvency law system. The level of efficiency and effectiveness in the operations of the judiciary has a strong bearing on the court’s application and administration of the law. The courts have been criticised for delayed disposal of cases as well as entertaining abuse of process through entertaining adjournments that generally lack merit by debtors as they attempt to frustrate the due process of litigation against them. The no of judges as well as the necessary support infrastructure such as courtrooms are inadequate to cope with the current demand from the public. This ultimately leads to a costly legal process (a long drawn out litigation is expensive in two ways: legal fees charged by lawyers and the fact that the assets which are used to secure the debt may diminish in value and condition with time with the result that any realisations from the sale of the assets is inadequate). It is clear from the discussion above, that the role of the judiciary is a key cog in the wheels of corporate law insolvency and directly affects the efficacy the laws in Zambia.

\textsuperscript{87} High Court (Amendment) Act of 1999, s.4
\textsuperscript{88} High Court (Amendment) Act of 1999, s.13

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CHAPTER FOUR: CRITICAL REVIEW OF CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

4.0 Introduction

The UNCITRAL Legislative Guide on Insolvency law identifies a key objective of insolvency law as the maximisation of value for assets as this facilitates higher distributions to creditors as a whole and reduces the burden of insolvency. The achievement of this goal is often furthered by achieving a balance of the risks allocated between the parties involved in insolvency proceedings, that is between the debtor company and its creditors. As has been discussed in Chapter 2 of this study, a key cornerstone of a good insolvency law is its balance between liquidation and reorganisation. The Insolvency law should include the possibility of reorganisation of the debtor as an alternative to liquidation, where creditors would not involuntarily receive less than in liquidation and the value of the debtor to society and to creditors may be maximised by allowing it to continue. It is usual under liquidations to break up the assets of a debtor company and sell them off as individual assets rather than keep the business assets together as a going concern. It is argued that there is greater value in keeping the assets together than breaking them up. The ultimate goal of reorganisation is to save companies that are financially distressed but still economically viable.

Many European countries (including, for instance, the United Kingdom, France, Germany, Italy, Finland and Sweden) have thoroughly reformed their bankruptcy legislation and in most cases the guiding principle of the reform was to change a liquidation based procedure into a more flexible system that encourages corporate reorganisation and preserves employment as much as possible. Westbrook observes that the emphasis on reorganization constitutes the most striking aspect of worldwide reform. Typically legislators have hoped to achieve corporate reorganisation by introducing or

89 UNCITRAL Legislative Guide on Insolvency Law, p10
90 The UNCITRAL Legislative Guide on Insolvency Law defines Reorganisation as “the process by which the financial well being and viability of a debtor’s business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversations and sale of the business (or parts of it) as a going concern”
91 UNCITRAL Legislative Guide on Insolvency Law, p10
92 Interview: Nitesh Patel, Joint Receiver and Manager of Kasama Coffee Company
reinforcing a United States Chapter 11 Bankruptcy code\textsuperscript{94} -type formal reorganisation procedure\textsuperscript{95}. In Chapter 2 of this study, it was concluded that the Zambian Insolvency law does not meet international Insolvency laws standards in that it does not specifically make provisions for company reorganisations. As the United States Chapter 11 Bankruptcy code has been used as a model for reform, it is important to review the US Chapter 11 bankruptcy law and assess its suitability as a model for adoption for Zambia. This is the objective of this chapter.

4.1 The United States Chapter 11 Bankruptcy Code

The United States’ insolvency law is codified in the Bankruptcy code\textsuperscript{96}. The code consists of 9 sections which are labelled “chapters” as follows:

2. Case Administration
3. Creditors, the Debtor, and the Estate
4. Liquidation
5. Adjustment of Debts of a Municipality
6. Reorganization
7. Adjustments of Debts of a Family Farmer or Family Fisherman with Regular Annual Income
8. Adjustment of Debts of an Individual with regular income
9. Ancillary and Other Cross-Border Cases

The United States chapter 11 bankruptcy code (US Chapter 11) is a leading example of shareholder/management oriented\textsuperscript{97} insolvency legislation. Shareholder and management oriented legislation is characterised by the existence of some form of debt forgiveness during financial restructuring or reorganization where a company is allowed to continue its operations. Stijn Claessens et al observe that the US Chapter 11 code is more debtor friendly\textsuperscript{98}. Westbrook asserts that the US Chapter 11 mechanism receives much attention in reform discussions because it provides that “sort of rule-bound participatory approach

\textsuperscript{94} The United States Bankruptcy (insolvency) law is codified and enacted as Title 11 of United States Code, entitled “Bankruptcy”. Chapter 11 represents the chapter number representing provisions relating to reorganisations. It is therefore commonly referred to as Chapter 11.
\textsuperscript{95} Nico Dewaelheyns and Cynthia Van Hulle, ‘Filtering Speed in a Continental Reorganisation Procedure’, p1
\textsuperscript{96} 11 U.S.C
\textsuperscript{97} Q Hussain and C Wihlborg, ‘Corporate Insolvency Procedures and Bank Behaviour: A study of selected Asian economies’, A working paper of the International Monetary Fund (WP/99/135), p7-8
because it was developed in a continental economy lacking a single cohesive class."

Perhaps the essence of Chapter 11 is best summarised by Jay Lawrence Westbrook and Elizabeth Warren who observe:

"American law claims many innovations, from the Bill of Rights to the Superfund. In the pantheon of extraordinary laws that have shaped the American economy and society and then echoed throughout the world, Chapter 11 of the U.S. Bankruptcy Code deserves a prominent place. Based on the idea that a failing business can be reshaped into a successful operation, Chapter 11 was perhaps a predictable creation from a people whose majority religion embraces the idea of life from death and whose central myth is the pioneer making a fresh start on the boundless prairie. So powerful is the idea of reorganization that Chapter 11 has heavily influenced commercial law reform throughout the world."

4.2 The Chapter 11 Process

Chapter 11 formally begins with the filing of a petition in bankruptcy court. Although such petitions are almost always filed by the debtor, creditors meeting certain requirements may force a firm to file for involuntary bankruptcy. A schedule of assets and liabilities and a statement of financial affairs also must be filed together with the petition. The first thing that happens upon the filing of a petition for bankruptcy is that all other legal proceeding involving debts of the company are frozen. This is what is called the "automatic stay", and it brings to an immediate stop to all collection efforts, harassment of a debtor, and all court proceedings, including seizing bank accounts or other property. It also means that a utility cannot cut off power or other services to a business (or an individual, for that matter) because of the non-payment of debt. This is the reason why this chapter is sometimes referred to as Chapter 11 "Bankruptcy protection." This proviso of the act therefore vests considerable power with the incumbent management. However, a bankruptcy judge had the power to lift the stay. In most cases, the debtor,

101 This section is adopted from www.uscourts.gov/bankruptcy courts/bankruptcybasics/chapter11.html
102 11 U.S.C Section 301
103 11 U.S.C Section 303
104 11 U.S.C Section 362
105 11 U.S.C Section 362 (a) (1)
106 11 U.S.C Section 362 (a) (3)
107 11U.S.C Section 366(a)
109 11 U.S.C Section 362 (a) (4) (d)
known as the debtor in possession once the case has begun, remains in possession of his property, develops a plan, and generates funds to pay his debts. If there is evidence of mismanagement or fraud, a trustee may be appointed upon the request of creditors.\textsuperscript{110} The ability of the debtor to remain in possession and to continue to operate the business is a substantial reason to file a Chapter 11.

After filing, Chapter 11 consists of three main parts. The first consists of the presentation of a plan of reorganization. A Chapter 11 plan typically classifies claims against the debtor, specifies the treatment to be given each class of claim, and provides the means for carrying out the plan. Under Chapter 11 U.S. Code Section 1121, the debtor in possession has a 120 filing day ‘exclusive period’ during which they have the sole right to file a plan of reorganization. If the debtor has failed to file a plan during the first 120 filing days, the debtor can request to extend their exclusive period. If their request for an extension is denied, other parties may file their own plan for firm reorganization\textsuperscript{111}.

Secondly, once a plan as been filed, creditors and equity holders vote to confirm the plan. A plan is considered confirmed when a majority consensus is reached as measured both in the number of creditors and fraction of the total debt owed\textsuperscript{112}. Creditors may object to the confirmation of the debtor’s plan in a Chapter 11 case. Such objections will usually challenge whether the debtor has met the technical requirements of Chapter 11. However, creditors may also challenge the debtor’s valuation of their collateral and the feasibility of the debtor’s plan. As a result, it is usually necessary for the debtor to obtain expert testimony concerning the current value of assets. In addition, it will be necessary for the debtor to provide his creditors with detailed financial projections which will assist the bankruptcy court in determining that the business may be successfully restructured. Upon confirmation of a plan, the debtor receives back all his property free and clear of all liens and encumbrances unless such liens are preserved by the plan. Both the debtor and the creditors are bound by the terms of the confirmed plan.

Finally once a plan has been confirmed, the process of reorganization begins with the implementation of the now approved plan of reorganization. Once completed to the

\textsuperscript{110} 11 U.S.C Section 1104 (a) (1)
\textsuperscript{111} 11 U.S.C Section 1121 (c)
\textsuperscript{112} 11 U.S.C Section 1129(a)
courts satisfaction, the case is officially closed and the bankruptcy process is considered complete.

In some circumstances the debtor may qualify as a "small business debtor." The small business election\textsuperscript{113} expedites the bankruptcy case. If the election is properly made, no creditors' committee may be appointed and only the debtor may file a plan during the first 180 days of the bankruptcy case (rather than the 120 days allowed for in a traditional Chapter 11 case). This "exclusivity period" may be extended by the court. However, this can only be extended to 300 days if the debtor demonstrates by a preponderance of the evidence that the court will confirm a plan within a reasonable period of time. To qualify for the election, the debtor must be engaged in commercial or business activities (other than primarily owning or operating real property) with total non-contingent liquidated secured and unsecured debts of $2,190,000 or less.

4.3 Power of the debtor in possession\textsuperscript{114}

4.3.1 Avoidable Transfers

The debtor in possession or the trustee, as the case may be, has what are called "avoiding" powers. These powers may be used to undo a transfer of money or property made during a certain period of time before the filing of the bankruptcy petition. By avoiding a particular transfer of property, the debtor in possession can cancel the transaction and force the return or "disgorgement" of the payments or property, which then are available to pay all creditors. Generally, and subject to various defences, the power to avoid transfers is effective against transfers made by the debtor within 90 days before filing the petition. But transfers to "insiders" (i.e., relatives, general partners, and directors or officers of the debtor) made up to a year before filing may be avoided.

4.3.2 Cash Collateral, Adequate Protection, and Operating Capital

Although the preparation, confirmation, and implementation of a plan of reorganization is at the heart of a chapter 11 case, other issues may arise that must be addressed by the debtor in possession. The debtor in possession may use, sell, or lease property of the estate in the ordinary course of its business, without prior approval, unless

\textsuperscript{113} 11 USC Section 1121(e)
\textsuperscript{114} This section adopted from \url{www.uscourts.gov/bankruptcy courts/bankruptcybasics/chapter11.html}
the court orders otherwise. If the intended sale or use is outside the ordinary course of its business, the debtor must obtain permission from the court.

A debtor in possession may not use "cash collateral" without the consent of the secured party or authorization by the court, which must first examine whether the interest of the secured party is adequately protected. Section 363 defines "cash collateral" as cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents, whenever acquired, in which the estate and an entity other than the estate have an interest. It includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a creditor's security interest.

When "cash collateral" is used, the secured creditors are entitled to receive additional protection under section 363 of the Bankruptcy Code. The debtor in possession must file a motion requesting an order from the court authorizing the use of the cash collateral. Pending consent of the secured creditor or court authorization for the debtor in possession's use of cash collateral, the debtor in possession must segregate and account for all cash collateral in its possession. A party with an interest in property being used by the debtor may request that the court prohibit or condition this use to the extent necessary to provide "adequate protection" to the creditor. Adequate protection may be required to protect the value of the creditor's interest in the property being used by the debtor in possession. This is especially important when there is a decrease in value of the property. The debtor may make periodic or lump sum cash payments, or provide an additional or replacement lien that will result in the creditor's property interest being adequately protected.

When a chapter 11 debtor needs operating capital, it may be able to obtain it from a lender by giving the lender a court-approved "super priority" over other unsecured creditors or a lien on property of the estate.

4.3.3 Fraudulent Transfers

The debtor in possession also can avoid fraudulent transfers made within one year before the filing of the bankruptcy petition. Under the Bankruptcy Code, a fraudulent

115 11 U.S.C Section 363(c)
116 11 U.S.C Section 363
117 11 U.S.C Section 363(c)(4)
118 11 U.S.C Section 361
119 11 U.S.C Section 364
transfer is a transfer made with the intent to hinder, delay, or defraud a creditor. It also includes transfers for which the debtor received less than a reasonably equivalent value in exchange for the transfer. Finally, the debtor in possession can avoid or set aside transfers that are not properly recorded or perfected under state law. These avoidance powers are potent tools that the debtor in possession can use to formulate and fund his or her plan.

4.4 Criticism of Chapter 11

Chapter 11 bankruptcy laws have received much critical review. Fisher and Martel have identified six fundamental criticisms of chapter 11 bankruptcy code in the literature\(^{120}\):

4.4.1 The probability of confirmation in Chapter 11 is very low.
Some studies suggest that the confirmation rate in chapter 11 is less than 20 percent and thus promotes failure rather than rescuing companies from financial difficulty.

4.4.2 Small businesses filing for Chapter 11 typically end up in liquidation.
This suggests that Chapter 11 is not suitable for small to medium sized companies and that it should only focus on larger organisations;

4.4.3 The probability of emerging from a Chapter 11 reorganisation as an ongoing business is very low.
Studies have suggested that companies have a less than 10 percent chance of surviving Chapter 11 proceedings;

4.4.4 Unsecured creditors usually have a weak bargaining position relative to the debtor.
Chapter 11 gives the debtor an exclusivity period to propose a reorganization plan of 120 days after filing for bankruptcy plus a 60-day period for its approval by creditors. This exclusivity period is often extended by the court, which makes it very difficult for creditors to propose their own plans or amendments to the original plan; To the extent that management favours equity, by virtue of these powers under the Act, considerable costs on

\(^{120}\) Timothy C.G Fisher and, Jocelyn Martel, ‘Should We Abolish Chapter 11? Evidence from Canada’ CIRANO Scientific Series, 1996, p3-4
creditors can be imposed by protracting the reorganization process. Creditors anticipating the loss in value of their claims due to the delay and in the interest of reaching an agreement, often waive their right to be fully satisfied before distributions are made to equity holders.\(^{121}\)

4.4.5 The absolute priority rule is systematically violated in Chapter 11

4.4.6 Chapter 11 is time-consuming, litigious, and costly.

_{In Re Humble Place Joint Venture}^{122}_ Judge Jones excoriated a real estate development company that had filed Chapter 11 to stave off foreclosure of a real estate development. The developer had testified that, while the Chapter 11 case was pending, the owner's business plan consisted of "mowing the grass and waiting for market conditions to turn," causing Judge Jones to confirm dismissal of the developer's case as a bad-faith filing. Despite the dismissal, the case only intensified the view that bankruptcy had become a haven for businesses that wanted to hide out from their creditors. Chapter 11, so went the story, was a safe zone that scoundrels used to evade their responsibilities--except perhaps in the rare cases in which a valiant judge would force them out\(^{123}\).

In their response to the criticisms of Chapter 11, Warren and Westbrook conclude as follows:

"Critics have been quite confident in their condemnation of the U.S. Chapter 11 system. They have been so confident; in fact, that they have advanced significant legal changes to the system and have proposed even more sweeping revisions in order to counteract its purported inefficiencies. Foreign policy makers, lured by the promise of reducing losses imposed by failing businesses, have moved toward Chapter 11-style systems, but some, such as Germany and Mexico, made critical adjustments to their reorganization systems to avoid those same purported problems. These data expose the heart of the efficiency question: is successful reorganization a rarity, available in a relatively small number of cases? Are the benefits of Chapter 11 achieved only at the expense of long delays? Our data offer a very different picture from the conventional wisdom. They show that confirmation rates before the 2005 Amendments were nearly double the commonly

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\(^{121}\) Sreedar T Bharath , ‘The Changing Nature of Chapter 11’, University of Michigan

\(^{122}\) 936 F 2d 814 (5th Cir. 1991)

accepted number, even when measured by the most naïve metric. They also show that confirmation rates jumped to two-thirds or more among larger debtors, debtors that were able to survive the first nine months in bankruptcy, and debtors who at least proposed a plan to reorganize. The data reveal that the cases—both those that exit the system and those that confirm plans of reorganization—moved at a lively pace. They also suggest that, at least between 1994 and 2002, the system showed signs of improvement. While the data cannot answer the normative question about whether the movement is as substantial as it should have been, they are adequate to dispel the notion that great numbers of debtors were hiding out in Chapter 11 for years, just mowing the lawn and waiting for the market to turn. Emergency surgery is never pretty and often unsuccessful, but the data reveal that Chapter 11 offered a realistic hope for troubled businesses to turn around their operations and rebuild their financial structures. These data show that prospects are far better than much of the world has been led to believe.”

4.5 Conclusion

This chapter has made a critical review of the Chapter 11 reorganisation legislation. From the outset it is clear that the legislation is extremely complex with a very high leaning towards debtor friendliness exemplified by the powers that the debtor company assumes once a filing is done under the Act. It is also clear, from the literature that there is no agreement on whether in fact the chapter 11 delivers on its objective of saving financially stressed but viable businesses from liquidation. Despite the criticisms, as has been discussed above, many countries reforming their Insolvency laws have used chapter 11 as a basis for modelling their own reorganisation provisions. From the forgoing it is clear that for Zambia, Chapter 11 would be a suitable basis to draw from though it is clear that wholesale adoption of its clauses would not work. The execution of chapter 11 is heavily dependent on the operation of the Courts and has been seen in Chapter 3 of this study, the Zambian Courts are stretched to deal with current cases and the addition of this complex legislation wholesale would be most ineffective.

CHAPTER FIVE: REVIEW OF THE IMPACT OF EXISTING RELATED LAWS AND PUBLIC ADMINISTRATIVE PROCESSES

5.0 Introduction

Insolvency laws do not operate in a vacuum and their effective operation is affected by other laws and administrative procedures. The judicial system was examined in chapter 3 of the study and under this chapter; we now look at as the law relating to secured interest legislation, the Banking and Financial Services Act as well as a brief look at the privatization acts. These areas are intertwined with insolvency and it is important to review them.

5.1 The Companies Act

Companies that borrow money are usually required to provide security against the obligation by way of either charges or mortgages. Part V of the Companies Act\textsuperscript{125} provides for matters relating to registration of debentures and charges over property or undertaking of the company. Under Section 99 of the Companies Act, any fixed or floating charge created by a company must be registered with the Register of Companies. This section covers the following charges:

(a) a charge for the purpose of securing any issue of a series of debentures;
(b) a charge on uncalled share capital of the company;
(c) a charge to which the Trade Charges Act applies;
(d) a floating charge on the whole or part of the undertaking or property of the company;
(e) a charge on land, wherever situated, or any interest therein;
(f) a charge on any present or future book debts of a company;
(g) a charge on calls made but not paid;
(h) a charge on a ship or aircraft or any share in a ship or aircraft;
(i) charge on goodwill, on a patent or a licence under a patent, on a trade mark, or on a copyright or a licence under a copyright;
(j) a charge over shares in another body corporate, not being-
   (i) a charge in favour of a broker who has paid for a share purchased or applied for on behalf of the company; or
   (ii) a charge created by or accompanied by delivery of the certificates for such shares.

\textsuperscript{125} Chapter 388 of the Laws of Zambia
The Registrar is required to issue a certificate of the registration of the charge stating the date of lodgement and, if applicable, the amount thereby secured, and the certificate shall be conclusive evidence that the requirements of this Part as to registration have been complied with.\textsuperscript{126} Under the Companies Act, the Register of Companies is tasked with the enforcement of the provisions of the Act. Section 366 of the Companies Act establishes the office of the Registrar of Companies. Section 366(4) provides that:

"(4) The Registrar shall exercise the powers conferred on the Registrar under this Act, and shall administer the Act through the Office of the Registrar of Companies."

As an office, the Registrar of Companies suffers from a number of inadequacies that have a direct impact on its operations. As a quasi government institution, it is dependant on funding from Government. However due to resource constraints the office is not usually adequately funded thereby affecting its operations. Other constraints include a shortage of staff as well as the fact that while companies are to be found all over the country, the Registrar has offices in no more than 3 locations. The Registrar is also responsible for the administration of patents, trademarks and business names registration which may therefore cause inefficiencies when dealing with its responsibilities over charges and other aspects of the law for which the registrar is responsible.

5.2 Agricultural Credits Act\textsuperscript{127}

The Agricultural credits Act was enacted to provide a procedure for borrowing money on the security of charges created upon farming stock, additional assets or agricultural assets\textsuperscript{128} and to provide for the registration of such charges. The security constituted by way of an agricultural charge can either be a floating or fixed charge. A floating charge is considered to have the effect as if the charge had been created by registered debenture issued by a company. A fixed charge on the other hand allows the holder of the right upon the happening of any event specified in the charge as being an event authorizing the seizure of property subject to the charge to take possession of any property so subject and after an interval of 14 days or such shorter period as may be specified by the charge to sell the property.\textsuperscript{129} The Agricultural Credits Act provides a statutory priority of an agricultural charge in comparison to any other security that may be created alongside it.

\textsuperscript{126} Companies Act, Chapter 388 of the Laws of Zambia,s.100  
\textsuperscript{127} Chapter 224 of the Laws of Zambia  
\textsuperscript{128} Agricultural Credits Act, Chapter 224 of the Laws of Zambia,s.3  
\textsuperscript{129} Agricultural Credits Act, Chapter 224 of the Laws of Zambia,s.4
When an agricultural charge creating a floating charge has been created, an agricultural charge creating a fixed charge on any of the property comprised in the floating charge shall as respects the property subject to such floating charge be of no interest so long as a floating charge remains in force. Where a farmer mortgages an interest in land and the farmer creates an agricultural charge which includes growing crops, the right of the holder under such charge shall have priority over those of the mortgage whether in possession or not and irrespective of the dates of the mortgage and the charge. This therefore means that an agricultural charge has priority over other charges.

5.3 The Lands and Deeds Registry Act\textsuperscript{130}

The preamble of the Lands and Deeds Registry Act states that this is:

“an Act to provide for the registration of documents (deeds and security over real property); to provide for the issue of Provisional Certificates of Title and Certificates of Title; to provide for the transfer and transmission of registered land; and to provide for matters incidental to or connected with the foregoing.”

Section 65 provides as follows:

“65. A mortgage of any estate or interest in land shall have effect as security and shall not operate as a transfer or lease of the estate or interest thereby mortgaged, but the mortgagee shall have and shall be deemed always to have had the same protection powers and remedies (including a power of sale, the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits or any of them and, in the case of land held in leasehold, the right to receive any notice relating to the land the subject of the mortgage which under any law or instrument the mortgagor is entitled to receive) as if the mortgage had so operated as a transfer or lease of the estate or interest mortgaged.”

The registration under this Act is more complicated than that under the Companies Act and consequently the mortgages that need to be registered under both Acts tends to take different lengths of time and thus affect the efficacy of commerce in the country.

5.4 The Banking and Financial Services Act\textsuperscript{131}

The Banking and Financial Services Act was enacted to “provide for the regulation of the conduct of banking and financial services; to provide safeguards for investors in and customers of banks and financial institutions; and to provide for matters connected with or

\textsuperscript{130} Chapter 185 of the Laws of Zambia
\textsuperscript{131} Chapter 387 of the Laws of Zambia
incidental to the foregoing. Banks and other financial institutions, though incorporated under the Companies Act, are subject to the Banking and Financial Services Act in relation to insolvency, dissolution and liquidation. Section 85 of the Banking and Financial Services Act provides the supremacy of the Act over any other law where inconsistencies may arise.

5.5 Conclusion

The laws reviewed in this chapter have a bearing on the creditor/debtor relationship and well as providing administrative processes that impact the insolvency laws. It would appear that certain inefficiencies exist in the operations of certain bodies such as the Registrars of Companies and the Registrar of Lands and Deeds who have a direct impact on the enforcements secured interests via mortgages and charges. The Agricultural Charges Act gives statutory priority to agricultural charges over the other mortgages. These inefficiencies therefore contribute to making the insolvency process expensive and time consuming.
CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

6.0 Conclusion

The objective of this study was to establish whether there is a case for bankruptcy protection laws similar to that obtaining in the United States under Chapter 11 of the Bankruptcy code. Would a similar enactment in Zambia improve the existing body of Zambia's insolvency legislation? As stated the overarching objectives of insolvency laws are:

a. the allocation of risk among participants in a market economy in a predictable, equitable, and transparent manner; and

b. to protect and maximise value for the benefit of all interested parties and the economy in general.

Without effective procedures that are applied in a predictable manner, creditors may be unable to collect on their claims, which will adversely affect the future availability of credit. Similarly the rights of debtors (and their employees) may not be adequately protected and different creditors may not be treated equitably. The capitalist run economy will thus not foster growth and competition and will result in increased risk. As a consequence, this may lead to economic failure and financial crisis as the world has recently experienced.

In attempting to answer the question, it was important to review the current insolvency laws in Zambia to assess their adequacy, particularly in the narrow question of the extent to which it provides an option for a financially troubled but viable debtor company to be reorganised rather than face liquidation. In reviewing the Insolvency law, it was concluded that the current law falls short of expected international standards as outlined in the UNCITRAL's Legislative Guide to Insolvency Laws in that the existing law does not adequately meet the expected provisions necessary to support company reorganization. In fact, the current law was never promulgated to reorganize financially troubled companies. The Zambian insolvency laws are also fairly old and are in need of immediate reform. In conclusion, it has been clearly found that a case exists for legislative reform. In relation to whether the United States Chapter 11 of the Bankruptcy code should be adopted, it has

\[133\] 11 U.S.C
\[134\] International Monetary Fund, Orderly and Effective Insolvency Procedural Principles: Key Issues, 1999, Washington DC
been recognized that Zambia's economy is not as advanced and sophisticated as that of the United States and therefore a wholesale adoption may not be appropriate. However, it is suggested that Chapter 11 be used as a model for the development of reorganization provisions, in particular where a debtor is protected from creditor actions as it develops a workable turnaround plan.

6.1 Recommendations

The following recommendations arise from the study undertaken:

6.1.1 The need for the consolidation of insolvency laws into one Act

Zambia does not have a single body of insolvency law. The Insolvency law is to be found mainly in the Companies Act\textsuperscript{135}, Bankruptcy Act\textsuperscript{136} and the Deed of Arrangement Act\textsuperscript{137}. The banking and Financial Services Act also contains provisions for dealing with banks that are facing financial difficulty. It would be therefore in the country's best interests to codify all the relevant provisions that are found in the various Acts into one consolidated Insolvency Act. Countries such as China and the United Kingdom have consolidated their insolvency laws into one Act. The benefit of this is that all relevant provisions are to be found in one Act that eliminates any contradictions between the provisions.

6.1.2 The need to fully update the Current Companies Act

The current Companies Act is a descendant of the pre independence English Companies Act of 1948. While the Zambian Act has seen some amendments to certain provisions, it requires a complete overhaul to bring it in line with modern developments as well as take recognisance of the fact that the quality of laws has a strong bearing on how attractive a country is to foreign investment that developing countries like Zambia needs. Having a body of modern and up to date laws is a competitive advantage.

\textsuperscript{135} Chapter 388
\textsuperscript{136} Chapter 85
\textsuperscript{137} Chapter 82
6.1.3 The need to introduce comprehensive reorganization provisions as part of the country's insolvency laws.

As this study has shown, it is important for insolvency law to provide balance between reorganization and liquidation of a debtor company. It has been argued that the ability to save a company from liquidation has positive benefits to society such as the retention of employment as well as the value created from keeping together the assets of a company than breaking them into components to be sold. Insolvency laws the world over are undergoing much reform\textsuperscript{138} with a large number of the reforms focusing on reorganisations or rescue of the ailing entity rather than liquidation. With the focus by the Government on encouraging and promoting entrepreneurial activity\textsuperscript{139}, the shift from liquidation to reorganisation should tend to spur start ups as the fear of liquidation is lessened. Chapter 11 of the United Stated Bankruptcy code\textsuperscript{140} provides a good basis on which the Zambian provisions may be based. Chapter 11 has been the basis of on which countries such as the United Kingdom, China, and Germany have modelled their reorganization provisions. While it is conceded that it would not be wise to adopt wholesale the provisions of Chapter 11, it stands out as a piece of legislation that has stood the test of time in one of the world's largest economies. Provisions relating to automatic and mandatory stay or suspension of actions and proceedings against the assets of the debtor affecting all creditors for a limited period of time would be critical. It is important however to also fully recognize that such a provision should have inbuilt mechanisms to ensure that it is not abused. The role of the Courts in this respect would be critical.

6.1.4 The need for increased support to the Zambian Judiciary

As was noted in Chapter three of this study, the judiciary is an important component of insolvency law system. The level of efficiency and effectiveness in the operations of the judiciary has a strong bearing on the court's application and administration of the law. The courts have been criticised for delayed disposal of cases as well as entertaining abuse of process. The Zambian Judiciary faces a number of challenges ranging from inadequate number of Judges and support staff to lack of support infrastructure such as inadequate law libraries, physical court buildings, office equipment and transport. Judges also need to be fully trained in the various specialist areas of law

\textsuperscript{138} For example Republic of China recently enacted a reformed body of insolvency laws
\textsuperscript{139} The Government enacted the Citizen Economic Empowerment (CEE) Act on 12\textsuperscript{th} and 19\textsuperscript{th} May 2006 respectively, based on a belief that a country's long term economic as well as political growth should be driven by its citizenry who need to be economically empowered.
\textsuperscript{140} USC 11
such as Insolvency. An ineffective judicial system loses the credibility of society and this ultimately leads to costly legal processes.

The creation of the commercial list, it is hoped will address the issues of long delays and non appreciation of many commercial matters by the court. The creation of the user committee should also improve the operations of the court given the diverse membership of the committee that includes representatives from business and industry. It is also important to note that Judges on the commercial list are bound not to entertain any applications for adjournments except in compelling and exceptional circumstances\textsuperscript{141}. However, the terms “compelling and exceptional circumstances” have not been defined in the amendment act.

The Government has recognized the need for providing support to the Judiciary. However the support needs to be improved in relation to the amount of funding made available and the timeliness of the support.

\textsuperscript{141} High Court (Amendment) Act of 1999, s.9
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