UGANDA
KATENDE, SSEMPEBWA & CO. ADVOCATES

FIRM INFORMATION

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COUNTRY INFORMATION

The Republic of Uganda, is a landlocked country situated in East-Central Africa and bordered to the East by Kenya, to the North by South Sudan, to the West by the Democratic Republic of the Congo, to the South-West by Rwanda, and to the South by Tanzania. The official languages of the country are English and Swahili.

TYPE OF GOVERNMENT

Uganda is a Presidential Republic. This means that the President of Uganda is both the Head of State and Head of Government. Executive power is exercised by the Government and legislative power is vested in both the Government and the National Assembly. The system of Government is a democratic parliamentary system with universal suffrage for all citizens over 18 years of age.

POLITICAL SYSTEM

Political party activities were restricted from 1986 in the non-party movement system, but in July 2005 a constitutional referendum cancelled this 19-year ban on multi-party politics. Membership of the Parliament of Uganda is comprised of a majority membership elected by popular vote with certain categories of seats reserved for established special interest groups, such as women, army members, disabled persons, elderly and the youth.

LEGAL SYSTEM

Uganda's legal system follows the English Common law tradition and the doctrine of Equity. The Judicature Act Cap 16 lays forth the laws applicable in Uganda and include: written law, common law (precedents from decided cases), doctrines of equity and any established and current custom or usage. The Ugandan judiciary operates as an independent branch of Government and consists of Magistrates Courts, the High Court, Court of Appeal/Constitutional Court and the Supreme Court. Judges for the High Court and Justices of the Court of Appeal are appointed by the President and approved by the Legislature.

TESTS FOR INSOLVENCY

What are the tests for insolvency? (i.e., liquidation)

The test for insolvency in Uganda's commercial law is evidenced by the company's inability to pay its debts as and when they fall due. This is demonstrated in the following ways:

- The failure of the company, within 20 working days, to comply with a statutory demand;
- An execution order issued against the debtor company in respect of a judgment debt remaining unsatisfied; or
- The receivership or attachment of all, or substantially all, of the debtor's property.

What are the tests for financial distress (i.e. business rescue or administration)?

The Insolvency Act, Cap 108 does not use the term 'financial distress', in Ugandan law, but an administration process may be commenced when the board opines that the business is or will be unable pay its debts in the same manner as set out above.

INSOLVENCY AND RESTRUCTURING PROCEDURES

Formal insolvency procedures

There are 3 formal insolvency procedures available in Uganda – bankruptcy, liquidation and receivership. The bankruptcy procedure secures a formal declaration of inability by an individual to pay his/her debts. Liquidation can be initiated by the Court, by the company or its directors (i.e. voluntary), or its creditors or subject to Court supervision. The receivership process is aimed at enabling a secured creditor to recover its money.

Formal restructuring procedures

The formal restructuring processes in Uganda include the following:

- Compromise or Arrangement. This is provided for under section 230 of the Companies Act. It may be approved by a majority in number representing three-fourths in value of the creditors (or class) present and voting at a meeting ordered by Court and, if sanctioned by Court, the compromise or arrangement is binding on all creditors (or the class), the company and, where applicable, the liquidator and contributories;
- Court annexed Alternative Dispute Resolution;
- Provisional Administration. This is a rescue mechanism by which a company can forestall its slide into receivership or liquidation. A provisional administrator is appointed by a special resolution and a notice in writing on the date the interim protective order is made; and
- Administration. This commences on the execution of an administration deed by a company in a general meeting.

Informal insolvency or restructuring procedures

The law does not particularly provide for informal insolvency procedures, but a party can nevertheless opt for it to avoid or mitigate the consequences of insolvency. They include the following:

- Government Bail Out: This can be done by way of tax waivers, capital injection, provision of soft loans, provision of guarantees, and provision of assets or offer of Government tenders. In Uganda, these are mainly obtained through negotiations with the Government, and are typically implemented on a case-by-case basis, subject to the applicable public finance, tax and procurement requirements; and
- Contractual Restructuring. This involves changing the composition and/or structure of assets and liabilities of a debtor in financial difficulty. Restructuring may take the form of rescheduling of debt repayments, roll-overs, conversion of the currency in which the debts are denominated, alteration of interest rates, forbearance of penalties in loan agreements, equity swaps, partial or total debt write offs, asset sales, hive downs and special purpose vehicles.

LIQUIDATION

What is the aim of liquidation?

The aim of liquidation is to bring the company's existence to an end and to distribute the proceeds from a sale of the company's assets fairly amongst the entitled persons (i.e. creditors and thereafter shareholders).

Process required to commence a liquidation

A voluntary liquidation is commenced when the company resolves by special resolution to liquidate. This voluntary liquidation is either a members or creditors voluntary liquidation.

At what point does the liquidation process commence

The liquidation is deemed to commence at the time the relevant resolution is passed, or (where a petition is presented first) at the time the petition is presented to Court.

Duration of the liquidation process

This depends on the complexity of the case and the size and nature of the company. It may take anything between 1 year or as long as 10 years.

Extent of court involvement in the liquidation process

The extent of Court involvement is determined by the actions of the affected parties, for instance:

- there is direct involvement by the Court if the liquidation is initiated by way of petition or if the Court is invited to supervise the liquidation process;
- recourse to Court may also be had in order to set aside voidable transactions or overcome process impasses;
- recourse to Court may be had to set aside a statutory demand for payment so as to forestall the liquidation process;
- recourse to Court may be had by a claimant, liquidator or trustee, if an uncertain amount subject to a contingency is being claimed, in order for the Court to determine the exact amount payable; and
- during liquidation, a decision by the liquidator to accept shares (or similar interests) as consideration for the sale of company property requires the relevant statutory approval (including a special resolution and, in some cases, court/committee approval).

Management of the company whilst in liquidation

Upon commencement of liquidation, the officers of the company remain in office but cease to have any powers, functions or duties other than those required or permitted under the Insolvency Act.. The liquidator's duty is to collect, realize and distribute the assets or proceeds of the assets of the company in accordance with the provisions of the Insolvency Act. In so doing the liquidator shall take custody of company assets, register the liquidator's interest in all assets, keep company money separate from other money held by the liquidator and keep full accounts and records of receipts, expenditure and other transactions.

Filing of claims

A creditor proves its claim by submitting a written statement of claim with the insolvency practitioner in charge of the liquidation. The particulars of the statement of claim may be verified by way of statutory declaration and accompanied by relevant supporting documentation. The time period in which the claim must be proved is set by the insolvency practitioner in charge of the liquidation. The Insolvency Regulations of 2013 prescribe a general form for proof of debt.

Factors which influence the period of the administration in a liquidation

Factors influencing the duration of liquidation proceedings include:

- complications in the form of multiple suits, injunctions and restraining orders during the liquidation;
- assistance (or lack thereof) from the former management of the company;
- the manner in which the business was traded or conducted prior to the commencement of liquidation, and
- the state of the goodwill between the company, the liquidator and the creditors.

Effects of liquidation on employees

Once a company is placed in liquidation, the employees may be required to fully disclose to the liquidator the details relating to the company property. The Insolvency Act provides that all wages or basic salary for a period of 4 months are preferential debts payable after payment of the liquidator's costs.

Effect of liquidation on contracts

The liquidator has the power to disclaim onerous contracts (including any unprofitable contract). Contracts are not automatically terminated by the commencement of liquidation unless they contain provisions to that effect.

Effect of liquidation on shareholders

The commencement of liquidation prevents share transfers and freezes the rights, liabilities, and powers of the shareholders under the Memorandum and Articles of Association. A shareholder is also, following the commencement of liquidation, required to fully disclose to the liquidator details relating to the business, accounts and other affairs of the company. Any transfer of shares (unless made to or with the sanction of the liquidator) and any alteration in the status of members after commencement of voluntary liquidation is void.

Effect of liquidation on creditors

A secured creditor may realize any asset subject to a charge if it is entitled to do so. After an asset is sold, if there is a shortfall, the creditor becomes an unsecured creditor for the balance and if there is a surplus the creditor must account for it to the liquidator. A secured creditor may also surrender a charge for the general benefit of creditors and claim as an unsecured creditor for the whole debt. A secured creditor's claim will take priority in the insolvency process where the assets of the insolvent are sufficient. Preferential debts are paid in priority to other debts, subject to the rights of secured creditors.

An unsecured creditor's claim is paid in full unless the assets of the insolvent company are insufficient to meet such claims. Where this occurs, they abate in equal proportions.

Pending claims, litigation and arbitration

No litigation can be commenced or continued with in respect of pending claims and any litigation or arbitration proceedings are stayed from the date of commencement of liquidation.

Voidable Transactions

A transaction is voidable if:

- it was entered into within 1-year preceding liquidation;
- the consideration received was significantly less than that provided by the company;
- it created obligations for which the company's resources were inadequate;
- as a result, the company became unable to pay its due debts;
- it was aimed at placing an asset beyond the reach of creditors;
- it created a charge over any property in the year preceding the commencement of liquidation; or
- it was characterized by insider dealing.

How is the liquidation process terminated?

With voluntary liquidation, at the conclusion of the liquidation process, the liquidator calls a final meeting of the shareholders of the company in the event of a members' voluntary liquidation, or a general meeting of the company and a meeting of the creditors in the event of a creditors' voluntary liquidation, by publishing a notice in the Gazette and a newspaper of wide circulation. This notice specifies the time, place and object(s) of the meeting(s) at least 30 days before the meeting(s). The liquidator presents an account of the liquidation to the meeting(s), showing how the liquidation was conducted and how the property of the company was disposed of. Within 14 days after the meeting (or, where the meetings are not held on the same day, after the later meeting), the liquidator sends a copy of the account to the Official Receiver and files a return of the meeting(s) and the date(s) of the meeting(s) with the Official Receiver, and upon expiry of three months from registration of the return(s), the company is taken to be dissolved unless court orders otherwise.

Director or officer liability

Officers of the company, including directors are liable for:

- their failure to publish notice of their resolution to liquidate (civil liability);
- their failure to preside over a creditors' meeting pursuant to a creditors' voluntary liquidation (civil liability);
- their failure to comply with a liquidator's demand for information (criminal liability);
- absconding from the country during the liquidation process (criminal liability); and
- failing to disclose all relevant information relating to company property and to deliver up company property under the director's control (criminal liability).

If the directors acted with intent to defraud creditors of the business or committed some other wrongful or illegal act, then they may be held personally liable for debts, obligations, and liabilities of the company.

Consequences of Director or Officer Liability

Civil consequences

A penalty is levied against a director for failing to preside over a creditors' meeting or a fine not exceeding 50 currency points (UGX 1,000,000 or USD 268).

Criminal consequences

A director may be liable for a penalty for failing to publish a resolution or for his or her non-compliance with the liquidator's requirements for the provision of information, subject to no more than 24 currency points or imprisonment not exceeding 1 year. A director could also be liable for absconding from the country and subject to imprisonment not exceeding 7 years. There is also a general penalty for which a director may be liable for his or her having contravened a provision of the Insolvency Act – a fine not exceeding 24 currency points (UGX 480,000 or USD 128) to imprisonment for a period not exceeding 2 years, and the latter coupled with a default fine.

BUSINESS RESCUE/ADMINISTRATION

Process required to commence a business rescue

The company passes a special resolution declaring the need to enter into a settlement with its creditors. The company thereafter petitions the Court for an interim protective order. If a protective order is granted, the company proceeds to appoint a provisional administrator. To finalize the appointment of the provisional administrator, the company obtains written consent for the appointment from the provisional administrator to act and from any secured creditor. The written consent is by a secured creditor holding a charge over the whole or substantially the whole of the property and undertaking of the company. There must be a notice appointing the provisional administrator. The provisional administrator is thereafter registered with the official Receiver and Registrar of Companies. Thereafter, the provisional administrator calls a creditors' meeting to approve the proposals put forward by the provisional administrator. The creditors at this meeting may resolve that the company execute an administration deed, that provisional administration ends or that the company be liquidated.

At what point does the administration process commence?

Provisional administration begins when an interim protective order is granted by Court. The administration process begins upon the execution of an administration deed.

Duration of the administration process

The provisional administration terminates:

- after the period specified in the interim protective order lapses, which may not exceed 30 days;
- upon execution of an administration deed; or
- after the provisional administrator gives public notice of the termination of the provisional administration (by giving the notices required under the Act). The duration of administration is derived from the terms of the administration deed.

Extent of court involvement in the administration process

The Court may be involved in the administration process in one or more of the following ways, by:

- issuing the interim protective order to commence the provisional administration;
- handing down compliance orders when officers of the company defy the provisional administrator;
- permitting the enforcement of a charge over property or the disposal of property subject to a charge, during the administration process;
- extending the period of provisional administration following an application made to Court by the provisional administrator;
- limiting or extinguishing the personal liability claims of the provisional administrator;
- extending the period for execution of the administration deed;
- examining a company officer regarding allegations levied against him or her in respect of unlawful behavior;
- giving directions on any matter concerning the functions of the provisional administrator or administrator; and
- cancelling or confirming variations made to the administration deed.

Management of the company whilst in administration

The role of the board of directors during the administration process is limited to facilitating the administration process by providing information, documents, the company seal and other required assistance to the appointed administrator and by assisting the administrator with any other role assigned to him or her by the administrator.

During the administration process, the administrator is required to:

- exercise the powers ordinarily exercised by the directors and secretary of the company;
- to take custody and control of the company's property and operations;
- to investigate the company's business, property and financial circumstances;
- to supervise the implementation of the administration deed;
- to prepare and distribute periodic reports to creditors;
- to facilitate the survival of the company;
- to attend to the approval of the administration deed;
- to achieve the advantageous realization of the company's assets that would be effected in a liquidation.

Filing of claims

The provisional administrator calls upon known creditors to submit documentation in support of their claims.

Factors which influence the period of administration

The duration of the administration process is dependent on the complexity of the case and nature of the company. The factors that may influence the duration of the administration process include the relationship between the company, the administrator and the creditors as well as the extent to which the former management of the company assist the administrator.

Funding of the company whilst in administration

Funds are derived from ongoing trading, realisations and any permitted financing/arrangements under the process/deed. A provisional administrator has an obligation to keep company money separate from other money held by or under the control of the provisional administrator. The provisional administrator is also expected to keep records of receipts, expenditure and other transactions and retain the accounts and records for not less than 6 years after the administration ends.

Effect of administration on employees

The Insolvency Act does not expressly terminate employment. The provisional administrator takes control of the business and may continue operations, and employment issues then follow the applicable contracts/labour law and the administrator's decisions in managing the company.

Effect of administration on contracts

The Insolvency Act is silent on the powers of the administrator in relation to contracts concluded by the company prior to the commencement of administration. It should be noted that in Uganda a company in distress, in lieu of outright liquidation, ordinarily resorts to informal means of compromising and settling with its creditors.

Effect of administration on shareholders

Under the Insolvency Act, an administration deed binds the company, its directors and secretary, the administrator, creditors and shareholders. Accordingly, shareholders remain members of the company, but their practical control over the company's affairs is constrained during the process because the company is managed in accordance with the administration arrangements and the statutory powers of the administrator. Any arrangement reached with creditors (including any variation of the administration deed) may therefore affect shareholders' positions to the extent set out in the deed. Further, creditors may resolve to reject the proposed administration arrangement and the company may then proceed to liquidation in accordance with the Act.

Effect of administration on creditors

Any property belonging to the company, and that is subject to a charge, cannot be disposed of during the administration process without the consent of the secured creditor or the sanction of the Court. A creditor who is bound by an administration deed is barred from making an application for the liquidation of the company or from proceeding with an application. A creditor is also barred from commencing or continuing with execution proceedings or other legal processes or from levying distress against the company or its property.

Pending claims, litigation and arbitration

From the date on which the administration process commences, a moratorium arises and no litigation or arbitration proceedings can be commenced with or continued. Administration also forestalls the commencement or continuation of liquidations and receiverships. No steps may be taken to enforce any charge over company property unless the proceedings were commenced prior to administration. Some of these limitations can be lifted by Court order.

Effects of the moratorium

The commencement of the administration process gives rise to a moratorium which prohibits the commencement of liquidations, receiverships, the enforcement of charges, the commencement or continuation of litigation and the disposal of company property subject to a charge. Any moratorium under an administration deed must be specified in the deed. Some of these limitations may be lifted by Court order. The administrator has the power to dispose of company property if the disposal is in the ordinary course of the company's business. However, property subject to a charge may only be disposed of after the secured creditor consents to the disposal.

Voidable transactions

Transactions which concern the disposal of property which is subject to a charge, without the consent of the concerned creditor, will be set aside by the Court on application by the concerned creditor.

The administration plan

The administration proposal developed by the provisional administrator must specify the identity of the proposed administrator, the available property, the nature and duration of any moratorium, the extent to which the company will be relieved from its debt, the conditions precedent to which the plan is subject, the proposed distribution plan for the distribution of proceeds to creditors and/or shareholders and the circumstances leading to the termination of the administration process.

Voting on the plan

The provisional administrator is required to call a creditors' meeting within 10 days of the provisional administration process having commenced in order to procure a vote on the plan. The provisional administrator's proposals are considered at a creditors' meeting convened for that purpose, and the notice of that meeting must be sent to every known creditor and accompanied by the proposals. At the meeting, creditors may resolve that the company execute an administration deed, that provisional administration ends, or that the company be liquidated.

Cram down on creditors

All decisions in respect of the administration process are made by the creditors at meetings and are made by way of a simple majority. There are no express cram down provisions in Uganda legislation.

Discharge of claims

An administration deed may provide that a creditor who has agreed to the partial discharge of a debt owing to it by the company may lose the right to enforce the part so discharged against the company. The discharge of a creditor's claim is therefore dependent on the provisions of the deed. For clarity, Creditors' claims are addressed to the extent and on the terms stated in the administration deed, including any stated release from debts and distribution order, and the administrator supervises implementation of the deed.

How is the process terminated?

The administration process is terminated by virtue of the administrator, creditor or liquidator (if the company is to be placed in liquidation) making application to Court to terminate the process or where the circumstances which are specified in the deed for terminating it occur.

What is the status of the company after administration?

If the administration process is successful, the business will continue to trade as a going concern. If the administration is, however, unsuccessful, liquidation proceedings are initiated and the business is would up.

Director and officer liability

The directors and officers of the company who used the company operations to defraud creditors or to do some wrong/illegal act may be held personally liable for debts, liabilities and obligations of the company.

SECURITY

Types of securities

The securities recognized in Uganda include mortgages over land, debentures and other company charges (fixed and floating), and security interests over movable property (e.g., equipment, receivables, inventory) that may be perfected by registration or other methods permitted by law. Charges among others include charges over uncalled share capital, book debts, and a floating charge over the undertaking or property

Security trustees or special purpose vehicles

The Insolvency Act does not provide for such an arrangement. The Insolvency Act only provides for the appointment of a receiver under several security instruments such as debenture deeds but such a receiver only acts in the interests of the appointing authority who usually is a single creditor/lender and not multiple lenders.

Most robust form of security

A debenture creating a charge over company property is a recommended form of security. It is simpler to enforce than a mortgage, easier to create and covers a wide range of the borrower's property. Nonetheless, it is advisable to couple a debenture with a mortgage instrument as security for the same loan facility. The mortgage is registrable as an encumbrance over the borrower's immovable property and prevents it from being alienated without recognizing the lender's interest.

Registration of security

The procedure for registration of a debenture or pledge involves the execution of the security documentation, the payment of stamp duty and the payment of the registration fees at an approved bank. Thereafter, the security must be registered with the company's registry within 42 days of its creation. In the case of a mortgage, the instrument with supporting documentation must also be registered with the land registry. Thereafter, a registration certificate is issued which is conclusive evidence of compliance. The registration of the security is usually undertaken by the lender. For mortgages, the instrument is registered at the land registry. For movable property security, perfection may be achieved by registering a notice in the SIMPA register (or by possession/control, as applicable).

Stamp duty

The due and payable stamp duty rates are as follows:

- documentary credits – UGX 15,000 (approximately USD 5);
- negotiable securities – cheques attract NIL stamp duty while bills of exchange that are not a bond, bank note or currency note attract stamp duty of UGX 15,000 (approximately USD 5);

- insurance policies – UGX 35,000 (approximate equivalent of USD 10);
- debenture – NIL;
- legal mortgage – NIL;
- equitable Mortgage- NIL;
- pledge – NIL.

Payment of stamp duty is usually undertaken by the borrower. There will be a Stamp Duty charge of 15,000 per copy of each security document for barcoding purposes.

Registration costs

A registration fee of UGX 50,000, equivalent to approximately USD 14, must be paid for any instrument creating a charge over company property if the instrument is to be registered with the company's registry.

Requirements for the assignment or transfer of security

The requirement for the assignment and/or transfer of security is determined by the terms of the instrument or agreement, and may also require registration steps (e.g. amendments/ transfers for SIMPA-registered security interests; registration of transfers for mortgages where applicable).

Instances in which securities might be vulnerable to attack

If the security relates to family land and the necessary consents were not obtained prior to execution, such transaction or security may be vulnerable to being attached by third parties. If the security was not registered, registered out of time or not renewed if required then it may be vulnerable to being attached by third parties, where a movable security interest is left unperfected, or where the security is susceptible to avoidance/clawback in insolvency (e.g., as a preference/voidable transaction depending on timing and circumstances).

Methods of enforcement of security

The enforcement of security is governed by the terms of the relevant instrument or contract. For mortgages, the mortgagee serves a notice on default requiring rectification within forty-five working days. f the mortgagor does not comply, the mortgagee may exercise remedies including appointing a receiver, leasing, taking possession, or selling the mortgaged land. A mortgagee may exercise the power of sale after the time for rectification lapses, and must serve a notice to sell and wait twenty-one working days before completing a sale contract. For movable security under SIMPA, after default the secured creditor may take possession (subject to conditions), and sale is by auction with prescribed notice requirements (including at least ten working days' notice before disposition).

Problems experienced when enforcing security

The following are some of the problems that one may experience when enforcing one's security:

- prior over-valuation of the property may result in recovery of a far lesser sum upon sale;
- long timeframes for enforcing mortgages; and
- delays in the litigation process.

Financial assistance requirements

The Companies Act, Cap 106 sets out board approvals that must be acquired before a company is permitted to grant security or create a charge over its assets. A company should ensure proper corporate authority (typically board approval in accordance with its governance documents) before executing security, and must comply with statutory registration requirements for charges under the Companies Act. (Note: 'financial assistance' provisions, where applicable, generally relate to assistance for acquisition of shares and are distinct from charge creation/registration.)

RECOGNITION OF FOREIGN JUDGMENTS

Instances in which your court will recognize a foreign judgment

The law of Uganda assures the enforceability of judgments of foreign jurisdictions provided that the judgment was issued by a superior court of a country declared by the Minister to have reciprocal arrangements with Uganda. In the absence of a ministerial order, enforcement may still proceed at common law by suing upon the judgment as a debt.

Requirements for recognition of a foreign judgment

Recognition requires that:

- the judgment was final and conclusive;
- the court had competent jurisdiction;
- the judgment is not contrary to public policy, fraud, or natural justice; and
- reciprocity is established under a Ministerial Order. Where no order exists, an action may be filed in Uganda to enforce the judgment at common law.

If reciprocity is not already established, this will require an application to the Minister of Justice and Constitutional Affairs to satisfy him or her that there is substantial reciprocity of treatment accorded to Ugandan judgments in the foreign jurisdiction. As a general rule, judgments of Courts in the territories of the Commonwealth are enforceable in Uganda.

Requirements for the Recognition of a Foreign Trustee, Business

Rescue practitioner or insolvency practitioner

A foreign trustee, foreign business rescue practitioner or foreign insolvency practitioner must be authorized to carry out their profession in Uganda (i.e. must have a valid business visa or work permit) whereafter Ugandan law will recognize such person for the purpose of carrying out any functions in Uganda. The Insolvency Act envisages a foreign a foreign representative (being a person or body authorized in a foreign proceeding to administer reorganization or liquidation of a debtor's assets or affairs) may apply to the High Court for recognition of the foreign proceedings. Upon recognition, the foreign representative may, with leave of court, intervene in any Ugandan proceedings in which the debtor is a party or seek relief under the Act.

A foreign representative, when in Uganda, may with leave of Court intervene in any proceedings in which a debtor is a party. There are two pre-requisites namely:

- There must be recognition of the foreign proceedings; and
- The requirements of the law of Uganda must be met.
- The requirements under the law of Uganda which must be complied with are:
- The foreign representative must be a lawyer, accountant or chartered secretary and a duly registered member of the relevant professional body or a registered member of any other professional body as the Minister may prescribe; and
- There is a professional indemnity in force at the relevant time for the proper performance of his or her duties.