

Insolvency proceedings: A double edged debt collection tool



WAISWA ABUDU SALLAM
Uganda Revenue Authority

We are delighted to announce that the winner of the Richard Turton award for 2015 is Waiswa Abudu Sallam from Uganda.

Waiswa works for the Uganda Revenue Authority in the Debt Collection Department. He is currently studying for a Master of Law in Corporate and Insolvency Law at Nottingham Trent University, UK (by distance learning).

Waiswa was invited to the Annual Congress in Berlin to receive his award.

A summary of his paper is presented here. The full version and further information about the award can be found on line at www.insol-europe.org/news/richard-turton-award-2015-winner

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Whereas it is generally acknowledged that insolvency proceedings are a collective debt collection mechanism through which an insolvent debtor's assets are pooled together for the benefit of all creditors, some creditors have over the years been using insolvency proceedings to collect their individual debts.

This is perhaps because of the historic coincidence that Bankruptcy law began as a debt collection device, a view that is incidentally shared by many commentators, especially those inspired by the economics movement, who contend that the proper function of insolvency law is to maximise the collective return to creditors.

The use of insolvency as an outright debt collection tool is however highly criticised as being unfair, harsh and illegitimate, and that if not carefully used, it could adversely affect the petitioning creditor.

Inability to pay debts is the primary reason why a creditor may choose to invoke insolvency proceedings against a debtor, and for individual debtors, it is the only ground upon which a debtor may be declared bankrupt. Inability to pay debts is generally presumed whenever a debtor fails to settle a debt of at least £750 for the UK, and for Uganda, Uganda shillings 2,000,000 in case of companies and 1,000,000 for individuals.

There is overwhelming consensus amongst both academics and debt collection practitioners that insolvency proceedings can be an effective

debt collection device, where, especially, the debtor is solvent but just unwilling to pay his or her debts, and it potentially has the following notable benefits:

- It enables the petitioning creditor to quickly determine whether the debtor has the means to pay or is indeed insolvent and unable to pay.
- Insolvency proceedings avert the problems associated with individual creditors separately rushing to recover their individual debts and the concomitant waste caused by such actions against an already distressed debtor, as well as the inequitable distribution of available assets to one or a few aggressive creditors to the detriment of the debtor and other creditors.
- The collective nature of insolvency proceedings present a more efficient and effective means of increasing payment to creditors and in enhancing fair distribution of payments amongst creditors.
- It works as a quasi-regulatory mechanism for extracting payment from unresponsive debtors.
- Insolvency enhances the creditor's capacity to negotiate and reach workable compromises with the debtor.
- It confirms to the debtor that the creditor is absolutely serious about collecting the debt, and that if the debt is not paid, the debtor will suffer the irreparable consequences of liquidation or bankruptcy.
- In terms of court fees,

insolvency proceedings are cheaper to commence than ordinary enforcement measures.

- Insolvency proceedings are fairly insulated from the very wide judicial discretion that is seen in ordinary enforcement procedures, which often favours debtors.

It is thus incumbent upon every debt collection professional to decide whether to collect their debts through the conventional and highly praised but ineffective way or through a means that is legal and highly effective but perceived by some people as illegitimate.

In my considered opinion, until the laws on insolvency are changed to provide otherwise, it is improper for courts to stigmatise the use of insolvency as a debt collection device. Debt collection is not a moral or ethical contest where a creditor's choice of collection procedure should be judged basing on moral or ethical standards.

It should however be noted that effective as it might seem, using insolvency proceedings to collect debts without carrying out a proper cost-benefit analysis can backfire and expose one to some of the following risks:

- Where, after presentation of the petition, the debtor succumbs to pressure and pays the petitioning creditor's debt ahead of other creditors, the court may not sanction withdrawal of the petition, and instead allow the other creditors to continue with the petition.
- Insolvency proceedings often negatively impacts on the

debtor's business prospects.

- Insolvency proceedings should never be invoked to recover genuinely disputed debts.
- Lastly, insolvency may provide relief to the debtor, since it suspends all actions against the debtor.

It is evident that although insolvency proceedings are generally believed to be collective in nature and meant to benefit the entire body of creditors, it is undeniable that there is a growing belief that these proceedings can also be used as a debt collection strategy by individual creditors, and in spite of the risks associated with it, there is every reason for all result-oriented debt collectors to deeply think of insolvency proceedings as the possible weapon against the capable but stubborn defaulters.

In order for insolvency to however work for creditors, it is important that players in the



Waiswa (centre) receiving his reward from (l-r) Graham Rumney (R3 Chief Executive Officer), Neil Cooper (INSOL Europe Honorary President), Nicky Fisher (IPA Committee Member), Mark Udink (INSOL Europe Honorary Chairman), Robert van Galen (INSOL Europe President 2014/15), Mark Robinson (INSOL International President).

judicial arena change their attitude towards creditors who prefer this mechanism over other possible debt collection measures. Creditors should not be criticised for using insolvency proceedings to collect their debts. The judge's role should remain as that of an umpire; to decide whether or not

the petition is lawfully introduced before the before court, and not to determine the legitimacy of one's choice of procedure. ■

Editor's Note:

From 1st October the minimum debt for a bankruptcy petition in the UK is £5000.

RICHARD TURTON AWARD

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Richard Turton had a unique role in the formation and management of INSOL Europe, INSOL International, the English Insolvency Practitioners Association and R3, the Association of Business Recovery Professionals in the UK. In recognition of his achievements these four organisations jointly created an award in memory of Richard. The Richard Turton Award provides an educational opportunity for a qualifying participant to attend the annual INSOL Europe Conference.

In recognition of those aspects in which Richard had a special interest, the award is open to applicants who fulfil all of the following:

- Work in and are a national of a developing or emerging nation;
- Work in or be actively studying insolvency law & practice;
- Be under 35 years of age at the date of the application;
- Have sufficient command of spoken English to benefit from the conference technical programme;
- Agree to the conditions below.

Applicants for the award are invited to write to the address below enclosing their C.V. and stating why they should be chosen in less than 200 words by the 1st July 2016. In addition the panel requests that the applicants include the title of their suggested paper as specified below. The applications will be adjudicated by a panel representing the four associations. The decision will be made by the 1st August 2016 to allow the successful applicant to co-ordinate their attendance with INSOL Europe.

The successful applicant will

- Be invited to attend the INSOL Europe Conference, which is being held in Lisbon, Portugal from 22-25 September 2016, all expenses paid.
- Write a paper of 3,000 words on a subject of insolvency and turnaround to be agreed with the panel. This paper will be published in summary in one or more of the Member Associations' journals and in full on their websites.
- Be recognised at the conference and receive a framed certificate of the Richard Turton Award.

Interested? Let us know why you should be given the opportunity to attend the IE Conference as the recipient of the Richard Turton Award plus an overview of your paper in no more than 200 words by the 1st July 2016 to:

Richard Turton Award
 c/o INSOL International
 6-7 Queen Street
 London
 EC4N 1SP
 E-mail: claireb@insol.ision.co.uk

Too old? Do a young colleague a favour and pass details of this opportunity on.

Applicants will receive notice by the 1st August 2016 of the panel's decision.