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Drivers of Insolvency Reforms in Kenya

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Abstract

Insolvency frameworks have increasingly become a subject of reform activities all over the world. In fundamental nature, the importance of reforming these regulations is generally recognised but the velocities at which the reforms are realised in different jurisdictions significantly differ. Besides opinions differ as to what the drivers for such reforms are, or ought to be, in a country. How can Kenya's slow progress and rate of regulatory changes, or lack of them, be explained? Some scholars believe in internal factors, such as the importance of history, social norms or political factors, such as leadership, democracy and/or some form of state centralisation. Others identify the relevance of external factors, in particular international trade or globalisation, with some emphasising the influence of reforms by neighbouring countries through regional integration. In essence, the reform drivers are arguably many and bear some similarity in all jurisdictions. However, the degree of influence of each of the drivers varies in different jurisdictions. In Kenya, insolvency reforms were recently realised with the enactment of the Insolvency Act 2015, yet attempts to reform started in the early 1990s. This article examines the Kenyan reform pathways by identifying and investigating the reform drivers of corporate insolvency law within the wider area of business reforms in Kenya.

Introduction

1 Reforming insolvency laws has increasingly become a subject of global interest and it will predictably remain so as part of the processes under which the jurisdictions of the world are becoming more integrated. In essence, the intensity of integration and interdependence among the jurisdictions of the world, much as it comes with significant benefits, inevitably makes many jurisdictions susceptible to financial crisis. This reality has made the consideration of insolvency reforms imperative in many jurisdictions. Kenya has, since the early 1990s, made attempts to reform the insolvency law which only bore fruits recently with the enactment of the Insolvency Act 2015. The insolvency framework under the Companies Act (Cap 486 Laws of Kenya) which was based on the UK Companies Act 1948 was long recognised as archaic and unable to support modern businesses. In fact, an assessment of insolvency systems in some Sub-Saharan African (SSA) countries within the context of the IMF's Financial System Stability Assessment Programmes[1] as well as periodic consultations with Bretton Wood institutions' member countries[2] reveals that much statutory law in SSA are obsolescent and in need of modernisation. The inadequacies found in the laws were described as 'symptoms of deeper structural impediments to private lending.'[3] In particular the 2008 IMF Report, while making reference to Kenya, was categorical that its insolvency laws needed to be modernised and the commercial courts be strengthened.[4]

2 Unfortunately, the reform efforts took more than a decade to realise despite the government; the official custodian of reforms acknowledging the need to update the law. For instance, Kenya's former President Mwai Kibaki in one of his speeches to the Parliament during the debates on the Insolvency Bill emphasised that there was a critical need for a new insolvency law, to enhance Kenya's competitiveness for

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[1] PD's Investment, Competition and Business Development Services Team, *Approaching International Financial Standards and Codes* (December 2003) <http://www.sed.manchester.ac.uk/research/iarc/edais/word-files/HowtoApproachInternationalFinancialStandardsCodes.doc> accessed 20 January 2013

[2] IMF, *Uganda: Financial System Stability Assessment* (April 2003) <http://www.imf.org/external/pubs/ft/scr/2003/cr0397.pdf> accessed 23 February 2013; World Bank, *Investment Climate Assessment Kenya: Enhancing the Competitiveness of Kenya's Manufacturing Sector: The Role of the Investment Climate* (November 2004) <http://www.ifc.org/ifcext/economics.nsf/attachmentsbytitle/ic-kenya.pdf/$file/ic-kenya.pdf> accessed 23 February 2013

[3] Ibid

[4] IMF, *Kenya, Uganda, and United Republic of Tanzania: Selected Issues* (October,2008) <http://www.imf.org/external/pubs/ft/scr/2008/cr08353.pdf> accessed on 23 Feb 2013

business and investment.[5] A significant number of corporations bore the brunt of this during this period. This reality was best captured in *Jambo Biscuits v Barclays Bank (2002),* where Justice Ringera, stated that:

> 'I think it is notorious facts of which judicial notice may be taken that receiverships in this country have tended to give the kiss of death to many a business.'[6]

In a nutshell, there was an early recognition that Kenyan insolvency laws needed reforms and this beckons an investigation as to why reforms have took too long to realize. What are the barriers to insolvency reforms? This article answers this question by investigating the Kenyan reform pathway, identifying and analysing the reform drivers in a bid to drawing significant lessons to inform future reform efforts.

3 The first category is the government which is a distinctive player because of the position it occupies in a jurisdiction. The second can be broadly categorised as interest groups, who are the business community and insolvency professionals. The third category is broadly referred to as the regional trends. Further, the consequences of global trends such as, regional integration and crisis will be given due attention. The last category is the domestic forces, such as competition to attract foreign investment, poverty reduction and unemployment and the bid to promote economic growth. The discussion includes contrasting references to Mauritius, as a country which has recently implemented wide-ranging insolvency law reforms and to other relevant jurisdictions. This is considered necessary in understanding how more less the same drivers are succeeding in one jurisdiction and almost totally failing in another.

The Government

4 It is largely accepted that the government is the ultimate driver of reforms through its political and legal operations. In particular, political factors are considered as crucial in determining the outcomes of such policies.[7] In many instances, the ability of any government to engage in reforms is largely dependent on their pre-election promises and the political games of trying to remain in power at the expiry of the 'current' term in office. A number of scholars argue that policy makers engage in reforming legislation on financial markets mainly to progress their own private gains

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[5] Available in <http://www.parliament.go.ke/parliament/download/tenth_forth_sess/SPEECH/%20HIS%20EXCELLENCE%20HON.pdf> accessed 15/2/2013

[6] [2001] LLR 1381 (CCK)

[7] Dani Rodrik, 'The Positive Economics of Policy Reform' (1993) 83 American Economic Review 2, pp. 356; O Morrisey, 'Politics and Economic Policy Reform: Trade Liberalization in Sub-Saharan Africa' (1995) 7 Journal of International Development 4 pp. 599-618

namely: political survival and the generation of low cost financial resources.[8] In particular, insolvency touches on the very fundamentals of the economic system of the country and, as such, the reform, as well as enforcement of an insolvency law, can be problematic unless powerful domestic groups are convinced that the law does not threaten them.

5 As stated by Agimba, political impetus influences reform.[9] This sentiment is true majorly because the government, which is inherently political, develops overarching policy objectives as well as the policy agenda and is active in facilitating the reform. The scope of political influence on reform is prominent in Kenya. For instance, the 2002 elections and the installation of the National Rainbow Coalition ("NARC") government with a strong reform mandate and high expectations of change provided an especially conducive environment for reforms. In fact, during the tenure of the NARC government in Kenya, crucial government policies championing reforms were developed.[10] The government enjoyed substantial public goodwill and a remarkable boost when the Bretton Woods institutions resumed lending of funds for budgetary support to the country, which had been previously stopped for many reasons, some of them being concerned with a lack of reforms and with corruption.[11]

6 Much as political impetus has in the past driven reforms, in equal measure political instability has been a major source of derailment of the progress of reforms. Noteworthy in Kenyan history is the 2007/2008 post-election violence and consequential formation of the Grand Coalition Government. The occurrence of violence disrupted existing reform engagements. Besides, the Grand Coalition Government constantly engaged in wrangles debilitating legislative engagements.[12] Undoubtedly, the intentions of the leaders of the coalition faction were to engage in necessary reforms as expressed by the Prime Minister, who stated that Kenya's bid to drive up its international competitiveness and position itself as an investor-friendly destination would be boosted once the state was done with enacting planned reforms.[13] However, little was achieved because there were a lot of high political manoeuvres and in-fighting among the political partners, leaving the important legislative agenda lacking in sufficient attention. Nonetheless, post-election violence

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[8] Alberto Giovannini and Martha De Melo, 'Government Revenue from Financial Repression' (1993) 83 American Economic Review 4, pp. 953 ; Cevdet Denizer, Raj M Desai, and Nikolay Gueorguiev, 'The Political Economy of Financial Repression in Transition Economies' (1998) Bank of Korea

[9] Christine Agimba, 'Global Trends in the Four Doing Business Indicators-Closing a Business: Kenya's Reform Experiences' (Paper given at doing business 2011 in Africa: Sharing Reform Experiences 2011) < https://www.wbginvestmentclimate.org/loader.cfm?csModule=security/getfile&pageid=16716> accessed 24 May 2014

[10] Vision 2030 is one of the significant policies which hold the threads of reform and transformation of Kenya.

[11] See News from Africa available in http://www.newsfromafrica.org/newsfromafrica/articles/art_2655.html accessed on 20th August 2014

[12] Henry Amadi, 'Kenya Grand Coalition Government – Another Obstacle to Urgent Constitutional Reform?' (2009) 3 Africa Spectrum 149-164

[13] Macharia Kamau, 'Reforms to boost Kenya's business competitiveness' *Standard Digital*, (Nairobi, 19th October 2010)

and the adoption of a new constitution during the tenure of the Grand Coalition Government were major political events that had a direct influence on the reforms. These upheavals slowed the pace of reform, but they have also helped donors to support a business environment reform within a broader framework of democracy and governance.[14] One direct outcome of these events has been the increased attention given by the government, the business community and civil society to the importance of public private dialogue, which is arguably a necessary platform for pushing for reforms.[15] Many donor and development agencies participate in these dialogues and have been stated as a valuable forum for the exchange of information and strategies.[16]

7 An important factor that has a bearing on how politics can frustrate, rather than drive, reforms in Kenya is the inability of the political class to maintain the reform momentum. Poor outcomes have been blamed on African bureaucracies that play a contradictory and conflict-ridden role, being at once part of the problem and the cure.[17] In particular, the first attempts to reform insolvency laws were in the 1990s when a task force was established to review the existing framework. Despite the task force's report recommending extensive changes being completed, nothing much was done. Another political effort came in 2009, which resulted in the Insolvency Bill 2010 being published by the government. For the whole year, its status did not change. In 2011, when it looked like the reform momentum had died out, the finance minister proposed and tabled three bills in Parliament: a companies bill, an insolvency bill and a partnership bill. In fact, during the budget statement for the fiscal year 2011/2012, the minister urged the Honourable Members of Parliament to prioritise debates for these critical bills which were then before Parliament.[18]

8 It is notable that during the time when little progress towards law reform was being made in Kenya, there were significant legislative developments in Mauritius, where there is a markedly different political scene. Mauritius takes pride in being a mature democracy with strong institutions and a political scene that is remarkably stable.[19] Besides, it has an open economy, a modern legal framework, demonstrates regulatory efficiency and a has reliable system of state justice.[20] This is despite Mauritius being similar to many African countries in its extreme cultural diversity.

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[14] Simon White, Liz Winton and Stefan Engels, 'Review of Donor Supported Business Environment Reforms Programs and Practices in Kenya' (DECD, 2010)

[15] Ibid

[16] Ibid

[17] Steve Kayizzi-Mugerwa (eds), *Reforming Africa's Institutions: Ownership, Incentives, and Capabilities* (United Nations University Press, 2003)

[18] Republic of Kenya Budget Statement For the Fiscal Year 2011/2012 (1st July – 30th June) by Hon. Uhuru Muigai Kenyatta, E.G.H., M.P. Deputy Prime Minister and Minister for Finance 8th June 2011

[19] African Development Bank, *Mauritius 2009-2013 Country Strategy Paper-Draft (*May 2009) available in http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Mauritius-%202009-2013%20Country%20Strategy%20Paper-Draft.pdf accessed on 3rd June 2014

[20] Anjana Chikhuri 'Business in Mauritius in Challenging Times Riding the Tide of the Current Economic Downturn for a Better Future' (2012) 51 The Magazine of Mauritius Chamber of Commerce and Industry 6-9

In particular, its inhabitants are politically and religiously divided. Nonetheless, Mauritius is undoubtedly one of Africa's rare consolidated democracies, having held several recent national elections and witnessed changes of successive governments peacefully.[21] Of significance is the boldness of the political class to implement reforms. For instance, Paul, as Minister of Finance, implemented the neoliberal reform programme negotiated by the previous government with the IMF and categorically stated that he, '….was impressed by the force of the logic inherent in the IMF recipe and adopted it despite its unpopularity'.[22] In particular, since 2005, the government embarked on a bold economic reform programme aimed at opening the economy, facilitating business, improving the investment climate and mobilising foreign direct investment and expertise.[23] Notable too are the government statements during the debates in Parliament over the Insolvency Bill. In particular, the Minister of Finance and Economic Empowerment was categorical that the Insolvency Bill was another example of the government's commitment to adapt to the modern environment and to comply with international norms, standards and best practices.[24] In essence, the government has guided reforms with sufficient autonomy from a capitalist class and sufficient bureaucratic capacity, together with sufficient incentive, to promote both growth and redistribution through selective engagement with market forces.[25]

9 On the legal front, a government is a custodian of legal reforms. In Kenya the reform process is facilitated by a government organ namely; the Kenya Law Reform Commission (the "KLRC"), originally established under the Law Reform Commission Act of 1982 but currently embodied in the Kenya Law Reform Commission Act 2013 (the "KLRCA 2013"). The KLRC has an obligation to keep under review all of the laws of Kenya and to recommend their reform to ensure that the law conforms to the letter and spirit of the Constitution. Thus laws must be consistent, harmonised, just, simple, accessible, modern and cost-effective in application.[26] In performing its mandate, the KLRC is supposed to work with the office of the Attorney General in formulating and implementing programmes, plans and actions for the effective reform of laws.[27] Through the KLRC, the government of Kenya has been able to drive reforms in the wider legal spectrum, albeit its performance in reforming insolvency laws has not yet met expectations. It is

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[21] Richard Sandbrook and David Romano, 'Globalization, Extremism and Violence in Poor Countries' (2004) 25 Third World Quarterly 6

[22] Ravi Gulhati & Raj Nallari, 'Successful Stabilization and Recovery in Mauritius', EDI Development Policy Case
Series No 5, Washington, DC: World Bank, (1990) pg. 40

[23] Mauritius 2013 Investment Climate Statement available in http://photos.state.gov/libraries/mauritius/196472/josephan/2013%20ICS-Final%20Report%20_Mauritius_.pdf accessed on 16 June 2014

[24] Ramakrishna Sithanen, GCSK Vice-Prime Minister, Minister Of Finance And Economic Empowerment National Assembly, Second Reading Speech of the Insolvency Bill, Tuesday 31 march 2009

[25] Richard Sandbrook and David Romano (n 24)

[26] The Reform Commission Act 2013 sec 6(1) (Kenya)

[27] The Reform Commission Act 2013 sec 6(1) (Kenya)

acknowledged that the KLRC has been unable to realise its full potential in this area and has not influenced the process and pace of insolvency law reform in Kenya to a noticeable degree.

10 As noted, the insolvency laws remained static for several decades in Kenya, despite the existence of the KLRC, an institution with a clear reform mandate. Arguably, insolvency law was either subordinated in legislative priorities, or the KLRC had neglected its statutory obligation because, even where reforms have occurred, they have been undertaken arbitrarily. For instance, the KLRC has a statutory role to advise departments and ministries with regard to amendments to any branch of the law relevant to them, but departments and ministries have routinely engaged consultants whenever they wish to reform the statutes relevant to them. A good example is where the Minister of Finance proposed to establish in the ministry a Business Regulatory Reform Unit (the "BRRU") which was subsequently set up through an administrative order to ensure that new regulations, licences, fees, and charges did not create unnecessary burdens on businesses and to liaise with regulators to ensure that all future regulations conform to international best practices.[28] In addition the Unit was to serve as the secretariat for the task force consultative bodies that might be set as part of the 'Doing Business Indicators' providing recommendations to decision-makers and promoting good regulatory processes across government.[29]

11 Although department led efforts count in championing for reforms, it is arguably difficult for ministries to reform themselves, given countervailing pressures and deficient financial and human resources. Noteworthy too, contrary to the legal requirement that the KLRC examine particular branches of the law and formulate draft bills and proposals for reform, the Attorney General has commonly established task forces with a law reform mandate outside of the ambit of the KLRC.[30] The proliferation of this practice was openly acknowledged by Attorney General Amos Wako on an occasion where he was moving a bill in the floor of Parliament. He categorically stated that the bill was a result of the work of a task force appointed by

[28] A Working Committee was formed by the Government through the Ministry of Finance Circular Ref. No. Conf.262/02/ (3) of 24 February 2005 as read with Kenya Gazette Notice No. 7521 published in the Kenya Gazette of 23rd September, 2005. The Government subsequently continued the Committee's mandate until 31 December, 2006 (subsequently extended to 28 February, 2007) The mandate of the Committee was to provide input to government decisions on the establishment of a Business Regulatory Reform Unit and A medium term regulatory reform strategy. Also see The World Bank Group, 'Regulatory Capacity Review of Kenya' (2010) available in https://www.wbginvestmentclimate.org/uploads/Kenya.pdf accessed on 9th June 2012

[29] Ibid

[30] In 1992 the Attorney General established 15 reform task forces to review and update Kenya's laws in various areas. However, in the political environment of Kenya in the 1990s, little progress could be registered. See http://www.gjlos.go.ke/default.asp for details of the programme accessed on 6th June 2014

the Attorney General in the 1990s to review the laws relating to companies, investment and insolvency.[31]

12 One of the explanations offered as to the reasons for KLRC's ineffectiveness has been the lack of operational independence as originally crafted in the founding legislation.[32] To be specific, the office of the Attorney General has been responsible for approving the KLRC work programmes while a different body (the Ministry of Justice and Constitutional Affairs) was responsible for controlling the funding allocated from the national budget.[33] In essence, mechanisms with explicit responsibilities and authorities for managing and tracking reforms inside the administration are needed to keep reforms on track and on schedule and to ensure that regulatory quality standards continue to improve.[34] Significant deficiencies inherent in the KLRC operations have been dealt with in the latest statute, the KLRCA 2013. Nevertheless, against the on and off impetus demonstrated by government efforts and previous legal inadequacies, it is not in doubt that there is a consensus that the regulatory environment is out-dated and therefore not in tandem with the modern challenges. Besides, there have been calls since the enactment of the Constitution of Kenya 2010 to include Regulatory Impact Assessments in the legislative process to ensure regulatory rigour and consistency across national and county government, to avoid the laws resulting in a 'Balkanization' of business regulation across 47 counties.[35] Nevertheless nothing much has changed five years later since a new constitution was enacted.

13 Despite all the aforementioned challenges, the government has engaged fairly in numerous attempts to drive reforms. For instance, the government has established committee/task forces which engage in extensive consultative processes with stakeholders from the public and private sectors. In fact, the task force established in 1999 by the Attorney General, which looked into insolvency laws amongst others, was composed of representatives of institutions such as the Kenya Association of Manufacturers, the Federation of Kenya Employees, the National Chamber of Commerce, accountants, chartered secretaries and lawyers, especially those who specialise in corporate practice.[36] Generally, formation of a task force with such a wide representation provides a good platform to capture the views of a significant

[31] Kenya National Assembly Official Record (Hansard) Tuesday 24 May 2011 pg 24. In particular Amos Wako who is a former AG but currently Bongoma Senator gave detailed information on how the Bill he was moving was a result of a task force he himself established.
[32] Patricia Kameri Mbote and Migail Akech, *Justice and the Rule of Law: A Review by AfriMAP and the Open Society Initiative for East Africa* (The open Society Initiative for East Africa, Nairobi, 2011) pg. 6
[33] Ibid
[34] The World Bank Group, 2010 'Regulatory Capacity Review of Kenya' available in https://www.wbginvestmentclimate.org/uploads/Kenya.pdf accessed on 9th June 2012
[35] African Development Bank Group, '*The State of Kenya's Private Sector: Recommendations for the Government, Development Partners and the Private Sector 2013* available in http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/The_State_of_Kenya_s_Private_Sector_-_Recommendations_for_Government-Development_Partners_and_the_Private_Sector.pdf accessed on 6th June 2014
[36] Hansard (n 34) pg. 24

portion of the stakeholders in the business arena. In fact, jurisdictions such as Mauritius which have successfully reformed their insolvency laws have used similar approaches. For instance in 2011 the government of Mauritius, in a bid to accelerate business law reforms, set up a Joint Public-Private Sector Business Facilitation Task Force to identify and eliminate weaknesses encountered by businesses.[37]

14 A closer look into the process of enacting the Mauritian Insolvency Act of 2009 reveals very intriguing facts. The Bill was developed in close cooperation with the World Bank. In fact, it has been openly acknowledged that the Mauritius reforms were possible mainly because of access to market financing and support from development partners.[38] Besides, the reform deliberations involved the stakeholders in Mauritius. For instance, a banking committee chaired by the Governor was involved and one of the objectives of the committee was to provide information and views on the functioning of the wider financial sector.[39] The government therefore appointed a Steering Committee on Insolvency and Creditor Rights to work with the World Bank in the development of its report.[40] The World Bank, upon completing its work, submitted its Report on the Observance of Standards and Codes (the "ROSC") of Insolvency and Creditor Rights Systems for Mauritius' in March 2004.[41] This was a noteworthy document that shaped the reform process. In addition, a dissemination seminar was held in 2004, with the widest possible participation, including lawyers, accountants, bankers and other professionals.[42] A further consultation paper was issued in August 2007 on the policy proposals and number of policy recommendations were discussed and incorporated in the final report.[43] Most importantly, there was a conspicuous governmental political will and resilient engagement, both of which are important in achieving substantial reforms.

15 Another noteworthy aspect in Mauritius is their Law Reform Commission, which is robust. The effectiveness and independence of this Commission is indicated in its

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[37] African Development Bank, *African Economic Outlook: Mauritius 2012* available in http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/PDF/Mauritius%20Full%20PDF%20Country%20Note.pdf accessed on 14 June 2014

[38] Koosiram Conhye, 'Implementing Aid for Trade in Latin America and the Caribbean' The National and Regional Review Meetings 2008–2009 available in http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=%202046821 accessed on 12 June 2014

[39] Bank of Mauritius, *Overview of Supervisory Developments*, available in https://www.bom.mu/pdf/Research_and_Publications/BSD_Annual_Report/BSD_annrep_2004/overview.pdf accessed on 12 June 2012

[40] World Bank , *Mauritius: Insolvency and Creditor Rights Systems (World Bank 2004)* available in https://openknowledge.worldbank.org/handle/10986/14423 Licence: CC BY 3.0 accessed on 12 June 2014

[41] World Bank, *Mauritius - Report on the observance of standards and codes (ROSC): Insolvency and c=Creditor Rights Systems* (World Bank, 2004) available in http://documents.worldbank.org/curated/en/2004/03/6572694/mauritius-report-observance-standards-codes-rosc-insolvency-creditor-rights-systems accessed on 12 June 2014

[42] Amar Bheenick, 'Mauritius: Insolvency Bill' (31 March 2009) http://amarbheenick.blogspot.com/2009/03/mauritius-insolvency-bill.html accessed on 12 June 2014

[43] Ibid

2013 report, which details several successful engagements that it has undertaken.[44] In fact, Section 5(2) of the Law Reform Commission Act gives the Commission the power to initiate proposals for the review, reform or development of any aspect of the law but the Attorney General can also submit papers on aspects of the law to the Commission for review.[45] Fundamentally, a significant aspect is a duty of the Lord Chancellor to report annually to Parliament on the extent to which the Government has implemented the Law Reform Commission's recommendations. In essence, the law provides a supportive environment for its Law Reform Commission and accountability regarding implementation for the Parliament, a system which is laudable in ensuring effectiveness and efficiency in reform.

Interest Groups

The Private Sector/ Business Community

16 The Kenyan private sector consists of a formal, large business sector which is relatively healthy, productive and influential and a massive informal small business sector that is poorly understood and supported, yet a significant player in the business industry.[46] The Kenya Private Sector Alliance is of the view that a major impetus for trade reform is Kenya's need to become globally competitive in business. A leading Kenyan lawyer expressed the following opinion:

> "the driving force for reform is being provided by Kenya's powerful clearing and forwarding agents, as well as leading importers and exporters – those who most understand the problems caused by dealing with excessive documentation, border-related costs, lost business opportunities, etc".[47]

The business community has, in a number of instances, engaged the government of Kenya in discussions in a bid to reform insolvency laws. According to the former Attorney General, the stakeholders, who were largely members of the business community, had expressed dissatisfaction with the law relating to investment; in particular company law and insolvency law which were stated as completely out-dated, hence inadequate for the modern needs of the modern Kenya.[48]

17 Remarkable agitation for reform started when a number of established corporations faced the threat of liquidation. The discussion of the need for reforms started in early 2000 with a number of entrepreneurs voicing their concerns through

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[44] Law Reform Commission of Mauritius [LRC]–Brief on LRC [June2013] available in http://lrc.gov.mu/English/Reports/Documents/Brief%20on%20LRC%20June%202013.pdf accessed on 14 June2014

[45] Law Reform Commission Act, 2009 (Mauritius)

[46] Ibid

[47] BIZCLIR, 'Customs Automation and Process Reform Lesson from Kenya (2007) Available in http://egateg.usaid.gov/sites/default/files/01.128.08BP12_Kenya.pdf last accessed on 12 June 2014

[48] Hansard (n 34)

the media. In 2006 when Uchumi supermarket, one of the few corporate entities to successfully undergo reorganisation, was being listed afresh on the Nairobi Stock Exchange (the "NSE"), the government was requested to speed up reforms on insolvency, bankruptcy regulation and the implementation of the new Companies Act.[49] It was pointed out that reforms were necessary so as to spur the growth of the private sector, and in particular make it easier for firms under receivership to emerge from insolvency. According to Agimba, there has been a continuous pressure for reform of business laws from the business community and a proactive response to the need for reform from the highest political leadership, key government ministries and agencies.[50] In essence, the government has been working closely with private actors in respect of various structural reforms, such as public sector reforms, business and regulatory reforms, financial services sector reforms, legal and judicial reforms and land reforms to improve the investment climate.[51]

18 It is noteworthy that the private sector has organised itself into a Kenya Private Sector Alliance ("KEPSA"), a forum that provides a unified voice for the private sector.[52] The main mandate of the alliance is to ensure development through advocacy, projects and partnerships, both local and international, as well as to influence public policy through policy formulation and implementation. In fact, KEPSA has in the past partnered with the government in passing various policies, strategies and bills and increasing strategic interventions. Specifically, KEPSA has organised meetings where key government officials have been invited for discussions on reform.

19 In 2008, the Prime Minister began holding quarterly meetings as part of a public-private 'National Business Agenda' with the chairpersons of the Kenya Association of Manufacturers ("KAM"), KEPSA and the East Africa Business Council (the "EABC") and other business leaders to learn what must be done to improve the country's business climate.[53] The discussions have been ongoing and influential, such that even in 2011, the 7th Prime Minister Round Table was organised by KEPSA as part of a continuous engagement with the government to create an enabling business environment. During that meeting, KEPSA outlined some urgent issues that needed to be addressed including a faster pace of implementation of the bills that would promote economic growth (including the Companies Bill, Partnership Bill, Insolvency Bill and Limited Liability Bill) and which were all geared towards easing the burden of doing business. One of the 2012 advocacy achievements stated

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[49] Speech by Nairobi Stock Exchange (NSE) Chairman Mr. Eddy Njoroge During the Bell Ringing Sponsored By Uchumi Supermarkets at NSE Trading Floor, Tuesday 31st t May 2011. See Eddy Njoroge's comment on the http://www.capitalfm.co.ke/business/2011/05/uchumi-shares-return-to-the-nse/?wpmp_switcher=mobile accessed on 9th June 2014.

[50] Agimba, (n 12)

[51] Ibid

[52] To read more about KEPSA and its engagement check http://www.newlookkenya.com/index.php/newlookkenya/general-info?id=127:kenya-private-sector-alliance accessed on 11th June 2014

[53] U.S. Department of State, *2010 Investment Climate Statement – Kenya* (March 2010) available in http://m.state.gov/md138092.htm accessed on 12/6/2014

by KEPSA on its website was the fast-tracking of the passing of stalled business-related policies and legislations which included an Insolvency Bill among others. The existence of the aforementioned forums organised by KEPSA ensured that the debate on reforms was kept alive and that the momentum was not lost. In fact, the Chairman of KEPSA, during the signing of the Insolvency Bill into law, categorically stated that KEPSA had for a long time been pushing for the Insolvency Act amongst other legislation.[54]

20 Members of the business community, whose role in driving reforms cannot be ignored, are Kenya's most important trade partners. This does not imply that Kenya does not trade openly within the global village but there are particular countries who, in a number of ways, trade closely and frequently with Kenya. For instance, Denmark has, since 2002, been committed to supporting development of the business sector in Kenya. Previously this has been on a basis of partnerships between Kenyan and Danish companies to facilitate knowledge transference from Denmark to Kenya and to enable those Danish companies to gain access to new markets and cheap production methods and facilities. Through such close relations, a new dimension was entered in 2005 with the launching of the Business Sector Programmes Support (BSPS).[55] This was a programme that was meant to support the business sector both on macro and micro-levels by assisting both the government and the private sector partners in creating an enabling environment for business. So far, the BSPS has supported the finalisation and implementation of a new Private Sector Development Strategy which includes, among other things, the implementation of new laws.

21 The business community, at both regional and international levels has been championing reforms by conducting surveys and research, on the basis of which sound recommendations have been made. For instance, in 2004, much as the government had promised that several policy reforms were underway, the Africa Private Sector Group in their analysis of the investment climate engaged in policy discussions, which were intended to preserve the momentum of on-going reforms, while also making additional suggestions to raise productivity.[56] Some of the specific recommendations they offered included the reform and modernisation of the insolvency procedures contained in the Companies and Bankruptcy Acts.

22 Similarly in 2005, the World Bank Private Sector Unit, Africa Region highlighted the key elements of commercial legislation impacting on the overall investment climate to be the Companies Act and the Bankruptcy Act, both of which in their

[54] See http://www.president.go.ke/2015/09/11/new-dawn-for-kenya-as-president-signs-landmark-business-laws/ accessed on 22/2/2016

[55] See Ministry of Industrialization and Enterprise Development website on http://www.industrialization.go.ke/index.php/projects/128-business-sector-program-support-bsps accessed on 23 September 2014

[56] World Bank & IFC, *Kenya: Enhancing the Competitiveness of Kenya's Manufacturing Sector: the Role of the Investment Climate* (November 2004) available in http://s3.amazonaws.com/zanran_storage/www.gcgf.org/ContentPages/352411637.pdf10th June 2014

view, were fundamentally sound, but extremely out-dated.[57] In comparison to international best practice, these Acts were unduly technical, complex and bureaucratic. Besides, by international standards Kenya's insolvency procedures – procedures which are vital to any market economy – were found to be lengthy and costly, even in comparison to other countries in SSA.[58] Generally, these laws contained serious weaknesses, including a lack of a modern system for the promotion of corporate rescue and limited ability for creditors to recover assets; they therefore needed a fundamental overhaul.

23 The engagement between the Kenyan business communities in insolvency reforms bears similarity to the approach that was used in Mauritius. Both jurisdictions have employed consultation and discussion forums. The Mauritian authorities embarked on an ambitious programme to transform the economy in partnership with the private sector.[59] However, in Kenya the discussion tended to consist more of the business community pushing for an opportunity to express their views, whereas in Mauritius, it tended to be the government inviting the views.

The Pursuit of Professionalism in the Insolvency Profession

24 A significant driver for insolvency law reform was the apparent realisation that the insolvency profession needed to tighten up its act.[60] Generally, members of the public in Kenya have low opinions of insolvency practitioners perceiving that they act merely as “corporate undertakers”. Exacerbating this, there have been an unfortunate number of reported cases of unethical behaviour by some receivers and liquidators.[61] For a long time, Kenya has operated without clarity as to the persons who are qualified and recognised to deal with insolvency matters within the legal framework. In fact, the many insolvency matters that have been dealt with so far are handled by lawyers and accountants without the presence of a clear regulatory body. The upshot of this is that their performance has not been satisfactory.

25 The challenge of appropriate regulation for insolvency practitioners is problematic in SSA, as demonstrated in a survey by Research and Innovation which revealed that only three countries in this region, Mauritius, Rwanda and Senegal have a regulatory body that oversees insolvency practitioners and requires them to

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[57] World Bank's Regional Programme for Enterprise Development (RPED), in conjunction with KIPPRA and CSAE, Oxford Published a report available in https://openknowledge.worldbank.org/bitstream/handle/10986/8505/313870KE.txt?sequence=2 accessed on 8th June 2014

[58] Ibid

[59] World Bank, *Mauritius - Financial Sector Assessment* (World Bank, 2003) available in http://documents.worldbank.org/curated/en/2003/08/2506938/mauritius-financial-sector-assessmen accessed on 15 June 2014

[60] Martin Whitehead, ‘A new Insolvency Act is Coming... So Lenders, Borrowers and Insolvency Practitioners Get Ready!’(2009) Financial Focus1-8 available in http://www.pwc.com/en_KE/ke/pdf/pwc-financial-focus.pdf accessed on 13th June 2014

[61] Ibid

be licensed.[62] In Kenya, the Insolvency Act 2015 captures this endeavour and introduces an Insolvency Practitioners' Board, insolvency practitioners and sets out requirements as to their qualifications.[63] The regulation of insolvency practitioners is indispensable given that insolvency practitioners have a public interest role as officers of the court and in that they owe a broader duty to society as a whole, not just creditors.[64] In essence, an insolvency regime, no matter how robust, remains reliant on the professionals who play crucial roles in advising on business restructuring, or liquidation.

26 Generally, the court has a supervisory role over the insolvency process but a considerable position of trust is given to insolvency professionals over the affairs of insolvent companies. There is therefore a need for expertise and efficiency in insolvency matters on the part of receivers or liquidators as well as specialised insolvency judges.[65] Sufficient evidence exists to support the use of expertise. For instance, the IMF, which while acknowledging the substantial reduction of backlog and speedier resolution of cases since the establishment of a Commercial Court, emphasised the need to enhance its capacity as well as expansion of commercial courts to other regions of the country.[66]

Regional Trends

27 The whole world has experienced a rapid pace of technological change, such that currencies float against one another and global exchange markets now account for sixty times the volume of trade and investment flows compared to the volume of world trade in goods.[67] Whereas business corporations have adapted to the new economic geography, and in most instances have encouraged its emergence, the national institutions have had considerable difficulty keeping up with the historic shift.[68] In essence, commercial laws are required to meet the challenges presented by the borderless global economy. Literature[69] reveals that the advanced economies simultaneously nurtured the norms and the complementary institutions needed to achieve harmonious connectivity to the global economy at an early stage. In contrast, most of the lesser developed countries did not adjust their laws, opting to retain weak governance, limited skills and fragile banking sectors. As a result, these

[62] INSOL International Africa Round Table on Insolvency Reform (30th September 2010 Abuja, Nigeria)
[63] The insolvency Bill, 2010 Part II (clauses 4 – 11) (Kenya)
[64] Africa Round Table on Insolvency Reform (n 64)
[65] Ibid
[66] International Monetary Fund, *Kenya, Uganda and the Republic of Tanzania: Selected Issues* (IMF, 2008) pg. 20
[67] Robert Picciotto, *' Poverty Reduction and Institutional Change'* Seton Hall Journal of Diplomacy and International Relations, Winter/Spring 2000
[68] Ibid
[69] Deepak Lal, *Unintended Consequences: The Impact of Factor Endowments, Culture and Politics on Long Run Economic Performance* (Mass.: MIT Press, 1998) pg. 78 ; Francis Fukuyama, *The Great Global Disruption: Human Nature and the Reconstitution of the Social Order* (New York: Free Press, 1999) pg. 50

countries suffered major set-backs.[70] In particular, much of Africa has tended to fall into the latter category due to civil strife, policy weaknesses, adverse terms of trade, a lack of domestic capacity and excessive debt. However, this position has recently changed as globalisation has taken place; more and more countries believe that creating a viable bankruptcy system will help to fuel a market economy.[71] Besides, globalisation has resulted in the emergence of international institutions that have in a number of ways played key roles in influencing reforms. The African jurisdictions have, over time, engaged in the adoption of international best practices as well as building their own regional blocs. The East African Community ("EAC"), of which Kenya is a member, has formulated a development strategy in which it is open to be guided by developments in the world economy, the regional economy and in the national economies.[72] In particular, the strategic interventions which encompass legal reforms are driven by globalisation, which manifests itself through intensification of competition in the global markets and the emergence of regional economic blocs. It is noteworthy too that the more the world becomes integrated, the more a jurisdiction becomes vulnerable to crisis, as will be detailed within this category of drivers.

Influence of International Organisations

28 Multilateral institutions have, for a while, been engaged in championing the institutionalisation of the rule of law and good governance in developing countries and among the areas of focus in this regard has been the improvement of insolvency laws. In fact, the collective will of the Group of Seven (G7) international organisations to create global insolvency standards paid special attention to developing economies due to their weak insolvency systems.[73] The existing international benchmarks on insolvency laws are a product of the efforts of international institutions, particularly the World Bank, UNCITRAL and the IMF. Their efforts have resulted in a unified set of insolvency benchmarks, represented by the consolidation of the World Bank's Principles for Effective Insolvency and Creditor Rights Systems and the UNCITRAL Legislative Guide on Insolvency Laws. States all over the world are encouraged to employ the World Bank Principles and guidelines on insolvency laws in modifying and updating their local insolvency laws. Such standards have been central to reforms and it is commendable that they provide guidelines and recommendations in the form of a soft law approach, rather than legally binding treaties.[74] The advantage of having them as 'soft law' is chiefly

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[70] Picciotto *(n 71)*

[71] Nathalie Martin, 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: the Perils of Legal Transplantation' (2005) 28 Boston College International & Comparative Law Review 1

[72] EAC Development Strategy 2006-2010 available in www.mineac.gov.rw/index.php?id=106 *accessed on 5th June 2014*

[73] Nilgun Onder, 'Global Financial Governance: 'Soft' Law and Neoliberal Dominion'(Paper for the Canadian Political Science Association Congress, June 2-4 2005 London)

[74] Curzio Giannini, 'Promoting Financial Stability in Emerging Market Countries: The soft Law Approach'(2002) 44 Comp Econ Studies 125

that such an approach allows the jurisdictions of the world to implement reforms at their own discretion, which is necessary for jurisdictions previously colonized and keen on avoiding any further *de facto* colonisation.

29 The international benchmarks have exerted a strong influence and have succeeded because the reforming countries rely heavily on aids and technical assistance from international institutions and the developed economies. Besides, the observance of international standards is encouraged by “market induced discipline” and official incentives.[75] Market induced discipline is where the investors utilise information on a country’s compliance with the relevant international standards in making investment decisions while official incentives arise where the use of peer pressure, naming and shaming, surveillance and financial incentives are employed by the international organisations.[76]

30 A key approach used by international organisations in pushing for reforms in many developing economies is through the attachment of conditions to foreign aid. Virtually every African country has received large amounts of aid aimed at stimulating policy reform, although the results have varied enormously.[77] For instance foreign aid played a positive role in Ghana and Uganda but Kenya is amongst those considered as behind in its reform agendas, despite available aid.[78] Technically, experts financed by the international institutions have been used to help with ideas in the initial phase but financial assistance grows as policies improve and increase the benefits of reform, helping to sustain local political support. In particular, the IMF and the World Bank have been known to push for the implementation of reforms as part of the preconditions for donor funding. For instance, the IMF, alongside other donor agencies, such as the World Bank in 1991, suspended donor aid to Kenya, due to what was described as rising levels of corruption, a failure to correct macro-economic imbalances caused by fiscal indiscipline, slow reforms in the civil service, lapses in the privatization of public enterprises, and a slow pace of political reforms.[79] This forced the Kenyan government to engage in several expediency measures in an attempt to regain the lost confidence.

31 A similar incident happened in 1997 due to a failure to fulfil a donor condition of good governance. The suspension of funds exerted pressure which resulted in progress in the implementation of some economic reforms.[80] When the government finally accepted the donors’ conditions and engaged in reforms, Kenya became the

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[75] Onder, (n 77); Also see Giannini (n 78)
[76] Ibid
[77] David Dollar, Shantayanan Devarajan and Torgny Holmgren, Aid and reform in Africa (World Bank Publications, 2001)
[78] Ibid
[79] Maureen Were, Rose Ngugi and Phyllis Makau ‘Understanding the Reform Process in Kenya’ in Joseph Mensah (eds) Understanding Economic Reforms in Africa: A Tale of Seven Nations (Palgrave Macmillan, 2006) pg. 31
[80] Ibid

first SSA country to receive structural adjustment lending from the World Bank and later on, the first to receive an Enhanced Structural Adjustment Facility ("ESAF") loan from the IMF.[81] Reforms are therefore generally not prioritised willingly by the government on account of the government realising the inadequacies in the law, or the increase of incidences of insolvency facing a jurisdiction. Rather, reforms assume a higher position in legislative priorities as a result of external pressure and primarily for the sake of the supposed economic advantage given by the donor communities for adopting a new insolvency system.

32 Previously, literature documented that reforms championed by outside agents have not been productive in other situations. In particular, where conditional loans have been used, there have been instances where a government has agreed to measures that it does not believe in, in order to get funding and then has eventually failed to carry these measures out.[82] Burdette expressed similar sentiments that there can never be any meaningful reform without political will and proper consultation and involvements of local experts when designing new laws.[83] Admittedly, tangible and successful reforms require goodwill from the government and a political movement for change which donors cannot do very much to generate. However, the recent trends show that the international institutions have taken deliberate efforts to involve the locals.

33 A significant tactic used by international organisations to push for reforms is through the use of global partnerships. The government of Kenya, in collaboration with its development partners (who are basically international financial institutions and countries which trade closely with Kenya), has developed a platform called the Development Partnership Forum (the "DPT"). At the moment, its new aid effectiveness technical group meets monthly and a ministerial level development partnership forum co-chaired by the World Bank and the Kenyan Finance Minister convenes twice a year.[84] In particular, in 2010 using the aforementioned forum, a meeting was organised where the government was urged to take further and bolder measures to improve the business climate in Kenya, to strengthen and increase transparency in procurement and public financial management, and to improve the absorption of donor funds by dealing with key implementation challenges.[85] To make progress in these areas, the Government and its partners agreed to work together to ensure that the budget would respond to emerging priorities and that aid was aligned with the budget.[86] The government has acknowledged that since the

[81] Stephen O'Brien, and Terrence Ryan, 'Mixed Reformers: Kenya' in Shantayanan Devarajan, David Dollar, and Torgny Holmgren (eds.) Aid and Reform in Africa: Lessons from Ten Case Studies (World Bank, 2001)
[82] O'Brien and Ryan, (n 85)
[83] David Burdette, 'Corporate Insolvency Reform Experiences' (INSOL Europe Academic Forum Conference, Friday October 2011 Venice Italy)
[84] See Global Partnership; For Effective Development Co-operation Website available in http://www.effectivecooperation.org/news-kenya.html accessed on 12th June 2014
[85] Kenya Second Meeting of the Development Partnership Forum held in Kenya International Conference Centre, Tsavo Ballroom Nairobi, May 19, 2010
[86] Ibid

government started participating in the exercise, substantial progress has been made in terms of administration and legal reforms have been simplified.[87]

34 Another approach used by international organisations such as the World Bank to drive reforms is the funding and commissioning of research undertaken through both local and foreign scholars, based on planned and prioritised activities.[88] In most developing economies, the locals hardly engage on their own initiative in research, although such studies can be very significant in understanding the limitations in the existing systems and appreciating the need for reforms. This gap has been identified and explored by the international institutions. For instance, Japan in 1991, through a Japanese agreement grant, engaged an American law firm to work in partnership with Kenyan law firms and legal professionals to assist in identifying desirable reforms to the legal and regulatory framework, which included the assessment of bankruptcy laws.[89] The aforementioned engagement concluded with a report proposing a comprehensive law reforms programme in the corporate area. It was revealed in the discussions that diagnostic studies have been invaluable, if not critical, to the success of any reform. A further noteworthy research project was done in March 2009 when an eleven-member team of U.S. based government representatives and consultants travelled to Kenya and conducted interviews across the public and private sectors, national and local officials, business owners, business associations, chambers of commerce, non-governmental organisations, the banking and lending community, university representatives, labour unions, and many others.[90] The investigation concluded in a round table presentation and discussion attended by nearly 100 local stakeholders and donors, and a worthwhile report which details recommendations and explanations of how lessons learned from previous development efforts might specifically apply in Kenya.[91]

35 Through such engagements, areas requiring reforms are earmarked and it is not uncommon for those areas now to include insolvency laws. Such initiatives have proved vital in other African jurisdictions. For instance, the World Bank engaged the expertise of insolvency academic Professor Burdette as part of a World Bank team that evaluated the insolvency systems in Malawi and the Seychelles and produced proposals to remedy shortcomings in the existing statutes dealing with

[87] Remarks by Hon. Robinson Njeru Githae, EGH. MP. Minister for Finance at the Launch of the Sub National Doing Business Reforms Report, held at the KICC, Nairobi, on 26th June 2012, 9.00 am

[88] The World Bank Websites has plenty of publication of its finding in the many undertaken researches.

[89] Paratii Ofusu Amaah, Reforming Business Related Laws to Promote Private Sector Development: The World Bank Experience in Africa (The World Bank for Reconstruction & Development, The World Bank, Washington Dc, USA, 2000) pg. 34

[90] USAID, 'Kenya Agenda For Action: Commercial Legal AND Institutional Reform; Diagnostic of Kenya's Business Environment' (USAID 2009) available in http://www.usaid.gov/kenya/fact-sheets/support-electoral-reforms-and-processes-kenya accessed on 12 June 2014

[91] Detailed information about BizCLIR, including an on-line library of BizCLIR reports, are available in www.bizclir.com. Accessed on 10th June 2014

Malawian and Seychelles insolvency law.[92] This culminated in the enactment of the Seychelles Insolvency Act and the Malawian Draft Insolvency Bill, which is awaiting approval by Parliament.[93] Although the respective governments play a leading role in the reform processes, it is evident that the international organisations are better positioned to ensure that their agenda and recommendations are captured in the insolvency reform through technical and financial support.[94] It is remarkable that research funded by these institutions is arguably credible, the analytical work is technically sound and their basis of arriving at conclusions is transparent and able to withstand public scrutiny.[95] This was well articulated by Besley in his discussion of the importance of World Bank data that is publicly available and internationally recognised as a reliable source of evidence-based policymaking.[96] It is argued that a reform-minded government can use such information to motivate and sustain reform efforts.

36 A further fundamental strategy that has also been employed by the international organizations is the organising of conferences and round table meetings. In particular, INSOL International has been organising round table meetings which are a platform for a high level dialogue with both private practitioners and public policy makers on insolvency reform in Africa.[97] Through such endeavours, a forum is availed for a coordinated approach by international bodies, countries and experts by sharing experience and knowledge, crucial in enhancing insolvency reform on the African policy agenda. They have held several meetings with cutting edge themes on insolvency.

37 A momentous Round Table meeting for Kenya was the one organized in 2012 by the World Bank Group in partnership with INSOL International held in Nairobi.[98] The event was documented as providing a rare opportunity for public-private dialogue in the region, where judges, regulators, policy makers, bankers, and insolvency experts discussed topics relating to non-performing loan resolution, loan workouts, restructuring and debt enforcement.[99] Besides, the event has been documented to have demonstrated a huge enthusiasm across the continent for

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[92] Nottingham Trent University, http://www.ntu.ac.uk/research/ref_2014/impact_case_studies/insolvency_law_practice/impact.html accessed on 3/June/2014.

[93] Ibid

[94] U Miller and S Ziegler, Making PRSP Inclusive (Project Print, Munich 2006) 4

[95] The world Bank Publications such as 'Doing Business reports' are known to be credible such that even though at the time of research and publications the country may not be directly involved in the analysis, they are able to follow up and criticize, evaluate and even implement them.

[96] Tim Besley, (A Key note speech presented in the World Bank conference at my alma mater Georgetown University) available in http://www.cipe.org/blog/tag/doing-business/ accessed on 5th June 2014

[97] INSOL International is the International Association of Restructuring Insolvency & Bankruptcy Professionals. See the INSOL website for details on the meeting conducted so far and those planned.

[98] The third Africa Round Table was held in Nairobi in September 2012 under the theme 'Insolvency Best Practices: A Roadmap for Reform in Africa' More than 70 participants attended this roundtable which was considered the most successful yet. .

[99] Ibid

pursuing law reform and for building the necessary capacity for successful restructurings and efficient insolvencies.[100] The Attorney General of Kenya was categorical on the need for African policymakers to "learn from others and to reflect that learning in practice". [101] He underscored the significance of best practice standards on insolvency in helping the region to continue to retain their productive value in the economy as well as stimulating entrepreneurship.[102] Inherently, such forums provide an opportunity to learn from reforms in other jurisdictions as well as stirring up reform debates which are necessary in maintaining the reform momentum.

38 Further, the World Bank has also been known to participate in reform processes by offering technical assistance.[103] Jurisdictions with long and established legal traditions usually seek help only in relation to specialised areas of law, and in strengthening the judiciary and establishing alternative dispute resolution mechanisms.[104] However, in states with lesser developed legal systems, the legal technical assistance that is sought may range from policy advice to assistance in drafting legislation, introducing, implementing, and enforcing new laws and regulations, devising procedures and institutions that carry out new laws, designing public information campaigns, and training.[105] In addition, support can include legislative reviews, process mappings, reviews of reform proposals, and, advice for investment that would help in the implementation of the reform agenda.[106] It is evident that offering technical assistance to any jurisdiction is a complex engagement. In essence, extra resources and numerous experts from a broad range of financial, legal and judicial technical areas are utilised and without these resources the objectives may not be achieved and reform momentum can be wasted.[107] Besides, technical assistance is provided to governments by World Bank Group units and sometimes in collaboration with other stakeholders. Therefore, given the wide range of stakeholders involved, there is need for considerable coordination of efforts. Consequently, the stakeholders conduct an important assessment, considering the country's laws or legal systems against the international benchmarks so as to maximise a given country's ability to meaningfully participate as a trusted partner in

[100] INSOL, *International Member Association Report 2012 : Annual Review* (INSOL 2012)

[101] Word Bank Website https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/insolvency/supporting-african-countries-in-improving-insolvency-procedures.cfm accessed on 3rd June 2014

[102] Ibid

[103] Owino Kimani, 'Cabinet Hailed for Approving Bills', Kenya Broadcasting Corporation (12 November 2010) <http://www.kbc.co.ke/news.asp?nid=67544 accessed on 13th Jan 2015

[104] World Bank, *The World Bank and Legal Technical Assistance: Initial Lessons* (World Bank, 1999) available in http://elibrary.worldbank.org/doi/book/10.1596/1813-9450-1414 accessed on 5th May 2014

[105] Ibid

[106] World Bank, *Doing Business Reform Advisory* available in https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/doing-business-reform-advisory/ accessed on 4 June 2014

[107] World Bank , *Kenya - Financial and Legal Sector Technical Assistance Project*, (World Bank, 2013) http://documents.worldbank.org/curated/en/2013/09/18341203/kenya-financial-legal-sector-technical-assistance-project accessed on 3 June 2014

international trade, while at the same time ensuring that the country's laws protect its citizens and the capital invested in that country.[108] However, much as the World Bank, through such involvement, is a significant driver of reforms, experience of reforms to date has revealed that the recipient governments must demonstrate a clear commitment to legal reform and take ownership of legal reform for legal technical assistance to bring about the desired results.

39 The Mauritius insolvency reform is a good example of how technical support from multinational institutions is helpful. During its insolvency reforms, it is documented that the World Bank provided technical assistance and support to help develop a pipeline of financial and private sector development policy reforms.[109] In fact, such support was recognised to have been a very useful tool, as it helped provide technical expertise and enabled global best practice on policy and institutional issues to inform policy dialogue.[110]

Crisis

40 Financial crisis has been said to be a catalyst for legal reforms in many jurisdictions.[111] This is mainly because times of crisis and uncertainty generate an energy which, if well harnessed, can help to build the foundations for a new and better order.[112] There is plenty of evidence that supports this assertion. For instance, during past financial crises, jurisdictions such as Russia, those in East Asia, and Argentina, turned their attentions to the importance of bankruptcy laws that supported the efficient resolution of financial distress.[113] The Asian financial crisis, which spread from Thailand to other countries in the region during the second half of 1997, plunged the countries affected into deep recessions that brought rising unemployment, poverty, and social dislocation and it eventually propelled massive reforms in that region.[114]

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[108] World Bank, 'UNCITRAL Legislative Guide on Insolvency Law on the Treatment of Enterprise Groups: Updating the World Banks Principles' The World Bank Insolvency and Creditors/Debtor Regimes Task Force Meetings Washington 10th January 2011 available in worldbank.org/EXTGILD/Resources/WB_TF_2011_UNCITRA_WB_Principles.pdf accessed on 5th May 2014

[109] World Bank, *Mauritius - Second Private Sector Competitiveness Development Policy Loan Project* (World Bank 2013) available in http://documents.worldbank.org/curated/en/2013/02/17279283/mauritius-mauritius-second-private-sector-competitiveness-dpl accessed on 16th June 2014

[110] Ibid

[111] Elena Cirmizi, Leora Klapper, Mahesh Uttamchandani, 'The Challenges of Bankruptcy Reform'(Policy Research Working Paper 5448,World Bank,2010)

[112] Anjana Chikhuri 'Business in Mauritius in challenging times Riding the tide of the current economic downturn for a better future' (2012) 51 The Magazine of Mauritius Chamber of Commerce and Industry 6-9

[113] Stijn Claessens, Simeon Djankov, and Leora Klapper, 'Resolution of corporate distress in East Asia' (2003) 10 Journal of Empirical Finance, 199– 216.

[114] Timothy Lane, 'The Asian Financial Crisis: What Have We Learned?' (1999) 36 A quarterly Magazine of the IMF 3

41 The 2008 crisis inspired some of the legislative changes made in 2009 to 2011 by many European Union ("EU") member states, including Romania and was a good opportunity for governments and policymakers to engage in significant reform of the bankruptcy process.[115] A new insolvency law was passed in Ukraine in December 2011.[116] Greece and Portugal implemented measures under the fund-supported programs to improve the efficiency of the judicial process, while some European countries such as Moldova and Serbia enhanced their insolvency administration regime.[117] The Slovak Republic adopted a new amendment to its bankruptcy and restructuring law that clearly defines the roles and powers of creditors, secured creditors and trustees with the aim of increasing the efficiency of the insolvency process.[118] Generally, several other EU jurisdictions responded by reforming their laws. It is well appreciated in these western jurisdictions that crisis puts even the strongest economies into disarray and, therefore, structural reforms are usually undertaken as a key feature of the countries' programs to address the root causes of the crisis and its consequences, as well as to set the stage for medium-term growth.

42 In the past, however, crisis did not propel any reforms in emerging economies and Kenya was no exception. This was because the impact of financial crisis in these jurisdictions was limited, purely because SSA countries were barely integrated into the global financial system.[119] The banks relied on domestic deposits and lending and did not have derivatives or asset-based securities among their portfolios and this insulated them from sources of financial vulnerability that had impacts elsewhere.[120] According to Shanta Devarajan:

> "African banks retain loans they originate on their balance sheets, the interbank market is small, and the market for securitised or derivative instruments was either small or non-existent."[121]

However, in recent years, globalisation has led to financial systems being more integrated. Hence, whenever a financial crisis occurs, its impacts are felt in almost all the jurisdictions of the world. In fact, Kenya's financial market is far more open now, though the extent is still not comparable to the openness of markets in the

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[115] Maruşa Beca, and Ileana Ashrafzadeh Nişulescu, 'The impact of the Economic Crisis on the Corporate Insolvency's Evolution in Romania' A Paper Presented in 2nd World Conference On Business, Economics And Management WCBEM 2013 held on 25-28 April 2013 in Antalya/Turkey

[116] Law of Ukraine '*On Amendments to the Law of Ukraine: On Restoring Debtor's Solvency or Declaring it Bankrupt*' dated 22 December 2011

[117] Yan Liu and Christoph B. Rosenberg 'Dealing with Private Debt Distress in the Wake of the European Financial Crisis: A Review of the Economics and Legal Toolbox' (IMF Working Paper, 2013) available in https://www.imf.org/external/pubs/ft/wp/2013/wp1344.pdf assessed on 10th August 2015

[118] World Bank, *Doing Business Report 2013: Smarter Regulations for Small and Medium-Size Enterprises (*World Bank, 2013) pg.95

[119] Francis M. Mwega 'Global Financial Crisis Discussion Series Paper 17: Kenya Phase 21' 2010

[120] Ibid

[121] Shanta Devarajanas quoted by Francis M. Mwega 'Global Financial Crisis Discussion Series Paper 17: Kenya Phase 21' Overseas Development Institute, London 2010

United States, Europe, or Asia.[122] In essence, Kenya has increasingly become integrated in the global economy and the effects of turmoil in the financial systems in the United States and Europe are bound to have an effect, albeit a lagged one.[123]

43 Similarly the Mauritius economy has evolved and grown in sophistication in the past two decades. There is a wider variety of businesses, the economy is more globally integrated and business risk is becoming more spread and more intense. Reform commenced in the early 1980s when the government introduced a series of financial and fiscal policy measures to liberalise the economy and prepare the country for global integration.[124] Besides, given the commitment and pace at which Mauritius has opened up its economy for integration, it is more vulnerable to financial crisis. For instance, in 2005, a "triple trade shock" caused by an erosion in textile and sugar preferences and combined with rising energy prices, shaped a very difficult outlook for Mauritius.[125] This prompted the newly-elected government in 2006 to announce an ambitious and comprehensive plan for accelerating the implementation of key reforms to realise the development vision from the previous decade.[126] Further, in 2008, the economic outlook for Mauritius turned dull as the world faced the worst economic conditions in decades. This reinforced the government's push for reforms, which resulted in the enactment of the Insolvency Act 2009, amongst other legislation necessary to forestall the impact of crisis.[127] The quick implementation of the pre-emptive reform agenda since 2006-2008 was at the core of Mauritius's resilience during the 2008-2009 crisis.[128]

44 In the Kenyan jurisdiction, it is only the recent crisis of 2008 that has stirred reform debates and prompted a rethinking regarding the country's ability to withstand the impact of crisis. In particular, the financial crisis of 2008, according to the Prime Minister, was anticipated to badly affect the Kenyan economy.[129] In reality, the magnitude of the impact is not well documented and was, according to a Ministry of Finance and Central Bank official, indirect and most likely small.[130] The explanation of the indirect effect was given in examples that include a slowdown of

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[122] Betty Kibaara, 'The Impact of Financial Crisis on Developing countries: Kenya' (2008) Institute of Development Studies, Brighton

[123] See Ernest Harsch 'A Growth slows, but Africa's economies are now more resilient' (Africa Renewal, 2009)

[124] Peter Larose, 'The Impact of Global Financial Integration on Mauritius and Seychelles' (2003) Summer , Bank of Valletta Review 28

[125] World Bank, *Backing Reform in Mauritius With IBRD Policy Lending* (World Bank 2010) available in http://siteresources.worldbank.org/NEWS/Resources/MauritiusBackingreform4-9-10.pdf accessed on 27 May 2014

[126] Sunil Benimadhu, 'Global Financial Crisis and Policy Response in Mauritius: Key Lessons' (A paper presented in the North-South Institute Sheraton Hotel Ottawa, June 8-9, 2010)

[127] World Bank (n 129)

[128] Ibid

[129] *Kevin Kelley,* 'Africa: Raila Sees U.S. Financial Crisis Affecting Continent'(Daily Nation, Nairobi, October 2008)

[130] Hezron O Nyangito: 'Impact of the global financial crisis on the Kenyan banking system' His Keynote address as a Deputy Governor of the Central Bank of Kenya, at the Kenya Institute of Bankers, Eldoret, 16 January 2009.

the tourism sector (which relies heavily on foreign tourists), the construction industry and the stock market which benefit from remittances from Kenyans living abroad and foreign institutions such as hedge funds.[131]

45 Nevertheless, the global financial crisis had both short and long terms impacts; the most immediate was the depreciation of the Kenya shilling relative to the US dollar.[132] In addition there was reduction in tourism revenue from KSh49.3 billion to KSh34.5 billion over the same time caused by increased fuel prices as well as the global financial crisis.[133] There were other effects including:

> "Psychological effects e.g. lending institutions being more specific and shying away from those who cannot show ability to pay. In a case of learning from others experience lending institutions want to avoid any action that would bring them in the same situation that triggered the financial crisis. Firms with foreign lending had to rethink their lending terms and priorities."[134]

The portfolio flows adversely affected the stock market, with foreign sales exceeding foreign buys in many counters, as foreign portfolio investors diversified from the market.[135] Equally the NSE-20 share index has been affected since mid-2008 and there have been reduced economic activities and capital inflows including a reversal/ reduction of portfolio capital which has aggravated the macroeconomic imbalances in the economy, amongst others.

46 A taskforce was formed to inform the government on how to shield the economy from the adverse effects of the global financial crisis.[136] Some of the recommendations that were made highlighted a need to review the legal framework. A number of financial specialists have reiterated the need for ensuring that the financial sectors are regulated in the interest of promoting their growth while at the same time insulating them from collapse instigated by global financial crisis.[137] Such

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[131] Capital Market Authority, 'The global Financial Crisis: Its Effects on Kenya and Possible Strategies to Mitigate the Effects'14th November 2008.

[132] Kibaara (n 126)

[133] Dorothy McCormick, 'The Impact of the Global Financial Crisis on Developing Countries: Impact of the Financial crisis on Kenya' in Southern Voices on the Impact of the Financial Crisis 2008 available in http://www.ids.ac.uk/go/financial-crisis-impact accessed on 5th August 2015

[134] Ibid

[135] Kibaara, (n 126)

[136] Francis Mwega, 'The Effects of the Global Financial Crisis: A Case Study of Kenya' Also see Koech, Oscar Kipyegon, and Gladys Rotich. 'The Effect of the 2008 Global Financial Crisis On The Performance Of Stock Indices At The Nairobi Securities Exchange' (2013) 2 International Journal of Innovative Research and Development 5

[137] Nzomo Mutuku, 'The Impact of the Global Financial Crisis on the Kenyan Retirement Benefits Industry' (June 30, 2010) Available at SSRN: http://ssrn.com/abstract=1837325 or http://dx.doi.org/10.2139/ssrn.1837325 Also see Hezron O Nyangito: 'Impact of the global financial crisis on the Kenyan banking system' His Keynote address as a Deputy Governor of the Central Bank of Kenya, at the Kenya Institute of Bankers, Eldoret, 16 January 2009.

sentiments are inspired by observation of examples such as the Asian banks that are documented to have escaped, largely due to well capitalised banks, cautious regulation and huge forex reserves.[138] This is significant given the fact that the previous crisis had badly affected the Asian jurisdictions, prompting them to engage in reforms whose rewards seem to have been reaped already. From the foregoing, it may be observed that the financial crisis contributes impetus to insolvency reforms by triggering the reform debates. In fact, much as the central focus of reforms has been on the policy interventions aimed at enhancing liquidity in the market, efforts were directed towards other measures that would, arguably, enhance the depth, operation and efficiency of the financial market and ultimately enhance monetary policy effectiveness.[139]

Regional Integration

47 For more than a decade now, the East African countries have engaged in deliberate efforts to establish a regional economic bloc. The EAC Treaty which established the EAC came into force in 2000. According to article 5 (1) of the EAC Treaty, one of the objectives of the EAC is to develop policies and programs aimed at widening and deepening cooperation among partner states in political, economic, social and cultural fields, research and technology, defence, security, legal and judicial affairs, for their mutual benefit. In so far as business engagements are concerned, the signing of the EAC Common Market Protocol and its annexes in 2009 was momentous as it reinforced the commitment by the member states to establish a common market.

48 Primarily, the achievement of an integrated market necessitates the establishment of an institutional framework to develop, implement, and sustain the efficient, transparent, and market-based regulatory systems in order to achieve the economic benefits of regional integration.[140] An effective way of integrating member jurisdictions is through the harmonisation of laws. In essence, laws are tools for implementing economic integration because stable, clear and uniform legislation, once commonly implemented, will encourage investment and growth of markets.[141] Therefore, national laws require review against community legislation/policy to

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[138] Capital Market Authority, 'The global Financial Crisis: Its Effects on Kenya and Possible Strategies to Mitigate the Effects'14th November 2008

[139] Maureen Were and Samuel Tiriongo 'Central Bank's Response to Economic Crises from a Developing African Economy Perspective: Lessons from Kenya's Experience' available in http://www.afdb.org/fileadmin/uploads/afdb/Documents/Knowledge/Central%20Bank%E2%80%99s%20Response%20to%20Economic%20Crises%20from%20a%20Developing%20African%20Economy%20Perspective%20Lessons%20from%20Kenya%E2%80%99s%20Experience.pdf accessed on 12 June 2014

[140] World Bank, *Regulatory Capacity Review: East African Community* (World Bank 2011) available at https://www.wbginvestmentclimate.org/uploads/EAC%20Regulatory%20Capacity%20Review%20Published.pdf accessed on 5th June 2014

[141] Wilbert TK Kaahwa, 'The State of Harmonisation of Municipal Laws in the East African Community Context' in Reforming Justice in East Africa: Comparative Review of Legal Sector Processes, (Fountain Publishers, 2008) p.17, 2008

assess whether changes in national legal enactments are necessary to facilitate the intended objectives of the cooperation. In fact, the partner states, according to article 7(1) (b) of the EAC Treaty, committed themselves to provide an adequate and appropriate enabling environment to facilitate the integration process, including favourable policies and basic infrastructures. The adequate and appropriate enabling environment ultimately includes harmonisation of all their national laws. As a member, Kenya inevitably has to engage in reforms necessary towards eliminating existing rules at domestic levels that violate the principles of the common market.

49 Since the inception of the EAC, the prospects of huge economic benefits to the member states have triggered a debate on reforms. The EAC Development Strategy 2006-2010 is one of the reform engagements which stipulates that harmonization of laws is considered a key strategic intervention.[142] Besides, the EAC Secretariat commissioned a study to harmonise the commercial laws of the partner states in 2010, which recommended that the commercial laws to be harmonised should fall within nine broad clusters and one of them would be laws governing business transactions (covering legislation on bankruptcy, building societies, business organisations, capital market development, chattels transfer, the co-operative movement, export processing zones and transfer of businesses etc.).[143] In addition, the Kenya government pledged to move with speed to amend a number of its legislative enactments and among the targeted areas are commercial laws, especially those dealing with the registration of companies and other business entities, bankruptcy and insolvency, as well as investment laws.[144]

50 Besides the EAC, Kenya is also a member of the World Trade Organisation ("WTO") and its commitment to the Common Market for East and Southern Africa ("COMESA") exerts pressure on the government of Kenya to engage in a wide range of reforms in its trade processes. Pressure for change specifically in Kenya's trade processes is being felt due to Kenya's position as a founding member of the World Trade Organization. Kenya's commitment to participate in the Preferential Trade Area of the COMESA, the formation of the EAC Customs Union, and the private sector, form a formidable force propelling reforms necessary for this jurisdiction to become globally competitive.[145] For example, through COMESA, Kenya is among six jurisdictions that are leading the way to put into place a regional customs bond guarantee programme designed to, among other things, streamline the process of doing business in the critical trade corridor that runs from Mombasa in Kenya to

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[142] EAC Development Strategy 2006-2010 is available in www.eac.int/legal/index.php?option=com...id...eac-development *accessed on 5th June 2014*

[143] Edward Kitonsa, 'The Status of the EAC Legal Harmonization Process in Uganda' (A paper presented at a conference on Creating a Predictable and Facilitative Legal Environment for Business in the East African Community 6th – 7th august 2012 in Arusha Tanzania)

[144] Francis Ayieko, 'Kenya fast tracks reforms to make EAC dream a reality' (The East African, 5th July 2010)

[145] BIZCLIR, 2007 'Customs Automation and Process Reform Lesson from Kenya Available in http://egateg.usaid.gov/sites/default/files/01.128.08BP12_Kenya.pdf Access on 12 June 2014

Uganda and on to Kigali, Rwanda.[146] It is acknowledged that the prioritised areas of reform propelled by this grouping do not include insolvency laws but generally the wider business legal spheres meant to improve its trading across borders and to enable the grouping to become more globally competitive. However, it is argued that attracting investors and remaining globally competitive will inevitably require insolvency reforms, given the pivotal role that insolvency law plays in directing the flow of credit.

International Forces/Realities

51 Most SSA countries struggle with poverty, unemployment, and minimal economic growth etc. For a long time, laws in these emerging economies have been known to be unresponsive to development needs. However, trends have recently changed as law reforms in areas such as business law and in relation to commercial transactions have been documented to stimulate economic growth. In essence, the attempts to tackle the challenges have forced the jurisdictions to engage in legal reforms. Of particular interest is how foreign direct investment, poverty reduction and economic growth have propelled insolvency reforms.

Foreign Direct Investment (FDI)

52 FDI is generally understood as a direct investment into production or business in a country by an individual or company of another country. It includes equity capital, re-invested earnings and intra-company loans, with the first two dominating net FDI to Kenya.[147] FDI is particularly important because it brings investable financial resources to host countries, provides new technologies and may enhance the efficiency of existing technologies.[148] In addition, FDI may facilitate access into export markets, thereby playing an important role in strengthening the export capabilities of domestic economies; may enhance skills and management techniques; and may provide cleaner technologies and modern environment management systems.[149] Undoubtedly, FDI contributes to the growth and development of a country by complementing its domestic investment, facilitating trade and transfer of knowledge and technology.[150]

53 However, foreign investors face considerable levels of risk where legal systems lack transparency, predictability and security, and as a result such investors will often avoid high-risk environments. In essence, foreign investors are attracted to legal systems which are predictable and efficient; and second, investors have the ability to easily identify a uniform set of characteristics which render any legal system

[146] Ibid
[147] Mwega (n 123)
[148] Ibid
[149] Ibid
[150] Read more on the benefits of FDI in Judith Kemunto Mainye 'The Main Impediments to the Growth of Foreign Direct Investment Inflows in Kenya' (Maters Thesis, University of Nairobi, 2013) pg. 6

predictable and efficient.[151] An inefficient legal system raises transaction costs by failing to provide affordable mechanisms for enforcing legal rights and obligations.[152] Low transaction costs are guaranteed where a host state's laws are of good quality and modern and its courts and bureaucracies are provided with adequate infrastructure and with trained and properly compensated staff.[153] Fundamentally, the availability of business opportunities alone is not sufficient; investment climate features such as strong institutions and investor-friendly regulations also matter and may even boost the development impact of the investment. The international community underscored the importance of an enabling business climate for private investment and job creation during the Group of 20 (G20) summit in Mexico.[154]

54 Conversely, the business climates of many emerging economies are dominated by a few players and entry to such emerging markets is difficult and costly; laws and regulations distort market competition and the ineffective enforcement of rules makes emerging economies less likely to compete globally.[155] In particular, operating and regulatory environments in developing economies have been documented as challenging, as they remain relatively inefficient, uncompetitive and dominated by their informal economies.[156] Nonetheless, given the significance of foreign investment, developing countries are now taking a new interest in the creation of the right environment for a country to attract foreign investment. In particular, it is widely acknowledged that business regulation reforms help a country to create an investment climate that is conducive to starting and running a business, where complying with regulations brings more benefits than costs. The countries' governments are therefore formulating and implementing laws that will ensure that the country attracts foreign investors and ensure that they operate in a competitive environment.[157] In particular, among the laws given attention are corporate insolvency laws. This is because well-functioning corporate governance and bankruptcy laws are generally believed to be critical to investment and growth. They

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[151] Amanda Perry, 'An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality' (2000) 15 American University International Law Review 6

[152] World Bank , *The Role of the State in a Changing World* (World Bank, 1997) at page 43 available in http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469382&piPK=64165421&menuPK=64166093&entityID=000020953_20070620145917 accessed on 5th May 2014

[153] Perry, (n 155)

[154] IFC Jobs Study: 'Assessing Private Sector Contributions to Job Creation and Poverty Reduction', January 2013

[155] Martha M Licetti, '**Competition Policy, Trade and Competitiveness'**(A Paper Presented in Pre-ICN Forum held at Palmeraie Golf Hotel, Marrakech on 22nd April 2014)

[156] World Development, *A Better Investment Climate for Everyone* (World Bank and Oxford University Press, 2005) available in http://web.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/0,,contentMDK:23062314~pagePK:478093~piPK:477627~theSitePK:477624,00.html accessed on 18 June 2014

[157] Benson Durham, 'Absorptive Capacity and the Effects of Foreign Direct Investment and Equity Foreign Portfolio Investment on Economic Growth' (2004) 48 European Economic Review, No. 2, pp. 285-306

are particularly important in emerging market economies where corporations often are hugely influential in the economy-at-large and in politics.[158]

55 FDI has played an increasingly important role in the Kenyan economy, such that when there was a decline in the net FDI flows in the early 1980s and 1990s, economic reforms were undertaken in an attempt to improve the business environment.[159] However, since the 2000s FDI flows to Kenya have not only been highly volatile, they have generally declined.[160] There is evidence that investors are moving their interests to Kenya's neighbours in the EAC (Uganda and Tanzania) due to low investor confidence, resulting from factors in Kenya like insecurity, poor infrastructure, high interest rates, and high operational costs, an unsupportive judicial system and insufficient legislation. In fact by 2004, there was a growing concern within the Kenya Government as to the decline of Kenya's competitiveness, not only in the global economy but also in the region.[161] Equally, there was a growing consensus within the government as to the need for bolder and more aggressive reforms to create a competitive and an enabling environment for enhanced private sector investments.[162] A notable reforming effort included the establishment of the Business Regulatory Reform Unit (BRRU) in the Ministry of Finance. This was a culmination of the Business Licensing Reform Project, a crucial move in reforming business laws generally.

56 The limited reforms in the business laws have done little to improve Kenya's competitiveness since, according to the World Bank Doing Business Report, Kenya was ranked 106 in 2011, 109 in 2012 and further dropped to position 121 in the world's global list of economic competitiveness in the year 2013.[163] This is disturbing, given that Kenya compares so unfavourably in relation to its neighbours Uganda and Rwanda which were ranked at 52 and 120 respectively in the same index.[164] These reports highlight a number of issues touching upon a country's business environment, namely: ease of starting business, dealing with construction permits, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency. Given the variety of issues that they address, these reports are very informative and arguably contribute in influencing the investors' choice of investment destination.

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[158] Erik Berglof, Patrick Bolton, Sergei Guriev, & Ekatherina Zhuravskaya, 'Government and Market Failures in Emerging Market Economies: Implications for Corporate Governance and Bankruptcy available in http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1257192350745/ErikBerglof.PDF accessed on 18th June 2014

[159] Francis M Mwega, and Rose Wanjiru Ngugi, 'Foreign Direct Investment in Kenya'. Paper presented at the AERC Special Workshop on FDI in Sub-Saharan Africa, February 2005.

[160] Ibid

[161] The Ministry Of Finance, 'Establishment of the Business Regulatory Reform Unit (BRRU)' available in http://www.businessadvocacy.org/dloads/briefBBRU0808.pdf accessed on 21 August 2014

[162] Ibid

[163] World Bank, *Doing Business Reports 2013* available in http://www.doingbusiness.org/rankings accessed on 29th May 2014

[164] Ibid

57 The desire to improve Kenya's competitiveness to attract FDI has driven a number of reforms; insolvency reforms being one of them. The pressures of globalisation on capital movement and the threat that companies will relocate to countries with more favourable business environments have pushed the Kenya government to respond.[165] In fact the former president of Kenya, Hon. Mwai Kibaki is on record as having said that the Insolvency Bill 2010 was one amongst many government engagements that are pursuing an enabling environment that will make Kenya more competitive in terms of business and investment.[166] The efforts have been on-going for almost two decades with the aim to review, modernise and generally simplify the laws.[167] A notable impetus was in 2003-2007 when a policy strategy was adopted that was anchored on the new government overarching policy objectives of its Economic Recovery Strategy for Wealth and Employment Creation.[168] Much as this particular policy did not directly discuss insolvency reforms, it is one of the significant engagements by the government in the reform of business laws. A further impetus came in 2008 with the launching of Kenya's 'Vision 2030', a government driven agenda which seeks to transform Kenya into a competitive and prosperous middle income economy.[169] It is noteworthy that the reform initiative is carried out within the wider context of facilitating growth of trade and investment and foreign direct investment, all aimed at reducing poverty.[170]

Economic Growth and Poverty Reduction

58 There is also a general consensus that entrepreneurship is very important for supporting the dynamism of the modern market economy, and that a greater entry rate of new businesses can encourage competition and economic growth.[171] This reality has pushed jurisdictions all over the world to engage in legal reforms necessary for encouraging such entrepreneurial activities. In particular, jurisdictions are reforming their laws to make it possible for firms to enter into the market and secondly to ensure that business exit processes are quick and efficient, to allow creditors to recover their assets and entrepreneurs to pursue new opportunities.[172]

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[165] Catherine K Gachenge and Karanja Ngugi, 'Challenges Facing Licencing Process of Foreign Direct Investments: A Case of Kenya Investment Authority' (2013) 1 International Journal of Social Sciences and Entrepreneurship 2

[166] HE Hon President M Kibaki, 'Speech During the Official Opening of Parliament' (the Fourth Session of the Tenth Kenyan Parliament 23rd February 2010)

[167] Agimba (n 12)

[168] Kenya, 'Investment Programme for the Economic Recovery Strategy for Wealth and Employment Creation 2003-2007' (Poverty Reduction Papers IMF Country Report No. 05/11, 2005) < http://www.imf.org/external/pubs/ft/scr/2005/cr0511.pdf > accessed on 29th May 2013

[169] Benhajj S Masoud, 'The Kenyan Insolvency Bill 2010: A Cross-Border Insolvency Analysis' (2013) 4 Open University Law Journal 1:195-207

[170] Whitehead (n 62)

[171] Leora Klapper, Luc Laeven, Raghuram Rajan 'Entry Regulation as a Barrier to Entrepreneurship' (2006) 823 Journal of Financial Economics 591– 629

[172] Ron Duncan and Doan Quang 'Trade Liberalisation, Economic Growth and Poverty Reduction Strategies' (2002) available in http://aid.dfat.gov.au/Pages/Publications-and-Research.aspx accessed on 16 June 2014

Growing the economy inevitably reduces poverty. Besides, poverty reduction is the overarching global policy challenge today.[173] This is primarily because poverty breeds despair, social unrest, aggravated ethnic tensions and engenders political instability.[174] In addressing this challenge, development assistance is moving away from the fulfilment of resource transfer targets toward the nurturing of new policy ideas, the sharing of development knowledge across countries, and the promotion of domestic capacity.[175] In essence, greater selectivity is being practised to ensure that assistance flows are directed to countries committed to policy reform and poverty reduction. In fact, the international players who have partnered for a while with poorer countries in fighting poverty acknowledge that facilitation of commercial activities is important. A general observation of the World Bank Doing Business cross-country surveys suggests that poorer countries tend to have faulty commercial law systems.[176]

59 In Kenya, a serious challenge facing the country today is to create employment opportunities for its continuously growing labour force, notably the youth. Another key challenge is poverty reduction.[177] As a result, reform has been undertaken in the wider legal spectrum as part of Kenya's strategies towards overcoming the challenges. Such engagements are considered worthwhile since there is a growing body of evidence that demonstrates that entrepreneurial activity plays a direct and important role in poverty reduction.[178] In fact, studies in a number of countries show that entrepreneurial activity is a primary determinant of upward income mobility of poor people.[179] Generally, entrepreneurship is, or can be, the central creative economic force in all countries. Arguably, the realisation that one of the ways of dealing with poverty challenges is by encouraging entrepreneurship is a force that drives policy change that creates conditions where entrepreneurship is constructive and dynamic.

60 Generally, one of the objectives of an insolvency law is to protect and maximise value for the benefit of all interested parties and the economy in general.[180] This is an objective that is most obviously pursued during rehabilitation, where value is maximised by continuing a viable enterprise. In particular, rescue mechanisms can be viewed as economically beneficial in the long run, since they encourage debtors

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[173] Picciotto *(n 74)*
[174] Ibid
[175] Ibid
[176] USAID, *Commercial Law & Microeconomic Reform: A practical Guide to Program Implementation* available in http://pdf.usaid.gov/pdf_docs/Pnadn787.pd accessed on 22nd March 2016

[177] African Development Bank Group, *Kenya2014 Country Strategy Paper 2014-2018* (February 2014) available in http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/2014-2018_-_Kenya_Country_Strategy_Paper.pdf accessed on 4th May 2014
[178] Nicholas Stern, 'Investment Climate: Lessons and Challenges' The British Academy, Distinguished Lecture Series 19 November 2002
[179] Ibid
[180] IMF, *Orderly and Effective Insolvency Procedures: Key Issues* (IMF 1999) available in http://www.imf.org/external/pubs/ft/orderly/ accessed on 18 August 2015

to restructure before their financial difficulties become too severe. Moreover, rescuing a viable enterprise serves a broader societal interest, by giving debtors a second chance; hence it encourages the growth of the private sector and an entrepreneurial class. In fact, one of the primary drivers of corporate insolvency law has been the recognition that Kenya should move to embrace the so-called 'rescue culture'.[181] An embedded and intrinsic objective of the on-going insolvency reforms is, therefore, to strengthen poverty reduction strategies through rehabilitation and the use of rescue procedures whose effective implementation would save jobs and revenue in the long term.[182]

61 There is a close relationship between the establishment of a strong investment climate and poverty reduction in the sense that an enabling investment climate facilitates investments and exports and it improves productivity which, in turn, spurs economic growth, which positively affects poor people through improvements to their income.[183] It is not in doubt that sustained economic growth is the most critical factor in alleviating poverty.[184] Consequently, economic growth requires an enabling investment climate and one of the ways of achieving this is by establishing efficient legal frameworks.

Conclusion

For any meaningful reforms to be realised, each of the drivers plays crucial roles to varying degrees and some drivers are complementary. As such the Kenya reform pathway can be summarised by the following quotation:

> "When are reforms likely to be successfully implemented? They tend to be successful when certain conditions, or combinations of them, are present. These include, demand from strong lobbyists in the private sector, the World Bank and other donor agencies, the media or the existence of specific crisis situations. These trigger response from the highest level of government…….which then force through the demanded changes"[185]

In essence, reforming the legal framework is a long process which requires stimulus from the drivers considered leading to a commitment from the government and a continuous sustained effort over time.

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[181] Whitehead, (n 62)
[182] Kenya, (n 172)
[183] IFC's poverty webpage: http://ifcnet.ifc.org/ifcint/deveffectiveness.nsf/Content/home accessed on 28/May 2014
[184] Raj Nallari & Breda Griffith 'Understanding Growth and Poverty Theory, Policy, and Empirics' (World Bank 2011)
[185] Hemant B Chittoo, Needesh Ramphul, and Bhissum Nowbutsing, 'Globalization and Public Sector Reforms in a Developing Country' (2009) 8 Culture Mandala: Bulletin of the Centre for East-West Cultural & Economic Studies 2