

<b>Institution: Nottingham Trent University</b>
<b>Unit of Assessment: C20 Law</b>
<b>Title of case study: Insolvency Law and Practice in Certain African States and the UK</b>
<p><b>1. Summary of the impact</b> (indicative maximum 100 words)</p> <p>Research by the Centre for Business and Insolvency Law is helping to increase investor confidence and economic stability through influence on laws in Africa and practice in the UK.</p> <p>Integrating developing countries into the global economy and encouraging investment require sound legal infrastructure, with modern insolvency laws that increase investor confidence over likely outcomes of financial crisis. Burdette's research has directly influenced Seychelles legislation, legislation currently before parliament in Malawi and insolvency practice in South Africa.</p> <p>Robust insolvency laws are also important for maintaining a stable domestic economy. Walters (with external co-authors) has influenced public debate regarding costs in insolvency.</p>
<p><b>2. Underpinning research</b> (indicative maximum 500 words)</p> <p>This case study considers the work of Burdette on insolvency law in Africa and of Walters on insolvency law and practice in the UK.</p> <p><i>a) Insolvency law in Africa</i></p> <p>Burdette, who joined the UoA in 2007, plays a leading role in influencing insolvency law and practice in sub-Saharan Africa. Most notably as a Senior Restructuring and Insolvency Specialist for the World Bank, he conducted an external peer review of the World Bank ROSC (Reports on the Observance of Standards and Codes) in Zambia and in relation to a World Bank sponsored project considering the introduction of a legal framework for the licensing and regulation of insolvency practitioners in South Africa. As part of a World Bank team he carried out a review of the insolvency systems in the Republic of Malawi and the Republic of Seychelles, and drafted legislation (a Draft Insolvency Bill) for each country. The Seychelles Bill has been passed into law and the Malawian Bill is currently going through the legislative process.</p> <p>Burdette's scholarship also informs and influences legal practice in South Africa through his contributions to major texts on insolvency law, <i>Meskin</i> and <i>Henochsberg</i>. Both books are the leading textbooks in their respective fields, and are widely used by practitioners in South Africa.</p> <p><i>b) Insolvency law and practice in the UK</i></p> <p>A report by Walters (with Armour and Hsu, both external) was commissioned by the Insolvency Service to assess the impact of the virtual abolition of administrative receivership and its replacement with the power to appoint an administrator. It found evidence to support the hypothesis that secured creditor control in bankruptcy (through administrative receivership) does no worse a job than administration, a collective insolvency proceeding, in generating net returns for unsecured creditors. This finding was at odds with claims in the existing law and finance literature which suggested that secured creditor control creates perverse incentives to liquidate assets at fire sale prices without paying due regard to the interests of unsecured creditors. In particular, the report identified that banks are better able than unsecured creditors to control insolvency practitioner costs by negotiating competitive rates. This is because secured creditors, such as banks, are repeat players whereas unsecured creditors are often not repeat players who also suffer from coordination problems. The report also identified that floating charge holders were content for an administrator to be appointed even in cases where administrative receivership was an option available to them, owing to their charges having been granted prior to the Enterprise Act 2002 reforms taking effect.</p>

## Impact case study (REF3b)

**3. References to the research** (indicative maximum of six references)

D Burdette, *Report on Insolvency Law in Malawi* (2010) - confidential report prepared for the World Bank.

D Burdette, *Report on the Regulatory Environment of Insolvency Practitioners in South Africa* (2008) - report arising from a World Bank sponsored project.

D Burdette, Chapter 18 "Business Rescue" in *Meskin, Insolvency Law and Its Operation in Winding-Up* 0 409 04136 X (LexisNexis South Africa, looseleaf, chapter first published 2011, updated twice annually) - book chapter.

D Burdette, Chapter 6 "Business Rescue" in *Henochsberg on the Companies Act 71 of 2008* (LexisNexis South Africa, looseleaf, chapter first published 2011) - book chapter.

A Walters, (with two external co-authors), *The Impact of the Enterprise Act on Realisations and Costs in Corporate Rescue Proceedings* (2006) - Insolvency Service funded research report.

Evidence of the quality of the research:

*a) Insolvency law in Africa*

Burdette's Malawi report and legislation and Seychelles legislation were subject to rigorous review as part of the World Bank quality control processes. An external review of the Malawi draft legislation was conducted by the late Prof Ron Harmer (University College London). An external review of the Seychelles draft legislation was conducted by Judge Samuel Bufford, a retired United States Bankruptcy Judge. The *Report on the Regulatory Environment of Insolvency Practitioners in South Africa* was commissioned by the World Bank.

The *Meskin* and *Henochsberg* texts are the leading texts in their fields in South Africa and are widely used by the practitioner community. This is evidenced by the number of occasions when these textbooks are referred to by the courts in their judgments (as examples see 5.3 and 5.4 below). Statistics can also be provided by LexisNexis Butterworths as regards subscriber bases, as both texts are loose-leaf publications. Corroborating source 5.9 can provide meaningful input regarding the fact that both are the leading textbooks in their respective fields.

*b) Insolvency law and practice in the UK*

The report by Walters (with Armour and Hsu) was funded by the Insolvency Service. Funding of £1063 was received in respect of an initial pilot exercise in April and May 2005. Research for the main project took place in June 2005 to June 2006 and funding of £3645 was received from the Insolvency Service. The report was extensively cited in the Insolvency Service's *Enterprise Act 2002 - Corporate Insolvency Provisions: Evaluation Report* (January 2008).

**4. Details of the impact** (indicative maximum 750 words)*a) Changes in Insolvency Law in Africa:*

Burdette's work on the insolvency systems in Malawi and Seychelles was undertaken upon request by the World Bank and specifically for the purpose of remedying any shortcomings in the statutes dealing with Malawian and Seychelles insolvency law at the time. The work was undertaken after week-long field trips to Malawi and Seychelles where the author met with various stakeholder groups. At these meetings interviewees were requested to express their opinions on shortcomings in the current legislation and what they thought could be done to improve them. The Malawi project formed part of a larger *Doing Business* project involving the World Bank's activities in Malawi. The Seychelles project was one of a suite of projects forming part of a World Bank Non-Lending Technical Assistance programme in support of a Development Policy Loan to the Seychelles.

The subsequent reports dealt with the shortcomings in Malawi and Seychelles insolvency legislation and how these could be remedied. On the basis of these reports Burdette was requested to draft new insolvency legislation for both Malawi and Seychelles. The nature and extent of the impact is illustrated by the resulting Seychelles Insolvency Bill having been passed

into law. The Malawian Draft Insolvency Bill is currently in the Parliamentary process.

The Malawi and Seychelles legal, accounting and banking professions are the main beneficiaries of the research. The Department of Industry and Trade, as the implementing authority of this legislation in Malawi, and the Ministry of Finance, as the implementing authority in Seychelles, are the other major beneficiaries. The new Seychelles insolvency law has contributed to the improvement of the general financial architecture of Seychelles, which is regarded as essential for encouraging external investment. The Insolvency Bill has put the Malawi government in the position to achieve similar improvements.

Burdette's work for the World Bank in South Africa influenced debate regarding the framework of insolvency practice and policy in South Africa. It led to recommendations and although ultimately the South African government developed its own reform proposals, they were influenced by the World Bank recommendations.

*b) Reforms in Insolvency Law and Practice in the UK*

The report of Walters (with Armour and Hsu) influenced government evaluation of the Enterprise Act 2002 and it informed the Office of Fair Trading's market study (5.5 below) which, in turn, led to the Insolvency Service *Consultation on Reforms to the Regulation of Insolvency Practitioners* (February 2011). The Office of Fair Trading carried out a similar empirical study on costs and realisations in insolvency proceedings covering a later time span than the sample of corporate insolvencies studied by Walters et al. This study made similar findings especially as regards the weakness of collective proceedings as a mechanism for holding down insolvency practitioner costs in cases where the principal lenders are fully secured or oversecured. More recently the findings of the Walters report on this point were referred to in the Kempson review of insolvency practitioner fees, carried out for the Insolvency Service (5.6 below).

**5. Sources to corroborate the impact** (indicative maximum of 10 references)

5.1. Draft Insolvency Bill (Seychelles) – (corroboration of deliverable provided to World Bank and Government of Seychelles upon conclusion of project).

5.2. Draft Malawi Insolvency Bill (with executive summary) – (confidential - corroboration of deliverable provided to World Bank upon conclusion of project).

5.3. *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa and Another v Bestvest 153 (Pty) Ltd and Another (Companies and Intellectual Property Commission and Another Intervening)* [2012] JOL 29185 (WCC) (example reported case corroborating the impact of the *Henochsberg* text as a leading textbook on business rescue in South Africa).

5.4. *Zoneska Investments (Pty) Ltd / Bonatla Properties (Pty) Ltd v Midnight Storm Investments 386 Ltd and Others (First Rand Bank Ltd Intervening)* [2012] JOL 29438 (WCC); - (a further example reported case corroborating the impact of the *Henochsberg* text).

Findings of Walters (with Armour and Hsu) are cited in:

5.5. The Office of Fair Trading market study on "The Market for Corporate Insolvency Practitioners" (June 2010) [http://www.offt.gov.uk/shared\\_offt/reports/Insolvency/oft1245](http://www.offt.gov.uk/shared_offt/reports/Insolvency/oft1245) at paragraph 4.5 (as evidence of secured creditor control over the appointment of insolvency practitioners).

5.6. Kempson, E., Review of Insolvency Practitioner Fees, Report to the Insolvency Service (July 2013) <http://www.bis.gov.uk/assets/insolvency/docs/insolvency%20profession/ip-fees-review-july-2013.doc> at page 34 (as evidence of the role of secured creditors in controlling costs).

5.7. Corroborating Source at the World Bank - corroboration of impact of work done by Burdette on World Bank projects (as discussed in 4a) above).

**Impact case study (REF3b)**

- 5.8. Corroborating Source at the Ministry of Industry and Trade, Malawi - corroboration of impact of work done by Burdette on Malawi draft insolvency law (as discussed in 4a) above).
- 5.9. Corroborating Source at the University of Pretoria - corroboration of impact of the *Henochsberg* text as a leading textbook on business rescue in South Africa, and the fact that it is frequently referred to by the courts (as discussed in 3a), 5.3 and 5.4 above).
- 5.10. Corroborating Source at the Insolvency Service - corroboration of impact of findings of Walters (with Armour and Hsu) in relation to secured creditor control and the role of this report as a forerunner to further research (as discussed in 4b) above).