THE BANKRUPTCY TRUSTEE'S POWERS: RWANDA VERSUS US

BY

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LL.M SHORT THESIS

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ACRONYMS

Art	Article
B.O	Bulletin Officiel
CFR	Code of Federal Regulations
DIP	Debt In Possession
Ed.	Edition
Fed.R Bank.P	Federal Rules of Bankruptcy Procedural
IRS	Internal Revenue Services
US C	United States Code
UFCA	Uniform Fraudulent Conveyance Act
UFTA	Uniform Fraudulent Transfer Act.
UNCITRAL	United Nations Commission on International Trade Law

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ABSTRACT

This thesis brings about a comparative research undertaken between the Rwandan Insolvency Law and the more advanced of theoretical model of the US bankruptcy system. This research examines underlying structure of the US bankruptcy trustee's powers and finds out asymmetric concepts, and what overhaul that they present to Rwandan Insolvency Law, a regulatory text designed to contribute transforming the country into a middle income economy.

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DEDICATION

This research is dedicated to **Professor Tibor Tajti** for his contribution in building my capacity in the leading bankruptcy systems including German, UK and US. The skills that I benefited from the course of "Comparative Bankruptcy Law" have immensely transformed my analytical insight into insolvency regulatory concepts and enabled me to make a research in this area.

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Justin Cyubahiro **March 27, 2015**

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Introduction

1. Background

The powers and duties of the bankruptcy trustee arise when the relationship between the debtors and creditors becomes adversarial as a result of non-payment of indebtedness. This default invokes the court filing to obtain an insolvency relief and cure debtors' liability towards their creditors depending upon how the obligation has been constructed. The general rule is that the duties of the bankruptcy trustee are couched on two goals offered by bankruptcy law, namely to protect a debtor by giving him a fresh start, discharge from creditors' claims, and to ensure equitable treatment of moneylenders while competing for the property of the estates.[1] In lending, the creditors are very cautious to avoid any risk that would hamper the recovery of the money they lend since they are not charitable organizations. The battle to recover the money is seen by some scholars not as a deal between the debtors and creditors, but rather as a concern for the micro economy.[2]

Once a bankruptcy claim is filed, a court determines without more complications the right of the creditor whose claim is valid.[3] In practice, the problem is much more complex when it comes to seizure the debtor's property, selling it and distributing cash to creditors; especially if the debtor's interest in diversified portfolios business may be ill-defined or unclear. If the debtor is a partnership, he has certain interests in the partnership assets; if he is the shareholder of a

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[1] Clarkson, Miller, Gentz and Cross, *West's Business Law*, (9th ed. Thamson 2003) at page 8.
[2] Kevin Johnston, 'The Effects of Macro and Microeconomics in Decision Making', <http://smallbusiness.chron.com/effects-macro-microeconomics-decision-making-35035.html > accessed on 2 March 2015.
[3] James J. White, *Bankruptcy and Creditors' Rights*, (American Casebook Series, Minnsota, West Publishng Company, 1984) page 8.

corporation, he has different interests.[4] In default of the bankruptcy trustee, the mainstream logic would support the idea that the moneylenders rights to the property of the estate would be intractable and suffered or frustrated by inability to managing the estate and to exhaust creditors' interests over the debtor's non-exempt assets. Furthermore, actions that may be taken by creditors to recover their money would be deadweight cost and time-consuming as a result of miscommunication between themselves or with debtors or the lack of coordination. Therefore, a need for a neutral and impartial intermediary in the administration of the property of the estate is of paramount importance so as to gear up efforts likely to be made by each party in finding a workable solution.

The bankruptcy trustee is an indispensable protection against risk in such a way that the theoretical concept underlines that a modern bankruptcy legal system could not function safely without it. The bankruptcy trustee presents a number of advantages in modern economies, including prevention of fraudulent conveyances of the debtors' assets, expropriation of beneficial holders on the insolvency of the titleholder and unjust enrichment of the title-holders' creditors, having a device whereby experienced and specialist body or person can act as active managers or as passive, protection of the property of the estate from insolvency and systematic risks, administration of most bankruptcy cases as well as distribution of any recovery to creditors according to the plan's distribution scheme.[5]

It must be underlined that lawyers should take further action when a debtor satisfies a claim and enforcement in respect with what has been reduced to judgment. However, empirical evidence shows that debtors are sometimes either unwilling or unable to satisfy the claim

[4] *Ibid at page 8.*
[5] A. James Barnes, Terry Morehead Dworkin, Eric L. Richards, *Law for Business* (fifth ed. Irwin, 1994) at page 792-795.

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asserted against them. Sometimes, the debtor can go bankrupt and therefore file reorganization and satisfy the money judgment, "in other cases the debtor is recalcitrant, and simply refuses to pay; and in still others, the debtor may be willing to pay, but another creditor may have already seized assets that otherwise would have been available to satisfy the judgment". [6] One remedy in favour of the protection of property of the estate of the debtors filed either under liquidation or reorganization is that the bankruptcy trustee plays a milestone role in order to address the aforesaid concerns by ensuring the effective and secure management of both the creditor and debtor benefits. A strong argument in that regard suggests that the role of bankruptcy trustee turned out to be essential in saving businesses struggling with bankruptcy related problems.

2. The Research Question

It must be realized that not only in modern commercial societies, but especially in developing economies, effective bankruptcy system and adequate procedural rules are essential.[7] This is explained by the fact that both developed and developing countries consider the need for stability in the market economies as a primordial issue. A need for economic stability denotes a huge concern for transitional economy, and it requires a standard bankruptcy procedure that provides businesslike solution for such stability. "Another difficulty with transition economies is that under centrally planned economies, there has been no standard mechanism for commercial entities to exit the market. Indeed, no need existed for such a mechanism since generating a

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[6] Tibor Tajti, *Comparative Bankruptcy Law*, (Material for 2014/2015, Budapest, CEU) at page 33, cited by Lawrence P. King, *Michael L. Cook, Creditors Rights, Debtors Protection, and Bankruptcy* (Matthew & Bender, New York, 1997).

[7] Richard L. Bohanon , William C. Jr. Plouffe, 'Mongolian Bankruptcy Law: A Comparative Analysis with the American Bankruptcy System' (1999), Tulsa Journal of Comparative and International Law, Volume 7, p. 2, <http://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1069&context=tjcil > last accessed 15 January 2015.

profit and insolvency were not fundamental concerns of commercial organizations. In a market economy, these mechanisms are essential".[8]

The main purpose of this thesis is to provide practical guidance for Rwanda in a comparative analysis concerning of the bankruptcy trustee' powers between the United States bankruptcy law and the Rwandan Insolvency Law, in addition to paving the way for the development of Rwandan economy. The reason for this need is vindicated by the fact that developing economies have to learn a lot from challenges experienced by developed countries where financial difficulties hit enterprises; and therefore, some companies and corporation survive and others do not. Actually, a financial distress may affect a range of industrial business, manufacturing of products and delivery of service.

Since *Rwanda Vision 2020* aimed at transmuting Rwanda into a middle-income economy (transition from a centralized economy toward a market economy), the lack of a proper bankruptcy system or a suitable functioning vehicle that takes into account its economic potential would inevitably impact on the national financial system and increasingly undercut commitment for fresh investment such as capital venture and private equity. The recent periods of flux have shown that countries should lay down adequate strategies and formalize procedures in order to handle economic challenges that could eventually occur, otherwise incentive for investment capital into what is substantially a risky market, will not be successful or, at the least, be radically unimportant. [9] "A functioning bankruptcy system provides order in what would be a chaotic economic situation. Further, a formal bankruptcy system provides a mechanism for

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[8] *Ibid at page 2.*
[9]Richard supra note 7 at page 42, cited by International Monetary Fund, *Policy Challenges Facing Transition Countries,* World ECON. Outlook**,** Oct. 1995, at 60.

creditors and investors to minimize their losses and recover at least part of their investment when an enterprise fails".[10]

Rwanda is geographically a small nation, landlocked and located in central-eastern Africa with an area of 26,338 square kilometers; it has a population of almost 12 million. Since 1959, Rwanda has undergone political difficulties resulted in a war and 1994 genocide which has taken the lives of one million people. During the last two decades, after the genocide committed against the Tutsi, Rwanda has stepped forward to stabilize the economy by various means which promotes economic freedom, creating a private business sector and promulgating a market oriented regulatory framework. According to Doing Business dated 2013, Rwanda has passed 26 business regulation reforms since 2005.[11]

The legislative history reveals that Rwanda has espoused a large-scale regulatory reform whereby several efforts were put *inter alia* in shaping a legal business device which was devastated by the war and a tragedy of genocide that the country had gone through. It appears that these efforts have been made in order to cope with post-war challenges and to pave the way for future financial relief. It is in that perspective that the Legislator reviewed in tandem the Decree of 12th December 1925 relating to the Prevention of Insolvency and Decree of 27th July 1934 relating to Commercial Insolvency and enacted a modern Insolvency Law embodied in the Law nº 12/2009 of 26/05/2009 relating to the Commercial Recovery and Settling of Issues arising from the Insolvency whether related to a Trader or a Company.

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[10] Richard supra note 7 at page 2.

[11] Doing Business, 'Rwanda: Fostering Prosperity by Promoting Entrepreneurship' page 32 (2013) < http://www.doingbusiness.org/~/media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-Chapters/DB13-CS-Rwanda.pdf > last accessed on 08 February 2015.

Like other bankruptcy regimes around the world, the Rwandan Insolvency Law is grounded on a prima facie focus aimed at recognizing the essence of maximization of the creditors' interests, in consideration of opportunity that would put into play a recovery of the debtor's financial distress and a liquidation of the property of the estate. Some countries bankruptcy trustee' powers may sometimes sound as a pro-creditor or pro-debtors as regard to their philosophical foundations or basic features that are concerned. This research will show the position of Rwanda on this matter.

Moreover, keeping businesses operating healthily attracts investors and maintain a promising tie between the moneylenders and debtors. Thus, doing business requires sometime competition to get a flexible set of rule and incentives to be able to attract investors in a specific country or area. So the most attractive bankruptcy system or an effective insolvency regime assures the creditors' interests, so long as it curtails or inhibits eventual premature winding up of sustainable businesses. Nonetheless, a secured bankruptcy system lies also at the heart of effectiveness of regulatory ruling, which empowers the trustee with certain powers to avoid any preferential or improperly executed security interests and to have a control over the activities of the principal players of bankruptcy proceedings, including debtors, creditors and third parties.

In order to cope with bankruptcy challenges, the Rwandan Insolvent Law provides and determines the responsibilities and powers of the bodies in charge of management, administrating and controlling the property of the estate, namely Insolvency General Registrar, Administrator and Receiver. Thus, as regards to the bankruptcy trustee' powers, it faces a number of challenges and shortcomings as compared to the much more advanced bankruptcy law system in the United States. This thesis is entitled "**The Bankruptcy Trustee's Powers:**

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Rwanda versus US". It seeks to bring about the similarities and disparities of the bankruptcy trustee's powers offered by these two systems with a view to further recommend for an overhaul of the drawbacks could be embedded in Rwandan Insolvency law.

One might say that the trustee's duties under the US bankruptcy are sophisticated because of the immense powers confided in her. "If the bankruptcy judge is the king, the trustee in bankruptcy is the chief courtier in the bankruptcy court".[12] In order to address the concerns relating to the unfair cost and unnecessary bureaucracy marked bankruptcy judge, the Senate felt that the US trustee system would be run under a considerable predominance of the US Trustee rather than the bankruptcy court. The United States Trustee does set up and supervise a panel of private trustees for Chapter 7 cases and appoints or serves as a Chapter 13 standing trustee. The US bankruptcy provides that the Trustee also appoints Chapter 11 trustees, examiners, creditor's committees and conducts investigations so as to ensure that participants in bankruptcy cases are not violating the procedures and the requirements of the code. In establishing the Bankruptcy Trustee, there was a hope that the US Trustee will play a key role to eliminate "cronyism" and the uncomfortably close relationship" between the judge and "their trustees" and to assume a minimum standard of competence as well as appointment process regularization.[13] It must go without saying that these efforts yielded positive results for the original 18 districts and it assures the quality of promptness, professionalism, and completion of bankruptcy cases.[14]

Applied to the setting of the Rwandan Insolvency Law, the Legislator has designated the Office of the "Registrar General in charge of commercial activities registration as the Chief

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[12] Kevin supra note 2 at page 49.
[13] Ibid at page 51.
[14] Martin A. Frey, Sidney K. Swinson, *Introduction to Bankruptcy Law*, (Sixth ed., Delmar, Cengage Learning, 2013) at page 55.

Administrator responsible for insolvency proceedings".[15] The insolvency law provides that the administrator should be "a natural person and appointed during insolvency proceedings in order to administer reorganization or liquidation of the insolvent estates and the receiver as administrator appointed by a court if the debtor was not deprived of the rights to manage her property".[16] The nuance of the two systems as regards to the set of bodies established in order to carry out the trustee's duties would give the impression that both the US and Rwanda Trustee's powers traced their roots to the same set of principles. However, US and Rwandan law do not share a common legal system heritage (Rwandan law is of civil law origin, whereas US is of common law origin), and the functionality of the aforesaid bodies differs significantly.

Since this thesis sets out a comparative study between two different legal systems, it is essential to state that the use of terminologies may significantly differ. For instance, "property of the estate" and "insolvent estate", "trustee" and "Administrator", "claim" and "interest", "lien" and "mortgage" would be interchangeable used. Where it is reasonably believed that the reader would encounter some difficulty in understanding terminologies and terms ensued from the use of the legal system in question, the researcher will make considerable efforts to provide clarity in the footnotes.[17]

3. The Anatomy of the Thesis

This thesis contains four Chapters. Chapter one introduces the background of the bankruptcy trustee's powers in the United States and provides a brief overview of the role and quality of the trustee in a series of bankruptcy relief provided by the UCC. Considering that a

[15] Rwandan Insolvency Law (art. 5).
[16] Rwandan Insolvent Law (art 2 (6).
[17] The terminologies footnoted were cited by the US Glossary of Bankruptcy Terms, <http://www.njb.uscourts.gov/content/glossary-bankruptcy-terms > last accessed on 07 February 2015.

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comparative study of the US and Rwandan bankruptcy trustee's powers is beyond the scope of this work, effort will be dedicated to major parts of these two legal systems so as to tease out the meaning of theoretical concepts that are discussed and be able to understand the overall lessons to be learnt from the much more effective bankruptcy law. In Chapter one, the researcher will look at US Bankruptcy Law Chapter 7 and Chapter 11 with a view to coming forward with a general perspective of the requirements for performing the bankruptcy trustee's duties and related responsibilities.

Chapter two streamlines the basis of the powers of the administrator in Rwandan Insolvency Law and discusses the responsibilities entrusted with different bodies set up to carry out the trustee's duties. In this Chapter will be looked at the history of Rwandan insolvency law in order to grasp the genesis of the "administrator" powers from a historical point of view and be aware of the improvements made in the current law.

Chapter three compares the US and Rwandan Insolvency Law from the perspective of managing the property of the estate. It is obvious that bankruptcy proceedings might sometimes take a prolonged period of time. At the onset, it may not be clear how to sort out the entitlements of all creditors. Some assets may be in the custody of the creditors or in possession of the debtor. Meanwhile, a trustee is entitled to retain and recapture the assets needed to continue the debtor's business. Further, it should be noted that the management of the property of the estate is a wide concept. In Chapter three, a focal point will be emphasized on the underlying operations that denote much attention as regard to the adequate administration and protection of the interests of the debtors and creditor.

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Chapter four examines the disparities between the two legal systems and is dedicated to discussing the efficient and inefficient elements of the detailed provisions relating to the bankruptcy trustee' powers: Rwanda versus US. The main purpose of this Chapter is aimed at discussing the wider the virtues in the realm of the US bankruptcy Trustee avoiding powers including Trustee's Strong-Arm Power, fraudulent conveyances and voidable preferences. It must be assumed that in assessing these concepts, the result will derive drive a premise, which will help to see what would be brought about to the Rwandan Law and challenges that might be encountered in the transplanting process.

This chapter compares also the bankruptcy trustee' power in the US and Rwandan Law with a focus centered on noticeable differences that might reasonably draw the attention of an advanced bankruptcy practitioner. It is of note to underscore that the divergence between the legal systems of different states might be elucidated by ample realities deep-seated in asymmetry of their economic development or variable factors. At the end, this thesis gives an overall comparison of bankruptcy trustee' powers under US and Rwanda law and draws a final conclusion and recommendations.

4. Limitations of the Research

It might be likely a subtle argument to say that no research is easy, and reducing one's thoughts into writing to perfectly reflect as his mind perceives the facts is undoubtedly difficult, and probably the most challenging in academics. The situation becomes more complicated when the researcher is a forerunner of an aspect not yet explored. The paucity of the relevant material concerned with the Rwandan Insolvency Law is a challenge that the writer has encountered in the course of this research. The researcher would wish to have a look at the Rwandan

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jurisprudence; particularly the material related to this topic. However, he is not currently in Rwanda and therefore does not have access to the relevant material. The discussions of this thesis are based on legal material that the writer is able to glean from accessible source.

Admittedly, a researcher in the field of bankruptcy law is required to peer much attention because he/she may not hit the nub of the matter as a result of the narrow nexus between the realm of bankruptcy and other courses such as security transaction. The terminologies used in bankruptcy are sometimes referred to secured transaction law vice versa. In this regard, comparing two systems as we have in this research could be work overload in the sense that the writer will have to make a considerable effort to ensure that the terminologies are employed as embodied in respective legal systems. As mentioned above, the two systems diverge from a legal system heritage. One may raise a concern that the indifference and antitheses between common law and civil law would backfire or inspire a strong paradox towards the comparison of the US and Rwandan bankruptcy law. It is probably unpersuasive to refute such argument as the philosophical basis of a legal system impacts on drafting and conceptualization of legal texts.

5. Research Methodology

This research is a comparative study. It is based on the content analysis of the relevant provisions of the US bankruptcy law and Rwandan Insolvency law and doctrinal works of prominent experts on the issue of bankruptcy trustee' powers as well as underlying jurisprudence emerged from this concept. The research finds it essential to mull the legal texts of both states over so long as the purpose of this research is primarily aimed at digging out great lessons that Rwanda might learn from a more advanced bankruptcy trustee system.

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Chapter 1: Overview of the Statutory Powers of the US Bankruptcy Trustee

Bankruptcy Reform Act of 1978 brought about significant novelties. One of the important changes relates to discharging of the judge of responsibilities of day to day administration of bankruptcy cases. It is understandable that bankruptcy players, including debtors, creditors and third parties would not always feel safe as regard to the duties of impartiality and independence, since the court which was previously designated to appoint the trustee was also entitled to carry out the duties of supervision. To answer these concerns, Congress assigned administrative functions with the bankruptcy system to the United States Trustee in 1978. [18]

1.1. The Role of the Bankruptcy Trustee in Chapter 7

Chapter 7 of the United States Bankruptcy Code 28.USC § 586 is entitled "Liquidation". In a typical liquidation case, the duties of the trustee revolve around the collection of the non-exempt property of the debtor, marshalling the property to cash, and distribution of the proceeds to the creditors.[19] "The debtor gives up all of the non-exempt property she owned at the time of the filing of the bankruptcy petition and hopes to obtain a discharge. The debtor-initiated the proceedings are often referred to as "voluntary", creditor-initiated proceeding are often referred labelled "involuntary."[20] When a petition is filed under Chapter 7, a bankruptcy trustee is appointed to oversee and administer the case. A trustee is appointed by the United States trustee.

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[18] U.S. Department of Justice, Executive Office for United States Trustees, 'Handbook for Chapter 7 Trustees' (2012) 1-2, http://www.justice.gov/ust/eo/private_trustee/library/chapter07/docs/ch7hb2012/Handbook_for_Chapter_7_Trustees.pdf > accessed 07 February 2015.
[19] David G. Epstein, Steve. H. Nickles and James J. White, *Bankruptcy* (Practitioner Treatise Series, Volume 1, 1992) at page 10.
[20] *Ibid at page 10.*

In accordance with section 702, the creditors can replace the appointed trustee with a trustee of their choice.[21]

The role of trustee in a bankruptcy case goes along with the proceeding. At the onset, the trustee has a prima facie duty relating to reviewing the bankruptcy petition and documents filed. It is obvious that a Chapter 7 case begins with the filing a petition with the bankruptcy court.[22] When a bankruptcy case is filed, it means a submission of documents disclosing to court the personal and financial situation of the debtor, including the information about her income, debts, property and the state of her financial affairs. In addition to filing the documents with the court, the trustee is entitled to have all hands on certain documents such as stubs, tax return, and information about assets. In this regard, the trustee crosschecks the veracity of the documents filed and verified technically the information enclosed in petition in order to be sure of the accuracy of the filing. For example, the debtor may state that she makes one million dollars a month in bankruptcy papers. However, it is a job of the trustee to compare this commitment made to effect the payment against the stubs so as to ensure that the figures are accurate.

One of the most important activities of the Chapter 7 trustee is the collection of the property of the estate of the debtor.[23] "The filing of a bankruptcy petition creates property of the estate".[24] The commencement of bankruptcy proceeding affects the debtor's property in the sense that the time of the filing of the petition transfers his property includes all of her interest in the estate. In addition, the trustee's powers are extended over and permit exercising a statutory

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[21] Durrel Dunham, 'Election of Chapter 7 trustees under Bankrupcty Code' (1999) page 4, <http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1490&context=clevstlrev > last accessed 07 Febreuary 2015.
[22] 11 U.S.C. § 301,303 (b)
[23] Ronald A. Anderson, Ivan Fox, David P. Twomey, *Business Law and the Legal Envirnment*, (South-Wetern Publishing Co. Cininnati, Ohio, 1993) at page 698.
[24] David supra note 20 at page 11.

authority to recover some property of the debtor prior to bankruptcy.[25] The problematic issue is concerned about how does the trustee learn what property the debtor owns and already transferred prior the petition?

To answer this question, the bankruptcy code provides a phase known as "examining the bankruptcy filer under oath". This means that the debtor is compulsorily required to file by section 521 and section 343 which confide the trustee a role to chair a meeting and require that the debtor must appear at a meeting of creditors and submit to questioning under oath. This hearing to be held before a bankruptcy trustee is provided by the section 341 whereby all creditors are free to come and ask questions about any issue regarding to the debtor's petition. The trustee conducts the hearing and asks also questions concerning the information contained in the documents filed in the court. At this stage, section 522 "allows an individual debtor to claim as "exempt" from the property of the estate[26] "certain assets".[27] In the event the debtor's assets declared "no assert" case,[28] there are no assert for the trustee to collect and liquidate".[29]

In a Chapter 7 case, the most probably well-known role of the trustee is selling the non-exempt assets of the debtor.[30] This is explained by the fact that in liquidation any distribution to creditors is done in cash and not in kind. Accordingly, it is necessary for the trustee to sell the property that he/she collected in order to be able to give the maximum amount of return to the creditors. If there are no non-exempt assets, the trustee will have to make a report declaring no distribution to creditors. Sometimes the trustee encountered with challenges in relation to some

[25] This duty will be much discussed in the Chapter 4.
[26] "All legal or equitable interests of the debtor in property as of the commencement of the case". This is the Insolvent estates in Rwandan law).
[27] David supra note 20 at page 12.
[28] A chapter 7 case where there are no assets available to satisfy any portion of the creditors' unsecured claims.
[29] David supra note 20 at page 12.
[30] Baran Bulkat, 'The Role of Bankruptcy Trustee under Chapter 7',< http://www.nolo.com/legal-encyclopedia/bankruptcy-trustee-chapter-7.html>, last accessed on 7 February 2015.

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of the property of the estate has little if any resale value or required extensive repairs to be made saleable. Section 556 entrusts the trustee with power to abandon such burdensome property.

Another important role of the trustee is to distribute the amount return to creditors according to their priority. At this phase, a creditor with a valid lien on the property may choose either to receive its collateral or the proceeds from its sale. Section 726 "governs the proceeds from the sale of unencumbered property of the estate. This section provides for a pro rata distribution to the holders of an allowed unsecured claim".[31]

1.2. The Role of the Debtor in Possession under Chapter 11

Unlike Chapter 7, it must be noted that Chapter 11 does involve rehabilitation rather than liquidation. In a Chapter 11 case, the debtor may be called "debtor in possession" meaning that he retains the property of the estate and makes payments from the post-petition earnings in accordance with the plan approved by both creditors and court. In other words, the court may not appoint a trustee, and therefore the debtor in possession becomes forthwith as a fiduciary responsible for maintaining control and ownership over the asset in order to continue regular business operations. A debtor that declares Chapter 11 relief must disclose all his or her assets and make a list of all debts.

The trustee is appointed in Chapter 11 when the bankruptcy court finds that there has been gross mismanagement of the property of the estate or fraudulent operations.[32] In this case, the appointed trustee is an independent third party who steps into the shoes of the debtor's management of the estate and takes over the operation of the debtor until completion of the

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[31] Ibid at page 13.
[32] See 11 U.S.C. § 1104 (a).

proceeding unless the court decides otherwise.[33] In case the court does not order the appointment of a trustee, the interested party or the United trustee may request the it to appoint an examiner to conduct an investigation of the debtor's assets, including "an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor".[34] "Additionally, the U.S. trustee monitors applications for compensation and reimbursement by professionals, plans and disclosure statements filed with the court, and creditors' committees. The U.S. trustee conducts a meeting of the creditors, often referred to as the "section 341 meeting"[35]. The U.S. trustee and creditors may question the debtor under oath at the section 341 meeting concerning the debtor's acts, conduct, property, and the administration of the case". [36] It must be understood that the trustee has the capacity to sue and to be sued either in liquidation and reorganization. The role of a bankruptcy trustee in the case either Chapter 7 or Chapter 11 hand in hand with the duties and powers that will be discussed in chapter three and four.

1.3. Eligibility and Recruitment of Bankruptcy Trustee

The requirements for recruitment and appointment of a trustee trace their roots from the duties that the latter has to perform. As the US bankruptcy code provides different relief, the appointment of the trustee varies depending on the nature of the filing petition. With regard to Chapter 7, the United States Trustee establishes a panel of individuals qualified to be appointed as trustees. In order to be eligible, a trustee who wants to serve in a Chapter 7 case must fulfil sine qua non: "(1) individual competent to perform the duties of a Chapter 7 trustee, (2) reside or

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[33] See 11 U.S.C. § 1108.
[34] See 11 U.S.C. § 1104 (c).
[35] See 11 U.S.C. § 341.
[36] James C. Duff, *Bankruptcy Basics* (ed. 2010) Applicable to Cases Filed on or After October 17, 2005, Bankruptcy Judge division, Administrative Office of the United States Courts, at page 32.

have an office in the district where the cases are pending or in an adjacent district, and (3) be an individual or a corporation authorized by corporate charter or bylaws to act as a trustee (11 U.S.C. § 321".[37]

In order to serve, the trustee must furnish a bond in favour of the United States as a security for any penalty or forfeiture committed in performing his duties. Unless the United States Trustee decides otherwise, a jurisdiction of panel trustee is determined in accordance with the region and district covered by a blanket bond. [38] In addition, the trustee must be subject to investigation purporting to unearth her initial background.[39] "Full disclosure and freedom from the connections which taint the appearance of disinterestedness is the sine qua non of bankruptcy court approval of the retention of a professional by a debtor, a trustee, or a creditors' committee".[40] The United States Trustee utilizes the system of a blind rotation in appointing the panel members to serve under Chapter 7. It has to be noted that this system promotes equity and fairness and presents some advantages *inter alia* to avoid the favouritism and to eliminate any sort of individual appearance judgement when assigning cases.[41]

In contrast with Chapter 7, a court rarely appoints the trustee in a Chapter 11 case. The US Trustee or any interested party can request the appointment of a trustee or examiner provided that the request is filed prior to confirmation of a Chapter 11 case. The role of an examiner is limited in comparison with a trustee. At this point, it is essential to mention the "request for §

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[37] Donald supra 23 at page 2-3.
[38] See 11U.S.C. § 322.
[39] See 11 U.S.C § 586 (a) and 28 C.F.R. § 58.3 (b) (8).
[40] William H. Schrag and Mark C. Hau, 'Why Professionals must be Interested in "Disinterestedness" under the Bankruptcy Code', (2005),Morgan, Lewis & Bockius LLP, page 1.
<http://www.morganlewis.com/pubs/Disinterestedness_v2.pdf > last accessed 28 December 2014.
[41] US Glossary of Bankruptcy Terms supra 17 at page 2-4.

341 meeting"[42] whereby any interested party may request the US Trustee pursuant to §1104 (b) to convene a meeting of creditors for the purpose of electing a Chapter 11 trustee. "Pending court's approval of any person elected, the trustee who is appointed by the US trustee and approved by the court, shall serve as trustee".[43] If there is not a trustee election, the US bankruptcy trustee may design the appointed interim trustee to perform permanently the duties provided that the majority of Chapter 7 cases do not oppose it.[44] In contrast, the US Trustee must file with the court, without delay, a comprehensive report once the election has taken place. The meeting of creditors must be chaired by the United States Trustee. The Trustee may also designate the interim trustee who may preside the conduct of creditors' meeting in case no election is expected.[45] "Where, however, an election is anticipated, the presiding officer should not be the interim trustee, but an employee of the United States Trustee. In comparison with Chapter 7, in Chapter 11 cases, creditors whose claims are not listed as disputed, contingent, or unliquidated are not required to file proofs of claims in a Chapter 11 case. Such claims are treated as deemed filed and should be considered in calculating whether the 20% requirement has been met".[46]

1.4. Resignation and Removal of the US Bankruptcy Trustee

A trustee may voluntarily resign from the duties provided that he has taken "reasonable steps to ensure that a resignation from a pending case does not unduly impede its

[42] See 11 U.S. Code § 341.
[43] U.S. Department of Justice, 'Executive Office for United States Trustees: Handbook for Chapter 11 Trustees' (2004) page 12, < http://www.justice.gov/ust/eo/private_trustee/library/chapter11/docs/Ch11Handbook-200405.pdf > last accessed on 7 February 2015.
[44] See U.S.C. § 702 (d).
[45] See Fed. R. Bank. P. 9001(11).
[46] Richard C. Friedman, 'Guide to Trustee Election', <*http://www.justice.gov/ust/eo/public_affairs/articles/docs/trusteeelect02-00.htm#N_1* > last accessed on 18/1/2015.

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administration".[47] When a trustee dies, resigns, or fails to qualify under § 324, is removed from a case. The US bankruptcy code does specifically underline a list of grounds that may constitute the cause for removal. The discretion to assess whether the circumstances amount to the removal of a trustee is necessarily left to the court. It might be assumed that the fiduciary obligations resulting from the duties of the trustee remain the benchmark to warrant the removal of a trustee or examiner. A petition to remove a trustee from office may be filed by any party in interest, including the US Trustee. A trustee who has been removed from office is required to comply with 11 USC § 704 (9). "The United States Trustee will appoint an interim successor trustee to preserve or prevent loss to the estate. If creditors do not elect a successor, the United States Trustee will appoint one".[48] The removal of a trustee from office does not affect ongoing proceeding or action in the sense that the successor trustee steps into the foot of the outgoing trustee.

1.5. Compensation of the US Bankruptcy Trustee

Pursuant to § 326, 327 and 328, in a case under Chapter 7 and 11, the court may allow reasonable compensation to a trustee for the services rendered. The US bankruptcy code breaks down the modality of payment by indicating the minimum and maximum of what should be the remuneration of the trustee. After the trustee renders the services, he/she is entitled to a remuneration not exceeding "25 percent on the first $5,000 or less, 10 percent on any amount in excess of $5,000 but not in excess of $50,000, five percent on any amount in excess of $50,000 but not in excess of $100,000, and reasonable compensation not exceed three percent of such money in excess of $1,000,000. If more than one person serves as trustee in the case, the aggregate compensation of such person for such service may not exceed the maximum

[47] See 28 U.S.C. § 586.
[48] See Section 703 (b).

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compensation prescribed for a single trustee".[49] In addition, unless otherwise approved by the court, the trustee may employ resources, including attorneys, account, appraisers, auctioneers, or other professional person. The persons hired in such a situation have to apply for their compensation to the court. In case the requested compensation exceeds the reasonable value of the services rendered, "the court may cancel the agreement or order the return of payment, to the extent excessive to the estate or the entity that made such payment".[50]

In sum, the present chapter discussed the role of the US bankruptcy trustee in a set of relief provided by thereof. It was stated that the trustee is not as active in liquidation as in the reorganization. The duties of supervision and control entrusted with the US bankruptcy Trustee play an indispensable role in the performance of the powers confided to the trustee. As the researcher finds it coherent to conclude the first chapter by the way of confronting it with the discussions be fetched out in the second chapter, there are noticeable observations that denote a certain degree of attention for the comprehension of the debate of next chapter. First, the insight into the US Bankruptcy Trustee and the General Registrar with focus on institutional apparatus a standpoint. Second, the powers of the trustee vis à vis the insolvency administrator. Third, the functionality of the administrator and decision making process. Differences between the two systems as regard to appointment and compensation of the bankruptcy trustee. Fourth, philosophical basis of each of the system as of trustee's powers framework.

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[49] Douglas G. Baird, Theodore Eisenberg, Thomas H. Jackson, *Commercial and Debtor-Creditor Law* (2010 ed. Chicago, Foundation Press) page 1912-14.
[50] Ibid at page 15.

Chapter 2: The Basis of the Powers of Administrator in Rwandan Insolvency Law

Bankruptcy law can remedy a distinct aspect between the relation of debtor and creditors not only when the debtor does not have enough to repay everyone in full, even then, however, a developed system exists for paying creditors without bankruptcy.[51] The more the notion of bankruptcy law becomes wider, the trustee's powers are extended accordingly. As mentioned above, Rwanda adopted the first legal regime on insolvency in the Decree of 12th December 1925 relating to the prevention of insolvency and Decree of 27th July 1934 relating to commercial insolvency (27 Juillet 1934 - Décret. Des Faillites. (B.O., 1934, p.796). The duties of the administrator in the management of the property of the estate as provided by the regime of the Law nº 12/2009/ of 26/05/2009 differ completely from those conceived by the Decree of 27th July 1934 relating to commercial insolvency. The following paragraphs outline the relevant provisions of the current law with regard to the duties of the administrator.

2.1. Inadequacy of the Powers of the Administrator under Pre-reform Act

The pre-reform act presented some drawbacks relating to the management of the estate, especially as regards to its utmost powers confided to the magistrate of the High Instance Court to oversee the administration of the property of the debtor. This magistrate could chair the creditors meetings and appoint and revoke the Curator (s) with restrictions.[52] The accumulation of all powers by the magistrate over the bankruptcy case hindered the creditors' rights. It must be understood that the bankruptcy proceedings resolved around the Judiciary. In practice, the non-performance and ineffectiveness stemming from the overwork and lack of complementarity were absolutely unavoidable. This legal reform is similar to the US. Bankruptcy Reform Act of

[51] Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law*, (Harvard University Press by Beard Books, Washington, D.C, 2001) page 8.
[52] Décret. Des Faillites. (Art. 15, 27 Juillet 1934 - B.O., p.796).

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1978 that removed the bankruptcy judge from the responsibilities for day-to-day administration of cases. As Jane P. Mallor says, each state has its own legal system.[53] One may probably say that the manner in which the management of the property of the estate was designed in this pre-reform act could have been in line with the realities of business activities of 1934's. This foregoing supposition is based on the fact that Rwanda is among the first African countries which adopted or adhered to legislative texts regulating the realm of insolvency. Nonetheless, it is persuasive that the provisions of this Decree are incompatible with the emergence of the current business vehicle of Rwanda. That is a reason why the Legislator resolved to review this Decree and enact a new law that takes into account the economic growth and sustainable development of the country.

2.2. The Roots of the Powers of the Administrator under the Rwanda Insolvency Law

A business plan sets a time horizon. A legal system that does limit the time frame for proceedings cannot effectively enhance the insolvency process. A time consuming proceedings disfavour creditors' chances to recover outstanding debt and can cause unnecessary uncertainty for all parties concerned.[54] The current Rwandan insolvency law introduces time limits for the management of the bankruptcy case and challenges specifically the responsibilities of the creditors and administrator in addressing the concerns regarding to deadlines set thereto. The commencement of bankruptcy proceedings has effects on the duties of the administrator and creditors' debts in the sense that the creditors have to register their debts in periods prescribed by the law; and the creditors also shall immediately notice administrator of any evidence that would

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[53] Jane P. Mallor, A James Barnes, Thomas Bowers, Michael J. Philips, Arlien W. Langvardt, *Business Law and the Regulatory Environment* (10th ed. Irwin Mc Braw-Hill1998) page 513.
[54] Doing Business supra note 11 at page 6, cited by Cirmizi, Elena, Leora Klapper and Mahesh Uttamchandani ,*The Challenges of Bankruptcy Reform'Policy Research Working Paper 5448*, World Bank, Washington, DC.

establish debtor's property or any ongoing concerned debts. This law provides liability for any person who may commit any error or lateness.[55]

On the other hand, "the creditors' General Assembly deciding on the insolvency proceedings is based on the administrator's report; such assembly is scheduled within six weeks and must not be scheduled more than three months later".[56] The article 11 provides that "the court shall require the creditors' committee to provide its comments in a period not exceeding fifteen days. The General Assembly of the creditors shall be held in seven days in order to receive the administrator's report".[57] From one philosophical point of view, this focus is understandable in that the primary purpose of the Rwandan Insolvency Law, at least at this point in the development of the Rwandan free market economy, is to address the macro-economic issues of attracting more international investment in Rwanda and to provide economic stability.[58]

Promoting specialization and complementarity in the management of the property of the estate is one of the major novelties of the current Rwandan insolvency law. Besides the commercial courts introduced to hear insolvency cases, the services to be rendered in the administration of the estate are under the supervision of a governmental body which helps to ensure effective performance of the duties assigned to the administrator. The nature of the competitive process exerted to recruit the administrator and the qualifications required to perform his duties remain of additional value to the improvement of the industry of a bankruptcy trustee in Rwanda.

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[55] Rwandan Insolvency Law (art. 21 (30).
[56] Rwandan Insolvency Law (art. 22 (1).
[57] Rwandan Insolvency Law (art 11).
[58] Richard supra note 7 at page 8, cited by Ronald **I.** McKimnnon *Financial Growth and Macroeconomic Stability in China, 1978-1992: Implications for Russia and Other Transitional Economies,* 18 J. COMP. ECON. 438 .

"Research has shown that if secured creditors are not protected or granted priority under the law, they will have less incentive to lend in the future. That leads to a less developed credit market".[59] It is obvious that the role of the administrator in the protection of the secured creditors looks like a self-help repossession so long as the office in charge of the supervision of the services of the administrator was also entrusted to ensure proper registration of the mortgages and to allow the enforcement of the assets in order to satisfy secured creditors' interests. "A secured creditor with an asset involved in the insolvency proceedings may apply for retention of such an asset and shall not be considered among the creditors. In the case a secured creditor opts to relinquish the security, he/she shall treat and be paid like other creditors".[60] Thus, the aspect of transparency governs all instances of a bankruptcy case. In contrast to the outgoing law, the new law promotes synergy because it is backed up by concrete pillars that are designed to make more effective the administration of the estate. The next subsection discusses these pillars.

2.3. The Insolvency Administrator and Institutional Apparatus

Thankfully, the system of debt-slavery and debtors' prisons has been abolished long ago. Nevertheless, the judiciary system sets out other restrictive procedures for protecting the creditors' interest, such as seizure of the property of the debtors.[61] Enforcement of this system known as levy required efficiency. As Kevin J. Delaney says, a system disregarding the corporate bankruptcy process is surprising and troubling.[62] Therefore, the Rwandan insolvency law is entirely focused on business activities, whether related to a trader or company. The fact

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[59] Doing Business supra note 11 page 7, cited by UNCITRAL, *Legislative Guide on Insolvency Law, (2004)*. New York: United Nations.
[60] Rwandan Insolvency Law (art.30).
[61] Lawrence, P. King Michael L. Cook, *Creditors' Rights, Debtors Protection and Bankrupcty*, (Matthew Bender & Co., Inc, New York, 1997) at page 1-2.
[62] Kevin J. Delaney, *Strategic Bankruptcy: How Corporation and Creditors Use Chapter 11 to Their Advantage*, (University of California Press, New Preface, 1998) at page 39.

that this law acknowledges an individual debtor and creditors as protected subjects, it practically drives a premise that the scope to be covered by the duties of the administrator is basically wide. Indeed, this insolvency law looks modern because it does not consider the creditor as the only one with rights; however, it does grant a "second chance" while emphasizing on consumer protection.[63] A workable solution to make successful this situation gives rise to the setting of a system reclined on synergistic efforts of all active players in bankruptcy in order to give them a say in the management of the property of the estate (court, creditors' committee, Registrar General, and administrator).

2.3.1. The Administration of the Office of General Registrar

While the US Trustee is entitled to oversee the administration of bankruptcy cases and ensures that cases do not languish in bankruptcy court,[64] the Rwandan insolvency law provides that the Registrar General has the powers to establish instructions, provide licenses for performing the duties of an administrator in the case of insolvency, and conduct supervisory obligations on insolvency proceedings and related activities. Unlike the US bankruptcy law, the administrator is not eligible to file a bankruptcy case or be sued. Article 16 lists eligible persons who can file a court petition, including creditors, debtors, Board of Directors, and the Registrar General. The Office of the Registrar General is the key element in the management of a bankruptcy case to extent that the court is required to submit to him all official information in relation to the commencement or refusal of insolvency proceedings. The Court registrar has also to submit to the Registrar General a copy of "Authentic Land Titles" for cases involving real estate and immovable property. In a case of settling issues arising from the insolvency or

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[63] Robert W. Emerson, John W. Hardwicke, *Business Law* (Third ed. Barron's Educational Series, 1997) at page 215.
[64] Douglas G. Baird, *Element of Bankruptcy*, (Fifth ed. the Foundation Press, Newyork, 2010) at page 6.

reorganization, the General Registrar monitors the reports submitted by the administrator on debtor's business and financial affairs to the court and creditors.[65]

2.3.2. Appointment of the Insolvency Administrator and Receiver

In Rwandan Insolvency law, the creditors seem to be immune as long as they have the last word for the designation of the administrator. They were actually granted absolute power in determining the person who has to be vested with the duties of the management of the estate. The court is eligible to designate an independent licensed individual and who does not have a relationship with the creditors or debtors. The Court decision is based on the list approved by the Registrar General. The administrator appointed by the Court is definitively approved by the first creditors' meeting. Thus, the first creditors' meeting following the appointment of the administrator may select a separate person in order to replace the administrator appointed. However, the court is entitled to appoint a temporary administrator in a view to take all necessary action in order to avoid any harmful act would be detrimental to the financial status of the debtor or the creditors. Article 19 provides the rights and powers of the temporary administrator. The Court may, upon request by the Registrar General, dismiss or suspend the administrator if he has committed a criminal offense, breach of restrictive provisions governing her duties and upon his own request.[66] It is understood that the administrator is removed from office only for good reasons.

On the other side, as the examiner is appointed in Chapter 11, a receiver is in principle "appointed by a court in case the debtor was not dispossessed of the rights to manage his/her

[65] Rwandan Insolvency Law (art. 85).
[66] Rwandan Insolvency Law (art 12).

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property".[67] A court may also grant a debtor with the right to administrate the estate under overseeing of the receiver. In this case, "no obligations exceeding the range of his/her ordinary business contract may be entered into by the debtor without the receiver's approval. The debtor shall not even enter into other obligations falling under the range of his/her ordinary business if the receiver objects to such obligations".[68]

2.3.3. The Remuneration of the Administrator

It must be noted that the remuneration of the administrator differs drastically from the US Bankruptcy trustee. As mentioned above, the compensation of the trustee follows a regime that does not have anything to do with the federal or state resources; it is based a progressive fixed price and it is not susceptible to appeal. In the Rwandan insolvency regime, the administrator is remunerated due to his/her performance, and is reimbursed for the expenses incurred. The remuneration is calculated on the "basis of the value of the assets involved and the insolvency proceedings. If the value of assets of the debtor is less than the expenses the administrator incurred during the insolvency proceedings, the claim shall be directed against the Government".[69] Hence, the Registrar General of business activities is entitled to determine, through instructions, other conditions for determination of the remuneration of the administrator.

2.4. Powers of Insolvency Registrar General in Insolvency Proceedings

The philosophical basis of the powers of the General Registrar and US bankruptcy Trustee seems to have generally the same purpose which is mainly aimed at supervising the conduct of the bankruptcy proceedings. The Registrar General is "particularly in charge of receiving and keeping an insolvency administration document with regard to the services he/she

[67] Rwandan Insolvency Law (art. 1.9).
[68] Rwandan Insolvency Law (art.92).
[69] Rwandan Insolvency Law (art.10).

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is going to perform in insolvency proceedings; carrying out or setting up, if considered necessary, control procedures or investigations on insolvency works and all other related matters, intervening in court at any given time and be considered as one of the parties; establishing requirements in determining what the debtor should be given for subsistence".[70] In my view, it should be assumed that the General Registrar is bound by fiduciary duties with regard to the Government and stakeholders. The concept of fiduciary duties is wide and it cannot be discussed in this thesis.

2.5. Prosecution of the Offenses Committed against the Estate

Unlike the US bankruptcy trustee, the cases involving criminal offenses are reported by the General Registrar to the prosecution. Article 5 (5) provides that the General Registrar is entitled to inform the prosecution of criminal offenses committed against the property of the debtor. It seems that the Legislator did not take into account tort as a resource for the debtor to discharge of the debts. This issued will be discussed in chapter 4 where US court cases stress that tort committed either against the property of the estate or the debtor himself is constituted a lawful source fund to feed the property of the estate.

Summarizing the second chapter of the thesis, it is important to mention that there are a number of major discrepancies between the two systems as regard to the basic powers of the bankruptcy trustee. The US bankruptcy Trustee is decentralized in the sense that once the trustee is appointed, he/she takes responsibility of the bankruptcy case. The trustee can file a petition and he/she can be sued as well. In contrast, the Rwandan Insolvency law does not empower the administrator to commence a court filing or be a party to the proceeding. As mentioned above, the General Registrar is the only one that the law granted the right to intervene in the court -and be considered as a party in the proceedings. It is persuasive to say that Rwandan system is

[70] Rwandan Insolvency Law (art.5).

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quietly centralized because the General Registrar is not likely to intervene in any case where need be, at all time throughout the country. The provisions relating to the appointment of the administrator suggest that Rwandan insolvency law might be a pro-creditor. This assertion is explained by the fact that the law vested the creditors' committee with the privilege to definitively approve the person (s) who has to carry out the duties of the administrator. In my opinion, the possibility that administrators are able to accumulate many cases, while others are idle is very risky, if the creditors' committees have to approve the administrator at its discretion.

On the US side, it must be underlined that a system of blind rotation rules; and it yields a good result chiefly it avoids the appearance of favouritism and eliminates the need to make individual judgments about case assignments. The trustee must furnish a bond in favour of the United States that is conditioned on the faithful performance of the trustee's duties. Another significant difference relates to the modalities used to compensate the administrator for the services rendered. The US legal system adopted progressive fixed price, whereas the Rwandan system prefers a remuneration based on performance services, and if need be the government pays in lieu of insolvent debtors. One may say that the legal system of Rwanda earmarks for investors incentive in bridging a route to the government body to fill a potential gap while the US bankruptcy trustee is a further professionalized business vehicle.

The focus of this thesis is to find out what solution could be transplanted to Rwanda from US bankruptcy law. Previous discussions have shown appreciable similarities between the two systems; especially on the level of the structural configuration of a bankruptcy trustee. However, on the functionality side, the Rwandan system still has great room to improve chiefly by empowering the administrator with right to deal with cases just at the onset of bankruptcy. This

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means that the administrator could make a more significant contribution to the insolvency system if he/she would be granted the capacity to file a court petition or be sued not only in case of default of a duty of care but also for any situation in connection with the normal course of bankruptcy proceedings.[71] The supervisory role of General Registrar combines both participative and managerial functions in a bankruptcy case. The writer is skeptical about the productivity and smartness of the service rendered by the General Registrar in day to day administration of bankruptcy cases. In the face of the duties of the administrator it requires at least institutional body mandated specifically for assessing, monitoring, and reporting thoroughly to concerned governmental bodies any threat would rise against financial system.

On the other side, one may suggest that the administrator's duties need to be shaped and centered on the top management of bankruptcy routine challenges so as to improve professionally this career. It is a strong view that the Office of the Registrar General in charge of commercial activities registration and administrative functions of the bankruptcy system be completely bifurcated. The supervision and control of the carrying out of the duties of the administrator would be *specifically* assigned to a governmental body. Thus the insolvency law has no remedy in case the administrator appointed to manage the property of the estate goes also bankrupt; and therefore be unable to cure claims brought against him. A bond assures commitment and limits naivety. It is persuasive that an administrator who offered a bond would likely perform his duties faithfully and carefully compared to that did not furnish any security. In addition, as it was pointed out above, the government discharges of expenses incurred by the administrator if the asset of the debtor declared insufficient. This sounds that the role of the Rwandan administrator existing within a para-governmental interest based system. A recommendable suggestion in

[71] Deborah L. Thorne, *Preference Defence Handbook: The Circuits Compared* (Second ed. American Bankrupcty Institute, 2006) at page 2-3.

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favour of liberal market is that a step forward to a private oriented system would crystallize professional risk and liability insurance and upgrade alertness, cross-checking, and irresponsibility or unfair dealing deterrence. Clearly, these aforementioned elements remain interesting lessons that can be migrated to the Rwandan bankruptcy system.

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Chapter 3: Insight into the Trustee' Powers on Managing the Estate: Rwanda versus US

3.1. Introduction

This chapter elaborates the insolvency administrator and trustee's powers as to the management of the property of the estate during bankruptcy proceedings and the enforcement phase as well. As it was previously mentioned, the bankruptcy process may unlikely be defined in a certain time and then change the value of creditors' rights if the management of the debtors' property is not properly done. As designed, the bankruptcy trustee should ensure that the administration of the estate is safe and adequately protected from any potential effects resulting from the debtor relationship with the rest of the world. The property of the estate engenders expenses and therefore requires finances to preserve it. This chapter explores the challenges which arise when decisions taken either by the trustee or debtor in possession may adversely affect the creditors' rights and what the respective system provides thereto.

3.2. Trustee's powers in establishing the turnover of the estate

By interpreting the Bankruptcy Code § 541 which establishes an "estate", the United States Supreme Court concludes that the property seized by the IRS remains essential to the reorganization of the Whiting and therefore the IRS is bound by the provisions of § 543 (b) (1). The court directed whiting Pools, Inc. to assume the protection of the property turned over by the IRS.[72]

This case presents a situation whereby the Respondent Whiting Pools Inc, a company incorporated to undertake the business of selling, installing and providing swimming pool services as well as supply related equipments, failed to pay federal taxes liability valued

[72] United States v.Whiting Pools. Ic. United States Supreme Court, 1983, 462 U.S. 198.

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approximately to $ 92,000. As a result, the IRS opted to seize all the property of Whiting Pools including equipment, vehicles and inventory as a tax lien. The very next day, Whiting filed a petition under Chapter 11 and the court granted her the right to continue its business as a debtor-in-possession. The Court of Appeal examined the issues of this case in four sequences: whether § 542 affects a seizure done by a secured creditor against the debtor's property prior to the commencement of reorganization proceedings (1), if section 542 (a) authorizes the trustee to sell, use, and lease the property of the estate in possession of an entity pursuant to the subsection b and c of § 363 or the entity in possession is required to deliver that property to the trustee (2), certain condition required to preserve the property estate and protect the creditors (3) and the definition of the "estate" (4).

With regard to the concern relating to whether the debtor's property seized by a secured creditor may be affected even though the seizure was done prior to the commencement of reorganization proceeding, the court built its motives on the congressional goal and emphasized that the Congress's choice in proceedings under Chapter 11 intended to protect the creditor and to rehabilitate business because the debtor' assets are more valuable under reorganization in lieu of "sold for scrap". Rehabilitation anticipates that the business is subject to continue to provide jobs, satisfy moneylenders' claims and to produce a return for its owners. So, these foregoing concerns suggest that "reorganization would have a small chance of success, however, if property essential to running the business were excluded from the estate...Thus, to facilitate the rehabilitation of the debtor's business, all the debtor's property must be included in the reorganization".[73]

[73] Roy GISARA 'Law and Regulations in global Finance Market' (2013) < https://books.google.hu/books?id=GUevAgAAQBAJ&pg=PA133&lpg=PA133&dq=reorganization+would+have+small+chance+of+success+however,+if+property+essential+to+running+the+business+were+excluded+from+the+es

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The second point raises the issue linked to the trustee's powers in disposing of the property of the estate. The court held that the trustee or debtor in possession is entitled to manage the property of the estate under reorganization within the limits and conditions set by the court so to protect the secured creditors. This includes the limitation of the trustee's powers to sell, use and lease property. In other words, the management of the estate is in principle conducted by the bankruptcy trustee or debtor in possession *mutatis mutandis* under the court protocol for the sake of the creditors' interests.

In assessing the forth issue, the court insisted on the broad definition of the "estate". Basing on the House and Senate Reports, the Court of Appeal says that § 542 (a) of the US Bankruptcy Code does not restrict the scope of the estate to the assets possessed by the debtor at the commencement of the reorganization proceedings. Thus, section 542 (a) obliges any entity (other than a custodian) that holds the debtor's property to turn it over to the trustee under § 363 in order that he/she sells, uses or leases that property to repay the debts owed to the creditors. The court indicates that the Bankruptcy Code provides various rights for secured creditors *inter alia* the right to adequate protection, which supersedes the protection afforded by possession. The court concludes that the reorganization of the estate does not exclude debtor's property seized by the creditor prior to the filing of a petition for reorganization. The IRS was required by the court to turn over the property of Whiting Pools with the view to form the property of the estate and contribute to the operation of the reorganized business. The court says that the term

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tate&source=bl&ots=aVtYEGkimR&sig=prvFW3SyPx-fCcjexYMukw4S0Fg&hl=en&sa=X&ei=E5j1VOHoBKm6ygOIh4GQAQ&ved=0CCgQ6AEwAQ#v=onepage&q=reorganization%20would%20have%20small%20chance%20of%20success%20however%2C%20if%20property%20essential%20to%20running%20the%20business%20were%20excluded%20from%20the%20estate&f=false> accessed on 9 March 2015.

entity includes governmental unit and therefore the IRS was defined at the same extend as any other secured creditor. [74]

In contrast with the Rwanda Insolvency Law, article 37 and 38 do not expressly specify whether the property of the estate may have an effect on actions taken prior to the commencement of insolvency proceedings. Neither liquidation nor recovery provisions do contemplate a clause that puts into question a lawful act accomplished before filing a court case for the purposes of turnover of property. Although tax lien is not recognized under Rwandan Law, the insolvency law grants to the government the right to satisfy separately with the debtor' property subject to the custom duties.[75] This privilege is parallel to the formation of the estate that might be processed through the channel of the bankruptcy trustee or debtor in possession. The insolvency proceedings seem to affect pending transactions and they do not apply retroactively. This assertion gives the impression that the administrator is not allowed to exercise power over the debtor's property seized by the government nor any other creditors prior the filing of a petition for reorganization unless those transactions have been adjudicated as fraudulent acts.

Another thing to look at is the definition of the insolvent estate as contemplated in the article 2 (3). The researcher finds that the definition given to the property of the estate not under the eyes of critics. This article reads as follows: insolvent estate is "*assets of the debtor that are subject to the insolvency proceedings*".[76] This means that a transfer of ownership made shortly before the filing of a petition is excluded from the property subject to the insolvency

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[74] Barry E. Adler, Douglas G. Baird, Thomas H. Jackson, *Bankruptcy: Cases, Problems, and Materials* (Fourth Edition, Foundation Press, New York, 2007) at page 409.
[75] Rwandan Insolvency Law (art. 33 (4)).
[76] Rwandan Insolvency law (art. 2 (3)).

proceedings. If the baseline for stating the estate is centered on the *ownership as such* rather than essential ingredients required to run effectively the debtor's business in case of reorganization and creditors' interest in liquidation, not everyone agrees that the speculation about the property of the estate will be sheltered from a pure hide and seek game. The more the concept of "estate" is narrowly defined, the more the vacuum becomes bigger, which in turn disrupts the services to be offered by the administrator.

3.3. Adequate protection as the duty of the trustee

Once the property of the estate is formed, the trustee (or debtor in possession) is entrusted with the power to maintain the estate for the benefit of the creditors. When the collateral in which the creditor has an interest is worth more than the debt, the trustee may wish to retain it in order to preserve the estate in its entirety. Thus, the trustee has to manage this collateral in the limit of two antagonist restrictions: to ensure full compensation of the secured creditors for the creditor's forgone opportunity to foreclosure and to allow the debtor to benefit from the retention of that property.[77] In the event that a secured creditor fears that the trustee will dissipate the value of the security, he/she may seek protection by requesting the court to grant relief from the stay.[78] The court may authorize a post-petition effect of security interest by permitting the proceeds including profits, offspring, rents, and product derived from the collateral itself.[79] In this context, the court can lift the automatic stay.[80] In the case, United Savings Association v. Timbers of Inwood Forest Associates, Ltd, the court held that "the Fifth Circuit correctly held that the

[77] Douglas supra note 64 at page 411.
[78] See 11 US Code § 362 (d).
[79] See 11 US Code § 552 (b)

[80] H. Miles Cohn, 'Protecting Secured Creditors Against the Costs of Delay in Bankruptcy: Timbers of Inwood Forest and Its Aftermath', (1989) < https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=6+Bank.+Dev.+J.+147&key=9463b05b31bfaf43ca368d0e76f479d7>, accessed on 3 March 2015.

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undersecured petitioner is not entitled to interest on its collateral during the stay to assure adequate protection under 11 U.S.C. § 362(d) (1). Petitioner has never sought relief from the stay under § 362(d) (2) or on any ground other than lack of adequate protection*"*.[81] In contrast with the Rwandan Insolvency Law, the administrator does not have anything to do with secured creditors. Unless he surrenders his/her security interest, a secured creditor is entitled to a separate satisfaction i.e. may apply for retention in accordance with the provisions of the Law on the mortgages.[82]

3.4. Effects of commencement of insolvency proceedings

One may conclude that the stay is similarly legislated under Rwandan insolvency.[83] The effect of commencement of insolvency proceedings as embodied in article 37 seemingly reflects some elements of automatic stay such as codified under the US law § 362. Unlike the US stay, the Rwandan Insolvency Law does not expressly specify whether the stay can be applied to post-petition earnings. Both systems disallow any action aimed at recovering, satisfying or enforcing a pre-petition obligation. The remarkable difference is that Rwandan Insolvency Law grants a privilege to a secured creditor of immovable property to satisfy with the asset separately.[84] As regards to reorganization relief, the authority of a receiver differs radically from the lessons learnt from the case United States v. Whiting Pools (where the trustee' powers may have effects on prior petition transactions) for the insolvency plan affects only those actions taken or to be taken after the onset of insolvency proceedings.[85]

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[81] United Savings Association v. Timbers of Inwood Forest Associates, 484 U.S. 365 (1988).
[82] Rwandan Insolvency Law (art. 30-31).
[83] Rwandan Insolvency Law (art. 37).
[84] Rwandan Insolvency Law (art. 30) "Creditors with a privilege from immovable property that are subject to sale shall be entitled to separate satisfaction under the provisions of the Law on mortgages".
[85] Rwandan Insolvency law (art. 80).

3.5. The powers of the trustee in administrating the estate

Administering property of the estate is at the bottom of the duties of the bankruptcy trustee. This job does not just require a collection and keeping together the assets, but also to induce the business function at least more or not less as usual in a reorganization case. Such activity tables a set of issues and business operation that entail a risk. The bankruptcy trustee deals with suppliers and buyers who undertake business with the debtor. During this course, the trustee may take decisions and make commitments that might dispose of the estate such as sale, use and lease. In the following discussions, the focal point will emphasize on these foregoing transactions.

Generally, the application of management of the property of the estate in the US bankruptcy law draws a distinction between cases in which the business is in the ordinary course or outside of the ordinary court.[86] A trustee may sell, use, or lease property outside of the ordinary course of business prior a specific notice, hearing and court's approval. In case of reorganization, the authorization to enter into the aforementioned transactions is automatic and has to be done in compliance with a confirmed reorganization plan.[87] As there is not continuous business contemplated in Chapter 7, any bankruptcy operation requires a court authorization.[88] In the case of In Re Lionel Coro, the court has further developed an approach to assess the validity of transaction made by debtor-in-possession by introducing a guidance checklist composing of the following elements:

> "relevance factors as the proportionate value of the asset to the estate a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will

[86] See 11 US Bankruptcy Code § 363 (c)(1).
[87] Official Committee of Equity Security Holders v. Mabey, United Sates Court of Appeal, Fourth Circuit, 1987, 832 F.2d 299.
[88] See 11 US Bankruptcy Code § 721.

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be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the alternatives of the use, sale or lease of property vis à vis any appraisal of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the assets is increasingly or decreasingly in value".[89]

Moreover, in the case of In Re Trans World Airlines and In Re Bruce Howard Marko and Jeri Elizabeth Marko, the court concluded that the trustee is entrusted with powers to sell "free and clear" not only an interest in a property but also *in rem* lien as well.[90]

On the side of Rwandan Insolvency Law, a transaction may modify or dispose of the estate imposes *modus operandi* on the administrator because he/she is not allowed to sell, use or lease property without a court's permission.[91] In a typical reorganization case, a transaction that ranges in the "ordinary course of the contract" is dealt with the debtor while the receiver intervenes for any obligation exceeding such contract. The receiver reserves the right to make or receive all payments on behalf of the debtor. However, important transactions require the approval from the creditors' committee. The creditors' committees may also request the court to validate those transactions accomplished by the debtor at the receiver's abstention.[92]

3.6. Financing and expenses of preserving the estate

For the purpose of supplementing the requirements conceived in section 363 and 364 of the US Bankruptcy Code and Bankruptcy rules 4001 (b) and (c), the United States Bankruptcy

[89] In Re Lionel Corp, United States Court of Appeals, Second Circuit, 1983,722 F.2d 1063.
[90] In Re Bruce Howard Marko and Jeri Elizabeth Marko, (2014) United States Bankruptcy Court for the Western District of North Carolina Charlotte Division, Case No. 11-31287 http://business-finance-restructuring.weil.com/wp-content/uploads/2014/04/Marko-No-11-31287-JCW-Bankr-WDNC-3-11-14ECF-112.pdf accessed on 5 March. 2015.
[91] Rwandan Insolvency law (art. 7).
[92] Rwandan Insolvency Law (art. 92-95).

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Court Southern District of New York established a General Order No.M-274 that provides guidelines for financing the estate. The motions encompass of description of use of cash, collateral or material provisions of DIP financing, adequacy of Budget, Extraordinary Provisions, effort to Obtain Financing and Emergency Applications.[93] A request for a cash collateral or DIP financing agreement must be approved under an order called "Extraordinary Provisions" which must be disclosed conspicuously following items: Cross-collateralization, Rollups, Waivers and concessions as to validity of prepetition debt, Lien on avoidance actions, Carve-outs, termination, Default and Remedies.

In the case of Reading Co. V. Brown, the United Court of Appeals holds that "damages resulting from the negligence of a receiver acting within the scope of his authority as receiver gives rise to "actual and necessary costs" of a Chapter XI arrangement".[94] However, Chief Justice Warren and Douglas' dissent opinion that consisting of "*the court misinterpreted the term cost and expenses of administration"* sounds more reasonable to the researcher because it takes into consideration the duty of care normally applied to assess the degree of irresponsibility of a decision maker. It seems that the court construed the negligence of a receiver under the banner of "business judgment rule". In my view, one may assume that the magnitude of that negligence did not meet the requirements for a gross-negligence so as to constitute a breach of duty of care; otherwise the court's reasoning would be completely beyond my judgment as well.

Unlike the US bankruptcy law, the Rwandan Insolvency Law provides all expenses and earnings that are supposed to be indicated in the insolvency plan.[95] This means that the receiver

[93] Douglas supra note 64 at page 487.
[94] Reading Co. v. Brown, United States Supreme Court (1968) 391 US. 471.
[95] Rwandan Insolvency Law (art. 83).

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or debtor in possession has to carry out the insolvency plan without any adjustment. Payments and expenses are done in conformity with the insolvency plan approved by the court.

3.7. The role of the trustee in a claim against the estate

The scope of bankruptcy trustee's powers is crucial in dealing with the claims sued to the estate, creditors or third parties. This is explained by the fact that the estate and individual creditors may have a distinct claim against the same third party.[96] The major difference between the two systems is that the administrator and receiver do not absolutely represent the estate and lack of a mandate to pursue any claim without the court authorization. In the US, a clarification of the authority of bankruptcy trustee has become a debatable matter so as three rules were developed and include the rule named *Caplin* which defers to the trustee's discretion to litigate those claims that belong to the estate and forbids him to pursue any claim on behalf of creditors.[97]

A negative side of this rule is that many claims against third parties escape the litigation, "sometimes transferred, and then litigated by post-confirmation trustees".[98] Another rule traces its genesis in the case of Grede v. Bank of New York Mellon "Grede rule", in which the US Court of Appeals acknowledged the assignment of rights. This rule grants the trustee to pursue and litigate on behalf of assigning creditors for the account of the creditors. In the *Caplin* rule, a creditor cannot file a petition against a third party whilst the Grede rule is not opposed to the creditor's claim filed after the confirmation of the bankruptcy plan. In the same vein, a new

[96] Andrew J. Morris, 'Clarifying the Authority of Litigation Trusts: why Post-confirmation Trustees cannot assert Creditors' Claims against Third Parties' < http://www.morvillolaw.com/AJ-Morris-Clarifying-LT.pdf> accessed on 5 March 2015.
[97] Caplin v Marine Midland Grace Trust Co. of New York (1972).
[98] Andrew J. Morris, 'Clarifying the Authority of Litigation Trusts: why Post-confirmation Trustees cannot assert Creditors' Claims against Third Parties' < http://www.morvillolaw.com/AJ-Morris-Clarifying-LT.pdf> accessed on 5 March 2015.

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approach came into practice. This is the *bright-line rule* which takes into consideration of evaluation of case by case and claim by claim in order to determine the permissible scope of the trustee authority "a bright-line rule that restricts the trustee to pursuing actions for the estate, rather than a more contextual test that evaluates the pros and cons of each proposed arrangement".[99]

From what is discussed above, it is obvious that the administrator's power in the management of the estate is limited to some extent. The administrator suffers from a lack of decision making authority. In the context of the Rwandan Insolvency Law, the functions of the administrator as regard to turnover property, adequate protection, and financing the estate are subordinated to either creditors' committee consent or court approval. This framework shows how little the administrator is empowered, and therefore is open to a number of substantial criticisms. First, bearing in mind that the estate may have a separate claim with individual creditors, a conflict of interest might eat up the management of the estate. Second, if any claim to be filed by the administrator needs to be preceded by a court scrutiny; it may subsequently anticipate the position of a court with regard to the principal action. A judgement ordering the pursuit of a third party might cause a concealment of evidence on the side of the aggrieved party; yet it is a time consuming process. Third, in a reorganization typical case, it is virtually impossible to carry out in word and letter the insolvency plan approved by the court for a long period of time. In business, predictability is possible, but is not always achievable. If in a reorganization case, the authority to make a decision should be assessed on the basis of a single contract rather than the ordinary business of the enterprise, a move back and forth from looking

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[99] Andrew J. Morris, 'Clarifying the Authority of Litigation Trusts: why Post-confirmation Trustees cannot assert Creditors' Claims against Third Parties' < http://www.morvillolaw.com/AJ-Morris-Clarifying-LT.pdf> accessed on 5 March 2015.

for a court approval would be unavoidable, and consequently delays some transactions or commitments.

Another strong lesson to learn from the US bankruptcy relates to a full representative mandate and business judgement authority that allocated to the trustee to act for the benefit of the estate. Lastly, a definition that the Legislator gave the estate should be a business oriented definition, which cares about what may revive the enterprise and feed the estate, not just based on a mere debtor's ownership characteristic. Ownership over a property is easily transferable and often precarious, but business as an aggregate is stable. So, turnover property and estate itself should be built on the pillar of what is essential to run the business or sufficiently satisfy the creditors if need be rather than what is residual belonged to the debtor.

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C**hapter 4: Noticeable Disparities between Rwanda and US Trustee's Powers**

4.1. An Overview

One of the things that make the US Bankruptcy Code different and unique is the notion of Trustee's Strong Arm Powers. This concept invests the trustee with powers known as "avoiding powers". The trustee possesses a set of the right by operation of the law which allows him/her to "do what the creditors could have done under non-bankruptcy law".[100] This chapter examines succinctly noticeable differences between the two systems so as to find novelties that can be transplanted into the Rwandan insolvency regime. Avoiding powers include avoiding preference, trustee's right to step into the shoes of other people, and the right to avoid fraudulent conveyances.

4.2. Fraudulent Conveyances

The provisions for fraudulent conveyances are enshrined in the UFCA and UFTA and apply even if the debtor has not fraudulent intent. This means that the trustee is entitled to avoid a transaction made within two years before the bankruptcy petition in case such a transaction is connected with actual fraud (if the debtor has an illicit motive to hinder, delay and defraud) and constructive fraud which can even hit a transfer made regardless of whether the debtor is not technically insolvent at the time of transfer.[101] Moreover, a transfer or obligation is deemed as a constructively fraudulent as long as the debtor would have believed that the engaged business or obligations undertaken would be "unreasonably small capital" (beyond the ability to repay) or clear and manifest below the fair market or fair foreclose price.[102] However, the United States

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[100] Douglas supra note 64 at page 274.
[101] UFCA §7.
[102]UFCA §4.

Court of Appeals affirmed that "leveraged buyout does not constitute a fraudulent conveyance under the constructive or intentional fraud provisions of the UFCA".[103]

4.3. Trustee's Strong-Arm Powers

4.3.1. Trustee as hypothetical lien creditor and Purchaser

The bankruptcy trustee can act as a hypothetical creditor and purchaser. The provisions of section 544(a) 1 grants the trustee immense powers as it allows him/her to take certain decisions as an idea or hypothetical lien creditor at the time debtor's bankruptcy: "ideal because no actual knowledge is imputed that might, under non bankruptcy law, defeat an action; hypothetical because the trustee can act whether or not there is a real judgment creditor who could exercise rights or powers or avoids a transfer".[104]

4.3.2. Trustee as successor to certain creditors and purchasers

The significant difference between the actual and hypothetical creditor is that under § 554 (b) 1, "the trustee avoid any transfer and takes on the role of actual creditor, to whom the debtor incurred an obligation before bankruptcy, while under §544 (a) the trustee takes on the role of a hypothetical creditor who makes a loan at the time of bankruptcy".[105]

4.3.3. Statutory Powers of the Insolvency Administrator

A lease agreement on an immovable asset entered into by the debtor in the quality of a tenant may be terminated by the insolvency administrator upon a notice period prescribed by the law, regardless of any notice period agreed by the parties. In the event the subject matter of the agreement is the residential accommodation of the debtor, the administrator is entitled to vest in

[103] United States Court of Appeals, Moody v. Security Pacific Business Credit Inc, (1992) 971 F.2d 1056.
[104] Douglas supra note 64 at page 276.
[105] Ibid at page 287.

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the right to declare that the mature debt at the end of the notice period be disclaimed in the insolvency proceedings.[106] Where the debtor, as the owner or lessor of real property, assigns his future lease receivables to a third party before the commencement of insolvency proceedings, the validity of that assignment is limited to rental fees received for the current month of the opening of the insolvency proceedings. If the opening of the insolvency occurred after the fifteenth day of the month, the assignment is also valid for the following month. The administrator may annul unilaterally any transaction entered into prior six months to commencement of the insolvency if he finds that such transaction may invalidate or disadvantage the creditors' interest.

Still, these statutory powers granted to the administrator do not match the powers of the trustee as a statutory lien. The scope of statutory lien is wider than statutory powers allocated to the administrator. For instance, a trustee as a statutory lien does put into question even those transactions entered into by a *bonafide* purchaser before the bankruptcy proceedings.[107]

4.4. Voidable Preference

Some creditors may be aware of insider information concerning imminent bankruptcy and then do more harm than good. The creditors preference list which does not consider a period before the time of bankruptcy may not track the creditors' position before bankruptcy was on the horizon. The lesson to learn from US avoidable preference is how it solves a gun-jumping problem which may have the effect of accelerating the creditors' race to the debtor's assets.[108] The bankruptcy code grants the trustee the authority to root out only preferences or payments

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[106] Rwandan Insolvency Law (art. 47)
[107] 11 U.S. Code § 545
[108] See 11 US Code §547.

that are made on the eve of bankruptcy. Every unsecured creditor is "preferred when it is paid, but for a creditor to be paid is an ordinary part of commercial life".[109]

4.5. Earmarking Doctrine

Unlike the administrator who is unilaterally able to annul certain transactions, a trustee cannot avoid a preferential transaction when a third party lends the debtor to make a payment to a specified creditor. This means that earmarking doctrine applies to bless a security interests given for funds or if the money paid out by new lender was disbursed in order to be used to satisfy a specified antecedent debt, and provided that such transaction does not diminish the estate.[110]

4.6. The Trustee' Powers and the Fugitive Disentitlement Doctrine

Fugitive disentitlement doctrine was traditionally considered as a criminal law concept. However, US jurisprudence expanded this doctrine to the context of civil forfeiture.[111] In Mastro v. Rigby, the bankruptcy trustee brought an action aimed at prosecuting a fraudulent conveyance against Ms Masrto. When Mr. Mastro appealed the judgment, the bankruptcy court rejected her appeal under the umbrella of the disentitlement doctrine, finding that "her blatant disregard for the authority of the judicial system renders her ineligible to pursue an appeal".[112] In addition, the trustee can also file against the damages resulting from the tort liability owed to the debtors in the case the estate may benefit from damages.[113]

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[109] Douglas supra note 64 page 352.
[110] In RE Heitkamp, (1998), 137 F.3d 1087.
[111] Martha B. Stolley, 'Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine' (1997), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6920&context=jclc> accessed on 11 March 2015.
[112] Mastro v. Rigby, (2014) No. 13-35209.
[113] George W. Kuney, 'Bankruptcy and Recovery of Tort Damages' < http://law.utk.edu/wp-content/uploads/2012/10/KunBankruptcyArt.pdf>, accessed on 25 March 2015.

The important lesson to learn from this doctrine is how much the US trustee powers are extended even to those issues involving fugitive and criminal aspects. The administrator is not legally allowed to pursue cases arising out of criminal actions either close to bankruptcy offenses or not. The administrator has only to inform the prosecution of those offenses.

In conclusion, it is evident that the Rwandan insolvency regime presents some shortcomings as regards to the management of the estate and it can get inspired by the US trustee's powers concept as discussed in this chapter. The ability of the administrator should implicate the essence of business judgment and be associated with decisive actions that any reasonable person would take in the situation where an emergence occurs or in the case where out of court settlement is practically the best way to deal with the problem.

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Conclusion and Recommendations

This research has discussed the bankruptcy trustee's powers between the Rwandan insolvency regime and the more advanced bankruptcy system of the United States of America, with a focus on what practical guidance and lessons can be transplanted into Rwanda. It is of note that the result of this research provides an empirical backup and constitutes a solid ground for understanding different paradoxical concepts subject to the management of the estate and the role of the trustee in bankruptcy relief proceedings.

Bearing in mind that it is unlikely the scope of this thesis would exhaust all details of the aspects covered by the US bankruptcy trustee's powers, the outcome of this research provides essential and strong workable solutions for Rwanda in terms of addressing issues relating to what should be contained in a structural platform of the advanced bankruptcy trustee system. This research has brought about a number of challenges, and it indicates the needs to overhaul the administrator's duties. Indeed, the outcome suggests that there are good reasons for which the concept of the US bankruptcy trustee's powers could be migrated to Rwanda in order to fill gaps noticed in Rwandan Insolvency Law.

What was discussed has shown that the administrator has a little statutory power to run satisfactorily the bankruptcy trusteeship device and meet what should be expected from a modern management of the estate. Thus, the debate has revealed that the system of the administrator is centralized in the sense that the General Register combines both managerial functions and routine matters of bankruptcy proceedings. For instance, the administrator is not eligible to file either a voluntary or involuntary bankruptcy case. This lack of capacity demonstrates that the administrator's performance is basically difficult for fledging

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professionally a business based career. The administrator should be empowered and granted the right to assess and deal with bankruptcy cases prior the onset of bankruptcy proceedings.

This thesis strongly holds that the Office of the Registrar General and administrative functions of the bankruptcy system would be bifurcated for the purpose of promoting specialization and adequate monitoring of the services delivered by the administrator. A creation of a specified body purporting to oversee the functionality of the duties confided in the administrator or received would give impetus to the efficiency of this career and create a reliable mechanism that is able to fast-track potential risks or challenges that may be caused by actions taken by the key players engaging in insolvency process.

This research has endorsed the blind rotation system utilized by the US in appointing the trustee who has to handle a given bankruptcy case. The writer does not endorse the manner in which the administrator gets compensated if the debtor's assets are declared insufficient to pay the services rendered in Rwanda. In my view, there is no way that the expenses originated from a private deal can be incurred by a government budget. I did not find a legitimate link between the duties of the administrator and government accountability. If the administrator's profession presents a potential risk, a practical suggestion in favour of liberal market requires a further step ascending to a private oriented system, which is built on an insurance scheme that covers a professional risk and liability.

In order to make the administrator system more efficient and build the confidence of those who want to undertake the career of managing and administrating the property of the estate, the requirements for recruitment of candidates eligible to exercise the profession of the

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administrator or receiver should be well defined and enshrined in the law established by a Parliament Chamber not just a simple circular jotted by the General Register.

In addition, this thesis has looked into the authority of the administrator and the management of the estate. The outcome has shown that the Rwandan Insolvency Law does not grant the administrator or a receiver a mandate to represent the property of the estate. The estate is jointly and severally administered, and any act that may dispose of a debtor's property entails a court's approval. The researcher has criticized this assertion because it is not friendly with business decision-making process. The ability to make a decision should be assessed on the basis of the normal business course of the enterprise and fiduciary duties which should characterize the administrator's functions in whatever transaction entered into by him. It should go without saying that a business judgement rule can indeed help to figure out the outer limit of the default for which the administrator may be held accountable.

The literature review and court cases discussed in this research have shown to some degree what to change in the Rwandan Insolvency Law and novelties to be transplanted from the US Bankruptcy Code. As a result, the concept of trustee's strong arm power is of paramount importance as it can boost the productivity of the services rendered by the administrator and contribute to the performance of the insolvency relief in general. The administrator system fails to operate a suitable mechanism. In my opinion, this mechanism is the ability that authorizes the administrator to make compelling decisions. It is recommended that the administrator's powers need to be seen not only as a concern for bankruptcy law but rather as a microeconomic concern as well. So, the administrator system should make a step forward and embrace a modern management of the estate.

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In addition, the debtor's property should be turned over, collected and administrated with respect to the essential ingredients assessed from the outlook of the ordinary business of the enterprise, not just a diagnosis resulting from a single item or transaction. In this perspective, avoiding preferences and fraudulent conveyances would equip the administrator with the ability to exercise power over transactions and issues that would escape the insolvency litigation or raise a threat against the creditors' interests. It is obvious that the administrator deals with important business issues. Therefore, it is recommended to invest him/her with powers, but also put in place practical ethics so to enable him/her excel in performance and discharge of his/her duties without bottlenecks.

It is in favour of prospective research that the writer desires to underline that this thesis is a pioneering research for the expanded work will be located in this matter. Thus, the researcher recognizes that the relevant material concerning the court cases on Rwandan Insolvency Law would have been advantageous to the discussions of this thesis. However, whatever paucity of judicial sources, credible findings herein debated have proven without doubt that the US bankruptcy trustee's powers is the advanced model from which Rwanda would fetch out great lessons and transplant novelties on bankruptcy trustee businesslike concepts.

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