Keynote Address by the Deputy Minister of Justice and Constitutional Development, 
the Hon John Jeffery, MP
At the INSOL Africa Round Table, 
Cape Town, 12 October 2015

Vice-President of INSOL, Mr Adam Harris
Members of the Executive Committee of INSOL
Members of the judiciary,
Distinguished guests from across our continent
Representatives of academia
Representatives from government, the private sector and the legal profession
Ladies and gentlemen

There is a saying that one often hears about the virtue of love and being loved in return. However, there is a similar saying that, when it comes to all things financial, it better to be owed – fullstop – rather than to owe and be owed in return.

Nowhere is the issue of “owing” and “owed” more pertinent than in the area of insolvency.

In a High Court judgment earlier this year, Acting Judge Katz held that although the law of insolvency is generally concerned with protecting the rights and interests of the creditors, insolvency, necessarily and appropriately, is shifting from being a creditor-driven regime to focusing on the interests of other stakeholders involved in and affected by the insolvency proceedings.

This is a sentiment echoed by the Cork Report which states that a modern system of insolvency law must consider the interests of three key parties: the debtor, the creditor and society.

When considering the effects of insolvency on society, the Cork Report identifies the effect on the livelihoods of all those reliant on a particular enterprise as a legitimate legal consideration.

Consequently, and this is something we are seeing globally, ‘good modern insolvency law’ should recognise the wider effect of insolvency beyond the narrow interests of the insolvent and his or her creditors and, as far as possible, provide mechanisms for preserving commercial entities ‘capable of making a useful contribution to the economic life of the country.

The Katz judgment stressed that it is necessary that insolvency law and its implementation, like all South African law, be constitutionally compliant. Whilst it is necessary to have regard to the rights and interests of creditors in insolvency matters, it is also appropriate to consider, in the light of the Constitution, and in particular, the Bill of Rights, the need to protect the rights and interests of employees and society more broadly as they may also be affected by the insolvency proceedings.

The long and the short of it, in other words, is that it’s about more than just creditors.

Effective insolvency and creditor rights systems are an important element of financial system stability and can be viewed as a means to foster and sustain growth and development.

Speaking from the side of government, there are many factors to consider. A modern and well-developed insolvency law is important. But it is but one aspect.

There are a host of other factors at play: Proper implementation is key, as well as creating and maintaining strong institutions, appropriate accounting and auditing standards, access to courts, capable insolvency administrators, proper restructuring regimes, enhanced corporate governance in corporations and financial institutions and effective regulatory oversight.
In 2011, when the World Bank convened its Insolvency and Creditor/Debtor Regimes Task Force, it stated that –

“One of the lessons from the recent financial crisis was the recognition of the problem of consumer insolvency as a systemic risk and the consequent need for the modernization of domestic laws and institutions to enable jurisdictions to deal effectively and efficiently with the risks of over-indebtedness.”

The World Bank Report states that an effective and well-designed regime for consumer insolvency should address a number of critical issues. They are the different approaches to the general design of the regime as well as its institutional framework, access to the formal insolvency regime, the participation of creditors, the solutions to the insolvency problems and the discharge.

The Dean of the Faculty of Law at the University of Pretoria, Prof Andre Borain – who is also here with us today – has argued that the current South African insolvency system does not provide effective debt relief to insolvent or debt stressed individuals and that current insolvency law reform initiatives do not address this situation.

Prof Borain argues that over the past 20 years the system has remained creditor orientated *inter alia* because of, what he refers to as, our courts’ “stern approach” regarding sequestration applications aimed at obtaining debt relief. In a modern credit-driven society, debt relief is of the utmost importance and, he argues, it is thus apparent that the South African insolvency regime is in urgent need of reform.

He argues, correctly in my view, that equal relief should be provided to all insolvent and debt-stressed individuals and the opportunity to obtain a statutory discharge should thus be afforded to all debtors, not only those who are able to prove an advantage to creditors.

A proper alternative debt relief measure providing for a discharge of debt is thus of paramount importance.
An effective consumer insolvency regime and hence its ability to assist in counteracting poverty, economic exclusion and inequality may, it is submitted, play an important role in the economic development of South Africa.

In this regard our Department is currently finalizing the Insolvency Bill which is intended to revise the law of insolvency in South Africa, as well as the statutory provisions dealing with the liquidation of companies, bringing them in line with international best practice.

The Bill will replace the out-dated 1936 Insolvency Act and provide a revised and modern statutory framework for overseeing the winding up of insolvent estates and the estates of juristic persons.

The Bill emanates from an investigation by the South African Law Reform Commission dating back to the late 1990’s. One of the main reasons for the investigation was that the law regulating insolvency is fragmented and contained in a number of different statutes. Although, the principal legislation regulating insolvency and administration of insolvency matters is the Insolvency Act other provisions are found in the Companies Act, the Close Corporations Act and many other statutes relating to financial institutions and insurance companies.

The Insolvency Act itself is a very old piece of legislation which has been amended a number of times, but has never been reviewed as a whole to modernize it or align it with the constitutional dispensation and international developments in the law of insolvency.

The main aim of the investigation by the SALRC was to consolidate and unify laws relating to the insolvency in accordance with prevailing circumstances and developments, and to balance and satisfy the needs of the different stakeholders.

The draft Bill therefore consolidate laws relating to the insolvency of natural persons, companies, close corporations, trusts, partnerships and other legal entities with or without legal personality, and also incorporates cross-border insolvency.
Some of the main features of the draft Bill include -

- **Effective, speedy and fair procedures:** Effective, speedy and fair procedures were seen as important needs of stakeholders. The Bill contains many provisions to streamline procedures and the differentiation between liquidation or sequestration, and the “acts of insolvency” have been done away with. The draft Bill refers to liquidation for both natural persons and entities.

- **Liquidators to be members of recognized professional bodies:** The draft Bill regulates the appointment of liquidators and requires that only a person who is a member of a professional body recognized by the Minister responsible for justice may be appointed as liquidator.

- **Composition:** The requirement that the liquidation of an estate of a natural person must be to the advantage of creditors makes it difficult for the debtor who is unable to pay his or her debts and has little or no assets to apply for liquidation. The draft Bill provides for a mechanism in terms of which the debtor may make arrangement with his or her creditors outside the liquidation process. Pre-liquidation composition is binding between a debtor (other than a company or close corporation) and creditors.

- **Notice, records and money transfers by electronic means:** The manner of giving notice has been extended to include notice by means of e-mails.

- **Cross-Border Insolvencies:** The UNICITRAL Model Law on Cross-Border Insolvency was developed to facilitate consideration of cross-border insolvency issues. It was adopted and became part of national law through the promulgation of the Cross-Border Insolvency Act. In an attempt to consolidate insolvency law into a single legislation, the Cross-Border Insolvency Act is incorporated in the draft Bill.

- **Business rescue:** The draft Bill incorporates Chapter 6 of the Companies Act of 2008 dealing with the business rescue to apply to entities other
than companies and close corporations that carry on a business and employ ten or more employees.

On the issue of business rescue, I would argue that current reforms appear to reflect an attempt to harmonise insolvency and restructuring regimes across our continent.

An example of this is our business rescue regime which was introduced by Chapter 6 of our Companies Act, 2008. The purpose thereof is to facilitate the rescue and rehabilitation of a company in financial difficulty. The proceedings commence by resolution of the directors of the company or by application to court by a shareholder, a creditor or employees.

The grounds for commencement are based on an insolvency test and there must be a reasonable prospect of the rescue proceedings succeeding. The court procedure may also be commenced on alternative grounds.

The Act contains significant restrictions against any action by third parties against the company, its property or property in its possession, during the proceedings.

A qualified business rescue practitioner is then appointed to oversee the operations of the company and to develop and implement a business rescue plan. Employees, creditors and shareholders have certain rights.

Implementation of the rescue plan is intended to rescue the company by a restructuring which maximizes the likelihood of it continuing in existence on a solvent basis or, if that is not possible, results in a better return for creditors or shareholders than would result from its liquidation.

If the plan is approved and implemented, the formal process is terminated. If the plan is not approved, employees, creditors or shareholders may make an offer to other stakeholders who opposed the plan to purchase their interests.

When it comes to insolvency and particularly restructuring, the emerging view tends to be towards saving a business and the attendant employment.

As Adam Harris so aptly said to me – “We cannot afford to retain the old slash-and-burn approach to business exit.”
Instead of companies going into judicial management, which is invariably a route to bankruptcy, a rescue process can be initiated.

Our Courts here in South Africa have held that business rescue “constitutes a major theme of the new Act, and is amplified in section 7(k) thereof, which states that one of the purposes of the Act ‘is to provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders’. With the implementation of the 2008 Act and the business rescue provisions, “[t]he rights of creditors no longer have pride of place and have been levelled with those of shareholders, employees, and with the public interest too.”

In August last year, a symposium was organised by the Department of Trade and Industry and a specialist committee on company law.

The old Companies Act allowed for judicial management of companies in financial distress, but the concept never really took hold and was an assured step to liquidation. Judge Dennis Davis – one of the co-drafters of the new Act - said the new act is predicated on a radical break from exclusively protecting the interests of creditors and shareholders and it also deals with the interests of employees and trade unions.

One of the most important considerations in drafting the business rescue provisions of the Act was the preservation of jobs.

Some international evidence suggests that only 5% of business rescue cases are successful.

But Judge Davis is correct when he argues that if only 5% of business rescue applications in South Africa are successful, it is still a worthy endeavour, particularly given our country’s high unemployment rate.

He said - "You want to ensure that the liquidation route, that is so often used to force the payment of a claim (by creditors), can at least be diluted and that the consideration of saving jobs is foremost."

The Department of Trade and Industry and the special committee on company law have since commissioned a study of the dynamics of the system.
Professor Marius Pretorius of the University of Pretoria will undertake the study. He estimates that the success rate for business rescue in South Africa could be 12%.

From the side of the Department of Justice, we are also working on a Draft Insolvency Practitioners Bill. The Bill establishes a statutory body, known as the Council for Insolvency Practitioners. The main objectives of the Council include the regulation of the registration of insolvency practitioners, improving and upholding the standards of professional conduct and qualification of insolvency practitioners and to facilitate transformation of the insolvency industry.

The Council will be made up of members appointed by the Ministers of Justice and Constitutional Development, Trade and industry, organized labour, organized business and different associations of the insolvency practitioners.

The Bill makes provision for registration with the Council, and regulates professional conduct of the insolvency practitioners and makes it an offence to practice as an insolvency practitioner without registration with the Council.

Government is extremely concerned about high levels of household debt and over-indebtedness. Therefore Cabinet in December 2013 listed, in addition to broader financial sector regulatory reforms, a number of preventative steps to be taken by government to protect consumers and to minimize household indebtedness.

One of the steps is to investigate simpler and lower–cost insolvency arrangements for lower and middle-income individual persons. We are positive that the new draft Insolvency Bill will achieve this.

Other measures include setting clear affordability criteria for all retail lenders and clearly defining reckless credit granting; ensuring that the provision of credit is not only affordable but suitable and reviewing the pricing caps under the National Credit Act.
Other measures include strengthening regulatory monitoring, supervision and enforcement to ensure the shutting down of unregistered credit providers and reviewing the regulatory framework for credit insurance policies. It also includes setting norms and standards for access to the payment system and emoluments attachment and garnishee orders issued for credit.

These are but some of the initiatives we hope will benefit our insolvency regime. At the same time, we should not lose sight of the bigger picture, the milieu within which this all takes place, that of economic policy.

The ultimate objective of economic policy is to create a sustainable level of economic growth through investment, employment and production. This is best achieved when contributions are made from all sectors in the economy. Historically the financial sector has made substantial contributions to the level of economic growth.

The responsibility for ensuring healthy contributions from this sector towards sustainable economic growth, are generally split between three parties.

Firstly, government’s responsibility is to create a stable environment and infrastructure of legal rules and practice and timely, accurate information, supported by regulatory and supervisory arrangements that help ensure constructive incentives for financial market participants.

Secondly, the central bank is responsible for contributing towards the achievement and maintenance of a stable financial system.

Thirdly, the environment and conditions created by the government and the central bank will enable the private sector to create economic growth through investment, employment and physical production.

For many years, central banks have focussed primarily on their monetary policy (price stability) objective. However, the global recession has seen a rethink, with an increased emphasis on financial stability.
In closing, and perhaps as an aside, I want to share with you our own Department’s more immediate trials and tribulations when it comes to insolvency, in particular the Katz judgment which I referred to earlier.

Earlier this year our policy, aimed at transforming the insolvency industry to give black and female practitioners better opportunities, was found to be unconstitutional and invalid.

In a nutshell, it is the Master who has the power, and who appoints the trustees to sequestrated estates. He or she enjoys discretion as to who to appoint as provisional trustees to insolvent estates. This is to be done in accordance with the Policy determined by the Minister.

The policy was to have been implemented in March and the objective of the Policy was to promote consistency, fairness, transparency and the achievement of equality for persons previously disadvantaged by unfair discrimination.

The policy subsequently divided practitioners into four categories, with African women at the top and white men, who are considered to be the top earners in the industry, at the bottom of a list from which the Master may then make discretionary appointments.

But Saripa - the South African Restructuring and Insolvency Practitioners Association - argued that the policy prevented African, coloured, Indian and Chinese people, who became South African citizens after April 27, 1994, from being appointed. White men would also only get 10% of the work, which would affect their ability to continue practising, the association submitted.

However, the Minister of Justice, the Chief Master and the Association for Black Business Rescue and Insolvency Practitioners of South Africa countered that the system in place unfairly favoured white men.

In the judgment, Acting Judge Katz said that- 

“the minister has attempted to adopt a policy to deal with the difficult process of appointments of insolvency practitioners to sequestrated estates and liquidated companies. The objectives and goals are admirable and are supported.”
However, he argued, a Policy cannot pass constitutional muster on good intentions alone. It must, in fact, comply with constitutional prescripts.

The Court held that it is ultimately the Master who is responsible for the appointment of insolvency practitioners and that it is the Master who must apply his/her discretion when making an appointment. The Court was of the view that the Policy puts in place a rigid, inflexible regime in which the Master effectively becomes a rubber stamp which must appoint a designated person by rote from fixed lists arranged alphabetically and on race and gender lines and that this amounts to “an unlawful fettering of his/her discretion.”

We are appealing the judgment in the Supreme Court of Appeal.

Ladies and gentlemen, I would like to wish you all a very successful and inspired Round Table.

History shows us that the area of insolvency law is one which is ever-changing, ever-reforming.

For example, the editorial in the UK’s Bankers’ Magazine and Journal of the Money Market of September 1853 proclaimed - “Our commercial code, so far as bankruptcy administration is concerned, is a national disgrace, and we are compelled to exclaim, with Hamlet, “Reform it altogether’.”

For us here today, let us retain that which is working, and reform that which is not – for the benefit of every debtor, every creditor and indeed society at large.

I thank you.