DIGITAL ANALYSIS: THE IMPACT OF KENYA'S INSOLVENCY ACT, 2015 ON SECURED CREDITOR'S SECURITY REALIZATION.

Jane Juma[1*], Charles Ochieng' Oguk[2]

[1*]Rongo University – Kenya, jjumacloy67@gmail.com
[2]Rongo University – Kenya, drcoguk@gmail.com, coguk@rongovarsity.ac.ke

[*]***Corresponding author:***

Abstract

This article analyzes the impact of the Kenya's Insolvency Act, 2015 (the Act) on the ***efficiency and predictability of secured creditors' ability to realize their security interests in digital age****. It critically examines key provisions of the Act, relevant case laws, and highlights identified procedural ambiguities and systemic impediments that deviate from the Act's objectives of establishing a clear, efficient, and equitable framework balancing debtor rehabilitation and predictable security realization. The study draws upon existing legal research and comparative analysis with international insolvency regimes. While the Act aims to protect creditor rights, the introduction of debtor rescue mechanisms and practical implementation challenges, including the lack of comprehensive empirical data and limited integration of digital tools, potentially undermine the anticipated ease and cost-effectiveness of security realization. The article explores the potential role of digital technologies, including data analytics and Artificial Intelligence (AI), in enhancing transparency, predictability, and efficiency within the insolvency process, particularly concerning data management and decision support for security realization.*

Keywords: *debt, insolvency, bankruptcy, secured creditors, security realization, Kenya, Insolvency Act 2015, efficiency, predictability, AI, digital, data analytics, moratorium, debtor rehabilitation, and creditor security.*

1. INTRODUCTION

The extension of credit, frequently underpinned by various forms of collateral, is a vital component of Kenya's financial and economic system[1]. It supports markets, facilitates private credit flow, and stimulates investment, serving as a critical driver for economic growth and stability. In this context, an effective insolvency framework is paramount for ensuring the just resolution of financial distress, the robust protection of creditor rights, and the orderly reallocation of essential economic resources. A well-functioning insolvency regime fosters confidence within the financial system, encouraging lending and investment by providing a predictable and fair process for addressing financial failures.[2]

Historically, Kenya's legal framework for financial failure was fragmented and often inefficient, primarily focused on liquidation with limited avenues for viable businesses or individuals to pursue rehabilitation.[3] The enactment of the Insolvency Act, 2015 marked a significant legislative shift, aiming to consolidate and modernize insolvency laws in line with international best practices. A key objective was to introduce and strengthen alternatives to liquidation, such as administration and voluntary arrangements, empowering financially distressed entities to manage their affairs for the collective benefit of creditors and, where feasible, continue as going concerns. This reorientation towards rehabilitation and providing a "fresh start" for debtors represented a notable departure from the previous punitive approach, under Bankruptcy Act, now repealed.

The protection of property rights is a fundamental principle constitutionally enshrined in Kenya, under Artilce (40).[4] Secured creditors, by extending credit and acquiring security interests over a debtor's assets, possess valuable property rights. Article 40 of the Constitution of Kenya, 2010, guarantees the fundamental right to property, which extends to the interests of secured creditors in collateral. Article (10) emphasizes the rule of law, demanding a legal framework that is fair, transparent, and predictable, particularly in economically sensitive areas like insolvency. The Insolvency Act, 2015 was enacted with objectives resonating with these constitutional mandates, aiming for efficient and equitable administration that balances the interests of debtors and creditors, promotes the rescue of viable entities, and secures a "better outcome for the creditors as a whole".

It is within this reformed legal environment that this article critically examines the impact of the Insolvency Act, 2015 on creditors, specifically their entrenched right to realize securities. While the Act aims to protect creditor rights, particularly those of secured creditors who traditionally held a prioritized position, the introduction of debtor rescue mechanisms introduces complexities that potentially reshape the traditional pathways for enforcing claims and realizing collateral. Vital questions emerge regarding the **practical effectiveness, predictability, and efficiency of realizing security interests** under the new Act.

2. Research Problem Statement

Ideally, a modernized insolvency law, like Kenya's Insolvency Act, 2015, should establish a clear, efficient, and equitable framework that effectively balances the goals of debtor rehabilitation with the predictable realization of security interests for creditors. This framework should provide secured creditors with certainty regarding their rights, the process for enforcing those rights, and the likely timelines and costs involved.

In reality, however, evidence suggests a significant divergence has emerged between this ideal and the practical implementation of the Act in Kenya. There is a persistent inclination towards prioritizing avoiding liquidation and business rescue over creditors' securities. This is compounded by specific legal provisions, such as the imposition of moratoria on creditor actions, and procedural ambiguities within the Act. Furthermore, systemic impediments, including substantial costs, often protracted proceedings, and the intricate task of balancing diverse stakeholder interests, further complicate the ability of creditors to effectively recover debts through security realization. A significant gap exists in comprehensive empirical data quantifying the actual efficiency and predictability of security realization post-2015, including average delays and recovery rates, and a precise identification of procedural ambiguities. The current environment also lacks the pervasive integration of digital tools and data-driven approaches that could potentially alleviate some of these challenges.

The problem arising from this discrepancy is that it undermines the anticipated ease and cost-effectiveness with which secured creditors can realize their collateral, creating a notable gap between the Act's objectives and its practical impact. This generates adverse economic and financial consequences, potentially increasing the perceived risk of lending, leading to reduced credit availability, higher borrowing costs, and hindering economic growth. The erosion of secured collateral value through protracted insolvency processes undermines the fundamental risk mitigation principle of secured lending and can erode confidence in the financial system.

To address this critical problem, this research undertakes an analysis of the Act's provisions and relevant case law to identify the specific impediments hindering efficient and predictable security realization. It seeks to understand how the Act mediates the realization of securities, navigating the interface between facilitating rehabilitation and safeguarding the rights of secured creditors. Furthermore, recognizing the increasing role of technology, the study aims to explore how digital solutions and data-driven approaches could potentially be leveraged to enhance the efficiency, predictability,

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[2] Casey, Anthony J., and Joshua C. Macey. "Insolvency courts: General principles for systems design." *International Insolvency Review* 33.1 (2024): 23-39.

[3] Shukri, Mohamed. *Legal Framework on Sovereign Debt Restructuring in the Face of Debt Crisis Kenya*. Diss. University of Nairobi, 2021.

[4] Kenyan Constitution-2010, Article (40)

and transparency of the security realization process under the Act, thereby contributing to a more robust and equitable insolvency regime.

3. Objectives

1. To analyze the Insolvency Act, 2015 on the **efficiency and predictability of secured creditors' ability to realize their security interests in Kenya**.
2. To explore the potential role of digital technologies and data-driven approaches in addressing challenges to the **efficiency and predictability of secured creditor security realization** under the Insolvency Act, 2015 in Kenya.

4. Scope and Significance

The scope of this article is limited to an analysis of the Insolvency Act, 2015 in Kenya, focusing specifically on the rights and experiences of **secured creditors** concerning the realization of their security interests during insolvency proceedings. It examines the relevant statutory provisions, judicial interpretations through key case law, and synthesizes existing research identifying practical challenges and systemic impediments. The article also incorporates a forward-looking perspective by considering the potential application of digital technologies and data analytics within this specific context. It neither delves into the complexities of unsecured and preferential creditor claims in detail, nor does it provide an exhaustive analysis of all international insolvency regimes, using comparative examples primarily to highlight differing approaches and potential areas for improvement in Kenya.

This study is significant for several reasons. It directly addresses a critical gap in the literature by synthesizing existing knowledge and identifying areas where further empirical data is needed to fully understand the practical impact of the Insolvency Act, 2015 on secured creditor realization. By analyzing the interplay between debtor rehabilitation goals and the protection of secured creditor rights, it provides valuable insights into the operational dynamics of the Act. Furthermore, by exploring the potential for digital transformation, it offers insights for leveraging modern technology to enhance the transparency, speed, and predictability of insolvency processes in Kenya, aligning with global trends in the application of AI and data in legal and financial services. The findings and recommendations can inform legislative and regulatory reforms aimed at enhancing the effectiveness of Kenya's insolvency regime, potentially fostering greater confidence among lenders and investors.

5. LITERATURE AND LEGAL REVIEW

The enactment of the Insolvency Act, 2015 marked a significant modernization of Kenya's insolvency regime, consolidating previous laws and drawing influence from international best practices in countries like the United Kingdom, New Zealand, Australia, and Canada. Existing scholarly work and legal analyses provide a foundational understanding of secured creditor rights under the Act. [5]The Act introduces mechanisms such as administration, receivership, voluntary arrangements, and liquidation, all of which directly impact a secured creditor's ability to realize security.

A core objective of the Act is to shift from a liquidation-centric approach towards rehabilitating viable distressed entities.[6] This "rehabilitation theory" aims to preserve businesses and jobs, while also protecting stakeholder interests and providing for equitable distribution of assets based on clear priority rules, especially for secured creditors, aligning with guides like the UNCITRAL Legislative Guide on Insolvency Law. Studies indicate the Act specifically intends for secured creditors to be in a "forefront position".[7] However, the practical translation of these aspirations into a consistently predictable pathway for timely security realization remains debated and subject to judicial interpretation.

Key legal provisions significantly affecting secured creditor realization include:

a) **Moratoria (Section 560):** Rescue-oriented procedures introduce a stay on creditor actions, preventing secured creditors from immediately enforcing security without administrator consent or court approval. [8]This directly impacts the timing and predictability of realization. Cases like *Kahindi Mumba Chome & 23 Others v. ARM Cement PLC Limited (Under Administration)* and *Allan Ochieng Oliech v Komaza Forestry Limited (Under Administration)* illustrate the court's consideration of the moratorium and its discretionary power to lift it, introducing an element of unpredictability. The *ARM Cement Injunction Case* further exemplifies judicial intervention impacting asset disposal timelines.

b) **Receiver Powers (Part IV, Section 227):** While the Act provides a framework for receivership, a remedy for secured creditors, its effectiveness is subject to judicial oversight. Section 227(1) and (2) grant the Court power over the disposal of charged property, requiring court approval and potentially introducing delay and uncertainty.

c) **Liquidation and the "Prescribed Part" (Part V, Section 474(2)):** In liquidation, secured creditors have priority over assets subject to their security. However, Section 474(2) mandates a "prescribed part" of floating charge proceeds be set aside for unsecured creditors, directly impacting the amount realized by floating charge holders. The principle of *pari passu* applies among creditors of the same class after secured and preferential creditors are paid.

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[5] Syengo, Brenda. *Securitisation of Ip Assets: an Examination of the Legal Regime on the Use of Intellectual Property as Collateral in Kenya*. Diss. University of Nairobi, 2021.

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[8] Rescue-oriented procedures introduce a stay on creditor actions, preventing secured creditors from immediately enforcing security without administrator consent or court approval.

d) **Treatment of Secured Creditors in Bankruptcy (Sections 226(3)):** Secured creditors have options to realize, surrender, or value their property. Section 226(3) introduces a 30-day timeframe for the bankruptcy trustee to require the secured creditor to exercise one of these options.

Procedural ambiguities are identified as contributing to judicial uncertainty and hindering efficient realization. Studies highlight a lack of clear procedural rules, particularly for liquidation proceedings, leading to inconsistency in court handling.[9] The *Insolvency Regulations, 2016* were intended to provide guidance, but gaps persist. Strict adherence to procedures is critical, as non-compliance can lead to delays, as seen in *Patrick Asuma v ARM Cement Limited*. Judicial discretion in granting leave under Section 560, while aimed at balancing interests, can affect predictability. A perceived lack of granular liquidation procedures and regulatory gaps also contributes to potential delays.

Systemic impediments beyond legal provisions and ambiguities constrain efficient realization. The substantial costs of proceedings, including insolvency practitioner fees and legal expenses, can significantly erode asset value and diminish secured creditor recovery prospects.[10] The *ARM Cement* case illustrates how high costs can impact recovery. Lengthy processes, exacerbated by moratoria, can lead to asset depreciation and delay recouping investments. The *ARM Cement Injunction Case* exemplifies potentially lengthy administration processes. Balancing debtor rehabilitation with secured creditor rights, while an objective, can become an impediment if it leads to unduly prolonged uncertainty or restricts enforcement without a realistic prospect of rehabilitation. The *Komaza Forestry* and *Mumias Sugar* cases show how judicial discretion under Section 560 can extend timelines.

A significant research gap exists concerning comprehensive empirical data quantifying the actual impact of the Act post-2015, including recovery rates, delays, and the precise effect of provisions like the "prescribed part". In-depth analysis precisely identifying procedural ambiguities and quantifying the costs and duration of proceedings under the new Act is also needed.

While the aforementioned literature extensively discuss the legal and practical challenges, the explicit integration of digital technologies within the *Kenyan* insolvency context for secured creditor realization is less detailed. However, broader discussions highlight the increasing adoption of AI and data analytics in insolvency globally.[11] Artificial Intelligence (AI) can assist in analyzing large datasets, predicting outcomes, identifying patterns, automating routine tasks, and potentially enhancing decision-making and transparency in insolvency processes. Challenges in using AI in finance and legal contexts include data scarcity/quality, interpretability, bias, privacy, and regulatory compliance. Despite these, AI is seen as essential for effective risk management and transforming legal processes by automating mundane tasks and handling large document volumes.[12] Digital platforms and e-portals can improve communication, information sharing, and document submission in insolvency.[13] The lack of standardized data storage and exchange protocols in some systems hinders AI applications.

6. Theoretical Framework and Analysis

The discourse on Kenya's Insolvency Act, 2015 is fundamentally shaped by the tension between two dominant theoretical frameworks in insolvency law: the **Creditors' Bargain Theory (CBT)** and the **Rescue Theory** (often linked to a communitarian approach).

CBT, originating in the United States, posits that insolvency law should mimic the hypothetical agreement rational creditors would make *ex ante* to maximize collective recovery. It prioritizes protecting pre-insolvency entitlements, orderly distribution based on priority rules (like the Absolute Priority Rule), and predictability for creditors, favoring efficient liquidation to minimize debtor strategic behavior and ensure cost-effective asset realization. The research gap's concern over the lack of empirical data on post-2015 delays and reduced recoveries directly challenges the predictability central to CBT. The documented delays and costs in the Kenyan process also contrast with CBT's emphasis on efficiency.

The Rescue Theory, which gained prominence later, often with a communitarian perspective, argues that insolvency law should prioritize rescuing and rehabilitating viable businesses to preserve jobs, economic activity, and broader societal well-being. It emphasizes stakeholder inclusivity and advocates for judicial supervision and flexibility to facilitate restructuring and compromise, potentially at the temporary expense of strict creditor enforcement. The Act's introduction of administration and voluntary arrangements reflects the influence of the Rescue Theory. The identified procedural ambiguities and systemic impediments in the Kenyan process can be viewed through the lens of implementing this theory, particularly the practical challenges in balancing rescue attempts with the need for efficient secured asset realization. The tension created by the moratorium, a key tool for rescue, versus the secured creditors' right

[9] Omwega, Annah N. *The Role of Arbitration in Promoting Access to Justice in Nairobi County, Kenya"*. Diss. University of Nairobi, 2023.

[10] Akinsola, Oluwaseun Kayode, and Farinu Hamzah. "Legal Mechanisms for Corporate Restructuring: Understanding the Legal Landscape of Mergers, Acquisitions, and Bankruptcy Proceedings." (2025).

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[13] Kamalnath, Akshaya. "The future of corporate insolvency law: A review of technology and AI-powered changes." *International Insolvency Review* 33.1 (2024): 40-54.

to timely realization, directly exemplifies the inherent balancing act between CBT and the Rescue Theory explored in the Act.

The practical challenges identified, such as the inclination towards avoiding liquidation over creditors' securities and the lengthy, costly processes, highlight the difficulty in achieving a successful balance between these competing objectives within Kenya's specific context. While the Act aims to protect secured creditors (CBT principle) and promote rescue (Rescue Theory principle), the practical implementation struggles, leading to inefficiencies in security realization that challenge the predictability and efficiency desired by the CBT framework.

7. METHODOLOGY

This article employs a qualitative research approach, drawing on existing legal scholarship, statutory analysis, and judicial interpretations from the provided sources. The methodology involves several interconnected steps:

1. **Statutory Analysis:** A detailed review of the relevant provisions of Kenya's Insolvency Act, 2015, was conducted to understand the legal framework governing secured creditor rights and security realization. This included examining provisions related to insolvency procedures, the hierarchy of claims, moratoria, and the powers of insolvency practitioners.
2. **Literature Review:** A comprehensive review of existing scholarly articles, legal journals, and publications on insolvency law in Kenya was undertaken to identify key debates, scholarly perspectives, and, importantly, the research gaps concerning the practical impact of the Act on security realization. This step also incorporates insights from comparative analyses of international insolvency regimes to provide context and benchmarks. Furthermore, literature on the application of AI and digital technologies in financial services and legal contexts is reviewed to identify potential relevance to enhancing insolvency processes.
3. **Case Law Examination:** Selected case law from Kenyan courts relevant to secured creditor realization under the Insolvency Act, 2015 is critically examined. Cases such as *In re Cape Holdings Limited*, *KTK Advocates v Nyambane Coffee Mills Limited*, *Mertens v Bank of Africa Limited*, and *In re Nakumat Holdings Limited* are analyzed to illustrate the practical challenges and complexities encountered by creditors and the judiciary's interpretation and application of the Act.
4. **Synthesis and Analysis:** The information gathered from the statutory analysis, literature review, and case law examination is synthesized to analyze how the Act impacts the efficiency and predictability of secured creditor security realization. This involves identifying how specific provisions and judicial interpretations contribute to or hinder these aspects, highlighting the identified procedural ambiguities and systemic impediments.
5. **Integration of Digital Context:** Potential applications and implications of digital technologies and data-driven approaches (AI, data analytics, digital platforms) are integrated into the analysis, considering how they could potentially address the identified challenges and enhance efficiency, predictability, and transparency in secured creditor realization.
6. **Drawing Conclusions and Recommendations:** Based on the synthesis and analysis, conclusions are drawn regarding the effectiveness of the Act in achieving its objectives related to secured creditor realization. Recommendations for potential legislative, regulatory, or technological interventions are formulated to enhance the efficiency and predictability of the process.

8. RESEARCH FINDINGS

Based on the analysis and review, several key findings emerge regarding the impact of Kenya's Insolvency Act, 2015 on the efficiency and predictability of secured creditors' ability to realize their security interests:

a) **Moratoria Impede Immediate Realization:** The introduction of moratoria under Section 560 significantly impedes secured creditors from immediately enforcing their security without administrator consent or court approval. This directly impacts the timing and predictability of when they can access and realize collateral.

b) **Judicial Discretion Adds Unpredictability:** While courts consider the moratorium's purpose against creditor rights, their discretionary power to lift the moratorium under Section 560(1)(d) and over the disposal of charged property under Section 227(1) and (2) introduces an element of unpredictability in the timing of realization.

c) **"Prescribed Part" Reduces Floating Charge Recovery:** Section 474(2) mandates setting aside a "prescribed part" of floating charge proceeds for unsecured creditors, directly impacting the amount realized by floating charge holders and affecting the predictability of their full recovery.

d) **Procedural Ambiguities Cause Delays:** Perceived procedural ambiguities within the Act, particularly a lack of clear rules for liquidation and the need for strict adherence to Section 560 procedures, contribute to judicial uncertainty and consequent delays in realizing secured assets.

e) **Systemic Impediments Undermine Efficiency:** High costs of insolvency proceedings, often protracted duration, and the complexity of balancing stakeholder interests act as significant systemic impediments, eroding asset value and diminishing recovery prospects for secured creditors.

f) **Lack of Data and Digital Integration Limits Insight:** A significant gap exists in comprehensive empirical data quantifying the Act's practical impact on realization timelines and recovery rates. The limited integration of digital tools and data-driven approaches within the Kenyan insolvency process hinders the potential for enhanced efficiency, predictability, and transparency in data management and decision support for secured creditor realization.

9. DISCUSSION OF THE FINDINGS

The findings highlight a significant disconnect between the progressive objectives of Kenya's Insolvency Act, 2015 and the practical realities faced by secured creditors seeking to realize their security interests. While the Act aims to modernize the insolvency regime and protect creditor rights, the mechanisms designed to facilitate debtor rehabilitation inadvertently introduce challenges to the efficiency and predictability of security realization.

The imposition of moratoria is a prime example of the tension between rescue theory and creditor rights. While providing necessary breathing space for potential rehabilitation, the associated delays can lead to asset depreciation and increased costs, directly impacting the value recoverable by secured creditors. The judicial discretion in lifting these stays and approving asset disposals further adds an element of case-specific assessment that undermines the predictability desired by secured creditors and emphasized by the Creditors' Bargain Theory.

The impact on floating charge holders through the "prescribed part" highlights a legislative decision to prioritize a degree of return for unsecured creditors, directly reducing the pool of assets available to the secured creditor and affecting the predictability of their full recovery. This legislative balance, while potentially aligning with broader societal interests (Rescue Theory), presents a tangible financial implication for a specific class of secured creditors (impacting CBT predictability).

Procedural ambiguities and systemic inefficiencies act as practical hurdles that exacerbate the challenges introduced by the Act's substantive provisions. The lack of clear guidelines leads to inconsistent application and delays, while the inherent costs and length of proceedings erode asset value over time. These issues compound the unpredictability of the process for secured creditors.

Crucially, the identified lack of comprehensive empirical data and limited digital integration within the Kenyan insolvency process presents a significant opportunity for improvement. **Digital technologies, such as AI and data analytics, could play a transformative role in addressing some of these challenges**. AI could potentially be used to analyze historical case data (if sufficiently collated and standardized) to provide more predictable insights into the likely duration and outcomes of different case types, including those involving security realization. Data platforms and e-portals could enhance the transparency and efficiency of information sharing, document submission, and communication among stakeholders, potentially reducing delays caused by procedural opaqueness. AI-powered tools could also assist in automating routine data analysis tasks, potentially speeding up asset valuation or identifying inconsistencies in financial records. While challenges related to data quality, bias, and interpretability of AI decisions exist, addressing these through careful implementation and human oversight could unlock significant benefits in streamlining the security realization process and providing more predictable outcomes for secured creditors. The lack of standardized data storage and exchange protocols in some systems currently presents a barrier to leveraging AI effectively, highlighting a key area for foundational digital development.

10. SUMMARY, CONCLUSION AND RECOMMENDATIONS

Summary

This article analyzed the impact of Kenya's Insolvency Act, 2015 on the efficiency and predictability of secured creditors' ability to realize their security interests. The Act aimed to modernize insolvency law and balance debtor rehabilitation with creditor protection. However, findings indicate that the implementation faces significant challenges, including delays due to moratoria, unpredictability stemming from judicial discretion and the "prescribed part" rule, delays caused by procedural ambiguities, and systemic inefficiencies related to costs and lengthy processes. A notable lack of empirical data and limited integration of digital technologies hinders a comprehensive understanding of the Act's practical impact and limits opportunities for process enhancement.

Conclusion

In conclusion, while Kenya's Insolvency Act, 2015 provides a legal framework for secured creditor realization, its practical effectiveness in ensuring efficiency and predictability is significantly hampered by the identified impediments. The inherent tension between facilitating debtor rehabilitation and protecting secured creditor rights, coupled with procedural and systemic challenges, creates an environment less predictable and efficient than the Act intended. The absence of robust empirical data collection and a lack of strategic integration of digital technologies further constrain the ability to fully assess the impact and implement targeted improvements. Addressing these issues is crucial for fostering greater confidence among lenders and enhancing the overall effectiveness and equity of Kenya's insolvency regime.

Recommendations

Based on the findings and analysis, the following recommendations are made to enhance the efficiency and predictability of secured creditor security realization under Kenya's Insolvency Act, 2015, particularly considering the potential of digital solutions:

1. **Enhance Data Collection and Standardization:** Implement a comprehensive system for collecting standardized empirical data on insolvency proceedings, focusing on timelines, costs, and recovery rates across different creditor classes and insolvency procedures. This data should be stored in formats conducive to analysis.
2. **Develop Data-Driven Insights and Predictive Tools:** Leverage data analytics and AI to analyze collected data to identify trends, predict outcomes, and provide stakeholders with data-driven insights into the likely efficiency and predictability of security realization in specific case types.

3. **Increase Procedural Clarity and Standardization:** Review and refine the Insolvency Regulations, 2016, to provide clearer and more standardized procedural guidelines, particularly for liquidation, to reduce ambiguities and promote consistent application by courts and insolvency practitioners.
4. **Explore Digital Platforms for Process Management:** Invest in or enhance digital platforms and e-portals to streamline information sharing, document submission, communication, and case management within the insolvency process, potentially reducing delays and increasing transparency.
5. **Train Judiciary and Practitioners on Data and Technology:** Provide specialized training for members of the judiciary and insolvency practitioners on insolvency law, data analysis, and the ethical and practical application of digital technologies and AI in insolvency proceedings.
6. **Establish Guidelines for AI Use:** Develop clear guidelines for the ethical and compliant use of AI in insolvency processes, addressing concerns related to data privacy, bias, interpretability, and accountability.

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