Corporate Rescue Reform in Nigeria: A comparative analysis of the Law and policy in the context of African Rehabilitation models

By

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Acknowledgements

Long before I started my post-primary education, my parents envisaged this day and made a lot of sacrifices to make it a reality. Despite their initial belief in my capacity to reach the pinnacle of my career, it was not until the second year of my LLB program that I realised this dream was possible. Real belief started unfolding during my LLM studies, especially in the period immediately prior to completing my dissertation. It was when I was researching anti-suit injunctions and insolvency proceedings that I decided to pursue a PhD in insolvency law. This thesis is a milestone in fulfilling—in part, what my parents envisioned, and a huge step towards achieving my desire to reach the highest level of legal scholarship. Therefore, I want to acknowledge the sacrifices and support of my parents. My PhD journey is like a helicopter ride. Usually, a PhD student has two supervisors, but my case was unique. I started this research with Professor David Milman and Dr Kayode Akintola, who helped me during the take-off stage of the research journey, providing academic and pastoral support during the high and low moments. Midway into the research journey, Dr Kayode moved to a different institution and Dr Sofia Ellina replaced him as my second supervisor. Professor David and Dr Sofia continued to provide relentless supervision and pastoral advice until Professor David retired in January 2024. Dr Nkechi Valerie Azinge-Egbiri replaced Prof. David upon his retirement. Dr Sofia and Dr Nkechi coordinated the supervision as the research approached the concluding stage and finally landed the plane. I want to acknowledge Dr Sofia and Dr Nkechi for their invaluable insight, guidance and support in helping me complete this thesis. I would also like to seize this opportunity to thank and appreciate Prof. David and Dr. Kayode for their encouragement, support and inspiration. The journey to completing this thesis has been both financially and academically challenging. Still, with the collective support and guidance of my supervisors and funding partners, it is finally ending. As this turbulent but mostly enjoyable experience draws to a close, I want to thank my friends and family, for their prayers and understanding. Finally, and more importantly, I want to appreciate my Lord and Saviour Jesus, for never failing me.

Declaration

I declare that this thesis is a result of my research. I am solely responsible for drafting the entire thesis and received no contribution to the research from anyone else. No part of the thesis has been submitted in substantially the same form for the award of a higher degree somewhere else, and no section of the thesis has been published or submitted for publication elsewhere.

Abstract

This thesis critically examines the corporate rescue reform in Nigeria, focusing on the extent to which the Companies and Allied Matters Act (CAMA) 2020 facilitates the effective and efficient rescue of financially distressed companies. Historically, Nigeria's insolvency law significantly focused on creditor recovery, resulting in the winding up of companies in financial distress, which increased business closures, loss of jobs, and economic uncertainty. This traditional approach to insolvency, entrenched under the CAMA 1990, provided limited corporate rescue options. Hence, the CAMA 2020 was enacted, in part, to shift the focus of Nigeria's insolvency law from liquidation and winding-up to the rescue of companies with the introduction of modern corporate rescue tools such as the Companies Voluntary Arrangement and Administration.

Taking a comparative and analytical approach, the thesis interrogates the corporate rescue models from leading Anglo-American jurisdictions, such as the United Kingdom and the United States, and the African jurisdictions, such as Kenya and South Africa, to provide a basis for assessing CAMA 2020. It demonstrates that CAMA 2020 incorporates the hallmarks of an effective and efficient insolvency system based on the benchmark under the UNCITRAL Legislative Guide. However, it argues that the attempt to shift the focus of Nigeria's insolvency law has not altered the statistics on corporate failure due to practical challenges that limit the application of CAMA 2020. These challenges are particularly evident in the lack of a cross-border insolvency framework and weak institutional capacity. By benchmarking Nigeria's corporate rescue model with the models from select African jurisdictions, Nigeria can draw lessons to strengthen its corporate rescue policy. The thesis, therefore, highlights the need for substantial alignment with international best practices, including the need to strengthen relevant institutions to support more efficient implementation of the corporate rescue tools under CAMA 2020.

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1 CHAPTER 1: Introduction

1.1 General Overview

Corporate rescue has evolved into the central focus of most modern insolvency regimes. In Nigeria, Africa's most populous country, the enactment of the Companies and Allied Matters Act (CAMA) 2020 was a deliberate shift in approach to insolvency law, moving from traditional liquidation to corporate rescue.[1] Traditionally, Nigeria's insolvency law significantly focused on creditor recovery, which resulted in the prioritisation of the interest of the creditors, especially the secured creditors, to recover their debts as fully as possible by selling the company's assets. The tendency to use the sale of the company's assets as a default solution to corporate distress induced by "insolvency" led to the winding up of companies in financial distress, which increased business closures, loss of jobs, and economic uncertainty in Nigeria.[2] This is unsurprising, given the fact that CAMA 1990, which embodies the traditional view provided limited opportunities for distressed companies.

Under CAMA 1990, the options available to companies in financial distressed were receivership, liquidation and arrangement and compromise.[3] But none of these tools could facilitate corporate rescue. Even the arrangement and compromise provisions, which have been widely used as a restructuring tool under Nigerian law, could not guarantee rescue *per se*.[4] Consequently, the literature on corporate insolvency law in Nigeria, particularly prior to the enactment of CAMA 2020, mainly focussed on the traditional approach to insolvency law, ingrained under CAMA 1990.[5] For example, Professor Olakunle Orojo comprehensively examined Nigeria's insolvency regime, concentrating on debt recovery and liquidation tools.[6]

[1] The term "traditional" is used here to show a long-established method—for resolving insolvency, which is liquidation; this context is distinguished from the "traditionalist", which describes the axiomatic bases of the role of insolvency law. For an analysis of the axiomatic bases for insolvency law, see Douglas G Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108(3) The Yale Law Journal 573, 575.
[2] Discussed later in s 2.2.
[3] CAMA 1990, ss 387 – 584.
[4] CAMA 1990, s 537 - 540.
[5] Abiodun Akinrele, 'Corporate Insolvency and Business Rescue in Nigeria' (2011) 55 Journal of African Law 45; Fabian Ajogwu, 'Insolvency Reforms: A Catalyst for Economic Growth' (2013) *Nigerian Bar Journal* 92.
[6] Olakunle Orojo, *Company Law and Practice in Nigeria* (5th edn, Lexis Nexis, Butterworth 2008).

Similarly, Professor Akintunde Emiola dedicated part of his work to researching restructuring tools under the CAMA 1990, focussed on winding-up and other restructuring tools.[7]

This initial focus on liquidation and restructuring underlines the prioritisation of the narrow traditional approach to insolvency, leaving an important gap in the literature on corporate rescue in Nigeria. Accordingly, leading practitioners and academics criticised this approach to insolvency law in Nigeria due to the absence of corporate rescue framework.[8] In practice, the liquidation and receivership tools were more widely used under CAMA 1990. While liquidation mainly leads to winding-up of the company, receivership is a debt recovery tool. Yet, it is argued that the end product from both cases, in practice, is usually the winding-up of companies.[9]

CAMA 2020 seeks to bridge the gap in the existing legal framework for corporate insolvency by reforming Nigeria's corporate rescue law through the introduction of corporate rescue tools. The shift in the approach to corporate rescue in Nigeria was introduced to promote an efficient and effective insolvency regime with the primary purpose of rescuing companies. Thus, recognising the value of preserving businesses—an approach to insolvency law gaining momentum across different jurisdictions, including Africa.[10] But, despite the introduction of corporate rescue tools such as the Company Voluntary Arrangement (CVA) and Administration, there has been an uptick in the liquidation and winding-up of financially distressed companies in Nigeria.[11]

By the end of the second quarter of 2024, several multinational companies in Nigeria, including Heritage Bank PLC, Greif Nigeria PLC, Microsoft Nigeria, Diageo PLC, PZ Cussons PLC and

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[7] Akintunde Emiola, *Nigerian Company Law* (Emiola Publishers 2007) 541. It should be noted that Part XVI of CAMA 1990 deals with Arrangements and Compromise while Mergers, Take-overs and Acquisitions are covered under PART 11 of the Investment and Securities Act 1999, which was a repeal of Part XVII of CAMA 19190 (sections 541 – 623).

[8] Jacob O. Orojo, *Company Law and Practice in Nigeria* (LexisNexis 2008); Abiodun Akinrele, 'Corporate Insolvency and Business Rescue in Nigeria' (2011) 55 Journal of African Law 45; Bolanle Adebola, 'Corporate Rescue and the Nigerian Insolvency System' (2013) <https://scholar.google.co.uk/citations?view_op=view_citation&hl=en&user=40vZLOgAAAAJ&citation_for_view=40vZLOgAAAAJ:IjCSPb-OGe4C> accessed 5 June 2024.

[9] See ch 2, s 2.2 below.

[10] Kayode Akintola, Sofia Ellina and David Milman, 'Should We Rescue in Insolvency?' (2021) Lancaster University Law School Working Paper (*Google Docs*29 October 2021) <https://docs.google.com/document/d/1C1AKzpHdcrNklrIK77KUgoBceV1luL6L/edit> accessed 7 July 2024; Katarzyna Gromek Broc and Rebecca Parry, *Corporate Rescue: An Overview of Recent Developments from Selected Countries in Europe* (Kluwer Law International 2004); Katarzyna Gromek Broc and Rebecca Parry, *Corporate Rescue: An Overview of Recent Developments* (2nd edn, Kluwer Law International 2006).

[11] Bashir A. Nuhu, 'UPDATE on PAYMENT to DEPOSITORS of HERITAGE BANK (IN-LIQUIDATION)' (*NDIC*12 August 2024) <https://ndic.gov.ng/update-on-payment-to-depositors-of-heritage-bank-in-liquidation/> accessed 24 September 2024; [11] Inam Wilson, 'STATUS of MEMBERS VOLUNTARY WINDING up of GREIF NIGERIA PLC RC: 501' (2024) <https://doclib.ngxgroup.com/Financial_NewsDocs/Greif_-_Letter_to_NGX29042024.pdf> accessed 24 September 2024.

Kimberly-Clark, have either started liquidation or are winding-up proceedings.[12] This development follows a trend that started in 2020, resulting in a cumulative lost output of N95 trillion (ninety-five trillion naira).[13] Several factors contribute to this challenging situation, including the failure to utilise the corporate rescue tools instead of winding up distressed companies. This apparent preference for traditional insolvency tools such as receivership and liquidation, which leads to winding-up, *prima facie* raises the issue of whether the corporate rescue tools introduced under CAMA 2020 are effective in facilitating the rescue of financially distressed companies in Nigeria.[14]

Since the enactment of CAMA 2020, some academics have shown interest in researching various aspects of Nigeria's corporate rescue regime.[15] However, most of the recent literature has focused on understanding and analysing the provisions governing the application of the existing corporate rescue tools under CAMA 2020 rather than whether these tools are effective or efficient in facilitating the rescue of financially distressed companies in Nigeria.[16] Similarly, a considerable amount of literature has focused on measuring the effectiveness of corporate rescue procedures.[17] Though, relatively few studies - if any - evaluate and compare the

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[12] Inam Wilson, 'STATUS of MEMBERS VOLUNTARY WINDING up of GREIF NIGERIA PLC RC: 501' (2024) <https://doclib.ngxgroup.com/Financial_NewsDocs/Greif_-_Letter_to_NGX29042024.pdf> accessed 24 September 2024; Fahad Garba Aliyu , 'The Multinational Exodus from Nigeria: A Balanced Perspective - Businessday NG' *Businessday NG* (30 July 2024) <https://businessday.ng/opinion/article/the-multinational-exodus-from-nigeria-a-balanced-perspective/#:~:text=While%20Nigeria%20has%20seen%20a> accessed 24 September 2024.

[13] Joan Aimuengheuwa, 'Multinational Companies Fleeing Nigeria: Causes, Impacts and the Way Forward' (*Tech | Business | Economy*17 June 2024) <https://techeconomy.ng/multinational-corporations-fleeing-nigeria-causes-impacts-and-the-way-forward/> accessed 24 September 2024; Dike Onwuamaeze, 'MAN: 335 Manufacturing Companies Became Distressed, 767 Shut down in 2023 – THISDAYLIVE' *Thisdaylive.com* (2023) <https://www.thisdaylive.com/index.php/2024/03/06/man-335-manufacturing-companies-became-distressed-767-shut-down-in-2023/> accessed 24 September 2024.

[14] Gabriel Iji Adenyuma, 'Rethinking Winding Up as a Distress Remedy under CAMA 2020' (2021) 8 (2) NAU.JCPL 112.

[15] Paul Obo Idornigie, 'Insolvency Law in Nigeria: The Reforms Introduced by CAMA 2020' (2021) 45 *Commercial Law Review* 119; Chioma Adiele, 'Business Rescue in Nigeria: A Step in the Right Direction' [2021] SSRN Electronic Journal; Halimat Onigbinde, 'Corporate Insolvency Regime in Nigeria: An Appraisal of the Innovations under the Companies and Allied Matters Act 2020' (2021) 4(2) UNILAG Law Review 76; Konyinsola Ajayi, 'Modernizing Insolvency Law in Nigeria' (2021) 34 *Nigerian Law Review* 23; Fabian Ajogwu, 'Corporate Rescue and the Judicial Framework under CAMA 2020' (2022) *Nigerian Bar Journal 58*; Chuka Agbu, 'Economic Impact of Effective Corporate Rescue Practices under CAMA 2020' (2022) *Business Law Review* 92; Bolanle Adebola, 'Diversifying rescue: corporate rescue and the models of receivership' (2023) 34(10) International Company and Commercial Law Review 572; Olufunmilayo Arewa, 'Practical Challenges in Implementing Corporate Rescue Mechanisms under CAMA 2020' (2023) 23 *African Journal of International and Comparative Law* 110; Epiphany Azinge, 'Comparative Analysis of Corporate Rescue Mechanisms: Lessons for Nigeria from Other Jurisdictions' (2023) *Nigerian Institute of Advanced Legal Studies Journal* 65.

[16] ibid.

[17] Jadesola Faseluka, 'A critical analysis of the effectiveness of corporate rescue in retail sector insolvency cases' (PhD Thesis, The University of Leeds2022); Pride M Chanakira, 'A Critical Analysis of the Effectiveness of the Corporate Rescue Provisions under sch B1 of Insolvency Act 1986' (PhD Thesis, University of Wolverhampton 2022); Shashi Rajani, 'Cost-Effectiveness of Corporate Rescue and Insolvency Procedures in the UK' (1993) 1 Am Bankr Inst L Rev 441.

efficiency and effectiveness of Nigeria's corporate rescue regime based on the objectives required for an effective and efficient insolvency system. Unquestionably, creating a gap in the literature on the question of whether CAMA 2020 is effective and efficient insolvency framework.

To address these gaps, the thesis asks this research question: *To what extent does the redefinition of the approach to corporate rescue under CAMA 2020 facilitate the effective and efficient rescue of financially distressed companies in Nigeria?* This question seeks to explore how effectively corporate rescue tools (such as CVAs, administration, etc) under CAMA 2020 provide mechanisms for rescuing financially distressed companies. To examine the theoretical and practical aspects of Nigeria's insolvency regime, the thesis further explores five questions that will provide further context to the core research question:

A. What rationale occasioned the codification of corporate rescue mechanisms in Nigeria?
B. To what extent does the Nigerian model of corporate rescue align with the objectives of the UNCITRAL Legislative Guide?
C. What practical obstacles hinder the implementation of corporate rescue procedures under CAMA 2020, and how do they impact alignment with international best practices?
D. Is there a significant difference in the approach to corporate rescue under Kenya and Nigeria's insolvency law?
E. Can South Africa's model be characterised as a corporate rescue mechanism in a comparative context?

Question A evaluates Nigeria's corporate rescue reform objectives, including stakeholder protections under CAMA 2020. Questions B and C answer the "effectiveness" and "efficiency" questions, which include the assessment of the provision of early detection and resolution of financial distress and the successful implementation of corporate rescue reform under CAMA 2020. To further address this question, in relation to the main research question, the thesis adopts the meaning of the terms effective and efficient, as discussed in section 5.4.1, based on the key objectives of an effective and efficient insolvency law under the United Nations UNCITRAL Legislative Guide on Insolvency Law. These objectives are used as a proxy for evaluating the effectiveness and efficiency of CAMA 2020. The rationale for adopting this approach is twofold: First, these objectives are globally recognised as a standard for assessing insolvency regimes and therefore, offer, in part, a more structured and comprehensive basis for evaluating whether Nigeria's corporate rescue regime aligns with international best practices.

Secondly, the need to adopt the UNCITRAL Legislative Guide in measuring the effectiveness and efficiency of Nigeria's corporate rescue regime is driven partly by the lack of comprehensive empirical data on the outcomes of insolvency in Nigeria. This lack of empirical data presents a significant challenge in examining the performance of corporate rescue tools under CAMA 2020, necessitating the need for a standard to measure the extent to which the provisions of CAMA 2020—such as the CVA and administration—align with international best practice on corporate rescue. Unlike most established jurisdictions, such as the UK or US, Nigeria lacks a centralised database where insolvency cases are readily accessible. Court records and outcomes of rescue procedures are either incomplete or not recorded. The insolvency profession is a developing profession; hence, the practitioners and judges are not as sophisticated, leading to a scarcity of data and difficulty in accessing empirical evidence. Therefore, the UNCITRAL Legislative Guide serves as a remedy to the gap in empirical data, offering a qualitative basis for assessing CAMA 2020 in the absence of statistical data.

Beyond contextualising these terms, question C is important in understanding the challenge of corporate rescue in Nigeria, and questions D and E are crucial in understanding the approach to corporate rescue in Kenya and Nigeria, and the business rescue approach in South Africa. From a comparative perspective, these questions support the examination of corporate rescue procedures in chapters 17 and 18 of CAMA 2020 (CVA and Administration procedures). This thesis finds a general preference for liquidation and receivership procedures in Nigeria despite the introduction of corporate rescue procedures under CAMA 2020.

Historically, Nigeria's insolvency law has been criticised for being too creditor focussed and liquidation oriented.[18] First - and on a practical note - prior to 2020, Nigeria's insolvency regime was criticised for being rigid and punitive and generally failing to give viable but distressed companies a survival chance.[19] In addition, there is weak institutional support. The general lack of a robust judicial system to implement insolvency laws and the non-

[18] Anthony Idigbe, 'Insolvency Reform in Nigeria: INSOL 2018 African Round Table Peer to Peer Update' (*Punuka.com*2024) <https://punuka.com/wp-content/uploads/2019/10/Insolvency-Reform-Agenda-in-Nigeria-INSOL-ART-Peer-to-Peer-Update-BY-ANTHONY-IDIGBE.docx> accessed 1 December 2024.

[19] Akanmu Ayodele, *Corporate Insolvency Law and Reform in Nigeria: Perspectives and Issues* (Nigerian Institute of Advanced Legal Studies 2020) 112.

professionalisation of insolvency to complement institutional efforts made the insolvency processes rigid and time-consuming.[20]

Second, is the criticism from academics, and rightly so, because of the dearth of literature to support the scholarship and practice of insolvency law in Nigeria. Most academic commentaries, with few exceptions, have focused on foreign insolvency systems.[21] The shortage of academic commentaries on Nigeria's insolvency system limits the debate on the need for an effective and efficient insolvency framework that will help to facilitate the rescue of companies in Nigeria.[22] Against these backdrops, academics called for the reform of Nigeria's insolvency framework under CAMA 1990 to incorporate modern insolvency practices in Anglo-American jurisdictions such as the United Kingdom (UK) and the United States of America (US).[23]

In the UK, formal corporate rescue procedures are traceable to the introduction of the scheme of arrangement procedure under the Joint Stock Companies Arrangement Act 1870. Though, the establishment of a sophisticated tool for preserving financially distressed but viable companies can be traced to the recommendations of the Insolvency Law Review Committee (Cork Committee) 1982, which cumulated into the Insolvency Act 1985 (IA 1985) and subsequently under the Insolvency Act 1986 (IA 1986).[24] However, CAMA 1990 was modelled after the English Companies Act 1985 (IA 1985), which did not contain corporate rescue procedures. It is important to note that when CAMA 1990 was enacted in Nigeria, it not only overlooked the developments in insolvency law in the UK from 1977 (when the Cork Committee was appointed) to 1990 (when CAMA 1990 came into force), but it also disregarded the subsequent amendments to these statutes until 7th August 2020, when President Muhammadu Buhari assented to the Bill to amend and replace CAMA 1990.

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[20] Fidelis Oditah, *'*Legal Framework for Corporate Insolvency in Nigeria*'* (1992) 55(2) Modern Law Review 180.

[21] A few academics focussed on developing countries or emerging markets, but not necessarily Nigeria. See Oliver Hart and others, 'Proposal for a New Bankruptcy Procedure in Emerging Markets' in Richard M Levich (ed), *Emerging Market Capital Flows* (Springer Science & Business Media 1988) 401; Stijn Claessens, Simeon Djankov and Ashoka Mody, *Resolution of Financial Distress: An International Perspective on the Design of Bankruptcy Laws* (World Bank 2001); Sonali Abeyratne, *Banking and Debt Recovery in Emerging Markets* (Routledge 2019).

[22] Emeka Kachikwu, Corporate Restructuring and Insolvency in Nigeria (Nigerian Institute of Advanced Legal Studies 2011) 127.

[23] Abiodun Akinrele, 'Corporate Insolvency and Business Rescue in Nigeria' (2011) 55 Journal of African Law 45; Fabian Ajogwu, 'Insolvency Reforms: A Catalyst for Economic Growth' (2013) *Nigerian Bar Journal* 92; Bolanle Adebola, 'Corporate Rescue and the Nigerian Insolvency System' (2013) <https://scholar.google.co.uk/citations?view_op=view_citation&hl=en&user=40vZLOgAAAAJ&citation_for_view=40vZLOgAAAAJ:IjCSPb-OGe4C> accessed 5 June 2024; Paul Obo Idornigie, 'Insolvency Law in Nigeria: Need for Reform' (2017) 45 Commercial Law Review 119.

[24] Rebecca Parry and Stephen Gwaza, 'Is the Balance of Power in UK Insolvencies Shifting' (2019) 7 Nottingham Insolvency and Business Law e-Journal. The Insolvency Law Review Committee (Cork Committee) 1976 was formed in 1976, appointed in 1977 and published the review in 1982.

Although the presidential assent to this 30-year legislation marked a significant legislative milestone in response to the myriads of challenges under the CAMA 1990 regime, the need to improve Nigeria's standing in the World Bank's *Ease of Doing Business Index* accelerated the enactment of CAMA 2020.[25] CAMA 2020 established several innovative practices, including adopting modern 'corporate rescue procedures and providing corporate rescue tools to foster "seamless and less cumbersome mechanisms" for rescuing companies in financial distress.[26] Furthermore, it limits the practice of using the threat of liquidation to force payment of debt.[27] Thus, creditors can no longer secure speedy debt repayment under the guise of filing a winding-up petition.[28]

In recent times, most countries have and continue to reform their national legislation to prioritise corporate rescue.[29] These reforms, which affect both national and international insolvency laws, are heavily influenced by both local bodies, such as the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN),[30] and international organisations, such as the World Bank, the United Nations Commission on International Trade (UNCITRAL) and the International Monetary Fund (IMF).[31] These organisations have set out standards for domestic reforms of insolvency law to promote international best practices in transnational insolvency law. They also harmonise national insolvency law with best practices for effective and efficient resolution of corporate distress to facilitate global trade.[32]

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[25] To understand more about the World Bank's influence on CAMA 2020, see World Bank Group, 'Doing Business 2020: Comparing Business Regulation in 190 Economies' (2020) <https://www.doingbusiness.org/content/dam/doingBusiness/media/Profiles/Regional/DB2020/SSA.pdf> accessed 21 October 2024.

[26] The Doing Business Report has been discontinued. A replacement has now come into effect, see The World Bank, 'Business Ready (B-READY)' (*World Bank*2023) <https://www.worldbank.org/en/businessready> accessed 25 September 2024.

[27] *Air Via Ltd v Oriental Airlines Ltd* (2004) ALL FWLR (part 212) 1565, 1569; Julian Franks and Oren Sussman, 'Financial Distress and Bank Restructuring of Small to Medium Size UK Companies*' (2005) 9(1) Review of Finance 65, 88.

[28] *Re Javelin Promotions Ltd* [2003] EWHC 1932 (Ch) 21 [Evans Lombe J]; Paul Davies and others, *Gower Principles of Modern Company Law* (Sweet & Maxwell 2021) 901–915.

[29] Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98(7) Michigan Law Review 2276, 2278.

[30] Unini Chioma, 'BRIPAN Conference Explores Enhancing Nigeria's Business Recovery, Insolvency Regulations' (The Nigeria Lawyer3 October 2023) <https://thenigerialawyer.com/bripan-conference-explores-enhancing-nigerias-business-recovery-insolvency-regulations/> accessed 4 June 2024.

[31] The World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes' (World Bank19 November 2015) <https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights> accessed 4 June 2024; Legal Department, International Monetary Fund, *Orderly & Effective Insolvency Procedures: Key Issues.* (International Monetary Fund 1999).

[32] Jay Lawrence Westbrook, 'A Global Solution to Multinational Default' (2000) 98(7) Michigan Law Review 2276, 2279; Osaretin Kayode Omoregie, 'Business Rescue and Insolvency Regulation and Practice in Nigeria: The Imperatives of Globalization' (2019) 7(3) Archives of Business Research 87.

However, this is not to imply that there is no bottom-up influence on the reform of corporate rescue law globally. Market participants, small and medium-sized enterprises (SMEs), and developing economies also provide useful data and feedback that influence reforms. For example, the UK's Corporate Insolvency and Governance Act 2020 (CIGA 2020) was partly influenced by the stakeholders' criticisms and demand for a more flexible insolvency regime pre-CIGA.[33] Nevertheless, most reforms have been top-down, and some countries as part of the agenda to build an effective and efficient insolvency regime have not only scheduled the reform of insolvency laws in the agenda of their legislative institutions but continue to undertake implementation reviews of existing insolvency laws.[34]

According to Gurrea-Martínez,[35] there are leading insolvency jurisdictions with developed markets whose insolvency models have significantly influenced several jurisdictions. These include the United Kingdom (UK) and the United States of America (US), which continue to review and reassess the reforms in their insolvency laws to sustain economic growth and enhance overall development.[36] This is why foremost academic commentaries focused on appraising Nigeria's insolvency regime by comparing the Nigerian model to models from these jurisdictions.[37] This approach, as demonstrated by this thesis, limits the appraisal of Nigeria's corporate rescue model under CAMA 2020.[38] In forming an original contribution to knowledge, this thesis takes a different approach in two significant ways. On the one hand, it examines the nature of corporate rehabilitation tools under the previous and current insolvency regimes. On the other hand, it explores the extent to which the corporate rescue tools under the current regime are effective and efficient in resolving financial distress by benchmarking other models within the African jurisdiction.

One recent piece of comparative literature that examines corporate rescue tools within the African jurisdiction is the study by Bolanle Adebola, which considered the reform of corporate

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[33] See text below at 2.6.12, 55.

[34] Emilie Ghio et al, 'Harmonising Insolvency Law in the EU: New Thoughts on Old Ideas in the Wake of the COVID-19 Pandemic' (2021) 30(3) International Insolvency Review 427, 428.

[35] Aurelio Gurrea-Martínez, 'Insolvency Law in Emerging Markets' [2020] SSRN Electronic Journal 1, 6.

[36] ibid 14-15; Michelle J White, 'The Corporate Bankruptcy Decision' (1989) 3(2) Journal of Economic Perspectives 129, 141; Douglas G Baird and Robert K Rasmussen, 'The End of Bankruptcy' (2002) 55(3) Stanford Law Review 751, 777-778; For example, the UK undertook a three-year post-implementation review of the Corporate Insolvency and Governance Act 2020 (CIGA), see Insolvency Service, 'Title: Corporate Insolvency and Governance Act Post Implementation Review' (2023) <https://www.legislation.gov.uk/ukia/2023/69/pdfs/ukia_20230069_en.pdf> accessed 4 June 2024; Aurelio Gurrea-Martínez, 'The Future of Insolvency Law in a Post-Pandemic World' (2021) 31(3) International Insolvency Review 385.

[37] Onigbinde (n 15).

[38] Adebola (n 15); Agbu (n 15); Asinge (n 27); Arewa (n 15); Olusegun Onakoya, 'Corporate Rescue as Sustainable Mechanism for Strengthening Companies in Nigeria?' (2022) 118 Journal of Law, Policy and Globalization 54.

rescue laws in Ghana, Nigeria, and Uganda.[39] This thesis differs from this study in double measures. Rather than limit the discussion to administration and receivership, it considers other corporate rescue tools in select jurisdictions. In addition, it is important to consider the discussion within a broader geographical and legal context. This is why this thesis is important, original and significant. It juxtaposes the approach in leading Anglo-American jurisdictions (UK and US) with the approach within the select African countries (Nigeria, Kenya, and South Africa) to provide a broader socio-legal and geographical context in the analysis. In this regard, it provides a detailed comparative literature that highlights specific areas where CAMA 2020 aligns or deviates from international best practices. The thesis concludes by observing that CAMA 2020 substantially facilitates an effective and efficient rescue of financially distressed companies in Nigeria. However, the benefits of corporate rescue reform in Nigeria have not been fully ascertained. The failure to maximise these procedures is attributed to a few challenges, including the lack of a cross-border framework and weak institutional capacity.

1.2 Relevance of the Thesis

The history and ongoing development of corporate rescue law in England, particularly in the wake of the 2008 global financial crisis, has been extensively documented.[40] However, this area has not received any significant commentary from legal practitioners in Nigeria, perhaps due to a lack of a robust corporate insolvency statute and institutional expertise.[41] Prior to 2020, the limited commentaries on the subject focused on traditional insolvency tools.[42] Professor Orojo's book on "Nigeria Company Law" is the beginning point of an exhaustive discussion

[39] Adebola (n 15).

[40] The literature regarding corporate rescue law and insolvency law in England is very rich. For a neat and holistic view of the law and practice of insolvency law, see David Milman and Durant Christopher, *Corporate Insolvency: law and practice* (3rd edn, Sweet & Maxwell 1999). For a good exposition, see Royston Miles Goode, *Goode on Principles of Corporate Insolvency Law* (Kristin Van Zwieten ed, 5th edn., Sweet & Maxwell 2018) para 2-14 - 2-25; Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, Cambridge University Press 2017) 1-25, 32–65, 282-283. For the history of insolvency from a bankruptcy perspective, see Francis John James Cadwallader, *In pursuit of the merchant debtor and bankrupt: 1066-1732* (PhD thesis, University College London, University of London 1965); cf Markham Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth-Century England* (Clarendon, OUP 1995); Coull David, The *Prevention of Fraud prior to bankruptcy – a comparative study* (PhD thesis, University of Aberdeen 1974); Treiman Israel, *A History of the English Law of Bankruptcy, with Special Reference to the Origins, Continental Sources, and Early Development of the Principal Features of the Law* (DPhil thesis, University of Oxford 1927).

[41] Anthony Idigbe, 'Using Existing Insolvency Framework to Drive Business Recovery in Nigeria: The Role of the Judges' <https://punuka.com/wp-content/uploads/2019/01/role_of_judges_in_driving_a_business_recue_approach_in_existing_insolvency_framework.pdf> accessed 21 October 2024.

[42] Ebenezer Yebisi and Taiye Omidoyin, 'Corporate Rescue Law to the Rescue of Businesses in Trauma in Nigeria' (2018) 73 JLPG 2224-3259.

of the Arrangements and Compromise procedure and Mergers and Takeovers under CAMA 1990 in chapters 23 and 24, respectively.[43] Although most of the mechanisms described in his book are not rescue mechanisms in the strict sense, it shows the state of the law and the challenges that companies face at a time when rescue options have been limited contextually to corporate restructuring options. Here, regulatory bodies such as the Securities and Exchanges Commission (SEC), the Central Bank of Nigeria (CBN) and the court have played major roles in providing solutions for ailing companies.[44]

This lack of flexibility in the corporate legal framework did nothing to help the business environment in Nigeria; in fact, it stalled economic growth. Sensing the danger posed by this prolonged economic stagnation, President Olusegun Obasanjo's administration embarked on sweeping economic reforms that transformed the Nigerian economy. These reforms unbuckled business stiffening regulations which constricted the corporate climate and de-incentivised entrepreneurs.[45] The question is - what was the effect of these policies? The effect was a new order of market-driven policies and economic structures, transforming Nigeria's economy into a free market system, albeit not without regulatory scrutiny and government supervision. An example of such a structure is the establishment of the Debt Management Office (DMO) and the Budget Monitoring and Price Intelligence Unit (BMPIU, also known as the Due Process Office).[46]

From the policy angle, the best example is the CBN policy on National Economic Empowerment and Development Strategies (NEEDS), which is the forerunner of the Vision 2020 program: a bottom-top strategic economic plan for the development of the country.[47] So, what, then, is the implication of these policies to the Nigerian economy? The implications are the liberalisation of the Nigerian economy, debt forgiveness, privatisation, deregulation, an

[43] Orojo, *Company Law and Practice in Nigeria*.

[44] Although mergers and acquisitions, takeovers, arrangements, and compromises are corporate rehabilitation tools under Nigerian Company law, they are not corporate rescue tools *stricto sensu*. These schemes, especially the Arrangement and Compromise provision, serve as the most effective and flexible means of rescuing ailing companies in the absence of a corporate rescue scheme, providing a part to corporate survival and not liquidation. However, they are not an effective remedy when a company is facing liquidity issues. See Brenda Hannigan, *Company law* (3rd edn, Oxford University Press 2012) 562-564.

[45] Jide Chime, 'International Journal of Research in Economics and Social Sciences' (2017) 7(11) IJRESS 2249-7382, 562.

[46] Dr. (Mrs.) Obby Ezekwesili (Madam Due Process), another scholar from the IMF was appointed by President Obasanjo to head the BMPIU.

[47] Professor Chukwuma Soludo, the then Governor of CBN was the brainchild behind the NEEDS program. See *News Magazines* 25(2) (Lagos, 18 July 2005) 30. See generally, Nigeria National Planning Commission, 'Meeting Everyone's Need: National Economic Empowerment and Development Strategy' (2004) <www.researchgate.net/publication/44834588_meeting_everyones'_NEEDS_national_economic_empowerment_anddevelopment_strategy> accessed 24 December 2020.

increase in foreign direct investment, foreign companies, etc.[48] The liberalisation of the economy encouraged industrial and capital growth, and while some companies were building to expand, others - especially in the telecommunication and internet service industries - were only just springing up. However, as the economy continued to grow, the need for a substantial legal reform to handle the result of the interplay between commercial and social relations became apparent. This sentiment was captured by Professor Emiola in chapter 13 (Restructuring a Company) of his book on 'Nigerian Company Law' thus:

> "The exigencies of the world of business have sometimes forced companies to seek structural changes in their organisation to enable them to cope with their immediate or long-term problem […] The Companies Act 1990 and the Investments and Securities Act 1999 make elaborate provisions to facilitate these changes."[49]

Despite rationalising the need for changes, the 19th and 20th-century reforms had no direct impact on insolvency law in Nigeria, prompting calls for reform.[50] The reforms were finally implemented in 2020 after several unsuccessful attempts to amend the CAMA in 1990.[51] Since the enactment of CAMA 2020, there has not been any in-depth assessment of the effectiveness and efficiency of the rescue tools. Additionally, there is very limited data and case law in Nigeria's corporate rescue field. It is therefore crucial to learn from jurisdictions such as England and Wales, which have comparable provisions in their corporate rescue laws, in order to interpret some of the provisions better. The question is: will such decisions be persuasive enough to sway the Nigerian courts? Will the Nigerian courts be hostile, complementary, or constructive in their approach? This is a huge challenge that CAMA 2020 presents. By evaluating the effectiveness and efficiency of CAMA 2020 based on international best practices (as outlined by the UNCITRAL Legislative Guide), this thesis is significant in two ways.

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[48] Nigeria accepted and implemented the IMF's 'Policy Support Instrument' (PSI). The PSI is a euphemism for the conditions upon which the IMF gave Nigeria debt forgiveness or cancellation. See International Monetary Fund, 'Nigeria: Fourth Review under the Policy Support Instrument: Staff Report; Staff Statement; Press Release on the Executive Board Discussion; and Statement by the Executive Director for Nigeria' (2007) 2007 IMF Staff Country Reports <https://www.elibrary.imf.org/view/journals/002/2007/353/article-A001-en.xml> accessed 6 August 2024; International Monetary Fund Annual Report 2006: Making the Global Economy Work for All' (*IMF*14 September 2006) <https://www.imf.ozzrg/en/Publications/AREB/Issues/2016/12/31/International-Monetary-Fund-Annual-Report-2006-Making-the-Global-Economy-Work-for-All-19231> accessed 6 August 2024.

[49] Emiola, *Nigerian Company Law* 541. It should be noted that Part XVI of CAMA 1990 deals with Arrangements and Compromise while Mergers, Take-overs and Acquisitions is covered under PART 11 of the Investment and Securities Act 1999 which was a repeal of Part XVII of CAMA 19190 (sections 541 – 623).

[50] Ebenezer Yebisi and Taiye Omidoyin, 'Corporate Rescue Law to the Rescue of Businesses in Trauma in Nigeria' (2018) 73 JLPG 2224-3259; Bolanle Adebola, 'Corporate rescue and Nigeria insolvency system' (PhD thesis, University College London 2013) 14.

[51] CAMA 2020, ch 17 and 18 respectively.

Firstly, it seeks to add to the body of knowledge on corporate rescue, and secondly, to bring Nigerian law in line with modern corporate rescue standards.

1.2.1 The Rationale for the Research Topic

CAMA 2020, in many respects, signifies a shift in philosophy from the previous corporate liquidation regime to a new corporate rescue philosophy. The aim is to bring Nigerian law up to speed with modern corporate rescue law and practices that promote free-market enterprise. A free-market economy supports the utilisation of legal and economic tools available within the business framework to help achieve the ultimate business return. In this regard, it is not uncommon for companies to fall into liquidation when business is bad. Therefore, corporate failure is a normal occurrence in a free market economy. For this reason, different countries have developed a corporate legal framework that supports the rescue of businesses facing the potential danger of liquidation, especially when the business milieu is no longer economically friendly. For example, while the legal framework in South Africa has shown a clear preference for Business rescue procedures, the only rescue tool is offered under Chapter 2 of the Companies Act 2008.

Although there has not been any in-depth study that covers the rescue law of the three countries, Halito Mafo Habi conducted "a comparative study of some issues relating to corporate insolvency law in Nigeria and South Africa", where he compared corporate rescue law and insolvency regime in Nigeria and South Africa.[52] Habi concluded his study by proposing that Nigeria adopt the South African business rescue model under Chapter 6 of SACA. Given that Habi and other scholars did not extend their rescue scholarship to Kenya, it will not be inappropriate to have a comprehensive study of corporate rescue under these three regimes. Therefore, conducting comparative research on the "corporate rescue mechanisms in Nigeria" is appropriate, because the topic gives an opportunity to compare Nigeria's corporate rescue options to the rescue tools available under the corporate legal framework of South Africa and Kenya.

This topic of this thesis embraces a holistic inquiry into whether the provisions of CAMA 2020 concerning CVAs and Administration can be the most effective way of rescuing a company when the other rescue mechanisms are proven to be ineffective in dealing with corporate

[52] Halita Mafo Habi, 'A comparative study of some issues relating to corporate insolvency law in Nigeria and South Africa' (LLM Dissertation, University of Pretoria 2013).

failure, especially due to liquidity challenges. While previous studies were conducted under the former rescue regime as epitomized by CAMA 1990, there is no comprehensive study of the effectiveness of the rescue mechanisms under CAMA 2020. Furthermore, there is no literature on the effect of the CVA and Administration procedures under CAMA 2020 on the business environment in Nigeria.

Furthermore, no comprehensive study compares the rescue tools under CAMA 2020, especially the CVA and Administration procedure, to the rescue tools under the legal framework of Kenya and South Africa. It is submitted that the change in objective and philosophy of resolving corporate insolvencies under the current business milieu justifies this research topic. Consequently, gaps in literature can be identified in virtually every aspect of corporate rescue as it concerns CAMA 2020, especially because the effect of the provisions has yet to be tested on the backdrop of the new philosophy of corporate rescue and ease of business. This topic therefore allows the thesis to identify and evaluate the corporate rescue remedies under CAMA 2020 and compare them with the corporate rescue tools in South Africa and Kenya to find the most effective remedy or rescue tool for corporate rescue regimes in Africa.

Overall, the thesis makes a significant contribution to the field of corporate rescue law within Sub-Saharan Africa in three key areas - serving a practical, legislative, and academic purpose. Practically, it serves as a guide to insolvency practitioners, judges, and corporate and commercial lawyers in understanding the objectives and philosophy of Nigeria's corporate rescue regime. In terms of legislative significance, this thesis will help to assist lawmakers and policymakers in understanding potential areas of policy and legislative intervention. Finally, this thesis adds to the general body of knowledge on corporate rescue scholarship in Nigeria. It serves as a reference point for comparative scholarship in corporate rescue, especially in Nigeria, Kenya and South Africa.

1.2.1.1 Rationale for regional comparators

This thesis focuses on the modernisation of regional corporate rescue and insolvency laws, specifically in three key African jurisdictions: Nigeria, Kenya, and South Africa. The choice of these countries is driven by a variety of reasons, the least of which is the promotion of free trade and economic growth in developing countries.[53] To enhance the potential for economic growth, these countries have reformed their insolvency laws to address corporate distress and

[53] Karen Huff, 'Developing Country Concerns and Multilateral Trade Negotiations' (2000) CATRN Paper 2.

ensure business survival. The practices in these countries are indicative of the broader trends across different jurisdictions within the African continent.

Generally, there are several reasons for the adoption of regional comparators. One key aspect of comparison is the economic structure and institutional practices. These countries are developing nations and hold significant regional economic influence. For example, with a GDP of $373 billion, South Africa is currently the most industrialised country in Africa, and it is projected by the International Monetary Fund (IMF) to become Africa's biggest economy by 2027.[54] South Africa's experience is therefore important in providing an understanding of how corporate rescue tools function in emerging but relatively mature economies within the African region. Similarly, Kenya is one of the leading economies in Africa - certainly in East Africa - with a rapidly developing business landscape comprising large corporations and SMEs.

Another important factor is the legal and institutional comparability. English law has greatly influenced the development of law in these jurisdictions. Some vestiges of the English common law tradition have been received in different legal jurisdictions across the globe, including countries with civil law origins that seem to have mixed some elements of the institutional practices of the English legal system.[55] Thus, countries such as South Africa, which have some trace of the civil law system it inherited from the Dutch as a result of its colonial history, are now running a mixed system. This heavily tilts towards common law so that the legal system is now mostly driven by the *stare decisis* principle under English common law.[56] For this reason, South Africa has been loosely referred to as part of the common law and accorded the same homogenous approach in Anglo-American comparative terms.[57] Therefore, to examine corporate rescue law in these jurisdictions, one must compare the corporate rescue tools in

[54] International Monetary Fund, 'Regional Economic Outlook. Sub-Saharan Africa: A Tepid and Pricey Recovery' (International Monetary Fund 2024) <https://www.imf.org/-/media/Files/Publications/REO/AFR/2024/April/English/text.ashx> accessed 31 October 2024.

[55] JuriGlobe Research Group, 'Common Law Systems and Mixed Systems with a Common Law Tradition' (University of Ottawa) <www.juriglobe.c/n/ys-jur/lass-pol/ommon-law.php> accessed 19 January 2021.

[56] For a detailed analysis on countries with a mixed system, see Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison' (1966-1967) 15 AJCL 419.

[57] Squire Patton Boggs, 'A snapshot of the legal system in South Africa' (*DROIT INTERNATIONAL ET COMPARE - DROIT COMMUNAUTAIRE,* 18 0ctober, 2012) <https://larevue.squirepattonboggs.com/A-snapshot-of-the-legal-system-in-South-Africa_a1902.html> accessed 19 January 2021. In contrast with the strict classification under Anglo-American Jurisprudence and the likelihood of bias assumption that puts the English and American system in focus whenever there is a discussion on common law jurisdictions, see Selim Atiyah, Patrick Robert and Summers Robert, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press 1987); Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998).

Nigeria and those in the selected jurisdictions, to determine if the rescue tool is effective and efficient.[58]

Furthermore, Kenya and South Africa have reformed their insolvency law and moved towards rescue before Nigeria introduced CAMA 2020.[59] South Africa introduced business rescue procedure with the South African Insolvency Act 2008 (SIA 2008). Similarly, Kenya modernised their insolvency law with the introduction of the Kenyan Insolvency Act 2015 (KIA 2015), which introduced corporate rescue tools such as the CVA and Administration procedures. These statutes provide a useful comparative basis for understanding the approach to resolving regional corporate distress. Comparing the provisions of these statutes with CAMA 20220 can help to provide practical lessons on the implementation of corporate rescue reform in Nigeria.

In summary, and in relation to the research question, the comparative analysis of Nigeria's corporate rescue model and that of Kenya and South Africa improves the appraisal of CAMA 2020 by providing a regional perspective on what constitutes an effective and efficient corporate rescue model. This approach will not only enhance the assessment of the extent to which CAMA 2020 is effective, but also identify the extent to which Nigeria will have to improve its legislation to meet the demands of a modern economy. The approach will also ensure that Nigeria's corporate rescue regime is more efficient and effectively suited to resolve specific insolvency issues which are peculiar to the local economic and environmental context. The findings will help policymakers assess business and entrepreneurial growth, promote investment, and resolve insolvencies within the region, and form the basis for the conclusion and recommendations in chapter six. The section below discusses the methodology adopted to address the research questions, followed by an overview of the chapters.

1.3 Research Methodologies

Legal research involves the 'systematic study of legal rules, principles, concepts, theories, doctrines, decided cases, legal institutions, legal problems, issues or questions or a combination of some or all of them'.[60] There are many approaches to legal research, but this thesis adopts a

[58] Vernon Valentine Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2004) 4 Global Jurist Frontiers 2.

[59] International Monetary Fund, *World Economic Outlook (International Monetary Fund): WEO | Occasional Paper (International Monetary Fund) | World Economic and Financial Surveys* (International Monetary Fund, Publication Services 2024).

[60] Anwarul Yaqin, *Legal Research and Writing* (1st edn, Lexis Nexis Publications 2007).

mixed methods approach to answer the research questions.[61] In a mixed methods approach, the research mainly employs the doctrinal method alongside other research methods and techniques, such as historical and comparative methodologies and/or theoretical or empirical research.

Some commentators argue that the mixed method is suitable where a single method and the mixed method will result in the same outcome because the mixed method will provide a more in-depth analysis and greater reliability.[62] Therefore, in analysing the research question, a combination of doctrinal, historical, and comparative legal research methodologies will be used to provide a more rigorous and in-depth analysis of the corporate rescue challenges in Nigeria. The doctrinal and historical methodologies are used in chapter two (The Philosophical Underpinnings and Theoretical Context); chapter three (Corporate Rescue Reform in Nigeria: An Exercise in the Isometrics of CAMA); and chapter four (Examination of Corporate Rescue Models: An 'Afri-insolvency' Approach).

Chapters five and six will utilise the comparative method. The discussion critically evaluates the reform of corporate rescue in Nigeria based on best practices and answers the question of whether CAMA 2020 is effective and efficient in resolving corporate distress. It provides an in-depth analysis of the criteria for comparing the select insolvency regimes and attempts to reconcile the same with practices from leading insolvency regimes. Combining these methods gives the thesis flexibility, leading to a free selection of data sources to analyse the research questions, make key findings, and reach conclusions.[63]

1.3.1 Doctrinal Methodology

This thesis utilises the doctrinal methodology, a method of study that seeks to inquire into existing statutes, case law, principles and doctrines in order to develop a comprehensive understanding of the law. This method, also known as the traditional or theoretical approach to legal research, is concerned with the interpretation of the "black letter" law—analysing how regulations, statutes, and precedents can be interpreted to guide courts, lawyers, and lawmakers

[61] John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage Publication 2013) 273.

[62] Khadijah Mohamed, 'Combining Methods in Legal Research' (2016) 11(21) The Social Science 5191 – 5198, 5195; John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage Publication 2013) 273.

[63] Alan Bryman, 'Mixed Methods in Organisational Research' in David Buchanan and Alan Bryman (eds), *The SAGE Handbook of Organizational Research Methods* (Sage Publications Limited 2009) 516-531.

in establishing rules and doctrines. The method 'consists of either simple research directed at finding a specific statement of the law or a more complex and in-depth analysis of legal reasoning'.[64] The doctrinal methodology is typically suitable for analysing case law and statute. It focuses on the analysis of the law in the statute books to establish the interpretive context. In particular, the doctrinal methodology will be employed in chapter four of this thesis to analyse the provisions of the law before CAMA 2020 and post-CAMA 2020. This method will also be used in chapter five to analyse the relevant provisions of the law under the corporate rescue framework of South Africa and Kenya.

In comparison with the non-doctrinal methods, the doctrinal method provides an in-depth analysis of the provisions of CAMA 2020 and other similar laws and regulations to check the dynamics of legal reasoning and the development of the text in the statute. Jurisprudentially, the doctrinal method operates with positivist legal theory. The doctrinal method is mostly concerned with the analytics of the law in the text. Since the main jurisprudential basis of this thesis is rooted in legal interpretivism as opposed to legal positivism, relying solely on the doctrinal method will result in an approach which, though objective, would ultimately be too static.[65]

1.3.2 Historical Legal Methodology

This thesis also employs the historical legal methodology. Historical legal methodology is used to research data or legal problems deep-rooted in the past.[66] This methodology allows the researcher to trace the historical development of a legal concept through the experiences of either the account of participants or the records left from institutional practices by observers or records of the legal institutions and concepts themselves.[67] Within this thesis, the historical legal method is used to give a background of corporate rescue law in Nigeria, and the development of the Companies and Allied Matters Act before and after the amendments in CAMA 2020.

In contrast to other legal methodologies, the historical method involves the historical contextualisation of qualitative and quantitative findings on the history of corporate rescue in

[64] Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Michael McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 18-19.
[65] Hutchinson Terry and Duncan Nigel, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin Law Review 84, 116.
[66] BC Nirmal, Rajnish Kumar Singh and Arti Nirmal, *Legal Research and Methodology Perspectives, Process and Practice* (Satyam LawInternational 2019).
[67] Naresh Chandra Sengupta, *The Evolution of Law* (Calcutta, Uttarayan Limited 1951) 1 – 3.

Nigeria. As a result, the historical method is precisely suited to complement the doctrinal method in this thesis. However, this will not translate to guarantees of the accuracy of the proposed theories. In this sense, the historical legal methodology can be too speculative because it does not support the empirical formulation of legal data beyond the conclusion of the action. In addition, over-reliance on social-cultural events may be construed to be an under reliance on key legal reforms, which alter the cause of the history of corporate rescue.

Thus, unlike the doctrinal method which centres on the 'privileged voices' of parliamentarians and judges in the form of statutes and cases, the historical legal method operates in a way that seeks truth by going through the views of every player, irrespective of their role or status in the events under review, and by evaluating available data.[68] Accordingly, the historical method will be used to trace the history of insolvency law under the Nigerian legal system in chapter three, and unravel the theoretical classification of insolvency law in chapter two of this thesis.[69] However, over-reliance on the historical method may lead to bias and reliance on unnecessary assumptions. Consequently, this thesis employs the comparative-legal method to patch that potential pocket of bias and speculation.

1.3.3 Comparative Legal Methodology

The thesis also utilises the comparative legal methodology. In fact, it is the main methodology overlapping with other methodologies in this thesis. Comparative legal research involves comparing diverse areas, concepts, patterns, behaviour and phenomena. This practice of comparing different concepts and systems has increasingly gained prominence in modern scholarship due to globalisation and international trade.[70] Historically, comparative legal methodology can be traced to early Greek scholars. Existing evidence supports the assertion that Aristotle documented a study that compared the records of 158 City States, before the 41st century BC.[71]

Comparative Law has been defined as a scholarly exercise aimed at examining the corresponding dynamism between law and comparison.[72] Recent debate on comparative law

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[68] ibid (n 65) 108.
[69] See ch 2, Section 2.3 (p 28).
[70] Hiram Chodosh, 'Comparing Comparisons' (1999) 84 ILR 1025, 1033-1034.
[71] Martin R Thomas, 'Thomas R. Martin, an Overview of Classical Greek History from Mycenae to Alexander, New Directions in Philosophy and Education, Aristotle's Interests' (*Tufts.edu* 2024) <https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0009%3Achapter%3D15%3Asection%3D11> accessed 26 August 2024; Anthony JP Kenny, 'Aristotle' *Encyclopaedia Britannica Online (*2015) <http://www.britannica.com/EBchecked/topic/34560/Aristotle> accessed 12 January 2021.
[72] Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 2.

scholarship examines the approaches to comparative legal scholarship and the dimension that comparative law should follow as a methodological discipline.[73] Cruz argued that there are eight steps to follow in comparative studies: (1) identify the legal problem; (2) classify the legal family; (3) determine the most significant source of the law applicable to the problem; (4) assemble the necessary resources to the jurisdictions in question; (5) set out the title of the corresponding materials; (6) map-out clear strategy on how to identify the problems; (7) examine the legal principles involved in accordance with their legal meaning; and (8) comprehensively conclude the study in a comparative manner.[74] Similarly, Mark Van Hoeck identified six different methods for comparative legal research.[75] Van Hoecke distinguished these different methods, which he called the 'toolbox for comparative research' and argued that the 'functionalist method' is the only method that provides concrete guidelines and explanation in comparative literature.[76]

1.3.3.1 Functionalist Dimension

To explain the different literature from several jurisdictions, this thesis adopts the 'functionalist method' for comparative research. Zweigert and Kötz identified the functionality principle as the main methodical principle of comparative law.[77] The core tenet of the principle is hinged on the argument that in law - only things that perform the same function can be compared. Hence, comparative legal methodology has been used to analyse the functionality and practice of corporate rescue laws in these jurisdictions because of the practical equivalence of the rescue of companies, irrespective of the different rescue tools adopted under the respective legal framework. This is because functionalists focus on solving legal problems. If the result of applying corporate rescue tools to the corporate rescue challenge is the same in respective jurisdictions, the functionalist might conclude that the laws are the same in these countries. However, the functionalist method is unsuitable if the research focuses on how legal concepts, rules, and doctrinal structure find solutions to the corporate rescue challenge.[78] This thesis,

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[73] Esin Orucu, 'Methodology of Comparative Law' in J M Smits (ed), *Elgar Encyclopaedia of Comparative Law. Edward Elgar* (Cheltenham 2006) 442-454.
[74] Cruz de Peter, *Comparative Law in a Changing World* (Cavendish Publishing Limited 1999) 235-239.
[75] Mark Van Hoecke, 'Legal Culture and Legal Transplants' in Nobles Richard and Schiff David (eds), *Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell 273–91* (Ashgate 2014).
[76] ibid.
[77] Zweigert and Kotz, *Introduction to Comparative Law* (3rd ed, OUP 1998) 34, 68.
[78] Belgium is a classic example. The Belgian government adopted the Code Napoléon and retained the code even after the defeat of Napoleon' in 1815. However, the Belgian authorities interpreted the exact provisions of the in a completely different, if not opposite manner in relation to its interpretation from France.

therefore, acknowledges the danger of making overly simplistic assumptions and will adopt alternatives to functionalism to manoeuvre through.[79]

Accordingly, Michaels proposed three main alternatives to functionalism: the comparative study of legal culture, comparative legal history and legal transplant.[80] While the comparative study of legal culture is mostly used in anthropology, it can also be used to understand cultural characteristics in a legal system. Comparative legal history is used to study the history or development of different legal systems. Legal transplant is a social-legal construct used to compare how legal systems respond to social-legal problems. In comparison with the convergence model, the functionalist model gives the thesis a cover for criticising the transplant of various companies' statutes that failed to consider local flavour.[81] Watson has argued that transplantation is the most productive element of legal development.[82] As the analysis indicates, legal transplant is important in developing the framework for this thesis.[83] Before exploring the importance of legal transplants in chapter two, it is necessary to firstly highlight the contribution and structure of the thesis.

1.4 Research Contribution

The importance of the contribution of this thesis to the body of knowledge on corporate rescue law is threefold: firstly, it defines the concept of corporate rescue in Nigeria; secondly, it focuses on the use of comparative legal history as a methodological basis for answering the research question; and thirdly, it adopts a jurisprudential basis for theorising the subject of corporate rescue scholarship. Conceptually, it defines and evaluates the idea of corporate rescue in Nigeria. The thesis highlights the changes CAMA 2020 introduced into Nigerian company law and probes their effectiveness in solving regional corporate rescue challenges. Methodologically, it combines the benchmarking approach with the comparative legal method to evaluate existing literature in selected jurisdictions within the Sub-Saharan region - Nigeria, South Africa, and Kenya. Thirdly, and paradoxically, the thesis by way of jurisprudential contribution, demonstrates that the interpretivist judicial philosophy can be used in testing the attitude of the Nigerian court towards corporate rescue.

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[79] Ralf Michaels, 'The Functional Method of Comparative Law', in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative law* (Oxford University Press 2006) ch 10, 340-382, 356.
[80] ibid 341.
[81] Christopher Whytock, 'Legal Origins, Functionalism and the Future of Comparative Law' (2009) 6 Bringham Young University Law Review 1879, 1906; cf Teubner G, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in Divergence' (1998) 1 MLR 11, 32.
[82] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1974).
[83] See ch 2, Section 2.3 (p 28 - 31).

Although this thesis acknowledges the contribution of some academics in researching the developments in the Nigerian insolvency system and the need for a rescue philosophy in Nigeria's corporate landscape, it establishes the argument that there is a dearth of academic literature on the comparative aspect of corporate rescue in Nigeria. The thesis, therefore, makes an original contribution to the academy, by providing new literature on corporate rescue in Nigeria and parts of the Sub-Saharan region. Finally, the thesis is important as it serves as a useful and complementary guide for judges, practitioners, legislators and academics in corporate insolvency law in Nigeria.

1.5 Thesis Structure

The thesis is separated into six chapters. Chapter 1 is the introductory chapter. It begins with a general overview of corporate rescue scholarship in Nigeria and continues with a structural overview of the thesis. It then provides a background to corporate rescue reform in Nigeria and explores the research aims and objectives. The chapter also highlights the research question and discusses the research methodologies and contribution by examining the rationale for the research topic and regional comparators before closing to delineate the scope of the thesis. This chapter is important to establish the context and framework of the thesis to ensure a well-grounded, focused, and comprehensible analysis of the topic. It provides the background for a thorough and systematic exploration of corporate rescue reform in Nigeria and establishes the basis for subsequent analysis that will eventually contribute to a more robust and impactful discussion in this thesis.

Chapter 2 of the thesis provides an important theoretical framework to support the study of corporate rescue reform in Nigeria. It offers a deeper insight into the underlying principles and philosophies of insolvency law and, by extension, to corporate rescue. The chapter opens with an overview of the theoretical framework of the thesis before giving a contextual background to the study of corporate rescue. The chapter also provides the theoretical and philosophical basis for the classification of corporate rescue before moving on to an analysis of the different approaches to corporate rescue. The theoretical and philosophical context is foundational to analysing corporate rescue law in Nigeria under Chapter 3 of this thesis. Chapter 3 also discusses the historical developments of corporate rescue law pre-CAMA 1990 and post-CAMA 1990, before examining reform under CAMA 2020.

Chapter 4 examines the corporate rescue models in select African jurisdictions. The chapter is divided into two parts. Part I examines the Kenyan model of corporate rescue, and Part II

examines the South African model of Business rescue. The chapter takes a comparative approach to rescue scholarship and sets the stage for the evaluative assessment of CAMA 2020 in Chapter 5. Chapter 5 further examines common themes and development in corporate rescue, summarises the core themes, and responds to the research questions. Finally, Chapter 6 concludes the thesis. It reflects on the research question and discusses the path ahead before highlighting some policy considerations for the improvement of Nigeria's corporate rescue regime.

2 CHAPTER 2: Framework for Corporate Rescue Reform

2.1 Overview

This chapter examines the foundations of corporate rescue law and provides the framework for this thesis. In a nutshell, it analyses the concept of corporate rescue law in selected Anglo-American legal systems. An integral part of the analytical context is the concept of legal transplant, a key element of comparative legal research which is adopted to discuss corporate rescue procedures transplanted from the UK and US to African jurisdictions. In this sense, legal transplant is the framework used in theorising the conceptual and philosophical foundations of CAMA 2020. It also formed the basis for analysing the extent to which CAMA 2020 facilitates an effective and efficient rescue of financially distressed companies in Nigeria. This approach will make the outcome of corporate rescue an integral theme in analysing stakeholders' treatment during insolvency. The chapter adopts a broad approach to corporate rescue scholarship. It begins by contextualising issues that pose conceptual challenges and establishes the theoretical basis for the thesis. Reference will be made throughout the thesis to the literature, theories, ideas, and practices introduced here. It is particularly important to signpost chapters three, four, and five, which contribute to understanding the rationale for rescuing distressed entities, corporate rescue tools, and common themes and practices. Finally, the chapter considers the rescue tools under English and American corporate rescue regimes, which are the main sources for the transplant of corporate rescue law in Nigeria, in order to understand the foundational bases for the different approaches to corporate rescue. The rescue models in these jurisdictions serve as leading models for best practices and as a basis for the comparative evaluation of Nigeria's corporate rescue regime in Chapter 6.

2.2 Corporate rescue in the context of insolvency

Traditional insolvency proceedings through liquidation, are typically geared towards liquidating the company's assets (and the company itself) to recover the company's debt. Strictly speaking, liquidation is a collective remedy.[84] Yet, creditors often use it coercively to force compliance.[85] This occurs to the extent that the threat of liquidation can be used as a debt collection tool, a remedy which may create a destructive effect on the company and its

[84] See text to n 964, 167.
[85] Later discussed in p 23.

stakeholders, especially in companies with limited resources.[86] Liquidation creates a number of problems for the company and its stakeholders - including the shareholders, directors, creditors, employees, suppliers and the community at large.[87]

However, liquidation may not always be dangerous.[88] The cost of continuing the business could be greater than the cost of liquidating the company, especially given innovation in product and service delivery, thus making the old company obsolete and outdated. Similarly, liquidating a subsidiary company can save the parent or the group company from negative publicity and loss of business of an existing top company.[89] In these situations, it may be necessary to creatively destroy the old business model to drive progress or innovation in the marketplace.[90] While the short-term implications of liquidating the company may be painful, it can be an important element in a broader progression of creative destruction.[91] In the long-term, liquidation may lead to better innovation and greater efficiency in the economy - which may therefore be less destructive, if not helpful for economic growth.[92] Thus, John Wood argued that failure in such circumstances should be viewed as a natural occurrence with immediate severe significance, provided the process of creative destruction is applied to inefficient businesses.[93] However, the overall impact of creatively destroying companies can be dangerous to certain stakeholders and the economy in general.[94] This is because of the risk posed by the uncertainty in the destruction of businesses.

Uncertainty and disruption in business, particularly in well-established industries, may lead to corporate failure and expedite liquidation - resulting in loss of jobs and investment for shareholders and creditors. This is particularly true if the residue of the company's assets cannot sufficiently offset all debt obligations.[95] As a result, corporate rescue has emerged as a strategy for rescuing companies from liquidation in most jurisdictions, including the UK and the US.

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[86] Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge University Press 2009) 464-465.

[87] For a thorough overview of the effect of insolvency on creditors, see Akintola, *Creditor Treatment in Corporate Insolvency Law 2020* (Edward Elgar 2020).

[88] Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (Harper & Brothers 1942).

[89] 'Liquidation demergers' (Tax, Restructuring & Insolvency, Corporate, LexisNexis 2024) <Liquidation demergers (lexis.com)> accessed 12 September 2024.

[90] ibid 83.

[91] John Wood, 'Creative Destruction and the Post COVID-19 Economy: A Critique of the (Un) creative Rescue Value Contained within the Permanent CIGA 2020 Reforms' (2023) 3 Journal of Business Law 197.

[92] ibid 210-211.

[93] ibid 210.

[94] Kenneth Rogoff, 'The Curse of Cash' (Princeton University Press 2017) 112.

[95] For an assessment of the broader impact of corporate failure, see Ricardo J Caballero and Mohamad L Hammour, 'The Cost of Recessions Revisited: A Reverse-Liquidationist View' (2005) 72(2) Review of Economic Studies 313 <https://economics.mit.edu/files/1795> accessed 6 April 2021; Peter Rogers and Herman E Daly, 'Beyond Growth: The Economics of Sustainable Development.' (1996) 22(4) Population and Development Review 783.

The managers of corporate entities in modern economies are not only concerned with planning the assets of the company when the company is a going concern but must also prepare for distress and failure when the company is faced with liquidity challenges. Hence, corporate rescue law must address the different stakeholders' concerns, including preserving stakeholder value and preventing corporate failure.[96]

While the scope of this discussion does not extend to investigating the factors that constitute "cause", it suffices to say that several factors can cause corporate failure.[97] On a broad level, corporate failure may be induced by economic decline, natural disasters, weak corporate governance culture, and managerial incompetence, inefficiency, or ineffectiveness.[98] However, managerial incompetence, inefficiency, or ineffectiveness is in fact a common reason for corporate failure.[99] Corporate failure as a result of financial distress could have a devastating effect on the company's stakeholders, including the directors, creditors, and employees. [100]

Indeed, insolvency law addresses this issue of corporate failure. Modern insolvency legislation provides a two-part sequence route to resolving distress and corporate failure: liquidation and corporate rescue. Although both routes provide a sequence to resolving challenges associated with the use of credit, each sequence provides a distinct route to realise the company's assets for the benefit of creditors and other stakeholders of the company.[101] The former serves the purpose of winding up the company to realise its net assets and distribute them in an orderly manner as provided by the law, based on ranking and priorities. The latter sequence provides a route that allows the company to rehabilitate and rescue itself from corporate failure by breathing space for the company to recover from financial distress.

It is important to note that not all efforts to rehabilitate a company are considered to be corporate rescue. For instance, restructuring a company's finances by altering the share capital under section 127 of CAMA 2020 can be a means to rehabilitate a company facing liquidity

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[96] See generally Milman David, 'Holding directors to account in order to promote good corporate governance and protect the public from abuse of limited liability' *Sweet and Maxwell Company Law Newsletter* (1 February 2013) 380, 1-5.

[97] David O Mbat and Eyo I Eyo, 'Corporate Failure: Causes and Remedies' (2013) 2(4) Business and Management Research 19, 21.

[98] David, 'Holding directors to account in order to promote good corporate governance and protect the public from abuse of limited liability' 1-5.

[99] R3, 'US "Chapter 11": Should It Be Adopted in the UK?' (*R3.org.uk*2012) <https://www.r3.org.uk/stream.asp?stream=true&eid=22119&node=194&checksum=2D326103575FF0F5D44AD7D2A6BD316A> accessed 10 September 2024.

[100] For a brief but important explanation regarding the impact of corporate failure on stakeholders of the company and its impact on the economy see Akintola, 'The Proposed Preferential Priority of Prepaying Consumers: A Fair Pack of Insolvency Recommendations?' (2018) Journal of Business Law 1-14, 2.

[101] Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Monograph Book, 2016) 3.

challenges, not a rescue, even though both processes can prevent liquidation.[102] This naturally raises questions as to the distinction between corporate rescue and other concepts such as corporate restructuring, business rescue, etc.

Corporate rescue and corporate restructuring are both valuable processes that can be effectively utilised to resolve corporate distress. However, they are two distinct procedures with separate objectives and outcomes. Whereas the main objective of corporate rescue is to prevent the company from liquidation and continue the business as a going concern, the objective of corporate restructuring is the reorganisation of the operational structure or finances of the company to maximise efficiency, profitability, and the overall performance of the company.[103] Unlike corporate rescue, which is focused on preserving the company's business and operations to prevent insolvency, corporate restructuring does not necessarily prevent insolvency. Corporate restructuring can happen even when the company is not in financial distress; it could simply be a pre-emptive measure or a proactive step to reorganise the operations of the company or enhance competitiveness based on market dynamics.[104] This is why the outcome of a successful restructuring is greater efficiency, profitability, and competitiveness in business - although it can pre-emptively prevent financial distress.

Since the 1980s, corporate reorganisation laws have evolved and adapted to the business environment. The process involves less court involvement than corporate rescue, which involves crucial procedural and court involvement.[105] In practice, restructuring may be used as a strategy to rescue a distressed company. However, as noted, a company can undertake any type of restructuring (financial, operational, or organisational) without the need to achieve a rescue outcome.[106] In other words, corporate rescue is an alternative to liquidation. So, what, then, is rescue in the context of insolvency? What do we mean when we use the term corporate rescue?

Generally, rescue means to take, recover, or save. The Merriam-Webster dictionary defines rescue as "to free from confinement, danger, or evil..."[107] Etymologically, the word rescue is a derivative of an Anglo-French word rescue*,* which means *shake off*. It also means to save or

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[102] Mergers and acquisitions are also classic restructuring tools. See section 849 of CAMA 2020.

[103] Finch (n 86) 308-309; Paul Davies and Sarah Worthington, *Gower and Davies' Principles of Modern Company Law* (10th edn, Sweet & Maxwell 2016) 822-825.

[104] John Armour, Antonia Hsu and Adrian Walters, 'The Costs and Benefits of Secured Creditor Control in Bankruptcy: Evidence from the UK' (2012) 8 Review of Law & Economics 101, 125; Goode, *Goode on Principles of Corporate Insolvency Law* (n 32) 350-352.

[105] See Sarah Paterson, *Corporate Reorganization Law and Forces of Change* (OUP Oxford 2020) 45-55.

[106] Finch (n 86) 380-381.

[107] Merriam-Webster.com Dictionary, s.v. "rescue," <https://www.merriam-webster.com/dictionary/rescue> accessed July 21, 2021.

deliver. In the context of insolvency, Belcher described rescue as "a major intervention necessary to avert eventual failure of the company".[108] Although this definition is far-reaching, rescue in the context of insolvency must involve a company in crisis or distress. Such a company could be undergoing a fiscal or monetary crisis, and actions can be taken such as management changes, adjusting finances, reducing staff, or simply changing the mode of operation. Rescue procedure refers to the process for undertaking these changes, and the processes - including rules to follow in saving the company - are referred to as the rescue procedure.

Another point to consider when defining corporate rescue is its nature: formal or informal. While the former refers to formal rescue procedures or, at times, other insolvency proceedings, the latter refers to contractual agreements outside the formal process. In the book *Corporate Rescue*, David Brown described corporate rescue as the "survival of the company or a substantial part of its business".[109] Although this definition can be considered a working definition of corporate rescue, it has two measure issues. First, it seems to characterise actions aimed at saving parts or any structure in the business and actions geared towards ensuring the survival of the legal entity as a corporate rescue. As this thesis will argue later, there is a remarkable difference between both actions.[110] While one seeks to rescue the business venture or undertaking, the other seeks to rescue the corporate entity. Similarly, there is a point of connectivity between both actions. If the part of the company's business saved remains in the original corporate entity, then the company's actions will still be considered a corporate rescue because the legal entity continues to exist.

Secondly, this definition is too wide in scope. Every action that ensures the company's corporate existence - including purely managerial decisions or the day-to-day business of keeping the company out of distress - will be classified as corporate rescue. This seemingly vague characterisation of corporate rescue appears to have attracted criticism. According to Belcher: "if rescue is defined simply as the avoidance of distress and failure, all management activity can be thought of as a constant and repeated rescue attempt".[111] Defining corporate rescue without including hybrid or inchoate attempts to save the company from perceived or real failures is exceedingly difficult. The difficulty stems from the lack of practical difference between saving the company or a part of its business.

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[108] Alice Belcher, *Corporate Rescue* (Sweet and Maxwell 1997) 12.
[109] David Brown, *Corporate Rescue: Insolvency Law in Practice* (John Wiley & Sons, 1996) 3.
[110] See ch 5, s 4.3.2.1, 152 - 155.
[111] Belcher (n 108).

A business undertaking or part thereof may be so vital that its failure may lead to the collapse of the company. This situation presents a more complex problem when considered in the light of wrongful trading provisions. The underlying question is: at what point will a director be liable for the civil offence of wrongful trading under section 214 of the IA 1986?[112] Or should directors be liable for both wrongful trading and breaching their duties, resulting in inevitable corporate failure?[113] This thesis argues that directors' actions taken to prevent the company from failing, especially when they involve an arrangement or compromise scheme, should be considered corporate rescue, except such actions result in liability for wrongful trading.[114]

In contrast, Omar and Burdette identified this important feature of corporate rescue when they described it as the "revival of companies on the brink of economic collapse and the salvage of economically viable units to restore production capacity and employment, as well as the continued rewarding of capital and investment".[115] Like Belcher, Omar and Burdette's definition encapsulates the technical nature and challenges characteristic of a rescue situation.[116] The definition does not only cover formal and informal rescue mechanisms; it includes actions necessary to avoid failure of the company and not the business or any part of the business venture. It also suggests that corporate rescue is outcome-determinative. A common determination in most of these definitions is the emphasis on the outcome of the intervention, leading to the avoidance of failure of the company.

Therefore, the term 'corporate rescue' in this thesis is construed to mean any action taken to salvage a company in a financial crisis and preserve its going concern value. As we will see, value is often an essential element in the rescue process, so the term corporate rescue is wide enough to include steps to avoid insolvency proceedings if it maximises corporate value.[117] Such intercession may be in the form of a formal legal process or an informal arrangement between the company and its creditors. The creditors may either be corporate or individual creditors, but the aim of intercession will be to save the failing corporate entity. This intervention can be a formal legal process, an informal arrangement - or both. In this regard, the goal of rescue is to restore the company to a liquid state and prevent liquidation. The section below discusses the theoretical context of the thesis.

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[112] Although CIGA 2020 suspended sections 214 and 246 of the IA 1986 as it involved the liability of directors for wrongful trading due to the uncertainty created by COVID-19, most of its provisions regarding directors' liability have since expired. Directors are back to facing this problem.

[113] *Wright v Chappell* [2024] EWHC 1417 (Ch).

[114] *Re Marini Ltd* (the liquidator of Dickenson and others) [2003] EWHC 334.

[115] David Burdette and Paul Omar, 'Why Rescue?' in J Adriaanse and JP van der Rest, *Turnaround Management and Bankruptcy* (Routledge 2017) 230.

[116] ibid.

[117] ibid (n 102).

2.3 Theoretical Context: Perspectives in Rescue Taxonomy

In the English Court of Appeal decision of *Nyali Ltd v Attorney General*,[118] Denning LJ opined that "You cannot transplant […English law] to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with common law."[119] Almost three decades after Denning LJ's famous analogy of the oak tree, legal transplant is still a challenging subject in comparative legal studies. At first glance, this statement seems problematic, given the influence of English law in most African jurisdictions and globalisation.

Yet, in spite of the commonalities of globalisation and the influence of the English legal system, the trend towards the transplantation of English law in Africa has not resolved the specific problem in most African jurisdictions.[120] So, is legal transplant bad? In a sense, it is wrong to assume that legal transplant is bad. After all, Denning LJ was not cautioning against legal transplant. By this, he meant that legal systems continue to borrow from each other.[121] However, he also highlighted the challenge of transplants, therefore, transposing English law to African jurisdiction is not an easy task.

As many countries within the African jurisdiction reform their laws on corporate insolvency, caution must be taken when implementing corporate rescue procedures from English law or any other jurisdiction. Ongutu J in *Re Nakumat Holdings Limited*,[122] observed the importance of exercising caution when transplanting corporate rescue tools in Kenya. According to Onguto J, "care must be taken when interpreting and applying Part VIII of KIA 2015, which is *in pari materia* with the UK Insolvency Act 1986… It may otherwise not thrive with the same gusto".[123] He further argued that corporate rescue tools must be tailored to meet the demands of local circumstances.[124]

Nigeria reformed its corporate insolvency law to introduce corporate rescue tools similar to those in leading Anglo-American jurisdictions. This section positions the discussion on Nigeria's corporate rescue reform in the context of legal transplant - from the UK and US insolvency systems to Nigeria. First, it introduces the discussion on the concept of legal

[118] *Nyali Ltd v Attorney General* [1955] 1 All ER 646.
[119] ibid 653.
[120] ibid.
[121] Silvia Ferreri and Larry Dimatteo, 'Terminology Matters: Dangers of Superficial Transplantation' (2019) 37(35) B.U. Int'l L.J. 35.
[122] *In re Nakumat Holdings Limited* [2017] Eklr.
[123] ibid para 36.
[124] ibid.

transplant and describes the theories to understand the underpinnings of corporate rescue law in Nigeria. A discussion on the approach to corporate rescue law in the UK and the US follows.

2.3.1 Legal Transplant

Legal Transplant is the transfer or transfusion of a legal concept, institution or phenomenon from a foreign jurisdiction to a local jurisdiction.[125] The subject of legal transplant is an old narrative that gained legal notoriety with the advancement in globalisation, trade, commerce and industries, especially in the 19th century. This rapid advancement in the study of legal transplants is due largely to the debate about the relevance of the subject itself as an approach to comparative law. The debate on transplantation is represented in the literature of two sound legal minds representing separate blocks of argument.[126] Watson, the Scottish legal historian renowned for coining the word "legal transplant", argued that legal transplantation or borrowing is the most fertile source of development in law; it transports ideas that lead to changes in most legal systems.[127]

In contrast to Watson's argument, and in his famous debate and criticism of the use of the metaphor 'legal transplant', Khan-Freud observed that although Members of Parliament in the United Kingdom undertake a search for new concepts, policies, techniques and ideas from foreign jurisdictions which may be assimilated into local jurisdictions, due to intervention of the environment and local circumstances, legal transplant will become ineffective.[128] That legal transplant can be ineffective is seen particularly when legal concepts are applied to jurisdictions which are conceptually and politically different. Montesquieu cautioned against transplanting legal concepts to conceptually and politically different jurisdictions.[129] The basic question is whether a legal transplant is possible. Legrand argued that a legal transplant is impossible because the law is not segregated from the society it is meant to regulate.[130] The premise of the criticism of legal transplant is the belief that law in a particular jurisdiction is only suitable for

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[125] I would like to make a caveat and one explanation. First, the caveat. Reference to the word Transplant does not carry any medical connotation, so that, it will not be an exercise in human anatomy or medical surgery. Now, the explanation. In this thesis, transplant will be construed to mean
the movement of legal ideas from one jurisdiction known as the donor jurisdiction to another jurisdiction called the donee jurisdiction.

[126] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37(1) The Modern Law Review 1, 1-27; cf Alan Watson, 'Legal Transplants and Law Reform' (1976) 92 Law Quarterly Review 79, 79-84.

[127] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 95; Alan Watson, 'Aspects of Reception of Law' (1996) 44 Am J Comp L 335, 335.

[128] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1, 1–5.

[129] Baron De Montesquieu, *The Spirit of the Laws* (New York: Hafner 1949). See also Baron Montesquieu, *De l'esprit des lois* (Thomas Nugent tr, first published 1748, 1750) XIII.

[130] Pierre Legrand, 'The impossibility of Legal Transplant' (1997) 4 Maastricht J Eur & Comp 2.

that specific society and cannot be transplanted to a different society or jurisdiction due to cultural, religious and even grammatical dynamics.[131]

While this thesis will not involve a detailed debate on the binaries of legal transplants, the thesis rejects Legrand's argument.[132] The assumption that law is not an abstract but real concept is based on a more nuanced approach to legal transplant. Although this thesis acknowledges the difficulty in transplanting a legal concept from foreign jurisdictions, transplantation is not impossible. However, it can lead to effective administration when laws are fused together, especially in a mixed system such as South Africa. This thesis emphasises that legal transplants are very difficult but not impossible. Therefore, law reformers should pay attention to the cultural dynamics of the donee or donor society before transplanting an idea or statute cross-jurisdictionally. For example, Nigeria transplanted the Infectious Disease Act 2000 from Singapore's Infectious Disease Act 1977 without considering the local dynamics, especially because Singapore was a one-party state when the law was enacted. The result of this situation could be dangerous, especially due to the lack of comparison of the local circumstances in the two jurisdictions before the process of transplantation.[133]

Legal transplant is important for the purpose of law reform and political, economic, and legal development. One notable example in this sense is South Africa, which transplanted the principles of separation of powers, bicameral legislation and judicial review from Anglo-American jurisdictions.[134] However, the greatest influence of foreign law in South Africa is the transplant of human rights law under the Constitution of the Republic of South Africa, 1996. Similarly, Legal transplant is important to this thesis because Nigeria, like most British former colonies such as Kenya, inherited most of its corporate laws from the UK.[135]

Nigeria's company statute and, by extension, insolvency policies and regulations have been transplanted from the common law of England and other corporate statutes or codes from England and Wales.[136] Virtually all laws in Nigeria have been transplanted, apart from Customary law. While the Nigerian Companies Ordinance 1912 is a transplant of the Companies (Consolidation) Act 1908 in England, the Nigerian Companies Act 1968 was a transplant and indigenisation of the English Companies Act 1948. More particularly, CAMA

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[131] Shen Zongling, 'Legal Transplant and Comparative Law' (1999) 51 (4) Revue internationale de droit comparé Octobre-décembre 853-857.
[132] ibid (n 130).
[133] cf Singapore's Infectious Disease Act of 1977.
[134] For a good example of an unreceptive legal transplant in South Africa, see Tay-Cheng Ma, 'Legal Transplant, Legal Origin, and Antitrust Effectiveness' (2013) 9 (1) Journal of Competition Law & Economics 65–88.
[135] ENM Okike, 'Corporate Governance in Nigeria: The Status Quo' (2007) 15(2) Corporate Governance 175.
[136] Ajibike Oludara Awolalu, 'Understanding and Evaluating the Enforcement of Corporate Law in Nigeria: The Case for Enhanced Public Civil Enforcement' (Durham theses, Durham University 2017).

2020 provisions on CVA and Administration are a transplant of the Insolvency Act 1986 and the Enterprise Act 2002 (EA 2002).

Therefore, to fully understand the philosophy behind the enactment of CVA and Administration provisions under CAMA 2020, one needs to understand the effectiveness of these tools in resolving distress and the court's interpretation of similar provisions in the donor jurisdiction. This reasoning begs the question of the relationship between legal transplants and comparative legal studies. The question is necessary when you consider the changes in society after Montesquieu wrote his chef-d'oeuvre, *De l'esprit des lois*.[137] Today, there is an inordinate movement of people across the globe; artificial borders are eliminated, so information sharing is increasingly significant in order to foster inter-state or intra-state collaboration. The effect is the ease in global trends and trade, but the difficulty is in the contextual and political problems that arise when you compare different legal systems, norms, institutions, and political cultures. Modern comparative legal scholars are interested in comparing the legal systems in different countries, recommending solutions, and transplanting ideas from foreign jurisdictions after objectively and critically evaluating how similar legal challenges have been addressed in the foreign jurisdiction. This is why Professor Kamba argued that legal comparison involves three main stages: (1) describing legal norms and laws; (2) identifying similarities and differences, if any; and (3) possible transplant of these laws and institutions.[138] When laws cautiously weaved into the fabric of one legal system are now transplanted into foreign legal systems, comparative legal scholarship raises the challenge of contextualising the criteria in which such comparison will be carried out. In this regard, the thesis aims to improve Nigeria's corporate rescue framework by identifying common trends and convergence in the select jurisdictions, evaluating the difference in the use of corporate rescue tools in the respective legal systems, and the transplantation of these rescue tools.[139]

To effectively utilise this methodology to identify the gaps and opportunities for improving Nigeria's corporate rescue framework, the thesis combines an approach of "Benchmarking" to measure the standard for best practice. The process of benchmarking involves setting ideals to identify standards of excellence and areas of improvement necessary to achieve those standards

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[137] Baron Montesquieu, *De l'Esprit Des Lois* (Flammarion 2019).

[138] WJ Kamba 'Comparative Law: A Theoretical Framework' (1974) 23 ICLQ 485.

[139] Compare this line of thought with the sentiments of one of the earliest comparative writers, the great philosopher Max Weber who had these perfectly immutable words to say about the main essence of comparative studies: "[C]omparative study [sh]ould not aim at finding 'analogies' and 'parallels', […] The aim should, rather, be precisely the opposite: to identify and define the individuality of each development, the characteristics which made the one conclude in a manner so different from that of the other. This done, one can then determine the causes which led to these differences." See Max Weber, *The Agrarian Sociology of Ancient Civilizations* (RI Frank tr, first published 1909, NLB 1976) 385.

- commonly regarded as "Best Practices".[140] The thesis utilises the key objectives for establishing an effective and efficient insolvency regime under the UNCITRAL Legislative Guide on Insolvency Law to measure the effectiveness and efficiency of CAMA 2020 in resolving financial distress in the absence of reliable statistical data.[141]

There are nine objectives identified under the UNCITRAL Legislative Guide. These objectives set out this thesis's criteria for measuring effectiveness and efficiency. To determine whether CAMA 2020 meets the benchmark for an effective and efficient insolvency regime, it will be measured against the insolvency statutes in Kenya and South Africa based on the nine objectives under the UNCITRAL Legislative Guide. Although this approach to implementing best practices is typically associated with research in industrial and health sectors,[142] this thesis envisages providing practical lessons from the comparison with select jurisdictions, specifically on the transplant of CVA and administration procedures.[143]

2.4 Insolvency Law Theories: Perspectives on Philosophical Taxonomies

There is no clearly defined theory that underpins corporate rescue law.[144] As a result, the theories of corporate insolvency law will be explored to support the theoretical framework for analysing the underlying philosophy of Nigeria's corporate rescue reform under CAMA 2020.[145] A starting point is to consider the underlying philosophy of corporate rescue under CAMA 2020. The underlying philosophy of Nigeria's insolvency law can be summarised as follows: the promotion of economic efficiency,[146] collective action and fairness,[147] business rescue and continuity,[148] stakeholder protection,[149] and alignment with international best practices.[150] All but the alignment with international best practices can be directly linked to the

[140] Khurrum S Bhutta and Faizul Huq, 'Benchmarking – Best Practices: An Integrated Approach' (1999) 6(3) Benchmarking: An International Journal 254, 254.
[141] United Nations Commission on International Trade Law (UNCITRAL), 'UNCITRAL Legislative Guide on Insolvency Law' (United Nations 2005) (UNCITRAL Legislative Guide) 10 – 15.
[142] Amina Ettorchi-Tardy, Marie Levif and Philippe Michel, 'Benchmarking: A Method for Continuous Quality Improvement in Health' (2012) 7(4) Healthcare Policy | Politiques de Santé e101, e101-19.
[143] Alan Watson, 'Comparative Law and Legal Change' (1978) 37(2) The Cambridge Law Journal 313, 318.
[144] Goode (n 40) 59-61.
[145] For a broad debate about corporate rescue theories see John M Wood, *The Interpretation and Value of Corporate Rescue* (Edward Elgar Publishing 2022) 48-85.
[146] CAMA 2020, s 434. Details in ch 4, s 4.2 (p 65).
[147] CAMA 2020, ss 438 and 439.
[148] CAMA 2020, ss 434-454.
[149] CAMA 2020, s 434(1).
[150] Laolu Akande, 'We Must Sustain the Ease of Doing Business Reforms- Osinbajo – the Statehouse, Abuja' (The statehouse, 21 July 2020) <https://statehouse.gov.ng/news/we-must-sustain-the-ease-of-doing-business-reforms-osinbajo/> accessed 19 June 2024.

provisions of CAMA 2020. The last point, though not directly covered by CAMA 2020, can be inferred from the Presidential statement on ease of doing business.[151]

2.4.1 The Traditionalists and Proceduralists' theories

Insolvency theories are broadly classified into two schools of thought: the "Traditionalists" and the "Proceduralists".[152] While the former focuses on protecting and enforcing pre-existing contractual and property rights of the company's creditors and other stakeholders, the latter emphasises the resolution of financial distress through the design of a fair and efficient insolvency framework. In other words, the traditionalist approach emphasises the protection of the substantive rights of the company's creditors and an orderly liquidation process. Conversely, the proceduralist approach emphasises the design of efficient and flexible processes that can rehabilitate distressed companies to maximise economic return.[153]

However, there appears to be a point of commonality and difference between the two schools of thought on the purpose of insolvency law. Both the traditionalists and the proceduralists emphasise the importance of setting up frameworks to protect the legitimate expectations of the different stakeholders in the event of insolvency. The point of difference aligns with the normative purpose of this framework. Whereas the normative basis for insolvency law from the proceduralist perspective is the triumph of individual autonomy based on priority rules which requires the enforcement of contracts between the creditors and the company to promote free market ideals, the normative basis for the traditionalist is the triumph of collective good, which reflects in balancing the interest of all stakeholders to the promotion of economic efficiency.[154]

In relation to corporate rescue, traditionalists argue that insolvency law's main purpose is to reorganise financially distressed companies to prevent liquidation and maximise the company's going concern value or preserve the company as a legal entity.[155] Conversely, proceduralists argue that rescuing a company is a market-driven process. Consequently, insolvency law should

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[151] ibid

[152] For a general discussion on Corporate rescue theories, see Vanessa Finch and David Milman, *Corporate Insolvency Law Perspectives and Principles* (3rd edn, Cambridge University Press 2017) 1-25, 58-94; John Wood (n 137) 52. For specific discussion on these two schools of thought, see Hamiisi Junior Nsubuga, 'Bankruptcy Legal Theory: The Traditionalist and Proceduralist Theoretical Models', *Employee Rights in Corporate Insolvency: A UK and US Perspective* (1st edn, Routledge 2019) 24-43.

[153] Elizabeth Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92(2) Michigan Law Review 336.

[154] Alan Schwartz, 'A Normative Theory of Business Bankruptcy' (2005) 91(5) Social Science Research Network 1199, 1202.

[155] Medha Shekar and Anuradha Guru, 'Indian Insolvency Law' (2020) 45 Vikalpa: The Journal for Decision Makers 69.

not seek to prolong the life of a distressed company but only prevent untimely liquidation.[156] This philosophical divide in the normative nature of insolvency law presents a continuing challenge beyond the divergence in the traditionalist and proceduralist theoretical positions - a divide entrenched in the deep-rooted debate on the essence of company law and companies. These debates are espoused in the normative theories on corporate social responsibility, which consider the role of the company, particularly pre-insolvency.

Two main theories of corporate governance assert the company's role in the context of insolvency: the shareholder and stakeholder theories. Although these theories are more relevant in pre-insolvency, they show the nexus in the role of the directors pre- and post-insolvency. One group of theorists posits that a company's principal role is to increase shareholders' value.[157] Shareholder primacy theorists argue that company management (directors and managers) owes the shareholders of the company a fiduciary duty to act in their best interests. This idea is typically interpreted as maximising profits and share prices, which flows from the belief that the company belongs to its shareholders, who only advance the company money to be spent in ventures they authorise.[158]

Although this view on maximising shareholders' interest aligns to some extent with Adams Smith's views on self-interest and competition, it would be too anachronistic to group them together. First, on a theoretical basis, the shareholder theory is a creation of the 20th century.[159] Secondly, and more importantly, Smith's perception of a company's role as principally pursuing profit within a free-market system is too antiquated.[160] Modern companies are not restricted to regulatory measures that support a narrow spectrum of society – those of shareholders.[161] Contrary to Smith and other Shareholder primacy theorists, the modern view of a company's role in the event of insolvency is to consider the interests of creditors.[162] In fact, Milton Freidman summarises the shareholders' theory with clarity in his seminal work, "The Social Responsibility of Business is to Increase its Profits" - thus:

> "There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the

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[156] ibid 70.
[157] Adolf A. Berle and Gardiner C. Means, 'The Modern Corporation and Private Property.' (1970) 80(317) The Economic Journal 120.
[158] Lynn A Stout, 'Bad and Not-So-Bad Arguments for Shareholder Primacy' (2002) 75 S. Cal. L. Rev. 1189, 1190.
[159] ibid 1189; D. Gordon Smith, 'The Shareholder Primacy Norm' (1998) 23 J Corp L 277.
[160] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations. Vol. II* (Bibiobazaar 2010).
[161] William Rees-Mogg, *Adam Smith: An Inquiry into the Nature and Causes of the Wealth of Nations, Volume II* (Routledge 1995).
[162] *BTI 2014 LLC v Sequana SA* [2022] UKSC 25.

rules of the game, which is to say, engages in open and free competition without deception or fraud." [163]

The above quote encapsulates the core of the argument in support of shareholders' theory.[164] Focusing on maximising profit within the bounds of law and ethical considerations mostly contributes to a broader social good, which may not be in the interest of the shareholders.[165] This is why stakeholder theorists view companies as economic institutions with dual functions: "social service as well as a profit-making function".[166] This version of the role of a company encompasses the narrow version that confines the company's role to the service of the shareholders and includes an extended version - to serve employees, consumers, and the wider community.[167]

Unlike the shareholder primacy theory which emphasises the maximisation of shareholder value, the stakeholder theory considers the interests of all its stakeholders, making a profit for shareholders in its decisions and operations. Although there have been several scholarly works prior to 1984, Edward Freeman popularised this theory in his seminal work on *"*Strategic Management".[168] Freeman clarified the company's role pertaining to different *stakeholders*: Shareholders - making a profit; Employees - providing job security; Consumers - providing quality products; and Community - contributing to the welfare of the larger community.[169]

This normative view of the company's role appears to be inimical to the separate legal personality principle. Since 1897, companies have been considered legal entities - in and of themselves. [170] Therefore, shareholders may not be considered as the legal owners of the company in a strict sense. In modern times, certainly, to insolvency, the interest of the shareholder may not be prioritised over the interest of the creditors. In *BTI 2014 LLC v Sequana SA and others,*[171] the court affirmed this rule of thumb in insolvency cases.[172] Lord Briggs sets

[163] Milton Friedman, 'The Social Responsibility of Business is to Increase its Profits' *The New York Times Magazine* (New York, 13 September 1970).
[164] Adolf A. Berle, 'Corporate Powers as Powers in Trust' (1931) 44(7) Harvard Law Review 1049.
[165] ibid 32.
[166] Merrick Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45(7) Harvard Law Review 1145, 1148.
[167] Stout (n 150) 1189.
[168] Edward Freeman, *Strategic Management: A Stakeholder Approach* (Cambridge University Press 2010).
[169] ibid.
[170] *Salomon v A Salomon and Co Ltd* [1897] AC 22.
[171] *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25.
[172] ibid 81-82.

out the modern principle contrary to the shareholders' primacy view that "directors owe their duties to the company, rather than directly to shareholders or to creditors".[173]

As a corollary to corporate social responsibility theories, the traditionalists' and proceduralists' debate over the normative nature of insolvency law is carried over to this thesis to understand the fundamental influence of insolvency theory and Nigeria's insolvency regime. For example, the creditors' bargain theory has a foundational nexus with the shareholders' theory. While the shareholders' theory emphasises shareholders' interest in corporate governance, the creditors' bargain theory emphasises creditors' interest in insolvency. Both theories take a restrictive view of the role of companies and the interests that corporate rescue should serve.

Similarly, CAMA 1990 seems to have relied more on the proceduralist ideology, which relies on priority rules and liquidation interest, aligning more with protecting creditors' interest. CAMA 2020 adopts a more expansive view that considers the interests of other stakeholders. As observed, the traditionalist view of insolvency is wider in scope and more inclusive in approach beyond the economic interest of the creditor to maximise debt return.[174] Unlike the proceduralist view, which relies on priority rules and the liquidation interest of creditors, this view, as we will see from a cursory look at the side-shoot of these theories below, considers social factors in the insolvency process, so that the interest of the creditors cannot determine the lifecycle of the company.[175]

2.4.1.1 The Creditors' Bargain Theory

Thomas Jackson pioneered the creditors' bargain theory, which articulates the position that bankruptcy laws should closely follow the position that the creditors would have reached among themselves if they had anticipated the debtor's insolvency at the contracting phase.[176] The approach prioritises the rights of the creditors to maximise debt return and the enforcement of pre-insolvency rights. This theory has three key aspects: enforcing creditors' pre-insolvency rights, providing a predictable and orderly process, and adhering to priority rules. In this regard, the primary question is whether the law protects the interest of the creditors as a whole? Here,

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[173] ibid 277. For further analysis on the debate, see Leo E. Strine Jr., 'The Social Responsibility of Boards of Directors and Stockholders in Charge of Control Transactions: Is There Any There There' (2002) 75 S Cal L Rev 1169.

[174] Donald R. Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 Tex L Rev 541; cf Alan Schwartz, 'A Contract Theory Approach to Business Bankruptcy' (1998) 107(6) The Yale Law Journal 1807.

[175] Douglas G. Baird, 'The Uneasy Case for Corporate Reorganizations' (1986) 15(1) The Journal of Legal Studies 127, 133.

[176] Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Beard Books 2001) 7 – 45.

this theory takes the more restrictive approach of the proceduralist by limiting the role of insolvency law to the consideration of pre-insolvency bargain - prioritising creditor interest despite acknowledging the interest of other stakeholders.[177] However, the interests of other stakeholders are considered only insofar as they align with the interests of the creditors.

The rationale for prioritising the creditor's interest is not just the imposition of a collective method of debt collection, but the imposition of compulsory proceedings.[178] The proceedings' outcome is the value distribution based on insolvency entitlements. The relevant question here regarding corporate rescue is: whose interest should insolvency law serve? The historically recognised purpose of insolvency law is to solve the common pool problem.[179] This view of insolvency provides a compulsory procedure for solving the common pool problem that arises from diverse claims to the limited assets of the company by maximising collective returns to creditors.[180]

When this theory is applied in a practical sense, the main question to determine in an insolvency regime is whether there is a framework for the collective interest of the creditors. As we will see in the later part of this chapter, the US Chapter 11 procedure demonstrates the practical application of creditors' bargain theory. The procedure is partly a response to this common pool problem at the core of insolvency. Thus, collective action will enhance the assets of the company and ensure equitable treatment of the creditors.[181] This allows for winding up, structural reorganisation plans, or business sales, as well as maximising the company's assets and enforcing pre-insolvency rights based on priority rules. In *Butner v. United States*, the US court echoed this sentiment when it expressed support for insolvency law to recognise and support proprietary interest.

2.4.1.2 Contractarian Theory

These theorists, championed by Robert Rasmussen, see companies as a connection - albeit inchoate - to a contract among different parties, including the company directors and other stakeholders.[182] Insolvency law should therefore be seen as a collection of contract enforcement

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[177] ibid.

[178] Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Beard Books 2001) 13.

[179] ibid 10-14; Edward Janger and Adam J Levitin, 'The Proceduralist Inversion–a Response to Skeel' (2020) 130 Social Science Research Network 335.

[180] Kenneth Ayotte and David A Skeel, 'Bankruptcy Law as a Liquidity Provider' (2013) 80(4) The University of Chicago Law Review 1557.

[181] Thomas H. Jackson and Robert E. Scott, 'On the Nature of Bankruptcy: An Essay of Bankruptcy Sharing and the Creditor's Bargain' (1989) 75(2) VA. L. REV. 155, 155-204.

[182] Robert K. Rasmussen, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy ' (1992) 71 Tex L Rev 51.

instruments which allow the negotiation of terms between the company creditors and debtors. The idea is that these contract and agreement terms should be respected and enforced in insolvency proceedings.[183] That is to say, this view acknowledges the role of institutions such as the courts and other authorities in the insolvency process but limits their role to facilitating and supporting the private agreement of the parties through the administration and provisions of standards that the parties will elect to abide by. The role of the court in this regard also includes the resolution of insolvencies through 'hypothetical logic' that merely fills the gaps in inchoate agreements.[184] Although this view also acknowledges the interests of other stakeholders apart from the creditors, it considers the network of interests of these stakeholders based on the terms of their agreement with the company. This is a departure from the Creditors' bargain theory that focuses on creditors' interests.

2.4.1.3 Communitarian theory

The communitarian theory, as advanced by Elizabeth Warren, focuses on the role of insolvency law in protecting the broader interests of stakeholders.[185] The idea is that the services of a company impact not just the immediate stakeholders or parties to the transactions affected but also a larger community that may be impacted by the business of the company. Therefore, insolvency law should consider corporate failure's social and economic consequences and seek to balance individual and collective interests.[186] Consequently, to assess an insolvency regime from this prism, the criteria to consider is whether the insolvency framework protects the interest of multiple stakeholders, which includes company employees, suppliers, and the larger community.

It is important to state the fact that communitarian theory shares some characteristics with multiple value theory, which posits that insolvency law should seek the fulfilment of multiple goals beyond the satisfaction of the creditor's interest. These goals include the preservation of the value of the company as a going concern, the protection of employees, and the mitigation of economic impact on a broad spectrum of stakeholders, including the stakeholders of the company and society at large.[187] While it is clear that both theories espouse an expansive and more inclusive view of the role of insolvency law by focusing on a broad interest beyond that

[183] ibid 54-65.
[184] David Gibbs-Kneller, David Gindis and Derek Whayman, 'Not by Contract Alone: The Contractarian Theory of the Corporation and the Paradox of Implied Terms' (2022) 23 Eur Bus Org Law Rev 573, 573–601 (2022).
[185] Elizabeth Warren, 'Bankruptcy Policy' (1987) 54(3) The University of Chicago Law Review 775, 775–814.
[186] ibid.
[187] Saleh Al-Barashdi and Horace Yeung, 'An Assessment of Various Theoretical Approaches to Bankruptcy Law' (2018) 9 Journal of Arts and Social Sciences 23.

of the creditors, there are two important characteristics which distinguish these theories. Firstly, while the focus on the role of insolvency law from a communitarian perspective is the company's social responsibility to the community, the focus from a multiple values perspective is broader, including a larger societal and economic impact of corporate failure on the economic development of the society.

Although there are other theories of insolvency law that are not covered by this thesis, the central theoretical point in these theories is the question of how insolvency law should manage corporate financial distress and failures. These theories offer different perspectives on managing corporate financial distress and failure. One view applies a restrictive approach to managing corporate financial distress, while another applies a more inclusive and expansive approach. Whether one expresses a preference for the former or latter view, it is important to observe a common trend in US bankruptcy scholarship. That is the emphasis on a court-based approach in resolving corporate distress. The US theoretical literature on insolvency, particularly from Jackson and Baird, emphasises a court-based approach that is consistent with the creditor's bargain theory.[188] Court-based approaches such as Chapter 11 procedure, which preserves the company's value while preserving creditor interest and hierarchies, provide for debtor-in-possession financing and contract renegotiation to preserve the business as a going concern. However, this approach, while robust and effective in resolving distress in the US, relies heavily on the presumption that the legal system, market, and infrastructure are sophisticated. The challenge, however, is that these conditions are mostly not prevalent or underdeveloped in the context of an emerging and developing economy, particularly across African jurisdictions such as Nigeria. Hence, the need for a tailored-made approach—integrating Kenya and South Africa's models in this thesis, to provide an approach that aligns with Nigeria's economic and social-legal context.

Regardless of its shortcomings, the US approach, apart from being effective, is consistent with the reasoning of most insolvency law theorists on the importance of the law in economic development pre-insolvency. Pre-insolvency, an effective and efficient insolvency system should facilitate entrepreneurship, innovation, and access to credit.[189] This thesis however is more concerned with the approach to insolvency in post-insolvency. There appears to be a consensus, at least from the traditionalists - albeit with varied approaches - that post-insolvency,

[188] Jackson (n 176) 12–15; Baird, 'The New Face of Chapter 11' (2004) 12 Am Bankr Inst L Rev 69.

[189] Gurrea-Martínez (n 35).

the law should provide tools for the rescue of financially distressed but viable companies and liquidate non-viable companies.[190]

Evaluating these theories is important to understanding the fundamental principles that influence policymakers and institutions in developing, organising, interpreting, and implementing the insolvency framework in specific jurisdictions. It provides diverse lenses for understanding and evaluating the fundamental philosophy influencing the reforms, the rescue model, and the treatment of different stakeholders in these jurisdictions. As we will see in the next section, these theories are crucial in understanding the practical approach to corporate rescue in different jurisdictions.

2.5 Approach to Insolvency Law: The Rescue Perspective

Modern economies are devoting resources to creating innovations supporting an efficient corporate rescue regime. Increasingly, resolving insolvency is becoming synonymous with creating a modern corporate rescue culture as an alternative means to resolving the collective pool problem among creditors in the event of insolvency.[191] Corporate rescue policies in most jurisdictions are now formulated to break the dichotomy between formal and informal rescue systems. This is done by offering legislative efficacy to purely contractual agreements outside the formal rescue procedures which are stipulated under the various corporate rescue legislations. What are the differences between formal and informal corporate rescue mechanisms, and is this classification the sole legal ambit for defining the corporate rescue policies of any jurisdiction?

2.5.1 Formal Corporate Rescue Mechanism

A formal corporate rescue mechanism is a developed system of a corporate rescue procedure that sets out a framework of measures to save a company from liquidation. In practice, parties usually tread on the heels of a step-by-step procedure in the corporate insolvency legislation. Some leading examples of formal corporate rescue mechanisms include the CVA and the Administration procedures under the UK IA 1986. The formal corporate rescue procedure in the US is contained in Chapter 11 of the United States Code 1978 (chapter 11 procedure).[192] Chapter 11 procedure statutorily provides a process for debt reorganisation and operational

[190] ibid 1.
[191] In so far as insolvency is a function of economic or financial distress or even both. See Schwartz (n 154) 1200.
[192] Cornel Law School, '11 U.S. Code Chapter 11 - REORGANIZATION' (*LII / Legal Information Institute*2019) <https://www.law.cornell.edu/uscode/text/11/chapter-11> accessed 5 September 2024.

restructuring under the supervision of the court.[193] There are also formal restructuring devices under company law, which can be used to restructure a company on its own or in combination with other insolvency tools to achieve a rescue goal.[194] In practice, restructuring tools under company law can be combined with other insolvency tools, such as administration or even the new standalone moratorium under the Corporate Insolvency and Governance Act 2020 (CIGA 2020), to effect rescue.[195]

Historically, formal corporate rescue procedure in the UK can be traced back to the Joint Stock Companies Arrangement Act 1870.[196] While there is evidence of some form of rescue mechanism in the early 20th century, a sophisticated framework for corporate rescue began to develop only in 1870, following the financial crisis occasioned by a prolonged recession.[197] This development crystallised into the Insolvency Act 1986, as will be discussed later in this thesis. This is the single most important piece of legislation which changed the underpinnings of the philosophy of UK insolvency law from liquidation to rescue.[198] Formal corporate rescue procedures in the US were developed as an alternative route to liquidating a financially distressed company. As the discussion in section 2.4 shows, the rescue procedures under the IA 1986 and chapter 11 - which introduced rescue solutions for all types of businesses, including corporate entities in the US - are fundamentally different.[199] These procedures are examined to highlight the importance of an effective and efficient corporate rescue regime promoting the rescue culture.

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[193] Cornel Law School, '11 U.S. Code Chapter 11 - REORGANIZATION' (*LII / Legal Information Institute*2019) <https://www.law.cornell.edu/uscode/text/11/chapter-11> accessed 5 September 2024.

[194] Companies Act (CA) 2006, Pt 26 and 26A.

[195] See CA 2006, ss 895-901 (Schemes of Arrangement) and ss 901A-901J (Restructuring Plans). For an example of the combined use of these devices, like the Lehman Brothers administration, see Paul Davies and Sarah Worthington, Gower and Davies' Principles of Modern Company Law (11th edn, Sweet & Maxwell 2022) 930-932.

[196] ibid (n 24).

[197] Yet, it was in 1861 that Bankruptcy and Insolvency were separated, and insolvency was given a restrictive meaning. For a complete examination of the historical development of insolvency law, see Milman, *Personal Insolvency Law, Regulation and Policy* (Routledge 2016) 40 – 43. See also Sir Kenneth Cork (Chairman), Insolvency Law and Practice: Report of the Review Committee (Cmnd. 8558) (HMSO, 1982) ("Cork Report").

[198] The philosophy espoused by Cork and some remarkable innovations in the Insolvency Act 1986 formed part of the provisions in the updated statute, the Enterprise Act 2002 (EA 2002), which introduced the "out-of-court" administration mechanism.

[199] McCormack, 'Control and Corporate Rescue - Anglo-American Evaluation' (2007) 56 International and Comparative Law Quarterly 515, 518. For a thorough argument against the Chapter 11 procedure, see Bradley and Rosenzweig, 'The Untenable Case for Chapter 11' (1992) 101 Yale LJ 1043; in contrast see Warren, 'The Untenable Case for the Repeal of Chapter 11' (1992) 102 Yale LJ 437.

2.5.2 Informal Corporate Rescue Mechanism

An informal corporate rescue mechanism refers to simple steps which are taken to save a company from failing or to prevent a company from going into liquidation without following the established procedures under the law. An example of an informal corporate rescue mechanism is a 'sell-off' in which a company in distress sells parts of its business to its managers or another company to raise capital.[200] This type of informal rescue scheme allows the company in distress to complete the sale of part of the business in a timely manner, and without unnecessary and adverse publicity. Its advantage is that it is very flexible, saves cost and time, and preserves the company's value.[201] This is mostly an internal process, usually pioneered by the directors of the company, the shareholders of the company, or both. In other words, measures can be taken by the company to save itself from liquidation. However, it is possible that some external elements or bodies can also trigger an informal rescue process. For example, the company's bankers may carry out a forensic audit of the company's balance sheet and determine whether certain measures should be taken to avert the imploding danger of the company failing.

Although there is no conclusive empirical evidence to demonstrate the precise extent and importance of third-party involvement in the informal corporate rescue process, the anecdotal evidence available since the establishment of the Insolvency Act 1986[202] seems to point to the fact that relevant laws support the timely intervention of the company's bankers and directors.[203] In practice, once the bankers notice that the company's finances are no longer stable and will need some drastic intervention, they normally prompt the company directors, who will engage the services of a professional to investigate and proffer measures to save the company. This is why secured creditors - such as banks - dominated the handling of corporate

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[200] Ruzita Azmi and Adilah Abd Razak, (2014) 'Corporate Rehabilitation: Informal Corporate Rescue Mechanisms for Troubled Companies in the United Kingdom and Malaysia' 22 (s) Soc. Sci. & Hum. 161 – 182. This type of rescue tool serves both the company and the creditors: it is mostly suitable for companies facing short-term liquidity crisis because it allows the company to quickly re-organise with little or no publicity. On the other hand, the prospect of a higher return in the event that the company is successfully kept as a going concern gives consumers confidence.

[201] For the merit and demerit of the informal corporate rescue tools, see Finch, *Corporate Insolvency Law: Perspectives and Principles* 209–10; David Brown, *Corporate Rescue: Insolvency Law in Practice* (Wiley Series in Commercial Law, New York 1996) 10.

[202] Insolvency Act 1986, s 214. The combined effect of the wrongful trading provisions and the provision on unfit directors under the Insolvency Act 1986 and the Company Directors Disqualification Act 1986 respectively, provide increased scope especially for directors to react in earnest. See Company Directors Disqualification Act 1986, s 6 which repealed and replaced section 300 of the Companies Act 1985 (Schedule 10 of the Insolvency Act 1985).

[203] David Brown (n 109) 4-5.

distress pre-Enterprise Act.[204] The banks were motivated to recover their debts by using their expertise to identify when a company's finances were no longer stable, so they could act quickly to recover the debt.[205] Some have argued that this approach to debt recovery could create an unreasonable incentive to liquidate the company, especially when the creditor has over-secured the debt.[206]

However, with the abolition of administrative receivership under the EA 2002 and subsequent development in the sector, this practice seems to have been abandoned.[207] The banks will now insert a clause in the agreement allowing them to sell delinquent debts to debt buyers, meaning the banks no longer need to take pre-emptive action to put the company in intensive care.[208]

An example of an informal corporate rescue mechanism is a 'Sell-off' in which a company in distress sells parts of its business to its managers or another company to raise capital.[209] The advantage of this type of informal rescue scheme is that it is very flexible, saves cost and time, and preserves the company's value.[210]

While the origin of informal corporate rescue devices - especially with regards to the practice of debt restructuring - is traceable to the previous days of the development of sovereign debt defaults, its usage seems to have developed towards the close of the medieval period, popularised in the 19th century and continued well into the 20th century.[211] Nonetheless, the modern use of informal corporate rescue devices can be attributed to the Bank of England.[212]

In the 1970s, the Bank of England developed some general principles to secure the cooperation of companies in financial crisis by creating established simple principles governing an informal

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[204] Parry and Gwaza (n 24).

[205] ibid citing Riz Mokal, 'Administrative Receivership and Administration--an Analysis' (2004) 57(1) Current Legal Problems 355.

[206] ibid.

[207] It seems like Pre-pack now acts as a quasi-receivership tool. See Kayode Akintola and David Milman, 'The Rise, Fall and Potential for a Rebirth of Receivership in UK Corporate Law' (2019) 20(1) Journal of Corporate Law Studies 1.

[208] Parry and Gwaza (n 24).

[209] Ruzita Azmi and Adilah Abd Razak, (2014) 'Corporate Rehabilitation: Informal Corporate Rescue Mechanisms for Troubled Companies in the United Kingdom and Malaysia' 22 (s) Soc. Sci. & Hum. 161 – 182. This type of rescue tool serves both the company and the creditors: it is mostly suitable for companies facing short-term liquidity crises because it allows the company to re-organise with little or no publicity quickly. On the other hand, the prospect of a higher return in the event that the company is successfully kept as a going concern gives consumers confidence.

[210] For the merit and demerit of the informal corporate rescue tools, see Finch, *Corporate Insolvency Law: Perspectives and Principles*, 209–10; David Brown, *Corporate Rescue: Insolvency Law in Practice* (Wiley Series in Commercial Law, New York 1996) 10.

[211] Goode, *Goode on Principles of Corporate Insolvency Law* para10-04. For the impact of the informal corporate rescue process on corporate governance, see generally David Milman, *Governance of Distressed Firms* (Cheltenham: Edward Elgar Publishing Limited 2013) ch 4 and 5.

[212] Bank of England, 'Bank of England Quarterly Bulletin: February 1993' <https://www.bankofengland.co.uk/-/media/boe/files/quarterly-bulletin/1993/the-london-approach.pdf> accessed 7 August 20-21.

rescue process called the "London Approach". So - what is the London approach, and what are its guiding principles? According to the British Bankers Association, the 'London approach' is "a non-statutory and informal framework introduced with the support of the Bank of England.[213]

The crucial point to note is that it is an organised contractual arrangement to settle conflicting interests amongst creditors in a company with an elevated risk of debt exposure. [214] It allows the company to navigate through monetary crises while maintaining the value of the company's going concern without recourse to statutory hurdles. It has been argued that the contractual basis for informal rescue, including the Bank of England approach, is the implied consent drawn from the power to compromise or modify the rights of all or any class of shareholders and creditors under the Memorandum of Association of the company.[215]

2.6 Underpinnings of Corporate Rescue Policies: The Anglo-American Panorama

Discussion surrounding the underpinnings of corporate rescue law is intensely rooted in the examination of corporate rescue theories and policies, particularly in jurisdictions such as the UK and the US. Given their global influence in legal and financial systems, these two countries play significant roles in the development of corporate rescue culture in other jurisdictions. Post-2008 global financial crisis, most jurisdictions globally have developed a hybrid rescue policy that integrates the US and UK approaches to corporate rescue.[216] As evidenced in chapters three, four and five of this thesis, variants of these approaches - including elements of US debtor-in-possession and UK management displacement approaches - were transplanted in some African countries, such as Nigeria, Kenya, and South Africa. Although the theories were discussed in section 2.3.2, it is important to examine corporate rescue policies in each of these jurisdictions to understand how best practices - in Anglo-American jurisdictions and globally

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[213] See the British Banking Association Policy Bulletin of 16th February 2004 cited in Chris Howard, 'Law and Practice: Contributed by Sullivan & Cromwell LLP' < https://www.sullcrom.com/files/upload/Insolvency_UK_Chapter.pdf> accessed 7 August 2021. See particularly pages 547 – 548 for the definition of 'London Approach'; Goode (n 32) paras 10-04 and 10-135. For an example of institutional intervention to save companies affected by COVID-19, see HMRC, Business and Economy (Her Majesty's Revenue and Customs 12 March 2013) <https://data.gov.uk/dataset/edd98f8d-a453-46e8-9541-a0d8ddeb096e/business-payment-support-service-official-statistics> accessed 29 March 2022.

[214] See generally e Finch and Milman (n 152) 223 – 225; INSOL International, 'Statement of Principles for a Global Approach to Multi-Creditor Workouts' (Report) (2000), 2–3. For the problems bedevilling the Bank of England approach, see Vanessa Finch, 'The Recasting of Insolvency Law' (2005) 68 Modern Law Review 713, 727.

[215] *Re Norwich Provident Insurance Society* (1878) 8 Ch D 334; Pennington, *Corporate Insolvency* (Butterworths 1991) 358 – 359.

[216] Andrew Keay and Peter Walton, *Insolvency Law: Corporate and Personal* (6th edn, LexisNexis 2020) 289 - 290.

- align with Nigeria's corporate rescue policy. The discussion, therefore, begins by defining corporate rescue policy before examining the approaches in the respective jurisdictions.

In the context of this thesis, policy is the network of laws, regulatory initiatives, courses of action, and legal measures promulgated by a competent entity or agency of government. Therefore, corporate rescue policy is the collection of corporate rescue statutes, regulations, initiatives, actions, and measures to prevent or save a company in crisis from failing. One may ask, why the term corporate rescue policy and not corporate rescue law?

Without going into the debate and analysis of law and policy in different contexts, this thesis adopts the term "corporate rescue policy" as a broad characterisation for all corporate rescue measures, including laws and statutes promulgated to support the rescue of companies in financial crisis. It encompasses formal and informal rescue methods, including regulations and directories to rescue the company. Analysing corporate rescue policy provides robust insight into the range of options available for resolving companies' distress. The discussion focuses on the development of corporate rescue in Anglo-American jurisdictions such as the UK and the US, even though the statutory provisions, procedures, and rescue tools for the rescue of distressed companies in both jurisdictions are different.[217]

The justification for exploring the UK and US approach to corporate rescue in this thesis is driven by two factors: First, these jurisdictions offer established corporate rescue frameworks for evaluating Nigeria's corporate rescue reform from a comparative perspective; second, the frameworks provide a benchmark for legal and practical reforms in many jurisdictions. The UK, with its common law heritage, has a robust insolvency regime, which was updated by the reforms under the CIGA 2020, that introduced permanent measures such as a free-standing moratorium to give UK companies breathing space to rescue or restructure, making it a potentially suitable alternative or complementary tool to the CVA in Nigeria. Similarly, the US's Chapter 11 process, through its debtor-in-possession procedure, allows companies to continue operating while restructuring. This procedure is globally recognised mostly due to its successes in rescuing large companies.[218]

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[217] The evidence in Table 4 of the study conducted by La Porta et al in 1998 seems to put the UK way ahead of the US on creditors' rights – the UK scored the maximum 4-point score compared to the US with a 1-point score. See La Porta, Lopez-De-Silanes, Shleifer and Vishny, 'Law and Finance' (1998) 106 (6) Journal of Political Economy 1113, 1136. For a challenge of this claim that US law is 'pro-debtor' and UK law is 'pro-creditor', see McCormack, *Corporate Rescue Law – An Anglo-American Perspective* (Edward Elgar Publication 2008); ibid (n 199) 515-51.

[218] David A Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton University Press 2001) 232–235.

However, corporate rescue laws do not operate in isolation, but are influenced by a variety of factors, including local circumstances that may impact its applicability.[219] It is therefore impracticable to merely transplant the UK and US approaches into a developing country such as Nigeria, without considering modifications that aligns with Nigeria's unique economic and social-legal contexts. To address this challenge, the thesis adopts a more structured approach that considers African countries such as Kenya and South Africa with shared regional challenges, such as colonial legacy, economic volatility and limited judicial resources. By following this approach, it provides practical examples of how similar corporate rescue mechanisms have been adapted, offering a different perspective which the UK and US models will not provide due to differing contexts. Kenya and South Africa do not only share similar developmental challenges, legal systems, and cultural factors that make their experiences directly applicable to Nigeria, they also adopt features of these advanced corporate rescue models, reflecting the importance of successful adaptation in the African context. By adopting this approach, the thesis provides practical lessons for adapting these frameworks to meet specific local needs, ensuring that corporate rescue reforms in Nigeria are not merely sound theoretically but practically and contextually reasonable.

2.6.1 The United Kingdom Approach

The UK's laws on Bankruptcy and Insolvency are contained in the IA 1986. Although this legislation is old, it was generally the government’s response to the select committee's report on insolvency law and practice inaugurated on 27th January 1977 (Cork Committee).[220] Some scholars and practitioners may have referred to the Cork Committee report as the foundation of the concept of corporate rescue “within the UK’s legal system”.[221] In response, this thesis argues that direct and anecdotal evidence exists to support the argument that abstract reasoning, which seems, at best, assumptive, may have been responsible for the mischaracterisation of this position. The alternate argument requires a distinction of the subject between the pre-Cork Committee era and the post-Cork Committee era.

[219] Rebecca Parry and Haizheng Zhang, China's New Corporate Rescue Laws: Perspectives and Principles (2008) 8(1) Journal of Corporate Law Studies.
[220] Report of the Review Committee on Insolvency Law and Practice (Cork Committee Report) (Cmnd 8558, 1982).
[221] Wood (n 145) 50-52; John Michael Wood, ‘Corporate Rescue: A Critical Analysis of Its Fundamentals and Existence’ (Law PhD Thesis, University of Leeds 2013).

2.6.1.1 Pre-Cork Era

Whereas it can be argued that there is no substantive difference to warrant a debate on the foundation of UK corporate law, it is necessary to provide an analysis of the subject to show the evidential basis for the argument that the foundation of UK corporate rescue law precedes the Cork era. The rationale is both historical and contextual, and the evidence puts into context the approach of the thesis regarding the development of a corporate rescue culture in the UK, with at least two examples. Firstly, it was not until the enactment of the Limited Liability Act of 1855 that the idea of investors having limited liability upon registering a company gained statutory recognition. Thus, the assumptive position was that liquidation is the best remedy for distressed companies. Given the fact that early corporate investors considered companies as mere artificial entities of private concern, dissolving and distributing the assets of these companies was a safer way for creditors to liquidate their debt.[222]

However, this treatment encouraged the prevalence of fraud in the administration of assets by parties who often deal with debtors' assets in bad faith, and at least one observer called for a law that protects the interest of the public in a way that prevents companies from failing.[223] Joseph Chamberlain MP, President of the Board of Trade, observed during the House of Commons debate on the Bankruptcy Bill 1883 that:

> "[A good Bankruptcy law must have two distinct objects…] Those were, firstly, in the honest administration of bankrupt estates, with a view to the fair and speedy distribution of the assets among the creditors, whose property they were; and, in the second place, their object should be, following the idea that prevention was better than cure, to do something to improve the general tone of commercial morality, to promote honest trading, and to lessen the number of failures."[224]

Chamberlain's perspective that insolvency law should embody the administration of bankrupt estates and reduce the number of corporate failures seems to foreshadow a key aspect of the

[222] David Milman, 'Reforming Corporate Rescue Mechanisms' in JohnDe lacy (ed), *Reform of UK Company Law* (Taylor & Francis Group 2002) 418.
[223] Joseph Chamberlain MP, who was the President of the Board of Trade in 1883, urged Parliament to enact a law that prevents companies from failing during the second reading of the Bankruptcy Bill—Bill 4. See Joseph Chamberlain MP, Hansard, debated on Monday 19 March 1883, vol 277, columns 817-818.
[224] Joseph Chamberlain MP, Hansard, debated on Monday 19 March 1883, vol 277, columns 817.

Cork Committee report.[225] This aimed to provide a means for preserving distressed but financially viable commercial enterprises.[226]

Although Chamberlain's groundbreaking efforts to promote corporate survival may have been unsuccessful, he did present a compelling case for parliament's role in shaping bankruptcy laws. Its role is "to endeavour, as far as possible, to protect the salvage and also to diminish the number of wrecks".[227] Sir Kenneth Cork seems to have picked up on this point when he argued in his autobiography that the Cork Committee sought "to provide the means by which an insolvent business could be continued and disposed of as a going concern so as best to preserve jobs for employees and preserve the nation's assets".[228]

Secondly, the Joint Stock Arrangements Act 1870 empowers the court to sanction a composition or arrangement between a distressed company and its creditors to rehabilitate and save the company from liquidation.[229] A "composition" in the context of insolvency is an agreement between an insolvent debtor and their creditors whereby the creditors agree to accept partial payment of debts in satisfaction of the entire claim. While this composition is not a drastic response to distressed companies, and in its strictest sense cannot be referred to as a corporate rescue procedure, they have provided a means of rescuing and rehabilitating a company in distress from liquidation – albeit not without its share of shortcoming.[230] In this sense and the initial example from the parliamentary debate, there seems to be evidence of gradual movement towards corporate rescue as an idea, and by way of legislative intervention. Consequently, it may appear seemingly misleading to trace the foundation of UK corporate rescue law to the Cork committee. The correct analytic point of defining the place of the Cork committee report in UK corporate law history may be to characterise it either as the foundation of modern corporate rescue law in the UK and/or the Insolvency Act 1985 but certainly, the foundation of the Insolvency Act 1986.[231] However, while it may seem plausible to treat this

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[225] Insolvency Law Review Committee, 'Insolvency Law and Practice: Report of the Review Committee' (Cmnd 8558, 1982) paras 198(j) and 204.

[226] Ruzita Azmi and Adilah Abd Razak, 'Theories, Objectives and Principles of Corporate Insolvency Law: A Comparative Study between Malaysia and UK', *3rd International Conference on Management (3rd ICM 2013)* (2013) 667, 674.

[227] ibid 817.

[228] Kenneth Cork, *Cork on Cork* (Macmillan 1988) ch 10.

[229] See also section 24 of the Companies Act 1900. This Act adopts an expanded view—it includes 'members' participation'. Similar provisions, with little difference, can be found in subsequent enactments, including section 425 of the Companies Act 1985.

[230] Milman (n 221). See text to n 9, 416.

[231] Ian F. Fletcher, 'UK corporate rescue: recent developments - changes to administrative receivership, administration, and company voluntary arrangements - the Insolvency Act 2000, the White Paper 2001, and the Enterprise Act 2002' (2004) 5(1) EBOR 119-151, 121-122. See the lecture delivered by Paul Omar on July 26, 2021, at the Colloquium on "Benchmarking Voluntary Administration on its 20-Year Anniversary". The colloquium was organised by the Bankruptcy and Insolvency Law Scholarship Unit, Adelaide Law School,

explanation as a trivial departure from the core of the history of corporate rescue in the UK, it is necessary because of its historical and academic importance.

In many ways, the history of corporate rescue cannot be isolated from the history of bankruptcy law from medieval company legislation in the UK, which began with the Joint Stock Companies Act 1844 and the Joint Stock Companies Winding-Up Act 1844 (These earlier company legislations only contained provisions on personal insolvency law). Historically, no corporate rescue or rehabilitation legislation existed in the UK before the 18th century. The insolvency legislation focused on creditors' recovery of debt at the expense of the undertaking. This was achieved by imprisonment and enslavement, occasionally leading to the death of debtors.[232] Despite this report or earlier passage of the Magna Carter 1215[233] preventing proprietary confiscation, the policymakers did not consider a push towards rescue.[234] It is worth noting that this earlier approach to corporate rescue was due largely to the establishment of the British Joint Stock Company in 1711 and under a light economy. In addition, the 1720 stock market disaster motivated policymakers to prohibit establishing limited liability companies. Nevertheless, the principle of limited liability was later ushered into the corporate landscape. After the Industrial Revolution, policymakers and industrialists entertained less pestilent views of companies.[235]

On the legislative end, the first sign that the hitherto perception of corporate bankruptcy was beginning to fade off, was the promulgation of the Companies Act 1948. Two main differences exist between the Bankruptcy Act 1914 and the Companies Act 1984. This difference lies in the application and scope. Primarily, the former only applies to personal bankruptcy, while the latter applies to both personal and corporate bankruptcies. In terms of applicability, while the

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Adelaide, Australia; Paul Omar, 'Corporate Rescue in the UK: Ten Years after the Enterprise Act 2002 Reforms' (2013) <http://irep.ntu.ac.uk/id/eprint/27854/1/Pubsub5402_Omar.pdf> accessed 4 September 2021. Milman (n 213) 418.

[232] In February 1729, parliament set up the Gaols Committee, which put up a report documenting the harsh conditions in debtors' prisons following the death of a very high-profile personality who was a friend of a Tory MP in the late 18th century.

[233] Magna Carta 1215, cl 9.

[234] Israel Treiman, 'Escaping the Creditor in the Middle Ages' (1927) 43 Law Quarterly Review 230, 233. They rather sought means of strengthening the existing bankruptcy laws to the detriment of the debtors. For example, the Fraudulent Conveyances Act 1571 even discouraged the earliest attempt at creating a moratorium regime by making 'utterly void', any attempt or agreement by a debtor to delay payment of credit. Even the Novelist of the time captured this pestilent. Charles Dickens wrote about the horrors of the debtors' prisons. See Taylor J. Bourne, 'David Copperfield' Encyclopedia Britannica, February 4, 2020. <https://www.britannica.com/topic/David-Copperfield-novel> accessed 20 September 2021. Shakespeare also portrayed the danger of these laws in the legendary portrayal of a very shrewd businessperson in Shylock who wanted a pound of flesh. See William Shakespeare, *The Merchant of Venice* (Thomas Heyes 1598) Act IV, scene i. In *Fowler v Padget* [1798] 7 Term Rep 509; 101 ER 1103, Lord Kenyon's sentiments seem to express the harsh realities that debtors face.

[235] Adam Smith, *The Wealth of Nations* (W Strahan and T Cadell, London 1776) Book V, ch 1, para.107.

Bankruptcy Act of 1914 was only applicable in England and Wales, the Companies Act 1948 is wider in scope, covering the entire United Kingdom.

Apart from the scope in applicability, the Companies Act 1948 is remarkable, both as a legislative instrument which provides an alternative to liquidation and as a law that pioneered the modern Scheme of Arrangement devices.[236] The provision on liquidation covers both voluntary and involuntary liquidation. The alternative to liquidation is the arrangement or compromise provision between the company and its creditors, which is to be executed in the form of a deed.[237] Whereas the provision on arrangements is similar to the provision under the Joint Stock Arrangements Act 1870, it is noted that it may appear that distressed companies did not consider the arrangement and compromised provisions which were attractive in the 1960s and 1970s.[238] This is because creditors fancied the appointment of mostly an accountant or a firm of accountants who then acted on behalf of the creditor to recover the debt.[239] Liquidation was a more attractive outcome for a distressed company than survival, at least in the eyes of the contemporaneous creditors and policymakers.

On the other hand, the courts, towards the close of the 18th century and well into the 19th century, became more enlightened and cautiously constructive in their approach to distressed companies. The case of *Salomon v Salomon*[240] opened a new vista to the perception of companies in the event of insolvency, effectively providing corporate protection for corporate insolvency. The judicial acceptance and recognition of the corporate personality principle espoused in *Salomon v Salomon*[241] accounts for the gradual push by the court for discretionary intervention to rescue a distressed company.[242] Although this discretionary power was exercised in a bid to sanction an arrangement with creditors for debt restructuring or in support

[236] The Scheme of Arrangements made its first entry into corporate insolvency law in the Joint Stock Companies Arrangement Acts 1870.
[237] Companies Act 1948 (1948 c. 38), ch V.
[238] ibid (n 221) 416.
[239] ibid.
[240] ibid (n 170).
[241] ibid.
[242] See Diane M Hare Diane and David Milman, 'Debenture holders and judgment creditors - problems of priority' (1982) 1 Lloyd's Maritime and Commercial Law Quarterly 57-80. Creditors now had the option of utilising the receivership procedure. The receivership procedure is based upon an equitable device developed in the 18th century. It gives a creditor whose debt is secured by a floating charge the power to appoint a third party (usually an accountant but rarely a lawyer) known as a receiver to take control of the asset of a company for the purpose of realising the security of his client, while the directors resume control once the credit has been realised. See Vanessa Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge University Press, 2009) 20.

of the power of the creditor to appoint a receiver, the arrangement and receivership procedures have been criticised.[243]

The scheme of arrangements under CA 1948 and even subsequent enactments have been complicated, expensive, and less productive.[244] The ineffectiveness of the old scheme of arrangement device as a corporate restructuring procedure led to the clamour for reforms, but the subsequent enactments did not provide a wholesome approach to remedying corporate failure.[245] To some extent, the old receivership procedure has also been criticised for not providing a wholesome approach to debt recovery that will maximise corporate value.[246]

Prior to the reform of the UK insolvency law of the late 1990s and early 2000s, policymakers were pressured to develop a system to address the looming threat of company liquidation. In response to the social and economic challenges following World War II - such as the recession and plummeting crude oil prices - policymakers aimed to develop a system that could effectively address the danger of company liquidation.[247] In 1977, the Bank of England responded with the "London Approach", albeit informally providing rescue options for distressed companies in the absence of reform.[248] The Cork Committee subsequently considered the arguments in support of reform.[249]

2.6.1.2 Post Cork Era

The Cork committee report formed the philosophical basis for the enactment of the Insolvency Act 1986 and ushered in a new shift in corporate culture – that of a shift towards corporate survival. However, the regime, which had hitherto existed during the 1970s, necessitated the call for restructuring, if not rescue. One example is the highly publicised case of John Poulson in 1972. Mr Poulson was a high-profile British business executive convicted of bribery offences relating to building contracts.[250] Many high-profile individuals were implicated during the hearing, including Reginal Mauling, the then Home Office Secretary, who had to resign due to

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[243] John Paul Tribe, 'Companies Act Schemes of Arrangement and Rescue: The Lost Cousin of Restructuring Practice?' [2009] SSRN Electronic Journal; Sandra Frisby, 'In search of a rescue regime: The Enterprise Act 2002' (2004) 67(2) The Modern Law Review 247, 252.

[244] Tribe 'Companies Act Schemes of Arrangement and Rescue: The Lost Cousin of Restructuring Practice?' 6; Ben Pettet, *Company Law* (2nd edn., Pearson Longman 2005) 406-407.

[245] Tribe (n 243) 6-7.

[246] Frisby (n 243) 253.

[247] Between 1831 and 1914, there was an attempt to introduce about 100 Bills to Parliament. See Markham Lester, *Victorian Insolvency* (Clarendon 1995).

[248] For an explanation of the nature of the London approach, see text to note 8.

[249] Cork Committee Report 400.

[250] John Tribe, 'The Poulson Affair: Corruption and the Role of Bankruptcy Law Public Examinations in the Early 1970s' (2010) 21(3) Kings Law Journal 495.

his alleged role in the scandal. As it emerged, from 1967 to 1969, Mauling joined at least three of Poulson's companies in return for huge payments to his wife's charity project (Adeline Genée Theatre).[251]

Although Mr Poulson continued to maintain his innocence even after his conviction, this case exposed the inherent lapses in English law in the 1970s: the obvious lack of ethical standards and absence of consumer protection practices, which sometimes could encourage fraudulent directors to dissipate the assets of their company or sell-off for their benefit. This fraudulent practice of transferring a company or a company's asset to a different company set up by the directors of the former company to enrich themselves in the event of liquidation (which may be self-inflicted) is known as the 'phoenix syndrome.[252] As cases of directors and employees of companies taking advantage of this weak link in the law to defraud unsuspecting creditors became increasingly common, practitioners tried to set ethical standards by revitalising the Insolvency Practitioners Association (IPA). The IPA was initially formed in 1961 but only became active in the 1970s as a body to help practitioners set standards and encourage best practices.[253]

While the IPA served as a forum for practitioners to share ideas, there was still a need for a law that would regulate their practice and protect consumers and other stakeholders, hence the call for reform of the pestilent legislation on insolvency. The increasing demand for the reform of penal laws on bankruptcy leads to diminishing creditor returns, loss of return on investment, sometimes for both the debtors and creditors and mostly the loss of jobs, which ultimately affects the economy. This cry for reform of the extremely limited penal laws circled the background for the appointment of a twelve-man committee, put together by the duo of Edmund Dell and Kenneth Cork in 1976, and inaugurated in 1977.[254]

The Cork committee was chaired by Sir Kenneth Cork, a British accountant and celebrated insolvency expert. The brief of the committee, at least in relation to this thesis, included among other things, to consider 'less formal procedures as alternatives to bankruptcy and company winding up proceedings in appropriate circumstances'.[255] The committee's work – from 1977 to 1982 - pursued the objective of simplifying the insolvency law procedures in England and

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[251] ibid 501 – 503.

[252] Paul Omar and Jennifer Gant, 'Corporate Rescue in the United Kingdom: Past, Present and Future Reforms' (2016) 132 South African Law Journal 39.

[253] ibid. For a historical overview of the work of Ips, see John M Wood, 'Assessing the Effectiveness of the UK's Insolvency Regulatory Framework at Deterring Insolvency Practitioners' Opportunistic Behaviour' (2019) 19(2) Journal of Corporate Law Studies 333.

[254] Edfowlermund Dell was the then Secretary of State for Trade and Industry. See Kenneth Cork, *Cork on Cork* (Macmillan London Limited 1988) 184.

[255] Edmund Dell, Hansard, debated on 25 October 1976, vol 918, column 20W.

Wales 'to provide a means by which an insolvent business could be continued and disposed of as a going concern…'.[256]

According to the Cork Committee, modern insolvency law must, among other things, seek to:

> "(i) recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome, and to ensure that these public interests are recognised and secured;
> (ii) to provide means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country."[257]

The Cork Committee recommended that corporate rescue provisions be introduced into English law as a means of continuance for insolvent companies. The new rescue provision introduced the 'administration procedure' as the main rescue tool.[258] Another rescue tool introduced is the receivership procedure. While the receivership procedure may not be considered a rescue in the strict sense of the word, it possesses some rescue element, which could be why the Cork committee report misconstrued this mechanism as a corporate rescue mechanism.[259] The Insolvency Act 1985 was immediately replaced by the Insolvency Act 1986. The Insolvency Act of 1986 consolidated the different forms of insolvencies, including corporate rescue procedures.

The IA 1986 set out a two-stringed precursor of the approach to corporate rescue: Company Voluntary Arrangement, and Administration. During deliberation on adopting a new corporate rescue regime, the Cork committee considered various alternatives to liquidation, including the pre-existing approach to rescuing the distressed companies, which was given legislative recognition under the IA 1986.[260] While these new rescue models were conceptually different from the receivership and scheme of arrangement procedures prior to the Cork committee report, they all offered some alternatives to liquidating distressed companies. Apart from the fact that a scheme of arrangement does not automatically result in a moratorium, the main difference between the scheme of arrangement and the CVA is the fact that unlike a scheme of arrangement that applies to only a particular class of creditors or members, the CVA may lead

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[256] Cork (n 254) 188.
[257] Cork Committee Report 198, I - J.
[258] ibid ch 9.
[259] For a brief analysis of the Cork committee's perception of the receivership procedure, see Milman, 'Reforming Corporate Rescue Mechanisms' (n 221) 417 - 418.
[260] See specifically sections 7 – 10 of the 1A 1986.

to cancellation or reduction of debt for all creditors without prior consensus.[261] Another difference between both procedures is the level of court involvement. Unlike the scheme of arrangement that requires court sanction after the creditors/members approve the scheme, the CVA takes effect immediately.[262] There is no requirement for an additional court hearing for the court to sanction or approve the agreement.[263]

Whilst the Administration and CVA mechanisms under the IA 1986 are watered-down models of the receivership and scheme of arrangement models, they present significant practical differences so that the administration procedure is a process where the company is placed under the control of an administrator but supervised by the court and CVA procedure. This is more like an informal workout between the creditors and the debtor.[264] And although both the CVA and administration procedures can be triggered by the creditors, the CVA procedure is suitable for remote distress or distress prior to insolvency, and the administration procedure is suitable for immediate distress or distress close to insolvency.[265] Under the administration procedure, in comparison with the receivership procedure (where the receiver manager only serves the interest of the appointing creditor), the administrator serves the interest of both the secure and unsecured creditor.[266]

The focus of Insolvency Law after the passage of the IA 1986 was the pursuit of mechanisms that would facilitate corporate rehabilitation, rescue, and survival. Among other ideas that outlived the Cork committee report is the push towards a corporate rescue culture. Notably, two stand-out rescue devices that have not only survived the IA 1986 but have also influenced the enactment of corporate rescue legislations in most jurisdictions are the CVA and administration procedures. These were entrenched in the EA 2002.[267] In fact, Insolvency law post-IA 1986 has seen a race to pursue the Cork committee's far-reaching philosophy: the control of directorial misconduct, on the one hand, and the rehabilitation of distressed companies, on the other.[268]

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[261] It should be noted that the schemes of arrangement under certain circumstances can trigger an automatic moratorium. For example, when a scheme of arrangement is used as part of an administration process.

[262] Tsvetan Petrov, 'Harmonising Restructuring Law in Europe: A Comparative Analysis of the Legislative Impact of the Proposed Restructuring Directive on Insolvency Law in the UK and Germany' (2017) 3 Anglo-Ger LJ 129, 135-137.

[263] ibid 137; Jennifer Payne, *Schemes of Arrangement: Theory, Structure, and Operation* (Cambridge University Press 2021) 5.

[264] IA 1986, pt I, s 1-6.

[265] ibid (n 209) 569 and 641.

[266] Paul Omar and Jennifer Grant, 'Corporate Rescue in the United Kingdom: Past, Present and Future Reforms' (2010) <http://irep.ntu.ac.uk/id/eprint/27854/1/Pubsub5402_Omar.pdf> accessed 13 November 2021.

[267] The millennial push towards rescue-oriented legislation can be traced to the IA 2000. Apart from amending the Directors Disqualification Act 1986, it ushered in the unique provisions on CVA and Moratorium.

[268] Finch (n 40) 15.

Some significant changes in the EA 2002 with regards to corporate rescue include the partial abolishment of the non-collectivist debt enforcement model of receivership (administrative receivership) that gives a floating charge holder the power to appoint an administrative receiver to be in control of the company and administer its asset for the realisation of the debt of the appointing creditor. This model was replaced under the EA 2002 by a more collectivist model (administration) which allows the floating charge holder to appoint an administrator who will administer the company for the overall benefit of all creditors.[269]

The notion of collectivity is central to insolvency law.[270] The principle is that all creditors' interests should be treated collectively rather than individually in the event of insolvency. It ensures that insolvency law prioritises the fair and equitable distribution of the insolvent company's assets among all creditors and stays at individual creditors' actions.[271] This explanation of staying in individual action is a clear priority switch from the individual to the collective creditors' interest. A key aspect of the focus on fair and equitable distribution of the insolvent company's assets as it relates to collectivity is the statutory moratorium, which disincentives creditors from rushing to enforce their claims. The moratorium, introduced in most jurisdictions, ensures that all creditors' claims are addressed collectively to avoid situations where a creditor might obtain a disproportionate share of the insolvent company's assets.[272]

The IA 2000 also introduced the moratorium provisions, which could be triggered once the CVA is initiated.[273] Its provisions are part of the broader framework under IA 1986, which provides alternative cover for small and medium-sized enterprises (SMEs) in the form of a moratorium for the CVA.[274] These combined changes under the IA 2000 and EA 2002 permeated the move towards a modern corporate rescue culture in the UK that seeks to balance creditors' interests with the interests of other stakeholders.[275] Successive attempts have been made post-enterprise to improve the effectiveness of the CVA and administration procedures, and refine their effects on stakeholders.[276] For example, the Insolvency Rules 2016 (IR 2016) were enacted to modernise insolvency procedures and reduce administrative burdens in rescue

[269] EA 2002, s 72A.
[270] Rizwaan Jameel Mokal, *Corporate Insolvency Law: Theory and Application* (Oxford University Press 2005) 33.
[271] ibid 33, 104-106.
[272] ibid (n 217) 482.
[273] IA 2000, sch A1. Although with CIGA 2020, the CVA moratorium has now been abolished.
[274] Schedule A1 of the IA 2000 amended section 1A of the IA 1986.
[275] Association of Business Recovery Professionals, 'CVAs reforms needed, says insolvency and restructuring profession', R3 press notice, 29 May 2018 [online] (accessed 28 December 2021).
[276] See the Small Business, Enterprise and Employment Act 2015.

activities, especially with regards to CVAs and administration. This example clearly indicates that this attempt to streamline corporate rescue procedures was aimed at improving corporate rescue culture.[277]

Another attempt is the Corporate Insolvency and Governance Act 2020 (CIGA 2020). Before CIGA 2020, UK insolvency law was generally criticised for lacking a "debtor-in-possession" model. [278] As a rescue tool, it lacked the ability to bind secured creditors to a rescue plan, especially for companies outside the limitation of small companies.[279] This is in contrast to the Chapter 11 procedure in the US, which gives the distressed company directors management and control power over the company's activities, including the power to implement the restructuring plan as a result of the moratorium.[280]

CIGA 2020 appears partly to be the UK Government's response to criticisms of the pre-CIGA regime.[281] It introduced, among other things, a new moratorium regime known as the stand-alone moratorium, which can be utilised alone during contractual restructuring negotiation or in combination with other restructuring procedures, such as the CVA, Part 26 Schemes of Arrangement or the Part 26A Restructuring plan.[282] The core principle, as expressed in Part A1 of the IA 1986, was characterised more broadly: to give financially distressed companies breathing space to explore rescue and restructuring mechanisms without creditor action.[283]

Unlike the administration moratorium, the CVA moratorium introduced under IA 2000, though now abolished, did not apply automatically, unless the company is in administration**,** for which the administration moratorium applies. Alternatively, the company could enjoy the benefit of the moratorium under Part A1 of IA 1986.[284] Thus, the CVA may not be suitable for late-stage insolvency, especially for large companies, due to its limited protection.[285] Nonetheless, as the following section makes clear, the CVA is the closest tool to the Chapter 11 model in the UK. [286] It incorporates important elements of the automatic stay under the Chapter 11 procedure, which protects the company from creditors' actions while undergoing restructures.

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[277] Keay and Walton, (n 217) 541.
[278] The Insolvency Service, 'A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform' (May 2016) <https://assets.publishing.service.gov.uk/media/5a816394ed915d74e33fdef9/A_Review_of_the_Corporate_Insolvency_Framework.pdf> accessed 8 September 2024.
[279] ibid 10.
[280] Bankruptcy Code, Section 1107.
[281] ibid (n 278) 10-18.
[282] Sarah Paterson, 'Restructuring Moratoriums through an Information-Processing Lens' (2023) 23(1) The Journal of Corporate Law Studies 37, 39.
[283] See para 4 of the explanatory notes to CIGA 2020.
[284] ibid (n 282) 39.
[285] Paterson, 'Restructuring Moratoriums through an Information-Processing Lens' 40.
[286] ibid (n 278) 22.

2.6.2 The United States Perspective

The history of insolvency law in the US differs significantly from that in the UK. Unlike in the UK, where IPs are usually appointed to conduct the insolvency process in place of management, managers (directors) typically play important roles in the US reorganisation process. Insolvency law in the US empowers financially distressed companies and their directors to make decisions regarding their fate. This includes the authority to control and manage the company while considering options such as filing for liquidation or reorganisation. This disparity in US insolvency law was influenced by the increase in consumer credit —driven by reasons such as unsecured consumer loans and complemented by the 1978 Bankruptcy Code, which made debt reorganisation easier.[287]

Similarly, the history of corporate rescue in both jurisdictions has developed differently despite their corresponding economic and legal systems. Although both countries run a capitalist economy that promotes free-market enterprise and encourages both private and public sector borrowing, the disparity can be seen in the development of corporate rescue law in both jurisdictions.[288] For example, despite the fact that most of the provisions of the inaugural bankruptcy legislation of 1800 were transplanted from pro-creditor legislation - the Statute of Bankrupts 1542[289] - the US approach to insolvency is debtor-driven.

The Bankruptcy Code governs personal and corporate bankruptcy (insolvency). The statute treats corporate failure as an opportunity for the management of distressed companies to restructure and rescue to prevent pending liquidation.[290] A company in financial distress can either file for liquidation under Chapter 7 or restructuring under Chapter 11 of the Bankruptcy Code. Unlike the liquidation procedure under Chapter 7, the Chapter 11 procedure does not liquidate the company's assets. Rather, it reorganises the existing assets, mainly as debt. Reorganisation usually involves a corporation or partnership (companies). Some commentators have argued that the Chapter 11 procedure is universally the most important insolvency procedure.[291] It is designed to reorganise a distressed company's business debt,

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[287] David A. Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton University Press 2001) 131.

[288] Lester V. Markham, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth Century England* (Oxford University Press 1995).

[289] Bankruptcy Act of 1800.

[290] Maria Brouwer, 'Reorganisation in US and European Bankruptcy Law' (2006) 5 European Journal of Law & Economics 11.

[291] Roelf Jakob de Weijs and Bob Wessels, 'Proposed Recommendations for the Reform of Chapter 11 US Bankruptcy Code' [2015] SSRN Electronic Journal; Paolo Di Martino, 'The Historical Evolution of Bankruptcy Law in England, the US and Italy up to 1939: Determinants of Institutional Change and Structural Differences' (Workshop, Södertörns Högskola University College Stockholm, August 2005)263, 268.

assets and affairs, to give it a fresh start. Insolvency statutes in many countries, including South Africa, have been inspired by the Chapter 11 model.[292]

2.6.2.1 Chapter 11 process

Chapter 11 reorganisation is premised on a debtor being more suitable as an operating entity than falling into liquidation. Hence, reorganisation is suitable if the goal is to return a distressed company to viability. As the US District Judge, Brock Hornby, in *Tamir v. U.S. Trustee*[293] opined: "the primary goal of Chapter 11 remains: to formulate a comprehensive reorganization plan that -will ultimately rehabilitate financially distressed debtors".[294] Chapter 11 envisages a negotiation procedure for parties to reach a compromise position.[295] Ideally, the Chapter 11 procedure commences with filing a petition at the bankruptcy court, either voluntary or involuntary, to place the company under Chapter 11 reorganisation. A voluntary petition is filed by the debtor, while an involuntary petition is filed by the company's creditors subject to certain requirements.[296] The power to file a petition is limited to voluntary petitions. However, creditors can file an involuntary petition.[297] Such a petition is filed through the company's management, which has an "exclusive period" of at least four months, subject to renewal, to propose a reorganisation plan.[298] Filing of the petition initiates an "automatic stay"[299] (moratorium), halting all collections, foreclosures, and legal proceedings and giving the company breathing space while the managers negotiate a reorganisation plan with creditors.[300] Upon a secured creditor's request, the court may order that the creditor be relieved from the stay, provided the reason is valid. However, the debtor can prevent this by providing evidence of suitable protection for the creditor and evidence that the asset is crucial to the reorganisation process.[301] If the court is not satisfied with the secured creditor's prayers, it may dismiss the application. Alternatively, and subject to the interests of the group of stakeholders or the estate,

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[292] As discussed in ch 4, pt II.
[293] *Tamir v. United States Trustee*, 566 B.R. 278 (2016) (Brock Hornby).
[294] ibid 283.
[295] *In re AG Consultants Grain Division, Inc.*, 77 B.R. 665, 667 (Bankr. N.D. Ind. 1987) (Francis Conrad) 671.
[296] 11 USC s 301, 303.
[297] ibid.
[298] United States Code, Title 11, Chapter 11 (2022) (US Bankruptcy Code). For large companies, renewal can continue until the matter is resolved. Chapter 11 procedure is overwhelmingly initiated by the management, but in very few cases, it has been initiated by creditors. For an in-depth study of why creditors file fewer Chapter 11 petitions, see Susan Block-Leib, 'Why Creditors File so Few Involuntary Petitions and Why the Number is not too Small' (1991) 57 Brooklyn Law Review.
[299] Unlike in the UK, where the protection granted to distressed companies from creditors' actions is referred to as a "moratorium," the terminology used under Chapter 11 is "automatic stay."
[300] 11 USC, s 362. You could put in a footnote that a different terminology is used for the moratorium in the US - "the stay"
[301] 11 USC, s 1112.

the court may convert the proceedings to liquidation proceedings upon the applicant's request.[302] Unsecured creditors will be represented by a committee of seven of the largest unsecured creditors, although the court may appoint additional committees representing different classes of stakeholders, creditors, etc.[303] After commencement, the US trustee,[304] which serves as the nexus between the unsecured creditors and the debtor, will appoint the committee of unsecured creditors and, if necessary, appoint additional committees to represent other interests.[305]

The job of the committee of unsecured creditors is to consult with the reorganisers on the administration of the case, investigate the debtor's condition *vis-à-vis* to continuing the business, contribute to the formulation of a reorganisation plan, and advice the group of any interests they represent. The committee may carry out this duty by itself or designate agents.[306] The court has the authority to appoint a trustee or an examiner to investigate management activities and the desirability of continuing the debtor's business if requested.[307] It is important to differentiate between the trustee and the examiner. While the former takes control of the debtor, operates its businesses, and administers the reorganisation, the latter only investigates allegations relating to the company or management.[308]

After negotiation, a reorganisation plan is reached. The plan divides the company's creditors into different classes and specifies their treatment.[309] All creditors and shareholders are expected to vote on the plan, but only two-thirds of the votes of any class of creditor are required to affirm the plan for that class of creditor to be construed to have voted in favour of the reorganisation plan.[310] The court will confirm the plan if every class of creditors votes to affirm it. Although creditors have the right to vote against the reorganisation plan, the court can still confirm the plan in accordance with the absolute priority rule under the "cramdown" provision if only one class of creditors votes against it.[311]

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[302] ibid s 1112.
[303] ibid s 1102.
[304] The US trustee is the agency of the Justice Department responsible for overseeing the administration of the bankruptcy case.
[305] 11 USC, s 330.
[306] ibid 1103.
[307] ibid 1104-1106.
[308] ibid.
[309] See generally, Elizabeth Warren and Jay Lawrence Westbrook, *The Law of Debtors and Creditors* (Aspen Publishers 1996); Elizabeth Warren and Jay Lawrence Westbrook, *The Law of Debtors and Creditors* (Little Brown GBR 1991).
[310] William Miller Collier, Alan N Resnick and Henry J Sommer, *Collier on Bankruptcy.* (Lexisnexis 2009).
[311] Tom Bannister and others, 'Restructuring Plans and Chapter 11: A Transatlantic Perspective' (2022) <https://www.akingump.com/a/web/p617UPqnhmdNq6rKYVozdm/4pSmfr/financial-restructuring-in-depth_restructuring-plans-and-chapter-11_a-transatlantic-perspective_september-2022.pdf> accessed 10 September 2024.

2.6.2.2 Rescue Decision and the Players

Rescue decisions under the Chapter 11 procedure are intended to facilitate a timely, neutral and transparent decision-making process.[312] Its aim is to determine whether a financially distressed company can successfully restructure its operations and debts to remain financially viable. Due to the advantage of judicial protection in the form of a stay that Chapter 11 provides, it is important that the debtor maintains objectivity to prevent undue advantage over other stakeholders.[313] Generally, in consultation with the creditors, the debtor is expected to make objective decisions by balancing the company's potential for survival with the interests of creditors, employees, and other stakeholders. However, checks are also provided through the US trustee, who monitors the progress of the case and supervises its administration.[314]

Recall again that managerial incompetence, inefficiency and ineffectiveness are the common causes of corporate failure.[315] Nevertheless, the CVA and Chapter 11 procedures allow directors and managers who have presided over their company's financial decline to remain in their positions and the company during the rescue process.[316] Therefore, the debtor is expected to demonstrate both competence and objectivity in outlining the company's financial challenges and the prospect of rescue.[317] In practice, the company's managers or plan proponent must file a written disclosure statement providing "adequate information" regarding the company's affairs.[318] The disclosure statement must be filed, approved by the court, and served to the necessary parties to enable holders of claims or interests to make an informed decision.[319]

Other parties are involved in the rescue decision-making process. The court, the Office of the US trustee, and the committees all play significant roles in this process. The role of the US trustee is particularly significant for monitoring and supervision purposes. For example, the US trustee monitors the company's operation, including management's commercial activities, and submits operating reports and fees. Similarly, the trustee monitors compensation and

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[312] Westbrook describes it as the "idea of neutrality". See Jay Lawrence Westbrook, 'The Control of Wealth in Bankruptcy' (2004) 82 Tex L Rev 795, 825.

[313] R3, 'US "Chapter 11": Should It Be Adopted in the UK?' (*R3.org.uk*2012) <https://www.r3.org.uk/stream.asp?stream=true&eid=22119&node=194&checksum=2D326103575FF0F5D44AD7D2A6BD316A> accessed 10 September 2024.

[314] United States Courts, 'Chapter 11 - Bankruptcy Basics' (*United States Courts*) <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics#:~:text=A%20case%20filed%20under%20chapter> accessed 10 September 2024.

[315] See earlier discussion at p 23.

[316] ibid.

[317] 11 USC, s1103 (c) (2).

[318] 11 USC s 1125

[319] 11 USC s 1125

reimbursement applications for compensation and reimbursement and other statements filed with the court and the creditors' committees.[320]

The committee is also an important player in the rescue decision-making process. The committee consists of creditors with the seven largest unsecured claims against the company.[321] They are appointed by the US trustee and may perform the committee's duties themselves or, subject to the court's approval, delegate them to a professional at any stage in the reorganisation process.[322] The committee consults and investigates the management of the debtor company, its conduct, and its business.[323] Additionally, the committee participates in and is involved in the formulation of the reorganisation plan.

The bankruptcy court also plays an important role in the decision-making process. Generally, the court has jurisdiction to "interpret, enforce, or aid" the formulation and management of a reorganisation plan.[324] The court supervises and controls the reorganisation process to ensure fairness among the parties. Specifically, the court oversees the US trustee and the committees and approves critical decisions, such as asset sales and financing, which are management decisions taken during the reorganisation process.[325]

2.6.2.3 Chapter 11 Debtor-in-possession

A key feature of the Chapter 11 procedure is the debtor's ability to retain possession of the properties which form part of the bankruptcy estate.[326] This feature of controlled possession, termed "debtor in possession," is deemed to be exercised in the interest of the creditors from the commencement of the petition throughout the proceedings.[327] Section 1107 of the Bankruptcy Code empowers the debtor to retain possession of the bankruptcy estate. The provision further empowers the debtor to act as a Chapter 11 trustee with fiduciary duties - including all duties under the Bankruptcy Code,[328] and the Federal Rules of Bankruptcy Procedure 1983.[329] In practice, the debtor-in-possession's power to hold the property includes the power to use it and transact without the court's approval in the ordinary course of

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[320] ibid (n 305).
[321] 11 USC s 1102.
[322] John D. Ayer, Michael Bernstein, and Jonathan Friedland, 'The Life Cycle of a Chapter 11 Debtor Through the Debtor's Eyes' (2003) AM. BANKR. INST. J 50.
[323] 11 USC s 1103.
[324] *Lacy v. Stinky Love, Inc. (In re Lacy)*, 304 B.R. 439, 440 (D. Colo. 2004) [Richard Matsch] 444.
[325] 11 USC s 363(b), 364 (2020).
[326] For the definition of property, see 11 USC s 541(a)1. Note that the US Supreme Court has taken an expansive view on this to include all types of properties. See *United States v. Whiting Pools, Inc.,* 462 U.S. 198 (1983).
[327] *Westmoreland Human Opportunities v. Walsh*, 246 F.3d 233, 234 (3d Cir. 2001) [BECKER, Chie] 241.
[328] 11 USC s 1106, 1107.
[329] Bankruptcy Procedure 1983, 2015(a).

business.[330] However, the power over the property is limited. The debtor cannot use the property outside the ordinary course of business without the court's approval. Additionally, the debtor is prohibited from exercising the trustee's investigative powers.

As earlier discussed, Chapter 11 debtor-in-possession permits directors who may have contributed to the company's failure to remain in place.[331] Unfortunately, this creates a situation where the debtor-in-possession protection may be used both as a shield - protecting the debtor against creditors' claims, and a sword - to punish other businesses or distort the market.[332] A closely connected question is whether inefficient or ineffective management remains in control of a distressed company. The answer to this question puts the goal of reorganisation in the spotlight. In *Mason v. Official Committee of Unsecured Creditors ex rel. FBI Distribution Corp.*,[333] the court stated that the main objective of the reorganisation process is the rehabilitation and preservation of the value of the company.[334] This sentiment appears to enjoy statutory support. Section 507(a)(1) of the Bankruptcy Code prioritises administrative expenses, including "the actual, necessary costs and expenses of preserving" the bankruptcy estate.[335] As Stahl stated,

> "Congress recognised that granting first priority to administrative expenses would encourage creditors, otherwise wary of dealing with Chapter 11 businesses, to provide the goods and services required for successful rehabilitation."[336]

A combined reading of this provision and the court's decision in *Mason v. Official Committee of Unsecured Creditors ex rel. FBI Distribution Corp.* clearly shows a disposition to incentivise by incidentally rewarding management for early intervention to preserve the company's going concern value.[337] The above analysis raises a fundamental question of whether fraudulent management may abuse the debtor-in-possession status and remain even when reorganisation is not feasible.

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[330] *In re Husting Land Development, Inc.*, Bankruptcy Case Number 97-20309 JAB, Chapter 11, (Bankr. D. Utah Nov. 22, 2000).
[331] As discussed in s 2.6.2.2, 59 – 60.
[332] R3, 'US "Chapter 11": Should It Be Adopted in the UK?' 4.
[333] *Mason v. Official Committee of Unsecured Creditors ex rel. FBI Distribution Corp.*, 330 F.3d 36, 39 (1st Cir. 2003) [Stahl].
[334] ibid 41.
[335] See 11 USC 507(a)(1) and section 11 USC s 503(b)(1)(A).
[336] *Mason v. Official Committee of Unsecured Creditors ex rel. FBI Distribution Corp.* (n 333) 41.
[337] Sefa Franken, 'Creditor- and Debtor-Oriented Corporate Bankruptcy Regimes Revisited' (2004) 5(4) European Business Organization Law Review 645, 666; Belcher (n 108) 16 -17.

Although the objective of the DIP procedure is "to rehabilitate and preserve" the company's value, reorganisation should not be pursued at any cost.[338] Upon reasonable suspicion of abuse by the debtor, the court will permit the creditor to determine efficiency.[339] As a result, this may create uncertainty. Nevertheless, Chapter 11's goal is to prepare a reorganisation plan that will rescue the company, and when it is impracticable to do so, the stay may be vacated.[340] When all these statutory and judicial commentaries are considered, it appears that most Chapter 11 cases show a preference for management control.[341] However, in limited circumstances, the courts may have had to displace the existing management, especially when the management has been found to be abusing the stay.

2.7 Conclusion

This chapter has examined the underpinnings of corporate rescue law and laid out the theoretical framework for corporate rescue reform in Nigeria. To examine the extent to which CAMA 2020 facilitates an effective and efficient rescue of financially distressed companies in Nigeria, this chapter provides an analytical approach based on the legal transplant of corporate rescue models from Anglo-American jurisdictions such as the UK and US. The purpose of examining the UK and US approaches to corporate rescue in this chapter was to identify effective corporate rescue regimes and frameworks for rescuing distressed companies, which is useful in analysing the research question and identifying the gaps in the existing literature on corporate rescue. The review of the existing literature revealed one important finding: the UK's management displacement model and the US debtor-in-possession model have long inspired the reform of insolvency regimes in most jurisdictions, including Nigeria. As Chapters 3, 4 and 5 indicate, most jurisdictions have adopted provisions that borrow features from these models. As with the reforms in some African jurisdictions, such as Kenya and South Africa, Nigeria has reformed its insolvency statute with the enactment of CAMA 2020. Yet, as it was argued in chapter 4, the US and UK approaches may not always be suitable in the context of an emerging and developing economy such as Nigeria. There are, of course, important differences in the context of African insolvency rescue, which the next chapters will explore, but first, it is necessary to reiterate the conceptual differences between the terms "insolvency"

[338] *In Re Timbers of Inwood Forest Associates, Ltd., Debtor.united Savings Association of Texas, Movant v. Timbers of Inwood Forest Associates, Ltd*., 808 F.2d 363 (5th Cir. 1987).
[339] ibid [Clark CJ dissenting].
[340] ibid.
[341] Franks and Torous, "Lessons from a Comparison of U.S. and U.K. Insolvency Codes" (1992) 8 Oxford Review of Economic Policy 70, 75 – 76.

and “bankruptcy” to clarify their use in this thesis. As the discussion in 2.4 and 2.5 above shows, these terms differ in meaning within most jurisdictions, certainly in the UK and the US. Therefore, reference to the term insolvency or bankruptcy in this thesis is limited to corporate entities rather than individuals.

3 CHAPTER 3: Corporate Rescue Reform in Nigeria: An Exercise in the Isometrics of CAMA

3.1 Overview

Corporate rescue philosophy in Nigeria is arguably not novel *per se*. Some scholars consider the introduction of the receiver-manager provision to be the inaugural march toward progressive rescue philosophy in Nigeria.[342] However, the attitude of the Nigerian courts on receivership has been short of strict coherence.[343] For this reason, it is not surprising that CAMA 2020 adopts a restrictive approach to receivership. In addition, CAMA 2020 jettisoned the traditional approach to resolving insolvencies. Instead, corporate rescue procedures have been introduced to promote the modern corporate rescue culture. As explored in this chapter, Nigeria's corporate rescue regime adopts aspects of the management displacement and debtor-in-possession models that indeed promote rescue culture. However, as explained in Chapter 6, Nigeria, in fact, lacks some of the essential elements associated with rescue culture, such as a robust judicial system, a weak institutional framework, and a shortage of skilled insolvency practitioners.

This chapter, therefore, examines Nigeria's corporate rescue regime pre-CAMA 2020 and post-CAMA 2020 to show the extent of transplantation of corporate rescue law and, by extension, insolvency in Nigeria. It begins with a brief overview, which defines the term 'isometrics' in the context of CAMA. The chapter also analytically evaluates the corporate rescue tools under CAMA 2020 and comparatively examines the rescue procedure under CAMA 2020 and English law. It argues that CAMA 2020 redefined the approach to corporate rescue in Nigeria, prioritising the modern view of corporate rescue over the limited traditional approach focussed on liquidation.

3.1.1 Rescue Isometrics: Contextual issues

As it relates to this thesis, the term 'isometry' does not take its traditional meaning, which denotes muscular or exercise in which tension is established without changing the shape of the muscle. Unlike its physiological definition of 'isometry' exercises in physical fitness or

[342] Bolanle Adebola, 'The duty of the Nigerian Receiver to 'Manage' the company' (2011) 8 (4) ICR 248; Chimemeka Egonu, 'An Examination of the Scope of the Liabilities and Indemnity of the Receiver/Manager under Nigerian Law' (2019) 10 (4) The Gravitas Review of Business & Property Law 15.

[343] *Adetona V Zenith Bank Ltd [2007]* LPELR (CA); cf see *Pharmatek Industrial Projects Ltd V Trade Bank (Nig) Plc* [2009] All FWLR (Part 495) 1678, 1722[E] – [F].

callisthenics protocol, this thesis adopts a metaphorical construal of the term to mean stabilising, strengthening, and rescuing - so that in the context of CAMA, it refers to legal policies, tools and procedures aimed at stabilising, strengthening and rescuing distressed companies. Pertaining to corporate rescue, it refers to the tools and mechanisms strategically applied to rescue or rehabilitate a company in financial distress. Just as isometric exercises strengthen the muscles or rehabilitate the body without causing movement; tools, such as the CVA, Administration, Moratorium, etc, are designed to strengthen financially distressed companies to avoid immediate liquidation. It follows, therefore, that "isometrics of CAMA" refer to the corporate rescue and rehabilitation tools under CAMA.

Understanding the isometrics of CAMA is vital to answering the research question. It is essential to examine the corporate rescue procedures and tools introduced under CAMA 2020, as the "isometric" tools discussed in this chapter will form the background for assessing the rescue provisions' effectiveness and efficiency in resolving corporate distress in Nigeria. Nevertheless, it is also important to discuss the extent of the transformation of the underlying philosophy of CAMA - pre-CAMA and post-CAMA - regarding the resolution of distressed companies before considering the rescue tools, which were only introduced under CAMA in 2020. There is a wide range of issues to discuss when considering the transformation of the underlying philosophy of corporate rescue under CAMA; chief among these issues is the near absence of rescue devices prior to the amendments under CAMA 2020.[344] This is why it is imperative to commence this chapter with a discussion on the development of corporate rescue law in Nigeria.

3.2 Development of Corporate Rescue Law in Nigeria

3.2.1 Pre CAMA

Nigeria's current legal instrument governing corporate rescue law is the Companies and Allied Matters Act (CAMA) 2020.[345] CAMA 2020 is not just the source of corporate insolvency law, but it generally governs the activities of companies. Historically, CAMA is rooted in English law. Although CAMA has undergone some amendments over the years, the influence of English law, especially due to Nigeria's colonial legacy, cannot be over-emphasised. In short, most of what forms corporate rescue law in Nigeria is part of the company law infrastructure received from England and Wales.

[344] See p 19 above.
[345] Companies and Allied Matters Act, Cap C20, Laws of the Federation of Nigeria 2020.

Whereas some early company law scholars have traced the history of Nigeria's company law to the introduction of the Joint Stock Companies Act 1855 which established the principle of limited liability, the earliest attempt to indigenise the English legislation on company law was the introduction of the Companies Ordinance 1912 (1912 Companies Ordinance).[346] Apart from the fact that the company ordinance is a transplant of the English Companies (Consolidation) Act 1908, it was a good attempt at preventing the constant reference to London for interpretation of the Joint Stock Companies Act as it applied to Nigerian companies.

Therefore, the 1912 Companies Ordinance was the first attempt by the British Parliament to provide incorporation status to companies registered in Nigeria.[347] For all that, the scope of its application was not beyond the then colony of Lagos. Hence, the Companies Amendment and Extension Act 1917 (1917 Act) was promulgated following the amalgamation of the Northern and Southern protectorates in 1914.[348] The 1917 Act gave the 1912 Companies Ordinance a nationwide application and stimulated commercial activities across Southern and Northern Nigeria.

Nevertheless, it is preferable not to assess the impact of the 1917 Act *vis-a-vis* the latter effect, since commercial activities in Nigeria were halted as a result of World War I (1914 – 1918). This, in part, is why the 1912 Companies Ordinance and the 1917 Act were repealed and replaced by the Companies Ordinance of 1922 (1922 Ordinance). As with its predecessor, it is advisable to refrain from any commercial or legal scrutiny about the impact of the 1922 Ordinance. This is because, despite several amendments (1929, 1941, and 1954), it has been difficult for practitioners and scholars to fully assess the transformative impact of the 1922 Ordinance in Nigeria's jurisprudence due to the effect of World War II (1939 – 1945).[349]

Following Nigeria's declaration of independence in 1960, and the subsequent adoption of the 1963 Republican Constitution, which scrapped the British Monarchy and recognised Nigeria as a republic, the British parliament was no longer seized with the powers to make laws for Nigeria. The 1922 Ordinance was renamed the Companies Act 1963 and remained in force

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[346] Olakunle Orojo, *Company Law and Practice* (3rd edn, Mbeyi & Associate (Nig) Ltd 1992) 17

[347] Joseph Joseph Abugu, *Principles of Corporate Law in Nigeria* (MIJ Professional Publishers Ltd 2015) (MIJ Professional Publishers Ltd) 69.

[348] Omoniyi Bukola Akinola, 'A Critical Appraisal of the Doctrine of Corporate Personality under the Nigerian Company Law' (2022) 2 NLII Working Paper Series 2. Also, see the Supreme Court Ordinance 1914, which received the English common law, the doctrines of equity and the statutes of general application in England came into force in Nigeria. See Olakunle Orojo, *Company Law and Practice in Nigeria* (5th edn, Lexis Nexis 2008) 16.

[349] World War II also slowed down commercial activities and put to a halt the development of companies in Nigeria. Thus, the Ordinances of 1929, 1941 and 1951 did not impact the development of Nigerian company law significantly. See Orojo, *Company Law and Practice in Nigeria 9. For a more detailed analysis of subsequent amendments of the 1922 Companies Ordinance, see* Nigerian Law Reform Commission, *Report on the Reform of Nigerian Company Law*, 1991).

until 1968 when the then military government in Nigeria through the supreme military council passed the Companies Decree 1968 (1968 Decree).[350] Notwithstanding the fact that the 1968 decree introduced some novel provisions such as registration of foreign companies in the register of companies in Nigeria, publication of company affairs, and increased directors and shareholders accountability, it was largely a combined patch of two legislative paths. The 1968 decree combined provisions from two prior enactments; the 1958 Companies Act and the Companies Act 1948 in Britain.[351] Critics have also referred to the failure of the 1968 decree to put local circumstances into consideration whilst transplanting the British Companies Act 1948 as a major flaw that made its enforcement and applicability problematic.[352] An example that captures the irony of that moment is that by 1968, the British Parliament had already repelled the Companies Act 1948 and replaced it with the Companies Act 1967. Still, Nigeria did not consider the new amendments.[353]

Despite the above obvious defects, the 1968 decree remained in force for more than two decades. Thus, pursuant to the Nigerian Law Reform Commission Act 1979, Prince Bola Ajibola (SAN), the then Attorney-General and Commissioner of Justice in Nigeria, authorised the Nigerian Law Reform Commission (Law Reform Commission) in March of 1987 to review Nigerian company law in order to bring reforms that will meet the rapidly developing economic activities of the country.[354] Consequently, the commission received memoranda from stakeholders and reviewed their opinions on how to reform Nigeria's company law to meet the exigencies of the time. The review of Nigeria company law led to the Law Reform Commission recommending a new Companies Degree to codify some of the common law principles and address other concerns raised by stakeholders. This recommendation cumulated into the

[350] The company Ordinance 1912 which was amended in 1922 became chapters 38 and 37 of the Laws of Nigeria in 1948 (1948 Companies Act) and 1958 (1958 Companies Act) editions respectively.
[351] Commission, *Report on the Reform of Nigerian Company Law)* 6.
[352] Bolanle Adenike Adebola, 'Corporate Rescue and the Nigerian Insolvency System', UCL (PhD Thesis, University College London 2013) 16; Nigeria Law Reform Commission, *Report on the Reform of Nigerian Company Law and Related Matters (Volume 1, Review and Recommendation 1988)*, 1988) 1.
[353] The Companies Act 1967 was not the only legal instrument that was snubbed. The 1967 Companies Act was not the only legal instrument that was snubbed. The Jenkins Report 1962 and the Report of the Commission of inquiry in Ghana were also snubbed. See The Jenkins Committee, *Report on the Company Law Committee 1962* (The Jenkins Report, 1962); OKF, 'Final Report of the Commission of Inquiry into the Working and Administration of the Present Company Law of Ghana' (1962) The Modern Law Review 78. See also law reform, *Final Report of the Commission of Enquiry into the Working and Administration of the Present Company Law of Ghana* (London School of Economics and Political Sciences 1961). All these reports provided evidence of the failures of the 1948 Companies Act. Yet, no steps were taken to codify the common law rules and decisions of the courts that appears to have address these problems prior to 1968.
[354] The Law Reform Commission was initially chaired by Sir Darnley Alexander in 1987 while Dr. Olakunle Orojo was the project commissioner. Dr. Orojo later became the Chairman of the Law Reform Commission between 1988 -1993.

enactment of the Companies and Allied Matters Decree 1990, which became CAMA 1990, following Nigeria's return to democratic governance.

3.2.2 CAMA Regime

CAMA 1990 is the premier legislation that ushered in the new CAMA regime for the regulation of companies in Nigeria. In terms of impact, it has been described as the legislation that signalled the shift of Nigeria's company law towards a progressive tradition.[355] This legislation not just transformed the economic landscape in Nigeria but also reshaped corporate law jurisprudence with the indigenisation of the company statute.[356] Although most of its provisions were similar to the English Companies Act 1985, CAMA 1990 had three parts, and on the face of the enactment; it appears to be a tripartite mix of responses to stakeholders' concerns.[357]

First, it addresses the non-codification of common law rules, which was a general criticism of the 1968 Act.[358] For example, it codified the English law principle of separate legal personality of incorporated companies.[359] Similarly, it codified the ultra-vires rule espoused in the *Ashbury Railway Carriage and Iron Co. Ltd. v Riche* case.[360] Secondly, it addressed regional and international concerns. In this regard, CAMA 1990 addressed the concerns of stakeholders by providing simplified Indigenous legislation that encourages foreign direct investment, especially with international trade partners and regional organisations.[361] Finally, in line with best practice, a central agency known as the Corporate Affairs Commission (CAC) was created to regulate companies' formation, management, and dissolution.[362]

CAMA 1990 empowers companies to access credit, increase productivity, and sustain the company or its business.[363] Similarly, under CAMA 1990, companies could use their assets as collateral to secure loans and issue debentures to raise corporate capital.[364] This is a way of giving creditors security interest in the debtor company's assets. When credits are secured, the

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[355] Emmanuel Akanki, 'Company Law Development Through the 1990 Legislation', *in* Akintunde Obilade*, A Blueprint for Nigerian Law: A collection of critical essays written in commemoration of the thirteenth anniversary of the establishment of the Faculty of Law of the University of Lagos* (Faculty of Law, University of Lagos 1995) ch 5.
[356] Adebola (n 352) 32.
[357] The provisions in Part A cover the incorporation of Companies. Part B covers the registration of the Business name and Part C covers incorporated trustees.
[358] Companies Decree 1968.
[359] CAMA 1990, s 37; *Salomon v Salomon* [1896] UKHL 1, [1897] A.C. 22.
[360] (1875) L.R.7 HL 653.
[361] CAMA 1990, s 20 (4). See also , *Companies Regulations 2012*, r 26(1); ECOWAS, *Protocol A/P.1/11/84 of 23 November 1984* (1984).
[362] CAMA 1990, s 1. See also Akintunde Ẹmiọla, *Nigerian Company Law* (ch 2).
[363] CAMA 1990, s 166.
[364] ibid.

company and the economy benefit from such security: it increases the possibility of the company obtaining future credit and reduces the cost of borrowing throughout the economy.[365] Such credit may be secured by a fixed or floating charge, or a mixture of both. However, in the event of default or failure to liquidate the debt, the adverse party may launch insolvency proceedings, which can lead to any of the following outcomes: winding-up, arrangement and compromise, and receivership.[366]

A superficial look at these rescue tools seems to show that the focus of CAMA 1990, and perhaps the pre-CAMA regime, was on the ability of creditors to realise their assets. In particular, the insolvency tools under CAMA 1990 were mostly used as debt recovery tools. For example, section 409 of CAMA 1990 allows creditors to initiate winding up proceedings if a company indebted to the creditor for an amount above N2000 neglects to pay the debt three weeks after demand.[367] In *Re Bryant Investment Co Ltd*,[368] the English court interpreting a similar provision from section 123(1) of the IA 1986 (as amended) considered the meaning of the words: "is indebted", "then due", and "so due" in the context of the debtor-creditor relationship. The court held that these words should be construed to mean that a debt forms the base for a statutory demand served subject to section 123(1)(a) of the IA 1986, only if such debt was due on the day when the creditor sought to recall the debt.[369]

Consequently, under CAMA 1990, the effect of failing to pay a debt in excess of N2000 three weeks after the due date for repayment upon demand, includes the initiation of winding-up proceedings, restructuring the company by way of arrangement and compromise, and the appointment of a receiver or receiver-manager. Although the arrangement and compromise provisions can be viewed as restructuring provisions, they may sometimes lead to the collapse of the corporate entity. Similarly, while the winding-up and receivership provisions are debt recovery provisions, the end-product of these tools may, in peculiar circumstances, lead to the death of the entity. However, as will be highlighted, these tools may be considered effective options in the rescue matrix.

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[365] Robert E Scott, 'A Relational Theory of Secured Financing' (1986) 86 (5) Columbia Law Review 901, 927.
[366] CAMA 1990, PartS XV, XVI and XIV.
[367] ibid s 409; *Gateway Holdings Ltd v Sterling Asset Management & Trustees United* (2016) 9 NWLR (pt 1518) 490, 514- 51S (paras E-C).
[368] *In re BRYANT INVESTMENT CO. LTD.* [1974] 1 WLR 826.
[369] Insolvency Act 1986 (Amended), s 123(1). For the definition of a debt, see the opinion of per Uwaifo JCA (as he then was) in *Hansa International Construction Ltd v Mobil Producing Nigeria* (1994) 9 NWLR (pt 366) 76, 86; *International Merchant Bank Nigeria Ltd v Speegaffs Company Nigeria Ltd* (1997) 3 NWLR (pt 494) 423; Emeka Chianu, *Company Law* (LawLords Publications 2012) 628.

3.2.2.1 Winding-up Proceedings

A creditor can commence winding-up proceedings under CAMA 1990 by applying to the Federal High Court to wind up a company unable to pay its debt.[370] This process primarily allows for the orderly distribution of company assets to stakeholders, including the company's creditors. Also, an additional incentive for winding up a company is provided by the fact that during insolvency, the law ranks both the secure and unsecured creditors above members of the company for the purpose of distributing the company's assets.[371] What is more, the court has given further impetus to creditors to petition for winding up for failure to pay a debt that is the subject of a judgment or a debt emanating from a judgment.[372]

In *Ado Ibrahim & Co Ltd v BCC Ltd*,[373] the Nigerian Supreme Court held that the mere fact that a company disputes the amount or total sum of credit owed to the creditor will not prevent the court from entertaining a petition for the winding up of the company.[374] This position can be construed to be the same when viewed in the context of a judgment debt. A judgment creditor can take advantage of section 409 by bringing a petition to wind up a company pursuant to section 409(b) of CAMA 1990 if the judgment debt is wholly or partly unsatisfied, after the execution of the judgment order or such other processes as the court has directed on the judgment debtor. In such a situation, if the company's assets are not sufficient to satisfy the judgment debt, the company will be treated as insolvent pursuant to section 567(1) of CAMA 1990.

Notwithstanding the provisions of section 409(b) of CAMA 1990, a judgment debtor could still find a narrow window to dispute a judgment debt. If a judgment debtor can furnish evidence to satisfy the court that such a judgment is a nullity or the judgment creditor procured the judgment by fraudulent means, or that the court lacked the jurisdiction to entertain such matters.[375] Although there is no clear pronouncement as to whether the court will apply the plea of *res judicata* to winding-up proceedings, it is argued that the plea of *res judicata* applies within the purview of section 409(b) of CAMA 1990 and its succeeding provision.[376]

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[370] CAMA 1990, s 408(d); cf s 408(d); cf CAMA 1990, s 471.
[371] ibid s 493.
[372] Note that by the time of the coming into force of CAMA 1990, the Foreign Judgement (Reciprocal Enforcement) Act Cap 152 LFN 1990 (which has been replaced by CAP F35 LFN 2004) was also enacted. Although it came into force in 1961, section 10 of the Foreign Judgement Act provided for the enforcement of foreign judgements within 12 months from the date of its delivery.
[373] *Ado Ibrahim & Co Ltd v BCC Ltd* (2007) 15 NWLR (pt 1058) 538.
[374] ibid 573.
[375] *Alowiye v Ogunsanya* (2013) 5 NWLR (pt 1348) 570; *Nwonkwo v Yar'Aduo* (2010) 12 NWLR (pt 1209) 518; *Babatunde v Olatunji* (2000) 2 NWLR (pt 646) 557.
[376] CAMA 2020.

In *Tony-Anthony Holdings v Commercial Bank for Africa*,[377] the Court of Appeal in Nigeria accepted and upheld the appellant's plea of *res judicata* even though the respondent bank's claim at the Federal High Court included, among other things, the winding-up of the appellant company pursuant to section 409(b) of CAMA 1990. The decision of the court of appeal has been criticised by some commentators, including but not limited to Halliday Chidi.[378] The main crux of the criticism is the fact that the Court of Appeal (CA) upheld the plea of *res judicata* due to the winding-up of the appellant company. Halliday argued that the CA was wrong to have considered this case as one that the principle of *res judicata* would apply since it falls under the ambit of section 409(b) of CAMA 1990 and the appellant has failed to satisfy the judgment debt in the judgements of the Lagos state High Court, and the Failed Bank Tribunal in 1995 and 1998.[379] With the greatest respect, it appears that Halliday did not consider the fact that both judgements were on the same subject matter. Even though the respondent was considered under section 409(b) of CAMA 1990, it would be an abuse of the process of court if the appellant had paid the same twice by way of complying with both judgment debts. It is submitted that section 409(b) of CAMA 1990 is not an exception to the principle of *res judicata*. The court therefore should not enforce section 409 (b) of CAMA 1990 if it will be considered to be an abuse of the court process.

It is pertinent to observe in the above case, as it is with many cases involving winding-up, that the proceedings were commenced to enable the creditor to either recover the judgment debt or recover the actual debt sum. However, this kind of action may sometimes lead to an unpredictable outcome - bringing the life of the company to an end. This is why the winding-up tool has not been viewed as an effective means of saving the companies or even a debt recovery tool. There is a high probability that wind-up will put the company in abeyance, and if not comatose, the probability is extremely high. In practice, the winding-up process usually snowballs into the dissolution of such a company.[380]

3.2.2.2 Arrangement and Compromise

As a rescue tool, arrangement and compromise are two words with mutual reciprocity. An Arrangement is a variation in rights or liabilities of members or creditors or debenture holders

[377] *Tony-Anthony Holdings v Commercial Bank for Africa* (2013) All FWLR (pt 698) 944
[378] Halliday Chidi, 'The aftermath of Company's inability to pay its debt in Nigeria: An Appraisal' (2018) 7(1) Port Harcourt Law Journal 178.
[379] ibid 184.
[380] *Spring Bank Plc v ACB Internotionol Plc* (2016) 18 NWLR (pt 1544) 245, 255 at paras C -F

of a corporation, or a class of any of these groups.[381] Conversely, compromise is mainly an arrangement by a company where the creditors of the company and/or its members or a class thereof, agree to accept less than their actual entitlement in satisfaction of the entire debt or obligation owed to them by the company.[382] CAMA 1990 provides for corporate restructuring by way of arrangement and compromise.

Central to the procedure to vary the rights or liability of the members and creditors or restructure the debt of the company or the company itself, is the court. An applicant under the CAMA 1990 regime applies to the Federal High Court for a meeting between creditors and members. The applicant will then attach a statement showing the extent to which the arrangement will affect the company's stakeholders (directors, shareholders, and creditors) and forward the same along with the notice of the meeting to the shareholders and creditors of the company. Although the court will have to sanction the meeting, it may do so after an exhaustive investigation of the scheme, or may defer to the Securities and Exchange Commission (SEC) to investigate the scheme and submit a report to the court before the court can sanction it.[383]

Unlike the 1948 Companies Act in Britain which restricts the application of distinct types of arrangements to a single procedure,[384] CAMA 1990 permitted the administration of arrangements under two categories: Part XVI and XVII. While Part XVI covers arrangements between a company, its creditors and members, Part XVII covers arrangements between two or more companies. As earlier noted, SEC may get involved in reviewing arrangements under Part XVI if the court deems it necessary, but arrangements under Part XVII are usually subjected to the scrutiny of the SEC to determine the appropriateness or otherwise of the scheme.[385]

Arrangement under the 1968 Decree is almost identical to the CA 1948. Although these enactments provide a single legislative procedure for the enforcement of diverse types of Arrangements, there appears to be an important difference between both procedures.[386] While the arrangement procedure under the 1968 Decree appears to be simplistic, the dual statutory

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[381] CAMA 1990, s 539.
[382] ibid.
[383] CAMA 1990, s 539 – 540. The effect of the court sanctioning the scheme is that it becomes binding on both the company and the creditors but can only be effective when a certified true copy of the order of the court sanctioning the scheme has been deposited with the *Corporate Affairs Commission*. See CAMA 1990, s 715 (4).
[384] Companies Act 1948, s 206.
[385] This was one of the key recommendations of the Nigerian Law Reform Commission (Commission, *Report on the Reform of Nigerian Company Law).* See the Commission Report 1991, Volume II.
[386] 1968 Decree, s 197.

provisions of Part XVI and XVII under CAMA 1990 appear to be cumbersome.[387] In addition, there is no debtor protection mechanism in the form of a moratorium against creditors' enforcement of proprietary rights. Therefore, this procedure under CAMA 1990 was not a suitable rescue mechanism, especially if the company was deep into insolvency. This is because creditors are not precluded from enforcing property rights even to the detriment of the business. For this reason, and especially because of the high cost of prosecuting the arrangement and compromise scheme under CAMA 1990, it was not viewed as a popular rescue device in Nigeria.[388]

3.2.2.3 Receivership Procedure and the Nigerian Receiver under CAMA 1990

The Receivership procedure under the CAMA 1990 regime is the most robust insolvency procedure in Nigeria.[389] This is not just because of the enormous powers that the receivership procedure offers the secured creditor but also because of the unique nature of the Nigerian receiver. So, what is the term "receivership", and who is the Nigerian Receiver?

Generally, receivership is a corporate rehabilitation tool available to a secured creditor who intends to realise or recover their outstanding debt sum when the debtor defaults in payment under a secured loan transaction. The secured creditor appoints a third party known as the receiver, who is empowered under CAMA 1990 to recover the debt of the secured creditor.[390] Such debt may have been secured by a fixed or floating charge. In this regard, a receiver can be appointed if the company debt is secured by a fixed charge, and a receiver-manager (receiver-manager) is usually appointed when the debt is secured by a floating charge over the entirety or part of the insolvent company's assets.

Although the receiver and receiver-manager can be appointed by a secure creditor, there are fundamental differences between both procedures. On the one hand, the receiver only collects and liquidates the part of the assets to which the receivership applies.[391] On the other hand, they act as a receiver and manager of the company's business, including all its assets.[392] However, CAMA 1990 neither provides a working definition of a receiver nor a conceptual differentiation between a receiver and a receiver-manager. Accordingly, section 868 of CAMA

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[387] Tunda Idolo Ogowewo, 'The dual statutory procedure for effecting a scheme of arrangement in Nigeria: law reform or retrogression' (1994) 6 Afr J Int'l & Comp L 594, 595 – 596.
[388] Commission, *Report on the Reform of Nigerian Company Law, 325*
[389] For a brief highlight on the etymology of receivership, see Justice Murphy's commentary in *Re Bula Ltd* (2002) WJSC-HC 879, 905.
[390] CAMA 1990, s 390 and 393.
[391] ibid, s 393(1).
[392] ibid, s 393(2)., s 393 (2).

1990 stated clearly that a receiver includes a manager. Just as important, the Nigerian courts, especially the Supreme Court have attempted to define a receiver. In *Uwakwe & Ors V. Odogwu & Ors*,[393] the Supreme Court defined a Receiver as:

> "[A]n impartial person appointed by the court to manage, collect and receive pending the proceedings, rents, issues and profits of land or personal estate which seems unreasonable to the court that either party should collect or receive or for the same to be distributed amongst the persons entitled."[394]

Similarly, in *Magbagbeola v. Sanni*,[395] the Supreme Court held that, among other things, a Receiver is a person appointed by the court to either hold a property in trust or administer the same in the event of bankruptcy or similar proceedings. Thus, a Receiver is a natural person who is appointed for the purpose of realising a company's assets. In this regard, the receiver is appointed to perform two main functions: either sell or manage the assets of the company until the debt is realised for the Secured Creditor, in which case, the company will then be handed over to its owners. Invariably, the powers of the directors while the receiver is in place are only limited to assets not covered by the receivership. Thus, directors of the company are not displaced by the receiver, but they lose the power to deal with assets covered by the appointment of a receiver and resume their duties once the receiver completes his assignment. Nevertheless, the directors may exercise residual powers with respect to assets covered by the receivership if the need arises. For example, if the receiver refuses to pursue or defend an action concerning a property covered by the receivership, the directors can institute such actions.[396] The directors can also continue their statutory duties and may work simultaneously with the receiver. In such cases, the directors may request information from the receiver regarding assets controlled by the receiver.[397]

The definition in the above two cases strikes a chord with the definition of a receiver in the Black's Law Dictionary.[398] According to Black's Law Dictionary, a receiver is a disinterested person appointed by the court or corporation or other person to preserve or apply the property of a debtor to satisfy the claim of a creditor, to prevent the loss or destruction or damage of such property.[399] Though practically useful, these definitions only cover an aspect of

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[393] *Uwakwe & Ors V. Odogwu & Ors* (1989) LPELR 3446(SC); (1989) 5 NWLR pt. 123, 562.
[394] ibid, NWLR (pt. 123) 562 at 579.
[395] *Magbagbeola v. Sanni* (2005) LPELR 1815(SC).
[396] *In Re Kayford Ltd* [1975] WLR 1; [1975] 1 ALL ER 604, 133.
[397] *Gomba Holdings UK Ltd v. Homan* [1986] 1 WLR 1301, 1308.
[398] Bryan A Garner (ed), *Black's Law Dictionary* (12 edn, Sweet & Maxwell 2024) 1524.
[399] ibid 1524.

receivership - through a court-appointed receiver. While it can be argued that these definitions do not envisage a scenario (as will be discussed later)[400] where a receiver can be appointed contractually, Gower and Davies offered a definition that covers an out-of-court appointment of a receiver by an instrument in the form of a contract creating a charge over the property of the company.[401] Specifically, Gower and Davies described a receiver as a third party appointed by a charge holder based on a contractual agreement to manage and control a company for the realisation or liquidation of the debt of the charge holder.[402] This definition satisfies two main characteristics. First, it recognises the ability of a debenture holder to appoint a receiver. Secondly, and related to the first characteristic is the recognition of the appointment of a receiver out of court. However, it falls short, in recognising the powers of the court to appoint a receiver.

Whereas *Magbagbeola v. Sanni*,[403] *Uwakwe & Ors V. Odogwu & Ors*[404] and even the Black's Law Dictionary[405] recognises the power of the court to appoint a receiver, Gower and Davies[406] in contrast, recognised the power of a debenture holder to appoint a receiver pursuant to a loan agreement. These respective definitions, on their own, are inadequate because, in practice, one cannot substitute the other. Though the courts have the power to appoint a receiver, most debenture instruments permit the debenture holder to appoint a receiver upon default of payment of the agreed sum.[407] The power of the court to appoint a receiver is recognised both in case law and statutory enactments and can be invoked either upon application from a debenture holder or *suo motu* to maintain the value of the asset or prevent the company from dissipating the asset. For example, section 37(1) of the Senior Courts Act 1981 sets out the jurisdiction of the English courts to appoint a receiver in specific circumstances. [408]

Thus, any working definition of a receiver must incorporate the power of the court and the debenture holder to appoint them. Both aspects are not mutually exclusive but are complementary in ascertaining the extent and circumstances in which a receiver can be

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[400] See discussion in pp 77 -79.
[401] Paul Lyndon Davies, *Gower: principles of modern company law* (Classics series, Sweet & Maxwell 2021).
[402] ibid 1196.
[403] *Magbagbeola v. Sanni* (n 395).
[404] *Uwakwe & Ors V. Odogwu & Ors* (n 393).
[405] Garner (ed), *Black's Law Dictionary* (n 398).
[406] Davies, *Gower: principles of modern company law* (n 401).
[407] Office of the Director of Corporate Enforcement, 'Liquidators, Receivers and Examiners: Their duties and powers' <https://www.odce.ie/Portals/0/Documents/Functions/Quick%20guide%20for%20liquidators.pdf> accessed 27th September 2022, 4.
[408] See the Companies Act 1963, Part VII and the Companies Act 1990, Part VIII. See also Civil Procedure Rules 1998(CPR) 69 9.2; Practice Direction (PD) 69- Court's power to appoint a receiver.

appointed. In this regard, this thesis will adopt the definition from the Office of the Director of Corporate Enforcement in the UK, which describes a receiver as:

> "[...]a person appointed pursuant to a debenture (loan agreement) or a Court order, whose main task is to take control of those of the company's assets that have been mortgaged or charged by the company in favour of a debenture holder (lender), to sell such assets and apply the proceeds to discharge the debt owing to the debenture holder."[409]

This definition appears to be more balanced as it satisfies both premises. On the one hand, it recognises the power of a debenture holder to appoint a receiver pursuant to a debenture. On the other hand, it recognises the power of the court to appoint a receiver. These essential elements of the receivership under English law were received and transplanted in the Nigerian Jurisprudence both in terms of the structure of the enactment in the form under CAMA 1990 but in the interpretation of the law, save for a few modifications, which, as this this thesis will argue later, set the Nigerian law on a rescue trajectory.[410]

CAMA 1990 held onto the structural framework of the Receivership procedure under the British Companies Act 1948, with slight modifications that enabled the law to foreshadow the modern concept of corporate rescue in Nigeria. In hindsight, one could argue that while the concept of corporate rescue is relatively new in Nigeria, the receivership procedure under CAMA 1990 signifies the first ambitious shift towards a more communitarian approach to corporate rescue in Nigeria.[411] This is true, considering not just the fact that the Nigerian economy was in recession at the time but also the way the drafters sought to deviate from judicial precedents by uniquely designing the duties of the Nigerian receiver.[412]

CAMA 1990 positioned the receiver and receiver-manager in a similar place to the company's directors. Unlike the English model of receivership, in which the receiver only takes the interest of the appointing authority into consideration, the Nigerian receiver is obligated to consider the interests of all stakeholders in reaching decisions.[413] Consequently, the Nigerian receiver under

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[409]Office of the Director of Corporate Enforcement, 'Decision Notice D/2011/1: The Principal Duties and Powers of Liquidators, Receivers & Examiners under the Companies Acts 1963-2009' <http://edepositireland.ie/bitstream/handle/2262/70818/Liquidators_Receivers_Examiners.pdf?sequence=1&isAllowed=y> accessed 27th September 2022.

[410] See Chapter 5.

[411] See ch 2, s 2.4.1.3.

[412] Nigerian Law Reform Commission, *Report on the Reform of Nigerian Company Law*, vol II, Part XV: Receivers and Managers (Nigerian Law Reform Commission 1988) 300.

[413] ibid 304; This position is similar to the position provided under the Draft Companies Bill of Ghana, at the time. See Ghana Draft Companies Code Bill, Clause 238(1) and (2).

CAMA 1990 was expected to maximise the company's overall objective and maintain its corporate existence. In other words, the Nigerian receiver is expected to manage the company to prevent corporate collapse.

Another point of departure from the British model is the non-professionalisation of Receivers. Alternatively, CAMA 1990 moved for appointors to be liable for their Receiver's decision by making the Receivers agents of the appointors and placing fiduciary duties on them.[414] This is contrary to what is obtainable in the UK jurisdiction, where a professional known as an 'insolvency practitioner' is appointed as a receiver under section 230 (2) of the IA 1986.[415] Perhaps the idea was to incentivise the appointors to upgrade the scale of criteria they consider when appointing receivers, rather than to professionalise by certification those who will be qualified to be appointed as receivers.[416]

Despite this difference, the procedure under CAMA 1990 on receivership is not diametrically opposed to the procedure under the CA 1948. The major difficulty lies in the interpretation and application of the duties of the receiver. Specifically, sections 390 and 393 of CAMA 1990 have been subject to misinterpretation or misapplication by judges, practitioners and academics.[417] To fully grasp this and understand where the confusion comes from, it is necessary to analyse key cases from the pre-CAMA and post-CAMA era that put into context the misinterpretation and misapplication of the duties of the Nigerian Receiver. Prior to the CAMA era, no codified legislation in Nigeria outlined the procedure for the appointment, duties, and functions of a receiver. Apart from the Companies Decree 1968, much of the governing principle in this regard was based on judicial precedents from cases decided in England under the CA 1948. Interestingly, two very important cases decided by the Nigerian Supreme Court in the pre-CAMA era, influenced and changed the dynamics of the application of the rules on the nature, powers and rights of the Nigerian receiver in the post-CAMA era.

The first consequential decision was in the case of *Intercontractors Nig. Ltd v National Provident Fund Management Board* (NPFMB case).[418] In the *NPFMB* case, a statutory body (National Provident Fund Management Board) [the Board] was saddled with the legal authority to collect contributions from employees, by way of statutory deductions. These contributions

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[414] CAMA 1990, Schedule 11.

[415] Such a person must have been licensed to exercise his authority by a professional body pursuant to sections 390 - 392 of the Insolvency Act 1986 and The Insolvency Practitioners (Recognised Professional Bodies) Order 1986.

[416] ibid (n 412) 302-303. In line with section 230 (2) of the IA 1986, CAMA 2020 now provides for the appointment of professionals as receivers. See CAMA 2020, chapter 26.

[417] Adebola (n 352) 248 - 249.

[418] *Intercontractors Nigeria Ltd v. National Provident Fund Management Board* (1988) 2 NWLR (Pt 76) 280.

were made pursuant to the National Provident Fund, in which the Defendant/Appellant, Intercontractors Nig. Ltd., carried out some deductions without remitting the same to the Board. These deductions were made in 1981, 1983, and 1985, and the appellant company failed to service a loan from Savannah Bank Nig. Ltd.

Consequently, on 27th June 1985, the company was placed under receivership. On 7th April 1986, the Board commenced an action at the Federal High Court to recover the unremitted fund, but the Appellant/Defendant urged the court to discountenance the arguments of the Board and strike out the matter on the premise that the Defendant company was undergoing receivership. Furthermore, even though the action may be successful, the judgement may be nugatory because an unsecured creditor cannot bring an action against a company undergoing receivership. At the trial court, the Judge discountenanced the argument of the Defendant by overruling the defendant's objection and the Court of Appeal agreed with the trial judge in dismissing the appeal of the Defendant/Appellant. The receiver/manager of the Defendant/Appellant appealed the decision on behalf of the Defendant/Appellant to the Nigerian Supreme Court. At the Supreme Court, the receiver/manager sought the leave of court to signify his interest in the matter and authority to file an appeal in the name of the company. The Supreme Court refused to grant the receiver leave to state his authority but allowed the appeal in the name of the company to proceed.[419] The court also held that the Board was right to have filed the action against the Defendants for recovery of the unremitted fund because there was no evidence to show that such assets were covered by debenture.[420]

Thus, the *NPFMB case* established that the Nigerian courts would allow an action against a company in receivership as far as the action has to do with assets outside the receivership. Similarly, the company can bring an action against a defendant if the asset in the dispute falls outside the scope of the receivership. In these circumstances, Karibi-Whyte JSC held that the directors will take the lead, but where such an asset is covered by a debenture, the receiver/manager will take the lead as the proper party to sue, although he cautioned that this must be done with the leave of court.[421]

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[419] ibid 290, 294.

[420] The key determinant whether an action will succeed for or against the receiver or the company is the scope of the receivership. An action can only be brought against the company when the assets in dispute are not covered by the receivership. See Justice Karibi-Whyte JSC, ibid 291 – 292.

[421] The key determinant whether an action will succeed for or against the receiver or the company is the scope of the receivership. An action can only be brought against the company when the assets in dispute are not covered by the receivership. See Justice Karibi-Whyte JSC, ibid 291 – 294.

The second consequential decision is the case of *Intercontractors Nig. Ltd v UAC* (UAC case),[422] wherein the Claimant company UAC received a default judgement in their favour - against the Defendant company Intercontractors Nig. Ltd., for a debt owed to the Claimant. The Judgement was obtained in May 1985, and in June 1985, a receiver/manager was appointed pursuant to a debenture by Savannah Bank Nig. Ltd., over the Defendant's company asset.

By September 1985, the Defendant's company, on its own accord as Applicant, filed an action seeking the High Court to grant an indefinite stay on a writ of *fieri facias* because the company was under receivership and the chattel in question could not be seized. If it were, this would be deemed trespass, plus it could be contemptuous to attach such property in fulfilment of a judgement debt. The Claimant company, as Respondent, objected to the arguments of the Applicant on the grounds that there was no subsisting appeal to obstruct the enforcement of the Judgement debt and that, in any case, such an action ought to be instituted by the receiver/manager and not the company alone. The Judge sustained the respondent's objection and dismissed the Applicant's action on the premise that it was not an appeal against a matter that constitutes *res judicata*.[423]

Also, the trial judge held, among other things, that the Applicant was not the proper party to institute the action because it was not an action seeking a declaration as to priority between the Claimant and the Defendant.[424] The idea that the Judge espoused was that, in determining the question of whether a judgment debtor can stay execution of a judgment debt, the court would consider whether the action is a question of priority among competing equities - in this case, between the receiver and a Judgement-creditor – or an appeal against the decision of the court. The implication is that, while the court will only consider the Receiver as the property party in an action regarding the former, the court will not consider the Receiver as the proper party in the latter. That is because such a decision reached in the latter case is final. The proper party to bring an action when there is a final judgement is the judgement-debtor, who can do so in limited circumstances.[425] For example, the Judgement-debtor can challenge the judgment of the court or plea for extension of time to liquidate the debt.

The decision of the trial Judge in the UAC case puts into question the role and powers of the receiver in Nigeria and how the floating charge affects the company stakeholders when a receiver has been appointed or when the company is under receivership. Apart from the issue

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[422] *Intercontractors Nigeria Ltd v UAC of Nigeria Ltd* (1988) 2 NWLR (Pt 76) 303.
[423] ibid 314.
[424] ibid 324.
[425] Kathleen Okafor, 'Historical evolution, nature and powers of the receiver in Nigeria ' (2019) 11 (7) International Journal of Current Research 5392, 5393 - 5394.

of whether a receiver will require the leave of court to bring an action, which the court espoused in the *NPFMB case*, the Supreme Court in the UAC case also considered the nature and powers of the Nigerian Receiver. Although the Supreme Court and the Court of Appeal, especially, agreed mostly with the trial Judge in dismissing the appeal, the Supreme Court made some valuable remarks that have shaped stakeholders' view of the Nigerian receiver in the post-CAMA era. Among such remarks is the theory that a receiver must first seek and obtain the leave of court before instituting or defending an action. The power to grant leave is discretionary and will be determined on a case-by-case basis.[426] In confirming the fact that the discretion to commence or defend an action is not a private initiative of the Receiver, the Supreme Court reinforced its earlier approach to receivership in the NPFMB case by criticising as "too simplistic" the argument that a receiver can bring an action without the leave of court and that receivership cannot trigger a stay of execution of a final judgement.[427]

Furthermore, the court explained the effect of the appointment of a receiver. Relying, at least in substance, on the English case of Vine v. Raleigh,[428] the court made the case that the "company does not lose its legal personality neither are the goods vested in the Receiver/Manager on the appointment", the appointment of the receiver only paralyses the powers of the company to deal with such goods, but the Receiver/Manager can still maintain possessory title subject to all specific charges that were legally "created in priority to the floating charge".[429] However, the most instructive observation, at least, regarding this research, was the way the court described the duties of a receiver – focusing on the fundamental difference between receivership under Nigerian and UK Law prior to the EA 2002. In explaining the duties of the Nigerian receiver, Karibi-Whyte opined that a receiver is not just appointed for the purpose of protecting a debenture holder's interest "but also the estate involved in the debenture and for the benefit of all concerned".[430] This interpretation, especially the requirement for a receiver to consider the interest of concerned parties, will later conform with the provisions of CAMA 1990 on receivership.[431] In short, CAMA 1990 places the receiver/manager as a fiduciary so that in their dealings with or on behalf of the company, the receiver/manager must maintain utmost good faith towards the company.[432]

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[426] *UAC case* (n 422) 323.
[427] ibid [Karibi-Whyte JSC]. This is why the appeal was dismissed.
[428] *Vine v. Raleigh* 24 Ch D 238.
[429] ibid; See Sections 92 and 297 of the Companies Act 1986
[430] *UAC case* (n 422) 295.
[431] CAMA 1990, s 390.
[432] CAMA 1990, s 390 (1).

More importantly, and perhaps by share legislative dexterity, section 390 requires the receiver/manager to always act in the company's interest as a whole.[433] The interest of the charge holder is not prioritised against that of other stakeholders, even though both the floating and fixed charge holders have the power to appoint a receiver out of court.[434] This position is better amplified by the combined application of sections 390[435] and 393 of CAMA.[436] These important characteristics of the Nigerian receiver to control and manage the company's assets for the overall benefit of all stakeholders uniquely position the Nigerian receiver, at least conceptually, on a higher trajectory when compared with its older offspring (1968 Decree) and their parent enactment (CA 1948). This can be viewed in relation to the role of the Nigerian receiver and the forward-looking approach of the law – foreshadowing a rescue culture in Nigeria, even at a time when corporate rescue was not popular in England and Wales.

In contrast to the concept of the English model of receivership, the receiver was only required to realise the asset of the charge holder, or appointor only receives; the Nigerian law, via section 390 of CAMA 1990, gives the receiver the power to manage the assets of the company in the interest of all the company stakeholders, including the charge holder. Although this argument over the idea of corporate rescue in the Nigerian receivership model is purely for academic purposes, it is important to note that there is no evidence to show that the outcome of a receivership process has led to corporate rescue in Nigeria. Perhaps this is due to the nexus between an enforcement tool that can lead to rescue and having a process for governance that considers 'collectivity', which may lead to rescue. On the one hand, the enforcement tools or mechanisms are designed to ensure corporate rescue as an outcome. On the other hand, the process for governance is the mechanisms and institutions through which the receiver makes his decision - and in the case of the Nigerian receiver - inclusive of everyone. It could be that the lawmakers in Nigeria wanted to emphasise "inclusivity" when considering the receiver's decision. This view is supported by the fact that the general purpose for appointing receivers – whether the Nigerian receiver or an administrative receiver - is not to save the business or the company; the end-product of the receivership process is not pure rescue. However, it could lead to restructuring or partial rescue in limited circumstances, as we saw in Nigeria's telecoms and power sectors.[437]

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[433] CAMA 1990, s 390 (1) (a).
[434] CAMA 1990, sections 208 and 388.
[435] CAMA 1990, s 390 (2) (a) and s 393(a); contra s 393 (2).
[436] CAMA 1990, s 393(1) and s 390(3). However, this will not exclude him from liability occasioned by a breach of his duties. See section 390(3).
[437] For example, a receiver was appointed for Intercontinental Bank in the wake of the 2008-2009 global financial crisis due to unperforming loans, the process metamorphosed into an operational and financial restructuring and

3.2.2.3.1 Difference Between the role of Nigerian Receiver and the Receiver under English Law

In examining the difference between the receiver's role in Nigeria and England and Wales prior to the EA 2002, one has to examine the difference between a receiver and a manager. In *Re Manchester and Milford Railway*,[438] the court made an important observation when it described a receiver as one who receives and pays rent or other income 'paying ascertained outgoing' but who does not have the power to manage the company's assets.[439] For example, a receiver under English law will not have the power to buy and sell anything on the company's behalf. If the company intends to continue to carry on the business, the company will have to appoint a manager or a receiver and manager: the receiver will receive inflows and authorise outgoings for the benefit of the appointor, while the manager will be a separate person to manage the company's asset on behalf of the company.[440]

This Nigerian concept of receivership unlike its English counterpart creates a positive duty to manage the company's asset and certainly eliminates any discretion in this regard.[441] Conversely, the English equivalent has no duty to manage, but the receiver has a discretionary right to manage the company, and when the receiver elects to exercise this right, he does so to repay the secured creditor the debt sums and accrued interest. The implication is that, pursuant to the duties of a receiver under English law, the receiver has a discretion to sell the company's assets or close shop by liquidating the business or do both by selling the assets and closing the business; all in a bid to liquidate the debt of the secured creditor. However, this discretionary power is not without a caveat. Such discretionary power to manage the company's asset whenever exercised, must be done in a diligent manner.[442]

Another but closely related difference between the Nigerian receiver and its English equivalent has to do with responsibility. The English receiver was solely responsible and answerable to the secured creditor who appointed him. In short, he has one business only: to recover the debt of the appointor – whether he decides to sell the company's asset or close the company's

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cumulated as a strategic merger in 2012. See Central Bank of Nigeria, 'Central Bank of Nigeria Annual Report and Statement of Accounts for the Year Ended 31st December, 2009' (Central Bank of Nigeria 2009) (CBN 2009) 35.

[438] *In Re Manchester and Milford Railway Company. Ex parte Cambrian Railway Company* (1880) 14 ChD 645.

[439] ibid 653.

[440] *Pharmatek Ind. Projects Ltd v. Trade Bank (Nig.) Plc* [2009] 13 NWLR 577, 637.

[441] See text to note 44 in Bolanle, 'The Duty of the Nigerian Receiver to 'Manage' the company' (2011) 8(1) ICR 248, 9.

[442] See *Medforth v. Blake and Others* [2000] Ch 86

business to accomplish this result is his discretion – and this discretion will be exercised with due regard to the receiver's primary duty to the appointor and not to the debtor company.[443] Undoubtedly, the English receiver's responsibility towards the secured creditor was derived from the residue of the Court of Chancery, which the court described above, in the first limb of the definition in *Re Manchester & Milford Railway Co.*[444] The CA 1968 codified the one-way concept of responsibility reasoning, which was re-enacted under the 1968 Decree in Nigeria. The provisions of section 92 of the 1968 Decree restate the position under common law and equity as codified in the CA 1948; creating a one-way duty to recover the debt of the secured creditor.[445] In this regard, the receiver's duty does not include management duties - meaning he cannot manage the company in the interest of any stakeholder apart from the secured creditor.

Conversely, the Nigerian receiver under CAMA 1990 has a duty to manage the common law in the interest of the company's stakeholders. Although section 393 of CAMA 1990 restates the common law principle under section 92 of the 1968 Decree, section 390 expands the scope of responsibility of the Nigerian receiver beyond its English law counterpart. By making the receiver a fiduciary, CAMA 1990 places the receiver in the position of a director of the company to act in the interest of the company, while the director's powers to deal with the assets covered by the receivership remain in abeyance.

Furthermore, section 390(2) of CAMA 1990 constrains the Nigerian receiver to exercise his powers to preserve the company's assets, continue the company's business and promote the objectives of the company. This is not a matter of discretionary power but a positive and mandatory duty to ensure that the receiver does not just sell off the company's assets and close the company. Overall, the idea behind section 390(2) of CAMA 1990 is to protect the company from collapse. The Nigerian receiver was expected to act in ways that would 'facilitate the preservation of companies'.[446] That is to say, while the receiver is appointed to realise the asset of the company for the secured creditor, the receiver must consider the effect of his decision to sell the company's asset or close the company's business or both on other stakeholders, especially the employees and members of the company.[447]

Therefore, the receiver must first seek to rescue the company by making decisions that will preserve the company's assets and keep the company running as a going concern. The receiver

[443] *In Re B Johnson & Co. (Builders) Ltd* [1955] Ch 634 [661] (Jenkins J).
[444] ibid 89.
[445] 1968 Decree, s 92. See also section 297 of the 1968 Decree.
[446] Adebola (n 342).
[447] CAMA 1990, S 390(2)(b).

must defer the debt payment to such a time when the company is financially stable if the immediate realisation of the debt of the secured creditor will liquidate the company or adversely affect the members or employees, so long as that will lead to a better outcome. The goal in this regard is to keep the company as a going concern – indeed rescue the company if possible. It is arguable that the dynamics of section 390(2) placed the Nigerian receiver above its English law counterpart – in pursuit of corporate rescue.

Just like the Nigerian receiver, the administrator under English law is expected to consider the interests of different stakeholders in reaching decisions. Specifically, the administrator's responsibility is owed to all the creditors.[448] This innovation is a departure from the previous system of administrative receivership. Accordingly, the new system of administration gives the receiver greater accountability and increased responsibility, which could translate into the utilisation of corporate efficiency to rescue the distressed company from liquidation. The above argument is further justified by the challenge that practitioners and scholars in Nigeria faced when approaching the discussion on the concept of receivership under English law, which was viewed even by English scholars as unfair to other stakeholders and inimical to rescue culture.[449]

Similar sentiment was voiced by lawmakers in England who considered the system of administrative receivership as lacking inclusivity or as being a non-collectivist device.[450] In fact, a survey conducted by the Association of Business Recovery Professionals (APRB) between 1997 and 1999 shows the damage administrative receivership inflicts on the value of a company.[451] This feature of administrative receivership distinguishes it from the Nigerian receiver. Administrative receivership lacked the feature of inclusivity, thus, incentivising creditors to over-secure their assets, which contributed to the shutting down of businesses when receivers were appointed prior to the introduction of the EA 2002.[452]

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[448] IA 1986, Sch B1, para 3(2).

[449] Sandra Frisby, 'In search of a rescue regime: The Enterprise Act 2002' (2004) 67 The Modern Law Review 247, 252.

[450] Great Britain: Department of Trade & Industry, *Productivity and Enterprise: Insolvency — A Second Chance* (Cm 5234, London: HMSO 2001) 25. It is against this background that the administration procedure under the EA 2002 was enacted to provide a more collective approach to debt recovery that minimises, if not eliminates, the loss of the value of the company.

[451] Association of Business Recovery Professionals, *R3: 9th Survey of Business Recovery in the UK (London: ABRP 2000*) 18.

[452] Riz Mokal, 'Administration and Administrative Receivership - an Analysis. Current Legal Problems' Current Legal Problems <https://ssrn.com/abstract=466701> accessed 29 September 2022; Julian Franks and Oren Sussman, 'Resolving financial distress by way of a contract: An empirical study of small UK companies' SSRN Electronic Journal.

Notwithstanding the positive feature of "inclusivity", receivership in Nigeria did not enjoy positive treatment in practice. Two important cases show a discrepancy in the treatment of stakeholders or other parties: *Union Bank of Nigeria Ltd v Tropic Foods Ltd* (UBN case)[453] and *NBCI V. Alfijir (Mining) Nig Ltd* (NBCI case).[454] In the *UBN case*, the Defendant's company, United Bank of Nigeria via a syndicate bank facility, financed the Plaintiff's company, Tropic Foods Ltd under a secured loan transaction. The Applicant upon completing the agreement issued a debenture in favour of the Defendant's company. Under the debenture agreement, the applicant was authorised to appoint a receiver if the Defendant defaulted in payment. Upon default and attempt to sell some of the company's assets to raise capital, the Defendant as applicant approached the court seeking for an order of injunction restraining the Plaintiff/respondent from selling its assets. The court declined to issue the order, hence the Defendant appointed a receiver who prohibited the sale and froze the Plaintiff's account. The Plaintiff instituted a fresh action before the High court seeking the nullification of the receiver's appointment, and damages due to the actions of the receiver. At the High court, the Plaintiff argued that due to the failure of the bank to make payment, the company had to sell its property to raise capital for operational purposes. The company further argued that the value of the company's assets was beyond the bank's debt, therefore, the receiver's actions were not in the company's interest. The High Court decided in favour of the Plaintiff. At the Court of Appeal, Ejiwumi JCA, relying on the section 390 of CAMA 1990 and the decisions in the *UAC*[455] and the *NPFMB* case,[456] opined that although the Defendant's bank has the power to appoint a receiver pursuant to the secured loan transaction instrument, '[such a receiver on assumption of office] cannot ignore the interest of the company'.[457] Therefore, the court affirmed the power of the Plaintiff/Respondent restraining the receiver from the sale and freezing of its assets by the receiver appointed by the Defendant/Appellant.

The main point that influences the reasoning of the Court of Appeal in the *UBN case* is the nature of the powers of the Nigerian receiver. By virtue of section 390 of CAMA 1990, the Nigerian receiver is in a fiduciary position, so it must consider the interest of the company in all of its actions. In this regard, a company has the power to challenge the actions of a receiver in selling the company's assets, when such actions lead to an unjustifiable depletion of assets.[458]

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[453] *Union Bank of Nigeria Plc v. Tropic Foods Ltd* (1992) 3 NWLR (pt 228) CA.
[454] *NBCI V. Alfijir (Mining) Nig Ltd* (1993) 4 NWLR (Pt 287) 346 CA; (2000) 22 WRN 66 SC.
[455] *UAC case*.
[456] *NPFMB* case.
[457] *UBN* case 245-247 [Ejiwumi JCA].
[458] ibid 248.

Therefore, while the Plaintiff had the power to appoint a receiver, the Defendant also had the power to challenge the manner in which the receiver exercised his powers by virtue of the fiduciary relationship between the receiver and the company under section 390 of CAMA 1990. It appears that the power to challenge the receiver when the business of the company is about to be ruined, or when there is immediate danger to dissipate the assets of the company or prevent the company from running as a going concern.[459] According to the court, a receiver is not a repository of the legal right of the assets but merely a person with possessory rights. Therefore, the directors of the company, who are the repository of the legal right over its assets, can bring action to prevent the dissipation of its assets.[460]

The above opinion, though similar to the opinion of the court in *Robinson Printing Co Ltd v Chic Ltd,*[461] is not identical and immediately raises the question of whether the receiver is an agent of the company or the debenture holder. The legal implications are very different and should be distinguished. Apart from the fact that *Robinson Printing Co Ltd vs Chic Ltd,*[462] is an English common law case, it was decided under the Companies Act 1985. In this case, the court cited with approval, the dicta of Cozens-Hardy J in *Re Vimbos Ltd*[463] regarding the view that the receiver is an agent of the debenture holder.[464] The court further affirmed the power of the directors to deal with and even protect the assets of the company not covered by the debenture agreement.[465] On the other hand, the UBN case was decided under CAMA; particularly section 390 of CAMA 1990, which placed the receiver in a fiduciary relationship with the company, given the company the power to challenge the decision and/or action of the receiver not just with respect to assets not covered by the debenture agreement but with regards to assets covered by the debenture agreement. Therefore, a company or its directors can challenge the decision/action of the receiver if the receiver's decision/action will lead to the needless dissipation of the assets of the company, whether such assets were charged or not.[466]

In the *NBIC case*, the Plaintiff Alfijir Ltd via a debenture agreement obtained and secured a loan from the Defendant NBIC. The loan was obtained to enable the plaintiff to purchase a crusher plant, and the agreement contained a right to appoint a receiver clause. Specifically, clause 32 permits the Defendant to appoint a receiver if the Plaintiff defaults on the payment.[467]

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[459] ibid.
[460] *UBN case* 245 -246 [Ejiwumi JCA]
[461] *Robinson Printing Co Ltd v Chic Ltd* [1905] 2 Ch D 123.
[462] ibid.
[463] *In re Vimbos* [1900] 1 Ch 470 , 473.
[464] *Robinson Printing Co Ltd v Chic Ltd* 133 -134 [Warrington J].
[465] ibid 132.
[466] *UBN case* 248 [Katsina-Alu JSC].
[467] *NBIC case* [pt 287] 352.

The Plaintiff leased the crushing plant for a rental fee to Guffanti (Nig) Ltd, who did not only fail to pay the rental fee but also damaged the machine. This affected the plaintiff's ability to service the debt, which led to a default of the debenture agreement, as the Plaintiff was unable to pay any instalment. The plaintiff then brought an action against Guffanti (Nig) Ltd and recovered the sum of N2,300.000, only as compensatory damage. Pursuant to the order of the court, Guffanti (Nig) Ltd issued a cheque in favour of the Plaintiff, but immediately the proceedings ended, and before the cheque was issued, the Defendant appointed a receiver to recover the company's debt from the Plaintiff. Following the appointment of a receiver, the receipt was issued by the Defendant, who received but failed to return the cheque to the Plaintiff for a period of five months in spite of repeated demands from the Plaintiff. Hence, the Plaintiff's action against the Defendant for damages for loss, suffered due to the delay. The trial court agreed with the Plaintiffs and awarded damages against the Defendant.[468]

On appeal, the Court of Appeal in agreeing with the High Court considered whether the actions of the Defendant in delaying the issuance of the cheque prevented the receiver from carrying out his duties. The Court of Appeal held that the delay by the Defendant/Applicant to return the cheque prevented the receiver from applying it to the business and therefore the company incurred loss due to such failure.[469] Upon further appeal, the Supreme Court in upturning the decision of both the trial court and the Court of Appeal argued that based on the debenture agreement, the Defendant/Applicant was authorised to appoint a receiver upon default and the receiver can apply any money received in realising the debt of a secured creditor.[470] Although the court agreed that the Defendant/Applicant was wrong to have issued the receipt, it waived that as a mere irregularity and more importantly, held that once a receiver is appointed, the company can no longer deal with its assets.[471] Therefore, the Defendant/Applicant will not pay damages for the loss of business caused by the receiver's failure to return the cheque because the receiver's duty is to realise the debt of the debenture holder and not to conduct the business of the company.

The analysis of the *UBN* and *NBCI* cases shows that the concept of receivership in Nigeria was not only problematic to practitioners but also to the Judges. Whereas both cases are similar in the recognising the cessation of the power of the company to deal with the property covered by the debenture agreement, once a receiver is appointed; there is a point of dichotomy and

[468] ibid.
[469] ibid 359, 365-366 [Katsina-Alu JCA, as he then was].
[470] ibid 193 [Kalgo JSC].
[471] *NBCI case* (2000) 22 WRN (66 SC) 82 [Ogwuegbu JSC].

maybe controversy occasioned by the understanding of the duty and status of the receiver under CAMA 1990. While the court in the *UBN case* appears to have considered the receiver as an agent of the company and therefore owes the company fiduciary duties including the duty to preserve the going concern value of the company, the *NBCI* case seems to have treated the receiver as an agent of the secured creditor or debenture holder alone.

The asymmetry in the interpretation of the duties and status of the Nigerian receiver has also found its way into academic commentaries. Bhadmus Hammed Yemi argued, on the strength of section 393 of CAMA 1990, that the receiver appointed pursuant to a debenture agreement is an agent of the appointor. Therefore, the receiver cannot owe fiduciary duties to the company because such a receiver is neither an agent nor an officer of the company.[472] This assertion seems to hinge heavily on the agency principle: that an agent should pursue the interest of the principal who is the appointor. Bhadmus argued that the principal's main interest in a receivership is to realise the debt, the receiver as his agent should only be preoccupied with the job of debt realisation.[473] The whole argument is premised on the literal interpretation of section 390 of CAMA 1990. That, in spite of the provisions of section 393, the receiver cannot be an agent of the company, but of the debenture holder as the law only provides a narrow duty to the appointer.[474]

However, it is important to note that section 390 is subject to section 393, which gives a person appointed as a receiver and manager the power to manage the company's assets for the benefit of the company. This provision—especially when interpreted positively—implies a broader obligation to manage the company's assets for the benefit of other stakeholders too, so that the fiduciary relationship between the receiver and the company is in abeyance as long as it conflicts with the ability of the appointing creditor to realise its debt.

Adebola put forward a very compelling argument in this regard that contradicts the agency position of Bhadmus. Adebola argued that the intentions of the draftsmen of CAMA 1990 was the imposition of a duty on the receiver to 'manage' the company and run the same to a going concern in order to offset its financial liability.[475] Adebola argued that section 393 of CAMA 1990 does not override section 390 but rather creates a positive duty of the receiver to manage

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[472] Bhadmus Hammed Yemi, 'Rethinking Corporate Receivership in Nigeria' (2016) 53 JL Pol'y & Globalisation 158, 159.

[473] ibid 159 - 160.

[474] ibid 163. Note that "Whenever the phase "subject to" is used in a statute the intention, purpose and legal effect is to make the provisions of the section inferior, dependent on, or limited and restricted in application to the section to which they are made subject to." See the opinion of Per Adekeye J.S.C in *Oloruntoba-Oju & Ors v. Abdul-Raheem & Ors.* (2009) LPELR-2596, 60 [Paras B-E] (SC).

[475] Adebola, 'The duty of the Nigerian Receiver to 'Manage' the company' 7 – 8.

the company.[476] This interpretation would have construed section 393 of CAMA 1990 complements the provision of section 390 by adding an affirmative obligation to manage the assets of the company's diligently. It does not conflict with or supersede the powers granted under section 390 of CAMA 1990. In other words, by the combined effects of sections 390 and 393 CAMA 1990, the receiver's primary duty is twofold: (1) a negative duty - to realise the appointor's debt; and (2) a positive duty – to manage the company as a going concern.

At first glimpse, Adebola's approach to receivership in Nigeria may seem like an overstated hyperbole, but the argument has some underlying historical basis. Contrary to the proposition of Bhadmus, Bolanle recognises that section 390 qualifies section 393 CAMA 1990 unequivocally.[477] Bolanle's departure from the literal interpretation of the above provisions sets her argument apart. Historically, and to Bolanle's credit, the main objective of the draftsmen of CAMA 1990 was to provide a law that facilitates commercial transactions and 'protect the interests of the investors, the public and of [Nigeria] as a whole'.[478] A positive reading of the provision could have placed receivership in Nigeria as a business rescue tool. Such interpretation would emphasise the proactive and constructive application of the provision of section 393 of CAMA 1990 to achieve far broader objectives beyond the sole interests of the charge holder. The implication is that section 393's duty of care and good faith will be construed in a way that positions Nigeria's model of receivership as a business rescue tool, rather than solely an asset recovery or liquidation tool. The interpretation of these provisions would have been such that the objective of CAMA to protect the interests of the investors, the public and the company as a whole could[479]fulfilled. To this point, the objective of the draftsmen was to provide a collectivist approach to receivership. The purpose of section 393 was not to continue the pre-CAMA one-way approach to debt collection in favour of the debenture holder at the expense of the company and other stakeholders. Consequently, the receiver was not conceived as someone to render the company's going concern value nugatory.[OBJ] That said, the agency principle that Bhadmus highlighted cannot be applied to receivership in its strict sense, especially when it will lead to the worst outcome for the company and other stakeholders.

The lack of symmetry from scholars, practitioners and Judges brought to the fore the question of whether the Nigerian receiver has an implicit duty to ensure corporate survival. This has always been a matter of legislative misadventure that presents logical difficulties. The case law

[476] ibid 10-11.
[477] ibid 4.
[478] Commission, *Report on the Reform of Nigerian Company Law and Related Matters* (Volume 1, Review and Recommendation 1988) 4.
[479] *UBN case* 248.

espouses the fact that the symmetric difficulty lies in the way the draftsmen communicated their thoughts. The mischief of subjecting section 363 to section 390 is contrary to the objective of the law and the intentions of the draftsmen. To the extent that they wanted the receiver to owe fiduciary duties under section 393, similar to that owed by an agent to a principal in traditional agency law, it is argued that the intention of the draftsmen was to ensure corporate survival.

This assertion has some historical support. In the period leading to the enactment of CAMA 1990, creditors in Nigeria exercised a cavalier approach to debt recovery; bypassing a long-drawn-out debt enforcement litigation process to appoint a receiver.[480] One reason the draftsmen introduced the fiduciary principle was to stop negative exploitation of the receivership procedure by initiating a move, in clear terms, away from a creditor debt realisation philosophy to a more communitarian philosophy that addresses the concern of all stakeholders connected to the company – exactly what Cork argued a modern insolvency law must promote.[481]

However, the characterisation of section 393 may have led to unintended consequences. From case law, the main warning practitioners should have heeded is whether a Nigerian receiver will be treated as an agent of the creditor, or the company will depend on the circumstances of the case and the action of the receiver. Although the receiver is not treated as though he is appointed by the court, one will not find any difference based on the case law.[482] In the absence of a clear provision making the receiver an agent of the company, it will not serve the interest of justice to second guess the intention of the drafters and, therefore, not to confer on the receiver any such duty as an agent of the company.[483]

Notwithstanding, the point must be reemphasised that CAMA 1990 marked a positive shift towards a rescue culture in Nigeria. As the evidence from existing literature suggests, apart from the legislatorial and regulatory failure in providing a modern framework for resolving insolvencies before CAMA 2020, the courts are partly responsible for the slow pace of the development of corporate rescue law in Nigeria, as they missed the opportunity in *UBN* and

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[480] In the *UAC* and *NPFMB* cases, the receivers were appointed prior to the introduction of CAMA 1990.

[481] Insolvency Law Review Committee, *Insolvency Law and Practice: Report of the Review Committee* (Cmnd 8558, HMSO: London 1982).

[482] *Parsons v. Sovereign Bank of Canada* [1913] AC 160, 167 [per Viscount Haldane LC]; cited in David Milman, 'Receivers as Agents' (1981) 44(6) The Modern Law Review 658, 658 at n 1. Note that in English law, If the secured creditor is a mortgagee who appoints a receiver pursuant to the Law of Property Act 1925, then the receiver becomes an agent of the mortgagor. See section 109 (2)(5) of Law of Property Act 1925; contra *Blaker v. Herts and Essex Waterworks Company* [1888 B 3896] (1889) 41 ChD 399

[483] Raymond Walton, William Williamson Keer and Muir Hunter (ed), *Kerr on the Law and Practice as to Receivers and Administrators* (17 edn, Sweet & Maxwell 1989) 317.

NBCI cases to set Nigerian insolvency law on a rescue trajectory. At the very least, the court missed an opportunity to apply a collective approach to receivership; both in terms of remedy for creditors and in the decision-making process, which, when applied simultaneously, may not only contribute to a fair and effective process but could result in a rescue outcome.[484] This means the court in the *NBCI case* could have balanced the need to maximise returns for the secured creditors with the duty of good faith and fairness by treating the receiver as a fiduciary of both the company and the creditors. In this regard, the receiver's action may lead to the preservation of the value of the company, which can result in a better outcome for all creditors - or the stakeholders in general, in the event of corporate recovery or sale of a company's assets at a higher value.

Consequently, the court could have taken a normative approach to receivership in Nigeria by construing, and rightly so, the receiver's duty to act in good faith, account for, and manage as fiduciary duties to the company under section 390 of CAMA 1990. By making the receiver a fiduciary to the company as with the appointor, in order to preserve the going concern value of the company. This position, of course, completely aligns with Dworkin's interpretative theory of law and would have underscored the broader perspective on the role of the Nigerian receiver, which indirectly is to act for the benefit of all stakeholders.[485]

3.3 Background to the introduction of Corporate Rescue Tools

As it has been argued in the previous section, corporate rescue philosophy is not novel in Nigeria, at least in its practical sense.[486] However, the prevailing culture in Nigeria prior to the corporate rescue reform under CAMA 2020 was not rescue-oriented.[487] Apart from the limited rescue options, the lack of consistency in the application of the receivership procedure contributed to depinning the liquidation culture.[488] Another contributory factor is the stakeholders' treatment of the scheme of arrangement provision.[489] Whilst the courts did not put in a straight line to determine the need for corporate sustainability above the need to liquidate the company's assets, the stakeholders did not take advantage of the scheme of

[484] Finch and Milman, *Corporate Insolvency Law Perspectives and Principles* 123 -145; cf Parry and Gwaza, 'Is the Balance of Power in UK Insolvencies Shifting' on the contractual approaches is receivership.
[485] Ronald Dworkin, 'Taking Rights Seriously' (1977) 91(1) Harvard Law Review 302.
[486] See Chapter 3 (text to 3.1).
[487] Olusola Joshua Olujobi, 'Combating insolvency and business recovery problems in the oil industry: proposal for improvement in Nigeria's insolvency and bankruptcy legal framework' (2021) 7(2) Heliyon e06123, ch 3.4
[488] Oc-Chukwuocha Onyinye, 'Corporate Rescue Models in the United Kingdom and the United States: A Comparative Study with Nigeria' (2020) 2(3) IJOCLLEP 15, 18.
[489] CAMA 2020, s 539.

arrangement provisions under CAMA 1990.[490] Moreover, Nigeria's company law gives creditors an undue advantage over debtors in terms of debt recovery. For example, the threshold to determine insolvency is limited to cash flow indebtedness.[491] By a combined reading of sections 408(d) and 409(a), a creditor may wind up a company facing short-term cash flow issues as long as the company cannot satisfy a debt within three weeks.[492] These provisions appear to incentivise creditors to opt for winding-up proceedings, even though recovery of debt cannot be sought as a relief in a winding-up petition but the winding-up of a company due to the inability of the company to pay its debt.[493] This is why the Nigerian courts will not allow a creditor to use the winding-up provisions to recover a debt.[494]

Notwithstanding the above, creditors jettisoned the idea of pursuing the rescue of companies by appointing receivers who ditched the interest of the company or by not discontinuing the appointment of a receiver even after reaching a debt repayment agreement with the debtors.[495] Creditors also ignored the schemes of arrangement provisions under CAMA 1990, which could have opened a window for corporate recovery.[496] In all, the jurisprudence in the Nigerian jurisdiction pre-CAMA 2020 did not take up the challenge of pursuing corporate rescue despite the hostile effect of winding up, especially to the debtor company.[497]

The jurisprudence in Nigeria is replete with cases where the courts have warned creditors that filing for winding-up due to the failure of the debtor to offset debts could affect the debtor company in such a way that it may injure the company's reputation, if not destroy it or may paralyse the business of the company.[498] In *Air Via Ltd v. Oriental Airlines Ltd*,[499] the Court

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[490] Sections 539-540.

[491] Under s 409(a) the amount is N2000. That a company is unable to pay a debt of N2000 does not necessarily means it is unable to discharge its liability, especially when its assets exceed the liability.

[492] CAMA 1990, s 408(d) and 409(a).

[493] *Oriental Airlines Ltd v Air Via Ltd* (1998) 12 NWLR (Pt 577) 271, 281B-C.

[494] ibid 281D, 280H, 281D; contra *Hansa Int'l Construction Ltd v Mobil Producing Nigeria* (1994) 9 NWLR (Pt 366) 76.

[495] *O.B.I. Ltd v UBN & Anor* [2009] 3 NWLR (Pt. 1127) 129; the Court of Appeal held that such an appointee ceases to be a receiver.

[496] However, it is unclear if this is due to the discrepancy between the requirements of majority approval of 75% under CAMA 1990 and 90% under the Investment and Securities Act 2007 (ISA) for a buyout of dissenting minority and the Security and Exchange Commission's (SEC's) approval. But stakeholders did not approach the SEC to know their position on the interpretation of this aspect of ISA.

[497] Despite the above, there were still limited framework to pursue corporate rescue in some sectors. For example, the Banking and Telecommunications sectors. See the Nigerian Deposit Insurance Act 2006 (NDIC Act), the Nigerian Communications Act 2003 (NCA) and the Asset Management Corporation of Nigeria Act 2010 (AMCON Act).

[498] *Tate Industries Plc v Devcom MB Ltd* (2004) 17 NWLR (Pt 901) 182, 225B - E*; Parmalat Capital Finance Ltd v Food Holdings Ltd* (2008) BCC 371, 374E - F; *Oriental Airlines Ltd v Air Via Ltd* (1998) 12 NWLR (Pt 577) 271, 280H

[499] *Air Via Ltd v. Oriental Airlines Ltd* (2004) 4 SC (Pt.11) 3; [2004] 9 NWLR (Pt. 978) 298

reiterated the adverse effect of winding up proceedings under CAMA 1990 and went further to caution that winding-up proceedings should not be used as an alternative to debt recovery because it presents two mutually exclusive options to the debtor company; pay the debt or risk the adverse consequence of winding-up.[500]

Despite the above caution by the Supreme Court to litigants, creditors were not dissuaded from exerting pressure on debtors by exploiting the winding-up provisions under CAMA 1990. This is partly because the Nigerian courts will not decline to wind up a company simply because the petitioner's motive is to recover a debt. In *Oriental Airlines Ltd v Air Via Ltd*,[501] the court echoed this sentiment by declaring that "when the debt is established, and a formal demand is made, the court has no discretion in the matter but wind up the company."[502] The court's refusal to exercise discretion in cases where a formal demand has been made over an established debt by the court shows that the Nigerian courts were willing to put the interest of the creditor above the debtor company.

Economically viable companies cannot exempt themselves from the dangers of a winding-up proceeding if such a company fails to pay an undisputed debt.[503] In addition to this, the Federal High Court, which is the court of first instance, will not substitute an order to wind up a company for an order to recover individual debts in winding-up proceedings due to a lack of jurisdiction.[504] Consequently, this has led to an increase in corporate failure due to insolvency, or at least attempts to wind up even solvent companies for failure to liquidate debts.[505]

Beyond the refusal to expressly dismiss debt recovery cases brought under the veneer of winding-up petitions, the other option apart from the appointment of a receiver, which is the Arrangement and Compromise provision (though with less court involvement), may need substantial commitment from the debtor company and a corporate investor that is ready for a merger or an outright acquisition of viable assets of the debtor company.[506] That is to say, the end product of the process may not be corporate or business rescue – which is a nightmare from a debtor perspective. For this reason, stakeholders in Nigeria clamoured for the amendment of

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[500] ibid 327G-H.
[501] *Oriental Airlines Ltd v Air Via Ltd* (1998) 12 NWLR (Pt 577) 271, 181D.
[502] ibid 280H-281A
[503] *Mann v Goldstein* (1968) 1 WLR 1091 at 1096C-F.
[504] *Tate Industries Plc v D.M.B. Ltd* (2004) 17 NWLT (Pt 901) 182, 219C-D: *Re Yanju International Motel Ltd Oriental* (1990) FHCLR 17: *Akono v C-P.M.B. Ltd* (1996) FHCLR 269.
[505] *Oriental Airlines Ltd v Air Via Ltd (1998) 12 NWLR (Pt 577) 271:* Kubi Udofia, 'The Propriety of Debt Recovery and Settlement in Winding-up Proceedings' (2022) Available at SSRN:<http://dxdoiorg/102139/ssrn4076853> accessed 02 April 2023.
[506] Onigbinde (n 15) 82.

CAMA 1990 for over two decades to meet the realities of a modern economy with an effective insolvency statute that will promote corporate rescue.[507]

In reaction to the criticism of the lack of a corporate rescue mechanism under CAMA 1990, the National Assembly in Nigeria repealed CAMA 1990 and replaced it with CAMA 2020, a new legal framework for corporate insolvency law in Nigeria.[508] CAMA 2020 introduced corporate rescue mechanisms that promote the corporate survival of companies in distress. The law also professionalised the practice of insolvency, and set out criteria for qualification and the roles of certain bodies, such as the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN)[509] and the Corporate Affairs Commission (CAC), in determining who qualifies to practice as an insolvency practitioner.[510] In addition, the receivership and scheme of arrangement procedures were amended, and Netting was introduced into the Nigerian insolvency law.[511] That said, the question is what informed the reform of insolvency law in Nigeria, and what is the philosophy behind the introduction of corporate rescue in Nigeria?

The above question is a normative question. It is, therefore, important to clearly articulate the normative aspect of CAMA 2020 in relation to corporate rescue. However, given the dearth of empirical evidence on the effectiveness of the rescue tools under CAMA 2020 or theoretical studies on the normative aspects of CAMA 2020, it is unsurprisingly conceivable, yet confusing to realize that like most jurisdictions, there is no clearly articulated philosophy of corporate rescue under CAMA 2020.[512] In the absence of clarity on the philosophy, the discussion in this section focuses on the current objectives of CAMA 2020, and not necessarily the broader

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[507] Udo Udoma and Belo-Osagie, 'The Companies and Allied Matters Act (Repeal and Re - Enactment) Bill 2019 – What You Need To Know' *Business Day: Companies & Markets* (Lagos, 04 June 2019). <https://uubo.org/wp-content/uploads/2022/08/cama-bill-series-part-11-002.pdf> accessed 01 April 2023.

[508] The President, Muhammadu Buhari assented to the Companies and Allied Matters Bill, which amended CAMA 2020 after previously declining to assent to it in 2018. See Henry Umoru, 'Senate passes CAMA amendment bill' *Vanguard* (Lagos, 10 March 2020) 10 March 2020). <https://www.vanguardngr.com/2020/03/senate-passes-cama-amendment-bill/> accessed 05 April 2023. The law itself is a product of a collaborative joint effort: Presidential Enabling Business Environment Council (PEBEC), National Economic Summit Group (NESG), National Assembly Business Environment Roundtable (NASSBER), and Nigerian Bar Association Section on Business Law (NBA-SBL), etc. See Sylva Ogwemoh and Akorede Folarin, 'The Companies And Allied Matters Act 2020-Highlights of the Reforming Provisions and their Implications for Businesses and Investors in Nigeria' (2020) Available at SSRN: <https://papersssrncom/sol3/paperscfm?abstract_id=3720259> accessed 05 April 2023.

[509] BRIPAN is a body of professionals involved in business rescue, corporate recovery, and insolvency practice in Nigeria.

[510] See CAMA 2020, sections 704 and 705; contra section 868 (1) of CAMA 2020. Section 705 which allows members of BRIPAN to practice as Insolvency Practitioners upon application and approval by CAC appears to contradict section 861 which excludes members of BRIPAN from the definition of Insolvency Practitioners.

[511] CAMA 2020, ss 710 – 715 (Schemes of Arrangement) and 718 – 721 (Netting).

[512] CAMA 2020, S 444.

theoretical debate on the normative nature of insolvency law—which includes the question of what the objectives ought to be and how they can be achieved.[513] In this regard,, it is important to explore the objectives of corporate rescue under CAMA 2020.

Generally, corporate rescue was introduced to provide a means for companies in financial distress to rehabilitate and reorganise the operations of their businesses to avoid liquidation.[514] This objective is wholly consistent with the need to preserve the going concern value of the company under section 444(1)(a) of CAMA 2020. However, this is not the wholly judicial or legislative underpinning of insolvency law in Nigeria. This is especially so as several objectives aimed at addressing the challenge of corporate rescue under CAMA 1990 seem to have been crucial to the reform of Nigeria's insolvency regime. These objectives include the equitable treatment of creditors, stakeholders' protection, business rescue, etc, which envisage a wider theoretical objective.[515] In so far as specific outcomes are concerned, there are different goals that can be distilled from the general objective, which can be targeted by the IP in isolation or in combination with all or some of the other goals. These goals, some of which are discussed below, include business continuity, debt restructuring, value maximisation, protection of employees and stakeholders' interests, and the avoidance of liquidation.[516]

3.4 Company Voluntary Arrangement (CVA) Under CAMA 2020

CAMA 2020 introduced the CVA into the jurisprudence of insolvency law in Nigeria.[517] One of the main aims of the introduction of the CVA is to provide an opportunity to rescue a distressed company before the company goes into receivership or liquidation. Since the traditional insolvency tools under CAMA 1990 could not guarantee the turning around of distressed companies, CVA was introduced to allow a debtor company to restructure its debt and/or repayment plan with the creditors of the company. The CVA device under CAMA 2020 is a debtor-in-possession rescue model fashioned after the CVA under the UK Insolvency Act of 1986.[518]

Although no clear definition of CVA is given under CAMA 2020, the CVA under Nigerian law is no different from the CVA under English law. It is used as a corporate rescue device that

[513] ibid.
[514] CAMA 2020 s 434.
[515] See ch 4.2.2.1.2.
[516] CAMA 2020, ss 434, 438, 439, 443-454, 715-718.
[517] CAMA 2020, ss 432-44.
[518] The CVA device has been used to restructure the debt of many high-profile corporations in England. For example, Wigan-based craft bakery chain Waterfields used the CVA to restructure its debt in 2016.

allows financially distressed companies to renegotiate their debt with the creditors, to accept either full or less than what the company owes the creditors.[519] It is important to state that such renegotiations must be by way of an agreement. According to Udofia, a CVA is "a binding agreement for debt repayment between a company and its unsecured creditors."[520] The negotiation of a CVA agreement with the creditors of the distressed company prevents the creditors of the company from appointing a receiver and prevents the company from going into liquidation induced by insolvency. This is why such an agreement may not only vary the amount to be paid but will include a payment plan, which is an agreed period.[521]

3.4.1 CVA Procedure under CAMA 2020

3.4.1.1 Who can propose CVAs?

Chapter 17 of CAMA 2020 provides a step-by-step process by which a company may enter a CVA. The steps include the appointments to be done, when such appointments can be made, and the nomenclature of such an appointee. The process by which these steps are achieved is as important as the CVA procedure itself. First, by section 434,[522] only the directors of the company can propose a CVA to the company creditors. Though the directors are authorised to propose a CVA; it should be noted that the directors will not oversee the implementation process. While the directors will continue to run the daily affairs of the company, they are required to propose a nominee as part of the proposal to the creditors and such a nominee shall be an insolvency practitioner (IP) – to act as a trustee or otherwise, for the purpose of supervising the implementation of the CVA.[523] However, in cases where the company is already in liquidation or administration, the proposal will be made by the liquidator or the administrator; as the case may be.[524] Such a proposal will be in the form of an agreement between the company and its creditors. The compounding creditors of the company will agree to accept less than the due sum owed in satisfaction of the entire debt sum.

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[519] Chioma Adiele, 'Business Rescue in Nigeria: A Step in the Right Direction' (23 April 2021) Available at SSRN: <https://ssrncom/abstract=3832465 or http://dxdoiorg/102139/ssrn> accessed 06 April 2023

[520] Kubi Udofia, 'An Overview of Company Voluntary Arrangements in CAMA 2020' (3 November 2021) Available at SSRN: <https://ssrncom/abstract=3956249 or http://dxdoiorg/102139/ssrn3956249> accessed 06 April 2023.

[521] Adiele, 'Business Rescue in Nigeria: A Step in the Right Direction' (n 519), 2.2.1.

[522] CAMA 2020, s 434.

[523] CAMA 2020, 434(2).

[524] CAMA 2020, 434(3).

3.4.2 Consideration, Approval, and Implementation of CVAs

Once a nominee is notified regarding the proposal for a voluntary arrangement, such a nominee shall receive a copy of the proposal and other specified documents which will enable the nominee to prepare and submit a report to the Court within 28 days.[525] The report shall propose meetings, with full particulars, and state whether such meetings of the company and its creditors should be convened to consider the proposal, based on the nominee's opinion. Once the report has been tabled before the court, the nominee can proceed to convene the meetings as specified under the report, unless directed otherwise by the court.[526]At the meeting, the company and the creditors will consider whether to approve or disapprove the proposal; without adjustments or with adjustments - which may include, conferring the powers of the nominee on the IA or any other modification that is not inconsistent with the provisions of section 434 of CAMA 2020 and/or any modification that restrict the right of a secured creditor to enforce his security, without the prior agreement of the company and the secured creditor affected.[527] Also, the meeting shall not approve or modify a proposal that affects the priority payment of preferential creditors without the consent of such creditors.[528]

Upon concluding either the meeting of the creditors or the company, the respective chairpersons are required to report the outcome of such a meeting to the Court and proceed to notify those specified immediately.[529] It is possible that both meetings may reach the same/ similar or different outcomes. Where both meetings reach the same or similar outcome, the decision reached will take effect; but, where the outcome from the two meetings is different, a member of the company may apply to the Court not later than 28 days from the day the decision was taken, to give effect to the meeting of the company.[530] The Court may make an order giving effect to the decision of the company, and it will be deemed to have been made by the company

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[525] The court may extend such a period (CAMA 2020, s 435(2)). The Directors of the company or the person intending to make such proposals will have to also accompany the proposal with a document containing the terms of the proposed agreement, a statement of the affairs of the company, particulars of the creditors, debts, assets, and liabilities of the company and other relevant pieces of information (CAMA 2020, 435(3)(a) - (c)). Also, the directors of the company or the person making the proposal may apply to the court for a substitution of the nominee, if such nominee fails to submit a report within the prescribed period but where he does, unless the court holds otherwise, the nominee will convene such meetings specified in the report (CAMA 2020, S 435(4)). See generally Onigbinde (n 15) 92-93.

[526] Note that where the company is under liquidation or administration, the liquidator or administrator will put forward the report before the court and summon such a meeting as prescribed in the report. (CAMA 2020, s 436(1)(b)).

[527] CAMA 2O2O, s 437(2) - (3).

[528] CAMA 2020, s 437(4).

[529] CAMA 2020, 437(6).

[530] It will appear that the 28 days begin from the day of the last decision of either the creditors or the company – whichever comes later. See CAMA 2020, s 438(3) – (4); Onyinye OC-Chukwuocha, Company Voluntary Arrangement under CAMA 2020: A Review (2023) 19(2) Unizik Law Journal 41, 50.

at the creditors' meeting. The court may also make any other order it may deem necessary in the circumstance.[531] This may include an order of stay of proceedings, in the case of winding up proceedings, or an order of cessation of the appointment of an administrator, etc.

Having given an order, the question then is: what will be the effect of such an order? The effect of the CVA on the creditors and the company is similar. It binds the company and the creditors of the company, whether present or not, who was entitled to vote in such meeting, whether they voted or not, or anyone entitled to the notice of such meetings, whether they received the notice or not.[532] The order of approval also has the effect of presenting the CVA for implementation by a supervisor (the nominee may transition to a supervisor).

However, such decisions can be challenged upon application to the Court. CAMA 2020 provides two grounds for which an aggrieved party can challenge a CVA: when the CVA is unfairly prejudicial to the interest of a creditor, member, or contributory of the company; or where there is substantial irregularity regarding either the meeting of creditors or the company.[533] The application to challenge the CVA can be brought by an aggrieved member of the company, creditor, the nominee or nominee's replacement, or the liquidator or administrator of the company if the company is under liquidation or administration.[534] If such a party succeeds in challenging the CVA in court, the Court may make an order revoking or suspending part or the entire decision approving the CVA; or even order for the reconvening of meetings where a new or revised proposal will be considered. Similarly, if a party is not satisfied with the actions or decisions of the supervisor regarding the implementation of the CVA, such a person can approach the court for redress. The court may reverse or modify or even confirm such actions or decisions or, in the alternative, make any order as it deems fit to make in the circumstance.[535]

Consequently, it can be argued that the terms of a CVA are like the terms of any binding contract. In other words, a CVA can be implemented and enforced as though it is a commercial contract agreement between the company and the party seeking enforcement – and where there are consequences for default in such an agreement, the adverse party can take such action as specified in the agreement. For example, where the company defaults in taking specified action or conducting a specific event, the creditors may stop implementing such an agreement due to

[531] CAMA 2020, s 438(5).
[532] CAMA 2020, s 439.
[533] CAMA 2020, s 440(1); James Sharon Tolulope and Elendu Chinenye Rachel, 'Company voluntary arrangements (CVA) and administration of companies: an appraisal of the innovative corporate insolvency procedures under the companies and Allied Matters Act 2020' (2023) 13(1) Nigerian Bar Journal 143, 154-155.
[534] CAMA 2020, s 439.
[535] CAMA 2020, 442(3).

the breach of the terms of the CVA. In addition to cessation of implementation, the creditors or the supervisor can apply to the court for the winding up of the company or the appointment of an administrator.[536]

3.5 CVAs under CAMA 2020 Vs English CVA under IA 1986

The CVA procedure is a straightforward process that heavily depends on the discretion of the directors. To commence the process, the directors of a financially distressed company who have discovered that the company is either insolvent or approaching insolvency have decided they would like to make a CVA proposal, wherein they appoint a nominee, who is an IP.[537] Although the directors are expected to notify the nominee after preparing the proposal, in practice, there will be a prior consensus between the directors and the nominee.[538] Upon receiving notice of the proposal, the nominee submits a report to the court within 28 days stating whether meetings be convened.[539] If the nominee recommends the meetings, the meetings will be held, and if approved, the decision to restructure the debt takes effect; but if it is unapproved, the directors could explore other insolvency mechanisms.[540] Once the approval has taken effect, the supervisor, who is also an IP, takes charge of implementing the CVA.[541]

While the CVA procedure is mostly used when the company is facing liquidity issues, there is no provision under CAMA 2020 or the Insolvency Regulation (IR) 2020 preventing a financially solvent company from taking advantage of the CVA procedure. Thus, the definition of a CVA does not connote any technical meaning that will restrict its usage to only companies facing insolvency. However, because the CVA seeks to either extend the time for debt repayment and/or debt reduction, it has mostly been utilised by insolvent companies – whether actual or potential.[542]

The CVA procedure under CAMA 2020 is significantly the same as the procedure under English law, with slight but crucial differences. First, the difference in the application of the term CVA in relation to companies. While the meaning of 'company' under Chapter 17 of CAMA 2020 may be restrictive, the definition of the term appears to have a broader meaning

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[536] CAMA 2020, 442(4).
[537] CAMA 2020, 434(1)-(2).
[538] ibid 434(2).
[539] ibid 435.
[540] ibid 438-439.
[541] CAMA 2020, ss 434 – 442. See generally Kubi Udofia, 'Appraisal of Nigeria's First Company Voluntary Arrangement' [2022] SSRN Electronic Journal.
[542] Geoffrey Weisgard, Geoffrey Weisgard and Michael Griffiths, *Company Voluntary Arrangements and Administration* (3rd edn, LexisNexis UK 2013).

in English law. Although there is no technical meaning of a 'company' in the context of a CVA under CAMA 2020, the IR 2022 interprets the term to include a registered company under the CAMA or any company or corporate entity deemed to be registered under any legislation involving companies or established by a rule or an order of the minister.[543] The meaning of a company under IR 2022 does not seem to cover business names, partnerships, trading associations, and societies.

Conversely, the term 'company' in relation to CVA under English law includes limited liability partnerships, partnerships, trading societies, and associations – whether incorporated in the UK or incorporated outside the UK – but, its 'centre of main interest' is situated in the UK.[544] In *Re The Salvage Association,*[545] the question arose whether an association incorporated by a Royal Charter in a bid to unwind its activities can seek a CVA to compromise its pension fund liability with creditors. The court held that such an association could enter a CVA with creditors.[546] Following the decision in *Re Brac Rent-A-Car International Inc*,[547] the court further held that, in relation to companies incorporated within or outside the EU, it will exercise jurisdiction, so long as the centre of the main interest of the company's business is in England.[548]

Similarly, in *Re Daisytek ISA Ltd*,[549] the English court assumed jurisdiction and granted an administration order regarding the French and German subsidiaries of Daisytek, a holding company doing most of its business in England where the head office of the company was located. The principle was also applied in *Re Television Trade Rentals Ltd*,[550] where the English court agreed to grant an application made pursuant to section 426 of the IA 1986 concerning two companies incorporated in the Isle of Man. The court allowed the application of Part I of the IA 1986, which deals with CVAs, to apply to these companies.[551] Therefore, whilst it

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[543] IR 2022, 1(5).

[544] David Milman and Peter Bailey, *Annotated Guide to Insolvency Legislation 2022* (vol 1, 23rd edn, Sweet and Maxwell 2022).

[545] *Re The Salvage Association* [2004] 1 WLR 174.

[546] ibid.

[547] *Re Brac Rent-A-Car International Inc* [2003] EWHC 128 (Ch); [2003] EIRCR (A) 265.

[548] In *Re Brac Rent-A-Car International Inc*, the court proceeded to make an administration order, after considering the effect of the Insolvency Regulations on the 'centre of main interest' principle for companies with registered offices outside of the EC area. ibid [2003] EIRCR (A) 265; cf Council Regulation (EC) No 1346/2000 of 29 May 2000 (European Insolvency Regulation (No 1346/2000), arts 2 and 3(1), recitals 12, 13 and 14.

[549] *Re Daisytek ISA Ltd* [2003] B.C.C. 562; [2003] EIRCR(A) 266

[550] *Re Television Trade Rentals* Ltd [2002] BPIR 859

[551] ibid [2002] BPIR 859, 864; cf *HSBC Bank plc v Tambrook Jersey Ltd* [2013] EWCA Civ 576; [2014] Ch 252 . In this case, an application under s 426 of the IA 1986 was refused on the grounds that the court lacked jurisdicrtion. The Court of Appeal, Civil Division, in making an administartive order overturned the decision of the judge because his misinterpretation of the courts jurisdiction under s 426 of IA 1986. See also EU Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (EU Regulation 2015/848).

appears that CVAs in Nigeria only apply to corporate, statutory, or registered entities within the meaning of the IR 2022, CVAs in the UK apply to corporate bodies and statutory entities beyond the successive companies Acts;[552] but not limited to foundational trusts, community benefit societies, credit unions, and co-operatives.[553]

Secondly, there is uncertainty about the creditors' intention to be bound by the arrangement when there is a conflict between the decision of the members and the creditors' meetings. The provision of section 438(3) of CAMA 2020 empowers a member of the company to apply to the court if there are discrepancies between the decision taken by the creditors' meeting and the members' meeting. However, the court is mandated by section 438(5)(a) - when applications under section 438(3) are presented - to make an order giving effect to the decision of the latter over the former. By allowing the decision of the members to prevail over that of the creditors, the law takes away the element of intentionality from the creditors, whose proprietary rights will be affected by the decision of the members. The effect is that such a composition can no longer be a 'voluntary arrangement' because the outcome was not a result of voluntary negotiation.

Although it has been established that a CVA by itself cannot be regarded as a contract or an agreement;[554] by its binding nature, it is a contractual agreement between the company and its creditors. It binds both members of the company and creditors who are eligible to attend such meetings or people who would have been entitled to attend such meetings, whether they attend or not.[555] One of the essential features of a binding contract is the intention to create an agreement that parties will be bound by.[556] Thus, when creditors lose their ability to consent to a proposal by way of approval, it takes away the intention of that party to contract and leaves the creditors at the mercy of the members of the company. What is more, because a secured creditor who disapproves of the CVA is not bound by it, the secured creditor may pursue alternative remedies, which will include winding up the company. This could incentivise rogue directors or companies to connive with secure creditors who are eager to get a considerable degree of debt return whilst leaving the unsecured creditors with little or no return.[557] For these reasons, the CVA procedure under CAMA 2020 may leave the unsecured creditor in a position

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[552] *Re The Salvage Association* [2004] 1 WLR 174, 177 [8] (Blackburne J); [2003] EWHC 1028 (Ch)
[553] ibid [2004] 1 WLR 174, 176 - 178 [Blackburne J] .
[554] *Re Rhino Enterprises Holdings Ltd; (1) Schofield (2) Rhino Enterprises Holdings Ltd v (1) Smith (2) Boardman* [2021] BPIR 144, 146 [HHJ Simon Barker QC].
[555] CAMA 2020, S 489(2).
[556] *Rose and Frank Co v J R Crompton & Bros Ltd* [1923] 2 KB 261 (CA) 288.
[557] *National Westminister Bank PLC v Scher* [1998] BPIR 224*;* cf *Commissioners of Inland Revenue v Adam & Partners Ltd* [2001] 1 BCLC 222.

of inconvenience. Although there is a provision to challenge the decision under section 440 of CAMA 2020, the unsecured creditor falls under the heel of the members and the secured creditors, in which case, the possibility of maximising minimal return for the unsecured creditors may be diminished, if not result completely lost.[558]

In comparison with the law in England, when there are discrepancies between the decision in the creditors and members' meetings, that of the former will prevail over the latter.[559] There is also an opportunity for a member of the company to challenge the decision in court. The rationale for the preference of the creditors' decision may not be unconnected with the fact that the CVA will require the creditors to compromise part of their proprietary rights. It, therefore, behoves them to accept or reject such an arrangement. This is in sharp contrast with the provision under Nigerian law, which gives the members decision preference, while the creditors can only rely on the right to approach the court to challenge the decision.

Furthermore, there is the understanding of the nominee's role *vis-à-vis* the court's involvement in a CVA process. The nominee in a CVA procedure is in a unique position. This is why it is understandable that some practitioners confuse the role of the nominee and the role of the court in the CVA process. The role of the nominee in a CVA is analogous to that of 'a facilitator or mediator' of the arrangement between the directors of the company and the creditors.[560] CAMA 2020 authorises the nominee to 'submit a report' on the viability of the proposed arrangement to the court within 28 days (except extended) of notification of his appointment.[561] The nominee is expected to assess the proposal in the face of the documents submitted, including stating the current affairs of the company and the state of indebtedness. Based on the assessment, the nominee gives his opinion on whether the meetings of creditors and members should be held; if the answer is affirmative, the nominee will have to supply particulars of such meetings as part of the report.

Correspondingly, the involvement of the court is limited to non-judicial interventions.[562] The provision of section 436(1) offers a clear and complementary explanation, in this regard. Upon submitting the report to the court, the nominee 'shall' [mandatorily] summon the meetings in accordance with the particulars provided "unless the Court otherwise direct".[563] A thorough investigation of section 436(1) of CAMA 2020 seems to show that the only predicate for the

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[558] *Commissioners of Inland Revenue v Adam & Partners Ltd* [2001] 1 BCLC 222.
[559] IA 1986, s 4A.
[560] Griffiths, *Company Voluntary Arrangements and Administration* [3.1] – [3.2].
[561] CAMA 2020, s 435(2).
[562] Griffiths, *Company Voluntary Arrangements and Administration* [1.93].
[563] CAMA 2020, s 436(1)(a). For liquidators and see administrators, see section 436(1)(b).

court to disregard, discard, overturn and/or even comment on a CVA proposal is when a creditor challenge the same.[564] Therefore, the court will not exercise its discretionary powers as regards the proposal but will defer to the members and creditors; after all, it is merely a proposal and the process is predominantly an out-of-court arrangement.

Interestingly, it appears that the Nigerian court and the counsel in *Re Seyi Akinwunmi and Okorie Kalu*[565] (Nigeria's inaugural CVA case) missed this essential feature of the CVA – an out of court procedure. In Nigeria's inaugural CVA case, the Tourist Company of Nigeria (TCN), owners of Federal Palace Hotel in Lagos, Nigeria, who are in the business of hospitality, appointed the applicant as nominee with respect to a proposal for a CVA induced by cash flow challenges due to Covid-19. The applicant filed an originating summons (*ex-parte*) seeking, among other things, that separate meetings of creditors and members be convened and an order summoning the said meetings. It is important to note that CAMA 2020 is noticeably clear in the prayers of the applicant. Indeed, there is no provision under CAMA or the IR that instructs the nominee as an applicant to "apply" to the court for such orders. The law is very clear, by the combined effect of sections 435(1) and 436(1) of CAMA 2020, the nominee is expected to turn in a report, which contains the nominee's opinion, and if the question of whether the meeting be held is answered in the affirmative, as contained in the report, then the nominee 'shall' go ahead to convene the meetings.[566]

Despite answering the question of whether the meeting should be held in the affirmative, the applicant's approach was to seek an order to affirm the nominee's opinion. This approach is not only misconceived but also unnecessary. It fundamentally contradicts the essential feature of a CVA – which limits the involvement of the court. The out of court element distinguishes the CVA from the US chapter 11, administration, and the scheme of arrangement procedures.[567] Historically, the CVA was conceived by the Cork Committee, which conceived the CVA as 'a relatively simple procedure' to facilitate out-of-court arrangements between a company and its creditors.[568] This view is consistent with rule 2.9(3) IR 2016 (UK), which limits the duty of the court upon receiving the report to endorse and return the nominee's copy, with particulars of endorsement, including the filing date. Accordingly, some commentator explained the role of

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[564] Sarah Paterson and Adrian Walters, 'Selective Corporate Restructuring Strategy' (2023) 86(2) MLR 436, 455.
[565] *Re Seyi Akinwunmi and Okorie Kalu* [Unreported] Suit No: FHC/L/CS/1250/2021. For a detail analysis of this case, see Kubi Udofia, 'A Preliminary Appraisal of Nigeria's First-Ever Company Voluntary Arrangement' *THISDAY* (Lagos, 11 January 2022) <https://www.thisdaylive.com/index.php/2022/01/11/a-preliminary-appraisal-of-nigerias-first-ever-company-voluntary-arrangement/> accessed 22 April 2023.
[566] CAMA 2020, s 436(1)(a).
[567] Walters, 'Selective Corporate Restructuring Strategy'.
[568] Cork Committe Report, paras 400 - 403 . See also Bailey, *Annotated Guide to Insolvency Legislation* 2022 pt 1.

the court *vis-à-vis* the report under rule 2.9 of IR 2016, which is the English law equivalent of section 436(1) of CAMA 2020. Thus: "[the] nominee's role is to opine on the proposal […] The report to the court is largely a matter of record only. The court does not become judicially involved in the CVA unless a problem arises".[569] These provisions are self-explanatory, therefore, the nominee's application to the court for an order summoning the meetings in Nigeria's inaugural CVA case, is an invitation for the court to intervene in a judicial manner.

Finally, the CVA under CAMA 2020, is not supported by a moratorium procedure. Historically, the CVA regime under Part 1 of the IA 1986 was a standalone rescue procedure, just like the Nigerian equivalent in its current form. The IA 2000 introduced a new model of CVA, which gave small 'eligible companies the option of a moratorium.[570] Although the CVA, even without a moratorium procedure, has been described as an effective tool for low-priced debt restructuring,[571] the absence thereof could be counterproductive, especially for large companies. For example, a creditor, especially secured creditors who are dissatisfied with the arrangement, may explore other mechanisms, including approaching the court to torpedo the process.[572] In such a situation, when a creditor becomes either hostile or unhelpful during the process leading to and even after the approval of the CVA, Nigerian law does not provide effective cover or restraint against the creditor so that the action of the creditor could either stale or derail the agreement.

English law has abolished the CVA moratorium under the IA 1986 - through CIGA 2020, which inserts Part A1 into the IA 1986. The provision broadened the scope of the moratorium process by providing a standalone moratorium.[573] In the absence of a standalone provision in Nigeria, insolvency practitioners in Nigeria can employ a bit of ingenuity and creativity by using the CVA along with the administration process to protect the debtor company moratorium, in case of aggressive creditors. This is because the administration procedure under CAMA 2020 provides interim protection against creditors' claims; it follows then that a moratorium can be achieved if a proposal for a CVA is made after the appointment of an

[569] Peter Walton, Joseph Curl, and Andrew Keay, *Corporate Governance and Insolvency: Accountability and Transparency* (Edward Elgar Publishing 2022) 79 [para 3.130].
[570] IA 2000, ss 1 and 2; schs 1 and 2 to IA 2000. To ascertained the qualification for small eligible companies, see Insolvency Act 1986 (Amendment) (No 3) Regulations 2002 (SI 2002/1990).
[571] John Tribe, 'Company voluntary arrangements and rescue: a new hope and a Tudor orthodoxy' (2009) Journal of Business Law 5 , 454–487; John Tribe, 'Company voluntary arrangements and rescue: a new hope and a Tudor orthodoxy, and Companies Act schemes of arrangement and rescue: consensus in a pressing environment' (2008) (Unpublished).
[572] Edward Bailey and Hugo Groves, 'Rescue/restructure' in Edward Bailey and Hugo Groves (eds), *Bailey and Groves: Corporate Insolvency - Law and Practice* (5th edn, LexisNexis UK 2017) para 10.5.
[573] IA 1986, sch A1; cf Corporate Insolvency and Governance Act 2020 (CIGA 2020).

administrator. While the company may enjoy the protection of the moratorium because of the underlying administration process or due to the presence of an administrator, this process, as elucidated below, could be more elaborate, time-consuming, and expensive.[574] However, if the creditors are not aggressive, the directors are able to communicate with the creditors and reach an agreement in principle.

3.6 Company Administration under CAMA 2020

In furtherance of the objective of corporate rescue, CAMA 2020 also introduced a new device known as the company administration procedure.[575] The administration device and the CVA are the two main innovations of CAMA 2020 that commentators have argued could lead to a shift toward rescue culture in Nigeria, signalling a move from a creditor-friendly jurisdiction to a balanced procedure which considers the interest of all stakeholders in Nigeria. CAMA 2020 provides a mechanism for an ailing company to appoint a person, known as an 'administrator', to look after the company's activities, businesses, and properties in order to ensure it meets its financial commitments and obligations.

An administrator under CAMA 2020 can be appointed via the in-court and the out-of-court route.[576] A company enters administration through the in-court route when an order of the Court appointing an administrator is made pursuant to an application by the company or its directors, or one or more creditors or designated officers of the Federal High Court appointed to be a receiver under CAMA or another enactment or a combination of any two or more of the above persons.[577] An out-of-court route can be done pursuant to an appointment by the company itself or directors of the company or a qualifying floating charge holder.[578] In this situation, the appointor is required to inform the court upon making the appointment. However, an administrator, whether appointed through the in-court or out-of-court route, is deemed to be an official court. However, when appointed by a person other than the court, the administrator acts as an agent of the company, rather than the appointing authority.[579]

Similarly, an administrator, whether appointed through the in-court or out-of-court route; must be a qualified insolvency practitioner, whose fees are paid out from the company's assets,[580]

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[574] This process is similar to the mechanism under sch B1 of the IA 1986 but CAMA 2020 does not provide a channel for combined or simotenous applications for the appointment of an administrator and a CVA proposal.
[575] CAMA 2020, ss 443-549.
[576] CAMA 2020, s 443(1).
[577] CAMA 450(1) (a)-(e) .
[578] CAMA 2020, ss 443(1)(b)-(c) and 452.
[579] CAMA 2020, s 446.
[580] CAMA 2020, ss 445(1) and 535(2).

and ranks in priority above the floating charge holder on the queue of insolvency.[581] In practice, it is possible to have more than one administrator, but their primary objective, either acting jointly or individually, will be to rescue the entirety or part of the company, as a going concern.[582] In addition to pursuing rescue, the administrator has two secondary objectives: (i) to seek a better outcome for the creditors together than what could be achieved if the company is wound up; (ii) to realise the company's assets to, in turn, dispense same to one or more secured or preferential creditors.[583]

3.6.1 In-Court route

An in-court application for an administration order can be made by any or a combination of the persons listed in section 450 of CAMA 2020, and the court will make the order if such a company with respect to which the order is sought, is or is likely to face cash flow insolvency issues, and an order or administration is likely to achieve any of the objectives of administration stated above.[584] The applicant must send notice of the administration application, as soon as reasonably possible; to any court or person who has or who is appointed a receiver for or on behalf of the company, any person entitled to appoint either a receiver or an administrator, and any person as may be directed.[585]

Upon considering the application, the court may make an order approving or dismissing the application. The court may also adjourn the proceedings or make a provisional order or make any of the orders it would have made in a winding-up proceeding, or such orders as it deems fit to make in the circumstance.[586] Section 451 of CAMA 2020 appears to give the court extensive discretionary powers; so the court could even treat an administration application as a winding-up petition to make such orders as it could have done upon hearing a winding petition.[587]

3.6.2 Out-of-Court route

An out-of-court application process can also commence following the appointment of an administrator by a floating charge holder or the company itself or its directors. The applicant

[581] CAMA 2020, s 537.
[582] CAMA 2020, s 444(2).
[583] CAMA 2020, s 444(1) (b) - (c).
[584] CAMA 2020, s 449; cf CAMA 2020, s 444.
[585] CAMA 2O2O, s 450(2). See section 450(3).
[586] CAMA 2020, s 451; cf CAMA 2020, s 574.
[587] That is to say, the court may dismiss the application or adjourn the hearing - either conditionally or unconditionally - or make an interim order or such orders as may be necessary for the particular circumstance. See section 574 of CAMA 2020(1).

who intends to appoint an administrator under this route must inform the CAC by filing at the CAC; a notice of appointment to be accompanied by relevant documents as prescribed. However, where there is a secured creditor (qualified floating charge holder) who has, or might have appointed an administrator or a receiver, the applicant for an out-of-court appointment must first file a notice of intention to appoint the right, such an applicant will be required to file, giving a minimum of three days written notice to any person who may be entitled to appoint a receiver and an administrator via the in-court-route.[588]

An out-of-court applicant who gives notice of intention to appoint, shall as soon as practicable, file a copy of the notice with the CAC and any relevant documentation. The relevant documents that will accompany the notice shall include a declaration stating that the company cannot meet its debt obligation, and a liquidator has not been appointed, and the declarant/applicant is qualified to make the appointment.[589] The out-of-court appointment takes effect once the applicant files the notice of the appointment in the prescribed form at the CAC.[590] In addition to notifying CAC, a person making the out-of-court appointment on behalf of the company is expected to notify the court; by filing a copy of the notice of appointment and the relevant documents, including the statutory declaration and statement made by or for such a person making the appointment, stating that the appointment was made in compliance with CAMA 2020. They must also confirm that the information contained in the declaration is correct and the appointor is entitled to make the appointment on behalf of the company.[591]

Once an administrator - whether out-of-court or in-court - is appointed, the administrator is expected to notify the company, make a publication of the notice, obtain a list of creditors, and notify every creditor whose claim and address are known by the administrator; within fourteen.[592] The notice of the administrator's appointment shall also be sent to the CAC and will be published within fourteen working days as provided by section 483(5) of CAMA 2020. The administrator shall as soon as possible after the appointment request relevant persons to furnish the administrator with a statement of the company's affairs, which must be provided by the persons concerned within eleven working days, from the date of such appointment.[593]

The administrator shall make a proposal for achieving the purpose of the administration, which may include a proposed CVA, scheme of arrangement and compromise, or reconstruction under

[588] CAMA 2020, s 463; cf CAMA 2020, ss 452, 469, 464 and 459.
[589] CAMA 2020, s 464.
[590] CAMA 2020. S 469.
[591] 466(2) (a) – (c).
[592] CAMA 2020, s 483; James and Elendu (n 533) 156.
[593] CAMA 2020, ss 484 and 485.

CAMA 2020.[594] The proposal shall be sent to CAC, the company's creditors, whose claims are known to the administrator, and members of the company whose addresses are known to the administrator.[595] It should be noted that the administrator is expected to send the proposal to the prescribed persons before the end of 30 days, from the date of commencement of administration.[596]

Having sent out the proposal, the administrator will summon a meeting of the company's creditors (a creditors' meeting) in the prescribed mode and time, notifying any creditors the administrator is aware of.[597] An invitation to the creditors meeting, known as initial creditors meeting, shall be accompanied by a copy of the administrator's proposal sent to all the creditors of the company whose claim and address is known to the administrator.[598] It is pertinent to note that, under certain conditions, it may not be necessary to summon the creditors' meeting. For example, a creditors meeting may not be necessary if the company's assets are enough to satisfy the debt of all creditors. Similarly, the meeting may not be necessary, if the company's asset is not sufficient to enable a distribution to the unsecured creditor or perhaps if the rescue is not achievable and the administrator cannot achieve a better return for the creditors as a whole, than it would have achieved in the event of liquidation without first entering administration.[599] However, the administrator will have to summon the initial creditors' meeting, if creditors representing 10% of the total debt cumulatively, request for it using the specified manner, form, and time.[600]

Where the administrator summons the initial creditors' meeting, the creditors may either approve or disapprove the administrator's proposal. In the case of approval, the creditors may approve the proposal, with modification subject to the administrator's consent or without modification.[601] If the creditors approve the proposal with modifications, there may be a need for another creditors' meeting in order to consider the modifications. A creditors committee may also be set up at the meeting requiring the administrator, upon seven-day notice, to address any request of the committee.[602]

The administrator shall report the decision of the initial creditors' meeting, after such meeting, as soon as practicable. The report of the creditors' decision will be to the Court, CAC, and

[594] CAMA 2020, s 486.
[595] CAMA 2020, s 486(4).
[596] CAMA 2020, s 486(5). Non-compliance with this provision is an offence. See CAMA 2020, s 486(7).
[597] CAMA 2020, s 487.
[598] CAMA 2020, s 488; cf CAMA 2020, s 486 (4) (b).
[599] CAMA 2020, s 489 (1).
[600] CAMA 2020, ss 489 (2) and (3). The time could be varied by the court. See CAMA 2020, s 489 (4).
[601] CAMA 2020, s 490(1).
[602] CAMA 2020, s 494.

designated persons.[603] Thus, if the creditors disapprove of the proposal, the court may order the cessation of the appointment of the administrator.[604] The court may also order to adjourn the hearing - either conditionally or unconditionally – or make any order it deems fit to make in the circumstances, including proceeding with a petition for winding up that was previously suspended.[605] Similarly, the court may also entertain an application challenging the actions of the administrator. In such circumstances, the court can allow the application or order to make such orders based on the discretion of the court, including an interim order.

3.6.3 Termination of Administration

There are diverse ways in which administration can come to an end including an effluxion of time, notice, and Order of Court. With effluxion of time, an administration may terminate if the time elapses. When the tenure of a person appointed as an administrator elapse, such a person will cease to be an administrator, and the administration terminates. The time limit for an administrator to be in office under CAMA 2020 is a period of one year beginning from the date the administration order takes effect.[606] Although the administration elapses a year after the order takes effect, the administrator may apply to the court to extend the time to a period not exceeding six months, if the secured or preferential creditors consent.[607]

The administration may also be determined by notice. This could occur when in the opinion of the administrator, the administration has achieved its purpose, or the company ought not to be under administration, to begin with.[608] In such situations, the administrator is expected to send a notice of termination to the court and the CAC. A copy of the notice must also be sent to all the company creditors.

In terms of an Order of court, administration may also end following a court order terminating the administration. This can happen in two ways; either by application from creditors (at the creditors' meeting) for cessation of the administration order - or by court *suo motu*, on the grounds of public interest.[609]

3.6.4 Effect of Administration under CAMA 2020

The main impact of administration under CAMA 2020 on a company is the power of management, which a person appointed as an administrator of a company has responsibility

[603] CAMA 2020, s 490(2).
[604] CAMA 2020, s 492.
[605] ibid.
[606] CAMA 2020, 513(1).
[607] CAMA 2020, 517.
[608] CAMA 2020, 517(2)(a).
[609] CAMA 2020, ss 517(2)(b) and 520(1).

for. Once a company is in administration, the administrator is empowered to manage the company's affairs, business, and properties in accordance with the proposal.[610] The implication is that all the business documents of the company, including correspondence for or on behalf of the company, or issued by the company or the administrator, must have the name of the administrator, and be clearly marked to show that the company is in administration. This includes online documentation and database, such as websites and repositories. What is more, there is a presumption of authority in favour of third parties who deals with an administrator in good faith and for value.[611]

The power of the administrator to manage and control appears to move beyond the vagaries of material assets. The administrator has power even over some human assets of the company. For instance, section 498 of CAMA 2020, permits the administrator to remove or appoint a company's director, whether such a director was appointed to fill an existing vacancy or not. The administrator also has the power to call a meeting of the company's directors or members, and no resolution to wind up the company can pass without the prior consent of the administrator. In fact, the court will only make a winding-up order without the nod of the administrator in extremely limited circumstances.

Another effect of the administration is that in most cases, all pending winding-up petitions will either be dismissed or kept in abeyance and no action to enforce the company's security can be taken against the company or its assets, without the administrator's consent.[612] This includes but is not limited to, any action to repossess goods in the company's possession under a hire purchase agreement. The rationale is not unrelated to the fact that an administrator has the possessory right over every property of the company, which the administrator thinks belongs to the company.[613] An attempt to repossess goods in the company's possession, whether under a hire purchase agreement or not, will be deemed to be interference with the administrator's power of custody and control of the property. In fact, it is argued that such action will interfere with the management power of the administrator under section 501 of CAMA 2020.

The above example highlights the overlap between the administrator's power of custody and control of the company's assets and the power to manage the company's affairs, including the property, under sections 504 and 505 of CAMA 2020. For example, in tenancy matters, a

[610] CAMA 2020, ss 504 and 505; cf CAMA 2020, s 496 (1).
[611] CAMA 2020, s 496 (3).
[612] James Sharon Tolulope and Elendu Chinenye Rachel, 'Company voluntary arrangements (CVA) & administration of companies: an appraisal of the innovative corporate insolvency procedures under the companies and Allied Matters Act 2020' -157-158.
[613] CAMA 2020, s 504.

property owner may not exercise the forfeiture by peaceable re-entry right regarding the premises of a leasehold property without the permission of the company's administrator or the court. Similarly, neither the company nor an officer of the company can interfere with the management power of the administrator without the administrator's prior consent.[614] Consequently, any action that interferes with the right of possession of the company may be deemed to be an interference with the management and control power of the company.

3.6.4.1 Effect of Administration on Company Security under CAMA 2020

From a debtor's perspective, the most important effect of the administration procedure under CAMA 2020 is the fact that it acts as an automatic temporary stay against enforcement of creditors' security over the assets of the company. This process is known as a moratorium. Section 480 of CAMA 2020 places a moratorium on other legal processes. The implication of the moratorium procedure is to the effect that the creditors are precluded from approaching the court or taking steps to enforce their debt, whether by way of appointing a receiver by the floating charge holder or winding up the company, or even bringing an action in court for debt recovery. Apart from the interference with the power of management and control, the moratorium precludes property owners, in the example above, from exercising their right of forfeiture or re-entry regarding premises let to, or in the possession of the debtor.[615]

The moratorium provision for administration is one of the main distinguishing features between the CVA procedure and the administration procedure under CAMA 2020. Although the formal moratorium procedure was only introduced under CAMA 2020, it is not unique to the administration procedure. CAMA 1990 also provided a moratorium on debt enforcement with respect to companies which have appointed a provisional liquidator or are undergoing the winding-up process, except with the consent of the Federal High Court.[616] The moratorium does not prevent the floodgate of litigation *per se*; it only prevents the race to court - essentially the surprise element, especially when the assets of the company are not up to the liability.[617] Under CAMA 2020, the moratorium applies to the administration and associated schemes. However, the moratorium procedure cannot support a CVA. This naturally raises a curious question as to why the moratorium procedure is unavailable for the CVAs. While the answer to this question may be uncertain, it is submitted that the failure to extend the moratorium

[614] CAMA 2020, s 501(1).
[615] CAMA 2020, s 480(3).
[616] CAMA 1990, s 217; Chioma Adiele, 'Business Rescue in Nigeria: A Step in the Right Direction'[2021] SSRN Electronic Journal 1, 13.
[617] Akingbolahan Adeniran, 'A Mediation-Based Approach to Corporate Reorganizations in Nigeria' (2003) 29 NCJ Int'l L & Com Reg 291, 328-329.

provision to CVAs under CAMA 2020 is a significant oversight that limits the application of the CVA procedure, especially by small businesses in Nigeria.

Nigeria's economy is dominated by SMEs, which controls about 97% of the economy.[618] SMEs in Nigeria face several challenges, including a lack of capital, which has led to insolvency within five years of their existence.[619] A smaller percentage of companies go extinct within the sixth to the tenth year, while only five to ten percent of the companies recover from distress.[620] Due to the lack of capital, the administration procedure may be too expensive for the SMEs as compared to the CVA procedure. However, the lack of a moratorium in support of the CVA makes it impossible for the directors of SMEs' breathing space to remain in position and pursue the agreement without interference. Thus, a creditor of a financially distressed company may interfere in the process by unilaterally instituting a claim or an action during the pendency of the CVA process.[621]

In summary, the administration tool introduced under CAMA 2020 is *in pari materia*, at least in substance, with the system of administration under UK law. The mode of commencement, appointment, the different appointment routes, and the purpose of administration are the same. However, there are two areas of difference in the administration procedure in these jurisdictions: the elasticity of its applicability, and the effects it has on receiverships. With regard to the former, the scope of administration procedure under CAMA 2020 has yet to be evaluated judicially. Nevertheless, CAMA 2020 limits the application of administration.[622] Certain companies are precluded from using the administration procedure under CAMA 2020. Companies which accept deposits, such as commercial banks, merchant banks, specialised banks, and payment service banks are regulated by the Banks and Other Financial Institutions Act 2020 (BOFIA), the CBN Act 2007 and the NDIC Act.[623] The administration procedure under CAMA 2020 is also not available to non-authorised deposit takers (within the meaning of banking laws and regulations), such as Foreign exchange dealerships and payment systems covered by the Foreign Exchange (Monitoring & Miscellaneous Provisions, etc.) Act 1995 and CBN Regulations.[624] Finally, the administration procedure is not applicable to insurance companies, except for the fact that the National Insurance Commission has approved it.[625]

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[618] Remigius Olisah Chinedu, 'Small and Medium Enterprises in Nigeria: Contributions to Economic Development and Challenges' (2023) 10(1) International Journal of Advanced Research in Statistics 148, 149.
[619] ibid.
[620] ibid 149-150.
[621] Udofia (n 541).
[622] CAMA 2020, 447(4) - (5). The latter will be discussed in the context of receivership.
[623] CAMA 2020, s 447(4)(a).
[624] CAMA 2020, s 447(4)(b).
[625] CAMA 2020, s 447(5).

By contrast, the applicability of the administration procedure in the UK is more elastic. The UK administration procedure, like the CVA procedure as noted above, has been cooperatives, community societies, credit unions, building societies, partnerships, and several types of companies established under separate legislations. Concerning insurance companies, the IA 1986 does not preclude making administration orders to insurance companies in the UK.[626] However, only the court can appoint an administrator for an insurer.[627] This shows that unlike CAMA 2020, where the provisions on administration are subject to a subsidiary or specialised legislations, regulations, and policies, the IA 1986 does not outrightly subject its provisions to secondary legislations.

3.6.4.2 Effect of Administration on Receivership under CAMA 2020

The effect of the Administration procedure under CAMA 2020 appears to be close to the Receivership procedure under CAMA 2020, at least, by the underlying philosophy behind the introduction of these procedures. Both the administrator and the receiver under Nigerian law, by the nature of their duties and obligations have the responsibility to ensure corporate survival. As previously stated, a receiver under the pre-CAMA procedure must realise the assets of the company in satisfaction of the debt of the appointor, but the duty to realise the company's assets is not indispensable. This duty should not conflict with the receiver's obligation to manage the company in the interest of the company's stakeholders - to rescue. This duty and obligation are identical to the purpose of administration under CAMA 2020, which is the rescue of the company as its primary purpose, and a better result for the company's creditors, where the primary purpose cannot be achieved.[628]

However, CAMA 2020 has whittled down the obligation of the receiver, if not abolished it, with the introduction of the administration procedure. Section 556(1)(2) of CAMA 2020 makes the primary goal of a receiver the possession of the company's assets, for the realisation of the debt of the appointor. The duty to rescue the company now lies with the administrator. The question in the minds of scholars and practitioners in Nigeria is, what is the effect of the administration on the receiver? And can the receivership procedure exist side-by-side with the administration procedure in Nigeria?

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[626] IA 1986, sch B1, para 9(2). The relevant provision applicable to insurance companies are in Pt II, s 8, sch B1. However, this provision is subject to the modifications in the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2002 (SI 2002/1242).

[627] The main modification in SI 2002/1242 is to allow the appointment of an administrator for an insurer to be made by a court order only. This provision is avalable in the subsequent amendment. See art 3 of the Financial Services Act 2012 (Consequential Amendments and Transitional Provisions) Order 2013 (SI 2013/472).

[628] CAMA 2020, s 444(2).

First, section 454(c) of CAMA 2020 protects receivers who were appointed under CAMA 1990 provisions by preventing the appointment of an administrator where a receiver had been appointed prior to CAMA 2020 coming into force. This provision is necessary for the protection of receivers, whether appointed by the court or not, whose lifespan transitions into CAMA 2020. Second, it allays the fear of the charge holder, who will be waiting for the receiver to recover the debt. Similarly, section 476(1) of CAMA 2020 also protects receivers appointed by a fixed or floating charge holder after CAMA 2020 came into force, by giving the court powers to dismiss any administration application regarding a company where a receiver has already been appointed by a fixed charge holder with the exception of when the charge holder agrees.

With respect to a receiver of part of the company's assets, section 478(2) gives the administrator, upon appointment, the discretion to retain a receiver of part of the company's assets if the receiver was appointed by a secured creditor. In interpreting the English equivalent of this provision under the IA 1986, the court in *London Flight Centre (Stansted) Ltd (Acting by its Administrator) v Osprey Aviation Ltd*,[629] considered a case where the receivers were already appointed at the instance of a secured creditor with respect to aircraft G-LOVB, before the administration order was made. The court included, in the order, the acknowledgement of the administrator to the effect that, upon the order of administration taking effect, the administrator consents to the receiver's continued stay for the purpose of enforcing the security of the secured creditor over the aircraft, of the Petitioner.

It is pertinent to note that when the administration procedure was first introduced in the UK under the IA 1986 following the recommendations of the Cork Committee report, the effect of this device as a rescue tool was curtailed by floating charge holders, who hurriedly appointed receivers to realise the company's assets, upon the slightest hint of liquidity challenges. This situation was not salutary to companies with short-term liquidity problems, as well as other creditors who will be excluded from benefitting from the assets of the company, especially when assets that are viable are sold to recover the debt of the floating charge holder. English law addressed this anomaly with the introduction of the EA 2002. Section 250 of the EA 2002 inserted section 72A of IA 1986, which prohibited the appointment of an administrative receiver by a qualifying floating charge holder. However, this provision curtailing the powers of the floating charge holder to appoint a receiver took effect on the coming into force of section

[629] *London Flight Centre (Stansted) Ltd (Acting by its Administrator) v Osprey Aviation Ltd* (2002) BPIR 1115.

72A of IA 1986 on 15th September 2003.[630] The effect is that the floating charge holder could no longer enforce the company's security through the appointment of an administrative receiver.

While this may appear on its face as a seismic shift in the law regulating the appointment of a receiver, it is important to note that the utilisation of the receivership procedure as an exploitative tool for the recovery of the company's security by the floating charge holders, are grossly inimical to the spirit of the Cork committee's report for accountability, transparency, and collectivism.[631] The focus of the receivers on debt recovery means this tool was exploited as an unaccountable debt recovery tool that functions with opacity.[632] For this reason, debtors, especially commercial banks, were not receptive to receivership and did not consider it as a tool to rescue ailing companies. Based on the priorities of the receivership procedure, it appears the argument by some stakeholders that administrative receivership is not a rescue tool is a valid logical argument.[633] Perhaps this was what led the authorities to consider a new route to administration (the out-of-court route) that will fundamentally promote a rescue culture for businesses in the UK?[634]

From the above analysis, the effect of the administration procedure on receivership under Nigerian law appears to be no different to that under UK law. While it does seem as though the power of the floating charge holder to appoint a receiver is curtailed, the receivership procedure has not been ditched.[635] To the extent that receiverships which were initiated prior to CAMA 2020 are still valid, and the power of the fixed charge holder to appoint a receiver still inures, it is argued that the receivership procedure has not been jettisoned by the introduction of the administration by CAMA 2020. In fact, both could exist simultaneously. For example, if a fixed charge holder consents, the court will allow a receiver appointed by a fixed charge holder to

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[630] Insolvency Act 1986 (Amendment) (Administrative Receivership and Urban Regeneration etc) Order 2003 (SI 2003/1832). This amendment modified section 250 of the EA so that the provision of section 72A of the IA 2002 will come into force on the 15th of September 2003. Note that section 72A cannot be varied by the agreement of the parties or a debenture instrument and would not apply retrospectively, so that, a person appointed as a receiver prior to 15th September 2003 will continue to operate as such except in limited circumstances. See s 72A (4) IA 1986.

[631] See also section 29 IA 1986.

[632] David Milman and Peter Bailey, Annotated Guide to Insolvency Legislation 2024 (vol 1, 27th edn, Sweet and Maxwell 2022) 96 – 97.

[633] McKendrick Ewan, *Goode on Commercial Law* (4th edn, Penguin 2010) 928.

[634] The introduction of the out-of-court route towards administration was meant to promote rescue. For an analysis of the rescue culture, see *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2003] BCC 885.

[635] Although it is yet to be seen whether this has impacted the number of administrations but has certainly not prevented the appointment of receivers. See Busola Aro, 'AMCON Clarifies Court Judgement on Receivership over Arik Air | TheCable' (*TheCable*2 April 2023) <https://www.thecable.ng/amcon-clarifies-court-judgement-on-receivership-over-arik-air/> accessed 19 September 2024.

co-exist with an administrator, otherwise, the court shall dismiss the administration.[636] In a similar vein, a receiver of part appointed by a secured creditor can also co-exist with the administrator if the administrator consents.

However, the key difference in the Nigerian system of receivership and receivership under English law lies in the application of section 478 of CAMA 2020. Unlike English law, which prohibits the appointment of an administrative receiver by a floating charge holder under section 72A of IA 1986, section 478(1) of CAMA 2020 allows the floating charge holder or the company to appoint a receiver, but such a receiver will vacate the office once an administrator is appointed.[637] This is because, in practice, when a person is appointed as a receiver/manager, such a person will be under obligation to manage the day-to-day affairs of the company, which is what an administrator will do upon assuming office. Consequently, the administration procedure has not discarded the receivership device in Nigeria but limited its applicability to the extent that a receiver appointed by the floating charge holder, or the court can only function if an administrator is not appointed. In summary, although a receiver appointed by either the court or a floating charge holder cannot co-exist with an administrator, a receiver appointed by a secured creditor can exist simultaneously with the administrator, and in some circumstances, it may be a ground for dismissing an administration application.[638]

3.7 Other Corporate rescue and restructuring tools under CAMA 2020

3.7.1 Netting

Apart from the CVA and administration, other tools can aid the rescue of insolvent companies. Some of these tools are not corporate rescue tools in the strict sense. Others could be considered a corporate restructuring tool, which can help save the company's business. One such option is the Netting provision introduced in Chapter 28 of CAMA 2020. Netting is a rescue procedure that allows companies by way of contract to reconcile and set off their corresponding obligations to realise a reduced net responsibility between the companies. In comparison with set-off, netting – though similar, is a method of reducing settlement risks in executory financial contracts, while set-off applies to the set-off of debts in a contract that has already been executed by one or both parties.

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[636] CAMA 2020, 476(1).

[637] Emmanuel Abasiubong Bassey, 'Effect of an Administration Order on Receivership Under CAMA 2020' *THISDAY* (Lagos, 13 October 2020) <https://www.thisdaylive.com/index.php/2020/10/13/effect-of-an-administration-order-on-receivership-under-cama-2020/> accessed 28 May 2023.

[638] CAMA 2020, ss 476(1)(b) and 478(2); contra CAMA 2020, s 478(1). The option open to the floating charge holder in the UK is utilise the administration process.

Netting contracts or agreements are mostly used to reduce risk exposure between financial institutions and other financial market participants. Amongst other things, the contracting parties agree to aggregate and value competing rights and interests so that they can consolidate the amount payable by the parties to achieve a reduced net obligation. This could be by paying the net difference, in the case of payment netting, or cancelling and setting off the losses and gains to reduce exposure to risk in the case of close-out netting. Section 718 of CAMA 2020 recognises both payment and close-out netting and CAMA empowers financial regulatory authorities to designate agreements, contracts, or transactions as "qualified financial contracts" that are enforceable by its terms and provisions, against an insolvent party, guarantor, or other person providing security for any of the parties.[639] What is more, CAMA 2020 gives the agreement of the parties further impetus by limiting the provisions of any insolvency law, and the powers of liquidator, receiver, regulatory agencies, and even third parties to void, stay or avoid the agreement.[640]

The effect of the introduction of netting provisions under CAMA 2020 is that where a netting agreement exists, an insolvency proceeding such as the scheme of arrangement or merger and acquisition cannot commence or cause to proceed unless such netting agreement is executed or settled.[641] Although netting is not strictly a rescue tool, the provision on netting can help rehabilitate ailing companies and support debt restructuring. In times of corporate distress occasioned by insolvency, Nigerian companies can now take advantage of the netting agreements to reduce financial risk or obligations in the event of insolvency or rescue the company from financial distress to avoid insolvency. However, it should be noted that the netting provision under CAMA only applies to companies in the financial sector whose agreement or contract includes a netting clause.[642] In addition, the main drawback to the netting provision is the lack of a definition of what will constitute a netting clause in a contract or agreement, and the potential for parties to use it as a weapon to jump the queue of insolvency by making themselves super-priority creditors. In this sense, netting will no longer be a shield for avoiding financial risk exposure or a tool to rescue the company but rather a creditor's tool or weapon for evading *pari passu* (equal) treatment in the event of insolvency.

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[639] See CAMA 2020, ss 719 and 721.
[640] CAMA 2020, s 721(1)(a) - (c).
[641] Okorie Kalu, 'Chapter 28 of the Companies and Allied Matters Act 2020- Netting in Nigeria' (*Mondaq.com*4 September 2020) <https://www.mondaq.com/nigeria/securities/982072/chapter-28-of-the-companies-and-allied-matters-act-2020-netting-in-nigeria> accessed 19 September 2024.
[642] CAMA 2020, ss 718 and 719.

3.7.2 Schemes of Arrangements or Compromise or Reconstruction of Companies

CAMA 2020 retains the arrangement and compromise schemes. The procedure for arrangement and compromise schemes under CAMA 2020 is analogous to CAMA 1990 with few, but fundamental modifications. First, there is no definition to give both words technical meaning. On the one hand, an arrangement is defined as any alteration of the rights or liability of or any class of members, creditors, debenture holders. Furthermore, it is defined in the regulation of a company other than an alteration effected under any provision of CAMA 2020 or by unanimous consent of all those affected.[643] On the other hand, compromise is not defined. While this may not appear to raise nerves, it is uncertain what transaction can be construed by the court as constituting a compromise. However, one can attempt to distinguish a scheme of arrangement from a compromise based on the connotation of both words. While the former implies a more comprehensive scheme that may involve some form of reconstruction, the latter connotes elements of difficulty which can be settled by the agreement of the parties.[644]

Secondly, CAMA 2020 provides two separate procedures to cover schemes of arrangements or compromise. Meanwhile, sections 711-714 of CAMA 2020 cover "compromise", "arrangement or reconstruction" between two or more companies, or a "merger" of any two or more companies. This can be recharacterised as "schemes of reconstruction of companies or court-sanctioned mergers". Under this procedure, where the whole or any part of the undertaking or the property of a company involved in any of these schemes of reconstruction of companies or court-sanctioned mergers is to be transferred to another company, the court may, upon summary application by any of the affected companies, order separate meetings of the companies involved in the scheme.[645] The court will also sanction the resolution approving the scheme if the transaction is approved by shareholders holding 75% total share value of the shareholders or their proxies present and voting at such meeting.[646]

The second procedure for arrangement or compromise is contained in section 715 of CAMA 2020. It covers schemes of arrangements and compromises with creditors and members of a company (schemes of arrangements and compromise with creditors). The provision is the same as the previous CAMA regime. A summary application for a scheme under this procedure can be made to the court by the company, member, creditor, or liquidator of the company where

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[643] CAMA 2020, s 710.
[644] *Re NFU Development Trust Ltd* [1973] 1 All ER 135, [1972] 1 WLR 1548; *Re T & N Ltd (No 3)* [2006] EWHC 1447 (Ch), [2006] BPIR 1283, 1304, paras 53 and 54.
[645] CAMA 2020. s 711(1).
[646] CAMA 2020, s 711(2). Note that the court sanction will be filed at the CAC within 7 days. See CAMA 2020, s 711(6).

such company is undergoing liquidation.[647] Where a company proposes a compromise or arrangement between itself and its members or creditors or any class of them, the court may, upon summary application by any of the authorised persons to make the application, order separate meetings of the creditors or members or class of them affected by the scheme.[648] It should be noted that the voting threshold is not significantly different from the schemes of reconstruction of companies or court-sanctioned mergers: shareholders holding 75% total share value of the shareholders, or their proxies present and voting at such meeting, and creditors holding 75% of the total claim of the creditors or their proxies present and voting at such meeting.

Once a scheme is approved by the shareholders, the court may refer it to the SEC for investigation on the fairness of the scheme and revert to the court in the form of a report. If the court is satisfied with SEC's report on the fairness of the scheme, the court will sanction the scheme, which will take effect when the CTC of the court order is registered with the CAC. One important development that distinguishes the schemes of reconstruction of companies, or court-sanctioned mergers from schemes of arrangements and compromises with creditors is that the court sanction becomes effective and binding on the companies as soon as the Court sanctions it, whether the sanction has been filed or not. However, the court sanction must be registered with the CAC within seven days. Also, it is worth noting that referral is not a requirement for schemes covering the reconstruction of companies or court-sanctioned mergers. In addition, the introduction of court-sanctioned mergers and acquisitions under CAMA 2020 has provided certainty in the framework for the implementation of mergers. This is because the repeal of sections 118-128 of ISA 2007, which previously provided a legal framework for mergers, created a lacuna in the Nigerian jurisprudence regarding the procedure for mergers that section 711 of CAMA had filled.

3.7.3 Difference between Schemes and CVAs under CAMA 2020

The difference between appraising the schemes and CVAs based on their characteristics and considering how effective these tools can be based on the output, outcome, and impact on distressed companies is fundamental. The question before us is whether the scheme under CAMA 2020 is a more effective tool for the resolution of corporate distress than the CVA. The answer to this question lies in considering the output, outcome, and impact of both processes.

[647] CAMA 2020, s 715.
[648] ibid.

To understand the output of a scheme or the CVA, it is pertinent to take a cursory glance at the procedural differences. Much like the schemes, the CVA is a debtor-in-possession tool, which leaves the management of the company in the hands of the directors.

However, the process involved in both procedures is distinct. The CVA procedure under CAMA 2020 is simple and flexible with little or no court involvement. Moreover, it can be used by itself or in combination with another rescue tool such as administration. The simplicity lies in the fact that it is based on the agreement of the parties and managed by the directors of the company without the input of the court. By contrast, the procedure for schemes is a complicated, expensive, and time-consuming process with too much court involvement. The consequence of involving the court at distinct stages of the process is that parties will seek the services of legal practitioners who will make the proposals. The overreliance on the court also places the success of the process at the mercy of the judge, who may second-guess the intentions of the parties and refuse its approval to sanction the scheme or subject the approval to certain conditions or amendments.[649]

When considering the outcome of the CVA and schemes, the focus her is on the effect of these tools. The question is, what benefits or changes will occur immediately after the CVA or scheme takes effect? To answer this question, consider one important feature of a rescue tool – which is the moratorium. Unlike the CVAs under CAMA 2020, schemes are backed up with a moratorium. That is to say, the immediate effect of the scheme is debt suspension due to the moratorium protection against legal and execution proceedings by a creditor, such as winding up or debt enforcement actions within six months.[650] Although the moratorium for schemes provided under CAMA 2020 is not automatic, one cannot oversell the importance of a moratorium when companies are trying to resolve distress using rescue and or restructuring tools.

Concerning the impact, one will have to consider the product of both processes in the context of corporate rescue. While the CVA is used to reconstruct debt and/or repayment plans with the creditors, the schemes are used not just to restructure debts with its creditors but for the restructuring of a company's organisational and corporate set-up.[651] Both tools can be used to

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[649] Though the court may be reluctant to sanction arragement with the provision for future amendments, it may alow amendment in exceptional cases. See *Re Cape plc* [2006] EWHC 1316 (Ch); cf *Re Lehman Brothers International (Europe) (in administration) (No 2)* [2009] EWCA Civ 1161 [where the court refused to sanction an arrangement with respect to trust property]. A better way to do this is to have a clause in the agreement that allows modification with the consent of the court: See *Re Canning Jarrah Timber Co (Western Australia) Ltd* [1900] 1 Ch 708, CA.

[650] CAMA 2020, s 717(1).

[651] For example, reducing the company's share capital or the replacement of a holding company or mergers and acquisition.

restructure the company's debt with its creditors to keep the business as a going concern. The end-product or long-term effect of a scheme is two-fold; to restructure the company's debt - to rescue the company from corporate failure and/or reorganise the corporate structure of the company. This may not necessarily be corporate rescue but company restructures; the end-product of a CVA process is corporate rescue. That said, it is doubtful whether rescue can be achieved without the benefit of a moratorium procedure. Accordingly, the absence of a standalone moratorium, which can serve as a precursor to the CVA under CAMA 2020 significantly exposes the debtor company to the risk of creditors' actions throughout the process. If there are no aggressive creditors, the CVA without a moratorium can sufficiently achieve rescue outcome. However, this will be impossible where there is serious threat of immediate action, prior to the creditors' meeting. The solution in contentious cases is to have a pre-insolvency moratorium procedure such as the standalone moratorium, which could serve as a precursor to a CVA. In such a situation, rescue can be achieved if the CVA is combined with either a moratorium similar to the one under Part A1 of the IA 1986, or an administration.[652]

Therefore, to return to the question of which tool is more effective, the answer will be subjective depending on the company involved, the nature of the charges created, and the goal of the rescue. Typically, companies create charges over the company's assets to secure loans or debentures or raise finances from their lending partners, so the CVA procedure will not be an effective rescue tool for a company in Nigeria with secured debt exposure. The schemes are considered more effective if the company, whether small or big, has already created a charge in favour of its creditors, except if the CVA is used in combination and during the winding-up or administration process. This is not to mean that smaller companies whose debts are not secured should prioritise schemes. The CVA will be best for all companies, including smaller companies whose credits are not charged because it is a simpler, faster, and less complex agreement between the company and the creditors. However, where the goal of the process is not corporate rescue but corporate reorganisation or reconstruction, such as reduction or increase in share capital or mergers and acquisitions, the scheme is the most effective tool because the CVA is only useful for debt restructuring.

[652] Thomson Reuters Practical Law, 'Glossary | Practical Law' (*Thomas Reuters* 2024) <https://uk.practicallaw.thomsonreuters.com/Glossary/UKPracticalLaw/I3f4a4741e8db11e398db8b09b4f043e0?contextData=%28sc.Default%29&transitionType=Default> accessed 29 October 2024.

3.8 Conclusion

This chapter has discussed the Nigerian model of corporate rescue. In spite of the different corporate cultures in Nigeria, the UK and the US, Nigeria's corporate rescue model incorporates features of the management displacement and debtor-in-possession models. First, the chapter discussed the advancement of corporate rescue law pre-CAMA 2020 and post-CAMA 2020. The analysis of the historical development of corporate rescue law indicates a movement from the tradition of liquidation to corporate rescue culture. Additionally, it shows the need to address certain local challenges that will enhance the adaptation made in the transplantation of corporate rescue procedures in Nigeria. These challenges include a lack of awareness regarding the importance of corporate rescue, stakeholder reluctance to use the procedure, creditor attitudes towards distress, institutional weakness and a lack of post-commencement financing, which inhibit the practical implementation of corporate rescue procedures under CAMA 2020. As argued in Chapter 5, these issues affect the timely resolution of distress and hinder the alignment with best practices. To set the stage for analysis in Chapter 5, the next chapter examines corporate rescue and restructuring models in Kenya and South Africa.

4 `CHAPTER 4: Examination of Corporate Rescue Models: An 'Afri-insolvency' Approach

4.1 Overview

This chapter introduced the term *Afri-insolvency*—a term I have coined to describe African insolvencies. The term, which has not been previously defined or explored in existing literature, encapsulates the policies, structure, or broader financial challenge for both corporate and individual persons in Africa. Thus, its usage depends on the context, and in this thesis is refers to the legal framework designed for resolving corporate insolvency issues within Africa. As an emerging market, African jurisdictions are establishing modern insolvency tools that will help to rescue distressed companies and incentivise investors to increase foreign direct investment in the region to drive up economic growth.[653] The previous chapter discussed the reform of Nigeria's corporate rescue law, and the tools introduced to promote the rescue culture. This chapter provides the relevant background to the comparative analysis in Chapter 5. The chapter is divided into two parts. Part I examines the Kenyan model of corporate rescue, and part II examines South Africa's corporate rescue model. It aims to provide detailed discussions on corporate rescue policies and develop an understanding of the legal framework and tools for resolving insolvencies in these jurisdictions.[654] The question then seeks to discover whether an *Afri-Insolvency* approach to corporate rescue has any relevance to these aims.

The rationale for the introduction of corporate rescue models within the African jurisdiction is the need to move to a rescue culture, which is historically antithetical to the pro-creditor environment and, therefore, foreign. Corporate rescue models, like most foreign legal concepts and practices, must be tailored to adapt and integrate specific socio-economic or legal and/or cultural dynamics of the region, and in this case, the African region. An *Afri-insolvency* approach provides a tailor-made approach specifically for African countries and economies, which may defer contextually from the UK or US models due to the legal infrastructure, economic and business environment.

As previously argued in chapter 2, the court-based approach to resolving insolvency, which is dominant in the US rely heavily on a sophisticated legal system, market, and infrastructures,

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[653] Anthony I Idigbe and Okorie Kalu, 'Best practice and tailored reforms in African insolvency: Lessons from INSOL' (Insolvency & Restructuring - International, International Law Office 2012) <https://punuka.com/wp-content/uploads/2019/01/best_practice_and_tailored_reforms_in_african_insolvency.pdf> accessed 21 June 2023; McCormack, 'Control and Corporate Rescue–An Anglo-American Evaluation'.

[654] See ch 1, s 1.2.1.

which is underdeveloped in most emerging and developing countries, in the context of Africa, particularly Nigeria. Hence, the need for an Afri-Insolvency Perspective, which provides an approach for reimagining corporate rescue in the African contexts by considering models that integrate Africa's legal and socio-economic realities. In this regard, the thesis utilises Kenya and South Africa's models as a primary lens for addressing the challenges of court-based approaches, and therefore, providing valuable case studies for comparison, and lessons in reforming the insolvency framework in Nigeria.

Many African countries, such as Nigeria, face institutional and administrative challenges, which leads to delays and uncertainty in the rescue process.[655] The Afri-Insolvency Perspective seeks to address insolvency in African context by considering the court-based approaches but prioritising legal and social-economic perspectives which African models provide. To cover the lacuna in addressing Nigeria's local context which the UK and US approaches present, Kenya and South Africa's models will be discussed to complement the Nigerian context in answering the research question. This chapter will, therefore, support a comprehensive assessment of the extent to which CAMA 2020 provides an effective and efficient framework for the resolution of corporate distress in Nigeria through a comparative analysis of the provisions, context, implementation, and outcomes in jurisdictions such as Kenya and South Africa, with similar characteristics to Nigeria.

4.2 PART I

4.2.1 The Kenyan model

Kenya is one of the African countries selected as a place of comparison in this research. Since a comparative study requires the identification of objects of comparison, it is recognised - in the context of this analysis - based on its legal jurisdiction. Generally, Kenya is classified as an emerging market, geographically located in East Africa, with a population of about 57 million.[656] In the current governmental structure, Kenya is a democratic republic with a multi-party-political system, a common law-based legal system, and one of the jurisdictions within the African regions which is imbibing the rescue culture.[657]

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[655] Hannah Ozieme and Princess Otah, 'Is Receivership an Effective Rescue Mechanism under Nigerian Corporate Insolvency Law?' (2025) 19(1) Insolv & Restructuring Int'l J.

[656] Tyler Cowen, 'Kenya Is Poised to Become the 'Singapore of Africa'' (*The Washington Post*, 14 June 2023) (<https://www.washingtonpost.com/business/energy/2023/06/14/kenya-is-poised-to-become-the-singapore-of-africa/d92f9be2-0a6a-11ee-8132-a84600f3bb9b_story.html> accessed 21 June 2023.

[657] LEX Africa, 'Insolvency and Restructuring Guide for Africa 2015' (*LEX Africa*, 2015) <https://lexafrica.com/wp-content/uploads/2022/09/LEX-Africa-Insolvency-Guide-Digital.pdf> accessed 27 June 2023.

Until 2015 when the Kenyan Parliament passed the Insolvency Act (Kenya Insolvency Act 2015), the statutory framework regulating insolvency law in Kenya was based on the provisions of the Bankruptcy Act (Kenya Bankruptcy Act 2012 [2010]) and the Companies Act (Kenya Companies Act 2012 [2010]). While the provisions of the former covered personal insolvency, the latter provisions relate to corporate insolvency. The analysis here is limited to the examination of the jurisprudence in this jurisdiction, and because it concerns the latter, the wider approach of comparing the different research objects will not be lost in the analysis. Part I of Chapter 4, therefore, demonstrate that Kenya's approach is similar to Nigeria's approach to corporate rescue. However, there is a significant difference in both approaches due to the limited application of the moratorium regime in Nigeria.

4.2.2 History of Corporate Rescue Law in Kenya: A Synoptic Analysis

Etymologically, the Kenya Companies Act is a transplant of the CA 1948.[658] As it relates to insolvency, it includes provisions for liquidating (winding up) and dissolving (dissolution) companies. However, it did not contain any corporate rescue provision or rehabilitation tool. This is not merely a characteristic that is shared with the Kenyan Bankruptcy Act, but an indication of the corporate culture at the time.[659] Even though both statutes regulate polar opposite conditions in insolvency law, the fact that neither the Kenya Companies Act nor the Kenya Bankruptcy Act contained provisions on corporate rescue also denotes the orientation of the insolvency legislations in Kenya prior to 2015 - a creditor-oriented jurisdiction.[660]

The anti-rescue posture of the insolvency legislations in Kenya led to the untimely dissolution of companies and earned Kenya a bit of reputation, depicting insolvency proceedings in this jurisdiction as a "kiss of death".[661] A creditor who wanted to recover debt or loan had two options: file a liquidation petition, or appoint a receiver. Admittedly, the outcome of both processes for the company leads to a graveyard by the statutory administrators of the company. While the consequences of a receivership were harsh and drastic, that of a liquidation order is

[658] Riziki Mzikamanda Ernest, 'The Influence of British Insolvency Law on the Development of Insolvency Law in Kenya' (2018) 26(3) African Journal of International and Comparative Law 455, 461.
[659] Caroline Omari Lichuma and Florence Shako, 'Like a Phoenix from the Ashes of Insolvency: An Appraisal of the Rescue Culture of the Kenyan Insolvency Act of 2015' (2020) 1(1) East African Community Law Journal 33, 34.
[660] Clas Wihlborg, *Insolvency and debt recovery procedures in economic development: An overview of African law* (WIDER Discussion Paper 2002/27, UNU-WIDER 2002) 6-7.
[661] Mwaniki Wahome, 'Kenya: 'Kiss of Death' Receivership Laws to Be Reviewed, Says State' *Daily Nation* (Nairobi, 30 JANUARY 2010) <https://allafrica.com/stories/201002010498.html> accessed 28 June 2023; Otieno Eunice A Arwa, 'Corporate insolvency systems in Kenya: a case for reform' (LLM Thesis, University of Nairobi 2005).

severe, if not worse. A cursory assessment of the case law in this regard shows an intersection between insolvency and the approach to debt recovery.[662]

On the one hand, debtors advanced the argument that creditors ought to first utilise other available civil remedies before commencing insolvency proceedings.[663] As a corollary to this argument, debtors posited that rescuing a distressed company is more beneficial to all stakeholders of the company, than liquidating to pay creditors. For example, the court in *Siro Brugnoli & another v Giancarlo Camerucci & another*[664] (Siro Brugnoli), declined an application for a winding up order because it was of the view that parties could work out an alternative to winding up. Judge Olga Sewe cited with approval, the dicta of Lord Hoffman in *O'Neill v. Phillips*,[665] where Lord Hoffman set out the criteria for what would constitute an alternative remedy.[666]

In reaching its decision, the court considered the alternative proposal to liquidation put forward by the Respondents. The court relied on the decision of the English court in *Re A Company*,[667] to reach the conclusion that justice will be served if the winding up application is granted when there is an alternative remedy that will benefit all stakeholders involved in the matter.[668] Likewise, in *Kitmin Holding Limited v Noble Resources International Pte Limited*,[669] the court argued that it would be oppressive and improper to allow an application to liquidate a company when there is another remedy that can serve as an efficacious alternative.[670] The court's reasoning that insolvency proceedings should not be used by a creditor to exact pressure on the debtor to liquidate the debt.[671] This point was highlighted by Hon. Kimaru J in *Re Matter of Alamin Insurance Brokers Limited v In Re Matter of the Companies Act*,[672] that such actions constitute an abuse of the court process. These decisions show that the court's attitude towards insolvency is to balance the interests of creditors with those of other stakeholders. In this

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[662] Edward I Altman and others, 'The Link between Default and Recovery Rates: Theory, Empirical Evidence, and Implications' (2005) 78(6) The Journal of business 2203, 2204 – 2207.
[663] *Siro Brugnoli & Another V Giancarlo Camerucci & Another* (Winding Up Cause 23 of 2015) [2020] eKLR.
[664] *Siro Brugnoli & Elisabeth Lo Pinto v Giancarlo Camerucci & Philip Camerucci* (Winding up Cause 23 of 2015) [2016] eKLR.
[665] *O'Neill v. Phillips* [1999] 1 WLR 1092 – 1999.
[666] *Siro Brugnoli* (n 655) para 31 [George Olga Sewe].
[667] *In Re A Company* [1983] 1 WLR 927, 928.
[668] *Siro Brugnoli* (n 655) para 32 - 34 [Judge Olga Sewe]. On a subsequent application for review of this decision, Judge GL Nzioka declined to review, varie, and/or set aside the order declining to wind up the company; *Siro Brugnoli & Another V Giancarlo Camerucci & Another* [2020] eKLR.
[669] *Kitmin Holding Limited v Noble Resources International Pte Limited* [2018] eKLR.
[670] ibid para 26 [Judge F Tuiyot].
[671] ibid para 25.
[672] *In Re Matter of Alamin Insurance Brokers Limited Vs In Re Matter of the Companies Act* (2009) eKLR; *Matic General Contractors Limited Vs Kenya Power and Lighting Company Limited* (2001) eKLR 3493.

regard, the court will not allow a liquidation petition for default in debt repayment unless it is the only remedy available.[673]

On the other hand, creditors argue that liquidation should not be a remedy of last resort. The predicate for this argument is the apprehension that it is the perception the alternative will not be more advantageous for them. In *Pride Inn Hotels & Investments Limited v Tropicana Hotels Limited* (Pride Inn Hotels),[674] the court espoused this contrasting view when it held that if a company fails to pay its debt, the creditors need not explore liquidation as a last remedy. This case exposed the disturbing dilemma that debtors in Kenya faced. Once a creditor serves a demand notice, it presents a binary choice to the debtor company; pay up or face liquidation. The challenge may not be much about convincing the court that the creditor is coercing the debtor to pay, or other sufficiently justifiable reasons for the failure to pay the debt. However, it is the loss of goodwill, reputation, and loss of business that the company will face. In the present case, although the actual debt sum was Sh69.3 million, it was gathered that during the advertisement of the winding up petition, the company lost about Sh90 million in revenue from contracts of services.[675] The dynamics of the dilemma here is that companies with short-term liquidity issues may also face the risk of closure due to the inability to liquidate the debt when it is due.[676]

In the *Pride Inn Hotels* case, the appellant appealed, among other things, a liquidation order issued against the appellant company on the grounds that the respondent did not file the petition for liquidation of the appellant company as a last resort.[677] The court dismissed the appeal on the premise that liquidation is one of the methods available for a creditor to secure a debt and certainly not an option of last resort.[678] The *Pride Inn Hotels* decision casts a shadow over whether insolvency proceedings should be instituted as a matter of last resort. Although Siro Brugnoli and others appear to suggest that the court will prefer creditors pursue alternative

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[673] For an in-depth overview of the use and abuse of rescue procedure in particular see Kayode Akintola and Sofia Ellina, 'The Use and Abuse of Corporate Insolvency Rescue Procedures: A Contextual Evaluation of the United Kingdom and Cyprus' in Jennnifer L.L. Gant (ed), *Party Autonomy and Third Party Protection in Insolvency Law* (INSOL Europe 2019).

[674] *Pride Inn Hotels & Investments Limited v Tropicana Hotels Limited* [2018] eKLR.

[675] Philip Muyanga, 'PrideInn Hotels put under liquidation over Sh69m debt' *Business Daily* (Nairobi, 03 October 2017) <https://www.businessdailyafrica.com/bd/corporate/companies/prideinn-hotels-put-under-liquidation-over-sh69m-debt-2171534> accessed 01 July 2023; Philip Muyanga, 'PrideInn Hotels now loses Sh90m deals after petition' *Business Daily* (Nairobi, 11 May 2017) <PrideInn Hotels now loses Sh90m deals after petition> accessed 01 July 2023.

[676] Herbling David, 'PrideInn Hotels risks closure in lease debt row' *Business Daily* (Nairobi, 10 May 2017) <https://www.businessdailyafrica.com/corporate/companies/PrideInn-Hotels-risks-closure-lease-debt-row/4003102-3920752-8ar1vdz/index.html> accessed 01 July 2023.

[677] *Pride Inn Hotels & Investments Limited v Tropicana Hotels Limited* 1 [Alnashir Visram].

[678] ibid 38 [Alnashir Visram].

means of recovering debts instead of liquidation, the Pride Inn Hotels case is not consistent with this position.

Despite the lack of consistency in the court's approach, it is established that the corporate culture in Kenya prior to 2015 did not support the rescue of companies. Creditors could enforce debt recovery by instituting liquidation proceedings without recourse to alternative remedies. Notwithstanding the foregoing, the court may consider and even support other means of debt settlement if they are justifiable. In the *Pride Inn Hotels* case, in spite of the court's refusal to quash the liquidation order, the court postponed the implementation of the liquidation order against the respondent for about 30 days so the appellant could offset the debt in full.[679] It can, therefore, be argued that despite the lack of a direct provision under the Companies Act 2015 or the Insolvency Act 2015, mandating creditors to resort to liquidation should be carried out only as a last measure. However, the question of whether the court will allow a creditor to file a liquidation petition as a first point of recourse or not, depends on the circumstance of the case, and the judge in question.

For example, Justice Karanji, in the *Pride Inn Hotels case* (dissenting judgment), took the view that a creditor who files a winding-up petition must adduce evidence to show that all other efforts to recover the debt have been abortive.[680] Whether it is Justice Karanja's dissent or Siro Brugnoli's case or the thirty days suspension decision of the majority in the *Pride Inn Hotels* case, what has emerged from the inconsistency in the hitherto application of the law regarding corporate rescue in Kenya is the willingness of the company to find an alternative to liquidation which is viewed as draconian and equivalent to giving a company the death sentence.[681]

This perception towards debtors and insolvency in general as being draconian in Kenya can be traced back to Kenya's colonial history and the influence of British legal traditions, which were integrated into Kenyan insolvency law and lingered on, as we can see from these cases, despite independence.[682] These cases do not just show the willingness to assist stakeholders in resuscitating distressed companies but express a sentiment that has been judicially noticed in Kenyan insolvency law prior to 2015. That sentiment was echoed by Justice Karanja while

[679] ibid 39 [Alnashir Visram].
[680] ibid 5 [Justice Wanjiru Karanja's dissent].
[681] ibid [Justice Wanjiru Karanja's dissent]; Christopher Judith, 'Definition of Terms, Concepts and History of Insolvency Law in Tanzania and Different Jurisdiction' (2022) 8(6) Journal of Legal Studies & Research 28, 37.
[682] Riziki Mzikamanda Ernest, 'The Influence of British Insolvency Law on the Development of Insolvency Law in Kenya' (2018) 26(3) AJICL 455, 461.

citing the dicta of Justice Ringera (as he then was), in *Jambo Biscuits (K) Ltd. v Barclays Bank of Kenya Ltd. Andrew Douglas Gregory and Abdul Zahir Sheikh*.[683] Thus:

> "[…]The receivership would most probably result in the complete destruction of the business and goodwill of the company…And I think it is a notorious fact of which judicial notice may be taken that receiverships in this country have tended to give kiss of death to many a business."[684]

Although the kiss of death reference was made regarding receiverships, it was an expression of the reality that characterised insolvency proceedings in general because of its grave implication at the time.[685] More importantly, it was an admission of the need to reform the insolvency laws that have led to the failure of several companies in Kenya, including commercial banks and other financial service institutions.[686] This is because the insolvency regime could not meet the realities of modern enterprises, especially in times of financial crisis. For example, from 1997 to 2004, the economic situation led to the failure of several companies, including about 250 companies that collapsed, and 25 companies forced into receivership, leading to the loss of around 7,000 jobs.[687]

The loss of jobs and businesses was concerning to the court and to other stakeholders, including Kenya's foreign partners, who have championed the call for the reform of insolvency law. For instance, in 2008, the IMF called for the reform of insolvency laws in Kenya and the improvement of the capacity of commercial courts to drive the reforms.[688] Similar sentiment recognising the need to reform Kenya's insolvency law was expressed by the Task Force in charge of the legal sector reform programme, appointed by the Attorney General of Kenya on 13th August 1993.[689] In fact, in one of his speeches to Parliament in Kenya during the debate over the Insolvency Bill, the then-President of Kenya, Mwai Kibaki reiterated the need for a statute that will improve investment and corporate competitiveness.[690]

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[683] *Jambo Biscuits (K) Ltd. V Barclays Bank of Kenya Ltd. Andrew Douglas Gregory and Abdul Zahir Sheikh* (2003) 2EA 434.
[684] ibid; *Surya Holdings Limited & 4 others v ICICI Bank Limited & another* [2015] eKLR, 74 [Judge Gikonjo]; *Kwality Candies & Sweet Ltd vs. Industrial Development Bank Ltd* [2005] eKLR [Anyara Emukule J].
[685] Fancy Chepkemoi Too, 'Drivers of Insolvency Reforms in Kenya' (2016) 4(1) NIBLeJ 5.
[686] Loise R Wairange, 'The Link Between Corporate Governance Failure and The Collapse of Major Private Companies in Kenya' (LLM Thesis, University of Nairobi 2019) 1 – 2.
[687] Arwa, 'Corporate insolvency systems in Kenya: a case for reform, IX – X.
[688] Kevin Cheng, *Kenya, Uganda, and United Republic of Tanzania: Selected Issues* (vol 8, International Monetary Fund 2008).
[689] James Thuo Gathii, 'Lessons From the Transplantation of Kenya's 2015 Companies Act From the U.K.'s Companies Act of 2006' (*Afronomicslaw,* 11 April 2020) <https://www.afronomicslaw.org/2020/04/11/lessons-from-the-transplantation-of-kenyas-2015-companies-act-from-the-u-k-s-companies-act-of-2006/> accessed 12 July 2023.
[690] Fancy Chepkemoi Too, 'A comparative analysis of corporate insolvency laws: what is the best option for Kenya?' (PhD Thesis, Nottingham Trent University 2015) 4 [text to note 8].

The work of the Task Force which was completed in 1999, and efforts of the Kenya Law Reform Commission, began the process for reform with the recommendation and complete overhaul of the existing company law and insolvency regime in Kenya.[691] This report became the underlying foundation for the draft Companies Act 2015, which amends the Companies Act (Cap. 486) of 1948 and introduced the Kenya Insolvency Act (KIA 2015) 2015.[692] While the former contains provisions relating to companies - except with respect to insolvency - the latter consolidated and amended the various laws relating to bankruptcy and insolvency.[693] The analysis that follows below centres on the latter. The question is, what are the rescue tools under the KIA 2015? What are the challenges to corporate rescue in Kenya? To what extent do the corporate rescue tools under KIA differ from the rescue tools under CAMA? The next section will answer the above questions by first examining the rescue tools under KIA 2015 taking into consideration best practices established under the UK and US insolvency framework.

4.2.2.1 Corporate Rescue and Rehabilitation Tools under KIA 2015

The current insolvency framework in Kenya covers individual and corporate bankruptcy. Regarding corporate restructuring, KIA retained the receivership and scheme of arrangement procedures whilst introducing the CVA and administration procedures. The CVA and administration procedures are the main alternatives to liquidation for distressed companies under KIA 2023.[694]

4.2.2.1.1 CVAs under KIA 2015

Under Part IX of KIA 2015, a financially distressed company may propose a CVA that allows the company and its creditors to reach an agreement in lieu of the creditor's claims against the company, as with CVAs in the UK. The directors are expected to make a proposal to the company and the creditors stating the terms of the agreement, which may either be in the form of composition of the debt in full satisfaction of the compounding claims of the creditors or a scheme or a scheme for arranging the financial affairs of the debtor company.[695] It is important to note that nothing in KIA prevents the directors from combining a composition and a scheme

[691] Gathii, 'Lessons From the Transplantation of Kenya's 2015 Companies Act From the U.K.'s Companies Act of 2006'; Kenya Law Reform Commission, *Kenya law reform commission* (Retrieved 2019).
[692] Kenya Companies Act 2015; Kenya Insolvency Act 2015.
[693] Benhajj S Masoud, 'The Kenyan Insolvency Bill 2010: a cross-border insolvency analysis' (2013) 4(1) Open University Law Journal 195, 198.
[694] KIA 2015, Part IX and VIII.
[695] ibid s 624. See also p 46 – 47.

in a single proposal. In other words, although a composition and a scheme can be proposed separately, both can be brought under the same CVA proposal.[696]

In preparing the proposal, the company directors would have to appoint an IP, who will file a report stating the viability of the proposal, and whether or not they should proceed with meetings to consider the proposal. The IP is also expected to convene meetings of the company and its creditors respectively, and supervise the implementation of the CVA.[697] At the meeting, decisions are made by way of voting, including the appointment of a chairperson who will separate creditors for voting purposes into different categories of secured, preferential, and unsecured creditors.[698] The purpose of the meetings of the company and creditors convened pursuant to section 627 of KIA 2015, is to consider the proposal with a view to dismissing, approving, or modifying – which may include replacing the supervising IP. If the proposal is approved, the IP or administrator (if the company is under administration) is expected to report the approval as soon as possible to the court, which will then sanction the voluntary arrangement by way of an order to take effect as a binding agreement between the company and its creditors.[699]

It is important to note that, in practice, much of the success of a CVA depends on the ability of the company to convince most shareholders and creditors that the proposed arrangement will serve their interests. This is due to the 75% majority requirement under KIA for the purpose of approving the proposal during the shareholders and creditors.[700] Therefore, directors or administrators who intend to pursue rescue via CVAs must keep in mind that creditors and shareholders may only approve a proposed CVA if the proposal is in the "best-case situation" for both parties, otherwise, such a proposal will be rejected. One topical example that highlights the failure of a CVA due to the non-acceptance of the proposal in the restructuring process was the case of *Primrose Management Limited v Nakumatt Holding Limited and others* (Nakumatt Holdings).[701]

Nakumatt Holdings is a company registered in Kenya as a supermarket chain with about 62 branches across different regions, including 45 branches in Kenya, and a few branches in other countries such as Tanzania, Rwanda and Uganda.[702] Moreover, the company funded most of its

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[696] ibid s 625.
[697] ibid ss 628 and 633.
[698] KIA 2015, ss 627 – 628.
[699] KIA 2015, s 629.
[700] ibid.
[701] *Primrose Management Limited v Nakumatt Holding Limited and others* (2018) eKLR.
[702] The East African, 'Nakumatt supermarket books space in Dar es Salaam mall' (23 January 2015) https://www.theeastafrican.co.ke/tea/business/nakumatt-supermarket-books-space-in-dar-es-salaam-mall--1331830 (accessed on 20 October 2023); The EastAfrican, 'Nakumatt: Empty shelves, unhappy suppliers' (29

expansion via debt financing, including short-term loans, borrowings from banks, and issuance of letters of credit to suppliers.[703] However, in 2016, the company began to experience cash-flow issues for several reasons. This means the company was unable to pay its debt or meet its debt obligations not just to its suppliers but also to its employees. Therefore, in 2018, the court appointed an administrator on the application of the company's unsecured creditors. Upon assuming office, the administrator, PKF Consulting Limited proposed a CVA that involves a 25% debt waiver and restructuring of debt into equity to ease the debt burden for the company, and enable the company to be kept as a going concern.[704] However, some creditors stalled the process by voting to reject the proposal for several reasons, including the fact that the debt-to-equity conversion was only limited to the company's non-preferential creditors, and there was no guaranteed upfront payment to cushion the effect of the 25% debt waiver for these non-preferential creditors.[705]

Unlike the *Nakumatt holdings* situation, the Kenya Airways restructuring plan received the support of both the creditors and the shareholders because the best-case scenario was to convert the company's debt into equity instead of liquidating the company.[706] In this instance, which is similar to part 26 of the IA 1986, the creditors - including the government and the bank's consortium (KQ Lenders Co.) - converted their debt-to-equity investment.[707] Although the Kenyan Airways example is not a CVA in the strict sense, it explains the dynamics that characterise the decision-making process of the creditors and shareholders when a proposal for restructuring is placed before them. The reality is that creditors will always compare the outcome of the arrangement in the form of the proposal to the outcome in the event of liquidation and elect to approve or reject depending on which will serve their interest the most – i.e., the best-case situation. While in the former case, creditors voted to reject the proposal - in the case of the latter, they voted to approve the proposal. Though a vote to reject the proposal may appear to have stalled the entire process, the court can still order a repeat of the creditors'

October 2016) <https://www.theeastafrican.co.ke/business/Nakumatt-Empty-shelves-unhappy-suppliers-/2560-3434606-format-sitemap-v5kigsz/index.html> (accessed 20 October 2023).

[703] Felix Adamu Nandonde, "In the Desire of Conquering East African Supermarket Business: What Went Wrong in Nakumatt Supermarket" (2020) 2(2) Emerging Economies Cases Journal 126, 126 – 130.

[704] Cytonn, 'Restructuring an Insolvent Business – Case Study of Nakumatt Holdings' (*Cytonn*, 25 March 2018) <https://www.cytonn.com/topicals/restructuring-an-insolvent-business-case-study-of-nakumatt-holdings> accessed 20 October 2023.

[705] ibid. Also, CVA's in Kenya like their counterpart in the UK needs 75% votes to pass.

[706] Duncan Miriri, 'Kenya Airways says minority shareholders back restructuring' (*Reuters*, 7 August 2017) <https://www.reuters.com/article/ozabs-uk-kenya-airways-restructuring-idAFKBN1AN1MQ-OZABS> accessed 20 October 2023.

[707] John Crabb, 'DEAL: Kenya's largest debt-for-equity restructuring' (IFLR, 29 November 2017) < https://www.iflr.com/article/2a63zhoybfila8fe6lips/deal-kenyas-largest-debt-for-equity-restructuring> accessed 20 October 2023.

votes[708], as it appears at least from the ruling of the High Court in the case of *Uchumi Supermarket Limited v Commissioner of Domestic Taxes* (Uchumi Supermarket).[709]

From a comparative perspective, the CVA procedure under KIA 2015 is not significantly different from the procedure under English Law. However, Kenyan law requires the company to apply and obtain the consent of the court for a moratorium before proceeding with the CVA process - unlike English law where CVA with a moratorium has now been abolished.[710] In comparison with the CVA under Nigerian Law, the procedure is similar in substance to what was introduced under CAMA 2020 in Nigeria – with one significant difference. Unlike CAMA 2020, CVA under KIA 2015 can be accompanied by a moratorium. Nevertheless, the Business Laws (Amendment) (No. 2) Act 2021 introduced the pre-insolvency moratorium, which replaced and expanded the moratorium that was available for CVA's.[711] The provision supports the directors' proposal for a CVA, which is a single procedure under KIA 2015.[712] That means there will be a thirty-day debt suspension once the prescribed documents are lodged and deposited with the court, and this can be extended by the court.[713] The suspension of debt repayment also operates against judgment debt, taxes, and ongoing judicial proceedings for recovery of debt.

In the *Uchumi Supermarket* case*,* which was the very first ever CVA in Kenya, the High Court restrained, albeit temporarily, the Kenya Revenue Authority (KRA) from attaching the assets of the appellant company over the company's inability to fulfil its tax liability of Sh64.3 million, due to a pending CVA signed in 2020 and ratified by the court.[714] The main contention of the appellant company (Uchumi) was that the ratification of the CVA by the court operates as a stay on all pending execution proceedings, including declarations regarding attachment of assets, sequestrations, application of the statutory right of sale, distress for rent payment, or evictions in matters relating to recovery of premises. The court noted that the execution of the judgment of the lower court on the appellant would disrupt the CVA already in place and thus, become detrimental to the Uchumi's creditors.[715] The court seems to have considered the

[708] Kepha Muiruri, 'Uchumi's agony as High Court sets repeat creditors vote' (Citizens Digital, 22 February 2020) <https://www.citizen.digital/business/uchumis-agony-high-court-sets-repeat-creditors-vote-323858> accessed 20 October 2023.
[709] *Uchumi Supermarket Limited v Commissioner of Domestic Taxes* (Tax Appeal E002 of 2022) [2022] KEHC 3138 (KLR) (Commercial and Tax) (13 May 2022) (Ruling).
[710] *Re Uchumi Supermarkets PLC* [2020] eKLR.
[711] KIA 2015, ss 637-638.
[712] KIA 2015, Part IXA. See particularly KIA 2015, sections 638 – 641.
[713] This can be deduced from the combined reading of sections 644(1) and 669.
[714] ibid, para 7 [Justice Majanja].
[715] ibid.

application of section 630 of KIA 2015 "[in] view of the objects of the Insolvency Act, that is to enable the company to continue to operate as a going concern so that ultimately it may be able to meet its financial obligations to its creditors, this court would rather err in caution".[716] In this case, the court approved the provision of section 630 of KIA to the effect fact that once a CVA proposal is approved by the court, it takes effect and becomes binding on the company and its creditors, which includes judgment creditors.

4.2.2.1.2 Administration under KIA 2015

Another new corporate rescue tool that was introduced in KIA 2015 is "administration".[717] Under KIA 2015, a distressed company can appoint a person known as an administrator, who must be an IP - individuals or professionals trained to be IPs and recognised by regulatory bodies which govern lawyers or accountants, to manage the affairs and properties of the company so the company can continue to run as a going concern or achieve a better outcome for the whole of the creditors of the company.[718] To achieve this objective of keeping distressed companies running as a going concern, the administration procedure introduced under KIA 2015 appears to have replaced the receivership under the previous insolvency regime in Kenya, although this can be used in limited circumstances.[719] Administration is not just a tool that can be utilised to rescue companies which are insolvent, it is a rescue device that prioritises the interest of the company's creditors as a whole. If the likelihood of turning around an insolvent company is not visible, the legal basis for appointing an administrator over the company may be difficult, if not impossible, to justify.[720] As a result, an administration order cannot be granted for a solvent company.[721]

A number of striking similarities exist between administration under English law and under KIA. As it is with administration under UK and Nigerian insolvency law, an administrator under KIA can be appointed in two broad ways. The in-court route and out-of-court appointment. While the court appoints the administrator in the case of the former, the holder of a qualifying floating charge, or the company or its directors, can make appointments with respect to the latter.[722] Such appointment takes effect when the appointing authority lodges a

[716] ibid para 6 [Justice Majania].
[717] KIA 2015, Part VIII.
[718] KIA 2015, s 520 – 522.
[719] *I & M Bank Limited v ABC Bank Limited & another* [2021] eKLR (Hon. Justice D.S. Majanja).
[720] *Primrose Management Limited & 3 others v Nakumatt Holdings Limited & another* [2018] eKLR, paras 93.
[721] ibid para 89.
[722] KIA 2015, s 523.

notice of appointment with the court.[723] In *Midland Energy Limited v George Muiruri t/a Leakeys Auctioneers & another*[724] where the notice of appointment of an administrator was lodged with the court on 19th November 2018, the court determined the appointment of the administrator to have taken effect on the day the notice was lodged at the court registry (19th November 2018).[725]

Similarly, the objectives of administration under KIA are *in pari materia* (on the same subject or matter) with the objectives of administration under English law and CAMA 2020. This position was recognised by Judge Onguto in *Re Nakumat Holdings Limited*[726] when he acknowledged the fact that the concept of administration of companies was not a unique concept to KIA, but rather a concept that already existed under English law. The main objective under section 522 of KIA is to keep the company as a "going concern".[727]

Under KIA, there are three hierarchical objectives that a person appointed as an administrator of a company under Kenyan insolvency law must pursue:

i. To keep the company running as a going concern;
ii. To get a better outcome for the company's creditors as a whole, as opposed to liquidating the company; and
iii. To realise the company's assets for the purpose of distributing the secured or preferential creditors.[728]

In *Midland Energy Limited v George Muiruri t/a Leakeys Auctioneers & another,*[729] Tuiyott J. summarised the objectives of administration under Kenyan insolvency law as a mechanism to give a second chance to companies undergoing financial distress. Once an administrator is appointed, any action for the enforcement of security over the assets of the company will either require the consent of the administrator or the approval of the court. The effect is that the administrator takes control of the assets of the company to which the company is entitled with respect to the administration order and the court will not entertain any action to liquidate such a company.[730] Once the administrator takes control of the assets or repossesses an asset of the

[723] Section 537 KIA 2015.
[724] [2019] eKLR.
[725] ibid 16 [Tuiyott J].
[726] *In re Nakumat Holdings Limited* [2017] eKLR.
[727] ibid 35 – 38 [Judge Onguto].
[728] KIA 2015, s 522(1) a – c.
[729] *Midland Energy Limited v George Muiruri t/a Leakeys Auctioneers & another* [2019] eKLR, 12.
[730] KIA 2015, s 558.

company, the administrator shall not give up possession of the asset unless the court orders otherwise.[731]

Also, the administration order under KIA 2015 has the same effect as an administration order under English law by imposing debt suspension, or a freeze on debt repayment – a moratorium on insolvency proceedings, including pending legal proceedings, without leave of court.[732] In *re Nakumat Holdings Limited*,[733] the court elucidated this position while comparing administration to compromises.[734] Accordingly Onguto J, argued that "unlike compromises, administration as an alternative rescue process leads to a stay of past and future legal proceedings."[735] The stay also applies to actions for repossession of properties, including goods which the company exercises possessory right over due to it being acquired by credit and/or hire purchase transaction.[736]

The above position can be deduced from the combined reading of sections 560 and 561 of KIA, which explicitly shows the wide range of effects of the moratorium, especially in a credit or hire purchase transaction. The moratorium stops the other party from repossessing goods in possession of a company which is the subject of an administration order in a credit purchase transaction and/or hire purchase contract.[737] This is, however, subject to the discretion of the administrator or the court, as such a repossession can take effect with the consent or approval of the administrator or the court.[738] The moratorium has the same effect as a CVA moratorium in Kenya, which is similar to the moratorium in support of Administration under Nigerian law.

4.2.2.1.3 Case Analysis: Power to grant Administration order under KIA 2015

As a corporate rescue tool, the administration device has been deployed in several cases in Kenya. Although the outcome of the process does not necessarily reflect the overall objective of the administration procedure - as we will observe in at least one instance, the company administrator was able to keep the company running as a going concern. There are two celebrated instances where a Kenyan court has been confronted with an application for an order of administration. The first was in *Re Nakumat Holdings Limited* (Re Nakumat Holdings

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[731] *Midland Energy Limited v George Muiruri t/a Leakeys Auctioneers & another* [2019] eKLR, 12, para 24 [Tuiyott J].
[732] KIA 2015, s 559.
[733] *Re Nakumat Holdings Limited* [2017] eKLR
[734] ibid.
[735] ibid 33. See also sections 560 and 561 of KIA.
[736] *Midland Energy Limited v George Muiruri t/a Leakeys Auctioneers & another* [2019] eKLR.
[737] ibid paras 20 - 21.
[738] ibid 20.

Limited)[739] and the other one is the *John Munyao Musiku Claimant v Athi River Mining Limited* (Athi River Mining (ARM) Cement).[740] The analysis of these two cases establishes the approach of the court in Kenya clearly when confronted with an application for an administration order.

4.2.2.1.3.1 Re Nakumat Holdings Limited

In *Re Nakumat Holdings Limited* (Nakumat Holdings Ltd*)*,[741] the application for an administration order was brought pursuant to Part VIII Division 3 of KIA 2015, seeking, among other things, an order of administration and an order sanctioning the appointment of an administrator in respect of the applicant's company (Nakumatt Holdings Limited). The court considered section 531 in the context of Part VIII of KIA 2015 to establish that the power of the court to grant an administration order is discretionary.[742] This means a judge has the discretion to grant or refuse an application for an order of administration. This position aligns with the decision of the English court in *Rowntree Ventures Ltd and Another Company v Oak Property Partners Ltd and Another Company*.[743] In particular, Purle QC considered the provision of paragraph 11 of schedule B1 of the IA 1986, which is in *pari materia* with the provisions of Part VIII of KIA 2015, to reach the conclusion that the power of the court to grant an administration order is at the discretion of the court.[744]

However, in exercising this discretion, the court must consider the two conditions set out in paragraph 11 of Schedule B1 of IA 1986. In this regard, the court must be convinced that, on the balance of probability, the applicant company is or is likely to be unable to fulfil its debt obligation, and the order, if made, is likely to achieve the purpose of administration under paragraph 3(1) of schedule B1 of IA 1986. In practice, it is very easy to achieve the first condition.[745] Either balance sheet or cash flow insolvency will suffice to establish insolvency due to the inability of the company to pay its debt.[746] Admittedly, the second condition is more complicated than the first.[747] However, the provision does not require strict interpretation.[748]

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[739] *Re Nakumat Holdings Limited* (n 732).
[740] *John Munyao Musiku Claimant v Athi River Mining Limited* [2020] Eklr.
[741] *Re Nakumat Holdings Limited* (n 732).
[742] ibid 44.
[743] [2016] EWHR 1523 (Ch).
[744] ibid.
[745] IA 1986, Schedule B1, para 11(a).
[746] *Re Colt Telecom Group PLC* [2002] EWHC 2815; *Rowntree Ventures Ltd and Another Company v Oak Property Partners Ltd and Another Company* [2016] EWHC 1523 (Ch), para 7 [Judge Purle QC].
[747] IA 1986, Schedule B1, para 11(b).
[748] *Re Nakumat Holdings Limited* [2017] Eklr, para 78 [Onguto].

Section 531 of KIA 2015 used the phrase "reasonably likely" to achieve the purpose of the administration. To satisfy the requirement of section 531 of KIA 2015, the applicant will need to satisfy the court that there are reasonable grounds or prospects that the objective of administration would be achieved.[749]

Interestingly, the case law on the interpretation of similar provisions under English Law is far from consistent. Suffice to state that the challenge is not about the discretionary nature of the power of the court under section 531 of KIA 2015 or paragraph 11 of schedule B1 under IA 1986, but rather it is the nature of the discretion – whether the court will exercise discretion "in the strict sense [or] in the loose sense". For a court to exercise its discretion in favour of an application for an administration order, the applicant must show that it is "reasonably likely" to achieve the objective of the administration, if the order is made.[750]

Given the use of the phrase "reasonably likely" in the statute, the question is whether the phrase connotes probability or certainty. In *Rowntree Ventures Ltd and Another v Oak Property Partners Ltd and Another,*[751] the English court took the view that the term means the applicant must show a "realistic chance" that the objective of administration will be achieved.[752] In contrast, the court in *Re Mutual International Insurance Co. Ltd*[753] took the view that "reasonably likely" in the context of administration proceedings means "a real prospect" of achieving the objective of the administration.[754]

Recently, the court in *Re Grove Independent School Ltd* (Grove),[755] provided important guidance on what constitutes "reasonably likely". Although Grove is a Part A1 moratorium case, the court discussed the term "reasonably likely" by drawing a distinction between the phrase "reasonably likely" and "likely". In applying the case of *Auto Management Services Ltd v Oracle Fleet UK Ltd*,[756] the court considered "likely" to mean the balance of probability and "reasonably likely" to be simply a real prospect of success. In this regard, the court will apply the term in a strict sense, which requires a 'real prospect' of achieving the objective of the administration.[757]

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[749] This applicant must do this by way of an affidavit in support of the motion. See Judge Muigai in *Re Hi-Plast Ltd* [2019] eKLR.
[750] *Rowntree Ventures Ltd and Another Company v Oak Property Partners Ltd and Another Company* [2016] EWHC 1523 (Ch), para 7 – 8.
[751] ibid.
[752] ibid 8 [Judge Purle QC].
[753] *Re Mutual International Insurance Co. Ltd*, [2004] EWHC 2430, para 55.
[754] *Re Mutual International Insurance Co. Ltd* [2004] EWHC 2430.
[755] *Re Grove Independent School Ltd* [2023] EWHC 2546 (Ch).
[756] *Auto Management Services Ltd v Oracle Fleet UK Ltd* [2008] BCC 761.
[757] ibid (n 739).

Although the Kenyan court in the *Nakumat Holdings Ltd*,[758] the court drew from the decision in *Re Mutual International Insurance Co. Ltd*,[759] which is consistent with the opinion in *Grove*, it seems to have taken a different position in interpreting the phrase "reasonably likely". The Judge took the view that the phrase "connotes probability", not "real prospect".[760] This view of the Kenyan court appears to be an endorsement of the position expressed by the Purle QC regarding paragraphs 11 and 3(1) of schedule B1, which is the English law equivalent of sections 522 and 532(b) of KIA 2015.[761]

Accordingly, the court acknowledged the fact that its powers under section 531 of KIA 2015 are not discretionary "in the strict sense but in the loose sense".[762] However, in the *Nakumat Holdings Ltd* case, even though the applicant adduced evidence to show it was unable to pay its debt, the court refused to grant the order of administration because the applicant could not meet the required standard under the law.[763] That means, though the court was convinced that the company could not pay its debt, the court was not convinced that it would be "reasonably likely" to achieve the objective of administration if the administration order was granted.[764]

4.2.2.1.3.2 Athi River Mining (ARM) Cement

In the case of *John Munyao Musiku Claimant v Athi River Mining Limited* (*Athi River Mining (ARM) Cement* case),[765] an administrator was appointed with respect to a manufacturing company (Athi River Mining (ARM) Cement), incorporated in Kenya and listed in the Nairobi Securities Exchange.[766] ARM Cement was a Kenyan manufacturing company with operational branches in Kenya, Tanzania, and Rwanda. ARM Cement, which was the second-largest cement maker in Kenya, specialised in the production and distribution of cement and other industrial minerals. In 2016, the company started facing financial distress, which affected its revenue and therefore, ARM Cement could not meet its financial obligations. By August 2018, ARM's creditors led by some commercial banks, including United Bank for Africa - a commercial bank headquartered in Nigeria - appointed PricewaterhouseCoopers (PwC), an

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[758] *Re Nakumat* (n 732).
[759] ibid 55.
[760] *Re Nakumat* para 57 [Judge Onguto].
[761] *Rowntree Ventures Ltd and Another Company v Oak Property Partners Ltd and Another Company* [2016] EWHC 1523 (Ch), para 8 [Judge Purle QC].
[762] ibid.
[763] *Re Nakumat Holdings Limited* [2017] eKLR, para 88 [Judge Onguto].
[764] ibid paras 87 – 88.
[765] *John Munyao Musiku Claimant v Athi River Mining Limited* [2020] eKLR.
[766] Jackson Okoth, 'ARM to be Finally Sold After Its Revival Flops' *The Kenyan Wall street* (Nairobi, 25 September 2021) < https://kenyanwallstreet.com/arm-was-placed-under-administration-by-uba/> accessed 5 November 2023.

audit company, as joint administrators of ARM cement.[767] Upon assuming office, the administrators brought an application for an order of court to restrain the respondent John Munyao Musiku, who was a judgment debtor, from attaching ARM's asset or executing a judgement debt on ARM, or interfering with any of the company's assets without the prior consent of the administrators.[768]

It is important to note that although ARM had a counsel on record on the judgement that the claimant/respondent sought to enforce, they did not inform the court that the company was under administration during the matter. If that was done, as the court noted, the right application would have been an application for a stay of proceedings.[769] Hence, the court considered the application of a moratorium while a company was under administration. Even though ARM did not notify the court regarding the appointment of administrators prior to judgement in the earlier proceedings, the court considered the effect of section 560 of KIA 2020 on a moratorium with respect to a company under administration. The court concluded based on section 560 of KIA 2015, that even though the respondent could not execute the judgement on the applicant, the court can neither invalidate the proceedings nor the judgement delivered in the earlier case.[770] Onyango J. considered the dicta of Makau J. in *Fredrick Okoth Owino v T. S. S Grain Millers*[771] which was cited with approval by the Kenyan Court of Appeal in *Nakumatt Holdings Limited and Another v Ideal Locations Limited*[772] to conclude that the respondent cannot enforce the judgement without the leave of the court with the original jurisdiction and therefore, restrained from enforcing the judgement by any means.[773]

The analysis of these two defining cases dealing with insolvency disputes under KIA 2015; the *Nakumat Holdings Ltd* and the *Athi River Mining (ARM) Cement* cases clearly underscore the approach of the Kenyan court with respect to companies in administration. The court's interpretation of KIA 2015 shows a willingness to construe KIA as the main framework for dealing with all insolvency disputes, and certainly, the rescue of companies facing corporate

[767] Muniu Thoithi and George Weru acting as representatives of PWC administered the company as administrators. See George Obulutsa, 'UPDATE 1-Kenya's ARM Cement put under administration - PWC statement' (*Reuters*, 18 August 2018) <https://www.reuters.com/article/kenya-arm-cement-idUSL5N1V9042> accessed 5 November 2023.
[768] *John Munyao Musiku Claimant v Athi River Mining Limited* [2020] eKLR, paras 2 – 3.
[769] ibid.
[770] ibid [Maureen Onyango J].
[771] *Fredrick Okoth Owino v T. S. S Grain Millers* (2017) eKLR.
[772] *Nakumatt Holdings Limited and Another v Ideal Locations Limited* (2019) eKLR.
[773] *John Munyao Musiku Claimant v Athi River Mining Limited* [2020] eKLR [Maureen Onyango J].

distress, especially when insolvency proceedings have been filed by the creditors of such a company.[774]

On the one hand, the Kenyan court will not grant an order of administration even if the company is in financial distress unless the applicant can exhibit evidence to convince the court that the standard requirement for an administration order is met; it is reasonably likely to achieve any of the objectives of administration under KIA 2015.[775] On the other hand, the court will restrain a party from executing or enforcing a judgment against the company assets if there is a subsisting order of administration prior to or after the judgment.[776] This is so even when the applicant refuses to draw the attention of the court to the administration order prior to the judgment.[777] This is due to the moratorium over all proceedings, including execution proceedings instituted without prior consensus with the court or the administrator.[778]

In summary, KIA 2015 introduced a new vista for the resolution of insolvency disputes in Kenya. The new view which exists in most common law jurisdictions signifies a shift toward a corporate rescue culture.[779] The CVA and administration procedures are rescue tools envisioned to operate as mechanisms for the resolution of distressed companies in Kenya. Therefore, the Kenyan courts, in interpreting the provisions of KIA as it relates to CVA and administration, must consider it as a tailor-made device for the resolution of corporate distress in a manner that promotes the social and economic objectives of the law;[780] as providing an 'alternative to liquidation procedures' for distressed companies.[781]

The case analysis above underscores the significant shift in the attitude of the Kenyan court in adjudicating insolvency disputes for distressed companies. Rather than passing on a kiss of death judicially on a distressed company, the Kenyan court will consider the possibility of revival and rehabilitation to the hitherto state of profitability. This shift in attitude is part of the core focus of the reforms in KIA 2015, which is to 'provide alternative procedures' to liquidation and give distressed companies an option for revival.[782] However, it will be hasty to reach a conclusive statement on whether the purpose of the reforms has been achieved based

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[774] *Fredrick Okoth Owino v T. S. S Grain Millers* (2017) Eklr, para 14 [Makau J.]; *Shee Hamisi Mashipa v Mare Nostrum Limited* [2021] eKLR, para 13 [Ndolo J]; *Nakumatt Holdings Limited and Another v Ideal Locations Limited* (2019) eKLR, para 41.
[775] *In re Nakumat Holdings Limited* [2017] eKLR, para 91 [Onguto J.].
[776] *John Munyao Musiku Claimant v Athi River Mining Limited* [2020] eKLR.
[777] ibid.
[778] KIA 2015, s 560.
[779] *In re Nakumat Holdings Limited* [2017] eKLR, para 35 [Onguto J.].
[780] See *Nyali Ltd v Attorney General* [1955] 1 All ER 646, 653 [Lord Denning].
[781] *In re Nakumat Holdings Limited* [2017] eKLR, para 30 [Onguto J.].
[782] See Preamble, IA 2015.

solely on the consideration of these limited cases, without any analysis of Kenya's insolvency stats.

4.2.3 Evaluating the Impact of KIA: An Analysis of Kenya's Insolvency Stats

Before the enactment of KIA 2015, the main insolvency procedure available to a financially distressed company in Kenya was liquidation.[783] If a distressed company is to avoid liquidation, it could either compromise with the company creditors and/or reconstruct such a company via amalgamation or merger of two or more corporate entities.[784] Although KIA 2015 reformed insolvency law in Kenya, it did not jettison liquidation as an insolvency procedure. The retention of the arrangements and compromise procedures, in addition to the reconstruction and court supervision procedures, means the culture of liquidation persisted in some ways despite the introduction of corporate rescue tools under KIA 2015.[785]

The question then is whether the rescue tools under the KIA 2015 achieved the purpose of the reform of Kenya's insolvency law. To answer the above question, one first needs to consider the purpose of the reform. From the preamble of KIA 2015, the reform of the insolvency law in Kenya as it relates to corporate rescue was "to provide as an alternative to liquidation procedures that will enable the affairs of […incorporated and unincorporated bodies that have…] become insolvent to be administered for the benefit of their creditors…".[786] Similarly, section 3(1)(c) of KIA 2015 highlights the objective of KIA regarding insolvent companies and other corporate bodies in financial distress. If the financial outlook of such accompanies is redeemable, the objective is to ensure that the entity continues to run as a going concern or that a better outcome than liquidation is achieved for the creditors of the company.[787]

Thus, to evaluate the impact of KIA in a manner that indicates a shift toward the rescue culture highlighted in the preamble of KIA 2015, one needs to consider whether the rescue tools under KIA 2015 have been applied pursuant to the objectives enumerated under section 3(1)(c). To conduct this evaluation, it is important to analyse the insolvency statistics. Recent statistics from Kenya's Business Registration Service (BRS), the Office of the Official Receiver in Kenya, indicate that between 2015 and 2022, the number of firms facing liquidation in Kenya

[783] Augustus Mutemi Mbila, 'From Debtor Repression to Protection: Giving Debtors a Fresh Start under the Kenyan Insolvency Regime' (2022) 49(1) EALR 93, 115.
[784] See sections 207-210, CA (Cap 486) [repealed].
[785] *In re Nakumat Holdings Limited* [2017] eKLR, para 32 [Onguto J].
[786] ibid (n 769).
[787] KIA 2015, s 3(1)(c)(i)-(ii).

increased exponentially.[788] Despite the Kenyan court indicating their willingness to assist in rescuing distressed companies with prospects for corporate survival, this negative trend continues.[789] What is more, Kenya's High Court ruled in support of the recognition of foreign insolvency proceedings, which may include the recognition of a foreign administrator if it is in the interest of, and for the protection of the creditors in Kenya.[790]

However, despite these developments in Kenya's insolvency jurisprudence, the rescue tools under KIA 2015 continue to be underutilised as an alternative to corporate liquidation in Kenya.[791] For this reason, one may be tempted to infer that stakeholders' attitudes towards alternative tools imply a peremptory refusal to rescue distressed companies in Kenya. Although this research will not delve into the reason for the lack of enthusiasm, it is important to note that the underutilisation of the rescue tools under KIA 2015 is a contributing factor to the limited use and influence in Kenya's insolvency landscape. To this extent, one cannot make the case that the purpose of the reforms under KIA 2015 has been achieved. This is more so when you consider the potential of KIA 2015 to address pandemic-induced distress, especially given the corporate rescue challenges in Kenya.

4.3 PART II

4.3.1 The South African Model: A Business Rescue Perspective

Corporate rescue has been identified as one of the main objectives of a modern insolvency regime.[792] Therefore, to better appreciate the corporate rescue tools under the insolvency framework in the Republic of South Africa (SA), it is important to provide a brief background on the development of corporate insolvency law in SA. The origin of corporate insolvency law in SA is not significantly different from that of Kenya and Nigeria, given its early development

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[788] Office of the Official Receiver, 'Business Registration Service: Doing Business Made Easier' <https://brs.go.ke/office-of-the-official-receiver/> accessed 12 November 2023.

[789] *DAC Aviation (EA) Limited v AMRA Leasing Limited & 3 others* (Insolvency Petition E039 of 2020) [2023] KEHC 20525 (KLR) [Ruling delivered 3 November 2021]; Richard Harney et al., 'Kenya: High Court Clarifies the Legal position of formal insolvency proceedings in Kenya (Bowmans, 22 November 2022) <https://bowmanslaw.com/insights/restructuring/kenya-high-court-clarifies-the-legal-position-on-foreign-insolvency-proceedings-in-kenya/#:~:text=The%20Court%20delivered%20its%20ruling,existence%20of%20the%20foreign%20insolvency> accessed 17 November 2023.

[790] *In the matter of Zarara Oil & Gas Company Limited* (Miscellaneous Application E532 of 2021) [2021] KEHC 191 (KLR) [Ruling delivered on the 24th October 2021]; contra KIA 2015, s 6 and; ibid [Richard Harney et al.].

[791] Richard Harney et al., 'East Africa: Restructuring Quarterly Bulletin – August 2023 (Bowmans, 4 September 2023) < https://bowmanslaw.com/insights/mergers-and-acquisitions/east-africa-restructuring-quarterly-bulletin-august-2023/> accessed 17 November 2023.

[792] Goode, *Goode on Principles of Corporate Insolvency Law*.

even prior to the late Nineteenth Century.[793] Insolvency law in SA is rooted in both Roman-Dutch Law and English law.[794] Although both Roman-Dutch law and English Law have been influenced by Roman Law, especially in Table III of the Twelve Tables on the execution of judgments,[795] corporate rescue law in SA has been mostly influenced by developments in English law.[796]

Generally, English law has greatly influenced insolvency law. For example, the SA Insolvency Act 24 of 1936 transplanted some provisions from English law.[797] As Lord Tomlin argued in the Privy Council case of *Pearl Assurance Company v Union Government*,[798] the development of SA law, in general, and insolvency law, in particular, has indeed been influenced by English law.[799] The Joint Stock Companies Act of 1844 was first introduced in the Cape during the pre-union era through the Joint Stock Companies Limited Liability Act 23 of 1861.[800] Regarding corporate rescue, two statutes provide context for discussion in different eras: the Companies Act 1926 and the Companies Act 2008, representing the old and new eras, respectively.[801]Although neither of these statutes used the term corporate rescue, it is argued in this Part of Chapter 4 that South Africa's model rightly be characterized as a corporate rescue mechanism.

Corporate Rescue under the Companies Act 1926

The Companies Act of 1926 introduced a formal corporate rescue procedure in SA with the concept of judicial management.[802] This legislation was influenced by statutory developments in English law, especially from the provisions of the Companies (Consolidation) Act 1908, which was amended by the CA 1929 and subsequently amended and replaced by the CA 1948.

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[793] David Burdette, 'A Framework for Corporate Insolvency Law Reform in South Africa' (PhD Thesis, University of Pretoria 2004) 20–40.

[794] Waiswa Sallam and Prof Geldenhuys, 'An Evaluation of the Strengths and Weaknesses of South Africa's Corporate Rescue Regime as Potential Benchmark for Uganda' (2022) <https://uir.unisa.ac.za/bitstream/handle/10500/29549/thesis_%20waiswa_as.pdf?sequence=1&isAllowed=y> accessed 25 June 2024.

[795] Eberhard Bertelsmann and Others, *The Law of Insolvency in South Africa* (10th ed, Juta 2019) 1–2.

[796] Burdette, 'A Framework for Corporate Insolvency Law Reform in South Africa' 34.

[797] Sallam (n 785) 32.

[798] (1934) AD 560 (PC) 563; (1934) AC 570, 578.

[799] Schreiner, The contribution of English law to South African law and the Rule of law in South Africa The Hamlyn Lectures 19th Series (Juta Cape Town 1967) 16. Available at https://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialscienc es/law/pdfs/The_Contribution_of_English_Law_to_South_African_Law.pdf (21-03-2019).

[800] Sallam, 'An Evaluation of the Strengths and Weaknesses of South Africa's Corporate Rescue Regime as Potential Benchmark for Uganda' 31 -32.

[801] Elizabeth Sman-Van Deventer and Lézelle Jacob, 'Corporate Rescue: The South African Business Plan Examined' (2014) 2(6) NIBLeJ 103, 103-104.

[802] Anneli Loubser, 'Business Rescue in South Africa: A Procedure in Search of a Home?' (2007) 40 The Comparative and International Law Journal of Southern Africa 152, 153.

Although the term 'corporate rescue' was initially used in the United States in the 1960s to describe actions taken to avoid liquidation, it is intentionally used in relation to Judicial Management, which was introduced by SACA1926.[803]

Unlike business rescue, corporate rescue only applies to companies. As described under section 1 of SACA 1973, "a company incorporated under Chapter IV of this Act", including any corporate body prior to the commencement of SACA 1973, was a company by virtue of the law repealed by SACA 1973.[804] However, the judicial management concept was not popular amongst stakeholders due to a lack of understanding in terms of its origin and application.[805] This is partly because the idea of rescuing companies instead of liquidating them was still novel in SA at the time, and it was unclear where the concept originated from.[806] In addition, there was general confusion as to its origin because this insolvency tool was not available under the provisions of the CA 1908 and its successor, the CA 1948.

Accordingly, the Minister of Justice, who was the chief promoter of the bill, argued during the House of Assembly debates that the concept of judicial management was an Anglo-American concept which originated from receivership (in equity) procedure under English and American law.[807] This explanation did not dispel the uncertainty but left more to be desired since the principles of equity, particularly receivership and equity receivership, were not part of the law in SA at the time.[808] What is more, there is no statutory provision under English common law or even in equity that is *in pari materia* with the procedure, not even the receivership procedure. Clearly, the minister of justice demonstrated a misunderstanding of English Law. Hence, the criticism of the procedure, because historically the English receivership model has not been utilised as a rescue tool.[809]

4.3.1.1 Judicial Management as a rescue tool

As earlier stated, judicial management as a rescue mechanism in SA was greeted with criticism, not least of which is the fact that a company in distress should be rescued rather than liquidated.

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[803] Paul Omar, "Insolvency Law in Malaysia: A Case for Reform" (1998) 4 MLJ XIX, 1.
[804] ibid 2; AH Olver, 'Judicial Management in South Africa' (LLD thesis (Unpublished), University of Cape Town 1980).
[805] Anneli Loubser, 'Tilting at windmills? The quest for an effective corporate rescue procedure in South African law' 1-2.
[806] ibid.
[807] Union of South Africa House of Assembly Debates, 25 February 1926, vol 6, col 1138-1139; Hansard House of Assembly Debates 6 25 February 1926 col 996-7.
[808] Anneli Loubser, 'Tilting at windmills? The quest for an effective corporate rescue procedure in South African law' 2.
[809] Bolanle Adebola, 'Diversifying rescue: corporate rescue and the models of receivership' (2023) 34(10) International Company and Commercial Law Review 572.

This was new to the South African jurisdiction and has not worked since 1926, when the SACA1926 was first enacted.[810] Although there are academic commentaries which disapprove of the concept of judicial management, commentaries on the actual rationale for introducing this concept itself are sparse.[811] In fact, the only comments on record for justification of judicial management in SA'[812] were from the Minister of Justice, who traced the origin from the practice in England and America under which receivers in equity are appointed to salvage a company in financial difficulty.[813]

Indeed, Loubser criticised the Minister's opinion, especially with regards to the argument that the concept of judicial management is 'derived from the procedure for appointing receivers in equity' under Anglo-American law.[814] The underlying rationale for the criticism is the fact that historically receivership and equity receivership had never formed part of the legal jurisprudence in SA, hence, Loubser argument that the Minister's opinion would have kept the members of the House of Assembly in the loop about the origin of this concept.[815] Despite the controversy surrounding the etymology of the concept of judicial management, it appears the Minister's commentary is the only explanation on the record explaining the rationale for introducing this concept in SA.[816] Accordingly, Oliver acknowledged the fact that the Minister's comments are the only recorded commentary that elucidates the legal and etymological basis for judicial management during the debate on the bill which was introduced in 1923.[817]

The sparsity of commentary on the origin of the concept of judicial management has not just contributed to the "dismal failure"[818] in its application, but in the understanding of the concept

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[810] Hansard House of Assembly Debates 6 25 February 1926 col 996-7; *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (c) para 55 [Jossman J, para 60]; Anneli Loubser, 'Judicial management as a business rescue procedure in South African corporate law' (2004) 16(2) SA Merc LJ 137.

[811] Carl Stein and Geoff Everingham, *The New Companies Act Unlocked* (Siber Ink 2011); Anthony J Smits, 'Corporate administration: a proposed model' (1999) 32 DeJure 85; Tronel Joubert, 'Reasonable Possibility' Versus 'Reasonable Prospect': Did Business Rescue Succeed in Creating a Better Test than Judicial Management?' (2013) 79 Journal of Contemporary Roman-Dutch Law 550.

[812] Kiren Kesh Bagwandeen, 'A critical analysis of the effectiveness of the business rescue regime as a mechanism for corporate rescue' (LLM Dissertation, University of Kwazulu-Natal 2018) 17; AH Olver, 'Judicial Management in South Africa' (LLD thesis (Unpublished), University of Cape Town 1980) 3.

[813] Bagwandeen, 'A critical analysis of the effectiveness of the business rescue regime as a mechanism for corporate rescue' 17.

[814] Anneli Loubser, 'Tilting at Windmills? The Quest for an Effective Corporate Rescue Procedure in South African Law' (2013) 25(4) SA Merc LJ437 437, 437 - 438.

[815] ibid 438.

[816] Bagwandeen, 'A critical analysis of the effectiveness of the business rescue regime as a mechanism for corporate rescue' 17.

[817] Oliver (n 803) 3.

[818] Da Burdette, 'Some Initial Thoughts on the Development of a Modern and Effective Business Rescue Model for South Africa (Part 1)' (2004) 16 SA Merc LJ 241, 248 – 250.

itself. It has also generated controversy regarding its origin, which persists. Thus, some commentators have tried to reinforce the argument that judicial management originated from Anglo-American jurisprudence, particularly English law.[819] In advancing this theory, one commentator argued that the concept emanated from the dicta of Lord Halsbury in the English case of *Moss Steamship Co Ltd v Whinney*:[820]

> "When joint stock companies needed to obtain capital, they issued debentures. In order to secure the debenture holders in their rights, the company used a form of application to court which removed the conduct and guidance of the company from its directors and placed it in the hands of the receiver and manager'."[821]

The similarity between the concept of judicial management and the system of receivership is remarkable in any jurisdiction, certainly under English insolvency law. Under English law, a receiver can be appointed by a debenture holder to control and manage the assets of the company covered by the debenture agreement – the security of the debenture – in the interest of the secured creditor. When it is necessary to carry on the business of the company, a manager will be appointed for that purpose separately as the receiver does not have the power to run the business of the company.[822] Similarly, an order of judicial management places the management of an ailing company in the hands of a judicial manager who will be supervised by the court. The judicial management order may divest the current managers of the company of the power to manage it if the court deems it fit, for the company to become a successful concern.[823] This operates in the same way the receiver divests the directors of the company of the power to deal with the property covered by the debenture, incapacitating the board of directors from directing the actions of the receiver, and thereby displacing the company.

Although both concepts are similar, they are also remarkably different from each other. While the receiver and manager's primary duty under English law is the realisation of the assets of the company for the appointor, the judicial manager's primary concern is the protection of the interests of key stakeholders - the creditors as a whole, shareholders, and the company itself. On the flip side, the receiver's primary concern is not to rehabilitate the company, but the judicial manager's job is to rehabilitate the company and run it to become a going concern.[824]

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[819] Mulamuleli Ramabulana, 'Business Rescue in South Africa: An Analysis of the attitude of Key Stakeholders' (LLM Dissertation, University of Pretoria 2019) 9.
[820] *Moss Steamship Co Ltd V Whinney* [1912] AC 254; Oliver (n 811) 14.
[821] ibid 260.
[822] Oliver, 'Judicial Management in South Africa' (n 803) 14.
[823] John Armour and Sandra Frisby, 'Rethinking Receivership' (2001) 21 Oxford Journal of Legal Studies 73, 78-79.
[824] Oliver, 'Judicial Management in South Africa' 18 -19.

However, the point must be restated that under English law, the court will appoint a manager to manage the company and carry on the business if it deems it necessary for the business to continue. This is because the power of a receiver under English law does not include the managing of the day-to-day affairs of the company. But like the judicial manager, the receiver and manager are officers of the Court whose duties are defined by the order which gives effect to the appointment.[825] That said, there is still no material evidence to support the theory that the concept of judicial management originated from English law, or the concept of receivership under English law. Likewise, there is no direct evidence linking the etymology of judicial management to American jurisprudence despite the Minister's assertion.[826]

Notwithstanding the absence of a direct nexus between judicial management and Anglo-American law, there is anecdotal evidence linking the concept of judicial management to a particular innovative practice of receivership which was common in the period towards the end of the 19th century.[827] In response to years of economic strains and the challenges that reorganisers of distressed railroads encountered during the last half of the 19th century in the US, an innovative practice for re-organising insolvent railroad companies known as the 'Federal equity consent receivership' procedure emerged. In particular, this judicial innovation involved creditors of distressed railroad corporations approaching a US federal court with jurisdiction and presenting a case for the preservation of the liquid assets of the corporation. If the court obliges, a reorganisation plan modifying existing security contracts would be negotiated and approved by the court.[828] This innovative practice later received legislative assent through the codification, in part, of the practice in the Bankruptcy Act of (US) 1898.[829] Although the 'Federal equity consent receivership' practice was initially 'limited to corporations affected with a public interest, such as railroads', the scope of application of this practice has been expanded in recent times, to include corporations who serve diverse purposes.[830] Thus, the US court took judicial notice of this type of receivership practice as far back as 1908.[831] In *Parsons v. Sovereign Bank of Canada*,[832] Lord Haldane in elucidating the general nature of receivership opined that:

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[825] *Parsons v Sovereign Bank of Canada* [1913] AC 160, 166 –167 [Lord Haldane].
[826] As discussed in pp 148 - 150.
[827] RK Hill, 'Consent Receiverships in Federal Equity Practice' (1933) 11 Chicago-Kent} Law Review 267.
[828] Peter Tufano, 'Business Failure, Judicial Intervention, and Financial Innovation: Restructuring U.S. Railroads in the Nineteenth Century' (1997) 71 Business History Review 1, 3-4.
[829] Bankruptcy Act of (US) 1898, s 77; *Encyclopaedia Britannica* (vol 17, 1971) 22.
[830] Hill, 'Consent Receiverships in Federal Equity Practice' 267-268.
[831] *Re Metropolitan Railway Receivership* 208 US 90.
[832] 1913 AC 160, 166-167 [per Viscount Haldane LC].

> "A receiver and manager appointed, as were those in the present case, is the agent neither of the debenture-holders, whose credit he cannot pledge, nor of the company, which cannot control him. He is an officer of the Court put in to discharge certain duties prescribed by the order appointing him..."[833]

From the above analysis, it can be argued that the English and American systems of receivership (though not on all fours with the practice of judicial management), appear at least in substance, to pursue similar objectives. Some commentators have argued that the discussions by Lord Halsbury in *Moss Steamship Co Ltd v. Whinney*[834] and Lord Haldane in *Parsons v. Sovereign Bank of Canada*[835] may have influenced the enactment of the provisions on judicial management in SA.[836] Whilst this argument may be logically relevant, the discussion above, which referenced the consent receivership practice in the US, seems more plausible. This practice appears to have motivated the South African House of Assembly, and certainly, the Minister, to propose a system of judicial management in company law in SA.[837] For as it were with consent receivership, which was initially applied in the railway sector in the US, the system of judicial management was to be used only in limited circumstances to rescue vital industry.[838] As the Minister warned during the House of Assembly debate on the Bill in SA, this procedure should be rarely used by the courts, and even when used only in limited circumstances, this is to help solvent companies out of the mire.[839] However, the final legislation was not reflective of this sentiment.[840] Consequently, the reality was different. Due to the lack of limitation regarding the size or type of companies that are able to take advantage of the judicial management procedure, in practice, the hitherto objective of protecting vital industries was overstretched and just like consent receivership, courts were disposed to assist any type of corporate distress whenever it deemed necessary.[841]

In *Silverman v Doornhoek Mines Limited*,[842] the court considered the objective of judicial management under the SACA1926. De Wet J put forward a very strict approach by proposing that for an order of judicial management to be made, the company must demonstrate a "strong

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[833] 1913 AC 160 at 166-7 [Lord Haldane].
[834] 1912 AC 254, 260.
[835] 1913 AC 160, 166-167.
[836] Oliver, 'Judicial Management in South Africa' 13.
[837] Union of SA House of Assembly Debates vol 6 25 Feb 1926 col 983-4
[838] Olver, 'Judicial management-a case for law reform'.
[839] House of Assembly Debates vol 6 25 Feb 1926 col 996-7; Oliver (n 803) 3.
[840] The (SA) Companies 1926 Act.
[841] Anneli Loubser, 'Business Rescue in South Africa: A Procedure in Search of a Home?' (2007) 40 Comparative and International Law Journal of Southern Africa 152, 156.
[842] 1935 (TPD) 349.

probability" that granting the order may save the company from liquidation and keep it as a going concern.[843] However, in *Kotze v Tullbyk Ltd and Others*[844] and *Tobacco Auctions Ltd v A W Hamilton (Pvt) Ltd,*[845] the court whittled down the strict requirement when it replaced the "strong probability" test with a "reasonable probability" test.[846] This means, for an order of judicial management to be granted, the court has to determine that the company demonstrates "reasonable probability" it may surmount its difficulties and keep running as a going concern. Therefore, the SACA1926 created a novel concept that empowers the court to appoint a judicial manager for a distressed company or companies that ordinarily should be wound up, to allow the company to carry on the business.[847]

Once the order for judicial management is made, the existing management will be displaced, and the judicial manager appointed under the order of the court will replace the members of the board of directors. The Judicial manager will oversee the day-to-day running of the business. It should be noted that, in practice, the court order appointing the judicial manager is usually accompanied by a moratorium on enforcement of the company's debts.[848] This will allow the company to run until the business resumes to normal after the creditors are paid and even protect the interests of the stakeholders of the company.[849] However, the judicial manager may not be able to work with complete independence as the activities of the judicial manager are to be supervised by the Master of the Supreme Court.[850] In addition to this, the judicial management order may affect the company's ability to access further credit as potential lenders will consider the creditworthiness of the company before lending, even in cases where the order is vacated or set aside.[851] These difficulties created an opportunity for companies to work out informal restructuring plans, often resulting in a moratorium, to manoeuvre the formal rescue procedure.[852] Given the fact that this mechanism involved less time and money than the formal

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[843] ibid 353.
[844] 1977 (3) SA 118.
[845] 1966 (2) SA 451.
[846] ibid; Lovemore Madhuku, 'Insolvency and the Corporate Debtor: Some Legal Aspects of Creditors Rights Under Corporate Insolvency in Zimbabwe'(1995) 12 Zimbabwe Law Review 85, 91.
[847] Oliver, 'Judicial Management in South Africa'.
[848] Just like the administration process, the company can continue trading, but the day-to-day management and control of the company passes to the administrator. For a discussion on the nature and history of administration, see *Kaupthing Singer & Friedlander Ltd (In Administration), Re* [2010] EWCA Civ 518.
[849] *Makhuva v Lukoto Bus Service (Pry) Ltd* 1987 (3) SA 376 (VSC) 395 (G); cf *Estate Laock v Graaff-Reinet Board of ExecuJors* 1935 CPD 117:119.
[850] JJ Henning, 'Judicial Management and Corporate Rescues in South Africa' (1992) 17(1) Journal of juridical science 90, 92.
[851] JJ Henning, 'Judicial Management and Corporate Rescues in South Africa' 92; cf s 427 of the (SA) Companies Act of 1973.
[852] Eric Levenstein, 'An Appraisal of the New South African Business Rescue Procedure' (PhD thesis, University of Pretoria 2015) 57 – 58.

process, the informal compromise became very popular, even with its flaws. This untimely led in part to the failure of judicial management.[853]

Over the years, South African legislators have tried to address the challenges that Judicial management presents through several amendments, including the SACA61 of 1973.[854] SACA 1973 re-introduced the concept of judicial management to address the criticisms identified above and reform the concept in line with developments in England.[855] The decision to retain this tool was against the backdrop of the Van Wyk de Vries Commission,[856] which waived away criticisms from the Masters of the Supreme Court regarding the abusive use of this tool (especially when the tool is used where a company is not rescuable) *vis-à-vis* the low success rate.[857] The Van Wyk de Vries Commission considered the main argument against judicial management - the use of the procedure in circumstances where judicial management is not a practical solution to resolve corporate distress - in relation to the success rate. The commission determined that judicial management had been "extremely successful in a number of cases".[858] Rather than jettison judicial management as a tool for corporate rehabilitation, the Commission sought to establish an appropriate mechanism that would help the court determine a valid assessment of the prospect of rehabilitating a distressed company.[859]

The fundamental principle and underlying philosophy behind the enactment of the SACA1926 remained unchanged under sections 427 to 440 of the SACA1973. The court may grant an order of judicial management on the application of one or more of the parties entitled to apply for the winding up of a company under 346 of SACA 1973,[860] if this is due to mismanagement or other reasons:

i. The company cannot pay its debt or is incapable of fulfilling its financial obligations or unable to remain a going concern;
ii. It is reasonably probable that granting an order of judicial management could rehabilitate the company to be capable of paying its debts or meeting its financial obligation and becoming a going concern; and

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[853] ibid 58-59.
[854] SA Companies Law Amendment Act 11 of 1932; SA Companies Law Amendment Act 23 of 1939.
[855] SACA1973, Chapter XV; Mikovhe Maphiri, 'The Suitability of South Africa's Business Rescue Procedure in the Reorganization of Small-to-Medium-Sized Enterprises: Lessons from Chapter 11 of the United States Bankruptcy Code' (2018) 8(1) Michigan Business & Entrepreneurial Law Review 101, 109.
[856] The Van Wyk de Vries Commission operated between 1963 to 1970.
[857] Levenstein, 'An appraisal of the new South African business rescue procedure'.
[858] Loubser, 'Judicial Management as a business rescue procedure in South African corporate law' 139.
[859] Harry Rajak and John Henning, 'Business Rescue for South Africa' (1999) 116 SALJat 262, 266.
[860] The onus to prove lies with the applicant - meaning one or more of those mentioned under section 346 of SACA 1973 - meaning the company or creditors or members. See SACA 1973, S 427(2).

iii. It appears just and equitable for the court to grant the order.[861]

With that said, a closer look at section 427 of SACA 1973 reveals the extent to which the court is involved in judicial management. One unique feature of judicial management under South African law is the over-reliance on the court to drive the process forward. In other words, the system of judicial management is subject to supervision by the court.[862] Incidentally, SACA 1973 maintained the main purpose of judicial management was for the rescue of the whole company. This means the rescue of part, or the entirety of its business alone is not a feasible outcome of the rescue process, and the court cannot pursue a better return for the creditors or shareholders, even if one exists.[863] This marks another remarkable difference between judicial management and the English model of receivership. The only outcome of judicial management is the rescue of the company as a going concern, unlike receivership, where the only rescue outcome was for the rescue of the business, which could have also been an incidental outcome, even though it is not the primary goal.[864] Accordingly, the system of judicial management did not flourish as a rescue tool in SA, as most of the applications that began with a prayer for an order of judicial management ended up with a kiss of death – that of liquidation.[865] This outcome was partly because most applications were brought before the court at a time when it was relatively unlikely that rescuing the company was possible.[866]

Understandably, the outcome of the judicial management process was not beneficial to stakeholders, especially the creditors.[867] This is because, strictly speaking, the purpose of judicial management is not to achieve a compromise or save part of the company's business. Its purpose is however to rescue the company as a whole, by providing a mechanism for distressed companies to restructure to pay their debts, meet their financial obligations, and become successful.[868]

Apart from the above, the involvement of the court - especially during the inception of the rescue process - means that the system of judicial management under SA law involves the

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[861] SACA 1973, S 427.

[862] In comparison with the Australian model of judicial management, which is free of judicial supervision, it has been argued that the Australian model is "creditor management". See Oliver 1982, 290.

[863] *Millman, NO v Swartland Huis Meubileerders (Edms) Bpk: Repfin Acceptances Ltd Intervening* 1972 (1) SA 741 (C), 744-745.

[864] Ian F Fletcher, *The Law of Insolvency* (4th edn., Sweet & Maxwell 2009) 524-527.

[865] Le Roux Hotel Management (Pty) Ltd and Another v E Rand (Pty) Ltd (FBC Fidelity Bank. Ltd (under Curatorship), intervening 2001 (2) SA 727 (C).

[866] David A Burdette, 'Unified Insolvency Legislation in South Africa: Obstacles in the Path of the Unification Process' (1999) 32 De Jure 44, 57 –58.

[867] Oliver 1982, 286.

[868] SACA 1973, s 427; Frederick Ian Ofwono, 'Suggested reasons for the failure of judicial management as a business rescue mechanism in South African law. University of Cape Town' (PhD thesis, University of Cape Town 2014) II; Henning, 'Judicial Management and Corporate Rescues in South Africa' 95-96.

services of a legal practitioner even from its inception and, therefore, is not cost-effective.[869] In summary, even though the system of judicial management was largely unsuccessful, it was an ambitious effort to introduce a tool for rehabilitating and turning distressed companies into a going concern, in a prevailing pro-creditor culture.

4.3.2 Corporate Rescue under the Companies Act 2008

As stated above, the former corporate rescue regime, the system of Judicial Management under SACA 1926, as amended by SACA 1973, was not only too formal but largely restrictive in its application to companies.[870] In addition to the over-reliance on the court to drive the rescue process highlighted above, it is still unclear whether section 427 of SACA 1973 applied to public and closed corporations, especially SMEs.[871] Hence, there is a need to apply an approach to rescuing companies that consider different types of business entities and structures, including MSMEs.[872] In light of the above considerations, the Department of Trade and Industry in SA elucidates the need for a more expansive tool that effectively facilitates corporate rescue and recovery of distressed companies, in a way which is suitable for relevant stakeholders, including historically disadvantaged individuals.[873] This idea informed the reform of corporate rescue under SACA 2008 with the introduction of a new rescue tool known as "business rescue". This explanation invites an obvious question: "What is a business rescue, and can South Africa's model be described as a corporate rescue?"

4.3.2.1 Business Rescue as a Corporate Rescue Tool

Business rescue as a corporate rescue tool was borne out of the need to develop a less formal and more inclusive and effective domestic approach to corporate rescue that will be sensitive to the demands of the South African economy.[874] According to section 128 of SACA 2008,

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[869] Pieter Kloppers, 'Judicial management reform: steps to initiate a business rescue' (2001) 13 SA Merc LJ 359; Levenstein, 'An appraisal of the new South African business rescue procedure'.
[870] While corporate rescue was introduced in SA with the consolidated legislation regulating companies in 1926, company law itself existed in SA SINCE 1861 WITH THE INTRODUCTION OF THE JOINT STOCK companies Limited Liabilities Act 1861 as applicable to the Cape Colony. See DTI, South African Company Law for 21ST century Guidelines for Corporate Law Reform (May 2004).
[871] As earlier noted in p 155.
[872] ibid 111.
[873] Department of Trade and Industry (Republic of South Africa), *The Companies Act, No. 71 OF 2008: An Explanatory Guide Replacing the Companies Act, No. 61 of 1973* (Department of Trade and Industry 2010).
[874] Mikovhe Maphiri, 'The Suitability of South Africa's Business Rescue Procedure in the Reorganization of Small-to-Medium-Sized Enterprises: Lessons from Chapter 11 of the United States Bankruptcy Code' (2018) 8(1) Michigan Business & Entrepreneurial Law Review 101, 110.

business rescue is any proceeding that aims to enable the rehabilitation of a financially distressed company by making provision for:

(i) the temporary supervision of the company, and of the management of its affairs, business and property;

(ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and

(iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.[875]

Although the definition above appears to be somewhat complex, it gives room for certain assumptions: that business rescue is a self-administering tool for the most part; it is administered by the company itself, provides a moratorium on debt enforcement; and involves temporary supervision and management of the company by an independent business rescue practitioner (BRP).[876] The BRP's role is three-dimensional: general business management, financial knowledge and legal expertise - superintending and facilitating the business rescue process in the best interests of the company's stakeholders. The professionalisation of business rescue practice in SA became a reality for the first time under SACA 2008. The BRP, which is expected to abide by professional conduct, draws out and implements a "business rescue plan" to rescue the company[877] and is entitled to compensation.[878] Thus, Meskin summarised the meaning of business rescue as "a plan that would achieve a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company".[879] From the definitions above, it appears that there is a relationship or at least a nexus between business rescue as a concept and the business rescue plan. Yet, SACA 2008 did not define what a rescue plan is. The question arises as to what a business rescue plan is. While section 128 of

[875] SACA 2008, s 128(1)(b).
[876] SACA 2OO8, s 140(1)(a)).
[877] SACA 2008, S 128.
[878] *Murgatroyd v Van Den Heever & others* NNO 2015 (2) SA 512 (GJ).
[879] Philip M. Meskin, *Insolvency Law and Its Operation in Winding-up* (A. Boraine, Jennifer A. Kunst, David A. Burdette eds., LexisNexis 2015). This reflects the sentiment in Sch B1, para 3(1)(b) of IA 1986 regarding administration.

SACA 2008 defined business rescue, it did not define what a business rescue plan is. The section merely refers to the meaning contemplated by section 150 of SACA 2008, which discusses the proposal for business rescue. This means that the business rescue plan is the proposal for business rescue, and section 150 of SACA 2008 highlights the content and structure of the proposal. This clarification is important as both terminologies - business rescue plan and proposal - have been used interchangeably - yet, there may be a slight technical difference between both. A second look at the two terminologies in the context of SACA 2008 seems to suggest that the business rescue proposal is the business rescue plan in its unapproved form. When the proposal is approved, it becomes the business rescue plan.

Similarly, because the meaning of business rescue contemplates proceedings where the business rescue plan is adopted by affected persons, it is submitted that the reference to "a plan" under section 128 (1)(b)(iii) of SACA 2008 concerns an approved proposal. For this present research, a "business rescue plan" is a proposal detailing all the required information that will assist an affected person in deciding to adopt or reject the plan.[880] Accordingly, it is submitted that business rescue is a corporate survival plan displaying alternative scenarios to liquidation for a financially distressed company. Therefore, the success of business rescue proceedings depends on the outcome. Anthony Smits highlighted three spectrums of successful rescue.[881] On one extreme is pure rescue. For example, confirming the reorganisation plan under Chapter 11 procedure to save the company itself - with shareholders continuing to have control of the business after restructuring.

In the middle of the spectrum are two dimensions of rescue. On the one hand, there is the rescue of the company's business by selling the entire business to preserve the business's value while the corporate entity is liquidated. On the other hand, there is a corporate restructuring which results in the creditors receiving more when compared to the winding up of the company. Finally, on the other end of the spectrum is "rescue", which has been applied mostly in civil law jurisdictions in geographies such as France.[882] This involves the successful continuation of the company's business in a way that ensures job preservation albeit with limited emphasis on debt recovery.[883]

[880] SACA 2008, ss 128(1)(c) and 150.
[881] Anthony Smits, 'Corporate Administration: A Proposed Model' (1999) 32(1) De Jure 80, 84.
[882] ibid 84.
[883] ibid.

Although there is a lack of unanimity on what constitutes a successful rescue, there are indicators for success in this regard identified from a perusal of international literature.[884] However, these indicators may not be equally as applicable and significant under SA insolvency law because it may not be effective in successfully achieving the rescue goal under the relevant statutory provision.[885] It is therefore submitted that whether or not a rescue will be successful, first depends on the interpretation based on the objectives of rescue under the enabling statute. It is also submitted that the success or otherwise of the process may also be determined by achieving the goals set out in the business rescue plan under review.[886] While it is pertinent to acknowledge the similarities in the rescue goals of most corporate rescue regimes, there is no support for clarity in the literature on what constitutes successful rescue under SA law.[887] In fact, it has been argued that a successful rescue promotes entrepreneurship and economic growth in the private sector.[888] The question then is, what kind of rescue promotes entrepreneurship and economic growth? In practical terms, it can be argued that any rescue process that successfully ensures the continuance of the business will pass this test. Yet, it is difficult to discern success based on the expectations of different stakeholders in the rescue process.[889] However, the prevention of liquidation will certainly promote entrepreneurship and economic growth. A "successful" business rescue, therefore, will involve proceedings that yield a better outcome for creditors or shareholders than from the company's immediate liquidation.

4.3.3 Difference between Judicial Management and Business Rescue in SA

4.3.4 Objectives

For the purpose of business rescue under SACA 2008,[890] in the context of business rescue, a successful business rescue is essential in achieving economic growth, which in turn benefits

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[884] ibid; *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others* para 11. For indicators of successful rescue from international literature, see Shaneen Conradie and Christiaan Lamprecht, 'Business Rescue: How Can Its Success Be Evaluated at Company Level?' (2015) 19(3) Southern African Business Review 1, 18.

[885] Shaneen Conradie and Christiaan Lamprecht, 'What Are the Indicators of a Successful Business Rescue in South Africa? Ask the Business Rescue Practitioners' (2018) 21 South African Journal of Economic and Management Sciences.

[886] Marius Pretorius and W Rosslyn-Smith, 'Expectations of a Business Rescue Plan: International Directives for Chapter 6 Implementation' (2014) 18(2) Southern African Business Review 108.

[887] Marius Pretorius, 'Business rescue status quo report: Final report' (2015) *Business Enterprises–University of Pretoria*.

[888] Talira Naidoo, Adnan Patel and Nirupa Padia, 'Business Rescue Practices in South Africa: An Explorative View' (2018) 11(1) Journal of Economic and Financial Sciences.

[889] Ibid; Marius Pretorius, 'Business rescue status quo report: Final report' (2015) *Business Enterprises–University of Pretoria* 33.

[890] SACA 2008, s 7(d).

the country economically. This means that a successful rescue will benefit not only the relevant stakeholders of the company but also the public, as it will save jobs, allow for full repayment of the credit sums, or result in a better outcome for the creditors than liquidation.[891] In recognising this public interest objective of corporate rescue, Binns-Ward J in *Koen and Another v Wedgewood Village Golf & Country Estate (Pty) Ltd and Others*[892] held thus:

> "Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidation in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or securing a better return to creditors than would probably be achieved in an immediate liquidation."[893]

From Binns-Ward J's opinion, it can be deduced that the underlying objective behind business rescue is not necessarily to prevent liquidation.[894] As Claassen in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others*[895] argued:

> "The general philosophy permeating the business rescue provisions is the recognition of the value of the business as a going concern rather than the juristic person itself. Hence the name "business rescue" and not "company rescue". This is in line with the modern trend in rescue regimes. It attempts to secure and balance the opposing interests of creditors, shareholders and employees. It encapsulates a shift from creditors' interests to a broader range of interests."[896]

This statement shows that business rescue recognises the value of the business of a distressed company and the need to keep the company as a going concern, rather than liquidating the company. It also means that business rescue may not necessarily lead to saving the business and returning it to profitability.[897] This is because the company may not pursue a plan to rescue

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[891] Simphiwe Peaceful Phungula, 'The evolution of an effective business rescue statutory regime in South Africa 1926–2021' (PhD thesis, University of Kwazulu-Natal 2021) 1.
[892] 2012 (2) SA 378 (WCC)
[893] ibid 383, para 14 [Binns-Ward J].
[894] ibid.
[895] Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others, Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events and Exhibitions (Pty) Ltd and Others (2011/35199, 2011/24545) [2012] ZAGPJHC 12, 1; Richard Bradstreet, 'The new business rescue: will creditors sink or swim?' 2011 SALJ 352, 355.
[896] ibid 12.
[897] David Burdette, Andre Boraine and Alastair Smith, 'Business Rescue in South Africa' (Studocu 2019) <https://www.studocu.com/row/document/national-university-of-lesotho/international-organizations/2002-oct-business-rescue-in-south-africa/36598061> accessed 26 February 2024.

the legal entity, but rather seek a better outcome for the company's stakeholders. The reality is that the result from the outcome of the process – preserving the value of the business as a going concern – may still be better for the stakeholders, especially the creditors, even though the company as a legal entity will be destroyed via liquidation in the long run. However, it is important to restate that in certain cases, liquidation may better serve the interests of the stakeholders. What business rescue will do in such situations is to 'preserve and possibly' enhance the value of the business to gain a more profitable return for the creditors instead of a piecemeal sale.[898] Again, the reality is that it better serves the interest of the creditors if the company's going concern value is preserved.[899] Yet, like judicial management, business rescue has also been connected to this idea of rescuing financially distressed companies from liquidation. In *NLRB v. Bildisco & Bildisco*,[900] the court argued that the main purpose of business rescue is to rescue a company from liquidation.[901] The question becomes whether there is any ideological difference between judicial management and business rescue.

Though some significant ideological differences exist between business rescue and judicial management, these two concepts are philosophically similar. Like the judicial management tool, which was not only entirely novel prior to 1962, business rescue, though not available under company law in SA before 2008, is fundamentally - as McCormack described - a "management displacement model".[902] This is because both concepts involve the displacement of the existing management of the debtor company by either the judicial manager or the BRP in judicial management and business rescue, respectively, who then take over control of the business and manage the affairs of the debtor company.

Unlike the debtor-in-possession model which allows the management of a debtor company to retain power and remain in possession and control of the assets and operations of the business of the company, in a management displacement model such as business rescue, the BRP takes charge of the management and control of the distressed company, together with a substantial part of the business rescue process.[903] That is to say, the main difference between the South

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[898] Anthony J Smits, 'Corporate Administration: A proposed model' (1999) 32 De Jure 80, 83.
[899] Trebilcock M and Katz J, 'The Law and Economics of Corporate Insolvency: A North American Perspective' in Charles EF Rickett (ed), *Essays on Corporate Restructuring and Insolvency* (Brooker's 1996) 7.
[900] 465 U.S. 513 (1984).
[901] ibid 528.
[902] Gerard McCormack, *Corporate Rescue Law: An Anglo-American Perspective Gerard McCormack* (Edward Elgar Publishing Ltd 2008) 80-83, 152-54; Carl Stein and GK Everingham, *The New Companies Act Unlocked* (Siber Ink 2011) 409; John Wood, 'Corporate Rescue Reanimated' [2024] Journal of Business Law <https://www.research.lancs.ac.uk/portal/services/downloadRegister/415514089/CRR_2024_author_details.pdf > accessed 30 October 2024.
[903] For examples of other debtors in possession tools, see Chapter 11 of the USBC. See also 'administration' under the Australian Corporations Act 2001 (Part 5.3A (ss 435A – 451D)) and IA 1986 (Schedule B1).

African model and the US model is that, unlike the SA model, in the US the management of the distressed company prior to the company commencing the rescue process remains in place with no third party (whether an administrator or BRP) appointed to supervise the rescue process directly.[904]

The debtor-in-possession model in the US is a unique development in insolvency law, not just due to the fact that the jurisdiction is historically pro-debtor, but because the principle was developed to cover the lacuna under US law when railway companies default in their financial obligations to its lenders. This provided a remedy for this kind of corporate failure, apart from the right of foreclosure for lenders and the equitable right of the court to appoint a receiver in respect of the debtor's assets.[905] To avoid a piecemeal sale of the debtor's assets, which would have been economically damaging to the company, the US court - by way of judicial gymnastics - fused both remedies together and ordered the lender to sell the assets as a going-concern.[906] These judicial gymnastics gave birth to the first successful reorganisation process in the railroad industry, opened a new vista for corporate reorganisation and value preservation, and subsequently served as the forerunner of the Chapter 11 procedure.[907]

The historical significance and influence of the "debtor in possession" procedure under Chapter 11 of the US Bankruptcy Code cannot be over-emphasised, as many jurisdictions including the UK and the EU, have developed similar procedures to improve the role of debtors in the rescue process and strengthen the rescue culture in their respective jurisdiction.[908] In SA, remnants of the debtor-in-possession model can be seen in Chapter 6 of SACA 2008.[909] The objective of infusing the debtor-in-possession model in the current business rescue regime under SACA 2008 is to move the jurisdiction to be debtor-friendly.[910] This is done by encouraging more debtor participation in the rescue process whilst balancing the interests of the creditors.

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[904] Nathalie Martin, 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28(1) Boston College international and comparative law review 1, 32.

[905] ibid.

[906] Juanitta Calitz, 'Is Post-Commencement Finance Proving to Be the Thorn in the Side of Business Rescue Proceedings under the 2008 Companies Act?' (2016) 49(2) De Jure 265 [See text to note 53].

[907] Anneli Loubser, 'Tilting at Windmills? The Quest for an Effective Corporate Rescue Procedure in South African Law' (2013) 25(4) SA Mercantile Law Journal 437, 441.

[908] The CVA is the closest thing to the debtor in possession model under English Law, while the EU passed Directive 2019/1023/EU on preventive restructuring frameworks. See Hamiisi Junior Nsubuga, 'The Debtor-In-Possession Model in the EU Insolvency and Restructuring Framework – a Domino Effect?' (2022) 3(1) Journal of Business Law 238, 238-239.

[909] The SA legislature, considered the rescue provisions in different jurisdictions, including, the US, UK, France, Australia and Germany. See *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* Case Number: 2011/35199, para 9 [Claassen J].

[910] Marius Pretorius and Wanya Du Preez, 'Constraints on Decision Making Regarding Post-Commencement Finance in Business Rescue' (2013) 6(1) The Southern African Journal of Entrepreneurship and Small Business Management 168, 172.

Although the SA approach is not as sophisticated as the US approach because it considers the interest of all affected stakeholders, it does acknowledge the existence of the value of the company as a going concern.[911]

This analysis mirrors the objective of business rescue under SACA 2008 - providing an 'efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders' of the company.[912] Thus, the lawmakers opted for a rescue tool that would prevent immediate liquidation, an outcome that leads to 'significant collateral damage'.[913] There are two clear reasons why the lawmakers in SA may have opted for business rescue procedures: (1) to open a channel where the assets of a distressed company may be used as part of a viable business with a better resale value than the assets of the company themselves; and (2) to help distressed companies avoid liquidation at fire-sale rates, which enhances the value of the company for debtors and the creditor.[914]

Similarly, although the system of judicial management was meant to protect stakeholders' interests, the process's outcome did not necessarily result in the protection of all stakeholders' interests. Since the aftermath of the judicial management process was the frequent destruction of the value, wealth, and livelihood of key stakeholders, it was not always in the company's interest to lose its value. It follows, therefore, that business rescue did not jettison the core idea behind corporate rescue. It rather provides a more expansive and collectivist approach to corporate rescue policy – either keep the company alive or maximise the value of the business.[915] This means under SACA 2008, even though a distressed company undergoing business rescue may be unable to do business on a solvent basis, it is still possible to achieve corporate rescue if the business rescue process will lead to the retention as opposed to the termination of the corporate entity itself, rather than to immediate liquidation.

A contributing factor to the difference in approach to business rescue may have been the need to transform the corporate regime in SA from a creditor-friendly to a debtor-friendly regime. This is so because historically, debtor-friendly regimes have been fertile ground for debtor-in-possession tools.[916] Therefore, it follows that a debtor-in-possession tool may not be effective

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[911] Richard Bradstreet, 'The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders' willingness and the Growth of the Economy' (2010) 22(2) SA Mercantile Law Journal 195.

[912] SACA 2008, ss 7(k); cf SACA 2008, s 128 (1)(b) and (h) (rescuing a company).

[913] ibid (2012 (2) SA 383, para 14.

[914] Shaneen Conradie and Christiaan Lamprecht, 'Valuation Practices under Business Rescue Circumstances in South Africa' (2021) 24(1) South African Journal of Economic and management Sciences 1, 3.

[915] ibid (Simphiwe P Phungula, 2021) 30.

[916] Ron W Harmer, 'Comparison of Trends in National Law: The Pacific Rim' (1997) 23 Brooklyn journal of international law 139, 147.

in resolving corporate distress within a creditor-friendly regime. For this reason, corporate rescue tools may be counterproductive when there is no rescue culture. This assertion is particularly true in SA, where the courts applied a restrictive approach to corporate rescue through judicial management - leading to limited instances where rescue was successful.[917]

The fact that the SA courts took a restrictive approach to judicial management can also be deduced from the interpretation of the pre-2008 legislations, which treated judicial management as an extraordinary measure.[918] Conversely, corporate rescue models, such as business rescue and even the models in other jurisdictions such as the US, have been treated as a necessary intervention in the resolution of corporate distress.[919] Apart from this approach to corporate rescue under judicial management and business rescue, there are very few practical differences between judicial management and business rescue. Admittedly, some scholars have argued that judicial management in SA is an example of a business rescue tool.[920] Loubser argued that both concepts are ideologically the same, save for the extent of the outcome of both processes, while the objective of the former is the survival of the company as a whole - that of the latter is to save a part or the whole of the company. [921]

The reference to 'saving part' or 'the whole' of the company may be conceptually misleading, especially given the terminology attached to the procedure – that of 'business rescue.' Although both terminologies are not complex concepts, combining both terminologies is fundamental to understanding the objectives of business rescue. However, it is important to attempt to explain functionally the practical implications of both terms as they relate to business rescue. Both terms are covered by the provisions of section 128(1)(b) of SACA 2008, which implies that the objectives of business rescue cover the rescue of the whole or part of the business of the company. This conclusion can be reached by considering the implication of section 128(1)(b)(iii). Although business rescue takes a more expansive approach to corporate rescue than that of judicial management, saving 'the whole' of the company is an acceptable outcome of both processes.[922]

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[917] Burdett (n 896) 2 - 3.

[918] *Le Roux Hotel Management (Pty) Ltd v E Rand (Pty) Ltd* [2001] 1 All SA 223 (C); *Silverman v Doornhoek Mines Ltd* 1935 TPD 349; *Ladybrand Hotel (Pty) Ltd v Segal and Another* 1975 (2) SA 357 (O); *Gushman v TT Gushman & Son (Pty) Ltd and Others* [2009] JOL 23589 (ECM); *Kotzé v Tulryk Bpk en 'n Ander* 1977 (3) SA 118 (T); *Ben-Tovim v Ben-Tovim and Others* 2000 (3) SA 325 (C).

[919] Michael J Herbert, *Understanding Bankruptcy Law* (M Bender 1995) 303 303–313.

[920] ibid (n 896) 3.

[921] Anneli Loubser, 'Some Comparative Aspects of Corporate Rescue in South African Company Law' (PhD Thesis, University of South Africa 2010) 45.

[922] ibid (Zuogbo TC 2017).

In contrast, beyond the restrictive approach to corporate rescue under judicial management, business rescue may not always lead to the rescue or recovery of the whole company. Unlike judicial management where the rescue is restricted to 'the whole' company's business, business rescue could lead to 'saving part' of the company's business. The provision refers to 'proceedings to rehabilitate a company' and a rescue plan.[923] When it is impracticable to rescue or restructure the whole of the company, part of its business can be rescued in a manner that would result in better returns for the stakeholders of the company than from liquidating the company immediately.[924]

In practice, this objective can be achieved in a variety of ways or by applying different strategies. Examples of a strategy involving the rescue of part of a company's business is a management buy-out or a takeover of a company in distress, which will lead to the destruction of the distressed company itself but continue or restructure the useful part of the business. The underlying reason for this expansive approach to corporate rescue is twofold: First, the separation of the company as a juristic person and the business of the company; Second, and paradoxically linked to the first is the recognition of the value of the business of the company above the company as a juristic person. The basis for the rescue in this regard is the recognition of the corporate entity as an integral part of the search for value maximisation so that failure diminishes the value potential.[925] Hence, the need to continue the company from a panorama of value maximisation. The underlying philosophy deduced from the provisions on business rescue is the recognition of the going concern value of the business of the company above the company as a juristic person; hence the name "business rescue" and not "company rescue".[926] So, what is the difference between business rescue and company rescue?

4.3.5 The difference between business rescue and company rescue

Some scholars have attempted to draw parallels between rescuing the company as an entity and rescuing the business of the entity.[927] Rescue, in the first instance, involves the corporate entity remaining intact after undergoing the rescue process. This kind of rescue has also been described as "pure rescue" because it aims to continue the company's business operations with

[923] SACA 2008, s128(1)(b).
[924] See ss 4.3.4 – 4.3.5 above on the definition under section 128(1).
[925] Tim Verdoes and Anthon Verweij, 'The (Implicit) Dogmas of Business Rescue Culture' (2018) 27 International Insolvency Review 398, 401.
[926] [2012] ZAGPJHC 12, para 12 [CJ Claassen J].
[927] Sandra Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67(2) Modern Law Review 247; Onyinye Oc-Chukwuocha, 'Corporate Rescue Models in the United Kingdom and the United States: A Comparative Study with Nigeria'15.

the same, or a substantial part of the company's workforce under the same ownership.[928] By contrast, rescue in the second instance is a corporate restructuring process which involves the sale of the business or a viable part of it as a going concern. This could result in change or reduction of workforce and even ownership. However, some scholars have denied the existence of parallels in their characterisation of these two instances of corporate rescue.[929] According to Davis:

> "In my opinion the true meaning of a company rescue is the saving of an entity in whole or in part by satisfying in some measure its unsecured creditors and enabling the company to continue in business. This will also in some measure preserve employment."[930]

Davis seems to have given a definition that does not cover rescue under the second instance. This approach may have been adopted in some jurisdictions, but with the introduction of hierarchical objectives, pure rescue is not the only expected outcome, even when it is the primary objective.[931] In terms of SACA 2008, it will appear that the definition of business rescue under 128(1)(b) only covers the rescue under the second instance - to rescue the company as a going concern. The term "rescuing the company" is defined under section 128(1)(h) of SACA 2008 to mean achieving the goals of "business rescue" under section 128(1)(b) SACA 2008. The rationale for this provision is a bit uncertain, as section 128(1)(b) refers to a primary and a secondary goal where it is impracticable to achieve the primary goal.[932] The primary goals appear to be two co-joined aspects of the rescue process -temporary supervision and moratorium - and there is a third goal, which seems to describe two independent aspects of rescue - pure rescue, and business rescue.[933]

Despite the awkward attempt to define the term, it is interesting to note that in both instances under the third goal of business rescue, the rescue aims to prevent the failure of the company's business, but the difference lies in how the rescue objective is achieved. That said, the question which begs to be answered is whether or not business rescue can be classified as a corporate

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[928] ibid 248.
[929] Paul Davis, 'The Rescue Culture in the United Kingdom' (1997) 2 Insolvency Litigation Practice 3, 4 cited at footnote 46 in Sandra Frisby, 'Insolvency Law and Insolvency Practice: Principles and Pragmatism Diverge?' (2011) 64(1) Current Legal Problems 349.
[930] ibid 4.
[931] The EA 2002 in England adopts the pure rescue outcome approach. See Sandra Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67(2) Modern Law Review 247, 249.
[932] As discussed in p 164 – 165.
[933] SACA 2008, s 128(1)(b)(iii).

rescue procedure. In this respect, it is crucial to re-explore the underlying principle behind rescue culture as canvassed by the Cork Committee. According to the Cork Committee Report, 'a good modern insolvency law' must, among other things, seek to:

> "(i) recognise that the effects of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome, and to ensure that these public interests are recognised and secured;
> (j) to provide means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country;"[934]

Similar objectives of modern insolvency law were highlighted by the IMF.[935] For this argument, the second general objective will be reproduced below:

> "the second objective of an insolvency law is to protect and maximise value for the benefit of all interested parties and the economy in general;"[936]

Regarding the above, it is obvious that business rescue seeks to promote rescue culture, and therefore, it is not just intertwined with corporate insolvency law, but rather it is a corporate rescue procedure.[937] This statement presupposes, and rightly so, that corporate rescue is broader in scope and incorporates business rescue, which is a limited and targeted approach to resolving corporate distress.[938] As Milman and Durrant argued, one of the main aims of corporate insolvency law is the promotion of business rescue.[939] A critical aspect of the promotion of business rescue via corporate insolvency is the prioritisation of the stakeholders' return by

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[934] Cork Committee Report 198, I - J.
[935] IMF, *Orderly & Effective Insolvency Procedures* (International Monetary Fund, Washington DC 1999). For a thorough analysis of the eleven qualities, see John Tribe, 'The Kekhman Quintessence: What Is English Personal Insolvency Law For?' (2015) 18 (3) NIBLeJ 337, 337-338.
[936] IMF, *Orderly & Effective Insolvency Procedures* (International Monetary Fund, Washington DC 1999). For a thorough analysis of the eleven qualities, see John Tribe, 'The Kekhman Quintessence: What Is English Personal Insolvency Law For?' (2015) 18 (3) NIBLeJ 337, 337-338.
[937] ibid (Harmer 1997) 143. David Burdette et al, went beyond the link between business rescue and insolvency to put it more generally that "business rescue provisions must be contained in the same legislation as the insolvency laws so that the link between insolvency and business rescue can be maintained. For example, in the United States, Germany and England, their respective business rescue procedures are contained in their insolvency legislation." ibid (Burdett et al) 4; Cf Cork Report, para 198 on a good insolvency law offering a simple, easy, and adaptive framework.
[938] Sandra Frisby, Insolvency Law and Insolvency Practice: Principles and Pragmatism Diverge? (2011) 64 (1) Current Legal Problems 349, 362-363.
[939] David Milman and Chris Durrant, *Corporate Insolvency* (Sweet & Maxwell 1994) 1.

facilitation of agreements among affected parties. This could include the renegotiation of debt agreements, selling non-productive assets, or effecting changes in the operations of the company. In this regard, business rescue seeks to secure and balance the interests of different creditors on the one hand and, on the other, the creditors against the interests of the shareholders and employees of the company.[940] Joubert summarised this better: '[the] objective with business rescue is to keep companies alive and prolong the benefits that so many stakeholders, employees, shareholders and creditors, receive from it'.[941]

Based on the above analysis, it is argued that South Africa's model can be described as a corporate rescue. It is also a collective model, as it promotes a shift from the prioritisation of creditors' interest, typical of individual debt collection mechanisms, to a broader range of interests – thus it is a collectivist approach.[942] Therefore, despite the use of the terminology "business rescue" in section 71 of SACA 2008, the South African model can be considered a corporate rescue procedure because the outcome of the process may not necessarily be saving part of the business, but rather the juristic person or legal entity - which could be a logical consequence of saving the whole of the business.[943] Essentially, the idea behind saving the whole or part of the business is to save the company from liquidation and return to profitability, so it does not guarantee a return to solvency. In this regard, the outcome of the rescue process can be a management buy-out or a takeover of the business entity.[944]

4.4 Procedure for Commencement of Business Rescue

While it is important to know the objectives of business rescue, it is fundamental to understand the process by which one can achieve the objectives. To achieve the objectives of business rescue in SA, the process involves different stages, and even more important, it offers a helpful insolvency tool for the facilitation of the business rescue process, which will be discussed later. The stages are:

1. The appointment of a BRP to temporarily supervise the affairs of the company;

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[940] Richard Bradstreet, 'The New Business Rescue: Will Creditors Sink or Swim?' (2011) 128 South African Law Journal 352, 355; Jonathan Rushworth, 'A Critical Analysis of the Business Rescue Regime in the Companies Act 71 of 2008: Business Rescue: Part III' (2010) 2010 Acta Juridica 375, 375.

[941] Tronel Joubert, '"Reasonable Possibility" versus "Reasonable Prospect": Did Business Rescue Succeed in Creating a Better Test than Judicial Management?' (2013) 76 Social Science Research Network 550.

[942] [2012] ZAGPJHC 12, para 12.

[943] ibid (Zuogbo 2016) 14; Dennis Davis and others, *Companies and Other Business Structures in South Africa: Commercial Law* (Oxford University Press 2009).

[944] AK Biggs, CB Scheepers and Monray Botha, 'The Influence of Post-2008 Legislation on an Acquisition That Turned Hostile: A South African Case Study' (2017) 48(3) South African Journal of Business Management 47, 49.

2. The imposition of a temporary moratorium on any claim or proceedings for enforcement of proprietary rights for any of the company's property or any property in the company's possession; and
3. The development and, if approved, implementation of a business rescue plan to restructure the affairs of the company.[945]

In practice, the order placing a company under business rescue is usually accompanied by an order appointing a BRP to pursue the rescue goal. The court order also imposes a moratorium, allowing the BRP to restructure the company.[946] In this regard, the Business rescue practitioner (BRP) takes over the management and control power of the company - displacing the directors of the company.[947] However, the directors are expected to help the BRP in the discharge of the BRP's duty, including the convening of meetings and preparation of the proposal.[948] After the BRP convenes the meeting with the company's creditors, a proposed business rescue plan will be prepared by the BRP, with notice sent to the company's creditors and other affected persons.[949] Afterwards, the BRP convenes a meeting where the proposal is considered, voted upon, and approved of by the holders of more than 75% of the creditors' voting interests and at least 50% of the voting interest of independent creditors.[950]

4.4.1 Business Rescue Routes

There are two routes to the commencement of business rescue:[951] the out-of-court and the in-court routes. The out-of-court route is the most direct route to business rescue. This involves the company resolving *suo moto* to place itself voluntarily under supervision. Hence, the procedure has been described by scholars and practitioners as 'voluntary business rescue'.[952]

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[945] SACA 2008, ch 6.
[946] SACA 2008, s 133.
[947] SACA 2008, s 140. This is a major departure from the "debtor-in-possession" model under chapter 11 of the US Bankruptcy Code. See Richard Bradstreet, 'The Leak in the Chapter 6 lifeboat: Inadequate Regulation of Business Rescue Practitioners may adversely affect lenders' willingness and the growth of the economy' (2010) 22 SA Mercantile Law Journal 195, 199 –212.
[948] SACA 2008, s 142.
[949] SACA 2008, s 150 – 151.
[950] SACA 2008, s 151 – 152; *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others, Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events and Exhibitions (Pty) Ltd and Others (2011/35199, 2011/24545)* [2012] ZAGPJHC 12; 2012 (3) SA 273 (GSJ); [2012] 2 All SA 433 (GSJ) (17 February 2012),15.
[951] SACA 2008, ss 128 - 131. See Farouk HI Cassim, 'Business Rescue and Compromises'in Farouk HI Cassim and others (eds), *Contemporary Company Law* (3rd ed, Juta 2022).
[952] Mona Oruji, Mohammad Hassanzadeh and Mohammad Feizi, 'The Impact of Relationship Marketing and New Product Features on Customer's Perceptions and the Intention of Their Acceptance in Life and Investment Insurance' (2014) 3 Kuwait Chapter of Arabian Journal of Business and Management Review 406, 72; Maleka

Alternatively, the in-court route manifests in two instances: on the one hand, it involves affected persons applying to the court for the company to be placed under business rescue. This process begins with the party seeking to place the company under business rescue, applying to the court to grant an order placing the company under business rescue. On the other hand, based on section 131 of SACA 2008, in certain instance and even in the course of liquidation, the court can order a company to be placed under business rescue based on the application of the party's concern.[953] In both in-court situations, the process does not commence at the instance of the company in question but on an involuntary basis. For this reason, traditional academics and lawyers have described this process as an 'involuntary'[954] or 'compulsory'[955] business rescue. So, what is the procedure for business rescue? The specific procedure, as well as the provision for commencing business rescue, depends on the route or model of entry which will be discussed below.

By the provisions of SACA 2008, the board of directors of a financially distressed company can decide to place the company under supervision;[956] or an affected person can apply to the court to put the company into business rescue.[957] The board of directors' decision is made through a resolution, and the procedure does not require additional resolution of the members of the company in a general meeting.[958] This is in contrast with the administration procedure under English law which requires the majority of either the company in a general meeting or the directors of the company to pass a resolution .[959] Despite the fact that the SACA 2008 used the terminology "company resolution", only the board of directors are expected to pass a resolution to place the company under voluntary business rescue when the company is financially distressed.[960] This statement appears to be straightforward at face value, but could present conceptual and even practical challenges, given the history of business rescue in SA.

Femida Cassim 'South African Airways makes an emergency landing into business rescue: Some burning issues' (2020) 137(2) SALJ 201, 202; Daniel Hart and Lillian Mello, 'A Beginner's Guide to Business Rescue in South Africa' (*www.fasken.com* 26 April 2022) <https://www.fasken.com/en/knowledge/2022/04/26-a-beginners-guide-to-business-rescue-in-south-africa> accessed 29 February 2024.

[953] SACA 2008, s 131(6).

[954] Hart and Mello (n 951).

[955] Cliffe Dekker Hofmeyr, 'Business Rescue 101 – an Introduction - Part 1' (*www.cliffedekkerhofmeyr.com*14 April 2022) <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/dispute/business-rescue-newsletter-14-april-Business-Rescue-101-An-introduction-Part-1.html> accessed 29 February 2024.

[956] SACA 2008, s 129.

[957] SACA 2008, s 131; Farouk HI Cassim, 'Business Rescue and Compromises' in *Contemporary Company Law* in (Juta 2022) ch 18.

[958] SACA 2008, s 129.

[959] SACA 2008, s 129; IAct 1986 Sch B1 para 22. See also The Insolvency (England and Wales) Rules 2016, Chapter 4 r 3.23(1).; *Minmar (929) Ltd v Khalastchi* [2011] EWHC 1159 (Ch).

[960] Anneli Loubser, *Some Comparative Aspects of Corporate Rescue in South African Company Law* (PhD Thesis, University of South Africa 2010) 50.

Firstly, the phrase 'financially distressed' seems to have been introduced to settle the controversy over when a business rescue can be initiated. Secondly, the statement does not seem to cover instances when a court may order that a company be put into business rescue during liquidation proceedings. These two issues are discussed below.

Under the previous SACA regime of 1926, rescue can be initiated due to the 'inability to pay debts or meet obligations'. However, the law did not define this term, leaving room for academics to speculate as to the extent a company can be *in mora* (default) before the procedure can be triggered.[961] The introduction of the term 'financially distressed' appears to have quelled the uncertainty under the previous regime. Section 128(1)(f) of SACA 208 defines 'financially distressed' as (i) a state in which a company is reasonably unlikely to offset all its debt when due and payable immediately within the next six months; or (ii) a company that appears to be reasonably likely to be insolvent immediately within the next six months.[962] The above provision implies that unlike judicial management, where there is no specificity as to the extent of *mora*, business rescue cannot be applied when the company is actually insolvent; "It must either be unlikely that the debts can be repaid within six months or that there is the likelihood that the company will go insolvent within the ensuing six months".[963] In addition to this provision, section 4 of SACA 208 outlines the basis for assessing the company's ability to meet its obligations - whether long or short-term, through the "solvency and liquidity test".[964] Whilst the solvency test helps protect creditors from debt overburden and asset stripping, the liquidity test ensures the timeous discharge of debt responsibility. Furthermore, while the former requires an examination of the company's balance sheet to determine if the assets of the company exceed its liabilities (the balance sheet test) the latter requires a cashflow assessment to determine as to whether the company can offset its debts when they are due. Consequently, when a company is experiencing either cash flow or balance sheet insolvency, it behoves on the directors of the company to commence a business rescue.

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[961] Philip M Meskin, *Henochsberg on the Companies Act* (4th edn, Butterworths 1985) 15,755; Philip M Meskin and Jennifer A Kunst, *Insolvency Law* (Butterworth-Heinemann 1984) 2 2-14(2); Anneli Loubser, 'The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (Part 1)' (2010) 2010 Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg 501, 143, 235.

[962] SACA 2008, s 128(1)(f).

[963] *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another* (19075/11, 15584/11) [2012] ZAWCHC 33 (18 April 2012) para11.lj

[964] Kathleen Van, 'The Solvency and Liquidity Approach in the Companies Act 2008' (2009) 2009(2) Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg 224; Richard S Bradstreet, 'Should Creditors Rely on the Solvency and Liquidity Threshold for Protection? A South African Case Study' (2015) 59 Journal of African Law 121, 133-136.

That said, the second issue that the statement presents is the failure to acknowledge the discretionary power of the court to order that a company be put into business rescue during liquidation proceedings. In certain circumstances, the court can order that rather than continue liquidation proceedings,[965] business rescue proceedings should be commenced. This can be done when an affected party requests for the court to interpret section 131(6) of SACA 2008.[966] In *Richter v ABSA,*[967] the court held that an application for the commencement of business rescue can be made at any time before the completion of liquidation proceedings. However, this does not mean that the liquidator or affected persons will have no say in whether the court should grant the application.[968] In fact, this can only be done in exceptional situations. Although this process is like the other in-court processes, the timing of the applications is different. While an application regarding the former can only be initiated prior to liquidation proceedings by virtue of section 131(4) of SACA, an application regarding the latter can be done during liquidation proceedings by virtue of section 131(7).

In summary, although a company resolution is required to commence business rescue under section 125 of SACA 2008, such resolution may not be necessary if the company is already undergoing any liquidation proceedings - by or against it.[969] In addition, business rescue can only be initiated by the court if liquidation proceedings have commenced. The application can either be brought by an affected person following the procedure under section 131 of SACA 2008 or during liquidation proceedings.[970] Nevertheless, the role of the court in both processes is the same - the court acts as a facilitator of the rescue process, and the process only takes effect when the order is made. This is why some commentators have described both procedures as 'court-ordered business rescue'.[971] However it is submitted, with respect, that the procedures are and should not be the same; while the former is governed by section 131(4) and covers

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[965] For the meaning of "liquidation proceedings", see the cases of *ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2014 (3) SA 90 (GP) and *ABSA Bank Ltd v Summer Lodge (Pty) Ltd* 2013 (5) SA 444 (GNP); cf *Richter v Absa Bank Limited* (20181/2014) 2015 ZASCA 100 and *GCC Engineering (Pty) Ltd and Others v Maroos and Others* 2019 (2) SA 379 (SCA).

[966] Section 131(6) of SACA 2008:
"If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), [for business rescue] the application will suspend those liquidation proceedings until—
(a) the court has adjudicated upon the application; or
(b) the business rescue proceedings end, if the court makes the order applied for."

[967] 2015 (5) SA 57 (SCA).

[968] Van Staden NO v Pro-Wiz Group (Pty) Ltd 2019 (4) SA 532 (SCA). The liquidator continues to be in control until the court rules that on the application and a BRP is appointed. See *Jansen Van Rensburg NO v Cardio Fitness Properties (Pty) Ltd and Others* (46194/13) [2014] ZAGPJHC 40 (4 March 2014).

[969] SACA 2008, s 129(2)(a); O*akdene* (n 949) 13.

[970] SACA 2008, ss 131(4) and 131(7).

[971] H Stoop, 'When Does an Application for Business Rescue Proceedings Suspend Liquidation Proceedings?: Notes' (2014) 47 De Jure Law Journal 329.

applications prior to the commencement of liquidation proceedings, the latter is covered by section 131(7) can only be initiated during liquidation proceedings.

4.5 Effect of Business Rescue Proceedings

When a company is placed under business rescue - whether voluntarily or involuntarily - no legal proceeding can be commenced or continued against the company without the written consent BRP sought and obtained; and with the leave of the court.[972] This includes proceedings in any forum or action for the enforcement of proprietary rights against the company or in relation to any property belonging to or in possession of the company.[973] The moratorium applies automatically; and it is designed to give the company breathing space whilst the BRP formulates a business rescue plan to rescue the company in line with the objective of the rescue – to protect the company and return it to the state of a going concern.[974] However, the provision of section 133(1) of SACA 2008 does not cover criminal proceedings against the directors of the company or the company itself.

Closely related to the moratorium is the way creditors are treated during business rescue. Although the moratorium freezes the rights of creditors in debt enforcement, creditors have the right to influence the decisions of the company regarding the regulation of its affairs, including voting to either approve or reject the business rescue plan.[975] In this regard, the creditors have similar rights and powers as the employees of the company as they can only play advisory roles or act as 'watchdogs' over the entire process, yet in certain situations, they can become joint decision-makers in the process.[976] The only difference in the treatment of creditors is the fact that during the process, the creditors act in the form of a committee while employees are represented by the trade union.[977] Similarly, creditors have the right to vote for the business rescue plan, which is exercised based on the value of the amount owed by the company.[978] Nevertheless, the employees are regarded as preferred unsecured creditors with respect to

[972] SACA 2008, s 133(1).
[973] ibid, s 133(1)(a) and (b).
[974] SACA 2008, s 133; Cawekazi Jijana, Nishika Chetty and Anis Mahomed Karodia, 'Investigating the Nature, Purpose and Effectiveness of Business Rescue in South Africa: Chapter 6 of Companies Act 71 of 2008 as Amended' (2016) 4 Singaporean Journal of Business Economics and Management Studies 37.
[975] Farouk Cassim and Maleka Femida Cassim, *Contemporary Company Law* (2nd edn., Juta 2012) 902.
[976] David Burdette, Tronel Joubert, Stefan van Eck, 'Impact of Labour Law on South Africa's New Corporate Rescue Mechanism' (2011) 2(1) International Journal of Comparative Labour Law and Industrial Relations 65, 87.
[977] Cawekazi Jijana, Nishika Chetty and Anis Mahomed Karodia, 'Investigating the Nature, Purpose and Effectiveness of Business Rescue in South Africa: Chapter 6 of Companies Act 71 of 2008 as Amended' (2016) 78.
[978] ibid.

unpaid debt prior to the commencement of the business rescue despite the provisions of section 144 of SACA 2008.

Business rescue also leads to the protection of employees' rights. The rights of employees during business rescue depend on their employment. The status of employees who were contracted prior to the commencement of business rescue proceedings remains as prescribed by the employment contract except with regard to changes due to attrition in the ordinary course of the business, or subsequent agreement executed between the company and the creditor concerned in accordance with various labour laws.[979] Also, by virtue of section 136(1)(b), the retrenchment of employees pursuant to the business rescue plan must be done in accordance with extant labour laws.[980] However, it is important to reiterate that employees are regarded as preferred unsecured creditors with respect to unpaid monies which have become due prior to the commencement of the business rescue process.[981] However, any debt that becomes due and payable after the business rescue process begins shall be deemed post-commencement finance (PCF).

Furthermore, business rescue impacts the obligations under the company's contract. The company's obligations under any agreement between the company and any party at the commencement of the proceedings or that will become due in the course of the proceedings, may be suspended in its entirety or partially or subject to any condition. This can be done by the BRP during the business rescue proceedings following conditions prescribed under section 136(2)(a) of SACA 2008 or by application to the court under section 136(2)(b) of SACA 2008 when it is just and reasonable for the court to suspend such obligation in its entirety, or partially, or subject to any condition. The point to note is that SACA 2008 protects the company from contractual obligations pursuant to any existing contract at the commencement of the business rescue proceedings by giving the BRP the power to put a pause or withdraw on behalf of the company from any contractual obligation that will adversely affect the rescue process.[982] However, when an agreement is affected either by way of withdrawal or a hold on enforcement, an action can arise in favour of the adverse party, and the damages claimed by such a party will be paid based on the agreement in the business rescue plan.[983]

Finally, business rescue affects proprietary rights. When a company is placed under business rescue, there is a restriction on the powers of the company to deal with its property. The ability

[979] SACA 2008, s 136(1)(a); cf SACA 2008, 136(1)(b).
[980] Labour Relations Act 66 of 1995, s 189.
[981] SACA 2008, s144.
[982] SACA 2008, s 136.
[983] SACA 2008, s 136(3).

of the company to dispose of the property is restricted to transactions that occur in the ordinary course of its business or *bona fide* transactions for value without notice and approved by the BRP, or a transaction that forms part of the business rescue plan.[984] The whole idea here is to prevent the depletion of the company assets and give the distressed company an opportunity to control key assets of the company required to keep the business running so that no one will be allowed to exercise their rights over any property under lawful possession of the company without prior assent from the BRP.

Although the company's assent is required, the BRP cannot unduly withhold such assent.[985] However, where a company under business rescue intends to deal with an asset over which a creditor's interest applies, the company shall require prior notice from the creditor affected unless the sale will completely discharge the interest of the creditor affected.[986] When such a sale is made, the creditor's debt must be settled promptly, or a security in lieu of the proceeds required to satisfy the debt must be provided.[987]

The impact of the Business rescue procedure on the resolution of corporate distress in SA since the enactment of Chapter 6 of SACA 2008 can be examined from several isometrical prisms, including the rate of application for business rescue and implementation. Although it is acknowledged, without a detailed survey of the complexities of the business rescue process, that the success of business rescue can hinge on several factors. The statistics indicate without hesitation a lack of consistency. The latest statistics from the CIPC indicate an increase in the number of active business rescue proceedings between 2011/2012, when business rescue was introduced in SA, to 2022/20123, and when the report was released.[988]

However, the data shows a marginal decline in the overall total of business rescue proceedings between 2016/17 and 2022/2023. Specifically, the data shows 4,599 cases of business rescue proceedings within the period covered. About 585 of these cases, representing 13% of the total business rescue proceedings, ended in liquidation. Since 2019/2020, the number of companies going into liquidation has been decreasing despite the increase in the number of cases set aside and the number of active business rescue proceedings within that same period.

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[984] SACA 2008, s 134(1)(c).
[985] ibid.
[986] SACA 2008, s 134(3).
[987] *Energydrive Systems (Pty) Ltd v Tin Can Man (Pty) Ltd and Others* 2017 (3) SA 539 (GJ).
[988] CIPC, 'Annual Report 2022/23' (*www.cipc.co.za,* 31 August 2023) <https://www.cipc.co.za/wp-content/uploads/2023/10/29-September-2023-CIPC-Annual-Report.pdf> accessed 27 August 2024.

4.6 Conclusion

This chapter has examined corporate rescue models in select-African jurisdictions. Part I examined the Kenyan model, and Part II examined the South African model. The analysis above shows that Kenya and South Africa have adopted a pro-rescue culture focused on saving financially distressed companies from liquidation. The Kenyan model adopted debtor-in-possession and management displacement tools similar to the UK model. Similarly, SA has adopted a corporate rescue model that shares certain features with most modern insolvency regimes, not the least of which is a moratorium and the professionalisation of insolvency practice. Regardless of the route, a business rescue proceeding is conducted under SACA 2008. The main effect is the appointment of a BRP to control the business and supervise the company's affairs with a view to rehabilitating the company. In this regard, the business rescue procedure in SA is just like the US debtor-in-possession model, as the company remains in possession.[989] However, the rescue regimes are significantly different. Unlike the US model, where the incumbent management remains in control, SA adopts a "management displacement" model as the BRP displaces the incumbent management and takes over control of the company.[990] Having examined the corporate rescue models in Nigeria, Kenya, and South Africa in Chapters 3 and 4, the task ahead is to evaluate and assess CAMA 2020 based on best practices. Considering the criteria for an effective and efficient insolvency regime under the UNCETRAL legislative guide, the analysis here - and as shown in Chapter 5 - indicate that Kenya and South Africa's insolvency statutes meet the key objectives and therefore are effective in resolving insolvency.

[989] Patrick C. Osode, Judicial Implementation of South Africa's New Business Rescue Model: A Preliminary Assessment (2015) 4 (1) PENN. ST. J.L. & INT'L AFF 459, 464.
[990] Gerard McCormack, *Corporate Rescue Law: An Anglo-American Perspective Gerard McCormack* (Edward Elgar Publishing Ltd, 2008) 80-83, 152-54; Farouk Cassim and Maleka Femida Cassim, *Contemporary Company Law* (Juta 2012) 861, 866.

5 CHAPTER 5: Evaluative Assessment of CAMA 2020

5.1 Overview

The previous two chapters discussed corporate rescue in Nigeria, Kenya and South Africa. While Chapter 3 examined Nigeria's model of corporate rescue, Chapter 4 examined Kenya and South Africa's models. The discussions in these chapters showed the significant difference in the corporate rescue models of these countries. This chapter balances the discussions in the earlier chapters. The chapter further evaluates the common themes and developments in the corporate rescue policies of these jurisdictions. The purpose is to provide a comparative context to the discussion on corporate rescue in Nigeria. As with the previous chapter, the aim is to analytically examine the extent to which CAMA 2020 facilitates the effective and efficient rescue of financially distressed companies in Nigeria. The criteria for the comparison are based on the key objectives of an effective and efficient insolvency regime under the UNCITRAL Legislative Guide on Insolvency Law. These criteria are not only used as a basis to assess CAMA 2020 but to provide further context to answering the core question.

5.2 Common Themes and Development in Corporate Rescue Policy

It has been argued that a modern corporate insolvency regime must include statutory provisions that seek to provide a "comprehensive corporate rescue model". A comprehensive corporate rescue model must have a framework designed to achieve business rescue and corporate rescue in general.[991] This type of model is typically intended to capture the going concern value of the company, but it is not the wholly philosophical or perhaps legislative reason for adopting an insolvency framework. Such a framework must include tools designed to ensure the survival of the whole or part of the company or the preservation of the company's business or assets.[992] To assist in the establishment of an efficient and effective insolvency regime to address financially distressed companies, the UNCITRAL legislative guide on insolvency law provides international standards and best practices for developing national insolvency laws that directly influence the design of corporate rescue tools.[993] Part one of the legislative guide sets out nine

[991] Bo Xie, *Corporate Rescue – the New Orientation of Insolvency Law* (Edward Elgar Publishing Limited 2016) 5.
[992] ibid.
[993] UNCITRAL Legislative Guide (n 133).

key objectives and structures that an effective and efficient insolvency regime should focus on achieving.[994] These objectives are examined in the context of the research below.

5.2.1 Creating Market Certainty

The first objective of a corporate rescue regime under the UNCITRAL Legislative Guide is the provision of certainty in the market to promote economic stability and growth.[995] In this regard, a country is required to adopt a model that seeks to elevate corporate efficiency and restructuring of viable businesses and the transfer of assets from the distressed company to a third-party company. Both the laws and the institutions must perform their functions in this regard with a view to creating market certainty and ensuring stability and growth in businesses. In this regard, the CAMA 1990 regime will not pass this test. As previously discussed, the options available for distressed companies under CAMA 1990 were winding up, receivership, and arrangement and compromise procedures. These tools do not enhance certainty in business, so overall, they inhibit economic growth and stability.

However, CAMA 2020 provides formal rescue procedures such as CVA and Administration, which promote the rescue of companies and the restructuring of viable businesses. It also provides moratorium provisions to enhance market certainty and support business stability. The Kenyan and South African statutes also have corporate rescue models that prevent distressed companies from winding up, in addition to a moratorium.[996] This approach provides economic certainty and economic growth. Consequently, all three models promote the rescue and restructuring of companies, which in turn saves jobs and ensures market stability and sustainability in the respective jurisdictions.

5.2.2 Maximising asset value

Another important objective that an insolvency regime must seek to promote corporate rescue culture, is the maximisation of the value of assets of the distressed company.[997] While the piecemeal sale of a company's asset by a liquidator depletes both the assets and the going concern value of the company, the IP or BRP ensures the sustainability of the going concern

[994] ibid 9.
[995] ibid 10.
[996] Jonathan Rushworth, 'A Critical Analysis of the Business Rescue Regime in the Companies Act 71 of 2008: Business Rescue: Part III' (2010) 2010 Acta Juridica 375; Richard Harney, Vruti Shah & Joyce Mbui, 'When Practice Meets Law: Review of the Insolvency Legislative Framework in Kenya' (2021) 15 Insolvency & Restructuring Int'l 47.
[997] ibid.

by maximising the value of the company for the creditors. In addition, the provision of a moratorium provides another layer of support and cover for distressed companies to continue business during the rescue process or pending the adoption of the rescue plan.

Moreover, the moratorium gives the company time to negotiate post-commencement finance to fund the rescue process and minimise incidents of insolvency. The effect is streamlined, such as the CVA process which reduces time and expense, and encourages early intervention from the company to preserve the value of the business and provide a clear and predictable rule.[998] What is more, by making provisions for rescue financing and moratorium, in some cases under CAMA 2020, to prop up the rescue tools under the respective statute, the rescue models in all three jurisdictions incentivise companies to pursue rescue in a way that maximises the value of the company's assets. This leads to a better outcome for the creditors of the company, as a whole.[999] In this respect, CAMA 2020 is similar to the Kenya and SA model because it maximises asset value through the preservation of going concern value, and a structured asset disposition procedure in the event that the rescue is not achievable.[1000]

5.2.3 Balancing liquidation and reorganisation

Closely related to the need to maximise the value of the assets of the company is the need to find a balance between liquidation and reorganisation.[1001] Nigeria's corporate rescue regime not only offers liquidation as a means of debt collection but also provides a mechanism that gives distressed companies whose businesses are still viable, the opportunity to preserve the value of the business by way of corporate rescue. While the creditors usually prefer the former, companies prefer the latter. In practice, both groups present competing interests, scuffling for priority in the event of insolvency.

To balance these competing interests, CAMA 2020 provides two alternative tools to liquidation. On the one hand, the CVA can be used to reorganise a financially distressed company under CAMA 2020. On the other hand, administration gives the company an opportunity to rescue, or an opportunity for creditors to get a better outcome than in liquidation. The fundamental point regarding administration is that the law provides for the appointment of a BRP who will act as the administrator and independently decide whether to liquidate or rescue the company. To balance liquidation and reorganisation, the administrator's proposal for a

[998] CAMA 2020, s 434.
[999] UNCITRAL Legislative Guide 11.
[1000] KIA 2015, s 522-531; SACA 2008, s 128-154.
[1001] CAMA 2020, ch 28.

rescue plan considers the effect and potential for reorganisation on the current financial position of the company.

In balancing the decision to liquidate the company with the decision to reorganise the company, the BRP will consider the implication of the decision on the promotion of entrepreneurship and the protection of employees. The Nigerian rescue model also considers the importance of debtors in the economy by introducing netting provisions to reduce credit settlement and additional risk[1002] and post-commencement financing, which gives the debtors the liquidity to continue the business so that the creditors can maximise return on investment.[1003] The Kenyan model is similar to the Nigerian model in this sense; the only difference lies in the approval process. While the Kenyan and Nigerian model considers the effect of the current financial position of the company with the need to maximise creditor returns, the SA model depends on the approval of the creditors and stakeholders - and BRP will not only consider the interest of all affected parties but balance that same in the reorganisation plan.[1004]

5.2.4 Equitable treatment of creditors

The Nigerian corporate rescue framework ensures the equitable treatment of similarly situated creditors by ranking a company's debt in *pari-passu* (side by side) among similarly situated debt after making preferential payment.[1005] In this sense, CAMA 2020 retained the provisions of CAMA 1990, ranking preferential payments equally.[1006] When the assets cannot sufficiently offset the company's debts, preferential debts abate in similar proportion and rank below the winding-up expenses.[1007] As it relates to corporate rescue, the Administrator under CAMA 2020, like the Administrator under KIA 2015, is partly appointed to ensure fair and equitable treatment of creditors by proposing a rescue plan that benefits the creditors as a whole. Similarly, the BRP's Business rescue plan must include debt restructuring or a reorganisation of the operations of the company, to yield a better outcome for creditors as a whole, compared to liquidation.[1008]

[1002] CAMA 2020, ch 28.
[1003] UNCITRAL Legislative Guide 11.
[1004] KIA 2015, s 522-532; SACA 2008, s 128-154.
[1005] CAMA 2020, s 657.
[1006] CAMA 2020, s 657(4)(a).
[1007] Kubi Udofia, 'Revisions to Insolvent Liquidation Framework by CAMA 2020: The Refinements and the Flaws – THISDAYLIVE' (www.thisdaylive.com8 September 2020) <https://www.thisdaylive.com/index.php/2020/09/08/revisions-to-insolvent-liquidation-framework-by-cama-2020-the-refinements-and-the-flaws/> accessed 28 May 2024.
[1008] SACA 2008, s 128-154; contra KIA 2015, s 522-531.

The law also considers priority ranking among creditors in the event of liquidation, ranking secured creditors above all other creditors, including preferential creditors or any other debt, including winding-up expenses, and ranking equity holders such as shareholders last.[1009] Amongst the secured creditors, the fixed charge holders rank above the floating charge.[1010] The provision in this regard is similar in all three jurisdictions, with slight differences. Suffice it to state that there is equitable treatment of creditors ranked at the same level in collective proceedings across the different jurisdictions, there is a lack of uniformity in the ranking between secured creditors and post-commencement creditors.

Under the SA model, employees who render service during the rescue process are ranked in priority over other creditors, but the question is whether post-commencement financiers can be classified as creditors. From a careful reading of the provision of Chapter 6 of SACA 2008, post-commencement financiers may not be considered creditors.[1011] However, to promote the rescue of businesses, section 129 of SACA 2008 specifically gives post commencement financers priority over any further resources rented to the business, during bankruptcy.[1012]

5.2.4.1 Treatment of creditors and post-commencement financing

CAMA 2020 does not specifically make provision for rescue finance or post-commencement financing in Nigeria.[1013] Although section 537 of CAMA 2020 alludes to post-commencement finance, which is the finance provided to a distressed company after it begins insolvency procedures, there is no clarification of what it entails in a practical sense. Similarly, there is no judicial certainty on the status of post-commencement creditors. Therefore, in the absence of judicial pronouncement on the subject, the position of commencement financers in the insolvency process cannot be ascertained. Idigbe argued on the basis of the provisions of section 537 of CAMA 2020, which covers charges and liability of administrators upon termination of the process, that post commencement financers rank in priority over the

[1009] CAMA 2020, s 657(4)(b).
[1010] CAMA 2020, s 204. Order of priority: secured creditors; liquidation expenses; preferential creditors; unsecured creditors; and shareholders. See CAMA 2020, s 657.
[1011] *Wescoal Mining (Pty) Ltd & Another v Mkhombo NO & Others* (2023-079991) [2023] ZAGPJHC 1097 (2 October 2023).
[1012] Dr Surendran Pillay, Dr Rajendra Rajaram and Kajal Ramnanun, 'Ascertaining the Impact of Post-Commencement Finance on Business Rescue in Kwazulu-Natal, South Africa' (2020) 6(3) The Journal of Social Sciences Research 236, 237.
[1013] IINSOL INTERNATIONAL, 'Comparative Review of Approaches to "Rescue" or "Debtor- In-Possession" (DIP) Finance in Restructuring and Insolvency Regimes' <https://www.mourant.com/file-library/media---2022/comparative-review-of-approaches-to-rescue-or-dbtor-in-possession-finance-in-restructuring-and-insolvency-regimes---cayman-islands.pdf> accessed 22 May 2024.

Administrator's cost.[1014] The premise for this argument is the assumption that, although the administrators cost ranks high in priority, the post-commencement finance is not part of it.[1015] The administration costs include the remunerations and expenses of the administrators, and monies paid out of the floating charge assets.[1016] To the extent that post-commencement financing is distinct from the administrator's cost, it is argued that CAMA 2020 prioritises such debts over claims regarding the Administrator's cost, remuneration and expenses.[1017] That is to say, post-commencement creditors or debts are prioritised over the cost of administration. However, it is important to recognise the dangers of prioritising post-commencement debt during insolvency, because this has the potential to dilute the residue of the asset poll and result in over-investment.[1018]

Apart from the process of distribution during insolvency, the policy of equitable treatment under CAMA 2020 can also be seen in the application of moratorium and in the voting process. For example, the moratorium on debt enforcement applies to all debt under CAMA 2020. Section 717 of CAMA 2020 prevents winding up petitions or debt enforcement actions against the company or its assets if such a company has commenced an arrangement and compromise processes. The moratorium applies to all creditors (secured and unsecured). Similarly, creditors in similar positions have equal rights to notice and attendance of creditors' meetings and voting. Overall, CAMA 2020, much like its equivalent under SACA 2008 and KIA 2015, provides an equitable treatment of creditors in the event of insolvency. Despite the uncertainty in the respective statutes, it is argued that rescue under both statutes seeks to provide a fair and equitable treatment of creditors based on the contract between such creditors and the debtors.

5.2.5 Create timely, efficient and impartial resolution of insolvency

The insolvency provisions under CAMA 2020 provide a timely, efficient and impartial resolution of insolvencies.[1019] Regarding corporate rescue, although the actual timeline for completing the CVA varies on a case-by-case basis, it appears that the process can be completed between six and eight weeks. However, this could take a longer time in certain

[1014] ibid 72.
[1015] Sofia Ellina and David Milman, 'Greensill Capital and the Use of the Administration Process in UK Company Law: An Incomplete Case Study' (2024) 17(4) Law and Financial Markets Review 257-271.
[1016] ibid 17.
[1017] ibid. CAMA 2020, s 537(2).
[1018] Sofia Ellina, '(Re)Considering the Position of Corporate Rescue Finance for Distressed Companies under English Insolvency Law' [2024] Journal of Business Law (Upcoming/ In press) <https://www.research.lancs.ac.uk/portal/services/downloadRegister/415751818/Rescue_finance_JBL.pdf> accessed 30 October 2024.
[1019] UNCITRAL Legislative Guide 11.

circumstances.[1020] In addition, the process of resolving insolvencies using the CVA is quite flexible, so directors, administrators or liquidators have the discretion to make a CVA proposal when it is necessary.[1021] That is to say, CAMA 2020 gives room for directors or the company management to utilise the CVA in a timely manner. The timing of the CVA application is in most cases, as good as the tool itself. It has been argued that failure to seek early assistance in the rescue process can easily lead to failure in the rescue process.[1022] In spite of the wrongful trading rules that incentivise directors to be proactive in intervening to save the company, directors must act in a timely manner to achieve successful rescue.[1023] However, even though the process under CAMA 2020 involves less court participation, it exposes the CVA to the risk of delay. In this regard, the CVA under CAMA 20020 may not be entirely shielded from undue disruption to business, especially from secured and preferential creditors who may torpedo the process by exercising their right to appoint administrators.

Similarly, the practice of applying to the court to summon the meeting of creditors under the Nigerian system may not just lead to delays in the CVA process, but is contrary to section 435(1) of CAMA 2020, which merely requires the nominee to submit a report and summon the meetings. The implication in a country like Nigeria with a slow justice delivery system is that the process may be delayed. For example, in the CVA for the *Tourist Company Nigeria Plc case*,[1024] the nominee was notified of the proposal for a voluntary arrangement on 30th August 2021. The nominee prepared the report on 15th September 2021 and filed it along with the *ex-parte* originating summons before the court on 20th September 2021 but got the order to summon separate meetings of the company and creditors on 15th November 2021.[1025] In summary, the process from when the nominee was notified of the proposal for a CVA to when the nominee was granted the order to submit the report, took eleven weeks (two months and sixteen days). This cannot be regarded as a timely and quick way of resolving corporate distress - the process in this case could have been completed within 28 days if the provisions of section 435(2) were adhered to. In addition, there is no specific provision under CAMA 2020 that provides a specific duration to complete the administration process; there is a prescribed

[1020] Kon M. Asimacopoulos and others, 'Debenhams' CVA Upheld in Major Test Case | Publications | Kirkland & Ellis LLP' (*www.kirkland.com*24 September 2019) <https://www.kirkland.com/publications/kirkland-alert/2019/09/debenhams-cva-upheld-in-major-test-case> accessed 22 September 2024.
[1021] CAMA 2020, s 434.
[1022] Sofia Elina, Administration and CVA in corporate insolvency law: pursuing the optimum outcome (2019) 30(3) I.C.C.L.R. 180, 182.
[1023] CAMA 2020, ss 658 and 659. See Okubor Cecil Nwachukwu, 'Top Core Elements of the Insider Trading and Market Manipulation Offences in Nigeria and South Africa' (2020) 47(4) Commonwealth Law Bulletin 719.
[1024] Suit No: FHC/L/CS/ 1250/2021
[1025] ibid 3 [Lifu PJ].

timeline for various stages for both CVAs and administration in Kenya and Nigeria. However, it appears that the timeline for completing the Administration process varies in both jurisdictions and will be decided on a case-by-case basis. In Nigeria, the administration process will automatically terminate after twelve months from the date on which it takes effect – except for when the court extends the period of administration.[1026] There are also additional timelines in between the process, such as the fourteen-day timeline for publishing the notice of appointment and the sixty-day timeline for the administrator to prepare and submit a copy of the schedule of the company's assets to the appointing authority.

SACA 2008 also have specific timeline for various stages in the business rescue process. For example, the timeline for completing this process is three months from the beginning to the end of the process - except for extensions granted by the court.[25] [1027]Although the timeline for completion of the rescue process under SACA 2008 is relatively quicker compared to the process under CAMA 2020, the process in both jurisdictions is efficient since it is susceptible to elongation of time. In practice, this can be done if the BRP can convince the court that the rescue process is on course and the application for extension of time is not merely to filibuster for more fees. In this case, the BRP is expected to be impartial and ensures that the extension is in the best interest of the company and its creditors - so that if a company is not financially viable, there will be no need to extend the mortality period by attempting to rescue the company.

5.2.6 Preserving insolvency estate for equitable distribution

Under the previous regime of CAMA 1990, insolvency proceedings such as receivership and winding-up were used as debt collection tools. Despite the wording of the law on receivership which opens the door for a progressive interpretation that fosters rescue, these tools are individual debt collection tools which only deplete the company's assets. However, CAMA 2020 introduced corporate rescue tools such as the CVA and Administration that could preserve the estate of distressed but viable companies, and prevent them from premature liquidation as a result of actions from individual creditors - which practically reduces the value of the pool of the company's assets.[1028] The company's directors can reorganise the company's structure through a CVA or sale of the company's business as a going concern through Administration

[1026] CAMA 2020, s 513. Although the provisions are similar in the UK, the Lehman Brothers have already lasted 15 years and are likely to continue forward until 2025.
[1027] SACA 2008, ch 6; cf SACA 2008, ss 132 and 141.
[1028] As discussed in ch 3, s 3.4 – 3.6.

procedure to preserve the insolvent estate for equal distribution among the creditors. In this case, it is important for the directors of the distressed company to intervene in a timely manner and seek a moratorium to give the debtor company breathing space, especially during an administration process. It is also important for the BRPs to properly examine the company's state of financial indebtedness and the necessary intervention, including the level of PCF required to rescue the company from immediate liquidation, and pursue rescue in a manner that maximises both the value of the business and equitable returns to the creditors of the company.

The Kenyan and SA model of corporate rescue also provides an opportunity for the preservation of assets. The moratorium on creditors' actions for debt enforcement in a business rescue proceeding, not only gives the company breathing space but enables the BRP to properly examine the state of the company's finances. Similar asset preservation mechanisms can be found in the Kenyan model, which also provides for a moratorium to accompany the proposal for a CVA, although it is not an automatic application.[1029] As with the Administration procedure in Nigeria, the BRP in a Business rescue process can suspend, vary or cancel prejudicial contracts to further preserve the going concern value of the company.[1030] This is an essential feature in both rescue models as it gives the BRP the ability to preserve the value of the company by limiting, if not outrightly cancelling, the ability to enforce any obligation that will inhibit the rescue process. By preserving the value of the company's business, the BRP will trade-off the immediate liquidation of the company to maintain the maximum value of the company. In this regard, the BRP's action can result in a fair and equitable dividend to be distributed amongst creditors in the long run.

The COVID-19 crisis encouraged many countries to strengthen their laws to preserve insolvency estates.[1031] This includes reform of insolvency laws to provide a pre-insolvency moratorium and, in some cases, the provision of a temporary moratorium on debt repayment. The introduction of a new moratorium process under CIGA 2020 and the new restructuring plan that allows debt restructuring under court approval represents a more proactive approach to preserving the insolvent estate.[1032] This approach enhances the use of corporate rescue tools and provides statutory relief for pandemic-induced distress.[1033] In the US, the Small Business

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[1029] KIA 2015, Part IX, s 620.

[1030] SACA 2008, s 136(2).

[1031] Aurelio Gurrea-Martínez, 'The Future of Insolvency Law in a Post-Pandemic World' (2022) 31(3) International Insolvency Review 385.

[1032] Clause 1 of CIGA 2020 introduced Part A1 to the IA 1986, pursuant to which a company can now obtain the new standalone moratorium. There are also protections introduced by CIGA 2020 to section 233B of IA 1986.

[1033] Antonia Menezes and Sergio Muro 'COVID-19 Outbreak: Implications on Corporate and Individual Insolvency' (*World Bank Group*, 13 April 2020) <https://pubdocs.worldbank.org/en/912121588018942884/COVID-19-

Reorganisation Act 2020 (SBRA 2020) was enacted to hasten the reorganisation process and make it less expensive, especially for small businesses.[1034] Some of these changes are still applicable in these jurisdictions post-pandemic.[1035] Most, certainly the select African jurisdictions, have yet to provide statutory reforms post-pandemic.[1036] Neither Nigeria nor Kenya and South Africa have provided a structured pre-insolvency moratorium process to enhance the rescue tools in preserving the insolvency estate. Unlike the changes under CIGA 2020, these countries only provided temporary relief measures for distressed companies.[1037] For example, the prohibition of "ipso facto" clauses, which takes effect when companies begin an insolvency process, a moratorium or a restructuring plan.[1038] Similar restriction was placed on winding-up petitions for unpaid debt due as a result of Covid-19.[1039] Although these measures have been effective in the stimulation of economic activities, boosting investors' confidence, and reducing unemployment, they do not qualify as a statutory moratorium in the way that it is conceived under CIGA 2020, and they do not have any post-pandemic effect.[1040] In Nigeria, although the Government responded to the pandemic by adopting a range of measures targeted at limiting the spread of the pandemic[1041] and preventing corporate failure, these measures were not structured as formal statutory changes to the existing corporate rescue tools. Although CAMA 2020 was enacted during the early days of the pandemic, it was not a direct response to the COVID-19-induced pandemic, and there is no provision to cover the pre-insolvency moratorium. Perhaps, the introduction of a pre-insolvency moratorium is one area that the reform in Nigeria needs to target in the post-pandemic era to strengthen the provisions on preserving the insolvency estate during distress and support the rescue of such companies.

Outbreak-Implications-on-Corporate-and-Individual-Insolvency.pdf> (accessed 20 November 2023).

[1034] Small Business Reorganization Act of 2019 (SBRA 2019) ch 11(V). The Coronavirus Aid, Relief, and Economic Security Act 2020 (CARES Act 2020) increased the debt threshold.

[1035] CIGA 2020, s 1-14.

[1036] Antonia Menezes and Akvile Gropper, 'Overview of Insolvency and Debt Restructuring Reforms in Response to the COVID-19 Pandemic and Past Financial Crises : Lessons for Emerging Markets' (Guidance Notes on the COVID-19 Washington, World Bank Group 2021) <http://documents.worldbank.org/curated/en/182341615352260595/Overview-of-Insolvency-and-Debt-Restructuring-Reforms-in-Response-to-the-COVID-19-Pandemic-and-Past-Financial-Crises-Lessons-for-Emerging-Markets> accessed 28 June 2024; Williams C Iheme and Sanford U Mba, 'A Doctrinal Assessment of the Insolvency Frameworks of African Countries in Coping with the Pandemic-Triggered Economic Crisis' (2021) 2021 Stellenbosch Law Review 306.

[1037] Williams C Iheme and Sanford U Mba, 'A Doctrinal Assessment of the Insolvency Frameworks of African Countries in Coping with the Pandemic-Triggered Economic Crisis' (2021) 2021 Stellenbosch Law Review 306.

[1038] CIGA 2020, s 14(1).

[1039] CIGA 2020, sch 10, para 1.

[1040] Davide Furceri and others, 'The Effects of Fiscal Measures during COVID-19' (2021) 2021 IMF Working Papers 1.

[1041] Chioma Dan-Nwafor et al, "Nigeria's public health response to the COVID-19 pandemic: January to May 2020." *Journal of global health* vol. 10,2 (2020): 020399. doi:10.7189/jogh.10.020399

5.2.7 Incentives for gathering and dispensing information

The penultimate objective of a corporate rescue regime under the UNCITRAL Legislative Guide is to ensure that the insolvency law is transparent and predictable - containing incentives for gathering and dispensing information.[1042] CAMA 2020 provides a framework for resolving insolvency transparently. First, it recognises BRIPAN as the professional body to certify BRP's and gives the CAC the power to authorise such practitioners.[1043] However, the commission reserves the power to recognise other professional bodies.[1044] In this regard, it is glaringly obvious that the provisions of sections 705 and 706 of CAMA 2020 are similar to the provisions of section 391 of IA 1986, which gives the UK Secretary of State the responsibility to recognise professional bodies. Yet, some academics have struggled to reach this same conclusion in their analysis of the provisions of CAMA *vis-a-vis* the provision of the IA 1986 with regards to the process of obtaining authorisation to practice as an IP in Nigeria.[1045]

A painstaking glance at the provisions on certification and authorisation of IPs under section 705 of CAMA 2020 and section 391 of the IA 1986, shows that both processes are similar. Nevertheless, the former is a more demanding process. Section 705 deals with the qualification of an IP, and section 706 gives CAC the power to recognise other certifying authorities under section 705(1)(c),[1046] thus, creating a dichotomy between certification and licensing of IPs.[1047] While the former is done by a body recognised by the CAC, the latter is done by the CAC itself. Also, section 705(1)(c) creates a paradoxical effect on the process of obtaining authorisation to practice as an IP, to the extent that the provision used the conjunction "or" to link the second sentence, it is submitted that its use is disjunctive. That means the "or" under section 705(1)(c) of CAMA 2020 is a disjunctive conjunction that presents an alternative to authorisation by virtue of certification from BRIPAN. The equivalent provision under IA 1986 recognises individuals authorised as IPs by virtue of membership of a professional body recognised by the Secretary of State for that purpose; or authorised by a competent authority to act as an IP.[1048]

[1042] UNCITRAL Legislative Guide 13.
[1043] CAMA 2020, s 705.
[1044] CAMA 2020, s 706.
[1045] Okorie Kalu and Peter Edokpayi, 'Nigeria - Insolvency/Bankruptcy - Innovations in Corporate Insolvency in Nigeria under the Companies and Allied Matters Act, 2020 – Insolvency Practitioners' (www.mondaq.com20 August 2020) <https://www.mondaq.com/nigeria/insolvencybankruptcy/1102386/innovations-in-corporate-insolvency-in-nigeria-under-the-companies-and-allied-matters-act-2020-insolvency-practitioners#_ftn14> accessed 27 May 2024.
[1046] Section 706(1) erroneously references section 705(2) of CAMA 2020 instead of section 705(1)(c) of CAMA 2020.
[1047] CAMA 2020, s 705(1)(c) and 705(1)(d).
[1048] IA 1986, ss 390 –393.

By virtue of section 392 (2) of CAMA 2020, a competent authority is: (i) a body or person designated by the Secretary of State as an IP; or (ii) the Secretary of State in any other case outside the above. In the first and second instance under section 392(2), the authority to give authorisation to practice as an IP in the UK is derived from the Secretary of State. In the first instance the Secretary of State may delegate the power to authorise to a body or person and in the second instance, the Secretary of state may exercise the power directly authorising a person to act as an IP. The implication of the provision, when considered along with sections 390 and 392 of CAMA 2020, is that there is a dual route to obtaining a practice license as an IP in the UK – that of authorisation by membership of a professional body, or a competent authority.

In comparison with the provision of CAMA 2020, it appears that CAMA 2020 fused both routes together. It recognises BRIPAN or any other body recognised by the CAC as the body authorised to certify an IP who will subsequently apply for a practice license. Unlike the UK provision, such persons will be required to apply for a license subsequently. In either case, it is obvious that an IP derives authority to practice directly or indirectly from the Secretary of State under the IA 1986 or CAC under CAMA 2020. Both provisions differ in the absence of authority to grant the practice license under CAMA.[1049]

Similarly, and more significantly, the UK model has two categories of authorisation for IPs; partial authorisation and full authorisation, and it recognises foreign practitioners.[1050] Therefore, it is submitted that while CAMA 2020 does not provide dual routes to authorising IP practice such as its counterpart in the UK law,[1051] it also did not create dual categories of authorisation.[1052] Thus, it is argued that the Nigerian model distinguishes between "certifying" and "licensing". This provides dual recognition bodies: BRIPAN and others yet to be designated; and a single licensing authority: the CAC.[1053] Hence, the Nigerian model is akin to the SA model in this regard, as it recognises the difference between the registering bodies and licensing authorities which grant licenses after registration.[1054] It appears that the Nigerian

[1049] The UK model gives Professional bodies and competent authorities the power to grant license to practice as an IP while the Nigerian model only gives BRIPAN and other bodies the power to certify. Only the CAC can license a practitioner.

[1050] IA 1986, s 390.

[1051] Uzoma Azikiwe, Festus Onyia and Mesuabari Mene-Josiah, 'Nigeria - Insolvency/Bankruptcy - Chapter 26 CAMA 2020: Insolvency Professionals, a Miscellany Issue?' (*www.mondaq.com*27 September 2021) <https://www.mondaq.com/nigeria/insolvencybankruptcy/977940/chapter-26-cama-2020-insolvency-professionals-a-miscellany-issue#_ftnref53> accessed 27 May 2024.

[1052] cf IA 1986, s 390.

[1053] cf CAMA 2020, s 708.

[1054] For example, Turnaround Management Association (TMA-SA) and South African Restructuring and Insolvency Practitioner Association (SARIPA) are all registering bodies recognised by the CIPC, which will subsequently grant the license. See CIPC, 'Step by Step Guide: Business Rescue Practitioner Licensing'

model is unique in the sense that it authorises only one professional body as the certifying authority. Furthermore, it is submitted that although the Nigerian model with regards to the regulation of IPs was adopted from the UK, it has in fact been modified to fit local circumstances - so that the practice is very much regulated and closely monitored.[1055] Given that Nigeria is just adopting the system of professionalisation of IP's practice, it makes sense to limit the number of certifying bodies so the activities of IPs can be easily monitored.

Secondly, and very important, is the collaborative role of the IPs in the rescue process. From the beginning of the rescue process, the IP is expected to collaborate with management, creditors, and other company stakeholders.[1056] For example, in an administration process, the IP ensures all affected persons are notified of the commencement of the rescue process, they notify affected persons and convene statutory meetings of the company and ensure that the rights of employees are protected. Likewise, in a CVA process, the IP, once appointed as a Nominee, will have to propose a CVA to the company's creditors; and once approved, supervises the progress of the CVA. Furthermore, the IP formulates the payment CVA proposal and presents it to the creditors for a vote. The BRP performs a similar role in a business rescue process, IPs play an important role in the rescue process; they issue notices and convene meeting of creditors and employees. In practice, whilst performing these obligations, IPs are expected to collaborate closely with the different stakeholders of the company - possibly from the pre-insolvency stage, and certainly at the commencement stage of the rescue process.[1057] They do not only collaborate with management to rescue the company from financial distress but also identify, realise, and distribute the company's assets to the creditors in accordance with relevant laws - ensuring that all creditors are treated fairly and equitably.

Information gathering and dispensation is a critical aspect of the collaborative process for IPs under CAMA 2020. Apart from the general obligation to disclose relevant information to affected stakeholders, CAMA 2020 statutorily imposes an obligation to disclose specific information regarding the debtor's situation. For example, CAMA 2020 requires the IP to announce his appointment to relevant stakeholders.[1058] The IP is required to send information regarding his work and the debtor's situation to the creditors or their committee, upon their

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<https://www.cipc.co.za/wp-content/uploads/2022/02/Business_rescue_steps_by_step.pdf> accessed 27 May 2024.

[1055] For detailed discussion on the regulation of Ips, see Wood, 'Assessing the Effectiveness of the UK's Insolvency Regulatory Framework at Deterring Insolvency Practitioners' Opportunistic Behaviour' 341-344.

[1056] Bo Xie, 'Role of Insolvency Practitioners in the UK Pre-Pack Administrations: Challenges and Control' (2012) 21(2) International Insolvency Review 85, 89-92.

[1057] Julian Franks and Oren Sussman, 'The Cycle of Corporate Distress, Rescue and Dissolution: A Study of Small and Medium Size UK Companies' (2000) IFA Working Paper FIN 306.

[1058] CAMA 2020, s 483

request.[1059] The process is similar under the Kenyan model, where the administrator is expected to send the initial report detailing the company's financial status, the reason for distress and the rescue plan - which must be shared with creditors and shareholders within sixty days.[1060] Likewise, the SA model requires the BRP to send a comprehensive business plan which includes the reason for distress and the rescue strategy, and it must be presented to the creditors and other affected parties within 25 business/working days.[1061] The BRP is also expected to provide regular updates; by doing so, the BRP does not just protect themselves but also ensures transparency in the process.[1062] What is more, information dissemination by the IP will not only incentivise stakeholders to disclose their position but also ensure stakeholders buy-in the IP's plan in order to rescue the company. To ensure that stakeholders are informed about the rescue process, CAMA 2020 requires the IP to send a copy rescue plan to all relevant stakeholders.[1063] Just as the IP is required to inform relevant stakeholders of his appointment, the IP is also required to inform the appropriate authority on cessation of office in administration.[1064] To ensure compliance, CAMA 2020 provides punitive measure by criminalising the failure to disclose this information to CAC.[1065]

To further enable easy gathering and dispensing of information, CAMA 2020 allows for flexibility in the sending of information between creditors and the IPs. For example, it requires anything, including information, to be passed on or discussed in a creditor's meeting, to be done by way of correspondence instead of convening a meeting.[1066] This innovative step of allowing correspondence between creditors and the administrators in place of meetings, is pivotal to maintaining transparency by ensuring easy access and dispensation of up-to-date information about the debtor's financial situation. It also makes it easy for the creditors to assess and determine the best outcome for the company, which invariably gives stakeholders in the insolvency proceedings the information required to supervise the insolvency process to a predictable end.

5.2.8 Recognising and establishing creditor rights and priority ranking rules

The penultimate objective of an efficient and effective insolvency framework is the recognition and establishment of the rights of existing creditors with clear priority rules for ranking

[1059] CAMA 2020, s 494(1)(b)
[1060] KIA 2015, s 522.
[1061] SACA 2008, s 150. See also pp 157 - 159.
[1062] SACA 2008, s 141.
[1063] CAMA 2020, s 486 (4).
[1064] CAMA 2020, 524(2).
[1065] CAMA 2020, s 524(3)
[1066] CAMA 2020, s 495.

claims.[1067] Under the previous CAMA regime, the position of secured creditors during insolvency was a bit uncertain as there was no clear provision that excludes assets subject to fixed charges as part of the pool of assets of the insolvent estate, and therefore which are not available to the liquidator. This lack of clarity has often led to conflict between liquidators and creditors.[1068] However, CAMA 2020 clearly establishes and recognises the rights of existing creditors, especially secured creditors, by allowing fixed charge holders to attach, execute and sequester assets covered by fixed charges prior to the commencement of the winding-up process.[1069] The Kenyan and SA models also recognise the importance of clarity in the insolvency process, and more particularly in the asset distribution process – in order to ensure fairness and enhance creditor confidence.[1070]

The recognition of netting agreements, even during insolvency, also enhances transparency and ensures predictability in the treatment of creditors under CANMA 2020.[1071] To underscore the importance of transparency further, CAMA 2020 provides rules for ranking claims of secured creditors to determine the payment order. More particularly, section 657 of CAMA 2020 provides a clear order of ranking claims - ranking all preferential payments equally and prioritising the claims of secured creditors whilst leaving equity holders at the bottom of the insolvency queue.[1072] By virtue of section 657 of CAMA 2020, the preferential creditors are creditors entitled to deductions from employees' remuneration and a company's obligations under the Pension Reform Act. These creditors are ranked higher in priority of payment after the fixed charge holder.[1073]

5.2.9 Cross-border insolvency framework

The final objective of an effective and efficient insolvency system under the UNCITRAL Legislative guide on insolvency law, is the establishment of a framework for cross-border insolvency.[1074] Establishing a framework for cross-border insolvency helps facilitate the management of insolvency proceedings across different jurisdictions. It can also facilitate a

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[1067] UNCITRAL Legislative Guide 13.
[1068] Adewale Atake and Chidiebere Ejiofor, 'TEMPLARS | Enhanced Protection for Secured Creditors in a Winding Up' (*TEMPLARS*27 February 2023) <https://www.templars-law.com/app/uploads/2023/02/Final-Enhanced-Protection-for-Secured-Creditors-in-a-Winding-Up-under-CAMA-2020-.pdf> accessed 28 May 2024.
[1069] See the proviso to section 577 of CAMA 2020; cf CAMA 1990, s 497.
[1070] KIA 2015, ss 524, 530; SACA 2008, ss 141, 150, 151.
[1071] CAMA 2020, s 721.
[1072] Adewale Atake and Chidiebere Ejiofor, 'TEMPLARS | Enhanced Protection for Secured Creditors in a Winding Up' (*TEMPLARS*27 February 2023) <https://www.templars-law.com/app/uploads/2023/02/Final-Enhanced-Protection-for-Secured-Creditors-in-a-Winding-Up-under-CAMA-2020-.pdf> accessed 28 May 2024.
[1073] Order of priority: Fixed charge holders, Preferential creditors, Floating charge holders, unsecured creditors and shareholders. See CAMA 2020, s 657.
[1074] UNCITRAL Legislative Guide 14.

regional or universal approach to resolving insolvencies. The adoption of these laws or rules on cross-border insolvency, facilitates the recognition and enforcement of foreign insolvency proceedings and the coordination of proceedings across different jurisdictions, especially where the assets of the distressed company are sited in different countries. In addition to the above, it helps to promote the share of information and investment between different jurisdictions. [1075]

Leading insolvency regimes have adopted the practice of adopting rules on cross-border insolvency that help promote the administration of cross-border insolvencies.[1076] Although the practice may vary across jurisdictions, there are two common best practices which are both transparent and cost-effective: (1) adopting the United Nations Commission on International Trade Law on Cross-Border Insolvency 1997 (UNCITRAL Model Law) - which aims to seek the harmonisation of insolvency laws across different jurisdictions; and (2) including in the local law provisions on modified universalism - which promotes the recognition/co-operation of the courts, and other stakeholders in cross-border proceedings.[1077] Under the former, while the main proceedings are opened in the country where the debtor company is incorporated, they are recognised in other jurisdictions where the assets and creditors are domiciled.[1078] Similarly, under the latter, the main insolvency proceeding in the country of incorporation of the debtor's company is recognised and enforced in other jurisdictions in so far as it is not in conflict with the laws and policies in the other jurisdiction.[1079]

Both the UK and the US have adopted the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) to govern cross-border insolvencies.[1080] In a similar vein, South Africa and Kenya have also adopted the Model Law, which was implemented through the Cross-Border Insolvency Act 42 of 2000 (CIA 2000).[1081] As it relates to corporate rescue, the

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[1075] Benhajj Shaaban Masoud, 'The Context for Cross-Border Insolvency Law Reform in Sub-Saharan Africa' (2014) 23 International Insolvency Review 181.

[1076] Felicity Deane and Rosalind Mason, 'The UNCITRAL Model Law on Cross-Border Insolvency and the Rule of Law' (2016) 25 International Insolvency Review 138.

[1077] Emmanuel Abasiubong Bassey, Uche Matthew and Jeremiah Aderinto, 'Nigeria - Insolvency/Bankruptcy - the Need for a Cross-Border Insolvency Legislation in Nigeria' (*www.mondaq.com*22 June 2022) <https://www.mondaq.com/nigeria/insolvencybankruptcy/1200680/the-need-for-a-cross-border-insolvency-legislation-in-nigeria#:~:text=One%20of%20the%20challenges%20Nigeria%20faces%20in%20relation> accessed 28 May 2024.

[1078] Scott Atkins, 'The Model Law on Cross-Border Insolvency Turns 25 | Global Law Firm | Norton Rose Fulbright' (*nortonrosefulbright.com,* May 2022) <https://nortonrosefulbright.com/en/knowledge/publications/87d4ce21/the-model-law-on-cross-border-insolvency-turns-25> accessed 28 May 2024.

[1079] ibid.

[1080] See the Cross-Border Insolvency Regulations 2006 (CBIR 2006) and Chapter 15 of the US Bankruptcy Code, respectively.

[1081] Cross-Border Insolvency Act 2000 (CIA 2000), s 2.

objective of the CIA 2000 is to promote the facilitation of the rescue of financially distressed companies, in order to protect investment and preserve employment.[1082] Thus, it recognises cross-border proceedings[1083] and facilitates cooperation[1084] with foreign courts of designated countries.[1085] In Kenya, provision for the recognition and enforcement of cross-border insolvencies was made by incorporating the UNCITRAL Model Law under section 720 of the KIA 2015.[1086] However, unlike most insolvency statutes in leading jurisdictions, CAMA 2020 neither provided for the recognition of cross-border insolvency and nor has it adopted the UNCITRAL Model Law.[1087] In the absence of any local or international legal policy on cross-border insolvency, Nigeria will have to resort to the framework on the recognition and enforcement of foreign judgment, which is limited to final and conclusive judgements from countries who have reciprocity policies with Nigeria. This means that foreign insolvency proceedings, including rescue proceedings, will not be recognised in Nigeria except when certain conditions under the law are met, including conditions of bilateral reciprocity. Similarly, foreign IPs may not be allowed to practice in Nigeria. Ultimately, Nigerian courts will not recognise and enforce CVA or Administration proceedings for foreign companies with assets in Nigeria - leading to a gap in the recognition and enforcement of rescue proceedings in Nigeria. Therefore, Nigeria will need to adopt the UNCITRAL Model Law to address this challenge in its insolvency law, in a way that guarantees the recognition of foreign IPs and the enforcement of foreign insolvency proceedings.[1088]

5.3 Evaluating core themes and practices

Table 1, below, is a tabular summary of the key objectives of an effective and efficient insolvency law under the NUCITRAL Legislative Guide. The table also indicates whether the approach to corporate rescue in Nigeria, Kenya and South Africa meets the objectives identified below. The findings show that Kenya and South Africa's insolvency statutes meet

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[1082] See Preamble to CIA 2000.
[1083] CIA 2000, s 2.
[1084] CIA 2000, s 5.
[1085] The Model Law in SA applies only to countries designated by the Department of Justice. See CIA 2000, s 2(2). See also Scott Atkins, 'The Model Law on Cross-Border Insolvency Turns 25 | Global Law Firm | Norton Rose Fulbright' (*nortonrosefulbright.com,* May 2022) <https://nortonrosefulbright.com/en/knowledge/publications/87d4ce21/the-model-law-on-cross-border-insolvency-turns-25> accessed 28 May 2024.
[1086] In Zarara Oil & Gas Company Limited (Miscellaneous Application E532 of 2021) [2021] KEHC 191 (KLR) (Commercial and Tax) (3 November 2021) (Ruling), the Kenyan High Court in a series of ruling recognised foreign insolvency proceedings, including the appointment of foreign IPs. The only qualification is that the IP needs the leave of the court to move assets out of Kenya.
[1087] Similarly, Nigeria has also not the Hague Convention on Choice of Court Agreement 2005.
[1088] UNICTRAL Model Law, ch III, arts 15 and 21

the key regulatory objectives in their design of insolvency statutes. This is evidence of regulatory compliance best practices in jurisdictions such as the UK and the US. However, the question of whether Nigeria's model of corporate rescue aligns with the objectives of the UNCITRAL Legislative Guide should be approached by comparing the provisions of CAMA 2020 with key objectives.

In addition to the earlier analysis of the objectives, it suffices to state that CAMA aligns with all but one of the objectives. As shown in the table, it does not meet the 9th objective because CAMA 2020 does not establish a cross-border insolvency framework. Despite the significant changes that have been introduced, further reform will be needed to align CAMA 2020 with best practices.

Table 1: Compliance with UNCITRAL Legislative Guide

Key Objectives	**Nigeria**	**Kenya**	**South Africa**
1. Creating Market certainty	✓	✓	✓
2. Maximising asset value	✓	✓	✓
3. Balancing liquidation and reorganisation	✓	✓	✓
4. Equitable treatment of creditors	✓	✓	✓
5. Create timely, efficient and impartial resolution of insolvency	✓	✓	✓
6. Preserving insolvency estate for equitable distribution	✓	✓	✓
7. Incentives for gathering and dispensing information	✓	✓	✓
8. Recognising and establishing creditor rights and priority ranking rules	✓	✓	✓

9. Cross-border insolvency framework	❌	✓	✓

This is not to say that CAMA 2020 cannot facilitate the effective and efficient rescue of financially distressed companies in Nigeria. It only limits the extent of the effectiveness of the procedures and its application to companies with offshore assets. However, the damage may be substantial to the economy, as it will affect the capacity of most multinational companies with offshore assets, to utilise rescue procedures under CAMA 2020. Recent development in Nigeria confirms this point. Accordingly, Segun Ajayi-Kadir, the Director General of the Manufacturers Association of Nigeria (MAN), revealed that 335 manufacturing companies became distressed and 767 shut down in just 2023 alone.[1089] This trend has snowballed into 2024, with major companies such as Heritage Bank Plc, Greif Nigeria Plc, Microsoft Nigeria, Diageo PLC, PZ Cussons PLC and Kimberly-Clark either starting liquidation or winding up proceedings[1090] or even divesting their assets.[1091] Although this thesis does not discuss the reason for the prevalence of liquidation and receivership procedures in Nigeria, it suffices to state that despite the introduction of corporate rescue procedures in Nigeria, traditional insolvency procedures are still the preferable means of resolving financial distress in the country. Several reasons may be responsible for the failure to utilise the rescue tools provided under CAMA 2020; and indeed, the lack of a cross-border framework for corporate rescue may have potentially hindered the ability of multinational companies to rescue.[1092]

Nevertheless, CAMA 2020 presents a flexible approach to insolvency law. It recognises the need to balance the going concern value against the company's liquidation value.[1093] In this regard, it aligns with the objective of corporate rescue, as it recognises that not all debtors that default in payment should be liquidated.[1094] Thus, CAMA 2020 provides an option for the liquidation of companies whose liquidation value outweighs the going concern value.[1095]

[1089] Onwuamaeze (n 13).
[1090] ibid.
[1091] Stren & Blan Partners, 'DIVESTMENT & EXIT of MULTINATIONAL COMPANIES in NIGERIA: IMPLICATIONS and RECOMMENDATIONS' (2024) <https://strenandblan.com/wp-content/uploads/2024/07/DIVESTMENT-AND-EXIT-OF-MULTINATIONAL-COMPANIES-IN-NIGERIA_ITS-IMPLICATIONS-AND-RECOMMENDATIONS.pdf> accessed 24 September 2024.
[1092] Amala Umeike, 'New Frontiers in Nigeria's Corporate Insolvency Regime: Focus on Administration' (2024) 18(1) The Journal of the IBA Insolvency Section 5.
[1093] Gerard Mccormack, *Corporate Rescue Law – an Anglo-American Perspective* (Edward Elgar Publishing 2008) 6.
[1094] UNCITRAL Legislative Guide 27.
[1095] Mccormack, *Corporate Rescue Law – an Anglo-American Perspective* 6-7.

Likewise, it also introduces corporate rescue tools such as CVAs and Administration to rescue financially distressed but viable companies.

As seen above, the practice of saving financially distressed companies is common in most jurisdictions that recognise the importance of the going concern value of the company. To achieve this objective of maintaining the going concern value of the companies, there are other common themes - often several - contained in the insolvency framework, rescue models, and practices. Some of these common themes include the debtor-in-possession practice, management displacement practice, a moratorium on debt enforcement, rules on priority ranking, cross-border recognition, the practice of netting, and the cramming down of creditors. In practice, some of these themes function as a standalone process, while some function in combination with rescue tools such as Administration and CVA.

Therefore, it is submitted that Nigeria's corporate rescue model embodies several themes that can be traced back to Anglo-American jurisdictions. These themes emphasise flexible and speedy resolution of financial distress to support economic growth and stability. It further submitted that the corporate rescue tools introduced under CAMA 2020 align with best practice on corporate rescue in leading common law jurisdictions.[1096] However, the impact of these rescue tools may be limited due to practical challenges. In addition to the challenge of cross-border cooperation to implement CAMA 2020, the lack of awareness of the procedures, stakeholder reluctance to engage practitioners, creditor attitudes towards debt collection as highlighted in Chapter 3, and a lack of post-commencement financing, will affect the timely resolution of distress, and ultimately the value of the asset. Given these challenges, the question is - to what extent does CAMA 2020 facilitate the effective and efficient rescue of financially distressed companies in Nigeria?

5.4 To what extent does the redefinition of the approach to corporate rescue under CAMA 2020 facilitate the effective and efficient rescue of financially distressed companies in Nigeria?

Having summarised the core themes and practices in this thesis, it is now important to consider the more immediate and precise question: to what extent does CAMA 2020 facilitate an effective and efficient rescue of financially distressed companies in Nigeria? Admittedly, the approach to answering this research question is inferential, analytical and comparative. From

[1096] Sylva Ogwemoh and Akorede Folarin, 'The Companies and Allied Matters Act 2020 - Highlights of the Reforming Provisions and Their Implications for Businesses and Investors in Nigeria' [2020] SSRN Electronic Journal.

the face of the question, certain terminologies pose conceptual challenges. To properly answer the question, it is therefore necessary to define a key term in relation to the research question.

5.4.1 Contextual Issues

At the core of the research question is the issue of whether CAMA 2020 facilitates the effective rescue of financially distressed companies in Nigeria. Finch argued that effectiveness in corporate rescue should be measured by the procedure's ability to preserve the company's value, maintain its operations, and achieve a better outcome for creditors than through liquidation.[1097] Finch also acknowledged the difficulty, including the different views of various interested stakeholders, in making an assessment about what constitutes a successful rescue.[1098] This thesis takes a simplistic view of the term "effective" to refer to a successful and efficient rescue process. Although the meaning of effectiveness may include efficiency, the term is in fact different. In the context of this thesis, it refers to achieving the best outcome possible based on the timing and cost for the company and the stakeholders. Unlike efficiency, assessing effectiveness based on the success of a corporate rescue regime is easy because success can be measured by the outcome of the procedure in relation to the objectives. The issue with the term "efficient" is that it is impossible to assess efficiency based on its merits. Some benchmarks are needed to determine what is particularly efficient. To be assessed, *efficiency* must be used in combination with another value, which in this thesis is *effective*. Several factors contribute to determining whether an insolvency statute is effective and efficient in the rescue of financially distressed companies. As the previous section highlights, this thesis adopts the nine key objectives under the UNCITRAL legislative guide.

5.4.2 CAMA 2020 in retrospect

As earlier stated, CAMA 2020 represents a palpable effort at bringing Nigerian insolvency law in line with leading common law jurisdictions. However, to answer the main research question, it is imperative to ask if CAMA 2020 provides effective mechanisms for the rescue of financially distressed companies. To answer the question of whether these tools are effective in resolving corporate distress in Nigeria, one would have to revert to the practical and theoretical application of these tools. In this sense, it is important to refer to the fact that in the

[1097] Vanessa Finch, 'Corporate rescue processes: the search for quality and the capacity to resolve' (2010) 6 Journal of Business Law 502, 502-503.
[1098] ibid.

TCN case, the Nigerian court was willing to support the use of the new rescue procedure, in this case - a CVA, for a leading hospitality company in Nigeria.[1099]

Although it remains uncertain how the court will approach its role regarding the administration process, the *TCN case*, despite its shortcomings in the interpretation of the law on the procedures, can be relied upon as an indication of the approach of the court. Thus, the Nigerian court will support restructuring companies or its obligations to maintain the going concern value of the business.[1100] Lifu J of the Nigerian Federal High Court recognised this point, while acknowledging the benefits of corporate rescue reforms introduced under CAMA 2020 when he stated that: "…it must be appreciated that the lawmakers have introduced these novel steps for the purpose of fostering seamless and less cumbersome mechanisms in insolvency with the primary purpose of rescuing businesses...".[1101]

Justice Lifu's sentiment seems practically to have been similar to the attitude of the Kenyan court in the *TCN case.* These decisions show that corporate rescue tools if properly administered, can effectively resolve corporate distress in Nigeria. Yet, in the absence of case law on these procedures, the question is, to what extent does CAMA 2020 facilitate the effective and efficient rescue of financially distressed companies in Nigeria? To answer the above question, it is important to consider whether CAMA 2020 is an effective and efficient rescue model and whether CAMA 2020 meets the standards under the UNCITRAL legislative guide.

From the previous analysis of common themes, CAMA 2020 redefined the approach to corporate rescue in Nigeria with the introduction of corporate rescue tools. Concerning the question of effectiveness, CAMA 2020 checked all but one of the boxes to classify as being an effective and efficient rescue model under the UNCITRAL Legislative Guide. As explained above, the absence of a cross-border insolvency provision renders the Nigerian rescue model inadequate in resolving cross-border insolvencies. It is argued that the Nigerian rescue model meets most of the core themes and practices. However, most of the features that exist under the UK and US systems, such as the moratorium procedure, debtor in possession, management displacement tools, etc., can be traced back to the Nigerian model. However, some of the provisions are not robust enough. For example, there is no standalone moratorium procedure in Nigeria as found in the UK under CIGA 2020.[1102] Therefore, it inhibits the success of a

[1099] *Re: Seyi Akinwunmi & Okorie Kalu* suit No: FHC/L/CS/1250/2021
[1100] ibid.
[1101] *Re: Seyi Akinwunmi & Okorie Kalu* – Suit No: FHC/L/CS/1250/2021 (TCN case) [Lifu J].
[1102] Onyinye OC-Chukwuocha," Company Voluntary Arrangement under CAMA 2020: A Review" (2023) 19(2) Unizik Law Journal 41, 54.

CVA, as creditors may pre-empt the potential insolvency proceedings and torpedo the rescue process by exercising their right of re-possession or appointment of a receiver or petition to wind-up the company.

CAMA 2020 provides a holistic approach to resolving corporate distress in Nigeria by introducing a corporate rescue model that provides rescue tools such as the CVA and administration procedures for financially distressed companies. This model incorporates the features of the debtor-in-possession and management displacement model for example, which may be used differently or in combination with other rescue tools to resolve corporate distress in Nigeria. However, when considered in isolation, it does appear that the CVA may not necessarily be wholly effective, if indeed effective is construed to mean the extent to which the objectives and goals of rescue under CAMA 2020 are achieved.

It is important to reiterate that one of the objectives of corporate rescue under CAMA 2020 is to provide a means for companies in financial distress to rehabilitate and reorganise the operations of their businesses and, in so doing, avoid liquidation.[1103] Given the absence of a moratorium to complement the CVA, it is submitted that the effectiveness of the CVA as a rescue tool under CAMA 2020 is significantly weakened, as companies lack the necessary breathing space to enable them to achieve the goal of corporate rescue. This is because the company may not be able, especially in contentious cases, to withstand the pressure from creditors whilst the rescue process and negotiation with creditors is ongoing.

However, considering Nigeria's economy is dominated by SMEs, it is doubtful whether the CVA moratorium will be successful in Nigeria. Lessons from the application of the CVA moratorium for small companies in the UK show limited use with mixed outcomes, [1104] Thus, the abolition of the CVA moratorium for small companies in Schedule A1 to the IA 1986 by CIGA 2020. CIGA 2020 introduced a new moratorium under Part A1 moratorium, with a wider scope that can be used as a precursor to CVA or in conjunction with other tools. This is subject to certain conditions, including a declaration from the management that the company is unable or likely unable to pay their debt when due, and the question as to whether the moratorium would likely result in the rescue of the company.

Similarly, the CVA, under KIA 2015, can be accompanied by a moratorium if the company or the directors apply for a moratorium to accompany the proposal. Unlike the CVA under Nigerian law, this optional CVA moratorium can be effective in shielding the company from

[1103] See s 3.3, p 93 above.

[1104] Peter Walton, Chris Umfreville and Lézelle Jacobs, 'A Snapshot of Company Voluntary Arrangements: Success, Failure and Proposals for Reform' (2020) 29(2) International Insolvency Review 267.

creditors' action – particularly in contentious cases for small companies.[1105] Therefore, due to the lack of a moratorium in support of CVAs, the CVA, on its own cannot practicably be an effective tool in preventing creditors' action and asset seizure, which may stall negotiation and increase uncertainty in the rescue process. It is submitted that Nigeria expands its moratorium regime to encourage early preventative measures and prevent insolvency, just as it is attainable in the UK under CIGA 2020.

An expansive approach in the form of a 'standalone' moratorium procedure can be used as a preventative insolvency tool or as a precursor to CVAs and administration, or other corporate rehabilitation tools. As a preventative insolvency tool, it can be exclusively useful in enforcing a rescue plan in the form of refinancing or turnaround agreement and it can precede formal corporate rescue tools or be used in support of a CVA, Administration, Schemes or restructuring plans simultaneously.[1106] The use of a moratorium as a precursor to the CVA could remedy the defect in the current regime and make the CVA more attractive to stakeholders in Nigeria. However, the CVA may be part of the current regime's rescue strategy for an Administration process. A company that proposes a CVA as part of the Administration process will enjoy the protection of the moratorium. The CVA, if used in this context, can be effective in resolving financial distress. But the extent to which it will be efficient, in terms of optimal use of time, money, and process is yet to be seen. Although the statistics show how many administration procedures have been undertaken in Nigeria, administration procedures are time-consuming, more expensive, and involve more court involvement which may not be beneficial, especially to smaller companies.

Perhaps companies may be better off having pre-administration agreements, which can quickly be presented for ratification by creditors and sanctioned by the court. In summary, the effectiveness and efficiency of the corporate rescue model under CAMA 2020 depends on a comprehensive analysis of the nine objectives discussed above. To the extent that CAMA 2020 provides a rescue model that comprehensively and interconnectedly integrates rescue tools that contain all but one of the key objectives of a corporate rescue regime under the UNCITRAL Legislative Guide, it is argued that the rescue model under CAMA 2020 is successful. This is because the model has introduced modern rescue tools such as the CVA and administration and moratorium to promote corporate rescue and give viable but distressed companies an alternative to liquidation.

[1105] KIA 2015, s 620.

[1106] Onyinye OC-Chukwuocha, 'Company Voluntary Arrangement under CAMA 2020: A Review' (2023)19(2).

Overall, CAMA 2020 improved Nigeria's insolvency framework by introducing alternative tools for resolving corporate distress in order to promote the going concern value of companies. These tools are designed to create an effective and efficient corporate rescue model. For example, the Administration procedure provides a rescue mechanism that preserves the company's going concern value or assists in providing a greater return for creditors compared to immediate liquidation. This procedure is supported by a moratorium to give the company breathing space while the administrator attempts to resolve the distress, although the moratorium is not automatic.[1107]

Similarly, the CVA is a tool designed to streamline the rescue process - giving the company the opportunity to restructure its debt while still remaining in control of the operations.[1108] The role of the court in the CVA process is limited to enhance efficiency.[1109] If these procedures cannot maximise better returns for the company's stakeholders, CAMA 2020 provides a well-defined rule of priority – that of ranking creditors' claims, with the secured creditors on top of the insolvency queue, thereby ensuring payments from the secured assets. CAMA 2020 also prioritised certain payments, including wages of employees and taxes, which are ranked above unsecured credits.[1110]

In relation to the UNCITRAL Legislative Guide, it is arguable from the above analysis that the Nigerian rescue model successfully meets, to a great extent, eight out of the nine criteria, which is impressive. However, its effectiveness and efficiency are limited in two ways: (1) the lack of cross-border insolvency procedures; and (2) the lack of moratoriums to support the CVA process. The lack of cross-border elements limits the effectiveness of the rescue tools in handling cross-border insolvencies, and the reliance on the enforcement of judgment provision may lead to additional financial burdens on the company. This is because the involvement of lawyers and the court will increase costs and delays associated with the administration of justice in Nigeria.[1111] In any case, they will negate the effect of a streamlined procedure such as the CVA due to the challenges that the weak judicial capacity in the enforcement process in Nigeria could present, in the light of court involvement.[1112] In practice, these challenges could affect the resolution of distress involving multinationals or creditors with assets across different

[1107] CAMA 2020, s 452-453.
[1108] See ch 3, s 3.4.
[1109] See discussion at p 104-105.
[1110] CAMA 2020, s 507. See pp 192-193.
[1111] Joan Monye, Richard Obidegwu and Patience Obiagbaoso, 'Where Are We in Curbing Delays in Administration of Justice in Nigeria?' (Punuka Attorneys13 October 2020) <https://punuka.com/where-are-we-in-curbing-delays-in-administration-of-justice-in-nigeria/> accessed 26 June 2024.
[1112] Onigbinde, (n 517) 105.

jurisdictions. Likewise, the lack of a mechanism for mutual recognition of insolvency proceedings may lead to a conflict in law issues or inconsistencies in the process.

The implication of a lack of cross-border insolvency provision on rescue proceedings is not just about how it could affect the management of overseas assets and the rescue process itself, which will diminish creditor confidence in resolving corporate distress in Nigeria. This in fact means that CAMA 2020 has not met the ninth criterion under the UNCITRAL Legislative guide. Although it falls short by not meeting the ninth criterion - on cross-border insolvency - it is argued that the rescue model under CAMA 2020 is substantially effective and efficient because it significantly changes the hitherto status quo of liquidation to the corporate rescue. That means it is effective and efficient in resolving corporate distress in Nigeria. However, whether it is successful in resolving corporate distress in Nigeria depends on the implementation - by institutional authorities, awareness, and cooperation of stakeholders. Consequently, it is argued that CAMA 2020 provides an effective and efficient model for the resolution of distressed companies in Nigeria, although in the absence of specific statistical data on the number of CVAs and Administration processes that have been successfully implemented, it is very problematic to ascertain the level of impacts. In any case, they do appear to have been grossly underutilised in Nigeria, given the level of patronage.

Notwithstanding the above analysis, the answer to the question of the effect these innovations under CAMA 2020 have on effectiveness and efficiency cannot be fully answered without admitting that beyond the institutional weakness, the challenges under the current framework make it less attractive compared to the Kenyan and SA model. Firstly, the Kenyan and SA models adopt the Model Law, which makes it easy to recognise and enforce cross-border rescue procedures and ensures harmony in the application in both jurisdictions. The second point relates to wider application of the moratorium on legal proceedings, and enforcement during the rescue process. The moratorium is automatic in SA, and though not automatic in Kenya, it applies to administration, CVAs, and schemes. Instead, in Nigeria, the moratorium does not apply to CVAs - whether by default or otherwise, which circles back to the question: to what extent do the corporate rescue tools under KIA differ from the rescue tools under CAMA? The evidence from the analysis above suggests that the procedures - CVA and Administration - are similar at their core, but differ in effect due to the richer moratorium regime in Kenya. Specifically with regards to CVAs in Kenya, the moratorium not only makes it attractive but also enhances the efficiency of the tool. This puts into question the need to improve the attractiveness of CAMA 2020 in resolving corporate distress.

From a debtor's perspective, companies in Nigeria need a moratorium to fully utilise the CVA procedure efficiently. From a creditor's perspective, cross-border provision is important to protect the interests of foreign investors. On a general note, with regards to CAMA 2020, there is a need for further reform of CAMA to improve the market and institutional environment. This is to meet the demands of modern challenges and make Nigeria attractive for FDI within the African region, especially in a post-pandemic era, where most African jurisdictions have yet to introduce any statutory reform to strengthen the existing framework for corporate rescue.[1113]

5.5 Conclusion

This chapter concludes the comparative analysis of this thesis. It aimed to evaluate the corporate rescue models of Nigeria, Kenya, and South Africa, which were discussed in chapters three and four. The analysis confirms that 2020 significantly moved the philosophy underpinning Nigeria's insolvency law towards rescue culture. To the extent that Nigeria's rescue model seeks the preservation of the going concern value, it aligns with Kenya and South Africa's business rescue models.[1114] The thesis has found that Kenya and South Africa's models align with the UNCITRAL Legislative Guide, and that Nigeria's model substantially aligns with the UNCITRAL Legislative Guide. To the extent that Nigeria's model does not establish a cross-border framework, it is argued that its effect is limited. Similarly, the practical and institutional challenges, especially institutional weakness, affect the timely resolution of distress. Consequently, the efficiency of CAMA 2020 is affected. Further reforms are required, including the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, to improve the effectiveness and efficiency of CAMA in facilitating the rescue of financially distressed companies. The next chapter, which concludes the thesis, will further highlight the areas of improvement and the lessons learned from the comparative analysis.

[1113] Kubi Udofia, 'Critical assessment of Nigeria's response to Covid-19 pandemic, insolvency risk' *The Guardian* (Guardian Newspapers, 19 May 2020) < https://guardian.ng/features/law/critical-assessment-of-nigerias-response-to-covid-19-pandemic-insolvency-risk/> accessed 1 December 2023.
[1114] Bo Xie, *Corporate Rescue – the New Orientation of Insolvency Law* (Edward Elgar Publishing Limited 2016)5; contra Gerard Mccormack, *Corporate Rescue Law – an Anglo-American Perspective* (Edward Elgar Publishing 2008) 3.

6 Chapter 6: Conclusion

6.1 Reflection on the research question

This is the concluding chapter. The chapter translates the arguments in the thesis into actionable points which enhance the understanding of the reforms under CAMA 2020 by outlining how the respective research questions are answered and highlighting the policy roadmap for improving Nigeria's corporate rescue policy. Chapter One examined the challenge of corporate rescue in Nigeria, identifying the lack of a robust corporate insolvency statute, deficiency in institutional capabilities and/or even the nonexistence of accurate data, and the insufficiency or lack of literature on the subject as the challenge of corporate rescue scholarship in Nigeria.[1115] In retrospect, this thesis has examined Corporate Rescue Reform in Nigeria through a comparative analysis of the Law and Policy in the context of African Rehabilitation models.

To undertake a comprehensive analysis of corporate rescue reform in Nigeria, the chapter sought to answer the research question - To what extent does CAMA 2020 facilitate the effective and efficient rescue of financially distressed companies in Nigeria? This question is crucial in the assessment of the legislative and economic impact of the reform under CAMA 2020. In this sense, it contributes to the determination of whether the corporate rescue tools under CAMA 2020 meet the practical objectives of corporate rescue and contribute to corporate stability and economic growth. In a more practical sense, the question enhanced the examination of the application and implementation of the rescue tools relative to the rescue challenge to reach the desired outcome.

As Chapter 5 indicates, the question also provided the opportunity to explore corporate rescue practice in other jurisdictions - to measure areas of progress and pinpoint specific areas for policy response in view of future reforms. Although the final analysis of the research question is cited in section 5.4 of Chapter 5, several sub-research questions were developed and addressed to provide a comprehensive context and framework for analysing the extent of effectiveness and efficiency in the resolution of distress under CAMA 2020. These questions are reproduced as follows:

A. What rationale occasioned the codification of corporate rescue mechanisms in Nigeria?
B. To what extent does the Nigerian model of corporate rescue align with the objectives of the UNCITRAL Legislative Guide?

[1115] See discussion in ch 1, s 1.2.

C. What practical obstacles hinder the implementation of corporate rescue procedures under CAMA 2020, and how do they impact alignment with international best practices?
D. Is there a significant difference in the approach to corporate rescue under Kenya and Nigeria's insolvency law?
E. Can South Africa's model be characterised as a corporate rescue mechanism in a comparative context?

6.1.1 What rationale occasioned the codification of corporate rescue mechanisms in Nigeria?

To answer this question, Chapter 3 of the thesis considered the theoretical and philosophical bases of CAMA 2020. The chapter builds on the discussion of philosophical underpinnings and theoretical context in the previous chapter. Specifically, in section 3.4, the thesis summarised the general objective of CAMA 2020 concerning corporate rescue - to provide a means for companies in financial distress to rehabilitate and reorganise the operations of their businesses, in so doing avoid liquidation, and argued that this objective is consistent with the need to preserve going concern value of the company. However, it is important to note that this is not the wholly judicial or legislative reason for the introduction of CAMA 2020.

Several objectives are proposed, including some specific to the rescue tool in question, and others that can be inferred, as highlighted in sections 1.51.1 and 2.31. The reality is that CAMA 2020 was enacted for several reasons, including for the protection of stakeholders' interests and the need to align Nigeria's insolvency regime with international best practices. This is why this question is important not just in understanding the philosophical and theoretical foundations of Nigeria's insolvency law but also in the development of an effective and efficient insolvency regime.

6.1.2 To what extent does the Nigerian model of corporate rescue align with the objectives of the UNCITRAL Legislative Guide?

This question provides an opportunity to analyse Nigeria's model through a comparative lens. Chapter 3 of this thesis examined corporate rescue in Nigeria. Specifically, it discussed Nigeria's approach to corporate rescue pre-CAMA and post-CAMA. Notably, section 3.2.2 acknowledged the impact of legal transplants in Nigeria's insolvency jurisprudence. Similarly, in Chapter 5, the thesis found that the transplantation of corporate rescue tools such as CVA and administration from Anglo-American jurisdictions to Nigeria's liquidation-oriented system

brings Nigeria's insolvency jurisprudence in line with best practice. More particularly, section 5.2 analysed these objectives, showing alignment or non-alignment with Nigeria's model. Furthermore, section 5.3 presents the key objectives in a tabular form and analyses the examined CAMA 2020 in light of the objectives of the UNCITRAL Legislative Guide. The research has found that Nigeria's corporate rescue model embodies several themes traceable to Anglo-American jurisdictions. As argued in section 5.4.2, the shift in orientation occasioned by CAMA 2020 is positive, as the rescue model is flexible and cost-effective.

6.1.3 What practical obstacles hinder the implementation of corporate rescue procedures under CAMA 2020, and how do they impact alignment with international best practices?

Understanding the practical challenges in implementing corporate rescue procedures under CAMA 2020 is fundamental to understanding the extent to which CAMA 2020 facilitates the effective and efficient rescue of financially distressed companies in Nigeria. In Chapter 1, the thesis acknowledges the challenge of corporate rescue. First, it identified the dearth of literature as the main challenge to corporate rescue scholarship in section 1.1. Secondly, section 3.8.4 identified other challenges to corporate rescue, including the lack of awareness regarding the importance of corporate rescue, stakeholder reluctance to use the procedure, creditor attitudes towards distress, institutional weakness and a lack of a clear provision on post-commencement financing. As with Chapter 3, Chapter 5 also highlighted these challenges and argued that these challenges inhibit the practical implementation of corporate rescue procedures under CAMA 2020. These challenges, especially the limited institutional capacity, slow judicial processes, and absence of cross-border frameworks, prevent Nigeria from fully aligning with international best practices. Hence, section 5.3 makes the case that further reform will be needed to align CAMA 2020 with best practices.

6.1.4 Is there a significant difference in the approach to corporate rescue under Kenya's and Nigeria's insolvency law?

This question is necessary for espousing the similarities between Nigeria's corporate rescue model and Kenya's model. While Chapter 3 examined the Nigerian model, Part I of Chapter 4 examined Kenya's model. Although the procedures under the relevant statutes in the respective jurisdictions are similar, there is a point of difference. Section 4.2.2.1.1 captures these important differences while comparing the moratorium regime, as it applies to CVAs in both

jurisdictions. Unlike CAMA 2020, CVA under KIA 2015 can be accompanied by a moratorium. This analysis in chapters 3 and part 1 of chapter 4 indicates significant differences in the approach under Kenya's and Nigeria's corporate rescue regimes. KIA 2015 provides a more advanced rescue framework. Corporate rescue tools such as the CVAs are complemented by the pre-insolvency moratoriums. Also, the institutional support in Kenya is more robust compared to the limited support in Nigeria due to the institutional challenges in Nigeria. For example, Kenya has more experienced licensed insolvency practitioners and judicial officers who provide better support and oversight, as seen in the restructuring of Kenya Airways.[1116] Institutions such as the Business Registration Service also provide better support and oversight, though creditor resistance remains a challenge.[1117] Nigeria faces slow judicial processes, limited practitioner expertise, and institutional constraints, pushing stakeholders towards receivership rather than rescue. Thus, Kenya's corporate rescue framework better facilitates corporate rescue, while Nigeria's regime requires further reform to achieve a similar impact and outcome to Kenya's.

6.1.5 Can South Africa's model be characterised as a corporate rescue mechanism in a comparative context?

This question is important in assessing the extent to which CAMA 2020 addresses the different aspects of corporate rescue - pure rescue and partial rescue - and the overall efficacy in resolving corporate distress. From the analysis in Chapter 3 of the thesis, the outcome of the rescue process in the leading insolvency jurisdictions such as the UK and the US, is usually the rescue of the company or the business, or both. This means that an effective corporate rescue regime must have a blend of either or both outcomes. Yet, it is important to draw a distinction between both concepts and to understand how the CAMA 2020 imbed the outcomes from both processes in the rescue process, and the appropriate tool to apply based on the needs and the outcome that the company desires. As section 4.4.1 of Chapter 4 indicates, understanding the difference between these concepts provides a foundational basis for understanding the rescue tools and outcomes under CAMA 2020 and SACA 2008. Based on the arguments in section sections 4.33 and 4.3.6, it is argued that South Africa's model is a corporate rescue, especially due to its emphasis on the surplus of going-concern value over liquidation value.[1118]

[1116] ibid (n 706); *Re Kenya Airways Ltd* [2017] eKLR.
[1117] ibid (n 720); *Re Nakumatt Holdings Ltd* [2018] eKLR.
[1118] McCormack, 'Corporate Rescue Law – An Anglo-American Perspective' 4.

6.2 The Path Ahead

In conclusion, this analysis of corporate rescue reform in Nigeria reveals without hesitation that the reform of Nigeria's insolvency law has led to the introduction of a framework on corporate rescue - an important development that ushered in the rescue culture which leading insolvency scholars and practitioners in Nigeria have argued in support of. The analysis of corporate rescue procedures and tools introduced by the reform indicates an expansive view of the goal of insolvency law in Nigeria. On the one hand, the law continues to provide a means for an orderly distribution of the company assets as a means of resolving corporate distress, which is a retention of the culture under CAMA 1990. On the other hand, in line with the new rescue culture under CAMA 2020, it introduced a means to rescue companies from distress. An assessment of the extent to which CAMA 2020 provides an effective and efficient model for the resolution of corporate distress in Nigeria discloses practical insights into the application of CAMA 2020 on corporate rescue. CAMA 2020 introduced new procedures and tools that align with the practice in leading insolvency jurisdictions both within the African region and internationally. The CVAs, administration, and moratorium are prominent among these, albeit with limited application. These tools either provide a means for or facilitate the resolution of corporate distress in Nigeria through the rescue of companies in distress. This assessment underscores the importance of reforming insolvency law in Nigeria to provide a corporate rescue system that tackles the challenges of corporate distress through rescue and liquidation - when rescue is not foreseeable and improves the ease of doing business in Nigeria.

However, the extent to which CAMA 2020 is effective and efficient in resolving corporate distress in Nigeria is limited due to the practical challenges inhibiting the application and implementation of the new corporate rescue tools. This limitation includes, among other things, the absence of a moratorium regime to support CVAs or as a standalone provision and the weak institutional capacity to support the implementation and enforcement of rescue procedures.[1119] Apart from these issues, there is also the challenge of local circumstances, which sometimes overlap with institutional challenges to inhibit the comprehensive application of rescue procedures.[1120] For example, creditors may still be reluctant to adjust the terms of the

[1119] Anu Balogun, Akinwunmi Ajiboye and Nsikan Efo, 'Business Rescue Mechanisms under CAMA 2020 and BOFIA 2020: A Business Case for Distressed M&A' (*Financier Worldwide*May 2023) <https://www.financierworldwide.com/business-rescue-mechanisms-under-cama-2020-and-bofia-2020-a-business-case-for-distressed-ma> accessed 3 July 2024.

[1120] Daily Trust, 'CAMA 2020: From Liquidation to Business Rescue - Daily Trust' (*https://dailytrust.com/*19 April 2022) <https://dailytrust.com/cama-2020-from-liquidation-to-business-rescue/> accessed 3 July 2024.

agreement between themselves and a distressed company, making it difficult to resolve the distress, or it could even be the naivety of the company directors in utilising the procedure to rescue a company in distress. The practical implication of this is that the company will be liquidated, or winding-up proceedings could begin.

The recent collapse and revocation of the operating licence of Heritage Bank plc (Heritage Bank) underscores the need for stakeholders, especially directors, to understand the importance of corporate rescue tools such as the CVAs, which can be used pre-emptively to rescue a company in financial distress.[1121] It also highlights the lack of apparent naivety of the directors and shareholders of the company who, whether wittingly or unwittingly, decided against consulting a BRP. They could also have detected potential insolvency based on the balance sheet test for the company, to take preventative steps in rescuing the company before the NDIC commenced the liquidation process.[1122] The fact that the shareholders and Directors of Heritage Bank did not consult an insolvency practitioner and did not attempt to rescue the company prior to the NDIC commencing liquidation proceedings, is an indication that implementation remains a significant challenge to corporate rescue in Nigeria.

Apart from the challenges, such as an extensive moratorium regime and the absence of a cross-border provision, the Heritage Bank situation highlights Nigeria's importance and lack of a preventative or early detection and intervention rescue model. The absence of an early preventative tool, such as a standalone moratorium coupled with a weak institutional capacity to bolster the implementation process, has proved to be a practical challenge to achieving an effective and efficient corporate rescue regime, at least in the case of Heritage Bank.[1123] As the thesis has shown, the expertise and regulatory oversight from institutional bodies in the form of regulatory or certifying agencies such as the CAC, BRIPAN, and the Courts are important in effectively enforcing the provisions and rescue tools.

As it has been observed throughout this thesis, particularly in Chapter 5, all the hallmarks of an effective and efficient insolvency system can exist under a particular corporate rescue model or framework. Effectiveness in the context of CAMA 2020 relative to corporate rescue, is the

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[1121] The Capital NG, 'The Fall of Heritage Bank: A Tale of Management Deceit, Lavish Lifestyles, and Financial Ruin' (*The Capital NG*6 June 2024) <https://www.thecapital.ng/fall-of-heritage/#google_vignette> accessed 3 July 2024.

[1122] Bashir A. Nuhu, 'NDIC COMMENCES LIQUIDATION of HERITAGE BANK' (2024) <https://ndic.gov.ng/wp-content/uploads/2024/06/HERITAGE-BANK-PRESS-RELEASE.pdf> accessed 3 July 2024.

[1123] Unini Chioma, 'Analysis of Administration as a Business Recovery Mechanism under the Companies and Allied Matters Act 2020.' (*TheNigeriaLawyer*14 November 2021) <https://thenigerialawyer.com/analysis-of-administration-as-a-business-recovery-mechanism-under-the-companies-and-allied-matters-act-2020/> accessed 3 July 2024.

provision of procedures to rescue a distressed company. It is also the ability of the company to utilise a rescue tool such as the CVA and Administration, whether this be with or without a moratorium. Additionally, it is the ability of the company to achieve different rescue outcomes or objectives, including debt restructuring, management control, piecemeal sale or transfer of assets, etc. This could result in retaining the legal entity as a going concern or even liquidating the entity if it leads to a better return for the stakeholders. Efficiency overlaps with effectiveness. It refers to the effective and swift means of resolving corporate distress - focusing on the minimisation of cost and time and the maximisation of the value of the asset and the company. CAMA 2020 introduced several tools, such as the CVA administration, which can be used on its own or combined, or in combination with other devices to achieve a timely, cost-effective, and asset-maximising outcome. In this regard, as the original findings from the thesis suggest, CAMA 2020 provides an effective and efficient model for the resolution of corporate distress in Nigeria despite its limitations.

6.2.1 Policy considerations

Despite the limitations in providing an effective and efficient corporate rescue regime, CAMA 2020 represents a seismic shift in Nigeria's insolvency policy - towards a rescue culture in comparison to the previous regime, which focussed on liquidation.[1124] Policymakers should not only retain this model of resolving corporate distress but should consider enhancing its effectiveness and efficiency by engaging in a regulatory review of the impact so far. This will expose the gaps, such as the lack of a comprehensive moratorium regime and the lack of cross-border provision, which could be the subject of further reforms to meet international best practices. In relation to cross-border insolvency, it is recommended that Nigeria adopts the UNCITRAL Model Law on Cross-Border Insolvency due to the cumbersome and expensive nature of the enforcement of the judgment process in Nigeria.

The need for early intervention in the insolvency process cannot be over-emphasised. Insolvency law should not just aim to resolve corporate distress but seek to prevent distress by detecting and applying measures to resolve potential distress. Otherwise, the company could be in a position where a rescue outcome is difficult, if not impossible, to achieve. Policymakers should consider the introduction of preventative insolvency measures or tools or provisions that encourage early intervention, such as the pre-insolvency moratorium regime, to prevent

[1124] Onigbinde (n 517).

distress or even potential liquidation.[1125] In this regard, it is recommended that CAMA 2020 be amended to expand the moratorium regime and provide a standalone moratorium provision. The expansion of Nigeria's moratorium regime, if accompanied by the adoption of the UNCITRAL Model Law, will not only bring CAMA 2020 to par with KIA 2015 and SACA 2008 but could possibly place CAMA 2020 ahead with the introduction of the pre-insolvency provisions. These will be effective in resolving potential economic shock such as that which occurred with the COVID-19 related distress.

There is also a need to strengthen regulatory institutions in Nigeria. The role of the judges and the BRP/IP in the rescue process is very important. Although BRIPAN is helping in training professionals, and some judges are making an effort to build capacity in insolvency proceedings, there is a lack of sophistication when it comes to expertise in this area in Nigeria.[1126] In the absence of a sophisticated body of insolvency professionals, reliable judges, and specialised courts in a developing market and restructuring environment, continuous training and capacity building are important. Regulatory institutions must encourage continuous training and development of insolvency practitioners and judges to enable them to manage and implement the new procedures introduced by the reform.[1127] From a policy perspective, Nigeria should consider the establishment of specialised insolvency courts or open an insolvency division in the Federal High Court and provide special training for the officers who will mount to courts. This will further enhance efficiency by reducing time and costs incurred during the insolvency process.

In the final analysis, it is important to reiterate that this thesis provides an original contribution to insolvency law in Nigeria by addressing the extent to which the reforms under CAMA 2020 are effective and efficient in resolving corporate distress. By examining Nigeria's corporate rescue model in light of the elements of an efficient and effective insolvency system, the thesis drew from best practices in other jurisdictions to provide a nuanced understanding of the limitations of the rescue tools under CAMA 2020 in resolving corporate distress. This is significant not only in breaching the gap in comparative literature on the nature of the Nigerian model of corporate rescue but also in assessing the reform within a broader regional context. In doing this, the thesis provides a robust comparative context for highlighting important lessons from the selected jurisdiction. Furthermore, the thesis moves the literature forward by

[1125] For an example of a comparative assessment of pre-Insolvency procedures in the UK and SA, see Alexandra Kastrinou and Lézelle Jacobs, 'Pre-Insolvency Procedures: A United Kingdom and South African Perspective' in Rebecca Parry and Paul J. Omar (eds), *Reimagining Rescue* (INSOL-Europe 2016) 91-108.
[1126] Gurrea- Martínez, 'The Future of Insolvency Law in a Post-Pandemic World' 19.
[1127] ibid.

proposing a comprehensive model encompassing elements of a debtor in possession and management displacement approach with a cross-border effect for the consideration of policymakers, and a platform for further scholarly activity on the effectiveness and limitations of the Nigerian rescue model under CAMA 2020.[1128]

[1128] The World Bank Group, 'Open Knowledge Repository' (*Worldbank.org*2024) <https://openknowledge.worldbank.org/bitstreams/b02052ec-b06f-4dbf-b362-066941586a3a/download> accessed 23 October 2024.

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