

Western University
Scholarship@Western

Master of Laws Research Papers Repository

Law School

October 2020

Developing a Corporate Insolvency Framework For Nigeria.

Chioma Ezinne Adiele

Supervisor: Professor Thomas Telfer & Professor Alfonso Nocilla
University of Western Ontario

Follow this and additional works at: <https://ir.lib.uwo.ca/llmp>



Part of the [Bankruptcy Law Commons](#), [Business Organizations Law Commons](#), and the [Commercial Law Commons](#)

Recommended Citation

Adiele, Chioma Ezinne, "Developing a Corporate Insolvency Framework For Nigeria." (2020). *Master of Laws Research Papers Repository*. 9.
<https://ir.lib.uwo.ca/llmp/9>

This Dissertation/Thesis is brought to you for free and open access by the Law School at Scholarship@Western. It has been accepted for inclusion in Master of Laws Research Papers Repository by an authorized administrator of Scholarship@Western. For more information, please contact wlsadmin@uwo.ca.

ABSTRACT

An important indicator of a country's economic strength is the resilience of its businesses, as evidenced by their ability to survive insolvency, reorganize, and return to profitability.¹ Before a rescue² process is commenced, it is important to determine the viability of the company to avoid deferred liquidations. When a viable corporation is insolvent, the going concern of the company should be preserved because the corporation is worth more to its creditors alive than dead. When a corporation is not viable, the swift sale of the assets as a going concern has the same purpose of rescuing the business to maximize value for its creditors.³ This thesis compares restructuring in Nigeria with restructuring in Canada to decipher ways to develop corporate restructuring in Nigeria. To enable Nigeria to compete globally, recommendations are provided to adopt effective corporate and business rescue mechanisms.⁴

Keywords: Corporate insolvency; corporate restructuring; corporate rescue; business rescue; liquidation; *Companies and Allied Matters Act, Companies Creditors Arrangement Act.*

¹ World Bank Group, *Doing Business 2020* Comparing Business Regulation in 190 Economies, Online, <<https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf>> This report states that fourteen of the top twenty economies that scored highest for the "ease of doing business" had insolvency regimes that permitted "a viable business to continue operating as a going concern during insolvency proceedings" at 5.

² Rescue is a necessary intervention when a company is insolvent to prevent the company from failing. Reorganization is used to refer to the restructuring of the debts of an insolvent corporation. The terms reorganization and restructuring are often used interchangeably.

³ World Bank Group, *supra* note 1.

⁴ Incidentally, the World Bank Group states that Nigeria is one of a handful of countries that have implemented large-scale reforms that have significantly improved the ease of doing business, see the heading "Main Findings": <https://www.doingbusiness.org/en/reports/global-reports/doing-business-2020>. However, looking at the actual rankings based on different indicators of the ease of doing business, Nigeria ranks very well overall but lags behind in insolvency resolution, ranking 148th out of 190 countries: <https://www.doingbusiness.org/en/data/exploreeconomies/nigeria#>. Recovery rates are low, costs are high, many proceedings take a long time to complete, and the overall strength of the insolvency framework is actually lower than the average in Sub-Saharan Africa: https://www.doingbusiness.org/en/data/exploreeconomies/nigeria#DB_ri

ACKNOWLEDGMENTS

I am eternally grateful to God for good health and a sound mind.

My deepest gratitude goes to my supervisors, Professor Thomas Telfer and Professor Alfonso Nocilla. This thesis would not have been a success without their kind guidance, insightful advice and dedication. Thank you.

I am grateful to Western University for the funding awarded to me to undergo my LLM.

I am also grateful to my parents, Hon. Justice and Mrs. C.C.T Adiele for supporting my education up to this level. I would not have been able to accomplish this without their full support and encouragements.

Finally, I thank my friends for their support during the program.

TABLE OF CONTENTS

ABSTRACT.....	i
ACKNOWLEDGMENTS	ii
INTRODUCTION	1
Research Methodology.....	6
CHAPTER 1: GENERAL OVERVIEW OF CORPORATE INSOLVENCY	10
1.0 Introduction.....	10
1.1 Definition of Corporate Insolvency.....	10
1.2 Determinants of Insolvency.....	12
1.2.1 Cash flow Test.....	14
1.2.2 Balance Sheet Test	16
1.3 The Objectives of Corporate Insolvency Law.....	19
1.3.1 Maximizing the value of the assets and the returns to creditors.....	20
1.3.2 Restoring the corporation to solvency	21
1.3.3 Preserving the insolvency estate and providing for an equitable system for ranking of claims during dissolution.....	21
1.3.4 Identifying the causes of a company’s failure by creating rules of management and sanctioning directors and officers who go against them..	22
1.4 Corporate Restructuring Law	23
1.4.1 Rescue.....	25
1.4.1.1 Business Rescue	25
1.4.1.2 Corporate Rescue.....	27
1.5 Theories of Corporate Restructuring.....	27
1.5.1 Preserving the Value of the corporation as a “Going Concern”	28
1.5.2 The Collective Debt Recovery Platform for Creditors	33
1.5.3 Loss Distribution and the Consideration of Public Interest.....	36
1.6 Conclusion	38
CHAPTER 2: CORPORATE INSOLVENCY IN NIGERIA	39
2.0 Introduction.....	39
2.1 History of Nigerian Corporate Law.....	39
2.2 Winding Up.....	43
2.2.1 Modes of Winding up	43
2.2.1.1 Winding up by the Court.....	44
2.2.1.2 Voluntary Winding up.....	45
2.2.1.3 Winding up Subject to the Supervision of the Court	46
2.2.2 Drawbacks of Winding Up.....	47
2.2.2.1 Winding up as a tool for debt recovery	47

2.2.2.2	Winding up as a punitive measure.....	48
2.2.2.3	Winding up leads to loss of asset value.....	49
2.2.2.4	Moratorium does not prevent a floodgate of litigation.....	49
2.2.2.5	Negative impact on a viable company's business.....	50
2.2.3	Receivership	51
2.2.3.1	Who is a Receiver?.....	51
2.2.3.2	In whose interest should a receiver act?	52
2.2.3.3	Concluding remarks on receivership	57
2.3	The Role of AMCON in Corporate Insolvency	57
2.3.1	Special Powers of AMCON.....	58
2.3.2	AMCON Receivership	59
2.3.3	AMCON Liquidation	61
2.4	Corporate Restructuring in Nigeria.....	64
2.4.1	Internal Restructuring in Nigeria	65
2.4.1.1	Arrangement on Sale	66
2.4.1.2	Arrangement and compromise.....	67
Drawbacks of the Arrangement and Compromise	68	
2.4.1.2.1	Lack of Moratorium or a stay of proceedings.....	68
2.4.1.2.2	The degree of Court involvement in the process	69
2.4.1.2.3	Expensive procedure.....	70
2.4.2	External Restructuring.....	70
2.4.2.1	Mergers and acquisitions.....	71
2.4.2.2	Takeover.....	72
2.4.2.3	Drawbacks of the External Restructuring Procedure.....	72
2.5	Conclusion	73
CHAPTER 3: THE RECENT AMENDMENTS TO NIGERIAN INSOLVENCY		
LAW		75
3.0	Introduction.....	75
3.1	The Idea Behind the Recent Amendment.....	76
3.2	The Business Rescue Amendments in the CAMA 2020.....	78
3.2.1	Company Voluntary Arrangements.....	79
3.2.1.1	Procedure.....	79
3.2.1.2	Drawbacks of the CVA.....	81
3.2.2	Company Administration	83
3.2.2.1	Procedure.....	84
3.2.2.2	Drawbacks of Administration	87
3.3	The practicability of the business rescue amendments.....	93

3.4	Amendments to the Winding up procedure.....	95
3.5	Conclusion	96
CHAPTER 4: THE CANADIAN CORPORATE INSOLVENCY SYSTEM		98
4.0	Introduction.....	98
4.1	Corporate Restructuring in Canada.....	99
4.2	The Companies Creditors Arrangement Act (CCAA)	102
4.2.1	History and Development of the CCAA.....	104
4.3	Commencement of CCAA Proceedings	109
4.3.1	Stay of Proceedings.....	110
4.3.2	DIP Financing.....	111
4.3.3	Key Players in a CCAA Proceeding.....	114
4.3.3.1	The Monitor.....	114
4.3.3.2	The Court.....	116
4.3.4	Exiting CCAA Proceedings.....	119
4.4	Asset Sales under the CCAA	120
4.5	Conclusion	128
CHAPTER 5: DEVELOPING A CORPORATE RESTRUCTURING FRAMEWORK FOR NIGERIA		130
5.0	Introduction.....	130
5.1	A Comparative Analysis of Corporate Restructuring in Nigeria and Canada.....	131
5.1.1	Debtor in Possession.....	132
5.1.2	Stay of Proceedings.....	133
5.1.3	Creditors' right to information.....	135
5.1.4	The need for Creditor Approval.....	139
5.1.5	Court involvement in the procedure.....	140
5.2	Developing a Corporate Restructuring Framework for Nigeria: Lessons learnt from restructuring procedures in Canada.	142
5.3	Conclusion	144
CONCLUSION.....		146
BIBLIOGRAPHY		150

INTRODUCTION

Capital and credit⁵ are the lifeblood of modern business relationships.⁶ Corporations⁷ need credit when the available capital is insufficient to boost the profitability and development of the business. Creditors, who believe in the objects of a corporation, invest their resources with the hope to benefit from the returns when they are due.⁸ To secure their loans, some creditors obtain a security interest in the assets of the corporation as collateral. Generally, the existence of secured credit should, all things being equal, increase the overall availability of credit and reduce borrowing costs across the economy.⁹ Creditors run certain risks when the company becomes insolvent and is unable to repay these loans.¹⁰

A company is insolvent when its available assets are insufficient to satisfy claims against it on the due date.¹¹ Insolvency law is the core of commercial and financial

⁵ Insolvency arises from the extension of credit. Credit could be extended either by loan or sale. In a loan credit money can be advanced in a contract, in exchange of the assets of the corporation that serve as a collateral with a specific date of repayment of the loan. (Roy Goode, *Principles of Corporate Insolvency Law*, 4th ed. (London: Sweet & Maxwell, 2011) at 2.)

⁶ World Bank, *Principles for Effective Insolvency and Creditor/Debtor Rights Regimes* (World Bank Publications, 2015) at 2.

⁷ The words corporation and company are used interchangeably in this thesis.

⁸ Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Fredrick, United States: Beard Books, 2001) at 7–8. This is the traditional method of advancing credit, they are commonly referred to as secured creditors because they have the right to sell the assets of the debtor when the debtor is unable to repay at the due date. The other way by which credits can be extended is a sale credit that involves an exchange of goods and services with a promise of payment at a later date. This applies to suppliers of the company who supply their resources on credit or employees who work till the end of a full calendar month before a paycheck is received. They are also creditors and often referred to as the non-traditional creditors or unsecured creditors. This is why the corporation owes the creditors an obligation not just of repayment when it is insolvent but also to maximize their returns.

⁹ Robert E. Scott, "A Relational Theory of Secured Financing", 86 Columbia Law Review 901.

¹⁰ Goode, *supra* note 5 at 3.

¹¹ The insolvency of a corporation is not a condition to which legal consequences attach. Thus, it is neither a criminal offence nor a civil wrong for a company to become insolvent. The legal consequences arise only after there have been some formal proceedings such as a winding up or an administration. (Roderick J Wood, *Bankruptcy and insolvency law*, 2nd ed, (Toronto: Irwin Law, 2015) at 16.

law.¹² In insolvency, commercial law compels the debtor to choose whom to pay amongst the creditors considering that there is not enough money to go round.¹³ The law determines the process of maximization of value by deciding who gets paid out and whose debt will remain unpaid.¹⁴ Just like focusing a camera with several key players in view, the focus determines whose interest is of greater importance.¹⁵ There are certain normative attitudes that arise from the existence of a debtor creditor relationship such as an obligation to save the company during insolvency knowing that all the assets of the corporation at the time will not be able to satisfy claims against it.¹⁶ Insolvency law provides for a rescue option that protects the debtor and its assets by helping the debtor reorganize its business to enable it satisfy all the claims against it.

The rationale behind a rescue mechanism is to preserve the status quo *ex ante* while a way forward is negotiated and implemented.¹⁷ A rescue law substitutes the continuous race to seize the assets of the debtor once it is insolvent, with a regime that gives the debtor breathing space to reorganize its affairs.¹⁸ This regime puts the debtor in possession of its assets and suspends all the rights and remedies of the creditors, to ensure the creditors get their returns in full.¹⁹ An effective corporate rescue law regulates the activities of the corporation when it becomes insolvent and it is one of the peculiarities of a thriving economy.²⁰ It recognizes the need to preserve the going concern value of the corporation alongside maximizing the returns for the creditors.

¹² Philip Wood, *Principles of International Insolvency*, 2nd ed (London: Sweet & Maxwell, 2007) at 4.

¹³ *Ibid* at 3.

¹⁴ *Ibid*.

¹⁵ Elizabeth Warren, "Bankruptcy Policy" (1987) 54:3 U Chicago L Rev 40 at 778.

¹⁶ Philip Wood, *supra* note 12 at 4.

¹⁷ Rebecca Parry, *Corporate Rescue* (London: Sweet & Maxwell, 2008) at 1.

¹⁸ Goode, *supra* note 5 at 5.

¹⁹ This implies that there will be a stay of actions against the debtor to avoid a floodgate of claims.

²⁰ Parry, *supra* note 17 at 1.

The law protects the interests of both the debtor and creditor by ensuring that there is a stay of actions against the debtor and individual grabs from the assets of the debtor are prevented in order to maximize returns for creditors.²¹

At the earliest stage of a financial distress it is necessary to identify the likelihood of survival or not of a corporation.²² As difficult as this may sound, some corporations in distress are viable while others are non-viable. It is important to make this identification to ensure that the restructuring process embarked on is most suitable for the corporation considering its present assets and due liabilities. Ascertaining the viability or not of an insolvent company will aid decisions on the insolvency procedure to be embarked on. According to Rizwaan Mokal, a company can either be financially distressed or economically distressed.²³ A debtor is financially distressed when its business is viable but it is either cash flow²⁴ or balance sheet insolvent.²⁵ In either of these cases, restructuring the debtor company would yield greater returns for its creditors as a going concern than if the assets of the viable debtor company were sold piecemeal.²⁶ For viable corporations, the optimal rescue outcome is a corporate rescue where the corporation survives with the management and ownership in place.²⁷ On the other hand, a debtor is economically distressed when its business is unviable and there is a fundamental problem with the nature of the business. In this situation the best option is if the assets of the debtor are sold piecemeal than if the business is allowed to continue

²¹ Philip Wood, *supra* note 12 at 4.

²² Jackson, *supra* note 8 at 2.

²³ Rizwaan Jameel Mokal, *Corporate Insolvency Law: Theory and Application* (New York: Oxford University Press, 2005) at 195.

²⁴ A debtor is cash flow insolvent when the when it is unable to pay its debts as they become due.

²⁵ A debtor is Balance sheet insolvent when the debtors' liabilities are greater than the value of the assets making the company's assets insufficient to discharge the liabilities.

²⁶ Mokal, *supra* note 23 at 195.

²⁷ Parry, *supra* note 17 at 2.

as a going concern.²⁸ It is therefore necessary that a company ascertains if it is viable or not from the onset to avoid seeking to restructure and then discovering that liquidation is preferable. It is important to ensure that resources of a corporation are channeled to a fruitful venture beneficial to both the corporation and its creditors. When a rescue mechanism is embarked upon, certain changes will be made to enable the corporation to continue carrying on business as a going concern with the same purpose of retaining the going concern value. Whatever choice of rescue is employed, the ultimate aim is that the corporation is given breathing space to enable it to reorganize its business and return to solvency.

The primary law, which regulates companies in Nigeria, is the *Companies and Allied matters Act*²⁹ (“CAMA”). The corporate insolvency framework of Nigeria is embodied in CAMA. The *Companies and Allied Matters Act* 1990 (“CAMA 1990”) previously regulated corporate insolvency in Nigeria. Before the enactment of the *Companies and Allied matters Act* (“CAMA 2020”), there was no substantial amendment to CAMA 1990, for over thirty years since its enactment. The CAMA 2020 introduced business rescue mechanisms for insolvent companies in Nigeria. These mechanisms are Companies Voluntary Arrangement (“CVA”) and Company Administration (“CA”). This is a paradigm shift from the liquidation and receivership processes that have been practiced over the years under the CAMA 1990 to a rescue mechanism under the CAMA 2020.

²⁸ Mokal, *supra* note 23 at 195.

²⁹ Cap C20, Laws of the Federation of Nigeria 2004.

In Canada, the primary law regulating corporate restructuring is the *Companies Creditors Arrangement Act* (“CCAA”).³⁰ This law was enacted to create an enabling environment for insolvent corporations to restructure and carry on their business as a going concern to avoid being put into liquidation.³¹ There has been an escalating use of the CCAA in Canada for effecting asset sales, where corporations claim to intend to undergo a restructuring process in order to get the protection of the CCAA and they begin the piecemeal sale of their assets. This has been referred to as “liquidating CCAA’s” and recent CCAA proceedings have been identified to be liquidating CCAA’s from the outset.³² It is an unreasonable practice to use a scheme originally designed for restructuring of insolvent corporations to effect liquidations.³³ This thesis while reviewing the corporate insolvency system in Nigeria and engaging in a comparative analysis of the insolvency practices in both jurisdictions will highlight the need for Nigeria to beware of this growing trend of Liquidating CCAA’s practiced in Canada.

This thesis will discuss the Nigerian insolvency law, highlighting the insolvency procedures previously practiced and how the innovation of business rescue options in the CAMA 2020 will lead to a boost in the insolvency framework and the Nigerian economy. This thesis will also analyze the corporate restructuring framework in Canada in order to determine the gaps and limitations in the *Companies’ Creditors Arrangement Act* (“CCAA”), the restructuring law for large corporations while highlighting lessons

³⁰ RSC 1985, c C-36.

³¹ Janis Pearl Sarra, *Rescue!: The Companies’ Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 13–14.

³² Alfonso Nocilla, “Is Corporate Rescue Working in Canada Papers from the 42nd Annual Workshop on Consumer and Commercial Law” (2012) 53:3 Can Bus L J 382 at 384.

³³ Roderick J Wood, “Rescue and Liquidation in Restructuring Law Papers from the 42nd Annual Workshop on Consumer and Commercial Law” (2012) 53:3 Can Bus L J 407 at 407.

Nigeria can adopt from the framework in Canada. This thesis will discuss the importance of the business rescue mechanisms to the restructuring framework in Nigeria. It will provide recommendations for a separate framework regulating corporate restructuring to be developed in Nigeria and emphasize on the need for the institutions administering these laws to be well equipped. This is because if these institutions are not improved upon, they might become bottlenecks to the administration of the amended laws.

Research Methodology

The methodology for this research will be a combination of doctrinal, historical and a comparative law approach. The doctrinal approach will be applied to set out the current state of the law in Canada and Nigeria, the historical approach will show how the laws and principles have evolved, and the comparative law approach would involve a comparison of the corporate insolvency framework in Canada and Nigeria, as the basis for investigating the suitability or otherwise applying some of Canada's business rescue framework in Nigeria. Particularly, the comparative law approach would provide a framework that will consider corporate insolvency law in Canada to discover how business rescue options are carried out, how well they have worked, and the lessons Nigerian law can learn from Canada. To achieve this, the research would be based on primary and secondary legal sources from both Canada and Nigeria.

This thesis is set out in five Chapters:

The first chapter is a general overview on corporate insolvency. It defines insolvency, explains how it can be determined and the objectives or goals which a corporate insolvency law seeks to achieve. This chapter goes further to discuss corporate

restructuring law and the idea behind a rescue and its purpose. The underlying theories of insolvency are also discussed. The discussion in the first provides a background on why a rescue mechanism should be present in the legal framework of every economy.

The second chapter will discuss the history of Nigerian corporate law. It will discuss the Nigerian Corporate insolvency system and highlight the shortcomings of the insolvency provisions in the *Companies and Allied Matters Act 1990*. This chapter will discuss the winding up and receivership procedures in CAMA 1990 and show how these procedures do not rescue insolvent businesses. This chapter will also discuss the role the Asset Management Corporation of Nigeria (“AMCON”) plays in corporate insolvency in Nigeria. Additionally, the second chapter will discuss the current restructuring mechanisms practiced in Nigeria, which are either internal or external. This chapter will also show that these corporate restructuring procedures do not rescue insolvent businesses.

The third chapter examines the business rescue provisions in the *Companies and Allied Matters Act 2020* (“CAMA 2020”). It will begin by discussing the ideas behind the recent amendments in the CAMA 2020 and then proceed to discuss the amendments to the corporate insolvency framework in Nigeria. Given that these amendments are similar to the practice in the United Kingdom (UK), this chapter will undertake a comparative analysis with the current corporate restructuring practices in the UK. The discussion of these business rescue options will evidence how well they have fared in the UK and the practicability of these amendments in the CAMA 2020 thriving in Nigeria. This chapter will also discuss the amendments to the winding up procedure contained in CAMA 2020.

The fourth chapter will discuss the Canadian corporate insolvency system. This chapter will begin by discussing the major restructuring regimes in Canada which are the *Bankruptcy and Insolvency Act* (“BIA”) or the *Companies’ Creditors Arrangement Act* (“CCAA”) and highlight the differences between the two regimes. The history of the CCAA will also be discussed to show how the CCAA became the restructuring legislation of choice for large insolvent companies in Canada. This discussion will establish the intent of the Canadian legislature while establishing the CCAA and the purpose of the CCAA. This chapter will then proceed to discuss the commencement of CCAA proceedings, its key features, its key players and how CCAA proceedings can be exited. The recent amendments to the CCAA on the key features and the key players in a CCAA proceeding will be discussed. This chapter will then delve into liquidating CCAAs, which is a mechanism where the CCAA is used to effect liquidations to show that this practice has deviated from the goal and purpose of corporate restructuring under the CCAA.

The fifth chapter calls for the development of the corporate restructuring framework in Nigeria. This chapter will begin by comparing the corporate restructuring law in Canada under the CCAA with the recent amendment to the corporate restructuring in Nigeria to determine how effective these amendments will be in rescuing insolvent companies. This chapter will then highlight lessons Nigeria can adopt from Canadian laws, which is not available under its restructuring framework. These lessons will help develop an effective corporate restructuring framework for Nigeria. It will also review the gaps in the business rescue options provided by the CAMA 2020 and suggest best ways to

develop a separate corporate restructuring framework in Nigeria learning from how restructuring is practiced in Canada.

The concluding chapter will contain my final thoughts on the corporate restructuring framework in Nigeria. It will highlight that the recent amendments in the CAMA 2020 are not very effective mechanisms for business rescue. Suggestions would be provided on how the business rescue mechanisms can be effectively administered. This chapter will conclude by providing recommendations on how Nigeria's corporate restructuring framework can be developed.

CHAPTER 1: **GENERAL OVERVIEW OF CORPORATE INSOLVENCY**

1.0 Introduction

During insolvency, creditors aim to recover monies owed to them using several available remedies.³⁴ In addition to the expenses incurred in pursuing their rights and remedies against the debtor is the tendency of the depletion of assets of the debtor and a risk that the claims of most creditors will be left unsatisfied.³⁵ Insolvency law is primarily concerned with providing a collective proceeding that overrides the regular civil processes, which are available to creditors for enforcing their claims. This chapter will define insolvency, how it can be determined, and consider the objectives of corporate insolvency law. It will further examine corporate restructuring, its purpose, the idea behind a rescue option, the types of rescue and the underlying theories of restructuring.

1.1 Definition of Corporate Insolvency

Insolvency is when a corporation is unable to fulfill its financial obligations to its creditors.³⁶ Insolvency is factual and can be easily identifiable when a debtor is unable to pay his or her creditors.³⁷ The insolvency regime is different from insolvency itself because it is a formal proceeding initiated to determine when insolvency exists. Various regimes arise in response to the insolvency of the debtor and the initiating party has to

³⁴ There are several civil processes where they can enforce their rights such as the right to enforce interests in the contract, the right to sell the assets of the debtor, the right to a set off and the right of foreclosure. Vanessa Finch & David Milman, *Corporate Insolvency Law: Perspectives and Principles* 3rd ed (New York: Cambridge University Press, 2017) at 9.

³⁵ Thomas H Jackson, *supra* note 8 at 9.

³⁶ Insolvency law deals primarily with a debtors “inability to pay” rather than a debtors “unwillingness to pay”. Roderick Wood, *supra* note 11 at 2.

³⁷ *Ibid* at 17.

choose which of the regimes would yield the greatest results.³⁸ Insolvency law does not compel debtors to pay their debts to creditors but it enables the debtor determine how the debts owed will be satisfied considering that the debtors' assets are insufficient to do so.

Liquidation and a rescue are the two main opposing objectives of an insolvency regime. A liquidation regime aims to solve the collective action problem by substituting the race to the assets of the debtor with a scheme that suspends the rights and remedies available to creditors and establishes a process for the retrieval of the debtor's assets from the creditors and a distributes them according to the creditors' claims.³⁹ A liquidation process prevents individual grabs by creditors from the assets of the debtor, which decreases the value of the assets that would be used to settle their claims.⁴⁰ In liquidation, there is always a victor and a victim because the law is compelled to decide on who bears the risk of the failure of the debtor.⁴¹ These are very difficult choices considering the presence of creditors who are worst hit by the insolvency and the claims that would be left unsatisfied as a result of insufficient assets.

On the other hand the rescue regime, also known as a restructuring or a reorganization regime, has the aim of preserving the going concern value of the corporation by reducing or adjusting the claims of the creditors. In most cases, the financial crises, which a corporation encounters during insolvency, is of a nature that cannot be resolved without a reorganization of the firms' business or structure.⁴² The purpose of a rescue

³⁸ *Ibid.*

³⁹ Finch & Milman, *supra* note 34 at 9.

⁴⁰ Jackson, *supra* note 8 at 14.

⁴¹ Philip Wood, *supra* note 12 at 4.

⁴² Finch & Milman, *supra* note 34 at 118.

law is not to prevent corporations from failing but to give financially distressed⁴³ corporations a chance to reorganize or restructure their business and continue as a going concern.⁴⁴ This chapter will now discuss how corporate insolvency can be determined.

1.2 Determinants of Insolvency

These are the indicators or signals to creditors and to the corporation itself that it has become insolvent. In Nigeria, one of the circumstances for the winding up of a company is the inability of the company to pay its debts.⁴⁵ The *Companies and Allied Matters Act* (“CAMA 2020”) in Section 570(a)-(c) has defined inability to pay debts. It states:

A company shall be deemed to be unable to pay its debts if-

- (a) a creditor by assignment or otherwise, to whom the company is indebted in a sum exceeding ₦200 000 then due, has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
- (b) execution or other process issued on a judgment, Act or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (c) A company shall be deemed to be unable to pay its debts if the court, after taking into account any contingent or prospective liability of the company is satisfied that the company is unable to pay its debts.

The Supreme Court of Nigeria, In *Afrotech Technical Services v MIA & Sons Ltd & Anor*⁴⁶ defined an insolvent person:

A person is deemed to be insolvent within the meaning of this Act who has either ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an acts of bankruptcy or not.

⁴³ This is when the corporation is near insolvency or at the verge of insolvency.

⁴⁴ Finch & Milman, *supra* note 34 at 117.

⁴⁵ *Companies and Allied Matters Act*, Cap C20, Laws of the Federation of Nigeria 2004, s. 569(d).

⁴⁶ [2000] LPELR- 219(SC) P.41, Paras.c-d)

In Nigeria, the test used in determining the insolvency of a debtor is the cash flow test. The law considers the debtors inability to pay past and future debts. The provisions do not clearly state that the assets of the debtor will be considered in determining the insolvency of the debtor. CAMA 2020 in section 507(b) includes the failure of a debtor to satisfy an order of the court in determining the insolvency of the debtor. These orders given by the court against a debtor could arise in several circumstances and it makes it easy for companies to be wound up in Nigeria once any of those conditions have been fulfilled.

In Canada, Section 2(1) of the *Bankruptcy and Insolvency Act* (“BIA”)⁴⁷ has defined an insolvent person. It states

Insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars:

- (a) [The debtor] is for any reason unable to meet obligations as they generally become due
- (b) [The debtor] has ceased paying his current obligations in the ordinary course of business as they generally become due
- (c) The aggregate of [the debtor’s] property is not, at a fair valuation sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable the payment of all obligations, due and accruing due.

The *Companies’ Creditors Arrangement Act* (“CCAA”)⁴⁸ does not define an insolvent person but defines a debtor company. It defines a debtor company as any company that is bankrupt or insolvent. This means that for a person to obtain the protection of the CCAA the person must be bankrupt or insolvent and admit its insolvency.⁴⁹ In *Re Stelco*,⁵⁰ the court stated that:

⁴⁷ RSC 1985, c B-3

⁴⁸ RSC 1985, c C-36 s 2

⁴⁹ *Re Companies Creditors Arrangement Act (Canada)* [1934] SCR 659.

⁵⁰ [2004] 48 CBR (4th) 299 (Ont SCJ) (Stelco)

In interpreting “Debtor Company”, reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . . To be able to use the Act, a company must be bankrupt or insolvent... The company must, in its application, admit its insolvency.

The determinants of insolvency are imbedded in these provisions. In Canada, the cash flow and the balance sheet test are the two predominant tests used in determining the insolvency of a corporation. From the provisions in the BIA, the first two tests in Section 2(1) (a) and (b) of the BIA are cash flow tests while the third test in Section 2(1)(c) of the BIA is the balance sheet test. The first cash flow test is backward looking while the first test is forward looking. The Canadian approach differs from the Nigerian approach. Under the Nigerian law, the balance sheet test is not applicable in determining if a corporation is insolvent, as the assets of the debtor are not considered.

In the analysis of the two tests, the Canadian statutes and case law will be used. This is because in a corporate restructuring the creditors are usually drawn to the debtors’ ability to pay the debts as they mature as opposed to the debtor having enough present assets to satisfy the future liabilities.⁵¹ This is because the creditors understand that the monies the debtors will use to satisfy the debts owed to them might not have accrued. This chapter will now discuss the two tests.

1.2.1 Cash flow Test

The cash flow test is also referred to as the commercial insolvency test.⁵² In the first cash flow test a corporation is considered as insolvent when it is unable to pay its debts

⁵¹ Kubi Udofia, “Establishing Corporate Insolvency: The Balance Sheet Insolvency Test”, (2 July 2019), online: *Harvard Law School Bankruptcy Roundtable* <<http://blogs.harvard.edu/bankruptcyroundtable/2019/07/02/establishing-corporate-insolvency-the-balance-sheet-insolvency-test/>>.

⁵² *Ibid.*

as they become due.⁵³ This means that with the available resources that the debtor owns, the future debt owed to creditors cannot be satisfied. It is irrelevant that the assets of the debtor exceed its liabilities, what is relevant is that it cannot pay for debts that would be incurred in the conduct of its business. This test is not concerned with “whether the debtor has not paid his or her current obligations in the past. The main issue is whether the debtor is able to pay.”⁵⁴ There is a distinction between the ability to pay and the unwillingness to pay. A person will not meet the requirements of insolvency if they have the sufficient funds to meet their obligations but have simply refused to do so. Saunders J in *Thorne Riddell v Fleishman*⁵⁵ held that “unable” as referred to in section 2(1) of the BIA does not mean “unwilling”. A debtor is regarded as insolvent under this test regardless of the absence of debts currently due if it is established that the payments will be due in future and the debtor has no means to satisfy the debts.⁵⁶ The debtors’ ability to pay can be determined by accessing the value of the assets the debtor currently has to meet these obligations. A debtor that has a line of credit that can be used in meeting his obligations to the creditors is not insolvent. The presence of liquid funds is not necessary.⁵⁷ Batshaw J of the Quebec Superior Court, held in *Bel Air Electric Inc*⁵⁸ that:

It is reasonable to conclude that a businessman would be entitled to consider himself solvent because of the expectation that the bank will continue to finance him and he would in fact be so, so long as that expectation was fulfilled.

⁵³ Goode, *supra* note 5 at 112–113.

⁵⁴ Roderick Wood, *supra* note 11 at 19.

⁵⁵ (1983) 47 CBR (NS) 233 (Ont. HCJ). This is the correct way to cite without periods. I note that in some of your other cites you use W.W.R with periods. Please review all cites to ensure periods are deleted.

⁵⁶ Roderick Wood, *supra* note 11 at 20.

⁵⁷ *Ibid.*

⁵⁸ (1962), 3 CBR (NS) 252 (Que SC)

The second cash flow test is a backward-looking test that considers the past debts incurred by the debtor and it can be perceived to apply to only a debtor who carries on a business. This test disregards the ability of the debtor to pay future obligations it requires proof that the debtor has ceased fulfilling its obligations to the creditors in the ordinary course of business as they become due. The main issue under this test is if the debtor has ceased to pay his or her debts.⁵⁹ The cash flow tests usually easy to apply in practice as all the court looks at to determine if the debtor is insolvent is examining if the past debts have been paid and if the debtor is paying its debts as they fall due.⁶⁰ The rationale behind this test is to prevent corporations from acquiring large and costly assets at the expense of paying its creditors.

1.2.2 Balance Sheet Test

This can be referred to as the absolute insolvency test. The idea underlying this test is that a corporation is insolvent if the liabilities are greater than the value of the assets making the company's assets insufficient to discharge the liabilities.⁶¹ There is need to know the value of the assets owned by the corporation and the amount of liabilities. The assets to be calculated are present assets owned by the debtor at the time the insolvency test is carried out.⁶² Spencer J in *Consolidated Seed Exports Ltd Re*⁶³ was of the opinion that the solvency of a person is to be determined on a day-to-day basis. The assets that may be acquired in the future or an increase in value of the assets that may occur sometime in the future are not included in determining a debtor's present

⁵⁹ Roderick Wood, *supra* note 11 at 20.

⁶⁰ Goode, *supra* note 5 at 87. Unliquidated claims and bonafide disputes of the debt are excluded.

⁶¹ *Ibid* at 88.

⁶² Roderick Wood, *supra* note 11 at 21.

⁶³ (1986), 62 CBR (NS) 156 (BCSC).

solvency.⁶⁴ However, assets that are exempted must be included regardless of the assets not being available to satisfy the claims of creditors in insolvency.⁶⁵

The balance sheet test deals mainly with obligations rather than debts and as such contingent and unliquidated claims are included. The insolvency test must be met by the debtor before a payment or transfer is made to a third party otherwise it will be considered as a preference. In *Re Challmie*,⁶⁶ the courts considered if the debtor was insolvent at the time the mortgage was given to his brother-in-law and it held that the mortgage was void as a fraudulent preference. Proving the balance sheet test is more difficult than proving a cash flow test which is factual. The burden of proving the balance sheet test lies on the party asserting insolvency who may not be able to easily access the books of the corporation to prove the insolvency. A court is unlikely to liquidate a company by considering the balance sheet test alone.⁶⁷ The court will only want to liquidate if the debts owed to the party asserting cannot be met. This is simply because an inability to pay already demonstrates cash flow insolvency.

Another issue with this test is the liabilities that should be taken into account. According to Section 2 (c) of the BIA it refers to “all obligations due and accruing due”. In some cases the court has held that future liabilities are not included but only obligations currently payable at the time the test is applied. In *Enterprise Capital Management Inc v Semi-Tech Corp*⁶⁸ the position of the note holders was that the corporation was insolvent as it did not have sufficient assets to enable payment of the corporations

⁶⁴ Roderick Wood, *supra* note 11 at 21.

⁶⁵ *Ibid.*

⁶⁶ (1976), 22 CBR (NS) 78 (BCSC)

⁶⁷ Roderick Wood, *supra* note 11 at 21.

⁶⁸ [1999] 10 CBR (4th) 133 (Ont SCJ) [Semi-tech]

obligations due and accruing due. Ground J held that not all debts payable at some future date are to be included in “accruing due” for the purpose of insolvency tests.

Some other cases have held that future obligations and contingent liabilities should be included while determining liabilities due and accruing due. In *Re Stelco inc.*,⁶⁹ Stelco filed for protection under the CCAA on the basis that it was insolvent.⁷⁰ The union representing Stelco’s employees, the United Steelworkers of America (USWA) brought several motions one of which was to rescind the initial order and dismiss the application of Stelco from obtaining protection under the CCAA on the basis that Stelco was at no point insolvent and could not claim protection under the CCAA. Farley J held that the CCAA does not define an insolvent or insolvency and recourse should be had to the BIA.⁷¹ The BIA tests on their own are disjunctive and anyone who meets either of the tests is said to be insolvent.⁷² The view of the USWA would render the test in Section 2(a) of the BIA redundant and no legislative provision should be interpreted in such a way as to “render it a mere surplusage.” The court stated that Stelco had met the insolvency test by being unable to meet its obligations as they became due. The USWA’s motion was therefore dismissed.

The decision of the courts in *Semi-tech* and *Stelco* seem contradictory but the difference between the courts’ decision in both cases lies in the initiating party. In *Semi-tech* a creditor initiated the proceedings, whereas in *Stelco* the debtor initiated the

⁶⁹ [2004] 48 CBR (4th) 299 (Ont SCJ)

⁷⁰ A direct consequence of filing for protection under the CCAA is that it provides for an automatic stay of proceedings for all actions against the company.

⁷¹ *Houlden & Morawetz*, the 2004 Annotated Bankruptcy and Insolvency Act (Toronto Carswell; 2003) at p.1107 states: In interpreting “Debtor Company”, reference must be had to the definition of an “insolvent person” in Section 2(1) of the BIA.

⁷² *Optical Recording Laboratories Inc. Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A)

proceedings.⁷³ The provisions of the CCAA also require the debtor to admit its insolvency before it can be said to be insolvent. *Stelco* admitted that it was insolvent and went ahead to seek the protection of the courts on time whereas in *Semi-tech* the corporation did not admit that it was unable to meet its future obligations to its creditors.

In the balance sheet test, the assets to be considered should be the assets owned by the corporation at the time of the test and the liabilities should be those due and not those that would become due at a future date.⁷⁴ Roderick Wood is of the opinion that a failure to include future obligations into the computation would prejudice long-term creditors.⁷⁵ It would be inconsiderate to compute future debts that the corporation would incur long before the debts have matured. This is because the assets or funds that would be used in offsetting those debts might not be readily available at the time but will be at the time the debt has accrued. This chapter will now consider the objectives of corporate insolvency law.

1.3 The Objectives of Corporate Insolvency Law

The objectives which corporate insolvency law seeks to achieve can also be referred to as the goals of corporate insolvency law. They tell us what corporate insolvency law aims to do. The Supreme Court of Canada in *Century Services*⁷⁶ explained the nature of corporate insolvency in Canada regulated by both the BIA and the CCAA. The BIA is a strict rule-based approach for resolving the corporate insolvency of a debtor while the CCAA is a more relaxed approach, remedial in nature and should be construed

⁷³ Stephanie Ben-Ishai & Thomas Telfer eds, *Bankruptcy and Insolvency Law in Canada* (Toronto: Irwin Law, 2019) at 531.

⁷⁴ Roderick Wood, *supra* note 11 at 21.

⁷⁵ *Ibid* at 21.

⁷⁶ *Century Services Inc v Canada (Attorney General)* (2010), SCC 60.

broadly. Corporate insolvency laws seek to achieve two main objectives, which are liquidation and rescue. Liquidation seeks to fairly distribute the assets of the debtor to its creditors. Rescue which is also referred to as reorganization or restructuring regimes aim to preserve the business by maintaining it as a going concern by an agreement with the creditors to accept less than what they are owed.⁷⁷ The objectives aim to increase the certainty, efficiency, and transparency of the insolvency process and make the creditors certain about the outcomes to expect in the future which increases the assets used to satisfy all claims of creditors.⁷⁸ The objectives can be summarized as follows:

1.3.1 Maximizing the value of the assets and the returns to creditors

The maximization of value of the assets goes hand in hand with maximizing returns for creditors. Insolvency law aims to eliminate the rights of creditors to claim individually against the assets of the debtor and propagating for the need for collective interests of creditors as a group.⁷⁹ Other methods of enforcement of claims by creditors are subject to the collective interests of creditors as a group. Insolvency law eliminates the frequent individual race to grab the assets of the debtor once the debtor is insolvent and replaces it with a collective means where the assets of the debtor are gathered and distributed fairly to the creditors.⁸⁰ The gathering of the assets of the debtor and the collective claim on his assets by the creditors prevent the depletion of assets, which would have occurred if individual grabs were permitted.⁸¹ Insolvency law recognizes that the maximization of returns for creditors are dependent on the actions taken by other

⁷⁷ Roderick Wood, *supra* note 11 at 4.

⁷⁸ *Ibid* at 5.

⁷⁹ Goode, *supra* note 5 at 61.

⁸⁰ Jackson, *supra* note 8 at 9.

⁸¹ Goode, *supra* note 5 at 61.

creditors who have claims against the debtor. In other words, the collective process is employed to bring them all together as a group to prevent the assets being destroyed.

1.3.2 Restoring the corporation to solvency

Insolvency law aims to facilitate the recovery of a corporation in financial distress.⁸² Insolvency law facilitates the recovery of companies in distress and ensures that they continue carrying on their businesses as going concerns. This goal is usually achieved in rescue mechanisms such as the company voluntary arrangement and administration.⁸³ Jackson argues that insolvency law can be used to keep viable corporations in operation.⁸⁴ It provides for how the corporation will be managed during insolvency. In order to restore the corporation to solvency the debtor has to remain in control of affairs whilst negotiating with the creditors in order to determine if its liabilities would be forgone or reduced. The debtors also have the opportunity to agree with the creditors on a new payment plan.

1.3.3 Preserving the insolvency estate and providing for an equitable system for ranking of claims during dissolution.

Insolvency law has ensured that the ranking of creditors' claims has moved from a first come first served basis where the creditor who first stakes a claim to the assets of the debtor is entitled to be paid first out of those assets to a priority ranking distribution scheme where the claims are satisfied in order of priority.⁸⁵ The law establishes the rules that govern the ranking of creditors' claims and the order of distribution. Insolvency law also provides for an equitable and fair distribution to creditors. It lays

⁸² Finch & Milman, *supra* note 34 at 25.

⁸³ Goode, *supra* note 5 at 60–61.

⁸⁴ Jackson, *supra* note 8 at 2.

⁸⁵ *Ibid* at 9.

down ground rules that govern how the assets of the debtor are distributed and protects and preserves the assets of the debtor for the creditors.⁸⁶ These rules are only confined to liquidation or winding up proceedings and do not concern other objectives or goals which insolvency law seeks to achieve.⁸⁷

1.3.4 Identifying the causes of a company's failure by creating rules of management and sanctioning directors and officers who go against them.

In recent times, the reason why corporations enter into insolvency has been attributed to poor corporate governance. When a corporation is insolvent the creditors incur losses and the employees of the corporation fear the loss of their jobs. Insolvency laws provides for investigation into the failure of the corporation by the liquidator and sanctions are placed on the directors and officers for their acts or omissions in relation to their fiduciary duties to the corporation. The rationale behind this is that people who are harmed should receive full compensations from the directors and officers committing the harm.⁸⁸ There are also stipulated sanctions imposed on the directors and officers for failure to exercise due diligence in handling the affairs of the corporation hence leading to financial collapses. This is done to ensure that the affairs of the corporation are managed properly.⁸⁹ This chapter will now discuss corporate restructuring law and the ways a rescue process can be achieved.

⁸⁶ Finch & Milman, *supra* note 34 at 25.

⁸⁷ Goode, *supra* note 5 at 62.

⁸⁸ Janis Sarra and Ronald Davis, “*Director and Officer Liability in Corporate Insolvency: A Comprehensive Guide to Rights and Obligations*” 3rd ed. (Toronto: LexisNexis 2015) at 1.

⁸⁹ Finch & Milman, *supra* note 34 at 25.

1.4 Corporate Restructuring Law

Restructuring law can be used to keep viable corporations in operation by allowing them to reorganize their business.⁹⁰ Restructuring law is aimed at apportioning decision and control rights in the insolvent corporation to ensure the maximization of its assets.⁹¹ The restructuring law gives room for negotiations between debtors and creditors where the creditors agree to accept something less than they are fully entitled to as full and final satisfaction of their debts.⁹² A restructuring law provides the corporation in distress with a reasonable time to draft a proposal that would be given to the creditors for their approval or disapproval. If the creditors approve the restructuring plan then it binds them and gives the corporation enough breathing space to continue its business as a going concern whilst retaining its ownership structure or the sale of the corporation as a going concern to a third party.

A restructuring law should be tasked with rescuing insolvent businesses and not liquidations. For a corporation to keep up with global best practices the presence of an effective corporate restructuring framework is necessary to boost the confidence of investors whilst enhancing the certainty of creditors rights and debtors obligations.⁹³ In Canada, the CCAA is one of the enabling statutes that permit insolvent corporations and business enterprises to restructure their affairs.⁹⁴ The CCAA provides various rescue options for insolvent corporations. When a rescue process has been embarked

⁹⁰ Jackson, *supra* note 8 at 2.

⁹¹ Sarra, *supra* note 31 at 4.

⁹² Roderick Wood, *supra* note 11 at 333.

⁹³ Roderick Wood, *supra* note 11 at 3.

⁹⁴ Sarra, *supra* note 31 at 1.

upon, the ability of the company to continue as a going concern can be determined by several factors, which vary from one corporation to another. According to Janis Sarra:⁹⁵

The going forward solution to the firm's financial distress depends on the reason for the insolvency, the firm's capital structure, the viability of the business plan and effectiveness of its governance structure, the availability of capital to refinance the purchase the business.

The objectives of restructuring are rescuing financially distressed firms which either permits the debtor to continue its business or it results to a sale as a going concern to a third party.⁹⁶ Restructuring also maximizes the value of assets for creditors in a way that ensures that creditors receive higher returns than would be available to them in liquidation proceedings. The higher returns are achieved by the preservation of the corporation as a going concern.⁹⁷ Restructuring law further recognizes that it is not only the interest of creditors that should be protected in corporate insolvency but also the interest of employees, suppliers and the larger community.⁹⁸ The Supreme Court of Canada in *Century Services*⁹⁹ has also recognized the importance of considering public interest in a restructuring process. In situations where the debtor corporation envisages that a restructuring would not be more profitable than a liquidation as a result of the deterioration of its assets, the case is not to be considered for restructuring but should be terminated.¹⁰⁰

⁹⁵ *Ibid.*

⁹⁶ Roderick Wood, *supra* note 11 at 333.

⁹⁷ *Ibid* at 339.

⁹⁸ *Ibid* at 341.

⁹⁹ *Century Services*, *supra* note 76.

¹⁰⁰ Roderick Wood, *supra* note 11 at 339.

1.4.1 Rescue

Rescue is a necessary intervention when a company is insolvent to prevent the company from failing.¹⁰¹ Put differently, a rescue can be referred to as a remedial action taken when the corporation is in distress. To restructure its affairs the corporation needs an arrangement with its creditors considering that it may not afford to pay everyone.¹⁰² The end results of a rescue can often be referred to as arrangements, restructurings or reorganizations. Globally rescue is becoming widely accepted and liquidation is only considered as a tool of last resort when the rescue process is unable to bring the company back to solvency.¹⁰³ The rescue of a corporation can either be a business rescue or a corporate rescue. These mechanisms will be discussed.

1.4.1.1 Business Rescue

The corporation is an abstract entity that carries on an economic activity called a business.¹⁰⁴ As a result of this, the corporation is separate from the business it carries on. The directors or managers of the corporation run the affairs of the company and are responsible for making major decisions in the corporation. The output of managerial duties such as good decision-making, improved productivity or sustained financial viability reflects the efforts the directors put in running the company's business.¹⁰⁵ If the directors fail to carve a viable business plan or if they are not diligent in handling its affairs, leading to the insolvency of the corporation, a business rescue is

¹⁰¹ Finch & Milman, *supra* note 34 at 197.

¹⁰² Andrew R Keay & Peter Walton, *Insolvency law: Corporate and Personal*, 4th ed (Bristol: LexisNexis, 2017) at 137.

¹⁰³ Kubi Udofia, "An Evaluation Of The Adequacy Of Nigeria's Sector-Specific Business Rescue Legal Regimes", (2019), online: *Lawyard.ng* <<https://www.lawyard.ng/wp-content/uploads/2019/11/Lawyard-Quarterly-Journal.pdf>> at 16.

¹⁰⁴ Omobolanle Adebola, *Corporate Rescue and the Nigerian Insolvency System* (University College London, 2012) [unpublished] at 77.

¹⁰⁵ Sarra, *supra* note 31 at 2.

appropriate.¹⁰⁶ This is because the root of the problem lies in the management of the corporation and not in the corporations' business. To rescue this company, the sale of the business as a going concern to pre-filing creditors or to new parties may bring the company to a healthier state especially when the new owner brings in capital, new operational expertise, new management skills and other benefits to the business.¹⁰⁷ The sale of the company as a going concern would give a new opportunity to the company to succeed at the business through a new entity and management.¹⁰⁸

Janis Sarra refers to this as “releasing the capital and assets to higher value uses.”¹⁰⁹ Goode suggests that the sale of a business as a going concern gives the assets a higher value than when it is sold on a piece-meal basis.¹¹⁰ This sale of the business to a healthy entity will enable the corporation to offset its debts with the money recovered from the sale whilst preserving the going concern value of the corporation. The sale will increase the likelihood of success of the business by obtaining the control of the corporation from the ineffective directors and officers as the success of every business lies in the hands those who call the shots in that business.¹¹¹ The sale of the business as a going concern to a third party not only benefits the business but also serves public interest as it preserves economic relationships with the employers, suppliers and other stakeholders.¹¹²

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid* at 4.

¹⁰⁸ Adebola, *supra* note 104 at 79.

¹⁰⁹ Sarra, *supra* note 31 at 2.

¹¹⁰ Goode, *supra* note 5 at 88.

¹¹¹ Douglas G Baird, “A World Without Bankruptcy” (1987) 50:2 Law & Contemp Probs 173 at 177.

¹¹² Roderick Wood, *supra* note 11 at 338.

1.4.1.2 Corporate Rescue

Corporate Rescue is the preservation of the corporate entity and the business it operates with the ownership of the corporation remaining intact.¹¹³ This is usually practiced when the underlying business of the corporation is sound and the problems faced by the corporation are temporary or external and have a nature that an effective solution can be found.¹¹⁴ An example of this is a situation where the debtor corporation runs its affairs properly and utilizes its assets efficiently is affected by unforeseen circumstances that cause an interruption in its business. As a result of this incident, the corporation will lack the capital structure to sustain its affairs as it used to. The best option is for this corporation to understand the new market, draw up a new capital structure that would complement the market and draft a plan to enable it to continue its business as a going concern. In a situation like this, there is no need for a change in the ownership or structure of the corporation. A corporate rescue is appropriate to provide protection to the insolvent corporation pending when a restructuring plan is carved out, agreed upon and implemented.¹¹⁵ This chapter will now discuss the theories of corporate restructuring.

1.5 Theories of Corporate Restructuring

Several theorists have expressed their various opinions on the reasons for the corporate insolvency regime.¹¹⁶ Ben-Ishai and Telfer have identified three functions of bankruptcy law, which are: (1) to give viable businesses time to restructure their

¹¹³ Parry, *supra* note 17 at 2.

¹¹⁴ These problems could be the loss of a major customer, an increase in the price of raw materials, excessive interest rates, over expansion, poor management etc. *Ibid* at 1.

¹¹⁵ Sarra, *supra* note 31 at 2.

¹¹⁶ When a debtor enters into formal insolvency proceedings, he or she could either be found to be bankrupt or not. Bankruptcy is a legal regime that responds to the insolvency of a debtor.

operations and continue their business as a going concern (2) to solve the collective action problem (3) to enable debtors make a fresh start.¹¹⁷ The first two functions apply to corporations but the third will not as Jackson has highlighted that debtors who are corporations are not allowed to make a fresh start.¹¹⁸

1.5.1 Preserving the Value of the corporation as a “Going Concern”

The starting point of this argument is the premise that restructuring is used to keep insolvent corporations in business because they are worth more as going concerns than being liquidated.¹¹⁹ Put differently, the value of the business, as a going concern in a restructuring is higher than the value that would be realized from the piecemeal sale of its assets to individual buyers.¹²⁰ A common justification is that if corporations are allowed to restructure and continue their operations as going concerns, it would yield greater returns for the creditors when the company becomes solvent.¹²¹ Restructuring can be perceived to be a better option, as creditors seek the maximization of their returns and this would not be achieved in liquidation.¹²² When the corporation is allowed to restructure, the debtor remains in possession of its assets and in control of its affairs with the aim of working together with the creditors to carve out a restructuring plan for the healthier future of the corporation.¹²³ The debtor and creditors decide on an effective solution to the corporations’ insolvency. Restructuring gives the debtor time

¹¹⁷ Ben-Ishai & Telfer eds, *supra* note 73 at 22.

¹¹⁸ Jackson, *supra* note 8 at 4. The fresh start policy implies that a debtor might be allowed to surrender their non-exempt assets and obtain a discharge for their debts. Corporations are not allowed to do so.

¹¹⁹ *Ibid* at 2.

¹²⁰ Roderick Wood, *supra* note 11 at 339.

¹²¹ Keay & Walton, *supra* note 102 at 25.

¹²² Roderick J Wood, *supra* note 33 at 407.

¹²³ Roderick Wood, *supra* note 11 at 338.

to carve out a rescue plan and negotiate with the creditors on how the payments of the debts owed to them will be reduced.¹²⁴

David Skeel¹²⁵ supports that the going concern value of a corporation should be preserved. He argues that when the corporation remains a going concern and the debtor remains in control there is a relief from creditors' control which gives the debtor breathing space,¹²⁶ as opposed to a liquidation or receivership where there would be a change in the control and management of the corporation as receiver managers can now be placed in charge of managing the affairs of a corporation in distress. When the debtor is in control, the debtor proposes a plan during negotiations between creditors and debtors management in a restructuring for the creditors to deliberate on to ensure that the general interests of the creditors are ascertained. Skeel¹²⁷ upholds the "Debtor in Control" principle stating that when a corporation is in financial distress and the debtor is in control of the corporations' affairs, the going concern value would be preserved and the assets of the debtor would be kept far from the reach of creditors who want to grab its assets.

In the late 1980's there were constraints on the exclusive rights of debtors to propose a reorganization plan and a new narrative began in the 1990's which is called the "No time to spare."¹²⁸ This mode of restructuring seemed contradictory to the "Debtor in Control" but its purpose remained to ensure that the corporation continued as a going

¹²⁴ Parry, *supra* note 17 at 2.

¹²⁵ David A Jr Skeel, "Competing Narratives in Corporate Bankruptcy: Debtor in Control vs. No Time to Spare" (2009) 4 Mich State L Rev 1187 at 1198.

¹²⁶ Once a restructuring process begins there is an automatic stay of creditors' claims to give the debtor a breathing space. See, *Ibid*.

¹²⁷ *Ibid*.

¹²⁸ *Ibid* at 1199.

concern. The No time to spare narrative by Skeel required the court to urgently approve a loan proposal financed by the debtor and a lender to prevent the immediate collapse of the corporation.¹²⁹ He explained “The judge must sign off on everything right away, because the company’s assets are a melting ice cube and will... evaporate unless the court springs immediately into action.”¹³⁰ This narrative shows the urgency inflicted on courts to approve a restructuring plan in order to ensure that the assets are not totally destroyed before the corporation can continue its operations as a going concern.

The opponents of the going concern value believe that time is of the essence and the timeframe within which the debtor would return to solvency as well as the rise and fall in value of the currency can be a determining factor why creditors would prefer an outright liquidation to a restructuring. Wood holds the view that secured creditors may have a strong incentive to steer the insolvency towards a liquidation to avoid the risk of not recovering their claims after a long wait for the corporation to bounce into solvency in a traditional restructuring.¹³¹ Janis Sarra believes that many insolvent corporations are worth more liquidated than as going concerns.¹³² She refers to it as “Deferred Liquidation” and states that the continuous investment in an insolvent corporation creates an obligation that the corporation would continue running its affairs and the interest of workers and secured creditors are at a greater risk when the resources could be used elsewhere.¹³³ Jackson and Baird point out that the sale of a corporation as a going concern will not maximize value for creditors as much a liquidation would in

¹²⁹ *Ibid.*

¹³⁰ *Ibid* at 1199.

¹³¹ Roderick Wood, *supra* note 33 at 410.

¹³² Janis Sarra, *Creditor Rights and the Public Interest, Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003) at 42.

¹³³ *Ibid.*

corporations like sole proprietorships with skills and knowledge specific to the owners which would be lost if the corporation is sold as a going concern to a third party.¹³⁴ According to Roderick Wood, the causes of financial difficulty of a corporation and the appropriate method of addressing the issue are not “immediately apparent” and it would require a restructuring process to enable the corporation decipher what the problem is and propose rescue plans.¹³⁵

When a corporation is not viable, selling the corporation as a going concern is difficult but might be considered to preserve the value of the corporation and also maximize value for the creditors. This is a restructuring option that yields greater value than a piecemeal sale of assets. Stanley Edwards argues that restructuring preserves the going concern value of the corporation by preventing fire sale scenarios.¹³⁶ Roderick Wood expresses his concern in understanding why the maximization of value cannot be done in a liquidation regardless of the additional costs involved in negotiating a plan with creditors that is not present in liquidation.¹³⁷ Wood suggests that liquidation may be preferable to restructuring if there is a possibility of liquidating a debtor’s assets while it remains a going concern thus reducing strategic costs. Wood adds that it is more commercially beneficial for corporations in distress to carry out a restructuring other than an outright liquidation, as it might be impossible to sell the business as a going concern having regard to the secured creditors interests on key assets of the corporation and during a restructuring other creditors would be stayed from enforcing their

¹³⁴ Douglas G Baird & Thomas H Jackson, “Bargaining after the Fall and the Contours of the Absolute Priority Rule” 55 U Chicago L Rev 738 at 742–743.

¹³⁵ Roderick Wood, *supra* note 11 at 339.

¹³⁶ Stanley E Edwards, “Reorganizations under the Companies’ Creditors Arrangement Act” (1947) 25:6 CBR 587 at 587.

¹³⁷ Roderick Wood, *supra* note 11 at 339.

claims.¹³⁸ Lopuki and Doherty have also stated that reorganization is the only option which supports the going concern sales of insolvent corporations as the markets are inadequate.¹³⁹

Despite these views, when maximization of value for creditors is in issue, the preservation of the going concern value should be the main focus. If a corporation is insolvent and the creditors are paid out at that time the value would be less than that which would be recovered if the corporation were given a breathing space to restructure its affairs. Janis Sarra argues that almost always a viable business is frequently worth more as a going concern than if the assets are liquidated on a piecemeal basis to satisfy the claims of creditors.¹⁴⁰ This theory not only considers the interests of the creditors or the corporation in distress but also considers the broader interests of the public. For example, the interests of the employees who might be working with the corporation at the time, the suppliers who have certain contracts with the corporation to render services, the community who benefits from their services, etc. This extended consideration of other interests has been recognized by Professor Finch who holds the view that corporate rescue requires the continuation of the debtors business in order to preserve jobs and limit the negative economic effects of corporate failures.¹⁴¹

From the different views of theorists in support of preserving the going concern value of a corporation, there are two important outcomes when a corporation is given such an opportunity to remain in business. Firstly, a situation where the debtor corporation

¹³⁸ *Ibid.*

¹³⁹ Lynn M Lopucki & Joseph W Doherty, "Bankruptcy Fire Sales" (2007) 106 Mich Law Rev 61 at 61.

¹⁴⁰ Sarra, *supra* note 32 at 4.

¹⁴¹ Finch & Milman, *supra* note 34 at 198.

company continues as a going concern with its ownership and structure in place. Secondly, where the business is sold as a going concern and it continues carrying on business under a different ownership and structure.

1.5.2 The Collective Debt Recovery Platform for Creditors

The major proponent of the maximization of recovery of creditors is Thomas Jackson who believes that insolvency law should serve as a debt collection tool.¹⁴² His view arises from the understanding that the main goal of insolvency law is resolving creditors collection problems for greater returns. Not only does he hold the view that the procedure should maximize value for creditors, he believes that creditors should come together to lay their claims against the debtor to avoid the scrambling to seize the assets of the debtor leading to its depletion.¹⁴³ The proponents of this theory believe that when individual remedies are substituted with a non-piecemeal collective process there will be an increase in the aggregate value of the pool of assets and of greater commercial benefit to the creditors as a group.

According to Jackson, a collectivist system is administratively efficient and quite attractive to creditors as it reduces the additional costs of restructuring that involves series of negotiations between parties. He believes that all insolvency laws should be able to enhance the collective benefits of creditors.¹⁴⁴ Jackson has identified two reasons why the collective recovery of creditors should be encouraged. Firstly, he stated that it avoids the duplication of actions against the debtor and enforcement costs.

¹⁴² Jackson, *supra* note 8 at 7.

¹⁴³ *Ibid* at 14.

¹⁴⁴ Douglas G Baird & Thomas H Jackson, "Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy" (1984) 51 U Chicago L Rev 97 at 108.

Secondly, a more orderly liquidation would yield greater returns to the creditors instead of creditors rushing to grab assets of the debtor on a first come first served basis. The collective act of creditors on the assumption that they are better off acting as a group and their strength being in their numbers is able to do its best in enforcing entitlements of creditors which existed prior to bankruptcy.¹⁴⁵

Douglas Baird agrees with Jackson's view that creditors should remain entitled to their rights before insolvency as opposed to a post insolvency redistribution of rights.¹⁴⁶ Some commentators believe a decision to restructure or liquidate should be made considering which strategy yields the greatest return on the assets for creditors.¹⁴⁷ Lopucki and Doherty argue that a restructuring can maximize greater returns for the creditors than a liquidation¹⁴⁸ but Baird and Rasmussen hold a different view and have argued that "the days when reorganization law promised substantial benefits are gone," and that the rapid sale of the debtor company could lead to greater returns than a reorganization.¹⁴⁹

This theory of insolvency law being a collective debt recovery platform for creditors has been criticized as being constrained to a specific class who are the traditional creditors.¹⁵⁰ It does not pay attention to other legitimate interests or claims of many who are not referred to in their contract with the company as creditors.¹⁵¹ Professor

¹⁴⁵ Jackson, *supra* note 8 at 9.

¹⁴⁶ Baird & Jackson, *supra* note 144 at 108.

¹⁴⁷ Sarra, *supra* note 132 at 42.

¹⁴⁸ Lopucki & Doherty, *supra* note 139 at 5.

¹⁴⁹ Douglas G Baird & Robert K Rasmussen, *The End of Bankruptcy* (2002) 55 *Stan L Rev* at 781.

¹⁵⁰ Sarra, *supra* note 132 at 42.

¹⁵¹ Karen Gross, "Taking Community Interests into Account in Bankruptcy: An Essay" (1994) 72:3 *Wash U L Q* 1031 at 1047.

Keay and Professor Walton hold the opinion that the debt collection theory fails to take account that some creditors may possess stronger rights than other creditors. This may vary depending on the kind of security they possess and their ability to bargain freely with the insolvent.¹⁵² Janis Sarra also agrees that maximizing value for the traditional creditors is too limited and constrained and cannot be the major aim of a corporate restructuring but it is just one of the many aims.¹⁵³ She explained:

Market and debt collection theories are limited in their analysis because their definition of interest recognizes only equity and debt capital investment in the firm. They ignore the other investments that contribute value and which may be vitally important to decision making in terms of wealth maximization.

Jackson's view tilts towards the economic values of the creditors and has failed to put into consideration the broader interests of the public such as the preservation of jobs of employees. Professor Korobkin holds the view that when a corporation is reorganized, non-economic values, such as moral, political and social values should be considered.¹⁵⁴ Professor Vanessa Finch holds the same view as Korobkin stating that the debt collection theory "fails adequately to value the continuation of business relationships that have not been formalized in contracts and may indeed, omit from the consideration those who suffer the greatest hardships in the context of financial stress."¹⁵⁵

Baird and Rasmussen argue that "the new world of corporate reorganizations" makes liquidation more practicable than reorganization. They acknowledge the problem of the "empty core" and attribute this to the presence of different creditors and key players in

¹⁵² Keay & Walton, *supra* note 102 at 26.

¹⁵³ Sarra, *supra* note 132 at 41.

¹⁵⁴ Donald R Korobkin, "Rehabilitating Values: A Jurisprudence of Bankruptcy" (1991) 91:4 Columbia L Rev 717 at 762.

¹⁵⁵ Finch & Milman, *supra* note 34 at 234.

a corporation whose ownership rights conflict thus making the corporate reorganization process inefficient.¹⁵⁶ Unlike in bankruptcy where a few familiar processes are employed in a collective system, Baird and Rasmussen hold the view that a corporate restructuring process in a holding corporation would involve complex arrangements between the different subsidiaries and the creditors thus leading to fragmented interests and the inability for a consensus to be reached.¹⁵⁷ This point is counterproductive because times are changing, and companies have more innovative ways of ascertaining where assets of each corporation belong. If corporate restructuring would pose a problem according to Baird and Rasmussen, then the collective process should be almost impossible, as the creditors and investors would hardly know themselves.

1.5.3 Loss Distribution and the Consideration of Public Interest.

This theory upholds the consideration of the interests of the greater number of people who might be affected by the insolvency of the corporation. Janis Sarra believes that the reason for a restructuring is more than the preservation of a firm as a going concern and the resolving of debt collection claims of traditional creditors whether individually or as a group.¹⁵⁸ Warren has identified that the inability of the debtor to pay its debts can lead to distributional issues that would incur costs to some and yield benefits to the others.¹⁵⁹ In Warren's view, bankruptcy law determines how losses from a business failure should be borne and effectively distributed. She points out that in order to achieve this, certain normative questions such as, who suffers more when a business fails? And whom can best bear the loss? Should be considered and answered.¹⁶⁰

¹⁵⁶ Douglas Baird & Robert Rasmussen, "Antibankruptcy" (2010) 119:4 Yale L J 648 at 652.

¹⁵⁷ *Ibid* at 658.

¹⁵⁸ Sarra, *supra* note 132 at 36.

¹⁵⁹ Warren, *supra* note 15 at 789.

¹⁶⁰ *Ibid* at 790.

Gross advocates that the impact of a corporation's failure on the non-traditional creditors should be put into assessment to ascertain their losses. She holds the view that a broader understanding of economic interests, such as community interests should be considered in bankruptcy. She emphasizes the need for certain creditors to be paid when their survival is at risk.¹⁶¹ This humanistic approach by the proponents of this theory is uncertain, as community interests are relative. If all community interests are considered there might not be a closure as to who can claim from the debtor. Bowers has also identified that the term "community interests" are not strictly quantifiable.¹⁶² The consideration of the interest of a greater number of people would also mean placing the cost on secured creditors to pay for the social and economic costs of the firm's decision.

Korobkin makes it clearer by stating that the courts should be given the discretion to recognize "public interests."¹⁶³ Stanley Edwards agrees that the interest of the public should be put into great consideration in a decision to continue the enterprise.¹⁶⁴ The Supreme Court of Canada¹⁶⁵ has defined the public interest to comprise of the interests of employees, customers, communities and pensioners as people who should be considered while preserving the going concern of the corporation. This theory is in line with the going concern value theory and suggests that the public interest should be considered in restructuring to maximize value for both the creditors and non-traditional creditors.

¹⁶¹ Karen Gross, "On the Merits: A Response to Professor Girth and White" (1999) *American Bankruptcy Law Journal* 485 at 495-6.

¹⁶² James W Bowers, "Whither what Hits the Fan: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution" (1991) 26:1 *Georgia L Rev* 27 at 72.

¹⁶³ Korobkin, "Rehabilitating Values", *supra* note 154 at 745.

¹⁶⁴ Edwards, *supra* note 136 at 593.

¹⁶⁵ *Century Services*, *supra* note 76 at paras 16-18, 60.

From the analysis of the theories of restructuring, this paper will be more inclined to the purposes of restructuring stated by the proponents of preserving the going concern value of the corporation as the innovations in the CAM Bill aim to preserve the going concern value of businesses.

1.6 Conclusion

This chapter has given a general overview of corporate insolvency for better understanding of the key concepts and terms used in this thesis. It has also discussed the objectives of restructuring law and the theories of restructuring. This chapter has discussed a rescue and has differentiated a business rescue from a corporate rescue. Nigeria is a credit friendly jurisdiction that lacked a framework that provided mechanisms for business rescue till the recent amendments in the CAMA 2020. The courts also do not exercise restraint in giving orders to wind up a company once the company is insolvent. Prior to the passing of the CAMA 2020, liquidation and receivership procedures were usually practiced to maximize value for creditors. The next chapter will discuss corporate insolvency in Nigeria. It will evaluate the previous insolvency framework of Nigeria under the CAMA 1990 and will highlight the shortcomings in the previous framework that led to the reforms in the CAMA 2020.

CHAPTER 2: **CORPORATE INSOLVENCY IN NIGERIA**

2.0 Introduction

Nigeria does not have a separate regulatory framework for insolvency. Prior to the enactment of the CAMA 2020, the CAMA 1990 regulated corporations and provided the rules that governed corporate insolvency in Nigeria. In the past 30 years, there was no significant amendment to the CAMA 1990. The CAMA 1990 provided mechanisms that focused on debt collection. These mechanisms were winding up, receivership and arrangement and compromise. The restructuring mechanisms that are available are also not sufficient in rescuing the business of insolvent companies. In addition to the lack of business rescue options in Nigeria, loopholes that make the system unworkable weakened the existing insolvency framework in Nigeria. This chapter will review the previous corporate insolvency law in Nigeria. It will begin by discussing the history of corporate law in Nigeria and then proceed to discuss the corporate insolvency and restructuring procedures available in Nigeria under the CAMA 1990. While analyzing the options available in the CAMA 1990, this chapter will identify the shortcomings in the previous insolvency framework.

2.1 History of Nigerian Corporate Law

During the Pre-colonial era, corporate law practice was alien to the Nigerian legal system because commercial activities were minimal. At this time, most of the prominent businesses in Nigeria at that time include fishing, agriculture, farming and trading were for subsistence.¹⁶⁶ With the advent of slave trade in Nigeria, there was a boost in commercial economic interests; raw materials extracted from agricultural

¹⁶⁶ O Akinlola, *Corporate Law Practice*, 3rd ed (Lagos: Malthouse Press Limited, 2017) at 1.

produce were exchanged for manufactured goods from other countries.¹⁶⁷ The raw materials produced in Nigeria became a source of economic power, which slowly removed the interests of the colonial masters from human trading to trading in goods and services. This was how commercial activities blossomed in Nigeria. This led to a need to set up a legal framework to regulate commerce in Nigeria.

Before 1912, there was no local statute enacted to oversee corporate law practice in Nigeria.¹⁶⁸ The rapid growth of trade and commerce in Nigeria led to the enactment of the first Nigerian *Companies Ordinance of 1912* modeled after the United Kingdom's *Companies Act of 1908*.¹⁶⁹ The British Parliament passed this legislation to provide for the incorporation of companies by registration in Nigeria.¹⁷⁰ Between 1914 and 1918, World War 1 interrupted this development.¹⁷¹ After World War I, the *Companies Ordinance of 1912* was repealed and replaced with the *Companies Ordinance of 1922*. The new enactment was introduced to meet the commercial objectives of the Nigerian economy, enable the economy recover from the setback of the war, and ensure a stable corporate environment in Nigeria.¹⁷² The Second World War, between 1939-1945, also interrupted the growth of company law in Nigeria. The company ordinances of 1941 and 1954 were subsequently amended but these amendments had no significant impact on the growth of the company law of Nigeria.¹⁷³ On the 1st of October 1960, Nigeria gained its independence and the British Parliament lost the power to make laws for

¹⁶⁷ *Ibid.*

¹⁶⁸ E. O Akanki, *Essays on Company law*, (Lagos: University of Lagos Press, 1992) at 1.

¹⁶⁹ Akinlola, *supra* note 166 at 1.

¹⁷⁰ Joseph Abugu, *Principles of Corporate Law in Nigeria* (Lagos: MIJ Professional Publishers Limited, 2015) at 69.

¹⁷¹ Akinlola, *supra* note 166 at 1.

¹⁷² Abugu, *supra* note 170 at 69.

¹⁷³ Olakunle Orojo, *Company Law and Practice in Nigeria*, 5th ed. (LexisNexis Butterworths, 2008) at 9.

Nigeria as the country now had the power to make its laws.¹⁷⁴ Subsequently on the 1st of October 1963, Nigeria became a republic and the office of the Queen ceased as monarchy was abolished and the president took over control of Nigeria as the constitutional head of state who made laws for Nigeria.¹⁷⁵

In 1968, the Federal military government enacted the *Companies Decree of 1968*, which was more detailed and sophisticated, and this remained in force for two decades.¹⁷⁶ This *Companies Act* required a high level of accountability from directors to the company and its shareholders. There were defects in the application and enforcement of the *Companies Decree of 1968*. Critics noted that the Decree was modeled after the British *Companies Act 1948*,¹⁷⁷ without considering that the special features of Nigerian corporate law practice that were different from that of the United Kingdom at the time. Following a reform of Nigeria's corporate law in 1990, the Nigerian Law Reform Commission repealed the *Companies Decree of 1968* and enacted the *Companies and Allied Matters Act 1990* ("CAMA 1990").¹⁷⁸ The CAMA 1990 was divided into three parts: Part A deals with the incorporation of Companies; Part B deals with the procedure for the registration of Business name while Part C provides for incorporated trustees.¹⁷⁹

Previously, the CAMA 1990 was the primary legislation regulating corporate insolvency in Nigeria. It permitted companies to obtain credit from creditors to keep

¹⁷⁴ Abugu, *supra* note 170 at 70.

¹⁷⁵ *Ibid* at 71.

¹⁷⁶ Akinlola, *supra* note 166 at 2.

¹⁷⁷ Omobolanle Adebola, *supra* note 104 at 16.

¹⁷⁸ Akinlola, *supra* note 166 at 2.

¹⁷⁹ H. Y. Bhadmus, *Bhadmus on Corporate Law Practice*, 3rd ed. (Enugu: Chenglo Limited, 2017) at 4.

them in business and increase their productivity.¹⁸⁰ It also encouraged foreign investors to invest in companies and do business in Nigeria.¹⁸¹ CAMA 1990 also permitted creditors to obtain collateral to secure their loans. When these loans are unpaid, they become debts in the hands of the borrowing companies. The options available under the CAMA 1990 to creditors to recover the debts include winding up,¹⁸² receivership,¹⁸³ and arrangement and compromise.¹⁸⁴ The court with the jurisdiction to handle insolvency proceedings in Nigeria is the Federal High Court (the “court”).¹⁸⁵ This chapter is discussing the mechanisms previously available under the CAMA 1990 to illustrate the deficiencies in the framework and subsequently compare this previous framework under the CAMA 1990 to the CAMA 2020.

The two most practiced debt recovery options were winding up and receivership. A winding up process aims to dissolve a company while a receivership process aims to recover debts through the sale of the secured assets. The end result of both processes is the dissolution of the company. What is significant about these two options is that they do not aim to rescue insolvent companies.¹⁸⁶ Thus, the previous insolvency framework in Nigeria focused on the interests of creditors with debt collection being the main objective and no provision for a business rescue. Consequently, the framework neglected the interests of other key players in the insolvency system such as the debtor, employees, pensioners, the community and the public. This chapter will now discuss in

¹⁸⁰ CAMA 1990, s 166.

¹⁸¹ CAMA 1990, s 20 (4); Regulation 26(1) of *Companies Regulations* 2012.

¹⁸² CAMA 1990, s 422 - 432; 464 - 468; 473- 478; 481-518; 524.

¹⁸³ CAMA 1990, s 387 - 400; 410(10(c); 419 - 421.

¹⁸⁴ CAMA 1990, s 537 - 540.

¹⁸⁵ *Constitution of the Federal Republic of Nigeria* 1999 (as amended) (CFRN), s.251 (e).

¹⁸⁶ As discussed in chapter 1, a rescue is a necessary intervention when a company is insolvent which prevents the company from failing. A rescue process includes a business sale and a corporate or business rescue.

more detail the process of winding up and receivership commonly practiced in Nigeria highlighting the inefficiencies in both options.

2.2 Winding Up

Winding up proceedings are a special form of civil proceedings that aim to terminate the existence of a company.¹⁸⁷ In a winding up process the assets of the debtor company are dissolved and distributed to its creditors in accordance with the rules of priority.¹⁸⁸ Winding up proceedings are *sui generis* and are governed by Part XV of CAMA 1990.¹⁸⁹ The term “winding up” and “liquidation” are often used interchangeably but they do not represent the same action. Winding up involves both liquidation and dissolution of the company. When a winding up order is made against a company, the business of the company stops, all obligations owed by the company are terminated; before the commencement of the liquidation process where the assets of the company are sold off. Therefore, liquidation is only an aspect of the winding up process.

2.2.1 Modes of Winding up

CAMA 1990 provides for three modes of winding up a company and they are: winding up by the court, voluntary winding up and winding up subject to the supervision of the court.¹⁹⁰

¹⁸⁷ *Chief Bola Adedipe v. Sameindir Frameinendur* (2011) CA/L/128/08.

¹⁸⁸ *Utuk v. The Liquidator (Utuks Construction Marketing Company Ltd) Anor* (2009) LPELR-4322(CA) (P.24. Para. b).

¹⁸⁹ Kubi Udofia, “Applications in Winding-up Proceedings: Settled and Unsettled Issues”, (18 December 2018), online: <<https://kubiudofia.wordpress.com/2018/12/18/applications-in-winding-up-proceedings-settled-and-unsettled-issues/>>, Library Catalog: kubiudofia.wordpress.com [*Applications in Winding-up Proceedings*].

¹⁹⁰ CAMA 1990, s 401 of; *Oredola Okeya Trading Co & Anor v. Bank of Credit & Commerce International & Anor* (2014) LPELR-22011 (SC).

2.2.1.1 Winding up by the Court

A corporation may be wound up by an order of the court. This process is commenced when a petition for winding up of the corporation is filed in court. The company, a creditor, an official receiver, a contributory, a trustee in bankruptcy or a personal representative of creditor or contributory, or the Corporate Affairs Commission may file petitions for the winding up of a company.¹⁹¹ The CAMA 1990 provides that a winding up petition may be brought by any of these persons or a combination of all of them.¹⁹² The power to make winding up orders is vested in the Federal High Court with jurisdiction in the territory where the company has a head office or registered office.¹⁹³ The court has the power to appoint an official receiver or a liquidator to conduct the winding up of the company.¹⁹⁴ Once a liquidator is appointed the powers of directors cease except the court sanctions otherwise.¹⁹⁵

The CAMA 1990 provides for some grounds on the basis of which the court can wind up a company. They are where: (a) the company has by special resolution resolved that the company be wound up by the court (b) default is made in delivering the statutory report to the commission or in holding the statutory meeting (c) the number of members is reduced below two (d) the company is unable to pay its debts (e) the court is of the opinion that it is just and equitable that the company should be wound up.¹⁹⁶ In practice, most applications for the compulsory winding up of a company are brought under one of the last two grounds. With regards to winding up on grounds of company's inability

¹⁹¹ CAMA 1990, s.410(1). *Ado Ibrahim & Company Ltd v. Bendel Cement Company Ltd* (2007) LPELR-188 (SC).

¹⁹² *Ibid.*

¹⁹³ CAMA 1990, s.407.

¹⁹⁴ CAMA 1990, s.422 (3).

¹⁹⁵ CAMA 1990, s.422 (9).

¹⁹⁶ CAMA 1990, s.408 (a)-(e).

to pay debt, the courts have maintained that before a winding up order can be made, it must be satisfied that there is a debt, the debt is due and the company to be wound up is unable to pay the debt.¹⁹⁷

2.2.1.2 Voluntary Winding up

A company may be wound up voluntarily by its members or creditors, without the intervention of the court or occurrence of any of the grounds mentioned above. Voluntary winding up arises in two circumstances. First, where the company is incorporated for a limited period or it is stated in the company's articles that it would be dissolved upon the occurrence of any event, the company may be voluntarily wound up when the period expires or when the event occurs, by passing an ordinary resolution at the company's general meeting.¹⁹⁸ Second, a company may also voluntarily wound for any other reason by passing a special resolution for voluntary winding up.¹⁹⁹

Under the CAMA 1990, there is a distinction between a member's voluntary winding up and a creditors voluntary winding up. The distinction between the two is determined by the solvency or insolvency of the company. The CAMA 1990 provides that for a winding up to be a member's voluntary winding up, the directors of the company must make a statutory declaration of solvency.²⁰⁰ The statutory declaration of solvency would state that the directors have made a full inquiry into the affairs of the company and have formed the opinion that within 12 months from the commencement of the

¹⁹⁷ *Durumugo Resources Ltd v Zenith Bank* (2016) LPELR-40487 (CA) Per Nimpar, J.C.A (Pp. 15-16, Paras. C-A).

¹⁹⁸ CAMA 1990, s. 457(a).

¹⁹⁹ CAMA 1990, s. 457(b).

²⁰⁰ CAMA 1990, s. 462(4).

winding up the company will be able to pay its debts in full.²⁰¹ According to the CAMA 1990:

a statutory declaration can only have effect upon fulfilling of the following conditions:

- (a) It was made within 5 weeks before the date of passing of the resolution for winding up the company and is delivered to the commission, CAC for registration before that date. (b) The statutory declaration embodies a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration.²⁰²

Where the directors are unable to make a declaration of solvency, the voluntary winding up process is classified as a creditors voluntary winding up.²⁰³ This distinction is important because it determines which party as between the members and creditors that would have more control over the winding up process. For instance, in a members voluntary winding up, the company in a general meeting appoint the liquidators,²⁰⁴ whilst in a creditors' voluntary winding up, creditors appoint the liquidator for the purpose of winding up the company.²⁰⁵ In both cases, the liquidator has the obligation to wind up the company in accordance with CAMA, and deliver an account of the winding up of the Corporate Affairs Commission (CAC). The CAC registers the account, and upon this registration, the company stands dissolved.²⁰⁶

2.2.1.3 Winding up Subject to the Supervision of the Court

In a winding up subject to the supervision of the court, a company passes a resolution to voluntarily wind up and in addition files a petition in court seeking for the winding

²⁰¹ CAMA 1990, s 462(1).

²⁰² CAMA 1990, s 462 (2) (a)-(b).

²⁰³ CAMA 1990, s. 462(4).

²⁰⁴ CAMA 1990, s. 464.

²⁰⁵ CAMA 1990, s. 472 and 473.

²⁰⁶ CAMA 1990, s. 468 – 469, 478

up process to be subject to the supervision of the court.²⁰⁷ Winding up may also be subject to the supervision of the court where the court makes an order for that purpose pursuant to an application filed by either creditors, contributories or other persons who the court think are fit to bring the application.²⁰⁸ A winding up subject to the supervision of the court applies the rules of voluntary winding up. However, the process allows the court to oversee and control through prior approval, certain powers vested on the liquidators including power to pay classes of creditors in full, power to make any arrangement and compromise with creditors and powers to compromise all calls and liabilities to calls.²⁰⁹

Having explained the three major modes of winding up in Nigeria, this chapter will now highlight the drawbacks of the winding up process.

2.2.2 Drawbacks of Winding Up

2.2.2.1 Winding up as a tool for debt recovery

The most common ground petitioners rely on to seek a winding up order against a company is that the company is unable to pay its debts.²¹⁰ The Act provides that “a company shall be deemed unable to pay its debt if it owes a sum exceeding ₦2000 and has failed to repay the debt for a period of three weeks after a statutory demand for payment has been issued by the creditor”.²¹¹ The major problem with this section is that the amount of debt was too low and it created room for abuse by creditors. In Nigeria, there is an escalated use of winding up by creditors to recover debts owed to a

²⁰⁷ CAMA 1990, s 486

²⁰⁸ *Ibid.*

²⁰⁹ CAMA 1990, s. 425 (d – f)

²¹⁰ CAMA 1990, s 408(d).

²¹¹ CAMA 1990, s 409(a).

company on the basis that the debtor company is insolvent and has failed to meet its financial obligations.²¹² This has resulted in abuse of the winding up process; many winding up petitions are filed in bad faith and just as a means to recover debts, which in many cases are disputed. In recognition of the damaging effect of a winding up petition on a company's ability to continue as a going concern;²¹³ the courts have warned that the process should be used sparingly. The court in *Tate Industries v Devcom MB Ltd*,²¹⁴ stated that "winding-up proceedings is signing the death warrant of a company or the pronouncement of the death of the company. It is a very serious matter." Unfortunately, warnings such as this do not deter creditors from taking advantage of the very low financial threshold of insolvency in CAMA 1990.

2.2.2.2 Winding up as a punitive measure

Some of the grounds for winding up of a company in CAMA indicates that in Nigeria, the winding up of a company is a punitive measure employed by courts on a company for not meeting its obligations.²¹⁵ For instance, the CAMA empowers the court to wind up a company for failure to hold statutory meetings or file statutory reports. Given that a company functions through its directors, the omissions of these directors in charge of running the affairs of the company should not be borne by the company. The CAMA should in these circumstances hold the directors, and not the company responsible.

²¹² Etigwe Uwa, "Restructuring & Insolvency In Nigeria", online: *whoswholegal* <<https://whoswholegal.com/features/restructuring---insolvency-in-nigeria>>.

²¹³ Chidi Halliday, "The Aftermath of Company's Inability to pay its debt in Nigeria: An Appraisal" (2018) Vol 7:1 PH L J at 178.

²¹⁴ (2004) 17 NWLR pt. 901 (CA) 182.

²¹⁵ CAMA 1990, s 408(b).

2.2.2.3 Winding up leads to loss of asset value

A winding up order and the accompanying liquidation are drastic measures that has bad consequences for the company involved. Among other things, a winding up order can negatively affect the asset value of the company, and may lead to sale of assets of the company for less than its market value.²¹⁶ According to Adeniran, a winding up is hardly considered as a rescue procedure. He argued that compared to other insolvency procedures, its main limitation is that as a result of the stigma society attaches to firms being wound up, it leads to systematic "underpricing" of the assets of those firms.²¹⁷ Regardless of how the sales of assets are being procured by the liquidator, they will be grossly undervalued and there will be no maximization of value for creditors. The liquidation proceeds of the company will be used to settle more of administrative expenses than the debts owed to creditors.

2.2.2.4 Moratorium does not prevent a floodgate of litigation

The CAMA 1990 provides for a moratorium for a company in respect of which a winding up order is made or a provisional liquidator is appointed. During this period, actions against the company can only be commenced or continued with the consent of the Federal High Court.²¹⁸ This stay of proceedings against creditors has been regarded as necessary because the winding up procedure is a multi-party debt collection procedure. The liquidator would be tasked with a fair distribution of the proceeds of the debtor's assets among the creditors, considering that there are insufficient assets to

²¹⁶ *Loch v John Blackwood* (1924) AC 783.

²¹⁷ Akingbolahan Adeniran, "A Mediation-Based Approach to Corporate Reorganizations in Nigeria" (2003) 29:2 North Carolina Journal of International Law and Commercial Regulation 291-350 at 321.

²¹⁸ CAMA 1990, s. 417.

settle claims against the debtor in full. Adeniran argued, that a possible advantage of the winding up process is the moratorium provided “against other enforcement actions by creditors, thereby preventing a race to the courthouse syndrome”.²¹⁹

However, this protection is not very efficient in preventing a floodgate of actions. The CAMA 1990 did not state what factors are important for the court to consider in granting or refusing its consent to commence or continue an action. However, case law has stated that the most important factors are that the company is a necessary party to the suit.²²⁰ This threshold is too low, and can easily be satisfied by creditors. Creditors can therefore institute several actions to recover debts against companies undergoing winding up by simply complying with the procedural requirement of obtaining leave of court. For this reason, the moratorium on winding up is not effective, as it does not prevent a floodgate of claims by the debtor against the company.

2.2.2.5 Negative impact on a viable company’s business

Winding up proceedings have a negative effect on the reputation of the debtor companies, even when winding up petitions filed against them are dismissed. This is worsened by CAMA’s low threshold, which enables creditors to easily file winding up petitions. When creditors resort to winding up as a means of debt recovery, the company involved loses credibility before its investors even after dismissal of the winding up petition. These investors become discouraged from investing in the company as a result of the information made available to them regarding the liquidity of the company.²²¹

²¹⁹ Adeniran, *supra* note 217 at 322.

²²⁰ *Bwacha v. Ikenya & ors.* (2011) 3 NWLR 610. *L.S.B.P.C v. Purification Tech. (Nig.) Limited* (2013) 7 NWLR (Pt. 1352) 91.

²²¹ Rule 19 (1-4) of the *Companies Winding up Rules* 2001 provides that the petition for winding up of a company shall be advertised in a gazette, one national daily newspaper and one other

Thus, a company that may otherwise be viable may become insolvent because of an improper use of the winding up procedure.

Further, CAMA makes void any dealings and contracts entered into with a company after the commencement of a winding up proceeding.²²² Thus, advertisement of a winding up petition would deter a company's business partners from dealings with the company. The company might be compelled to pay disputed debts rather than risk the adverse consequences of the winding up petition being advertised.²²³ The advertisement of a winding up petition causes significant losses to the company regardless of its subsequent dismissal by the court.²²⁴ This chapter has explained so far winding up as an insolvency process in Nigeria under CAMA, highlighting some of the challenges with the process. It shall now proceed to consider another important aspect of Nigeria's insolvency law; receivership.

2.2.3 Receivership

2.2.3.1 Who is a Receiver?

As a consequence of incorporation, a company gains the power to borrow and provide the necessary collateral in order to secure their debts. The loan agreements for these lending arrangements usually include terms that allow secured creditors to appoint a receiver over the assets and undertakings of the company.²²⁵ When a company fails to

newspaper in circulation in the company's registered office or last known place of business, 15 days before the hearing of the petition on the order of the judge.

²²² CAMA 1990, s.413.

²²³ *Air Via Ltd v Oriental Airlines Ltd*, (2004) 9 NWLR (Pt. 878) 298 at 327 G-H; *Tate Industries Plc v Devcom MB Ltd*, (2004) 17 NWLR (Pt. 901) 182 at 225B-E.

²²⁴ Kubi Udofia, *An Analysis of Judicial Approach to Disputed Debts in Winding-Up Proceedings in Nigeria*, SSRN Scholarly Paper, by, papers.ssrn.com, (Rochester, NY: Social Science Research Network, 2018).

²²⁵ CAMA 1990, s 180(3).

repay these loans, creditors have the right to appoint a receiver or a receiver manager.²²⁶ The Supreme Court of Nigeria defined a “receiver” as “an impartial person appointed by the court to manage, collect and receive, pending the proceedings, rents, issues and profits of land or personal estate which it does not seem reasonable to the court that either party should collect or receive or for the same to be distributed among the persons entitled”.²²⁷ A company does not have the power to appoint its own receiver or receiver manager. However, once receivership is concluded, it may appoint a liquidator to distribute the remaining funds (if any) to the unsecured creditors.²²⁸ The court pursuant to enabling statutes may also appoint a receiver.²²⁹

2.2.3.2 In whose interest should a receiver act?

There is a controversy on this subject arising from the uncertainty in CAMA on the definition of the duties of a receiver. The CAMA states that a person can be a receiver and a manager of the corporation and defined a receiver to include a manager.²³⁰ This is conflicting because while s 393 CAMA mandates receivers to realize debts on behalf of the person who has appointed him and nothing more, s 390²³¹ CAMA provides that when a receiver is also appointed manager, the receiver has a fiduciary relationship with the company.

²²⁶ CAMA 1990, s.209.

²²⁷ *Uwakwe & ors v Odogwu & ors* (1989) LPELR-3446 (SC) per Obaseki, JSC.

²²⁸ Bhadmus Hammed Yemi, “Rethinking Corporate Receivership in Nigeria” (2016) 53:0 Journal of Law, Policy and Globalization 158–165 at 159.

²²⁹ CAMA 1990, s. 180.

²³⁰ CAMA 1990, s 567.

²³¹ A receiver or manager of any property or undertaking of a company appointed out of court under a power contained in any instrument shall, subject to section 393 of this Act, be deemed to be an agent of the person or persons on whose behalf he is appointed and, if appointed manager of the whole or any part of the undertaking of a company, he shall be deemed to stand in a fiduciary relationship to the company and observe the utmost good faith towards it in any transaction with it or on its behalf”

What is clear is that once a receiver is appointed; the sole duty is to recover the debt on behalf of the appointing creditor. It is not the duty of a receiver to preserve the business of the company as the receiver is acting for the benefit of the person who has appointed him. The Supreme Court in *Uwakwe v Odogwu* stated, “A receiver as such has no authority to carry on a going concern. His duty is to stop the business, collect the debts and realise the assets...A manager, on the other hand, has power to continue a business or any going concern”.²³² In *NBCI v Alfijir (Mining) Nig Ltd*,²³³ the Supreme Court maintained the same view. In this case, the respondent Alfijir Ltd obtained a loan from NBCI and defaulted to repay the loan on the due date. The loan agreement empowered NBCI to appoint a receiver upon default.²³⁴

After a receiver was appointed by NBCI, a cheque was issued in favour of Alfijir Ltd by Guffanti Ltd but was held back by NBCI and not delivered to Alfijir Ltd. Alfijir Ltd initiated an action to recover damages from NCBI for losses incurred during the period when NCBI held on to the cheque. The High Court granted the claims of Alfijir Ltd on the basis that NBCI prevented the receiver from performing his duties by holding on to the cheque. The court noted that if the cheque was handed over to the receiver, the money would have been applied to the business of Alfijir Ltd and the economic loss, which it encountered during the period it was deprived of cash would have been avoided. The Court of Appeal upheld this decision.

On appeal the Supreme Court overturned the judgment of the Court of Appeal. The Supreme Court stated that once a receiver is appointed the rights of the company to deal

²³² *Uwakwe v Odogwu* (1989) 5NWLJ. (pt. 123) at 562.

²³³ (1993) 4NWLJ [Pt. 287] 346 CA; (1999) 14NWLJ [Pt. 638] 176 (SC).

²³⁴ [Pt 287]. Pp. 352.

with its assets are suspended. The Supreme Court further held that the duty of a receiver is not to run the company's business but to realize assets for the benefit of the secured creditor who appointed him.²³⁵ This decision shows that the Supreme Court concluded that the duty of a receiver to be only to recover monies for the secured creditor who has appointed him. The secured creditor is also excused for wrongful acts and would not be liable for the losses suffered by a business at this time because a receiver has been appointed. This decision places companies at the mercy of secured creditors when a receiver has been appointed as they lose the power to run its affairs.

However, when a receiver is also appointed manager, it becomes unclear what the real duty of receivers are and whose interest they ought to protect, given the fiduciary obligation imposed on managers. In *West African Breweries v Savannah Ventures Ltd*,²³⁶ the court held that a receiver appointed manager acts in dual capacity and has to carry out the duties of both positions. In this case, West African Breweries (WAB) held 50% equity in the assets of North Brewery (NB) while the Nigerian Federal Government (FG) held the remaining 50%. WAB was interested in purchasing the FG's 50% and as negotiations were ongoing, NB defaulted on the loans to its creditors. Consequently, a receiver-manager was appointed by the creditors to recover the debt. WAB informed the receiver of its intention to pay off the indebtedness of NB and proceeded to acquire FG's 50% in NB. While discussions were still ongoing between WAB and the receiver, the receiver sold NB's assets to Savannah Ventures Ltd at gross undervalue. WAB brought an action against the receiver for the sale of certain assets belonging to NB arguing that the sale was carried out in bad faith, and sought to have

²³⁵ Ogwuegbu, JSC at p. 34, paras a-e.

²³⁶ (2008) 10 NWLR [Pt 775] 401 SC.

the sale set aside by the court. The Supreme Court considered the duty of the receiver to the company and held that the receiver had a duty to manage NB.²³⁷ The court stated that the receiver abandoned his duty to manage the company and the receiver was engrossed with the realization and sale of assets.²³⁸ Thus, a receiver of a company has a positive duty, not just to sell the assets of the company but also to manage the affairs of the company putting into consideration all competing interests.²³⁹

It is therefore clear from the foregoing that CAMA provisions on duties of a receiver and manager appear contradictory in cases where a person is appointed both receiver and manager. This conflation has created uncertainty as to how a receiver manager in Nigeria should perform its duties.

CAMA's imposition of fiduciary duties on receiver-managers has been criticized by academics. For instance, Bhadmus notes that it is absurd for fiduciary obligations to be imposed on a receiver-manager who is neither an agent nor an officer of the company.²⁴⁰ Relying on the wordings of s. 393 CAMA which states that a receiver appointed pursuant to a debt instrument is an agent of the person of the appointing creditor, he argues that the goal of the agent should be the same as that of the principal.²⁴¹ Bhadmus further argues that since the principal creditor's objective is to realize outstanding debt, the receiver manager should only act in the best interest of the principal and not in the best interest of the company.²⁴² Bhadmus points out that

²³⁷ *Ibid*, pp. 436-438.

²³⁸ *Ibid*, pp. 440.

²³⁹ Bolanle Adebola, "The Duty of the Nigerian Receiver to 'Manage' the Company" (2011) 8:4 International Corporate Rescue 248 at 1.

²⁴⁰ Yemi, *supra* note 228.

²⁴¹ *Ibid* at 163.

²⁴² *Ibid*.

provisions of s 390 which creates fiduciary obligations on a receiver manager is subject to s 393 and is therefore subordinate to s 393 of CAMA.²⁴³ In essence, he argues that the fiduciary duty imposed on managers in s 390 is redundant.

Another academic, Bolanle Adebola disagrees with the arguments raised by Bhadmus. and claims that s 393 does not override the provisions of s 390.²⁴⁴ Adebola relied on a historical analysis of the CAMA to argue that the drafters of the CAMA 1990 intended to impose an additional duty on receivers to manage the affairs of the company and not just realize assets.²⁴⁵ Accordingly, s 390 CAMA is the overriding statute because it ensures that receivers “manage the company if that is the best option of [for] the company and other interests concerned.²⁴⁶ In summary, Adebola argues that the primary duty of a receiver appointed by secured creditors is to realize the asset of the secured creditors that appointed him, whilst at the same time, preserving the company and other interests in the company.

The foregoing highlights the uncertainty surrounding the question: in whose interest should a receiver act in Nigeria? It would be noted that the commentators referenced above did not make a distinction between when a person merely acts as a “receiver”, “manager” and when these two roles are infused into one; “receiver manager”. This arguably weakens both arguments. However, making this distinction does not make the issue clearer. The role of a receiver manager is dual in nature with dual and conflicting

²⁴³ The case of *Oloruntoba-Oju & Ors v Abdul-Raheem & Ors*. (2009) LPELR-2596 (SC) (p.60, Paras B-E) Per Adekeye J.S.C stated 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.

²⁴⁴ Adebola, *supra* note 239 at 11.

²⁴⁵ *Ibid*, at 7 – 10.

²⁴⁶ *Ibid*, at 12.

responsibilities. Thus, although purport of s 390 CAMA appears to be preservation of the business of companies and interest of other stakeholders in the company, the conflicting wordings of that provision and the provisions of s 393 CAMA have defeated that objective.

2.2.3.3 Concluding remarks on receivership

Receivership can be perceived as a better option for debt recovery than a winding up as there is a possibility for the continuation of a company's affairs after a receivership, however, receivership is equally an unfavourable process for business rescue. Some of its unfavourable features include: the board of directors cease to function upon appointment of a receiver,²⁴⁷ and the right of the company to deal with its assets becomes suspended.²⁴⁸ Consequently, the company's business is put on hold till the receivership process is concluded. In many cases, upon conclusion of receivership, the chances of a company continuing its business is very slim, and to make matters worse, unsecured creditors might be left with nothing.

2.3 The Role of AMCON in Corporate Insolvency

The Asset Management Corporation of Nigeria (AMCON) was established pursuant to the *Asset Management Corporation of Nigeria Act 2010* ("AMCON Act") to purchase non-performing loans of banks in Nigeria and realize debts owed to the banks. AMCON was established at a time banks were failing and there was the need to protect the public, the banks and the economy.²⁴⁹ The main objective of AMCON is to acquire the non-

²⁴⁷ CAMA 2004, s.393 (4); *Unibix (Nig.) Ltd v C.B.C.L. (Nig.) Ltd* (2001) 7 NWLR (Pt.713) p.534.

²⁴⁸ *Intercontractors (Nig.) Ltd v U.A.C* (1988) 2 NWLR (Pt.78) pg. 280.

²⁴⁹ *Van Vilet Trucks (Nig) Ltd v. Amcon & Anor* (2018) LPELR-46789 (CA)

performing loans (“eligible assets”)²⁵⁰ in the books of eligible financial institutions (EFIs). This is done to enable EFIs reorganize their affairs and continue their core banking operations without being overburdened by bad loans.²⁵¹

AMCON was set up as a statutory corporation with a lifespan of 10 years.²⁵² Thus, AMCON was expected to accomplish its mandate within the 10-year time frame, after which, it would be liquidated.²⁵³ To achieve its mandate, AMCON was vested with “special powers” to be utilized in recovering acquired assets. Unfortunately, 9 years after the establishment of AMCON, it currently has a debt profile valued at over N5.5 trillion.²⁵⁴ As a result of this huge debt profile AMCON has resorted to its stringent powers to recover the acquired debts.

2.3.1 Special Powers of AMCON

The *AMCON Act* vested AMCON with very broad powers for the purpose of accomplishing its mandate.²⁵⁵ The most significant powers are the powers to appoint and act as a receiver²⁵⁶ and the power to approach the courts for a winding up order in certain circumstances.²⁵⁷ In 2015, the *AMCON Act* was amended to include additional rules and principles for receivership governed by the *AMCON Act*, amongst other

²⁵⁰ These toxic assets are non-performing loans also referred to as eligible bank assets (“EBAs”).

²⁵¹ Nat Ofo, “*Is the Asset Management Corporation of Nigeria Designed to Fail?*”, (Rochester, NY: Social Science Research Network, 2011) at 2.

²⁵² *Ibid* at 28.

²⁵³ Obinna Chima, “AMCON: Stakeholders Propose Tenure Extension”, online: *AMCON: Stakeholders Propose Tenure Extension* <<https://www.proshareng.com/news/Debtors---Recovery/AMCON--Stakeholders-Propose-Tenure-Extension/11817>>.

²⁵⁴ Kubi, “AMCON (Amendment No. 2) Act 2019 and Its Weighty Flaws (1)”, (15 October 2019), online: *INSOLVENCY DISCOURSE* <<https://kubiudofia.wordpress.com/2019/10/15/amcon-amendment-no-2-act-2019-and-its-weighty-flaws-1/>>.

²⁵⁵ AMCON Act 2010, ss. 48 -55.

²⁵⁶ AMCON Act 2010, s. 48.

²⁵⁷ AMCON Act 2010, s. 52 and s. 54(4).

amendments.²⁵⁸ The principles of receivership and liquidation in the *AMCON Act* are discussed in the succeeding paragraphs.

2.3.2 AMCON Receivership

The *AMCON Act* provides that AMCON “shall have the power to act as or appoint a receiver over asset charged, mortgaged or pledged” as security for any eligible asset acquired by the corporation.²⁵⁹ This means that the *AMCON Act* essentially amended loan contracts retrospectively to vest on AMCON the power to act and appoint receivers, even if such powers were never provided for by the contracting parties.

The receivership provisions in the *AMCON Act* are comparable in some respect with that in *CAMA*. Just like the *CAMA* rules imposing specific duties on a receiver, and a receiver-manager,²⁶⁰ the *AMCON Act* provides that a receiver shall have the power to realize the assets of the debtor company²⁶¹, enforce any liabilities of directors and shareholders of the debtor company²⁶², and manage the affairs of the debtor company²⁶³. In addition, the *AMCON Act* also contemplates that AMCON or a receiver it appoints may also manage the affairs of the debtor company.²⁶⁴ Specifically, the *AMCON Act* provides that a receiver may elect to manage the affairs of the debtor company by giving public notice of its election.²⁶⁵ Once the notice is filed, all “judgments, claims, debt enforcement procedures existing or being pursued before the

²⁵⁸ *Asset Management Corporation of Nigeria (Amendment) Act* 2015, s. 6.

²⁵⁹ *AMCON Act* 2010, s. 48 (1).

²⁶⁰ *CAMA*, ss. 390 and 393.

²⁶¹ *AMCON Act* 2010, s. 48(2)(a).

²⁶² *AMCON Act* 2010, s. 48(2)(b).

²⁶³ *AMCON Act* 2010, s. 48(2)(c).

²⁶⁴ *AMCON Act* 2010, ss. 48 (4), (5) and (6).

²⁶⁵ *AMCON Act* 2010, s. 48 (4).

publication of the notice” becomes automatically suspended and unenforceable against the debtor-company for a period of 1 year or during the period the receiver continues to manage the affairs of the debtor company.²⁶⁶ Following this notice, the receiver becomes entitled to take over and continue the management of the debtor company’s business for the benefit of the company and other body of creditors of the company.²⁶⁷

Similar to the CAMA, the *AMCON Act* imposes fiduciary duties to a receiver managing the affairs of the debtor company. Unlike the CAMA, the *AMCON Act* extends the benefit of the fiduciary obligation of a receiver manager to other creditors of the debtor company.²⁶⁸ The *AMCON Act* attempted to settle any conflict arising from creating a fiduciary relationship in favour of other creditors on the one hand, and the interest of AMCON²⁶⁹ by stating that payments be made strictly in accordance with the priority rules in CAMA.²⁷⁰ However, the *AMCON Act* has the same defect as CAMA in the sense that the fiduciary duty imposed on receiver may contradict the receiver’s power and duty to realize the assets of the debtor company for the purpose of settling its outstanding debt.

There are provisions in the *AMCON Act* that are unique to receivers appointed under the Act. The most striking provision is s 48(3) of the *AMCON Act* which states that a receiver can exercise its powers over “all assets and entire undertaking of the debtor company notwithstanding that only a part of the assets of the debtor company charged”

²⁶⁶ AMCON Act, s. 48(4),(7).

²⁶⁷ AMCON Act 2010, s. 48 (5).

²⁶⁸ AMCON Act 2010, s. 48(6).

²⁶⁹ AMCON’s interest is essentially the interest of the EFI from whom the debt was acquired. See AMCON Act 2010, s. 34.

²⁷⁰ AMCON Act 2010, s. 6. The priority rule in CAMA states that payment be made in the following order; See CAMA 2004, s. 494.

as security for the debt. This provision appears to be arbitrary because all that is required to trigger it is the sole decision of AMCON to act as or appoint a receiver without more. Once this is done, the debtor corporation stands at risk of having all its assets in receivership, including assets used as security for other creditors. Arguably, the effect of this power may be cushioned when a receiver elects to also manage the debtor company. However, the fact that the decision to act as both receiver and manager is entirely that of AMCON lessens this potential advantage.

Another important provision in the *AMCON Act* on receivership can be found in s 48(8) of the *AMCON Act*. This provides that if a receiver elects to manage the affairs of the company, the receiver has an obligation to prepare and publish a detailed plan for the “rehabilitation of the debtor-company”. On its face, this appears to be an obligation that can potentially preserve the debtor-company. However, this is not really the case, as failure to do so does not have significant consequences for the receiver, neither is the receiver personally liable for such failure. The only consequence for failure to prepare a rehabilitation plan is that the ban on enforcement and recovery actions of other creditors is lifted. This is not sufficient to compel receiver to manage the assets of the debtor corporation meaningfully where the elect to also act as manager of the company.

2.3.3 AMCON Liquidation

In addition to the power to act as or appoint a receiver over a debtor-company, the *AMCON Act* empowers AMCON to seek a winding up order against a debtor company.

The *AMCON Act* provides as follows:

Where the court gives a decision against a body corporate in a debt recovery action under this Act, requiring the debtor company to pay any sum to the Corporation and such sum is not liquidated or paid over to the Corporation within 90 days from the date of the order for

payment, the Corporation may apply to the court to issue a winding up order against the debtor company.²⁷¹

This provision does not consider that a debtor company might intend to enter an appeal on the judgment debt disputing the debt or the judgment. This would lead to the unfortunate consequence of creditors being wound up for debts that are disputed, even in court.

Another ground for winding up under the *AMCON Act* is where any corporation is convicted of the statutory offences in s 54 (1) and (2) of the *AMCON Act*, whether or not such corporations are indebted to AMCON.²⁷² Winding up a company on this ground is punitive because the acts criminalized by these provisions include making false informations with respect to an eligible asset or a property used to secure the debt. Given that this false information is made by directors or officers on behalf of the company, the winding up of the company has no relation to the company's solvency or insolvency status and is merely punitive. Nat Ofo noted that "this fact of conviction can now be regarded as a sixth ground for winding up the company by the court since in practical terms that is the only mode which can accommodate such winding up."²⁷³ It is unusual that AMCON, a body established to remedy the negative impacts of winding up of financial companies, resorts to liquidation as a primary means of debt recovery. Given that the offence in s 54 *AMCON Act* can only be committed by officers in charge of running the affairs of the company, it curious that the punishment for the offences is inflicted on the company. In circumstances where these offences are committed, the

²⁷¹ AMCON Act s 52(1).

²⁷² AMCON Act 2010, s 54 (4).

²⁷³ Ofo, *supra* note 251 at 16.

corporate veil should be pierced to hold the directors in charge of these acts personally liable instead of taking the extreme measure of winding up the company.²⁷⁴

On the 7 August 2019, the President of Nigeria gave assent to the new *Asset Management Corporation of Nigeria (Amendment) Act, 2019*. Through this amendment, AMCON is granted the power to apply *ex parte* for a court order to monitor the bank account of debtors,²⁷⁵ and the unfettered access to the electronic devices of debtors.²⁷⁶ AMCON is further empowered by the new amendments to advertise the list of debtors in a newspaper to procuring entities for the purpose of prohibiting the debtors from obtaining contracts, conducting businesses or fulfilling their monetary obligations under existing contracts without a prior written approval from AMCON.²⁷⁷

The recent amendments to the *AMCON Act* appear to be a statutory sanction of arbitrariness. As noted by one commentator, Kubi Udofia, the *AMCON Act 2019* empowers AMCON to “employ self-help and extrajudicial measures in its debt recovery drive”.²⁷⁸ There are stringent and arbitrary powers introduced in the new amendment. This include enabling AMCON’s to sell or assign a debts to a third party irrespective of a pending suit disputing the debt.²⁷⁹ The courts are even prohibited in the Act from granting injunctions or preservative orders against AMCON, its directors or officers in any proceedings related to AMCON’s exercise of its power to recover debts.²⁸⁰ To further bolster AMCON’s position, the amendment stated that no action

²⁷⁴ *Ibid* at 17.

²⁷⁵ S.6(1)(i)

²⁷⁶ AMCON Act 2019, s.6 (1) (ii)

²⁷⁷ AMCON Act 2019, s.50B (2) and (3)

²⁷⁸ Kubi, *supra* note 254 at 1.

²⁷⁹ AMCON Act 2019, s 34(2), s 39(c)

²⁸⁰ AMCON Act 2019, s.34 (6)

may be instituted against AMCON for any act done in good faith while executing its duties; pending actions against AMCON abated.²⁸¹ AMCON has the power to present interlocutory applications freezing the funds of the debtors.²⁸² It is curious that a statutory body is vested with so much arbitrary power over debtors, paralyzing their business in the process, while also preventing them from seeking redress from a court of law for violations of their rights.

The aim of the Nigerian government in setting up AMCON was to protect financial institutions and the economy in general by boosting the liquidity of the financial institutions and recovering non-performing loans. This is arguably a commendable objective. But the extent and arbitrariness of the powers vested on AMCON is problematic because it threatens the continuity of debtors' businesses. To encourage an effective insolvency system in Nigeria, these arbitrary acts of AMCON should be controlled. Nigeria needs a sustainable mechanism to be employed to cater for all the stakeholders in the insolvency system, mostly by ensuring that AMCON's recovery processes do not undermine the ability of debtor companies to repay their debt without becoming insolvent or becoming wound up. The need for a business rescue law that would render AMCON's intervention unnecessary is thus imperative.

2.4 Corporate Restructuring in Nigeria

Corporate restructuring is the reorganization of a company's operational structure, usually in response to its financial distress, for the purpose of stabilizing the company

²⁸¹ AMCON Act 2019, s.33 (A) of the Act provides that no action or proceedings shall lie, be instituted or maintainable against AMCON or any of its directors or officers by reason only of the acquisition of bad debt by AMCON. See also s.43 (3)

²⁸² AMCON Act 2019, s.50 (1)

so that it can continue its business as a going concern. According to Adeniran, a company reorganizes its business to maintain “an optimal capital structure” which would enable it carry on its business effectively, pay the debts owed to its creditors and retain its efficient employees.²⁸³ A corporate restructuring process can either be internal or external. It is conventional for a company to first exhaust the internal restructuring options before embarking on external restructuring.

2.4.1 Internal Restructuring in Nigeria

Internal restructuring refers to the various informal workouts a company may undertake to improve its capital structure and pay its debts.²⁸⁴ This procedure is generally employed when a company is in financial distress and decides to maintain its corporate identity, and recover on its own without seeking the help of third parties.²⁸⁵ This process usually involves negotiations between the company and its members or creditors to restructure the company’s debt and equity portfolios. Internal restructuring plans usually range from creating further charges on company’s assets, deciding to pay creditors before a restructuring and giving creditors the option to take shares or a combination of debt and shares in the company to liquidate the outstanding debt.²⁸⁶ The two internal restructuring procedures in CAMA 1990 are arrangement on sale and arrangement and compromise. Both procedures are discussed below.

²⁸³ Adeniran, *supra* note 217 at 299.

²⁸⁴ Uwa, *supra* note 212 at 1.

²⁸⁵ Habeeb Adekola, “A General Overview of Corporate Restructuring in Nigeria”, (12 September 2019), online: *AAA Chambers* <<http://www.aaachambers.com/articles/a-general-overview-of-corporate-restructuring-in-nigeria/>> at 1, Library Catalog: <www.aaachambers.com>.

²⁸⁶ Uwa, *supra* note 212 at 1.

2.4.1.1 Arrangement on Sale

In an arrangement on sale procedure, the members of the company resolve by special resolution to voluntarily wind up the business of the company, sell its assets to another company and receive shares or debenture of that company as consideration for the assets.²⁸⁷ Arrangement on sale involves the following process. First, the transferor company by special resolution resolves to voluntarily wind up its business. In the context of the winding up process, a liquidator would be appointed with the specific mandate of gathering the assets of the company and selling the whole or part of the assets of the company to an identified transferee company. Thereafter, the liquidator distributes the shares or debenture of the transferee company to the members of the transferor company in order of their priority in liquidation.

The most plausible interpretation of the objective of the arrangement on sale process is to settle outstanding debts by selling the whole or part of the assets to the creditor company, such that the business continues as a going concern in the creditor company (i.e. the transferor company). However, this is a process that can only be undertaken by solvent companies. This is because it can only be executed through a members' voluntary winding up of the transferor company. As earlier noted, a condition precedent to members' voluntary winding is a statutory declaration by the directors stating that the company are able to liquidate outstanding debts within 12 months.²⁸⁸ Thus, arrangement on sale is not a business rescue option, but an option for solvent companies that wish to wind up its affairs and achieve better proceeds from the sale of its assets than would be possible by piecemeal sales in a winding up procedure.

²⁸⁷ CAMA 1990, s.538.

²⁸⁸ CAMA 1990, s. 462.

2.4.1.2 Arrangement and compromise

Arrangement and compromise is a procedure whereby the company and its creditors, members or a class of creditor or members accept less than what they are entitled to as full and final satisfaction of the debt obligations of the company.²⁸⁹ This process involves complex negotiations between creditors and the debtor company, in which the company seeks a variation or relinquishment of its obligations to creditors, debenture-holders or shareholders as the case may be.

The arrangement and compromise option in CAMA requires the prior approval and sanction of the Federal High Court. The first step towards the process is to file an application to court for a court ordered meeting.²⁹⁰ If the court grants the application, the company would hold a meeting and, in that meeting, present a scheme of arrangement for approval by the interested creditors or members.²⁹¹ At the meeting, if the scheme is approved by persons holding 75% of the value of the company's shares, debt, or specific class of debt, the company would go back to court to seek approval of the scheme.²⁹² The primary consideration for the courts when called upon to sanction a scheme of arrangement is to determine the fairness of the entire process.²⁹³ The CAMA 1990 provides that in making this determination, the court may invite the Security and Exchange Commission to appoint an inspector to inquire into the fairness of the scheme and provide a written report to court afterwards.²⁹⁴ If the court is

²⁸⁹ Adekola, *supra* note 285 at 1.

²⁹⁰ CAMA 1990, s. 539(1).

²⁹¹ *Ibid.*

²⁹² CAMA 1990, s. 539(2).

²⁹³ *Ibid.*

²⁹⁴ CAMA 1990, s. 539(2).

satisfied with the fairness of the scheme of arrangement, it will sanction the scheme and then the scheme becomes binding on the company and relevant parties. While this option may be seen as an effective business rescue option for insolvent companies, its effectiveness is impaired by procedural challenges. Some of these challenges are highlighted below.

Drawbacks of the Arrangement and Compromise

2.4.1.2.1 Lack of Moratorium or a stay of proceedings

CAMA makes no provision for a stay of proceedings to assist debtor companies when an arrangement and compromise procedure is being carried out. A moratorium would give the insolvent company some breathing space to carry on and finalize the restructuring process without interruptions from creditors that are not part of the process. These creditors may institute actions in court against the company undergoing internal restructuring to enforce their claims. When this happens, the debtor company would be compelled to settle with creditors and this may in the process diminish the assets available to effectively conclude the ongoing arrangement and compromise.

Finally, it is unusual that CAMA does not provide for a moratorium in an arrangement and compromise procedure, which is a restructuring procedure, but the Act provides for a moratorium for the winding up procedure.²⁹⁵ This is done because the arrangement and compromise procedure is a negotiation done on an individual basis with the creditors, hence there are few creditors who will reject the plan of arrangement to file claims against the debtor and there is no basis for preventing them. Unlike a winding

²⁹⁵ CAMA 2004, s.417 provides that if a winding up order is made or a provisional liquidator is appointed, no action or proceedings shall be proceeded or commenced against the company except by leave of the court given on such terms as the court may impose.

up process where all the creditors race to grab the assets of the debtor thus creating the need for a moratorium to avoid the depletion of the debtor's assets. The rationale behind the lack of moratorium in an arrangement and compromise procedure is the greater priority placed on the collective interests of creditors than the interests of individual creditors in an insolvency process.²⁹⁶

2.4.1.2.2 The degree of Court involvement in the process

The courts have a high degree of involvement in the arrangement and compromise procedure. Indeed, this procedure relies heavily on the courts and its success or failure is substantially dependent on the courts. As noted earlier, the process can only be commenced with the approval of the court and its sanction is entirely dependent on the court's perception of fairness. This poses a number of challenges. First, it is time consuming. The initial application for a meeting of members or creditors, as well as the application for a court order sanctioning the scheme of arrangement are additional caseloads on an already congested court.²⁹⁷ Business rescue procedures are time sensitive given its aim of reaching prompt compromise with the creditors. The entire process may be defeated by the delay and complexities of Nigeria's judicial system.²⁹⁸ Second, the reliance on the court to determine fairness of the scheme even when no complaint is made regarding its unfairness is absurd. The provision essentially allows

²⁹⁶ "Scheme of arrangement as a business rescue tool", (2012), online: *International Law Office* <<https://www.internationallawoffice.com/Newsletters/Insolvency-Restructuring/Nigeria/Punuka-Attorneys-Solicitors/Scheme-of-arrangement-as-a-business-rescue-tool>>, Library Catalog: www.internationallawoffice.com.

²⁹⁷ *Constitution of Federal Republic of Nigeria*, 1999 as amended. S. 251. The Nigerian Constitution vests jurisdiction on the Federal High Court to handle a great number of subject matters arising from different statutes including the CAMA. As a result of this, the Federal High Court is often overburdened with caseloads; such that a simple application for a court ordered meeting may take months before it is considered by the court.

²⁹⁸ Bolanle Adebola, "Conflated Arrangements: A Comment on the Company Voluntary Arrangements in the Proposed Nigerian Insolvency Act 2014", (15 February 2015), online: <<https://papers.ssrn.com/abstract=2565491>>.

the court to usurp the duties of directors, and perhaps the creditors as well in determining fairness of a transaction.

2.4.1.2.3 Expensive procedure

The cost problems associated with the arrangement and compromise procedure cannot be overstated.²⁹⁹ The arrangement and compromise procedure requires the debtor to appear in court seeking two different applications, which include an order to convene a court ordered meeting and an order for the scheme to be sanctioned. The companies would need the services of legal practitioners to present these two applications before the court. Adeniran has argued “these expenses could easily run into millions of naira or other amounts beyond the reach of small companies in financial distress”.³⁰⁰ Given the uncertainty on the duration of the process, a company in distress might end up paying legal fees for years instead of channeling these funds to offset some of the debts owed to creditors.

2.4.2 External Restructuring

This type of restructuring involves an arrangement between the company in financial distress and a third party. Usually, companies attempt internal restructuring before exploring external restructuring. The reason for this is clear; once an external restructuring procedure is completed, the company loses its identity. There are two types of external restructuring processes commonly practiced in Nigeria. These are mergers/acquisitions and takeovers. Both processes are discussed below.

²⁹⁹ Adeniran, *supra* note 217 at 325.

³⁰⁰ *Ibid* at 326.

2.4.2.1 Mergers and acquisitions

A merger is the fusion of two or more corporate entities to become one single entity. A merger occurs “when one or more undertakings directly or indirectly acquire or establish indirect control over the whole or part of the business of another undertaking”.³⁰¹ An acquisition is: “...The take-over by one company of sufficient shares in another company to give the acquiring company control over that company”³⁰² The difference between a merger and an acquisition is in the result of the two processes. In a merger process, two or more companies are fused to form a new company. In an acquisition process, a company purchases the shares and assets of another company, and takes control of it. In this case, no new company is formed unless the acquiring company winds up the target company.

The principal law that governs mergers and acquisitions in Nigeria is the *Federal Competition and Consumer Protection Act 2019* (FCCPA). The *FCCPA* has provided that the key regulator for mergers and acquisition is the Federal Competition and Consumer Protection Commission. When there is a merger of two companies, the *FCCPA* checkmates monopoly by ensuring that mergers are fair and do not hinder competition in the Nigerian economy. *FCCPA* performs a housekeeping role regarding mergers and acquisitions in Nigeria. It provides a comprehensive legal and regulatory framework for the control of mergers.³⁰³ The *FCCPA* vests on the commission, the power to consider all pre-merger notifications,³⁰⁴ formal applications,³⁰⁵ and also the

³⁰¹ Rule 421, *Consolidated Securities and Exchange Commission Rules 2013*

³⁰² *Ibid.*

³⁰³ FCCPA 2019, s.92-103

³⁰⁴ FCCPA 2019, s.93 (1)

³⁰⁵ FCCPA 2019, s. 97(2)

power to approve or refuse a merger scheme. The commission also has the responsibility of confirming that post-merger requirements are complied with.

A viable company would want to merge with or acquire an insolvent company for reasons, including (1) management expertise (2) desire for growth and earnings per share (3) enhancing the economy of scale and expand the company's productive capacity (4) risk diversification to guard against possible failure (5) stock exchange quotation.³⁰⁶ When the merger or acquisition occurs, it prevents the company from going into insolvency or ceasing its operations as it has joined resources with another company. Mergers and acquisitions are a good option for restructuring a company but it comes with some disadvantages to the company's business.

2.4.2.2 Takeover

A takeover is an external restructuring process that involves the acquisition of 30%-50% of the shares or voting rights of the target company.³⁰⁷ A takeover is similar to an acquisition except that a takeover is a hostile or unilateral acquisition where the target company does not wish to be acquired.³⁰⁸ The acquiring company makes a bid for the target company and if its bid is successful, the acquiring company takes control of all the target company's operations, holdings and debt.

2.4.2.3 Drawbacks of the External Restructuring Procedure

Firstly is the loss of identity. The insolvent company would lose its identity especially in acquisitions where the larger company is in control. A merger and acquisition may

³⁰⁶ Adekola, *supra* note 285 at 1.

³⁰⁷ Section 131(1) *Investment and Securities Act* 2007.

³⁰⁸ Adeniran, *supra* note 217 at 322.

hurt the image of the new company or damage the existing brand the company has built over the years. Secondly, there would be the duplication of duties. When a company merges with another or is acquired by another, the duties of the employees in the two companies might begin to conflict. The company might not need the services of the employees with conflicting duties and this can lead to job losses. Thirdly, there would be conflicting objectives. The goals and objectives of the companies may differ. A merger or acquisition between companies with conflicting objectives might cause problems for the acquiring company. One company might want to cut costs or expenses, while the other company might want to invest into new markets to increase productivity. This might lead to clashes and the failure of the business.

Fourthly, there is financial burden on the new company. The debt of the acquired insolvent company might overwhelm the viable company and lead it to insolvency. If expert advice is not sought before a merger or acquisition the merger may bring more challenges than growth to the existing business. Lastly, there could be a breach in corporate Representations and warranties. Companies make representations and warranties in contracts with creditors. Corporate representations and warranties do not survive the closing and there might be claims against the company for breach of these representation and warranties which would increase their litigation profile and prevent the new company from functioning smoothly.

2.5 Conclusion

This Chapter has discussed corporate insolvency and restructuring procedures in Nigeria. It has also highlighted the challenges faced with the previous insolvency procedures under the CAMA 1990 and how they are unable to achieve the main purpose

of a business rescue. The absence of business rescue options made winding up, receivership and arrangement and compromise the dominant insolvency regimes in Nigeria. The discussion in this chapter has shown how these procedures are unable to balance the interests of both the debtors and the creditors and appropriately provide for the rescue of insolvent corporations.

Times are changing and as an economy evolves, its laws should evolve at the same pace to meet the present needs of the economy. Considering that the CAMA 1990 was not amended in the past 29 years, the recent amendment of the CAMA 1990 to include business rescue provisions is a step toward changing the face of restructuring in Nigeria. The CAMA 2020 introduces amongst others business rescue options, to enable financially distressed companies avert insolvency and keep their businesses going. The next chapter will discuss the CAMA 2020, the idea behind the recent amendment and will provide some analysis of its amendments.

CHAPTER 3:
THE RECENT AMENDMENTS TO NIGERIAN INSOLVENCY LAW

3.0 Introduction

The first chapter of this thesis gave a general overview of corporate insolvency and more particularly discussed corporate restructuring. It highlighted the goals achieved when a rescue is embarked upon which include a business sale and a corporate or business rescue. The second chapter discussed corporate insolvency law in Nigeria and established the loopholes in the previous insolvency framework embodied in the CAMA 1990, which was created by an absence of a business rescue mechanism in Nigeria. This chapter will discuss the recent amendments to CAMA 1990 which have been provided for by the *Companies and Allied Matters Act 2020* (“CAMA 2020”). The CAMA 2020 introduces business rescue procedures into the corporate insolvency framework in Nigeria. These amendments are a step in the right direction in putting Nigeria’s business sector in line with international best practices.

This chapter will begin by discussing the idea behind the recent amendments to the CAMA 1990. In addition, this chapter will discuss the amendments to the corporate insolvency framework in Nigeria. Given that these amendments are similar to the practice in the United Kingdom (UK), this chapter will undertake a comparative analysis with the current corporate restructuring practices in the UK. The discussion of these business rescue options will evidence how well they have fared in the UK and the practicability of these amendments to the CAMA 1990 thriving in Nigeria. This chapter will find that the introduction of these amendments into the Nigerian company law will improve the position of Nigeria’s business sector considering Nigeria’s ranking prior to the amendment. However, this chapter will also proffer reasons why Nigeria should

proceed with caution while applying these new business rescue mechanisms considering how they have been practiced in the UK. It will also highlight the amendments to the winding up procedure laid out in the CAMA 2020.

3.1 The Idea Behind the Recent Amendment

The *Companies and Allied Matters Act* (“CAMA 1990”), the law previously regulating companies in Nigeria had not been amended for close to three decades.³⁰⁹ For an economy to be in tandem with global trends, its corporate laws should be amended to meet advancing trends. Nigeria was an exception to this, as CAMA 1990 was outdated and did not meet the standard of corporate laws of fast-growing countries. This resulted in the Nigerian economy becoming less attractive to investors. Investors gradually became wary of doing business in Nigeria because they feared that their returns would not be maximized if a company they have invested in becomes insolvent. As discussed in the second chapter, Nigeria being a creditor friendly economy only had procedures such as winding up and receivership, mainly aimed at debt collection. Insolvent companies did not have the opportunity to restructure their affairs, as there were no laws that encouraged the rescue of businesses, which maximizes greater returns for creditors. In order to boost investors’ confidence in doing business in Nigeria, the need arose to amend the CAMA 1990.³¹⁰ On 10 March 2020, the 8th Senate of the Federal Republic of Nigeria passed the *Companies and Allied Matters Act (Repeal and Re-*

³⁰⁹ Udo Udoma & Belo Osagie, *The Companies and Allied Matters Act (Repeal and Re-enactment) Bill 2019 - What you need to know*, (May 2019), online: Business Day (Capital & Markets) <<https://www.uubo.org/media/1755/cama-bill-series-part-10.pdf>>.

³¹⁰ Banwo & Ighodalo, *Reforming The Business Climate In Nigeria: Critical Changes Introduced By The Companies And Allied Matters Bill*, (February 2019), online: Banwo & Ighodalo <<https://www.banwo-ighodalo.com/grey-matter/reforming-business-climate-nigeria-critical-changes-introduced-companies-allied-matters-bill-2018?leaf=3>>.

enactment) Bill, 2020 (“CAM Bill”) to Repeal the CAMA 1990.³¹¹ On the 7th of August 2020, the *CAM Bill* received Presidential assent and the CAMA 2020 came into effect. The discussions in this chapter revolve around the amendment made by the CAMA 2020 to provide a clear and practical framework to govern corporate insolvency in Nigeria. This amendment envisages a business rescue mechanism, which will restore the financial well-being and viability of the business of an insolvent company. Giving the insolvent company, greater chances of remaining in business to yield greater returns for its creditors than would have been achieved from other insolvency procedures.³¹² This mechanism aims at balancing the interests of the debtor and creditor whilst preserving the going concern value of the corporation.³¹³

The CAMA 2020 introduces the Company Voluntary Arrangements (“CVA”) and Company Administration into Nigeria’s corporate insolvency framework. The idea behind this amendment is to ensure that before winding up and receivership procedures are considered, the CVA and the administration procedures have been explored. In other words, the CAMA introduced a shift from the usual winding up of insolvent businesses in Nigeria to a procedure where the rescue of these insolvent businesses are considered and explored before a winding up. These two processes are similar as they permit the insolvent company continue its operations as a going concern. The insolvent company is therefore given an opportunity to agree on an arrangement with its creditors,

³¹¹ Vanguard, *Senate passes Companies and Allied Matters Act Amendment Bill*, (May 2020), *Vanguard newspaper*, online: <<https://www.vanguardngr.com/2020/03/senate-passes-cama-amendment-bill/>>.

³¹² Aelex, *The Evolution Of Business Rescue In Nigeria - Insolvency/Bankruptcy/Re-structuring - Nigeria*, (May 2019), online: Aelex <<https://www.mondaq.com/nigeria/insolvencybankruptcy/809026/the-evolution-of-business-rescue-in-nigeria>>.

³¹³ *Ibid.*

which will restructure its business, preserve jobs and maintain existing business relationships.

The CAMA 2020 addresses the shortcomings of the previous CAMA, enhances the business environment in Nigeria and aligns it with global best practices.³¹⁴ The CAMA 2020 aims to promote the ease of doing business in Nigeria and more particularly, in relation to this chapter provide for business rescue mechanisms. This Chapter will now discuss the business rescue amendments in the CAMA.

3.2 The Business Rescue Amendments in the CAMA 2020

According to Bolanle Adebola, business rescue entails giving a potentially viable corporation the opportunity to succeed, by preserving its going concern value.³¹⁵ The provisions in the CAMA 2020 provide for business rescue and are modeled after the UK Insolvency Act of 1986.³¹⁶ The two amendments introduced by the CAMA 2020 into Nigeria's Corporate Insolvency framework are Company Administration and Company Voluntary Arrangement. These options aim to rescue the business of Insolvent Corporations and their procedures will be discussed in detail below. Considering the similarity between the United Kingdom (UK) laws and Nigerian Laws, the arguments proffered by insolvency experts in the (UK) regarding how well these procedures have fared in the UK will be discussed.

³¹⁴ Templars, *The Repeal and Re-Enactment of The Companies and Allied Matters Act- A Bold Step Towards Business Reform*, (May 2018), online: *Templars - Nigerian Law Firm of the Year* <<https://www.templars-law.com/repeal-re-enactment-companies-allied-matters-act-bold-step-towards-business-reform/>>.

³¹⁵ Bolanle Adebola, "An Invitation to Encourage Due Consideration for the Survivability of Rescued Businesses in the Business Rescue System of England and Wales" (2017) 26:2 *International Insolvency Review* 42 at 1.

³¹⁶ Udo Udoma & Belo Osagie, *supra* note 309.

3.2.1 Company Voluntary Arrangements

The CAMA 2020 introduces Company Voluntary Arrangement (“CVA”) into Nigeria’s insolvency framework.³¹⁷ CVA is an arrangement by an insolvent corporation, which is used to structure debt repayment plans to their creditors.³¹⁸ The CAMA 2020 did not specifically define the CVA but drawing from the practice in the UK, CVAs are defined as a mode of rescuing the company through an arrangement with the creditors, to accept to be paid all or less than what they are owed by the debtor.³¹⁹ In this procedure, the repayment of this debt proposed by the debtor to his creditors runs over an agreed period of time.

3.2.1.1 Procedure

A CVA is a debtor in possession procedure where the debtor is left in control of its affairs while it continues its business as a going concern under the supervision of an insolvency practitioner.³²⁰ A CVA can either be commenced when a company is in administration or where a liquidator is winding up the company.³²¹ The process begins by a CVA proposal being made to the creditors by a person appointed by the directors, administrator or liquidator, usually acting as a nominee for the purpose of supervising the implementation of the CVA.³²² The CAMA 2020 requires the nominee to be qualified to act as an insolvency practitioner and within 28 days of receiving the notice of the proposal for a CVA; the nominee is required to submit a report to the Federal High Court (the “Court”).³²³ The nominee in this report to the Court will state whether

³¹⁷ CAMA 2020, s 432-441.

³¹⁸ Udo Udoma & Belo Osagie, *supra* note 309.

³¹⁹ Keye & Walton, *supra* note 102 at 137.

³²⁰ Parry, *supra* note 17 at 131.

³²¹ CAM 2020, s 432(3).

³²² CAMA 2020, s 432(2).

³²³ CAMA 2020, s 433(2).

meetings of the company and its creditors should be summoned to consider the proposal. The report will also include the date, time and place at which the proposed meetings will be held.³²⁴ In situations where the company is already in an administration or winding up, the nominee is not required to submit a report to the Court. A CVA may be approved provided that it does not affect the right of secured creditors to enforce their security or the priority and rights of preferential creditors except in situations where the secured or preferential creditors concerned permit.³²⁵

The meetings of members and creditors are required to be held separately. In situations where the decision made at the creditors meeting differs from the decision at the members meeting, the Court may, on application by a member, order that the decision of the members shall prevail over the decision of the creditors or the Court might make such orders as it deems fit.³²⁶ The decision relating to the approval of a CVA has effect if both creditors and members agree on it. In situations where the approval of the CVA is based on the creditors meeting alone, then the decision is subject to an order of the Court.³²⁷ Once the CVA has been approved, the company becomes liable to pay the creditors the amount approved under the CVA.³²⁸

³²⁴ *CAMA 2020*, s 433(2) (a)&(b).

³²⁵ *CAMA 2020*, s 435(3) & (4).

³²⁶ *CAMA 2020*, s 436(3).

³²⁷ *CAMA 2020*, s 437.

³²⁸ *CAMA 2020*, s 437(3)(b).

3.2.1.2 Drawbacks of the CVA

Firstly, There is no moratorium³²⁹ present in a CVA and the arrangement with creditors might fall apart due to actions filed by other creditors who do not consent to the arrangement to enforce their claims.³³⁰ To enable an insolvent company to successfully restructure its affairs, it is important that a moratorium is put in place. A moratorium prevents the creditors of the insolvent company from instituting or continuing actions against the debtor during the period of the CVA. This is to ensure that the race towards the assets of the debtor is prevented, giving the insolvent company and its creditors an opportunity to agree on a restructuring plan without being interrupted by the claims of creditors who do not accept the CVA. The absence of a moratorium encourages a race to the bottom, as creditors would resort to several means to gain priority and the debtor might employ any technique to keep non-consenting creditors away.³³¹ The lack of a moratorium could work against achieving a business rescue for the insolvent company.

A CVA proposal would be most effective if it were initiated under an administration where a moratorium is available. However, a statutory moratorium is not available for small companies under the CAMA 2020. Unlike the UK, where regardless of the absence of a moratorium in a CVA, small eligible companies enjoy an automatic moratorium once they embark on a CVA.³³²

³²⁹ A moratorium prevents the company creditors from instituting insolvency proceedings or legal processes against the company. It acts as a stay of actions against the debtor company when a restructuring process is ongoing.

³³⁰ Keay & Walton, *supra* note 102 at 137.

³³¹ As discussed extensively in the first chapter at page 38, the mandatory collective system is important in a rescue process.

³³² Parry, *supra* note 17 at 131.

Secondly, a CVA is informal in nature. The contractual nature of a CVA requires the approval of creditors and members of the company to become effective. This is because the CVA is a contract between the debtor and the creditors that binds the company and all unsecured creditors. However, the CVA is not binding on secured creditors who do not accept the CVA and this poses a problem. These secured creditors who do not consent to the CVA can ignore the CVA and proceed to enforce their claims in court against the insolvent company.

Thirdly, the CAMA 2020 has failed to provide the voting threshold for the approval of a CVA at the creditors and members meetings, and this is a significant lacuna in the Act.³³³ The CAMA 2020 only provides that “... each of the meetings shall be conducted in accordance with the rules.”³³⁴ There is, however, no particular indication of the rules, which the CAMA 2020 implies will govern the meetings of the creditors and the members. If reference is made blindly to the Nigeria’s *Companies Winding Up Rules 2001* (“CWR”),³³⁵ the voting threshold will be a simple majority (i.e. a 50% + 1 vote) for a resolution to have been deemed to be passed at either a members or creditors meeting. However, if reference is made to the UK *Insolvency Rules, 1986*, where the CVA was adopted from, the approval of the CVA requires majority in excess of three-quarters (by debt value) of the creditors present in person or by proxy at the creditors meeting,³³⁶ and a simple majority approval of the members present in person or proxy at the members meeting.³³⁷

³³³ Udo Udoma & Belo Osagie, *supra* note 309.

³³⁴ CAMA 2020, s 435(5)

³³⁵ These rules embody the procedural provisions governing winding up proceedings in Nigeria.

³³⁶ *Insolvency Rules 1986*, Rule 1.19.

³³⁷ *Insolvency Rules 1986*, Rule 1.20.

The threshold provided for by the CWR is too low when compared to the voting threshold in the UK. The threshold was clearly provided for in UK's insolvency rules, Nigeria should adopt this threshold instead of a simple majority threshold, provided for in the CWR. This Chapter will now discuss Company Administration.

3.2.2 Company Administration

The CAMA 2020 introduces Company Administration into Nigeria's insolvency framework.³³⁸ Administration is a restructuring procedure where an administrator is appointed to manage the insolvent company's assets with the intention of rescuing whole or part of the company's business and preserving the going concern value of the company.³³⁹ Unlike other insolvency procedures such as winding up or receivership that eventually lead to the dissolution of a company, an administration has the ability to return the company to solvency.³⁴⁰ However, even though the primary objective of an administration is a rescue, the CAMA 2020 gives the administrator³⁴¹ the power to pursue a different course, which will yield a better result for the company's creditors, if the administrator determines that a rescue is not reasonably achievable.³⁴²

The CAMA 2020 requires an administrator to be a qualified insolvency practitioner who will take custody of all assets of the insolvent company.³⁴³ The remuneration of the administrator will be paid from the property in the administrator's custody and it

³³⁸ CAMA 2020, s 441-547.

³³⁹ CAMA 2020, s 442.

³⁴⁰ Udo Udoma & Belo Osagie, *The Companies and Allied Matters Act (Repeal and Re-enactment) Bill 2019 - What you need to know*, (June 2019), online: Business Day (Capital & Markets) <<https://www.uubo.org/media/1757/cama-bill-series-part-11-002.pdf>>.

³⁴¹ An administrator of a company means a person appointed to manage the company's affairs, business and property of the company.

³⁴² CAMA 2020, s 442.

³⁴³ CAMA 2020, s 445 (1) and 502.

will have priority over the claims of holders of a floating charge.³⁴⁴ Two or more administrators may be appointed to act jointly or concurrently by the reference to the appointment of an administrator of an insolvent company.³⁴⁵ In an administration, the administrator becomes an officer of the court and an agent of the company unlike in a receivership where the receiver is an agent of the person who appoints him.³⁴⁶

Once a company enters into administration, legal actions or proceedings against it are stayed and creditors will not be able to enforce their claims without obtaining the permission to do so by the Court or the consent of the administrator.³⁴⁷ The stay of proceedings or moratorium gives the company breathing space to enable the administrator focus on the rescue process. During the administration process, all enforcement of securities, court actions, sequestration of assets will be suspended. A company will now have the ability to disclaim onerous contracts that it cannot perform with the leave of the court.³⁴⁸ The contracts for the supply of essential services will, however, be continued provided that the insolvent company undergoing a rescue will give a personal guarantee to the suppliers.³⁴⁹

3.2.2.1 Procedure

An application for an administration order can be brought by (a) the company, (b) its directors, (c) one or more creditors of the company, (d) a designated officer of the court

³⁴⁴ *CAMA 2020*, s 535 (2).

³⁴⁵ *CAMA 2020*, s 536.

³⁴⁶ *CAMA 2020*, s 504.

³⁴⁷ *CAMA 2020*, s 478 (4).

³⁴⁸ *CAMA 2020*, s 506 and 507.

³⁴⁹ Udo Udoma & Belo Osagie, *supra* note 340.

appointed to act as a receiver and a combination of persons listed from (a)-(d).³⁵⁰ An administrator is usually appointed to oversee the restructuring process and the appointment can be done in two different ways. Firstly, the court, upon the application of the insolvent company or one or more debenture holders, may appoint an administrator.³⁵¹ Secondly, an administrator may be appointed out of court upon the application of a floating charge holder, the insolvent company or its directors.³⁵² In situations where an administrator is appointed out of court, the person who appoints the administrator is required to file a notice of appointment and such other documents as may be prescribed with the Corporate Affairs Commission (“CAC”).³⁵³ In some other instances the person will be required to file a notice of appointment with the court.³⁵⁴

Once an administrator has been appointed, the administrator is required to send a notice of his appointment to the company and obtain a list of the company’s creditors.³⁵⁵ The administrator is also required to forward a notice of his appointment to each creditor and publish his notice of appointment in a prescribed manner.³⁵⁶ After the administrator has complied with his duty regarding the announcement of his appointment, the company will provide the administrator with the statement of affairs of the company.³⁵⁷ Within 60 days of the appointment of an administrator, he is required to prepare a detailed schedule of assets and submit a copy to the person who has appointed him.³⁵⁸ The administrator will then consider the state of the company’s affairs and circulate a

³⁵⁰ *CAMA 2020*, s 448.

³⁵¹ *CAMA 2020*, s 441(1) (a).

³⁵² *CAMA 2020*, s 441(1) (b) and (c).

³⁵³ *CAMA 2020*, s 453(1).

³⁵⁴ *CAMA 2020*, s 464.

³⁵⁵ *CAMA 2020*, s 481 (2) (a) and (c).

³⁵⁶ *CAMA 2020*, s 481.

³⁵⁷ *CAMA 2020*, s 482.

³⁵⁸ *CAMA 2020*, s 442(6).

proposal to the company's creditors on the procedure for achieving the administration.³⁵⁹ If the creditors do not approve the proposal, the administrator will apply to the court for further direction.³⁶⁰

An administration process can come to an end in several ways. First, once the duration of an administration expires, it comes to an end. The appointment of an administrator expires at the end of one year from the date in which the appointment took effect, except where the administration process is extended by the court for a specified period (prior to expiration) or extended for a period not exceeding six months with the consent of each secured creditor of the company and qualified preferential creditors where applicable.³⁶¹ Second, the administrator may apply to the court to cease the administration process if he has reached a conclusion that the administration cannot be achieved or the company should not have entered into administration in the first place or if the creditors require him to make such an application. On the application of an administrator the court may make an order that an administration shall cease.³⁶²

Third, an administration can come to an end before the statutory period, where the administrator files a notice to the court and the CAC, stating that the purpose of the administration has been sufficiently achieved.³⁶³ Fourth, the court may also make an order upon the application by the administrator or creditor, for the cessation of the appointment of the administrator prior to the expiration of the administrator's term.³⁶⁴

³⁵⁹ *CAMA 2020*, s 484

³⁶⁰ *CAMA 2020*, s 490 (1) and (2).

³⁶¹ *CAMA 2020*, s 511-514.

³⁶² *CAMA 2020*, s 515.

³⁶³ *CAMA 2020*, s 516.

³⁶⁴ *CAMA 2020*, s 517.

Fifth, an administration might end in a public interest winding up where a winding up order is made for the winding up of the company on ground of public interest, or by a petition presented by special banking and financial provisions and markets related Acts.³⁶⁵ Sixth, an administration might also lead to a creditors voluntary liquidation³⁶⁶ and lastly the administration process might end up in the dissolution of the company.³⁶⁷

3.2.2.2 Drawbacks of Administration

The drawbacks of an administration will be approached from an analogical perspective of what occurs in the UK. Administration is generally regarded as an effective restructuring process as it saves viable businesses and ensures that non-viable businesses effectively exit the market. However, it has a major flaw as a result of its conflicting dual purpose. CAMA 2020 gives an administrator the duty to rescue the company and if a rescue is not achievable, the sale of the assets of the company and its subsequent distribution to its creditors.³⁶⁸ At the first glance, one would wonder why a restructuring process would offer two conflicting remedies of rescue and liquidation to an insolvent company. This can lead to an administration merely being a trial-based process where rescue is merely attempted before the assets of the debtor are sold for the benefit of debenture holders.

As stated in the first chapter, restructuring law should be rescuing insolvent businesses and not tasked with winding up, liquidations and dissolving insolvent companies.³⁶⁹ In the UK, the administration procedure is not totally considered as a rescue option.

³⁶⁵ CAMA 2020, s 518.

³⁶⁶ CAMA 2020, s 519.

³⁶⁷ CAMA 2020, s 520.

³⁶⁸ CAMA 2020, s 442(2).

³⁶⁹ Chapter 1 at page 23.

According to Rebecca Parry, administration is a restructuring procedure that provides moratorium protection to insolvent companies pending when an exit strategy is devised.³⁷⁰ Professor Keay and Walton argue that the moratorium present in an administration gives the insolvent company temporary freedom from claims of debenture holders pending when a solution is carved out to ameliorate the company's financial distress.³⁷¹ Keay and Walton further note that the moratorium on creditor actions could either lead to a rescue or other beneficial result to be achieved."³⁷² The dual role administration serves can also create an incentive for debenture holders to prefer to appoint an administrator to fulfill the second objective of selling the assets of the debtor to maximize their returns instead of the first objective of a rescue.³⁷³ This process is commonly known as pre-packaged transactions.

Pre-packs or the pre-packaged sale of the business has become one of the most common outcomes of administration proceedings. In pre-packs, insolvent corporations sell substantially all of their assets.³⁷⁴ According to Rebecca Parry, "it is the most controversial yet common use of administration proceedings."³⁷⁵ In a pre-pack, the sale of the assets of the company is agreed upon before the commencement of the formal administration process as opposed to the usual administration procedure where the administrator determines each case after his or her appointment.³⁷⁶ According to Andrew Keay and Peter Walton, pre-packs are agreed upon prior to the appointment of

³⁷⁰ Parry, *supra* note 17 at 9.

³⁷¹ Keay & Walton, *supra* note 102 at 77.

³⁷² *Ibid* at 77.

³⁷³ *Ibid* at 75.

³⁷⁴ Parry, *supra* note 17 at 15.

³⁷⁵ *Ibid*.

³⁷⁶ Adebola, *supra* note 315 at 11.

an administrator and the company's business will be sold as soon as the company is placed into administration.³⁷⁷

Insolvent corporations, alongside its creditors, decide to pre-pack when attempts to reach a form of compromise or arrangement with their creditors fail or attempts to sell the company, as a going concern remain unsuccessful.³⁷⁸ David Brown argues that the decision to pre-pack could be made when it is difficult to access funds for trading in an administration, as there is no provision in the UK for funds to be borrowed from a super-priority lender.³⁷⁹ Keay and Walton argue that, a pre-pack can be embarked on when a trading administration is perceived "to destroy the company's goodwill and to reduce any likely sale price" for the process.³⁸⁰ Rebecca Parry considers it a matter of practicality, "where there are insufficient funds available for a prolonged period of trading while in administration."³⁸¹ Also in situations where the management seems to be the potential buyers, it is commercially sensible to sell the business to them.³⁸² The rise of pre-packs is perceived to enhance the interests of secured creditors and other stakeholders making them benefit from the process at the expense of unsecured creditors.³⁸³ Regardless of this, whatever reason or justification behind pre-packs i.e. using a restructuring law to effect liquidations whether piecemeal or as a going concern, has put pre-packs in a bad light.³⁸⁴ Indeed, it appears to be rebranded form of liquidation.

³⁷⁷ Keay & Walton, *supra* note 102 at 118–19.

³⁷⁸ *Ibid* at 119.

³⁷⁹ David Brown, "Unpacking the pre-pack" (2009) *Insolvency Law Bulletin* 5 at 2.

³⁸⁰ Keay & Walton, *supra* note 102 at 118.

³⁸¹ Parry, *supra* note 17 at 16.

³⁸² G McCormack, *Corporate rescue law--an Anglo-American perspective*, Corporations, globalization and the law (Cheltenham ; Northampton, MA: E. Elgar, 2008) at 73.

³⁸³ *Ibid*.

³⁸⁴ *Ibid*.

There is no intention to rescue the insolvent company in pre-packaged administrations and the process is secured creditor driven. These secured creditors opt for administration instead of other insolvency processes because it gives them certainty that their returns will be maximized.³⁸⁵ Gerard McCormack on this point argued: “There is a high degree of certainty in a pre-pack and secured creditors also enjoy a high degree of control. For these reasons secured creditors may consider it a more attractive alternative than a protracted formal insolvency process.”³⁸⁶

This control by the secured creditors of administration is evident in several ways. Firstly, the secured creditors are the parties with security in the assets of the debtor company and as a result possess more information about the debtor than other parties.³⁸⁷ Secondly, according to Roy Goode, secured creditors are the only parties involved in negotiating a pre-pack and appointing an administrator with the insolvent debtor.³⁸⁸ Other parties like the unsecured creditors are not consulted when a pre pack is to be implemented.

Thirdly, given that the pre-packaged deal is an abridged process that is completed very quickly, other stakeholders might be unable to scrutinize and challenge the terms of the pre pack and will rely on the expertise of the administrator to ensure that their returns would be maximized. To their disadvantage, this would be impossible as secured

³⁸⁵ Finch & Milman, *supra* note 34 at 373.

³⁸⁶ McCormack, *supra* note 382 at 73.

³⁸⁷ Alfonso Nocilla, “Asset Sales and Secured Creditor Control in Restructuring: A Comparison of the UK, US and Canadian Models” (2017) 26 Int Insolv Rev 60–81 at 68.

³⁸⁸ Goode, *supra* note 5 at 413.

creditors choose and appoint the administrator.³⁸⁹ More often than not, given that pre-packs would be more beneficial to secured creditors, the administrator will tend to choose pre-packs as the best option ahead of a rescue. Rebecca Parry argues that the administrators may misrepresent the urgency of the pre-pack as a means to justify its dubious legality.³⁹⁰ Finch and Milman also claim that it is unrealistic for unsecured creditors and other stakeholders to expect an administrator to act in the interests of all parties. They stated:

The danger is that when powerful creditors agree to a pre-pack such an agreement creates a momentum that is difficult for the administrator to upset... If this is the case, the pre-pack commits the administrator to a course of action that is agreed outside statutory procedures and it is extremely difficult for less powerful creditors to scrutinize the pre-pack and to renegotiate terms.³⁹¹

Secured creditors, through pre-packs, are able to control the realization of the assets of the debtor almost in the same way as they would in a receivership process.³⁹² Administrative receivership formerly practiced distorted value from the assets of the insolvent company, lacked transparency and wielded so much control to the secured creditors over the process.³⁹³ Administration, which has one of its dual roles as a rescue of insolvent companies, faces the same criticisms of administrative receivership. The effect of administrative receivership and administrations practiced through pre-packs is one and the same as they both do not aim at the rescue of the insolvent corporation but debt collection. Additionally, critics have argued that pre-packs disenfranchise unsecured creditors as the administrator can organize a pre-pack without getting the prior approval of creditors as long as he perceives it yields better returns than a

³⁸⁹ Adrian J Walters, "Statutory Erosion of Secured Creditors' Rights: Some Insights from the United Kingdom" (2015) 2015:2 U Ill L Rev 28 at 569.

³⁹⁰ Parry, *supra* note 17 at 16.

³⁹¹ Finch & Milman, *supra* note 34 at 397.

³⁹² Walters, *supra* note 389 at 569.

³⁹³ Nocilla, *supra* note 387 at 69.

liquidation.³⁹⁴ Pre-packs create potential conflict of interest as secured creditors appoint most administrators, giving rise to a greater incentive to act on their behalf instead of acting in the interest of the insolvent company.³⁹⁵

The critical problem with pre-packs or pre-packaged administrations is that the UK *Enterprise Act* of 2002 makes no provision for it and Parliament intended something different from what the administration process is currently used for. Pre-packs are not provided for in the insolvency legislation in the UK, hence it would be correct to say that it is an illegitimate exercise.³⁹⁶ Alfonso Nocilla argues that the role of pre-packs is out of place as it represents a shift in UK insolvency law - a shift from business rescue to debt collection that facilitates quick realizations.³⁹⁷ Keay and Walton on this point argued that:

The provisions of the act dealing with administration do not expressly allow for pre-packs. There is no indication that Parliament intended that the new regime should be used in this way. In fact, parliament intended something quite different with a clear emphasis on rescuing companies not just their businesses.³⁹⁸

From the arguments raised by insolvency experts in the UK the CVA process might not be very successful in rescuing businesses as a result of the lack of a stay of proceedings. Secured creditors might always institute actions in court claiming the debts from the insolvent company and this might end up frustrating the entire CVA process. Also, regarding how administration is practiced and how the first role of the rescue of insolvent companies is being neglected, Nigeria, whilst adopting the administration as

³⁹⁴ Walters, *supra* note 389 at 569.

³⁹⁵ *Ibid.*

³⁹⁶ Parry, *supra* note 17 at 17.

³⁹⁷ Nocilla, *supra* note 387 at 69.

³⁹⁸ Keay & Walton, *supra* note 102 at 120.

a process for business rescue, should tread with caution and be aware of the possible outcomes of administrations, which include pre-packaged administrations.

3.3 The practicability of the business rescue amendments

The two amendments introduced by the CAMA 2020 provide for measures to keep insolvent businesses going by devising a means to settle full or part of the debt owed to creditors. These two business rescue mechanisms aim to consider the interests of all parties in the insolvency process, while devising a rescue option for the insolvent company.

A CVA is effective to the extent that it prevents creditors from filing winding up petitions against the company if the creditors are offered a better return than they would recover from winding up the company.³⁹⁹ However, this procedure is only effective provided that other creditors do not file actions in court. If the debt repayment proposal offered to secured creditors does not guarantee a full repayment, they are unlikely to consent to the CVA. Enforcing their claims in court might be a better option for them. Keay and Walton, have argued that “it will only take one creditor to break ranks and bring an action in court to enforce his or her debt and any proposed arrangement will immediately fall apart.”⁴⁰⁰ In other words, when a secured creditor pursues a claim in court, it could lead to the winding up of the company and the aim of rescuing the business would be defeated.

³⁹⁹ *Ibid* at 139.

⁴⁰⁰ *Ibid* at 137.

A CVA is most effective when initiated under an administration where a moratorium is already put in place. Keay and Walton have noted the strain on the effectiveness of this procedure caused by the absence of a moratorium. They argued that:

Proposing a CVA without the benefit of first entering into administration has the apparent weakness that there is no moratorium on actions against the company during the period when the CVA proposal is being prepared. Creditors may therefore frustrate a possible CVA by enforcing their rights prior to any decisions approving the proposal.⁴⁰¹

It will however be pointless for a CVA to be commenced on its own, considering the lack of a moratorium in the process.

The second business rescue procedure is an administration. An administration is more effective than a CVA in rescuing the businesses of insolvent corporations. Once this process is commenced, it dismisses any winding up petition and vacates any receiver manager appointed by secured creditors or holders of floating charge. There is also an automatic moratorium on the enforcement of security or the repossession of goods and premises. This law, will totally put a halt to the current practice of the appointment of multiple receiver managers by secured creditors as the administrator will be in charge of the insolvent company's affairs.

The Nigerian Courts are structured in a way that several courts adjudicate on several areas of law. The Constitution of the Federal Republic of Nigeria has given the Federal High Court the power to handle cases related to companies in Nigeria.⁴⁰² However, this is a wide jurisdiction and insolvency cases are just a little ambit of company law. The courts play a huge role in the appointments of nominees or administrator and also certain actions cannot be taken without a prior approval gotten from the court.

⁴⁰¹ *Ibid* at 138.

⁴⁰² CFRN, s. 251(1)(e).

Considering the urgency at which the attention of the court is needed, these business rescue procedures might not be concluded speedily and the assets of the debtor might be depleted. The bill has not provided a timeline for the courts to reach certain decisions regarding the business rescue procedures. The absence of this might appear to be the deferring of the winding up of the company to a later date.

The role of the courts in these processes is however purely administrative. But in some instances, the court will be faced with settling disputes concerning possible unfair prejudice under the approved CVA, or the procedural impropriety on the conduct of the meetings.⁴⁰³ These actions have the ability to prolong this process. There is no timeline for the conclusion of the process and this can lead to pre-packaged administrations. Regardless of the challenges that might be faced in implementing these amendments, they are anticipated to reduce the risk of corporate insolvency, directly boost foreign investment in Nigeria and ensure that the Nigerian corporate insolvency framework thrives.

3.4 Amendments to the Winding up procedure

The previous chapter discussed the drawbacks of the winding up procedure under the prior law. The CAMA 2020 has made some adjustments to the winding up procedure in order to remedy the low threshold afforded to creditors who use the process as a tool for debt collection. First, the CAMA 2020 has put in place a limitation period for the recovery of debts owed by contributories.⁴⁰⁴ Given that the liability of contributories

⁴⁰³ Parry, *supra* note 17 at 171.

⁴⁰⁴ CAMA 2020, s 564 defined a contributory as “contributory” means every person liable to contribute to the assets of a company in the event of its being wound up and for the purposes of all proceedings for determining and all proceedings prior to the final determination of the persons who are to be deemed contributories, the expression shall include any person alleged to be a contributory.

constitute debts,⁴⁰⁵ actions to recover these debts can no longer be brought after the expiration of six (6) years from the date, which the cause of action occurred.⁴⁰⁶

Second, the threshold of debt, which may trigger a petition for winding up of a company, has been increased from N2, 000 (Two thousand Naira) to N200, 000 (Two hundred thousand naira).⁴⁰⁷ Solola and Akpana recognized the necessity of the amendment but argued that the provision does not envisage inflation in the coming years.⁴⁰⁸ Solola and Akpana have recommended that the trigger threshold should have been left open to be determined by the CAC through the company regulations published by the CAC frequently.⁴⁰⁹ This is a valid argument and recommendation, as N200,000 (Two hundred thousand naira) is also a low debt trigger for winding up medium to large-scale companies. In coming years, the value of the currency may drop and there will be a need to amend the CAMA 2020. The lawmakers should therefore be on their toes to amend the CAMA more frequently, instead of waiting to do so in 30 years again into the future.

3.5 Conclusion

This Chapter has discussed the amendments introduced into Nigeria's corporate insolvency framework by the CAMA 2020. These amendments aim to improve Nigeria's rank in the business sector to enable Nigeria to compete globally as the

⁴⁰⁵ CAMA 2020, s 565(1)

⁴⁰⁶ CAMA 2020, s 565(2)

⁴⁰⁷ CAMA 2020, s 570(a)

⁴⁰⁸ Solola & Akpana, *A Review Of The Companies And Allied Matters Act (CAMA), 2004 (Repeal And Re-Enactment) Bill, 2018 - Corporate/Commercial Law - Nigeria* (March 2020), online: <<https://www.mondaq.com/nigeria/shareholders/900874/a-review-of-the-companies-and-allied-matters-act-cama-2004-repeal-and-re-enactment-bill-2018>>.

⁴⁰⁹ *Ibid.*

previous provisions in CAMA 1990 were outdated. The introduction of the Company Voluntary Arrangement and Company Administration is a step in the right direction in changing the face of Corporate restructuring in Nigeria. The CAMA 2020 is expected to ease the mechanisms for restructuring insolvent companies. It will also boost activities of micro, small and medium sized enterprises (MSMEs), with the overall effect of growing the Nigerian economy in the process, providing more jobs and guaranteeing economic stability.

Considering that the UK insolvency laws inspired the amendments in the CAMA 2020, it will be beneficial if the drawbacks of these procedures in the UK are considered while implementing these amendments in Nigeria. This chapter has discussed that these procedures might be challenging as effective business rescue options. The next chapter will discuss corporate restructuring in Canada to establish how effective the corporate restructuring laws in Canada are in rescuing insolvent businesses.

CHAPTER 4: **THE CANADIAN CORPORATE INSOLVENCY SYSTEM**

4.0 Introduction

This Chapter will discuss the Canadian Corporate Insolvency system in order to determine how effective Canadian restructuring laws are in rescuing insolvent corporations and also to draw lessons Nigeria can incorporate into its insolvency framework. It will begin by discussing the major regimes through which restructuring is carried out in Canada which can either be through the *Bankruptcy and Insolvency Act* (“BIA”) or the *Companies’ Creditors Arrangement Act* (“CCAA”). This chapter will discuss both regimes whilst highlighting the differences between the two. The history of the CCAA will also be discussed in order to show how the CCAA became the restructuring legislation of choice for large insolvent companies in Canada. This discussion will establish the intent of the Canadian legislature while drafting the CCAA as well as the purpose of the CCAA.

In particular, this Chapter will go into an extensive discussion of restructuring in Canada under the CCAA. It will discuss the commencement of CCAA proceedings whilst highlighting its key features, which are the stay of proceedings and debtor in possession financing. The key players in a CCAA proceeding, and the process of exiting CCAA proceedings will also be discussed. The effects of the recent amendments to the CCAA on the key features and the key players will be discussed. This chapter will then delve into liquidating CCAAs, which is a mechanism where the CCAA is used to effect liquidations to show that this practice has deviated from the goal and purpose of corporate restructuring under the CCAA.

4.1 Corporate Restructuring in Canada

Insolvency by its nature entails that available assets of a debtor are insufficient to pay out all claims.⁴¹⁰ The law, therefore, puts the debtor in a position to choose who will be paid out and who will be left out in the cold.⁴¹¹ To avoid the negative consequences of this choice and to ensure that value is maximized for all creditors with competing claims against the debtor, insolvent companies file for restructuring. Before a company is declared insolvent, the company undergoes several restructuring and reorganization procedures that involve informal negotiations with its largest creditors.⁴¹² As this chapter expands, the terms reorganization and restructuring will be used interchangeably to describe how debts of an insolvent company are restructured.⁴¹³

In Canada, insolvent corporations have the option of restructuring their affairs either through Part III of the *Bankruptcy and Insolvency Act*⁴¹⁴ (“BIA”) or the *Companies Creditors Arrangement Act*⁴¹⁵ (“CCAA”) and the courts take an active part in supervising these restructuring processes.⁴¹⁶ The BIA is a creditor driven process, which aims at bringing uniformity to administration and liquidation of the estates of an insolvent company.⁴¹⁷ The rationale behind this is that creditors should control the administration of the insolvent debtors assets because liquidating these assets should

⁴¹⁰ Roderick Wood, *supra* note 11 at 16.

⁴¹¹ Philip Wood, *supra* note 12 at 3.

⁴¹² Ben-Ishai & Thomas Telfer, *supra* note 73 at 505.

⁴¹³ *Ibid* at 509.

⁴¹⁴ RSC 1985 c B-3.

⁴¹⁵ *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA].

⁴¹⁶ Nocilla, *supra* note 387 at 77.

⁴¹⁷ Sarra, *supra* note 132 at 17.

meet their best interests.⁴¹⁸ The BIA is however, accessible to large, medium sized and small companies who wish to restructure their affairs.

The CCAA on the other hand is used for facilitating the restructuring of large insolvent corporations in Canada that have debts exceeding \$5million. The BIA and CCAA provide complimentary regimes for companies to reach compromises or arrangements with their creditors. Over time, the CCAA has become the restructuring legislation of choice for large insolvent companies as a result of the liberal and flexible nature of the CCAA process compared to the BIA commercial proposal process. The BIA business proposals regime is statutorily driven while the CCAA regime is court driven. This implies that when restructuring is commenced under the BIA, the wordings of the statute are followed and adhered to very strictly, unlike the CCAA where the courts are permitted to exercise their discretion in line with the statute and in situations when they are faced with novel situations not foreseen when the statute was enacted. Large insolvent companies, therefore, prefer to restructure their affairs using the CCAA as opposed to the BIA.⁴¹⁹

The differences between these two regimes are mainly procedural. The first difference lies in their commencement. Under the BIA, the debtor initiates the reorganization procedure by filing a proposal or a notice of an intention to make a proposal. There is no need for an application to the court as the creditors meet and vote on the proposal subject to the rules of the statute and the court sanctions it.⁴²⁰ In the CCAA on the other hand, the debtor or a creditor can initiate the reorganization procedure by filing an

⁴¹⁸ *Ibid.*

⁴¹⁹ Nocilla, *supra* note 32 at 400.

⁴²⁰ Ben-Ishai & Telfer, *supra* note 73 at 510.

application in court. The debtor carves out a plan for submission to the creditors subject to the timelines put in place by the court. The creditors then meet and vote on the plan and the court decides whether to approve the plan or not.⁴²¹ Second, once a debtor files a proposal under the BIA, the debtor's assets vests in the trustee and the debtor loses control to the trustee who takes control over the business. However, when a company goes into CCAA protection, its assets do not vest in a trustee but the debtor remains in control of its affairs and continues to run the company during the proceedings.⁴²²

Third, the time limitation in which proposals should be filed is strict under the BIA. The BIA provides that proposals should be made six months from when the intention to make a proposal has been filed by the debtor company. However, restructuring proceedings commenced through the CCAA have no statutory time limit for a restructuring plan to be presented in court. Fourth, the BIA does not provide for stay extensions on the expiration of this time limit.⁴²³ This is considered a limitation, as the company might need some more time to figure out the cause of the company's financial distress and also the best restructuring plans it may pursue. In the CCAA, the stay of proceedings remains in force even if creditors reject the restructuring plan. Also, the stay of proceedings can be extended as long as the pre conditions for granting or extending the stay are found to exist.⁴²⁴

Fifth, in the BIA, the debtor company will need to get the creditors to vote on the plan before the expiration of the six months' time limit. If negotiations with creditors are not

⁴²¹ *Ibid.*

⁴²² *Ibid* at 506.

⁴²³ *BIA*, s. 50.4(9) and (10).

⁴²⁴ *CCAA*, s 11.02(2).

concluded or the debtor fails to obtain the creditors' consent or more so, if the creditors reject the proposal, the debtor is automatically deemed bankrupt.⁴²⁵ In the CCAA, on the other hand, the debtor has sufficient time and opportunity to re-negotiate with creditors and file an amended plan.

This Chapter will now discuss restructuring under the CCAA.

4.2 The Companies Creditors Arrangement Act (CCAA)

The CCAA is the restructuring legislation of choice in Canada, which facilitates arrangements and compromises between large insolvent companies and their creditors.⁴²⁶ A company can seek protection under the CCAA from court if the company is insolvent with over \$5 million of debt being owed to its creditors.⁴²⁷ The Act defines a 'debtor company' as a company that is bankrupt or insolvent.⁴²⁸

The CCAA does not have an express purpose clause but case law has elaborated the purpose of the CCAA. The Court of Appeal in *Hong Kong Bank of Canada v Chef Ready Foods Ltd*,⁴²⁹ stated that the purpose of the CCAA, is to facilitate an arrangement between a company and its creditors "to the end that the company is able to continue its business." The Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*⁴³⁰ reiterated that the purpose of the CCAA is "to permit the debtor to continue to carry on business and, where possible, avoid the social and economic

⁴²⁵ *BIA*, s. 57

⁴²⁶ Nocilla, *supra* note 32 at 382.

⁴²⁷ *CCAA*, s 3(1).

⁴²⁸ *CCAA*, s 2(1).

⁴²⁹ (1991) 2 WWR 136 (B.C.CA) at para 10.

⁴³⁰ *Century Services*, *supra* note 76 at para 70

costs of liquidating its assets."⁴³¹ Very recently, the Court in *9354-9186 Québec inc. v. Callidus Capital Corp*⁴³² recognized that the CCAA's has the objective of ameliorating the harsh effects of insolvency. The court stated:

The CCAA is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

These three court decisions show that the CCAA facilitates the reorganization and the survival of an insolvent company as a going concern. In circumstances where this goal is not achieved and reorganization is impossible, the insolvent company can proceed to liquidation either through a receivership or under the BIA regime.⁴³³ However, despite the intent of the legislature and these interpretations given by the courts on the purpose of the CCAA, there has been an escalating use of the CCAA as a mechanism used to effect asset sales.⁴³⁴ This chapter will also discuss this mechanism known as liquidating CCAAs.

In a bid to interpret the CCAA and its purpose, it is necessary to examine the history of the CCAA and its function amidst the body of insolvency legislation. This Chapter will now discuss the history of the CCAA.

⁴³¹ *Century Services*, *supra* note 76 at para 70.

⁴³² (2020) SCC 10.

⁴³³ *Century services*, *supra* note 76 at para 14.

⁴³⁴ *Nocilla*, *supra* note 32 at 382.

4.2.1 History and Development of the CCAA

At the beginning of Great Depression, the parliament of Canada passed the *Companies' Creditors Arrangement Act*, 1933 ("CCAA") in order to provide an insolvency procedure that encouraged the reorganization of insolvent companies, as opposed to liquidation, which brought an end to the life of insolvent companies.⁴³⁵ The CCAA was introduced with the notion that "it was in the public interest to afford corporations the opportunity to reorganize as an alternative to liquidation."⁴³⁶ The CCAA majorly aimed at facilitating compromises and arrangements between insolvent companies and their creditors.⁴³⁷

The introduction of the CCAA was as a result of the criticism and the obvious defects in the previous bankruptcy legislation. The *Bankruptcy Act* of 1919⁴³⁸ was restricted to effective administration of estates and Liquidations, which received little scrutiny.⁴³⁹ The Act was amended in 1923, and according to the Tassé Report⁴⁴⁰ one of the criticisms that led to this amendment was that debtors in order to obtain creditors approval of a plan to avoid bankruptcy, bribed their creditors through fraudulent means.⁴⁴¹ The 1923 amendments to the *Bankruptcy Act* of 1923 only allowed companies that were actually bankrupt to restructure their business.⁴⁴² There was so

⁴³⁵ Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (University of Toronto Press, 2020) at 3.

⁴³⁶ Sarra, *supra* note 132 at 11.

⁴³⁷ *Ibid* at 12.

⁴³⁸ 9-10 Geo V, Can S 1919, C 36.

⁴³⁹ Thomas Telfer, "The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?" (1995) 24 Can Bus LJ 357 at 358-9, 361.

⁴⁴⁰ House of Commons, Study Committee on Bankruptcy and Insolvency Legislation, Report of the Study Committee on Bankruptcy and Insolvency Legislation (June 1970) (Chair: Roger Tassé) [Tassé Report]

⁴⁴¹ *The Bankruptcy Act Amendment Act*, 1923, 13-14 Geo V, Can S 1923, C 31.

⁴⁴² Alfonso Nocilla, *Asset Sales Under the Companies' Creditors Arrangement Act* University of Western Ontario, 2011) [unpublished] at 7.

much difficulty faced with this Act, given that a company was required to be bankrupt and the debtor was required to hold a first meeting of creditors, before a proposal could be made.⁴⁴³ In 1933, this Act was met with several criticisms regarding the condition precedents which had to be met before a debtor could make a proposal. This led to the amendment of the *Bankruptcy Act* of 1923 to provide for the CCAA as an alternative for insolvent companies who wanted to restructure their business.⁴⁴⁴

The CCAA was adopted from the British *Companies Act* of 1929, which provided for compromises with creditors and set out the amount of approvals, which the court will require before approving a restructuring plan.⁴⁴⁵ The CCAA of 1933 required a majority of creditors by class and three quarters in value to vote in favour of the plan before the court would sanction it.⁴⁴⁶ According to Janis Sarra, the CCAA was introduced to guard against the improvident sale of assets of a debtor. She stated:

The Act was introduced because of the ‘prevailing commercial and industrial depression’ and was intended to promote adoption of a method by which the courts could supervise arrangements between creditors and debtor corporations without the improvident sale of assets of the firm.⁴⁴⁷

The CCAA was introduced to bind both secured and unsecured creditors, which was lacking in the previous bankruptcy legislation.⁴⁴⁸ However, the CCAA was structured in a way that it facilitated arrangements between the debtor and its secured creditors only.⁴⁴⁹ This was because secured creditors were protected by the legislation and trust

⁴⁴³ Sarra, *supra* note 132 at 12.

⁴⁴⁴ Nocilla, *supra* note 442 at 7.

⁴⁴⁵ *Companies Act 1929*, c.23 (U.K)

⁴⁴⁶ Sarra, *supra* note 132 at 13.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Ibid.*

⁴⁴⁹ Tassé Report, *supra* note 440 at 1.2.23

deeds, which gave indenture trustees the power to intervene in the debtor's affairs.⁴⁵⁰ As a result of this, unsecured creditors viewed the CCAA as being unable to sufficiently protect their interests as the debtor wielded so much control over the restructuring process by being in control of its affairs.⁴⁵¹ This led to reforms of the CCAA in 1953.

In 1953, considering the control the debtors had over the restructuring process, the need arose to give debtors less opportunity to act in their interests alone in the CCAA proceedings. The CCAA was then amended to restrict its protection to larger and publicly held companies who had issued bonds or debentures under a trust and running in favour of a trustee.⁴⁵² According to Virginia Torrie, at the time "all restructurings carried out under the CCAA had to include a compromise or arrangement with respect to these claims."⁴⁵³ This amendment focused on reorganization of companies with complex public debt profiles and provided for an indenture trustee or monitor to oversee the restructuring process.⁴⁵⁴ After the amendments in 1953, the CCAA fell into disuse for half a century and Canadian insolvency system continued to be creditor driven, with debt collection as the major goal.⁴⁵⁵

In the late 1980's and early 1990s judges, counsel, academics and the press began a new public interest consideration around the CCAA.⁴⁵⁶ This ensured that the interest of everyone with a financial stake in the company was met as opposed to the interests

⁴⁵⁰ *Ibid* at 1.2.24.

⁴⁵¹ Sarra, *supra* note 132 at 14.

⁴⁵² Richard McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1999) at 1-4.

⁴⁵³ Torrie, *supra* note 435 at 4.

⁴⁵⁴ Sarra, *supra* note 132 at 14.

⁴⁵⁵ *Ibid* at 16.

⁴⁵⁶ Torrie, *supra* note 435 at 4.

of just the shareholders and traditional creditors. According to Stanley Edwards, those who supervise restructuring processes should put the interests of the public into consideration. He defined public interests to include the interests of consumers, investors and employees.⁴⁵⁷ Janis Sarra recognizes a wider scope of interests, which should be considered in a restructuring process. They include, the interests of workers, trade suppliers and communities. Janis Sarra sums it up by stating that the interests of everyone with investments at risk should be considered.⁴⁵⁸

In 1992, the Bankruptcy and Insolvency Act was amended to facilitate restructuring for small to medium sized companies and the debate on the necessity of having two restructuring legislations arose. Insolvency practitioners opposed the repeal of the CCAA, as it was a more liberal legislation that afforded the debtor the necessary flexibility and breathing space required for complex reorganizations of large companies.⁴⁵⁹ The CCAA was then amended in 1997, to make it more accessible and its protection was restricted to large insolvent corporations alone with at least \$5 million in debt. There was also a new requirement for a court appointed monitor who will protect the interests of creditor and report to the court while the debtor prepares a restructuring plan.⁴⁶⁰ These amendments to the CCAA gave a new look to business reorganizations in Canada.

Prior to amendments of the CCAA in 2009, the courts were permitted by common law to approve sale of assets under the CCAA. In 2009, the CCAA was amended to

⁴⁵⁷ Edwards, *supra* note 136 at 593.

⁴⁵⁸ Sarra, *supra* note 132 at 15.

⁴⁵⁹ Jacob S Ziegel, "Canada's Phased-In Bankruptcy Law Reform" (1996) 70 Am Bankr LJ 383 at 397.

⁴⁶⁰ Nocilla, *supra* note 442 at 15.

introduce a new provision that resolves all the controversies relating to the jurisdiction of the court to approve sales under the CCAA.⁴⁶¹ Section 36 of the CCAA was introduced which laid down guidelines that the court will adhere to while approving the sale of assets under the CCAA. In light of the history discussed for far, this new amendment is indeed a change in the narrative of what the CCAA originally set out to achieve. The Supreme Court of Canada, while interpreting the provisions of the CCAA in *Reference re Companies Creditors Arrangement Act*⁴⁶² stated that it was not envisioned that the CCAA would be used for anything other than restructuring. This Chapter will now discuss liquidating CCAAs that has sprung up as a result of this new amendment.

In November 1, 2019 through Bill C-97⁴⁶³ there were extensive amendments to the BIA and the CCAA. The amendments aimed at making insolvency proceedings more transparent and accessible to workers and pensioners. The amendments to the CCAA relating to this thesis will be discussed. They include: First, an express duty of good faith for any interested person and failing this duty entitles another interested person to bring an application to court. The court is empowered to make an order it deems appropriate if the court is satisfied that an interested person has not acted in good faith. This amendment does not elaborate on who an interested person is or the type of orders the court can give when it discovers that a party has not acted in good faith.⁴⁶⁴

⁴⁶¹ *Ibid* at 61.

⁴⁶² [1934] SCR 659 at para 4.

⁴⁶³ *An Act to Implement Certain Provisions of the Budget Tabled in Parliament on March 19, 2019 and Other Measures*.

⁴⁶⁴ CCAA, s 18.6(1)(2).

Second, there is a reduction in the length of the initial stay of proceedings upon a company's application for CCAA protection from 30 days to 10 days.⁴⁶⁵ The amendment limits the relief that a company can obtain from the Court during the initial 10-day period to "relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business". This has an effect on the amount of DIP (interim) financing that a court can approve at the first day hearing.⁴⁶⁶ This Chapter will now discuss how restructuring is carried out under the CCAA.

4.3 Commencement of CCAA Proceedings

Restructuring proceedings under the CCAA are commenced through an application to the court for an initial order.⁴⁶⁷ The application may be made to a court in the province within which the company has its head office or chief place of business.⁴⁶⁸ The application can also be made in the province within which the assets of the company are situated.⁴⁶⁹ Generally, a CCAA restructuring plan is set out in a way that creditors with provable claims receive less than the amount they are owed as full and final satisfaction of their debts. For e.g. the creditors may receive 40 cents on a dollar. Upon the commencement of a CCAA proceeding, the current management of the company remains intact and continues to run the affairs of the company throughout the duration of the CCAA proceedings. It is usually referred to as a debtor-in-possession regime.⁴⁷⁰ The rationale behind the debtor in possession regime is that the current management is

⁴⁶⁵ CCAA, s. 11.02 (1)

⁴⁶⁶ CCAA, s. 11.2 (5) compliments s. 11.02(1) as it aims to limit the terms and amount of financing which a company can obtain within the period of the stay granted by the initial order.

⁴⁶⁷ CCAA, s 11.02(1).

⁴⁶⁸ CCAA, s 9(1)

⁴⁶⁹ Roderick Wood, *supra* note 11 at 359.

⁴⁷⁰ Ben-Ishai & Telfer, *supra* note 73 at 507.

more familiar with running the affairs of the company than an administrator who will have to learn the internal workings of the company to replace them.⁴⁷¹

4.3.1 Stay of Proceedings

The stay of proceedings is by an order of the court and it is automatic upon filing for protection under the CCAA. According to Janis Sarra, the purpose of the stay is to maintain the status quo for the plan to be carved out and presented to the creditors.⁴⁷² A stay guards against the depletion of the assets of the debtor. It bars all creditors from commencing proceedings against the debtor, including execution proceedings to recover debts. It also has an effect of staying already existing proceedings. This protection under the CCAA will ensure that debt enforcement actions initiated by creditors of the insolvent corporation are stayed to give the insolvent company breathing space to negotiate with its creditors and enable the insolvent company to return to financial stability.⁴⁷³

The initial stay of proceedings can be extended based on the assessment by the court that the debtor has worked diligently and in good faith towards the restructuring plan.⁴⁷⁴ The initial stay of proceedings in a CCAA restructuring process was recently reduced to ten days.⁴⁷⁵ The lawmakers shortened duration of the stay a court can grant arguably because it would protect creditors, and other stakeholder from the effect of far reaching orders. In other words, the reduction may have been intended at limiting the consequences of a stay order in situations where substantial reliefs are sought in the

⁴⁷¹ *Ibid.*

⁴⁷² Sarra, *supra* note 132 at 25.

⁴⁷³ Nocilla, *supra* note 442 at 1.

⁴⁷⁴ *Re Downtown Lumber* (1996), 39 C.B.R (3d) 4 (N.B.C.A.)

⁴⁷⁵ CCAA, s. 11.02 (1)

interim, with little or no notice to creditors. However, this limitation might prevent the smooth operation of a restructuring process because the limited duration of a stay is too short to achieve the restructuring goals intended by the law. The limitation is also contrary to objectives of a stay of proceedings. In *Re Doman Industries Ltd*,⁴⁷⁶ the purpose of a stay of proceedings was stated which includes:

...To maintain status quo among creditors while a debtor company endeavors to recognize or restructure its financial affairs. Another purpose is to relieve the debtor company of the burden of dealing with litigation against it so that it would focus on restructuring its financial affairs. Another purpose is to prevent the frustration of a reorganization plan after its implementation on the basis of events of default or breaches, which existed prior to or during the restructuring period.

To achieve this goal, the law ought to be designed in a manner that would not impede a long-term restructuring plan. The reality of insolvency and restructuring is that most businesses would require a longer period to gain some form of financial stability and continue as a going concern.

4.3.2 DIP Financing

Once restructuring proceedings are commenced, the debtor is put in control of its business and creditors are stayed from enforcing their claims against the debtor, giving the debtor breathing space to restructure its affairs.⁴⁷⁷ However, to operate as a going concern, the debtor needs financing. This is known as the Debtor in Possession financing (“DIP Financing”).⁴⁷⁸ DIP Financing provides an insolvent company with working capital for the continuation of its operations, pending when a plan acceptable to creditors is devised.

⁴⁷⁶ (2003) BCSC 376, at para 22

⁴⁷⁷ Ben-Ishai & Telfer, *supra* note 73 at 585.

⁴⁷⁸ *Ibid.*

DIP Financing also known, as an “interim financing” is a term used in describing a situation where the debtor remains in possession of its affairs in a restructuring process and receives financing from either a current creditor or a third party. These lenders are referred to as a super priority lenders or DIP lenders.⁴⁷⁹ The financing obtained from the DIP lender enables the debtor to continue its business during a brief period in line with the moratorium provisions in the CCAA while the company negotiates a plan with its creditors.⁴⁸⁰ DIP Financing is generally considered as less risky venture because post-filing creditors⁴⁸¹ are usually able to acquire priority for their loans.⁴⁸² Put differently, the DIP lender is granted super priority security interest ranking above the loans of other creditors.⁴⁸³ This is referred to as (“priming”) and it entails that if the restructuring process is unsuccessful, the DIP lender will be paid out first from the assets of the insolvent company, whether encumbered or not.⁴⁸⁴

The amendment introduced through s. 11.2 (5) of the CCAA limits the courts’ discretion to provide relief pursuant to an initial order to that which is reasonably necessary for continued operation of the company within the 10 days stay period. s. 11.2 (5) of the CCAA compliments s. 11.02(1) as it aims to limit the terms and amount of financing which a company can obtain within the period of the stay granted by the initial order. This section states:

⁴⁷⁹ Patrick Cleary, “DIP financing basics and recent case law”, (20 August 2014), online: *Alexander Holburn Beaudin + Lang LLP* <<https://www.ahbl.ca/dip-financing-basics-and-recent-case-law/>>.

⁴⁸⁰ Janis Sarra, “Debtor in Possession Financing: the Jurisdiction of Canadian Courts to Grant Super-Priority Financing in CCAA Applications” (2000) 23 *Dalhousie L J* 33 at 4.

⁴⁸¹ Post-filing creditors are creditors who extend financing to the debtor after restructuring proceedings have been commenced. Pre-filing creditors on other hand are creditors who have existing claims against the debtor prior to the debtors’ insolvency; their claims are subject to the restructuring plan.

⁴⁸² Ben-Ishai & Telfer, *supra* note 73 at 585.

⁴⁸³ CCAA, s.11 (2).

⁴⁸⁴ Kenneth Atlas & Kendall Anderson, “DIP Super-Priorities and the Secured creditor’s Dilemma” (2009) 6 *Ann Rev Insol.* 12 at 1.

When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

The amendments to the DIP is incidental to the amendment that shortens the length of the initial stay of proceedings. It has to be considered alongside the amendment to the stay to determine what relief an insolvent company can obtain once it files an initial order. Considering that the length of the stay of proceedings is now 10 days, this subsection implies that when an application for DIP financing is made, no order will be made if the court is not satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operation of the debtor company in the ordinary course of business within 10 days.

The reduction of the duration for the initial stay of proceedings to ten days has a significant impact on the quantum of DIP Financing the debtor may obtain.⁴⁸⁵ Lesser funds would mean that debtor companies would have to go back to court at the expiration of the initial period for another DIP Financing order. This could pose a problem because long-term funding is particularly important at the initial period for restructuring businesses. In addition, this creates an additional bottleneck to the restructuring process. DIP Financing being an important tool of restructuring because it provides the necessary funds for restructuring should be put into consideration when amendments to the CCAA are made.

⁴⁸⁵ CCAA s. 11.2(5).

4.3.3 Key Players in a CCAA Proceeding

4.3.3.1 The Monitor

In a CCAA proceeding, a monitor is appointed to oversee the restructuring process. This is done to ease concerns about retaining the existing management of the debtor. The monitor is usually a licensed insolvency professional with an accounting or turnaround expertise, and is represented by a legal counsel in the proceedings.⁴⁸⁶ The monitor is appointed by the court in the initial order and is regarded as an officer of the court.⁴⁸⁷ The monitor has the duty to monitor the business and financial affairs of the company; ensure that the court and the creditors receive accurate and timely information about the proceedings.⁴⁸⁸ The CCAA provides for the powers and duties of a monitor.⁴⁸⁹ According to the Supreme Court in *Century Services*,⁴⁹⁰ the courts have the discretion to extend the duties and powers of the monitor however; the exercise of this discretion by the courts should not be done arbitrarily but in accordance with the objectives of the CCAA. Very recently in *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*,⁴⁹¹ additional powers of the monitor to institute legal proceedings on behalf of creditors was recognized. The Quebec Court of Appeal found that the monitor had a duty in accordance with the CCAA objectives to maximize returns for creditors by establishing a litigation pool for distribution to Aquadis creditors. This decision draws the powers of a CCAA monitor closer to those of a

⁴⁸⁶ Sarra, *supra* note 132 at 26.

⁴⁸⁷ CCAA, s 11.7(1).

⁴⁸⁸ Ben-Ishai & Telfer, *supra* note 73 at 548.

⁴⁸⁹ CCAA, s 23

⁴⁹⁰ *Century Services supra* note 76 at para 59.

⁴⁹¹ *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)* (2020) QCCA 659. [Aquadis]

trustee in bankruptcy thus diminishing the remedial nature of the act. This decision also provides an additional tool to increase creditor recovery in a liquidating CCAA.⁴⁹²

The monitor generally ensures compliance with the law, the court orders and the terms of the restructuring plan. The monitor also performs supervisory functions over the directors and officers of the insolvent company to ensure that they do nothing that will unnecessarily deplete the resources available to satisfy creditors' claims and they act in good faith. The new amendment to the CCAA introduces a broad duty of good faith for "interested parties" in CCAA proceedings.⁴⁹³ Prior to this amendment, the CCAA already imposed duties of good faith on the insolvent company and Monitors in CCAA proceedings.⁴⁹⁴ At common law, good faith implies that parties in an insolvency proceeding should act honestly, take timely actions and act fairly.⁴⁹⁵ The Supreme Court of Canada in *Century Services*,⁴⁹⁶ stated that "the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority." In *Bhasin v. Hrynew*⁴⁹⁷ the court recognized good faith as a broad "organizing principle".

The new duty of good faith lacks clarity. This amendment tends to take away this duty from the monitors and the court and place it on a wide category of unknown persons.

⁴⁹² Sandra Abitan, Ilia Kravtsov & Cristina Cosneanu, The Aquadis Case: Québec Court Of Appeal Confirms The Broad Powers Of The CCAA Monitor - Insolvency/Bankruptcy/Re-structuring - Canada (June 2020), online: <<https://www.mondaq.com/canada/insolvencybankruptcy/959996/the-aquadis-case-qubec-court-of-appeal-confirms-the-broad-powers-of-the-ccaa-monitor>> .

⁴⁹³ CCAA, s. 18.6 (1) and (2).

⁴⁹⁴ Linc A Rogers, David Sierardzki & Matthew Kanter, "What does "Good Faith" Mean in Insolvency Proceedings", (2015) 4 Insolvency Institute of Canada 55. See CCAA s. 11.02(3) and 25(3).

⁴⁹⁵ *Gateway Realty Ltd v Arton Holdings Ltd* [1992] NSJ No 175 (NSCA) at para 39.

⁴⁹⁶ *Century Services supra* note 76 at para 70.

⁴⁹⁷ (2014) SCC 71 at para 33 and 86.

For instance, the new duty of good faith is imposed on an “interested party” and can be enforced by another “interested party”. Yet the CCAA does not stipulate the requirements that would make a person “an interested party”. The term is vague, and arguably can cover a very broad category of persons, including persons that are barely affected by the activities of the restructuring company. It has been argued that an interested person is a participant in the proceedings or a non-participant who will be affected by the outcome of the proceedings.⁴⁹⁸ This creates a broad duty owed by a wide range of persons to another wide range of persons.

On the bright side this provides an avenue for vulnerable parties in an insolvency proceeding to enforce their rights against parties acting in bad faith to their detriment.⁴⁹⁹ However, this provision may lead to a floodgate of litigation against the debtor thus slowing down the restructuring process. Considering that creditors want to maximize their returns speedily, they have the incentive to bring applications that a party is acting in bad faith to stall the restructuring proceedings. The duty to act in good faith should be left within the confines of the duties of a monitor who is an officer of the court and the court itself. Allowing almost anybody come under the guise of an interested party decreases the responsibility of the monitor and the court.

4.3.3.2 The Court

The CCAA equips the supervising judge or the court with a broad deference to exercise their discretion to “meet contemporary business and social needs”⁵⁰⁰ given that new

⁴⁹⁸ Jules Monteyne, “The New Duty of Good Faith and How it Applies in Insolvency Proceedings” (2019) 16 Ann Rev Insol L 9 at 2.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Century services supra* note 76 at para 58.

issues might arise which the legislation did not envisage at the time the CCAA was drafted. The supervising judges are conferred with powers to exercise their discretion while handling restructuring of companies, most especially those with complex debt profiles. The Supreme Court of Canada in *9354-9186 Québec inc v Callidus Capital Corp*⁵⁰¹ stated that one of the ways in which the objectives of the CCAA is met is through the supervisory role of a supervising judge over the process. The supervising judge has the discretion to make decisions over the CCAA process.⁵⁰² A lot of deference is given to the supervising judge and when there are competing interests in insolvency, it is the duty of the supervising judge to recognize interests that will work against the goals of the statute and exercise his or her discretion in getting rid of them.⁵⁰³

The recent amendments to the CCAA leave a lot of discretion in the hands of the court. First, to determine the quantum and terms of DIP Financing reasonably necessary for a debtor company's restructuring process. Ordinarily, by s. 11.2(1) of the CCAA, the court has the power to determine the quantum of DIP Financing it may grant by having regard to the cash-flow statement of the debtor company. However, unlike s. 11.2(1), this amendment is silent on how the court would determine what is "reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This amendment assumes the court has the expertise to determine the quantum of DIP Financing that is reasonably necessary for the continued

⁵⁰¹ 2020 SCC 10 at para 47 [Bluberi].

⁵⁰² *Bluberi*, *supra* note 501 at para 48.

⁵⁰³ Janis Sarra & Barbara Romaine, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law" (2016) *Ann Rev Insol.* at 30.

operations of the debtor company during the initial period. In my opinion the court does not have this expertise.

Without prejudice to other arguments advanced above, it is argued that s. 11.2(5) should have given the courts some guidance on how to determine what would be reasonably necessary. One suggestion is that the court may defer to the directors or trustees of the debtor company on this point. An analogy may be made between the court's attitudes to director's decisions under the business judgment rule. Generally, under this rule, the courts are skeptical and indeed refuse in most cases to interfere with the decisions of corporate directors. This is because it is presumed that directors have acted in an informed basis, in good faith, honestly and in the best interest of the corporation.⁵⁰⁴ Given the court's lack of expertise on what would be a reasonable DIP Financing for the 10-day initial period, the courts should also defer to the directors of the insolvent company and the monitor to make this decision.

In *Re Crystallex International Corporation*,⁵⁰⁵ the court considered whether deference should be made to the business judgment of the debtor company's directors in granting DIP financing loans. The court held that the approval of a director would not impact on the granting of the DIP loan as the court must make an independent determination considering the factors laid down in s.11.2 (4) of the CCAA. However, in this case, s. 11.2(5) of the CCAA does not provide any factors or guideline to the courts. Accordingly, the courts, lacking expertise on the internal running of a company, should not be granted the wide discretion of determining what amount of DIP loan is

⁵⁰⁴ Christopher C Nicholls, *Corporate law* (Toronto: Montgomery, 2005) at 303.

⁵⁰⁵ (2012) ONCA 404.

reasonably necessary for operation of the company during the initial period. A poor assessment of the court may impede restructuring even before it starts.

Second, discretion is also given to the court when this duty to act in good faith has been breached. The statute gives the court the discretion to determine the remedy that it considers appropriate in the circumstance.⁵⁰⁶ This leaves wide range discretion in the hands of the court. It also makes the duty of good faith provision more uncertain. The legislature is advised to go back to the drawing board and define vague terms in this amendment and if possible limit the duty of good faith to be owed by the monitors and the court to all participants in an insolvency proceeding.

4.3.4 Exiting CCAA Proceedings

In *Century Services*, the court laid down three ways in which CCAA proceedings can be exited. First, when the stay of proceedings provides the debtor with breathing space and solvency is restored. The CCAA process terminates and there is no need for reorganization. Second, when creditors accept the compromise or arrangement put forward by the debtor and the company is able to reorganize its affairs and continue as a going concern. Third, if the compromise or arrangement fails and either the company or its creditors request that the debtor's assets be liquidated under the BIA or put into receivership.⁵⁰⁷

⁵⁰⁶ CCAA, s 18.6 (2).

⁵⁰⁷ *Century services supra* note 76 at para 14.

4.4 Asset Sales under the CCAA

The 2009 amendments to the CCAA introduced new guidelines for the court to follow while deciding whether to approve asset sales.⁵⁰⁸ S.36 (1) of the CCAA provides:

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Section 36 permits not only reorganizations of insolvent companies but also liquidations where the assets of the insolvent company are sold and the company ceases to exist. Liquidating CCAAs is a term that refers to the ongoing trend where the CCAA is used as a tool to effect sales of assets of an insolvent company; after which it ceases to operate.⁵⁰⁹ These assets are either liquidated piecemeal or on a going concern basis under the supervision of the court.⁵¹⁰ Regardless of the involvement of the court in CCAA proceedings, it has been observed that many CCAA proceedings have been liquidating CCAAs from the onset and in several other cases, no plan is presented to the creditors and there is no intention of continuing the debtor as a going concern.⁵¹¹ In view of this practice, it could be said that the CCAA has evolved into a more flexible mechanism that permits both reorganizations and liquidations.

Liquidating CCAAs can take place in several forms. First, liquidating the company while it carries on business as a going concern. This type of liquidation entails that the assets of the company would be sold in an operating or idle state and the new buyers would be able to run the company with minimal investment.⁵¹² Second, liquidating the

⁵⁰⁸ CCAA, s 36.

⁵⁰⁹ Nocilla, *supra* note 32 at 382.

⁵¹⁰ *Ibid* at 385.

⁵¹¹ *Ibid*.

⁵¹² Bill Kaplan, "Liquidating CCAAs: Discretion Gone Awry" (2008) 3 Ann Rev Insol. 34 at 6.

assets of the company en bloc as opposed to a going concern sale. This means that the assets would be sold as a group of assets, which are not in operation but are capable of being operational. Third, liquidating the assets of the company piecemeal to separate buyers.⁵¹³ The Supreme Court of Canada in *Bluberi*, listed the several outcomes facilitated by Liquidating CCAAs which include the continued operation of the business under a new entity and management,⁵¹⁴ others can result in the sale of assets with no new entity emerging from the sale⁵¹⁵ or finally as seen in *Bluberi*, the sale of most of the assets of the company while it remains a going concern, leaving the residual assets to be dealt with by the debtor and its stakeholders.⁵¹⁶

Under Canadian insolvency law, liquidation of insolvent corporations either on a piecemeal or going concern basis can be carried out through receivership or liquidation by a trustee in bankruptcy.⁵¹⁷ However, the practice of liquidating CCAAs gives room for creditors to avoid this traditional process of asset sales. In situations where the available assets are insufficient to pay off claims of secured creditors, a fully secured creditor will prefer liquidation to restructuring regardless of whether the sale maximizes returns for other creditors.⁵¹⁸ Secured creditors usually initiate CCAA liquidating proceedings as an alternative to appointing a receiver.⁵¹⁹ It is questionable why secured creditors would abandon the receivership process that enables them to sell the assets of

⁵¹³ *Ibid.*

⁵¹⁴ An example of this is the liquidation carried out in *Re Canadian Red Cross Society* (1998), 5 C.B.R (4th) (Ont. C.J (Gen. Div.)).

⁵¹⁵ An example of this is the liquidation carried out in *Re Target Canada Co.* (2015) 22 C.B.R (6th) 323 at para. 7 and 31.

⁵¹⁶ *Bluberi supra* note 501 at para 43.

⁵¹⁷ *Nocilla, supra* note 387 at 78.

⁵¹⁸ Ben-Ishai & Telfer, *supra* note 73 at 513.

⁵¹⁹ *Ibid* at 511.

the debtor, opt for a restructuring process and then use this process to liquidate the assets of the debtor.

The features of a receivership are similar to that of liquidating CCAAs. First, the supervisory role the court performs in CCAA proceedings is present in receivership proceedings (in cases where the receiver is appointed by the court). Second, the duties of the court appointed monitor in a CCAA proceeding is same as a receiver's in a receivership proceeding. Third, the CCAA process provides for DIP financing to cover costs incurred while running the business as a going concern, while in a receivership process, the court authorizes super priority charges and payments of administrative expenses.⁵²⁰ Despite these similarities, there is still one striking conceptual difference between the CCAA process and a court-appointed receivership which is that the CCAA process is debtor driven while the receivership is creditor driven.⁵²¹ The liquidating CCAA now practiced in Canada now make both processes creditor driven. Given this conceptual difference, both processes ought not to be one and the same. Roderick Wood noted the striking semblance between liquidating CCAAs and what goes on in receivership proceedings in Canada. He argued that “the fact that courts in CCAA proceedings are applying receivership law when dealing with liquidating sales clearly brings home the point that the processes used in CCAA liquidations are mimicking those in receivership proceedings.”⁵²²

Roderick Wood's conclusion simply illustrates that the CCAA has become an indirect means for liquidation. Further, commenting on the shift of the CCAA process from

⁵²⁰ Roderick Wood, *supra* note 33 at 412.

⁵²¹ *Ibid.*

⁵²² *Ibid.*

being debtor driven to creditor driven, Shelley Fitzpatrick argues that the CCAA is no longer used by the debtor company to prevent its creditors from depleting the debtors assets, rather the CCAA is used by the secured creditors to liquidate the debtors assets for their benefit by fusing receivership and liquidation into a single collective process.⁵²³

The incentive behind the secured creditors in Canada choosing liquidating CCAA over receivership can be deduced from the decision of the court in *GMAC Commercial Creditor Corp of Canada v TCT Logistics Inc*⁵²⁴ where the Supreme Court confirmed that the bankruptcy court lacked the jurisdiction to determine if an interim receiver is a successor employer within the meaning of the *Labour Relations Act*. In this case, T.C.T Logistics Inc.'s ("TCT") became insolvent and its second largest secured creditor applied that KPMG be appointed as an interim receiver. The appointment letter provided that the contract of employment of TCT's employees be terminated and also provided that KPMG would not be considered a successor employer. Subsequently, TCT filed an assignment into bankruptcy with the aid of KPMG. The assets of TCT were sold to a new company and this purchaser re-hired some of TCT's employees. The union filed for a declaration at the Ontario Labour Relations Board that the purchaser or the interim receiver was a successor employer to TCT. The Supreme Court held that the Bankruptcy Court lacked the jurisdiction to make successor employer declarations. The sections of the appointment order which shielded the interim receiver from successor employer liability were set aside and the court held that an interim receiver is not protected from successor employer claims filed by a union.

⁵²³ Shelley Fitzpatrick, "Liquidating CCAAs-Are We Praying to False Gods?" (2008) 2 Ann. Rev. Insol. at 2.

⁵²⁴ (2006) SCC 35

The uncertainty behind the status of receivers becoming successor employers discouraged secured creditors from appointing receivers to sell the assets of the company while it remains a going concern. This case had a significant effect on receiverships in Canada because it led to a preference for using “restructuring” under the CCAA as a means for the sale of assets without incurring third party liabilities. This has resulted in a rise in liquidating CCAAs while it remains a going concern.⁵²⁵ Commenting on the reason why secured creditors favour CCAA liquidations, David Bish noted that:

In one fell swoop, receivership became an anathema and so insolvency practitioners set to work doing what they do best: they aggressively and creatively fashioned a new realization paradigm by looking to the CCAA as a means to leave a debtor in possession of its assets, yet ensuring that the principal secured creditors wielded significant control over the process.⁵²⁶

As evidenced by the Supreme Court of Canada in *Century Services*⁵²⁷ the purpose of the CCAA is not to liquidate assets. However, insolvency practitioners who adopt the liquidating CCAA approach do so without considering this objective. Alfonso Nocilla has argued that liquidating CCAA’s are usually intended before the debtor company files for protection under the CCAA most especially debtor companies who file for CCAA protection in the absence of a restructuring plan.⁵²⁸ Similarly, Roderick Wood noted that the causes of insolvency of a corporation and the appropriate method of addressing the issue are not “immediately apparent” and it would require a restructuring process to enable the corporation decipher what the problem is and propose rescue

⁵²⁵ Karma Dolkar, “Re-thinking Rescue: A Critical Examination of CCAA Liquidating Plans - ProQuest” (2011) 27:111 BFLR 10 at 10.

⁵²⁶ David Bish, “The Plight of Receiverships in a CCAA World” (2013) 2 J Insol. Inst. of Can 221 at 235–36.

⁵²⁷ *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, 2010.

⁵²⁸ Nocilla, *supra* note 387 at 78.

plans.⁵²⁹ In circumstances like this, Liquidating CCAAs defeats the purpose of the CCAA since restructuring is bypassed or treated with mere formality. The question now remains: if parties are aware of the conceptual purpose of the various insolvency processes, why should the CCAA, a restructuring law be used to achieve liquidation. In order to justify liquidating CCAAs, Karma Dolkar has tried to draw up a distinction between liquidation and a liquidating plan by arguing that “liquidation occurs when assets are sold on a piecemeal basis, while a liquidating plan occurs when the assets of the debtor company are sold on a going concern basis to a willing buyer.”⁵³⁰ He lays emphasis on a liquidating plan being more beneficial than liquidation as the business is sold with prospects and as a viable concern. He further argued that a liquidating plan is similar to a restructuring plan as a liquidating plan avoids the socio- economic effects of liquidation, which include loss of jobs, loss to creditors, suppliers, customers, the government and the community.⁵³¹ Karma Dolkar argues that the only distinction between a liquidation plan and a restructuring plan is that in a liquidating plan the assets of the insolvent company can be sold as a going concern resulting to a change in the management of the debtor company.⁵³² Despite these arguments, the goal of Restructuring remains to rescue the insolvent company and a liquidating plan does not achieve that.

Liquidating CCAAs are controlled by Canadian courts by requiring sale plans to be presented for approval when a restructuring plan is present. However this requirement is restricted to companies that are viable. In *Re Fracmaster*,⁵³³ the court refused to

⁵²⁹ Roderick Wood, *supra* note 11 at 339.

⁵³⁰ Dolkar, “Re-thinking Rescue”, *supra* note 525 at 9.

⁵³¹ *Ibid.*

⁵³³ (1999) 11 CBR (4th) 204 (Alta QB)

approve a sale plan where no restructuring plan was produced and stated: “it is generally accepted that the CCAA is not to be used to wind up or liquidate a company, although there are some circumstances in which the CCAA can be used in such a way.”⁵³⁴ In this case, the courts recognized that when an insolvent company is non-viable, restructuring under the CCAA is not in the interest of the creditors and a liquidating plan is therefore necessary.

Proponents of Liquidating CCAAs have distinguished Liquidating CCAAs from mere liquidations stating that Liquidating CCAAs are in line with the purpose of the CCAA; to avoid the negative social and economic consequences of bankruptcy.⁵³⁵ They argue that there are insufficient arguments against liquidating CCAAs because even if it fails to rescue the company, jobs and existing relationships with customers and suppliers are nevertheless preserved.⁵³⁶ In my view, this argument misses the point, which is that a restructuring law should not be used to effect liquidations. It must be noted that this paper is not inquiring into the appropriateness or not of employing liquidating CCAAs to serve a broader public interest. Rather it argues that the CCAA should not be used for the purpose of liquidations in the first place.

Professor Janis Sarra identifies the problem with incorporating section 36 as a policy issue. She stated: ⁵³⁷

One policy issue that has not to date been fully explored is whether the CCAA should be used to effect an organized liquidation that should properly occur under the BIA or receivership proceedings ... there may be some public policy concerns regarding the use of a restructuring statute, under the broad scope of judicial discretion, to effect liquidation ... While the courts have endorsed liquidating CCAAs, there has not yet been a judgment

⁵³⁴ *Re Fracmaster* at para 20.

⁵³⁷ Sarra, *supra* note 31 at 82–83.

that carefully considers both the benefits and prejudice to expanding the scope of the CCAA to allow for this ...

There are also arguments by proponents of Liquidating CCAAs that the process is embarked upon to gather funds to sustain the company as a going concern. Again, this argument is not valid. The CCAA has provisions for Debtor in Possession (DIP) financing, designed to allow an insolvent corporation to obtain fresh funds to enable it to remain in business and possibly bounce back to solvency. That option should be explored instead of a liquidating CCAA as the company may be unable to operate as a going concern if its major assets are sold. In fact, a research into major CCAAs liquidations in recent years including those of *Nortel Networks*⁵³⁸, *Canwest Global*⁵³⁹ and *Indalex*⁵⁴⁰ show that the CCAA process is mainly driven by secured creditors to maximize their returns.⁵⁴¹

The Supreme Court of Canada in *Bluberi*, has recognized instances where the reorganization of a debtor company is impossible, a liquidation of the company on a going concern basis would be the best option as the maximization of creditors returns will be the main focus. The court stated,

Similarly, under the CCAA, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take center stage.⁵⁴²

The Supreme Court in *Century Services* has also stated that liquidation should only be considered as an option where restructuring has failed, and where this is the case;

⁵³⁸ *Re Nortel Networks Corp*, (2009) 56 CBR (5th) 224 (Ont Sup Ct).

⁵³⁹ *Re Canwest Global Communications Corp*, 2009 CarswellOnt 7169 (Ont Sup Ct).

⁵⁴⁰ *Re Indalex Limited*, 2011 ONCA 265.

⁵⁴¹ Nocilla, *supra* note 442 at 86.

⁵⁴² *Bluberi supra* note 501 at para 46.

liquidation should be carried out under the BIA.⁵⁴³ The court in *Century Services* was clear that sale of assets, whether piecemeal or as a going concern basis, is not the purpose for which the CCAA was enacted. Consequently, liquidating CCAA's does not play any role in rescuing insolvent corporations, and in line with the intent of the legislature for establishing the CCAA, should not be used in the CCAA restructuring process.

4.5 Conclusion

This Chapter has discussed the corporate insolvency system in Canada. It has discussed the CCAA, its purpose and history. It has also discussed how CCAA proceedings are commenced and the roles of the key players in a typical CCAA proceeding. This chapter has also discussed the new amendments to the CCAA, which are broadly speaking, important innovations for achieving transparency in a restructuring process. However, transparency is only one of the goals that an ideal restructuring plan must aim to achieve. In addition, transparency ought to be balanced with efficiency and certainty, which are important goals that would benefit a restructuring process. The major concern of the legislature for the CCAA should be to ensure that it enables the smooth carrying out of the restructuring process, in order to return the company to solvency.

This Chapter has also discussed the amendments to the CCAA, which encourage asset sales under the CCAA. Liquidating CCAAs generally do not serve any purpose in rescuing insolvent companies and the control secured creditors have over this process has made the process entirely debt collection driven thus creating no room for rescue. Liquidating CCAAs could imply that the liquidation laws are not sufficient. The

⁵⁴³ *Century Services*, *supra* note 76 at para. 14.

legislature may need to go back to the drawing board to make the processes of maximizing returns either using receivership or liquidation in bankruptcy more effective. This may prevent secured creditors from abusing restructuring procedures.

This Chapter has provided an overview of the Canadian corporate restructuring regime to assist the comparative analysis, which will be done, in the next chapter. The next chapter will compare the Canadian restructuring law and the proposed amendments to Nigerian Restructuring law highlighting lessons to be drawn from the restructuring practices in both jurisdictions.

CHAPTER 5:
DEVELOPING A CORPORATE RESTRUCTURING FRAMEWORK FOR
NIGERIA

5.0 Introduction

This first chapter of this thesis began with an overview of corporate restructuring and established the goals a restructuring law should aim at accomplishing. It established that a restructuring law should have the ability to return an insolvent company to solvency either by preserving the going concern value or rescuing the business to enable the insolvent company to continue as a new entity. The second chapter discussed the corporate insolvency system in Nigeria and established that the previous insolvency regime embodied in the *Companies and Allied Matters Act 1990* (“CAMA”) did not have any mechanism to rescue insolvent businesses as it is mainly focused on liquidations. The third chapter went further to discuss the recent amendments to the CAMA 2020. These amendments aim to incorporate mechanisms or procedures that will facilitate the rescue of insolvent companies. However, these procedures are practiced in the UK and have not been very successful in rescuing businesses.⁵⁴⁴

The fourth chapter discusses corporate restructuring in Canada highlighting the restructuring procedure under the *Companies' Creditors Arrangement Act* (“CCAA”) to determine procedures practiced in Canada that facilitate the rescue of insolvent corporations. This chapter will begin by comparing the corporate restructuring law in Canada under the CCAA with and the recent amendment to CAMA in Nigeria to determine how effective these amendments will be in rescuing insolvent companies.

⁵⁴⁴ The lack of a stay of proceedings in a CVA prevents rescue from being actualized. Also as discussed in the third chapter, the administration procedure often leads to pre-packaged administrations.

This chapter will then highlight lessons Nigeria can adopt from Canadian laws, which is not available under its restructuring framework. These lessons will help develop an effective corporate restructuring framework for Nigeria. It will also review the gaps in the business rescue options provided by the CAMA 2020 and suggest best ways to develop a separate corporate restructuring framework in Nigeria learning from how restructuring is practiced in Canada.

5.1 A Comparative Analysis of Corporate Restructuring in Nigeria and Canada

Globally, there is an increasing practice that when a failing business has viable prospects it is more beneficial that business rescue options are considered before liquidation.⁵⁴⁵ In many circumstances when a company is insolvent and its underlying business is sound, all it needs at this time is a prompt arrangement with its creditors considering that it may not afford to pay everyone.⁵⁴⁶ Nigeria is not fully equipped with business rescue practices prevalent in other jurisdictions. The detailed analysis of the recent amendments in the CAMA 2020 demonstrates that the business rescue provisions in the recent amendments need to be improved upon.

In Canada, the CCAA is the restructuring law of choice for rescuing large insolvent companies as a result of its liberal application.⁵⁴⁷ Based on the discussion in the fourth chapter, the development of corporate restructuring laws in Canada is worth emulating and countries without a strong corporate restructuring framework such as Nigeria have a lot of lessons to learn from the CCAA and its administration. As stated in the second

⁵⁴⁵ Udofia, *supra* note 103 at 16.

⁵⁴⁶ Keay & Walton, *supra* note 102 at 137.

⁵⁴⁷ Chapter 4 at pages 106-108.

chapter, there is no separate law governing corporate insolvency or restructuring law in Nigeria as the corporate insolvency framework is embodied in the CAMA. This chapter aims to improve upon the recent amendments in the CAMA 2020, which introduces business rescue mechanisms for insolvent companies in Nigeria. The chapter will compare the proposed restructuring procedures in the CAM Bill with the restructuring procedure in the CCAA. This comparison between the laws in the two jurisdictions will be carried out using the fundamental principles governing restructuring law as a guide.

5.1.1 Debtor in Possession

The act of placing the debtor in possession and control of its affairs is a good mechanism that is perceived to aid the smooth running of the restructuring process. This is because the debtor is better equipped with the skills of tracing the business decisions the company made that led to its financial distress and will then work on returning the company to solvency. Upon a bankruptcy order being made or an assignment being filed against a debtor, all of the debtors' assets vests in the bankruptcy trustee.⁵⁴⁸ In a receivership or winding up proceedings, the assets of the debtor remain in the debtors possession but a receiver or administrator takes over the control of the management of the debtors business.⁵⁴⁹ However, when restructuring proceedings are commenced in Canada under the CCAA, there is a divergence from the features in bankruptcy and receivership or winding up proceedings as the debtor retains both possession and management of its affairs.⁵⁵⁰ The debtor therefore has the ability to run the affairs of the company as a going concern while trying to reorganize its affairs under its control.

⁵⁴⁸ *BIA*, s 71.

⁵⁴⁹ Roderick Wood, *supra* note 11 at 344.

⁵⁵⁰ *Ibid.*

In Nigeria, the Debtor is not in full possession of its affairs in the proposed restructuring mechanisms. Just one of the two business rescue procedures proposed in the CAMA 2020 gives the debtor possession and control of its affairs. This procedure is the Company Voluntary Arrangement (“CVA”). CAMA 2020 provides that the directors of the company remain in control of the business while the company continues as a going concern. Regardless of the control the debtor may possess, the rights of secured creditors, who do not consent to the repayment plan, limit the control the debtor has in a CVA. The Company Administration (“CA”) on the other hand leaves possession in the debtor but takes away the control of its affairs from the debtor and places it on an administrator appointed to manage and control the affairs of the company.

This principle of letting the debtor remain in possession of its affairs appears to be a very effective mechanism for business rescue. When third parties such as administrators are involved, business rescue will just be one of their duties that they may merely attempt to fulfill. Nigeria will need to adopt a business rescue mechanism that reserves the possession and control of the debtors’ affairs with the debtor. The debtor knows its business better than third parties. In situations where the expertise of third parties is sought, they should act as monitors and not take over full control of the insolvent corporation. The Debtor being in possession of its affairs should be backed up with a stay of proceedings.

5.1.2 Stay of Proceedings

When restructuring proceedings are commenced, it is important for the debtor to have sufficient breathing space to negotiate with its creditors. According to Roderick Wood,

a stay of proceedings during restructuring creates an environment that facilitates negotiations with creditors.⁵⁵¹ A stay of proceeding is imposed is to prevent the assets of the debtor from being depleted by creditors. It prevents creditors from seizing the assets of the debtor or enforcing their claims against the debtors assets. The stay of proceedings keeps the assets of the debtor intact and prevents any creditor from having undue advantage over other creditors while restructuring proceedings are ongoing.

Under the CCAA, once restructuring proceedings are commenced a stay of proceedings takes effect and all actions and claims (including secured claims) against the debtor are put on hold. As stated in the fourth chapter, this stay applies to both secured and unsecured creditors and lasts for an initial period of 10days.⁵⁵² The problems that might be created as a result of the short duration of the stay in Canada have been discussed in the previous chapter. However, in Nigeria, under the CVA there is no stay of proceedings. The approval of creditors to a CVA is only binding on the company and the unsecured creditors. This means that upon the commencement of a CVA, secured creditors who are not bound by the CVA can file actions such as winding up petitions or enforcement of actions against the debtor. This procedure aimed at business rescue is clearly a shift from what was previously obtainable in Nigeria and it does not create a sustainable environment for the CVA process to be carried out.

A stay of proceedings is absent in a CVA, which renders the debtor's possession, and control futile. Therefore, using the CVA to rescue insolvent corporations will be mainly unproductive, as the secured creditors who do not consent to the CVA will deny the

⁵⁵¹ *Ibid.*

⁵⁵² Chapter 4 at pages 115-117.

company the breathing space to run its affairs smoothly. Several applications will be filed in court preventing the company from properly restructuring its affairs. The CVA mechanism needs to be amended to include a stay of proceedings

Under the CA, once an administrator is appointed, there is an automatic stay of proceedings or moratorium that binds both the secured and unsecured creditors of the insolvent company.⁵⁵³ The stay protects the company from the enforcement of legal actions against it and gives the administrator the necessary breathing space to focus on returning the company to solvency. This stay of proceedings imposed under an administration process is subject to an order from the Federal High Court or the consent of an administrator to lift the stay. After the debtor has been put in possession of its affairs and a stay of proceedings is enforced, the creditors in the restructuring process should be furnished with adequate information.

5.1.3 Creditors' right to information

For a company to attain financial stability, it is necessary that an effective creditors' rights system is put in place.⁵⁵⁴ This ensures that when restructuring proceedings are commenced, creditors are furnished with sufficient information regarding the steps taken in the restructuring process. The relationship between the corporation and its creditors is contractual in nature.⁵⁵⁵ In contract law, there is an implied covenant of good faith⁵⁵⁶ and fair dealing present to ensure that the "reasonable expectations" of

⁵⁵³ *Bloom v Harms AHT 'Taurus' GmbH & Co KG* [2009] EWCA Civ 632, [2010] Ch 687

⁵⁵⁴ World Bank, *supra* note 6 at 1.

⁵⁵⁵ Stephen McDonnell, "Geyer v Ingersoll Publications Co.: Insolvency Shifts Directors' Burden from Shareholders to Creditors" (1994) 19 Delaware Journal of Corporate Law 177 at 183.

⁵⁵⁶ This is also evident in the CCAA in the new duty of good faith imposed on an "interested party" to be enforced by another "interested party". This is discussed in the fourth chapter at pages 121-122.

the parties in a contract are met and neither party deprives the other of the fruits of the contract.⁵⁵⁷ These implied contractual obligations would be breached if one party prevents the performance of the contract or withholds its benefits. As it is in the best interest of the corporation to preserve its going concern value when insolvent, it is also in its best interest to perform its contractual obligations to its creditors by maximizing their returns.

The directors of corporations are not necessarily required to bring the company's business to an end when it is insolvent, hence these directors will explore the option of restructuring and continue carrying on business with the assets of the corporation at the expense of creditors.⁵⁵⁸ Given that companies are not certain that it will return to solvency and its debts will be paid, the directors' efforts to save the company could compromise creditors interests.⁵⁵⁹ Therefore, it is important that creditors are furnished with sufficient information.

In restructuring proceedings in Canada, after the debtor has carved out the restructuring plan, the creditors will determine whether to accept or reject the plan. According to Roderick Wood, the rationale behind this is that the debtor is in control of the company's business during this period and creditors are required to be supplied with full and accurate information to enable them, make informed decisions on the merits of the plan.⁵⁶⁰ Creditors are also guaranteed the flow of relevant information from the

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Mehreen Rehman, *Directors' Duties to Creditors - Mapping the Twilight Zone* (University of Western Ontario, 2012) [unpublished] at 1-2.

⁵⁵⁹ *Ibid* at 2.

⁵⁶⁰ Roderick Wood, *supra* note 11 at 345.

monitor. The court generally appoints the monitor as discussed in the fourth chapter,⁵⁶¹ to oversee the restructuring process and act on behalf of all the parties. The monitor performs supervisory roles to keep the debtor who is in possession and control of its affairs in check thus avoiding any discrepancies and foul play. Very recently in Canada, the monitor was given an additional duty to initiate litigation proceedings on behalf of the creditors.⁵⁶²

In Nigeria, under the two restructuring regimes, creditors are given information regarding the restructuring proceedings. First, the CVA can only be initiated and carried on by the consent of the creditors and members of the company. When the creditors consent to a CVA and the process is begun, a nominee is appointed by the directors of the debtor to make a proposal to the creditors on their behalf. The nominee basically acts in the interest of the directors of the insolvent company who has appointed them. Secondly, Under the CA process, an administrator is in charge of running the affairs of the insolvent company. The administrator is an officer of the court and an agent of the company and has the duty to act on behalf of all interested parties in the restructuring proceedings. As stated in the third chapter,⁵⁶³ once an administrator is appointed, he is required to notify the creditors and carry them along with the restructuring process.

The role of the nominee in a CVA is different from the roles the administrator and the monitor play in a CA and under the CCAA respectively. In a CVA, the nominee acts on behalf of the person who has appointed him who is the director, whereas the monitor and administrator who are appointed by the court, act on behalf of all parties. Limited

⁵⁶¹ Chapter 4 at page 119-120.

⁵⁶² *Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)* (2020) QCCA 659

⁵⁶³ Chapter 3 at pages 92-93.

information is provided to creditors in a CVA, as a result of the lack of a stay of proceedings. Secured creditors therefore have the right to enforce their interests and recover monies owed to them by the debtor. However, the unsecured creditors under the CVA are at a greater risk because they do not have sufficient information and are bound by whatever restructuring plan the debtor decides to undertake.

The monitor and the administrator are one of the key players in restructuring proceedings who ensure that creditors are furnished with relevant information regarding the restructuring proceedings. The role of the administrator in a CA and a monitor under the CCAA appear to be the same in both jurisdictions. However, there is the likelihood that the duties of the monitor and the administrator, which is usually for the benefit of all parties, might be compromised. The recent decision of the Quebec Court of Appeal in *Aquadis* as discussed in the fourth chapter,⁵⁶⁴ creates some difficulty for a monitor to be totally independent, as an extra duty to institute litigation claims on behalf of the creditors has been placed on them. This could create problems in the restructuring process and slow things down. This could even cause a shift of the goal of restructuring from preserving the going concern value of the insolvent company to a collective debt recovery platform for creditors as discussed in the first chapter.⁵⁶⁵

Similarly, in an administration as discussed in the third chapter, the additional duty placed on an administrator to pursue some other course that will yield better result for the company creditors if a rescue cannot be achieved places a debt collection duty on an administrator on behalf of creditors and most times the initial duty to rescue the

⁵⁶⁴ Chapter 4 at page 120.

⁵⁶⁵ Chapter 1 at pages 39-42.

company would be neglected. After relevant information has been furnished to creditors, it is important that the creditors exercise their right to determine how the restructuring plan should be carried out. They do this by voting on the plan. The need for creditor approval in a restructuring process will now be discussed.

5.1.4 The need for Creditor Approval

As a result of the stake creditors have in a company in distress, creditors have the right to take part in the major decisions taken in a restructuring process. In a restructuring there is a business plan and a restructuring plan. The business plan is usually drawn up by those managing and controlling the company to lay down a mechanism for the insolvent company to return to solvency. This may include plans to downsize operations by cutting off units or products that are not necessary.⁵⁶⁶ Given how particular the business plan is to preserve the going concern of an insolvent company, creditors are not required to vote on the business plan. The restructuring plan deals with how the creditors will be treated during the restructuring process and the creditors are required to vote on the plan for it to be approved. The creditors are not bound by the restructuring plan unless they approve it.⁵⁶⁷

In Canada, before the court approves a restructuring plan, the creditors are required to vote on the plan and either accept or reject it.⁵⁶⁸ The approval by creditors is required because it is expected to kick start the restructuring negotiations between the debtor and its creditors.⁵⁶⁹ However, in circumstances where the debtor intends to sell the assets

⁵⁶⁶ Roderick Wood, *supra* note 11 at 345.

⁵⁶⁷ *Ibid* at 346.

⁵⁶⁸ *Ibid* at 345.

⁵⁶⁹ *Ibid*.

of the company piecemeal, the debtor may not present a restructuring plan to its creditors. As stated in the fourth chapter,⁵⁷⁰ in Liquidating CCAAs there is usually an absence of a restructuring plan, which implies that no platform is provided for creditors to cast their votes.

In Nigeria, the CVA requires the approval of creditors to take effect, however despite this, there is a lacuna in the voting threshold for the approval of a CVA. Given that the votes cast can only determine an approval of creditors individually, it is necessary that the voting threshold for either an approval or a rejection should be clear. As discussed in the third chapter, the absence of this threshold might create a problem in the CVA being actually used to rescue insolvent businesses.⁵⁷¹ Under the CA, after the administrator has carved out the mechanism to be employed in returning the company to solvency, the monitor is required to present a proposal to the creditors. The creditors now have the duty to accept or reject the proposal. However, the rejection of the creditors of the proposal is not final as the administrator has to seek further direction from the court.⁵⁷² The courts have a role to play in both initiating and wrapping up the restructuring process.

5.1.5 Court involvement in the procedure.

In restructuring proceedings, the courts play a unique and crucial role of ensuring that restructurings are carried on smoothly. Courts have the duty to supervise the restructuring proceedings and ensure that parties who are seeking protection under the

⁵⁷⁰ Chapter 4 at page 125-126.

⁵⁷¹ Chapter 3 at page 88.

⁵⁷² Chapter 3 at page 91-92.

CCAA have satisfied the baseline considerations. The considerations are that the order sought is appropriate, that the applicant has acted in good faith and with due diligence.⁵⁷³

Under the CCAA, the courts are bestowed with a broad discretion to make orders in addition to the rules laid down in the CCAA. The courts exercise their discretion on novel issues which were unforeseen by the legislature at the time the statute was drafted. According to Lopucki and Triantis,⁵⁷⁴ the courts serve gatekeeping roles of monitoring applications for CCAA protection and screening out inappropriate applications. The courts decide whether or not to approve a plan, even after the creditors have voted in favour of the plan. This duty is placed solely on the courts, as the plan is not binding on creditors until the court has approved it. The courts also have the duty and the jurisdiction to sanction and oversee the sale of the companies' assets.⁵⁷⁵

In Nigeria, the courts are also involved in the restructuring process. The nominee and the administrator report to the court and seek the courts approval before major decisions are taken in the restructuring process. However, the courts in Nigeria do not necessarily have the broad discretion bestowed on courts in Canada. The judges do not have so much discretion bestowed on them as it might lead to an abuse. Therefore, the judges are expected to follow the restructuring laws to the letter, otherwise they may be perceived to be acting in bad faith. The courts also do not have the duty to approve asset sales of insolvent companies under restructuring laws. While Nigeria might want to

⁵⁷³ 9354-9186 *Québec inc v Callidus Capital Corp.* (2020) SCC 10 at para 49; CCAA, s18.6

⁵⁷⁴ L LoPucki & G Triantis, "A Systems Approach to Comparing US and Canadian Reorganization of Financially Distressed Companies" in J Ziegel, ed *Current Developments in International and Comparative Corporate Insolvency Law* (Oxford: Clarendon Press, 1994) 109 at 125

⁵⁷⁵ CCAA, s 36.

adopt some procedures from Canada, it is advised that one should thread with caution to avoid the practice of liquidating CCAs being inculcated into Nigeria's restructuring procedures.

5.2 Developing a Corporate Restructuring Framework for Nigeria: Lessons learnt from restructuring procedures in Canada.

In 2012, Bolanle Adebola, identified the greatest challenge to corporate rescue in Nigeria as the inadequacy of the institutions.⁵⁷⁶ I hold the same view that this is still currently a challenge that hinders not only corporate rescue but also the business rescue amendments in CAMA 2020. This is because the institutions charged with administering these laws are either not properly equipped or trained and this can render the laws ineffective. First, as stated in the third chapter, there is no separate court that handles issues relating to the insolvency or restructuring of a company. In other words, restructuring proceedings, which are supposed to be expedited, are taken to one court and it is often delayed. Several months would have gone by before the case is listed for hearing. The lawyers of the debtor might even stall the proceedings themselves to enable them to continue operating the company as a going concern at the expense of the creditors. Even when these cases are finally listed for hearing, the numerous cases the judge handles might prevent the case from being heard on the hearing date and hence adjourned. Also, the adjourned date might be prolonged and this will have a great effect on the entire rescue process as some secured creditors might not have the patience to wait to receive an order from the court. This might result to self-help, depleting the assets of the debtor.

⁵⁷⁶ Adebola, *supra* note 104 at 314.

Given that rescue of a corporation requires speed, a tardy legal system will pose a challenge to its application.⁵⁷⁷ There is need for separate courts to be created to handle insolvency and more particularly restructuring proceedings. Insolvency and restructuring proceedings are currently treated as part of cases arising from disputes surrounding company law and are handled by the Federal High Court (the “court”). The court in addition to handling matters bothering on corporate insolvency has several other matters they are handling.⁵⁷⁸ It is important that a separate court is created to handle restructuring proceedings to avoid rendering these business rescue amendments futile.

Second, Canadian judges have an in-depth understanding of the purpose of a rescue and the intent of the legislature when drafting the law. This is evident in several Supreme Court decisions in Canada.⁵⁷⁹ However, by contrast, Nigerian judges always misinterpret or misapply statutes. The judges have failed to exhibit that they understand what a restructuring process entails. This is evident in how quickly the courts grant orders to wind up a company when very little debt is owed as seen in the second chapter. Not only are the courts uncertain about the law, the lawyers also lack the requisite knowledge of insolvency law.⁵⁸⁰ If the lawyers and the judges are not detailed in the application of the law, there is a great need to improve upon the competence of these institutions. There is need for the judges and the lawyers to attend mandatory and continuing legal education programs, which keeps their knowledge of restructuring law

⁵⁷⁷ *Ibid* at 317.

⁵⁷⁸ CFRN, s 251(1)a-s

⁵⁷⁹ *Sun Indalex Finance, LLC et al. v United Steelworkers et al.*, (2013) SCC 6; *Canwest Publishing Inc.*, (2010) ONSC 222; *Timminco Limited (Re)*, 2012 ONSC 948.

⁵⁸⁰ Adebola, *supra* note 104 at 315.

up to date. These programs will expose the world's best insolvency practices also enable them view how restructuring is carried out in other jurisdictions.

Third, for a restructuring proceeding to be successful, a debtor in possession financing scheme needs to be introduced into the restructuring laws. The financing would be sufficient to ensure that the company returns to solvency within that period. The new amendments to the CCAA in Canada, limit DIP Financing through the reduction of the length of the stay of proceedings. As highlighted in the third chapter,⁵⁸¹ AMCON acts as an agent for banks by acquiring debts owed to them.⁵⁸² AMCON does this by employing stringent measures to seize assets of the debtors. To ensure that the proposed business rescue mechanisms proposed by the CAM Bill is achieved, AMCON instead of acting as a debt collection agent, can step in and act as a DIP lender who will have priority over the existing lenders of the debtor to assist insolvent corporations to restructure their affairs.

5.3 Conclusion

This chapter advocates that the corporate restructuring framework of Nigeria should be developed. It began by comparing the recent amendments in the CAMA 2020, which provide for business rescue options with the CCAA, the corporate restructuring law for large companies in Canada. This comparison was done using the key principles of restructuring of insolvent companies as a guide. The CCAA procedure was examined to determine the practicability of adopting these procedures into the Nigerian corporate

⁵⁸¹ Chapter 2 at pages 63-70.

⁵⁸² AMCON purchases non-performing loans of banks in Nigeria and realizes debts owed to the banks. The current role of AMCON is discussed in Chapter 2 at pages 63-70.

restructuring law. This chapter has also discussed the lessons Nigeria should adopt from the restructuring practice in Canada.

The recent amendment in the CAMA 2020 focuses on both corporate and business rescue and is in line with the need to preserve the going concern value. The going concern value theory for restructuring accommodates the need to maximize value for creditors and it considers the interest of the large number of people affiliated with the insolvent company. The amendment envisages a shift from liquidation, making it a tool of last resort after all business rescue options have been exhausted. The amendment supports the debtor being in possession of its business to ensure that the corporation remains a going concern and returns to solvency. Regardless of the amendments in the CAMA 2020, Nigeria has to improve on the competence of its institutions. From what is practiced in Canada, Nigeria can adopt a separate framework that provides for corporate insolvency. This is to enable the amendments in the CAMA 2020 to be implemented effectively. This new framework should also provide for separate courts to enforce these business rescue mechanisms.

CONCLUSION

This thesis has examined the corporate insolvency framework in Nigeria with particular reference to the recent amendments to the CAMA, which introduces business rescue provisions into Nigeria's insolvency framework. The rescue process discussed in this thesis is in relation to insolvent viable corporations and non-viable corporations so as to guard against deferred liquidations. These amendments tend to balance the interests of the debtor, its creditors and third parties by preserving the going concern of the company for better maximization of creditors returns and preservation of existing relationships. The amendment is a progressive development from what was obtainable in the previous insolvency framework in CAMA 1990. More particularly, the restructuring legislations now accommodate broader interests.

The first Chapter began by stating the goals and objectives of a restructuring legislation and concluded that a restructuring legislation should have the primary purpose of rescuing insolvent companies and not liquidating them. The second chapter examined the previous insolvency framework under the repealed CAMA 1990 and highlighted the major problems and constraints associated with the previous regime. This chapter highlighted the absence of business rescue mechanisms as huge defect in Nigeria's restructuring law, which makes it difficult for insolvent companies to bounce back to solvency. This has also posed as a bottleneck for investors who want to do business in Nigeria. The third chapter discussed the recent amendments in the CAMA 2020, which provides business rescue mechanisms for insolvent companies. These amendments are commendable and a step in the right direction to improve restructuring in Nigeria. This chapter also compared these new business rescue mechanisms with the practice in the UK since these procedures were adopted from the UK. This chapter evidenced that

these procedures have not been very efficient in rescuing insolvent companies in the UK. First, the CVA procedure is an informal procedure, which lacks a moratorium. For a rescue process to be effective it has to be binding on all creditors and the creditors should be estopped from instituting actions against the debtor during the period of the rescue. Unfortunately, the CVA cannot guarantee a quiet and peaceful rescue free of claims from secured creditors and this renders this procedure less effective. Second, the administration process is not just a rescue process. Business rescue is not the sole purpose of the administration, it is just the primary purpose and as discussed in the third chapter, this particular duty to rescue the insolvent company might not be achieved. This is because if the administrator has the option that a better result can be achieved for creditors other than a rescue, that option would be explored.

There is also an express provision for the conversion from an administration to liquidation in the statute. In the UK the administration procedure is also used as a winding up procedure in a situation where a rescue is impossible. The administrator has the duty to make distributions to creditors in the same manner, which a liquidator will. In situations where there are no assets to be distributed an administration goes into dissolution. If the Nigerian law emulates the UK Insolvency law then it appears that the two procedures laid out for the rescue of insolvent companies might not necessarily be effective in a business rescue. This chapter concluded that these mechanisms are not sufficient in rescuing insolvent companies, as they have not been very successful in the UK. This chapter also suggests that Nigeria looks to another jurisdiction such as Canada to learn how Canadian restructuring laws are able to rescue businesses and balance the competing interests using their restructuring laws.

The fourth chapter discusses the Canadian corporate insolvency system. It discussed how restructuring is carried out in Canada under the CCAA and highlighted the practice of liquidating CCAA which deviates from the goal and purpose of the legislation earmarked by Parliament. This fifth chapter advocates for the development of a separate corporate insolvency framework in Nigeria. This chapter utilizes a comparative analysis between the recent amendments in the CAMA 2020 and the restructuring mechanism under the CCAA in Canada. The discussion of the restructuring in Canada provides another view of restructuring in another jurisdiction for Nigeria to adopt some practices from. Whilst adopting the restructuring practice in Canada, Nigeria is required to thread with caution to avoid liquidating CCAAs.

This thesis advocates for the Nigeria's insolvency framework to be separate from the CAMA. There should be a separate body of rules that govern insolvency matters. There should also be separate courts and trained insolvency practitioners who handle corporate insolvency matters. From the discussion of what happens in Canada, Nigeria will need to improve upon the competence of its institutions. This is because even though the insolvency laws are continuously amended to meet evolving trends in other jurisdictions, if the institutions administering these laws are incompetent they will continue pose challenges to the effectiveness of the amendments.

Balancing competing interests in an insolvency system is a very difficult task. In a restructuring process, the two major interests are the going concern value, which needs to be preserved for the debtor and the maximization of value for the creditors. To effectively balance these interests, a viable rescue plan needs to be mapped out. This is because if a non-viable rescue plan is carved out, it will just defer the failure of the

business to a later date and put the insolvent company into more debt. After a viable rescue plan is carved out, it is important to consider that the assets of the insolvent company are like a melting ice cube and might vanish away very quickly. In other words, the rescue process should be carried out expeditiously. Speed is necessary to preserve the assets of the insolvent company to prevent the rescue process from being converted to a pre-pack.

One of the major challenges to a rescue process is the cost associated with the process. This is because the professionals involved in rescuing the insolvent corporation must be paid regardless of the insolvency of the corporation. As a result of this, it is also necessary that an existing creditor or a third party finances the insolvent corporation intending to rescue its affairs to ensure that there are sufficient funds to pull through the rescue process. If these recommendations are implemented, Nigeria will be a step closer to perfecting its business rescue mechanisms thus creating a healthy corporate insolvency system.

BIBLIOGRAPHY

LEGISLATION

Asset Management Corporation of Nigeria (Amendment) Act 2010, 2015, 2019.

Bankruptcy and Insolvency Act, RSC 1985, c B-3.

Companies Act 1929, c.23.

Companies and Allied Matters Act 1990 Cap C20, LFN 2004.

Companies and Allied Matters Act 2020.

Companies Creditors Arrangement Act, RSC 1985, c C-36.

Companies Decree 1968.

Companies Regulations 2012.

Companies Winding up Rules 2001.

Consolidated Securities and Exchange Commission Rules 2013.

Constitution of the Federal Republic of Nigeria 1999.

Federal Competition and Consumer Protection Act, 2018.

Investment and Securities Act, 2007.

Insolvency Rules 1986.

Companies Ordinance 1912,1922.

JURISPRUDENCE

Cases: Canada

9354-9186 Québec inc. v. Callidus Capital Corp (2020) SCC 10.

Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc) (2020)

QCCA 659

Bel Air Electric Inc (1962), 3 CBR (NS) 252 (Que SC).

Bhasin v. Hrynew (2014) SCC 71

Canwest Publishing Inc., (2010) ONSC 222.

Century Services Inc v Canada (Attorney General) (2010), SCC 60.

Consolidated Seed Exports Ltd Re (1986), 62 CBR (NS) 156 (BCSC).

Enterprise Capital Management Inc v Semi-Tech Corp [1999] 10 CBR (4th) 133 (Ont SCJ)

Gateway Realty Ltd v Arton Holdings Ltd [1992] NSJ No 175 (NSCA).

GMAC Commercial Creditor Corp of Canada v TCT Logistics Inc (2006) SCC 35

Hong Kong Bank of Canada v Chef Ready Foods Ltd, (1991) 2 WWR 136 (B.C.CA)

Loch v John Blackwood (1924) AC 783.

L.S.B.P.C v. Purification Tech. (Nig.) Limited (2013) 7 NWLR (Pt. 1352) 91.

Optical Recording Laboratories Inc. Re (1990), 75 D.L.R. (4th) 747 (Ont. C.A)

Re Canwest Global Communications Corp, 2009 CarswellOnt 7169 (Ont Sup Ct).

Re Challmie (1976), 22 CBR (NS) 78 (BCSC)

Re Canadian Red Cross Society (1998), 5 C.B.R (4th) (Ont. C.J (Gen. Div.)).

Re Companies Creditors Arrangement Act (Canada) [1934] SCR 659.

Re Crystallex International Corporation (2012) ONCA 404.

Re Doman Industries Ltd (2003) BCSC 376.

Re Downtown Lumber (1996), 39 C.B.R (3d) 4 (N.B.C.A.)

Re Fracmaster (1999) 11 CBR (4th) 204 (Alta QB)

Re Indalex Limited, 2011 ONCA 265.

Re Nortel Networks Corp, (2009) 56 CBR (5th) 224 (Ont Sup Ct).

Re Stelco [2004] 48 CBR (4th) 299 (Ont SCJ)

Re Target Canada Co. (2015) 22 C.B.R (6th) 323.

Sun Indalex Finance, LLC et al. v United Steelworkers et al., (2013) SCC 6.

Thorne Riddell v Fleishman (1983) 47 CBR (NS) 233 (Ont. HCJ).

Timminco Limited (Re), 2012 ONSC 948.

Cases: Nigeria

Ado Ibrahim & Company Ltd v. Bendel Cement Company Ltd (2007) LPELR-188 (SC).

Afrotech Technical Services v MIA & Sons Ltd & Anor [2000] LPELR- 219(SC)

Air Via Ltd v Oriental Airlines Ltd, (2004) 9 NWLR (Pt. 878) 298 at 327.

Bwacha v. Ikenya & ors. (2011) 3 NWLR 610.

Chief Bola Adedipe v. Sameindir Frameinendur (2011) CA/L/128/08.

Durumugo Resources Ltd v Zenith Bank (2016) LPELR-40487 (CA)

Intercontractors (Nig.) Ltd v U.A.C (1988) 2 NWLR (Pt.78) pg. 280.

NBCI v Alfijir (Mining) Nig Ltd (1999) 14NWLR [Pt. 638] 176 (SC).

Oloruntoba-Oju & Ors v Abdul-Raheem & Ors. (2009) LPELR-2596 (SC)

Oredola Okeya Trading Co & Anor v. Bank of Credit & Commerce International & Anor (2014) LPELR-22011

Tate Industries v Devcom MB Ltd (2004) 17 NWLR pt. 901 (CA) 182.

Unibix (Nig.) Ltd v C.B.C.L. (Nig.) Ltd (2001) 7 NWLR (Pt.713) p.534.

Utuk v. The Liquidator (Utuks Construction Marketing Company Ltd) Anor (2009) LPELR-4322 (CA)

Uwakwe & ors v Odogwu & ors (1989) LPELR-3446 (SC)

Van Vilet Trucks (Nig) Ltd v. Amcon & Anor (2018) LPELR-46789 (CA)

West African Breweries v Savannah Ventures Ltd (2008) 10 NWLR [Pt 775] 401 SC.

Cases: United Kingdom

Bloom v Harms AHT 'Taurus' GmbH & Co KG [2009] EWCA Civ 632.

SECONDARY MATERIALS: MONOGRAPHS

Abugu, Joseph. *Principles of Corporate Law in Nigeria* (Lagos: MIJ Professional Publishers Limited, 2015).

Akanki, E. O. *Essays on Company law*, (Lagos: University of Lagos Press, 1992).

Akinlola, O. *Corporate Law Practice*, 3rd ed (Lagos: Malthouse Press Limited, 2017).

Ben-Ishai, Stephanie and Telfer, Thomas eds. *Bankruptcy and Insolvency Law in Canada* (Toronto: Irwin Law, 2019).

Bhadmus, H. Y. *Bhadmus on Corporate Law Practice*, 3rd ed. (Enugu: Chenglo Limited, 2017).

Finch, Vanessa. and Milman, David. *Corporate Insolvency Law: Perspectives and Principles* 3rd ed (New York: Cambridge University Press, 2017).

Goode, Roy. *Principles of Corporate Insolvency Law*, 4th ed. (London: Sweet & Maxwell, 2011).

Houlden and Morawetz, the 2004 Annotated Bankruptcy and Insolvency Act (Toronto Carswell; 2003).

Jackson, Thomas H. *The Logic and Limits of Bankruptcy Law* (Fredrick, United States: Beard Books, 2001).

Keay, Andrew R and Walton, Peter. *Insolvency law: Corporate and Personal*, 4th ed (Bristol: LexisNexis, 2017).

McCormack, G. *Corporate rescue law--an Anglo-American perspective*, Corporations, globalization and the law (Cheltenham ; Northampton, MA: E. Elgar, 2008).

McLaren, Richard. *Canadian Commercial Reorganization: Preventing Bankruptcy* (Toronto: Canada Law Book, 1999).

Mokal, Rizwaan J. *Corporate Insolvency Law: Theory and Application* (New York: Oxford University Press, 2005).

Nicholls, Christopher C. *Corporate law* (Toronto: Montgomery, 2005).

Orojo, Olakunle. *Company Law and Practice in Nigeria*, 5th ed. (LexisNexis Butterworths, 2008).

Parry, Rebecca. *Corporate Rescue* (London: Sweet & Maxwell, 2008).

Sarra, Janis P. *Creditor Rights and the Public Interest, Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003).

Sarra, Janis P. *Rescue!: The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013).

Sarra, Janis P. and Davis, Ronald. *Director and Officer Liability in Corporate Insolvency: A Comprehensive Guide to Rights and Obligations* 3rd ed. (Toronto: LexisNexis 2015)

Torrie, Virginia *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (University of Toronto Press, 2020).

Wood, Philip R. *Principles of International Insolvency*, 2nd ed (London: Sweet & Maxwell, 2007).

Wood, Roderick J. *Bankruptcy and insolvency law*, 2nd ed, (Toronto: Irwin Law, 2015).

World Bank, *Principles for Effective Insolvency and Creditor/Debtor Rights Regimes* (World Bank Publications, 2015).

SECONDARY MATERIALS: ARTICLES

Adeniran, Akingbolahan. "A Mediation-Based Approach to Corporate Reorganizations in Nigeria" (2003) 29:2 North Carolina Journal of International Law and Commercial Regulation 291–350 at 321.

Atlas, Kenneth. and Anderson, Kendall. "DIP Super-Priorities and the Secured creditor's Dilemma" (2009) 6 Ann Rev Insol. 12 at 1.

Adebola, Bolanle. "An Invitation to Encourage Due Consideration for the Survivability of Rescued Businesses in the Business Rescue System of England and Wales" (2017) 26:2 International Insolvency Review 42 at 1.

Adebola, Bolanle. "The Duty of the Nigerian Receiver to 'Manage' the Company" (2011) 8:4 International Corporate Rescue 248 at 1.

Baird, Douglas G. and Rasmussen, Robert K. "Antibankruptcy" (2010) 119:4 Yale L J 648 at 652.

Baird, Douglas G. "A World Without Bankruptcy" (1987) 50:2 Law & Contemp Probs 173 at 177.

Baird, Douglas G. and Jackson, Thomas H. "Bargaining after the Fall and the Contours of the Absolute Priority Rule" 55 U Chicago L Rev 738 at 742–743.

Baird, Douglas G and Jackson, Thomas H "Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy" (1984) 51 U Chicago L Rev 97 at 108.

Baird, Douglas G and Rasmussen, Robert K. *The End of Bankruptcy* (2002) 55 *Stan L Rev* at 781.

Bhadmus, Hammed Y. "Rethinking Corporate Receivership in Nigeria" (2016) 53:0 *Journal of Law, Policy and Globalization* 158–165 at 159.

Bish, David "The Plight of Receiverships in a CCAA World" (2013) 2 *J Insol. Inst. of Can* 221 at 235–36.

Bowers, James W. "Whither what Hits the Fan: Murphy's Law, Bankruptcy Theory, and the Elementary Economics of Loss Distribution" (1991) 26:1 *Georgia L Rev* 27 at 72.

Brown, David "Unpacking the pre-pack" (2009) *Insolvency Law Bulletin* 5 at 2.

Halliday, Chidi. "The Aftermath of Company's Inability to pay its debt in Nigeria: An Appraisal" (2018) Vol 7:1 *PH L J* at 178.

Kaplan, Bill "Liquidating CCAAs: Discretion Gone Awry" (2008) 3 *Ann Rev Insol.* 34 at 6.

McDonnell, Stephen. "Geyer v Ingersoll Publications Co.: Insolvency Shifts Directors' Burden from Shareholders to Creditors" (1994) 19 *Delaware Journal of Corporate Law* 177 at 183.

Monteyne, Jules. "The New Duty of Good Faith and How it Applies in Insolvency Proceedings" (2019) 16 *Ann Rev Insol L* 9 at 2.

Nocilla, Alfonso. "Asset Sales and Secured Creditor Control in Restructuring: A Comparison of the UK, US and Canadian Models" (2017) 26 *Int Insolv Rev* 60–81 at 68.

Nocilla, Alfonso. "Is Corporate Rescue Working in Canada Papers from the 42nd Annual Workshop on Consumer and Commercial Law" (2012) 53:3 *Can Bus L J* 382 at 384.

Ofo, Nat "Is the Asset Management Corporation of Nigeria Designed to Fail?", (Rochester, NY: Social Science Research Network, 2011) at 2.

Rogers, Linc A and Sierardzki David et al. "What does "Good Faith" Mean in Insolvency Proceedings", (2015) 4 *Insolvency Institute of Canada* 55. See CCAA s. 11.02(3) and 25(3).

Sarra, Janis P. "Debtor in Possession Financing: the Jurisdiction of Canadian Courts to Grant Super-Priority Financing in CCAA Applications" (2000) 23 *Dalhousie L J* 33 at 4.

Sarra, Janis P. & Romaine, Barbara. “The Oscillating Pendulum: Canada’s Sesquicentennial and Finding the Equilibrium for Insolvency Law” (2016) *Ann Rev Insol.* at 30.

Scott, Robert E. “A Relational Theory of Secured Financing”, 86 *Columbia Law Review* 901.

Skeel, David A Jr. “Competing Narratives in Corporate Bankruptcy: Debtor in Control vs. No Time to Spare” (2009) 4 *Mich State L Rev* 1187 at 1198.

Telfer, Thomas. “The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest?” (1995) 24 *Can Bus LJ* 357 at 358–9, 361.

Walters, Adrian J. “Statutory Erosion of Secured Creditors’ Rights: Some Insights from the United Kingdom” (2015) 2015:2 *U Ill L Rev* 28 at 569.

Warren, Elizabeth “Bankruptcy Policy” (1987) 54:3 *U Chicago L Rev* 40 at 778.

Wood, Roderick J. "Rescue and Liquidation in Restructuring Law Papers from the 42nd Annual Workshop on Consumer and Commercial Law" (2012) 53:3 *Can Bus L J* 407 at 407.

Ziegel, Jacob S. “Canada’s Phased-In Bankruptcy Law Reform” (1996) 70 *Am Bankr*

SECONDARY MATERIALS: THESIS

Adebola, Omobolanle. *Corporate Rescue and the Nigerian Insolvency System* (University College London, 2012) [unpublished] at 77.

Nocilla, Alfonso. *Asset Sales Under the Companies’ Creditors Arrangement Act* (University of Western Ontario, 2011) [unpublished] at 7.

Rehman, Mehreen. *Directors’ Duties to Creditors - Mapping the Twilight Zone* (University of Western Ontario, 2012) [unpublished] at 1-2.

SECONDARY MATERIALS: GOVERNMENT REPORTS AND DEBATES

House of Commons, Study Committee on Bankruptcy and Insolvency Legislation, Report of the Study Committee on Bankruptcy and Insolvency Legislation (June 1970) (Chair: Roger Tassé)

SECONDARY MATERIALS: ONLINE SOURCES

Abitan, Sandra and Kravtsov, Ilia et al. The Aquadis Case: Québec Court Of Appeal Confirms The Broad Powers Of The CCAA Monitor - Insolvency/Bankruptcy/Restructuring - Canada (June 2020), online:

<<https://www.mondaq.com/canada/insolvencybankruptcy/959996/the-aquadis-case-quebec-court-of-appeal-confirms-the-broad-powers-of-the-ccaa-monitor>> .

Adebola, Bolanle “Conflated Arrangements: A Comment on the Company Voluntary Arrangements in the Proposed Nigerian Insolvency Act 2014”, (15 February 2015), online: <<https://papers.ssrn.com/abstract=2565491>>.

Adekola, Habeeb. “A General Overview of Corporate Restructuring in Nigeria”, (12 September 2019), online: *AAA Chambers* <<http://www.aachambers.com/articles/a-general-overview-of-corporate-restructuring-in-nigeria/>> at 1, Library Catalog: <www.aachambers.com>.

Aalex, “The Evolution Of Business Rescue In Nigeria - Insolvency/Bankruptcy - Nigeria”, online: <<http://www.mondaq.com/Nigeria/x/809026/Insolvency+Bankruptcy/The+Evolution+Of+Business+Rescue+n+Nigeria>>.

Banwo & Ighodalo, "*Reforming The Business Climate In Nigeria: Critical Changes Introduced By The Companies And Allied Matters Bill*", (February 2019), online: *Banwo & Ighodalo* <<https://www.banwo-ighodalo.com/grey-matter/reforming-business-climate-nigeria-critical-changes-introduced-companies-allied-matters-bill-2018?leaf=3>>.

Chima, Obinna. “AMCON: Stakeholders Propose Tenure Extension”, online: *AMCON: Stakeholders Propose Tenure Extension* <<https://www.proshareng.com/news/Debtors--Recovery/AMCON--Stakeholders-Propose-Tenure-Extension/11817>>.

Cleary, Patrick “DIP financing basics and recent case law”, (20 August 2014), online: *Alexander Holburn Beaudin + Lang LLP* <<https://www.ahbl.ca/dip-financing-basics-and-recent-case-law/>>.

Punuka Attorneys, “Scheme of arrangement as a business rescue tool”, (2012), online: *International Law Office* <<https://www.internationallawoffice.com/Newsletters/Insolvency-Restructuring/Nigeria/Punuka-Attorneys-Solicitors/Scheme-of-arrangement-as-a-business-rescue-tool>>, Library Catalog: www.internationallawoffice.com.

Solola & Akpana, *A Review Of The Companies And Allied Matters Act (CAMA), 2004 (Repeal And Re-Enactment) Bill, 2018 - Corporate/Commercial Law - Nigeria* (March 2020), online: <<https://www.mondaq.com/nigeria/shareholders/900874/a-review-of-the-companies-and-allied-matters-act-cama-2004-repeal-and-re-enactment-bill-2018>>.

Templars, *The Repeal and Re-Enactment of The Companies and Allied Matters Act- A Bold Step Towards Business Reform*, (May 2018), online: *Templars - Nigerian Law Firm of the Year* <<https://www.templars-law.com/repeal-re-enactment-companies-allied-matters-act-bold-step-towards-business-reform/>>.

Udofia, Kubi. “AMCON (Amendment No. 2) Act 2019 and Its Weighty Flaws (1)”, (15 October 2019), online: *INSOLVENCY DISCOURSE*

<<https://kubiudofia.wordpress.com/2019/10/15/amcon-amendment-no-2-act-2019-and-its-weighty-flaws-1/>>.

Udofia, Kubi, “Applications in Winding-up Proceedings: Settled and Unsettled Issues”, (18 December 2018), online: <<https://kubiudofia.wordpress.com/2018/12/18/applications-in-winding-up-proceedings-settled-and-unsettled-issues/>>, Library Catalog: kubiudofia.wordpress.com [*Applications in Winding-up Proceedings*].

Udofia, Kubi. “*An Analysis of Judicial Approach to Disputed Debts in Winding-Up Proceedings in Nigeria*”, SSRN Scholarly Paper, by, papers.ssrn.com, (Rochester, NY: Social Science Research Network, 2018).

Udofia, Kubi “An Evaluation Of The Adequacy Of Nigeria’s Sector-Specific Business Rescue Legal Regimes”, (2019), online: *Lawyard.ng* <<https://www.lawyard.ng/wp-content/uploads/2019/11/Lawyard-Quarterly-Journal.pdf>> at 16.

Udofia, Kubi “Establishing Corporate Insolvency: The Balance Sheet Insolvency Test”, (2 July 2019), online: *Harvard Law School Bankruptcy Roundtable* <<http://blogs.harvard.edu/bankruptcyroundtable/2019/07/02/establishing-corporate-insolvency-the-balance-sheet-insolvency-test/>>.

Udoma, Udo & Osagie, Belo. *The Companies and Allied Matters Act (Repeal and Re-enactment) Bill 2019 - What you need to know*, (May 2019), online: Business Day (Capital & Markets) <<https://www.uubo.org/media/1755/cama-bill-series-part-10.pdf>>.

Udoma, Udo & Osagie, Belo *The Companies and Allied Matters Act (Repeal and Re-enactment) Bill 2019 - What you need to know*, (June 2019), online: Business Day (Capital & Markets) <<https://www.uubo.org/media/1757/cama-bill-series-part-11-002.pdf>>.

Uwa, Etigwe “Restructuring & Insolvency In Nigeria”, online: *whoswholegal* <<https://whoswholegal.com/features/restructuring---insolvency-in-nigeria>>.

Vanguard, *Senate passes Companies and Allied Matters Act Amendment Bill*, (May 2020), *Vanguard newspaper*, online: <<https://www.vanguardngr.com/2020/03/senate-passes-cama-amendment-bill/>>.

World Bank Group, *Doing Business 2020: Comparing Business Regulation in 190 Economies*,

Online, <<https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf>>