CORPORATE DEBT RESTRUCTURING AND THE GLOBAL HARMONISATION PROCESS: EMERGING TRENDS IN AFRICA.

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ABSTRACT

This research aims to evaluate changes in restructuring and insolvency practices in Africa, in the light of the trend towards global convergence in the field of insolvency. Notwithstanding the claim that the convergence of insolvency norms has gone relatively well among global powers, some questions are yet to be fully settled- which economies matter in harmonisation process and why? Is global convergence in insolvency truly achievable or desirable? Because they are often the target of global norms, the experience of developing regions is crucial to this debate. Accounts of reform in economies in Asia, Latin America and other emerging regions have contributed to the understanding of both the global harmonisation process and the development of insolvency in those jurisdictions. Conspicuously missing from the debates are African countries, where a wave of reform is now happening as countries on the continent catch up with the global impetus for insolvency law reform. To paint a complete picture of global trends in restructuring law and practice, an African perspective is important, especially as global interests in the continent increases. This is what motivates this thesis. One of the most significant contributions of the thesis is that it fills a gap in the harmonisation process, by revealing Africa's contribution to the building of global norms while also evaluating the impact of the harmonisation trend on restructuring and insolvency practices in Africa. The thesis evaluates recent reforms and the debt restructuring frameworks they introduce. It also considers changes in local practices, using an empirical study in Africa's largest economy, Nigeria. While it finds that that Africa is indeed contributing to the harmonisation process in insolvency, it questions whether reforms are aiming to meet development needs in African countries or whether they are merely driven by the pressure to keep up with global trends.

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TABLE OF ABBREVIATIONS

ADB	**World Bank Group and the Asian Development Bank**
ADR	Alternative Dispute Resolution
AfCFTA	African Continental Free Trade Area
AMCON	Asset Management Company of Nigeria
APE	Acuerdo Preventivo Extrajudicial
APEC	Asia-Pacific Economic Cooperation forum
ART	Africa Round Table
BRICs	Brazil Russia India China South Africa
BRIPAN	Business Recovery and Insolvency Practitioners Association of Nigeria
BSU	Bank Support Unit
CAC	Corporate Affairs Commission
CAMA	Companies and Allied Matters Act
CBN	Central Bank of Nigeria
CBT	Creditors' Bargain Theory
CCAA	Companies' Creditors Arrangement Act
CDR	Corporate Debt Restructuring
CIPC	Companies and Intellectual Property Commission
CVA	Companies Voluntary Arrangement
DB	Doing Business
DDI	Distressed Debt Investors
DIP	Debtor-in-Possession
DRC	Democratic Republic of Congo
EBRD	European Bank for Reconstruction and Development
EFCC	Economic and Financial Crimes Commission
FAIR	Forum for Asian Insolvency Reform
FMO	Dutch Development Bank
FTSE	Financial Times Stock Exchange
HKAB	Joint Hong Kong Association of Banks
HKMA	Hong Kong Monetary Authority
IBA	International Bar Association
ICR	Insolvency and Creditor/Debtor Rights
IFC	International Finance Corporation
IFIs	International Financial Institutions
IMF	International Monetary Fund
INSOL	International Association of Restructuring, Insolvency and Bankruptcy Professionals
IOs	International Organisations
IPPs	Independent Power Plants
IPs	Insolvency Practitioners
JIFT	Jakarta Initiative Task Force
MINT	Mexico Indonesia Nigeria and Turkey
NPLs	Non Performing Loans

OECD	Organisation for Economic Co-operation and Development
OECD	Organisation of Economic Co-operation and Development
OHADA	Organisation pour l'harmonisation en Afrique du droit des affaires
PCF	Post Commencement Financing
PEBEC	Presidential Enabling Business Environment Council
PIP	Practitioner- in-Possession
RBI	Reserve Bank of India
RM	Receiver and Manager
ROSC	Report on the Observance of Standards and Codes
RPs	Restructuring Professionals
SEC	Securities and Exchange Commission
SMEs	Small and Medium-Sized Enterprises
TLO	Transnational Legal Order
UACP	Uniform Act organizing Collective Proceedings for Wiping off debts
UNCITRAL	The United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USAID	United States Agency for International Development
WTO	World Trade Organisation

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Intercontractors Nig Ltd v UAC (Nig) Ltd (1988) 2 NWLR (pt 76) 303.

Oceanic Int Bank v Victor Odili [2005] FHC/L/CS/1361/

Re-Interfirst Finance Securities Limited [1993] FHCLR 421

Standard Printing and Publishing Co Ltd v. N.A.B Ltd (2003) F.W.L.R (pt 137) 1097.

Unibiz (Nig) Ltd v CBCL Nig. Ltd [2001] 7 NWLR (pt 713) 534; [2003] 6 NWLR (pt816) 402.

Union Bank of Nigeria Ltd v Tropic Foods Ltd [1992] 3 NWLR (pt 228) 231.

Wema Bank Plc v Onafowokan (2005) 6 NWLR (pt 921) 410.

West African Breweries v Savannah Ventures Ltd (2002) 10 NWLR (pt 775) 401, 432.

Yinka Folawiyo & Sons v Hammond Projects Ltd [1977] 3 FRCR 143.

Kenya

In the matter of Nakumatt Holdings Limited (Insolvency Cause No. 10 of 2017)

In the matter of Nakumatt Holdings Limited (Insolvency Cause No. 10 & 13 of 2017 consolidated)

United Kingdom

BNY Corporate Trustee Services Ltd v Eurosail [2013] UKSC 28,

Re Bluebrook Ltd [2010] 1 B.C.L.C. 338

Re Hawk Insurance Co Ltd [2001] 2 BCLC 480

Re MyTravel Group Plc [2004] EWHC 2741 (Ch)

Sovereign Life Assurance Co v Dodd [1892] 2 QB 573

TABLE OF LEGISLATIONS

Nigeria

CBN Scope of Banking Activities & Ancillary Matters, No. 3 2010

CBN Act No.24 of 1991

CBN Regulation on the scope of banking activities& ancillary Matters, No. 3, 2010

Companies and Allied Matters Act, Cap C20, LFN 2004

Criminal Code Act Cap C38 LFN 2004.

Foreign Judgments (Reciprocal Enforcement) Act 2004

Lagos State Civil Procedure Rules 2012

Secured Transactions in Moveable Assets Act 2017

Securities and Exchange Commission Rules 2013

The Assets Management Corporation of Nigeria Act, 2010 (as amended)

The Banks and other Financial Institutions Act, Cap B3 LFN 2004

The Constitution of the Federal Republic of Nigeria 1999

The Federal High Court Act, Cap F12, LFN 2004

The Investment and Securities Act 2007

The Nigeria Deposit Insurance Corporation Act, Cap N 102, LFN 2004

The Reciprocal Enforcement of Judgments Act 1958

Other West Africa

Ghanaian Companies Code Act 179 of 1963

Liberian Chapter 8 of the Commercial Code, Insolvency and Restructuring Act 2016

Sierra Leonean Companies Act 2009

The Cape Verdean Insolvency and Recovery Code - Law no116/VIII/2016

East Africa

Arbitration Law nº 11/99 of 8 July (Mozambique)

Djibouti- Code de Commerce de la Republique de Djibouti 2011

Kenyan Companies Act Cap 486

Kenyan Insolvency Act 2015

Malawi - Insolvency Act 2015

Mauritius- Insolvency Act 2009

Mozambique - Insolvency and Recuperation of Commercial Agents Decree-Law no. 1/ 2013.

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Uganda- The Commercial Court Division) (Mediation) Rules, No. 55 of 2007

Zambia - Corporate Insolvency Act 2017

Zimbabwe - Corporate Insolvency Act 2018

South Africa
South Africa Companies Act 2008

OHADA countries
Uniform Act organizing Collective Proceedings for Wiping off Debts 2015

United States and Canada

Chapter 11, United States Code

Companies' Creditors Arrangement Act 1985

United Kingdom

Companies Act 2006

Insolvency Act 1986

Insolvency Amendment Rules 2017

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CHAPTER ONE

INTRODUCTION

The subject of this thesis is the development of corporate debt restructuring frameworks in Africa.[1] With the growing trend towards the global convergence of commercial laws,[2] International Financial Institutions (IFIs) such as the World Bank, the International Monetary Fund (IMF) and the United Nations Commission on International Trade Law (UNCITRAL) have sought to develop norms about what ideal corporate insolvency[3] and restructuring laws should aim to achieve, and how they should be designed. These norms are propagated in the form of models, principles, guidelines and normative standards and they influence insolvency reform in many countries.[4] Notably, the rehabilitation of viable businesses, rather than wasteful liquidation has come to gain centre stage in these prescriptions. This has occasioned a shift from liquidation to debt restructuring and other rescue-oriented mechanisms.[5] Reforms that aim to bring insolvency regimes into conformity with these norms have now spread across different regions of the world.

African countries have been sideliners in these developments as their insolvency laws have been obsolete for many decades. Now that Africa is experiencing significant economic growth, insolvency jurisprudence and practice are also evolving and nations across the continent have begun to reform their insolvency laws. One of the concerns of this research is how global norms and actors are impacting these reforms. It also seeks to understand if and how Africa is navigating the trend towards global convergence to establish insolvency regimes that meet their development needs.

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[1] The thesis focuses on companies other than financial institutions (which often have special legal regimes regulating them).

[2] Terence Halliday and Bruce Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press 2009) 339- 380.

[3] Known as bankruptcy law to most American scholars and practitioners. Insolvency is adopted here because it is the term common to the UK where this thesis is completed and many African countries to which the research relates.

[4] For example, The World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems World Bank* (ICR Principles) (April 2001 as revised in 2015); The UNCITRAL Legislative Guide on Insolvency Law (2005); The World Bank Guidelines for Out of Court Restructuring; IMF, *Orderly and Effective Insolvency Procedures; Key Issues* (IMF 1999) 5(*Orderly Procedures*).

[5] These concepts are briefly described below.

This chapter provides an overview of the discussion and lays out the structure of the thesis. It is divided into three parts. The first part engages in a background discussion of the general area of research, including developments in African economies and their impact on insolvency law reform. It also outlines the central questions and objectives of the research, the methodology and the significance of the research. The second part discusses the empirical aspect of the research. It introduces Nigeria as case study for the empirical research and describes existing insolvency frameworks in the country. The third part clarifies the meanings of concepts that are central to the thesis and concludes with an organisational structure of the chapters.

1.1. Background and research justification.

African countries are often classified as developing economies. [6] The past decade has brought a boost in the growth of African economies with the continent being recognised as the second fastest growing region in the world after South Asia.[7] Some

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[6] The precise definition of 'developing economy/country' is not free of controversy. It is rooted in the idea that countries are at different stages of development and as undeveloped countries undergo economic transition, they will eventually evolve to a state of development that mirrors the economic, political and social characteristics of the more advanced economies. (See Walt Whitman Rostow, *The stages of Economic Growth; A Non-Communist Manifesto* (3rd edn 1990 CUP). However, there is no universally accepted criterion for making the distinction, especially when other terms like least developed, less developing, transitioning and emerging economies are thrown in the mix. The United Nations declares that the distinction between developed and developing countries is intended for statistical convenience and does not express a judgement about stage of development of a country. However, the distinction is tied to the Sustainable and Millennium Development Goals. <https://unstats.un.org/unsd/methodology/m49/>;<www.un.org/millenniumgoals/>; accessed 8 September 2018. Economic development is commonly measured by the Gross Domestic Product, Gross National Product, and Gross National Income per capita of countries to determine rate of growth, expansion and recovery. These typically describe the total income value of goods and services produced or consumed by an economy in a given period, usually one year. The World Bank, 'Beyond Economic Growth: Meeting the Challenges of Global Development' <www.worldbank.org/depweb/beyond/global/chapter2.html> accessed 8 September 2018. The Human Development Index has also gained some popularity in more recent times (The focus on human welfare and use in statistics was popularised by Amartya Sen who argued that development includes the right every individual has to make their own choices and use their capabilities. See Amartya Sen, *Development as Freedom* (OUP 1999); Kevin Davis and Michael Trebilcock, 'What Role Do Legal Institutions Play in Development?' October 20, 1999, Faculty of Law, University of Toronto Draft prepared for the International Monetary Fund's Conference on Second Generation Reforms, 8-9 November 1999) 4-5. Acknowledging the nebulous nature of the term, this thesis uses the term loosely to describe countries that (i) are recognised to have lower standard of living, low per capita income, underdeveloped industrial base and HDI relative to economies that measure higher in these areas (developed economies); and (ii) are striving to transform their economies and institutions to catch up with developed economies.

[7] AfDB, 'Africa remains world's second fastest growing region' (Africa Development Bank Group, 24 May 2017) <www.afdb.org/en/news-and-events/africa-remains-worlds-second-fastest-growing-region-17036/>; AfDB, 'Africa is Now the Fastest Growing Continent in the World' (2013) <www.afdb.org/en/news-and-events/article/africa-is-now-the-fastest-growing-continent-in-the-world-12107/> all accessed 8 September 2018.

economies in Africa have been named among the fastest growing in the world.[8] With the increase in economic growth and huge developmental projects coming out of Africa, the continent has received more global attention. Massive projects are accompanied with financial innovations such as derivatives, compound securitisations and syndicated lending involving financial institutions and investors from across the world.[9]

However, rapid changes in African economies are also attended by economic volatility and instability, which put many businesses at the risk of financial distress.[10] This makes it necessary for economic growth and new financial arrangements to be complemented by sound and responsive mechanisms for resolving financial distress.[11]

Until recently, African countries have been lax about putting up supportive structures, like frameworks for rehabilitating viable businesses to help cushion the impact of financial distress.[12] Many countries have retained liquidation-based insolvency laws which were received decades ago as part of their colonial heritage. Before recent reforms, countries like Ethiopia, Ghana, Kenya, Mozambique, Nigeria, Cape Verde, Liberia, Namibia all had liquidation and or receivership-based laws with some dating back to the 1920s and falling into disuse.[13]

[8] Nigeria for example has been declared one of the next eleven emerging economies of the world by Columbia University analysts. Steven Radelet, *Emerging Africa: How 17 Countries Are Leading the Way* (Centre for Global Development, September 2010) 9-26.

[9] For example, Nigeria, like many other African nations has in the past few years begun implementing plans to privatise major sectors of its economy. This includes the privatisation of transport, water, electricity and other utility sectors. Ernest Harsch, 'Privatization shifts gears in Africa' (2000) 14(1) Africa Recovery 8-17; George Schoneveld and Annelies Zoomers, 'Natural Resource Privatisation in Sub-Saharan Africa and the Challenges for Inclusive Green Growth' (2015) 37 International Development Planning Review 95-118.

[10] Giovanni Melina and Rafael Portillo, 'Economic Fluctuations in Sub-Saharan Africa' (2018) Monetary Policy in Sub-Saharan Africa 61. See for a robust analysis, Adebayo Adedeji and Timothy Shaw, 'Economic Crisis in Africa; African Perspectives on Development Problems and Potentials' (1985) FAO UN Papers.

[11] Thomas Laryea, 'Approaches to Corporate Debt Restructuring in the Wake of Financial Crises' (IMF Staff Position Note, 26 January 2010) 17.

[12] Nitesh Patel, 'Insolvency Reforms Across Africa: Is it Happening Fast Enough?' (Africa Round Table Highlight Article, 2014) available at <https://www.insol.org/_files/Africa%20Round%20Table/Highlight%20article%20EN%20June%202014.pdf> accessed 8 September 2018.

[13] For example, until recently Tanzania's insolvency laws were part of its company law of 1929; The World Bank reported in 2012, that 'Sub-Saharan Africa has the largest share of economies with little or no insolvency practice. Twelve of the region's 46 economies (more than a quarter) have had fewer than five insolvency cases annually in recent years…judges have little or no experience in handling insolvency cases, and costs are prohibitive'. The World Bank, *Making a difference for entrepreneurs* (Doing Business Report 2011) 80.

It is therefore worthy of note that since year 2006 when Tanzania introduced an administration procedure (patterned after English law) and 2011 when South Africa (followed closely by Mauritius in 2009) reformed its insolvency law, a wave of insolvency law reforms has hit the continent. Now, over half of the fifty-four countries in Africa have new insolvency laws and others are in the process of reform.

These developments raise a question about the major drivers of the reforms, both endogenous and exogenous. This question is important for two reasons - the *first* is that it seeks to understand whether insolvency law reforms are being informed by development needs that have become more prominent with economic growth in Africa. An answer in the affirmative provides some assurance that reforms can produce the benefits that effective insolvency systems offer, particularly to fast growing economies.[14] *Secondly*, it uncovers the impact of the trend towards global convergence in insolvency regulation on these reforms thereby providing a fuller understanding of the harmonisation process.

In their Transnational Legal Order (TLO) framework, Halliday, Carruthers and Shaffer paint a picture of how the trajectory and content of insolvency legislation across the globe are now being shaped by a set of norms developed by powerful global actors who propagate these norms transnationally.[15] They study the operation of transnational insolvency norms in emerging economies, mostly in the context of Asian jurisdictions like Indonesia, China and South Korea. Halliday and Carruthers note that African economies are understudied in this regard, as *they are never used as exemplars*.[16] Considering that twenty-three of the forty-four countries that have now adopted the UNCITRAL Model Law on Cross Border Insolvency are African,[17] this

<www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB11-FullReport.pdf> accessed 8 September 2018.

[14] For the relationship between insolvency law and economic development, see Halliday and Carruthers, *Bankrupt* (n 2) 339- 380; Mariana Prado and Michael Trebilcock, 'Path dependence, development, and the dynamics of institutional reform' (2009) 59 (3) University of Toronto Law Journal 350; Kenneth Dam, The Law-Growth Nexus; The Rule of Law and Development (2006 Brookings Institution Press) 160-161.

[15] Terence Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence Halliday, *Transnational legal orders* (Cambridge University Press, 2015) 28-29.

[16] Terrence Halliday and Bruce Carruthers, 'The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes '(2007) 112 (4) American Journal of Sociology 1173, 1188.

[17] UNCITRAL Model Law on Cross-Border Insolvency (1997) Status. <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html> accessed 18 September 2018.

thesis argues that the picture of the TLO and the narrative of global convergence in insolvency law are incomplete without an African perspective. The thesis closes some of this gap by applying their ideas to ongoing insolvency reform and restructuring experience in Africa.

1.2. Research questions and objectives

This thesis aims to answer three questions-

- How is the drive towards global convergence in insolvency impacting corporate debt restructuring law and practice in Africa?
- Is Africa contributing to the growth of a transnational legal order in insolvency?
- What socio-cultural and institutional factors can impact the settling of global restructuring norms in an African economy?

In answering these questions, the thesis evaluates the introduction of debt restructuring frameworks in African countries, while examining the role of global actors and norms in the reforms on one hand, and the interaction of new restructuring laws with local institutions on the other hand. It considers recent and ongoing changes in the way African countries are responding to financial distress in two dimensions. The first captures changes in restructuring practices among local stakeholders who are now opening up to more rehabilitative approaches and adopting new strategies within the boundaries of outdated laws and in their shadow. The second dimension describes formal efforts to introduce new insolvency and restructuring laws through national legislations in thirty-six countries.[18] New laws are inspired by the restructuring laws of developed countries like England, France, New Zealand and the United States (US), that have had considerable success in incorporating the rescue culture into their insolvency regimes.

[18] Kenya, Uganda, Tanzania, Mauritius, Nigeria, Ghana, Ethiopia, Zimbabwe, Seychelles, Malawi, Mozambique, Zambia, South Africa, Cape Verde, Liberia, Namibia, Burundi, Rwanda, Lesotho, Djibouti and the OHADA countries (Benin, Burkina Faso, Cameroon, Central African Republic, Chad, the Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea Bissau, Guinea, Mali, Niger, Senegal and Togo).

1.3. *Africa is (not) a country.*

This research acknowledges that varied distinctions among African countries make it difficult to speak of an African experience as if it were a single story. With fifty-four independent countries on the continent, Africa enjoys a lot of diversity as demonstrated by the varying sizes,[19] economic performance, political,[20] social and cultural features of different countries in the region. The continent is divided along the lines of language, religion, colonial heritage and geographic location.[21] For example, the term 'Sub-Saharan Africa' is commonly used to separate North Africa from the rest of Africa.[22] Countries in West Africa share a lot of affinity because of their geographical proximity but at the same time are divided by colonial history, with some West African countries being francophone and others anglophone.[23] One important effect of this is that some countries adopt a common law system and others operate civil law.[24]

In terms of economic diversity, the three largest economies are South Africa, Nigeria and Angola.[25] While the economies of oil producing Nigeria and Angola took a massive hit following the oil crisis in 2016, non-oil countries like Ethiopia, Kenya,

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[19] Compare for example, the population of Madagascar (24 million), Seychelles (94 thousand) and Nigeria (181 million). United Nations Population estimates (2015) <https://esa.un.org/unpd/wpp/Download/Standard/Population/ > accessed 10 September 18

[20] Some countries in Africa struggle with a faltering democracy bordering on dictatorship, others go in and out of military rule while others have a fairly stable democracy. See for an overview, Emmanueal Gyimah-Boadi, 'Africa's Waning Democratic Commitment' (2015) 26(1) Journal of Democracy (2015) 101-113.

[21] North Africa, Central Africa, East Africa, Southern Africa, West Africa and the Africa Island nations. See the New World Encyclopedia <http://www.newworldencyclopedia.org/entry/Sub-Saharan_Africa> accessed 10 September 2018.

[22] Countries in Sub Saharan Africa lie south of the Sahara Desert while others are in the Northern area. The World Bank classifies forty-seven Sub Saharan African countries separately and the seven North African countries together with the Middle East. <https://data.worldbank.org/region/sub-saharan-africa> accessed 10 September 2018.

[23] Also, there are Lusophone and Arabophone and Spanish speaking countries in Africa. This is in addition to the thousands of local languages across the continent.

[24] Principally dictated by whether a country was colonised by the British or French (and Belgium or Portugal in fewer cases). See Sandra Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39(4) Journal of Modern African Studies 571–596.

[25] Grant Thornton, 'Emerging markets opportunity index: high growth economies' (2012) International Business Report 26.

Mali, Botswana, Rwanda, Senegal, Tanzania, Côte d'Ivoire and Mali have demonstrated significant economic growth and resilience.[26]

Notwithstanding their differences however, there is a good volume of co-operation, shared history, shared institutions, commercial relations, laws, socio-cultural connections and institutional deficiencies that bind countries in the region together. For example, weak judicial systems, corruption, capacity gaps, poor governance and economic instability are common elements in African countries.[27]

Beyond the struggles, there is also significant socio-economic integration in Africa, ranging from trade and investments to digital communications.[28] For example, pan-African businesses and financial institutions, led by South African companies, are rapidly growing to create cross border networks in the region.[29] There have been many projects aimed at building regional/sub-regional cooperation and economic integration in Africa, including the Economic Community of West African States, Common Market for Eastern and Southern Africa, The African Union, Arab Maghreb Union amongst others[30]. Of huge significance however is the AfCFTA, a recent initiative that seeks to establish among other things, free trade among all African countries.[31] With forty-nine out of fifty-four countries having executed it, the agreement is poised to become the biggest trade agreement since the formation of the World Trade Organisation.[32] This collaboration among African countries encourages

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[26]'Economic Growth in Africa is on the Upswing Following a Sharp Slowdown' *The World Bank* (19 April 2017). <www.worldbank.org/en/news/pressrelease/2017/04/19/economic-growth-in-africa-is-on-the-upswing-following-a-sharp-slowdown> accessed 8 September 2018.

[27] Marcel Fafchamps, *Market institutions in sub-Saharan Africa: Theory and evidence* (MIT press 2003); Chantal Uwimana, 'How corruption is stifling Africa's growth' *World Economic Forum* (9 December 2014). https://www.weforum.org/agenda/2014/12/how-corruption-is-stifling-africas-growth/ > accessed 8 September 2018.

[28] For example, One Africa Network is a project aimed at facilitating intra-African communications and digital networks. Jean-Philbert Nsengimana,'One Africa Network – Ending Africa's digital exploitation *The New Times* (8 August 2018) <www.newtimes.co.rw/opinions/oan-digital-africa > accessed 10 September 2018.

[29] For example, it is not unusual to find a commercial bank headquartered in one African county operating across a few other African countries- Ecobank, United Bank for Africa and Diamond Bank are examples.

[30] See Trudi Hartzenberg, 'Regional Integration in Africa' (October 10, 2011) < https://ssrn.com/abstract=1941742 > accessed 10 September 2018.

[31] The Africa Continental Free Trade Area, an agreement that is part of AU's initiative for closer economic integration in Africa. The agreement was signed by 44 countries in March 2018 at an AU summit in Rwanda. AU, AfCTA <https://au.int/en/CFTASummit2018> accessed 10 September 2018.

[32] African continental free trade Area: Policy and negotiation options for trade in Goods (UNCTAD 2016); Justina Crabtree, Africa is on the verge of forming the largest free trade area since the World Trade Organization' CNBC (20 March 2018) <www.cnbc.com/2018/03/20/africa-leaders-to-form-largest-free-trade-area-since-the-wto.html>; Nigeria abstains as 49 AU members sign free trade pact' *News Agency of Nigeria* (July 3, 2018).

horizontal movement of experiences, methods and regulatory strategies across the continent.[33]

While this thesis does not claim to provide an in-depth account of the reform experience in all fifty-four African countries, it discusses reforms and changes introduced to restructuring law in thirty-six countries.[34] One of the benefits of consolidating the discussion of reform and restructuring law developments in Africa is the opportunity to analyse the regional efforts of global actors on the continent. Also, it provides a basis for determining the general direction of insolvency developments in Africa, in the same way reform in Asian countries like South Korea, Indonesia, China and India has driven the Asian insolvency story, as told by Halliday and Carruthers.[35] The discussion helps to paint a more complete picture of the trend towards convergence. In the process, it makes the original contribution of revealing the role of the African continent in the harmonisation trend and conversely, showing the impact of the movement on the continent.

It also does the important work of laying the foundation for a deeper, multi-country discussion of the evolution of insolvency law and practice in Africa, as insolvency law and jurisprudence begin to take shape on the continent. However, because reforms are in their early days, the tensions between the law on the books and the law in practice are not extensively discussed in this research. Rather, what the thesis does is to identify potential challenges to the settling process by shedding some light on existing local institutions and practices. To allow for an in-depth analysis, this investigation of existing restructuring practices, institutions and the perspectives of stakeholders is limited to Nigeria.

<www.today.ng/news/nigeria/nigeria-abstains-49-members-sign-free-trade-pact-128821 > all accessed 10 September 2018.

[33] PwC, Africa Asset Management 2020 <www.amafrica2020.com/amafrica2020/docs/am-africa-2020.pdf>; OECD, 'Africa Economic Outlook 2015' <www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/PDF_Chapters/Overview_AEO2015_EN-web.pdf> all accessed 10 September 2018.

[34] This is not intended to suggest that reforms are not happening in the other 18 countries. The selection of these countries is based on accessibility of information from different sources and is representative for the purpose of the research.

[35] Bruce Carruthers and Terence Halliday, 'Negotiating globalization: Global scripts and intermediation in the construction of Asian bankruptcy regimes' (2006) 31(3) Law & Social Inquiry 521-584; Terrence Halliday and Bruce Carruthers, 'Foiling the Financial Hegemons: Limits to the Globalisation of Corporate Bankruptcy Regimes in Indonesia, Korea, and China' (2007) Globalisation and Resistance: Law Reform in Asia since the Crisis.

1.4. Methodology

Underneath the movement for global convergence in insolvency law lies unanswered questions about the theoretical foundations of insolvency regulation, the goals of insolvency and restructuring law and the roles of state and private actors in achieving them. The research considers conventional insolvency theories and how these theories are evolving with the increasing role of private bargaining in resolving financial distress, high creditor control, financial innovations and the use of corporate debt restructuring as an emerging response to financial distress. In presenting these debates, it considers the key elements of corporate debt restructuring and important considerations in the choices made by countries (particularly developing countries) in the design of restructuring law.

The research also examines the trend towards global convergence in insolvency and the propagation of insolvency norms which have corporate rescue and restructuring at their core. Using the framework adopted by Halliday and Shaffer in their work on transnational legal orders, it discusses corporate debt restructuring in Africa as socio-legal phenomena both in a global and local context. In critiquing the trend towards global convergence, this research also engages the neo-institutional theory in the law and development literature, to unearth the challenges that the propagation of insolvency scripts by global actors presents for African countries.

The empirical study in Nigeria provides material for discussing the relevance of so-called global restructuring norms and guidelines to an African country. The study adopts a qualitative approach which is suitable for exploring the complex interaction of stakeholders with laws and institutions and their perspectives about new developments and proposed reforms. The findings from the study are of relevance to scholars and global actors involved in the formulation and propagation of insolvency norms transnationally. Likewise, it provides context-specific guidance to insolvency policymakers, stakeholders and researchers in Nigeria and other parts of Africa, as reform, implementation and settling of new laws progress.

Choice of Nigeria for empirical case study

Nigeria is the most populous and largest economy in Africa. The country has been recognised as one of the fastest growing on the continent, earning it a place on lists of emerging and frontier economies like the MINT, the Next Eleven and FTSE frontier markets list.[36] Over the last decade, Nigeria has witnessed impressive economic growth engendered by economic reforms and increased foreign direct investment inflows. During this period, the average annual growth rate was over seven per cent, placing Nigeria amongst the fastest-growing economies of the world.[37] Unfortunately, Nigeria recently plunged into economic recession, following the oil price drop and a forex crisis.[38] This recession had an adverse effect on businesses, crippling small and big businesses alike. Large companies in the oil and gas, manufacturing, telecommunications, hospitality and aviation sectors received a hit.[39] This had a ripple effect on smaller companies who built their business around servicing the larger companies. The distress experienced by corporate bodies was also passed on to banks and other financial institutions, creating the risk of a systemic breakdown.[40]

Nigeria is a highly influential country in Africa and it exhibits many of the issues that growing African countries grapple with. Despite its growth, it continues to suffer from weak institutional infrastructure, poor governance, professional capacity gaps, a defective judicial system and low transparency.[41] The country is now in the middle of

[36] The MINT countries: next economic giants? BBC (6 January 2014) <http://www.bbc.co.uk/news/magazine-25548060>; accessed 10 September 2018; Goldman Sachs, 'Beyond The Brics: A Look At The Next 11' Insights (April 2007) Ch 13.

[37] Reinaldo Fiorini and others, *Africa's Growing Giant: Nigeria's New Retail Economy* (McKinsey & Co, December 2013) <https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/africas-growing-giant-nigerias-new-retail-economy> accessed 10 September 2018.

[38] Maggie Fick, 'Nigeria economy suffers first annual contraction in 25 years' *Financial Times* (28 February 2017) <www.ft.com/content/12698e60-fdb4-11e6-8d8e-a5e3738f9ae4> accessed 10 September 2018.

[39] For instance, Arik Air, West Africa's biggest carrier recently went into receivership. Intercontinental Hotels and Etisalat Communications also suffered the same fate. Editorial, 'Arik Air owes creditors N376 billion' *Vanguard Newspapers* (12 April 2017); Yinka Ibukun and Tope Alake, 'InterContinental Exits Nigeria Over Debt Fallout with Partners' *Bloomberg* (10 January 2018) <www.bloomberg.com/news/articles/2018-01-10/intercontinental-hotels-group-exits-nigeria-jan-18-over-debt> ; Bassey Udo, 'Why we intervened in Etisalat debt crisis – CBN, NCC' *Vanguard* (23 May 2017) <www.premiumtimesng.com/business/business-news/234951-intervened-etisalat-debt-crisis-cbn-ncc.html > all accessed 8 Septemeber 2018.

[40] Babajide Komolafe, 'How economic recession constrained banking in 2016' *Vanguard News* (1 January 2016) <https://www.vanguardngr.com/2017/01/economic-recession-constrained-banking-2016/> accessed 8 Septemeber 2018.

[41] Onyenekenwa Cyprian Eneh, 'Failed development vision, political leadership and Nigeria's underdevelopment: A critique' (2011) 1(1) Asian Journal of Rural Development 63-69.

an insolvency law reform and at the same time, stakeholders increasingly attempt to restructure distressed companies informally.[42] These qualities make Nigeria a suitable case study for investigating the evolution of restructuring and insolvency practice in an African economy. As a debt restructuring system is being constructed both informally and formally, the country offers an opportunity to study the relationship between global norms and local practices and institutions, and between global actors and local actors.

In terms of generalising the outcome of this study to other parts of Africa, there are limitations which relate to the previously mentioned diversity of the continent. Business culture, institutions and legal institutions can vary across Africa, therefore the experience in Nigeria is not expected to be on all fours with other countries. While acknowledging that not all the experience in Nigeria is generalisable, the thesis however emphasises issues that have been found to apply in many African countries, particularly relating to institutional quality and its effects on insolvency practices. The cumulative experience of a fast-growing African economy that is aiming to meet its development needs while navigating institutional deficiencies and the external pressures to conform to global standards, is one that other African countries at different stages of development can relate to.

The empirical study: objectives, design, conduct and limitations.

The qualitative research was conducted in Lagos state, Nigeria's commercial hub where most businesses (including all commercial banks) have their head offices.

The goals of the empirical study were to (i) understand how local actors experience corporate debt restructuring; (ii) learn how they interact with existing insolvency laws and institutions; and why these interactions have developed in the way they have; (iii) explore the views of local actors about proposed/ongoing insolvency law reform and (iv) investigate the impact (if any) of global norms and actors in insolvency and restructuring practice in Nigeria.

[42] See INSOL, Africa Round Table 2015, Full Program <https://www.insol.org/library/opendownload/377 > 35-36; Damilola Odetola, 'Corporate insolvency reform in emerging Africa: the need, challenges and prospects' (2017) 28(10) I.C.C.L.R. 364-366.

In 2012, Adebola conducted empirical research on corporate rescue in Nigeria, interviewing lenders, judges, IPs and debtors.[43] Adebola's work sought to explain the gaps between the rescue laws (mostly receivership) on the books and the law in action by investigating the factors informing the actions and attitudes of stakeholders. Some of Adebola's findings about the challenges that stakeholders identified with corporate rescue in general are confirmed in this thesis.

This study however goes further to tell the story of an ongoing construction of a corporate debt restructuring practice in Nigeria. Beyond investigating the practice of extant laws, it investigates the actions of stakeholders in the shadow of the law, especially where informal debt restructuring is concerned. It also explores emerging developments in restructuring practice and the roles of global actors, local actors and professionals in these developments. In doing this, it captures the socio-cultural and institutional complexities of the transition from a traditional insolvency regime to a modern, restructuring system. In addition, it investigates the engagement of stakeholders with proposed insolvency law reform.

Participants and conduct of study

One of the most important set of actors in corporate debt restructuring are creditors. The interviews therefore focus on creditors, with commercial banks (which dominate corporate lending in Nigeria) accounting for fifty per cent of the participants. There are currently twenty-two commercial banks in Nigeria.[44] Five out of these are top tier banks that engage in large corporate lending, syndicated lending, sovereign lending, issuing bonds and financing ground breaking infrastructural projects.[45] Mid-range banks lend on a lower scale to a mix of large companies and SMEs and participate in

[43] Bolanle Adebola, 'Corporate rescue and the Nigerian Insolvency System' (PhD thesis, UCL 2013) 191.

[44] Access Bank Plc, Citibank Nigeria Limited, Diamond Bank Plc, Ecobank Nigeria Plc, Enterprise Bank, Fidelity Bank Plc, First Bank Nigeria Limited, First City Monument Bank Plc, Guaranty Trust Bank Plc, Heritage Banking Company Ltd., Key Stone Bank, Mainstreet Bank, Skye Bank Plc, Stanbic IBTC Bank Ltd., Standard Chartered Bank Nigeria Ltd., Sterling Bank Plc, SunTrust Bank Nigeria Limited, Union Bank of Nigeria Plc, United Bank For Africa Plc, Unity Bank Plc, Wema Bank Plc, Zenith Bank Plc. See Central Bank of Nigeria Website <www.cbn.gov.ng/supervision/Inst-DM.asp> accessed 8 Septemeber 2018 (Note that in 2015, Heritage Bank acquired Enterprise bank. Also, Mainstreet Bank was acquired by Skye Bank in 2014 as part of the restructuring of financial institutions in Nigeria).

[45] Zenith, First Bank, UBA, Access Bank and GTB are top tier banks rated by Tier 1 capital.The Banker (Global 1000) <https://www.thebanker.com/Top-1000 >; Aderemi Ojekunle, 'Five Nigerian banks make it to the list of top 1,000 global banks, here they are' *Business Insider* (6 July 2018) <https://www.pulse.ng/bi/finance/5-nigerian-banks-make-it-to-the-list-of-top-1-000-global-banks-id8585854.html> all accessed 8 Septemeber 2018

some syndicated lending and project finance.[46] Smaller banks have lower credit ratings and capacity to participate in large syndicated lending.[47] Participants in the empirical study were key officers in fifteen of the twenty-two banks (four of the five top tier banks, five mid-range banks and six of the smaller banks). The selection helped to achieve a balanced representation of practices by involving banks that deal with different sizes of companies and corporate debts. A representative sample also provided information on which practices can be said to have become embedded in the Nigerian lending industry. In addition, it provided material for discussing the practicality of a multi creditor restructuring framework that relies on unanimity. Finally, the bank interviews helped to gauge the involvement, both in terms of numbers and degree, of this important group of actors with proposed law reform.[48]

The participants from the banks were the heads of the departments that handled loan defaults, often described as loan restructuring and review, remedial assets or recovery department. Because all the interviews were conducted in head offices, the participants had an informed understanding of not just how things worked in the head office but also in the thousands of branch offices across the nation. Many of them had been in the industry for decades.

The next group of participants are insolvency practitioners (IPs), lawyers and accountants by profession. IPs were interviewed to gain some insight into the role of professionals in shaping debt restructuring and insolvency practice. There were eleven participants who had acted as receiver, liquidator, restructuring practitioner or all three. As insolvency practice is significantly dominated by lawyers in Nigeria, eight of the IPs were lawyers while the remaining three were accountants. In addition to explaining the challenges with corporate debt restructuring and their views on proposed law reform, IPs shared their experience with both lenders and corporate

[46] See Global Credit Rating Co for Nigerian Bank ratings <http://globalratings.com.ng/news/article/gcr-publishes-its-nigeria-bank-bulletin2> accessed 8 Septemeber 2018.
[47] ibid.
[48] For example, out of the fifteen bank officers, only two had some idea that a bill for insolvency law reform had been presented for legislation.

debtors having represented both sides on different occasions. This was important because there were no debtor interviews in this study.

Because the empirical study aimed to understand the drivers of reform in Nigeria and the role of global and local actors in the reform, it was important to speak to the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN),[49] the association coordinating insolvency law reform in Nigeria. Three members of the executive committee were interviewed, and they provided information regarding the proposed reform and its challenges.

In total, twenty-nine interviews were conducted. The participants were contacted in different ways, mostly through social and professional networks. Bankers were particularly eager to participate in the research and provided information and access to their colleagues in other banks. While none of the participants declined the request for an interview, four interviews had to be rescheduled on short notice because of busy schedules. Two participants (lenders) agreed to follow-up interviews for further clarification. Participants were asked an average of ten questions and the interviews typically lasted between 0.45 and 1.30 hours. The interviews were semi-structured, though all participants had been contacted beforehand by email or phone and informed about the aim of the research and the information expected from them. This gave them some time to reflect on their work and articulate their views. Participants had no difficulty understanding the questions and required little guidance in addressing the issues that the interviews sought to address.

Limitations of empirical study

The main limitation was difficulty in accessing companies that had gone through or were going through a debt restructuring. The first challenge with this was identifying such companies. There are over a million companies registered in Nigeria, spanning several sectors of the economy.[50] Debt restructuring is often done informally and

[49] BRIPAN currently represents the only form of organisation among Insolvency Practitioners in Nigeria. BRIPAN is a member association of INSOL International and engages in training and development of practitioners. Membership of BRIPAN is however not a prerequisite for practising as an insolvency practitioner in Nigeria. <http://bripan.org.ng/ >; < https://www.insol.org/ma-profile/7 > accessed 8 September 2018.

[50] As at 2017, the Corporate Affairs Commission had 1.5 million companies registered on its database. Harrison Edeh, 'CAC has so far registered 1.5 million companies in its database' *This Day* (22 May 2017).

where attempted within a receivership, there is no database from which this information can be readily accessed. Banks and IPs were understandably reluctant to provide information about distressed companies with which they were working or had worked. They alluded to the culture of shame around debt and distress, as no debtor would be proud to speak about their situation. In the few cases where big companies were being restructured (usually as part of a formal procedure such as a receivership), identification was easy but there remained the issue of accessing the managers of such companies. Two companies that had recently gone through a restructuring were contacted but did not respond.

Although interviews with managers of distressed companies would have provided more balanced material, this limitation is mitigated in two ways. First, while company representatives were impossible to reach, the interviews indirectly recorded their perspectives through insolvency practitioners that routinely represent them. Secondly, one of the IPs provided the opportunity for participant observation in an ongoing debt restructuring of a large manufacturing company. While there was no opportunity to interview representatives of the distressed company, the observation which occurred over a four-week period provided an opportunity to listen to managers speak about their challenges. It also provided access to the financial history of the company including details of its borrowing, negotiation documents between the company and its lenders, restructuring schedules, and involved visits to the company's premises for the inspection of its fixed assets. This provided a unique insight into financial distress and issues around restructuring from the debtor's perspective.

Another group that was not included in the interviews were judges. Although judges are important because of the role they play in one of the primary institutions in insolvency regulation- the courts, this empirical study aimed to interview judges only on the condition that initial interviews revealed the need to do so; they did not. None of the questions that were central to the study needed to be directed to judges

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<www.businessdayonline.com/cac-far-registered-1-5-million-companies-%E2%80%8E-database/> accessed 8 September 2018.

specifically. Judges play a limited role in informal debt restructuring and where debt restructuring occurs within a formal process, lenders, lawyers and IPs often have the power to determine how the courts serve them. Furthermore, the constraints of the Nigerian judicial system are well documented, including in an empirical research conducted on corporate rescue in Nigeria.[51]

Also, it would have been useful to obtain some statistics to support qualitative data obtained from the interviews. While interviews explained how stakeholders use the legal system, information about the frequency of entry and exit from insolvency procedures in Nigeria is shrouded in mystery. Participants hinted at the frequency with which insolvency procedures are used but it was impossible to get accurate numbers or even estimates from the interviews. Such data would be best obtained from the Corporate Affairs Commission, as all company information including receiverships and winding ups are required to be filed at the CAC. There is however no evidence that the CAC collate, organise or publish this information. A request was made to the CAC for information on the number of receiverships and winding up in Nigeria within a 5-year period, but this was not successful.[52]

Some findings from the empirical study.

Largely, the interviews achieved their aim and produced more than enough material to ground a thorough analysis of the issues highlighted for discussion and the conclusions reached. It was found that the restructuring environment in Nigeria can be difficult because of a combination of factors, some of which are systemic. For example, many participants identified courts, corruption and poor regulation as the key challenges in financial distress resolution.

[51] Oko Okechukwu, 'Seeking justice in transitional societies: an analysis of the problems and failures of the judiciary in Nigeria' (2005) Brook. J. Int'l L. 31; Jude Cocodia, 'Identifying causes for congestion in Nigeria's courts via non-participant observation: A case study of brass high court, Bayelsa State, Nigeria' (2010) 1 (11) International Journal of Politics and Good Governance 1-16; Adebola (n 43) 191.

[52] The CAC requested some documentation to allow them to process the request. The documentation was supplied but there has been no significant progress. The researcher intends to continue to pursue this data for future research in the area.

'Instead of invoking confidence, the mention of court only invokes signs of uncertainty and resignation. If local people dread the courts that much, imagine how foreign investors would feel.'

Contrary to the common narrative, creditors do not go about liquidating companies at the earliest sign of trouble. The interviews show that winding up and receivership are often no more than a tool to exact some repayment or promise if it.

'I must be honest, I cannot recall any winding up where we went through with the process. At first, they think we are not serious but once we get a court order to advertise the petition, they quickly come to discuss a restructuring plan'.

Participants identified some issues as 'cultural' and made some assertions based on anecdotal rather than real evidence. While these are taken with caution, it gave a glimpse into their attitude towards distress and how their perspectives have shaped restructuring practice.

'Lenders are swayed by big names, I think it is a cultural thing'.

There is a growing acknowledgment of the need for and importance of debt restructuring. There is however a pervasive distrust among stakeholders, coupled with regulatory and structural difficulties that make this difficult to achieve. Apart from weak institutions, stakeholders displayed a lack of confidence in the skills of other stakeholders in the lending industry.

'At the point of lending or restructuring, most banks assume that their in-house loan review department can do a good job of assessing the viability of a business, but they cannot. They are not trained to and are often too overwhelmed to do a thorough job'.

The study also answered questions around the role of local actors and global norms in reform and how the roles of local practitioners in restructuring might be evolving.

Data

Data from the interviews was recorded either digitally or manually by note taking. Five of the interviews were conducted over the phone, and notes were taken over the

course of phone calls that lasted between 30-45 minutes. Where notes were taken, they were re-written immediately after the interview.

The interviews were subsequently transcribed by the researcher. All data was completely anonymised even though personal details were obtained from all participants for organisation. Identifying factors have been completely removed from all data and quotes. The data was analysed using the Nvivo application. With the Nvivo application, trends and themes in the data became clearer, making it easier to eliminate repetition and structure the study coherently.

1.5. Overview of Nigeria's existing insolvency and restructuring framework

Corporate insolvency in Nigeria has seen very little development since the enactment of the Companies and Allied Matters Act 1990 (CAMA), [53] where most of the legal framework for corporate insolvency is found. With growing markets, commercial and corporate issues dealing with capital markets, securities, investments, mergers and acquisitions have gone through relatively rigorous reform, resulting in separate legislations to deal with these market activities.[54] The provisions on corporate insolvency however remained untouched. Corporate insolvency and restructuring procedures in Nigeria include winding up, receivership and the arrangement and compromise procedures.

1.5.1. **Winding up:** A Nigerian company can be wound up in three ways- voluntarily, by the court or under court supervision.[55] The most common form of winding up for a distressed company is a court winding up. A court winding up petition can be brought by the company, a creditor, the official receiver, a contributory, a trustee in insolvency, the Corporate Affairs Commission and /or a receiver.[56] One of the grounds for a court winding up is the inability of a company to pay its debts. This is

[53] Cap C20 Laws of the Federation of Nigeria 2004 (particularly sections 387 to 580).

[54] The Investment and Securities Act 2007 and Securities and Exchange Commission Rules 2013 regulate mergers, takeover and acquisitions of shares in publicly quoted companies in Nigeria. other relevant legislations - The Banks and other Financial Institutions Act (the BOFIA) 2004 regulates restructuring, reorganisation, mergers and disposal of banks; The Nigeria Deposit Insurance Corporation Act 2004 regulates insurance of deposit liabilities of licensed banks and other financial institutions to protect interest of depositors in the event of imminent or actual financial difficulties of banks. The Assets Management Corporation of Nigeria Act 2010 (as amended), established the Assets Management Corporation of Nigeria to efficiently resolve non-performing loan assets of banks.

[55] CAMA, s 401; The Federal High Court Act 2004, s7 and the Nigerian Constitution 1999, s251 (1) (e) confer jurisdiction to hear insolvency proceedings on the Federal High Court.

[56] CAMA, s 410.

defined in three ways- (i) where the company has neglected to pay a debt exceeding N2000 (USD 5) for three weeks, after a written demand has been made (ii) where a judgment debt made against the company has remain unpaid and (iii) when considering its contingent or prospective liability, the court is satisfied that the - company is unable to pay its debts. Before a winding up order is given, the petition must be advertised in the national gazette, national and state newspapers.[57] A liquidator may also be appointed to coordinate the winding up and is vested with powers such as audit of the company, asset sales, payment of creditors, litigation etc. Alternatively, a distressed company may be wound up without the involvement of the court. This is called a creditors' voluntary winding up.[58] The creditors can decide in a meeting that a resolution to wind up the company be passed.[59] There is very little scope for court involvement in a voluntary winding up.[60] It can however be quickly converted into a court-supervised process on the petition of creditors, the company or a contributory.[61]

1.5.2. Receivership: a Nigerian company can borrow money by issuing a debenture[62], which could be secured or naked, to the lender(s).[63] A series of lenders can hold a debenture over the same asset(s). In this case, a debenture trust deed is executed, appointing a trustee to hold the assets for the benefit of the debenture holders. Also, lenders can create a fixed and floating charge over all the assets and undertakings of the company, commonly called an all-asset debenture.[64] A fixed charge allows the holder(s) to appoint a receiver while the holder of a floating charge can appoint a

[57] CAMA, s 486.
[58] In a members' voluntary winding up, the company is required to provide a declaration of solvency.
[59] Companies Winding up Rules 2001, s 117.
[60] For instance, where there is a disagreement over liquidator appointed by creditors and by the company. CAMA, s 474.
[61] CAMA, s 483.
[62] CAMA, s 176 (a debenture is a debt instrument that is executed in favour of a creditor by a company and evidences the company's indebtedness to the holder, including the rights of the holder against the company. It could be secured or unsecured).
[63] CAMA, s 173.
[64] Floating charge is defined as an equitable charge over the whole or a specified part of the company's undertakings and assets, including cash and uncalled capital of the company both present and future and becomes enforceable on the occurrence of certain events including the appointment of a receiver manager.

receiver and manager 'RM', if the company defaults or becomes unable to pay its debts.[65]

CAMA does not stipulate who should be appointed a receiver, it however precludes infants, persons of unsound mind, corporate bodies, undischarged bankrupts and persons convicted of any offence involving fraud or dishonesty from acting as receiver.[66] A receiver or RM can be appointed out of court, pursuant to an instrument such as a debenture. Although the law provides that such a receiver or RM can apply to court for directions for matters concerning his performance as receiver, his appointment requires no court sanction or involvement.

When a RM is appointed, the law makes it clear that he is not a mere debt collector or debt recovery agent. Both receivers and RMs are deemed to be an agent of their appointor(s) but a RM owes the company a special duty to, 'act at all times in what he believes to be the best interests of the company as a whole so as to *preserve its assets, further its business, and promote the purposes for which it was formed*'.[67] The law describes the 'best interest of the company' to include the interests of the employees, members of the company and finally, special but not exclusive consideration to a special class of members or creditors that he is appointed to represent. Thus, even though not clearly spelt out, there is a scope for a RM to aim to rescue a distressed company.

In practice, the receivership is a court-driven process, often characterised by unending litigation, unwritten rules and inconsistent decisions. One of the problematic aspects of the procedure concerns duties and powers of the receiver.[68] While CAMA specifies that the receiver is an agent of the appointor, courts (in some cases, the Supreme court) have remained inclined to the common law position of holding the receiver to be an agent of the company.[69] Similarly, the duty of a receiver to manage a company is not

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[65] Other means by which a debenture holder can realise their security is by a foreclosure action or winding up proceeding.

[66] CAMA, s 387.

[67] CAMA, s 390(a).

[68] Bolanle Adebola (n 43) 109, 117-119; E.S Nwauche,'The Duties of a Receiver/Manager in Nigeria and Ghana' (2005) 14 (1) International Insolvency Review , Journal of the International Association of Insolvency Practitioners 79-89.

[69] *Unibiz (Nig) Ltd v CBCL Nig. Ltd* [2001] 7 NWLR (pt 713) 534; [2003] 6 NWLR (pt816) 402. This was the previous position under Nigeria's 1968 Companies Act. One of the changes made by CAMA is the alteration of the receiver's agency to appointor rather than company.

free from controversy. Although the courts have on occasion reiterated that the RM must act in the best interest of the company while pursuing beneficial realisation for the appointor, they have not provided clear guidance on how the conflict between these duties are resolved.[70] There has also been some confusion around the scope of a receiver's powers, where rules not contained in CAMA have been developed by the courts and become embedded in practice. For example, in *Intercontractors (Nig) v NPFMB*[71], the Supreme Court ruled that a receiver must seek the leave of court to institute an action on behalf of the company.[72]

Insolvency is one area of law where there is a shortage of robust analysis, and this has further exacerbated the uncertainties and inconsistencies surrounding procedures like receivership.[73] Scholars have pointed out that the procedure suffers from lack of expertise on the part of receivers/managers, underhanded practices and an overwhelming focus on debt recovery to the detriment of the company. This has motivated calls for insolvency frameworks that provide clearer guidance to actors and balance the rights of parties more effectively.[74]

1.5.3. Arrangement and compromise: Nigerian law provides for an equivalent of the English scheme of arrangement, the arrangement and compromise procedures (referred to here as schemes). Section 537 of CAMA provides for an arrangement

[70] See *West African Breweries v Savannah Ventures Ltd* [2002] 10 NWLR (pt 775) 401, 432 where the court held that the receiver manager breached his duty to manage the company by not striking a balance between the receivership and managing the company. As Nwauche suggests, the case seems to suggest albeit unclearly, that a decision to sell rather than manage what appears to be a going concern may lead to a conclusion that there has been a dereliction of the duty of care by the receiver/manager, thereby showing some commitment to corporate rescue goals. Nwauche (n 68) 84; *In Union Bank of Nigeria Ltd v Tropic Foods Ltd* [1992] 3 NWLR (pt 228) 231, 245-246, the Nigerian Court of Appeal emphasised that a receiver/manager in the management of the company cannot ignore the interest of the company.

[71] [1988] 2 NWLR (pt 76) 280.

[72] A reiteration of its decision in *Intercontractors Nig Ltd v UAC (Nig) Ltd* (1988) 2 NWLR (pt 76) 303. See also *Standard Printing and Publishing Co Ltd v. N.A.B Ltd* (2003) F.W.L.R (pt 137) p. 1097. This position has since been changed by the decision in *Wema Bank Plc v Onafowokan* (2005) 6 NWLR (pt 921) 410, where the need for leave was dispensed with. Nwauche submits that a receiver/manager should obtain leave of the court to institute or defend actions. See Nwauche (n 68) 87 Some of these interpretational challenges may have stemmed from continued reliance on common law precedents and the repealed Companies Law Decree 1968 which was replaced by CAMA in 1990.

[73] Adebola (n 43) 111.

[74] Iyiola Oyedepo, 'The Imperatives of a Vibrant Insolvency Practice in Nigeria' (February 2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1089345> accessed 10 September 2018; Akingbolahan Adeniran, 'A Mediation-Based Approach to Corporate Reorganisations in Nigeria' (2003) 29 NCJ Int'l L & Com Reg 291; Anthony Idigbe and Okorie Kalu,' Nigeria: Recent Strides in Nigerian Insolvency Law - Banking Insolvency & AMCON Act' Mondaq (5 October 2015) <www.mondaq.com/Nigeria/x/431946/Insolvency+Bankruptcy/Recent+Strides+In+Nigerian+Insolvency+Law+Banking+Insolvency+AMCON+Act > accessed 10 September 2018.

which is defined to mean 'any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them…other than a change effected under any other provision of the Act or by the unanimous agreement of all parties affected'. The 'change' referred to in section 537 may be in the form of a compromise by the creditors (and or members).[75]

The courts have an important role to play in the process. When the proposal for the scheme is made, an application is made to the court to order a meeting of the relevant parties- creditors or class of creditors, members or class of members.[76] For the purpose of making decisions at this meeting, the majority is set at three quarters of the value in shares or interests of the members of the relevant class.[77] If the court is satisfied as to the fairness of the scheme, it sanctions it and it becomes binding. [78]

Schemes proved particularly useful in the banking industry during the 2004 Central Bank of Nigeria's (CBN) consolidation exercise which aimed to clean up the operations of commercial banks.[79] Many Nigerian banks executed compliance with the CBN's regulations by using schemes of arrangement to restructure their operations.[80] Given their non-contentious nature and the involvement of the CBN, these schemes were executed within as little time as possible.[81]

[75] CAMA, s 539. It is useful to draw a distinction between an arrangement/compromise and an arrangement on sale as defined by section 538 of the Act. The section 539 procedure on first look seems to have the characteristics of an insolvency procedure as it expects that a members' voluntary winding up be conducted, and a liquidator engaged to sell the undertaking of the company wholly or in part to another company. The members are paid their consideration in the form of shares in the transferee company, debentures, policies, cash or other interests. This is a useful restructuring tool as it allows the arrangement to be made by special resolution with minimal court involvement. However, the Act in different section, requires that a members' voluntary winding up be accompanied by a declaration of solvency. This makes it difficult to reconcile the use of this device when the company is distressed or on the brink of insolvency.

[76] CAMA, s 540.

[77] CAMA, s 539(2).

[78] CAMA, s 539 (3)

[79] K.S Adeyemi, 'Banking sector consolidation in Nigeria: Issues and challenges' (2006) 9(3) Union digest 1-19.

[80] Scope of Banking Activities & Ancillary Matters, No. 3, became effective on November 15, 2010, prohibiting banks from undertaking non-banking activities. See Tunde Ogowewo and Chibuike Uche,'(Mis) using bank share capital as a regulatory tool to force bank consolidations in Nigeria' (2006) Journal of African law (2006) 50 (2) 161-186.

[81] The timeline for the UBA (one of the banks) scheme of arrangement for instance was three months- between November 2012 and January 2013. See scheme documents at <https://www.yumpu.com/en/document/view/51496585/scheme-of-arrangement-between-united-bank-uba-pl c> accessed 12 July 2018.

With the tension and pressures that come with financial distress, the seemingly straightforward scheme provisions can quickly become complicated.[82] Design challenges such as the lack of a moratorium also contribute to this. As schemes are not exclusively designed as a rescue or even insolvency tool, the kind of philosophy that seeks to restrict the race to collect by imposing a 'stay of proceedings' is absent. Also, the voting mechanism in a scheme allows for a three-quarter majority within each voting class. This creates a challenge with cramming down a whole class of creditors who can hold the whole scheme to ransom irrespective of the nature of their stake.

There are very few reported cases on the procedure in Nigeria[83] and it has been pointed out that the lack of case law suggests its unsuitability and resulting disuse.[84] Another scholar argues that the Nigerian scheme provisions are laced with absurdities resulting from defective legislative drafting and poor grasp of the procedure by policymakers.[85] More complexity is introduced by the involvement of the Securities and Exchange Commission (SEC) in sanctioning a scheme.[86] The time and effort required to obtain the court and regulatory sanctions makes it difficult to use for the resolution of financial distress.

1.6. Key concepts in corporate restructuring and insolvency.

This section aims to clarify the meanings of some fundamental terms and concepts and the senses in which they are used in this thesis.

Insolvency generally refers to the inability (rather than refusal or unwillingness) of a debtor to pay its creditors. However, there are different senses in which the term might be used. A company may be balance sheet or cash flow insolvent. The former is a

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[82] Schemes have been used to relieve distressed companies but mostly for capital restructuring. See for example the capital reduction of the troubled telecommunications company, Starcomms Plc in Dipo Okuribido,'The Scheme of Arrangement: A Viable Option for Nigerian Companies in a Downturn' (2018) 1 Emerging Markets Restructuring Journal 27; Adeniran (n 74) 291.

[83] Adeniran (n 74) 299; for example *Oceanic Int Bank v Victor Odili* [2005] FHC/L/CS/1361/; *Andrucchue Investment Plc v Financial Mediators* [1994] FHCLR; *Re-Interfirst Finance Securities Limited* [1993] FHCLR 421, 424-425; *Yinka Folawiyo & Sons v Hammond Projects Ltd* [1977] 3 FRCR 143; *Finbank plc V BGL* [2011] FHC/CS/L/1367/.

[84] Adeniran (n 74) 292-293.

[85] Tunde Ogowewo, 'The Dual Statutory Procedure for Effecting a Scheme of Arrangement in Nigeria: Law Reform or Retrogression' (1994) Afr. J. Int'l & Comp. L. 6 (1994) 594; Ogoewo and Uche (n 80) 180-183, For example, the effort to distinguish between internal restructurings and amalgamation was so poorly executed that it has created some confusion in relation to the duties of the courts and SEC.

[86] The Court may refer a scheme to SEC 'which shall appoint one or more inspectors to investigate the fairness of the said compromise or arrangement and to make a written report' to the court. CAMA, s 539 (2).

technical accounting term that describes a situation where the book value of company's assets is less than its liabilities. Cash flow insolvency on the other hand refers to a company's inability to pay its debts as they fall due.[87] This can be proved in a number of ways including the company's non-payment of obligations, the presence of a large amount of unpaid debt or its admission of inability to pay. Thus, a company which is not yet balance sheet insolvent may be cash flow insolvent, if its assets are illiquid. Conversely, a company that is balance sheet insolvent may be able to continue paying its debts as they fall due, for a period of time. [88] In addition to being a factual situation, insolvency is also a legal concept, where the law defines the criteria that can trigger an insolvency procedure. For example, an insolvency law may require cash flow insolvency evidenced by inability to pay a specified minimum upon demand, as the requirement for commencing an insolvency procedure.[89]

In relation to insolvency procedures, a distinction is made between liquidation and restructuring, which is discussed in some detail in chapter three. A liquidation refers to the sale of a company's assets for cash or cash equivalent.[90] A restructuring is the rearrangement of a firm's financial obligations (and of its operations in some cases), which is often attended by a rehabilitative goal to keep the company or its business functioning as a going concern.**[91]**

Also, financial distress, a term which is often used to describe cash flow insolvency, is distinguished from economic distress.[92] A *financially distressed* business is one that is

[87] John Armour, 'The law and economics of corporate insolvency: A review' (2001) ESRC Centre for Business Research, University of Cambridge 3-4.

[88] ibid 3-5. This may be misleading as to the company's health or long-term viability and explains why countries like the UK include contingent and prospective liabilities in their definition of cash flow insolvency. Insolvency Act 1986, s 123(c); see also the Supreme Court's decision in *BNY Corporate Trustee Services Ltd v Eurosail* [2013] UKSC 28, which clarifies the meaning of balance sheet insolvency under s123(2). The Supreme Court rejected the "point of no return" formulation of the Court of Appeal, holding instead that the balance sheet insolvency test requires a detailed consideration of a company's position, and the court cannot be satisfied simply because the aggregate value of its liabilities exceeds the value of its assets.

[89] Nigerian law for example defines inability to pay debt to include indebtedness in a sum exceeding N2,000 which has remained unpaid for three weeks after demand. CAMA, s 409.

[90] The term is often used interchangeably with 'winding up' but they are slightly different. While liquidation can (and often occurs) within a winding up procedure, in the technical sense, it is not restricted to a winding up and can also occur in other procedures such as receivership. Armour, 'The Law and Economics' (n 87) 4.

[91] Jennifer Payne, 'Debt Restructuring in English Law: Lessons from the US and the Need for Reform' (2014). Legal Research Paper Series Paper No 89/2013 2.

[92] Armour, 'The Law and Economics' (n 87) 3.

suffering from liquidity issues but remains viable i.e. has prospects of making profits.[93] On the other hand, an *economically* distressed business lacks profit making capacity and has no going concern value.[94]

The importance of this distinction is that the optimal choice between liquidation and restructuring is predicated on a determination of the true state of the company- whether economically or financially distressed. For a firm in economic distress, the net present value will always be negative regardless of management or operational changes.[95] Thus, there is nothing to be gained from keeping the firm or its assets together by restructuring it or selling as a going concern. A financially distressed firm however has a going concern value and merely suffers a liquidity problem.[96] This firm is worth keeping together as its problems may be solved by operational changes, debt restructuring, debt-rescheduling and/or change in management.

Finally, reference to law in this thesis means corporate insolvency and restructuring law- legislations that establish frameworks/mechanisms for winding up insolvent/distressed companies or provide an alternative to liquidation. On a broader scale, insolvency regimes or systems capture three elements (i) insolvency laws and the frameworks they establish (for example, the English administration procedure) (ii) institutions that implement them such as courts and professionals (iii) other corporate debt restructuring mechanisms, formal and informal, that aim to resolve financial distress and are therefore connected to insolvency law. [97] When the argument requires it, a distinction is made among these elements.

[93] From this point, reference to distressed companies in this chapter should be understood to mean financially distressed companies operating viable businesses.

[94] See Douglas Baird, 'Bankruptcy's uncontested axioms' (1998) 108(3) The Yale Law Journal 573-599; Paul Goldschmid, 'More phoenix than vulture: The case for distressed investor presence in the bankruptcy reorganization process' (2005) Colum. Bus. L. Rev., 191, 198.

[95] Régis Blazy and Bertrand Chopard, 'Ex post efficiency of bankruptcy procedures (2004) 24(4) International Review of Law and Economics 448-449; Armour, 'The Law and Economics' (n 87) 3-4; Baird, 'Bankruptcy's uncontested axioms' (n 94) 581-583.

[96] ibid.

[97] As discussed earlier, some restructuring mechanisms do not require factual insolvency and are not regarded as insolvency frameworks for this reason. However, this thesis includes such procedures in its use of the term insolvency.

1.7. Thesis structure

The thesis is structured in seven chapters. This first chapter provides a general overview. It explains the research questions and objectives and the methodology adopted in resolving them. The chapter sets the agenda for understanding the relationship between developments in African restructuring law and practice and the global convergence of insolvency laws. It identifies a primary concern for ongoing reforms- whether they are responding to development needs in Africa or to the pressure to keep up with the rest of the world. The chapter also introduces Nigeria as a suitable case study for generating a focused discussion on corporate debt problems and the construction of corporate debt restructuring practice in a growing African nation.

Chapter two explores theories about the regulation of corporate insolvency. It discusses the growing connection between private bargaining and insolvency, and the debates that the role of the law in insolvency regulation might be exaggerated. The chapter considers the significant role of creditors in determining how financial distress is resolved (both before and after the distress occurs). This creditor control has gained more significance due to innovative financial structuring and increased emphasis on debt restructuring as a viable alternative to liquidation.

Following the discussion in chapter two, chapter three focuses on debt restructuring as an emerging response to financial distress. Discussion here reinforces the arguments made in chapter two about the ability of creditors to determine the outcome of financial distress by private bargaining. The chapter discusses the relationship between debt restructuring and corporate rescue and revisits questions about the role of law (and courts) in the resolution of financial distress. The chapter also discusses key elements in the design of debt restructuring mechanisms, drawing from different legal frameworks and principles and guidelines developed over time by institutions like the World Bank, IMF and UNCITRAL. It highlights the considerations for developing countries in choosing between alternative systems of debt restructuring.

Chapter four builds on the discussion of restructuring principles and norms which have become influential in insolvency law reforms across the globe. Using Halliday and Shaffer's work on Transnational Legal Orders (TLOs), this chapter considers how the activities of certain actors propagate insolvency norms transnationally. It also considers Carruthers and Halliday's ideas about the settling of these norms at national and local levels. This analysis resonates with broader socio-legal research about the influence of underlying cultural values, social relations, local peculiarities and political processes embedded in each jurisdiction, on law reform. The contribution of this chapter is two-fold, it promotes an understanding of global influence on insolvency law and at the same time emphasises the need to understand socio-economic peculiarities at the local level. It provides a framework for considering how the trend and content of insolvency reform in Africa is influenced by so-called global norms. Also, the analysis on the settling of insolvency law at the local level provides the tools to question whether so-called best practises and ideal forms are suitable for African economies.

Chapter five examines insolvency and restructuring developments across Africa in two dimensions. One is the evolution of restructuring practice and the other is the trend of insolvency law in thirty-six countries. This chapter examines observable patterns in these reforms vis claims of the emergence of an insolvency TLO.

One lesson from the discussion in the thesis is that although emerging African countries are faced with an array of choices of debt restructuring mechanisms, they are potentially subject to the pressure to comply with certain 'ideal' frameworks. Consequently, a clear understanding of their local institutions and peculiarities is necessary for making the most efficient choices while navigating the globalised world of insolvency. Thus, chapter six seeks to better understand these local peculiarities by studying the restructuring experience in Africa's largest economy, Nigeria.

The qualitative study explores the experience of actors (corporate lenders, debtors and insolvency practitioners) with insolvency law, proposed restructuring reform, emerging restructuring practices and the influence or role of global actors and norms in these. It also seeks to understand how local peculiarities such as institutional

factors, social values and political processes affect insolvency practice and restructuring.

Chapter seven outlines the findings of the thesis and extracts important considerations in the design of context-specific restructuring guidelines in Nigeria and other African countries. It discusses ways by which countries in Africa can adapt transnational norms of insolvency to meet their restructuring needs. The chapter concludes that while reforms in African countries are ostensibly furthering the global trend towards convergence by adopting ideal insolvency frameworks, the compatibility of these laws with local institutions are in question. This can pose significant challenges for implementation, which if not corrected may deprive these countries of the benefits of effective insolvency systems and ultimately impede global convergence in its true sense.

CHAPTER TWO

THEORETICAL PERSPECTIVES IN INSOLVENCY REGULATION AND POLICYMAKING

Introduction.

Insolvency regulation has come to be regarded as an important part of social life. It has gained even more importance after series of financial crises hit the global economy.[98] Now, almost every country has mechanisms for dealing with insolvent or distressed companies.[99]

While the need for insolvency systems may be fairly settled, many questions linger regarding the form, goals and content of insolvency law. Throughout the development of the field of insolvency law, three questions have been persistently asked; *what purpose does insolvency law serve? What purpose should it serve*? *How should it achieve its goals?*[100] These questions have survived many decades and may never grow old.[101] Not only do they have theoretical appeal in the academic field, they also have practical significance. As times change and markets evolve, there is a constant need to revisit insolvency policy.[102] Also, each financial or economic crisis teaches the world new things about insolvency law and policy.[103] Furthermore, as our understanding of institutions and how they operate in different economic, social and political settings improve, there is a need to adapt insolvency frameworks to the peculiarities of different jurisdictions. At the same time, powerful global actors, spurred on by rising

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[98] Halliday and Carruthers, *Bankrupt* (n 2) 70; Laryea (n 11) 17.

[99] World Bank Doing Business Reports provide country specific information. Out of about 196 independent countries in the world, the Doing Business 2018 rank 190 countries, all of which have some form of insolvency mechanism <www.doingbusiness.org/rankings > accessed 22 August 2018.

[100] Baird, 'Bankruptcy's Uncontested Axioms' (n 94) 580-583 gives a summary of debates between the competing groups.

[101] The debates about the goals of insolvency law gained momentum with Thomas Jackson's formulation of the Creditors' Bargain Theory in 1982. Thomas Jackson in Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain (1982) 91 Yale Law Journal.

[102] Vanessa Finch, *Corporate Insolvency law: Perspectives and Principles* (2nd edn, CUP 2009) 28; The American Bankruptcy Institute, *Commission to Study the Reform of Chapter 11* (2012-2014) Final Report 18.

[103] One vital lesson that has been learnt from financial crises is the importance of rehabilitative frameworks and corporate rescue. Laryea (n 11) 17-19; many jurisdictions have sought to develop appropriate responses to financial distress and have had considerable success in adopting viable insolvency alternatives. Vanessa Finch, 'Corporate Rescue in a World of Debt' (2008) JBL 756; Armour and Deakin,' Norms in Private Insolvency: The "London Approach" To the Resolution of Financial Distress' (2001) 1 J. Corp. L. Stud. 21, 23.

international collaborations and integration of markets, push the need for convergence in insolvency regulation across jurisdictions.[104]

This chapter has three objectives, the first of which is to discuss mainstream theories with which scholars have sought to provide theoretical guidance and justification for insolvency law and policy. The first part of the chapter discusses the main theories in two broad categories, the exclusive, creditor-focused view of insolvency and the inclusive perspectives that advocate for the inclusion of wider interests in insolvency.[105] It finds that while the former primarily thrives on efficiency, the latter is anchored on fairness and inclusion. Also, these theories are not free of policy influences and value choices, and they have been significantly inspired by the experience in influential jurisdictions like the United States (US) and the United Kingdom (UK). It is expected that insolvency laws of countries share some similarities but also have differences that reflect the different underlying policy considerations, socio-economic realities, values and needs.

The second part of the chapter considers the less conventional ground for contestation in insolvency theory, the argument for a contractual insolvency system that gives creditors considerable freedom to determine how financial distress is resolved. This proposition challenges the foundations of the mainstream theories of insolvency, as they proceed from an assumption that the law has a direct regulatory role to play in insolvency. The chapter finds that criticisms of contractual insolvency echo the criticisms that have been levelled against the creditors' bargain theory.

It points out that the arguments are heavily influenced by US law and do not consider the use of debt structures to achieve creditor control in the other countries like the UK, and the innovative means by which creditors bypass the effects of insolvency law even in the US. Thus, the contractualist proposals may not be as radical as critics suggest. The chapter also finds that restrictions on creditors' rights which are often informed by fairness concerns, elicit ingenious ways of circumventing the law. Consequently,

[104] Halliday and Carruthers, 'The recursivity of law' (n 16) 1135-1202; Roman Tomasic, 'Insolvency Law Reform in Asia and Emerging Global Insolvency Norms' (2007) 15 Insolvency Law Journal 229-242.

[105] The economic approach (described as free marketers by Baird) exalt the goal of efficiency above all else, a goal best achieved by maximising the wealth of consensual creditors. Advocates of the inclusive view on the other hand view it as a forum for ensuring that all affected parties receive fair treatment. Baird (n 94) 580-583.

creditors can achieve different results from what the theories and policies envisage and what insolvency law intends.

2.0. The economic account of insolvency law.

2.1. The goal of efficiency in insolvency

Economic theories are strongly driven by the goal of efficiency.[106] Efficiency is however a multifarious concept and it is important that the different senses in which this term is used are set out early in this work. The word 'efficiency' can be explained in terms of allocation of wealth. This stipulates that the value of assets be maximised by allocating them to their highest use.[107] There are two broad concepts of allocative efficiency. A *pareto* efficient situation refers to one where the welfare of one individual cannot improve without another member of the group being made worse off.[108] This understanding of efficiency has been used to justify the principle of equality in wealth distribution.[109] Kaldor–Hicks efficiency on the other hand is when the value received by one party outweighs the losses suffered by the other. In both cases, value is measured by the willingness of the parties to pay for the benefit. Those who gain could in principle compensate the losers and still be better off. Because these forms of efficiency are judged according to the value placed by economic actors on wealth, an action is considered efficient as long as it maximises collective wealth and not individual gains.[110] Thus, allocative efficiency is achieved when the people that value a benefit the most and are willing to pay for it, receive it. This is proof that wealth has been put to its most valuable use.

Specifically in insolvency, efficiency is often evaluated in two senses- ex ante and ex post efficiency. An optimally-efficient insolvency framework is determined by both

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[106] Stephen e. Margolis, 'Two Definitions of Efficiency in Law and Economics' (1987) 16 J. Legal Stud. 471.

[107] Guido Calabresi, 'About Law and Economics: A Letter to Ronald Dworkin' (1980) Hofstra L. REv. 553.

[108] It is however difficult to conceive of many situations in practical terms where redistribution can be made without someone else being made worse off. Trina Bose, 'Resolving Financial Distress -Justice as Fairness and Reciprocity' (2004) UCL Jurisprudence Rev. 230, 234.

[109] Ronald Dworkin, 'Why Efficiency? A Response to Professors Calabresi and Posner' (1980) 8 Hofstra L. Rev. 563, 566.

[110] This is a reflection of Posner's definition of Efficiency as a 'means exploiting economic resources in such a way that value-human satisfaction as measured by aggregate willingness to pay for goods and services is maximized' Richard Posner, *Economic Analysis of Law* (2d ed. 1977) 10; Posner, 'The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication' (1980) 8 Hofstra Lair Review 487. For a criticism of this view, see Margolis (n 106) 472-473 (it is impossible and undesirable to achieve as it takes no account of transaction costs).

its ex ante and ex post efficiency implications.[111] Ex ante efficiency refers to the incentives (or disincentives) that an insolvency regime creates for creditors and debtors before the company goes insolvent. Insolvency regimes can affect the cost and availability of credit by informing the willingness of creditors to lend, the terms on which they are willing to lend and the commitment of creditors to monitor the activities of debtors.[112] They can also affect the incentives of managers and entrepreneurs.[113] Thus, it is claimed that the protection of creditors' interests in insolvency procedures affects the cost of credit ex ante.[114] The protection of creditors' interests here concerns the returns they receive in insolvency and how much control they have in the process. Qian and Strahan argue that strong creditor rights expand loan availability which in turn increases the potential for economic growth. This is because with better legal protection during insolvency, lenders are willing to extend credit on favourable terms ex ante.[115] As we consider shortly, this idea of creditor protection often sets the goal of efficiency against fairness concerns in insolvency.

Ex post efficiency is achieved when the optimal choice is made in relation to an insolvent company. Broadly, the choices are between a liquidation and a restructuring. The choice between liquidation and restructuring, or who is in the best position to make it is not always a straightforward one. Making the optimal choice requires a determination of whether the company is financially or economically distressed.[116] The next chapter considers how conflicting self-interests can complicate the process of making an efficient choice. [117]

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[111] Cornelli Francesca and Leonardo Felli, 'Ex-ante efficiency of insolvency procedures' (1997) 41 (3) European Economic Review 475-485.
[112] Blazy and Chopard (n 95) 448.
[113] Some research has been done on the relationship between the incentives of managers/entrepreneurs and insolvency law. They are not discussed here as this thesis focuses on creditors. Philippe Aghion and Patrick Bolton, 'An incomplete contracts approach to financial contracting' (1992) 59 (3) The Review of Economic Studies 473-494; Patrick Bolton and David S. Scharfstein, 'Optimal debt structure and the number of creditors' (1996) 9 (25) Journal of Political Economy.
[114] Lawrence Weiss, 'Bankruptcy resolution: Direct costs and violation of priority of claims' (1990) 27 (2) Journal of Financial Economics 285-314; Cornelli and Felli (n 111) 476.
[115] Where creditor protection is strong, bank loans tend to have longer maturities and lower interest rates. Jun Qian and Phillip Strahan, 'How laws and institutions shape financial contracts: The case of bank loans' (2007) 62 (6) The Journal of Finance 2803, 2805.
[116] See Chapter 1, page 25.
[117] Thomas Jackson and Robert E. Scott, 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain' (1989) 75 Va. L. Rev. 169-170.

Apart from making the optimal choice, an important aspect of ex post efficiency is transaction cost efficiency.[118] Technical or transaction cost efficiency is concerned with achieving desired results with the minimum use of resources and costs and minimum wastage of effort.[119] The cost-benefit analysis provided by transaction cost efficiency is important in the implementation of any normative theory.[120] The choice of an insolvency procedure and the process itself are technically efficient when wastage of efforts, time and resources are eliminated. Summarily, an efficient insolvency framework is one (i) that provides the right incentives for creditors ex ante by reducing (or not increasing) the cost of credit (ii) that makes the right choice between liquidation and restructuring and (iii) where the benefits of the procedure exceeds its costs.

2.2. The Creditors' Bargain Theory- an efficiency-driven theory.

The most widely referenced economic account of insolvency law is the Creditors Bargain Theory "CBT", developed by Thomas Jackson and later, Douglas Baird and Robert Scott.[121] The proponents of this theory who have been referred to as free marketers,[122] adopt efficiency in its different forms as described above. The CBT is backed by neoclassical economics ideas such as the assumption that every individual is rational and will make rational choices to promote their self-interest.[123] In its simplest formulation, the theory views insolvency law as a representation of what the creditors of a company would agree to ex ante, if they were to bargain for the rules that will apply to them upon the debtor's insolvency.[124] Like a Rawlsian veil of ignorance,[125] creditors at the point where the bargain is made, are unaware of the

[118] Armour, 'Law and Economics' (n 87) 15-19.
[119] Finch, *Corporate Insolvency Law* (n 102) 61, footnote 110. Dynamic efficiency refers to the capacity of a given system to innovate and survive in a changing and uncertain environment.
[120] Armour, 'Law and Economics' (n 87) 15.
[121] In its simplest form, the CBT was developed by Thomas Jackson in 'Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain (1982) 91 The Yale Law Journal 857-907; The Logic and Limits of Bankruptcy Law (Harvard University Press 1986). The model has been expanded in subsequent publications, Thomas Jackson and Robert Scott, 'On the Nature of Bankruptcy' (n 117) 155.
[122] Alan Schwartz, 'A contract theory approach to business bankruptcy' (1998) 107 (6) The Yale Law Journal 1814; Donald Korobkin, 'Role of Normative Theory in Bankruptcy Debates' (1996) 82 Iowa L. Rev. 75.
[123] Robert K Rasmussen, 'Behavioral Economics, the Economic Analysis of Bankruptcy Law and the Pricing of Credit' (1998) 51 Vand. L. Rev. 1679, 1680-1684.
[124] Jackson, 'Entitlements' (n 101) 857.
[125] ibid footnote 59; Rawl's theory of Justice posits that in the original position, it is asked what political system people would choose if they did not know what their place in society and the amount of wealth or natural abilities

position they would be in relation to the other creditors or where the operations of the debtors' business would place them in the future. On the assumption that these creditors are risk averse, the uncertainty motivates them to consent to a bargain that allows equal treatment with creditors having similar claims, in the event of insolvency.[126]

The main argument and probably the most controversial claim of the CBT is that the sole aim of insolvency law is (or should be)[127] to solve creditor coordination problems by providing a collective mechanism for settling creditor claims.[128] Collective action in insolvency law is necessitated by the 'common pool problem' which sets several entitled creditors with legitimate claims against a pool of limited assets.[129] The knowledge that the assets are insufficient to fully satisfy each claim triggers what is described as 'the race to collect', a potentially destructive move by creditors to beat others to enforce their rights against the company's assets, prematurely driving the debtor off the cliff. Collective action provides the space to determine how best to allocate and maximise value.

Individual enforcement actions also come at a cost to an enforcing party. In different jurisdictions (some more than others), debt enforcement actions are quite problematic and demanding in terms of time and money.[130] Furthermore, if parties are to get the best from individual enforcement, they would need to monitor the debtor closely.[131] Such monitoring comes with costs of its own. Jackson regards these costs as strategic

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would be, they would choose a system is one that caters to the welfare of the least-advantaged members of the society. This is what he refers to as the 'veil of ignorance'. John Rawls, A theory of Justice (1971).

[126] David Carlson, 'Bankruptcy Theory and the Creditors' Bargain' (1993) 61 U. Chi. L. Rev 486; this equal treatment is pareto efficient as no consensual creditor is left worse off. Other interests (non-consensual creditors) affected by insolvency are not considered part of the bargain. The Pari Passu sharing formula in insolvency law which provides that the creditors of a company in liquidation are to be paid rateably in proportion to their preinsolvency claims is another example. English Insolvency Act 1986, s 107 and Insolvency Rules 1986, r.4.181 Riz Mokal, 'Priority as Pathology: The Pari Passu Myth' (2000) 60 (3) Cambridge Law Journal 581 – 621.

[127] The force of the CBT as a positive rather than normative claim has not gone uncontested. Carlson,'Bankruptcy Theory (n 126) 480.

[128] Jackson, 'Entitlements' (n 101) 861.

[129] ibid 862-864.

[130] The World Bank Doing Business Reports provide information on debt enforcement around the world. The ease of doing business in about 190 countries is ranked based on criteria such as debt enforcement. Doing Business Report 2018 (Resolving Insolvency Methodology) <www.doingbusiness.org/methodology/resolving-insolvency> accessed 22 August 2018; see also Simeon Djankov and others, 'Debt Enforcement around the World' (2008) 116 Journal of Political Economy 1105.

[131] Jackson, 'Entitlements' (n 101) 862- 864.

costs that can be reduced by mandatory collective action.[132] For mandatory collective action to be effective however, the incentive for individual enforcement must be removed. Consequently, no creditor should be able to opt out of the collective procedure contractually or by other means.[133]

The CBT is committed to the maintenance of pre-insolvency entitlements. This means that insolvency law tries as much as possible to mirror the pre-insolvency rights of creditors (of course with the exception of individual enforcement rights) in a bid to eliminate strategic actions by creditors.[134] Only creditors whose claims originate from a contractual relationship should be included in the collective bargain.[135] This aversion to distributional motives in insolvency law has been debated by academics, particularly in relation to security interests.[136] With few exceptions, secured creditors are not subjected to the collective enforcement rule in the same manner as unsecured creditors. This is because they can look to their security which is considered outside the reach of the common pool. Underlying the priority of secured credit is the perceived efficiency of security interests in commercial lending.[137]

A popularly held view in Law and Economics is that secured creditors can charge lower interest rates because they are certain of their position in the event of the debtor's insolvency. For unsecured creditors, they can adjust to the uncertainty and any adverse effect of security interests on their claims, by charging higher interest rates.[138] For this reason, security interests are pareto efficient because no one is made

[132] ibid 861-863.
[133] ibid 866.
[134] Jackson and Scott (n 117) 158, 177.
[135] ibid 156
[136] Warren sites the CBT's preference for consensual creditors as an expression of distributional motives, one that seeks to be smuggled into the system through an analysis of allocative efficiency. Elizabeth Warren, 'Bankruptcy policymaking in an imperfect world' (1993) 92 Michigan LR 386; Elizabeth Warren, 'Bankruptcy Policy' (1987). 54(3) U. Chi. L. Rev 803-804; Korobkin makes a similar argument, Donald Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Colum. L. Rev. 717, 736-737.
[137] See Alan Schwartz, 'Security interests and bankruptcy priorities: a review of current theories' (1981) 10 (1) The Journal of Legal studies, 1-39 for both a summary and critic of these efficiency arguments.
[138] Jackson, 'Entitlements' (n 101) 868, Jackson and Kronman, 'Secured Financing and Priorities Among Creditors' (1979) 88 Yale L.J. 1143; Robert K. Rasmussen, 'Debtor's Choice: A Menu Approach to Corporate Bankruptcy' (1993) 71 Tex. L. Rev. 109; Randal C. Picker, 'Security Interests, Misbehavior, and Common Pools' (1999) 59 U. Chi. L. Rev 645-679; Alan Schwartz, 'The Continuing Puzzle of Secured Debt' (1984) 37 Vand. L. Rev. 1051; Alan Schwartz, 'Security Interests and Bankruptcy Priorities: A Review of Current Theories' (1981) 10 J. Legal Stud. 1; George G. Triantis, 'Secured Debt under Conditions of Imperfect Information' (1992) 21 J. Legal Stud. 225; David Gray Carlson, 'On the Efficiency of Secured Lending' (1994) 80 VA. L. REV. 2179; Schwarcz, 'The Easy Case for the

worse of as a result of the benefit to another.[139] They also argue that security helps to reduce the cost of credit for the borrower.[140] A security interest can help to prevent or reduce an inefficient run on the borrower's assets. Because the secured creditor has priority over all other creditors in relation to the security, there is no incentive for unsecured creditors to make a move on the assets if the company gets into financial trouble.[141] Additionally, secured credit enables a company to fund risky but profitable projects for which it would otherwise be unable to obtain loans.[142] Based on the efficiency arguments they make, law and economics scholars caution that tinkering with the priority rights of secured creditors would have a disruptive effect on non-insolvency behaviour (i.e. distort their incentives ex ante) and may impose costs 'elsewhere in the debtor-creditor' system.[143]

The efficiency attributed to security interests has been labelled as 'overrated' by some. Secured credit comes with costs of its own, which may cancel out its efficiency benefits. Bebchuk and Fried outline some of these costs.[144] First, they identify contracting costs, incurred in the process of negotiating and perfecting the security interest. In some jurisdictions, perfection of security could be a very cumbersome and costly process.[145] Costs may also be incurred in the process of 'policing the collateral' to ensure that the right of the security holder to reclaim the collateral above every other interest is not put at risk through an illegal transfer, destruction, waste or

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Priority of Secured Claims in Bankruptcy' (1997) 47 Duke Law Journal 425; Riz Mokal, 'The Search for Someone to Save: A Defensive Case for the Priority of Secured Credit' (2002) 22 Oxford Journal of Legal Studies 687.

[139] This is based on the assumption that all unsecured creditors are able to adjust to the risks created by security. However, even if some unsecured creditors do not adjust, security interests would still be kaldor-hicks efficient because the gainers- secured creditors and the company can afford to compensate the losers and still be better off. Alan Schwartz, 'Security interests' (n 138) Fn 7.

[140] Alan Schwartz has pointed out that the existence of security might have zero effect on interest rates if secured creditors charge less interest but unsecured creditors charge higher interest rate to make up for the increased risk. ibid 7-8.

[141] Picker (n 138) 645.

[142] A strong priority helps to balance the risk presented by such projects. Related to this is the signalling effect of security as a testament to the financial health of a company. Stephen Harris and Charles Mooney, 'A Property Based Theory of Security Interests: Taking Debtors' Choices Seriously' (1994) 80 Va. L Rev. 2021, 2033 & 2037; But Finch, *Corporate Insolvency Law* (n 102) 102 argues that this may encourage excessive risk taking to the detriment of unsecured creditors who have no buffer. Proponents also argue that secured credit helps to monitor the debtor and prevent debtor misbehaviours such as asset dilution. Triantis (n 138) 238-241.

[143] Warren, 'Bankruptcy Policy' (n 136) 804; Jackson, 'Entitlements' (n 102) 870; Timothy Muris, 'Opportunistic Behavior and the Law of Contracts' (1981) 65 MINN. L. REV. 521, 532-52.

[144] Lucian Bebchuk and Jesse Fried, 'The uneasy case for the priority of secured claims in bankruptcy' (1995) 105 Yale LJ 857.

[145] Chapter six gives an account of lenders' experience with security in Nigeria.

subordination.[146] Opportunity costs also arise because security interests may prevent the borrower from pursuing more efficient activities.[147]

Even in the absence of mandatory rules to that effect, enforcement difficulties may incentivise secured creditors to participate in the collective process. The rate and ease of enforcing security differs with jurisdictions.[148] For instance, enforcement is known to be particularly problematic in some developing jurisdictions.[149] This may provide a strong incentive for all creditors, including security holders, to seek the protection of insolvency law. Warren paints a picture:

> '…collateral may be hard to find. Some of it may be in another jurisdiction. The debtor may resist the creditor's self-help repossession, requiring the creditor to file a lawsuit. Some debtors seek restraining orders to prevent court-ordered repossession. State courts can be quick to restrain repossession and excruciatingly slow to give final effect to repo orders...Notwithstanding any contractual agreements, the debtor may sell the collateral or give it to another creditor to satisfy loan obligations'.[150]

While Warren's picture is realistic, it is noted that in such jurisdictions, there is often a systemic institutional weakness which also affects the administration of insolvency law. The implication of this is that insolvency law is not necessarily an attractive alternative as creditors may prefer to circumvent formal mechanisms altogether and explore other alternatives.[151] These institutional difficulties may also lead secured creditors to demand higher interests than they ordinarily would, considering that they often have the influence to do so.

2.3. Inclusive views of insolvency law

The CBT has been criticised most prominently for its exclusion of interests other than the creditors'. These criticisms have come from scholars who contend the utilitarian

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[146] Bebchuk and Fried, 'The Uneasy Case' (n 144) 875.
[147] ibid.
[148] Djankov and others (n 130) 5.
[149] ibid 40-42.
[150] Warren, 'Bankruptcy Policy' (n 136) 809; Kenneth N. Klee, 'Chapter 11: The Commercial Creditor's Best Friend' (1993) Com. Lending Review, 44, 48.
[151] Chapter six describes a circumvention of insolvency law and institutions by stakeholders in Nigeria. Ch 6, Section 2.

approach of the CBT and argue that more than being a collective mechanism for consensual creditors, insolvency law is also a loss allocation mechanism that spreads the losses from business failure among all affected parties, including but not limited to creditors.[152] Unlike the CBT which pursues the single value of efficiency through creditor wealth maximisation, these theories are driven by ideas of fairness, communitarian values and inclusivity.[153] The fairness element of this view of insolvency is both procedural and substantive. It not only requires a forum to accommodate the views of other interests, it also demands that the outcome of the process be fair to them.[154] They justify this distributive goal of insolvency law by arguing that there are other legitimate interests that deserve the protection of insolvency law apart from the interests of consensual creditors. Such interests include employees, the community,[155] taxing authorities, tort creditors and the company itself.[156] Although unified in the belief that there are other goals apart from efficiency that are worth pursuing, these theories are different because there is no consensus among them on what values insolvency law should seek to achieve and in what order of priority.[157]

Korobkin takes an all-encompassing view of insolvency and argues that the economic account of insolvency misidentifies the problem to which insolvency law responds. By making insolvency law solely about debt collection, proponents of the CBT suggest that insolvency law becomes redundant if creditors find a cheaper means of solving

[152]Karen Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 Wash. ULQ 1031; Korobkin, 'Rehabilitating Values' (n 136) 736-737; Warren, 'Imperfect World' (n 136) 336.

[153] Communitarian theory argues that insolvency law should not focus solely on protecting the private rights of creditors but should also consider the employees, suppliers, customers and the wider community. Karen Gross (n 152).

[154] Peter Walton, 'When is Pre-Packaged Administration Appropriate-A Theoretical Consideration' (2011) 20 Nottingham LJ 20 (2011) 3-8; the forum theory of insolvency considers the insolvency process as establishing a 'forum' in which all interests, monetary and non-monetary, affected by insolvency are recognised. Finch, *Corporate Insolvency Law* (n 102) 28-33.

[155] Karen Gross, *Failure and forgiveness: Rebalancing the bankruptcy system* (Yale University Press 1999); Taking Community Interests into Account in Bankruptcy (n 152).

[156] The rescue of distressed companies has come to be acknowledged as an important goal in insolvency because of the view that saving the company gives the other affected interests a chance of survival.

[157] Scholars fall on different points of the spectrum in terms of what values insolvency law should seek to pursue. While some consider insolvency law as responsible for capturing all the effects of financial distress- Korobkin, 'Rehabilitating Values' (n 136), others like Gross focus on community interests, a few strive to achieve some balance between efficiency and these other goals- 'Warren, 'Imperfect World' (n 136); Finch 'The measures of insolvency law' (1997) 17 OJLS 227.

the coordination problem.[158] Korobkin offers an alternative theory which views insolvency law as a 'response to the many aspects of financial distress-moral, political, personal, social, and economic- and, in particular, to the grievances of those who are affected by financial distress.' [159] These interests range from creditors, managers and shareholders to employees and the wider community.[160] He however offers no guidance on how these complex interests must be prioritised.[161]

Warren's multiple value approach on the other hand, admits that efficiency is an important normative goal in insolvency. Warren however maintains that the insolvency system is designed to cater for more complex situations than the protection of consensual creditors.[162] Larger social and economic issues arise as workers may lose jobs, taxing authorities may lose income, trade creditors and suppliers will lose customers and property owners will lose beneficial neighbours.[163] Without denying the value-enhancing characteristics of collective action in insolvency, she claims that insolvency laws are organised to minimise losses to the public following the failure of a business. This is done by forcing parties (consensual creditors) dealing with the debtor to bear the burden of its failure, thereby cushioning the effect of failure on other persons and interests. This would involve distribution from the common pool to the other interests thought deserving of protection. Warren meets the CBT on its terms and argues that consensual creditors are in the best position to bear the costs of insolvency, therefore it is more efficient to allocate the costs to them. Warren bases this argument on the premise that consensual creditors can make carefully considered lending decisions and monitor the debtor. Their ability to externalise their losses significantly blunts the incentive to carry out this monitoring.[164]

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[158] Evidence of effective allocation of control rights in debt contracts coupled with the increased role of distressed debt investors and informal restructuring discussed in the next chapter provide some support for this. Douglas Baird & Robert Rasmussen, 'The End of Bankruptcy' (2002) Stanford law review, John M. Olin Law & Economics Working Paper No. 173.
[159] Korobkin, 'Rehabilitating values' (n 136) 720.
[160] ibid 779.
[161] ibid 768 (He admits that the different political, social, moral and economic values are complex).
[162] Warren, 'Imperfect World' (n 136) 345.
[163] ibid 350.
[164] ibid 361.

The difficulty with Warren's premise is that it suggests that financial distress is almost always a result of mismanagement and can always be prevented by intensive monitoring.[165] Even if it were, not all consensual creditors are in a position to carry out this sort of monitoring. If the CBT is criticised for being too exclusive to consensual creditors, this argument suffers from a similar shortcoming in relation to non-consensual parties, as it attempts to limit the cost of insolvency to consensual creditors.

It has been argued that because they fail to provide clear guidance on how the different interests that they identify may be managed, the approaches that advocate for inclusion escape the narrowness of the CBT but also encounter the problem of indeterminacy.[166] Apart from the problem of indeterminacy, the inclusive views of insolvency have been criticised for their tendency for inefficient redistribution.[167] Such redistributions botch important marketplace arrangements, particularly the cost and availability of credit. Economic scholars argue that the choice of insolvency law should consider the ex ante incentives it creates for creditors rather than aiming to achieve fairness ex post. This is more so because distributional goals can be more efficiently achieved through other state instruments. Rather than overtaxing consensual creditors, the burden is more easily borne by tax payers and other insurance schemes.[168]

2.4. *Insolvency law and underlying policy.*

Insolvency regulation requires policy choices among different competing interests, by the stakeholders who are in the position to make these choices.[169] This means that insolvency law responds to a set of underlying values and are designed to promote these values by incentivising behaviours that do so. For example, US reorganisation

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[165] Finch, *Corporate Insolvency Law* (n 102) 91, Also, such monitoring may end up stifling the creativity of managers. See Gullifer and Payne, *Corporate Finance Law: Principles and Policy* (Hart Publishing, Oxford 2011) Ch 2.

[166] Finch, *Corporate Insolvency Law* (n 102) 48, 52.

[167] Robert K. Rasmussen, 'An Essay On Optimal Bankruptcy Rules And Social Justice' (1994) U. Ill. L. Rev. 1, 16; Barry Adler, 'Theory of Corporate Bankruptcy' (1997) 72 A." NYUL Rev. 72 343; John Armour, 'Should we Redistribute in Insolvency?' (2006) Available at SSRN 901451.

[168] For instance, mandatory insurance schemes or legislations aimed at compensating employees and tort victims. This has been done in the UK to some extent; see John Armour, 'The law and economics debate about secured lending: lessons for European lawmaking?' (2008) 5 European Company and Financial Law Review 11; Third Parties (Rights Against Insurers) Act 1930.

[169] Priority may be dictated by local culture, politics, interests of powerful local groups among other factors.

law grew organically out of a liberal, forgiving attitude towards debt and a culture rooted in capitalism, consumerism and entrepreneurship.[170] Also, France's strong history of state intervention in corporate affairs is reflected in its rescue-oriented insolvency law which tends to favour the preservation of jobs at almost any cost.[171] As gleaned from the discussion of insolvency theories, some of the choices to be made include the preservation of jobs versus protection of creditor rights and investment; the adoption of a pro-debtor approach or a pro-creditor one; having a wider communitarian or social purpose versus focusing on the welfare of residual claimants. Thus, if a country considers the availability of credit to corporate entities more important to its current development needs than the protection of employees, it is likely to choose pro-creditor insolvency laws that incentivise creditors to lend willingly and on favourable terms.

The implication of this premise is that while a set of principles and theories of insolvency have emerged out of the experience of a few influential countries over time; and while these theories and principles may have become popular enough to suggest that they are universal, the needs, values and priorities of jurisdictions can call for different approaches, whether in little or more significant ways. As Martin puts it, insolvency systems 'are value-laden and must be drafted with care to reflect the particular values of a culture.'[172]

Two developments challenge this proposition. The first is the aforementioned propagation of a set of insolvency norms globally. Chapter four considers that the drive towards global convergence of insolvency laws which persuades countries to adopt insolvency laws that are presented as ideal forms, can erode the connections between a country's values and its insolvency laws. One may argue that the decision to conform to global standards in this manner is in itself a policy decision. However, such a policy choice has less to do with insolvency regulation and is more connected

[170] Nathalie Martin, 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28(1) Boston College International & Comparative LR 5, 6-25, 29.
[171] ibid 46-47.
[172]ibid 5.

to a broad need for international approval or signalling to potential commercial partners that a country is open for business. It may then boil down to a mere choice of template without thinking in advance about what goals, needs and values must be met in insolvency regulation. But despite not making conscious policy decisions on the content of insolvency law, the transplant of an insolvency law imports underlying values and policy orientations with it. The question would then be whose values and policies they are, and whether they reflect or are compatible with local needs and values.

The second challenge is the subject of the next section. It is the contention that the relevance of law and policy to insolvency resolution is limited. Contractual theories propose that the inefficiencies in insolvency regulation can be eliminated by greater creditor control of the insolvency process. With the growing connection between private bargaining and financial distress resolution, they suggest that the role of insolvency law in the resolution of financial distress is exaggerated.[173] If this premise is accepted, arguments around theories and goals of insolvency law become less important, as the only guiding principle would be that creditors resolve corporate distress privately and as each case requires.

2.5. A contractual approach to distress resolution

A group of scholars, (referred to here as *contractualists*) have argued for a more prominent role for private contracting in insolvency.[174] Though based on the goal of efficiency, the contractual theories question the insistence of the early economic theories on a mandatory insolvency regime.[175] The contractualists see no reason for a hypothetical bargain when the creditors can make actual bargains. They are also unconvinced that the outcome of such actual bargains would necessarily be submission to a mandatory insolvency system. They however stand with the proponents of the CBT in rejecting the view that insolvency law should seek to achieve distributional goals.

[173] Armour, 'Law and Economics' (n 87) 31- 37.

[174] Alan Schwartz, 'A contract theory approach to business bankruptcy' (1998) 107 (6) The Yale Law Journal; Barry Adler, 'Financial and Political Theories of American Corporate Bankruptcy' (1993) 45 Stan. L. Rev. 311; Adler, 'World without Debt' (1994) 72 Wash. ULQ 72, 811.

[175] Armour, 'Law and Economics' (n 87) 10- 17.

Theories that call for the privatisation of insolvency have been formulated in a range of ways.[176] Broadly speaking, there are those who argue for complete privatisation of insolvency law, dispensing with every form of state control. Barry Adler imagines a world without debt, state collection or insolvency laws.[177] In this world, a financing structure which he terms the chameleon equity is used. Chameleon equity acts exactly like debt until the company is insolvent. Upon default, claims are converted into equity in a pre-agreed priority system. This would eliminate nearly all costs associated with formal insolvency laws. Also, the common pool problem does not exist because there is no right to collect upon insolvency.[178]

Some of the contractual proposals retain the state-controlled system but only as a default rule that parties may choose to opt out of.[179] Rasmussen suggests a menu option that allows debtors to choose what insolvency regime will apply to them ex ante. Included in the menu is the option that allows them to completely opt out of the insolvency regime and come up with their own framework.[180] This is a more efficient scheme because some firms have nothing to gain from a mandatory insolvency regime.[181] Rasmussen further argues that mandatory insolvency rules are inefficient because they worsen investment incentives. Creditors are wary to fund projects when they do not have the freedom to choose the optimal means of dealing with default.[182] Alan Schwartz's model also proposes the adoption of insolvency legislation as a default rule. For him, 'parties who feel themselves unable to foresee future events well enough to write insolvency contracts could use the default procedure while the others would not'.[183]

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[176] The claims of the contractualists are foreshadowed by earlier arguments in the law and economics field. For example, Douglas Baird in his article, 'A world without bankruptcy' (1987) 50 (2) Law and contemporary problems 173-193, imagined a world without insolvency to isolate insolvency issues from other issues and argue against redistribution.
[177] Adler, 'Financial and Political Theories' (n 174); 'World without Debt' (n 174) 811; 'Theory of Corporate Bankruptcy' (n 167) 343.
[178]ibid; Bradley and Rosenzweig suggest a similar structure which they tag 'contingent equity' which involves a transfer of the firm to 'creditors' upon default by the issuance of this contingent equity which would wipe out. See Michael Bradley & Michael Rosenzweig, 'The untenable case for Chapter 11' (1992) Yale Law Journal 1043-1095.
[179] ibid.
[180] Rasmussen, 'Debtor's Choice' (n 138) 101.
[181] For example, a firm with a sole asset and a secured creditor.
[182] Rasmussen, 'Debtor's Choice' (n 138) 116-120.
[183] Schwartz, 'A Contract Approach' (n 174) 1839.

2.5.1. Ex ante and ex post efficiency

Although the options proposed by the contractualists vary in their details, they are unified by a set of norms.[184] Like the law and economics scholars, they maintain that the cost of debt capital will be reduced as a result of an all-round reduction in the cost of insolvency.[185] Contractual insolvency is both transaction cost and ex post efficient because it saves time and money spent determining the best course of action for the failing company, administrative costs that go into judicial action and deadweight costs for insolvency practitioners, attorneys and accountants.[186] They also argue that private insolvency will eliminate insolvency loss in the form of redistribution to employees, tax authorities and regulatory bodies under current law. All these cost savings enhance creditor returns and ultimately result in a reduction in the cost of credit. Contractualists admit that there would be costs at the point of contracting, but they argue that these costs are trivial compared to the costs of insolvency legislation.[187] This is more so because companies already negotiate commercial contracts extensively, often in reaction to perceived insolvency risk. Therefore, contract insolvency is not expected to add any significant level of costs to these negotiations.

2.5.2. Freedom of contract

Traditionally, two normative goals have wrestled for dominance in insolvency scholarship- creditor-wealth maximisation and distributive justice. Contractualists seek to throw party autonomy/ freedom of contract into the mix.[188] Commercial parties ought to freely decide not only the terms of their financing but also how any resulting distress should be resolved. They argue that where a pre-insolvency contract

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[184] Another group of scholars have suggested preinsolvency waivers rather than a complete privatisation of insolvency procedure. This involves an agreement between a debtor and its creditor to waive certain insolvency protection in exchange for forbearance or additional finance. Steven Schwarcz, 'Rethinking Freedom of Contract: A Bankruptcy Paradigm' (1998) 77 Tex. L. Rev. 515; Daniel B. Bogart, 'Games Lawyers Play: Waivers of the Automatic Stay in Insolvency and the Single Asset Loan Workout' (1996) 43 UCLAL. REV. 1117.

[185] Schwartz for instance argues that 'the only goal of an insolvency law should be to reduce the cost of debt capital. Alan Schwartz, 'Bankruptcy contracting reviewed' (1999) 109 (2) The Yale Law Journal 343.

[186] Bradley and Rosenzweig, 'The Untenable Case' (n 178) Parts II and III.

[187] In admitting that the enforcement of his proposed Chameleon Equity model would not be costless, Adler acknowledges that 'Disputes would arise over liability and remedy just as they do now with respect to traditional debt and equity contracts' however, the 'enforcement costs of alternative contracts would be less than current enforcement costs, which include bankruptcy reorganization expense'. Adler, 'World without Debt' (n 174) 817.

[188] Schwarcz particularly harnesses the idea of freedom of contract for his waiver model. Steven Schwarcz, 'Rethinking Freedom' (n 184) 515-604.

is voluntary, intelligently made, for value and between parties of equal bargaining power, it should be enforceable. This is because 'the law presumes that business people are fully competent to enter into contracts and obligate themselves to perform in any manner they wish'.[189] Adequate justification must be provided for any incursion into contractual freedom and no insolvency theory has provided this justification.[190] The paternalistic premise of the CBT is faulty because the collective action problem may be eliminated by private action. Also, the protection of broader interests can be more efficiently achieved outside insolvency law.

2.5.3. Social welfare

Some contractualists attempt to incorporate a social welfare perspective into their narratives. They speak about the social costs and benefits of the systems they propose, thereby drawing an intersection between the seemingly mutually exclusive goals of fairness and efficiency. They argue that suboptimal insolvency decisions adversely affect social welfare. Bradley and Rosenzweig for example, maintain that current legislation reduces social welfare because it enhances the wealth of managers at the expense of creditors and this affects the cost of credit.[191] When insolvency costs are saved, these cost savings are passed on to all affected interests in the form of lower interest rates and increased availability of credit which means better business for the firms, its customers, suppliers and employees.[192] Rasmussen also argues that treating insolvency as a default rule aligns with notions of social justice.[193] Rasmussen seeks to equate efficiency with fairness by arguing that adopting a insolvency regime that is designed to promote efficiency would inadvertently promote social justice. In Rasmussen's view, insolvency legislation ties parties to suboptimal arrangements and the cost of this is ultimately borne by the creditors, the borrowing firms and those that deal with them.[194]

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[189] ibid 550.
[190] ibid 546-552; Rasmussen, 'Debtor's Choice' (n 138) 62.
[191] Bradley and Rosenzweig, 'The Untenable Case' (n 178) 1045-1049, 1088-1099.
[192] ibid; Adler also speaks about the social costs of different responses to financial distress- legislation, market-based valuation and contractual insolvency. He concludes that the first two often yield socially inefficient results because of the costs associated with them. Adler, 'A Theory of Corporate Bankruptcy' (n 174) 367-375.
[193] Rasmussen, 'Debtor's choice' (n 138) fn 53; 'Optimal Bankruptcy Rules' (n 167) 16.
[194] Rasmussen, 'Optimal Bankruptcy Rules' (n 167) 19-37.

2.6. Criticisms of the contractual approach.

Unsurprisingly, a good amount of the criticism received by the contractual theories has come from scholars that argue for a wider role for insolvency law. They contend that this system is bound to shift the costs of insolvency from strong creditors to weak ones such as tort victims and unsophisticated creditors.[195] Although they aim to point out the impracticalities and cost implications of some of the contractual models,[196] their criticisms largely revolve around these fairness concerns.

In response to calls for private insolvency, scholars like Warren, Korobkin and LoPucki argue with the same force they have thrown at the CBT that the contractual theory produces the undesirable outcome of leaving non-adjusting creditors and other third parties stranded.[197] LoPucki particularly opposes their attempt to equate the welfare of consensual creditors with social welfare. Citing instances of current experience with bargaining such as private workouts where secured creditors often fail to include unsecured creditors, LoPucki maintains that private bargaining is motivated by the desire of stronger creditors to redistribute wealth from weaker creditors.[198]

It has also been pointed out that secured credit is an instance of pre-insolvency contract. As Steven Schwarcz notes, 'a certain type of pre-insolvency contract, unrecognized as such, has long been a permissible private law exception. Whenever a company gives collateral to a creditor, it enters into a pre-insolvency contract in the form of a security agreement, which prefers that creditor at the risk of prejudicing

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[195] Donald Korobkin, 'The Unwarranted Case Against Corporate Reorganization: A Reply to Bradley and Rosenzweig, 78 Iowa L. Rev. 669 (1993) ; Lynn M. LoPucki, 'Strange Visions in a Strange World: A Reply to Professors Bradley and Rosenzweig' (1992) 91 Mich. L. Rev. 79; Elizabeth Warren, 'The untenable case for repeal of Chapter 11'(1992) 102 (2) 437-479; Lynn LoPucki, 'Contract Bankruptcy: A Reply to Alan Schwartz'(1999) 109(2) The Yale Law Journal 317-342.; 'Contracting Revised: A Reply to Alan Schwartz's New Model (1999) 109 (2) 365-379; Elizabeth Warren and Jay L Westbrook, 'Contracting out of bankruptcy: an empirical intervention' (2005) Harvard Law Review) 1197-1254 (Empirical Intervention); Susan Block-Lieb, 'Logic and Limits of Contract Bankruptcy' (2001) The U. Ill. L. Rev.503.

[196] Korobkin particularly focuses on Bradley and Rosenzweig's contingent equity arguing that it is bound to create implementation and enforcement costs both ex ante and ex post, Korobkin, 'A Reply to Bradley and Rosenzweig (n 195); LoPucki, 'A Reply to Schwartz' (n 195).

[197] LoPucki, 'A Reply to Schwartz (n 195) 339-342; Block-Lieb, 'Logic and Limits' (n 195) 525-528.

[198] LoPucki, 'A Reply to Schwartz' (n 195) 340-341.

nonconsenting creditors and impairing the company's ability to reorganize'.[199] Warren and Westbrook argue that secured credit, which currently operates within the limits of insolvency's mandatory rules, already shifts some of the costs of insolvency to weaker interests. It would be catastrophic to further worsen the situation by withdrawing what little protection they have under insolvency law.[200]

Also, critics challenge the argument that contractual systems are less costly to administer and enforce.[201] While some enforcement costs might be saved, private action has its own costs such as the internal decision-making costs among parties. Contractualists either underestimate these costs or remain vague about how to deal with them. [202] Warren and Westbrook argue that unlike a relatively straightforward security interest, pre-insolvency contracts are bound to vary very widely in terms of content and structure. A contractualist proposal would embrace many alternative insolvency schemes. Warren and Westbrook predict that this would further increase the information costs for other creditors.[203]

Clearly, the contractual proposals have their shortcomings but as LoPucki argued in relation to Schwartz's model, 'Schwartz's failure to deliver a model of insolvency contracting that works does not mean that such a model is impossible'.[204] The next section explores what these possibilities might be.

2.7. A practical outlook on the contractual approach.

The theoretical debate generated by the contractual theories has been described as *entertaining* largely because of their unconventional proposals.[205] Most of the literature on insolvency theory have emanated from the United States. Consequently, they are

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[199] Schwartcz, 'Rethinking Freedom' (n 184) 520.
[200] Warren and Westbrook, 'Empirical Intervention' (n 195) 1216-1218; LoPucki, 'A Reply to Schwartz' (n 195)541.
[201] Korobkin, 'A Reply to Bradley and Rosenzweig' (n 195) 675; Block-Lieb, 'Logic and Limits' (n 195).
[202] For example, Block-Lieb argues that 'chameleon Equity contracts drafted along the lines suggested by Adler would be complex and costly to implement. Block-Lieb, 'Logic and Limits' (n 195) 550.
[203] Warren and Westbrook, 'Empirical Intervention' (n 195) 1216-1219; With the innovative use of asset securitisations in project finance and syndicated lending, secured interests are increasingly becoming less about an identifiable asset and more about contractual agreements that act like security. Securitized transactions involve a process of packaging and selling receivables in the form of securities. These transactions are even more difficult to monitor by other persons dealing with a borrowing firm and they have been the subject of criticism. See LoPucki, 'A Reply to Schwartz' (n 195) 541; Steven Schwarcz, 'The Alchemy of asset securitization' (1994) 1 Stanford Journal of Law, Business, and Finance 133; Lois Lupica, 'Asset Securitization: The Unsecured Creditor's Perspective' (1998) Texas Law Review 76.
[204] LoPucki, 'A Reply to Schwartz' (n 195) 340.
[205] ibid; Warren and Westbrook, 'Empirical Intervention' (n 195) 1254.

heavily informed by insolvency law and practice in that jurisdiction. When considering the value of the theoretical propositions of the contractual theories therefore, it is important not to get carried away with the US-centric view of insolvency. As Armour and Deakin note, it is too soon to conclude on the impracticality of the contractual theory as its application is yet to be given sufficient consideration in the context of jurisdictions with less restrictive insolvency systems.[206] This is true of the United Kingdom for example, where there has been less contribution in terms of theoretical analysis but useful lessons on the practical operation of contractual insolvency.[207] Franks and Sussman point out in their seminal research that the UK insolvency system contrasts strikingly with US law and may be described as 'contractual' to a large extent. They note about the UK system, 'insolvency law is little more than the strict enforcement of the default clauses in the debt contract, as negotiated ex ante by the lender and the borrower.'[208]

Unlike US law which is heavily regulated by the Bankruptcy Code and courts, the UK has traditionally been less restrictive with scarce court involvement.[209] Although limited to small and medium businesses in the UK, Franks and Sussman's research provides some insight into the insolvency privatisation debate. First, they show how the debt structure of a company without more, can determine the outcome of the insolvency process. This is usually because parties are able to prioritise and allocate liquidation rights with less restrictions.[210] Before 2003, the floating charge holder had extensive decision-making powers and enjoyed substantial priority in the insolvency process.[211] The floating charge holder was able to appoint an administrative receiver who would act on their behalf and had the powers to realise the company's assets by effecting a private liquidation. Unlike US insolvency legislation which tends to dilute

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[206] Armour and Deakin, 'Norms in Private Insolvency' (n 103) 27.
[207] Julian Franks and Oren Sussman, 'Financial distress and bank restructuring of small to medium size UK companies' (2005) 9 (1) Review of Finance 65-96; John Armour, 'Should We Redistribute? (n 167); John Armour, Audrey Hsu and Adrian Walters, 'The costs and benefits of secured creditor control in insolvency: Evidence from the UK' (2006) 8 (1) Review of Law and Economics (Secured Credit Control).
[208] Franks and Sussman (n 207) 66.
[209]In their study of 542 companies for example, they find only one incident of litigation, ibid 73.
[210] Armour, 'Should we redistribute?' (n 167).
[211] Changes made by the Enterprise Act watered down both the control and priority of the floating charge holder. For example, some preferential creditors are now set above floating charge holders, also a 'prescribed part' is ring-fenced from assets subject to a floating charge and set aside for payment to unsecured creditors. Insolvency Act, ss 72A & 176.

the powers of secured creditors by giving managers and the court extensive decision-making powers, the balance of power was considerably tilted in favour of the senior security holder in the UK.

Secondly, they show that the common pool problem can be controlled by pre-insolvency contracts. With the controlling creditor having substantial control of liquidation rights, they found no evidence of asset grabbing or creditor runs as predicted by the CBT. Like the contractualists propose, 'the problem of asset grabbing has a contractual solution, which is successfully applied in practice'.[212] From their studies, debt contracts in the U.K. were drafted to avoid coordination failures through a careful allocation of liquidation rights. A senior lender who typically took a floating charge over all the company's assets and had a relationship with the debtor was often in the best position to coordinate the insolvency process.

Even in more restrictive jurisdictions like the US where insolvency procedures are heavily supervised by the court and the law is pro-debtor, private bargaining plays a bigger role than is often acknowledged. The US National Bankruptcy Review Commission observed that 'lenders increasingly include contingencies in loan documents, indentures, and workout, forbearance, and settlement agreements that waive certain rights of the borrower upon filing for bankruptcy'.[213] With time, the frequency and sophistication of financial arrangements that have the effect of bypassing bankruptcy law have increased.[214] Lending contracts determine bankruptcy outcomes more clearly by allocating control rights among creditors. For instance, there are provisions that allow a creditor to appoint an outsider as director or turnaround manager.[215] Also, venture capital contracts would usually specify the movement of control rights in the event of distress. These fund providers may hold

[212]Franks and Sussman (n 207) 67.

[213] National Bankruptcy Review Commission, 'Bankruptcy: The Next Twenty Years' (1997) 484-485; Schwarcz, 'Rethinking Freedom' (n 184) 520.

[214] Baird & Rasmussen, 'The End of Bankruptcy' (n 158). Baird and Rasmussen contemplate the gradual demise of the US chapter 11 stating that large firms hardly use it anymore except as a vehicle for finalising pre-arranged plans; The ABI considers the decrease in the use of Chapter 11 and attribute it to factors like costs and financial globalisation. The American Bankruptcy Institute (n 213) 18.

[215] The growing popularity of the position of a Chief Restructuring Officer is an example. See Todd Zoha,' A Primer on the Chief Restructuring Officer (CRO) (11 September 2017) Commercial Bankruptcy Alternatives Americas Restructuring and Insolvency Guide 2008/2009) 200.

the power to change management if the company shows signs of distress.[216] Additionally, with the growing popularity of Distressed Debt Investors (DDIs) who specialise in buying off claims in distressed companies, creditors can now exit the bankruptcy process more easily.[217]

2.8. Achieving the goal of fairness

Fairness concerns dominate the resistance to both the CBT and the contractual approach to insolvency. The view that certain interests, other than creditor interests deserve legal protection is not unfounded. However, developments in insolvency practice suggest the need to revisit how these fairness concerns are addressed.

Professors Westbrook and Warren present an empirical account with which they intended to test the efficiency claims of the contractualists.[218] Their arguments however provide little or no new knowledge about contractual insolvency specifically. Their work focuses on the thoroughly-debated fact that certain creditors do not adjust properly or at all.[219] In reaching this conclusion, they analyse data from 40per cent of the business insolvency cases filed in the US in 1994 and a smaller amount of cases filed in 2002.[220] They find that trade creditors make a 'substantial' percentage of the creditors and remain unpaid in 75.6per cent of the cases. For tort victims, they admit the difficulty in determining for sure what percentage they constitute as the companies' books hardly described tort claims in detail and would typically lump them into 'unliquidated or unknown' amounts.[221] They record that employees are not listed as creditors in more than 90 per cent of the cases, suggesting that employers were meeting their payrolls consistently. In total, they conclude that pre-insolvency contracts are likely to leave at least 20 maladjusting creditors stranded in each case as

[216] Baird and Rasmussen, 'The End of Bankruptcy' (n 158) 30.

[217] Discussed in more detail in the next chapter. Sarah Paterson, 'Rethinking the Role of the Law of Corporate Distress in the Twenty-First Century' (2014) LSE Law, Society and Economy Working Papers 27/2014 11; Goldschmid (n 94) 191,297. These developments in bankruptcy practice lend some credence to contractual theories that advocate for insolvency legislation as a default rule that parties can opt in and out of depending on their ability to resolve financial distress efficiently.

[218] Warren and Westbrook, 'Empirical Intervention' (n 195) 1198-1204.

[219] Sefa Franken, 'Three Principles of Transnational Corporate Bankruptcy Law: A Review' (2005) 11(2) European Law Journal 232-257; Finch, *Corporate Insolvency Law* (n 102) 99-101.

[220] Warren and Westbrook, 'Empirical Intervention' (n 195) 1220.

[221] ibid. About 8-8 % were so listed. They however conclude that reality lies between the boundaries of 1% and 25.5% of claims having at least one tort creditor.

they do not envisage that these creditors would be involved in negotiations with the company.

Armed with these facts, they conclude that contractualists have 'given us an entertaining debate, but it is time to move on.'[222] For many reasons however, it is far from clear that Warren and Westbrook's empirical intervention has settled the matter. In fact, more questions linger. First, although they declare an intention to focus on efficiency rather than principles of fairness in making their arguments against contractual insolvency,[223] their arguments ultimately border on fairness. They go to lengths to show that a high percentage of weakly adjusting creditors will be the ultimate losers and such imbalance is clearly unfair. They do not show how or why this outcome is inefficient.[224] They do claim that maladjusting creditors are too weak to demand good bargains for themselves and this suggests a disposition to raising the cost of credit ex ante. However, from their data, employees were hardly classified as creditors, and even if they were, the research does not show how protecting employee claims achieves an efficiency rather than fairness goal. If one agrees that the objections are mostly based on fairness even when they claim to be efficiency-based, it becomes important to question whether current insolvency policy addresses these concerns sufficiently.

It must be recognised that fairness can be fluid and the ideas about what is fair in different circumstances should neither be left to intuition or assumed as fixed.[225] For instance, fairness concerns in a restructuring would be different from concerns in liquidation.[226] Fairness to one group may be perceived as producing unfair results for another. Even among the same group in a restructuring or liquidation, fairness concerns can differ based on the size and business of the companies involved.[227] Also,

[222] ibid 1254.
[223] ibid 1203.
[224] A similar argument may be applied to the claim of tort creditors.
[225] Sarah Paterson, 'Debt restructuring and notions of fairness' (2017) 80(4) The Modern Law Review 600-623.
[226] As the next chapter discusses, the aim in debt restructuring is not to end the company's life, and creditors are often in the driver's seat of this process. Fairness concerns are less about the inclusion of wider interests such as communities, prospective creditors etc, and more about balancing the rights of parties involved in the restructuring process.
[227] Paterson argues that the fairness often has a different quality depending on whether the company being restructured is an SME, large companies and financial institutions, the focus of fairness concerns can differ. The focus for SMEs might be the creditors and achieving procedural and distributional fairness for them. For larger

different jurisdictions have different experiences in terms of groups that truly need protection. Armour reports from an empirical study conducted in the UK from 1999-2000 that none of the insolvency practitioners interviewed had ever had to deal with significant tort liabilities in relation to insolvency cases conducted.[228] The alteration of long-standing rules can be daunting, but it is by no means impossible. A good example of how such a change has been made is with the removal of the preference of tax authorities in the UK. While they remain classified as non-adjusting creditors that require protection in insolvency under US law, the UK has applied the good logic in altering their preference, considering that the government is the ultimate adjusting creditor.[229] Thus, in the process of formulating insolvency legislation, it is important to identify what the goals of the law are and the immediate interests involved, in order to ensure that the right fairness concerns are formulated into the law.

Given the evidence that strong creditors continue to device ways to circumvent the insolvency system, it is highly likely that the in-built protections in existing law do not always serve their purpose.[230] Armour cautions that redistributions to so-called non-adjusting creditors hardly ever get to the intended beneficiaries. There is a risk of adjusting, unsecured creditors free-riding on benefits intended for non-adjusting creditors.[231] Armour concludes that, 'this has resulted in relatively little money reaching the intended beneficiaries of the statutory redistribution. It has also engendered significant costs: the direct costs of litigation and the opportunity costs of a constrained choice of financial structures'.[232] Surely, fairness concerns among

companies however, the focus might shift to how restructuring rules affect the health of the credit market and in many cases the welfare of the aged. Where financial institutions are concerned, there are fairness implications for taxpayers that do not arise in other types of restructuring. Paterson, 'Notions of Fairness' (n 225) 607 - 617.

[228] Armour, 'Should we redistribute? (n 167) 34, John Armour and Sandra Frisby, 'Rethinking Receivership' (2001) 21 Oxford Journal of Legal Studies 73.The situation may differ in the US where compensation culture is arguably higher.

[229] As Armour argues in relation to the deductions made from floating charges in the UK, parties are expected to structure their transactions to avoid the redistributive effects of the law. Armour, 'Should we Redistribute?' (N 167) 10-11, 25; Insolvency Act 1986, ss 40, 175, 386 and Sch 6, Sch B1 para 99(5). Preference of crown over unpaid taxes has been abolished following Enterprise Act 2002.

[230] For example, Akintola recently found that lenders in the UK increasingly employ factoring arrangements. In 1087 transactions studied, 528 factoring agreements were found. K Akintola, 'What is Left of the Floating Charge? An Empirical Outlook' (2015) 7 *JIBFL* 404-405 This typically involves taking a fixed charge over receivables thereby taking what is essentially a floating charge outside the ambit of the law.

[231] Armour, 'Should we redistribute?' (n 167) 27-28.

[232] ibid 1; See also, John Armour, Audrey Hsu and Adrian Walters, 'The costs and benefits of secured creditor control in insolvency: Evidence from the UK' (2006) 8 (1) Review of Law and Economics 101-135. In an empirical

consensual creditors remain, as there is no guarantee that powerful creditors will not attempt to subordinate the claims of weaker creditors. However, if interests that can be better protected outside insolvency law are taken out of the equation, more clarity can be achieved in achieving fairness among consensual creditors.

Conclusion

This chapter considers debates about the goals and structure of insolvency law. The theoretical perspectives revolve around the goals of coordination, efficiency and fairness. While some theories focus on consensual creditors and their interests and others advocate for the inclusion of wider interests like communities and employees in the resolution of financial distress, some advocate for private bargaining in the resolution of financial distress. The design of insolvency frameworks in different jurisdictions is informed by the prevailing underlying values and policy goals. At the same time, pressure created by the propagation of certain insolvency norms around the world, which are discussed later in the thesis, suggest that these differences are not significant enough to preclude convergence.

The chapter considers proposals from contractualists which suggest that insolvency law need not be mandatory, as creditors can effectively determine the outcome of financial distress by contract before it occurs. The arguments against a contractual insolvency system largely originate from fairness concerns and they inform the legal restrictions placed on creditor control. However, the role of private bargaining in insolvency law is more prominent than the traditional theories admit.

The chapter discusses the use of contract pre-insolvency, in the UK and the US and finds that the proposals have some application in practice. Often, restrictive rules of insolvency law are keenly resisted by creditors through innovative structuring of financial structures to avoid the redistributive effects of insolvency law. Efforts to

study conducted to determine the effects of the changes to the floating charge, their core finding was that while the amount of recoveries was vastly improved in administration, these benefits were immediately lost in the costs of the procedure.

protect broad interests through the imposition of restrictive rules and taxing consensual creditors often meet with resistance from consensual creditors. Resistance comes in the form of ex ante innovative structuring of financial structures to avoid the redistributive effects of insolvency law, complete circumvention of the law by selling off debt claims to distressed debt investors, pre-packaged deals and informal and semi-formal restructuring.

The chapter finds that insolvency law does not always achieve its goals, especially those driven by notions of fairness. Thus, in a world of resistant creditor control and financial innovation that may not have been contemplated by the traditional insolvency theories, there must be an honest assessment of the goals that insolvency law can realistically achieve and the most efficient ways to achieve them. As the next chapter discusses, alternatives to insolvency law are becoming more prominent. Debt restructuring is one of those alternatives and it has private bargaining at its core, even though the law also plays a role in the process.

CHAPTER THREE

CORPORATE DEBT RESTRUCTURING: AN EMERGING RESPONSE TO FINANCIAL DISTRESS

Introduction

The previous chapter considered theoretical perspectives of insolvency regulation including the recent debates about contractual insolvency. As the law and practice of corporate insolvency expands beyond liquidation to capture the rehabilitation of financially distressed companies, debt restructuring has gained more prominence. This chapter situates debt restructuring within previous discussion about the the role of the law and the place of private bargaining in the resolution of financial distress.

The chapter finds that debt restructuring is often compatible with a corporate rescue aim, but creditors are ultimately driven by the need to achieve the best results for themselves. The use of purely private workouts, which are largely within creditors' control, demonstrates the operation of a contractual approach in distress resolution. True to Korobkin's observation, insolvency law may be rendered redundant if creditors find a cheaper means of resolving financial distress.[233]

However, the role of the law cannot be ruled out, as bargaining is done in the shadow of the law, and this is not limited to insolvency law. Also, private workouts have shortcomings that restructuring law can ameliorate. The chapter also finds that as financial innovation and globalisation intensify, it becomes more difficult for economies to depend on purely contractual mechanisms. Thus, informal and formal restructuring present as a continuum with varying degrees of formality. To combine the relative advantages of both informal and court-supervised work-outs, stakeholders commonly opt for semi-formal arrangements, widely inspired by the US Chapter 11 pre-packaged reorganisation procedure.

Acknowledging the need for restructuring laws, the chapter discusses some key elements of restructuring frameworks- commencement, control, decision making, restructuring plan and restructuring finance. It considers the different ways by which

[233] Korobkin, 'Rehabilitating Values' (n 136) 736-737

jurisdictions address these elements, the levels of court involvement and the factors that inform these choices. The chapter finds that powerful creditors in most jurisdictions are often able to influence the outcome of a restructuring, particularly when they are in a position to fund the process. Contrary to what the CBT envisages, creditors are able to bargain their way out of the collective process, by selling their claim to a distressed debt investor, for example. The chapter highlights some implications of different choices in the design of restructuring law for developing economies, emphasising that existing institutional infrastructure be considered as these countries embark on insolvency law reform.

The chapter is divided into four sections. The first section describes debt restructuring, and the relationship between restructuring and corporate rescue. The second section discusses informal debt restructuring drawing from the experience in countries like the UK with the London Approach and variants of it in other jurisdictions. The third section examines the role of law and the courts in debt restructuring. The fourth section highlights the key elements of a restructuring framework and the implications of different alternatives in the design of restructuring frameworks, particularly for developing countries.

3.1. Debt restructuring and corporate rescue: one side of the same coin?

There are two broad options open to a financially distressed company, liquidation and restructuring.[234] Liquidation describes a situation where decisionmakers resolve to dissolve the company and strip its assets. Here, the business of the company is no longer considered viable. Consequently, some or all the existing stakeholders who finance the company no longer wish to support it and new financiers cannot be found.[235] In a restructuring, most of the existing financial stakeholders wish to remain invested in the company but must agree a new bargain (because their old bargain no longer accurately reflects the risks of the business).[236]

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[234] Also referred to as reorganisation popularly associated with the US Chapter 11 reorganisation procedure. Paterson, 'Rethinking the role of the law' (n 217) 2-4

[235] ibid.

[236] ibid. Payne, 'Debt Restructuring' (n 91) 2

Debt restructuring is strictly speaking, financial restructuring which involves the rearrangement of a company's debt obligations including the postponement of imminent liabilities, the conversion of fixed liabilities to more flexible ones (such as a debt-for-equity swap and debt asset swap), debt write-downs, debt forgiveness or waiver. Though the term debt restructuring suggests that it is merely the debt obligations of the company that are being restructured, it is likely to be accompanied by some restructuring of the company's capital structure and or operations.[237] This is because while mere debt restructuring without more can be useful for giving the company enough space to recover, a distressed company may often require in addition to the restructuring of debt obligations, a restructuring of its corporate activities.[238]

Of the different normative goals of insolvency law, corporate rescue has gained considerable global attention.[239] Corporate rescue prescribes that businesses be rehabilitated and offered a second chance if they are still economically viable.[240] This raises the assumption that where viable companies are concerned, the goal of corporate rescue is always driving the response to financial distress, including restructuring. Thus, frameworks like the US Chapter 11 and the UK administration procedure are often referred to as corporate rescue laws.[241] The preoccupation with giving viable companies a second chance suggests that restructuring law gravitates away from the efficiency-focused goal of the CBT to give the health of the company primacy over the interests of consensual creditors. This has been the subject of controversy among the competing theories of insolvency.

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[237] Debt restructuring in this chapter captures the restructuring of debt obligations and other restructuring that are incidental to this.

[238] Adolfo Rouillon,'Formal Processes and Alternative Mechanisms in International Initiatives on Insolvency' in Rodrigo Olivares-Caminal (ed), *Expedited Corporate Debt Restructuring: An International Comparative Analysis* (Kluwer Law, 2007) 3.

[239] Helped along by the series of global financial crises, corporate rescue has been stamped with the seal of legitimacy in the global bankruptcy script. Halliday and Carruthers, *Bankrupt* (n 2) 43.

[240] As discussed in the introductory chapter, this is financial distress as opposed to economic distress. See Baird, 'Bankruptcy's Uncontested Axioms' (n 94) 573-599; Goldschmid, 'More Phoenix than Vulture' (n 94) 191, 198.

[241] There are other frameworks that are used for restructuring such as the UK Company's Voluntary Arrangement (CVA) and the scheme of arrangement which is not an insolvency device but has been used for restructuring both in the UK and other jurisdictions like Hong Kong. See Booth, Briscoe and Smart, 'Corporate Rescue in Hong Kong' in Olivares-Caminal (ed), '*Expedited Restructuring*' (n 238) 299-322.

While antagonists of the CBT attempt to lay claim to rescue law as evidence of insolvency law's recognition of broader interests,[242] law and economics scholars have attempted to provide economic justifications for restructuring law. Left to them, restructuring is set up to achieve the same economic goals as liquidation. The choice between a piecemeal sale and a restructuring is strictly connected to the option that generates more value for creditors at the least cost. In other words, the choice that achieves ex post efficiency.[243] Where there is a going concern surplus to be derived from keeping the company together, then the rational choice for creditors is restructuring. Outside this, they reject values such as preservation of jobs and businesses as independent goals worth pursuing.[244] The problem with giving these goals priority in insolvency law is that in the absence of an assessment that a company has a going concern surplus, restructuring attempts will ultimately fail, but not before resources have been wasted.[245] As Armour argues,

> 'In many cases of business insolvency, the firm is 'economically distressed'—that is, its assets are worth more in some other use. Under such circumstances, there will be no necessary synergies to liquidating the firm's assets together, as opposed to piecemeal. Staying secured creditors will not lead to higher realisations for the firm's assets. It will, however, impose delay costs on secured creditors, and hence a net social loss. To be sure, it may not be apparent at the commencement of insolvency proceedings whether a going concern exists.'[246]

Warren also concurs that restructuring should only be pursued when the cost of achieving it is less than the value obtained. In terms of conflicting values, Warren

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[242] Korobkin rejects the economic approach to restructuring, arguing that restructuring is not solely aimed at solving economic problems. Rather, it creates an avenue for a rehabilitation of the firm's values and a coherent vision of its aims. The outcome would not matter if this is successfully achieved. Korobkin 'Rehabilitating Values (n 136) 739-742. Riz Mokal, 'The Authentic Consent Model: contractarianism, Creditors' Bargain, and corporate liquidation' (2001) 21 Legal Studies 400, 23 (argues that such 'benevolence is arbitrary and misguided')
See Jackson, *The Logic and Limits* (n 121) 211; Douglas Baird, 'The uneasy case for corporate reorganizations' (1986) 15(1) The Journal of Legal Studies 136-139; Schwartz, 'A Contract Theory' (n 174) 1807.
[244]Baird, 'The Uneasy Case (n 242) 137; Schwartz 'A Contract Theory (n) 1807; Rasmussen, 'Optimal Bankruptcy Rules' (n 167) 16.
[245] Rasmussen, 'Optimal Bankruptcy Rules' (n 167) 19-37.
[246]Armour, 'Debate about secured lending' (n 168) 20.

admits that 'the protection given to parties without formal legal rights is derivative in nature and limited in scope.'[247]

One contention here is whether a company may only be 'rescued' by making certain operational changes and debt renegotiations, leaving it to carry on operations as the same corporate entity (company rescue); Or whether corporate rescue also captures a situation where the business of a company is transferred to a new company to carry on business as a different entity (business rescue).[248] The UK administration law prioritises the sustenance of a company as a going concern as the ideal rescue goal.[249] Alternatively, the IP is expected to pursue a course of action that achieves a better result for the creditors than would be likely in liquidation, failing which the assets of the company may be sold in piecemeal.[250] Thus, the law acknowledges that while company rescue is a desirable aim, it may not always be compatible with the best interests of the creditors. The better choice for them may be a business rescue which does not save the company in its current form but preserves its business in a new entity.[251] In contrast to English law, US restructuring law (the Chapter 11 reorganisation procedure) is more focused on preserving the corporate structure of the restructured entity. While English administration often results in the sale of the business as a going concern,[252] this is hardly restructuring as contemplated by Chapter 11. American practitioners are more likely to consider a business rescue as a liquidation rather than a restructuring.[253]

These distinctions are important for developing countries who are newly introduced to the concept of corporate rescue and confronted with a range of options and terminologies in the design of their restructuring laws. Much of restructuring law

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[247] Warren, 'Imperfect world' (n 136) 355.

[248] Franks and Sussman caution against a preoccupation with company rescue in their work. They note that the real 'economic value lies in the combination of physical assets and human capital rather than in the corporate name...'. Franks and Sussman (n 207) 65-96.

[249] Insolvency Act 1986, section 3, schedule B1.

[250] ibid.

[251] Corporate Insolvency Act, sch B1.

[252] Sloan Beckner, 'Current Problems in International Insolvency' (1995) 2 Sw. J. L.& TRADE AM (book review) 173. See for examples, *Re MyTravel Group Plc* [2004] EWHC 2741 (Ch); *Re Bluebrook Ltd* [2010] 1 B.C.L.C. 338.

[253] Nathalie Martin, 'Common-Law Bankruptcy Systems: Similarities and Differences' (2003) 11 Am. Bankr. Inst. L. Rev. 367.

reform is driven by the idea of corporate rescue.[254] Calls for reform by international organisations emphasise the goal of corporate rescue and its benefits for the economy, highlighting its potential to save jobs and provide stability.[255] This desire to accommodate wider economic interests is not always incompatible with maximising wealth for creditors.[256] However, it can colour the expectations that come with debt restructuring.

While the requirements and outcome of corporate rescue and debt restructuring often coincide, the main intent of creditors in a debt restructuring may not always be the rescue of the distressed firm and the saving of jobs. This has some implications for how restructuring law should be framed. One is whether corporate rescue should be mandatory, such that creditors have no option than to pursue the goal of corporate rescue, even if they consider alternative methods more beneficial to them.[257] Also relevant is whether control should lie with creditors or more powers be given to the debtor who is more likely to be inclined towards the rescue goal. These issues are discussed later in the chapter.

3.2. The use of private workouts in resolving financial distress.[258]

The role of insolvency law versus private bargaining in the resolution of financial distress has been debated. While the contractual theories focus on the use of pre-insolvency contracts, private workouts relate to bargaining that occurs after the fact. Regardless of when it occurs, private workout provides an alternative that a company's creditors may elect to pursue in the event of distress, lending some strength to Rasmussen's picture of a menu of alternatives from which creditors may choose.[259] Creditors who agree to a private workout do not act under a legal

[254]See for example, Cork Report: Report of the Review Committee, Insolvency Law and Practice (Cmnd 8558, 1982) para 198; Insolvency Service, A review of the corporate insolvency framework: A consultation on options for reform' (May 2016).

[255] World Bank, ICR Principles (2015) para 72, principles 6 (3), 8, 17; UNCITRAL Legislative Guide 209.

[256] Creditors, especially financial institutions who are repeat lenders can benefit from keeping distressed companies in business.

[257] As discussed in the previous chapter, the potential effect of such mandatory rules may produce outcomes unintended by the law.

[258] Also informal workout, out-of-court restructuring or multi-creditor workout.

[259] Rasmussen, 'Debtor's Choice' (n 138) 51.

compulsion to save the company or achieve wider objectives attached to rescue law, they do so because they have recognised the benefits they stand to gain.[260]

A workout allows a company to privately negotiate a restructuring with its creditors without the involvement of formal restructuring law or the courts. It could occur unilaterally i.e. between a debtor and one creditor, or multilaterally, between a debtor and a group of creditors (multi creditor workout).[261] This purely contractual arrangement offers some advantages for the restructuring process. It is flexible and easily adapted to the business of the distressed company.[262] As it does not typically involve courts and regulatory authorities, it can be done within as little time and as privately as possible, thereby preserving the goodwill of the company while seeking efficient ways to keep it alive.[263] Also, negotiation is easier because the process is less confrontational, and it does not usually trigger regulatory or contractual sanctions.[264]

The London Approach is perhaps the most prominent example of a multi-creditor workout system. This describes how banks in the city of London achieve out of court restructuring for larger companies,[265] with reference to social norms rather than the law. Armour and Deakin point out how regulatory institutions (which in the case of the London Approach is the Bank of England) help to 'seed' certain norms until they become acceptable rules of behaviour in the environment within which they operate.[266] Under the London Approach, there is an unwritten understanding among all participants that individual enforcement is unacceptable. The main creditors often sponsor an independent review of the company's long-term viability. They then reach a joint view as to whether, and how the company may be restructured.[267] A lead bank (usually the bank with the biggest exposure and the company's main banker) may be

[260] Vanessa Finch, 'Corporate rescue: a game of three halves' (2012) 32(2) Legal Studies 307-308.
[261] Multi-creditor workout is the focus here as unilateral restructuring pose relatively little challenges.
[262] Jose M. Garrido, *Out-of-court debt restructuring* (World Bank, 2012) 8-12; P Omar 'The convergence of creditor-driven and formal insolvency models' (2005) 2 International Corporate Rescue 251.
[263] Garrido, *Out-of-court debt restructuring* (n 262) 8-12.
[264] ibid.
[265] SMEs are not left out of informal workouts in London. Frank and Sussman that the head offices of banks operate a Bank Support Unit (BSU) which are tasked with the turnaround of distressed SMEs. Franks and Sussman, (n 207) 65-96.
[266] Armour and Deakin,' Norms in Private Insolvency' (n 103)48.
[267] Peter Brierley and Gertjan Vlieghe, 'Corporate workouts, the London Approach and financial stability' (1999) Financial Stability (Bank of England) 168.

designated to facilitate the discussions. A steering committee of creditors which represents the creditors in decision making is formed. To meet the company's financing needs, lenders agree to maintain existing credit facilities and may provide additional finance when needed.[268]

The London Approach is a flexible framework rather than a detailed set of rules. As a Bank of England Executive stated;

> 'The London Approach is not a statutory process and has nothing to do with regulation...The Bank has no statutory powers for what we do as an intermediary in the context of workouts. We rely instead on the authority vested in us by the constituent members of the London banking community who continue to seek our assistance in resolving difficult issues. The London Approach is voluntary, and it is widely used because it is seen to work and to be fair'.[269]

Nonetheless, because creditors are an identifiable group of repeat players in the lending industry, the threat of being ostracised from the 'group' in future transactions and perhaps tacit threats from the regulatory body have helped to elicit cooperation.[270]

The flexibility of the London Approach has been identified as efficient because it makes for easy transplant and adaption to other jurisdictions.[271] In a bid to propagate the principles of the London Approach more widely, INSOL International developed the London Approach further and published its Global Principles for Multi-Creditor Workouts.[272] The eight principles prescribe that creditors of a distressed company be prepared to cooperate and give a standstill period during which they refrain from enforcing their claims or do anything to affect return to other creditors adversely. The standstill period should be used to obtain relevant information about the debtor to

[268] ibid; Michael Smith, 'The London Approach and Trading in Distressed Debt' (May 1996) Bank of England Quarterly Bulletin 223.
[269] Smith (n 268) 223.
[270] Armour and Deakin,' Norms in Private Insolvency' (n 103) 45-46.
[271] ibid 50-51.
[272]INSOL International is a global association of practitioners (lawyers and accountants) who specialise in insolvency and turnaround. INSOL International, *Statement of Principles for a Global Approach to Multi-Creditor Workouts II* (2000, revised in 2017).

allow proposals to be made for resolving the distress. Such information should be kept confidential as much as possible. They also prescribe the facilitation of co-ordination using creditor representatives and committees; and that any additional funding be accorded priority status.[273]

Indeed, countries at different stages of economic development have been inspired by the London Approach and the INSOL Global Principles in dealing with multi-creditor workouts.[274] In addition to their formal insolvency frameworks, East Asian countries like Malaysia, Indonesia, Hong Kong, Korea and Japan have adopted guidelines for out-of-court restructuring.[275]

In Indonesia, the Jakarta Initiative was introduced by the Indonesian government, assisted by the World Bank and the IMF, to avoid the costs and difficulties associated with court processes.[276] The initiative adopts non-binding procedures aimed at helping creditors and debtors negotiate an out-of-court restructuring plan.[277] As prescribed by the INSOL Principles, the Jakarta initiative provides for the representation of the company by advisors, a restructuring plan and procedure for approval. Regulatory support comes in the form of the Indonesian Debt Restructuring Agency where agreed restructuring plans are registered; and the Jakarta Initiative Task Force (JIFT) mostly composed of senior central bank officials who oversee restructuring. Departing from the London Approach, the Jakarta initiative starts off as an out of court restructuring but where a unanimous decision cannot be reached among creditors, the plan may be presented to court for approval.[278] The JITF uses a combination of carrots and sticks to elicit cooperation. Such that noncooperative companies can be penalised by shaming or referred to the Attorney General for

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[273] The World Bank Guidelines for Out of Court Debt Restructuring similarly emphasise the need for independent experts and advisors to ensure independent professional information. Garrido, Out of Court Restructuring (n 262) Para 59.

[274] Developing economies who suffer from institutional deficiencies and economic volatility particularly stand to benefit from informal resolution mechanisms. World Bank, *ICR Principles* (n 255) 3.

[275] Dr Shinjiro Takagi, 'Debt Restructuring by Out-of-Court Workouts in East Asia' (2012)3 9(3) International Corporate Rescue.

[276] See Letter of intent from Indonesian government to the IMF (19 October 1988) at <https://www.imf.org/external/np/loi/101998.htm > accessed 8 September 2018.

[277] Stacey Steele, 'The New Law on Bankruptcy in Indonesia: Towards a Modern Corporate Bankruptcy Regime' (1999) 23 Melb. UL Rev 144.

[278] Holger Schier, *Towards a Reorganisation System for Sovereign Debt* (Leiden: Martinus Nijhoff Publishers, 2007) 153.

insolvency proceedings, and cooperative parties can enjoy tax incentives and other regulatory concessions.[279]

In India, the Corporate Debt Restructuring (CDR) mechanism was designed by the Reserve Bank of India (RBI), India's regulator of banks and financial institutions, in 2001. With the government backing it, the RBI has the power to facilitate restructuring and it has been known to oversee many.[280] The CDR is a well-structured, three-tier mechanism. The top tier is the CDR Standing Forum, consisting of top bank executives who prescribe general guidelines for restructuring. At the second tier, the Empowered Group consists of middle range managers that have a more direct connection with debtors, dealing with the specifics of debt restructuring as they come up. The CDR Cell consists of participating banks in each restructuring. They jointly bear the cost of the process, deliberate on restructuring plans and refer the plan for the Empowered Group's final decision.[281] Plans often consist of concessions on the part of shareholders and creditors, including a commitment by creditors to provide additional finance. While the CDR is not backed by statute, the guidelines have some force because of the influence of the RBI and an Inter Creditor Agreement which binds major financial institutions through enforcement clauses.[282] The CDR has recorded success in turning around companies, particularly because of the strong control of the RBI over the financial institutions, allowing the CDR to impose the requirements necessary for successful restructuring. The fact that most of the big lenders tend to be government owned or controlled also makes it easier to control creditor action in restructuring.[283]

In Hong Kong, the Joint Hong Kong Association of Banks (HKAB) and Hong Kong Monetary Authority (HKMA) developed the Guidelines to the Hong Kong approach to Corporate Difficulties in 1998 and 1999.[284] Like the INSOL Principles, the

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[279] Financial Sector Policy Committee can make these directions. See Indonesia, Selected Issues (IMF Staff Country Report, 16 August 2000) 120-121.
[280] Rajiv Luthra, 'The Corporate Debt Restructuring Mechanisms in India' in Olivares Caminal (ed), *Expedited Debt Restructuring* (n 238) *333.*
[281] ibid 334-335.
[282] ibid 339.
[283] ibid 340.
[284] Hong Kong Monetary Authority, Hong Kong Approach to Corporate Difficulties (November 1999) <https://www.hkma.gov.hk/media/eng/publication-and-research/reference-materials/banking/fa03.pdf> Booth, Briscoe and Smart, 'Corporate Rescue in Hong Kong' in Olivares-Caminal (ed) (n) 299-322, 309-311

HKAB/HKMA Guidelines seek to achieve a standstill and representation from the creditor body in making a restructuring plan and provide for the appointment of a lead bank to head negotiations.[285] Japan's Guidelines for private workout was established by the National Bankers Association in 2001, expanding INSOL principles to stipulate procedural guidelines including rules for commencement, content of a rehabilitation proposal, conduct of meetings, amongst others.[286] Similarly, the Italian Banks' Association issued a code of conduct for debt restructuring agreements in 2000.[287]

In prescribing guidance for private workouts, these guidelines adopt slightly varied ways of achieving the core prescriptions for successful workouts. An observable trend among them is the influence of some regulatory or government authority in the restructuring process. While their presence is more tacit in some jurisdictions like London, others like India and Indonesia have government authorities adopting a more prominent role in the process.[288]

3.3. Do we need law for restructuring? The role of the law and courts

If stakeholders can bargain for the outome they want via a contractual workout, why do the law and the courts need to be involved in debt restructuring? A cursory answer may be that without the law's intervention, creditors cannot always be trusted to pursue corporate rescue or that stronger creditors are likely dominate the process and exclude weaker ones. In addition to these fairness and rescue concerns however, coordination issues and efficiency also account for the need for a legal framework for restructuring.

[285] Booth and others (n 284) 311.

[286] Shinjiro Takagi, Expedited Corporate Debt Restructuring in Japan' in Olivares-Caminal (ed) (n 238) 299-322, 383-384.

[287] Antonio Auricchio, 'Article 182bis of Law 80/2005 and the Code of Conduct to Restructure Debt Issued by the Italian Bank Association' in Olivares-Caminal (ed) (n 238) 299-322, 364 -365.

[288] This is not unconnected to the mode of ownership and control of financial institutions, large companies and markets in those jurisdictions. Luthra (n 280) 340. It may also be argued that this governmental support is 'law' in a different form.

3.3.1. The limitations of private workouts

Notwithstanding the benefits they offer, private workouts present challenges of their own, one of which is the hold out problem.[289] A hold out occurs when certain creditors withdraw their support from a restructuring plan (usually in hopes for a payoff), thereby preventing the implementation of the plan.[290] Guidelines for private workouts are often non-binding and lack a decision-making mechanism. This means that creditors may decide to reject the restructuring proposal at any point in the process.[291] Even if enforcement were possible under contract law, there is no mechanism for involving other stakeholders who are not part of the bargaining process but whose cooperation may be crucial to the restructuring.[292]

Information asymmetry also presents a problem. Where all the parties involved are not (or perceive that they are not) well-informed about the financial prospects of the firm and the interests of the other creditors, it may become difficult for them to reach an agreement.[293] Other difficulties include challenges that may prevent creditors from retaining the benefits of the workout if the company eventually enters into a formal process.[294]

The need for restructuring law has been predicated on these shortcomings and the inefficiencies they can create.[295] As we discuss in some detail shortly, the law offers a binding effect in the form of a moratorium that stays actions by all creditors during the period of the restructuring. Also, the law can prevent hold out problems and eliminate the need for unanimity by imposing a system that allows dissenting

[289] Whether in liquidation, reorganisation, or out of court restructuring, scholars of all persuasions would agree that it is important to reduce incentives for individual creditors to act in isolation. See Paterson, 'Rethinking the Role of the Law' (n 217) 5; Armour and Deakin, 'Norms in Private Insolvency' (n 103) 25, 26 describe hold outs as the free rider problem.

[290] Schwartz asserts that distressed firms are not the victims of the hold out, rather they are the cause because they occur when firms make 'greedy offers' to creditors. Schwartz, 'Bankruptcy Workouts and Debt Contracts' (1993) 36 J.L. & Econ. 595, 598.

[291] Schwartz, 'Bankruptcy Workouts' (n 290) 601-608; Armour and Deakin, 'Norms in Private Insolvency' (n 103) 42 describe this opportunistic behaviour as 'ransom tactics'.

[292] For example, landlords. It may also be difficult to get secured creditors and the assets they hold involved.

[293] Schwartz argues that offers from outsiders often fail because of the inability of creditors to observe the bidder's expected gain or their disagreement options. Schwartz, 'Bankruptcy Workouts' (n 290) Footnote 43; Armour and Deakin, 'Norms in Private Insolvency' (n 103) 26.

[294] Kevin P. McElcheran, 'Canada's Expedited Debt Restructuring' in Olivares-Caminal (ed) (n 238)142-143. This includes unfair preference challenges under insolvency legislation.

[295] Particularly a substantial waste of scarce time and resources.

creditors to be overruled. Importantly, the participation of secured creditors, who hold assets that might be fundamental to the success of the restructuring can be compelled by law. In the same vein, the law attempts to prevent abuse and achieve a fair result by ensuring that dissenting creditors are offered some protection.

Also, the problem of information asymmetry can be eliminated or reduced by the imposition of disclosure requirements about the financial condition of the company. Restructuring law can also facilitate the provision of restructuring finance by offering incentives to providers of new credit and binding existing creditors to priority rules. To ensure long term competitiveness of a restructured company, it is important that a wide variety of restructuring options are open to the company. Restructuring laws can provide a framework that ensures that the ability of the stakeholders to pursue options such as debt equity swaps, debt forgiveness, and distressed debt investment is not constrained.[296]

Under the London approach, the tacit threat of ostracisation and the backing of the Bank of England had been effective in dealing with hold outs.[297] The group model also ensured that information about the financial prospects of the firm was made available to the creditors.[298] Over time, the uncertainties created by coordination and enforcement limitations in workouts have however become more prominent across jurisdictions, including London.[299] The use of the London Approach and its variants have seen a decline with shifts in the market caused by financial globalisation and the growth of distressed debt investment in insolvency.[300] Paterson describes how these changes have ushered in new entrants with different values into the London market. Their entrance has eroded some of the shared understanding that once existed between London's banks, and the proliferation of secondary debt markets have now

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[296] For instance, exceptions to restrictions imposed by company, securities and labour laws can be provided for under a restructuring law.

[297] Armour and Deakin, 'Norms in Private Insolvency' (n 103) 45 – 46.

[298] ibid 34 -35 (Armour and Deakin report how accountants are often hired to do a comprehensive assessment of the financial health and prospects of the distressed firm and report back to the creditors).

[299] Reporting the experience in Canada, McElcheran submits that private restructuring is increasingly a fragile and uncertain process, making many creditors reluctant to participate in it. McElcheran, 'Canada's Expedited Debt Restructuring' in Olivares-Caminal (ed) (n 238) *142*.

[300] Armour and Deakin, 'Norms in Private Insolvency' (n 103) 50, 51. These are discussed in detail below.

diluted the influence of group expectations. [301] Although informal restructuring still has its place, parties who previously bargained in accordance with group norms and values are now more likely to take a more legal stance, bargaining with greater reference to their legal rights.[302] Emerging economies are not left out; in India, the continued efficacy of the RBI has become more doubtful with the growth of the corporate bond market and financial intermediaries that are independent of government control, making it difficult for the CDR to carry on in its current form.[303]

3.3.2. The unavoidable shadow of the law.

To varying degrees, and whether parties acknowledge it or not, the influence of insolvency and or other laws is present in the bargaining process.[304] Jackson makes the point that insolvency law stipulates 'a minimum set of entitlements for claimants that, in turn, provides a framework for implementing a consensual collective proceeding outside of the insolvency process.'[305]

Schwartz accords an implicit but important role to the law by arguing that creditors are bound to agree to offers that maintain a similar order of priority as they would receive under formal insolvency procedures.[306] For example, under the London Approach, pay offs are determined against what is obtainable in formal insolvency. Thus, Armour and Deakin admit that the substitution of legal rules with norms cannot be absolute.[307] The goal is that 'each unsecured creditor will be at least as well off as they would be in winding-up proceedings. This makes it individually rational to participate in the workout.'[308]

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[301] Sarah Paterson, 'Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards, Journal of Corporate Law Studies' (2014) 14 (2) 333, 338.

[302] Armour and Deakin however predict that new entrants would eventually settle in, become repeat players and part of market associations, making them subject to threats of ostracization as in the London Approach. Armour and Deakin, 'Norms in Private Insolvency' (n 103) 50, 51; See John Armour, 'The Rise of the 'Pre-Pack': Corporate Restructuring in the UK and Proposals for Reform' (2012) <https://ssrn.com/abstract=2093134 > accessed 8 September 2018 (arguing that fragmented debt structures make informal renegotiation much more difficult to coordinate in times of financial distress. This has increased the incidence of formal insolvency proceedings and the use of pre-packaged administration).

[303] Luthra (n 280) 340-341.

[304] Paterson, 'Bargaining in Financial Restructuring' (n 301) 338; Armour and Deakin, 'Norms in Private Insolvency' (n) 39.

[305] Thomas Jackson, 'Entitlements' (n 102) 867.

[306] Schwartz, 'Bankruptcy Workouts' (n 290) 595, 598.

[307] Armour and Deakin, 'Norms in Private Insolvency' (n 103) 50.

[308] ibid 39.

It is not only creditors that bargain against their position under insolvency law. The debtor (management) armed with the knowledge of the creditors' preference for a renegotiation, may strengthen their position by threatening to initiate insolvency proceedings if the creditors do not consent to their offer.[309] Conversely, private workouts may be unappealing to managers if they perceive that they might receive 'better' treatment under formal restructuring law.[310]

As suggested above, the 'shadow of the law 'here goes beyond insolvency laws and captures other legal rules and institutions that can impact the distressed company and those that deal with it. For example, laws regulating secured transactions, securities law, company law and corporate governance rules, industry -specific regulations and labour laws can determine the choices available to parties in a workout, thereby informing decision making. The enforcement infrastructure such as courts and regulators can also affect outcomes. For example, reports on the outcome of informal workouts in Asia reveal that most of them often ended up in fictive debt rescheduling with the creditors having no real faith that the debtor would be able to comply with the new schedule. Reasons for this include the weak creditor rights, supporting laws (including insolvency law) and institutions.[311] Thus, the INSOL Principles maintain that the Principles 'will be most successful in facilitating rescues and workouts if an appropriate legal, regulatory and governmental policy framework supports them.' [312]

3.3.3. The formal-informal continuum.

The relationship between formal and informal restructuring mechanisms is rightly described as a continuum, which may feature different mixes of formality.[313] Jurisdictions in both advanced and developing economies, have explored this relationship in order to reap the benefits of both systems while avoiding their

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[309] It has however been pointed out that such a threat must be credible for it to be effective. Schwartz, 'Bankruptcy Workouts' (n 290) 602; Paterson, 'Bargaining in Financial Restructuring' (n 301) 345.

[310] Schwartz, 'Bankruptcy Workouts' (n 290) 605; This argument is of selective application because restructuring laws are not always patterned after the Chapter 11 Debtor in Possession model. Also, see argument below that creditors increasingly displace manages even in Chapter 11.

[311] Robert Zafft and Lampros Vassiliou, 'Policy Implications from the Second Forum on Asian Insolvency Reform' in *Informal Workouts, Restructuring and the Future of Asian Insolvency Reform Proceedings from the Second Forum for Asian Insolvency Reform* (OECD December 2002) 8-9.

[312] INSOL, *Statement of Principles* (n 272) 5.

[313] Garrido, *Out of Court Debt Restructuring* (n 262) 7-11. It is not strange for a restructuring to begin as an informal procedure and later transition into a fully formal procedure.

shortcomings. This is most evident in the use of pre-packaged and pre-negotiated debt restructuring mechanisms.[314]

What these mechanisms have in common is the moderation of court and regulatory involvement in the restructuring process, allowing parties to agree privately and subsequently take advantage of the court's enforcement powers. The US has inspired other jurisdictions in its use of a semi-formal restructuring through the pre-packaged reorganisation device in Chapter 11. The provision allows distressed companies to negotiate with creditors and obtain their support for a reorganisation plan before entering into Chapter 11, upon which the plan is filed for confirmation.[315] In the UK, though not explicitly provided for by law, companies in administration have been found to increasingly make arrangements where the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the administrator effects the sale immediately, or shortly after, his appointment.[316] In addition, the composition and scheme of arrangement procedures are company law tools that also allow a company to agree a restructuring with its creditors with the approval of the court.[317] Australia provides for a creditor-controlled voluntary administration system that allows a company to be restructured with no mandatory role for the court. Although the powers of the court can be invoked during the administration, a company may commence administration, agree to a plan and pass a deed of company arrangement without the participation of the court.[318]

A case can be made for the use of semi-formal mechanisms in developing countries where problems of weak and inefficient institutions is often a challenge. For these countries, finding the right balance between court involvement and private

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[314] The difference between the prepackaged reorganisation and the prenegotiated plan is that the former is prevoted before the formal procecure while the latter is postvoted i.e after the formal procedure commences. M. B. Jacoby, 'Prepacks and the Deal-Litigation Tension' (2004) 23(2) American Bankruptcy Institute Journal 34.
[315] 11 U.S.C 1125 (g).
[316] Statement of Insolvency Practice 16, England and Wales (Association of Recovery Processionals November 2015) 1.
[317] See Part 26 of the Companies Act 2006.
[318] Part 5.3A Administration, Australian Corporations Act 2001. It has been observed that where the court is involved, its role is often supervisory. Ian Walker, 'Voluntary Administration Leading to a Deed of Company Arrangement' in Olivares-Caminal (n 238) 69.

bargaining can be particularly beneficial in expediting the restructuring of distressed companies.[319]

Argentina's APE (Acuerdo Preventivo Extrajudicial) is an expedited restructuring mechanism contemplated under the Argentine Bankruptcy Law[320] which allows a distressed company to agree with its creditors for a range of restructuring options and thereafter submit such an agreement for judicial homologation.[321] Agreements can often be reached with little or no supervision from the court, except where proposals are abusive or illegal.[322] Brazil has followed a similar path with its two out-of-court reorganisation procedures - Homologation of Consensus and Enforcement of Agreement, provided by its Insolvency and Reorganisation Law of 2005. As with Argentina's restructuring law, parties are able to privately bargain and make a reorganisation plan, which is subsequently homologated in court. The main difference between Brazil's two reorganisation procedures is that while the former requires unanimous agreement by all affected creditors, under the Enforcement of Agreement system, dissenting creditors can be crammed down once a sixty per cent vote is achieved.[323]

For developing countries in Africa undergoing insolvency law reform, the role of the law in restructuring becomes more difficult to deny, especially as markets and foreign investment grow. The real question then becomes what the structure of such restructuring laws would be, what degree of formality and court involvement would be appropriate considering the institutional infrastructure, socio-economic realities and the underlying policy orientation of the economies.[324]

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[319] As seen in some Latin and South American economies. See Olivares-Caminal and Frigerio, Expedited Debt Restructuring in Latin America; a Regional Overview' (2010) IDB Working Paper Series, No 113.

[320] Argentine Bankruptcy Law No. 24.533 (ABL), ss 69-76.

[321] ABL, s 73. Voting is two-tier, an absolute majority on head count basis and two thirds by value of interests. The law gained some notoriety after the Argentine crisis of 2001 to 2002 that resulted in the restructuring of up to USD 31.5 billion. Rodrigo Olivares-Caminal,' Expedited Debt Restructuring under Argentine Law: Acuerdo Preventivo Extrajudicial (APE)' in Olivares-Caminal (ed) (n 238) 21.

[322] The success of expedited restructuring in this jurisdiction has been hinged on factors such as fair proposals and fluent dialogue among stakeholders. ibid 50-51.

[323] Luiz Fernando Valente-de-Paiva, Brazil's Two New Mechanisms for Out-Of-Court Reorganizations: 'Homologation of Consensus' and 'Enforcement of Agreement' in Olivares-Caminal, (n 238) 102.

[324] In designing legislation, Armour and Deakin propose that the frame of reference should be expanded to include social norms to ensure that these laws interact effectively with the norms that exist in the market place. Armour and Deakin, 'Norms in Private Insolvency (n 103) 50.

The next section discusses how key issues in restructuring are addressed, the factors that inform different choices in restructuring frameworks and the role of the law and courts.

3.4. Key Elements of a (formal) debt restructuring process.

While it may be widely accepted that law plays an important role in facilitating debt restructuring, the features of a restructuring framework must be sufficiently attractive to encourage stakeholders to participate in it. They must also be compatible with existing laws and institutional infrastructure. The key elements of restructuring frameworks discussed here are commencement, decision making, control, restructuring plan and restructuring finance.[325]

3.4.1. Commencement

Commencement raises two important questions- *who* can initiate a restructuring and *when* they may do so. It remains unsettled who is in the best position to make the optimally efficient choice regarding the fate of a distressed company. It is debated whether this task should fall on management,[326] the senior creditors, the market or the junior creditors.[327] Rational, self-interested behaviour dictates that senior lenders and secured creditors who are in the money have no incentive to engage in value-maximising restructuring. They would therefore have a bias for an inefficient liquidation.[328] Hahn argues that where commencement is left to creditors, debtors are able to delay timely restructuring of a distressed company by strategically avoiding

[325] It is noted that there are other relevant considerations for establishing a restructuring framework that are not discussed here. Some of them are treatment of ongoing contracts, accountability of managers and the relationship of the procedure with other insolvency procedures including a transition from restructuring to liquidation. See UNCITRAL Legislative Guide for a discussion.

[326] Warren, 'Imperfect World' (n 136) 359 (She defends the decision-making powers given to managers because it incentivises them to submit to restructuring early enough and limits risk aversion).

[327] This is the residual actor problem. Jackson suggests that the ideal decision maker would be a claim holder whose single residual claimant whose wealth, when a firm's balance sheet's assets are worth less than its liabilities, directly increases or decreases from any movement upwards or downwards in the company's value. Jackson and Scott, 'On The Nature of Bankruptcy' (n 117) 155. This suggestion has been criticised as cumbersome and impractical. Goldschmid (More Phoenix than Vulture) (n 94) 195-199 (arguing that there is no easy way to identify and shift decision making to this ideal residual claimant; He refers to Lynn M. LoPucki, The Myth of the Residual Owner: An Empirical Study, No. 3-11, (2003) (unpublished manuscript) 15 who points out that there may be a number of people who qualify for this role and there is no certain standard for deciding who gets it).

[328] Ivor Benveniste, 'Receivers: Double Agents or Surrogate Liquidators?' (1986) Accounting and Business Research 245; Aghion, Hart and Moore, 'The Economics of Bankruptcy Reform' (1992) 8 Journal of Law Economics and Organisation 523-546; Ayotte and Morrison, 'Creditor Control and Conflict in Chapter 11' (2008) Columbia Law and Economics Research Paper No 321.

default through continued payment of specific debts. 'The more management succeeds in appeasing the secured lender the more likely that the latter will remain inactive and abstain from taking any action against the corporation.'[329]

On the other hand, managers will prefer an option that allows them private benefits such as staying in control for as long as possible. They will seek to prolong the life of the company even where it is not efficient to do so. This continuation bias is also shared by junior creditors and equity holders who are out of the money and can only get their returns in the event of a miraculous turnaround.[330] As a result of this, there is difficulty deciding who is in the best position to make the best value yielding decision. Most restructuring laws solve this dilemma by allowing both creditors and debtors to initiate a restructuring procedure.[331]

In determining the '*when*' question i.e. criteria for commencement, early intervention is crucial to a successful debt restructuring, especially where the goal is to rescue the company, as many laws aim to do. While some laws do not impose a substantive criterion, allowing procedures to open whenever the company is considered in need of it,[332] others impose a condition based on prospective illiquidity- that the company or its creditors opens proceedings if they envisage illiquidity or insolvency in the near future.[333] A further question that arises here is what the test for solvency would be- whether balance sheet or cash flow test.[334] While a cash flow test is much easier for

[329] David Hahn, 'Concentrated ownership and control of corporate reorganisations' (2004) 4(1) Journal of Corporate Law Studies 143. For a summary of the pros and cons of DIP systems, see 118-119.
[330] Jackson & Scott, 'On the Nature of Bankruptcy' (n 117) 157.
[331] Insolvency Act 1986 (UK), s 123(2). US Chapter 11 allows creditors to commence an involuntary reorganisation although it has been found that most reorganisations are voluntarily commenced by the debtor. 11 USC 301 & 303. See also, Insolvency Act 1986, s 12. This is the recommendation of the World Bank, *ICR Principles* (n 253) C4; The Doing Business rankings scores countries on the question of commencement, countries where both creditors and debtors can initiate a reorganisation receive a higher score in the efficiency of their insolvency frameworks. See Doing Business Report, Resolving Insolvency (Methodology) <http://www.doingbusiness.org/Methodology/resolving-insolvency > accessed 8 September 2018.
[332] The English CVA for example. Insolvency Act 1986, s 1(1). There is no requirement of insolvency before a company can enter the US Chapter 11 process, but a case can be dismissed early if it has been filed in bad faith or without reasonable hope of success.
[333] The UK administration procedure stands in contrast to the CVA in this regard. It requires that the company is or is likely to become unable to pay its debts. The English administration procedure requires prospective illiquidity as it must be shown that 'the company is or is likely to become unable to pay its debts'. Insolvency Act 1986, s 11. In contrast, the Company Voluntary Arrangement allows a company's directors to propose a restructuring when they wish. Insolvency Act 1986, s 1(1). Mauritian Insolvency Act requires directors to resolve that the company is insolvent or is likely to become insolvent. Insolvency Act 2009, s 215(6).
[334] See Ch 1, 24-25; Horst Eidenmüller, 'Trading in times of crisis: Formal insolvency proceedings, workouts and the incentives for shareholders/managers' (2006) 7(1) European Business Organization Law Review 239-258.

managers or creditors to demonstrate, a balance sheet test usually takes longer.[335] However, the company should not be expected to wait until payments or cash flow has ceased completely and the company can be described as illiquid, before a procedure for restructuring is initiated.[336]

The ability to commence a restructuring without needing to wait till the company is insolvent has been commended as allowing distress to be tackled at an earlier stage.[337] On the other hand, there is a concern that debtors could abuse the procedure where the criterion for commencement is too lenient. For example, debtors could commence a restructuring proceeding to achieve other goals that are unconnected to the rehabilitation of the company, such as shedding some obligations that management considers onerous.[338]

Once a restructuring commences or is initiated, a moratorium in the form of a stay on the ability of creditors to exercise their legal rights to enforce legal actions is important. In the context of a restructuring, it is critical that enforcement actions are suspended to avoid depleting the value in the business. Secured creditors have been identified as having little incentive to participate in a collective process and therefore a bias for a quick liquidation rather than preserving the company as a going concern.[339] This liquidation bias has informed attempts to force them into the restructuring process by legislation. For instance, Chapter 11 imposes an automatic stay of action on all creditors including the secured creditors. The security holder's priority in relation to the assets remain intact but they are unable to take the security out of the 'pool' without the court's approval.[340]

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[335] IMF, *Orderly Procedures* (n 4) 54-55.
[336] Early intervention may be encouraged with either carrots or sticks. Some frameworks like Chapter 11 incentivise the company's management to intervene early by allowing them to stay in control during the restructuring process.
[337] This is one of the reasons why scheme of arrangement is identified as a useful tool for rehabilitating distressed companies. See Jennifer Payne, Cross-border schemes of arrangement and forum shopping' (2013) 14 (4) European Business Organization Law Review 563-589.
[338] IMF, *Orderly Procedures* (n 4) *54*; For example, recent use of CVAs in the UK following the retail crisis has been resisted by landlords who consider the use of the Insolvency Act 1986, Sch 1, s 12(1)(f) by retail companies oppressive. Peter Walton, Chris Umfreville and Lezelle Jacobs 'Company Voluntary Arrangements: Evaluating Success and Failure' (May 2018, Empirical study Commissioned by R3, the insolvency and restructuring trade body, and sponsored by ICAEW) Para 7.2; Rhiannon Curry, 'House of Fraser CVA faces resistance from landlords' *The Telegraph* (26 May 2018).
[339] Nick Segal, 'The Effect of Reorganization Proceedings on Security Interests: The Position Under English And U.S. Law' (2007) 32 Brook. J. Int'l L. 927; Bebchuk and Fried, 'The Uneasy Case' (n 144) 881-887.
[340] 11 USC 362; Insolvency Act 1986, schedule B1 s 43.

3.4.2. Control

Compared to liquidation which ousts the debtor's management and puts a liquidator in place, the displacement of management is up for debate in a restructuring process. Some frameworks, notably the US Chapter 11, adopt a debtor-in-possession (DIP) system that leaves current management in control of the company while others like the UK administration procedure employ a practitioner-in-possession (PIP) system.[341] This is one of the most prominent distinctions in the way restructuring law operates in countries across the world. One common explanation for the choice between a DIP and PIP system is the postulation that there is a relationship between the predominant corporate shareholding structure in an economy and the structure of its restructuring law. In countries with a dispersed shareholding structure where control is often separated from ownership,[342] management can be relied on to remain in control when the company is distressed. For jurisdictions with concentrated ownership, where owners closely control the firm, allowing management to retain control of the distressed company jeopardises the creditors and leaves them vulnerable to the manipulation of shareholders.[343]

Hahn argues that the separation of ownership and control helps the debtor-in-possession to discharge its fiduciary duties to creditors satisfactorily as managers can 'desert shareholders and cooperate with creditors in formulating a reorganisation plan'.[344] With concentrated ownership, which is commonplace in less developed markets, companies are closely controlled by strong shareholders and predominantly financed by bank lending rather than capital markets. There, not only does senior management consist of appointees of the controlling shareholder(s), these appointees are the 'flesh and blood' of that controlling group. Because these executives display fervent loyalty to the controlling owner, leaving them in control exacerbates the risk

[341] Vanessa Finch, 'Control and Coordination in Corporate Rescue' (2005) 25 Legal Studies 375.
[342] Labelled the Berle-Means model of ownership propagated by Professors Berle and Means as a model where large companies are financed by a widely dispersed group of shareholders while the actual control is concentrated in the hands of a few management personnel. Berle & Means, *The Modern Corporation and Private Property* (New York, Harcourt 1932); Hahn, 'Concentrated Ownership' (n 329) 120.
[343] Hahn, 'Concentrated Ownership' (n 329) 131.
[344] Ibid.

of loss to creditors. Thus, in such systems, it is more beneficial that managers are displaced when companies become distressed.

The Practitioner- in-Possession (PIP) system demands the displacement of managers and the installation of a restructuring professional to manage the company. English administration law is an example of a system that adopts this approach.[345] Because its markets are developed, and ownership-management structure closely resembles that of the US, the UK has been regarded as an 'anomaly', a 'problem child' that challenges the proposition that jurisdictions with dispersed ownership are better off with a DIP system.[346] Among the explanations given for this 'anomaly' is the fact that dispersed ownership is a relatively recent development in the UK (mid 1970s- 1980s), and reforms will soon catch up as ownership becomes even more dispersed. The projection is therefore that the UK is in transition and with cycles of reform, restructuring law in the UK is likely to conform more to the DIP system.[347]

Some doubt has been cast on both this prediction and its theoretical foundation. The theory oversimplifies the matter because beyond corporate structure, attitude to entrepreneurship, risk-taking and corporate failure can also influence the structure of restructuring law.[348] It has been observed that the UK shows a bias towards creditors because it is inherently believed that managers are responsible for corporate failure. The US system on the other hand views corporate failure more as a misfortune than

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[345] An administrator who is either appointed by the directors, the court or a qualifying floating charge holder displaces management to direct the procedure. Insolvency Act 1986, Schedule B1, ss22, 35.

[346] Some have sought to differentiate between shareholding structure in the UK and the US, for instance on the basis that institutional investors are more prominent and influential in the UK which ultimately results in strong shareholding. John Armour, BR Cheffins & DA Skeel, 'Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons from the United Kingdom' (2002) 55 Vanderbilt Law Review 1699, 1747–1748. Hahn however admits that these arguments are not completely convincing. Hahn 'Concentrated Ownership' (n 329) 135.

[347] The introduction of the CVA in 2000 which allows debtor to stay in control while the company is restructured (albeit limited to small companies), and proposals for reform in the UK have been identified as evidence of movement in that direction. Hahn, 'Concentrated Ownership' (n 329) fn 93. (McCormack points out rightly that the CVA does not support the theory as it is small firms to which the procedure applies, that are more likely to operate a concentrated ownership system. Gerard McCormack, 'Control and Corporate Rescue–An Anglo-American Evaluation' (2007) 56(3) International & Comparative Law Quarterly 544. It has also been pointed out that the prominent use of the London Approach where the debtor stays in possession while the company is restructured out of court indicates that the UK conforms to the theory more than is immediately apparent. Here however, the creditors have significant control over the process. Armour, Cheffins & Skeel (n 346) 1754–1762.

[348] Gerard McCormack, 'Anglo-American Evaluation' (n 347) 533-538 argues that path dependence and historical circumstances can also explain the differences. McCormack points out that administration evolved from the age-old administrative receivership procedure which was creditor-controlled.

wrongdoing.[349] The same has also been noted about France and Germany, with the former adopting a forgiving, pro-debtor approach while the latter exhibits a culture of blame towards failing companies.[350]

McCormack argues that the US is more of an outlier than the UK in its adoption of a DIP system, highlighting that other jurisdictions with dispersed ownership systems (such as Australia) adopt a creditor-controlled restructuring system.[351] A study of common law insolvency systems suggests that corporate failures are attended by stigma and embarrassment, and these regimes are more inclined to be hard on company management and are sceptical of DIP systems.[352] The argument that UK law would ultimately come to resemble the US system has thus been resisted by commentators who argue that if harmonisation would occur, it is likely to be half-way or for US law to tilt towards the English system.[353]

It is instructive to consider the pros and cons of each approach on its merits. In contrast to a system that displaces managers, a DIP system is thought to encourage early intervention, because management do not have to be apprehensive of losing their place in the company when a formal procedure is initiated. Secondly, it is believed that managers are better positioned to manage the company because they have all the information about the company and specific set of skills and expertise required for managing it.[354] Also, reputational damage from financial distress is reduced where status quo is maintained.[355] This is particularly important for jurisdictions where corporate distress is seriously frowned upon and formal procedures are attended by social stigma.[356]

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[349] ibid 525.
[350] Martin 'The Role of History and Culture' (n 170) 46-48.
[351] McCormack, 'Anglo-American Evaluation' (n 347) 543.
[352] Nathalie Martin, 'Common-Law Bankruptcy' (n 253) 367, 374.
[353]One of the arguments in support of this is the increasing trend of creditor control in the US. McCormack, 'Anglo-American Evaluation' (n 347) 516; Gerard McCormack, 'Apples and oranges? Corporate rescue and functional convergence in the US and UK' (2009) 18(2) International Insolvency Review 110.
[354] Hahn, 'Concentrated ownership' (n 329) 117-154.
[355] Baird, 'The Uneasy Case' (n 242) 136 – 139.
[356] Reports about the cultural realignment that formal insolvency mechanisms require in collectivist East Asian economies reveal that 'taking a bankruptcy case to court is tantamount to a public admission of failure. It requires the disclosure of many private details of business practice, and it puts the fate of family businesses in the hands of unknown third parties. Above all, it brings public shame and loss of face.' Halliday and Carruthers, *Bankrupt* (n 2) 343; Asian Development Bank, 'Insolvency Law Reforms in the Asian and Pacific Region' in *Law and Reform at the Asian Development Bank* (Manila, ADB 2000).

On the other hand, a DIP restructuring may trigger perverse incentives such as the continuation bias discussed above.[357] This is a particularly high risk where the commencement criterion is flexible.[358] Also, where a company has been led into distress because of bad management, allowing such management to retain control can be counterproductive.[359] Furthermore, managers may have become jaded and bereft of creativity in the running of a company. In such cases, new management with fresh ideas may be the most important ingredient for a successful restructuring.[360]

Some safeguards have been adopted in dealing with some of these shortcomings. One of them is to accord the court a supervisory role that allows it to of its own volition or at the prompting of the creditors, convert the restructuring to a liquidation because there is no likelihood of a successful restructuring or for lack of good faith by the debtor management.[361] Consequently, a DIP system must be accompanied by balancing mechanisms such as sound corporate governance provisions and/or court supervision.[362] Regardless of who the law puts in control of management, senior creditors often have a strong influence in the restructuring process, ultimately making most restructuring creditor-oriented.[363] Also, empirical studies on Chapter 11 have found that key officers in management are often displaced during or shortly after the restructuring process, at the creditors' will.[364] Thus, while DIP and PIP systems seem widely divergent doctrinally, the differences between them are less obvious in practice.

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[357] Stuart C. Gilson, 'Bankruptcy, Boards, Banks, and Blockholders: Evidence on Changes in Corporate Ownership and Control When Firms Default' (1990) 27 Journal of Financial Economics 355.

[358] IMF, *Orderly Procedures* (n 4) 54.

[359] Allowing an alcoholic control of a pub as described by Gabriel Moss in G Moss, 'Chapter 11: An English Lawyer's Critique' (1998) 11 Insolvency Intelligence 17, 18-19.

[360] Goldschmid, 'More Phoenix than Vulture' (n 94) 187.

[361] Jennifer Payne, 'The role of the court in debt restructuring' (2018) 77(1) The Cambridge Law Journal 124, 127; Insolvency Act 1986, s 7A.

[362] As seen in the higher level of court involvement under US Chapter 11.

[363] The English administration procedure has not eliminated the control of floating charge holders in practice, they have been shown to retain control by exercising their power to appoint the administrator. McCormack, 'Anglo-American Evaluation' (n 347) 544. Even in DIP systems, powerful creditors can hijack control of the process. Baird and Rasmussen, 'The end of bankruptcy' (n 158) 751-789. Douglas Baird and Robert Rasmussen, 'Antibankruptcy' (2010) Yale Law Journal 648; McCormack, 'Anglo-American Evaluation' (n 347) 515.

[364] LM LoPucki and WC Whitford, 'Corporate Governance in the Bankruptcy Reorganisation of Large, Publicly Held Companies' (1993) 141 UPa L Rev 669.

Some countries also find a middle ground between the two approaches in an effort to balance the incentives of creditors and debtors, and to extract the benefits of both systems.[365] Here, management and control is split between the debtor and an independent, usually court-appointed professional. One power sharing formula is for managers to retain control of the everyday management of the company while the implementation of the restructuring plan and other significant transactions are supervised by the professional.[366] The professional can be poised to fully displace the management if their actions warrant it. This approach however carries its own caveats, mainly the clarity of the power sharing formula between the independent professional and management.[367] Questions such as who decides the limit of each party's powers and the yardstick for making such determination arise. In the absence of clear and precise rules, the restructuring process will be tainted with a lot of uncertainty.

Developing countries in the process of reforming insolvency legislations stand to learn from these considerations. In adopting a DIP system, it must be noted that corporate governance laws and mechanisms for holding directors accountable are important.[368] Also, the supervision of managers would require the judiciary or relevant authority to exercise some discretionary powers. The delegated authority must be equipped to make such decisions, with judges that are independent and well versed in complex

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[365] Hahn argues that this system enjoys the relative advantages of the DIP and PIP systems. Hahn 'Concentrated ownership' (n 329) 149.

[366] This approach is adopted by countries such as Canada, Under the Companies' Creditors Arrangement Act (CCAA) a monitor (that is, a person licensed to act as a trustee) is appointed to supervise the debtor company and to assist the debtor company with the formulation of its plan of reorganisation. The debtor remains in control of its business and its property and assets but is subject to the monitor's scrutiny. See sections 11.7 and 23 of the CCAA 1985. As discussed in Chapter five, the same approach has recently been adopted in African countries like South Africa and Liberia.

[367] Hahn proposes that the PIP sits on the board and has a veto power. The chairman of the board and CEO would be required to report to the trustee on all business matters of the corporation. Thus, the trustee would be involved in all business decisions of the debtor, except decisions involving ordinary course of business activities that did not reach the board. Hahn, 'Concentrated Ownership' (n 329) 148-153. Adams on the other hand suggests a bifurcated system where management would retain the exclusive power to operate the business of the debtor and make all investment and financing decisions. The PIP on the other hand has the exclusive power to negotiate with the creditors and draft a reorganisation plan. Edward S. Adams, 'Governance in Chapter 11 Reorganisations: Reducing Costs, Improving Results' (1993) 73 Boston University Law Review 581.

[368] Benjamin Mwanzia Mulili and Peter Wong, 'Corporate governance practices in developing countries: The case for Kenya' (2011) 2(1) International journal of business administration 14-17; Darryl Reed, 'Corporate governance reforms in developing countries' (2002) 37 (3) Journal of Business Ethics 223-247.

commercial issues. Institutional infrastructure like courts must also be competent and able to process decisions timeously.[369]

3.4.3. The restructuring plan

Once a decision to restructure is made, it is important that a clear plan is put in place. Questions that arise in this regard include the party that is tasked with the responsibility of drawing up a plan and whether they should be given exclusivity in doing so. US Chapter 11 deals with this issue by providing for an exclusivity period within which the debtor can propose a reorganisation plan.[370] At the expiration of this period, the creditors may then propose a plan, if the court does not exercise its discretion to extend the exclusivity period. An independent professional may also be given the responsibility of proposing a restructuring plan. This is the model in jurisdictions that displace managers upon commencement of the formal procedure.[371] Whether the debtor or a professional proposes a plan, it is often subject to the approval of creditors. Thus, debtors and IPs are unlikely to propose any plan that creditors are likely to disapprove of.[372]

It is not settled what kind of information a restructuring plan should be required to provide. Most laws would impose disclosure requirements such as information regarding financial state of the company, how the rights of all stakeholders would be affected by the proposed plan, whether the plan protects the rights of dissenting creditors. [373] Substantive limits may also be imposed on the terms of a restructuring plan. A restructuring law may require that the restructuring plan be accompanied by a business plan detailing the changes and strategies for running the business over a period of time and projections on how these changes will realistically improve the financial condition of the business long term.[374] This requirement is beneficial for

[369]If the claims about the concentration of ownership and control structures hold any credibility, it becomes relevant to note that markets in Africa are still developing and ownership and control are often concentrated. The implications of this for restructuring law are revisited later in this thesis. See Ch 5, section 5.7.2.
[370] The DIP enjoys a period of 120 days from the date of the order during which it has the exclusive right to propose a reorganisation plan, Chapter 11 USC, s1121 (a) (b).
[371] The administrator makes proposals for the restructuring. Section 49 Insolvency Act 1986.
[372] IMF, *Orderly Procedures* (n 4) 62.
[373] 11 USC 1123 requires the plan to stipulate clearly the changes to be made, interests that would be impaired by the plan and plans for implementation.
[374] South African Law requires a projected three years financial statement from the time the plan is approved. Companies Act 2008, s 150.

effective restructuring that goes beyond mere debt rescheduling to include business strategies for enhancing the competitiveness of the business. It inspires creativity on the part of the company's management and can be an important factor in obtaining fresh finance.[375] The content of a plan may also be informed by other laws such as company, banking and labour laws.[376]

3.4.4. The decision-making process

There are often competing considerations in restructuring, as the interests of debtors, different groups of creditors, employee groups and shareholders would not always align. Restructuring law offers mechanisms for enhancing decision making, including the creation of voting classes and majorities, the imposition of a decision on a dissenting minority, the protection of the interests of such minority, the cram down of whole classes and the intervention of the courts in approving a plan.

One of the questions that will often arise is how secured creditors should be treated in the voting process. Secured assets can constitute a substantial portion of the assets of a distressed company. Thus, it may become important to include these assets in the restructuring plan while also protecting the interests of the secured creditors.[377] There can also be different economic interests among general creditors, for instance between ongoing creditors that have a long-term interest in the business and short-term creditors. It becomes important to create classes so that the restructuring plan can be structured to identify and accommodate different interests and have a better chance of receiving support.[378]

Restructuring laws must also consider what the threshold for binding all the creditors in a class would be. Frameworks commonly adopt a three-quarter or two-third

[375] However, this may not prevent the presentation of a merely cosmetic business plan which is only made to satisfy the requirement of restructuring law.

[376] For example, if company law restricts debt-equity conversions, a restructuring plan cannot include a debt-equity conversion except that prohibition is removed.

[377] Nick Segal, 'The Effect of Reorganization Proceedings on Security Interests: The Position Under English And U.S. Law' (2007) 32 Brook. J. Int'l L. 927; 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. CHI. L. REv. 97, 121.

[378] Chapter 11 USC 1129(b); IMF, *Orderly Procedures* (n 4) 65-66.

majority.[379] Importantly, it must be determined whether it is a fraction of the total value of claims, the number of creditors voting or both. The English Scheme of arrangement is an example of a framework that adopts a two-tier voting system, requiring that the majority must represent three quarters in value of both the affected interests and their number.[380] Although criticised for making the restructuring process more difficult, this requirement is driven by a fairness concern. The justification for a two-tier approval system is that if voting is solely based on the value of claim, a single creditor or a small group that hold a substantial value of the debt will dominate the decision making.[381]

A key issue in decision making and the balancing of competing interests is whether a restructuring law should allow a plan to bind a whole class where a majority vote has not been achieved by that class. Countries have different approaches to this question. While Chapter 11 allows restructurings to go on without the approval of a whole class, in the UK, no single mechanism allows for such cramdown.[382]

Cram down provisions are increasingly regarded as useful for enhancing the chances of successful restructuring.[383] While cramdown can help to speed up decision making in restructuring, it should be accompanied by mechanisms for protecting dissenting classes. At the minimum, it is ensured that the priority rules in liquidation are respected, such that no creditor of that class receives less than they would have in liquidation. In addition to this, the absolute priority rule, dictates that a dissenting

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[379] Under Chapter 11, creditors holding at least one-half in number and two-thirds in amount of the claims of that class. Chapter 11 USC, s1126(c) (e); For the English administration procedure, 'a decision is not made if those voting against it include more than half in value of the creditors to whom notice of the decision procedure was delivered who are not, to the best of the convener's or chair's belief, persons connected with the company'. Insolvency (amendment) Rules 2017, r 15.34(2).

[380] Companies Act 2006 Pt 26. Under Nigerian law by contrast, it is only in relation to value of interests in the company that a three-quarters majority is required. Section 538 of the Companies and Allied Matters Act

[381] It has however been argued that creditors with small claims can be protected in other ways such as court oversight. Payne, 'The Role of the Court' (n 361) 133.

[382] Paterson, 'Notions of Fairness'(n 225) 600- 623; In the UK, stakeholders have devised ways to achieve a cram down, notably by pairing a scheme of arrangement with an administration procedure, where a scheme is used to exempt creditors that are out of the money from voting while the process enjoys the moratorium and other protection that administration offers. *Re MyTravel Group Plc* [2004] EWHC 2741 (Ch); *Re Bluebrook Ltd* [2010] 1 B.C.L.C. 338. Payne, 'Debt Restructuring'(n 91) 16- 20.

[383] Payne, 'Debt Restructuring (n 91) 1-4; Consultations for restructuring law reform in the UK are now proposing a procedure that allows for a cramdown or the extension of an existing procedure. Insolvency Service, A review of the corporate insolvency framework: A consultation on options for reform (May 2016) para 9

class should not receive less than the full value of their claim if creditors of a junior class (applying the ranking applicable in liquidation) receive any value at all. [384]

On a final note, jurisdictions must decide what role the courts would play in the decision-making process. Where voting and decision making is concerned, different jurisdictions allocate varying degrees of involvement to the court.[385] From the ordering of meetings, division of creditors into classes, determination of majorities, cram down, and a general oversight role to ensure fairness. For example, the court may be called upon to categorise creditors based on their economic interests or to approve a categorisation done by the company or a practitioner. The court may also be required to determine if an absolute priority rule has been adhered to. To the extent that they further complicate the restructuring process and the role of practitioners and the court, these rules rely on a relatively developed institutional infrastructure. The class voting mechanism for decision making can be particularly cumbersome and complex, as dividing creditors into classes is not always a straightforward exercise.[386] Developing economies must be aware that while these mechanisms can potentially enhance the opportunity for successful restructuring, creditors must be confident that judges or other institutions are required to exercise these discretions are informed, knowledgeable and well-equipped to do so.[387]

3.4.5. Restructuring finance

The successful restructuring of distressed companies often requires fresh finance for both continued operation in the short term and long-term turnaround measures. Companies in financial distress have low credit ratings and find it difficult or costly to obtain financing. Suppliers are hesitant to continue to supply if there are no assurances of payment.[388] The funding needs range from working capital

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[384] The absolute priority rule applies under the US Chapter 11 procedure. See 11 USC 1129; Douglas Baird, and Thomas H. Jackson, 'Bargaining after the fall and the contours of the absolute priority rule' (1988) The University of Chicago Law Review 738-789.

[385] With frameworks like Chapter 11 relying on the court more heavily than UK administration.

[386] *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573; *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480 demonstrate these complexities.

[387] IMF, *Orderly Procedures* (n 4) 69. In the absence of such assurance, these mechanisms may erode creditor confidence and result in creative application or disuse.

[388] Raphael La Porta et.al, 'Legal Determinants of External Finance' (1997) NBER Working Paper No. w5879; Janis Sarra 'Financing Insolvency Restructurings in the Wake of the Financial Crisis: Stalking Horses, Rogue White Knights and Circling Vultures' (2011) Penn State International Law Review 582.

requirements to restructuring costs and long-term costs of financing the business plan. There are two main sources of new finance providers, pre-insolvency lenders that extend trade credit or new funds and lenders with no previous relationship with the company who seek a chance for a higher return on their investment in the distressed company.[389] New money for the restructuring process variously described as rescue finance, short term financing, restructuring finance, DIP finance or post commencement finance, has increasingly become a central concern of insolvency law reform.[390]

As discussed in the previous chapter, one of the traditional views of insolvency regulation is anchored on a commitment to the maintenance of pre-insolvency entitlements. The major issue in restructuring finance is the tension between incentives that may be offered to a new finance provider vis the rights of existing creditors. Restructuring laws have responded to the need for fresh finance in different ways. While some have left the provision of post commencement finance to the market,[391] others have sought to incentivise existing or new lenders to provide finance by establishing a funding mechanism.

The US DIP financing under the Chapter 11 is perhaps the leading example for designing a restructuring funding mechanism. DIP financing has different tranches of financing which debtors can explore in ascending order. One is to obtain credit on an unsecured basis in the ordinary course of business. Such credit is treated as an administrative expense which gives priority over other general creditors.[392] Although it does not raise significant priority issues, it may be difficult for a troubled company to find lenders willing to extend unsecured finance.[393] Where the debtor is unable to

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[389] UNCITRAL Legislative Guide (n 4) Para 99.

[390] The influential World Bank Doing Business project has now included the availability of post commencement finance as one of the basis for measuring the strength of restructuring frameworks across the world. Doing Business Report 2018 (Resolving Insolvency Methodology) <www.doingbusiness.org/methodology/resolving-insolvency> accessed 22 August 2018.

[391] English administration law for example does not provide a mechanism for prioritising restructuring finance. Smith (n 268); See proposals for reform, Insolvency Service, A review of the corporate insolvency framework: A consultation on options for reform (May 2016) para 10.

[392] 11 USC 364 (a)(b).

[393] It is reported that the provision is mostly used to obtain credit from suppliers Michael Rochelle, 'Post-Filing Loans to the Chapter 11 Debtor: Good Money after Bad' (1990)107 Banking LJ 344. Most lenders instead insist on a lien that equals or outranks senior liens.

obtain credit in this way, the law allows the new credit to have priority above other administrative creditors.[394] New credit may be obtained on a secured basis, and where a security interest is involved, the question of priority becomes crucial. If the assets are encumbered, a second, junior priority interest may be created.[395] A more extreme approach is to grant a post commencement finance provider a super-priority security interest that ranks higher than existing security interests.[396] The challenge with this is the potential ex ante effect of such super-priority on the value of security.[397] Apart from potential ex-ante effects, such redistributive tendencies raise the possibility that secured credit holders would devise means to circumvent the restructuring process, thereby depriving a troubled company of essential assets.[398] In acknowledgment of these issues, the court is given the duty to ensure that the debtor makes sufficient efforts to obtain credit using the mechanisms that are less disruptive to secured creditors rights. So, before the super-priority security interest is granted under Chapter 11, the court must ensure that there is adequate protection for pre-filing secured creditors.[399] It is noted that international standards like the UNCITRAL Legislative Guide tend to reflect the US position on the subject. [400]

However, countries justifiably approach the issue of priority and security interests for new money providers cautiously. Some restructuring frameworks are still silent on

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[394] 11 USC 364 c (1).
[395] 11 USC 364 c (3).
[396] ibid s364(d) This is a priming lien which allows the debtor or trustee to seek approval of financing on a priority basis, that is the claim can be secured by a lien equal to or senior to an existing lien, if the applicant can establish that it was unable to obtain credit otherwise, and there is "adequate protection" for pre-filing secured creditors; Payne, 'The role of Court' (n 361)147; Sandeep Dahiya and others, 'Debtor-in-possession financing and bankruptcy resolution: Empirical evidence'(2003) 69(1) Journal of Financial Economics 259-280.
[397] Payne, 'The role of Court' (n 361) 147.
[398] John Armour, 'Should we Redistribute?' (n 167) 1-22.
[399] 11 USC 364 (d). The Canadian Bankruptcy and Insolvency Act (BIA) provides trustees with the power to borrow money and grant security on the property of the debtor. See BIA section 30(1)(g). No special priority is granted to such financing, however. Under the wide discretion granted to courts by the CCAA, they have authorised super-priority lending, but the court ensures that there is a reasonable prospect of successfully restructuring. See Janis Sarra, 'Debtor in Possession Financing: The Jurisdiction of Canadian Courts to Grant Super-Priority Financing in CCAA Applications' (2000) 23 Dalhousie L.J. 337, 341-345.
[400] The 64th recommendation of the UNCITRAL Guide relating to the priority for post commencement finance states that insolvency law should establish the priority that may be accorded to post commencement finance, ensuring at least the payment of the post commencement finance provider ahead of ordinary unsecured creditors, including those unsecured creditors with administrative priority. For security interests and priority over existing security, recommendations 55 to 67 follow the US pattern, and incorporate a protection mechanism for priming liens (a) The existing secured creditor was given the opportunity to be heard by the court; (b) The debtor can prove that it cannot obtain the finance in any other way; and (c) The interests of the existing secured creditor will be protected. UNCITRAL Legislative Guide 2004 (n 4); see also The World Bank, '*ICR Principles*' (n 4) C9.2.

the provision of a funding mechanism and resort to giving the PIP or DIP broad powers that may accommodate the provision of new money.[401] Others adopt a milder system of priority ranking where new money may rank equally with or ahead of general unsecured creditors only.[402]

3.4.6. Distressed Debt Investment and financial innovations

The need for fresh finance coupled with the proliferation of financial innovations has ushered new entrants and arrangements such as distressed debt investors (DDIs) into the resolution of financial distress. These developments have implications for the control, coordination and outcome of the restructuring process.

Over the years, there has been a growth in the distressed debt market,[403] a specialist market that trades in the debt assets of financially distressed companies. DDIs usually seek to exploit the restructuring surplus in a troubled company.[404] They typically buy such debt at discounted rates, restructure the company and sell at a profit after the restructuring. Others may bank on the difference between the value of the company if sold immediately and the value after time has passed. They may in the meantime deleverage the company, increase its operational capacity or simply wait till the market has recovered before selling or floating the company.[405] Although they can include existing lenders, DDIs increasingly come in the form of hedge funds, private equity firms and institutions seeking to use restructuring finance as a means of gaining control of firms in which they see some value.[406] Complex financial structures, particularly credit and financial derivatives that promote a separation of control and

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[401] For example, BIA s 30(1)(g); Also, English Law provides that sums payable 'in respect of a debt or liability arising out of a contract' are paid in priority to all other expenses. Insolvency Act 1986, Sch B1, para 99(4). McCormack has argued that this could be broadly interpreted to give the payment of capital and interest charges from a loan contract priority over other payments including administrator's renumeration. Gerard McCormack, 'Super-priority new financing and corporate rescue' (2007) JBL 701, 729-730.

[402] For example, South Africa's Business Rescue procedure. Companies Act 2008, s 153.

[403] The 1980s and 1990s in the US and the mid-1990s in the UK. See Paterson, 'Bargaining in Financial Restructuring' (n 301) 341.

[404] Sarah Paterson, 'Rethinking the Role of the Law' (n 217) 11 (adopting explanation given by LM Lopucki and WC Whitford, in 'Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies' (1993) 14 University of Pennsylvania Law Review 669, 752, of restructuring surplus as the difference between the value of the business if it were to be sold at the time of the restructuring and a sale after the restructuring of the existing capital structure).

[405] ibid 11.

[406] ibid.

ownership have had a catalytic effect on the growth of distressed debt investment.[407] This shift in the market has not gone unnoticed. As Baird and Rasmussen describe the situation, 'Today, we no longer have a single bank and dispersed general creditors. Dozens of constantly changing stakeholders occupy every tranche, each pursuing its own agenda'.[408]

Insolvency scholars have approached the proliferation of distressed debt investment and financial innovation with mixed reactions. Their arguments centre on how DDIs and financial innovations are altering the dynamics of bargaining and control in restructuring and the implications of these changes for corporate rescue.

Some law and economics scholars have argued that the distressed debt market takes care of the fundamental economics worries about the efficient allocation of resources to the highest and best use.[409] It is often the case that DDIs are turnaround experts who possess specialist knowledge about valuation and restructuring. They are therefore in a good position to make the important decision of whether a company should be sold in piece meal, as a going concern or simply restructured.[410] Also, because they aim to exploit the going concern surplus in the distressed company, DDIs have the right motivation and incentive to maximise value.[411] Thus, contrary to what many have said about these investors, their interests are not necessarily incompatible with the well-being of the company.[412]

It has also been claimed that DDIs have the specialist managerial skills required to bring the company out of the woods. The interest of hedge funds in controlling the business produces efficient results and should be encouraged.[413] Goldschmid argues

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[407] Vanessa Finch, 'Corporate Rescue in a World of Debt' (n 103) 760 (describes credit derivative contracts that transfer defined credit risks in a credit product or bundle of credit products to a *counterpart*, a market participant or the capital market itself. The trading of credit risk has been further advanced by the growth of structured financing techniques and the securitisation of such risks. Securitisation is the process involving the rendering of a credit derivative into an investment product--as where a bank places loans in a special purpose vehicle (SPV) which then issues new securities such as bonds—allowing investors to buy credit linked notes and to gain credit exposure to an entity or group of entities).

[408] Baird and Rasmussen, 'Antibankruptcy' (n 363) 651.

[409] Paterson, 'Rethinking the Role of the Law' (n 217) 3-5; Goldschmid, 'More Phoenix Than Vulture' (n 94) 193.

[410] Paterson, 'Rethinking the Role of the Law' (n 217) 12.

[411] Goldschmid, 'More Phoenix Than Vulture' (n 94) 264 Cites empirical research that suggest that supports the idea that aggregating claims in the hands of distressed debt investors maximise firm value.

[412] Goldschmid challenges the notion of cold DDIs as cold, ruthless vultures arguing that they add a lot of value to the reorganisation process. 'More Phoenix than Vulture' (n 94) 194-195, 257.

[413] Ibid.

that DDIs can infuse a distressed firm with the new energy needed to turn its fortunes around and may find it easier to relate with existing management as the relationship is not encumbered with prior history and hostilities.[414] Besides, they are in a better position than senior creditors to take the reins as the effectiveness of senior creditors may have become impeded by the negative psychological impact of financial distress.[415] DDIs may make genuine efforts to understand the company's problems rather than just try to get the problems off their plate like commercial lenders, who are often under regulatory pressure, would do. In comparison with commercial lenders, it is further argued that the use of restructuring finance provided by DDIs is more efficient. Goldschmid argues that when provided by commercial banks, the finance is often used for cosmetic purposes such as signalling to suppliers and the public that the company intends to continue operating. When the finance is provided by a DDI on the other hand, it is less cosmetic, and the funds are meaningfully applied towards the debtor's survival.[416]

On the other side are those who argue that DDIs are essentially vultures who hover around distressed companies, ready to pick the company apart and make a quick profit rather than any real efforts to save the company. The speed with which distressed debt investors operate may not always be a good thing for troubled firms as they may be more preoccupied with profit margins than the long-term health of the company, thus running the risk of sacrificing full rehabilitation for a speedy restructuring.[417] While costs may be saved in the short term, the company may end up only being carefully packaged for failure in the near future. In an empirical study, Harner confirms that distressed debt investors often have large amounts of funds at their disposal and are usually successful in their efforts to acquire troubled companies.

[414] ibid 256, 259 (presents empirical evidence to the effect that both claim holders and restructuring experts find it more acceptable to deal with debtors who 'failed' them and creditors who made the original deal that failed respectively).
[415] They may also harbour a lot of anger and ill feelings towards the management and shareholders. ibid 257.
[416] Goldschmid, 'More Phoenix Than Vulture' (n 94) 235-255 (it is argued that when provided by commercial lenders, the money is hardly ever drawn).
[417] Harvey R. Miller, 'Chapter 11 Reorganization Cases and the Delaware Myth' *(2002)* 55 VAND. L. REV., 2013, 2014 (arguing that distressed debt investors will rehabilitate a company only to the minimum degree necessary to make it attractive to potential buyers); Eilee Applebaum and Rosemary Batt, *Private equity at work: When Wall Street manages Main Street*. (Russell Sage Foundation 2014) Ch 6 and 7 (for an argument that private equity funds do not perform as well as believed and they often fail after a few years, having an adverse effect on labour and jobs).

Harner however cautions out that they have the potential to act to the detriment of the debtor and other stakeholders.[418] Miller also argues that companies are often rushed through the restructuring without careful attempts to fix the fundamental operational problems thereby raising the risk of recidivism.[419] These issues are difficult to manage because restructuring frameworks do not seek to strictly regulate the finance agreements between distressed companies and finance providers.

Worse still, it may be difficult to recognise who the creditors of the company are at every point in time let alone decipher their interests and motives.[420] Huebner & Tisdell argue that increasing difficulty in determining the ultimate decision makers makes the negotiation of restructuring, a process which relies very much on early intervention and speed, difficult. [421] As Baird and Rasmussen recount, 'The day after a petition is filed, the old creditors may disappear and be replaced by those who now hold the debt in the company'.[422] The cost of communication rises when the parties are continually changing.[423] This situation may create problems other than coordination. The ease with which banks can now divest of their interests in a failing company may affect the incentive of banks to monitor the debtor thereby eroding the discipline that comes with debt.[424]

There is no clear winner in this debate, especially considering the shortage of empirical research. The arguments engage the debates about what is considered a successful restructuring and from whose perspective- whether one that achieves company rescue by keeping the company as a going concern in its current state; or a restructuring that only preserves the business of the company to continue in a different entity. Whatever side of the arguments comes out on top, distressed debt investment is likely to become

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[418] Michelle Harner, 'Activist Distressed Debtholders: The New Barbarians at the Gate? (2012) 89 Wash. U. L. Rev. 155, 169-170.

[419] Miller (n 417) 2016.

[420] Baird and Rasmussen, 'Antibankruptcy' (n 363) 680.

[421] ibid 684; Huebner & Tisdell, 'As the Wheel Turns: New Dynamics in the Coming Restructuring Cycle' in *The Americas Restructuring and Insolvency Guide (*2008/2009) 81-834.

[422] Baird and Rasmussen, 'Antibankruptcy' (n 363) 682.

[423] Armour and Deakin, 'Norms in Private Insolvency' (n 103) 49.

[424] The mere presence of credit in the capital structure of a company can provide a discipline that may in some cases prevent the company from distress. See Finch, 'Corporate Rescue in a World of Debt' (n 103) 762; Frank Partnoy and David Skeel, 'The Promises and Perils of Credit Derivatives' (2006) U. Pen. Law School Working Paper 125.

increasingly prominent in restructuring because it offers an important and scarce ingredient- new funds.

For advanced economies, some optimism has been expressed about the ability of the insolvency system to cope with these market changes.[425] For developing African economies which are the subject of this thesis, foreign distressed debt investors can provide some succour by providing rescue finance that may be unavailable locally. As we see in chapter five, economic volatility is a real challenge and can occasion widespread distress that requires desperate means of resolution, especially where economically significant companies are concerned.[426] Affected creditors can be expected to eagerly embrace DDIs without questioning their motives and implications for corporate rescue, especially where regulatory oversight is low or non-existent. Beyond the implications of DDIs for rescue in these countries, foreign investors may also seize the opportunity to obtain controlling interests in crucial sectors of the economy. Depending on the country's policy on foreign participation in certain sectors, this could result in unintended effects on ownership and control of core industries.[427]

Conclusion

This chapter discusses key concerns in corporate debt restructuring, including the relationship between corporate rescue and debt restructuring, and the roles of private bargaining, the law and courts in the restructuring process. Informal procedures like the London Approach and its variants may offer some value, especially in developed jurisdictions, because they do not rely heavily on institutional infrastructure. However, such private workouts can hardly escape changing financial landscapes, cross border insolvency, external influence in distress regulation and the shadows that the law casts. As the resolution of financial distress becomes the subject of legislation in countries around the world, global actors such as the IMF, the World Bank,

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[425] Baird and Rasmussen, 'Antibankruptcy' (n 363) 699; Harner (n 418) 193-205 (makes recommendations for the regulation of DDI activity in insolvency).
[426] Ch 5, section 5.4.
[427] IMF, *Orderly Procedures* (n 4) 59.

UNCITRAL and other IFIs continue to push the notion that many of the challenges in the restructuring of distressed companies can be ameliorated by good law. Influential platforms like the World Bank Doing Business Reports emphasise the need for restructuring laws by ranking countries based on the availability of restructuring frameworks that meet a set of standards, while the availability of informal frameworks does little to improve a country's ranking. Using US and UK restructuring law as primary examples, the chapter examines key elements of restructuring law, the choices the laws make in facilitating restructuring and the factors that inform those choices. It also considers how senior creditors and providers of new money are often able to hijack the restructuring process to obtain their desired outcome. The central concern of creditors, as law and economics scholars argue is one of efficiency-achieving the best result for themselves at the least cost.

The chapter highlights the implications of different choices in restructuring law for developing countries. For one, relying on the court to make discretionary calls depends on the quality of the judiciary and requires experienced commercial or insolvency judges. As the next discussion shows, there is global pressure for restructuring and insolvency law reform as the trend towards harmonisation heightens. For developing countries confronted with this pressure, this chapter (together with chapter two) provide important grounding by identifying important elements in the regulation of distress resolution.

CHAPTER FOUR

THE GLOBAL HARMONISATION OF INSOLVENCY AND RESTRUCTURING NORMS.

To one degree or another, the momentum for reform, the content of reform, and the trajectory of reform proceed from or respond to transnational and global contexts.
(Halliday and Carruthers, *The Recursivity of Law* 2007)

Introduction.

In many areas of commercial law, it has become almost impossible to speak of legal reforms that are purely domestic in character.[428] The previous chapters have considered insolvency regulation, the key elements of corporate debt restructuring frameworks and the factors that drive policy choices in designing these frameworks, all in a domestic context. Increasingly however, external influences are playing a big role in these choices. The aim of this chapter is to examine the role of global actors and norms[429] in shaping how countries respond to corporate financial distress and design their restructuring frameworks.

Between 1998 and 2004, Carruthers and Halliday trace the process of convergence in insolvency regulation, from ad hoc resolution of corporate failures in advanced economies and ad hoc cross border insolvency rules to national insolvency principles, regional harmonisation of insolvency principles and now the current trend of global harmonisation.[430] This process has resulted in what Halliday and Shaffer term a *transnational legal order* where insolvency laws are propagated transnationally by a set of global actors.

Questions were raised in chapter one regarding the universality of insolvency regulation and the theories that underlie them. This chapter builds on that discussion

[428] Halliday and Carruthers, 'The Recursivity of Law' (n 16) 1173.
[429] While there can be informal and non-institutionalised norms in insolvency, the norms referred to in this chapter are backed by powerful institutions and in many cases, given the force of law by national governments. See Armour and Deakin, Norms in Private Insolvency (n 103) 10-11. Norms in this chapter means a common understanding which provides a basis of coordinating the actions of a group of individuals and may have become institutionalised or state-enforced.
[430] Halliday and Carruthers, 'The Recursivity of Law' (n 16) 1136; The growing recognition of the roles of institutions and series of financial crises contributed to the increased interest in insolvency law from the 1990s and upwards. Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) 47-67.

by considering (a) how insolvency norms are created and propagated across nation states (b) how they interact with local actors and institutions of developing economies. Importantly, the chapter questions whether the drive towards harmonisation provides the freedom and tools that developing countries require to make efficient choices in insolvency and restructuring law reform. The position of developing economies in this analysis is important because they are often the target of 'global' norms, guidelines and reforms. The chapter finds that reforms based on these norms may appear to advance the harmonisation agenda on paper while yielding little fruit in practice.

The first part of the chapter discusses the meaning of global and transnational norms and the making of a transnational legal order in insolvency and restructuring law. It examines the events that have led to the development of transnational norms and the important actors involved. Drawing from some of the insolvency reform experience in jurisdictions like Indonesia, it considers how transnational norms are propagated in developing jurisdictions at the national and local levels, and how global actors interact with national and local actors.

The second part considers the factors that determine the settling and implementation of transnational norms. Diagnostic problems, actor mismatch, institutional mismatch and contradictions present difficulties for settling. The chapter finds that these mechanisms are triggered even before enactment and stresses the value of carrying relevant actors (particularly seemingly weak actors that can foil the reform at the implementation stage) through all stages of reform.

Focusing on insolvency scripts from global actors like the World Bank and UNCITRAL, and the influence of the World Bank Doing Business Reports, the third part considers the tensions between global scripts for restructuring and the local institutions they seek to settle into. It finds it problematic that these normative guidelines are usually targeted at developing countries, but often fail to take account of the institutional needs of these countries. The section concludes by highlighting

important lessons and considerations for developing economies as they navigate the increasingly globalised world of corporate insolvency.

4.0. Globalisation of norms and the development of a Transnational Legal Order (TLO) in insolvency.

4.1. Global norms, TLOs and international law.

It is important to clarify early in this chapter, the sense in which the terms 'global norms' and transnational legal orders' are used; and the distinction between these concepts and international law.

International law focuses on the relationship between nation states and usually involves state actors.[431] On the other hand, the legal ordering of social relationships within the nation state is considered a domestic matter. For reasons which are discussed shortly, the ordering of relationships within the nation state has taken on a more global character. Because they do not fit neatly into the scope of international law properly so-called, scholars have sought to understand how this global ordering of domestic interactions operates. In his 2009 work, Benedict Kingsbury considered the idea of global law in the context of administrative law, emphasising the divergence from traditional international law that is largely inter-governmental in nature, to a rising transnational framework where there are no strict distinctions between the national and international domains. Unlike international law which is consent-based and intergovernmental, private regulators, non-state actors and national law makers are involved in the globalisation of norms and laws.[432] The norms have varying degrees of bindingness and several ways of propagation. As Kingsbury argues regarding the idea of global laws and norms, 'there are no shared rules of recognition or celebrated courts, no great charters, no textual provisions in national constitutions giving it status in national law, no significant long-appreciated history'.[433] They are however global because they are sets of shared ideas, expectations and laws that are

[431] Duncan Hollis, 'Why State Consent Still Matters-Non-State Actors, Treaties, and the Changing Sources of International Law' (2005) 23 Berkeley J. Int'l L. 140-146. But see debates around the fragmentation of international law. Arguments that international law is more pluralistic than is often suggested. David Kennedy, 'One, two, three, many legal orders: legal pluralism and the cosmopolitan dream' (2006) 31 NYU Rev. L. & Soc. 641.
[432] Benedict Kingsbury, 'The Concept of 'Law' in Global Administrative Law (2009) 20 EJIL 23-57, 28.
[433] ibid 35.

created and diffused among nation states without carrying traditional international law implications.[434]

4.1.1. Global norms and TLOs

The globalisation of norms tends to be more prominent in commercial law as there is less resistance here than with subject matters like inheritance, religion and family laws that are deeply rooted in indigenous practices.[435] Ogus provides an economic explanation for competition among legal systems and the convergence that can result from such competition. Ogus proposes that there is competition among legal systems and whether convergence will occur or not depends on if the laws in competition are homogenous or heterogenous.[436] Homogenous laws are those that facilitate economic transactions, and because they operate to reduce overall costs for all involved, there is less resistance to their natural (or even forced) convergence. Heterogenous laws on the other hand seek to dictate social and economic objectives that are preferable for some and not for others. For such laws, convergence is less likely to arise naturally and unsuitable for coercion.

A relevant question from this literature is whether insolvency law belongs to the homogenous group of laws where overall reduction of costs is the more important goal, thereby making it an easy target for convergence. Arguments for high convergence in insolvency law claim that insolvency plays an important role in the international financial architecture. Therefore, it is one of those areas where convergence is most obvious and necessary. On the other hand, skeptics maintain that insolvency is embedded in local legal, economic culture and institutions that are characterised by 'divergent attitudes to debt and debtors' and not readily susceptible to change. This provides strong reasons to argue for low convergence.[437] This debate

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[434] Sanjeev Khagram, James Riker and Kathryn Sikkink, *Restructuring world politics: transnational social movements, networks, and norms* (U of Minnesota Press 2002) 14.
[435] Amanda Perry, 'Multinational enterprises, international economic organisations and convergence among legal systems' (2002) 2 Non State Actors & International Law 23-39; Douglass North, *Institutions* (n 430) 36; Amanda Perry, 'The Relationship between Legal Systems and Economic Development: Integrating Economic and Cultural Approaches (2002) 29 Journal of Law and Society 282, 290.
[436] Anthony Ogus, 'Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law' (1999) 48 I.C.L.Q. 405.
[437] Halliday and Carruthers, *Bankrupt* (n 2) 25.

is revisited shortly, as the chapter considers how for different reasons, the trend of convergence in insolvency has arisen naturally in some jurisdictions and situations, failed to take traction in some and been forced in others.

Global norms emerge for a variety of reasons and in different ways. They can be built in response to shared financial crisis where countries develop 'similar but independent' responses to global crisis.[438] They can also arise in a deliberate and sometimes coercive way, through an imposition of policies and standards by powerful organisations and governments with a harmonisation agenda.[439] Furthermore, the influence of international treaties and resulting harmonisations of laws and policies can contribute to the building of global norms. Other contributing factors include transnational communication and regulatory competition among nations and markets.[440] This involves lesson-drawing and information gathering facilitated by stakeholder co-operation, common affiliations and institutional memberships.[441] Together with globalisation and market integration, these factors work hand in hand to produce what can be regarded as global scripts in different areas of policy.

Halliday and Shaffer have criticised the use of the word 'global' as misleading because it suggests that legal order is truly global in its geographic reach. Given the amount of variation that can be present in the geography, organisation and content of this transnational ordering, they consider the term *Transnational Legal Orders* to be a more appropriate representation of what is going on. For them, global norms more accurately refer to an effect or result (convergence of ideas among nations) which can be achieved by different means, while the TLO is a more deliberate, precise and legal ordering of norms across nations.[442] The TLO captures both the process and result of the legal ordering, and all the actors involved.[443] Because the chapter relies heavily on

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[438] Christoph Knill, 'Introduction: Cross-national policy convergence: concepts, approaches and explanatory factors' (2005) 12 (5) Journal of European public Policy 769; DiMaggio and Powell describe the channels through which the spread of norms occurs using the concept of isomorphism (convergence). They identify mimetic, coercive and normative isomorphism as the main channels of propagation. DiMaggio and Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective rationality in Organisational Fields' (1983) 48 American Sociological Review 147-160.

[439] Knill (n 438) 770; Halliday and Carruthers, *Bankrupt* (n 2) 9.

[440] Amanda Perry, 'Convergence among legal systems' (n 435) 23-39.

[441] ibid.

[442] Halliday and Shaffer, 'Transnational Legal Orders' (n 15) 15.

[443] The result of a TLO is to institutionalise global norms by enhancing coordination transnationally and reaching deep within nation states to enforce and implement legal norms.

Halliday and Shaffer's conception of transnational norms, the meanings they have attributed to TLOs is adopted here. [444]

Transnational legal orders result in the extension of social ordering beyond national boundaries. Halliday and Shaffer define them as a 'collection of formalized legal norms and associated organisations and actors that authoritatively order the understanding and practice of law across national jurisdictions'.[445] It is useful to reproduce the authors' extraction of the three important elements of TLOs. They note that:

- A TLO seeks to produce *order* in a domain of social activity or an issue area that relevant actors have construed as a "problem" of some sort or another;[446]
- A TLO is *legal* insofar as it has legal form, is produced by or in connection with a transnational body or network and is directed towards or indirectly engages national legal bodies. Whether directly or indirectly, it engages multiple national and local legal institutions, and assumes a recognisable legal form;[447]
- A TLO is *transnational* insofar as it orders social relationships domestically, but is practised in multiple sites, across nation-states.[448]

A TLO involves bottom-up and top-down analysis, because it captures all levels, from the development of legal norms at the transnational level to their propagation and enforcement at the grassroots.[449] In one analytic frame, the TLO examines the processes and actors involved in local, national, transnational and even international law making.

[444] Throughout the thesis however, the term global is also used interchangeably to describe prominent actors in the process of harmonisation, and the norms they offer. By referring to them as global norms and actors, it is not intended to suggest that the norms have been accepted by all nations of the world or that the actors are representative of all countries. Rather, it loosely describes the scripts of insolvency that these set of actors propagate transnationally in the harmonisation process.

[445] Halliday and Shaffer, 'Transnational Legal Orders' (n 15) 5.

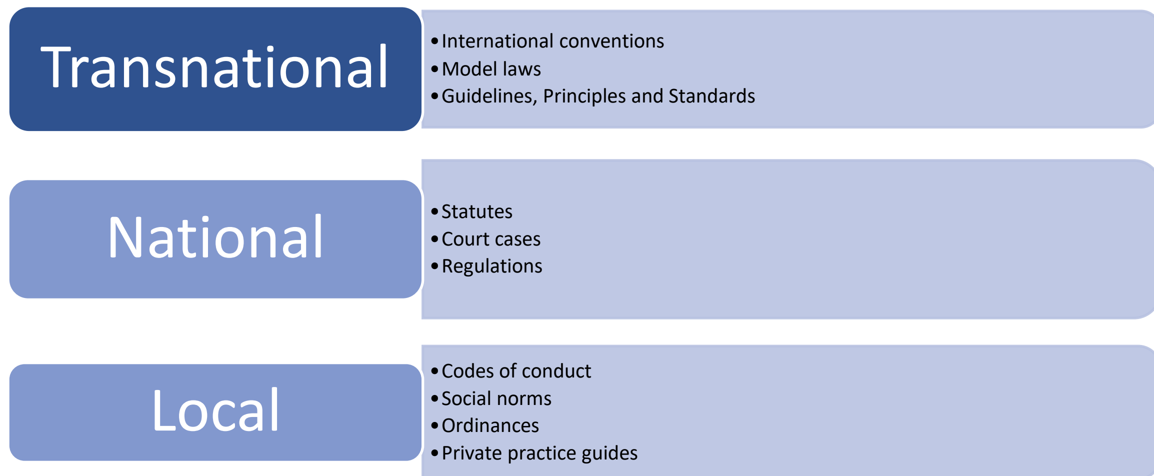
[446] The problem under consideration here is the financial distress of companies.

[447] It could take the form of a soft law (non-binding norms intended to shape behaviours and orientations) or hard law (mandatory legal norms that are binding, precise and often propagated by coercion) Halliday and Shaffer, 'Transnational Legal Orders' (n) 15; Kenneth Abbott and Duncan Snidal, 'Hard and soft law in international governance' (2000) 54 (3) International organization 421-456 for a more detailed analysis of soft and hard laws, their use in international law, advantages and disadvantages.

[448] Halliday and Shaffer, 'Transnational Legal Orders' (n 15) 18.

[449] ibid 3.

Figure 1. The three levels of a TLO



The scope and impact of these norms vary widely. As such, a TLO may be ***fully or partially settled*** depending on its geographical scope and level of acceptance at the grassroots.[450] Norms at any of these three levels become settled when -

(i) 'stakeholders know which norms apply to them in given situations and accept the scope of these norms; and

(ii) the meanings and reach of the norms become stabilized for the great majority of those engaged with them for most relevant behaviour.'[451]

The TLO becomes fully integrated when transnational, national, and local legal norms and practices are concordant and have meanings that closely resemble each other. Thus, the wider the gap between the formal law and practice, the less settled a transnational norm is said to be. As foreshadowed by law and society literature, settling at any level is never a straightforward process.[452] It is influenced by several factors including the source and process of the norm making. Shortly, the specific settling challenges that confront countries in the adoption of transnational norms are discussed.

[450] ibid 48.

[451] Susan Block-Lieb and Terence Halliday, 'Settling and Concordance: Two Cases in Global Commercial Law' in Terence Halliday, *Transnational legal orders* (Cambridge University Press 2015) 90.

[452] Katharina Pistor, Martin Raiser and Stanislaw Gelfer, 'Law and Finance in Transition Economies' (2000) 8(2) Economics of Transition 325-368; Daniel Berkowitz, Katharina Pistor and Jean Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2002) 47 European Economic Review 165-195 suggest that how a legal system was initially received rather than its origin, determines – whether how it functions today.

4.2. The development of a TLO in insolvency regulation.

4.2.1. The transnational level.

Transnational norms did not arise in corporate insolvency until the 1990s.[453] Before this time, there were no international standards governing either domestic or cross-border bankruptcies. The beginning of change came with insolvency reform in the United States, Canada and the United Kingdom in the 1980s, the rescue of viable companies being the most significant reform agenda.[454] In other parts of the world, corporate insolvency laws were highly obsolete or unused. Asian countries like Indonesia and South Korea had insolvency laws that were not used in practice. Likewise in Africa, insolvency laws were outdated and unused.[455] China had no formal corporate insolvency law on the books.[456] Change in Anglo-American law however triggered a flurry of reforms and began the process of developing transnational insolvency norms.

Five sets of global actors shown below, have been identified as influential in shaping these global standards, and consequently the insolvency frameworks of nation states.

Figure 2. Global actors in the building of an insolvency TLO.[457]

Two major factors fuelled the rapid development of transnational norms in corporate insolvency: market integration and financial crises. The push for globalisation of commercial laws was driven by concern that the integration of markets has far outpaced the globalisation of the law. This asymmetry has been painted as dangerous

[453] Block-Lieb and Halliday, 'Settling and Concordance' (n 451) 77.
[454] ibid.
[455] See Ch 6, Table 1.
[456] Roman Tomasic and Zinian Zhang, 'From Global Convergence In China's Enterprise Bankruptcy Law 2006 To Divergent Implementation: Corporate Reorganisation In China' (2012) 12 (2) Journal of Corporate Law Studies.
[457] Halliday and Carruthers, *Bankrupt* (n 2) 33.

and a recipe for global financial instability.[458] With markets becoming more connected, the occurrence of cross border insolvency increased. Professional associations like the IBA and regional organisations like the European Union began to seek more harmonisation of insolvency law among their members.[459] Soon, powerful governance institutions like the UN (through the UNCITRAL) became involved in the harmonisation process. In 1997, UNCITRAL produced its Model Law on Cross Border Insolvency.[460]

The connectedness of markets also meant that domestic bankruptcies could have huge global implications. The Asian financial crises in the late 1990s led to insolvency law reforms in that region, led by the G22, The Asian Development Bank, The IMF and the World Bank.[461] Although the crises and corporate failures exploded within Asia, they induced a reaction from global actors and a significant part of the resulting reforms aimed to propagate a US-inspired rehabilitation culture.[462] In Central and Eastern Europe also, the European Bank for Reconstruction and Development (EBRD) had an agenda to appraise insolvency laws and practices.[463]

With series of law making and reform experiences in different countries, International Organisations (IOs) and IFIs began to produce sets of normative principles, guidelines and standards that were transnational in scope. They published guidelines, insolvency principles, and transnational soft laws to guide countries in insolvency legislation. Notably, the World Bank produced its *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems,*[464] and the IMF published a book which identified the main principles of corporate insolvency laws for nations.[465]

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[458] Core nations such as US, Germany often work behind the scenes to influence international bodies. In addition to implementing the directives of the club of nations, IFIs help to develop global norms and provides diagnostic services to 'ailing' nations. ibid 25.

[459] ibid

[460] See UNCITRAL Model Law on Cross Border Insolvency. <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html> accessed 10 September 2018.

[461] Halliday and Carruthers, *Bankrupt* (n 2) 70.

[462] Block-Lieb and Halliday, 'Settling and Concordance' (n 451) 78; Bruce Carruthers and Terence Halliday, *Rescuing business: The making of corporate bankruptcy law in England and the United States* (Clarendon press 1998).

[463] The EBRD embarked on a diagnostic exercise within Europe and produced a report that contained implicit norms. European Bank for Reconstruction and Development (EBRD), *Transition Report 1999: Ten Years of Transition* (London: EBRD 1999).

[464] World Bank, *ICR Principles* (n 4)

[465] IMF, *Orderly Procedures* (n 4).

4.2.1. Have insolvency norms settled at the transnational level?

In line with Halliday and Shaffer's objection, reference to global norms in the context of insolvency suggests that there is a form of consensus between the nations of the world as to what the global scripts on insolvency ought to look like. However, it is noted that the process involves a game of power between powerful global actors on the one hand and between these global actors and nations at the peripheries of power on the other hand.[466] Tension between global powers arise in the struggle to determine which set of norms emerge as the global standard. Because global norms privilege those of a particular local, they may be better understood as *globalised localisms*.[467] US bankruptcy law has been the most influential in the formation of these global norms.[468]

Notwithstanding the competition among major global actors (particularly UNCITRAL and the World Bank), they moved towards a consensus on insolvency norms with remarkable speed and have remained largely unified in their prescriptions.[469] The UNCITRAL Legislative Guide which was published in 2004 became particularly influential. Global actors like the IMF and the World Bank also relied on the Legislative Guide in assessing and implementing insolvency law reform.[470] By the end of 2012, it could be claimed that transnational norms on insolvency had become widely accepted (settled) among global actors. More importantly, the norms were incorporated in many developed countries like the US, UK, Germany, Canada, France, Poland and some developing countries like Indonesia.[471]

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[466] Halliday and Carruthers, *Bankrupt* (n 2) Part 1.

[467] ibid; Boaventura de Sousa Santos, 'The processes of globalisation' (2002) Revista Crítica de Ciências Sociais and Eurozine 1-48, 36.

[468] Halliday and Carruthers, *Bankrupt* (n 2) 346-347; One explanation for this is the influence and proximity of the US to powerful global actors like the World Bank, the IMF and the UN. Also, professional organisations like the IBA are proliferated by US lawyers, judges and insolvency practitioners.

[469] For example, in making recommendations for voluntary restructuring, the UNCITRAL Legislative Guide refers users to the INSOL, *Statement of Principles for a Global Approach to Multi-Creditor Workouts*. UNCITRAL Legislative Guide (n 4) 26.

[470] The World Bank and the UNCITRAL in consultation with IMF revised its Principles in 2015 to incorporate elements of the UNCITRAL Legislative Guide. <www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights> accessed 10 September 2018.

[471] The success of the UNCITRAL Legislative Guide at the transnational level has been attributed to effort to consult with other nations, representative from different countries. The Guide also tried to produce normative guidelines that were both specific and general while avoiding an outright replication of the laws of any single jurisdiction. Halliday and Carruthers, 'The Recursivity of Law' (n 16) 1184-1187.

Some of the core norms of these guidelines and standards have been discussed in the previous chapter in the context of restructuring. There is no intention to reproduce the details of how the norms recommend that issues in insolvency be dealt with here, but their broad prescriptions are outlined below.[472]

Figure 3. Summary of global norms of insolvency and restructuring.

Insolvency norms (insolvency procedures generally)

- Maximisation of value of assets.
- Liquidation of moribund enterprises and rehabilitation of viable ones.
- Ensure equitable treatment of similarly situated creditors.
- Strike a balance between creditor and debtor rights (efficient and impartial resolution of insolvency).
- Ensure transparent and predictable insolvency law with incentives for gathering and dispensing information.
- Recognition of existing creditor rights and establishment of clear rules for ranking of priority claims.
- Proper regulation of Insolvency Practitioners.
- Regulation of directors' activities, obligations and liabilities near insolvency.
- Coordinated administration of the insolvency of group companies.
- Clear and harmonised rules for cross border insolvency by adopting the Model Law.
- Provide guidance for identification of creditors and assets included in the debtor's estate.

Restructuring norms

- Provide clear rules for commencing a restructuring: e.g. persons that can initiate restructuring (debtor and creditors recommended).
- Establish measures to ensure for protecting the assets of the company through a stay on the actions of debtor, creditors or third parties.
- Outline the duties of all parties during the restructuring, creditors, IP, debtor, court, including who stays in control.
- Facilitate funding for the continued operation or survival of the business. Post commencement finance provisions should balance rights of providers and rights of existing creditors.
- Require a restructuring plan and clarify who makes it, the content, mechanisms for approval and confirmation.
- Establish a mechanism for voting, threshold for voting, whether voting is done in classes and rules for cramdown.
- The law should also provide guidance for converting a restructuring process to liquidation.

While there is consensus on the broad goals and values that transnational norms aim to achieve, the means of achieving these norms can take different forms.[473]

Carruthers and Halliday identify four[474] variations of global scripts in the field of insolvency:[475] Single-standard, fully explicated formal rules that that provide for a best alternative and are propagated in a formalised, fully articulated form. For example, UNCITRAL's Model Law on Cross-Border Insolvency. The Model Law is perhaps the clearest example of a TLO at the transnational level. It gives specific

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[472] The World Bank, *ICR Principles* (n 33) 2-5; The UNCITRAL Guide (n 4) 10-14. These core norms are shared by global actors and guidelines such as the Legislative Guide, IMF and World Bank Principles. These standards are routinely revised to provide more details on how laws can be structured to achieve these norms. Some of the other prescriptions include the availability of a regulated body of insolvency practitioners, post commencement financing, special insolvency courts etc.

[473] For instance, while the US uses the Chapter 11 reorganisation procedure, the corporate rescue regime in the UK is the administration procedure.

[474] They identify a fifth but point out that it has not emerged in insolvency. A Single-standard, fully explicated formal rules that represent best practices but diffuses the best among preexisting alternatives and not necessarily the best overall. Carruthers and Halliday, 'Negotiating globalization' (n 35) 540.

[475] Ibid.

directions on issues pertaining to cross border insolvency, is binding on countries that have adopted it and actively engages with national law-making bodies to implement it in recognisable legal form.[476] The second option is fully explicated formal rules that set a minimum standard below which countries should not go. This is illustrated by recommendations in the UNCITRAL Legislative Guide that prescribe minimum conditions for countries where they choose between alternative courses.[477] Global scripts can also come in the form of general principles, 'to be specified or interpreted as appropriate' i.e. broad goals that can be implemented to fit local circumstances. This option allows for the most local variation and gives local actors more discretion.[478] Finally, insolvency scripts can be presented as a menu of options, with different means of achieving a goal. The UNCITRAL Guide starts up in this form by discussing different approaches to issues but presents a single recommendation based on a preferred approach.[479]

Global actors have made a necessary compromise to loosely define convergence such that underlying norms are not too divergent, even if all the elements of insolvency laws do not operate in the same way across jurisdictions. By defining convergence in this way, global 'convergence' in insolvency law becomes possible and perhaps desirable. Another implication of this loose definition of convergence is that competition can remain among global actors in terms of what laws other countries, particularly developing countries, choose to adopt as templates.[480]

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[476] Countries have the freedom to adapt the model law to suit their needs, but it is recommended that they make as few changes as possible 'in order to achieve a satisfactory degree of harmonization and certainty' UNCITRAL Model Law on Cross Border Insolvency, Guide to Enactment and Interpretation 25.

[477]For example, UNCITRAL Legislative Guide (n 4) Rec 45 provides that 'The insolvency law may permit exceptions to the application of the stay or suspension under recommendation 46 and, where it does so, those exceptions should be clearly stated. Paragraph *(a)* of recommendation 46 should not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor'.

[478] The World Bank ICR Principles has been put forward as an example of this in theory. Caruthers and Halliday,' Negotiating Globalization' (n 35) 540.

[479] ibid. Preference often tilts towards the US reorganisation model.

[480] Globalised localism is not just a source of bragging rights. There are practical reasons why countries would desire that as many countries as possible adopt their laws. This creates competitive advantage and continued relevance in business and other areas. For example, the continued choice of English Law as the governing law of contract in many jurisdictions is strengthened by the familiarity of local practitioners with English law and legal system. This has the potential to reinforce England as the capital of international centre for commercial law services. This is revisited in the next chapter which considers the different influences on insolvency law reform in Africa. See Ogus (n 436) 405-418.

As we discuss shortly however, activities of global actors in the harmonisation process (such as the World Bank Doing Business rankings) can have the effect of holding out specific legal forms and templates as the preferred or more effective approach.[481] This can limit the reform options and freedom of countries, particularly developing countries, to adopt global norms in ways and at a pace that is most compatible with their local institutions. [482]

4.3. Propagation of transnational norms by global actors: focus on developing countries.

While the settling of insolvency norms has gone relatively well at the transnational level, their transition into national and local norms remains complicated, particularly for developing economies.[483] The claim that global scripts for insolvency are fairly settled among global actors is remarkable but unsurprising, considering that they are often the originators of so-called global norms.[484] For advanced economies who may have lost out in the competition for globalising their local norms, the formulation of global norms as we see, is broad enough to accommodate their insolvency institutions. It may even be argued that the distance between the national laws of those countries and the global scripts that have emerged was never significant to begin with. Inevitably, an important piece in the propagation of global scripts of insolvency are less powerful developing economies, whose laws and institutions bear a greater distance to global scripts.

Two factors have been shown to be important in determing which economies global actors choose to actively propagate global norms in and the methods they adopt: the socio-economic interests of the global actors in a developing country and their leverage in that country. Developing countries vary in the level of their integration into the global market and their impact on the global economy. The more significant

[481] Commonly the US Model. Caruthers and Halliday,’ Negotiating Globalization’ (n 35) 540.
[482] This is later revisited later in this chapter and in subsequent chapters in the context of African countries.
[483] Djankov and others (n 130) 40-42.
[484] Even for UNCITRAL legislative Guide which has been the poster child for homogenisation of bankruptcy norms because of wide consultations from both advanced and developing economies, the overarching influence of US is present. Susan Block-Lieb and Terence Halliday, ‘Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law’ (2006) 42 Tex. Int'l LJ 508.

a developing economy is to global actors, the more important it is for global actors that the commercial laws of that economy be aligned with global scripts. It has been suggested that powerful countries like the USA, use their influence on IFIs to indirectly pursue their interests in insolvency law reforms in developing economies. These 'leading creditor nations sought to stabilize financial systems and position themselves competitively vis-à-vis each other for entry into emerging credit markets.' [485]

As mentioned above, the Asian financial crisis was an important trigger for the intervention that led to extensive insolvency reforms. The crisis is reported to have 'urgently impelled commercial law reform and institution building' through the aggregation of global best practices and standards.[486]

This was because Asia had become important to the global economy and by extension, global actors.[487] In Latin America, insolvency law reform gained momentum following series of financial crises such as the Mexican Peso crisis of 1995, the devaluation of the Brazilian real in 1999, Argentina's external debt default in 2001 and its banking crisis in 2002 and the direct effect of the Asian financial crisis of 1997.[488] The interests of global powers, particularly the US in Latin America has also influenced the trajectory and content of insolvency reform in the region.[489]Argentina, Brazil, Mexico, Uruguay, Bolivia, Peru have all adopted reorganisation laws and debt restructuring frameworks that are variants of the US chapter 11.

Means of propagation

In addition to global interest is the issue of leverage, which also informs the approach to propagation. Global actors adopt different means of propagation ranging from emulation, learning, networks, reward systems to strong encouragement and economic coercion. In ordinary circumstances, the preferred means has been to show the legitimacy of a model by persuading other economies as to its rightness. Labels

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[485] Halliday and Carruthers, *Bankrupt* (n 2) 72.
[486] ibid 70.
[487] ibid.
[488]Olivares-Caminal and Gerónimo Frigerio,'Expedited Debt Restructuring in Latin America' (2010) Warwick School of Law Research Paper Series 7.
[489] ibid 1- 3.

such as 'universal, normal, modern, efficient, advanced' are used to stamp these norms with legitimacy, reduce resistance to enactment and allow for easy implementation.[490] Global actors also legitimate their normative prescriptions using internal and external validation, based on their past experiences, achievements elsewhere and the subscription of other international institutions to the same or similar principles.[491]

Coercive pressure is applied where global actors are in a strong position to extract compliance from weaker countries. Financial dependence can leave a nation at the mercy of IFIs especially in situations of financial crises where they provide rescue finance. The IMF has considerable leverage because its relevance in emergency situations as a creditor to countries with severe balance of payment deficits puts it in good stead to impose conditionalities such as law reform and adoption of its standards. The series of events in Indonesia from 1998 to mid-2000s where the IMF exerted quasi-coercive pressure by mandating insolvency reforms as one of the conditions for providing new loans illustrates this.[492] Also, Thailand was in a stronger bargaining position and more able to resist external pressure in 1995 than in 1997, such that the IMF was more likely to successfully achieve insolvency law reform by coercion in 1997 than in 1995.[493] Similarly, the emergence of the insolvency law reform agenda in India has been partly linked to the 'negotiation' of structural adjustment loan support from the World Bank in 1991.[494]

Persuasion is a subtler form of pressure and often comes in form of moral suasion and encouragement. This was adopted in Korea, a rich developing country (at that time),

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[490] Halliday and Carruthers, *Bankrupt* (n 2) 24, 25-27.

[491] For example, the IMF legitimises its principles on the basis of the IMF's experience in different jurisdictions and that of organisations like the World Bank and the IFC. IMF, *Orderly Procedures* (n 4) 62.

[492] Halliday and Carruthers, 'The Recursivity of Law' (n 16) 1155; the Eurozone crisis which erupted in late 2009 provides another example. Highly indebted countries like Greece, Portugal and Ireland required urgent intervention from the IMF, the European Commission and the European Central Bank (the Troika) to ameliorate the adverse economic effects of the crisis on the whole of the European Union. The Troika exerted extensive structural reforms as part of the conditions for the bailouts. Philip Lane, 'The European sovereign debt crisis' (2012) 26 (3) The Journal of Economic Perspectives 49-67.

[493] Carruthers and Halliday, 'Negotiating globalization' (n 35) 526.

[494] Kristin van Zweiten, *The Demise of Corporate Insolvency Law in India: The Role of the Courts*. (Dphil thesis, Oxford University 2012); Valerie Cerra and Sweta Chaman Saxena, 'What Caused the 1991 Currency Crisis in India?' (2002) 49(3) IMF Staff Papers 395.

that was less susceptible to pressure.[495] China presented a more difficult case for propagation, having been considered immune to western institutions for a long time and defying expectations that it would move from a command to a market economy as it developed.[496] The Chinese economy was relatively unaffected by the financial crisis and global actors did not have as much leverage to impose reform in China.[497] In fact, China enacted an indigenous bankruptcy law that was suited for its economic and political structure at about the same time law reform was carried out in the UK.[498] The growing importance of China in the Asian region and the global economy as a whole however made it important for global actors to have a sustained interest in propagating global norms in China.

Even if able to resist the imposition from IFIs, China could not remain immune to pressures to conform to global standards as its economy became more integrated in global markets.[499] The work of global actors was therefore made easier by a coinciding willingness in China to open up to the incorporation of 'western institutions', albeit measuredly. China has selectively allowed some global norms of insolvency into its insolvency regime and has now ended up with a reorganisation law that is acceptable to global actors as sufficiently representative of the norms they profess.[500] Intervention from global actors[501] was achieved largely by suasion and offered in the form of technical support. In contrast to the rushed reform in more vulnerable Indonesia, the reform process happened at the pace of national and local actors with the close involvement of Chinese practitioners. Because the use of conditionality and coercion in policy-based lending and aids programs has become the subject of intense criticism

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[495] Halliday and Carruthers, *Bankrupt* (n 2) 40-42.

[496] Franklin Allen and Jun Qian, 'Comparing legal and alternative institutions in finance and commerce' in Heckman, Nelson, and Cabatingan (eds) *Global perspectives on the rule of law* (Routledge, 2010) 119 – 121.

[497] Zhou Fang, and Geng Xiao, 'China in the Context of the Asian Financial Crisis' (1999) China Review 165-178;

[498] Peng Xiaohua, 'Characteristics of China's First Bankruptcy Law' (1987) 28 Harv. Int'l. LJ 373. China's bankruptcy law of 1986 which dealt with the bankruptcy of state-owned enterprises was passed in 1986, coinciding with the enactment of the UK Insolvency Act 1986.

[499] Carruthers and Halliday, 'Negotiating globalization' (n 35) 561-568.

[500] The Enterprise Bankruptcy Law 2006. It has been suggested that this law may essentially amount to "window dressing" for western investors. For instance, the bankruptcy laws in many aspects resemble bankruptcy codes in Western countries but there continues to exist a parallel system based on existing rules and practices. Li, Shuguang, 'Bankruptcy law in China: lessons of the past twelve years' (2001) 5 (1) Harvard Asia Quarterly.

[501] The World Bank, Asian Development Bank, Germany, Australia. See Carruthers and Halliday, 'Negotiating globalization' (n 35) 544-560.

and resistance,[502] there has since been a general shift towards less coercive forms of propagation.

In addition to involvement in legislative reforms in individual countries, global actors also supplement their propagation of norms in the Asian region through networks and peer pressure. Persuasion is often accompanied with rhetorical stratagems involving a combination of comparison among countries, modelling, peer pressure and sometimes shaming.[503] The Forum for Asian Insolvency Reform (FAIR) is an organisation co-founded in 2007 and run by Organisation of Economic Co-operation and Development (OECD), the Asia-Pacific Economic Cooperation forum (APEC), the World Bank, the Asian Development Bank (ADB) and INSOL. FAIR hosts events that bring together stakeholders from different countries to discuss insolvency reform across the continent.[504]

4.3.1. Relationship between global actors and nation states

The interaction of global actor with nation-states could be direct or mediated. Global actors relate directly with the government of the nation-states but more often, they find it more practical to use intermediaries.[505] Intermediaries come in different forms - they can be individuals or organisations, possess different competencies and perform different functions in the reform process. (See figure 4 to 7 below). [506]

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[502] Joseph Stiglitz, 'Participation and development: Perspectives from the comprehensive development paradigm' (2002) 6(2) Review of development economics 163-182; John Toye, Jane Harrigan, and Paul Mosley, *Aid and Power-Vol 1: The World Bank and Policy Based Lending* (Routledge 2013).

[503] Halliday and Carruthers, *Bankrupt* (n 2) 58.

[504] The World Bank, Forum for Asian Insolvency Reform (World Bank Brief 28 July 2016) <http://www.worldbank.org/en/topic/financialsector/brief/forum-for-asian-insolvency-reform-fair>. Even if not efficient in producing quick and specific outcomes like direct intervention would, it is cost effective for global actors to invest into reform in a few countries and then reach other countries in the region through a combination of modelling and peer pressure. The next chapter discusses how this strategy is now being developed in Africa. Other examples of global actors pressing for the adoption of global standards from a safe distance include, the IMF multi-country reviews such as the Article IV reports, The World Bank Doing Business project. The IMF's regular monitoring of economies and associated provision of policy advice. IMF Country Surveillance <https://www.imf.org/external/about/econsurv.htm>; Also, The Report on the Observance of Standards and Codes (ROSC) initiative run by the IMF and World Bank operate to develop and disseminate international standards and codes. Insolvency and Creditor Rights is one of the three target areas of the ROSC <http://www.worldbank.org/en/programs/rosc;http://www.imf.org/external/NP/rosc/rosc.aspx> all accessed 10 September 2018.

[505] Carruthers and Halliday, 'Negotiating globalization' (n 35) 577.

[506] As described by Caruthers and Halliday, ibid 577-578.

Figure 4. *Direct relationship* between global centre and nation state, no intermediaries (less common/practical)

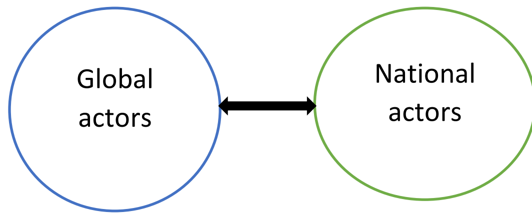


Figure 5. *First order intermediaries* have a direct relationship with the global centre and with the local nation-state (most common)

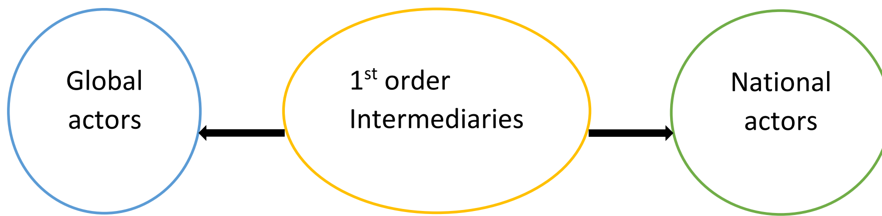


Figure 6. *Second order intermediaries* act as consultants to national/global actors on their side but have no direct contact with the national/global actors on the other side although they can relate with their intermediaries.

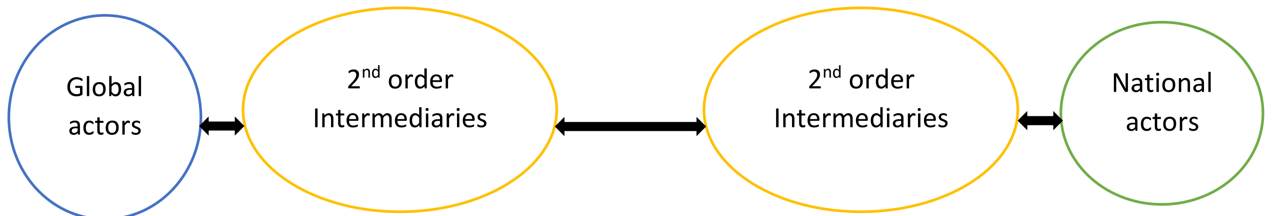
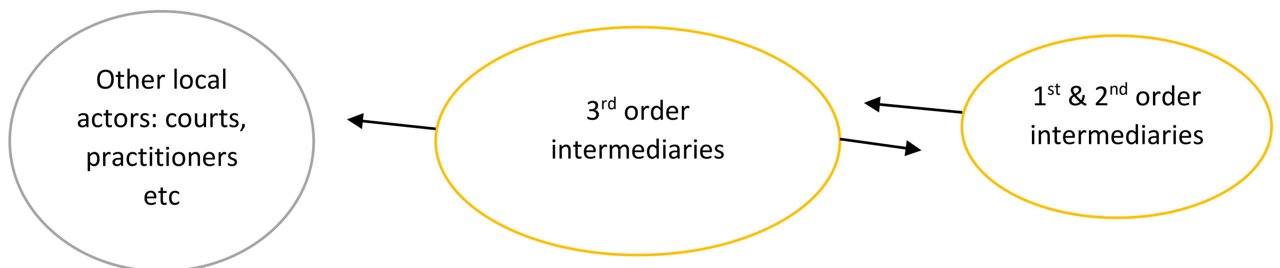


Figure 7. *Third order intermediaries* have no direct contact with global/national actors but indirectly affect the process of enactment and implementation by advocating global norms and influencing local thinking and practices. Most prominent at implementation stage.



Intermediaries can range from indigenous practitioners, foreign law firms to local or foreign academics, and have varying skills such as economic, legal expertise, diagnostic, prescriptive abilities and translation competencies. They therefore play

different roles at different stages of the reform process from enactment to implementation. Halliday and Carruthers report that global actors look for three qualities in intermediaries- competencies, power and loyalty to global standards.[507] While it may be more difficult to find local allies that possess all of these qualities in developing jurisdictions, global actors find ways to compensate.[508] For example, the webs of knowledge, constituted by practitioners and academics can become webs of influence through the process of enrolment.[509] Enrolment occurs when a weaker actor is able to persuade a stronger actor to take on its cause. Thus, 'weak' academics and individual practitioners who suffer from both 'legitimation deficits' and an 'inability to compel implementation' can persuade more influential actors to push the reform agenda.[510]

4.4. Towards complete convergence: settling at national and local levels

An important inquiry in the discussion on global convergence of insolvency norms and laws is how well laws take root in target countries and the determining factors for this settling process. As stated above, settling is a continuous process from the point of enactment of laws, the local implementation of those laws and the outcome of implementation.

As discussed earlier in the chapter, theories are divided on the possibility (and desirability) of complete convergence, particularly at the local level. While some groups argue for ultimate homogeneity of financial architectures, others maintain that local varieties and peculiarities will remain.[511] Both arguments are supported by some evidence – in terms of formal law, there is considerable convergence on the global scripts of insolvency, most clearly represented by the UNCITRAL Model Law and the

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[507] Ibid 576.
[508] ibid 552.
[509] Halliday and Carruthers, *Bankrupt* (n 2) 57 68; John Braithwaite and Peter Drahos, *Global business regulation* (Cambridge university press 2000).
[510] Halliday and Carruthers, *Bankrupt* (n 2) 68-69.
[511] Nathalie Martin 'The Role of History and Culture' (n 170) 25-29; David Held and others, 'Global transformations: Politics, economics and culture' in *Politics at the Edge* (Palgrave Macmillan UK, 2000) 14-28; Dimitrova and Steunenberg, 'The search for convergence of national policies in the European Union, An impossible quest?' (2000) 1 (2) European Union Politics 26; D.W Drezner, 'Globalization and policy convergence' (2001) 3 The International Studies Review 53–78.

UNCITRAL Legislative Guide.[512] However, contradictions and conflicts exist underneath this consensus, particularly at the national and local levels. The next section considers factors that adversely affect settling at these levels - diagnostic problems, actor and institutional mismatch and contradictions, mechanisms which Halliday and Caruthers claim result in rounds of recursive law making until the law becomes fully settled.[513]

4.4.1. Diagnostic problems

The definition and classification of a problem informs its treatment and the choice between alternative solutions. Diagnostic problems arise when the process of identifying the problems for which a solution is being designed is faulty.[514] The process of diagnosing the problem in insolvency legislation (or any legislation indeed) can be complicated. There will likely be disagreements between different actors on the nature, scope, source and significance of the problem. For instance, debtor associations may consider that the main problems are unforgiving insolvency laws and harsh recovery practices by creditors. For creditor bodies, weak institutions may top the list. Apart from misdiagnosis, some important stakeholder groups may be absent from the diagnostic process thereby warping the result of the diagnosis.

Other stakeholders who are present may be wrong in their assessment of what the issues are, or they may be biased in their analysis. Worst still, there may be no attempt at diagnosing the problems before introducing a 'solution'. This diagnostic struggle will further lead to a dispute over prescriptions and ultimately resistance from groups whose diagnosis and prescriptions have been rejected.[515] Diagnostic problems can become even more complicated when the momentum and content of reform are influenced externally. There is a possibility of overlooking, rushing or taking the diagnostic stage for granted. The proliferation of global norms in corporate insolvency may be interpreted by target countries to mean that insolvency problems and the

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[512] As stated earlier, although there is consensus, the price of that consensus is that these scripts come in different forms that allow for local variations.
[513] Halliday and Carruthers also include indeterminacy of law which results from a lack of certainty arising from multiplicity of norms for the same issue. Halliday and Carruthers, 'The Recursivity of Law' (n 16) 1135.
[514] ibid 1150.
[515] ibid 1151.

means of addressing them are established. This can discourage in-depth diagnosis by these countries when they embark on insolvency law reform. Additionally, diagnostic gaps and errors made at the transnational level may be imported when these norms are incorporated into national laws.

The degree of diagnostic problems in insolvency norms is also related to the method and circumstance of propagation. In a crisis, there is little guarantee that diagnostic issues are thoroughly dealt with. Also, the more capable, knowledgeable and effective local stakeholders and professionals are, the less the degree of external imposition. Contrasting external influence on insolvency reform in Korea and Indonesia countries, Caruthers and Halliday note that 'Korea was less vulnerable than Indonesia partly because Korea's internal capacities for professional diagnosis and prescription were much better developed'.[516] In Korea, global actors set broad parameters for reform and allowed local actors to fill in the details while the reform in Indonesia was more intrusive. [517]

4.4.2. Mismatch (actor)

A dissonance may exist between persons involved in law making and those that implement the law in practice.[518] Actor mismatch is almost always a problem in legislation as it takes great effort to carry all interest groups along in the process of deliberations and law making. The exclusion of relevant interest groups may result in diagnostic errors and protests from excluded groups at the point of implementation.[519] Even where opportunities are provided for participation, there is a strong possibility that relevant actors ignorantly fail to participate, are unable to diagnose the problem correctly or identify their interests.[520] One effect of this is more heavy-handed imposition of global norms with less consideration for local institutions by global actors. Again, this problem is exacerbated by crisis events. In Indonesia, 'the short time horizons forced by crisis events and inherent biases in the diagnostic phase of reforms

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[516] Ibid 1166.
[517] ibid 1167.
[518] ibid 1152.
[519]One element that is often missing in law making in developing economies is consultations with stakeholders. See United Nations African Governance Report (United Nations Economic Commission 2005) 13-19.
[520] Terence Halliday, Susan Block-Lieb, and Bruce Carruthers, 'Missing Debtors: National Lawmaking and Global Norm-Making of Corporate Bankruptcy Regimes' (2008) (published by Oxford University Press 2012) 1-5.

completely excluded integral players in practice— the debtor corporations, many private banks, and the Chinese commercial leaders'.[521]

4.4.3. Mismatch (Institutional)

Apart from an actor mismatch, a mismatch between local institutions and transnational norms can create settling difficulties. North defines institutions as the 'rules or constraints' that seek to shape human behaviour and interactions.[522] Formal institutions are precise and stable, making them easy to compare and transfer across jurisdictions. And while formal institutions can be easily transplanted by legislation, there is no guarantee that they would yield the same efficient outcomes as in the countries of origin.[523] One reason for this is that the formal institutions on which transplanted legislations rely to function may be unavailable or may not function as effectively in target countries. Also, the peculiarities of the informal institutions that have become embedded in the host country and their interaction with formal institutions can pose.

Informal institutions affect the actions of stakeholders in insolvency and must be taken into account to construct a true picture of efficient choices. Informal institutions can include observable practices, social norms and mechanisms that have solidified into unwritten codes and conventions within this group of actors. They can emanate from the extension and application of formal rules to solve specific problems. Also, they can erupt from repetitive social interactions, loopholes, inappropriate or ineffective laws as ways of getting around the problems or transaction costs created by formal constraints.[524] Lastly, informal institutions have great survival tenacity and will often survive change in formal rules.

Path dependence dictates that institutional practices become more difficult and costlier to change as they become reinforced.[525] When activities are carried out in

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[521] Halliday and Carruthers, 'The Recursivity of Law' (n 16) 1161.

[522] This includes both formal and informal (cultural and social norms). Douglass North, *Institutions* (n 430) 3.

[523] For a broad analysis of the transplant effect, see Berkowitz, Pistor & Richard,'Economic Development' (n 452) 170; The transplant effect' (2003) 51 (1) The American Journal of Comparative Law 163-203.

[524] North, *Institutions* (n 430) 138.

[525] The theory of path dependence has been used to explain how these institutional changes occur in some detail. Paul David,' Why are institutions the 'carriers of history'?; Path dependence and the evolution of conventions, organizations and institutions' (1994) 5(2) Structural change and economic dynamics 205-220; Stan Liebowitz and Stephen E. Margolis, 'Path dependence, lock-in, and history' (1995) 11 JL Econ. & Org. 205; Mariana Prado and

certain way over time, more time and cost are invested into that system. The resulting outcome is that the relative cost of adopting alternative systems becomes high, making it difficult to change them.[526] The resistance is even stronger where the government and powerful private actors benefit from existing systems and proposed changes potentially rob them of those benefits.[527]

Thus, 'changing the law and getting people to use the new law, are two very different things'.[528] In Japan, like many Asian traditional societies, the adoption of formal, debtor-oriented restructuring laws has done little to change the negative attitude towards debt and corporate failure. Continued incidences of debt-related suicides in that jurisdiction shows that 'it is far easier to change the laws than the attitudes'.[529]

Overtime, formal rules may have the effect of mutating or being mutated by informal constraints to produce a different set of rules.[530] This presents a peculiar settling challenge for developing economies seeking to translate transnational norms to a local context. The likely policy response to the emergence of undesirable mutant institutions is to view them as problems that must be solved with the introduction of better, more 'modern' laws.[531] Failing to acknowledge that they have only developed as a result of the gap between embedded institutions and so-called modern laws, further reform will only widen this gap.

4.4.4. Contradictions

This is connected to the institutional mismatch problem. Contradictions in the law can result from incompatible institutions and conflicting ideologies. Halliday and Caruthers argue that when lawmakers are unable to resolve conflicts between different interest groups or ideologies, they settle for partial solutions which often result in further interpretation problems and indeterminacies.[532] Where transnational

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Michael Trebilcock, 'Path dependence, development, and the dynamics of institutional reform' (2009) 59 (3) University of Toronto Law Journal 341, 346.

[526] Prado and Trebilcock (n 525) 341.

[527] Allen and Qian (n 496) 119-121; Mary Shirley, 'Institutions and development' (2003) Handbook of new institutional economics, Springer US 613.

[528] Martin, 'The Role of History and Culture' (n 170) 74.

[529] ibid.

[530] An implementation gap is often present in law reform and can be more problematic where there is a sudden and wide gap between informal constraints and formal laws. North, *Institutions* (n 430) 91.

[531] Halliday and Carruthers, *Bankrupt* (n 2) 15-17.

[532] Halliday and Carruthers, 'The Recursivity of Law' (n 16) 1162.

norms are the subject of such legislations, the conflicts become even more complicated. Global actors can impose ideologies that conflict with local political and social institutions. The resolution of these conflicts depends on how vulnerable the jurisdiction is to external influence. For example, frustrated efforts at insolvency reform in Indonesia was partly due to unresolved ethnic, political and ideological conflicts between the Chinese who dominated businesses and Indonesians who dominated politics.[533]

Apart from conflicting ideologies, countries may have divided loyalties to organisations or countries that favour conflicting norms. The IMF and World Bank have considerable influence on the nation states they provide with last-resort loans.[534] Organisations such as UNCITRAL and INSOL have political, technocratic and rhetorical resources which many countries rely on.[535] Creditor and/or investor groups may push hard for laws that favour their interests. International trade partners may also mount their own pressure as a condition for continued investment or trade.[536] While IOs have reached some consensus regarding insolvency norms, attempts to pacify different interests (both local and foreign) can still constitute a problem for developing countries.[537]

4.5. Local resistance: weapons of the weak

Regardless of the form of pressure used, seemingly powerless nations possess what has been termed the 'weapons on the weak' which is rooted in their control of the local institutions. Some of these 'weapons' include avoidance or rejection of conditional foreign capital and aid, selective acceptance of recommendations, symbolic compliance, deferred compliance, qualified enactment, judicial subversion, perverse implementation and failure to enforce.[538] These are all strategies that vulnerable

[533] ibid 1161.
[534] Mosley, Harrigan and Toye (n 502) 199; Patrick Bond, *Against global apartheid: South Africa meets the World Bank, IMF and international finance* (Palgrave Macmillan 2003).
[535] Carruthers and Halliday, *Bankrupt* (n 2) 33. An example is the provision of research and other support for law reform in developing countries by INSOL and UNCITRAL.
[536] It is because of these diverse influences that a country like China is unable to boast of full immunity to external influence. Halliday and Carruthers, *Bankrupt* (n 2) 41.
[537] For example, the next chapter discusses the increasing Chinese influence in Africa and what this may imply for law and institutional reform. Ch 5, section 5.2.1.
[538] For more, see Halliday and Carruthers, *Bankrupt (n* 2) 342-351.

countries have been known to adopt in foiling the hegemony of global actors, depending on their vulnerability at every point in history.[539] Carruthers and Halliday argue that seemingly weak actors often let go of the battle they are unable to win (enactment) and retreat to the point of implementation to fight the more important war.[540] These actors range from national actors, to excluded interest groups and stakeholders who are dealt the short end of the stick through misdiagnosis, actor mismatch or conflicting ideologies.

At the point of implementation, stakeholders can identify the problems more accurately with the benefit of hindsight. In their recursivity theory, Carruthers and Halliday claim that this often results in another round of law making to correct errors that surface at the implementation stage. It took six years of recursive law making to complete the reform process during the IMF's intervention in Indonesia as 'every two steps forward in formal law-making, implementation took at least one step back'.[541]

The picture of the recursive loop of law making painted by the authors may be more of a maze than a loop for certain jurisdictions. If the response of stakeholders to an incompatible law is to abandon its use, the continuous process of learning and returning to the drawing board to fill the gaps becomes untenable, as there would be no implementation to learn from. This is more likely to occur where some or all the unsettling mechanisms are present, there is no internal political will to see the law function correctly and global actors are unavailable to follow up the implementation of the norms they have introduced.

Settling and implementation challenges at national and local sites have not gone unnoticed by global actors and they have responded by reiterating the importance of local institutions in legal reform. According to the World Bank, not only do formal rules matter, but the institutional environment within which the rules are enforced also matter.[542] However, this admission without more may be of limited relevance to

[539] ibid.
[540] Halliday and Carruthers, *Bankrupt* (n 2) 286-292.
[541] Halliday and Carruthers, 'The Recursivity of Law' (n 16) 1160.
[542] World Bank, *ICR Principles* (April 2001) 8.

developing countries that are constantly confronted with model laws and guidelines which require strong formal institutions to function.[543]

4.6. Global scripts, formal institutions and local varieties.

It has been stated that insolvency scripts are largely propagated in the form of normative principles, guidelines and model laws.[544] These scripts are often accompanied by a reminder that local peculiarities must be taken into account in reform. In its 2001 Principles, the World Bank was quick to caution that 'effective systems respond to national needs and problems. As such, these systems must be rooted in the country's broader cultural, economic, legal and social context'.[545] Countries are also encouraged to adopt informal procedures for resolving financial distress. However, many of the scripts have focused on providing guidance for the reform of formal insolvency frameworks.[546] Even with guidelines for informal workout procedures, they are often presented in the shadow of the overwhelming narrative that informal restructuring only works where formal insolvency law and institutions are in place and highly functional.[547] The UNCITRAL Guide frankly declares, 'while not based or reliant upon the provisions of the insolvency law, use of this type of negotiation depends very largely for its success upon the existence and availability of an effective and efficient insolvency law and supporting institutional framework'. [548]

As discussed in the previous chapter, hybrid procedures can help to overcome some of the institutional challenges that developing countries face. The UNCITRAL Guide considers hybrid mechanisms as a means of combining the advantages of the informal mechanisms with those of the formal procedures while eliminating or at least reducing the shortcomings of both.[549] According to the Guide, informal workouts

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[543] Davis and Trebilcock, 'The Relationship between Law and Development: Optimists Versus Skeptics' (2008) Law & Economics Research Paper Series Working Paper No. 08-24, 12.

[544] Here, we consider the World Bank, ICR *Principles* (n 4); UNCITRAL Legislative Guide (n 4).

[545] The World Bank, ICR Principles (April 2001) 2; a similar caveat is found in UNCITRAL Legislative Guide (n 4) 10.

[546] This is not surprising because informal procedures are not often regarded as insolvency mechanisms properly so-called. The UNCITRAL Legislative Guide (n 4) Rec 1-5, 21.

[547] See The World Bank, *ICR Principles* (n 4) B3 and B4; Garrido, *Out of Court Restructuring* (n 262) para 93- 99.

[548] UNCITRAL Legislative Guide (n 4) 22, 238.

[549] See Ch 3, section 3.3.3.

provide an alternative because they are less expensive, subject to the control of the parties and can be done with minimum disruption to debtor's business.[550] These advantages identified by the UNCITRAL Guide have very little to do with weak formal institutions. Thus, the Guide not only anticipates the existence of solid legal institutions but also a formal reorganisation procedure, in jurisdictions seeking to adopt the hybrid approach.[551]

Navigating global scripts can be daunting for developing countries that lack such effective formal procedures, as they are troubled by the idea that they cannot successfully adopt informal, formal or hybrid restructuring procedures. This focus on formal institutions reveals a strong reliance on best practices only.[552] The limitation for developing countries is that dogmatic adherence to international best practices do not account for their current realities- extremely weak formal institutions and mutant institutions that produce inefficient results.[553]

4.6.1. The impact of the World Bank Doing Business Reports

Admitting the limitation of global standards for developing countries, the World Bank pointed out that there is serious difficulty in designing systems that 'address the needs of developing countries while at the same time keeping pace with global trends and international best practices.'[554] However, this observation is not very helpful to developing countries because it is against the same international best practices that their institutions continue to be held. The World Bank Doing Business (DB) reports have become an influential reference point in the evaluation of the growth rate and ease of doing business in economies all over the world.[555] The methodology adopted

[550] The UNCITRAL Guide acknowledges this and recommends that insolvency law reform be accompanied by institutional reform UNCITRAL Legislative Guide (n 4) 33.
[551] ibid 245.
[552] Dani Rodrik, 'Second-best institutions' (2008) No. w14050. National Bureau of Economic Research. Rodrik criticises a focus on best practises, arguing that it is unrealistic to expect all countries at different stages of development to function optimally with the same set of institutions.
[553] Ibid.
[554] The World Bank, *Principles* (April 2001) 3; Perry, 'Relationship between Legal Systems' (n 435) 286.
[555] Benito Arruñada, 'Pitfalls to avoid when measuring institutions: Is Doing Business damaging business?' (2007) *35*(4) Journal of Comparative Economics 732; Davis and Kruse, 'Taking the Measure of Law: The Case of the Doing Business Project' (2007) 4 Law and Social Inquiry 32.

by the World Bank for insolvency indicators in the DB reports is influenced by the principles considered earlier (the Bank's ICR Principles and UNCITRAL Guide).[556]

Apart from providing information to foreign investors and potential trade partners about the economic health of economies, the reports are also intended to direct the policy and reform agenda of governments.[557]

One of the important indicators for ranking in the DB reports is the resolution of insolvency. Indices for ranking insolvency systems include the cost, time, outcome and recovery rate in insolvency proceedings. Importantly, the strength of insolvency frameworks is measured by considering the formal rules regarding management of assets, availability of post commencement financing, reorganisation proceedings and creditor participation.[558]

The DB reports clearly provide a useful database and information resource about the economy and accompanying legal structures of virtually all the countries of the world.[559] What may however be problematic is the influence the DB ranking has on reform agenda of countries, especially developing ones.[560] The indices hold up certain forms as ideal and provide pressure on countries to attain to tick recommended boxes in reform. Not minding the unsuitability of certain procedures to their specific needs, many countries would rather 'window-dress' and carry the badge of 'modernity' than seek out less recognised alternatives that benefit them.[561]

For example, the availability and design of reorganisation proceedings have been recognised by the DB reports as one of the indicators of effective insolvency systems. It is unsurprising that many countries have in this period imported reorganisation

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[556] ibid.

[557] World Bank, 'About Doing Business 2018' 18 <www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB18-Chapters/DB18-About-Doing-Business.pdf> accessed 10 September 2018; Editorial, 'Unblocking Business' *The Economist* (15 September 2005).

[558] Doing Business Report, Resolving Insolvency (Methodology) <*www.doingbusiness.org/methodology/resolving-insolvency*> accessed 10 September 2018.

[559] The shortcomings of the indices in terms of focusing on specific formal procedures are also understandable given that a standardised approach must be adopted in comparing 189/190 diverse economies globally.

[560] Arruñada (n 555) 1- 5 reports how some of the reforms attributed to the Doing Business Reports have done more harm than good in countries like Spain and Colombia.

[561] ibid 4-5.

proceedings into their laws.[562] This is in spite of the WB's caution that the existence of a reorganisation procedure does not guarantee that it can or will be used in practice.[563] The reason for this caution is clear, reorganisation procedures are complex, expensive and highly dependent on efficient enforcement mechanisms, expert practitioners and judges. These factors remain a challenge even in the US.[564]

As Allen and Qian compellingly argue, 'if there are significant deficiencies in using the legal system in countries with the most developed institutions, these deficiencies are likely to be magnified in developing countries with poor institutions'.[565] The new addition to list of 'insolvency must-haves' is the availability and priority of post commencement finance. The 2016 DB reports reiterate that reorganisation procedures by themselves are no longer sufficient. They must be accompanied by clear, explicit provisions for post commencement financing to increase the chances of corporate rescue. Since 2015 when it was included as part of the indices for measuring insolvency, many economies have embarked on reform to make specific provisions for post commencement financing.[566] The World Bank DB project reported how by 2016, countries like Cyprus, Jamaica, and Trinidad and Tobago had introduced provisions on post commencement finance as part of an overall effort to strengthen and modernise mechanisms for business rescue.[567] As we discuss in the next chapter, some countries in Africa are also doing the same.

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[562] The Doing Business 2016 reports that, 'In the five years from 2009 to 2014, 60 economies implemented 87 reforms affecting the *Doing Business* indicators on resolving insolvency. Reforms in the area of corporate reorganization were the most common: 10 economies introduced a new reorganization proceeding, and 21 promoted reorganization or made improvements to their existing reorganization framework'. World Bank, Doing Business 2016, *Measuring Regulatory Quality and Efficiency* (Full report) 104. <http://espanol.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB16-Full-Report.pdf > accessed 8 September 2018.

[563] ibid 102.

[564] Djankov and others (n 130) 1106-1107; The American Bankruptcy Institute, Commission to Study the Reform of Chapter 11 (2012-2014) Final Report 12-18.

[565] Allen and Qian (n 496) 119.

[566] The Doing Business 2016 Report (n 562) 102.

[567] ibid 104. Interestingly, developed jurisdictions like the UK are not left out of this drive to conform to international standards. The UK Government recently launched consultations for the reform of its insolvency framework. The main goal of this proposed reform is to make the law more restructuring-friendly Insolvency Service, 'A review of the Corporate Insolvency Framework' (25 May 2016) <www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework> accessed 4 June 2016. There are four proposals under consideration (a) creating a new moratorium, (b) helping businesses to continue trading through the restructuring process (c) developing a flexible restructuring plan and (d) exploring options for rescue financing.

It is evident from discussion in chapter three that mechanisms such as specific provisions for post commencement financing are useful in restructuring. However, their mere presence in the law is not enough to guarantee more efficient resolution of financial distress. It must be acknowledged that for advanced economies like the US, it has taken decades for these attitudes and practices to evolve. They have in the process put in place the fundamental groundwork that contributes to the proper functioning of these mechanisms. Developing economies would struggle if the expectation is that they assimilate these practices and mechanisms at the stroke of a pen. In discussing recently introduced restructuring laws in African countries, the next chapter considers some of the difficulties and confusion brought on by sudden, extensive changes to insolvency regimes, including PCF provisions.

4.7. Navigating global convergence in insolvency: some lessons for developing economies.

This thesis would go on to consider the impact of the trend towards convergence on countries in Africa. While it may be yet unable to answer a crucial question, it does the vital job of raising it- is the trend towards global convergence in insolvency beneficial to African countries?

One of the important lessons from this chapter, which has been extensively explored in socio-legal research,[568] is that legal reforms must take account of existing local institutions and actors, if settling would be achieved. This requires gradual learning aided by education, research, and communication,[569] a process described as 'adaptive efficiency'.[570] It involves learning from failures, eliminating inefficiencies and exploring new alternatives; a 'long and often painful process of adaptation and competition'.[571] Adaptive efficiency allows societies to explore different ways of solving problems.

[568] Daniel Berkowitz, 'Economic development, legality, and the transplant effect' (2003) 47(1) European economic review 165-195; Katharina Pistor, 'The standardization of law and its effect on developing economies' (2002) 50(1) The American Journal of Comparative Law 97-130.

[569] Shirley (n 527) 640.

[570] North (n 430) 80-82.

[571] 'The institutions that protect property rights and support strong market economies in Western Europe emerged gradually from a long and disorderly process of adaptation and experimentation spurred by competition and wars'. Shirley (n 527) 645.

Closely following the acknowledgment that local institutions matter is the turn towards the more pragmatic approach of horizontal learning among peer developing countries. This is captured in Stiglitz's advice to *scan globally but reinvent locally*.[572] According to Trubek;

> 'This approach involves detailed comparisons of parallel experiences in similarly situated developing countries by experts from these countries. Rather than look [*only*] to advanced country models or universal prescriptions from international bodies, this method relies on a bottom-up, demand-driven approach in which the developing countries themselves identify the issues they wish to deal with, select the peer nations they think they can learn from, and engage directly with peer experts in these nations.'[573]

This form of horizontal learning makes it easier to adapt institutions that are built to respond to similar needs. Drawing from experience of experimentation with horizontal learning among the BRICs countries, Trubek identifies some of the limitations to the study and practice of horizontal learning. They include a general weakness of research in developing countries, high cost of comparative studies in law and development, continued reliance on legal institutions from developed countries, embeddedness of legal traditions and lack of interest in horizontal learning by development organisations.[574] However, they can be overcome with more empirical studies and interactions between scholars and practitioners in developing countries.[575]

Arriving late at the development table has its advantages[576] but can be overwhelmed by disadvantages. One of the disadvantages is the inability to adapt efficiency by

[572] Joseph Stiglitz, 'Scan Globally Reinvent Locally. Knowledge Infrastructure and the Localization of Knowledge' in Diane Stone (ed), *Banking on knowledge: the genesis of the Global Development Network* (Routledge 2003).
[573] David Trubek, 'Scan Globally, Reinvent Locally: Can We Overcome the Barriers to Using the Horizontal Learning Method in Law and Development?' (2014) 258 Hosei Ronshu, Nagoya University Journal of Law and Politics 5; David Trubek, 'Scan Globally, Reform Locally: The Horizontal Learning Method in Law and Development' (2014) 5 Jindal Global L. Rev. 161.
[574] Trubek, 'Scan Globally, Reinvent Locally' (n 573) 7-9. In the next chapter, we discuss how the move towards global convergence in insolvency contributes to this.
[575] Stiglitz, 'Scan globally' (n 572) 35-37; Trubek 'Can we overcome the Barriers?'(n 573) 9-10.
[576] For example, a wealth of experience and tested templates to learn form.

learning from past mistakes and current experiences, both domestically and horizontally from similarly situated countries.[577] In a fast-moving world that urges developing economies towards modernisation through the adoption of 'global' norms, it is unclear that developing countries have the luxury of this adaptive efficiency. This limitation has been a feature of the development process of Africa as far back as the 16th century.

It has been posited that perhaps the organic process would have taken deeper roots if it had not been interrupted by colonialism's transplants of institutions that were less well adapted to local norms, beliefs and environments.[578] Stiglitz offers a forceful argument;

> 'Colonialism served to eviscerate existing institutions in the affected countries, which is almost all of the developing world. It tried to graft on to existing cultures foreign institutions and ideas, but in a process of imposition…it is not surprising that the graft did not take hold. What was left in its place was a void-the old was destroyed and nothing really viable had been created in its stead'.[579]

After colonialism came development assistance that was driven by a modernisation theory, perhaps a well-intended gesture, but having similar effects as colonialism.[580] It is important to explore and acknowledge the ways in which the recent move towards global convergence can also limit that adaptive process.

Other lessons arise from an understanding of institutions and the reliance of global norms of insolvency on formal institutions.[581] Even before enactment, the gaps between proposed laws and local institutions are evident. Supposing that constant revision of laws to close the gaps were practicable, the points made above regarding the tenacity of underlying social norms will remain unresolved. In insolvency, the lack

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577 Shirley (n 527) 3.

578 ibid 21; Simeon Djankov, La Porta, Lopez-de-Silanes & Shleifer 'Appropriate institutions' (Annual World Bank Conference on Development Economics 2003) 283-298.

579 Stiglitz, 'Scan Globally' (n 572) 24.

580 Stiglitz considers it a paternalistic approach that is a close cousin of colonialism, ibid 24-25.

581 Allen and Qian (n 496) 118 This sort of fluid and efficient development of law in consonance with social realities only comes close to being achievable in very developed jurisdictions with optimally operating institutions. See Berkowitz, Pistor & Richard, 'Economic development' (n 452) 170.

of technical knowledge by lawmakers and other actors (such as judicial officers) can further compound this problem. Also, courts are the predominant enforcement mechanism for formal institutions.[582] Davis and Trebilcock note that 'predominant preoccupation with the court system inappropriately discounts the important role' other institutions play.[583] On this basis, it has been proposed that the promotion of competitive alternatives to the formal court system where possible, is more effective.[584] Rodrik suggests that as the world approaches convergence, global actors ought to be cautious of using best practices as a way of assessing institutions in developing countries.[585] Rodrik proposes second-best practices for developing countries because a first best practices approach focuses on the minimisation of transaction costs for the immediate transaction while ignoring costs that arise elsewhere in the institutional framework. This supports the proposition that a second-best approach allows developing countries to discover and reform loopholes in other parts of the system and engage more efficient alternatives such as informal mechanisms.[586] With the advancement of an outward looking TLO in corporate insolvency law, it is important that these lessons are not lost on developing countries.

Conclusion.

This chapter discusses the emergence of a transnational legal order in insolvency and restructuring. There are divergent views about the possibility and desirability of harmonisation in insolvency regulation. The chapter considers the development of insolvency norms by global actors and how these norms are propagated across nation states. It finds that while there is a form of consensus among global actors on global scripts of insolvency, ssettling is much more complex at the national and local levels. Developing countries are important to the debates as they are often the target of propagation, methods of which can range from coercion, moral suasion to peer

[582] Thomas Heller, 'An Immodest Postscript' in Erik Jensen & Thomas Heller (eds) *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003); Davis and Trebilcock, 'What Role Do Legal Institutions Play in Development?' (n 6).
[583] Davis and Trebilcock,'What Role Do Legal Institutions Play in Development' (n 6) 9.
[584] ibid.
[585] Rodrik, 'Second-best institutions' (n 552); Perry, 'Relationship between Legal Systems' (n 435) 288.
[586] Rodrik, 'Second-best institutions' (n 552) 3.

pressure. It is therefore important to understand the harmonisation drive from their perspective. The chapter draws from the experience in Asian countries like Indonesia, China and Korea to discuss the factors that inform the means of propagation and interaction of global actors with local stakeholders.

The chapter finds that although global scripts can provide useful guidance for insolvency reform, tensions persist between so-called global norms and local institutions. It highlights settling and implementation problems and how they manifest at local sites. The importance of getting a correct diagnosis of the problem, involving the right local actors in reform and seeking compatibility with local institutions cannot be over stressed.

The chapter considers the main scripts of insolvency produced by actors such as the World Bank and UNCITRAL and finds that their focus on formal institutions can be problematic for insolvency reform in developing economies. Global actors have acknowledged the important role that embedded local institutions play but factoring diverse social and informal norms into the globalisation paradigm is an enormous if not impossible task for global actors. Thus, developing economies must navigate an increasingly globalised word by looking inwards to decide what best meets their development needs. With the pressure to modernise their laws in line with global scripts, the chapter acknowledges that developing countries can easily lose the adaptive efficiency that is derivable from exploring more compatible institution choices and learning from countries that they have more in common with.

To contribute to the understanding of the emergence of a TLO in insolvency, the next chapter considers the recent insolvency reforms in Africa and the impact of global norms and actors on these reforms.

CHAPTER FIVE

EXPLORING THE CONVERGENCE OF INSOLVENCY NORMS IN DEVELOPING COUNTRIES: THE EXPERIENCE IN AFRICA

There is good news out of Africa. Not all of Africa. But from a large part of Africa that quietly, with little fanfare, is on the move.

(Steven Radelet, Emerging Africa, 2010)

Introduction

The previous chapter discussed the trend towards global convergence in the field of insolvency law, examining the creation and propagation of transnational norms of insolvency by global actors. This chapter contributes to that debate by revealing the impact of those norms in an understudied but fast-growing region of the world- Africa. Compared to emerging regions in Asia and Latin America, the experience in Africa has not been a part of conversations about the spread of global norms in developing economies. Carruthers and Halliday note from their repeated interventions in different emerging regions, that global actors compile lessons which they apply to other jurisdictions and from which normative models emerge. However, '[Big, transitional] and geographically important countries weigh more heavily as models for IFIs than small or marginal nations'.[587] Thus, while accumulated experiences in countries in parts of the world like East Asia and Latin America have been studied, the authors acknowledge that 'African countries are almost never used as exemplars'.[588]

This chapter will close some of that gap by exploring insolvency reform and practice in Africa where insolvency jurisprudence and practice are growing. Given that twenty-three of the forty-four (more than half) countries that have adopted the UNCITRAL Model Law are in Africa,[589] the continent plays an increasingly significant role in the emergence of an insolvency TLO. The chapter discusses the ways by which transnational norms have found their way into African countries. Where appropriate,

[587] Halliday and Carruthers, 'The Recursivity of Law' (n 16) 1188.
[588] ibid.
[589] UNCITRAL Model Law Status
<http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>

it refers to some of the findings from the empirical study conducted in Africa's largest nation, Nigeria.

The limitation to the discussion stems from two factors; as stated in chapter one, Africa is a diverse continent with fifty-four countries and experiences.[590] Thus, the discussion cannot capture or represent the experience in all fifty-four countries, and it does not attempt to. Rather, it highlights reform efforts targeted at the continent by global actors and discusses some of the experience and changes in countries at the forefront of restructuring practice and insolvency law reforms in Africa.[591]

Secondly, reform is at its infancy in many African countries. Some countries have enacted their insolvency laws for some years but still struggle with implementation. For others, enactment is still ongoing, even after a few years of beginning the process.[592]

This chapter does the important work of laying the foundation for a deeper discussion of the evolution of insolvency law and practice in Africa. However, because reforms are in their early days, the tensions between the new laws on the books and the law in practice are not extensively discussed.

In capturing the process of insolvency reforms and developments in insolvency practice as they evolve, the chapter queries the factors driving the developments, including the role of global actors. This promotes the building of a more complete picture of the trend towards convergence in insolvency and the impact of that trend in Africa.

The chapter is divided into two broad parts, A and B. In part A, the chapter considers Africa's place in the global economy. The aim here is to better understand the links between Africa's role in global markets, its relationship with global actors and the spread of global scripts of insolvency across the continent. The chapter finds that financial crises in Africa have not elicited the same reaction from global powers as

[590] As emphasised in chapter one however, many countries in Africa have a lot in common, including a shared heritage, colonial history, business cooperation and institutional, political and development challenges.
[591] See tables 1 and 2 below.
[592]Also, the information available is limited as the documentation of the reform process is not always detailed or transparent. As discussion in this chapter shows, some countries are more transparent, organised and forthcoming with information about the reform process than others.

they did in Asia and argues that one of the reasons for this is Africa's slow integration into the global economy. In recent years, as Africa experiences more growth, interest in the continent has increased, with loyalty to new actors like China rising. In light of this growing interest, Part A concludes with a discussion of the relatively recent activities of global actors like the World Bank and INSOL in insolvency reform in Africa.

Part B is divided into two sections, the first section considers changes in restructuring practice in selected African countries, and the factors that have informed these changes. The aim of this section is to show how local practices are opening up to rescue-oriented debt restructuring in the resolution of financial distress. The chapter finds that these changes are happening independent of (and in some jurisdictions simultaneously with) insolvency law reforms. The second section gives an outline of the progress of insolvency law reforms in thirty-six African countries and briefly comments on the settling of these new norms at local sites. The chapter identifies the ways in which the mechanisms of actor and institutional mismatch, diagnostic struggles and contradictions may disrupt the reform and settling process in African countries.

PART A
AFRICA'S RELATIONSHIP WITH THE GLOBAL ECONOMY, GLOBAL ACTORS AND NORMS.

5.1. Africa's place in the global market

Developing countries vary in the level of their integration into the global market and their importance to the global economy. As discussed in the previous chapter, the importance of economies in Asia and Latin America and their vulnerability to

pressure from global actors influenced reforms in those regions, such that financial crisis became a precipitating factor for intervention in insolvency reform.[593]

Although they are conspicuously missing from discussions about insolvency reform and the spread of transnational norms across developing countries, many African countries have also experienced their fair share of financial and economic crises. [594] Additionally, they have a long history of depending on IFIs for financial aid, credit and technical support;[595] two elements that spell a high degree of susceptibility to pressure from global actors. However, unlike in Asia where financial crisis led to intervention that resulted in insolvency law reform because of the growing importance of that region as a global player; financial crisis in Africa has not elicited the same response. Countries in Africa are not seen to be as important to the global financial architecture. [596]

Debates about if and how Africa fits in the global economy are not new. Questions have been asked in relation to trade regimes in Africa and the activities of multinationals on the continent.[597] Where many emerging jurisdictions have experienced a sustained increase in trade and foreign direct investment to earn them a place as players in the global economy, African countries and their investments have been missing. This has led some to the conclusion that Africa resides on the fringes of the global economy.[598] Africa's detachment from the global financial markets has even been used to explain why the continent did not take a direct hit from a financial crisis

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593 Halliday and Carruthers, *Bankrupt* (n 2) 70.

594 Vijay Gupta, 'Economic Crisis in Africa' (1985) 41(2) India Quarterly 236-250; John Ravenhill (ed), *Africa in economic crisis* (Springer 1986); Peter Lewis, *Africa: Dilemmas of development and change* (Routledge 2018).

595 Moyo Dambisa '*Dead Aid: Why aid is not working and how there is another way for Africa* (Vancouver: Douglas & Mcintyre 2009).

596Reforms in Africa have only begun to gain momentum across Africa in the past 8 years. Caruthers and Halliday report that by 2005, all countries in the Asian region had a single standard legitimated by the United Nations to which they are pressed to conform. Caruthers and Halliday, 'Negotiating Globalization' (n 35) 539.

597 Antoine Bouet, Santosh Mishra and Devesh Roy, 'Does Africa trade less than it should, and if so, why? The role of market access and domestic factors' (2008) Intl Food Policy Res Inst 1-2; Arvind Subramanian and Natalia T. Tamirisa, 'Is Africa integrated in the global economy?' (2003) 50(3) IMF Staff Papers 352-372; Steve Onyeiwu and Hemanta Shrestha, 'Determinants of foreign direct investment in Africa' (2004) 20 (1-2) Journal of Developing Societies 89-106; Tonia Kandiero and Margaret Chitiga, 'Trade openness and foreign direct investment in Africa: economics' (2006) 9(3) South African Journal of Economic and Management Sciences 355-370.

598Samir Amin, 'Africa: Living on the fringe' (2002) 53 (10) Monthly Review 41; Geoffrey Schneider, 'Globalization and the poorest of the poor: global integration and the development process in sub-Saharan Africa' (2003) 37(2) Journal of economic issues 389-396.

that was said to be 'global'.[599] This detachment might also explain the disengagement of global actors from insolvency reform in Africa.

It is not suggested that Africa or its laws and institutions have been untouched by global actors. For many decades, most of the global players who are also the dominant actors in the harmonisation process, have maintained a relationship with Africa. Notably, the UK and France by virtue of their colonial history have continued to influence the legal systems of former colonies, the US has cemented its place as a significant aid donor and trade partner, and IFIs like the IMF and the World Bank as development partners and creditors of last resort.[600]

Loans from IFIs accompanied by conditionalities are not a strange concept in Africa.[601] Thus, if financial crisis and accompanying aid and loans did not produce the same revolutionary result for insolvency law in Africa, it was not for lack of leverage. Rather, it may be attributed to a deprioritising of private sector and investment related reform in Africa. A review of the conditionalities of IMF and World Bank lending to African countries suggest a focus on public sector governance, public financial management reform, macro-economic reform, accountability and budget process and social sector reform.[602] Conditionalities have mostly responded to the belief that what Africa needed the most was good governance. [603] For other global actors with

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[599] Although it has been argued that Africa suffered from the aftershocks of the crisis. Kimiko Sugimoto, Takashi Matsuki and Yushi Yoshida, 'The global financial crisis: An analysis of the spillover effects on African stock markets' (2014) 21 Emerging Markets Review 201-233.

[600] Sun Yun and Jane Olin-Ammentorp, 'The US and China in Africa: Competition or Cooperation?' Brookings Institution (28 April 2014); Lewis Gann, Peter Duignan, and Victor Witter Turner (eds), *Colonialism in Africa 1870-1960* (Vol. 4. CUP Archive 1969); Kjell Havnevik, 'The IMF and the World Bank in Africa: Conditionality, impact and alternatives' (1987) Nordiska Afrikainstitutet.

[601] Ranging from the market liberalisation programs like the Washington Consensus, structural adjustment programs, Poverty Reduction Strategies, to aids and debt relief, resources have longed been extended on the condition of reform. In *Dead Aid* (n 595) Part I Dambisa condemns the reduction of African countries to a childlike state of beggary.

[602]For example, the IMF and the World Bank have suspended aids to some countries in the past, like Kenya in 1991 as a result of corruption, civil service inefficiencies, slow political and public enterprises reforms and macro-economic imbalances. Maureen Were, Rose Ngugi and Phyllis Makau 'Understanding the Reform Process in Kenya' in Joseph Mensah (eds), Understanding Economic Reforms in Africa: A Tale of Seven Nations (Palgrave Macmillan, 2006) 30-33; Carlos Santiso, 'Good governance and aid effectiveness: The World Bank and conditionality' (2001) 7(1) The Georgetown public policy review 1-22.

[603] In 1997, the IMF again suspended aids to Kenya for failing to fulfil the condition of 'good governance'. This prompted a round of economic reforms by the Kenyan government. Were and others (n 602) 31; C Biau and J Biau, 'Governmental Reform in Developing Countries: External Conditionality versus Peer Pressure. The Case of Kenya' (2008) Reinvention 1. The focus on good governance in IMF and World Bank conditionality to developing countries in Africa has been the subject of criticism. It has been argued that conditionality has so far failed to

influence in Africa, a region that was not considered to be a player in the global market, there was little to be gained from pushing the alignment of insolvency laws with global norms.

Apart from the provision of aids and loans, Africa has a history of decades of trade with leading nations. This trade has been highly limited to the exportation of extractive resources, mostly of crude oil and metal resources.[604] With the lack of real investment and partnership beyond trade agreements, foreign direct investment into and out of Africa has even been more dismal than the volume of trade,[605] with most foreign direct investment being largely focused on the primary commodities sector.[606] Despite being its largest trade partner and foreign donor for many decades, the US (and indeed most of the developed world) did not have the political, strategic and economic interests that it did in Europe, Asia, the Middle East or Latin America.

5.2. Africa's growing importance in the global economy: An overview of Africa's economic growth.

The past decade has brought a boost in the growth of African economies and the beginning of movement away from the fringes. Africa was recently recognised as the second fastest growing continent in the world after South Asia.[607] With the increase in economic growth and huge developmental projects coming out of Africa, the continent has received more global attention.[608]

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achieve reform in governance because as Kapur and Webb explain, 'reforms rarely succeed unless a government shares the conviction that they are essential'. Devesh Kapur and Richard Webb, 'Governance-related Conditionalities of the International Financial Institution' (United Nations Conference on Trade and Development, 2000) 8; Steve Kayizzi-Mugerwa (eds), *Reforming Africa's Institutions: Ownership, Incentives, and Capabilities* (United Nations University Press 2003) for a discussion of governance issues, conditionalities and reform ownership in Africa.

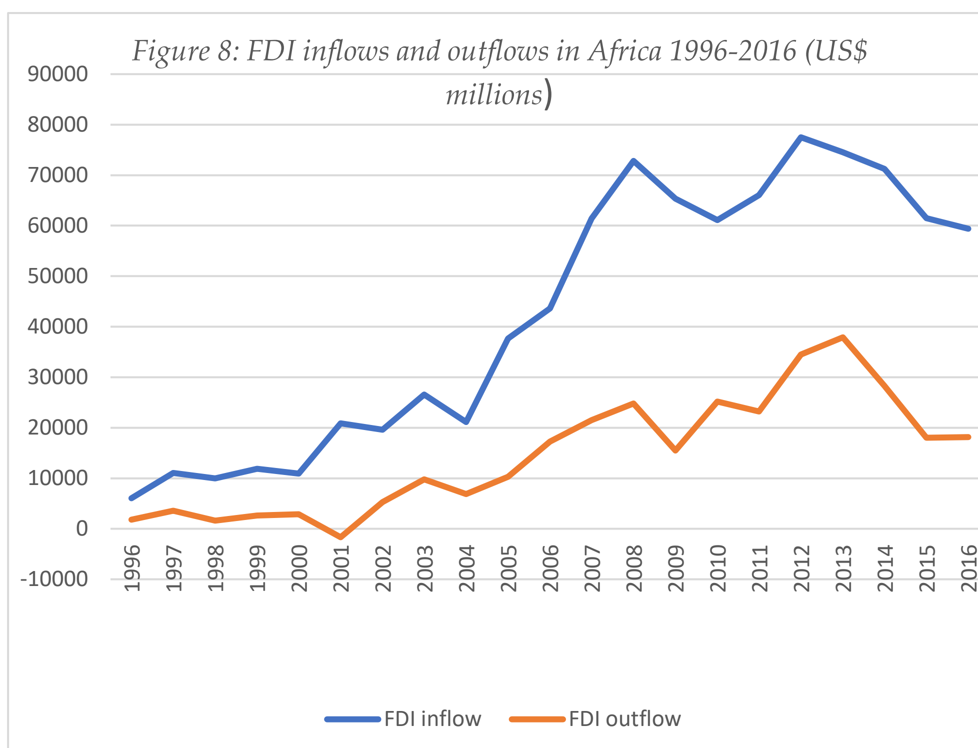
[604] Scott Taylor, *Globalization and the Cultures of Business in Africa: from patrimonialism to profit* (Indiana University Press 2012) 17.

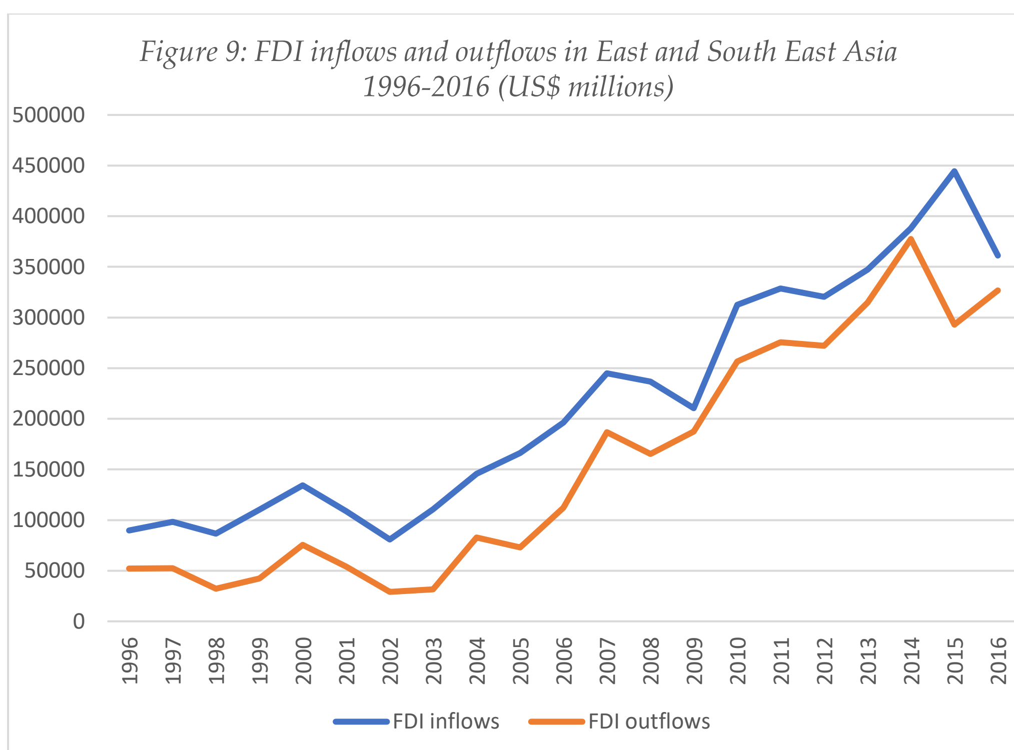
[605] Foreign direct investment (FDI) is an investment that involves a long-term relationship between two economies. It reflects a lasting interest and control by a foreign direct investor, resident in one economy, in an enterprise resident in another economy. UNCTAD Handbook of Statistics 2017 <http://unctad.org/en/PublicationChapters/tdstat42_FS09_en.pdf> accessed 10 September 2018.

[606] And failing to impact the economies of the countries significantly. Taylor (n 604) 17; Todd Moss, 'Where does Africa fit in the globalization puzzle?' Yale Insights (23 June 2009) available at <https://insights.som.yale.edu/insights/where-does-africa-fit-in-the-globalization-puzzle> accessed 10 September 2018.

[607] AfDB, 'Africa remains world's second fastest growing region' (n 7).

[608] World Bank, 'Economic Growth in Africa is on the Upswing Following a Sharp Slowdown' (19 April 2017) <www.worldbank.org/en/news/press-release/2017/04/19/economic-growth-in-africa-is-on-the-upswing-





Source: UNCTAD (Index Tables, FDI inflows and outflows by region and economy)

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following-a-sharp-slowdown>; Africa Development Bank, '2017 Financial Presentation' https://www.afdb.org/fileadmin/uploads/afdb/Documents/GenericDocuments/Annual_Meetings/AfDB_Financial_Presentation_2017_en.PDF> all accessed 10 September 2018.

The financial landscape of Africa continues to see rapid changes including the introduction of new financial instruments, services and practices. Likewise, new uses of funds, new sources of funds, new financial institutions and markets are also emerging.[609] The influx of foreign investment and consequent cross border transactions has been fuelled notably by rising infrastructural development in Africa.[610] Nigeria's first Independent Power Plant, the Azura-Edo IPP was funded mainly by IFC (a member of the World Bank), FMO (the Dutch Development Bank) and some foreign and local commercial lenders.[611] Similarly in Kenya, the government has actively attracted foreign investment for its power sector reforms with funding for its IPPs coming mostly from China.[612]

In addition, finance markets are becoming more developed, with South Africa, Namibia, Morocco and Mauritius leading the way and Kenya, Botswana, Egypt, Ghana and Nigeria following closely behind.[613] Apart from African governments accessing the global market, local corporations and financial institutions in Africa are also making a play for the big stage, with commercial banks issuing bonds on the international debt market.[614] As they become more actively incorporated into the global market, African countries are expected to experience more directly, the effects of global economic downturns and vice versa. The developments in African

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609 The Bond & Derivatives Exchange (Badex) in Zambia concluded its first live trade at 2.49pm on April 15, a US dollar/Zambian kwacha futures contract. Luke Clancy, 'Lion's Share' *Africa Derivatives* (2 May 2014) <www.dreadnought.co.za/Portals/0/African%20Derivatives%20-%20The%20Lion%27s%20Share%20-%2030%20Apr%202014%20-%20Risk%20Magazine.pdf>; The activities of private equity funds has gained some momentum on the continent. Since 2007, about $22 billion has been raised from private equity firms. Lawrence Delevingne, 'Private Investors Pile into Africa' *CNBC* (17 March 2015) <www.cnbc.com/2015/03/17/private-equity-investors-pile-into-africa.html > all accessed 10 September 2018.

610 Financing Infrastructure (UN, OSAA policy brief 2015) available at <www.un.org/en/africa/osaa/pdf/policybriefs/2015_financing_infrastructure.pdf > accessed 10 September 2018. To plug the remaining funding gap for infrastructural development, African countries continue to explore innovative funding sources. One of this is the consideration of infrastructure bond to raise funding from private sectors.

611 FMO invests in Azura in Nigeria (FMO press release 28 November 2014) <www.fmo.nl/news-detail/d23adf4d-8883-4224-95de-7f7a8403028f/fmo-invests-in-azura-in-nigeria> accessed 10 September 2018.

612 Africa Oil and Power, Power Privatisation: Kenya Case Study (5 May 2016) <www.howwemadeitinafrica.com/power-privatisation-kenya-case-study/> accessed 10 September 2018.

613 PwC, Africa Asset Management 2020 (October 2015) 19-102 <www.amafrica2020.com/amafrica2020/docs/am-africa-2020.pdf> accessed 10 September 2018.

614 EuroMoney, Sub-Saharan Eurobonds hold up under pressure (6 October 2017). <www.euromoney.com/article/b1512pbb2r0p5c/sub-saharan-eurobonds-hold-up-under-pressure>; Paul Wallace, Lyubov Pronina and Emele Onu,' Nigerian Bank Just Sold Most Expensive Emerging-Market Bond' Bloomberg (11 October 2017) <www.bloomberg.com/news/articles/2017-10-11/nigeria-s-fidelity-issues-highest-yielding-em-eurobond-of-2017> all accessed 10 September 2018; Todd Moss (n 606).

economies therefore raise questions about the propagation of global norms of commercial law, including insolvency law in these countries.

As African economies open up, there is more pressure for commercial law reforms. This is evident in the recent wave of insolvency reforms across the continent. Some global actors play a role in these reforms, but it is uncertain that the rise in Africa's growth would spell a more direct involvement of these global actors in insolvency law reforms in Africa. Two reasons for this deduction are the dilution of Africa's conventional foreign partners and the growing resistance to the use of conditionalities to compel reform in developing countries.

5.2.1. Changing loyalties; a note on China's rising influence in Africa

China is fast replacing global actors like the US and the IFIs as Africa's trade and development partner of choice. China's overseas investments in Africa exceeded US$107 billion in 2013 and accumulated outbound direct investment stock reached over US$660 billion.[615] China has also become a major lender to Africa with nearly one-third ($6.8bn) of the $25.6bn that China's state-owned development banks lent worldwide to energy projects in 2017 going to African countries.[616] China's involvement is both politically and economically strategic; beyond the oil, copper, cobalt and iron ore, they also see markets for manufacturing and construction companies, and the geopolitical advantage of having fifty-four sovereign nations as allies.[617]

Certainly, the emergence of China as Africa's development partner of choice has attracted the attention of global powers and some skepticism. Warnings about the potential for neo-colonialism, China's tenuous history with human rights and its

[615] These investments are not restricted to natural resources but cover a range of industries including construction, agriculture, real estate, wholesale and retail, finance etc. White Paper, China State Council, China-Africa Economic and Trade Cooperation (2013) <http://english.gov.cn/archive/white_paper/2014/08/23/content_281474982986536.htm> accessed 10 September 2018.

[616] This was ahead of south Asia, with $5.84bn. The loans bring total Chinese energy finance in Africa since 2000 to $34.8bn.616. Africa Eats up Lion's Share of Chinese Funding' *Financial Times* <www.ft.com/content/668968e8-23b6-11e8-add1-0e8958b189ea> accessed 10 September 2018.

[617] Jing Gu, 'Is China's Role in African Fragile States Exploitative or Developmental?' (2015) (IDS Policy Briefing 91, Brighton: IDS); 'Chinese investment in Africa: Beijing's testing ground' *Financial Times* <www.ft.com/content/0f534aa4-4549-11e7-8519-9f94ee97d996 > accessed 10 September 2018.

unconventional means of operating are replete.[618] While African countries are not oblivious to these issues, China also offers something that is hard to reject- choice. Having been estranged from the globalisation agenda and jaded by the failure of western prescriptions like the Washington Consensus[619] and the Structural Adjustment Programmes[620] to deliver needed change, China offers Africa an array of seemingly revolutionary options; infrastructural development, trade partnership, foreign direct investment and a policy of non-interference in domestic governance as the icing on top.[621] In addition to Chinese funded projects and investments, some African countries are also looking beyond the US and the IFIs to other sources of finance, such as international bond markets.[622]

China's adoption of a non-interference policy in internal governance of national governments may suggest that where domestic laws and policies are concerned, the emergence of China in Africa is a non-factor. While there may be no direct imposition of economic and political ideologies through the instrument of conditionality, there is no ruling out the gradual propagation of a 'Chinese way of doing things' as China

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[618] Tillerson tells Africa that China finance imperils their sovereignty' Financial Times (March 2018) <www.ft.com/content/f6691e18-22da-11e8-ae48-60d3531b7d11>; Keith Somerville, 'Why Zimbabwe's use of elephants to pay off old debt to China is problematic' CNBC Africa (11 January 2017) <www.cnbcafrica.com/news/southern-africa/2017/01/11/zimbabwes-elephants/ > Yun Sun, 'China in Africa: Implications for U.S. Competition and Diplomacy' Brookings (3 April 2013) <www.brookings.edu/research/china-in-africa-implications-for-u-s-competition-and-diplomacy/> ; David Shinn, The Impact of China's Growing Influence in Africa International Policy Digest (12 July 2011) <https://intpolicydigest.org/2011/07/12/the-impact-of-china-s-growing-influence-in-africa/> allaccessed 10 September 2018.

[619] A set of ten policies implemented by the World Bank and IMF in 1989, which prescribe a reduced role for the state, strict fiscal discipline, deregulation and privatization, trade liberalisation, financial liberalisation and increase in FDI. Charles Gore, 'The rise and fall of the Washington Consensus as a paradigm for developing countries' (2000) 28(5) World development 789-804.

[620] Kwadwo Konadu-Agyemang, 'The best of times and the worst of times: structural adjustment programs and uneven development in Africa: the case of Ghana' (2000) 52(3) The Professional Geographer 469-483. The collapse of Kisumu Cotton Mills (Kicomi) in Kenya, which led to thousands of job losses was primarily blamed on the negative sting of the structural adjustment programmes (SAPs) for its unregulated liberalisation. Kenneth Kwama, 'Receiverships: The Safe Way Under' *Standard Digital* (23 March 2010) <www.standardmedia.co.ke/business/article/2000006175/receiverships-the-safe-way-under > accessed 10 September 2018.

[621] Maggie Fick, ' Nigeria unveils economic-reform plan as it aims to secure World Bank loan' Financial Times (7 March 2017) (the world bank and IMF are still a source of credit to many governments including African countries, and they still impose conditions for giving out funds, but as mentioned earlier, such conditionalities are increasingly coming under attack); Maggie Fick, 'Ghana on course to end $918m IMF loan programme next year' *Financial Times* (13 April 2017) <www.ft.com/content/e951f5ba-815e-36ee-9e4b-f2f6c7e4db60> accessed 10 September 2018.

[622] Kenya seeks to raise 30-year debt after rating downgrade (Financial Times March 2018) <www.ft.com/content/c145f044-16f5-11e8-9e9c-25c814761640 > accessed 10 September 2018; EuroMoney, Sub-Saharan Eurobonds hold up under pressure (n 614).

increasingly becomes a model for African countries.[623] Furthermore, the possibility of China's influence on law reform and governance in Africa grows as the West loses more of its economic leverage, and resistance to western ideas (which include global norms and the actors that propagate them) heightens.[624] Without these factors, perhaps, global actors would have been motivated and now poised to directly intervene in insolvency law reform in fast growing Africa.

As far as corporate insolvency is concerned, China itself only recently opened up to external influence with the enactment of the Enterprise Insolvency Law in 2006. The reorganisation law and the norms it embodies are far from becoming fully settled in China.[625] Therefore, just as China itself has had to accommodate these norms, African countries, for similar reasons, are likely to continue to succumb to the pressure to conform to global norms.[626]

Carruthers and Halliday in developing their theory of global convergence in insolvency admit that the pressure for and pattern of convergence rise and fall as loyalties change or the geopolitical climate of host countries shift.[627] Because economic conditions and loyalties in developing economies are not static, the interests and leverage of global actors in these economies can also vary over time. Indeed, the list of global actors that Carruthers and Halliday identify as key to the development and propagation of insolvency norms is more fluid at the national and local levels and can vary by jurisdiction. Even at the global centre, as loyalties and leverage evolve, some global actors may lose their influence in engineering a global order, while new players take their place. With new global actors also come the possibility of disrupting a relatively settled set of insolvency norms and/or the pace of propagation and settling.

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[623] Editorial, 'How the West Got China Wrong' *The Economist* (1 March 2018) < www.economist.com/leaders/2018/03/01/how-the-west-got-china-wrong > accessed 10 September 2018. For example, it is not unreasonable to ask whether China's defiance of western ideas about democracy can encourage African countries who already struggle with faltering democracies to tow a similar path. Mehari Taddele Maru, 'China-Africa Relations Democracy and Delivery' *Aljazeera* (1 May 2013) <http://studies.aljazeera.net/en/reports/2013/04/201343011415424904.html > accessed 10 September 2018.

[624] Shinn (n 618).

[625] See Roman Tomasic and Zinian Zhang, 'From Global Convergence in China's Enterprise Bankruptcy Law 2006 to Divergent Implementation: Corporate Reorganisation in China' (2012) 12(2) Journal of Corporate Law Studies 295-332 for statistics and a discussion of implementation issues with the EBL.

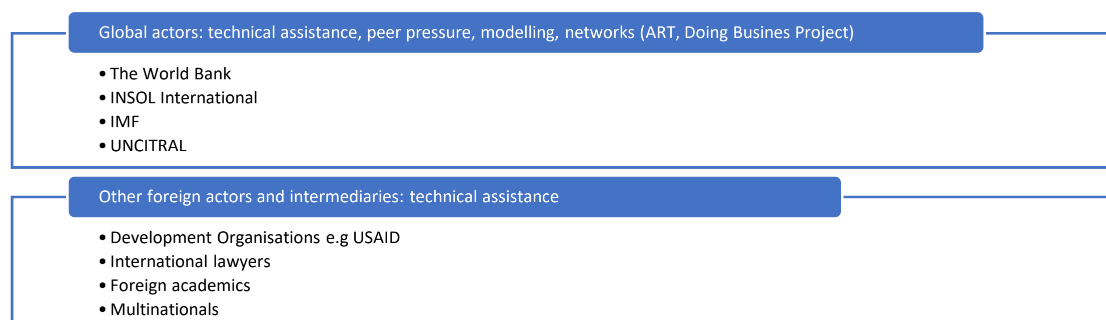
[626] See Ch 4, page 107 for a discussion of China's reform.

[627] Halliday and Carruthers, *Bankrupt* (n 2) 35-37.

5.3. The harmonisation process in Africa; global actors and methods of propagation. Recent insolvency law reforms in Africa are driven by both exogenous and endogenous factors including a desire to encourage foreign investment and favourably compete with other emerging jurisdictions.[628] Global actors like the World Bank, INSOL, IMF and UNCITRAL have been involved to varying degrees in these reforms. Their influence in Africa's reforms has lacked the direct force that they had in Asian countries like Indonesia and Korea but is present nonetheless. Out of the forty-five (45) countries that have now enacted the UNCITRAL Model Law, twenty-three (23) countries are in Africa.[629]

Global actors have turned to less coercive means of propagation including suasion, modelling and peer pressure; and intervention has come mainly by way of technical aid to governments and locally constituted reform committees using second and third order intermediaries.

Figure 10. Global actors and their intermediaries in Africa



5.3.1. Technical and financial assistance for reform

The World Bank is one of the prominent global actors that have been involved in these reforms both directly and indirectly. Directly, the Bank engages with policymakers in African countries to provide technical and financial assistance towards reforms.[630] Their involvement has included consultations with stakeholders (1st order intermediaries such as Law Reform Commissions, 2nd order intermediaries like

628 Patel (n 12).

629 Model Law status update <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html> accessed 10 September 2018.

630 David Burdette, 'Corporate Insolvency Reform Experiences' (Presented at the INSOL Conference, Insolvency Law in the Channel Islands: Modern Themes and Reform Perspectives, 14 October 2011).

practitioners and lawyers) to produce reports and recommendations for reform, working with technical committees to draft insolvency legislations and organising sensitisation programs. For example, in Mauritius, the World Bank in partnership with the IMF, worked with a local steering committee to provide consultation and technical assistance in the diagnostic and prescriptive process for a new insolvency law.[631] In Namibia and Lesotho, the World Bank engaged consultants to work with local stakeholders in consultation for insolvency law reform.[632] Additionally, the World Bank sponsored a project for the introduction of a legal framework for the licensing and regulation of insolvency practitioners in South Africa.[633] The Bank provided technical expertise for the review of the insolvency systems in Zambia and the drafting of insolvency bills in the Republic of Malawi, the Republic of Seychelles and Zimbabwe.[634]

Other actors who are less prominent at the global centre have also been directly involved in reform in some African countries. For example, USAID was highly invested in the different stages of insolvency law reform in Mozambique. Apart from assisting the government in the drafting and enactment process, USAID organised a training program for commercial judges throughout the country and published a guidebook on the new insolvency legislation.[635]

Private practitioners and experts from developed countries have also been present in the law-making process. The final draft of the Mauritian Insolvency Act was

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[631] World Bank, *Mauritius: Insolvency and Creditor Rights Systems (World Bank 2004)* <https://openknowledge.worldbank.org/handle/10986/14423> accessed 10 September 2018.

[632] Professor Andre Boraine of the University of Pretoria, South Africa was engaged by the Bank. See Namibia Law Reform Commission, 'Discussion Paper on Issues Relating to the Insolvency Act 1936' (February 2015) foreword ix; Africa Round Table (ART), (Freedom to Fail? Insolvency for Micro, Small and Medium Enterprises, Ghana 2016) 26-27 <https://www.insol.org/_files/Africa%20Round%20Table/Ghana%202016/ART%202016%20print%20numbered.pdf > accessed 10 September 2018.

[633] See Insolvency Law and Practice in Certain African States and the UK (Research Excellence Framework, Impact Studies, Nottingham Trent University 2014) <https://impact.ref.ac.uk/CaseStudies/CaseStudy.aspx?Id=23280> accessed 10 September 2018 .

[634] The Bank engaged external consultants to work with local stakeholders in those countries. Ibid.

[635] USAID, 'Mozambique Reforms Business Insolvency Laws' (October 2014)<https://20122017.usaid.gov/resultsdata/successstories/reforming-insolvency-laws-mozambique-priority-private-sector > accessed 10 September 2018.

completed with the help of a New Zealand professor, Peter Mc Kenzie (who also drafted the Companies Act 2001 and the Companies Act 1984).[636]

5.3.2. Propagation through peer pressure, modelling and suasion

More prominent than direct involvement in legislative reforms is the propagation of insolvency norms through networks, peer pressure and modelling. Notably, the impact of the World Bank through its projects, particularly the Doing Business project is influential and often shows up in narratives about the need for reform. Many African countries now measure their progress in terms of ease of doing business and legitimise reform proposals with the promise of a better ranking on the DB project.[637] Governments have also demonstrated commitment to the project by investing in committees and departments that are dedicated to improving the ease of doing business, using the World Bank indicators as a reference point.[638]

Supplemental to this is the Africa Round Table event (ART), an initiative of INSOL in collaboration with the World Bank and some assistance from the IMF.[639] First convened in Nigeria in 2010, the ART appears to be an attempt to replicate Asia's FAIR (which was established in 2001), and its stated objectives are: to have a high level dialogue with both private practitioners and public policy makers regarding insolvency reform in Africa, thereby encouraging reform experiences to be shared and challenges to be discussed in an open and frank forum; to elevate insolvency reform on the African policy agenda; and finally, to encourage insolvency policy makers and

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[636] Amar Bheenick, 'Mauritius: Insolvency Bill' (31 March 2009) <https://amarbheenick.blogspot.com/2009/03/> accessed 10 September 2018.
[637] Burdette, Corporate Insolvency Reform Experiences (n 630); 'Rwanda Struggles On Insolvency Law' *AllAfrica.com* (13 May 2012) <https://allafrica.com/stories/201205141215.html>; Juliana Taiwo-Obalonye,'World Bank top 10 ranking: Nigeria has exceeded target – Osinbajo' *The Sun* (31 October 2017) <http://sunnewsonline.com/world-bank-top-10-ranking-nigeria-has-exceeded-target-osinbajo/>; Ludger Kasumun, 'Tanzania: New Plan to Harmonise Bankruptcy Laws' *All Africa* (8 March 2018) <http://allafrica.com/stories/201803080456.html> ; USAID, 'Mozambique Reforms Business Insolvency Laws' (n 635); Editorial, 'Zim Open for Business: Govt abolishes Companies Act, says move to attract investors' *New Zimbabwe* (18 May 2018) <www.newzimbabwe.com/zimopenforbusinessgovtabolishescompanies-act-says-move-to-attract-investors/> ; 'Ethiopia: Attorney General Tunes Six-Decade-Old Bankruptcy Law' *All Africa* (18 December 2017) <http://allafrica.com/stories/201712190730.html> all accessed 10 September 2018.
[638] Nigeria and Mauritius are examples of such countries that have invested in such organisations. The Presidential Enabling Business Environment Council (PEBEC) was set up in July 2016 in Nigeria. The Mauritian government also has an ease of doing business department within its board of investment.
[639] Patel (n 12) 2.

professionals to establish an annual forum to stimulate discourse and learning across the region.'[640]

The ART complements other global platforms for comparing performance in countries.[641] While the DB project provides a basis for global comparison, the ART provides the necessary proximity among African countries for effective 'shaming' and peer pressure.[642] By creating an avenue for African policymakers, judicial officers and insolvency practitioners to report on the progress of reform in their countries, the ART stimulates some healthy competition among stakeholders and encourages horizontal learning from countries that have implemented reform. For example, at the ART events, a country like Mauritius gets the chance to showcase its exceptional ranking on the DB report to other African countries, emphasising how that ranking has cemented its place as the investment gateway into Africa, and how commercial law reforms have influenced economic growth.[643] This has in turn occasioned some horizontal learning. [644]

Because countries are encouraged to 'show off' the progress they have made, the ART leverages on the sense of competition among the states to persuade them to bring their laws and institutions in conformity with approved standards. By displaying the adoption of the global norms that they sanction by some African countries, global actors achieve the legitimation of these norms in Africa. Countries that have reformed their laws to conform to global standards can serve as success stories to other African states, thereby validating the claim that these norms are globally relevant. Also, while countries are not coerced to pursue a single standard, they are provided information

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[640] INSOL International <https://www.insol.org/ART/ > accessed 10 September 2018.

[641] For instance, the IMF Article IV Consultation, The World Bank Doing Business Project and the ROSC. See Ch 4, footnote 504.

[642] It is noted that the efficacy of this shaming and peer pressure is highly dependent on attendance at the event. But not mere attendance, attendance by the right people.

[643] African Development Bank, *Mauritius 2009-2013 Country Strategy Paper-Draft* (May 2009) available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Projecterations/Mauritius%2020092013%20Country%20Strategy%20PaperDraft.pdf> accessed 10 September 2018.

[644] African countries like Malawi find these testimonials and Mauritius' impressive rankings persuasive and now consider Mauritian Insolvency law a useful model for them. ART 2015 (Restoring Financial Sector Stability and Promoting Growth: The role of insolvency regimes, South Africa) 30 – 33 <www.insol.org/_files/Africa%20Round%20Table/2015/Papers/Final%20programme.pdf > accessed 10 September 2018.

on guidelines, frameworks and standards created by global actors. Hints about what is desirable, and undesirable are dropped at this forum. [645]

Global actors all have factors that impede the adoption of the norms they offer. For the powerful IFIs like the IMF and World Bank, their shortcoming also lies in their strength- their economic power and financial incentives which can earn them the resentment of national policymakers for interference in domestic law making. For other organisations like INSOL and the IBA, their strength lies in their technical expertise, but they often lack economic leverage.[646] Consequently, global actors have had to choose whether to cooperate or compete in the harmonisation process.[647] They often choose to cooperate, and this cooperation has been instrumental in the propagation of global norms in developing economies as illustrated by insolvency law reforms in Asia and now in Africa through the ART.

5.3.3. Engagement with local practitioners and other stakeholder groups

As we learn from comparing reforms in China, Indonesia and Korea, the level of intervention can make a difference in how reforms pan out. In Asia, the FAIR was complementary to direct intervention. While it is true that global actors have engaged directly with governments or used first order intermediaries in African countries, the ART remains the major move by global actors towards the deliberate propagation of insolvency norms in Africa. Indeed, such a forum can open up opportunities for more hands-on involvement of global actors in insolvency reform in individual countries. However, it generally operates at a safe distance, allowing countries to reform at their pace while nudging them towards ideal forms and standards.

Practitioner groups form an important part of the strategy of global actors for propagation. In their work in African countries, they have given the credit to insolvency practitioners from Africa for taking matters into their hands and

[645] For example, representatives of the UNCITRAL would weigh in on conversations about issues such as reciprocity requirements in cross border insolvency, engaging stakeholders on why this requirement is unnecessary if the model law is adopted. Discussion at ART 2017 (attended by the researcher).
[646] Halliday and Carruthers, *Bankrupt* (n 2) 25.
[647] ibid.

demanding the attention of global actors as they press for reform.[648] The regulation of insolvency profession is a recent development in many African countries. This is due to the lack of robust corporate insolvency law regimes.[649] Nevertheless, some form of organisation among IPs is beginning to emerge and actors like INSOL have contributed to this. For example, INSOL integrated insolvency professionals' associations in countries like Ghana, Nigeria and South Africa as member bodies.[650] These organisations provide a platform through which global actors can achieve reform goals in those countries. Members serve as second or third order intermediaries for global actors in insolvency reform.[651]

Although dominated by practitioners, the ART makes a point of achieving varied representation from all stakeholder groups. As such, they organise an annual closed-door meeting for high profile participants like judges, legislators, policymakers, lender groups and insolvency practitioners to deliberate on the direction of policy and reform in their different jurisdictions.

This method of propagation carries its implications for the speed and trajectory of reform. For example, although the ART attracts a rich mix of stakeholders, there are limitations to its ability to engineer and supervise the settling of global norms. For one, consistent attendance by all relevant stakeholders from different countries is not guaranteed.[652] Also, some stakeholder groups may be more committed to participating in the event than others. As stated above, practitioners are playing an important role in driving reform in many African countries and they are often well

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[648] Adam Harris, reporting in his capacity as president of INSOL said at the ART in 2011 'One lone question was raised …about why there was no attention given to Africa. Felix Addo of PwC in Ghana takes credit for putting his hand up. Since then, Africa has in fact become one of the focus points to which INSOL has turned its global attention. INSOL Africa Round Table (16-17 September 2011 Cape Town, South Africa) <www.insol.org/library/opendownload/369> accessed 10 September 2018

[649] Thus, reference to insolvency practitioners in this chapter and the next chapter loosely describes persons (usually lawyers and accountants) who are appointed to act as a liquidator, receivers, receiver managers or more recently a restructuring professional.

[650] Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), Ghana Association of Restructuring and Insolvency Advisors (GARIA) and South African Restructuring and Insolvency Practitioners Association (SARIPA).

[651] Patel (n 12) 3; Insolvency reforms led in Nigeria and Ghana by BRIPAN and GARIPA respectively.

[652] Political instability and constant change of government with no continuity plan in place also poses a challenge to sustained deliberations and efforts by participants. For example, change of government in Nigeria has been identified as one of the factors that delayed insolvency law reform in Nigeria. Idigbe and Kalu, 'Recent Strides' (n 74).

represented at the ART.[653] However, the same cannot be said of lending groups and government officials from most countries.[654] Wihlborg notes that, 'insolvency touches on the very fundamentals of the political and economic system of the country; enforcement of an insolvency law can thus be problematic. Powerful domestic groups need to be convinced that the law does not threaten them.'[655] Considering the degree of power that these stakeholders can wield in the reform process, their input in insolvency reform cannot be taken for granted. The non-participation of crucial stakeholders can heighten the operation of un-settling mechanisms like actor mismatch and diagnostic struggles.[656]

Also, in the absence of sustained engagement with relevant stakeholders, there is a possibility that the efforts of global actors through forums like the ART do not coincide with (or have the intended impact on) ongoing reform or emerging restructuring practices in African countries.

The experience documented regarding the evolution of insolvency law transnationally shows that expertise alone is not enough and must be combined with political authority. The UNCITRAL Model Law provides a lesson on why and how this is true. One of the factors reported to have set the law apart from earlier unsuccessful attempts to achieve similar and even less ambitious results was that national government officials and representatives worked with experts at the formative stage and at other stages of the reform.[657]

While it is true that engagement with experts and practitioners can contribute to the reform process through the enrolment process,[658] it is also true that not all experts have the power to enlist the help of politically relevant actors; and sometimes, global actors who are not fully apprised of local networks within a country can end up partnering with 'experts' who are not well positioned help them achieve their reform

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[653]See Africa Round Table (Mauritius 2017 Delegate List) at <https://www.insol.org/_files/Africa%20Round%20Table/Mauritius%202017/Delegate%20Folder/Delegate%20List%2031%20Oct.pdf>; <www.insol.org/Past-art-events/> (for previous years) accessed 10 September 2018.
[654] Ibid.
[655] Clas Wihlborg, 'Institutional development in Africa: The case of insolvency law in Steve Kayizzi-Mugerwa (eds), *Reforming Africa's Institutions: Ownership, Incentives, and Capabilities* (United Nations University Press, 2003) 277.
[656] See Ch 4, section 4.4
[657] Halliday and Carruthers, *Bankrupt* (n 2) 57.
[658] Ch 4, page 111.

aims. As noted in chapter four, global actors need intermediaries that possess three qualities- competencies, power and loyalty.[659] In some developing economies, it can be a difficult task to find these qualities. While a few intermediaries may be eager for reform, there may be wide capacity gaps among stakeholders because of their distance to the global.[660] Also, the few intermediaries with capacity for diagnosis and prescription may lack power, and those with power may not be loyal to global standards. Thus, close engagement with different stakeholders at the local site may be necessary to access the needed quality of intermediaries.

The engagement of practitioners and experts with the government is different across African juridcitions. For example, in Kenya's insolvency law reform, the business community drove the reform and pushed hard to be heard by the government. In contrast, the Mauritian government has been credited for driving reform and inviting contributions from the business community.[661] The Mauritian bill is reported to have been developed with the widest possible participation with lawyers, accountants, bankers and other professionals.[662] In other African countries where reforms that began many years ago have been slowed despite the efforts of local intermediaries, a lack of political backing and loyalty of powerful stakeholders have contributed to the slow pace of reform.[663]

A case in point is Nigeria's insolvency law reforms where the local intermediaries are mostly professionals (BRIPAN members). One of the reasons why the reforms failed to gain traction is the limit to the power of the intermediaries. During the empirical study, BRIPAN officials were unable to provide clear answers as to the progress of the Insolvency Bill.[664]

> *'Sometimes, it is ultimately a question of which vested interests has more influence or resources to move things along with the legislators'.*

[659] Carruthers and Halliday, 'Negotiating globalization' (n 35) 530.
[660] ibid 552-576.
[661] Fancy Chepkemoi Too, A Comparative Analysis of Corporate Insolvency Laws: Which is the Best Option for Kenya? (PhD thesis, NTU September 2015) 264.
[662] Bheenick (n 636).
[663] Burdette, 'Corporate Insolvency Reform Experiences' (n 630).
[664] Reform is now headed in a different direction as the insolvency law reform has been consolidated with company law reform.

However, even if it has little influence on legislative reform, the active participation of insolvency practitioners in forums like the ART can impact the practice of corporate insolvency, provided that they apply lessons from the forum to their work. By doing this, they act as third order intermediaries, passing on global norms to other practitioners, lenders and other stakeholders. Part B of this chapter considers the evolution of insolvency law and practice across Africa and the connection with the global harmonisation process. These developments are considered in two sections- one looks at the changes in restructuring practice, highlighting a shift in the response of stakeholders to financial distress and the factors that have influenced this shift. The second part provides an analysis of insolvency law reforms in selected African countries.

PART B
THE EVOLUTION OF RESTRUCTURING PRACTICES AND INSOLVENCY LAW REFORM

5.4. Developments in Restructuring.

Most African countries can be rightly described as late-comers to the insolvency law reform table. In many jurisdictions, corporate insolvency law and practice is largely understood as a debt recovery process and thinly constituted by the winding up and receivership procedures.[665] As African economies grow, these laws now struggle to meet the demands of current commercial realities.[666] With increase in economic activities and foreign investment comes a growing need for supporting institutions including rehabilitative insolvency frameworks to cushion the effects of economic volatility on businesses. Huge commercial transactions can ordinarily involve complex financing and security arrangements. The novelty of such arrangements in the African market and the budding state of the institutions add an extra layer of complexity to these transactions. As participants in the Azura-Edo IPP deal reported, it 'required an even more dizzying array of contractual innovation and project participants than is typical of emerging market IPPs'.[667] There is a need for practitioners to build the capacity to deal with these transactions and for institutions to be better equipped to handle the resolution of financial distress.

In Africa, governments and private stakeholders increasingly acknowledge the importance of sound insolvency practices, especially the rehabilitation of distressed but viable companies. Within the limited set of laws and outside the law, they are carving a space for the adoption of new strategies for debt resolution and restructuring. Some contributing factors are, the realisation that insolvency frameworks all over the world have become more forgiving and an understanding that more value may be preserved by restructuring rather than destructive recovery actions. The impact of both factors is heightened by increased collaborations among

[665] Patel (n 12).
[666] ibid.
[667] Nigeria's first independent power plant. IFC, Nigeria's Electric Power Sector (Investing in Africa) 5 <www.energynet.co.uk/webfm_send/1243 > accessed 10 September 2018.

practitioners transnationally and a need for restructuring arising from economic growth and volatility. Thus, beyond insolvency law reform, the impact of global norms of insolvency is also reflected in the informal restructuring practices of African countries. Again, practitioners (both local and foreign) stand out in their role as third order intermediaries for the propagation of these norms.

5.4.1. Private workouts

The insolvency laws of most African countries have only recently begun to accommodate corporate debt restructuring and other insolvency alternatives. However, private workouts are not an uncommon practice.[668]

One of the factors contributing to this is the growing acknowledgment and use of alternatives to court-driven procedures, especially in commercial cases. In some countries, the law now demands an attempt at Alternative Dispute Resolution (ADR) before a dispute is brought before the court. In commercial courts in Uganda for instance, it is prescribed that commercial disputes are considered for suitability for ADR before litigation.[669] Likewise, Kenyan, Nigerian and Zambian lawyers are encouraged to try ADR before filing any case.[670] Mozambican insolvency law requires that consensual workouts be executed under the arbitration laws.[671]

However, private workouts are mostly ad hoc, unilateral and only bound by the internal rules and procedures of each bank. In South Africa, workouts are often initiated by the banking sector, with officials on credit committees cooperating with the management of distressed companies to restructure its affairs.[672] In Nigeria where commercial banks dominate the lending market, banks have been known to file

[668] From the empirical study detailed in the next chapter, 15 out of 22 commercial banks in Nigeria (including the pan African banks), have set up departments that are dedicated to the restructuring of distressed loans. Creditors explore the option of restructuring before taking stricter measures against the debtor.
[669]The Judicature Act, ss 26-32, 41 (Commercial Court Division) (Mediation) Rules, No. 55 of 2007.
[670] The Constitution of Kenya, Article 159 (2) (c); Order 3 R 2 of the Lagos State Civil Procedure Rules 2012; Order 31 of the High Court Rule Zambia; Anthony Idigbe and Okorie Kalu, 'Best practice and tailored reforms in African insolvency: lessons from INSOL' ILO (14 December 2012).
[671] Though parties may still agree on other private arrangements for the restructuring of the debtor. See Arbitration Law nº 11/99 of 8 July.
[672] Hans Klopper, 'South Africa' (2017) 10 The Restructuring Review 319.

winding up actions only as a strategy to bring defaulting companies to the negotiating table.[673]

In 2013, guidelines patterned after the INSOL Statement of Principles for a Global Approach to Multi-Creditor Workouts were issued by the Mauritian Insolvency Service and endorsed by the Bank of Mauritius. It is not yet clear how well Mauritius' guidelines are being used in practice,[674] but as restructuring and insolvency receive more attention and other countries catch on, guidelines for multi creditor restructuring are likely to become part of the insolvency framework in African countries.

5.4.2. Achieving corporate rescue with existing procedures.

Until recently, corporate insolvency regimes in most African countries revolved around winding up proceedings and debt recovery.[675] In common law jurisdictions like Nigeria, Ghana and Kenya, Sierra Leone, receivership is a well-known debt recovery procedure. Receivership allows a creditor or group of creditors with security over the company's assets to appoint a receiver or receiver manager (RM) to take over the management of the company or its assets until the debt is realised. As discussed in chapter one, in addition to realising the debt for her appointor, a receiver manager is also in the postion to manage and rescue the business of the distressed company.[676] The position of the receiver manager has however not had this effect.[677] Rather, it has come to acquire the reputation of a death sentence.[678] This is because of the focus on the realisation of the assets of the appointing creditor(s), often to the detriment of the company's already fragile health.

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[673] Ch 6, section 6.7. It is noted that courts in Africa can be slow and inefficient, and this factor contributes to the reluctance of commercial actors to get locked into litigation.
[674]BLC Robert & Associates (Chambers and Practice Guide, Mauritius). <https://practiceguides.chambersandpartners.com/practiceguides/insolvency-2018/mauritius/31-consensual-and-other-out-ofcourtworkouts-and-restructurings > accessed 10 September 2018; INSOL, *Statetement of Principles*.
[675] As Table 1.0 below shows, many countries have now adopted or are in the process of adopting rescue-oriented laws.
[676] Ghanaian Companies Code Act 179 of 1963, s 650; CAMA, s 389; Kenyan Companies Act Cap 486, s 341; Sierra Leonan Companies act 2009, s 330.
[677] Kwama (n 620).
[678] 'Kenya's Kiss of Death Receivership Laws to Be Reviewed' Global Insolvency.com < http://globalinsolvency.com/headlines/kenya's-'kiss-death'-receivership-laws-be-reviewed> accessed 10 September 2018.

The interviews in Nigeria revealed that every stage of the receivership procedure, including the appointment of the receiver, is potentially contentious.

> *'The moment we appoint a receiver, the customer rushes to court seeking an order to restrain the receiver from functioning. And once that happens your hands are tied, you sit in court while the debt piles up'.*[679]

Although the lenders in the interviews understood the distinction between the roles of a receiver and the receiver manager, they did not think that there was much difference in practice. They tended to consider both as recovery devices and struggled with the use of receiver management as a turnaround procedure.

> *'Receiver managers do not manage, most times they strip the company, sell the assets, get their commission and pay the bank. They interpret their role as recovery agents and nothing else'.*[680]

In more recent times, there is a move towards achieving corporate rescue particularly when large companies that are significant to the economy go into receivership. In such cases, the stakeholders (often led by the government) seek to explore the corporate rescue potential of the receivership procedure, using it as a mechanism for coordinating the company's creditors to resolve its difficulties. The appointment of a receiver manager over Nigeria's Arik Air is a recent example of a rescue-orientated receivership. Arik Air, the airline that took over the ground facilities of the country's first indigenous flag carrier, Nigeria Airways, became distressed as a result of a combination of massive financial debt burden, operational challenges and mismanagement.[681] Owing millions of US dollars to a wide range of creditors including banks, foreign partners, regulators, employees and suppliers, it was taken over by creditors and put in receivership in February 2017. From the point of take-over, it was clear that the appointment of a receiver manager was intended to be used

[679] Lender 1 (empirical study).
[680] Lender 5 (empirical study).
[681]Chinedu Eze, 'FG Takes Over Troubled Arik, AMCON Says Airline Too Important To Fail' *This Day* (10 February 2017) 1 &10.

as a turnaround procedure, as liquidation was taken off the table.[682] As part of these rescue efforts, a new team of aviation and finance experts was put in place to operate the company under the supervision of the receiver manager.[683]

The approach to Arik's financial distress sharply contrasts with the attitude surrounding the liquidation of Nigeria's previous national carrier, Nigeria Airways, and Ghana's flagship airline, Ghana Airways in 2004.[684] These airlines suffered very similar challenges as Arik but ended up in liquidation at a time when the norm of corporate rescue was yet to break into the resolution of financial distress in African countries. Thirteen years after its liquidation and with the benefit of hindsight, stakeholders have expressed regret over the avoidable death of Nigeria Airways.[685]

Similarly, in Kenya, while efforts were being made to reverse the 'kiss of death' effect of insolvency laws through new legislation, the practice of receivership has also reflected this new thinking, again in the case of large companies.[686] Kenyan business, Uchumi Supermarkets was East Africa's largest supermarket chain with branches all over East Africa before it ran into financial difficulties. The company had been in and out of distress since 2006 when it first went into receivership. With some state support, the banks have recently declared a readiness to turn around the company's fate and ensure that it comes out of the receivership.[687] In Uganda, The Steel Rolling Mills is currently in receivership but is due to receive support from the government to enhance the likelihood of a turnaround from the process.[688]

Also, the arrangement and compromise procedure (an equivalent of the English scheme of arrangement) which features in the company legislation of common law

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[682] Nwafor Polycarp, 'We are not Interested in Liquidating Arik Air- AMCON' *Vanguard News* (27 February 2017) <www.google.com.ng/amp/www.vanguardngr.com/2017/02/not-interested-liquidating-arik-air-amcon/amp/ > accessed 10 September 2018.

[683] Ibid.

[684] Franklin Cudjoe, 'Ghana Airways, the grim reaper' *The Africa Report* (9 September 2014) <www.theafricareport.com/Columns/ghana-airways-the-grim-reaper.html> accessed 10 September 2018.

[685] Abdullateef Aliyu, '12 Years After Liquidation, Nigeria Airways Echoes' *Daily Trust* (31 May 2016) < www.dailytrust.com.ng/12-years-after-liquidation-nigeria-airways-echoes.html > accessed 10 September 2018.

[686] Global Insolvency.com (n 678).

[687] Michael Omondi, 'Bankers agree to lift Uchumi from receivership' *Business Daily* (28 January 2010) <www.businessdailyafrica.com/-/539552/851318/-/6b7h2n/- > accessed 10 September 2018.

[688] Editorial,' Why Steel Rolling Mills is a case both for and against a government bailout for distressed Ugandan businesses' 256 Business News (10 November 2015) <https://256businessnews.com/why-srm-case-is-a-case-both-for-and-against-a-government-bailout-for-distressed-ugandan-businesses/ > accessed 10 September 2018.

African countries is gradually being considered a viable option for distressed debt restructuring.[689] For example, the recent restructuring of South Africa's EDCON, the largest non-food retailer in Southern Africa was completed using the compromise procedure in 2017. The agreement was pre-negotiated by 80 per cent of the company's secured creditors and thereafter, court sanction was used to bind other creditors. The use of the compromise procedure in this way was facilitated by the involvement of a London based law firm, which advised on the restructuring.[690] In Kenya, the financial restructuring of the $2 billion indebtedness of Kenya Airways was recently completed using a scheme of arrangement under Kenyan Companies Act. The scheme was used to implement a debt equity swap that resulted in bank lenders converting their debt into 38.1 per cent equity ownership of the airways. [691]

These developments show that debt restructuring is becoming more prominent. However, it is difficult to make the most of the existing procedures because of negative connotations that attend them and or design challenges that make it more difficult to use them for financial restructuring of distressed companies.[692] These cases are limited to companies large enough to attract the attention and support of the state. This leaves SMEs which form a large percentage of the total number of companies and make important contributions to the economy, without support.[693] For smaller companies, rescue-oriented receiverships are either non-existent or few and far between.[694]

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[689] Dipo Okuribido (n 82) 26-29.

[690] IFLR Correspondent, 'Edcon's landmark debt restructuring explained' (22 March 2017) <www.weil.com/~/media/files/pdfs/2017/iflr_edcon.pdf > accessed 10 September 2018.

[691] Bob Koigi, 'Schemes of arrangement to the rescue of Kenyan companies in financial distress' Africa Business Communities (24 May 2017) <https://africabusinesscommunities.com/news/schemes-of-arrangement-to-the-rescue-of-kenyan-companies-in-financial-distress,-bowmans/ >; John Aglionby, Kenya Airways agrees debt-for-equity restructuring terms' *The Financial Times* (13 November 2017) <www.ft.com/content/9fad4091-b1be-3098-b510-6d658c113371> accessed 10 September 2018. Again, London's international law firm, White and Case advised on the transaction.

[692] For example, Kenya Airways scheme of arrangement was not without difficulty as creditors strongly disputed the application of the scheme to them. see ibid. The next chapter also explores the challenges that practitioners in Nigeria have faced in implementing a rescue-oriented receivership.

[693] José Filomeno de Sousa dos Santos, 'Why SMEs are Key to Growth in Africa' World Economic Forum (4 August 2015) <www.weforum.org/agenda/2015/08/why-smes-are-key-to-growth-in-africa/ > accessed 10 September 2018.

[694] In Kenya, out of about 50 companies that have been placed in receivership, only a handful have been fortunate to get a fresh start. Kwama (n 620).

Consequently, there remains a need for strong and effective restructuring frameworks.

5.4.3. Government intervention

Governments in Africa have begun to show more concern and intervention in the survival of companies in distress. As noted above, the appointment of receiver managers over distressed large companies is often backed by some government support. Government intervention has manifested in different forms, most remarkably bailouts and in some cases like Nigeria, the establishment of an asset management company to clean up the debt portfolio of commercial banks and resolve NPLs.[695] The Asset Management Corporation of Nigeria (AMCON) was set up in 2010 as a government-funded bad bank. In adverse economic conditions, AMCON has contributed to restructuring (particularly multi-creditor restructuring of large companies) in Nigeria. AMCON's portfolio reveals that it purchased more than 12,000 loans from industries including aviation, gasoline marketing and manufacturing for about N1.8 trillion (USD 5 billion).[696] The qualities that make it possible for AMCON to facilitate restructuring include government backing, special powers to obtain expedited judgments from the courts and funds to finance restructuring.[697]

In Uganda, the government recently reserved $300 million for the bailout of distressed companies that are considered viable and capable of contributing to the economy.[698] In 2017, the Ghanaian government launched an initiative that identified about 100 distressed but viable companies and earmarked them for government bailout.[699] Government intervention has also come in form of a strong influence on the decisions

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[695] Babajide Komolafe, 'Analysis: AMCON, bad debtors and moral hazard' *The Vanguard* (Nigeria, 28 February 2011) <www.vanguardngr.com/2011/02/analysis-amcon-bad-debtors-and-moral-hazard/ > accessed 10 September 2018.

[696] Editorial, 'AMCON Records 57 Percent Recovery of Banks' Bad Debts' *All Africa* (26 May 2015) <https://allafrica.com/stories/201505270863.html > accessed 10 September 2018.

[697] AMCON Act 2010, s 48-53.

[698] Before it has gained traction, some factors already cast doubt on the efficacy of the program. For one, it has been criticised as politically motivated. See DW 'Uganda Company Bailouts Politically Motivated' (28 July 2016) <www.dw.com/en/uganda-company-bailouts-politically-motivated-critics-allege/a-19432023> accessed 10 September 2018.

[699] Nana Dr Appiagyei Dankawoso II, ' Government to Bail Viable But Struggling Companies' GhanaNews (8 June 2017) < http://ghananewsonline.com.gh/government-bail-viable-struggling-companies/ > accessed 10 September 2018.

of creditors regarding the fate of a distressed company. In May 2017, one of Nigeria's top four telecommunications companies, Etisalat, narrowly escaped debt recovery action by its creditors due to government intervention.[700]

Government intervention in the rescue of distressed companies is a welcome step that signals openness to a rescue culture by politically relevant stakeholders. Intervention of this nature can however not be a long-term solution. The establishment of a bad bank can provide some immediate relief but is only a temporary, ad hoc solution to corporate debt problems.[701] A case in point is Nigeria's AMCON, now caving under the weight of the debt it has acquired and struggling to find avenues for resolving NPLs.[702]

Also, the overuse of bailouts poses its own risks to the economy. The arguments against a bailout culture range from the moral hazard that can result from the dependence of businesses on state rescue to an erosion of the nation's resources and a lack of transparency in the selection and implementation of the bailout process.[703] For African countries that are battling deep seated problems of corruption, economic instability, lack of corporate governance and poor accountability measures, these risks become even more palpable.[704] In an increasingly competitive market, it will be a better use of government resources to provide an enabling environment by putting up solid rehabilitative frameworks for viable businesses while allowing the market to take care of moribund companies.

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[700] Ozioma Ubabukoh, 'Three Banks Take Over Etisalat' *Punch Newspapers* (8 March 2017) 1 ; Bassey Udo (n 39)

[701] Laryea (n 17) 17; Mohammed Awal 'CPC asks for gov't bailout' *StarFM* (7 February 2018) <http://starrfmonline.com/2018/02/07/cpc-asks-govt-bailout/ > accessed 10 September 2018.

[702] Babajide Komolafe, 'AMCON battles economic difficulties to repay N6.5trn bond obligations' Vanguard (9 December 2015) <www.vanguardngr.com/2015/12/amcon-battles-economic-difficulties-to-repay-n5-6trn-bond-obligations/> ; AMCON stopped buying bad loans to discourage corporate rascality—Kure' (12 June 2017) <www.vanguardngr.com/2017/06/amcon-stopped-buying-bad-loans-discourage-corporate-rascality-kure/ > all accessed 10 September 2018.

[703] Cheryl D Block, 'Measuring the True Cost of Government Bailout' (2010) 88 Wash. UL Rev. 149; Rosas, Guillermo, *Curbing bailouts: Bank crises and democratic accountability in comparative perspective* (University of Michigan Press, 2009).

[704] Wiseman Khuzwayo, 'Abil's bailout is political – experts' Business Report (12 August 2014) <www.iol.co.za/business-report/companies/abils-bailout-is-political---experts-1733837> accessed 10 September 2018; DW (n 698).

5.4.4. Distressed debt investment

Distressed debt investment is gradually making its way into African countries and showing potential for growth as one of the mechanisms for corporate debt resolution on the continent. Investors, notably private equity funds from the US, the Middle East and China have shown some interest in exploring opportunities in Africa's distressed debt.[705] They aim to come in through a consensual process, as part of a formal insolvency process, troubled M&As, takeovers or a loan to own process. [706] The involvement of these actors offers an important element of a successful restructuring, new funds.[707] In Nigeria, AMCON can also be considered to have cleared the path for a distressed debt market.[708] Duet Private Equity recently partnered with AMCON to establish an investment fund in the Fast-Moving Consumer Goods sector. The fund is fully focused on turnaround and distressed situations in the sector, with the aim of funding additional capital and debt restructuring needs of selected companies.[709] Duet has also made similar investments in Ghana, Cote D'Ivoire and Ethiopia.[710] In May 2017, Africa Special Opportunity in its first distressed private equity deal acquired OptiCo in South Africa, with the aim of turning around the business.[711] Also, financial

[705] Much of the activity in this area has been directed at the South African market but other sub-Saharan countries are beginning to attract investors. South African Restructuring Outlook Survey Results (Deloitte 2016) 17-19 ; Irene Madongo, 'South Africa, Private Equity Eyes Distressed Debt Assets' *Financial Times* (April 19 2013) <www.ft.com/content/638a0a5b-02f9-3d8a-9502-b5c6b85db1d5 > accessed 10 September 2018.

[706] Recently, proposals were made for a merger between troubled Kenyan retail chain Nakumatt and rival business Tuskys, Brian Ngugi, 'Nakumatt, Tuskys deal faces regulatory hurdle' Business Daily (19 September 2017)<www.businessdailyafrica.com/corporate/companies/Nakumatt-Tuskys-deal-faces-regulatory-hurdle/4003102-4102148-pqi37qz/index.html > accessed 10 September 2018.

[707] Daniel Rzasa, 'Duet Group expands African PE portfolio with new acquisition' Modern Investor (15 December 2015) <http://moderninvestor.com/news/duetgroupexpandsafricanpeportfoliowithnewacquisition/a867532 > accessed 10 September 2018.

[708] It is noteworthy that the Central Bank of Nigeria now aims to create more space for distressed debt investment through the proposed licensing of Private Asset Management Companies. CBN, 'Exposure Draft of the Framework for Licensing, Regulation and Supervision of Private Asset Management Companies in Nigeria' (14 June 2017) <www.cbn.gov.ng/out/2017/fprd/exposure%20draft%20of%20the%20framework%20for%20licensing,%20regulation%20and%20supervision%20of%20private%20asset%20management%20companies%20in%20nigeria.pdf > accessed 10 September 2018.

[709] Lyndon Norley, 'Distressed Debt Opportunities in Africa' *Bowmans* (7 September 2016) <www.bowmanslaw.com/press_releases/distressed-debt-opportunities-africa/ > accessed 10 September 2018.

[710] Daniel Rzasa, 'Duet Launches New PE Fund Focused on Distressed Nigerian Companies' Modern Investor (22 July 2016) <http://moderninvestor.com/news/duet-launches-new-pe-fund-focused-on-distressed-nigerian-companies/a935338 > accessed 10 September 2018.

[711] Africa Capital Digest, Wrap up of Africa's Key Private Equity, Infrastructure and Venture Capital (May 29, 2017) <https://www.proshareng.com/news/PRIVATE%20EQUITY/WrapUp-of-Africa-s-Key-Private-Equity--Infrastructure-and-Venture-Capital/35019 > accessed 10 September 2018.

institutions are now exploring the creation of private debt resolution vehicles to manage distressed loans and sell them off to investors willing to take up the risk.[712]

The experience of Etisalat Nigeria in its ongoing restructuring illustrates the growth of DDI in Africa. In a process managed by Barclays Bank, a varied mix of investors ranging from indigenous companies in the telecommunication sector, investors from other parts of Africa, foreign companies in the sector and private equity firms from the US and the Middle East have made bids to purchase the distressed company.[713]

The availability of DDI holds potential benefits for the rescue of distressed companies in Africa as it indicates that rescue finance, an important element of corporate rescue is coming into place as insolvency reform is ongoing. For distressed debt investment to flourish however, it is important that frameworks and supporting institutions for resolving corporate distress are clear and effective. This allows investors estimate the risks they are undertaking, and devise exit strategies with more certainty.

Overall, these developments indicate a growing sophistication in the response to financial distress. They also emphasise a need for insolvency law reforms to provide appropriate frameworks that complement the efforts of commercial actors. It is against this background that the next section considers recent corporate insolvency and restructuring law reforms across Africa.

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[712] Ecobank Transnational Incorporated, the parent company of a pan African bank recently adopted this approach. The company set up the first private sector funded debt resolution vehicle in Nigeria to resolve some of Ecobank Nigeria's challenged assets. Nkiruka Nnorom, 'ETI loses N52.6bn after Tax on Full Impairment Charge Adoption' Vanguard (18 April 2017) <www.vanguardngr.com/2017/04/eti-loses-n52-6bn-tax-full-impairment-charge-adoption/amp/ > accessed 10 September 2018.

[713] Globacom Nigeria Limited, Nigeria's second largest network; India's Bharti Airtel, operating as Airtel in Nigeria; Dangote Group's telecoms business unit, Alheri Engineering Limited, which has the backing of U.S.-based Blackstone Group with an investment portfolio of $378 billion and a Nigerian subsidiary called the Black Rhino Group; Smile Telecoms Holdings, a South African telecommunications group with subsidiaries in Nigeria, Tanzania and Uganda; and Helios Towers, Centricus Capital and Africell, a subsidiary of the Lebanon-based Lintel Group of Companies, with cellular communications operations in the Democratic Republic of Congo (DRC), The Gambia, Sierra Leone and Uganda; Dubai-based Abraaj Capital, a private equity firm with an investment portfolio of $11 billion; Teleology Holdings Limited, a special purpose vehicle led by a former chief executive of MTN Nigeria, Mr. Adian Wood, and Ericsson; Africa Capital Alliance (ACA), a leading pan-African investment firm based in Lagos; and The Carlyle Group, a U.S.-based multinational private equity, alternative asset management and financial services corporation are all in the running to take over the company. Emma Okonji, 'Glo, Airtel, Dangote, Seven Others Advance to Final Stage in 9mobile Bid' *This Day* (20 November 2017) 1.

5.5. Insolvency law reforms in selected African countries.

Table 1.

S/N	Country	Previous insolvency law	State of reform	Reform agenda	UNCITRAL cross-border legislation
1	Burundi[714]	N°1/07 of 15 March 2006 on Bankruptcy and Law N°1/08 of 15 March 2006 on legal settlement of ailing company.	Draft insolvency law adopted by government and presented to parliament in 2014.	Aims to incorporate international and regional best practices. Seeks to harmonise with other East African countries like Kenya, Rwanda, Uganda and Tanzania.	Model Law within the contemplation of proposed law.
2	Cape Verde (Cabo Verde)[715]	Civil Process Code 1962	The Insolvency and Recovery Code - Law no116/VIII/2016 (came into force September 2016)	Introduces a procedure for the revitalisation of distressed companies (influences	Model Law not adopted.

[714] See ART 2014 (Jobs in Africa: How insolvency regimes impact economic growth, Uganda) 21 <https://www.insol.org/_files/Africa%20Round%20Table/Kampala%202014/V3%20FINAL%20Africa%20Roundtable%202014%20delegate%20folder%208%20Oct.pdf > accessed 10 September 2018.

[715] ART 2017 (Plugging the Implementation Gap, Mauritius) 1 <www.insol.org/_files/Africa%20Round%20Table/Mauritius%202017/Delegate%20Folder/Peer%20to%20Peer/Peer%20to%20peer%20session%20FULL.pdf > accessed 10 September 2018.

				from Portuguese law)	
3	Djibouti[716]	The Civil Procedure Code	New Commercial Code, Code de Commerce de la Republique de Djibouti 2011, came into operation in 2012.	The new code allows a range of insolvency alternatives including preventive settlement with creditors.	Model Law not adopted
4	Ethiopia[717]	Commercial Code of 1960 (Bankruptcy and Schemes of Arrangement)	Draft Law submitted by AG to Council of Ministers in December 2017	Reform to be based on UNCITRAL Legislative Guide. Aims to introduce corporate rescue procedures.	Model Law not adopted
5	Ghana[718]	Bodies Corporate (Official Liquidations)	Draft Corporate Insolvency Bill 2016 led by GARIA to go	Law to introduce a corporate	Bills contemplates the adoption of Model Law.

[716] World Bank Doing Business, Djibouti Country Report. <www.doingbusiness.org/Reforms/Overview/Economy/djibouti> accessed 10 September 2018.
[717] ART 2015(n 644) 29; Haimanot Ashenafi, 'Ethiopia: Attorney General Tunes Six-Decade-Old Bankruptcy Law' *AllAfrica* (18 December 2017) <https://allafrica.com/stories/201712190730.html > accessed 10 September 2018.
[718] ART 2015 (n 644) 29-30; Emmanuel Bruce, 'Insolvency, Companies bills to be laid before Parliament' Graphic Online (5 September 2017) <www.graphic.com.gh/business/business-news/insolvency-companies-bills-to-be-laid-before-parliament.html> accessed 10 September 2018.

		Act, 1963 (Act 180); and Companies Code (Act 179) 1963	before parliament. New law is anticipated in March 2019.	reorganisation framework.	
6	Kenya[719]	Bankruptcy Act 1930 (revised in 1962). Based on English Bankruptcy Act 1926.	Insolvency Act 2015 became effective in March 2016.	New law incorporates corporate rescue via administration and CVA procedures. Majorly influenced by English Insolvency Law.	New law adopts Model Law.
7	Lesotho[720]	The Insolvency Proclamation No. 51 of 1957	Proposal for the drafting of new Insolvency Law submitted to Office of Parliamentary Counsel.	Aims to introduce business rescue mechanisms including out of court workout procedures.	Contemplates the adoption of the Model Law

719 Kenya Insolvency Act 2015.

720 ART 2016 (Freedom to Fail? Insolvency for Micro, Small and Medium Enterprises, Ghana) 26- 27 <www.insol.org/_files/Africa%20Round%20Table/Ghana%202016/ART%202016%20print%20numbered.pdf > accessed 10 September 2018; In 2014, the government of Lesotho released a call for curriculum vitae for advisors in the review process. See Government of Lesotho, 'Private sector competitiveness and economic diversification project individual consultancy services request for curriculum vitae for a technical advisor for review and drafting of insolvency law and regulations' Mail&Guardian (3 September 2018) <https://mg.co.za/notice/2014-02-21-government-of-lesotho-gol > accessed 10 September 2018.

8	Liberia[721]	Chapter 8 of the Commercial Code, the fraudulent Conveyance Act 1956 and Title 7 of the Liberian Code of Laws Revised.	New Chapter 8 of the Commercial Code, Insolvency and Restructuring Act was approved in December 2016	The law introduced a corporate reorganisation procedure similar to the US Chapter 11 procedure	Model Law not adopted. No cross-border insolvency regime available.
9	Malawi[722]	Companies Act 1984.	Insolvency Act 2015.	Introduces restructuring framework influenced by Mauritian and English insolvency Laws.	New law adopts Model Law
10	Mauritius[723]	Companies Act 1984	Insolvency Act 2009 (as amended)	Introduces a corporate rescue mechanism - voluntary administration	Model Law adopted.

[721] ART 2016 (n 720) 27; Morrison O.g Sayon,' Liberia: Cllr. Barbu Wants Timely Passage of Insolvency Law' *All Africa.com* (4 June 2014) <https://allafrica.com/stories/201406050716.html> accessed 10 September 2018.

[722] ART 2015 (n 644) 30-33; Marek Dubovec and Cyprian Kambili, 'Secured Transactions Law Reform in Malawi: the 2013 Personal Property Security Act' in Louise Gullifer and Orkun Akseli (eds.), *Secured Transactions Law Reform: Principles, Policies and Practice* (Bloomsbury Publishing 2016) 201-202.

[723] BLC Roberts, 'Guide to law types in Mauritius' BLC Roberts & Associates ALN (31 May 2017) <http://www.blc.mu/blc.mu1/view_news.php?id=25> accessed 10 September 2018. Recall from earlier discussion that final draft was produced by a professor from New Zealand. See text to fn (636) above.

				which borrows from New Zealand and Australian insolvency laws.	
11	Mozambique[724]	Civil Procedure Code 1967	Insolvency and Recuperation of Commercial Agents Decree-Law no. 1/ 2013.	New law drafted with the help of USAID. Introduces a robust corporate reorganisation system. Patterned after the Brazilian Insolvency Law 2005.	Model Law not adopted.
12	Namibia[725]	Insolvency law 1936 (amended in 1965) Companies Act 2004.	Review of the existing law being done by Law Reform and Development Commission (LRDC) since 2013.	Proposals include corporate rescue, the regulation of insolvency practitioners, the insolvency	The proposals contemplate the adoption of the Model Law.

[724]ART 2016 (n 720) 23-24; Fabrícia de Almedia Henriques, 'The new insolvency paradigm in Mozambique' Emerging Markets Africa (2015) 26.
[725] ART 2016 (n 720) 30 – 31.

				of trusts and set-off.	
13	Nigeria[726]	Companies and allied Matters Act 1990 (based on UK Companies Act 1948).	Companies and Allied Matters Bill 2018	Reform aims to introduce corporate rescue by adopting the CVA and administration procedures from the UK Insolvency Act 1986.	Bill contemplates adoption of Model Law.
14-29	OHADA[727]	OHADA Uniform Act organising Collective Proceedings for wiping off debts (UACP), adopted on 10 April 1998	A new UACP was adopted on 10 September 2015	Draws from French law. Introduces preventive rescue mechanisms (conciliation and preventive settlement) and a reorganisation procedure for	Model Law adopted in all 16 countries.

[726] LawPavilion, 'The Proposed Companies and Allied Matters Act 2018: What's New?' <https://lawpavilion.com/blog/companies-and-allied-matters-act-2018-whats-new/ > accessed 10 September 2018.

[727] ART 2016 (n 720) 33-34; Louis Degos, James Green, Dara Akchoti, 'A New OHADA Uniform Act on Insolvency and Restructuring in Africa' K&L Gates (27 October 2015) <www.klgates.com/ohada_uniform_act-10-27-2015/> accessed 10 September 2018. OHADA includes sixteen countries; Benin, Burkina Faso, Cameroon, Central African Republic, Chad, the Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea Bissau, Guinea, Mali, Niger, Senegal and Togo.

				insolvent companies.	
30	Rwanda[728]	Law No. 12/2009 of 26/5/2009 Relating to Commercial Recovery and Settling of Issues Arising from Insolvency Modified in 2015 by Law N° 35/2013 of 29/05/2013	LAW N° 23/2018 OF 29/04/2018 Relating to Insolvency and Bankruptcy passed in April 2018	The law introduces both administration and reorganisation procedures.	Model Law not adopted.
31	Seychelles[729]	Companies Act 1972	Insolvency Act 2013	Introduces a company reorganisation procedure that takes after English Insolvency law but with variations.	Model Law adopted.

[728] ART 2015 (n 644) 39-40.
[729] ART 2017 (n 715) 7-8, Seychelles Insolvency Act 2018.

32	South Africa[730]	Companies Act 1973 Under which the judicial management procedure was introduced	Companies Act (2008) which became operative in 2011.	Introduced business rescue proceeding which combines elements of Chapter 11 and UK administration procedure.	Model Law adopted but yet to be fully implemented.
33	Tanzania[731]	Companies Act 1929.	Companies Act 2002 (came into force in 2006).	Introduces administration and CVA procedures modelled after English law.	Model Law not adopted.
34	Uganda[732]	Companies Act 1961.	Insolvency Act 2011 (came into force in 2013)	Introduces a corporate rescue mechanism modelled after English and Mauritian laws.	Model Law adopted.
35	Zambia[733]	Companies Act 2000	Corporate Insolvency Act 2017 passed into law.	Patterned after South African Law.[734]	Model Law not adopted

[730] ART 2014 (n 714) 23-25.
[731] ART 2014 (n 714).
[732] ibid 27-28.
[733] ART 2015 (n 644) 42-43.
[734] See Table 2 below.

				Introduces a business rescue procedure.	
36	Zimbabwe[735]	Companies Act 1951 Insolvency Act 1973.	Insolvency Act 2018 (passed into law in June 2018).	Introduces a corporate rescue procedure modelled after South African Law.	Model Law adopted.

5.6. Key features of reform

It is unclear to what extent consultations with relevant stakeholders or their representatives preceded all the reforms.[736] In Zimbabwe for example, participation in the public hearings was limited because the Insolvency Bill was technical and voluminous, and copies had not been made available well ahead of the public hearings to allow adequate analysis. As such, most of the participants' contributions focused on the prioritisation of the payment of workers over other creditors.[737] This suggests an imbalance in the participation of other stakeholder groups in the hearings. One of the risks of this is that alienated stakeholders would foil the implementation of the law. Indeed, some countries like South Africa have reported public hearings in line with the prescriptions for legislative processes.[738]

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[735] ART 2017 (n 715) 15-16; For download, see <http://www.veritaszim.net/sites/veritas_d/files/insolvency%20act%20clean.pdf> accessed 10 September 2018.

[736] Detailed reports of the consultation process have not been made readily available in many of the jurisdictions. Transparency and rigorous debate in law making process is still developing in African countries. Burdette points out that defective consultation with relevant stakeholders is a problem and it contributed along with other factors, to the shortcomings of the South African insolvency reform, particularly the business rescue provisions. Burdette, 'Corporate Insolvency Reform Experiences' (n 630).

[737] Others centred on personal bankruptcy. See Portfolio Committee on Justice Report on Insolvency Bill (6 March 2018 available for download at <www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=0ahUKEwiR69nD0vfbAhXUOcAKHZ0BcQQFgg5MAI&url=http%3A%2F%2Fwww.veritaszim.net%2Fsites%2Fveritas_d%2Ffiles%2FPortfolio%2520Committee%2520on%2520Justice%2520%2520Report%2520on%2520Insolvency%2520Bill.docx&usg=AOvVaw1AQzEpytsr3IrLNNm2A8oV > accessed 10 September 2018.

[738] For example, The Namibia Law Reform Commission have provided accessible reports of the reform process. Namibia Law Reform Commission (n 632). Also, South Africa Law Reform Commission reports that part of the insolvency reform process received contributions from a range of stakeholders including banks, insolvency

Because some of these laws are still in the process of enactment and most of the ones that have been passed into law are not fully implemented, information on their use and impact on the resolution of financial distress is limited. Nonetheless, a few things stand out from the trend of reform.

5.6.1. The drive to modernise by conforming to global standards.

One quality that these laws have in common is an attempt to modernise current insolvency regimes in line with international best practices. This is most prominently seen through the introduction of corporate rescue frameworks, exact replicas or variants of administration, Chapter 11 procedures and French law (in OHADA countries).[739]

5.6.2. Lingering impact of historical (colonial) ties on reform.

Although they are united in the desire to meet global standards, African countries have sought to achieve this in a variety of ways, drawing inspiration from a mix of jurisdictions.[740] External influence in the ordering of laws and legal institutions has for a long time been informed by historical connections such as colonisation. For example, the Uniform Act in OHADA countries (most of which are former French colonies) draws heavily from French law. Similarly, Nigeria, Ghana, Kenya, Malawi and other former colonies of Britain have been known to habitually transplant British laws and institutions,[741] hardly subjecting the assumption that English laws and institutions are

practitioners and judicial officers. See South African Law Reform Commission, 'Reports on the Review of the Law of Insolvency' (2000) 12, 33. But Loubser points out that compared to the Companies Act 61 of 1973 which was the result of a detailed report that explained every single proposed provision, the Companies Act 2008 containing the Business Rescue proceedings was introduced into Parliament only 16 months after the publication of the first draft Bill and was approved barely five months later. Anneli Loubser, *Some comparative aspects of corporate rescue in South African company law* (PhD thesis, University of South Africa 2010); Uganda Law Reform Commission, (Report on Insolvency Law Reform <http://www.ulrc.go.ug/system/files_force/ulrc_resources/Insolvency%20Law%20%20body_0.pdf?download=1 > accessed 10 September 2018.

[739]The laws also attempt to introduce some form of regulation of insolvency practitioners and provide for cross border insolvency.

[740] This is understandable as the continent is home to a diverse group of countries with varying legal histories, cultures and influences. The near impossibility of achieving convergence within Africa illustrates how difficult it is to achieve convergence on a global scale.

[741] Robert Seidman, 'Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa' (1966) Wis. L. Rev. 999, 1018; Sandra Fullerton Joireman, 'Inherited legal systems and effective rule of law: Africa and the colonial legacy' (2001) 39 (4) The Journal of Modern African Studies 571-596. Going by proposed insolvency law reform, Nigeria is still set on this path. For a criticism, see Bolanle Adebola, 'Conflated Arrangements: A

the best fit for them to rigorous questioning.[742] Lawmakers in these countries are not compelled to follow the laws of England but tend to do so out of convenience or familiarity, a tendency that may be explained by path dependence.[743] In the empirical study, when asked about the choice of English law, BRIPAN participants acknowledged that the proposed Nigerian insolvency bill replicates the English Insolvency Act. They disclosed that this was because the reform committee members were more 'comfortable with English law'. Attempts to familiarise the committee with other frameworks like the US Chapter 11 reorganisation and the South African system that combines elements of the US and UK systems proved abortive.

'They just did not understand it, so we gave up'.

As the discussion in the previous chapter suggests, the drive towards global convergence has not displaced the competition among developed countries to have their laws and institutions used as models by many jurisdictions.[744] Thus, the adoption of English frameworks can reinforce the popularity of English law as the governing law for commercial agreements, which in turn contributes to the continued relevance of England and its legal systems in both domestic and cross border commercial transactions.

The Liberian law (which generally oprates an Anglo-American legal system) bears the closest resemblance to US Chapter 11, but has commendably adopted a simple, straightforward language and style in its adaptation of Chapter 11.

Reforms in Africa continue the tradition of popularising a group of templates: US, UK, France and to some extent Portugal. However, this trend does not defeat the building of a TLO in insolvency law, as there is no single model law for domestic insolvency. Indeed, it serves the globalisation agenda less well for developing countries to strictly adhere to suggestions by law and development scholars for the local adaptation of

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Comment on the Company Voluntary Arrangements in the Proposed Nigerian Insolvency Act 2014' (2015) 1 *Available at SSRN 2565491*.

[742] One of the lessons from the theory is that incremental rather than widely divergent change is a better option for insolvency reforms in African countries. Thus, this may not necessarily be a negative trend provided some effort at local adaptation is made. Ch 4, section 4.7.

[743] Prado and Trebilcock (n 525); Berkowitz, Pistor and Richard, 'Economic Development' (n 452) 165-195.

[744] See Ch 4, 102-104

global norms, which may result in extensive changes to those norms. Such variations would create more divergence and deviation from a known set of ideal forms in the harmonisation trend.

5.6.3. Reference to global standards and guidelines

Although local practitioners and actors in the reform process have demonstrated an awareness of global norms like the UNCITRAL Legislative Guide, it is not clear that the recommendations of the UNCITRAL Guide have impacted reforms significantly.[745] Most of the reforms have involved varying degrees of transplant from developed countries with which African countries share some connection. This is likely based on an assumption that developed jurisdictions have incorporated international best practices into their laws, thereby providing ready-made templates and a shortcut to incorporating global standards.

The UNCITRAL Legislative Guide offers alternative ways of incorporating insolvency norms into legislation and this can be of benefit to developing countries seeking to adopt these norms in a way that is compatible with their institutions.[746] It is likely that insolvency reforms in Africa have failed to harness this benefit. This trend also challenges the postulation that the US enjoys the privilege of globalised localism in insolvency law as most countries continue to favour the law of countries to which they are accustomed. However, as discussed shortly, the influence of the activities of global actors like the World Bank Doing Business projects, and by extension elements of US reorganisation law can be seen in the choices made by some countries.

5.6.4. Other issues thrown up by countries' template choices

Notwithstandng that many countries remain true to the conventional tendencies in their choice of templates,[747] the proliferation of global norms opens African countries up to new forms of influence. For example, Malawi's 2015 Insolvency Law is largely based on the English administration procedure but deviates from the English Act by

[745] For example, reform in Ethiopia is said to be based on the UNCITRAL Legislative Guide. Also, Law Reform Commissions refer to the UNCITRAL Guide. See for example, Namibia Law Reform Commission (n 632) 83-84, 91.
[746] Note however that the Guide goes further to recommend a preferred approach. Ch 4, 104.
[747] Nigeria, Kenya, Cape Verde and Mozambique are examples.

introducing provisions for post commencement finance.[748] Reform in Mozambique made the choice of transplanting the Brazilian Insolvency Act 2005.[749] Although Mozambique and Brazil have a shared colonial history and language that explain this choice, the reform can engender the kind of horizontal learning advocated for developing economies in chapter four.[750] A similar horizontal learning can be seen in Zambia and Zimbabwe's choice of South African law as template.[751]

As African countries navigate insolvency law reform, they are confronted with legal systems with which they are familiar on the one hand; and norms that have gained popularity as the global standards against which economies are measured, on the other hand. The effect of these new influences can either present an opportunity or be problematic. For one, it can aggravate the un-settling mechanisms discussed in chapter four. With global norms (represented most prominently by US reorganisation law) competing with conventional templates in African countries, there are increased chances of contradictions among stakeholders. The influence of US law is manifest in the terminology of new laws which mostly adopt the use of 'reorganisation' even while describing a UK administration procedure.[752] This is likely connected to the reach of platforms such as the Doing Business projects. Beyond terminology, the tensions also manifest in reforms that aim to adapt both US and UK law, by combining elements of a DIP and PIP system. [753]

Stakeholders in Nigeria have debated the form corporate rescue mechanisms should take in the country. While certain groups believed that a US-inspired, DIP reorganisation framework is more suitable, others are convinced that a UK style creditor-oriented framework is a better fit.[754] While English Law seems to have

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[748] A former British colony, Malawi's law is said to draw from the laws of Mauritius which in turn draws largely from New Zealand. See Dubovec and Kambili (n 722) 202.
[749] Fabrícia de Almedia Henriques (n 724) 26 The Brazilian Insolvency is based on the US Chapter 11 procedure which has been adapted to facilitate expedited restructuring in Brazil. Olivares-Caminal and Frigerio, 'Expedited Debt Restructuring in Latin America; a Regional Overview' (2010) IDB Working Paper Series, No 113.
[750] Ch 4, section 4.7. David Trubek, 'Scan Globally, Reinvent Locally: Can We Overcome the Barriers to Using the Horizontal Learning Method in Law and Development?' (2014) 258.
[751] See Table 2 below.
[752] For example, Malawi and Seychelles. See Table 2.
[753] Liberia's 2016 law is an example of an insolvency law that adopts a hybrid system, a reorganisation procedure with the debtor-in-possession supervised by an administrator. S 8.24 (3) Insolvency and Restructuring Act 2016.
[754] Adebola, *Corporate rescue* (n 43) 332. Admittedly, this struggle is not peculiar to Nigeria or even developing countries. A similar conversation has been debated in the UK. See Insolvency Service, 'A review of the Corporate

emerged victorious in this contest, the fact that there was a debate at all may indicate that global norms may be inspiring change in previously uncontested areas. The incorporation of different frameworks may be a manifestation of unresolved conflicts among stakeholders. As the contradiction mechanism identified by Halliday and Carruthers suggests, policymakers may avoid resolving this conflict by internalising them in formal law in a bid to pacify different interests.[755] Reforms in Africa remain largely untested but inherent inconsistencies in the laws could result in vagueness, creative application or disuse ultimately.

On the positive side, the combination of different systems may not always result in a contradiction or be the result of unresolved conflicts among stakeholders. Rather, it may be a genuine attempt to produce a superior legislation that combines effective tools from different jurisdictions.[756]

5.6.5. *Unified or Dualistic Insolvency systems*

The reforms have taken different forms in terms of structure and form of legislation. As Keay points out, choosing between a unified or dualistic system is a key decision with implications for implementation.[757] Some of the advantages in having a unified insolvency legislation include cost savings, harmony and efficiency, while the major disadvantage is lack of clarity.[758] As Table 1 shows, some of the insolvency legislations combine personal and corporate insolvency[759] or a standalone act that regulates corporate insolvency,[760] while a few countries have included restructuring frameworks in their companies Act.[761] Countries have different reasons for making

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Insolvency Framework' (25 May 2016) <www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework> accessed 10 September 2018.

[755] Halliday and Carruthers, 'The Recursivity of Law' (n 16) 1149- 1150.

[756]As discussed in chapter three, the power-sharing arrangement between debtor management and an administrator has been adopted in some developed jurisdictions in a bid to achieve a better balance between two systems. For example, Canada under the Companies' Creditors Arrangement Act, sections 11.7 & 23.

[757] A dualistic system has different legislations for companies and individuals while a unified system has different procedures for individuals and companies in one statue (or procedures that largely applies to both personal and corporates in one statute). Andrew Keay, 'To unify or not to unify insolvency legislation: International experience and the latest South African proposals (1999) 32 *De Jure* 64-65.

[758] ibid 71-74.

[759] Kenya, Seychelles, Uganda, Zimbabwe, Rwanda, Malawi, Mauritius and OHADA have unified insolvency acts that separate the procedures for individual and corporate insolvency in one legislation. Liberia and Mozambique and OHADA have unified personal and insolvency such that same procedures can apply to both.

[760] Zambia has a corporate insolvency Act.

[761] South Africa, Tanzania and proposed in Nigeria.

the choices that they did. For example, Nigeria like South Africa, started out with a standalone corporate insolvency bill but has now gone in the direction of incorporating the administration and CVA procedures as part of ongoing company law reform.[762] The difficulty with this choice is that important issues in insolvency such as regulation of practitioners and directors' liability are not fully resolved by the law. For South Africa, the decision to separate the rescue procedures (contrary to proposals for unification) [763] has been attributed to an intention to separate the procedure from the negative connotation that often attends insolvency.[764] To contribute to the shift in orientation and attitude, it was thought important that the rescue process was not associated with the term 'insolvency'.[765]

5.7. Key features of restructuring frameworks introduced in twenty-eight countries.[766]

Table 2.

Country	Procedures introduced	Commencement (Who and When?)	Restructuring plan, decision making (voting/cramdown)	Control and Moratorium	Post-commencement
Kenya	Administration	***Who*** Creditors and debtors can commence. s 532 ***When*** Illiquidity or Prospective illiquidity s. 531[767]	**Restructuring plan** Prepared by PIP. To contain information such as means of achieving and financing the plan.[768] PIP proposal to be sanctioned by creditors.[769]	**Moratorium** Moratorium and interim moratorium in place. Secured creditors bound except with permission of PIP s 559-561	**PCF** No provision for post commencement finance. Law precludes proposals that affect preferential creditors/secured creditors' rights

[762] Contributing factors such as low political support for insolvency reform and conflict among stakeholders are discussed in the next chapter. Ch 6, section 6.12.1.

[763] Proposals for unification drafted by Professor of Law, David Burdette. See David Burdette, 'Final Report Containing Proposals on a Unified Insolvency Act: Part 1 Final Report and Explanatory Memorandum' (The University of Pretoria, Faculty of Law, Centre for advanced Corporate and Insolvency Law 2000).

[764] View of local stakeholders in empirical research by Wanya Du Preez, 'The status of post-commencement finance for business rescue in South Africa' (Phd thesis, University of Pretoria 2012) 115.

[765] Ibid.

[766] Note that the procedures identified here are in addition to existing procedures such as arrangements and compromise, receivership, administrative receivership that already existed in these countries. These are not included, neither are liquidation proceedings.

[767] Like in England, a Qualifying Floating Charge Holder can commence in special cases. Kenyan Insolvency Act (Kenyan Act), s 534 cf section 14 Sch B1 Insolvency Act 1986

[768] Plan may include a CVA or Scheme of arrangement. Kenyan Act, s 566(3). See also Kenyan Insolvency regulations 2016, s 110-127.

[769] In some cases, PIP may dispense with need for creditors' approval (deemed consent): if all creditors can be paid in full, distributions cannot be made to unsecured creditors or objectives of the administration cannot be met. s570(1)

			Voting Majority in value of those voting. Invalid where more than 50 per cent of unconnected persons vote against. No provision for class voting or cram down.	**Control** PIP: administrator takes over management. s 577-581	of enforcement. (s 590)
	Companies Voluntary Arrangement. s624	***Who*** Company directors. s 625 ***When*** No requirement of illiquidity/insolvency	**Restructuring plan** Proposed plan may include composition of debts or a scheme. Plan to be sanctioned by joint meeting of company and creditors. **Voting** Voting to be done in three groups of secured, preferential and unsecured creditors. Voting threshold is (i) majority in number of shareholders present (ii) three-quarter majority in number and value of each group of creditors. Decision is not made if more than half of unconnected creditors disagree. (665 (2)(i), Rule 28 of Regulations) **Cramdown** Cramdown of members and unsecured creditors possible if majority of secured creditors agree.665(2)(8)[770]	**Moratorium** Moratorium in place with exceptions (including companies with large outstanding debt of more than one billion shillings). S638, 642[771] **Control** Supervisor appointed to oversee directors. Roles and powers of supervisor outlined. (revolve around implementation of the proposal) s 668	No provision for post commencement finance. Modification of secured creditor rights restricted. s 628(6)
Liberia	Administration or Reorganisation. S 8.11 (2)[772]	***Who*** Petition may be filed by debtor or creditor(s).	**Restructuring plan** Administrator to recommend course of action to court:	**Moratorium** Moratorium exists in all insolvency procedures (judge	**PCF** Provides for post commencement finance and

770 Supported with provisions for adequate protection of crammed down creditors' rights.
771 Approximately USD10million. The law leaves room for regulations to prescribe more eligibility requirements.
772 The decision of which procedure to undertake will be made by court.

		s8.5 ***When*** In voluntary cases commenced by debtor: Insolvent or experiencing financial difficulties that may lead to insolvency. s8.19 In involuntary cases commenced by other parties- determined to be insolvent by the court using either cash flow or balance sheet test. S 8.8	whether Reorganisation, going concern sale or liquidation. s8.17(f) If reorganisation, a plan (Agreement for Settlement) to be prepared by PIP or by DIP with the help of administrator. Should include prospects of company. s8.29 First priority of plan is high recoveries for creditors while continuation of business comes in fifth place. s8.29(1) Provides for pre-negotiated agreements to be considered/approved by judge. s8.30 **Classes** Voting in two groups- secured and unsecured creditors (creditors' committee to be approved by judge) **Voting thresholds** All secured creditors must agree but Judge may deem them to have agreed. Unsecured: more than half in number holding at least two-thirds of amount of unsecured debts. s8.31(5)(6)	may grant secured creditors relief). s8.27 **Control** If court orders administration (rather than reorganisation), PIP. If company ends up in reorganisation, court could allow DIP under supervision of administrator. Powers of DIP and administrator are outlined. s8.24(3) Administrator designated by court and approved by creditors in both cases.	modification of rights of existing creditors including secured creditors. Provides for debt-equity swaps and distressed debt investment. To be approved by judge Allows security to be given to new finance providers. Security granted over unencumbered assets, as junior liens or with priority over existing security subject to adequate protection of existing security. s8.32
Malawi	Company Reorganization. s13	***Who*** Creditors and debtors can commence. s18[773] ***When***	**Restructuring plan** Restructuring plan to be prepared by PIP.s33	**Moratorium** Moratorium and interim moratorium in place. S26-28	**PCF** Administrator has the power to obtain new credit s42(9) (10)

[773] Like in England, a Qualifying Floating Charge Holder can commence in special cases. Malawian Act 2013, s 20-21.

		Illiquidity or Prospective illiquidity. s17	PIP proposal to be sanctioned by Creditors.s36 No provision for cram down. Voting threshold deferred to rules.	Secured creditors bound except with permission of PIP **Control** PIP appointed by court, company or QFCH.	Security may be granted but generally not in priority to existing security. s42(10) Court may grant order allowing such priority if certain that existing security is not adversely affected. S42(11-12)
Mauritius	Administration (preceded by provisional administration where decision is made whether to execute deed of administration). s214	***Who*** Creditors and debtors can commence. s215(5) ***When*** Illiquidity or Prospective illiquidity s215(6)(9)	**Restructuring plan** Deed of company arrangement to be drafted by administrator, approved by creditors and executed by both company and creditors. s237(6) **Voting** A resolution is adopted if a majority in number representing 75 per cent in value of the creditors or class of creditors voting vote in favour. s5	**Moratorium** Moratorium in place. Secured creditors bound except with permission of PIP. Ss243,244,246&251 **Control** Mostly administrator. Directors are allowed to remain but powers very limited as they are to seek written permission of administrator for all acts as officer of the company. ss 222& 224 Administrator performs nearly all functions s 222.	**PCF** No provision for post commencement and priority finance although administrator has broad powers. s222
Mozambique[774]	Judicial recovery procedure (Chapter III of the Decree)	***Who*** The debtor can commence through directors, 'spouse', 'heirs' or shareholders.[775] ***When***	**Restructuring plan** Recovery plan to be drafted and presented to court by company. Creditors may challenge plan within	**Moratorium** 180 days Moratorium in place against recovery actions including against secured creditors	**PCF** No provision for post commencement finance

[774] See Rita Donato (Couto, Graca e Associados Limitada), Mozambique – Law and Practice' Chambers Global Practice Guide (Chambers and Partners 2016).
[775] This illustrates the lack of clarity that can arise from combining personal bankruptcy procedures with corporate framworks. See Keay,'To Unify or Not' (n 757) 72-73.

		Debtor can initiate as long as it is not insolvent, has not been granted concession for business rescue in two years and has not been convicted of crime.	thirty days of the plan being presented to court. If no challenge, court approves plan. If challenged, creditors meeting is called to debate and approve plan. **<u>Voting</u>** Cramdown of classes possible if: Vote of creditors representing more than half the value of all claims supports the plan; approval of the plan is received from two classes of creditors or, if there are only two classes of creditors, approval being received from at least one of them; and in respect of any class that rejected the plan, an affirmative vote of more than one third of the creditors supporting the plan.	**<u>Control</u>** Directors remain (unless the directors are found guilty of fraud or mismanagement of company). Rescue to be supervised by an insolvency administrator and creditors' committee (if any).	
	Extra Judicial Recovery Procedure	***<u>Who</u>*** The debtor can commence ***<u>When</u>*** Debtor can initiate by presenting plan to creditors.	**<u>Restructuring plan</u>** Recovery agreement to be approved by creditors and then submitted to court for sanction. **<u>Voting</u>** Voting is done in classes (secured, unsecured and employment related classes) Threshold is creditors which represent more than 3/5 of the total value of the credits in each voting class.	**<u>Moratorium</u>** No moratorium. The procedure is a mediation procedure governed by rules of the arbitration, mediation and conciliation law. **<u>Control</u>** Company directors remain in control. Administrators may be appointed to help with the implementation of the plan.	No provision but parties may agree to have their rights affected.
OHADA	Conciliation (confidential process) Art 2	***<u>Who</u>*** Debtor alone or jointly with creditor(s). Art 5	**<u>Restructuring plan</u>** Court decides if to open procedure.	**<u>Moratorium</u>** Stay on all enforcement proceedings when	**<u>PCF</u>** Provides for post commencement finance.

		When Experiencing difficulties, which are proved or predictable, but not yet insolvent. Art5.1	Objective is to reach agreement with creditors. Conciliator to facilitate decision making. Art5.3-5.5	agreement is reached but no automatic stay during negotiation. Art 5-7/5-12 **Control** DIP but conciliation coordinated by conciliator.	Definition of new money includes post commencement goods and services. In the event of asset sale/liquidation, new finance has priority over other creditors. Art 5-11,166,167
	Preventive settlement	***Who*** Debtor alone or jointly with creditor(s). Art 6 ***When*** Experiencing financial or serious economic problems, but not insolvent. Art 6	Aims to restructure the company. Proposed arrangement to be drafted by debtor and agreed by company and its creditors under supervision of appointed expert. Detailed restructuring plan required. To stipulate specific measures for the restructuring. Court decides if to approve preventive arrangement or not. Art 7-8 Creditors to agree on settlement but court has ultimate power to sanction. Art 15(2)	**Moratorium** Stay on all enforcement actions for duration. Art 9 **Control** DIP supervised by appointed expert (appointed by court)	Provides for post commencement finance. Definition of new money includes providers of goods and services. Priority above all other creditors, including secured and privileged. Art 11-1, 166, 167
	Judicial Reorganisation	***Who*** Debtor or creditor can initiate subject to court's approval. Art 25 ***When*** Cash flow insolvency required. Art 28	**Restructuring plan** Proposal drafted by debtor to indicate reorganization prospects of the company, business opportunities and activities, available financing resources & specific plan for restructuring.[776] **Voting** The majority in number of unsecured	**Moratorium** Provides for a stay of enforcement actions by company's individual creditors. Art 75 **Control** Supervised DIP: DIP can carry on daily management but report to	Provides for post commencement finance. Definition of new money includes providers of goods and services. Priority above all other creditors, including secured and privileged. Art 33-1, 166,167.

[776] Note that Article 145 provides for a simplified reorganisation which is mostly centred on debt reduction and is reserved for small companies.

			creditors representing 50 per cent of total claims. Secured credit remains untouched but rights may be waived. Art 120-121	trustee(s) who implement the reorganisation, assisted by controllers, all under the supervision of a court appointed receiver. Art 52	
Rwanda	Provisional administration Or Administration (preceded by a provisional administration which results in the execution of deed of administration.	***Who*** Company, directors, creditors and IP. Art 39 ***When*** The company is or will be unable to pay its debts. Art 40	**Restructuring plan** Proposals to be made by provisional administrator may include deed of administration for company to reach a settlement with creditors. Art 49 Deed of administration to be executed by company and proposed administrator. to specify among other things, property to be affected and extent to which company would be relieved from debt. Art 52&53 Creditors meeting to be called for deciding on proposals. **Voting** Majority vote needed. Art 47	**Moratorium** Moratorium in place. Art 48 **Control** Managers are not removed but company managed by administrator who can exercise all powers of directors and must approve all acts of directors. Art 63&65	**PCF** No provision for post commencement finance.
	Company Reorganisation	***Who*** The creditors, debtor, directors and registrar general. Art 80 ***When*** Reasonable prospect of rescue. Art 80[777]	**Restructuring plan** Reorganisation plan prepared by administrator. Art 85. **Voting** 75 per cent of votes by creditors or a class of creditors affected by the proposed reorganisation. No cram down except resolution stipulates it. Art 87	**Moratorium** Moratorium in place. Secured creditors can seek relief from stay Art 83&84 **Control** Administrator has effective management and control. Art 89	Provides for post commencement finance. Art 94 PCF must be approved by majority vote of creditors or any class of creditors. Art 95 Priority over unsecured debt. Does not stipulate whether

[777] No express requirement of insolvency.

					security may be granted for PCF. Art 96
Seychelles	Company reorganisation.	***Who*** The debtor (directors) and creditors. s206 ***When*** Company is insolvent or likely to be insolvent.[778]	**Restructuring plan** Creditors to decide if to execute rescue plan. Plan drafted by administrator. s229 **Voting** A majority in number representing 75 per cent in value of the creditors of creditors voting in person. s224(3)	**Moratorium** Moratorium in place and binds secured creditors, s235-237 **Control** Mostly administrator. Directors are allowed to remain but powers very limited as they are to seek written permission of administrator for all acts as officer of the company. s216	**PCF** Provides for post commencement finance. Priority only over existing unsecured creditors. New finance may be secured using only unencumbered assets. S 215
South Africa	Business rescue proceedings (s 129)	***Who*** Members by resolution or affected persons by order of court.[779] ***When*** Financial distress with reasonable prospects of rescue. Defined as prospective illiquidity or insolvency. S129	**Restructuring plan** Business rescue plan to be proposed by administrator. Plan to include details of assets, changes to rights and obligations and projected three years financial statement if plan is adopted. S150 **Voting** Threshold a) supported by holders of more 75 per cent of the affected persons' voting interests; and (b) include at least fifty percent of the independent creditors' voting interests, if any. S152(2)	**Moratorium** Stay on all enforcement actions. s133 **Control** Directors are not removed but the business recue administrator has extensive control over company including approval of all acts of directors and removal if needed. S137(2)	**PCF** Provides for post commencement finance. New finance includes monies payable to employees during the rescue. To have priority over all new finance secured or unsecured. New finance can be secured with unencumbered assets and have priority over unsecured assets only. S135
Tanzania	Administration	***Who***	**Restructuring plan** Restructuring plan to	**Moratorium** Moratorium and interim	**PCF** No specific provisions for

[778] Defined as inability to pay debt as they become due, s204.
[779] Includes a regulator, shareholder, member, director, creditor or an employee, a former employee of a company, registered trade union representing employees of the company and the Registrar. Companies Act, ss131 & 2.

		Creditors, company and debtors can commence. s 248(1) ***<u>When</u>*** Illiquidity or Prospective illiquidity. s 247(1)(a-b)	be prepared by PIP. s 261 PIP proposal to be sanctioned by Creditors. s 262 No provision for cram down. Voting threshold not prescribed	moratorium in place. Secured creditors bound except with permission of PIP **<u>Control</u>** PIP appointed by court, company or QFCH	PCF even though administrator has general powers 'to raise or borrow money and grant security therefore over the property of the company'. s 253(c)
	Companies Voluntary Arrangement	***<u>Who</u>*** Company directors. s240 ***<u>When</u>*** No requirement of illiquidity	**<u>Restructuring plan</u>** Proposed plan may include composition of debts or a scheme. s240 Plan to be sanctioned by meetings of company and creditors. No voting classes or threshold prescribed.	***<u>Moratorium</u>*** No mention of moratorium ***<u>Control</u>*** Supervised DIP. Nominee appointed to supervise process. s240(2)	No provision for post commencement finance. Modification of secured creditor and preferential rights restricted. s243(4)
Uganda	Provisional administration (30-day interim order). S138 Or Administration (preceded by a provisional administration which results in the execution of a deed of administration)	***<u>Who</u>*** Company and directors ***<u>When</u>*** The company is or will be unable to pay its debts. S138(2)	**<u>Restructuring plan</u>** Proposals to be made by provisional administrator may include deed of administration for company to reach a settlement with creditors. s146 Deed of administration to be executed by company and proposed administrator. to specify among other things, property to be affected and extent to which company would be relieved from debt. s148 Creditors meeting to be called for deciding on proposals.	**<u>Moratorium</u>** Moratorium in place. S142 (f). But secured creditors only bound if deed affects them and they vote in favour of the deed. s155(3) **<u>Control</u>** Managed by administrator who can exercise all powers of directors and must approve all acts of directors. s153&155	**<u>PCF</u>** No provision for post commencement finance

			Voting Each creditor entitled to cast number of votes proportionate to the value their debt bears to the aggregate of total debt, OR if there is more than one class of creditors, to the aggregate of the debts owing to all creditors of the class to which that creditor belongs. A resolution is adopted if it is approved by a majority of the votes cast. s147, Third schedule s4.		
Zambia	Business rescue proceedings	***Who*** Members by special resolution or affected persons by order of court.[780] ***When*** Financial distress with reasonable prospects of rescue. S 21	**Restructuring plan** Business rescue plan to be proposed by business rescue administrator. Plan to include details of assets, changes to rights and obligations and projected three years financial statement if plan is adopted. S41 **Voting** Threshold is holders of more 75 per cent of the affected persons' voting interests; and *(b)* include at least fifty percent of the independent creditors' voting interests, if any. S43(2)(a)(b)	**Moratorium** Stay on all enforcement actions. S25 **Control** Directors stay in place, but business recue administrator has full control over company including approval of all acts of directors and removal if needed. s32 (1)(1), 29(2).	**PCF** Provides for post commencement finance. New finance includes monies payable to employees during the rescue. To have priority over all new finance secured or unsecured (after costs are paid). s27(1) New finance can be secured with unencumbered assets and have priority over unsecured assets only. S27 (2)(3)
Zimbabwe	Corporate Rescue Proceedings.	***Who*** Company board resolution or affected persons by order of court.[781] ***When***	**Restructuring plan** Business rescue plan to be proposed by business rescue administrator. Plan to include details of assets, changes to	**Moratorium** Stay on all enforcement actions. S126 **Control**	**PCF** Provides for post commencement finance. New finance includes monies

[780] Includes a regulator, shareholder, member, director, creditor or an employee, a former employee of a company, registered trade union representing employees of the company and the Registrar. Corporate Insolvency Act, s2.
[781] Includes a shareholder, creditor, any registered trade union representing employees of the company, or employees. See sections 121,124 (1).

		Financial distress with reasonable prospects of rescue. S 122(1), 121(f)	rights and obligations and projected three years financial statement if plan is adopted. S142(2) **Voting** Threshold is holders of more 75 per cent of the affected persons' voting interests; and *(b)* include at least fifty percent of the independent creditors' voting interests, if any. S144(2)(a)(b)	PIP. Board is dissolved, corporate recue administrator has full control over company s130(2),133(1)(a).	payable to employees during the rescue. To have priority over all new finance secured or unsecured (after costs are paid). New finance can be secured with unencumbered assets and have priority over unsecured assets only. S128

5.7.1. Commencement

As discussed in chapter three, the question of when a restructuring may be commenced is crucial. Most of the laws require illiquidity or prospective illiquidity as a condition for commencement.[782] These laws find a balance between the complexity of a balance sheet test and the indeterminacy of not laying down criteria for commencement, by settling for a cash flow test.[783] For a few jurisdictions however, preventive mechanisms that do not require insolvency to trigger them are also introduced.[784]

5.7.2. Control

In terms of control, the laws are divided along the lines of PIP systems and a hybrid (supervised DIP) procedure. None of the laws considered here have adopted a full DIP system as obtains under the Chapter 11 procedure.[785] Upon closer look at jurisdictions that have adopted a hybrid system, the supervising professional has effective control of the company even though directors remain in office. This is

[782] The laws adopt different terms in prescribing this. In Zimbabwe, Zambia and South Africa for example, the criterion for commencement is stated to be 'financial distress with reasonable prospects of rescue'.
[783] As discussed in chapter three, a cash flow test is preferable in the context of debt restructuring. Ch 3, page 74.
[784] the CVA procedures introduced in Kenya and Tanzania to supplement the administration procedure do not have an insolvency requirement; also, the OHADA conciliation and preventive settlement procedures do not require insolvency (but that company be experiencing difficulties).
[785] Including reorganisation procedure in Liberia modelled after the Chapter 11 procedure.

because many of them require the approval of the professional for directors to act in their capacity as officers of the company.[786] The overall implication of the hybrid system may be that debtors do not resist the restructuring procedure with as much force as they would a procedure that fully displaces them.[787]

This is useful in African countries where family-owned businesses are rife, and owner-managers can be territorial.[788] Also, the hybrid system can substantiate the claim (especially to debtors) that the newly introduced procedures are indeed different from recovery-based practices that dominated insolvency practice prior to reform. Keeping the directors in place may drive home the point that the philosophy behind the new procedures is to keep the company alive. Some of the laws also aim to address the concern about keeping managers who may have caused the downfall of the company in the first place. For example, Mozambican law only allows a DIP restructuring when directors have not mismanaged the company or been fraudulent.[789]

5.7.3. Decision making

Table 2 shows that decision-making powers are shared between the court, insolvency practitioner, creditors, the company and its directors. All the laws, after the fashion of the templates they adopted, depend on the court in varying degrees to approve a range of decisions from the commencement of the restructuring process to the end. In Liberia, the court through the assigned judge is involved in virtually all decision making throughout the restructuring. The court is tasked with responsibilities including appointing an administrator, deciding whether directors remain in place, authorising post commencement finance, and the licencing of administrators.[790] As the discussion in the previous chapter stresses, in a country with overburdened

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[786] See Mauritius Insolvency Act, ss 222 & 224; Rwanda Insolvency Act, Art 63&66; Seychelles Insolvency Act, s 126 and South Africa Companies Act, s152(2.

[787] Alternatively, directors may see through the text of the law to its practical effect which has the potential to handicap them significantly.

[788] See Idigbe and Kalu, 'Best practice and tailored reforms' (n 670); The next chapter gives an account of the territorial nature of owner-managers in Nigeria and the resistance that attends attempts to displace them.

[789] Ch III of decree; see also Liberian Insolvency Act, s8.24 (9).

[790] See Table 2 above.

courts,[791] the goal should be the adoption of systems that reduce rather than perpetuate overdependence on courts.[792] This institutional mismatch can result from diagnostic struggles that occur when law reformers fail to properly diagnose issues that are central to reform before a new law is enacted. If unpredictable and inefficient court systems is rightly identified as one of the fundamental problems that face insolvency practice in African countries, then insolvency law reform should reflect this diagnosis by proposing systems that ameliorate rather than complicate the problems. Even if the issues were clearly diagnosed, the problem of indeterminacy may also set in where stakeholders are unsure of how to resolve the problems identified.[793] For one, the templates (laws of developed countries) from which they receive guidance do not contemplate these issues as they are designed for stronger institutions. [794]

In contrast, the PIP procedures rely more on the practitioner for a range of decision making. The implication of this is that training is required for practitioners and judges. Insolvency regulation is at its infancy in most African countries. Although some of the legislations provide for registration and licencing of practitioners,[795] this process would require an investment in intense training programs and re-orientation.

In terms of voting, some laws prescribe that decision making be conducted in specified classes and stipulate the threshold for decision making.[796] For others, thresholds are complex or vague.[797] This is again potentially problematic for implementation. The hope is that future amendments or accompanying regulations would provide more clarity.

5.7.4. Restructuring finance.

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[791] See Liberia: Resurrecting the Justice System (Africa Report N°107 International Crisis Group 6 April 2006) i-3 on Liberia's difficult road to recovery after years of civil war and continuing impact of crisis and corruption on the judicial system. Weak judicial systems is a problem that many African countries have in common and it is discussed in some detail below.

[792] UNCITRAL Legislative Guide (n 4) 30-35 for example, addresses judicial and institutional competence, suggesting that roles of court be reduced and more responsibilities given to other /better equipped participants

[793] Halliday and Carruthers,'The Recursivity of Law' (n 16) 1149.

[794] There is therefore a strong case for learning from jurisdictions that have successfully adapted global standards to fit their institutional frameworks.

[795] Kenya Regulations, part IV; Malawi Insolvency Act, part ix.

[796] For example, Liberia.

[797] See Malawi and Uganda for examples.

Provision for new money is one of the main prescriptions of global norms for insolvency reforms. Some jurisdictions in Africa have embraced this norm by including provisions for post commencement finance, even in cases where the countries they borrowed from have not.[798] Rwanda stands out in requiring creditors to vote on PCF. Some of the provisions cautiously approach the issue of PCF and only allow providers of new finance to have priority above unsecured creditors.[799] Some others keep the possibility open for the court to decide[800] while some countries like Liberia follow Chapter 11 in providing a range of options including priority over existing security in some cases.[801] South Africa (imitated by Zambia and Zimbabwe) makes a unique choice of including employee claims which arise after commencement in the definition of PCF and gives such claims priority over other new finance and existing unsecured credit. South Africa is the only country that has a relatively substantial implementation record and the next section discusses how the PCF provisions have turned out to be one of the most problematic issues with implementation in that jurisdiction.

5.8. Toward the implementation of new debt restructuring procedures in Africa

Some of the reforming countries have gradually begun to implement their new restructuring procedures even though implementation gaps have yet to become very clear. This section gives a broad description of the institutional environment in which these laws are expected to operate and highlights some of the experience with implementation in a few jurisdictions. Some of the discussion here pre-empts the focus of the next chapter which gives a detailed account of the challenges with insolvency practice from the perspectives of stakeholders, and the socio-cultural and institutional factors that affect restructuring practice in Nigeria.

[798] Malawi is an example.
[799] Rwanda and Seychelles.
[800] See Malawi.
[801] The Liberian law also goes further to provide for distressed debt investment. See Table 2.

5.8.1. Weak judicial systems and corruption: common institutional deficiencies in Africa

One of the significant issues that have been identified with the settling of laws at the local level (particularly where developing countries are concerned) is the compatibility of local institutions and practices with the law. In the previous chapter, it was stated that implementation gaps open up as a result of institutional mismatch and courts are one prominent example of such institutions. An effective judicial system is central to the effective implementation of insolvency global standards as they often depend on the existence of an independent, well-informed, fair, objective and competent judiciary.[802]

Judicial systems have been found to be problematic in many developing countries for different reasons. Carruthers and Halliday report how the judiciary in some Asian jurisdictions was the least developed arm of government.[803] Because it already had a pool of quality judges to choose from, Korea reformed its courts relatively quickly by establishing insolvency courts and making the courts more independent. Indonesia on the other hand was more problematic. At the start of insolvency reform, the state of courts in Indonesia was such that,' creditors and debtors seldom used courts. Court powers were limited; they failed to recruit high quality judges, and their independence was deeply compromised by political and market interventions. Indonesian courts had little experience with significant commercial cases. Over decades, Indonesia's state bureaucratic-led economic development reduced the powers and independence of the courts almost to irrelevance'. [804] In closing the implementation gap that opened after insolvency law reform in Indonesia, the IMF sought to correct some of these institutional issues by negotiating policy changes in the court system. Proposed changes included the creation of commercial courts, recruitment of high-quality judges and in some cases, specialist judges, more independence of the judicial system etc. These changes proved extremely difficult to achieve because of factors such as 'lack of political will to reform the justice system, resistance from the Supreme Court and other judges to a special status for commercial

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[802] UNCITRAL Legislative Guide (n 4) 33-35; World Bank, *ICR Principles* (n 4) D1 – D8.
[803] Terrence Halliday, 'Lawmaking and Institution Building in Asian Insolvency Reforms: Between Global Norms and national Circumstances' (5th Forum for Asian Insolvency Reform 2006) 15-20.
[804] ibid 20.

court judges; and a laxity by the government in taking corruption seriously in any part of public administration'.[805]

Countries in Africa have longed battled similar issues as Indonesia. Judicial systems are known to be weak and overburdened; judges are not always competent in complex commercial matters and courts have lost the confidence of both locals and foreigners.[806] Although many African countries have established commercial courts whether as divisions of a high court system or as stand-alone courts, these problems persist.[807] The tenure of these judges is not always guaranteed and there have been incidences of indiscriminate layoffs. The courts are often hijacked by an overbearing government out to consolidate their power and have come to be viewed as a tool in the hands of the ruling powers to crush the opposition.[808] The difficulty with getting high quality judges in the field of commercial law is not disconnected with unfavourable compensation packages and tenure for judges. Thus, reforms aimed at improving the remuneration, financial and administrative independence of judges can be effective at attracting high-quality lawyers with commercial experience to the bench. Many countries are yet to effect those reforms and as a result, successful and experienced commercial lawyers consider themselves better off in private practice.[809]

In the empirical study conducted for this thesis, the issues plaguing the Nigerian judicial system frequently came up in the interviews. All the banks identified the courts as one of the major problems in debt restructuring and recovery. Participants

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[805] ibid.

[806] Marcel Fafchamps, *Market institutions in sub-Saharan Africa: Theory and evidence* (MIT press 2003); Rodrik, 'Second-best institutions' (n 552) 100-104.

[807] Kenya, Nigeria, the Gambia, Uganda, Ghana, Malawi, Tanzania, Liberia, Zambia, South Africa, Lesotho, Mozambique, Zimbabwe (proposed for 2018), Burundi, Mali, Mauritius, Sudan are examples. Some countries in Africa depend on other African countries to staff their courts. Gambia for instance has long depended on recruiting judges from Nigeria and Sierra Leone. Editorial, 'Gambia swears in several homegrown judges' *The Vanguard* (15 May 2017) <www.vanguardngr.com/2017/05/gambia-swears-several-homegrown-judges/> accessed 10 September 2018.

[808] Franck Kuwonu,' Judiciary: Fighting graft needs muscles' (August – November 2016) Africa Renewal

[809] In a recent attempt in Nigeria to attract higher quality judges by calling for the nomination of reputable lawyers to be appointed directly to the Supreme Court. This move was met with stiff opposition. Joseph Onyekwere, 'Nomination of lawyers for Supreme Court bench stokes controversy' *The Guardian* (21 February 2017)<https://guardian.ng/features/law/nomination-of-lawyers-for-supreme-court-bench-stokes-controversy/> accessed 10 September 2018.

bemoaned how the simplest court processes including ex parte applications and applications to court for directions, are attended by long, frustrating delays.

> *'Instead of invoking confidence, the mention of court only invokes signs of uncertainty and resignation. If local people dread the courts that much, imagine how foreign investors would feel.'*
>
> *'Debtors use the court to buy time, so we avoid it when we can. The case I am currently working on with our lawyers started in 1995, when I was in secondary school.'*
>
> *'Courts do not follow the rules. We file a motion ex parte but somehow the debtor finds out, they allow them to intervene and file all sorts of frivolous applications'.*

Also, judges sometimes misunderstand, misapply or fail to apply the law.[810] These problems are caused by a combination of infrastructural, substantive and procedural deficiencies which are not peculiar to insolvency or commercial law cases.[811] Because of poor infrastructure, judges are overburdened and must deal with cases spanning different areas of the law simultaneously, preventing them from gaining deep knowledge and expertise in a specific area. A lender concluded that these irregularities explain why commercial contracts now increasingly choose English law as the governing law, to avoid Nigerian courts. It also explains why some companies resist this choice as it deprives them of the opportunity to use the loopholes in the Nigerian judicial system to their advantage.

5.8.2. The corruption problem

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[810] An IP expressed his frustration in a receivership case where a corporate debtor was contesting the receivership. In response to the IP's point that the loan agreement clearly provided the powers that the IP sought to exercise to take over the company, the judge ruled that the clause was unenforceable because the owner of the company (who signed the debenture on behalf of the company) was dead. This lack of an understanding of the basic principle of corporate personality by the court gravely reduces stakeholders' confidence in the ability of the courts to grasp the more complex issues that arise in corporate insolvency and restructuring. See also Debola, Corporate Rescue (n 43) 315.

[811] Peter Obutte, 'Corruption, Administration of Justice and the Judiciary in Nigeria' (2016) <https://ssrn.com/abstract=2727319>; Johnson Amadi, 'Enhancing Access to Justice in Nigeria with Judicial Case Management: An Evolving Norm in Common Law Countries' (2009) <https://ssrn.com/abstract=1366943> all accessed 10 September 2018.

The problems with institutions like courts are inextricably linked with a corruption problem, [812] a deep-seated issue in many African countries which has been identified as a major threat to sustained economic growth.[813] Institutions are weak, and this makes it possible for political leaders and public servants to misuse resources and abuse their power without being checked, forming a vicious cycle that leaves institutions in a deplorable state. African countries score low on transparency tables and there are persistent reports of bribery and cutting corners in virtually every facet of society, from petty to grand corruption schemes.[814] It was recently found based on a survey in 28 African countries, that one in five Africans paid bribes to obtain official documents, and the police and courts which are meant to safeguard citizens' rights are considered to be the biggest culprits.[815]

In the empirical study conducted for this thesis, the problem of corruption unsurprisingly came up in all the interviews. Lenders criticised other lenders, courts, companies, IPs and lawyers for being dishonest and engaging in underhanded practices. A common example of corruption within the banks is collusion between bankers and corporate debtors. A bank official would plot with the debtor that the official would make a case to the bank management for the debtor's debt be reduced. The debtor then pays the official a percentage of the reduced amount. In other cases, for a percentage of the loan amount, a bank official grossly overvalues assets being offered as collateral to help the debtor secure a higher sum. The banker is subsequently paid a proportion of the loan. IPs also accused other IPs, lenders, courts, companies, and lawyers of corrupt practices. According to two IPs, both lenders and

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[812] It is noted that some African countries in recent years have taken decisive steps to curb corruption and their efforts have altered the perception of corruption to some degree, reflecting in their corruption perception indices. Examples are Rwanda, Cape Verde, Botswana, Mauritius, Cote d'Ivoire and Senegal. See *Paul Banoba, 'A redefining moment for Africa'* Transparency International *(21 February 2018)* at <www.transparency.org/news/feature/a_redefining_moment_for_africa > accessed 10 September 2018.

[813] Uwimana (n 27).

[814] Transparency International, Corruption Perceptions Index 2017 available for download at <www.transparency.org/news/feature/corruption_perceptions_index_2017 > accessed 10 September 2018.

[815]Milena Veselinovic, 'Why Corruption is Holding Africa Back' CNN (28 January 2016) <https://edition.cnn.com/2015/12/24/africa/africa-corruption-transparency-international/index.html> accessed 10 September 2018.

companies deliberately fail to keep proper documentation, in order to provide several loopholes to make creative arguments about the level of indebtedness.[816]

It must be noted that reports of corruption are often perception-based, which makes it difficult to obtain objective data on corruption.[817] However, this perception whether based on factual evidence or not is widespread and its effects are real. The perceptions and attitudes are important because they influence commercial laws and commercial arrangements in different ways,[818] and are bound to impact the implementation of new insolvency laws. One of the most significant effects is a pervasive sense of distrust that has become a socio-cultural element of business environments in African countries. In Fafchamps' empirical study in sub-Saharan Africa, he found that people avoided going to court to settle business disputes for these reasons. Questioning businesses in Ghana on whether they would use the court in settling disputes, less than 10 per cent of the participants said that they would.[819] Research by Afrobarometer reveals that in Togo, only 37 per cent of citizens *somewhat* trust the court system, with Liberia and Sierra Leone coming closely behind at 32 per cent.[820] The impact of corruption and associated lack of trust on insolvency and restructuring practice is also seen in the empirical study conducted in Nigeria discussed in the next chapter.

5.9. The Implementation experience in some African countries

As the implementation of restructuring laws begin to gain momentum in Africa, there have been a few success stories and stories of difficulties.

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[816] An IP said that he had seen many incidents where a corporate debtor would have three different sets of accounts-one for the lender, one for tax purposes and the real one.

[817] Measuring corruption in Africa: The international dimension matters (United Nations Economic Commission for Africa, African Governance Report IV 2016) <www.uneca.org/sites/default/files/PublicationFiles/agr4_eng_fin_web_11april.pdf > accessed 10 September 2018.

[818] The next chapter probes this issue in relation to Nigeria.

[819] Fafchamps (n 806); Table 4.5.

[820] For full statistics, see Pauline M. Wambua and Carolyn Logan, 'Togo's judicial system marked by popular distrust, perceptions of corruption' (Afrobarometer, No. 147, 18 May 2017) <http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r6_dispatchno147_access_to_justice_in_togo.pdf > accessed 10 September 2018.

South Africa has the most tested business rescue law. Since 2011 when the Business rescue procedure came into operation, 2867 business rescue proceedings have been commenced.[821] By March 2018, a total of 1176 business rescue cases were pending.[822]

The major hurdles first encountered in South Africa stemmed from the poor regulation of practitioners, lack of expertise and understanding of the corporate rescue regime, distrust among stakeholders and abuse of the process.[823] Cases of rescue practitioners unjustifiably placing businesses in rescue in order to earn practitioners' fees, inability to determine the viability of the company, companies using the procedure as a delay tactic have been reported.[824] The effect of this has been that financiers are extremely wary of proposals for the business rescue procedure. [825]

Also, there remains an orientation problem in South Africa as many stakeholders are yet to adjust from the debt-recovery mindset to a rescue-orientated practice. Pre-existing problems of mistrust, incompetence and poor infrastructure contribute to the slow progress of a rescue culture as the 'inherent distrust' among management, banks and creditors and government have become magnified because stakeholders (particularly lenders) are being prodded away from the familiar territory of debt recovery.[826] Creditors are a very crucial part of building a rescue culture and some practitioners have shared the view that creditors have 'unofficially made a policy decision that they are not in favour of business rescue', even where there are justifiable reasons why they should get involved.[827]

Thirdly, the unavailability of rescue finance has been identified as one of the significant reasons for the low success rate.[828] Practitioners also report implementation challenges arising from the interpretation of certain provisions (particularly the PCF

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821 See Companies and Intellectual Property Commission (CIPC) <http://www.cipc.co.za/files/3915/2639/0127/Business_Rescue_Status_Report_March_2018_v1.0.pdf > accessed 10 September 2018.

822 ibid (Year 2016). Some success stories include Dial-a-Bed, Beares, Optimum Coal Mine, High Veld Steel etc. See Piers Marsden, 'Business Rescue Growing Pains' (March 2016) The Quarterly Journal of INSOL International 10-12.

823 Du Preez (n 764) 105 - 120 ; ART 2017 (n 715) 12.

824 Du Preez (n 764) 106-109.

825 ibid 119-121.

826 ibid 114.

827 ibid 119.

828 Marsden (n 822) 10.

provisions) by practitioners and the courts. This difficulty arises from a combination of deficient institutions and 'novel concepts and bad drafting'. [829] The PCF provisions have raised questions and attracted confusing court decisions especially regarding the priority of existing security holders in relation to employee PCF claims and other claims.[830] One of the causes of confusion is the unclear priority ranking system. The Act uniquely provides that employment related claims arising after the business rescue procedure has commenced ranks above other creditors.[831] However, the position of pre-existing secured creditors is not clarified in this ranking, creating confusion as to where they stand.

This deviation from the Chapter 11 PCF provisions has been explained as a contextual adaptation of international standards, to address the protection of employee rights in South Africa.[832] However, the drafting and execution has resulted in implementation problems because of ambiguity. Zambia and Zimbabwe are likely to have inherited this ambiguity and accompanying implementation difficulties by adopting South Africa's PCF provisions wholesale. OHADA countries also potentially stand to face similar challenges as seen in South Africa because the priority for PCF in the Uniform Act also suffers from a lack of clarity.[833]

Notwithstanding the low rate of success following the introduction of the South African Business Rescue procedure, the sustained increase in the number of filings suggests a commitment to business recue objectives and the implementation of the law.

Kenya has recorded some implementation of its new law, notably with the country's biggest supermarket and retail chain, Nakumatt going into administration in hopes for a turnaround.[834] The administration is ongoing (at the time of writing) but one of

[829] ART 2017 (n 715) 12.
[830] Juanitta Calitz and Giles Freebody, 'Is post-commencement finance proving to be the thorn in the side of business rescue proceedings under the 2008 Companies Act?' (2016) 49(2) *De Jure* 265-287.
[831] Companies Act, s 135; Table 2.0 above.
[832] Loubser (n 738) 10.
[833] On first reading, it seems to suggest that all PCF has priority over all creditors including secured and privileged creditors. See UACP, arts 166 & 167.
[834] Abdi Latif Dahir, 'Kenya's largest supermarket has gone bankrupt and rivals are set to snap up its empty stores' Quartz Africa (31 October 2017) <https://qz.com/1116051/kenyas-nakumatt-files-for-bankruptcy-as-shoprite-prepares-to-fill-its-empty-stores/>; Kennedy Kangethe, 'Nakumatt files for voluntary administration, PKF

the early lessons from the administration order is the steepness of the learning curve that the concepts introduced by Kenya's new law presents for stakeholders, particularly judges. [835] At the first hearing for the administration order, the judge identified the lack of clarity and guidance for actors involved in the process as a challenge.[836] Some practitioners have also attributed implementation gaps to the lack of understanding of the new law by stakeholders.[837]

Since its law came into effect in 2013, Uganda recorded its first administration in 2017, when Uganda Telecom Limited was placed in administration. Because UTL is state-owned, the government has been closely involved in the administration.[838] The commitment of the government to the rescue of the company can significantly increase the chances of the administration resulting in a turnaround of UTL. [839] This has the potential of boosting the confidence of stakeholders in the newly introduced administration system. It however limits the prospects of assessing the implementation of the law on its own merits at this stage.

In countries like Seychelles and Mozambique, where new corporate rescue laws were enacted five years ago, there is still little clarity as to the use of the law.[840] Similarly, Mozambique has seen little implementation of its 2013 law. One of the difficulties identified with the implementation of this law is interpretation and application because of the new philosophy and different terminologies brought by the law.[841] Perhaps due to failure to carry all relevant actors along in the reform process (actor mismatch), ad hoc insolvency experts have been reported as not giving 'due attention

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consultant to take over management' Capital Business (31 October 2017) <www.capitalfm.co.ke/business/2017/10/nakumatt-files-voluntary-administration-pkf-consultant-take-management/ > all accessed 10 September 2018.

[835] The administration order was given on 22 January 2018. See court order at Kenya Law, Insolvency Cause 10 of 2017 <http://kenyalaw.org/caselaw/cases/view/146499/> accessed 10 September 2018.

[836] See para 6 of judgment at Kenya Law, Insolvency Cause 10 & 13 of 2017 (consolidated) <http://kenyalaw.org/caselaw/cases/view/143828/ > accessed 10 September 2018.

[837] See ART 2017 (n 715) 3.

[838] Ronal Mugabe, 'URSB takes charge of UTL' New Vision (29 April 2017). <www.newvision.co.ug/new_vision/news/1452214/ursb-takes-charge-utl > accessed 10 September 2018.

[839] Editorial, 'Signs of recovery at UTL, government says' TeleGeography (29 June 2017) <www.telegeography.com/products/commsupdate/articles/2017/06/29/signs-of-recovery-at-utl-government-says/ > accessed 10 September 2018.

[840] ART 2017 (n 715) 6- 7.

[841] ibid 3-4.

to the process'.[842] As participants of the ART 2017 pointed out, the implementation of the law continues to be affected by a lack of knowledge of the law by businessmen, embedded cultural conceptions about insolvency procedures and lack of sanctions for non-submission to the law.[843]

Also, the Rwandan law enacted in 2009 was not used because of a lack of clarity on the reorganisation procedures, plans and timelines. After 2012 and 2014 reforms which aimed to provide more clarity for insolvency processes, the country has now passed a 2018 Insolvency Act to correct these issues.[844] This may be a manifestation of recursive cycles of lawmaking predicted by Carruthers and Halliday.[845] However, the question remains whether that reform is driven by the goal of making the law a better fit for local institutions rather than a desire to meet up with international standards and improve the country's Doing Business ranking.[846]

Conclusion

Restructuring and insolvency systems in Africa are evolving. This chapter considers the actors involved in these reforms and Africa's role in contributing to the building of an insolvency TLO. It finds that the operation of global actors in African countries have lacked the direct force that they had in Asian countries like Indonesia and Korea, even though there have been no shortages of economic crisis and susceptibility to foreign influence in Africa. This is understandable, as Africa has not always occupied a significant position in the global economy. Increasingly however, interest in Africa is growing, although the influence of conventional partners from the West is now being diluted by new partners, particularly China. As interest grows, the role of global actors like the World Bank, the IMF and UNCITRAL in insolvency law reform have

[842] ART 2016 (n 720) 28-29. These issues are predicted by the literature on legal transplant and discussion in the previous chapter. As Dani Rodrik asserts, 'even under the best possible circumstances, an imported blueprint requires domestic expertise for successful implementation. Dani Rodrik, 'Institutions for High-Quality Growth: What They Are and How to Acquire them' (2000) 35 (3) Studies in Comparative International Development 70; Berkowitz, Pistor & Richard, 'Economic development' (n 452) 170.

[843] See ART 2017 (n 715) 1-5, 8-10. Country reports for Kenya, Cape Verde and South Africa for examples.

[844] World Bank Doing Business Report 2014, Rwanda country report 168 <http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB14-Full-Report.pdf > accessed 10 September 2018.

[845] Halliday and Carruthers, 'The Recursivity of Law' (n 16) 1160.

[846] Rwanda Struggles On Insolvency Law' (n 637).

centred on technical support in reform and modelling through platforms like the ART and the World Bank Doing Business Project.

The chapter highlights the changes made or proposed to restructuring law in thirty-six jurisdictions and briefly comments on the settling of these new laws. Recent and ongoing changes in insolvency regimes suggest that while the momentum and content of reform is significantly influenced by external factors, the need for restructuring frameworks is also becoming more apparent to local stakeholders. As reforms are ongoing, restructuring practices are also evolving. This creates a real opportunity to pass laws that are adapted to practical issues, institutional demands and development needs. It is however only likely to happen if the stakeholders involved in restructuring practice also have some input in the reform. In some countries, there are suggestions of significant detachment between the promoters of reform and end users of the law, which again highlights the value in carrying all stakeholders along, before a law is enacted.

The chapter finds that the content of reform may be responding more to the need to conform to global standards than to domestic needs and institutions. In effect, rather than domestic need or policy orientation as discussed in chapter one, the content and momentum for reform is overwhelmingly influenced by external factors. Some countries have deviated from the usual habit of a full transplant from a developed country with which they share some connection and have introduced changes based on global norms. For some countries in Africa, global norms have not done very much to change the tendency to fully transplant the laws of countries with which they bear historical (mostly colonial) connection. Some other contries have taken baby steps away from this tendency. Many countries have also adopted the UNCITRAL Model Law for Cross-border insolvency. In this way, reforms in Africa are contributing to the building of a TLO in insolvency as they continue to popularise insolvency legislations of powerful countries and increasingly incorporate global norms like the PCF provisions.

As latecomers to the development table, African countries may not enjoy the same luxury that countries with home-grown insolvency laws like the US and the UK

enjoyed in crafting laws that were compatible with their local institutions and development needs. While the opportunity for such organic reform may have been interrupted by globalisation and the proliferation of global norms, African countries can take advantage of the absence of direct coercion in the propagation of those norms to produce versions of insolvency law that are most compatible with their institutions. Some of the institutional constraints that can pose a challenge to the settling of new laws were raised in this chapter and as reform and implementation progress, the tensions between new laws and existing institutions and practises can be explored in more detail. Using Nigeria as empirical case study, the next chapter continues this discussion with a detailed account of the experience of stakeholders with evolving insolvency and restructuring practice. The chapter describes local institutions and how stakeholders interact with them, with the aim of gaining deeper insight into the environment into which new restructuring legislations are being introduced and how local institutions engage with global norms and actors.

CHAPTER SIX

THE CONSTRUCTION OF A CORPORATE DEBT RESTRUCTURING PRACTICE IN NIGERIA: AN EMPIRICAL CASE STUDY

Introduction

The previous chapter addressed the development of insolvency and restructuring norms in Africa and the role that global norms and actors are playing in these developments. This chapter describes the experience of stakeholders with corporate insolvency and debt restructuring in Nigeria. Recall that chapter one discussed the design of this empirical study, the conduct of the study, its limitations; and engaged in a general discussion of the Nigerian legal framework for corporate insolvency and restructuring.[847]

As discussion in previous chapters of this thesis reveals, scholars, development experts, IFIs and other commentators have for a long time emphasised the importance of local compatibility in reform. What is clearly missing from the literature is substantial empirical research to unearth what these local elements are.[848] Relevant local elements would differ across countries and for different subject matters, and this chapter aims to contribute in its own narrow field of restructuring and insolvency. It investigates the different factors that have shaped the relationship of stakeholders (lenders, insolvency practitioners and lawyers) among themselves and with insolvency laws and institutions. It also seeks to understand ongoing changes in restructuring practice, the role of global actors and/or norms in engendering those changes and the tension between existing practices and emerging developments in insolvency, all from the perspective of stakeholders. The empirical study was conducted principally by interviewing lenders (commercial banks), insolvency practitioners, lawyers and secondarily debtors, through a participant observation of an ongoing debt restructuring.

[847] Ch 1, section 1.4

[848] Trubek, 'Scan Globally, Reinvent Locally' (n 573) 7-9.

Background to interviews

Following the drop in commodity price and a forex crisis, Nigeria plunged into an economic recession that had an adverse effect on businesses in different sectors of the economy in 2016.[849] In the face of economic hardship, the lapses in the provision of rehabilitative frameworks for distressed companies became more apparent.

In 2012, BRIPAN[850] supported by INSOL International, had produced a draft Corporate Insolvency Bill (The BRIPAN Bill). The BRIPAN Bill sought to promote business restructuring, the regulation of insolvency practice and cross-border insolvency.[851] The Bill was largely based on English law, meaning it sought to introduce the CVA and administration procedures into the country. BRIPAN got the support of the Federal Ministry of Industry, Trade & Investments to sponsor the Bill as an Executive Bill and it went through some reviews and approvals, including its first legislative reading. However, since the 2015 change of administration in Nigeria, the BRIPAN Bill saw very little progress.[852] Later in May 2018, it was revealed that the BRIPAN Bill would no longer be pursued, as insolvency reform had been consolidated with ongoing companies' law reform.[853] The restructuring procedures (administration and CVA) are now included into the Companies and Allied Matters Bill, currently undergoing legislative process. The interviews with BRIPAN executives and other stakeholders, throw more light on issues surrounding the reform. They also describe how commercial lenders and insolvency practitioners engage with proposed reform, revealing how problems of actor mismatch, institutional mismatch, misdiagnosis and contradictions potentially arise.

[849] Fick, Nigeria Economy Suffers' (n 38).

[850] The Business Recovery & Insolvency Practitioners Association of Nigeria (BRIPAN) is the only professional association of its kind. While BRIPAN does not have regulatory powers, it offers training and has taken the forefront in insolvency legislative reform. However, one need not be a member of BRIPAN to act as an IP.

[851] Anthony Idigbe, 'Progress of Insolvency Law Reform' ILO (15 November 2013) <www.internationallawoffice.com/Newsletters/Insolvency-Restructuring/Nigeria/Punuka-Attorneys-Solicitors/Progress-of-insolvency-law-reform> accessed 10 September 2018; Recent Strides (n 74).

[852] ibid.

[853] LawPavilion (n 726). The details of the ongoing company law reform is neither clear nor readily accessible as no consultation documents or reports have been made available.

While the country awaits a restructuring framework, distressed companies, commercial banks, insolvency practitioners and regulatory bodies have made some efforts to restructure debt informally, though not always successfully. This empirical research explores the use of existing insolvency frameworks and the challenges that confront stakeholders as new restructuring practices emerge.

The interviews reveal that interactions among stakeholders are coloured with distrust and suspicion. This is accompanied by a lack of confidence in institutions such as courts and regulatory bodies. The law and practice of corporate insolvency is limited to debt recovery practices. Lenders judge the effectiveness of laws and institutions by their ability to aid prompt recovery of assets. While Nigeria can be said to be a creditor friendly jurisdiction because it prioritises recovery, a popular view among lenders was that the judicial system is biased towards debtors and often allows itself to be hijacked by debtors to the detriment of lenders. Lenders consider debtor recalcitrance to be a major problem in Nigerian corporate borrowing, especially with big companies that are often backed by powerful owners who have the tools to bend the rules to their advantage. The courts are criticised for being slow and unmindful of the complexities of business and the technicalities involved in corporate matters. Insolvency practitioners are also criticised for being unskilled in commercial matters. Lenders are criticised by other stakeholders for being impatient, preoccupied with profit, ill-equipped to restructure and lacking good lending practices.

From the interviews, the attitude to proposals for reform ranged from apathy, ignorance and scepticism to guarded optimism. Most participants were disinterested in reform efforts, others thought that efforts were misdirected while a few lenders thought that it could do some good.

The rest of the chapter presents the empirical study using themes and sub-themes, supported with excerpts from the interviews where appropriate. Each section concludes with a summary of findings.

THE INTERVIEWS

The interviews are thematically structured in five broad sections. The first section considers corporate lending, informal debt restructuring and the challenges that lenders and IPs face in the process. It is helpful to clarify that although it applies to large companies to some degree, this section of the interviews relates more to small and medium corporate debtors. The second section discusses the legal framework and instruments that affect debt restructuring and how stakeholders interact with these frameworks in practice. The third section narrows on multi-creditor restructuring and the issues that arise in the process. It is in this section that the interaction of stakeholders with large companies is explored. Section four discusses the proposed reform, from the perspective of lenders, BRIPAN members and insolvency practitioners. The fifth section briefly considers developments in the debt market that are likely to impact corporate debt restructuring in the near future.

SECTION ONE: LENDING STRUCTURE AND INFORMAL DEBT RESTRUCTURING.

6.0. The structure of business lending in Nigeria.

Bankers reported largely similar lending procedures. Business lending in Nigeria often takes the form of term loans and in some cases, revolving facilities.[854] Most banks reported that term loans typically have a tenure of 12 months but have in recent times become shorter because of the rise in NPLs and regulatory constraints, with loans now maturing between 30 to 180 days.[855]

In a typical corporate lending, requests for loans come in through account officers. Depending on the amount of money involved, the request is passed to management represented by the Managing Director (up to N200 million), Management Credit Committee (N300-500million), Board Credit Committee (above N500 million to 1.5 billion) or the full board (above N1.5 billion). Smaller loans are considered to be

[854] A revolving loan allows the credit to be drawn (up to a limit), repaid and redrawn for as long as the arrangement stands. A term loan, broadly speaking provides a lump sum upfront and regular repayments including interest are required to be made over a fixed period.

[855] The short tenure of loans impacts the kind of concessions banks are prepared to give in debt restructuring. Restructuring that draws out the loan for an extended period of time are avoided.

around N5-10 million and they are often handled by other managers such as an executive director or a regional manager.[856] Before approval by the relevant approving authority, credit checks would have been carried out by the credit administration department. The legal department also ensures that all conditions precedent are met before the loan is disbursed. The loan review department takes over once the debtor begins to draw from the facility, monitoring repayment and ensuring that the loan is always classified correctly. Depending on the way the loan is performing and length of default, it may be classified as substandard, doubtful or lost.[857] When default occurs, the loan review department investigates the default and makes recommendations. After considering the nature of default and likely causes, they may decide to place the company under a watchlist and/or restructure the debt. If performance is not enhanced, the account begins to deteriorate until it gets to the point where it is classified as lost. Once deemed lost, the account is moved from the branch office to the remedial department and this is where debt recovery begins.

The role of reputation in lending and recovery

The Nigerian banking system has had its fair share of problems, plagued with problems of undercapitalisation, poor regulation, cronyism and corruption.[858] Corporate lending can also be reputation-based, with the status of a company's promoters playing a major role in lending decisions. Some banks have been accused of making lending decisions based on relationships, tribal or familial connections rather than credit worthiness.[859] Problems in the Nigerian banking industry came to a head in 2009, resulting in intervention by the Central bank through several reforms and stricter regulations. Bank directors were sanctioned for colluding with debtors and giving out undocumented loans, embezzling funds, manipulating records

[856] There are slight variations in figures across the different banks.
[857] The CBN prudential guidelines classify loans based on performance. Defective loans can be substandard, lost or doubtful. Central Bank of Nigeria, Prudential Guidelines for Deposit Money Banks in Nigeria (July 2010) 32-34.
[858] 'After the Boom, a Purge' *Africa Confidential* (28 August 2009) <www.africaconfidential.com/articlepreview/id/3205/After_the_boom%2c_a_purge > accessed 10 September 2018.
[859] Emmanuel Majebi, 'Sack of Five Bank MDs, is Tribalism the Issue?' *The Vanguard* (20 August 2009) <www.vanguardngr.com/2009/08/sack-of-five-banks-mds-is-tribalism-the-issue/> accessed 10 September 2018.

amongst others.[860] The purging of 2009 curbed some of the excesses in the banking system. However, relationships and reputation still have a strong presence in the Nigerian corporate lending scene.

The reaction of the Central Bank of Nigeria (CBN) to the rise in NPLs is an acknowledgement of the significance of reputation in Nigerian corporate lending. One of the regulator's strategies in 2009 was to publish a list of the biggest non-performing loans, naming the debtors and their directors/majority shareholders. Many of the debtors were big companies operating an owner-manager structure. The aim of the publication, particularly the move to publish the names of the promoters in national newspapers was to shame these reputable individuals into payment. [861] The CBN periodically mandates banks to publish this list when their NPLs begins to rise above acceptable levels.[862]

During the interviews, it was sometimes difficult for bank participants to distinguish between individual and corporate lending. For both lending decisions and in response to a borrowing company's financial distress, bankers placed a lot of emphasis on directors and owners and their assessment of their ability to pay in their personal capacity.[863] Relationships and reputation play a role in the way loans are structured including the use of security. Understandably, this would often be the case with SMEs, which are usually one-man businesses. However, the interviews revealed that the bigger the company involved, the higher the tendency for the lending to be reputation-based.

Lawyers reported that lenders are always eager to negotiate a personal guarantee and take a lot of comfort in having recourse to the personal assets of owner/managers. A personal guarantee may be of more value to a lender than other collateral, where the

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[860] Africa Confidential (n 4); 'EFCC Declares Ibru Akingbola Wanted' *The Vanguard* (24 August 2009) <www.vanguardngr.com/2009/08/efcc-declares-ibru-akingbola-wanted/> accessed 10 September 2018.

[861] The list would show only a handful of private debtors, with a high percentage being limited companies, and a substantial number in the oil sector. <www.cbn.gov.ng/OUT/PUBLICATIONS/PRESSRELEASE/GOV/2009/ADVERTORIAL_18082009.PDF > accessed 10 September 2018.

[862] Lolade O, 'CBN, Deposit Banks will Publish List of Serial Debtors on August 1' (12 June 2015) <http://bizwatchnigeria.ng/cbn-deposit-banks-fix-august-1-publish-serial-debtors-list/ > accessed 10 September 2018.

[863] In the interviews, bank managers tended to refer to the owner/manager rather than the company itself as the borrower.

promoters of the company are reputable and wealthy or perceived to be wealthy. Where smaller companies with less influential promoters are concerned, security in the form of fixed assets like land and buildings becomes very important. For lenders, the bigger the loan (or the company), the less likely it is that the loan will be secured and the more likely it is that the debtor can negotiate a reduced interest rate.[864]

> *'I can lend billions of naira to companies like Dangote Plc[865] unsecured, but for a smaller company, I can ask for their mother's head before I give them 5 million'.*[866]

6.1. Informal (unilateral) debt restructuring.

From the perspective of banks.

All the banks claimed that they often consider debt restructuring when a corporate debtor defaults. Debt restructuring or more accurately, rescheduling prominently featured in the processes they described. Although the procedures are similar, there were slight variations in the departments responsible for implementation. Some of the banks had a department for remedial services and loan restructuring; others left the task to the same department responsible for monitoring the account. In some banks, only the approving authority for a loan could make a restructuring decision while other banks would trust a head of department or committee with the decision. Once they see signs of trouble,[867] the relevant department invites the representatives of the company for an informal chat.[868] This meeting is important for a few reasons- it helps the bank to determine the reasons for default and the challenges being faced by the company. It also allows the bank to decide whether to restructure the company's debt or not. When asked about the criteria for making the decision to restrucure, the

[864] It is noted that there are ongoing reform efforts towards strengthening the secured credit transactions regime in Nigeria. Notably, a credit risk management system (credit bureau) and a collateral registry have been established. If implemented effectively, these developments should address some of the issues identified by lenders such as debtor recalcitrance and enforcement of security interests. Secured Transactions in Moveable Assets Act 2017, ss 3 and 8; CBN Act No.24 of 1991, ss 28 and 52.

[865] DangotePLC is one of the most successful, if not most successful chain of businesses in Nigeria.

[866] Lender 9. The downside of this is that some companies may be viable only by reputation but experiencing serious liquidity issues or even nearing economic distress.

[867] Signs of trouble include where the loan is not running in line with expectation, returns are not in tune with the projected/expected cash flow, the turnover is lower than expected, and for term loans where payments are periodic, if some payments are missed.

[868] One bank (Lender 1) admitted that at the first sign of trouble, it would scrutinise its loan documentation and collateral (if any) and get battle ready. After looking at the bank's legal rights and ensuring that the lender is in a strong fighting position, the lender approaches the company to demand payment.

lenders all approached the question by categorising debtors as: *willing and able, able but unwilling, unable and unwilling, unable but willing*. They claimed that this matrix gave them a clear guide on whether to restructure, and how to go about the restructuring. They could differentiate between these categories of debtors by their 'character'.

Although they clearly attached a lot of value to it, the banks had some difficulty giving a clear indication of what they defined as 'character'. Their answers suggested that they have acquired a radar for discerning which managers passed this character test. They were convinced that if confronted with a 'genuine' company, they would 'just know'. A common example that they gave of acceptable character was of debtors that show a willingness to discuss rather than try to use the court to buy time. The character of the company owners/managers ranked so high on the banks' list of criteria that they suggested that the viability of a business was not always a barrier to restructuring. For example, one lender spoke about a hospital business being funded by his bank. The hospital is in a remote area with very few, low-paying clients.[869] Though it is clear to the bank that the hospital in its current state can never generate enough cash flow to pay, the bank is willing to continue to accommodate the debtor.

> *'The business is not viable, but they are sincere and have dealt with us in good faith.'*[870]

Five banks did mention viability of the business as one of the factors that influence their decision to restructure the loan.[871] They claimed that they determine this by conducting an analysis of the company's business and looking into its cash flow. When asked what tools they use for this analysis and whether they engage professionals to carry out the review, the banks all thought that this was unnecessary as they were perfectly capable of making the assessment.

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[869] He admitted that these issues should have been considered before the loan was approved. From conversations with lenders and other professionals, this kind of laxity on the part of lenders is not uncommon in Nigeria.
[870] Lender 13.
[871] Lenders 1, 2, 8, 3, 14.

In some cases, the restructuring described by the bankers is intended to delay the regulatory requirement for banks to provide for loans classified as lost.[872] Although the classification of a distressed loan cannot be upgraded based on a mere restructuring of the debtor's obligations, banks can buy some time by asking the debtor to pay some part of the debt and restructuring the rest of it, even if they do not truly believe that obligations would be met in the future. This allows the bank to make a real case for reclassification or at least delay the further deterioration of the loan.

If a company is deemed qualified for a restructuring and the recommendation is approved by the appropriate authority, a restructured facility is executed. On the form that restructuring often takes, it is often the case that the tenure of the loan is extended and or interest rate is reduced for a period. Less often, debt restructuring can include the forgiveness of part of accrued interest and or principal. Where restructuring fails to result in an improvement in the company's performance, the case is transferred to the legal department for recovery. When asked how well informal restructuring works, lenders could not provide numbers or estimates. They however stated that in their experience, financial distress results from a combination of factors, mainly economic hardship and mismanagement. Companies always wait until it is too late before asking for help and the rescheduling of debt does little to tackle these issues. So, it is not surprising that distressed companies often end up defaulting on a restructured payment. [873]

One recurring theme in the banks' restructuring practice is that while banks may take the first step to engage defaulting corporate debtors, they often expect the request for debt restructuring to come from the debtor. This is connected to their philosophy that the right candidate for restructuring will show the willingness without being prompted.

Bank lending and restructuring practices from the perspective of Insolvency Practitioners.

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[872] Banks provide for lost accounts by provisioning i.e having the Central Bank of Nigeria deduct the sum off the bank's deposit with the CBN. CBN Prudential Guidelines (n 857) 35.

[873] Participants had not given much thought to keeping a record of whether companies recovered after a restructuring or the frequency with which companies ended up in recovery after they have had their debt restructured.

IPs were of the view that lenders are too lax in their attitude towards lending and monitoring. As an instance of this laxity, they criticised the tendency of banks to loan huge sums of money based only on the reputation of the owner of a company.

> *'Lenders are swayed by big names, I think it is a cultural thing'.* [874]

Apart from failing to do a critical business assessment before giving out funds, IPs also disagreed with the approach of lenders to monitoring. They pointed out that lenders neglect the debtor and only make belated monitoring efforts after the company is far gone.

In addition to poor due diligence, IPs criticised the fact that banks do not get help where appropriate because they assume that they are finance experts. Their methods and views of restructuring according to one IP, are dated and narrow. IPs confirmed that lenders' idea of restructuring is limited to a few basic steps such as extension of tenure and waiver or reduction of interests. While these may be useful for companies that only need some breathing room to recover from a temporary cash flow problem, banks apply this one-size fits all solution to all companies without properly diagnosing the cause of distress. As a result, what the banks claim to be a restructuring practice is often superficial and ineffective rescheduling.

> '*At the point of lending or restructuring, most banks assume that their in-house loan review department can do a good job of assessing the viability of a business, but they cannot. They are not trained to and are often too overwhelmed to do a thorough job'.*[875]

> *'Most of them only understand debit and credit, they have no knowledge of finance'* [876]

6.2. Problems encountered in informal debt restructuring

Bankers emphasised that there are wider considerations that impact restructuring in individual cases and the restructuring culture generally. It was particularly important

[874] IP 7.
[875] IP 3.
[876] IP 7.

for them that the constraints they face as commercial lenders and the effect of these constraints on how they respond to financial distress, be understood.

6.2.1. Debtors recalcitrance and mismanagement, a socio-cultural phenomenon?

Lenders' views

Debtor recalcitrance came up in all the interviews. Although lenders acknowledged that there were different categories of corporate debtors as highlighted above, they held the view that the *unwilling* category (whether able or unable to pay) dominated the numbers. They repeatedly attributed the attitude of debtors to 'culture', pointing out that the lackadaisical attitude of debtors to debt is a sociocultural phenomenon in Nigeria.

> *'Nigerians as a people do not believe in paying bank loans. People actually see bank loans as part of the national cake.'* [877]

It was clear from the responses of lenders that there is a deep-seated distrust for the debtors that they deal with, especially companies. Lenders revealed that in their experience, the people that have capacity to pay are the ones who do not want to pay. The root cause of this is that corporate debtors are often knowledgeable and well-connected. They are fully aware of all the loopholes in the system and they have no scruples about taking advantage of them.

> *'At times when you go after bad loans, the knowledgeable ones among them would ask you why you are bothering them when you must have fully provided for the loan'.*[878]

> *'The small debtors are not a problem as we can easily deal with them. They have no judge or minister to talk to. The big company owners are the real criminals.'*[879]

One of the strategies that corporate debtors use is to get ahead of the 'race to collect' by filing frivolous actions against the banks. Typically, the claim would be that they have been overcharged by the bank or that the bank overestimated the debt figure.

877 Lender 10.
878 Lender 3.
879 Lender 1.

The lenders considered this an antic to delay the recovery process, as the debtors are aware of how long court processes can take in Nigeria.[880] These experiences contribute to the reluctance of lenders to initiate a restructuring.

Other constraints identified by lenders include the failure of corporate debtors to recognise early signs of trouble and their tendency to mismanage the company. Lenders also thought that this mismanagement or lack of a maintenance culture was another socio-cultural phenomenon that reflects some deep-seated problems in the Nigerian society- corruption and incompetence.

Lenders acknowledged that it may become necessary to make changes to the management of a troubled company. They however find it difficult to intervene when a viable company is plagued by corrupt or incompetent management.[881] The situation is further complicated by what they consider yet another cultural issue- a predominant family business structure and accompanying territoriality. Most companies in the lenders' experience, are structured such that the owners are also the managers.[882] Even in the big companies, the patriarch of the family commonly sits at the head of the board, with other family members constituting the board. Because company owner/managers consider the business private property, they resist any attempt by outsiders to get involved.

> *'Because they see the company as a family legacy, many owners believe it is better for the company to die than for an outsider to come and take over'.*[883]

IPs' views on debtor recalcitrance and mismanagement

IPs confirmed that owner/managers use a combination of aggression, political influence and emotional blackmail to harass creditors and insolvency practitioners. In some cases, they extend this behaviour to third party investors and potential buyers.

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[880] While some of these suits may be indeed tactics to delay recovery, an insolvency practitioner disclosed that there have been several incidences where banks have indeed overcharged interests, whether deliberately or as a result of carelessness.

[881] Note that there is also a legal concern, which is fear of being seen as a shadow director under the section of 245 of CAMA. Only one of the lenders however felt that this was a real concern as claims based on shadow directorship are a rarity in Nigeria. The other lenders all cited the territorial nature of company owner/managers as the challenge.

[882] This echoes the discussion in chapter three about concentrated ownership and control in developing economies.

[883] Lender 9.

IPs also pointed out that the Nigerian legal system has loopholes that make it easy for debtors to default and walk away.[884]

6.2.2. Regulatory and macro-economic factors

All the lenders identified the government as one of the core sources of challenges in debt restructuring. The different ways by which the government is implicated include unfavourable business policies, high cost of funds, non-payment of debts, excessive regulation and unstable economic policies. [885] Most of these are bigger macro-economic issues that are outside the scope of this research. However, the issues of cost of funds and regulation deserve some attention.

In the lenders' view, one of the major obstacles to debt restructuring is the high cost of funds in Nigerian banking. The rate at which they lend to companies is determined by the borrowing rate from the CBN and the interests paid on fixed deposits. High rates from these sources has set commercial lending rates between the ranges of 29-35 per cent.[886] The lenders acknowledged that only companies with a strong backbone can survive these rates, especially in the difficult economic climates.

Also, banks pointed out that they are over-regulated by the government, through the Central Bank of Nigeria (CBN). Following the country's banking crisis and restructuring from 2010-2015, banks have been placed under closer scrutiny by the regulator.[887] The lenders reported that they often struggle to keep up with CBN's policies and their discretion is highly limited by the need to seek the permission of the CBN for most transactions. Generally, there is an air of uncertainty around what kinds of transactions banks can validly do. Bank officials reported that the CBN keeps its oversight powers over banks flexible such that it can step into any transaction it considers 'unacceptable' on one-off bases. This, they claim affects their ability to freely

[884] One suggested that more forceful prosecution of the directors of failed companies might make a difference.
[885] They however did not fail to give credit where it was due. They referred to the recently established credit bureau which has promising prospects of curbing career debtors.
[886] The CBN official rate is benchmarked at 14-16%. The interest rate is generally informed by inflation rates. Trading Economics,'Nigeria Interest Rate' (2017-2018) <https://tradingeconomics.com/nigeria/interest-rate > accessed 10 September 2018.
[887] Seth Apati, *The Nigerian banking sector reforms: power and politics* (Springer 2011) 1-15.

and creatively restructure debt. An example is their ability to take on shares of a distressed company (debt for equity swap) as part of a restructuring package.[888]

Lenders also disclosed that the government plays a more direct role in making debt restructuring difficult. In their view, the government is the most recalcitrant debtor within the economy. They admitted that many distressed companies that banks are currently pursuing for debt recovery were put in that state by the government.[889] It often happens that companies that work with the government have their contracts revoked or remain unpaid for years, especially when a change in government occurs. This affects both the companies that deal directly with the government and small businesses that work as subcontractors for them.

> *'What kind of restructuring are you doing in such a situation? Will you invite the government to be part of the restructuring?'*[890]

6.3. Corporate rescue: the attitude of lenders.

Because of the close relationship between corporate rescue and debt restructuring, the interviews aimed to understand the attitude of lenders towards corporate rescue. Generally, lenders acknowledged the need for corporate rescue in some cases but sought to avoid the responsibility because of the challenges discussed above.

One banker lamented the wasteful piecemeal sale of companies' assets, revealing that he was in the process of selling a company's warehouse for church use.

> *'Can you imagine? A warehouse that should be productive and contributing to the economy…we are selling it at a ridiculous price for church services. Not even to another business! It is not a good sign that warehouses are being given up for church. It's hurtful for the economy.'*[891]

Another lender shared his experience with an ongoing receivership;

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[888] One of the policies of the CBN mandated banks to divest their non-banking businesses. Banks now carry on investment through separate entities. Central Bank of Nigeria, Regulation on the scope of banking activities& ancillary Matters, No. 3, 2010, ss 5 and 8.

[889] The same trend has been observed in Uganda. Uganda Law reform Commission Report on Insolvency (n 738) clause 2.2.19.

[890] Lender 9.

[891] Lender 9.

'All of us know that it is wrong to strip that kind of company, it is a big company. Everyone I have mentioned it to, including the receiver we appointed, has been shocked. The company is a manufacturing company with certifications that no other country in West Africa has. But the bank wants its money'.[892]

'It is very hard to wait for companies to break even. So, even if you know that they will be viable in the next few years, you may still go ahead and sell the company's assets to get a quick exit'.[893]

However, when it becomes unrealistic to sell, lenders may tow the path of 'rescue'. A lender illustrated this by pointing out the window to an oil rig in the distance. The rig had been taken over by another bank in a recovery action and parked in that spot for many years.

'A rig like that would cost millions for servicing and security over time. Why not restructure the debt, leave the rig with the owner and pray that they get contracts to work the rigs?'[894]

Another banker relayed how his bank recently waived 6 billion naira out of 11 billion naira, because the company promised an immediate payment of N5 billion. These 'concessions' are not driven by noble notions of rescue, rather they are dictated by difficulty of enforcement. Should lenders find it easier to extract the value of their claims, they would dismember the company without caring that the business is still viable. One lender stated that one of the reasons for the seemingly brutal attitude of banks towards corporate rescue is that apart from pressure from shareholders, bank managers stand the risk of legal and regulatory sanctions if they are seen to have failed to pursue recovery diligently.[895]

[892] Lender 3.
[893] Lender 1.
[894] Lender 3.
[895] He referred to the prosecution of some prominent bank executives and pointed out that although they were fraudulent, failure to put their best efforts into debt recovery was a big factor. BBC News, 'Former Nigeria bank CEO Cecilia Ibru jailed for fraud' 9 October 2010 <http://www.bbc.co.uk/news/world-africa-11506421> accessed 10 September 2018.

6.4. Restructuring finance: lenders' views.

In chapter two, additional finance was identified as one of the most important elements of a successful restructuring. Lenders were asked about their views and experience with providing new money to distressed companies.

Here, the general sentiment was that 'it is unwise to put good money after bad money'. They explained that their experience over time has cemented this view. One lender relayed how a N500 million debt became N2 billion within a year, because the bank 'made the mistake of providing additional finance'.[896] This skepticism is even heightened where the finance is sought not as part of an informal restructuring, but in a formal process like a receivership. For them, a formal process carries with it a sense of finality that companies hardly recover from.

Some of the lenders considered the provision of additional finance to be outside the banks' scope of operations. They believe it is the duty of the government to provide such funds to troubled companies. Other lenders admitted that banks ought to be able to do that in a 'normal' society, but the cost of funds and the bank's responsibilities to its shareholders prevent them from doing so.

However, not all banks were completely opposed to providing additional finance. One lender pointed out that banks already provide rescue finance by refinancing big companies with a new facility that carries new terms and lower interest rates.[897] He reported that oil companies have in recent times benefited from refinancing following the drop in oil prices.

Relationships also play a role in the decision to offer new money. One lender would consider providing additional finance based on their previous relationship with the debtor, if the debtor has an impeccable character and is competent. Another said that

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[896] Lender 2.
[897] Lender 2.

they would only consider giving new finance to a borrower to pursue a new line of business 'but not the struggling one'.[898]

Summary of Findings: lending, informal institutions and debt restructuring.

Out of Court debt restructuring is a known practice in the Nigerian corporate lending industry. It is typically unilateral, involving the debtor company and one bank. Even where the distressed company has several bank creditors, restructuring is still done unilaterally because there is no mechanism for coordinating multi creditor workouts.

The banks operate loan remedial units that bear some similarities to the English Bank Support Unit (BSU) situated within head offices of banks in England and tasked with the turnaround of distressed SMEs.[899] Although the remedial units observed in Nigeria were not said to be exclusively committed to SMEs, lenders revealed that larger companies and loans are often taken outside such units to be restructured by most senior management with more authority.

Unlike the BSU however, the responsibility of remedial departments to rescue companies in distress is not as pronounced in Nigeria. There are no clear guidelines or criteria for entry or exit from these remedial units and decisions seem to be left to the discretion of department heads.

In terms of the restructuring process itself, debt forgiveness is rare, so are debt equity swaps, refinancing, asset sales or any kind of corporate restructuring. This is consistent with the findings of Frank and Sussman in the BSU, where banks rarely take a soft stand, making refinancing and debt forgiveness uncommon. Considering the views of lenders about debtor recalcitrance, Frank and Sussman's argument that the disinclination from a soft approach may be a way of dealing with strategic default by corporate debtors is plausible in relation to Nigeria. Much of the restructuring is

[898] Lender 1. This confirms the restructuring professionals' point later in the chapter that debt restructuring would often need to be combined with some corporate restructuring to regain the faith of lenders in the business.
[899] Frank and Sussman's research on how UK banks deal with the financial distress of SMEs was discussed in chapter two. Franks and Sussman (n 207) 65-96.

better described as a fictive rescheduling of debt which does little or nothing to improve the health of the company.

Frank and Sussman indicate that more concessions might be seen where bigger companies are involved as the decision makers have full authority in such cases. Again, this is consistent with the findings on multi creditor debt restructuring of big companies in Nigeria, discussed below.

Consistent with studies regarding the perception of professionals about their own work, bank officials in the interviews displayed great confidence in their expertise[900] and the accuracy of their discretion when it comes to issues of default and financial distress. They saw no need to explain their administrative decisions as they expect to be trusted to be capable of making the right call by virtue of their positions. However, other professionals challenge their claim to expertise- finance experts and lawyers who consider bankers to be ill-equipped to make the assessments about the viability of companies.

This professional dilemma complicates, (or is perhaps complicated by) a pervasive sense of distrust among the stakeholders. Lenders regard debtors with suspicion, accusing them of a lack of integrity and management skills. They also consider courts to be complicit in companies' evasive schemes by accommodating frivolous suits designed by clever companies to avoid payment.

In speaking about the attitudes and actions of other stakeholders, participants attributed some of the practices they identified to culture, which they considered to be peculiar to Nigeria (and sometimes Africa). For example, IPs believed that reputation-based lending is informed by wider socio-cultural elements such as a cultural tendency to worship the rich and influential; and exalt social status over merit. Similarly, debtor recalcitrance is considered another manifestation of the 'Nigerian factor', a cultural tendency to cut corners and shirk responsibility.[901] As

[900] Eliot Freidson, 'Theory of professionalism: Method and substance' (1999) 9(1) International Review of Sociology, 127 (professionals claim that they deal with problems so complex and esoteric such that it is difficult for outsiders to understand or make choices for them; Keith Hawkins (ed.), *The Uses of Discretion (*Oxford, Clarendon Press 1992); Terrence Johnson, *Professions and Power (*London, Macmillan 1972).
[901] Confirming findings in study by Adebola. Adebola, *Corporate rescue* (n 43) 191.

expected in any qualitative study, some of the claims must be taken with caution. For example, the trends that participants identified as cultural must be read with the understanding of the nebulousness of culture as a concept.

Finally, lenders consider debt restructuring, turnaround finance and corporate rescue desirable goals that can be beneficial to companies and the economy but feel constrained and unable to effectively restructure distressed companies and pursue the goal of corporate rescue as a result of a combination of factors- opportunistic behaviour of debtors, the difficult macro-economic environment they operate in and regulatory constraints. In many cases, they pursue debt restructuring as an initial reaction to default. However, this is mostly a fictive debt rescheduling that may buy some time for both the debtor and the creditor, but with no real expectation that the company will recover from distress.

SECTION TWO: HOW STAKEHOLDERS INTERACT WITH EXISTING INSTITUTIONS AND LAWS.

The interviews explored stakeholders' perception of and experience with the legal framework and institutions for insolvency and debt restructuring.[902] This helped to understand (i) how stakeholders interpret and interact with corporate insolvency law in practice and (ii) the shadows that these laws cast on informal debt restructuring.

6.5. A debt recovery culture

The responses of bankers revealed that the understanding and practice of corporate insolvency among Nigerian lenders is largely centred on debt recovery.[903] Although they all claimed to have procedures for informal debt restructuring as described above, it plays a less significant role in dealing with corporate financial distress.

An interesting practice which all the lenders admitted to, is the movement away from the conventional means of recovery such as foreclosure and receivership, towards less orthodox (and sometimes aggressive) recovery techniques, the most common of

[902] Recall that perceptions of the judicial system from the interviews were discussed in the previous chapter.
[903] The means of recovery available under the law are foreclosure actions, sale (with or without recourse to the court), simple action for debt sum and receivership.

which is the involvement of law enforcement agents. Lenders have found a way to use the available space in law enforcement to replace or get around the inadequacies of the legal system. They do this by looking out for actions of the debtor's management that may be interpreted as fraudulent, for example, a bounced cheque.[904] The banks deploy special criminal prosecutors like the Economic and Financial Crimes Commission (EFCC), whose mandate is to handle cases of fraud and economic crimes. This device works for lenders because using agencies who attach little importance to the concept of corporate personality is an easy way to 'lift the veil'. In the lenders' experience, directors tend to respond better to the fear of prosecution than civil action.

These are not genuine attempts to prosecute criminal actions. Rather, they are strategies to drive corporate debtors to the negotiating table and readjust the balance of power so that lenders can negotiate from a position of strength.[905]

Other lenders revealed that they publicly shame and harass managers of small companies with the aid of the police, sometimes in their church or their houses.[906]

In response to the high demand for debt recovery, some persons (usually lawyers, accountants, former bank workers) have carved a niche for themselves as professional debt recovery agents. All the banks stated they kept a list of recovery agents handy and often engage their services.[907]

6.6. Receivership

6.6.1. Lenders' views.

In theory, it should be easier to deal with corporate debtors because banks would typically take a debenture on the company's assets and easily appoint a receiver or Receiver Manager (RM) to realise the debt. However, as reported in the previous chapter, receivership is often a difficult and litigious process.[908]

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[904] Criminal Code Act, s 473.
[905] Banks may not have considered (or perhaps are unbothered) that this could be interpreted as offending the law against attempts at extortion or gain by threat of criminal action. Criminal Code Act, s 408.
[906] One lender described what he tagged the 'STORM' method where about ten bank officials would storm the company's premises to intimidate them into compliance.
[907] Some of these debt recovery agents also act as insolvency practitioners in receivership or winding up.
[908] Ch 5, section 5.4.2.

For example, lenders reported that even where the debt instrument empowers a creditor to appoint a receiver/RM, receivers hardly come into place without the involvement of the court. This is because of the need to seek some protective orders, such as an order mandating the Commissioner of Police to provide security for the receiver. A move necessitated by the resistance (sometimes physical violence) that often attends an attempt by the receiver or RM to take over a company.[909]

Lenders also thought that a receiver management's potential for turnaround was limited by lack of industry knowledge and expertise by IPs. Usually lawyers (and in fewer cases accountants) are appointed as receivers/RMs. Many lenders believed that lawyers who act as receiver managers do not have sufficient patience and skill as '*they just want their 20 per cent commission*'.[910] When asked why they continue to appoint lawyers to act as receiver manager inspite of this, lenders explained that since receiverships are often contentious, it is more effective to put in a lawyer who is battle-ready, rather than appointing another professional who would still need to engage a lawyer.

There is also the interesting angle of using receivership as a bargaining chip, to harass debtors into offering a restructured payment. Lenders exploit their knowledge of the territorial nature of owner/managers. Corporate debtors resist receivership because they consider it a death sentence.[911] The threat of a receivership can force managers (who are bent on retaining control) to raise payment by all means necessary, especially where they are unable to come up with ways to challenge the receivership in court.

> *'Sometimes, we try to get ahead of the company in the game. We find a clever lawyer who knows his way around the court and can ensure that the debtor's case never sees the light of day. At the end of the day, the company is forced to come to the negotiating table'.*[912]

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[909]As later see from the IPs' perspective, it is not strange for a receiver/RM to be confronted with physical threat and danger to his person.
[910] Again, we must question whether receivers do this based on the knowledge (and perhaps direct instruction) that the banks want their money out as quickly as possible.
[911] And lenders and IPs admit that it often is.
[912] Lender 10.

For lenders that are able to pull this off, it is a win-win situation. If the company refuses to cooperate, lenders cut their losses and continue with the receivership.

The combination of lack of expertise, resistance from corporate debtors, shortcomings of the judicial system and lack of transparency makes a rescue-oriented receivership unappealing. As noted in the previous chapter however, some restructuring still occurs in receivership. This is revisited in the discussion of multi-creditor restructuring below.

6.6.2. IPs' views

As stated earlier, most lenders appoint lawyers as IPs in Nigeria. When asked, some of the lawyers admitted that they are not always in the best position to serve as RM.

> *'I believe that if you really want a turnaround, anyone with no understanding of the business of the distressed company has no business being a RM. I am a lawyer and we make money from it but that is the truth. At the end of the day, we still end up hiring experts who want to be paid thousands of dollars per day. That is a lot for a dying business'.*[913]

IPs also admitted to feeling torn between the lender(s) and borrower, and having a hard time balancing their duties to both parties.

> *'You don't want to be seen as doing anything prejudicial to the interests of the company. At the same time, you don't want to be seen as betraying the lenders who appointed you. It is quite tough'.*[914]

In the end, most IPs tend to do the bidding of the lenders. This according to one of them, makes them take a heavy-handed approach to the process as they do not want to be considered weak or inefficient by the banks.

One IP admitted that taking a softer, more conciliatory stance as a RM has made him less popular, but in the cases where the stakeholders really desired a turnaround

[913] IP 2.
[914] IP 8.

(because of the importance of the company involved), they have sought him out.[915] Other issues identified with receiver managers were corruption and lack of integrity.[916]

6.7. Winding up

6.7.1. Lenders' views

Like some lenders do with receivership, winding up petitions for most of the lenders are used as a threat to bring the debtor to the negotiating table. They pointed out that this is particularly effective for politically exposed persons, who fear the reputational damage and are therefore forced to negotiate a payment plan.

> '*I must be honest, I cannot recall any winding up where we went through with the process. At first, they think we are not serious but once we get a court order to advertise the petition, they quickly come to discuss a restructuring plan*'.[917]

Thus, winding up petitions are targeted at companies that are believed to be going concerns or where the owner/managers have 'something to offer'.[918] For companies that have become insolvent or with less wealthy owner/managers, lenders do not consider them worth the trouble of a winding up procedure. They simply find ways to take what they can and walk away.

Interestingly, some courts may have begun to catch up to this practice and are reacting by exercising their discretion not to grant the winding up order.[919] One of the cases that three lenders brought up in the interviews was that of a big importing business that was indebted to a number of banks. In a winding up petition filed by one of the lenders, the directors of the distressed company argued that they might be able to pay

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[915] It would therefore seem that lenders know that it is possible to turn around companies, with patience and some sacrifice, but they mount the pressure for quick recovery on IPs because they are unwilling to wait.

[916] One IP mentioned names of RMs that have been caught in the act of embezzling already scarce funds from companies they were appointed to manage, without any legal repercussions.

[917] Lender 9. Another lender admitted that they wind up in extreme cases. When asked for his definition of extreme, he referred to debtors that never intended to pay from day one.

[918] Meaning even if the company is not viable, it might have influential owners whom, if pushed to the wall, will obtain funds from other sources to pay off some of the debt.

[919] CAMA does give the court considerable discretion in this regard. On hearing a winding up petition, the court has several options- it may dismiss it, adjourn the hearing conditionally or unconditionally, make any interim order, or any other order that it thinks fit. CAMA, s 411.

in the future if the court gave them time. Even though the legal requirements for the winding up were met, the court, to the surprise of the lenders, granted the company's prayer. In their view, the company was no longer viable, but the court was only swayed by the reputation of the company.[920]

6.7.2. IPs' views on winding up.

IPs confirmed that they are hardly ever engaged to wind up distressed companies. Most of the liquidation they do is in relation to corporate restructuring. In their experience, when a company is truly insolvent, it is uncommon to see creditors take the trouble to wind up the company. Rather, the banks strip the company by selling the assets and then abandon the shell.

6.8. Arrangement and compromise ('schemes')

6.8.1. Lenders' views

Commercial lenders had little to say about schemes and could only relate to its use for corporate restructuring, usually to achieve a capital reduction or a demerger. The scheme is often outside their contemplation for distressed debt restructuring, even though it provides a framework for such restructuring. When probed further, two of the lenders disclosed that schemes are less attractive because of the previously discussed uncertainty around the kinds of arrangements that the CBN would sanction.

6.8.2. IPs' views on schemes

Insolvency practitioners also had reservations regarding the use of schemes, but their answers were based more on a technical understanding of the procedure. Two IPs highlighted that schemes of arrangement in Nigeria suffer drawbacks such as the lack of moratorium and an inability to obtain a universal stay of proceeding. These issues are further complicated in Nigeria by the weak state of the courts.

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[920] While it is a good step that courts are conscious of the need for corporate rescue, there must also be certainty and these decisions must not be based on sentiments but on clear proof that a company is not better off liquidated. The participant also made the point that since the company was past the point of turnaround, such a court other only gives room for the company directors to quickly hide away and sell assets and leave a shell for the creditors.

Considering that many Nigeran contracts increasingly choose English law as the governing law, it became important to explore whether a scheme involving Nigerian creditors can be done in the UK and enforced in Nigeria. Legal practitioners could not provide easy answers to this question. One lawyer thought that such a scheme might run into enforcement difficulties. Rather than being considered as a foreign judgment that can be registered in a Nigerian court, it could be interpreted as an attempt to apply the UK Companies Act in Nigeria. Two other lawyers were more optimistic about the possibility of sanctioning a UK scheme in Nigeria. In their view, Nigerian law allowed parties freedom to choose the law to govern their contract. If they have chosen English law, their choice would be honoured by the courts and such a scheme will be registrable as a foreign judgment.[921] It may however not be possible to cram down a whole class of creditors or bind creditors in Nigeria that have not participated in scheme. The lawyers opined that because the system is still developing, the rules can be quite flexible and well-respected lawyers can take advantage of this to pitch innovative ideas to the court.

Summary of findings: concentrated ownership and control, a debt recovery culture and mutant institutions.

Stakeholders emphasised that from their experience, the owner-manager company structure is predominant in the Nigerian corporate environment. This impacts corporate lending and informs the response of stakeholders to financial distress.

Lenders believe that most owing companies can find a way to raise the funds, whether from the business or other sources. They reported that with creative recovery strategies, managers always find a way to pay at least a proportion of the debt. This incentivises lenders to focus on diligent, and sometimes aggressive recovery. In pursuing recovery, lenders did not draw a clear distinction between the company's directors and the company itself, even where big companies were concerned.

The interviews also provided more clarity on how the insolvency legal framework is perceived and used by stakeholders. Stakeholders have an uneasy relationship with

[921] Foreign Judgments (Reciprocal Enforcement) Act 2004, part 1& s 10(a) and the Reciprocal Enforcement of Judgments Act 1958.

the law and the courts that administer them. Courts are largely used as a tool by a party who seeks to get around the law rather than enforce it. For debtors, it provides a form of forced moratorium, to keep the creditor from pursuing recovery but with no rescue plan in place. For the creditor, winding up and sometimes receivership *petitions are often* a tool to achieve an arm-twisted-behind-back form of restructuring. For the IPs, legal institutions provide a means to achieve recovery at all cost. Frameworks like schemes that are complex and provide little openings for such easy manoeuvre are seldom used. Also, because corporate rescue has not taken root in the system, there is no difference in the execution of a simple receivership and one managed by a RM.

Again, more skepticism among stakeholders of each other's professional expertise is revealed, this time directed at lawyers and judges. Lenders consider lawyers ill-suited to act as receivers because they lack the skills required to understand business and finance. They however feel bound to keep engaging lawyers because of the potential of receiverships to get litigious.

It is noteworthy that the issues identified by the participants here are aggravated by lack of transparency, corruption, a weak judicial system and poor corporate governance. These recurrent themes in the interviews were discussed in the previous chapter. There were anecdotes and examples to suggest that corruption is woven into the fabric of the society, again suggesting that it is a cultural problem. Whether this perception is rightly shaped by reality, imagined or exaggerated, it feeds the culture of distrust and suspicion among stakeholders. Because there is no legal framework to regulate the actions of parties, this lack of trust poses a serious challenge for corporate debt restructuring.

SECTION THREE: MULTI-CREDITOR RESTRUCTURING: A GROWING PRACTICE IN NIGERIA.

One of the goals of the interviews was to understand the experience of stakeholders with multi-creditor restructuring. As discussed in chapter three, it is important for a distressed company with multiple creditors that all creditors can agree to a restructuring plan rather than unilateral (and conflicting) action by each creditor.

Multi-creditor restructuring happens less frequently in Nigeria and in addition to the constraints discussed above, it comes with unique challenges of its own.

6.9. The lenders' account of multi-creditor restructuring

Coordination problems

Most of the lenders struggled with the question on multi-creditor restructuring because of their limited experience with it. Their answers revolved around coordination problems and a lack of moratorium, reflecting some of the issues identified with private workouts in chapter three.[922]

It was difficult for most lenders to think of multi-creditor restructuring other than in cases where there had been coordination at the time of borrowing. Thus, they struggled with the idea of a multi-creditor work out where the facility was not a syndicated loan, or the creditors were not united by a debenture trust deed.[923]

There is room for coordination where different creditors are party to a syndication or a debenture trust deed. With the latter, the lenders loan the company money at different times but become party to one debenture trust by seeking the permission of the existing lenders. When the company runs into difficulties, the appointed trustee coordinates recovery. However, lenders admitted that within this set up, circumstances still arise that make it necessary for each party to fight for its own interests. The tendency is for the bank with highest exposure to try to get ahead of the others, even though they are all equally ranked in priority. This would often result in litigation. A lender cited an ongoing case where the three lenders decided to appoint receivers individually rather than appoint a trustee, because one bank made the first move to do so.

Thus, even where there was coordination at the time of borrowing, coordinating to resolve financial distress is difficult. Nevertheless, some lenders shared their

[922] Ch 3, section 3.3.1.

[923] Having identified syndication as a criterion for multi-creditor restructuring, lenders pointed out that they were not very common, at least for the smaller banks (this happens to be about 50% of the banks in Nigeria).

experiences with multi-creditor workout both for syndicated and non- syndicated borrowing.

Self-interest and lack of moratorium

One of the banks narrated an ongoing case of a publicly-owned company with multiple bank lenders. When the company became distressed, the bank's lawyer suggested what he termed a '*multilateral creditor scheme* 'where all the banks come together, conduct a joint audit of the company and make a restructured payment plan based on the business review. [924]

The proposed scheme got no traction because while the discussions were still ongoing, one of the banks filed a winding up suit. When asked to suspend the petition and give the scheme a try, the bank refused. According to the lender, this was because the petitioning bank *strangely* believed they were in a stronger position by being the first to present a winding up petition. Strange because (i) all the banks gave a negative pledge and were equally ranked as there was no collateral and (ii) the petitioning bank was the bank with the least financial exposure. Therefore, in a winding up proceeding, there was no reason why they would be in a better position than the other banks. However, this may not be completely irrational reasoning considering the previously discussed use of winding up petitions as a threat. The managers of the company may be forced to scamper around to pay the company that delivers this threat, even though they are not the ones with the biggest exposure and have no priority over other banks.

In a different interview, another lender confirmed that the main reason why multi-creditor restructuring would not work is because some lenders would always believe they can benefit more outside of the process. He admitted that if his loan is fully secured, anything short of selling the charged assets would be unacceptable to him.

> '*Any one that has something valuable would not want to join the consortium at that point. There would be winners and losers, and the security holder is likely to*

[924] Lender 9. The participant stated that he suspected that the distressed company had put the lawyer up to it.

be on the losing side as he may not get optimal return. In that case, I would prefer to go unilaterally'.[925]

In the 'multi-lateral scheme' example, the participant also disclosed that apart from the lack of cooperation from the bank that petitioned for winding up, other lenders (including his bank) were reluctant about the process. One of the issues was the period of time they would have had to wait for the company to recover. Another constraint was the reluctance to inject new money into the business and a general lack of faith in the process, perhaps due to the absence of a legal framework. As one banker said regarding a proposal for multi-creditor restructuring;

'our lawyer believes that we should give this joint restructuring a try, some of us think that he just wants to use us for an experiment'.[926]

Relationship among lenders

Two banks thought that they would be reluctant to do a multi-creditor workout, especially when the other banks involved are bigger. They claimed that there is a culture of bullying in the banking industry and in a multi-creditor workout, they could expect that the bigger banks would stifle the smaller ones in an attempt to improve their position in the restructuring process.[927]

One lender pointed out that some banks are more responsive and cooperative than others. Unresponsive banks are not diligent with monitoring and they are often very impossible to deal with. They are notorious in the industry for being ruthless and unyielding and this makes it difficult to partner with them.

'There are some banks that once I hear that they are in a consortium or syndication, I would not even go near it'.[928]

[925] Lender 8. This is in line with the discussion in chapter one of the rational aversion of secured lenders to reorganisation.
[926] Lender 7.
[927] Because the smaller banks form the larger proportion of banks in Nigeria, this lack of trust potentially stands in the way of the growth of multi-creditor restructuring in the country.
[928] Lender 5.

Potential coordinating committee for informal restructuring

Interestingly, commercial banks in Nigeria have found a way to cooperate and coordinate themselves for other purposes. This is seen in the Bankers' Committee, an association created by the bankers. The bankers described the committee as a private body that bankers and customers can approach for information, to lodge a complaint and resolve bank-customer disputes. The Bankers' Committee is funded by all the banks and in the view of one lender, can be a useful starting point for achieving coordination among the banks.[929] Other banks were however less enthusiastic about the committee's value to multi-creditor workouts, stating that a more independent body that was not affiliated to the banks would be in a better position to coordinate the process.

6.10. Multi-creditor restructuring from the perspective of IPs

Insolvency practitioners provided more nuanced answers to questions around multi-creditor restructuring. Some of their responses demonstrated how the views expressed by lenders play out. One of the insolvency practitioners recounted their experience with a big oil company ('*the case*'). Because it provides a practical example and explores most, if not all the issues highlighted by the other IPs, this case will be the focal point from which the views of IPs on multi-creditor restructuring are presented.

The case of the oil company

The company was a large company in the oil and gas industry, owned by a patriarch whose sons also served as chairman and board members. The company was on the brink of insolvency as a result of being unable to generate the cash flow to pay over four billion naira ($5 million) owed to a consortium of five Nigerian banks, a foreign creditor and an institutional lender.[930] The banks had joint security over some of the assets (in the form of a debenture trust) and some members of the consortium had individual charges over other assets. After struggling to restructure unilaterally,

[929] This committee could potentially play the role of authorised committees like the Indonesia JITF under the Jakarta Initiative, in the implementation of guidelines for informal debt restructuring. Ch 3, 63-64.
[930] Excluding debt to other creditors such as suppliers and trade creditors.

lenders put the company into receivership by appointing a receiver manager and attempted a multi-creditor workout during the receivership. The receivership was useful for surmounting some of the coordination problems highlighted by the lenders.

Coordination problems and decision making

All the IPs emphasised that one of the main issues with multi-creditor restructuring is that lenders find it so hard so decide among themselves. One of the factors that made lenders come to the restructuring table at all in *the case* was the involvement of AMCON.[931] Unfortunately, while AMCON is often able to bring lenders to the table, there is a limit to the resources it can provide and its ability to demand cooperation from them. Despite the fact that the receivership provided some form of coordination through the RM, there was no mechanism for decision making.

The IPs in *the case* narrated how they drew up several term sheets and lenders could not agree to any one of them in the end. In their experience, lenders find it hard to decide because of two factors, distrust (of the company, the IPs and other lenders) and the perception that they are (or could be) in a stronger position than the others.

The effect of security interests

One bone of contention among the lenders was security. The banks that *thought* they had good security over some valuable assets proved to be the most difficult parties during the restructuring process. They refused to agree to virtually all the proposals, on the basis that they would be in a better position outside the restructuring process. This is a rational position to take, if one has existing and enforceable security.

Interestingly however, they did not realise that the security they took such great comfort in was only valuable on paper. This case clearly shows how security provides little comfort in the Nigerian lending industry. Once the lenders moved to take action against the company, the bulk of the assets were quickly depleted by the owners and the lenders had no clue until the receivership was well under way.[932] It was upon

[931] AMCON had bought some of the debts of the company from some banks and therefore participated in the restructuring as a creditor.
[932] The IP pointed out that it was not uncommon for lenders to put their faith in assets that they have neither seen, valued nor made efforts to monitor.

investigation by the IP that they realised that some vanished into thin air, some were in bad shape requiring millions to be revamped, and others were the subject of court action where the claim value exceeded the value of the assets, leaving the life of the company hanging on a few solid assets.

In this situation, the banks that had security over those good assets were not about to compromise. To make it worse, lenders blatantly disregarded their commitments under the loan documents. It did not matter that all the loans were extensively documented and properly executed. A proposal from the restructuring professional was to pool the assets together for the restructuring while maintaining the priority of payment. Again, this proposal was rejected, as the secured creditors insisted that the other creditors buy into the security by contributing new money.

Commercial orientation of lenders

Another major issue that IPs found in multi-party restructuring was that banks were not always commercially realistic and flexible. They often came with a fixed idea of how a restructuring should go - a corporate debtor who is willing to bend over backwards and pay the debt by any means necessary, failing which the bank pursues aggressive recovery. Their understanding of restructuring was also limited to granting longer tenures or reducing interest rates. They therefore found it difficult to adapt to different kinds of debtors and commercial realities. In *the case*, the IP pointed out that this behaviour manifested in different ways. For example, the lenders immediately demanded that the RM sell the company's assets once he gained control. It took a lot of convincing by the IP for the lenders to agree to work the assets instead, as selling them would not have yielded more than 10 per cent of the amount owed.[933] Also, during the restructuring, the lenders paid little attention to the cost implications of their decisions. Forgetting that they were now the residual beneficiaries, they mounted up costs, claiming the debtor was to bear the costs of the restructuring.

One recurring issue in the restructuring processes is that banks dominate the restructuring and creditors such as suppliers (trade creditors) are often left out. This

[933] Working these assets was estimated to bring in about $90,000 per day (although the business was also capital intensive).

remains the case even where the larger proportion of the debt is owed to suppliers.[934] Many large servicing companies would usually have a massive number of suppliers and this is one of the often-overlooked factors that can destroy the whole process. IPs pointed out that banks are often blind to supplier obligations and insist on restructuring debtor's obligations without factoring these obligations in. This always results in unrealistic figures and projections for the restructuring. Admittedly, coordination may be more difficult to achieve with the involvement of suppliers. However, the exclusion of their interests from the process creates difficulties as the company eventually gets drowned by demands from suppliers. In *the case*, although trade creditors were not involved in the restructuring, the IP reported that they constantly harassed the borrower and the RM. In his view, this was one of the reasons why the restructuring could not have worked.

Attitude to new finance

IPs confirmed that turnaround finance, which is arguably the lifeblood of restructuring is also a major challenge. Once they have entered a formal insolvency process, the provision of additional finance is usually out of the question for banks as they are become anxious to exit the process. In one IP's experience, the grant of priority to providers of additional finance causes considerable difficulties that they are often unable to resolve. He cited an ongoing multi-creditor restructuring where a proposal had been made for additional facility with enhanced priority for the finance providers. The existing creditors however refused to offer this priority as they argued that they were all making concessions in the restructuring and these concessions were tantamount to rescue finance because without them, the restructuring would not work.

IPs have sought to explore other sources of rescue finance such as equity investment with little success. They admitted that the entrant of DDIs into the market would make a huge difference but were not very optimistic because while some investors are

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[934] For example, in the ongoing Etisalat case, a huge percentage of the debt is owed to HIS Towers even though the restructuring is dominated by the consortium of banks. Akinpelu Dada and Ozioma Ubabukoh, 'Etisalat, lenders disagree over $1.2bn loan repayment' *The Punch* (23 June 2017) <http://punchng.com/etisalat-lenders-disagree-over-1-2bn-loan-repayment/ > accessed 10 September 2018.

beginning to trickle into the field, the debt market remains underdeveloped. They also believed that it would take investors who have a very high appetite for risk to invest in Nigeria's distressed loans.

Lack of cooperation from debtors

The RM in *the case* reported that the first challenge they faced was intense resistance from the company owner/managers to the receivership. It took months of court hearings, intervention from law enforcement and persuasion, before the receiver manager could finally take over the company. During this time, the IP involved had cause to believe that their personal safety was under threat.[935]

One other issue identified by IPs was the attachment of distressed companies to idle assets. These assets are non-core assets like landed property and buildings that can provide funds for the business to be turned around. In an ongoing case observed in the process of this research, the total debt figure was about 500 million naira (USD 1.4 million) while the idle assets that could have been sold came up to 250 million naira (USD 690, 000). The company remained adamant to recommendations to sell the assets claiming they could get more value for the assets under better economic conditions. While this is a conceivable argument, they seemed to miss the point that one of the reasons they were on the brink of insolvency in the first place was the adverse economic condition and they stood to lose both the business and its assets.

IPs argued that attachment to idle assets is more of an emotional than commercial or rational reasoning. For them it is closely related to the tendency of owner/managers to desperately hold on to a sinking company, against all reason. Restructuring professionals were of the view that many owner/managers would rather have a hundred per cent stake in a dying company than ten per cent in a healthy one.[936]

The role of foreign actors

Interestingly, the large restructurings that have happened recently and are currently underway in Nigeria involve foreign creditors (and their advisers) from jurisdictions

[935] Other IPs confirmed that this was not an uncommon experience with receivership.
[936] Since this kind of dilution is likely to happen in Distressed Debt Investment, an IP pointed out that it is potentially a barrier to its use as a restructuring tool.

with more developed restructuring and insolvency laws. The interviews sought to investigate the influence of these creditors on multi-creditor restructuring, particularly whether they have tried to apply modern restructuring principles in the way they handle the process. IPs admitted that the decision to restructure distressed companies can be partly attributed to exposure to 'new ways of approaching debt problems' globally and the fact that many big Nigerian companies increasingly have foreign creditors and investors. This means that foreign professionals such as international law firms and investment banks are often involved in the process. The Nigerian government in a bid to protect jobs and other systemic risks associated with the collapse of big companies, also weighs in on the decision and participates in the process, usually through AMCON. IPs however stated that while foreign creditors are open to participating in a rescue process, their presence has not made a significant difference.

> '*Foreign creditors don't come with the approach of corporate rescue even though that is what happens in their countries. They want their money immediately*'.[937]

An IP relayed his experience in the financial restructuring of a big company where foreign creditors prolonged the process by demanding a government guarantee as the condition for their participation in the process.

Summary of findings: multi creditor restructuring, coordination problems and lack of clear guidelines.

Multi creditor debt restructuring is gaining some popularity as a stakeholder response to the financial distress of big companies. This restructuring can occur purely as an informal process or as part of a formal process- usually receivership. Restructuring of this kind is often accompanied by a corporate rescue goal. In some cases, the process enjoys government support, because of the economic significance of the corporate entity in question. The trend towards the restructuring rather than recovery/liquidation of big companies increasingly involves foreign actors (creditors,

[937] IP 1.

investors, lawyers and other professionals) even though their participation does not always make a significant difference to the process.

Attempting a restructuring within a receivership provides a form of moratorium and means of coordinating creditors, but several challenges remain. Even though CAMA contemplates the use of receiver management as a rescue device, it is still viewed as a recovery process, even by IPs. For example, damaging enforcement actions by security holders is not curtailed, and it is evident from *the case* that this can impede the process. Also, the absence of clear guidelines creates confusion for all involved. Like with informal restructuring, there is no requirement to come up with a clear rescue or restructuring plan, neither is there a mechanism for decision making. The provision of turnaround finance is also problematic.

In the interviews, lenders were opposed to the idea of super priority for rescue finance as they considered that this would be an unfair advantage over other creditors who have submitted to a restructuring. Also, the receivership and restructuring are treated as separate processes. In *the case*, the IP explained that there were two separate work streams for the receivership and the restructuring. The receiver manager oversaw the recovery while a separate team handled the restructuring. Treating the receivership and a restructuring that occurs within it as two separate procedures not only creates confusion, it also has adverse cost implications for an already distressed borrower.

These issues indicate the need for a framework for multi-creditor restructuring to provide clear guidance for the process and resolve coordination problems.

SECTION FOUR: PROPOSED REFORM

Another major aim of the empirical study was to understand the views of stakeholders regarding the proposals for corporate insolvency law reform in Nigeria. The questions focused mostly on the proposed introduction of administration and the CVA procedures.

6.11. The Lenders' views on the reform proposals.

When asked if they were familiar with the proposal to reform corporate insolvency law by introducing these procedures, only two lenders knew that an insolvency bill

existed.[938] They however had no idea about the changes that the Bill was trying to make.[939]

It became the task of the interviewer to give the lenders some education about what the Bill proposes and how the administration and CVA procedures work.

Based on their reaction to proposed changes, there were three categories of lenders: The first were those who disagreed with the introduction of administration for different reasons. For example, some of the lenders in this category immediately saw similarities between administration and receiver management and transferred their skepticism of receiver management to the administration procedure.

The second group of lenders had their reservations but thought that the law might do some good, to the extent that the rules are clear, and the law learns from the pitfalls of receivership.

The last group did not engage with the substance of the reform. They either thought it was unnecessary, unlikely to happen or irrelevant to their work.

Category 1[940]

On learning that corporate rescue is a crucial component of the administration procedure (unlike in receivership), and that the administrator enjoys more independence from the lenders in the performance of his duties, many lenders became skeptical. Almost all the lenders[941] expressed resistance to any rules that might have the effect of binding them to a restructuring process. They maintained that the banks are already very heavily restrained by regulation and when it comes to decisions around debt recovery, there should be '*no additional regulation in a bid to save businesses*'. These lenders did not dispute the value in debt restructuring but would like the freedom to decide when and how to go about the process. They considered it unwise

[938] One of them read about it in the news and the other heard about it through a friend that was an executive member of BRIPAN.

[939] They pointed out that they should ordinarily be contacted about reforms that might impact them and asked to make comments, but they had not been intimated of any such plans regarding the Bill.

[940] Seven lenders fell in this category.

[941] Two of the lenders thought that having a framework that binds all lenders to a rescue process was a good way of ensuring corporate rescue.

to waste time in administration only to begin a long, court-driven recovery process *when* the administration falls apart.

> *'How are we sure the assets are not deteriorating while we wait around for an administrator to turn the business around? Are the insurance policies for the assets still in place?'*[942]

> *'At the end of the day, whose interests are we protecting? The lenders can sell their assets, so it's not them you are helping, you are just elongating everyone's suffering'.*[943]

A related point that lenders made was that as long as problems like high cost of funds remain unsolved, there is a limit to how many concessions banks will be willing to give or how long they want to wait.

> *'In England, you have close to a perfect system, here you have a lot to deal with. In Nigeria, the procedure is likely to become prolonged and court-driven' one lender pointed out.'*

Additionally, lenders expressed the fear that debtors would exploit the administration process and only initiate it as a delay tactic. Although administration is largely a creditor-controlled process, banks believed that it would encourage default from debtors who are already recalcitrant and eager to take advantage of every loophole. Also, the lenders reasoned that the court system will continue to be a problem with administration.

> *'Do you know what would happen in Nigeria? They will kill themselves in court right from the appointment stage, even more than they already do in receivership, because a lot is at stake for creditors here.'*[944]

These issues are complicated by a deep distrust among stakeholders in the Nigerian debt market. Lenders do not trust corporate debtors, their colleagues in the industry, courts and insolvency practitioners.

[942] Lender 3.
[943] Lender 8.
[944] Lender 9.

'The administrator will come with the aim of stealing his own portion of the little money available.'[945]

On what would happen if the law is eventually passed, some lenders doubted that it would get passed. Others predicted that if it did get passed, they would either not use the law, find ways to avoid its provisions through prolonged litigation or reducing the amount of corporate lending that they do altogether.[946]

Category 2[947]

Some lenders recognised that pursuing individual enforcement does not guarantee that a lender will get more returns. With a framework unifying the lenders and providing an avenue for coordination, it may be possible to achieve a value-preserving restructuring.

These lenders thought that a legal framework that provides for a moratorium would be very helpful as it would reduce litigation and eliminate extreme recovery practices by lenders. One of the lenders also mentioned that administration would help to provide better management for distressed companies. He imagined that the effect of administration would be that insolvency practice is no longer dominated by lawyers but by IPs with technical expertise.

Category 3[948]

This group of lenders did not delve into the merits or demerits of administration and CVA. They were either detached from insolvency law generally and/or simply dismissed the reform as unnecessary or misguided.

[945] Lender 1.

[946] According to one lender, banks are already beginning to boycott corporate lending because of the difficulties that attend enforcement and recovery. They are increasingly shifting towards retail lending.

> *'Let me give 100 million naira to 50 individuals, they won't all die or default at once. Better than giving all that money to a company that can suddenly go bankrupt'.*

[947] Six lenders fell in this category.

[948] Two lenders fell in this category

'It is the IPs that are trying to put the law together, so we are not the ones going to use it. Insolvency law might concern us, but I have not taken any particular interest in it'. [949]

The lenders thought that the proposed reform was just another irrelevant law that only sounded good in theory.

'If we get our court system right, we won't need them. There is no lack of laws, we only need to use what we already have effectively'.[950]

'What we need are commercial courts that can dispose of cases very quickly'.[951]

A lender thought that it was generally a bad idea to provide formal guidelines for debt restructuring and corporate rescue. He said that this could be limiting because in his experience, most of the creative ideas that have worked in distress situations have come from the most unexpected sources.

'Policies are straitjacket, but every corporate debtor is unique. In a moving economy like ours, we need to constantly review policy based on experience'.[952]

6.11.1 Lenders' views on a debtor in possession system.

All the lenders were asked for their views on the US DIP system, and whether it would be a better alternative to administration. Except for one, lenders were largely opposed to a debtor in possession framework because of their distrust for the debtors in terms of management, integrity, competence and willingness to pay.[953] Lenders believed that a system that leaves debtors in charge arms those debtors with 'more powers to misbehave'. A lender lamented that a form of debtor in possession system is already

[949] Lender 11.
[950] Lender 13.
[951] Lender 13.
[952] Lender 13. This echoes the arguments by Allen and Qian that in fast growing regions, the ability to conduct business and settle disputes outside the formal institutions may be superior to a strained resort to western-style institutions. This is because of the costs associated with constant revision of laws to adapt them to the rapidly changing economic environment. Allen and Qian (n 496) 118.
[953] These issues have been discussed earlier in the chapter.

creeping in through the backdoor. This comes in the form of the courts granting the prayers of distressed companies for more time to run the business.[954]

6.12. IPs' views on proposed reform.

Like the lenders, IPs were divided in their views about the relevance and effectiveness of the reform.

6.12.1. BRIPAN members

Describing the reform process, the BRIPAN executives who were interviewed stated that a committee was set up to deliberate on the BRIPAN Bill. The committee was made up of representatives of banks, some companies and insolvency practitioners.[955] Answers were vague on whether the larger body of stakeholders had been consulted for comments on the Bill. One participant pointed out that a few stakeholders were consulted while another one suggested that stakeholders, particularly bankers, were often too busy to respond to such requests. One of the participants revealed that the Bill produced by BRIPAN had met with some competition in the senate as a different group proposed a different insolvency bill for legislation. At the time of the interviews, participants were uncertain about how these issues would be resolved or what the fate of the Bill would be.[956]

6.12.2. Views of other insolvency practitioners about reform proposals.

Category 1

Not all IPs (including some that were members of BRIPAN) had heard about or taken any interest in the Bill. They however had opinions about the changes that the Bill proposes to make.

[954] An example is the winding up petition discussed above, where the court denied the petition in response to the company's arguments that it had prospects to continue contributing to the economy.
[955] The committee's choice of English law has been discussed in the previous chapter. See Ch 5, 166-167.
[956] In May 2018, it was announced that the Companies Act reform had passed its third reading. The Companies and Allied Matters Bill purports to introduce the administration and CVA procedures. In this new form, it is unclear to what extent BRIPAN and other stakeholders in insolvency reform were involved in the reform process, but the reform is not as comprehensive as the BRIPAN Bill envisaged.

One of the IPs said that a restructuring framework is needed, even if only to provide a moratorium. The law will also help the courts to make recue-oriented decisions.

> *'The courts currently have no basis to deny dissenting lenders, and a law that gives them such grounds will do some good'.*[957]

Another insolvency practitioner thought that the proposed reform would have some positive impact because ongoing informal restructuring attempts could benefit from some formalisation. In his view, the adjustment process might be difficult, but the market would eventually buy into the law and align its practices with it. This adjustment process would require a reorientation for stakeholders, who must learn to use the court as a facilitator rather than an obstruction. He used arbitration as an example of a system that was initially misunderstood. Until recently, arbitration was almost always a first stage to litigation. However, through years of education and advocacy, courts are beginning to understand that the whole idea of arbitration is to limit court intervention to a bare minimum.

An IP pointed out that one of the values that the reform would bring is to make it easy for companies to move across insolvency procedures in an efficient manner. In his view, it is quite challenging to make the transition from a restructuring to a recovery process and vice versa.

Most IPs also admitted that a restructuring framework would take care of the lack of clarity and uncertainty in the market. This is often a problem in restructuring because they are constantly on edge that all the hard work can be toppled by one creditor or regulator that disagrees. Because there is no enabling framework, the parties are often unsure of the legal implications of restructuring strategies and this makes stakeholders reluctant to invest time and effort in restructuring. As one of the lenders pointed out, they often regard restructuring plans as experiments.

Category 2

Not all the IPs were enthusiastic about the proposed reform. One IP said that he had not seen the law and did not need to do so for him to conclude that it was unnecessary.

[957] IP 6.

He maintained that existing laws provide the needed framework for restructuring and they only need to be enforced properly.

Another IP pointed out that because the market is lacking in transparency, integrity and trust, whatever reform is introduced will eventually be neutralised to the function the way receivership does. There will continue to be a need to deploy law enforcement agencies and engage in endless litigation to enforce the law. In his view, the situation becomes even worse if prepacks find their way into the system as there are no proper safeguards and checks on corporate fraud.

Other objections came from practitioners who saw no real difference between receiver management and administration. In addition to this, one IP's objections were informed by his opinions of the promoters of the Bill. He pointed out that they have a very limited understanding of finance as they are mostly litigation lawyers, and '*this is evident in the way they practise receivership*'. In his view, the reform is unlikely to change anything because it would be dominated by the practice of the drafters, whether in the way it is worded or in its interpretation and enforcement. Thus, even if a commercially sound law is passed because of the transplant from English law, the practice remains the same.

Summary of findings: proposed reform, disengaged stakeholders and divided views.

Participants responded to the proposals for insolvency law reform with mixed reactions. Lenders were either completely ignorant of moves to change the law, in strong disagreement with, or unbothered by the proposed changes.

When asked to choose, 14 out of 15 lenders thought that a creditor-oriented administration regime was more appropriate for Nigeria than a debtor-controlled system. Insolvency practitioners also shared this view. Lenders however struggled with the idea of a law that would curtail their freedom to resolve corporate debt as they deem appropriate. They were of the view that the regulatory constraints they face and the difficult debt environment within which they operate make it unacceptable

for them to be locked into rescue efforts. As noted in the previous chapter, this group of stakeholders have the power to foil the settling of the law at the stage of implementation. Indeed, lenders in Nigeria are not oblivious of their power as creditors and of the loopholes in Nigerian institutions. Some lenders said that if a law that had the effect of placing them in this position gets passed, they would boycott the law or resort to creative application.

Other participants objected to the reform on grounds that existing laws are sufficient, and the only reform needed was institutional reform. They insisted that laws would work if the institutions, especially the courts, work as they should. While it is right that an efficient court system is vital, it would seem that the lenders who thought that this was enough held that opinion because of their focus on debt recovery and not insolvency and restructuring law as a whole.

Insolvency practitioners were more open to the enactment of a framework for debt restructuring although they highlighted the need for reorientation and institutional reform to avoid a duplication of existing framework in practice. Considering that stakeholders (including some IPs) have already assumed so easily that there is no difference between administration and receiver (management), the concern that a new law would make no difference in practice is understandable.

In general, most participants seemed disengaged from global norms of insolvency. For lenders, even though they were aware that advanced countries aim to rescue viable companies, they extricated themselves from these norms on the ground that the environment within which they operate calls for different methods, unlike advanced economies that have '*near perfect systems*'.

IPs were more aware of systems like Chapter 11 and UK administration, even though many of them had no knowledge of the proposed reform in Nigeria. Practitioners who were not members of BRIPAN felt disenfranchised from the reform process.

IPs who were directly aware of and/or involved in insolvency reform represent a very small percentage of practitioners in Nigeria. This may be due to the fact that

insolvency practice is not regulated in Nigeria, making almost any legal practitioner or accountant eligible to practice as an IP. The few IPs involved in the reform did not express optimism about its progress. While global actors such as INSOL and the World Bank are supportive of the reform process, the BRIPAN-led reform is short on political support.

SECTION FIVE: DEVELOPMENTS IN RESTRUCTURING PRACTICE.

Nigeria is beginning to experience some changes that can impact the restructuring practice in the country. The two developments that came out most prominently from the interviews are - the initiation of restructuring by skilled professionals and the rise of distressed debt investment.

6.13. Skilled restructuring professionals (RPs)[958], Lessons from a participant observation.

Professional service providers and business consultants have taken a keen interest in debt restructuring in recent times. Some interesting observations came out of speaking with this group of practitioners and observing an ongoing debt restructuring. Although RPs have on occasion been engaged by lenders in multi-creditor restructuring to conduct business reviews and cash flow projections, they have started taking a more active role by initiating and driving debt restructuring. This means that they have had to go through distressed companies to initiate the process rather than wait to be engaged by lenders after the decision to restructure is made.

The contribution of RPs is useful because it gives us some insight into the role and perspective of corporate debtors, even though no debtor was directly interviewed in this research.

The restructuring professionals pointed out that one of the reasons that lenders seldom initiate restructuring is because the lack of coordination among them makes it hard to decide to restructure. RPs have therefore stepped in by adopting the strategy of finding distressed companies through market research in order to propose a

[958] The term restructuring professionals is used here to distinguish between this group of professionals and other IPs.

restructuring to them. They target troubled companies that either have high prospects for a turnaround or the backing of a foreign major shareholder. The restructuring professionals are efficient at this because they have the required resources, skill set and connections both within and outside the country. After the research, they put a proposal together and approach the company owners/managers. Apart from the restructuring process itself, they perform two important functions. The first is an independent business review to enable them (and potentially the lenders) draw an educated conclusion about the viability of the company, and the value to be derived from restructuring. Secondly, once they have established that the company is viable, they play the crucial role of restoring the relationship between the company and its creditors and bringing them to the table. Because of the reputation and skills of these restructuring experts, creditors are more open to discussion. Also, the fact that the restructuring professionals are private, independent experts rather than regulatory bodies makes it easier to convince creditors to consider a multi-creditor restructuring.

This practice is however not without its challenges. Firstly, it is difficult for the expert to control the actions of the debtor as they are technically employed by them.

One situation where this manifests most strongly is when change of management is crucial to the survival of the company. RPs lack the authority to displace the management that they report to. They admitted that this kind of control may be easier where they are engaged by the banks. Apart from change of management, RPs find that they must work hard (sometimes without much success) to elicit compliance with their recommendations from the debtors.

An ongoing case observed by the researcher illustrates these points clearly. The distressed company was one of the top manufacturers of iron aluminium in the country. The company had a large market share, with their products being a household name across Nigeria and parts of West Africa. Unfortunately, the company was indebted to six banks and was not generating enough cash flow to meet its debt obligations. After being instructed by the company, the RP conducted an IBR that revealed that the company was viable, and its products were in high demand. Lenders were brought to the restructuring table and the various debts were reorganised into a

'syndicated facility' where all rights and priorities remained intact. The syndication was to make the process easier and streamline decision making. The RP came up with a restructured payment schedule based on new cash flow projections and was tasked with the responsibility of monitoring the company and providing periodic reports and recommendations based on the company's performance. It soon became clear that the company was not going to meet its next set of obligations under the restructured schedule.

One of the factors that the RP identified as a major issue was poor management. It was clear that the management had become jaded, lacking in enthusiasm and creativity. This reflected in their attitude not just towards the running of the company, but also towards the restructuring. It took weeks of chasing and coercing for management to respond to the IP's requests for information,[959] they did not always honour meetings, rejected several suggestions for salary cuts and continued to take expensive trips abroad. The RPs however felt constrained to act and could not include these in their reports to the creditors.[960] Notwithstanding these challenges, RPs were optimistic that increased involvement of skilled professionals (especially if they can go through the lenders) is bound to fuel the growth of debt restructuring in Nigeria.

6.14. Distressed Debt Investment

As discussed in the previous chapter, Distressed Debt Investment (DDI) is gradually becoming part of the conversation in the African debt market. Although stakeholders had some reservations about the use of DDIs in Nigeria, there is more optimism as the debt market grows, evidenced by the proliferation of bonds in the country.[961] Also, with AMCON no longer purchasing NPLs from them, banks have begun to look for creative ways to deal with distressed assets on their hands. An IP cited the case of a Nigerian bank in the process of selling its troubled assets to a private equity fund.

[959] The IP pointed out that this was caused by a combination of incompetence and having too many skeletons to hide.

[960] One can draw the preliminary conclusion from the RPs' experiences that while some managers may be genuinely interested in early intervention and debt restructuring, a debtor in possession system may not be ideal in the Nigerian context.

[961] Babajide Komolafe, 'Eurobond: Nigeria's External Reserve to Hit 54 Month High of $45 billion' *Vanguard* (19 February 2018) <www.vanguardngr.com/2018/02/eurobond-nigeria-external-reserves-hit-54-months-high-45bn/ > accessed 8 September 2018.

Another bank recently set up a debt resolution vehicle where the banks would transfer all its troubled assets to the vehicle and then explore options for the resolution of those assets.[962] In a bid to supplement the work of AMCON, the CBN in April 2017 announced proposals for the licencing of Private Asset Management Companies in Nigeria.[963]

Banks considered the introduction of distressed debt investors in the Nigerian loan market a feasible solution. In their view, these investors are better placed for restructuring and corporate rescue, as they are not bound by the same constraints. However, banks would approach DDIs with some caution and would only be inclined to transfer distressed loans to DDIs if valuation is transparent and fair.

Summary of findings: the emergence of skilled restructuring professionals and distressed debt investment

As restructuring acquires a new layer of complexity because of the involvement of foreign investors, shareholders and creditors, multi creditor restructuring is beginning to gain momentum. The role of investment bankers, professional services firms and accountants is also becoming more prominent. Increasingly, restructuring professionals who have previously maintained a distance from the recovery-dominated insolvency system are coming into the picture. These professionals are expanding the roles of professionals in insolvency practice beyond acting as receiver or liquidator. Indeed, these experts have become proactive in seeking out viable companies and offering their services as restructuring professionals. Because they are affiliated with sister firms in economies where global norms of rescue are relatively established, they are positioned to introduce global norms of restructuring into the Nigerian market. Thus, the gradual entrance of distressed debt investment into the market is well timed as it provides much needed turnaround finance and exit for commercial lenders.

[962] Ecobank Transnational Incorporated, the parent company of a pan African set up the first private sector funded debt resolution vehicle in Nigeria to resolve some of Ecobank Nigeria's challenged assets. The transaction is still in its early days but indicates a move towards a robust distressed debt market in the country. Nnorom (n).
[963] Whether this encourages, or stifles distressed debt investment as a result of over-regulation, remains to be seen.

The efforts of RPs are not without challenges, as coordination problems and the lack of a restructuring framework remain unresolved. Their work provided an opportunity to gain some insight into the experience of distressed companies. From observing the conduct of managers of a distressed company undergoing restructuring during the study, they were reluctant to sell any of the company's assets, including idle assets, uninspired to bring in new leadership or ideas and reluctant to cut down on their compensation and spending. Managers were eager to benefit from the concessions that came with the restructuring but slow to reciprocate by putting in the efforts to bring the company out of the woods. Rather, they constantly expressed helplessness in the face of adverse economic conditions. These observations lent some credence to the claims of lenders regarding the attitude of debtors. They also put RPs in a difficult position as they struggled to elicit compliance from the manager whom they represented while trying to maintain their reputation and the cooperation they worked so hard to get from lenders. RPs made it clear that they would work more effectively if they are engaged by lenders.[964]

The role of professionals in institution building has been the subject of some research.[965] In insolvency, professionals like lawyers, accountants and judges, have been known to contribute to reform in both advanced and transitional economies.[966] The level and nature of contribution from these sets of professionals have taken varied forms in different jurisdictions.[967] For Nigeria, while judges and lenders have been more passive in the process of legislative reform, a small group of IPs have been directly involved in the reform. Lenders have however contributed to the shaping of insolvency institutions by establishing a recovery-dominated practice. Restructuring professionals are positioned to alter this dynamic by actively steering stakeholders towards a robust restructuring practice, even in the absence of an enabling framework.

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[964] As discussed earlier, lenders tend to consider themselves capable of handling a restructuring.

[965] Daniel Muzio, David M. Brock, and Roy Suddaby, 'Professions and institutional change: Towards an institutionalist sociology of the professions' (2013) 50(5) *Journal of Management Studies* 699-721.

[966] Bruce Carruthers and Terence Halliday, 'Professionals in Systemic Reform of Bankruptcy Law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act of 1986' (2000) 74 Am. Bankr. L.J. (2000) 35.

[967] For example, Carruthers and Halliday found that judges in the US were actively involved in legislative reform while English judges were relatively neutral. Ibid.

Conclusion

The impact of institutions on law and law reform been a recurrent theme in this thesis. In the last two chapters, it was emphasised that local institutions can significantly impact the implementation of laws. This chapter sheds some light on local institutions and insolvency and restructuring practices in Nigeria.

It finds that insolvency practice is indeed dominated by debt recovery. Lenders acknowledged their preference for quick recovery which can lead to unwarranted value destruction, blaming regulatory constraints, debtor recalcitrance, lack of knowledgeable turnaround experts, lawyers' preference for quick compensation and institutional deficiencies. One of the prominent themes in the study is the influence of owner/manger reputation in the debt resolution strategy of lenders. While banks have internal guidelines for lending and resolving financial distress, the guidelines are fluid enough to accommodate reputational considerations. This makes lenders less concerned about the viability or otherwise of the company and more influenced by their assessment of the promoters' personal financial viability. Related to this is the concentration of ownership and control of most companies, leading to a territorial nature of managers and resistance to insolvency procedures.

There is also a pervasive sense of distrust, which is expressed towards other stakeholders and the institutions. Coupled with this distrust is the fact that stakeholders considered other groups of stakeholders as incompetent. The empirical study illustrates how socio cultural and institutional issues that are commonplace in most African countries- institutional deficiencies, corruption, poor corporate governance and a gap in professional capacity, play out in insolvency and restructuring practice. These issues impact the use of both insolvency procedures and informal restructuring, magnifying coordination problems among creditors in the few cases of multi-creditor restructuring. It is in the breakdown of such rescue-inspired restructuring that one sees a manifestation of the arguments in chapter three that the actions of creditors are not necessarily motivated by a desire for corporate rescue, except their interests coincide with it.

However, there are indications of the beginning of change with multi-creditor restructuring and increased involvement of professional service firms, engendering a shift from a recovery-based practice to restructuring and other insolvency alternatives. There is also the possibility of judicial activism and the establishment of corporate rescue through case law as courts become more aware of the need for it. Likewise, banks show a cautious willingness to embrace other insolvency alternatives, to the extent that regulatory constraints allow them. The stage is set for a suitable restructuring framework that accounts for the local institutions and dynamics among stakeholders.

CHAPTER SEVEN

RESEARCH IMPLICATIONS AND CONCLUSION

Introduction

This thesis set out to consider emerging trends in restructuring and insolvency law and practice across Africa. It makes a two-way inquiry into the impact of the drive towards global harmonisation of insolvency norms on recent reforms in Africa on one hand, and the contributions that Africa is making to the harmonisation trend in insolvency, on the other hand. It finds that Africa is indeed catching up to the global impetus to modernise insolvency and restructuring laws. Many countries in Africa are for the first time adopting restructuring frameworks as a viable means of resolving financial distress.

From the onset, the project acknowledged both the value and limitations in a consolidated discussion of the experience in Africa, reiterating that Africa is a diverse continent of fifty-four countries with divergent experiences and legal history. At the same time, many countries in Africa do have a lot in common, including a shared heritage, colonial history, business cooperation and institutional, political and development challenges. While qualitative study was conducted only in Nigeria, the thesis documents restructuring developments in thirty-six countries,[968] and the efforts of global actors in Africa. It points out some common issues and trends shared by countries in Africa and how they play out in insolvency reforms. These provide a background for the discussion in this chapter, which draws out policy implications of the findings of the research to Nigeria and other African countries.

The chapter is divided into two parts. The first part gives an overview of work done so far in the research. The second part gives a summary of the findings of the thesis and the theoretical and policy implications of these findings.

[968] Nigeria, Kenya, Ghana, Mauritius, Malawi, Liberia, Mozambique, Seychelles, Zambia, Uganda, South Africa; Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo (OHADA).

PART A. RESEARCH OVERVIEW: OBJECTIVES AND METHODOLOGY.

The central objective of the thesis was to paint a more complete picture of the trend towards globalisation in insolvency by telling the story of Africa's evolving restructuring practices and insolvency law reforms. The objectives of the thesis are three-tiered. At the first tier, it aimed to investigate the relationship between global developments in insolvency and emerging developments in Africa. The second tier sought to evaluate developments in insolvency and restructuring at the national level, including restructuring laws being introduced across Africa. The third tier centred on activities at the local level with the aim of understanding the engagement of local actors with ongoing reforms and posing questions about the compatibility of new laws with existing practices. The thesis focused on corporate debt restructuring because of the importance that corporate rescue has come to gain globally as a goal of insolvency law. Indeed, much of the developments in Africa, formal and informal, revolve around corporate rescue and debt restructuring.

In chapter two, the thesis analysed theoretical perspectives in insolvency law as a background for understanding the underlying goals and principles in the resolution of corporate financial distress. Chapter three built on this by considering key elements of restructuring law and frameworks. One of the objectives of the chapter was to draw out the potential policy implications of choices made in the design of restructuring law, particularly for a developing economy. This served as a useful background for discussing new restructuring laws adopted by African countries in chapter five. Chapters two and three established that insolvency laws are social tools which reflect the needs and values of a society, making them subject to change as the socio-economic realities of jurisdictions evolve. These lessons were substantiated with examples of new contestations in insolvency regulation, the propositions that question the mandatory nature of insolvency law, the entrants of new actors into the insolvency scene and the use of innovative financial strategies by stakeholders to achieve their desired outcomes in insolvency.

With these lessons in mind, chapter four considered the drive towards harmonisation, highlighting the tension between the global convergence of insolvency norms and context-specific insolvency policymaking, particularly for developing countries. The chapter relied on Halliday, Carruthers and Schaffer's works on transnational legal orders in insolvency, and the role of global actors in designing insolvency norms and propagating them in developing economies. Their in-depth analysis of the reform process in Asia provided a useful tool for evaluating current developments in Africa and identifying similarities and differences in the approach to insolvency reform. The chapter also engaged neo-institutional theory which builds on socio-legal ideas to analyse the interactions between institutions (formal and informal) and law reform. These bodies of work helped to understand and challenge emerging developments from global, national and local perspectives.

Chapters five and six represent the climax of the three-tiered objective of the research in relation to Africa. At the first tier, chapter five assessed the impact of global norms and actors on insolvency reform in Africa and at the same time considered Africa's contribution to the building of a transnational legal order in insolvency law. At the second tier, the chapter explored reform at the national level, discussing recent and ongoing insolvency reforms in twenty-eight African countries, the role of global actors and norms in the reforms, and the common elements in both the process and content of reform. In addition to law reforms, the chapter also observed that changes in the responses of stakeholders to financial distress might reflect a more rescue-oriented approach to the resolution of financial distress. Using an empirical approach, the third tier looked beneath the surface of laws reforms to understand local institutions, actors, practices and their potential effect on proposed reforms in Nigeria.

Chapter six detailed the outcome of empirical study in Africa's largest and one of its most influential economies, Nigeria. The empirical study not only provided a clearer picture of how restructuring practices are evolving, it also provided some insight into the experiences and constraints of stakeholders in the ongoing construction of a debt restructuring regime, and how they are being shaped by global norms and actors. The combination of these inquiries culminates in this chapter which concludes the thesis by highlighting key findings and their policy implications.

In summary, the findings of the thesis demonstrate that choices made in resolving corporate financial distress and the design of restructuring laws are influenced by a variety of factors including historical, economic and institutional factors. Developing countries are often the target of propagation of transnational norms, but the approach to propagation of norms differs over time and from one jurisdiction to the other. The involvement of global actors in African countries has been less direct and forceful than observed in Asia. However, subtler forms of pressure remain.

The research also finds that activities at the global and national levels do not always coincide with what goes on at the local site. While the propagation of global norms in African countries seems to be achieving considerable success at the transnational level, enactment and implementation at local sites is a different consideration. The UNCITRAL Legislative Guide has been put forward as proof that harmonisation of broad ideas while leaving fine details for local tailoring is possible and a step in the right direction.[969] One of the reasons for this endorsement is that rather than try to ignore the differences between jurisdictions, it seeks to accommodate them. This thesis however finds that many countries in Africa are not engaging with the Legislative Guide in ongoing reforms. They have instead taken the easier path of importing templates from jurisdictions with which they have a legal or historical connection or which they consider meet global standards. Global actors acknowledge that designing a set of guidelines that allows countries to adopt insolvency laws which meet global standards and are at the same time compatible with local institutions in developing economies, is a difficult task.[970] The research finds that the task is even more difficult when as part of the same trend towards harmonisation, there are influential systems that ranks all countries based on a set of criteria that rely heavily on institutions that are lacking in developing countries.

[969] UNCITRAL Model Law on Cross Border Insolvency, Guide to Enactment and Interpretation 25; Halliday and Carruthers, 'The Recursivity of Law' (n 16) 1184-1187.
[970] World Bank, Principles (April 2001) 3.

Qualitative study in Nigeria threw light on the experience of local actors, finding that informal debt restructuring has gained some momentum, especially following recent financial crises. However, efforts are frustrated by factors ranging from a lack of clear guidelines to distrust among stakeholders and institutional inadequacies. The relationship of local actors with global actors/norms and with proposed reforms was also found to be insignificant, with only a small group of practitioners engaging with reform.

The next part outlines the key findings of the research in five sections and draws out the theoretical and policy implications of the findings. Where policy implications relate specifically to the empirical part of the research, it is acknowledged that the discussion is based on what was discovered in Nigeria, and the extent to which they could apply to other African countries is indicated.

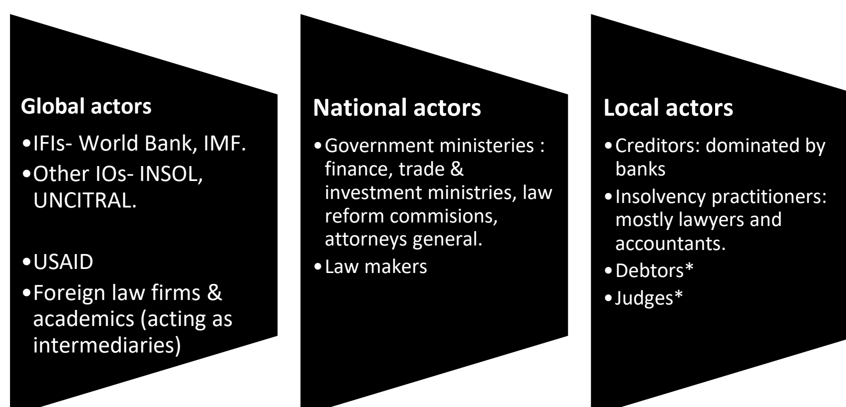
PART B. KEY FINDINGS, IMPLICATIONS FOR THEORY AND POLICY.

7.1. Actors and the influence of global norms

Key findings

One of the aims of the research was to investigate the roles of different actors at the global, national and local levels in insolvency law reforms. Figure 10 below shows the main actors involved to different degrees in reform efforts across Africa.

Figure 10. Actors in insolvency law reform in Africa.



The thesis found that the mode of engagement of global actors in African insolvency reforms is not as intense as their involvement in Asian insolvency reforms. For example, insolvency reforms imposed as conditionalities for financial assistance are much less common. While this should imply that countries in Africa would have the freedom to adapt to reform efficiently, pressure is still present in subtler forms such as suasion and peer pressure. IFIs like the World Bank and IMF have been influential through direct engagement with national stakeholders, projects like the Reports on the Observance of Standards and Codes and the Doing Business project and by establishing a regional forum, the Africa Round Table (ART), for deliberating on insolvency reform in Africa. INSOL International has particularly made strides in the region with the ART and its support of practitioner groups in individual countries like Ghana, Nigeria and South Africa. The World Bank also works behind the scenes in some countries to offer technical assistance to stakeholders in the reform process. The influence of the UNCITRAL is also indirectly present through the Cross-Border Model Law which a significant number of African countries have adopted.[971]

Locally, prominent national actors include government bodies such as government ministries charged with the responsibility of improving of commerce and investment, attorneys general, law reform commissions and legislators. In Nigeria, the PEBEC has as one of its primary aims, law reform aimed at improving the country's ranking in the Doing Business Project. National actors possess the political authority required for the progress of reform and have varying levels of interactions (direct and indirect) with global actors.[972]

Of all the groups of actors at the local level, the involvement of insolvency practitioners (mostly lawyers and accountants) stands out, both in their engagement with global actors and national reform efforts.

7.1.1. Missing actors

One of the trends observed in ongoing reforms is the low levels of participation by stakeholder groups. For many countries in Africa, the education, consultations and

[971] See table 1.
[972] Ch 5, section 5.3.3.

involvement of stakeholders that should have come pre-enactment have been postponed to the stage of implementation.[973]

Debtors: From the empirical study and analysis of reform activities in Africa, the thesis found that debtors are not prominent actors in the reform process, notwithstanding their importance at the implementation stage. The detachment of companies from ongoing conversations about proposed reforms is reflected in their absence at forums like the ART and local forums. [974]

Lenders: The thesis also found that while lenders are more engaged than debtors, they are still largely missing from the reform process at the global and national levels. Chapter five highlighted the poor engagement of lender groups with regional reform activities of global actors in Africa.[975] The same low levels of involvement were evident from the empirical study in Nigeria. Lenders were either completely ignorant of moves to change the law or disinterested in the proposed changes. [976]

Insolvency practitioners: IPs were found to be the most active stakeholder group in reform activities. However, it is not clear that their involvement and contributions are representative enough. The empirical study revealed that there is limited coordination among IPs which may be attributable to the lack of regulation or licencing requirements for insolvency practice. Because BRIPAN, the group leading insolvency reforms in Nigeria, only involves a limited class of practitioners, insolvency practitioners who are not members of the association feel disenfranchised from the reform process and do not engage with the activities of the ART.

Judges: INSOL and the World Bank through the ART have made some efforts to include the voice of the judiciary in the ongoing developments in African insolvency reforms. Locally, they have encouraged the education of judges in their collaborations with local insolvency practitioners. The participation of judges in insolvency law

[973] Chapter five documents how some countries that have enacted new insolvency laws now report the lack of awareness and understanding among most practitioners as one of the main difficulties with implementation. See section 5.9.
[974] Ch 5, section 5.3.3.
[975] ibid.
[976] Ch 6, section 6.11.

reform across different jurisdictions is however still relatively low, at all three levels-global, national and local.

7.1.2. Implications of actor involvement for theory and policy

- Using the reform experience in the UK, the US and Asia as examples, Halliday, Block-Lieb and Carruthers have argued that debtors are often missing from forums of global and national insolvency norm making for a variety of reasons. They found that these three jurisdictions had in common, a low direct participation of debtors, for different reasons ranging from ignorance about the relevance of insolvency law to them, public shame and loss of face that attends insolvency, the difficulty in achieving collective effort among such a diverse group, debtors preferring to influence judicial rule making rather than legislation, other stakeholder groups dominating the process and silencing debtors, or representation of debtors' interests by other stakeholder groups like insolvency practitioners.[977] In the US, where corporate failure is treated with less ridicule and harshness and entrepreneurial risk is encouraged, the absence of debtors may be more attributable to the refusal of debtors to recognise their interests in a law that was so infrequently reformed and; the representation of debtor interests by other groups such as lawyers and politicians.[978]

  From the empirical study in Nigeria, a combination of these reasons is likely. With the lack of engagement of stakeholders with existing insolvency laws and the infrequency of insolvency reform, it is plausible that debtors and even creditors do not recognise their interests in reform or the relevance of insolvency law to them. Also, unlike the UK and the US where lender groups and businesses have active associations that made it easy to coordinate their interests and contributions to law reform, organised debtor or lender groups are either not available or inactive in Nigeria.[979]

[977] Halliday, Block-Lieb and Carruthers, 'Missing Debtors' (n 520) 2-4.
[978] ibid 8-9.
[979] The authors report that even with representation in law reform committees, organised debtors made no significant contributions or submissions. ibid 7-9.

Furthermore, the study revealed that insolvency law has indeed not been a conventional platform for resolving financial distress in Nigeria. For instance, the only top bank executive that was aware of reform proposals was reported as saying that he was unconcerned because insolvency law did not affect banks.[980] As such, the authors' explanations regarding the absence of debtors are limited to debtors in the context of Nigeria (and indeed many African countries). They also extend to other groups of stakeholders and are exacerbated by a general lack of coordination among different stakeholder groups, restricting participation in law reform to only small groups of people.

- The question that follows is what, if any, and how significant is the effect of the absence of some stakeholders on the outcome of reform? Halliday, Susan Block-Lieb and Carruthers argue that missing debtors do not produce significant unwanted outcomes, as the interests of debtors are often represented quite effectively by practitioners whose interests coincide with the debtors'.[981] In the US for instance, the insolvency law that was produced, was debtor-orientated, despite the absence of debtors' participation in the reform process.[982] As the empirical study in Nigeria found, although debtors were unwilling to speak about their experience of financial distress and restructuring, restructuring professionals who routinely represent them stepped in to provide the perspective of debtors and their experience with debt restructuring. However, it is not clear that this representation is present in actual reform efforts, given that the participation of insolvency practitioners themselves is limited in that regard. The poor quality of stakeholder representation across board can have undesired implications for reforms, heightening the potential for actor mismatch and misdiagnosis and creating difficulties at the implementation stage.[983]

[980] Ch 6, page 234.
[981]Terence Halliday, Susan Block-Lieb and Bruce Carruthers (n 520) 11-12.
[982] ibid 38.
[983] Ch 4, section 4.4.

- The absence of a large percentage of stakeholders has the effect of swelling the pool of potential agents of resistance to both the enactment and implementation of a new insolvency law. From experience elsewhere, the banking community has been known to wield significant power, influencing the making of insolvency laws,[984] and where impossible, sabotaging its application. Carruthers and Halliday point out that, 'temporal separation of designers of legal instruments from their implementers undermines the political viability of instruments, since they do not spring from established power bases'.[985] Given that some of the side-lined practitioners in Nigeria have been known to lead major restructuring efforts in the country and have therefore gained both the expertise and the reputation required for the enrolment process discussed in chapter five,[986] the enactment of a context-specific insolvency law could benefit a great deal from their involvement. This group of stakeholders also has the power to foil the settling of the law at the stage of implementation. As chapter six reports, some lenders in Nigeria alluded to their ability to get around whatever new law is made if they do not agree with the changes. The lesson to policy makers is simple, if the goal is to achieve meaningful reform rather than mere window dressing, it is wise for reform efforts to involve as many stakeholders as possible to ease the process of implementation.

7.2. Restructuring practices at the local sites: a snapshot of existing procedures and emerging unilateral and multi-creditor restructuring practices from the empirical case study.

Key Findings

The study in Nigeria showed that insolvency practice is dominated by (sometimes aggressive) individual debt recovery, using formal mechanisms such as the receivership procedure and other innovative strategies. Regulatory constraints, debtor recalcitrance, lack of knowledgeable turnaround experts, lawyers' preference for

[984] Paterson, 'Notions of Fairness' (n 225) 605.
[985] Halliday and Carruthers, *Bankrupt* (n 2)46.
[986] Enrolment occurs when a weaker actor is able to persuade a stronger actor to take on its cause. ibid 68-69.

quick compensation and institutional deficiencies are blamed for this. However, restructuring practices are evolving. The study found that most banks now have units that aim to restructure debt obligations unilaterally, but private workouts are mostly limited to debt rescheduling where the tenure of the debt is extended, or interest reduced. Multi creditor restructurings are fewer and farther between but there is a growing practice heightened by economic crisis in Nigeria.[987] However, multi creditor restructuring often involves big companies and have been known to occur with a receiver manager in place. The position of the RM and presence of government influence (usually through AMCON) provides some regulatory backing akin to what is found within the London Approach and variants of it discussed earlier. Multi creditor restructuring is neither coordinated nor governed by clear guidelines as obtains under those systems. A new practice multi-creditor restructuring initiated by restructuring professionals from professional services firms is also growing.

The thesis found that these different forms of restructuring suffer numerous challenges including blind or fictive restructuring that glosses over the important question of viability, the lack of coordination among creditors, the fear of oppression of small banks by bigger banks, regulatory constraints, lack of supportive institutional infrastructure and low levels of cooperation by debtor management.

7.2.1. Implications of developments in restructuring practice

- The incidence of unilateral restructuring by banks should not lead to the conclusion that a corporate rescue culture is established among stakeholders, particularly lending institutions in Nigeria. Although lenders acknowledged the long-term economic value in keeping distressed companies alive, they consider such rescue missions the responsibility of the government, especially considering the government-induced regulatory constraints that they claim prevent them pursuing rescue. Thus, the response to financial distress is still overwhelmingly dominated by debt recovery and where restructuring occurs, it is often a fictive rescheduling of payments obligations to take some pressure

[987] Chapter five also reports a similar pattern in other African countries like Uganda, Kenya and Ghana. Ch 5, sections 5.4.1 & 5.4.2.

off the creditor while they consider enforcement prospects. To achieve meaningful restructuring or even rescue, policy should be directed towards clear viability tests that establish that the restructuring has real prospects and requires a substantial plan for achieving both the short and long-term goals of the restructuring. It must however be borne in mind that a forced attempt to prioritise the rescue of distressed companies as a going concern is likely to meet with resistance from creditor groups.[988]

- The increasing use of the receivership process to achieve a multi creditor restructuring of big companies in place of its conventional debt recovery role has not been very successful but it can help to ease transition into the proposed administration procedure. This is because it gives all stakeholders, particularly debtor companies the opportunity to get acquainted with the idea of an administrator taking over the management of a company for the purpose of restructuring it. Likewise, it can prepare creditors for the shift in the duty of the appointed professional who before now, served at their pleasure to recover debt at all cost, even if value-destroying. It also exposes practitioners to the expectations of administration which focuses on rehabilitative restructuring rather than mere recovery. Furthermore, the difficulties encountered in the process foreshadow some of the challenges that may emerge in the use of proposed restructuring frameworks. It is important that these lessons are applied in the design and implementation of proposed insolvency law to prevent the new law from producing the same outcomes as receivership.

- One of the issues identified with receivership twinned multi-creditor restructuring is the oppression/highhandedness of smaller banks by big banks and regulatory authority (AMCON). Smaller banks admitted to avoiding restructuring involving more influential banks for this reason. As discussed in chapter three, fairness concerns are fluid and differ with the jurisdiction and nature of procedure in question. Restructuring law must account for the predominant fairness concerns among stakeholders for example, by providing

[988] See Ch 3, section 3.1.

for a clear decision-making mechanism for creditors. As discussed below, Nigeria is tending towards the adoption of the UK administration procedure in largely the same form. Given that the threshold for creditor decision making on restructuring proposals under the English administration procedure is dealt with separately by the Insolvency Rules, care must be taken by African countries importing the law wholesale not to import a vague or incomplete decision-making process that can exacerbate the problems being experienced in practice.

- Another lesson from the experience with multi-creditor restructuring is the changing roles of practitioners in distress resolution. As restructuring acquires a new layer of complexity because of the involvement of foreign investors and practitioners, and multi-creditor restructuring begins to gain momentum, the role of investment bankers, professional services firms and accountants is becoming more prominent and insolvency practice is expanding past the debt recovery functions of the receiver. Consequently, beyond the ability to file or respond to court injunctions, more technical expertise is now required to deal with the complex arrangements that can show up in multicreditor restructuring. This changes the demands on the legal system and legal practitioners who are now no longer needed to just flex their legal muscles in devising delay tactics, defending unnecessary legal battles or writing demand letters. Lawyers would increasingly be needed for more tasking and creative work- to push complex arrangements borne out of restructuring plans through the legal system. They would be needed to comment on the legality of such plans and sometimes, make novel arguments to the courts, thereby shaping the direction and development of insolvency jurisprudence and practice in the country.
- In light of this, the training of professionals and regulation of insolvency professionals become crucial. As discussed shortly, some countries, particularly those that have enacted unified insolvency laws have made the move of regulating insolvency practice.[989] For countries like Nigeria that are

[989] Kenya for example. Insolvency Regulations, part IV.

tending towards incorporating restructuring frameworks into existing Companies Act, there is the chance that ancillary but germane issues like this are left out. Policymakers must consider hastily following up enacted laws with comprehensive regulations to deal with issues left out of the Act.

7.3. Some Socio-cultural and institutional elements

Key findings

The thesis found from the empirical study that in lending relationships, the reputation of the debtors' promoter(s) strongly impacts lending decisions and how creditors respond to financial distress. Connected to this is the fact that many businesses are structured such that ownership and control of companies are concentrated. Many companies, both small and large, are family-owned and controlled, resulting in a territorial nature where companies are regarded as personal property and outsider control is met with heavy (sometimes life-threatening) resistance.

The study also found a pervasive sense of distrust among stakeholders, an element which may resulted from years of witnessing or hearing reports of corruption, mismanagement and lack of integrity across the society. Corroborating existing research on the subject, the study found that courts including specialised commercial courts are plagued with jurisdictional and infrastructural challenges ranging from inconsistent interpretation of the law which results in uncertainties, lack of capacity to grasp complex commercial matters, lack of appreciation for commercial expediency leading to unjustifiable injunctions and unnecessary delays, heavy caseloads and perceptions of corruption.[990] The study found the combined effect of these issues to be the avoidance of formal insolvency procedures and the proliferation of innovative debt recovery strategies by creditors. Such strategies include the use of crime enforcement agencies to blackmail distressed debtors into payment.

[990] Chapter five highlighted that corruption is often measured in terms of perception. Whether they are proven cases or not, the widespread perception of corruption is just as problematic as it impacts decision making, the relationship among actors in insolvency and their actions in ways that are discussed shortly. Ch 5, section 5.8.2.

7.3.1. Implications of findings on socio-cultural and institutional issues.

- Debtor-creditor relationships are embedded in the (legal) culture of a nation.[991] Similar to what obtains in East Asia, major indigenous businesses in Africa are family-owned and there is an overwhelming need to keep the business within the family.[992] This provides some insight to the resistance (sometimes resorting to physical harm) that debtor companies have been known to put up against insolvency procedures in Nigeria.
- An important element that has made all the difference in China's relational capitalism is trust. This ingredient is missing not just in Nigeria but in African business environments. There have been reports of how a gradual sense of distrust has grown in work environments in Africa.[993] A pervasive lack of trust and confidence holds some implications for reform. As the interviews reveal, the sense of distrust is not limited to debtors and the judicial system, but also extends to the law-making process and the national actors involved. This creates a problem for proposed law reform, where stakeholders are unable to deliberate or reasonably agree on a framework for restructuring.[994] As Halliday and Carruthers caution, 'if locked in a stalemate among competing powerful actors, then rule-making bodies will opt for vague formulations. [995]

- The impact of institutions on legal rules and law reform has been visited earlier in this thesis.[996] It was discussed in chapter five that institutional challenges observed in the empirical study (such as inefficient courts and corruption) are commonplace in many African countries. As neo-institutional thought indicates, the role of institutions in increasing or decreasing transaction costs is

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[991] Halliday and Carruthers, *Bankrupt* (n 2) 113.

[992] Asian Development Bank, 'Insolvency Law Reforms in the Asian and Pacific Region' in *Law and Reform at the Asian Development Bank* (Manila, ADB 2000); Mfonobong Nsehe, 'The 10 Leading Family Businesses In Africa' *Forbes* (8 Jan 2014) <www.forbes.com/sites/mfonobongnsehe/2014/01/08/the-10-leading-family-businesses-in-africa/#292c924d5274>; Kurt Davis, 'The African Family-Owned Business: A Partner For Private Equity' *Ventures* (22 Sep 2014) <http://venturesafrica.com/the-african-family-owned-business-a-partner-for-private-equity/> all accessed 10 June 2018.

[993] Niels G. Noorderhaven and Bassirou Tidjani, 'Culture, governance, and economic performance: An explorative study with a special focus on Africa (2001) International Journal of Cross-Cultural Management 35

[994] An example is the report about the two conflicting insolvency legislations presented by different groups for enactment in Nigeria. Ch 6, page 236

[995] Halliday and Carruthers, *Bankrupt* (n 2) 78.

[996] Ch 4, sections 4.4.3 & 4.7.

connected to the incentives and disincentives they provide to economic actors.[997] Thus, the institutional structure may incentivise economic actors to bend rules, engage in sharp practices and employ underhanded methods, mostly because they have more to gain from breaking the rules than from keeping them.[998] Some of the practices observed in Nigeria, like debtors capitalising on the deficiencies of the court system to delay the debt recovery process and the use of force to prevent the commencement of receivership are products of ineffective institutional interaction. Also, loopholes in criminal law enforcement institutions and the inadequacies of court systems have opened up a space for creditors to get around insolvency law and approach debt recovery as if it were a criminal matter. These practices do not only raise transaction costs, they further perpetuate the cycle of distrust among commercial parties.[999] The result of such is that these practices evolve into mutant institutions that become difficult to change by merely passing a new law.

- As the theory of path dependence suggests, institutional practices become more difficult and costlier to change as they become reinforced.[1000] As discussed in chapter four, the resulting outcome of entrenched informal systems is that the relative cost of adopting alternative systems become prohibitive. Thus, even if actors are offered better alternatives, the cost of switching may preclude such a transition because the activities have become entrenched to the point of being self-reinforcing.[1001] As unwritten rules of enforcement have emerged and mutated formal rules in insolvency, policymakers may consider that these mutant institutions can be corrected with the 'modern' laws and global norms being introduced across the globe. They must however note that informal constraints have great survival tenacity and a sudden introduction of new

[997] North, *Institutions* (n 430) 8.
[998] This is a common feature of economies where enforcement mechanisms are ineffective resulting in weak formal institutions, blatant corruption and ultimately high transaction costs. Ibid.
[999] Daniel Etounga-Manguelle, 'Does Africa need a cultural adjustment program?' in Harrison, Lawrence E., and Samuel P. Huntington (eds) *Culture matters: How values shape human progress* (Basic books, 2000) 65, 72. (He describes how Africans tend to be excessively convivial and reject open conflict to the detriment of business).
[1000] Prado and Trebilcock (n 525) 341; Ch 4, sections 4.4.3.
[1001] Prado and Trebilcock (n 525) 341.

formal rules does not stop them from persisting. The realisation that 'we are not writing on a blank slate' is a useful lesson for policy makers in ongoing insolvency law reforms.

- As Nigeria (and other African countries) seek to adopt new restructuring mechanisms, some questions call for consideration: how do we prevent proposed administration, CVAs and other restructuring mechanisms being introduced from becoming plagued by the same ills that currently affect receivership? Would stakeholders continue to interpret and implement the law exactly like receivership, thereby turning a restructuring tool into a debt recovery tool? Would administration not trigger the same level of resistance from territorial debtors like receivership currently does? These concerns are especially valid because participants in the empirical study already failed to see a real difference between the administration procedure and a receivership.[1002]
- The point in raising these questions is not to suggest that deliberate attempts to change formal law should never occur. Indeed, they should, because entrenched practices such as those observed in Nigeria, may have become clearly ineffective and incompatible with economic growth. The prescriptions for policy here are two-fold (i) that new restructuring laws be accompanied by changes in other laws and institutions that impact the incentives of actors in restructuring. Some of those connected laws include secured transactions legislations to strengthen enforcement of security interests and strong corporate governance and directors' liability to alleviate debtor recalcitrance. Also, it goes without saying that judicial reforms be implemented to expedite court hearings and eliminate complicity in delay and other underhanded tactics by parties.
- The challenge with this first prescription is clear, policymakers currently involved in the reform of insolvency law may not be in a position to reform this range of laws and institutions. Even if they were, there is no guarantee that those reforms would happen simultaneously with insolvency reforms, or even

[1002] This is one of the fall outs of low stakeholder involvement discussed above but can be fixed with extensive re-orientation.

soon after. While we await judicial reforms and comprehensive commercial law reforms, what is realistically within their power in designing insolvency laws is to acknowledge these institutional deficiencies and their effects. For one, laws should take account of inadequacies of courts and judges by limiting reliance on them for decision making in the restructuring process. Where it is necessary to do so, clear guidance should be given to judges, without completely robbing them of discretion. Judges should also be given room to seek directions/guidance from independent professionals who understand the complexities of business.

- The second prescription is that change should not only target formal procedures but should also be aimed at informal institutions and practices which have the effect of either mutating or complementing formal procedures. As Davis and Trebilcock argue, 'predominant preoccupation with the court system inappropriately discounts the important role' other institutions play.[1003] On this basis, it has been proposed that the promotion of competitive alternatives to the formal [restructuring] frameworks can be effective.[1004] Competition from informal institutions if well structured, can exert a positive influence on the development of legal institutions to make them more efficient and adaptable to changes.[1005] As chapters five and six reveal, stakeholders in African economies are increasingly making efforts to restructure corporate debt informally. Among other things, trust, coordination problems and lack of clear guidelines undermine those efforts. To provide an effective complement for emerging restructuring frameworks, policy makers should consider setting up proper dynamics for informal debt restructuring. These include clear guidelines sanctioned and backed by recognised authority as seen in the London Approach and its variants.[1006]

7.4. Key changes introduced by restructuring law.

[1003] Davis and Trebilcock, 'Optimists versus Skeptics' (n 543) 9.
[1004] ibid.
[1005] ibid; Allen and Qian (n 496) 141.
[1006] Ch 3, section 3.1. The Nigerian Bankers' Committee is an example of lender coordination that can be applied in corporate debt restructuring. Ch 6, page 224.

The substantive elements of restructuring law introduced by recent and ongoing reforms are discussed in some detail in Chapter five. Here, the key elements are summarised. Law reforms have borrowed from different developed jurisdictions like the UK, the US and France, but a common trend is that countries' choices have been influenced mainly by the law in the jurisdictions with which they have historical connections. For example, Kenya, Malawi, Uganda and proposed law in Nigeria have adopted the UK administration and CVA procedures in largely the same form. OHADA follows French law and introduces the conciliation, preventive and reorganisation procedures. For Liberia which operates an Anglo-American common law system, the new restructuring law bears close resemblance to the US Chapter 11 procedure. There is some evidence of horizontal learning with Zambia and Namibia's reliance on South Africa's 2008 Business Rescue procedure which in turn combined elements of UK and US law.

Some of the legislations are stand-alone laws that deal with corporate insolvency alone.[1007] Some have unified corporate and personal insolvency reforms in one legislation,[1008] while other reforms have come in the form of the inclusion of restructuring frameworks in the Companies Act.[1009]

All the frameworks introduce a moratorium which prevents, among other enforcement actions, secured creditors from pursuing enforcement without the permission of the PIP or court.

Some procedures require illiquidity, prospective illiquidity or financial distress as a criterion for commencement,[1010] while others do not.[1011] Also, some systems have adopted a practitioner-controlled framework [1012]others adopt a practitioner-supervised DIP system. [1013]

[1007] Zambia for example.
[1008] Kenya, Uganda, Malawi, Mauritius, Seychelles, Liberia and OHADA countries.
[1009] Nigeria's proposed reform, Tanzania and South Africa.
[1010] Zambia, South Africa, Liberia, administration in Kenya, Malawi.
[1011] For example, CVAs adopted in Kenya and Malawi and proposed in Nigeria.
[1012] Kenya, Uganda, Malawi.
[1013] Countries like Liberia, South Africa and Zambia.

Some laws introduce provisions for restructuring finance.[1014] Among these, Liberia follows the US in allowing providers of new money to be given priority over existing security holders in certain circumstances. Countries that have adopted the UK administration procedure wholesale do not provide for restructuring finance.

Courts are tasked with a range decision making, supervision and approvals, as obtains under the laws that have inspired these new frameworks. Liberia particularly depends heavily on an assigned judge to make decisions ranging from the designation of the administrator to the approval of creditor committees.

7.4.1. Policy implications of changes introduced by restructuring laws

- Control: chapter three discussed the proposition by Hahn that jurisdictions with concentrated ownership and control are better suited for a PIP system while jurisdictions with dispersed ownership should adopt a DIP system.[1015] Companies in Nigeria (and many other African countries) predominantly operate a concentrated business structure, but they may not fall neatly into Hahn's analysis. A DIP system accommodates the interests of possessive owner/managers and protects them from the agony of admitting to corporate failure, thereby encouraging them to cooperate with the restructuring process. However, it has the effect of being interpreted by creditors as seizing power from them and giving it to debtors. Given the level of distrust and reports of mismanagement and debtor recalcitrance highlighted earlier in this chapter, this is bound to meet with intense resistance from creditors. The safeguards for protecting creditors' interests in developed jurisdictions that operate a DIP system rely on courts to ensure that the rights of creditors are balanced while the debtor remains in control. Such reliance on the court is problematic for many African countries where the court systems can be weak, with judges being unequipped to handle complex commercial issues and creditors lacking faith in the judicial system. A PIP system on the other hand is subject to resistance from debtors, as the receivership experience in Nigeria shows. For

[1014] Liberia, Zambia, South Africa.
[1015] Hahn, 'Concentrated ownership' (n 329) 143; Ch 3, section 3.4.2.

African jurisdictions that have adopted PIP systems, it is noteworthy that debtor cooperation may be achieved by emphasising the rescue potential of restructuring mechanisms and clearly distinguishing between the procedure and other value-destroying procedures. If debtors perceive that the process offers an opportunity for turnaround, there is a higher chance of cooperation with the process.

A hybrid between the two options may however be more effective and some countries have already made this choice.[1016] An effective restructuring law in the context of most African countries has been described as one flexible enough to allow for a DIP framework thereby accommodating the territorial attitude of debtors; but prudent enough to safeguard the rights and interests of creditors.[1017] Such flexibility is provided by laws that allow debtor management to stay in place under the supervision of a professional whose duties are clearly outlined. This allows decision making to fall on a restructuring expert who has powers to elicit the company's cooperation. One of the lessons from the empirical study in Nigeria is that with some education and advocacy, insolvency practitioners, particularly lawyers and other professional service providers are in a good position to drive a strong restructuring practice and rescue culture.

- Shifts in creditor rights: one of the dynamics being introduced by insolvency legislations are changes to the rights of creditors in relation to a distressed debtor. For many decades, insolvency practice in most jurisdictions has centred on creditor-driven debt recovery through foreclosure, receivership and other related procedures.[1018] Systems are now shifting from frameworks that gave creditors all the control, to those that restrict the timing and pace of their enforcement powers. Restructuring laws impose a moratorium on recovery actions (even by secured creditors) while the restructuring is ongoing. It is expected that creditors would resist their relegation from the top of the list,

[1016] Liberia, Mauritius and Mozambique are examples. See Table 2.
[1017] See Idigbe and Kalu, 'Best practice and tailored reforms' (n 670).
[1018] Fabrícia de Almedia Henriques (n 724).

especially where they feel (like seen in Nigeria) that formal enforcement devices are weak and susceptible to manipulation.

In a bid to appear to take serious steps towards establishing corporate rescue, policy makers may be tempted to make drastic changes to the rights of creditors. It should be noted that an implementation gap is almost always present in reform, but it becomes more obvious and problematic where there is a sudden and wide gap between existing institutions and new laws.[1019] To ease the transition into new systems, policymakers should consider making changes to creditor rights incrementally. This is perhaps one benefit that the UK administration procedure offers with its cautious prioritisation of the need to maximise creditors' interests.

Also, while post commencement finance is a useful mechanism in restructuring law, policymakers must be wary of importing the mechanism wholesale with the complexities that come with it. Implementation is at infancy for most countries but chapter five highlights the struggle with post commencement finance in South Africa,[1020] and is instructive to other countries to cautiously introduce provisions that drastically alter the priority and interests of creditors.

- Decision making: Another policy consideration is the need to make the decision-making process among creditors as easy and straightforward as possible. Voting thresholds should be clear and jurisdictions would benefit from avoiding the complexities that can attend the class voting system. As discussed in chapter three, class voting can be valuable but also problematic.[1021] Given that most laws do not provide for the cram down of groups, it may be worth limiting the possibilities to voting in fewer but larger groups, rather than many small groups.

  Also, policy makers must be wary of relying too heavily on courts for decision making. It may be worth considering shifting some of the responsibilities placed on courts by the templates being used, to a restructuring practitioner or other efficient regulatory authority. It is acknowledged that judges can play an

[1019] Mariana Prado and Michael Trebilcock (n 19) 341.
[1020] Ch 5, page 190-191.
[1021] Ch 3, page 83

important role through their activism and the use of their discretion. As insolvency laws settle in different countries, the role of judges in the process should be constantly re-assessed. Frequent training and the appointment of commercial lawyers as commercial judges should also be considered.

- Unified legislations versus consolidation with company law: One of the decisions that policymakers are confronted with in the process of drafting insolvency legislation is the form that such laws should take. Nigeria for example started off with a stand-alone bill but is now tending towards including the administration and CVA procedures in its Companies and Allied Matters Act, as done in Tanzania, South Africa and Zambia. Understandably, including insolvency law reform in a Companies Act streamlines the legislative process and is likely to make it easier to garner support and interest for the legislation, especially in jurisdictions where law making is extremely tedious. However, there is a tendency for important components of insolvency law to slip through the cracks as it is hard to give the subject the attention it deserves. For example, incidental but important issues such as insolvency practitioners' regulation may be missed or deferred to regulations that might take another long process to deliver. Another implication is that the legislation misses an opportunity to reform personal bankruptcy laws as unified insolvency legislations would do. In African countries where the lines between the identity of a company and its owners can get blurry, such joint reform of both personal and corporate bankruptcy can be useful.

Looking ahead: future research and concluding remarks

As Africa becomes increasingly important to the global economy and interest in the continent grows, it is imperative to understand the continent's understudied but significant contributions to emerging global trends in insolvency law and practice. The objective of this thesis was to highlight the developments in restructuring law and practice in Africa, and the roles of global actors, global norms and local actors and institutions in those developments.

In the process of meeting these objectives, the thesis has taken the reader through a journey which began with both the traditional and unconventional theoretical perspectives for regulating corporate financial distress, engaged the key elements of debt restructuring frameworks, then discussed the trend towards global convergence in insolvency law and analysed some emerging developments in insolvency law and practice across Africa, which is where the journey ends, for now.

This thesis has laid the right foundation and set the stage for questions to be raised regarding the direction of reform on the continent. However, there is still a lot to learn about the insolvency reform process in individual African countries, including an outline of the history of insolvency regulation and the unique experiences of actors involved in the reform process. More research in this area will provide a basis for comparing reform experiences across jurisdictions on the continent.

Overall, reforms continue to progress in Africa, with subtle but effective pressure mounted by the World Bank Doing Business project, closely followed up with the INSOL/World Bank ART. Remarkably, out of the forty-five countries that have adopted the UNCITRAL Model Law on Cross Border Insolvency, twenty-three are African. To the extent that reforms in Africa are replacing obsolete insolvency regimes with recognised legislations that reflect global norms, Africa is indeed contributing to the harmonisation of insolvency law. One must however not be too soon to conclude about the depth and reach of this harmonisation. The purpose of harmonisation is not harmonisation for its sake, rather it is to support the integration of markets, such that as cross border insolvency or the potential for it increases, the means of resolving financial distress are not too divergent. An important element in the building of a TLO is the settling process, with the ultimate goal being that transnational, national, and local norms and practices are concordant and have meanings that closely resemble each other. Thus, before any claim may be laid to true harmonisation, one question that must be answered is whether reforms reflect what obtains in practice, or new laws fall into disuse or end up morphing into unintended outcomes upon interaction with existing institutions. Also, it is vital to constantly question, especially for developing

countries whether reforms are responding to development needs, or to the pressure to conform or to both. These are areas of note for future research.

Lessons from neo-institutitonal theory and the law and development movement explored in this research emphasise the importance of understanding local peculiarities and their compatibility with new laws. This indicates the need for more empirical studies to unearth what these peculiarities might be. This thesis has begun to fill the gap by consucting empirical research in Nigeria, but it is acknowledged that more research is needed to understand the practical impact of the changes introduced by insolvency reform on a country by country basis.

As laws settle across Africa and implementation gaps open up, there is bound to be more clarity regarding what works and what does not. It is expected that law would settle at different paces and in different ways across jurisdictions. Given that some countries have had a head start with reform and implementation, policy makers in countries undergoing reform should aim to learn from the victories and challenges in those countries, in order to effectively tailor the templates that they have chosen to local contexts. There is already some evidence of such horizontal learning in the choice of law, but it is even more useful to learn from the outcome of implementation. This is one advantage that the ART offers, provided that the forum can continue to capture the interest of the relevant stakeholders and decision makers across the continent.

The contributions of the thesis are not constrained to African countries and policy makers alone. They provide material for evaluating the harmonisation process in insolvency law, including the methods adopted by prominent global actors in pushing insolvency reform agenda in developing regions. Also, the policy lessons derived from the project are useful in other areas of commercial law that are seeing a similar drive for globalisation. Just as this thesis has extracted lessons from developments in Asian insolvency law, lessons from the experience in Africa documented here would also be instructive to other developing jurisdictions. A resounding lesson for policymakers is not to try to run before learning to walk and to acknowledge that there are fundamentals that make the advanced aspects of modern insolvency regimes

work. Enactment of new laws is a laudable move, but only a first step in the right direction. There is more work to be done and time would reveal the growing pains that adopting new insolvency regimes would bring.

APPENDICES

Interview Questions.

A. LENDERS (COMMERCIAL BANKS)

About the interviewee

1. Could you tell me about your role in this organisation?
a. How long have you had this role?

Factors that inform lending and relationship with borrowers

2. What kind of factors inform your decision to lend? For instance, does the size of the borrowing company influence lending decisions and the conditions of the loan?
3. How often (if at all) do you lend on unsecured basis?
4. Do you maintain close contact with corporate customers during the lending period, for example by periodic monitoring or do you give them complete space until there is a reason to contact them?

Response to default

5. How do you typically respond when a borrowing company has not met its debt obligations?
a. How soon do you take these steps?
b. Is your response informed by the cause of the default?

Out of court restructuring/work outs

6. Do you try to privately work out the financial problems of the defaulting company?
   a. What forms do these workout/restructuring efforts take?
7. How do you determine whether a company is still viable and a good candidate for debt restructuring?
8. Do you have any set of internal rules/procedure that you use for debt restructuring?
9. What are the major problems you experience with restructuring?
10. Do you generally find the management of the defaulting company to be co-operative in the restructuring process?
11. Do your restructuring efforts include the provision of additional finance?

Multiple banking/ regulatory influence

12. I would like to know how you deal with other creditors when the debtor has multiple creditors. For instance, do you coordinate with other banks often or is this difficult to achieve?
13. Have the activities of AMCON had any effect on your response to financial distress, especially multi creditor restructuring?
14. Do you find pressure, moral suasion from other banks/AMCON persuasive in dealing with distressed companies?

Use of Legal devices and engagement with the law

15. Do you often move to wind up the corporate debtor?

a. If no, why not?
b. If yes, how soon after default and what factors inform this decision?
16. Do you often use the receivership?
    a. Under what circumstances do you appoint a receiver?
    b. What is the role of the receiver in such situations?
17. Do you have any experience with schemes of arrangement?
    a. Have you had cause to use it to restructure a distressed company?
18. Are you aware of the proposed Corporate Insolvency Bill?
    b. How did you learn about it?

19. What is your view about the changes being proposed by the law?

B. INSOLVENCY PRACTITIONERS (ACCOUNTANTS AND SOLICITORS)

About the interviewee

1. What do you do as an insolvency practitioner?
    a. How long have you been doing this?

Response to default- recovery and liquidation

2. How do you typically handle distressed companies?
3. Would you consider your role to be limited to debt recovery; to involve corporate rescue/rehabilitation; or as determined by your appointor?
4. How commonly do you see liquidation of companies occur in your work?
    a. What factors influence the decision to liquidate?
    b. Does it often happen that companies that could have traded out of their difficulties are liquidated?
    c. What factors are responsible for this?

Corporate rescue and debt restructuring

5. Have you been involved in the debt restructuring or rescue of a distressed company?
6. How successful would you say these restructuring efforts have been?
7. What challenges do/did you encounter in the restructuring process?
    a. Do any of these challenges stem from the law/courts?
    b. How do lenders/debtors respond to rescue efforts?

Engagement with the law

8. When acting as a receiver, do you find that your position allows you to rescue the company or its business?
9. What legal/institutional changes do you think will promote rescue/restructuring practice?
10. Have you tried to use a scheme of arrangement to restructure a distressed company?
    a. What was your experience with this?
11. Do you know about the new corporate insolvency bill?
a. Were you involved in any way in the proposed law?

C. BRIPAN (Association spearheading insolvency law reform in Nigeria)

1. What does the Association do?
   a. What is your position in the Association?
   b. What role is the Association playing in Nigerian insolvency law reform?

Corporate Insolvency Bill – domestic factors

2. What are the main factors that influenced the draft insolvency bill (the need for reform and the choice of 'model' law)?
3. Did the current practices among stakeholders inform the content of the bill significantly?
   a. For instance, is the law geared towards addressing some of the challenges that stakeholders face with private work outs?
4. What role did stakeholders like commercial lenders play in the draft bill?
5. Apart from the proposed law, what other changes can be made to improve corporate debt restructuring mechanisms

Insolvency Bill- external factors

6. Did any international organisation play any role in the reform process?
7. Are you aware of current bankruptcy law reform in other African countries?
8. Have you had the opportunity to interact with insolvency practitioners from other countries?
   b. What countries?

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