Corporate Rescue Law to the Rescue of Businesses in Trauma in Nigeria

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Abstract
The failure of a company potentially affects the livelihood and well-being of those dependent upon it. The company may be the life blood of a whole town, state or country. Therefore, the chain reaction consequent upon any business failure can not be treated as banal. Forging a robust legislated corporate or business rescue regime for Nigeria is now a necessity. The regime of insolvency as contained in its statutes are antiquated and this work examines options opened to Nigeria in reforming its law to fill the void occasioned by lack of or inadequate legislation to drive a well developed restructuring process. The options include, the adoption of the highly codified American model, the United Kingdom model, informal models such as pre-pack, the court inspired model, the Debtor Restructuring and the Corporate Management models. The paper concludes that, it is not enough to have a law to drive the process, but the judicial environment and the public and private sectors must be ready to imbibe the rescue culture.
Keywords: Administrative procedure - business failure - corporate rescue - company voluntary arrangement - chapter II

Introduction
In recent years, the escalation of company and business failures with its debilitating consequences, had accentuated the debates on measures to be taken to stem the trend. A company is an integral part of the community in which it does business and it has direct impact on the economic and thus, the social well-being of that community through its employees, suppliers and distributors to mention but a few. In another language, the failure of a company may potentially affect the owner, the manager, the labourer, the food or water hawker in the precinct, the market-woman, the commercial motor-cycle rider, the tailor, the teacher, the banker, the hairdresser, the local church or mosque, the schools, the estate agent or landlord and others too numerous to list. It therefore behoves society to evolve an intervention necessary to avert eventual failure of the company. As poignantly put by the Cork Committee in relation to England.

> A concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.[2]

Picking the gauntlet, major economies of the world, including Britain, have taken legislative strides to ameliorate if not to arrest, he growing trend of corporate failures, by putting robust legislation or regulations in place to rescue businesses in trauma, by reforming their insolvency legislation.[3]

The regime of insolvency in Nigeria is contained in the Companies and Allied Matters Act which was promulgated in 1990 to replace the Companies Act of 1968 which was a cut and paste of the English Companies Act of 1948.[4] The extant Act contains provisions on Arrangements and Compromises and other options for a company in trauma, as well as laborious provisions relating to how a company could be liquidated. These efforts, fall short of a dedicated enactment which will be at par with international standards in the quest to rescue companies in distress. The hardship caused in recent years by the distress of banking giants like, Intercontinental Bank, Oceanic Bank, Afribank, Bank PHB as well as textile giants like Kaduna Textile Mills, Odua Textile Mills and the telecom giant Mtel, easily calls for a need to revamp our laws to provide the necessary intervention to avert future occurrences. The deteriorated state of business environment in Nigeria owing to archaic insolvency laws amongst other indices, was reiterated by the World Bank in its annual doing business report in 2014.[5]

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[2] Report of the Review Committee on Insolvency Law and Practice (Cork Committee Report, 1982 (Cmnd 8558) para 204.
[3] Recommendations of the Cork Committee led to promulgation of the Insolvency Act, 1986 (UK).
[4] Orojo J.O (2008) *Company Law and Practice in Nigeria,* 5th ed. Lexis Nexis, Butterworth p.17.
[5] Idigbe, A and O, Kanu, “Recent Strides in Nigeria Insolvency Law-Banking Insolvency and AMCON Act.” October 5, 2015 www.monday.com.Nigeria.(Accessed17th July, 2016).

The paper examines the causes of company and business failures in Nigeria and in the absence of legislation or regulations dedicated to save businesses in trauma, examines key reforms introduced by the United Kingdom and the United States of America aimed at rehabilitating ailing businesses, rather than leaving them to face liquidation or administrative receivership (the process by which the holder of a “floating charge” over the assets of the company can appoint a receiver to run and ultimately sell the assets). The paper also analyses some informal rescue models, including appropriateness of the courts driven business recovery or in the alternative endorsing the highly controversial pre-packaged administration.

Causes of Business Failure

According to Mbat and Eyo[1], managerial inefficiency and infectiveness, constitutes the most pronounced source of corporate failure, which is accentuated by lack of a well articulated corporate strategic plan. Bhattacharjee, Higson, et al remarked that the derivatives of this could consist of over expansion, ineffective sales force, high production cost, inappropriate costing strategies, low productivity, poor financial management strategy and poor risk assessment strategy.[2] According to the authors, a company that undertakes over expansion is likely to immobilize short-term funds thereby creating an avenue for corporate failure. Corporate expansion should therefore be made to follow strictly corporate strategic plan. Gilman, opined that the end result of production is to sell the product. If the sales force is not properly trained and developed, the company may find it difficult to sell its product especially if the product is sold in a highly differentiated competitive market. This situation according to the author will create cash flow problem and by implication, solvency problem. [3]

High production costs is also said to be a debilitating factor. This is a situation where the production cost of a firm makes its product not to compete favorably with other differentiated products in the market. Bowen, Morara and Mureithi noted that this could be due to over employment of human and material resources or technical inefficiency in the production process.[4] Richard and Steward also posit that a firm whose financial manager is unable to take effective financial management decisions is bound to experience acute liquidity problem and such decisions include investment, financing and dividend policy decisions.[5] Mbat and Eyo further opined that, the risk associated with an investment decision should be properly evaluated. The reason is that investments in assets constitute the most important source of corporate earnings. Thus, if risk assessment is not properly done, corporate income would be impaired.[6] According to Alo, inappropriate commercial policy, especially policies affecting sales should be carefully evaluated since such could lead to debt build up and by implication liquidity crises.[7] Absence of manpower training and development policy may also be a militating factor. A firm that does not have manpower training and development policy cannot make use of well trained and specialized staff that can help in the achievement of corporate objectives. Bedelan noted that an evaluation of strategic business units will show average poor performance of staff which occupies critical positions in the organization.[8]

Capital inadequacy is also identified as a factor that could cause business failure. A firm that is undercapitalized is bound to fail sooner or later. Caballero and Krishnamurthy observed that, the firm will not have enough capital to buy the relevant fixed assets, invest in enough income generating assets or enough working capital. Moreover, capital structure could create a problem which ultimately ends up in corporate failure. For example, if the capital structure is highly geared, instead of being lowly geared it may create income sharing problems.[9] Hopenhayn identified socio cultural factors. A firm that produces products which are not absorbed by the immediate environment will have tough times selling its products. It will force the firm to look for distant markets which lead to higher marketing costs and inability to sell its products.[10] Robson opines that, public policy is a very important external source of corporate failure. When government policy is against the interest of a firm within the short-term period, the firm could go bankrupt. For example, if government places a ban on importation of a firm’s input, production will be impossible when the existing stock inputs are exhausted.[11]

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[1] *David O. Mbat 1 & Eyo I. Eyo*, Corporate Failures: Causes and Remedies, Business and Management Research.

[2] Bhattacharjee, A., Higson, C., Holly, S. and Kattuman, P. (2002). “Macroeconomic instability and business exit: Determinants of failures and acquisitions of large UK firms”. *Journal of Economic Dynamics and Control* 1(2). 18-33

[3] Gilman, L. J. (2001). *Principle of Managerial Finance* (9th Edition). India: Addison Wesley Longman.

[4] Bowen, M., Morara, M. and Murethi, S. (2009). “Management of small business challenges among and micro enterprises in Nairobi-Kenya.” *KCA Journal of Business Management* 2(1). 16-31.

[5] Richard, B. and Steward, M. (1986). *Principles of Corporate Finance*. Singapore: McGraw Hill Book Company.

[6] David O. Mbat1 & Eyo I op. ci t.

[7] Alo, O. (2003). *Issues In Corporate Governance*. An FITC Publication

[8] Bedelan, A.G. (1987). *Management*. Japan: Dryden Press Ltd.

[9] Caballero, R. and Krishnamurthy, A. (1999). Emerging markets crisis – An assets markets perspective. IMF Working Paper 99/129. Washington: The International Monetary Fund.

[10] Hopenhayn, H.A. (1992). Entry, exit and firm dynamics in long run equilibrium. Econometrica 60. 1127 – 1150. http://dx.doi.org/10.2307 /2951541 accessed.

[11] Robson, M.T. (1996). Macroecnomic factors in birth and death of UK firms: Evidence from quarterly VAT registrations. The Manchester School 64. 170 – 188. http://dx.doi.org/10.1111/j.1467-9957.tb00479.x accessed.

Corporate Rescue Law, an Alien Development in Nigerian Company

The concept of corporate rescue is at a point of company formation and liquidation or the winding up of a company. It is a relatively newly constructed crossroad. The literature in Nigeria is practically non-existent. Nigerian authors limit their discussions to hornbook law. Orojo's book,[1] arguably the most popular publication on Nigerian company law and practice, devotes chapter 23 to Arrangements and Compromise, where the various ways a company may alter the rights and relations of its members and creditors are described. The author devotes the next chapter, to discussion on merger and takeover where, a merger is defined as an amalgamation of the undertakings' or any part of the undertakings or interest of two or more companies and one or more bodies corporate. On the other hand, takeover is defined as the acquisition by a company of sufficient share in another company to give the acquiring company control of that other company. Orojo thereafter delves into the analysis of the legal framework for mergers and takeovers in Nigeria and the role of the regulatory bodies, like the Securities and Exchanges Commission, the Central Bank of Nigeria and the court which puts final seal on these schemes. Orojo's work also dwells extensively on liquidation or winding-up of companies. The author maintains that one of the most important remedies available to debenture holders or other interested persons to realize their security or preserve the asset of the company, is the power to appoint a receiver and/or manager of the property charged or concern. The purpose of appointing the receiver according to the author, is for the receiver to work towards paying outstanding debt or redeeming security or freeing property from some jeopardy for the benefit of creditors or debenture holders on whose behalf the appointment is made. Thus, the major duty of the receiver is not to save an ailing company from collapse, but to help realize and protect its assets for the purpose of settling claims of persons entitled to them.

On mergers and takeovers, the reasons adduced by the author for such include, the desire to diversify and reduce risks, to take advantage of the resulting economies of scale by large scale production and lowering unit costs and so enhance profits, to secure efficient management where the acquired company is poorly managed, to eliminate or reduce competition. The author thereafter horned in on how the life of a company comes to an end. Here, Orojo describes the role of the liquidator, who is appointed to preserve the company's assets before a winding-up order is made. The winding-up order on the directors as posited by the author is to put an end to the directors powers of management, while in the case of the company's employees, on the making of the order, the employees are ipso facto dismissed. In effect, the winding-up proceeding is not to save the company or its employees or dependants, but to terminate the life of the company.

Another prominent Nigeria author, Akintunde Emiola in his book, titled chapter 13,[2] as "Restructuring a Company" and writes that, the exigencies of the world business have sometimes forced companies to seek structural changes in their organization, to enable them to cope with the immediate or long-term problem. The author exemplifies this statement by stating that, a company may want to prune down its organisation with a view to making economy or to reduce its areas of operation or to go into some non-commercial ventures. These desired changes the author opined, are facilitated through the elaborate provisions of the Companies and Allied Matters act and the Investments and Securities Act, through its provisions on arrangements and compromise, mergers, take-overs and acquisitions. By way of reiteration, these schemes, mergers, take-overs, acquisitions, arrangements and compromises, although formal, are not conscious platforms and cannot take the place of a formal elaborate corporate rescue law which includes, but provides cost effective, less cumbersome and corporate friendly means of rescuing a company in trauma, rather than overseeing its demise. The British author, Brenda Hannigan[3] devotes part V of her book to "Corporate Rescue and Restructuring" and opines that, one option to adopt in rescuing a company is to use the provisions governing schemes of arrangement in the Companies Act, but admits that these are complex provisions, time consuming and expensive to operate, especially with respect to identifying distinct classes of creditors who are entitled to separate meetings. The author concludes that, although, schemes of arrangement may be of value in a variety of situations, they are inappropriate rescue mechanism for companies in financial difficulty, other than in complex cases.

In their recent work: "Recent Strides in Nigerian Insolvency Law-Banking Insolvency and AMCON Act". Idigbe, A and Kalu, O[4]., examined the pace of modern reforms on the law of insolvency with special reference to the 2015 AMCON Act amendment. The authors trace the genesis of the original law, the AMCON Act No. 4, of 2010, which was enacted to provide business rescue mechanism, that would help to segregate the several damaged aspect of banking business, from the viable portion and create a third party institution to manage or absorb the polluted aspect of banks, without necessarily removing the managers of the banks, whilst improving the liquidity and business of the bank as much as is possible. This approach the authors asserted, was in contrast with the Central Bank of Nigeria or the Nigerian Deposit Insurance Corporation approach, which involved the takeover of management and ultimately liquidation, as once management was dislodged, public confidence is

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[1] Orojo J.O. op. cit.
[2] Emiola, A. (2007*) Nigerian Company Law*, Ogbomoso: Emiola Publishers.
[3] Hannigan, B. (2012) Company law, 3rd ed. Oxford, Oxford University Press. p. 562
[4] www.monday.com7Nigeria7 accessed 17th.

usually lost leading to a run on the bank. According to them, initially the AMCON Act was hailed as a welcome development for the business rescue, with the use of AMCON (Assest Management Corporation of Nigeria) as an additional tool for banking restructuring of the 2009 financial crisis. However, criticisms trailed the retention of draconian powers under the Act, a deep aloofness to major principles of creditors' rights and lack of safeguard of constitutional rights including rights to property and labour rights. The amendment of the Act was therefore inevitable, despite some lofty innovations, such as the window provided for the insolvency practitioner appointed by AMCON to elect to proceed on a purely liquidation approach or to proceed on the basis of business rescue of the debtor company.

These mechanisms were aimed at promoting business rescue of the borrower on one hand and that of the banks and financial institutions on the other hand. The window for general business rescue, arguably remains limited but the fact that, the choices provided are only available to AMCON appointed receivers. There is no right to any debtor to apply for moratorium in the nature of protection through automatic stay, upon a plan to be approved by the general body of creditors. In spite of the noted shortcomings, it is healthy to welcome the amendment as a vista for a bright future for the Nigeria insolvency regime.

Why Corporate Rescue Law for Nigeria?

The advantage of having a corporate rescue law in place is that, it has the potential of preventing or limiting job losses and its spiral effects. In Nigeria with its unacceptably high unemployment figures, no effort should be spared to save jobs. Having a successful and effective corporate rescue regime or procedure is of importance to the economic growth and stability of a nation. It has been articulated that having an effective business rescue regime is one of the factors, that foreign investor take into account, when deciding whether to invest in a country.[1] Major economies of the world, like the United States, Britain, Germany, Austria, South Africa and France have realized that there are many benefits to be gained from attempting to rescue a company or its business if it has potential to survive. As a result these nations, have introduced in their jurisdictions special legislation for business rescue.

Corporate rescue models

A corporate rescue is about putting in place institutional and substantial interventions to avert corporate failure. It is possible to rescue a company or other forms of business enterprise by formal and informal or unregulated methods. The formal rescue regime is divided into the court driven rescue procedure, which is the United States model and the administrative procedure, which is the procedure in England and Wales.

The United States model

Chapter II is the United States primary version of corporate rescue and is contained in the American Bankruptcy Reform Act, 1978. This model permits the management of the debtor company to remain in control of the company while under the protection of the Act to formulate a restructuring plan for the company, despite the possibility that it was the same management which run the company into financial problems. This approach is characterized as recognizing that failure does not need to rule out future successes of incumbent management.[2] The procedure entails, leaving the debtor in charge of the company, where the debtor is transformed to a trustee of its assets which constitutes an estate. Its creditors and members establish committees which act as conduits between the debtor and the groups they represent.

This model is based on the team production theory, which dictates that the production effort within a company is the result of contribution from many sources, creating one joint effort as opposed to separate inputs belonging to one person.[3] The theory acknowledges that the creditors are not the only ones that contribute to the positive value of the company, nor are they the only ones who take risk of investment in companies; they should therefore be given equal weight.[4] Thus, the insolvency law process is dedicated and based on a collective basis where the rights of all interested parties are considered. It acknowledges the importance and value of human capital contribution to a company and proceeds on the basis that, management should stay in place if their value adds to the firm and believes that it is necessary and fairer to consider the broader interests.[5]

Rescue Procedure under Chapter II of the Bankruptcy Code

The rescue procedure is usually commenced voluntarily when the debtor files a petition with the bankruptcy

[1] This statement is credited to Roger Baxter, Chief Economist of the Chamber of Mines of South Africa, at a lecture titled: "Black Economic Empowerment Transformation in the Mining Industry", delivered to participants in the Certificate in Advanced Corporate Law and Security Law Programme at the University of South Africa, Pretoria on July, 2008.

[2] M. Brouwwer, Reorganisation in Us and European Bankruptcy Law, *European Journal of Law & Economics* (2006) 5 at 11.

[3] A.A. Alchian and H. Demsetz, Production, information costs and economic Organisation, *62 American Economic Review* (1972) at 777.

[4] M.M. Blair, *Ownership and Control: Re Thinking Corporate Governance for the Twenty First Century* (Washington: Brooking institute, 1995 at 239.

[5] See A. Rahmani, 'Shareholder Control and its Premises'; *ICCLR* (2012) 12 at 19.

court[1], although the procedure may be commenced involuntarily at the request of creditors[2]. The commencement operates as an automatic stay in legal and administrative action against the company or its assets, until the subject matter of the dispute ceases to belong to the company or the reorganization terminates.[3] At the request of a secured creditor who can show cause, unless the debtor furnishes that creditor with adequate protection that the subject matter of the dispute or property is important to its re-organisation the court can grant relief from the stay.[4] The court may also dismiss the case or convert it to a liquidation case if requested, subject to the interests of the stakeholders as a group or the estate.[5] Soon after commencement, the debtor is transformed to a trustee of the assets of the company which is constituted an estate. Its creditors and members establish a committee which acts as conduit between creditors and the debtor[6]. The role of the committee is to consult with the organisers on the administration of the case, investigate the debtor's true condition and the desirability of carrying on its business, participate in the formulation of a plan and advise the interests it represents.[7]

When appropriate, the court may order the appointment of a trustee or an examiner, if requested, who takes control of the debtor, operates its business and administers the reorganisation.[8] The administrator of the company's property or estate who is also called a debtor in possession is empowered to propose a re-organisation plan and where permitted, any intended party including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder or any indenture trustee, may file a plan.[9] The plan sent by the debtor must be accompanied by a pre-approved disclosure statement outlining information that will facilitate decision-making to claimants.[10] The proposer of the plan must place all claims in classes based on their similarities. A class of claims accepts a plan if two-thirds in amount and more than half in number of the allowed claims approves it in good faith.[11] An unimpaired class is presumed to approve the plan, while a class which receives nothing is presumed to reject it.[12] A claim is impaired when the legal/equitable and /or actual rights that attach to it are altered without the creditor's acquiescence. The approved plan must be confirmed by the court before it takes effect.[13] The court will not confirm the plan unless it is approved by at least one class of claims.[14] During the hearing the court must ascertain that the plan and its proposer have complied with all statutory requirements.[15] The plan may still be confirmed by the court if all other conditions have been met, except acceptable by all classes of at least one class has approved.[16] If there are several plans submitted, the court can confirm only one and the plan confirmed will bind all claimants, interest holders and the debtor.[17]

The United States rescue code is structured to engender democratic rescue decisions. The procedure hinges on the assumption that the debtor in consultation with the committee will make the rescue decision objectively.[18] The debtor is expected to know its problems quite well and the committee during the consultation is expected to be guided by the results of its investigations.[19] Otherwise, the committee may solicit the appointment of an examiner to investigate its suspicions of the debtor.[20] The implication is that, at the end of the process at least in theory the business would have been thoroughly investigated and evaluated, resulting in the termination of businesses which are unviable and the retention of their viable counterparts through resale or sold as appropriate.[21]

Critics of the American model, aver that the idea of leaving existing management in charge of an ailing business is like "leaving the fox in charge of a henhouse". [22] But this argument is countered by the assertion that, displacing the management and replacing them with a professional insolvency practitioner, as the prime decision maker may sometimes not augur well for the ailing company. Concerns are expressed regarding the suitability and the level of quality control in place, to ensure that the insolvency practitioner fairly and efficiently deals with

[1] II USC s 301
[2] Ibid s.303
[3] Ibid s.362
[4] Ibid 362(d)
[5] Ibid s.1112
[6] See generally Ibid, s.1102
[7] Ibid s.1103 (c)
[8] Ibid s.1104, 1106 (a)
[9] Ibid s.1121 (a)(b) and (c)
[10] Ibid s.1125(b)
[11] Ibid s.1126 (c)
[12] Ibid s.1124
[13] Ibid 1141.
[14] Ibid 1129 (a) (10)
[15] Ibid 1129 (a)
[16] Ibid 1129 (b) (1)
[17] Ibid 1141
[18] Jay Westwood, 'The Control of Wealth in Bankruptcy' (2004) 82 *TLR* 795.
[19] II USC 1103 (c) (2)
[20] Adebola, B.A op. cit 213
[21] Ibid
[22] McCormack, 'Control and Corporate Rescue' 56 (3) *ICLQ* (2007) 523 at 524

the affairs of the distressed company. The role of the court is central in this procedure, as judges make several decisions after hearings at which the parties interested may be heard. This model is litigious.[1]

The England and Wales Model

The current regime governing corporate rescue traces its genesis to the report of the review committee on Insolvency Law and Practice.[2] The recommendation of the Cork committee led to the Insolvency Act 1986, the principal object of which was to facilitate a rescue culture which enable companies in financial difficulties to be rescued before sliding into insolvency. Under the Act, two procedures were introduced aimed at implementing the objective of corporate rescue, viz(i) the administrative order; and (ii) the company voluntary arrangement (CVA).

Administrative Procedure

The commencement of administration is signified by the appointment of an administrator, who may be appointed by court order on the application of the company, its directors, its creditors, the qualifying floating share holder or the liquidator.[3] Section 8 together with para 3(1) of sch B1 to the Insolvency Act, 1986 as substituted by section 248 of the Enterprise Act 2002 lays down the objective of administration in terms of the duty of the administrator. The administrator who must necessarily be a qualified insolvency practitioner,[4] is required to perform his functions with the objective of:

a. rescuing the company as a going concern;
b. achieving a better result for the company's creditors as a whole than would be likely if the company were wound up … ; and
c. realising the property in order to make a distribution to one or more secured or preferential creditors.[5]

An application for an administration order can be made by petition by the company, the directors, or by qualifying holders of a charge[6]. When a petition for an administration order is presented a moratorium on insolvency proceedings comes into place, and except for an excepted petition i.e. a petition by the Secretary of State that winding-up is in the public interest under s.124 A of the Insolvency Act 1986, no petition to wind-up the company can be commenced nor can any other insolvency proceedings. No steps may be taken to enforce any security over the company's property,[7] or repossess any goods in the company's possession under any hire-purchase agreement, nor can any other proceedings execution or other legal process be commenced or continued, or distraint. No meeting of the company may be held or requisitioned within the consent of the administrator or of the court.

The legislation confers a wide range of management powers on the administrator so that he may do all such things as may be necessary for the management of the affairs, business and property of the company.[8] He may remove or appoint directors.[9] He may call meetings of members and creditors of the company.[10] He may dispose of property secured by floating charge without prior approval, provided that the secured party is given a corresponding interest in the acquired property.[11] He may dispose of property subject to other charges with the permission of the court.[12] He may make distributions to secured and preferential creditors without prior approval of the court, but may only make distribution to other unsecured creditors if approved by the court.[13] Indeed, he may make distributions to any creditor without prior approval, if that would facilitate the achievement of the purpose of the administration.[14] The scope of administrator's powers is such that, any person dealing with him does not have to inquire about his authority.[15] His actions are valid, even if his appointment is defective. [16]

The administrator must within eleven days of his appointment be presented by the company's officers a verified statement of affairs, unless he extend the time limit or revokes the requirement.[17] Within eight weeks of

[1] Adebola op. cit.
[2] Cork Committee Report, 1982 (comd 8558)
[3] Insolvency Act, 1986 Sch BI Para 14.
[4] Ibid Sch B1 para 6.
[5] Ibid Sch BI, Para 3(1)
[6] See para 10, 14 and 22 of Sch B1 to the 1986 Act; See *Fliptex Ltd v Hogg* (2004). EWHC 1280.
[7] Insolvency Act, 1986 s.10 (1); See also *Bristol Airport Plc v Powdrill* [1990] Ch. 744.
[8] Ibid section 14 (1).
[9] Ibid Sch B1, para 61.
[10] Ibid s.14, Sch 1.
[11] Ibid Sch B1 para 70.
[12] Ibid Sch B1 para 71, 72.
[13] Ibid Sch BI para 65.
[14] Ibid para 66.
[15] Ibid para 593.
[16] Ibid para 104.
[17] Ibid para 47, 48.

his appointment, the administrator must formulate his plan for achieving the goal of the administration.[1] In his plan, he may propose to rescue the company or its business; whichever is achievable or serves the interests of the creditors better.[2] If any part of the business cannot be saved, the administrator may realise the assets for distribution to secured or preferential creditors.[3] The proposals formulated in the plan, must be sent accompanied by a notice of meeting by the administrator to the creditors, members and the registrar of companies.[4]

On receipt of the proposals, the creditors may approve or reject them at a meeting and may also establish a committee which may summon the administrator for questioning about his duties.[5] If the proposals are rejected, the court may terminate the administration, approve a previously suspended wind-up petition or make any order it considers appropriate.[6] The appointment of the administrator may also come to an end automatically, twelve months after the date on which the appointment took effect, unless extended by consent or the court.[7] Administrators are expected to make commercial decisions and when necessary take legal advice.[8] He is expected to have passed the requisite training and duly licensed by any recognised professional bodies. He takes the rescue decision. Theoretically, the law prioritizes the preservation of business within their corporate shells, over business sales, however, the administrator is to be guided by the option that best serves the interests of the creditors as a group.[9] It is only where the administrator thinks that he cannot achieve either of these preferred objectives, that he may choose to realise assets for distribution to secured and preferential creditors.[10]

The Company Voluntary Arrangement (CVA)

Sections 1 to 7 of the IA 1986 provide for a type of arrangement which is concerned to prevent a company for being wound up. The company voluntary arrangement offer a comparative simple and low cost way to reorganise the affairs by a company, by allowing it to be under the control of its present management and subject to the supervision of a qualified insolvency practitioner. It provides a framework for agreement with creditors and members. In general terms, a CVA is a contract made between the company and its creditors, whereby the contract freezes the existing debts at an agreed date. The company carries on trading and pays a monthly amount into the CVA over an agreed period, usually of three to five years.[11] The CVA allows the company to go on trading, but enables the creditors to receive at least a part of the debt.

Formal proposals for a voluntary arrangement may be initiated anytime by the company's directors, even if the company is not actually insolvent, then it is often the case that it will be or at any rate close to it.[12] Once a winding-up begins or an administration order is made, the directors can no longer initiate a scheme, though the initiative may come in such a case from the liquidator or the administrator. A voluntary arrangement initiated by the latter is more likely to succeed after an administration order has been made, since the order will ensure the suspension of creditors rights, and thus give the administrator a better opportunity to put together, a fully considered scheme without any untoward pressure.

Meetings of both creditors and directors are held to approve the proposals, which require a simple majority in value of the members voting in person or by proxy or by written resolution and a three-quarters majority in value of creditors, voting in person or by proxy at a creditor's meeting. If the meetings approve the arrangement, it becomes binding on all ordinary creditors, but not on preferred or secured creditors, unless they agree on who can pursue their claims against the company. *In Re Cancol Ltd*[13] the courts decided that a person who was entitled to a future or contingently payable debt, such as future payments of rent to fall due under on existing lease was a creditor, for the purpose of insolvency legislation and was bound by a company voluntary arrangement approved at a meeting of creditors, of which he had notice and at which he was entitled to vote. The CVA is potentially vulnerable in the first twenty-eight days to a challenge by a disgruntled creditor, member or contributory on grounds of unfair prejudice or material irregularity. In such circumstances, the CVA may be revoked or suspended and further meetings may be held to consider a revised proposal.[14] The approval of the scheme is reported to the court which may discharge an administration order or a winding-up order.[15]

Under the Insolvency Act, a moratorium is available to small companies for a short period of twenty-eight

[1] Ibid para 48.
[2] Ibid para 3 and 49.
[3] Ibid para 3(c).
[4] Ibid para 49 (4) and 51 (1).
[5] Ibid para 53, 54 and 57.
[6] Ibid para 55.
[7] Ibid para 76.
[8] Ibid para 257
[9] *BLV Reality Group II Ltd v Zegna III Holdings Inc.* (2009) *EWHC* 2994.
[10] 2009 WL 3805449, paras 8-10.
[11] Denis Keenan (2005) *Smith and Keenan's Company Law*, 13th Ed. Harlow, Pearson Education Limited p 510.
[12] Ibid.
[13] *Re Cancol Ltd* (1996) IBCLC 10.
[14] *Retrident Fashions Plc*. (2004) *The Times* 23
[15] Ibid.

days, where its directors intend to put a proposal to the company's creditors for a company voluntary arrangement. [1] In relation to larger companies, it will be necessary to open administration proceedings in order to obtain the benefit of moratorium.

Basic differences between Administration and Company Voluntary Arrangement

If an administrator is to be appointed, the company must be insolvent or close to insolvency. In contrast, there is no insolvency requirement in respect of the implementation of a CVA. Another distinction is noted with respect to control of the company. The company voluntary arrangement is a "debtor in possession", where the board of directors retains management powers and the role of the insolvency practitioner is to act initially as nominee, while the CVA is being proposed, and then as supervisor once the CVA has been implemented. The administration procedure may be described as a "practitioner in possession" procedure since an insolvency practitioner is appointed to take control of the company and has full management powers and can control the functions of, and composition of the board of directors. The administrator formulates the administration proposals.

Unless it is a small company, there is generally no moratorium available in relation to a CVA, but a company subject to the administration procedure has a benefit of a moratorium. An interim moratorium applies where an application for an administration has been made or where notice of intention to appoint an administrator out of court has been filed.[2] The objectives of CVA and administration are also different. The CVA facilities continued trading and provides a process for an agreement with creditors as to the settlement of the company's debts. For example, the arrangement might entail a delayed payment schedule, a reduction in the amount owned, or a debt for equity swap. It binds all creditors who were entitled to vote at the creditors' meeting, regardless of whether or not they received notice of the meeting. It does not bind those who were not eligible to vote. At the meeting a majority of creditors in number, in excess of three quarters in value, must approve the arrangement. Administration on the other hand, acts primarily as temporary protection to enable the company to resolve its difficulties, until such time as the administrator identifies the best exit route. This may be the agreement of a company voluntary arrangement or administration which may last until such time as the administrator is able to implement strategy that has already been identified, such as a "pre-pack".[3]

Comparing the US Model with English and Wales Model

Under the English and Wales model it is widely accepted that senior lenders with the benefit of floating charges are in a very strong position when it comes to a financial reconstruction of the company, particularly when there are other financial creditors involved. For example, senior lenders can block, the company or any other creditor from appointing an administrator to a company over which they have a floating charge. Also, the administrator operates to try to turn the company around with the benefit of a stay of execution, affecting all creditors. But lenders with a floating charge, can instead appoint an administrative receiver, who is their appointee in running the company.

However, in recent years a large number of changes have been made to the United Kingdom Insolvency law. These include the implementation of the Insolvency Act, 2002 and the changes made in the Enterprise Act, 2002, with the former among other matters introducing the small company moratorium and the latter:

a. virtually abolishing the concept of administrative receivership by preventing holders of floating charges from blocking the appointment of an administrator;
b. allowing administrators to be appointed out of court by the holder of a qualifying floating charge or the directors in certain circumstances;
c. emphasizing that the main objective of administration is rescuing the company as a going concern and only if that primary objective cannot be achieved may the administrator then break up or sell the whole business or realise property in order to make a distribution to secured or preferred creditors; and
d. ensuring that the administrator now owes a duty to protect the interests of all creditors, compared to administrative receivership where the receiver owed a primary duty to the secured lender who appointed him.

In contrast, is the United States, Chapter II of the Bankruptcy Code which deals with restructuring. In many ways, it is similar to administration under part II of the Insolvency Act, 1986, except that in most Chapter II cases the debtor remains in possession. This means that, the debtor is authorized to continue its operations and the existing or new management remain in office, rather than a licensed insolvency practitioner being appointed to take over the management of the business, as in the case with an English administration. A judicial environment is created which assists in restructuring companies through an automatic stay which enables the

[1] Insolvency Act, 2000 sch I.
[2] Ibid.
[3] A pre-pack involves a pre-arranged sale of all or part of a distressed business or assets f the company, which will be executed, immediately, or shortly after the appointment of an administrator.

conclusion of debtor in possession financing, which is generally not practicable in England. Binding non-accepting creditors through the bankruptcy plan is also an advantageous feature of chapter II. The law of restructuring in the United States is highly codified and the restructuring proceedings tend to favour granting a debtor the opportunity to reorganize, a predisposition often at odds with the interests of secured creditors. In addition, American reorganisation proceedings are typically litigious and protracted in nature.[1] Court approval is required for any action outside the ordinary course of business; sales, assumption or rejection of contracts, borrowing money, etc. In the United Kingdom, once in administration, the company's business is conducted almost entirely outside court supervision.

Informal Rescue Methods

It is possible to rescue a company or other form of business enterprise by varying informal and thus unregulated methods, for example by the banks monitoring disbursed loans or debtors interacting with creditors as to how a company could be kept afloat as is customary in Nigeria or by using statutory procedures that are not specifically aimed at business rescue, for example through arrangements, compromise, receivership and liquidation which is provided for under Nigerian law. But these approaches are fraught with certain disadvantages attached to these procedures. These vary from high cost and the cumbersome processes involved, to the lack of protection of company assets against individual creditors who are unwilling to support an informal rescue attempt.[2]

Courts Role in Driving Business Recovery

It has been suggested that the courts should pick up the gauntlet in driving business recovery. In an article titled: "Driving Business Recovery: The Role of the Courts", Idigbe opined that, the principal focus of modern insolvency legislation is no longer the liquidation and elimination of insolvent entities, but rather, the remodeling of the financial and organisational structure of enterprises in financial distress, to enable the reliabilitation and continuation of their businesses.[3]

The Nigerian general insolvency regime is lacking in this business rescue bias and pending legislative intervention, the court should proactively encourage business recovery in suitable circumstances using some well established techniques.[4] The suggested techniques include but not limited to the courts using their discretionary powers, in demanding to be satisfied that real insolvency exists, before liquidation in commercial insolvency-based disputes, and by preferring business rescue in appropriate cases rather than winding-up.[5] With respect, the issue of discretion calls for cautious introspection. Judicial activism and creativity if not watched closely may rock the cornerstone of the common law system as practiced in Nigeria, viz, judicial precedent and its merits, which include certainty of the law, predictability of the law and in theory, unbiaseness on the part of the arbiter. Moreover it is doubtful if Nigerian judges have the experience and knowledge to oversee this iconic aspect of insolvency law. Alternatively, Idigbe [6] suggests that, the Chief Judge of the Federal High Court,[7] who has constitutional subsidiary rule making and practice direction powers under the 1999 Constitution (As Amended) and its enabling Act, can subtly issue a practice direction whose objective is to influence a rescue culture. In this respect, a practice direction could be issued by the chief judge requiring that every application for relief against exercise of a security of right or for directions under section 391 of the Companies and Allied Matters Act, be supported by a rescue plan prepared by a member of an authorized insolvency association or a professional licensed by the official receiver of the court. While these suggestions are laudable initiatives to fill the void in the extant general insolvency framework, they can never replace a dedicated legislation with all the attributes of company and business rescue. A business rescue law should be very clear on crucial elements to a corporate rescue activity. One of such elements is moratorium, which is an automatic stay on the enforcement of creditors' claims against a company and its assets. A moratorium enables a financially distressed company to take a short breath and recover from the temporary cash flow problems, negotiate with creditors for debt restructuring, seek new financing and keep its assets away from the debt enforcement.[8]

The rationale of the moratorium is to sacrifice the immediate and partial repayment of creditors, for the long term objective of corporate turnaround and a high rate of recovery to creditors. However, the interests of a few parties, especially the secured creditors who hold strong power, may need to suffer from the freezing on their claims in order to achieve a better outcome for all the stakeholders, than would be expected on an immediate

[1] Henry Gibbon, Chapter II vs UK Insolvency Laws: US Investors have brought their own style of conducting restructuring to the UK and are having a growing influence. www.acquisitions-monthly.com. Accessed

[2] Milma and Durant "*Corporate Insolvency"* p 22.

[3] Idigbe A.I. (2011)

[4] Ibid

[5] Ibid.

[6] Ibid.

[7] It is the court in Nigeria with the jurisdiction to deal with insolvency matters.

[8] United Nations Commission on International Trade Law (UNCITRAL), Legal Guide.

liquidation.[1] It is therefore legislatively wise, that care be taken in designing a moratorium in rescue laws, especially the entrance and length, in order to avoid abuse. Another element crucial to the business of a rescue attempt in respect of an ailing company which is suffering cash-flow problems, is new finance. After corporate rescue procedures commence, the financially troubled debtor must have access to enable it to obtain sufficient funds for continued trading, the income from which could enable the debtor to pay debts of existing creditors, to obtain the indispensable supplies of the goods and services, and to spend on other necessaries in order to ensure the operation of its business activities.[2] A company in financial distress may need new money at an early stage of rescue, but lenders will not easily warm up to assist, because when a company is in actual or impending insolvency, in most cases there will be no supplies, or not enough, assets which can be used to provide security for further borrowing. The financial institutions may be reluctant to take risk to lend in the unsecured or under-secured situations where the full repayment will usually depend on the successful turnaround of the borrower.[3] New financing in post-commencement has been recognized as a crucial factor for a rescue attempt by insolvency law reforms, which may consider conferring priority or providing security to encourage a lender to advance new funds.[4] The issue of priority becomes important in circumstances where the debtor does not have assets available to provide a security for the new borrowing and owes existing creditors. As the new lenders bear the biggest risks in the period of re-organisation, they deserve distribution priority over other claimants. Thus it is germane for the legislation to be carefully crafted to incorporate the legitimate interests, by according super-priority for such post-commencement of restructuring lenders.[5]

Debtor Restructuring and Corporate Management

Adebola in her work proposed two procedures which are distilled from comments of stakeholders the researcher interacted with.[6] The first procedure is referred to as Debtor Restructuring while the other is called Corporate Management. The debtor restructuring is a modified chapter II, where the management is left in control, but requires the appointment of a professional, known as the Restructuring Officer (RO) to oversee the restructuring and to monitor management. Debtor restricting may be triggered by the management or initiated by the creditor. The procedure commences when the court clerk stamps the documents. As soon as the procedure commences, the Federal High Court obtains exclusive jurisdiction over all matters pertaining to the debtor, regardless of subject matter. The commencement of restructuring also triggers a moratorium on legal and administrative proceedings against the company. Although, the stay also prohibits the enforcement of security and quasi security rights against the company, the bank has the right within five business days to request, to the court, that the case be converted to corporate management, if it shows adequate cause.[7] If the secured creditors, including the bank, have no faith in the rescue, they may exit by requesting the court to lift the stay.

The management remain in office during the procedure and continue to run the daily affairs of the company, but cannot pledge the unencumbered assets of the company without the consent of the RO, or of the court if the RO refuses. Directors who contravene these provisions may be penalized on the application of the RO, bank or creditors. Keeping the manages in place and inviting them to apply for the procedure according to Adebola, is to placate these officers and the staff as a whole and since many Nigerian companies are owner-managed, they may be the best persons available to run the company.[8] This approach Adebola first, opines will be less likely to encourage protest or long value destructive legal and extra-legal battles which are hallmarks of hostile take-overs of companies if management is on the other side.[9] The role of the RO is to take control of the structuring, while the management continues to administer the daily schedule of the company. On appointment the RO determines whether debtor restructuring is most suited to the needs of the company, or if any other salvage regime is more appropriate. He can not determine the appointment of directors, but may make recommendation to the creditors meeting for the replacement of senior officers if need be. The RO is mainly to bring a professional perspective to the administration of the rescue and the management of the company's affairs.

The company is given a period of three months within which to attempt a rescue, if this is not feasible then the rescue is transferred to the creditors' representatives, who may propose Corporate Management as a means of rescuing the company. The procedure here as proposed by Adebola is initiated at first instance or commenced when a debt restructuring is converted.[10] Both the company or the bank may apply separately, with similar filing

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[1] Milman, D (2004) "Moratoria on enforcement right: revising corporate rescue" *Conveyance and Property Law,* 89, 90.
[2] Davies, S (2003). *Insolvency and the Enterprise Act*, 2002, Jordans, Bristol, p.21.
[3] The insolvency Service, (1999) *A Review of Company Rescue and Business Reconstruction Mechanisms*, London: Hmso, paras. 6(t)-6(v).
[4] Zhang, H (2008) Making an efficient and well functioning corporate rescue system in Chinese Bankruptcy Laws: from the perspective of comparative study between England and China. Thesis submitted for the Degree of Doctor of Philosophy of the University of Leicester. p.42.
[5] Davies, S. op. cit pp 20-25; Finch, V. (2003) "Re-invigorating Corporate Rescue" *JBL*, 527, 538.
[6] Adebola, , op. cit. p. 318
[7] Ibid.
[8] Ibid p. 321.
[9] Ibid.
[10] Ibid, 324.

statements as obtained in Debtor Restructuring. There will also be a moratorium where the Debtor Restructuring is converted to corporate management on the application of the bank or the Restructuring Officer to the courts, if for instance the proposal for Debtor Restructuring was not approved, the Restructuring Officer (RO) becomes the Management Officer (MO). However the bank can apply to the practitioners' supervising body or the court for the substitution of the Management Officer. On appointment the MO takes over management responsibilities in addition to rescue responsibilities. The MO takes control of the assets of the business. The managers may only perform functions delegated to them, if they are permitted to remain in office.[1] Just like the RO, the MO must design in consultation with creditors, a restructuring plan, which he will administer. The MO carries out his duties on behalf of the company as a whole.

Essentially, the major difference between Debtor Restructuring and Corporate Management is that, the company's managers lose their power in the latter regime. The proposals of Adebola minimize the role of courts and rely more on the experience of the Securities and Exchange Commission as well as the Business Recovery and Insolvency Practitioner's Association of Nigeria (BRIPAN), from where the ROs and the MOs could be recruited. It is important that the courts in Nigeria play a diminished role because at present they are ill-equipped to support to any meaningful rescue regime.

Pre-Package Administration

One of the common uses of administration proceedings is to effect a pre-package sale of the business. Although with no comprehensive definition, a pre-package involves, a pre-arranged sale of all or part of a distressed business or assets of the company, which will be executed immediately or shortly, after the appointment of an administrator[2]. Although highly controversial, it is important to explore the positives regarding this model. The main advantage of a pre-pack process is that, it enables the business to be sold quickly, with the minimum possible adverse impact from either public knowledge of its insolvency or the restrictions imposed by the insolvency process itself.[3] The oduim associated with failed business may make continuity of the business of a financially distressed company difficult while negotiations are ongoing to secure sale of business, investors may want to protect their interest. But the disadvantage of concealing the troubles of a company from the public through a pre-packaged sale is that, a pre-packaged proposed sale may not be subjected to the competitive forces of the market, which ultimately may lead to the company or assets within the business being sold at a value below what would ordinarily have been the case, if it had been exposed to the market for an appropriate period[4]. This process also effectively, takes way the right of shareholders to participate in the decision making process which is a central principle in the administration process. The lack of transparency renders it difficult for most creditors to determine how the deed was struck and whether the interest of the creditors have not been prejudiced.[5] An unscrupulous administrator can abuse the visita by mispresenting the urgency of the situation in order to justify the pre-pack.

It is to be noted however that, the pre-pack regime appears nowhere in the insolvency legislation and seems to be inconsistent with rescue theory, which to all intentions and purposes is to strive to rescue companies or business to which rescue is due. In spite of these shortcomings, pre-package sale can take place for sound financial reasons, since insolvency procedures, once opened, can have a negative impact on the good will and on the value of the business. Businesses that are based on employee skills and knowhow can be badly affected if key employees decided to leave due to the insolvency proceedings[6]. A pre-package may also be the best option, where there are insufficient funds available for a prolonged period of trading, while the company is undergoing restructuring.

Conclusion

A company is an integral part of the community in which it does business and therefore has direct impact on the economic and social well-being of that community. The failure of a company potentially affects the livelihood and well-being of those dependent upon it. The company may be the life blood of a whole town, state or country. Therefore, the chain reaction consequent upon any given business failure cannot be overlooked. A corporate rescue regime or plan is one of the most effective tools to reduce or stem the incidence of company or business failures.

The current rescue regime in Nigeria if any, is antiquated. Simply adopting a British or American model will not solve the impasse. Traditionally, the American Bankruptcy laws adopt a debtor friendly approach which

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[1] Ibid, p. 325.
[2] Insolvency Service, 'Report on the First Six Months', Operation of statement of Insolvency Practice 16, (2009), para 2.1.
[3] Wood J.M. (2003) 'Corporate Rescue: 'A Critical Analysis of its fundamentals and Existence' Thesis submitted in Accordance with the Requirements for the Degree of Doctor of Philosophy of the University of Leads. p. 186.) see also *Re KAyley Vending Ltd* (2009) EWHC 904 or (2009) BCC 578 para 6.
[4] Wood, Ibid p. 187.
[5] Ibid.
[6] Corporate Rescue

is strongly oriented to rescuing the financially troubled firms and the re-organisation procedure in Chapter II is created under such culture. In contrast, the English Corporate Insolvency laws are established under a creditor-friendly approach, which favours the interest of creditors, especially secured creditors like banks and financial lenders. Nigeria is culturally different from these countries and it must be cautions in adopting wholesale, foreign ethos.

Whether Nigeria adopts the formal models as espoused by the American Chapter II and the English and Wales, Administrative procedure and the Company Voluntary Arrangement (CVA), the informal models or the suggested models by Nigerian writers, the effective implementation of a new insolvency legislation which incorporates rescue law, needs judges who are competent at hearing insolvency related cases. Skills and expertise in insolvency law and related knowledge like finance and accounting is a sine qua non. Series of training programmes which tend to develop the expertise and enhance the ability and competence of the judges must be embarked upon. The Restructuring Officers or Management Officers of the rescue process must also be well equipped to undertake the arduous task of restructuring an ailing company.

In order to encourage reorganization and enhance a successful rate of rehabilitation, legal reforms should consider how to incentivize directors to put the ailing company into rescue procedure at an early stage. The greater the delay in access to corporate rescue, the greater the loss of hope for the rehabilitation of a financially distress firm. Business failure should be seen as a misfortune rather than a disgrace, so as to encourage directors of ailing companies to co-operate in rehabilitating such companies. Corporate rescue legislation is a statute whose time has come and it is therefore incumbent on Nigeria to have such a dedicated legislation.