ResearchGate

See discussions, stats, and author profiles for this publication at: https://www.researchgate.net/publication/330936580

Insolvency law and business recovery practices in Nigeria's upstream petroleum sector: The need for a paradigm shift

Article · January 2019

CITATIONS
9

READS
2,693

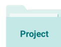
2 authors, including:

Olusola JOSHUA Olujobi
Elizade University

41 PUBLICATIONS **223** CITATIONS

SEE PROFILE

Some of the authors of this publication are also working on these related projects:



UPSTREAM PETROLEUM SECTOR - CORRUPTION View project

OIL AND GAS INDUSTRY View project

All content following this page was uploaded by Olusola JOSHUA Olujobi on 07 February 2019.

The user has requested enhancement of the downloaded file.

International Journal of Mechanical Engineering and Technology (IJMET)
Volume 10, Issue 01, January 2019, pp. 1609–1628, Article ID: IJMET_10_01_165
Available online at http://www.iaeme.com/ijmet/issues.asp?JType=IJMET&VType=10&IType=1
ISSN Print: 0976-6340 and ISSN Online: 0976-6359

© **IAEME** Publication

Scopus Indexed

INSOLVENCY LAW AND BUSINESS RECOVERY PRACTICES IN NIGERIA'S UPSTREAM PETROLEUM SECTOR: THE NEED FOR A PARADIGM SHIFT

Olujobi, Olusola Joshua
LL.B, B.L, LL.M, AciArb. & Notary Public
Legal Practitioner and Lecturer, Business Management Department,
Covenant University Nigeria

Olusola-Olujobi, Temilola
LL.B, B.L, LL.M.
Legal Practitioner and Senior Partner in Olujobi Olusola & Co. Lagos

ABSTRACT

Insolvency and business recovery practices are not at infancy stage in Nigeria, although it has not crystallized to a full profession as it is practiced in other relatively advanced climes. As the global financial sector evolves, the focus of modern insolvency and business recovery practices have shifted from winding up of insolvent oil companies to reorganization, restructuring of such companies and its operations to foster economic stability and financial propriety. But the case is the reverse in Nigeria, as liquidation is seen as the panacea to insolvency. The study evaluates Nigerian insolvency and business recovery laws to sustain modern businesses practices to prevent incessant corporate failure. Many jurisdictions are now overhauling their insolvency and business recovery laws to support business practices and to reform the gaps identified. The study conducts comparative legal and policy analyses of solvency and business recovery laws in Nigeria, Malaysia, India, South Africa, United Kingdom and United States. These countries were selected because their insolvency and business recovery laws are business rescue driven. The study is a doctrinal legal research that adopts a point-by-point comparative approach with library research method. The study finds that Nigerian law on insolvency seems deficient with regard to business rescue, turnaround and restructuring. It concludes that, regulatory agencies in the selected countries are more effective than those in Nigeria because of the political will of the governments of the former to successfully turn around insolvent oil companies, save jobs and protect creditors by optimising businesses through restructuring and business turnaround strategies. The study therefore recommends reform of Nigeria's insolvency and business recovery law and practices in conformity with the global best practices on insolvent companies rescued and creditors driven strategies for healthy economy.

Keywords: Companies, Creditor, Insolvency, Recovery Practices, Nigeria

Cite this Article: Olujobi, Olusola Joshua and Olusola-Olujobi, Temilola, Insolvency Law and Business Recovery Practices in Nigeria's Upstream Petroleum Sector: The Need for a Paradigm Shift, *International Journal of Mechanical Engineering and Technology* 10(1), 2019, pp. 1609–1628.
http://www.iaeme.com/IJMET/issues.asp?JType=IJMET&VType=10&IType=1

1. INTRODUCTION

The need to reform insolvency and business recovery laws and practices has been subject of concern globally as the various jurisdictions in the world are working hard to enrich their laws towards business rescue and creditor driven regime to boost economic stability, financial propriety and to prevent loss of jobs with basic reforms in the selected jurisdictions to enhance efficient insolvency and business recovery practices. Nigeria cannot afford be left behind in this global initiative on insolvency and business recovery practices.

Insolvency is the inability of a company to pay its debts. The Companies and Allied Matters Act, Cap, C 20, Laws of the Federation of Nigeria, 2004 and Section 408(d) of Bankruptcy and Insolvency (Repeal and Re-enactment) Act, 2016, defines insolvency as the inability to pay a debt which arises where a creditor by assignment or otherwise to whom the company is owed the sum exceeding two thousand serves a notice of demand on the company at its registered office requesting for payment of the sum that is outstanding, if after the expiration of three weeks, the company neglected or refused to pay the outstanding sum to the reasonable satisfaction of such creditor.

This also occurs where an order of the court is issued in favour of a creditor of a company. Where the order is not complied with, either in whole or in part, the court may consider contingent liability of the company and where the insolvency continues, the company can be declared insolvent by the order of the court through a petition filled by the creditors, the debtors or by a deed of agreement with the creditors, that his assets should be sold to satisfy the debt as much as the assets can disburse.

Many upstream petroleum companies are now winding up their activities while some are leaving Nigeria due to insolvency, unhealthy business recovery practices, slump in global oil prices and lack of capitals to fund strategic oil projects. Chevron, Total, Royal Dutch Shell and Eni among others have divested some of their onshore assets in the sector due to regulatory developments and other factors there is the need for the Federal Government to intervene to avoid loss of jobs.

The Bankruptcy Act covers bankruptcy proceedings against individual debtors and partnerships alone while the Companies and Allied Matters Act Cap, C20, Laws of the Federation of Nigeria deals with winding-up of companies as well as arrangements and compromises. The latter option is seldom used in reality because insolvent practitioners prefer to push for the courts to liquidate and terminate the life of insolvent oil companies without the debtor company being given an opportunity to restructure its operations and to pay its debt over time. While liquidation is the last resort in some other jurisdictions, in Nigeria it is used as a first option thus causing the untimely death of many oil companies which could have been salvaged if given the chance to properly manage and restructure its debts.

The focus of modern insolvency laws has been redefined to promote the option of restructuring insolvent oil companies and their businesses to guarantee continuation of business which will yield prolonged employment, payment of taxes and dividends and other similar socio-economic benefits to Nigeria. There is therefore the need for comprehensive

reform of the existing insolvency legislations in line with the global trend of nipping insolvency in the bud by encouraging business restructuring mechanisms in the oil sector.

The goal of this study is to conduct comparative legal and policy analyses of insolvency and business recovery laws in Nigeria, Malaysia, India, South Africa, United Kingdom and United States to reform Nigeria's insolvency and business recovery laws from winding up of insolvent oil companies to reorganization, restructuring of such oil companies and its operations to foster economic stability and financial propriety in Nigeria's oil sector. The paper is divided into five sections, section one is the introduction, section two discusses statement of the problems, theoretical framework, national legal framework regulating insolvency and business recovery in Nigeria, section three, describes institutional legal framework and carries out comparative analysis of national legal regimes of Nigeria, Malaysia, India and South Africa, United Kingdom and United States current global developments in insolvency and business recovery practice. Section four discusses signs to watch out for if company is under insolvency and section five discusses insolvent oil company's rescue or restructuring strategies and other remedies open to unsecured creditors with some practical lessons Nigeria can learn from the selected case study countries. The paper ended with conclusion and recommendations.

2. STATEMENT OF PROBLEMS

In Nigeria, most oil companies that that are in critical financial crisis often end up being liquidated and this is detrimental to the economy due to loss of jobs, since some of these companies may be potentially viable and can be restructured for the benefits of their creditors, debtors and Nigeria's economy. Ailing public owned oil companies preceding insolvency may source for capital by offering their shares to the public for subscription through the initial public offer or private placement or through the capital market as stated in Section 2 of the Public Enterprise (Privatisation and Commercialisation) Act, 1999 and private oil companies or businesses can as well raise capital through borrowing from financial institutions or from other viable sources rather than liquidating or winding up such companies. There is therefore the need for a new paradigm shift design to revive financially troubled oil companies by restating their assets and liabilities, as well as holding talks with their creditors in order to make unanimous arrangement for the repayment of the loan.

3. METHODOLOGY

The main objective of this study is to examine how the nucleus of insolvency and business recovery practices in Nigeria can change from punishment of insolvent oil companies via liquidation or winding up to reorganization, restructuring of such oil companies to boost economic stability, financial propriety and economic development. To achieve this objective, the researchers explore the library-based doctrinal legal research, supported by a contextual analysis, including reference to internet sources, an extensive review of academic literature, examination of case studies and analysis of relevant judicial and statutory provisions. The study adopts secondary sources, such as journals, textbooks and primary sources, such as case laws and statutory provisions with comparative legal and policy analyses of solvency and business recovery laws in Nigeria, Malaysia, India, South Africa, United Kingdom and the United States and use the lessons learnt to reform the gaps identified in Nigeria's legal regimes.

4. THEORETICAL FRAMEWORK ON INSOLVENCY AND BUSINESS RECOVERY PRACTICES IN NIGERIA

The stewardship theory was developed by Donaldson and Davis in 1991. The theory focused on the concept that the interest of shareholders and the interest of the management should be aligned and driven to take decisions that would take full advantage of the performance and the total value of the company. The theory believes that there is greater utility in collective efforts towards the success of the company than individualistic goals while the actions of the management, regulatory authorities should be towards maximizing the shareholders' wealth and simultaneously meet their personal needs. The board and management of the oil company is obliged to make the most of their shareholders' wealth through business rescued, turnaround and restructuring by so-doing, the insolvent oil companies utilities and prospects are maximized.

To achieve this goal, government must overhaul the legal framework regulating insolvency and business recovery practices towards business rescued, turnaround and restructuring strategies to saved jobs, creditors driven strategies for healthy economy for the nation. The actions of the management who are stewards of the oil company are best facilitated when the corporate governance structures of the company give them high authority and discretion to ensure that the company remain in business successfully to serve the interest of the shareholders, to boost the nation's economy and to promote the interest of all stakeholders in the sector. (Donaldson and Davis, 1991). Davis *et al* pinpointed five components of the management idea of stewardship as trust, open communication, empowerment, long-term orientation and business performance and economy enhancement.

In addition, the second theory that is relevant to this study is the resource dependency theory which was developed by Pfeffer and Salancik in 1978 with the objective of emphasizing the significance of the role played by all the stakeholders such as the government's regulatory authorities, the board of directors and shareholders to enhance the oil company's performance and to protect it against winding up or liquidation. Oil companies require resources in the areas of finance, human, technical, information, communication and technology to function properly and to achieve its corporate objectives.

Generally, it is opined that accessibility to resources enhances the oil companies' operations, sustainability, performance and business survival. Some scholars have argued that the theory focuses on the crucial role that government regulatory authorities and management play in providing essential resources to the company through their linkages to the external environment. They argue that, directors bring resources to the company in the form of information, skills, access to suppliers, buyers, public policy makers, social groups as well as legitimacy. Oil companies depend on each other for business because they form the largest proportion of the company's customer base, meaning the actions of one oil company can greatly influence the financial performance of the other either positively or negatively, hence the need for the companies to establish relationships at board levels.

The theory focus on the means of gaining access to resources for the oil companies' operations which is critical to its success. According to Pfeffer and Salancik (1978), boards provide advice, counsel and technical know-how, legitimacy and reputation, channel for communicating information with external organisations, and preferential access to commitments or support from important actors outside the company. The boards perform these functions through social and professional networking. Zahra and Pearce (1989) posit that the diverse background of the directors enhances the quality of their advice to the company and this will enhance the company's profitability and business sustainability free from insolvency.

Another applicable theory is the utilitarianism ethical theory, which is based on the rightness and wrongness of acts depends entirely on facts about the maximization of overall well-being of man. It is based on the greatest good for the greatest number, and it requires people to act in whatever way that will result in the greatest possible amount of well-being for the general well-being of all. David Hume argued in his ethical writings that much of our moral thinking is ultimately determined by what we find agreeable. Utilitarianism's focus on well-being has a strong basis in human nature. Jeremy Bentham believed that when the overall amount of pleasure is increased then ethics can be maintained properly all over the world.

5. NATIONAL LEGAL REGIMES ON INSOLVENCY AND BUSINESS RECOVERY PRACTICES

The main legal framework on personal insolvency otherwise known as bankruptcy in Nigeria is the Bankruptcy Act Cap. B2 LFN, 2004 and the Rules of Procedure set out in the Bankruptcy Rules Cap. B2, LFN, 2004. The rule is supplemented by the Federal High Court Rules with some modifications in conformity with the provisions of the Bankruptcy Act. The Bankruptcy and Insolvency (Repeal and Re-enactment) Act, 2016 and Bankruptcy Rules regulate bankruptcy proceedings in Nigeria.

The Companies and Allied Matters Act, Cap, C 20, Laws of the Federation of Nigeria, 2004, the Investment and Securities Act, 2007 (No 29), Investment and Securities Rules, 2013, Banks and Other financial Institutions Act, Cap. B3, LFN, 2004 (as amended), Sections 16 and 21 of the Nigeria Deposit Insurance Corporation Act require the insurance of banking deposits. The Failed Banks (Recovery of Debts and Financial Malpractices in Banks) Act, Cap F2, LFN 2004, the Secured Transactions in Moveable Assets Act, 2017 No.3, A43 and Central Bank of Nigeria Act, Cap. C4, LFN, 2010.

Generally, insolvency and business recovery practices can be practiced by anyone except by an infant (persons below the age of 21 years), by persons of unsound mind, by persons who have been declared bankrupt by a court of competent jurisdiction and by persons who have been convicted by a court of competent jurisdiction. Insolvency law is concerned with companies who are debtors and who are unable to repay their debts while bankruptcy is applicable to individuals and partnerships.

It is regulated by the Bankruptcy Act, (as amended) by Decree No. 109 of 1992 Cap. B2 LFN 2004, Bankruptcy Rules made pursuant to the Bankruptcy Act Cap. B2 LFN 2004; and on the other hand, Section 108 of the Bankruptcy Act prohibits the making of receiving order under the Act against any association or company registered under Companies and Allied Matters Act (CAMA). Companies and incorporated trustees, being an association registered under part A and C of Companies and Allied Matters Act, 2004 respectively are excluded from receiving order under the Bankruptcy Act. Sole proprietorship and partnerships are not excluded.

The procedure in a case of insolvent companies is regulated mainly by Winding up proceedings under the Companies and Allied Matters Act, CAP. C20, LFN, 2004. Section 7 of the Federal High Court Act, Cap F12, Laws of the Federation of Nigeria, 2004 and Section 251(1) (e) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) empowered the Federal High Court to entertain insolvency matters and the appropriate venue for the institution of the proceedings, is the place where the debtor carried on business rather than where he resides. A petition must be filed in the division of the Federal High Court where the debtor carries on business for the greater part of the six months immediately preceding the presentation of the petition even where the petitioner is no longer resides in

such a division but this is subject to the appellate powers of the Court of Appeal and the Supreme Court. Section 251(1) (i) of the 1999 Constitution (as amended) gives exclusive jurisdiction to the Federal High Court to hear matters relating to the operation of companies and Allied Matters Act *inter alia* and shall exercise this jurisdiction to the exclusion of any other court. Section 554(1) of Companies and Allied Matters Act and by virtue of the provision of Section 411(2) of the same Act, the court may turn down an application for winding-up on the ground of insolvency if it is not meritorious.

In Nigeria, the issue of recovery of debts from debtors to creditors may be filed in the Federal High Court or State High Court depending on the jurisdiction where the parties entered the contract and the circumstances of the facts of each case.

A creditor may file bankruptcy petition against the debtor who owes more than One Million Naira ₦1,000,000.00 or committed bankruptcy in (6) six months before the filling of the petition. The Investment and Securities Act, 2007 and Securities and Exchange Commission Rules, 2013 regulate mergers, takeover and acquisitions of shares in publicly quoted oil companies in Nigeria.

Another thing peculiar to the insolvency profession is that corporate bodies are not allowed by law to engage in it. A corporate body cannot be a trustee in bankruptcy Section 123 of the Bankruptcy Act, Cap.B2 LFN, 2004. A corporate body can neither be appointed a receiver or a liquidator Section 387(i)(c) and Section 509(i)(c) of the Companies and Allied Matters Act Cap.20, LFN, 2004.

The Banks and other Financial Institutions Act (the BOFIA), Cap B3, Laws of the Federation of Nigeria, 2004 regulates restructuring, re-organisation, mergers and disposal of banks. Section 7 of the Banks and other Financial Institutions Act forbids restructuring, re-organisation, merger and disposal of interest in financial institution without the approval of the Governor of the Central Bank of Nigeria. The Nigeria Deposit Insurance Corporation Act, Cap N, 102, Laws of the Federation of Nigeria, 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 following flaws among others are identified in Nigerian insolvency legal framework, absence of well-organized mechanism for restructuring the debts of insolvent oil companies, its operations to prevent winding up of potentially viable oil companies. Absence of comprehensive legal framework regulating insolvency and business recovery practices in Nigeria. Poorly funded, over congested court with insolvency cases and it may be susceptible to corruption and thereby occasioned substantial delay and miscarriage of justice in the hearing of insolvency proceedings.

6. INSTITUTIONAL FRAMEWORKS REGULATING INSOLVENCY AND BUSINESS RECOVERY PRACTICES IN NIGERIA

Section 7(1) (c) of the Banks and other Financial Institutions Act, Cap.B3 LFN, 2004, provides that “Except with the prior consent of the Governor of the Central Bank of Nigeria, no bank shall enter into an agreement or arrangement for the amalgamation or merger of the bank with any other person.”

This means that the Central Bank of Nigeria has a role to play to ensure that no bank in Nigeria enters into any agreement with another bank on merger or amalgamation without its approval and non-compliance attracts a fine not exceeding ₦1, 000,000 and in the case of a continuing offence to an additional fine of ₦10, 000 for each day during which the offence continues. Section 7(2) of the Banks and other financial Institutions Act, Cap. B, LFN, 2004. The statutory roles of the Central Bank of Nigeria and the Nigeria Deposit Insurance

Corporation complement each other; a clear distinction exists in their roles in the handling of failed or insolvent financial institutions. The Assets Management Corporation of Nigeria Act (Amendment) Act, 2015, established the Assets Management Corporation of Nigeria for the purpose of efficiently resolving non-performing loan assets of banks.

The Securities and Exchange Commission (SEC) is empowered to regulate capital and securities-related issues in Nigeria. It appraisals and approves mergers and acquisitions of oil companies. Its enabling law, the Investments and Securities Act, 2007 should be overhauled to incorporate insolvent oil companies rescue system to guarantee job security and to enhance Nigeria's economy.

Corporate Affairs Commission (CAC) is established by Section 1 Companies Allied Matters Act Cap. C20, LFN 2004 to administer Nigerian company registry, to conduct an investigation into the affairs of any oil company to protect the interest of shareholders and the public, to regulate, supervise the formation, incorporation, registration, management and winding up of oil companies in Nigeria to prevent fraud, irregularities and mismanagement (Asada, D and Olong, M., 2006).

Section 119(1) the Investments and Securities Act, 2007 provide that:

"... any amalgamation of the undertakings or any part of the undertaking or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate."

Under Section 119(2) of the Act, a merger may be achieved in any manner including by purchase or lease of the shares, interest or assets of the other company in question or amalgamation or other combination with the other company in question. The Federal High Court is vested with the exclusive powers to wind-up oil company as stated under Section 407 CAMA. There is the need for special courts manned by judges who are experts in insolvency and bankruptcy with staff who are experts in this area of law.

Nigeria Deposit Insurance Corporation established under the Nigeria Deposit Insurance Corporation Act, Cap N, 102, LFN, 2004 regulates insurance of deposit liabilities of licensed banks and other financial institutions to protect interest of depositors in the event of financial difficulties of banks.

Recovery and Insolvency Practitioners' Association of Nigeria, this is a society of insolvency practitioners with knowledge of business recovery and insolvency in Nigeria. It ensures that its members retain such knowledge and conduct their insolvency and business recovery work in accordance with their professional ethics. It should sponsor a bill at the National Assembly prohibiting the services of uncertified persons as insolvent practitioners. It must have framework on the minimum qualifications required for training as insolvency practitioner with up to date register of its members with incessant professional training, development of its members with the Code of Conduct and to discipline its erring members and there is the need for licensing of insolvent and business recovery practitioners in Nigeria.

The Ministry of Petroleum and Energy Resources, the ministry is headed by a Minister of petroleum who is statutorily empowered to formulate policies regulating the oil industry via the Department of Petroleum Resources (DPR) to enact regulations for oil exploration and production in Nigeria the ministry needs to do more to prevent incessant corporate failure of oil and gas companies in Nigeria due to insolvency and poor corporate governance. There is also the need for institutional reforms and cooperation with the statutory bodies that regulate insolvency practitioners in Nigeria with the regulatory agencies in the oil and gas sector to reduce winding-up of oil companies on account of insolvencies.

7. COMPARATIVE ANALYSIS OF NATIONAL LEGAL FRAMEWORK OF NIGERIA, MALAYSIA, INDIA, SOUTH AFRICA, UNITED KINGDOM AND THE UNITED STATES ON INSOLVENCY AND BUSINESS RECOVERY PRACTICES

Several trends on business rescue and good practices have emerged over the years and many countries have overhauled and implemented their laws in conformity with these trends in order to have an efficient legal framework that incorporate international good practice on creditor's rights and on insolvency as set by the World Bank and the United Nations Commission on International Trade Law (UNICITRAL).

In England and Wales Insolvency Act, 1986 (as amended) regulate insolvency while Directors Disqualification Act, 1986 govern directors of insolvent companies. The insolvency law of England and Wales fails to define insolvency while in Nigeria, Section 408(d) of Bankruptcy and Insolvency (Repeal and Re-enactment) Act, 2016, defines insolvency as the inability to pay a debt which arises where a creditor by assignment or otherwise to whom the company is owed the sum exceeding ₦2,000 serves a notice of demand on the company at its registered office requesting for payment of the sum that is outstanding, if after the expiration of three weeks, the company refused to pay the outstanding sum to the reasonable satisfaction of the creditor but in other selected case study countries, the Act only defines incapacity to pay as failure to pay a claim due to a creditor exceeding the sum of £750 within three weeks after a written notice of demand has been served on the company.

England and Wales has no special court dealing with insolvency matters but their High Court has power to wind up any company registered in England and Wales but in the United States, insolvency matters are handled by the bankruptcy courts, a division of the Federal District courts with limited jurisdiction while in Nigeria no special court has been designated as insolvency court it is being handled exclusively by the Federal High Court as provided under Section 251(1) (e) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

In Malaysia, Section 176 of the Companies Act, 1965 introduced specialised courts to handle insolvency proceedings with provisions for out-of-court workouts, giving opportunity to the creditors to be involved in decision making, applying stringent rules to insolvency practitioners to prevent fraud and unethical insolvency practices. Also, Malaysia has been practicing some of these good practices on business rescue and this has proven to be an effective way of resolving insolvency cases in speedy and effective manner.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010 and the Insolvent Partnerships Order, 1994 (as amended) regulate insolvency of partnership in the United States while in Malaysia, insolvency is governed by two statutes the Companies Act, 1965 and the Companies Winding-Up Rules. In India, the parliament passed the second amendment to restructure the 1956 Insolvency Act, leading to a new regime for corporate business rescued in December 2002. Also in Nigeria, notwithstanding that bankruptcy and winding up are very similar the provisions dealing with them are contained in separate legislations unlike some of the selected case study countries.

Similarly, the South Africa Companies Act, 2008 restructured its arrangement and compromise legal provisions to eliminate one phase of insolvency proceedings that required court application before ordering meeting. Also, in 2016, the United Kingdom's government reforms its insolvency laws to incorporate restructuring and rearrangement.

In other relatively advanced jurisdictions, where the insolvency regime has been reasonably modernized, like the United Kingdom and the United States, the operations of the insolvent oil company may continue under a declared protective arrangement while

alternative options to achieve recovery are worked out between the parties. The protective arrangement may provide for a certain period of time for the debtor companies to be in possession of their assets under the supervision of the court with a plan for turnaround the business or put in place a professional insolvency practitioner to administer the failing oil business beneficially and to avert an avoidable winding up where there are clear prospects that the business itself remains viable and the insolvency may have been due to improper governance, mismanagement, act of God, *force majeure* and sudden adverse regulatory change of policies among others but these are not yet in place in Nigeria unlike the selected case study countries.

Nigeria has no law on cross-border insolvency yet and it has not replicated the provisions of the 1997 UNCITRAL Model Law on Cross-Border Insolvency Law yet in its national insolvency law but some of the selected case study countries had done it. The United States domesticated the provisions of the UNCITRAL Model Law in Chapter 15 of its Bankruptcy Code in year, 2005. The Title 11 of the United States Code named the Bankruptcy Code regulates insolvencies in the United States.

In Nigeria, under Section 246(3) Companies Allied Matters Act 2004 the creditors can apply to court to lift the veil of incorporation of the company to make its directors personally liable if they are culpable for any crime or civil wrongs committed by the oil company which they aware of the infringement and the company will lose its privilege of legal entities especially if the directors signed personal guarantee contract. Sections 206, 211, 213 and 214 of the Insolvency Act of England and Wales has similar provision that allow a liquidator or an administrator to sue the directors for unlawful trading knowing fully well that the company lacks prospects of trading leading to insolvency.

8. CURRENT GLOBAL DEVELOPMENTS IN INSOLVENCY AND BUSINESS RECOVERY PRACTICE

As the global financial and upstream petroleum sector evolves, the focus of modern insolvency practice and regulation has shifted from punishment of insolvent companies through compulsory liquidation, to a more constructive alternative, re-organisation and restructuring of such business entities, and their operations, with a view of rehabilitation to ensure economic stability and financial propriety. In Nigeria, however, the traditional approach is retained where liquidation of the business and/or the winding-up of the oil company remain the sole mechanism for dealing with instances of oil company insolvency.

One of the current developments is that lawyers are now getting more insolvency assignments than accountants. Banks, upstream petroleum companies and Assets Management Company of Nigeria (AMCON) now give most juicy insolvency assignments to Senior Advocates of Nigeria (SANs) and the SANs would thereafter engage an accountant as Financial Adviser with this development, accountants are now playing second fiddle behind lawyers in insolvency and business recovery practices in Nigeria. Institute of Chartered Accountants of Nigerian (ICAN) being a professional body regulating the profession has to come to the rescue of the accountants in this area.

Also, creditors especially banks and other financial institutions now prefer outright realization of charged assets rather than turnaround management. Since some lawyers are not trained as business manager or to manage business, their approach to insolvency assignments is to take over charged assets and to realise it without any consideration for turnaround option or business rescued strategies.

The implication of this is that jobs are lost in the event of outright realization of charged assets while jobs are retained in the case of turnaround management option. This has a far

reaching implication on the nation's economy. This is the basic difference in the insolvency practice in relatively advanced economies and that of Nigeria. In advanced economies, the objective of insolvency practice is to reduce loss of jobs while at the same time protect the creditors. Closing down insolvent companies that can be successfully turned around has led to several job loses. The case in point is that of Afroil Plc. Some lawyers do not like turnaround management whereas this is the area of competence of some accountants.

Another current development is that Corporate Affairs Commission (CAC) requires a copy of the Deed of Debenture to be submitted by the Receiver or Manager before his appointment is registered. This was not the case until recently. Before, Corporate Affairs Commission (CAC) relies on the Deed of Debenture which was earlier registered in the insolvent company's file.

More also, another development is that the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN) are currently pushing a bill in the National Assembly to harmonize insolvency laws and its practice in Nigeria.

Also, the Assets Management Company of Nigeria (AMCON) Act tolerates the exercise of many arbitrary powers which is at variance with the interests of the shareholders and this can be used punitively against insolvent oil companies with little scrutiny. It has been proposed by some eminent legal scholars that specialized Revenue Courts should be set up with sole jurisdiction as the court of first instance for the settlement of disputes in the upstream petroleum and financial sector to curb the arbitrariness of the current legal regime for dealing with insolvent oil companies in Nigeria.

Conversely, modern insolvency laws favoured alternative debt resolution mechanisms that would have saved insolvent company rather than liquidating it. Generally, Nigerian law on insolvency seems deficient with regard to business turnaround and restructuring strategies. The current insolvency legal framework as contained in Parts XIV, XV and XVI of Companies Allied Matters Act (CAMA), LFN, 2004 which envisages various categories of corporate insolvency proceedings; non-collective proceedings (receivership) and collective proceedings (winding up, arrangements and compromises, mergers and acquisitions).

Another development in insolvency practice, is the use of summary judgment procedure under Order 11 of the Lagos High Court Civil Procedure Rules, 2012, this is another recovery mechanism that is utilized in Nigeria for speedy recovery of debt. This procedure is only applicable in Lagos State under Order 11 of Lagos High Court Civil Procedure Rules, 2012. A summary judgment is a judgment that is in favour of the claimant summarily without going through a full trial especially where the defendant has no defence to the claim. In some instances, there may be no pleadings but just an affidavit by the plaintiff and if necessary, a counter-affidavit by the defendant. The procedure is used where the claimant believes that the facts of the case are straight forward and uncontested by the defendant. It saves time and cost of lengthy trials. *Mcgregor Associates v. NNBN (1996) 2 SCNJ 72.*

However, a defendant who intends to defend the claim must do so within 42days by filing within the limited time his defence Order 15 Rule 1(2), Lagos State Civil Procedure Rules, 2012. The defence must show whether the defendant is denying the whole or part of the claim and not just a mere or general denial. In *Cotia Commercio E. Importacao SA v. Sanusi Brothers (Nig.) Ltd. (2000) 6 SCNJ 453*, the Supreme Court held that mere general denial of a claim, showing a case of hardship or inability to pay in the counter affidavit; or filing of frivolous defence was not sufficient for the defendant to be granted leave to defend. Where a *prima facie* case has been established by the Defendant he may be granted leave to defend. Order 11 Rule 5(1) Lagos State Civil Procedure, 2012 then the matter will be entered in the general cause list to be tried.

Also, there is a Disputes Resolution option for debts recovery, this is an informal dispute resolution mechanism where the parties meet with a professional third party who helps them resolve their dispute in a way that is less formal and often more consensual than courts which is costlier and associated with delays. Other forms of Alternative Dispute Resolution mechanism are mediation, arbitration, negotiation among others.

Alternative Dispute Resolution (ADR) is generally faster and less expensive. It is based on more direct participation by the disputants, rather than being run by lawyers, judges, and the State. In most ADR processes, the disputants outline the process they will use and define the substance of the agreements. This type of involvement is believed to increase people's satisfaction with the outcomes, as well as their compliance with the agreements reached.

9. SIGNS TO WATCH OUT FOR WHERE OIL COMPANY IS UNDER INSOLVENCY

The following among others are the signs to watch out for if an oil company is close to insolvency which often arise due to poor management: Absence of strategic business plan or strategic corporate plan of where the oil company intends to be in five years' time. Where an oil company does not know where it is going such an oil company will end up somewhere else.

Absence of strategic business plan limits the oil company's chances of success in business and where the oil company persistently refused to remit or often withholds deducted taxes to appropriate tax authorities so as to have access to cash to meet their immediate financial obligations. Lack of capacity to raise equity or loan capital, generally, oil company with insufficient cash to pay for its due debts can raise capital through refinancing, the raising of equity or by deferment the debts and inability to do so within a reasonable time indicates that such oil company is at the edge of insolvency.

Absence of timely and accurate financial information of the oil company, where there is persistent failure to make available financial information of an oil company, this may give an inference that such oil company is insolvent. Also, where such company is making continuous losses or there is lack of sufficient working capital, this is a red flag on the possibility of insolvency and where the company persistently issue post-dated cheques or having its cheques dishonoured by banks. A postdated check issued by an oil company that is dishonored in the absence of any irregularities is a clear sign that the company is under insolvency rather than temporary cash-flow difficulty.

Where the oil company is not able to manage properly its cash flow, oftentimes, a profit and loss statement may show that an oil company is profitable, yet the company may be struggling to remain in business due to poor cash flow. Where such oil company is being cut off by its vendors, consultants for non-payment, this is a sign that such oil company is not properly managed and where the oil company persistent experiences low sales**,** this is an obvious sign of a dying oil company due to the fact that sales is the vein of every oil company and where the creditors of the oil company are issuing demands notices or legal proceedings for recovery of outstanding debts, a single demand notice is not proof of insolvency as the debt may be contestable but numerous demands from several solicitors may create presumption of insolvency among others.

10. INSOLVENT OIL COMPANIES RESCUE OR RESTRUCTURING STRATEGIES AND OTHER REMEDIES OPEN TO UNSECURED CREDITORS

Generally, an unsecured creditor has no rights to the insolvent oil company property unless he obtained a court judgment or by garnishment. Section 117 of the Investments and Securities Act LFN, provide for take-over bid strategy which is the acquisition of sufficient shares in another oil company (often referred to as the target oil company) to give the acquiring oil company control over that other oil company. It is different from a merger in that the oil company taken over remains in existence but as a subsidiary of the acquiring oil company. Thus, the target oil company remains separate and distinct but as a subsidiary of the acquiring oil company. However, a corporation cannot make a take-over bid either with another person or alone, unless the making of the take-over bid has been approved by a resolution of its directors, Section 139(1) of the Investments and Securities Act.

However, it should be noted that for a take-over to amount to a merger, there must be not less than 51% of the shares of the oil company to be acquired. A bid, which is an invitation under a take-over bid, must be incorporated in a document that must state or specify the matter required under section 136(1) of the Act. The shareholders of the offeree oil company may accept or reject the offer made to them in respect of their share holdings.

Another strategy is the management-buy-out, under this procedure, the target management plays the leading role. The acquisition is effected by a management group which uses debt financing supplied by a bank or other lender to acquire an insolvent oil company. The assets of the oil company so acquired are pledged as collateral for the loan and it is anticipated that the loan will be repaid out of the oil company's cash flow. Management buy-out may create conflict of interest in that the management is an equity participant in the buy-out group and also has a duty to represent the interests of the target oil company's shareholders.

Also, there is purchase and assumption, this is a situation where an oil company decides to buy over another oil company. For example, where Oando Plc buys over ConocoPhillips's Nigeria's upstream business. Conversely, purchase and assumption should not be mistaken for merger as it is a total buying and acquisition of the other oil company. Other strategy is the appointment of an administrator, an oil company may go into administration to carry out an established plan to save the company from insolvency. An insolvency practitioner is put in control of the oil company with a defined programme for rescuing the oil company from insolvency.

Similarly, an unsecured creditor of an oil company can insert retention of title clause in the supply agreement to protect itself and to ensure prompt payment and until the full purchase price is paid, title to the good supplied will not passed to the buyer.

Equally, an unsecured creditor can bring an action for winding up against an insolvent company or may apply for the appointment of an administrator after series of written demands have been made but the court frown at winding-up being utilised as a tool for debt recovery in Nigeria.

11. CORPORATE LIQUIDATION OR WINDING-UP OF COMPANY - AS A LAST RESORT

Winding up of an insolvent oil company may be made by the court, voluntarily by the member, creditors of the oil company and subject to the supervision of the court in accordance the provision of the Companies and Allied Matters Act, LFN, 2004 which should be the last resort after all mechanisms to rescue and restructure the oil company have failed. Section 408 of the Companies and Allied Matters Act, 2004 Cap. C20, LFN, 2004 provide the

grounds for winding up of insolvent oil company as follows: Where the company has by special resolution, resolved that the company should be wound-up, where the oil company is in default of filing statutory reports to the Corporate Affairs Commission (CAC) and where the number of members of the oil company has reduced below two. Where the oil company is unable to pay its debts sum exceeding ₦2,000 after several written demands have been made on the oil company and where the court is of the view that it is just and equitable that such oil company should be wound up.

Where the oil company fails to hold its statutory meeting and filed statutory reports,

an action may be taken by the court, on the petition of an aggrieved party, the oil company *suo motu* may "commit suicide" by going on voluntary liquidation which is provided for under Section 457 (a) (b) of CAMA by passing a special resolution to that effect in a general meeting.

However, Section 462 of the Act provides that the directors must file a statutory declaration of solvency to the effect that, after careful enquiry, they had formed an opinion that such oil company will be in a position to pay its debts in full within such a period not exceeding twelve months and such a declaration must be within five weeks of passing the resolution for winding up.

An oil company may also decide to go into voluntary liquidation with the consent of its creditors. This is known as Creditor's voluntary Winding-up as provided for under Sections 472 and 474 CAMA. In a creditor's voluntary winding up, a meeting of the oil company and the creditors for which adequate notice had been sent and published once in at least (2) two newspapers and in the federal gazette, is convened for the same day. A full statement of the position of the oil company's affairs with the list of creditors and the estimated amount of their claims is laid before the meeting together with the resolution for voluntary winding up of the company. The creditors in their own meeting will appoint a Committee of Inspection consisting of not more than (5) five among themselves to oversee the operation of the liquidation. The oil company will also appoint an equal number to join the committee but such appointment must receive the approval of the creditors or the court.

The only situation where an insolvent practitioner can expect to have the maximum cooperation of the debtor is in the case of members' voluntary winding up, in all other cases, the insolvent practitioner should adopt an investigative attitude and regard any unusual friendliness of the debtor as a Greek gift, until it is proved otherwise. Tracing of the debtor's assets can assume serious dimension if the debtor happens to be one with asset in other countries because retrieving or realizing such assets may involve invoking international laws and may even depend on whether Nigeria has diplomatic relationship with the country concerned.

Whatever action that is taken by the practitioner to trace the asset, he should bear in mind that such action must be cost effective and must increase the dividend payable to the creditors without unduly delaying the assignment.

Immediately the winding up order is made by the court, the official receiver by virtue of his office becomes the provisional liquidator if none had been appointed and after the appointment of a liquidator, the powers of the directors cease. Section 422(9) CAMA. No legal action shall proceed or commence afresh against the oil company except with the leave of the court. Section 417 CAMA. Any disposition of the property of the oil company, transfer of its shares or alteration in the status of its members after the initiation of the winding up proceeding is void unless the court ordered it. Any attachment, sequestration, distress, or execution put in force against the estate or effects of the oil company after the commencement

of the winding up is void and once the winding-up order has been made the services of the oil company's employees become terminated.

Winding-up proceeding should be last resort or not to be resorted to at all for debt recovery from a company in Nigeria. Oriental Airlines Limited v. Air via Ltd. (1998) 12 NWLR (Pt. 577) 271 at 280-281, Hansa International Construction Limited v. Mobil Producing Nigeria (1994) 9 NWLR (Pt. 336) 76 at 86, Nigeria Industrial Development Bank Ltd. v. Fembo Nigeria Limited (1997) 2 FHCLR 501 at 502.

Alternatively, the unsecured creditors can ask for the release of securities of the insolvent oil company to him, creation of prior charge or pari passu charge. The oil company may alter its share capital through recapitalization. The oil company may also choose scheme of arrangement or compromise by amending class of rights and preference shares to pay the accrued unpaid dividends. The unsecured creditors can take up shares in the oil company or part cash in satisfaction of the debt owed. Creditors can apply to the court for the judicial sale of the oil company's assets to satisfy the outstanding debts and commencement of legal proceedings for the recovery of the principal debt and the interest if any.

The creditors can apply to court to lift the veil of incorporation of the oil company to make its directors personally liable if they are culpable for any crime or civil wrongs committed by the oil company especially if they signed personal guarantee contracts and are aware of the company financial incapacity to trade.

Likewise, Sections 206, 211, 213 and 214 of the Insolvency Act of England and Wales has similar provision that allow a liquidator or an administrator to sue the directors for unlawful trading knowing fully well that the company lacks prospects of trading. Any transaction carried out with the loan can be rescinded by the oil company if there is an element of fraud of misrepresentation and damages can also be claimed as well. The Director can be suspended for 15 years under the Company Directors Disqualification Act, 1986 of the United Kingdom.

12. LESSONS NIGERIA CAN LEARN FROM THE SELECTED CASE STUDY COUNTRIES

There are many lessons to learn from the solvency and debt recovery legal framework of the jurisdictions under consideration to serve as a model for Nigeria's solvency and debt recovery legal framework reform. Recent trends of restructuring in other countries such as Malaysia, India and South Africa among others.

Business restructuring and turnaround strategies, this involves restatement of the insolvent oil companies' assets and liabilities, as well as holding talks with creditors in order to make arrangements for repayments of the outstanding loans. Reorganization is an attempt to extend the life of an oil company facing insolvency through special arrangements in order to minimize the possibility of past insolvency situations re-occurring. Oil companies can renegotiate their debts with their creditors to try to get better terms and the company can continues operating and works toward repaying its outstanding debts.

Compromise or arrangement under Sections 530, 537 and 540 of Companies Allied Matters, Cap C.20 LFN, 2004 and under the England and Wales Companies Act, 2006 Act where creditors and shareholders are tools that can be used to carry out internal restructuring of an insolvent oil company, it is an arrangement by an oil company with the creditors and/or the shareholders or a class of them to accept less than what they are entitled to as full satisfaction of the oil company's obligation to them.

Compromise arises where the oil company persuades its creditors to accept shares or part shares and part cash, in satisfaction of its debts while merger is the process of buying the

controlling shares or transfer the oil business or part of it to another oil company in consideration for shares. It is significant to note that, a private oil company cannot be taken over by another private oil company but the same can be acquired by another private oil company.

Conversely, holders of preference shares may be swayed by an insolvent oil company to cancel accrued dividends, reduce the fixed rate of dividend or to accept the conversion of their preference shares to ordinary shares to reduce the oil company's financial burdens. In extreme cases, an oil company may resolve to sell all or part of its shares to another oil company or agree with another oil company by giving majority of its voting power as consideration for shares after which it may be wound up if it has no assets left.

Also, arrangement on sale is provided for in Section 538 CAMA, an oil company may resolve by special resolution that the company be wound up and a liquidator may be appointed to sell the whole or part of the company's assets to another oil company for cash, shares or debentures as consideration which the liquidator will distribute proportionately to members in accordance with their rights in liquidation but the creditors remain creditors of the transferor oil company and they have all the rights against the oil company as much as their debts confer and where the creditors feel that the arrangement is causing variation of their rights, they can petition for creditors' voluntary winding up of such insolvent oil company.

Note that, any shareholder may require not to be part of the arrangement and no dissentient shareholder can be compelled to take interest in the transferor oil company as long as he or she signifies his dissent according to the law.

13. DISCUSSIONS OF FINDINGS

The legal framework for restructuring of insolvent oil companies in Nigeria is inadequate. The statutory legal framework on insolvency appears to be leans towards liquidation proceedings. The concept of business rescue is not new in Nigeria as some of these provisions can be found under the Companies and Allied Matters Act ,CAP C20, LFN 2004 as arrangements, compromises, receivership, mergers/acquisitions under the Investments and Securities Act, 2007 but our current legal provisions on rescue are not well structured like the typical modern business rescue laws, it is not consistent with the current global best practices, it lack rehabilitation mechanism for insolvent oil companies and it also fail to make provisions for licensing of insolvent and business recovery practitioners in Nigeria.

Moreover, there are various challenges confronting the business rescue options these challenges point to the need to have a well-structured business rescue provisions that will assist oil businesses in Nigeria whether by way of harmonized insolvency law or piecemeal amendments in our current insolvency laws. It has also been observed that heavy reliance on courts system makes the insolvent oil company rescue process more cumbersome which may not be cost and time effective for oil businesses. South Africa in its Companies Act, 2008 restructured its arrangement and compromise provisions to eliminate one phase of court application which is the court-ordering meeting which Nigeria can replicate.

14. RECOMMENDATIONS

For insolvency and business recovery practices in Nigeria's upstream petroleum sector to develop there is the need for a unified and dedicated insolvency law regime which will cover all types of insolvencies. Even in the United Kingdom where the two regimes remain distinct, there is a separate statute for bankruptcy and what is obtainable now is the insolvency Act of 1986 which has abridged the differences between the rules and procedures governing insolvency of individuals and insolvency of oil companies.

In addition to the enactment of a unified legal framework, there is the need for certainty in the law. The contents of such harmonized legal regime must be plain and expressed in clear terms that can be easily understood by those who have to apply it. Absence of clarity is destructive of the law and is unfair to those who wish to preserve the rule of law and encourages those who wish to undermine it. (Chiwete, 2013).

There is therefore the need to develop Nigeria's business rescue legal framework like the selected case study countries which is debtor's rehabilitation focused commonly known as business rescue. This option ensures that viable upstream oil companies are saved from liquidation and only oil companies with no chances of survival are liquidated considering the vital roles that oil business play in the economy of many developing countries resulting in many countries restructuring their credit systems and as well developing their insolvency laws around business rescue and restructuring.

The world is gradually moving towards a business rescue regime that is debtors companies' friendly, flexible and that can apply to all businesses such as the United States model which recently South Africa have adopted with some modifications. Even the United Kingdom in appreciation of paradigm shift had also made several reforms to its business rescue legal provisions by drastically reducing the efficacy of receivership and also reforming its court driven business rescue process. Whilst the business rescue provisions i.e. company voluntary arrangement and receivership may be efficient in the selected case study countries having been tailored specifically to suit their jurisdictions needs, the contrary may be the case where adopted totally in Nigeria. The danger of importing a foreign law without filter is the loss of connectivity between the law and Nigerians. The points below are noteworthy in determining the right business rescue and restructuring model for Nigeria:

First is to consider the level of court involvement and what stage in the rescue process the court will be required. Our courts are already over-burdened with cases; therefore rescue options that are quite flexible with minimal court supervision will be more suitable for oil businesses in Nigeria.

It is also important to consider not imposing new management on the company in the form of a rescue practitioner who may not even know much about the business of the oil company. In practical terms, those that favour change of directors end up putting the rescue practitioner in a position where he may have to engage the service of experts to be able to rescue the oil company and eventually incur more costs. Where the management or directors are removed entirely and replaced with a rescue practitioner, so many challenges come to play.

First the rescue practitioner is received with so much hostility, he receives little or no cooperation from the management and often finds the rescue objectives very difficult to achieve. These lessons are not farfetched in view of our existing receivership practice in Nigeria. To take over the insolvent oil company, the Nigerian receiver will require the help of law enforcement agents and in most instances faced with heavy resistance from the company. The way forward for us may be to have business rescue regimes that allow the debtor to remain in possession perhaps under supervision of the rescue practitioners to ensure checks and balances.

The approach of making the same rescue practitioner the liquidator of the oil company where the rescue fails is a major pitfall to avoid. The reason is very simple; the objectives of the rescue practitioner and the liquidator are conflicting. Also their fees are different. Once we adopt that approach; the rescue practitioner will naturally want to earn both fees. The consequence is that no good efforts will be made to rescue the insolvent oil company because the rescue practitioner earns more if the oil business fails. The importance of having a well-structured business rescue mechanism cannot be over-emphasized. The benefits are numerous

to the debtors and creditors and the society at large. Jobs are preserved, oil companies are more willing to take business risks, foreign investments are encouraged to invest in the oil sector and Nigeria's economy will be enhanced.

We therefore need, rescue mechanisms that are workable, that can be easily implemented and at the minimum cost with basic issues such as: the key indicators as to when to initiate business rescue particularly for the directors, flexibility in terms of both formal and informal approaches, moratorium provisions, standard qualifications for rescue practitioners, little court intervention, provision for a rescue plan with a well-defined content, that deal with post commencement financing and ranking of claims, this apply to oil companies and other forms of businesses, define the relation and impact of the process on existing contracts including employees' contract, consider security or bond to be provided by rescue practitioners as against criminal sanctions. These provisions are not only accord with modern global trends but will ensure rescue provisions that are relevant and oil business friendly in Nigeria.

The issue of debt recovery by individual (bankruptcy) or corporate bodies' insolvency proceedings in Nigeria without recourse to litigation, parties may seek to resolve their differences via Alternative Dispute Resolution (ADR) mechanisms to settle out of court and to reduce the cost of litigations and the protracted delays associated with legal actions.

However, in the individual bankruptcy, they may decide to forget or forgive the debtor. Even though, the company is wound up and liquidators are appointed they may not recover the total debts owed to the oil companies by the debtors thereby incurring more expenses and liabilities on the company that they intend to savage for its shareholders.

The writers are of the opinion that claims arising from debts as well as insolvency charges can only encourage investors or creditors if a peaceful resolution are agreed by both parties and time frame is given to debtors to pay or settle the creditors as judgments obtained against a debtor is not immediately settled and this may resolve to enforcement through the law enforcement agencies.

A good insolvency law must be capable of eliminating inefficient oil companies and build confidence in the nation's economy. Apart from establishing the substantive aspects of insolvencies or bankruptcies, the legal regime should create an original court specialised in bankruptcies and insolvencies' matters. There is the need for the appointment of judges who are experts in commercial law and trained for the purpose of facilitating the special courts. The commercial courts to be created should be limited to hearing cases involving insolvencies and unsecured creditors leaving secured creditors to continue seeking remedies from the conventional courts. The court being the last resort, proceedings should only be initiated against those oil company debtors who are unwilling to co-operate in paying their debts despite the ability to do so and against debtors who are acting in bad faith concerning the repayment of the debts.

The writers suggest that the Federal government should enact law requiring financial institutions to assist insolvent oil companies in restructuring their loans and to allow the management of insolvent oil companies to remain in office with their operations being oversees by insolvent and business recovery professionals.

15. CONCLUSIONS

Having examined the theoretical framework on insolvency and business recovery practices in Nigeria, national legal regimes on insolvency and business recovery practices, institutional frameworks regulating insolvency and business recovery practices in Nigeria and having done comparative analysis of national legal framework of Nigeria, Malaysia, India and South Africa on insolvency and business recovery practices and drawing instances from other

jurisdictions, legal reorganization options, symptoms of corporate insolvency, insolvent oil companies rescue or restructuring strategies and other remedies open to unsecured creditors, corporate liquidation or winding-up of company - as a last resort, lessons Nigeria can learn from the selected case study countries . The writers agree that the main drawback in the Nigerian legal regime is the absence of a unified, dedicated and consolidated insolvency legal framework as highlighted.

It is the view of the writers that the judiciary in its contributions to the development of the insolvency law must engender the confidence of all stakeholders in the judicial process, by being fair, expeditious and giving due regard to the dictates of commercial oil sense and principles. A review of the current legislations on insolvency and restructuring reveals some unresolved issues that have become cause of concern among insolvent practitioners. For example, despite modernization in the area, Bankruptcy Act in Nigeria has not been amended since 1992.

The need for legislative reform of several obsolete statutes on insolvency, creditors' rights, corporate workouts and restructurings for instance the Companies and Allied Matters Act, the Bankruptcy Act and the Dishonoured Cheques Act. The Nigerian Insolvency law should be reformed to provide a more neutral framework to safeguards debtors and creditors alike and the right time to do this is now and we must not wait for the occurrence of a major financial crisis before we embark on transformative reforms. Notwithstanding the limitations of the existing insolvency framework which admittedly is in urgent need of reform, the courts still have a fundamental role to play in dispensing equity and balancing the interests of the various stakeholders in commercial disputes that are based on insolvency. By a creative application of its constitutional and adjudicatory powers, the courts can subtly achieve a paradigm shift in our insolvency framework towards business rescue and effective regulation and professionalization of insolvency practice in Nigeria.

An independent business review could be carried out when an oil company is underperforming or in financial crisis. A review of a threatened or seriously underperforming business by specialists experienced in working out turnaround business strategies can be engaged to undertake rigorous review of the oil company's operations.

Restructuring of oil companies that are financially underperforming and lenders or other stakeholders restructuring solutions is needed to build a platform for swift recovery and to sustained future success of the oil company. There is the need also for oil company operational restructuring by benchmarking the key operations parameters to assess areas where immediate improvements can be made, developing strategies to make these improvements work better and providing the necessary project management thrust to ensure that the proposed turnaround strategies are duly implemented in the company's operations.

Finally, there is the need for financial restructuring by analyzing the earnings of the oil company's cash flows that are sustainable into the future in conjunction with the operational restructuring, so as to determine the level of debts that the oil business can sustain upon restructuring. There is also the need for profitability enhancement of the oil company as profitability is a measure of the health of the company. Oil Company's profitability can be enhanced by restructuring its budget to control costs, monitor profit and to evaluate the viability of new business opportunities in the sector. The recommendations if compiled with, it will have positive impact on insolvent oil companies in financial quandaries to continue to do business while undergoing momentous reforms.

ACKNOWLEDGMENT

The financial support by Covenant University, Ota, Nigeria is gratefully acknowledged.

REFERENCES

[1] Asada, M., and Olong, M., (2007), "The Corporate Investigative Powers of the Corporate Affairs Commission in the Promotion of Corporate Governance in Nigeria", Bar Review, A publication of the Nigerian Bar Association, Ikeja Branch, Vol. 1, Parts 1& 2, p.79.

[2] Bernard, B. P., "The Effect of Recent Changes in the Financial Sector Development in Nigeria" Being Paper Presented at the 15th General Assembly of the African Rural and Agricultural Credit Association.

[3] Donaldson, I and Davis, J.H (1991) " Stewardship Theory or Agency Theory, CEO Governance and Shareholders Returns" Australian Journal of Management, Vol.16, pp.49-64.

[4] Fatula, O., (2007), A Comparative Critique of the Framework of Insolvency in Nigeria Bar Review, A publication of the Nigerian Bar Association, Ikeja Branch, Vol. 1. Parts 1& 2, pp.44-63.

[5] Hunt, S. D., Wood, V. R., & Chonko, L. B. (1989). Corporate ethical values and Organizational Commitment in Marketing. The Journal of Marketing, 79-90.

[6] Leonard C. Opara, Livinus I. Okere, Chinwendu O. Opara (2014) "The Legal Regime of Bankruptcy and Winding up Proceedings as a Tool for Debt Recovery in Nigeria: An Appraisal" Canadian Social Science Vol. 10, No. 5, pp. 61-69

[7] Olisa Agbakoba & Associates. Bankruptcy Proceedings as a Tool for Debt Recovery.CL.E.S Vol. 1 No. 1 p. 3

[8] Soludo, C.C., "Consolidating the Nigerian Banking Industry to Meet the Development Challenges of the 21ST Century" Being an address delivered to the Special Meeting of the Bankers' Committee, held on July 6, 2004 at the CBN Headquarter, Abuja.

[9] Khan, S., Olivia, T., and Bidin., A., (2014) "Recent Developments of Insolvency and Restructuring in Malaysia", Australian Journal of Basic and Applied Sciences, 8(1) pp. 508-512.

[10] Zahra and Pearce (1989) " Boards of Directors and Corporate Financial Performance: A Review and Integrative Model" J. Manage., 15: 291.

[11] Andrew Kaey and Peter Walton Insolvency Law, (Pearson Education Limited Edinburgh Gate, Harlow, Essex CM202JE. 2003).

[12] Ibiyemi, J.A. (1999) Introduction to Insolvency Practice in Nigeria (1999, Spectrum Books Limited, Ibadan, Nigeria).

[13] Principles of executorship, trusteeship and bankruptcy law. By Leonard C. Opara & Prince Lukman Jayeola Agunbiade.

[14] Pfeffer, J., and Salancik, G.R., (1978) The External Control of Organizations: sources – Dependency Perspective, Haper and Row New York, NY.

[15] Hume, D. (1979). Hume's ethical Writings: Selections from David Hume.

[16] Leonard, B., the International Insolvency Institute, (2017) "Restructuring and Insolvency 2017" Available at: https://www.freshfields.com/globalassets/services-page/restructuring-and-insolvency/publication-pdfs/getting-the-deal-through-randi-2017.pdf (visited January 10, 2019).

[17] Lord Diplock in Merkur Island shipping Corporation .v. Laughton (1983) 2 ALL E.R 189 at 190.

[18] Mcgregor Associates v. NNBN (1996) 2 SCNJ 72

[19] Oriental Airlines Limited v. Air via Ltd. (1998) 12 NWLR (Pt. 577) 271 at 280-281, Hansa International Construction Limited v. Mobil Producing Nigeria (1994) 9 NWLR (Pt. 336) 76 at 86, Nigeria Industrial Development Bank Ltd. v. Fembo Nigeria Limited (1997) 2 FHCLR 501 at 502.

[20] Bankruptcy Act Cap B 2, Laws of the Federation of Nigeria 2004.

[21] Bankruptcy Rules, Cap B1, Laws of the Federation 2004

[22] Company Winding Rules 2001

[23] Lagos State High Court (Civil Procedure) Rules 2012.

[24] Rule 17, Bankruptcy Rules – made pursuant to the Bankruptcy Act. Cap. B2 LFN 2004

[25] Section 7(1)(c) of the Banks and Other Financial Institutions Act, Cap. B LFN, 2004.

[26] Securities and Exchange Commission Act, 1999

[27] The Companies and Allied Matters Act Cap C20, Law of the Federation, 2004.

[28] The Constitution of Federal Republic of Nigeria, 1999 (as amended).

Unpublished Thesis

Adebola, B.A., (2012), Corporate Rescue and the Nigerian Insolvency System, Being a Thesis Submitted to the University College London for the Degree of Doctor of Philosophy, available at: http://discovery.ucl.ac.uk/1385156/7/1385156_Thesis.pdf (visited January 3, 2019)

[29] Anthony Idigbe SAN (2011) "Using Existing Insolvency Framework to Drive Business Recovery in Nigeria: The Role of The Judges " Being paper presented at 2011 Federal High Court Judges Conference held at Sankuru Hotel Sokoto on 11th October 2011 Available at: http://www.punuka.com/uploads/role_of_judges_in_driving_a_business_recue_approach_in_existing_insolvency_framework.pdf (visited January 4, 2019), pp.1-21.

[30] Dentons, (2016) A legal overview of M&A and financing transactions in Nigeria's oil and gas sector available at: https://www.dentons.com/en/insights/articles/2016/january/19/a-legal-overview-of-ma-and-financing-transactions-in-nigerias-oil-and-gas-sector (visited December 30, 2018)

[31] Etigwe Uwa, Streamsowers & Kohn (2014) "Insolvency & Restructuring Practice Area Review" http://whoswholegal.com/news/analysis/article/31657/insolvency-restructuring-practice-area-review.

[32] Douglas- Abubakar, J., (2018) International Comparative Legal Guides to Corporate Recovery and Insolvency 2018 Nigeria, https://iclg.com/practice-areas/corporate-recovery-and-insolvency-laws-and-regulations/nigeria

[33] Idigbe, A.I., (2017), Recall: Insolvency & Restructuring in Nigeria, available at: https://www.proshareng.com/news/Debtors%20&%20Recovery/Recall:-Insolvency-&-Restructuring-In-Nigeria/34616 (visited January 3, 2019)

[34] Idigbe, A., (2018) Insolvency and Directors' Duties in Nigeria: Overview, available at: https://uk.practicallaw.thomsonreuters.com/3-637-5072?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1 (visited January 3, 2019)

[35] Wihlborg, Clas, (2002), Insolvency and debt recovery procedures in economic development: An overview of African law , econstor www.econstor.eu

[36] Chiwete, C., (2013) "Need to develop Nigeria's business rescue laws" http://www.punchng.com/feature/the-law-you/need-to-develop-nigerias-business-rescue-laws (visited January 3, 2019).

[37] Gerard, C., and Klingebiel, D., (1997) "Bank Insolvency: Bad Luck, Bad Policy, or Bad Banking?" Available at: http://siteresources.worldbank.org/DEC/Resources/18701_bad_luck.pdf (visited January 3, 2019).

View publication stats