A CASE FOR CORPORATE BANKRUPTCY REGIME IN NIGERIA THROUGH LEGISLATIVE ACTION

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Abstract
The extant legislation on bankruptcy in Nigeria affects only individuals or natural persons as well as partners. It has no relevance or effects whatsoever on corporations or registered companies. Such companies in Nigeria, can be liquidated or wound-up under the provisions of the Companies and Allied Matters Act (CAMA) and the Companies Winding-up Proceedings Rules. The attendant or resultant effect is that companies that are no longer financially solvent are unable to continue to exist and must be liquidated under CAMA. Such liquidations do not in anyway affect the fortunes of the Directors or Shareholders of such a company. Again, bankruptcy practice in Nigeria seeks the complete stoppage of operation of the entity concerned. There is no procedure like Rehabilitation that mark out the American bankruptcy process. There are different bankruptcy routes or channels in America. We intend to emphasize the Chapter 11 process particularly as it concerns corporate insolvency and bankruptcy, corporate resuscitation or rehabilitation, corporate survival and continuity. This study will draw from the American chapter 11 model in making a clear case for corporate bankruptcy in Nigeria.

1.0 Introduction
The inspiration or thought to do this study came as 1 looked through the Postgraduate Seminar Paper of Dr. G.U. Ahuchogu titled “Legal Regime for the Resolution of Banking Sector Distress; The Nigerian Banking Industry in Perspective”. At page 66 of the paper the learned researcher had stated that;

> *similar to The Bankruptcy Act is directed towards individuals and partners of a firm. Registered or incorporated companies are exempted from its operation… the members of such registered or incorporated companies have two distinct advantages when their companies default on their loans or become insolvent. First, the members of an incorporated company which is unable to pay its debts escape the disqualifications to hold public offices and punishments provided for an adjudged bankrupt in sections 126, 127 and 128 of the Bankruptcy Act. Such members are deemed to be separated from the companies which they own since such companies are separate and distinct legal entities under the law. Secondly, such members escape a non-legal but adverse effect of a person being declared bankrupt having to incur public disapproval. It is therefore recommended that the Bankruptcy Act be amended to include limited liability companies*

> *that are unable to pay their debts with the controlling members of the companies being adjudged bankrupt at the same time with their companies……. It is also recommended that a provision chapter 11 of the United State Bankruptcy Code be inserted into the nation's Bankruptcy Act to enable companies restructure under court supervision while its assets are protected from seizure by creditors*"

In this paper, I intend to agree wholeheartedly with the above recommendations. The reasons for our approbation of the above view of my respected Senior Colleague forms the main plank or body of this discourse. I shall sift through the Bankruptcy Act, and any other relevant law rule or regulation on the exact legal positions in Nigeria presently. We shall use that as a necessary palladium to critically analyze the American corporate bankruptcy law/practice from where lessons shall be drawn for the betterment of our laws and practice in corporate resuscitation, rehabilitation and / or restructuring.

2.0 Bankruptcy and Corporate Insolvency Defined

Before attempting a definition/description of "Bankruptcy" it is imperative and germane that I first define or explain what the term "Corporate or Corporation" means or denotes. The word "Corporate signifies or means" to be legally united in a body so as to act as an individual; belonging or pertaining to a corporation"[1]. A corporate body is an organization, recognized and created by law, which allows people to pursue similar objectives. It is governed by rules of the individuals' own making and is said to assert rights and assume obligations, associate together for a common purpose under a common name. The Corporation is therefore a vital socio-economic institutions. It is however not the most prevalent form of business organization. The corporation represents man's voluntary attempt at achieving economic competence, success and an enlarged capital base:
According to Ojobor Livinus Onyebuchi,

> *"A corporate body is an organization, recognized and created by law, which allows people to (pursue) objectives. It is governed by the rules of the individuals own modeling and is said to be able to assert rights and assume obligations, associated together for a common purpose under a common name... it is man's voluntary approach to deliver economic competence, created through the exercise of individual rights (i.e freedom of association and freedom of contract).... The corporation is an association of individuals who engage in a particular type of contractual relationship with one*

[1] Mairi Robinson, et al (ed) Chambers 20th Century Dictionary (Edinbingh, Chambers Harrap Publishers Ltd. 1999) P. 97

> *another in order to pursue common business when rights and obligations are imputed to a corporation, what are really being referred to are the rights and obligations of its members who create and sustain it (i.e the stock holders, directors, officers, employees etc)*[2]

Businessmen or traders otherwise called investors with business ideas who pool their resources together and attempt to create further or new wealth, establish companies or corporations. Such entities are joint stock companies since they are jointly owned by different people who get shares or stocks in exchange for their investment or money in the going – concern or venture.

A company or a corporation in terms of its existence, operations, rights and obligations are separate and distinct from those persons or individuals who, from time to time, it has as constituting its membership. It can be a public limited liability company or a private limited liability outfit. It can also be unlimited. Among its merits or advantages are:-

- It exists, independently, of its owners or shareholders.
- It is distinctly recognized as a legal person with rights enjoyed by natural or individual persons.
- It is a hugely successful device for raising vast amount of business capital by pooling together the resources of many persons.
- It spreads the risk of the new business or venture collapsing amongst many people.
- Its owners are not ordinarily liable for its debts beyond their investment.[3]

A Corporation in a nutshell is a separate legal entity that has been incorporated either directly through legislation or through process established by law. Incorporated entities have legal rights and liabilities that are distinct from their employees and shareholders[4]. Registered companies or corporations have legal personality and are owned by shareholders[5] whose liabilities are limited to their investment. A company is an organization which produces or sells goods or services in order to make profits or sells goods or services in order to make profit[6]. It is an association of persons formed for the purpose of some business or undertaking carried on in the company's

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[2] Ojobor Livinus Onyebuchi "Globalization and Contemporary Practices in Corporate Governance; An Appraisal: a seminar paper presented at the Faculty of Law, NAU Awka for the award of an LL.M Degree on 30th July 2009 pp.20-21

[3]See the case of Salomon V. Salomon & Co. (1897). A.C 22, 66 LT Ch. 35, 75 LT 426, 13 TLR 46

[4] Sobel R. "The Age of Giant Corporations "1984 Corporation <http//reference.com>accessed on 3rd June, 2014.

[5] Adaramola, Junisprudence (4th edn, Durban: Lexis Nexis Butterworths, 2008) p.169. see Blacks Law Dictionary 9th edition. (US St Paul West Mwin, 2009) p.391.

[6] Procter, P. Cambridge International Dictionary of English (Cambridge, University press 1996) p. 816.

name[7]. A company is a corporation or commonly an association, partnership or union, that carries on a commercial or industrial enterprise[8].

The term "Bankruptcy" can be seen as a legal status of a person or any entity that cannot repay the debts it owes to creditors. This legal status is usually court imposed by order otherwise called the "adjudication order". The process or proceedings leading to the making of the order is usually initiated by creditors of a debtor. Bankruptcy is the legal status of an individual against whom adjudication order has been made by the court primarily because of inability to meet his financial liabilities. The adjudication order here is the legal declaration of a debtor's insolvency which attaches to his person certain disqualifications and disabilities while divesting him of his assets which must then be shared or distributed amongst his creditors[9]. Bankruptcy remains a process by which the state takes over possession of the available properties of a debtor by an officer appointed for the purpose and such property is realized and subject to certain priorities distributed rateably amongst persons the debtor owes money or has incurred pecuniary liabilities[10]. It is a procedure by which an insolvent debtor's property is coercively brought under judicial administration in the interest of the creditors[11]. To Sir Loinigatme Njemenze, Bankruptcy is a legal procedure designed to extricate an insolvent debtor from financial burden by distributing his available estate among his creditors equitably[12]. At this juncture, what is insolvency? Ayeni A.R, after having defined bankruptcy as a legal declaration of insolvency says it is the inability of a debtor to meet his obligation as they fall due[13]. Njemanze sees it as a situation where a person's liabilities exceeds his assets resulting in his inability to meet his financial obligations as they become due[14].

Bankruptcy is thus distinguishable from insolvency since both are not interchangeable and definitely do not mean the same thing. A person can be insolvent without being bankrupt. According to E.I. Okiche, "that a person is temporarily out of pocket does not mean that person is bankrupt. Again, a business concern with a temporary cash

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[7] Rutherford L. and Bone, S. Osborn; Concise Law Dictionary 8th edition, (London) Sweet and Maxwell 1993) p.200.
[8] See Frank Asogwah, A. Critical Appraisal of the Liability of a Company for the Acts of others under the CAMA" a seminar paper for Ph.D to Faculty of Law NAU at pp. 3 – 4.
[9] Thompson J.H, The Principles of Bankruptcy Law (UK, Foulk Lynch Pub. Ltd 1992) p.54.
[10] See Ezejiofor et al, Nigerian Business Law (London, Sweet & Maxwell, 1982) p.427, M.C. Okany, Nigerian Commercial Law (Onitsha, Africana Feb. Publishers Ltd, 1982), p.691. See Okay Achike, Commercial Law in Nigeria (1985) p. 422. Halsbury's Laws of England (3rd edn) vol. 2 p. 250.
[11] J.P. Credit, Creditors Remedy" (Vancouver, Unitrend Ind Ltd 1970) p. 37.
[12] Njemanze L.O. Understanding Bankruptcy, Executorship and Trusteeship Law and Accounts (Enugu, Rhyce Kerex Publishers, 2003) p.1.
[13] Ayeni, A.R, Bankruptcy, Liquidation, Executorship and Trusteeship Law and Accounts (Ado-Ekiti, Printech Press Ltd, 2003) 1st ed. p.1.
[14] Ibid,

flow problem but with a strong balance sheet assets base is also not bankrupt. Insolvency is therefore, purely a question of fact[15]. In the context of this study, I crave your indulgence to attempt a description of corporate insolvency and corporate bankruptcy for a better comprehension of the thrust of this paper. Corporate insolvency can be seen as a condition or situation when a company or a corporate organization is no longer able to pay its debts when they fall due, or in the usual course of business[16]. Corporate bankruptcy can arise as a result of two broad categories of failure. It can arise due to business failure or collapse on the one hand and as a result of financial distress. Business failure may be as a result of a critical flaw or defect in the company's business plan or model which hinders or prohibits it from producing or attaining the necessary level of profit to justify its capital investment. On the other hand, according to John Knox and Mark A. Lewinson "financial distress stems from a critical flow in the way the company is financed or its capital structure. Continued financial distress leads to either technical insolvency[17]... or bankruptcy" (liabilities outweighs assets and the firm has a negative net worth[18])
Both writers maintain that

> *"a company experiencing business failure can stay off bankruptcy as long as it has access to funding. Conversely, a company experiencing financial failure will be pushed into bankruptcy regardless of the soundness of its business model. The actual causes of corporate bankruptcies are difficult to establish....*[19]

3.0 The Nigeria Bankruptcy Act and the Exclusion of Corporate Bankruptcy

In Nigeria, only individual or personal bankruptcies are allowed or permitted by law. This must be in strict compliance with the provisions of the Bankruptcy Act, 2004[20]. Corporate bankruptcy was not included within the purview of the Act. Rather whenever any company or corporation is insolvent it must be liquidated or wound-up in accordance with the stipulations or provisions of other legislation(s) particularly, the Companies and Allied Matters Act, 2004 and all other subsidiary legislations made pursuant to it such as the Companies (Winding-up) Procedure Rules. Our thrust in this study is that there should be an immediate legislative alteration of all relevant Laws to ensure and make all winding-up (or liquidation) proceedings less attractive[21]

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[15] Okiche, E.L. "The Relevance of Bankruptcy Law to Consumer Protection in 'UNIZIK Law Journal vol.7 No1. 2010 pp.246 – 247.
[16] See Akpoghome T.U.(Mrs) "Corporate Insolvency: The Role of Receivers and Managers in Selected Jurisdictions" in University of Benin Law Journal, 2010 – 2012 vol. 13 No. 1, p. 143.
[17] Assets outweighs liabilities, but the firm is unable to meet current obligations.
[18] See John Knox and Mark. A. Lewinson (2009), Municipal Bankruptcy, Avoiding and Using Chapter 9 in Times of Fiscal Stress, (USA, Orrick, Herrington and Sutcliffe LLP pp. 21 – 22.
[19] ibid
[20] The Bankruptcy, Act Cap B2 Laws of the Federation of Nigeria, 2004 is the extent legislation on bankruptcy.
[21] ibid

by creating and establishing a legal palladium or mechanism(s) for corporate rehabilitation which should rescue most insolvent companies from being wound-up. This is presently the trend is the West and Nigeria must do something now.

Akpoghome has lamented that liquidation has often been seen as the only viable option for companies which are insolvent[22]. Added to that is the blank exclusion of corporate bodies or corporations from the operation of the Bankruptcy Act. Section 108 therefore stipulates that: "A receiving order shall not be made against any corporation or against any association or company registered under the Companies and Allied Matters Act[23]

Though S.123 of the Bankruptcy Act permits a company or corporate body to file proof of debts owed it in any bankruptcy proceedings against any individual, the damage was done by S.108 above stated. The obvious implication is that a company can be a petitioning creditor but cannot itself be proceeded against in bankruptcy adjudications in Nigeria. This is highly discriminatory and should be reviewed. If a company can be a party in the adjudication of an individual, file proof of its debts, question him thereat, attend and contribute at the first and subsequent meetings of creditors, may even be in the committee of inspection or even be a Trustee in Bankruptcy, why then should such a company not be amenable to Bankruptcy adjudication. Our Constitution even frowns upon such discriminatory tendencies[24].

The extant law in Nigeria, as well as the practice and procedure is as captured by a learned writer, Akpoghome T.U. (Mrs) who opined that "when a company become insolvent, a liquidator may be appointed to wind up the company under the creditor's voluntary winding-up, members voluntary winding-up or winding-up by the courts. A receiver/manager may also be appointed to carry on the business as a going concern and realize its assets. It is also possible to use a scheme of arrangement for the reconstruction of companies. Liquidation has often been seen as the only viable option for companies which are insolvent"[25]. It is noteworthy that in almost all the

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[22] ibid at p.145

[23] See Section 108 of the Bankruptcy Act, 2004

[24] S. 42(1) of the 1999 Constitution of the FRN (as amended) provides that "A citizen of Nigeria of a particular community, ethnic group, and place of origin, sex, religion or political opinion shall not, by reason, only that he is such a person. (a) be subjected either expressly by or in the practical application of any law in force in Nigeria, or any executive or administrative action of the government to disabilities, or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion, or political opinions are not made subject".

[25] ibid at p. 143-144. at p.145 footnote 17, stated and I enthusiastically agree using Australia and Malaysia in comparison with Nigeria that "In Australia... there should be an effective release of the insolvent companies from financial obligations and liabilities. In Malaysia... the present framework is very much focused on liquidation or winding-up of companies. This trend is also found in Nigeria. In most cases companies are wound-up without first considering any rescue mechanism.

cases where the above procedures were employed or admitted the corporate entities or companies did not survive but had to be liquidated or wound-up. Hence it is our position that a solution may be found through the bankruptcy channel or route especially if we model it against the backdrop of what happens in the United States of America. We intend to look at Chapter 11 Bankruptcy in America and recommend its modified adoption into Nigeria.

4.0 An Overview of the United States Bankruptcy and Insolvency Practice/Regime

The United States bankruptcy and insolvency law and practice is unique. The story of Pacific Gas and Electric Company is fascinating in its turn-around venture. With its headquarters in San Francisco, it was founded in 1905. It supplies natural gas and electricity to most parts of Northern Carolina. This company did well for several years. It owned gas power, hydroelectric and steam plants. During the electricity market deregulation it sold its natural gas power plants and retained its hydroelectric plants. Following the sale, its generating capacity went down drastically and it had to buy power from other energy generators. It bought at fluctuating prices and sold at fixed or regulated prices. It incurred losses and eventually bankruptcy came. It was allowed to retain it assets and continued to function while it followed its debt repayment plans. In 2004, the company emerged from bankruptcy having reorganized itself proficiently well and was named or cited as one of the most profitable companies in 2005 on the Fortune 500 list. An epic case of a stock slide resulting in bankruptcy and thereafter an amazing recovery occurred in Conseco Incorporated, an insurance, investment and lending company in Carmel, USA. Before filing for bankruptcy, it had reached agreement with its major creditors to restructure its debt. The Bankruptcy Judge approved a rehabilitation plan cutting the company's debt from $7 billion to $1.4 billion. Within a few months, the company emerged from being the third largest bankruptcy in U.S history paving its way back to financial recovery.[26] On July 21st, 2002, WorldCom, one of the world's most valuable companies valued at over more than $10 billion filed for the largest bankruptcy in U.S. history. That was a month after it revealed that it had wrongly accounted almost $4 billion in expenses. It was the largest U.S. based Telecommunications Company with more than 20 million customers and 80,000 employees. Other companies that went bankrupt and today are back in business having recovered financially like WorldCom include Lehman Brothers Holding Incorporated, Enron Corporation, Global Crossing Ltd (January 28th, 2002). **Val Corporation,** an airline holding company, Illinois (December, 8th 2002). Delta Airlines Incorporated (September, 14th, 2005) which filed for bankruptcy after 76 years operation as an airline based in Atlanta, Georgia operating extensive international and domestic flights. It tried

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Receivers/Managers are hardly appointed official receivers and liquidators are always there to wind-up insolvent companies"

[26] See http://www.siwesdata.org/intitution_student.php

starving off bankruptcy through job cuts and expansion plans. It cited high jet fuel prices and high labour cost as the two main factors. It had $20.5 billion debt at the time of filing. On 30th April, 2007, the Airlines emerged from bankruptcy protection as a restructured, rejuvenated and financially viable independent carrier.

The two key phenomena or terms that underlie the American bankruptcy regime or practice is Re-organization and Rehabilitation. The underlying factor here is that it is better that a company as a going concern remains alive instead of dead. Its financial and social value is normally greater than the sum total of its debts. The advantages of restructuring, rehabilitation and reorganization of corporate entities includes:

- Avoidance of untimely corporate death or collapses or failures due to financial distress though it is still economically efficient and productive. They sort out their financial difficulties avoiding winding-up.
- Creditor's assurance and benefit as full or substantial recovery of debts are more guaranteed than would be the case should the company be folded up or liquidated.
- Creation of economic stability with less companies embarking on winding up proceedings which results in job losses and economic hardship for workers.
- An effective bankruptcy process for both individuals and corporate entities is essential to a viable assets management/recovery system as it remains a veritable bedrock for a country's economic success and results into strong and economically stable companies able to compare with other corporate bodies in foreign economies.

Under the American bankruptcy process, the U.S. Constitution authorizes Congress to enact "uniform laws on the subject of Bankruptcy throughout the United States[27]. Congress had since 1801 acted through legislation. It had in 1978 enacted the Bankruptcy Reform Act of 1978 codified in Title 11 of the US Code as the Bankruptcy Code. The most recent amendment thereto occurred in 2005 through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Some laws relevant to bankruptcy are found in other parts of the US Code, for example, Bankruptcy Crimes are in Title 18, tax implications of bankruptcy are found in Title 26, and the creations and jurisdiction of bankruptcy courts are in Title 28 of the United States Code[28].

Dependent on circumstances entities or persons seeking relief may petition under 6 relevant chapters out of the 9 that constitute Title 11. The remaining 3 chapters contain rules that govern the petitions in America. Bankruptcy matters are referred to by the chapter under which it is filed. They include;

a) Chapter 7 Liquidation: This is the most common form of bankruptcy and it involves the appointment of a Trustee who collects the non-exempt properties of the debtor, sells it and shares the proceeds thereof among the creditors. States

[27] See Article 1, section 8, clause 4 of the U.S. Constitution.

[28] David Skeel Debts Dominion; A History of Bankruptcy Law in America (Princeton, Princeton University Press, 2001)

Law allows for debtors to keep essential properties, thus most chapter 7 cases are no assets cases making the debtor to keep most of his assets.

b) Chapter 9: Reorganization for Municipalities: It is available only to municipalities. It is a door of reorganization and not liquidation. Orange County, California is or remains a famous municipal bankruptcy case in US history. Again, the city of Detroit also made headline news.
c) Chapters 11, 12 and 13 Reorganization: These chapters focus on reorganization and rehabilitation/restructuring. It permits the debtor to keep some or all of his or her property and to employ future income or earnings to pay off creditors. Consumers can go for either chapter 7 or chapter 13. Chapter 11 filing for individuals are permissible but rare Chapter 12 is available to "family farmers and family fishermen only".
d) Chapter 15 Cross-border Insolvency: The Bankruptcy Abuse Prevention and Consumer Protection Act, 2005 added chapter 15 to the Bankruptcy Code and is concerned with cross-border insolvency and it is to go after foreign companies with US debts.

As a major feature of the US Bankruptcy Law bankruptcy matters can be voluntary or involuntary. It is voluntary where debtors petition the bankruptcy court. It is involuntary when creditors rather than the debtors, file the petition in bankruptcy. In America, involuntary petitions may be rare, however, it is used in business settings to force a company into bankruptcy so that creditors can enforce their rights.

Another major feature is that debtors may be permitted to keep exempt properties. This is so as the purpose of bankruptcy is partly to ensure an orderly and reasonable management of debt. Exemptions for personal effects such as clothes, beddings etc. are thought to prevent primitive seizures of items with little or no economic significance. Personal effects, personal or body care items, clothings are thus exempt property. In addition, tools or implement of trade are exempted.

A typical American chapter 11 bankruptcy preaches reorganization as opposed to liquidation. Debtors may emerge from a chapter 11 bankruptcy within a few months or several years depending on the size and complexity of the bankruptcy. The American Bankruptcy Code relies on the use of a Bankruptcy plan. This plan, with some exceptions, may be proposed by any interested party. Interested creditors then vote on such a plan. Upon a confirmation, the plan becomes binding and identifies the treatment of debts and operations of the business for the duration of the plan. Under a typical chapter 11 bankruptcy, debtors have the exclusive right to propose a plan of reorganization usually for a period of 120 days (4 months). In the absence of such a proposal emanating from the debtor, the creditors may propose such a plan after the expiration of the time allowed the debtor. The plan must satisfy certain stipulated criteria to be confirmed by the Bankruptcy Court. Again, creditors must vote to approve any plan for reorganization. Any plan that fails confirmation may be converted into a chapter 7 bankruptcy that is liquidation proper or if the best interest of the creditors and the estate permits, the case may be dismissed resulting in a return to the status quo before the initiation of bankruptcy action. In any case of dismissal, the creditors will look to non-bankruptcy law in order to satisfy their claims.

Another salient feature of chapter 11 bankruptcy is that it allows priority in repayments to creditors. This is covered or stipulated by Section 507 of the U.S. Bankruptcy Code. As a general rule, secured creditors, (creditors with secured interest or collateral in the debtor's property) will be paid off before the unsecured creditors. Again, even unsecured creditors' claims are prioritized. In this regard, the claims of suppliers of goods or products or employees of a company may be settled first before other creditors are paid. Each priority level must be comprehensively settled before the next lowest priority level is paid or settled. Critically assessing albeit juxtaposing the bankruptcy and insolvency legal regimes of the USA, the United Kingdom, Indonesia and Nigeria's, on the basis of being creditor driven or debtor driven, a learned commentator had asserted that:

Insolvency regime may be creditor driven or debtor driven: An example of a debtor driven or creditor focused insolvency law regime is the United States Bankruptcy Code while the United Kingdom regime before the Insolvency Act 1986 and that of Nigeria by virtue of her historical connection with Britain is substantially creditor driven. The Indonesia (Bankruptcy) Act 1906 also have as it purported purpose to advance the financial interest of creditors. It therefore weigh heavily in favour of creditors and did not provide debtors with a fresh start. Under this Act, individual debtors continue to be liable for the entirety of their debts after the discharge of the bankruptcy. In the U.S. bankruptcy law, the purpose of bankruptcy is to provide the debtor with a clean slate free of debt, even if the liquidation of the debtor's estate is unsuccessful in satisfying all of the debtor's then existing debts. In line with the 1906 pro-creditor tradition, the 1980 Indonesian Bankruptcy Code provides for a wide variety of creditor remedies. Conversely, the U.S Bankruptcy Code provides for a complete discharge of the debtor's obligation to pay debt to a chapter 7 proceedings[29].

It is worthy of note that in a chapter 7 proceedings a trustee is saddled with the duty of gathering or realizing the debtor's properties, liquidating and paying the greater proportion of debts as the realized assets permit. Creditors get paid in order of priority and on *prorata* basis. It is instructive to further note that under chapter 11 of the U.S Bankruptcy Law, the debtor's obligation to make payments to creditors is suspended

[29]Olugbemi Fatula, A Comparative Critique of the Framework of Insolvency in Nigeria, in Ikeja Bar Review, vol. 1 Parts 1 and 2, Sept. 2006. 2007 p.44 at 49-50, Biodum Layonu Insolvency Banks; now Your Customers, This Day, Tuesday Nov. 23, 2004 at 56 – 57. Robert N. Hornick, Indonesian Bankruptcy Law Protects Creditors, 17 Int'l Financial Review 21, 21 (1998)

while the parties work to shape a reorganization plan[30]. The U.S. chapter 11 bankruptcy route primarily focuses on the salvaging of an ailing or troubled corporation to have a first option as a debtor in possession. It usually seeks to continue operating its business and to pay its creditors via a court approved restructuring plan. In short, the system is shaped to assist the debtor to recovery. He is firstly permitted to propose a recovery plan before creditors and other interested parties can make other or counter proposals.

It is a truism that "there is no dedicated corporate insolvency law in Nigeria. Rather there are many statutes on corporate insolvency. The main statute being the Companies and Allied Matters Act. The Nigerian corporate insolvency law regime is largely creditor driven. Its provisions allow debtors or troubled companies to seize the initiative to commence and take charge of the process of any reorganization though such arrangements still largely depend for their success on the cooperation of other creditors and significant involvement of the Judiciary'[31].

Under the American chapter 11 procedure, the petition may be voluntary or involuntary. It may be filed by individuals in the voluntary model. Creditors usually file the involuntary ones and we shall henceforth restrict ourselves to the involuntary petition and its incidences. The petition must contain standard information concerning the debtor's assets, names, tax identification, residence, location of principal assets, the debtor's plan or intention to file a plan and a request for debt relief. Upon filing a voluntary petition for relief under chapter 11, the debtor or entity in debt assumes an additional identity as 'debtor in possession'. This term refers to a debtor who keeps possession and control of its assets while undergoing a reorganization under chapter 11, without the appointment of a Case Trustee. The debtor remains so and is known as such until the approval or confirmation of its reorganization plan, the debtor's case is dismissed, or converted to a chapter 7 petition or a chapter 11 Trustee is appointed. The debtor in possession runs the day to day operations and indeed continues the business while creditors and the Bankruptcy Court alongside the debtor negotiates and completes the reorganization plan. Once the plan meets certain requirements, (such as fairness among creditors, priority of creditor rights) the creditors are allowed to vote on the proposed plan. If the plan is confirmed, the debtor continues to run the business and pay the debts under the terms of the confirmed plan. Alongside the proposed reorganization plan must be filed a disclosure statement. This is a document that must contain information concerning the assets, liabilities, and business affairs of the debtor sufficient to enable a creditor to make an informed judgment about the debtor's plan of reorganization. The contents of a plan must include a classification of

[30] See Part XIV, XV and XVI of CAMA that is sections 387 – 400, 401 – 536 and 534 – 540 respectively other important collateral statutes include BOFIA, NDIC ACT, the CBN Act, investment and Security Act etc.
[31] see Olugbemi Fatvla op. cit. pp.57-58.

claims and must specify how each class of claims will be treated under the plan. Creditors whose rights or claims are to be modified under the plan are then allowed to vote by ballot. After the Disclosure Statement is approved by the Court, ballot collected and tallied, the Court conducts a confirmation hearing whereat it may confirm a plan for reorganization or restructuring.

In Brazil, the Bankruptcy Law (11/01/05) governs insolvency proceedings, court ordered or out of court receivership and only public companies and publicly traded companies are involved. State-run companies are excluded. Three separate and distinct procedures govern bankruptcy and insolvency. The first is Bankruptcy itself which is essentially a court ordered procedure for the liquidation of insolvent businesses. Its final goal is to liquidate company assets and pay its creditors. The second and more important one is Court-Ordered Restructuring. The goal of this procedure is to overcome the business crisis situation of the debtor in order to allow the continuation of the company, the employment of workers and the interests of creditors. This results in the preservation of the company, its corporate status and function and the development of economic activity. To activate this procedure the debtor must have been in business for not more than 2 years. It must be judge approved as well. The third procedure in Brazil is the Extrajudicial Restructuring which involve a private negotiation to involve creditors and debtors. Any plan agreed here must also be approved by the court.

5.0 Corporate Insolvency Proceedings in Germany and Japan

Similar to Chapter 11 of the U.S. Bankruptcy Code, Germany's new bankruptcy law will enable corporate debtors and their creditors to structure renegotiated, court – approved balance sheet restructuring with the consensus of some, but not necessarily all stakeholders. In particular, the new law, among other things, rids the German Bankruptcy Code of its current prohibition on non consensual impairment of equity.

Under the current code, while equity goes away empty-handed if insufficient funds remain in the estate, a corporate debtor cannot issue new equity and cancel old ones as typically occurs under a Chapter 11 plan. This gives equity holders in a German insolvency proceeding a blocking position in any proposed debt-for-equity swap, resulting in diversion of value even if equity is clearly out of the money. The new German code flies away with its historical protection of out-of-the-money stakeholders, a key impediment to serious consideration of its use as a restructuring tool.

Whereas, today, an order allowing a debtor to remain in possession is granted in only the most rare of circumstances (currently all business bankruptcies), the new German law aims to keep the debtor in possession without interference from a trustee/administrator as long as a path to exit exists (for example, in the form of a prenegotiated insolvency plan) and the debtor's constituents generally approve. Since insolvency administrators can be expensive (racking up fees of 5% to 9% of a going-concern sale, for instance, which fees come out of the sale proceeds) and may have interests inconsistent with, in particular, creditors with strategic interests, stakeholders generally should be supportive.

Further key revisions pertain to creditors' committees. The current code provides for appointment of a committee only after, generally, a case is three to four months old. In certain instances, so-called preliminary creditors' committees may, in practice, be appointed earlier than that, but they have little decision-making or approval power. In the absence of a creditor-controlled counterweight, an insolvency administrator (or a debtor in possession, for that matter], will accomplish a lot in three to four months, including preparations for asset sales, financing and other matters.

To counteract this, the new German law mandates the appointment of a creditors' committee at the outset - in all but the smallest - of corporate debtor cases. This is important, as, similar to England, clearly not all corporate debtors will remain in possession during a case and creditors will need a source of leverage to check the administrator. Immediate committee appointment coupled with committee approval of non-ordinary course transactions does just that by 1999 an absolutely new era of insolvency law has started in Germany. After almost 20 years of discussions, hearings and negotiations the Insolvency Statute has replaced the Bankruptcy Act and the Settlement Act in the West German States and the Total Execution Act in the East German States. The former bankruptcy law had largely proven to be unfunctioning. Under the Insolvency Statute the preconditions for the opening of insolvency proceedings should be formed in a way that would allow to open more insolvency proceedings than under the Bankruptcy Act (under the Bankruptcy Act 84 % of the requests to open bankruptcy proceedings were dismissed because of the lack of sufficient assets). The introduction of a possible self-administration of the debtor under the supervision of a court appointed custodian by the Insolvency Statute was supposed to facilitate the decision for a timely beginning of insolvency proceedings. The law of avoidance was intensified. Moreover the insolvency proceedings are now much more determined by the autonomy of the creditors. Another basic change is that the secured creditors now take part in the insolvency proceedings. They join the meeting of creditors and are entitled to vote. Finally the Insolvency Statute for the first time contains proceedings by which a debtor if he is *a* natural person can receive a discharge.

The insolvency plan is one of the cores of the new German insolvency law. The autonomous mastering of the insolvency by the creditors and the debtor is not any more subject to separate proceedings but part of a uniform insolvency proceedings. Within these proceedings it is one of several courses which can be followed in the search for the best opportunity to satisfy the creditors' claims. This uniform system is different from other insolvency laws like for example the U.S. Bankruptcy Code which demands a decision between the liquidation proceedings of Chapter 7 and the plan proceedings of Chapter 11. Nevertheless, there are also many similarities between the insolvency plan proceedings of the German Insolvency Statute and the provisions of Chapter 11.

The law does not define the purpose of the insolvency plan. The parties are allowed to diverge from the provisions of the Insolvency Statute and to find a different solution. Therefore, the insolvency plan can even provide a liquidation although it was introduced mainly to preserve, to rehabilitate and to reorganize the enterprise of the debtor.

An insolvency plan can be set up and submitted to the court only by the debtor or the administrator. The plan has to consist of a declaratory and a constructive part. In the declaratory part, the rehabilitation concept is described. The constructive part determines the impacts of the rehabilitation on the single rights and claims of the creditors. One of the most important principles of the insolvency plan is that the creditors are divided into groups. The creditor groups can be treated differently by the plan if a justifying reason exists. The plan, for example, can form different groups for secured creditors, for normal insolvency creditors, for those creditors whose claims rank behind the claims of the normal insolvency creditors and for the employees. The number of groups is not limited. It is up to the fantasy of the person who is setting up the plan. The only demand is that there has to be a justifying reason if two creditors are put into two different groups.

The insolvency plan needs the consent of the creditors. It has to be presented to them in a meeting during which the plan is discussed. At the end of that meeting the creditors decide on the adoption of the plan. They vote by groups. The plan is adopted if in each group the majority of the voting creditors backs the plan and if the sum of the claims of the creditors backing the plan exceeds half of the sum of all claims of the voting creditors. There is however a prohibition of obstruction, which shall prevent that an economically sensible plan fails because of the opposition of a single or a few creditors: If in one group the majority is not achieved that group is deemed to have consented if the creditors of that group are not treated worse by the plan than they would be without the plan. Moreover, the majority of the groups must have backed the plan.

The debtor has to back the plan too. He is deemed to have consented if he has not opposed the plan until the voting of the creditors. If he is not treated worse than he would be without the plan his opposition to the plan is irrelevant.

Finally the plan has to be confirmed by the court. After the decision of the court has got legal backing the plan gets effective, the insolvency proceedings are terminated and the debtor recovers the power to transfer his assets. The constructive part of the insolvency plan may provide for surveillance of implementation of the plan by the administrator.

In Japan, the purpose of the corporation Reorganization cases is to maintain and reorganize the Company's business when such a company finds itself in extreme difficulty in paying its debts and yet has some possibility of reconstruction. Usually, the District Court, on the application of the company, the obligee or stakeholder, renders a ruling for the commencement of the corporation reorganization plan or procedure. It appoints a trustee(s) if the application is appropriate. The trustee takes control over the business and assets of the company under the supervision of the court and makes a draft plan of reorganization within the period designated by the court. That includes a large degree of discharge from liability and payment in instalments. The reorganization plan comes into force if it is adopted at a meeting of interested persons and approved by the court. The claims and interests of parties (obligees and shareholders) are modified in accordance with the plan. When the plan is executed or carried out the procedure of reorganization comes to an end.

6.0 Mechanisms for Effective Corporate Rescue, Turnaround or Rehabilitation

One must admit that to restructure an ailing corporate entity is better than its liquidation as long as its revival or resuscitation keeps it alive and profitable or viable. Mechanisms through which an otherwise insolvent company can be rehabilitated include internal restructuring options and external restructuring options. While the internal restructuring options are those that involve the company alone with its members or creditors, the external restructuring options involves the company with other companies and third parties. In Nigeria, the new SEC Rules 2010[32] identifies documents to be sent to SEC upon the internal restructuring of a corporate entity to include the Shareholder's Resolution approving the restructuring, Certificate of Incroproation certified by the Company Secretary, CAC forms on Particulars of Directors and Allotment of Shares, approval or "No objection" letters from regulatory agencies/authorities, and an information memorandum[33]Under extant Nigerian Corporate Law and Practice, corporate restructuring options include Arrangement and

[32] See Rule 230(6) of the Securities and Exchange Commission Rules, 2010.

[33] The Information Memorandum must explain or name the directors of the company, state the profit or share capital history of the company, its shareholding structure, director's beneficial interest, status of the subsidiaries after the restructuring, status of the shares of the restructured company, status of its employees, percentage or level of involvement of the combined companies and other information or document which SEC may require from time to time. See Nelson C.S. Ogbuanya, Essentials of Corporate Law Practices in Nigeria (2013 Revised Edition) (Logos, Novena Publishers Ltd, 2013) chapter 15 generally pp. 579

Compromise, Arrangement on Sale, Merger and Acquisition, Takeovers, Management Buy-outs, Purchases on Assumption and Cherry-picking[34].

A. **Internal Corporate Restructuring Options:** Arrangement and Compromise, Arrangement on Sale or Management Buy-out are the internal corporate restructuring mechanisms known to or allowed in Nigeria by our extant laws- Under S.537 of CAMA, a company may negotiate with its creditors or members or a class of them, to accept less than what they are entitled to ordinarily in full and final settlement or satisfaction of its obligations to them. If accepted by the creditors or members, it results in the alteration of rights which ultimately must be sanctioned by a court[35]. Compromises and arrangements facilitate the modification of rights of the class of persons involved following the assent of a majority of them at a meeting called for that purpose. The scheme when sanctioned by the court as being fair and equitable in the circumstances becomes binding on the company and its affected creditors/members[36].

Under an arrangement on sale, permitted under sections 538 – 540 of CAMA "the members (of an ailing company) in a General Meeting are empowered to resolve by way of special resolution that the company should be wound-up and that the liquidator be appointed and authorized to sell the whole or part of the undertaking or assets to another corporate body. The consideration for the sale may be cash, shares, debentures or policies which should then be distributed in species amongst the members of the company in accordance with their rights in liquidation. The money realized can be used in flotation of a new company or as equity contribution in any scheme of arrangement for restructuring, such as merger ....winding-up embarked on for restructuring usually result in the resurrection of the company in another form either as a new company, or providing front for another restructuring scheme"[37].

Another internal restructuring option is through Management Buy-out. Here, the management team of a corporate body purchases the controlling shares in it with or without financing from anybody[38]. The Managers, Directors or Officers of a company

[34] See Nelson C.S. Ogbuanya, Supra p.579.

[35] The Federal High Court is saddled with this duty See S.251 (e) of the 1999 Constitution (as amended).

[36] ibid p.580 The negotiation may propose relinquishment of shares, acquisition of shares partly or cash partly for their debts, forgiveness or rebate on security, permission to create a charge (prior one or *pari pasu*), propose reduction or voiding of preferential rights to dividend in arrears exchange with ordinary shareholders surrendering part of their holdings in lieu of dividend arrears or convert preference shares to ordinary ones.

[37] Nelson C.S Ogbuanya, Supra pp.582 – 583. The court are generally left out except under the circumstances contemplated under sections 310-312 of CAMA or there is an order for creditors voluntary winding-up which cannot be made if the corporate body is solvent.

[38] See R. 238A SEC Rules 2007 as amended in 2010.

who previously were the company's employees, now opt to acquire controlling shares in the affairs of the company. Ogbuanya opines and I agree that "Management buy-out favours the proponents of Director's share qualification requirement and employees share ownership scheme to the effect that ownership of substantial interest in a company makes the management stakeholders in the affairs of the company they manage, making them to adopt dexterous management skills to salvage the company out of distress coast and reposition it for profitable returns on investment"[39]. The fund used in acquiring the company may come from the Directors or Officers or through third party financing or loans to the individuals (acquiring Directors/Officers).

B. External Restructuring Options: The popular external corporate restructuring options in Nigeria are Mergers and Acquisitions, Take overs, Purchase and Assumption and Cherry picking. A merger is a combination of business involving the fusion of two or more corporate entities into one on the basis of equality. It may change name or adopt the name of any of the entities giving birth to it. An acquisition occurs when one corporate entity purchases all or a substantial part of the interest or shares of another corporate entity making the acquired company a subsidiary or a distinct part of the purchasing entity or corporation. Ogbuanya identified many reasons for this: risk or operational diversification, expansion of productivity base (economics of scale), stock exchange, quotation capacity, corporate leverage or improvement in debt/equity ratio, drive for technology, managerial expertise or competence (skill), desire for growth and increased market shares. Regulatory requirement for mergers and acquisitions may also lead to consolidation or the concatenation of two erstwhile separate companies[40]. Mergers and acquisitions may be horizontal, vertical and conglomerate. The fusion of 2 competitors or enterprises involved in the same line of business is referred to as horizontal mergers. It is vertical when the merging companies have a sort of customer/supplier relationship. The joining together of two business concerns with completely unrelated businesses, lines or operations, usually to spread risks and earn more profits, is called conglomerate mergers[41].

To merge successfully, companies may require the approval of SEC and the Federal High Court. However, the Nigerian Stock Exchange (NSE) shall also approve if the 2 companies are quoted or have foreign investment or shareholding. The Central Bank of Nigeria must also approve the merger of 2 Banks. The Corporate Affairs Commission plays a role too.

In line with the thrust of this study, I approbate the fact that "there are great prospects for mergers and acquisitions, as corporate survival options, given the embrace of the process during the Bank Consolidation Policy of the Central Bank of Nigeria (CBN)

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[39] Ogbuanya op cit p. 585. See also Rule 288A SEC Rules, 2007 as amended in 2010.
[40] ibid
[41] ibid

between 2004 and 2005, which invariably forced many Banks to take the options of merger rather than extinction"[42]

S. 118(1) of the Investment and Securities Act, 2007 provides that "every merger, acquisition or business combination between or among companies shall be subject to prior review and approval of the Commission (SEC)". The Commission is "empowered to receive the pre-merger notification with other necessary documents set out under the "SEC Rules and give approval in principle... It also receives the formal application and grants approval for the scheme to be undertaken and... Post-merger notification of compliance is also done to its satisfaction"[43].

The CBN must give a prior approval to any merger scheme involving banks in Nigeria, even before SEC approval[44].

The Federal High Court has two essential or key roles in the merger process: to order meetings of members/shareholders of the merging entities to deliberate upon and support the proposed scheme and to sanction the scheme as per transfer of assets, dissolution without winding-up of the company and the compulsory acquisition of dissenting shareholder's shares. Infact, a merger becomes effective from the date the FHC gives the order sanctioning the merger. The NSE and CAC again play roles in the merger process. Merging entities must comply with the listing requirements of the Stock Exchange in order to admit their shares for trading proposes. Its relevance applies to only quoted entities. It is the apex regulator of all listed public companies, all secondary market transactions and must be priory notified of intention to merge by listed companies. The CAC is responsible for the filing and ratification of corporate resolutions and documents to be sent to SEC, filing of sanctions as well as the de-registration of dissolved companies.

In the areas of legal regulation of mergers, S.117 of the ISA, 2007 extended the meaning of the word 'companies' to mean anybody corporate and includes a firm or association of individuals. S.21 of ISA, 2007 ensures that mergers do not offend competitions regulations by empowering SEC to grant approval where transactions are not likely to substantially prevent or lessen competitions or create monopolies in the line of the business enterprise. It is required that parties to a merger negotiation must submit detailed report on the proposed deal with a list of major competitors in the product market, the market position and share of each entity, an analysis of the

[42] Ogbuanya op. cit. p 580.
[43] ibid
[44] This is mandated by S.7 of BOFIA, No. 25 of 1991 to the effect that "No Bank shall enter into an agreement or arrangement... for the amalgamation or merger of the Bank with any other person (or) for the reconstruction of the Bank" without the prior consent of the Governor of the CBN.

effect of the transaction on the market and the post transaction market position of the surviving company[45].

The legal framework or procedure for mergers break it down into small mergers, Intermediate mergers and large mergers. Merger schemes on a combination of assets and turnover or combined annual turnover or assets of N500 million and below are called small mergers. It can be done without notifying SEC except the Commission demands such since pre-merger notice is not mandatory. SEC may within 20 working days and not exceeding 40 working days, consider and approve the merger[46]. If approved parties then apply to the FHC to sanction the fusion at which it becomes effective and binding. The amount for intermediate mergers is between N500 million and N500 billion ($4.2 million - $42 million). For large mergers, it is N500 billion ($42 million) and above. For these two, there must be a pre-merger notification to SEC. The notice must be sent to the trade union to which most of its employees belong or concerned staff or their representatives. SEC may investigate or appoint an inspector to do so or call for more information. It shall refer the notice to the FHC and within 40 working days, forward to the Court its approval or disapproval subject to conditions or prohibition of the merger. Under Rule 231 SEC Rules 2010 (as amended), Companies wishing to merge shall:

- File with SEC, a pre-merger notice
- When notice is evaluated and approved, a scheme of arrangement for clearance
- Apply to the FHC for an order to call a court ordered meeting.
- Upon the shareholders resolution at the meeting a formal application for merger approval is lodged with SEC.
- Comply with post-approval requirements[47]

A takeover is a restructuring model or option which leads to the buying of substantial interests (shares) by an individual or companies from another company so that he (the purchaser) gets sufficient control over the company management or its overall affairs[48].

The takeover results from the acquisition of sufficient shares of the target entity by the core Investor or holding company. It is germane hence that both companies survives. To be sufficient, the acquirer must appropriate or get about 30-50% of the voting rights of the target company. He acquires the called up shares. In this regard, Rules 235 SEC Rules 2007 stipulates that

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[45] See Rule 232(ii) b and e of the SEC Rules.

[46] SEC must notify the parties in the prescribed form as stipulated in S.121, ISA, 2007 of its approval, approval subject to conditions or its prohibition of the merger.

[47] For the requirement for pre-merger notice and formal approval see Rules 232 and 233 of SEC Rules, for details of documents required by SEC.

[48] See S.131 ISA 007.

> *Where a person or group of persons acquire(s) or wish to acquire shares in a target company with the intention of taking over control of that company, a takeover bid shall be made by such person or group of persons or through their agents to the shareholders of the target company*[49]

Every takeover bid must be fully authorized by SEC and it shall be for a period of three months which is renewable. The validity of a takeover bid is anchored on meeting the following conditions that is:

- The agent dispatching the bid shall be a registered capital market operator.
- It must be sent to shareholders representing 60% of the members of the target company.
- It must be advertised in 2 National Newspapers.
- It must concern shares of a public company.
- SEC must have authorized it and within 3 months thereof the bid must have been dispatched.
- It must contain the required content.
- It must be registered with SEC.

The option of Purchase and Assumption simply aims at rescuing part of the investment in a moribund or failing corporate entity. It does this instigative role by allowing or permitting another investor or company to buy the liabilities of the dying entity and assume or acquire ownership of the assets of that entity. This is usually done at an auction price. The dying or failing corporate entity is merely dissolved through a judicially supervised sale of its assets and liabilities. It is not put through a formal winding-up proceedings. The failing company merges into the purchasing one upon the successful purchase and assumption process and takes up its status and profits. To perfect this procedure a duly executed Deed of Purchase and Assumption and the Board Resolutions of both companies approving the process are filed alongside the court process for the judicial approval or sanction at the Federal High Courts. The Court's involvement allows a smooth transfer of lands/proprietary titles.
The issue of Cherry Picking allows the healthy company or investor to inspect the books and assets, operations and general business activities of the failed company with a view to picking but those aspects it could possibly save through integrating same into its own business or operations.

The above options are part of the extant Nigerian legal practice. However, it remains this Writer's opinion that these options have or suffer various limitations which all culminate in the liquidation or death of a corporate entity or body. The option of adopting the bankruptcy option as it is practiced in the United States of America

[49] See Rule 237(1) and (2) SEC Rules and S.134 of the ISA. The content of a takeover bid is stipulated in Rule 236 of the SEC Rules.

under chapter 11 beams the light of hope for saving the lives of these companies as is presently the expectation in Nigeria. After all

> *"the object of law is to solve difficulties and adjust relations in social and commercial life. It must grow with the development of the nation. It must face and deal with changing and novel circumstances. And unless it can do that, it fails in its function and declines in its dignity and values*[50].

Instructively, in Asia (China, Indonesia, Singapore, Malaysia) "Work outs" instead of liquidation or rescue appear to be the in-thing. A work – out or an arrangement can be described as an informal process that does not involve court proceedings. Debtors remain in possession of their assets while creditors accept either a reduction or a rescheduling of debts. The question now is: Why do Asian businesses or corporate bodies prefer "work-outs"? According to William Gamble, the answer is simply that

> *First, there are cultural reasons.... that the Confucian ethics of harmony in conjunction with the desire to 'save face' requires that debtors and creditors avoid public proceedings. As in the West, there is a social stigma attached to a bankruptcy filing..... A greater influence is the most lack of a reliable legal infrastructure. For the most part laws are exceptionally antiquated. Most allow only for liquidation. When the creditors or lenders do resort to the local legal system they often find that it is lengthy, costly and often corrupt the end of the process there is often nothing left for either creditor or debtor. Finally those countries that have reformed their system or are in the process, the new system is often hobbled by the lack of legal resources. Judges and Lawyers skilled in the process are non-existent. The many years of growth in Asia have left a gap in the number of local professionals with experience in handling insolvency proceedings*[51].

7.0 The Necessity of Corporate Rescue through Bankruptcy or Insolvency Regimes or Framework

It is today settled that:

> *"Insolvency regimes remain a vital component of insolvency law and corporate rescue framework. This process has enabled receivers and managers extensive powers to manage and carry on the business of the company and restore ailing enterprises to profitability making winding-up proceedings less attractive"*[52].

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[50] Per McCradie in Pager V. Claspeil, Stamp and Heacode Ltd (1924) 1KB 566 at 570.
[51] William Gamble, 'Restructuring in Asia A Brief Survey of Asian Bankruiptcy' http://www.lawyerment.com.my/library/public/bnkr/review/d-3.shtml last accessed on 4/9/2009.
[52] See Akpoghome, T.U.(Mrs), "Corporate Insolvency; The Role of Receivers and Managers in Selected Jurisdiction in University of Benin Law Journal, 2010 – 2012, vol. 13, No.1, p.142 at 168.

From its earliest origin when bankruptcy was highly unfriendly to debtors, to the present times when the interest of both the debtor and his creditors appear equally protected, the necessity for corporate rescue or resuscitation has never been more germane. May be a brief history of early bankruptcy actions may be helpful, at this juncture. Under early Roman practices a debtor who could not pay his creditors, over time was radically punished penalized with death. Later the harsh punishment was reduced to a more humane remedy the sale of the debtors assets and its distribution to his creditors[53]. To buttress our point here, I had in an earlier work pointed out that:

> *Given the harsh consequences that follow bankrupt adjudication in the past, such as the infliction of corporal punishment on debtors (bankrupts), in serious cases by the loss of an ear and in extreme cases by being put to death as was partly stipulated by the English Bankruptcy Act of 1624, punishing a bankruptcy was sure since the "trade of bankruptcy is the worm that eateth out the heart of all commerce and trade" It was predicated on the above perhaps that only merchants and men engaged in commerce could be adjudged bankrupt. Today an all-inclusive or embracing bankruptcy regime reigns*[54].

English Common Law, the precursor of our legal system, was unique as "imprisoning debtors for non-payment of debts was common (while) basic American bankruptcy law is less harsh and present a debtor with a method for putting its financial affairs in order[55]. Many writers agree that the first English Bankruptcy Act was that made by King Henry, the VIII in 1524[56].

Okiche E.L. opines that:

> *The Law then was purely made as a remedy for creditors not debtors. It allowed a creditor to seize all the assets of the debtor who in addition was subject to imprisonment. His family then had to pay his debt to free him. As time progressed, the rights of debtors increased. By the 1700, the practice was that debtors were released from their debts but they had to flee to the United States of America precisely, the States of Georgia and Texas, which came to be known as debtors colonies by the 1800s, debtors came to be released and discharged from their debts* without them having to flee England[57].

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[53] See Wenger Institutes of the Roman Law of Civil Procedure (1940); see Continental National Bank & Trust Co. V. Chicago, Rock Island and Pacific Railway Co. 294 US 648, 70 Led. 1110; 55 Ct 595.

[54] Kalu Uwadineke C. "Bankruptcy and Executorship" in Umenweke M. N et al Commercial Law and Practice in Nigeria (Enugu Nolix Educational Publications (Nig.) 2009, p.681 Graham David, Q.C. "A Dark and Neglected Subject" International Insolvency Review vol. 11, 2002, 97 at 102.

[55] See generally Holdsworth History of English Law VIII (1936).

[56] See en.wikipedia.org/wiki/bankruptcy visited 10/5/2010

[57] Okiche E.L. op. cit. p.247-248 in the Holy Bible, Deut.15:1-3 spoke of every 7th year as a Sabbatical year in which all debts owed are forgiven and the debtor released from the obligation to pay. Leviticus 25,8 – 24 spoke of it as a year of jubilee when all debtors are released or freed. Those on debt salary are included.

Presently, in the United Kingdom, the Insolvency Act of 1986 has been made to reduce the numerous controls on the obvious and ubiquitous abuses of the old order vis-a-viz the adjudicatory process. The activities of unscrupulous corporate liquidators, receiver/managers, dubious actions and activities of directors of companies that are hopelessly insolvent have been checkmated. There was also the need to update the defunct provisions of the 1914 Bankruptcy Act of England which was the extant law before the enactment of the 1986 Insolvency Act[58]. Globally, all modern insolvency regimes/Legislations are now geared or directed towards corporate rescue or resuscitation of ailing companies as against the option of corporate liquidation. In accordance with the new found international trend, winding-up or liquidation of ailing or insolvent corporate entities is now being rendered antiquated and anachronistic. It is no longer the expected or anticipated outcome of a corporate failure. It is now clear that the rationale or objectives of the new corporate insolvency regime or trend may be identified or isolated as:

- The facilitation of the recovery of companies which are in financial difficulties.
- The suspension of legal actions by individual creditors through the creation of a moratorium.
- The removal of power of management of the company by its directors, even if directors retain their positions as directors.
- The avoidance of transfer and transactions which unfairly prejudice the general body of creditors.
- Ensuring that there is an orderly distribution of company assets.
- The provision of a fair system for the ranking of claims against the company.
- Making provision for the investigation of the company's failures and the imposition of liability on those responsible for the failure.
- The protection of the public from directors who might in future engage in improper trading.
- The dissolution of a company at the end of the liquidation process[59].

The above objectives of modern corporate insolvency legislation across the developed world influenced Akpoghome's opinion which I also subscribe to, that "an effective insolvency regime is seen to be one that should be able to provide a system to enable the winding-up of companies where there is no future prospect of the business becoming profitable and viable with the least possible cost and delay. At the same time, an effective corporate regime should be able to provide for mechanisms to rehabilitate companies and rescue them from being wound-up" [60].

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[58] ibid

[59] See Akpoghome T.U. (Mrs), Supra pp.144-145. Goode R.M, Principles of Corporate Insolvency Law (London, Sweet and Maxwell, 1990) 5-10. Fletcher F. The Law of Insolvency, 2nd ed. (London. Sweet and Maxwell, 1996).

[60] ibid p.145

Conclusion

The issue of corporate bankruptcy and insolvency which is the thrust of this work is a necessity if the legal regime on it in Nigeria is to be reformed in line with internationally acclaimed best practices or standards since the quintessence of this work is the death of an entity or the need to rescue an ailing one. The statement of L.C.B Gower rankles with truth and he said that:

> *"One of the obvious advantages of an artificial person is that it is not susceptible to the thousand natural shocks that "flesh is heir to" it cannot be incapacitated by illness, mental or physical, and that is not to say that the death or incapacity of its human member may not cause the company considerable embarrassment" But the vicissitudes of the flesh have a direct effect on the disembodied company. The death of a member leaves the company unmoved, members may come and go but the company can go on forever*[61].

The principal focus of modern insolvency legislation and business debt restructuring practices no longer rests on the elimination of insolvent entities but on remodeling of the financial and organizational structure of debtors experiencing financial distress so as to permit the rehabilitation and continuation of their businesses. Like the Japanese, German and US insolvency regimes for corporate bodies, Nigerian Law should look towards lifting the bankruptcy conditions or legislative stipulation in the respective legal regimes for domiciliation here. Our corporate bankruptcy and insolvency regime should look towards rehabilitation and resuscitation of debtor companies instead of liquidating them as is the extant practice. The Bankruptcy and Insolvency Bill, 2015 introduced by Senator Barnabas Gemade of the Nigerian Senate, when passed into law and assented to by Mr. President, will address some of the challenges of corporate Insolvency practice in Nigeria but not all as the continued application and enforcement of CAMA remains a big challenge. I suggest we borrow from the Japanese Corporate Reorganization Law, 1952. Nigeria must not be left out of the evolving new or modern corporate insolvency regulations which has outclassed the anachronistic practice of corporate liquidation in all corporate debts or failure cases. Rehabilitation of distressed companies should be the principal focus of our legislative intervention and I call for a timeous amendment of all relevant laws in this area of our Corpus Juris. The time to do so is now.

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[61] L.C.B Gower, Gower's Principles of Modern Company Law 5th Edition pp. 92-93.