

**COMPARATIVE ANALYSIS OF LEGAL FRAMEWORK FOR INSOLVENCY
PROCEDURES AND PRACTICE IN NIGERIA AND SELECTED JURISDICTIONS**

OBINUCHI, Chimezule¹
OBIDIMMA, Emmanuel O. C.²
ANUSHIEM, Matthew³

Abstract

The concept of insolvency remains a critical issue worldwide due to its economic and social implications. Generally, insolvency denotes the inability to pay debt upon demand. In both Nigeria and United Kingdom insolvency is a statutory ground for winding up of a company as a stipulated amount is stated in the Act whereby a company who is indebted to that amount or above but, cannot pay back upon demand may face severe consequences. This paper adopts doctrinal research methodology utilizing both Primary and secondary sources of data. This work finds that a thorough examination of the legal frameworks for insolvency procedures and practice in Nigeria and the selected countries are now geared towards saving companies with insolvency matters and not to kill or liquidate them. The work recommends that Nigeria should enact a separate Act dealing with insolvency and matters related thereto. In United Kingdom, beyond the Companies Act, the Insolvency Act and Corporate Insolvency Governance Act provide a better legal framework. In India, a similar observation exists as there is the Companies Act of India as well as the Insolvency and Bankruptcy Code. Such reform in Nigeria will enhance Nigerian insolvency management system.

Key Words: Insolvency, Companies, Legal Framework and Act

1.0 Introduction

The concept of insolvency draws emotions from all and sundry in any society especially developing countries as it affects a greater percentage of its populace. The harsh economic realities all over the world after Covid 19 stares citizens in their faces. This paper shall do a comparative analysis of the legal framework for insolvency in Nigeria, United Kingdom and India. It shall make comparative analysis of some reforms to address insolvency related matters

in the countries under review. This paper hopes to address the insolvency laws and procedures in the two selected jurisdictions of United Kingdom and India and compare same with Nigeria. The attention insolvency draws are mostly because of its numerous negative consequences. It can lead to winding up of a company although reforms these days are geared towards saving companies and not liquidating them. The present economic realities points to the need for companies to be saved and not otherwise. Companies in Nigeria according to the extant law have all the powers of a natural

¹**OBINUCHI, Chimezule, LL.B (RSU PH), LL.M (RSU PH), Ph.D** in view (NAU, Awka), Lecturer, Faculty of Law, University of Port Harcourt. Email: obinuchi.chimezule@uniport.ng.edu. Tel:08037196554;

²**OBIDIMMA, Emmanuel O C**, Professor of Law and Provost College of Post Graduate Studies, Nnamdi Azikiwe University Awka. Email: eocobidimma@unizik.edu.ng. Tel: 08034003436; and

³**ANUSHIEM, Matthew, LL.B, BL, Ph.D**, Associate Professor, Dept. of Human Rights Law, Faculty of Law, NAU Awka. Email: mi.anushiem@unizik.edu.ng. Tel:08032641757

person of full capacity⁴. This means companies or body corporates are very important in Nigeria and other jurisdictions.

Nigeria in its post Covid 19 laws - Companies and Allied Matters Act 2020 and Business Facilitation Act 2023 made deliberate efforts to introduce saving mechanisms for companies with insolvency issues rather than just liquidating them as was the case in previous enactments which focused on winding up of companies for its inability to pay debt. The contemporary realities today remains that the public and indeed the private sector dedicate concerted efforts to saving companies and not wind them up as the time for such practice has gone.

2.0 Theoretical Framework

There are two basic theories on insolvency. These theories include – the Real Entity Theory and Creditors Bargain Theory, these theories shall be discussed seriatim in this work.

2.1 Real Entity Theory

The Real Entity Theory describes the company as a real and separate legal entity distinct from members and or shareholders of a company. The company is a body corporate capable of suing and being sued in its corporate name. Canfield⁵, wrote that the acts of a group of persons recognized by law as a corporation are, in legal contemplation, the acts of the group itself conceived of as if it were a separate individual or legal group. The rights and liabilities arising out of such acts are in legal contemplation, the rights and liabilities of the group as such, and not the rights and liabilities of the members of the group as joint parties in interest. The author above has described the real theory as that having broad scope with stockholders as real persons coming together to form a corporation. The author queried, whether an individual incurs the same obligation under a contract for acts done by him through the instrumentality of a corporation. He wrote further, as for acts done by him through the instrumentality of a corporation, as individual does not qualify as that done by the corporation.

Avhale⁶, traced origin of entity theory and projected it to be around 1600s, promoted by Lord Coke, who stated that a business or corporation is a separate entity. Avhale wrote that entity theory is denoted by its unique name and continued existence as a separate individual entity regardless of shareholder changes. The corporation owns the profits until dividends are established which is usually shared among the members of the company. Real Entity Theory isolates owners, making them disconnected from their respective business which is counter intuitive as their interest align with corresponding business interest or goals. Phillips⁷, evaluates the real entity theory. Micheler⁸ traced real entity theory to the writings of the German Jurist Otto Von Gierke and the social theorists, Walter Von Rathenau. Gierke characterized the company as a living organism and a real person, with body and members and a will of its own⁹.

⁴ Companies and Allied Matters Act 2020, s. 43(1)

⁵ G F Canfield, 'The Scope and Limits of the Corporate Entity Theory' available on <https://www.jstor.org/stable/pdf/11116741>>, accessed on 15 June, 2025.

⁶ A Avhale, 'What is Entity Theory' available on <https://www.wallstreetoasis.com/resources/skills/finances/entity-theory>>, accessed on 11 May, 2025

⁷ M J Phillips, 'Reappraising the Real Entity Theory of the Corporation' available on <https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1548contenttext+ir>>, accessed on 1 July, 2025

⁸ M Micheler, 'Company Law: A Real Entity Theory' (Oxford: Oxford University Press, 2021)19

⁹ Micheler, (n 5) 19

2.2 Creditors Bargain Theory

It is argued that the creditor bargain theory is most suitable on insolvency matters. The theory was proposed by Thomas Jackson through his lectures and writings. Douglas Baird and Robert Scott joined him to propound and grow the theory¹⁰. The general principle of this theory is around the law of contract. Proponents were influenced by the law and economic movement born in the United States around the mid-1970s whose influence equally spread to United Kingdom¹¹. The proponent of this theory, Thomas Jackson and his supporters argued that the main role and objective of insolvency law should be to maximize the collective returns to the creditors of the insolvent debtor. They see insolvency law as a collective debt-collection device and the rights of creditors of an insolvent company. They do not recognize any form of reorganization of distressed enterprise as legitimate objective of insolvency law except, to the extent, that it is intended to maximize returns to the creditors. It can therefore be deduced that the theory sees insolvency law as helping a company to stay in operation when it is worth more to its creditors alive than dead. Baird¹², a supporter of Thomas Jackson argued that creditors bargain theory protecting the rights of employees, local suppliers, environment costs, and community right under insolvency law is inappropriate.

George¹³, discussed the creditors bargain theory of law as providing a theoretical underpinning to the insolvency and bankruptcy processes. According to George, Creditor Bargaining Theory propounded by Thomas Jackson is one of the predominant theories about insolvency processes. The theory stipulates that assuming that the debtor and the creditors of the debtor are rational beings, such parties would begin ex ante and would prefer to offer a collective system of recovery of debts as opposed to multiple individual recovery attempts by creditors. Such a consolidated and collective procedure of recovery would also have the benefit of reducing the expenses incurred in the collection of the debt and furthermore, a result in the maximization of the value of the debtor. This has the benefit of ensuring that the individual creditors in their haste to recover their individual claims do not divide the company piecemeal which ultimately result in lower recoveries.

3.0 Conceptual Clarifications

The concept of insolvency has been variously defined. The extant Act in Nigerian defined insolvent person thus:

Where used in this Act, means any person in Nigeria who, in respect of any Judgment, Act or Court order against him is unable to satisfy the execution or other process issued in favour of a creditor, and the execution or other process remains unsatisfied for not less six weeks¹⁴.

The extant law in Nigeria, which is the Companies and Allied Matters Act has in the definition above referred to an insolvent person as one who could not satisfy the execution in favour of a

¹⁰S Al-Barashdi and H Young, 'An Assessment of Various Theoretical Approaches to Bankruptcy Law' *Journal of Arts and Social Sciences* (2018) (9) (1) 23-36

¹¹ *ibid*

¹² D Baird and T Jackson, 'Bargaining after the fall and the contours of the absolute priority rule' *University of Chicago Law Review* (1988) (55) 738-789

¹³ S George, 'A Review of the Creditor's Bargain Theory in light of the Insolvency and Bankruptcy Code 2016' *International Journal of Creative Research Thoughts* (2021) (9)(8) 357-361

¹⁴ Companies and Allied Matters Act 2020. s. 868

creditor of any debt owed after a period of six weeks. Insolvency here is referred to as either a legal being (i.e. company). What is common however is that it relates to inability of a debtor either an individual or a company to pay back debt owed after a period. The interpretation section of the extant law stated a period of six weeks. Thus, after six weeks, a person could not satisfy the debt of a creditor such individual is declared insolvent. It is noteworthy, however, that the same interpretation section of the extant Act defined inability to pay debts thus: ‘inability to pay debts in relation to a company has the meaning assigned by Section 572 of this Act¹⁵,’ it follows, therefore, the need to critically examine the aforementioned section of the Act.

Insolvency is generally regarded as inability to pay debt. It is expedient to define inability to pay debt as in the law in Nigeria. A company is deemed to be unable to pay its debts if:-

- a. A creditor, by assignment or otherwise to whom the company is indebted in a sum exceeding N200,000 then due, has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.
- b. Execution or other process on a Judgment, Act or Order for any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- c. The court, after considering any contingent or prospective liability of the company, is satisfied that the company is unable to pay its debts¹⁶

A close examination of the above two provision of the extant Act, one would be tempted to conclude that there exists an insolvent person or individual as well as insolvent company. This is because the interpretation section of the extant Act conceptualized an insolvent person as one who is unable to satisfy or repay debt after six weeks. On the other hand, inability to pay debt found in the interpretation section of the extant Act, referred us to section 572 of the Act. A perusal of the section shows that a company is said to be unable to pay its debts if there has been a demand on the company and it has lasted three weeks. While the section of the Act on the company stated three weeks, that which relates to individuals is stated to last six weeks. Therefore, insolvency which relates to company can be said to be the inability of a company to pay its debt after three weeks. On the other hand, it is therefore submitted that bankruptcy which is related to insolvent person is inability of an individual to pay back debt after it has been demanded for three weeks.

There are however new developments with the new Act signed by President Muhammadu Buhari on 8th February 2023. The Business Facilitation Act (hereinafter BFA) amended some of the provisions of CAMA 2020 as it relates to insolvency matters. The new Act states that –

The Companies and Allied Matters No. 3, 2020 (in this part referred to as the principal Act) is amended as set out in this part section 572 of the principal Act is amended in paragraph (a) by substituting for the expression ‘a sum exceeding N200,000’ the words ‘a sum to be determined by a regulation by the commission¹⁷.’

¹⁵ Companies and Allied Matters Act 2020.s. 868

¹⁶ Companies and Matters Act 2020. s. 572(a)-(c)

¹⁷ Business Facilitation Act 2023. s. 9(10)

The Business Facilitation Act [BFA] 2023, amended some sections/provisions of Companies and Allied Matters Act [CAMA] 2020. As observed above, the insolvency threshold for companies put at N200,000¹⁸ from the provisions of CAMA 2020 has been amended by the BFA¹⁹. It necessarily follows that the current law regarding insolvency threshold and insolvency law in Nigeria is that stated in BFA 2023.

Olujobi²⁰, defined insolvency from the oil company perspective as failure of an oil firm to fulfil its financial obligations. In his work which discussed combating insolvency in the oil industry, he added that where there is a demand for payment of debt on an oil firm and it has lasted three weeks according to the provisions of the extant law and the firm has neglected or refused to pay the debt and such notice of demand has lasted three weeks, then the oil firm can be said to be insolvent. The author added that the situation arises often where the court made a directive in the interest of a creditor of an oil firm. Where the directive is not obeyed by the debtor oil firm, the court may declare subject to petition brought before the court by the creditor that the oil is insolvent. The court can further direct that the properties of the insolvent oil firm be sold in order to settle the creditor who is owed.

Onakoya and Olotu²¹, in their paper, conceptualized insolvency as where a corporate body is unable to pay its debts owed to creditors. They added that whereas, insolvency and bankruptcy are applicable to individuals and partnerships, liquidations are applicable to companies. Furthermore, the duo added that the main objectives of insolvency and bankruptcy laws are to protect indebted entities. That is, the creditors who the companies or individuals have used their monies or materials and are unable to pay back. Another objective is that insolvency and bankruptcy law offers the means of equitable distribution of debtor's assets among creditors.

They wrote: 'accordingly, where a company is unable to pay its debt when due, an equitable insolvency is said to crystallize'²². They equally discussed balance sheet insolvency which arises when the asset of a debtor is exceeded by its liabilities which may result in cash crunch and limit the ability of the debtor to meet its obligation. Omoregie²³, described insolvency as a situation where there is a temporary or sustained reduction in the liquidity and cash flow of a business such that the company cannot meet its financial obligations to its creditor. Furthermore, he explained that while the exact procedure will vary based on the legal rules in the relevant jurisdiction, and the specific context of each case, the general statutory provisions is that where a creditor brings a proceeding against an insolvent borrower and the court determines that the borrower is not able to repay his indebtedness, such a firm/debtor will be declared insolvent and should be liquidated under the supervision of a court appointed liquidator, and the proceeds from the liquidation of the firm's

¹⁸ Companies and Allied Matters Act 2020. s. 572

¹⁹ Business Facilitation Act 2023. s. 9(19)

²⁰ O J Olujobi, 'Combating Insolvency and Business Recovery problems in Oil Industry; Proposal for improvement in Nigeria's Insolvency and Bankruptcy Legal Framework' available on [https://www.cell.com/heliyon/pdf/school2405-8440\(21\)002/28-0.pdf](https://www.cell.com/heliyon/pdf/school2405-8440(21)002/28-0.pdf)>, accessed on 2 June, 2024.

²¹ A B Onakoya and A E Oloru, 'Bankruptcy and Insolvency: An Exploration of Relevant Theories' International Journal of Economics and Financial Issues (2017)7(3) 706-71

²² *ibid*

²³ O K Omoregie, 'Business Rescue and Insolvency Regulation and Practice in Nigeria: The Imperatives of Globalization' Archives of Business Research (2019) 7(3) 87-104

assets will be distributed among the creditors in the order of priority of their security, in settlement of outstanding obligations.

Liman and Uruchi²⁴, discussed company's insolvency and informed that a company is in troubled waters when it encounters financial crises that cannot be resolved without substantial re- evaluation of its operations and structures. Such distress becomes manifest in terms of default, where the company has failed to meet up with its obligations to its creditors or other parties. They further informed that when a company is distressed, there is a tendency for the company to go into insolvency which they termed inability to pay debt. The duo's opinion on insolvency and how it manifests is very interesting. First is their ability to recognize that when a company is unable to pay its debts, such company had run into troubled waters and insolvency sets in. They conclude that the way out is for the company to be reconstructed and re-evaluated of its operation and structures.

Halliday²⁵, explained that insolvency is where a company cannot pay back the borrowed capital or debts as they fall due for repayment. He added, the state of insolvency may be precipitated by poor business or poor corporate governance culture. This paper appreciates the author's ability to introduce two factors that can lead to insolvency. According to the author, lack of complete adherence to corporate governance principles by a company can led to insolvency. Also, poor business and returns as pointed out by the author can lead to insolvency.

Fletcher²⁶, explained cash flow insolvency to mean a situation where a company is unable to pay its debt as they fall due. That is, the overall assets balance of the company may not be in deficit but its cash balance at the point in time not sufficient to settle its debt. Fletcher's explanation hereinbefore is what is usually referred to as illiquid. That is, a company does not have either physical cash at hand or in bank. However, such a company may not necessarily be broken. Fletcher's explanation is very important in understanding insolvency from all ramifications. Thus, not having cash or being illiquid does not translate to being insolvent. At best, it is cashflow insolvency.

Sealy and Worthington²⁷, explained balance sheet insolvency as a situation where the liabilities of a company exceed it assets considering, not only current liabilities but also, contingent and prospective liabilities. Balance sheet insolvency could be the real insolvency as the liabilities outweighs the assets. In a situation where liability is greater than assets, then such a company could be said to be insolvent. It is so because even all the assets of a company are sold, they would not offset the debts of the company since the liabilities are bigger.

²⁴ Y U Liman and B O Uruchi, 'The Company in Trouble Waters – Rescues' in C C Ohuruogu (ed) *Law of Business Association Nigeria* (Princeton & Associate Publishing Co. Ltd 2022) 602

²⁵ C E Halliday. 'Comparative Analysis of Companies in Liquidation in Nigeria, UK and India: A case Study of Statutory Claw Back and Avoidance Provisions' *Unimaid Journal of Private and Property Law* (2022) (5)(1) 80 – 86.

²⁶ I F Fletcher, *The Law of Insolvency* 2nd edn, (London: Sweet and Maxwell, 1996) 485

²⁷ L Sealy and S Worthington, *Cases and Materials in Company Law* (10th edn, Oxford OUP 2013) 768

4.0 Legal Framework for Insolvency in Nigeria

In this segment of this work, the work will investigate some laws in Nigeria to x-ray their relevance to insolvency process in Nigeria. These laws appear to form the bed rock of the legal framework for insolvency in Nigeria. They will be discussed in this work one after the other.

4.1 Constitution of Federal Republic of Nigeria

The Constitution of the Federal Republic of Nigeria [hereafter referred to as the Constitution] is the bedrock of laws and all legal and economic activities in Nigeria. The constitution provides for establishment of a Federal Republic, structure of government and the rights and duties of citizens, and other matters of national importance²⁸. All laws in Nigeria including company laws and administration must be consistent with the constitution of Nigeria otherwise, such law would be void to the extent of its inconsistency²⁹. It therefore follows that the principle as enshrined in the Act that a company shall for the furtherance of its business or objects, have all the powers of a natural person of full capacity must be in tandem with the constitution of the Federal Republic.

In *Nafiu Rabi v Kano State*³⁰, the Supreme Court via Udoma Udoma, JSC stated that ‘...the function of the constitution is to establish a framework and principle of government, broad and general in terms...’³¹

The constitution established various courts and their jurisdictional powers. The Federal High Court jurisdiction over company laws and administration are clearly stated in the constitution³². In *Kotoye v Central Bank of Nigeria*³³ Nnaemeka – Agu JSC held-

... by the very letter of the constitution which is not only the supreme law of the land but also, in appropriate metaphor, the touchstone and yardstick of measurement of the validity of all other laws, it is intended that such decision be appealable... all rules of court which run counter to or are inconsistent with this enabling provision of the constitution are, ipso facto, null and void to the extent of the inconsistency.

The Constitution appears not to have provided for insolvency outrightly. But it is seen as the grundnorm. The constitution which is the grundnorm is the basis of all laws including corporate laws and administration which is the area of primary focus of this research work.

4.2 Companies and Allied Matters Act 2020

The Companies and Allied Matters Act (CAMA) 2020, is the extant law in Nigeria governing company matters like - incorporation, administration, operation and regulation in Nigeria. The Act was signed into law by former President Muhammadu Buhari on 7 August 2020. The Act defined insolvent person thus:

Where used in this Act means any person in Nigeria who, in respect of any judgment, Act or court order against him, is unable to satisfy execution or other process issued

²⁸ Constitution of the Federal Republic of Nigeria 1999 (as amended) s. 1(1)

²⁹ Constitution of the Federal Republic of Nigeria 1999 (as amended) s. 1(3)

³⁰ (1980) 8 SC 130

³¹ *ibid*

³² Constitution of the Federal Republic of Nigeria 1999 (as amended) s 251 (1) (e)

³³ (2000) 16 WRN 71(w) 106

in favour of a creditor and the execution or other process remains unsatisfied for not less than six weeks³⁴.

The insolvency of a company or inability to pay debt is a ground to petition for winding up³⁵. The Act further defined inability to pay debt to mean:

A company is deemed to be unable to pay its debts if a creditor, by assignment or otherwise to whom the company is indebted in a sum exceeding N200,000, then due, has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor³⁶.

The above provision of the Act makes it clear that a company is insolvent if the company is unable to pay its debts after demand has been made and it has lasted three weeks. It seems the use of the phrase “insolvent person” refers to either an individual or company or both. This is because the Act had early defined a company as human being of full capacity. The interpretative section of the Act clearly stated as already reproduced above that failure of insolvent person to pay demanded debt for six weeks, such can be termed insolvent. It seems the other provision which relate to winding up is for companies. These are all contained in CAMA 2020 regarding insolvency laws in Nigeria which is the core of this research paper. Statutory declaration of solvency; the Act states -

Where on or after the commencement of this Act, it is proposed to wind up a company voluntarily the directors of the company or in the case of a company having more than two directors the majority of the directors, may at a meeting of the directors make statutory declaration to the effect that they have made full inquiry into the affairs of the company and that, having done so, they have formed the opinion that the company will be able to pay its debts in full within a period, not exceeding 12 months from the commencement of the winding up as is specified in the declaration³⁷.

The Act provides for insolvency practitioners³⁸. The Act equally spells out the qualification for insolvency practitioner³⁹. Thus, insolvency matters are covered in the Act.

4.3 Business Facilitation (Miscellaneous Provisions) Act 2023

The Business Facilitation Act 2023 was signed into law by former President Muhammadu Buhari on 14 February 2023. The Act is a legislative intervention aimed at promoting business and enterprise in Nigeria. The Act amended some sections of CAMA 2020. For example, the Act amended section 127 (1) CAMA 2020 to allow companies having share capital to increase their issued share capital either by allotting new shares in general meeting or through a resolution of the Board of Directors, subject to the condition or direction that may be imposed in the company's

³⁴ Companies and Allied Matters Act 2020. s. 868

³⁵ Companies and Allied Matters Act 2020 s. 571(d)

³⁶ Companies and Allied Matters Act 2020 s. 572(a)

³⁷ Companies and Allied Matters Act 2020. s 625(1)

³⁸ Companies and Allied Matters Act 2020. s. 704

³⁹ Companies and Allied Matters Act 2020. s. 705 (1) (a)-(c)

articles of association or by the company in a general meeting⁴⁰. Relating to this research work, it is important to inform that insolvency which is inability of a company to pay its debt constitute a ground for winding up of a company and the definition or inability to pay debt is stated in CAMA 2020 thus -

A company is deemed to be unable to pay its debts if; a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N200,000 then due, has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to vary the sum due, and the company has for three weeks thereafter neglected, to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor⁴¹.

The above section of CAMA 2020 dealing with definition of inability to pay debt which is insolvency and a ground to winding up of a company has now been further amended by Business facilitation Act thus, “Section 572 of the Companies and Allied Matters Act is amended in paragraph (a) by substituting for the expression ‘a sum exceeding N200,000’ with the words, a sum to be determined by a regulation issued by the commission⁴²”. The Business Facilitation Act changed the face of insolvency in corporate law practice since it was signed into law in Nigeria.

4.4 Investment and Securities Act 2025

The Investment and Securities Act (ISA) regulate transactions relating to company securities.

The current Act was signed into law by President Bola Ahmed Tinubu on 30 March 2025. The Act has eighteen parts. The current Act regulates Take-over of companies which usually occurs because of company’s insolvency. This research work is about insolvency law relating to incorporated companies in Nigeria. Incorporated companies have shares and other securities which must be registered with the institutional body – the Securities and Exchange Commission. Accordingly, ‘A person shall not establish or operate a securities exchange ... unless such person has been registered with the Commission⁴³’.

4.1.5 Federal Competition and Consumer Protection Act 2019

The Federal Competition and Consumer Protection Act (hereinafter FCCPA) was signed into law by former President Muhammadu Buhari on 30 January 2019. The Act is divided into 18 parts and consist of 168 sections. The FCCPA is the main statute governing consumer protection and regulation in Nigeria. FCCPA regulates mergers in Nigeria as the Act abolished the sections of ISA dealing with mergers⁴⁴. The importance of merger in company law and administration is to be reckoned with. This is against the backdrop that companies avoid insolvency by merging. Unlike mergers in ISA, which was categorized in small, medium and large, under the present law, merger is now two small or large mergers⁴⁵.

⁴⁰ Business Facilitation Act 2023. s. 9(3)

⁴¹ Companies and Allied Matters Act 2023. s.572

⁴² Business Facilitation Act 2023. s. 9 (19)

⁴³ Federal Competition and Consumer Protection Act 2019. s 165(1)

⁴⁴ Federal Competition and Consumer Protection Act 2019. s 165(1)

⁴⁵ Federal Competition and Consumer Protection Act 2019. s. 92(4) (a) & (b)

4.1.7 Insolvency Regulations, 2022

The insolvency regulations, 2022 was approved by the Honourable Minister of Industrial, Trade and Investment on 24 April 2022. This was pursuant to the powers conferred on the minister by the provisions of CAMA 2020. “The commission may, with the approval of the minister, make regulations generally for the purpose of this Act and in particular, make regulation⁴⁶.” The insolvency regulations are aimed at clarifying compliance requirements for insolvency practitioners and providing comprehensive governance and procedural framework for insolvency practices with global regulatory best practice. It has 13 parts and 3 schedules.

The regulation referred to a company; thus, a company registered or deemed to have been registered under the principal Act or any other special legislation relating to companies; or any other corporate entity which is recognized under rules or orders made by the minister⁴⁷. Part 9 of the regulation deals with Notice of compulsory winding up while part 10 on Notice of creditors voluntary winding up to the commission. The regulation is an important instrument during insolvency which is the core of this paper and winding up which follows a company is declared to be insolvent. The regulation assist in no small measure when it comes to issue which are necessary and central to this research.

4.1.8 Bankruptcy Act 2004

The Bankruptcy Act refers to being bankrupt in the preamble to the Act thus:

An Act to make provisions for declaring bankrupt any person who cannot pay his debts of a specified amount and to disqualify him from holding certain elective and other public offices or from practicing any regulated profession (except as an employee)⁴⁸.

The Bankruptcy Act therefore seem to declare that only human beings can be declared bankrupt especially with the obvious listing of employee. The Act declares a debtor bankrupt thus:

if a creditor obtain final judgment or order against him for any amount, and execution thereon not having been stayed, has a bankruptcy notice served on him and he does not within 14 days after service of notice, comply with the requirements of the notice or satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and he could not set up in the action in which the judgment was obtained or the proceedings in which the order was obtained...⁴⁹

The importance of Bankruptcy Act wherever insolvency is discussed cannot be overemphasized, bankruptcy relates with individual human beings, while insolvency relates to companies. In insolvency, the estate of insolvent company is administered by the official receiver for the benefit of company creditors. On the other hand, the estate of bankrupt individual is equally administered for the benefit of creditors of such individual. Bankruptcy and insolvency are interrelated as both

⁴⁶ Companies and Allied Matters Act 2020. s. 867

⁴⁷ Insolvency Regulations 2022. Rule 1.05

⁴⁸ The Preamble to Bankruptcy Act Laws of the Federation of Nigeria (LFN) 2004

⁴⁹ Bankruptcy Act 2004. s. 1(a) (i) and (ii)

relates to the inability to pay debt. The inability to pay debt or insolvency forms the fulcrum of this research work.

5.0 Legal Framework for Insolvency in India

5.1 Insolvency and Bankruptcy Code (IBC) of India 2016

India has a separate law regulating insolvency matters. This is outside Companies Act 2013 of India. The code has some notable objectives which includes:

- (a) To promote entrepreneurship
- (b) To make credit available
- (c) To balance the interest of all stakeholders by consolidating and amending the existing laws relating to insolvency and bankruptcy.
- (d) To reduce the time of resolution for maximizing the value of assets⁵⁰

The code makes provisions for every matter on insolvency. It provides for the persons permitted by the code to initiate corporate insolvency resolution process. Accordingly, where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor in the manner as provided under this chapter⁵¹. A careful perusal of the provisions of the code above reveals that any of the following three persons can initiate insolvency resolution process. They are - the corporate debtor itself, the financial creditor or operational creditor. Accordingly, financial creditor shall make application in such form and manner and pay the accompanied fee as may be prescribed and along with the application furnish the following:

- (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified.
- (b) the name of the resolution professional proposed to act as an interim resolution professional; and
- (c) any other information as may be specified by the board⁵²

It is clearly explained above the requirements to accompany the form for insolvency resolution process initiated by the financial creditor. In furtherance, where these items accompany the insolvency form, the Adjudicating Authority shall within fourteen days of the receipt of the application ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor⁵³.

According to the code, where the Adjudicating Authority is satisfied that a default has occurred and the application is complete there is no disciplinary proceedings pending against the proposed resolution professional, it may by order admit such application⁵⁴. On the other hand, if a default

⁵⁰ C A U Patwardhan, 'Insolvency and Bankruptcy Code 2016' available on <https://www.icsi.edu/media/portals/68/insolvency%20&%20Bankruptcy20code%20OPPT%20%20.pdf> accessed on 1 May 2025.

⁵¹ Section 6 Insolvency and Bankruptcy Code of India 2016

⁵² Section 7(3) (a)-(c) Insolvency and Bankruptcy Code of India 2016

⁵³ Section 7(4) Insolvency and Bankruptcy Code of India 2016

⁵⁴ Insolvency and Bankruptcy Code of India 2016. s. 7(5)

has not occurred or the application is incomplete or there exist any disciplinary proceedings pending against the proposed resolution professional, it may by order reject such application.

There is a provision however, to the effect that the Adjudicating Authority shall before, rejecting the application give the applicant a notice to rectify the defect within seven days⁵⁵. The decision of the Adjudicating Authority is communicated within seven days to the financial creditor and corporate debtor where it admits such application and issues order where it rejects the application for whatever reason, it communicates only to the financial creditor⁵⁶. It can be deduced that the reason for communicating both parties where the application is admitted is because the outcome affects both parties. However, where it rejects the application, no reason to communicate the corporate debtor because the process cannot continue. The financial creditor is the important party to be communicated where the application is rejected.

As stated earlier, the three persons that can initiate these proceedings as used above are the financial creditor, the corporate debtor and operational creditor. The manner for the financial creditor to begin the process is already explained above. As for operational creditor, where there is a default, he delivers a demand notice of unpaid operational debt or copy of invoice demanding payment of the amount in a prescribed form. The corporate debtor shall within ten days of receipt of the demand notice or copy of invoice bring to the attention of the operational creditor, the following –

- (a) existence of a dispute, if any, and copy of pendency of the suit or arbitration proceedings filed before the receipt of such demand notice or copy of invoice.
- (b) the repayment of unpaid operational debt either by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or by sending an attested copy of record that the operational creditor has an uncashed cheque issued by the corporate debtor⁵⁷.

It is important to further inform that after the ten days from the date the demand notice was issued except where it is to be contested as explained above, otherwise the financial creditor is expected to be paid else, he files his application with the Adjudicating Authority for initiation of the corporate insolvency process. The application by the operational creditor is investigated by the Adjudicating Authority within fourteen days of the receipt of the application and by order admit the application and communicate its decision to the operational creditor and corporate debtor if the application is complete or reject the application and communicate to the operational creditor and corporate debtor. It should also be put on record before rejecting the application the Adjudicating Authority gives seven days to rectify any defect by the applicant⁵⁸.

Finally, there is punishment for contravention of the moratorium or the resolution plan according to the code. Where the corporate debtor or any of its officer violates the provisions of the code any such officer who knowingly or willingly committed or authorized or permitted such contravention shall be punishable with imprisonment for a term which shall not be less than three years, but may extend to five years or with fine which shall not be less than one lakh rupees, but may extend to

⁵⁵ *ibid*

⁵⁶ Insolvency and Bankruptcy Code of India 2016. s. 7(7)

⁵⁷ Insolvency and Bankruptcy Code of India 2016. s. 8(1) and (2)

⁵⁸ Insolvency and Bankruptcy Code of India 2016. s. 9

three lakh rupees, or both⁵⁹ same punishment exist for creditors. In India insolvency mechanism explained above are for corporate bodies. There exist for individuals or partnerships and the Adjudicating Authority here is the Debt Recovery Tribunal⁶⁰.

5.2 Companies Act of India 2013

The Companies Act of India 2013 was signed into law on 29 August 2013. The Act consist of 29 chapters, 470 sections and 7 schedules. The Act was amended in 2015 and further amended in 2017. Insolvency is provided for in the Companies Act of India. It states -

where on a demand by the secured creditors of the company representing 50% or more of its outstanding amount or debt, the company has failed to pay the debt within a period of thirty days of the service of the notice of demand or to secure or compound it to the reasonable satisfaction of the creditors, any secured creditor may file an application to the Tribunal in the prescribed manner along the relevant evidence for such default, non-payment or failure to offer security or compound it, for a determination that the company be declared as a sick company⁶¹.

The above provision is for rehabilitation and revival of sick companies. The provisions of the Companies Act of India and Nigerian Company and Allied Matters Act are slightly different. The law in Nigeria is three weeks or as to be determined by the commission according to recent enactment. However, in India as seen hereinbefore it is thirty days. The law in India remains that the Central Government or the Reserve Bank of India or a state government or a public financial institution or a state level institution or a scheduled bank may, if it has sufficient reasons to believe that any company has become, for the purposes of this Act, a sick company, make a reference in respect of such company to the Tribunal for determination of the measures which may be adopted with respect to such company⁶².

6.0 Legal Framework for Insolvency in United Kingdom

6.1 Corporate Insolvency and Governance Act of United Kingdom 2020

This Corporate Insolvency and Governance Act (CIGA) 2020 has a central aim of relieving the burden on businesses during and after Covid 19 pandemic. The Act introduced procedures and measures to rescue companies in financial distress because of the Covid 19 pandemic. The preamble of the Act states: “An Act to make provision about companies and other entities in financial difficulty; and to make temporary changes to the law relating to the governance and regulation of companies and other entities⁶³.”

The principal Act remains the insolvency Act 1986. This present Act contains provisions that enables an eligible company, in certain circumstances, to obtain a moratorium, giving it various protections from creditors⁶⁴. A new section –A2 was introduced to define, what is meant by eligible

⁵⁹ Insolvency and Bankruptcy Code of India 2016. s. 774(1)

⁶⁰ Insolvency and Bankruptcy Code of India 2016. s 79(1)

⁶¹ Companies Act India 2013. s. 253

⁶² Companies Act India 2013. s. 253(5)

⁶³ The Preamble to Corporate Insolvency and Governance Act 2020

⁶⁴ Corporate Insolvency and Governance Act 2020. s. A1

company in the current Act. Eligible companies apply for moratorium. The Act excludes the following:

- 2 (1) A company is excluded from being eligible if— (a) on the filing date, a moratorium for the company is in force, or
- (b) at any time during the period of 12 months ending with the filing date, a moratorium for the company was in force (but see section A 42 (6) for power of the court to modify the effect of this paragraph)⁶⁵

6.2 Companies Act of the United Kingdom 2006

The Companies Act 2006 of the United Kingdom was an Act of parliament. The Act commenced on 1st October 2009. The Act has a total of 47 parts, 16 schedules and 1,300 sections. The Act has passing remark on insolvency and winding up. The Act provides for incorporation of companies and other organizations according to laid down rules. The Act introduced several reforms when it was enacted enhancing the ability of shareholders to influence company decision⁶⁶. The Act clearly informed that insolvency and winding up are set out in the Insolvency Act. The Act is one of the most important legislations in the United Kingdom as it regulates companies and its practices and administration in the United Kingdom. Activities of members of the Board of Directors and other shareholders of a company are adequately contained in the Act. The rights of third parties in their transactions with incorporated companies are also contained. Creditors and other debenture holders in the United Kingdom rely on the Act when instituting any action in court on any subject matter.

6.3 Insolvency Act of the United Kingdom 1986

Insolvency or inability to pay debt is adequately explained in this Act. On the circumstances for a company to be wound up by court, the Act listed many circumstances. Among them is inability to pay debt⁶⁷. This provision is in tandem with provisions of CAMA 2020. The Insolvency Act UK defined inability to pay debt thus –

If a creditor (by assignment or otherwise) to whom a company is indebted in a sum exceeding 750 pounds then due has served on the company by leaving it at the company's principal office, a written demand (in the prescribed form) requiring the company to pay the sum so due and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor⁶⁸.

An interesting part of the Insolvency Act, UK, which this work identified to be unique is the provision which clearly states that a company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities⁶⁹. The work will come to this later when dealing with inability to pay debt in Nigeria situation. The above two provisions of the Act demonstrate inability to pay debt by a company which is a ground to wind up such company.

⁶⁵ Insolvency Act United Kingdom 1986. Schedule 2A1 s 2 (1) (a); (b)

⁶⁶ K Pons, 'Understanding the Companies Act 2006' available on <https://brittontime.com/insights/understanding-the-companies-act-2006/>> accessed 5 January 2025.

⁶⁷ Insolvency Act United Kingdom 1986. s. 122(1)(c)

⁶⁸ Insolvency Act United Kingdom 1986. s. 123(1) (a)

⁶⁹ Insolvency Act United Kingdom 1986. s. 123 (2)

7.0 Findings and Recommendations

This work has examined the legal framework for insolvency procedures and practice in Nigeria vis-à-vis The United Kingdom and India. What is common remains that countries all over the world after the Covid 19 pandemic, have made deliberate efforts to address insolvency matters in their respective territories. The economy of most nations of the world are no longer too strong, therefore it is the findings of this research work that deliberate efforts by countries to ensure that companies remain going concerns should be maintained.

The recommendations of this paper among others includes that Nigeria should enact a separate Act to deal with insolvency issues and matters related thereto. Comparatively, there is the Insolvency Act of the United Kingdom and the Corporate Insolvency and Governance Act. In India, there is the Insolvency and Bankruptcy Code. The above is in addition to Companies Act of both United Kingdom and India.

Secondly, more attention should be paid to see that companies are not liquidated rather, there should be provisions in the proposed Act to help stabilize sick industries in Nigeria till they are strong again.

7.1 Conclusion

This work has thoroughly discussed legal framework for insolvency procedures and practice in Nigeria and two selected jurisdictions of United Kingdom and India. The work is of the firm belief that the issues identified and raised especially the need for separate enactment for insolvency should be considered by the appropriate organ of government in Nigeria. This will go a long way in addressing issues of insolvency which are currently added to Companies and Allied Matters Act thereby making Corporate Affairs Commission which is already overworked to still oversee insolvency matters in Nigeria. Where the above recommendations are implemented, the business climate in the country will be better as company operation is an integral part of the economic activities in a country.