CORPORATE RESCUE MODELS IN THE UNITED KINGDOM AND THE UNITED STATES: A COMPARATIVE STUDY WITH NIGERIA*

Abstract

The trend in modern insolvency practice is to give companies in financial difficulty opportunity to be rescued instead of going into liquidation. Many countries have developed their own Corporate Rescue Model to provide for measures to save companies that, though in financial difficulty, are still viable. At the forefront of this rescue is United Kingdom and United States. Whereas United Kingdom run the Debtor-in-Possession rescue model, which is a creditor friendly model, United states run Administrative order rescue model, which is a debtor friendly model. In the modern legal regime for corporate insolvency there are two basic routes which can be followed in dealing with an ailing company; it is either liquidation or corporate rescue. Both Liquidation and corporate rescue provide a collective way of settling the fate of an ailing company. Yet, they both have different implications, whereas, liquidation serves the basic purpose of winding up an ailing company through an orderly collection and realisation of the company's assets, the net value of which is distributed among claimants according to a statutory system of priorities. Corporate rescue on the other hand, provide an alternative to the immediate liquidation of the ailing company, by putting together measures to rehabilitate and restructure the ailing company. The aim of the article is to compare the US and UK corporate rescue models, with the intention of learning from their rescue practise, to improve the Nigerian's rescue practise.

Keywords: Insolvency, Bankruptcy, Debtor-in-Possession, Administration, Corporate/ Business Rescue and Automatic stay.

1. The Concept of Corporate/ Business Rescue

Professor Belcher defined the term 'corporate rescue' as 'a major intervention necessary to avert eventual failure of the company'.[1] Corporate rescue in the North American terminology, may be regarded as an alternative to immediate liquidation of the company, with the aim to prevent the death of the company. In the UK, the scope of rescue is wider, including both a turnaround of the company and alternatively preserving the core of a company's business. [2] Corporate rescue have been distinguished from Business rescue. Whereas, corporate rescue works towards the restoration of a company in difficulty, which leads to the preservation of the legal entity itself so that the company can continue operations after reorganisation. Business rescue on the other hand may entail the termination of the old company, but the actual business and its activities will remain as a cohesive, productive unit under new ownership.[3] Sometimes, a result that amounts to a rescue may be achieved in the form of a complete takeover or a bulk sale of the assets of a company in financial difficulty, which involves the sale of the entire business, including goodwill and other intangibles.[4] Nevertheless, it is worthy of note, that despite the rescue outcomes that may be achieved through the liquidation procedure, it is not recognised as part of corporate rescue proceedings, because its goal is different. [5]

2. The Nigeria Situation

Nigeria does not have as a formal legislation on corporate rescue. Attempt was made to come up with an Insolvency Bill which has not been passed into law. Nigeria does not have an Insolvency law that gives room for a rescue of the company in financial difficulty in deserving circumstances. However, Nigeria has some legislation that could be used on the interim to achieve corporate/ business rescue pending the time Nigeria will come up with a more robust Insolvency Law with a rescue bias. Corporate rescue is presently being carried out through the Receiver-manager role, scheme of arrangement, and Asset Management Corporation of Nigeria (AMCON) interventions. The major provision for achieving business rescue on the interim in Nigerian is through the receiver- manager role under the Companies Allied Matters Act(CAMA)[6] , which provides for the management of the company by the receiver-manger, on behalf of all the stakeholders, whereas, under the repealed Companies Decree in Nigeria, the receiver-manager may choose to rescue the distressed company or its business, but has no duty to do so. He may upon his appointment, sell the core assets of the company, which could precipitate the ultimate failure of the company. On the contrary, Section 390 of CAMA instructs the receiver/manager to take the interests of the company and its stakeholders, including in particular its employees, into consideration when taking decisions. Bolanle opined that if the express provisions of Section 390 are applied effectively, it would

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[1] A Belcher, *Corporate Rescue* (Sweet and Maxwell 1997), 12.
[2] G McCormack, *Corporate Rescue Law: An Anglo-American Perspective* (Edward Elgar, Cheltenham 2008), 3.
[3] V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, CUP, Cambridge 2009), 188.
[4] G McCormack, *Corporate Rescue Law: An Anglo-American Perspective* (Edward Elgar, Cheltenham 2008), 3.
[5] *ibid*
[6] Hereinafter referred to as CAMA

move the Nigerian receivership procedure further from the traditional receivership concept of England and Wales, closer to the procedure known as 'Administration' in UK.[7]

A Scheme of Arrangement is a court-approved agreement, between a company and its shareholders and creditors, binding them to reorganization or restructuring of their rights and obligations. It is a process used by a company in financial difficulty to reach a binding agreement with its creditors to pay back all or part, of its debts over an agreed timeline.[8]Section 537 of the Companies and Allied Matters Act defines 'an arrangement' as any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any other provision of this Act or by the unanimous agreement of all parties affected thereby. In order for an Arrangement and Compromise to be executed, a scheme of arrangement needs to propose by the company. The procedure of implementing a scheme of arrangement is provided in Section 539 and 540 CAMA and involves two court applications. The court may on the application in a summary way[9], order a meeting of members and the creditors of the company.[10] At the meeting the proposed scheme is considered, the scheme must be approved by a majority vote representing not less than three quarters or seventy five percent in value of the shares of members or class of members, or of the interest of creditors or class of creditors, as the case may be, being present and voting either in person or by proxy. Once the statutory majority of 75 percent is obtained, an application must be made to court to sanction the scheme[11]. If the court is satisfied as to the fairness of the scheme, it shall sanction the scheme and it becomes binding on all the creditors or the members.[12]

The AMCON Bill was signed into law on the 9th day of July, 2010[13] during the tenure of the former President of Nigeria, Dr. Goodluck Jonathan. The AMCON Act has however been amended in 2015 and 2019 which brought further innovations into the AMCON Act. Asset Management Corporation of Nigeria(AMCON) has helped the recovery of the financial sector from crisis, by boosting the liquidity of the troubled banks through buying their non-performing loans.[14] AMCON is a form of securitisation vehicle that pools and repackages the homogenous illiquid financial assets into marketable securities that can be sold to investors. It also involves selling assets and/ or the rights to future cash flows to a third party for cash.[15]

3. Chapter 11 of US Bankruptcy Code/ UK Administration in Perspective

Both US and UK have an Insolvency regime that supports and encourages the rescue of companies in financial difficulty, when they have a viable business. Both countries insolvency laws emphasize financial rehabilitation for ailing companies. US Chapter 11 reflects the primary policy of US bankruptcy law for corporate debtors, which is to preserve and protect an ailing business by encouraging a financial restructuring that is binding upon all parties. Under Chapter 11, a distressed company has the opportunity to remain in business with existing management, reassess its business plan and negotiate a restructuring of its capital structure which binds all existing creditors and shareholders. Chapter 11 is viewed as debtor friendly legislation, this impression cannot be far from the fact that Chapter 11 allows the existing management to continue to run the affairs of the ailing company, instead of some court-appointed outsider. Also, it is the management itself that prepare a reorganisation plan and present it to creditors and shareholders.

The UK insolvency law was influenced by the Cork Report, in fact, it was the recommendation of the Cork Report that has adopted as the UK Insolvency Act. Administration was however, introduced because it was noticed that it is not always the case that a company borrows from only one secured lender. Such companies should still be able to take advantage of the appointment of a specialist insolvency practitioner, who could work either to save the company or its business or to ensure the company's assets were realised in the most beneficial manner. The main driver behind this reform was the desire to produce an enforcement mechanism in which the relevant insolvency practitioner owed duties to all the creditors of the company and not

[7]Adebola Bolanle, 'The Duty of the Nigerian Receiver to Manage the Company' available at < *https://papers. ssrn.com/sol3/papers.cfm?*> , accessed 7th February, 2017.

[8] David Van Dessel and Warren Baxter, 'Schemes of Arrangement: Best possible chance of success', available at< https://www2.deloitte.com> accessed 13th April, 2020.

[9] S. 539(2) CAMA 2004

[10] S. 540 (1) CAMA 2004

[11] S. 539(2) CAMA 2004

[12] S. 539(3) CAMA 2004

[13] The commencement date in the Act is 19th July, 2010.

[14]T Adebayo, 'An Appraisal Of The Asset Management Corporation Of Nigeria (AMCON) Act, 2010', <*http:// topeadebayollp.wordpress.com/2012/02/28/an- appraisal-of-the- asset-management-corporation-of- nigeria-amcon-act-2010* >, accessed 4th May, 2019.

[15] *Dictionary of Banking and Finance,* (3rd Edition A &C Black Publisher 2005) 287.

primarily to the floating charge holder.[16] The UK Insolvency Act[17] was not able to play its rescue role until it was reformed with the introduction of the Enterprise Act. Section 3(2) of the Enterprise Act provides that the administrator must perform his functions in the interest of all the company's creditors as a whole. Section 3(3) the same Enterprise Act allows an administrator to only consider the option of winding up if rescue of the company is not practicable or if he believes that the winding up of the company will achieve a better result for the creditors in the given situation. [18] This paper will now go ahead to compare the rescue legislation of United States as contained in Chapter 11 of US Bankruptcy Code and the UK Administrative Procedure along the following lines;

Management/Control

Chapter 11 is based on 'Debtor-in-Possession'. Debtor in possession (DIP) refers to the status of a business that retains control of its assets and continues to operate while under the chapter 11 bankruptcy reorganization process. Under Chapter 11 the existing management continue to run the affairs of the ailing company, they are not displaced by a court-appointed outsider. Under Chapter 11, a business files for protection from creditors while it reorganizes itself. The debtor-in-possession can run the business in the ordinary way but will need court approval for substantial asset sales.[19] The rationale behind a debtor in possession is the persuasion that the current management of a company in financial difficulty is best suited to orchestrate the process of rehabilitation of the company. The debtor in- possession is already familiar with the business, understands the intrigues of the business, it had been managing the company before the bankruptcy was filed, making it the best party to conduct its operations during the reorganization. The debtor-in-possession is a fiduciary of the creditors and, as a result, has a duty to act in the best interest of the estate, and to refrain from acting in a manner which could damage the estate, or hinder a successful reorganization[20]. The fiduciary duties that a debtor owes the estate are comparable to the duties that the officers and directors of a solvent corporation owe their shareholders outside bankruptcy. The Management of the Debtors-in-possession are expected to carry out their functions with the same fiduciary responsibilities as a trustee[21] and has all the powers of a bankruptcy trustee.[22] An outside trustee can only be appointed to take over the management of the business of the company for cause,[23] such as fraud, dishonesty or gross mismanagement. It has been held that simple mismanagement is not a sufficient reason for an appointment.[24]Their appointment should be seen as an exception rather than the rule.[25]

An alternative under Section 1104 is for the court to appoint an examiner who may investigate any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the management of the company's affairs, instead of an outside trustee. The appointment of an examiner unlike the appointment of a trustee does not displace the existing management structures of the company. They continue to operate in tandem with whatever functions the court assigns the examiner. [26]

Under UK Administration Procedure the rescue of a company is achieved by placing its management in the hands of an external insolvency practitioner known as an 'administrator'. The Administrator has full management control over the company in substitution for the board of the company and its pre-existing management. His appointment displaces the existing management of ailing company. The administrator must be a qualified insolvency practitioner. UK has a well structured and regulated system for admitting insolvency practitioners. He must be a member of a professional body recognised under section 391 of the Act being licensed by a competent authority under section 393 of United Kingdom's Insolvency Act 1986. Such persons must be fit and proper persons to act, and must meet acceptable requirements as to education and practical training and experience.[27]

Under the Nigerian law, Insolvency Practitioners are not regulated. Business Recovery and Insolvency Practitioner Association of Nigeria (BRIPAN), is just an association registered under CAMA. They don't have a chartered

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[16] Paul Lyndon Davies and others, *Gower and Davies Principles of modern Company Law, (*8th edition Sweet and Maxwell 2008) 1196.
[17] See Part ii, S. 8(3) UK Insolvency Act 1986 and S. 3(1) Enterprise Act, 2002.
[18] This the improved innovation introduces under S.3(1) Enterprise Act 2002.
[19] S 363 of the US Bankruptcy Code.
[20] G Varallo and J Finkelstein, 'Fiduciary Obligations of Directors of the Financially Troubled Company' [1992] *48 Business Law* 244.
[21] *Commodity Futures Trading Commission v Weintraub* (1985) 471 US 343 at 355.
[22] S. 1107 of the US Bankruptcy Code
[23] S. 1104(a)(1) of the US Bankruptcy Code
[24] *Re Anchorage Boat Sales* (1980) 4 BANKR 635.
[25] *Re Marvel Entertainment Group* 13 (1998) 140 p. 463 at 471.
[26] Douglas G Baird, *Elements of Bankruptcy* (4th ed. New York Foundation Press 2006) 22.
[27] S. .391(2) United Kingdom's Insolvency Act 1986.

status like ICAN, belonging to BRIPAN is not yet a pre requisite for handling rescue jobs. Therefore, BRIPAN cannot be said, to have offered a strong regulation for rescue practice in Nigeria, because BRIPAN training is not obligatory. CAMA did not provide any qualification for eligibility to be appointed as receiver-manger but merely listed those disqualified from being appointed as one.[28] Their qualifications were not specified, there is no regulation of their activities, which has predisposed Insolvency/ rescue practitioners to incompetent rescue practice. The Nigerian insolvency practice is creditor friendly, and patterned after the UK rescue model. The US debtor-in-possession has the advantage that the management trying to rescue the business is conversant with the intrigues of the business, its suppliers and customers. Also, because the debtor-in-possession model in US does not misplace the management of the company, makes the customers and shareholders to be relaxed, it removes that tension associated with a new management. However, it has the disadvantage that if the financial difficulty was orchestrated by the existing management's corruption, malpractice or lack of good management skill and strategy, the problem will likely continue. The opportunity of bringing in a trained expert in business rescue, helps the insolvency practitioner to look at the problem of the company with a second eye, it helps him to objectively notice what the company needs to do differently. The US debtor-in-possession model also have the disadvantage that because the management will not want to lose their job, they will want the company business to continue, even in the face of obvious reasons to the contrary. Chapter 11 appears to be anti-takeover; it is centred on ensuring the survival of the existing business unlike the provision under UK where business rescue sometimes may take the form of take over. Under UK administration, one of the emphases of a business rescue regime is that even if the business cannot be restored to a solvent and profitable status, the return to creditors in the long-run will be much higher. [29] I am of the firm view that a country like Nigeria with a high level of corruption and corporate misbehaviours, coupled with the poor and slow judicial system in Nigeria, adopting the debtor –in-possession practise, as seen in US rescue model, is likely to be abused. The experience in Nigeria with the AMCON debtors is a good eye opener. It may not work well like as it does in US. Until the 2019 AMCON amendment, Nigeria witnessed many politically exposed and calcitrant debtors, who will rather pay lawyers to delay their matters in court, with all manner of frivolous applications, than to pay back their debt. The AMCON debtors live big, not withstanding that they are owing, because of the slow judicial system in Nigeria.

Commencement

In US, a Chapter 11 case begins when the company voluntarily files a petition with a bankruptcy court, with the petition being accompanied firstly by, a list of creditors, and secondly, a summary of company assets and liabilities. Companies as well as individuals can file for Chapter 11 relief. Chapter 11 case can also be commenced on involuntary basis by the creditors.[30] A company need not be insolvent to explore the relief under Chapter 11 . Companies may enter into Chapter 11 because of pressure from creditors who may be seeking to enforce security interests.[31] But whatever be the reason the petition must be brought in good faith, if the court find out that the company has no genuine reorganizational purpose, the Chapter 11 filing may be dismissed. In UK administration can be commenced out of court by a secured creditor who holds a qualifying floating charge, the company itself or its directors. Alternatively, general creditors can apply to court. The application must be supported by a statement from the proposed administrator confirming that it is reasonably likely that the purpose of the administration will be achieved, providing details of the company's financial position, details of creditors' security and any other relevant matter. Whether the administration was commenced in court or out of court, the application must state that the company, is, or is likely to become insolvent, and that it is reasonably likely to rescue the business, or where rescue is not possible , that the administration will realize better value from the company assets. Unlike the position in US, a company must be insolvent to apply for Administration. In Nigeria every rescue is usually associated with insolvency. A receiver-manger is usually appointed because a company can no longer pay its debts as the fall due, the fear that the asset of the company is in jeopardy usually leads to the appointment of a receiver-manager.[32] However, many times the insolvency situation has become very bad. The US model will help many companies to commence rescue process early, more so, as the appointment is usually done by the company in US who truly know its true financial condition, as opposed to the UK model that is usually commenced by the creditors, who may not be able to dictate any problem, until the company can no longer meet up with its financial obligations. The UK model is also very good in terms of the little court involvement. If the Nigerian rescue law will require only little court involvement, it will improve Nigeria rescue regime. Especially because of the Nigeria court system that is very slow, out of court appointment will be better in Nigeria.

The Automatic Stay

[28] S. 387 of CAMA 2004

[29] Glen Smits, 'Corporate Administration: A Proposed Model'[1999] 32 *DJ* 83.

[30] S. 303(b)(1)US Bankruptcy code

[31] Lynn M LoPucki, 'The Debtor in Full Control: Systems Failure Under Chapter 11 of the Bankruptcy Code'[1983] 57 *American Bankruptcy Law Journal* 114.

[32] S. 180 & S. 389 CAMA

The automatic stay provision is a fundamental feature of Chapter 11. The commencement of a bankruptcy case triggers an 'automatic stay' which operates as an injunction against all actions affecting the debtor or its property.[33] It imposes a freeze on proceedings or executions against the company and its assets. This stay or moratorium provides a breathing space during which the company has an opportunity to make arrangements with its creditors and shareholders for the rescheduling of its debts, and the reorganisation and restructuring of its affairs. It stops all recovery and enforcement efforts, all harassment, and all foreclosure actions. It helps alleviate the financial pressures that drove the debtor into bankruptcy. The automatic brings to a halt all actions by individual creditors to obtain satisfaction of their claims. The stay operates regardless of whether a creditor has notice of the filing of a bankruptcy petition. Any action taken in violation of the stay generally is void. Persons violating the stay can be held liable for damages.[34] Under the automatic stay, the holder of a security interest in the debtor's property may not repossess or foreclose on that property without the permission of the bankruptcy court. There is a specific provision for 'adequate protection' for the holders of property rights who are adversely affected by the stay.[35] If the debtor is unable to provide adequate protection, then a secured party is entitled to obtain relief from the automatic stay and enforce its collateral rights.[36] In UK one of the effects of appointment of administrators is a 'moratorium on actions'. A company in administration is effectively protected by a moratorium against the enforcement of actions by creditors. It is a period when creditors' rights are frozen. Moratorium of actions does not allow creditors to enforce their legal rights against the company without leave of the court.[37] This temporary freedom from creditor harassment is designed to allow the administrator some breathing space within which he/she can put a proposal to the creditors to attempt to rescue the company or achieve some other beneficial realisation of the company assets. Any creditor who wishes to enforce his/her rights during the administration must either persuade the administrator to permit enforcement or obtain leave of the court.[38]

Both the US and UK models provide for a period of automatic stay on action, which gives the debtor a breathing space during which he is given time to formulate plans for a reorganization. Under both models the 'stay' or 'moratorium' is automatic. An automatic stay is an indispensible feature of every rescue proceeding, if the rescue will be successful. Every ailing company needs a breathing space, of no pressure, action or enforcement to be able to gather itself together. I propose an automatic moratorium in Nigerian's proposed insolvency Act. Moratorium on actions does not exist under Nigerian CAMA. However with the recent amendment of the AMCON act in 2015, moratorium have been introduced into the AMCON Act, 2015, which gives the debtor company one year from the appointment of the receiver to enjoy an automatic suspension of the enforcement of judgements, claims, debt enforcement but allows claims relating to wages and other entitlements of existing staff of the debtor company.[39] This is a major step in the rescue regime in Nigeria. It is worthy of note that is provision only pertains to receivers appointed by AMCON. Appointment of receiver- manager in Nigeria only suspends the right of the directors over the assets that form part of the security, until the secured creditors recover their money, and in some instance not minding that the recovery is dissipating the assets of the company, provided the secured creditors have realized their money

Financing

Chapter 11 gives lenders incentives to provide finance to the debtor (called 'Debtor in Possession' Financing'). There is a specific mechanism for the financing of the company in financial difficulty during the Chapter 11 period.[40] Companies in financial difficulty need new finance to be able to survive. Section 364 of the US Bankruptcy code provides for new financing for the debtor-in-possession. Under this provision, any credit extended to the corporate debtor during the reorganisation process has priority over pre-petition unsecured claims.[41] If the extension of credit is in the ordinary course of business, then priority is automatic whereas if the extension of credit is outside the ordinary course, then the priority must be authorised by the court, prior to the granting of credit. It is also worthy of note, even if the reorganisation plan fails, 'new' debts will have priority over unsecured pre-filing debts in the ensuring liquidation. The debtor is temporarily relieved of paying its prepetition debts, since many bankruptcy filings are precipitated by cash shortages to meet current debts and expenses. While the Chapter 11 case is pending, the debtor needs only to pay post-petition wages, expenses, trade

[33]S. 362 (a) US Code.
[34] S. 362 11 US Code.
[35] S 361 US Bankruptcy Code.
[36] S. 362(d)(1) US Bankruptcy Code.
[37] S. 42 UK Enterprise Act, 2002.
[38] *Re Atlantic Computer Systems plc* [1992] Ch 505
[39] S. 48(7) AMCON ACT , 2015
[40] R La Porta et al, 'Law and Finance'[1998], 106 *Journal of Political Economy* 1113.
[41] S. 364(a) US Bankuptcy Code

payables, taxes and administrative expenses needed to keep its business going, while it focuses on a permanent financial restructuring of all prepetition claims. In special circumstances, the court may grant the new lender a lien with priority senior or equal to that of any existing lien upon a showing that the estate is otherwise unable to obtain sufficient credit and that the interests of the existing holder of the collateral will be adequately protected.[42] A new lender may also be granted a lien on unencumbered property of the estate, or may grant a junior lien upon property that is already subject to a lien.[43] Chapter 11 provides an opportunity to restructure the manner a company in financial difficulty service its debt. The Plan can provide for a number of changes, including changes in the amounts, interest rates or maturities of outstanding debts, satisfaction or modification of liens, debt for equity swap or issuance of new debt or equity securities for cash.[44] In the US there is a robust market for securities issued by troubled companies. These investors provide liquidity and a more efficient marketplace for distressed securities and debt.

Under the UK administration the company is more likely to continue to look to its existing lenders or other finance providers for continued support. Whereas an administrator has the power to borrow and encumber assets, no special priority is given to post-administration lenders. US Chapter 11 debtor-in- possession financing is one of the beautiful features of the US rescue model, which makes US rescue model to stand out. The funding provision may not be far from the reason for more successful rescue proceeding in US. Without the introduction of equivalent provisions, which provide for priority over pre-petition claims, and adequate protection to lenders who take the risk to provide funds for ailing companies, it is doubtful whether corporate rescue will have access to funding that will make the rescue successful. There is no specific provision for funding during corporate rescue in Nigeria. The provision that can be used to provide funding during corporate rescue in Nigeria is only through Scheme of arrangement under Section 539 and 540 of CAMA. Compromise can be made with creditors and shareholders that will vary their rights and entitlements, to help the company restructure itself; outside that, there are no specific provision that provides for priority over pre-petition claims.

Rescue Plan

In US, a reorganisation plan agreed by a majority of creditors is required for a successful Chapter 11 outcome. Confirmation of a plan of reorganization is the statutory goal of every chapter 11 case.[45] The confirmation of a reorganisation plan by the court discharges a corporate debtor from fulfilling all the legal obligations that have not been specified in the plan.[46] For the first 120 days after the order for relief only the debtor may propose reorganization plans.[47] The debtor also has an exclusive right for 180 days from the petition date in which to solicit acceptances from impaired creditors and shareholders. The court may extend or reduce the exclusivity period for cause, but in no case more than 18 months following the Chapter 11 filing date. After the end of this period the creditors' committee or any individual creditor can propose its own reorganization plan. If the court approves the statement it will also fix voting procedures and set a confirmation hearing date on at least 25 days' notice to creditors.[48] Section 1129 enumerates a list of requirements but the list is not exhaustive. The explicit requirement is that the whole plan should have been proposed in good faith. Chapter 11 requires creditors and shareholders to be designated into classes, and each class whose rights will be adversely affected, must vote in favour by a majority in number and two-thirds in amount of those actually voting[49]. Only those creditors who are going to have their rights modified by the plan can vote. Generally, classification of scheme is part of the debtor's plan proposal, and there has been litigation on grounds of wrong classification. While it is important to attempt to gain consensus among creditors and shareholders, the cramdown helps businesses to reorganise even if a few creditors object strenuously. Experience has shown, that, there will always be a small minority of creditors who will resist a composition, however fair and reasonable, if the law does not subject them to a pressure to obey the general will'.[50]

Dissenting creditors are protected by convincing them that they would receive more under the plan than they would have received, if, the business was shut down and liquidated, this is known as the 'best interest' test. If a class of creditors votes to reject the Plan, the Plan can nevertheless be imposed on the class if the Plan passes the 'Fair and Equitable Test'. Section 1129(b)(2) of Chapter 11 also provides that dissenting classes should be paid in full before any junior class receives, or retains, any property under the plan. This is the so called 'absolute

[42] S. 364(d) US Bankuptcy Code
[43] S. 364(c) US Bankuptcy Code
[44] George WKuney,'Hijacking Chapter 11' [2004], 21 *Bankruptcy Developments Journal* 48.
[45] *Bank of America v 203 North LaSalle Street Partnership* (1999) 526 US 434.
[46] S. 1141 US Bankruptcy Code.
[47] S. 1121 US Bankruptcy Code.
[48] Cardozo J in *Ashton v Cameron County Water Improvement District* (1936) 298 US 513
[49] Bankruptcy Code paragraph 1126(c)16
[50] *opcit.*

priority' principle. Where a debtor is unable to confirm a plan, the Chapter 11 case may be dismissed or converted to a Chapter 7 case.[51]

The UK rescue model provides for Administrator's proposal. This is a proposal by the insolvency practitioner, as to how he intends to achieve the company rescue. It is the administrator's job to put together a proposal that seeks to satisfy one of the three statutory purposes of the administration.[52] The proposal cannot affect the priority rights of secured or preferential creditors without their consent. The administrator has eight weeks from appointment to prepare the proposal for achieving the purposes of the administration and present same to a meeting of creditors.[53] A meeting of the company's unsecured creditors is called to consider the proposal within ten weeks of appointment. The meeting may accept, reject or accept with modifications the proposals. Any modifications must be approved by the administrator. Acceptance of the proposals requires a simple majority in value of those creditors present and voting. If the proposals are accepted, the administrator must manage the affairs of the company in accordance with those proposals. If the proposals are rejected, then the court may discharge the administration, or make such other order as it thinks fit. It is important to note that provision for rescue plan have been introduced recently into Nigerian law through the amendment of the AMCON Act in 2015[54]. However, it only applies to the AMCON appointed Receivers. In both jurisdictions some level of creditor consent is required for the approval of the proposals. Court approval is also required.

Contracts

US Chapter 11 provides the debtor with tremendous flexibility regarding certain types of on-going agreements. It provides the debtor with wide-ranging and valuable powers with which it can disclaim, adopt or assign contracts. Subject to certain exceptions, the debtor may assume, assign to a third party, or reject any executory contract or lease with the court's approval.[55] Given this flexibility, the debtor's decision will usually depend on what makes the most business or financial sense, in the eyes of the debtor, for the business reorganization. The debtor or trustee may assume a contract or lease even it if contains a clause that provides for termination in the event of insolvency, provided the debtor cures any default, and if the debtor had been in default, provides adequate assurance of future performance by itself or its assignee. The trustee or the debtor in possession has the power to extract value from favourable contracts by assuming and then assigning these contracts regardless of whether the contracts themselves prohibit such assignment. Under the UK administration, there is no power to disclaim difficult contracts for an administrator, the making of an administration order does not, of itself, terminate a contract unless the contract provides so. Again, in Nigeria a receiver-manager cannot contract out of his fiduciary duties , if he does he will be held personally liable.[56] The receiver is entitled to be indemnified only where he entered into the contract in the proper performance of his functions, or with the express authority of the debenture holders, subject to the rights of prior encumbrances.[57] However, such rights could be altered through scheme of arrangement under Section 539 and 540 of CAMA.

4. Conclusion

There are some practices under United States Chapter 11 and United Kingdom Company Administration that will help Nigeria if incorporated into Nigerian rescue regime. Bodies like the Business Rescue and Insolvency Practitioner Association of Nigeria (BRIPAN), have been leading, in the advocacy for an Insolvency practice with a rescue bias, in line with the trend all over the world today. The key reforms include a stronger regulation of the insolvency practitioners, an insolvency law with automatic stay, provision for a rescue plan as a pre-requisite for approving a rescue process. United Kingdom Insolvency law has evolved with the Enterprise Act 2002 that changed the face insolvency practice in UK with its rescue provisions. Many countries in recent times had experienced a process of legislative reform and development, to come up with a legislation with a rescue bias. The present reforms in our insolvency practice under CAMA 2004 as good as it appears, which is a departure from the position under the Companies decree 1968 should only be an interim recourse in dealing with corporate rescue in Nigeria. There is need for more robust and more specific legislation on corporate rescue. We must draw lesson from United Kingdom and United States to help Nigeria's practice.

[51] Paragraph 1121(b)(c) Bankruptcy Code
[52] Stephen Griffin, *Company Law Fundamental Principles* (4th Edition Pearson Education Limited 2006) 260
[53] this period may be extended by the court
[54] S. 48 AMCON Act, 2015,
[55] S. 365(a) US Bankruptcy Code
[56] S. 390(3) CAMA 2004
[57] S. 394(2) CAMA 2004