

Contesting the Trend Towards the Globalisation of Laws in Corporate Bankruptcy:
The Experience in Africa.

Damilola Odetola*

Abstract

It has become almost impossible to speak of purely national reforms in many areas of commercial law, including bankruptcy law. The trend towards global convergence and the prominent actors has been debated in the context of bankruptcy law. Given that they are often the target of propagation, developing countries are at the centre of these conversations. So far, the literature has favoured the experience of a limited set of developing countries, mostly in Asia. This paper seeks to contribute to the understanding of harmonisation in bankruptcy law by shinning the torch on countries in a part of the world that has been largely ignored, Africa. It engages debates around the development and global spread of bankruptcy norms and considers the evolution of bankruptcy practice in Africa and recent wave of bankruptcy law reforms through the lens of these debates.

INTRODUCTION

‘To one degree or another, the momentum for reform, the content of reform, and the trajectory of reform proceed from or respond to transnational and global contexts.’¹ Increasingly, mechanisms for ordering business relations, human rights and other aspects of social activities are being developed and propagated transnationally. Between 1998 and 2004, Carruthers and Halliday trace the process of convergence in bankruptcy from ad hoc resolution of corporate failures in advanced economies, ad hoc cross border insolvency rules to national insolvency principles, regional

* BCL (Oxon), Phd Candidate, Kent Law School, University of Kent.

¹ Terrence Halliday and Bruce Carruthers, ‘The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes’ (2007) 112 (4) American Journal of Sociology 1173.

harmonisation of insolvency principles and now the current trend of global harmonisation.²

A set of prominent global actors lead the formulation of bankruptcy norms and the propagation of these norms transnationally. Notwithstanding the claim that the convergence of bankruptcy norms has gone relatively well among these global powers at the national level, it poses many questions that are yet to be fully settled; the degree to which bankruptcy norms need to be incorporated in developing economies before true convergence can be said to be achieved. Which economies matter in the emergence of global norms of bankruptcy and why. Whether true convergence is possible or even desirable in the field of bankruptcy. What the implications of the means of propagation adopted by global actors in different jurisdictions are.

The contestations are multidimensional and developing economies are caught in the middle as they are often the target of 'global' norms, guidelines and reforms.³

As economies evolve, our understanding of globalisation of norms in different areas of commercial law including bankruptcy law also evolves. This paper contributes to that understanding by illuminating the impact of bankruptcy norms in an understudied but fast-growing region of the world- Africa. While these concepts have been explored in the context of some developing economies, mostly countries in Asia- Korea, China and Indonesia, African countries have been largely ignored. Carruthers and Halliday note that from their repeated interventions in different emerging regions, global actors compile lessons which they apply to other jurisdictions and from which normative models emerge. However, '[Big, transitional] and geographically important countries weigh more heavily as models for IFIs than small or marginal nations'.⁴ Thus, while accumulated experiences in countries in parts of the world like East Asia and Latin America have been studied,

² ibid 1136

³ ibid

⁴ ibid 1188

the authors acknowledge that 'African countries are almost never used as exemplars'.⁵

This aim of this paper is to close some of that gap by exploring bankruptcy law reform and practice in Africa. In defining the scope of the paper, it is acknowledged that a crucial part of the debate is if and how developing economies can navigate the challenge of conforming to global standards without sacrificing their development needs.⁶ However, the tensions that can occur between the law on the books and the law in practice are not extensively discussed in this paper. Rather, the focus of the paper is to capture the process of bankruptcy reforms and developments in bankruptcy practice as they evolve in Africa. In doing so, the paper queries the factors driving the developments including the role of global actors. The discussion sets the stage for future analysis of how new laws would interact with local institutions in African countries. Also, the contributions the paper makes to the understanding of how bankruptcy norms are impacting bankruptcy reform in Africa, promotes the building of a more complete picture of the trend towards convergence in bankruptcy. These insights may also be applicable to understanding the globalisation of other fields of law in Africa and other developing economies.

The discussion in this paper is structured in three parts. The first part gives a brief background to ideas around global convergence in bankruptcy, the emergence of global norms, the prominent actors involved. Drawing from the experience in Asia,

⁵ *ibid*

⁶ The tensions that persist between global norms and local institutions have been extensively explored in the literature. Katharina Pistor, Katharina, Martin Raiser and Stanislaw Gelfer, 'Law and Finance in Transition Economies' (2000) 8(2) *Economics of Transition* 325-68; Daniel Berkowitz, Katharina Pistor and Jean Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2002) 47 *European Economic Review* 165-95 suggest that how a legal system was initially received rather than its origin, determines - whether how it functions today. Mariana Prado and Michael Trebilcock, 'Path dependence, development, and the dynamics of institutional reform' (2009) 59 (3) *University of Toronto Law Journal* 341, 369; Thomas Heller, 'An Immodest Postscript' in Erik Jensen & Thomas Heller (eds) *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003); Kevin Davis and Michael Trebilcock, 'What Role Do Legal Institutions Play in Development?' October 20, 1999, Faculty of Law, University of Toronto Draft prepared for the International Monetary Fund's Conference on Second Generation Reforms, November 8-9, 1999; Dani Rodrik, 'Second-best institutions' (2008) No. w14050. National Bureau of Economic Research 2; Berkowitz, Pistor & Richard, 'Economic development, legality, and the transplant effect' (2003) *European Economic Review*, 47(1) 170; David Trubek, 'Scan Globally, Reinvent Locally: Can We Overcome the Barriers to Using the Horizontal Learning Method in Law and Development?' (2014) 258 *Hosei Ronshu, Nagoya University Journal of Law and Politics* 5; Joseph Stiglitz, 'Scan Globally Reinvent Locally. Knowledge Infrastructure and the Localization of Knowledge' in Diane Stone (ed), *Banking on knowledge: the genesis of the Global Development Network* (Routledge 2003).

it examines the factors informing the spread of global bankruptcy norms and the means of propagation.

The second part shifts the focus to Africa beginning with an overview of Africa's place in the global economy and the relationship of global actors with African economies. It considers the links between Africa's role in global markets and the spread of global scripts of bankruptcy across the continent. It concludes by evaluating the growing involvement of global actors in bankruptcy law in Africa.

Part three considers the evolution of bankruptcy law and practice in Africa. The recent developments are considered in two parts, one examines changes in the corporate bankruptcy practice, the factors driving these changes and the stakeholders involved. The second part presents an outline of the progress of insolvency law reforms in 36 African countries. The paper concludes that developments in bankruptcy are being driven by a combination of exogenous and endogenous factors. Particularly, the growing integration of Africa into the global economy has impacted the pace of reform and involvement of global actors. While the interaction between African economies and global actors may have taken a less robust form than in Asia however, changes in bankruptcy landscape are not free from the influence of global actors and the norms they offer.

Part 1: GLOBALISATION OF BANKRUPTCY NORMS

Global norms emerge for a variety of reasons and in different ways. They can be built in response to global crisis experienced by many countries in the world. In this case, norms can develop as a result of 'similar but independent' responses to shared problems.⁷ They can also arise in a deliberate and less-voluntary way, through an

⁷ Christoph Knill, 'Introduction: Cross-national policy convergence: concepts, approaches and explanatory factors' (2005) 12 (5) *Journal of European public Policy* 769; DiMaggio and Powell describe the channels through which the spread of norms occurs using the concept of isomorphism (convergence). They identify mimetic, coercive and normative isomorphism as the main channels of propagation. DiMaggio and Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective rationality in Organisational Fields' (1983) 48 *American Sociological Review* 147-160.

imposition of policies and standards by powerful organisations and governments.⁸ The influence of international treaties and resulting harmonisations of laws and policies can also contribute to the building of global norms. Other causal factors like transnational communication, and regulatory competition⁹ involve lesson-drawing and information gathering among countries which are facilitated by stakeholder cooperation, common affiliations and institutional memberships.¹⁰ Together with globalisation and market integration, these factors work hand in hand to produce what can be regarded as global scripts in different areas of policy.

The globalisation of norms tends to be more prominent in commercial law as there is less resistance here than with traditional laws like inheritance, religion and marriage laws.¹¹ Anthony Ogus provides an economic explanation for competition among legal systems and the convergence that can result from such competition.¹² For Ogus, whether convergence will occur or not depends on whether the laws in competition are homogenous or heterogenous. Homogenous laws are those that facilitate economic transactions. Because they operate to reduce overall costs for all involved, there is less resistance to their natural (or even forced) convergence. Heterogenous laws on the other hand seek to dictate social and economic objectives that are preferable for some and not for others. For such laws, convergence is less likely to arise naturally and unsuitable for forced convergence. A relevant question from this literature is whether bankruptcy law belongs to the heterogenous group of laws where some outcomes are preferable for some consumers than others.

The theories are divided on the possibility and desirability of complete convergence in bankruptcy. While some groups argue for ultimate homogeneity of financial

8 Knill (n 7) 770; Terence Halliday and Bruce Carruthers, *Bankrupt: global lawmaking and systemic financial crisis* (Stanford University Press 2009) 9

9 Amanda Perry, 'Multinational enterprises, international economic organisations and convergence among legal systems' (2002) 2 *Non State Actors & International Law* 23-39.

10 *ibid*

11 Amanda Perry, 'Multinational enterprises, international economic organisations and convergence among legal systems' (2002) 2 *Non State Actors & International Law* 23-39; Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) 36; Amanda Perry, 'The Relationship between Legal Systems and Economic Development: Integrating Economic and Cultural Approaches' (2002) 29 *Journal of Law and Society* 282, 290.

12 Anthony Ogus, 'Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law' (1999) 48 *I.C.L.Q.* 405.

architectures, others maintain that local varieties and peculiarities will remain.¹³ Applying Ogus's analysis regarding homogenous and heterogenous laws, arguments for high convergence in bankruptcy law claim that bankruptcy plays an important role in the international financial architecture. Therefore, it is one of those areas where convergence is most obvious and necessary. On the other hand, skeptics maintain that bankruptcy is 'embedded in local legal culture and institutions' characterised by 'divergent attitudes to debt and debtors' which provide strong reasons to argue for low convergence.¹⁴

Both arguments are supported by some evidence – in terms of formal law, there is considerable convergence of bankruptcy norms, most clearly represented by the UNCITRAL model law and the UNCITRAL Legislative Guide, which have become influential in national bankruptcy law reforms. However, contradictions and conflicts also exist underneath this bubble, particularly at the national and local levels.¹⁵

Harmonisation of norms did not arise in corporate bankruptcy until the 1990s.¹⁶ Before this time, there were no international standards governing either domestic or cross-border bankruptcies. The beginning of change came with bankruptcy reform in the United States, Canada and the United Kingdom in the 1980s, the rescue of viable companies being the most significant reform agenda.¹⁷ In many parts of the world, corporate insolvency laws were highly obsolete or unused. Asian countries like Indonesia and South Korea had extensive bankruptcy laws that were not used in

¹³ David Held et al, 'Global transformations: Politics, economics and culture' in *Politics at the Edge* (Palgrave Macmillan UK, 2000) 14-28; Dimitrova and Steunenberg, 'The search for convergence of national policies in the European Union, An impossible quest?' (2000) 1 (2) *European Union Politics* 201-26; D.W Drezner, 'Globalization and policy convergence' (2001) 3 *The International Studies Review* 53-78; Perry questions the need to define a set of characteristics against which all legal systems are measured. Amanda Perry (n 9).

¹⁴ Halliday and Carruthers (n 8) 25; They also report that IFIs have considered insolvency a difficult case for homogenisation for a long time. This is because of its connection to embedded legal cultures that are not readily susceptible to change. Factors such as the level of protection nations offer to property and economic interests, the options offered to a company in distress, the level of protection offered to creditors and debtors etc are relevant. Halliday and Carruthers (n 8) 135-136

¹⁵ See Halliday and Carruthers (n 1) 1135 for factors that affect settling at these levels – indeterminacy, diagnostic problems, actor mismatch and contradictions.

¹⁶ Susan Block-Lieb and Terence Halliday, 'Settling and Concordance *Two Cases in Global Commercial Law*' in Terence Halliday, *Transnational legal orders* (Cambridge University Press 2015) 77

¹⁷ *ibid*

practice.¹⁸ In Africa, bankruptcy laws were outdated and unused in practice. Like most formal legislations, bankruptcy laws had been dated back many decades.¹⁹ Change in Anglo-American law however triggered a flurry of reforms in other regions and began the process of harmonisation.

Two major factors fuelled the rapid development of global norms in corporate bankruptcy: market integration and financial crises. The push for globalisation of commercial laws was driven by the fear that the integration of markets had far outpaced the globalisation of the law. This asymmetry has been painted as dangerous and a recipe for global financial instability.²⁰ With markets becoming more connected, the occurrence of cross border bankruptcies increased. Professional associations like the IBA and regional organisations like the European Union began to seek more harmonisation of bankruptcy law among members. Soon, powerful governance institutions like the UN through the UNCITRAL became involved in the harmonisation process. In 1997, UNCITRAL produced its model law on cross border insolvency.²¹

The connectedness of markets also meant that domestic bankruptcies could have huge global implications. The Asian financial crises between in the late 1990s led to reforms of corporate bankruptcy laws assisted by the G22, The Asian Development Bank, The IMF and the World Bank in that region. Although the crises and corporate failures were triggered internally, reform was driven externally by global actors and was based on the rehabilitation culture of the US.²² In Central and Eastern Europe, the European Bank for Reconstruction and Development (EBRD) had an agenda to appraise bankruptcy laws and practices.²³ With law making and reform experiences

¹⁸ China had no formal corporate bankruptcy law on the books. Roman Tomasic and Zinian Zhang, 'From Global Convergence in China's Enterprise Bankruptcy Law 2006 To Divergent Implementation: Corporate Reorganisation In China' (2012) 12 (2) *Journal of Corporate Law Studies*; *ibid*.

¹⁹ see Table 1.0 below.

²⁰ Halliday and Carruthers (n 8) 25

²¹ See <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html>

²² Block-Lieb and Halliday (n 16) 78; Bruce Carruthers and Terence Halliday, *Rescuing business: The making of corporate bankruptcy law in England and the United States* (Clarendon press 1998)

²³ The EBRD embarked on a diagnostic exercise within Europe and produced a report that contained implicit norms. *Ibid* 5; European Bank for Reconstruction and Development (EBRD), *Transition Report 1999: Ten Years of Transition* (London: EBRD 1999).

in different countries, IOs began to produce sets of normative principles, guidelines and standards that were transnational in scope. They published guidelines, principles and transnational soft laws to guide countries in bankruptcy legislation. Notably, the World Bank produced its *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems*,²⁴ and the IMF published a book which identified the main principles of corporate insolvency laws for nations.²⁵ Norms have also come in the form of a model law that gives some room for adaption like the UNCITRAL Model Law.²⁶

Some of the prominent goals that global scripts push include-

- Maximisation of value of assets;
- Liquidation of moribund enterprises and rehabilitation of viable ones;
- Ensuring equitable treatment of similarly situated creditors;
- Striking a balance Creditor and Debtor rights (efficient and impartial resolution of insolvency);
- Ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information;
- Recognition of existing creditor rights and establishment of clear rules for ranking of priority claims.²⁷

It has been stated that the means of achieving these norms might take different forms among countries.²⁸ For instance, the UNCITRAL Legislative Guide while addressing the issues central to an effective and efficient insolvency law, evaluates different approaches to enable countries choose one most suitable in local context.²⁹

²⁴ World Bank (April 2001 as revised in 2011) <www.worldbank.org/ifa/ipg_eng.pdf>

²⁵ Orderly and Effective Insolvency Procedures: Key Issues (Legal Department International Monetary Fund 1999).

²⁶ Countries have some freedom to adapt the model law to suit their needs but it is recommended that they make as few changes as possible 'in order to achieve a satisfactory degree of harmonization and certainty' UNCITRAL Model Law on Cross Border Insolvency, Guide to Enactment and Interpretation 25

²⁷ The World Bank Principles (n 24) 2-5; The UNCITRAL Guide 10-14. These core norms are shared by global actors and guidelines such as the Legislative Guide, IMF and World Bank Principles. These standards are routinely revised to provide more details on how laws can be structured to achieve these norms. Some of the other prescriptions include the availability of a regulated body of insolvency practitioners, post commencement financing, special bankruptcy courts etc.

²⁸ For instance, while the US uses the debtor-controlled Chapter 11 reorganisation procedure, the corporate rescue regime in the UK is a creditor-oriented administration procedure.

²⁹ The UNCITRAL Legislative Guide

It is however noteworthy that other activities of global actors can have the effect of holding out specific legal forms as the preferred or more effective approach.³⁰ The next section considers how these norms are planted in developing economies and the factors that inform the means and direction of propagation by global actors.

Five sets of global actors have been identified as influential in shaping global standards of bankruptcy and consequently the bankruptcy institutions of nation states;

- (i) The club of nations (such as G 7, G 22 and OECD)
- (ii) International financial institutions such as World bank and the IMF who in addition to implementing the directives of the club of nations, also develop global norms and provides diagnostic services to 'ailing' nations
- (iii) International governance organisations such as the United Nations
- (iv) Confederates of professionals such as INSOL, IBA
- (v) Core nations such as US, Germany who often work behind the scenes to influence international bodies.³¹

Tension between global powers arise in the struggle to determine which set of norms emerge as the global standard. Because global norms privilege those of a particular local, they may be better understood as *globalised localisms*.³² In corporate bankruptcy, US bankruptcy law and practice has been quite influential in influencing bankruptcy regulation across the globe.³³ Notwithstanding the competition among major global actors (particularly UNCITRAL and the World Bank), they moved towards a consensus on these norms with remarkable speed and

³⁰ Such as the World Bank Doing Business rankings. We discuss the impact of these reports on national bankruptcy legislations below.

³¹ Terence Halliday and Bruce Carruthers (n 8) 33

³² *ibid*; Boaventura de Sousa Santos, 'The processes of globalisation' (2002) *Revista Crítica de Ciências Sociais and Eurozine* 1-48, 36

³³ Halliday and Carruthers (n 8) 346-347; One explanation for this is the influence and proximity of the US to powerful global actors like the World Bank, the IMF and the UN. Also, professional organisations like the IBA are proliferated by US lawyers, judges and insolvency practitioners. The UK has not been a strong point of reference globally especially in relation to its corporate rescue and restructuring laws. Recently, consultations have been held for a review of UK Insolvency framework to facilitate restructuring. Insolvency Service, 'A review of the Corporate Insolvency Framework' (25 May 2016) <www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework>

have remained largely unified in their prescriptions. The UNCITRAL Legislative Guide which was published in 2004 became particularly influential as many countries began to reform their laws in line with the UNCITRAL standard. Global actors like the IMF and the World Bank also relied on the Legislative Guide in assessing and implementing insolvency law reform.³⁴ By the end of 2012, it could be claimed that global norms of bankruptcy had become widely accepted (settled) among global actors.

It is noted that the use of 'global' in relation to these bankruptcy norms have met with some objections mainly because it suggests that there is a form of consensus between the nations of the world as to what the global script on bankruptcy ought to look like. Carruthers and Shaffer have criticised the use of the word 'global' as misleading because it suggests that legal order is truly global in its geographic reach. This is not the case, rather, the process involves a game of power between powerful global actors on the one hand and between these global actors and nations at the peripheries of power on the other hand.³⁵ Given the amount of variation that can be present in the geography, organisation and content of this transnational ordering, they consider the term *Transnational Legal Orders* to be a more appropriate representation of what is going on.³⁶

In this paper, the term global is used to describe prominent actors in the process of harmonisation, and the norms they offer. By referring to them as global norms and actors, it is not intended to suggest that the norms have been accepted by all nations of the world or that the actors are representative of all countries. Rather, it loosely describes the global scripts of bankruptcy that these set of actors propagate transnationally in different forms and as part of the trend towards globalisation. They are global because they are sets of shared ideas, expectations and laws that are

³⁴ The World Bank Doing Business Reports state that the methodology and indices are based on World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes and the UNCITRAL Guide. See <www.doingbusiness.org/methodology/resolving-insolvency>

³⁵ Halliday and Carruthers (n 8) Part 1

³⁶ A transnational legal order has been defined as a 'collection of formalized legal norms and associated organisations and actors that authoritatively order the understanding and practice of law across national jurisdictions' Terence Halliday and Gregory Shaffer, 'Transnational Legal Orders' in Terence Halliday, *Transnational legal orders* (Cambridge University Press, 2015) 5

created and diffused among nation states without carrying traditional international law implications.³⁷

1.1. The propagation of bankruptcy norms in the developing countries

The claim that global scripts for bankruptcy are fairly settled among global actors is unsurprising, considering that they are often the originators of so-called global norms.³⁸ For advanced economies who may have lost out in the competition for globalising their local norms, the formulation of global norms is often broad enough to accommodate their bankruptcy institutions. It may even be argued that the distance between the national laws of those countries and the global scripts that have emerged was never significant to begin with. Inevitably, the main targets of propagation are developing countries.³⁹ The most important piece in the propagation of global scripts of bankruptcy are less powerful, developing economies, whose laws and institutions bear a greater distance to global scripts. Global actors have pressured and persuaded transitional, emerging and developing jurisdictions into bringing their domestic laws in conformity with these norms. For different reasons, the trend of convergence in bankruptcy has arisen naturally in some jurisdictions and situations, failed to take traction in some and been forced in others.

Different factors can inform which economies global actors choose to actively propagate global norms in and the methods they adopt. Two factors have been shown to be important- the interests of the global actors in a developing country and the leverage of global actors over the country. Developing countries vary in the level of their integration into the global market and their importance to the global economy. The more important a developing economy is to global actors, the more

³⁷ Sanjeev Khagram, James V. Riker and Kathryn Sikkink, *Restructuring world politics: transnational social movements, networks, and norms* (U of Minnesota Press 2002) 14;

³⁸ Even for UNCITRAL legislative Guide which has been the poster child for homogenisation of bankruptcy norms, because of its claim to legitimacy by involving a wide group of consultations from both advanced and developing economies, the overarching influence of US and French law is not lost.

³⁹ The UNCITRAL Guide, the IMF principles are said to be aimed at developing economies to facilitate the building of their bankruptcy frameworks in line with advanced economies.

important it is for global actors that their commercial laws, be aligned with global scripts of bankruptcy.

Global actors adopt different means of propagation ranging from emulation, learning, networks, suasion, reward systems to strong encouragement and economic coercion. The leverage that global actors have in a country informs the choice of the means of propagation in that country. Also, the roles they play differs by country and situation and could range from hands on, direct interaction with the government in the drafting and implementation of new law to the provision of technical aid to support local actors. Their interests and leverage in developing economies also respond to movements in the economy. It has been pointed out that Thailand was in a stronger bargaining position and able to resist external pressure in 1995 than in 1997, such that the IMF was more likely to successfully achieve insolvency law reform by coercion in 1997 than in 1995.⁴⁰ Factors such as financial crisis may make economies more vulnerable to external influence thereby becoming a precipitating factor for intervention in bankruptcy reform. The Asian Financial crisis of 1997 was one of the most important factors in bankruptcy reform in many Asian countries.⁴¹

In ordinary circumstances, the preferred means has been to show the legitimacy of a model by persuading developing economies as to its inherent rightness. Labels such as 'universal, normal, modern, efficient, advanced' are used stamp these norms with legitimacy, reduce resistance to enactment and allow for easy implementation.⁴² By modelling these norms as desirable, developing countries are nudged in the direction of conforming reform.

Coercive pressure is applied where global actors are in a strong position to extract compliance from countries which they enjoy some leverage over. Financial

⁴⁰ Bruce Carruthers and Terence C. Halliday, 'Negotiating globalization: Global scripts and intermediation in the construction of Asian insolvency regimes (2006) 31(2) Law & Social Inquiry

⁴¹Halliday and Carruthers report that by 2005, all countries in the region had a single standard legitimated by the United Nations to which they are pressed to conform. Ibid 539

⁴² Halliday and Carruthers (n 8) 24, 25-27

dependence can leave a nation at the mercy of IOs especially in situations of financial crises where IOs provide rescue financing. IFIs can use reform as a conditionality for loans or financial aid. The series of events in Indonesia from 1998 to mid-2000s where the IMF exerted quasi-coercive pressure by mandating bankruptcy reforms as conditions for providing new loans illustrates this.⁴³

Persuasion, a subtler form of pressure, was adopted in Korea, a rich developing country, that was less susceptible to pressure.⁴⁴ The competence and knowledge of local actors also play a role in the dynamics of propagation. Contrasting bankruptcy reform in Korea and Indonesia, Carruthers and Halliday note that one of the reasons Korea was less vulnerable to external influence than Indonesia was because Korea's internal capacities were much better developed. In Korea, IOs set broad parameters for reform and let Korean stakeholders fill in the details while the reform in Indonesia was more intrusive.⁴⁵

China presented a more difficult case for propagation, having been considered immune to western institutions for a long time and defying expectations that it would move from a command to a market economy as it developed.⁴⁶ It has been observed that the economic progress made in China is not remarkable because they have happened *despite* the absence of western-like institutions, rather they are remarkable because they have happened *because* of the absence of the western institutions.⁴⁷ The Chinese economy was relatively unaffected by the financial crisis and global actors did not have as much leverage to impose reform in China.⁴⁸ In fact, China enacted a completely indigenous bankruptcy law that was suited for its economic and political structure at about the same time law reform was carried out in the UK.⁴⁹ The growing importance of China in the Asian region and the global

⁴³ Halliday and Carruthers (n 1) 1155

⁴⁴ Halliday and Carruthers (n 8) 40-42

⁴⁵ Carruthers and Halliday (n 1) 1167

⁴⁶ Franklin Allen and Jun Qian, 'Comparing legal and alternative institutions in finance and commerce' in Heckman, Nelson, and Cabatingan (eds) *Global perspectives on the rule of law* (Routledge, 2010) 119 - 121

⁴⁷ *ibid* 118

⁴⁸ Zhou Fang, and Geng Xiao, 'China in the Context of the Asian Financial Crisis' (1999) *China Review* 165-178;

⁴⁹ Peng Xiaohua, 'Characteristics of China's First Bankruptcy Law' (1987) 28 *Harv. Int'l. LJ* 373. China's bankruptcy law of 1986 which dealt with the bankruptcy of state-owned enterprises was passed in 1986, coinciding with the enactment of the UK Insolvency Act 1986.

economy as a whole however made it important for global actors to have a sustained interest in propagating global norms in China.

Even if able to resist the imposition from IFIs, China could not remain immune to pressures to conform to global standards as its economy became more integrated in global markets.⁵⁰ The work of global actors was therefore made easier by a coinciding willingness in China to open up to the incorporation of some foreign ideas, albeit measuredly. China has selectively allowed some global norms of bankruptcy into its bankruptcy regime and has now ended up with a reorganisation law that is acceptable to global actors as sufficiently representative of the norms they profess.⁵¹ Intervention from global actors⁵² was achieved largely by suasion and offered in the form of technical aid. In contrast to the rushed reform in more vulnerable Indonesia, the reform process happened at the pace of local actors with the close involvement of Chinese experts who were knowledgeable about the bankruptcy laws of different countries.

In Latin America, bankruptcy law reform gained momentum following series of financial crises such as the Mexican Peso crisis of 1995, the devaluation of the Brazilian real in 1999, Argentina's external debt default in 2001 and its banking crisis in 2002 and the direct effect of the Asian financial crisis of 1997.⁵³ The interests of global powers, particularly the US in Latin America has also influenced the trajectory and content of bankruptcy reform in the region.⁵⁴ Argentina, Brazil, Mexico, Uruguay, Bolivia, Peru have all adopted reorganisation laws and debt restructuring frameworks which are variants of the US chapter 11.

⁵⁰ Halliday and Carruthers (n 8) 41;

⁵¹ The Enterprise Bankruptcy Law 2006. It has been pointed that this law may essentially amount to "window dressing" for western investors. For instance, the bankruptcy laws in many aspects resemble bankruptcy codes in Western countries but there continues to exist a parallel system based on existing rules and practices. Li, Shuguang, 'Bankruptcy law in China: lessons of the past twelve years' (2001) 5 (1) Harvard Asia Quarterly

⁵² The World Bank, Asian Development Bank, Germany, Australia. See Bruce Carruthers and Terence C. Halliday, 'Negotiating globalization: Global scripts and intermediation in the construction of Asian insolvency regimes (2006) 31(2) Law & Social Inquiry 544-560

⁵³ Olivares-Caminal and Gerónimo Frigerio, 'Expedited Debt Restructuring in Latin America' (2010).

⁵⁴ *ibid*

In addition to involvement in legislative reforms in individual countries, global actors also supplemented their propagation of norms in the Asian region through networks and peer pressure. The Forum for Asian Insolvency Reform (FAIR) is an organisation co-founded by Organisation of Economic Co-operation and Development (OECD), the Asia-Pacific Economic Cooperation forum (APEC), the World Bank Group and the Asian Development Bank (ADB). FAIR hosts events that bring together stakeholders to discuss insolvency reform in Asia.⁵⁵ On the motivation for creating FAIR, the World Bank stated that ‘as the economies in Asian countries grow in global prominence, it becomes increasingly important that they create insolvency regimes that provide creditors with sufficient protection to encourage the lending of capital.’⁵⁶ Even if not efficient in producing quick and specific outcomes like direct intervention would, it is cost effective for global actors to invest into reform in a few countries and then reach other countries in the region through a combination of modelling and peer pressure. We shortly discuss how this strategy is now being developed in Africa.

Also, global actors can press for the adoption of global standards from a safe distance using the tools of peer review programs and resulting recommendations. Examples are the IMF Article IV consultations⁵⁷ or more prominently through projects like the World Bank Doing Business projects. The World Bank Doing Business (DB) reports have become an influential reference point in the evaluation of the growth rate and the ease of doing business in economies all over the world.⁵⁸ Apart from providing information to foreign investors and potential trade partners about the economic health of economies, the reports are also intended to direct the

⁵⁵ The World Bank (28 July 2016) <<http://www.worldbank.org/en/topic/financialsector/brief/forum-for-asian-insolvency-reform-fair>>

⁵⁶ *ibid*

⁵⁷ The IMF's regular monitoring of economies and associated provision of policy advice. <<https://www.imf.org/external/about/econsurv.htm>> ; Also, The Report on the Observance of Standards and Codes (ROSC) initiative run by the IMF and World Bank operate to develop and disseminate international standards and codes. Insolvency and Creditor Rights is one of the three target areas of the ROSC <<http://www.worldbank.org/en/programs/rosoc> ; <http://www.imf.org/external/NP/rosoc/rosoc.aspx>

⁵⁸ B Arruñada, ‘Pitfalls to avoid when measuring institutions: Is Doing Business damaging business?’ (2007) 35(4) *Journal of Comparative Economics* 732; Davis and Kruse, ‘Taking the Measure of Law: The Case of the Doing Business Project’ (2007) 4 32 *Law and Social Inquiry* 32

policy and reform agenda of governments.⁵⁹ One of the important indicators for ranking in the DB reports is the resolution of insolvency. Indices for ranking insolvency systems include the cost, time, outcome and recovery rate in insolvency proceedings. Importantly, the strength of insolvency frameworks is measured by considering the formal rules regarding management of assets, availability of post commencement financing, reorganisation proceedings and creditor participation.⁶⁰ Countries get points for these indices depending on factors such as the availability and design of reorganisation proceedings. The methodology adopted by the World Bank for insolvency indicators in the DB reports is heavily influenced by the principles considered earlier (the Bank Guidelines and UNCITRAL Guide).⁶¹

The DB reports clearly provide a useful database and information resource about the economy and accompanying legal structures of virtually all the countries of the world. For some years, the availability and design of reorganisation proceedings have been recognised by the DB reports as one of the indicators of effective insolvency systems. It is unsurprising that many developing countries have in this period imported US Style reorganisation proceedings into their laws.⁶² This is in spite of the WB's caution that the existence of a reorganisation procedure does not guarantee that it can or will be used in practice.⁶³

⁵⁹ World Bank Doing Business Reports 2005, 17-20; 2007, 16-20; Simeon Djankov, manager of the Doing Business database reported that 21 different reforms over the past two years were inspired by the 'Doing Business' audit. See "Unblocking Business," *The Economist*, 15 September 2005.

⁶⁰Doing Business Reports 2015, 2016 (Resolving Insolvency) <www.doingbusiness.org/methodology/resolvinginsolvency>

⁶¹ The DB Reports state that the methodology and indices are based on the seminal work of Hart, Djankov, McLiesh & Shleifer, 'Debt Enforcement around the World' (2008) 116 (6) *Journal of Political Economy*; World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes and the UNCITRAL Guide. See <www.doingbusiness.org/methodology/resolving-insolvency>

⁶² The Doing Business 2016 reports on insolvency reform reports, 'In the five years from 2009 to 2014, 60 economies implemented 87 reforms affecting the *Doing Business* indicators on resolving insolvency. Reforms in the area of corporate reorganization were the most common: 10 economies introduced a new reorganization proceeding, and 21 promoted reorganization or made improvements to their existing reorganization framework'. <www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/AnnualReports/English/DB16-Chapters/DB16-CS-RI.pdf> For example, Cambodia (2009), Columbia (2009), Cyprus (2016), Jamaica (2016). See <www.doingbusiness.org/data/exploretopics/resolvinginsolvency/reforms>

⁶³ The reason for this caution is clear, reorganisation procedures are complex, expensive and highly dependent on efficient enforcement mechanisms, expert practitioners and judges. These factors remain a challenge even in the US. As Allen and Qian compellingly argue, 'if there are significant deficiencies in using the legal system in countries with the most developed institutions, these deficiencies are likely to be magnified in developing countries with poor institutions' Djankov et al (n 61) 1106-1107; The American Bankruptcy Institute, Commission to Study the Reform of Chapter 11 (2012-2014) Final Report 12-18; Franklin Allen and Jun Qian, 'Comparing legal

Conspicuously missing from discussions about bankruptcy reform and the spread of so-called global norms across developing countries are nations in Africa. Many African countries have a long history of depending on IFIs for financial aid, credit and technical support. They have also experienced their fair share of financial and economic crises; elements that spell a high degree of susceptibility to pressure from global actors for bankruptcy law reform. Bankruptcy reform in Africa has however not attracted the attention of global actors as in Asia. The next section considers Africa's place in the global economy and the impact of this on the propagation of bankruptcy norms on the continent.

Part II: THE PROPAGATION OF BANKRUPTCY NORMS IN AFRICA

2.1. Africa's place in the global market.

One of the factors that inform the interest of global actors in the propagation of bankruptcy norms in a developing country, is the importance of such a jurisdiction to the global market. Debates about if and how Africa fits in the global economy are not new. Questions have been asked in relation to trade regimes in Africa and the activities of multinationals on the continent.⁶⁴ Where many emerging jurisdictions have experienced a sustained increase in trade and foreign direct investment to earn them a place as players in the global economy, African countries and their firms have been missing. This has led some to the conclusion that Africa resides on the fringes on the global economy.⁶⁵ Africa's detachment from the global financial markets has even been used to explain why the continent did not take a direct hit from a financial crisis that was said to be 'global'.⁶⁶

and alternative institutions in finance and commerce' in Heckman, Nelson, and Cabatingan (eds) *Global perspectives on the rule of law* (Routledge, 2010) 119

⁶⁴ Antoine Bouet, Santosh Mishra and Devesh Roy, 'Does Africa trade less than it should, and if so, why? The role of market access and domestic factors' (2008) Intl Food Policy Res Inst; Arvind Subramanian and Natalia T. Tamirisa, 'Is Africa integrated in the global economy?' (2003) 50(3) IMF Staff Papers 352-372;

⁶⁵ Samir Amin, 'Africa: Living on the fringe' (2002) 53 (10) Monthly Review 41; Geoffrey Schneider, 'Globalization and the poorest of the poor: global integration and the development process in sub-Saharan Africa' (2003) 37(2) Journal of economic issues 389-396.

⁶⁶ Although it has been argued that Africa suffered from the aftershocks of the crisis. Kimiko Sugimoto, Takashi Matsuki and Yushi Yoshida, 'The global financial crisis: An analysis of the spillover effects on African stock markets' (2014) 21 Emerging Markets Review 201-233.

This detachment might also explain the disengagement of global actors in bankruptcy reform in Africa. While financial crisis in Asia led to intervention that resulted in bankruptcy law reform because of the growing importance of that region as a global player, financial crisis in Africa has not elicited the same response. Countries in Africa have moved in and out of economic downturns, recessions and financial crises.⁶⁷ However, because they are not regarded as important to the global financial architecture, crises are not expected to have any significant impact outside the continent.

It is not suggested that Africa or its laws and institutions have been untouched by global actors. For many decades, most of the global players who are also the dominant actors in the building of global norms of bankruptcy have maintained a relationship with Africa. Notably, the UK and France by virtue of their colonial history have continued to influence the legal systems of former colonies, the US cemented its place as a significant aid donor and trade partner, and IFIs like the IMF and the World Bank as development partners and creditors of last resort.

Loans from IFIs accompanied by conditionalities (comparable to the conditionalities that cemented bankruptcy reform) are not a strange concept in Africa.⁶⁸ Thus, if financial crisis and the resulting aid and loans did not produce the same revolutionary result for bankruptcy law in Africa, it was not for a lack of leverage. Rather, it may be attributed to a deprioritising of private sector and investment related reform in Africa. A review of the conditionalities of IMF and World bank lending to African countries suggest a focus on public sector governance, public financial management reform, financial management, accountability and budget process, social sector reform with less emphasis on private financial sector reform.⁶⁹

⁶⁷ Vijay Gupta, 'Economic Crisis in Africa' (1985) 41(2) *India Quarterly* 236-250; John Ravenhill ed, *Africa in economic crisis* (Springer 1986); Peter Lewis, *Africa: Dilemmas of development and change* (Routledge 2018).

⁶⁸ Ranging from the market liberalisation programs like the Washington Consensus, structural adjustment programs, Poverty Reduction Strategies, to aids and debt relief, resources have longed been extended on the condition of reform. In Moyo Dambisa 'Dead Aid: Why aid is not working and how there is another way for Africa' (Vancouver : Douglas & McIntyre 2009), the author condemns the reduction of African countries to a childlike state of beggary.

⁶⁹ See

<http://siteresources.worldbank.org/PROJECTS/Resources/409401114615847489/Conditionalityfinalreport120407.pdf>> ; Carlos Santiso, 'Good governance and aid effectiveness: The World Bank and conditionality' (2001) 7(1) *The Georgetown public policy review* 1-22.

Conditionalities have mostly responded to the belief that what Africa needed the most was good governance.⁷⁰ Also, for a region that was not considered to be a player in the global market, there was little to be gained from aligning its bankruptcy laws with global norms.

Apart from the provision of aids and loans, Africa has a history of decades of trade with leading nations. This trade has mostly revolved around the exportation of extractive resources, mostly of crude oil and metal resources.⁷¹ Foreign direct investment into and out of Africa has even been more dismal than the volume of trade,⁷² with most foreign direct investment also being largely focused on the primary commodities sector.⁷³ Despite being its largest trade partner and foreign donor for many decades, the US (and indeed most of the developed world) did not have the political, strategic and economic interests that it has in Europe, Asia, the Middle East or Latin America.

2.2. Africa's growing importance in the global economy.

The past decade has brought a boost in the growth of African economies and the beginning of movement away from the fringes. Africa was recently recognised as the second fastest growing continent in the world after South Asia.⁷⁴ With the increase in economic growth and huge developmental projects coming out of Africa, the continent has received more global attention. Africa witnessed an accelerated GDP growth rate of 4.5% in 2015 and 5% in 2016 from 3% in 2013, earning it first place in

⁷⁰ C Biau and J Biau, 'Governmental Reform in Developing Countries: External Conditionality versus Peer Pressure. The Case of Kenya' (2008) Reinvention 1. The focus on good governance in IMF and World Bank conditionality to developing countries in Africa has been the subject of criticism. It has been argued that conditionality has so far failed to achieve reform in governance because as Kapur and Webb explain, 'reforms rarely succeed unless a government shares the conviction that they are essential'. Devesh Kapur and Richard Webb, 'Governance-related Conditionalities of the International Financial Institution' (2000)

⁷¹ Scott Taylor, *Globalization and the Cultures of Business in Africa: from patrimonialism to profit* (Indiana University Press, 2012) 17

⁷² Foreign direct investment (FDI) is an investment that involves a long-term relationship between two economies. It reflects a lasting interest and control by a foreign direct investor, resident in one economy, in an enterprise resident in another economy. http://unctad.org/en/PublicationChapters/tdstat42_FS09_en.pdf

⁷³ And failing to impact the economies of the countries significantly. Scott Taylor, *Globalization and the Cultures of Business in Africa: from patrimonialism to profit* (Indiana University Press, 2012) 17; Todd Moss, 'Where does Africa fit in the globalization puzzle?' Yale Insights (23 June 2009) <https://insights.som.yale.edu/insights/where-does-africa-fit-in-the-globalization-puzzle>

⁷⁴ ADB, 'Africa is Now the Fastest Growing Continent in the World' (2013) <www.afdb.org/en/news-and-events/article/africa-is-now-the-fastest-growing-continent-in-the-world-12107/>

terms of rate of growth globally.⁷⁵ However, in 2016, it experienced one of its worst declines with growth rate falling as low as 1%.⁷⁶ Africa is now considered to be back in recovery, with projected growth rates of 2.6% in 2017, 3.2% in 2018 and 3.5% in 2019.⁷⁷

With fifty-four independent countries on the continent, Africa enjoys a lot of diversity as demonstrated by the varying sizes,⁷⁸ economic performance, political,⁷⁹ social and cultural features of different countries in the region. Africa is divided along the lines of language, religion, colonial heritage and geographic location⁸⁰. For example, the term Sub-Saharan Africa is commonly used to separate North Africa from the rest of Africa. Countries in West Africa share a lot of affinity by virtue of their proximity but at the same time are divided by colonial history, with some west African countries being francophone and others anglophone.⁸¹ In terms of economic performance, the three largest economies are South Africa, Nigeria and Angola. These economies, particularly South Africa are becomingly increasingly prominent in the global market. While the economies of oil producing Nigeria and Angola took a massive hit following the oil crisis in 2016, non-oil countries like Côte d'Ivoire, Ethiopia, Kenya, Mali, Rwanda, Senegal, and Tanzania have demonstrated significant economic growth and resilience.⁸²

⁷⁵Africa Development Bank, '2017 Financial Presentation' https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Annual_Meetings/AfDB_Financial_Presentation_2017_en.PDF>

⁷⁶Despite the increase in economic growth, economic volatility remains a problem in the African region.

⁷⁷World Bank, 'Economic Growth in Africa is on the Upswing Following a Sharp Slowdown' (19 April 2017) www.worldbank.org/en/news/press-release/2017/04/19/economic-growth-in-africa-is-on-the-upswing-following-a-sharp-slowdown; This instability has been attributed to a number of factors including political instability, corruption, unpredictable policies, an enduring infrastructural gap, lack of institutions that support private sector growth and investment. The end of the commodities boom is also one of the immediate factors challenging economic stability in oil-dependent African countries.

Africa Economic Outlook 2015 www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/PDF_Chapters/Overview_AEO2015_EN-web.pdf>

⁷⁸ Compare for example, the population of Madagascar (24 million), Seychelles (94 thousand) and Nigeria (181 million) UN estimates as at 2015. <https://esa.un.org/unpd/wpp/Download/Standard/Population/> >

⁷⁹ Some countries in Africa struggle with a faltering democracy bordering on dictatorship, others go in and out of military rule while others have a fairly stable democracy. Emmanuel Gyimah-Boadi, 'Africa's Waning Democratic Commitment' (2015) 26(1) Journal of Democracy (2015) 101-113.

⁸⁰ Northern Africa, Eastern Africa, Central Africa, Western Africa, Southern Africa

⁸¹ In addition, there are Lusophone and Arabophone and Spanish speaking countries. This is in addition to the thousands of local languages across the continent.

⁸²World Bank (n 77)

These multi-dimensional distinctions among African countries make it difficult to speak of an African experience as if it were a single story. Notwithstanding their differences however, there is a good volume of co-operation, shared history, shared institutions, commercial relations and even laws that bind countries in the region together. For example, pan-African businesses and financial institutions, led by South African companies, are rapidly growing to create cross border networks in the region.⁸³

Of huge significance is the AfCFTA, a recent initiative aimed at promoting intra-African trade by establishing free trade among all African countries.⁸⁴ With forty out of fifty-four countries having executed it, the agreement is poised to become the biggest trade agreement since the formation of the World Trade Organisation.⁸⁵ This collaboration among African countries encourages horizontal movement of experiences, methods and strategies.⁸⁶ The financial landscape of Africa continues to see rapid changes including the introduction of new financial instruments, services and practices. Likewise, new uses of funds, new sources of funds, new financial institutions and markets are also emerging.⁸⁷ The influx of foreign investment and consequent cross border transactions has been fuelled notably by rising infrastructural development across the continent.⁸⁸ Nigeria's first Independent

⁸³ For example, it is not unusual to find a commercial bank headquartered in one African county operating across a few other African countries- Ecobank, United Bank for Africa and Diamond Bank are examples.

⁸⁴ The Africa Continental Free Trade Area, an agreement that is part of AU's initiative for closer economic integration in Africa. The agreement was signed by 44 countries in March 2018 at an AU summit in Rwanda <<https://au.int/en/CFTASummit2018>>

⁸⁵Chris Giles, 44 African countries agree free trade agreement, Nigeria yet to sign' CNN (23 March 2018). <<https://edition.cnn.com/2018/03/22/africa/african-trade-agreement-world/index.html>> ; Justina Crabtree, Africa is on the verge of forming the largest free trade area since the World Trade Organization' CNBC (20 March 2018) <<https://www.cnbc.com/2018/03/20/africa-leaders-to-form-largest-free-trade-area-since-the-wto.html>>

⁸⁶ PwC, Africa Asset Management 2020 <www.amafrica2020.com/amafrica2020/docs/am-africa-2020.pdf> ; Africa Economic Outlook 2015 <www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/PDF_Chapters/Overview_AEO2015_EN-web.pdf>.

⁸⁷ *ibid*; The Bond & Derivatives Exchange (Badex) in Zambia concluded its first live trade at 2.49pm on April 15, a US dollar/Zambian kwacha futures contract www.dreadnought.co.za/Portals/0/African%20Derivatives%20-%20The%20Lion%27s%20Share%20-%2030%20Apr%202014%20-%20Risk%20Magazine.pdf; The activities of private equity funds has gained some momentum on the continent. Since 2007, about \$22 billion has been raised from private equity firms <www.cnbc.com/2015/03/17/private-equity-investors-pile-into-africa.html> 7

⁸⁸UN, Financing Infrastructure <www.un.org/en/africa/osaa/pdf/policybriefs/2015_financing_infrastructure.pdf> To plug the remaining funding gap for infrastructural development, African countries continue to explore innovative funding sources. One of this is the consideration of infrastructure bond to raise funding from private sectors.

Power Plant, the Azura-Edo IPP was funded mainly by IFC, FMO, Standard Chartered Bank.⁸⁹ Similarly in Kenya, the government has actively attracted foreign investment for its power sector reforms with funding for its IPPs coming mostly from China.⁹⁰

In addition, finance markets are becoming more developed, with South Africa, Namibia and Mauritius leading the way and Kenya, Botswana, Ghana and Nigeria following closely behind.⁹¹ Apart from African governments assessing the global market, local corporations and financial institutions in Africa are also making a play for the big stage.⁹² African countries for the first time have local banks issuing bonds on the international debt market.⁹³

Clearly, significant foreign direct investment that goes beyond mere exportation of resources is a relatively recent phenomenon in most of Africa. The new developments in Africa's economy raises questions about the spread of global norms of commercial law, including bankruptcy law in the region, and what the role of global actors might be in these changes. Growth in Africa is getting some global attention and as the economies open up, there is more pressure for commercial law reforms. This is evident in the recent wave of bankruptcy reforms across the continent. As we discuss in the next section, some global actors play a role in these reforms, but their role is limited and it is uncertain that the rise in Africa's growth would spell more a more direct involvement in bankruptcy law reform by global

⁸⁹ These organisations have similarly funded infrastructural projects in Ghana, Zimbabwe, Tanzania and other parts of Africa.

⁹⁰ Power Privatisation: Kenya Case Study www.howwemadeitinafrica.com/power-privatisation-kenya-case-study/

⁹¹ PwC, Africa Asset Management 2020 (October 2015) <http://www.amafrica2020.com/amafrica2020/docs/am-africa-2020.pdf>

⁹² EuroMoney, Sub-Saharan Eurobonds hold up under pressure (6 October 2017). <https://www.euromoney.com/article/b1512pbb2r0p5c/sub-saharan-eurobonds-hold-up-under-pressure>

⁹³ Paul Wallace, Lyubov Pronina and Emele Onu, 'Nigerian Bank Just Sold Most Expensive Emerging-Market Bond' Bloomberg (11 October 2017) <https://www.bloomberg.com/news/articles/2017-10-11/nigeria-s-fidelity-issues-highest-yielding-em-eurobond-of-2017>; Chijoke Oluocha, 'Nigeria Union Bank working with Citi on Eurobond, others to follow' Reuters (1 March 2018) <https://www.reuters.com/article/nigeria-banks-eurobonds/nigeria-union-bank-working-with-citi-on-eurobond-others-to-follow-sources-idUSL8N1QJ5WA>; 'Nigeria: Diamond Bank issues USD200m notes at 9.0%' <http://standardtimespress.org/?p=5111>; As they become more actively incorporated into the global market, African countries are expected to experience more directly, the effects of global economic downturns. This is most obvious with the drop in the price of commodity which result in fiscal shocks and outright economic recessions in some African countries. Todd Moss, 'Where does Africa fit in the globalization puzzle?' Yale Insights (23 June 2009) <https://insights.som.yale.edu/insights/where-does-africa-fit-in-the-globalization-puzzle>

actors.⁹⁴ One reason for this might be the dilution of interests of Africa's conventional foreign partners.

China is fast replacing global actors like the US and the IFIs as Africa's development partner of choice. China's overseas investments in Africa exceeded US\$107 billion in 2013 and accumulated outbound direct investment stock reached over US\$660 billion.⁹⁵ Chinese businesses exist in almost every African country, including San Tome & Principles, Burkina Faso, Swaziland, which have not established formal diplomatic relationship.⁹⁶ China has also become a major lender to Africa with nearly one-third (\$6.8bn) of the \$25.6bn that China's state-owned development banks lent last year to energy projects worldwide going to African countries.⁹⁷ Surely, China like other trade partners, has been attracted to Africa's natural resources, but the relationship goes beyond commodities. China's involvement is both politically and economically strategic, beyond the oil, copper, cobalt and iron ore, they also see markets for manufacturers and construction companies, and the geopolitical advantage of having 54 sovereign nations as allies.⁹⁸

Certainly, the emergence of China as Africa's development partner of choice has attracted the attention of global powers and some skepticism. Warnings about neo-colonialism and China's history with human rights and unconventional means of operating are replete.⁹⁹ While African countries are not oblivious to these issues,

⁹⁴ Apart from China's emergence in Africa, global actors increasingly favour less coercive means of propagation as objections mount against the imposition of reforms on developing countries in exchange for reform. See

⁹⁵ These investments are not restricted to natural resources but cover a range of industries including construction, agriculture, real estate, wholesale and retail, finance etc MOFCOM, 'General Survey of China-African Economic Cooperation in 2014' <<http://www.cn156.com/article-43376-1.html>>

⁹⁶ *ibid*

⁹⁷ This was ahead of south Asia, with \$5.84bn. The loans bring total Chinese energy finance in Africa since 2000 to \$34.8bn.⁹⁷ <https://www.ft.com/content/668968e8-23b6-11e8-add1-0e8958b189ea>

⁹⁸ Jing Gu, 'Is China's Role in African Fragile States Exploitative or Developmental?' (2015) ; <https://www.ft.com/content/0f534aa4-4549-11e7-8519-9f94ee97d996>

⁹⁹ 'Tillerson tells Africa that China finance imperils their sovereignty' Financial Times (March 2018) <https://www.ft.com/content/f6691e18-22da-11e8-ae48-60d3531b7d11>;

<https://www.ft.com/content/bee2b852-0190-11e8-9650-9c0ad2d7c5b5?sharetype=share>; Keith Somerville, 'Why Zimbabwe's use of elephants to pay off old debt to China is problematic' CNBC Africa (11 January 2017) https://www.cnbc.com/news/southern-africa/2017/01/11/zimbabwes-elephants/?utm_content=buffer998c2&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer ;

Yun Sun, 'China in Africa: Implications for U.S. Competition and Diplomacy' Brookings (3 April 2013) <https://www.brookings.edu/research/china-in-africa-implications-for-u-s-competition-and-diplomacy/> ; David Shinn, 'The Impact of China's Growing Influence in Africa' International Policy Digest (12 July 2011) <https://intpolicydigest.org/2011/07/12/the-impact-of-china-s-growing-influence-in-africa/>

China also offers something that is hard to reject- choice. Having been estranged from the globalisation agenda and jaded by the failure of the Washington Consensus, structural adjustment programmes¹⁰⁰ and previous relationships to deliver needed change, China offers an array of potentially revolutionary options; infrastructural development, trade partnership, foreign direct investment and a policy of non-interference in domestic governance as the icing on top.¹⁰¹ In addition to Chinese funded projects and investments, African countries are also looking beyond the US and IFIs to other sources of finance, such as international bond markets.¹⁰²

China's adoption of a non-interference policy in internal governance of national governments should not lead to a hurried conclusion that where laws and policies are concerned, the emergence of China in Africa is a non-factor. While there may be no direct imposition of economic and political ideologies through the instrument of conditionality, there is no ruling out the gradual propagation of a 'Chinese way of doing things' as China increasingly becomes a model for African countries.¹⁰³ For example, it is not preposterous to ask whether China's defiance of western ideas about democracy can encourage African countries who already struggle with faltering democracies to tow a similar path.¹⁰⁴ However, the possibility of China's influence on law reform and governance in Africa grows as the West loses more of

¹⁰⁰ The collapse of Kisumu Cotton Mills (Kicomi), for example, led to thousands of job losses for both cotton farmers and factory workers. The firm's collapse was primarily blamed on the negative sting of the structural adjustment programmes (SAPs) popularised by the World Bank and the International Monetary Fund.

Kenneth Kwama, 'Receiverships: The Safe Way Under' Standard Digital (23 March 2010) <https://www.standardmedia.co.ke/business/article/2000006175/receiverships-the-safe-way-under>

¹⁰¹ Maggie Fick, 'Nigeria unveils economic-reform plan as it aims to secure World Bank loan' Financial Times (7 March 2017) (the world bank and IMF are still a source of credit to many governments including African countries, and they still impose reforms they deem necessary as a condition for giving out the money); Maggie Fick, 'Ghana on course to end \$918m IMF loan programme next year' Financial Times (13 April 2017) <https://www.ft.com/content/e951f5ba-815e-36ee-9e4b-f2f6c7e4db60>

¹⁰² Kenya seeks to raise 30-year debt after rating downgrade (Financial Times March 2018) <https://www.ft.com/content/c145f044-16f5-11e8-9e9c-25c814761640>; EuroMoney, Sub-Saharan Eurobonds hold up under pressure (6 October 2017). <https://www.euromoney.com/article/b1512pbb2r0p5c/sub-saharan-eurobonds-hold-up-under-pressure>

¹⁰³ The Economist, 'How the West Got China Wrong' (1 March 2018) <https://www.economist.com/news/leaders/21737517-it-bet-china-would-head-towards-democracy-and-market-economy-gamble-has-failed-how?fsrc=scn/tw/te/bl/ed/howthewestgotchinawronggeopolitics>

¹⁰⁴ Mehari Taddele Maru, 'China-Africa Relations Democracy and Delivery' Aljazeera (1 May 2013) <http://studies.aljazeera.net/en/reports/2013/04/201343011415424904.html>

its economic leverage, and resistance to western ideas couched as global norms and the global actors that propagate them heightens.¹⁰⁵

Some speculations may be made on the likely effect that China's growing influence in Africa may have on budding commercial law reforms in Africa. Without China's emergence as a major player in Africa's economy, perhaps global actors would now be positioned to directly intervene in bankruptcy law reform as the continent attracts more global attention.¹⁰⁶ With China's involvement, developing African economies may build more resistance to global norms and actors. The dilution of the political and economic influence of mainstream global actors in Africa makes African countries less vulnerable to influence from the actors that propagate these norms. As far as corporate bankruptcy is concerned, China itself only recently opened up to global bankruptcy norms with the enactment of the Enterprise Bankruptcy Law in 2006. The reorganisation law and the norms it embodies are far from becoming fully settled in China.¹⁰⁷ Given that China itself has had to accommodate these norms, African countries, for similar reasons, may likely succumb to the pressure to conform.

Carruthers and Halliday in developing their framework for the globalization of bankruptcy norms admit that the pressure for and pattern of convergence rise and fall as loyalties change or the geopolitical climate of host countries shift.¹⁰⁸ Because economic conditions and loyalties in developing economies are not static, the interests and leverage of global actors in these economies can also vary over time. Indeed, one may argue that the list of global actors that they identify as key to the development and propagation of bankruptcy norms may be more fluid than assumed. As loyalties and leverage evolve, some actors may lose their influence in engineering a global order in while new players take their place. With new global

¹⁰⁵ David Shinn, 'The Impact of China's Growing Influence in Africa' International Policy Digest (12 July 2011) <https://www.brookings.edu/research/china-in-africa-implications-for-u-s-competition-and-diplomacy/>

¹⁰⁶ Given the challenges that have been directed at imposed law reform through conditionalities, such intervention is not likely to have followed the coercive path taken in Indonesia.

¹⁰⁷ See Roman Tomasic and Zinian Zhang, 'From Global Convergence in China's Enterprise Bankruptcy Law 2006 to Divergent Implementation: Corporate Reorganisation in China' (2012) 12(2) Journal of Corporate Law Studies 295-332 for statistics and a description of implementation issues with the EBL

¹⁰⁸ Halliday and Carruthers (n 8) 35-37; Carruthers and Halliday (n 40)

actors also come the possibility of disrupting a relatively settled set of bankruptcy norms at the transnational level.

2.3. Bankruptcy law in Africa: the impact of the global norms and actors

The speculations on how movements in African economies might influence the trajectory of reform can be tested against current and ongoing events in African bankruptcy law. These developments establish that while the momentum and content of reform is significantly influenced by external factors, they are also dictated by endogenous factors. In reality, the lack of a direct and deliberate bankruptcy law reform by global actors has not prevented economies in the region from realising the need for reform as they aspire to build more globally competitive economies. The dynamics of reform may be altered by the absence of hands on involvement of global actors but this has not stopped bankruptcy law reform from happening in Africa, neither has it resulted in bankruptcy laws that are free from the influence of global norms and actors. In fact, out of the forty-five (45) countries that have now enacted the UNCITRAL Model Law, twenty-three (23) countries are in Africa.¹⁰⁹

In recent times, global actors such as the World Bank, the IMF, UNCITRAL and INSOL have, to one degree or another impacted bankruptcy reform in Africa. They have turned to persuasive means of propagation including suasion, modelling and peer pressure; and their intervention has come mainly by way of technical aid. On what birthed interest in Africa, INSOL have given the credit to insolvency practitioners from Africa for taking matters into their hands and demanding the attention of global actors as they press for reform.¹¹⁰

The World Bank is one of the prominent global actors that have been involved directly but more indirectly, in these reforms. Directly, the Bank engages with

¹⁰⁹ See <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>

¹¹⁰ Adam Harris, reporting in his capacity as president of INSOL said 'One lone question was raised ...about why there was no attention given to Africa. Felix Addo of PWC in Ghana takes credit for putting his hand up. Since then, Africa has in fact become one of the focus points to which INSOL has turned its global attention.' <<https://www.insol.org/Africa%20Round%20Table/INSOL%20World%20article%20Q4%202011.pdf>>

policymakers in some African countries to provide technical assistance towards reforms.¹¹¹ More common however is the indirect impact of the Bank through its projects,¹¹² particularly the Doing Business project. As mentioned earlier in this paper, the Doing Business project on its own is very influential in many countries around the world. Similarly in Africa, the World Bank Rankings have considerable weight and show up in narratives about the need for reform. Many countries now measure their progress in terms of ease of doing business and legitimise reform proposals with the promise of a better ranking on the DB project.¹¹³ Governments have also demonstrated commitment to the project by investing in committees and departments that are dedicated to improving the ease of doing business, using the world bank indicators as a reference point.¹¹⁴

Highly supplemental to this is the Africa Round Table event (ART), an initiative of INSOL in collaboration with the World Bank and some assistance from the IMF. The first INSOL Africa Round Table on insolvency reform was convened in Abuja, Nigeria in 2010. ART appears to be an attempt to replicate Asia's FAIR, and its stated objectives are: to have a high level dialogue with both private practitioners and public policy makers regarding insolvency reform in Africa, thereby encouraging reform experiences to be shared and challenges to be discussed in an open and frank forum; to elevate insolvency reform on the African policy agenda; and finally, to encourage insolvency policy makers and professionals to establish an annual forum to stimulate discourse and learning across the region.¹¹⁵

¹¹¹ For example, the World Bank has sponsored projects considering the introduction of a legal framework for the licensing and regulation of insolvency practitioners in South Africa, a review of the insolvency systems in the Republic of Malawi, Lesotho, the Republic of Seychelles and Zimbabwe.

¹¹² The Bank through its investment climate facility arm, conducted a survey of the Restructuring and Insolvency frameworks of 12 countries in Sub-Saharan Africa in 2010. The report is similarly structured as the Resolving Insolvency Indicator of the Doing Business Reports and aims to diagnose as well as prescribe by asking a set of questions on what obtains in each country, all the while insinuating what is desirable.

¹¹³ Rwanda Struggles On Insolvency Law (Global Insolvency Law.com) <http://globalinsolvency.com/headlines/rwanda-struggles-on-insolvency-law>; Juliana Taiwo-Obalonye, 'World Bank top 10 ranking: Nigeria has exceeded target - Osinbajo' The Sun (31 October 2017) <http://sunnewsonline.com/world-bank-top-10-ranking-nigeria-has-exceeded-target-osinbajo/>.

¹¹⁴ Nigeria, Mauritius, are only examples of such countries that have invested in such organisations. The Presidential Enabling Business Environment Council (PEBEC) was set up in July 2016 in Nigeria.

¹¹⁵ INSOL International <<https://www.insol.org/page/553/background-to-the-initiative>>

Global actors all have factors that impede the adoption of the norms they offer. For the powerful IFIs like the IMF and World Bank, their shortcoming also lies in their strength- their economic power and financial incentives which can earn them the resentment of national policymakers for their ability to interfere in domestic law making. For other organisations like INSOL and the IBA, their strength lies in their technical expertise, but they often lack economic leverage.¹¹⁶ In the building of global norms, global actors have consequently had to choose whether to cooperate or compete.¹¹⁷ They often choose to cooperate, and this cooperation has been instrumental in the propagation of global norms in developing economies as illustrated by bankruptcy law reforms in Asia. Global actors have also been shown to cooperate in pursuing their aims in Africa, and the ART is an instance of this.

The ART uses a combination of modelling, suasion, learning, emulation and peer pressure to facilitate the propagation of global norms across Africa. In this forum, guidance about what is desirable, and undesirable is provided as countries are stirred towards reform. By creating an avenue for African policymakers, judges and insolvency practitioners to report on the progress of reform in their countries, the ART stimulates some healthy competition among stakeholders and encourages horizontal learning from countries that have implemented reform. The ART complements other global platforms for comparing performance in countries.¹¹⁸ While the DB project provides a basis for comparison, the ART provides the necessary proximity among African countries for effective shaming and peer pressure.¹¹⁹

By allowing their peers in the region to ‘show off’ the progress they have made, they leverage on the sense of competition among the states to persuade them to bring their laws and institutions in conformity with approved standards. By showcasing the adoption of the global norms which they sanction by some African countries,

¹¹⁶ Halliday and Carruthers (n 8) 25

¹¹⁷ *ibid*

¹¹⁸ For instance, the IMF Article IV Consultation, The World Bank Doing Business Project cf note 57

¹¹⁹ It is noted that the efficacy of this shaming and peer pressure is highly dependent on attendance at the event. But not mere attendance, attendance by the right people.

global actors achieve the legitimation of these norms in Africa. Countries that have reformed their laws to conform with global standards can serve as success stories to other African states, thereby validating the claim that these norms are globally relevant.

INSOL and the World Bank also engage with local practitioners in African countries. For example, INSOL integrated insolvency professionals' associations in countries like Ghana, Nigeria and South Africa as member bodies.¹²⁰ These organisations provide a platform through which global actors can achieve reform goals. Members can serve as intermediaries for global actors when the opportunity arises for them to take a more direct role in bankruptcy reform. Also, The ART makes a point of achieving varied representation from all stakeholder groups. As such, they organise a preliminary annual closed-door meeting with the aim of getting high profile participants like judges, legislators, policymakers, lender groups and insolvency practitioners engaged in intense deliberation on the direction of policy and reform in the different jurisdictions.

Direct intervention of global actors is not necessary for bankruptcy reform in a developing economy. This does not however mean that it is an irrelevant factor, for the level of intervention can make a difference in how reforms pan out. Overall, the ART represents the biggest move by global actors towards the deliberate propagation of bankruptcy norms in Africa. While the ART can open up opportunities for more hands-on involvement of these actors in bankruptcy reform in individual countries, it generally operates at a safe distance, allowing countries to reform at their pace while providing subtle nudges towards ideal forms and standards.

The means of propagation carries its implications for the speed and trajectory of reform. For example, Although the ART attracts a rich mix of stakeholders, there are limitations to its ability to engineer and supervise the establishment of global norms

¹²⁰ Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), Ghana Association of Restructuring and Insolvency Advisors (GARIA) and South African Restructuring and Insolvency Practitioners Association (SARIPA).

through reform. Firstly, even though global actors can make efforts to establish an ongoing relationship with stakeholders from participating countries and stay involved in the process of reform, the ART itself is a 2-day annual event. This means that consistent attendance by all relevant stakeholders from different countries is not guaranteed.¹²¹ Also, some stakeholder groups may be more committed to participating in the event than others. As stated above, practitioners are playing an important role in driving reform in African countries and they are often well represented at the ART.¹²² However, the same cannot be said of lending groups and government officials from most countries.¹²³ Considering the degree of power that these stakeholders can wield in the reform process, their input in bankruptcy reform cannot be taken for granted. In the absence of sustained engagement with relevant stakeholders, there is a strong possibility that the efforts of global actors through forums like the ART do not coincide with or have the intended impact on ongoing reform in African countries.

Experience with the development of global norms has shown that expertise alone is not sufficient but must be combined with political authority at every stage of the reform process. It is important that persons who can achieve implementation have a stake in the process from deliberations, enactment to implementation.¹²⁴

It is helpful to reiterate that engagement with experts and practitioners can contribute to the reform process. It has been argued that the webs of knowledge, constituted by practitioners and academics can become webs of influence through the process of enrollment.¹²⁵ Enrollment occurs when a weaker actor is able to persuade a stronger actor to take on its cause. Carruthers and Halliday point out how INSOL successfully used enrollment to enlist the help of the UN in establishing cross border insolvency norms. Thus, academics and individual practitioners who suffer

¹²¹ Political instability and constant change of government with no continuity plan in place also poses a challenge to sustained deliberations and efforts by participants.

¹²² See

https://www.insol.org/_files/Africa%20Round%20Table/Mauritius%202017/Delegate%20Folder/Delegate%20List%2031%20Oct.pdf for delegate list of the 2017 ART; <https://www.insol.org/page/242/africa-round-table> for previous events.

¹²³ *ibid*

¹²⁴ Halliday and Carruthers Terence Halliday and Bruce Carruthers, *Bankrupt: global lawmaking and systemic financial crisis* (Stanford University Press 2009) 57

¹²⁵ *ibid* 68; John Braithwaite and Peter Drahos, *Global business regulation* (Cambridge university press 2000).

from both ‘legitimation deficits’ and an ‘inability to compel implementation’ can persuade more influential actors to push the reform agenda. But, not all experts have the power to enlist the help of politically relevant actors.¹²⁶ However, even if it has little influence on legislative reform, the active participation of insolvency practitioners in forums like the ART can impact the practice of corporate bankruptcy, assuming that they would seek to reflect new learning in the practice.

The next section considers the evolution of bankruptcy law and practice across Africa. The developments are considered in two parts- one looks at the evolution of bankruptcy practice, highlighting a shift in the response of stakeholders to financial distress and the factors that have influenced this shift. The second part provides a synopsis of bankruptcy law reform in selected African countries.

Part III: BANKRUPTCY AND RESTRUCTURING PRACTICE IN SOME AFRICAN COUNTRIES.

Most African countries can be rightly described as late-comers to the bankruptcy law reform table.¹²⁷ Corporate bankruptcy law and practice is largely understood as a debt recovery process and thinly constituted by winding up and variants of the receivership procedure in many jurisdictions. Because the fast growth in African economies is also accompanied by economic volatility, these laws now struggle to meet the demands of current commercial realities.¹²⁸

In most countries, governments and private stakeholders increasingly acknowledge the importance of sound insolvency practices, especially the rehabilitation of distressed but viable companies. Within the limited set of laws and outside the law, they are carving a space for the adoption of new strategies for corporate debt resolution and restructuring. This shift in attitude is attributed to global movements, such as the propagation of the normative goal of corporate rescue. A realisation that

¹²⁶ In Carruthers and Halliday (n 40) 530, the authors identify competencies, power, and loyalty as three qualities global actors seek in intermediaries.

¹²⁷ With the exception of South Africa that got a head start on incorporating corporate rescue into its laws.

¹²⁸ In 2016, the World Bank Doing Business data showed that Sub-Saharan Africa has the lowest creditor recovery rate than any other region in the world. 20 cents on the dollar, compared to 72.3 cents on the dollar in OECD High Income countries.

bankruptcy frameworks all over the world have become more forgiving and supportive, increased collaborations among practitioners transnationally and need arising from economic volatility have also contributed. Thus, beyond bankruptcy law reform, the impact of global norms of bankruptcy is also reflected in the informal bankruptcy and restructuring practice of countries in Africa.

3.1. Evolving restructuring practice: The experience in some African countries.

3.1.1. *Private workouts*

The bankruptcy laws of most African countries are yet to fully accommodate corporate debt restructuring and other insolvency alternatives. However, informal work outs are not a strange practice in African countries. Although liquidation is prominent on the books, it is increasingly less so in practice.¹²⁹ Even for jurisdictions with no corporate rescue and restructuring laws, creditors would almost always explore the option of restructuring before taking stricter measures against the debtor.¹³⁰ However, private workouts are mostly ad hoc and only bound by internal rules and procedures of each bank. In Nigeria where commercial banks dominate the financial market, creditors have been known to file winding up actions only as a strategy to bring defaulting companies to the negotiating table.¹³¹

Another relevant factor is the growing acknowledgment of alternatives to court-driven procedures, especially in commercial cases. In some countries, the law demands an attempt at alternative dispute resolution before a dispute is brought before the court. In commercial courts in Uganda for instance, all commercial

¹²⁹ See for example Proshare, 'Ecobank Nigeria Loses Winding Up Suit(s) Against Honeywell Group' www.proshareng.com/news/DEBTORS%20&%20RECOVERY/Ecobank-Nigeria-Loses-Winding-Up-Suit-s--Against-Honeywell-Group/31499

¹³⁰ In an empirical study conducted as part of the writer's ongoing doctoral research in 15 out of 20 commercial banks in Nigeria (including the pan African banks), all the banks have now set up departments that are dedicated to the restructuring of distressed loans. See www.proshareng.com/news/DEBTORS%20&%20RECOVERY/Ecobank-Nigeria-Loses-Winding-Up-Suit-s--Against-Honeywell-Group/31499

¹³¹ Outcome of empirical study. It is noted that courts in Africa can be slow and inefficient, and this factor contributes to the reluctance of commercial actors to get locked into litigation.

disputes are first considered for suitability ADR. Likewise in Nigeria and Zambia, lawyers are encouraged to try ADR before filing any case.¹³²

However, while stakeholders have a heightened interest in corporate debt restructuring, what is visibly lacking are well-thought-out restructuring guidelines designed with the specific needs of the jurisdiction in mind. Also, private workouts even in advanced jurisdictions often suffer enforcement challenges. It is therefore important that informal debt resolution strategies are supported by strong formal institutions, sufficient skills and resources to deal with the large volume of distressed loans.

3.1.2. Achieving corporate rescue with existing procedures.

Until very recently, the practice of corporate bankruptcy in most African countries revolved around winding up proceedings and debt recovery.¹³³ For common law Nigeria, Ghana and Kenya, receivership is a commonly used debt recovery procedure. Receivership, allows a creditor or group of creditors with security over the company's assets to appoint a receiver or receiver manager to take over the management of the company or its assets until the debt is realised. A receiver manager has a slightly different mandate from a receiver. In addition to realising the debt for her appointer, she is also in a position to manage the company and even though not clearly spelt out, there is a scope for a RM to aim to rescue a distressed company.¹³⁴ The position of the receiver manager has however not had this effect.¹³⁵ Rather, it has come to acquire the reputation of a death sentence in these jurisdictions. This is because of the focus on the realisation of the assets of the appointing creditor(s), often to the detriment of the company's already fragile health.

¹³² See Order 3 R 2 of the Lagos State Civil Procedure Rules 2012; Order 31 of the High Court Rule Zambia; ILO Newsletter, 'Best Practice and Tailored Reforms in African Insolvency: Lessons from INSOL

¹³³ As Table 1.0 below shows, many countries have now adopted or are in the process of adopting rescue-oriented laws.

¹³⁴ Section 650 of the Ghanaian Companies Code Act 179 of 1963; Sections 389, 650 of the Nigerian Companies and Allied Matters Act 1990; Section 341 of the Kenyan Companies Act Cap 486

¹³⁵ Kenneth Kwama, 'Receiverships: The Safe Way Under' Standard Digital (23 March 2010) <www.standardmedia.co.ke/business/article/2000006175/receiverships-the-safe-way-under>

In more recent times, there is a move towards achieving corporate rescue particularly when large companies that are considered to make significant contributions to the economy, are involved. In such cases, the stakeholders seek to explore the corporate rescue potential of the receivership procedure, using it as a mechanism for coordinating the company's creditors for the purpose of resolving its difficulties rather than decimating the company. The appointment of a receiver manager over Nigeria's Arik Air is a recent example of a rescue-orientated receivership. Arik Air, the airline that took over the ground facilities of the country's first indigenous flag carrier, Nigeria Airways, became distressed as a result of a combination of massive financial debt burden, operational challenges and mismanagement.¹³⁶ Owing millions of US dollars to a wide range of creditors including banks, foreign partners, regulators, employees, suppliers, it was taken over by creditors and put in receivership in February 2017. From the point of take-over, it was clear that the appointment of a receiver manager was intended to be used as a turnaround procedure. Liquidation was taken off the table from the beginning with a view to taking all possible steps to ensure that the airline was restored back to health¹³⁷ As part of these rescue efforts, a new team of aviation and finance experts was put in place to operate the company under the supervision of the receiver manager.

The approach to Arik's financial distress sharply contrasts with the attitude surrounding the liquidation of Nigeria's previous national carrier, Nigeria Airways, and Ghana's flagship airline, Ghana Airways in 2004.¹³⁸ These airlines suffered very similar challenges as Arik but ended up in liquidation at a time when the norm of corporate rescue was yet to break into African bankruptcy practice. Thirteen years

¹³⁶Chinedu Eze, 'FG Takes Over Troubled Arik, AMCON Says Airline Too Important To Fail' The Vanguard (10 February 2017) www.vanguardngr.com/2017/04/arik-air-owes-creditors-n375bn-amcon/

¹³⁷ Nwafor Polycarp, 'We are not Interested in Liquidating Arik Air- AMCON' Vanguard News (27 February 2017) www.google.com.ng/amp/www.vanguardngr.com/2017/02/not-interested-liquidating-arik-air-amcon/amp/

¹³⁸ Franklin Cudjoe, 'Ghana Airways, the grim reaper' The Africa Report (9 September 2014) <http://www.theafricareport.com/Columns/ghana-airways-the-grim-reaper.html>

after its liquidation and with the benefit of hindsight, stakeholders have expressed regret over the avoidable death of Nigeria Airways.¹³⁹

Similarly, in Kenya, while efforts are being made to reverse the kiss of death effect of the receivership procedure through legal reform, the practice of receivership has also reflected this new thinking, again in the case of large companies.¹⁴⁰ Kenyan business, Uchumi Supermarkets was East Africa's largest supermarket chain with branches all over East Africa before it ran into financial difficulties. The company had been in and out of distress since 2006 when it first went into receivership. With some state support, the banks have recently declared a readiness to turn around the company's fate and ensure that it comes out of the receivership.¹⁴¹ In Uganda, The Steel Rolling Mills is currently in receivership but is due to receive support from the government to enhance the likelihood of a turnaround from the process.¹⁴²

The re-orientation of receivership away from mere debt recovery towards achieving a turnaround shows the proliferation of the global norm of corporate rescue in African countries. It is however difficult to make the most of receivership as a result of the negative connotations that attend the procedure. Also, receivership suffers from design challenges as the rescue goal is not clearly spelt out and the mechanism is not deliberately designed to address the specific issues that come up in a turnaround. Stakeholders are therefore left with little guidance and institutional support on how to navigate the process. Also, most of these cases involve large companies and the receivership is usually accompanied with some state support. This leaves MSMEs which form a large percentage of the total number of companies and make important contributions to the economy without support.¹⁴³ For smaller

¹³⁹ Abdullateef Aliyu, '12 Years After Liquidation, Nigeria Airways Echoes' Daily Trust (31 May 2016) ; Emmanuel Elebeke, 'Liquidation of Nigeria Airways is Illegal' Vanguard (15 August 2011) ; Pearl Ngwama, 'Nigerian Airways Shouldn't have been liquidated- Olubadewo' The Authority (2 May 2017) <www.authorityngr.com/2017/05/Nigerian-Airways-shouldn-t-have-been-liquidated--Olubadewo/> 7

¹⁴⁰ Editorial, 'Kenya's Kiss of Death Receivership Laws to Be Reviewed' Global Insolvency.com <http://globalinsolvency.com/headlines/kenya-s-'kiss-death'-receivership-laws-be-reviewed>

¹⁴¹ Michael Omondi, 'Bankers agree to lift Uchumi from receivership' Business Daily (28 January 2010) <www.businessdailyafrica.com/markets/539552-851318-w88bjc/index.html>

¹⁴² Isaac Khisa 'Steel Trouble Melts away in 2017' The Independent (10 January 2017) <https://www.independent.co.ug/steel-troubles-melt-away-2017/>

¹⁴³ José Filomeno de Sousa dos Santos, 'Why SMEs are Key to Growth in Africa' World Economic Forum (4 August 2015) <https://www.weforum.org/agenda/2015/08/why-smes-are-key-to-growth-in-africa/>.

companies, rescue-oriented receiverships are either non-existent or few and far between.¹⁴⁴ Consequently, using the procedure as a rescue mechanism remains an uphill task.

3.1.3. Government intervention

Governments in Sub-Saharan Africa have begun to show more concern and intervention in the survival of companies in distress. As noted above, the appointment of receiver managers over distressed large companies is often backed by some government support. Government intervention has manifested in different forms, most remarkably bailouts and in some cases like Nigeria, the establishment of an asset management company to clean up the debt portfolio of commercial banks and resolve NPLs.¹⁴⁵ The Asset Management Corporation of Nigeria (AMCON) was set up in 2010 as a government-funded bad bank. In adverse economic conditions, AMCON has contributed to restructuring (particularly multi-creditor restructuring of large companies) in Nigeria. AMCON's portfolio reveals that it purchased more than 12,000 loans from industries including aviation, gasoline marketing and manufacturing for about N1.8 trillion.¹⁴⁶ The characteristics that make it possible for the corporation to facilitate restructuring include government backing, special powers to obtain expedited judgments from the courts and funds to finance a restructuring. AMCON can also be considered to have cleared the path for a distressed debt market in Nigeria.¹⁴⁷ It is noteworthy that the Central Bank of Nigeria now aims to create more space for distressed debt investment through the proposed licensing of Private Asset Management Companies.

¹⁴⁴ In Kenya, out of about 50 companies that have been placed in receivership, only a handful have been fortunate to get a fresh start. Kenneth Kwama, 'Receiverships: The Safe Way Under' Standard Digital (23 March 2010) <www.standardmedia.co.ke/business/article/2000006175/receiverships-the-safe-way-under>

¹⁴⁵ Babajide Komolafe, 'Analysis: AMCON, bad debtors and moral hazard' *The Vanguard* (Nigeria, 28 February 2011)

¹⁴⁶ Editorial, 'AMCON Records 57 Percent Recovery of Banks' Bad Debts' *Daily Independent* (Lagos, 26 May 2015) <http://allafrica.com/stories/201505270863.html>.

¹⁴⁷ By 2015, AMCON's portfolio revealed that it purchased more than 12,000 loans from industries including aviation, gasoline marketing and manufacturing for about N1.8 trillion, Editorial, 'AMCON Records 57 Percent Recovery of Banks' Bad Debts' <<http://angelstartups.com.ng/industry-news/amcon-recovers-57-of-bad-debts-bought-in-crisis>>

In Uganda, the government recently earmarked \$300 million for the bailout of distressed companies who are considered viable and capable of contributing to the economy.¹⁴⁸ In 2017, the Ghanaian government launched an initiative that identified about 100 distressed but viable companies and earmarked them for government bailout.¹⁴⁹

Government intervention has also come in form of a strong influence on the decisions of creditors regarding the fate of a distressed company. Recently, one of Nigeria's top four telecommunications companies, Etisalat, narrowly escaped debt recovery action by its creditors due to government intervention.¹⁵⁰

Government intervention in the rescue of distressed companies is a welcome step that signals openness to a rescue culture by politically relevant stakeholders. Intervention in its current form can however not be a long-term solution. The establishment of a bad bank can provide some immediate relief but is by is only a temporary, ad hoc solution to corporate debt problems.¹⁵¹ Nigeria's AMCON is now caving under the weight of the debt it has acquired and struggling to find avenues for resolving NPLs.¹⁵² Similar objections arise in relation to bailouts, the overuse of which can pose its own risks to the economy. The arguments against a bailout culture range from the moral hazard that can result from the dependence of businesses on state rescue, an erosion of the nation's resources to a lack of

¹⁴⁸ Before it has gained traction, some factors already cast doubt on the efficacy of the program. For one, it has been criticised as politically motivated. See DW 'Uganda Company Bailouts Politically Motivated' (28 July 2016) <www.dw.com/en/uganda-company-bailouts-politically-motivated-critics-allege/a-19432023 >

¹⁴⁹ Nana Dr Appiagyei Dankawoso II, 'Government to Bail Viable But Struggling Companies' GhanaNews (8 June 2017) <<http://ghananewsonline.com.gh/government-bail-viable-struggling-companies/> >

¹⁵⁰ Proshare, 'Three Banks Take Over Etisalat' <www.proshareng.com/news/Debtors%20&%20Recovery/Three-banks-take-over-Etisalat--8206-Nigeria/33969>; 'CBN, NCC Launch Rescue Mission for Etisalat' The Nation Online (May 2017) <thenationonlineng.net/ncc-cbc-join-forces-save-etisalat-creditors/amp/>

¹⁵¹ Thomas Laryea, Approaches to Corporate Debt Restructuring in the Wake of Financial Crises (IMF Staff Position Note, 26 Jan 2010) 17; Mohammed Awal 'CPC asks for gov't bailout' StarFM (7 February 2018) <<http://starrfmonline.com/2018/02/07/cpc-asks-govt-bailout/>>

¹⁵² Beatrice Ada-Waku, 'AMCON Forecloses Fresh Acquisition of Bad Loans' Today (9 December 2015) <www.today.ng/news/nigeria/49388/amcon-forecloses-fresh-acquisition-of-bad-loans>

transparency in the selection and implementation of the bailout process.¹⁵³ For African countries that are battling deep seated problems of corruption, economic instability, lack of corporate governance and lack of accountability, these risks become even more palpable.¹⁵⁴ In an increasingly competitive market, it will be a better use of government resources to provide an enabling environment by putting up solid rehabilitative frameworks for viable businesses while allowing the market to take care of moribund companies.

3.1.4. *Distressed debt investment*

Distressed debt investment is gradually making its way into African countries and showing potential for growth as one of the mechanisms for corporate debt resolution on the continent. This development has been driven almost completely by external forces and actors. Investors, notably private equity funds from the US, the Middle East and China have shown some interest in exploring opportunities in Africa's distressed debt.¹⁵⁵

Investors can come in through a consensual process, as part of a formal bankruptcy process, troubled M&As,¹⁵⁶ takeovers or a loan to own process. The involvement of these actors offer support that existing laws and frameworks do not offer, by providing new money and breathing space and a strong possibility of turnaround

¹⁵³ Cheryl D Block, 'Measuring the True Cost of Government Bailout' (2010) 88 Wash. UL Rev. 149; Rosas, Guillermo, *Curbing bailouts: Bank crises and democratic accountability in comparative perspective* (University of Michigan Press, 2009)

¹⁵⁴ Wiseman Khuzwayo, 'Abil's bailout is political - experts' Business Report (12 August 2014) www.iol.co.za/business-report/companies/abils-bailout-is-political---experts-1733837; DW 'Uganda Company Bailouts Politically Motivated' (28 July 2016) www.dw.com/en/uganda-company-bailouts-politically-motivated-critics-allege/a-19432023

¹⁵⁵ Much of the activity in this area has been directed at the South African market but other sub-Saharan countries are beginning to attract investors. South African Restructuring Outlook Survey Results (Deloitte 2016) <www2.deloitte.com/content/dam/Deloitte/za/Documents/finance/ZA_RestructuringOutlookSurveyResults_2015.pdf&ved=0ahUKEwjXoZ_lx7XUAhVRLFAKHZB0AsAQFggIMAQ&usg=AFQjCNHzXIJ_s_XzefoR4DFireUdaO2_1gg> ; Irene Madongo, 'South Africa, Private Equity Eyes Distressed Debt Assets' Beyondbrics (April 19 2013) <<http://blogs.ft.com/beyond-brics/2013/04/19/south-africa-private-equity-eyes-distressed-assets/>>

¹⁵⁶ Recently, proposals were made for a merger between troubled Kenyan chain Nakumatt and rival business Tuskys, Brian Ngugi, 'Nakumatt, Tuskys deal faces regulatory hurdle' Business Daily (19 September 2017) <https://www.businessdailyafrica.com/corporate/companies/Nakumatt-Tuskys-deal-faces-regulatory-hurdle/4003102-4102148-pqi37qz/index.html>

for companies.¹⁵⁷ In Nigeria, Duet Private Equity recently partnered with AMCON to establish an investment fund in the Fast-Moving Consumer Goods sector. The fund is fully focused on turnaround and distressed situations in the sector, with the aim of funding additional capital and debt restructuring needs of selected companies.¹⁵⁸ Duet has also made similar investments in Ghana, Cote D'Ivoire and Ethiopia.¹⁵⁹ In May 2017, Africa Special Opportunity in its first distressed private equity deal acquired OptiCo in South Africa, with the aim of turning around the business.¹⁶⁰ Also, financial institutions are now exploring is the creation of private debt resolution vehicles to manage distressed loans and sell them off to investors willing to take up the risk.¹⁶¹

The experience of Etisalat in its ongoing restructuring is a strong example of the growth of DDI in Africa. In a process managed by Barclays Bank, a varied mix of investors ranging from indigenous companies in the telecommunication sector, investors from other parts of Africa, foreign companies in the sector and private equity firms from the US and the Middle East have made bids to purchase the distressed company.¹⁶²

¹⁵⁷ Daniel Rzasa, 'Duet Group expands African PE portfolio with new acquisition' Modern Investor (15 December 2015) https://www.bowmanslaw.com/press_releases/distressed-debt-opportunities-africa/

¹⁵⁸ Lyndon Norley, 'Distressed Debt Opportunities in Africa' Bowmans (7 September 2016) <http://moderninvestor.com/news/duet-group-expands-african-pe-portfolio-with-new-acquisition/a867532>

¹⁵⁹ Daniel Rzasa, 'Duet Launches New PE Fund Focused on Distressed Nigerian Companies' (22 July 2016) Modern Investor <<http://moderninvestor.com/news/duet-launches-new-pe-fund-focused-on-distressed-nigerian-companies/a935338>>

¹⁶⁰ Africa Capital Digest, 'Wrap up of Africa's Key Private Equity, Infrastructure and Venture Capital (May 29, 2017)

¹⁶¹ Ecobank Transnational Incorporated, the parent company of a pan African bank recently adopted this approach. The company set up the first private sector funded debt resolution vehicle in Nigeria to resolve some of Ecobank Nigeria's challenged assets. The transaction is still in its early days but indicates a move towards a robust distressed debt market in the country. Nkiruka Nnorom, 'ETI loses N52.6bn after Tax on Full Impairment Charge Adoption' Vanguard (18 April 2017) <https://www.vanguardngr.com/2017/04/eti-loses-n52-6bn-tax-full-impairment-charge-adoption/amp/>

¹⁶² Globacom Nigeria Limited, Nigeria's second largest network; India's Bharti Airtel, operating as Airtel in Nigeria; Dangote Group's telecoms business unit, Alheri Engineering Limited, which has the backing of U.S.-based Blackstone Group with an investment portfolio of \$378 billion and a Nigerian subsidiary called the Black Rhino Group; Smile Telecoms Holdings, a South African telecommunications group with subsidiaries in Nigeria, Tanzania and Uganda; and Helios Towers, Centricus Capital and Africell, a subsidiary of the Lebanon-based Lintel Group of Companies, with cellular communications operations in the Democratic Republic of Congo (DRC), The Gambia, Sierra Leone and Uganda; Dubai-based Abraaj Capital, a private equity firm with an investment portfolio of \$11 billion; Teleology Holdings Limited, a special purpose vehicle led by a former chief executive of MTN Nigeria, Mr. Adian Wood, and Ericsson; Africa Capital Alliance (ACA), a leading pan-African

This development holds potential benefits for the rescue of distressed companies in Africa as it indicates that rescue finance, an important element of corporate rescue is also coming into place as insolvency reform is ongoing. For distressed debt investment to flourish however, it is important that clear frameworks and supporting institutions for resolving corporate distress are in place.¹⁶³ This allows investors estimate the risks they are undertaking and devise exit strategies with more certainty.

Overall, the evolution of bankruptcy practice reveals a growing sophistication in the response to financial distress and the opening up of the economies to the rescue norm boosted by the involvement of foreign actors. There are efforts to achieve corporate rescue both in the shadow of the law and with existing frameworks. These developments emphasise a need for bankruptcy law reforms to provide appropriate frameworks that complement the efforts of commercial actors and growing economies. It is against this background that the next section considers recent corporate insolvency and restructuring law reforms across sub-Saharan Africa.

investment firm based in Lagos; and The Carlyle Group, a U.S.-based multinational private equity, alternative asset management and financial services corporation are all in the running to take over the company. Emma Okonji, 'Glo, Airtel, Dangote, Seven Others Advance to Final Stage in 9mobile Bid' ThisDay (20 November 2017) <https://www.thisdaylive.com/index.php/2017/11/20/glo-airtel-dangote-seven-others-advance-to-final-stage-in-9mobile-bid/>

¹⁶³ This is one of the factors that makes South Africa a favourable destination for investors within the continent. Apart from more developed markets, the business rescue law and supporting institutions are relatively grounded in comparison to the rest of Sub-Saharan Africa.

3.2. A synopsis of Bankruptcy law reforms in selected sub-Saharan African states

Table 1.0

| S/N | Country | Previous insolvency law | State of reform | Reform agenda | UNCITRAL cross-border legislation |
|-----|----------|--|---|---|-----------------------------------|
| 1 | Ethiopia | Commercial Code of 1960 | Draft Law 2016 | Reform based on UNCITRAL Legislative Guide. Aims to introduce corporate rescue. | Model Law adopted |
| 2 | Ghana | Insolvency Act 2006 (not substantially different from Insolvency Act 1962 as it is not rescue-oriented). | Draft Corporate Insolvency Bill 2016 to go before parliament. | Reform to improve relatively new insolvency Act of 2005. Driven by professionals in Ghana. Law to introduce a corporate reorganisation framework. | Bills seeks to adopt Model Law. |
| 3 | Kenya | Bankruptcy Act 1930 (revised in 1962). Based on English Bankruptcy Act 1926. | Insolvency Act became effective in March 2016. | New law aims to incorporate corporate rescue. Patterned after UK Insolvency Act, 1986. | New law adopts Model Law. |
| 4 | Malawi | Companies Act 1984. | Insolvency Act 2015. | Introduces approach similar to the UK administration | New law adopts Model Law |

| | | | | | |
|---|------------|---|--|--|------------------------------------|
| | | | | <p>procedure.</p> <p>Also draws from Mauritius and New Zealand</p> | |
| 5 | Mozambique | Civil Procedure Code 1967 | Insolvency and Recuperation of Commercial Agents Decree-Law no. 1/ 2013. | <p>New law drafted with the help of USAID.</p> <p>Introduces a robust corporate reorganisation system.</p> <p>Almost identical with the Brazilian Insolvency Law 2005.</p> | Not considered a priority. |
| 6 | Nigeria | Companies and allied Matters Act 1990 (based on UK Companies Act 1948). | Insolvency Bill 2014 now before the parliament. | Reform aims to introduce business rescue. Driven by professionals in Nigeria and based on UK Insolvency Act 1986. | Bill seeks to adopt the Model Law. |
| 7 | Tanzania | Companies Act 1929. | Companies Act 2002 (came into force in 2006). | Corporate reorganisation containing elements of both US Chapter 11 and UK administration procedure. | Not adopted. |
| 8 | Zambia | Companies Act 2000 | Insolvency Bill 2017 now before the National Assembly awaiting approval. | Bill aims to introduce corporate rescue. Patterned after UK Insolvency Act, US Chapter 11 and the Insolvency Act of New Zealand. | Bill seeks to adopt Model Law |

| | | | | | |
|----|-------------------------|--|--|---|---|
| 9 | South Africa | Companies Act 1973 | Companies Act (2008) which became operative in 2011. Both 1973 and 2008 Laws continue to apply. | New Law introduced Business rescue proceedings. Provides for a reorganisation procedure. Combines elements of Chapter 11 and UK administration procedure. | Model Law adopted. |
| 10 | Zimbabwe | Companies Act 1951 Insolvency Act 1973. | Insolvency bill before parliament. | Reform being driven by World Bank and INSOL. Major aim is provision of corporate rescue law and non-insolvency alternatives. | Reform agenda includes adoption of Model Law. |
| 11 | Uganda | Companies Act 1961. | Insolvency Act 2011 (came into force in 2013) | Patterned after the UK law. Introduces administration as a corporate rescue mechanism | Model Law adopted. |
| 12 | Cape Verde (Cabo Verde) | Civil Process Code 1962 | The Insolvency and Recovery Code - Law no116/VIII/2016 (came into force September 2016) | Patterned after Portuguese law and introduces a procedure for the revitalisation of distressed companies. | Model Law not adopted. |
| 13 | Liberia | | Insolvency and Restructuring Act. Approved, December 2016 | The law bears some resemblance to English law and introduces an administration procedure. | Model Law not adopted. |

| | | | | | |
|----|------------|--|--|---|---|
| 14 | Namibia | <p>Insolvency law 1936 (amended in 1965)</p> <p>Companies Act 2004.</p> | <p>Review of the existing law being done by Law Reform and Development Commission (LRDC) since 2013.</p> | <p>Proposals include the regulation of insolvency practitioners, the insolvency of trusts and set-off. Corporate rescue does feature prominently as a top agenda of the reform.</p> | <p>The proposals contemplate the adoption of across border legislation.</p> |
| 15 | Seychelles | <p>Companies Act 1972</p> | <p>Insolvency Act 2013</p> | <p>Merges both personal bankruptcy and Corporate bankruptcy.</p> <p>Uses the terminology of 'reorganisation' but essentially introduces a UK-style administration regime.</p> | <p>Model Law adopted.</p> |
| 16 | Burundi | <p>N°1/07 of 15 March 2006 on bankruptcy and Law N°1/08 of 15 March 2006 on legal settlement of ailing company</p> | <p>Draft insolvency law adopted by government and presented to parliament in 2014.</p> | <p>Aims to incorporate international and regional best practices. Seeks to harmonise with other East African countries like Kenya, Rwanda, Uganda and Tanzania.</p> | <p>Model Law within the contemplation of proposed law.</p> |

| | | | | | |
|----|-----------|---|---|--|--|
| 17 | Rwanda | <p>Law No. 12/2009 of 26/5/2009 Relating to Commercial Recovery and Settling of Issues Arising from Insolvency.</p> <p>Modified in 2015 by Law N° 35/2013 of 29/05/2013</p> | A 2017 Insolvency law is being drafted by the Ministry of Trade and Industry | To provide more clarity in law and reform in line with international standards. | Law contemplates regulating cross border insolvency. |
| 18 | Lesotho | The Insolvency Proclamation No. 51 of 1957 | Proposal for the drafting of new Insolvency Law submitted to Office of Parliamentary Counsel. | Aims to introduce business rescue mechanisms including out of court work out procedures. | Contemplates the adoption of the Model Law |
| 19 | Mauritius | Companies Act 1984 | Insolvency Act 2009 | Introduces a corporate rescue mechanism, a UK style administration system. | Model Law adopted. |

| | | | | | |
|-------|----------------------|---|---|--|--|
| 20-36 | OHADA ¹⁶⁴ | OHADA Uniform Act organising Collective Proceedings for wiping off debts (UACP), adopted on 10 April 1998 | A new UACP was adopted on 10 September 2015 | Introduces a rescue mechanism called the conciliation procedure. Also provides for priority for providers of post commencement finance. | Model Law adopted in all 17 countries. |
|-------|----------------------|---|---|--|--|

Because some of these laws are still in the process of enactment and those that have been passed into law are in the process of implementation, little can be said about their use or impact on the resolution of financial distress.¹⁶⁵ Nonetheless, a few things stand out from the trend of reform.

3.2.1. The drive to modernise by conforming with global standards.

One quality that these laws have in common is an attempt to modernise current insolvency regimes in line with international best practices. This is most prominently seen through the introduction of corporate rescue frameworks, patterned after UK administration and the CVA or in fewer cases, US reorganisation. These laws also attempt to introduce some form of regulation of insolvency practitioners, a phenomenon that was not obtainable in pre-existing insolvency regimes. They also provide for cross border insolvency by adopting the UNCITRAL Model Law.

3.2.2. Lingering impact of historical (colonial) ties on reform.

Although they are united in the desire to meet global standards, reforming countries have sought to achieve this in a variety of ways, drawing inspiration from a mix of

¹⁶⁴ Includes seventeen countries; Benin, Burkina Faso, Cameroon, Central African Republic, Chad, the Comoros, Congo, Côte d'Ivoire, Equatorial Guinea, Gabon, Guinea Bissau, Guinea, Mali, Niger, Senegal and Togo.

¹⁶⁵ Even though many of these laws are in the process of parliamentary approval, it is expected that they will be passed into law in essentially the same form.

jurisdictions.¹⁶⁶ External influence in the ordering of laws legal institutions has for a long time been informed by historical connections such as colonisation. For example, Nigeria, Ghana, Kenya, Malawi and other former colonies of Britain have been known to habitually transplant British laws and institutions.¹⁶⁷ They hardly subjected the assumption that English laws and institutions are the best fit for them to rigorous questioning. While lawmakers in common law countries do not feel compelled to follow the laws of England, they tend to do so out of convenience or familiarity.¹⁶⁸ Similarly, the Uniform Act in OHADA countries draws heavily from French law. Reform in Mozambique made the choice of transplanting the Brazilian Insolvency Act 2005.¹⁶⁹ Although the countries have a shared colonial history and language which may explain the choice, the reform can engender the kind of horizontal learning advocated for developing economies.¹⁷⁰

3.2.3. Reference to Global scripts like the UNCITRAL Guide

¹⁶⁶ This is understandable as the continent is home to a diverse group of countries with varying legal histories, cultures and influences. The near impossibility of achieving convergence within Africa illustrates how difficult it is to achieve convergence on a global scale. The difficulty of a one size fits all approach is increasingly acknowledged by global actors and is reflected in the standards and principles they provide. For instance, UNCITRAL and the World Bank in their guidelines acknowledge this, and provide for alternative ways of achieving broad goals in insolvency law.

¹⁶⁷ Robert Seidman, 'Law and Economic Development in Independent, English-Speaking, Sub-Saharan Africa' (1966) *Wis. L. Rev.* 999, 1018.; Sandra Fullerton Joireman, 'Inherited legal systems and effective rule of law: Africa and the colonial legacy' (2001) 39 (4) *The Journal of Modern African Studies* 571-596. Going by proposed insolvency law reform, Nigeria is still set on this path. For a criticism, see Bolanle Adebola, 'Conflated Arrangements: A Comment on the Company Voluntary Arrangements in the Proposed Nigerian Insolvency Act 2014' (2015) 1 *Available at SSRN 2565491*. Interestingly, the reform in Kenya has been described as an impressive effort by the 2017 WB Doing Business report, for introducing the mechanism of administration and incorporating many of the best international practices. <www.doingbusiness.org/data/exploretopics/resolving-insolvency/reforms>

¹⁶⁸ Daniel Berkowitz, Katharina Pistor and Jean Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2002) 47 *European Economic Review* 165-95 for an analysis on legal origins and legal transplant

¹⁶⁹ Africa Round Table 2015, Mozambique Country Report, 34. It is noteworthy that Mozambique and Brazil have a shared colonial history as they were both colonised by Portugal and speak the same language. The Brazilian Insolvency Law as we consider in the next chapter is based on the US Chapter 11 procedure which has been adapted to facilitate expedited restructuring in Brazil. Olivares-Caminal and Frigerio, 'Expedited Debt Restructuring in Latin America; a Regional Overview' (2010) IDB Working Paper Series, No 113.

¹⁷⁰ According to Trubek, 'this approach involves detailed comparisons of parallel experiences in similarly situated developing countries by experts from these countries. Rather than look to advanced country models or follow universal prescriptions from international bodies, this method relies on a bottom-up, demand-driven approach in which the developing countries themselves identify the issues they wish to deal with, select the peer nations they think they can learn from, and engage directly with peer experts in these nations. David Trubek, 'Scan Globally, Reinvent Locally: Can We Overcome the Barriers to Using the Horizontal Learning Method in Law and Development?' (2014) 258 *Hosei Ronshu, Nagoya University Journal of Law and Politics* 5; Joseph Stiglitz, 'Scan Globally Reinvent Locally. Knowledge Infrastructure and the Localization of Knowledge' in Diane Stone (ed), *Banking on knowledge: the genesis of the Global Development Network* (Routledge 2003).

It is not clear to what extent global scripts like the UNCITRAL Guide have been influential in the actual drafting of the bankruptcy laws. Except in Ethiopia where reform is stated to be based on the UNCITRAL legislative guidelines, most of the reforms have involved varying degrees of transplant from developed countries with which African countries share some connection.¹⁷¹ This is likely based on an assumption that these jurisdictions have incorporated international best practices into their laws, thereby providing ready-made templates and a shortcut to incorporating global standards. Many of the reforms that purport to adopt the UNCITRAL Model Law on Cross-Border Insolvency do so with little or no modifications. The UNCITRAL Guide offers alternative ways of incorporating global norms into legislation and this can be of benefit to developing countries seeking to adopt these norms in a way that is compatible with their institutions. It is likely that bankruptcy reforms in Africa have failed to harness this benefit. Global norms have not done very much in undermining the tendency to fully transplant the laws of countries to which African countries bear some connection. This trend challenges the postulation that the US enjoys the privilege of globalised localism in bankruptcy law. This may not be the case in Africa, as countries continue to more overwhelmingly favour the law of locals to which they are accustomed in their choice of template.

3.2.4. Other issues thrown up by countries' template choices

Notwithstanding that many countries remain true to the conventional tendencies in their choice of templates,¹⁷² the proliferation of global norms opens developing African countries up to new forms of influence. For example, Malawi's 2015 Insolvency Law contains elements from Mauritius, New Zealand and English laws. The choice of Mauritian law according to a report, was based on the belief by

¹⁷¹ INSOL and World Bank African Round Table 2015, Restoring Financial Sector Stability and Promoting Growth: The role of insolvency regimes. Other than in Zimbabwe where the World Bank and INSOL are involved in the ongoing corporate bankruptcy reform, and Mozambique being assisted by USAID, the extent of hands-on involvement of global actors in reforms across African countries is unclear.

¹⁷² Nigeria, Kenya, Cape Verde and Mozambique are examples.

reformers that Mauritian law is internationally regarded as best practice.¹⁷³ As mentioned earlier, this horizontal learning is further promoted by avenues like the ART which provides a forum for countries in the region to learn about the progress of reform in other countries. Similarly, Zambia combines elements of US Chapter 11, UK and New Zealand Insolvency Laws.

The incorporation of different frameworks into these laws may also be a manifestation of unresolved conflicts among stakeholders. For instance, stakeholders in Nigeria have debated the form corporate rescue mechanisms should take in the country. While certain groups believed that an American-themed, debtor-in-possession reorganisation framework is more suitable, others are convinced that a UK inspired creditor-oriented framework is a better fit.¹⁷⁴ While English Law has emerged victorious in these debates, the fact that there was a debate at all may indicate that global norms may be inspiring change in previously uncontested areas. Following the discussion in the previous chapter, policymakers may avoid resolving this conflict by internalising them in formal law in a bid to pacify different interests. Although reforms remain largely untested, inherent inconsistencies in the laws could result in vagueness, creative application or disuse ultimately. The new law in Malawi introduces a corporate rescue mechanism modelled after the UK administration procedure. However, unlike the position in England where the company itself or the holder of a qualifying charge may appoint an administrator, a company administration order in Malawi can only be granted by the High Court. This substitution is curious considering that for a country with overburdened courts,¹⁷⁵ the goal should be the adoption of systems that reduce rather than perpetuate overdependence on courts. This institutional mismatch can result from diagnostic

¹⁷³Freedom House, Malawi Country Report 2015, <<https://freedomhouse.org/report/freedomworld/2015/malawi>>

¹⁷⁴ Bolanle Adebola, *Corporate rescue and the Nigerian Insolvency System* (Doctoral dissertation, UCL (University College London 2013) 332. Admittedly, this struggle is not peculiar to Nigeria or even developing countries. A similar conversation has been debated in the UK. The UK is now on a path of turning to ideas derived from US Chapter 11 reorganisation- moratorium, cram-down, rescue financing. See Insolvency Service, 'A review of the Corporate Insolvency Framework' (25 May 2016) <www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework>

¹⁷⁵ibid

struggles that occur when law reformers fail to properly diagnose issues that are central to reform before a new law is enacted. If unpredictable and inefficient court systems is rightly diagnosed as one of the fundamental problems that face the insolvency practice in African countries, then insolvency law reform should reflect this diagnosis by proposing systems that ameliorate rather than complicate the problems. Even if the issues are clearly diagnosed, the problem of indeterminacy may also set in where stakeholders are unsure of how to resolve the problems identified. For one, the templates (laws of developed countries) from which they receive guidance are designed for stronger institutions.¹⁷⁶

3.2.5. *Some notes on Implementation*

As the spate of insolvency reform rises in countries across Africa, there have been a few success stories and stories of difficulties with implementation. Since its law came into effect in 2013, Uganda recorded its first administration in 2017, when Uganda Telecom Limited was placed in administration. Because UTL is state-owned, the government has been closely involved in the ongoing administration.¹⁷⁷ The commitment of the government to the rescue of the company can significantly increase the chances of the administration resulting in a turnaround of ATL.¹⁷⁸ This has the potential of boosting the confidence of stakeholders in the newly introduced administration system. It however limits the possibility to assess the implementation of the law on its own merits at this stage.

South Africa has the longest standing business rescue law and over 1600 business rescue proceedings had been commenced as at March 2015.¹⁷⁹ By March 2016, 1911

¹⁷⁶ There is therefore a strong case for learning from jurisdictions that have successfully adapted global standards to fit their institutional frameworks

¹⁷⁷ Ronal Mugabe, 'URSB takes charge of UTL' New Vision (29 April 2017)

https://www.newvision.co.ug/new_vision/news/1452214/ursb-takes-charge-utl

¹⁷⁸ Isaac Khisa, 'UTL on route to recovery' The Independent (20 November 2017) <https://www.independent.co.ug/utl-route-recovery/>; Peer to Peer Reports from ART 2017 <https://www.insol.org/_files/Africa%20Round%20Table/Mauritius%202017/Delegate%20Folder/Peer%20to%20Peer/Peer%20to%20peer%20session%20FULL.pdf>

¹⁷⁹ Companies and Intellectual Property Commission 2015 <http://www.cipc.gov.za/files/1914/3377/1988/Status_of_Business_Rescue_in_South_Africa_version1_0.pdf>

filing had been made with only 310 being successful.¹⁸⁰ The inadequacy of rescue finance has been identified as one of the significant reasons for the low success rate.¹⁸¹ Practitioners also report implementation challenges arising from the interpretation of certain provisions by practitioners and the courts. This difficulty stems from a combination of deficient institutions and ‘novel concepts and bad drafting’.¹⁸² Notwithstanding the low rate of success, the sustained increase in the number of filings suggests a commitment to business rescue objectives and the implementation of the rescue law.

Kenya has recorded some implementation of its new law notably with the country’s biggest supermarket and retail chain, Nakumatt entering into administration in hopes for a turnaround.¹⁸³ The administration is still in its infancy as the order was only recently granted.¹⁸⁴ One of the early lessons from the administration order is the steepness of the learning curve that the concepts introduced by Kenya’s new law presents for stakeholders, particularly judges. At the first hearing for the administration order, the judge bemoaned the lack of rules to provide more clarity and guidance for actors involved in the process.¹⁸⁵ Some practitioners have confirmed the challenge by attributing implementation gaps to the lack of understanding of the new law by stakeholders.¹⁸⁶

In countries like Seychelles and Mozambique, where new corporate rescue laws were enacted five years ago, there is still little clarity as to the use of the law.¹⁸⁷ From

¹⁸⁰ Companies and Intellectual Property Commission 2016. Some success stories include Dial-a-Bed Beares, Optimum Coal Mine, High Veld Steel etc. See Piers Marsden, ‘Business Rescue Growing Pains’ (March 2016) The Quarterly Journal of INSOL International

¹⁸¹ Piers Marsden, ‘Business Rescue Growing Pains’ (March 2016) The Quarterly Journal of INSOL International

¹⁸² Peer to Peer Reports from ART 2017 <<https://www.insol.org/files/Africa%20Round%20Table/Mauritius%202017/Delegate%20Folder/Peer%20to%20Peer/Peer%20to%20peer%20session%20FULL.pdf>>

¹⁸³ Abdi Latif Dahir, ‘Kenya’s largest supermarket has gone bankrupt and rivals are set to snap up its empty stores’ Quartz Africa (31 October 2017) <https://qz.com/1116051/kenyas-nakumatt-files-for-bankruptcy-as-shoprite-prepares-to-fill-its-empty-stores/>; Kennedy Kangethe, ‘Nakumatt files for voluntary administration, PKF consultant to take over management’ Capital Business (31 October 2017) <https://www.capitalfm.co.ke/business/2017/10/nakumatt-files-voluntary-administration-pkf-consultant-take-management/>

¹⁸⁴ On 22 January 2018. See court order at <http://kenyalaw.org/caselaw/cases/view/146499/>

¹⁸⁵ See para 6 of judgment at <http://kenyalaw.org/caselaw/cases/view/143828/>

¹⁸⁶ See Peer to Peer Reports from ART 2017 <<https://www.insol.org/files/Africa%20Round%20Table/Mauritius%202017/Delegate%20Folder/Peer%20to%20Peer/Peer%20to%20peer%20session%20FULL.pdf>>

¹⁸⁷ *ibid*

inception, practitioners were not optimistic about the use of the Mozambican law.¹⁸⁸ One of the difficulties identified with the implementation of this law is interpretation and application because of the new philosophy and different terminologies brought by the law. Perhaps due to failure to carry all relevant actors along in the reform process (actor mismatch), ad hoc insolvency experts have been reported as not giving 'due attention to the process'.¹⁸⁹ As participants of the ART 2017 pointed out, the implementation of the law continues to be affected by a lack of knowledge of the law by businessmen, embedded cultural conceptions about insolvency procedures and lack of sanctions for non-submission to the law. Also, the suboptimal functioning of institutions poses a challenge for implementation in many countries.¹⁹⁰

Other countries like Nigeria, Ghana, Ethiopia, and Zambia are still making efforts to enact insolvency laws that have been in draft for many years. Reforms have been stalled due to a combination of factors including the lack of political will.

Overall, bankruptcy reform in Africa is evolving and as reform and implementation progress, the tensions between new laws and existing institutions and practises can be explored in more detail. While the need for reform is driven by a combination of endogenous and exogenous factors, the content of reform may be responding more to the need to conform to global standards than to domestic needs and institutions. In some countries, there are suggestions of significant detachment between the promoters of reform and end users of the law, which again highlights the value in carrying all stakeholders along, before a law is enacted. As reforms are ongoing, restructuring practices are also evolving. This creates a real opportunity to pass laws that are adapted to practical problems, institutional demands and development

¹⁸⁸ Chambers and Partners, Mozambique Law and Practice <www.chambersandpartners.com/guide/practice-guides/location/276/8278/2658-200>

¹⁸⁹ Africa Round Table 2015, 34; <www.chambersandpartners.com/guide/practice-guides/location/276/8278/2658-200>; These issues are foreshadowed by the literature on legal transplant and previous discussion on institutions. As Dani Rodrik asserts, 'even under the best possible circumstances, an imported blueprint requires domestic expertise for successful implementation. Dani Rodrik, 'Institutions for High-Quality Growth: What They Are and How to Acquire Them' (2000) 35 (3) *Studies in Comparative International Development* 70; Berkowitz, Pistor & Richard, 'Economic development, legality, and the transplant effect' (2003) *European Economic Review*, 47(1) 170.

¹⁹⁰ countries like Uganda, Malawi and Mozambique attribute some of the implementation gaps to the deficient institutions, particularly courts

needs. It is however only likely to happen if the stakeholders involved in restructuring practice have some input in the reform.

As latecomers to the development table, African countries may not enjoy the same luxury that countries with home-grown bankruptcy laws like the US and the UK have enjoyed in crafting laws that were compatible with their local institutions and development needs.¹⁹¹ However, while the opportunity for such organic reform may have been interrupted by globalisation and the proliferation of global norms, African countries can take advantage of the absence of coercion in the propagation of those norms to produce versions of bankruptcy law that are most compatible with their institutions.

CONCLUSION

This trend towards global convergence in bankruptcy law has been debated in the context of advanced countries and some developing regions, particularly in Asia. This paper emphasises the importance of the experience of developing countries to the emergence of global norms of bankruptcy. To contribute to the understanding of how bankruptcy norms are spreading globally, it considers ongoing bankruptcy reform in a fast-growing region that has been largely ignored in the literature, Africa. It examines the role of global norms and actors in bankruptcy reforms and concludes that while the developments in the law and practice of bankruptcy in selected African countries are driven by both endogenous and exogenous factors, the content of reform on the other hand, is highly influenced by external factors. Reform is still ongoing in many countries and implementation is at infancy in others. Thus, the paper only makes preliminary observations on the impact of reform. The discussion however sets the stage for a discussion of how global bankruptcy norms will settle locally. As reform progresses, the lessons that these debates offer can now be applied to Africa through extensive multi-country examination of the interaction between local institutions bankruptcy law and practice.

¹⁹¹ Bruce G. Carruthers; Terence C. Halliday, Professionals in Systemic Reform of Bankruptcy Law: The 1978 U.S. Bankruptcy Code and the English Insolvency Act of 1986, 74 Am. Bankr. L.J. 35 (2000); Bruce Carruthers and Terence Halliday, *Rescuing business: The making of corporate bankruptcy law in England and the United States* (Clarendon press 1998)