The Debtor’s Trident: The Prospective Business Rescue Proceedings in the Nigerian Insolvency Framework

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The allocation of control powers is a perennial issue in the design of effective rescue systems. Where allocated ineffectively, control rights could lead to an improvement in the position of the empowered group, to the detriment of other stakeholder groups impacted by the company’s financial distress. Thus, like the trident - a three-pronged piece of equipment used in several mythologies as both a tool and a weapon - the rescue system can be used as a tool with which to maximise value in a distressed company or business for the benefit of stakeholders or as a weapon through which an empowered group can extract value to the detriment of others.

In Nigeria, as in other countries, there have been attempts to include rescue-oriented processes into the insolvency system, through proposed reforms to the Companies and Allied Matters Act 1990. The latest iteration of proposals in the recently passed Companies and Allied Matters Bill 2018 signals a shift towards rescue but portend dangerous consequences for stakeholders including creditors who have been disempowered by the law unless additional changes are made.

Designing Effective Rescue Models: The Global Challenge

There are several rescue models across the globe. The concentrated-creditor model allocates strong rights to a sophisticated creditor - typically the secured lender with the information and powers necessary to act whenever the debtor becomes distressed. Variations of the receivership procedure favour this model. Thus, it is typical to find this model amongst countries that draw the origins of their insolvency law from England and Wales; such as Nigeria. The challenge faced by this model of rescue is that secured-creditors are likely to take value extracting decisions that typically disadvantage excluded stakeholders when given control.

An alternative is the debtor-oriented model, which allocate strong control rights to the incumbent management of the debtor. The US Chapter 11 is, in principle, designed on this model; so are recent rescue systems that draw inspiration from that model, such as Singapore. The implications of giving the debtor control is that they typically keep going until they run out of money. Where the company is balance-sheet but not cash-flow insolvent, the debtors will therefore be in the position to take huge risks with creditors’ money in circumstances in which they enjoy the upsides but not the downsides of their actions.

The great challenge in the design of effective rescue systems has been how to create models that effectively allocate control rights for the benefit of all stakeholders of distressed entities. The challenge remains open as no theoretical framework or country has yet presented an adequate answer. Still, there is an incontrovertible advantage to allocating control rights to the debtor

- a point which even the most ardent of concentrated-creditor models concede. This is that the debtor is in the best position to recognise the on-set of financial distress and so, would be best positioned to respond. Thus, more timely responses through which greater value can be saved are more likely in debtor-oriented models. Many countries across the globe have therefore embarked upon reforms that re-orientate their rescue laws towards debtor-oriented models. We turn next to Nigeria's latest rescue reform set out in the Companies and Allied Matters Bill 2018 passed in 2019.

Control Rights in Nigeria's Prospective Business Rescue Proceedings

The Companies and Allied Matters Bill 2018 introduced the novel Business Rescue Proceedings to provide for the rehabilitation of distressed companies and businesses. The origins of the procedure are unclear, as they have not been in any of the previous iterations of the reform bill. To qualify, the proposal should provide for the temporary supervision of the company and the management of its affairs, a temporary moratorium of claims against the company or its assets and indication of the (intention to) develop a plan to rescue the company or that results in a better outcome than liquidation (which would include a business rescue). The procedure is initiated where a financially distressed debtor passes a resolution to commence business rescue and by so doing, places the company under temporary supervision. S. 402 sets out the conditions that must be met including, importantly: a statutory declaration that the company is financially distressed and that no liquidation proceedings have been initiated against it. The company is to publish a notice of the resolution subsequently.

The new procedure clear provides a debtor-oriented model; a sharp re-orientation from the previous concentrated-creditor model imposed by the receivership procedure, which has been at the fore-front of the Nigerian rescue system. There are limited grounds on which the actions of the debtor can be successfully challenged, including: (i) That there is no reasonable basis for believing the company is financially distressed, (ii) That there is no prospect for rescuing the company, or (iii) That the company has not fully complied with the stated procedure. A creditor faces an uphill task in convincing the court to overturn the decision to rescue, given that the test is vaguely worded, while the amount of information that would be required to proffer a convincing alternative view is unlikely to be available to most creditors. Most concerning, however, is the open-ended nature of the powers granted to the debtor. In combination, these powers give the debtor and its agents complete control over the business, while the rights of creditors are pared back at a time in which value in the company is fast depleting to their disadvantage.

The Companies and Allied Matters Bill 2018 has undergone further revision since it was passed. Its latest iteration was passed recently by the Nigerian Senate and awaits the approval of the House of Representatives. The fundamental challenge for its proponents would be how to transform a creditor-oriented system into one that is debtor-oriented. Changing the rule on the books will be insufficient to change the law in practice. Thus, it would be important to consider means through which the new set of norms can be properly propagated within the relevant stakeholder groups.

Ultimately, the proposed Nigerian business rescue proceedings offer both a tool to restructure the company, as well a potentially potent weapon that can be used by the debtor to retain control till value in the company is depleted. It is important that the government limits the opportunities for debtors to 'weaponise' a tool that ought to be used to the benefit of the stakeholders as a group by urgently revising the procedure to limit the control rights allocated to the debtor before presidential assent is given to the bill. Finally, the government must provide resources to effectively translate the new approach to insolvency into practice.

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