

MAKING RESCUE CHOICES FOR FINANCIAL DISTRESS IN GHANA:
LESSONS FROM CHAPTER 11 OF U.S.A. BANKRUPTCY CODE

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ABSTRACT

The past thirty years has seen a tremendous change in the treatment of insolvent companies across the world. The change from liquidation to the rescue of ailing companies has arisen as a result of the introduction of corporate rescue mechanisms like reorganization in U.S and administration and company voluntary arrangement in the U.K.

The change in the treatment of ailing companies across the world call into question the operation of the Bodies Corporate (Official Liquidation) Act, 1963 (Act 180) of Ghana. This law has been in operation for over half a century without a single amendment to its provisions. While the fact that the law is dated does not mean that it is ineffective, a reasoned evaluation of the law must suffice before a conclusion that it is ineffective can be made.

This study, therefore, put into question the effectiveness of the insolvency law in Ghana. The study uses the U.S as a comparative state and applying the doctrinal and transplant methodological approaches, reveals that not only is the insolvency law in Ghana outdated but also inefficient and ineffective and in need of reform. The study proposes

the introduction of rescue mechanism like Chapter 11 style reorganization under the U.S Bankruptcy Code 1978.

The study finally calls into question the distributive goals of bankruptcy law. Given that bankruptcy law is a collective procedure premised on the footing that all similarly situated creditors must be treated equally, the concept of statutory priority in bankruptcy law where the law elevates an unsecured creditor above others in the line for payment defeats the equality principle that bankruptcy law provides to similarly situated creditors. This study, therefore, argues for the introduction of a priority cap being a maximum amount in proportion to the value of the assets of the debtor which can be paid to all priority class. All outstanding debts to priority creditors after depleting the maximum amount should be treated as any other unsecured debt to be settled with all general unsecured creditors. This cap will likely return payments to unsecured creditors who often get nothing out of bankruptcy process.

BIOGRAPHICAL SKETCH

Samuel B. Adarkwah joined Cornell Law School J.S.D program in August 2012 as a Schlesinger Fellow. Prior to that, Samuel graduated from Cornell Law School's Master of Laws (LL.M) program where he was awarded the CALI Excellence Award for the Future for attaining the highest grade in Public International law. He graduated as Degree Marshall for the LL.M Class at the 144th Commencement in May 2012. He holds an LL.B with Honours (*summa cum laude*) from the Faculty of Law, Kwame Nkrumah University of Science and Technology and a Barrister's License (B.L) from the Ghana School of Law in 2007 and 2009 respectively.

To my wife Belinda and lovely daughters Elsa and Ava Adarkwah

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I developed an interest in insolvency law during my final year at Kwame Nkrumah University of Science and Technology. As a young undergraduate student, I realized that there was no scholarly publication on the subject in my country. I was challenged to make a useful contribution to the field. Today, my interest has grown into a full blown scholarship in the area. I am grateful to Dr. Ernest Owusu-Dapaa for his encouragement.

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CHAPTER ONE

INTRODUCTION

1. Overview

The past thirty years has seen a tremendous change in the traditional way of dealing with companies undergoing financial distress. In Commonwealth countries, this shift is attributable to the work of The Cork Committee on Insolvency Law and Practice, which made proposals for the possibility of adopting a formal mechanism for rescuing distressed companies rather than allowing them to go under. The core principle was that a good insolvency law should “provide the means for the preservation of viable commercial enterprise capable of making a useful contribution to the economic life of the country.”¹ As a result of this proposal, two mechanisms i.e. administration and company voluntary arrangements were introduced into insolvency law in England to rescue financially distressed companies.

In the US, the introduction of corporate reorganization from the period of the great depression of 1930’s to the 1978 reform, saw an increase in the use of rescue policy designed to help distressed companies from folding up. These rescue mechanisms have influenced some countries and even International Organizations such as the International Bank for Reconstruction and Development (The World Bank) and the International Monetary Fund (I.M.F.) who view corporate rescue positively and style or recommend it as an efficient and effective way of dealing with corporate failure.² A number of countries have since adopted some form of formal rescue mechanisms using

¹ See Insolvency Law and Practice, Report of the Review Committee. Cmnd 8558. HMSO, London, 1982.

² See Jay Lawrence Westbrook, A Global Solution to Multinational Default, 98 Mich. L. Rev. 2276, 2278–79 nn.2–15 (2000) (Westbrook discusses bankruptcy reform efforts by a number of countries throughout the world). See also International Monetary Fund, Orderly & Effective Insolvency Procedures (1999) available at <http://www.imf.org/external/pubs/ft/orderly/#cross> accessed on (01/19/2012).

it as an alternative to outright liquidation or winding up when companies trade their way into bankruptcy.³

The change in the traditional ways of dealing with bankruptcy has also led to a change in the traditional private international law rules dealing with insolvency that cuts across national borders. In recent times, the growth of multinational businesses has led to increasing international insolvencies. Multinational corporations end up with branches and assets located in at least one country. When bankruptcy occurs, they end up with creditors spread across the world. Cross-border issues come to play when international elements show up in domestic bankruptcy proceedings involving multinational corporations. Since bankruptcy rules substantially differ across the world, complex problems are presented to the parties which are not too often resolved efficiently by a resort to the rules of private international law.⁴

To deal with some of these problems and most importantly to ensure certainty in cross-border issues, the United Nations tasked The United Nations Commission on International Trade Law (UNCITRAL) to brainstorm and recommend harmonization of cross-border issues. This work led to the production and subsequent adoption of Legislative Guide on Insolvency and Model Law for Cross-Border Insolvency, which espouses model rules for legislating bankruptcy laws and resolving cross-border issues.⁵ These changes over the years have been the focal point for addressing corporate bankruptcy in an efficient and effective manner.

³ *Id.*

⁴ See *Maxwell Communication Corp. v. Société Générale* 93 F.3d 1036 (2d Cir. 1996), *In re Olympia & York Dev. Ltd.*, [1993] 12 O.R. 3d 500 and *United States v. BCCI Holdings (Luxembourg) S.A.*, 48 F.3d 551.

⁵ United Nations Commission on International Trade Law, Legislative Guide on Insolvency Law, U.N. Sales No. E.05.V.10 (2005).

2. The Ghanaian Problem: A Lacuna Or Problem Of Application Of Law?

In Ghana, like most other countries, companies are juridical entities. Their existence is based on statute. The Companies Act, 1963 (Act 179) prescribe the birth, operation and the end of the life of a company. When companies face financial distress or difficulty, they are presented with doses of legal mechanisms to help them escape total collapse. Company law in Ghana dated to early 1906 when the first Companies Ordinance was enacted to deal with the influx of foreign corporation trading in the country.⁶ This Ordinance contained the first set of rules dealing with winding up of financially distressed companies. As more companies were incorporated over the years and coupled with the attainment of independence in 1957, Ghana set up a Commission to overhaul company and insolvency law. The current piece of legislation dealing with financial distress or difficulty is the Bodies Corporate (Official Liquidation) Act 1963 (Act 180) (hereinafter referred to as Act 180) enacted after the Insolvency Commission's work. This law has been in operation from 1963 till today.

The change in the treatment of financially distressed companies across the world raises significant concerns regarding Act 180. This is because the law has operated for more than half a century without a single amendment or review. While the time frame alone does not suggest that the law is palpably ineffective, a reasoned evaluation of the law must be conducted to ascertain whether the law efficiently handles financial distress.

Act 180 was enacted to deal with involuntary winding up arising as a result of the company's inability to pay its debts. To achieve this aim, the Act contain elaborate provisions empowering the Official Liquidator- who is the Registrar of Companies, and other creditors to petition the court to seek reliefs under the Act. Section 9(1) (a) and (b) on the Powers of Liquidator provides that:

⁶ No. 14 of 1906.

“(1) the liquidator in an official winding up under this Act shall have power,
(a) to bring or defend any action or other legal proceedings in the name and on behalf of the company;
(b) to carry on the business of the company so far as may be necessary for the beneficial winding up thereof;”

In furtherance of this goal, the liquidator has the power “to sell the real and personal property and things in action of the company by public auction or private contract.”⁷ He also has the authority to transfer any property either in whole or part to individuals or corporate buyers.⁸ Additionally, the Liquidator has a residual power to do other things necessary for winding up the affairs of the company and distribute its assets to creditors.⁹ In *The Liquidator v Joseph Karam*, Adjei Frimpong J. succinctly stated the principal duty of the Liquidator as follows:

“There cannot be any question about the basic function of an official liquidator appointed by a court to wind up a company. The liquidator is to secure, that the assets of the company are got in, realized and distributed to the company’s creditors and, if there is surplus, to the persons entitled to it. This statutory duty is without doubt what the Plaintiff sought to discharge.”¹⁰

Liquidation, without a doubt, is the first remedy available to distressed companies under Ghanaian law. This is however in addition to other forms of statutory engagement like compromises and arrangements found in other legislation dealing with corporate failure.¹¹

⁷ Section 9(1) (e) of Act 180.

⁸ Section 9(1) (g) of Act 180.

⁹ Section 9(1) (m) of Act 180.

¹⁰ *The Liquidator v Joseph Karam*, Suit No. Acc/12/09 at 2.

¹¹ Even though liquidation is the foremost remedy under Act 180, reorganization is not an entirely new concept. Attempts to reorganize companies can be traced to the Final Report of the Company Law Commission in 1961. One

Liquidation as a remedy does not automatically flow when a company's debts are due and remain unpaid. Some statutory grounds must be satisfied. Section 3(3)(c) of Act 180 dealing with winding up petition presented to the Registrar provides:

“A company shall be deemed to be unable to pay its debts... (c) if it is proved to the satisfaction of the Registrar that the company is unable to pay its debts; and, in determining whether a company is unable to pay its debts the Registrar shall take into account the contingent and prospective liabilities of the company.”

Section 4(3) of Act 180 dealing with winding up petition made pursuant to Court also provides that: “In determining whether the company is unable to pay its debts the provisions of subsection (3) of section 3 of this Act shall apply.” The combined effect is that it is not always automatic for a company to be wound up merely because it is owing and unable to pay its debt. The Registrar or the Court is duty bound to consider the contingent and prospective liabilities of the debtor company before making a winding up order. In *Billy v. Kuwor*, Benin J stated, “...it is my view that the court must look at the business realities of the situation and should avoid taking a narrow legalistic view that because the company is owing, it should be wound up.”¹²

Act 180, however, does not espouse how the balancing of prospective and contingent liabilities is to be achieved and how the debtor's company creditors are to be treated afterward. Billy's case also failed to pronounce on the mechanics of the balancing test- that was not the main issue before the court. This leaves a big space for guessing what happens to a distressed company after the

of the defects of the Companies Ordinance of 1906 was that it provided little or no machinery for corporate reorganization. The solution to that problem was the enactment of provisions dealing with corporate arrangements and amalgamation under the Companies Act (Act 179) of 1963. See Final Report of the Commission of Enquiry into The Working and Administration of the present Company Law of Ghana, 169 (1961).

¹² [1991] 1 GLR 522-532.

court refuses to wind it up on the basis of contingent and prospective liability test even though admittedly the company owes and it's unable to pay. It is entirely unclear how the company and especially creditors are to be treated after the winding up order has been refused.¹³ The closest one can come to is the provision which gives the court the power to make any order it thinks fit when winding up petition is brought before it.¹⁴ This order, however, cannot be made in a vacuum. The complexities involved in reviving a modern day company, makes it fit that the process is prescribed by statute and not thrown into the realm of the discretion of the judge. In the absence of clear-cut rules, this can be a breeding ground for inconsistency and chaos.

The other form of statutory engagement of financial distress which is Section 231 of the Companies Act, 1963 (Act 179) deals with arrangements and amalgamation. The section is linked to Section 9(e) of Act 180. This provision allows the Liquidator to make compromises and arrangements with creditors for the satisfaction of their claims than for full payment on the due date. Compromises and arrangements include simple composition, moratorium, amalgamation, etc. It may lead to complete reorganization of share and loan capital or the acquisition of the entire share capital by one company of another.¹⁵ Thus the rights of debenture holders and other creditors may be altered. Schemes and arrangements under section 231 were copied from section 206 of the Companies Act 1948 of England, which constituted an early set of reorganization mechanisms dating back to the Joint Stock Company era. The mechanism is regarded as being overly

¹³ That issue was not resolved in *Billy v Kuwor*. In that case the petition has been brought on other grounds. The court ended its enquiry when it found that the company was solvent.

¹⁴ Section 4(4) of Act 180 provides: "On the hearing of a winding up petition the Court may dismiss or adjourn the hearing conditionally or unconditionally or make an interim order, or any other order that it thinks fit, but the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to, or in excess of, those assets or that the company has no assets."

¹⁵ Gower L.C.B, Modern Company Law (4th Edition), 687 (1979).

complicated, cumbersome and costly as a debt restructuring mechanism.¹⁶ In modern times they have been used by many insurance companies in England to restructure; they have by no stretch of the imagination in England taken as an “emergency response to companies undergoing financial distress.”¹⁷

Recent Bankruptcies

A number of issues have arisen over the years, which raise questions about the efficacy of the laws dealing with corporate financial distress or insolvency in Ghana. Between the periods 2000 and 2010 about 30 big companies employing a lot of people were liquidated.¹⁸ One notable case was the Bonte Gold Mine Affairs. Bonte Gold Mines Limited was incorporated in 1989. It was 85% owned subsidiary of Akrokeri-Ashanti Gold Mine Inc., a Canadian company listed on the Toronto Stock Exchange (TSXVE: AKR).¹⁹ Bonte Gold Mine Ltd held a 30-year mining lease on the Esaase property in the Ashanti Region of Ghana. It operated the mine for some time until the year

¹⁶ Jennifer Payne, Schemes of Arrangement: Theory, Structure and Operation (Cambridge University Press) 2014.

¹⁷ See David Milman, Reforming Corporate Rescue Mechanisms; The Reform of United Kingdom Company Law, Cavendish Publishing Limited, 417 (2002).

¹⁸ In the year 2000, the Bank for Housing and Construction went into liquidation. The company had a total debt of \$16 million and its assets totaled \$12 million. After realizing the assets of the company, the liquidator paid up to about 80% of the debts to creditors. To forestall the eroding of confidence in the banking system the government stepped in and settled all depositors. The company had a total of 1,000 employees who lost their jobs. The Ghana Airways liquidation left over 1400 workers jobless. See Essabra-Mensah, 30 Companies Go Bust in 10 years accessed at <http://essabra-mensah.blogspot.com/2011/08/30-companies-go-bust-in-10-years.html> on (02/15/2013). See also Albert Yeboah, Business Failure in Ghana: The Case of Ghana Airways Limited (May, 2009) (C.E.M.B.A Thesis, Kwame Nkrumah University of Science and Technology).

¹⁹ Akrokeri Ashanti operated through its three principal subsidiaries: (i) Bonte Gold Mines Limited, an 85%-controlled Ghanaian subsidiary that operates the Bonte Gold Mine and holds a 30-year mining lease on the Esaase property; (ii) Jeni Gold Mining Limited, a 90%-controlled Ghanaian subsidiary that holds 100% of the surface rights to the Jeni property, which is adjacent to the Esaase property; and (iii) Goldenrae Mining Company Limited, a 90%-controlled Ghanaian subsidiary that holds 30-year mining leases on the Kwabeng and Pameng properties.

2001, when the company reported that it was experiencing processing problems derailing it from achieving its expected target for the year.²⁰ The company subsequently announced that it was experiencing a shortage of reliable mining equipment, which kept production level low. Bonte Gold Mine later cancelled its exploration program due to lack of funds and inability to find high-grade ore. During 2003-2004, the company was constrained by the high level of debts and cash flow problems. On March 4th, 2004 Bonte Gold Mine Ltd received a letter from its largest creditor and parent company Akrokeri-Ashanti Gold Mines Inc., demanding payment for U.S. \$3,400,000. Unable to meet this demand, the company sought advice from its solicitors on the possibility for the company to apply to the court for protection while producing a plan of reorganization. They soon realized after consultation with their solicitors that they could not take that route.²¹ Official liquidation was the only available route for the company.

On March 26th, 2004, about three weeks later, Akrokeri-Ashanti Gold Mines Inc. announced that it had petitioned Bonte Gold Mines Ltd into formal liquidation. In its official declaration, the company stated that the liquidation would not prejudice the interest of its creditors or its shareholders.²² The aftermath left behind a shattered town with heavy environmental pollution and

²⁰ The company's target was to mine 19,000oz but it could only manage 15,926oz. Part of the problem was due to the fact that the gold particles were finer than anticipated. See Fine Gold Foils Bonte Target. (Production), Mining Journal 19 Oct. 2001: 303. Business Insights: Essentials accessed at http://bi.galegroup.com/essentials/article/GALE%7CA80056149?u=nysl_sc_cornl on (02/15/2013).

²¹ Liquidation of Bonte Gold Mines, http://www.modernghana.com/news/52246/1/liquidation-of-bonte_goldmines-limited.html on (02/15/2013).

²² "Akrokeri-Ashanti Announces Official Liquidation of Bonte Gold Mines Limited." Canadian Corporate News 26 Mar. 2004. Business Insights: Essentials accessed at http://bi.galegroup.com/essentials/article/GALE%7CA114636133/d0bea8e67a7f0dcca074f5535bba4930?u=nysl_sc_cornl on (02/15/2013).

large trenches that were never reclaimed and persisted today. Supplier chains were broken; several workers numbering over 400 lost their jobs, and most of them never compensated.²³

In a sequel to its failure to reclaim the environment, a suit was filed against Bonte Gold Mine Ltd and other government agencies as defendants. In *Cepil & Anor V. Environmental Protection Agency, Minerals Commission and Bonte Gold Mines*²⁴ the plaintiff brought an action against Bonte Gold Mines and other defendants for failure to reclaim or rehabilitate destroyed lands arising as a result of its operations in the Esaase area. Plaintiff obtained a judgment from the High Court after five (5) years of litigation. Very little could be done about the mess left behind. Within one week of filing for liquidation, the directors had abandoned the company and exited the country.²⁵ The parent company, whose business was being carried on by the subsidiary at Esaase area, through the liquidation was able to recoup its money leaving behind a myriad of unsolved problems. The short period of which Bonte's liquidation was announced and the exiting of the directors raised suspicion of fraud.²⁶ The Environmental Protection Agency had alleged that the company perpetrated fraud against it when it agreed to pay a Costed Reclamation Plan in the sum of US\$1,263,565.00. The company only paid US\$38,000 and sought an extension of time to March 30th, 2004 to pay the remainder. The official winding up order was made on the 25th March 2004,

²³ See Abdulai Darimani, Impacts of Activities of Canadian Mining Companies in Africa available at http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Africa_case_study_0.pdf. accessed on (10/19/2014).

²⁴ Suit No. A (En) 1/2005.

²⁵ The parent company, Akrokeri-Ashanti also announced on May 14th 2004 that Gerald Rupke, Douglas Mills and Michael Cawood, being all of the directors of Akrokeri-Ashanti, have resigned as directors of the Corporation. Michael Cawood also resigned as President and Chief Executive Officer of the Corporation. John de Boer resigned his position as director and chairman of the Corporation and Alan Legg resigned his position as interim Chief Financial Officer. The parent company ceased its operation as a result and advised its secured notes and debenture holders to contact their trustees.

²⁶ See Suit No. A (En) 1/2005 at 6.

and within a week all the directors had exited the country.²⁷ This case left marks on the potency of Act 180.

Currently, Ghana is undergoing massive power crisis which is affecting the productivity of major companies.²⁸ This power rationing will inevitably result in increased default in credit arrangement by some businesses operating in the country. During the last power rationing, some small and large companies failed which lead to increased non-performing debt portfolio of major creditors.²⁹ Many bankruptcies are brewing.³⁰ The need to set in place a regime that efficiently handles this reality and places confidence in the financial market cannot be overemphasized.³¹ Following the world financial crisis and the peculiar circumstances of Ghana,³² it is prudent that a thorough study is conducted about the efficacy of the insolvency law. Not only must the law be tested from within but it is desirable that a comparative study is carried out to ascertain the strengths and weakness of the law and where necessary to suggest reform.

²⁷ There are provisions in Act 180 dealing with arrest of absconding directors and members of a company when delinquency or other impropriety is suspected but these provisions were not enforced. See section 53 of Act 180.

²⁸ Ghana Gets Power Ministry amid Deepening Electricity Crisis accessed at <http://www.theafricareport.com/West-Africa/ghana-gets-power-ministry-amid-deepening-electricity-crisis.html> on (11/25/2014).

²⁹ See Abigail Nana Yaa Badu, An Assessment On The Effectiveness Of Credit Risk Management Tools Utilized By Financial Institutions In Ghana 2012. She points out that as at December 2010, 17.6% of the banks' total outstanding loans were classified as nonperforming an increase from the figure 16.2% a year before.

³⁰ For an exposition on the causes of business failure in Ghana see Albert Yeboah, Business Failure in Ghana: The Case of Ghana Airways Limited (May, 2009) (C.E.M.B.A Thesis, Kwame Nkrumah University of Science and Technology).

³¹ See Stijn Claessens, Simeon Djankov & Askoka Mody, Resolution of Financial Distress: International Perspectives on the Design of Bankruptcy Laws, The World Bank Institute pg. xv.

³² See Dr. Fritz Augustine Gockel, The World Financial Crisis And Its Implications For Ghana accessed at http://www.fesghana.org/uploads/PDF/BP_WorldFinancialCrisis_Ghana.pdf (10/19/2014). The effect of the crisis has implication for real GDP growth, commodity prices and export performance, implication for corporate Ghana's chances to borrow from international capital markets among others.

Some insolvency practitioners believe that there exist lacunae in the law which could be filled to enable asset-rich but distressed companies to have a breather from their creditors once a restructuring or a turn-around plan is in place.³³ A Justice of the Supreme Court of Ghana, Justice S. K. Date-Bah (now retired), has stated *ex-curia* that “the first response of the law to a distressed company, that is unable to honour its credit obligations as they fell due should not be to liquidate it.”³⁴ He stated, “This is too drastic a remedy which is not responsive to the inevitable ups and downs of business life. A legal system that provides principally for only liquidation can fairly be characterised as primitive, from the business point of view...it is better to save the company than allow it to go under.”³⁵ This is sound reasoning and perhaps may have arisen as a result of the effect of outright liquidation of prominent businesses felt by almost everyone in the country.³⁶

³³ See more at: <http://graphic.com.gh/business/business-news/27111-ghana-airways-liquidation-not-over.html#sthash.X5hCiETT.dpuf> on (04/5/2013).

³⁴ See Distressed Companies Need Second Chance, (April 5, 2013, 10:00 AM)

<http://www.modernghana.com/news/342995/1/distressed-companies-need-second-chance.html>. See also Mr. Felix Addo, President of Ghana Association of Restructuring and Insolvency Advisors (GARIA), who have stated time and again that Ghana needed a restructuring law to help companies grow economically, especially in this time of the global financial crisis. Felix Addo, Ghana Needs Restructuring Law, (April 5, 2013, 11:00 AM) <http://www.modernghana.com/news/208182/1/ghana-needs-a-restructuring-law-garia.html>.

³⁵ See <http://www.modernghana.com/news/342995/1/distressed-companies-need-second-chance.html>.

³⁶ The liquidation of Ghana Airways, Black Starline, Swedru Contractors, Bonte Gold Mines, Bank for Housing and Construction, Ghana Co-operative Bank, Plant Pool Ltd, etc. left a total loss of over 3400 jobs, massive environmental degradation, broken supplier chains, shattered community and losses to the economy. See also Ghana Airways: Fast Track to Liquidation, (April 5, 2013, 11:00 AM) <http://www.modernghana.com/news/82366/1/ghana-airways-fast-track-to-liquidation.html>. The liquidator claims that the process was stalled as a result of a suit filed in the U.S.A and Ghana. In *Paradis v. Ghana Airways Ltd*, 348 F.Supp.2d 106 (2004), the plaintiff claimed that Ghana Airways canceled her scheduled flight from Sierra Leone to U.S.A and refused to compensate her for the price of a ticket she bought to fly out of Sierra Leone on another airline. The case was dismissed on technical grounds. The liquidator believed that the company had goodwill and loyal customer a factor that meant that the company could have been saved. The main problem was mismanagement, which could have been resolved by putting a new one in place.

3. Research Question(s)

Flowing from the above, this research, therefore, asks the following question(s):

1. Does the current insolvency law in Ghana efficiently handle corporate failure? To answer this central question, I probe further:
 - a. To what extent will distressed companies benefit from interim restructuring or reorganization mechanism in Ghana?
 - b. What purposes and values are served by corporate reorganization proceedings?
 - c. What are the key choices of a robust corporate insolvency regime and how can Ghanaian legal system benefit from its implementation?

4. Objective Of The Study

The objective of this study is to elicit key choices towards an efficient and effective insolvency law in Ghana. In doing this, the study will explore the historical and theoretical development of bankruptcy and insolvency law in Ghana. The study will also focus on the operation of Chapter 11 of U.S Bankruptcy Code. Chapter 11 has influenced some recent bankruptcy reform over the years.

5. Significance Of The Study

Insolvency law is claimed to be the root of commercial and financial law because it obliges the law to make a choice between competing interests since there is not enough money to go around.³⁷ It affects other aspects of law and makes changes to the rights people possess pre-insolvency. It is, therefore, important that insolvency law proceeds with a sense of purpose embracing the core objectives of a robust insolvency regime designed for smooth interaction with other aspects of law

³⁷ Wood P. R. Principles of International Insolvency 1 (1995).

in the legal system. For the reasons above this study become significant because it elicits key choices to an effective insolvency regime in Ghana.

The study is also significant because, in my extensive research, I hardly found any pioneering work on insolvency law of Ghana. This study will break the grounds by researching extensively into the early history and theoretical justification for insolvency law in Ghana and contribute immensely to other literature on insolvency law. It is also significant for countries contemplating reform of their insolvency or bankruptcy laws especially countries with dated legislation looking for alternative ways to address corporate financial distress.

6. Methodology

In a comparative study, a researcher must carefully choose research tools that sit well with the aims of the study. To start with, legal scholars are cautious whether comparative law has a proper method of its own.³⁸ Jaap Hage argues that there are many ways of conducting a comparative law research, but the methods depend strongly on the purpose for which comparative law research is performed; the view one has of a domain on which comparative law research is performed and on the research question one aims to answer.³⁹ He concludes his note by stating that there is no such thing as a proper way of conducting comparative law research.⁴⁰

This research asks the central question whether insolvency law in Ghana efficiently handle corporate failure. Another question is the extent to which distressed companies can benefit from

³⁸ Jaako hold the view that comparative law research does not fulfill the requirements for research design in natural sciences neither does it contain exact methodology. See Jaako Husa, Research Design of Comparative Law-Methodology or Heuristics?, in The Method and Culture of Comparative Law 68 (2014).

³⁹ Jaap Hage, Comparative Law as a Method and Method of Comparative Law, in The Method and Culture of Comparative Law 52 (2014).

⁴⁰ *Id* at 52.

interim restructuring procedures like Chapter 11 of US Bankruptcy Code. This will inevitably lead to a comparison of the operation of the bankruptcy law in both jurisdictions. Practically, this will be achieved by means of observing and explaining similarities as well as differences in the law.⁴¹ The aim of this study is eliciting key choices for an efficient bankruptcy law in Ghana. The ultimate goal is to influence the judicial construction of the insolvency legislation and legislative reform. To be able to do this successfully, the legal transplant approach becomes an extremely useful tool for this study.

The legal transplant approach in general terms is the movement of a rule or a system of law from one country or people to another.⁴² Laws have been transplanted for a long time from one legal tradition to another by a conscious process of law-making or legal reform. Some people or country may voluntarily transplant laws when they accept a large part of the system of another people. According to Watson, “A successful legal transplant- like that of a human organ- will grow in its new body, and become part of the body just as a rule or institution would have continued to develop in its parent system.”⁴³ It is argued that this has certain ingrained benefits. A transplanted law between two legal systems can be economically beneficial. This is because it can reduce transaction cost from differences in the two legal systems.⁴⁴ It may also save cost since the benefit of importing the law may outweigh the cost of designing a new law from scratch.⁴⁵ In the case of

⁴¹ On what comparison is for purposes of comparative study, see RB Schlesinger, The Past and Future of Comparative Law, 43 *American Journal of Comparative Law*, 477 (1995).

⁴² See Alan Watson, Legal Transplants: An Approach To Comparative Law, 21 (1974).

⁴³ *Id* at 27.

⁴⁴ See Mathias M. Siems, The Curious Case of Overfitting Legal Transplant in The Method and Culture of Comparative Law 133 (2014) See also U Mattei, Comparative Law and Economics, 94 (1997).

⁴⁵ Mathias M. Siems, The Curious Case of Overfitting Legal Transplant in The Method and Culture of Comparative Law 138 (2014).

bankruptcy, it may ensure certainty which is beneficial for trade between the donor and receiving country.⁴⁶

The transplant approach is not without criticism. It is argued that a legal rule cannot survive the journey from one legal system to another unchanged since as the meaning of the rule changes, the rule itself also changes.⁴⁷ The legal transplant, therefore, becomes largely irrelevant. It is also argued that legal transplants are often irritants which are harmful to the receiving legal system.⁴⁸ The transplanted law become unsuitable because of a disconnect between the foreign law and the domestic culture, economic and political environment.⁴⁹

Despite these criticisms, it is understood that legal transplant can help countries address important social and economic problems. The caveat has been to design a transplant in a way that responds to economic, social, political, and other conditions of the receiving state.

With respect to new bankruptcy legislation, it is urged that the law must “reflect how individual nations have experienced the growth of market economies, and how, philosophically, countries have viewed debt.”⁵⁰ Since the end product of this research is to propose reforms in bankruptcy

⁴⁶ A number of US companies are mushrooming in Ghana as a result of the oil boom in 2007. A bankruptcy law that has the characteristics of the two legal systems will make it easier for investors to make prediction of what happens bankruptcy occurs and make informed investment decisions.

⁴⁷ See P Legrand, What Legal Transplants? In D. Nelken and J Feest (eds), Adapting Legal Culture, 57 (2001); P Legrand, The Impossibility of Legal Transplants, 4 Maastricht Journal of European and Comparative Law, 111 (1997); see also Mathias M. Siems, The Curious Case of Overfitting Legal Transplant in The Method and Culture of Comparative Law 137 (2014).

⁴⁸ See G. Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, 61 Modern Law Review, 11 (1998).

⁴⁹ It is also urged that transplants are more successful when they belong to the same family.

⁵⁰ See Nathalie Martin, The Role Of History And Culture In Developing Bankruptcy And Insolvency Systems: The Perils Of Legal Transplantation 28 B. C. Int'l & Comp. L. Rev. 1 (2005).

law in Ghana, attention will be paid to these factors in addition to the competing interest of creditors, debtors and all other interested parties in a company's distress to avoid undue friction.⁵¹ The study will also adopt a doctrinal approach explaining certain outcomes generated in the two legal systems by reference to legal rules and constructs.⁵² The goal is not to argue that Ghanaian law sheepishly follows other jurisdiction but as stated before to set out key choices on the way to building an efficient bankruptcy regime.

7. Summary Of Chapters

Chapter One: Introduction

This chapter introduces the research by providing an overview of current insolvency practices. It introduces the problem, the research question, the aims, the significance of the research and the research methods.

Chapter Two: Terminology, Paradigm Shift And Literature Review

Chapter Two gives an overview of bankruptcy terminologies and their use and effect in this study. It also draws on the literature on bankruptcy law. Understanding the theory behind bankruptcy law is important for evaluating proposals for reform. To this end, the Chapter discusses the early and contemporary view on the theory and purpose of bankruptcy law. It also discusses literature on corporate reorganization or rescue. It finally introduces a new concept about statutory priorities later discussed in Chapter 5 of this research.

Chapter Three: A History Of How Bankruptcy Law Evolved In Ghana

⁵¹ The transplant approach recognizes the friction between legal systems and the successful transplant overcomes obstacles in the new legal system. See Alan Watson, Legal Transplants and Law Reform, 92 L. Q. Rev. 79 (1976).

⁵² See Lynn M. LoPucki and George G. Triantis, A Systems Approach to comparing U.S. and Canadian Reorganization of Financially Distressed Companies, 35 Harv. Int'l L.J. 267, 269.

Chapter Three explores the history behind the development of bankruptcy law in Ghana. It traces the history from pre-colonial days through colonial to post-independence Ghana. It touches on the history of both individual and corporate bankruptcy the later benefiting from the principles developed under individual bankruptcy law. The Chapter ultimately gives a framework of the legal system in Ghana, demonstrate the sources of law under the legal system and show the courts with jurisdiction and extent of application of bankruptcy laws in Ghana.

Chapter Four: Corporate Insolvency Law In Ghana

This Chapter will examine the liquidation provision of the Bodies Corporate (Official liquidation) Act, 1963 (Act 180) and other statutory engagements under the Companies Act of 1963 such as schemes of arrangement and receivership as primary means of dealing with companies undergoing financial distress. It will attempt to correct some judicial pronouncement that goes contrary to the true intent and provisions of the bankruptcy law in Ghana. It will explore modern transnational bankruptcy law responses to cross-border issues and how these issues are dealt with under Act 180 of Ghana. The Chapter will draw attention to some areas of the law such as receivership and schemes of arrangements under the Companies Act that has received very little academic engagement. It finally concludes on the efficiency or otherwise of Act 180 and the impact it has for business in the country.

Chapter Five: Statutory Priorities: Revisiting Director's Near Relative Exception In Ghana

This Chapter discusses the *pari passu* principle under bankruptcy law. It argues that the proliferation of preference claim betrays the central theme of bankruptcy law which is the maximization of assets pool for the benefit of all creditors. It espouses the exceptions to the equality principle and goes on to state that any attempt to subordinate a class for purposes of distribution of the assets is an abrasion on the equality principle and must be justified to the hilt.

The Chapter considers the directors near relative exception under Ghanaian law by discussing the appropriateness of the exception. The Chapter ultimately proposes a new way of dealing with bankruptcy priority rules. It suggests a preference cap not being the number of claims that can claim priority payment status but a cap on the overall amount priority claimants be made entitled to in proportion to the total assets of the debtor.

Chapter Six: Corporate Rescue

This Chapter discusses the reorganization procedure under US bankruptcy law. It explores the history, mechanics and the reason why Chapter 11 of the US Bankruptcy Code has been embraced as a model by a number of countries and international organizations. It also discusses Chapter 7 liquidation under the US Bankruptcy Code. The Chapter finally explores whether Chapter 11 of the US Bankruptcy Code has been successful taking into consideration the aims the Chapter espouses.

Chapter Seven: Transplanting Chapter 11 Of The U.S. Bankruptcy Code

This Chapter, ask the question whether it is impractical for developing countries to adopt Chapter 11 style reorganization mechanism. It challenges the view that a legal system must demonstrate to an exactitude, the unique characteristics of U.S attitude towards bankruptcy before it can transplant key reorganization elements under Chapter 11 of the U.S Bankruptcy Code. The second part of the Chapter probes the objectives and structures of an efficient bankruptcy regime. It also compares and contrast the bankruptcy law in Ghana and the U.S.A and most importantly, discuss some factors that develop or inhibit legal transplant in the Ghanaian society.

Chapter Eight: Conclusions and Recommendations

This Chapter concludes the study by giving a summary of the research, conclusions and recommendations.

CHAPTER TWO

TERMINOLOGY, PARADIGM SHIFT AND LITERATURE REVIEW

1. Introduction

It is important to set out basic bankruptcy terms and their meanings to ensure consistency in the study since some terms have differing meanings. Like terms have different meanings in different jurisdictions even though these jurisdictions share the same common law legal tradition. It is, therefore, important that these terms are set out for a clearer understanding of what they are used for in this study.

The movement of some countries towards Chapter 11 of U.S Bankruptcy Code was made on some objective basis. This Chapter will espouse the reason why Ghana needs to move in that direction and focus on Chapter 11 of the U.S. Bankruptcy Code to elicit key choices for an efficient bankruptcy regime in Ghana. The Chapter will finally discuss the scholarly literature on the subject of bankruptcy and how the understanding of the theoretical positions helps shape the proposal for future reform.

2. Bankruptcy Terminology

Bankruptcy terminology contrasts in some jurisdictions. This inconsistency can lead to confusion. In England and Wales, the term bankruptcy is a reference to liquidation proceedings involving the assets of individual and partnerships.⁵³ The term bankruptcy is therefore not applicable to companies. When a company is insolvent, the term that is used to describe the liquidation proceeding which ensues is ‘winding up.’ The company is insolvent when it's unable to pay its

⁵³ See Jacob S. Ziegel et al., Canadian Bankruptcy and Insolvency Law: Cases, Text and Materials, 4 (Emond Montgomery Pub Ltd 2003). The authors lay out how terminological difference can cause confusion with the use of data from jurisdictions where one term have different meaning.

debts. The term 'winding up' was used in the Act of 1844, which was passed to deal with insolvent Joint Stock Companies. The subsequent 1862 Companies Act laid down the foundation upon which many legislation dealing with winding up of companies were built.⁵⁴

In the U.S., there is no clear distinction between bankruptcy and winding up. The U.S Bankruptcy Code does not make such distinction. Individual and corporate proceeding are all referred to as bankruptcy proceedings.⁵⁵

In Ghana, insolvency occurs when an individual is unable to pay his/her debts as they fall due. Insolvency proceedings are referable to the proceedings which ensue to conserve the assets of the debtor until the court sort out his/her affairs.⁵⁶ The term bankruptcy connotes some wrongdoing. Under the current law, a person is adjudged bankrupt when in insolvency proceedings it is apparent that the debtor had intentionally or negligently traded his way into insolvency or has gambled or made rash speculation decision leading to his insolvency.⁵⁷ In that case, he/her is adjudged bankrupt and attached with additional duties and liabilities. The winding up procedure on the other hand addresses corporate insolvency under the Bodies Corporate (Official Liquidation) Act of Ghana. Bankruptcy is therefore not applicable to companies operating in Ghana.

There is a stark difference between bankruptcy terminologies in the U.S. and Ghana. While the term bankruptcy applies to both individual and corporations in the U.S, bankruptcy is only applicable to individuals in Ghana. In this study, a discussion of bankruptcy law in the U.S and Ghana will be a central theme. To ensure uniformity and avoid confusion, in some instances,

⁵⁴ See Report of the Review Committee on Insolvency Law and Practice, Cmnd 8558, 25 para. 75 (1982).

⁵⁵ See Jacob S. Ziegel et al., Canadian Bankruptcy and Insolvency Law: Cases, Text and Materials, 4 (Emond Montgomery Pub Ltd 2003).

⁵⁶ See Section 8(1) of Insolvency Act, 2006 (Act 708).

⁵⁷ See Section 23 of Insolvency Act, 2006 (Act 708).

bankruptcy will be used loosely to refer to both individual insolvency and company's winding up in Ghana unless otherwise indicated.

3. Paradigm Shift: Why Chapter 11 Of U.S. Bankruptcy Code Of 1978?

The call for change in the way distressed companies are treated in Ghana often reference the rescue mechanisms in the United States and the United Kingdom.⁵⁸ Regarding rescue mechanism, there exist a difference between the two jurisdictions. To be able to make a more focused research, this study will focus on the rescue mechanism in the U.S. This choice is made for good reasons.

Personal and corporate insolvency law in Ghana at all material times has been a reproduction of English law. The reason is not far-fetched. There was no equivalent of company law under customary law in Ghana. Colonialism introduced a plural system of law where English law and customary law operated side by side. The reception of English law and the growth of business in the colony led to the adaptation of English Company law with necessary modification for the colony.

Some legislations have been passed to deal with company law since the formal reception of English Law in 1876. These are the Companies Ordinance of 1906 and the Companies Act (Act 179) of 1963. This two legislation contained winding up provisions dealing with failed companies. Other pieces of legislation were the Foreign Companies' Preferential Creditors Ordinance of 1906 and the Bodies Corporate (Official Liquidation) Act (Act 180) of 1963. The former dealt with the

⁵⁸ B. J. da ROCHA, The Need for A Modern Insolvency Law In Ghana [January - March 2004] Vol.2 No.1 Journal 133—137. See also Mr. Sumant Batra, Vice-President of INSOL International, a worldwide federation of restructuring and insolvency practitioners called for effective and efficient insolvency laws to protect the interest of investors in Ghana but failed to set out what it should entail or look like. See Ghana: Country Needs Insolvency Laws, (April 5, 2013, 10:00 AM) <http://allafrica.com/stories/200903270700.html>. See also Justice Date-Bah Distressed Companies Need Second Chance (April 4, 2013, 10:00 AM) <http://www.modernghana.com/news/342995/1/distressed-companies-need-second-chance.html>.

insolvency of foreign companies operating in Ghana while the latter dealt with the official liquidation of both domestic and foreign companies working in Ghana. The Bodies Corporate (Official Liquidation) Act, 1963 of Ghana was a reproduction of the winding up provisions of the 1948 English Act. Some changes have since occurred after the passage of both the Companies Act 1948 of England and Bodies Corporate (Official Liquidation) Act, 1963 of Ghana. These changes it is urged makes it desirable to look at rescue mechanism in the U.S. for comparative study.

Before delving into these changes, it is appropriate to give a brief overview of the system existing in England to make a clearer appreciation why a paradigm shift is needed in Ghana. The old common law dating to medieval times drew a distinction between two remedies that were open to creditors. Creditors could seize the body of his debtor or seize his properties. He could not do both and thus when he chooses to seize his person; he could not resort to seizing his property afterward. When it came to seizing his properties, it was a first come, first served basis, the survival of the fittest race for the assets of the debtor to satisfy debts owed to creditors.⁵⁹ Insolvency was an offense and debtors were treated as criminals who could be thrown in jail at the pleasure of their creditors.⁶⁰ As economic activity expanded as a result of the industrial revolution, people began to realize that commerce was built on credit and credit produced debts.⁶¹ It was, therefore, important that honest traders who had failed in their trade and for that matter were unable to pay their debts were treated better.⁶² As a result, the right of the creditor to ask the court to use its powers to imprison his debtor was whittled down though not completely abolished by the Debtors Act 1869.

⁵⁹ Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 pg. 15 para. 31.

⁶⁰ See Emily Kadens, The Last Bankrupt Hanged: Balancing Incentives In The Development Of Bankruptcy Law, 59 Duke L.J. 1229.

⁶¹ Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 pg. 15 para. 31.

⁶² The earlier legislation covering bankruptcy law in England to wit the English Bankruptcy Act 1542, 1570, 1705 contained a number of penal provisions against the debtor.

Further amelioration was contained in the subsequent legislations which posited that although insolvency was not necessarily a crime, the debtor would be subjected to public examination and inquiry about his deeds leading to bankruptcy.⁶³

In 1977, the Cork Committee was appointed to look into Insolvency Law in England and to recommend reform. The Committee made some recommendations to simplify procedures available to debtors and creditors when insolvency arises. Among others were procedures for debtors to make voluntary arrangements with their creditors. Other procedures existed to allow for the administration of the affairs of the bankrupt eschewing the more severe bankruptcy procedure under the old law.⁶⁴ The Committee's work led to the enactment of the Insolvency Act of 1985 and later the consolidating Act of 1986. The Insolvency Act has been hailed as containing rescue provisions emulating procedures designed to rescue entities in the U.S. The Enterprise Act of 2002 made a number of changes to the Insolvency Act 1986 with the aim of addressing shortfalls in the Insolvency Act of 1986 and fortifying modern rescue culture.⁶⁵ This constitutes the present framework for addressing individual bankruptcy in England.

⁶³ See the Bankruptcy Act of 1883. This feature was carried through subsequent legislations to wit the Bankruptcy Act of 1914 and the Bankruptcy (Amendment) Act of 1926, which touched on the provisions leading to discharge of debtors. The Insolvency Act of 1976 enabled public examination of bankrupts to be dispensed with in appropriate cases.

⁶⁴ Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 pg. 446.

⁶⁵ The main structural features were the reduction in the duration of bankruptcy; the lifting of statutory restrictions and disabilities, which were imposed on undischarged bankrupts; the new rules dealing with culpable bankrupts; and the introduction of quicker individual voluntary arrangement procedure under supervision of the official receiver.

See examination of the four structural elements of the Enterprise Act 2002 by Adrian Walters in his article titled Personal Insolvency Law After the Enterprise Act: An Appraisal Available at:

http://www.researchgate.net/publication/228236058_Personal_Insolvency_Law_After_the_Enterprise_Act_An_Appraisal [accessed Sep 19, 2015].

Corporate insolvency, however, was dealt with under a different regime. As stated earlier, bankruptcy in England and Wales primarily refers to individuals and partnerships. When a company is unable to pay its debts, it is insolvent. This is a ground for bringing the life of the company to an end. Insolvent companies have traditionally been dealt with under winding up rules of the various Acts of Parliament dealing with corporate insolvency. Winding up is the process of bringing the life of a company to a close. It involves realizing its assets, distributing the assets to creditors and where there is surplus, to shareholders. The company is finally dissolved, and its name is struck out from the register of companies.

As stated above, even though the 1844 Act coined the term winding up, the 1862 Companies Act laid down the foundation upon which many legislation dealing with winding up of companies were built.⁶⁶ The Act provided that an insolvent company may be wound up voluntarily when its members resolved that because of its liability the company cannot continue to operate. In that case, the members appointed a liquidator and conducted the liquidation without representation from creditors. When the company resolved to conduct a voluntary winding up, the court could still make an order directing that the winding up should continue subject to the supervision of the court and with liberties for creditors, contributories and others to apply to the court for relief.⁶⁷ In other circumstance under the Act, a company could be wound up when it could be proved that the company was unable to pay its debts. A company was unable to pay its debts when:

- (a) a creditor serves a demand requesting the company to pay debt due and the company was for a period of three weeks unable to do so;
 - (b) an execution of a judgment against the company had been returned in whole or in part;
- and

⁶⁶ Report of the Review Committee on Insolvency Law and Practice, Cmnd 8558, 25 para. 75 (1982).

⁶⁷ *Id* at 25.

(c) whenever it was proved to the satisfaction of the court that a company was unable to pay its debts.⁶⁸

When these conditions existed, the official liquidator was appointed to wind up the affairs of the company. The office of the Official Receiver was created by the Companies (Winding –Up) Act 1890. The Official Receiver was attached to the court and had the responsibility to investigate the affairs of the company and to act as liquidator to gather the assets of the company and distribute it to creditors.⁶⁹

One piece of legislation, which is significant for this study, is the Companies Act of 1948. The provisions of this legislation were transplanted into the Ghanaian legal system and for that matter, form the architecture of Bodies Corporate (Official Liquidation) Act 1963 (Act 180) and the Companies Act, 1963 (Act 179) of Ghana.⁷⁰ The Ghanaian company and insolvency law, therefore, takes its colour and content from the provisions of Companies Act 1948.⁷¹ The Companies Act of

⁶⁸ This formulation has been maintained in subsequent legislations.

⁶⁹ The official receiver had been introduced in 1883 to deal with personal bankruptcy but was imported into corporate circles in 1890. Whenever the court made a compulsory order for winding up, he immediately became the provisional liquidator. The official receiver had power to make a report to the court stating whether any person being a promoter, director or officer of the company had committed fraud in relation to the affairs of the company and then ask that such a person be examined publicly. The Official Receiver’s duties evolved over the period along with other significant reform on corporate winding up.

⁷⁰ In its wisdom, The Commission appointed to inquire into Insolvency law in Ghana stated that they will:

“(b)... improve the Ghanaian legislation by adopting a number of reforms subsequently made to the English company liquidation law on which the Companies Ordinance was based; and (c) to remedy certain other deficiencies which even after adopting the reforms mentioned above will still remain in the Companies Ordinance.” See Report of the Commissioner Appointed to Inquire into Insolvency law in Ghana, 52 (1961).

⁷¹ The Company law of Ghana was however different in some respect. The Commission Appointed to look into the Company law of Ghana met problems when they proposed to follow English law under the 1948 Companies Act. The reason was that another Committee (The Jenkins Committee) had been appointed to look into Company Law in England because the law was seen as inadequate to solve the problems in England. Ghana’s problem was unique because the Companies Ordinance of 1906 was based on the 1862 English law which was changed in 1908 a year

1948 made some additions to the winding up provisions of English Law. It provided that the period for advertisement of a resolution for winding up should be increased from 7 to 14 days. It also provided that the notice of appointment of a liquidator should be truncated from 21 days to 14 days. Ghana reproduced these changes.

The 1948 Act had some provisions aimed at enhancing the estate of the company for distribution. It extended the period for invalidating fraudulent preferences from 3 months to 6 months. Under the previous 1929 Companies Act, any transaction, which took place within three months before winding up, constituted a fraudulent preference and was invalid for that matter. The 1948 Act invalidated all floating charges created within 12 months before the commencement of winding up of the company. It also made it possible for execution creditors to keep the benefit of any execution they may have levied which had not been completed before winding up was commenced on terms as the court thinks just. The Act frowned on fraudulent dealing by directors that led to the bankruptcy of the company. To this end, the Act extended civil and criminal liabilities to directors and anyone who encouraged directors of the company to engage in fraudulent trading leading to winding up of the company.⁷² The Bodies Corporate (Official Liquidation) Act, Act 180 of Ghana retained a number of changes made by the Companies Act of 1948.

after Ghana's Ordinance came into force. Ghana didn't need to rely on yet another law that was in the process of been remodeled. For that reason, the Commission's approach was to propose a codifying statute bringing together all the common law and statutory rules on company law with necessary modification to suit the Ghanaian environment. The provisions of the Companies Act of 1963 was however not far from that of English 1948 Act since the Commission feared that a total turnaround will risk a disconnect with lawyers and other practitioners which will hinder economic development.

⁷² See Jordans, New Company Law, (1948).

Some reforms have ensued afterward significantly changing the nature of insolvency law in England.⁷³ This change started with the work of The Cork Committee on Insolvency Law and Practice, which advocated for reviving distressed companies by giving them some space to reorganize. As stated above, the core principle was that a good modern insolvency law should “provide the means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country.”⁷⁴ This proposal was given statutory effect by the Insolvency Act 1985 and then later the following year by the consolidating Insolvency Act of 1986. The 1986 Act had two rescue procedures the Company Voluntary Arrangement⁷⁵ procedure and the Administration procedure that were made available to distressed companies. The Administration procedure was “designed to strengthen the foundation of an enterprise economy by establishing an insolvency regime that encourage honest, but unsuccessful, entrepreneurs to persevere despite initial failure.”⁷⁶ The administration is a court-based procedure.

⁷³ See David Milman, Reforming Corporate Rescue Mechanisms: The Reform of United Kingdom Company Law, Cavendish Publishing Limited, 415-435 (2002).

⁷⁴ Report of the Review Committee, Insolvency Law and Practice, Cmnd 8558, para 198 (1982). See also John Armour et al, Corporate Insolvency in the United Kingdom: The Impact of the Enterprise Act 2002 available at <http://ssrn.com/abstract=1151785>.

⁷⁵ The company voluntary arrangement is an arrangement where the distressed company puts a proposal or some scheme of arrangement to its unsecured creditors. It does this with the services of a nominee usually an insolvency practitioner. If the majority accepts the proposal it is binding on all unsecured creditors. The arrangement could not affect in a detrimental way the rights of secured creditors and preferential creditors unless they gave their consent.⁷⁵ The directors of the company remained in charge of the affairs of the company but were supervised by insolvency practitioner. If everything goes according to plan the debt is paid and the company survives but if things don't go according to plan the supervisor may petition the company into administration or liquidation. In 2000, The Insolvency Act of 2000 was passed to strengthen the company voluntary arrangement procedure by providing for a moratorium to support the arrangement. Since the CVA was an out of court mechanism, the moratorium blocked a number of hostile actions against the company. See Section 7(4) (b) of IA 1986. See also David Milman, Reforming Corporate Rescue Mechanisms: The Reform of United Kingdom Company Law, Cavendish Publishing Limited (2002).

⁷⁶ See Gerard McCormack, Corporate Rescue Law - An Anglo-American Perspective, 45 (2008).

A director or the company can initiate administration by petitioning the court.⁷⁷ When a petition is presented to the court, an automatic moratorium comes into effect. The moratorium stays all hostile action against the company and allows the company to propose a plan to pay off the debt owed to creditors.⁷⁸ The court makes an administration order and then appoints an administrator. He assumes management control of the company and then prepares a package to pay off creditors. The creditors must approve this payment package.

The Enterprise Act of 2002 made some changes to support the administration procedure. While the administrative procedure automatically triggered a moratorium staying hostile action against the company, creditors who were secured by floating charge could appoint administrative receivers to realize their security. This worked against the success of the administration procedure. As a result, the Enterprise Act 2002, curtailed the right to appoint a receiver during administration leaving the exercise of the right to exceptional cases. The secured creditor, however, controls the administration procedure by appointing the administrator when insolvency occurs. The administrator's first duty is to rescue the company as a going concern and when that fails to achieve a better return to creditors than in liquidation.⁷⁹ If the administrator is unable to do all this, then he will have to realize the collateral for the benefit of secured and preferential creditors.

These set of rules constitute modern corporate rescue mechanism in England. The mechanism eschews the traditional liquidation approach. In the words of McCormack, "The law was moved in the direction of the corporate reorganization provision in Chapter 11 of the U.S Bankruptcy

⁷⁷ The law allows creditors to petition if they so choose. See section 9(1) of Insolvency Act 1986.

⁷⁸ An exception is that a floating charge holder can enforce his right by appointing an administrative receiver. A holder of such a charge is entitled to notice of administration petition. This will enable him to exercise his right if he chooses so to do.

⁷⁹ See John Armour et al, Corporate Insolvency in the United Kingdom: The Impact of the Enterprise Act 2002 available at <http://ssrn.com/abstract=1151785>.

Code but still with some significant differences. The objective was to borrow the best features of the U.S system but, at the same time, avoiding the pitfalls.”⁸⁰ Given this important fact, it is not only desirable but also appropriate that research on corporate rescue takes aim at the source, which is the rescue procedure in U.S.A to elicit at first-hand key rescue choices in dealing with challenges faced by distressed companies.

Is there a legitimate basis to compare the U.S and the Ghanaian legal system?

First, the biases for English law are extinguished to the extent that the UK is essentially borrowing its current rescue mechanism from elsewhere. That is not to say that the English law on the subject is not worthy of study, but it is evident that the law is still undergoing development. This is clearly apparent with the retiring of administrative receivership in favor of administration procedure and subsequent legislative and judicial intervention aimed at engraving corporate rescue in English law.⁸¹

Second, the U.S share the common law legal tradition. Even though the U.K is regarded in Ghana as a higher standing common law jurisdiction, for purposes of legal innovation addressing corporate rescue, the U.S being the originator of corporate reorganization culture is preferred. The Bankruptcy Code of the U.S emanates from the U.S Constitution and it’s a federal law applicable to all the States.⁸² The Code applies in the same manner as the Bodies Corporate (Official Liquidation) Act, 1963 of Ghana which applies to all the regions of Ghana.

⁸⁰ See *id.*

⁸¹ See generally *Powdrill v Watson* [1995] 2 AC 394.

⁸² There is room for individual States to make bankruptcy rules under guidance of the federal rules. The Bodies Corporate (Official Liquidation) Act, (Act 180) and the relevant provisions of the Companies Act (Act 179) of Ghana are Acts of Parliament applicable to all the Regions in Ghana.

Third, there is room for deviating from a dominant legal system that has fed another with constitutive rules where a better legal rule exists elsewhere.⁸³ For example, there exists a rich history of borrowing legal rules from the United States into Company Law of Ghana even though the U.K law heavily informs Ghana's Company Law. Professor Gower, Chairman of the Committee charged with the overhaul of the Company Law of Ghana, borrowed extensively from the United States on areas like:

- (a) Appointment of directors, filling vacancy of directors, executive directors and their remuneration, duties of directors, duties in connection with sales or purchases of the company's securities;
- (b) Legal proceedings to enforce liabilities by members and company,
- (c) Canons of construction of class rights, share deal account, whether companies should be able to purchase their shares, meeting of debenture holders and postponement of payment of principal and interest;
- (d) Auditing of company accounts;
- (e) Liability of companies for acts of officers; and
- (f) Circulation of member's circulars and compensation, the quorum for a company meeting and postal ballot and rules on obtaining proxies by misrepresentation.⁸⁴

⁸³ See Manfield Balz, The European Union Convention on Insolvency Proceedings, 70 Am. Bankr. L.J. 485 (1996). The legal traditions affect how bankruptcy laws are modeled whether towards English law or civil law. Most African countries have their bankruptcy laws deeply rooted in the laws of their colonial powers. However certain aspects are heavily influenced by the manner in which the local laws deal with security interest or secured creditors rights, employment, environment, pension and other issues. See Lavinia Iancu, The Framework Of Insolvency Law accessed at http://fse.tibiscus.ro/anale/Lucrari2012_2/AnaleFSE_2012_2_033.pdf.

⁸⁴ See Final Report of the Commission of Enquiry into the Working and Administration of the present Company Law of Ghana (1961).

Other reforms were in areas such *ultra vires* doctrine and the doctrine of constructive notice, which Professor Gower stated, had been dealt with in a “workmanlike manner by United States law.”⁸⁵

It follows that turning to U.S law will not be an unprecedented adventure.

Fourth, corporate rescue law is older and richer in the U.S than any other developing African country of comparable status to Ghana’s legal system.⁸⁶ The American bankruptcy law has a rich history dating back to the enactment of the American Constitution. The current piece of legislation the Bankruptcy Code of 1978, amended in 1990 and reformed in 2005 by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) has spun through periods of great depression to periods of plenty. Chapter 11 of the Code deals with a corporate reorganization, which is essentially rescuing procedures for distressed companies.⁸⁷

Over the years, there have emerged studies that conclude that looking up to U.S bankruptcy law may not be appropriate for developing country like Ghana since the U.S have a different cultural

⁸⁵ Other reforms were in areas such as arrangement and amalgamation with court approval, registration of prospectuses, and cumulative voting for directors of a public company and on representative action. See Final Report of the Commission of Enquiry into the Working and Administration of the present Company Law of Ghana (1961).

⁸⁶ Insolvency law in a number of African states is a reflection of the laws of the colonizing states. The Organization for Harmonization of Business Law in Africa (OHADA) is a seventeen-country Sub Saharan African arrangement dealing with insolvency law among the contracting states. It is an arrangement between francophone countries and based on French civil law. The initial thought was that it will influence insolvency law among other countries in Africa but that thought has watered down and given that the arrangement is based on civil law, it may not serve a good reference point for this study. The Economic Community of West African States (ECOWAS) is a regional economic harmonization arrangement between West African countries. It has not adopted a common approach addressing corporate insolvency. It therefore like OHADA does not offer a good reference for research. It is for the reasons articulated above that the US becomes a good point for comparative research.

⁸⁷ Corporate reorganization is premised on the footing that the assets of the company of the company that are used for production are more valuable than those same assets being sold piecemeal in liquidation. See Charles Jordan Tabb, The Future of Chapter 11 44 S.C. L. Rev. 791 (1993); also reproduced in Charles J. Tabb, Bankruptcy Anthology pg. 659.

attitude towards debt forgiveness.⁸⁸ Though this is true to an extent; the Ghanaian society has copied extensively from the U.K while major differences persist. Regarding attitude towards debts, the Ghanaian society is entirely different from the U.K, but this has not stopped legal adaptation. Given, this background, the key to a successful research is consciousness of the dynamics and tailoring the end product to suit Ghanaian environment. To this end, this research has adopted methodological approaches which cater for potential frictions that are likely to arise.

Flowing from the above reasons, the United States Bankruptcy Code becomes a good focal point for thorough study. The aim is to elicit key choices towards an effective and efficient bankruptcy law in Ghana.

4. Literature Review

It is important for one to grasp the reason why bankruptcy law exists to evaluate proposition for future reform properly. Any proposal for reform should be undertaken with a proper understanding of the theory and nature of bankruptcy law in society.⁸⁹ What then is the theory and nature of bankruptcy law?

Early Theorist

The early view presented by James Olmstead was that the true function of bankruptcy law was administration and the distribution of the assets of the debtor. Bankruptcy existed because of commerce and it is a tool in the hands of creditors, which could be used to punish the fraudulent debtor, reinstate the unfortunate innocent debtor and to equitably distribute the insufficient assets

⁸⁸ See Nathalie Martin, The Role Of History And Culture In Developing Bankruptcy And Insolvency Systems: The Perils Of Legal Transplantation 28 B. C. Int'l & Comp. L. Rev. 1 2005.

⁸⁹ See generally Elizabeth Warren, Bankruptcy Policymaking in an Imperfect World, 92 Mich. L. Rev. 336.

among creditors.⁹⁰ It was therefore out of place for bankruptcy to be regarded as a sort of ‘poor-debtor law’ or as it were a ‘Hebrew Jubilee’ where people at intermittent periods received emancipation from their debts. Drawing support from the U.S. Constitution, he argued further that Congress had ascribed the regulation of commerce as the true reason for bankruptcy legislation. The true function of bankruptcy law was, therefore, the administration or distribution of the debtor’s assets rather than relief of the debtor, which was incidental to what the law could be used for but that was not the function of the law.⁹¹

Max Radin held a similar view. He argued that bankruptcy law devised a compulsory method by which all creditors were compelled to accept some arrangement or some disposition of their claims against the bankrupt’s property whether they all agreed to it or not. All other things including relief of the debtor were incidental to what bankruptcy stands for and should not be confused with the proper function of bankruptcy law.⁹² Garrard Glen held the view that bankruptcy law existed to do two things: to take care of debtor fraud; and to control the debtor.⁹³ He argued that there is always a fraudulent debtor, and never yet, so far as human experience goes, has it been proper to legislate in bankruptcy matters without providing for the fraudulent debtor. He stated that bankruptcy law was not conceivable without a controllable debtor. His arguments came at a time when reforms

⁹⁰ James M. Olmstead, Bankruptcy a Commercial Regulation, 15 Harv. L. Rev. 829 (1902).

⁹¹ He based his assertion on history behind the constitutional provision dealing with bankruptcy law. He was not happy about the new bankruptcy law of 1898, which he saw as somewhat debtor friendly a deviation from the true function of bankruptcy law. His arguments were that constitutionally, regulation of creditors and debtors was part of commerce a cornerstone of the constitution. The relief of the debtor was not commerce and Congress should not concern itself with that since it was only incidental to what the law could be stretched to do.

⁹² Max Radin, The Nature of Bankruptcy, 89 U. PA. L. Rev. 1 (1940).

⁹³ Garrard Glen, Essentials of Bankruptcy: Prevention of Fraud and Control of the Debtor, 23 Va. L. Rev 373 (1937).

were under way and an outstanding feature of the reform was the relief of the debtor, yet he saw that little or no attention was paid to regulating the fraudulent debtor.

The early views were obviously influenced by its time when bankruptcy carried a huge stigma and relief of the debtor was not a prominent feature. Bankruptcy legislations before and immediately after the Second World War provided little incentives for restructuring distressed companies because it was mainly used as a tool of debtor control in the hands of powerful creditors whose primary interest was to distribute assets of the debtor to satisfy debts owed.⁹⁴

Contemporary Theorist

The continual search for a theory of bankruptcy law sprung in modern times with the works of Professor Jackson with his publication in the Yale Law Review in 1982 and subsequently in his controversial book entitled *The Logic and Limits of Bankruptcy Law*. In his article *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain* (which also formed part of his book) he devised what has been known as the 'creditors' bargain' theory. The theory posits that bankruptcy must be viewed as a system designed to mirror the agreement one would expect creditors to form among themselves were they able to negotiate such an agreement from an *ex-ante* position. From that perspective, bankruptcy law exists to maximize the value of assets to consensual creditors and nothing more. He goes on to state that, individual action by creditors to collect what is due them by resorting to state law remedies tend to harm the total value of the debtor's estate, it's bad for creditors as a group and are in themselves costly and inefficient. This creates what he calls a

⁹⁴ In Italy, the old 1942 Act contemplated the stigma against the entrepreneur declared bankrupt. An entrepreneur in insolvency could not obtain a discharge and found himself unable, after the procedure's closing, to initiate a new activity. See Luciano Panzani, The Italian Bankruptcy Law Reform Act III, Norton Annual Review of International Insolvency, 301 (2009 Edition). The tenor of the law was the same in Brazil and elsewhere. See Thomas Benes Felsberg and Paulo Fernando Campana Filho, Corporate Bankruptcy and Reorganization in Brazil: National and Cross-border Perspectives, Norton Annual Review of International Insolvency, 275 (2009 Edition).

‘common pool’ problem. The purpose of bankruptcy law, therefore, is to solve this common pool problem and the model bankruptcy law enacts the bargain that creditors will arrive at, were they able to negotiate *ex-ante*.⁹⁵

In simple terms, the best bankruptcy model is the model that allows creditors to bargain with the debtor and choose the rules that will regulate the debtor’s default. Creditors should be able to do this because the bankruptcy process is a collective action created to maximize returns to creditors. A tool in the hands of creditors. Thus the model attempts to implement the collective and compulsory system that rational creditors would privately agree to if they could bargain as a group before the debtor’s default. Jackson states that this reduces strategic cost, increases the aggregate pool of assets to creditors and is administratively efficient.

Jackson notes that because action by secured creditors to realize their security comes with a cost which is passed on to the debtor’s estate, it is advantageous to have a collective proceeding that brings along secured creditors. This cost is pushed to the debtor and eventually reduces the available assets in the pool for distribution to unsecured creditors. Bringing secured creditors on board, therefore, is cost effective because it minimizes administrative cost and enhances the debtor’s estate for distribution to unsecured creditors. Secured creditors should, however, have the assurance that the bankruptcy system will respect their pre-bankruptcy law entitlements during the bankruptcy process.

On the issue whether bankruptcy law should discharge debtors and protect debtors employees, Jackson argues that issues relating to protecting the rights of employees, relief of the debtor and anything unrelated to maximizing the aggregate value of assets to creditors should not be

⁹⁵ Thomas Jackson, The Logic and Limits of Bankruptcy Law, (1986). See also exposition and contrasting view from Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 849 (6th Edition).

encouraged since these are not the independent goal of bankruptcy law.⁹⁶ His conclusion, which is inspired by the law and economics school, is also not different from the earlier view of bankruptcy law articulated above. The early writers viewed bankruptcy as a creditors tool for distribution of the assets of the debtor. Therefore, issues such as relief of the debtor were seen as purely incidental to the function of the bankruptcy law.

Douglas Baird, another scholar who usually co-authored with Professor Jackson, shares the creditor's bargain theory. He notes that bankruptcy law should be tested on a measure whether they enhance the creditors' collective benefits. The only goal of bankruptcy law, therefore, is to enhance the collective efforts of creditors with state-defined property rights.⁹⁷

Criticism and rejection of the creditor bargain theory have been many and varied and still ongoing, but his work set the stage for critical thinking on the proper purpose of bankruptcy law in modern times. Vern Countryman argues that the assumption made by Jackson is wrong to such a large extent because not every creditor (including victims and tort claimants) will have full information and competent legal advice in dealing with the debtor. Not every creditor will bring to bear the same highly skilled free market economic analysis in fixing his price and terms. Not all creditors have the opportunity to bargain on such matters before the fact as suggested and there is, in fact, no creditors bargain.⁹⁸ The best example is tort creditors, who will have no connection with the debtor but for a wrong committed by the debtor to which they have sought damages through the courts.⁹⁹

⁹⁶ Thomas Jackson, The Logic and Limits of Bankruptcy Law, 25 (1986).

⁹⁷ Douglas G. Baird & Thomas H. Jackson, "Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy," 51 *University of Chicago Law Review* 97 (1984).

⁹⁸ Vern Countryman, The Concept of a Voidable Preference in Bankruptcy, 38 *Vand. L. Rev.* 713 (1985).

⁹⁹ *Id.*

David Carlson also argues that the idea that the creditor's bargain assumes anyone who loses his or her entitlements in bankruptcy is shown to have consented in advance to the loss is internally inconsistent and hopelessly ad hoc. He argues that to see the bargain, as a product of creditors who are totally equal in all aspect of life and completely apathetic of status is a highly unbelievable portrait of historically situated human beings.¹⁰⁰ Vanessa Finch, for example, argue that in real life, creditors differ in their knowledge, skills and leverage. Because creditors differ in various respect, the assumption that powerful creditors e.g. secured creditors who are better placed when bankruptcy occur will agree to collectivize their claims to the pool alongside weaker unsecured creditors is highly questionable.¹⁰¹

Challenges to the creditor's bargain theory and stern defense of the theory led to The Warren-Baird debate. In her article, *Bankruptcy Policy*, Elizabeth Warren rejected the creditor's bargain view as the overarching purpose of bankruptcy law. She stated:

“I see bankruptcy as an attempt to reckon with a debtor’s multiple defaults and to distribute the consequences among a number of different actors. Bankruptcy encompasses a number of competing- and sometimes conflicting- values in this distribution. As I see it, no one value dominates, so that bankruptcy policy becomes a composite of factors that bear on a better answer to the question, “How shall the loss be distributed?””¹⁰²

Warren’s view on bankruptcy law is one that she describes as dirty, complex, elastic and interconnected. Her view rests on the proposition that, bankruptcy law has a role to play in how losses in a business failure should be shared. In this wise creditors may be required to give up some

¹⁰⁰ See David G. Carlson, *Philosophy in Bankruptcy*, 85 Mich. L. Rev. 1341 (1987).

¹⁰¹ Vanessa Finch, *Corporate Insolvency Law; Perspectives and Principles*, 31 (2002) She goes on to say that the idea that creditors in the bargain are assumed to be de-historicized and equal in the Rawlsian sense is also unfounded.

¹⁰² Elizabeth Warren, *Bankruptcy Policy*, 54 U. Chi. L. Rev. 775 (1987).

of their rights to the assets of the debtor so that the debtor company will have a better chance of surviving. To be able to do this it is useful to entrust bankruptcy judges with discretion as a way to balance conflicting and competing interest during bankruptcy.¹⁰³

Baird rejects Warren's propositions as being completely unfocused and misguided. He argued that Warren fails to explain why special rules in bankruptcy should exist to keep businesses from closing even when those with a legally cognizable interest in the business want it to close. He notes that, the thought that the benefits of bankruptcy, justify the additional burden on creditors is not the proper question. The issue is not whether the burden on creditors in bankruptcy are just but whether the burden should only exist in bankruptcy.¹⁰⁴ According to Baird, taxing creditors differently depending on which enforcement mechanism they use invites troublesome forum shopping; a problem Warren does not take seriously. He notes that the need for a collective action during bankruptcy is not a license or a reason for reassessing relative entitlements so that workers suddenly have a different place in the priority line simply because someone has started bankruptcy proceedings. This debate shaped the landscape on how to approach the proper scope of bankruptcy law, especially how to craft reorganization rules without disrupting pre-bankruptcy entitlements.¹⁰⁵

¹⁰³ *Id.*

¹⁰⁴ Douglas Baird, Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren, 54 U. Chi. L. Rev. 815 (1987).

¹⁰⁵ A few years later, following the criticism of the creditors bargain theory, Professor Jackson published an updated theory, which was broader in scope and took into consideration the importance of sharing of risk between interested parties. Professor Bowers criticized this updated theory on the grounds that the debtor is very important in any analysis of bankruptcy and that any creditors bargain that leaves out the debtor is programmed to fail. See Thomas Jackson & Robert Scott, On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and Creditors Bargain, 75 Va. L. Rev. 155 (1989); James Bowers, Groping in the Shadow of Murphy's Law: Bankruptcy Theory and the Elementary Economics of Failure, 88 Mich. L. Rev. 2097 (1990); Barry Adler, Bankruptcy and Risk Allocation, 77 Cornell L. Rev. 439 (1992). See also Charles Tabb, Bankruptcy Anthology, 51-107 (2002)

Another approach to answering the purpose of bankruptcy law, the “Contractarian Theory” tries to overcome the central tenets of the creditor bargain theory by advocating for eliminating or lessening bankruptcy law. The theory advocates for eliminating mandatory rules so that firms and creditors can choose their own rules to manage debtor’s default. Robert Rasmussen devises what he calls a ‘bankruptcy menu’ a list of bankruptcy provisions from which the firm chooses provision which suits it and its creditors’ interest when bankruptcy occurs. According to his plan, a company chooses its bankruptcy provision as part of its constitution when it is incorporated. With this done, creditors will know beforehand, the set of rules that govern a company’s financial distress, producing an efficient result and eliminating collective action transaction cost.¹⁰⁶ This proposition though sound to adherents of the creditor bargain theory has an obvious drawback. Not all creditors will have the chance to bargain with the firm or have access to its menu. Involuntary tort creditors fall into this category of people who cannot make a choice before default.¹⁰⁷

Alan Schwartz endorses the “contractarian approach” but in a twist see the menu approach as problematic because circumstances of the debtor change over time so that the most efficient regime at one time may not be efficient at a later time. He proposes that every new creditor negotiate a new bankruptcy plan with the company and when it appears that new plan is different from that negotiated with the first creditor, then the first creditor would automatically move to the new plan or bargain.¹⁰⁸ According to Alan Schwartz, mandatory bankruptcy rules increases the cost of

¹⁰⁶ See Robert K. Rasmussen, Debtor’s Choice: A Menu Approach to Corporate Bankruptcy, 71 Tex. L. Rev. 51 (1992). See also Robert K. Rasmussen, An Essay on Optimal Bankruptcy Rules and Social Justice, 1994 U. ILL. L. REV. 1.

¹⁰⁷ It is not realistic to require involuntary creditors to agree to a company’s default provision in case of bankruptcy. For the most part these creditors cannot make a choice before default occurs since they are involuntary creditors.

¹⁰⁸ Alan Schwartz, A Contract Theory Approach to Business Bankruptcy, 107 Yale LJ. 1807(1998).

capital during bankruptcy and its palpably inefficient.¹⁰⁹ The only goal of bankruptcy law “should be to reduce the cost of debt capital, which the law best does by maximizing the debt investors’ insolvency state payoff.”¹¹⁰

Warren and Westbrook open sharp criticism on the theories so far discussed. According to them a large number of negotiations of bankruptcy contracts and changes in bankruptcy contract would be required under any of the contractarian theory given the large numbers of unsecured creditors still around on bankruptcy day. They note that negotiation over possible bankruptcy clauses will involve potentially huge transaction cost and a battle of the forms beyond anything taught in contract class.¹¹¹ The Authors also argue that the second notable problem with the above theories is the missing debtor problem. Warren argues that bankruptcy encompasses a number of competing and sometimes conflicting values. No one value dominates the other (in contrast to what other theories have suggested) in the quest to find the answer to how loss shall be distributed.¹¹² Increasingly, some scholar agree with the broad-based or interconnected approach advocated by Warren rather than the law and economics theory proposed by Jackson and Baird.

¹⁰⁹ He however admits that there exist some mandatory rules, which are necessary for the bankruptcy system itself. These are structural rules such as the automatic stay principle, which is essential for an efficient bankruptcy system.

¹¹⁰ See *Id.* Another contractarian is Professor Steven L. Schwarcz who believes that the bankruptcy code provision should sometimes be seen as default rules and not mandatory rules. He argues that a pre-bankruptcy contract that is unlikely to result in a secondary material impact neither offends the bankruptcy policy of equality of distribution nor creates externality that should be unenforceable under contract law. According to him this determination can be made *ex ante* at the time of contracting. See Steven L. Schwarcz, Rethinking Freedom of Contract: A Bankruptcy Paradigm, 77 Tex. L. Rev. 584. See also Marshall E. Tracht, Contractual Bankruptcy Waivers: Reconciling Theory, Practice and Law, 82 Cornell L. Rev. 301 (1997) who thinks that bankruptcy rules remain as they are but to some extent should become default rules.

¹¹¹ Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 894 (6th Edition).

¹¹² Elizabeth Warren, Bankruptcy Policymaking in an Imperfect World, 92 Mich. L. Rev. 336, 344.

Donald Korobkin argues that bankruptcy law provides a forum within which competing and various interest and values accompanying financial distress may be expressed and sometimes recognized. According to him, through the bankruptcy process, these competing interests are transformed, over time, into a renewed vision of the corporation as a moral, political, social and economic actor. Bankruptcy law thus creates a condition for a special kind of discourse one that is fundamentally rehabilitative in nature.¹¹³ Finch also shares the view that, bankruptcy law encompasses more than just being a tool for creditor wealth maximization. She sets out her framework of explicit value approach, which is a broad-based interdisciplinary approach, that factors, community and public interest as necessary bankruptcy goals.¹¹⁴ Flowing from Professor Warren, Westbrook, Korobkin, et al., it is urged that when it comes to distribution of losses the sole aim of bankruptcy law should not be the maximization of creditor's wealth but a consideration of other interest as well.¹¹⁵

The theories discussed above points out issues which are fundamental to understanding the purpose or the function of bankruptcy law. The analysis has been a tussle over whether bankruptcy law has been contaminated with non-bankruptcy issues and how these issues can be decoupled from the true purpose of bankruptcy law. I consider bankruptcy law to embrace not only economic ends but also other equally important ends, which cannot necessarily be separated from the economic. For

¹¹³ See Donald R. Korobkin, Rehabilitating Values: A Jurisprudence of Bankruptcy, 91 Colum. L. Rev. 717 (1991). See also Karen Gross, The Need to take Community Interest into Account in Bankruptcy: An Essay, 72 Wash. U. L. Q. 1031 (1994).

¹¹⁴ Vanessa Finch, Corporate Insolvency Law; Perspectives and Principles, (2002).

¹¹⁵ Other theorist also suggests that the purely economic function of bankruptcy should be separated from the litigation aspect of bankruptcy. They propose a solution that places much emphasis on creditors control and lesser court involvement. See Lucian A. Bebchuk, A new Approach to Corporate Reorganization, 101 Harv. L. Rev. 775 (1988). See also Barry E. Adler, A Theory of Corporate Insolvency, 72 N.Y.U L. Rev. 343 (1997).

instance, it is accepted that bankruptcy law should punish fraudulent debtors. Early writer as James Olmstead and Garrard Glen thinks this is of high importance. But this function to which bankruptcy law has been designed to serve cannot be said to be an exclusive economic end. While the civil remedies designed to arrest debtor fraud are designed to facilitate honest disclosure of the debtor's assets, the criminal remedies have been designed with something else in mind.¹¹⁶ But these remedies go hand in hand in resolving how bankruptcy should be resolved.

Relating this to bankruptcy law in Ghana, I don't see how problems like Bonte Gold Mine affairs discussed above can be curtailed if the focus of Ghanaian bankruptcy law should be a rehashing of the creditor's wealth maximization theory concerning itself only with maximizing payout to creditors. In this case, the Canadian-based creditors recovered their monies from their subsidiary company in Ghana leaving behind large tracts of environmental degradation among other problems. Such a result is not only inequitable but also serves a little legitimate purpose. The problems created in this case should be a concern of the bankruptcy law the same way fraud is a concern to the creditor's bargain theorist. Remedying environmental degradation when bankruptcy occurs, should be seen as a justified incidental to bankruptcy law collective action proceedings. There are certain factors that cannot inherently be decoupled from bankruptcy law today.

5. A Theory And Purpose Of Business Reorganization

Before the enactment of the Bankruptcy Code of 1978, Professor Walter Blum had written an interesting piece about the language of corporate reorganization. He stated that two main principles constitute the framework of reorganization law:

¹¹⁶ See Mary Jo Heston, Bankruptcy Fraud: Article: The United States Trustee: The Missing Link Of Bankruptcy Crime Prosecutions, 6 Am. Bankr. Inst. L. Rev. 359.

“One is that the assets of a distressed business are not to be disposed of until there has been a reasonable opportunity to determine what disposition will be most advantageous. This principle is so clearly sound that elaboration is unnecessary. The other is that the market value of a distressed business or its assets is not to govern the rights of those financially interested in the company.”¹¹⁷

His statement shines a light on the fundamental issues surrounding reorganization today. The Congressional debate on the purpose of bankruptcy reorganization stated in relevant part as follows:

“The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business’s finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of business reorganization is that the assets that are used for production in the industry for which they were designed are more valuable than those assets sold for scrap.”¹¹⁸

The Congressional debate centered on protection of investors, safeguarding jobs and helping troubled American businesses revive themselves in cases of distress. In *NLRB v. Bildisco*, the US Supreme Court stated that “The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic

¹¹⁷ Walter A. Blum, The Law and Language of Corporate Reorganization, 17 U. CHI. L. REV. 565 (1950). He stated further that more particularly the creditors are not to foreclose and force a sale or valuation of assets at prevailing market prices. Instead junior interests are to be protected from forced sales and the impact of unfavourable market conditions.

¹¹⁸ See HR Rep No 595, 95th Congress, 1st Session 220 (1977). See Gerard McCormack, Corporate Rescue Law - An Anglo-American Perspective, 41 (2008). See also Charles Jordan Tabb, The Future of Chapter 11, 44 S.C.L. REV. 791 (1993).

resources.”¹¹⁹ In *US v Whiting Pools Inc.*, the Supreme Court commenting on the purpose of reorganization stated “... Congress anticipated that the business would continue to provide jobs, to satisfy creditors’ claims, and to produce a return for its owners... Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if ‘sold for scrap’.”¹²⁰ The purpose of corporate reorganization, therefore, is not left in doubt. It is to help firms stay in business where the prospect to do so will mean the assets of the distressed company will be worth more in business than if sold in piecemeal liquidation. This we are told will save jobs, pays creditors and returns some monies to shareholders of the distressed company.¹²¹

A major opponent of reorganization process is Professor Jackson. He argues that there is no correlation between firms staying in business and the common pool problem. The common pool problem exists where there are little assets for claimants to go around. If it is important that a firm stays in business because of the jobs they save or their importance to the general community, that should be provided for as a matter of general law but not bankruptcy law, which exists solely to solve a common pool problem.¹²² He states further that the problems of business failure themselves are not bankruptcy problems and for that matter, the resolution of them should not be thought of as bankruptcy specific. In the end, reorganization should be tested against standards of whether

¹¹⁹ (1983) 465 US 513 at 528.

¹²⁰ (1983) 462 US 198 at 203. See also Gerard McCormack, Corporate Rescue Law - An Anglo-American Perspective 42 (2008).

¹²¹ In the UK, the Enterprise Act of 2002 creates a hierarchical to do list for administrators in a company’s insolvency. The administrator’s primary objective is to rescue the company as a going concern. The last is the beneficial realization of the assets for distribution to creditors. McCormack argues that the law still has creditor wealth maximization although it is well disguise by the hierarchy created by the law. See Gerard McCormack, Corporate Rescue Law - An Anglo-American Perspective, 36-37 (2008).

¹²² Thomas Jackson, The Logic and Limits of Bankruptcy Law, 210 (1986). Assuming a general law is passed to deal with problems of business failure and such laws provide an opportunity to save businesses and jobs will such a law not be construed as affecting bankruptcy law? What difference will it make?

they facilitate achieving the asset deployment greatest benefits to the claimants as a group. The justification of Chapter 11 of the US Bankruptcy Code, therefore, should be whether the reorganized firm is better off for its owners as a group than alternative use of its assets.

Jackson further asks very critical questions about who should foot the bill of the reorganized company. If the government desires to step in and save a distressed company, then the government should foot the bill. He asks why creditors, especially secured creditors, should be forced in some cases to accept a reorganized firm that may be beneficial to unsecured creditors and the company rather than being sold piecemeal in liquidation? He notes that, if the purpose of reorganization is to save jobs, why should employees not take responsibility for such restructuring since they stand to benefit? In line with the argument, Charles Mooney argues that bankruptcy law exists solely for the benefit of creditors, for that matter, the interest of employees, suppliers, customers and the community should be taken into consideration only when these parties are creditors with enforceable rights against the company. He concludes by stating that any attempt to take any other interest of those constituencies into bankruptcy law, to the detriment of secured creditors accordingly constitute prima facie theft.¹²³ Bradley and Rosenzweig suggest that the debtor-in-possession concept in reorganization is wrought with incentives for management. These incentives encourage management to run down the company, drag the whole process and abridge contracts for their benefit to the disadvantage of the interested parties.¹²⁴

¹²³ See Charles W. Mooney, A Normative Theory of Bankruptcy Law: Bankruptcy As (IS) Civil Procedure, 61 Washington and Lee Law Review, 964 (2004).

¹²⁴ M Bradley and Rosenzweig, The Untenable Case for Chapter 11, 101 Yale Law Journal, 1043 (1043). It is however difficult to understand why management will drag a business into bankruptcy for their own benefit. Bankruptcy is an unwanted event for the most part of commerce. The evidence show that after the company folds, it is difficult for managers to secure equally paying jobs or any at all. See Stuart C. Gilson, 'Management Turnover and Financial

Professor Douglas Baird once again offers quite an interesting view- advocating for abolishing bankruptcy reorganization in favor of liquidation. He argues that creditors taken together as a group and bargaining *ex-ante* would rarely prefer reorganization to liquidation because the cost of actual sale or liquidation is likely to be less than the cost of procedures needed to prevent manipulation and game playing by the participants in a reorganization process.¹²⁵ He notes that the entire reorganization process has been hijacked by management who use the filing to advance their interest instead of that of creditors.

On the other side, Warren a proponent of business reorganization argues that critics of reorganization have constructed a hypothetical system, superficial to the current bankruptcy system forgetting that bankruptcy policy itself exists in an imperfect market. She notes that bankruptcy system has been designed to serve critical functions necessary to preserve the value of the failing business, to distribute that value according to defined policies, to internalize the cost of business failure and to create reliance on private monitoring.¹²⁶

She notes that, first, reorganization enhances the value of the failing debtor by creating specialized collection rules to govern in the case of multiple defaults and requiring collective rather than individual state action. The advantage is that; it reduces collection cost. Second, reorganization

Distress' Journal of Financial Economics 25 (December 1989): 241–262. See also Elizabeth Warren, The Untenable Case for Repeal of Chapter 11, 102 Yale L.J. 437.

¹²⁵ Douglas G. Baird, The Uneasy case for corporate reorganization, 15 Journal of Legal Studies 127-47. Professor Eisenberg and Shoichi Tagashira have concluded that reorganization may not be appropriate for small scale companies in Japan since almost all cases filed by these companies under reorganization procedures were converted into outright liquidation. Eisenberg, Theodore and Tagashira, Shoichi, "Should We Abolish Chapter 11? The Evidence from Japan" (1994). Cornell Law Faculty Publications. Paper 381 accessed at <http://scholarship.law.cornell.edu/facpub/381> (11/12/2014). The situation in Japan may not necessarily reflect the reality in Ghana. A large number of companies in Ghana are small scale; some may be saved through reorganization procedures if the rules are carefully tailored to avoid pitfalls.

¹²⁶ Elizabeth Warren, Bankruptcy Policymaking in an Imperfect World, 92 Mich. L. Rev. 336, 344.

distributes values according to normative principles by rejecting the ‘race of the diligent’ that characterize state law, and then substitute a different normative principle ‘equity is equality.’ It begins with the premise that all similarly situated creditors should be treated alike. Parties who have no formal rights in the assets of the debtor may profit from a second chance at restructuring the debt and giving the debtor a second chance. Third, reorganization internalizes the cost of corporate failure to the parties dealing with the debtor. A viable reorganization reduces pressure on the government to bail out failing companies. This minimizes losses to the general public and forces creditors dealing with the company to make market-based lending decisions. Finally, reorganization establishes a privately monitored system. This is done by placing the decision in the hands of the parties who have superior information about the finances and the likely future of the business and who will not expend resources to dispute the appropriateness of the filing. Professor Warren states that we must consider bankruptcy policies in the light of their application to cases that arise in the real world. The markets that bankruptcy affects are not perfect and along that route there exist substantial transaction cost, information asymmetry and ambiguities about the property rights of the parties.¹²⁷ In response to Bradley and Rosenzweig, Warren argues that reorganization had not encouraged management misbehavior to the detriment of creditors and shareholders.¹²⁸ A careful study of data on the subject revealed that the position taken by the two couldn’t be supported since their assertion that managers intentionally filed for Chapter 11 to protect their interest were a huge overstatement. In her research, she found that managers of chapter 11 companies often lose their position through retrenchment and are unlikely to find jobs, which pay the same way as the old one. There was no incentive to intentionally trade their

¹²⁷ See *id.* She says further that while we should point out the inefficiencies, errors and shortcomings as an academic venture, we should never lose the fact that the market is imperfect.

¹²⁸ Elizabeth Warren, The Untenable Case for Repeal of Chapter 11., 102 Yale L.J. 437.

companies into bankruptcy and then seek refuge behind Chapter 11. Corporate distress is an unwanted event as far as management was concerned, it is, therefore, strange that managers will intentionally drive the business towards that path. Warren argues that bankruptcy law was deliberately designed to distribute assets and losses when a company cannot meet its debts and its distributive aim is carefully crafted to prevent hold out by a single class.

Warren may have the better of the exchanges over the period. The calls for the abolition of reorganization have stalled. This has arisen as a result of a pre-packaged contractual arrangement made between creditors and debtors before officially filing for Chapter 11 reorganization. This practice addresses some of the thorny issues that are likely to arise during reorganization process that start right away from filing in a court. Pre-packs, as they are called, make the process efficient, fast, cheap and creditor-controlled. After consultation with creditors, the expected outcomes become a done deal since the parties will have agreed on all aspects of the filing and how it affects their rights. This practice effectively curtailed the argument against time, manipulation and overall cost of the process.

6. What's New?

In this thesis, I will question some bankruptcy practices. It is believed that bankruptcy law ensures equality of distribution through predetermined priority rules. The reality is that some creditors are far better off than their counterparts under this rule. It is therefore not out of place to question whether bankruptcy law achieves equality of distribution as touted. What is the history and theory behind statutory priority rules? Will the abolition of some priority rules cause pandemonium in bankruptcy practice? Who will bear the direct cost? In Ghana, there exist deferred payment for creditors who are relatives or near relatives of directors of debtor companies. Is this practice justified? I argue in this thesis that demoting close relatives of directors of a debtor company to a

lower rank defeats the *pari passu* or equality principles under bankruptcy law. In response to the proliferation of priority claims, I make a suggestion for the introduction of a priority cap, placing a maximum amount out of the estate that can be paid to all priority claim holders.

CHAPTER THREE

A HISTORY OF HOW INSOLVENCY LAW EVOLVED IN GHANA

1. Introduction

Ascertaining the history behind insolvency law in Ghana is important because it throws light on the pattern of acceptable standards for bankruptcy and winding up legislation over the period. This pattern is crucial for evaluating future proposals largely to ensure that the pitfalls of the past are avoided and also to ensure that reform is not totally bereft of the history background of the community to which it is designed to serve.

Bankruptcy is a universal phenomenon. Individuals, partnerships and corporation sometimes go bankrupt. This is common in every organized society. When bankruptcy occurs, choices ought to be made since there is not enough money to go around to satisfy creditors. Every civilized society one way or another has means of dealing with the phenomenon.

A number of reasons account for choosing one bankruptcy regime over another. It may be a resolve to punish debtors for running down their affairs for which reason strict monitoring is visited on them or a resolve to help debtors revive themselves from a misfortune for which reason they are afforded a fresh start among others. This determination springs from the general perception of bankrupts in society, which also characterizes the tenor of bankruptcy legislation. It is permissible to state that, today, the tenor of bankruptcy legislation could be the test of a country's fairness, equity and legal civilization.¹²⁹

Country approaches to bankruptcy differ significantly.¹³⁰ Individual jurisdictions can be classified into pro-debtor, pro-creditor or not-interested. Although this difference exists, there are common

¹²⁹ See Philip R. Wood, Principles of International Insolvency viii, (1995).

¹³⁰ *Id* at 2-3.

grounds or areas uniting the many bankruptcy jurisdictions across the world. This primarily has arisen as a result of colonial influence, the impartation of legal traditions and legal borrowing. The legal traditions affect how bankruptcy laws are modeled whether towards English law or civil law, but the nature of the relationship between the bankruptcy law and other areas such as security, trust, land, environment, etc. are often dictated by the local conditions. Most African countries have bankruptcy laws deeply rooted in the laws of their colonial States.

2. Extent Of The Application Of English Law In Ghana

Ghana¹³¹ under colonial rule was known as the Gold Coast, which “consisted of the settled colony of the coastal areas, the conquered colony of Ashanti in the middle belt, the Protectorate of the Northern Territories, and the Trust Territory of British Togoland.”¹³² The coastal territories were not conquered but gradually fell under colonial control through sufferance. It was through the coastal areas that trade in slavery flourished until same was abolished in 1807.¹³³

Before the advent of colonialism, there existed an organized society with institutions and systems of laws. These laws were the laws, which by custom applied to the various communities big and small. Disputes were resolved in a hierarchical manner and subjects could appeal to higher adjudicating bodies within the hierarchy created by custom. This was the state of affairs well

¹³¹ The Constitution of the Republic of Ghana 1992 per Article 4(1) provides as follows: “4. (1) The sovereign State of Ghana is a unitary republic consisting of those territories comprised in the regions which immediately before the coming into force of this Constitution, existed in Ghana, including the territorial sea and the air space.”

¹³² See Kofi Quashigah, The Historical Development of the Legal System of Ghana: An Example of the Coexistence of Two System of Law, 14 *Fundamina* 95 (2008) and T. O. Elias, The British Commonwealth: Ghana and Sierra Leone 3 (1963).

¹³³ See Hayes Redwar, Comments on Some Ordinances of the Gold Coast Colony 60 (1909) and Kofi Quashigah, The Historical Development of the Legal System of Ghana: An Example of the Coexistence of Two System of Law, 14 *Fundamina* 95 (2008).

documented before colonizers surfaced.¹³⁴ John Mensah Sarbah in his *Fanti Customary Laws*¹³⁵ wrote that:

“[A] study of these ancient authors abundantly proves that when, in 1481 Portuguese navigators and other European trading adventurers first appeared on the Gold Coast, they found an organized society having kings, rulers, institutions, and a system of customary laws, most of which remain to this day.”

Dispute resolution mechanism was a prominent feature in the pre-colonial society. Families resolved their disputes through principal members of the family and lineages resolved their disputes through lineage head or an arbitrator.¹³⁶ In adjudicating disputes, the family head or arbitrator primarily employed customs applicable to their community.

The ushering in of British system of justice was slow and initially was restricted to the British forts and immediate surroundings where the British colonizers maintained a physical presence. The process had been slow because the forts initially were trading post for the private businesses and the British colonizers had been reluctant to take active political control for that matter.¹³⁷ The abolition of slave trade saw the rise in trade in natural resources, which later led to direct political intervention in the affairs of the Gold Coast.

The stage was set for greater political control of the Gold Coast when the business grew much more lucrative and the Dutch and other traders transferred their forts to the British. The elimination of Ashanti control in the middle belt, the entry into treaties with the local chiefs of the northern

¹³⁴ See Yeboa K. Y, The History Of The Ghana Legal System: The Evolution Of A Unified National System Of Courts [1991-92] Vol. XVIII RGL 1-35.

¹³⁵ John Mensah Sarbah, Fanti Customary Laws (2nd ed, 1904).

¹³⁶ See Yeboa K. Y, The History Of The Ghana Legal System: The Evolution Of A Unified National System Of Courts [1991-92] Vol. XVIII RGL 1-35.

¹³⁷ The trading forts and the settlements on the Gold Coast were vested in the Company of Merchants trading to Africa.

territories and the defeat of the Germans, who had control of the Togoland meant total control of the British over the entire territories of the Gold Coast. German's control over the Togoland was ended by the League of Nations in 1922 who placed the entire area under the Protectorate of the British and later by the United Nations in 1946 after the Second World War.¹³⁸

The British fortified their control and established Petty Debt Court for the resolution of commercial dispute. This court sat and administered British brand of justice within the forts and its immediate surroundings. The Magistrates of the Court were British merchants and they exercised jurisdiction over the forts and the natives who worked as assistants to the colonizers. British laws and brand of justice appealed to the natives who lived close to the forts. For this reason, the jurisdiction of the court was extended to the areas or communities without any formal legal backing or instrument.¹³⁹

A Parliamentary Select Committee was appointed in the year 1842 to examine British administration in the Gold Coast.¹⁴⁰ The Committee recommended regularization of judicial jurisdiction exercised by the Magistrates at the forts. Quarshigah notes that this meant that the *de facto* jurisdiction, which had been exercised by Magistrates, was to be defined properly by law.¹⁴¹ According to Bennion, this objective “was to be achieved by means of agreements with the local chiefs and by the appointment of a judicial officer who, in administering justice to the African

¹³⁸ T. O Elias, The British Commonwealth: Ghana and Sierra Leone (1963).

¹³⁹ See Yeboa K Y, The History Of The Ghana Legal System: The Evolution Of A Unified National System Of Courts [1991-92] Vol. XVIII RGL.

¹⁴⁰ This Committee was set up to investigate allegation of misuse of government subsidy and illicit slave trade by the Company of Merchants. After the investigation an Act was passed in 1821 dissolving the Company and vesting its properties in the Crown. Kofi Quashigah, The Historical Development of the Legal System of Ghana: An Example of the Coexistence of Two System of Law, 14 Fundamina 95 (2008).

¹⁴¹ See *id.*

population, should follow the principles, while not being restricted to the technicalities, of English law and should be allowed a large discretion.”¹⁴²

In furtherance of the Parliamentary Select Committee’s work and to enable the British Crown to provide for the government of Her Settlement on the Coast of Africa, The British Settlement Act¹⁴³ and the Foreign Jurisdiction Act¹⁴⁴ were passed in 1843 to regularized British political and judicial authority. Under the British Settlement Act, it was made lawful for Order in Council to be passed to establish laws, institutions, ordinances, constitute courts and appoints officers for the administration of justice. According to Bennion,¹⁴⁵ the Foreign Jurisdiction Act authorized “the exercise of political powers acquired by agreement or usage in territories which had not become part of the Her Majesty’s dominions by cession or conquest.”¹⁴⁶

In its application to the Gold Coast, these two pieces of legislation created a hybrid system of dispute resolution, where the British Governor and the Local Chiefs constituted a Court for the resolution of disputes in the territories.¹⁴⁷ It also empowered the British Crown to extend jurisdiction to areas over which it did not have jurisdiction. This set the stage and paved the way for the rise of British Courts system in the Gold Coast. Establishing hybrid court system was strategic to the British for good reasons. First the hybrid courts recognized native laws and customs

¹⁴² See Bennion, Constitutional Law of Ghana, 6 (1962). See also Kofi Quashigah, 14 *Fundamina* 95 (2008).

¹⁴³ (6 & 7 Vict c 13).

¹⁴⁴ (6 & 7 Vict c 94).

¹⁴⁵ Bennion, Constitutional Law of Ghana, 8 (1962).

¹⁴⁶ Pennell argues that the Foreign Jurisdiction Act was enacted to extend British jurisdiction over disorderly individuals and not over territory. It was part of an effort to enforce sovereignty over detached subjects that began in the early modern period and became more urgent as the empire economic hegemony grew. See Pennell, C. R., The Origins of the Foreign Jurisdiction Act and the Extension of British Sovereignty (2010) *Historical Research*, 83: 465–485.

¹⁴⁷ *Id.*

and second, it gave the British the leverage to subject native laws and customs to a stringent test of British reasonableness and repugnance test, a test the British applied before deciding a case according to local custom. This gave the British recognition by the natives and also control over the territories because while recognizing native law, British law was made paramount to indigenous or native law.¹⁴⁸

On March 6, 1844, the British and the Local Chiefs entered into a popularly known Treaty, The Bond of 1844. Under this Bond, the Local Chiefs acknowledged the power and jurisdiction of the Crown and gave formal consent to the trial of serious cases before British Judicial Officers. The Bond further outlawed certain practices such as panyarring or kidnapping of hostages for the payment of debt. The Bond set the tone for a comprehensive extension of British laws in the Gold Coast as was envisioned in the report of the Parliamentary Select Committee set up in 1842.

In 1853, the British established a Supreme Court of Her Majesty's Fort and Settlement of the Gold Coast to sit at Cape Coast.¹⁴⁹ Its jurisdiction extended to the forts and the surrounding communities. The court was presided over by Barristers-At-Law as Chief Justice. Its jurisdiction was that of:

“Common Pleas, Queen's Bench and Exchequer at Westminster and of the Admiralty over treasons, piracies, murders, conspiracies, and such other offences, of what nature or kind whatsoever committed, upon the sea, or any haven, river, creek, or place where the Admiral

¹⁴⁸ On 3rd September 1844, an Order in Council was made which required Judicial Authorities when exercising jurisdiction among natives to observe local custom as were compatible with the laws of England.

¹⁴⁹ The Supreme Court Ordinance No. 4 of 1853 was passed on April 26th, 1853. See Sarbah, Fanti Constitution, 160 (2nd edn, 1904). The Court, the Supreme Court of Her Majesty's Forts and Settlements on the Gold Coast was presided over by Chief Justice. This was a court of record and had similar jurisdiction to that of the English Courts of Queen's Bench, Common Pleas, and Exchequer. See also Hayes Redwar, Comments on Some Ordinances of the Gold Coast Colony 3 (1909).

or Admiralty have authority, power or jurisdiction, according to the common course of the laws of the realm of England, and not otherwise.”¹⁵⁰

The Supreme Court, save for admiralty matters had unlimited power over substantive and procedural laws when determining an issue before it. It applied rules of private international law where the parties to a suit would raise such question of application of such laws and applied customary laws to the extent that the custom in question was not repugnant to, barbarous or incompatible with English law.¹⁵¹ In 1856, under the British Settlement on Coast of Africa and Falklands Act of 1843, the British decided to extend the jurisdiction of the courts outside the forts to all communities where the British did not exercise jurisdiction. A prominent feature of this piece of legislation was the extension of the jurisdiction of the court to resolving Bankruptcy and Insolvency as well as Administration of Estates.¹⁵² This piece of legislation will evolve and form the basis of insolvency legislation in the country to be discussed later in this chapter.

The main characteristics of the Ghanaian legal system were therefore shaped by the two systems of laws; English law on one side and indigenous or native law on the other. In 1876, one significant piece of legislation was passed by the Local Legislature. This was the Supreme Court Ordinance of 1876. The legislation re-established the Supreme Court which had the jurisdiction to that of the High Court in England except for admiralty matters.¹⁵³ Admiralty matters were vested in the High

¹⁵⁰ See No. 4 of 1853.

¹⁵¹ *Id.*

¹⁵² Sarbah writing in his Fanti Customary Laws stated that, “What that jurisdiction (i.e. in bankruptcy, insolvency and administration of estates) was it is difficult to say, but as the chief Justice was also Judicial Assessor there would not have been any conflict.”

¹⁵³ The Supreme Court was a court of record and was duly constituted under Section 4. It provided that: “The Supreme Court shall consist of the Chief Justice of the Gold Coast Colony, and so many Puisne Judges, not exceeding four in number at any one time, as the Governor may from time to time appoint by letters patent under the public seal of the Colony, in accordance with such instructions as he may receive from Her Majesty. The Court shall be deemed to be

Courts of Justice in England. One prominent provision was Section 14 which enacted how far the laws of England applied to the Gold Coast. Section 14 provided as follows:

“The common law, the doctrines of Equity and the statutes of general application which were in force in England at the date when the colony obtained a local legislature, that is to say, on the 24th day of July 1874, shall be in force within the jurisdiction of the court.”

Flowing from this provision (known as the Reception Clause) the Common Law of England and the Doctrines of Equity, which were in force on July 24th, 1874, were imported wholesale into the laws of the Gold Coast. The Ordinance did not exclude the application of the native law in the territory. Under Section 19, the Courts were to apply native laws to the extent that they were reasonable, not repugnant to good conscience and consistent with laws made by the Local Legislature.

English law and native law were applied side by side in the courts. Some frictions would arise later which were resolved by resort to rules on conflict of laws and scholarly writing by legal luminaries.¹⁵⁴ Section 19 of the Ordinance further provided that before English laws would be applied exclusively, the court had to satisfy itself that the parties agreed that English law be the exclusive governing law or the court could go ahead and apply English and native law as appropriate to resolve a dispute. In sum, the two system of laws were applied by the court and has now been fully integrated and applied by the courts in the country.

duly constituted during, and notwithstanding, any vacancy in the office of Chief Justice or of any Puisne Judge thereof.”

¹⁵⁴ See valuable contribution on the subject by Hayes Redwar, Comments on Some Ordinances of the Gold Coast Colony (1909).

*Thompson vs. Thompson*¹⁵⁵ illustrate how the laws were applied in the Gold Coast. In that case, the deceased husband was married under the Marriage Ordinance, but the wife had died earlier without issue. The Court held “that his surviving son born out of wedlock was entitled to share in the distribution of the estate as one of the next-of-kin of the deceased in accordance with native customary law.”¹⁵⁶ This resonated well under customary law but not under English law where the concept of illegitimacy would have barred the deceased son from any inheritance. In supporting its decision, the Court quoted the Nigerian case of *In re Sapara* which held that:

“[U]nder English law, marriage is necessary to legitimise the offspring of two persons, such offspring, if illegitimate, having no right of inheritance; but under native law, a child’s right of succession to his father’s property can be legalised by mere acknowledgement of paternity, without the necessity of any form of marriage between his parents.”¹⁵⁷

In 1883, the Local Legislature passed the Gold Coast Native Jurisdiction Ordinance, which provided for the creation of Native Courts. The Native Courts were presided over by the Chiefs and Elders and had jurisdiction over both civil and criminal matters. Though it had jurisdiction in civil and criminal matters, their jurisdiction was limited by proprietary value. The Courts primarily administered customary law and appeals from the courts lied to the Supreme Court of the Gold Coast. When it came to the exposition of the customary law, decisions of the Native Court were

¹⁵⁵ Div Court 1921-1925 at 155 (Selected Judgments of the Divisional Courts of Gold Coast Colony 29 June 1921 to 31 December 1925). I could not lay hands on this case law, the facts and rendition is therefore taken from Kofi Quarshigah’s work on the historical development of the legal system in Ghana. See Kofi Quashigah, The Historical Development of the Legal System of Ghana: An Example of the Coexistence of Two System of Law, 14 *Fundamina* 103 (2008).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

binding upon the Superior Courts, unless it could be shown or proved that the custom was repugnant to natural justice, equity and good conscience.¹⁵⁸

The laws of the Gold Coast were therefore administered on one hand in the order of hierarchy from the bottom by: The Magistrate Courts, The Supreme Court, The West African Court of Appeal and the Privy Council in England and on the other hand by the Native Courts with appeals to The Supreme Court of the Gold Coast.¹⁵⁹ This was the state of affairs until recent changes upon attainment of independence in 1957.

3. Sources Of Law In Ghana

The sources of law in Ghana were contained in the 1957 Independence Constitution and carried onto 1960, 1969, 1979 and the 1992 Constitution of Ghana. Article 11 of The 1992 Constitution provides as follows:

“11 (1) the laws of Ghana shall comprise-

- (a) This Constitution;
- (b) Enactment made by or under the authority of the Parliament established by this Constitution;
- (c) Any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitutions;
- (d) The existing law; and
- (e) The common law.”

The Constitution is the supreme law in Ghana. All other laws found inconsistent with the provisions of the Constitution are void to the extent of that inconsistency. Parliament under the

¹⁵⁸ See Ollenu N. A, Judicial Precedent in Ghana Vol. III No. 2 UGLJ 139-164 (1966). See also *Anane v. Mensah* (1959) G.L.R. 53 and *Kwan v. Nyieni and Another* (1959) G.L.R. 67. See also Kofi Quashigah, The Historical Development of the Legal System of Ghana: An Example of the Coexistence of Two System of Law, 14 *Fundamina* (2008).

¹⁵⁹ *Id.*

Constitution is vested with authority to make laws. All laws made by Parliament must, however, conform to the provisions of the Constitution, which is the enabling law, or the resulting enactment is void to the extent of such inconsistency. Thus in *New Patriotic Party vs. Attorney-General*, the Supreme Court held as follows:

“Although Parliament had the right to legislate, every such legislation had to be within the parameters of the powers conferred on the legislature by the Constitution, 1992 because under article 1(2) of the Constitution, any law found to be inconsistent with any provision of the Constitution should, to the extent of the inconsistency, be void. And once an Act was null and void, the President or the executive could be restrained by injunction from enforcing or obeying it.”¹⁶⁰

Article 11(1) (c) provides that Orders, Rules and Regulation made by constitutionally created bodies also has the force of law in the country. It follows that Constitutional Bodies created under the 1992 Constitution such as the Commission on Human Rights and Administrative Justice (CHRAJ) has authority to make rules to carry out its mandate. Such rules are valid to the extent that they are not inconsistent with the provisions of the 1992 constitution and their enabling Acts of Parliament. In *Republic v. Fast Track High Court Accra, Ex parte Commission on Human Rights and Administrative Justice (Richard Anane Interested Party)*¹⁶¹ the facts of which were that CHRAJ on its own and without a formal written complaint (from an identifiable complainant), investigated allegation of corruption and conflict of interest against Dr Anane, A Minister of State of the Republic of Ghana. This investigation arose after Ghanaian newspaper published allegations against him. Article 218(a) of the 1992 Constitution provided that CHRAJ has the power to

¹⁶⁰ [1993-94] 2 GLR 35-192.

¹⁶¹ [2007-2008] SCGLR 213.

investigate “complaints” of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties. Section 12(1) of the CHRAJ Act provided that a complaint to the Commission shall be made in writing or orally to the national offices of the Commission or a representative of the Commission in the Regional or District branch.

After a thorough investigation, the CHRAJ made adverse findings of abuse of office, conflict of interest and perjury against the Minister of State. The adverse findings did not include corruption. CHRAJ recommended that the Minister be removed from his office. Aggrieved by the findings of the CHRAJ, Dr. Anane sought certiorari in the High Court to bring forth the proceedings of the CHRAJ and quash it because the CHRAJ violated a constitutional precondition under Article 218 (a) to investigate allegations, which is to act upon receiving a formal complaint. The High Court agreed with the Minister’s position and quashed the entire proceedings by the CHRAJ. On review to the Supreme Court, the Court had to interpret whether the word “complaint” connote a formal complaint or expression of dissatisfaction in the media enough to form a basis for investigation? The Court affirmed the position of the High Court and held, speaking through Chief Justice Wood that the word “complaint” under Article 218(a) and (b) is limited to formal complaint made to the Commission by an identifiable complainant; not necessarily the victim, but an identifiable complainant, armed with a complaint.¹⁶² This meant that CHRAJ acted outside the ambit of the Constitution and its enabling law in conducting the investigation and its finding had no validity under the laws of Ghana.¹⁶³

¹⁶² [2007-2008] SCGLR 213 at p. 260.

¹⁶³ Date-Bah J.S.C wrote a dissent on the interpretation to be given to the word “complaint”. He stated that “When a choice is put that starkly, I have no doubt in determining what interpretation of the given language would be more in consonance with the values of the framers of the Constitution. The broader interpretation is even more obvious in

The existing law in Ghana according to Article 11(4) comprise the written and unwritten laws of Ghana as they existed immediately before the coming into force of this Constitution. They also include any Act, Decree, Law or Statutory Instrument issued or made before that date, which is to come into force on or after the coming into force of the Constitution. The existing laws have validity and can continue to the extent that they are not inconsistent with the constitution. In *New Patriotic Party vs. Attorney-General*, after invalidating provisions of The Public Order Decree as inconsistent with the 1992 Constitution, the Supreme Court speaking through Akoto Bamford JSC had this to say:

“But NRCD 68, ss 7, 8, 12 and 13 being null and void, cannot be said to fall within the proviso to article 21 (4) of the Constitution, 1992 and cannot even be considered as existing laws, much less laws which are reasonably justifiable in terms of the spirit of the Constitution, 1992.”¹⁶⁴

Article 11(2) also provides that the common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature. Article 11 (3) further defines customary law as the rules of law which by custom apply to particular communities in Ghana.

relation to the breach of fundamental human rights. Can it be reasonably said that when there are persistent media reports of breaches of fundamental human rights, such as of female genital mutilation or *trokosi* practices, CHRAJ should be forbidden from investigating those reports with a view to making recommendations to the appropriate authorities for the abatement of these breaches, unless an identifiable complainant has lodged a complaint with it? Any interpretation that reached the conclusion that CHRAJ was forbidden in those circumstances would represent a huge missed opportunity for the development of the liberty and the protection of fundamental human rights that is the bedrock of our Constitution.” See [2007-2008] SCGLR 213 at p. 317. See also Date-Bah, S. K, Reflections on the Supreme Court of Ghana, Wildy, Simmonds & Hill Publishing, 161-165 (2014).

¹⁶⁴ [1992 -93] GBR 585.

The modern common law of Ghana, therefore, comprises the principles of common law and the doctrines of equity and the customary laws of the various communities. Article 11 in the words of Quarshigah, “represent the harmonization of all sources of law into one comprehensive unit.” The Ghanaian legal system is, therefore, pluralistic comprising the common law and customary law in addition to the Constitution and statutes, which the Courts are mandated to enforce.¹⁶⁵ The Native Courts have since been abolished. The courts now established are the Supreme Court, the Court of Appeal, the High Court and Regional Tribunals, Circuit Court, District Court and the Juvenile Courts in hierarchical order from the top.¹⁶⁶ The High Courts generally resolve insolvency matters.

4. Tracing Out The Development Of Insolvency Law In Ghana

Before colonization, the natives applied customary law to enforce payment and obtain redress. This is not to be confused with bankruptcy procedure where collective action was initiated by creditors to take over the affairs of the bankrupt, and share whatever they get according to predetermined normative.¹⁶⁷ Customary mode of enforcing payment is akin to modern day individual or State debt collection mechanism.

When the early European traders arrived in the Gold Coast, they found in place mechanisms for enforcing payment. According to Sarbah, several methods of enforcing payment of liability existed

¹⁶⁵ See Date-Bah, S. K, Reflections on the Supreme Court of Ghana, Wildy, Simmonds & Hill Publishing, 1 (2014)

¹⁶⁶ The Constitution vest judicial power in the Judiciary per Article 125. Among the Courts created is the Regional Tribunal, which has concurrent jurisdiction with the High Court in specified matters. The Chief Justice who is the Head of the Judiciary has powers to create divisions of the courts and has since created variants of the High Court to wit the Commercial Courts, The Fast Track High Court, The Labour Courts, The Human Rights Court, Financial Crimes Courts, etc. See also Courts Act, 1993 (Act 459).

¹⁶⁷ This pertains to modes of obtaining payment for debts. It is not synonymous with bankruptcy.

under customary law.¹⁶⁸ These modes included *Dharna* which was a practice also well known in India.¹⁶⁹ *Dharna* was the act of fasting by the creditor to press the debtor to pay the debt owed. The creditor wore sack clothes and followed the debtor until the debt was paid.¹⁷⁰ This mode of enforcing payment, with its attendant discomfort, died out in favour of less stressful ones.¹⁷¹ Panyarring was another mode of enforcing payment obligation. Panyarring was of two kinds namely of the person or his chattels. The practice was to seize a member of a tribe or his goods until debts owed by another or himself was repaid. Sarbah writes that among the coastal tribe and members of the same tribe, panyarring was not customary.¹⁷² He notes that, when a member of a different tribe was found, he was seized together with his goods and kept in bondage for the debt owed until members of his tribe paid the sum owed. Where the creditor chooses not to seize people, he could seize the chattel of the debtor, usually of higher value and keep them until the debt owed was paid.¹⁷³ The creditor was under no obligation to take good care of the chattel seized. He could

¹⁶⁸ See J. M Sarbah, Fanti Customary Laws 114-115 (2nd edn., 1904). See also Report of the Commissioners Appointed to Enquire into Insolvency law of Ghana, 5-6 (1961).

¹⁶⁹ The word *Dharna* is the equivalent of the Roman *capio* which means to seize, catch, to take or to grasp.

¹⁷⁰ See J. M Sarbah, Fanti Customary Laws, 115 (2nd edn., 1904). In practice, the creditor wore sack clothes and ashes or covers himself in white clay and takes with him food sufficient for one meal to his debtor's house. He goes early in the morning and informs his debtor that he will not leave until the money is paid. If the money is not paid, he followed the debtor everywhere he/she went. In extreme cases, the creditor starved himself to death or committed suicide. If he died or committed suicide simpliciter, the debtor was made to pay for his funeral in addition to the debt owed. In some places, however, when the creditor swears that he and his debtor should forfeit their lives if the debt is not repaid by a certain date, the debtor was required to take his life, if the debt is not repaid by such date and the creditor committed suicide.

¹⁷¹ See Report of the Commissioners Appointed to Enquire into Insolvency Law of Ghana, 5-6 (1961).

¹⁷² J. M Sarbah, Fanti Customary Laws, 115 (2nd edn., 1904).

¹⁷³ The members of the debtor's family or sometime complete strangers were seized and kept until the debt owed was paid.

however not sell or use the chattel.¹⁷⁴ If he used the chattel in a wrongful manner, he was liable to pay damages.¹⁷⁵ Panyarring was widely practiced until 1831 where with the signing of a Treaty between Ashanti and Fanti Chiefs, the practice was strictly forbidden and perpetrators punished.¹⁷⁶ The practice was effectively put to rest in the Bond of 1844 where panyarring was declared a barbaric custom and contrary to law. With the consent of the Chiefs panyarring became a customary law offense and punished severely.¹⁷⁷

In modern times, the custom reared its head in the case of *Gym v Insaidoo*.¹⁷⁸ In that case, the High Court was called upon to make a pronouncement on the practice between a husband and a wife.¹⁷⁹ The facts were that the plaintiff had sued the defendant for the return of certain articles he had seized from her room. The articles belonged in part to the plaintiff and in part to her sister. In his defense, the defendant stated that he had been customarily married to the plaintiff. He alleged that Plaintiff had stolen money from the room he shared with her while he was ill and taken to the

¹⁷⁴ Sarbah states that panyarring is a law rather than a custom. He does not explain the need for the distinction and how that distinction affected the rights of creditors and debtor. He states however that if panyarring was prostituted for bad purposes it could result in heavy damage to the wrong doer. See J. M Sarbah, Fanti Customary Laws, 116 (2nd Edn., 1906).

¹⁷⁵ R. S Rattray, Ashanti Law and Constitution, 370 (1929).

¹⁷⁶ Report of the Commissioners Appointed to Enquire into Insolvency law of Ghana, 6 (1961). Rattray however writes that the practice did not extend to Ashanti and was not customary among them. See R.S. Rattray, Ashanti Law and Constitution, 370 (1929).

¹⁷⁷ Report of the Commissioners Appointed to Enquire into Insolvency law of Ghana, 6 (1961).

¹⁷⁸ [1965] GLR 574-588.

¹⁷⁹ In this case the defendant claimed that he had customarily married off the Plaintiff. The Plaintiff rejected this assertion and claimed that she had only lived with the defendant as a concubine. The defendant led evidence to show that he sent a messenger to present drinks and a token to the Plaintiff's family and then asked for the Plaintiff's hand in marriage. The drinks and money were accepted. The parties had lived together for fourteen years. The court ruled that in the absence of publicity the parties were not husband and wife. In modern times, the court will have presumed the existence of customary marriage given these facts. See Kofi Oti Adinkrah, 'Essentials Of A Customary Marriage: A New Approach' [1980] Vol. Xii RGL 40 – 52.

hospital. The defendant claimed among others that he seized the articles in the exercise of his customary law right of panyarring or the exercise of a lien. In resolving the dispute, the High Court presided over by Koranteng-Addow J. held that no creditor and debtor relationship existed between the defendant and plaintiff merely because of accusation of theft which allegation had been strenuously denied. She held further that:

“Even assuming the existence of a debt, the defendant could not exercise the customary law right of panyarring as that was abolished in 1844, neither could he rely on a common law lien as the goods in question were at no time in his possession.”¹⁸⁰

Detention was the other mode of enforcing repayment of debt. According to Sarbah, the debtor could be held in custody, imprisoned in the Chief’s prison or the village lock up until the debt owed was paid. The debtor was to care for himself while he was in prison. If he could not, he had to procure his family or friend to cater for his upkeep. Failing all these, he was forced into hard labour to cater for himself while in prison. Detention was fairly used and proved very effective. Once the debtor was imprisoned, his family came together to pay the debt to secure his release. This method proved very effective in enforcing repayment of debt even in modern times.¹⁸¹ This method was used effectively until outlawed (with resistance) in the 19th century.

Colonial Influence on Enforcing Payment

The customary methods of enforcing payment faded away in the course of time after colonial rule. In its place, the colonial administration introduced a number of procedures existing in England for the enforcement of a judgment for payment of money. The procedures, which at some point was the same as under English law, (some variation made to it with the coming into force of the

¹⁸⁰ *Gym v Insaidoo* [1965] GLR 574-575.

¹⁸¹ The practice changed over the years. In 1876, creditors had an obligation to fend for debtors they had imprisoned. Debtors no longer cater for themselves and if the creditor could not he had to be released.

Supreme Court Ordinance of 1876) was that, when a creditor obtained judgment for repayment of debt, he had a choice to levy execution against the person of the debtor or his property. The creditor could, therefore, cause a *capias ad satisfaciendum* (*Ca.Sa*) to be issued, which would be an execution against the person of the debtor or cause a writ of *fi. fa* to issue, which would be an execution against the debtor's property by way of seizure and sale of his property.

The procedure for imprisonment for debt as existed in England was applied in the colony without difficulty. It was not until 1869 to the early 1900's that imprisonment for debt was overhauled and completely abolished in England by the Debtors Act of 1869 and its sister legislation the Bankruptcy Act of 1869.¹⁸² These two legislations were enacted as a scheme for getting rid of imprisonment and making bankruptcy proceedings more effective against fraudulent and other undesirable debtors.

The change in enforcement of a judgment for debt in England caused serious concern for the merchants trading in the Gold Coast. They were concerned about the rippling effect it will have and whether the same rules will apply to the colony. Imprisonment for debt had proved effective both under customary law and under English law because once a debtor was incarcerated the family came together to satisfy the debt owed since customarily it was a dent on the extended family's good image.¹⁸³ Further, the concept of individual ownership of land or property was not

¹⁸² See The Debtors Act 1869, The Bankruptcy Act 1869 and Bankruptcy Act 1914. Under these pieces of legislation imprisonment for debt of up to £50 and over was abolished and later extended to debts below £50. In its place the Bankruptcy laws retained the powers to imprison fraudulent debtors. The Debtors Act also had provisions which allowed to the court to imprison a debtor who failed or neglected to obey a command of the court to for example to pay part of his salary for the benefit of creditors.

¹⁸³ Debt of a family member sometime became the responsibility of the entire family who were called upon the pay. In *Quacoom v. Ansa and Taweia* (1845) the defendants who had admitted their mother's indebtedness to the Plaintiff, undertook to pay off debt contracted by their mother that was still outstanding after a very long time. After that gesture,

well developed in the Gold Coast. Property was for the most part family owned, raising the difficulty in enforcing the writ of *fi.fa* for the seizure of the debtor's property.

The difficulty in finding and attaching individual property could be seen in *Russell v Meffull*.¹⁸⁴ In that case, in an interpleader suit, the claimants had claimed that a house, land and certain personal property specified in the summons belonged to the family of the claimants and was not liable to be attached by the plaintiff. They claimed that the property belonged to one Kofi Eku of Anomaboe who had purchased the land and built upon it. Kofi Eku died and his property devolved unto his sisters. The debtor in the substantive suit was the son of one Eku's sisters. It was made evident during the trial that the debtor had made some improvement to the house. The land and house were the subjects of the execution by the plaintiff. Stanley Morgan J. held that:

“It is clear that by native law the real property of Eku at his death became family property in the hands of his successor, and so not liable to be taken in execution under ordinary circumstances for debt of such successor.”¹⁸⁵

He went on to state that even if the debtor was not the successor, the property could not be attached by execution since it was family property. He, however, stated that if the plaintiff could prove that the cost of the materials used in the alterations to the house formed part of the judgment debt, he would have forced the family to pay, but this the plaintiff failed to do.¹⁸⁶

the plaintiff agreed to absolve the defendants and their mother from any further claim. The claim was brought against the defendant but not their mother. See Fanti Law Report, 1 (2nd Selection, 1904).

¹⁸⁴ Fanti Law Report, 119 (2nd Selection, 1904).

¹⁸⁵ *Id* at 119-120.

¹⁸⁶ *Id* at 121-122.

The colonial merchants, therefore, opposed total abolishing of imprisonment for debt for the reasons stated above.¹⁸⁷ The merchant's opposition to the application of the Debtors Act to the colony was made concrete when in 1874 the Secretary of State for the Colonies decided that the Act should not apply in the Gold Coast colony. Two years later, the Supreme Court Ordinance provided that: "if the decree be for money it shall be enforced by the imprisonment of the party against whom the decree is made, or by the seizure and sale of his property, or both if necessary."¹⁸⁸ The judiciary was somehow divided on continued application of imprisonment for debts. A school of thought opposed the idea believing it was only moulding the laws of the Gold Coast to general principles of England that civilization could be achieved in the colony. This led to circumspection and arrest warrant were issued in the most appropriate cases. Chief Justice Bailey had set the proposition that:

"(1) that when a party obtains judgment he ought first to obtain a writ of fi.fa. if the judgment-debtor has property; (2) that if the judgment-creditor has no knowledge of any property belonging to the judgment-debtor, he must take out a judgment-debtor summons; and (3) that the judgment-debtor cannot be imprisoned unless he fails to appear or has misconducted himself."¹⁸⁹

Another school of thought also believed that Chief Justice Bailey's proposition was bad at law. Hector Macleod J. in *Swanzy v. de Veer and Another* (1883), stated that the Chief Justice had

¹⁸⁷ The merchants' opposition was also strengthened because the bankruptcy law of 1858 had some provisions giving the debtor certain relief from imprisonment.

¹⁸⁸ No. 4 of 1876, Schedule II, Order XLV Section 5. Order XLV Section 5 is erroneously referred to as Order XIV in the Report of the Insolvency Commissioner, (1961); see page 11 note 28.

¹⁸⁹ *Swanzy v. Madden* (1882) cited in *Swanzy v. de Veer and Another* (1883). J. M. Sarbah, Fanti Customary Laws 236 (2nd ed, 1904). See also Report of the Commissioners Appointed to Enquire into the Insolvency Law of Ghana, 11 (1961).

quoted no authority to support his illegal formulation. He stated further that this position was contrary the Supreme Court Ordinance of 1876 which allowed imprisonment for debt.¹⁹⁰ He held the view that imprisonment was intended to make judgment debtors disclose their property because there were avenues for debtors to conceal their properties. He also found that provision had been made to prevent the power of imprisonment from being abused by the courts. In deciding the case before him, he issued a warrant for the arrest of the judgment debtors, who had failed to satisfy a judgment debt, four months after he had handed down the judgment.¹⁹¹

In another case, *Rhule v Roberts*, Hector Macleod J. again had to decide an application moved by plaintiff for a warrant to issue to arrest the defendant judgment debtor. He held refusing the application that, he would not issue a warrant for the arrest of a defendant for a claimed lump sum based on a questionable calculation.¹⁹² He also refused an application for an order of imprisonment of a debtor who had disclosed in open court that he had enough properties to cover the debt and was willing to send court appointed bailiffs to locate the properties he mentioned.¹⁹³

¹⁹⁰ Hector Macleod stated:

“But the law says differently. Section 5, Order xlv., Schedule ii, Supreme Court Ordinance, 1876, says that a decree for money shall be enforced by the imprisonment of the party against whom the decree is made, etc.; while sect. 7 and following sections of Order xlvii., Schedule ii., Supreme Court Ordinance, 1876, provide in terms an additional imprisonment and punishment for. Those judgment-debtors who fail to appear or misconduct themselves in the terms of those sections, and expressly so as to state, that the imprisonment and punishment therein set forth are to be additional in the case of those who have already been imprisoned under sect. 5 of Order xlv.”

¹⁹¹ Judgment had been given in August of 1883. It remained unsatisfied until December 1883 when the plaintiff applied for a warrant to imprison the judgment debtors.

¹⁹² Fanti Law Report, 41(1904).

¹⁹³ See *Swanzy v Brew* (1883). See also J. M. Sarbah, Fanti Law Report, 261 (1904).

The tussle over imprisonment for debt continued until 1935 when the Chief Justice proposed an amendment to the Supreme Court Rules. This amendment got the approval of the Legislative Council. The Supreme Court Amendment Rules¹⁹⁴ abolished imprisonment for debts.

The Show Cause Procedure

Even though the Supreme Court Amendment Rules of 1935 abolished imprisonment for debt, the rules allowed the judges to order judgment debtors to “show cause” why they should not be imprisoned for failure to satisfy a judgment debt. Although this procedure was introduced to replace *capias ad satisfaciendum* (*Ca. Sa*) under the 1876 Supreme Court Rules, in practice it was seen and used as a continuation of old rules.¹⁹⁵ The procedure was intended to be used in fitting cases where the debtor was fraudulent or had means to pay but refused to pay and grossly misconducted himself.

The controversy over the Show Cause procedure, was revived in 1954 with the coming into force of the Supreme Court (Civil Procedure) Rules, 1954, L.N. 140 A. Order 42 Rule 3 of the Rule provided that a judgment for the payment of money may be enforced by the attachment and sale of the property of the party against whom judgment was given or subject to Order 69 of the Rules, by his imprisonment or both. Order 69 (1) provided that where an application is made for the arrest of the debtor, the Court shall summon him to show cause why he should not be committed to prison. When he appeared before the court, the judgment creditor had to adduce evidence that the debtor had misconducted himself. This requirement effectively reintroduced imprisonment for debt by reinforcing the Show Cause procedure, introduced in the 1935 amendment to the Supreme Court rules. The practice was, however, different from what had ensued under the 1935 rules.

¹⁹⁴ No. 30 of 1934.

¹⁹⁵ Report of the Commissioners Appointed to Enquire into the Insolvency Law of Ghana, 31 para 182 (1961).

Under this dispensation, the courts were not compelled to send the debtor to jail only because he had misconducted themselves. The court could, however, imprison the debtor where he had been guilty of misconduct and had neglected to pay the judgment debt.¹⁹⁶

The procedure was sometimes used in very oppressive manner. Commenting on the application of the Show Cause procedure, Atuguba J.S.C. (A Justice of the Supreme Court of Ghana) stated that the procedure was used to reap evil and was a threat to individual liberties. He stated that: “It can be seen that the summons to show cause procedure was a perilous one which endangered personal liberty even though in reality the contemnor just could not pay up the judgment debt.”¹⁹⁷ He went on to state that in reality, some people went to jail for mere assessment of evidence led in court, which later turns out that such people in truth had no means to pay. A classic case is that of

¹⁹⁶ E.D Kom sums the procedure up in his Civil Procedure in Ghana, at page 99 as follows: “Summons to show cause, Order 69

A judgment creditor can apply in writing to the registrar of the court where he obtained judgment, to issue summons against the judgment debtor, calling upon him to appear before the court on a day specified in the summons, and show cause why he should not be committed into prison for refusing or neglecting to pay the judgment debt.

If after service of the summons on him he fails to appear before the court bench warrant will be issued for his arrest. If he appears in obedience to the summons or is arrested and brought to court, the judgment creditor has to prove one of the following before the order can be made.

- (a) that the judgment debtor has means to pay but has refused or neglected to pay the same;
- (b) that with intent to defraud or delay his creditors he has made a gift, delivery or transfer of his property or removed it from the jurisdiction of the court where the judgment was obtained;
- (c) that the debt or liability in respect of which the judgment was obtained was contracted, or incurred by him by fraud or breach of trust;
- (d) that forbearance of the debt was obtained by him by fraud;
- (e) that the debt or liability was willfully or recklessly contracted, or incurred by him without his having at the same time a reasonable expectation of being able to pay or discharge it.

If the judgment creditor proves his case to the satisfaction of the court the judgment debtor will be committed into prison.”

¹⁹⁷ See *Republic v High Court (Commercial Div.) Accra Ex Parte Nii Armah Oblie & Others*, Civil Motion No. J5/5/2012.

Asumadu-Sakyi II v Owusu.¹⁹⁸ In that case, judgment for over one million cedis was entered against the applicant by the High Court, Kumasi, and he was further ordered to pay the judgment debt into court within ten days. As a result of the applicant's failure to pay the amount, the respondents applied to the court to have him committed for contempt of court. Consequently, the High Court ordered the applicant to pay the sum of just over ₵766,000 on or before a specified date. He was unable to do so and thus was committed to prison for contempt of court for an indefinite period. On an application for his release after 16 months in jail, the Court of Appeal held:

“Contempt of court was a criminal offence, the punishment of which must be commensurate with the offence. And ordinarily, a person against whom judgment was given for money payment and who defaulted in meeting the judgment debt would not be committed to prison for contempt. The judgment creditor would be left with the legal remedies available to an execution creditor for enforcement of his judgment. In the instant case, the applicant was adjudged guilty of contempt because he was thought to have wilfully disobeyed the court's order to pay the judgment debt. If it was shown that the applicant could not by the date of the court's order had been in possession of the money, there could be no case of wilful disobedience which merited an attachment for contempt. Mere inability to pay could not ground a penal proceeding for contempt.”

In this case, it was evident that the appellant was genuinely unable to pay the judgment debt, but he had to spend a considerable amount of time in prison because of the show cause procedure.¹⁹⁹

¹⁹⁸ [1981] GLR 201-207.

¹⁹⁹ At other times courts were prepared to accept any proposal that the debtor came up with in an attempt to pay the judgment debt. See Report of the Commissioners Appointed to Enquire into the Insolvency Law of Ghana, 31 para 181-183 (1961).

The Show Cause procedure was fairly used until the year 2004 when the High Court (Civil Procedure) Rules C.I 47 2004 was enacted. The procedure was omitted from the new rules. Though it was widely believed that the procedure had been omitted, the drafting of the rule was not clear enough. Order 43, Rule 1(1) provided as follows:

“Subject to these Rules, a judgment or order for the payment of money, not being a judgment or order for the payment of money into court, may be enforced by one or more of the following means: (a) writ of *fiery facias*; (b) garnishee proceedings; (c) a charging order; (d) the appointment of a receiver; (e) in a case in which rule 5 applies, an order of committal or a writ of sequestration.”

Rule 5(1) (a), (b) and (cc) provided that:

“5(1) Where (a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or within extended or reduced under Order 80 rule 4; or (b) a person disobeys a judgment or order requiring the person to abstain from doing an act; the judgment or order may subject to these Rules be enforced by one or more of the following means... (cc) an order of committal against that person or, where that person is a body corporate, against any director or other officer.”

Paragraph (e) provided for committal of a person or a director of a company in accordance with the procedure listed in Rule 5(1) (a), (b) and (cc). Some concerns arose over whether imprisonment for debts had indeed been re-introduced or abolished since a specific provision in the same order said something quite contrary. Rule 12(1) of the same Order 43 provided as follows: “Rule 1(1) of this Order with the omission of paragraph (e) and Orders 27, 44 to 47 and 49 shall apply to a

judgment or order for the payment of money.”²⁰⁰ The effect of this Rule was that a writ of *feri facias*, garnishee proceedings, a charging order and the appointment of a receiver were to be used for enforcing payment of judgment or order for the payment of money but not an order of committal.

The controversy over this matter was brought up when Unique Trust Company Limited a company incorporated under the laws of Ghana and offering financial and other services sought to imprison a director of a company who had failed to satisfy a judgment debt and a subsequent order of the court to pay the judgment debt by a specified date. Thus in *Republic v High Court (Fast Track Division) Accra; Ex Parte PPE Ltd & Paul Juric (Unique Trust Financial Services Ltd Interested Party)*,²⁰¹ the plaintiff judgment creditor had moved the High Court for an order of committal against the defendant director of PPE Ltd for failure to satisfy judgment debt and subsequent order of the court to pay the judgment by a specified date. During the hearing of the application the defendant’s lawyer raised a preliminary objection to the procedure adopted by the plaintiff but the presiding judge overruled it. Dissatisfied with this, the defendant filed an application in this case before the Supreme Court invoking its supervisory jurisdiction to bring before it the ruling of the High Court Judge and quash it and further issue an order prohibiting him from the proceedings before him. The court granted the application stating that the issue before the court was one of civil liberty and the court was called upon to answer whether imprisonment should be an option available for failure to pay a debt. The court speaking through Date-Bah J.S.C stated that although Article 14 (1) (b) of the 1992 Constitution permits imprisonment of a person punishing him for contempt of court, he would be deeply troubled if this power were extended to the payment of

²⁰⁰ Paragraph (e) in essence provided that an order for committal or writ of sequestration shall be used in a case where a judgment or order requires a person to do something or refrain from doing something.

²⁰¹ [2007-2008] SCGLR 188.

debt. He stated that the procedure under Order 43 of the High Court (Civil Procedure) Rules C.I 47, contained an internal contradiction which could easily be resolved by a resort to the *generalibus specialia derogant* rule of interpretation.²⁰² He, therefore, held that:

“The provision in Order 43, r 12(1) means that the option of committal for non-payment of “a judgment or order for the payment of money” has been removed from the jurisdiction of the High Court. The special provision in Order 43, r 12(1) needs to be interpreted to override the general provision in Order 43, r 5(1).”

In his opening statement, Justice Atuguba JSC, also stated:

“I entirely concur in the opinion of my learned brother Date-Bah JSC. It is not surprising that the Rules of Court Committee repented, by the provision in Order 43, r 12(1) of C.I 47, of punishment by way of imprisonment of a debtor as a means of enforcing a judgment for the recovery of money. The courts themselves have shown that the power to punish for contempt is so wide that it ought to be kept within limits.”²⁰³

It, therefore, follows that the power to imprison as a mode for the payment of debt has finally been removed from the jurisdiction of the High Court.

The Supreme Court, differently constituted, however, held that the precedent laid in Unique Trust case, couldn't be extended to almost every order of the court that involved payment of money. In *Republic v High Court (Commercial Div.) Accra Ex Parte Nii Armah Oblie & Others*,²⁰⁴ the

²⁰² He quoted F. Bennion, *Statutory Interpretation* (3rd ed) 903 to explain the maxim as follows: ‘*Generalibus specialia derogant*. Where the literal meaning of a general enactment cover a situation for which a specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision...’

²⁰³ [2007-2008] SCGLR 188.

²⁰⁴ Civil Motion No. J5/5/2012.

plaintiff's in a suit before the High Court sought a declaratory and other reliefs inter alia that they held shares in the 2nd defendant company. They moved the court for an order appointing a manager and receiver and for a further order restraining the 1st defendant from managing the affairs of the 2nd defendant company. The High Court found that the 1st defendant Nii Armah Oblie kept the monies of the 1st defendant company in his personal bank account. He was ordered to pay all monies that have accrued to the company into the company's bank account within seven days. He refused to comply with the order and for that reason was committed to prison for 60 days. He sought certiorari to quash the decision of the High Court on the strength of the *Republic v High Court (Fast Track Division), Accra, Ex parte PPE Ltd & Paul Juric (Unique Trust Financial Services Limited Interested Party)* discussed above. The issue before the court was therefore whether the order of the trial court for the return of the money from the applicant's personal account to the company's account is an order for the payment of money and therefore not enforceable by committal, by reason of O.43 r.12(1) of the High Court (Civil Procedure) Rules, 2004, C.1.47 and the case discussed above. The Supreme Court dismissed the application and speaking through Atuguba J.S.C held:

“though the order of the trial court involves the payment of money it is a payment of money only in the strict and technical sense but not the kind of judgment or order for the payment of money within the contemplated scope of exemption from committal relief under O.43 r.12 (1).”²⁰⁵

Currently, judgment creditors have viable options. They may apply for a writ of *feri facias*, a garnishee order, a charging order, appoint a receiver or apply for a writ of sequestration as a means

²⁰⁵ Civil Motion No. J5/5/2012 at 8.

of enforcing judgment or order for payment of money.²⁰⁶ These remedies are available in addition to any other remedy available to enforce the judgment or order relating to bankruptcy, insolvency or the winding up of companies.²⁰⁷

It is correct to state here that the practice of imprisonment for debt, as a means of debt recovery, could not be abolished earlier in the Gold Coast as happened in England due to the attitude of the colonial merchants. This attitude was equally extended to the development of insolvency laws in the colony. The colonial merchants dictated the tenor of insolvency law. The adaptation of modern principles of insolvency law as existed in England was therefore hampered by the British merchants who felt the application of some of the laws in the colony was inimical their economic interest. For this reason, punitive measures such as imprisonment, which had been abolished in England, could not be applied to the Gold Coast.

First Insolvency Legislation (Colonial Period)

The first insolvency law was enacted in 1856. This was the Gold Coast Bankrupt and Insolvency Ordinance. This legislation was replaced the following year with the Gold Coast Bankrupt and Insolvency Ordinance of 1857. This piece of legislation was however disallowed by the Privy Council in England, on the grounds that the law was made with the advice of the Legislative Council but not with its consent. On August 18, 1858, a new law was passed, this time with the advice and consent of the Legislative Council and signed by the Governor the following day. This

²⁰⁶ See High Court (Civil Procedure) Rules, 2004, C.1.47 O.43. R1.

²⁰⁷ *Id* O.43. R1 (5). For further exposition see Justice S.A. Brobbey, Enforcement Of Judgments And Orders, Judicial Training Institute (March, 2008) available at <http://www.jtighana.org/new/links/papers/EXECUTIONS%20-%20MARCH%202008%20-Justice%20Brobbey.pdf> accessed on (12/15/2015).

law was the Gold Coast Bankrupt and Insolvency Ordinance of 1858.²⁰⁸ This law, retrospectively validated all proceedings taken under the 1857 law and repealed the 1856 and 1857 Ordinances.²⁰⁹

The 1858 Ordinance gave jurisdiction to any Court of Justice in the settlements to adjudicate over bankrupts and insolvents. Debtors could petition for their bankruptcy. They could also be forced into bankruptcy by a creditor's petition. The threshold amount was £25-50. Once an individual was unable to pay that amount, a petition could be brought before the court to declare him bankrupt. After a petition is filed, the court was required to take steps to secure the person and his property from absconding or dissipation as the case may be. In some cases, the Court may issue an order requiring the debtor to give security that he will not leave the Gold Coast colony.²¹⁰

After the initial orders to secure the debtor's estate, the Court caused a list of creditors to be prepared. All monies due them are duly filed with the Court. Once this is done, the Court caused a notice to be served on creditors requiring them to attend a meeting of creditors. During such meetings, the creditors appoint two assignees, who take charge of the properties of the insolvent. The assignees principally were trustees. All properties of the bankrupt, current and accruing were vested in the assignees. The bankrupt was however allowed his apparel and that of his family, his furniture and tools of trade not exceeding £20. After appointing the assignees and vesting in them the debtor's assets, the debtor could call for the protection of the court from arrest for any debt contracted before he was declared insolvent and if he was already imprisoned, pray the court that

²⁰⁸ No. 8 of 1858.

²⁰⁹ See Section 1 of No. 8 of 1858. The Memorandum to the Insolvency Act, 2006 (Act 708) notes that: "Insolvency legislation made its impact in the Gold Coast in 1856, 1857 and 1858. None of those pieces of legislation was brought into force. For some reason, the Bankruptcy Ordinance 1856 was repealed in 1893." This assertion is inaccurate. The 1856 was replaced in 1857. The 1857 law was disallowed by the Privy Council. The 1858 law repealed the two legislations and operated until it was repealed in 1893.

²¹⁰ See Section 7 of No. 8 of 1858.

he should be released on account of those debts.²¹¹ The court had the absolute discretion to refuse such provisional orders, where it found that, the debtor was guilty of the fraudulent or dishonest transaction in respect of his debts.²¹² The assignees could be compared to modern day receivers or liquidators. Their business was to speedily realize the assets of the debtor into money or other available medium and distribute the proceeds to creditors in proportion to their unsatisfied claim against the debtor. The assignees were paid out of the proceeds up to seven per cent. Anyone who was aggrieved by their action could apply to the court to seek redress and the court had authority to issue orders it deemed just to resolve such complaint.²¹³

The law gave the Court power to enhance the estate of the bankrupt. This power was necessary to prevent dissipation of his assets to the detriment of creditors. Thus, where any gift or disposal of the debtor's property was made without adequate consideration, within six calendar months preceding the debtor's insolvency, the Court could declare the transaction as fraudulent and order that it be restored or payment made in full for the benefit of creditors.²¹⁴

All debts were ranked according to their classes and paid in that order. The number one priority class, was salary and wages not exceeding six months' due clerks and servants.²¹⁵ Aside from this class, creditors having a specific lien on any part of the debtor's property or secured creditors were entitled to be paid in full and to claim rateably with others creditors for balance.²¹⁶ All other

²¹¹ See Section 20 of No. 8 of 1858.

²¹² The general laws at the time allowed creditors to imprison debtors for non-payment of debts. So long as insolvents were kept in prison, the creditor at whose instance the insolvent was imprisoned was liable to pay prison allowance to the prisoner.

²¹³ See Section 27 of No. 8 of 1858.

²¹⁴ *Id* Section 23.

²¹⁵ *Id* Section 26(1).

²¹⁶ *Id* Section 26(7).

creditors were at par except for creditors whose claim were inserted before distribution and creditors whose debts were found to have been incurred by the debtor without valuable consideration been given.²¹⁷ No claim was to be paid to any creditor, which was incurred or became payable six years before the debtor was declared insolvent. This constituted the early set of priority principles for the distribution of the insolvent's assets in the colony. The priority set resembled the early set of rules under the Bankruptcy Act of 1842 in England.

The 1858 law in sum allowed both debtor and creditor to petition any court for an order declaring a debtor insolvent. Once he was so declared, the creditors were called to a meeting and proceeded to elect assignees to represent their interest. The assignees acted as trustees and worked with a list of creditors. They compiled debts owed creditors on the list and realized the assets of the debtor to pay the creditors. The law allowed the court to rescind under arm's length transactions to maximize assets available for distribution to creditors.

Debtors were harshly treated if they indulged in fraudulent conduct. The law had some punitive measures it could visit on the debtor if such findings were made. Where the debtor had wagered his way into bankruptcy, he could be imprisoned with or without release during the entire bankruptcy process. Where debtors had been honest, there were able to take advantage of the relief from imprisonment and apply for protection against their creditors.

One criticism levelled against this piece of legislation by the Insolvency Commission set up in 1961 to investigate into insolvency law of Ghana was that “while the procedure to be followed in bankruptcy was prescribed in fairly considerable detail, (the 1858 Ordinance ran to 37 Sections), no attempt was made to set down the mode for obtaining judgment and execution for debts.”²¹⁸

²¹⁷ Section 26 of No. 8 of 1858.

²¹⁸ See Report of the Commissioners Appointed to Enquire into the Insolvency Law of Ghana, 8 para 46 (1961).

This criticism is quite curious because ordinarily, bankruptcy law does not consolidate all laws on debt collection. Individual collection procedures under general law are normally not the preserve of bankruptcy law. Under the 1858 law, once a debtor has been declared insolvent, the assignees in whom his properties were vested, proceeded to sell his assets to satisfy the debts owed to creditors. Realizing assets to satisfy debts owed to creditors is eventually what every other judgment and execution solely for repayment of debt are aimed at.²¹⁹ Furthermore, the procedure for enforcing a judgment for payment of money was dealt with under general law as has been discussed above. The criticism leveled against the bankruptcy law was quite odd.

Pre and Post-Independence Legislation

The Gold Coast Bankrupt and Insolvency Ordinance, 1858 was repealed in 1893.²²⁰ Though the Ordinance was repealed in 1893, none was immediately put in its place. Proposal to enact a bankruptcy law, that will distant itself from the imprisonment of debtors, did not get enough support from the merchants and for that reason was dropped. This happened as a result of opposition from traders and other commercial interest within and outside of the Gold Coast who taught that, with the abolishing of imprisonment for debt in England (and same was sought to be applied in the Gold Coast), the bankruptcy law will maintain punitive provisions against the debtor becoming an alternative for debt collection. The development of bankruptcy law was therefore left to fallow until 1952 when a draft bill, The Bankruptcy Ordinance of 1952 was introduced into the

²¹⁹ The end of the law was to realize the assets and pay creditors and where he has been fraudulent to punish him for his misconduct. A critical look at the law showed that several enforcement powers were given to the court. The court's powers started right from the inception of the process and continued to guide the appointment of assignees until distribution of monies to the creditor. See No. 8 of 1858, Section 1 to 37.

²²⁰ Statute Law Revision Ordinance 1893 (No 1 of 1893). Prior to that a number of obsolete laws were repealed in 1877 after the coming into force of the Supreme Court Ordinance of 1876.

National Assembly.²²¹ The Bill was intended to curb the unregulated scramble for assets of debtors, the survival of the fittest race that left some creditors with nothing to fall on. This Bill was largely viewed as debtor friendly and complicated. It essentially followed the provisions of the Bankruptcy Act of 1914 in England. With the usual opposition from merchants and not garnering enough support among lawmakers, the bill was finally dropped.²²²

Exponential growth in commerce in the newly formed country, Ghana, immediately after independence in 1957, forced the government to appoint a Commission to investigate into insolvency law in Ghana and recommend reforms. The Insolvency Commission was therefore appointed on January 20, 1960, under the Commission of Enquiry Ordinance (CAP. 249) and charged with the following task:

- “(a) To consider and make recommendation regarding the better protection by law of creditors and debtors in case of insolvency; and
- (b) To consider what legislation is desirable for the purposes of the administration of the assets of insolvent persons, estates, firms and companies and related matters, and to make detailed recommendations thereon.”

The Commission started its work by holding series of meetings and holding an evidentiary hearing with individuals and organizations.²²³ It collected evidence from principal commercial areas across

²²¹ Report of the Commissioners Appointed to Enquire into the Insolvency Law of Ghana, 15 (1961).

²²² The Bankruptcy Bill followed largely the provisions of the Bankruptcy Act of 1914 in England. It was primary aimed at curbing scramble for the debtor’s assets in case of bankruptcy. The unregulated scramble meant that some creditors who were early in time got their monies back whilst others were left with nothing. The Bill was criticized from all sides. See Report of the Commissioners Appointed to Enquire into the Insolvency Law of Ghana, 15 para 79-80 (1961).

²²³ The Commissioners were appointed by the Governor-General of the Gold Coast and were Mr. Albert Adomakoh Esq. (Chairman), J.A Addison Esq. (Deputy Chairman) and B.E.P MacTavish Esq. (Member). The Secretary to the Commission was J.K Abbensetts Esq. The Commission visited the Regional Capitals and held series of meetings.

the country. It did not, however, rely on formal means such as subpoena and examination of witnesses under oath to collect evidence. The Commission felt that relaxing its approach would encourage people to speak their mind freely and honestly without fear of perjury or other consequence.²²⁴

At the conclusion of their work, the Commission found that the overwhelming evidence it had received, leaves them in no doubt that bankruptcy legislation was badly needed. It also expressed its surprise by the unanimity with which witnesses stated that the law of debtor and creditor was heavily skewed in favour of the debtor.²²⁵ The Commission finally stated that it was realized that, the lack of modern insolvency legislation and effective machinery for settlement of debt was proving an increasingly serious handicap to the economic development of the country.²²⁶ The Commission's case for reform was based on a number of grounds. First, inadequate attention was paid to the importance of credit mechanism in the country. The Commission noted that credit was the lifeblood of the Ghanaian economy which flowed through every sector, the lack of adequate

They sat in Accra and visited Tarkwa, Kumasi, Tamale, Sunyani, Takoradi, Cape Coast and Ho. One notable thing about the Commission's work is that it did not conduct statistical survey of the credit mechanism in the country. It felt that such survey was not important to achieving the aims of the Commission. It cited that fact that it had limited resources to conduct statistical survey of such magnitude. It is curious to understand how statistics on the operation of the credit mechanism could not help the Commission come to the right conclusion given the fact that the bankruptcy law has been one with a very checkered history.

²²⁴ Report of the Commissioners Appointed to Enquire into the Insolvency Law of Ghana, 3 para 14 (1961).

²²⁵ *Id* at 3. The Commission did not give enough indication about which law, in particular, that respondents talked about. Ordinarily, the 1858 Ordinance had been repealed. The 1952 Bill was also defeated. There existed a vacuum and the possible resolution would have been 'grab law' or the survival of the fittest race. The Supreme Court Ordinance of 1876, was not entirely debtor friendly, especially when it allowed imprisonment for debt and the Supreme Court (Civil Procedure) Rules, 1954, L.N. 140 A, Order 69(1), created the Show Cause procedure that permitted debtor imprisonment for non-payment of money judgments.

²²⁶ Report of the Commissioners Appointed to Enquire into the Insolvency Law of Ghana, 3 (1961).

legal machinery to protect the interest of both creditors and debtors had raised serious concerns hampering credit badly needed for development.

Second, it noted that interlocking nature of credit mechanism made any shortcoming in the law doubly damaging. Credit was seldom a one-way affair and the effect of credit giving was cumulative. Credit advanced to one person or organization enables them, in turn, to extend credit to others. Conversely, any failure to recover a debt reduces the amount of credit that can be extended. This also reduces the ability of the creditor to pay any debts that he owed.

Third, it found that there was difficulty in granting credit due to the risk attached to it. The difficulties arose from the lack of suitable security and the concept of family property which made it harder to distinguish between self-acquired property which was good for security and family owned property which could not secure individual loans.

The Commission found that though the wealth of the country had increased it had not reflected in the pockets of the ordinary consumer and businessman making it difficult to find pledgeable assets. This was also compounded by the customary law position on the family property making it tricky to accept some properties as security. Further, a lack of comprehensive land registration made it difficult for the lender to know whether the property being used as security was not encumbered in any way.

Lastly, and most importantly the Commission received overwhelming evidence to come to a conclusion that, “Ghanaian were dilatory about paying their debts, and that a not inconsiderable minority default altogether in whole or in part.”²²⁷ This attitude caused high cost of recovery seriously hampering the progress of the country and needed to be addressed. The absence of

²²⁷ *Id* at 20 para. 111.

effective remedies against defaulting debtors also made credit giving risky.²²⁸ The main concern against the existing machinery was that it was slow, costly and frequently abortive.

The cumulative effect of these findings led to Commission to propose draft legislation based on broad general principles necessary for the legislation to achieve its aims. These were as follows:

(a) Promotion of commercial morality. This required people whose financial conduct had been questionable in the past to exercise more caution or unpleasant consequences are visited on them under the law.

(b) Fairness to both creditors and debtors. Just as the evidence revealed that the law was heavily skewed in favour of the debtor, the commission was careful to come out with a law that was overly weighted in favour of creditors.

(c) Different treatment for different types of debtor. Debtors are divided into bankrupts and non-bankrupts with additional duties and responsibilities attaching to bankrupts. Bankrupts were to be subjected to public examination and their discharge date, fixed at the end of a public examination having regard to past conduct.

(d) Minimization of losses by creditors. The estate of the debtor was to be enhanced. This means preventing disposal of his estate, investigating cases of disappearance and recovering assets.

(e) Close links with existing law. Since bankruptcy law impinges on other areas of the law, the law has been made to link with existing law especially avoiding pitfall with the customary law on family property.

(f) Competent and Impartial Administration. Given the background of bankruptcy law, an impartial administrator is needed to command the confidence of both creditors and debtors.²²⁹

²²⁸ This arises because the existing machinery for enforcement of debt was seen as ineffective and there also existed no legislation providing for the administration of insolvent persons, estates and firms.

²²⁹ See Report of the Commissioners Appointed to Enquire into the Insolvency Law of Ghana, (1961).

These principles and ideas, formed the architecture of the new legislation, the Draft Insolvency Bill of 1961. The draft law had seven parts and contained 77 sections. Part 1 created the office of the Official Trustee and vested in him certain powers to administer the Act. Part 2 dealt with commencement of insolvency proceedings by creditors and debtors, protection orders which stops all civil proceedings against debtors in favour of bankruptcy laws, judicial consideration which gave the judge power to confirm arrangements and other matters, general duties and liabilities of the debtor, discharge and termination of proceedings. Part 3 dealt with administration of the debtor's property by passing assets to the official trustee to make certain decision to enhance the estate of the debtor. Part 4 dealt with an arrangement with creditors outside of insolvency proceedings such arrangements were to be registered or void. Part 5 dealt with modification of the law in special cases of minors, partners, debtors who were trustees and participation insolvency proceeding by subsequent creditors. Part 6 dealt with the administration of the estate of deceased insolvents. Chapter 7 dealt with supplemental issues by providing for offenses and power of the Minister to make certain rules to enforce the law.

The Insolvency Bill was passed by the National Assembly and became the Insolvency Act, 1962 (Act 153). The new Act had 78 sections. Section 78 (1) provided that: "This Act shall come into operation on such date as the Minister of Justice may, by legislative instrument, appoint, and different dates may be appointed for different provisions." The law was assented to and gazetted in accordance with law, but the requirement in section 78 was not met. It is not clear whether this was caused by conscious design or by omission. The Insolvency Act was therefore left in limbo and never had the force of law.²³⁰ The Act was finally repealed in 2006 by the Insolvency Act,

²³⁰ Professor Kuruk in his article, A Survey of Bankruptcy Law in Ghana briefly outlines customary law and statutory schemes of bankruptcy law in Ghana. He discusses the provisions of Insolvency Act, 1962 (Act 153) and conclude by saying that debtors who are overburdened with debts would find solace under the statutory scheme presented by the

(Act 708) 2006.²³¹ The Insolvency Act of 2006 was almost a reproduction of the 1962 law with similar arrangement and provisions and sometimes changes in language construction. This is the current insolvency law dealing with individual insolvency in Ghana.

The history as has been traced so far show how personal bankruptcy was handled under the pre-colonial, colonial and post-colonial rule in Ghana. This is distinct from corporate bankruptcy law during the same period.

Corporate Insolvency (Colonial Period)

Personal insolvency laws have historically overshadowed the development of corporate insolvency law in the country. This is so because there was no equivalent of the corporation under customary law. Company law was generally unknown to customary law. The corporation had developed from the Joint Stock system run under English law and nothing of its sort is reported under customary law. The application of principles of corporate law as existed in England was therefore left until a

Insolvency Act, 1962. This is quite curious especially when he fails to trace its history and also point out the important fact that the requirement in Section 78 which was to commence the Act was not met for which reason the law did not see the light of day. See 17 N.Y.L. Sch. J. Int'l & Comp. L. 487 (1997) Survey of Bankruptcy Law in Ghana, A, Kuruk, Paul. On the other hand Chris Adomako-Kwakye, in his article Developing A Uniform Commercial Law Policy in Ghana rightly alludes to the fact that the law technically existed on paper and was dormant until repealed after over forty years in 2006 because section 78(1) was never complied with. See Chris Adomako-Kwakye, 'Developing A Uniform Commercial Law Policy in Ghana' KNUST Law Journal Vol. 4 (2007/2008) 54.

²³¹ See section 78 of Act 708. Prior to enacting this law, the Ghana Law Reform Commission made a review of insolvency and bankruptcy law in Ghana. They interviewed lawyers, industrialist, academics and litigants eliciting suggestions on the provisions of the Insolvency Act, 1962. The question that exercised the mind of the Commission was whether it was sufficient to bring into force the 1962 Act since it was enacted after a full enquiry. They recommended bringing the law up to date and putting it into operation instead of enacting a completely new one. They recommended further that if constitutional questions are raised about such an action since the law has stood dormant for years witnessing the coming into force of the 1992 Constitution, the better approach will be to revise the law, re-enact it and immediately bring it into operation. See 27 Commw. L. Bull. 245, (2001) *Bankruptcy and Insolvency*, Volume 27, No. 1, (2001). Some more work was done bringing into force the Insolvency Act (Act 708) 2006.

large number of trading concerns started to operate in the colony. A considerable increase in trade during the early part of the 20th century saw the coming into force of the Companies Ordinance of 1906.²³² The Companies Ordinance provided for the incorporation, regulation and winding up of trading companies and other associations. It provided that no company, association or partnership consisting of more than twenty persons shall be formed within the colony to carry on business for gain unless it is registered as a company under the Ordinance or formed under some Act of Parliament, Ordinance, or Letters Patent or Royal Charter.²³³ The law provided for registration of memorandum of association, articles of association and the effect of such registration. It also provided liability for directors and promoters in running the affairs of the company. It also made provisions for the protection of creditors and members of the company by requiring directors to keep proper accounts and handing down penalties for contravention of the rules. The relevant part, which is Part VI, dealt with winding up of companies. This was essentially the first set of rules governing corporate insolvency in the country.

Under the Ordinance, winding up could be either voluntary or involuntary. It was voluntary if the company passed a special resolution, specifying that the company should be wound up. Where a specific duration was fixed by the company's Articles of Association that upon the expiry of specified time the company should be wound up, the members could voluntarily pass a special resolution to that effect.²³⁴ When the company passed such a resolution, it ceased to have the legal capacity to carry out its business.²³⁵ The company was required to appoint a liquidator to take over the affairs of the company. It could also delegate the power to appoint a liquidator to its creditors.

²³² No. 14 of 1906 was passed on 11th December 1906 and came into force on 1st July 1907.

²³³ *Id* at Section 4.

²³⁴ *Id* at Section 118.

²³⁵ *Id* at Section 120.

After the appointment of a liquidator, the liquidator assumed all the powers of the directors of the company. He was required to settle a list of contributories of the companies.²³⁶ A contributory was every person liable to contribute to the assets of a company in the event of the same being wound up.²³⁷

The primary duty of the liquidator was to wind up the company and pay its creditors. Where it was evident that a voluntary winding up will prejudice the rights of any creditor, the creditor had the option to petition the court and request that the company should be wound up by the court.²³⁸ When the court decides to take over, the voluntary winding up initiated by the company converted to an involuntary winding up and was to be conducted by the relevant provisions dealing with involuntary winding up under the Companies Ordinance of 1906.

Involuntary winding up or winding up by the court occurred in specified cases.²³⁹ It occurred where the company was unable to pay its debt.²⁴⁰ For debts, a company was unable to pay its debts where it was indebted in the sum exceeding £50 and has been unable to satisfy the debt after been served with a months' notice. The company was also unable to pay its debts where a judgment was returned unsatisfied either in full or in parts. The company was also deemed unable to pay its debts

²³⁶ The law provided that the liability of any person to contribute to the asset of the company in case of winding up shall be deemed to create a debt payable upon a call being made by the liquidator. See No. 14 of 1906 section 81.

²³⁷ No. 14 of 1906 Section 3.

²³⁸ *Id* at Section 133.

²³⁹ Others were instances where the company passed a special resolution requiring the company to be wound up by the court; where the company failed to commence business within a year after its incorporation; where the number of members reduced to seven; and finally where the court was of opinion that it was just and equitable to wind up the company.

²⁴⁰ No. 14 of 1906 Section 83.

where a party proved successfully to the satisfaction of the court that the company was unable to pay its debts.²⁴¹

Where any of the conditions outline above existed, a petition for winding up was presented before the court by a creditor, a shareholder or a contributory.²⁴² Official winding up commenced upon presentation of the petition. This triggered some processes under the law. No action could be commenced against the company except with leave of the court.²⁴³ The court had the power to order any suit or action against the company to cease pending winding up of the company.

The court was vested with ordinary and extraordinary powers for the efficient administration of the affairs of the company. Among its ordinary powers, was the power to determine whom a contributory was. In *Conte v Kpeglo*, the facts of which were that, the liquidator appointed by the court for winding up J. Conte Ltd. called upon the High Court to settle the list of contributories as provided by section 103 of the Companies Ordinance. The liquidator had been unable to settle a list because the only admissible evidence as to the contributories was the minute's book of the company, all other relevant documents i.e. the register of members and annual returns having been lost or cancelled in previous proceedings. The first respondent to the suit claimed that the majority of the shareholders and directors of J. Conte Ltd. had voted him 10,000 shares valued at £G1 each, free of charge for services he had rendered to the company. Basing its decision on the oral evidence of the first respondent and a letter he had received from the appellant, the High Court declared that the first respondent had been allotted these 10,000 shares, thus giving him 10,001 shares in the final disposition of the contributories of the company. Aggrieved by this decision, the Appellant, a member of the company and whose shareholding the first respondent will have surpassed by the

²⁴¹ *Id* at Section 84.

²⁴² *Id* at Section 85.

²⁴³ *Id* at Section 87-89.

decision of the High Court, appealed to the Supreme Court. The Court set aside the 10,000 shares granted the respondent by the High Court. It held that after the shares had been allotted to him, he was required by law to accept them and the company was also required to enter his name into the register of members. These steps not having been taken, he could derive no benefit. The court, therefore, ordered that the list of contributories should be as contained in the minute's book reporting the minutes of a meeting of the directors.²⁴⁴

In administering the winding up of the company, the court had the power to compel creditors to prove their debts against the company. It also had the power to call for a meeting of creditors to deliberate on issues. The Court had the power to adjust rights and responsibilities of contributories and determine how cost, charges and expenses are satisfied in cases where the assets of the company are insufficient.²⁴⁵ The court could call on contributories to pay, deliver, convey, surrender or transfer to the court or the official liquidator any sums or balance or estate that the company was prima facie entitled.²⁴⁶ Thus in *Tom Barrett v African Products Limited*, a shareholder who had been paid £10,010 by the company as a result of fraudulent misrepresentation was on winding up, declared a debtor to the company and ordered to pay back the said amount less the amount of counterclaim he successfully proved.²⁴⁷ The above constituted the ordinary powers of the Court under the Ordinance.

²⁴⁴ *Conte v Kpeglo and Another* [1964] GLR 311-317.

²⁴⁵ Section 106-109 of Companies Ordinance 1906.

²⁴⁶ *Id* at Section 99.

²⁴⁷ *Tom Boevey Barrett v African Products Limited (Gold Coast Colony)* [1928] UKPC 48. In this case, the Appellant had been convicted and sentenced to 3 years' imprisonment for the offence. In a consolidated appeal to the Privy Council, the appellant argued among others that his evidence in answer was not heard due to disability arising as a result of his incarceration and ill health preventing him from presenting his defense. The Privy Council dismissed his appeal.

The extraordinary powers of the court were more aggressive than the ordinary powers. It included the power of the court to arrest and imprison contributories. Where it was apparent to the court that a contributory was about to conceal property or evade payment of calls, avoid examination of the affairs of the company, or fail to produce any document being required to do so, the court went ahead to issue an arrest warrant for the person to be apprehended and safely kept until such times the court determined that he should be brought before the court.²⁴⁸ The extraordinary powers were in addition to any other powers it had over contributories and any debtors of the company.

The Court appointed an official liquidator(s) to oversee the winding up of the company. The Liquidators were vested with authority to bring and defend any action against the company, to sell the moveable and immoveable property of the company and most importantly to carry out the business of the company as far as necessary for the beneficial winding up.²⁴⁹

The priority class for settling debts, were rates and taxes owed by the company, all wages and salaries of clerks during four months before winding up and all wages of labourers or workman not exceeding £25.²⁵⁰ The debt owed this class ranked equally between themselves and were to be paid in full unless there were insufficient assets to satisfy them. Any other person was paid after this class had been satisfied. This rules constituted the early set of priority rules in the country.

To enhance the assets of the company for payout to creditors all attachment, sequestration, distress or whatever made against the assets of the company after winding up was automatically void. The same was the fate of all conveyance or transfer made to trustees for the benefit of some creditors. After winding up, the name of the company was struck out of the companies' register.

²⁴⁸ Section 112-114 of Companies Ordinance 1906.

²⁴⁹ *Id* at Section 93-95.

²⁵⁰ *Id* at Section 136. Holders of debentures under floating charge were subordinated to this class.

The rules discussed above constituted the early corporate insolvency laws in the Gold Coast. The law was akin to the winding up provisions of the Companies Act 1862 in England. The main differences were that the Official Liquidator was a government official in England while his position was not that of a government official in the Gold Coast.²⁵¹ The Companies Ordinance of 1906 was passed alongside The Foreign Companies' Preferential Creditors Ordinance 1906. The legislation applied to companies or corporations which were incorporated outside of the Gold Coast but set up a presence in the territory for purposes of trading and were undergoing winding up.²⁵² The target was the mining corporation coming into the Gold Coast in droves.

The law created preferential debts in cases where the company was being wound up. Such companies were liable to be wound up where an execution on a judgment for a preferential creditor was returned unsatisfied or where such a foreign company had defaulted in payment of a preferential debt for two months.²⁵³ Where these conditions were established, an official receiver was appointed to take charge of the moveable and immoveable assets of the foreign company. The official receiver was empowered to sell the assets and pay out creditors by the provisions of the law. The preferential debts created under the law were all rates and taxes due from the foreign company, all wages and salaries of any clerk or servant in respect of any services during four months before making an order under the law not exceeding £50 and finally all wages of any

²⁵¹ The Winding up provisions under the Ordinance, save for a few modifications, were substantially the same as the Companies Act of 1862 in England. The Ordinance made it possible for solvent and insolvent companies to be wound up upon the happening of certain events. The Ordinance was hastily adopted in Ghana due to influx of foreign traders. At the time of its adoption the English Act was undergoing serious review because it was seen as an obsolete legislation. See Final Report of the Commission of Enquiry into the Working and Administration of the present Company Law of Ghana, 2 (1961).

²⁵² No. 18 of 1906 Section 2.

²⁵³ *Id* Section 4.

labourers or workman not exceeding £25. This class was to rank equally and to be settled in full before any other class could be paid. They enjoyed priority over debenture created over any floating charge of the foreign company's assets. The priority class listed here was the same as that listed under the Companies Ordinance 1906. The Official Receiver had powers akin to the Liquidator and was charged with selling the assets to pay off the preferential creditors. This was an essentially simple set of winding up rules for foreign companies operating in the Gold Coast. It, however, did not have some of the aggressive powers granted the court under the Companies Ordinance.

These two pieces of legislations discussed above set up a scheme for winding up of companies registered in or outside of the Gold Coast. One notable thing about these two legislations was that it did not raise or attract strong opposition from the business community, unlike the personal bankruptcy laws. This is primarily attributable to the fact that it dealt with juristic persons or corporations, which were a recent invention in the Gold Coast.²⁵⁴ A decade after its enactment only a handful of corporations had been incorporated under the Ordinance. The Privy Council speaking through Lord Buckmaster made this observation in *Tom Barrett v African Product Limited*,

“The laws applicable to this company are certain ordinances of the Gold Coast Colony, which in the material respects reproduce the English Companies Act of 1862. It appears that limited companies were not commonly known in the Colony- this one was only the 23rd that had been registered- and it may well be that subsequent events were affected by this ignorance.”²⁵⁵

²⁵⁴ Report of the Commissioner Appointed to Inquire into Insolvency Law of Ghana, 13 para. 70 (1961).

²⁵⁵ *Tom Boevey Barrett v African Products Limited (Gold Coast Colony)* [1928] UKPC 48 at 2.

The phrase ‘this ignorance’ as used in this contest though referable to the events in the case before the court, generally reflected the knowledge of the populace about the operation of the Companies Ordinance in the colony.

Corporate Insolvency (Post-Colonial)

In 1957, a Committee was tasked to look into the operation of Company Law of Ghana and suggest reform. This Committee stated that it was important that the law dealing with corporate insolvency was reviewed to compliment the new provisions of the Company Law they had advocated. When eventually, in 1960 the Insolvency Commission was appointed to look into bankruptcy law in Ghana, they were tasked with the duty to look into the operation of corporate insolvency law in the country and recommend reform to work in tandem with the Company Laws of Ghana. Upon completion of its enquiry, The Commission saw the need to improve the Ghanaian legislation by adopting some reforms subsequently made to the English Company Law upon which the Companies Ordinance (Cap 193) was based. The Committee noted that concerning corporate insolvency, reform was necessary for three reasons:

- “(a) to simplify and rearrange the present liquidation provisions in the Companies Ordinance, amended as below, so as to facilitate their application to particular cases;
- (b) to improve the Ghanaian legislation by adopting a number of reforms subsequently made to the English company liquidation law on which the Companies Ordinance was based; and
- (c) to remedy certain other deficiencies which even after adopting the reforms mentioned above will still remain in the Companies Ordinance.”²⁵⁶

²⁵⁶ Report of the Commissioner Appointed to Inquire into Insolvency law of Ghana, 52 (1961).

The Committee felt that the winding up procedures under current English law, which were essentially contained in the Bankruptcy Act of 1914 and the Companies Act of 1948, were lengthy and arranged in an illogical manner making it impossible for newcomers to comprehend. They would rather adopt a much easier rearrangement into a logical order and then fill in the gaps by redistributing certain powers to the liquidator, granting him more discretion and initiative under Ghanaian law.

Additionally, the Committee felt the need to bridge the marked differences between treatments of individuals whose businesses or trade failed compared with that of directors of companies which also failed. The present law saddled individuals with certain responsibilities while directors were treated differently and more leniently. This was in tune with reforms, which had taken place under English law where directors were saddled with liabilities for certain conducts which led to the bankruptcy of their companies. Lastly, Ghanaian law was to be brought up to date by making provision for winding up of companies, which were not incorporated in Ghana but were essentially trading in the country.²⁵⁷

The Bodies Corporate (Official Liquidations) Act, 1963 (Act 180) (hereinafter called Act 180) the end product of the Committee's work adopted a number of principles from English law save for a few changes to suit the Ghanaian environment. This is the current piece of legislation dealing with corporate insolvency in Ghana. Act 180 has operated for over half a century as the primary legislation dealing with corporate insolvency. Liquidation is the primary relief under the Act. The law has seen no rigorous changes the entire time it has been operational.

5. Conclusion

²⁵⁷ *Id* at 53.

The history behind insolvency law in Ghana goes all the way back to the colonial period. Prior to colonial times, the customary law provided means of redressing debtor default. These rules were however not extended to companies because there was no known equivalent of corporations under customary law. The rules governing corporate insolvency was therefore imported wholesale from English law especially the winding up provisions of the 1862 and the 1948 Act of England. The history behind personal bankruptcy laws fairly leads to the conclusion that, bankruptcy law has been harsh on the debtor. The concept of imprisonment was prominent under some colonial legislation. This attitude is fairly attributable to colonial merchants operating in the colony. The merchant had been insistent because the concept of family property made it difficult to enforce a judgment against individual property, which was often indistinguishable from the family. This attitude has shifted. Currently, there is total abolishing of imprisonment for debt. This position is supported because the lines between family and individual property are clear and as the country developed more individuals acquire personal property that is used as security for credit. Land title registration and security registration has also streamlined the process making it easy to enforce a judgment against the individual. The corporate winding up rules has not changed. They are akin to the old rules under 1948 English law and have operated without any reform.

The history behind insolvency law in Ghana must serve as a guide for future attempts to reform the law. This is important because this Chapter has shown the ideals, aspiration and to some extent, exactly what the country wants from insolvency legislation.

CHAPTER FOUR

CORPORATE INSOLVENCY LAW IN GHANA

1. Introduction

The life and death of a company are important statutory events. This is because corporations are fictional entities. They require statutory authority to incorporate and to fold. In Ghana, the Companies Act 1963 (Act 179) contains the provisions for the incorporation and demise of the company. Under the Companies Act, a company can bring its life to a close, when it is solvent and the members' wish to end the business. If the company is insolvent, creditors could petition the company into liquidation under the Bodies Corporate (Official Liquidation) Act, 1963 (Act 180). Act 180 is the primary statute dealing with companies when they go insolvent. Act 180 developed its principles from the winding up provision of the 1948 Companies Act of England. The primary aim of Act 180 is to weed out dishonest and unreliable traders, subject such persons with duties and disabilities of bankrupts and to help revive or restructure the honest debtor.²⁵⁸ The Companies Act 1963 of Ghana also have provisions dealing with distressed companies. These are provisions dealing with arrangements, amalgamations and the appointment of receivers or managers. This Chapter will examine the liquidation provision of the Bodies Corporate (Official liquidation) Act, 1963 (Act 180) and statutory engagements under the Companies Act of 1963 such as schemes of arrangement and receivership as primary means of dealing with companies undergoing financial distress.

²⁵⁸ Report of the Commissioner Appointed to Inquire into Insolvency law of Ghana, 76 para. 419 - 422 (1961). See also Insolvency Law in Ghana, Journal of African Law, Vol. 6, No. 1 pp. 2-4 (Spring, 1962). The principles applicable to individual insolvency under the Insolvency Act of 1962 were extended to Act 180. These principles were essentially copied from English law under the 1914 Bankruptcy Act and the 1948 Companies Act.

2. Commencement Of Official Liquidation Under Act 180

There are various ways to commence official liquidation in Ghana. Act 180 provides four modes of commencing winding up. These are:

(1) A company may be wound up when it passes a special resolution stating that the business should be brought to an end.

(2) A company may also be wound up when a member, creditor or contributory address a petition for winding up to the Registrar of Companies. The Registrar may then commence official liquidation on his own.

(3) A petition for winding up may also be addressed to the Court by a member, creditor or contributory.

(4) A company can convert a private liquidation under the provision of the Companies Act 1963 into an official liquidation under Act 180.²⁵⁹

There is a distinction between a petition filed before the Registrar and the Court. The Registrar may order the official liquidation of a company without the Court's involvement if a *prima facie* case for winding up is made by a member or a prospective or contingent creditor to the Registrar.²⁶⁰

The Registrar, however, cannot wind up a company when certain grounds under section 4 of Act 180 are presented before him. Ordinarily, any grounds that can be invoked by the Attorney General to force the winding up of a company are outside the ambit of the Registrar's authority. The distinction lies in the forum as well as the substantive grounds for winding up a company. The rules relating to gathering assets, meeting of creditors and enforcement of other provisions of the Act, however, remain the same.

²⁵⁹ See Section 1 of Act 180.

²⁶⁰ *Id* section 3.

2.1 Eligibility

To be eligible to file for liquidation under Act 180, an applicant must be a creditor, member or contributory of the company, Registrar or the Attorney General.²⁶¹ These applicants can file for liquidation when certain grounds exist under Act 180. It has been held that a company, its members and directors can agree to suspend eligibility to petition the court for liquidation until certain specified events occur. In *re Timber and Transport Kumasi-Krusevac Co. Zastava Bonsu and Another*, by a written agreement between Timber and Transport Co. Ltd and a Yugoslav company, the two companies were merged and a new company under the name T &T Kumasi-Krusevac Co. Ltd was formed to engage in a common enterprise in the timber industry. Clause 15 of the agreement provided that, the agreement was to remain irrevocable for ten years and no member or director of the company could present a petition or make an application seeking the winding up or liquidation or in any way seek or attempt to bring the existence of the company to an end. The Yugoslav company, shareholders of the new company, petitioned for official liquidation eight years after the agreement notwithstanding the provisions of clause 15. The company argued that clause 15 offends against section 4 (1) of Act 180 because it purported to oust the jurisdiction of the court and was illegal and unenforceable. Section 4 (1) of Act 180 provides:

“(1) The Registrar or any person who is, (a) a creditor of the company, (b) a member or contributory of the company, or (c) the Attorney-General, but only on the ground specified in paragraph (c) of subsection (2) of this section, may present a petition to the Court for the official winding up of the company.”

T &T Kumasi-Krusevac Co. Ltd argued that given clause 15 of the agreement prohibiting the presentation of winding up petition within a ten-year period, the petition was incompetent and

²⁶¹ *Id* section 3 and 4.

should not be entertained. They argued further that the clause couldn't be construed as a complete ouster of the court's jurisdiction since in the event of a breach, several remedies were available to the parties. The High Court ruled in favour of T & T and held that: "The effect of clause 15, then, is that a period of at least ten years must elapse before any of the parties to the agreement can apply to the court under Act 180, s. 4 (1) for the official winding-up of the company." On appeal, it was held affirming the decision of the High Court that:

"We do not see any reason which should prevent the parties from entering into such contract as is contained in clause 15 of the agreement. Indeed there is much to be said for that clause. The parties would wish to maintain the company's integrity as a going concern during the currency of the agreement."²⁶²

It follows that where by agreement or through its regulations, the company restricts the right of members and directors to petition the court from winding up; it shall not be competent and a party will lack eligibility to commence winding up petition unless by the terms of their agreement.

2.2 The Grounds For Winding Up

The filing decision is an important decision because some factors must be taken into consideration. The party filing must carefully invoke the grounds listed in section 3 and 4 of Act 180 before the court can grant relief under the Act. There are a number of grounds to wind up a company in Ghana. Only the Court has authority to order the winding up of a company under the following grounds:

- (a) When a company does not within a year from its incorporation commence or carry on its authorized business or suspends any such business for a year.

²⁶² [1981] GLR 256-262.

This provision was made to check the registration of an excessive number of objects by promoters.²⁶³ The question arises whether the court should wind up a company when it carries on some of its objects while it suspends others. On the whole, the courts have been reluctant to wind up a company on this ground. In *Kosa Beach Resort*, the court refused to wind up Anninopa Ltd when it was evident that the company had failed to conduct any of its authorized business years after incorporation.²⁶⁴ Anninopa was incorporated to carry on farming, food processing and manufacturing of agricultural equipment. Its only asset was a 1.96-acre land on which another company Kosa Beach Resort was situated and conducting its business. In order to preserve the Resort, the court declined to wind up Anninopa Ltd even though it was evident that none of its authorized business was ever carried on.

(b) When the company has no members.

This ground was maintained in the Act over the advice of the Commissioners appointed to look into Insolvency Law in Ghana. The courts in England had been reluctant to wind up a company under this ground, so the Commissioners found no use for it in Ghana.²⁶⁵ The question had been whose interest is to be protected when the company has no members and whether the company should be allowed to go on without shareholders. Ordinarily, the members of the company in general meeting have the power to change a number of things. Certain decisions can be taken by members alone. It is, therefore, important that the company maintains shareholders who can satisfy statutory requirements when the situation arises.

(c) When the business of the company or objects is unlawful, or the company is operated for an illegal purpose or the business being carried on is not authorized by its regulations.

²⁶³ See Report of the Commissioners Appointed to Inquire into Insolvency Law of Ghana, 232 (1961).

²⁶⁴ See *Kosa Beach and Arnoldus Maria van de Mast vs Patrick Harro Koolen*, Suit No. Misc/05/2011, 14-15.

²⁶⁵ See Report of the Commissioners Appointed to Inquire into Insolvency Law of Ghana, 232 (1961).

Only the Attorney General may present a petition to wind up a company under this ground. Generally, the Registrar has authority to refuse registration of a company when its stated objects are illegal.²⁶⁶ One will expect that with such powers, registering illegal objects will not arise in the first place. Where the Registrar falls short to carry out this duty, the Attorney General is empowered to petition the court for the winding up of the company. This ground can also be invoked when a company conducts its business for illegal purposes. This occurs where the company's objects are not illegal, but the company turns to illegal business. The power and capacity granted to the company to carry its business are not to be used for illegal purposes. The Attorney General can petition a company to be wound up if it engages in *ultra vires* transaction.²⁶⁷ These are transactions not authorized by the company's regulation. They may not necessarily be illegal but goes beyond what has been authorized in the company's regulations.²⁶⁸

(d) When the Court is of the opinion that it is just and equitable to wind up the company.

The Act provides that a company should be wound up when the Court is of the opinion that it is just and equitable to do so. The petitioner is not required to exhaust other remedies, which were available to him/her in respect of the matters complained of. The court may, however, refuse a winding up order when it could be shown that there exists some other remedy but the petitioner had acted unreasonably in not pursuing that other remedy.²⁶⁹ In *Ebrahimi v Westbourne Galleries Ltd*, Lord Wilberforce stated that the just and equitable principle enabled the court to:

²⁶⁶ See Companies Act 1963 (Act 179) section 14.

²⁶⁷ See Companies Act 1963 (Act 179) section 25.

²⁶⁸ See Ernest Owusu-Dapaa & Samuel Adarkwah, The doctrine of ultra vires and the protection of shareholders, creditors and third parties in Ghana: a balancing act, Commonwealth Law Bulletin, Vol. 35, Iss. 3, 2009.

²⁶⁹ This provision was copied from The Companies Act 1948, Section 225(2). See also Jordans New Company Law 85 (1948).

“subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.”²⁷⁰

The ground was developed to deal with an unjustifiable expulsion of a member from office, justifiable loss of confidence among members, deadlock and situation where the corporate substratum has failed.²⁷¹ Ghanaian Courts have been slow to formulate hard rules under this ground. The Courts are reluctant to wind up businesses on this ground. Benin J has stated in *Billy v. Kuwor* that:

“When it comes to consider the just and equitable rule, it is a question of fact and as such each case must depend on its own circumstances. The court therefore has an unfettered discretion in this exercise since it is not possible to lay down a general guide to the solution of what are essentially individual cases.”²⁷²

In *Billy v. Kuwor*, a petition was presented to the High Court for winding up of the Green Revolution (Ghana) Company Ltd on the grounds that it was just and equitable to do so. The petitioner alleged oppression by the respondent against him in his capacity as a member and as an employee of the company. The petitioner also alleged financial mismanagement, which had resulted in the company, been run at a loss. The court found that the petitioner had been oppressed by series of events leading to his unlawful dismissal both as an employee and as a member of the company. Despite these established facts, the court refused to wind up the company and ordered the petitioner’s shares to be bought by the respondents.

²⁷⁰ [1973] AC 360, [1972] 2 All ER 492, [1972] 2 WLR 1289.

²⁷¹ See F. H Callaway, Winding Up on the Just and Equitable Ground (1978).

²⁷² [1991] 1 GLR 522-532.

Since this ground is an equitable one, public interest consideration comes to play when deciding whether it is appropriate to wind up a company.²⁷³ In *KOSA Beach Resort*, the petitioners sought the winding up of two companies; the KOSA Beach Resort Ltd and Anninopa Company Ltd. Anninopa Ltd owned a piece of land, which KOSA Beach Resort was situated and conducted its business. The petitioners and respondents were both members and directors of the two companies. The petition was brought on the grounds that it was just and equitable to wind the company. The petitioners sought an alternative order to purchase the shares of the respondents. In this case, despite the fact that the High Court found symptoms of the total breakdown of trust and confidence, lack of effective communication and outright rivalry between the parties, the court refused to wind up the company on the just and equitable grounds and ordered the petitioners to buy out the shares of the respondents. One overarching consideration was the fact that KOSA was a hiring company, which should be saved from winding up. Adjei Frimpong J., refusing the order for winding up of the beach resort stated as follows:

“In an economy where the level of unemployment is towering I doubt whether if there are no statutory or other special reasons for it a court in Ghana today should be happy in pronouncing the demise of a hiring company like KOSA. Law should aid development and those of us who interpret them should be the apostles.”²⁷⁴

KOSA Beach Resort was decided in the rather interesting way. The petitioners wanted the company to be wound up if the court found that they were not entitled to buy out the respondents. The respondents, on the other hand, wanted to preserve the company and prayed for relief to buy out the petitioners. In resolving the dispute, the court decided that the petitioners had a slight edge

²⁷³ See F. H Callaway, Winding Up on the Just and Equitable Ground, 101(1978).

²⁷⁴ *KOSA Beach and Arnoldus Maria van de Mast vs Patrick Harro Koolen*, Suit No. Misc/05/2011, 14-15.

over the respondent. The court explained that the petitioners had since the incorporation of the company handled the finance, administrative, marketing and reservation aspects of the company while the respondent handled beautification, gardening, kitchen and shopping aspects of the business. Based on this consideration the court believed that the company would do well in the hands of the petitioners and ordered petitioners to buy out the respondents. The court's decision was based on whose hands the company can do well.²⁷⁵ The "doing well" test, however, raises questions because ordinarily, hired employees (who are not shareholders) can competently handle finance, administration, marketing and reservation, the same way hired employees can handle gardening and beautification. The respondents could have hired employees to undertake those duties if they were granted their remedy.

(e) When the company is unable to pay its debts

This ground has traditionally been the main ground for winding up a company. When a company is unable to pay its debts, it was up for liquidation. Under Ghanaian law, when it is proved either to the Registrar or the Court that the company is unable to pay its debts, winding up order is issued and a liquidator is appointed to wind up the affairs of the company.²⁷⁶ Section 3(3) of Act 180 dealing with winding up petition to the Registrar provides:

“A company shall be deemed to be unable to pay its debt,

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding fifty pounds then due, has served on the company a written demand requiring the company to pay the sum so due and the company has for twenty-one days thereafter

²⁷⁵ *Id* at 25.

²⁷⁶ The Registrar of Companies has authority to order the winding up of a company on one ground. The Registrar may order the official winding up of a company when a creditor, member or contributory of a company petitions the Registrar claiming that the company is unable to pay its debts.

neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if in Ghana execution or other process issued on a judgment, decree or order of any court in favour of a creditor of a company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the Registrar that the company is unable to pay its debts; and, in determining whether a company is unable to pay its debts the Registrar shall take into account the contingent and prospective liabilities of the company.”

Section 4(3) of Act 180 dealing with winding up petition pursuant to court also provides that: “In determining whether the company is unable to pay its debts the provisions of subsection (3) of section 3 of this Act shall apply.”

Act 180 employs a two-tier test to determine whether a company is unable to pay its debts. The first tier is satisfied when a company is served with a demand notice and it's unable to pay, or execution has been issued against the company and its returned unsatisfied in full or in parts and when a creditor prove to the Court that the company is unable to pay its debts. This test is often referred to as the “Cash Flow.” Thus “A company's non-compliance with a statutory demand, or non-satisfaction of execution of a judgment debt, is a matter that can be proved quite simply, usually by a single short witness statement. If proved, it establishes the court's jurisdiction to make a winding up order, even if the company is in fact well able to pay its debts.”²⁷⁷ In such cases, the company may not have enough cash on hand to pay off creditors but has assets that could be realized to pay off debts owed to its creditors. The law does not require creditors to wait until the company realizes assets or do other things. It gives the creditors to the right to petition right away for the liquidation of the company.

²⁷⁷ See *BNY Corporate Trustee Services Ltd & Ors v Neuberger* [2013] UKSC 28 (9 May 2013).

Debt simpliciter is not defined under Act 180. However, for the purposes of proving a claim or debt to the liquidator, a "provable debt" means "an obligation, the value of which is capable of assessment in money."²⁷⁸ For the Court to make a winding-up order on this ground, there need not be a dispute about the existence of the debt giving rise to the petition. In *Mann and Another v. Goldstein and Another*, the court held that:

“as the existence of the debt on which each winding-up petition was founded was disputed on grounds showing a substantial defence requiring investigation the petitioner did not establish that he was a creditor and thus had the locus standi to present the petition and the companies court was not the appropriate court to decide the dispute.”²⁷⁹

The situation is different where the dispute goes to the amount of indebtedness, but not the existence of debt and the non-disputed part meets the threshold for making up winding up order under the Act. Thus where there is no dispute over a lesser amount, which amount is sufficient to entitle a creditor to petition the court, a dispute over a larger amount will not provide a sufficient answer to a winding-up petition against the company.²⁸⁰ When the petitioner meets the threshold, the court is duty bound to take into consideration the contingent and prospective liabilities of the company as the second tier test before making a winding up order.

The Act does not define what contingent and prospective liabilities are for the purposes of this test. Ascertaining the contingent and prospective liabilities against the assets of the company for the

²⁷⁸ See Act 180 sections 22(2)(a) and 66.

²⁷⁹ [1968] 2 All ER 769, [1968] 1 WLR 1091 Chancery Division. See also *In Re a Company 12209 of 1991* [1992] BCLC 865, 868 (Hoffmann J) holding that a petitioner adopts a high-risk strategy, which may be dismissed with punitive cost, if a debt which has been made the subject of a statutory demand is disputed on reasonable grounds by the Respondent. See *Re a Company (No. 001573 of 1983)* (1983) 1 BCC 98.

²⁸⁰ See *Re Tweeds Garages, Ltd.*, [1962] 1 All E.R. 121.

purposes of liquidation is sometimes referred to as the “Balance Sheet” test under section 123(2) of Insolvency Act 1986 of the UK. It has been held that:

“... section 123(2) requires the court to make a judgment whether it has been established that, looking at the company's assets and making proper allowance for its prospective and contingent liabilities, it cannot reasonably be expected to be able to meet those liabilities. If so, it will be deemed insolvent although it is currently able to pay its debts as they fall due. The more distant the liabilities, the harder this will be to establish.”²⁸¹

Prospective liabilities have been defined as “...a debt which will certainly become due in the future, either on some date which has already been determined or on some date determinable by reference to future events.”²⁸² This may include an unmatured bill of exchange.²⁸³ Contingent liabilities are liabilities or other losses “which arises out of an existing obligation or state of affairs, but which is dependent on the happening of an event that may or may not occur.”²⁸⁴ This may include a liability of a surety created through a guarantee, which arises when the principal debtor defaults or a liability of a defendant in a negligence claim, which may or may not succeed.²⁸⁵ Act 180 provides that a provable debt can be an obligation capable of being quantified in money and which could be any:

“obligation which, apart from this Act, would have been enforceable by the creditor against the company at the date on which the winding up commenced; or (b) any existing or future

²⁸¹ See *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc & Ors*, [2011] EWCA Civ 227 (07 March 2011) Lord Lord Neuberger MR. This statement was quoted with approval by Lord Walker in *BNY Corporate Trustee Services Ltd & Ors v Neuberger* [2013] UKSC 28 (9 May 2013).

²⁸² See *Stonegate Securities Ltd v Gregory* [1980] Ch 576 Lord Buckley at 579.

²⁸³ See *Re a Company (No. 001573 of 1983)* (1983) 1 BCC 98.

²⁸⁴ Roy Goode, Principles Of Corporate Insolvency Law, 134 (Sweet & Maxwell, 2010).

²⁸⁵ *Id* at 135.

obligation, other than an obligation unenforceable by virtue of the law relating to limitation of actions, which, by reason of some transaction which took place before the said date, might, apart from this Act, have become enforceable by the creditor against the company after that date...²⁸⁶

While the Court is bound to consider prospective and contingent liabilities, it cannot take into account contingent and prospect assets of the company.²⁸⁷ Such words are not found in Act 180. The Court is duty bound to make a cash flow and a balance sheet test before making a winding up order. Satisfying the cash flow test is not enough to secure an order for the winding up of the company.

The Ghanaian jurisprudence on this subject is woefully anemic. In *Billy v. Kuwor*, among the grounds presented for winding was the allegation of financial mismanagement, which had resulted in the company, being run at a loss. This allegation could not be proved in court. The court, however, found the evidence that the company was a viable one and had assets, which could meet its liabilities. Benin J declined to wind up the company and in response to the winding up order stated as follows:

“Under the Draft Proposals of the Companies Code, it was proposed that a company may be wound up by the court, if, among others, it is proved to the satisfaction of the court that it is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company. Although section 247 of Act 179, as eventually enacted, does not contain this proposal, I think in considering a winding up order a court should not fail to take these

²⁸⁶ See Act 180 Section 66.

²⁸⁷ *Re Cheyne Finance Plc (In Receivership)* [2007] EWHC 2402 (Ch).

factors into consideration, for it is my view that the court must look at the business realities of the situation and should avoid taking a narrow legalistic view that because the company is owing, it should be wound up.”²⁸⁸

The statement by Benin J must be analyzed carefully. It is correct that the Company Law Commission made a proposal requiring the courts to look into the contingent and prospective liabilities of an insolvent company before winding it up.²⁸⁹ This proposal was dropped from the Companies Act (Act 179) but however maintained under Act 180.²⁹⁰ Sections 3(3)(c) and 4(3) of Act 180 came into operation at the same time as the Companies Act, 1963.²⁹¹ As can be noticed, Benin J addressed those factors without reference to Sections 3(3)(c) and 4(3) of Act 180 believing that was not the state of the law. Though this is regrettable, it is without a doubt that he held the same view as Justice Date-Bah that “the first response of the law to a distressed company” was not to wind it up.²⁹² Benin J thought a contingent and prospective liabilities test was appropriate. Beyond this formulation, no clear cut rules have been laid down to guide the two-tier statutory test under Act 180.

²⁸⁸ [1991] 1 GLR 522-532.

²⁸⁹ See Final Report of the Commission of Enquiry into The Working and Administration of the Present Company Law of Ghana, 181-182 (1961).

²⁹⁰ The reason was that the Commissioners appointed to look into Insolvency Law of Ghana had been tasked with the duty to look into both personal and corporate insolvency law of Ghana. This Commission was working alongside the Gower’s Commission that was appointed to look into the Company Law of Ghana. The question of what to do with companies that were unable to pay their debt was therefore left for the Insolvency Commissioners to decide. The current winding up provisions under the Companies Act (Act 179) which was the end product of the Gower’s Commission therefore dealt with private liquidation where a winding up order could be procured only when the directors by a special resolution declare that the company was solvent and was able to meet its debts.

²⁹¹ See Final Report of the Commission of Enquiry into The Working and Administration of the Present Company Law of Ghana, 48-56 (1961).

²⁹² See Distressed Companies Need Second Chance, <http://www.modernghana.com/news/342995/1/distressed-companies-need-second-chance.html>. accessed on (April 5, 2013, 10:00 AM).

It is unclear how the company and the creditors are to be treated once the court refuses to wind it up under the two-tier test. This issue arises when a creditor passes the cash flow test but is unable to establish the balance sheet test. Under such circumstances, the company may owe a lot of people money and has cash flow problems, but the company may not be up for liquidation because of consideration of its contingent and prospective liabilities. The issue is what become the rights of creditors and their relationship with the company after winding up order is refused under the formulation?

It appears that creditors are left to fend for themselves by resorting to the survival of the fittest race for the assets of the company; something Act 180 had been designed to curb. These questions were not answered in *Billy v Kuwor*. The court ended its enquiry when it found that the company was solvent. The petition had been brought on a different ground, which is the just and equitable ground. This ground does not call into question the two-tier test discussed above. Had the petition been brought on the ground that the company owed and was unable to pay, the court would have prescribed how the company was to be dealt with (Even then the Court was unaware of Sections 3 and 4 of Act 180). Though Benin J sounded like he will go to that length to save a business, the test under the law is not synonymous with corporate rescue developed to save companies that are undergoing financial distress in other jurisdictions.

3. Automatic Stay Principle

One of the goals of bankruptcy law is to prevent a rush for the assets of the debtor. It is without a doubt that when the company is insolvent and unable to pay its debts, only the first in time creditors can recoup all their monies leaving other creditors with nothing to fall on. Bankruptcy law exists to halt this grab of the debtor's property by creating a pool of the assets of the debtor and distributing it to creditors. It is important that the rush for the assets of the debtor is stayed to

achieve the equality of distribution among creditors. The automatic stay principle is, therefore, central to achieving the aims of bankruptcy law. Thus on the commencement of winding up, all civil proceedings against the company are stayed automatically by the operation of law.²⁹³ This applies to all transfer of the property of the debtor company. All transfer of the assets or shares of the company after the commencement of winding up are automatically voided. No fresh action can be commenced against the company unless authorized by the Court. By operation of law, automatic stay comes into effect when the court makes the winding up order but not when the petition is presented for winding. The presentation of a petition for winding up in itself does not invoke an automatic stay of proceedings or stay disposition of the debtor company's property. However, between the time of filing a petition and the making of the winding up order, a party or the registrar may make an application to the court to stay all civil proceedings and disposition of the company's property.²⁹⁴

There are exceptions to the automatic stay principle. A proceeding against the debtor company by a secured creditor to realize his security cannot be stayed or affected by the automatic stay principle. Automatic stay principle generally applies to proceedings by unsecured creditors. The court may, however, allow a proceeding by an unsecured creditor to proceed against the debtor company subject to such terms as the court thinks just. It is only with the leave of the court that any other proceedings can continue against the company.²⁹⁵ Any other proceeding without the court's leave is void and any execution no matter what stage it has reached is voided. If the property

²⁹³ See Act 180 section 6(1) and Section 17.

²⁹⁴ *Id* section 6(2).

²⁹⁵ Section 17 of Act 180 provides as follows: "On the commencement of a winding up, no action or civil proceedings against the company, other than proceedings by a secured creditor for the realization of this security, shall be proceeded with or commenced save by leave of the Court and subject to such terms as the Court may impose."

of the company comes into the hands of the sheriff, by reason of an uncompleted execution, he is required to return the property to the Liquidator.

The case of *Merchant Bank v Saoud and others* is a classic case of the automatic stay and quite apposite here.²⁹⁶ In that case, the facts of which are that Merchant Bank issued a writ of summons for judicial sale of property the subject matter of a mortgage executed between the Bank and Saoud Brothers. The Bank also asked for judicial sale of certain assets used as security by way of debentures. The mortgage was executed as security for repayment of a loan contract between the parties. Before commencement of the writ by Merchant Bank, Saoud Brothers filed a petition for official winding up before the High Court and liquidator had been appointed. Saoud Brothers, therefore, moved the High Court for a stay of proceedings against Merchant Bank on the grounds that by virtue of section 17 of Act 180, all civil proceedings against the company must be stayed since winding up has commenced in another High Court against the company. The Merchant Bank contended that, since their action was an action seeking to enforce their security, automatic stay did not come to play by virtue of the exception afforded secured creditors under section 17 of Act 180. The High Court agreed with Saoud Brothers and made an order staying proceedings against the Bank. Merchant Bank appealed. On appeal, the issue before the Court was whether on the commencement of winding up by Saoud Brothers against their company, the action by Merchant Bank to enforce their security automatically stayed under Section 17 of Act 180. The Court of Appeal granted the appeal and held as follows:

“A careful consideration of the submissions made to us by the parties through their counsel leads me to the conclusion that although the section on which reliance was placed to stay proceedings forbids certain civil actions it excepts those mounted by "secured creditors"

²⁹⁶ H1/92/2006.

seeking the realization of the security. It is to be said that the words by which the section on which these proceedings turn is so plain and free from any difficulty that there is no need to resort to any aid to its construction in order to ascertain its true meaning.”

Since the Act did not define who a ‘secured creditor’ is, the court took it upon itself to construe what security is to be understood. The Court stated as follows:

“I am of the opinion that the words as employed in the section are used in their ordinary sense. Accordingly, I am of the view that "secured" must receive the meaning that is attached to it in ordinary parlance as the simple past tense of the word "to secure." In this sense it refers to the practice of bankers or lenders in exercising the right to own things that belong to borrowers in order to ensure or make certain that the money received is paid back. In the realm of corporate law some examples readily come to mind such as mortgages and debentures.”

The Court finally made an observation for future guidance clarifying the effect of winding up on actions commenced against the company by secured and unsecured creditors. The Court stated as follows:

“Where the action is commenced after the commencement of winding up not being one at the instance of a secured creditor to realize its security then leave of the court must first be obtained to issue out the writ. If there is a default in seeking the leave of the court then such an action would have been improperly constituted and may when properly objected to be struck out. I do not think that the proper course of action by a defendant in such a circumstance is to apply to stay proceedings. The right to stay proceedings in my view relates to pending actions that do not seek to realize security and even in this latter category,

a careful reading of section 17 of the law leads one to the conclusion that there is as regards such pending actions a stay of proceedings by operation of law.”

It follows that action by secured creditors is an exception to the automatic stay rule under Act 180. There are some cases that suggest that the automatic stay may be lifted when dealing even with unsecured creditors. The court may disregard the automatic stay principle where the debtor company perpetrates trickery or actual dishonesty against an unsecured creditor. In *Re Grosvenor Metal Co Ltd*, BI Ltd obtained a judgment against the GM Co Ltd and was issued a writ of *feri facias*. Owing to representations made by the GM Co Ltd, BI Ltd delayed the execution. GM Co Ltd later filed for liquidation when the execution had not been completed. On application by BI Ltd to go into execution despite the commencement of winding up, it was found that the representation made by the GM Co Ltd was not dishonest or improper. The court held that it had jurisdiction to make the order asked for by BI Co Ltd because its jurisdiction to allow execution in such circumstances was not limited to cases in which there had been actual dishonesty or trickery on the part of the debtor company.²⁹⁷

This case was quoted with approval in *Brown and Others v. Hoeks (Ghana) Ltd*.²⁹⁸ In this case, the plaintiffs obtained a judgment against the defendant company and recovered ten per cent of the judgment debt in attachment proceedings they instituted against the defendant company's garnishees. The plaintiffs, later on, applied for a writ of *fi. fa.* to issue in respect of the unexpired terms of leases on properties owned by the defendant company to pay for the rest of the judgment credit. The defendant company thereupon applied for a stay of execution and pleaded for three months' adjournment to enable them to discharge the judgment debt. Unable to pay the judgment

²⁹⁷ [1950] Ch 63, [1949] 2 All ER 948, 65 TLR 755, [1949] WN 440.

²⁹⁸ [1977] 2 GLR 15-20.

debt the defendant petitioned the official liquidator to wind up the company. After being prompted of the commencement of winding up of the defendant company, the plaintiffs brought an application on notice for an order for leave to proceed to execution notwithstanding the winding up petition.

On the hearing of this application, the official liquidator argued that by the provisions of Act 180, the debt owed the plaintiff company could be proved against the company in the liquidation proceedings and settled in accordance with the priority it ranks. The liquidator then asked the court to defer to the liquidation proceedings and halt execution sought by the plaintiff. The court presided over by Griffiths-Randolph J., granted leave to the plaintiff to levy execution against the defendant company notwithstanding the commencement of the winding up proceedings. The court came to this conclusion, because the chairman of the directors of the company and his counsel made representations in court that it was in a position to pay off the debt, and pleaded for a time within which to pay the money. It was on that understanding that the court acceded to the request for a three-month adjournment. It became obvious that it was only a trick perpetrated by the company so as to enable the company to be wound-up and frustrate the judgment creditor.

4. Powers And Duties Of The Liquidator

The primary function of the Liquidator under Act 180 is to wind up the company and distribute its assets to creditors.²⁹⁹ The Liquidator has been given enormous powers to achieve this aim. The Liquidator once appointed, takes the management of the business away from the directors of the company. Under section 9 of Act 180, the Liquidator has the power to bring or defend any legal action in the name and on behalf of the company and to carry on the business of the company

²⁹⁹ See *The Liquidator v Joseph Karam*, Suit No. Acc/12/09 at 2.

necessary for the beneficial winding up. To carry out this business, the Liquidator has the power to execute in the name or on behalf of the company, deeds, receipts and other documents and to use the company's seal. He/she can draw, accept, make and endorse any bill of exchange or promissory note. He/She can also make compromises or arrangements with creditors in accordance with section 231 of the Companies Act 1963 (Act 179).

To gather and secure the assets of the company, the Liquidator has the power to sell the property of the company by public auction or private contract. He/she can also take out letters of administration to any deceased contributory and obtain payment for any money due from the contributory. Where the Contributory is bankrupt or insolvent, the Liquidator has the power to prove and rank debts in the bankruptcy or insolvency of the contributory and receive dividends on behalf of the company.

The Liquidator has further powers to group debts into classes and settle the debt owed to each class in accordance with the priority ranking under Act 180. To be able to take care of ancillary or residuary issues, the Liquidator can do other things as may be necessary for winding up the affairs of the company and for the distribution of its assets to creditors and if anything is left to the shareholders.³⁰⁰

The Liquidator has been saddled with a number of responsibilities. He stands in a fiduciary position as if he was a director of the company. He is therefore saddled with duties and liabilities of

³⁰⁰ Other powers includes: to raise on the security of the assets of the company any money requisite; to appoint a legal practitioner to assist him in the performance of his duties; to compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect thereof.

directors under section 203 to 216 of the Companies Act 1963 (Act 179). The Liquidator does not stand in fiduciary position as regards creditors. It is not provided under Act 180 that he stands in such a position. Therefore, his primary concern is to secure the best interest of the company but not the creditors who have petitioned for liquidation.³⁰¹

The Liquidator has a duty to vest all property of the company in himself if he so chooses. When he chooses to do this, he may bring or defend in his official name, any acts or another legal proceeding, which relates to the property of the company necessary for the effectual winding up the company. He also has a duty to collect debts owed to the company and to realize assets not held in cash for distribution to creditors. All these monies must be deposited into a Liquidation Fund set up Liquidator under section 12 of Act 180.

After creditors submit proof of their debts to him, he has a duty to verify the correctness of all proof of debts submitted to him. Where genuine circumstances exist to amend a debt, he has a duty to amend the proof of debt to reflect the actual debt owed to the company. After verifying all debts, he has a duty to ascertain which class each debt falls for payment. Priority rules are provided for in section 41 of Act 180. During the liquidation, the Liquidator has a duty to consult creditors about any matter that affects their interest. This duty may be discharged by calling for a meeting of creditors.

Even though the Liquidator has been entrusted with numerous responsibilities, there are few checks and balances under Act 180. There are no avenues for challenging the appointment of a particular individual as a Liquidator. Once he is appointed, there are no clear-cut rules governing his removal during the liquidation. The Liquidator can delegate his powers to any public official

³⁰¹ It appears that under section 203(3) of the Companies Act, Act 179, the Liquidator when he assumes the duties of a director may be required to give special but not exclusive consideration to the interest of creditors.

or hire professionals to liquidate a company.³⁰² Such delegation of duty to public officials and professionals are not clearly regulated and no clear cut procedures are available to challenge anyone delegated such authority to wind up a company. The Act, however, provides that anyone who feels aggrieved by any action or omission of the Liquidator can bring an action before the High Court for redress.³⁰³

5. Continuing The Business Of The Company Under Liquidation

On the commencement of winding up, the company shall cease to carry on its authorized business. The only exception is the business that may be required for the beneficial winding-up of the company.³⁰⁴ The corporate state and power shall continue until the company is completely dissolved. The Registrar becomes the automatic Liquidator under Act 180.³⁰⁵ He can appoint legal practitioners to help him with aspects of the liquidation. As stated above, the Liquidator stands in a fiduciary relationship to the company as if he was a director and is subject to the same duties and liabilities as a director under the Companies Act 1963 (Act 179). The director's functions, therefore, cease and become vested by operation of law in the Liquidator.³⁰⁶ All the property of the company, however, remains vested in the company. The liquidator has a duty to take the properties of the company into his custody or bring them under his control.³⁰⁷

When the Liquidator takes control of the company from the directors, he goes ahead to settle a list of contributories who may be called upon to settle the liabilities of the company. Where the

³⁰² See section 10 of Act 180.

³⁰³ See *id* at section 11.

³⁰⁴ *Id* at Section 15.

³⁰⁵ *Id* at Section 7.

³⁰⁶ *Id* at Section 14.

³⁰⁷ *Id* at Section 16.

liquidator determines that such a list is not necessary, he dispenses with the list. After this step, the Directors and the Secretary of the company, forward to the Liquidator, a statement of affairs of the company detailing particulars of the assets of the company, the debts and liabilities, the names and particulars of creditors and a statement of the reasons why the company became insolvent.³⁰⁸ Upon receiving these vital details, the Liquidator shall then cause a notice to be placed in the Gazette fixing a time for creditors to lodge or prove their debt against the company.³⁰⁹ After admitting debts and being satisfied with the statement of affairs, the Liquidator convenes the first meeting of creditors to discuss the progress of the liquidation. This meeting is statutorily scheduled to occur within six weeks after the commencement of winding up. At the said meeting, where the company has proposed an arrangement with the creditors, it shall be put to the vote and either accepted or rejected. The High Court shall confirm any such arrangement. The Liquidator chairs such meeting and asks questions he deems appropriate during such events.

6. Reshaping The Debtor's Estate

As stated above, bankruptcy law aims at ensuring equality of treatment and distribution of assets to creditors. The Liquidator has the power to invalidate a number of transactions, conducted between the debtor and some creditors, within a certain time frame with the aim of overreaching or undercutting other creditors. Where the debtor favors one creditor over others or does some other act, which unfairly diminishes the assets available for distribution to other creditors, the law steps in to undo such acts and restore the property to the estate for fair distribution. These statutory avoidance mechanisms are exploited by Liquidators to reduce last minute preference transaction,

³⁰⁸ *Id* at Section 21.

³⁰⁹ *Id* at section 22.

restore the property to the company and consequently to enhance the debtor's estate for distribution to all creditors.

Custody of the Company's Property

The Liquidator is duty bound to take custody or bring under his control all properties of the company immediately after winding up. This is to prevent company assets from going into the wrong hands. To carry out this task, the Liquidator has the power to require anyone to surrender or transfer any property that belongs to the company. Section 16 of Act 180 provides that the property of the company shall during winding up, be vested in the company. Any property in possession of the company at any time within six months before the commencement of winding up shall be presumed vested in the company unless the contrary is shown. This means that anyone who claims a property was not vested in the company during that period, bears the burden of proving that the property belongs to him but not the company.³¹⁰

Preference Creditors

When the debtor company pays a creditor in preference to all others prior to petitioning for winding up, that creditor is required to repay the benefit back to the debtor's estate for distribution to all creditors in a fair and equitable manner. This is sometimes referred to as voidable or fraudulent preference. This principle prevents last minute creditor's rush for the assets of the company or disposition of the company's assets to preferred individuals over and against the interest of others. The Liquidator may call upon the creditor to reimburse the company within a reasonable time. In the words of Adjei-Frimpong J., "The object of the rules of preference is to prevent a creditor from

³¹⁰ *Id* at Section 16(3).

gaining an unfair advantage by concluding a transaction with the company during the twilight period which preceded winding up.”³¹¹

Three circumstances must exist before a transaction can be referred to as a preference transaction. First, the payment, transfer of property or judgment rendered must be made or incurred at the time when the company was insolvent; second, it must be done within six months preceding the making of the winding up order; and third, it must be made with the dominant intent that the creditor should benefit at the expense of others.³¹² The Liquidator may at the time between the making of winding up the order and the end of the liquidation of the company, require any preferred creditor to “restore to the liquidator, whether by payment of money, transfer of property or surrender of rights, the benefit which has accrued to the creditor.”³¹³ The Liquidator need not go to Court to pursue this claim. He may issue a notice to the preferred creditor giving him/her a reasonable period to restore the property. If the creditor fails to restore the property, the liquidator may then institute a suit for the recovery of the property.

The burden of establishing the necessary intention to prefer the creditor is on the Liquidator. The Liquidator, however, need not prove the direct intention of the debtor company to create a preference, since intention can be inferred from all the circumstances surrounding a particular case. The Liquidator must also hold the belief that the debtor made the transfer with the dominant intent to prefer that creditor at the expense of others. This area has caused a lot of confusion and difficulty in recovery since it is sometimes difficult to prove direct intention. The Insolvency Commission recommended that:

³¹¹ *The Liquidator v Joseph Karam*, Suit No. Acc/12/09 at page 8.

³¹² See Section 29 of Act 180.

³¹³ See *id.*

“..., the intention of the debtor need not be proved directly but can be established by inference from all the circumstances. See *In re M. Kushler Ltd.* [1943] Ch. 248, which has greatly assisted recoveries under Section 44 of the English Bankruptcy Act, 1914, and the corresponding provisions of the English Companies Act, 1948.”³¹⁴

If a party who is served with a notice to restore company property is aggrieved by such notice, that party can commence an action in court claiming he is the bona fide owner of the property or perhaps claim that the property was conveyed to him at the time when the company was solvent. In *Re Kushler Ltd*, Lord Greene held that “there is no rule of law, which precludes the court from drawing an inference of an intention to prefer a creditor in a case where some other possible explanation is open.”³¹⁵ In some jurisdictions, the requirement to prove that the directors of the debtor company intentionally preferred one creditor to others has been dispensed with. The test now is whether the payment had the effect of giving preference to the creditor. The creditor will have to show that the payment was made in good faith and made in the ordinary course of business.³¹⁶ In the UK, the requirement has been eased slightly. The test under Section 239 of the Insolvency Act 1986 is whether the company was “influenced by a desire to produce a preferential effect.”³¹⁷

Avoiding preference is not without difficulty in application. The case of *The Liquidator v. Joseph Karam*³¹⁸ presents the difficulty in application of the law. In that case, Metalloplastica Ghana Ltd

³¹⁴ Report of the Commissioners Appointed to Enquire into Insolvency law of Ghana, 160 (1961).

³¹⁵ [1943] Ch. 248.

³¹⁶ See Report of the Committee appointed by the Attorney General of the Commonwealth of Australia on 23 February 1956 to Review the Bankruptcy Law of the Commonwealth (8440/62). See also Corporations Act 2001 Section 588FA of Australia.

³¹⁷ See Milman & Durrant, Corporate Insolvency: Law and Practice, 207 (1999).

³¹⁸ Suit No. Acc/12/09.

became insolvent and was pursued by banks and other financial institution for non-payment of debts. The company filed for liquidation on 11th May 2007 and on the 18th May 2007 official winding up was commenced. In the course of the liquidation, the Official Liquidator received a letter from one Joseph Karam, claiming that the factory land and the premises of the company had ceased to be part of the assets of the company since those assets were conveyed to him before winding up. The Liquidator commenced an action against Joseph Karam, the Lands Commission and the Land Title Registry for a declaration that the purported execution of the deed of assignment between Joseph Karam and Metalloplastica Ghana Ltd is null and void by virtue of the provisions of Act 180.

The Court found that the deed of assignment conveying the properties in dispute was dated 10 January 2007 and the consent to assign by the Lands Commission was dated 28th March 2007. This was within six months before the winding up order. It also found no evidence of purchase and no shareholders or a director's resolution covering the transfer of the assets to Joseph Karam. It was revealed that Joseph Karam had a close affinity to the company. It was also found that he had given some monies to the Chairman of the company and on another occasion given money to pay off worker's salary. The actual purchase price for the properties was, however, unknown. Finally, the properties had several encumbrances, which were not discharged before the purported transfer. The company concealed this information from the Lands Commission inducing the Commission to give its consent. The Court held that the consent to assign was procured by fraudulent misrepresentation and for that reason, the land certificate issued to Joseph Karam ought to be set aside. The Court also held that Joseph Karam had failed to adduce evidence that the property was not vested in the company as required by section 16(3) of Act 180.

While the Court's holding that the property was to be restored to the estate of the company was apt, it missed a number of issues. The Court, with due respect assumed wrongly that section 16 of Act 180 deals with repayment by preference creditors. The court also erroneously suggested that there has been a change in the common law position regarding the burden of proof in creditor preference actions. This is demonstrated as follows:

Court's application of Section 16 of Act 180

In respect of preference law, the court stated as follows:

“In this light a transaction which smacks of preference of one creditor over a host of others falls to be avoided. The object of the rules of preference is to prevent a creditor from gaining an unfair advantage by concluding a transaction with the company during the twilight period which preceded winding up. I suppose this is the policy rationale behind the provisions in section 16 of our Bodies Corporate (Official Liquidation) Act 1963 Act 180 which I shall refer to in a moment.”

What the Court meant was that creditor preference law and its policy is to be found in section 16 of Act 180. With due respect, this is not the case. Section 16 of Act 180 generally deals with custody of the assets of the company during winding up. The section requires the Liquidator to bring all the property of the company under his custody and control when winding up commences. Upon winding up, the company's property still remains vested in the company. The Liquidator must therefore bring the properties under his control and custody. To ascertain and gather the property of the company and then bring it under his control, section 16(3) of Act 180 provides that all properties in possession of the company at any time within six months before commencement of winding up, shall be presumed vested in the company unless the third party shows the contrary. The rationale is to help ascertain the company's assets and prevent third parties from removing the

assets when the company is insolvent and contemplating winding up or to counter a case where a third party has removed or following the making of winding up order attempts to remove property in possession of the company.³¹⁹ This prevents dissipation of the company's assets unless bona fide can be established.

Preference law, on the other hand, deals with creditors who gains last minute advantage over other creditors through payment or transfer during the period leading to winding up when the company was insolvent. The situation is dealt with under section 29 of Act 180 but not section 16. Section 29 of Act 180 provides:

“Where, at the time between the making of a winding up order and the end of the liquidation of the company it appears to the liquidator that, during the six months ending with the commencement of the winding up and at a time when the company was insolvent the company,

(a) made any payment or other transfer of property, or

(b) paid any mortgage or other charge, or

(c) suffered any judgment or incurred any other obligations, with the dominant intent that any of its creditors should benefit at the expense of others, the liquidator shall give notice to the creditor so preferred and require such creditor within the period specified in the notice to restore to the liquidator whether by payment of money, transfer of property or surrender of rights, the benefit which has accrued to the creditor by reason of his being preferred.”³²⁰

³¹⁹ Report of the Commissioners Appointed to Enquire into Insolvency law of Ghana, 153, 238 (1961).

³²⁰ Emphasis mine.

Three things must coincide before the provisions of section 29 kicks in. There must be a transfer, judgment or payment or obligation; incurred during the six months preceding winding up when the company was insolvent; and which was made with the dominant intent that any of the company's creditors should benefit at the expense of others. This section, with due respect, holds the policy rationale the Court spoke about.³²¹

The distinction between the two sections is sometimes not clear at first sight, but it can be explained better with a scenario. Assume Company-A is insolvent and contemplating winding up. Company-A has two creditors, B-Bank and C-Credit Union. Company-A has an employee D whom it has leased out its Ford vehicle. D still has some obligation to fulfill before title eventually passes to him. B-Bank has been good to Company-A when it was prosperous. C-Credit Union, on the other hand, has been indifferent and has filed suit against Company-A for repayment of debt owed. About a month before Company-A files its petition for winding up, it conveys its only land and pays its unsecured overdraft owed to B-Bank. When D gets the wind that the company is about to file for winding up, he conceals the Ford vehicle. The C-Credit Union is left with nothing to fall on for repayment of its debt.

Given this scenario, it is clear that B-Bank is a preferred creditor because Company-A had the dominant intention of preferring it against C- Credit Union who will be left with next to nothing during winding up. To level the field Section 29 will set aside the transfer of the only land and the monies Company-A gave to B-Bank to pay off its unsecured overdraft. Section 16(3) on the other hand will be ineffective against B-Bank because even though the transfer was made within six months before commencement of winding up, B-Bank can prove to the contrary that the property was not vested in Company-A during winding up because the Company will have validly conveyed

³²¹ See Final Report of the Commissioners Appointed to Enquire into Insolvency law of Ghana, 158, 244 (1961).

the land to him but for section 29. Section 16(3) is, however, effective against D, the employee who has concealed the Ford vehicle. Since he still has an obligation to perform on the vehicle, the title has not passed to him. The Ford vehicle is vested in Company-A and he has to prove to the contrary. This scenario demonstrates the relationship between the two provisions aimed at enhancing the estate of the debtor for distribution to creditors.

Change in Burden of Proof

The court's application of section 16 led it to the conclusion that there has been a change in the common law position dealing with who bears the burden of proof in preference cases. The court stated in relevant part as follows:

“At common law the onus generally lies on the office holder, i.e. the liquidator or administrator to establish that the necessary conditions are met for the order avoiding, varying or setting aside the particular transaction. See *PEAT VRS GRESHAM TRUST LTD* (1934) AC 252; *Re M. KUSHLER LTD* (1943) AC 22. It however appears that the provisions in Section 16 particularly subsection 3 of the Bodies Corporate (Official Liquidations) Act 1963 Act 180 give a different indication.”

The Court went on to say:

“In the opinion of the court the provision in subsection 3 has made an inroad into the common law position that it is the liquidator (office holders) who must prove the ground for the avoidance. Though there is the general rule in construction that there is a presumption against the changes in the common law, where the presumption had been clearly rebutted by the clear words of the statute, such changes must be allowed for the statute to prevail. See *ASIBEY VRS AYISI* (1973) 1 GLR 102.”

The conclusion made by the Court with due respect is not the case. The common law position requiring the Liquidator to prove the conditions necessary for avoidance in preference cases was not changed under Act 180. The Liquidator bears the burden to prove all the conditions under Section 29 of Act 180. Intention is one of the many conditions under Section 29. Ability to prove direct intention was difficult in practice and for that matter, the common law eased the standards from one of requiring a direct intention to that of making inferences from the circumstances of the case. The *Re M. Kushler* and *Peat* cases stand for that proposition which was lifted into Ghanaian law. If Section 16(3) dispensed with all the requirements of proving preferences, then there will be no need for Section 29 which will be made redundant or superfluous. If that was the case, the Court should have addressed Section 29, but the entire decision did not make reference to Section 29.

The Insolvency Commission was aware of the problems Liquidators faced under the corresponding provisions of the English Act of 1948. To ease the work of the Liquidator, they proposed that *Re M. Kushler* should apply and also that the Liquidator should be able to recover the preference transaction without going to Court.³²² The later part resulted in the provision to the effect that: “...the liquidator shall give notice to the creditor so preferred and require such creditor within the period specified in the notice to restore to the liquidator...”³²³ The Insolvency Commission stated that before the Liquidator made this determination, he must be convinced or satisfied that the transaction was made with a dominant intention to prefer. Where the Liquidator goes to Court, he must prove the conditions for avoiding a preference. The creditor can defend the action by showing

³²² See Final Report of the Commissioners Appointed to Enquire into Insolvency law of Ghana, 160 (1961).

³²³ See Section 29 of Act 180.

that the debtor was solvent at the time of the transfer or perhaps is the bona fide owner of the property.

Where the Liquidator decides not to go to Court but instead issue a notice to the preferred creditor, an aggrieved creditor may go to court to set aside the notice. In such appeal cases before the court, the creditor must show that the transaction was bona fide.³²⁴ This does not mean that all the conditions necessary to show that the transaction is a preference rest on the creditor. Had the Judge avert his mind to Section 29 of Act 180 he would have come to the conclusion that all the conditions necessary to prove preference have not been dispensed with on the part of the Liquidator. The Judge took Section 16 as holding the rationale behind preference transactions and then interpreted Section 16(3) as eroding the common law position.

The cases referred to by the court to wit *Peat v Gresham Trust Ltd* (1934) AC 252 and *Re M. Kushler Ltd* (1943) AC 22 are classic cases dealing with repayment by preference creditors during winding up. In *Peat v Gresham*, the court held that:

“the onus was on the liquidator, as the person claiming to avoid the transaction, to establish that the real intention of the debtor company was to prefer the respondents; that onus was only discharged when the court, on a review of all the circumstances, was satisfied that the dominant intent to prefer was present; that might be a matter of direct evidence or of inference, but where there was not direct evidence and there was room for more than one explanation it was not enough to say that the intent to prefer must be inferred..”

In that case, the company deposited its title deeds as security for money owed to Respondent. The Respondent failed to register the charge on the security as required by law. Ten months after that Respondent learned that the company contemplated filing for liquidation. The Respondent quickly

³²⁴ See Final Report of the Commissioners Appointed to Enquire into Insolvency law of Ghana, 159-160 (1961).

applied to the court and asked for an extension of time to complete registration. When the company heard of the creditor's application, it suspended its petition for winding up until the court granted the Respondents extension of time to complete registration of the charge thereupon the company filed for winding up. The liquidator sought to set aside the charge. It was held that the liquidator failed to prove on the evidence that the transfer was done with intent to prefer the Respondent.

In *Re Kushler Ltd*, the insolvent company made two payments to the bank to defray its overdraft on the same day it made a resolution for winding up of the company. The court held that the proper inference to be drawn given the circumstances was that the payment was made with the view of giving the bank preference over other creditors. The Liquidator bore the burden to prove that the transfer amounted to a preference which was discharged rightly in this case.

These cases support the proposition that the Liquidator bears the burden to prove intention necessary to show that a transaction is a preference. It also stands for the proposition that intention need not be direct and can be inferred from the circumstances.

Section 16 complements the gathering of assets and together with sections 29 and 30 greatly enhances the estate of the debtor but at no point was it intended to make an inroad into the creditor preference law under section 29 of Act 180.

Put in its proper perspective, *The Liquidator v Joseph Karam* is a classic creditor preference case.³²⁵ All three requirements were met. There was a transfer of company's property. This was done within six months before winding up. It was done with the dominant intention to prefer Joseph Karam at the expense of other creditors which were the banks pursuing the company for its money. Joseph Karam was in close affinity with the company. He gave monies to the chairman

³²⁵ The concept of fraudulent transaction in bankruptcy has not yet been developed into Ghanaian bankruptcy law. If that is developed, it could take care of transactions made at undervalue or under-arm's length.

and even gave monies to the company to pay its worker's salary. He became an unsecured creditor for that matter. The company decided to pat his back by transferring the factory premises and other property to him at an under value. This is true because the purchase price was unknown and there was no resolution of the board or shareholders sanctioning the transaction. On the whole, this was a collusive transaction with the dominant intent to undercut secured and unsecured creditors. In this case, Section 29 will operate to set aside the transfer made to him since the transfer was made with the dominant intention to over-reach or disadvantage other unsecured creditors. His option will be to lodge a proof of debt with the Liquidator for his debt to be rank according to payment priority under Act 180. Relying on section 16(3) in the circumstances like this will likely occasion the loss of property to the debtor's estate. Assuming the assignment made by Metalloplastica to Joseph Karam was without fraudulent misrepresentation, he could have proved that the factory lands and premises were his and rebutted the presumption in section 16 (3), but he could not escape the preference law under section 29 of Act 180. Even though the Court cited authorities, which goes to buttress creditor preference repayments, it muddied the waters when it resorted to section 16 of Act 180 to decide the case without addressing section 29 of Act 180.

Restoring Property to the Estate

Act 180 sets a 'relevant period' within which all payment and transfer of property made in respect of a debt owed by the company to creditors must be restored to the Liquidator. The relevant period is twenty-one days. Thus all payments and transfers made to creditors 21 days before the presentation of the petition for winding up are automatically called in question and all recipients are required to restore such sums or property to the liquidator. This applies to all uncompleted execution properties in the hands of the sheriff. The sheriff is required to deduct sheriff and bailiff fees and then restore all properties it has taken under execution by a creditor to the Liquidator. The

only exceptions are monies or transfers made in respect of debts incurred during the relevant period, transfers made in respect of secured debts, transfers made by the company to its bankers which monies has been used to meet cheques drawn by the company and transfers made on enforcement against third parties of guarantees or indemnities, or of a mortgage, charge or lien on that party's property.

Repayment of gifts

Section 31 of Act 180 empowers the Liquidator to recover any excess benefit accruing from the disposition of the company's property otherwise than for full value in settlement of a debt or obligation due. The relevant period is two years after the commencement of winding up or more than two years but less than ten years after commencement of winding up which was made at a time when the company was insolvent. Here it is enough for the liquidator to prove that the transaction was undervalued. Any excess benefit restored under this section can be submitted to the Liquidator as a provable debt unless it can be shown that the directors committed a breach of duty under sections 203 to 205 of the Companies Act, 1963 (Act 179).

Repayment by Moneylenders

Section 32 of Act 180 allows the liquidator to pursue any money paid to a Moneylender within ten years ending with the making of the winding up order. The requirement is that the money must be paid under the circumstances such that a Court would if proceedings were brought under provisions of Section 3 of the Loans Recovery Ordinance (Cap. 175), have ordered the moneylender to make repayment to the company. Section 3 of the Loans Recovery Ordinance deals with a borrower's right to sue and maintain a claim for the re-opening of a loan transaction because it is harsh and unconscionable and to ask for accounts.

Avoidance of assignment and floating charges

Section 33(1) of Act 180 provides that “any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.” This includes a floating charge upon the whole of a company’s property for the benefit of all its creditors.³²⁶ Under Ghanaian law, a floating charge “is an equitable charge over the whole or a specified part of the company's undertaking and assets both present and future...”³²⁷

A floating charge over the property or undertaking of a company is invalid if it is created within twelve months of commencement of winding up and it can be shown that the company was insolvent at the time of creating such charge.³²⁸ The charge once created must be registered within 28 days. If the particulars are not registered within the statutory period or extension granted by the court, such a charge becomes void.³²⁹ A floating charge invalidated under this rule shall be dealt with as part of the general assets of the company available for distribution to creditors.

Call on Contributories

Section 34 entitles the Liquidator to either before or after ascertaining the assets of the company to make calls on contributories. These are members who are entitled to pay the liabilities of the company in the event of winding up. Some companies are not limited liabilities entities and for that matter, their members guarantee to pay up any liabilities in the event of winding up. A contributory has the right to appeal such calls where they feel aggrieved. In the absence of an appeal, the call becomes conclusive evidence of debts due to the company, which must be paid

³²⁶ This section is copied from section 320(2) of Companies Act 1948. See also *London Joint City and Midland Bank v. Dickinson (H.), Johnstone Claimant* [1922] W. N. 13.

³²⁷ See Section 87 of Companies Act, 1963 (Act 179).

³²⁸ Section 90 of Companies Act, 1963 (Act 179).

³²⁹ Mills J.E.A, Priority Between A Debenture Holder Secured By A Floating Charge And An Execution Creditor, [1986-90] Vol. XVII UGLJ. See also sections 107-118 of Companies Act, 1963 (Act 179).

into either the company account or to the Liquidator. The call under this section has the force of an order of a court.

Disclaimer

Section 43 of Act 180 allows the Liquidator to disclaim onerous property that is or will be detrimental to the estate of the debtor. It also allows the Liquidator to terminate the rights and interest of the company in any unprofitable contract.³³⁰ The Liquidator can disclaim a property or a contract within one year after the commencement of winding up.³³¹ If any person is interested in an onerous property, he/she may give the Liquidator one month's notice to either disclaim or elect to continue ownership of such property. If the Liquidator fails to make an election, an interested party may apply to the court for relief under Section 43(2) of Act 180.

The avoiding powers of the Liquidator discussed above shape the estate of the debtor for distribution to his creditors.

7. Treatment Of Subsidiary In A Group Of Companies (Enterprise Groups)

The concept of separate legal personality means that the corporation is different from its shareholders with separate rights and liabilities. This makes it possible for a group of companies under the same control or management to operate as separate legal entities with different rights and responsibilities. It is common for companies in a group to advance loans, guarantee loans and provide security for credit for other members of the enterprise group. When insolvency occurs, the rest of the group distant themselves from the insolvent member for fear of downgrading, loss of

³³⁰ See Gower L.C.B, Modern Company Law 736 (4th Edition, 1979).

³³¹ Disclaimer typically allows Liquidators to surrender or disclaim leases. Assuming a debtor has two commercial tenancies one prosperous and the other onerous to the estate, the Liquidator can assume the prosperous tenancy and continue to trade from the premises and disclaim the bad one.

business or being treated the same way as the insolvent or bankrupt member. The question that arises is whether a bankrupt member of an entity should be treated as a single entity or as a member of a whole group attaching responsibility for the debt owed to creditors to the whole group. Act 180 of Ghana does not answer these very important questions.

8. Receivers And Managers

A common way of securing the repayment of loans in Ghana is for the company to grant a floating charge over all its undertaking and assets. The company can deal with the properties secured by the charge in the ordinary course of its business unless the floating charge crystallizes.³³² One of the many ways a charge can crystallize is through the appointment of a Receiver and Manager. When the appointment is made, the charge becomes a fixed charge on the assets of the company.³³³ The happening of this event prevents unsecured creditors from dealing in any way with the property or levying execution over any part of the company's assets because, by operation of law, the assets have been assigned to the owners of the debenture.³³⁴

The primary function of the Receiver is to receive and recover the assets of the company. A Receiver has the power to collect rents and profits and discharge all outgoing in respect of the assets. As a Manager, his primary function is to carry on the business of the company with a view

³³² See sections 87-90 of Companies Act, 1963 (Act 179) and also Lord Macnaghten in *Government Stock v. Manila Railway Co. Ltd* [1897] A. C 81 at p. 86 and *Illingworth v. Houldsworth* [1904] A.C 355.

³³³ A director and accountant of the debtor company cannot be appointed as receivers and manager of the same company. A person of unsound mind, an infant, a person who has been disqualified as a director and an un-discharged bankrupt cannot be appointed as receivers and managers. See Section 236 of Companies Act 1963, (Act 179).

³³⁴ Mills J.E.A, Priority Between A Debenture Holder Secured By A Floating Charge And An Execution Creditor, [1986-90] Vol. XVII UGLJ.

to realizing the security.³³⁵ On the date of appointment of Receiver or Manager, the powers of the director's cease. The Manager takes over the control of the affairs of the company until the security is realized.³³⁶

The court or the parties to a debenture deed may appoint a Receiver or Manager. When the court appoints a Receiver or Manager, he/she becomes an officer of the court but not an officer of the company. When the parties appoint him under an instrument, he shall be the agent of the person on whose behalf he was appointed. If he is however appointed as a Manager over the whole or any part of the company's undertaking, he shall be deemed an officer of the company and stand in a fiduciary position just as a director or liquidator of the company.³³⁷ Even though a Manager may find himself in this position, his primary duty is to those on whose behalf he is acting. Due to the restricted nature of the position of a Receiver (who is not charged with running the affairs of the company) he is generally not deemed an officer of the company or stand in a fiduciary position to it.

The posture the Receiver and Manager assume in relation to the company is important because of liabilities that may arise during their tenure. Some people are reluctant to deal with or contract with a Receiver because of the risk attached to his position. A Receiver or Manager is personally liable on contracts he enters into unless the contract provides to the contrary. If the Receiver or Manager accrues any liability as a result of entering into any proper or genuine contract, he is

³³⁵ See section 238 of Companies Act 1963 (Act 179) and also Lawrence Collins, Floating Charges, Receivers and Managers and the Conflict of Laws, The International and Comparative Law Quarterly Vol. 27, No. 4, 691-710 (Oct., 1978).

³³⁶ When a Manager is appointed over a company undergoing liquidation, the Liquidators power continue to operate and unaffected in an involuntary liquidation. The Liquidator's power ceases only when the company is undergoing member's voluntary liquidation.

³³⁷ See Section 240 of Companies Act 1963 (Act 179).

entitled to be indemnified out of the assets over which he was appointed. If the assets are not sufficient, he is entitled to be indemnified by his appointers.³³⁸ In *Natar v Boye (The Receiver) and Fyne Ltd*, under a debenture between the Standard Chartered Bank and Fyne Ltd, the Bank appointed the Defendant as a Receiver over the assets of Fyne Ltd. The Receiver decided to continue the employment of the Plaintiff who was the Managing Director of Fyne Ltd. He promised to pay the salaries and end of service benefits of the plaintiff during the period of employment. Subsequently, the Receiver wrote to terminate the appointment of the Plaintiff. Having failed to pay the salary and benefits as promised in his appointment letter, the Plaintiff issued a writ against the defendant in his capacity as the Receiver for his salary and benefits. The defendant (Receiver) resisted the action on the grounds that the Plaintiff's salary could not be paid because he was an unsecured creditor who could be paid after all secured creditors had been settled. The High Court held that:

“By law, all appointments with the company should have ceased on the appointment of the receiver. The defendant knew this pretty well when he proceeded to engage the plaintiff on the basis of his contract with the company. I do not accept the view that he should be permitted to engage people and when it comes to payment, to turn round to avoid liability on some technical ground... Having induced the plaintiff to continue in the employment of the company, the defendant is liable to pay the remuneration of the plaintiff to him.”³³⁹

The Court ordered the Defendant to pay the salary and end of service benefit to the Plaintiff. The decision, in this case, draws scrutiny and calls for further elaboration. First Brobbey J., in his judgment, stated as follows: “By law, all appointments with the company should have ceased on

³³⁸ *Id* section 241 et seq.

³³⁹ [1992] 2 GLR 145-149.

the appointment of the receiver.” Secondly, he stated that: “The authorities indicate that the defendant, as receiver, is an agent of the company.” These statements of law must be put in its proper perspective and analyzed seriatim.

Appointments after appointment of Receiver

The Companies Act 1963 (Act 179) does not provide what happens to employees after the appointment of a Receiver. In *Mack Trust (Britain) Ltd*, Pennycuik J., stated as follows:

“There appears to be no actual decision in relation to a receiver appointed out of court who is the agent of the company, but I was referred to the dictum of PLOWMAN, J., in *Re Foster Clark, Ltd.'s Indenture Trusts, Loveland v. Horscroft*, and also to a number of textbook statements all to the effect that the appointment of a receiver out of court does not of itself bring about the determination of current service contracts. I have no hesitation in reaching the same conclusion myself.”³⁴⁰

Professor Gower also reaches the conclusion that the appointment of a Receiver out of court, does not automatically terminate the contract of employment within the company unless the Receiver sells the business.³⁴¹ Section 238(3) provides that the power of the directors to deal with the property over which the receiver is appointed however ceases. This does not mean they are automatically terminated. The Receiver can terminate or continue the employment of all employees. It is therefore not accurate to state that all appointments by the company cease upon the appointment of a Receiver out of court.

Receiver as agent of the company

³⁴⁰ [1976] 1 W.L.R. 125.

³⁴¹ Gower L.C.B, Modern Company Law 490 (4th Edition, 1979).

Section 240 (1) of the Companies Act 1963 (Act 179) makes it clear that a Receiver is an agent of the party who appointed him. This is the position where no intention to the contrary is shown. A Receiver, therefore, is not deemed an officer of the company or stand in a fiduciary position to the company unless the contrary is shown in the debenture deed. The situation is different if he was appointed a Manager over the whole or part of the company's undertaking. In that case, he became an agent and stood in a fiduciary position. The statement by Brobbey J., that the Receiver is an agent of the company *simpliciter* cannot be accurate. The Learned Judge made his observation without reference to the relevant provisions of the Companies Act 1963 (Act 179). Had he addressed his mind to this provision he would have come to a different conclusion on the position of the law.

Further elucidation of Natar's case

The Receiver, in this case, was appointed out of court under a debenture instrument between the Standard Chartered Bank and Fyne Ltd. The debenture deed stated that the Receiver was an agent of the defendant company. This meant that the parties intended him to be an agent of the company. He would have been deemed an agent of the Bank if this intention wasn't expressly provided for. As Receiver, he decided to continue the employment of the Plaintiff as Managing Director. He had the right to do so.³⁴² In *Re Mack Truck*, where the receiver re-appointed all employees it was held

³⁴² Whether he is an agent of the company or not, section 241(1) the Companies Act 1963 (Act 179) makes it clear that the receiver is personally liable for any contract he enters into unless the contract provides the contrary. This provision deals with future contracts that the receiver may enter into. The receiver incurs no liability in respect of past transaction between the company and third parties. According to Professor Gower in his Modern Principles of Company Law, he is not bound by it. He also does not assume liability because he procures the company to adopt or to go ahead with the contract. The receiver incurs liability when there is a novation by which the receiver with the consent of the third party assumes liability over the contract. See Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 pg. 108 para. 456.

that: “the contract offered on behalf of the receiver and accepted by the first respondent was a contract between the company, acting through the receiver, and the first respondent, and was not a contract between the receiver as principal and the first respondent.”³⁴³ The continuation of the contract of employment between the Receiver and the Plaintiff was binding on the company. The defendants did not deny this fact and the promise they made to pay the plaintiffs salary and benefit. Their argument simply was that, he being an unsecured creditor, could not be paid until secured creditors had been paid. The Court, however, ordered the defendant to pay the plaintiff skipping the queue. Under Ghanaian law, the appointment of the Receiver meant that the debenture or floating charge had crystallized.³⁴⁴ Once crystallized, the asset was assigned to the debenture holder and was ripe to be realized by the Receiver.³⁴⁵ The debenture holder or the Bank, in this case, being a secured creditor, had priority over salary and end of service benefit payment due to the Plaintiff. The order from the Court, directing that the Plaintiff should be paid before the Bank and other creditors, upsets the priority rules for paying secured and unsecured creditors.

Nature of the Position of Receiver and Manager

The Receiver or Manager is for all practical purposes akin to a Liquidator appointed to wind up a company. To successfully carry out his duties, the directors and secretary must prepare a statement of affairs of the company, detailing particulars of the assets of the company, the debts and liabilities of the company, the names and addresses of creditors and a statement of the reasons why the company became insolvent. The Receiver is required to give an account of his stewardship by

³⁴³ [1976] 1 W.L.R. 125.

³⁴⁴ See Section 87 and 88 of Companies Act 1963 (Act 179).

³⁴⁵ See Mills J.E.A, Priority Between A Debenture Holder Secured By A Floating Charge And An Execution Creditor, [1986-90] Vol. XVII UGLJ.

filing particulars of receipts with the Registrar. If he fails the company, a member, creditor, or a Liquidator may apply to the court to enforce his duty to account.

9. Schemes Of Arrangements During Winding Up

An arrangement loosely termed includes a compromise between creditors and members of the company, which is binding on all concerned even though some creditors and members may not have agreed to the terms.³⁴⁶ When a company is in financial difficulties, it may enter into an arrangement with its creditors for the satisfaction of the claim otherwise than payment in full.³⁴⁷ Such agreements can be made by way of the statutory framework under the Companies Act, 1963 (Act 179) and in the event of winding up under the provisions of Act 180. Outside liquidation, schemes of arrangements have been used to secure rehabilitation of an insolvent debtor and to secure a moratorium on the payment of creditors.³⁴⁸

During winding up, the creditors and members may decide to compromise in the form of an arrangement. This may likely result in the reduction of the company's liabilities or a procedure for the establishing of claims and payment.³⁴⁹ It may also result in the sale of the whole or part of the

³⁴⁶ Section 229 (a) provides that: "In this Act, (a) the expression "arrangement" means any change in the rights or liabilities of members, debentureholders or creditors of a company or any class thereof or in the Regulations of a company, other than a change effected under any of the foregoing sections of this Code or by the unanimous agreement of all the parties affected thereby;" See also Final Report of the Commission of Enquiry into The Working And Administration of the present Company Law of Ghana, 169 (1961).

³⁴⁷ Wilkinson et al, Creditors' Schemes of Arrangement and Company Voluntary Arrangements, 319, in Insolvency Law: Theory & Practice edited by Harry Rajak.

³⁴⁸ The comprise and arrangement contained in section 231 covers a wide numbers of things. Gower notes that compromises and arrangements: "ranges from a simple composition or moratorium to an amalgamation of various companies, with a complete reorganisation of their share and loan capital." See Gower L.C.B, Modern Company Law 687 (4th Edition, 1979).

³⁴⁹Wilkinson et al, Creditors' Schemes of Arrangement and Company Voluntary Arrangements, 321, in Insolvency Law: Theory & Practice edited by Harry Rajak.

company's undertaking or assets to another body corporate. The consideration for the sale may be fully paid shares, debentures or other like interests in the transferee company.³⁵⁰

When this happens, the Liquidator has the power to call a meeting of all members and creditors affected by the arrangement. Section 9(1) (e) provide that:

“(1) The liquidator in an official winding up under this Act shall have power,
(e) to make any compromise or arrangement, subject to the provisions of section 231 of the Companies Code, 1963, (Act 179) with creditors or persons claiming to be creditors or being or alleging themselves to have any claims, present or future, certain or contingent, ascertained or sounding only in damages against the company or whereby the company may be rendered liable”

Section 231 of the Companies Act (Act 179) governs an arrangement and amalgamation of this nature. The Court must confirm the arrangement reached by the parties and registered with the Registrar of Companies. At the meeting convened by the Liquidator, the members may by special resolution agree or reject the proposed arrangement. Before the meeting, the Liquidator must send a statement explaining the effect of the arrangement and stating any interests of the directors of the company and the effect the arrangement has on the interest of other persons.

After the meeting of members, the resolution and arrangement details are submitted to the Registrar. The Registrar then appoint a professional accountant to look into the fairness or otherwise of the arrangement and report to the court. After this step, the arrangement is put before the court for confirmation. Once the court confirms the arrangement, it shall have no effect until a copy of the order is delivered to the Registrar and the Registrar cause a notice of the order to be published in the Gazette. After an arrangement, the company may take a different shape. It may

³⁵⁰ See Section 230 of Companies Act 1963 (Act 179).

be liquidated and a new one formed with a new name. This provision is akin to section 206 of the Companies Act of 1948 in England. Though it may have the effect of reorganizing a company, Professor Milman notes that by no stretch of the imagination in England was it taken as an emergency response or rescue procedure for companies undergoing financial distress.³⁵¹

10. Cross Border Insolvency

The increase in trade across borders has resulted in an increase in international credit arrangements. When companies trade across borders, they end up with assets and creditors spread across borders. When bankruptcy occurs, complex issues about the forum and administration of the debtor's assets are raised. In relation to Ghanaian legal system, some of the questions that arise are whether foreign insolvency proceedings are recognized under Act 180; whether a foreign assignee, trustee or liquidator in a foreign proceeding can commence an action for the winding up of the same company in Ghana; whether creditors in other countries will be treated the same way as domestic creditors; and whether judicial assistance is available to foreign courts to resolve cross-border insolvency issues involving Ghana. Act 180 does not answer these questions. This is worrying especially when availability and effectiveness of bankruptcy procedures are important investment consideration for private investors who extend international credit. This is also important investment consideration for public institutions like the World Bank and the International Monetary Fund.³⁵²

11. Conclusion

³⁵¹ See David Milman, Reforming Corporate Rescue Mechanisms; The Reform of United Kingdom Company Law, Cavendish Publishing Limited, 417 (2002).

³⁵² The IMF has been promoting corporate rescue. See International Monetary Fund, Orderly & Effective Insolvency Procedures (1999) available at <http://www.imf.org/external/pubs/ft/orderly/#cross>.

The present law relating to corporate bankruptcy is archaic having remained unchanged since 1963. The truth about the situation is that Act 180 copied the winding up provisions of the Companies Act of 1948 in England. This makes it dates further back in time. Winding up or liquidation remains the primary remedy available to investors and creditors. The economic conditions and the current issues faced by corporations cannot simply be resolved by this archaic piece of legislation. Indeed, modern issues like reorganization, treatment of enterprise groups, cross-border insolvency among others are completely outside the ambit of Act 180.

Aside from its inability to deal with current issues, the lack of incentives for businesses and creditors which makes the law unattractive. This has contributed to little jurisprudence on the subject from jurist and practitioners. While the law has the basics of bankruptcy regime, an upgrade will better serve the aspirations of a robust bankrupt system.

CHAPTER FIVE

STATUTORY PRIORITIES: REVISITING DIRECTOR'S NEAR RELATIVE EXCEPTION IN GHANA

1. Introduction

A fundamental objective of bankruptcy law is to achieve a rateable distribution of the debtor's assets among creditors. Bankruptcy law finds legitimacy in the sense that it works to achieve an equitable distribution of assets rather than the first in time principle under State law collection action. Achieving an orderly and rateable distribution of debtor's assets through the bankruptcy process is often referred to as *pari passu* principle.³⁵³ The principle applies to the distribution of uncharged assets of the debtor since all charged or secured assets are available for distribution to secured creditors.

While the *pari passu* principle has been worked into various statutes dealing with payment of claims during bankruptcy, the ranking of a class of debt is not necessarily determined by the principle. It is determined by the substantive bankruptcy law of a country. The principle is often woven into the ranking system by the substantive law to effect equal and equitable distribution among the various classes of claims determined by a country's bankruptcy law.

To put it differently, when bankruptcy occurs, the law may provide that taxes and wages owed employee must be paid before all other unsecured creditors are paid. The law may further provide that these taxes and wages must be paid rateably. In that case, the law has determined that taxes and wages rank higher than all other unsecured payments. The law has also determined that the payment of taxes and wages should be made rateably. In that sense, the law has created a higher rank for taxes and wages above other unsecured creditors and has determined that the *pari passu*

³⁵³ Roy Goode, Principles of Corporate Insolvency Law, 46 (London: Sweet & Maxwell, 1997) (2nd edn.).

principle operates among that class by ensuring equitable and rateable payout to government and employees who are owed taxes and wages. Gower notes that:

“As in bankruptcy, certain debts are expressly given preference and must be paid, *pari passu* between themselves, before others... Thereafter the remaining debts provable in bankruptcy are paid *pari passu* and if there is then anything left, the non-provable debts.”³⁵⁴

Though the *pari passu* principle is held to achieve equality of treatment in bankruptcy, the fact that some unsecured creditors are preferred among their peers raises an important question about the equality of the *pari passu* principle and how it is used in bankruptcy legislation. Mokal argues that the *pari passu* principle is rather less important than it is made out to be and does not perform the functions it has primarily been designed to achieve.³⁵⁵ The nature of exceptions to the *pari passu* principle gives credence to this line of argument. Exceptions to the rule generally include taxes, wages, statutory liens, set-offs, child support and marital support payments, administrative expenses, fees and charges, contribution to employee benefit plans, etc.

In this Chapter I argue that, first, the proliferation of preference claim betrays the central theme of bankruptcy law- which is the equality of treatment principle. Second, I argue that the denigration of the *pari passu* or equality principle gets worse when creditors are demoted to subordinate class to be paid after all other without any wrongdoing. Regarding the bankruptcy law in Ghana, I argue that the “directors near relative” exception to the equality treatment strip the priority scheme of fairness. I make a suggestion for the imposition of a preference cap in the face of the proliferation of preference claims.

³⁵⁴ Gower L.C.B, Modern Company Law (4th Edition), 731 (1979).

³⁵⁵ Rizwaan J. Mokal, Corporate Insolvency Law: Theory and Application 94 (2005). Mokal argues that priority for secured and unsecured creditors are abrasions on the equality principle. He states further that the *pari passu* principle play no role in ensuring the orderly distribution of the debtor’s assets as it been touted.

2. Concept Of Statutory Priorities

The early set of principles underpinning bankruptcy distribution can be traced to Italian Merchants. This goes back to the middle ages. The merchants devised a system of distribution where all creditors were compelled to accept a proportional distribution of the debtor's assets.³⁵⁶ That was the foundation of the *pari passu* or equality principle. The State taxed the merchants and continued to pursue the tax even in bankruptcy. According to Garrido, tax credits had to be given priority, because the merchants' income was an important source of revenue for the state. Their default had consequences for the city's finances.³⁵⁷ In the year 1542, the British Parliament adopted this practice by enacting An Act Against such Persons as Do Make Bankrupts.³⁵⁸ This law provided that assets of the debtor's estate were to be paid in "portion rate and rate alike according to the quantity of debt."³⁵⁹

As the States began to regulate bankruptcy, it created a tax priority over and above all other payments to merchants.³⁶⁰ The State went ahead to create different sets of priority rules for bankruptcy distribution over the years. Thus in 1842, the Bankruptcy Act gave priority to wages

³⁵⁶ Garrido, J. M. The Distributional Question In Insolvency: Comparative Aspects. Int. Insolv. Rev., 4: 25, 34 (1995).

³⁵⁷ Garrido states further that "merchants agreed to this preferential treatment not only for political reasons, but also because the existence of the merchant community depended on the city being able to perform effectively its function of defence." See *id.*

³⁵⁸ An Act Against Such Person as Do Make Bankrupt 1542 (UK) 34 and 35 Henry VII.

³⁵⁹ *Id.* In the UK, before formal rules were enacted to deal with bankruptcy, creditors resorted to grab law to resolve debtor indebtedness. Thus it was a survival of the fittest race for the assets of the debtor. The scramble for the assets led to undesirable consequences. In some cases, the Courts stepped in to remedy this undesirable consequence where some creditors get paid whilst other gets absolutely nothing. See *Audley v. Harsley* (1628) Cro Car 148; *R v Cotton* (1751) 2 Ves 295, 28 ER 186. See also Christopher F. Symes, Statutory Priorities in Corporate Insolvency Law: An Analysis of Preferred Creditor Status, 16 (2008).

³⁶⁰ Christopher F. Symes, Statutory Priorities in Corporate Insolvency Law: An Analysis of Preferred Creditor Status, 18 (2008).

owed to servants and clerks out of the debtor's estate. This exception was continued into the Bankruptcy Act of 1869. The preceding legislations dealt with individual bankruptcy. As the corporation developed from the Joint Stock era, the individual priority rules were imported into the various company law legislations that followed.

The political system largely influenced the priority rules. Political and other pressure groups lobbied for preference during bankruptcy. The legislature created room for imposing priorities over general unsecured creditors to satisfy the need of the pressure groups. To this end, bankruptcy priorities were not only designed to suit the needs of the merchants but also made a political statement depending on the political pressure exerted at the time.³⁶¹ Legislatures felt free to impose priority rules because it shoved off political pressure and put them in good light with constituents. Garrido notes that even among the priority rules, the legislature tried to superimpose one over the other and was generally reluctant to repeal any priority it has already given because of political pressure.³⁶²

3. Concept Of Priorities In Ghanaian Legal System

The early bankruptcy legislation applied the *pari passu* rule for distribution of assets to creditors. The Gold Coast Bankrupt and Insolvency Act of 1858³⁶³ contained the first set of rules dealing with the distribution of assets to bankrupts. The law required that all similarly situated creditors should be treated equally. Section 26 provided that the assignees shall distribute the debtor's property among creditors in proportion to their unsatisfied claims. The exception contained in Section 26(1) however provided that: "The assignees may pay to any clerks or servants of the

³⁶¹ *Id* at 17.

³⁶² Garrido, J. M. The Distributional Question In Insolvency: Comparative Aspects. Int. Insolv. Rev., 4: 25, 34 (1995).

³⁶³ No. 8 of 1858.

insolvent so much salary or wages for a period not exceeding six months as may be due to them at the time of the declaration of insolvency.” Section 26(7) also provided that: “Every creditor having a specific lien on any part of the insolvent’s property shall be entitled to receive payment in full to the extent of the value of his security, and to claim rateably with other creditors for the balance.” The law, therefore, created two priority class for bankruptcy distribution, which was for clerks or servants and secured creditors. This legislation may have been influenced by the Bankruptcy Act of 1842 in the UK which gave priority to clerks and servants.

Preferential claims were carried on to the Insolvency Act of 1962. The Act created new priority grounds to include rates and taxes owed to the government or local authority. It also deferred payment for a certain type of creditors who were near relatives of the debtor. Near relatives included the debtor’s spouse, parents, issues, brothers, sisters, uncles, aunts, nephews and nieces, whether of the whole or the half blood.³⁶⁴ This set of priority rules was repeated verbatim in the current Insolvency Act of 2006.³⁶⁵

In corporate circles, bankruptcy was dealt with under the Companies Ordinance of 1906.³⁶⁶ This was the first piece of legislation dealing with corporations as distinct from individuals. Under the Ordinance, priority for payment of debts was created for rates, taxes, wages and salaries of clerks and servants, labourers and workmen.³⁶⁷ Section 136(2) provided that the priority claims shall rank equally between themselves, and shall be paid in full, unless the assets are insufficient to pay, in which case, they shall abate in equal proportion among themselves. The priority claims had

³⁶⁴ See section 47 of Act 153. It is important to note here that Act 153 never had the force of law and remained on the books because the Minister of Justice either failed, refused or neglected to issue a Legislative Instrument specifying commencement of the law as required by section 78 of the Act.

³⁶⁵ See section 47 of Insolvency Act, 2006. Coincidentally, it was section 47 as the previous legislation.

³⁶⁶ No. 14 of 1906.

³⁶⁷ Section 136 of No. 14 of 1906.

preference over all floating charges created by the company. Expenses related to the winding up was, however, to be paid before the priority class. Another piece of legislation, the Foreign Companies' Preferential Creditors Ordinance was passed in 1906.³⁶⁸ The law created the position of an Official Receiver who had the duty to wind up foreign companies operating in the colony. Preferential debts for a foreign company included rates and taxes due to the government and wages and salaries due to clerks, servant, labourers and workmen. These debts were to have priority over debentures secured by floating charges and were to rank equally. If the assets of the company were insufficient to satisfy the debt, they shall abate in equal proportion. It created a list of priority payment similar to the Companies Ordinance of 1906.

The 1906 set of winding up rules introduced the *pari passu* rule into the legal system. They also imported the known exception under English law into Ghanaian law. While debtor's assets were to be distributed in an equal and equitable manner, an exception was given to rates, taxes, wages and salaries which were to rank as priority claims over all unsecured debts. The Liquidator's expenses were to be paid out of the assets but before preferred creditors could get anything.

After independence, the Insolvency Commission was tasked with the duty to reform insolvency law in Ghana. The Commission proposed the enactment of the Bodies Corporate (Official liquidation) Act 1963 (Act 180) as a separate law dealing with winding up for distressed companies. The Commission proposed the inclusion of preferential debts in the Act. The Commission stated that its intention was guided as follows:

“In considering what debts should be paid out preferentially we have taken as our yardstick the principle that any exceptions to the general rule that all creditors should share equally in the proceeds of the estate according to the size of their debts should be justified up to

³⁶⁸ No. 18 of 1906.

the hilt. Otherwise the preferential creditors will gain an unfair advantage over the general body of creditors.”³⁶⁹

The Commission proposed that arrears of wages and salaries should be paid preferentially and rank higher than rates and taxes. Taxes and rates were to be paid preferentially compared to general unsecured creditors. The Commission stated that taxes have a character that is different from debts arising from trading activities. Generally, the Commission maintained the list of priority that existed in 1906 but differentiated between wages and taxes. One important addition the Commission proposed was the deferral of debts that are owed by close family members. This addition was a substantial departure from what pertains under the Companies Ordinance 1906 and even the Companies Act 1948 in the UK.

Section 41(1) of Act 180 provides that it shall be the duty of the Liquidator, on the commencement of winding up, to ascertain the class of each debt which ranks for dividends. The classes are provided in section 41(2). Section 41(2) (c) provides that:

“(c) class C, that is to say, a debt or part of a debt which does not fall within class D and is, or was at any time within the year preceding the commencement of the winding up, owed to a director or former director of the company or to a near relative of any such director or former director...”³⁷⁰

The Commission felt that individuals and business should be treated the same way because the majority of businesses in Ghana were a family owned business. They stated in relevant part that: “In our view, this difference in treatment is unfortunate, particularly as so many of the companies registered are in essence family businesses in an incorporated form.”³⁷¹ Near relative though not

³⁶⁹ Final Report of the Commission of Inquiry into Insolvency Law of Ghana, 179 (1961).

³⁷⁰ See section 41 of Act 180 for the full class of debts.

³⁷¹ Final Report of the Commission of Inquiry into Insolvency Law of Ghana, 249 (1961).

defined in Act 180 was defined in the Insolvency Act, 1962 (Act 153) to include debtor's spouse, parents, issues, brothers, sisters, uncles, aunts, nephews and nieces, whether of the whole or the half blood.³⁷² The Commission stated that the provision should be interpreted in a like manner as the Insolvency Act, 1962 Act 153).³⁷³ The current Insolvency Act has maintained this definition.

4. The Director's Near Relative Exception

The near relative exception under section 41 of Act 180 presents some questions. Ordinarily, a corporation is separate from its incorporators and officers. When bankruptcy occurs it is expected that this distinction will be maintained unless some wrongdoing can be shown. It is argued here that, the near relative exception does not rise to the standard the Commission held for itself as justifying every preference or demotion, it's misguided and defeat the *pari passu* principle for the following reasons:

Separate Legal Personality of the Company from its Incorporators

The company is a juristic entity separate from its incorporators. This is a cardinal rule of company law.³⁷⁴ Separate legal personality is recognized under Ghanaian company law. Section 24 of the Companies Act, 1963 (Act 179) provides that the company shall have all the powers of a natural person of full capacity upon incorporation.³⁷⁵ Companies, therefore, has the full capacity as natural

³⁷² section 47 (2) (a) and (b) provides: "For the purposes of this section the following shall be taken to be near relatives of the debtor, that is to say,

(a) his spouse, parents and issue;

(b) his brothers, sisters, uncles, aunts, nephews and nieces, whether of the whole or the half blood."

³⁷³ Final Report of the Commission of Inquiry into Insolvency Law in Ghana, 249 (1961).

³⁷⁴ See *Salomon v Salomon & Co Ltd* [1896] UKHL 1. See also Gower L.C.B, Modern Company Law (4th Edition), 97-102 (1979).

³⁷⁵ Section 24 of Act 179 provides as follows: "Except to the extent that a company's Regulations otherwise provide, every company registered after the commencement of this Code and every existing company which, pursuant to section 19 of this Code, adopts Regulations in lieu of its memorandum and articles of association shall have, for the

persons to further their objects under their memorandum or regulations. This means that the shareholders and officers are separate from the company as an entity. In *Salomon v Salomon*, Lord Macnaghten stated:

“The company is at law a different person altogether from the subscribers...; and, though it may be that after incorporation the business is precisely the same as it was before, and the same person are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members liable, in any shape or form, except to the extent and in the manner provided by the Act.”³⁷⁶

While the corporate veil may be lifted under appropriate circumstances to treat shareholders as one with the company, those grounds have not been extended to include bankruptcy simpliciter.³⁷⁷

Bankruptcy is not a ground for lifting the corporate veil to attach responsibility to directors and their near relatives. In *Morkor v Kuma*, where a director who was also the sole shareholder of the company was sued together with the company for a debt owed by the company, the Supreme Court held that until the corporate veil was lifted, it was the company but not the director that was the proper party to have been sued. The Court stated that:

“Thus in the absence of other factors driving the case such as fraud, improper business conduct, deliberate attempts at evasion of legal obligations, or other devises or wilful misdeeds on the part of the appellant, the majority of the Court of Appeal erred in lifting the veil of incorporation upon those allegations and finding the appellant personally liable

furtherance of its objects and of any business carried on by it and authorised in its Regulations, all the powers of a natural person of full capacity.”

³⁷⁶ *Salomon v Salomon & Co Ltd* [1896] UKHL 1.

³⁷⁷ *Id.*

for the first defendant's debts and a proper person to be sued with the first defendant for the recovery of the debt owed the respondent by the first defendant.”³⁷⁸

The Court stated, that where the company was set up to further a fraudulent activity or was set up to avoid contractual activity, then the Court was prepared to lift the veil of incorporation. The Court stated:

“But the veil of incorporation could be lifted only in circumstances where in the light of the evidence the dictates of justice, public policy or the Companies Code, 1963 (Act 179) so required. Although it was impossible to formulate an exhaustive list of those circumstances, on the authorities, they included situations where it could be shown that the company had been established to further fraudulent activities or to avoid contractual liability.”³⁷⁹

Lifting the corporate veil, therefore, find support when wrongdoing is committed or when a strong public policy ground is canvassed. In the absence of such facts, it becomes purely an overstretch to attach responsibility, not to shareholders but directors and their families.

Further, companies may have the limitation of liability.³⁸⁰ This limitation means that the shareholders are not personally liable for the debt of the company. This has been a common

³⁷⁸ [1999-2000] I GLR 721 – 740.

³⁷⁹ *Id.*

³⁸⁰ Section 9 of Act 179 provides that: “(1) An incorporated company may be either,

(a) a company having the liability of its members limited to the amount, if any, unpaid on the shares respectively held by them, in this Code referred to as a company limited by shares; or

(b) a company having the liability of its members limited to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up, in this Code referred to as a company limited by guarantee; or

(c) a company not having any limit on the liability of its members, in this Code referred to as an unlimited company.

(2) A company of any of the foregoing types may either be a private company or a public company.”

understanding of company law dating from the Joint Stock era. Limitation of liability absolves shareholders unless some wrongdoing is revealed or perhaps some calls on shares are outstanding. In the absence of these factors, it is unjustified to lump the director who is technically an employee (unless his position requires him to have shares or he decides to own shares or has shares) and his relatives and defer their ranking to a subordinate class. While the corporate veil may be lifted under the express statutory provision,³⁸¹ such provision must not be discriminatory and unfair.

Discriminatory to Single Out Directors

The directors (even if they are shareholders) stand on a different footing from the company. They are officers or agents of the company.³⁸² Though they are the face and engage in the day to day running of the affairs of the company, they are legally different and separate from the company. Directors are not the only officers of the company. The Secretary is a prominent officer whose position has been enhanced under the Companies Act of 1963. The Act requires the company to keep a register of directors and secretaries of the company. The Act also requires the company to maintain Accountants who prepare Financial Reports of the company. All these officers are recognized by the Companies Act of 1963. These officers, unless they own shares, are not members of the company and cannot exercise the powers given to members under the Companies Act. They can only exercise the powers of agents of the company and mostly stand in a fiduciary position to the company. It is discriminatory to single out directors and their relatives without extending the same to treatment to secretaries, auditors and all other officers of the company.

³⁸¹ See Gower L.C.B, Modern Company Law 112 (4th Edition, 1979).

³⁸² See Section 139 to 140 of Act 179 of Ghana.

English Bankruptcy Act 1914 Overstretched

The Insolvency Commission stated in its Report that even though the Companies Ordinance 1906 had preferential claims, it did not provide for the deferral of certain claims. They proposed that family debts should be deferred as was done under section 36 of the Bankruptcy Act 1914 of England.³⁸³ Section 36 dealt with the postponement of business loans or claim for husband and wife. Where a wife was adjudged bankrupt, her husband's claim against the estate was deferred until all others were paid. The same was provided for debts owed by the husband towards the wife. This law was considered by the Cork Committee in the 1980's. The Committee stated that it was only fair that husband and wife or persons closely connected should be treated as if they were dealing at arms-length. They stated that spouses stood to benefit from the success of each other's business. Spouses, therefore, should be seen as business partners when bankruptcy occurs.

Regarding companies, the Committee proposed that a company should be treated as close to another company when the shareholding structure in the two entities are the same or closely related. They proposed further that an individual should be treated as close to the company where he is a director or have substantial shareholding or is connected to a director.³⁸⁴ Treating individuals as closely connected to the company differently meant that they could not act as trustees or liquidators, make it easier to set aside, avoid or recover assets and in certain cases subordinate their loans and claims. The Committee stated that if their proposal were accepted it would be necessary for a comprehensive definition of connected persons to be defined in the Insolvency Act.³⁸⁵ The Insolvency Act 1986 deferred business debts between spouses.³⁸⁶ It did not

³⁸³ Final Report of the Commission of Inquiry into Insolvency Law of Ghana, 249 (1961).

³⁸⁴ Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558 pg. 288 para. 1033-1037.

³⁸⁵ *Id.*

³⁸⁶ See Insolvency Act 1986 section 329.

extend the list to near relatives. It also made provision dealing with parent and subsidiary companies and how claims between them should be handled in bankruptcy. It did not defer debts owed to near relatives of directors.

The near relative exception under Act 180 is an overstretch from what pertain in the UK. It poses practical problems because given the wide list of people who are deemed near relatives; some people may deal with the company at arms lengths without knowing they were ever related to the director(s) of the company. Practically, how is one supposed to ascertain whether the many directors of a company, with numerous branches across the ten regions of Ghana, are related to him or not before he decides to deal with the company at arm's length? That is not practicable.

Family Business Not Defined

To start with, family business as a term is open to differing definitions. There is no consensus as to what is a family business.³⁸⁷ While there are acceptable factors to indicate that a company can be termed a family business, the Commission did not give any indication as to how a business is to be characterized as such given the background of differing positions. Defining a family business is important because, for the purposes of the bankruptcy law, the people earmarked loses their turn in line for payment. They may get nothing at all if their claims are deferred. Therefore, to classify a business as a family business, without any legally ascertainable grounds and then lump the

³⁸⁷ Mike Peters, Succession in Tourism Family Business: The Motivation of Succeeding Family Members, *Tourism Review*, 60, 12-18. (2005) <http://dx.doi.org/10.1108/eb058461>, Garcia-Castro, R. and Casasola, M.J., A Set-Theoretic Analysis of the Components of Family Involvement in Publicly Listed and Major Unlisted Firm, *Journal of Family Business Strategy*, 2, 15-25. (2011) <http://dx.doi.org/10.1016/j.jfbs.2011.01.002>. Sarbah Albert and Xiao, W. Good Corporate Governance Structures: A Must for Family Businesses, *Open Journal of Business and Management*, 3, 40-57. <http://dx.doi.org/10.4236/ojbm.2015.31005> (2015).

spouse, parents, issues, brothers, sisters, uncles, aunts, nephews and nieces, whether of the whole or the half-blood of directors to the list of deferred payments is arbitrary, to say the least.

Differing a Priority Class must be Legitimate and Justified

Keay and Walton note that: “Before a creditor is entitled to claim a preferred position it must be demonstrated that deviation from the inveterate and equitable *pari passu* principle is warranted.”³⁸⁸

In the same way, since differed position deviates from the equality principle, it must be shown that a deviation is warranted.

Creditors right to payment are determined pre-bankruptcy. When bankruptcy occurs, it is generally expected that these rights will be respected in the bankruptcy process.³⁸⁹ It is the assurance that these rights will be respected that make the mad rush for the assets of the creditor unattractive.

Goode notes that the *pari passu* principle was designed to “strike down all agreements which have as their object or result the unfair preference of a particular creditor by removal from the estate on winding up of an asset that would otherwise have been available for the general body of creditors.”³⁹⁰ Bankruptcy law is thought of as instituting an orderly distribution of the debtor’s assets to creditors through the use of the *pari passu* principle and the principle is therefore thought of as central to achieving the aims of bankruptcy law.³⁹¹ Goode states further that: “The principle first come first served gives way to that of orderly realization of assets by the liquidator for the

³⁸⁸ Keay A, & Walton P, The Preferential Debts’ Regime in Liquidation Law: In the Public Interest? Company Financial and Insolvency Law Review, 3 (1999), 92.

³⁸⁹ Goode notes that “It is this principle of rateable distribution which marks off the rights of creditors in a winding up from their pre-liquidation entitlements.” See Roy Goode, Principles of Corporate Insolvency Law, 46 (London: Sweet & Maxwell, 1997) (2nd edn.).

³⁹⁰ *Id* at 142.

³⁹¹ Mokhal argues to the contrary that the *pari passu* principle has nothing to do with orderly distribution of the debtor’s estate. He argues further that, the principle has limited application today and it is not central to bankruptcy law today than it is made to be. See Rizwaan J. Mokhal, Corporate Insolvency Law: Theory and Application 92 (2005).

benefit of all unsecured creditors and distribution of the net proceeds *pari passu*.³⁹² The *pari passu* principle is claimed as ensuring uniformity of benefits to creditors.³⁹³ Seligson explains the equality as follows:

“Equality is equity. That maxim is a theme of bankruptcy administration- one of the cornerstones of the bankruptcy structure. All persons similarly situated are entitled to equality in treatment in the distribution of the assets of the bankrupt estate.”³⁹⁴

Respecting pre-bankruptcy rights mean giving equal and equitable treatment to all creditors. All creditors similarly situated must be treated equally. That is what the principle is designed to achieve. A deviation from this principle must be justified to the hilt. To the extent that it is hard to justify a near relative exception, in the face of established laws on separate legal personality, certainty and discrimination against the long held equality principle, the directors near relative exception fail. It is an anomaly that must be purged from the Statute.

5. Preference Cap During Bankruptcy Distribution

It is common knowledge that preferred creditors deplete the assets available for distribution to general unsecured creditors. Keays et al. notes that: “... the amount which they are owed can often be so large that there is very little, or nothing left for the general unsecured creditors.”³⁹⁵ The question that is apposite here is if it is agreed that *pari passu* principle is a fundamental objective of bankruptcy law, then why do bankruptcy law allow preferential payments that take away or

³⁹² See Roy Goode, Principles of Corporate Insolvency Law, 46 (London: Sweet & Maxwell, 1997) (2nd edn.).

³⁹³ Keay A, & Walton P, The Preferential Debts’ Regime in Liquidation Law: In the Public Interest? Company Financial and Insolvency Law Review, 3 (1999), 95.

³⁹⁴ See Charles Seligson, Preferences Under the Bankruptcy Act, 15 Vanderbilt Law Review 115 (1961).

³⁹⁵ Keay, A., Boraine, A. and Burdette, D., Preferential Debts In Corporate Insolvency: A Comparative Study. Int. Insolv. Rev., 10: 167–194. doi: 10.1002/iir.93 (2001).

depletes benefits general unsecured creditors can obtain from the bankruptcy process? Keays et al. note that the rule is not absolute:

“But, as Professor Goode observes, adroitly, it is respectfully submitted, '[t]he *pari passu* principle, though of fundamental importance, is not absolute. For reasons of policy insolvency law provides certain deviations. And the most significant deviation is caused by provisions in legislation which require insolvency administrators to pay out certain unsecured creditors who, while having no priority under the general law, are given a special priority to payment.”³⁹⁶

The classic understanding of the *pari passu* principle is therefore not absolute since there are some statutory exceptions to the rule. The exceptions to the rule currently are many and varied in most countries but generally include an exception for taxes, wages, statutory liens, set-offs, child support and marital support payments, administrative expenses, fees and charges, contribution to employee benefit plans, special claims, etc.

The nature of the exceptions has led modern scholars to argue that, the *pari passu* principle is rather less important than it is made out to be because it does not constitute an accurate description of how of the assets debtor company are distributed.³⁹⁷ This argument is sound, given that sometimes the amount owed preference creditors is so large that nothing is left for general unsecured creditors. Preference claims in their current state betray the central tenets of bankruptcy law. It begs the question: what sort of orderly distribution allow one similarly situated creditor to cut the queue and leaves the other creditor with nothing to fall on, when the basis of staying in the

³⁹⁶ Keay, A., Boraine, A. and Burdette, D., Preferential Debts In Corporate Insolvency: A Comparative Study. Int. Insolv. Rev., 10: 167–194. doi: 10.1002/iir.93 (2001). See also See Philip R. Wood, Principles of International Insolvency 27, (1995) noting that deferred creditors often get nothing out of the entire liquidation process.

³⁹⁷ Rizwaan J. Mokal, Corporate Insolvency Law: Theory and Application 94 (2005).

queue, is a promise of maximized returns to the creditor? The idea of collective proceeding is premised on maximized returns to creditors. It is a blatant betrayal to force a collective procedure on all creditors, to satisfy the needs of a few. More preferences are being considered on a regular basis. Each time preference is allowed, general unsecured creditors bear the cost of that preference because it decreases the amount available for distribution to that class. In a study of the bankruptcy system distribution in Canada, Ziegel found that the impact of stratifying unsecured debtors into preferred and general unsecured creditors are significant. Out of a study of 95 pure bankruptcy or liquidation cases, he found that secured creditors recovered an average of 43%, preferred creditors recovered an average of 17%, trustees recovered 99% while general unsecured creditors recovered 5%.³⁹⁸

General unsecured creditors are held hostage by increasing preferences. If they resort to self-help or state law collection, the debtor will reverse the fruits of their labour by invoking avoiding powers to undo their action. If they decide to remain in the bankruptcy process, they are cut in line by a list of increasing preference which decreases the pool of assets available to pay them. Preference must be approached with care because it has the potency to tilt the distribution scale unfairly against general unsecured creditors. The current condition is unsatisfactory. Some countries have addressed this situation by either eliminating some priority claims such as taxes. Others jurisdiction such as Germany has shredded the concept of statutory priority by abolition preference claims completely.³⁹⁹

³⁹⁸ See Jacob Ziegel, Preferences and Priorities in Insolvency Law: Is There a Solution? 39 St. Louis U. L.J 793-794, 1994-1995.

³⁹⁹ See Christopher F. Symes, Statutory Priorities in Corporate Insolvency Law: An Analysis of Preferred Creditor Status, 185 (2008).

Given that preference claims have entrenched itself in the administration of bankruptcy, a total abolition will be a drastic remedy. It is suggested however that a preference or priority payment cap should be introduced to address the situation. This may be implemented by creating or setting aside a maximum sum in proportion to the total assets realized from the sale of the debtor's assets to pay off preference creditors. This statutory maximum amount could be used to pay off all preference or priority claim holders. When the maximum amount set aside for preference claim holders is depleted, then it is suggested that the remainder of the unsatisfied claim, should participate as general unsecured claim and paid in the same order as general unsecured creditors. A preference payment cap on all preference claim it is urged will tilt the scale a bit towards fairness ensuring that unsecured creditors get something out of the insolvency process.

6. Environmental Claims As Preference

Environmental claims relating to the decontamination of hazardous substances released into the environment by the debtor are treated differently in some countries. In the U.S, a claim may be categorized as pre or post-petition. While pre-petition claims are classified as general claims along with unsecured creditors, post-petition claims may be treated as an administrative expense and paid before all other unsecured creditors. In others countries, the interaction between bankruptcy law and environmental protection laws are not clear. This is because bankruptcy law developed at a time when environmental pollution and claims were not prevalent or were in a developmental stage. As a result, environmental claims were not inserted into many bankruptcy legislations.

Currently, some people argue that environmental claims should be recognized as priority claims. Symes advance the position that because environmental claims can be classified as involuntary creditor's claim, in the same position as an employee, it deserves the law's sympathy and for that

matter should be rewarded as a priority claim.⁴⁰⁰ The problem here is that, creating a priority class for environmental claim does not solve the over-indebtedness problem. Second, adding more priority rules mean that unsecured creditors stand the risk of getting nothing from the process. This does not ensure equality of treatment of creditors in any way.

In Ghana, environmental claims are treated as general claims under section 41 of Act 180. To be able to solve problems like Bonte Gold Mines Affairs and balance other competing interest, a resort must be had to the priority cap. This will mean that while creating a priority ranking for environmental claims (which is admitted will offer a solution in this case), the amount owed must be settled from the statutory maximum set aside to pay for priority payments. Any remainder owed must classify as unsecured debt and settled in that manner.

Moreso, the Environmental Protection Act of 1994 grants the Agency the power to request environmental impact assessment.⁴⁰¹ The Agency then assess monetary term as security or pre-requisite for an activity in the country.⁴⁰² These assessments are enforced by monetary fines and sometimes by imprisonment. This put the Environmental Protection Agency is a rather different footing. The Agency has the power to request the payment of security for certain type of activities. This payment obligation may be enforced through a number of drastic measures against the offending party. This assessment may happen before or after the fact.

Given the circumstances, The Agency must be compelled to act when it fails to protect the environment. In Bonte Gold Mine Affairs; the Agency claimed that the company perpetrated fraud against it when they requested for additional time to pay a Costed Reclamation Plan of

⁴⁰⁰ Christopher F. Symes, Statutory Priorities in Corporate Insolvency Law: An Analysis of Preferred Creditor Status, 197 (2008).

⁴⁰¹ See Section 12 of Environmental Protection Act, 1994 (Act 490).

⁴⁰² A number of Mining firms post costed land reclamation bonds before exploration starts.

US\$1,263,565.00. The company only paid US\$38,000. The facts showed that the Agency had been complicit, failing or refusing to enforce the payment obligation long before the company filed for liquidation.⁴⁰³

7. Conclusion

Statutory priorities date back to the early period when bankruptcy distribution was instituted. The set of statutory priority rules has increased over the years. The increase in priority over the years mean that similarly situated creditors are paid earlier in comparison to other similarly situated creditors. Sometimes very little or anything is left for other creditors to fall on. The concept of statutory priority, therefore, must be looked at carefully because it hits hard on the fairness and equality principles embedded in the collective bankruptcy procedure. It is suggested that a statutory priority payment cap be instituted. This cap should be a maximum payment in proportion to the total assets from the pool of assets available for distribution. This maximum payment, I believe is fair and hold a greater chance that all unsecured creditors may get something from the collective procedure. The remainder of their claim should rank as unsecured claims to be satisfied along with all other unsecured claim.

While it is not feasible to advocate for the abolition of statutory priorities, it is not too much to require that any new priority payment must be justified. In the same way, it is not too much to require that any demotion of a rank to a subordinate class should be justified. The directors near relative exception under Ghanaian law, which automatically defer debts owed near relatives of directors without showing any fault or wrongdoing, cannot be justified on any objective basis. It

⁴⁰³ The Agencies attempt to enforce the obligation at a time when the company was bankrupt was little too late. There are provisions in Act 180 dealing with arrest of absconding directors and members of a company when delinquency or other impropriety is suspected but these provisions were not enforced. See section 53 of Act 180.

is unsatisfactory and needs to give way to a less discriminatory, considered and fair exception to the priority rules under Act 180 of Ghana.

CHAPTER SIX
CORPORATE RESCUE

1. Introduction

Corporate rescue generally is formal and informal procedures that help a distressed company escape folding up completely. They are designed to avoid the eventual closure and realization of the company's assets to pay off creditors.⁴⁰⁴ According to Finch, they go beyond the normal ways management resolves corporate troubles⁴⁰⁵ and are alternatives to liquidation where the assets of the company are sold one piece at a time in an old-fashioned way. Corporate rescue involves:

“either the continuation of the company as an entity (e.g. through reorganization, financial restructuring, refinancing, debt composition or rescheduling) or a going concern sale of the company's undertaking which may then continue under new ownership and management liberated from the company's debts.”⁴⁰⁶

Formal rescue mechanisms are laid down in statutes; these legislations intend primarily to oversee or facilitate the rescue of a distressed company from liquidation. Informal rescue mechanisms ensue when the distressed company employs mechanisms other than formal rescue procedures to save it from folding. These informal mechanisms include debt restructuring agreement with

⁴⁰⁴ See Alice Belcher, Corporate Rescue (Sweet & Maxwell, London) 12 (1997), Vanessa Finch, Corporate Insolvency Law; Perspectives and Principles, 187 (2002).

⁴⁰⁵ See Vanessa Finch, Corporate Insolvency Law; Perspectives and Principles, 187 (2002).

⁴⁰⁶ John Armour *et al*, The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings, (Insolvency Service, December, 2006) available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.96.6853&rep=rep1&type=pdf> accessed on (01/06/2016).

creditors. It may involve restructuring negotiation with a debtor's banker in-house, without involving the Court.⁴⁰⁷

In the U.S, reorganization under Chapter 11 of the U.S Bankruptcy Code of 1978, is statutorily designed to prevent eventual demise or failure of the company by deploying organized negotiation.⁴⁰⁸ In the end, the business remains, while the debts are reduced or eliminated. Ownership of the company may be changed; the business may become smaller; staff may be laid off; the business operation may be changed, etc.⁴⁰⁹ Reorganization is premised on the economic theory that the business is worth more as a going concern than sold piecemeal in a liquidation.⁴¹⁰ This Chapter discusses the reorganization procedure under US bankruptcy law. It considers the history, mechanics and the reason why it has been embraced as a model by a number of countries and international organizations. Chapter 11 was designed for companies, but a substantial number of individuals file for bankruptcy reorganization under Chapter 11. The focus of this work is business reorganization and any reference to this Chapter is for businesses rather than individuals.

2. Chapter 11 Corporate Reorganization

The history of corporate reorganization law in the U.S.A dates back to the passing of the Chandler Act of 1938. Prior to that time, bankruptcy law was instituted by the signing of the American

⁴⁰⁷ See John W. Wood, Corporate Rescue: A Critical Analysis of its Fundamentals and Existence, 20 (May, 2013) (PhD Dissertation, University of Leeds). See also John Armour et al, The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings, (Insolvency Service, December, 2006).

⁴⁰⁸ This is in accord with the basic theme of corporate rescue where formal or informal mechanisms are deployed to save the failing company from eventual demise or liquidation and its assets sold in liquidation. See generally Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 388 (6th Edition). The Author's ideas expressed in this book have shaped this Chapter substantially.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

Constitution in 1787. Article 1 Section 8 Clause 4 of the US Constitution empowered US Congress to pass uniform laws on the subject of bankruptcies. Establishing uniform laws on bankruptcy is connected to the regulation of commerce which came within the powers of Congress. In colonial times, the States had comprehensive laws dealing with debtor –creditor relationship.⁴¹¹ Some States allowed for the imprisonment of debtors. Though this was considered harsh, it was better than in England where bankruptcy was punishable by death. Others had more liberal regulations which did not allow imprisonment of debtors. The bankruptcy clause was added to the Constitution to create uniformity in the application of bankruptcy law across the country.⁴¹²

Congress passed the first bankruptcy legislation in 1800. This law was passed after the panic of 1797 ruined thousands of people and caused imprisonment of many debtors.⁴¹³ The law allowed creditors to petition their debtors into bankruptcy. It was not possible for debtors to petition for their bankruptcy. Only merchants were allowed to be petitioned into bankruptcy. The process was initiated in the District Courts which then handed its administration to Commissioners. The Commissioners had the power to appoint assignees who also had the power to liquidate the business of the debtor and distribute his assets to satisfy his creditors.⁴¹⁴ This Act was criticized as reaping little returns for creditors and coupled with the fact that it was difficult to access the District Courts, it gained strong opposition which led to its repeal in 1803.

⁴¹¹ See Charles J. Tabb, The History of Bankruptcy Laws in the United States, 3 Am. BANKR. INST. L. REV. 5 (1995).

⁴¹² *Id.*

⁴¹³ This Act was similar to the 1732 English Act on bankruptcy law. It is not uncommon to see a pattern where State's that got independence from England adopted bankruptcy legislation that were akin to what pertained in England.

⁴¹⁴ See Charles J. Tabb, The History of Bankruptcy Laws in the United States, 3 Am. BANKR. INST. L. REV. 5 (1995).

In 1841, a new bankruptcy law was passed. The Bankruptcy Act of 1841 was significant because it allowed debtors for the first time to petition for their bankruptcy and obtain a discharge. It also allowed everyone to petition for bankruptcy without limiting eligibility to merchants. The District Courts still had jurisdiction over bankruptcy matters. Assignees instead of Commissioners were appointed to administer liquidation and the distribution of debtor's assets under the Act.⁴¹⁵ The 1841 Act was seen as debtor friendly because a lot of debtors were discharged of their debts. It had a short life and was repealed in 1843. The next bankruptcy legislation was the 1867 Act which contained some of the key features of the 1841 Act. The Act allowed debtors to choose state exemption laws that were beneficial to them. State exemption laws could be used as alternatives to a federal exemption for the debtor. State exemption laws were more generous to the debtor and allowed leverage over some of his assets available for distribution. This law was repealed in 1878. The many problems that creditors and debtors faced during bankruptcy were tackled head on and some compromises were made. This culminated in the passing of one of the forward-looking legislation- The Bankruptcy Act of 1898. This legislation remained in effect until it was replaced in 1978 by the Bankruptcy Reform Act. During its years of existence, the 1898 Act was revised extensively by the Chandler Act of 1938. The Chandler Act introduced new procedures for the reorganization of businesses and the payment of debts over a time frame. The Chandler Act was carved from the effects of the Great Depression. During that time failing farm owners, railways, governments and businesses were allowed to reorganize their debts to pay them over a period. This practice developed from equity receivership which was a unique way of keeping the railway business running. The railways were of economic importance to the Country and their bankruptcy would have been disastrous to interstate commerce. The response to their financial problems was

⁴¹⁵ *Id.*

to restructure their affairs and allow them to pay their debts over a period without liquidating the entire railway system. A number of rules in the current reorganization procedure such as “absolute priority rule” and “upset rule” trace their origins to this practice.⁴¹⁶

The 1898 Bankruptcy Act was finally replaced in 1978 after the Commission on Bankruptcy Law in the United States conducted a study and made a report on the existing law. The Commission conducted wide research on the statutory and common law rules and doctrines and came out with its report. The Bankruptcy Code of 1978 is the end product of their work and the current piece of legislation dealing with a business reorganization under US law. Business reorganization is found in Chapter 11 of the Bankruptcy Code. The Code was amended in 2005.

3. Basics Of Business Reorganization Filing

Reorganization plan under Chapter 11 is designed to allow the debtor pay his debts over a period.⁴¹⁷ When a company is in financial difficulty, it may voluntarily file for Chapter 11 reorganization with a bankruptcy court. The Bankruptcy Code encourages early filing. Creditors can also force a company into reorganization by petitioning the court. There is no requirement however that the company must be insolvent before the filing. The company must, however, file for reorganization in good faith. This requires that the filing was made to effect the restructuring, liquidation⁴¹⁸ or sale of the company. In *SGL Carbon*, Scirica held that:

⁴¹⁶ *Id.*

⁴¹⁷ Assuming the debtor has a loan contract to repay the loan within a three-year period. He will be allowed to repay about 75% of the loan within say seven years. The debtor will be forgiven about 25% of the loan repayment due. The creditor is said to have been given a “hair cut”.

⁴¹⁸ While Chapter 7 is the traditional liquidation Chapter in the Bankruptcy Code, it is possible to liquidate a company under the provisions of Chapter 11. There are good reasons why a number of debtors choose Chapter 11 to liquidate instead of reorganizing. Chapter 11 allows the DIP to run the show by doing this the debtor may get good price for

“It is well established that a debtor need not be insolvent before filing for bankruptcy protection. It is also clear that the drafters of the Bankruptcy Code understood the need for early access to bankruptcy relief to allow a debtor to rehabilitate its business before it is faced with a hopeless situation... Such encouragement, however, does not open the door to premature filing, nor does it allow for the filing of bankruptcy petition that lacks a valid reorganizational purpose.”⁴¹⁹

To be able to achieve this aim of reorganization under the Code, when the debtor files a petition for Chapter 11 reorganization, an automatic stay of all proceedings against the debtor company and its assets is imposed. The business continues to be operated under the debtor who is called the debtor in possession or DIP. The DIP takes charge of the estate of the company and manages it. The DIP acts on behalf of all creditors and has powers, rights and duties as a trustee in bankruptcy. Where a group of secured creditors proposes to dispose of the automatic stay because they feel their interest are not well protected, the DIP can prevent such a process by providing “adequate protection” to cover their interest. Sometimes it is essential that the company obtains financing to survive. The DIP can obtain new financing and provide attractive contractual terms to the people providing the finance often called post-petition creditors.

The DIP has the power to enhance the estate available for distribution. To be able to do this the company can avoid a contract that is executory in nature and that has the potential to harm the estate available for distribution to creditors. The DIP can also recover monies paid to creditors within 90 prior to filing for reorganization. These creditors are called preference creditors. The DIP has powers to set aside security interest that is not perfected and also to avoid fraudulent

his assets. See Elizabeth Warren and Jay Lawrence Westbrook, Remembering Chapter 7, 2004 ABI Journal 22 (May 2004).

⁴¹⁹ In *Re SGL Carbon Corporation*, 200 F. 3d 154 (3d Cir. 1999).

conveyances of the company's property. The DIP position is quite uneasy because some of the transaction he is likely to set aside are transaction he may have authorized while he was in a management position with the debtor company. In reality, he is seen as setting aside a transaction which he himself has authorized in the ordinary course of business and now calls such a transaction as a preference or fraudulent. This power is unavailable to him outside of bankruptcy.

The debtor is allowed to put his house in order by firing employees, abandoning unprofitable facilities or ventures, etc. Once the debtor achieves this, he then invites creditors to a negotiation where the company proposes how it will pay the monies owed creditors. The company proposes a plan of reorganization which is subject to approval vote by the creditors and subsequent confirmation by the court. After the plan is confirmed, the company is discharged from its debts.

Chapter 11 is thought of as pro-debtor. This is because the process is normally begun by the debtor company who then has the leverage to propose a reorganization plan. If the plan is not acceptable to a minority of secured creditors, the company can force it on them. This is called "cram down."

The management remains the same during the period of reorganization and can only be changed when good grounds are demonstrated. These major features lend credence to the thought that Chapter 11 is pro-debtor.

Automatic Stay Principle

When a filing is made under Chapter 11, it automatically invokes a freeze on all process and execution against the company and its assets. This is what is referred to as the automatic stay principle. The automatic stay is a key element in U.S bankruptcy law. It prevents diminution of the debtor's estate and allows the debtor to propose a plan that will benefit all creditors. In *Farm Credit of Central Florida, ACA v Polk, Kovachevich*, District Judge stated as follows:

“In Chapter 11 reorganization proceeding, the stay prevents the dissipation or diminution of the debtor’s assets while rehabilitative efforts are undertaken. The stay goes into effect without regard to the conduct by the debtor or his creditors.”⁴²⁰

The stay is intended to preclude the opportunity of one creditor to pursue a remedy against the debtor company to the detriment of other creditors. It also promotes the orderly administration of the debtor’s estate.⁴²¹ In addition, Section 105 of the Code enables the Court in the exercise of its equity powers to stay proceeding not covered by the automatic stay principle.⁴²² The stay is however not absolute and may be lifted on specified grounds provided in Section 362(b) of the Bankruptcy Code. Though the Code provide a very long list of exceptions under section 362(b), the exceptions are narrowly construed by the Bankruptcy Courts.⁴²³

“Adequate Protection” as a Ground for Lifting Automatic Stay

The Bankruptcy Code section 362(a) stays an action against the debtor company and its assets once a petition is filed. The stay can, however, be lifted where secured creditors feel that they do not have enough protection for their interest in the debtor’s estate and for that matter wish to proceed to realize their security. One exception to the automatic stay rule is the “adequate protection” rule available to secured creditors. Secured creditors can successfully invoke the rule to lift the stay and commence an action to realize their interest.⁴²⁴

⁴²⁰ 160 B.R 870 (M.D. Fla. 1993).

⁴²¹ *Id.*

⁴²² See *United States v Steiles*, 106 B.R. 36 (S.D.N.Y. 1989).

⁴²³ See Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 409 (6th Edition) and *United States v Steiles*, 106 B.R. 36 (S.D.N.Y. 1989).

⁴²⁴ See generally Douglas G. Baird & Thomas H. Jackson, "Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy," 51 *University of Chicago Law Review* 97 (1984). He notes the need to respect pre-bankruptcy entitlements of secured creditors and

The phrase adequate protection is not defined anywhere in the Code. Section 361, however, give three methods for ascertaining whether adequate protection has been provided to a secured creditor with interest in the debtor's property.

The first method is the provision of cash payment or periodic payments to the secured creditor. The second is providing the secured creditor an additional or replacement lien. The last method is granting such other relief to the secured creditor that "will result in the realization by the secured creditor of the indubitable equivalent" of his interest in the property of the debtor.⁴²⁵ Since the Code does not prevent other forms of showing adequate protection to the secured creditor, it has been held that "a debtor may provide adequate protection by an equity cushion."⁴²⁶ The amount of the debt and the value of the debtor's property must be valued and ascertained before the court can come to the conclusion that an equity cushion in fact exists.⁴²⁷ In *Rogers*, after ascertaining the fair value of the debtor's assets which was over and above the loan commitment of the debtor to the creditor, Shelley J, held that "The Court is of the opinion that it should conclude that the Plaintiffs are currently adequately protected by the equity cushion that presently exists between the amount of Debtor's obligation to Heritage and the value of the Property."⁴²⁸ Warren and Westbrook note that not all adequate protection litigation are a direct attack on the automatic stay rule. Some litigation often focuses on how much the debtor must pay to the creditor during the proceedings to provide adequate protection for their interest.⁴²⁹ They note further that in cases where the secured

the need to maintain this throughout the bankruptcy process unless a departure warrants greater value to creditors as a group.

⁴²⁵ See 11 U.S.C. §361 (1) (2) and (3).

⁴²⁶ In *Re Blazon Flexible Flyer Inc.*, 407 F. Supp. 865 (N.D Ohio 1976).

⁴²⁷ See In *Re Rogers Development Corp.* 2 B.R. 679 (Bankr. E.D. Va. 1980).

⁴²⁸ *Id.*

⁴²⁹ Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 420 (6th Edition).

creditor anticipates a loss in his collateral value the hard legal question often turn on the nature of adequate protection provided whether an equity cushion, additional lien or cash payment will suffice to balance the decline in the value of the collateral.⁴³⁰

Only secured creditors have standing to raise the adequate protection exception to the stay. Unsecured creditors can, however, apply to the court to dismiss the entire petition for bankruptcy or push for the court to convert a Chapter 11 filing to a Chapter 7 liquidation where the debtor will be denied a chance to reorganize and his assets will be sold and distributed to creditors.

4. Operating In Chapter 11

Once a petition is filed for Chapter 11 reorganization, the business or the affairs of the company is left in the hands of the debtor in possession. (DIP). The business is then referred to as the estate and is run by the DIP which is usually the old management of the company. The old management is legally transformed into a quasi-trustee in bankruptcy and has the powers of a bankruptcy trustee.⁴³¹ The old management can be replaced for cause⁴³², but prudence often dictates that the old management is maintained to propose a reorganization plan.⁴³³ In *re Sharon Steel Corp*, Sharon filed for Chapter 11 reorganization after its liabilities of \$742 million exceeded its assets of \$478 million. The old management remained as debtors in possession. Five months afterward, the

⁴³⁰ *Id* at 421.

⁴³¹ The rights and duties of a Debtor in Possession are provided under 11 U.S.C. §1107. The Bankruptcy Trustee and examiners generally has duty to file the list of creditors, assets and liabilities of the debtor, schedule of current income and expenditure, investigate the desirability of continuing the debtor's business, file a statement of any investigation conducted including facts pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement, file reports after confirmation of the plan etc. See 11 U.S.C. §1106.

⁴³² 11 U.S.C. §1104 allows the Bankruptcy Court to appoint a Trustee when the Court find cause within its discretion.

⁴³³ The appointment of a trustee is an exception rather than the rule. Maintaining the old administration is important because they are well versed or familiar with the business and its cuts expense involved in appointing an outside trustee.

Creditor's Committee filed a petition to appoint a Trustee under Section 1104 of the US Bankruptcy Code.⁴³⁴ The Bankruptcy Court found that the business had failed as a result of careless management practices. It found further that on the eve of petitioning for reorganization, the company's management had transferred the company's yacht, plane, shares and others assets to another company under common control but made no effort to recover those assets after the petition was filed. The court also found that management had failed to produce current financial statements nine months after filing and the company continually lost revenue as a result of the management's failure to cut a major expense of \$4 million in added interest on the operating loan contracted by the management. The company also exhibited signs symptomatic of potential bankruptcy months after filing the petition. It was held that the court had cause given these facts to appoint a trustee to save the company from bankruptcy.⁴³⁵

In *Sharon*, the large scale waste and syphoning of the company's assets was important grounds to displace the DIP and appoint a Trustee. In other instances, fraudulent conveyance and other preference payments were held not enough to displace the DIP.⁴³⁶ The generally held view is that the appointment of a Trustee is an exception rather than the rule.⁴³⁷ Maintaining the old management is for good measure because current management is generally better suited to drive the rehabilitation process for the benefit of interested parties.⁴³⁸ For this reason, the old

⁴³⁴ Cause include fraud, dishonesty, gross mismanagement of the affairs of the company either before or after commencement of the case and incompetence.

⁴³⁵ 871 F. 2d 1217 (3d Cir. 1989).

⁴³⁶ See *In Re Rush*, 10 B.R. 518 (Bankr. N.D. Ala. 1980).

⁴³⁷ See H.R Rep. No. 595, 95th Cong., 1st Sess. 233. 233 (1977).

⁴³⁸ *In Re Marvel Entertainment Group*, 140 F. 3d 463 at 471 (1998).

management or DIP has a fiduciary duty to act in the best interest of entire estate including interest of creditors, equity holders and other parties in interest.⁴³⁹

Some abuses by management who run to Chapter 11 to advance their interest instead of that of their creditors led to the amendment of the Bankruptcy Code in 2005. This followed from the many concerns raised in the Enron liquidation, where despite all the many allegations of fraud the Court refused to appoint a trustee to manage Enron. The new law enjoins the US Trustee to move for the appointment of a Trustee where there are grounds to suspect that management committed actual fraud, dishonesty or criminal conduct.⁴⁴⁰

The Court in certain cases may also appoint an Examiner to carry out an investigation into the affairs of the company. The appointment of the examiner is for cause and specified grounds under section 1104 of the Bankruptcy Code must exist before the appointment. The appointment of an examiner, however, does not displace the existing or old management of the company. Creditors find this appointment attractive because while management continues to run the business, an independent examination of the affairs of the company can go on at the same time. This may lead to expense, but it may be beneficial to the company.⁴⁴¹

Post-Petition Financing or New Financing

Most companies that file for Chapter 11 reorganization need adequate financing to survive. If faced with cash flow problem, the company will require urgent financing to keep the business going. While new financing is essential to the survival of reorganization prospects, finding a new source

⁴³⁹ *LaSalle National Bank v Perelman*, 82 F Supp. 2d. 279 at 292-293 (2000).

⁴⁴⁰ See 11 U.S.C. §1104 (e).

⁴⁴¹ See Gerard McCormack, Corporate Rescue Law - An Anglo-American Perspective, (2008) and Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 435-438 (6th Edition).

of finance can become a challenge. To be able to meet these challenges, the Bankruptcy Code provides some incentives for new lenders to advance money to the debtor company.

The Bankruptcy Code per section 552(a) makes it clear that pre-petition security interest does not attach to property acquired by the company after filing for bankruptcy protection. The reason for this provision is that the estate is thought of as a new entity not bound by old security arrangements.⁴⁴² Since any new property acquired by the company after filing for bankruptcy belongs to the entire estate, the company can use it as security for any new financing arrangement it may enter into. Section 364 provides a further mechanism by which a debtor can obtain credit. It provides among others that any credit extended to the company during the reorganization process has priority over pre-petition unsecured claims. The court might grant priority status to such financing over unsecured claims if it was made outside of the ordinary course of business. In *re Garland Corporation*, the debtor company applied to the court to borrow additional money to finance its operation. The loan was deemed priority cost of administration and the first encumbrance on all assets of the company. The Creditor's Committee challenged this on the ground that the company ought to provide adequate protection for the interest of unsecured creditors because borrowing of operating funds secured by unencumbered assets without the protection of unsecured creditors constituted a taking of property without just compensation. The Court held that:

“There is no express statutory requirement that holders of unsecured claims be provided ‘adequate protection.’ Adequate protection within the meaning of the Bankruptcy Code §361 need be provided only as expressly required under section 362, section 363, or section 364. There is no requirement of adequate protection in respect of credit obtained under the

⁴⁴² *Id* at 452.

Bankruptcy Code § 364 (c) (2) ... Since there are no other constitutional or legislative requirements, the court may permit the use of unencumbered assets as collateral to secure post-petition indebtedness upon compliance with section 364(c) (2).”⁴⁴³

In respect of secured creditors with existing lien over the debtor’s property, the Bankruptcy Code provides that, if the debtor wishes to secure financing that will inevitably subordinate the secured creditor’s lien, then the debtor must provide adequate protection for the secured creditor’s interest.⁴⁴⁴ In *re Hubbard Power & Light, Inc.*, the court stated that: “The goal of adequate protection for the purposes of the provision entitling a debtor to obtain financing secured by liens senior to all other interest is to safeguard the secured creditor from diminution in the value of its interests.”⁴⁴⁵ The distinction in the treatment of creditors lies in whether one is secured or not. In *Hubbard’s* case, the court granted a motion to subordinate a lien holder’s interest in Hubbard’s property to Enron Capital when it was evident that Hubbard couldn’t secure any other financing from any source except from Enron and the lien holder who objected to the new financing was found to have been adequately protected by improvement made on the land over which he held a perfected lien.

Companies sometimes contract pre-petition loan and promise to secure the loan with the debtor’s property acquired post-petition. This means that an unsecured creditor will be upgraded as part of the loan agreement to a secured creditor post-petition. This practice called cross-collateralization is very controversial. Though the practice is not prohibited under the Bankruptcy Code and some Courts validate such practices others speak against the practice as totally inconsistent with the aims of bankruptcy law. Some Courts believe that Section 364 financing is forward-looking protecting

⁴⁴³ 6 B.R. 456 (Bankr. D. Mass.1980).

⁴⁴⁴ See 11 U.S.C. §364 (d).

⁴⁴⁵ 202 B.R. 680 (E.D.N.Y 1996).

future financing. In *Shapiro v Saybrook Manufacturing Co. Inc.*, Cox Circuit Judge stated as follows:

“We conclude that cross-collateralization is inconsistent with the Bankruptcy law for two reasons. First, cross-collateralization is not authorized as a method of post-petition financing under section 364. Second, cross-collateralization is beyond the scope of the bankruptcy court’s inherent equitable power because it is directly contrary to the fundamental priority scheme of the Bankruptcy Code.”⁴⁴⁶

The issue that arises under such circumstances is whether a creditor’s pre-petition’s position be upgraded in exchange for his post-petition financing. Even though *Shapiro* came to the conclusion that the practice is inconsistent with the Bankruptcy law, the Court acknowledge that the practice is controversial and has been approved by several bankruptcy courts.

First Day Orders

On the day of filing Chapter 11 petition, the debtor presents some orders before the court and gets it signed. This is referred to as First Day Orders. These orders typically are for additional injunctive reliefs outside of the automatic stay, authorization to buy and sell outside of the normal course of business, authorization to pay wages of employees, authorization of post-petition financing, use of cash collaterals among others.⁴⁴⁷ The company may also seek to pay critical vendors and may seek authorization from the court to effect such payment. Critical vendors are ‘suppliers whose continued supply of goods to the debtor is essential to the reorganization prospects of the debtor.

5. Reshaping The Debtor’s Estate

⁴⁴⁶ 963 F. 2d 1490 (11th Cir. 1992).

⁴⁴⁷ See Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 468 (6th Edition).

The DIP or Trustee has the power to enhance the estate for the benefit of creditors, equity holders and other interested parties to the company's reorganization. The power to enhance the estate include the ability to avoid settled transactions that are not advantageous to the estate. This is the known as "avoiding powers" of the DIP or Trustee. The DIP or Trustee has numerous avoiding powers discussed below.

"Strong Arm" Power

Sometimes called the Strong Arm Clause, section 544 of the Bankruptcy Code gives the Trustee the power of a hypothetical lien creditor and that of a hypothetical bona fide purchaser of real estate as at the time of filing the petition for reorganization. This gives the Trustee the power to avoid unperfected security interest and unrecorded interest in real property for the benefit of unsecured creditors. In *re Bowling*, the debtor executed a promissory note and mortgaged his house as security for the promissory note. The note was defective because though on the face of the document it was stated that the document was notarized in the presence of the debtor, the document was in fact notarized in the debtor's absence. This was contrary to Ohio's Revised Code §5301.01. The Trustee filed a motion to avoid the mortgage under §544 of the Bankruptcy Code and then to restore the property for the benefit of unsecured creditors. After sifting through the evidence adduced before the Court which showed that the document was notarized in the debtor's absence contrary to law, the court found that the Trustee had met the burden of proving that the mortgage was defective and made an order restoring the property to the estate. The validity or otherwise of a security interest are determined by the laws of the State where the property is located. When it is evident that a registered security interest does not conform to a statutory requirement, the strong arm clause can be invoked to restore the property to the estate.

Preferences

Preference power allows a Trustee to set aside or avoid a transaction that was made prior to bankruptcy and recover the value or the property to the estate. Preference is a transfer that enables a creditor to receive payment greater than what he would have received if he had participated in the general distribution of the assets of the estate.⁴⁴⁸ Preference law is designed to prevent dissipation of the debtor's estate in favor of some creditors before filing for bankruptcy. It prevents creditors from dismembering the debtor's assets in a 'race of diligence' before the debtor files for bankruptcy.⁴⁴⁹ It thus promotes equality of distribution among creditors and discourages secret liens which are not perfected until just before the debtor files petition for bankruptcy.

Section 547(b) of the Bankruptcy Code provides that the Trustee may avoid any transfer of an interest in the debtor's property for the benefit of a creditor (for an antecedent debt) made within 90 days before the filing of the petition that enables the creditor to receive more than he would have had the transfer not been made. The debtor must be insolvent at the time the transfer was made. In *re Pysz*, the Court defined insolvent to mean: "the term 'insolvent' means 'financial condition such that the sum of the entity's debt is greater than all of such entity's property, at a fair valuation,' excluding property that may be exempt under section 522. 11 U.S.C. §101 (32) (a)."⁴⁵⁰ The Trustee must prove the grounds provided for under Section 547(b) before a transaction will be deemed a preference and restored to the estate.

⁴⁴⁸ See H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977).

⁴⁴⁹ *Id.*

⁴⁵⁰ See 2008 WL 2001753 (Bank. D.N.H. 2008). Mark Vaughn, Chief Judge stated that it is generally presumed that the debtor is insolvent within the 90 days prior to filing the petition. The creditor therefore assumes the burden to displace the presumption which he may do by introducing evidence that the debtor was not in fact insolvent at the time of the transfer.

A number of defenses are available to the creditor when a Trustee wishes to avoid a transfer. The creditor can claim that the transfer was not “a transfer of an interest of the debtor in property.”

This is the Earmarking Doctrine. The doctrine applies:

“whenever a third party transfers property to a designated creditor of the debtor for the agreed-upon purpose of paying that creditor. Under such circumstances, the property is said to be ‘earmarked’ for the designated creditor. As a result, there is deemed to have been no transfer of an interest of the debtor in property, even if the property passes through the hands of the debtor on its way to the creditor.”⁴⁵¹

This is a judicially created defense available when the agreement for the transfer to the creditor is between the debtor and a third party or new creditor primarily for the payment of antecedent debt and the payment is made by its terms. The transaction must not result in diminishing the assets of the debtor.⁴⁵² This is an equitable defense and each case may be decided on its own peculiar circumstances. The creditor can also claim as a defense that the debtor was not insolvent at the time of the transfer. The creditor will bear the burden of adducing evidence to that effect.

The nature of bankruptcy reorganization requires that transaction that are beneficial to debtor’s ongoing business and which are made within the preference period be saved from the general preference rule. Section 547(c) provides some exceptions to the preference rule. The Contemporaneous Exchange rule is one such exception. All transaction that is contemporaneous in nature for which new value is given to the debtor come under the exception to the preference rule. Example are goods for a cash transaction that is delivered and paid for at the same time. The Bankruptcy Code also make an exemption for transactions that are made in the ordinary course of

⁴⁵¹ See opinion of R. Guy Cole, Jr., *Chase Manhattan Mortgage Corp. v Shapiro*, 2008 U.S. App. Lexis 13455 (6th Cir. 2008).

⁴⁵² *Id.*

business. This exemption is useful and usually applicable to short-term credit extension, trade suppliers and utility companies.⁴⁵³

Executory Contracts

When the DIP or Trustee starts to put in place his plan for reorganization, certain important decisions remain about how he assumes or rejects an executory contract and the effect such action has on the estate. Section 365(a) of the Bankruptcy Code provides that “the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” The Bankruptcy Code does not define the term executory contract. Countryman defines an executory contract as: “ a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.”⁴⁵⁴ In simple terms, it can be defined as “a contract under which (a) debtor and non-debtor each have unperformed obligations and (b) the debtor if it ceased further performance, would have no right to the other party’s continued performance.”⁴⁵⁵ When the Trustee assumes the contract, the assumption is deemed to have occurred, “when a bankruptcy estate elects to take on the obligation of a contract or lease as the price of obtaining the benefit of the non-debtor party’s performance.”⁴⁵⁶ Rejection, on the other hand, occurs when the DIP or Trustee decides not to assume the obligation under the

⁴⁵³ Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 493 (6th Edition). Other exceptions to the preference rule are setoffs, purchase money exception, the new value exception among others found in Section 547 (c) of the Bankruptcy Code.

⁴⁵⁴ Countryman’s definition was given prior to the enactment of the Bankruptcy Code but the general import captures what pertains under the Bankruptcy Code which fails to define the term. See Vern Countryman, Executory Contracts in Bankruptcy, 57 Minn. L. Rev. 439 (1973).

⁴⁵⁵ Michael T. Andrew, Executory Contracts in Bankruptcy: Understanding “Rejection”, 59 U. Colo. L. Rev. 845 (1988).

⁴⁵⁶ *Id.*

contract or lease. Rejection is not to be equated with cancellation, repudiation, renouncing or liked terms. It is simply deciding not to carry on the obligation under such contracts or lease. The Trustee or DIP can do this because the estate in bankruptcy is different from the debtor. As the Trustee manage the estate, he may decide to assume a certain contractual obligation that is beneficial to the estate or refrain from taking on such contracts when they are onerous and disadvantageous to the estate. The remedy of the affected party is a claim in the distribution of the estate during the debtor's reorganization.⁴⁵⁷

The Trustee faced with the question of whether to assume or reject an executory contract will have to rely on some sort of standard or test. The business judgment standard is where the Trustee makes a determination whether the assumption will maximize returns to the estate. As it is a business decision, the Court is likely to defer to the Trustee's reasoning. The Trustee may also rely on the burdensome standard test where the Trustee shuns worthless or burdensome assets.⁴⁵⁸ When the Trustee decides to assume the executory contract, he must do so before the contract is terminated prior to filing for bankruptcy. In *re Krystal Cadillac-Oldsmobile-GMC Truck, Inc.*, Krystal operated a GMC dealership pursuant to a dealership agreement. Krystal lost its line of financing and as a result was unable to purchase new GM vehicles. GM gave Krystal 60-day notice to terminate the dealership. Krystal sought a review of the termination notice but before the Review Board gave its decision, filed for bankruptcy. The Review Board gave its decision favoring termination of the dealership. The Trustee decided to assume the dealership contract anyway and sell it to a qualified buyer and use the proceeds to propose a reorganization plan. GM opposed this action claiming the contact had already been terminated. The court found that the Review Board's

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

decision had been rendered after the bankruptcy automatic stay principle was in force and as such was rendered in breach of the Bankruptcy Code. The Court held that since the contract had not been validly terminated before the bankruptcy petition was filed, the dealership became an asset of the estate and the contract could be assumed by the Trustee and then assign it for the benefit of all creditors.⁴⁵⁹

When the DIP or Trustee decides to assume a lease, he may assign the lease to a third party for the benefit of the estate. If there are any onerous provisions regarding the assignment of the lease, the Courts may come in to help the DIP or Trustee. In *re Jamesway Corp.*, after Jamesway filed for Chapter 11 reorganization, the DIP moved to assume their lease located at Newberry Shopping Center and assign the lease to Rite Aid Inc. The lease contained a provision to the effect that if Jamesway assigned the lease during the first twenty years, Jamesway should pay the lessor 50% profit received by Jamesway from such assignment. The Lessor opposed Jamesway decision not to pay the 50% profit from the assignment. Jamesway filed a motion to nullify the profit clause arguing that the provision is void under section 365(f) (1) because they limit the debtor's ability to realize the full economic value of the lease for the benefit of all unsecured creditors. The court held that the profit sharing clause limited the debtor's ability to realize the intrinsic value of the lease and was, therefore, unenforceable in bankruptcy. The Court stated that:

“In furtherance of Congressional policy favoring the assumption and assignment of unexpired lease as a means of assisting the debtor in its reorganization or liquidation efforts, we interpret §365(f) (1) to invalidate provisions restricting, conditioning or prohibiting debtor's right to assign the sublease lease.”⁴⁶⁰

⁴⁵⁹ 142 F. 3d 631 (3d Cir. 1998).

⁴⁶⁰ 201 B.R. 73 (Bankr. S.D.N.Y. 1996).

Where the Trustee or DIP decides to reject a lease, any damages for breach of contract are calculated as a pre-bankruptcy unsecured claim against the estate. Section 365 provides a number of statutory constraints on the Trustee's right to assume or reject executory contracts to balance the power in the hands of the Trustee.⁴⁶¹

Fraudulent Conveyances

The law of fraudulent conveyances allows creditors to set aside certain transfers made at undervalue or under unfair circumstances by the debtor while he was insolvent. The Uniform Fraudulent Transaction Act is the principal embodiment of the laws on fraudulent conveyances. During bankruptcy, the right of unsecured creditors to set aside fraudulent conveyances is preserved by Section 544(b) of the Bankruptcy Code and its vested in the Trustee or the DIP. Section 548 of the Bankruptcy Code provides an additional set of laws on fraudulent conveyances. Fraudulent conveyances law enforces the bargain between creditor and the debtor by preventing the debtor from misbehavior that hinder, delay or defrauds creditors.⁴⁶²

A conveyance is fraudulent under Section 548(a)(1) of the Bankruptcy Code if a transfer of interest in the debtor's property was made or incurred within two years of filing for bankruptcy with an intention to delay, hinder or defraud any creditor to which the debtor was indebted to.⁴⁶³ It is also fraudulent if the debtor received less than a reasonably equivalent value in exchange for the transfer or obligation and was made or incurred at a time when the debtor was insolvent.⁴⁶⁴ When

⁴⁶¹ See generally 11 U.S.C §365, Michael T. Andrew, Executory Contracts in Bankruptcy: Understanding "Rejection", 59 U. Colo. L. Rev. 845 (1988), Vern Countryman, Executory Contracts in Bankruptcy, 57 Minn. L. Rev. 439 (1973) and Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 534 (6th Edition).

⁴⁶² See Thomas H. Jackson, Avoiding Powers in Bankruptcy, 36 Stan. L. Rev. 725 (1984).

⁴⁶³ 11 U.S.C §548(a)(1).

⁴⁶⁴ *Id.*

a transferee gives very little consideration for a transfer of the debtor's property at a time that the debtor is insolvent, that transaction can be avoided by the Trustee as fraudulent.

Guarantees often fall for consideration under this head. For the purposes of a corporation and its affiliates, when a corporation guarantees a loan for its affiliates, the Courts are prepared to hold that an indirect benefit is a reasonable equivalent value. Thus in *Mellon Bank v Metro Communications, Inc.*, the courts held that a corporation gives reasonable equivalent value when it guarantees a loan for the affiliate and the loan strengthened the corporate group as a whole.⁴⁶⁵ Intangibles such as goodwill are also indirect benefits.⁴⁶⁶ While indirect benefits are considered reasonable equivalent value, it is possible to show still that it was not reasonably equivalent. Thus in *Re Image Worldwide Ltd*, the court held that, while Image Worldwide received an indirect benefit from the transaction (by guaranteeing a loan for its affiliate to keep it as a going concern), it did not receive reasonably equivalent value. In this case, Image Worldwide kept its affiliate from bankruptcy by guaranteeing a loan which made it insolvent and later to file for bankruptcy. The Court stated that:

“This shift of risk from the creditors of the debtor to the creditors of the guarantor is exactly the situation that fraudulent transfer laws seeks to avoid when applied to guarantees... Thus, while IW received an indirect benefit from the transaction, it did not receive reasonably equivalent value.”⁴⁶⁷

The Trustee has an absolute right to recover a fraudulent transfer from the transferee. It is, therefore, important for the Trustee to point to a transferee. Thus, when the President of a company, who controlled virtually all operations of the company, procures a cashier's check from the

⁴⁶⁵ 945 F. 2d 635 (3rd Cir. 1991).

⁴⁶⁶ *Id* at 647.

⁴⁶⁷ 139 F. 3d 574 (7th Cir. 1998).

company, and the check is issued in the name of a third party gambling company, to settle debts owed to the gambling company, the President does not become the transferee. The gambling company becomes the transferee even if the President physically handed the check to the gambling company.⁴⁶⁸ Where the transferee disposes of the property to a third party for full value, it will be difficult for the Trustee to recover from the third party.⁴⁶⁹

The nature of fraudulent conveyances brings out the fact that the debtor may have been involved in some wrongdoing. Thus if a debtor conveys or transfers property with the intention to hinder, delay or defraud creditors, that is a wrongdoing in itself. It should therefore not lie in the mouth of the debtor to institute an action to challenge the transfer as fraudulent. The Trustee or DIP can challenge the transfer on behalf of creditors because the Trustee's legal position is different from the debtor. The Trustee acts for the benefit of all creditors.

Equitable Subordination

This power of avoidance is a judicial creation, which has been developed and incorporated into the Bankruptcy Code. Equitable subordination is found in section 510 (c) of the Bankruptcy Code and allows the Trustee to postpone payment of a particular debtor until all others have been paid. If such a creditor has been paid, nothing prevents the court from subordinating his claim against other creditors and requiring him to return that which has been received. It also allows the Trustee to convert pre-petition loans into equity. Loans may be treated as a capital contribution when it is advanced to the company by equity holders and then settled after all other creditors are fully paid. The courts have formulated standards or requirement that must be met before the doctrine can apply. These are that the subordinated creditor must have engaged in some inequitable conduct;

⁴⁶⁸ *In re Video Depot, Ltd*, 127 F. 3d 1195 (9th Cir. 1997).

⁴⁶⁹ See 11 U.S.C § 550 (a) and (b). See also *In re Video Depot, Ltd*, 127 F. 3d 1195 (9th Cir. 1997).

such conduct must have resulted in the injury to other creditors or confer an unfair advantage on the subordinated creditor, and subordination must not be inconsistent with the provisions of the Bankruptcy Code.⁴⁷⁰ An additional requirement is that “a claim should be subordinated only to the extent necessary to offset the harm which the debtor or its creditors have suffered as a result of the inequitable conduct.”⁴⁷¹ In *Carolee’s Combine*, the defendant invested money into a no-minimum, no-reserve auction venture which failed. The auctioneers- *Carolee’s Combine*, who had contributed very little capital to the venture raised money from investors and promised them a ten percent annual interest together with a flat 10% on the principal amount styled as finder’s fee. Their contract stipulated that this money was to be paid on the first day of the auction. On the day before the auction, the auctioneers wrote checks for delivery to investors. The auction failed substantially; the only assets were the items sold at the auction - trade creditors, labor, utilities and other creditors remained unpaid. The Trustee appointed over estate sought to avoid the money paid to the defendant who received a check on the day before the auction. The Trustee contended that the transfer to him “represented a return on an investment of an equity nature such that it was not entitled to be paid in priority to general creditors” but had to be returned for distribution according to the bankruptcy priority rules.⁴⁷² The court held that it was consistent with its equity powers to avoid the transaction. The Court stated:

“the conduct of the defendant, like the other investors, was clearly inequitable since the provisions of their contracts for prior payment injured trade creditors and conferred an unconscionable advantage on them in high return. These investors advanced monies to a

⁴⁷⁰ See *re Carolee’s Combine*, 3 B.R. 324 (Bankr. N.D Ga. 1980); *re Mobile Steel Co.* 563 F. 2d 692 (5th Cir. 1977)

⁴⁷¹ See W. Eugene Davis, Circuit Judge in *re SI Restructuring* referencing *re Mobile Steel Co.*, to illustrate standards for applying equitable subordination doctrine.

⁴⁷² See *re Carolee’s Combine*, 3 B.R. 324 (Bankr. N.D Ga. 1980).

speculative venture for the promise of a high return (certainly not in itself inequitable) but shifted the risk of that speculation to general creditors by arranging to be paid in advance. In essence, the investors shifted the risk, normally associated with ‘seed money’ investments which yield the high returns they were seeking, to trade creditors.”⁴⁷³

Creditors may also agree among themselves to subordinate their claims or priority to one another. This is contractual subordination and the court will enforce it according to its terms. Creditors sometimes do this to attract new financing or creditors.⁴⁷⁴

6. Confirming A Chapter 11 Plan

A business undergoing reorganization must propose a plan for turning around its misfortune. Confirmation of the plan is the ultimate goal of Chapter 11. Stevens J stated in *Bank of America v 203 LaSalle Street Partnership*, that “Confirmation of a plan of reorganization is the statutory goal of every chapter 11 case. Section 1129 provides the requirements for such confirmation, containing Congress’ minimum requirements for allowing an entity to discharge its unpaid debts and continue its operations.”⁴⁷⁵ The company can do this with an automatic stay on actions that may be detrimental to its reorganization prospect. The company will have the sole right to propose a plan it believe will turn around the company into profit making venture. There is a 120 days’ window for the Trustee or DIP to proposed a plan failing which creditors may be forced to submit their proposals.⁴⁷⁶

⁴⁷³ *Id.*

⁴⁷⁴ Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 587 (6th Edition).

⁴⁷⁵ 526 U.S. 434 (1999).

⁴⁷⁶ 11 U.S.C § 1121.

A reorganized company can take the form of stock issuance to creditors. This happens when cash flow is a huge problem. Thus in exchange for demanding payment for their loans or other credit advanced to the company, the creditor takes home stock or shares in the company and they are promised dividends on the shares when the company get healthier and back on its tracks. Reorganization may also take the form of a sale of the company as an operating unit on a “going concern” basis. Here the company looks for a buyer to take over the entire business. The new buyer may retain management or the employees or may do away with them. The company may downsize, close some operations and do other things to put it on the track away from debt.

To be able to do all this, some negotiation will have to ensue between the company, its creditors and other parties in interest to the reorganization. Some negotiations are made prior to filing the petition for bankruptcy. Where certain creditors are holding out on the reorganization and certain advantages cannot be obtained through the negotiation phase, the debtor can file for bankruptcy to take advantage of the Bankruptcy Code’s provision. Given that negotiation will not always yield a unanimous result, to prevent a creditor stalling the process, the Bankruptcy Code gives the reorganizing entity a number of tools to move beyond a creditor who is not satisfied with a proposed plan. These tools are however balanced with the expectation that the reorganization plan must be in the interest of all creditors and must be feasible. At the end of negotiations, creditors must vote on the suitability or otherwise of the proposed plan before the Court can confirm it. The confirmation of the plan discharges the debtor from all obligation not specified in the plan.⁴⁷⁷

Voting on a Reorganization Plan

Once a plan has been put in place by the Trustee or DIP, a majority of creditors must vote and approve it before the Bankruptcy Court can confirm it. The Trustee or DIP is required to disclose

⁴⁷⁷ 11 U.S.C § 1141.

important financial and business information necessary for an informed decision on the proposed plan. Disclosure statements include a description of business, history of the debtor prior to filing the petition and financial information. It also includes the description of the reorganization plan, how the plan is to be executed, liquidation analysis, management to be retained and compensation to be paid to retained employees. The statement finally includes a projection of operations, any pending litigation and its effects on the debtor, any transaction with insiders and the tax consequences of the reorganization plan.⁴⁷⁸

The debtor must divide creditors into classes for the purpose of voting on the plan. Members of each class enjoy the same legal status and are entitled to pro rata distribution of their claims. The Bankruptcy Code provides that members of a class must have substantially similar claims. This prevents a situation where the debtor groups some creditors together to segregate them for the purpose of defeating their dissent to a proposed plan. In *re U.S. Truck Co., Inc.*, the Court held that:

“In this case U.S. Truck is using classification powers to segregate dissenting (impaired) creditors from assenting (impaired) creditors (by putting the dissenters into a class or classes by themselves) and, thus, it is assured that at least one class of impaired creditors will vote for the plan and make it eligible for cram down consideration by the court. We agree with the Teamster Committee that there must be some limit on a debtor’s power to classify creditors in such a manner.”⁴⁷⁹

⁴⁷⁸ 11 U.S.C § 1125 (a) (1) and *re Malek*, 35 443 (Bankr. E.D. Mich. 1983). The statement about the projection and operation of the debtor are exempt from the strict disclosure requirement under the U.S. SEC Regulations. This exemption is called the “Safe Harbor” Rule. The exemption applies so long as the statements are made in good faith and in compliance with the Bankruptcy Code. See 11 U.S.C § 1125 (d), (e).

⁴⁷⁹ 800 F. 2d 581 (6th Cir. 1986). The National Bankruptcy Review Commission upon reflection of this provision of the Bankruptcy Code concluded that section 1122 should be amended to provide that a debtor may classify legally

Section 1126(c) requires a plan to be approved by both a simple majority of creditors in a class and by a two-third majority in the amount of debt. If a class is not impaired in any way by the plan, then such a class is “conclusively presumed to have accepted the plan.”⁴⁸⁰ The debtor is not required to secure the votes of unimpaired creditors. Impairment is a reference to whether “a class will be completely protected under the plan.”⁴⁸¹ A claim by a creditor or a class is impaired unless the plan “leaves unaltered the legal, equitable, and contractual rights to which a claim...entitles the holder of such claim.”⁴⁸² A reorganization plan which does not alter the legal, equitable or contractual rights of creditors, does not impair that class of creditors. A creditor is not impaired if diminution or alteration of his legal, equitable or contractual right is caused by the Bankruptcy Code but not the plan.⁴⁸³

Cramdown

As stated above, the debtor will need the approval of impaired creditors for the plan’s confirmation. The debtor may aim at consensual plan confirmation if all classes of creditors are on board.⁴⁸⁴ Where the plan is objected to by a class of creditors, the plan can still get the Court’s confirmation. The Bankruptcy Code allows debtors to force acceptance of a plan on an objecting creditor or class through what is known as “Cramdown” under section 1129 (b) of the Bankruptcy Code. In *Bank*

similar claims separately if the debtor can demonstrate that the classification is supported by a ‘rational business justification’. See NBRC Recommendation 2.4.16 (1997). See also *re Bernhard Steiner Pianos USA, Inc.*, 292 B.R. 109 (Bankr. Tex. 2002) where the Court applied the rational business justification ground to overrule an objection by an unsecured creditor who had been placed in a class different from other unsecured creditors and by arrangement was to be paid after the other unsecured class had been paid 100%.

⁴⁸⁰ 11 U.S.C § 1126 (f).

⁴⁸¹ Elizabeth Warren and Jay L. Westbrook, *The Law of Debtors and Creditors*, 637 (6th Edition).

⁴⁸² See Opinion of Scirica, Circuit Judge in *PPI Enterprise (U.S.) Inc.*, 324 F. 3d 197 (3d Cir. 2003); 11 U.S.C § 1124(1).

⁴⁸³ See *id.*

⁴⁸⁴ 11 U.S.C § 1129 (a).

of America National Trust & Savings ASSN. v 203 North LaSalle Street Partnership, Justice Souter stated that:

“There are two conditions for a Cramdown. First, all requirements of §1129 (a) must be met (save for the plan’s acceptance by each impaired class of claims or interests, see §1129(a)(8)). Critical among them are the condition that the plan be accepted by at least one class of impaired creditors, see § 1129(a) (10), and satisfy the “best-interest-of-creditors” test, see §1129 (a)(7).”⁴⁸⁵

To be able to “Cramdown” a dissenting creditor, at least one class of impaired creditors must vote in favor of the reorganization plan. The plan must also satisfy the best interest test.⁴⁸⁶ Justice Souter stated further: “Second, the objection of an impaired creditor class may be overridden only if “the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.” §1129(b)(1).”⁴⁸⁷ The question remains what is fair and equitable for a Cramdown. Justice Souter considered what is fair and equitable for a dissenting creditor when he stated that:

“As to a dissenting class of impaired unsecured creditors, such a plan may be found to be “fair and equitable” only if the allowed value of the claim is to be paid in full, §1129(b)(2)(i), or, in the alternative, if “the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim or interest in any property,” §1129(b)(b)(ii). That latter condition is the core of what is known as the “absolute priority rule.””⁴⁸⁸

⁴⁸⁵ 526 U.S. 434 (1999).

⁴⁸⁶ The best interest test is discussed below.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

The “absolute priority rule” requires that when a class of unsecured creditors votes against the plan, that class must be paid in full or the plan must provide that any junior class such as equity holders or shareholders will get nothing out of the estate available for distribution. This means that unsecured creditors must be paid in full before owners of the debtor company get anything at all. In *LaSalle*, the debtor proposed a plan that included a clause which allowed old equity holders the sole option to contribute new capital in exchange for the entire ownership in the reorganized firm. This scheme was devised to retain title to the firm in order to avoid payment of personal tax liability to the tune of twenty million dollars. Bank of America being an impaired class objected to this provision, but the debtor used its Cramdown powers to force confirmation of the plan. On appeal, the Supreme Court stated that “the plan was doomed for vesting equity in the reorganized business in the Debtor’s partners without extending an opportunity to anyone else either to compete for that equity or to propose a competing reorganization plan.”⁴⁸⁹ The Court further held:

“that old equity holders are disqualified from participating in such a “new value” transaction by the terms of 11 U.S.C §1129(b)(2)(ii) which in such circumstances bars junior interest holder’s receipt of any property on account of his prior interest.”⁴⁹⁰

It is important to note that in *LaSalle* the incentive for old equity was to avoid the payment of major tax liability. That was the driving force behind the sole equity financing for ownership in the reorganized firm. It was not for the long-term value of the reorganized firm. Many practitioners put a differing view on the actual import of the case. While it is advantageous to maintain equity holders financing in reorganization because they may be the only ones with interest (in some cases) to do so, a blanket prohibition in a Cramdown will work to defeat reorganization prospects. The

⁴⁸⁹ *Id* at 454.

⁴⁹⁰ *Id* at 437.

National Bankruptcy Review Commission proposed to deal with equity participation in a reorganization by amending section 1129(b)(2)(ii) to allow the junior class to purchase a new interest in the reorganized debtor.⁴⁹¹ It also proposed to amend section 1121 so that when a debtor decided to sell an interest in the company to equity holders, and the plan was objected to by a class of creditors, a debtor could force a plan on a dissenting creditor only when the sale of the interest is open to any party in interest and not restricted in any way to equity holders.⁴⁹²

The Cramdown rule underscores the importance of getting creditors to support a reorganization plan. If that fails, the debtor can use its powers to force confirmation of the plan when it meets the requirements discussed above.

Best Interest and Feasibility Test

The reorganization plan must be in the best interest of creditors. It must also be feasible before the court approves it. To that end, section 1129(a) (11) provides that: “confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.” It is important that the plan is feasible. Feasibility does not mean that success must be guaranteed to an exactitude. In *re Yates Development*, it was held that “Although success does not have to be guaranteed, the Court is obligated to scrutinize a plan carefully to determine whether it offers a reasonable prospect of success and it's workable.”⁴⁹³ Reasonable prospects must not be expressed in purely visionary schemes which promise creditors more than what the debtor

⁴⁹¹ See NBRC Recommendation 2.4.15 and Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 675 (6th Edition).

⁴⁹² See *id.*

⁴⁹³ 285 B.R. 36, 44 (Bankr. M.D. Fla.2000).

can attain. It has been held that mere visionary scheme is not sufficient to make a plan feasible.⁴⁹⁴ A plan submitted on a conditional basis is not considered feasible.⁴⁹⁵ Feasibility requires that the plan is realistic, doable and provide a workable framework for reorganization.⁴⁹⁶ The test is whether the things proposed in the plan can be done as a practical matter under the facts.⁴⁹⁷ The feasibility requirement must be satisfied by the debtor. The debtor's past performance becomes an important factor in determining whether a plan will be successful.⁴⁹⁸ In *re Malkus*, the dismal track record of the debtor after he filed for reorganization gave the proposed plan away. In that case, the debtor failed to operate within the agreed plan twice and had on a separate occasion been ordered by the Court to comply with the proposed plan. On an application by a secured creditor to lift the automatic stay imposed by the Bankruptcy Code, the Court held that the dismal record of the debtor showed clearly that the projections in the proposed plan were unachievable and unreasonable.⁴⁹⁹

The reorganization plan must also satisfy the 'best interest' requirement before it can be approved. Section 1129 (a) (7) provides that each creditor under Chapter 11 reorganization must receive at least as much as they would receive under a liquidation in Chapter 7. A dissenting creditor may defeat a confirmation if he can show that he will receive a lesser value under the plan than in a liquidation.⁵⁰⁰ The debtor must assure each creditor who objects that the proposed plan is in their

⁴⁹⁴ See *re Sovereign Oil Co.*, 128 B.R. 585, 587 (Bankr. M.D. Fla. 1991).

⁴⁹⁵ See *re Pikes Peak Water Co.*, 779 F. 2d 1456, 1460 (10th Cir. 1985).

⁴⁹⁶ *Crestor Bank v Walker (In re Walker)*, 165 B.R. 994, 1004 (E.D. Va. 1994).

⁴⁹⁷ See *re Hoffman*, 52 B.R. 212, 215 (Bankr. D.N.D. 1985).

⁴⁹⁸ See Opinion of George Proctor in *re Malkus, Inc., Debtor*, 2004 Bankr. Lexis 2120; WL 3202212 (Bankr. M.D. Fla.2004).

⁴⁹⁹ See *Id.*

⁵⁰⁰ See *SK-Palladin Partners v Platinum Entertainment Inc.*, 2001 U.S. Dist. Lexis 20710 (N.D Ill. 2001).

best interest. Determining whether creditors will get lesser in reorganization than in liquidation turns on the valuation of the assets of the debtor. This often leads to liquidation analysis.⁵⁰¹ If the value of the assets is what the debtor proposes in the plan, then the plan will meet the best interest test.⁵⁰² This is because it will match or better what creditors will get in Chapter 7 liquidation.⁵⁰³ However, if the value of the assets is higher than what the plan proposes then it fails the best interest test because creditors will most likely get more in liquidation than in reorganization.⁵⁰⁴

7. Special Claims During Reorganization

Special claims arise when a debtor commits mass torts or degrades the environment. Not only do these acts touch on the bankruptcy policy alone but it also cuts across other areas of the law. Some claims arise pre-petition while others arise afterward. To be able to lump all claims into single bankruptcy proceedings and deal with them at a goal, Congress expanded the definition of bankruptcy claim in 1978. Prior to that, the concept of provability required that certain claims including tort claims could not be asserted in bankruptcy because they were unprovable claims.⁵⁰⁵

Environmental claims arise when the debtor pollutes the environment or does some other acts prohibited by environmental protection laws. While environmental protection laws are designed to protect public health and safety, it achieves this goal by finding the polluter and imposing clean-up and other associated cost on the polluter. It does not concern itself with whether the polluter has the resources to meet its clean-up obligation. Questions arise as to how to deal with

⁵⁰¹ See *Till v SCS Credit Corp.*, (2004) 541 US 465.

⁵⁰² See Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 624 (6th Edition).

⁵⁰³ *Id.*

⁵⁰⁴ See Opinion of Suzanne B. Conlon in *SK-Palladin Partners v Platinum Entertainment Inc.*, 2001 U.S. Dist. Lexis 20710 (N.D Ill. 2001).

⁵⁰⁵ See Elizabeth Warren and Jay L. Westbrook, The Law of Debtors and Creditors, 730 (6th Edition).

environmental issues along with other creditors of the debtor. Most importantly, when the environmental pollution continues after the debtor files for bankruptcy, the question arises whether the claim should be treated as a pre-petition or post-petition claim. Determining whether a claim is pre-petition or post-petition is important because it determines when a creditor will be paid according to the statutory scheme under the Bankruptcy Code. Such determination also impacts the success or otherwise of a proposed reorganization plan. A pre-petition clean-up cost will be considered as general unsecured debt and will rank like any other unsecured creditor. A post-petition clean-up cost will, however, be considered as an administrative cost and will be a priority payment to all other creditors.⁵⁰⁶ This has far reaching consequences for reorganization prospects because if the clean-up cost is large, it most likely will push the debtor into liquidation.

Mass tort cases arising from the sale of defective products and services also impact a debtor's ability to negotiate a successful reorganization plan. In some cases, the tort may be a continuing one since some of the products or services may still be in the market. In other cases, tort victims may not even be aware that they are suffering from a defective product sold to them by the debtor. The question, therefore, is whether all mass tort victims can be dealt with satisfactorily in a Chapter 11 reorganization.

In *Kane v Johns-Manville Corp.*, a creditor on behalf of himself and other personal injury claimants arising from exposure to asbestos appealed an order affirming a reorganization plan by Manville, debtor in Chapter 11 reorganization. The creditors claimed that the plan discharges the rights of future asbestos victims who do not have 'claims' within the meaning of 11 U.S.C §101(4). The Court determined that the creditors lacked standing to challenge the plan solely on the ground that it violated the rights of future claimants, which the petitioner was not. The court stated that the

⁵⁰⁶ See *In re Virginia Builders, Inc.*, 153 B.R 729 (Bankr. E.D. Va. 1993).

creditor's interest was potentially opposed to that of future claimants since they both wished to recover from the debtor for personal injuries. To the extent that the creditors were successful in obtaining more assets to satisfy his claim, fewer assets were available for the for future claimants. Their sincerity was not enough to ground them standing to challenge the plan on behalf of future creditors. Further, the Court had appointed a legal representative to represent the interest of future claimants during the confirmation process and the legal representative had indicated that it did not need the help of the creditors to assert the claims for future claimants.⁵⁰⁷

The Manville plan created an injunction against future lawsuits against the debtor. The debtor set up a Trust to deal with the claims of all creditors and future claimants who suffered from asbestos-related diseases. In *re Fairchild Aircraft Corp.*, the Fairchild Acquisition Inc., purchase Fairchild Aircraft Corporation during its bankruptcy reorganization. The plan stipulated that Fairchild Acquisition will assume no liability for defective airplanes built by its successor Fairchild Aircraft. The plan was confirmed by the court and Fairchild Acquisition became the new owner. One of Fairchild's old aircraft crashed and the survivors and estate of the dead passengers brought claims against Fairchild Acquisition as successors of Fairchild for defective product liability. Fairchild Acquisition raised a preliminary point that it was not liable to satisfy any claim because of the reorganization plan which insulates it from liability. The court held that since the debtor in the reorganization process took no steps to file claims on behalf of future claimants (the debtor had enough information to determine which planes were likely to fall from the sky) and attempt to have a legal representative represent their claim as was done in Manville's case, the order of sale did not insulate Fairchild Acquisition and it was liable to satisfy the claim of the injured as successors to Fairchild Aircraft- developers of the defective airplane which crashed.

⁵⁰⁷ 843 F.2d 636 (2d Cir. 1988).

After these cases, mass tort victims have been settled through the use of Trust funds created to take care of present and future claimants.

8. Pre-Packaged Bankruptcies (Pre-Packs)

In the early 1990's a hybrid form of restructuring straddling the advantages of reorganization and workouts emerged in the U.S. This is what is known as pre-packaged bankruptcy or pre-packs. Pre-packs allowed a company to engage in restructuring negotiations out of court. Once the debtor finalizes refinancing negotiations, the debtor then files a Chapter 11 petition. The debtor will do this to give effect to the out of court negotiations. It also allows the debtor to take advantage of certain rules such as preferences, Cramdown, etc.

The petition is filed alongside the reorganization plan. If the creditors have voted on the plan prior to filing, the results are filed alongside the petition and reorganization plan. Pre-packs come with a number of benefits to debtors. It saves time spent in Chapter 11 reorganization because a big chunk of the work is done outside of the courthouse. Arguably it saves money than what will be spent on traditional Chapter 11 process. It alleviates the problems associated with creditor holdouts on informal restructuring. Creditors who are unwilling to deal with the debtor may petition the debtor into bankruptcy. Others may move to sell their property or do other things that will force the debtor into filing for bankruptcy. To curtail this result, the Bankruptcy Abuse Prevention and Consumer Protection Act, 2005 provided that once a pre-pack solicitation has begun and it complies with the nonbankruptcy law, the solicitation may continue.⁵⁰⁸ Pre-packs may also attract some tax benefits to the debtor.⁵⁰⁹

⁵⁰⁸ 11 U.S.C §1125 (g).

⁵⁰⁹ See John McConnell & Henri Servaes, The Economics of pre-packaged bankruptcy, in Corporate Bankruptcy: Economic and Legal Perspectives (1996) edited by Jagdeep S. Bhandari and Lawrence A. Weiss.

Pre-packs had their inherent flaws. It is not useful in highly contentious and highly complex cases involving a large number of creditors who are sharply at odds with each other.⁵¹⁰ Such cases must take the normal route of Chapter 11 filing. While Pre-packs were embraced during its peak, the statistics now show that pre-packs often fail than normal chapter 11 proceedings.⁵¹¹

9. Post-Confirmation Issues

Once a debtor has gone through the process of reorganization by negotiating a plan, getting the necessary approval and the court's confirmation, the debtor is ordinarily discharged from all debts and liabilities. The Bankruptcy Code provides that the confirmed plan:

“binds the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.”⁵¹²

All question that pertains to the plan are res judicata and cannot be litigated.⁵¹³ This extends to all creditors who voted against the plan. Because a confirmed plan operates to discharge the debtor from all debts and liabilities, it is important that the debtor gives creditors sufficient notice of the reorganization process.

Sufficient notice is required because the process is accorded finality once the court confirms the plan. In *Mullane v Central Hanover Bank*, the Supreme Court held that: “An elementary and fundamental requirement of due process in any proceedings which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency

⁵¹⁰ *Id.*

⁵¹¹ Lynn M. LoPucki & Joseph Doherty, Why Are Delaware and New York Bankruptcy Reorganizations Failing? 55 Vand. L. Rev. 1933, 1973 (2002).

⁵¹² See 11 U.S.C. §1327(a).

⁵¹³ *In re Howe*, 913 F. 2d 1138 (5th Cir. 1990).

of the action and afford them an opportunity to present their objections.”⁵¹⁴ In *re U.S.H Corp.*, Lifland stated as follows:

“Discharge under the Bankruptcy Code, however, presumes that all creditors bound by the plan have been given notice sufficient to satisfy due process. Whether a creditor received adequate notice depends on the facts and circumstances of each case.”⁵¹⁵

To this end due process is met if the debtor gives notice which is “reasonably calculated to reach all interested parties, reasonably conveys all of the required information, and permits a reasonable amount of time for response.”⁵¹⁶ If a debtor fails to give sufficient notice and reasonable time for creditors to respond to a reorganization process, then a creditor’s claim after the plan has been confirmed cannot be barred.

Creditors may be known or unknown to the debtor. A creditor is known when his identity is either known or reasonably ascertainable by the debtor.⁵¹⁷ A creditor is unknown when his “interest are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to the knowledge [of the debtor].”⁵¹⁸ Where the creditor is known to the debtor, notice is sufficient if the debtor serves actual notice of the relevant bar dates to the creditor. Actual notice is different and distinguishable from notice by publication in a newspaper or another medium.⁵¹⁹ If the creditor is unknown, then *Mullane* holds that publication notice of reorganization

⁵¹⁴ 339 U.S 306, 313-14.

⁵¹⁵ 223 B.R 654 (Bankr. S.D.N.Y 1998).

⁵¹⁶ 339 U.S 306, 313-14.

⁵¹⁷ See *Tulsa Professional Collection Serv. Inc., v Pope*, 485 U.S 478, 490 (1988) quoted in *re U.S.H Corp*, 223 B.R 654 (Bankr. S.D.N.Y 1998).

⁵¹⁸ See 339 U.S 306, 317-18 and 223 B.R 654 (Bankr. S.D.N.Y 1998).

⁵¹⁹ See *re U.S.H Corp*, 223 B.R 654 (Bankr. S.D.N.Y 1998).

and the bar dates in the newspaper and another medium may satisfy due process.⁵²⁰ In *re U.S.H Corp.*, a group of homeowners filed a motion seeking a determination that they were not bound by the order of the court confirming a reorganization plan for U.S. Home Corporation and seeking permission to pursue pre-petition claims against U.S Home. The homeowner had lost their home insurance and was unable to insure with a willing insurer because their housing complex, constructed by U.S. Homes, did not comply with the requirements of a local property insurance guidelines. Non-compliance meant that the homes were not insurable against the risk of hurricanes and windstorm at reasonable rates. The homeowners filed demand notices with U.S Homes in accordance with local deceptive practices law. U.S Home responded to their demand with a statement that their reorganization confirmation order permanently barred litigation against them based on pre-petition claims. They also argued that the local guidelines were not mandatory and since the homeowners were unknown creditors, they received constructive notice by publication of the bankruptcy proceedings. They concluded that U.S Home was effectively discharged of any pre-petition claim by the confirmation order. The court found that the homeowners were unknown to U.S Homes. It also found that the local guidelines were not mandatory and therefore set no standards for U.S Homes to comply. The Court held that U.S Homes could not have been expected to discover any potential claim of the homeowners prior to confirmation particularly one so remote. It held further that if the homeowners were to be “considered known creditors at the time of the confirmation, the universe of creditors entitled to actual notice would defeat the purpose of title 11’s expedited and cost effective claims resolution process...”⁵²¹ In this case, the fact that the creditors were determined to be unknown meant that the publication of the bankruptcy proceeding

⁵²⁰ See 339 U.S 306, 317-18 and 223 B.R 654 (Bankr. S.D.N.Y 1998).

⁵²¹ 223 B.R 654 (Bankr. S.D.N.Y 1998).

was effective notice to the homeowners. The confirmation order was binding and the homeowners were enjoined from litigation.

While the confirmation order enjoys finality and enjoins creditors from litigating pre-petition claims against the debtor, the debtor in other respect is also barred from litigating certain actions after the confirmation. The res judicata doctrine operates to bar litigating issues or question that could have been raised during the confirmation stage. For the doctrine to operate reference must be given to the court's guidelines as follows: "(1) The parties be identical in both suits, (2) A court of competent jurisdiction rendered the prior judgement, (3) There was a final judgment on the merits of the previous decision, and (4) The plaintiff raises the same cause of action or claim in both suits."⁵²² When it comes to determining whether the same cause of action or claim has been brought before another court, the test is whether the plaintiff bases the two actions on the same nucleus of operative facts. All claims that could have been advanced and those that were actually advanced are barred from being re-litigated in another forum after the confirmation of the reorganization plan. This doctrine bars debtors from re-litigating issues that could have brought up against some creditors during the confirmation stage.

10. Does Chapter 11 Reorganization Work?

The promise of a better legal mechanism that rescues a company from financial distress and offers more value to creditors and society seem very appetizing on paper. Proposal for its inclusion in any new system is bolstered if there are real success story rather than just theory. Despite skepticism and calls to abolish Chapter 11, the available data suggest that the Chapter has been far more successful. From a survey conducted on bankruptcy filing between 1994 and 2002, Elizabeth

⁵²² In *re Howe*, 913 F. 2d 1138 (5th Cir. 1990).

Warren sampled data from twenty-three districts in the United States, collecting over 3000 bankruptcy reorganization filing and using nearly two hundred data points. The study concluded that Chapter 11 has 70% success rate.⁵²³ The study arrived at this figure looking at the successful confirmation of a proposed reorganization plan. While the data indicated that a large number of reorganization filing failed, those cases did not involve the filing of a proposed plan for reorganization.⁵²⁴ Those cases which the study categorized as being dead on arrival gave the bankruptcy court no chance to ascertain the prospects or otherwise of their reorganization plan. The study also found that the median time for the entire reorganization process was eleven months. Cases reached a final resolution in six months and they are disposed of by being dismissed, converted to Chapter 7, liquidated in Chapter 11 or confirmation of a proposed plan.⁵²⁵

11. Chapter 7 Of US Bankruptcy Code

Chapter 7 contains the primary or the original remedy in bankruptcy law which is liquidation. Liquidation is common to every country in the world and secured creditors mostly prefer it. Liquidation involves realizing the debtor's assets, either piecemeal or in whole, paying off creditors and where there is surplus returning it to shareholders. Consequently, the company ceases operations and its name is struck out.

The decision to file for liquidation is an important one. Under the Bankruptcy Code, when a debtor is unable to pay his debts as they fall due, he or a creditor may petition the court for official

⁵²³ See Elizabeth Warren & J Westbrook, The Success of Chapter 11: A Challenge to the Critics, Michigan Law Review, Vol. 107, No. 4 603-64 (Feb., 2009).

⁵²⁴ *Id* at 24.

⁵²⁵ *Id* at 24-25.

liquidation to commence. The first test under Section 303 of the Bankruptcy Code is for the Court to determine whether the debtor has not been paying its debts as they fall due.⁵²⁶

While it is for good measure that, the debtor, being aware of his financial position, will file for liquidation promptly to avoid further deterioration of his financial position, some debtors wait for things to turn around and if it doesn't then file for liquidation.⁵²⁷ Creditors in such a case will have the opportunity to petition the debtor into liquidation when they felt that their interest will be jeopardized by the debtor's refusal to file. This is called involuntary bankruptcy. A creditor can also petition the court to convert a reorganization proceeding into an outright liquidation on a proper showing.⁵²⁸

Involuntary bankruptcies are rarely filed compared to debtor's voluntary petition.⁵²⁹ The route to filing involuntary bankruptcy is however not an easy one and a creditor must exercise caution and restraint before filing a petition. Three creditors must file the petition for involuntary bankruptcy.⁵³⁰ Section 303 of the Bankruptcy Code provides the grounds for filing for involuntary

⁵²⁶ See 11 U.S.C. §303 and *In re Faberge Restaurant of Florida Inc.*, 222 B.R. 385 (Bankr. S.D. Fla. 1997).

⁵²⁷ It is argued that management wait too long before filing for liquidation; essentially using the assets that may be necessary for paying off creditors to fund this long period when liquidation should have been initiated. See generally Lynn M. LoPucki, A General Theory of the Dynamics of the State Remedies/Bankruptcy System, 1982 Wis. L. Rev. 311.

⁵²⁸ See 11 U.S.C. §112(b). A debtor may also petition the court to convert a reorganization petition into an outright liquidation under 11 U.S.C § 112(a).

⁵²⁹ Susan Block-Lieb, Why Creditors File So Few Involuntary Petitions and Why the Numbers Is Not Too Small, 57 Brook. L. Rev. 803 (1991).

⁵³⁰ *In re Gibraltar Amusements*, 291 F. 2d 22 (2d Cir.), cert. denied, 368 U.S. 925 (1961), the Circuit Court held that a creditor who was composed of a parent and a subsidiary company and who had separate federal income filing status, qualified to be counted separately for the purposes of determining the 'three creditors' requirement. It did not matter whether the subsidiary was under direct control of the parent. See Opinion of Smith, Circuit Judge. The dissenting opinion by Friendly Circuit Judge, held that assuming the company was not under direct control and was separate under state under federal law, it did not rise to the level of required under the Bankruptcy Act. It was inconsistent with

bankruptcy. Involuntary bankruptcy can be used as a means to bully and threaten debtors. A mere filing of bankruptcy can potentially destroy the debtor's business even if the petition is subsequently dismissed as unmeritorious. To this end, section 303 have a number of punitive measures against an unsuccessful creditor, requiring the creditor to pay punitive damages, attorney fees and cost of the defending the unmeritorious petition.⁵³¹ *In re Silverman*, the Court held that: "the imposition of punitive damages, unlike fees and cost, must be predicated upon a finding of bad faith, as the plain language of the Code section 303(i)(2)(b) states."⁵³² The totality of the circumstances indicating bad faith must be considered before imposing punitive damages. In *Silverman*, the Court awarded punitive damages of \$50, 000 in addition to attorney fees and cost after it found that the petition had been brought in bad faith. In particular, the petitioner commenced the involuntary proceedings shortly after a Superior Court held that genuine issues existed as to existence and totality of the amount the petitioner alleged was owed by the debtor. The petitioner ignored the ruling and filed a petition for bankruptcy hoping to use bankruptcy petition as a collection mechanism.⁵³³

Once a petition has been validly filed in accordance with section 303, an automatic stay of all proceeding against the debtor come to force. This stay permits the Trustee to pool the assets together and sell them to pay off all creditors in an equitable manner. The Trustee has all the powers of a Trustee or DIP in a reorganization. The Trustee may avoid transactions such as preferences, set aside fraudulent transfers executed when the debtor was insolvent and do other

the Act to hold that a single creditor corporation could petition for involuntary bankruptcy by simply organizing its financing subsidiaries into petitions to satisfy the 'three creditors' requirement. See also *In re Iowa Coal Mining*, 242 B.R. 661 (Bankr. S.D. Iowa 1999).

⁵³¹ See 11 U.S.C. § 303 (i).

⁵³² 230 B.R. 46 (Bankr. D.N.J. 1998).

⁵³³ See *id.*

things that are beneficial to the liquidation for the benefit of creditors and other interested parties. Once the estate has been enhanced using the Trustee's avoiding powers, the Trustee proceeds to realize the assets either by piecemeal sale or sale in whole satisfy the debt owed to creditors. Creditors are then paid in accordance with their priority ranking. After paying secured, priority and all other unsecured creditors, if anything remains, it is returned to the shareholders and the liquidation ends.

12. Conclusion

Corporate rescue takes many forms. They may be informal or formal mechanisms. Their ultimate goal is to see the business turned around instead of having it sold and ceasing its operation. In the U.S, reorganization under Chapter 11 serves this useful purpose. It is a legal innovation that has influenced corporate rescue models around the world. It employs organized negotiation among debtor and creditor to rescue a distressed company. It uses automatic stay to ward off all unnecessary actions against the company and allows the company to propose a plan to repay creditors. The process also employs some unique tools to enhance the estate so that it maximizes return to creditors. At the heart of reorganization is the promise that the company will be worth more if saved than if sold piecemeal in a liquidation. The automatic stay, avoiding powers and other measures help the debtor to achieve this aim.

Though Chapter 11 has saved a number of businesses, it also has some failures. Some scholars have called for its total abolition claiming the system rewards management game-playing tactics. Others note that if the company has to be reorganized, then it should be at the behest of the creditors who wish to do so but should not be forced on all creditors. They claim that if the government wishes to see companies rescued, then the government should take up the responsibility and pay for the entire process. Despite these challenges, reorganization has seen some successes allowing

employees to keep their jobs, sustaining supplier chains and warding off undesirable economic effect to the community where these businesses may be located.

CHAPTER SEVEN

TRANSPLANTING CHAPTER 11 OF THE U.S. BANKRUPTCY CODE

1. Introduction

Transplanting any law from one legal system to another require circumspection. It is a careful exercise which must take into account the history, culture, political and economic backgrounds of the dominant and the receiving legal system. While there exist differences in any two legal systems, it is not impossible to adopt sets of rules from one system and then tailor it to suit the needs of another. In the specialized fields of bankruptcy law, some suggest that it may be impracticable to transplant bankruptcy law, specifically Chapter 11 of the US Bankruptcy Code into other legal systems.

In this Chapter, I challenge that viewpoint and argue that a legal system must not demonstrate to an exactitude, the unique characteristics of U.S attitude towards bankruptcy before it can transplant key reorganization elements under Chapter 11 of the U.S Bankruptcy Code. The second part of this Chapter probes the objectives and structures of an efficient bankruptcy regime. It also compares and contrast the bankruptcy law in Ghana and the U.S.A and most importantly, discuss some factors that develop or inhibit legal transplant in the Ghanaian society.

2. Is It Impractical To Transplant Chapter 11 To Another Legal System?

Professor Nathalie Martin, argue in her article, *The Role of History & Culture in Bankruptcy & Insolvency Systems*, that insolvency systems reflect the legal, historical, political and cultural context of the countries that developed them.⁵³⁴ She notes that this explains the reason why countries that share the same legal traditions have marked differences in how they approach

⁵³⁴ Nathalie Martin, *The Role Of History And Culture In Developing Bankruptcy And Insolvency Systems: The Perils Of Legal Transplantation*, 28 B. C. Int'l & Comp. L. Rev. 1 2005.

individual and business insolvency. Given the vast cultural, historical and economic background, new insolvency system must, therefore, “reflect how individual nations have experienced the growth of market economies and how philosophically” these countries have viewed debt.⁵³⁵ While this view is largely apt, she makes another argument that is problematic from the Ghanaian point of view. She argues that for most countries across the world, grounds are unripe for transplanting Chapter 11 of U.S. Bankruptcy Code due to cultural attitude towards debt. She states in relevant part that:

“Around the world, people are less forgiving about debt forgiveness than they are in the United States. In some parts of the world, not paying debts is the ultimate disgrace. In other parts of the world, there simply is no personal bankruptcy system, and little in the way of business reorganization either. Despite this, many countries are starting to move towards a U.S bankruptcy reorganization model for businesses, and some are also replicating forgiving personal bankruptcy laws. Given the unique cultural, economic, and historical development of the U.S system, however, this may be impractical.”⁵³⁶

She arrives at this conclusion after recounting the history of U.S Bankruptcy law and U.S consumer behavior. She states that “a legal culture of tolerance toward non-payment developed to encourage people to continue entrepreneurial pursuits.”⁵³⁷ Politically, she notes the clash of creditors groups and debtor’s groups forced a compromise, leading to the unique bankruptcy law in the US.⁵³⁸ She notes in sum that, these unique characteristics have created a unique bankruptcy system and stated as follows:

⁵³⁵ *Id* at 5.

⁵³⁶ *Id* at 35.

⁵³⁷ *Id* at 11.

⁵³⁸ *Id* at 12.

“Thus a number of unique characteristics have created the U.S bankruptcy system. These characteristics include a strong societal desire to create a commercial economy, a resulting extensive use of credit, a desire to balance creditor and debtor interests in developing the law, a unique two-party political system that helped create this balance, as well as a highly unusual and prominent role for private attorneys in the bankruptcy process.”⁵³⁹

To drive home her point about differences in attitudes, she attempts to demonstrate how the rest of the world have different debt forgiveness attitude than the U.S. While she states that some European Countries are more forgiving of their debtors, she mentions in passing South Africa, Kenya and Uganda and draw the conclusion that these countries are not as forgiving of the debtor as the U.S.⁵⁴⁰ For the most relevant part, her analysis did not involve debt forgiveness analysis of a single African State and Ghana in particular. While her analysis may hold for some jurisdictions she had considered, it is submitted that the argument that both individual and business reorganization may be impractical in a developing country like Ghana, is at most superficial and misguided for the following reasons:

History behind US Debt Forgiveness

The history behind U.S. bankruptcy law cannot in fairness be categorized as one of outright forgiveness. Debtor forgiveness and eventual discharge did not come without resistance. Southerners disliked the possibility of voluntary bankruptcy and discharge for both merchants and non-merchants. They held the belief that the act of filing for voluntary bankruptcy and seeking some sort of protection and a discharge of debt obligation was an unconstitutional act.⁵⁴¹ As a

⁵³⁹ *Id* at 13.

⁵⁴⁰ *Id* at 42.

⁵⁴¹ See Charles Jordan Tabb, The History of the Bankruptcy Laws in the United States, 3 AM. BANKR. INST. L. REV. 5 (1995).

result, the Bankruptcy Act of 1841 passed with a close vote.⁵⁴² There existed a period where debtors were imprisoned and treated harshly. Thousands and thousands of debtors were imprisoned for their indebtedness across the US and it is notorious that one Supreme Court Justice, James Wilson had to flee the State of Pennsylvania fearing imprisonment for his debt.⁵⁴³

Bankruptcy legislation had also been crafted as a response to panics and depressions and not necessarily consumer spending habits. The first bankruptcy legislation was passed in 1800, 11 years after the ratification of the U.S. Constitution. This came about after the panic of 1797. The rest of U.S. Bankruptcy legislation have been enacted following panics and depressions. The 1841 law was enacted to deal with the panic of 1837, the 1867 Act was enacted to deal with the panic of 1857 and the effects of the Civil War, the 1898 Act was also enacted to deal with the panic of 1893.⁵⁴⁴ The 1898 Act which was replaced with the Bankruptcy Code of 1978 was substantially amended by the Chandler Act of 1938.

The Chandler Act was passed as a response to the great depression and facilitated debtor rehabilitation. Prior to the Chandler Act, depression era legislation in the 1930's for the first time made it possible for railways to reorganize their affairs and prevent them from folding. Corporate reorganization properly so called followed afterward. It follows that U.S. Bankruptcy legislations had been enacted to regulate the relationship between creditors and debtors during the period of great panics and depressions. They have not been crafted solely as a response to unique debt forgiveness ethos, responding to consumer spending habits during times of greener pastures.

⁵⁴² The 1841 Act passed also as a response to the panic of 1837. The change in the Political atmosphere after the panic, saw a government sympathetic to voluntary bankruptcy, this also contributed to the passing of the 1841 Act.

⁵⁴³ See Charles Jordan Tabb, The History of the Bankruptcy Laws in the United States, 3 AM. BANKR. INST. L. REV. 5 (1995).

⁵⁴⁴ See *id.*

Further, debtor discharge was introduced in the UK by the Statute of Anne in 1705. It was not until 1800 that the first Bankruptcy Act instituted discharge in the US.⁵⁴⁵ Discharge of debt was not automatic under the 1800 Act just as it was not automatic under the Statute of Anne. It is, therefore, fair to state that, debt forgiveness in the U.S has passed through the various stages of outright hostility to a period of acceptable conduct due to increasing individual debts. Prof Nathalie admits in one part that, the current U.S attitudes towards personal or consumer bankruptcy developed far recently.⁵⁴⁶ A number of developing countries are undergoing this process and there is no turning back. In Ghana, the rise of the middle class⁵⁴⁷ means more purchasing power and more credit advancement.⁵⁴⁸ This has led to increased home mortgages, auto loans, credit cards debts and the likes. While debt forgiveness has been met with indifference in the past, as time passed, the attitude has changed.

Attitude towards Individual Bankruptcy

In Ghana, an early attempt to institute pro-debtor bankruptcy law was met with resistance not by the natives, but by the foreign merchant representing their commercial interest in the colony. The merchants halted attempts to incorporate provisions of the Bankruptcy and Debtor's Act of 1869 as existed in England into the legal system in the colony. In 1874, the Secretary of State for the Colonies decided that the pro-debtor provisions could not apply to the colony. In 1876, the

⁵⁴⁵ Charles Tabb notes that the 1800 legislation was similar to the 1732 English Act. See *id.*

⁵⁴⁶ Nathalie Martin, The Role Of History And Culture In Developing Bankruptcy And Insolvency Systems: The Perils Of Legal Transplantation, 28 B. C. Int'l & Comp. L. Rev. 1 2005 at 13.

⁵⁴⁷ See Xan Rice, Ghana's modest middle takes to the skies: Nearly one in five Ghanaians is now lower or upper middle class (December, 28, 2012) available at <https://next.ft.com/content/893ae814-486d-11e2-a6b3-00144feab49a#comments> accessed on (05/01/2015).

⁵⁴⁸ See also Ghana News Agency, ECOBANK introduces Credit Card in Ghana, available at: <https://www.modernghana.com/news/139119/1/ecobank-introduces-credit-card-in-ghana.html> accessed on (05/01/2015).

Supreme Court Ordinance made it possible to imprison the debtor for non-payment of debt. Though there were judicial restraint and a division over whether to enforce imprisonment; the practice was carried on until independence when it was reversed.⁵⁴⁹ This attitude cannot in fairness be attributable to the natives; the law remained what it was because of colonial dictates.

Further, discharge of debt has been part of Ghanaian bankruptcy law since 1858. Section 31 of the Gold Coast Bankrupt and Insolvency Ordinance 1858 provided a mechanism where the insolvent could obtain a certificate from the court granting him discharge from all liabilities after the bankruptcy process.⁵⁵⁰ This provision has been carried through the subsequent legislations- the current one being the Insolvency Act of 2006. Despite opposition to lenient bankruptcy legislation mainly advocated by foreign commercial interest, discharge for debt was not unknown to the Ghanaian legal system.

Cultural attitude towards debt has also changed over the period. While the Insolvency Commission in 1961 stated that Ghanaians were dilatory about payment of debt, that perception has changed.⁵⁵¹ Today, payment of debt is seen as a matter of honor.⁵⁵² Debtors are determined to meet their obligation without much incentives from the bankruptcy system. Some debtor's go to extreme lengths to pay their debts and sacrifice a lot more than the average American sacrifices when they

⁵⁴⁹ See *Swanzy v. Madden* (1882) cited in *Swanzy v. de Veer and Another* (1883); *Rhule v. Roberts* (1885) Fanti Law Report 41 (1904); J. M. Sarbah, *Fanti Customary Laws* 236 (2nd ed, 1904); High Court (Civil Procedure) Rules, C.I. 47 of Ghana and *Republic v High Court (Fast Track Division) Accra; Ex Parte PPE ltd & Paul Juric (Unique Trust Financial Services Ltd Interested Party)*, [2007-2008] SCGLR 188.

⁵⁵⁰ See No. 8 of 1858.

⁵⁵¹ Failure to pay debts was attributable to the slow pace of life in the olden days but times have changed. In the rural subsistence economy, life was slow and the debtor could afford to delay. See Final Report of the Commission of Inquiry into Insolvency Law in Ghana 1961 at 20.

⁵⁵² See Jessica Schicks, *Over-Indebtedness of Microborrowers in Ghana: An Empirical Study from a Customer Protection Perspective*, 2011, Center for Financial Inclusion Publication No. 15.

have to reorganize their debts under the US Bankruptcy Code.⁵⁵³ Given the change in attitude towards meeting debts obligation, reorganization couldn't be more appropriate at this time as a social intervention program that alleviates psychological, emotional and other trauma's that often follow over-indebtedness.⁵⁵⁴ Professor Muna Ndulo notes that:

“The increased access to finance around the world, the conditions of economic crisis, and the general evolution of the economy and society have increased the importance of designing modern regimes for the insolvency of natural persons, effective at dealing with the complex problems and ramifications of the problem of personal over-indebtedness.”⁵⁵⁵

Relating this to developing countries he notes importantly that:

⁵⁵³ In her survey of the hardships borrowers go through on daily basis in Ghana, Schicks states that:

“When the easier coping strategies are no longer sufficient to meet repayment deadlines, many borrowers resort to cutting back on food. For those who do sacrifice on food, this usually becomes a repeated experience... Sometimes, when there are no other options left, borrowers resort to taking a new loan elsewhere to repay an old one, selling or pawning some of their household or business assets, or taking children out of school because they cannot afford the school fees or need their children as a workforce too urgently.”

One respondent described her psychological stress as follows:

“My mind is not clear because always I am thinking of that money [...] I am having severe headaches. Sometimes I do not hear it when people talk to me. [...] When the tension gets high, a lot of thoughts [of suicide] come to me. Then all that I do, I either take the Bible and read or sing some gospels to calm down and to forget about the evil intentions that have come to me.”

The study found that about 5% of the respondent had to endure shame and insults in addition to losing their properties through seizure. See *id* at 10-11.

⁵⁵⁴ Schicks states that, as much as collections has to be strict, borrowers have to be treated with dignity. See *id* at 11.

⁵⁵⁵ See remarks by Professor Muna Ndulo, UNCITRAL Seminar on “Trade, Development, and Law” In the Context of Post-2015 Development Agenda and Financing for Development, 5 (July 6, 2015). See also Jason Kilborn et al., Opportunity, Equity And Inclusion (2012) available at http://siteresources.worldbank.org/INTLAWJUSTICE/News%20and%20Events/23316220/Insolvency_Final_Part1.pdf accessed on (08/09/2015).

“The treatment of natural persons is at the core of many of the efforts directed against financial exclusion and poverty, and a fresh start policy in personal insolvency perceived as an efficient way of promoting entrepreneurship and avoiding the loss of valuable economic and human resources to society as a whole and yet in many developing countries insolvency laws are archaic and date back to the colonial period.”⁵⁵⁶

The need to move away from archaic laws towards modern bankruptcy laws is now and the conditions are ripe. Fresh start policy will be useful in developing countries because for those living in poverty; it will give them a second chance to organize their affairs. Its usefulness is in the fact that a fresh start will not condemn them to perpetual poverty with over-indebtedness. This doesn't seem impossible in Ghana today because the unique characteristics akin to the U.S cannot be demonstrated to an exactitude. A country doesn't need overly forgiving exemptions and other pompous schemes to establish bankruptcy reorganization.

The economic trajectory in Ghana is changing. The promotion of the private sector has become an integral part of the country's development strategy.⁵⁵⁷ Currently, one in five Ghanaians is either lower or upper middle class.⁵⁵⁸ Cultural attitude towards debt forgiveness and individual attitude

⁵⁵⁶ *Id* at 6. See also Jason Kilborn et al., Opportunity, Equity And Inclusion (2012) available at http://siteresources.worldbank.org/INTLAWJUSTICE/News%20and%20Events/23316220/Insolvency_Final_Part1.pdf accessed on (08/09/2015).

⁵⁵⁷ The government launched the “Golden Age of Business” strategy to advance private sector development to boost economic growth. This involved boosting investment climate and enhancing service delivery including financial services. See generally Peter Arthur, The State, Private Sector Development, and Ghana's “Golden Age of Business”, *African Studies Review*, 49, pp 31-50 doi:10.1353/arw.2006.0053 (2006).

⁵⁵⁸ See Xan Rice, Ghana's Modest Middle Takes To The Skies: Nearly One In Five Ghanaians is Now Lower Or Upper Middle Class (December, 28, 2012) available at <https://next.ft.com/content/893ae814-486d-11e2-a6b3-00144feab49a#comments> accessed on (05/01/2015). The middle class has enough purchasing power not only to afford non-essential consumer goods and to save, but also, to buy a modest house, car and to fly from Kumasi to Accra on regular basis.

towards debt repayment has changed in the right direction.⁵⁵⁹ There exist no political deadlock over the tenor of bankruptcy legislation. Given this background, it will not be impractical to grant today's middle-income debtor (who goes to extreme length to pay his debt without much statutory support) a moratorium on judicial enforcement against his property and then allow him to propose a repayment plan over a period. If such a plan makes sense and it's feasible, then the court confirms it and if not, the Court asks the creditor to proceed into liquidation. Such a law, will not only be a welcome development but necessary to deal with the problems of personal over-indebtedness. It's long overdue.

Attitude towards Corporate Bankruptcy

Ghana has a peculiar circumstance with corporate bankruptcy. The level of opposition faced by individual insolvency or bankruptcy laws was never extended to companies. Companies were seen as juridical entities or fictional characters as opposed to individuals. Discharge provisions were contained in the Companies Ordinance of 1906 and then the Bodies Corporate (Official Liquidation) Act, 1963. These legislations were not met with fierce opposition. Companies took credit as part of their business financing. The Insolvency Commission in 1961 described credit as the lifeblood of the economy.⁵⁶⁰ Though the quantum may not rise to the level of the U.S market, it is not a new concept.

When a company fails, it carries a negative connotation, but it doesn't go with stigma. Various reasons account for corporate failure. In not too distant past, the rationing of electricity in Ghana caused the collapse of many companies. No stigma attached to the many companies which failed. It was a national crisis and everyone was hit hard. Other companies like Ghana Airways Ltd, which

⁵⁵⁹ See Jessica Schicks, Over-Indebtedness of Microborrowers in Ghana: An Empirical Study from a Customer Protection Perspective, 2011, Center for Financial Inclusion Publication No. 15.

⁵⁶⁰ Final Report of the Commission of Inquiry into Insolvency Law in Ghana, 18 (1961).

was liquidated as a result of mismanagement, still had the goodwill of Ghanaian customers. It was the national pride and seeing it liquidated and its assets sold piecemeal, hurt Ghanaian pride the most.⁵⁶¹ Many wished the company could have been saved if laws existed to do that. The fact that corporate rescue or reorganization does not exist today does not mean transplanting reorganization in nature of U.S. Chapter 11 cannot be achieved in Ghana.

If the argument is that the U.S attitude and conditions are unique and therefore no other country can import U.S bankruptcy law, then it goes without saying that no other country can ever transplant any bankruptcy law from one jurisdiction to another because no two jurisdictions are the same. Yet Chapter 11 has influenced a good number of reorganization schemes across the world.⁵⁶² The better approach is to pay attention to local conditions and elicit key choices that suit those conditions i.e. the receiving state's legal, economic, political, social and cultural developments. No astute lawmaker will transplant *holus bolus*, a specialized branch of law like bankruptcy law, which is crafted to meet the conditions of one jurisdiction and situate it in another without changes and expect the law to work perfectly.

3. Analysis Of Bankruptcy Law In Ghana And U.S.A: Similarities And Differences

The Bankruptcy Code of 1978 and the Bodies Corporate (Official Liquidation) Act, 1963 (Act 180) of Ghana have been designed to serve a unique purpose; which is to solve a debtor's over-indebtedness problem by use of a collective procedure. This is a golden thread that passes through

⁵⁶¹ Ghana Airways assets were sold. Some airplanes have now been converted into restaurants. See Old Ghana Airways DC-10 opens as a Restaurant, available at <https://internationalflyguy.com/2013/11/11/old-ghana-airways-dc-10-opens-as-a-restaurant/> accessed on (05/01/2015).

⁵⁶² See Jay L. Westbrook, A Global Solution to Multinational Default, 98 Mich. L. Rev. 2276, 2278–79 nn.2–15 (2000) (Where he discusses bankruptcy reform efforts by a number of countries throughout the world).

the bankruptcy laws in the two jurisdictions. The approaches, however, differ in some significant details.

Entry Routes to Liquidation

Liquidation is a common procedure between the two jurisdictions. A company that is unable to meet its debts can petition for its liquidation or an involuntary petition for its liquidation may be presented by the creditors. The U.S restricts involuntary liquidation petition by confining it to at least three creditors.⁵⁶³ Three creditors must petition the court to force a debtor into liquidation. The Ghanaian law provides that any creditor, member, or the Attorney-General (on stated grounds in the Act) may petition the court for the liquidation of a company when it is evident that the company is unable to meet its debts.⁵⁶⁴ Upon filing, the Court must ascertain whether the petition has been brought in good faith. If it does not meet the good faith requirement, the petition is dismissed. In Ghana, though the good faith requirement is not explicit under the Law, the Court is duty bound to consider the prospective and contingent liabilities of the company and bound to refrain from the liquidating a company merely because the petitioner alleges that debt is owed and has not been paid.⁵⁶⁵

Moratorium

After the petition moves into the liquidation phase, some statutory mechanisms come into force. The first is the automatic stay principle. This is a common feature of most bankruptcy regimes. It stops all actions against the company except those commenced or continued with the leave of the Court. When a debtor proposes a reorganization of its affairs, the debtor may need some of its assets to convince would-be-financiers to invest in the company. If this asset or some portion of it

⁵⁶³ 11 U.S.C §303.

⁵⁶⁴ See Sections 3 and 4 of Act 180.

⁵⁶⁵ See *Billy v Kuwor* [1991] 1 GLR 522-532.

is secured, the asset becomes necessary for its reorganization prospects. When that happens, the automatic stay comes to play to stop secured creditors from realizing the asset. Under US Bankruptcy law, secured creditors may demand that adequate protection of their interest be provided where they believe that their interest is in jeopardy.

The automatic stay principle does not bind secured creditors under Ghanaian law.⁵⁶⁶ The automatic stay rule does not catch any action to realize security by a secured creditor and there is no provision for adequate protection because their action cannot be stayed. The law allows the court a discretion over whether to lift the stay when dealing with unsecured creditors. As a rule, trickery, actual dishonesty and deceit of an unsecured creditor are sufficient grounds to lift the automatic stay principle in favor of an action by an unsecured creditor.⁵⁶⁷ This happens when the creditor is prevented from concluding either execution or enforcement action using trickery or dishonesty and the debtor then files for bankruptcy protection.

Control of Bankruptcy Procedures: The Players

After bankruptcy commences, the debtor's business is legally transformed into what is called an "estate." Bankruptcy law regulates the control of the estate. Under US law, when a debtor wishes to reorganize under Chapter 11, the old management generally remains to see through with the reorganization. The management becomes quasi-trustees and in their new guise called debtor-in-possession or DIP. The old management can be replaced but only after a genuine cause is shown. Practically, it has been difficult to replace old management in a Chapter 11 case. The alternative to appointing DIP is for creditors to push for the appointment of an examiner. An examiner carries out an investigation into an allegation of fraud, dishonesty, misconduct and like matters that likely

⁵⁶⁶ *Merchant Bank v Saoud and others*, H1/92/2006.

⁵⁶⁷ See *Brown and Others v. Hoeks (Ghana) Ltd*, [1977] 2 GLR 15-20 and *Re Grosvenor Metal Co Ltd* [1950] Ch 63, [1949] 2 All ER 948, 65 TLR 755, [1949] WN 440.

contributed to the debtor's bankruptcy. The old management proposes a new plan and works to conduct the business to achieve the targets in the plan.

In a liquidation, the United States Trustee appoints a disinterested person to act as an interim Liquidator until creditors appoint a substantive liquidator. Where one cannot be settled on by creditors, The U.S Trustee has the power to appoint a private trustee to liquidate the company. The U.S. Trustee's office is created under the Bankruptcy Code to oversee the enforcement of certain provisions of the Bankruptcy Code. That includes taking legal action to prevent abuse and fraud and referring matters for investigation and criminal prosecution. The US bankruptcy process to an extent is controlled by the parties interested in a debtor's bankruptcy, the U.S Trustee and the Court.

In Ghana, Act 180 set up the public Liquidator who is the Official Liquidator in all cases arising under the Act.⁵⁶⁸ The Companies Registrar, affiliated with the Ministry of Justice and Attorney-General is the official Liquidator. When a petition is filed and winding up order is entered, the Official Liquidator is appointed and his sole purpose will be to run the business for the beneficial winding up of its affairs, realize the assets and pay off creditors. The Liquidator stands in a fiduciary position to the company and he has the same duties and liabilities as a director of the Company. The law does not make it clear whether the liquidator has a fiduciary duty to act in the best interest of the estate as a whole including the interest of creditors and other parties in interest. In the US, the DIP has been held to hold a fiduciary duty towards all party in interest including creditors.⁵⁶⁹

⁵⁶⁸ See Sections 7, 8 and 9 of Act 180.

⁵⁶⁹ *LaSalle National Bank v Perelman* (2000) 82 Supp 2d 279 at 292-293.

Neither the debtor nor the creditor has authority to appoint a Liquidator. There are no grounds to remove a Liquidator although if his actions aggrieve a party, the party may petition the court for directions. All investigation of fraud and misconduct is within the powers of the Liquidator. There are no provisions empowering creditors to appoint an examiner to investigate into the affairs of the company. The Liquidator has the power to make such examination after seeking approval from the court. It is fair to state that under Act 180, the control of the procedure is in the hands of the liquidator and the court.

Creditors Committee, Meetings and Voting

Creditors participation in the bankruptcy process find weight in their ability to meet, form committees to act on their behalf and vote on plans. In the U.S., after the commencement of liquidation, a meeting of creditors is scheduled to vote on a substantive trustee and to vote on a creditors committee.⁵⁷⁰ Unsecured creditors elect a committee of two up to eleven creditors to serve as creditors committee. The committee makes a recommendation to the U.S. Trustee about the performance of the Trustee and submits issues affecting the smooth operation of the liquidation to the court.

In a reorganization, the U.S. Trustee appoints a committee of creditors from unsecured creditors consisting of persons willing to serve, that hold the seven largest claims against the debtor.⁵⁷¹ The court may appoint additional creditors committee as it deems fit. The committee may appoint professionals to represent their interest in the entire reorganization process. The committee has the power to request the appointment of a trustee or an examiner. It also has the power to conduct its investigation into the affairs of the debtor, advice creditors on the proposed plan and consult with

⁵⁷⁰ 11 U.S.C § 701, 702 and 705.

⁵⁷¹ 11 U.S.C §1102.

the trustee during the administration of the estate.⁵⁷² The creditor's committee may file a reorganization plan if the debtor fails to file one within the statutory time frame. Once the debtor proposes a plan, it is voted on by creditors put into different class reflecting the nature of their claims against the debtor. Creditors in each class who hold at least two-thirds of the amount owed or half the number of the total number of creditors of the class may accept the plan.

By contrast, there is no provision for creditors committee under Act 180 of Ghana.⁵⁷³ A meeting of creditors is statutory sanctioned to be held within six weeks after publication of winding up order against a company. The Liquidator convenes this meeting and he chairs this and all other meeting of creditors. Meeting of creditors can proceed if three creditors with admitted proofs are present or acting through their authorized proxies. All questions at the meeting can be decided by simple majority of votes cast.

Where a company proposes an arrangement with creditors, the arrangement can be accepted by three-quarters of votes cast. An arrangement is a form of rescue mechanism that allows some sort of finance to be injected into the company. At the end of the process, shareholding structure change, the name of the company may change and employees may lose their jobs, etc.

Gathering Assets for distribution

The Trustee or liquidator has some tools to gather and to prevent dissipation of the debtor's assets. In a liquidation, the trustee has the power to avoid certain transaction considered as a preference which was conducted with the intention of overreaching other creditors. When he does the asset is returned to the estate. The trustee also has the power to set aside fraudulent conveyances, which are transfers made within two years prior to the filing of the petition for bankruptcy. In a

⁵⁷² 11 U.S.C §1102- 1103.

⁵⁷³ Section 23 of Act 180.

reorganization under Chapter 11, a number of rules come to play. The Trustee has the power to avoid an executory contract that is considered onerous to a successful reorganization and force the reorganization plan on dissenting creditors provided adequate protection is given to those creditors. The Ghanaian law on liquidation is not entirely different from what pertain in the U.S when it comes to gathering assets for the liquidation. The liquidator has the power to avoid preferences and set aside certain transfers. The only noticeable difference is the time frame within which the transaction can be caught within the rules. In the U.S, preferences can be avoided when the transaction occurred within ninety (90) days of filing for bankruptcy and a fraudulent transaction can be set aside when the occurred within two (2) years of filing for bankruptcy. In Ghana, preferences can be avoided if they happen with six months prior to filing a petition for bankruptcy. All property in the custody of the company within six months preceding the petition for bankruptcy is presumed vested in the company. All transfer to creditors for payment of any debt that occurs within 21 days immediately before the filing of the petition are automatically voided. The Ghanaian rules have potency in terms of duration compared to the U.S. The Liquidator has the power to abandon onerous property or contract which is detrimental to the estate. He may disclaim such property and become divested of any interest or liability over such property.

Schemes of Arrangements and Reorganization

Debtor reorganization under Chapter 11 of the US Bankruptcy Code is entirely different from what pertain in Ghana. There is no equivalent of the mechanism, though one can say that schemes of arrangements under Ghanaian law, can be used to achieve some sort of reorganized debtor in Ghana. Schemes of arrangement typically end with liquidating the company and setting up a new entity with a new name in its place. Liquidating the company and setting up a new one in its place is not what reorganization mechanism in the U.S. is about. Reorganization is aimed at saving the

debtor company from folding up. Though it may lead to downsizing, the aim is not to see the company fold.

Exit Routes

Liquidation has one exit plan. The company brings its life to a close by selling its assets either piecemeal or in large chunks. That is the plan available to companies who file for Chapter 7 liquidation in the US or winding up in Ghana. If the company filed for reorganization, the confirmation of the reorganization plan discharges all debts covered under the plan. If the plan is not confirmed, the case is moved from Chapter 11 to Chapter 7 and the company is liquidated to pay off creditors.

4. Designing Key Objectives Of An Efficient Bankruptcy Law

Country approaches to bankruptcy differ considerably. On the whole, the world jurisdiction is divided into pro-debtor, pro-creditor and what is often referred to as “Not Interested.”⁵⁷⁴ Pro-debtor jurisdiction tends to provide bankruptcy incentives and forgiveness for debtors. Pro-creditors, on the other hand, have strict creditor controlled mechanisms with little or no incentives and forgiveness for debtors. Other jurisdictions tend to have undeveloped bankruptcy systems and can be regarded as ‘not interested.’

Although this difference exists, it is generally agreed that an effective and efficient bankruptcy regime should aim to achieve certain key objectives.⁵⁷⁵ Designing an effective and effective bankruptcy regime matters for good reasons. First, an efficient and effective bankruptcy regime

⁵⁷⁴ Wood states that the world’s jurisdictions are roughly divided into pro-creditor, pro-debtor and “not interested” categories. See id pp. 2-3.

⁵⁷⁵ See United Nations Commission On International Trade Law, Legislative Guide on Insolvency Law, at 10-14, U.N Sales No. E.05.V.10 (2005).

puts confidence in the financial market home and abroad which is good for investment. The effectiveness of bankruptcy procedures is an important point in assessing non-market risk.⁵⁷⁶ Secondly, strengthening the institution, which regulates bankruptcy is important because the quality of institutions supporting economic activity is an important determinant of economic growth and welfare.⁵⁷⁷ Thirdly, the past and current events have shown that there is the need to strengthen institutions that regulate departure of distress companies.⁵⁷⁸ Fourthly, ensuring uniformity in bankruptcy legislation promotes regional integration and certainty in cross-border bankruptcy cases.⁵⁷⁹ The enunciation of core bankruptcy principles and standards, therefore, has tremendous advantages. Generally, robust and predictable bankruptcy regime promotes certainty in the market, drives economic growth and regional integration and when well-crafted sometimes saves jobs.⁵⁸⁰

⁵⁷⁶ See Harold S. Burman, Private International Law, 32 Int'l Law. 591-592 (1998). See also Federal Judicial Center, International Insolvency (2001).

⁵⁷⁷ See Clas Wihlborg, Institutional Development in Africa: The Case of Insolvency Law, in Reforming Africa's Institutions, 277 (2003). See also Douglass North, Institutions, Institutional Change, and Economic Performance, Cambridge University Press: Cambridge (1990).

⁵⁷⁸ The collapse of the Soviet Union and fall of communism in the 1980s, the Mexican debt crisis in 1994-1995, the Asian financial crisis in 1997-1998 and the recent world financial crisis have shown that there is the need to strengthen institutions that regulates departure of distressed companies. See Terence C. Halliday & Bruce G. Carruthers, Bankrupt: Global Lawmaking And Systematic Financial Crisis 70 (2009).

⁵⁷⁹ A number of complex international legal problems often arise in cross border bankruptcy cases. In *Maxwell Communication Corp. v. Société Générale* 93 F.3d 1036 (2d Cir. 1996), a media communication empire, had its headquarters in United Kingdom with corporate presence in United States and Canada. A number of procedures had to be resorted to achieve reorganization in the U.S.A and a scheme of administration and partial liquidation in the United Kingdom. Comity and judicial restraint was at the heart of the resolution of the problems that presented itself since no treaties or other rules were available to effectively resolve cross border bankruptcy issues.

⁵⁸⁰ United Nations Commission On International Trade Law, Legislative Guide on Insolvency Law, at 10, U.N Sales No. E.05.V.10 (2005).

The United Nations Commission on International Trade Law (UNCITRAL) has been tasked with the responsibility of researching and compiling key choices necessary for robust bankruptcy regime across the world. While the Commission agree that national law should shape the tenor of bankruptcy legislations, they also agree that certain key objectives are indispensable. The key objectives outlined as necessary to an efficient and effective bankruptcy regime are as follows:

1. Provision of certainty in the market to promote economic stability and growth. Ensuring certainty in the market through the use of bankruptcy laws is advantageous because it fosters the integration of national financial institutions with international financial institutions. This is critical today for economic growth.

According to UNCITRAL certainty can be achieved through:

- (a) Maximization of the value of assets. Bankruptcy law should have incentives for maximizing the value of assets available for distribution to creditors and other interested parties. The law should provide the liquidator or Trustee avoiding powers, to enhance the value of the estate. Through the use of avoiding powers, the liquidator or Trustee can recover preference transactions, set aside fraudulent transactions and avoid onerous contracts.
- (b) Striking a balance between liquidation and reorganization. Ensuring a balance between liquidation and reorganization is closely linked to the aim of maximizing the assets for distribution. Where the debtor has no prospects, the system must ensure that liquidation is initiated timely and efficiently to avoid further deterioration of the assets available for distribution. If the debtor is viable, he must be given the opportunity to reorganize. As a key element, reorganization must be an alternative to liquidation. This is premised on the theory that keeping the essential parts of the company together may reap greater value than selling them piecemeal.

- (c) Ensuring equitable treatment of similarly situated creditors. It is important that all creditors are treated in a manner that reflects the bargain they struck with the debtor. Thus, creditors with the same legal status should receive fair treatment during bankruptcy. To this end, the law should create avenues for the investigation of fraud and preferences and remedy this by restoring any property lost back to the estate for distribution to creditors. Equitable treatment must also inform the operation of automatic stay principle, the classification of claims, voting, etc.
- (d) Provision for timely, efficient and impartial resolution of insolvency. When a debtor falls into distress, the mechanism should exist to deal with it timely and efficiently in order to avoid total breakdown and disruption of business (where reorganization is possible) of the debtor. Viable businesses must take advantage of reorganization procedures while non-viable ones proceed under liquidation in an impartial and equitable manner. The law should be efficient, allowing the easy initiation, collection and preservation the debtor's assets in a cost efficient manner.
- (e) Preservation of the insolvency estate to allow equitable distribution to creditors. Bankruptcy law is a collective proceeding. It gathers insufficient assets of the debtor into a pool and distributes the assets to creditors. To be able to do this and prevent dissipation of the assets, the law should provide for an automatic stay of all actions, which are detrimental to the estate of the debtor. The law must also facilitate the return of assets taken in disregard of legal and equitable rules when the debtor was insolvent.
- (f) Ensuring a transparent and predictable insolvency law that contains incentives for gathering and dispensing information. Transparency and predictability are important elements of a bankruptcy system. It is important for debtors and creditors to know beforehand how the law will handle the debtor's default. This will make it easy for creditors to assess their risk before

advancing credit. If these important details exist beforehand, it lower investment risk and create stability. When the law is unpredictable, it allows speculation, which undermines creditor confidence both inside and outside of the bankruptcy process.

- (g) Recognition of existing creditor rights and establishment of clear rules for ranking of priority claims. As discussed above, predictability and transparency are important to an efficient and effective regime. Recognizing and enforcing certain pre-bankruptcy rights concretizes predictability. Recognizing existing creditor's rights before bankruptcy and enforcing these rights during bankruptcy proceedings ensures certainty for creditors especially for secured creditors. Clear- cut rules for ranking debts and post-bankruptcy financing creates confidence and certainty in the market.⁵⁸¹
2. Provision addressing both reorganization and liquidation. As stated earlier, reorganization and liquidation should exist as alternatives in a bankruptcy system. This allows rescue of viable debtors while non-viable debtors are timely liquidated.
 3. Provisions recognizing rights and claims arising under law other than the insolvency law, whether domestic or foreign, except to the extent of any express limitation outlined in the insolvency law. Bankruptcy law does not exist in isolation. The law impinges on a host of other areas of the law such as land, securities, employment, trust, company, etc. It is, therefore, important that the law develops having in mind that any alteration will affect other areas of the law and may likely alter the rights of individuals. Bankruptcy law should respect the rights of individual creditors prior to instituting bankruptcy proceedings.
 4. A provision specifying that where a security interest is effective and enforceable under law other than the bankruptcy law, bankruptcy proceedings will recognize as effective and enforce

⁵⁸¹ See *id* at 10-13, for an exhaustive analysis of keys bankruptcy elements that promote certainty in the market.

these rights. This point rehashes the need to enforce pre-bankruptcy rights and bargains, especially for secured creditors. It ensures certainty, boost confidence and lowers investor risk.

5. Establishment of a framework for cross-border insolvency. Some bankruptcies cut across national borders. In a situation where a debtor has assets in more than one jurisdiction, it is important that some form of coordination ensue between the two jurisdictions to deal with the debtor's bankruptcy. Promotion of coordination between jurisdictions is essential to achieving successful resolution of cross-border cases. To this end, offering assistance in cross-border bankruptcy cases and recognition of foreign proceedings are essential elements of an effective and efficient bankruptcy regime.⁵⁸²

The various key elements discussed above if incorporated, without a doubt, should produce a robust bankruptcy regime. Since each country is unique, it is only wise that balance is struck between achieving these goals and the accommodating the economic, social, cultural and political goals of the country.

5. Chapter 11 as a Model Transplant

⁵⁸² Regarding cross-border insolvency, Masoud argue that, although the standards are non-binding, the vulnerability of developing countries and the pressures from multinational institutions, international institutions and the developed economies translate the standards into indirect form of binding obligation. He notes further that these standards emanate from the best practices pertaining to the states that developed them and for that matter are unsuitable for reform in developing countries. The author however admits that globalization in trade and capital makes it imperative for the regulation of international commerce. He also admits that the insolvency laws in sub-Saharan Africa especially are archaic and in need of reform. He notes that since cross border insolvency are minimal in sub-Saharan Africa, it will be best if the rules are rolled out slowly than rapid wholesale adaptation which will not See Benhaji Shaaban Masoud, Legal Challenges Of Cross-Border Insolvencies In Sub-Saharan Africa With Reference To Tanzania And Kenya: A Framework For Legislation And Policies, (February, 2012) (Unpublished PhD dissertation, Nottingham Trent University).

In their article on the success of Chapter 11 of the US Bankruptcy Code, Warren & Westbrook states that:

“American law claims many innovations, from the Bill of Rights to the Superfund. In the pantheon of extraordinary laws that have shaped the American economy and society and then echoed throughout the world, Chapter 11 of the U.S. Bankruptcy Code deserves a prominent place. Based on the idea that a failing business can be reshaped into a successful operation, Chapter 11 was perhaps a predictable creation from a people whose majority religion embraces the idea of life from death and whose central myth is the pioneer making a fresh start on the boundless prairie. So powerful is the idea of reorganization that Chapter 11 has heavily influenced commercial law reform throughout the world.”⁵⁸³

Not only is Chapter 11 style reorganization influencing states but International Organizations like the International Monetary Fund, the World Bank and the United Nations advocate for the adoption of reorganization as an alternative to liquidation. This is grounded in the fact that some socio-economic benefits can be reaped from corporate reorganization procedure.⁵⁸⁴ Also, globalization is exerting pressure producing a convergence of laws in the field of bankruptcy law to address corporate failure. Thus, the adoption of the UNICTRAL Model Law on Cross-Border Insolvency has shaped the way transnational insolvency issues are dealt with.⁵⁸⁵ Some countries have adopted the model law and have changed their bankruptcy law in that direction. Mention can be made of Argentina, Germany, Japan, Mexico, China, Canada, Australia, Britain, Singapore, Indonesia,

⁵⁸³ See Elizabeth Warren & J Westbrook, The Success of Chapter 11: A Challenge to the Critics, Michigan Law Review, Vol. 107, No. 4 603-64 (Feb., 2009).

⁵⁸⁴ United Nations Commission On International Trade Law, Legislative Guide on Insolvency Law, U.N Sales No. E.05.V.10 (2005).

⁵⁸⁵ See Jay Westbrook, A Global Solution to Multinational Default, 98 Mich. L. Rev. 2276.

Thailand, Eastern Europe and the U.S.A.⁵⁸⁶ These countries have also adopted Chapter 11 style reorganization, rescuing companies from outright liquidation where there are prospects of success. Chapter 11 possess what UNCITRAL regards as the core provisions of an efficient and effective bankruptcy regime.⁵⁸⁷

6. Chapter 11: Ghanaian Legal System As Receiving Legal System

It is important to observe the conditions which favor legal development and those which hamper the development of transplanted legal rules. The question that arises here is whether the Ghanaian legal system has the necessary structures to accommodate and adopt key elements of Chapter 11 of the US Bankruptcy Code.

One significant source to turn to is the judiciary. The 1992 Constitution created the judiciary and bestowed it with final judicial power.⁵⁸⁸ The High Courts have primary jurisdiction over petitions for bankruptcy and related matters.⁵⁸⁹ The strength or otherwise of the judiciary is, therefore, important to achieving a successful adaptation or rejection of a legal transplant aimed at improving bankruptcy law in Ghana. Writing on the role of the judiciary in developing the jurisprudence surrounding the adaptation of legal transplants in the Companies Act of 1963, Mills concluded that:

“That these judicial transplants have been so successful without any signs of rejection is largely attributable to the ingenuity, clarity of thought and the high professional standards of the judges who have undertaken these judicial surgeries. It is hoped that, in accordance

⁵⁸⁶ *Id* at 2279-2281.

⁵⁸⁷ United Nations Commission On International Trade Law, Legislative Guide on Insolvency Law, 209, U.N Sales No. E.05.V.10 (2005).

⁵⁸⁸ See 1992 Constitution of the Republic of Ghana, Article 125.

⁵⁸⁹ See Act 180 Section 66.

with Gower's recommendation, in interpreting the Code, the development of the case law will be kept under constant review and amending legislation passed as necessary.”⁵⁹⁰

Ghana has a strong judiciary staffed by some of the best legal minds in the country. While this is necessary to an effective transplant, there are instances where lack of care or over-reliance on precedents from other jurisdiction, obscure the intended meaning of a transplant. Judicial precedent is created from concrete cases decided from Superior Courts. Ollennu states that:

“...judicial precedent is essentially a peculiarity of the common law system, and that its purpose is to make certain what the law is, to show its consistency, and ensure its stability in order that pronouncements of apparent new principles of law, necessitated by economic and social changes, as distinct from legislative enactments passed to meet new situations, or to repeal existing laws, might be shown to be natural evolution and elucidation of the law as it exists, and not new creations.”⁵⁹¹

Reliance on precedents is common practice among common law jurisdictions. The reliance on precedents sometimes obscures the meaning of transplants especially in cases where the transplanted law has been modified.⁵⁹² The problem is that, quite too often, reliance is placed on decisions from the UK without questioning the development and the intent behind certain provisions in the law. The situation can be demonstrated with the interpretation of section 218 of the Companies Act, 1963 (Act 179) of Ghana. Section 218 deals with oppression and the remedies that the court can grant a petitioner. This section was lifted from section 210 of the Companies Act

⁵⁹⁰ Mills J. E. A, Ghana Courts and The Companies Code [1987-88] VOL. XVI RGL 123—147.

⁵⁹¹ Ollennu N. A, Judicial Precedent in Ghana [1966] VOL. III NO. 2 UGLJ 139—164. See also Taylor J. N. K., Judicial Precedent in Ghana [1991-92] VOL. XVIII RGL 159—192.

⁵⁹² Transplanting laws from the US will mean, attention will have to be paid to the development of the law in the US. In the alternative, the Ghanaian Courts can develop their own jurisprudence and support their decisions based upon those pronouncements which suits the Ghanaian environment.

of 1948 in England. While the corresponding law in England gave restricted access to the remedy, the Ghanaian transplant did the exact opposite, granting wide access and wide remedy to petitioners. Under English law, members and debentures holders could petition the court, alleging oppression under section 210. They could not allege oppression purely in their capacity as officers of the company. This position was well articulated in the case of *Elder v Elder & Watson*.⁵⁹³ The Ghanaian position, however, saw this position as unsatisfactory and following the wording of N. Irish Committee defined oppression to include a situation where the proper interest of members, debenture holders and officers are disregarded in that capacity.⁵⁹⁴ Section 218 of the Companies Act of Ghana, therefore contemplated oppression of members even in their capacity as officers. In *Okudjeto and Others v Irani Brothers and Others*, the Court following the English case of *Elder v Elder and Watson*, held in clear contrast to section 218 of the Companies Act of Ghana that:

“Section 218 of Act 179 was intended to meet the case of the oppression of the members of the company in their character as such and not in their character as directors or secretary or manager, as in the instant case, [p.98] where the allegations made affected the respondents qua directors and not as members, or shareholders, or debentureholders. *Elder v. Elder and Watson, Ltd.* 1952 S.C. 49 at pp. 57-58 applied.”⁵⁹⁵

This case illustrates some of the shortfalls that are likely to arise when interpreting legal transplants without looking carefully at the import of the end product. While the Ghanaian legislation gave wide access to officers, the Court felt that the rule having roots in England was rather restricted. In his assessment of this particular case Mills stated that:

⁵⁹³ [1952] SC 49.

⁵⁹⁴ See Final Report of the Commission of Enquiry into The Working and Administration of the present Company Law of Ghana, 161 (1961).

⁵⁹⁵ [1975] 1 GLR 96-117.

“Thus, while under section 210 of the 1948 English Act, correctly interpreted in the case of *Elder v Elder and Watson Ltd*,⁴⁰ a decision upon which Anin JA erroneously and unfortunately relied, the acts complained of by the member or the debentureholder must affect him in that capacity under section 218, the acts complained of may affect the debentureholder or a member either in his capacity as such or in his capacity as an "officer", defined to include secretary, director or employee of the company.⁴¹”⁵⁹⁶

The mechanism to address such failures is luckily present under Ghanaian law. Thus in *Mahama v Soli*, the same Court of Appeal held in relation to section 218 that:

“Although section 218 of the Companies Code, 1963 (Act 179), which provides remedy against oppression has its origin in section 210 of the English Companies Act, 1948, and relief under that Act can only be granted if the complaining members show that they were oppressed qua members, the ambit of our section 218 is wider and clearly designedly. While the complainants must be members or debentureholders, they are entitled to relief even if the act complained of is also oppressive of them as shareholders or officers of the company.”⁵⁹⁷

The temptation to look at precedents and decide cases without carefully looking at the import of transplanted legislation is not unique to Companies Act. Bankruptcy law has had its fair share. In *Liquidator v Karam*, the Court after correctly stating the correct common law position which was founded in Section 29 of Act 180, though that position was rather found under Section 16. This led the court to apply Section 16 in a manner rendering Section 29 redundant or superfluous. The Court stated as follows:

⁵⁹⁶ Mills J. E. A, Ghana Courts and The Companies Code [1987-88] VOL. XVI RGL 123—147.

⁵⁹⁷ [1977] GLR 215-240.

“At common law the onus generally lies on the office holder, i.e. the liquidator or administrator to establish that the necessary conditions are met for the order avoiding, varying or setting aside the particular transaction. See *PEAT VRS GRESHAM TRUST LTD* (1934) AC 252; *Re M. KUSHLER LTD* (1943) AC 22. It, however, appears that the provisions in Section 16 particularly subsection 3 of the Bodies Corporate (Official Liquidations) Act 1963 Act 180 give a different indication.”⁵⁹⁸

The *Peat* and *Kushler* cases held that the onus was on the Liquidator to prove preference which could be done by inference where direct intention could not be proved. This position was reduced to Section 29 of Act 180.⁵⁹⁹ Section 29 however, did not reverse the burden of proof in preference action. It empowered the Liquidator to recover from the creditor even without going to court. Where the creditor refused to comply with a Liquidator’s request, the Liquidator could apply to the Court and prove his claim against the creditor. This section on preference is not the same as section 16 of Act 180 dealing with custody of the company’s property, which the Court thought was the operative section on creditor preference under Ghanaian law.⁶⁰⁰

This situation illustrates how the intent of transplants could be lost where precedents are followed without a pause to ascertain the origin and purpose of a legal rule. While some mistakes can be made during judicial construction of transplanted statutes, the legal system provides avenues for correcting such mistakes. This is critical for development.

The role of members of the legal profession and scholars are also important determinants of the development or otherwise of a transplant. Specialization and academic writings on an area of the law such as bankruptcy will help streamline the contours of the transplanted legislation so that its

⁵⁹⁸ Suit No. Acc/12/09.

⁵⁹⁹ See Final Report of the Commissioners Appointed to Enquire into Insolvency law of Ghana, 244 (1961).

⁶⁰⁰ Suit No. Acc/12/09.

import is not lost. Unfortunately, many people do not specialize in bankruptcy practice and hardly any scholarly articles are present on the subject almost 63 years or more after the coming into force of Act 180.

It is important that periodic judicial training programs are designed to point out changes that are made to transplant laws at regular intervals until the law become notorious. The Judicial Training Institute can undertake this. On the part of practitioners, continuing legal education programs should offer a platform to discuss some of these changes. Further, it is beneficial for memorandum accompanying transplanted legislation to point out areas of divergence from the established common law position. This will clear the confusion that can easily arise if one resort to reading case law from the jurisdiction where the transplant originated from.

7. Conclusion

Chapter 11 of the US Bankruptcy Code possess some of the key elements of a strong bankruptcy regime. Though the various elements of the Chapter are developed to suit creditors and debtors in the US, it is possible to style Chapter 11 and situate it in another jurisdiction. The positive elements of the Chapter have influenced reform across the world. A number of countries have enacted chapter 11 style reorganization schemes to address debtor financial distress. This has been possible even though the countries involved do not share the same unique characteristics as the U.S. Ghana do not share the exact characteristics of the U.S, but it cannot be said that the conditions are not ripe for enacting corporate rescue laws. Though liquidation is the primary relief under Ghanaian law, reorganization schemes in the nature of arrangements with creditors during winding up of companies are nothing new. Enacting modern reorganization rules will therefore not be repulsive to the legal system, which has inherent rules for the development of many transplanted legal rules making up the embodiment of the Ghanaian legal system. It is clear that for a Chapter 11 styled

reorganization to work; the receiving legal system must have certain basic functions and the law must be seen to perform the same function in both systems. Efforts to create reorganization schemes has been eased by the work of the UNCITRAL who have gone great length to compile elements common to and necessary for effective and efficient bankruptcy regimes.

CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS

1. Introduction

The research has raised a number of issues and addressed discrepancies in insolvency law especially in Ghana which hitherto was not given attention by academics, jurist and practitioners. The central research question was whether the Bodies Corporate (Official) Liquidation Act, 1963 (Act 180) effectively handle corporate failure. This question has become necessary because some companies went bust over a short period and were unable to seek protection under the law. The research, therefore, assessed the law in the face of globally acceptable standards and made a comparison with Chapter 11 of the US Bankruptcy Code as a model law to elicit key rescue choices towards an efficient regime in Ghana. After a thorough research going through the relevant materials, the conclusions and recommendations are provided in this Chapter.

2. Does Ghanaian Insolvency Law Effectively Handle Corporate Failure?

Corporate Insolvency has been dealt with under three legislations. The Company Ordinance of 1906, the Companies (Preferential Creditors) Ordinance of 1906 and the Bodies Corporate (Official Liquidation) Act, 1963 of Ghana. The two Ordinances were repealed by the Companies Act of 1963 and in its place, the winding up provisions under the Bodies Corporate (Official Liquidation) Act, 1963 (Act 180) came to force.

Act 180 came to force after a lengthy work of the Commission to Enquire into Insolvency Law in Ghana that drafted the new set of rules to govern corporate insolvency. The 1948 English Company Act heavily informed the work of the Insolvency Commission. The main changes to the Ghanaian law were the re-arrangement of the sections into a logical manner for newcomers to comprehend and some contextual changes to suit the Ghanaian environment. Act 180 for that matter takes its

colour and content from the English Act of 1948. It cannot be seriously contended that the 1948 English Act can withstand the scrutiny of modern-day demands of a robust insolvency regime. The same can be said for Act 180 (a clone of the 1948 English Act) which has operated without a single amendment to its provisions. While some dated legislation works well, it is prudent that thorough examination is conducted into the operation of the law to confirm whether it is indeed obsolete.

This research has shown that Act 180 has the basic elements of an insolvency regime. The law provides for an automatic stay of proceedings against the debtor, equal treatment of similarly situated creditors and avoidance of transactions made with the intention to overreach other creditors. The case of *Merchant Bank v. Saoud Brothers* and *The Liquidator v Joseph Karam* attest to the ability of the law to stay actions against the company and to avoid transactions that are detrimental to the interest of the debtor and creditors as a whole.

The study has shown, however, that the law is inadequate and does not rehabilitate debtor companies. The Bonte Mine Affairs, Ghana Airways Ltd and Plant Pool among other demonstrate or attest to this conclusion. Liquidation is the primary relief under the law. The test for insolvency is a two-tier balancing test. The mechanism is however not expressed in greater details and its unclear what happens after it's admitted that a debtor is insolvent yet grounds are not ripe to liquidate the debtor under the two-tier approach. The case of *Billy v Kuwor* did not elaborate on this approach. This is a huge gap which deviates from the demands of a modern insolvency regime. The modern approach treats corporate failure in a less drastic way when it is evident that rehabilitation will yield greater returns to all interested parties. The mechanism for rehabilitation must be expressed in statute leaving little to no room for guess work.

Act 180, however, provides a window for debtors to enter into schemes of arrangements with creditors. As the study has shown, this scheme is cumbersome, unattractive and result in the winding up of the company.

Aside from the law's inefficiency to rescue ailing companies, it is evident that the law does not deal with transnational insolvency issues. Globalization has led to increasing insolvency that cuts across national borders. The many problems that arise as a result are not easy to resolve. The *Maxwell Communication Corp. v. Société Générale, Olympia & York Dev. Ltd* etc. are examples of the difficulties transnationals face when insolvency occurs. UNCITRAL recognizes this difficulty and has come out with a model law addressing cross-border issues. Cross-border insolvency issues are completely outside the ambit of Ghanaian insolvency law. Current issues involving treatment of enterprise groups are not dealt with under Act 180.

The cumulative effect of these factors leads to a firm conclusion that while the law possesses the basic elements of insolvency law, it is ineffective and needs reform urgently.

3. Key Choices Of A Robust Insolvency Regime

The study has shown that there exist different approaches towards the question how to resolve insolvency. Some jurisdictions move closer to incentivising the creditor while others offer pompous schemes for the debtor. Despite these differences, it is agreed that there are some basic features that a robust regime must embrace. The UNCITRAL guide on insolvency law espouses model rules for a good insolvency regime. Though this work was initially restricted to western countries and the content was heavily informed by the laws in those countries, a study of the rules reveal that with necessary modification any jurisdiction can strengthen their insolvency law by careful adaptation of the principles in the guide. It is, therefore, important that the history, political, cultural and economic background of a country is factored into attempts to institute the basic

elements under the guide. This particular observation influenced the study in Chapter Three (researching into the history) and Chapter Seven examining cultural attitudes towards insolvency law in Ghana.

A closer examination of the key choices for an effective and efficient bankruptcy regime was undertaken in Chapter Seven. The examination revealed that at the basic level, bankruptcy legislation should aim to provide certainty in the market, address liquidation and reorganization, recognize pre-insolvency claims or claims arising outside of bankruptcy during the bankruptcy process and establishing a framework for dealing with cross-border insolvency issues. These key elements are present in the Bankruptcy Code of the U.S making it attractive as a case study or point of reference for insolvency reform.

Based on the study of the operation of insolvency law in Ghana in Chapter Five and the operation of bankruptcy law in the U.S in Chapter Six and taking into consideration the history, political, cultural and economic dynamics of Ghana, the following conclusions and recommendations are reached to strengthen winding up law:

Eligibility. Contingent and prospective liabilities must be defined properly. The law adopts a “Cash Flow” test to determine whether a company is unable to pay its debts. Once the cash flow question is resolved, the Court is duty bound to consider the contingent and prospective liabilities of the company before ordering the winding up of the company. This is what is referred to as the “Balance Sheet” test. The terms are however not defined in the law. There exist fertile grounds for dispute if this important threshold issue is not addressed under the law or in any proposal for reform. The Act must also define debts and liabilities for the purposes of insolvency since the terms are sometimes used to mean different things.

Powers of the Liquidator. The Liquidator holds enormous powers under Act 180. The study reveals that little to no checks are spelled out under the law. It is only reasonable that checks and balances are put in place to guard against excesses. In this respect, there must be laid down the procedure for impeaching a Liquidator or anyone he delegates to perform duties on his behalf. His impeachment or removal must, however, be for cause relating to abuse of power, neglect of duty, incompetence, etc.

The position of the Liquidator/Trustee is changing. In other jurisdictions, the Liquidator stands in a fiduciary position to creditors. Under Ghanaian Law, he does not stand in a fiduciary position to creditors even where creditors have petitioned for the liquidation. He stands in a fiduciary position to the company and for that matter seeks the best interest of the company. It is fair for the Liquidator to balance his duty to the company with that of creditors. This balance will incentivize creditors to petition for relief under the insolvency law since they know their best interest will be taken care of by the Liquidator.

Reshaping the Debtor's Estate. Maximizing the value of the assets of the debtor is an important attribute of a strong insolvency regime. While Ghanaian law provides an avenue for impeaching preferences and other transactions, the law leaves out impeaching fraudulent transactions. The law must make provision for unsecured creditors or the Liquidator to impeach fraudulent transaction which is essentially under arm-length transactions or transactions at undervalue made at the time when the debtor was insolvent. The fraudulent transaction is also made with the intention to defraud, hinder or overreach creditors. It is recommended that the relevant period should be pegged at two years prior to filing the petition for winding up. I make such recommendation because of the lesson from a decision like *The Liquidator V Joseph Karam* where the debtor company parted

with company property without a purchase price and any resolution from the Board or the shareholders.

The law must also enhance the rules on disclaimers. The Liquidator should be able to disclaim onerous property such as polluted lands etc. that bear a heavy burden for the estate.

Schemes of Arrangements. While this mechanism can be used to reorganize a debtor when it is initiated during liquidation, the company will have to be wound up and a new one put in its place. This may be undesirable especially in cases where the debtor's name carries goodwill and well known in the market. The best approach will be to introduce a full reorganization mechanism to take care of arrangement with creditors when the company is bankrupt without liquidating it. When such a substantive reorganization mechanism is adopted, schemes during winding up should be removed from the corporate insolvency law and confined to arrangements when the company is solvent and effected under the provisions of Companies Act, 1963 (Act 179) of Ghana.

Treatment of Enterprise Groups. Treatment of insolvency of entities within a group must be resolved effectively by the Law. This is completely lacking. The law must elaborate on how separate legal personality of each entity in a group play out during insolvency and answer whether certain factors will dictate separate entities being treated alike or individually.

Cross-Border Insolvency. Trade globalization has led to increasing international insolvencies. Harmonization of domestic insolvency rules with regional and international arrangements will lead to greater certainty in the transnational insolvency resolution. Increasingly credit agencies look to the resolution of international insolvency as a benchmark for advancing international credit. Cross-border issues, therefore, must be catered for under Ghanaian law to enable Ghanaian entity benefit from international credit arrangements. Though the level of cross-border insolvencies may not be high at this point, it is important to set in place forward-looking regulation to deal effectively with

this issue that is bound to arise. The UNCITRAL model rules on cross-border insolvency present a good focal point for addressing the issue.

Statutory Priorities. Environmental claims come out as a candidate for consideration because this study discussed Bonte Mine Affairs and the inability of the insolvency law to redress environmental degradation arising as a result of the Mine's insolvency. I have argued in Chapter Five that the concept of statutory priorities defeats the *pari passu* principle. What it does is to defeat the equality of distribution principle operating among similarly situated creditors. It also has the potential to drain the pool of assets, leaving nothing for general unsecured creditors to fall on.

In this wise, environmental claims must fall within the general class of unsecured creditors to be satisfied according to their rank. However, an exception can be made for treating the environmental claim as a statutory priority ranking ahead of other unsecured creditors. I made the suggestion in Chapter Five that while it will be too drastic to abolish priority class altogether, to ensure equity in the distribution of the debtor's assets, a maximum amount in proportion to the value of the debtor's estate should be set aside to pay for all debts in the priority class. This will prevent using all the debtor's assets to pay off priority class holders leaving nothing for general unsecured creditors. When the maximum amount set aside for satisfying all priority debts is depleted, the remainder of the amount owed to the class should rank as unsecured debt to be paid in that order. The other side of the coin is that The Environmental Protection Agency in Ghana has enforcement powers of its own to secure payment of its claim against solvent debtors. This method can be employed ahead of time if the Agency is vigilant. While it is unlikely that this power can be exercised when bankruptcy is initiated, an alert Agency can pursue claims on its own when bankruptcy has not been initiated.

4. Recommendations For The Introduction Of Corporate Rescue

Corporate rescue is formal and informal procedures that help a distressed company escape winding up. The purpose of reorganization as a rescue mechanism is quite clear. Reorganization under Chapter 11 of the US Bankruptcy Code promises a rehabilitated debtor with maximized assets for the benefits of creditors. Compared to liquidation, reorganization is the better of the two options where there are prospects that the business will be worth more when rehabilitated than sold piecemeal. The studies conducted by Professor Elizabeth Warren (*The Success of Chapter 11: A Challenge to the Critics*) shows that reorganization has high success rate. The benefits are manifest. The debtor gets the breathing space to organize his affairs, creditors will get more in return than if the debtor is liquidated, suppliers of goods and services will continue to provide their goods and services, employees will not be out of a job and the community will benefit from taxation and overall economic growth. The debtor, creditors, supply chain, employees and the entire society stand to gain when a debtor is successfully rehabilitated rather than liquidated.

Currently, schemes of arrangements, available during bankruptcy in Ghana offer the company the chance to strike a deal with creditors. The flip side is that the company will have to be liquidated and a new one put in its place.

Formal and informal reorganization mechanism following Chapter 11 style will be extremely beneficial for all interested parties if it is carefully adapted and simplified to suit the Ghanaian environment. The mechanism can help save jobs that are often in short supply in the country. Just as the *KOSA Beach Resort* case demonstrated, the Courts are reluctant to wind up a hiring company if there are prospects. In that case, the stated that:

“In an economy where the level of unemployment is towering I doubt whether if there are no statutory or other special reasons for it a court in Ghana today should be happy in

pronouncing the demise of a hiring company like KOSA. Law should aid development and those of us who interpret them should be the apostles.”⁶⁰¹

Not only will companies and employees stand to gain from interim arrangements, but where the company has a large supply chain and it's the main contributor to the city or town where it is located, rescue arrangement will go a long way to sustain the supply chain, keep the community going and in the long run the reorganized debtor can pay taxes to the Government

The pros and cons of the current system give way to the conclusion that the system can take advantage of key choices under Chapter 11 of the U.S Bankruptcy Code. In the area of interim arrangements or reorganization, it is recommended that reform looks closely at changing the law to afford debtors the possibility of reorganizing their affairs when they fall into financial distress. After a careful and thorough study of the relevant materials on bankruptcy law in the U.S the following Chapter 11 mechanisms should be adopted with necessary modification to wit:

Guiding Principles. The guiding principles for rescuing entities should be that the company is worth more to the parties in reorganization than in piecemeal liquidation. The Liquidator, therefore, should be required as a matter of law to pursue reorganization prospects before pursuing any other remedy. Where it is apparent that reorganization will be a waste of resources and time, the case should be immediately converted to liquidation to save resources and time.

Automatic Stay Principle And Adequate Protection. All hostile action against the debtor must be halted when the reorganization is initiated. The stay will give companies the chance to propose a reorganization plan to turn around its fortune. If secured creditors interest are not protected under the process, then the debtor must provide adequate protection to the secured creditor. Under Ghanaian law, secured creditors are exempted from the automatic bankruptcy stay. In a

⁶⁰¹ See *KOSA Beach and Arnoldus Maria van de Mast vs Patrick Harro Koolen*, Suit No. Misc/05/2011, 14-15.

reorganization under Chapter 11 style, it is suggested that where the property is essential or necessary for the debtor's reorganization prospects, then the property should form part of the reorganization and the stay should apply to it. The debtor should, however, be compelled to give adequate protection for the interest of the secured creditor.

Control Of The Reorganization Process. Currently, the Registrar is the statutory appointed Liquidator in all cases falling under Act 180. Control of reorganization under Chapter 11 is usually entrusted to the debtor or the management of the company and they are replaced only after cause is shown. In the Ghanaian scenario, it should be left open for the debtor to choose whether they prefer to remain in control or to allow the Registrar to take control over the process. Provision should be made for the appointment of examiners where the debtor decides to retain control of the company. All allegations of fraud must be properly investigated and where there is criminal culpability, the matter should be referred to the Attorney-General for investigation.

Financing The Reorganization Process. Post-petition financing is usually necessary to carry out the proposal for a turnaround. It is important that incentives are provided to attract post-petition creditors. Post-Petition finance can be treated as an administrative expense for that matter.

The Power To Enhance The Debtor's Estate. The strong arm, preference, equitable subordination, fraudulent conveyance and executory contracts are areas that must be applied with care. Under Act 180, there already exist provisions for avoiding preferences. Executory contracts are dealt with in a manner akin to disclaimer under Act 180. Disclaimer in its current form is completely archaic and can benefit from thorough reform, but the concept is not new to Ghanaian law. The concept of the strong arm clause, where unperfected security is voided, is also not new to Land and Conveyancing Law in Ghana. Fraudulent conveyancing is presently not provided for under Act 180. It is important that the strong arm and fraudulent transaction concepts are brought into

bankruptcy law in Ghana to bolster the tools available to the Liquidator to gather assets for a successful reorganization or liquidation.

Plan Confirmation. The plan to reorganize the debtor must be feasible and have a likelihood of success. The likelihood of success does not mean that the plan must be perfect, but the plan must have reasonable prospects of success. The business realities must be evaluated and the debtor must be compelled to make liquidation analysis before the court. The analysis must demonstrate that the parties are better off under reorganization than in liquidation. The court should be empowered to dismiss an application that has no prospects and brought before the court in bad faith and for time wasting tactics. Voting on the reorganization plan can be done in a manner under the Companies Act 1963. Every impaired class must have the right to vote on the proposal. If a class is crammed down, they should be bought out of their shares or treated fairly. The mechanism for buying out crammed down creditors works like schemes of arrangements and will not be new to the law in Ghana.

Time Management. Given the backlog of cases in the Courts in Ghana, it will be a travesty to introduce a process that allows for delays and game playing. It is important that strict timelines are provided and extension granted only for a cause shown to curtail intentional delay and showmanship.

Monitoring. It is important to monitor the implementation and operation of the law to gather information about the strengths and weakness of the application of the law. It is recommended that a Commission should be set up to monitor implementation and development of insolvency law in Ghana.

Tax Implication. The reorganization plan and approval must be registered with the Registrar of Companies. It is suggested that stamp duty is waived for reorganized debtors. Further, where

creditors decide to forgive part of their debt or take a haircut and go home with lesser sums than they would have recouped, the financial windfall due the company should either be exempt from taxation or tax liability should be assessed over flexible terms and period while the reorganization process is either in progress or after it has ceased.

5. Original Contribution To The Knowledge Of Bankruptcy Law, Limitations And Areas For Further Research

This study contributes to the existing scholarship on bankruptcy law in many different ways. First, it contributes to the knowledge of Ghanaian bankruptcy law which hitherto offered very little. This research probed the history of bankruptcy law in Ghana, going back to the period before colonization to modern day Ghana. It traced the development of both personal and corporate bankruptcy law and showcased the strength and weaknesses along the way. It also provided insight into the current laws and how effective or otherwise they have been over the years. This study will serve as an original writing covering the bases of the law and will be beneficial for scholars, jurist, practitioners, businesses and the general public. It fills the non-availability of scholarship gap and opens up the area for further research.

Secondly, this research advocates for the introduction of a priority payment cap. This is general and goes not only for Ghanaian bankruptcy law but for other jurisdictions struggling with the fact that, on the D-Day, general unsecured creditors are left with nothing to fall on after priority class has been paid. It is argued that creating priority class, defeats the equality principle of distribution which is a bedrock principle of bankruptcy law. A priority payment cap is advocated to remedy this situation. This cap is not a cap on the number of creditors the government wishes to move to priority class rank. It, however, advocate for a maximum amount in proportion to value assets of the company which can be paid to that class. If any amount remains unpaid after exhausting the

maximum amount allowed under the cap, the remaining unpaid or unsatisfied debts should rank as unsecured debts to be paid together with all other unsecured debts. I believe this idea will ensure that general unsecured creditors can recoup something during the bankruptcy process. The proliferation of priorities has been intense because once a class is afforded a priority class, it is assured of getting something out of the liquidation process. The reality is that this affects the position of general unsecured creditors who may get nothing at all.

This study encountered some limitations. First, it was difficult to lay hands on materials especially materials relating to bankruptcy law in Ghana. Even though the study relied on primary and secondary sources of information, it was hard to come by that information. This was compounded by the fact that there is a virtual lack of scholarship in the area. Ghanaian case law reporting on the subject was inadequate. It was difficult to come by current case law on the subject since a number of them remain unreported.

The scope of this study excluded detailed analysis of equally important areas that this study came in contact with. It is suggested that further research is conducted into the success or otherwise of schemes of arrangements and receivership in Ghana. This will shed more light on the suitability of the mechanism if formal reorganization following Chapter 11 is introduced. Further research is also needed to engage the effectiveness, or otherwise, of the preference cap recommendation this study has proposed.

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