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Editorial

Dr Hamiisi Junior Nsubuga[*] and Dr Bolanle Adebola[†]

This special issue of International Company and Commercial Law Review showcases some of the research that has been presented under the aegis of the Spotlight on Corporate Governance and Insolvency Law in Africa.[1] The Spotlight series is one of the projects of the Commercial Law Research Network Nigeria (CLRNN).[2] CLRNN was established to respond to the challenges that emerging economies such as Nigeria face in designing commercial laws that fit both their realities and the interconnected global system. Its Spotlight series provides insights into the context within which insolvency law is designed and practised across Africa. Thus, it invites investigations into the historical, theoretical, procedural, and practical elements of insolvency law and practice across the continent. This approach situates the African experience within the global debate on insolvency law design, highlights insights from which African countries can draw inspiration, and illuminates the contributions that African countries make or can make to the design of the transnational insolvency order that impacts them.[3]

Accordingly, the papers in this issue examine topical issues of national and transnational concern such as rescue models and their impact on stakeholders,[4] the role of the court in balancing stakeholder interests at insolvency,[5] the importance of reconsidering the insolvency implications of maritime security interests in African countries in preparation for an upsurge in intra-African trade following the introduction of the African Continental Free Trade Agreement (AfCFTA),[6] and the influence of transnational non-governmental actors in institutionalising the UNCITRAL Model Law on Cross-border Insolvency Law.[7]

[*] Senior Lecturer in Law, The City Law School, City, University of London, UK.
[†] Associate Professor in Law, University of Reading, UK.
[1] For more information on this network see; < CLRNN Spotlight on Corporate Governance and Insolvency Law in Africa> accessed 21 June 2023.
[2] See generally; <https://Commercial Law Research Network Nigeria> accessed 25 June 2023.
[3] On Transnational Orders, see: T. Halliday and G. Shaffer, 'Transnational Legal Orders', in T. Halliday and G. Shaffer *(eds.) Transnational Legal Orders* (CUP 2015), 21–28.
[4] B. Adebola, 'Diversifying Rescue: Corporate Rescue and the Models of Receivership'
[5] H. Nsubuga, 'The Role of the Court in Balancing Stakeholder Interests in Insolvency in Developing Economies – the Theoretical Conundrum'
[6] W. De Gaegh, 'Preparing for the Boom in Intra-African Trade: A General Evaluation of the Regulation of Maritime Security Interests in African Countries'.
[7] A.Idigbe, 'How INSOL Cascaded the UNCITRAL Model Law on Cross-Border Insolvency (1992 – 1997)'.

Adebola's paper provides an emphatic opinion on the decision by three African countries – Ghana, Nigeria, and Uganda to retain an unmodified receivership procedure in their legal systems. Receivership in this sense refers to the enforcement procedure preferred by secured creditors with rights over all or substantially all of a debtor's assets.[8] These creditors have been described as the main creditor or concentrated creditor.[9] Receivership is traditionally a remedy available to a charge holder.[10] In insolvency law, its utility lies in the fact that it provides the concentrated creditor with a cost-effective means of dislodging under-performing managers of a distressed entity and replacing same with an insolvency practitioner who takes a decision on the future of the company and its assets. It has been argued that receivership reduces monitoring and enforcement costs.[11] Its challenge is in the fact that the receiver mainly acts in the interests of the concentrated creditor. Thus, it has been perceived not to yield value maximising decisions, economically and socially, and this outcome has been said to negatively impact other stakeholders of a troubled company.[12]

Given its challenges, administration replaced administrative receivership as the rescue procedure of choice after undergoing substantial reform through the Enterprise Act 2002.[13] Administration was introduced in 1985/6 for use in those cases where administrative receivership was not fit; for example where there was no charge.[14] Unlike the receiver, the administrator acts, at least in principle, in the interests of the group of creditors and seeks, as a primary duty, to rescue the company as a going-concern.[15] Statistics uncovered shortly after its ascendancy demonstrated that administration had not succeeded in rescuing companies; neither could it be said to have scored runaway victory in preserving distressed businesses.[16] Since then, there has been no company rescued as a going-concern through the procedure. Conjecture suggests that these factors have influenced the decision of Nigeria to preserve receivership,

[8] The Administrative receiver in the UK: IA 1986, s29(2). Receiver and Manager in several other African countries, such as Nigeria, Ghana.
[9] For main creditor - R. Mokal, 'The Floating Charge — An Elegy' in S. Worthington (ed), *Commercial Law and Practice* (Hart Publishing, 2003), 479; For concentrated creditor: J. Armour and S. Frisby, 'Rethinking Receivership' (2001) 21 OJLS 73.
[10] *Gaskell v Gosling* [1897] AC 575.
[11] J. Armour and S. Frisby, 'Rethinking Receivership' (2001) 21 OJLS 73.
[12] R. Mokal, 'The Harm Done by Administrative Receivership' (June 2004) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=568702, accessed 14/07/2023.
[13] I. Fletcher, 'UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration, and Company Voluntary Arrangements – The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002' (2004) 5 EBOR, 119.
[13] IA 1986, s29(2).
[14] *Insolvency Law and Practice: Report of the Review Committee,* Cmnd 8558, 117, [496] – [496].
[15] Para 3(1), Schedule B1, Insolvency Act 1986.
[16] Sandra Frisby, 'Report on Insolvency Outcomes' (2006).

while adding administration to its laws. The same is possibly true of Ghana. Uganda, interestingly, introduced administrative receivership alongside administration through its insolvency reforms in 2011.

The challenges of receivership have been discussed in Nigeria, where the procedure is deemed by many to be a precursor to liquidation. In Uganda, the introduction of administration has been welcomed by some scholars, whereas others highlight the fact that it ought not to have been introduced given that it suppresses the use of the relatively more collective administration.[17] These arguments echo a much more extensive argument in the UK on the superiority or otherwise of receivership as a rescue mechanism. The paper draws on this debate, which it supplements by providing an illustration of a suggestion that was made at the time that receivership may simply have been reformed rather than restricted. This illustration is based on the model of receivership drawn from corporate and insolvency law in Ghana and Nigeria. The distinguishing factor of this model is the duty of the receiver to consider wider interests in the decisions made about the future of the company or its business. Adebola argues that while this model indeed responds to some of the known challenges of receivership, neither model of receivership is superior to administration which centres inclusion and invites directors to use rescue as one of their significant governance tools. She argues that the experiences of the UK demonstrate that inclusion cannot be wished away in the design of rescue procedures as it is fundamental to their legitimacy. For that reason, the enforcement perspective underlying receivership does not serve corporate rescue. She asserts that none of the countries discussed should retain an unmodified receivership procedure and concludes that they may look to revisit the option to restrict receivership in future. In the meantime, reforms to receivership along the lines suggested would curtails its most fundamental challenges. The novel arguments in the paper are also important to the UK as it reflects on the muted success of the decision to restrict receivership two decades later.

Continuing with the theme of the interaction of stakeholders in national insolvency systems, Nsubuga's article analyses the role of the court in balancing stakeholder interests on insolvency. He notes that national legal systems have provisions that empower courts, especially, commercial courts to regulate matters related to business and commercial affairs,

[17] For the former: C. Nyombi, A. Kibandama and D. Bakingbinga, The Motivations behind the Uganda Insolvency Act 2011 [2014] 8 JBL, 651. For the latter, H. Nsubuga, 'Reinvigorating Corporate Rescue in Developing Economies – A Ugandan Perspective' [2021] 34 Insolvency Intelligence, 95.

including insolvency related matters or disputes. National courts make strategic decisions, such as deciding whether a company faced with financial difficulties is worthy of a chance to restructure its debts/capital structures as opposed to being liquidated. A successful rescue process involves several players, such as the company itself, creditors, insolvency practitioners, the courts among other actors, that would require a custodian oversight to regulate and guide the process.[18] Nevertheless, the role of the court in this context is often, either misunderstood, or underestimated due to divergent theoretical perspectives on the role that it ought to play in an insolvency setting. Thus, Nsubuga analyses the theoretical contentions on the role of the court in insolvency proceedings between two leading theoretical perspectives of insolvency law, namely the traditionalist and proceduralist perspectives.[19]

While proceduralists view the role of the court as of that of a disinterested arbiter, that is, limiting the court's role to controlling parties' conflicting interests by allowing creditors to make their own decisions and influence the outcome they seek, traditionalists, are of the view that the court should play a key role in insolvency proceedings, especially on aspects of statutory interpretation and application of the law to facts presented by competing parties. Moreover, a dearth of specialist insolvency/bankruptcy judges in developing economies, as opposed to developed economies, such as the UK, US, and the EU to deal specifically with insolvency/bankruptcy issues, places the role of the court as central, in balancing stakeholder interests as advocated by the traditionalists. This is to ensure that issues, such as heavy reliance on insolvency practitioners in driving the insolvency process, the potential imposition of restructuring plans on dissenting/minority creditors, unfair application of mechanisms, such as creditor cross-class cramdown do not create a degree of imbalance on creditor protection in insolvency.

Due consideration of the design of national insolvency systems is also important at the regional level as Africa gets ready for more integrated regional trade. The passage of the African Continental Free Trade Agreement (AfCFTA)[20] has accelerated the growth in intra-African maritime trade. As a result, there is a need for the legal systems of the different African countries participating in AfCFTA to adopt measures that would adequately address the legal

[18] J. Payne, "The Role of the Court in Debt Restructuring" (2018) 77(1) *Cambridge Law Journal*, 124 - 150.
[19] T. H. Jackson, "Bankruptcy, non-bankruptcy entitlements and the creditors' bargain" (1982) 91(5) *Yale Law Journal*, 857; E. Warren, "Bankruptcy policy" (1987) 54(3) *The University of Chicago Law Review*, 775-811; E. Warren, "Bankruptcy policymaking in an imperfect world" (1993) 92(2) *Michigan Law Review*, 336-387; D.G. Baird, "Bankruptcy's Uncontested Axioms" (1998) 108 *Yale Law Journal*, 573.
[20] See <https://au-afcfta.org/2022/09/the-afcfta-guided-trade-initiative/ > (accessed 02 May 2023).

challenges that might arise in the wake of these developments. Highly relevant for this purpose is the framework of maritime security interests, that is, maritime liens and ship mortgages. Warren de Waegh analyses these security interests as they are of crucial importance for the financing and operation of the shipping industry.[21] They also determine the order of payment where the shipping company becomes insolvent, with security holders benefiting from a priority status which may see them get paid while other creditors are left empty-handed. Across the globe, there are difference in the categories of claims that are accorded security status, as well as the priority rankings accorded the different security interests. The grounds for these differences are rooted in history and policy choice.

As with the previous paper, De Waegh notes that the choice of protected maritime claims typically found across domestic frameworks in African countries is rooted in colonial history and the laws of the Metropole. This is similar in countries with both civil and common law origins. Very few African countries have made choices to fit their contexts after gaining independence. One of these is Egypt, which has a regime that suits its position as a highly profitable transit route between Europe and Asia due to the Suez Canal. The paper thus invites African countries to redesign their maritime security frameworks to fit their domestic realities in preparation for the expected surge in regional trade. The maritime security framework needs to strike the right balance between protecting vulnerable maritime creditors by way of maritime lien protection without jeopardising the provision of loans necessary for the financing of shipping. However, how exactly this balance takes effect, remains a hotly contested topic. The paper presents two general guidelines. First, that African States should consider extensive maritime lien protection, which suits the current African socio-economic maritime context. Second, that regional harmonisation of domestic maritime security frameworks would be needed to facilitate intra-African maritime trade.

Even after designing more effective frameworks, African countries more consider the effects of the transnational order on the categories of national interest. Thus, the paper turns finally to the effects of cross-border insolvency on domestic maritime frameworks. It sets out the two leading perspectives of cross-border insolvency namely territorialism and universalism, examining how these play out in the maritime context.[22] Thereafter, it assesses the extent to which countries in key maritime hubs have enacted the Model Law on Cross Border Insolvency

[21] Erik Göretzlehner, *Maritime Cross-Border Insolvency* (Springer, London, 2019) 65-104.
[22] J.L. Westbrook, 'A Global Solution to Multinational Default', 98 Michigan Law Review (2000) 2301-2302.

(MLCBI) and invites African countries looking to entrench it to take advantage of the liberty afforded to amend or modify provisions to better suit their contexts.[23]

Continuing with the theme of the transnational order and its underpinning norms, Idigbe's paper examines how the norms created at the transnational level become institutionalized such that nation states comply even in the absence of a central political power to oversee enforcement. This brings to the fore the role of international actors in generating and institutionalizing norms. The paper focuses on one group of actors in particular - the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL) which was instrumental to the creation of the transnational order that emerged as the global trade increased. INSOL played a leading role in the pivot from the pursuit of an international treaty seeking to harmonise insolvency laws globally towards the more permissive Model Law on Cross Border Insolvency (MLCBI). Its preferred norms of limited cooperation and coordination inform the principles of the MLCBI.

Applying the norm life cycle theory, the paper briefly sets out how the norms of cooperation and coordination cascaded through the efforts of INSOL, the norm entrepreneur. Norm cascade is the second of the three stages of the norm life cycle.[24] When a norm cascades, it is institutionalized. Hence, the paper examines how the norms of limited cooperation and coordination came to be institutionalized in the transnational insolvency order. It started with INSOL setting up a global association that was not perceived as dominated by any country or legal tradition. To improve the legitimacy of the output, it worked closely with the United National Commission on International Trade Law (UNCITRAL), supplying the technical support required to fill the awning capacity gaps that beset the project at its commencement. In this facilitative role, it steered the discourse towards the MLCBI. To cascade its norms however, INSOL had to take a step back for nation-states. Thus, the paper argues that the key actors at the initial stage of norm emergence are different from those engaged at the second stage of norm cascade. In the case of insolvency law, nation States members of UNCITRAL became the key actors debating the principles outlined in drafts and eventually agreeing the final text of the MLCBI. Nevertheless, INSOL did not disappear, contrary to some opinions. Though it played a more subtle role, it continued to facilitate; contributing considerably to discussions, and corralling state actors to engage fulsomely with its technologies as well as to maintain consensus at UNCITRAL sessions. Its methods thus enabled buy-in from the nation-

[23] Guide to enactment MLCBI, para 19-21.
[24] M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Int Organ 887.

States and improved the legitimacy of the process, both of which contributed to successful norm cascade.

The paper notes, nevertheless, that successful norm emergence and cascade, the first two stages of the norm life cycle, may not necessarily result in widespread internalization, which is the final stage. This is particularly so in the case of insolvency law where the adoption rate of the MLCBI amongst countries with high GDP is juxtaposed to that of their counterparts with low GDP. Thus, like the other papers, it raises the question of the intersection of nation-states and the transnational insolvency order. The papers in this special edition can thus be seen to argue that African countries must recognize and engage with the ideas that inform the systems that constrain the design of their insolvency laws. While Idigbe has called for the need to revisit the role of African countries at the locus of decision making, De Waegh has emphasized the importance of fit for the rules enacted. Adebola and Nsubuga have demonstrated how the chosen system affects the balance of decision-making and in turn, outcomes for the stakeholders. The balance of opinions encourages African states to engage with norm-setting at the national, regional, and transnational levels. Collectively, the papers demonstrate the role that African countries can and must play in the design of viable insolvency systems.