Original Article

Bankruptcy practice in the absence of long-term corporate financing: The Nigerian case

Abel E. Ezeoha
holds a PhD in Banking & Finance from the University of Nigeria. He is a lecturer in the Department of Banking & Finance, Ebonyi State University, and a research fellow at the African Institute for Applied Economics (AIAE).

Chioma Anyigor
is a barrister at law and a member of the Nigerian Bar Association. She is also a lecturer in the Faculty of Law, Ebonyi State University.

Correspondence: Abel E. Ezeoha, Faculty of Management Sciences, Ebonyi State University, Abakaliki, Nigeria
E-mail: ezeoha@yahoo.co.uk

ABSTRACT Evidences contained in this paper show that there is a serious dearth of long-term corporate finances in Nigeria. The paper draws out clearly the fact that there are many deficiencies in the legal instruments governing bankruptcy practices in the country, and that it is these deficiencies which joined to erode confidence in the financial system. Its conclusion, among others, is that the near lack of long-term investment capital in Nigeria may therefore be owing to the gaps in the bankruptcy and collateral laws, and that even the recent banking consolidation was formulated and implemented without any attempt to equally close these gaps. The paper suggests that the present banking industry in the country would only succeed in playing an efficient intermediation role in the economy if the bankruptcy regulation were reformed as well in order to make adequate provisions for corporate liquidation, workout and reorganisation, as part of its debt resolution options; in addition, it is necessary to incorporate provisions that ensure the equitable allocation of risks in cases of liquidation and the protection of the value of an insolvent in cases of liquidation or reorganisation. These, the paper recognises, are the ingredients of efficiency bankruptcy regulations in countries with exemplary debt markets.

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INTRODUCTION

Bankruptcy, according to Maness (p. 459),[1] is a formal legal proceeding under which a company that has overextended itself is placed under the protection of the bankruptcy court, allowing it to keep operating although a plan is developed to pay off creditors in an equitable manner. It is a legal proceeding for the court-supervised administration of a firm in financial distress (Barclay and Smith Jr, p. 901).[2] Technically, according to Harrington and Nichaus (p. 204),[3] a firm is bankrupt when it does not have sufficient funds to pay what it owes other parties (mainly creditors) and therefore must be either legally reorganised in order to restructure the terms of its obligations or liquidated with the proceeds paid to creditors.

The importance of bankruptcy matters incorporate management lies in the fact that firms' decisions to hold more debt are influenced by the implications of financial distress risk and bankruptcy possibilities (Arnold, pp. 777 and 798).[4] According to the trade-off theory of capital structure, bankruptcy costs constitute one of the key factors considered in an attempt to find a debt/equity optimal mix (Kisgen, p. 1040)[5] capable of enhancing corporate value. Generally, the presence of bankruptcy in corporate firms is also regarded as a major source of financial market imperfection. The existence of the high volume of literature on the implication of bankruptcy on corporate capital structure and performance, and on the lending behaviour of banks, is therefore an indication of the importance of corporate bankruptcy practice in the financing behaviour of firms in an economy.

Bankruptcy not only can pose huge costs to different stakeholders in a firm, but also is capable of leading to the distress and liquidation of the affected firm. Considering also that it is the shareholders that bear the *ex-ante* cost of bankruptcy, they would not want their firms to be exposed to some certain amount of debt holding. This is usually the case because lenders normally build into their required interest rate the expected costs of bankruptcy or high default risks (Maness, p. 460;[1] Bayen and Jansen, p. 276).[6]

The nature and scope of a country's bankruptcy laws and regulation determines the impact bankruptcy costs would have on corporate financing decisions, and on the probability of corporate failure. As explained by Hagan (2000),[7] effective insolvency (bankruptcy) systems facilitate the rehabilitation of enterprises and also provide an efficient mechanism for the liquidation of those enterprises that cannot be rehabilitated. He adds that such an effective system enables financial institutions in a country to curtail the deterioration of their assets by providing them the means of enforcing claims and also brings about a deepening and broadening of the capital market.

Also according to Hagan (2000),[7] the efficiency of a country's bankruptcy system can be assessed using key objective criteria, for example the ability of the system to allocate risk in a predictable, equitable and transparent way so as to bolster confidence in the credit system and the ability to maximise the value of the insolvent entity. In practice, a bankruptcy system that favours creditors may crowd out borrowers who may feel marginalised by the system. On the other hand, a system that awards more rights to borrowers may also discourage lenders from extending credit facilities to borrowers. Thus, an optimal practice ought to be one that addresses the above key goals, as suggested by Hagan. A well-designed bankruptcy system can also be viewed as one that makes adequate provisions for liquidation, rehabilitation and workouts (Fabozzi *et al*, p. 436;[8] Gray, p. 31[9]). A good case of this kind of practice is Chapter 11 of the US Bankruptcy Code, which allows managers to file for bankruptcy, retain their jobs after filing and have the first opportunity to present a reorganisation plan. Only when an agreement cannot be reached between the creditors and the managers, then the procedure would revert to Chapter 7 or liquidation.

In the case of Nigeria, the inefficient nature of the country's financial and judicial systems[10,11] has made the achievement of the goals of equity and value maximisation in bankruptcy proceedings very difficult. Again, like in most transition economies, because the country's corporate bankruptcy practice favours the liquidation option, there remains a great challenge to the issue of equity. Explaining the Nigerian practice, Fabunmi (p. 133)[12] posits that no operative bankruptcy legislation seems to be practically in existence and, where it is, most of the time it is used just as a debt recovery tool. This is because the laws governing liquidations in such countries tend to give little power to creditors.

This paper is aimed at examining the nature of the Nigerian corporate bankruptcy system. It focuses primarily on how a country's bankruptcy regulatory practice may influence the lender – borrower relationship existing between banks and corporate firms. A review approach is thus taken to achieve this. First, the paper reviews some existing literature on the relationship between corporate financing and bankruptcy. Next, it takes an analytical look into the environment of bankruptcy regulation in Nigeria,[13] focusing mainly on the Bankruptcy Act of 1962[14] (redrafted in 1990 and amended 1992) and the Failed Bank Decree (enacted by the then military government as a part of the measures to check the rising level of loan defaults and the rising number of cases of bank distress in the country between the late 1980s and the early 1990s). Next, the paper examines the arising issues in the prevailing bankruptcy practice in the country.

BANKRUPTCY AND CORPORATE FINANCING PATTERNS

The more debt a firm uses in its capital structure, the less likely the firm will be able to meet its debt service obligations, and the more likely default will occur (Benning and Sarig, p. 347).[15] It is this default likelihood that introduces bankruptcy costs into capital structure. As argued by Van Horne (p. 268),[16] the presence of bankruptcy costs is an important source of imperfection in the markets for corporate funds. Under imperfect conditions, there are the administrative costs of bankruptcy, and assets may have to be liquidated at less than their economic values. (Betker, p. 56).[17] It is also this tendency that Myers (p. 218)[18] describes as the direct cost of bankruptcy. The implication of the presence of bankruptcy cost in financial leverage is manifested more by the fact that debt-financing generates risks. Not only that, but it has been argued for instance that every financing decision comes with some risk implications on the value of the firm (Glen and Pinto, 1994).[19] The reason, according to Glen and Pinto, is that as a firm incurs more and more debt in its capital structure, its ability to meet fixed interest payments out of current earnings tends to diminish to an extent that the probability of bankruptcy is affected. Risks here may be in the form of either business risk or financial risk.[20–23] Schoubben and Van Hulle (p. 594),[24] who combine the two concepts, define risk generally as the variability of profits, and hypothesise that risk is negatively associated with financial leverage. In effect, both financial and business risks are widely acclaimed as a major subject matter in the bankruptcy hypothesis. This would mean that the higher the level of bankruptcy possibilities, the less willing the borrowers are to borrow and lenders (such as banks) to lend.

On the basis of the above theoretical projections, therefore, the value of a firm would be correspondingly affected by the extent to which bankruptcy costs, arising from the presence of business and financial risks, impact on its capital structure. A simple and common model on how this impact is felt is represented in the equation as follows.

$$\begin{aligned}&\text{Value of Firm}\\ &= \begin{pmatrix}\text{Value if}\\ \text{Unlevered}\end{pmatrix} \mathit{Add} \begin{pmatrix}\text{PV of Tax}\\ \text{Shields on}\\ \text{Debt}\end{pmatrix}\\ &\quad \mathit{Less} \begin{pmatrix}\text{PV of}\\ \text{Bankruptcy}\\ \text{Cost}\end{pmatrix}\end{aligned}$$

Theoretically, as can be seen in the equation, the presence of bankruptcy cost may cause some loss of corporate value and may as well be negatively correlated with financial leverage. In the same vein, the introduction of debt into a firm's capital structure creates an automatic incentive for bankruptcy.[16,22,25,26] This is based on the assumption that corporate managers would desist from borrowing more if such an act were to contradict with the shareholder value maximisation objective. Nevertheless, corporate bankruptcy not only is a threat to shareholders but also is a major source of threats to lenders and other corporate stakeholders.

Empirically, the impact of bankruptcy on corporate financial leverage has also attracted reasonable attention, as expected. The emphasis remains on how bankruptcy presence, measured as business risk, financial risk or just earnings volatility, affects leverage decisions among firms. The works of Kale *et al* (p. 1693),[27] which make use of business risk, find that this kind of risk is one of the primary determinants of a firm's capital structure and that an increase in a firm's business risk should lead the firm to lowering the level of debt in its capital structure. In the same vein, Kale *et al* (p. 1693)[27] have empirically established that an increase in financial leverage yields a proportionate increase in the level of business risk facing the firm. They explain this result to mean that the existence of debt in the capital structure increases the probability of bankruptcy, and firms with more variable cash flows normally should have a higher probability of bankruptcy for a given level of debt.[28,29] Shao *et al* (1995)[30] make use of financial risk as a measure of bankruptcy cost and find that both financial risk and political risk are negatively linked to leverage, and that the lower the financial risk associated with a firm, the high the possibility of taking on more debt. Titman and Wessels (p. 6)[31] adopt earnings volatility empirically and show that volatility (measured as the percentage change in operating income) is negatively related to leverage.

The overall implication, as can be seen from the results of the above studies, is that the presence of bankruptcy costs indeed may have some depressing effects on the financial leverage decisions of firms. Not only that, but the lack of adequate legal and administrative structures for the resolution of bankruptcy has the capacity to discourage creditors from further lending. It has been for instance argued that well-designed and implemented rules (on debt resolution) facilitate rapid and low-cost debt recovery in cases of default, thereby lowering the risk of lending and increasing the availability of credit to potential borrowers (Gray, p. 31).[9] Demonstrating also how bankruptcy presence may impact on lenders' decisions to extend credits, Harrington and Nichaus (p. 204)[3] posit that because bankruptcy and financial distress can impose costs on parties who have contractual relationships with the firm, the terms at which these parties will contract with the firm reflect the firm's probability of financial distress. The expectation therefore is that firms in countries with effective debt resolution policies are in a better position to attract more investable capital (especially long-term debts and equity) than those in countries with relatively weak policies. Given the notoriety of the Nigerian legal environment and the high level of inefficiencies in the country's financial system, it seems logical to conclude that the near lack of long-term investment capital in the country is a result of the lack of functional and efficient bankruptcy laws.

THE ENVIRONMENT FOR BANKRUPTCY REGULATION IN NIGERIA

Nigeria has witnessed two major regimes of bankruptcy practices. These include the 1962 and the 1990/1992 bankruptcy laws and amendments, which centered on resolving bankruptcy cases via the judiciary system, and the 1994 Failed Bank regime, which focused on using extra-judicial measures in resolving bank loan defaults. Although the former was enacted 2 years after the country's independence in 1960 and by a civilian government, the latter was part of the military measures adopted to sanitise the banking system. As this paper reveals, the prevailing political atmosphere under each of the regimes influenced greatly the practices of bankruptcy resolutions in the country. As part of its major contributions, this paper illustrates how a government's third-party attempt to mediate in corporate debt resolution can impede the flow of long-term investment capital in a developing country with inefficient financial and judicial systems.

Despite the elaborateness of the bankruptcy legal framework in Nigeria, it is common to allude that lenders and borrowers are yet to be offered enough legal protections in the country. In the main, one distinguishing feature of the bankruptcy regulation in the country is that, unlike the practice in the United Kingdom and other countries, the Nigerian bankruptcy procedures are aimed mainly at enforcing the payment of debts. The laws do not help in issues relating to establishing the existence or otherwise of debts. Whether an individual is under indebtedness or not is a matter that should be established through prior and separate judicial processes. It is after a case for the existence of indebtedness has been decided by the court that a bankruptcy procedure can actually commence.

The practice also tends to marginalise the borrower in particular, in a legal process involving debt resolution. A good instance of this is Section 17(5) of the 1990 Bankruptcy Act, which specifically states that ‘the Official Receiver shall take part in the examination of the debtor, and for the avoidance of doubt no legal practitioner shall be allowed to take part in the examination of the debtor or appear on his behalf at such examination’. The implication is that where the debtor lacks the technical competence to defend his ‘state of affairs’ (as stipulated in Section 16(1)), and the legal system is not efficient enough to support him, it may be difficult to objectively establish a case for bankruptcy. Even when established, some inherent incompetence on the part of the judiciary may delay cases longer than necessary.

The situation in Nigeria has in effect become such that the judicial process itself is a hindrance in bankruptcy procedures, thus making debt resolution far more difficult in the country than in other countries. Take the case of the mounting level of non-performing credits among some banks in the country, before the recent banking consolidation exercise. In the words of Soludo (2004),[32] for instance, the weaknesses of some of the ailing banks are manifested by their overdrawn positions with CBN, the high incidence of non-performing loans, capital deficiencies, weak management and poor corporate governance. According to him, non-performing assets of banks accounted for as much as 19.5 per cent of total banking industry assets.[32] Table 1 of this report equally shows that the proportion of non-performing credits to total credits in the Nigerian banking system rose from 19.9 per cent in 2001 to 23.08 per cent in 2004. In the same vein, percentages of non-performing credits to shareholders’ funds and bad debts to total credits rose from 77.14 to 105.3 per cent and 11.8 to 22.59 per cent, respectively. Thus, it seems right to argue that some dubious corporate managers in Nigeria are taking advantage of the lapses in the country’s bankruptcy practice in order to take up more loans without an original intention to pay back.

Unfortunately, not even bankruptcy regulation was considered during the peak of the series of bank distresses witnessed in the country from the late 1980s to the mid 1990s. By the early 1990s, it became evident

Table 1: Incidences of bank failure and the level of non-performing loans in the Nigerian banking system

Year	*Total number of banks*	*Number of distressed banks*	*Per cent of non-performing to total credits*	*Per cent of non-performing credits to shareholders’ funds*	*Per cent of bad debts to total credits*
1999	90	11	25.61	94.83	15.40
2000	90	—	21.50	83.35	15.00
2001	89	17	16.90	77.14	11.80
2002	89	23	21.27	85.85	19.25
2003	89	23	21.59	89.69	24.81
2004	89	26	23.08	105.30	22.59
2005	25	—	24.10	—	19.09

Sources: Central Bank of Nigeria and Nigerian Deposit Insurance annual reports and accounts (various years).

that the authorities had relegated the existing bankruptcy framework and had constituted some contingent measures in order to address the mounting levels of bad debts that were almost grounding the entire financial system. The neglect of bankruptcy framework was very clear in the report of a panel constituted by the government of Nigeria thatreviewed the Central Bank of Nigeria. According to the report, for instance,

> 'the bankruptcy law cannot be used effectively to remove the difficulties faced by banks in recovering their non-performing loans and advances. Banks have to use the remedies provided in the other existing laws, using the Bankruptcy law only as a last resort'.[33]

On the basis of the Panel's report, the Nigerian military government enacted the Failed Bank Decree but rejected the panel's recommendation for the creation of a special division of the High Court for dealing with cases involving fraud or bad debt. Instead, the government went ahead to create a Failed Bank Tribunal. The action of the government at that time was, however, in keeping with the need not only to recover non-performing loans and bad debts, but also to find ways of curtailing the then rising cases of bank failure and distress. The whole action was premised again on the belief that it was the inability of borrowers to repay loans granted to them by banks, which historically constitutes one of the major causes of bank failures and distress in the country. It was against this background, for instance, that the Failed Bank (Recovery of Debts) and Financial Malpractices in Banks, Decree No. 18 of 1994, were promulgated.[34] This almost took the place of the 1990 Bankruptcy Act, especially with regard to resolving the lending crisis between banks and their customers. The next section takes a review look at both the Bankruptcy Act and the Failed Bank Decree. This became a very significant development because of the overbearing influence of banks in the Nigerian financial markets and the fact that the majority of companies rely more on bank credits than on other sources of funds.

THE NIGERIAN BANKRUPTCY ACT OF 1992

One of the major legal issues in any bankruptcy law is the question of the stage at which a debtor is technically deemed as being incapable of making loan repayment. Indeed the question of whether a debtor is unable to pay his debt or not is solely a legal matter decidable only by a court of competent jurisdiction.[35] In the case of Nigeria, the Bankruptcy Act of 1992 (Section 1),[36] which is the major bankruptcy law in the country at date, specifies that a debtor commits an act of bankruptcy in each of the following cases:

(a) if a creditor has obtained a final judgment or final order against him for any amount, and execution thereon not having been stayed, has a bankruptcy notice served on him, and does not, within 14 days after service of the notice, comply with the requirements of the notice or satisfy the court that he has a counter-claim, set-off or cross-demand that equals or exceeds the amount of the judgment debt or sum ordered to be paid, and that he could not set up in the action in which the judgment was obtained or the proceedings in which the order was obtained;
(b) if execution against him has been levied by seizure of his goods under process in an action, or proceedings in the court, and the goods have been either sold or held by the bailiff for 21 days and
(c) if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself.

Ironically, Section 1 of the Act is premised under the assumption of an efficient judicial system where legal resolution is in a matter of days. Because of the high level of inefficiency in Nigeria's judicial system, among the recorded bankruptcy cases, an average resolution period per case remained at not less than 1.5 years. The implication of such delays in bankruptcy resolution can be assessed based on the fact that under most bankruptcy laws, debtholders typically are not paid until the process is resolved (Barclay and Smith Jr, p. 901).[2] Under such a situation, therefore, an inefficient judicial system that delays resolutions becomes a source of the problem itself, instead of offering some solutions as may be expected, and debtors can easily capitalise on that by shifting the goalpost of debt payments.

In addition, in a country where citizens have the culture of 'owning something of no value',[32,37] the voluntary declaration of bankruptcy is not a common case in Nigeria. It is on record that since 1992, no such voluntary declaration has taken place. Even when they do, as in some very few cases, the judicial system does not seem to provide reasonable supports for quicker resolution.[38] As it stands, unlike the practices in America and other developed economies, the bankruptcy law in Nigeria does not take any clear position on issues relating to corporate reorganisation. Market-based walkouts, which are allowed in the practices of these other countries, are visibly lacking in the case of Nigeria. The present practice is, instead, encumbered by bureaucratic protocols that make such walkouts by debtors almost impossible.

Instituting bankruptcy cases itself is equally a very complex issue, and ridiculous in the Nigerian practice. Two major provisions on the qualifications of creditors for instituting bankruptcy cases are worth mentioning, sections 4(1i) and 4(1iv). According to section 4(1i), a creditor is qualified to institute charges if 'the debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, is not less than ₦2000' (that is, two thousand Nigerian Naira or about US$ 15). The monetary limit specified above, although very encompassing, makes a caricature of the entire process. This is so, considering that the complex legal bottlenecks and administrative proceedings inherent in the country's legal system make the cost of adjudication so high. In which case, the legal limit of US$ 15 only portrays the high level of incompetence demonstrated by the original designers of the Act.

Again, section 4(1iv) provides that bankruptcy cases can only be instituted on resident debtors. According to the section,

> 'the debtor is ordinarily resident in Nigeria, or within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in Nigeria, or has carried on business in Nigeria, personally or by means of an agent or manager, or is or within the said period has been a member of a firm or partnership of persons which has carried on business in Nigeria by means of a partner or partners or an agent or manager'.

Section 4(iv) specifically, in the present era of globalisation, is very unfit with modern economic practice. Restricting the bankruptcy jurisdiction to the local geographical border does not in any way encourage economic and cross-borer financial relationships among firms, nor between firms and international fund providers.

Section 4(2) specifies that if the petitioning creditor is a secured creditor, he shall in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security; in the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt owing to him after deducting the value so estimated in the same manner as if he were an unsecured creditor. As good as this provision is in theory, the feasibility of its implementation is doubtful, as it is capable of being stalled by corruption and some foreclosure problems. Thus, in a country with high incidences of corruption, as is the case of Nigeria, foreclosure on the part of secured creditors might be a difficulty task. Also, debtors may have strong incentives to falsify their 'statements of affairs'.[39] Collier (1998)[40] uses a true case to demonstrate how fraud and dishonesty on the part of the debt could hamper debt resolution in Africa. According to him,

> It concerns a long-established foreign bank, which lent to finance a factory on the collateral of the land on which the factory was to be built. The borrower defaulted and the bank took the process through the courts. Normally, the courts would not give judgments. This was because the judges faced strong incentives not to reach a conclusion. If they reached a judgment they risk their personal safety. In this case the bank was pleased to find that the court reached judgment and permitted the bank to foreclose on its collateral. However, on closer inspection the bank discovered that its collateral was not the plot of land on which the factory was built, but the neighbouring swamp. Clearly, the firm had borrowed with the intention of defaulting.

Bankruptcy petition can also be filed by the debtor himself. Section 8(1) for instance gives a debtor the power to file a bankruptcy petition by stipulating that the debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts.

THE FAILED BANKS (RECOVERY OF DEBTS) AND FINANCIAL MALPRACTICES DECREE OF 1994

The historic confusions trailing the practice of bankruptcy in Nigeria have sparked off various alternative legal frameworks for distress resolution. There was, for instance, the Failed Bank Decree enacted by the Military Government in 1994. The Failed Bank Decree was promulgated in order to recover debts owed to failed banks that had remained outstanding as of the date the banks were closed or declared failed by the Central Bank of Nigeria and in order to subsequently try malpractices in banks (Nigerian Deposit Insurance Corporation, p. 114).[41] One major significance of the Decree was the establishment of a Failed Bank Tribunal, with powers to adjudicate on issues involving loan defaults and mismanagement. The Decree made provisions for the recovery of debts in only closed and distressed banks in the country and for the criminal prosecution of loan defaulters in all the banks.

The Failed Bank Tribunal consisted of a serving or retired judge as the chairman, who was empowered to singularly hear and dispose of all criminal or civil cases or matters before the Tribunal and every proceeding subsequent thereto. Section 3 of the Decree empowered the Tribunal to, among others, (a) recover, in accordance in accordance with the provisions of this Decree, the debt owed to a failed bank, arising in the ordinary course of business and which remains outstanding as of the date the bank is closed or declared a failed bank by the Central Bank of Nigeria; (b) try the offences specified in part III of this Decree; (c) try the offences specified in the Banks and Other Financial Institutions Decree 1991 and the Nigeria Deposit Insurance corporation Decree 1998 and (d) try other offences relating to the business or operation of a bank under any enactment. Section 9 also stipulates that notwithstanding anything to the contrary in any law, deed, agreement or memorandum of understanding, the Tribunal shall have exclusive jurisdiction to hear and determine all matters brought before it concerning the recovery from any person of any debt owed to a failed bank, which remains outstanding as of the date of closure of the business of the failed bank.

Section 4 also prescribed that the Tribunal deliver its judgment not less than 21 working days from the day of its first sitting, and a person convicted or against whom a judgment is given under the Decree may, within 21 days of the conviction or judgment, appeal to the Special Appeal Tribunal established under the Recovery of Public Property (Special Military Tribunal) Decree 1984, with the decision of the Special Appeal Tribunal being final.

The only person authorised by the decree to file an application for the recovery of a debt owed to a failed bank, as provided in section 11(1), is the Receiver or Liquidator of the failed bank and where there is no Receiver or Liquidator, by a person appointed by the Central Bank of Nigeria or the Nigeria Deposit Insurance Corporation. The contents of such application shall include the following: the name and address of the borrower; if the borrower is a body corporate, a partnership or a sole trader; the amount of loan and advance outstanding; details of securities pledged, if any and such other information as may be useful to the Tribunal (Section 11(2)). The judgment of the Tribunal may be such that it orders for the payment of the loan and interest. Where such is the case and the debtor fails to comply within the time specified in the order, the Tribunal is given the power to make an order to levy execution on all the properties of the debtor pledged as security for the loan (Section 13(2)). In the event of the occurrence of the latter, Section 15(1, 2 and 4) specifies that for the sale by auction or by private contract of such properties the money obtained from the sale shall, within two weeks from the date of sale, be paid to the Receiver or Liquidator of the failed, after all the recovery expenses have been deducted.

Where the money obtained from the sale is not sufficient to offset the outstanding loan and interest thereon, Section 15(5) empowers the Tribunal to the following: (a) where the debtor is an individual, levy execution on the other properties of the debtor; (b) where the debtor is a body corporate, partnership or other association of individuals, notwithstanding anything to the contrary in the Companies and Allied Matters Decree 1990 or any other law for the time being in force, levy execution on the other properties of the body corporate, partnership or association of individuals. And if the money obtained from the sale of properties is still not sufficient to offset the outstanding loan and interest thereon, the Tribunal may, subject to section 290 of the Companies and Allied Matters Decree 1990,[42] levy execution on the personal properties of the directors of the body corporate, partners of the partnership or individuals of the association, as the case may be, which shall be sold and applied in satisfaction of the outstanding debt. In the case of body corporate, levying execution on the personal property of the directors is in contrast with the theory of 'separate legal entity'.

Section 16(1) states that where (a) the information and details on the security pledged for the loan and filed before the Tribunal is impossible to locate; or (b) no security is pledged at all; or (c) the identity of the debtor is difficult to locate or (d) the debtor is found to be non-existent, fake or fictitious or in any way unidentifiable, the Tribunal shall hold liable, for the outstanding loan and interest thereon, the directors, shareholders, partners, managers, officers and other employees of the failed bank, who in the performance of their duties were found to have been connected in any way with the granting of the loan whichhas become irrecoverable. And that in the event of the occurrence of the latter, the Tribunal shall proceed to recover from the persons referred to in subsection (1) of this section, jointly and severally, the outstanding loan and interest thereon in accordance with the provisions of this Decree, unless the Tribunal is satisfied that the debt was incurred without the consent of the director, partner, shareholder, manager, officer or employee and that he exercised all such diligence as he ought to have exercised, having regard to the nature of his functions and all the circumstances of the case.

Section 19 defines different kinds of offenses under the Decree. According to subsection 1, any director, manager, officer or employee of a bank who (a) knowingly, recklessly, negligently, willfully or otherwise grants, approves the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility or financial accommodation to any person; (b) grants, approves the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility which is above his limit as laid down by law or any regulatory authority or the bank's regulations; (c) grants, approves the grant or is otherwise connected with the grant or approval of a loan, an advance, a guarantee or any other credit facility to any person in contravention of any law for the time being in force, any regulation, circular or procedure as laid down from time to time, by the regulatory authorities or by the bank; (d) receives or participates in sharing, for personal gratification, any money, profit, property or pecuniary benefit towards or after the procurement of a loan, an advance, a guarantee or any other credit facility from any person whether or not that person is a customer of the bank or (e) recklessly grants or approves a loan or an interest waiver where the borrower is known to have the ability to repay the loan and interest, is guilty of an offence. Also, subsection 2 makes a person, who, being indebted to or being a customer of a bank, negligently, willfully or recklessly (a) makes a statement, whether written or oral, or gives any information or (b) fills any form to a bank, knowing it to be false, fake, non-existent or fictitious, with the intention of concealing his identity from the bank so as to avoid the repayment of a loan, an advance, a guarantee or any other credit facility granted him by the bank, guilty of an offence under this Decree.

The Decree also holds liable corporate entities for offences committed by its officers. Section 22(1), for instance, states that where an offence under this Decree, which has been committed by a body corporate, is proved to have been committed with the connivance of or attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in any such capacity, he as well as the body corporate, where practicable, shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Finally, subsection 2 of the same section provides that where a body corporate, other than a bank, is convicted of an offence under this Decree, the Tribunal may order that the body corporate be wound up and the body corporate shall thereupon and without any further assurance but for that order, be wound up and all its assets, after satisfying all the claims of the Receiver or Liquidator, shall be forfeited to the Federal Government.

The notoriety of this Decree, at least during the period of its implementation, lies in its draconian nature and the ways and manner it was applied. This is especially so in the authorities' bid to enforce Sections 19(1c) and 22(2) of the Decree. It is on recorded that many bank managers and their allies were caught tight and jailed based on the applications of the provisions of that Decree. It was equally argued that the nature of the provisions of the Decree made them very vulnerable to abuses (Uche, p. 437).[43] This claim was amplified by a local newspaper criticism, that the regulatory authority has

> craftily seized from the police the right to grant bail to suspects; wrestled from the Attorney-General the right of Government to prosecute; conferred on itself the right to appoint private prosecutors (who are well paid); arrogate to itself the right to choose which particular tribunal to take what matter to without any regard for the right of the accused. All these premeditated actions can only lead to mistrials, mismarriages and pervasions of justice.[44]

Following the country's transition from military to civilian rule in 1999, the Decree was abolished and transformed into the Failed Bank Act of 1999. As part of the transformation, some stringent provisions such as trial in absentia and tight bail conditions were amended, and the jurisdiction of the Act was transferred to the Federal High Court (Nigerian Deposit Insurance Corporation, p. 116).[41] As claimed by the Nigerian Deposit Insurance Corporation, the Decree before its abolishment contributed greatly to the sanitisation of the Nigerian banking system. According to the Corporation, as of December 1999, the enforcement of the Decree had given rise to the filing of 132 criminal cases and 2332 civil loan default cases, out of which judgments were delivered in 44 cases and 672 cases, respectively. It goes further to conclude that the Failed Bank Tribunal played a critical role in criminal adjudication by making accused persons refund the various sums involved in offences committed and that the Decree sent a clear signal that it was no longer business as usual for debtors who borrow from banks with no intention of repaying. Ironically, evidence contained in Table 1 of this report shows that not even the Decree was enough to halt the spade of loan defaults in Nigerian banks.

THE ARISING CHALLENGES IN THE NIGERIAN BANKRUPTCY PRACTICE

The Failed Bank Decree under military implementation was, however, more efficient than the democratic regime of bankruptcy practice in the country. As argued by the Nigerian Deposit Insurance Corporation (p. 120),[41] for instance, the transfer of the jurisdiction of the Failed Bank Act from the Tribunal to the Federal High Courts in 1999, led to a drastic decline in the effectiveness of loan recovery, as well as a decrease in the number of cases concluded in the courts. This, it argued further, was because of a number of reasons, including delays in prosecution occasioned by long adjournments, difficulty in tracing debtors' assets and difficulty in disposing of the few assets found. This again is not surprising because there does not seem to be any functional collateral laws in the country at present. As many experts have argued, it is quite difficult to facilitate debt resolution, especially as it affects the foreclosure of collaterals, amidst a very inefficient judicial system.

The above situation, therefore, gives credence to the claim that the country's judicial system is incapable of accommodating effective bankruptcy practices. Incompetence on the part of the judiciary and the near lack of capacity to support the financial system are not, however, peculiar to Nigeria. Collier (1998),[40] in his address on the political economy of African banking reform, has essentially argued that

> More generally, the weakness of the banking system may be due to the weakness of the legal system. … the legal system is not functioning well enough to prevent dishonest financial behaviour. The risk of successful prosecution of dishonest behaviour is too small to be an effective deterrent. … There are currently two key points at which the judicial process typically breaks down in Africa. The first is at the level of the court staff, who manage the flow of the court's business, such as the clerk to the court. Typically, clerks are badly paid and are prime targets for bribery. …. The second is at the level of judges. Again, here the problem is not primarily that of corruption but rather of extreme delay in reaching judgments. Judges have no incentives to reach a verdict, and delay averts vengeance by aggrieved parties. Procedures which would, under the same legal system, in Europe take only minutes, in African courts may take a week or more.

The above critic, no doubt, creates a need for an independent judicial body to manage bankruptcy processes and procedures not only in

Nigeria, but also in other countries within the African region.[45] The use of the Nigerian Deposit Insurance Corporation (NDIC) as the sole liquidator of distressed banks in the country does not help matters here. As argued by Ogunleye (2005),[46] for instance, as the scrapping of the Failed Bank Tribunal, the NDIC has not had any appreciable success in the courts. Although the activities of the Corporation focus only on bank loan defaults and malpractices, there seems to be a total lack of public confidence on the capacity of the Corporation to effectively implement this role. In the same vein, situations where the apex bank itself (Central Bank of Nigeria) relies on bank license revocation as an option for solving bank crises constitute another major problem in the country's debt resolution strategy.[41,47] This is so, especially considering the overwhelming politics surrounding bank liquidation, as well as the inability of the Corporation to honour obligations to depositors, as provided in the enabling NDIC Act.[48]

Indeed, the fact that the Nigerian bankruptcy system precludes the option of liquidation makes credit flows very difficult in the country. Take the case of the average leverage ratios of firms in the country, where, as shown in Table 2 below, between the period 1980 and 2002, only an average of 13.3 per cent of total liabilities of quoted firms in Nigeria were of long-term finances. The rest (86.7 per cent) was made up of current liabilities. As shown in the table, even the enactment of the 1992 Bankruptcy Act did not induce long-term lending. This is so, considering that the ratio of long-term to total liabilities of firms fell from its 9.1 per cent level to 3.8 per cent in 1993. At the time of the enactment of the Failed Bank Decree in 1994, the ratio had risen significantly to 16.2 per cent, but failed drastically to 2.8 and 1.8 per cent, respectively, after the first and second year of the Decree. All these examples may provide some indication on the inability of the country's bankruptcy practice to induce corporate lending.

Table 2: Ratios of short- and long-term to total liabilities from aggregated financial statement of quoted companies in Nigeria

Year	*Ratio of short-term liabilities to total liabilities*	*Ratio of long-term liabilities to total liabilities*
1980	0.886	0.114
1981	0.912	0.088
1982	0.878	0.122
1983	0.866	0.134
1984	0.859	0.141
1985	0.844	0.156
1986	0.813	0.187
1987	0.806	0.194
1988	0.856	0.144
1989	0.855	0.145
1990	0.909	0.091
1991	0.941	0.059
1992	0.955	0.045
1993	0.962	0.038
1994	0.838	0.162
1995	0.972	0.028
1996	0.982	0.018
1997	0.879	0.121
1998	0.837	0.163
1999	0.844	0.156
2000	0.769	0.231
2001	0.694	0.306
2002	0.780	0.220
Average	0.867	0.133

Source: Computed from securities and exchange commission statistical bulletin.

From the supply side of corporate financing in Nigeria, there are indications that the frictions in the practice may have affected the flow of credits and the unwillingness of banks to lend long. There are growing evidences, for instance, that banks in Nigeria prefer to lend short and invest more funds in short-term assets (Ezeoha, p. 164).[11] Table 3 equally demonstrates the infinitesimal proportion of long-term lending among Nigerian banks. The table shows that the average bank lending of over 5-year maturity between 1980 and 1996[49] was 5.43 per cent, as against the proportion of loans below 5-year maturity, which stood at 94.57 per cent.

Table 3: Ratio of short- and long-term bank loans in Nigeria

Year	*Per cent of loans below 5-year maturity*	*Per cent of loans over 5-year maturity*	*Total*
1980	96.28	3.72	100.00
1981	94.82	5.18	100.00
1982	94.73	5.27	100.00
1983	97.23	2.77	100.00
1984	94.54	5.46	100.00
1985	94.44	5.56	100.00
1986	93.93	6.07	100.00
1987	93.94	6.06	100.00
1988	94.69	5.31	100.00
1989	94.64	5.36	100.00
1990	93.11	6.89	100.00
1991	93.84	6.16	100.00
1992	92.57	7.43	100.00
1993	91.03	8.97	100.00
1994	96.25	3.75	100.00
1995	95.96	4.04	100.00
1996	95.75	4.25	100.00
Average	94.57	5.43	100.00

Source: Computed from Central Bank of Nigeria annual reports and statements of accounts (various years).

Although various policy efforts have been made in the past to address the lingering dearth of long-term investment capital in Nigeria, no meaningful link exists between such efforts and the bankruptcy possibilities inherent in lending. Most recent among such efforts is the banking industry consolidation that took place in the country between July 2004 and December 2005. Essentially, the exercise was targeted at enabling surviving banks to carry out a core intermediatory role by balancing lending structure between short-, medium-, and long-term (Ezeoha, p. 165).[11] In line with the projections of Peek and Rosengreen (1995),[50] Hawkins and Mihaljak (2001)[51] and Berger *et al* (1999),[52] there is no doubt that banking consolidation is capable of boosting efficient financial intermediation and increasing the rate and level of credit delivery in an economy. However, to achieve this goal, consolidation must be supported with sound operating efficiency,[53,54] relatively cheap infrastructure cost,[55] as well as efficient judicial and debt resolution/bankruptcy practices.

Notwithstanding the deficiencies in the country's business environment, banking reforms so far have been formulated and implemented without any significant consideration as to how to balance lending with a borrower's capacity to make loan repayment. Dahiya *et al* (p. 397)[56] highlighted the importance of a supportive bankruptcy system in the attempt to boost credit delivery, when they stressed that the risk of loan default was indeed one of the most important risks faced by banks. Although consolidation may provide insurance for banks in the event of loan losses, it does not automatically address fundamental factors that lead to a high rate of loan defaults. Given the prevalence of corporate and public corruption in the country, there is no doubt that the huge capital acquired by banks would only lead to some 'free cash flow' and 'over-investment' behaviour among bank managers and directors.[57,58] The implication would be increased risk exposures and a hike in the level of non-performing credits. This would also lead to a gradual erosion of the banks' capital, and consequent exposure to bank distress and failures.

CONCLUSION

Tables 2 and 3 of this report provide evidence on the near lack of long-term corporate capital in Nigeria. The general claim is usually that financial institutions are unwilling to make long-term finances available to corporate fund users. Those who hold this view, however, fail to recognise that one of the key factors that were responsible for the financial system's distress of the 1980s and 1990s in the country was the high level of bad debts and non-performing credits. Perhaps, the inability of the institutions to recover such debts from the borrowers may be traced to the imperfections in the country's bankruptcy and collateral laws. Although, as shown in this review, the 1962 Bankruptcy Act (with its amendments) could not offer adequate protections to creditors in particular, the Failed Bank Decree that was enacted at the peak of the financial crisis could not help matters, mainly because of the near lack of legitimacy on the part of the then military dictatorship that brought it into being. Unfortunately, the recent banking consolidation was formulated and implemented without any attempt to equally reform the process of debt resolution in the country. This is so, notwithstanding the fact that the consolidation exercise offered an ample opportunity for the regulatory agencies to close the lingering gap between efforts to increase bank lending and the persistent cases of loan default and threats of corporate bankruptcy.

Essentially, this paper has examined the environment of bankruptcy regulation in the country. The paper identifies that, like the practices in developed economies, the Nigerian practice can only smooth the flow of investment capital if it is reformed by offering reasonable protections to both creditors and borrowers. The present banking industry can only succeed in playing an efficient intermediation role in the economy if the bankruptcy regulation is reformed as well, by making adequate provisions for corporate liquidation, workout and reorganisation as part of its debt resolution options. The regulation shall also incorporate adequate provisions to ensure the equitable allocation of risks in cases of liquidation, and that the value of an insolvent firm is not eroded on the cause of liquidation or reorganisation.[36,59] Relying on extra-judicial measures to enforce debt payment and distress resolution has only led to erosion in the legitimacy of the country's bankruptcy practice and so should be minimised or abolished. It is by so doing that effective intermediation processes that guarantee a smooth flow of long-term investment capital can be achieved.

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9 Gray, C. W. (1997) Creditors' crucial role in corporate governance. *IMF Finance and Development* 34(2): 29–32.

10 The Nigerian financial system, for instance, is just emerging from what has been adjudged as the largest industry convergence in the history of banking in Africa (Ezeoha, p. 172).[11] The exercise witnessed the forced reduction in the number of conventional banks in the country from 89 as at July 2004 to 25 as at present. According to official sources, the key goal of the consolidation was to solve the lingering cases of distress and failure and reposition the financial system to serve as catalyst for national development.

11 Ezeoha, A. E. (2007) Structural effects of banking industry consolidation in Nigeria: A review. *Journal of Banking Regulation* 8(2): 159–176.

12 Fabunmi, J. O. (1989) Equity and trusts in Nigeria. *Journal of African Law* 33(1): 133–134.

13 Bankruptcy laws apply in general proportion to all corporate firms. However, in the case of financial institutions (and banks in particular), other regulatory frameworks are used to facilitate the resolution of distress or bankruptcy cases. A good example is the existence of deposit insurance and bail-out schemes in most countries.

14 Federal Government of Nigeria. (1962) Bankruptcy Act No. 16 Chapter 30. *Laws of the Federation of Nigeria*. Lagos: Federal Government Press.

15 Benning, S. Z. and Sarig, O. H. (1997) *Corporate Financing: A Valuation Approach*. UK: McGraw-Hill Companies Inc., p. 347.

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20 Although a business risk is defined as the expected variation in future income of a firm (Ferri and Jones, p. 633),[21] especially if it uses no debt (Brigham, p. 423[23]; and Weston *et al*, p. 610[22]), financial risks constitute the additional variability in returns to shareholders that arise because the financial structure contains debt (Arnold, p. 787[4]; and Brigham, p. 423[23]).

21 Ferri, M. G. and Jones, W. H. (1979) Determinants of financial structure: A new methodological approach. *The Journal of Finance* 34: 631–644.

22 Weston, J. F., Besley, S. and Brigham, E. F. (1996) *Essentials of Managerial Finance*, 11th edn., Fort Worth: Dryden Press, pp. 609, 610, and 712.

23 Brigham, E. F. (1995) *Fundamentals of Financial Management*, 7th edn., Forth Worth: The Dryden Press Harcourt Brace, p. 423.

24 Schoubben, F. and Van Hulle, C. (2004) The determinants of leverage: Differences between quoted and non-quoted firms. *Trijdschrift voor Economie en Management* XLIX(4): 589–620.

25 According to Fama and French (2005),[26] the costs of debt include potential bankruptcy costs and agency conflicts between stockholders and bondholders. In the same vein, Van Horne (p. 225)[16] argues that with sufficient bankruptcy costs, stockholders will be affected and may view diversification of assets in different light.

26 Fama, E. F. and French, K. R. (2005) Financing decisions: Who issues stock? *Journal of Financial Economics* 76(3): 549–582.

27 Kale, J. R., Noe, T. H. and Remirez, G. G. (1991) The effect of business risk on corporate capital structure: Theory and evidence. *The Journal of Finance* 46(5): 1693–1715.

28 This is also in line with the earlier finding of Baxter (p. 402)[29] that a high degree of leverage increases the probability of bankruptcy and therefore increases the risk involved in the overall earnings stream.

29 Baxter, W. D. (1967) Leverage, risk of ruin and the cost of capital. *The Journal of Finance* 22(3): 395–403.

30 Shao, L. P., Iftekhar, H. and Shao, A. T. (1995) Determinants of international capital structure for US foreign subsidiaries. *Multinational Business Review* 3(2): 67–77.

31 Titman, S. and Wessels, R. (1988) The determinants of capital structure. *Journal of Finance* 43(1): 1–19.

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35 The Federal high court is vested with jurisdiction in bankruptcy and insolvency proceedings, by virtue of the provisions of basic bankruptcy related laws in Nigeria – such as Section 407 of the Companies and Allied Matters Act, Section 142 of the Bankruptcy Act, as well as Section 251(e) of the Constitution of the Federal Republic of Nigeria.

36 Federal Government of Nigeria. (1992) Bankruptcy (Amendment) Decree No. 109 of 1992. *Laws of the Federation of Nigeria*. Lagos: Federal Government Press.

37 In the historic 2004 address that heralded the much celebrated Nigerian banking consolidation, the governor of the Central Bank of Nigeria used the concept of 'the cultural environment and the mindset whereby many people prefer to own 100 per cent of barely nothing rather than 1 per cent of something' to explain the inherent difficulty in relinquishing control among Nigerian corporate owners (Soludo, 2004).[32]

38 The difficulty of enforcing commercial contracts in Nigeria is measured by the number of procedures counted from the moment the plaintiff files a lawsuit until actual payment, the associated time, and the cost as a percentage of debt value. On average, it requires 23 procedures, 730 days and 37.2 per cent of debt. The cost of bankruptcy in Nigeria is 18 per cent of estate value, the recovery rate for creditors is $0.33 per USD and the time in years to complete a foreclosure/bankruptcy procedure is 1.5 years (http://www.yearofmicrocredit.org/docs/countryprofiles/Nigeria.doc, Accessed 19 February 2008).

39 Section 16 of the Bankruptcy Act provides that 'where a receiving order is made, the debtor (within seven days if the debtor himself files petition or 14 days in case of creditor's petition) shall submit to the official receiver a statement under oath and in the prescribed form, showing particulars of his assets, his debts …, securities held by creditors, securities held by him in another name or in trust for him by his wife, children or any other person. Any creditor of the debtor or his agent may inspect or copy the statement'.

40 Collier, P. (1998) The Political Economy of African Banking Reform. Workshop on Building Sound Banking Systems in Sub-Saharan Africa, Geneva, 26–27 October.

41 Nigerian Deposit Insurance Corporation. (2005) *Bank Liquidation in Nigeria (1994–2004)*, edited by P.N. Umoh and G.A. Ogunleye. Lagos: NDIC Research Department.

42 The very aspect of the Companies and Allied Matters Act that relates to bankruptcy practice is the provision on liquidation/winding up procedures. The main thrust of this provision is to liquidate or terminate the life of companies without an option of reorganisation on the side of the debtor company.

43 Uche, U. C. (1996) The Nigerian failed banks decree: A critique. *Journal of International Law* 11(10): 436–441.

44 Quoted in Uche, p. 437.[43]

45 Or in general, Collier (1998) advises that the economic solutions to the problems of the judiciary in Africa are to change the incentives facing both clerks and judges; include an element of piece-rate into the wage structure, so that delay becomes costly; and raise clerks' wages by increasing court charges.

46 Ogunleye, G. A. (2005) Regulatory Challenges in Consolidated Nigerian Banking System – NDIC Perspective. The 14th Delegates Conference/Annual General Meeting of the Money Markets Association of Nigeria, Lagos, 24 February.

47 Most of the past revocation cases were based on a specific provision of Section 12 of the Banks and Other Financial Institutions Act of 1990 that a bank can be revoked if it has insufficient assets to meet its liabilities. Invoking this provision, the apex bank had between 1994 and 2003 revoked the licenses of 36 banks and consequently handed then over to the NDIC for liquidation (NDIC, p. 33).[41]

48 In most cases, the NDIC and the Central Bank of Nigeria have had to face stiff legal tussles in their bid to close a 'distressed' bank. In the last concluded banking consolidation in the country, at least 5 out of the 13 banks that were unable to meet up with the 25 billion (Nigerian) Naira capitalisation till date have some running legal cases against the regulatory agencies. Another good instance of this is the case of Savanah Bank Plc, which the agencies are yet to be liquidated because of the contention by the former that it was not in distress as at the time its license was revoked in 2002. All these have led to serious public impression that such revocation was an instrument of the ruling government to silence oppositions.

49 Regulatory provision that mandated banks to specify the maturity structure of their lending operations was abolished in 1996. Henceforth, banks regained the freedom to structure their loans and advances according to their individual preferences. This development may have no doubt consolidated the traditional financing patterns of banks – where because of the dominance of short-term deposit structure (and of course the absence of incentives to lend to most domestic economic sectors), banks tend to focus more on short-term lending.

50 Peek, J. and Rosengren, E. S. (1997) Banking consolidation and small business lending, it's not bank size that matters. *Journal of Banking and Finance* 22(6–8): 799–820.

51 Hawkins, J. and Mihaljak, D. (2001) The banking industry in the emerging market economies: Competition, consolidation and systemic stability – an overview. *Bank for International Settlements (BIS) Papers* (4): 1–44.

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53 Contributing to the efficiency argument, DeYoung and Whalen (1999)[54] stressed that the process of banking consolidation would be beneficial only if it drove inefficient banking organisations from the market and if it facilitated increased efficiency in the banking organisations that survive.

54 DeYoung, R. and Whalen, G. (1999) Banking Industry Consolidation: Efficiency Issues. Economics Working Paper No. 110.

55 Buches, T. and Mathien, J. (2003) Banking competition and efficiency in Ghana. (http://www.isser.org/Banking%20in%20Ghana.pdf), accessed 19 February 2008.

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58 Berkovitch, E. and Kim, E. H. (1990) Financial contracting and leverage induced over- and under-investment incentives. *Journal of Finance* XLV: 765–794.

59 The present practice where settlement of debts under the bankruptcy practice is prioritised to first take care of all the costs arising from the bankruptcy proceedings and administration does not seem to help matters. Section 35(1) specifically provides that 'the assets remaining after payment of the actual expenses incurred in realising any of the assets of the debtor shall, subject to any order of the court, first be liable to the following payments, which shall be made in the following order of priority, namely – (a) the actual expenses incurred by the Official Receiver in protecting or attempting to protect the property or assets of the debtor or any part thereof and any expenses or outlay incurred by him or by his authority in carrying on the business of the debtor; (b) the fees, percentages and charges payable to, or costs, charges and expenses incurred or authorised by, the Official Receiver, whether acting as Official Receiver or trustee; (c) the remuneration of the special manager, if any; and (d) the taxed costs of the petitioner, so far as the same may not have been disallowed by the court.'[36]

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