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Navigating Cross-Border Insolvency in Nigeria: A Case for Reform and International Alignment in Nigeria's Insolvency Laws

Peter OTAIGBE, ABR[1]

Abstract

Nigeria's cross-border insolvency framework remains fragmented and constrained by the dual application of the Foreign Judgments (Reciprocal Enforcement) Act and the Rules of the Ordinance. These laws impose restrictive reciprocity conditions that hinder access, recognition, and relief and judicial cooperation between foreign and local courts, thereby limiting Nigeria's ability to effectively manage cross-border insolvency proceedings. Unlike jurisdictions such as the United States, the United Kingdom, South-Korea and Japan which have adopted the UNCITRAL Model Law on Cross-Border Insolvency in line with their own social, economic, political and legal realities, Nigeria lacks a comprehensive framework for judicial cooperation and coordination, leaving debtor assets vulnerable to dissipation.

The Bankruptcy and Insolvency (Repeal and Re-enactment) Bill, 2015 (BIB) attempted to introduce a structured cross-border insolvency regime by incorporating some principles of the Model Law, including access, recognition, relief, and cooperation. However, the BIB's provisions remained inadequate in fully addressing the challenges of international insolvencies in Nigeria. Its failure to become law further entrenches the existing gaps in Nigeria's insolvency framework.

This paper examines these deficiencies and advocates for the adoption of the Model Law, not as a rigid template but as a flexible legal framework adaptable to Nigeria's unique socio-economic and legal realities. Given that the Model Law operates as a soft law instrument, its principles of access, recognition, relief, and cooperation can be tailored to align with Nigeria's distinct regulatory and commercial landscape. A carefully structured adoption would enhance creditor protection, improve judicial efficiency, and ensure procedural fairness while preserving national interests.

Keywords: Cross-Border Insolvency, Modified Universalism, UNCITRAL Model Law, Soft Law, Legal Adaptation, Economic Reform.

[1] Peter Otaigbe is associate in the Dispute Resolution practice group of Duale, Ovia & Alex-Adedipe. He is also a member of the Business Recovery and Insolvency Practitioners Association of Nigeria.

Introduction

In recent years, Nigeria has experienced a significant economic downturn driven by a range of policy challenges, including the volatility of the Naira, rising operational costs for businesses, and other economic pressures. These conditions have triggered an exodus of multinational companies from the Nigerian market through various exit strategies—such as selling stakes held by such companies to other international firms, re-strategization of business models, scaling down of operations, transfer of ownership, and general corporate insolvencies. [2] Cross-border insolvency law, which governs the recognition and enforcement of insolvency proceedings across multiple jurisdictions, has become an essential component of modern legal systems, particularly in an increasingly globalized economy. It provides mechanisms for coordinating and resolving the competing claims of creditors and debtors when a company has assets or liabilities spanning multiple countries.

As Nigeria continually integrates into the globalized economy, there is the increasing need for a robust cross-border insolvency framework to cater for the needs of both creditors and debtors alike. This is especially so, as some of these corporate insolvencies embody assets of companies within and outside the shores of Nigeria. [3]

Currently, there is no comprehensive legal framework to cater for cross-border insolvency matters within Nigeria as the Foreign Judgment (Reciprocal Enforcement) Act[4] and the rules of the Reciprocal Enforcement of Judgments Ordinance,[5] ("the Ordinance") which encompass the current legal framework governing cross border insolvencies in Nigeria have often been considered outdated or deficient in tackling the numerous challenges associated with cross-border insolvencies, partly due to the dualistic application of both laws concurrently within Nigeria's insolvency milieu. This deficiency has occasioned significant hurdles for both domestic and international actors, even as foreign insolvency proceedings cannot be recognized and enforced in Nigeria, without the existence of a monetary judgment which is final and is not subject to an appeal in the foreign state, which enforcement process is anchored on the reciprocity of the foreign state, where the judgment is to be enforced.[6] This legal vacuum has occasioned inefficiency and costly outcomes for all stakeholders involved, hindering the smooth resolution of cross-border insolvencies by allowing for the dissipation of assets of the insolvent being sued in Nigeria. The United Nations Commission on International Trade Law (UNCITRAL) on Cross-Border Insolvency (the "Model Law")[7] offers robust provisions

[2] Adetutu Shobowale, 'FULL LIST: Firms that left Nigeria from 2020 to 2024 over economic challenges' *Punch Newspaper* (29th October 2024) <https://punchng.com/full-list-firms-that-left-nigeria-from-2020-to-2024-over-economic-challenges/> Accessed 8th November 2024.

[3] For instance, in an insolvency suit instituted by Access Bank Plc against Tower Aluminum Company PLC for default in paying debt, the Bank as Petitioner sought reliefs to enable it take control over the assets of Tower Aluminum Company PLC within and outside the shores of Nigeria. See Ayodele Oluwagbemi, 'Bank seeks order to take over Aluminum Company' *Punch Newspaper* (8th February 2016) < https://punchng.com/bank-seeks-order-to-take-over-aluminium-company/ > Accessed 8th November 2024

[4] Foreign Judgment (Reciprocal Enforcement) Act Cap F3, Laws of the Federal Republic of Nigeria 2010.

[5] The Reciprocal Enforcement of Judgments Ordinance 1922.

[6] With the exception of foreign judgments relating to taxes, fines or penalties only final and monetary foreign judgments can be enforced in Nigeria. Section 3(2) of the Foreign Judgment (Reciprocal Enforcement) Act. Although under Section 3(3) of the Act, a foreign judgment is deemed final and conclusive notwithstanding the existence of an appeal, under section 3(2) of the Reciprocal Foreign Judgment Enforcement Ordinance, one of the grounds for refusing to set aside a foreign judgment is where the judgment debtor satisfies the Court that there is an appeal or that he intends to appeal the foreign judgment delivered.

[7] United Nations Commission on International Trade Law (UNCITRAL), *Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014) UN Doc

designed to address these very issues. The Model Law provides a framework for adopting states to recognize foreign insolvency proceedings and grant foreign representatives access to local courts. It also establishes mechanisms for relief, coordination, and cooperation across jurisdictions, ensuring more efficient resolution of cross-border insolvency cases. However, in offering these protections, it gives each adopting state, the opportunity to adapt its provisions to its own social milieu and landscape. Nigeria is yet to Incorporate the Model Law into its *corpus juris* and as it stands, Nigerian laws on cross-border insolvency standout as being primarily territorial, without adequately considering foreign insolvencies from a global scale. Although the Nigerian legislature made a commendable attempt to incorporate cross-border insolvency provisions through the Bankruptcy and Insolvency (Repeal and Re-enactment) Bill of 2015[8], the attempt ultimately failed as the proposed Bill never received Presidential assent.

In the following sections, these issues are discussed and models are proposed from other countries as possible solutions to Nigeria's cross-border insolvency woes. The first part of this paper examines the dualistic application of the Foreign Judgment (Reciprocal Enforcement) Act and the Ordinance in Nigeria, highlighting their deficiencies and challenges. The next segment discusses the Model Law's provisions, its applicability, and ramifications for its implementation in Nigeria. This is followed by a third segment which discusses the Model Law's application in some regions around the world, including the United Kingdom, the United States, South Korea and finally Japan. This is followed by another section which evaluates and explores the proposed reforms introduced by the Bankruptcy and Insolvency (Repeal and Re-enactment) Bill of 2015. The final segment of this paper provides a summary of findings and proposes actionable solutions, including adopting the UNCITRAL Model Law drawing lessons from jurisdictions already cited.

1. Current Cross-Border Insolvency Regime in Nigeria

The insolvency regime in Nigeria is primarily governed by the provisions of the Companies and Allied Matters Act 2020 (CAMA) , the Bankruptcy Act[9] as well as other subsidiary legislations directly or indirectly related to the regulation of insolvency proceedings in Nigeria.[10] Under the principal law regulating insolvency for companies in Nigeria, being the CAMA, the framework for corporate insolvencies is envisaged under receiverships, winding-ups, mergers, debt restructuring schemes and other informal corporate rescue mechanisms.[11] Whilst receiverships imbue the realization or management of assets of a debtor company for the repayment of a debt through the appointment of a receiver and/or manager[12], the winding-

A/CN.9/442<https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency> Accessed 8th November 2024. The UNCITRAL Model Law was adopted by the United Nations Commission on International Trade Law at its 30th session in Vienna, Austria, in May 1997.

[8] The Bill's purpose as captured in its preamble was to create a single law for Corporate and Individual bankruptcy/insolvency as well as to create an Office for the Supervisor of Solvency in Nigeria.

[9] Bankruptcy Act Cap B2, Laws of the Federation of Nigeria, 2004.

[10] Some of these laws include the Insolvency Regulations 2022, the Banks and other Financial Institutions Act 2020, the Asset Management Corporation Act 2010, the Nigerian Deposit Insurance Act 2006, the National Insurance Commission Act 1997 (NAICOM Act), the Business Facilitation (Miscellaneous Provisions) Act 2023 (Business Facilitation Act), the Insurance Act 2003 (IA), the Pension Reform Act 2014 and other regulations such as the Companies Proceedings Rules 1992 and Companies Winding up Rules 2001 amongst other laws.

[11] Such as debt/equity swap, cherry picking as well as purchase and assumption.

[12] This remedy is usually employed by secured creditors. Provisions on Receiverships under Nigerian law are generally covered under **Sections 550 to 563** of CAMA and the powers of Receivers are generally imbued under Part II of CAMA. In **Uwakwe & Ors v. Odogwu & Ors [1989] LPELR-3446 (SC),** a receiver was defined as "an impartial person appointed by the Court to manage, collect and receive pending the proceedings, rent, issues

up of a company necessarily imbues the liquidation and dissolution of a company for the realization of its assets either by the Court, voluntarily by (the Company's members, shareholders or Creditors) or under the Court's supervision. [13] Finally, a debt restructuring scheme, whether through the instrumentality of Arrangement and Compromise, [14] the Administration of Companies[15] and/or vide a Company Voluntary Arrangement[16] offers a Court-approved restructuring plan to avoid liquidation and to facilitate debt resolution. The CAMA has also introduced provisions on netting into Nigeria's insolvency regime.[17]

While corporate insolvency in Nigeria is governed primarily by CAMA and other related laws, the legal framework for the bankruptcy of individuals and partnerships in Nigeria is established under the Bankruptcy Act.[18] The Act provides a clear framework for defining and addressing individual bankruptcy, the administration of a bankrupt's estate, and the equitable distribution of a bankrupt's assets amongst creditors.[19] The process commences through the filing of bankruptcy petition, which may ultimately lead to a receiving order[20] or an adjudication order, through which the individual is formally declared bankrupt.[21] Unlike corporate insolvency proceedings under CAMA, bankruptcy relates to personal financial distress and aims to provide relief to individuals who are unable to meet their financial obligations, while ensuring that creditors recover as much of their claims as possible. The Bankruptcy Act establishes

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and profits of land or personal estate which seems unreasonable to the Court that either party should collect or receive or for the same to be distributed amongst the persons entitled"

[13] See **Section 564 of CAMA.** See generally stipulations under **Sections 564 to 703 of CAMA** for provisions on winding up under Nigerian law.

[14] This is a formal debt restructuring mechanism that allows a company to reach an agreement with its creditors and/or members to restructure its debts, reorganize its affairs, or merge with another entity. **See sections 710 to 717 of CAMA** for provisions on Arrangement and Compromise under Nigerian Insolvency law.

[15]This is a formal insolvency procedure designed to rescue a financially distressed company, achieve better results for creditors, or realize assets in an orderly manner. It occurs through the appointment an administrator by the Court, either by application by the Company's directors or secured Creditor to take control of the company and manage its affairs in the best interest of creditors and other stakeholders. Upon the appointment of an Administrator, there is a moratorium period for a year against all actions which may be commenced against a Company. **See sections 443 to 549 of CAMA** for provisions on Administration of Companies under Nigerian law.

[16] A Company Voluntary Arrangement **(CVA)** is a type of debt restructuring arrangement**,** employed by a company facing financial difficulties. Under CVA, a Company proposes a plan to its creditors to repay debts over time or in reduced amounts, allowing the company to avoid liquidation and continue operating. **See sections 434 to 442 of CAMA** for provisions on Company Voluntary Arrangement under Nigerian law.

[17] This is a risk management process that involves offsetting mutual obligations between parties in financial transactions to determine a single net payment obligation. This means that instead of each party paying all individual amounts they owe to the other, the amounts are added up, and only the net difference is paid. **See section 718 to 721 of CAMA** for provisions on netting under Nigerian law.

[18]Supra n_ 8

[19] For a Bankruptcy proceeding to be instituted against an individual, such an individual must have committed an act of Bankruptcy, such as where he voluntarily declares his inability to pay his debt, where he fails to pay a judgment debt within 14 days of being served a notice of bankruptcy or where execution has been levied against him in terms of a judgment of Court and his goods have been sold or seized by the bailiff of Court for at least 21 days. See section 1 of the Bankruptcy Act.

[20] Where the debtor is a Nigerian citizen or is resident in Nigeria, with an ascertainable and liquidated debt not less than **₦2000 (Two Thousand Naira only**) and the Court is satisfied that the act of bankruptcy occurred at least three months before presentation of the petition, the Court will make a receiving order, in so far as the petition has been verified and served on the debtor. The effect of such receiving order is to place the assets of the debtor under the custody of the Court through the official receiver. See sections 3, 7(1) and 12 of the Bankruptcy Act.

[21] This occurs where after a meeting of creditors upon call by the Official receiver, it is resolved that the debtor be declared bankrupt by the creditors or, where the creditors do not meet or where after a public examination of the debtors' properties, a compromise or arrangement is not approved within 14 days. See section 20(1) of the Bankruptcy Act.

mechanisms for asset liquidation, creditor prioritization, and discharge procedures that allow the debtor to obtain a fresh start after fulfilling certain conditions. [22]

Notably, the insolvency and bankruptcy regime in Nigeria has faced criticisms for its antiquated nature and its dis-alignment with global best practices.[23] Both the Bankruptcy Act and the CAMA, which was recently passed into law in 2020, have not been updated to contemplate contemporary challenges, such as cases of cross-border insolvency or the complexities arising from the globalized financial markets. As things stand, for a foreign judgment to be enforced in Nigeria, it must first be recognized in Nigerian Courts. The burden of initiating the recognition and enforcement process lies with the foreign judgment creditor, who must comply with Nigerian legal requirements. This recognition and registration may occur through a reciprocal arrangement in line with statutory law or common law principles.[24] When recognition and registration are based on statutes, the applicable legal instruments are the Foreign Judgment (Reciprocal Enforcement) Act and the Ordinance and when it is to be recognized and registered under common law, it suffices that a fresh action via a writ of summons, together with an application for summary judgment is filed.[25]

It has been argued that the regulations present an unresolved issue regarding the timeframe for registering foreign judgments in Nigeria due to the conflicting provisions of Section 4(1) of the Foreign Judgment (Reciprocal Enforcement) Act (the Act) and section 3(1) of the Ordinance.[26] Under the former provision, the timeframe for registering foreign judgments in Nigeria is six years, while under the latter, it is twelve months. However, a clear scrutiny of the provisions of the Act as well as the decisions of the Supreme Court on the applicability of the regulations, would reveal that this confusion, should not arise. This is hinged on three principal reasons. The first is that, in both the cases of Macaulay v. R.Z.B Austria[27] and Marine & General Assurance Company Plc v. Overseas Union Insurance Ltd & Ors,[28] decided by the Supreme Court on the applicability of the Regulations, the apex Court held that Part I of the Foreign Judgment (Reciprocal Enforcement) Act cannot come into operation until the Minister of Justice under Section 3(1) of the Act designates a list of Countries that the Act will apply to. It necessarily follows from the above decisions that Section 4(1) of the Act cannot take life, to expand the timeframe for registering foreign judgments in Nigeria to the length of six years until Section 3(1) of the Act is complied with, and since the Minister of Justice is yet to make that order, the said section, which falls under Part I of the Act cannot apply. However, unlike the stipulations under section 4(1), under section 10(a) of the Act, room is made to contemplate

[22] The debtor may apply to be discharged at anytime or upon application by any creditor who has proved his debt, by the Court, Official receiver or Trustee in Bankruptcy. The debtor may also be automatically discharged by operation of law after 5 years. See section 28(1)(2) and 31 of the Bankruptcy Act.

[23]Cyril Samson Dandison, 'Advancing Nigeria's Insolvency and Bankruptcy' (Omaplex Law firm, 23 July 2024)< https://omaplex.com.ng/advancing-nigerias-insolvency-and-bankruptcy/> Accessed 28th November 2024; Olujobi Olusola Joshua, 'Combating Insolvency and Business Recovery Problems in the Oil Industry: Proposal for Improvement in Nigeria's Insolvency and Bankruptcy Legal Framework' (2021) Heliyon 7(2) 1-12.

[24] See the decision in **Alfred C Toepfer Inc v Edokpolor (1965) NCLR 89; Wilbros West Africa v Mcdonnel Contract Mining Ltd *(*2015) All FWLR 310.** where it was held that an action can be brought at common law to enforce a foreign judgment**.** See also Section 3(4) of the Ordinance.

[25] Ibid.

[26] Emmanuel Ekpeyong, 'An Appraisal of Challenges in Enforcing Foreign Judgments in Nigeria' (Mondaq, 25th June 2014) < https://www.mondaq.com/nigeria/international-trade-amp-investment/322886/an-appraisal-of-challenges-of-enforcing-foreign-judgments-in-nigeria> Accessed 28th November 2024

[27] (2003) 18 NWLR (Pt.852) 282

[28] (2006) LPELR-1840(SC)

foreign judgments which may come into existence, before an order is made under Section 3(1) of the Act. Section 10(a)(b) of the Act provides as follows:

Notwithstanding any other provision of this Act-

(a) a judgment given before the commencement of an order under section 3 of this Act applying Part I of this Act to the foreign country where the judgment was given may be registered within twelve months from the date of the judgment or such longer period as may be allowed by a superior Court in Nigeria; [Emphasis mine]

(b) any judgment registered under the Reciprocal Enforcement of Judgments Ordinance at the time of the coming into operation of an order made under section 3 of this Act in respect of the foreign country where judgment was given shall be treated as if registered under this Act and compliance with the rules applicable to the former Act shall satisfy the requirements of rules made under this Act.

Despite the fact that section 10(a) also falls under Part I of the Act, a clear scrutiny of its provisions, reveals that the draftsmen of the Act intended to create some regulatory framework that would govern the timeframe for registering foreign judgments in Nigeria, prior to compliance with Section 3(1) of the Act. It would appear that it was for this reason, that the apex Court held that the timeframe for registering foreign judgments in Nigeria is twelve months in both cases cited above, whilst applying the provisions of Section 10(a) of the Act, despite the Court's holding with respect to the inoperability of Part I of the Act. Secondly, the preamble to section 10, contains a Supremacy Clause, which renders inferior, any other provision that may conflict with the stipulations contained underneath it and for this reason, the provisions of section 4(1) cannot trump that of Section 10(a). Thirdly, section 10(b) to which the supremacy clause applies, clearly showcases the applicability of the Ordinance to issues concerning the timeframe for registering foreign judgments in Nigeria till Section 3(1) is complied with, and the timeframe under the Ordinance remains a period of 12 months.

Notwithstanding the arguments above on the timeframe for registering foreign judgments in Nigeria, there is still some convolution on the applicability of the Ordinance and the provisions of the Act to the recognition and registration of foreign judgments in Nigeria. This is especially because of conflicting decisions of the Supreme Court on the applicability of the Regulations. For instance, in the case of Grosvenor Casinos Ltd v. Ghassan Halaoui [29] the apex Court, whilst relying on the cases of Macaulay v. R.Z.B Austria (Supra) and Marine & General Assurance Company Plc v. Overseas Union Insurance Ltd & Ors (Supra) held that the provisions of Section 6 of the Act (which falls under Part I of the Act) cannot be applied to set aside a foreign judgment, because the Minister of Justice is yet to make an order under Section 3(1) of the Act to bring that part of the Act into operation. However, in the more recent case of Obasi v. Mikson Establishment industries Ltd[30] the Supreme Court held that the stipulations under Section 6 of the Act can be applied to set aside a foreign judgment as against earlier authorities on the point. Due to conflicting decisions on the issue, and against the perceived better judgment of the author of this work, for the purpose of this paper, it is presumed that both the provisions of Act and the Ordinance apply to the registration of foreign judgments in Nigeria.

[29] [2009] 10 NWLR 309
[30] (2016)16 NWLR (Pt. 1539) 335

For registration under the Ordinance to take its full course, an ex-parte application, supported by an Affidavit and a written address must be filed by the judgment creditor which ought to show that the judgment sought to be enforced was given in a State that has reciprocal arrangement with Nigeria.[31] Furthermore, the application must be made to the High Court (whether State or Federal) as the Court of first instance, and it must be established that the Act or Ordinance applies to the foreign Court where the judgment was delivered. [32] Additionally, it must be shown that the foreign Court had the vires to deliver the judgment *ab initio* and the judgment debtor must have been notified of the proceedings in the foreign Court to allow a defence of the claims therein. Also, the judgment must not have been obtained by fraud or contrary to public policy and the person seeking to register and enforce the judgment must be vested with the requisite vires to apply for its registration and enforcement.[33] Upon registration of the foreign judgment, the judgment can be enforced as though it were a judgment of the Court which has registered it.

Despite the parameters set forth above, there are some significant flaws in Nigeria's legal framework for recognizing and enforcing foreign judgments, one of which includes the condition that only a monetary, final and un-appealed judgment can be enforced. This limitation creates a layer of uncertainty for foreign judgment creditors, as it raises concerns about the practicality of recovering assets from judgment debtors within Nigeria. What options are available to a judgment creditor if the debtor dissipates the *res* before the foreign court concludes an appeal? How should the system address situations where a debtor, seeking to indefinitely obstruct enforcement, files an appeal in a foreign Court only to abandon it? Would it not be reasonable for the registering Court to take steps to preserve the res until the appeal at the original jurisdiction is resolved? These questions have not been settled under the existing legal structure for the registration and enforcement of foreign judgments in Nigeria.

Furthermore, in view of the fact that the principle underpinning the enforcement of foreign judgments is the comity of the enforcing Court, superior Courts of record in Nigeria, have in times past, chosen not to enforce foreign judgments of the would-be successful foreign judgment creditor, but have applied the *lex situs rei*, in dealing with the assets of the judgment debtors found within their jurisdiction.[34] The legal framework is further undermined by the stipulation that enforceable foreign judgments must originate from countries recognized by Nigeria as reciprocating. As had been earlier indicated, the Act grants the Minister of Justice the authority to compile and publish a list of such countries. However, no such list has been issued to date, creating significant uncertainty and inconsistency in the enforcement of foreign judgments in Nigeria.[35] This confusion is further exacerbated by the Ordinance. One author has argued that the Ordinance is obsolete and inferior in its coverage and does not support

[31] See Section 1(1) and 5 of the Ordinance.
[32] Under Section 4(1) of the Foreign Judgment (Reciprocal Enforcement) Act, a foreign judgment may be registered in any superior Court in Nigeria, which under Section 2 of the Act is described to mean the High Court of a State, the High Court of the Federal Capital Territory, or the Federal High Court.
[33] See Section 6 of the Foreign Judgment (Reciprocal Enforcement) Act. Section 3(2) of the Ordinance adds some extra requirements. Registration can also be set aside where it is proven that the judgment debtor was resident outside the jurisdiction of the Court that gave the foreign judgment or carried his business outside the jurisdiction of the foreign Court and did not voluntarily submit to the jurisdiction of the foreign Court. Similarly, where the judgment debtor satisfies the Court that he intends to appeal the judgment of Court or has appealed the Court's judgment, the foreign judgment can be set aside.
[34] See **Access Bank Plc vs Akingbola (Unreported, Suit No M/563/2013)** where the Lagos State High Court refused to enforce a foreign judgment on the ground that the subject matter of the suit, fell under the exclusive preserves of the Federal High Court under Section 251(1)(e) of the Constitution of the Federal Republic of Nigeria.
[35] See section 3(1) of the Foreign Judgment (Reciprocal Enforcement) Act.

regional integration.[36] Olawoyin critiques the Ordinance's reliance on obsolete offices, such as the Office of the Governor-General and the Secretary of State, noting the ambiguity in whether these roles can be substituted with present-day offices like the President of Nigeria. Olawoyin also highlights the Ordinance's narrow application to jurisdictions such as England, Ireland, and Scotland while excluding many African nations. This, he contends, undermines regional integration and reflects the need for a more inclusive and modern legal framework.[37] Further questions also abound on whether the Act applies to the assets of a would-be judgment debtor in Nigeria who, due to a restructuring of its business model—such as the sale of its stakes, assignment of assets, or succession by a new entity—becomes a legally distinct entity from the one against whom the foreign Court's judgment was rendered. In such a situation, would a successful foreign judgment Creditor be able to proceed against the assets of the would-be judgment debtor in Nigeria? The provisions of the Act seem to lack clarity on this matter especially in its description of the status of a judgment creditor vis-a-vis a judgment debtor.[38]

These uncertainties highlight the pressing need to reform Nigeria's legal framework for registering and enforcing foreign judgments. Such reforms would better equip the country to address cross-border insolvencies and bankruptcies in line with international standards, as demonstrated by the United States and the United Kingdom, which have both adopted the Model Law into their legal systems.

2. The UNCITRAL Model Law on Cross-Border Insolvency

Given the possible geographical location of a debtor's assets across several borders, three approaches have been proposed in handling issues of cross-border insolvency and these approaches encompass a universality model, a territoriality model and a modified universality model.[39] Under the universality model, cross-border insolvency proceedings are treated as a single, unified process, with debts and assets of the debtor assessed collectively, regardless of geographical location. This approach prioritizes equal treatment of creditors, with the proceedings governed by the laws of the jurisdiction where the main insolvency proceeding is initiated.[40] Unlike the universality model, the territoriality model, has been noted to operate within the confines of jurisdictional boundaries. Under this model, each jurisdiction administers the debtors' assets within its territory, giving priority to local creditors before addressing claims from foreign jurisdictions.[41] The modified universality model on the other hand, introduces a central main proceeding in the debtor's centre of main interests (COMI), supplemented by secondary proceedings in other jurisdictions where the debtor holds its assets, thus combining elements of both universality and territoriality.[42] This model allows for the application of local laws when compelling local interests and maintaining overall coordination across jurisdictions. The aforesaid nonetheless; the universality model has largely developed as a theoretical concept within academic circles, rather than as a practical concept actively

[36] Adewale Olawoyin, "Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws' (2014) Journal of Private International Law 10(1) 129-156
[37] Ibid
[38] The Foreign Judgment Reciprocal Enforcement Act describes a judgment creditor to include any person in whom the rights under the judgment have become vested by succession or assignment or otherwise, but no such description is used for a judgment debtor under the Act. See section 2 of the Act.
[39]See Sean Story, 'Cross-border insolvency: A comparative analysis' (2015) Arizona Journal of International and Comparative law 32 431 and his discussion on the territoriality, universality and modified universality model.
[40] Ibid
[41] Ibid
[42] Ibid

utilized within practicing and adopting states [43], unlike the territoriality and modified universality model which have been severally applied in cross border insolvency cases. While a perfect embodiment of the universality theory is elusive, a close example of the theory's application is exemplified in the European Insolvency Regulation's (EIR) application within the European Union (EU). Under the EIR, there exists automatic recognition of foreign insolvency proceedings across EU member states, where such proceeding is recognized in one of the states in the EU(with the exception of Denmark). However, this still falls short of the principles underpinning true universality as the model's application is limited to only the EU.[44]

The adoption of these models are not without their demerits and advantages, some of which have been discussed by several scholars.[45] For instance, while a Court's application of the territoriality model allows for an expression of its national sovereignty, through the protection of local creditors, the refusal of the model to recognize extraterritoriality, may lead to conflicting procedures in insolvency matters and overburdening costs which may arise from the costs incurred in administering the debtor's estate, costs incurred by the foreign creditors in asserting their claims in the foreign court and finally costs incurred by the local creditors in proving their claims in local courts. [46] Similarly, it may allow for an "unequal" and "unpredictable" distribution of a debtor's assets, since different rules will apply to the debtor's assets and this may ultimately lead to the unfair treatment of certain classes of creditors depending on each country's national laws. Furthermore, the territoriality model may encourage the dissipation of a debtor's assets, encourage forum shopping by creditors and debtors alike and may as well occasion limited access to information that may be beneficial to foreign creditors interested in a debtor's assets.[47] In sharp contrast with the territoriality model which prioritizes national sovereignty, the abstract conception of a universal cross-border insolvency model, stands as a challenge to national sovereignty and this resonates as the most significant drawback to the model, since, "in the absence of an international treaty, it is hard to demand that a state gives up control over bankrupt estates that are within its purview".[48] This is not to say that there are no significant benefits to this system. For instance, a proposed implementation of the model will allow for reduced administrative costs, since the debtor's assets will universally be under the jurisdiction of a single Court. This will also allow for equity in the distribution of the debtor's assets and a more effective reorganization process under a single administrator or trustee.[49] The same benefits straddle the modified universality model, since it allows for the reorganization of a debtor's assets through a more predictable distribution process, without unhindered information of the proceedings affecting the debtor's assets in a

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[43] Walters Adrian, 'Modified universalism & the role of local legal culture in the making of cross-border insolvency law' (2019) *American Bankruptcy Law Journal Bank* 93 47; Tin Yan Kerensen Chan, "Modified Universality: The best model in regulating cross border insolvency" (LLM thesis, University of British Columbia 2005)

[44] Joy Lawrence Westbrook, 'Multinational enterprises in general default: chapter 15, the ALI principles, and the EU insolvency regulation.' (2002) *Am. Bankr. LJ* 76; Jon Aurrekoetxea, Ardil Salem, 'The European Commission's Proposal to Harmonise Aspects of Insolvency Law Across the EU' (Hogan Lovells, 20 June 2023)< https://www.hoganlovells.com/en/publications/the-european-commissions-proposal-to-harmonise-aspects-of-insolvency-law-across-the-eu#:~:text=The%20first%20of%20these%20was%20Regulation%20(EC),other%20EU%20member%20states%20(other%20than%20Denmark).> 8th February 2025

[45] Wang Ziyi, 'The critical discussion on theories in cross-border insolvency: universalism, territorialism, and modified universalism' (2023) International Journal of Frontiers in Sociology 5(9) 112-118

[46] Ibid

[47] Omar PJ, 'The landscape of international insolvency law' (2002) Int'l Insolvency Review 11 173.

[48] Supra n_56 See also John J. Chung, 'The New Chapter 15 of the Bankruptcy Code: A step Toward Erosion of National Sovereignty' (2006) Journal of International Law and Business 27(1) 89-136

[49] Ibid

foreign or local jurisdiction. This is asides other obvious benefits such as the allowance of access, relief, cooperation and coordination, between a foreign and local court. However, the distinction which exists between this model and the universality model rests in the fact that states are allowed some form of compromise in implementing or refusing cooperation with a foreign court's administration, through judicial activism. While this is beneficial as it sets up some form of balance between national laws and the laws of a foreign state, it can occasion some form of unpredictability on how local Courts will interpret foreign laws in an attempt to recognize them and provide relief.[50]

The Model Law, framed in 1997 and already adopted in about 60 jurisdictions around the World, [51] utilizes the modified universality model, by offering a modern legal framework through cooperation and coordination between jurisdictions to execute cross-border insolvency proceedings efficiently. According to the UNCITRAL, the Model Law is hinged on four primary principles, which are access, recognition, relief and cooperation/coordination between Courts of different jurisdictions for the purpose of insolvency proceedings.[52] Accordingly, and to allow foreign representatives/ foreign Courts access to adopting Courts, there are provisions in the Model Law, which grant foreign Courts assistance in the local proceedings of an adopting Court and allow foreign representatives participate in local proceedings, where a foreign judgment is to be recognized. [53] Similarly, and for purposes of recognition, proceedings in the foreign Court are categorized into foreign main proceedings and foreign non-main proceedings, the first being where the debtor's Centre of Main Interest (COMI) is based and the second, being the base of a debtor assets, other than where the COMI is located.[54] The third principle, being that of relief, identifies the particular remedy that should be given to a foreign representative after recognition of the foreign proceedings either as a main or non-main proceeding. It also identifies remedies that may be granted to a foreign representative pending recognition. This may range from interim reliefs, automatic stay and other discretionary reliefs either prior to, or post-recognition[55] Finally, the fourth principle allows for communication between the foreign Court and the adopting Court, as well as between the foreign representative and the foreign Court. It also propels the effective coordination of concurrent proceedings in a manner that will achieve the best results for all parties involved. [56]

The UNCITRAL itself succinctly articulates the underlying purpose of the Model Law. In its guide to the enactment of the Model Law, UNCITRAL explains that the law:

> "is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively

[50] See Juan Luis Goldenberg Serrano, ' Theoretical and practical Consequences of the deviations from the UNCITRAL Model Law on Cross-border insolvency: A view from the Latin American experience' International Company and Commercial Law Review 36(1/2) 93-106 and how he discusses the unpredictability associated with the modified universalist model in Latin America

[51] United Nations Commission on International Trade Law, 'Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)' (UNCITRAL) <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status> accessed 10th January 2025

[52] United Nations Commission on International Trade Law, *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (2013)< https://digitallibrary.un.org/record/1487896/files/1997-model-law-insol-2013-guide-enactment-e.pdf> accessed 10th January 2025. See, Part 2, Para 4.

[53] See articles 25-27 of the Model Law which contains key provisions on access granted to foreign Courts and foreign representatives to adopting Courts.

[54] See articles 29, 31- 32 of the Model Law, which contains provisions on foreign main and non-main proceedings.

[55] See articles 35-37 of the Model Law

[56] See article 42-45 for provisions on cooperation and coordination

> instances of cross-border proceedings concerning debtors experiencing severe financial distress or insolvency. Those instances include cases where the debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. In principle, the proceeding pending in the debtor's centre of main interests is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs"[57]

It is important to note that the UNCITRAL Model Law serves only as a guide for adopting countries, allowing each jurisdiction the flexibility to tailor implementation in line with its specific legal and procedural requirements.[58]hus, some countries have adopted the provisions of the Model Law with little or no changes made to its provisions, while some have adapted the provisions of the Model Law in line with already existent provisions in its national laws. Several factors have been identified as contributing to the observed divergence in the implementation of the UNCITRAL Model Law on Cross-Border Insolvency across jurisdictions. Firstly, the influence of legal origins is often cited.[59] Civil law jurisdictions, with their emphasis on codified legal systems, may demonstrate a greater inclination towards a towards a more nuanced approach, potentially leading to deviations from the Model Law while common law countries may adopt the provisions of the Model Law more wholesomely. Secondly, the impact of cultural, economic, and political considerations have also been suggested as factors that inevitably shape the legislative process and may influence a state's decision to adapt or modify the Model Law to align with its unique domestic needs and priorities.[60] Lastly, it has been argued that Countries that are significantly territorial before adoption of the Model Law are more likely to adapt changes to the Model Law, than Countries that are moderately territorial, with the latter, more likely to adopt the provisions wholesomely.[61]

These and other circumstances which cannot be fully covered by this paper, highlight why the Model Law exists as a soft law that allows adopting states to adapt its provisions to its own social milieu. The benefits which underscore a modified universalist model as highlighted above, however underlines the considerations for the Model Law's adoption in Nigeria, especially given the challenges militating against Nigeria's current cross border insolvency framework.

3. A Comparative Analysis: Cross-Border Insolvency from a globalized framework and the Model Law as a soft law

Globally, countries have adapted the provisions of the Model Law to align with their legal frameworks and national requirements. As a soft law instrument, the Model Law allows for flexibility, enabling jurisdictions to incorporate its principles while reflecting their societal

[57] Supra n_44, para 1.
[58] See article 7 of the Model Law.
[59] Wai Yee Wan and Gerard MCcormack, 'Implementing strategies for the Model Law on Cross-border insolvency: The divergence in Asia-Pacific and lessons for the UNCITRAL' (2020) Emory Development Bankruptcy Journal 36(1) 59-96
[60] Supra _50
[61] Supra n_59

norms. Various reasons have been advanced for this adaptability, some of which have been discussed above. It has also been argued that the Model Law's status as a soft law underscores the drafters' intention to create a framework that accommodates diverse legal traditions and economic realities.[62] This variance in adoption will now be considered amongst Countries that have wholesomely adopted the Model Law's provisions such as the United States and the United Kingdom in contrast with other Asian Countries such as South Korea and Japan that have selectively adopted the Model Law's provisions.

In the United States, the Model Law is incorporated through Chapter 15 of the U.S. Bankruptcy Code', enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) 2005 while in the United Kingdom, the Model Law is implemented via the Cross-Border Insolvency Regulations (CBIR) 2006. Recognition under both regimes require determining whether a foreign proceeding qualifies as a main proceeding, where the debtor's Centre of Main Interests (COMI) is located, or a non-main proceeding,[63] where the debtor has an establishment.[64] For purposes of recognition of foreign proceedings in both jurisdictions, a petition must be filed by a person or body, which shall enumerate the facts leading up to the application for recognition, alongside a certified copy of the foreign proceeding that is to be recognized, together with a certificate from the foreign Court affirming the existence and authenticity of the foreign proceeding, or any other evidence acceptable to the Court evidencing the existence of the foreign proceeding and appointment of the foreign representative.[65] Recognition as a main proceeding triggers an automatic stay[66] on creditor actions against the debtor's assets, while recognition of a non-main proceeding allows for discretionary relief by the Courts.[67] The test for determining COMI in both jurisdictions is also similar.[68] While earlier case law on the issue of COMI in the U.S seemed to suggest that the U.S Courts typically adopt a "nerve centre" approach, focusing on the debtor's principal place of business in determining COMI, the U.K. Courts emphasize third-party perceptions of the debtor's operational activities.[69] This divergence has been attributed to the U.K Courts' reliance on the European Union Regulation on Insolvency Proceedings (EC Regulation), which is considered persuasive because it shares fundamental assumptions with the Model Law, particularly regarding the COMI concept as well as the UK's ties to the EU pre-Brexit.[70] However, latter decisions of the U.S Courts show a departure from the "nerve centre" stance to third party perception of where the COMI is based. For instance, in *Re Bear Stearns* [71]decided by the U.S Bankruptcy court, the U.S Court denied recognition of foreign proceedings because the debtor's COMI was determined to be in the U.S. rather than the Cayman Islands. This was despite the fact that the debtors' principal office was in the Cayman Islands. The Court further noted that

[62] Supra n_59
[63] See Section **1502(4)** and **1502(5)** of the U.S Bankruptcy and Section and article 2(g)(h) Schedule 1, CBIR 2006.
[64]This is defined as any place of operation where the debtor carries out an economic activity with human means and goods, which is not of a temporary nature. See Section **1516(C**) of the United States Bankruptcy code and article 2(e), Schedule 1, CBIR 2006.
[65] See the joint provisions of Section 1517 and **1515(b)** of the U.S Bankruptcy Code and article 15, Schedule 1, CBIR 2006.
[66] See section 1520 of the U.S Bankruptcy Code and articles 20(1) and 20(2), Schedule 1, CBIR 2006.
[67] See section 1507 of the U.S Bankruptcy Code and article 21, Schedule 1, CBIR, 2006
[68] See articles 16(2A), Schedule 1, CBIR 2006 and Section **1502(4) of the U.S Bankruptcy Code.**
[69] The cases of **Re Eurofood IFSC Ltd [2006] ECR 1-3813; Re Stanford Int'l Bank Ltd [2010] EWCA (Civ) 137; Re Lennox Holdings pk [2008] EWHC B11 (Ch)** decided by the English Courts where the perception of third parties were utilized in determining the COMI are contrasted with the cases of **Re Ti-Continental Exchange Ltd 349 B.R. at 629; Re Fairfield Sentry, 440 B.R. 60 (Bankr. S.D.N.Y. 2010)** decided by the U.S Courts where the debtor's COMI was held to be its principal place of business despite evidence to the contrary.
[70] Supra_ n 39
[71] **374 B.R. 122 (Bankr. S.D.N.Y. 2007).**

the presumption that links COMI to the registered office address of a company is a rebuttable one, which may be trumped by stronger evidence. Both jurisdictions also require that the foreign proceeding be collective in nature, benefiting all creditors rather than specific parties. It must also relate to insolvency or debt adjustment, and be under the control or supervision of a foreign court.[72] Failure to meet these criteria can result in the denial of recognition. For example, in *Re Global Cord Blood Corp*[73], a U.S. Court refused recognition because the foreign proceeding was initiated solely for investigating embezzlement, rather than for restructuring or liquidation. Similarly, in Re bailey and another (Sturgeon Central Asia Balanced Fund Ltd)[74], the English Court set aside recognition of foreign proceedings on appeal, on the ground that the proceeding in the foreign Court was brought under "just and equitable" grounds rather than on grounds of financial distress and insolvency automatic stay provisions of the U.S. Bankruptcy Code.

Both regimes emphasize the importance of public policy exceptions, even though the exception is restrictively applied only where recognizing the foreign proceeding will be "manifestly" contrary to the public policy of the United States and the United Kingdom.[75] Despite this restrictive application of the public policy rule, the U.S Bankruptcy Courts' interpretation of what amounts to "affecting" public policy seems to differ from that of the U.K. The case of Re Toft[76], has been cited to exemplify this difference.[77] In Re Toft, insolvency proceedings in Germany authorized mail interception of a debtor, and the insolvency representative sought access to the debtor's U.S.-based email accounts through Chapter 15 proceedings. While the English Court upheld the German order, citing public interest and the need to prevent bankrupts from evading creditors, the U.S. Bankruptcy Court refused recognition, deeming the order contrary to U.S. public policy and constitutional protections for electronic communications.

It does appear that the U.K Courts have also expanded the requirements for recognition under the Model Law through judicial activism, to necessitate a full and frank disclosure of the effect of recognition of foreign proceedings on third parties who are not before the Court, before the granting of reliefs under the CBIR.[78] Though, while the requirement of a formal and full disclosure of recognition on third parties is not mandated under the U.S Bankruptcy Code, the interests of third parties may be implicitly factored into the Court's decision-making process under the public policy requirement.

Unlike the U.K and the U.S, South Korea and Japan's incorporation of the Model Law into their *corpus juris*, have not been as wholesome.Wai Yee Wan and Gerard Mccormack have argued that the factors that have influenced South Korea and Japan's approach to implementing the Model Law are hinged on factors other than the legal origins of both states.[79] They have argued that both Countries' adaptation of the Model Law to suit their legal system is due to

[72] See article 2(i), Schedule 1, CBIR 2006 which contains a similar provision as contained in section 101(23) of the U.S Bankruptcy Act.
[73]2022 WL 17478530 (Bankr. S.D.N.Y. Dec. 5, 2022).
[74] [2020] EWHC 123 (Ch)
[75] See Section 1506 of the U.S Bankruptcy Code and article 6, Schedule 1, CBIR, 2006
[76] (2011) 453 BR 186 and Re a Bankrupt - Prager v Toft [2012] BPIR 469 being U.S and English authorities, respectively on the same debtor company.
[77] Gerard McCORMACK, 'Foreign Law and Public Policy in the UNCITRAL Model Law on Cross-Border Insolvency: A Transatlantic Perspective' (2015) NIBLeJ 26(3) 477-492.
[78] See **(Nordic Trustee ASA and another v OGX Petroleo e Gas SA (Em Recuperacao Judicial) and another [2016] EWHC 25 (Ch).**
[79] Supra n_ 59

their previously territorial stance to foreign insolvency proceedings, which ultimately reflects in their adoption of the Model Law's provisions. They have also argued that both jurisdictions incorporation of the Model Law was done partly in response to domestic and international criticisms regarding their handling of cross-border insolvency after the Asian financial crises in 1997.[80]

In South Korea, the Model Law is incorporated through the Debtor Rehabilitation and Bankruptcy Act (DBRA) of 2008, while in Japan, it is incorporated through the Recognition of and Assistance for Foreign Insolvency Proceedings (Recognition Law) 2000.[81] While under the Recognition Law, and the DBRA, foreign insolvency proceedings may be recognized and enforced, mere recognition does not give rise to an automatic stay as posed under Chapter 11 of the Bankruptcy Code and the CBIR as applications for stay are to be individually made to the National Courts in both Japan and South Korea.[82] Furthermore, there is a difference in the definition of what constitutes foreign main and non-main proceedings under the Recognition Law as opposed to what exists under the Model Law,[83] while the DBRA does not distinguish between foreign main and foreign non-main proceedings.[84] This is different from what exists under the CBIR and the Bankruptcy Code as discussed above. Similarly, the Courts in both jurisdictions are given wider discretion to refuse recognition of foreign proceedings on issues of public policy as both under the DBRA and the Recognition Law, there is a deliberate exclusion of the word "manifestly" in defining circumstances, where a foreign proceeding may be refused on grounds of public policy.[85] There is also a distinction on what constitutes foreign insolvency proceedings under both laws. Unlike under the CBIR where foreign proceedings must relate to some form of financial distress and cannot be tied to other solvent liquidation process, such as the voluntary winding up of a company under "just and equitable" grounds; under the Recognition Law, foreign proceedings only qualify for recognition, where they correspond to Japan's definition of bankruptcy and insolvency even as it relates to rehabilitation, bankruptcy or reorganization.[86] In similar fashion, under the DBRA, the foreign proceeding must relate to rehabilitation, bankruptcy, and other similar proceedings.[87] It has been suggested that this will imbue schemes of arrangement, which is a corporate law procedure, rather than an insolvency procedure unlike what attains under the CBIR.[88]

Differences have also been cited in the implied exclusion of some claims that may not be pursued under the Model Law. For Instance, while Article 13 of the Model Law, makes express

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[80] Ibid

[81] Law on Recognition of and Assistance in Foreign Insolvency Proceedings, Law No 129 of 2000; Debtor Rehabilitation and Bankruptcy Act, Act No. 7428, March 2005 amended by Act. No. 8863, Feb. 29, 2008.

[82] See article 633 and 635 of the DBRA and article 25 of the Recognition Law

[83] Under article 2 of the Recognition Law, rather than using words such as the COMI, there is the usage of the word, "principle business office. According to Takahashi this is because usage of the word, "business office " is more familiar to the Japanese people. Furthermore , while establishment is required for the Model Law, the Recognition Law requires "domicile", "business office""residence" or "office in the state"- see article 17(1) of the Recognition Law. See generally Sohsuke Takahashi, 'The reality of Japanese Legal Sysytem for Cross border insolvency: Driven by fear of Universalism' (2011) International Insolvency Institute 1-76 < https://www.iiiglobal.org/file.cfm/12/docs/2011_gold_prizepaper.pdf> Accessed 9th February 2025

[84] Supra n_59

[85] See article 21(3) of the Recognition Law and article 632(2) of the DBRA

[86] See article 2 of the Recognition Law

[87] See article 628 of the DBRA

[88] Supra n_59

provision to allow foreign creditors participate in the insolvency proceedings of a recognizing state, subject to such issues as priority under the recognizing state's national laws; there is no mention as to whether such foreign claims will imbue foreign tax claims under both the Recognition law and the DBRA.[89] Interestingly, while under the U.S Bankruptcy code, allowance and priority of a foreign tax or public law claim depends on the applicable tax treaty between the U.S. and the foreign country, under the CBIR, foreign tax claims can be recognized where it is not exerted as penalty and is not antithetic to British insolvency law.[90] The DBRA and the Recognition Law do not expressly mention how foreign claims bordering on transactional avoidance should be handled, unlike is encapsulated under Article 23 of the Model Law.[91] However, under both the U.S. Bankruptcy Code and the CBIR, a foreign representative may seek relief to void fraudulent dispositions or other creditor-detrimental actions, but only after recognition of a foreign proceeding and in accordance with the U.S. Bankruptcy Code and the UK Insolvency Act, which govern clawback actions in both jurisdictions.[92] Provisions on direct Court communication are also absent under the Recognition Law[93] and under the DBRA, it is allowed.[94]Similarly, under both the CBIR and the U.S Bankruptcy Code, direct communication between Courts is allowed.[95] It is important to note that under the Recognition Law, a foreign proceeding may as as well be denied if the representative fails to pay required costs,[96] the foreign law excludes Japanese assets,[97] relief sought is unnecessary[98], the representative breaches their duty to provide information,[99] or the petition is filed in bad faith.[100]These conditions are non existent under the Model Law.

As it stands, it does appear that Nigeria's approach to cross-border insolvency is primarily territorial, since it promotes the administration of a debtor's assets, whilst prioritizing the interests of local creditors. For instance, under Nigerian Law, the mere institution of insolvency proceedings to wind up a Company does not prevent secured creditors from realizing their claims despite the existence of such proceedings.[101] Similarly and as earlier discussed, foreign claims under the Ordinance and the Foreign Judgment Reciprocal Enforcement Act can only be considered where there is evidence of reciprocity. However, given Nigeria's territorial stance, it begs for concern whether a wholesome adaptation of the entirety of the Model Law's provisions will be ideal in the case of Nigeria's adaptation, especially as doing same will conflict the Model Law's provisions will significant laws regulating insolvency in Nigeria. For instance, a wholesome adaptation of the automatic stay provisions under the Model Law will necessarily conflate the law's provisions with other laws in Nigeria regulating an insolvent company's affairs. Under CAMA's provisions, for instance, for there to be stay on other actions concerning a debtor's assets, an individual application has to be brought by the party seeking to enforce that stay and the Court has some form of discretion in granting or refusing stay.[102]

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[89] Ibid
[90] See section 1513 (2)(b) of the US Bankruptcy Code and article 13(3)(a)(b) of the CBIR
[91] Supra n_59
[92] See section 1524 of the US Bankruptcy Code and article 23 (1)(2) of the CBIR
[93] Supra n_84
[94]See article 641 of the CBIR
[95] See section 1525 of the US Bankruptcy Code and article 25 of the CBIR.
[96] See article 21(1) of the Recognition Law
[97] See article 21(2) of the Recognition Law
[98] See article 21(4) of the Recognition Law
[99] See article 21(5) of the Recognition Law
[100] See article 21(6) of the Recognition Law
[101] See proviso to section 656 of CAMA
[102] See section 575 of CAMA. See also Section 12 of the Bankruptcy Act

In the opinion of this author, that provision exists to ensure that decisions, particularly those affecting creditors' rights or debtor relief, are made on a case-by-case basis rather than automatically triggered by statute. This is to prevent a case of abuse, where insolvency protections might be exploited to delay or frustrate local creditor claims. By requiring individual application, the law ensures that such protections are granted only where justifiable.

Moreso, and given that Nigeria's insolvency regime is also cognizant of solvent liquidation processes such as the voluntary winding up of a company under just and equitable grounds, an application of the Model Law's provisions as has been done under the CBIR and Bankruptcy Code, where foreign proceedings do not envisage other solvent liquidation procedures, may not be ideal.[103] In the case of Nigeria, an admixture and a more nuanced approach is desirable. Drawing inspiration from the existing framework under the Companies and Allied Matters Act (CAMA) 2020 and the Bankruptcy Code, which recognize a broader spectrum of insolvency-related proceedings, a refined definition of 'foreign proceedings' could be adopted. This definition should encompass not only final judgments but also interim proceedings (as it is under the CBIR and the Bankruptcy Code). Such a nuanced approach, in the opinion of this author, would mitigate the mischief and risk of assets being dissipated before a final foreign judgment is obtained and also reflect the unique features of Nigeria's insolvency regime. In this author's opinion, this divergence is further proof that the legal and colonial origins of a state is not sufficient evidence to ground the wholesome application of the Model Law's provisions, since Nigeria's legal origins are closely tied with that of the U.K through colonial heritage.

Furthermore, a wholesome application of the Model Law's restrictive application of the public policy rule, may also conflate with Nigerian Courts conceptualization of public policy which has long been governed by principles of common law and equity and is generally broader and more discretionary.[104] Again, a moderate application as has been done under the DBRA and the Recognition Law, may be more ideal in Nigeria's case, since under both laws, some broader measure of discretion is granted to the Courts. Furthermore, in view of the fact that the Model Law is a single forum that covers both Bankruptcy and insolvency proceedings, issues may arise in applying the Model Law's provisions wholesomely to Nigeria, since Nigeria does not have a unified codified framework regulating corporate insolvency and Bankruptcy. [105]Thus, in the recognition of a foreign proceeding under the Model Law's provisions, issues may arise under priority rules for debt repayment, since there may be some uncertainty on how claims will be resolved by foreign creditors when both corporate and personal liabilities are in issue. A scenario will exemplify the point sought to be made. Take for instance, a foreign creditor, X (a secured creditor by fixed charge) commences foreign insolvency proceedings against ABC Ltd for a $6,000,000.00 (Six Million) United States dollar loan which is personally guaranteed by Mr. Y, the Managing Director and owner of ABC Ltd. However, Mr. Y is also Bankrupt and has filed for Bankruptcy in Nigeria over a $1,000,000.00 (One Million) United States dollar personal debt owed to other local creditors. Where the debt owed to X is not fully satisfied by the fixed charge, X may seek to enforce the personal guarantee as an unsecured debt under Nigerian Bankruptcy law. The local creditors to Mr. Y may argue that X should not be prioritized because the guarantee relates to a corporate debt, not personal debt and that claiming

[103] See generally the grounds for a court-ordered winding up under section 571 of CAMA

[104] In Dale Power Systemm Plc v. Wittsbusch Ltd (2001) 8 NWLR (Pt. 716) 699, the Court of Appeal held that issues of public policy with respect to the enforcement of foreign judgments will extend to public morals, health, safety and common conscience in determining whether to grant or refuse a foreign judgment.

[105] The insolvency and eventual winding up of Companies is governed by the CAMA 2020, while the liquidation of assets of a bankrupt is governed by the Bankruptcy Act 1990

under both ABC Ltd's insolvency and Mr. Y's personal guarantee will amount to double recovery since the two instances are governed by separate laws.

It also remains to be seen, how issues surrounding foreign tax claims will be handled, given the Model Law's provision on the equal treatment of foreign Creditors under Article 13 vis-a-vis the sensitive nature of taxes as a preferential debt under Nigerian Law.[106] In view of the approaches that have been adopted under the Bankruptcy Code and the CBIR, Nigeria may yet choose to subject the recognition and satisfaction of foreign tax claims to the provisions of any treaty signed between Nigeria and the foreign state or allow recognition only where same is not antithetic to the tax laws in Nigeria. Also, given that issues surrounding transactional avoidance or fraudulent preferences are already covered under CAMA,[107] it may also be necessary that the foreign representative seeks relief under Nigerian law to void fraudulent dispositions or other creditor-detrimental actions, after recognition of a foreign proceeding as it has been done under the Bankruptcy Code and the CBIR.

Beyond these specific considerations, Nigeria would benefit significantly from a wholesale adoption of some key provisions of the Model Law, particularly the Centre of Main Interests (COMI) concept. By adopting the framework, Nigeria can enhance certainty and predictability in cross-border insolvency cases. This will be achieved by prioritizing the jurisdiction with the most significant connection to the debtor's business operations and assets (i.e., the debtor's center of main interests or "COMI"), allowing for primary administration of a debtor's estate by the court in the jurisdiction with the strongest ties, while enabling other courts with minor asset holdings to play a more limited, supportive role. Furthermore, a wholesome adaptation of the the said provision will ensure that reliefs, even as it pertains to the interests of all stakeholders (creditors, debtors, and the company itself) are most effectively utilized for stakeholders' benefit without applying fragmented pieces of conflicting insolvency proceedings from different jurisdictions. More broadly, due to the inter-court collaboration that will inure from adopting the framework, greater predictability and certainty for both domestic and international businesses will be enhanced. This will ultimately promote cross-border trade and investment in Nigeria.

Nigeria's closest attempt at improving its current cross-border insolvency framework within the context of the principles underpinning the Model Law's provisions, remains through the Bankruptcy and Insolvency Bill (BIB), 2015 which sought to incorporate international insolvency principles within the realities of Nigeria's legal and economic environment. Some provisions of the proposed law will now be discussed.

Analysis of the Bankruptcy and Insolvency (Repeal and Re-enactment) Bill, 2015

The Bankruptcy and Insolvency (Repeal and Re-enactment) Bill, 2015 (the "BIB"), as outlined in its preamble, was introduced to provide a framework for addressing corporate and individual insolvency, establish the Office of the Supervisor of Insolvency, and address other matters related to the insolvency climate in Nigeria. While the reasons for the BIB's failure have been extensively addressed in a separate research article[108] and will not be revisited here, this part

[106] See section 657 of CAMA
[107] See section 658-660 of CAMA
[108] Anthony Idigbe, 'Insolvency Reform in Nigeria: INSOL 2018 African Round Table Peer to Peer Update' (2018) < https://punuka.com/wp-content/uploads/2019/10/Insolvency-Reform-Agenda-in-Nigeria-INSOL-ART-Peer-to-Peer-Update-BY-ANTHONY-IDIGBE.docx> Accessed 12/01/2025

of this paper focuses on the provisions of Part XI of the BIB, which pertains to international insolvencies.

Part XI of the BIB demonstrates a noteworthy attempt by the Nigerian legislature to incorporate key principles of the UNCITRAL Model Law on Cross-Border Insolvency— access, recognition, relief, and cooperation/coordination— in line with Nigeria's peculiar insolvency milieu, whilst addressing issues that currently plague Nigeria's current international insolvency framework.

For instance, there are provisions in the BIB which grant foreign representatives[109] and foreign Courts direct access to Nigerian Courts for the purposes of recognition of foreign proceedings [110] Similarly, there are provisions which allow for recognition of foreign proceedings in Nigeria;[111] however, unlike the scope presented under the Model Law, wherein parameters for recognition apply to distinguish main from non-main proceedings; stipulations on recognition as it pertains to a debtor's COMI or the existence of a mere establishment, are non-existent. Instead, the BIB seems to allow for recognition of foreign proceedings in so far as the foreign proceedings relate to a bankrupt or insolvent company's assets.[112] In consequence, there are also no parameters through which reliefs, such as stay of proceedings in any suit against a debtor's assets are streamlined, as under the BIB, it suffices, if the foreign proceeding instituted, was merely instituted for the purposes of effecting a composition, extension of time or a scheme of arrangement to warrant a stay of proceedings.[113] Though, under the BIB, Nigerian Courts are allowed to grant interim reliefs[114] as well as well as discretionary reliefs[115] to prevent the dissipation of a debtor's assets, the prerequisites for recognition; however, seem more restrictive than what attains under the Model Law. For instance, under Section 238 of the BIB, where a Bankruptcy or insolvency order is made in a foreign proceeding, a certified copy of such an order, is in the absence of evidence to the contrary, proof that the debtor is insolvent and proof of the appointment of the foreign representative. This necessarily infers that except the existence of such a certified order, is rebutted by the debtor, who challenges the veracity of the order, a certified copy of such a proceeding remains the only acceptable proof of its existence. However, under article 15 of the Model Law, for the purpose of filing for recognition of a foreign proceeding, where a certified true copy of such an order is unavailable, it suffices that any other evidence is adduced, to establish the existence of such foreign proceeding.[116]

[109] Defined under section 237 of the BIB as a person, other than a debtor, holding office under the law of jurisdiction outside Nigeria, who, irrespective of the person's designation, is assigned, under the laws of the jurisdiction outside Nigeria, functions in connection with a foreign proceeding that are similar to those performed by a trustee, liquidator, administrator or receiver appointed by the Court.

[110]See Section 240 and 241 of the BIB, which grants the foreign Court and a foreign representative direct access to Nigerian Courts.

[111] See Section 238 of the BIB

[112] See section 237 on the definition of foreign proceedings as a judicial or an administrative proceeding commenced outside Nigeria in respect of a debtor, under a law relating to bankruptcy or insolvency and dealing with the collective interest of creditors.

[113] See section 241(2) of the BIB

[114] See section 241(3) that allows the Court appoint an interim receiver to protect the debtor's assets from dissipation.

[115]See section 238(3)(4)(5) of the powers of the Court to grant discretionary reliefs to the foreign representative with respect to the debtor's assets.

[116] See similar provisions under section 1515 of the U.S Bankruptcy Code and article 15 of the CBIR.

Furthermore, the BIB also allows for cooperation and coordination between Nigerian Courts and foreign Courts for the just and equitable distribution of the debtor's assets; though in so doing, such cooperation must not allow the grant of reliefs contrary to Nigerian laws[117] and must also respect the order of priority as enumerated under Nigerian laws as a collective proceeding for foreign and local creditors alike.[118] The stipulation that the Nigerian Courts should not recognize any order that does not align with Nigerian laws, seems to recapitulate the provisions under the Model Law on the public policy exception as variably applied in the U.S, U.K South Korea and Japan.[119] However, in the opinion of this author, it does so much more than that, as it broadens the discretionary powers of the Nigerian Courts to refuse any foreign proceeding, so far as it does comply with the territorial laws of Nigeria, beyond the grounds of just public policy. This would therefore mean, that in the event, such foreign proceeding does not fall within the jurisdictional competence of a Court, perhaps as it was in Access Bank v. Akingbola[120], the proceeding will not be recognized, despite its legitimacy. This is most troubling, as the the broad language of the Bill is poised to hinder Nigeria's ability to cooperate effectively in cross-border insolvency cases, as even minor inconsistencies with domestic laws might prevent recognition or relief, being granted.

Perhaps, the singular most important innovation under the BIB rests in the fact that a debtor's appeal or intention to appeal will not fetter a foreign representative's right to apply for the recognition of a foreign proceeding, even if for preservative reliefs.[121] It also seems plausible under the BIB that the foreign proceeding need not be final before it is recognized. These provisions immensely distinguish the international insolvency provisions under the BIB from the current cross-border insolvency climate in Nigeria, wherein an appeal or the shown intention to appeal acts a bar for recognition and registration of a foreign judgement.

Interestingly and to capture issues peculiar to Nigeria's economic milieu, the BIB, in reflecting similar provisions under CAMA, require that an application for stay of proceedings concerning a debtor's assets in Nigeria, must be granted by a Nigerian Court for the purpose of realising the debtor's properties in Nigeria.[122] Furthermore, to address shortages in Nigeria's foreign exchange reserve, under the BIB, there is an express stipulation that any debt payable in a currency other than the Nigerian Naira, shall be converted into the Naira.[123] Understandably, while that provision is secured to prevent a strain on an already depleted foreign exchange reserve in Nigeria, it may as well worsen Nigeria's chances to have a world-class insolvency regime, since foreign investors, banks, and suppliers dealing with Nigerian entities may hesitate to offer credit if they risk having their debts converted into Naira at unfavorable rates in the event of insolvency. This is even more so, as a foreign judgment payable other than in

[117] See section 238(6) of the BIB.
[118] See section 244(2) of the BIB.
[119] See article 6 of the Model Law which aligns with section 1506 of the U.S Bankruptcy code and article 6 of the CBIR which provides that where such recognition is manifestly contrary to the public policy of the recognizing state, it should not be recognized.
[120] Supra _n 34
[121] See section 243 of the BIB which provides that an appeal or a review shall not be a bar to recognition.
[122] Section 239 of the BIB
[123] Section 245 of the BIB

Naira, may be paid in such foreign currency without being converted into the Naira, under the existing cross-border insolvency regime in Nigeria. [124]

Then again, the said provision as well as other provisions that have been considered above are a true reflection of the fact that the Model Law's encapsulation and consequent adoption, is usually reflective of the current social and economic challenges bedeviling a Country, as well as its national laws, other than the legal origins from which the Country's laws emanate.[125] Thus, in as much as Part XI of the BIB, might stand as the silver lining for Nigeria to overhaul its current cross-border insolvency laws in the coming future, so much more will have to be done to fully implement the Model Law's provisions into Nigeria's laws in the journey to adoption.

Conclusion and Recommendations

The lack of clarity in Nigeria's dualistic cross-border insolvency framework, outdated reciprocity requirements, and the absence of a comprehensive statutory regime have significantly hindered the country's ability to effectively manage cross-border insolvency cases. While the Bankruptcy and Insolvency Bill (BIB) represented a step toward reform, it ultimately fell short in addressing the systemic challenges within Nigeria's insolvency landscape—one of the key reasons for its eventual failure.

To address the issues plaguing Nigeria's cross-border insolvency regime, the following recommendations are proposed:

i. Adoption of the UNCITRAL Model Law on Cross-Border Insolvency – Nigeria should adopt the Model Law, tailored to align with its legal and procedural framework. This would establish a unified system for access, recognition, relief, cooperation, and coordination in cross-border insolvency proceedings, enhancing legal certainty and efficiency.

ii. Update and Implementation of the Reciprocity List – Pending the adoption of the Model Law, the Minister of Justice should exercise the powers conferred under Section 3(1) of the *Foreign Judgments (Reciprocal Enforcement) Act* to update and publish a comprehensive reciprocity list. This would activate the provisions of the Act, remove ambiguities regarding the applicable legal framework, and reduce reliance on judicial interpretation.

iii. Legislative Reconsideration of the Bankruptcy and Insolvency Bill (BIB) – As a transitional step toward adopting the Model Law, the Nigerian legislature should revisit the international insolvency provisions under the BIB and incorporate more robust insolvency principles. The revised framework should explicitly address modern insolvency practices while correcting the limitations of existing laws, as has been done in jurisdictions such as the United States and the United Kingdom. However, in doing so, Nigeria must account for its unique social, cultural, and economic considerations—similar to the approaches taken by Japan and South Korea, which adapted the Model Law to fit their domestic legal environments. Moreover, it is crucial that all relevant stakeholders, including but not limited to financial regulators, insolvency

[124] See the decision of the Supreme Court in Wittsbusch Ltd v. Dale Power System Ltd (2007) 17 NWLR Pt. 1062 1, which supports this view.

[125] See the comments of Emmanuel Bassey, Uche Matthew and Jeremiah Aderinto, 'The need for a cross border insolvency framework in Nigeria' https://spaajibade.com/the-need-for-a-cross-border-insolvency-legislation-in-nigeria/> Accessed 12/01/25 on aspects of the BIB which would subsequently require improvement under a proposed adoption of the Model Law.

practitioners and companies are consulted to ensure a balanced implementation that accommodates Nigeria's specific needs while maintaining alignment with international best practices.