RETHINKING CORPORATE RESCUE LAW IN VIETNAM FROM THE PERSPECTIVES OF THE UNITED KINGDOM AND CANADA

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This thesis is entirely my own original work

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LIST OF ABBREVIATION

ADB	Asian Development Bank
AMLC	Asset Management and Liquidation Company
AMO	Asset Management Officer
Art.	Article
BIA	Bankruptcy and Insolvency Act
BL 1993	Bankruptcy Law 1993
BL 2004	Bankruptcy Law 2004
BL 2014	Bankruptcy Law 2014
CA 2006	Company Act 2006
CBCA	Canada Business Corporation Act
CCAA	Companies' Creditors Arrangement Act
CDDA 1986	Company Directors Disqualification Act 1986
CIRP	Chartered Insolvency and Restructuring Professional
CRO	Chief of Restructuring Officer
CVA	Creditor Voluntary Arrangement
DATC	Debt and Asset Trading Company
DIP finance	Debtor-in-Possession finance
DIP	Debtor-in-Possession
EA 2002	Enterprise Act 2002

HAGLG	Hoang Anh Gia Lai Groups
IA 1986	Insolvency Act 1986
IA 2000	Insolvency Act 2000
ICAEW	Institute of Chartered Accountants in England and Wales
IMF	International Monetary Fund
INSOL International	World-Wide Federation of National Associations for Accountants and Lawyers Who Specialise in Turnaround and Insolvency.
IP	Insolvency Practitioner
IR 1986	Insolvency Rule 1985
IS	Insolvency Service
JIEB	Joint Insolvency Examination
OSB	Office of the Superintendent of Bankruptcy
PIP	Professional-in-Possession
R3	Association of Business Recovery Professionals
RPB	Recognised Professional Body
SA	Scheme of Arrangement
SCC	Supreme Court of Canada
SIP	Statement of Insolvency Practice
SME	Small and medium enterprise

SOE	State-owned enterprise
UK	United Kingdom
UNCITRAL	United Nation Commission on International Trade Law
US	the United State of America
VAMC	Vietnam Asset Management Company

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ABSTRACT

This thesis examines how the models of Debtor-in-Possession (DIP), the Professional-in-Possession (PIP) and the hybrid models are adopted in the administration of corporate rescue under insolvency laws of the United Kingdom, Canada and Vietnam. The thesis' aims are to evaluate the effectiveness of these models under the rescue laws of three countries and offer Vietnam recommendations to improve the effectiveness of its law. This thesis employs the socio-legal methodology supported by the doctrinal and comparative methods to respond to the inquiries of how three models of rescue administration are employed under the insolvency legislation of the countries, what benchmarks can be used to evaluate the effectiveness of rescue law and what lessons Vietnam can learn from the best practices emerging from the UK and Canada to enhance the effectiveness of its rescue law.

The selected countries adopt diverse approaches to the models of rescue administration. The UK introduces three different rescue procedures, the Administration and the Creditor Voluntary Arrangement under the Insolvency Act 1986 and the Scheme of Arrangement under the Companies Act 2006. Vietnam introduces only one rescue procedure under the Bankruptcy Law 2014 (BL2014), while Canada offers two procedures under the Bankruptcy and Insolvency Act and the Companies Creditor Arrangement Act. In assessing rescue laws of the selected countries under four benchmarks of time and cost, expertise, creditor participation and abuse management, Canadian law appears to satisfy with the four benchmarks the most. Based on the comparison's result, the thesis recommends Vietnam to shorten the time for creditors to approve a rescue plan, tighten the standards for licensing and monitoring insolvency practitioners and provide for a priority for the rescue finance to encourage creditor participation. Importantly, Vietnam should facilitate a suitable environment for the BL2014 to operate by sufficiently developing judicial expertise and minimising the state's intervention in corporate insolvency.

CHAPTER ONE

INTRODUCTION

1.1. Overview

1.1.1 The concept of insolvency and bankruptcy

The terms 'insolvency' is generally used to denote a situation where a person or a company does not have enough money to pay debts.[1] However, this term is sometimes used interchangeably with 'bankruptcy' for the same purpose of describing an individual's or a company's inability to meet its financial obligation. Therefore, there has been the existence of legislation named 'Insolvency Act' or 'Bankruptcy Code' elsewhere in the world.

However, 'insolvency' and 'bankruptcy' should be understood clearly in the legal context of each country, particularly their usage in the legislation. For example, in the United Kingdom (UK),[2] 'bankruptcy' is exclusively used to refer to an individual's financial difficulty, the term 'insolvency' is used for describing a corporate financial problem,[3] and the proceedings for personal and corporate insolvency are governed under separate parts of the Insolvency Act 1986 (IA1986).[4] Meanwhile, in the United States (US) 'bankruptcy' is used for denoting the financial problems of both individuals and companies and the US Bankruptcy Code offers a single insolvency proceeding to deal with both personal and corporate insolvency.[5] Following the US approach, Canada employs a single proceeding to deal with both personal and corporate insolvency. Yet, under the Canadian Bankruptcy and Insolvency Act (BIA), 'insolvency' is a wide concept which comprises several procedures for settling financial problems of

[1] Cambridge Dictionary, <http://dictionary.cambridge.org/dictionary/english/insolvency> accessed 25 April 2016
[2] Within this research, the subject of examination is the insolvency law of England and Wales, however, hereinafter referred to as the UK.
[3] R.M. Goode, *Principles of Corporate Insolvency Law,* (Sweet and Maxwell, 4th edn, 2011) at 1
[4] Insolvency Act 1986, <http://www.legislation.gov.uk/ukpga/1986/45/contents>
[5] American Bankruptcy Code, <https://www.law.cornell.edu/uscode/text/11 >

individuals and companies. 'Bankruptcy' does not have the same meaning as 'insolvency', rather, it is a procedure dealing with liquidation of companies or debt arrangement for an individual.[6] In the legal context of Vietnam, 'bankruptcy' is understood as a financially difficult state of a company or an individual. However, there is an absence of regulations to deal with personal insolvency in the country, only companies are eligible under the bankruptcy legislation.[7]

What the above-mentioned examples suggest is that there should be a consideration of the difference in using the terms 'insolvency' and 'bankruptcy' to address corporate and personal insolvency. Depending on the legislative policy of a country, a law can provide for a single proceeding or separate proceedings in dealing with corporate and personal insolvency. Regarding corporate insolvency, the law in this domain offers various proceedings, which are not exclusively constrained to the liquidation to terminate an insolvent company but includes other arrangements such as rescuing a company or receivership.[8]

1.1.2 The concept of rescue and the rise of the rescue culture

Compared to personal insolvency, the law on corporate insolvency was introduced later.[9] The history of corporate insolvency law began since the time when a company was first recognised as a distinct legal entity insolvency law then was created for the purpose of liquidating or winding up insolvent companies.[10] The modern

[6] See Canadian Insolvency and Bankruptcy Act 1985, <http://laws-lois.justice.gc.ca/eng/acts/b-3/> accessed 27 April 2016
[7] Law on Bankruptcy 2014, Vietnamese version at <http://www.moj.gov.vn/vbpq/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=29059> accessed 20 April 2016
English version at <http://www.itpc.gov.vn/investors/how_to_invest/law/Law_on_Bankruptcy_2014_0/mldocument_view/?set_language=en> accessed 20 April 2016
[8] Receivership is a regime under which a secured creditor appoints a receiver to control the debtor business to liquidate the debtor's asset for the purpose of enforcing its security interest according to the virtue of financing agreement signed between the debtor and the creditor; and R.J. Wood, *Bankruptcy and Insolvency Law* (Irwin Law, 2009) at 1 and 12
[9] Goode (n3) at 9-12
[10] Ibid. 11

corporate insolvency law has experienced a philosophical change which no longer places emphasis solely on liquidation, rather, extending its focus to restructuring insolvent companies. Two famous examples of this change are the US bankruptcy law reform with the introduction of Bankruptcy Code 1978, featuring Chapter 11 which permits the reorganisation of ailing companies[11] and the rise of 'rescue culture' in the insolvency law reform in the UK in the 1980s, resulting in the enactment of the IA 1986.[12]

While liquidation means to terminate, dissolve or wind up an insolvent company and sell its properties for the purpose of distributing the return to creditors, rescue offers a contrasting idea of preserving a financially troubled, but viable company by making 'major intervention necessary to avert eventual failure of the company'[13]. Underlying the liquidation is not only the idea of maximising the return to creditors through a sale of the company assets,[14] but also that companies which are unable to compete in the market should be eliminated to give way for more effective ones to thrive.[15] By contrast, corporate rescue is justified with the idea that creditors would get more benefits when the going-concern value of the company is preserved in a successful rescue bid than in the event of liquidation.[16] The rescue benefits lie in not only a better rate of creditor's return but the significance of preserving employment and stabilising the economy of a community.[17] Given the nature of the modern economy, the role of

[11] Arthur L. Moller and David B. Foltz Jr., 'Chapter 11 of the 1978 Bankruptcy Code' (1980) 58 North Carolina Law Review, 881-924
[12] Cork Report, Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558
[13] Belcher, Corporate Rescue, (Sweet and Maxwell, 1997), at 12
[14] TH Jackson, *Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986), chapter 1
[15] D.G. Baird, 'Bankruptcy 's Uncontested Axioms' (1998) 108 The Yale Law Journal 580
[16] G Mccormack, *Corporate Rescue Law – An Anglo-American Perspective* (Edward Elgar, 2008) at 5
[17] Cork Report, Report of the Review Committee on Insolvency Law and Practice (1982) Cmnd 8558, para 204. The report is seen as having the role to give rise to a "rescue culture".

corporate rescue has become essentially important. As stated by the International Monetary Fund (IMF),[18]

> [The] role of rescue gains more importance where the value of a company is increasingly based on technical know-how and goodwill rather than on its physical assets, preservation of the enterprise's human resources and business relations may be critical for creditors wishing to maximize the value of their claims.

The 2007-2008 financial crisis had a tremendous negative impact on the world economy, urging countries to devise effective mechanisms to solve the consequences it brought about as well as preventing the systematic risk from happening again. In this context, the issue of reforming insolvency legal systems, especially improving the effectiveness of legislation on corporate rescue has emerged as an urgent need among countries.[19] Generally, there have been two approaches for countries to follow in reforming their insolvency laws. The first one is to borrow the laws from the advanced states with a long history of insolvency legal development, such as the US and the UK. The second approach is to rely on the assistance of international donors, such as the UNCITRAL, the IMF and the World Bank,[20] who provide legislative guidelines for countries in drafting their legislation. Though the insolvency law reforms have already taken place in less-developed countries, they have not always produced fruitful results as expected because different countries have different political, economic, social,

[18] International Monetary Fund, 'Orderly and Effective Insolvency Procedures' [1999] 14.
[19] Godwin, 'Corporate rescue in Asia: Trends and Challenges' (2012), 34 Sydney Law Review 163, 164; Philip Wood, 'The philosophy of insolvency rescue' (2009) 6 Journal of International Banking and Financial Law 309
[20] UNCITRAL, *Legislative Guide on Insolvency Law* (United Nation, 2005)

history and traditional conditions, which presents several challenges to the reform's endeavour.[21]

1.1.3 The case of Vietnam in the trend of rescue law reform

Since 1986 Vietnam initiated the policy of 'Doi Moi' (renovation) to transform its economy from central planning to market towards socialist orientation.[22] This economic transition requires Vietnam to build a legal framework to govern economic and commercial relations, instead of relying on 'administrative economic contracts'.[23] Insolvency law is among the legislation Vietnam enacted to support the economic transition. The making of insolvency law in Vietnam was extensively influenced by the laws of Western countries;[24] yet, Vietnamese insolvency law is an example of a failure in adopting foreign law.[25] The first insolvency legislation of Vietnam is the Bankruptcy Law 1993 (BL1993).[26] After a decade of taking effect, it was replaced with the Bankruptcy Law 2004 (BL2004) for failing to attain the promised objective of being an effective route for companies to resolve their financial difficulties. However, the 2004 legislation followed the same path of failure as its predecessor, which resulted in the second placement with the current legislation, the Bankruptcy Law 2014 (BL2014).

The failure of the two pieces of insolvency legislation in 1993 and in 2004 is evidenced by an extremely small number of companies filing for bankruptcy. For example, between 1993 and 2003, there were only 152 applications received by courts

[21] Godwin, Ibid; and Nathalie Martin, 'The Role of History and Culture in Developing Bankruptcy and Insolvency System: The Perils of Legal Transplantation' (2005) 28 B.C.Int'l & Comp. L. Rev. 1.
[22] Vo Nhan Tri and Anne Booth, 'Recent Economic Developments in Vietnam' (1992) 6 Asian-Pacific Economic Literature, 24
[23] John Gillespie, 'Insolvency Law in Vietnam' in Roman Tomasic, *Insolvency Law in East Asia*, (Ashgate, 2006) at 243, 250, 257 and 262
[24] Ibid. 245
[25] Ibid. 245-250, the detailed examination will be presented in Chapter Six – Rescue Law in Vietnam
[26] C Booth, 'Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam' (2004) 18(1) Columbia Journal of Asian Law 93

in the country and only 46 companies were declared bankrupt under the BL1993.[27] In the period 2004-2013, during which the BL2004 had taken effect, the courts received 336 applications with only 83 enterprises declared bankrupt.[28] Meanwhile, the number of companies falling into financial distress every year is very high; for example, in 2011 the number of dissolved companies was approximately 54,000.[29] The failure of the legislation is attributed to the principal reason that the legal ideas borrowed from insolvency laws of Western countries could not take root in the unique legal culture of Vietnam.[30] The absence of an effective insolvency legal framework has negatively affected the competitiveness of the economy as a large number of distressed companies still exist in the market while market resources should be utilised by more efficient companies.

In 2014 Vietnam introduced new insolvency legislation, the BL 2014, with the mandate of providing a more effective route for financially distressed companies to exit the market as well as facilitating corporate rehabilitation for viable companies.[31] However, the failure of the two previous insolvency laws cast doubt on the effectiveness of the new law. As the new legislation took effect for five years, there emerges a need to examine whether it can become an effective mechanism on which financially distressed companies can rely to solve their insolvent affairs.

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[27] Gillespie (n23) 245

[28] According to Report No. 44/2013 of the People's Supreme Court of Vietnam on implementation of the Bankruptcy Law 2004, Vietnamese version is consulted at <http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=643&TabIndex=2&TaiLieuID=1156> accessed 1 May 2016

[29] Ho Huong, 'In 2012: About 54,261 companies dissolved' (2013) <https://enternews.vn/nam-2012-khoang-54-261-doanh-nghiep-giai-the-27780.html> accessed 1 May 2016

[30] Historically the insolvency law-making in Vietnam has been influenced by those of Western countries since the time of introduction of the first bankruptcy legislation. John Gillespie (n23) and, *Transplanting Commercial Law Reform in Vietnam: Developing a "rule of law" in Vietnam* (Ashgate, 2006)

[31] The legislation was passed by the National Assembly on June 19th 2014 and took effect on January 1st 2015, Vietnamese version at <http://www.moj.gov.vn/vbpq/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=29059> English version at < https://www.economica.vn/Portals/0/Documents/51-2014%20Law%20on%20Bankruptcy.pdf > accessed 20 April 2016

In principle, the BL2014 centres around two main proceedings: liquidation and rescue. What makes the 2014 legislation different from the two predecessors is that it places more emphasis on corporate rescue. Previously, the BL 1993 and 2004 were mainly seen as a tool for liquidating insolvent companies and most of the literature on Vietnamese insolvency law focused on the issues of why the law did not create incentives for financial distressed companies to file for liquidation.[32] As a result, the issue of corporate rescue has not sufficiently been researched. Inspired by the lack of academic research on corporate rescue law in Vietnam, this thesis is conducted to evaluate the effectiveness of the current legislation. Specifically, this thesis critically compares the models of rescue administration under the laws of the UK, Canada and the outcomes of the comparison will be utilised to make recommendations for Vietnam to enhance the effectiveness of its rescue law.

1.2 Thesis' objective and inquiries

1.2.1 Thesis' objective

When a company enters into a rescue procedure, models of administrative control will decide roles, rights and obligations of actors who participate in the procedure. There are various models of control featuring a different degree of the actor's participation. For example, the Debtor-in-Possession (DIP) model allows directors of a company to remain in their managerial position and continue to carry out business activities for the company;[33] the Professional-in-Possession (PIP) model features the involvement of insolvency practitioners (IP) who will replace the company

[32] According to Duong Dang Hue, the chair of the Drafting Committee of the Bankruptcy Law 2004 and an influential scholar in this area, recognised that it is an objective of the legislation to provide a mechanism for ineffective companies to orderly exit the market and create good conditions for more effective companies to thrive. See Duong Dang Hue, 'The Law on Bankruptcy with the Improvement of the Business Environment in Vietnam' (2005) 3 Democracy and Law 26–31

[33] D. Hahn, 'Concentrated Ownership and Control of Corporate Reorganisations' (2004) 4 J. Corp. L. Stud., 117, 122

directors in the management and take actions to rescue the company;[34] and the hybrid model of the DIP and the PIP permits company directors to hold the office, however, their activities will be subject to the supervision of IPs.[35] These models are employed very differently in legislation of different countries depending on the legislative policies and insolvency practices in the countries. This thesis launches a comparative examination into the models of administration under the insolvency laws of the UK, Canada and Vietnam to highlight similarities and differences among the laws of the countries in selecting and applying these models.

The main objective of this thesis is to make a proposal for Vietnam to improve the effectiveness of its rescue law. The proposal is formulated from the outcome of the comparison on models of rescue administration provided for under insolvency legislation of the UK, Canada and Vietnam. The comparison enables the thesis to ascertain the best practices emerging in each jurisdiction that Vietnam can apply to enhance the effectiveness of its law, in consideration of the differences of the legal culture among Vietnam and the selected countries.

1.2.2 Thesis inquiries

Deriving from the objective set out above, this thesis will launch an examination to the following inquiries:

- What is the justification for introducing corporate rescue law? How has legal history and culture contributed to shaping the uniqueness of the rescue law in the UK, Canada and Vietnam?

- What models of rescue administration are regulated under rescue laws of the UK, Vietnam and Canada? How are the participation of insolvency actors, such as

[34] Ibid. 124
[35] Y Rotem, 'Contemplating a Corporate Governance Model for Bankruptcy Reorganizations: Lessons from Canada' (2008) 3 Virginia Law & Business Review 125, 137

directors, creditors, IPs, and the courts regulated under these models? What are similarities and differences among them and what factors decide these differences?

• In evaluating the effectiveness of a rescue law, what benchmarks can be used and justification for introducing these benchmarks, and the extent to which rescue laws of the selected jurisdictions meet these standards?

• What lessons can Vietnam learn from experiences of the UK and Canada in regulating corporate rescue; in case Vietnam follows the laws of the UK and Canada, are the principles of rescue law in these countries compatible with the political, economic and social conditions of Vietnam?

1.3 Methodology

The term 'methodology' should be distinguished from 'method' within the research. While methods are tools or 'research techniques' for carrying out a research, methodology is understood as research strategies as a whole which provide justification for the selection of suitable methods to conduct research.[36] In answering the questions raised by this thesis, the author employs the socio-legal methodology, with the support of the doctrinal (black-letter law) and the comparative method.

1.3.1 The socio-legal methodology

Form a socio-legal scholars' point of view, law is considered as a part of the social and political structure, therefore, the proper way to understand law is to place it into the context to which it is related.[37] In light of this understanding, the socio-legal research does not see law as an 'autonomous force' that governs society,[38] rather, it approaches a law by examining the extent to which societal factors contribute to

[36] Matt Henn, Mark Weinstein and Nick Foard, *A Critical Introduction to Social Research* (Sage, 2nd edn, 2006), at 9
[37] P Thomas, 'Curriculum Development in Legal Studies' (1986) 20 Law Teacher 112
[38] D O'Donovan, 'Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls' in L Cahillane, J Schweppe, (eds) *Legal Research Methods: Principles and Practicalities* (Clarus Press, 2016) p110

shaping the law and the effects the law brings about to society.[39] As the socio-legal research examines the relationship between law and society, it approaches a legal issue from the perspectives of other social sciences.[40] Under this approach, knowledge of other disciplines such as history, sociology, economics and political science are used to provide answers to a legal problem.[41]

As the main objective of this thesis is to offer Vietnam recommendations to improve the effectiveness of its corporate rescue law, the methodology must be the socio-legal studies approach. As a law's purpose is to 'regulate and shape behaviour of people in a society',[42] the effectiveness of law is defined by its ability to fulfil its purposes or meet its objectives.[43] The examination on the effectiveness of a law falls within the objective of the socio-legal research studies because this approach aims to ascertain the actual operation of a law in society.[44] The application of the socio-legal approach enables this thesis to assess the effectiveness of Vietnamese corporate rescue law by examining the extent to which the law has actually operated in Vietnam and the extent to which societal factors such as history, politics, economy and culture influence on the creation of corporate rescue law in the country.

It cannot be denied that corporate insolvency affects not only the debtor company and creditors but also employees, suppliers and the economy of a community. In order to evaluate the effectiveness of insolvency law and rescue law, the author cannot employ the doctrinal methodology as this approach considers law to be autonomous and thus examining meanings, coherence and clarity of legal rules in

[39] Socio Legal Studies Association, SLSA Statement of Principles of Ethical Research Practice (January 2009) section 1.2.1 <https://www.slsa.ac.uk/images/slsadownloads/ethicalstatement/slsa%20ethics%20statement%20_final_%5B1%5D.pdf> accessed on February 12, 2020
[40] M Salter and J Mason, *Writing Law Dissertation: An Introduction and Guide to Conduct Legal Research* (Pearson Education, 2008), 132
[41] Ibid. 137
[42] A Allot, 'The effectiveness of Law' (1981) 15 (2) Valparaiso University Law Review, 234
[43] Ibid.
[44] Salter and Mason (n40) 152

isolation with external influence.[45] Therefore, the author must 'go beyond the law and legal doctrine itself'[46] to understand the effect of the rescue law in Vietnam, which is the function of the socio-legal methodology. Because the sociolegal research studies law and legal institutions from the perspective of the social sciences,[47] it has the nature of multi and interdisciplinary research, which relies on the knowledge of other social sciences, including sociology, psychology, economics and history.[48] In applying the socio-legal methodology, this thesis utilises the knowledge of a number of social sciences to ascertain two core issues: first, the influence of societal factors on the shaping of corporate rescue law of the UK, Canada and Vietnam and second, the actual operation of these laws in the selected countries. For the first issue, the thesis combines the knowledge relating to theories and history of insolvency law to highlight how the contextual factors and legal theories contribute to the uniqueness of insolvency and rescue legislative policies in the selected country.[49] Second, for assessing whether the operation of corporate rescue laws of the countries is effective or not, the thesis draws on psychological, sociological, economic and political insights to develop four benchmarks of time and cost, expertise, creditor participation and abuse management.

A limit of applying the socio-legal methodology within this research is that the author cannot generate his own data and some data is not available. For example, to evaluate the benchmark of time and cost, the author has to rely on secondary data from other research, such as the World Bank's statistics on insolvency.[50] However, due to the

[45] Ibid, 54, 106
[46] GL Priest, 'The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards' (1993) 91 Mich L Rev 1929, 1933
[47] Don Harris, 'The Development of Socio-Legal Studies in the United Kingdom', (1983) 2 Legal Studies, 315
[48] J Shaw, 'Socio-Legal Studies and the European Union', in Philip Thomas (ed.), Socio-Legal Studies, (Aldershot: Ashgate-Dartmouth, 1997), 311–12, cited by Mason and Salter (n39) 129.
[49] See the detailed examination in chapter four (UK law), chapter 5 (Canada law) and chapter six (Vietnam law)
[50] The World Bank, 'Resolving Insolvency' < https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency> accessed February 18, 2020

secrecy of information on the outcome of rescue cases and the private arrangement between companies and their creditors, the data cannot truly inform the time and cost of corporate rescue cases; instead, it is a general figure for all insolvency cases, including rescue and liquidation, which can partly support this research. However, as the thesis is not an empirical study and 'time and cost' is considered equally among other criteria in evaluating the effectiveness of rescue law, the limit relating to collecting data will not materially affect the validity of this thesis.

1.3.2 The support of doctrinal method and comparison method

1.3.2.1 The doctrinal method

As addressed above, because the objective of this research is to improve the effectiveness of the corporate rescue law of Vietnam, the methodology employed must be the socio-legal studies. However, in pursuing this objective, apart from the sociolegal research, the doctrinal method or black-letter law method plays a supplementary role.

The doctrinal method features 'a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation'.[51] This method approaches to a legal issue through an examination of the meaning of legal rules, principles, doctrines, and judicial statements relating to the issue.[52] The sources of doctrinal examination are very wide, ranging from statutory materials, case reports, standard textbooks, reference books, legal periodicals, Parliamentary Debates, and Government Reports.[53] It should be borne in mind that the analysis of employing the doctrinal method is not merely an interpretation of the meaning of statutes and legal decisions but it is a logical and systematic examination of

[51] T. Hutchinson, 'Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era', (2014) 106(4) Law Library Journal 579, at 58
[52] Khushal Vibhute & Filipos Aynalem, *Legal Research Methods*, at 71, <https://chilot.files.wordpress.com/2011/06/legal-research-methods.pdf> accessed 30 April 2016
[53] Ibid. 74

these materials to deduce the legal reasoning and rationales that decides the consistency and certainty of the law.[54]

The reason for applying the doctrinal method is that in order to improve the effectiveness of a law, it is important to ascertain the content of the law. It should be noted that law has internal and external effectiveness.[55] While the internal effectiveness refers to the coherence and consistency of legal rules, the external effectiveness refers to the effective operation of the law in real life.[56] Prior to examining the external effectiveness, the actual operation of law, a legal researcher must 'verify the authority and status of the legal doctrine being examined',[57] which means that he must understand and ascertain the content and meaning of the legal rules relating to the topic of his research. This thesis cannot assess the effectiveness of Vietnamese corporate rescue law if it does not examine and analyse legislation and cases. Within the ambit of this research, the doctrinal analysis is employed to provide an understanding of the corporate rescue procedures in the selected jurisdictions. Specifically, by examining the provisions regarding corporate rescue in insolvency legislation of the selected countries, the thesis can answer the questions of what models of control are prescribed in the legislation. This allows the thesis to provide detailed information on how rescue procedures are carried out; which actors are involved in the rescue proceeding; and what rights and obligations the laws confer to them. Under this approach, sources for the examination are the Insolvency Act 1986 (IA1986) and the Company Act 2006 (CA2006) in the UK, the Bankruptcy and Insolvency Act 1985 (BIA) and the Company Creditor Arrangement Act 2002 (CCAA) in Canada, and the Bankruptcy 2014

[54] Ibid. 73
[55] W Schrama, 'How to Carry Out Interdisciplinary Legal Research: Some Experiences with an Interdisciplinary Research Method' (2011) 7 Utrecht L Rev 147, 148
[56] Ibid,
[57] T Hutchinson, 'Doctrinal Research: Researching the Jury' in D Watkins, M Burton (eds), *Research Methods in Law* (1st edn, Routledge, 2013) p 7

(BL2014) in Vietnam. In addition to a legislative analysis, examining bodies of cases and judicial opinions has the supporting role to clarify and interpret the content of provision under the legislation.

Although the doctrinal research is able to respond to the question of how corporate rescue models are regulated under different jurisdictions and allows the research to test the degree of coherence and certainty, it cannot fully assist the author to achieve the research objective, which is to improve the effectiveness of Vietnamese corporate rescue law as well as answering the research questions raised by the thesis. For example, the analysis assisted by the doctrinal method cannot provide answers to the questions of what is the justification for introducing rescue law, what are criteria used for assessing the effectiveness of a rescue law and how to establish these standards, or how political, economic and social condition contribute to shaping the rescue law in each country? This is due to the constraint of this approach to the examination of legal rules, principles and doctrines in written law sources without considering what contributes to the shaping of the rescue laws and how the laws actually operate in the selected countries.[58] Since the doctrinal method cannot answer these questions, it only plays a supplementary role in conducting the research.

1.3.2.2 Comparative method

As this thesis involves a comparison on corporate rescue laws of the three jurisdictions, the comparative method has been adopted. However, this method cannot become the methodology as the purpose of the comparative method is to identify similarities and differences between the compared jurisdictions, while the objective of the investigation is to improve the effectiveness of Vietnamese rescue law. However, this method can assist the pursuit of the thesis objective by helping the author identify

[58] M Salter and J Mason, (n40) at 89-90

the best practices that Vietnam can take into consideration to enhance the efficacy of its law as well as contemplating the differences of the societal context among the countries.

Within comparative law research, the most prominent method is the functional approach with the purpose of looking at similarities among laws in responding to a social problem.[59] However, the functional method is insufficient for conducting this thesis as it aims to offer Vietnam recommendations to improve the effectiveness of its rescue based on the experience of the UK and Canada, which is feasibly conducted only where there is a clear understanding of how laws of the selected countries are similar and different from each other. Therefore, the research endorses a wide range of methods of comparative law, including functional method, analytical method (analysing legal concepts and rules), structural method (examining the framework of the law), historical method (examining legal development) and law-in-context method (focusing on societal context, including politics, economy, culture, ideology, etc).[60] With an extended comparative approach, subjects of the comparisons are not confined to legal provisions governing rescue procedures prescribed in insolvency legislation of three countries but extended to policies, economy, social and culture conditions shaping the laws of the three states.

There are three reasons for justifying a comparison of rescue laws of the UK, Canada and Vietnam within this thesis. First, although the differences in legal culture of Vietnam and Western countries dictated the failure of Vietnam in importing Western insolvency law in the legislation 1993 and 2004,[61] Vietnam has had two-decades experience to be familiar with Western insolvency law since the enactment of the first

[59] See K Zweigert and H Kötz*, An Introduction to Comparative Law* (Oxford University Press, 3rd edn, 1998)
[60] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) Law and Method, at 10, available at <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001> accessed 30 April 2016
[61] This will be discussed in detail in Chapter Six – Corporate Rescue Law in Vietnam

insolvency legislation in 1993.[62] Importantly, under the pressure of economic integration, the legal reform in Vietnam has brought its laws in alignment with Western laws[63] and the country has been facilitating a suitable platform for the Western-oriented law to operate, for example, by shifting economy towards market liberalism and privatising state-own-enterprises (SOE).[64]

Second, the UK and Canada appear to provide preferential practices for Vietnam to improve the efficacy of its new insolvency law. When Vietnam introduced the new insolvency legislation, the Bankruptcy Law 2014, the model of administration in rescue is the hybrid model, featuring the creation of a new profession of insolvency practitioner (IP) and the hybrid model of insolvency administration. As examined in chapters six and seven, in order to improve the effectiveness of the new legislation, Vietnam should enhance not only the judicial expertise but also the quality of IPs. In this regard, the UK and Canada can offer Vietnam with good recommendations. For the UK, the country has long a long history of development of the IP profession and the effectiveness of the UK insolvency law largely relies on the expertise of these IPs.[65] Therefore, the UK can provide Vietnam with valuable experience to develop qualified insolvency practitioners. Especially, Vietnam recently started to have initial interaction with the UK rescue law. For example, in *Bluecrest Mercantile BV and another v. Vietnam Shipbuilding Industry Group and others* and *Re Vietnam Shipbuilding Industry Group*, a Vietnam company was sanctioned by an English court to restructure its debts

[62] In drafting the first insolvency in 1993, Vietnam considered insolvency law of a number of Western countries, such as Australian, New Zealand, the United State and France, see J Gillespie (n23) at 255, footnote 80.
[63] The World Bank, 'Vietnam Legal Reform for WTO Accession' (March 2006), <http://siteresources.worldbank.org/INTVIETNAM/147271-1169742068115/21087827/vn_wto_legal_reform_march_2006.pdf> accessed on 21 February 2020
[64] In 1986, Vietnam embarked a new policy of 'Doi Moi' to open door with the world and shift the market towards market liberalism under which the private sector was conferred advantageous conditions to flourish while reducing the area of the public sector. See
[65] See the in-depth examination in Chapter Four

under the scheme of arrangement procedure provided for by the UK Company Act.[66] This case can suggest a degree of suitability in applying the UK law to resolve corporate restructuring in Vietnam. Considering Canada, the country is the mature insolvency jurisdiction in which court and IPs have an important role in deciding the effective operation of the law.[67] Canadian corporate rescue law features the hybrid model of administration under which directors of an insolvent company carry out rescue under the supervision of IPs and court. This model is similarly found under the Creditor Voluntary Arrangement (CVA) in the UK Insolvency Act and the Bankruptcy Law 2015 of Vietnam. Since the courts and the IPs play an important role deciding the effectiveness of the rescue procedure in Canada, Vietnam can utilise the experience of Canada in combining the expertise of these actors under the current model. In addition, the UK and Canada are jurisdictions with diverse approach to rescue model, therefore, they can broaden perspective for Vietnam in revising its law. Noticeably, the UK law provides for three rescue procedures that follow three different models of administration (the administration follows the PIP model; the scheme of arrangement follows the PIP model; and the CVA follows the hybrid model). Meanwhile, Canadian law provides for two rescue procedures similarly following the hybrid model. These different models provide with Vietnam multiple dimensions of examination to draw on the best practices that can be applicable to the case of Vietnam law.

1.4 Structure of the thesis

This thesis consists of eight chapters with an overview of content as follows. Chapter one deals with introducing the necessity for conducting the thesis, its

[66] *Bluecrest Mercantile BV and another v Vietnam Shipbuilding Industry Group and others* [2013] EWHC 1146 (Comm) and *Re Vietnam Shipbuilding Industry Group* [2013] EQHC 2476 (Ch), and see D Shah and J Walker, 'First Scheme of Arrangement for a Vietnamese Company is Sanctioned' <https://www.mayerbrown.com/en/perspectives-events/publications/2013/09/first-scheme-of-arrangement-for-a-vietnamese-compa> (accessed on February 20, 2020)

[67] See the detail examination in Chapter Five

objectives, questions, methodology and structure. Chapter two provides a literature review which highlights contemporary works underpinning the thesis and determines the originality of the thesis. Chapter three is a discussion on the framework for evaluating insolvency law and corporate rescue law. Specifically, it will examine the concept of corporate rescue and the justification of introducing rescue law, the models of administration in rescue and their characteristics, informal and formal rescue procedures, and the establishment of the benchmarks for evaluating a rescue law.

Chapters four, five, and six are the examinations on corporate rescue law in the UK, Canada, and Vietnam respectively. Each chapter will similarly investigate three main aspects, namely the influence of legal history and legal culture on the shape of the current legislative framework, the operation of current rescue procedures under the legislation, and the evaluation of the effectiveness of rescue law of each country following the benchmarks established in chapter three.

Chapter seven is a critical comparison where the rescue laws of the three countries are juxtaposed. The chapter begins with discussing the theoretical framework guiding how laws should be compared and then it compares the legal culture in which the rescue laws have operated in the three countries. Next, following the evaluation benchmarks established in chapter three, rescue laws of the selected countries will be compared together to highlight the best practices and the comparison's findings will become the basis to make recommendations for Vietnam. Finally, chapter eight summarises the thesis's objective, findings and recommendations for furthering research in corporate rescue law.

The next chapter will provide the literature review regarding the justification for introducing rescue law, the models of rescue administration, and the criteria to evaluate the effectiveness of a rescue law.

CHAPTER TWO

LITERATURE REVIEW

2.0 Introduction

This chapter is to achieve two purposes: first, it provides a literature review regarding the issues raised by the thesis, and second, it demonstrates the thesis' contribution to knowledge and originality emerging against the background of contemporary scholarly work. The literature review is divided into separate themes to examine the aspects of corporate rescue law into which the thesis makes inquiries. In particular, the literature review centres around the following issues: how rescue law is justified by contemporary theories? What are the main models of corporate rescue administration? What elements should be considered as benchmarks to evaluate the effectiveness of a rescue law? What problems have emerged from Vietnamese rescue law that merit the thesis examination? Within each theme, the thesis will identify who are main scholars and evaluate their contributions. After that, the originality of the thesis will be identified by addressing how it fills the gaps appearing in the literature and what additional contribution it makes to the literature.

2.1 Theories on insolvency laws and models of rescue administration

2.1.1 Two different schools of thought justifying the introduction of insolvency and rescue law

In tandem with introducing corporate rescue law, there is a need for justifying its existence by either devising sound theories or examining legislation and cases to define the core principles.[1] As for the former, contemporary theories on insolvency law devised

[1] A Keay and P Walton, *Insolvency Law Corporate and Personal* (Jordans, 3rd 2012) at 26

by legal scholars have been a subject of intense debate. There are two main schools of scholars who are categorised as traditionalists and proceduralists.[2] The traditionalists are those who believe financially troubled companies should be given a second chance to turn around their financial affairs while the proceduralists tend to defer the market mechanism under which ineffective companies should be liquidated to give way for more efficient companies to operate in the market.[3]

The proceduralists tend to focus their arguments on protecting the rights of creditors. A prominent scholar of this is Jackson, who proposes the creditor bargain theory.[4] Jackson sees insolvency law as having the objective of maximising return to creditors, therefore, insolvency law is considered as a device for creditors to collect debts. Accordingly, in order to preserve debtor's assets for the purpose of enhancing creditors' distribution, single procedures pursued by individual creditors to enforce their claims must be barred in replacement of a compulsory collective procedure. If creditors race to collect debts individually, this will duplicate cost and lead to harmful dismemberment of the debtor's assets. Therefore, the collective procedure should be what creditors would agree if they were able to negotiate before the occurrence of an insolvency event. Furthermore, the creditor bargain theory is developed in the direction of protecting pre-insolvency entitlement, which means that the law should deal with the relationship between the company and its creditors. Therefore, Jackson and Scott suggest that the interest taken into account must be those of creditors, and the interest of those other than the creditors such as suppliers, employees or community is considered only where they are qualified as creditors under a state's law.[5] Regarding corporate rescue, Jackson and

[2] D. G. Bair 'Bankruptcy's Uncontested Axioms' (1998) 108 Yale Law Journal 573
[3] Bair, Ibid
[4] T. Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986), Chapter 1
[5] T. Jackson and R.E Scott, 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain' (1989) 75 Va L Rev 155-204

Baird suggest that it is inappropriate for the cost of rescue to be borne by secured creditors as they are already protected by security agreements.[6] Rather, it is unsecured creditors, shareholders, and employees who should bear this cost because they would have incentives to get benefits from the rescue proceedings.[7]

In contrast to the proceduralists' position which largely considers and protects the interests of creditors, the traditionalists argue that insolvency law should channel its protection towards not only creditors but also a wider range of parties involved in insolvency. For example, Korobkin, Warren and Gross see the objective of insolvency laws in terms of protecting the interest of those directly or indirectly affected by insolvency affairs, including creditors, owners, managers, tort claimants and other members of communities.[8] Therefore, these scholars find corporate reorganisation as one of mandates insolvency law must pursue.[9] Another theory of traditionalism that advocates introducing rescue law is the team production devised by LoPucki.[10] This theory states that rescue law is perceived as an implicit bargain under which members of the team (stockholders, creditors, executives, other employees, suppliers, customers, local governments, regulatory agencies, and others) agree to compromise their rights for turning an insolvent company around and that the team delegates authority for directors to distribute the return to the members in proportion with their contribution.[11] The justification for corporate rescue, as expressed by this theory, lies not only in the

[6] D.G Baird and T. Jackson 'Corporate Reorganisations and the Treatment of Diverse Ownership Interest: A comment on adequate protection of secured creditors in bankruptcy' (1984) 51 U Chi Law Review 97
[7] Ibid. 101
[8] D.R. Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law', (1993) 71 Tex. L. Rev. 541; E. Warren, 'Bankruptcy Policy Making in an Imperfect World' (1993-4) 92 Mich. L. Rev. 336; K. Gross, 'Taking Community Interest into Account in Bankruptcy: An Essay' (1994) Washington University Law Quaterly 1031
[9] K.Gross, *Failure And Forgiveness: Rebalancing The Bankruptcy System* (Yale University Press, 1997), 248-49, D. R. Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Colombia Law Review. 717, 766-68.
[10] L. LoPucki 'A Team Production Theory of Bankruptcy Reorganization' (2004) 557 Vand. L. Rev, 741
[11] Ibid. at 749-50

distribution of surplus to creditors and shareholders and but also the increase of social wealth through preserving jobs for employees, paying taxes and maintaining the management position of directors – these results cannot be achieved in cases of liquidation.[12]

As such, the theories proposed the two schools of scholars contrasting ideas: while the traditionalists endorse corporate rescue, the proceduralists reject it. However, there are inherent shortcomings in both of these theories. As for the proceduralists, the creditor bargain theory takes into consideration only the interest of creditors without being able to explain why other parties' interest should be ignored in insolvency.[13] In addition, proceduralists see the creation of insolvency law can be justified by the creditor bargain to avoid the duplication of costs resulted from creditor's individual enforcement of debts.[14] However, in reality, the creditor bargain theory proposed by Jackson is unlikely to be achieved due to different perspectives, incentives and interest creditors would possess in the course of insolvency.[15] As for the traditionalists, they attempt to bring many parties into the scope of insolvency protection, but this cannot avoid criticism due to the indeterminacy of the involved parties. For example, as proposed by Korobkin, parties who are in the most vulnerable positions should have the protection over those in a better-off position,[16] yet, he himself acknowledges the difficulty in identifying the vulnerability position of these parties.[17] Similarly, though the team production theory defers the rescue option, it cannot fully explain why authority should be delegated to the board of directors

[12] Ibid. at 763
[13] V. Finch, *Corporate Insolvency: Perspective and Principle* (Cambridge University Press, 2edn, 2009) at 37
[14] Baird and Jackson (n6) at 105
[15] G. McCormack, *Corporate Rescue Law: An Anglo-American Perspective* (Edward Elgar, 2008) at 24
[16] Korobkin, (n7) at 575–89.
[17] Ibid. at 584

in control of rescue procedures and draws a clear boundary as to which parties should be protected by rescue law.[18]

It should be noted that these theories are proposed by legal scholars, who have attempted to justify the United States (US) bankruptcy law on a theoretical basis.[19] Given the difference among rescue laws in different jurisdictions, it is interesting to examine the extent to which these views are reflected under rescue laws of the United Kingdom (UK), Canada and Vietnam. Through examining the rescue laws in these countries, this thesis argues that there is an interplay between the ideas proposed by the traditionalists and the proceduralists. On the one hand, despite the shift of focus towards rescue in insolvency legislation of these countries, it appears from the examination that corporate rescue is only carried out where it provides creditors with more benefits than other options, which is an expression of the creditor maximisation under Jackson's creditor bargain theory.[20] On the other hand, rescue law of these countries also follows the traditionalists' view by emphasising the importance of protecting employment and stabilising economy.[21] It is also worth noting that rescue laws of the selected countries are aimed at 'business rescue', which is to preserve the going-concern values of a company, instead of 'company rescue', which is to keep the company intact as a whole.[22] The philosophy behind 'business rescue' is that if viable parts of the company's business is preserved, even by transferring to a new owner, and it will preserve the employment and contribute to the stability of the economy.[23]

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[18] G. McCormack (n15) at 33
[19] All the scholars mentioned above base their discussion on the US Bankruptcy Code.
[20] See Chapter Four (4.3.1 The emphasis of UK law on corporate rescue) and Chapter Five (5.4.5 Whether the BIA and the CCAA proceeding place emphasis on corporate rescue?)
[21] See Chapter Four (4.1.2 The rise of rescue culture in the UK), Chapter Five (5.1 Legal development of corporate insolvency and rescue law in Canada) and Chapter Six (6.4.1 The rescue concept and the extent to which Vietnam places emphasis on rescue)
[22] See n20
[23] See Chapter Three (3.3.2.2 Company Rescue and Business Rescue)

2.1.2 Models of rescue administration

2.1.2.1 Pro-creditor vs. Pro-debtor jurisdictions

Legal scholars attempt to classify insolvency jurisdictions around the world based on the extent to which debtors and creditors enjoy rights conferred by insolvency legislation to protect their interests. For example, Wood divides jurisdictions into pro-creditor or pro-debtor jurisdictions.[24] A pro-creditor jurisdiction allows creditors to protect themselves from insolvency risk, for example, by enforcing security interest against the debtor's assets outside the insolvency procedure.[25] A pro-debtor jurisdiction tends to encourage corporate rescue to increase the assets for creditor distribution.[26] However, this classification can produce a certain degree of ambiguity. For example, as admitted by Wood, though a pro-debtor jurisdiction aims to increase the debtor company's assets through favouring a rescue option, a formal rescue procedure might precipitate a company into 'trauma and destructiveness' instead of initiating an informal private restructuring.[27] McCormack shares a similar viewpoint in this regard. As corporate rescue becomes one of focus of insolvency law, he argues that the classification of the pro-debtor and pro-creditor jurisdiction no longer has a significance.[28] For example, through a comparison of Chapter 11 of the US law and with the Administration and the Creditor Voluntary Arrangement under the UK law, he finds that rescue laws of the two jurisdictions share similar elements such as the recognition of the preservation of the company going-concerns value and the stay of proceedings against creditors in order for the company to devise rescue plans.[29] Furthermore, he argues that it is not inclusive with the classification

[24] P. Wood, 'Principle of International Insolvency' (1995) 4 International Insolvency Review 94, 96. Actually, Wood also includes the not-interested jurisdiction in the classification, such as countries without commercial traditions. However, it is not significant to be examined within this research
[25] Ibid. 96
[26] Ibid.
[27] Ibid.96-7
[28] G. McCormack, (n15) 292-296
[29] Ibid. 289-290

of pro-debtor and pro-creditor jurisdiction since apart from the debtor and creditors, the classification can be extended to another parties, such as pro-manager jurisdiction or pro-employee jurisdiction.[30]

2.1.2.2 Three models of rescue administration

Another way to classify rescue law is to rely on the models of rescue administration. Hahn classifies insolvency systems based on the models of administrative control in rescue.[31] According to this characterisation, there are two main models of rescue administration emerging from insolvency legislation around the world: the Debtor-in-Possession (DIP) model in the US law and the Professional-in-Possession (PIP) model (or the trustee model) in the UK law.[32] While the DIP model allows the current board of directors to enjoy their management power in rescue, the PIP model brings outsider Insolvency Professionals (IPs) to replace the company directors in the management of the company.[33]

Hahn points out the shortcomings inherent in each model. As for the DIP model, retaining incumbent management bears a risk that the fate of the company will be gambled again by those who already led it to the financial trouble at the beginning.[34] Regarding the PIP model, the problem with it is that replacement of the current directors with IPs may produce more cost because the IP are unfamiliar with the management of a new company, which requires them to spend time and resources to obtain informational input regarding the operation of the company.[35] Furthermore, in fear of being replaced by

[30] Ibid.293
[31] D. Hahn, 'Concentrated Ownership and Control of Corporate Reorganisations' (2004) 4 J. Corp. L. Stud., 117
[32] Hahn (n31) 121-127.
[33] Ibid.
[34] Lynn M. LoPucki, 'Trouble With Chapter 11' (1993) Wis. L. Rev. 729, at 732-734
[35] David A. Skeel, Jr., 'Markets, Courts, and the Brave New World of Bankruptcy Theory' (1993) Wis. L. Rev. 465, 517 and note 18

IPs in rescue, the company directors are unlikely to file an early rescue application, rather they tend to hide the company's affairs to prolong their employment and not to cooperate with IPs in rescue procedures.[36]

In attempting to overcome the shortcomings of the two models discussed above, Hahn proposes a hybrid model called 'the integrated co-determination' which shares characteristics of both the DIP and the PIP model. Under this hybrid model, a trustee appointed by court will take a seat in the board of directors of an insolvent company and has the veto power over any matters voted on by the board; yet, the trustee cannot interfere with decisions made in the ordinary course of business beyond the scope of the board.[37] With this proposed model, Hahn attempts to solve the problems inherent with the two models mentioned above.[38] First, letting the current directors operate the company in rescue can provide incentives for them to initiate the procedure in a timely manner.[39] Second, granting the trustee the veto power over managerial decisions can prevent the board of directors from taking risky action that would harm the interest of creditors.[40]

Rotem believes that a hybrid model of rescue control can contribute to eliminating the shortcomings with the DIP and the PIP model.[41] However, Rotem disagrees with Hahn's proposition that the trustee should occupy a seat in management because this participation is likely to discourage the trustee to make decisions with the fear of producing failure and misjudgement on his part.[42] In examining the rescue procedures under Canadian law, Rotem argues that a hybrid model should be the one under which

[36] Hahn (n31), 137-138
[37] Ibid. 148
[38] Ibid. 149-151
[39] Ibid. 149
[40] Ibid. 151
[41] Yaad Rotem, 'Contemplating a Corporate Governance Model for Bankruptcy Reorganizations: Lessons from Canada' (2008) 3 Virginia Law & Business Review, 125
[42] Ibid. 138

the trustee holds a neutral position in channelling information for co-operation among parties in a rescue.[43]

As such, there are three models of administrative control in rescue, namely the DIP, the PIP, and the hybrid model. The thesis makes an additional contribution to this issue by examining the extent to which these models are reflected under the legislation of the UK, Canada and Vietnam.[44] The examination, in the next chapters of this thesis, finds that the UK has the most diverse approach which incorporates all three models in its legislation: the administration follows the PIP model, the Scheme of Arrangement (SA) follows the DIP model, and the Creditor Voluntary Arrangement (CVA) follows the hybrid model; meanwhile, Vietnam and Canada similarly adopt the hybrid in their rescue law.[45] It is worth noting that the hybrid model is reflected in the legislation of these countries is not the one proposed by Hahn with an IP holding a management position in the board of directors; rather, it is the model addressed by Rotem, under which the IP has a monitoring role over the company directors' activities in running the company.[46] Another contribution of this thesis is the finding that the incorporation of these models into rescue procedures is decided by the combination of unique societal factors in different countries.[47] Therefore, although a model of administrative control is similarly incorporated in rescue laws of different countries, such as the hybrid model, it operates differently and generates a different degree of effectiveness. The thesis will prove this

[43] Ibid. 157-160
[44] See Chapter Three (3.5 The reflection of rescue administrative model in rescue law of the UK, Canada, and Vietnam)
[45] Ibid.
[46] This will be examined deeply in the CVA procedure of UK law (Chapter Four), the BIA and CCAA procedures in Canadian law (Chapter Five) and the rescue procedure in Vietnamese law (Chapter Six)
[47] See Chapter Four (4.1.3 The unique environment where rescue law operates in the UK), Chapter 5 (5.2 The distinguishing characteristics of Canadian rescue law) and Chapter Six (6.1 Legal development of insolvency in Vietnam)

point by examining the influence of historical, economic, social and cultural factors on the operation of rescue laws in the selected countries.[48]

2.2 Assessing the effectiveness of rescue law

2.2.1 Legal scholarships on evaluating the effectiveness of rescue law

(i) Multiple values approach

Warren proposes to evaluate insolvency law under a multiple values approach.[49] In her perspective, insolvency law is viewed as a process of reckoning debtor's default and distributing insolvency consequences to a number of different actors, which involves competing and conflicting values and none of which dominates others.[50] Furthermore, she proposes four principal goals an insolvency law should achieve, namely enhancing the value of the debtor company, distributing the values according to multiples normative principles, internalising the costs of the business failure to the parties dealing with the company, and creating reliance on private monitoring.[51] This approach, however, is criticised by Finch for not being unable to establish in a precise manner how to resolve the contradictions among competing interests and which values should be emphasised.[52] Even Warren admits that her theory is unlikely to inform a policy decision.[53] Although there is a considerable limit in Warren's approach, there are recognisable aspects in her approach, which is the need for introducing a set of objectives or goals for evaluating rescue law and the need for rescue law to enhance the value of a company.

(ii) Finch's and Mokal's approach

In recognising that insolvency theories aim to protect the interests of different parties cannot completely resolve the tensions, Finch designs a set of benchmarks for

[48] Ibid.
[49] E. Warren, 'Bankruptcy Policy' (1987) 54 U. Chi. L. Rev. 775
[50] Ibid. 777
[51] E. Warren, 'Bankruptcy Policy Making in an Imperfect World' (1993) 92 Michigan Law Review 334
[52] V. Finch, 'The Meausres of Insolvency Law' (1997) 17 Oxford Journal of Legal Studies 227, at 241
[53] E. Warren (n38) at 811

evaluating the effectiveness of insolvency law.[54] The benchmarks include four elements of efficiency, expertise, accountability, and fairness.[55] 'Efficiency' looks to the securing of mandated ends at lowest cost; 'expertise' refers to the proper exercise of judgment by specialists; 'accountability' looks to the control of insolvency participants by democratic bodies or courts or through the openness of processes and their amenability to representations; and 'fairness' considers issues of substantive justice and distribution.[56] It is especially suggested by Finch that these four values can be traded off against each other in the attainment of the legitimacy of insolvency law.[57] Mokal is a famous critic who heavily rejects the evaluation approach proposed by Finch.[58] In an investigation of Finch's values, Mokal reasons that 'fairness' represents the substantive goal of the insolvency law, while 'efficiency' represents its procedural goal.[59] He argues that the procedural goal should be the means to pursue the substantive goal, therefore, the trade-off among these values, such as between fairness and efficiency as suggested by Finch, is unacceptable.[60] Furthermore, Mokal argues that it is Finch's mistake for viewing 'expertise' and 'accountability' as independent criteria, rather they are sub-components of 'efficiency'.[61]

In attempting to provide criteria for creating a sound insolvency law, Mokal offers an approach called the 'authentic consent model'.[62] This model places the emphasis of examination on the elements of 'fairness' and 'justice', which can be only produced by the principle of 'reciprocity'.[63] Accordingly, Mokal addresses that conflict among

[54] V. Finch, *Corporate Insolvency: Perspective and Principle* (n13)
[55] Ibid. at 56
[56] Ibid.
[57] Ibid. at 54-56
[58] RJ Mokal, 'On Fairness and Efficiency' (2003) 66 Modern Law Review 452
[59] Ibid. 548-9
[60] Ibid.
[61] Ibid. p.459-462
[62] RJ Mokal, 'The Authentic Consent Model: Contractarianism, Creditors' Bargain and Corporate Liquidation' (2001) 21(3) Legal Studies 400-43
[63] Ibid. 415, 421-2

creditors who possess different perspectives and incentives make it impossible to lead to good cooperation among creditors in insolvency, and to solve this problem, any principles governing insolvency law should be devised with the consent of the conflicting parties.[64] In Mokal's words, 'it is fair to require people to submit to procedures and institutions only if, given the opportunity, they could in some sense have agreed in advance on principles to which they must submit'.[65] The parties under Mokal's approach must give their consent in the satisfaction of four 'constructive attributes' which are 'liberty', 'equality', 'reasonableness' and 'self-interest'. Mokal's model attempts to avoid the limits of the creditor bargain theory by Jackson[66] by widening the scope of parties' participation in insolvency procedures to embrace not only those who have the rights before insolvency but those whose rights arise after.[67] However, Mokal's model is criticised for a wider scope of participating parties as well as the impossibility to implement it in reality.[68] McCormack argues that in reality different parties may possess different perspectives about the four attributes – liberty, reasonableness, equality, and self-interest as suggested by Mokal, which makes it impossible for them to find a common voice.[69] Furthermore, these parties are unlikely to have the same understanding of the concepts of 'fairness' and 'justice' because of the differences in political, philosophical and religious beliefs.[70]

In summary, all the above-mentioned scholars are unable to provide a set of benchmarks to evaluate an insolvency law in a convincing manner. Warren provides very abstract and vague values on what the law should pursue without certainty,[71] the set of

[64] Ibid. 422-3
[65] Ibid. 423
[66] See Jackson (n4)
[67] Mokal (n58) 424
[68] Gerard McCormack (n15) at 29
[69] Ibid.
[70] Ibid.
[71] Finch (n52) at 241

benchmarks of fairness, efficiency, expertise, and accountability proposed by Finch cannot escape the criticism for suggesting the trade-off between these benchmarks.[72] Meanwhile, Mokal emphasises merely on the issue of 'justice' and 'fairness' as core elements of an insolvency law without considering the fact that the parties involved in insolvency may have different perceptions about fairness because they possess different perspectives and interests.[73]

(iii) Rotem's approach

Rotem proposes a parameter for evaluating the effectiveness of a rescue law that consists of four criteria, namely timely commencement of rescue, skills and expertise of those who control a company during rescue and those who devise and negotiate rescue plan, avoidance of governance conflict, and quality and scope of information flowing to insolvency forum.[74] The last criteria, quality and scope of information flowing to the insolvency forum, is a new criterion devised by Rotem.[75]According Rotem, corporate rescue can be performed under legal proceedings prescribed by legislation or it can be performed via a sale of the company to a third party under an auction.[76] A rescue law, therefore, must facilitate the availability of information about the company for not only parties participating in rescue but also outside parties.[77] This thesis disagrees with Rotem in this regard and argues that the decision of whether to sell the company in the market is significantly based on the expertise of the parties involved in control of rescue, who can themselves evaluate the quality of information and that the disclosure of information may

[72] Mokal (n58) 458-9
[73] Mccormack (n15) at 29
[74] Rotem, (n41)
[75] Ibid. 152
[76] Ibid. 152-153
[77] Ibid. 156-157

negatively affect the company, for example, this can lead to the decrease of its value in the market.

2.2.2 Benchmarks for evaluation of rescue law formulated by this thesis

In recognising the limits pertaining to the measures for assessing rescue law in the above discussion, this thesis suggests a set of evaluation benchmarks including four elements of time and cost, expertise, the abuse management and creditor participation. Though the benchmarks are proposed based on the previous work as discussed above, yet they are expressed differently. Importantly, this thesis contributes a new benchmark for the evaluation of rescue law, which is creditor participation.[78]

Regarding Finch's approach, this thesis agrees with Finch for considering efficiency, expertise, and fairness as benchmarks to evaluate the effectiveness of rescue law.[79] Undeniably 'fairness' and 'efficiency' should be the first benchmarks of evaluation because the law has to deal with competing interests of different parties involved in insolvency in a fair way and this should be achieved with low cost to guarantee to return to creditors. However, these concepts should be given substances. As for 'efficiency', a law is efficient as insofar as it can produce low cost and timely procedure, therefore, the thesis finds time and cost should be taken into consideration. The thesis also agrees with Finch and Rotem in recognising 'expertise' to be an evaluation benchmark as corporate rescue involves the making of business decisions and monitoring decisions, which requires actors that participate in this procedure to possess a sufficient degree of expertise.[80] As for 'fairness', it appears to be a right approach for Finch to include this benchmark for evaluating a rescue law. However, the difficulty with Finch's approach

[78] This will be examined in detail in Chapter Three (See 3.5.2 Forming a set of benchmarks for evaluation of a rescue law)
[79] Ibid.
[80] Finch (n13) at 54 and Rotem (n41) at 152

lies in how to construe the meaning of 'fairness' in order to determine whether a rescue law has distributed fairness equally among the parties involved in rescue.[81] In response to this problem, the thesis employs a benchmark that is similar to, but carries clearer meaning than fairness, which is abuse management. As an alternative explanation of 'fairness', 'abuse management' simply addresses whether a rescue law is able to tackle a potential abuse arising in rescue procedure which harms the interest of a party, which appears to be a practical and feasible way to construe the meaning of fairness.

'Creditor participation' is a new benchmark this thesis contributes to the measure of the effectiveness of rescue law. It is perceived that creditors do not actively participate in insolvency administration due to lack of information and expertise regarding the business operation of a company or lack of incentive in contemplation that the amount they would receive in the distribution of the company assets will not compensate the effort they invested in administering the rescue.[82] Despite this, the success of a rescue procedure largely depends on the creditor participation insofar as they are those who decide whether to approve a rescue plan and contribute finances to fund the implementation of the plan. If a rescue law does not provide incentives for creditors to cast their vote and fund the rescue plan, it is unlikely that a company will be saved in its financial crisis. For these reasons, 'creditor participation' deserves to be a benchmark to evaluate the effectiveness of a rescue law.

2.3 The case of insolvency law and rescue law in Vietnam

2.3.1 Challenges of legal transplantation in insolvency law reform

[81] McCormack (n15) at 29
[82] R. Wood, *Bankruptcy and Insolvency* (Iwrin Law, 2009) at 220

Legal transplantation is termed by Watson to denote the movement of a rule, a law or a system of law from one country to another.[83] According to Watson, there is no connection between law and the social context in which it operates, thus a law can transfer easily to places and societies that are very different from the place of its origin.[84] In contrast to Watson's position, Legrand believes that it is impossible to have successful legal transplant because a legal rule has a unique meaning given by a legal culture which cannot be transferred along with it from a legal culture to another.[85] Holding a neutral point of view with two scholars above, Kahn-Freund recognises that there are still degrees of transferability, yet this depends on a level of compatibility between the transplanted laws and the political, economic and cultural environment in the host country.[86]

In an investigation of legal transplant in insolvency law, Martin suggests that the ignorance of societal factors such as history, tradition and culture contributes to the failure of incorporating foreign insolvency law into the law of the host country.[87] Starting with the investigation of US history and culture of consumer credit practice that shapes its bankruptcy law, Martin provides an abundance of evidence of countries, such as Japan, Hong Kong and China that failed to borrow and implement principles of US bankruptcy law into their own laws due to the incompatibility of US law with the legal culture of these countries.[88] The UNCITRAL also suggests that in applying principles of the Legislative Guide on Insolvency, lawmakers should consider the difference between these principles and the legal and social values of the society in their countries.[89]

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[83] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University Press of Virginia, 1974)
[84] Ibid. 21-30
[85] Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht Journal of European Comparative Law, 117-119
[86] Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Mod. L. Rev.1, at 7-8
[87] Nathalie Martin, 'The Role of History and Culture in Developing Bankruptcy and Insolvency System: The Perils of Legal Transplantation' (2005) 28 B.C.Int'l & Comp. L. Rev. 1
[88] Ibid.
[89] UNCITRAL, *Legislative Guide on Insolvency Law* (United Nation, 2005) at 9 <http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>

Regarding the case of Vietnam, the law-makers extensively borrowed Western insolvency law in drafting two insolvency legislation in 1993 and 2004.[90] However, as addressed by Gillespie, an extremely low number of companies filing for insolvency under the two legislation is the evidence that signifies the failure of embracing Western insolvency law.[91] Gillespie explains that cultural factors, such as the fear of losing prestige and reputation which is a reflection of the ingrained influence of Confucianism, are responsible for companies in Vietnam holding a hostile view towards relying on the formal insolvency procedures in the legislation.[92] In addition to traditional values, the influence of socialism is another factor that prevents the law from operating in the countries insofar as the government has the inclination to use administration orders instead of the legislation to deal with insolvency of state-own enterprises.[93] From a creditor's perspective, Kaneko finds that legislation featuring a pro-debtor model under which the company's directors are allowed to hold the office while secured creditors are conferred limited rights to enforce security has not encouraged the creditors from actively taking part in the insolvency procedures.[94] Furthermore, sharing the same opinion with Gillespie, Fitzpatrick and Wywil[95] and Booth[96] consider the lack of insolvency administrators and professionals to handle insolvency as another factor that discourages the use of insolvency law in Vietnam.

[90] Gillespie, 'Insolvency Law in Vietnam' in Roman Tomasic, *Insolvency Law in East Asia*, (Hampshire: Ashgate, 2006), at 239
[91] Ibid. for example, there were only 152 applications received by courts in the country and only 46 companies were declared bankrupt under the 1993 legislation.
[92] Ibid. 249
[93] Ibid.
[94] Kaneko Yuka, 'Re-evaluating model laws: Transplant and Change of Financial Law in Vietnam' (2012) 19 Journal of International Cooperation Studies
[95] Fitzpatrick and Wywil, 'Business Bankruptcy Law Reform in Vietnam' (1997-8) 5 Asia Pac. L. Rev. 37
[96] Booth, 'Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam', (2004) 18 Columbia Journal of Asia Law 93-147

2.3.2 The scarcity of the use of rescue law in practice and the lack of research on rescue law in Vietnam

Corporate rescue had been recognised as one of the insolvency procedures under the previous insolvency legislation in Vietnam. For example, the BL1993 had provisions that allow a company to be restructured by the creditor meeting approval[97] and the BL2004 had a section to provide for the company's reorganisation.[98] Inheriting the legacy of the two predecessors, the current legislation (BL2014) provides for a rescue procedure under chapter VII,[99] with an enumeration of a number of measures for rescuing the insolvent company[100] as well as governing the duration to implement a rescue plan.[101] However, in reality, the number of insolvency cases that involved corporate rescue is extremely rare. For example, there is only one case of successful rescue recorded in a research,[102] while the report 44 of the People Supreme Court of Vietnam on summarising the implementation of the Bankruptcy Law 2004 did not mention any decisions in respect of corporate rescue at all.[103]

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[97] For example, art 2 of the Bankruptcy Law 1993 governs that the creditor committee has the right to approve the plan to re-organise the business activity of the debtor company; and the Article 36 governs that the judge issues the bankruptcy order only if the creditor committee did not approve the plan to negotiate and reorganise the business activity of the debtor company. The Bankruptcy Law 1993, <https://onlinelibrary.wiley.com/doi/pdf/10.1002/iir.3940060104> accessed 10 June 2016

[98] Under the BL 2004, art. 5 regulates that rescue is one of bankruptcy procedures; and section 1 of chapter VI provide detailed procedure for corporate rescue, available at <http://www.moj.gov.vn/vbpq/en/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=7849>

[99] The Bankruptcy Law 2014, available at <http://www.economica.vn/Portals/0/Documents/51-2014%20Law%20on%20Bankruptcy.pdf> accessed 10 June 2016

[100] According to art.88(2) of the Bankruptcy Law 2014, Measures for recovery of business operations shall comprise: (a) Raising capital; (b) Reducing, writing off or rescheduling debts; (c) Changing lines of production and business; (d) Renovating production technology; (dd) Restructuring the management apparatus, merging, dividing or separating production sections; (e) Selling shares to creditors and other people; (g) Selling or leasing assets; (h) Other measures which are not contrary to law.

[101] BL 2014, art.89

[102] Duong Dang Hue, 'Vietnamese Bankruptcy Law in Practice and the Improvement of Business Environment in Vietnam' (2008), a research sponsored by Ministry of Justice and the GTZ Project of Federal Republic of Germany. The author mentions one case of rescuing a textile company (Xí nghiệp Ươm tơ Tháng 8) in Lam Dong province

[103] The People Supreme Court Report, the report 44/BC-TANDTC of the People Supreme Court on summarising the implementation of the Bankruptcy Law 2004

Along with the limited use of the rescue procedure in the legislation, the issue of corporate rescue has been unsophisticatedly researched in Vietnam. In fact, the issue of corporate rescue has been largely ignored by academic scholars. In the context of the transition of Vietnamese economy towards market liberalism, much of research on insolvency law tends to focus on the issues of how the borrowed ideas of Western law have been incorporated in Vietnamese law and how Vietnam facilitates a compatible legal environment in which the new law can function properly.[104] Similarly, the issue of how well the insolvency law functions in solving corporate insolvency affairs of insolvent companies attracts a great deal of attention of domestic scholars.[105] However, it appears that much of the discussion largely focuses on one aspect of insolvency which is liquidation, while the issue of corporate rescue has left untouched for a long time. As acknowledged by Duong Dang Hue, the chair of the Drafting Committee of the Bankruptcy Law 2004 and an influential scholar in this area, it is an objective of the legislation to provide a mechanism for ineffective companies to orderly exit the market and create good conditions for more effective companies to thrive.[106] Most of Hue's works are dedicated to improving the reliance of financially troubled companies on liquidation procedures to exit the market and rarely mention the rescue function of the legislation.[107]

[104] Gillespie (n90) and Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 2006), Fitzpatrick and Wywil (n95), and Booth (n96)
[105] See Duong Dang Hue, 'Vietnamese Bankruptcy Law in Practice and the Improvement of Business Environment in Vietnam' (2008), a research sponsored by Ministry of Justice and the GTZ Project of Federal Republic of Germany, and Duong Dang Hue, Bankruptcy Law in Vietnam (Judicial Publishing House, 2005) ; Pham Duy Nghia, 'Seeking the philosophy of Vietnamese Bankruptcy Law', (2003) 11 Law-Making Research Journal, 35-47
[106] Duong Dang Hue, 'The Law on Bankruptcy with the Improvement of the Business Environment in Vietnam' (2005) 3 Democracy and Law 26–31
[107] In 'Vietnamese Bankruptcy Law in Practice and the Improvement of Business Environment in Vietnam' (2008), a research sponsored by Ministry of Justice and the GTZ Project of Federal Republic of Germany, Hue mentioned that the Bankruptcy Law 2004 had the function of rescue is very limited with only one successful case of a textile company in Lam Dong province.

Recently, the issue of corporate rescue in Vietnam has been raised through a research article by Duong Huong Son on the website of the Ministry of Justice.[108] In recognition of the shift of insolvency law focus from liquidation towards rescue in the law-making practice around the world, Son emphasises the importance of rescue law in turning financially difficult companies around in Vietnam and the need to prevent the companies from entering into insolvency at early stages of the crisis.[109] Son recommends that in order for the rescue law to operate properly, Vietnam should provide clarity into the definition of 'insolvent company', simplify the filing for the rescue procedure and confer debtor companies more advantageous conditions to initiate the procedure.[110] What emerges from this article is that the importance of corporate rescue has been just recognised recently by academics and Vietnamese corporate rescue law has been still an area that is open for academic research. There are many important issues of Vietnamese corporate rescue that need to be thoroughly examined to contribute to the improvement of its effectiveness, which has been the impetus for the conduct of this thesis.

This thesis makes a new contribution to the research on Vietnamese rescue law in the following respects. First, it examines one of the issues that has been ignored in the literature, which is the model of rescue administration employed under the BL2014.[111] Specifically, it will examine how the practice of corporate rescue has emerged and supported in Vietnam, what model of administration is employed in the current legislation and if this model can generate a degree of effectiveness in consideration of its strengths

See other Hue's papers "Vietnamese Bankruptcy Law in Practice" (2003) 1 State and Law Journal and 'The Bankruptcy Law 2005 and the Improvement of Business Environment in Vietnam', (2005) 3 Democracy and Law.

[108] Duong Huong Son, 'Corporate Rescue – An Important Objective in the Making of Modern Bankruptcy Law' (2013), available at <http://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=1642> accessed 15 June 2016

[109] Ibid.

[110] Ibid.

[111] See Chapter Six on rescue law in Vietnam

and limits. Second, based on the best practices drawn on the comparative study on rescue laws of Vietnam, the UK and Canada, the thesis makes a number of recommendations for Vietnam to re-consider the effectiveness of its rescue law. Endorsing the findings of the previous literature that attributes the failure of legal transplant to the differences between an imported law and legal culture of a host country, the thesis takes into consideration the societal context of Vietnam in making these recommendations.

2.4 Conclusion

The literature review highlighted the three main issues on which the thesis focuses, namely the theoretical framework justifying the introduction of insolvency law and rescue law, the benchmarks for assessing the effectiveness of rescue law, and the background of research on Vietnamese corporate rescue law which provides incentives for conducting this thesis. Compared to the contemporary work, the originality of this thesis is expressed in the following respects. First, the thesis examines the validation of the theories proposed the traditionalists and the proceduralists by examining the extent to which they are reflected by the rescue laws in the UK, Canada and Vietnam. In addition, based on the previous literature, the thesis endorses the classification of three models of administrative control, the DIP, the PIP and the hybrid models, yet, argues that these models will be reflected differently in rescue laws of the selected countries due to the influence of unique societal factors in each jurisdiction. Second, based on the previous literature, the thesis has developed a set of evaluation benchmarks for assessing the effectiveness of rescue law, which consists of four elements: time and cost, expertise, abuse management and creditor participation. Third, set against the backdrop of the scarcity of research on rescue law in Vietnam, this thesis proves itself a contribution to knowledge in that it offers a number of recommendations for Vietnam to enhance the effectiveness of rescue law based on the best practices drawn from a critical comparison

on the models of administrative control under rescue laws of the UK, Canada, and Vietnam.

In the next chapter, this thesis will provide a discussion of the framework for evaluating a rescue law that encompasses a number of cores issues, such as the concept of corporate rescue, the role of rescue law, the model of rescue administration and the formulation of the benchmarks for assessing the effectiveness of rescue law.

CHAPTER THREE

FRAMEWORK FOR ASSESSING THE EFFECTIVENESS OF RESCUE LAW

3.0 Introduction

This chapter purports to gain insight into important issues that underpin corporate rescue law. First, it begins with an examination into the concept of corporate rescue along with issues related to it, such as modes of corporate rescue, the basis for initiating corporate rescue, and the importance of corporate rescue law. Second, the chapter furthers the examination into three models of rescue administration emerging from insolvency legislation, namely the Debtor-in-Possession (DIP) model, the Professional-in-Possession (PIP) models and the hybrid model. The chapter particularly identifies main actors, operation, strengths and limits pertaining to each model and examines how these models are reflected under the legislation of the United Kingdom (UK), Canada and Vietnam. Finally, based on contemporary works on the evaluation of a rescue law, the chapter develops a set of benchmarks for assessing the effectiveness of a rescue law, which consists of four elements: time and cost, expertise, abuse management and creditor participation. In this section, the examination focuses on the rationale for introducing the benchmarks and how to perceive their content. This chapter plays an important role in the examination of this thesis insofar as it establishes a framework for the investigation into rescue laws of the selected jurisdictions in the next chapters.[1]

3.1 The concept of corporate rescue

3.1.1 Understanding corporate rescue from a broad perspective

[1] The four benchmarks will be used to assess the effectiveness of rescue laws of the UK, Canada and Vietnam in Chapter Four, Five and Six respectively

A company in financial or economic difficulty has to consider two options, whether its operations will be terminated through liquidation or a course of rescue activities will be initiated. The second option is often identified as corporate rescue. Belcher defines corporate rescue as 'a major intervention that is necessary to avert the eventual failure of a company'[2] A major intervention must be understood as a drastic action at the time of crisis.[3] Unlike an action carried out at the time of normal business operation, a drastic action must be one that has the effect of a structural shift to turn a company from financial distress back to a healthy normal business.

According to this definition, rescue is initiated only when a company has been subject to a state of crisis, a situation where a company enters into financial or economic difficulty.[4] There is a wide range of causes, including internal and external factors that contribute to the crisis.[5] The internal factors causing crisis come from within the company, such as poor financial controls and mismanagement by the board of directors who take ill-advised strategic formulation.[6] The external factors of crisis are those that come from outside the company, such as downturn of the economy and changes in market conditions.[7] There are several signals that reveal a company's crisis, including default, failure and insolvency.[8] Default describes the inability of a company to make payment of debts when they become due.[9] Failure, in an economic sense, depicts a situation in which the rate of return of an invested capital is continually lower

[2] Alice Belcher, *Corporate Rescue* (Sweet and Maxwell, 1997), at 12
[3] Ibid
[4] H.D. Platt, *Why Companies Fail: Strategies for Detecting, Avoiding, and Profiting from Bankruptcy* (BearBooks, 1999) 6
[5] V. Finch, *Corporate Insolvency Law: Principles and Perspective* (Cambridge University Press, 2edn, 2009) 152-171
[6] Ibid. 152-160
[7] Ibid. 161-171
[8] Plat (n4) at 39-55; E.I. Altman and E. Hotchkiss, *Corporate Financial Distress and Company: Predict and Avoid Bankruptcy, Analyse and Invest in Distressed Debt* (John Wiley and Sons Inc,3rd edn, 2006), at 4-6
[9] Ibid. at 5; and Belcher (n2) at 39-40

than the similar ones or lower than the cost of capital investment of a company.[10] Most commonly, insolvency is used to describe a company's lack of liquidity, a situation where it is unable to meet current obligations or a situation where the total liabilities exceed the total assets in a company's capital structure under a fair valuation.[11] As corporate rescue is defined as 'a drastic remedial action' to deal with crisis, this definition is very broad in that it encompasses any activities to respond to the company's crisis, including both formal and informal rescue.[12] The formal rescue refers to legal proceedings regulated under insolvency legislation, while informal rescue includes remedial actions arising from a contractual agreement among parties. For the purpose of this thesis, corporate rescue is used in a narrow sense of the legal context, which includes legal proceedings prescribed in the legislation of the selected countries.

3.1.2 Understanding the concept of corporate rescue in the legal context

Insolvency and insolvency law are different concepts. Insolvency is a situation where a company cannot meet its obligations when they become due or a situation where the net asset of a company is less than the total liability.[13] Insolvency law is a branch of law mandated to solve problems arising from insolvency affairs of a company by providing different legal procedures, such as liquidation, rescue, or receivership.[14] In the legal context, rescue is a procedure provided by insolvency legislation to respond to the insolvency affair of a company by saving its operation and business. Insolvency is the prerequisite condition for rescue law to come into operation.[15] However, insolvency

[10] Altman and Hotchkiss, Ibid. at 4
[11] Ibid. at 5
[12] Belcher (n2) at 13
[13] Altman and Hotchkiss (n8), at 4-6
[14] RM Goode, *The principle of Corporate Insolvency Law* (Sweet and Maxwell, 4th edn, 2011) at 29, and RJ. Wood, *Bankruptcy and Insolvency Law* (Irwin Law Inc, 2009), at 16
[15] There is also an exception for this, for example, chapter 11 of US bankruptcy Law does not require the proof of insolvency for initiation of a reorganisation for a company. See Chapter 11 Bankruptcy Code, <https://www.law.cornell.edu/uscode/text/11/chapter-11> accessed on 5 July 2016> accessed 14 August 2016

does not itself automatically give rise to the operation of the rescue procedure, rather where there is the occurrence of an insolvency event, a company, its directors or its creditors must carry out actions to initiate rescue procedure, for example, by filing a rescue application. The rescue procedure is allowed to proceed so long as the company satisfies with requirements by legislation, such as the satisfaction with the insolvency test. As such, corporate rescue a narrow concept in the legal context and can be identified as formal rescue.

3.2 Formal rescue and informal rescue

3.2.1 Formal rescue

Formal rescue is a legal procedure stipulated by insolvency legislation. A distinct feature of this form of rescue is the binding effect on parties involved in this procedure.[16] Formal rescue often has the advantage of a moratorium or a stay, which prevents creditors from enforcing their claims against the company during rescue so that the company can enjoy a comfort zone to devise a rescue plan without being distorted by the creditors.[17] However, a disadvantage of the formal rescue is that it lacks secrecy or confidentiality insofar as information on the company's insolvency affair will be disclosed to the public as an obligation prescribed by legislation,[18] which might negatively affect the company's reputation and lead to creditor's unwillingness to support the company in rescue.[19]

3.2.2 Informal rescue

[16] For example, under UK administration procedure, the approved proposal will carry binding effects on all creditors.
[17] This will be discussed in detail when examining rescue procedures in rescue laws of the UK, Canada, and Vietnam.
[18] For example, the UK Insolvency Rules require the administrator in the administration to publish a notice of his appointment in the London Gazette and advertises it in a manner he thinks it fits. See Insolvency Rule 2009, Rule 8(1)
[19] Finch (n5) at 251

Informal rescue is referred to measures conducted out of the legislative scope, such as a private arrangement agreed by a debtor company and its creditor. There are several benefits associated with this type of rescue. For example, the informal rescue has a degree of flexibility as it is not subject to strict regulations and the terms of rescue can be negotiated and tailored to meet the company's needs.[20] As for the company's directors, the informal rescue allows them to stay in management and not to be replaced by an insolvency practitioner, who normally has the power granted by legislation to investigate their conduct or take over their role them in operating the company in rescue.[21] Furthermore, the informal rescue is often carried out under secrecy, thus prevent disclosing a company's insolvency affairs to the public, and this is a reason rendering the informal rescue an attractive option for distressed companies.[22] However, a major disadvantage of the informal rescue is that it is an agreement between parties whose interests are affected, therefore, dissenting parties can initiate a formal rescue procedure, such as liquidation to terminate the informal rescue attempts.[23]

The informal rescue is commonly associated with two similar strategies, turnaround and workout.[24] Turnaround denotes a radical improvement for a company facing entirely a crisis that sufficiently threatens its survival, with the goal of maintaining the significant participation status of the company in major industry.[25] Turnaround is carried out based on signals of corporate declines, including liquidity and profit problems[26] that threaten the existence of a company.[27] Workout is a process that

[20] Ibid.
[21] For example, the UK administration is the procedure that offers the administrator the right to replace the current directors of a company in management of its business (Insolvency Act 1986, Schedule B1, para 61)
[22] Finch (n5) at 251
[23] Ibid. at 253
[24] Belcher (n2) at 19-22
[25] Zimmerman, *The Turnaround Experience: Real-world Lessons in Revitalising Corporation*, at 26 <https://pdfs.semanticscholar.org/22a3/c313587e034bcb50395f927fb94f732f2702.pdf?_ga=2.5364211.1355532620.1565472027-2065229105.1565472027> accessed 15 August 2016
[26] Ibid

involves a private negotiation between a company and its creditors for the purpose of debt restructuring without resorting to formal insolvency rules.[28] Workout has emerged as a popular practice around the world and become one of important elements for an efficient insolvency system under the guidance of the UNCITRAL and the World Bank.[29] An example of workout is the London Approach, which is a set of principles developed by the Bank of England for guiding debt restructuring among bank creditors.[30] Turnaround and workout generally include activities such as reforming management, reducing the company assets by selling unprofitable ones, cutting cost and restructuring debts.[31]

3.2.3 Relationship between formal and informal rescue

Formal and informal rescue are essential elements of an effective rescue system and a distressed company can rely on both to solve its financial difficulty more effectively.[32] The informal rescue, with certain advantages such as flexibility and protection of the company reputation, is often the company's first resort. If the informal rescue attempts fail, the formal rescue will be initiated to continue the rescue process. It is suggested by the World Bank that a legal system should consider issues relating to the continuum of the informal rescue and the formal rescue.[33] For example, if a company participates in informal rescue with good faith, this can be considered as the basis for dismissing a creditor's petition to open formal insolvency procedure to avoid the

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[27] Ibid. 23
[28] Belcher (n2), at 23
[29] UNCITRAL, *Legislative Guide on Insolvency Law* (2004), at 238 and the World Bank, 'Principles for Effective Insolvency and Creditor/Debtor Regimes', at 14 <http://siteresources.worldbank.org/EXTGILD/Resources/5807554-1357753926066/ICRPrinciples-Jan2011%5bFINAL%5d.pdf>, accessed 16 August 2016
[30] The Bank of England, 'London Approach', <http://www.bankofengland.co.uk/archive/Documents/historicpubs/qb/1993/qb93q1110115.pdf > accessed 20 August 2016
[31] Finch (n5) at 317-321
[32] The World Bank, Out of Court Restructuring, part III.5 <http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/OutOfCourtDebtRestructuringBeforeTypesetting.pdf> accessed 1 September 2016
[33] Ibid. para 103

holdout problem.[34] Furthermore, the formal rescue should be well designed to deal with problems arising upon failure of the informal rescue. For example, transactions such as payment to some creditors under the informal rescue can constitute a preference and can be avoided under the formal rescue.[35]

3.3 The basis for initiating rescue procedures

3.3.1 The application of the cash flow test and the balance sheet test

Insolvency of a company is determined by the application of the two primary tests, the cash flow test and the balance sheet test.[36] Under the cash flow test, a company becomes insolvent when it is unable to pay debts when they become due.[37] Under the balance sheet test, a company is considered to be insolvent when its total assets are insufficient to satisfy its total liabilities.[38] The two tests have an important role of gatekeeping insofar as it determines whether a company is insolvent, which is the prerequisite requirement to initiate insolvency procedures.[39] As one of procedures dealing with the insolvency of a company, rescue is initiated upon the satisfaction of the tests.[40] Generally, the two tests are employed by insolvency legislation as a basis for determining if a company is insolvent.[41] However, it is not all cases that the two tests are provided for in legislation. For example, while the UK and Canadian insolvency

[34] Ibid. para 103
[35] Ibid. 16(c)
[36] RM Goode (n14) at 112-115
[37] Ibid. at 114
[38] Ibid.
[39] R.J Wood (n14), at 16-7
[40] For example, the insolvency test is a condition to initiate rescue procedures in three jurisdictions, see s.123 Insolvency Act 1986 (the UK) and s.2 'insolvency person' Bankruptcy and Insolvency Act (Canada) and art. 4.1 Bankruptcy Law 2014 (Vietnam). The exception for this is the Scheme of Arrangement under the Company Act 2006 of the UK, which does not require a company to satisfy the tests to be eligible for rescue the procedure.
[41] For example, among the selected jurisdictions, the UK and Canada apply two tests to determine insolvency ground, see section 123 Insolvency Act 1986 and section.2 "insolvent person" Bankruptcy and Insolvency Act 1985

legislation employ both tests,[42] Vietnamese insolvency law employs only the cash flow test.[43]

3.3.1.1 The cash flow test

The cash flow test is satisfied as long as there is evidence that a company is unable to pay debts when they become due.[44] A proper understanding of the test requires giving clarification to the elements of 'debt', 'due' and 'unable to pay'. Experience from case law has provided some guidance for examining the cash flow test in order to deal with these matters. For 'debts', a debt here must be a liquidated claim, which is an ascertainable claim.[45] Therefore, an unliquidated claim, such as damages for breach of contract must be excluded from the calculation.[46] It must be noted that only due debts are the subject of the calculation under the cash flow test.[47] 'Due' is viewed as an element of presence and futurity. 'Due' is the element of presence in the sense that it refers to the debts that are both existing and immediately payable.[48] 'Due' has the element of futurity as it refers to the existing but immature debt.[49] The court may examine the debt due in the future to determine the insolvent status of a company.[50] However, there is a degree of uncertainty pertaining to taking debts due in the future into the calculation because not all contingent and prospective debts will be considered

[42] Ibid.
[43] However, it is a special feature of Vietnamese insolvency that a company is considered to be insolvent until it is unable to pay a debt, however, within three months from the maturity date (art. 4.1, the Bankruptcy Law 2014)
[44] Statutory wordings of the test may be different but carry the same meaning. For example, under English insolvency legislation, s. 123(e) provide that a company is deemed unable to pay its debts if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due; under Canadian Bankruptcy and Insolvency Law (BIA), s. 2(1) provides that insolvent person is one that for any reason is unable to meet his obligations as they generally become due or who has ceased paying his current obligations in the ordinary course of business as they generally become due
[45] *Stooke v. Taylor* (1880) 5 Q.B.D 596 at 575
[46] Goode (n14) at 124
[47] Ibid.
[48] Ibid.
[49] Ibid. 125
[50] *Re Cheyne Finance Ltd* [2007] EWHC 2402 (Ch), cited by Goode, Ibid.

and this depends on the circumstances pertaining to companies on a case-by-case basis.[51]

For 'unable to pay', determining this element requires the consideration into a number of issues that are based on the commercial reality.[52] The consideration cannot be merely confined to the cash resources of a company,[53] rather, assets of a company are a subject of a careful calculation to determine which assets can be realisable and liquidated to pay the debts in a short time.[54] Furthermore, the consideration is extended to the whole financial position of a company; for example, the current revenue and net cash of a company are also examined.[55] The evidence of a temporary lack of liquidity is not sufficiently qualified as proof of insolvency because in examining commercial reality, the important issues are whether a company is able to continue to operate its business and whether it is able to continue to pay its debts.[56] Although there can be more technical issues pertaining to the cash flow test when its components are broken down, in reality, the test is easy to apply because the court looks at the company's actual ability to pay debts when a demand has been made.[57] If a creditor cannot make payment for due debts when a creditor has served a demand, this is sufficient to constitute the proof of insolvency for petitioning a winding-up order or administration order.[58]

3.3.1.2 The balance sheet test

[51] Ibid. and A. Keay and P. Walton, *Insolvency Law: Corporate and Personal* (Jordans, 3rdedn, 2012) at 19
[52] *Sandell v. Porter* 115 CLR 666 (Australian case)
[53] Ibid. para 15
[54] Ibid.
[55] Ibid.
[56] *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 (Federal Court of Australia)
[57] This is observed by Keay and Walton (n51) in *Re Camburn Petroleum Products Ltd* [1979] 3 All ER 297 at 307 and *Re Taylor's Industrial Flooring Ltd* [1990] BCC 44, CA
[58] Ibid.

The balance sheet test provides that a company is insolvent when its total assets are insufficient to discharge all liabilities.[59] The test is used to establish evidence for a number of insolvency orders, including the administration order, the contribution order for wrongful trading, the order for avoidance of undervalue or preference transactions, and the order for disqualification of directors under the UK law.[60] The test is undertaken by calculating the company's assets and liabilities and then comparing whether the value of the liabilities outweighs the value of the assets. However, similar to the cash-flow test, the application of the balance sheet test is not problem-free because of the difficulty associated with the valuation of assets and liabilities. Regarding the asset valuation, assets can be valued by either a fair valuation or disposal of assets under a fairly conducted sale.[61] Principally, the assets taken into account must be subject to the current ownership of the company and the prospective or contingent assets in the future are excluded. However, whether the value at the starting point in the balance sheet or the current value should be considered is a key question. The court can rely on the latter in the case some assets have depreciated in value.[62] For the liability, the test takes into account all liabilities, including contingent and prospective liabilities.[63] The term 'liability' under the balance sheet test is construed broadly, embracing debts and contingent and prospective claims for the purposes of protecting long-term creditors.[64] However, calculating contingent and prospective liabilities is not an easy task because this depends on the possibility of occurring these liabilities in the future.[65]

[59] Goode (n14) at 129
[60] s.123 and s.124 (UK IA 1896)
[61] Wood, (n14) 20
[62] *633746 Ontario Inc. (Trustee of) v. Salvati (1990),* 79 C.B.R (N.5) 72 (Ont. H.C.J)
[63] Goode (n14) at 145
[64] Wood (n14) at 21
[65] Notwithstanding this fact, professor Goode has offered two ways to calculate a contingent liability. See Goode (n14) 146-147

There is a degree of uncertainty in applying the balance sheet test. In practice, the mere fact that liabilities outweigh assets is not a conclusive evidence for insolvency. In *BNY Corporate Trustee Services Ltd v Eurosail*, the determinative evidence the Court of Appeal wants to see from the balance sheet test is that the insolvent company has reached the point of no return.[66] However, the UK Supreme Court has rejected the formulation of point of no return, ruling instead that a company is insolvent under the balance sheet test when it has insufficient assets to be able to meet all of its liabilities, including prospective and contingent liabilities when they eventually fall due.[67] The ruling invites the inference that since the cash-flow test deals with the currently due debts and the debts due in reasonably near future, the eventually due debts under the ruling must be seen as medium or long-term debts; therefore, the balance sheet test has a nature of medium and long-term liquidity test.[68] Nevertheless, the UK Supreme Court states that the determination on whether a company is insolvent under the test must depend on the evidence of specific circumstances of a company on a case-by-case basis.[69]

3.3.2 The role of insolvency tests in rescue

The two insolvency tests have a gatekeeping goal in deciding which procedures should apply to an insolvent company.[70] However, in selecting an appropriate insolvency test, the cash-flow test appears as a more favourable one. Guidance of the UNCITRAL on insolvency legislation states that where insolvent law adopts a single test, it should be based on the debtor's inability to pay debts as they mature and not on

[66] *BNY Corporate Trustee Services Ltd v. Eurosail*-UK [2011] EWCA Civ 227
[67] *BNY Corporate Trustee Services Limited and others (Respondents) v Eurosail*-UK 2007-3BL PLC (Appellant) [2013] UKSC 28
[68] Paul Sidle, 'The Supreme Court confirms that the 'balance sheet insolvency' test is fact-specific, focussing on whether there will eventually be a deficiency', <http://www.linklaters.com/pdfs/mkt/london/Supreme_Court_in_Eurosail_copy.pdf> accessed 26 October 2016
[69] The *Eurosail* Case, (n67) para 38
[70] See Wood (n14) at 16-7

the balance sheet test.[71] Because the balance sheet test suffers from a number of disadvantages, it should not be used as the single test.[72] Similarly, the World Bank recommends that 'the preferred test for insolvency should be the debtors' inability to pay debts as they come due', which means the cash-flow test.[73]

An important question regarding the application of the insolvency tests in rescue is that should the tests be a mandatory requirement for initiation of rescue procedures, or should rescue procedures be initiated even before a company satisfies the insolvency tests? It is recognised by the R3 that the success of corporate rescue large depends on whether it takes place at an early stage of a company's distress; therefore, rescue should be conducted before a company falls into insolvency.[74] However, making an early decision of rescue prior to insolvency is not purely a task for legislators, rather it depends greatly on the expertise of the company's directors who could practically understand the company's circumstances through day-by-day management. Therefore, the issue of initiating early rescue appears to be relevant to the informal rescue rather than the formal rescue. However, it is cautious that initiating early rescue could be an unsound business decision that brings about distortion to the normal operation of a company.[75] Regarding the formal rescue, approving rescue procedures prior to the satisfaction of the insolvency tests should be a matter subject to court discretion. Where rescue law confers a debtor company certain advantages, early initiation of rescue

[71] UNCITRAL (n29) at 61
[72] Ibid. at.60
[73] The World Bank Principle and Guidelines for Effective Insolvency and Creditor Rights System, 2001, at.8
[74] R3 – Association of Business Recovery Professional, 'Understanding Insolvency', October 2008, p.3 <https://www.r3.org.uk/media/documents/publications/public/Understanding_insolvency_-_October_2008.pdf > accessed 2 November 2016
[75] Henry Peter, 'Bankruptcy and Reorganisation trigger criteria: from retrospective (balance sheet) to a prospective (cash flow) test'. In Henry Peter, Nicolas Jeandin, and Jason Kiborn, *The Challenges of Insolvency Reform in the 21 Century* (Schulthess Juristischen Medien, 2006) at .37

procedures can be open to abuse and unfairness because the company can use the advantages provided for by the law to distort the competition with its competitors.[76]

3.4 Importance of corporate rescue law

3.4.1 Different views on the role of rescue law from contemporary legal scholarship

As mentioned in the literature chapter,[77] legal scholars who have attempted to justify insolvency law from a theoretical basis are classified as traditionalists and proceduralists.[78] These scholars hold contrasting views towards the issue of whether the insolvency law should focus on the corporate rescue option. The traditionalist scholars are those who identify themselves with the following features.[79] First, they advocate corporate rescue because of its important role in preserving the company, protecting the employment and stabilising the economy.[80] Second, for traditionalists, though the interest of creditors and other parties should be taken into account, rescue law should be designed in a manner that has limited effects on creditors and other parties who decide to do business with the debtor company prior to insolvency.[81] Third, in order to implement the rescue procedure effectively, traditionalists recognise the essential role of judges. Given the diversity of rescue cases with different facts and circumstances,

[76] R3 Association of Business Recovery Professionals, 'US 'Chapter 11': Should it be adopted in the UK?' <https://www.r3.org.uk/media/documents/policy/policy_papers/corporate_insolvency/R3_Chapter_11_briefing_(October_2015).pdf> accessed 5 November 2017

[77] See Chapter Two (2.1.1 Two different schools of thought justifying the introduction of insolvency and rescue law)

[78] D. G. Bair 'Bankruptcy's Uncontested Axioms' (1998) 108 Yale Law Journal, 573

[79] For the prominent scholars of this group see, Karen Gross, 'Failure and Forgiveness: Rebalancing the Bankruptcy System' (1997) 248-49; Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy', (1991) 91Colom. L. Rev. 717; Elizabeth Warren, Bankruptcy policy, (1987); 54 U. Chicago Law Review. 775; Elizabeth Warren & Jay Lawrence Westbrook, 'Searching for Reorganization Realities', (1994) 72 WASH. U. L.Q. 1257

[80] Ibid

[81] D.G. Baird, 'Bankruptcy's Uncontested Axioms' (1998) 108 Yale Law Journal 573

judges should be granted with a wide range of discretional authority to deal with rescue on a case by case basis.[82]

In contrast with the traditionalists, the proceduralists[83] are of the opinion that the survival of a company is a matter subject to market forces, instead of being decided by rescue law.[84] A company fails because it is unable to compete in the market, thus it should be liquidated to give way for more effective companies to prosper. The proceduralists believe that companies deserving protection of rescue law should be the ones in financial distress rather than economic distress.[85] Specifically, a company in financial distress is a well-operated company but has been facing financial difficulty, for example, not having enough money to pay its creditors despite good business operation.[86] However, a company in economic distress is one that has been losing its competitiveness or one that is not strong enough to survive in hard times of the market.[87] A company that is viable but has presently faced financial difficulty deserves rescue; yet, a company that is unable to compete in the market deserves to be eliminated and give way to more effective companies to operate in the market.[88] Rescue law does more harm than good if its goal is to preserve any companies failing in the market.[89] Additionally, the proceduralists pay more attention to the effects of the law on the parties before insolvency, especially the effects of the law on the behaviour of those who made investment in the company.[90] For them, insolvency law should protect the

[82] Ibid. 579
[83] For the prominent scholars of this group, see T. H. Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press,1986), Douglas G. Baird, 'A World without Bankruptcy' (1987) 50 Law and Contemporary Problems, 183-85
[84] Baird (n78) at 578
[85] Ibid. 581
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid. 578, and Douglas G. Baird and Thomas Jackson, 'Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 The University of Chicago Law Review, 102
[90] Baird (n78) 578

rights of the parties before the occurrence of insolvency instead of the rights arising after insolvency, otherwise, companies are likely to pursue ineffective courses of action before reaching the insolvency forum.[91] Furthermore, the proceduralists take the view that judges in rescue should be a 'disinterested arbiter' who has the role of controlling weaknesses associated with rescue procedures under which different parties have different interests needed to be protected, thus judges should not be granted a wide range of discretion to deal with the insolvency affairs.[92]

As such, there is a sharp distinction between the traditionalists and the proceduralists regarding the mandate of rescue law. The traditionalists recognise the need for the law to rescue a failing company but the proceduralists do not. Much of the debate between these scholars has been carried out and neither parties win or lose.[93] Values of the debate between the traditionalists and the proceduralists lie in the attempts looking for answers to the questions of what are the goals of rescue law, which interest the rescue law should represent for and how the law should be designed to achieve the goals. Theoretically, a rescue law drafted under the influence of traditionalists' idea will focus on the interests of a wide range of parties in insolvency and therefore tend to defer the rescue decision with a reliance on judicial expertise in implementing the procedure. By contrast, a rescue law based on proceduralists' viewpoint inclines to take into consideration the interest of creditors and favouring a sale of the debtor company to make distributions to creditors.

3.4.2 Important role of rescue law

3.4.2.1 The change of insolvency legislative focus from liquidation to corporate rescue

[91] Robert K. Rasmussen, 'The Ex Ante Effects of Bankruptcy Reform on Investment Incentives', (1994) 72 Wash. U. L. Q. 1159, 1163
[92] Baird (n78) 579
[93] Ibid.

Insolvency law was originally created to primarily deal with liquidation or winding-up of insolvent companies.[94] The law objective was mainly perceived in terms of maximising creditors return through selling the company's assets and distributing the proceeds to creditors.[95] However, changes in the economy have invited the adoption of a new philosophy that underpins the existence of insolvency law.[96] The objective of maximising the creditor's return of insolvency law has been pursued no longer by the way of liquidation, but by the way of preservation of the going-concern value of an insolvent company.[97] This is consistent with the fact that the determination of a company's value currently is not based merely on its physical assets but also intangible assets, such as know-how and goodwill.[98] The mandate of insolvency law is no longer viewed as serving creditor's interest but it is extended to serve wider social-economic interests, including employment, customers, tax collection and the economy.[99]

The philosophical change regarding the role of insolvency law gives rise to the so-called 'rescue culture' which supports the recognition of corporate rescue as a goal in the making of insolvency law.[100] What an insolvency law or rescue law should do is to preserve and enhance the value of a company. Harmer identifies two common principal tasks a rescue law should achieve, which are 'preservation of the income-producing business of the enterprise and the reduction, rescheduling of debt (for example, by write-off or by conversion of debt into equity) according to the realistic capacity of the enterprise to bear it'.[101] Yet, the rescue outcomes should not always mean saving a company and fully restoring it to the normal stage prior to its distress although this may

[94] R.M. Goode (n14) at 9-11
[95] Jackson (n83) Chapter 1
[96] R.W. Hamer, 'Comparison of Trends in National Law: The Pacific Rim' (1997) 23 Brooklyn Journal of International Law 139-165
[97] R.W. Hamer, Ibid. 144
[98] International Monetary Fund, 'Orderly and Effective Insolvency Procedures' (1999) at 14
[99] Finch (n5) 246
[100] M. Hunter, 'The Nature and Functions of a Rescue Culture' (1999) 104 Commercial Law Journal, 426
[101] R.W. Harmer (n96), at 146

be the case of rescue outcome.[102] Instead, what rescue should function is to create a proper environment where the two goals could be achieved in harmony with contemporary and economic thoughts.[103]

3.4.2.2 Company Rescue and Business Rescue

Insolvency law has shifted its focus from liquidation to rescuing companies, and the justification for rescue law is to preserve the going-concern value of the company.[104] However, there is a distinction between 'company rescue' and 'business rescue'. It is generally understood that a company is a separate legal entity from its owners, incorporated under company legislation and carries out a business for profit.[105] Business is commercial activities performed by a company, or more exactly by the people of the company – management and employment staff, and the business can be transferable from the original owner to new owners.[106] Company rescue or 'pure rescue' means preserving the whole company intact with the same operation, management, workforce and especially the same ownership.[107] Meanwhile, rescuing a business is perceived as preserving viable part or productive part of a company, making it survive under new ownership.[108] Therefore, while company rescue attempts to preserve a company as a whole, business rescue emphasises the preservation of the going-concern of a company through a complete sale or partial sale. [109]

The philosophy of 'company rescue' and 'business rescue' has an influence on the shaping of the objectives of a rescue law. If encouraging investment in

[102] Ibid. 144
[103] Ibid. 146
[104] McCormack, *Corporate Rescue Law: An Anglo-American Perspective* (Edward Elgar, 2008), at 3
[105] Salomon v Salomon & Company Ltd [1897] AC 2
[106] Sandra Frisby, 'In search of a Rescue Regime: The enterprise Act 2002' (2004) 67(2) Modern Law Review, at 248, and Bo Xie, *Comparative Insolvency Law: The Pre-pack Approach in Corporate Rescue* (Edward Elgar, 2016) at 4-5
S. Frisby, Ibid. 249
[108] Ibid. 249
[109] Ibid.

entrepreneurship is a favourable strategy, rescue law can be designed following the spirit of the 'company rescue', which offers protection to the owners of a company. An example of this is Chapter 11 of United States (US) Bankruptcy law under which shareholders are granted rights in insolvency proceedings. As examined by Moss, 'where in reality there is nothing properly left for shareholders, this seems to enable them to use blocking tactics so as to extract value from the situation in which equitably they should receive none.'[110] In contrast to the 'company rescue' approach, a rescue law based on the 'business rescue' tends to favour saving business and protecting employment. For example, UK insolvency law does not confer shareholders significant rights as Chapter 11 and the rationale is that shareholders bear lower-cost risk than employees and business partners.[111] Instead, the UK law places more on saving the business, preserving employment and protecting the wider business community.[112]

3.5 Models of rescue administration

3.5.1 Three models of rescue administration

Corporate rescue involves the participation of different actors who play very different roles in rescue procedures, such as company directors, creditors, courts and insolvency practitioners (IPs). For example, the company directors hold the best knowledge and skills regarding the company's operation, thus they are well prepared to design rescue plans and negotiate with creditors. IPs who are experts will assist the directors in drafting rescue plans and at the same time act as court officers to monitor the rescue procedure; the courts stand at the apex of an insolvency system with the power to approve or reject the insolvency application, adjudicate disputes among parties and monitor the parties' compliance with the law. As for creditors, though not

[110] G. Moss, 'Chapter 11 - an English lawyer's critique', (1998) 17 Insolvency Intelligence, 18
[111] Ibid. and Finch (n5) 288
[112] Ibid.

participating in the administration of insolvency, they have a significant role in deciding the fate of rescue in that they will decide the approval of a rescue plan and provide the rescue finance to implement the plan. Models of rescue administration differ from each other in the extent to which these actors have different participation in controlling rescue procedures. The following discussion on models of rescue administration largely relies on the works of Hahn and Rotem.[113] Based on the examination on rescue law of the US and the UK, Hahn determined that the two main models of rescue administration, namely the DIP model and the PIP model or the trustee model.[114] Rotem makes an additional contribution to Hahn's work that there is also the hybrid model of the DIP and PIP, which is reflected under Canadian rescue law.[115]

3.5.1.1 The Debtor-in-Possession model (DIP model)

The DIP is a model under which the current board of directors remains in control of the company and they have a significant role in preparing a rescue plan and implementing it, which is the reflection of core principles of Chapter 11 of the US Bankruptcy Code.[116] As remaining in office during rescue, the directors will control the company's operation and make important decisions regarding daily business activities. In implementing a rescue, the directors will carry out a course of negotiations between the company and its creditors. The company directors also play a major role in deciding whether to keep carrying rescue or apply for liquidation procedure.[117] However, the

[113] David Hahn, 'Concentrated Ownership and Control of Corporate Reoganizations', (2004) 4 J. CORP. L. STUD. 117, and Yaad Rotem, 'Contemplating a Corporate Governance Model for Bankruptcy Reorganizations: Lessons from Canada' (2008) 3 Va. L. & Bus. Rev. 125 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924598> accessed 10 November 2016
[114] Hahn, Ibid. at 121-127
[115] Rotem, Ibid. at 13-15
[116] 11 U.S. Code § 1107. See Hahn (n106) at 123 and Gerard McCormack, 'Control and Corporate Rescue: An Anglo-American Evaluation' (2007) 56 International and Comparative Law Quarterly, 517-18
[117] 11 U.S.C. § 1123(b)(4)

company directors do not absolutely enjoy a wide latitude of power, they are subject to the supervision of the creditors and the courts.[118]

The DIP model is distinct for not only the central role of the management board but also the way to monitor the rescue to avoid power abuse by the board. The monitoring role is performed by judges,[119] who hold key responsibilities and largely contribute to the efficiency of the procedure. For example, judges can expedite rescue by screening the rescue application to refuse the rescue application without or with a low prospect of success.[120] Judges are entitled to hear matters relating to the review of director's decisions that may prejudice the interest of other parties or decision outside the ordinary course of business.[121] Especially, judges are granted the power to replace the management board with a court-appointed official in case there is a necessary need to do so.[122]

The employment of the DIP models is justified on the ground that retaining the company directors will benefit rescue in key aspects. In the first place, as the directors have already run the company for a certain duration of time, they are familiar with the operation of the company.[123] Giving the directors a chance to continue their management during rescue allows the company to avoid indirect costs because if the directors are replaced with IPs, these outsider professionals have to invest time and resources to get used to with every aspect of the company's operation.[124] In addition, the conflict of interest between the management board and the outsiders could prevent

[118] See 11 U.S.C. § 1104(a) (2000) and 11 U.S.C. § 1103
[119] The law also entrusts monitoring role to creditor committee, but the role of court in this model is a dominantly significant feature of the law. See , Lynn M. LoPucki and Gorge G. Triantis, 'A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies' (1994) 35 Harv. Int'l. L. J. 267, 305
[120] Lynn M. LoPucki and Gorge G. Triantis, Ibid. 284
[121] U.S.C Bankruptcy Code § 363(b)(1)
[122] 11 U.S.C. § 1104 (a) (2000)
[123] Lynn M. LoPucki & William C. Whitford, 'Corporate Governance in the Bankruptcy of Large, Publicly Held Companies' (1993) 141 U. PA. L. REV. 669, 694
[124] David A. Skeel, Jr., 'Market, Court, and the Brave New World of Bankruptcy Theory', 1993 Wis. L. REV.465, at 517 & n.188.

effective cooperation necessary for accomplishing a successful rescue.[125] For example, in fear of losing their employment, directors may not disclose the financial situation of the company in a timely manner, or they tend to decline to provide the information required by IPs.[126]

However, these advantages do not mean that the DIP model can freely escape criticism. Opponents of the DIP model argue that failure of a company is attributed to unsound business decisions of the management board in the first place, thus it is highly risky to allow them to keep their position because the board can gamble the future of the company again.[127] This is likely to open the door for litigation if creditors find a business decision made by the directors prejudices their interest. Furthermore, it seems not to be convincing to claim that the company directors are the only party who possesses sufficient skill and expertise to run the firm in rescue because for some companies there is no requirement for management board to hold special skills.[128] Thus, the replacement of the board with outside IPs does not cause much of disruption or cost.[129] Another threat associated with the deployment of the DIP model is that it may create incentives for many non-viable companies to be rescued but they are unable to survive because of the poor management of the directors.[130]

3.5.1.2 The Professional-in-Possession (PIP) model

The PIP model represents a distinguishable feature of the administration procedure of the UK IA 1986.[131] The trustee model offers a contrasting approach to the DIP model in that outside IPs will be appointed and replace the company directors in

[125] LoPucki & Triantis (n119) at 304-305
[126] Ibid.
[127] Lynn M. LoPucki, 'The Trouble with Chapter11' (1993) Wis. L. Rev. 729, at 732-34
[128] LoPucki and Triantis (n119) 304
[129] Ibid.
[130] Empirical Study by C.G. Fisher & Jocelyn Martel, 'Empirical Estimates of Filtering Failure in Court Supervised Reorganization', (2004)1 Journal of Empirical Legal Studies. 143
[131] IA 1986, Schedule B1

operating the company and its business.[132] The IPs are in charge with proposing and implementing a rescue plan. In doing so, IPs must possess a certain degree of expertise necessary and that is the reason why IPs are required to hold a license to practice their profession.[133]

An advantage of the PIP model is that allowing IPs to take control of the company may avoid the management problem associated with abusive conduct of the directors because IPs are required to act in the best interests of all creditors.[134] However, there are certain concerns regarding the operation of this model. The company directors are likely to hide the company crisis and delay the filing for rescue due to the fear that they will lose their job upon the appointment of the IPs.[135] At the same time, they are likely to take highly risky business decisions with the hope that they can rescue the company without relying on formal rescue proceedings.[136] These risky attempts have a danger of exacerbating the company crisis and makes it more difficult for IPs when they participate to rescue the company. In order to tackle this problem, penalties can be imposed on the offenders such as monetary penalty or director disqualification.[137] This has a counter-effect because in couple with removing directors from office, imposing severe punishment cannot create incentives for the company directors to actively contribute to the rescue.[138]

3.5.1.3 The hybrid model

[132] For example, these powers are granted to an administrator under Schedule B1, English Insolvency Act 1986
[133] For example, in the UK, IPs must hold a license issued by a professional recognised body (PRB) to practice in insolvency. Currently, there are five PRBs in the UK. See <https://www.gov.uk/government/publications/insolvency-practitioners-recognised-professional-bodies/recognised-professional-bodies> accessed 13 August 2018
[134] See IA 1986, Schedule B1, para 3(2)
[135] D. Hahn (n113) at 139
[136] Ibid.
[137] See s.214 UK Insolvency Act 1986 (IA1986) and s.6 and 10, the UK Company Directors Disqualification Act 1986 in the UK.
[138] Hahn (n113) at 140-41

Due to the shortcomings of the DIP and PIP models, scholars have attempted to propose a hybrid model with a combination of characteristics of the two models. Under the hybrid model, both the company directors and IPs have roles to play in rescue administration.[139] Adams proposes a hybrid model under which a trustee will be appointed and the company directors remain in their position.[140] However, the trustee has limited participation by holding decisions on whether a company should be rescued or liquidated, leaving the management power still in hands of the directors.[141] With this model, the company directors continue their role of running the business, thereby reducing the cost and disruption caused by the trustee's unfamiliarity with the company in case they take control of the company.[142] Yet, this does not mean that all problems are solved. There is a warning that dishonest trustees may elect to rescue a company in an attempt to get a higher rate of fee than in the case they decide to liquidate a company.[143]

Hahn proposes another hybrid model, which is 'the integrated co-determination model', featuring the participation of both the company directors and the trustee.[144] The unique feature of this model is that the trustee will be appointed by a judge[145] and occupies one seat in the management team, which allows him to have a veto in respect of all matters voted by the board.[146] However, the trustee will not interfere with decisions made by the directors in the ordinary course of business. As a member of the management team, the trustee can work along with the directors on matters ranging from negotiating to drafting rescue plans. A rescue plan drafted by both the trustee and

[139] Ibid. and Edward S. Adams, 'Governance in Chapter 11 Reoganizations: Reducing Costs, Improving Results', 73 B.U. L. REv. 581, 621-23 (1993)
[140] Adams, Ibid. 621
[141] Ibid.
[142] Ibid. 622
[143] Ibid.
[144] David Hahn, (n106) 147-49
[145] Ibid. 148
[146] Ibid.

the management board can ensure the fairness in so far as the directors acting for the interests of shareholders will be balanced with the trustee acting disinterestedly as an independent objective party for the interest of all parties in rescue.[147] In addition, allowing the management to retain their power can avoid the problem of the trustee's unfamiliarity with the company operation, thus reduce cost and disruption.[148] However, this model has to accompany the facilitation of cooperation between the trustee and the directors in case of conflicts. The trustee can exercise the veto power to reject a decision by directors if there is no agreement reached but exercising the veto power cannot always solve the problem efficiently, rather, there must be a mechanism to resolve their disputes.

In recognition of the advantageous features pertaining to the hybrid model, Rotem finds the optimal hybrid model should be the one employed under the Companies' Creditor Arrangement Act (CCAA) of Canada.[149] According to Rotem's examination, the hybrid model under the CCAA provides for the participation of both company directors and the IP (the monitor). This model is different from the ones proposed by Adams and Hahn in that the monitor does not participate in the decision-making process, instead, he plays an intermediary role in assisting the directors in carrying out rescue and at the same time monitoring and reporting to the court on the rescue progress.[150] By not taking part in the day-to-day management of the company, the monitor will not distort the business decision-making and this also reduces direct costs for the company.[151]

[147] Ibid.
[148] Ibid.
[149] Rotem (n113) and Canadian Companies' Creditor Arrangement Act 1985, <https://laws-lois.justice.gc.ca/eng/acts/c-36/> accessed 20 November 2016
[150] For general duties of the monitor, see CCAA, s.23(1)
[151] Rotem, Ibid. at 142

To summarise the discussion, there are three models of administrative control in rescue, namely the DIP model, the PIP model and the hybrid model. The different levels of participation of parties in rescue administration render these models distinct from each other. The issues dealt with by these models are how to operate the company in rescue and how to monitor the rescue. While the DIP model and the PIP model have certain shortcomings in response to the issues, the hybrid model seems to be a more efficient approach. However, the hybrid model has different versions and the most efficient one should carry the features of inducing sound business decisions in operating the company and enhancing the monitoring over the company rescue.

3.5.2 Reflection of models of rescue administration in the laws of the UK, Canada and Vietnam

This section aims to provide an overview of rescue law in the UK,[152] Canada, and Vietnam by addressing main rescue procedures under insolvency legislation of these countries and how these procedures reflect the models of rescue administration as discussed above.

3.5.2.1 Rescue law in the UK

The main legislation providing for corporate rescue in the UK is the Insolvency Act 1986 (IA 1986).[153] Another legislation that governs corporate rescue in the UK is the Companies Act 2006 (CA 2006).[154] It is a distinguishable trait of the UK rescue law that there is a diverse approach to corporate rescue, which introduces three different rescue

[152] For the purpose of this thesis, as mentioned in the introduction chapter, the UK is referred to England and Wales and the UK insolvency law is the insolvency law of England and Wales.
[153]The Insolvency Act 1986, hereinafter referred as to the IA 1986 <http://www.legislation.gov.uk/ukpga/1986/45/contents> accessed 20 November 2016
[154] The company Act 2006 <http://www.legislation.gov.uk/ukpga/2006/46/contents> accessed 20 November 2016

procedures, namely the administration[155], the company voluntary arrangements (CVAs) under IA 1986[156] and the schemes of arrangement under section 895 of the CA 2006.

The administration is the most popular rescue procedure in the UK. Under this procedure, an administrator will be appointed and replace the company directors in management.[157] However, the administrator will not undertake the rescue in a straightforward manner, rather he has to perform his functions to pursue hierarchical objectives, (1) to rescue the company as a going concern, or (2) to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up, or (3) to realise the company's property in order to make a distribution to one or more secured or preferential creditors.[158] Though rescue is stated as the first objective, the administrator will not pursue it if he considers it is unlikely to do it or other options can yield more benefits to creditors. Once deciding which option is the best for the company, the administrator is in charge with drafting a proposal to deal with the company's insolvent affair and presenting it to creditors who will decide the approval of the proposal with their voting.[159] The administration procedure has the nature of the PIP model in that the administrator will replace the current directors in the management of the company.[160] The administrator plays a very important role in the administration insofar as he acts as an officer of the court[161] and an agent of the company.[162] He has important rights and obligations in performing his functions, such

[155] IA 1986: Sch.B1
[156] IA 1986: Part 1 and SchA1
[157] IA 1986: SchB1, para 59(1)
[158] Ibid. para 3
[159] Ibid. para 49(5) and para 51
[160] Ibid. Para 59(1)
[161] Ibid. para 4
[162] Ibid. para 69

as drafting the proposal,[163] controlling the administration process and managing the company's affair and assets and removing the company directors in management.[164]

Another rescue procedure regulated by the IA 1986 is the CVA.[165] Under this procedure, a debtor company negotiates with its creditors to come up with an agreement on how to pay its debts.[166] The CVA can be initiated by nominating an IP to act as a nominee, who then works with the company directors to prepare a rescue proposal. The proposal will be decided by creditors at a creditor meeting[167] and it will be implemented provided it obtains enough creditor approval.[168] The CVA is the reflection of the hybrid model of the DIP and the PIP model insofar as the company directors are allowed to stay in management, however, the IP will monitor the progress of the arrangement and distribute the dividend to creditors.[169]

The SA is another rescue procedure prescribed under Part 26 of the CA 2006.[170] The SA is an arrangement between a company and its members or between a company and its creditors to deal with the financial difficulties of the company.[171] Once legally approved by its member or its creditors, a SA needs to be sanctioned by the court to have a binding effect on the members or the creditors of the company.[172] The SA follows the DIP model in that the directors are permitted to keep in their management position and there is a high level of judicial involvement to monitor the procedure. A special feature of the SA is that it is regulated outside the IA 1986 and it does not require the proof of insolvency for companies that wants to initiate this procedure.

[163] Ibid. para 49(5)
[164] Ibid. para 59-66
[165] IA 1986: Part 1 and Sch. A1 (IA 1986)
[166] Ibid. s.1(1)
[167] IA 1986: SchA1
[168] Insolvency Rule 1986, rr.1.19
[169] IA 1986: s.7 (2)
[170] CA2006: Part 26, s.895-901
[171] CA 2006: s. 895
[172] CA 2006, s. 899

2.5.2.2 Rescue law in Canada

There is the existence of dual rescue procedures in Canada under the Bankruptcy and Insolvency Act (BIA)[173] and the Company Creditors Arrangement Act (CCAA).[174] While the BIA rescue is a law-based procedure that adheres strictly to statutory provisions, the CCAA rescue is a judicial-based model that relies significantly on the court's involvement. The both of the procedures follow the hybrid model that allows the current directors to run the company's business in rescue, however, they are subject to the supervision of IPs, such as the trustee and the monitor

The BIA procedure has a broad application to the extent that it does not impose any financial threshold of the amount of debt on insolvent companies, which means most companies can apply for it.[175] There are two ways to initiate a rescue procedure under BIA. The first way is that the debtor company can file a proposal that has already developed with a licensed trustee.[176] The second way, where the debtor company is unable to file the proposal in the first instance, is that it can initiate the procedure through filing a notice of attention to make a proposal with the official receiver.[177] Upon filing the notice of intention to make a proposal, the company must select a licensed trustee to act as the trustee under the proposal. Both of the ways will effect an automatic moratorium preventing creditors from enforcing debts against the company and providing a breathing space for it to negotiate with the creditors.[178] Following the hybrid model of administration control, the BIA procedure does not deprive the company directors of management power, however, there will be a trustee who is

[173] < https://laws-lois.justice.gc.ca/eng/acts/b-3/> accessed 20 November 2016
[174] <http://laws-lois.justice.gc.ca/eng/acts/C-36/> accessed 20 November 2016
[175] BIA s.50(1)
[176] Ibid. s.50(2)
[177] Ibid. s.50.4(1). The procedure can be initiated by a trustee in bankruptcy, a receiver or a liquidator of the debtor company.
[178] Ibid. s. 69.1 and s.69.1(1)

appointed by the debtor company but acts as a court officer to monitor the rescue procedure.[179]

Unlike the BIA, the CCAA narrows the scope of application by imposing a financial threshold of the amount of debts, which is C$5million or more, on companies that want to initiate this procedure.[180] Under the CCAA, an insolvent company enters into rescue by applying to the court for an initial order.[181] After reviewing the application, the court will decide whether to refuse the application or make an initial order providing a stay of creditors' claim and authorise the company to prepare a plan of rescue.[182] When a plan of rescue is drafted, creditors will be divided into classes for the purpose of voting the plan. After received the creditors' approval in a prescribed manner, the plan needs to be approved by the court to have a binding effect on all creditors of classes affected by the plan.[183] Similar to the BIA, the CCAA adopts the hybrid model of administration which allows directors of a company to remain control of the company. However, the company is monitored by the monitor, who is appointed by the court and assists the directors in dealing with rescue related matters. The CCAA rescue is considered more flexible than the BIA as there is a discretionary power of judges who are entitled to issue orders to deal with issues emerging on a case-by-case basis.[184]

2.5.2.3 Rescue law in Vietnam

[179] BIA s.50.5
[180] CCAA s.3.1
[181] Ibid. s.11.02(1)
[182] Wood (n14) at 330-31
[183] CCAA. s. 6(1)
[184] Ibid. s. 11.2(1), s. 11.3 s. 11.5(1), s. 11.52, s.32, s. 36,

The current legislation governing corporate insolvency and rescue in Vietnam is the Bankruptcy Law 2014 (BL2014)[185] which exclusively provides for insolvency of companies. Under the BL2014, when a company becomes insolvent, the company, its creditors or employees can file an application to the court requesting the initiation of a bankruptcy procedure.[186] The acceptance to initiate this procedure will trigger a moratorium that prevents creditors from enforcing their claims against the company[187]. If the judge decides to initiate the insolvency procedure, he will appoint an IP to act as the asset management officer (AMO) to monitor the company's assets and supervise the procedure.[188] There is a meeting of creditors summoned by the judge to vote for whether liquidating or rescuing the company.[189] If the decision of the meeting is to rescue the company, then the company will design a rescue plan with the assistance of the AMO,[190] which will be approved by creditors at the second creditor meeting.[191] Where the plan is approved by creditors, it will be implemented in the period of time decided by the creditor meeting or the legislation.[192] The rescue procedure in Vietnam follows the hybrid model of rescue administration insofar as it allows the directors to retain their management role in carrying out business activities and it provides for the participation of an IPs (the AMO) who will assist and monitor the company in rescue.

As such, at first glance, the UK appears to have the most diverse approach to rescue with three rescue procedures that follow different models of rescue administration (the administration follows the PIP model, the SA follows the DIP model

[185] <http://www.moj.gov.vn/vbpq/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=29059> (Vietnamese version) accessed 5 December 2016
<http://www.itpc.gov.vn/investors/how_to_invest/law/Law_on_Bankruptcy_2014_0/mldocument_view/?set_language=en> (English version) accessed 5 December 2016
[186] Ibid. Art. 5
[187] Ibid. Art. 41
[188] Asset management asset can be an individual or a company under BL 2014, see Article 11-13
[189] Ibid. Art. 83
[190] Ibid. Art. 87
[191] Ibid. Art. 90, 91
[192] Ibid. Art. 89

and the CVA follows hybrid model). Canada and Vietnam similarly adopt the hybrid model of administration under their rescue law. However, while Canada introduces dual rescue procedures under two pieces of legislation, Vietnam approaches corporate rescue with a single procedure. Noticeably, rescues laws of all selected jurisdictions share a common feature in incorporating the hybrid model into rescue procedures. Despite this similarity, differences in legal history and social and cultural conditions in these countries have rendered their rescue laws to be unique products which generate a various degree of efficiency.[193]

3.6 Measuring effectiveness of corporate rescue law

3.6.1 Definition of the effectiveness of law and measuring the effectiveness of corporate rescue law

Socio-legal scholars adopt the view of legal instrumentalism under which laws are considered as a pragmatic tool that regulates behaviour of people or results in social changes.[194] Because of this social function, the success or failure of a law is evaluated by examining its ability to achieve the reforms initiated by the policymakers.[195] Within this framework, legal scholars define 'legal effectiveness' as the ability or capacity of a law to fulfil its social objectives or purposes.[196] According to this understanding, the evaluation of legal effectiveness places the emphasis on the relationship between legislation's purposes and the actual results it is intended to bring about.[197] In other

[193] This will be examined in detail in Chapter Four (UK law), Chapter Five (Canada law) and Chapter Six (Rescue laws in Vietnam) and be highlighted again in Chapter Seven (Comparison)
[194] GL Priest, 'The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards' (1993) 91 Mich L Rev 1929, 1932
Friedman and Macaulay (1977), cited by A Sarat, 'Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistance of a Research Tradition', (1985) 9 Legal Stud Forum, 23
[195] H Xanthaki, 'Quality of Legislation: an Achievable Universal Concept or a Utopian Pursuit?' in M T Almeida (ed.), Quality of Legislation (Nomos, Baden-Baden, 2011), p.7 available at <https://sas-space.sas.ac.uk/4854/1/Nomos_book_Quality_of_legislation_a_utopian_pursuit.pdf> (accessed 24 March 2020)
[196] A Allots, "The Effectiveness of Laws" (1981) 15 Val. U. L. Rev. 229, at 233
[197] H Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in C Stefanou and H Xanthaki (eds) Drafting Legislation. A Modern Approach (Ashgate: 2008) at 17

words, the examination will focus on identifying and explaining the gap between legislative texts (law in books) and reality (law in action).[198]

However, where there is insufficient data to inform whether the post-application of new legislation has achieved the intended purposes, it is important for the examination to be directed at the quality of legislation or quality of legislative texts.[199] Legal effectiveness, which is the ability of legislation to meet the social objectives set by the policymakers, is considered to be the highest pursuit for legislators in the drafting process.[200] Notwithstanding the universal understanding of the concept of 'effectiveness', there remains the question of how to evaluate the 'effectiveness' in legislation.[201] The most practical way to test the legal effectiveness is to determine whether the legislation has provided a clear set of objectives, purposes or benchmarks, which is often stated in preambles, general purpose provision of legislation or in policy papers of a party.[202] If answered in the affirmative, the examination then goes further with assessing whether the substantive text of the legislation is aligned to its purposes and conducive to results.[203] However, it is often the case that the purpose is not clearly stated in the legislation and thus efforts must be taken to identify it.[204] Furthermore, because the legal effectiveness is a qualitative concept, the assessment of this concept requires researchers to attribute to it specific elements, virtues or parameters.[205] However, attributing specific values to the effectiveness are subject to a degree of indeterminacy as there are different values perceived to constitute 'effectiveness', which

[198] A Sarat (n193) at 23
[199] H Xanthaki (195) p1-9
[200] Ibid.
[201] Ibid.
[202] M Mousmouti, 'The "effectiveness test" as a tool for law reform' available at <https://journals.sas.ac.uk/lawreview/article/view/2116> accessed on 24 March 2014
[203]Ibid. p.6
[204] Ibid. p.6
[205] Xanthaki (n195) p9

is explained by the differences in 'the legal, political, social, and financial parameters which form the legislative environment'[206]

In applying the above analysis into corporate rescue law, there is understanding that its purpose is to rescue viable companies from the financial crisis. Therefore, assessing the effectiveness of rescue law is associated with examining the extent to which a rescue law can achieve this purpose. As effectiveness is a functional qualitative concept, the examination into the effectiveness of rescue law must identify specific values or benchmarks the law must possess in achieving its purpose – saving viable insolvency companies. However, different values and benchmarks can be selected to be criteria for the examination due to the indeterminate nature of the concept of the effectiveness. Therefore, the selection of appropriate benchmarks must go along with providing clarity into the content of the benchmarks as well as justification for the selection. Following this approach to effectiveness, this section begins with examining how contemporary scholars have established their benchmarks for evaluation of the effectiveness of rescue law and what are the shortcomings pertaining to their works. Based on the knowledge of contemporary work, the author develops his own benchmarks along with providing clarification and justification for his selection.

3.6.2 Forming a set of benchmarks for evaluation of a rescue law

3.6.2.1 Finch's benchmarks

Finch makes a claim that there is no need for an insolvency law to be evaluated if a clear mandate is already provided by the legislators and the law sufficiently achieves these mandates.[207] However, this happens only on rare occasions for the case of insolvency law.[208] Once the legislators do not expressly state the statutory mandates,

[206] Xanthaki (n195) at 9
[207] V Finch 'The Measures of Insolvency Law' (1997) 17 Oxford J. Legal Stud. 227 at 249
[208] For example, the Cork Committee, in a review of English insolvency law, proposed a set of aims which the modern insolvency law should achieve, however, these proposed objectives are not stated in

evaluating the effectiveness of an insolvency law demands the establishment of evaluation benchmarks.[209] Following this approach, Finch proposes a way of evaluation with reference to four elements of efficiency, fairness, accountability and expertise.[210] Finch explains these benchmarks as follows,

> 'Efficiency' looks to the securing of mandated ends at lowest cost; 'expertise' refers to the proper exercise of judgment by specialists; 'accountability' looks to the control of insolvency participants by democratic bodies or courts or through the openness of processes and their amenability to representations, and 'fairness' considers issues of substantive justice and distribution.[211]

The proposed benchmarks invite criticism on a number of fronts. First, it is the issue of determining precisely the meaning of 'fairness' in the context of insolvency law. Making a reference to the term 'justice' to clarify the term 'fairness' does not effectively work here because in the context of insolvency different parties possess different incentives and perspectives regarding their rights and entitlements.[212] For example, the scheme of asset distribution can be considered to be fair by a creditor but can be viewed to be unfair by other creditors. Furthermore, there is no clear boundary of these benchmarks because the benchmark of 'efficiency' is seen to overlap 'expertise' and 'accountability' in the sense that 'expertise' and 'accountability' are components of 'efficiency' instead of independent criteria.[213]

Another point that opens to attack in Finch's approach is the contention that to some extent it is possible for a trade-off between efficiency and fairness, which means

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the legislation, *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982), para 129

[209] Finch (n207), 235

[210] Finch (n5) at 56

[211] Ibid.

[212] RJ Mokal, 'On Fairness and Efficiency' (2003), 66 MLR 452

[213] Ibid. 459-462

that 'fairness' can give way to 'efficiency' in designing an insolvency law.[214] This claim is heavily criticised because of its unsoundness.[215] Mokal argues that while 'efficiency' represents the procedural goal of insolvency law, 'fairness' represents the substantive goal of the law,[216] allowing a trade-off between 'fairness' and 'efficiency' means accepting that the substantive goal is less important than the procedural role.[217]

Notwithstanding the above limitation, this thesis recognises good values proposed by Finch, such as 'fairness', 'efficiency' and 'expertise'. Undeniably 'fairness' and 'efficiency' should be the first benchmarks of evaluation because the law has to deal with competing interests of the parties involved in a fair way and this should be achieved with low cost to guarantee to return to creditors. In addition, 'expertise' is essential in achieving the effectiveness of a rescue law as the rescue procedure cannot operate effectively by those who lack skills and knowledge. However, the key issue emerging in Finch's approach is that her benchmarks should be clarified and given contents, especially two criteria of fairness and efficiency. A benchmark should not only have a clear meaning but also address how rescue law should do to achieve it.[218]

3.6.2.2 Rotem's parameter for evaluating rescue law

Based on the conventional wisdom,[219] Rotem has synthesised a set of parameters for evaluating the effectiveness of rescue law that consists of four criteria, timely commencement of rescue, skills and expertise of those who control a company during rescue and those who devise and negotiate rescue plan, avoidance of governance conflict, and quality and scope of information extracted within a rescue model.[220] There are significant similarities in the benchmarks proposed by Finch and Rotem in the

[214] Finch (n5) at 55-56
[215] RJ Mokal, (n212) 458
[216] Ibid.
[217] Ibid
[218] See 3.5.2.3 Benchmarks for evaluation of rescue proposed by the thesis
[219] Rotem (n113) 150-152
[220] Ibid. 151-152

following aspects. First, in Rotem's examination, 'avoidance of governance conflict' can be viewed as another explanation to 'fairness' because no conflict of interest among parties in rescue means their rights will be kept in balance without any prejudices or bias arising. Second, the benchmark of 'expertise' is similarly recognised by both Finch and Rotem.[221] Third, it is possible to consider 'timely commencement' as an equivalence to 'efficiency' criteria as 'timely commencement' purports to save time and cost arising in rescue.[222] However, in comparison with Finch's approach, the parameters set by Rotem has more clarity in terms of providing the content for each element instead of introducing ambiguous terms such as 'fairness' and 'efficiency'.[223] For example, Rotem justifies the criterion of 'timely management' on the ground that commencing corporate rescue in a timely manner will prevent the company directors from hiding the insolvency affairs and thus enhance the rescue success.[224]

A distinct contribution of Rotem for evaluating rescue law is the introduction of the criterion 'quality and scope of information extracted'.[225] According to Rotem's examination, there are two approaches to rescue a company.[226] The first one is to rely on the formal rescue administrative paradigm prescribed by the legislation with the participation of parties such as creditors, directors, courts, and IPs.[227] The second approach is a market-oriented one, which is to sell the company to a third party under an auction instead of entering into a formal rescue procedure.[228] Under the latter rescue approach, the company will be sold as a going concern through an auction, and a third party who wins the auction will be the new owner of the company and the company as a new one without being subject to any liabilities and obligations before the company's

[221] Ibid. and Finch (n5) at 56
[222] Rotem, Ibid. 151
[223] Ibid. 150-153
[224] Ibid. at 151
[225] Ibid. 152
[226] Ibid. 152-153
[227] Ibid. 152
[228] Ibid. 153

insolvency.[229] In making the decision whether to purchase the insolvent company, a potential buyer must be in a position of understanding the company situation very well through the possession of significant information that can inform its decision, but this information is not often available for him in the market.[230] Therefore, it is the insolvency judge to make a decision whether to rescue a company under a formal legal procedure or sell it via an auction and in doing so, there must be an administrative mechanism that is capable of extracting accurate information about the company.[231] However, Rotem noted that not only the bankruptcy judge but all parties in the insolvency forum should be able to obtain the information, even the outsiders of the company.[232]

This thesis disagrees with the criterion of 'quality and scope of information extracted' under Rotem's approach for two reasons. First, the idea of selling a debtor company to a third party through an auction can happen before or after the company has entered into the rescue procedure. However, it seems to be very uncertain about the nature of the sale, whether it is rescue or liquidation. The sale has the nature of rescue in the sense that the company is sold as a going concern and transferred to a new owner, and the sale has the nature of liquidation in the sense that the company assets are sold piecemeal and this leads to termination of the company. If the sale happens before the company enters into the formal rescue, it is not the role of rescue law to provide information for potential buyers, rather the market conditions will decide if the company can be bought or not.[233] If the sale occurs after the company enters into the formal rescue, the decision to sell the company does not depend only on the disclosure

[229] Ibid. 153
[230] Lucian Arye Bebchuk,' A New Approach to Corporate Reorganisations' (1998)101 Harvard Law Review 775, at 776, cited by Rotem (n106)
[231] Rotem (n113) at 156
[232] Ibid. 157
[233] A decision to buy an insolvent company is made so long as the potential buyer can possess sufficient information about the company and when the market functions well to allow the purchase. See Ibid. 154

of information to potential buyers but depends on the expertise of the persons administering the rescue procedures, who must evaluate the information and come up with right decisions. Second, disclosure of information about the company in insolvency for the purpose of achieving a better sale may not be always a sound policy for it can negatively affect the valuation of the company in that this information will decrease the business value of the company in the market. For the reasons discussed, this thesis is of the opinion that 'quality and scope of information extracted' cannot have a decisive role in evaluating the efficiency of a rescue law.

3.6.3.3 Benchmarks for evaluation of rescue law proposed by this thesis

This thesis agrees with Finch in that 'fairness' and 'efficiency' should be two main benchmarks for examining the effectiveness of rescue law. However, because ò the difficulty in construing the meaning of these benchmarks, their contents should be reasonably given to determine what they expect a rescue law to have. As discussed above, this thesis recognises some good values in the criteria proposed by Rotem.[234] Based on the works of the two scholars, this thesis develops a set of benchmarks for evaluating rescue law, including time and cost, expertise, abuse management and creditor participation.

(i) Time and cost

'Time and cost of rescue' should be the first benchmark for evaluation. In perceiving that the ultimate goal of rescue is to restore insolvent companies and make payments to creditors, rescue law is considered to be efficient only when it operates in a cost and time-saving manner.[235] Apparently, relying on rescue law will not be a feasible option if it provides for a lengthy and costly procedure. Finch addresses that rescue law

[234] See 3.5.2.2 Rotem's parameter for evaluating rescue law in this chapter

[235] According to Oxford Dictionary, 'efficiency' is defined as 'the quality of doing something well with no waste of time or money', <https://www.oxfordlearnersdictionaries.com/definition/english/efficiency?q=efficiency> accessed 12 December 2016

should achieve its goal at the lowest cost[236] and Rotem also finds rescue law should provide for a timely commencement of rescue procedure.[237] Time and cost relate to each other in that the longer rescue procedure is carried out, the more cost it will produce at expense of creditors.

Regarding time of rescue, the examination will focus on whether a law contains provisions that allows rescue to be carried out in a time-saving manner. Specifically, this thesis will examine provisions regulating the time for commencing rescue procedures, the length of the moratorium/stay of creditor's action and the time for completion of rescue.[238] As for the cost, rescue law is viewed to be effective if it is able to maximise creditor's return and reduce rescue costs, especially IP's fees as this expense often constitutes a dominant part of the costs of rescue.[239] However, it seems to be unlikely to obtain specific figures on creditor's return and the payment for IP's fees since these figures would be very different from case to case, which is subject to a thorough empirical study. Due to the unavailability of the empirical study,[240] the examination directs at whether rescue provides a mechanism to determine IP's fee appropriately, for example, the law confers creditors a right to decide this expense or to petition the court to adjust this fee where they find is unreasonably high.[241]

(ii) Expertise

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[236] Finch, (n5) at 56
[237] Rotem (n113)
[238] This examination will be applied to evaluate the effectiveness of rescue law in the selected countries in the next chapters.
[239] For example, the UK Insolvency Service, in their report, found a higher a level of insolvency fee in the administration, resulted from the increase of IP fee. See the UK Insolvency Service, *Enterprise Act 2002 - Corporate Insolvency Provisions: Evaluation Report* (2008), at 111, available at <https://webarchive.nationalarchives.gov.uk/20080610162953/http:/www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/EA02CorporateInsolvencyReport.pdf> accessed 3 January 2017
[240] The empirical studies on the rescue are not always available in the three selected countries. For example, this thesis makes reference to some studies regarding the UK law, however, there is the absence of similar studies in Canada and Vietnam
[241] This examination will be applied to examine the laws of UK in Chapter Four (4.3.2.1 Time and cost) Canada in Chapter Five (5.4.1 Time and cost) and Vietnam in Chapter Six (6.4.2.1)

The thesis agrees with the two scholars to include 'expertise' as the second benchmark because a rescue procedure cannot be operated effectively by the parties who lack knowledge, skill and experience in area of insolvency. The parties participating in rescue administration include company directors, court and IPs. In rescue, expertise is not only exercised in operating the company business but also in formulating the rescue plan and monitoring the rescue proceeding. Therefore, the examination will focus on if the parties involved in rescue administration possess a sufficient degree of expertise and co-ordinate their expertise. For example, in recognition that IPs should earn professional qualification to participate in a rescue proceeding,[242] the thesis will examine whether rescue law has sufficiently provided for the licencing IPs to guarantee the service required, and whether the law allows the IP to assist the company in rescue or to assist the court in monitoring the rescue.[243]

(iii) Abuse management

Abuse management can be considered as the alternative explanation to the 'fairness' proposed by Finch and the 'avoidance of governance conflict' proposed by Rotem because it can convey the meaning of fairness more clearly than the latter. While there is the difficulty in perceiving the true meaning of the 'fairness' under Finch's proposition,[244] the 'avoidance of governance conflict' does not completely convey the meaning of fairness as the law is likely to achieve fairness from tackling potential abuses arising which prejudice interests of parties involved rather than avoiding the governance conflict. Furthermore, under the examination of expertise, if parties sufficiently develop expertise in rescue, they can easily deal with the problem of conflict of interest. For example, insolvency judges who possess a sufficient degree of

[242] UNCITRAL, Legislative Guide on Insolvency Law (2004) at 174
[243] This examination will be applied to examine the effectiveness of rescue laws of the UK in Chapter Four (4.3.2.2 Expertise), Canada in Chapter Five (5.4.2 Expertise) and Vietnam in Chapter Six (6.4.2.2 Expertise)
[244] Finch (n5) at 56

expertise can adjudicate the dispute among the parties in rescue. Therefore, the thesis finds there is no need to include the 'avoidance of governance conflict' in the set of evaluation benchmarks. Instead, the thesis directs the investigation at whether there is potential abuse arising from a rescue procedure and whether rescue law is capable of tackling potential abuses.[245]

(iv) Creditor participation

Creditor participation is a new evaluation benchmark proposed by this thesis to assess the effectiveness of rescue law. This benchmark requires that rescue law should provide incentives for creditors to actively participate in the rescue procedure. The idea of creditors participating in rescue administration is not appreciated for creditors tend to be indifferent to rescue management.[246] Due to the uncertainty over the rescue's success, creditors are unlikely to invest time and effort in managing the company.[247] Although creditors do not directly take part in the decision-making process in corporate rescue, their interest is guaranteed by insolvency judges and IPs who monitor the rescue procedure. However, it does not mean creditors do not have a role to play in a rescue proceeding. Instead, they have significant participation that decides the success of corporate rescue in three aspects. Firstly, by exercising the right to approve rescue plans, creditors decide the likelihood for rescue to occur.[248] Secondly, there is often a creditor committee established by legislation to contribute to the rescue supervision.[249] Thirdly, by extending finance to fund rescue plans, creditors are the party who

[245] This examination will be applied to examine the effectiveness of rescue laws of the UK in Chapter Four (4.3.2.3 Abuse management), Canada in Chapter Five (5.4.4 Abuse management) and Vietnam in Chapter Six (6.4.2.4 Abuse management)
[246] Wood (n14) 220
[247] Ibid.
[248] It will be seen in the following chapters that rescue laws in the selected countries require the creditor approval for a rescue plan to be carried out.
[249] For example, s. 1102 US Bankruptcy Code, para 57 Schedule B1, the UK Insolvency Act 1986,

significantly decides the prospect of rescue success.[250] The most significant contribution of creditors to rescue lies in the last aspect, which is providing the rescue finance or 'DIP finance' for implementing a rescue plan. This kind of finance has been largely recognised for its importance in providing an insolvent company with a prospect of success as well as expediting rescue procedure by shorting the time of its implementation.[251] It is undeniable that borrowing money at the time of being insolvent is not an easy task for a company because substantial assets of the company are likely to be subject to security. Lending the company at this time seems to be a risky decision because the likelihood for the lender to recover his finance will be undermined in case of rescue failure if the company does not offer the lender of the rescue finance a mean of security. Therefore, giving the DIP finance a super-priority over the existing security will incentives the lender to provide finance to implement the rescue plan.

As such, there are three important factors a rescue law must have in satisfaction with this benchmark: first, providing a stay of proceedings against creditors to stop their individual enforcement,[252] second, providing a fair scheme of voting,[253] and third, providing a guarantee for the rescue finance extended by creditors to implement the rescue plan.[254]

An argument against creditor participation may be that calling for creditors to fund the rescue plan may invite potential abuses insofar as upon extending the funding, creditors may demand more benefits under a financing agreement and thereby exert

[250] The finance provided to by creditors implement a rescue is termed 'DIP financing'. This will be examined deeply in the section for evaluating the effectiveness of rescue law in each country.
[251] Sris Chatterjee, Upinder Dhillon, and Gabriel G. Ramirez, 'Debtor-in-Possession Financing' (2004) Journal of Banking and Finance, Vol. 28, No. 12, pp. 3097-3112; Sandeep Dahiyaa and others, 'Debtor-in-possession financing and bankruptcy resolution: Empirical evidence', (2003) 69 Journal of Financial Economics, 259–280
[252] INSOL International, 'Statement of Principles for a Global Approach to Multi-Creditor Workouts II' (2017), principle 1 & 2
[253] Ibid. principle 3,4,6, and 7
[254] Ibid. principle 8

influence on the decision-making process for their own benefits.[255] Admittedly, this possibility may occur but only to the extent that creditors occupy a dominant position in the administrative management of rescue. However, there is the participation of judges who take the role of supervising and monitoring the abuse as well as IPs who act for the best interest of creditors as the whole, and this will reduce potential abuse arising from creditors' inclination to influence the decision-making process. For example, the possibility that a creditor demands for favourable treatment under a financing agreement can be curtailed by a judge who reviews the agreement and makes a ruling in a manner that ensures a balance of interest among parties.[256]

3.7 Conclusion

This chapter provided an in-depth examination into the core issues that underpin corporate rescue law as follows. First, the examination addressed that rescue is a broad definition that involves any remedial actions to avert a company's failure in crisis. However, in the legal context, it is a narrow concept in that it refers to legal procedures provided for settling the insolvency affairs of a company. Rescue can be categorised into formal and informal rescue. While the formal rescue takes the form of legal proceedings prescribed by insolvency legislation, the informal rescue concerns remedial measures carried outside the legislative scope. There is the relationship between the formal and informal rescue in that both can be used and support each other in rescuing a company.

Second, the chapter has examined the application of the cash flow test and the balance sheet test in determining the insolvency status of a company. The chapter addressed the possibility of initiating corporate rescue in an early manner without

[255] Wood (n14) 400-1
[256] David A. Skeel, Jr, 'Creditors' Ball: The 'New' New Corporate Governance in Chapter 11' (2003). Faculty Scholarship. Paper 29, at 42 < http://scholarship.law.upenn.edu/faculty_scholarship/29> accessed 15 January 2017

recourse to the two tests yet makes caution of the limits of this practice in causing business distortion for the company and unfair competition in the market.

Third, the chapter addressed the importance of rescue law in preserving a company and clarified two different policies of company rescue and business rescue. While company rescue aims to preserve a company as a whole with the same ownership, business rescue purports to preserve the going-concern value of a company which can result in the sale of the company business to a new owner.

Fourth, this chapter identified three main models of rescue administration, DIP, the PIP and the hybrid model. In a brief examination of the application of these models in rescue laws of the select countries, the chapter found the UK has applied all three models under its rescue law, meanwhile, rescue law of Canada and Vietnam share the similarity in the employment of the PIP model.

Last, in addressing the limits inherent in the literature regarding establishing benchmarks for evaluating a rescue law, the chapter developed a set of evaluation benchmarks which includes four elements time and cost, expertise, abuse management and creditor participation. These benchmarks will be employed to assess effectiveness of rescue law of the selected countries in the following chapters.

In the next chapter, the thesis will launch a detailed examination of the rescue law of the UK.

CHAPTER FOUR

CORPORATE RESCUE LAW IN THE UNITED KINGDOM

4.0 Introduction

In the previous chapter, this thesis provided the discussion addressing the main models of rescue administration as well as formulating the benchmarks for evaluating the effectiveness of a rescue law. Furthering the discussion, this chapter examines the extent to which the rescue law of the United Kingdom (UK)[1] reflects these models and evaluates the effectiveness of the UK rescue law. It first maps out the legal environment comprising unique historical and economic conditions in which the rescue law operates. Then it makes a detailed investigation into the informal rescue under the London Approach and three rescue procedures, namely the administration and the Creditor Voluntary Arrangement (CVA) under the Insolvency Act 1986 (IA1986) and the Scheme of Arrangement (SA) under the Company Act 2006 (CA2006). Finally, the chapter is devoted to critically examining the effectiveness of the UK rescue law under the four benchmarks established in the previous chapter.[2]

4.1 The societal context where UK rescue law is operating

The socio-legal and comparative approach to legal study suggests that an examination of a legal system confined merely to 'rules and statutes' in isolation with the societal context where it has operated is insufficient because it cannot address factors that influence the shaping of that legal system.[3] Therefore, the examination of a legal system should be conducted in tandem with taking into consideration the history, ideology,

[1] For the purpose of this dissertation, the UK rescue refers to the law of England and Wales.
[2] See Chapter Three (3.5.2 Formulating benchmarks for evaluation of a rescue law)
[3] Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (Oxford University Press, 3edn, 1998) and M. Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 International and Comparative Law Quarterly 495, 496.

social-economic conditions to acquire a rounded understanding. Following this approach, this section examines the legal environment in which the UK rescue law has operated.

4.1.1 A brief history of corporate insolvency law in the UK.

The insolvency law in the UK was not introduced until the enactment of the Joint Stock Companies Act 1844, which provided a company with the status of a legal distinct entity although shareholders still bore unlimited liability.[4] The growth of companies at this time urged the need for liquidating financially troubled companies, resulting in the enactment of the Winding-Up Act 1844.[5] However, apart from this liquidation legislation, private practices for corporate restructuring were developed to deal with situations where companies entered into insolvency.[6] For example, the 'majority rule' was created under a trust deed to allow a majority of creditors to restructure the property rights of the minority.[7] Provisions for private arrangement between a debtor company and its creditor were first included in the Joint-Stock Companies Arrangements Act 1870 to provide for 'compromises and arrangements between creditors and shareholders of joint-stock and other companies in liquidation.'[8]

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[4] Joint Stock Companies Act, 7&8 Vict, c110.

[5] Winding Up Act 1844, 7&8 Vict, c111

[6] John Tribe, 'Companies Act Schemes of Arrangement and Rescue: the lost cousin of restructuring practice?', at 5, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328487> accessed 2 February 2017

Jérôme Sgard, 'Bankruptcy Law, Majority Rule, and Private Ordering in England and France (Seventeenth–Nineteenth Century)' (2009-2010) OXPO Working Paper, at 2, 9-11. In this article, Sgard cited the finding of Bowen as follows.

> [T]he great commercial world, alienated and scared by the divergence of the English bankruptcy law from their own habits and notions of right and wrong, avoided the court of bankruptcy as they would the plague. The important insolvencies which had been brought about by pure mercantile misfortune were administered to a large extent under private deeds and voluntary compositions, which, since they might be disturbed by the caprice or malice of a single outstanding creditor, were always liable to be made the instruments of extortion] (Bowen 1907)

See, <http://www.politics.ox.ac.uk/materials/centres/oxpo/working-papers/wp_09-10/OXPO_WP09-10b_Sgard.pdf> accessed 2 February 2017

[8] Joint Stock Companies Arrangements Act, 1870, 33 & 34 Vict c 104

The modern corporate insolvency in the UK began with the establishment of Cork Committee in 1977, with the mandates of reviewing and making recommendations to reform the insolvency legal system.[9] The recommendations by the Cork Committee led to the enactment of the IA1985[10] and then the IA1986[11] to overcome the shortcomings of the former statute. Presently, the IA1986 is the main legislation to deal with corporate insolvency and corporate rescue. There are two main procedures for corporate rescue in the UK, which are the administration[12] and the CVA[13] under the IA1986. Apart from these procedures, the CA2006 provides for another rescue procedure which is the SA.[14]

4.1.2 The rise of rescue culture in the UK

The foundation of UK rescue law was the establishment of the Cork Committee in 1977 to overhaul the insolvency legal system.[15] Through their report, the Committee proposed recommendations that supported the introduction of corporate rescue law.[16] Accordingly, the Committee suggested a 'possible less formal procedure as alternatives to bankruptcy and company winding-up proceeding in appropriate circumstances'[17] As recognised in the report, since insolvency affairs affect not only a company and its creditors but also the public interest, it is important to preserve viable companies that make a useful contribution to the economy.[18] The recommendations by the Cork Committee is seen to give rise to the so-called 'rescue culture' which contains multiple

[9] The committee was chaired by Sir Kenneth Cork, therefore, it is commonly referred as to 'Cork Committee' and the report of the committee is also referred as to 'Cork Report'. For detail of the report, see Cork Review Committee Report on Insolvency Law and Practice 1982 (Cmnd 8558).
[10] Insolvency Act 1985, c65
[11] Insolvency Act 1986, c45.
[12] IA1986, SchB1
[13] Ibid. Part I and SchA1
[14] CA 2006, part 26
[15] The Cork Committee (n9) and Muir Hunter, 'The Nature and Function of a Rescue Function' (1999) 104 Commercial Law Journal, 433.
[16] The Report on Insolvency and Law Practice, commonly known as the 'Cork Report'
[17] Muir Hunter (n15) 433
[18] Cork Report (n9) 19

attributes of 'positive', 'protective', 'corrective' and 'punitive', which means that a chance of rescue for deserving companies must go along with severe treatment for true economic delinquents.[19] In order to nurture this rescue culture, Hunter addresses key principles, including the judicial pressure to induce the parties into a compromise arrangement, the need for enforceable mechanisms of binding creditors collectively in their arrangement, the availability to have a moratorium under the CVA, the control of Insolvency Practitioner's (IP) qualification and professionalism, the participation of banks into rescue and the availability of funding to carry out rescue.[20]

The philosophy of rescue has been gradually accepted and endorsed in the UK. In terms of legislation making, the IA1986 provides two rescue-oriented procedures, the CVA and the administration order, as alternative routes to the winding-up.[21] Regarding judicial recognition, the House of Lords officially gave their acceptance of corporate rescue in *Powdrill v. Watson*, stating that 'the rescue culture, which seeks to preserve viable businesses, was and is fundamental to much of the Insolvency Act of 1986'.[22] Following the legislative and judicial recognition, government officials[23] and bankers[24] voiced their support and endorsement for the rescue culture. A significant example of the bankers' endorsement is the introduction of the London Approach, a set of principles developed by the Bank of England to deal with the financial difficulties of insolvent companies without resorting to formal legislation.[25] In terms of professional practice

[19] Hunter (n15) 435
[20] Ibid. at 437-438
[21] IA 1986, part I and II.
[22] *Powdrill v. Watson* [1995] 2 AC 394, [1995] 2WLR 312, [1995] 2 All ER 65, quoted by Hunter (n15) at 433.
[23] The Department of Trade and Industry and the Treasury, in the White Paper 1998, 'Our Competitive Future: Building Knowledge Driven Economy', examined how to further rescue culture more efficiently'. And see Peter Mandelson, the Secretary of Trade and Industry in 1998, had made a speech for reassessment of attitude toward business failure and encourage entrepreneurs to take risks in the future (quoted by Hunter (n15) at 462).
[24] For example, the British Bankers' Association, *Banks and Business Working Together* (London, 1997).
[25] John Flood and the others, 'The Professional Restructuring of Corporate Rescue: Company Voluntary Arrangements and the London Approach'

development, the rise of the rescue culture is partly a factor demanding regulations on licensing and enhancing the professionalism of IPs. For example, the IA986 subjected membership of IPs to a Recognised Professional Body (RPB) or to the licensing power of the Secretary of State directly.[26] There are now more than 1,700 IPs who passed the insolvency test along with earning a sufficient level of experience in order to be granted a license to practice in the UK.[27] The rescue culture also brings about a new character, namely turnaround professionals, who will assist companies to avert their financial difficulty before resorting to formal insolvency.[28]

A considerable change in UK rescue law is the introduction of the Insolvency Act 2000 (IA200) and the Enterprise Act 2002 (EA2002).[29] While the IA2000 facilitates a moratorium under the CVA procedure to support rescue for small companies,[30] and the EA2002 introduces a new administration procedure to replace the administrative receivership.[31] Since the enactment of the EA2002, there has been a change of rescue philosophy, with the focus shifting from dealing with ex-post consequences towards preventing ex-ante risks.[32] Through the replacement of the administrative receivership with the administration under this Act, rescue is no longer confined to making a proper

<http://www.johnflood.com/pdfs/Prof_Restructuring_of_Corp_Rescue_1995.pdf > accessed 20 July 2017.

[26] Insolvency Act 1986, part XIII. According to the Insolvency Service, there are 5 RPBs in the UK, including the Association of Certified Chartered Accountants (ACCA), the Institute of Chartered Accountants in England and Wales (ICAEW), the Institute of Chartered Accountants in Ireland – CARB (ICAI), the Institute of Chartered Accountants in Scotland (ICAS) and the Insolvency Practitioners Association (IPA). See The Insolvency Service, 'Recognised Professional Bodies' (2014) < https://www.gov.uk/government/publications/insolvency-practitioners-recognised-professional-bodies/recognised-professional-bodies> accessed 20 July 2017

[27] R3, 'The Future of Insolvency Practitioner Regulation', at 1 <https://www.r3.org.uk/media/documents/policy/policy_papers/insolvency_industry/The_future_of_insolvency_practitioner_regulation.pdf> Accessed 20 July 2017.

[28] V. Finch, *Corporate and Insolvency: Perspectives and Principles* (Cambridge University Press, 2edn, 2009) 222

[29] Enterprise Act 2002 <http://www.legislation.gov.uk/ukpga/2002/40/contents> accessed 29 May 2017 and Insolvency Act 2000 <https://www.legislation.gov.uk/ukpga/2000/39/contents> accessed 29 May 2017

[30] IA1986, SchA1.

[31] Ibid.

[32] Finch (n28) at 253

intervention at an early stage but now it has evolved to a new level, which is risk management.[33] The abolishment of the administrative receivership dictates that creditors can no longer take advantage of this regime to collect debts; rather, they have to rely on the new administration under which the administrator acts in the interest of all creditors as a whole.[34] The administration is conducted only if the administrator makes the statement of consent to act after evaluating the company's viability, and within eight weeks of their appointment, he must present proposals to creditors.[35] Under this strict timeframe, it is unlikely that the administrator will accept the appointment if he has not been provided with a sufficient amount of information. Therefore, major creditors, such as banks who wish to appoint the administrator, must be already in the position of obtaining information about the company as soon as possible. By entering into a financial agreement with the company, banks may exercise their lending power to demand that borrowing companies have to provide and update their financial situation as well as identifying potential risks and how to manage these risks.[36] The tendency of shifting the rescue focus is reinforced by the increasing requirement for corporate disclosure.[37] For example, under the Company Act 2004, the pre-insolvency scrutiny for a company is enhanced with the requirement for the directors to ensure that there is no relevant information that they know but the auditors are unaware of.[38] In addition, the CA2006 demands a company' directors to conduct a business review on how they perform their duties under which directors have to identify principal risks and uncertainty facing a company.[39]

[33] Ibid. 253.
[34] IA 1986, s.72A
[35] IA 1986: SchB1, para 52
[36] Finch (n28) at 256.
[37] Ibid.
[38] the Company Act 2004: s.9 < https://www.legislation.gov.uk/ukpga/2004/27> accessed 5 May 2017
[39] Company Act 2006: s. 417(3)

4.1.3 The unique legal environment where rescue law operates in the UK

The UK rescue law has been shaped under the influence of the following factors. First, the UK is identified as a pro-creditor insolvency jurisdiction.[40] This is reflected by the way the law confers creditors the right to protect themselves from insolvency. Traditionally, the main measure for a secured creditor to collect their debt was to appoint a receiver, who will take control of a company and realise its assets to pay the creditors.[41] However, when the receiver finished his job and handed the control back to the company's directors, the company was unlikely to survive because of the shortage of finance and assets.[42] This practice of debt collection had been employed for a long time in the UK until the enactment of the EA2002, which abolished the right of a floating charge holder to appoint a receiver. Alternatively, a floating charge holder now has the only option to initiate the administration procedure under which the administrator acts for the interest of creditors as a whole. The pro-creditor nature of the UK law also features a hostile attitude towards the management of an insolvent company. For example, despite the acceptance of the philosophy behind corporate rescue, the UK appeared to have hostility over the model of debtor-in-possession inspired by Chapter 11 of the United States (US) Bankruptcy law.[43] As corporate insolvency is perceived as wrongdoing rather misfortune,[44] the UK approach to rescue law is to replace directors of an insolvent

[40] P. Wood, 'Principle of International Insolvency' (1995) 4 International Insolvency Review 94, 97-98.
[41] RM Goode, *The principle of Corporate Insolvency Law* (Sweet and Maxwell, 4th edn, 2011) 315 and A. Keay and P. Walton, *Insolvency Law: Corporate and Personal* (Jordans, 3edn, 2012) 54-57
[42] Paul J. Omar and Jennifer Gant, 'Corporate Rescue in England: Past, Present and Future Reforms' (2016) 24 Insolvency Law Journal, available at <http://irep.ntu.ac.uk/id/eprint/27854/1/Pubsub5402_Omar.pdf> at 3
[43] Ibid. at 7
[44] Westbrook 'A Comparison of Bankruptcy Reorganisation in the US with Administration Procedure in the UK' (1990) 6 Insolvency Law and Practice 86, 88 and G Moss 'Chapter 11: An English Lawyer's Critique' (1998) 11 Insolvency Intelligence 17

company with outside professionals and punishing directors with culpable mismanagement.[45]

Secondly, the UK insolvency law relies heavily on the expertise of IPs. Stemming from the attitude towards treating insolvency as management wrongdoing, borrowing IP's expertise to control the rescue procedure appears to be a feature of the UK law. In recognition of the importance of IPs, the Cork Committee recommended that IPs should be provided by the private sector but subject to professional regulations to ensure their competence and integrity.[46] In the UK, IPs are often accountants and lawyers whose profession is regulated directly by the Secretary of State or by RPBs to maintain professionalism.[47] There are currently five RPBs in the UK[48] tasked with conferring membership for qualified IPs who have earned a level of working experience and successfully passed the JIEB examination.[49] The development of the IP professional in the UK is also recognised through the establishment of R3 (the Association of Business Recovery Professionals) whose objective is to support IPs profession through training, education and networking.[50]

Thirdly, UK banks have an important role in providing finance and rescuing debtor companies. Though companies can rely on various ways for financing, among other creditors, banks have been seen as a dominant financer to provide finance for both

[45] Goode (n41) 62
[46] Finch (n28) at 185
[47] Cork Report, ch.15
[48] See Insolvency Service (n26), The RPBs are self-regulatory organisations in that IPs must satisfy requirements of education, training, and experience provided by these RPBs to become their members and must follow their regulations to maintain their membership. However, the RPBs are subject to the oversight of the Insolvency Service, who exercises the Secretary of State's function regarding insolvency to ensure that the RPBs regulate their members properly with suitable rules. In doing so, there is a 'Memorandum of Understanding' between the RPBs and the Secretary of State to guarantee the consistency in RPBs' approaches to regulate IPs practice.
[49] It is the Joint Insolvency Examination Board (JIEB) exam organised by the RPBs. See ICAEW, 'Qualifying as an Insolvency Practitioner' at <https://www.icaew.com/technical/insolvency/qualifying-as-an-insolvency-practitioner> accessed 6 September 2017
[50] See R3 Website at <https://www.r3.org.uk/what-we-do> accessed 7 September 2017.

small and medium enterprises (SMEs) and large companies.[51] Not only do the banks involve in lending, but they have a significant role in corporate rescue. A very good example of this is the London Approach, a set of guidance that features the banks' co-operation in settlement of debt for distressed companies.[52] It was the Bank of England who first envisaged the necessity of rescuing large companies during the economic recession, resulting in the introduction of the London approach to guide the co-operation among bank creditors in rescue. Also, it is the Bank of England who still backs up the efficiency of the approach by exercising its influence on other banks to ensure they follow the principles by the approach and be willing to co-operate in the rescue. Despite findings addressing the UK banks' lack of concession and reluctance in restructuring debts that leads debtor companies to liquidation,[53] the replacement of the receivership with the administration by the EA 2002 has placed the banks in a different position other than merely collecting debts.[54] The banks now have to be actively involved in rescue as they no longer have the right to appoint a receiver to take over the company business to satisfy the debts owed to them. Instead, they are motivated to monitor the risk of insolvency at the early stage and co-operate with the administrator to solve the financial distress of debtor companies.[55]

4.2 Rescue law in the UK

4.2.1 The London Approach – an informal rescue measure

[51] The Bank of England, 'Understanding and Measuring Finance for Productive Investment', Discussion Paper April 2016, available at <http://www.bankofengland.co.uk/financialstability/Documents/fsdiscussionpaper/080416.pdf> accessed 18 Sep. 17 and A Cosh and others, 'Financing UK Small and Medium-sized Enterprises 2007 Survey' (2018) <https://www.cbr.cam.ac.uk/fileadmin/user_upload/centre-for-business-research/downloads/research-projects-output/sme-finance-report-final.pdf> accessed 18 September 2017.
[52] Flood (n25).
[53] J.R. Franks and O. Sussman, 'Financial Distress and Bank Restructuring of Small-to-Medium Size UK Companies' (2003) CEPR Discussion Paper No. 3915
[54] Finch (n28) 255-8
[55] Ibid.

Informal rescue involves private negotiation between a company and its creditors without resorting to formal procedures prescribed by legislation. The London Approach is a very good example of this kind of rescue. The London Approach has its origin dating back to the economic crisis in the mid-1970s when companies faced very serious financial difficulty at a large scale. The Bank of England, at that time, took an active role to promote corporate restructuring by acting as a broker to co-ordinate banks to solve the financial difficulties of large companies.[56] The Bank then gradually changed its policy, shifting its focus from direct participation towards transferring its expertise and guidance to market participants and left corporate financial difficulty to be solved by themselves.[57] After a number of discussions with London-based banks and their professional advisers, in 1990, a set of guiding principles was created in the name of 'London Approach'.[58] Although the Bank now has the policy of limiting its intervention into corporate restructurings, it can exercise its influence to make sure the market participants follow the principles set by the approach.[59] In some cases, the Bank's participation appears to be necessarily important to ensure rescue success. For example, in the case of Yell Group – a famous publisher facing a debt restructuring problem, the Bank secretly mediated the creditors' participation to ensure the likelihood of sufficiently getting creditor approval.[60] Noticeably, its efforts included using its influence to contact foreign banks in Spain to call for their participation in the process.[61]

[56] J. Flood (n25)
[57] J Amour and S Deakin, 'Norms in Private Insolvency Procedures: the London Approach to the Resolution of Financial Distress'(2000) ESRC Centre for Business Research, University of Cambridge, Working Paper 173, 16.
[58] Ibid.
[59] Ibid. 30-32.
[60] Mark Leftly, 'Yell's Restructuring Heralds the Return of the 'London Approach' (2009) <http://www.independent.co.uk/news/business/news/yells-restructuring-heralds-the-return-of-the-london-approach-1830370.html> accessed 03 September 2017.
[61] Ibid.

The London Approach involves two phases.[62] At the first phase, a debtor company informs its banks about its financial difficulty and asks for the banks' support in rescue. The banks will offer the company a stay during which no enforcement action is to be carried out against the company while credit and additional working capital may continue to be provided. During that time, an intensive investigation into the company's affairs is conducted to inform the banks about the rescue prospect. If the rescue is viable, some restructuring actions will be called for.[63] The second phase involves the implementation of the restructuring plan. There will be a lead bank who co-ordinates a series of negotiations among the creditor banks, accountants and the company. The negotiation could result in some of debt restructurings such as debt-equity swap or other debt compromise forms.[64]

The London Approach has its merit in the confidentiality for not disclosing the debtor company affair to the public and encouraging banks to co-operate together to solve the insolvency of a debtor company.[65] A weakness of the London approach is that it is very expensive to implement, thus is used to restructure high-profile companies.[66] Nevertheless, its success has invited the British Bankers Association to use the principles to resolve the financial difficulty of SMEs.[67] This resulted in the introduction of the statement of principles on how banks work together to assist SMEs in financial difficulties,[68] and the core value of the principles still lies in voluntary co-operation of the

[62] Amour and Deakin (n57) 18-19.
[63] Ibid.
[64] Ibid.
[65] John Flood (n25) at 29.
[66] Ibid.
[67] Katarzyna Gromek Broc and Rebecca Parry, *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (Kluwer Law International, 2004) at 155
[68] Ibid.

banks. The success of the London Approach is also recognised at international level as it has been modified to apply to corporate restructuring in several countries.[69]

Given the changes in the global credit market, however, the London Approach has been facing certain challenges.[70] With the existence of the financial market, companies no longer rely on bank loans as the only form of credit; and identities of creditors change continuously upon debt transfers. This situation has challenged the effectiveness of the London approach in the extent to which the banks cannot exert their influence on creditors who are not connected to them. Furthermore, the change of creditor's identity upon debt transactions makes it very difficult for the banks to call for the creditors to participate in rescue negotiation.

4.2.2 Formal rescue procedures under the legislation

4.2.2.1 The Administration

4.2.2.1.1 The origin of the administration

The administration has its origin related to the two procedures, namely the administrative receivership and the administration order (or the old administration) under the IA1986. The receivership was mainly a device for creditors to collect debts. Under common law, a receiver is a person appointed by the court to receive the rent and income to pay secured debts.[71] The appointment of a receiver is made when a debtor defaults in payment of debts and this is often stated in an agreement, such as a mortgage deed. The power to appoint a receiver then was legislatively regulated in 1860.[72] Initially, a receiver

[69] Thomas Laryea, 'Approaches to Corporate Debt Restructuring in the Wake of Financial Crises', IMF Staff Position Note (2010) SPN/10/02, at 16-17, available at <https://www.imf.org/external/pubs/ft/spn/2010/spn1002.pdf> accessed 04 September 2017
[70] Amour and Deakin (n57) 34-36
[71] *Re Morritt* (1886) 18 QBD 222.
[72] Conveyancing and Law of Property Act 1881, s.19. Presently, the power to appoint a receiver in a mortgage is subject to a Law of Property Act 1925.

was appointed by courts, however, when floating charge became a common security device for lending, a debenture allowed a receiver to be appointed on an out-of-court basis with the power of not only selling but also managing the charged property.[73] The IA1986 stipulated the appointment of a receiver under the administrative receiver procedure, under which the receiver was granted the power to dispose of the debtor's charged property to pay the charge holder.[74] However, the introduction of the EA2002 brought about a significant change to administrative receivership. Since 15 September 2003 (which is the date the Act took effect) a holder of a floating charge is no longer able to appoint a receiver, rather, the only way for him to collect debts is to rely on the administration procedure, under which the administrator is appointed to act for the interest of creditors as a whole.[75] This follows that a creditor no longer has the privilege to collect his own debt by appointing a receiver because the administrator does not act solely for a person who appoints him but for the creditors as a whole. This change is considered important for corporate rescue in the UK as one of the primary objectives of the new administration is to rescue insolvent companies.[76]

The enactment of the EA2002 also brought an end to the old administration or the administration order. Although the old regime offered some protections for debtor companies, such as a moratorium to prevent creditors from taking action to collect debts,[77] the use of the old administration as a rescue device was very rare for several reasons.[78] Firstly, the administration was created to replace receivership in cases where none of the

[73] A floating charge is a security that covers all the company's asset, including present or future assets. A floating charge will be crystallised and become a fixed charge – a charge executed on a specific piece of assets if there is an event for crystallisation such as debtor default on payments or liquidation.
[74] IA 1986: s.29 (2) and s.43.
[75] However, the holder of a debenture entered before 15 September 2003 enable to opt for either appointment of a receiver or administrator.
[76] IA 1986: SchB1, para 3.1(a).
[77] Ibid s.10(1).
[78] According to the Department of Trade and Industry (DIP) Among 88000 corporate insolvencies in the UK, there is only 447 Administration Orders were made, cited by Finch (n28) at 367

creditors is a floating charge holder. However, if there was a creditor holding a floating charge, the administration occurs only when the creditor's consent is obtained.[79] However, in most cases, creditors with a floating charge tend to initiate the receivership instead of the administration. Secondly, the lack of popularity of the old administration is attributed to its high cost stemming from the involvement of court and IPs.[80] Thirdly, its limited use is blamed for the administrator owing no obligation to consult creditors before making decisions.[81] The replacement of the old administration with the new one by the EA2002 has strengthened corporate rescue as the procedure purports to pursue a hierarchy of objectives with rescue being the first priority.[82] Furthermore, by preventing floating charge holders from relying on the receivership to collect their own debt, the new administration has become a dominant insolvency procedure in the UK.[83]

4.2.2.1.2 Objectives of the administration

The para 3(1) of Schedule B1 provides for objectives of the administration as follows

> The administrator of a company must perform his functions with the objective of
>
> (a) rescuing the company as a going concern, or
>
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or

[79] Ibid s.10(3).
[80] According to the report of the Department of Trade and Industry 1993, cited by Finch (n28) at 368-370.
[81] Ibid.
[82] IA 1986: SchB1, para 3(1)
[83] However, for a debenture entered into prior 15 September 2003, the right of appointing a receiver remains unchanged. Also, there are a number of exceptions for appointing receivership in special cases, section 72A-72GA IA 1986.

> (c) realising property in order to make a distribution to one or more secured or preferential creditors.[84]

As rescue is the first objective, it seems to be the highest objective the administrator must consider before the objectives 3(1)(b) and 3(1)(c). However, rescue is not the highest objective because the proper factor for the administrator to consider which objective is to be performed is whether it can produce better results for creditors than the others. According to the wording of para 3(3), the administrator will not pursue the objective 3(1)(a), rescuing the company, if he thinks it is not reasonably practicable to do so or the objective 3(1)(b) appears to produce the better result than rescue.[85] As such, the objective of rescue will be performed by the administrator so long as it can produce better results than other options stated in para 3. It is noticeable that 'the better result' test is based on what the administrator *thinks*, which means that his decision is based on subjective judgment.[86] To prevent potential abuse arising from this subjectivity, the administrator is required to perform his function in the interest of creditors as a whole[87] and performs his function as quickly and efficiently as is reasonably practicable.[88] Reality shows that rescue is not always the most popular option among administration cases; the rate of success for rescuing companies is very modest, at below 10%, while the majority of administration cases involves realising and selling a company's assets to distribute proceeds to creditors.[89]

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[84] IA 1986: SchB1 para.3(1)
[85] Ibid, para 3(3)
[86] IF Fletcher 'UK Corporate Rescue: Recent Developments—Changes to Administrative Receiverships, Administration, and Company Voluntary Arrangements—The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002' (2004) 5 EBOR 119, at 136
[87] IA 1986, SchB1, para 3(2)
[88] Ibid. para 4
[89] A Katz & M Mumford, *A Study of Administration Cases* (Insolvency Service, 2008) <www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/studyofadmincases.pdf> accessed 12 September 2017

4.2.2.1.3 Procedure for appointment of the administrator

The administration is initiated through the appointment of the administrator.[90] There are three ways for the administrator to be appointed, by court,[91] by a holder of floating charge[92] or by the company or its directors.[93] First, the court can make an administration order on an application by the company, its directors or its creditors if it satisfies that the company is or is likely to become unable to pay its debts along with the likelihood that the objectives of administration are achievable.[94] Second, a floating charge holder is granted the power to appoint the administrator. The condition for this appointment is that the floating charge must be a qualifying one that purports to empower the holder of the charge the right to appoint the administrator.[95] In addition, the floating charge must be enforceable to appoint the administrator.[96] For example, under the debenture between the charge holder and the company, the charge is agreed to be enforceable when the company defaults in payment or becomes insolvent. Third, similar to a holder of a floating charge, a company or its directors has the power to appoint the administrator with the requirement for providing insolvency proof that the company is unable to pay debts.[97]

Of the three methods of appointment above, the administration is usually initiated on an out-of-court basis, by a floating charge holder or a company's director. However, the right of directors to appoint the administrator is subject to that of a floating charge

[90] IA 1986 SchB1, para 1
[91] Ibid. para 10
[92] Ibid. para 14
[93] Ibid. par 22
[94] Ibid. para 11 and 12. The insolvency evidence is that the company is or is likely to become unable to pay its debt
[95] Ibid. para 14. A floating charge is considered qualifying if it alone or in combination with other securities is created on a whole or substantial asset of a company and it states that it purports to give the holder of the charge the power to initiate the administration or the administrative receivership.
[96] Ibid. para 16
[97] Ibid. para 27(2)

holder in that the directors must give a floating charge holder a five-day written notice of intention of appointment and within this period no appointment can be made without the consent of the floating charge holder.[98] Additionally, even if an administration order has been made to the court, a floating charge holder still has a right to appoint his own administrator unless the court thinks it is appropriate to refuse it.[99] As such, among the parties granted the right to file an application, the floating charge holder enjoys the priority over directors of a company.

4.2.2.1.4 Effect of the administration

The most noticeable element of the administration procedure is the availability of a moratorium or a stay of actions against the company. The objective of the moratorium is to give the company a breathing period in which it is free from creditors' harassment and has more time to solve its financial difficulties.[100] There are two types of moratoriums: the interim moratorium[101] and the substantive moratorium.[102] In a case of the court appointment, the interim moratorium triggers from the date the application for administration is made to the court and continues until an administration order is made or until the application is dismissed.[103] In case a floating charge holder or company's directors appoint an administrator, the interim moratorium takes effect from the date when a copy of the notice of intention to appoint the administrator is filed at the court and continues until the appointment is made.[104] An interim moratorium is very important in that it prevents creditors from immediately enforcing their debts against the company when they learn that the administration is going to be initiated. There is the continuity

[98] Ibid. para 26, 28 (1)
[99] Ibid. para 36.
[100] A. Keay and P. Walton (n41) at 108
[101] IA 1986 SchB1, para 44
[102] Ibid. para 42
[103] Ibid. para 44 (1)
[104] Ibid. para 44 (2).

between the interim and the substantive moratorium in that once the administration order is made, the interim moratorium comes to an end and is immediately replaced with the substantive moratorium.[105]

The scope of protection of the moratorium is very large.[106] Once a company enters into administration, no resolution to wind up the company can be passed, no winding-up order can be made, and no administrative receiver can be appointed.[107] Apart from these restrictions, a number of actions against the company are barred, including enforcing securities over the company's asset, repossessing goods in the company's possession under a hire-purchase agreement, landlord's right of forfeiture by peaceable re-entry in relation to premises let to the company and other legal processes such as legal proceedings, execution, distress, and diligence.[108] Preserving the company's assets has a vital role in implementing the administration, thus offering the company the protection of the moratorium is understandable. However, the effect of a moratorium is not absolute because parties with actions against the company can be able to overcome the moratorium's restrictions by obtaining a leave of the court or the administrator's consent.[109] The administrator only gives his consent if the actions about to be taken do not jeopardise the administration's viability. For example, it is appropriate for the administrator to give consent for a party to a hire-purchase agreement with the company to repossess a piece of equipment, which is no longer in use by the company.[110] The court will be the final resort to lift a moratorium if the administrator refuses to do so. In granting its permission, the court will consider whether lifting a moratorium will impede the

[105] Ibid. para 42 and 43
[106] Ibid. para 42 and 43
[107] Ibid. para 4.
[108] Ibid. para 43.
[109] Ibid. para 43.
[110] A. Keay (n41) at 113

purpose of the administration, and in case of refusal, fairness can be ensured for the petitioner by the court ordering the administrator to act in a certain way.[111]

4.2.2.1.5. Procedure following the appointment

After the administrator is appointed, he will perform a number of tasks as soon as reasonably practicable. Accordingly, the administrator must send a notice of the appointment to the company and publish it in a prescribed manner.[112] He must obtain the list of creditors, and send the notice of the appointment to creditors of whom he is aware of.[113] Furthermore, he must send the notice to the Registrar of Companies within seven days of his appointment.[114] These requirements ensure that the administration is publicly shared with related parties and the failure to follow them will constitute an offence.[115] As the main task of the administrator is to pursue the objectives under para 3(1) by presenting proposals to creditors to obtain their approval, within eight weeks of his appointment, the administrator must send a statement of proposals to creditors in which he must present the rationale for the decisions in the proposals.[116] A creditor meeting must be called within ten weeks of the appointment to decide whether to approve or reject the proposals.[117]

The proposals are approved by a simple majority in value of the indebtedness of unsecured creditors who are present and cast their votes.[118] Secured creditors and preferential creditors are protected from the proposals by virtue of para 73 under which their priority of debts is preserved and the right of secured creditors to enforce their

[111] See *Re Atlantic Computer Systems plc* [1992] Ch505. In this case, a computer-letting company entered into administration, the funders of the company petition the court to order the administrator to make the due rental payment to the funders. The Appeal Court granted permission and provided a guideline on what factors the court will consider granting a permission to lift a moratorium, one of which is that the permission is granted only if the purpose of the administration is not impeded to be achieved.
[112] IA 1986, SchB1 para 46 (2).
[113] Ibid. para 46(3).
[114] Ibid. para 46(3).
[115] Ibid. para 46(9).
[116] Ibid para 49.
[117] Ibid. para 51
[118] Insolvency Rule 1986, Rule 2.28

security is not affected.[119] The administrator must report to the court and the Registrar of Companies about the result of the voting, whether creditors approve without modification or with modification.[120] After the approval is obtained, the administrator will carry out it to pursue the stated objectives. The administration automatically ends after one year of the appointment unless it can be extended by the court for a specific period or it can be extended with the consent of creditors for a period of up to six months.[121] Also, the administration comes to an end where its objective has been achieved[122] or it is converted into other procedures such as the CVA.[123]

4.2.2.1.6 The pre-packaged administration

The pre-packaged or pre-pack administration is a special procedure under which an agreement has been concluded before a company enters into administration and the company's business or assets then will be sold immediately upon the appointment of the administrator. The pre-pack administration can be instigated in the existence of events that places the company in a disadvantageous position if it enters into administration. For example, creditors are unlikely to come up with an agreement, no lenders are willing to finance the administration, or putting a company into administration will potentially ruin its goodwill and reduce its value in the market.[124]

Generally, the pre-pack is a sale of the company's assets or business without obtaining the creditor's approval. There is no specific provision in insolvency legislation

[119] IA 1986, SchB1, para 73
[120] Ibid. para 53 and 55
[121] Ibid. para 76
[122] Ibid. para 80
[123] Ibid. para 83. Other ways for termination of the administration are that an administrator may be replaced because of resignation, removal, ceasing to be qualified, or death (para 87-89) and that the court ends administration at a petition of the administrator if he thinks it is impossible to achieve its objectives (para 80) or at a petition of a creditor who could establish that the administration is appointed with an improper motive (para 81).
[124] Keay (n41) at 128.

that explicitly permits the pre-pack, however, judicial responses to this matter can be addressed. The first case is *T&D Industries Ltd* with the ruling that the administrator has a right to deal with the company's asset under time pressure before a creditor meeting is called to decide it.[125] Later, the issue was repeated in *Re Transbus International Ltd.*[126] In this case, on the issue of whether or not the administrators can effect the sale of the company without the creditor's approval, the court made their decision in the affirmative. The judge recognised that there are certain circumstances in which the administrator is not required to present proposals in front of a creditor meeting and there is no need for the court to intervene with the administrator's business judgment.[127] Later, *DKLL Solicitor v Her Majesty's Revenue and Customs* reinforced the judicial approval for the pre-pack administration.[128] The case involves the application made to the court for an administration order in respect of an insolvent law firm. There had been a proposed arrangement to sell the firm, which would be effective immediately following the making of the order. The HMRC, a major creditor of the firm, opposed the making of the administrator on the ground that the proposed sale would prejudice the right of creditors who could not exercise their voting right over the sale because there would be no proposal presented before the creditor meeting.[129] The court granted the order for administration by virtue of para 55 of IA 1986 that grants the court the power to authorise a proposal despite creditors' opposition if the court thinks it is appropriate.[130] The court rationale is

[125] *Re T&D Industries plc* [2000] BCC 956.
[126] *Re Transbus International Ltd,* [2004] EWHC 932.
[127] Ibid. the judge in, this case, explained that:

> [T]here will be many cases where the administrators are justified in not laying any proposals before a meeting of creditors. This is so where they conclude that the unsecured creditors are either likely to be paid in full, or to receive no payment, or where neither of the first two objectives for the administration can be achieved: see paragraph 52 of the SchB1. If, in such administrations, administrators were prevented from acting without the direction of the court it would mean that they would have to seek the directions of the court before carrying out any function throughout the whole of the administration.

[128] *DKLL Solicitor v. Her Majesty's Revenue and Customs* [2007] B.C.C. 908
[129] Ibid. para 17
[130] IA 1986, SchB1, para 55

that implementing the sale would enhance the prospect for the statutory objective of the administration to be achieved as well as protecting current employment at the firm.[131] Along with *T&D Industries Ltd* and *Re Transbus*, this ruling again shows the court's willingness towards deferring business judgment of the administrator as well as endorsing the pre-pack.

The pre-pack has become popular as it provides for an expeditious route for selling a company's asset or business while keeping legal and professional costs at low levels.[132] A research addresses that the rate of employment preservation in the pre-pack is significantly higher than that in the sale conducted without the pre-pack,[133] which means key employees can be retained and continue to contribute to the company. Furthermore, as the pre-pack allows the company to be sold in a speedy and discreet manner, its business could be continued with the lowest distortion.[134] Another benefit is that by not putting the sale in front of creditors for approval, the pre-pack becomes a good way to overcome the holdout problem arising where a large number of creditors make it impossible for reaching an agreement or there is a major creditor who attempts to take advantage of his vote to gain benefits for himself.[135]

Nevertheless, there are concerns associated with the practice of using the pre-pack. Putting a company in a very quick sale means there is less likelihood for the sale to be presented widely to interested parties in an open market; therefore, it is unlikely for

[131] *DKLL Solicitor v. Her Majesty's Revenue and Customs* [2007] B.C.C. 908, para 20
[132] Finch (n28) at 456
[133] Sandra Frisby, 'A Preliminary Analysis off Pre-Packaged Administrations' (2007) Report to the Association of Business Recovery Professional (2007). According to the report, in 92% of pre-pack cases, all of the employees were transferred to the new company compared to 65% in a business sale <https://www.r3.org.uk/media/documents/technical_library/Consultation%20Responses/Pre-Pack.pdf> accessed 20September 2017
[134] Ibid.
[135] Finch (n28) 457.

the sale to obtain the best price.[136] Transparency appears to be a problem of the pre-pack as creditors are not informed about the pre-pack until it has been completed.[137] In order to improve the transparency of the pre-pack, the Statement of Insolvency Practice 16 (SIP16) is introduced to require IPs to disclose information relating to sales to creditors.[138] The SIP16 requires IPs to provide the information on how and why the pre-pack is conducted along with detailed information of the purchasers.[139] However, the statement does not require IPs to disclose information about the pre-pack before the administration takes place. Nor does SIP16 grant creditors the power to vote for approving a pre-pack sale. Another major concern with the pre-pack is that a debtor company may be sold to connected parties.[140] Due to the business urgency of the pre-pack sale, the company might be sold to connected parties such as its directors or shareholders instead of potentially interested parties in the market. This situation is described as 'phoenix trading' where directors of a financially troubled company purchase the company at undervalue and then start a new company free of any indebtedness owed by the old company.[141] In encountering this abuse, s. 216 of the IA1986 prohibits persons to be directors of a new company whose name is similar or the same as an insolvent liquidated company of which they were directors before.[142] Although the law prohibits both direct and indirect participation of the directors into a new company, it appears to be difficult to prove

[136] R3, 'Pre-packaged sales (pre-packs)' <https://www.r3.org.uk/media/documents/publications/press/Pre-packs_briefing.pdf > accessed 27 September 2017.
[137] Ibid.
[138] The statement is introduced by IP profession to ensure that IPs will maintain the benchmarks required for the purpose of harmonising IP practice. See R3, 'Statement of Insolvency Practice 16 (E&W)' <https://www.r3.org.uk/media/documents/technical_library/SIPS/SIP%2016%20E&W.pdf> accessed 28 September 2017
[139] Ibid,
[140] Frisby (n133) finds that in prepack administration, the proportion of sales to connected party is slightly higher than those to connected party (59 % compared to 41 %)
[141] See V. Bavoso and JP.Tribe, 'Phoenix Companies: Do Directors Learn Form Failure?' (2001), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117241> accessed 25 September 2017, and Helen Anderson, 'Directors' Liability for Fraudulent Phoenix Activity—A Comparison of the Australian and UK Approaches' (2014) 14 Journal of Corporate Law Studies, 139.
[142] IA 1986, s.216 even forbids directors of a liquidated company to directly or indirectly take part in the promotion, formation or management of a company that is known by the prohibited name within 5 years.

whether they actually participate in the management in an indirect way. This concern echoes with a finding that where companies are sold to connected parties the survival rate is much lower than those sold to an unconnected party.[143]

4.2.2.2 The Company Voluntary Arrangement (CVA)

The CVA provides for a compromise between a debtor company and its creditors to restructure the company's debts.[144] The CVA originates from the Cork Report's recommendation that there should be a simple procedure for debt settlement to tackle the deficiency of an informal arrangement that does not have a binding effect on dissenting creditors.[145] The justification for reaching the CVA is that though this arrangement allows creditors to receive the return less than the debts owed by the company, it would be higher the amount in case of liquidation. The CVA is considered as a rescue procedure insofar as if successfully approved, it prevents creditors from putting the company into liquidation and offers the company a chance to restructure its debts. Despite the perceived benefits, the number of CVA has been very small, which is accounted for the lack of a moratorium.[146] If combined with the administration, the CVA can have a moratorium which is available under the former. However, this practice becomes an expensive and complicated option.[147] In response to the demand for a moratorium, the IA2000 amended the IA1986 to facilitate a moratorium for eligible, small companies.[148] Consequently, there are two types of CVA, one under Part I and the other under the Schedule A1 of the IA1986.

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[143] Frisby (n133) the survival ratio of companies sold to unconnected and connected party is 71.5% to 51.4%.
[144] IA 1986, Part I and SchA1.
[145] Cork Report (n9) para 400-3.
[146] Keay and Walton (n41) at 156
[147] Finch (n28) at 490
[148] IA 2000, <http://www.legislation.gov.uk/ukpga/2000/39/pdfs/ukpga_20000039_en.pdf > accessed 30 November 2017

4.2.2.2.1 The CVA under Part I of the IA1986

The IA1986 provides that it is directors of the company who can commence the CVA procedure.[149] In the case of liquidation or administration, the liquidator or the administrator can initiate the CVA.[150] If the company directors initiate the CVA, they must make a proposal and seek a nominee who can act in relation to the CVA to supervise its implementation.[151] The nominee must be an IP or a person authorised to act as a nominee.[152] If the nominee agrees to act, within 28 days, he must submit a report to the court stating his opinion on whether there is a prospect for the proposal to be approved and implemented and whether the creditor meeting and the member meeting should be summoned to approve the proposal.[153] The report also includes information on the date, time and venue of the meeting to the court.[154] In order to make the report, directors must provide the nominee with the proposed voluntary arrangement and the statement of company affairs with the details of its creditors, assets and liabilities.[155] The nominee then sends the notice of meetings along with the proposal and the company's statement of affairs to its members and its creditors.[156] Where a company is in administration or liquidation, the administrator or the liquidator will act as the nominee to call for the meeting of the company's members and creditors with the time, date and place he thinks fit to consider the proposal and there is no requirement for submitting a report to court.[157]

[149] IA 1986 S. 1(1)
[150] Ibid. s.1(3)
[151] Ibid. s.2. However, in reality, directors of a company tend to approach an IP and have the IP's advice on whether or not to carry out the CVA as well as have the proposal drafted by the IP. See Keay and Walton (n41) at 153
[152] Ibid. s.1(2)
[153] Ibid. s. 2(2)
[154] Ibid.
[155] Ibid. s. 2(3) and Insolvency Rules 1986: r.15 and 1.6
[156] IR 1986, r.1.9. Notice of meetings must be sent by the nominee at least 14 days before the day the meeting takes place
[157] IA 1986, s.3

The meetings will decide the issue of whether the proposal will be approved. At the creditor meeting, a proposal is approved by a majority of creditors who hold 75% in value of unsecured debts.[158] There is no division of creditors into different classes for voting purpose and the votes are calculated according to the amount of unsecured debt as on the date of the meeting.[159] A secured creditor is allowed to vote only when he gives up his security interest or if his debt is partly secured, he can carry the vote in respect of the unsecured amount of his debt.[160]

It is a special feature of the CVA procedure that proposals can be approved either by both meetings of the company's creditor and its member or it can be approved just by the creditor meeting.[161] This means that although the company's members are conferred a right to vote, their approval is subject to those of creditors. The only way for them to oppose is to apply to the court within 28 days to have the CVA rejected.[162] Besides, the CVA's fate is decided by creditors because the CVA does not offer a moratorium to prevent creditor's actions against the company.[163] In the absence of a moratorium, nothing can prevent a creditor from enforcing debts and this can undermine the attempts to rescue a company under the CVA.

4.2.1.2.2 The CVA under the Schedule A1of the IA1986

The CVA under Schedule A1 is a rescue procedure for small companies. Under s. 382(3) of the CA2006, a small company is defined as (1) having the turnover of not more than £10.2 million, (2) its balance sheet total not exceeding £5.1 million and (3) having no more than 50 employees. A company is eligible for a moratorium if it can satisfy two

[158] Ibid. r.1.19
[159] Ibid. r.1.17
[160] Ibid. r.1.19 (3)
[161] IA1986 s.4A
[162] Ibid.
[163] The exception is made for the CVA of small companies which provides for a moratorium

of three requirements.[164] If an insolvent company satisfies these requirements, its directors can approach a nominee with a proposal and a statement of the company affairs. The nominee has to give his opinion to the directors as to the likelihood for the CVA to be approved, the funds available for the company to carry the business during the moratorium as well as meetings of creditors and members to be called to decide the CVA.[165] Then the directors will submit the proposal, the statement of the company affairs and the statement of the nominee's opinion along with the nominee's consent to court for obtaining a moratorium.[166] When these documents are filed, the moratorium comes into force and ends after 28 days or earlier when the creditor meeting and the member meeting are held.[167] Similar to the administration procedure, the scope of the moratorium is very wide and prevents parties from petitioning winding up or administration orders, appointing an administrative receiver, enforcing security or judgment over the company's assets, or taking other actions that may be harmful to the company pool of assets without a leave of court or consent of the nominee.[168] During the moratorium, the nominee has the duty of monitoring the company affairs to form his opinion on whether the CVA has a reasonable prospect of being approved and implemented.[169] If the prospect for CVA to be implemented no longer exists, the nominee must withdraw his consent to act, resulting in the termination of the CVA.[170] While the nominee monitors the company's affair, the company is under the management of the directors. However, the directors are allowed

[164] IA 1986, SchA1, para 3(2). However, the company cannot be eligible to a moratorium if either it is in administration, liquidation, administrative receivership or already in a CVA; or in the previous 12 months a moratorium was conferred to the company which did not result in the approval of the CVA or result in the approval of a CVA but the CVA ends prematurely. See IA 1986, SchA1, para 4
[165] Ibid. para 6
[166] Ibid. para 7
[167] Ibid. para 8, this time is extendable to further two-month period by agreement of both the meetings (SchA1, para 32)
[168] Ibid. para 12
[169] Ibid. para 24
[170] IA 1986, SchA1, para 25

to dispose of the company's asset so long as there is an approval from the creditors' committee or the nominee.[171]

4.2.2.2.3 Effects of the CVA

When a proposal is approved, the CVA is implemented according to its terms and the nominee will become the supervisor of the CVA.[172] The approved CVA carries a binding effect on every person who was entitled to vote at either meeting (whether they were present or represented at the meeting or not), or who would have been so entitled if he or she had notice of the meeting.[173] This means that creditors who voted against the CVA, who did not vote, or who did not receive the notice of CVA proposal are bound by the CVA.

Those who are entitled to vote may apply to the court to revoke the CVA on the grounds of unfair prejudices or material irregularity in respect of the meeting.[174] First, to establish there is unfair prejudice, the court uses two tests, the vertical test and the horizontal test.[175] The vertical test compares the creditor's position under the CVA with one under other procedures such as liquidation and the horizontal test compares the creditor's position with those of other creditors under the CVA. Second, material irregularity is addressed where an irregularity may affect the result of the creditor approval. As addressed by courts, material irregularity takes the form of the breach of the obligation to notice creditors or preventing them from voting at the meeting[176] or providing misleading information in the statement of the company's affairs.[177] However,

[171] Ibid. para 18
[172] Ibid. Para 39
[173] IA 1986, s.5
[174] IA 1986, s.6
[175] *Prudential Assurance Co Ltd v. PRG Powerhouse Ltd* [2007] BPIR 839
[176] Re Cardona [1997] BCC 679
[177] Re a Debtor (No 87 of 1993) (No 2) [1996] BPIR 64

an act of the nominee for not sending the notice of the meeting to a creditor with a small amount of debt that cannot influence the voting will not be considered as material.[178]

The CVA comes to an end where the company is able to pay all creditors and return to normal business. It may be also the case that the company can pay its creditor but after that it is no longer able to carry on the business or that the company fails to pay its creditors and has to enter into liquidation. If the terms of CVA provides for what is to happen on failure to CVA or in liquidation, then the terms are given effect.[179] In case there are no such provisions and the company goes to liquidation, the money or assets to be paid to creditors will be held in trust for creditors who benefit from its terms.[180]

4.2.2.3 The Scheme of Arrangement (SA) under the CA2006

The SA provides for a compromise or an arrangement between a company and its creditors or its members for the purpose of restructuring the company or carrying out an amalgamation.[181] The SA is a special procedure in that it does not require the proof of insolvency and the approval of the SA is decided not only by the companies' members or creditors but also by the court's sanction.

4.2.2.3.1 The operation of the SA procedure

To initiate the SA, a company, its creditors or its members must apply to the court for an order to convene a creditor or member meeting to vote on the proposed arrangement.[182] A liquidator or an administrator may apply for a court order if the company is in liquidation or administration.[183] The company must send the notice of the meeting along with the statement explaining the effects of the arrangement to related

[178] *Re A Debtor* (No 259 of 1990) [1992] 1 All ER 641 and *Re Cardona* [1997] BCC 697
[179] *Re NT Gallagher & Son* Ltd [2002] BBC 133
[180] Ibid.
[181] CA2006, part 26<https://www.legislation.gov.uk/ukpga/2006/46/part/26> accessed 1 November 2017
[182] Ibid. s.896
[183] Ibid.

parties before the meeting takes place.[184] Regarding the approval, the company's creditors or members will be divided into separate classes. The arrangement is approved when a majority in number representing 75% of the value of each class of creditors vote in favour of the arrangement.[185] Furthermore, the SA has a binding effect provided it is sanctioned by court at a formal hearing.[186] When the arrangement is given effect, it will bind all creditors within the class that approves the proposal, including secured creditors.[187]

4.2.2.3.2 Special features of the SA

There are some noticeable features associated with the SA. First, it is a flexible procedure for corporate rescue in that it does not require a company to be insolvent, its terms can be flexibly tailored and there is no requirement for external IPs to replace the current directors. Second, although the threshold for approval is higher than other procedures in couple with the requirement for creditors to be divided into classes, once the SA is approved, it will bind all creditors, even secured creditors.[188] However, it should be noted that the SA only binds creditors within a class and there is no binding effect across classes.[189] Third, the SA relies on a high level of court involvement insofar as the court convenes the meeting of creditors as well as sanctioning the arrangement.[190] Finally, unlike other procedures such as administration and CVA, there is no moratorium triggered by the initiation of the SA to stop creditors from enforcing their debts, which is considered as a disadvantage of this procedure for rescue.[191]

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[184] Ibid. s. 897
[185] Ibid. s.899
[186] Ibid.
[187] Ibid. s.899(3)
[188] Ibid.
[189] J. Payne, 'A New UK Debt Restructuring Regime? A Critique of the Insolvency Service's Consultation Paper' - Part 2 (2016) available at < https://www.law.ox.ac.uk/research-subject-groups/commercial-law-centre/blog/2016/06/new-uk-debt-restructuring-regime-0> accessed16 October 2017
[190] CA2006: s.896 and 899
[191] Keay and Walton (n41) at 204

The SA is beneficial to rescue in certain aspects. First, the SA's content is not prescribed by the legislation and parties to the SA can modify its terms to meet the company's broad range of needs.[192] Second, no requirement for the insolvency proof means the company's financial problems can be tackled at the early stage of its crisis to ensure the rescue viability.[193] Third, when directors remain in their management role instead of being replaced by IPs, this can prevent them from taking harmful actions to avoid transferring the control power to the outsider, such as hiding the company's difficult affairs.[194] Nevertheless, the SA faces the difficulty of how to properly divide creditors into different classes,[195] which often leads to judicial intervention.[196] Yet, the court's involvement with formality is likely to render the procedure more time and cost-consuming.[197] Furthermore, a feature that renders the SA less attractive is the absence of a moratorium to protect the company from enforcement actions by the creditors.[198]

4.2.2.4 The interplay between the administration, the CVA and the SA

Regarding the usage of rescue procedures in the UK, although corporate rescue accounts for a small figure, around 10% of insolvency cases and 90% of insolvency cases go to liquidation, the use of rescue procedures has slightly reduced since 2012.[199]

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[192] However, the design of the SA must be in the ambit of the company power under company law. See Finch (n28), at 481 and Mayer Brown, 'Scheme of Arrangement: An English Law Cramdown Procedure' <https://www.mayerbrown.com/public_docs/scheme_of_arrangement.pdf> accessed 20 October 2017

[193] Finch, Ibid. at 482 and Tribe (n6) at 11

[194] Finch, Ibid.

[195] Alastair Goldrein, 'Ready, Willing and Able, but Perhaps Not Always Acceptable: UK Schemes of Arrangement in Europe' (2011) 7 Pratt's Journal of Bankruptcy Law 114

[196] One of the approach the court utilises to classify creditors in a class is that 'those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest' (*Sovereign Life Assurance Company (In Liquidation) v Dodd* [1892] 2 QB 573); or the court will look at whether the rights of creditors are distinct to divide them into different classes (*Re Hawk Insurance Company Ltd* [2001] EWCA Civ 241, and *Re Telewest Communications plc* [2004] BCC, 342)

[197] Finch (n28) at 485

[198] Ibid. Yet, a counterview appears is that the importance of rescue is to get creditor's consensus; therefore, if creditors can be enlightened that the arrangement could lead to higher returns, the SA will be carried out faster without bearing the cost and time resulted from compliance of the moratorium. See John Tribe (n6) at 9-10

[199] The Insolvency Service, 'Insolvency Service Official Statistics' <https://www.gov.uk/government/collections/insolvency-service-official-statistics> accessed 07 October 2011

According to the Insolvency Service, the administration is the most popular procedure for rescue in 2018, with 1464 cases, followed by the CVA with 356 cases.[200] The popularity of the administration can be explained with the legislative strategy of abolishing the receivership by the enactment of the EA2002. As a result, creditors can only rely on the administration to collect debts in insolvency. Furthermore, the availability of a moratorium to stay creditors' action against the company renders the administration a more attractive option compared to the CVA and the SA as the latter procedures do not offer the same kind of protection.[201] There is no official figure for the SA, this may be because it is not a procedure prescribed under the Insolvency Act. Yet, a survey shows that it ranks behind the CVA in terms of popularity because it is a relatively new, complicated and costly procedure, with a high threshold of creditor approval and a high level of court involvement.[202]

	Number of insolvencies					% change – 2017 to 2018
	2014	2015	2016	2017	2018p	
Total new company insolvencies	**16,293**	**14,588**	**16,420**	**17,317**	**17,439**	**0.7**
Underlying total insolvencies	***16,293***	***14,588***	***14,716***	***14,631***	***16,090***	***10.0***
Compulsory liquidations	3,755	2,889	2,930	2,806	3,117	11.1
Creditors' voluntary liquidations[2]	10,356	9,904	11,794	12,886	12,501	-3.0
Underlying CVLs	*10,356*	*9,904*	*10,090*	*10,200*	*11,152*	*9.3*
Administrations	1,601	1,412	1,346	1,316	1,464	11.2
Company voluntary arrangements	559	372	345	307	356	16.0
Receiverships	22	11	5	2	1	-50.0

Source: Insolvency Service and Companies House

[200] Ibid. Insolvency Statistics (October to December 2018), at 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/780233/Commentary_domain_update.pdf> accessed 9 October 2017

[201] A moratorium is introduced under a CVA but it is exclusive for small companies. Ibid. SchA1, section 1

[202] A survey by PwC with 70 lawyers finds that 85% of respondents think CVA become more popular for the last two years, while the figure for the Scheme of Arrangement is only 45%. Especially, 66% prefers using the CVA over the Scheme of Arrangement. See PwC, 'Schemes and CVAs – the perfect arrangement? Law Survey' <https://www.pwc.co.uk/assets/pdf/schemes-and-cvas.pdf > accessed 7 October 2017

Table1. New company insolvency in England and Wales in 2014-2018.[203]

A special feature of the UK rescue law is the possible interplay between the rescue procedures. For example, the administration can be initiated in combination with the CVA. An advantage of this combination is that an insolvent company can use the moratorium available under the administration (which is not provided for under the CVA) to stop creditors from enforcing debts while negotiating the CVA.[204] Once the CVA proposal is approved, the administration procedure comes to an end and the term of the CVA is implemented.[205] Similarly, in combination with the SA, the administration can offer the SA with a moratorium that is not available under the CA2006. The issue here is whether the CVA or the SA will be a better choice with the administration. Each procedure has its advantages and disadvantages rendering it appealing or unattractive to lawyers and practitioners. While the CVA is considered to be simpler and more cost-effective to implement, the SA has its merit with the ability to deal with complex restructuring with a high involvement of creditors who possess different rights and interests.[206] CVA cannot bind secured creditors without their consent; while the SA has a high level of court involvement and has to deal with the issue of dividing creditors into proper classes despite the binding effect on secured creditors. The combination, therefore, is not optimal to rescue small companies, instead, it can be used for more complicated and expensive companies.[207]

4.3 Evaluation of the UK rescue law

[203] The Insolvency Statistics, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/780233/Commentary_domain_update.pdf> at 5
[204] The exception is made for the case of small companies CA 2006, see IA 1986, SchA1
[205] IA 1986, Section 5. IA and SchB1 para 83
[206] PwC Law Survey, 'Schemes and CVAs – the perfect arrangement?' (2010) available at <https://www.pwc.co.uk/assets/pdf/schemes-and-cvas.pdf> accessed 25 October 2017
[207] Finch (n28) at 490

4.3.1 The emphasis of UK law on corporate rescue

It is important to distinguish between 'company rescue' and 'business rescue'.[208] While 'company rescue' involves restoring an insolvent company back to a normal state with the same ownership, 'business rescue' preserves only viable parts of the company's business, which may result in the transfer of the business to a new owner.[209] The UK rescue law appears to operate under the latter philosophy.[210] This is expressly reflected in the objectives of the administration. According to para 3(1), the administration's objectives are to rescue a company as a going concern, to achieve a better result for creditors than in liquidation, or to realise the company's assets to distribute to secured creditors or preferential creditors.[211] As rescue is the first objective to be mentioned in para 3(1), this may lead to a misunderstanding that it will enjoy the highest priority over the others. Indeed, the ultimate purpose of the administration is to maximise creditor return because the administrator will select one objective that, he thinks, can produce better results to creditors in comparison with the others.[212] This means although rescue is feasible to achieve, the administrator will opt for a sale of the company if this option can produce higher returns for creditors. The study of the administration by Katz and Mumford has offered strong evidence for this, with only less than 10% of administration cases involving successful rescue.[213] Echoed with this study is the survey on the pre-pack administration by Frisby, which addresses an increasing trend in using the pre-pack to

[208] See Chapter Three (3.3.2.2 Company Rescue and Business Rescue)
[209] S. Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67 Mod. L. Rev. 247, at 272, 248, and 249
[210] As stated by the Insolvency Service in a report, 'corporate rescue mechanisms are not intended to maintain inefficient firms that are not economically viable, or to protect debtors from creditors except for time-limited and short periods to facilitate the orderly restructuring of the corporate entity and/or its business'. The Insolvency Service, 'A Review of Company Rescue and Business Reconstruction Mechanisms: Report by the Review Group' (The Insolvency Service, 2000)
[211] IA 1986: SchB1, para 3
[212] Ibid. para3(3) and 3(4)
[213] Katz and Mumford (n89)

sell insolvent companies before the administration occurs, with the pre-pack sale accounting for 52% of the administration cases.[214]

Nevertheless, this cannot obscure the rescue-oriented nature of UK law. With the enactment of the EA2002, creditors are barred from initiating the receivership,[215] and the administration becomes the only resort for creditors to collect debts. This helps a company avoid the risk of being liquidated for lacking assets necessary to operate business upon the completion of the receivership. The likelihood of liquidation is also prevented as any pending winding-up will be dismissed by the virtue of the administration appointment.[216] Furthermore, the administration is more conducive to rescue insofar as it can be initiated on an out-of-court basis, which allows the company to be rescued in an expeditious, convenient fashion.[217] The UK law also encourages rescue by offering diverse rescue procedures, including the administration, the CVA and the SA. Especially, being insolvent is not a requirement for a company to apply for the SA procedure, which implies the UK legislative policy of encouraging financially distressed companies to initiate rescue actions before their financial affairs get worse.

4.3.2 The assessment of the administration, the CVA and the SA under the four established benchmarks

Noticeably, the UK approach to corporate rescue is diverse with three different procedures: the administration, the CVA and the SA. According to the models of rescue administration discussed in chapter three,[218] the administration represents the Profession-in-Possession (PIP) model under which the IP replaces company directors in management and administering rescue, the SA features the Debtor-in-Possession (DIP) model with the

[214] S Frisby (n133)
[215] IA 1986 s.72
[216] Ibid. SchB1, para 40
[217] Ibid. para 17 and 21
[218] See Chapter Three, section 3.4.2.2

company directors remaining in management, and the CVA reflects a hybrid model under which the directors still hold the offices under the oversight of the IPs. This section will examine the effectiveness of these models of the UK rescue law under four benchmarks established in chapter three, namely time and cost of rescue, expertise, abuse management and creditor participation.

4.3.2.1 Time and cost

4.3.2.1.1 The Administration

The duration for carrying out the administration is restricted to twelve months, and this period may be extended by the court or extended with creditors' consent for up-to-six months.[219] However, the likelihood for an extension is relatively low as a report found the average time for completing the administration has been around 348 days.[220] The speediness of the administration could be attributed to a number of statutory efforts. Firstly, there is the requirement that the administrator must perform his functions as quickly and efficiently as is reasonably practicable.[221] Secondly, the route for entering into administration is no longer constrained to the court appointment, rather, the administration can be initiated in an out-of-court route, which allows the company to enter into the administration in a timely fashion.[222] Thirdly, the pre-pack sale speeds up the completion of the administration by selling the company before the occurrence of the administration. Finally, the availability of the moratorium bars creditors from taking actions against the company and offers it a peaceful time to devise rescue plans.[223]

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[219] IA 1986, SchB1, para 76

[220] The length of administration is significantly reduced compared to that of the administration before the Enterprise Act, which is 438 days. See Frisby Report 2006 codified by the Insolvency Service its Evaluation Report 2008 <http://webarchive.nationalarchives.gov.uk/20080610162953/http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/EA02CorporateInsolvencyReport.pdf> accessed 01 November 2017

[221] IA 1986: SchB1, para 4

[222] Ibid. para 22-34

[223] Ibid. para 42, 44

However, the time limit appears to be the main problem of the administration. Though the restriction of the twelve-month period seems to satisfy creditors who are always eager to get the administration results, this places a great deal of pressure on the administrator in making appropriate decisions. In addition, the IA1986 requires the administrator to present proposals to creditors within eight weeks and convene the creditor's meeting within ten weeks of his appointment.[224] It is apparent that the strict timeframe of eight weeks cannot support the administrator to come up with a well-prepared rescue proposal as it takes time for him to be familiar with the company's operations and devise rescue solutions based on what he has learned about the company's financial affairs. Under this pressure, the administrator is likely to select a more feasible option, such as selling the company, instead of investing time and efforts in an uncertain rescue. As a result, a company might be unreasonably sold although it could deserve a better chance to be rescued under the administration. Therefore, this thesis takes the view that instead of limiting the time for the administration, the law should allow this matter to be decided by negotiation between the administrator and the creditors.

In terms of cost, two factors for the consideration are the realisation and the return to creditors. Empirical studies often compare the cost of the administration with that of the receivership and the old administration (which is abolished under the EA2002). As for the creditor return, Frisby finds the administration benefits secured and preferential creditors only, with the figure of secured creditor's return increasing from 29.3% in the receivership to 34.6% in administration; and the figure for preferential creditors' return rose more significantly, from 13.2% to 52.7%.[225] Meanwhile, unsecured creditors enjoyed a slight increase from 1.9% to 2.8%, which is considerably lower than the figure

[224] Ibid. para 49(5)(b) and para 51(2)
[225] Frisby (n220), at 119

in the old administration with 6.7%.[226] However, it should not be forgotten that unsecured creditors could be compensated for the benefit under section 176A,[227] which provides for a prescribed part to be paid to unsecured creditors out of the company's net asset.[228]

Regarding realisation, a report by the Insolvency Service found the realisation in the administration significantly higher than in the receivership, and this is more obvious in the case where creditors are over-secured.[229] However, the cost of rescue in the administration was also found to be higher than in the receivership because of the increase in the professional fees such as IP and legal fees.[230] As a result, despite the increase in the realisation rate, the administration offers no actual increase in creditors' return because the realisation is reduced by the high administration fee.[231] Therefore, IPs appear to be the party who enjoys the benefit of the administration. In countering the abuse of fees by the administrator, rule 18.16 sets out the basis to fix the professional fee. According to the rule, the fee can be fixed by reference to the value of the property the administrator has to deal with or the time properly given by the administrator or as a set amount.[232] It is the creditor's committee who fixes and reviews the fee in case there is a substantial or material change that affects the original one.[233] By allowing creditors to decide the administration cost, the UK law can deal with the problem of IP fees as well as encouraging creditors to participate in rescue.

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[226] Ibid.
[227] IA 1986
[228]According to the Insolvency Act 1986 (Prescribed Part) Order 2003, the prescribed part is 50% if the net asset does not exceed £10,000. If the net asset exceeds £100,000, the prescribed part will be 50% of £10,000 plus 20% of net asset that exceeds £10,000. However, the total value of the prescribed part must not exceed £600,000.
[229] John Armour, Audrey Hsu and Adrian Walter, *Enterprise Act 2002 – Corporate Insolvency Provision: Evaluation Report*, codified in the Insolvency Service in the Evaluation Report 2008 (n217) at.111
[230] Ibid.
[231]Ibid.
[232] IR 2016: r.18.16 (2
[233] Ibid. r.18.16(9)

4.3.2.1.2 The CVA

Similar to the administration, the out-of-court initiation and the introduction of a moratorium offer CVA a degree of flexibility that allows it to be conducted in a timely fashion.[234] In addition to a flexible entry, a moratorium preventing actions against the company provides it with peacetime to draft CVA proposals. However, unlike the moratorium under administration, the CVA's moratorium is eligible to the small companies only.[235] This leads to the implication that there will be more use of the CVA with moratorium than the CVA without a moratorium. Yet, it is interesting to find that CVAs with moratorium has very little use and most of CVA cases are conducted without resorting to moratorium's advantage.[236]

In comparison, the CVA cannot be carried out as quickly as the administration for several reasons. First, the threshold for approval under the CVAs is higher than in the administration, with 75% compared to 50%.[237] This difficulty is coupled with the fact that the CVA cannot bind secured creditors and preferential creditors unless they agree to, which demands more efforts to be made to convince these creditors to approve the CVA proposals.[238] Second, while the legislation limits the duration of the administration to twelve months with a possible extension of six months, the CVA's duration depends on what the parties have agreed. Generally, the duration of the CVA completion is three to five years,[239] however, this period may be shorter or longer depending on the nature of

[234] IA 1986, s.1(1)
[235] IA 1986, SchA1, para 3(2)
[236] According to a survey by Walters and Frisby, there was 86% of CVA conducted without using a moratorium. See, A. Walters and S. Frisby, Preliminary Report to the Insolvency Service into Outcomes in Company Voluntary Arrangements, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1792402> at 10, accessed 11 November 2017
[237] IR 1986, r.1.19 and 2.28
[238] Ibid. r. 1.19(3)
[239] See This knowledge is provided by the Company Rescue, a professional company in this field <https://www.companyrescue.co.uk/guides-knowledge/guides/a-company-voluntary-arrangement-cva-or-a-formal-time-to-pay-agreement-3817/> accessed 11 November 2017

each case. A report on CVA's outcomes finds over half of surveyed CVAs which lasted for less than eighteen months were more likely to end up with failure, resulting in the company termination, while CVAs lasted for three years or more tend to be associated with the likelihood of company survival, yet this figure accounted for only 10% of the surveyed cases.[240]

The duration for carrying out CVAs can be longer than administration. It is understandable that as the administration is constrained to the statutory limit of twelve months, a sale of the company is a likely outcome under this time pressure.[241] For rescue purpose, the administration is viewed as the last resort because of 'damaging effects it can have on a company's value'.[242] Meanwhile, the CVA' purpose is to keep a company running and operating profitably in the future, therefore, it requires considerable time and efforts to be invested in the negotiation with creditors to get their approval. A longer duration of CVA is compensated for its benefits insofar as a successful CVA allows the company to preserve its valuable elements and continue its activities without suffering from the distortion of director's replacement and the change of ownership.

Regarding the creditor's realisation in CVA, unsecured creditors are the party who receiver more benefits according to the result of some surveys. An empirical study on the CVA reveals that unsecured creditors do better than secured creditors in terms of return.[243] However, it does not necessarily mean secured creditors perform badly in the CVA, their performance was recorded to be positive.[244] In 2004, R3 published a survey that unsecured creditors had an average return of 17 pence in the pound, which is higher

[240] Walters and Frisby (n236) at 15
[241] See the discussion on time and cost of the administration (4.3.2.1.1 The Administration)
[242] Richard Fleming, KPMG's UK Head of Restructuring, cited by G. M. Weisgard and M. Griffiths in *Company Voluntary Arrangement and Administration* (Jordan, 3edn, 2013) p.8
[243] G.A.S Cook, N.R Pandit and D. Milman, 'Formal Rehabilitation Procedures and Insolvent Firms: Empirical Evidence on the British Company Voluntary Arrangement Procedure' (2001) 17 Small Business Economics, at 266
[244] Ibid.

than the figures in the administration (6.3 pence) and receivership (5.4 pence).[245] The most recent survey of Walters and Frisby also confirms the high rate of return to unsecured creditors in CVA, at 13%.[246] The results from these surveys indicate that the high rate of return for unsecured creditors is an obvious advantage that encourages the use of the CVA.

Regarding the CVA fees, before the introduction of the IA2000, the CVA experienced a low use for several reasons, one of which is the cost.[247] It was considered to be too expensive for small companies to pursue it.[248] The changes provided by the IA2000 has rendered the CVA an efficient procedure.[249] Compared to the administration, CVA's fee is significantly lower. It is well-confirmed by law firms that CVA is a cost-effective procedure, with the cost being 5-10 times lower than in administration.[250] This fee can be agreed to be paid on an annual basis and can be deducted from the monthly payment the company makes into the CVA.[251] This scheme of payment, therefore, does not place a much heavy financial burden on an insolvent company, instead, it allows the company to continue its operation and business.

4.3.2.1.3 The SA

A special feature of the SA is that it can be initiated without the occurrence of an insolvency event, which means that a company can rely on it to solve its financial problem at the early stage of its crisis. Due to the lack of official statistic on the SA, data on time

[245] R3 Twelfth Survey, *Company Insolvency in the United Kingdom* (R3, 2004)
[246] Walters and Frisby (n236) at 24
[247] Finch (n28) at 497
[248] D. Milman and F. Chittenden, *Corporate Rescue: CVAs and the Challenge of Small Companies*, ACCA Research Report 44 (ACCA, 1995)
[249] Finch (n28) at 498
[250] Company Rescue, 'Administration or Company Voluntary Arrangement CVA' (2019) <https://www.companyrescue.co.uk/guides-knowledge/guides/administration-or-company-voluntary-arrangement-cva-3803/> accessed 11 November 2017
[251] Wilmott Turner Financial Services, 'What does a CVA cost?' <https://wilmottturner.com/company-voluntary-arrangements-cva/what-does-a-company-voluntary-arrangement-cva-cost> accessed 11 November 2017

and cost is not available for a comparison with the administration or the CVA. However, one conclusion can be made is that the SA is a less effective procedure compared to the CVA in terms of time and cost because of its complexity.[252] For instance, while the CVA treats all creditors as the same, the SA separates creditors into classes for voting.[253] Therefore, the threshold for approving the SA is duplicated as the approval for the SA must be satisfied within each class of creditors. Furthermore, the SA involves high participation of the court from reviewing the application, opening the hearings, settling disputes among parties to sanctioning the SA and these add more cost and time to its implementation.[254]

To summarise, the above analysis has assessed the effectiveness of the UK rescue law under the benchmark of time and cost. It appears that all procedures have advantages and drawbacks. The administration proves itself to be the fastest route to rescue, however, it cannot support corporate rescue with a very limited timeframe and high IP cost. The SA allows a company to be rescued with a timely initiation for not requiring insolvency proof, but it has the drawback of being costly and complicated procedure featuring a high level of court involvement. Of all the procedures, the CVA appears to be the best option in terms of time and cost and its lengthy implementation can be accepted for the purpose of corporate rescue. Though the UK law offers a degree of flexibility in introducing multiple procedures for rescue, this cannot work well in the absence of a moratorium under some procedures. As discussed previously,[255] the moratorium is not available under the CVA and the SA, therefore, the two procedures have to combine with the

[252] PwC, 'Schemes and CVAs – the perfect arrangement? Law Survey' (2010) <https://www.pwc.co.uk/assets/pdf/schemes-and-cvas.pdf> accessed 11 November 2011
[253] CA2006, s.896 (1)
[254] Finch (n28) at 485
[255] See section 4.2.2.2 of this chapter

administration to take advantage of the moratorium. However, as the administration is a costly procedure, this combination will add more time cost to rescue.

4.3.2.2 Expertise

4.3.2.2.1 The Administration

The administration follows the PIP model, featuring the participation of the administrator who replaces directors in managing and controlling the company. The explanation for the UK resorting to borrowing the expertise of an outsider can be the hostility that blames the director's mismanagement for insolvency.[256] The development of rescue practice led to the creation of IP profession, which comprises the membership of accountants and lawyers.[257] Presently, IPs are monitored by the membership to RPBs or by direct authorisation of the Secretary of State.[258] In order to become a member of a RPBs, an IP must earn a level of working experience and successfully pass the JIEB examination.[259] The way of regulating IPs in the UK is very special in that RPBs are self-regulatory organisations, but the government can exercise control over them in the form of the Insolvency Service's supervision.[260] Noticeably, the Insolvency Service and RPBs, in a joined effort, issued the Statement of Insolvency Practice to regulate IPs profession. If an IP is punished for his misconduct, the sanction will be published on the government website.[261] With these rigorous provisions for granting and controlling membership provided by the RPBs along with the governmental supervision, IPs in the UK appear to

[256] Westbrook (n44)
[257] J. Flood and E. Skordaki, *Insolvency Practitioners and Big Corporate Insolvencies*, ACCA Research Report 43 (1995) at 9
[258] See section 4.1.3 of this Chapter
[259] ICAEW (n49)
[260] Insolvency Service, <https://www.gov.uk/guidance/principles-for-monitoring-insolvency-practitioners> accessed 16 November 2017
[261] <https://www.gov.uk/government/collections/current-insolvency-practitioner-sanctions> accessed 16 November 2017

be qualified to exercise their expertise in rescue procedure.[262] It is the fact that recent concern about IPs is not principal with IPs' lack of skill, rather it is the IP's cost.[263]

Nevertheless, the more important issue in examining IP expertise is whether the law allows them to exercise their expertise within the administration. Noticeably, the law confers the administrator a wide range of power to do 'anything necessary and expedient' for management of the business and property of the company.[264] Yet, it does not necessarily mean that he can be able to work alone in pursuing the administration purpose; rather, he has to work with the directors and the creditors of the company. In this regard, the IA1986 presents a great deal of challenges to the administrator. Accordingly, the law stipulates that the administrator has eight weeks to present proposals to creditors and ten weeks to convene the creditor's meeting following his appointment.[265] In performing his functions under this time pressure, the administrator must rely on the director's information because he has not been familiar with the company's operation before the appointment. Although the law grants the administrator a right to require the information from the directors,[266] the likelihood of the co-operation depends on whether the directors have incentives to provide the required information. If the directors learn that the administrator's decision is to rescue the company, they are likely to co-operate with the administrator since working with the administrator to rescue the company is an opportunity for them to retain their employment. By contrast, if the directors are not certain about the administrator's intention, or if they learned that the administrator's

[262] Each RPB have their own benchmark, however, in general persons who want to have memberships must possesses a degree of experience, evidenced with a number of hours working on insolvency area. See R3, 'Making a Career as an Insolvency Practitioner' <https://www.r3.org.uk/media/documents/publications/professional/Making_a_Career_Brochure_V2.pdf > accessed 16November 2017
[263] Finch, (n28) at 192
[264] IA 1986: SchB1, Para 59
[265] Ibid. para 49(5)(b) and para 51(2)
[266] Ibid. para 47. Directors' misconduct is subject themselves to the severe punishment under Company Director Disqualification Act 1986 (CDDA)

intention is to sell the company, they tend to preserve information in an attempt to delay the decision-making as well as prolonging their employment. The directors are more likely to preserve information due to the threat that the administrator will launch an investigation into their conducts in the administration.[267]

As such, by imposing a time pressure on the administrator to perform his functions and discouraging the voluntary co-operation between the administrator and the directors, the administration does not allow expertise to be sufficiently contributed in rescue. In responding to this issue, imposing obligations on the directors to provide the information required by the administrator appears to be insufficient.[268] Along with the strong punishment for errant directors, the proper approach for effective communication between the administrator and the directors should lie in the changing of fault-based attitude towards insolvency which blames the director mainly for the company's failure. For example, it is proposed that there should be a lenient treatment for directors who seek early help and cooperate with the administrator.[269]

4.3.2.2.2 The CVA

The CVA follows the hybrid model of rescue administration that features the role of the IP in appraising and supervising rescue while allowing the company directors to stay in management and implement the rescue. Therefore, the efficiency of the CVA does not rely on the expertise of the directors and the IPs separately; rather, it demands the co-ordination of expertise between the IP and the directors.[270]

[267] IA 1986: schB1, Para 64,
[268] David Hahn, 'Concentrated Ownership and Control of Corporate Reoganizations', (2004) 4 J. CORP. L. STUD. 117, at 146-8, Finch (n28) 438
[269] Finch, Ibid. at 438
[270] Finch, Ibid. at 505

The IP's expertise is exercised at two stages, drafting the CVA proposal and implementing the proposal. At the first stage, IP acts as the nominee, using their expertise to screen and appraise the proposals drafted by the directors to report to court whether there is a reasonable prospect for the proposal to be approved.[271] In reality, the IP may involve earlier in the CVA when the directors approach them for professional advice on the suitability of the proposal.[272] However, in this case, the nominee must be objective and bases his opinion on his expertise and facts; otherwise, he must be liable for the cost incurred by his lack of professionalism.[273] At the second stage, when the proposal gets approved from creditors, the nominee will act as the supervisor to supervise its implementation. At both stages, it is important for IPs to maintain to be independent to gain the consensus for the CVA.[274] As the nominee is an IP, his membership and practice are regulated the same way as those under administration to ensure professionalism.

Apart from the IP's expertise, implementing the CVA importantly requires the expertise of the directors. Since the CVA is an arrangement between a company and its creditors, it involves a course of negotiation which demands the directors to have a degree of experience and skills. It is important for the directors to have the competence in running the company during troubled times, and even it is more important for them to show their competence to gain trust among creditors.[275] By not depriving the directors of the management power, the CVA has encouraged them to cooperate with the IPs and try their best at the second chance to save the company.[276] As the likelihood for the CVA to be

[271] Section 2 IA 1986
[272] Keay and Walton (n41) 152-153. Where the liquidator or the administrator may act as the nominee in the CVA, there is no requirement to make reports to court. s.3(2) IA 1986)
[273] Ibid.
[274] J. Tribe, 'Company Voluntary Arrangements and Rescue: A New Hope and a Tudor Orthodoxy', (2009) Journal of Business Law, 5, available at, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328471> p27-28, accessed 22 November 2017
[275] Flood (n25) 19
[276] J. Tribe, (n274) 17

approved depends on how well the directors perform to gain creditor approval, they are demanded to have a degree of competent management,[277] and encouraged to get training of insolvency to ensure that they could improve their performance.[278] As such, in comparison with the administration, the CVA appears to be more efficient in terms of expertise contributed in rescue insofar as it encourages directors' expertise in devising rescue proposals in couple with borrowing the expertise of the IPs to evaluate the proposals and supervise its implementation.

4.3.2.2.3 The SA

The SA is a very well-reflected example of the DIP model, which devolves the power of implementing rescue on hand of the company directors. In countering with potential abuse arising from director control, there is a high judicial involvement to supervise the procedure, which makes it distinct from the administration and the CVA. Under the CVA and the SA, directors remain in the management of the company. However, the extent to which they exercise their expertise under the latter is somewhat different from the former. Unlike the CVA, the SA can be initiated without the proof of insolvency,[279] which provides the directors with flexibility as well as encouraging them to be aware of the company's financial situation before commencing this procedure. If the insolvency, as correctly estimated by the directors, is likely to happen, the chance for the company to be rescued is very high; by contrast, an immature initiation can bring a degree of distortion to the normal operation of the company. Furthermore, the directors have to face the difficulty regarding dividing creditors into proper classes for the voting scheme and drafting the SA proposals in the absence of the moratorium protection.[280]

[277] Insolvency Practitioner Association, <www.insolvency-practitioners.org.uk/download/documents/145> accessed 3 December 2017
[278] Finch (28) at 506
[279] See Chapter three (3.3.1 The application of the cash flow test and the balance sheet test)
[280] Finch (n28) at 485

However, in compensation for these disadvantages, the SA provides the directors with incentives to optimise their expertise in certain important respects. For example, commencing the SA does not impose on the directors the obligation to disclose information on the company's affair publicly. In addition, by not removing the directors, the SA incentivises them to exercise their expertise since this is a second chance for them to correct their mistakes before as well as securing their employment.

Regarding the judicial role in insolvency, the courts have the highest status in an insolvency system, with the power to direct how insolvency procedure to be carried out and settle disputes among parties.[281] As a matter of cost, it is opined that the participation of the courts in insolvency procedure should be limited, except for special cases such as compulsory winding-up.[282] In case of rescue, a critical question as to judiciary participation is whether the court's role is restricted to the statutory rule or the judge should have judicial discretion. It appears to be normal if the court directs parties to follow procedural rules; however, judicial discretion requires judges to obtain a sufficient degree of expertise in insolvency to effectively deal with rescue on a case-by-case basis. The extent of court involvement in rescue significantly is not the same for all legal systems because it depends on the development of practice and legal culture of specific jurisdictions.[283]

Regarding the court involvement in the SA, there are two court hearings: the class hearing – to decide if a direction is issued to summon creditor's meeting, and the sanctioning hearing - to sanction the SA when it gets approval from creditors.[284] The

[281] Keay and Walton (n41) at 35
[282] Ibid.
[283] For example, in the USA, a jurisdiction famously featuring court involvement into rescue, the judges have an active role in restructuring, and the judges in famous jurisdiction for restructuring such as Delware and New York, has more expertise and sophistication than those at other courts. See, David A. Skeel Jr., 'Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware' (1998) Delaware Law Review (1), 31-33
[284] S.896(1) and 899(1), Company Act 2006

court's focus is to provide parties with guidance on how to divide creditors into proper classes.[285] Furthermore, the court ensures that procedural requirements have been complied; for example, whether notice of creditor meeting has been sent and appropriate resolution has been made.[286] Especially, the main focus of the court is fairness insofar as the court sanctions the SA only when it is approved fairly and reasonably.[287] Therefore, the court's functions under the SA are not to make business judgments, rather the court's function is to exercise its power to control and supervise the compliance of statutory rules. The explanation for this is that the UK courts do not have the sort of experience to deal with this issue like those in the US.[288] However, the UK courts have to exercise their discretion to solve the important issues silenced under the legislation scope, for example, how to properly divide creditors and what constitutes fairness to sanction the SA. Judicial experience on the SA has proved that the court has enough capacity to deal with the issues of classification of creditors for voting purposes or the issue of whether to sanction the based on the ground of fairness.[289]

4.2.3.3 Abuse management

4.3.2.3.1 Administration

Under this benchmark, a rescue law is effective so long as it can address and tackle potential abuse by a party that harms the interest of the others. Featuring the PIP model, the administration replaces the directors with the administrator, and thereby tackles the

[285] Latham and Watkins, 'UK Scheme of Arrangement Overview', <https://www.lw.com/admin/Upload/Documents/uk-schemes-of-arrangement-2014.pdf> accessed 28 November 2017, 4
[286] Ibid. 6
[287] Ibid.
[288] R3, US 'Chapter 11': Should it be adopted in the UK?, p4, available at <https://www.r3.org.uk/media/documents/policy/policy_papers/corporate_insolvency/R3_Chapter_11_briefing_(October_2015).pdf> accessed 06 December 2017
[289] See, *Re Hawk Insurance Company Ltd* [2001], Re *British Aviation Insurance Co Ltd*, [2005] APP.L.R. 07/21, *Scottish Lion Insurance Company Ltd v. Goodrich Corporation & Ors* [2010] ScotCS CSIH 6, SCLR 167,

abuse stemming from the directors taking risky actions in an attempt to save the company by themselves but at the cost incurred by creditors.[290] If the directors continue to operate the company without resorting to insolvency law, he can be subject to severe penalties, such as monetary fines or disqualification.[291]

Given the removal of company directors from management, abuse does not seem to arise from their conduct, rather it may potentially arise from the administrator's decision in the pre-pack. Accordingly, the administrator's decision to initiate the pre-pack allows a company to be sold immediately before entering into the administration without a need to call for a creditor meeting. Though the IA1986 does not expressly provide for the pre-pack, it can allow this practice to occur. According to para 3(1), objectives of the administration are (a) rescuing the company, (b) achieving better results for creditors than in the case of winding up and (c) realising assets to distribute to secured or preferential creditors.[292] Where the administrator thinks the objectives 3(1)(a) and 3(1)(b) cannot be achieved, para 52(1) allows him to come up with a decision that he does not need the approval of creditors[293] and the pre-pack is such the decision. The pre-pack practice has the judicial endorsement in a series of cases, such as *T&D Industries Ltd*,[294] *Re Transbus International Ltd,*[295] and *DKLL Solicitor v Her Majesty's Revenue and Customs,*[296] under which the courts showed their reluctance to make the second-guessing intervention into commercial judgments by the administrator.[297]

Once the administrator is allowed to have such the discretion in deciding the pre-pack, he may make a decision that prejudices creditors' interest. This possibility happens

[290] IA 1986: para 64, and D. Hahn (n268) at 127
[291] IA 1986: s.214 and Company Directors Disqualification Act 1986: s.6 and 10
[292] IA 1986: SchB1, para 3(1)
[293] Ibid. para
[294] *Re T&D Industries plc* [2000] BCC 956
[295] *Transbus International Ltd, [2004]* EWHC 932
[296] *DKLL Solicitor v. Her Majesty's Revenue and Customs,* [2007] B.C.C. 908
[297] *Transbus International Ltd, [2004]* EWHC 932, para 14

where a major creditor, who attempts to buy the company at an advantageous price, approaches the administrator for a pre-pack sale. Notwithstanding the requirement for the administrator's impartiality to act in the interest of creditor as a whole, he has to perform this function in a very limited time frame[298] and this pressure is likely to force him to select the pre-pack in order to sell the company in a prompt manner. Though the law allows aggrieved parties a right to challenge the administrator's conduct at court,[299] it is unlikely for creditors to establish sufficient evidence as they do not run the company and participate in its operations. Furthermore, the judicial endorsement for the administrator's business decision, shown as a number of cases, has the effect of discouraging creditors to exercise this right.[300]

In an effort to placate the creditors who are deprived the rights to approve the pre-pack, the Statement of Insolvency Practice 16 (SIP16) requires material information on the pre-pack such as the identity of purchasers and valuation to be provided to creditors,[301] and the compliance will be monitored by the Insolvency Service.[302] However, the SIP16 cannot sufficiently respond to this problem because it does not require the administrator to convene a meeting to explain to the creditors what is going to happen; and more importantly, it remains under the SIP 16 that creditors do not have the right to cast their vote over the approval of the pre-pack.[303] Especially, failing to comply with this requirement does not constitute serious misconduct for revocation of the administrator's

[298] The administrator has to present a proposal to creditors within 8 weeks of his appointment, convene the creditor meeting to approve the proposal within 10 weeks of his appointment and have one year to complete the administration. IA 1986: SchB1, para 52 and 76
[299] Ibid. para 74
[300] Although the courts endorse the administrator's decision, they might make an intervention in case of conflict of interest. For example, in *VE Vegas Investors IV LLC v. Shinners* [2018] EWHC 186 (Ch), the court removed the administrators for facilitating a pre-pack sale to sell the company back to its management
[301] See the content of SIP 16 at <https://www.r3.org.uk/what-we-do/publications/professional/statements-of-insolvency-practice/e-and-w/sip-16-list> accessed 28 November 2017
[302] <https://www.gov.uk/government/publications/statements-of-insolvency-practice-16-sip-16> accessed 28 November 2017
[303] SIP 16 (n302)

license by RBPs.[304] With these reasons, the administration appears to be an insufficient device in tackling abuse arising from the administrator's decision of selecting the pre-pack.

4.3.2.3.2 The CVA

The CVA follows the hybrid model of rescue administration under which the directors' control and implement rescue under the IP's supervision. As a hybrid model, the CVA is considered to overcome the drawback of the PIP model by allowing the company directors to remain in the management and the drawback of the DIP model by injecting the IP's supervision in the implementation of the CVA.[305] The CVA works more effectively than the administration in dealing with abuse in the extent to which it is an arrangement between the company and its creditors under which the terms will be negotiated by the parties themselves, while in administration, it is the administrator who proposes a rescue proposal without consulting creditors. Therefore, if the company directors abuse the CVA by including disadvantageous terms in the arrangement, creditors will prevent this by rejecting the arrangement. Similarly, by providing the CVA to be approved with a high threshold of 75% of creditors voting,[306] the law can prevent the abuse when a major creditor attempts to use his advantage to influence the CVA. Furthermore, the CVA facilitates a mechanism to deal with conflicts by allowing the suffered parties to challenge the CVA on the ground of unfair prejudice and material irregularity.[307] In response to the silence of the legislation as to what constitutes unfair prejudice, the courts have developed a set of well-established principles, which can

[304] Insolvency Service, Report on the Operation of Statement of Insolvency Practice 16 (2009) at 3, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/301181/sip16_report_dec_2009.pdf> accessed 5 December 2017
[305] See Chapter Three, section 3.4.2.3
[306] IR1986: r.1.19
[307] IA 1986: s.6

effectively identify whether a creditor being placed in a disadvantageous position.[308] Similarly, regarding the material irregularity, the case law has been developed to deal with this problem.[309] Furthermore, it should be mentioned the role of the IP, which is the supervisor, in the CVA in managing potential abuse. Since the supervisor has to keep a balance between protecting creditor and avoiding demotivating the directors in performing their function in the CVA, the law grants the supervisor limited powers that allow him to intervene the directors' decision.[310] Nevertheless, the supervisor can exercise the power granted by s.423 to apply for a court order to impeach transactions defrauding creditors, such as transactions entered at undervalue.[311]

4.3.2.3.3 The SA

The SA is the reflection of the DIP model, under which the directors implement the rescue under the court's oversight. The SA is different from the administration and the CVA procedure in that it does not involve IP's participation, although the directors may consult an IP for drafting a proposal. The SA is perceived to be fairer than the CVA in the extent to which there is a separation of creditors into specific classes for voting purposes and it can only bind creditors including secured creditors within a class and there is no binding effect across classes.[312] In ensuring there is no prejudice of interest, the obligation to provide information is strictly imposed on the directors with the serve punishment for non-compliance.[313] The court exercises the supervision role to prevent potential abuses by only sanctioning the agreement among parties when it is satisfied that it is fair and reasonable and creditors who are affected by the SA may challenge it at the

[308] See section 4.2.2.2.3. Effects of the CVA
[309] Ibid.
[310] Weisgard and Griffiths (n242) at 179.
[311] IA1986, s.423
[312] CA2006, s.899
[313] Ibid. 897

sanction hearing.[314] With the judicial monitoring and supervisor, the SA appears to be a very a strong regime to prevent abuse.

4.3.2.4 Creditors' participation

Creditors contribute to rescue efficiency in two important respects: first, the fate of a rescue proposal is decided by their approval and second, given the company's shortage of finance in the financial hardship, creditors are potential suppliers of the finance to implement rescue proposals.[315] In addition to the financial support, sophisticated creditors like banks can contribute their expertise to the implementation of rescue,[316] for example, by suggesting necessary modifications in a rescue proposal at the creditor meeting.[317] The fact that the UK creditors do not control rescue does not necessarily mean they do not have the capacity in doing so. An empirical research by Amour, Hsu and Walters in examining the receivership finds that allocating control rights to a single concentrated creditor can bring out positive outcomes such as high creditors' return and employment preservation rate.[318] Factors that encourage creditor participation, as discussed in chapter three, include the availability of a moratorium, equal treatment for all creditors in the proposal and a super-priority for the rescue finance.[319]

4.3.2.4.1 The administration

[314] *Re Anglo-Continental Supply Co. Ltd* [1922] 2 Ch 723,
[315] See Chapter 3: section 3.5.2.3(iv)
[316] In the UK, banks are major lenders among corporations and the introduction of the Enterprise Act 2002 with a new administration procedure has required the banks to make a shift to monitoring debtors' insolvency risk. See Finch, (n28) 265-268
[317] For example, IA 1986: s.4 and para 53 and 54 of SchB1 allow creditors to vote with modification of a proposal.
[318] J. Amour, A. Hsu and A. Walters, 'The Costs and Benefits of Secured Creditor Control in Bankruptcy: Evidence from the UK', University of Cambridge Centre for Business Research Working Paper No. 332, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=912302> accessed 01 December 2017
[319] See Chapter Three (3.5.2.3 Benchmarks for evaluation of rescue proposed by the thesis, (iv) creditor participation

The administration satisfies with the requirement for introducing a moratorium that prevents creditors from enforcing their security interest[320] and equal treatment for creditors as the administrator under the obligation to act in the interest of all creditors as a whole.[321] However, there is uncertainty regarding the availability of a super-priority for the rescue finance or the 'DIP finance'. Due to the importance of the DIP finance in implementing rescue,[322] giving this finance a super-priority has been adopted elsewhere in the US and Canada.[323] However, UK law seems to be silent on this matter. Similar provisions for a super-priority for the rescue finance can be found in the IA1986.[324] For example, para 99, which provides for the settlement of the debts incurred by the administrator under a contract he entered into in performing his functions, states that the debts will have priority over administrator's expense and remuneration. By virtue of this provision, the rescue finance could be sufficiently characterised as an expense of the administrator in performing his functions, and thus enjoy priority over any other security.[325] Judicial response to this matter is famously found in the case *Bibby Trade Finance Ltd v. McKay*, which involves the finance advanced to a company in administration.[326] When accounting for the proceeds, the administrator decided to pay the lender of the finance in priority, and this payment would not reduce the company's liability to the lenders incurred before the administration. The directors of the company did not agree and challenged the payment. The court decision is to accept the finance as the administration expense and therefore enjoy a priority status.[327] The judgment indicates

[320] IA1986: SchB1, para 42 and 44
[321] Ibid. para 3(2)
[322] L J Abbot, S Parker & G F Peters, 'The Effect of Post-bankruptcy Financing on Going Concern Reporting' (2000) 21 AICPA and UNCITRAL Legislative Guide on Insolvency Law (2005), <http://www.uncitral.org/pdf/english/texts/insolven/05- 80722_Ebook.pdf> accessed 2 December 2017
[323] 11 U.S. Code § 364 - Obtaining credit and Company Creditor Arrangement Act (Canada), 11.2(1)(2) Interim financing
[324] IA1986, s.19(4) (5) and para.99 SchB1
[325] McCormack, 'Super-Priority New Financing' (2007) JBLR 701, at 713
[326] *Bibby Trade Finance Ltd v. McKay* [2006] EWHC 2836 (Ch), 2006 WL 3831159
[327] Ibid. para 27

that although the legislation is still not clear on the issue of the rescue finance, the UK court has sufficient judicial capacity to deal with this issue. However, it should be noticed that the issue of deciding priority does not rest on the administrator's power, instead, it must be the matter decided by the court. In *Freakley v Centre Reinsurance International Co.,*[328] the House of Lords recognised the administrator's power in deciding which expense is necessary for the administration, yet this must be subject to the court's supervisory role to determine the matter of priority. [329]

The Insolvency Service has already recognised the importance of the rescue finance in the proposals for adopting super-security for the rescue finance under the Consultation Paper 2009 and 2016.[330] However, these proposals have not been taken forward by the UK Parliament as there has been controversy over how to protect the rights of existing creditors and the effect of the proposal on the UK lending practice.[331] In absence of legislative confirmation on the priority of the rescue finance, the fact that this matter has to be decided by the court on a case-by-case basis can demotivate creditors to advance the rescue finance in the fear of potential disputes and litigation.

4.3.2.4.2 The CVA

Unlike the administration procedure which may lead to different outcomes, the CVA is carried to pursue the only purpose of rescuing a company. Therefore, it demands a higher level of creditors' participation than under the administration. The CVA is able to provide equal treatment for creditors since it is an arrangement between the companies

[328] *Freakley v Centre Reinsurance International Co.* [2006] UKHL 45
[329] Ibid. para 16
[330] Insolvency Service, *A Review of The Corporate Insolvency Framework, A Consultation on Options for Reform*, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf > accessed 5 December 2017
[331] Jennifer Payne, 'The future of UK debt restructuring', at 11. Available at SSRN: <https://ssrn.com/abstract=2848160 >or <http://dx.doi.org/10.2139/ssrn.2848160> accessed 5 December 2017

and creditors, and this requires the directors to present an equal treatment to get creditor approval.

However, there are two factors that impede creditors from participating under the CVA. First, the absence of a moratorium appears to be the main weakness of the CVA.[332] Given the fact that a CVA proposal must be distributed to creditors before the creditor meeting is convened,[333] the creditors may recognise that the company is in financial trouble at the time of receiving the proposal and they may take individual actions against the company before the meeting takes place.[334] Although a study on the CVA reported that most of the companies carried out a stand-alone CVA rather than a CVA with a moratorium,[335] the Insolvency Service has proposed for including a moratorium under the CVA because of its potential necessity, especially for viable companies.[336] Second, similar to the administration, the legislation has been silent on the matter of super-priority for the rescue finance. A survey on corporate restructuring addresses this issue as one of the main hindrances preventing the CVA from achieving positive outcomes.[337]

4.3.2.4.1 The SA

The SA is similar to the CVA with the absence of a moratorium and a super-priority of the rescue finance. The SA is a flexible procedure insofar as it can be initiated without insolvency proof, therefore, it is not important to have the moratorium for all

[332] It should be noticed that a moratorium is only available under the CVA for small companies. IA1986, SchA1, para 3(2)
[333] Ibid. r.1.9
[334] The exception is made for the case of small, eligible companies who can rely on the moratorium under SchA1 IA 1986.
[335] Walters and Frisby (n236)
[336] The Insolvency Service, 'Proposals for A Restructuring Moratorium' - A Consultation, available at <http://webarchive.nationalarchives.gov.uk/+/http:/www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/RestructuringMoratoriumConsultationDocument.pdf> accessed 6 December 2017
[337] R3, Ninth Survey of Business Recovery in the UK, p.14 available at <https://www.r3.org.uk/media/documents/technical_library/Consultation%20Responses/Annual%20survey/09th_Company_survey.pdf> accessed 5 December 2017

cases. It is opined that the absence of the moratorium appears not to be a problem because in getting creditor's consensus, it is more important for the directors to enlighten and convince creditors that the SA is the best route for them to pursue rather than resorting a costly and burdensome moratorium.[338] Yet, this thesis takes a counterview that if the creditors cannot be convinced without a moratorium, the failure of negotiation at the beginning can result in creditors taking individual enforcement actions against the company, which destroys the chance of rescue success. Therefore, there must be an introduction of a moratorium to prevent creditors from initiating individual enforcement.

Nor does the SA provide for the super-priority of the rescue finance. The uncertainty as to whether the rescue finance should be given priority over the existing not only disincentives creditors to advance the finance but also subject directors to liability for dissipation of the company's asset if they agree that the funder can get this super-priority advantage.[339] It seems to be that the absence of insolvency proof to initiate the SA is an advantage for the company to approach new financiers or even existing creditors to get new finance. However, the initiation of the SA somehow informs creditors, especially sophisticated creditors that the company has faced financial difficulty. The new finance is advanced only if the lenders are satisfied that they can have better treatment than the existing creditors in recovering their finance, which again gives rise to the need for the super-priority to be addressed by the legislation.

The SA has a fairer treatment of creditors than the CVA in that despite the same requirement for the threshold of creditor approval of 75%, the SA divides creditors into separate classes for the purpose of voting. According to the voting mechanism, dissenting creditors are bound within a class and there is no cram-down across creditor's classes.[340]

[338] J. Tribe, (n6) at 10
[339] Finch (n28) at 503
[340] J. Payne (n184)

This can prevent the potential abuse of plotting more powerful creditors into a class and use the approval of such class to oppress the weaker, dissenting classes. However, similar to the CVA, the absence of moratorium and lacking provisions for dealing with super-priority for the rescue finance discourage creditors to participate in the SA.

4.4 Conclusion

The formation of the Cork Committee to overhaul the insolvency law system significantly gave rise to the rescue culture that has nurtured and shaped the rescue law in the UK. As a result of the wide endorsement of this culture, the UK law has a very diverse approach to corporate rescue, with the informal rescue under the London Approach and the formal rescue under three different rescue procedures in the IA1986 and the CA2006. Despite the flexibility associated with introducing three different procedures of the administration, the CVA and the SA, the UK legislative policy appears to make the administration a main legal device for corporate rescue by abolishing the receivership and not facilitating a moratorium to prevent creditors from taking actions against the company under the CVA and the SA. The administration reflects the UK traditional attitude that views insolvency as the failure of management. This has created conditions for the IP profession to develop and contribute to the effectiveness of its rescue law.

The UK legislation has a diverse approach in adopting different models of rescue administration, with the administration following the PIP model, the SA following the DIP model and the CVA following the hybrid model. The assessment of these procedures under the four benchmarks of time and cost, expertise, abuse management, and creditor participation produced different outcomes. As for the administration, its merit lies in

several aspects, such as the statement of rescue objectives, the facilitation of a moratorium, and the administrator acting for the interest of creditors as a whole. However, with the strict timeframe and the removal of the company directors from the office, this procedure does not allow the administrator to sufficiently contribute expertise in rescue. As a result, the administrator tends to put a company into the pre-pack sale instead of pursuing the rescue option. The practice of using the pre-pack can lead to potential abuse insofar as the administrator will sell the company at a lower price in the market. Furthermore, the absence of the super-priority for the rescue finance has the effect of demotivating creditors to participate in the administration.

The CVA is the second most popular procedure in the UK. Though the CVA is more cost-effective than the administration, it is a lengthy procedure which demands strong commitment and support from the creditors. The CVA appears to be a more advanced approach than the administration for being able to combine the expertise of the IP and the company's directors in devising and implementing rescue proposals. As an agreement between the company and creditors, the CVA allows creditors to tackle abuse by providing a high threshold of creditor approval. Furthermore, the abuse can be tackled by the supervisor exercising the role of monitoring over the CVA's implementation. However, this procedure cannot encourage creditor participation due to the unavailability of the moratorium and the uncertainty of the priority in respect of the rescue finance.

Regarding the SA, it is a flexible procedure that does not require a company to have proof of insolvency. Though the SA is managed by the current directors, the judicial involvement is a guarantee that potential abuse could be prevented. However, the SA may incur significant cost due to the intensive involvement of courts in supervising this procedure. In the absence of the moratorium coupled with the uncertainty of the

legislation on the priority status of the rescue finance, efforts to encourage creditor participation could be inhibited.

The advanced attribute of the UK rescue law is the diverse approach that allows a financially troubled company to consider different procedures or combine them together to settle its insolvency affair. However, due to the lack of a moratorium and the uncertainty over the super-priority for the rescue finance, the combination of these procedures, for example, the administration combined with the CVA, could result in unnecessary costs in rescue. Therefore, there has emerged a need for the UK law to facilitate a moratorium in all rescue procedures as well as addressing the issue of super-priority for the rescue finance.

The next chapter will launch an investigation into Canadian rescue law which similarly follows the evaluation framework employed in this chapter.

CHAPTER FIVE

CORPORATE RESCUE LAW IN CANADA

5.0 Introduction

Following the framework employed to examine the rescue law of the United Kingdom (the UK), this chapter launches the examination into the rescue law of Canada. This chapter begins with an examination of the legal development of Canadian insolvency law to identify the factors that shape the legislative framework of corporate rescue in the country. It then furthers the investigation into two rescue procedures under the Bankruptcy and Insolvency Act (BIA)[1] and the Company Creditor Arrangement Act (CCAA).[2] Finally, the chapter assesses the effectiveness of Canadian rescue law under the benchmarks established in chapter three, namely time and cost, expertise, creditor participation and abuse management.

5.1 Legal development of corporate insolvency and rescue law in Canada

Prior to the confederation in 1867, Canada was a British colony and governed by British law.[3] After the confederation, Canada enacted its first federal insolvency legislation, the Insolvency Act 1869 (IA1869), which exclusively provided for the voluntary and involuntary insolvency of traders.[4] The Act was replaced with the Insolvency Act 1875 (IA1875),[5] under which debtors were restricted to apply for debt discharge and debtor's ability to apply for voluntary bankruptcy was no longer permitted. However, some of these provisions were criticised due to the unfairness relating to the

[1] Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3), <https://laws-lois.justice.gc.ca/eng/acts/b-3/> accessed 7 July 2018
[2] Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36) <https://laws-lois.justice.gc.ca/eng/acts/c-36/> accessed 7 July 2018
[3] Canada Guide, 'The Canadian Legal System' <http://www.thecanadaguide.com/basics/legal-system/> accessed 7 July 2018
[4] IA 1875, S.C.1869, c.16, see R. Wood, Bankruptcy and Insolvency Law (Irwin Law, 2009) at 31
[5] Ibid

distinction between traders and non-traders as well as the fraudulence caused by the availability of debt discharge, which resulted in a need for repealing the Act.[6] In 1880, the Canadian Parliament repealed the IA1875, and in the following four decades, there were no federal bankruptcy laws enacted.[7] Instead, during this period, debtors and creditors had to rely on provincial laws to settle their insolvency affairs. However, the differences in the provincial laws in response to the problem of insolvency in conjunction with the economic depression in 1913 prompted the need for official insolvency legislation to be enacted by the federal parliament.[8] The insolvency law reform in this period resulted in the introduction of the Bankruptcy Act 1919 (BA1919).[9] The Act marked a milestone in the development of Canadian insolvency law, signifying the approach to regulating the insolvency affairs of individuals and companies under a single legislative framework.[10] After the enactment of the 1919 Act, Canadian insolvency law continued to experience a number of reforms. In 1932, the Office of the Superintendent in Bankruptcy was established for supervising and regulating the qualification of bankruptcy trustees.[11] Modern Canadian insolvency law began in the 1970s, with the Tessé report calling for an overhaul of the bankruptcy system,[12] followed by significant reforms in 1992, 1997, 2005/2007 and 2009.[13] Presently, Canada offers a single bankruptcy proceeding for discharging individuals and liquidating companies under the Bankruptcy and Insolvency Act (BIA).[14]

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[6] T. G.W. Telfer, *Ruin and Redemption: The Struggle for a Canadian Bankruptcy Law, 1867-1919* (Toronto University Press, 2014) and 'Ideas, Interests, Institutions and the History of Canadian Bankruptcy Law 1867-1880' (2010) 60(2) The University of Toronto Law Journal, 603-621
[7] Ibid
[8] S.W. Jacobs, 'A Canadian Bankruptcy Act: Is It a Necessity?' (1917) 37 Canadian Law Times, 604, at 605
[9] T.G.W. Telfer, 'The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest', (1994-1995) 24 Canadian Business Law Journal 24 Can. Bus. L.J. 357
[10] Ibid 357-359
[11] Wood (n4) at 33
[12] Roger Tassé, *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (Information Canada, 1970)
[13] Wood, (n4) at 34-35
[14] Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)

In terms of corporate insolvency law, the first statute dealing with corporate insolvency is the Winding-up Act 1882,[15] which provided for liquidation of insolvent companies. The Act was replaced by the BA1919 that regulated the insolvency of both companies and individuals.[16] Though the BA1919 govern the matter of corporate insolvency, it did not express the objective of corporate rescue in strong terms, rather there was a rudimentary provision that allowed an insolvent company to make a proposal for a scheme of arrangement with its creditors.[17] During the Great Depression, rescuing financially troubled companies had been debated in the legislative discussion and the Canadian Parliament determined that it was important to preserve the company value, goodwill and employment.[18] As a result, the Companies Creditors' Arrangement Act (CCAA) was enacted to provide for corporate restructuring.[19] As such, at this time there were two pieces of legislation that dealt with corporate insolvency, the BA1919 providing for liquidation matter and the CCAA providing for corporate rescue matters.

Due to the debtor's abuse of the CCAA to escape liability to creditors, the amendment in 1953 restricted the application of the Act to companies that issued bonds or debentures under trust deeds.[20] This amendment rendered the CCAA a product of extremely low use for forty years.[21] However, the economic recession in the 1980s provided incentives for Canadian courts to re-consider the Act to deal with restructuring insolvent companies, and thus revived its application.[22] The requirement for a company

[15] Winding-up Act 1882, S.C 1882 c.23
[16] Bankruptcy Act 1919, S.C 1919 c.36
[17] Ibid s.13. See Jacob S. Ziegel, 'The Modernization of Canada's Bankruptcy Law in a Comparative Context' (1998) 33 (1) Tex. Int'l L. J., 1-26
[18] Janis Sarra, 'The Evolution of the Companies' Creditor Arrangement Act in Light of the Recent Development' (2011) 50 Canadian Business Law Journal 211.
[19] Companies Creditors' Arrangement Act (CCAA), S.C 1933 c.36
[20] CCAA 1953, S.C 1952-53, c.3
[21] J. Sarra (n18) at 211
[22] Ziegel (n17) at 7

to issue bonds under a trust deed to be eligible under the CCAA was abolished, and as a result of this, most of companies are entitled to file for restructuring under the CCAA.[23]

In 1992, the Bankruptcy and Insolvency Act (BIA) was amended, and a rescue procedure was added under part III division I of the statute in an attempt to make it become the primary proceeding for corporate restructuring in Canada.[24] For example, the BIA facilitates easy access to initiate the rescue procedure with a simple notice of intention to make a proposal.[25] Nevertheless, the CCAA was not repealed by the BIA; instead, it proved to be the favourable choice for restructuring large companies with complex structures of debts. Consequently, there has existed a dual rescue regime under the BIA and the CCAA, which appears to be a distinguishable feature of Canadian rescue law. While the BIA features a rule-based procedure that is suitable for small and medium companies, the CCAA is a judicial-based procedure to deal with the insolvency of large companies with the value of debts exceeding C$5 million.[26] Both statutes had undergone several reforms in between 1997 and 2009, and Canada has pursued the policy of convergence which attempts to bring the two regimes into alignment as well as minimising the differences arising from them.[27] However, differences remain between them and this will be discussed further in this chapter.

5.2 The distinguishing characteristics of Canadian rescue law

5.2.1 Rescue law in Canada developed under the influence of UK and US laws

Canadian rescue law historically developed under a mixture of influence of UK and US laws. As a former British colony, Canadian insolvency law was traditionally

[23] Sara (n18) 212. It should be born in mind that the CCAA is eligible for companies with the total value of debts exceeding C$ 5 million, see CCAA, s.3(1)
[24] Ziegel (n17) at 7-8
[25] BIA, s.50.4
[26] Ziegel (n17) at 9
[27] Wood (n4) 310

rooted in the UK legal system.[28] Regarding corporate rescue, Canadian law has its origin in the practice of using trust deed - a financing instrument employed by bondholders to secure bonds against the debtor's asset through a fixed charge or a floating charge.[29] The trust deed operated based on the principle of the receivership that when the debtor fails to pay debts, bondholders can enforce security by appointing a receiver who manages the debtor's business and sell its assets to pay the bondholders.[30] When the economic crisis occurred in the 1920s and 1930s and dictated corporate failure on a large scale, trust deed vehemently became an important tool for restructuring companies since creditors found rescuing companies could bring more benefits to them than in liquidation.[31] The trust deed in Canada shared a very important characteristic with that in the UK in that it contained a majority provision, which allowed a major creditor to have the power to compel other creditors in deciding important matters relating to the debtor, including restructuring a debtor company.[32]

However, the practice of using the majority provision under trust deeds was gradually curtailed in order to attract finance from the US. Accordingly, as the US investment gained prevalence in Canada in the 1920s and 1930s, in order for Canadian companies to list their securities in the US security market, they were required to omit the majority provision under trust deed in compliance with US legislation in protecting minority investors.[33] Because the majority provision under Canadian trust deeds allowed

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[28] Canada Guide (n3)
[29] W. Kaspar Fraser, 'Reorganization of Companies in Canada' (1927) 27 Columbia Law Review, 932-957
[30] Ibid 934
[31] Ibid 945-949
[32] Ibid and F. R. MacKelcan, 'Canadian Bond Issues' (1952) 30:4 Can Bar Rev 325, 330, and Jérôme Sgard, 'Bankruptcy Law, Majority Rule, and Private Ordering in England and France (Seventeenth–Nineteenth Century)' (2009-2010), at 2 < http://www.politics.ox.ac.uk/materials/centres/oxpo/working-papers/wp_09-10/OXPO_WP09-10b_Sgard.pdf> accessed 9 July 2018
[33] Ibid W.K. Fraser, 'House of Commons Standing Committee on Banking and Commerce' Minutes of Proceedings and Evidence respecting the Companies Creditors' Arrangement Act, No. 1, 7 June 1938 (Ottawa: King's Printer, 1938), at 18-22, cited by V. E.Torrie in *Protagonists of company reorganisation: A history of the Companies' Creditors Arrangement Act (Canada) and the role of large secured creditors* (PhD thesis, Kent University, 2015) at 82.

a creditor to have the power to compel other creditors, it was perceived as lacking integrity and thereby deterring US investors to advance their finance.[34] In addition to responding to the need for attracting US finance, a large scale of corporate failures in the Great Depression urged Canada to enact corporate rescue legislation since the practice of using trust deeds to settle debts was insufficient. As a result of these impetuses, in 1933 Canada enacted the CCAA which is the first Canadian legislation dealing with corporate restructuring. The Act provided legitimacy to the objective of corporate rescue insofar as it permitted an arrangement between a company and its creditors and this arrangement had a binding effect on creditors, including secured creditors. The CCAA, as acknowledged by a Canadian parliamentarian at that time, is an adoption of the s.153 of English Company Act 1929 that provided for restructuring companies based on the restructuring measure under English trust deeds.[35]

Apart from the influence of the UK legal tradition, the shaping of Canadian law was decided by factors coming from the US. As examined, in compliance with the requirement of the US security market to abolish the majority provision from trust deeds.[36] However, in this regard, the US influence on Canadian rescue law was not significant because the majority provisions still remained an important feature of the trust deeds in Canada after the 1930s.[37] The influence of the US on the Canadian rescue law became more obvious in the 1970s when the US reformed its bankruptcy law with the introduction of Chapter 11,[38] a legal mechanism to restructure financially troubled companies characterised by the Debtor-in-Possession model (DIP). Chapter 11 brought

[34] Ibid
[35] *Companies Act, 1929*, 19 & 20 Geo 5, c 23, s 153 ; see Hon. C.H. Cahan (Conservative), *Debates of the House of Commons of Canada*, (9 May 1933) 4th session 17th Parl (Ottawa: King's Printer, 1933), 4724, cited by Torrie (n29)
[36] See note 33 and 34
[37] W Benson, *Business Methods of Canadian Trust Companies* (Ryerson Press, 1949) 169
[38] A. L. Moller, and D. B. Foltz Jr, 'Chapter 11 of the 1978 Bankruptcy Code' (1980) 58 (5) North Carolina Law Review 881

about a philosophical change that conferred corporate rescue a legitimate objective apart from liquidation and Chapter 11 has become a popular model for other countries to follow.[39] Canada also contemplated Chapter 11 to the extent that corporate rescue was considered as a remedy for debtor companies to restructure their debts and the hostile attitude toward the company insolvency changed as well. In the 1970s, there was more often debtor's application to CCAA rather than creditor's and the debtor's abuse of the proceeding was no longer a primary concern.[40] As Canada entered into a recession in the 1980s, the DIP model, as the distinct feature of Chapter 11, gained greater acceptance in Canada along with corporate rescue being widely recognised as a normative goal of insolvency law.[41]

In summary, corporate rescue law in Canada had been shaped by the influence of both the UK and the US. The primitive rescue practice had been rooted in the deployment of the trust deeds, which was an inheritance of the UK law. In the time of economic crisis in the 1930s and 1970s, Canada looked for the approach from the UK and US to reform its law, as exemplified with the adoption of the English Company Act 1929 to enact the CCAA and the acceptance of the philosophical change towards accepting corporate restructuring under Chapter 11 of the US Bankruptcy Code. The mixture of influence from both the UK and the US has become a special feature of Canadian rescue law.

5.2.2 Canadian rescue law was a creditor remedy to cure the shortage of rescue measures

Canadian rescue law developed under the influence of the UK counterpart with the practice of using trust deed - a private arrangement between a debtor company and a bondholder to secure the payment against the company' assets under a floating charge

[39] N. Martin, 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28 B.C. Int'l & Comp. L. Rev. 1
[40] Tassé Report (n12) 57-60
[41] Ibid at 175-176

and a fixed charge.[42] By including a major provision that allows a major creditor to compel other creditors in deciding important matters relating to a debtor company, trust deeds became a remedy used by creditors to restructure debts for a company.[43] Nevertheless, it should be born in mind that trust deeds operated under receivership which was a tool for creditors to enforce security.[44] Accordingly, upon the debtor's default, a bondholder could enforce security by seizing the company's assets or appointing a receiver to control the company and sell its assets to pay the bondholder. This practice often precipitated an insolvent company to liquidation because it lacked essential property to maintain its operation. The idea of employing a trust deed for the purpose of rescue only emerged later when the bondholders contemplated that maintaining the company's going concern status would allow them to more benefits than they would receive in liquidation.[45]

The first statute legitimising corporate rescue in Canada (CCAA) was enacted in the context of the economic downturn in the 1930s.[46] Not only did the Act provide for a legislative framework to deal with corporate insolvency in the time of crisis, it also responded to the creditor's demand. When the provision of majority was omitted from trust deeds for Canadian bonds to be eligibly listed in the US market, the creditors lacked a remedy to effect corporate restructuring.[47] Therefore, the introduction of the CCAA officially provided creditors with a solution to deal with this problem.[48] Second, the enactment of the CCAA offers creditors a solution to overcome the shortcoming pertaining to corporate restructuring under provincial laws. Particularly, in Canada,

[42] Fraser (n29) 936
[43] Ibid
[44] Ibid 934
[45] Ibid 946
[46] See n19
[47] See n34
[48] Alfonso Nocilla, 'The History of the Companies' Creditors Arrangement Act and the Future of Restructuring Law in Canada', (2014) 56 Can. Bus. L.J. 73, 78

creditor-debtor relations were subject to the stipulation of provincial laws instead of federal law,[49] and this created a degree of difficulty where a debtor company had properties situated in different provinces, which could lead to multiple actions to be taken to effect restructuring.[50] Rescuing companies through the receivership under provincial laws was not a sufficient approach because there was a lack of binding effect on and coordination among creditors to safeguard the viability of a rescue plan.[51] The receivership of Abitibi, a paper and pulp company, in the 1930s is a very good example of the insufficient capacity of the provincial laws to deal with rescuing insolvent companies.[52] The receivership of Abitibi had been conducted for a long period (1932-1946) and eventually had to be completed under the CCAA due to the lack of consensus for rescue plans that resulted in several rescue proposals to be rejected.[53] Therefore, the enactment of the CCAA signalled a legislative response to creditors' need for a more co-ordinated remedy to solve the restructuring of debtor companies.

Later amendments of the CCAA also reflected the Canadian Parliament's response to protecting creditor's interests. For example, in 1938 the CCAA was proposed to be repealed due to the abuse of debtor companies.[54] When debtor companies increasingly used the CCAA to tactically escape the debts owed to unsecured creditors and trade creditors, the Bill 1938 was drafted to repeal it.[55] However, the Act was not repealed promptly because of sporadic debates relating to the debtor company control.[56]

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[49] According to Section 92(13) of the Constitution Act, 1867, the exclusive power to make laws regarding to property and civil is granted the provincial governments, 'property and civil rights in the province'
[50] H. E. Manning, 'Company Reorganization, Part III' (1932-1933) 2 Fortnightly Law Journal, 176, cited by V.E Torrie, (n33) at 79
[51] Ibid
[52] Barry E.C. Boothman, 'Night of the Longest Day: The Receivership of Abitibi Power and Paper' Paper in Proceedings of Administrative Sciences Association of Canada (1992), 22 <http://luxor.acadiau.ca/library/ASAC/v15/Vol 15 No 14 History.pdf > accessed 9 July 2018
[53] Ibid
[54] J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (University of Toronto Press, 2003) at 14
[55] Ibid
[56] Ibid

Instead, there was an amendment in 1953,[57] under which the application to CCAA was restricted to companies issuing bonds under trust deeds. As a result of this, the abuse of the legislation was efficiently tackled as abusive debtor companies had no basis to restructure unsecured creditor debts.

After the amendment in 1953, the CCAA had a very limited use due to the changes in the lending and borrowing practice triggered by the introduction of new legislation. As the Bank Act 1967 was introduced, Canadian banks were permitted to offer finance on a long term and secured basis,[58] companies increasingly relied on the banks as main financers rather than obtaining finance from bondholders. In addition to this, at the provincial level, there were substantial reforms of the Personal Property Security Acts (PPSA),[59] with the introduction of a generic concept of security interest in order to overcome the complexity pertaining to the existence of different forms of security device as well as enhancing the predictability.[60] The simpler security device offered by the Bank Act and the PPSAs had gained popularity in use over the trust deeds, therefore, the CCAA entered into the stage of dormant and were considered 'a dead letter'.[61]

Notwithstanding the popularity of the Bank Act and PPSAs, the economic recession in the 1980s and 1990s revived the use of the CCAA as a substantial basis for corporate rescue. In the crisis periods, Canadian banks could not just rely on liquidation to recover their finance because corporate failures on a large scale had a negative impact on the financial industry.[62] As the banks wanted to restructure debtor companies, the Bank Act could not provide an efficient tool insofar as there were no provisions that granted

[57] *Companies' Creditors Arrangement Act*, RSC 1952, c C-54, s 2A
[58] E.P. Neufeld, *The Financial System of Canada: its Growth and Development* (Macmillan of Canada, 1972), at 110-111
[59] The first PPSA was enacted in Ontario in 1967, later followed Canadian common laws jurisdiction.
[60] Jacob S. Ziegel and Ronald C. C. Cuming, 'The Modernization of Canadian Personal Property Security Law', (1981) 31(3) the University of Toronto Law Journal, at 249-289
[61] Torrie, (n33) at 248
[62] Torrie (n33) at 156-159

the banks a right to compel other creditors. Furthermore, since the banks did not always employ trust deeds to secure their loans, they could not initiate the restructuring proceeding under the CCAA.[63] Because of the lack of statutory remedy available for creditors to restructure insolvent companies, the CCAA was revived to be a useful tool for corporate rescue. In fact, during the time of crisis, Canadian banks had utilised the CCAA to support the restructuring of major clients on an ad hoc basis.[64] The courts then gradually expressed the support to revive the application of the CCAA by allowing companies that had not issued trust deeds to be eligible to apply for the CCAA.[65] For instance, through the adoption of the concept 'instant trust deeds', the court permitted insolvent companies to issue trust deeds to their creditors in order to make them eligible to the application of the Act.[66] The restriction of trust deed was then abolished with the amendment in 1997.[67]

To summarise, though the rescue legislation in Canada was to respond to the economic downturn, it apparently reflects the parliamentary deference to protect the interest of creditors. From the examination of the creation and evolution of the CCAA, the Canadian Parliament took actions to respond to the creditor demands if there had been no available remedy. The Bill 1938 to repeal the CCAA and the 1953 Amendment of the CCAA were the parliamentary action to tackle the debtor's abuse of the CCAA that harmed the creditor interests. Later, when the Bank Act was insufficient to respond to creditor's need for restructuring debts of debtor companies, the CCAA was re-considered and amended to respond to this matter.

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[63] This is because the 1953 amendment confined the use of the CCAA to the companies that issue bonds under trust deeds, see (n57)
[64] Torrie, (n33) at 257
[65] Ziegel (n17) at 7
[66] *e United Maritime Fishermen Co-op.* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.), *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, [1991] 2 W.W.R. 136 (B.C.C.A.*); Banque Royal v. Biltisses d'Acier Novac Inc*. (1990), 5 C.B.R. (3d) 140 (Que. S.C.) and see C. Ham, '"Instant" Trust Deeds Under the C.C.A.A.' (1988) 2 *Commercial Insolvency Reports,* 25
[67] Jacob S. Ziegel, 'Canada's Phased-in Bankruptcy Law Reform' (1996), 70 Am. Bankr. L.J. 383., at 396

5.2.3 The bifurcation of rescue law and the significant role of the courts in Canada

Presently, there is the existence of two corporate rescue procedures under part III of the BIA[68] and the CCAA.[69] While the BIA provides a rule-based procedure with detailed provisions for the restructuring of small companies, the CCAA offers large companies a procedure that is based substantially on judicial supervision.[70] The bifurcation of rescue procedures is the reflection of strategically legislative reforms in Canada for a long time.[71] Substantially, the main legislation for rescue in Canada is the CCAA, first enacted in 1933. As previously examined, the Act has proved its long survival during multiple attempts of repeal.[72] In 1938, the Act was proposed to be repealed because of the debtor's abuse to escape liability to unsecured and trade creditors, but the investor creditors successfully lobbied to retain it in order to issue security in the US market.[73] In 1946, attempts to repeal the Act were renewed and proposals were published to incorporate company rescue under the Bankruptcy Act 1949. The attempt failed due to investor creditor's lobbying.[74] In 1970, the Tassé Committee recommended that Act should be repealed and replaced with a single and integrated law for bankruptcy and insolvency.[75] However, the recommendation was not adopted due to the government's inability to respond to the lobbying of different groups in the law-making process along with the importance of the Act in restructuring numerous financially

[68] Bankruptcy and Insolvency Act, RSC 1985, c B-3, available at <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-b-3/136170/rsc-1985-c-b-3.html>
[69] Companies' Creditors Arrangement Act, RSC 1985, c C-36, available at <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-36/136168/rsc-1985-c-c-36.html>
[70] Ziegel (n17) at 7
[71] Ibid
[72] See section 5.2.1 of this chapter and Alfonso Nocilla (n48) 73-103 and the Tassé Report (n12) at 1.2.27
[73] Ibid 1.2.27.
[74] A. Nocilla (n48), at 78-79. Although the Act was not repealed, there was an important amendment that limited the Act's application to companies that issued bonds under trust deeds.
[75] Tassé Report (n12)

difficult companies during the 1980s crisis.[76] The issue of having a single and integrated bankruptcy and insolvency system was considered again in 1992 and in 1997 with the recommendation to repeal the CCAA upon the enactment of the commercial rescue provisions under part III of the BIA.[77] However, insolvency practitioners (IPs) had successfully lobbied to retain the CCAA because it has been suitable for the restructuring of large and complex companies.[78] Consequently, the 1997 Amendment resulted in the bifurcation of rescue legislation in Canada with Part III of the BIA and the CCAA exclusively for the companies with the amount of debt exceeding C$5million.[79] As such, the survival of the CCAA is the result of the lobbying of interested parties such as creditors and IPs and the government's effort in responding to the lobbying as well as maintaining a flexible and efficient legislative framework for corporate rescue.

In fact, the CCAA contains basic principles for corporate rescue and does not have many detailed provisions.[80] However, the usefulness that renders it a resilient statute is attributed to judicial supports. The courts have been constructing and clarifying the statute in a rescue-oriented manner since the very beginning of its enactment. As the CCAA was first introduced in 1933, the binding effect it had on secured creditors was considered unconstitutional to Canadian legal community because the federal government could not interfere with the provinces in the law-making process in respect of the rights of secured creditors.[81] However, the constitutional reference of the CCAA by the Supreme Court of Canada (SCC) upheld its validity, holding that Parliament had the wide discretion to

[76] A. Nocilla (n48) 80
[77] House of Commons examined the Bill C22 to repeal the Act upon the enactment of rescue provision under part III of the BIA. See, Standing Committee on Consumer and Corporate Affairs and Government Operations, 'Pre-Study of Bill C-22' in *Official Report of Debates (Hansard), No.* 15 (October 7, 1991),
[78] J. S. Ziegel (n67) 397
[79] Ibid
[80] The CCAA is a relatively short statute with 62 articles
[81] According to Section 92(13) of the Constitution Act, 1867, the exclusive power to make laws regarding property and civil is granted the provincial governments, "property and civil rights in the province"

regulate matters relating to insolvency and bankruptcy.[82] Since then, the courts started to support the application of the statute through judicial interpretation although this practice was very strict and narrow in the first place.[83]

Since the 1953 amendment, the CCAA remained unused for a long time. The revival of the CCAA began in the 1970s when Canadian courts adopted a liberal interpretation, which paid more attention to policies behind the statute.[84] This period saw the transformation of the SCC to become a more policy-conscious institution with the functions evolving beyond adjudication to developing the law.[85] Following the SCC's departure in its functions, the lower courts played an active role in interpreting legislation based on policies and intention of the parliament.[86] The courts routinely exercised discretion and based their decisions on the inherent jurisdiction to provide answers to the matters related to rescue.[87] For example, before the requirement for trust deeds was abolished, only companies that issued bonds under trust deeds were eligible under the CCAA. However, in the case *Re United Maritime Fishermen Co-op*,[88] the court exercised its discretion to adopt the concept of the 'instant trust deeds' to make the CCAA procedure eligible to companies that had not issued bonds under trust deeds. The liberal power of

[82] Though the issue of whether the federal government regulates the right of secured creditors was not addressed with substantial analysis in the first place, the SCC had addressed it at the second reference. Factum on behalf of the Attorney-General for Canada, filed with the Supreme Court of Canada (Ottawa: King's Printer, 1934), submitted with respect to the CCAA Reference; and *Reference re constitutional validity of the Companies Creditors Arrangement Act (Dom.)*1934 CanLII 72, [1934] SCR 659 (6 June 1934), Supreme Court (Canada).
[83] See *Re Stelco Inc.* (2004), 48 CBR (4th) 299 (Ont SCJ),
[84] This new interpretation is constructed by Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974. The SCC and courts in Canada adopted it through a number of cases, see *Bell ExpressVu Ltd. Partnership* v *Rex*, 2002 SCC 42, [2002] 2 SCR 559, *Re Indalex Ltd.*, 2013 SCC 6, JE 2013-185, para 136, and *Norcen Energy Resources Ltd.* v *Oakwood Petroleums Ltd.* (1988), 1988 CanLII 3560 (AB QB)
[85] Philip Girard, *Bora Laskin: Bringing Law to Life* (University of Toronto Press for the Osgoode Society for Canadian Legal History, 2005), Part V: The Supreme Court of Canada. Contrast with the pre-Laskin SCC
[86] Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974)
[87] In *Stelco Inc. (Bankruptcy), Re*, 2005 CanLII 8671 (ON CA), the court cited a number of cases where the court exercises the literal interpretation and relied on inherent jurisdiction, para 32
[88] *Re United Maritime Fishermen Co-op.* (1988), 67 C.B.R. (N.S.) 44 (N.B. Q.B.)

courts in interpreting the CCAA is considered to 'flesh out' the 'bare bone' of the statute.[89] Because of the judicial flexible interpretation, the CCAA has become a popular rescue regime for large companies in Canada.[90] Although the reforms of 2005 to 2007 restricted the court's discretion by expressly stating their specific powers under the CCAA, Canadian courts still enjoy a wide range of powers to make orders regarding corporate rescue.[91] In addition to judicial interpretation, Canadian courts play an important role in supervising the rescue proceedings. The courts perform the function of screening rescue application to decide whether to accept or reject it.[92] The courts also maintain a fair framework for parties involved in the rescue proceedings through reviewing the classification of creditors and importantly decide whether to accept a rescue proposal.[93] The 2005/2007 amendment conferred the courts with similar jurisdiction under the BIA and the CCAA and this signalled the effort of the Canadian parliament to bring rescue under the two pieces of legislation closer and more integrated.[94]

5.3 Legislative framework for corporate rescue in Canada

Canadian corporate rescue law adopts the hybrid model of rescue administration which permits the incumbent directors of an insolvent company to retain in management. Both rescue procedures under the BIA and the CCAA reflect this model of rescue administration. While the BIA procedure is applicable for all companies, the application to CCAA is constrained to companies with the total value of debts being more than C$ 5 million.[95] This section examines how these rescue procedures work under the BIA and

[89] *Re Stelco* (2005), 75 OR (3d) 5, 253 DLR (4th) 109 (CA), para 32
[90] Ziegel (n59) 397
[91] Wood, (n4) at 322-324
[92] Ibid 319
[93] Ibid
[94] Ibid 394
[95] CCAA, s.3(1)

CCAA. The examination places the two procedures in parallel in order to highlight the similarities and differences between them.

5.3.1 Initiation of rescue procedures

Under the BIA

The BIA has a wide scope of application, which allows an 'insolvent person'[96] to make a commercial proposal to its creditors regardless of whether the debtor is an individual or a company.[97] In respect of companies, the BIA does not impose any restriction on the types of companies or the amount of debts, which means that insolvent companies with all sizes of operations and debt structure can file for rescue under this procedure. The procedure under the BIA can be initiated by two ways. The first one is to file a proposal with a licenced trustee if the proposal has been already formulated by the company, and the trustee then files the proposal and other related documents with the official receiver.[98] After ten days, the debtor must file the cash-flow statement and the trustee's report on the reasonableness of the statement.[99] The second way is that the company will file a notice of intention to make a proposal with the official receiver.[100] This way appears to be a more preferable option than the first one in that it does not require the company to already prepare a proposal like the first option. However, within thirty days of the filing of the notice of intention, the company must file the proposal with the trustee and the company's failure in doing so could result in voluntary liquidation.[101]

Under the CCAA

[96] BIA: ss.2, the definition of an 'insolvent person' does not distinguish between individuals and companies
[97] Ibid s.50(1) and 50 (1.1)
[98] Ibid s. 50(2.1) and s. 62(1)
[99] Ibid s.50.4(2)
[100] Ibid s.50.4(1)
[101] Ibid s.50.4(8)

Unlike the BIA, the CCAA limits its application by imposing a statutory threshold of debt value on an insolvent company. Accordingly, a company is eligible to initiate the rescue procedure under the CCAA if the total value of debts owed to creditors is more than C$5 million.[102] As a court-driven procedure, the CCAA is commenced by an eligible company that files an application to the court for an initial order.[103] It is more often that the debtor company is the party who initiates this procedure; however, the legislation does not restrict the right of initiation to other parties, therefore, there is still a case a secured creditor can commence the procedure.[104] After receiving the application along with prescribed documents such as the cash-flow statement and the financial statement submitted by the debtor[105] and in consideration of the circumstance of the company on hand, the court will make any order that it considers to be appropriate to the company.[106]

5.3.2 Operation of the moratorium (the stay of proceedings)

Under the BIA

Upon the filing of a proposal or the notice of intention to make a proposal, there will be a moratorium that automatically arises to prevents creditors from commencing or continuing any actions, execution or enforcing their claims against the company.[107] The moratorium under the BIA has a wide scope, carrying a binding effect on both unsecured creditors and secured creditors. However, the moratorium has its limitation in that it cannot operate against a secured creditor if he either already took possession of the secured assets before the notice of intention was filed for dealing with the asset.[108] Neither does the moratorium apply when the creditor has given a notice to enforce the security

[102] CCAA, s.3(1)
[103] The application often requests courts to issue important orders such as staying the enforcement of creditors, appointing the monitor and obtaining interim financing.
[104] *Re 1078385 Ontario Ltd.* (2004) CanLII 66329 (ON SC)
[105] CCAA, s.10(2)
[106] Ibid s.11
[107] BIA: s.69.1(1) and s.69(1)
[108] Ibid s.69(2)

more than ten days before the company filed a proposal or the notice of intention to file a proposal, or if the debtor consented to the enforcement after receiving the notice from the secured creditor.[109]

An important advantage of the BIA moratorium is its continuation. Accordingly, a moratorium automatically arises when the debtor initiates the rescue procedure by filing the notice of intention to make a rescue proposal and it terminates when a proposal is filed.[110] Another moratorium then automatically arises until the proposal is approved by creditors or the courts. Once the proposal gets sufficient approval from the creditors, another moratorium comes into operation during the implementation of the proposal and it is only terminated when the trustee is discharged or the company goes to liquidation.[111] With this continuity of the moratorium, the BIA protects the company from creditors' harassment and allows the company directors to have a comfort zone to draft a rescue proposal and carry out the rescue proceeding from the beginning to the end.[112]

Under the CCAA

If the moratorium under the BIA arises automatically upon the initiation of the proceeding, the moratorium under the CCAA arises from a court order. Therefore, the court could modify the moratorium to deal with specific problems in relation to the company's insolvency.[113] The scope of the moratorium issued by the court is very broad, comprising a moratorium that could be made under the BIA and it can be effective against secured and unsecured creditors.[114] The first moratorium will operate within thirty days, and then the debtor must apply for another moratorium,[115] thus allowing creditors to have

[109] Ibid s.69(2) and 69.1(2)
[110] Ibid s.69(1)
[111] Ibid s.69.1(1)a
[112] For the role of the stay, see UNCITRAL*, Legislative Guide on Insolvency Law*, (the United Nation, 2005) at 83, available at <https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> accessed 10 August 2018
[113] Wood (n4) at 333
[114] CCAA, s.11.02 (1) & (2)
[115] CCAA, s.11.02(1)

time to be aware of the proceeding and participate in.[116] In making any subsequent orders along with a moratorium, the court will consider the interest of not only the company but also its creditors to ensure that it is fair and equitable.[117] In addition, the court must be satisfied that the application is made with the company acting in good faith and with due diligence.[118] There are no limits in the number as well as the duration of the moratorium; therefore, the only way for creditors to stop the moratorium operation is to bring a motion to the court for lifting it.[119] A creditor who wants to challenge the moratorium should provide evidence to convince the court that the moratorium has a prejudicial effect on his interest, and his action will not lead to similar actions from other creditors.[120] In considering making an order to lift the moratorium, the court has to weigh the harm suffered by the creditor against the harm suffered by other creditors to determine whether he will suffer worse than the others.[121]

5.3.3 Approval of a rescue proposal

Both the BIA and the CCAA apply the same rules relating to the approval of a rescue proposal. Accordingly, a proposal must be approved by both the company's creditors and sanctioned by the court.[122] Regarding the creditor approval, creditors are divided into different classes for voting purposes; and the threshold for approving the proposal under the two statutes is the same, which is a majority of creditors holding two-third values of debts.[123] It is a special feature of the voting rule that the approved proposal

[116] D. W. Mann, 'CCAA vs. BIA: A Comparison of Reorganization Processes', at 13, <https://www.dentons.com/en/insights/articles/2000/january/1/ccaa-vs--bia--a-comparison-of-reorganization-processes> accessed 15 August 2018, 13
[117] In *Re Woodwards*, (1993) 17 C.B.R. (3d) 236, the Supreme Court of British Colombia declined to grant a moratorium on the ground that the prejudice to affected party that is greater than the benefits that would be achieved in the insolvency of the company.
[118] CCAA, s.11.02(3)
[119] Wood (n4) at 343
[120] Ibid
[121] *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.* (2005), 29 C.B.R. (5th) 62 (Ont. S.C.J.)
[122] BIA, s.59(2) and CCAA s.6(1)
[123] BIA, s.54(2) and CCAA s.6(1)

only has the binding effect on the dissenting creditors within a class, and the classes that approve the proposal cannot bind a class that opposes the proposal.[124] In addition to obtaining creditors' approval, a proposal must be sanctioned by the court to have a binding effect on creditors. The CCAA does not provide any guidance for the court to approve a plan, but judicial precedent has established a set of principles to deal with this matter. A court may approve a plan if it is shown that there is compliance with the statutory requirement, no unauthorised conduct and that the proposal must be fair and reasonable.[125] Meanwhile, under the BIA, a court's decision to sanction the proposal must be based on the ground of fairness and reasonableness; a proposal with unreasonable terms or one without being calculated to benefit of the general body of creditors will be refused.[126] Another significant requirement for getting court approval under the BIA is that the company must provide creditors with reasonable security of payment of not less than fifty cents on the dollar.[127]

Once a proposal is approved by both creditors and the court, it will bind unsecured creditors and secured creditors.[128] If the BIA proposal fails to gain either the creditor approval or the court sanction, it will automatically result in bankruptcy.[129] Unlike the BIA, a CCAA proposal that fails to gain sufficient creditor approval does not result in the termination of the moratorium or the rescue. Instead, they are able to apply to the court for lifting the moratorium and then initiating other insolvency procedures such as liquidation.[130] Upon the approval of the proposal, it will be implemented by the company's directors according to the terms agreed by the parties. Although the law allows

[124] Wood (n4) 450 and *UTI Energy Corp. v. Fracmaster Ltd*. (1999), 11 C.B.R. (4th) 230 para 14
[125] *Northland v Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (2d) 195 (BCCA)
[126] Ibid s.59(2)
[127] Ibid s.59(3)
[128] Ibid s.54(2)(d) and 6(1)
[129] BIA, s.57. The bankruptcy in Canadian law has the nature of liquidation
[130] Wood (n4) 451

the directors to retain their management power to carry the proposal, they are subject to the supervision of a trustee (under the BIA) or a monitor (under the CCAA) who are the officer of the court to ensure that accurate and timely information is provided to the creditors and the court.[131]

The above examination has provided some highlights on the corporate rescue procedures in Canada. The two procedures share a number of similarities. Firstly, they allow the directors to stay in the office and carry out the rescue. Secondly, there is the availability of a moratorium to prevent creditors from taking action against the company. Thirdly, the mechanism for a rescue proposal has to be approved and implemented is similar, which requires the creditor's approval and the court's sanction for the proposal. The striking difference between them is that while the BIA procedure adheres strictly to the rule, the CCAA procedure is heavily reliant on court involvement from reviewing the application to sanctioning the rescue proposal. The effectiveness of the two procedures will be examined in the following section.

5.4 Evaluation of Canadian rescue law under the four benchmarks

Canadian law approaches the issue of corporate rescue with the hybrid model of rescue administration that permits the company's directors to stay in office and continue to operate the business and implement the rescue plan. The hybrid model is incorporated into two distinct procedures under the BIA and the CCAA. In evaluating the effectiveness of these models, this thesis relies on the four benchmarks established in chapter three, namely time and cost, expertise, creditor participation and abuse management.[132]

5.4.1 Time and cost

As a rule-based procedure, the timeframe under the BIA is very strict. Though a debtor company can immediately initiate the BIA procedure by filing a notice of intention

[131] CCAA, s.11.7(1) and BIA s.2
[132] See Chapter Three (3.6.2.3 Benchmarks for evaluation of rescue law proposed by this thesis)

to make proposals,[133] it must present a proposal within one month from the date of making the notice and failing to do so could result in the automatic liquidation for the company.[134] Submitting a rescue proposal to creditors under this time pressure is a very challenging task for the company directors as this can lead to a situation where the company is unable to devise a proposal in time, or the proposal is not viable to convince creditors for approval. The company can make an application to the court for extending this period, however, this is not easy because there are conditions that must be satisfied in order to be granted the extension, one of which is its ability to submit a viable proposal.[135] If successful, the company can be granted an extension that does not exceed forty-five days for each individual extension and not exceeding five months in aggregate.[136] If the rescue proposal is approved by creditors, it will be implemented within a period of five years.[137]

In contrast to the BIA, the CCAA does not impose any time restriction. Therefore, a comparison based on the statutory wordings is unable to determine which procedure could be completed earlier. In addition, the length of the CCAA rescue depends on the nature of insolvency on a case-by-case basis as well as the terms of the proposal agreed by the creditors. As a result of this flexibility, the CCAA appears to be a more favourable option for companies with complex insolvency affairs. Meanwhile, small and medium companies tend to be attracted by the easy initiation of the BIA proceedings by just filing a notice of intention as well as the low court involvement.[138]

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[133] BIA s.50.4(1)
[134] Ibid s.50.4(8)
[135] Ibid s.50.4(9). Accordingly, the court will consider the following factors (a) the insolvent person has acted and is acting, in good faith and with due diligence; (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and (c) no creditor would be materially prejudiced if the extension being applied for were granted.
[136] Ibid
[137] Ibid s.66.12(5)
[138] See, Jacob S. Ziegel and Rajvinder S. Sahni, 'An Empirical Investigation of Corporate Division 1 Proposals in the Toronto Bankruptcy Region', (2003) 41:4 Osgoode Hall Law Journal, 665-710

The cost of implementing the BIA procedure is a problem according to a study by Ziegel and Sahni.[139] Though the rate of unsecured creditor return is significantly higher than it would be in liquidation, 44.65% compared to 6.89%,[140] this return is reduced by the high trustee fee, 19.89% and the disbursement, 28.13% of the amount available to distribute to creditors.[141] Therefore, the BIA does not appear to be a cost-effective procedure. In attempting to restrict the professional fees, there should be a mechanism to inspect and approve the professional fees. Unfortunately, Canadian law is insufficient in this regard. Section 39(3) allows the amount of trustee's remuneration to be agreed between the company and the trustee, and the court will decide the amount only in the absence of an agreement among the parties.[142] Because the legislation does not provide for how this remuneration is quantified, this provision is likely to bring more benefits to the trustees who charge their service with an inappropriate rate of professional fees. Therefore, this could encourage litigation by dissenting creditors if they find their return is largely deducted by the professional fee. If the issue of the professional fees is decided by the company and the trustees, to avoid potential disputes from creditors, the estimated fee should be clearly included in a rescue proposal.

Under the CCAA, there are no provisions that limit the number of court orders, the duration of the moratorium as well as the time to complete the rescue. Therefore, the courts can tailor their orders to meet the need of different companies in different circumstances. In fact, the CCAA is not a complex proceeding. Large companies choose it for restructuring because the complexity of their insolvency should be settled by the

[139] Ibid
[140] Ibid 691
[141] Ibid 693 This cost cover for the period from the initiation of the insolvency proceeding to accept
[142] BIA, s.39(3)

flexible mechanism under the CCAA.[143] However, the greater flexibility offered by the CCAA is a trade-off for the costs relating to professional fees and court involvement.[144] The professional cost has raised a concern of eroding creditor's recoveries and somehow jeopardising the justification for the pursuit of the rescue objective which is to bring creditors more return than in the case of liquidation.[145] Because the CCAA is a court-supervised procedure and the restructuring under this Act is not subject to the administrative supervision,[146] it is empirically difficult to obtain specific figures regarding the professional fees under the CCAA's restructuring. Nevertheless, evidence emerging from case law partly reveals the extent that unreasonable professional fees may affect the viability of rescue. In *Community Pork Ventures*, the judge stated that:[147]

> The issue of expense is of concern to the court. While senior lenders with $35,700,000 on the table are quite prepared to absorb the not inconsiderable costs in the long run, the companies foresee the presently budgeted $650,000 of professional fees ballooning to $1,000,000 or more for only a three month period. The consolidated cash flow statements before the courts show only $215,000 of positive cash flows and a pro-forma accrual statement for the same period would, I am told, show a deficiency. Any further expense would render the cash flow negative and accruals would show an even worse result. These numbers will affect the survival potential of the business and the court must be on guard against any course of action which would render the process futile.

When the judge saw the professional fee would render the rescue plan unviable, she ordered the stay to be expired.[148] In other cases, the courts did show the reluctance to allow IPs to receive unreasonable professional fees. For example, in *Triton Tubular*

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[143] Canadian Bar Association, Bankruptcy, Insolvency and Restructuring Law Section and Canadian Corporate Counsel Association of the Canadian Bar Association, 'Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act' (July 2014), at 18

[144] Jocelyne Gosselin and Benoit Mario Papillon, 'Empirical Analysis of the Effectiveness of Reorganization Proceedings under the BIA and the CCAA', a study conducted for the Office of The Superintendent of Bankruptcy (2005), at 18

[145] Canadian Bar Association (n143) at 19

[146] Corporate and Insolvency Law Policy Directorate, 'Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act', at 18 available at <https://www.iiiglobal.org/sites/default/files/20_Report_on_the_Operation_and_Administration_of_BIA_CCAA.pdf> accessed 14 August 2018

[147] *Community Pork Ventures Inc. v.Canadian Imperial Bank of Commerce* (2005), 11 C.B.R. (5th) 65, 2005 SKQB 245 (Sask. Q.B.), additional reasons 2005 SKQB 252 (Sask. Q.B.), para 10.

[148] Ibid

Components Corp,[149] the court refused a claim for collecting $750,000 professional fee resulted from the service that helped the debtor company recover only $1millon.

As such, these cases address the judicial willingness to adjust the high cost of professional fees where it negatively affects the viability of rescue plans. Apart from recognising judicial intervention, these cases reveal a high rate of professional fees that could occur under the CCAA restructuring. Similar to the BIA, professional fees under CCAA should be subject to a mechanism for checking and reviewing, which returns to the role of legislatures and the Office of Superintendent of Bankruptcy (OSB) in Canada to regulate the trustees' and monitors' license and conduct.[150]

5.4.2 Expertise

Expertise refers to a high degree of knowledge, skills and competence of the parties that take part in rescue administration.[151] The hybrid model employed under the BIA and the CCAA features the participation of the company directors, the IPs (the trustee in BIA procedure and the monitor in CCAA procedure) and the court. The directors' expertise is exercised by operating the company and drafting the rescue proposal, while the IPs exercise their expertise by assisting and supervising the rescue. The court contributes greatly to rescue by screening the application and making orders relating to matters of rescue. Given the difference between the BIA as a rule-based procedure and the CCAA as a court-based procedure, the extent to which the IPs and the court contribute their expertise to the rescue administration can be different. However, after the 2005/2007 amendment, the role of a trustee under the BIA and a monitor under the CCAA are

[149] *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J.[Commercial List]), additional reasons 2006 CarswellOnt 2968, at paras. 92 and 100. A similar case on judicial adjustment for professional can be found at Tepper Holdings Inc., Re (2011), 984 A.P.R. 1,2011 N3QB 311 (N.B. T.D.)
[150] The high professional fee is one of the issue proposed to review in reports submitted to the Office of Superintendent of Bankruptcy in Canada. See Industry Canada, *Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act,* <https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00871.html> accessed 4 September 2019
[151] See Chapter Three (3.6.2.3 Benchmarks for evaluation of rescue proposed by this thesis)

comparable.[152] Furthermore, the role of courts under the two procedures are similar when the amendments to the BIA granted the courts with similar powers as those under the CCAA.[153] As the above-mentioned actors have a very important role to play in rescue under the BIA and the CCAA, the law is considered to be effective so long as it can make sure that the participating actors possess a sufficient degree of expertise.

Directors

Both the BIA and the CCAA follow the hybrid model that allows existing directors to retain managerial power and this can bring about certain benefits. First, it is the existing directors who possess a great deal of knowledge on every aspect of the company operation, which means that they can start the rescue sooner without taking time to be familiar with the company's business again.[154] Secondly, this provides the directors a chance to correct their mistakes that led the company to the current stage of insolvency, and thus creates incentives for them to actively participate and co-operate with other parties in the rescue.[155] Thirdly, this may prevent the scenario where the directors are replaced with outside professionals, and therefore, they are discouraged from seeking assistance and tend to hide material information about company affairs to prolong their tenure and avoid liability.[156]

However, running a company during the rescue period is very different from that in the ordinary course of business given the changes in the business environment and multiple negotiations with creditors.[157] In order to manage an insolvent company properly, the directors are required to possess a degree of expertise in business

[152] D.W. Mann (n116) 11
[153] See Wood (n4) at 394
[154] Lynn M. LoPucki and William C. Whitford, 'Corporate Governance in the Bankruptcy of Large Public Held Companies', (1993) 141 U. PA. L. Rev. 669, 694 and Michael Bradley & Michael Rosenzweig, 'The Untenable Case for Chapter 11' (1992) 101 YALE L.J. 1043, 1044
[155] LoPucki and Triantis, 'A System Approach to Compavng U.S. and Canadian Reoganization of Financially Distressed Companies', 35 Havard International Law Journal. 267, 304-05
[156] Finch, *Corporate Insolvency Law: Perspectives and Principles* (CUP, 2edn, 2009) at 400
[157] Wood (n4) at 386

turnaround. Where existing directors are unlikely to possess such expertise, the practice of appointing a Chief Restructuring Officer (CRO) in Canada seems to be a solution for this. A CRO is a turnaround professional who is appointed to work along with the company directors to assist them in co-ordination of the rescue effort. The practice of appointing a CRO is recognised by courts to be an effective means for rescue success[158] insofar as the appointment can be an alleviation to creditors' fear that the company is being managed by incompetent directors.[159] The CRO can be appointed by the existing directors or the courts. However, the CRO is not an officer of the court, rather, he acts as the company's officer with the functions of formulating, implementing and monitoring the rescue plan.[160] Although the CRO is not a court officer, a special advantage the court would confer on a CRO is to protect him from potential liabilities which are similar to those of monitors when performing his functions.[161] The limited liability protection has the effect of incentivising the CRO to work the best their ability to produce the best restructuring result. Despite the additional cost incurred by the company, the CRO appointment appears to enhance the directors' expertise under the hybrid model. The participation of the CRO not only allows the incumbent directors to exercise their expertise in operating the company but also reassures creditors about the rescue viability.[162]

Insolvency Practitioners (IPs)

IPs are the monitor under the CCAA procedure or the trustee under the BIA procedure, and they have the role of an intermediary party who assists the court and the

[158] *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*., (Re) (2007), 33 C.B.R. (5th) 39 (Sask.Q.B.), para 19
[159] Wood (n4) at 386
[160] *Re Ivaco Inc.* (2004) 3 C.B.R. (5th) 33 (Ont. S.C.J.)
[161] *Re Collins & Aikman Canada Inc.* (2007), 37 C,B,R. (5th) 282 (Ont. S.C.J.) at paras. 134 and *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*., (Re) (2007) (n114)
[162] Grant B. Moffat, 'Chief Restructuring Officer or Cost-Effective Restructuring Option', (2002) available at <http://www.tgf.ca/resources/publications/publication/cro-chief-restructuring-officer-or-cost-effective-restructuring-option> accessed 14 August 2018

company in conducting the rescue. Under the BIA, the trustee has the duty of appraising and investigating the company's affairs and assets to make reports relating the accuracy of financial information of the company to creditors.[163] In addition, the trustee must file a report on the company's cash-flow with the Official Receiver within ten days after the company files a notice of intention to make a proposal to initiate the rescue procedure.[164] Furthermore, the trustee must monitor the company and report to court and creditors regarding the rescue progress and material adverse change.[165] Under the CCAA, the monitor must be a licensed trustee to be appointed[166] and the role of the monitor is similar to that of the trustee under BIA.[167] However, the monitor's role is more significant in that they assist the court in deciding important matters relating to rescue. For example, they will advise the court if the procedure under the BIA provides the company more benefits than the current one.[168] Given these important functions, the Office of Superintendent of Bankruptcy of Canada (OSB) regulates the licensing of monitors and trustees and monitor their practice to maintain professional standards.[169] The OSB performs this function through the Directive No. 13R6 to impose certain requirements for obtaining a trustee license.[170] Generally, candidates applying for a trustee license must be professionals in accounting or financial advisory firms and they have to pass a number of intensive courses and training programmes.[171] Particularly, they have to complete the Chartered Insolvency and Restructuring Professional (CIRP) Qualification Program (CQP), the CIRP National

[163] BIA, s. 50(5)
[164] Ibid s.50(6)
[165] Ibid s.50(10)
[166] CCAA, s.11.7(1)
[167] CCAA, s.23
[168] Ibid s.23(1)h
[169] Wood (n4) at 33
[170] See s.5 Directive No. 13R6 (2015) on Trustee Licencing <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03247.html> accessed 14 August 2018
[171] Ibid And see the OSB, 'How to become a Licensed Insolvency Trustee', <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01128.html> accessed 14 August 2018

Insolvency Exam and the Insolvency Counsellor's Qualification Course.[172] If candidates meet these prerequisites, they will make an application to the OSB to be invited to the Oral Board of Examination.[173] When a candidate is successfully issued a trustee license, he is required to undergo a probation period of two years during which he must actively practice with an established trustee in the same physical location.[174] In comparison with the UK, the requirements for licensing IPs in Canada appear to be stricter and more rigorous as the UK law just requires a candidate to obtain a level of working experience and successfully passed the JIEB examination.[175]

In terms of monitoring trustee's conduct, licensed trustees have to perform their function following the Code of Ethics prescribed by the Bankruptcy and Insolvency General Rules.[176] Furthermore, the OSB facilitates easy, open access for the public to lodge complaints against the trustees' alleged misconduct[177] in tandem with providing for a procedure to govern trustee professional conduct under which misconduct will be reviewed by a hearing and the decision of which will be communicated with the complainer and be published.[178] Similarly, for the investigation of monitors' conduct, the legislation confers the OSB a right to apply to the court to review the appointment of monitors as well as their conduct[179] and also the right to maintain a public record regarding CCAA proceeding.[180]

The courts

[172] Ibid s.5
[173] Ibid s.11
[174] Ibid s.20
[175] See Chapter Four (4.3.2.2 Expertise)
[176] S. 34-39, Bankruptcy and Insolvency General Rules, <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01858.html> accessed 14 August 2018)
[177] OSB, protecting public, <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br03199.html> Accessed 14 August 2018
[178] OSB, Directive No. 31 on Proceeding Governing Trustee Professional Conduct Proceedings, available at <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03243.html> accessed 14 August 2018
[179] CCAA, s.27-31
[180] Ibid s.26

The courts hold the highest position in the rescue administration model under the BIA and the CCAA. Courts participate in rescue through making a number of important orders relating to whether to accept or reject a rescue application,[181] to grant or extend a stay of proceedings[182] or to sanction a rescue plan[183] and so on. It should be borne in mind that courts exercise their expertise in corporate rescue differently from that of ordinary commercial litigation.[184] While hearing commercial litigation involves an examination of issues in the past, dealing with corporate rescue requires courts to review proposals and ongoing activities.[185] Therefore, insolvency judges should be well prepared with expertise regarding corporate restructuring.[186] The involvement of the courts in dealing with corporate rescue is a distinct feature of Canadian law that was influenced by its unique legal developments. As examined earlier, in the 1980s the SCC transformed itself to become a more policy-conscious institution that assumed the functions of not only settling disputes but also developing laws.[187] The transformations led to the adoption of a new liberal interpretation approach under which the courts construed laws based on the underlying policies behind the legislation as well as the intention of Parliament. Following this approach, the lower courts relied on their inherent jurisdiction and liberal interpretation to bring clarification into the very basic rules of the CCAA in a way that emphasises the objective of corporate rescue.[188] The judicial interpretation is considered to 'flesh out' the skeleton structure of the CCAA.[189] This practice of judicial interpretation is very important in the development of the CCAA insofar as it responded to a number of

[181] CCAA s.4
[182] CCAA, s.11.02 (1) & (2)
[183] BIA s.59(2)
[184] Wood (n4) at 395
[185] Ibid
[186] Ibid
[187] See section 5.2.3 The bifurcation of rescue law and the significant role of the courts in Canada in this chapter
[188] *Bell ExpressVu Ltd. Partnership* v *Rex*, 2002 SCC 42, [2002] 2 SCR 559
[189] *Re Stelco* (2005), 75 OR (3d) 5, 253 DLR (4th) 109 (CA), para 32

issues that were silent by the Act and gave it a degree of flexibility in dealing with large, complicated insolvent companies.[190]

The transformation of the Canadian courts' functions in combination with the proactive approach of interpretation allowed the judiciary to be well prepared and developed to deal with complicated and sophisticated issues of rescue on a case-by-case basis. Inheriting the development of judicial involvement, Canadian courts have utilised advanced approaches to effectively deal with corporate restructuring. One of the approaches is judicial specialisation,[191] which involves the institutionalisation of specialised judges working in bankruptcy and insolvency. For example, in Ontario and Quebec, there is the formal establishment of the Commercial List which comprises experienced judges who specialise in commercial litigation, including insolvency.[192] While in other provinces, restructuring cases will be assigned to judges who had experience in restructuring in the past.[193] Another approach the courts follow to deal with rescue is the case management, under which the same judge will stick into a particular insolvency case and will hear various applications related to it.[194] Given the complexity and time constraint, this approach has the benefit of familiarising the supervising judge with the case from the beginning and thus the judge can effectively deal various problems arising from the case in a timely fashion.[195]

In summary, Canadian law appears to be able to allow the participating actors to contribute their expertise in the rescue procedures. While the debtor's expertise is enhanced by the appointment of the CRO, the rigorous licensing and monitoring by the

[190] Ziegel (n59) 391
[191] Wood (n4) 395
[192] The Commercial Lists in Toronto, <http://www.ontariocourts.ca/scj/civil/commercial-list/> accessed 15 August 2018
[193] Wood (n4) at 395
[194] Ibid at 396
[195] Ibid

OSB can ensure the monitor/trustee to be qualified for a supervisory role over the directors' management. Especially, with the judicial development in insolvency, Canadian courts prove themselves sufficiently capable to deal with the matter of corporate rescue.

5.4.3 Creditor participation

Canadian rescue law adopts the hybrid model of rescue administration under which the company directors remain in office to implement the rescue proposal under the supervision of the trustee/monitor and the court. Although creditors do not directly participate in the administration, they significantly contribute to the success of the rescue in the extent to which they can be potential lenders of the rescue finance to implement rescue proposals and their voting decides whether a rescue plan is implemented.[196] Under the BIA, without sufficient approval from creditors, a debtor company will automatically enter into liquidation.[197] Under the CCAA, if the company cannot get the creditors' approval for the rescue plan, the court will make an order to lift the stay of proceeding against the company, which means that the company is no longer protected from creditors' enforcement and creditors can make an application for liquidating the company.[198] To raise awareness of creditors about their role in rescue, Canadian law offers them some important protections to ensure that their interest will be treated fairly. For example, creditors are entitled to apply to the court for lifting the stay of proceedings[199] or terminating the rescue procedure if they find the rescue implementation brings material prejudice to their interest.[200] The law also provides for a fair voting

[196] See Chapter Three (3.5.2.3 Benchmarks for evaluation of rescue proposed by the thesis: (iv) creditor participation)
[197] BIA s.57
[198] See Wood (n4) at 451
[199] BIA s.69.4 and the case *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.* (2005) 29 C.B.R (5th) 62 (Ont. S.C.J.)
[200] BIA s.50.4(11)(d) and *Re Bargain Harold's Discount Ltd*. (1992) 10 C.B.R (3d) 23 (Ont. Ct. Gen Div.)

mechanism under which creditors may be divided into different classes and the approval has no cram down effect to bind a dissenting class of creditors.[201]

One of the most striking features of Canadian rescue law is the lack of formal creditor's representation in rescue administration. Normally, in a jurisdiction that adopts the DIP model, such as the US, there is the formation of a creditor committee to represent creditors in the rescue procedures.[202] However, neither the BIA nor the CCAA adopts the formation of creditor committee. While the BIA entitles creditors to appoint inspectors who act on behalf of the creditors to supervise and instruct the trustee to take appropriate steps to protect the company's estate and creditors in liquidation, this power is restricted in rescue.[203] Similarly, there is no statutory framework providing for formulating a creditor committee under the CCAA. The perceived reasons behind this are that this will produce additional costs and delays as a creditor committee is likely to face the problem of solving competing interests among different groups of creditors[204] and that the current monitors/trustees, as court officers, are assumed to adequately represent the creditors in the rescue administration.[205] However, in practice, the trustees/monitors sometimes have not fulfilled their role in representing and protecting the creditors; for example, they did not provide creditors with timely information or the progression of rescue.[206] Therefore, Canadian creditors are likely to have a need for exerting their control in participating in rescue procedures.

There are two ways for creditors to exercise their control and participation in rescue, through the establishment of an ad-hoc creditor committee and the advance of the rescue finance. The ad-hoc committee is most frequently established under the CCAA

[201] *Olympia & York Developments Ltd. (Re)*, 1993 CanLII 8492 (ON SC)
[202] 11 U.S.C. § 1102 US bankruptcy Code,
[203] The BIA s.56
[204] K. McElcheran, *Commercial Insolvency in Canada* (Butterworths, 2005), at 238-41
[205] Cassels Brocks, 'Business Reorganisation Group e-COMMUNIQUÉ' (2005) 9 (5)
[206] Ibid

procedure with two or more creditors who hold similar claims against the debtor company.[207] These creditors participate in rescue by counselling the directors to advance their common interest. It is common for a group of creditors to form a committee on the ad-hoc basis prior to the CCAA filing and this committee continues to work after the company initiates the rescue procedure.[208] In complex rescue where a company has different structures of debts, security and priority, it is possible to have different committees representing different creditors that hold a similar type of claims.[209] These committees will perform a number of important roles in negotiating the terms of rescue plans, reviewing financial information and other disclosures on the company's operations and capital structure, acting as a sounding board for the monitor, assessing the governance of the debtor or even assisting in monitoring a going-concern sale.[210]

With these important functions, the ad-hoc creditor committee can become an effective mechanism for creditors to participate in the proceedings as well as protecting their own interest. With the same or similar type of claims, the creditors in a committee can work together and exchange ideas to contribute to the development of the rescue plan. This role can be enhanced to support the success of a rescue plan where a committee represents the creditors who hold substantial claims or voting power in aggregate, which allows them to easily approve the plan by exercising their vote.[211] Furthermore, the committee can perform the function of monitoring the director's activities, which is similar to the role of the monitor. However, while the monitor has the neutral role of a court-appointed officer, the creditor committee has a direct economic interest in corporate

[207] R.J. Chadwick and D. R. Bulas, 'Ad Hoc Creditors' Committees in CCAA Proceedings: The Result of a Changing and Expanding Restructuring World', in Janis Sarra, Annual Review of Insolvency Law, 2011. Available at <https://www.blaney.com/webfiles/5%20%20Ad%20Hoc%20Creditors%20Committees%20in%20CCAA%20Proceedings%20The%20Result%20of%20a%20Changing%20an.pdf> accessed 28 August 2018
[208] Ibid 2.
[209] Ibid
[210] Sarra (n54) at 82.
[211] Ibid

rescue they represent.[212] By exercising their control, the creditor committee can obtain information on the company's business operation and the ongoing restructuring in a timely fashion, thus protecting themselves from the directors if they take actions that materially affect their interest.[213] The collective work and co-ordination of the committee or different committees bring a further benefit in that it allows the debtor company to reduce time and cost that may arise from the multiple communications and negotiations between the directors with individual creditors.[214]

Canadian courts have been accepted the formation of the ad-hoc committee of creditors in a number of large and complicated rescue cases, such as *Air Canada* in 2003, *Stelco* in 2004 and *Calpine* in 2005.[215] The courts have increasingly recognised it as an effective channel for vulnerable creditors, especially unsecured creditors to advance their rights and interest in rescue.[216] As a result of judicial endorsement, the 2009 amendment of the CCAA added an important advantage to the committee's formation and operation under s.11.52(c)[217] which permits the court to make an order to create a charge or security against the company's property to secure the professional fees and expenses engaged by interested person if the court is satisfied that the security or charge is necessary for effective participation of that person. Compared to the status of the self-funded committees in earlier years,[218] s.11.52 has the obvious effect of encouraging the formation of the ad-hoc creditor committees. The encouraging effect is especially stronger for

[212] Chadwick and Bulas (n207) 7
[213] Ibid 3
[214] Ibid 3
[215] *Air Canada, Re*, 2003 CanLII 49366 (ON SC), *Stelco Inc., Re*, 2004 CanLII 24849 (ON SC), and *Re Calpine Canada Energy Limited* (Companies' Creditors Arrangement Act), 2007 ABCA 266 (CanLII)
[216] B.E. Romaine (Honourable Madam Justice, Court of Queen's Bench Alberta), 'Rights and Roles of Unsecured Creditors: Overview of the Current Status of Unsecured Creditors' Committees in Canada' (2012) The Twelfth Annual International Insolvency Conference, International Insolvency Institute. Available at <https://www.iiiglobal.org/sites/default/files/overviewofthecurrentstatusofunsecuredcreditorscommitteeincanada.pdf> accessed 28 August 2018
[217] CCAA, s.11.52(c)
[218] Romaine (n216) para 6

unsecured creditors whose debts were not protected by any means of security and they have to fund their own activities if they want to participate in the rescue. Relying on the virtue of s.11.52, the court can make a decision to fund the creditor committee representing vulnerable creditors such as employees and retirees in *Re Nortel Networks Corp* and *Re Fraser Papers Inc.*[219] The court decisions in the mentioned cases have signified the legal recognition of the importance of the creditor committee and their legitimate participation in the rescue administration. However, despite the benefits brought by the creditor committee, its participation in rescue along with IPs can produce more costs and potential delay if there is disagreement or disputes among them.[220] Furthermore, allowing the creditor committee to directly take part in rescue administration can lead to a degree of opportunistic abuse of creditors insofar as they owe no fiduciary duties to the company.[221]

The second way for creditors to exert their control in rescue administration is to advance the rescue finance or the 'DIP finance' to implement a rescue plan. The terms DIP finance refers to the interim finance[222] that is necessarily important for the implementation of a rescue plan.[223] This finance can be advanced to the company either by the existing creditors or new creditors. Initially, due to the silence of the legislation regarding this matter, Canadian courts, in relying on their inherent jurisdiction, granted orders that allow the debtor company to obtain the DIP finance.[224] The orders created a charge to secure the DIP finance against the company' assets which confer the lender of

[219] *Re Nortel Networks Corp (2009*), 53 CBR (5th) 196, also (2009, 55 BCR (5th) 114 (Ont. Sup. Ct.); Re Fraser Papers Inc., 2009 CarswellOnt 6169 (Ont.Sup.Ct.) cited by Honourable Madam Justice B.E. Romaine, Ibid
[220] K. McElcheran, (n204) 238-241.
[221] B.E. Romaine (n216)
[222] The term DIP financing is used under the Chapter 11 of US Bankruptcy Code, however, in Canada the term is used widely as interim financing. See BIA s.50.6(1) and CCAA s.11.2(1).
[223] *Re: United Used Auto & Truck Parts* et al, 2000 BCSC 1708 (CanLII).
[224] Re Westar Mining Ltd., [1992] B.C.J. No. 1360 (QL), 14 C.B.R. (3d) 88 (B.C.S.C.) and Skydome Corp., Re (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. – Commercial List).

this finance a priority over existing unsecured and secured creditors in the queue of payment.[225] Especially, the court sometimes allowed the lender of the DIP finance to use this charge to cover a pre-existing debt owed by the company regardless of whether or not the existing debt was connected to the DIP finance.[226] In order for the court to grant such orders, the court had to consider whether the priority given to the lender would adversely affect the pre-existing secured creditors.[227]

In response to the popularity of the DIP finance, Canada has codified the common law principles regarding this matter in the BIA and the CCAA. Currently, both the statutes allow the court to make an order that grants the DIP finance a security interest that has priority over the existing security.[228] However, the lender of the DIP finance cannot use this security to secure the debts that existed before the making of the order.[229] The judicial and legislative recognition of the super-priority security of the DIP finance can provide creditors a strong incentive to advance the rescue finance to the company, as there is a legislative guarantee that this kind of finance will be paid in priority. Apart from this protection, the DIP finance is a way for the creditors to exert their control in rescue. This can be achieved with a financial agreement between the company and the lenders, under which the lenders use their advantageous position to subject the company to the obligation of providing information about the progress of rescue on a regular basis.[230] However, a drawback of this is that the DIP lenders may use their position to influence the rescue in the direction that favours their own interest.[231] For example, they can force the company

[225] Ibid
[226] *Re Hunter Trailer & Marine Ltd*, 27 C.B.R (4th) 236 (Alta Q.B) and See R. Thornton, 'Air Canada and Stelco: Legal Development and Practical Lessons' in Janis Sarra, ed., Annual Review of Insolvency Law, 2006 (Carswell, 2007) at 76-80.
[227] Re *Tuan Development Inc*., 2007 BCSC 1827 (CanLII)
[228] BIA, s.50.6(1) & (3) and CCAA, s.11.2(1) & (2)
[229] Ibid
[230] Wood (n4) at 400-01
[231] Ibid

to a sale or pre-packaged sale and then become prospective purchasers with their informational advantages.[232]

As such, Canadian rescue law appears to encourage creditor participation in rescue by endorsing the functions of the creditor committee and granting a super-priority for the DIP finance. Notwithstanding these benefits, the ad-hoc credit committee and the DIP finance present avenues for creditors to take advantage of rescue to serve their own interest and more likely bringing detriment to the interest of others as well as increasing the rescue costs. To tackle these shortcomings, the courts and monitor/trustee have to perform their supervisory role to make sure that the legitimate interests are safeguarded and the potential abuse is preventable.

5.4.4 Abuse management

The hybrid model of administration in rescue adopted by Canadian law is justified by the argument that the incumbent directors of an insolvent company can take advantage of being familiar with its business and operation to manage the company and formulate a viable rescue plan.[233] However, this model functions well only when there is an efficient mechanism that can prevent potential abuse, for example, how to preclude the incumbent directors from taking highly risky actions at the cost incurred by creditors.[234] In preventing such abuse, Canadian law employs the court's supervision through the function of an intermediary party, which is trustee/monitor, who is the court's officer after accepting the appointment. It is worth examining if there are potential abuse emerging from the hybrid model and the extent to which this supervision mechanism works to prevent the abuse.

[232] Ibid
[233] LoPucki & Whitford (n154) 694
[234] Lynn M. LoPucki, 'The Trouble With Chapter 11', (1993) Wis. L.Rev. 729, 732-34

First, where the law facilitates easy access for an insolvent company to enter into the rescue procedure, the incumbent directors are likely to initiate rescue to either, prolong their office tenure or to take advantage of the moratorium to compete with their rivals in the market.[235] Canadian law effectively approaches this problem with the courts aggressively screening rescue application from the beginning to determine if it is viable or not.[236] The courts partly exercise their supervisory role through the functions of the trustee or the monitor who assists the courts with reports on the company's financial situation, the causes of business failure,[237] the cash-flow statement and the reasonableness of the cash-flow statement.[238] Especially, under the CCAA, monitors have the duty of advising courts immediately whether liquidation is a better option for the company and whether a rescue plan is fair and reasonable.[239] The information provided by the monitors/trustees becomes an important basis for the courts to make decisions on whether to accept the rescue application. Therefore, if the courts and the monitors/trustees perform their function properly, the directors will be barred from attempting to initiate rescue to prolong their tenure.[240]

In addition to the court's assessment on the viability of a rescue plan, the directors are subject to a fiduciary duty that prevents them from taking any actions that are harmful to the company. Section 122(1) of Canadian Business Corporation Act (CBCA) requires directors to act honestly and good faith in the best interest of the company.[241] In case the

[235] For example, in the case of US airlines re-organisation under chapter 11, the stay of proceeding allows the airlines company with great advantages, such as postponement of payment for creditors, employment and pension. As a result, these companies could offer low-cost tickets and distorted the healthy competition with other airlines. See, M. C. Mathiesen, 'Bankruptcy of Airlines: Causes, Complaints, and Changes', (1995-1996) 61 J. Air L. & Com. 1017,
[236] Lopucki and Triantis, (n155) 284
[237] BIA, s.50(5), CCAA, s.23(1)
[238] Ibid s.50 (6) and 50.4(2)
[239] CCAA, s.23(1)
[240] CCAA. S.6(1) BIA, s.59(2)
[241] CBCA, R.S.C., 1985, c. C-44 <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-44/latest/rsc-1985-c-c-44.html> accessed 14 August 2018. It is noticed that in Canada, a company can be incorporated under either CBCA or the provincial company legislations.

company enters into insolvency, the SCC adopted the interpretation that directors act in the best interest of the company by creating a better company and they must not favour the interest of any groups of stakeholders such as creditors or shareholders[242] Rather, the directors must take into consideration, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, government and the environment.[243] Although the court could not provide clear-cut guidance on how the directors are going to balance these competing interest,[244] an inference can be made from this ruling is that any action by the directors that harms the maximisation of the company's value is likely to be reviewed under 'the best interest' test.[245] It is common that the directors who engage in misconduct can be removed by shareholders with the oppression remedy available under the CBCA if the shareholders find their conduct to be unfair and oppressive to their interests.[246] However, it is unlikely for the remedy to be exercised by the shareholders during insolvency because shareholders rank the last in the queue of priority of payment and this status does not provide them with an incentive to supervise the company. Nevertheless, the law empowers the court with this similar kind of power in insolvency.[247] If the directors unreasonably impair the viability of the rescue plan, the courts can make an order to remove them from the office.[248] The court power of rejecting a rescue application[249] and withdrawing the directors from management appears to be a sufficiently preventative measure to prevent creditor abuse. The final preventative

[242] *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 SCR 461, Para.47
[243] Ibid para 42.
[244] Wood (n4) at 385 and Alan L. W. D'Silva and Genna Wood, 'Directors' Duties in Canada: Six Key Concepts, May 4, 2015', available at <https://www.stikeman.com/en-ca/kh/canadian-ma-law/directors-duties-in-canada-six-key-concepts> accessed 23 August 2018
[245]
[246] CBCA s.109
[247] BIA s.64(1) and CCAA s.11.5(1)
[248] Ibid
[249] See (n217)

measure should be mentioned is that once the directors make offences in rescue, they can be found civilly or criminally liable with severe punishment under the BIA.[250]

Second, the facilitation of rescue finance or 'DIP finance' can give rise to the creditor's abuse where a creditor attempts to use the super-priority of the DIP finance to change the priority of a pre-insolvency debt. This happens the lender enters into an agreement with the company that allows a previously unsecured debt to become secured and enjoys the super-priority status like the DIP financing. Allowing this to happen will unfairly change the priority among the creditors and bring detriment to the interest of existing creditors. In Air Canada, the court permitted a security to cover a $700 million DIP finance and the outstanding debt under the aircraft leasing contract with the lender, and this gave the DIP lender a priority over other unsecured creditors.[251] However, since the 2005/2007 amendment of BIA and CCAA, a creditor cannot use the DIP finance to secure the pre-existing obligation prior to the making of the order.[252] Therefore, the abuse associated with creditor utilising the DIP finance to change the priority status can be tackled by the law. Furthermore, the abuse of creditors using the DIP finance to influence the rescue in a way that serves their interest is blocked by courts testing the nature of the DIP finance before approving it. Accordingly, courts need to consider a number of factors to grant a DIP finance order.[253] For instance, the courts shall consider the period in which the company is expected to be subject to rescue proceedings, the management of the company's business and financial affairs, the nature and value of the company's assets.[254] The courts also rely on the report of the monitor/trustee on the reasonableness of the cash-flow statement and the likelihood that the financing will enhance the viability of the

[250] BIA, s.202(2.1), 203, and 204.1. The offended directors can be subject to a monetary fine can be up to ten thousand dollars and imprisonment for up to three years.
[251] R. Thornton (n207) at 76-78
[252] BIA s.50.6(1) and CCAA s.11.2(1).
[253] BIA s.50.6(5) and CCAA s.11.2(4).
[254] Ibid

rescue. Importantly, the court will consider if the security granted to the DIP finance will materially prejudiced other creditors.[255] An order will not be made unless there is 'cogent evidence that the benefit of DIP finance clearly outweighs the potential prejudice to the creditors whose security is subordinated'.[256] As such, in preventing abuse arising from the DIP finance, the effectiveness of Canadian law depends largely on the role and expertise of the courts in supervising rescue procedures.

Third, the abuse can take the form of the sale of company assets during the rescue. It is obvious that a sale of the company's assets at a lower price than the market leads to a decrease in creditor return. In tackling this problem, the BIA and the CCAA impose a restriction that does not allow directors to sell or otherwise dispose of the company's assets outside the ordinary course of business unless there is a court approval for it.[257] Both the BIA and CCAA provide courts with a set of non-exclusive factors in considering whether to approve or reject the sale.[258] This includes the reasonableness and the consideration of the sale, the opinions of the trustee or the monitor, the report of the trustee/monitor on whether the sale is more beneficial, the creditor consultation, and the possible effect of the sale.[259] In granting orders based on the above guidance, the courts have to rely significantly on the monitor/trustee's expertise via their report.[260] Therefore, the monitor/trustee's expertise and integrity play a decisive role that influences the soundness of the court's decisions.

The above analysis focuses on the sale of the company's asset happening before the rescue procedure is initiated. The sale process is carried out by the monitor/trustee, who will promote the sale, identify potential purchasers and invite them into the sale process.

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[255]Ibid
[256] Re *United Used Auto & Truck Parts Ltd*. (1999) 12 C.B.R 144, para. 28.
[257] BIA s.65.13(1) and CCAA s.36(1).
[258] BIA s.65.13(4) and CCAA s. 36 (3).
[259] Ibid
[260] BIA, s.50.4 and CCAA, s.23.

When the successful bidder is identified, an agreement will be entered into, and the court will make an order to approve the sale. However, the pre-packaged sale presents a different approach. The company will conduct the kind of sale that would need court approval, but all happened before filing for the rescue procedure. This quick sale practice offers the company several important benefits such as preserving the company market value and avoiding business disruption.[261] However, a degree of abuse can penetrate in the sale to the extent that an influential creditor, such as a DIP finance lender, can use its informational advantage to become a potential purchaser, or the company directors or connected parties can purchase the company at a price lower than the market price.[262]

Because the pre-packaged sale is conducted before filing for rescue, it falls outside the scope of legislation. However, in preventing the abuse of this kind of sale, the approach of the court is to treat it as similarly as the post-filing sale by imposing the same degree of scrutiny. In the case of *Re Nelson Education Limited,*[263] the court dealt with the issue of whether to approve a sale that had been entered into prior a debtor company filing an application for the CCAA restructuring. In deciding this matter, the court sets out a number of criteria for approving an out-of-court sale under the receivership, which was then developed and incorporated to become factors for the court to consider a sale under the s.36(3) of CCAA s65.13(4).[264] The court approves the sale if it is largely satisfied with the guiding factors, including the reasonableness of the sale process, the sale price compared to the market price, the effects on the creditors, the monitor/trustee's opinion.[265] Canadian courts, with these functions, have an important role in protecting all

[261] S. L. Graff and I. E. Aversa, 'Insolvency Aspects of the Purchase and Sale of a Distressed Business in Canada', at 23, available at <https://www.airdberlis.com/docs/default-source/articles/insolvency-aspects-of-the-purchase-and-sale-of-a-distressed-business-in-canada.pdf?sfvrsn=2> accessed 24 August 2018.
[262] Ibid 23
[263] *Re Nelson Education Limited* , 2015 ONSC 5557 (CanLII).
[264] *Royal Bank v. Soundair Corp.* (1991), 1991 CanLII 2727 (ON CA), 7 C.B.R. (3d) 1 (Ont. C.A.), cited in *Re Nelson Education Limited* case, para 32, 37.
[265] *Re Nelson Education Limited* , 2015 ONSC 5557 (CanLII), para 38.

parties in rescue as well as preserving the asset estate of the company. However, this also presents a challenging task for the court insofar as given the urgency pertaining to the sale, the court's decision must be made in a prompt basis to avoid the devaluation of the company asset.

To summarise this discussion so far, the rescue procedures under Canadian law may open the door to invite abuse by both the company and its creditors. However, the debtor abuse can be effectively prevented by the combination of the supervision of the monitor and the court with the remedy and the punishment under the legislation. The creditor's abuse in the pre-packaged sale can be prevented with the court's involvement in screening and approving the sale. Similarly, the court is capable of tackling the creditor abuse associated with the DIP finance by not sanctioning rescue plan if they found it produces unfairness to other parties. The above discussion has highlighted a special feature of Canadian rescue law, which is the high level of judicial involvement in deciding the effectiveness of the law.

5.4.5 Whether the BIA and the CCAA procedures place the emphasis on rescue?

There has been an emerging trend of employing the rescue procedure under the CCAA to effect liquidation rather than pursuing the purpose of saving insolvent companies.[266] The CCAA liquidation is a procedure under which a debtor company takes advantage of the moratorium (the stay of proceedings) to effect a sale of company's assets on a piecemeal or on a going concern basis.[267] Specifically, when the company initiates the CCAA procedure, a stay will prevent creditors from taking any action which is detrimental to the company's assets. However, this protection will be used to market and sell the company free of the creditor's harassment. When the sale has been completed,

[266] A. Nocilla, 'Is Corporate Rescue Working in Canada?', (2012) 53 Can. Bus. L.J. 382 and R. Wood, 'Rescue and Liquidation in Restructuring Law' (2012) 53 Can. Bus. L.J. 407.
[267] Nocilla, Ibid 385

the company will present a post-sale plan to its creditors to distribute the sale proceeds or to let the company enter into liquidation. The study conducted by Nocilla on the performance of the CCAA between 2002 and 2012 is a confirmation of this new trend.[268] According to the study, among 308 filings for the CCAA during 2001-2012, liquidation under the CCAA accounted for the largest proportion, 33%, followed by 31% and 17% for rescue and receivership/bankruptcy respectively.[269] These figures raise a question regarding the actual purpose of rescue law in Canada, whether it is a tool for corporate rescue or liquidation to distribute return to creditors.

It is the fact that the CCAA does not state its objectives in express terms. Therefore, the objectives are often clarified by the mean of judicial interpretation. In *Century Services Inc v Canada,* the SCC maintained that 'the purpose of the CCAA is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets'.[270] However, this ruling did not address the issue of whether it is legitimate to use the CCAA to liquidate debtor companies. As a result, judicial decisions form conflicting opinions regarding the liquidation under CCAA, for example, the courts in Ontario are more likely to approve the sale under the CCAA than those in British Colombia and Alberta.[271] This controversy raises the question of whether the CCAA can be used to effect a sale or liquidation.

In response to this issue, it is necessary to revisit the examination of the concept of corporate rescue. As examined in chapter three, rescue should be fully construed in

[268] Ibid 389
[269] Ibid 388-389
[270] *Century Services Inc. v. Canada*, 2010 SCC 60, [2010] 3 SCR 379, para 15
[271] Nocilla (n250) 395. For court approving CCAA liquidation, see *White Birch Paper Holding Co., Re* (2010), 72 C.B.R. (5th) 49, 2010 QCCS 4915 (Que. S.C.) and *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) I at para. II (Ont. S.C.J. [Commercial List]), affirmed (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), additional reasons (2002), 38 C.B.R. (4th) 5 (Ont. C.A.), leave to appeal refused (2003), 180 O.A.C. 399 (note) (S.C.C.). For court disapproving CCAA liquidation, see *Medical Intelligence Technologies inc., Re,* 2009 QCCS 2725 (Que. S.C.), in which the court refused to extend the stay of proceedings in order to facilitate the sale of the company's asset

terms of 'company rescue' and 'business rescue'.[272] While the former refers to turning a distressed company around to the healthy financial state with the same ownership, the latter depicts a scenario where the viable business of a company will be transferred or sold to a new owner to preserve the going-concern value of the business as well as the employment. Principally, Canadian law approaches corporate rescue with the adoption of the hybrid model that allows the directors to stay in management. This feature is similar to the DIP model under Chapter 11 of the US Bankruptcy Code. Because encouraging entrepreneurship is the justification of the DIP model, this model can suit well in a culture where business failure is considered to be a misfortune rather than misconduct as in the US.[273] Though the laws in Canada and the US similarly permit the directors to remain in the office, they do not work in the same way. In contrast to the easy initiation proceeding under the US law, a CCAA application is subject to a rigorous test of viability at the early stage through the screening by courts.[274] In case the procedure is initiated with the notice of intention under the BIA, if the company cannot present a proposal in time, it needs the court's approval to extend the stay of proceeding after the initial stay has expired. [275] The basis for courts to grant an extension is the viability test,[276] which means that the court will refuse to grant the extension if there is no prospect of success, and this will result in voluntary liquidation.[277] While the legislation facilitates good conditions to effect the rescue, the courts have attempted to make it clear that rescue cannot happen in all cases if it is not viable. Therefore, it seems to be that Canadian law has placed greater emphasis

[272] See Chapter 3 (3.3.2.2 Company Rescue and Business Rescue)
[273] G. Moss, 'Chapter 11: An English Lawyer's Critique' (1998)11 Insolvency Intelligence 17, 18
[274] LoPucki and Triantis (n142) 284-285
[275] BIA s.50.4(9)
[276] Ibid
[277] Ibid s50.4(8)

on 'business rescue' rather than 'company rescue'. As enlightened by the Supreme Court,[278]

> [I]t recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation. Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs.

As such, the purpose of the CCAA is to preserve the going-concern values of the company or the viable part of the company business, which is the reflection of the philosophy of 'business rescue'.

The justification for courts to approve liquidation under the CCAA is that this practice can maximise creditors return. For example, in *Anvil Range Mining Corp*, the court interpreted that the procedure under the CCAA can lead to a sale or a liquidation because the ultimate goal is to maximise the creditor's return.[279] In *Nortel Networks Corp,* the court reasoned that 'the CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives, and a sale by the debtor to preserve the going concern values of its business appears to be consistent with CCAA objectives'.[280] Therefore, the court has the jurisdiction to authorise a sale under the CCAA regardless of the absence of a rescue plan.[281] It appears from these cases that the court will approve a sale or liquidation of the company if it can maximise the creditor return without considering the viability of a rescue plan. The thesis does not agree with this approach because of the following reasons. First, the CCAA should not be a procedure employed for liquidation because the great flexibility offered by CCAA is exclusively architected to support the carrying out of corporate rescue.[282] For example, the ease to initiate the

[278] *Century Services Inc. v. Canada* (2010) SCC 60, [2010] 3 SCR 379, para 18
[279] *Re Anvil Range Mining Corp*., (2001) CanLII 28449 (ON SC), para 11
[280] Re *Nortel Networks Corp,* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), at para. 47
[281] Ibid
[282] R. Wood (n266) 413-414.

rescue proceedings and the stay of proceedings with very wide scope and the unlimited extension purport to give an insolvent company a breathing period to formulate proposals, instead of being utilised to sell the company in an expeditious fashion.[283] Second, as clearly stated by the SCC, 'the purpose of the CCAA is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets'[284]. Therefore, forcing the company into liquidation or a sale appears to run in contrast with the court ruling. Furthermore, the justification of maximising creditor return is not convincing because it ignores other parties' interest, such as employees and the community as a whole.[285] With these reasons, the thesis opines that the court should allow the practice of liquidation or a sale of a company under the CCAA only where there is no likelihood for an insolvent company to be rescued. If a sale of the company is conducted under the CCAA, it should be associated with a transfer of a going-concern business to a new owner rather than a piece-meal sale of company's assets as the former option permits the survival of the company's business. In overcoming the uncertainty around this matter, it is the Canadian Parliament who should clearly express the purpose of the CCAA.

5.5 Conclusion

The examination on the legal development has revealed the influence of UK and US law on the shape of Canadian rescue law. Developing in special historical conditions, Canadian rescue law has its own distinct features with the existence of the two insolvency procedures under the BIA and the CCAA. The BIA was intended to be the main procedure for corporate rescue to replace the CCAA, however, the flexibility resulted from the

[283] Also, the provision requiring the debtor to periodically see to court to extend the stay is clearly designed for the purpose of rescue supervision. See Wood, Ibid, 413
[284] *Century Services Inc. v. Canada (Attorney General)* [2010] 3 SCR 379, 2010 SCC 60 (CanLII)
[285] R. Goode, Principles of Corporate Insolvency Law (Sweet and Maxwell, 4th edn, 2011), at 73

judicial interpretation rendered the CCAA a product of long survival. As a result of this, there is the bifurcation of rescue procedures in Canada.

The BIA and the CCAA employ the same model of DIP in rescue administration, which permits the company directors to stay in management and carry out business under the supervision of the trustee, monitor and the court. While the BIA is a rule-based procedure that strictly follows a number of detailed statutory provisions, the CCAA has the characteristics of a court-driven procedure under which the court has a wide latitude of flexibility to tailor their orders to meet the company's demands on a case-by-case basis. Consequently, the BIA procedure is initiated to rescue small companies, while the CCAA procedure is suitable for large companies with a complex structure of debts being over C$5 million.

The examination of the effectiveness of Canadian rescue law based on the four benchmarks of time and cost, expertise, creditor participation, and abuse management reveals several interesting findings. Regarding time and cost, it appears to be that the time for rescue under the BIA is very strict compared to the CCAA under which there is no imposition of the time limit. However, this does not indicate that the BIA is more time-efficient than the CCAA. Rather, it reflects the flexible approach of Canadian law in that the BIA procedure must be time-efficient to respond to simpler rescue cases of small companies, meanwhile, the CCAA is used to rescue large and complex companies because of its flexibility associated with a high level of court involvement. However, the high level of professional fee appears to be a very concern in both procedures. While the court can decide this matter under the CCAA, the BIA allows this fee to be decided between the company and the trustee, which appears to insufficient for this can lead to the increase of IPs fee and the reduction of creditor's return. In terms of expertise, by employing the hybrid model, Canadian law can combine the expertise of the director in

operating the company with the expertise of court and IPs in monitoring and supervising the rescue procedure. Furthermore, borrowing expertise of the CRO to assist the directors in operating the company during rescue significantly enhances the rescue effectiveness. Compared to the BIA, the CCAA rescue appears to generate a higher degree of expertise with judicial involvement, yet, this has a disadvantage of adding more costs to rescue. In terms of creditor participation, Canadian law satisfies this benchmark through the recognition of the participation of the creditor committee and the super-priority security for the DIP finance. Yet, allowing the creditor committee to control the rescue procedure also contributes to the increase of rescue cost. Finally, Canadian law meets the benchmark of abuse management by relying on IPs and especially the court in monitoring rescue and preventing the director's abuse. The law also tackles the abuse arising from pre-packaged sales by subjecting the validity of the sales to court approval. Similarly, judicial supervision can be an effective response to the creditor abuse of DIP finance. These findings could lead to the conclusion that Canadian law can produce effectiveness for corporate rescue. Nevertheless, the issue of cost appears to be a concern as the rescue procedure has the participation of many actors such as the company, CRO, IPs, creditor committee and the courts.

Regarding the fact that Canadian courts approve the practice of using the CCAA procedure to effect liquidation or a sale of the company. The thesis took the view that this practice runs in contrast with the policy of corporate rescue that places the emphasis on preserving the going-concern value of the company as recognised by the SCC. If there is a prospect for rescuing a company, the CCAA should not be used to effect a piecemeal sale of the company asset or liquidation.

In the next chapter, this thesis will examine the corporate rescue law in Vietnam following the evaluation framework in this chapter.

CHAPTER SIX

CORPORATE RESCUE LAW IN VIETNAM

6.0 Introduction

Following the approach employed in the United Kingdom (UK) and Canada chapters, this chapter furthers the examination of rescue law to the legal landscape of Vietnam. The case of Vietnam promises interesting findings as the insolvency legal system of the country differs from those in the UK and Canada in many aspects, which is attributed to the combination of historical, political and economic factors. The chapter begins with an examination of the legal development in insolvency in Vietnam to highlight the extent to which traditional norms and values, legal transplantation and international integration have influenced the insolvency legislative framework of Vietnam. This part also addresses the reasons why Vietnam failed to adopt Western insolvency laws and the need for undertaking research on Vietnam rescue law given the enactment of the new legislation in 2014. The chapter then examines the informal rescue practices and the operation of the formal rescue procedure prescribed under the current insolvency legislation - the Bankruptcy Law 2014 (BL2014). Finally, the remaining and significant part of the chapter is devoted to critically evaluating the effectiveness of Vietnam rescue law under the four benchmarks as established in chapter three, namely the time and cost, the expertise, creditors' participation and abuse management.[1]

6.1 The development of insolvency law in Vietnam

6.1.1 A complicated legal transplantation of insolvency law in Vietnam

Vietnam is a very special case of legal transplantation insofar as its legal system had been shaped by multiple influences of foreign laws during consecutive periods of

[1] See Chapter Three (3.6.2.3 Benchmarks for evaluation of rescue law proposed by this thesis)

history from the domination of Chinese emperors to French colonisation, from the spread of Russian socialism to the emergence of Western commerce.[2] It is interesting to note that when new imported law dominated in Vietnam, the old traditions did not completely disappear, rather, they co-exist in the legal system and influenced the way the contemporary law has developed.[3]

During the time of Chinese invasion (111BC to 937AD), one important influence the Chinese empires brought to Vietnam is Confucianism (Nho Giao), which is a school of thought and wisdom established by Confucius and other scholars to provide order to the society.[4] Confucianism gained its popularity and deeply ingrained into Vietnamese society, becoming social norms and beliefs for people to act upon.[5] One of the most influences of Confucianism on Vietnamese society is the concept of 'collectivism'.[6] The philosophy of collectivism expresses that a person is born to be a member of a society and has obligation to act for the interest of the society, therefore, he is considered to be selfish if he struggles for his own interest.[7] In tandem with collectivism, Confucianism divided people in society into different classes and people in a class should act upon their social status to maintain the social order.[8] As the core values of Confucianism are to maintain social order, the ruling class in Vietnam employed it as the main political doctrine to require people to be loyal to the community and the country.[9]

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[2] John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam*, (Ashgate, 2006) Chapter Two, at 39-68
[3] Ibid
[4] Pham Duy Nghia, 'Confucianism and the conception of the law in Vietnam', in John Gillespie and Pip Nicholson (eds) *Asian Socialism and Legal Changes: The Dynamics of Vietnamese and Chinese Reforms* (Asia Pacific Press, Canberra, 2005), at 78-79
[5] Ibid
[6] Ibid80
[7] Ibid at 80 and D.G. Marr, 'Concept of "individual" and "self" in twentieth-century Vietnam' (2000) 34(4) Modern Asian Studies, 769-796
[8] Nghia, (n4) at 82.
[9] Ibid

In the ancient time, private matters related to creditor-debtor relations were largely governed by social norms instead of laws,[10] they came to the attention of official statutes only when they were likely to affect social order.[11] For example, in the Penal Code of the Le Dynasty (Le Code),[12] there imposed a limit on the interest rate to the maximum of 2.5-3% per month as well as the accrued interest amount not exceeding to the principal debt.[13] Also, under this statute, any attempts to collect debts by forcefully seizing the debtor's property were banned, and failure to adhere to this rule could lead to punishment as well as forfeiture of the debt.[14] In particular, the Le Code provided for the pro-rata sharing principle to distribute debts among creditors, but only in special cases where the debtors are state officials.[15] Although the Code appeared to govern creditor-debtor relations, it was mainly used by the ruling class to maintain social order and the application of the Code was very rare in practice.[16] The private relations between creditors and debtors were largely governed by social norms and customary practices,[17] some of which were created under the influence of Confucianism values.[18] For example, the value of 'nhan-nghia'[19] demands a son to have the obligation to pay his father's debts,[20] or as commanded by the values of 'face-saving' and 'relationship maintaining', an individual has to respect the opinion of the public and society and maintain a good relationship with others in the community.[21] In applying these values in a credit relationship, a debtor has to find a way

[10] Ibid 78
[11] Ibid 82. Nghia suggests that despite the existence of some provisions regarding contracts and property in traditional codes, the private law in Vietnam was weak and there is no need to have such provisions.
[12] This Code is widely known as "Hong Duc Code", which is the oldest penal code recorded in Vietnam. See Ta Van Tai, 'Vietnam's Code of the Le Dynasty (1428-1788)' (1982) 30 Am. J. Comp. L. 523
[13] Le Code, art.529
[14] The Lê Dynasty Decree 1634, cited by Ta Van Tai, Ibid
[15] Le Code, art.592
[16] Nghia (n4) at 78 and John Gillespie, 'Insolvency Law in Vietnam' in Roman Tomasic, *Insolvency in East Asia* (Ashgate Publishing Company, 2006) at 241
[17] Nghia, Ibid and Gillespie, Ibid
[18] Gillespie, Ibid
[19] According to this value, 'nhan' requires a person to learn benevolence and mercy in his life and 'nghia' demands a person to have an obligation towards the family and community, see Nghia, (n.2), p.81
[20] N. Jamieson, *Understanding Vietnam*, (University of California Press, 1993) 12–17.
[21] Nghia, (n4) at 80-81

to settle his debt secretly or cover up his indebtedness from the public knowledge to protect his reputation.[22] These traditional values are seen as having vigour that directs behaviours of people in Vietnamese society.[23] Some of the values, such as 'face-saving' and 'relationship maintaining' are believed to be one of the main hindrances that discourage insolvent companies to declare their bankruptcy, which contributes to the failure of the bankruptcy legislation in 1993 and 2004.[24]

In the time of French colonisation (1858-1954), Western insolvency law started to be imported to Vietnam. However, the application of Western law was very limited because French law relating to credit and insolvency, in principle, applied exclusively to Europeans, while domestic law (such as Gia Long Imperial Code) and customary rules governed the credit relationship among Vietnamese.[25] The resistance to French imported law at this time is attributed to a wide range of factors, such as the small contribution of Vietnamese to the colonial economy,[26] the unwillingness of Vietnamese intellectuals to accept the new foreign ideas when the country was extremely exploited and suppressed by the colonist,[27] and the strong survival of traditional customary rules and principles in Vietnamese villages.[28] Following the victory in 1954, the French legal influence declined;[29] meanwhile, in the South of Vietnam, there was the Commercial Code 1972 providing for the settlement of bankruptcy in the Republic of Vietnam.[30] However, after

[22] Ibid
[23] Ibid 81
[24] Gillespie (n16) at 249
[25] Ibid at 241
[26] Ibid at 242
[27] Nghia (n4) at 83
[28] Ibid
[29] Gillespie (n16) at 242
[30] Pham Duy Nghia, 'Seeking the philosophy of the Vietnamese Bankruptcy Law' (2003), 11 Law-Making Research Journal, 35-47, <http://vibonline.com.vn/bao_cao/gop-y-cua-ts-pham-duy-nghia > accessed 02 November 2018

the unification of the country in 1975, this legal legacy of the Republic of Vietnam was abolished.[31]

Since the 1960s, socialist influence started to permeate Vietnam with the support of the Soviet Union in the time of Vietnam-America war. Vietnam considered the Soviet Union as an ideal model for the country to follow in terms of political, economic and legal structure.[32] The concept of 'socialist legality' was imported into Vietnam, which centralised around three core principles, namely the people as the owners, the party as the leader, and the government as the manager.[33] Following the adoption of these principles, Vietnam pursued the policy of 'state economic management' and transforming the economy towards the state central management.[34] This political-economic movement led to the elimination of the private sector due to the belief that private companies might support the new capitalist class and this would undermine the state's interests.[35] Due to the state's control of the economy, economic plans and administrative contracts designed by line ministries carried the equivalent status to written laws.[36] As a result, there was no need for introducing insolvency law and the application of insolvency law in this period was unlikely to be discussed or documented.[37]

In 1986, echoing with the crisis of the Soviet Union, the failure of the state-central economy challenged the government leadership, urging innovative measures to be taken to direct the economy out of the stage of tardiness.[38] The Sixth Party Congress decided to

[31] Ibid
[32] Gillespie (n16) at 242-3
[33] Ibid
[34] Ibid
[35] Gillespie, 'Developing a Decentred Analysis of Legal Transfers' in Pip Nicholson and Sarah Biddulph (eds) Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia (Martinus Nijhoff Publishers, 2008) at 49
[36] Gillespie, (n16) at 243
[37] See Duong Dang Hue and Nguyen Minh Man, 'Some Issues on the Draft Bankruptcy Law', (1993) 2 State and Law, 39
[38] Duong Thi Nguyet, 'Transition to a market economy: the case of Vietnam' (1999), Working paper No.71, Department of Research Cooperation Economic Research Institute Economic planning Agency Tokyo, Japan, <http://www.esri.go.jp/jp/archive/wor/wor071/wor071.pdf> accessed 01 November 2018

initiate the renovation program (Doi Moi) with the objective of transforming the economy from the state central control towards the market liberation with multiple sectors subject to government regulations.[39] This economic transition demanded Vietnam to initiate a number of key changes, one of which is to reform the legal system. Accordingly, the legal system must be reformed to regulate social and economic transactions as well as promoting trading between Vietnam and other countries.[40] Apart from this impetus, the reform of the Vietnam legal system had been carried out under the pressure to cooperate with international donors such as the United Nation Development Program (UNDP), the Asian Development Bank[41] and the World Bank, and the urgent need to access the World Trade Organisation (WTO).[42] As global economic integration became a driving force, Western laws started to be imported into Vietnam via the support of these foreign donors.[43] The enactment of the Vietnamese first bankruptcy legislation, the Bankruptcy Law 1993 (BL1993), is one of the products of the attempt of incorporating principles of Western law to the Vietnamese domestic law under the reform agenda.[44] However, the first bankruptcy legislation did not produce the result as expected with an extremely low number of applications of insolvency companies, resulting in the replacement with the Bankruptcy Law 2004 (BL2004).[45] After a decade taking effect, the BL2004 failed to deliver the effectiveness in dealing with corporate insolvency in the country, which

[39] Ibid 6
[40] Gillespie (n2) at 64, 145-7
[41] Ibid at 63
[42] The World Bank, 'Vietnam Legal Reform for WTO Accession' (2006) <http://siteresources.worldbank.org/INTVIETNAM/1472711169742068115/21087827/vn_wto_legal_reform_march_2006.pdf > accessed 02 November 2018
[43] John Gillespie (n2) Ch.5
[44] Charles Booth, 'Drafting Bankruptcy Laws in Socialist Market Economies: Recent Developments in China and Vietnam' (2004) 18(1) Columbia Journal of Asian Law 93, and John Gillespie (n14), at 239
[45] The issue of limited use of the Vietnam Bankruptcy legislation will be discussed in detail in the next section of this chapter.

resulted in the replacement with the currently applicable legislation, which is the Bankruptcy Law 2014 (BL2014).[46]

In summary, the historical examination of insolvency law in Vietnam informs us that the Vietnamese insolvency law has been shaped in a complex legal environment, which is characterised by the influence of traditional values and foreign laws. Though Vietnam approached Western insolvency laws from the time of French colonisation, the Western insolvency ideals were truly adopted in Vietnam only when the country enacted the first insolvency legislation, the BL1993, to support the shift of the economy from the state control to the market liberalism. However, there has been the vestige of traditional values operating as resisting forces that limit the application of the legislation. This issue will be discussed in the next section of this chapter.

6.1.2 The failure of two bankruptcy legislation in 1993 and 2004

The current applicable insolvency legislation in Vietnam is the Bankruptcy Law 2014 (BL2014) which exclusively applies to insolvent companies rather than individuals. The predecessors of the BL2014 are the BL1993[47] and the BL2004.[48] Each legislation had a decade to take effect in Vietnam, yet the results of their implementation were not as expected. From 1994 – 2003, the courts received 152 petitions for bankruptcy but only 46 companies were declared bankrupt under the BL1993.[49] Similarly, between 2004 and 2012, there were 336 petitions for bankruptcy, however, only 83 companies declared

[46] The BL 2014 was passed the Vietnam National Assembly on June 19, 2014 and took effect on January 01, 2015. The English version of the Bankruptcy Law 2014 can be seen at the website of the Vietnam Investment and Trade Promotion Centre <https://www.economica.vn/Portals/0/Documents/51-2014%20Law%20on%20Bankruptcy.pdf> accessed 01 November 2018

[47] Bankruptcy Law 1993, <https://onlinelibrary.wiley.com/doi/pdf/10.1002/iir.3940060104> accessed 07 November 2018

[48] Bankruptcy Law 2004, <http://www.moj.gov.vn/vbpq/en/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=7849> accessed 07 November 2018>

[49] Gillespie (n16) 239

bankrupt under the BL2004.[50] The failure of the two laws in providing a legal mechanism for financially difficult companies to exit the market has attracted attention of legal scholars in this area. One of prominent scholars in Vietnamese insolvency law is Gillespie.[51] In researching the failure of transplanting Western insolvency law into Vietnam, Gillespie provides the following explanation for the extremely low number of companies resorting to the formal bankruptcy statute. As for the state-owned enterprises (SOEs), settling their insolvency affairs appeared to be a sensitive issue in the extent to which they represent the state management, and thus their insolvency would lead to loss of prestige of the supervising authorities as well as the state.[52] This coupled with the fear that SOEs would fail their social obligations in providing employment and social welfare given their important contribution to the economy.[53] Therefore, under these political, economic and social pressure, the state established the Central Steering Committee for Debt Solvency to coordinate the liquidation of SOEs by merging and privatising unprofitable enterprises instead of relying on the formal rules under these laws.[54] Similarly, for the private sector, Gillespie believes that the cultural influence of Confucianism that perceived debts and bankruptcy with hostile attitude has inhibited private companies to rely on the formal insolvency regulations.[55] Furthermore, Gillespie points out that the lack of an insolvency institution framework, such as insolvency practitioners and the insufficient judicial capacity has been a factor that prevented the operation of insolvency legislation in Vietnam.[56]

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[50] Report 44/BC-TANDTC of the Vietnamese Supreme Court on the implementation of the Bankruptcy 2004.
[51] Gillespie (n2) and (n16)
[52] John Gillespie (n16) at 249
[53] Ibid at 247. According to the statistic of the Vietnam General Statistical Office 2000, SOEs generated over 30 per cent of the GDP, compared to a mere eight per cent contributed by private enterprises (Gillespie, Ibid at 246). However, it should be reminded that the number of SOEs are significant decreased as the result of the policy of privatisation of the SOEs.
[54] Ibid
[55] Ibid at 249 and Nghia (n4) at 82
[56] Ibid at 268

Booth shares the same findings as Gillespie by determining that the preferential treatment for the SOEs rendered the bankruptcy legislation subject to the use of administrative decisions from the state authorities and the courts only accepted the application of an SOE provided the state authority had not issued a decision to settle its insolvency affairs.[57] The problem of applying the bankruptcy legislation to SOEs is also investigated by Nghia.[58] Not only does Nghia share the same findings as Gillespie and Booth, he also extends his finding to address the reasons behind the low reliance on the bankruptcy legislation in respect of private companies.[59] Accordingly, Nghia ascribes the limited use of the legislation to the tendency of Vietnamese companies of avoiding raising commercial disputes at courts as well as the establishment of supporting networks among companies in the industry.[60] Furthermore, Nghia attributes the limited use of the legislation to the practice of settling insolvency affairs secretly, the risk of the company directors being subject to criminal offense once the bankruptcy is officially raised to courts, and the lack of a legal mechanism to discharge debts for the individual bankrupts.[61] In enhancing the reliance on the formal insolvency procedure, Nghia determines that there is the need for improving judicial capacity as well as establishing the profession of insolvency practitioners (IPs) to support the operation of the legislation.[62]

As such, the failure of the BL1993 and the BL2004 is closely linked to the failure of facilitating a suitable environment for the two pieces of legislation to be implemented. During the time of economic transition, the remaining traditional values in combination

[57] Charles Booth (n44)
[58] Pham Duy Nghia (n30)
[59] Ibid
[60] Ibid
[61] Ibid
[62] Ibid

with business and legal practices in Vietnam has created a barrier for insolvency law to fully operate in Vietnam.

6.1.3 The scarcity of research on the rescue law in Vietnam

The issue of corporate rescue has been regulated since the enactment of the first insolvency legislation, the BL1993.[63] From primitive provisions under the first legislation,[64] corporate rescue has been recognised as one of the main insolvency procedures under the BL2004[65] and the current legislation, the BL2014.[66] However, in reality, the number of rescue cases officially recorded is extremely low. For example, while only one case of successful rescue was recorded in a previous research study,[67] Report 44 of the People Supreme Court on summarising the implementation of the BL2004 did not mention any decisions in respect of corporate rescue.[68] Similarly, the topic of corporate rescue law of Vietnam has rarely received academic attention. In the context of Vietnam's economic transition from central planning towards market liberalism, much of the research on Vietnamese insolvency law has focused on the issues of how Western law has been imported to Vietnam, and whether Vietnam has facilitated a compatible environment in which the imported law can function properly. The work of Gillespie on the transplant of bankruptcy law in Vietnam is an example of this.[69]

[63] For example, article 24 of the Bankruptcy Law 1993 governs that the creditor committee has the right to approve the plan to re-organise the business activity of the debtor company; and the Article 36 governs that the judge issues the bankruptcy order only if the creditor committee did not approve the plan to negotiate and reorganise the business activity of the debtor company. Bankruptcy Law 1993, <https://onlinelibrary.wiley.com/doi/pdf/10.1002/iir.3940060104> accessed 07 November 2018

[64] Ibid

[65] In the Bankruptcy Law 2004, the article 5 regulates that rescue is one of bankruptcy procedures; and the section 1 of chapter VI provides the detailed procedure for corporate rescue, <http://www.moj.gov.vn/vbpq/en/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=7849> accessed 07 November 2018

[66] The BL2014, chapter VII

[67] Duong Dang Hue, 'Vietnamese Bankruptcy Law in Practice and the Improvement of Business Environment in Vietnam' (2008), a research sponsored by Ministry of Justice and the GTZ Project of Federal Republic of Germany. Hue mentioned one case of rescuing a textile company (Xí nghiệp Ươm tơ Tháng 8) in Lam Dong province

[68] Report 44 of the People Supreme Court (n50)

[69] See Gillespie (n2) and (n16) and section 6.1.2 of this chapter

Similarly, the issue of how well Vietnamese insolvency law has functioned in solving the insolvency affairs of companies has attracted a great deal of attention from domestic scholars.[70] However, much of contemporary work has focused on the aspect of liquidation, while the issue of corporate rescue has been left untouched. Duong Dang Hue, the chair of the Drafting Committee of the BL2004 and an influential scholar in this area, recognises that it is an objective of the legislation to provide a mechanism for ineffective companies to exit the market and create conditions for more effective companies to thrive.[71] Most of Hue's work is dedicated to improving the use of insolvency law as a way to liquidate insolvent companies and rarely mention the function of corporate rescue of the legislation.[72] Recently, corporate rescue in Vietnam has been initially raised in a research article by Duong Huong Son on the website of the Ministry of Justice.[73] In recognition of the shift of insolvency law from liquidation to rescue, Son noted that rescue plays an important role in dealing with corporate insolvency as well as preventing companies from entering into liquidation.[74] In order for rescue law to operate properly, Son recommends that Vietnam should provide clarity into the definition of an insolvent company, simplifying the filing for the procedure as well as conferring the debtor company more advantages to initiate the rescue procedure.[75] However, an important issue that has been ignored so far is which model of rescue administration has been employed under Vietnamese rescue law and whether this model can generate effectiveness. This thesis provides an answer to these questions through an examination

[70] See Duong Dang Hue (n67) and Duong Dang Hue, *Bankruptcy Law in Vietnam* (Judicial Publishing House, 2005); Pham Duy Nghia, (n29) 35-47
[71] Duong Dang Hue, 'The Law on Bankruptcy with the Improvement of the Business Environment in Vietnam' (2005) 3 Democracy and Law, 26–31
[72] Ibid
[73] Duong Huong Son, 'Corporate Rescue – An Important Objective in the Making of Modern Bankruptcy law' (2013) <http://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=1642> accessed 08 November 2018
[74] Ibid
[75] Ibid

of the corporate rescue control model under the BL2014 in addition to a critical evaluation of its effectiveness based on the four benchmarks of time and cost, expertise, abuse management and creditor participation. Furthermore, in light of the comparison with the law of the UK and Canada, the research offers Vietnam recommendations to revise its corporate rescue law in consideration of its own distinctive legal culture.

6.2 The practice of informal rescue in Vietnam

In 2017, there were over 560,000 companies in Vietnam with approximately 126,000 new companies incorporated.[76] However, the number of companies ceasing in operation or waiting to be dissolved was very high, over 33,000.[77] These inefficient companies can be dissolved under the Enterprise Law 2014 (EL2014)[78] or can be liquidated or rescued under the BL2014.[79] Once the formal legal procedures under these legislation might present some challenges for the insolvent companies, informal rescue can provide an alternative solution. This section provides an understanding on how the informal rescue practice has been developed in Vietnam by examining the establishment and operation of two debt-trading companies along with investigating two famous cases of corporate rescue.

6.2.1 The existence of debt-trading companies

The practice of restructuring financially difficult companies outside the legislation has existed in Vietnam and the incorporation of the Debt and Asset Trading Corporation (DATC) is an example of governmental attempts to restructure state-owned enterprises

[76] According to the General Statistics Office of Vietnam, <http://www.gso.gov.vn/default.aspx?tabid=382&ItemID=18738> accessed 10 November 2018
[77] Ibid
[78] The art 201 of the EL2014 provides that a company is allowed to be dissolved only if it satisfies all financial obligations and is not in the process of dispute resolution at court. See the EL2014 at <https://dangkykinhdoanh.gov.vn/en/Pages/Detaildocument.aspx?vID=26963> accessed 10 November 2018
[79] BL2014

(SOEs).[80] Given the policy of the government on maintaining the state sector to be the leading force of the economy, SOEs have the dominant role in controlling several important industries such as petroleum, telecommunications and steel production in Vietnam.[81] However, as a consequence of the economic transition towards market mechanisms, SOEs have been privatised and the number of SOEs significantly reduced from 12,000 in the 1990s to over 2,700 in 2017.[82] In the process of privatisation, while downsizing the state sector, it is important for the government to continue to provide subsidies to existing SOEs through offering capital, tax payment postponement and debt write-off.[83] The establishment of the DATC is a way for the government to implement this policy.[84]

The DATC is incorporated under the Decision 109 of the Prime Minister to assist SOEs in restructuring and transferring the state ownership,[85] and it is itself an SOE and belongs to the Ministry of Finance.[86] The company carries out a number of business activities, including debt trading, debt and asset trading in connection with corporate restructuring and debt services consultation.[87] The DATC's existence serves the political and economic objective of restructuring the SOEs in the context where the government has tried to not exercise direct intervention into the business affairs of SOEs. However, by subjecting DATC's operation to exclusively serving the SOEs[88] instead of general

[80] The DATC company website <http://the DATC.vn/portal/KenhTin/Gioi-thieu.aspx> accessed 10 November 2018
[81] Dean-Leung, Suiwah, 'Vietnam: An Economic Survey' (2010) 24 (2) Asian Pacific Economic Literature, at 83–103.
[82] Kieu Linh, '2.700 SOEs has been operating' Vneconomy, <http://vneconomy.vn/2700-doanh-nghiep-nha-nuoc-dang-hoat-dong-20180119121233502.htm> access on 10 November 2018
[83] Vu Quoc Ngu, 'The State-Owned Enterprise Reform in Vietnam: Process and Achievement' (2002) Visiting Researchers Series, no. 4. Singapore: Institute of Southeast Asian Studies, June–August.
[84] The decision 109/2003/QĐ - TTg dated 05/06/2003 on the incorporation of the DATC
[85] Ibid art.1
[86] Ibid art. 2 and the Circular 135/2015 of the Ministry of Finance on regulating the incorporation and business activities of the DATC, and see The DATC website, <http://the DATC.vn/portal/KenhTin/Gioi-thieu.aspx> accessed 10 November 2018
[87] The Circular 135, Ibid art.11-17.
[88] According to art 4.8 of the EA2014, a SOE means any enterprise of which 100% charter capital is held by the State, and the Circular 135, Ibid, art.5

companies, the government seems to provide SOEs with preferential treatment over other companies in the private sector, which runs in contrast to the principle of market liberalism in the transition of the economy. Recently, in estimation that the decrease in the number of SOEs will affect the DATC's performance, there has been the proposal to broaden the scope of the company's activities to companies whose the state capital is less than 50%; however, this proposal generates concerns about the DATC's inability to participate in a broader market.[89]

The incorporation of Vietnam Asset Management Company (VAMC)[90] is another example of the government initiatives which has an impact on the practice of restructuring financially troubled companies. Established under the Decree 53/2013 of the government, the VAMC is an SOE that operates under the direct supervision of the State Bank. The VAMC is a debt-trading company with the functions of handling and trading bad debts of credit institutions. In supporting the project of restructuring credit institutions in 2011-2015,[91] the VAMC became an instrument for restructuring banks' lending portfolio in order to maintain a low ratio of non-performing debts.[92] Between 2013 and 2016, the VAMC purchased bad debts of over forty commercial banks in Vietnam. Although the VAMC does not directly participate in the restructuring of financially difficult companies, purchasing bad debts from commercial banks is an indirect way to restructure companies in the public and private sectors. As specifically stated in its charter, the VAMC has four

[89] Hoang Anh, 'The risks when The DATC broadens business Activities' The Bidding News (30/08/2018) (Rui ro khi DATC mo rong hoat dong, Bao Dau Thau), <http://baodauthau.vn/tai-chinh/rui-ro-khi-the DATC-mo-rong-hoat-dong-77885.html> accessed 10 November 2018 (article in Vietnamese)
[90] The company website at <https://sbvamc.vn/> accessed 11 November 2018
[91] Since 2011, the problem of bad debts of credit institutions has been increasingly critical for commercial banks as well as the government in Vietnam. On 01/3/2012, the Prime Minister issue the Decision No.254/QD-TTg approving the project 'The credit institution restructuring project of 2011-2015'. This project aims to develop a versatile modern, safe, efficient, and sustainable banking system for Vietnam by 2020.
[92] Sylwester Kozak and Anh Thi Mai Hoang, 'Vietnam Asset Management Company as a tool for improving asset quality of Vietnamese banks' (2017) PRZEDSIĘBIORSTWO I REGION NR 9/2017, 143-153, <www.ur.edu.pl/file/148726/15%20kozak-vietnam.pdf > accessed 11 November 2018

important functions, including purchasing bad debts, collecting bad debts, selling bad debts and collaterals, and restructuring bad debts and security.[93] As such, in performing their functions, VAMC can involve in corporate restructuring, for example, by turning debts of a company into equity and thus becoming a shareholder in the debtor company. Apart from DATC and VAMC, there are around thirty assets management companies owned by credit institutions that have operated in the debt-trading market.[94] However, the operation of these companies is not significant to rescue in that their functions are limited to collecting debts and managing collaterals for these credit institutions instead of providing insolvent companies a way to turn around their business.[95]

In principle, the incorporation of these debt-trading companies is one of the instruments employed by the government to control the economy, strengthening the performance of SOEs and stabilising the banking systems, which appears to bring direct benefits to SOEs and commercial banks. However, for general companies other than SOEs, the benefits brought by this policy are subject to a degree of uncertainty. After purchasing debts of an insolvent company, there are two options for the VAMC to deal with the debts, enforcing debts or restructuring the company. A decision to restructure a debtor company requires the VAMC to conduct a thorough investigation into whether it is realistically viable to save the company. However, the cost of spending time and resources in doing so tends to discourage the VAMC from being actively involved in restructuring business. Therefore, it is more likely for the VAMC to enforce the debts purchased from the banks. Furthermore, there is a doubt about the ability of these debt-trading companies in handling bad debts due to their poor performance. For example, the

[93] The State Bank issued the Decision 1590 on 22/7/2013 to issue the charter of incorporation of the VAMC
[94] Linh Trang, 'Debt-Trading Market in Vietnam: a Bottleneck at the Legal Framework' (11/9/2018) The Sai Gon Times, <https://www.thesaigontimes.vn/278093/Thi-truong-mua-ban-no-nut-that-o-hanh-lang-phap-ly!.html> accessed 11 November 2018 (article in Vietnamese)
[95] Ibid

ratio of the debt handled by the VAMC in 2015 is extremely low, with only 4.3% of the total debts purchased by the company.[96] Meanwhile, there is an emerging trend that commercial banks have re-purchased the debts sold to the VAMC due to the concern of its inability to deal with the huge debts from a large number of commercial banks.[97] It should be borne in mind that the VAMC is established to serve the government's policy on reducing the ratio of non-performing debts of the banking system.[98] The incorporation of the VAMC, therefore, has the effect of discouraging commercial banks from negotiating with debtor companies to resolve the debt. The banks tend to sell the debts to the VAMC in compliance with the government policy in maintaining a low rate of bad debts as well as avoiding spending resources to collect the debts from the debtor companies.

6.2.2 Examination on the informal rescue cases in Vietnam

Since the enactment of the first bankruptcy legislation, the BL1993, there has been no decision relating to corporate rescue recorded by the courts.[99] Nevertheless, in such a dynamic economy of Vietnam, where a large number of companies are incorporated and dissolved every year,[100] it is likely that a large number of companies facing financial

[96] Phan Minh Ngoc, 'The reality of handing bad debt through the financial statement of VAMC' (2018) The Sai Gon Times, <https://www.thesaigontimes.vn/271243/Tinh-hinh-xu-ly-no-xau-qua-bao-cao-tai-chinh-cua-VAMC.html> accessed 15 November 2018 (article in Vietnamese)

[97] In reality when the VAMC purchases debts from commercial banks, it does not make direct payment to the banks. Rather, VAMC has the right to issue the banks a special kind of bond. With this bond, the banks can ask the State Bank to re-finance capital for them to continue their business. See Nhung Vo, 'Why Commercial Banks Want to Purchase Back the Debts Sold to VAMC', (2018) Vietstock News, <https://vietstock.vn/2018/08/vi-sao-cac-ngan-hang-muon-mua-lai-no-xau-da-ban-cho-vamc-757-625993.htm> accessed 21 November 2018 (article in Vietnamese)

[98] See the Decision 254 of the Prime Minister on approving the project 'The credit institution restructuring project of 2011-2015' (n91)

[99] Report 44/BC-TANDTC of the People Supreme Court on summarizing the implementation of the bankruptcy law 2004 did not stated any figure of corporate rescue.

[100] According to the General Statistics Office of Vietnam, in 2017, there has been 126,000 new companies incorporated; however, the number of companies ceasing operation or waiting to be dissolved had been over 33,000 <http://www.gso.gov.vn/default.aspx?tabid=382&ItemID=18738> accessed 18 November 2018 (in Vietnamese)

difficulty have settled their insolvency affairs by informal rescue measures. This section examines two cases of the informal rescue emerging outside the insolvency legislation

Case 1. Bianfishco company in Southern Vietnam

In 2012, Bianfishco, one of the largest companies in the seafood industry with over 4,000 employment faced extreme financial hardship. The company was unable to pay banks, suppliers, the employees, and other creditors, with the total debt amounting to VND 1,525 billion (US$65 million).[101] In an attempt to collect debts, some of creditors had obtained court judgments, and when the company failed to comply with the judgments, the creditors filed an application to court for declaring the company bankruptcy or liquidation. However, the court refused the application on the ground that there be a likelihood for the company to be restructured.[102] In the time of crisis, the CEO of the company, Pham Thi Dieu Hien, went abroad for medical treatment and authorised her husband, Mr. Tran Van Tri, to be the CEO of the company. During his tenure as the CEO, Tri carried out a course of measures to restructure the company, including identifying the causes of the crisis, negotiating with creditors, selling the company's assets, cutting labour and seeking assistance from the local authority, the People Committee of Cantho city.[103]

What makes the case of Bianfishco special is the participation of the DATC into the restructuring.[104] Estimating that the insolvency of Bianfishco would have adversely

[101] VOV, 'Bianfishco owing VND 1,525 billion', <https://baomoi.com/cong-ty-thuy-san-binh-an-no-1-525-ty-dong/c/8213250.epi> accessed 11 November 2018 (article in Vietnamese)
[102] FIS, 'Court refuses petition to conduct bankruptcy proceedings on Bianfishco' (2012), <https://fis.com/fis/worldnews/worldnews.asp?monthyear=42012&day=16&id=51435&l=e&country=104&special=&ndb=1&df=0> accessed19 November 2018; and VietNamNet Bridge, 'Bianfishco clinically dead, but cannot declare bankruptcy yet' (2012), <https://english.vietnamnet.vn/fms/business/20820/bianfishco-clinically-dead--but-cannot-declare-bankruptcy-yet.html> accessed 12 November 2018 (article in Vietnamese)
[103] Tran Hung, 'Bianfishco selling company's asset to pay debts' (2012) Saigon Times, <https://www.thesaigontimes.vn/Home/doanhnghiep/chuyenlaman/72669/Binh-An-se-ban-tai-san-de-tra-no.htmlU> accessed 12 November 2018 (article in Vietnamese)
[104] See section 6.2.1 regarding functions of the DATC. According to the charter of incorporation, the DATC's functions are constrained to trading debts of SOEs, while Bianfishco is a private company.

affected the seafood industry, employment and the livelihood of the farmers in the region, the People Committee of Cantho city recommended the DATC to take part in the restructuring of the company. Because Bianfishco is not an SOE, the DATC's charter does not allow it to be involved in the restructuring. Yet, the DATC had made an exception to consult with the Ministry of Finance to have the permission to participate in the restructuring of Bianfishco.[105] With the DATC's assistance, the company has successfully negotiated with a new bank, Saigon-Hanoi Bank (SHB), who guaranteed to pay the company's debts, and in return, the SHB became a founding shareholder of the company when it transferred 50% of founding shares to the bank as agreed in the contract.[106] The rescue attempt has produced a fruitful result as Bianfishco finally overcame the financial difficulty and came back to normal business operations. With a good reputation and experience earned in this case, Tri, the CEO of the company, then took part in the restructuring of a number of companies in the seafood industry in the Mekong Delta such as Phuong Nam, Song Hau, Minh Tri and Ngu Long.[107] He was even invited to restructure a company in the medical industry in the North of Vietnam.[108]

Case 2. Hoang Anh Gia Lai Group (HAGLG)

HAGLG is a joint-stock company with the headquarter located in the Pleiku city in Vietnam. As a diversified company, HAGLG spreads its investment in a number of industries, including furniture production, rubber, real-estate and football club.[109] The

[105] Vietnam Financial Times, Interview with Pham Thanh Quang, the General Director of The DATC, in 'Rescuing Bianfishco: A "marriage" in crisis, concerns with the farmers' livelihood' (2012), <http://the DATC.com.vn/portal/home/print.aspx?p=1682> accessed 22 November 2018 (article in Vietnamese)
[106] Vnexpress, 'SHB bank rescues Bianfishco' (2012), <https://kinhdoanh.vnexpress.net/tin-tuc/ebank/ngan-hang/ngan-hang-cua-bau-hien-giai-cuu-cong-ty-binh-an-2721507.html> accessed 22 November 2018 (in Vietnamese)
[107] Security Investment, 'Interview with Mr. Tran Van Tri' (2014), <https://tinnhanhchungkhoan.vn/doanh-nhan/thuy-san-binh-an-voi-thang-ngay-bao-lua-tam-su-cua-doanh-nhan-tran-van-tri-92619.html> accessed 25 November 2018 (in Vietnamese)
[108] Vnexpress, 'Thanh Hoa companies asked for help from husband of Dieu Hien businesswoman' (2013) <https://kinhdoanh.vnexpress.net/tin-tuc/doanh-nghiep/doanh-nghiep-thanh-hoa-cau-cuu-chong-dai-gia-dieu-hien-2851803.html> accessed 25 November 2018 (in Vietnamese)
[109] The company website at <http://www.hagl.com.vn/>

financial hardship of HAGLC started to come to light in 2015 when its financial statement revealed that the company had the indebtedness of VND 30,700 billion (US$1.36 billion), accounting for 65% of the company's total assets and there were VND 12,000 billion (US$600million) debts due in the following year (2016).[110] The company's major creditors are ten commercial banks and the largest creditor is BIDV who had financed the company nearly VND 10,000 billion (US $500 million).[111] The pressure to pay debts became exacerbated since 2015 when the company suffered serious business losses due to the drop in the rubber price in the market. In attempts to ease this pressure, the CEO of the company, Doan Nguyen Duc, had negotiated with the bank creditors to restructure the company's debts.

However, the bank creditors faced a dilemma in dealing with restructuring the huge debts of HAGLG. On the one hand, if they enforced the debts by realising secured assets, such as selling secured shares and bonds, this decision could lead to the devaluation of assets and securities of the company. Furthermore, this action could precipitate the company to bankruptcy, resulting in large redundancies of 9,000 employments. One the other hand, if the bank creditors agreed to restructure the company, they would struggle with how to maintain a low level of bad debts as required by the government for the credit institutions.[112] After a meeting to discuss this situation, the banks eventually decided to rescue HAGLG by proposing the case to the State Bank, who then made a proposal to the Government for the final approval.[113] Though there had been

[110] Vietnamnet, 'Hoang Anh Gia Lai Group: Debt and worries', (17/02/2016), at <https://english.vietnamnet.vn/fms/special-reports/151286/hoang-anh-gia-lai-group--debt-and-worries.html> accessed 23 November 2018

[111] Quang Thang, 'Who is the largest creditor of Ha Anh Gia Lai' Zing News (2017) <https://news.zing.vn/ai-dang-la-chu-no-lon-nhat-cua-hoang-anh-gia-lai-post791875.html> accessed 28 November 2018 (article in Vietnamese)

[112] See the Decision No.254/QD-TTg approving the project 'The credit institution restructuring project of 2011-2015' (n91)

[113] This information was disclosed by the audit company of HAGLG, see Kinh Duong, 'A concern from Hoang Anh Gia Lai case', Vietnam Finance at <http://vietnamfinance.vn/noi-lo-tu-tien-le-hoang-anh-gia-lai-20170304151740381.htm> accessed 12 November 2018 (Article in Vietnamese)

no confirmation on whether the government had agreed to save the company, the submission of the rescued proposal by the State Bank to the government had aroused the controversy over the issues of fair treatment among companies as well as the government's commitment of maintaining a low rate of bad debts.[114] In 2018, HAGLG's extreme burden of debts was released when it entered into a strategic co-operation agreement with an auto-maker company, THACO, under which THACO committed to investing US$516 million to restructure the HAGLG's debts and thereby became a major shareholder of the company.[115]

What emerges from the two cases inform several important features of the corporate rescue practice in Vietnam. First, the state still has an important role in assisting financially difficult companies, especially large companies to restructure in the time of crisis. Though Bianfishco and HAGLG are not SOEs, they had received a great deal of support from state actors, such as the local authority, the DATC (an SOE operating in debt trading), and the State Bank, without mentioning the possibility that these state actors might be those who bridged these financially troubled companies to the rescue supporters.[116] Furthermore, although the case of Binhanfishco had been official raised to court, the company was still allowed to be rescued outside of the insolvency legislation. It appears from the two cases that the government tends to intervene with the financial affairs of private companies where they would largely affect employment and social welfare. Second, IP profession has not been developed to support rescue. What emerges from these two cases is that the companies' directors themselves negotiated with their

[114] Vietnam Bridge, 'Rescue of Hoang Anh Gia Lai group stirs strong debate' (2016) at <https://english.vietnamnet.vn/fms/business/157387/rescue-of-hoang-anh-gia-lai-group-stirs-strong-debate.html> accessed 12 November 2018

[115] Minh Do, 'THACO signs strategic cooperation deal with HAGL', (2018) <http://vneconomictimes.com/article/business/thaco-signs-strategic-cooperation-deal-with-hagl> accessed 12 November 2018

[116] For example, the agreement signed between HAGLG and THACO is signed under the witness of the Prime Minister, who praised their co-operation see , <https://www.vir.com.vn/thaco-announces-strategic-cooperation-with-hagl-61652.html> accessed 6 December 2018

creditors and sought new financers to solve their insolvency affairs. The sketch of corporate rescue in the two cases seems to be highlighted by the role of bank creditors, large corporate sponsors, and debt-trading companies, such as the DATC and the VAMC instead of the expertise and experience of IPs or companies specialising in business turnaround. This might be partly explained by the practice of establishing business supporting networks among companies in Vietnam.[117] However, another reason could be that the insolvency profession has been very primitive in Vietnam. The BL2014 recently created this profession by regulating the mandatory participation of the Asset Management Officer (AMO) in the insolvency procedure to assist courts and debtor companies.[118]

6.3 The rescue procedure under the Bankruptcy Law 2014 (BL2014)

The current regulatory framework for corporate insolvency in Vietnam is provided for by the BL2014. The legislation consists of 14 chapters with 133 articles, exclusively regulating corporate insolvency. As defined by the BL2014, 'bankruptcy' is a situation where a company becomes insolvent and subject to a court decision to declares its bankruptcy.[119] When the insolvency procedure is commenced under the BL2014, a company can be rescued or liquidated by a resolution of a creditor meeting.[120] If the rescue option is not approved by the creditors, the company will be declared bankrupt,[121] which means entering into the liquidation procedure. The model of rescue administration employed by the BL2014 is the hybrid model of Debtor-in-Possession (DIP) and

[117] See Pham Duy Nghia, (n30)
[118] BL2014, art.11-16, at and the Decree 22/2015 of the Government on providing detailed regulations on implementation of several articles of the bankruptcy law for the asset management officer, asset management and liquidation practicing
[119] Ibid art.4.2
[120] Ibid art.83
[121] Ibid art.107

Professional-in-Possession (PIP), under which the company directors are allowed to carry on business under the supervision the AMO and the court.[122]

6.3.1 Initiation of the rescue procedure

The definition of an insolvent company

Article 4.1 of the BL 2014 defines an insolvent company as failing to perform an obligation to repay a debt within three months from the maturity date of the debt.[123] This definition is unique for two reasons. First, it does not mention a company's inability to pay debts, rather it focuses on whether a company has actually performed the obligation of paying debts. This means if the company is still able to pay debts but has the intention not to do so, it will face the risk of being subject to the insolvency procedure. Second, this provision does not provide for the limit of the amount of debts, therefore, it is possible for any creditors to file an application against the company regardless whether a debt is small or large. By defining insolvency based on the actual payment of debts instead of the satisfaction of the balance sheet test or the cash-flow test, the BL2014 strictly requires a company to be fully aware of any debts owed to any creditors since the ignorance to pay a mature debt within three months could lead the company to the risk of being subject to the insolvency procedure. Third, by giving a debtor company three months to settle its debts, the BL2014 appears to be lenient insofar as it confers the company a specific time to devise appropriate measures to deal with paying debts.[124]

The commencement of the rescue procedure.

When a company becomes insolvent, a number of people are granted the right to file a bankruptcy application, including creditors, employees, shareholders and legal

[122] Ibid art.47
[123] Ibid art.4.1
[124] Duc Duy, 'New regulations in the Bankruptcy 2004' (2014) 20 Financial Information, <http://tapchitaichinh.vn/tai-chinh-phap-luat/phap-luat-kinh-doanh/nhung-diem-moi-trong-luat-pha-san-2014-55548.html> accessed 06 December 2018 (article in Vietnamese)

representatives of a company.[125] Five days after the court accepts the application, there will be a moratorium taking effect to prevents any actions by creditors against the company.[126] The court will then make a decision on whether it will commence the bankruptcy procedure against the company or not.[127] When the court has decided to commence the bankruptcy procedure, the decision does not directly result in the initiation of the rescue procedure.[128] Instead, creditors will decide whether the company will be rescued at a creditor meeting.[129] As such, rescue is not a separate insolvency procedure under the BL2014, rather, it is a procedure resulted from the commencement of bankruptcy apart from liquidation procedure.[130]

6.3.2 Formulating a rescue plan and approving the plan

Where the court decides to commence the bankruptcy procedure, it will appoint an AMO to take part in the procedure.[131] The first creditor meeting will be called to decide whether the company will be rescued or liquidated.[132] At this meeting, a resolution for rescue will be passed when it is approved by a majority of unsecured creditors representing 65% total value of unsecured debts.[133] Within thirty days after the resolution is made, the company must draft a rescue plan and send it to the creditors and the AMO for their opinion.[134] The plan, after receiving feedback from these parties, will be revised by the company and sent again to the AMO, who has the obligation to report the plan to the court.[135] After receiving the court's opinion, within fifteen days, the plan will be sent

[125] BL2014, art.5
[126] Article 41.
[127] Ibid art.42
[128] Ibid
[129] Ibid art.83.1(b)
[130] BL2014 art.83.1(b) & (c)
[131] Ibid 45. The appointment of the AMO or AMLC can be made by the court based on the request by the applicant
[132] Ibid art.75, 83
[133] Ibid art.81.2
[134] Ibid art.87.1
[135] Ibid art.81.2

by the judge to the creditors for further consideration and will be approved at the second creditor meeting. The threshold for approval this time is the same as the approval at the first meeting, with the approval of a majority of creditors holding 65% of the value of unsecured debts.[136] As such, creditors play an important role in deciding the rescue fate as failing to get their approval at either the meetings will lead to the elimination of rescue effort. However, the provisions for drafting and approving a rescue plan appears to be a lengthy procedure as it requires the creditor approval at two creditor meetings along with multiple participation of the company, the IPs, and creditors and the court in contributing to the rescue plan.

6.3.3 The effect of approving the rescue plan

Upon getting sufficient creditor approval at the second creditor meeting, the rescue plan will have a binding effect on all creditors,[137] and will be implemented according to its terms.[138] Every six months, the company has the obligation to report on the implementation of the plan to the AMO who then reports to the court and notify the creditors on the rescue progress.[139] If the rescue plan did not state the time for its completion, the legislation imposes a duration of three years on the implementation of the plan.[140] If the rescue plan fails to implement during this time, the court will issue a decision to suspend the rescue procedure and initiate the liquidation procedure.[141]

6.4 Evaluation of the rescue law in Vietnam

6.4.1 The extent to which the legislation places emphasis on rescue

The important role of corporate rescue had not been fully recognised when the first insolvency legislation, the BL1993, was enacted. As stated by Duong Dang Hue, the

[136] Ibid art.91.5
[137] Ibid art.91.6
[138] Ibid art.89.1
[139] Ibid art.93.2
[140] Ibid art.89.2
[141] Ibid art.95.1(b) and 96(2)

Chairman of the Drafting Committee of the two legislations in 1993 and 2004, the objective of the legislation is to liquidate inefficient companies for an orderly exit of the market while paving the way for more companies to thrive.[142] The corporate rescue has been only expressed in strong terms until the enactment of the BL2014.[143] The legislation contains a number of articles that encourages the initiation of rescue procedure. For example, the new definition of an insolvent company confers a company a grace period of three months to settle its financial affairs before a creditor can file a bankruptcy application against it at court.[144] This provision has the effect of encouraging the company to initiate informal rescue measures to pay debts, such as seeking financial advice and support before entering into formal bankruptcy procedure. Furthermore, the legislation facilitates negotiation with the creditors before the commencement of bankruptcy procedure[145] along with the stay of proceedings to prevent creditors from enforcing debts during the rescue time[146] According to the People's Supreme Court,[147] the new legislation created realistic opportunities for viable companies to remain and re-organise their business activities in order to minimise consequences of corporate bankruptcy to the lowest level, protect the right of parties in economic relations and contribute to stabilise the social life.[148] The focus of Vietnamese law on corporate rescue appears to align with the government project on re-structuring the economy towards enhancing quality, efficiency, and competitiveness in the period of 2013-2020.[149] The shift of focus towards

[142] Duong Dang Hue (n71)
[143] The People Supreme Court, The Statement 03/TTr-TANDTC of People Supreme Court on the Draft of New Bankruptcy Law submitted to the National Assembly.
[144] BL2014, art.4.1
[145] Ibid art.37
[146] Ibid art.41
[147] According to article 20 of the Law on Organisations of the People Courts, one of functions of the People Supreme Court in Vietnam is to draft legislations and present them to the National Assembly.
[148] The People Supreme Court, Ibid, The Statement 03/TTr-TANDTC of People Supreme Court on the Draft of New Bankruptcy Law submitted to the National Assembly.
[149] Decision 339/2013 of The Prime Minister on Approving the Project of Restructuring the Economy in connection with transforming the economic growth model towards enhancing quality, efficiency, and competitiveness from 2013-2020.

rescue is also a reflection of the trend of modern insolvency law-making practice around the world under which rescue becomes an important part of insolvency legislation due to its importance in maintaining business values, employments and stabilising the economy.[150] These policies can be considered as the basis for justifying the existence of the rescue law in Vietnam given the lack of literature and theoretical framework in this area.

Nevertheless, several issues of rescue law cannot be justified relevantly in light of these policies, one of which is the issue of 'company rescue' and 'business rescue'.[151] While company rescue refers to the preservation of a company as a whole with the same ownership, business rescue allows the viable part of a business to be saved by transferring to a new owner.[152] The BL2014 enumerates a number of measures available to rescue a company, one of which is to transfer the company's shares to creditors or other parties or sell the company's assets.[153] As this measure can lead to the change of the company ownership, the legislation seems to endorse the view of 'business rescue'. The examination of the practice of corporate rescue in Vietnam also supports this view. For instance, both cases of Bianfishco and HAGLG involved the transfer of the companies' shares to the lender of the rescue finance who then became major shareholders in these companies.[154]

While the BL2014 adopts the policy of 'business rescue', the case of SOEs rescue reflects the philosophy of 'company rescue'. As examined, SOEs in Vietnam have been restructured through the functions of the DATC, a company trading SOEs debts.[155] As

[150] See UNCITRAL, *Legislative Guide on Insolvency Law* (United Nation, 2015) <https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pd > accessed 06 December 2018
[151] See Chapter Three (3.3.2.2 Company Rescue and Business Rescue)
[152] Ibid and S Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67(2) Modern Law Review
247, 248.
[153] BL2014, art.88.2 (e)&(g)
[154] See section 6.3.2 Examination of corporate rescue cases in Vietnam
[155] See section 6.2.1 The existence of debt-trading companies

stated in its charter, one of the objectives of DATC's operation is to preserve and develop the amount of state capital invested in it and in other SOEs.[156] It follows that in the restructuring of an SOE, the DATC cannot let the state capital or the state ownership to be transferred to another party other than the state. There could be two reasons behind this policy. First, retaining the state ownership allows the state to maintain the controlling role of SOEs in key industries. Second, by not permitting the capital to be assigned to another party, the state can settle the financial affairs of ineffective SOEs behind the veil of public knowledge to preserve its reputation. However, it is not always the case that the state wants to retain its ownership in all SOEs. For example, in the effort to enhance the equitisation of SOEs, the government recently issued the Decree 126/2017 that allows SOEs to be privatised and their shares can be purchased by both domestic and foreign investors.[157]

To summarise this discussion, the BL2014 has placed more emphasis on the objective of corporate rescue. Though not expressly stated, 'business rescue' appears to be the policy endorsed by the legislation. By contrast, the restructuring of the SOEs presents the policy of 'company rescue' with the purpose of maintaining the control of SOEs in key industries as well as resolving the insolvency of SOEs in a discreet manner.

6.4.2 Evaluation of Vietnamese rescue law under the four benchmarks

Adopting the hybrid model in rescue administration, the BL2014 permits the company directors to stay in management. In order to prevent the director's abuse, this model borrows the supervision from the bankruptcy judges and IPs (the AMOs). This

[156] See Circular 135/2015 (n86)
[157] See Decree 126/2017 of the Government on privatisation of state-owned enterprises (SOEs) and Mayer Brown Legal Update, 'New Rules for Equitising State-owned Enterprises in Vietnam' (2017) <https://www.mayerbrown.com/new-rules-for-equitising-state-owned-enterprises-in-vietnam-12-11-2017/> accessed 07 December 2018

section examines the effectiveness of this model under the current legislation based on the four evaluation benchmarks of time and cost, expertise, creditor participation and abuse management.

6.4.2.1 Time and cost

The rescue procedure is considered effective under this benchmark provided it is implemented in a timely and cost-saving manner.[158] Therefore, the examination focuses not only on the consideration of the amount of time and expenses, and the rate of creditor's return involved in a rescue case but also the extent to which the law facilitates conditions to fasten the time and minimise the cost. Though the BL2014 has been taking effect for four years in Vietnam, there has been no official report on evaluating the implementation of the legislation or empirical research that provides specific figures to support this discussion.[159] The following examination, therefore, relies on the examination on the provisions regulating time and cost under the legislation to see if there is sufficient measure to limit time and cost involved in rescue.

Regarding the time for rescue, it seems to be the policy of the BL2014 to confer an insolvent company more time to formulate a rescue plan. Accordingly, art 4.1 of the BL 2014 defines an insolvent company as failing to perform its obligation to repay a debt within three months from the date of debt maturity.[160] This provision confers an insolvent company three months to deal with debts before resorting to the formal procedure under the legislation. Upon the acceptance of the application, the court has thirty days to decide whether to commence the procedure or not.[161] If the court decides to commence the

[158] See Chapter Three (3.6.2.3 Benchmarks for evaluation of rescue proposed by this thesis: (i) time and cost)
[159] For the time of resolving insolvency, World Bank Statistic shows that the time to resolve an insolvency case in Vietnam is 5 years. <https://data.worldbank.org/indicator/IC.ISV.DURS> accessed 20 November 2018
[160] BL2014 art. 4.1
[161] Ibid art.42

procedure, creditors of the company have thirty days to send written demands for payment to the AMO who is given fifteen days to formulate the list of creditors.[162] At the same time, when the court decides to commence the procedure, the company is given thirty days to conduct the asset inventory, with two times for extension of thirty days.[163] Finally, within twenty days after the list of creditors and the asset inventory is completed, the judge will call for the first creditor meeting to pass a resolution whether to liquidate or rescue the company. In total, there are about six months between the initiation of the procedure and the making of the rescue resolution. In addition to this, if the rescue resolution is approved by creditors, the company has thirty days to draft a rescue plan;[164] and there are another twenty-five days for the plan to get feedback and opinions from the AMO and the court before being presented to creditors at the second creditor meeting for the final approval.[165] Therefore, the company is given another fifty-five days to draft the rescue plan and get the plan approved by creditors.

This thesis finds this amount of time beneficial to the company in that it permits the company to diagnose causes of its distress, seeking assistance from outside professionals and negotiating with creditors. In addition, this allows the company to draft a well-prepared rescue plan in advance and this enhances the likelihood for sufficiently convincing creditors to approve the plan at the creditor meeting. However, a drawback of this is that creditors have to wait too long to decide the company affairs, with nearly six months to approve the rescue resolution made by the first creditor meeting and nearly two months to approve a rescue plan made by the second creditor meeting. This time is likely to bring a negative effect of discouraging creditors to approve the plan as creditors are more likely to refuse the rescue plan in the fear of abuse arising in association with

[162] Ibid art. 66&67
[163] Ibid art.65
[164] Ibid art.87
[165] Ibid art.87

allowing directors to remain in management in this period. For example, the company directors may take advantage of this time to have activities that are harmful to creditor's interest, such as transferring the company's assets at undervalue or dissipate the assets.

Another point raised by this thesis is that Vietnam should shorten the time for the company to present the rescue plan to the creditor. Instead of conducting two creditor meetings to pass a rescue resolution and to approve a rescue plan, the BL2014 should provide for only one creditor meeting. It is obvious that the basis for creditors to pass a rescue resolution is the ability of the company to produce a viable and feasible rescue plan and present it before the creditors at the first creditor meeting. If no rescue plan can be presented at the first meeting, it is unlikely for the creditors to trust the rescue viability. As a result, they will be more likely to vote against the rescue resolution in favour of liquidation. By contrast, if the company can produce a plan at the first creditor meeting, it is not necessary for it to conduct the second creditor meetings to approve it, which not only saves time but also reduces the cost arising from convening the second meeting.

As far as the cost is concerned, there has been no empirical study on the expenses of rescue in Vietnam. However, according to the general statistics on insolvency of the World Bank in 2017, the average cost for resolving insolvency cases in Vietnam is 14.5% of the company's estate with the creditor return rate being 21.3%.[166] Though the figures are of general cases, which may include both liquidation and rescue, it is worth noting that the expense for resolving insolvency in Vietnam is quite high, while the rate of creditor return is rather low (21.3 cent per dollar). Therefore, Vietnam should have regulations that minimise the cost involved in liquidation and rescue. As mentioned above, the requirement for two creditor meetings to be conducted to pass a rescue

[166] The World Bank Statistic on Insolvency 2017,
<http://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency> accessed 10 December 2018

resolution and to approve the rescue plan should be replaced with only one creditor meetings to reduce the unnecessary cost.

Under the BL2014, insolvency costs consist of two types of cost, namely the court fee[167] and the cost for resolving insolvency.[168] While the former is just a small amount,[169] the latter accounts for a dominant part of the insolvency cost since it includes remuneration for IP (AMO), audit fee, information publishing fee, and other related fees.[170] The remuneration for AMO is a special cost because the BL2014 has just introduced this new actor to participate in the rescue procedure.[171] The government has issued the Decree 22/2015 to provide clarification to several provisions that regulate the profession of the AMO under the BL2014.[172] Accordingly, the Decree provides for calculating the remuneration of AMO based on one of the following factors: working hours, package remuneration, or the value of recovered assets after liquidation.[173] In case of liquidation, the remuneration can be calculated with reference to the value of the recovered assets.[174] In case of rescue, the law respects the negotiation between the creditor and the AMO.[175] If there is no negotiation on the remuneration, it is the judge who will conduct the negotiation with the AMO to define an appropriate amount.[176] As such, Vietnam has established a regulatory framework to define the remuneration of the AMO. Allowing the IP fees to be negotiated between the creditors and the IP can prevent conflicts and encourage creditors to participate in the rescue procedure.

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[167] BL2014, art.4.11
[168] Ibid art.4.12
[169] According to the resolution 326/2016 of the Standing Committee of the National Assembly on regulating fees and court fees, the fee for applying for a court order is VND 1.5 million (approximately $70)
[170] BL2014, art.4.12
[171] Bankruptcy Law 2014, Art 11-16
[172] Decree 22/2015/ND-CP on 16/02/2015, English version at <https://vanbanphapluat.co/decree-no-22-2015-nd-cp-detailed-regulations-of-the-bankruptcy-law-for-the-asset-management-officer> accessed 11 December 2018
[173] Ibid art 21.2
[174] Ibid art 21.4(b)
[175] Ibid art.21.5
[176] Ibid 21.4(d)

Yet, in practice, the emerging concern is not of how to identify the amount properly. Rather, it is the problem of how to facilitate advance payment to cover the expenses incurred by the AMOs in performing their functions.[177] Although the law allows the AMO to sell some of the company asset to cover their expense,[178] AMOs have been struggling around the sale of company assets to cover these expenses as it appears to be difficult to sell the company assets in a timely fashion amid the insolvency.[179] As a result, the time for rescue will be longer because of the delay when there is not sufficient funds to pay AMO in performing their job. This problem is subject to the enhancement of professionalism for the AMOs in Vietnam, which is going to be discussed in the next section.

6.4.2.2 Expertise

The hybrid model adopted by Vietnamese rescue law features the role of the incumbent directors in running the company business, the role of the AMO in supervising the directors' activities, and on the top of that is the role of the court in supervising the compliance of the parties to the procedure.[180] This model will operate effectively under the benchmark of expertise provided the parties mentioned possess a sufficient degree of expertise to perform their functions. As for directors of the company, the hybrid model entrusts them with carrying out business activities, based on the justification that these people have already obtained certain information, knowledge and skills regarding the company's operation.[181] In the time of crisis, directors' expertise must be no longer

[177] Kim Quy, 'Asset Management Officer: A less-known profession in resolving bankruptcy' (2017) Bao Phap Luat Viet Nam' <http://baophapluat.vn/kinh-doanh-phap-luat/quan-tai-vien-nghe-con-it-biet-trong-giai-quyet-pha-san-327516.html > accessed 10 December 2018 (article in Vietnamese)
[178] BL2014, art.16(e)
[179] Ibid
[180] Ibid art.47.1
[181] Phillips and Goldring,'Rescue and Reconstruction' (2002) Insolvency Intelligence 76, at 78

constrained to carrying out activities in the ordinary course of business but extended to negotiating with creditors and seeking for new finance to support the rescue.[182]

In Vietnam, concern on the professionalism of the board of directors has been raised in the following aspects: no good process of controlling directors' activities had been well developed, their operational process was rather procedural and not clear, and there was confusion of functions among directors within the board.[183] In dealing with this concern, Vietnam enacted the new company legislation, the Enterprise Law 2014 (EL2014), which is recognised by the World Bank as a positive change to corporate governance in terms of enhancing professionalism, independence and risk management for company directors.[184] In fact, the EL2014 requires a director or general director of a company to hold professional qualifications and have experience in business management.[185] The basis for removing directors is not only the violation of this requirement but also that these people are no longer capable of satisfying new business plans and strategies of the company.[186] The imposition of professional qualifications and experience on directors has two benefits: first, corporate governance could be enhanced to lead the company to a healthy management stage; second, when the company goes to insolvency, and this can provide justification for allowing directors to remain control of the company business. However, the requirement of director qualification cannot be itself a guarantee for the expertise, there must be a combination between the expertise of the

[182] Wood, Insolvency and Bankruptcy Law (Irwin: 2009), at 385
[183] Nhue Man, 'Looking for weaknesses in the governance of Vietnamese companies', (2014) Securities Investment, <https://www.ifc.org/wps/wcm/connect/cd3a8b8043ce74a498b8b8869243d457/Looking+for+Weaknesses+in+Governance+of+Vietnamese+Companies.pdf?MOD=AJPERES> accessed 10 December 2018
[184] The World Bank, 'Corporate Governance in Vietnam: Success Stories' (2015) <http://documents.worldbank.org/curated/en/305431468187783026/Corporate-governance-in-Vietnam-success-stories> accessed 22 December 2018
[185] Vietnamese Law on Enterprise, art. 65, 92, 100, 151.
[186] Ibid art 101

directors in running the company and the expertise of supervising parties such as IPs and court.

The second actor joining the rescue procedure under the BL2014 is IPs who are AMOs. It is special that in Vietnam IPs is a very new profession that has been created by the introduction of the BL2014. According to the legislation, AMOs are individuals or companies specialising in management and liquidation of insolvent companies, who are licensed to participate in the rescue procedure.[187] AMOs play an important role in supervising the director's conducts in addition to managing and liquidating the company' assets.[188] Furthermore, where a company is subject to a rescue resolution, the AMO can take part in drafting rescue plans and assisting the company during rescue.[189] Though AMOs are court officers, they have the obligation to report to the court and have liability before the court in the performance of their duties.[190]

The underlying policy of bringing the AMOs in control of the rescue procedure seems to be that their professionalism will enhance the rescue efficiency and reduce the heavy workload of the court. The approach to borrowing outsider expertise of IPs to support insolvency settlement in Vietnam is a result of learning the failure of the previous legislation, the BL1993 and the BL2004. In the past, the model employed was the Asset Management and Liquidation Team which comprised representatives of civil judgement enforcement department, courts, trade union, creditors, and the debtor company.[191] Since this team is dominated by state officials who are not familiar with business management,

[187] BL2014, Art.11-13
[188] Ibid art. 87.2
[189] Ibid art.16.3
[190] Ibid 16.6
[191] BL2004, art.9,10

it could not generate sufficient expertise to support insolvent companies as expected, which is considered to one of the factors that contributed to the failure of the BL2004.[192]

In order to maintain and enhance professional standards for the AMOs under the new legislation, the BL2014 provides for conditions and criteria for licensing their profession. Accordingly, individuals eligible for an AMO license must be a lawyer, an auditor, or those who hold a bachelor degree in law, economics, accounting, finance or banking with five-year working experience in the areas they have trained.[193] According to the statistic of the Ministry of Justice, an organisation in charge of licensing the insolvency practitioners, until 2018, there have been 229 individuals granted the AMO license.[194] Though the regulations on the AMO profession contribute to the enhancement of their professional standards, two problems have emerged from the licensing and monitoring AMOs in Vietnam. First, regarding the AMO licensing, the requirement for becoming an AMO under the BL2014 is too simple to guarantee that these people can gain sufficient expertise to participate in the insolvency procedure. For example, the BL2014 simply provides that lawyers, auditors or holders of a degree in law, economics, accounting, finance, or banking with five-year working experience are eligible to obtain an AMO license.[195] Once they satisfy with this requirement, they can file an application to the Ministry of Justice for a license.[196] What has been missing in these provisions is the requirement for AMO applicants to take professional training and professional exams in insolvency and rescue like those in the UK and Canada. In the absence of professional

[192] The People Supreme Court, the Report 44/2013 on Summarising the Implementation of the Bankruptcy Law 2004.
[193] BL2014, art.12
[194] The Ministry of Justice Website, The updated list of AMOs and AMLCs <http://bttp.moj.gov.vn/qt/tintuc/Pages/quan-tai-vien.aspx?ItemID=57> accessed 11 December 2018
[195] BL 2014, art.12
[196] Under the Decree 22/2015 of the Government on clarifying provisions of the BL2014, the article 4 provides for the application of AMO license, which includes the application form, a copy of lawyer card, an auditor certificate, or the bachelor degree in required areas with the document certifying 5-year working experience, and two ID photos.

training and assessment, the BL2014 cannot uphold standards to create qualified AMOs to take part in the rescue procedure. The reason behind the policy of introducing the low standards for AMOs may be that the government needs to create a sufficient number of IPs in the entire state to fulfil the requirement by the BL2014 to make the AMO participation mandatory in the rescue procedure.[197] However, this cannot justify the fact that the lack of rigorous professional training and evaluation will seriously bar them from performing their functions properly and effectively once they involve in complicated insolvency cases.

Second, the thesis argues that the current regulations do not offer an effective mechanism to monitor the AMO conduct. Presently, the Ministry of Justice licenses the AMOs and provides a code of conduct for their profession.[198] After obtaining the license, AMOs have the obligation to register their profession with the Department of Justice in their residency as well as reporting to this department about their professional practice.[199] As such, in Vietnam, an AMO is licensed by a central governmental agency, the Ministry of Justice but supervised by a local governmental agency. A benefit of the governmental control of AMOs is that it can command public confidence. However, there are drawbacks associated with this type of control. The primary concern is the capacity of these governmental agencies in developing sufficient expertise to monitor IPs. Currently for other professions such as lawyer and auditor, apart from the regulatory control, the government monitors them via borrowing functions of recognised professional bodies (RPBs) such as the Vietnam Bar Federation[200] and the Vietnam Association of

[197] BL2014, art.45
[198] Article 3, Decree 22/2015 of the Government on providing guidance for implementing articles of the Bankruptcy law 2014 relating to the profession of AMOs and AMLCs.
[199] Ibid art. 7.5 and 13.5
[200] For the Bar Federation in Vietnam, see <http://liendoanluatsu.org.vn/web/en> accessed 11 December 2018

Accountants and Auditors[201] or the Vietnam Association of Certified Public Accountants.[202] However, regarding the case of IPs, in the absence of such RPBs, governmental agencies such as the Ministry of Justice and the Department of Justice at the local level have to build up their own expertise to monitor these IPs, which seems to be an extremely difficult task. For example, under the current regulation, the governmental agencies in charge with monitoring AMOs have the responsibility to consider the report on the practice of their profession and resolve complaints about their practices.[203] This presents a huge challenge for them in doing so because the state officials in these agencies have to obtain sufficient commercial and professional expertise in this area, without mentioning the fact that there is an absence of detailed regulations regarding facilitating easy access to the AMO's complaint system and how to hand the complaints.

The third actor that contributes expertise in the rescue procedure is insolvency judges. Presently, in Vietnam district courts and provincial courts have jurisdiction over hearing cases relating to corporate insolvency.[204] Within these institutions, there are sub-economic courts with judges specialising in settling commercial disputes and bankruptcy.[205] In settling corporate rescue, insolvent judges have to perform important functions, such as making a decision on whether to commence the bankruptcy procedure, supervising activities of the AMOs, and holding creditor meetings.[206] The judges directly take part in rescue by facilitating negotiation between a creditor who files bankruptcy application against the company[207] and contributing to the drafting of the rescue plan by

[201] For the Vietnam Association of Accountants and Auditors, see < http://vaa.net.vn/> accessed 11 December 2018
[202] For the Vietnam Association of Accountants and Auditors, see < http://www.vacpa.org.vn/en/> accessed 11 December 2018
[203] Decree 22/2015, art. 22-24 (n198)
[204] BL 2014, art.8
[205] The Law on the Organization of People's Courts (2014) art. 38, 45
[206] BL2014, art.9
[207] Ibid art.37

giving his opinion the plan before presenting it to creditors.[208] In performing these functions, insolvency judges not only exercise their judicial oversight but also produce commercial judgment that might decide the fate of a company. For example, when the judge decides to commence the insolvency procedure, the fate of an insolvent company will be handed to creditors who have the right to decide if the company should be liquidated or rescued.[209] Though the BL2014 allows a creditor to file an application to commence the insolvency procedure when the company becomes 'insolvent', based on the fact that the company has not paid a debt due for three months,[210] the judge cannot merely base a decision on this ground because the fact that a company has not paid debts for three months is very different from the fact that the company is unable to pay debts. Therefore, before making the decision, the judge has to consult the company financial statements and other documents to evaluate if the company is able to pay the debts. If the judge finds that the company is still able to pay debts, he will decide to facilitate negotiation among the parties,[211] instead of initiating an expensive, complicated bankruptcy procedure. Similarly, in giving his opinion about a rescue plan,[212] the judge has to use his commercial judgment to evaluate the strategies devised by the company and the AMOs. To produce sound judgment over these issues, the judge has to possess a degree of expertise in finance and business management.

Though the law appears to demand insolvency judges to have such expertise, the lack of judicial capacity has been a concern for Vietnam. Presently, the court system of Vietnam has been facing the challenge of lacking of competent judges in dealing with increasingly complicated insolvency cases.[213] Lacking expertise in areas of finance and

[208] BL 2014, art.9 and 87.4
[209] Ibid art.83
[210] Ibid art 4.1
[211] Ibid art.37
[212] Ibid art.87.3&4
[213] Duong Dang Hue (n67)

accounting[214] and insufficient experience in dealing with insolvency has rendered judicial involvement become ineffective.[215] This situation seems to be exacerbated by the fact that Vietnamese judges have been under pressure of resolving a great deal of heavy workload, which makes it difficult for them to properly develop their expertise.[216] Research has addressed that the insufficiency of judicial capacity in insolvency would lead to increasing time and cost and decreasing the livelihood for rescue and the creditor return.[217] In dealing with the issue of improving judicial expertise, Vietnam has enhanced judicial training in insolvency for judges under the support of international donors such as the World Bank and INSOL International.[218] However, when the outcome of multiplying the training on the large scale for judges in the entire state is subject to the matter of time, it is the fact that the efficiency of rescue law has been undermined by the lack of judicial capacity.

To conclude the discussion, although the BL2014 has provided for courts to exercise their expertise in the rescue procedure, the lack of judicial capacity in dealing with insolvency does not allow them to do so. While Vietnam has fostered a legal framework to enhance professionalism for directors, the insufficient regulations on licensing and monitoring IP profession coupled with the weak judicial capacity precludes these actors from contributing expertise in rescue. Once influential actors such judges and

[214] Ibid and Nguyen Ngoc Anh, 'Subjects in Bankruptcy Legal Relations: Problems and Recommendations' (2018) <http://tcdcpl.moj.gov.vn/qt/tintuc/Pages/phap-luat-kinh-te.aspx?ItemID=224> accessed 12 December 2018 (article in Vietnamese)

[215] Although bankruptcy law was first introduced in Vietnam in 1993, the practice of using administrative orders to resolve the insolvency of SOEs in replacement of court role had barred judges from gaining experience in this area for a long time. See Gillespie, (n16) at 252-254

[216] The Chairman of the Vietnam Supreme People Court addressed this problem to the conference of National Assembly on October 30, 2018, see <https://baomoi.com/chanh-an-tand-toi-cao-ap-luc-khi-phai-giam-bien-che/c/28419176.epi> accessed 12 December 2018 (article in Vietnamese)

[217] B. Iverson and others, 'Learning by Doing: Judge Experience and Bankruptcy Outcomes' (March 12, 2018). SSRN: <https://ssrn.com/abstract=3084318> accessed 12 December 2018

[218] The World Bank, 'Vietnam Debt Resolution Program Mid-Term Review' (2018) prepared by Charles Booth, < https://www.ifc.org/wps/wcm/connect/7b9a74f7-21da-4d90-8cc4-204e38fd4593/Vietnam+DRE+MTR++Executive+Summary+for+Public+Disclosure.pdf?MOD=AJPERES> accessed 12 December 2018

IPs cannot produce expertise to the administration of the rescue procedure, the co-ordination of expertise between these actors is unlikely to occur, which undermines the effectiveness of the hybrid model of rescue administration employed by the BL2014.

6.4.2.3 Creditor participation

Under the BL2014, creditors significantly contribute to the effectiveness of corporate rescue in two aspects. First, they decide the rescue livelihood by exercising the right to approve the rescue resolution[219] and the rescue plan.[220] Second, they can be the provider of the rescue finance for implementing a rescue plan. The BL2014 grants creditors a number of important rights that incentivise their participation in the rescue procedure. First, by simplifying the definition of 'insolvent company', the legislation allows any creditors to file a bankruptcy application against the company at court without imposing a limit on the value of the debt.[221] Especially, in the application, what a creditor needs to provide is the evidence of the debt and the law does not place the onus on the applicant to prove if the company is unable to pay the debt.[222] Second, creditors are granted a right to propose an AMO to participate in the rescue procedure,[223] which can avoid the abuse where the company directors choose the AMO by themselves. Third, after the court decides to commence the procedure, creditors have the right to vote on whether the company should be liquidated or rescued,[224] and if they choose the rescue option, they continue to have the right to approve the rescue plan.[225] Fourth, though creditors are not directly involved in the implementation of a rescue, they can exercise the right to monitor rescue through a creditor committee whose functions, including monitoring the rescue

[219] BL 2014, art.81.2 & 83.1(b)
[220] BL2014, art.91.5
[221] BL2014, Art.5.1
[222] Ibid art.26
[223] Ibid art.19
[224] Ibid art.83.1
[225] Ibid art.90.1

implementation[226] and proposing to the AMOs or the judge on how rescue should be implemented.[227] Especially, the BL2014 confer creditors a right to review the draft of a rescue plan and giving their opinion on it.[228]

Though the BL2014 provides creditors with significant rights in rescue, there are two problems that discourage creditor to participate in the rescue procedure. The first problem associated with unfair treatment between secured creditors and unsecured creditors.[229] Accordingly, the BL2014 divides creditors into three groups: unsecured creditor, under-secured creditor, and secured creditor,[230] but allows only unsecured and under-secured creditors to file an application against the company, excluding secured creditors from getting such right.[231] In addition, art 81.2 dictates that a rescue resolution is approved by a majority of unsecured creditors who represent 65% of the total value of unsecured debt. Similarly, art 91.5 provides for the approval of a rescue plan with the same threshold of unsecured debts. As such, the right to approve the rescue is only granted on unsecured creditors. These provisions, therefore, discourage secured creditors and under-secured creditors to participate in the rescue procedure, not to mention that this is unfair for an under-secured creditor because he should be treated as an unsecured creditor to the extent of the debt not covered by the collateral.[232] As a result of this unfair treatment, in practice, secured creditors tend to enforce debts by disposing of the collateral

[226] The article 16.3 states that the AMO has the obligation to report on the company's asset status, the obligation and the business, it does not mention to whom the AMO owed this obligation. However, it could be inferred that it is judges and creditors to whom the AMO has to report. While the obligation to report to judges is already stated in the art.16.6, if the AMO does not report to creditors at their request, this could constitute the ground that he is not objective and can be removed by court at the request of the creditor. In addition to this, after creditor meeting approve the rescue plan, the AMO has to report to the in-charged judge and creditor on every six months (art.93.2)
[227] Ibid art.87
[228] Ibid art.46.1
[229] Nguyen Hoang Duy, 'Three Issues for Secured Creditors in a Bankruptcy Situation in Vietnam' (2016) <https://vietnam-business-law.info/blog/2016/12/28/three-issues-for-secured-creditors-in-a-bankruptcy-situation-in-vietnam> accessed 12 December 2018
[230] Art.4.4-4.6. Under-secured creditors are those whose debts owed by the company are secured by the collateral which has the value lower than the secured debt.
[231] The BL 2014, art.5.1
[232] Nguyen Hoang Duy (n229)

before the company initiates the insolvency procedure in contemplation that this will stay their action against the company's assets. The enforcement of secured creditors against the company's assets can contribute to the exacerbation of the company's financial hardship since lacking essential assets for operating business could precipitate the company into the verge of liquidation.[233]

Under the BL2014, a secured creditor cannot enforce a secured debt if the insolvency procedure is commenced before the debt falls due because the commencement of insolvency will result in a moratorium that prevents the creditor from taking any actions against the company, including enforcing a judgment.[234] A secured creditor can only enforce the debt after a resolution is passed by creditors to decide whether to liquidate or rescue the company.[235] Once the rescue resolution is approved, the BL2014 allows using the secured asset to implement the rescue plan, however, in doing so there must a consent of the secured creditor who has security in the asset.[236] However, the secured creditor is more likely to refuse the request of using the asset and will take action to enforce security in considering the fact that the legislation does not allow him to file the application against the company and vote for the approval of the resolution.[237] Therefore, this appears to be a shortcoming of Vietnamese law to discourage secured creditors to participate in rescue as well as underestimating the important role they have in providing finance to support for the implementation of the rescue plan.

The second failure of Vietnamese law in promoting creditor participation is that there is an absence of a guarantee for the payment of the rescue finance advanced to the

[233] Kaneko Yuka, 'Re-evaluating model laws: Transplant and Change of Financial Law in Vietnam', (2012) 19 Journal of International Cooperation Studies, p. 25, <http://www.lib.kobe-u.ac.jp/repository/81003749.pdf> accessed 12 December 2018 and Tran Duc Phuong, 'The Paradox of Creditors Afraid of the Debtor' (2016) <https://tinnhanhchungkhoan.vn/phap-luat/nghich-ly-chu-no-so-con-no-171570.html> accessed 12 December 2018
[234] BL2014, art.41.1
[235] Ibid art.53
[236] Ibid art.91.5
[237] Ibid art.53.1(b) and 53.3

company to implement the rescue plan. When the rescue plan is agreed upon, it seems to be very difficult for the company to seek finance since the insolvency affairs are likely to degrade its creditworthiness.[238] In deciding to extend the rescue finance, the lender cannot just rely on the assessment on rescue viability but demands a sufficient guarantee that the finance must be paid in priority over other secured creditors in case rescue attempts fail.[239] Given the importance of the rescue finance in implementing rescue plans as well as the legitimate protection for the lender of the rescue finance against insolvency risks, several jurisdictions grant the finance a super-priority in payment over the existing secured creditors[240] and this is also a recommendation of the UNCITRAL for countries to draft insolvency legislation.[241]

However, there is the absence of a super-priority in the treatment of the rescue finance under the BL2014. According to the priority scheme for distributing a company's assets in liquidation,

> Where a judge issues a decision declaring bankruptcy,[242] the assets of the enterprise or cooperative shall be distributed in the following order:
> (a) Bankruptcy costs;
> (b) Unpaid wages, severance allowances, social insurance and health insurance of the employees and other benefits in accordance with the executed labour contracts and collective labour agreement;
> (c) Debts arising subsequent to the commencement of the bankruptcy procedure which serve the purpose of business recovery of the enterprise or cooperative;

[238] Paul H. Zumbro, 'DIP and Exit Financing Trends and Strategies in a Changing Marketplace' in *Debtor-in-possession and Exit Financing: Leading Lawyers on Securing Funding and Analyzing Recent Trends in Bankruptcy Financing* (Thomson West, 2010), at 4<https://www.cravath.com/files/uploads/Documents/Publications/3616890_1.PDF> accessed 12 December 2018

[239] A lender of new finance may be a pre-petition lender who wants to protect his position against an upper-secured creditor. Jordan Myers, 'Market Trends, Recent Deal Terms in Retail DIP Financing', (2018) <https://turnaround.org/jcr/2018/06/market-trends-recent-deal-terms-retail-dip-financing> accessed 12 December 2018

[240] Examples of this are the United State and Canada

[241] UNCITRAL (n150) at 115-117

[242] It should be clarified that the bankruptcy term in the BL 2014 has two meanings. First, when a court makes a decision to commence bankruptcy procedure, bankruptcy, in this case, has the same meaning as insolvency which confirms the insolvency of a company has officially initiated, and bankruptcy procedure can lead either consequences: rescue or liquidation. However, when the court makes a decision to declare bankruptcy, bankruptcy, in this case, means liquidation and the company will be liquidated to pay creditors.

> (d) Financial obligations to the State; unsecured debts payable to the creditors named in the list of creditors; secured debts which remain unpaid due to the value of the assets being insufficient to repay them.[243]

By the virtue of this priority, when a company goes to liquidation, the payment for rescue finance (c) will rank behind the payment for the bankruptcy cost (a) and the salaries and benefits of employees (b). Though this provision does not mention secured creditors, they are allowed to realise the secured asset out of the bankruptcy procedure once a resolution is passed by creditors at the first meeting to decide if a company should be rescued or liquidated.[244] Secured creditors are eligible to participate in the payment scheme only if the value of the secured asset is not sufficient to cover the secured debt, and the outstanding debt will fall into category (d) in the scheme above.[245] Allowing secured creditors to be paid outside the bankruptcy procedure means that secured creditors are conferred the highest priority in payment. Therefore, the lender of the rescue finance ranks behind the secured creditors, the IPs, and the employees in this scheme of priority.

A question arising from this scheme of payment is that if the company still has assets free of security, whether it can grant the lender of the rescue finance a security in the asset, and thereby the lender can enjoy the status of a secured creditor. However, it is impossible to do so because by the virtue of art 54.1, any debts arising after the commencement of bankruptcy procedure for the purpose of rescuing the company will be characterised as the debts at art 54.1(c) regardless of whether it is secured or unsecured, and thereby ranking behind the bankruptcy costs and payment for employees. By providing this priority of payment, the BL2014 discourages either the existing creditors or the new creditors to advance the rescue finance to the company. For an existing secured

[243] BL2014, art.54.1
[244] Ibid art 53
[245] Ibid

creditor, if he consents to use the secured asset to fund the rescue, this will subject him to the risk of losing the advantage of being able to enforce security in the asset. This is because when the rescue fails, the debt the company owed to him is no longer a secured debt, rather, by the virtue of art 54.1(c), it has the status of the debt for rescuing the company, which ranks behind other debts. The same holds true in the case the lender of the rescue finance is a new creditor. In recognising that the payment for the rescue finance will rank behind the payment for not only secured creditors but also the payment for bankruptcy cost and employees in liquidation, the lender is unlikely to take risks to fund the rescue plan.

As such, though the BL2014 confers creditors significant rights to check, approve and monitor a rescue plan, it has failed to encourage the participation of secured creditors due to the unfair treatment with other creditors. Nor can the BL2014 incentivise creditors to advance the rescue finance to implement the rescue plan in the absence of a super-priority to guarantee the repayment of the rescue finance in case of liquidation.

6.4.2.4 Abuse management

As examined, the hybrid model of rescue administration features the retention of the incumbent directors in managing and operating the company.[246] However, permitting the incumbent directors to run the business during insolvency time bears a risk that they may gamble the company's assets through making risky decisions at the expense incurred by creditors.[247] The hybrid model, therefore, invites IPs to supervise the directors. By adopting this model in the BL2014, Vietnamese legislators had foreseen the importance of monitoring the directors' abusive behaviours, thereby brings several actors such as the court, the AMOs, and creditors to participate in monitoring the company directors during the rescue.

[246] See Chapter Three (3.5.1.3 The hybrid model of rescue administration)
[247] See Lynn M. LoPucki, 'The Trouble with Chapter 11' (1993) Wis. L. Rev. 729, 732-34.

The director abuse can be tackled with three measures, monitoring directors in running the company, changing directors, and punishing directors for misconduct. First, when the directors are allowed to run the business during insolvency, they are subject to the oversight of the bankruptcy judge, the AMOs,[248] and creditors.[249] In preserving the value of the company estate, the directors are forbidden to take several actions, including hiding, dissipating or giving away asset, turning unsecured debts into secured debts, paying unsecured creditors, or giving up the right to claim a debt.[250] Though directors are monitored after the commencement of insolvency, some of their activities can be reviewed backward, for example, within six months prior to the insolvency commencement,[251] or even longer if the transactions were carried out on a non arm'slength basis.[252] Second, if directors are incapable of running the business or violates their obligations during performing their functions, they will face the risk of being replaced by the court at the request of creditors or the AMO.[253] Third, the last measure to monitor directors is to subject them to severe punishment if they conducted activities that are prohibited by the law. Directors who carried out prohibited activities will be banned from holding any management position in a company for three years,[254] or even subject to a potential criminal charge.[255] As such, with three measures of control, the BL2014 appears to effectively tackle the problem of directors' abuse as the law allows the court, the AMOs and creditors to participate in supervising their activities. The legislative effectiveness of this aspect is even enhanced as the law does not provide for any

[248] BL 2014, art.47.1
[249] Ibid art.82
[250] Ibid art 48.1
[251] Ibid art.59.1
[252] Ibid art. 59.2, according, if the company conducted transactions with related people, the duration for a court to declare these transactions to be invalid is extended to 18 months prior to the commencement of the bankruptcy.
[253] Ibid art. 47.2
[254] Ibid art.130
[255] Ibid art.129

facilitation of transactions such as the pre-packaged sale, thereby avoiding the problem that the company might enter into a secret deal to promptly sell the business to an influential creditor at the disadvantages to other creditors.[256]

Though director abuse is legislatively tackled in the examination of the BL 2014 regulatory framework, the effectiveness of the legislation is challenged due to two reasons. First, the insolvency institutional framework in Vietnam has not been developed sufficiently to implement the regulations. For example, reviewing director's conducts and business judgement in running and managing the company requires insolvency judges and AMOs to obtain a sufficient degree of expertise in rescue. However, as examined, insolvency judges and the AMOs have not been adequately developing their expertise to contribute to the monitoring of the rescue procedure.[257] Second, by allowing secured creditors to enforce security in rescue, the BL2014 not only fails to recognise the importance of preserving key assets to fund the rescue plan but also discourages the secure creditors to participate in rescue procedure.[258] Apart from lacking the key assets to fund rescue plan, the policy of excluding secured creditor has the drawback of not being able to utilise the expertise of secured creditors, such as commercial banks, who possess a considerate degree of expertise as compared to general unsecured creditors such as employees or trade creditors.

In summarising the matter of managing abuse pertaining to the DIP model, the BL2014 has addressed the problem with directors' abuse of the procedure through designing a mechanism of control that features the supervision of the court, the AMOs

[256] See the discussion of pre-package transaction in the UK and Canada in Chapter Four (4.2.3.3 Abuse management) and Chapter Five (5.4.4 Abuse management)
[257] See the discussion of creditor participation under section 6.5.2.3 of this Chapter.
[258] Mike Falke, 'Secured Creditor Protection and the Treatment of different unsecured Creditor Classes under the Chinese draft Bankruptcy Code – A Comparative Analysis' (1998) <http://siteresources.worldbank.org/GILD/ConferenceMaterial/20206017/Chinese%20Insolvency%20Law%20Reform%20-%20Falke.pdf> accessed 12 December 2018

and the creditors in addition to imposing the punishments for the directors' misconducts. However, the promising effectiveness of the legislation in this regard cannot be guaranteed due to the lack of expertise of the participating actors in couple with the discouragement of creditors to actively engage in the rescue procedure.

6.5 Conclusion

The examination of the legal development in insolvency revealed the influence of traditional beliefs and foreign laws on the shaping of the insolvency legislative framework in Vietnam. Currently, corporate insolvency and rescue are provided for by the BL2014, which is the inheritance of the BL1993 and the BL2004. The examination of the failure of two legislation in 1993 and 2004 Vietnam shed a light on how Vietnam struggled to apply Western insolvency law to the unique legal environment of Vietnam in which the traditional beliefs and the influence of state-economic control have still dictated the low reliance on official rules to settle corporate insolvency.

The practice of informal rescue in Vietnam has emerged against the backdrop of privatising the SOEs and enhancing the effectiveness of the banking system to deal with non-performing debts, which leads to the incorporation of debt-trading companies under the state management. The pioneering role of the state in this area, to a large extent, signals the undeveloped rescue practice in Vietnam. Regarding the law-making process, though corporate rescue was regulated in the BL1993 and the BL2004, its importance has just been emphasised with the enactment of the BL2014 that provides for detailed rules to support the pursuit of rescue objective.

In administering the implementation of the rescue procedure, the BL2014 adopts the hybrid model of rescue administration that features directors running the company under the supervision of the court and the AMOs. Though the BL2014 provides for a court-driven procedure, it invited a new actor, namely the AMOs to participate in

monitoring the company along with the insolvency judges, resulting in the establishment of a new IP profession in Vietnam. Based on the four benchmarks of time and cost, expertise, creditor participation, and abuse management, the assessment of the effectiveness of Vietnamese rescue law produces the following results. First, in terms of time and cost, although there is no specific figure to draw a conclusion on the time and cost for rescue, the examination addressed that the rescue procedure has been lengthy, which can lead to generating more cost in rescue. Therefore, Vietnam should shorten the time of conducting the rescue procedure by the requirement for conducting one creditor meeting instead of two. Second, in an attempt to borrow the expertise of a professional outsider to assist the courts in monitoring the rescue procedure, the BL2014 provides for mandatory participation of AMOs. However, the legislation appears to be unable to allow expertise to be sufficiently generated in rescue due to the weak regulations in licensing and monitoring the AMOs in couple with the fact that insolvency judges in Vietnam have not been developing judicial capacity adequately to deal with insolvency cases. Third, the legislation has also failed to call for creditor participation through adopting the policy that excludes secured creditors and under-secured creditors from approving rescue plans as well as discouraging the supply of the finance for implementing the rescue plan in the absence of a priority for the payment of the finance in case of liquidation. Fourth, the legislation has properly addressed the issue of director's abuse along with providing measures to tackle it. Nevertheless, implementing these measures has presented considerable challenges given the insufficient expertise of the monitoring actors such as the courts and the IPs and the discouragement of secured creditors to contribute expertise in rescue.

In the next chapter, the thesis will conduct a comparison of the rescue laws of the UK, Canada and Vietnam to identify the best practices emerging in each jurisdiction and make recommendations for Vietnam to improve the effectiveness of its rescue law.

CHAPTER SEVEN

COMPARISON ON RESCUE LAWS OF THE UNITED KINGDOM, CANADA AND VIETNAM

7.0 Introduction

Based on the previous examination on the corporate rescue laws of the United Kingdom (UK), Canada and Vietnam, this chapter provides a comparative analysis into the corporate rescue laws of the three selected jurisdictions. Purposes served by the chapter are twofold: first, it highlights similarities and distinct features of the rescue laws in the three states; second, it provides recommendations for Vietnam to enhance the effectiveness of its corporate rescue law through an evaluation of the approaches offered by the UK and Canada. In pursuit of its purposes, this chapter is structured with three parts. The first part maps out influential theories on comparative law and legal transplantation, which are the basis for guiding the comparison of rescue law under the three legal systems. The second part provides a comparative analysis into rescue models and procedures in the laws of three jurisdictions in tandem with providing explanation and justification for similarities and differences among them. The comparison will be carried out following the four benchmarks previously established, namely time and cost, expertise, creditor participation and abuse management. The final part of this chapter is devoted to offering Vietnam recommendations to improve the effectiveness of its law, based on the best practices found in the results of the comparison and suggests what Vietnam should do to facilitate a suitable environment for these practices to prosper.

7.1 Theories on comparative law and legal transplantation.

7.1.1 Comparative law

Comparative law, in essence, is perceived as an 'intellectual activity'[1] or a 'science'[2] that involves a process of comparing rules within a single legal system or different legal systems to examine the extent to which they are similar and different.[3] The history of comparative law can be traced back to the year 1900 when French scholars Lambert and Saleilles founded the International Congress for Comparative Law with the objective of resolving accidental differences and reduce the level of divergence in laws of different nations.[4] Since then, comparative law has continuously developed and embraced a number of important objectives, including producing new knowledge, supporting legislators in the law-making process, providing a tool for constructing law and contributing to the unification of law and being a useful discipline in legal education.[5]

A dominant approach to comparative law is functionalism established by Zweigert and Kötz in *An Introduction to Comparative Law*.[6] The functional approach focuses on the function of laws, that is, what laws actually do to achieve their social purposes.[7] The functional method rests on three premises: (i) legal systems face the same problems; (ii) in solving the same problem, different legal systems take different solutions; and (iii) despite different measures taken, legal systems reach similar results.[8] According to the functional approach, laws in different legal systems are created in response to the same problems arising in most societies, such as theft, murder, contractual disputes and so on;

[1]K Zweigert and H Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998), at 2.
[2] Vanina Narcisa Botezatu, 'Comparative Law and Legal Translation', Journal of Danubian Studies and Research, Vol 6, No 2 (2016), <http://journals.univ-danubius.ro/index.php/research/article/view/3466/3918> accessed 23 January 2019.
[3] This common understanding of the comparative concept can be found in numerous literature, for example, K Zweigert and H Kötz, (n1), Botezatu (n2), Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method*, (Oxford and Portland, 2014), at11, and E.J. Eberle, 'The Method and Role Of Comparative Law' (2009) 8 Washington University Global Studies Law Review 451, 452,
[4]Zweigert and Kötz, (n1), at 3
[5] Ibid p.16 and ücü 2007 E. Örücü, 'Developing Comparative Law', in: E. Örücü & D. Nelken (eds.), *Comparative Law: A Handbook*, (Oxford: Hart Publishing 2007)
[6] K Zweigert and H Kötz, (n1) at 3
[7] Richard Hyland, 'Comparative Law', in *A Companion to Philosophy of Law and Legal Theory* (Dennis Patterson ed., 1999), 185-7
[8] Zweigert and Kötz, (n1), at 34

and although the approach offered by laws can be diverse the solutions to the problems are eventually similar and identical.[9] Therefore, in essence, the functional method aims at highlighting similarities among compared legal systems to produce similar, practical solutions to a social problem rather than emphasising their differences.[10] As claimed by Zweigert and Kötz,

> 'incomparables cannot usefully be compared,…if he (a comparative lawyer) finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he posed his original question were indeed purely functional.'[11]

Apparently, the use of the functional approach in comparative law has the benefit of directly answering a question of how a problem is dealt with by the law in different legal systems and in particular contribute to the unification of law in different legal systems through an 'attempt to delineate a common core of legal institution'[12] Nevertheless, functionalism has been heavily criticised in a number of fronts. Significant criticism over the functional approach is directed at the functionalist's assumption of the universal similarity among legal systems that fails to take into consideration the differences in historical and socio-economic conditions underpinning compared legal systems.[13] Critics of the functional approach rely on the negligence of differences among the systems to attack the construction of the premises on which the functional method grounds. For example, Husa disagrees with the premise that legal systems provide the

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[9] Mark Van Hoecke, 'Methodology of Comparative Legal Research' (2015) Law and Method, p.10, <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001> accessed 24 January 2014

[10] Oliver Brand, 'Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies' (2007) 32(2) Brooklyn Journal of International Law, 410

[11] Zweigert and Kötz, (n1) at 34, 40

[12] Brand (n10) at 411

[13] See Brand, Ibid; Mark Van Hoecke (n9); Jaakko Husa, 'Farewell to Functionalism or Methodological Tolerance?', (2003) 67 The Rabel Journal of Comparative and International Private Law, 419; David J. Gerber, 'Sculpturing the Agenda of Comparative Law: Ernst Rabel and the Facade of Language', *in Rethinking the Masters of Comparative Law* (Annelise Riles, 2001); William Ewald, 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"' (1998) 46 The American Journal of Comparative Law, 701; Nora V. Demleitner, Combating Legal Ethnocentrism: Comparative Law Sets Boundaries, 31 ARIZ. ST. L.J. 737; and Ralf Michaels, 'The Functional Method of Comparative Law' in *The Oxford Handbook of Comparative Law* (2006)

same solutions to the same problems within the same cultural sphere because the assumption of universal similarity or 'sameness' cannot work well or even be pointless if the comparison is taken between culturally remote systems.[14] Brand points out that a factual situation considered to be problematic in one society may not be a problem in others; therefore, it is unsound to rely on the premise that different legal systems face similar problems.[15] Brand also criticises the functionalism for assuming laws as solutions to problems since it is not always the case that laws can effectively provide solutions to problems and laws can be dysfunctional in several aspects, for example, a law can be a symbolical product or it lacks norms to address social problems.[16] With these constructive deficits, it is believed that comparative results followed the functionalism could be an alien product to be applied to a particular legal system.[17] Furthermore, the indifference to unique conditions that shape a given legal system subjects the functionalists to the attack over being 'external' for lacking understanding of about foreign legal systems[18] and being 'ethnocentric' for favouring the examination into states that share close, similar conditions while neglecting remote states.[19]

The limits of functionalism, as mentioned above, has rendered it a doubtful and controversial method in comparative law that invites a great deal of academic attention in seeking more suitable approaches to replace it. Husa takes a view that it is not correct for the functionalists to merely focus on similarities between legal systems as suggested by Zweigert and Kötz; rather, the functional method should fully embrace both similarities and differences with full consideration and explanation.[20] Those who

[14] Jaakko Husa (n13) at 425
[15] Brand (n10) at 419
[16] Ibid
[17] D. J. Gerber (n13) 204
[18] W. Ewald (n13) 703–04
[19] N. V. Demleitner (n13) 741–44
[20] Husa (n13) 424-425

advocate examining comparative law in light of other social sciences have developed their own method for comparative law. For example, Mattei approaches comparative law under the economics perspective that employs the standard of 'efficiency' to compare which legal systems are better off.[21] Accordingly, a legal system is regarded as efficient so long as it can generate less waste and lower transaction cost or better resource allocation.[22] Another alternative to the functionalism is the cultural approach by Legrand, which attempts to examine a legal rule in a political, economic, social and ideological context in order to discover the real meaning attributed to the rule under a legal system.[23] In a similar, but more exhaustive view, Hoecke emphasises the importance of equally considering the doctrinal framework and the underlying legal culture.[24] Apart from the functional method, he recognises a wide range of methods that can be employed to carry out comparative law, including the analytical method (analysing legal concepts and rules), the structural method (examining the framework of the law), the historical method (examining legal development), and the law-in-context method (focusing on societal context, including politics, economy, culture and ideology).[25] Hoecke claims that these methods are not mutually exclusive, which means that there can be a combination of these methods in comparative legal research[26] and the selection of which method should be used is subject to how legal research designs its aims and questions.[27]

To summarise this discussion, the issue of whether comparative law should concentrate on similarities or differences between legal systems has distinguished the functionalists from the other comparatists and becomes the ground for the debate over

[21] Ugo Mattei, *Comparative Law and Economics* (University of Michigan Press, 1997) at. 145
[22] Ibid
[23] Pierre Legrand, 'How to Compare Now' (1996) 16(2) Legal Studies, 232, at 235 and 'The Impossibility of "Legal Transplants,"' (1997) 4 Maastricht Journal of European and Comparative Law, 111.
[24] Mark Van Hoecke (n9)
[25] Ibid 8-21
[26] Ibid 9
[27] Ibid 2 and 29

which method should be used in comparative law to flourish. What is suggested from the discussion is that comparatists should not be confined exclusively to a single method, rather they must open their perspective to see comparative law in a larger context and be familiar with a range of methods so that the comparison is no longer constrained to the surface of legislation or doctrinal framework but delves into a deeper understanding of the background and the context that shapes the compared legal systems.

7.1.2 Legal transplantation

Legal transplantation is a term coined by Watson in his famous book *Legal Transplants: An Approach to Comparative Law.*[28] Watson describes legal transplantation as a phenomenon where a legal rule moves from one country to another or from one person to another and argues that there is no connection between law and the social context in which it operates, thus laws can transfer easily to new places that are very different from the place of its origin.[29] Watson's core argument on the legal transferability lies in the assumption that laws have their own life or autonomy that allows them to develop in insolation with social, economic or political factors.[30] Significantly, he finds legal transplants or 'legal borrowing' has the most important contribution in changes in many legal systems by citing cases of transferring European law to many countries in the world.[31]

Legrand is the most prominent critic of Watson' work who challenges the argument on the legal transferability with the claim that it is impossible for legal transplant to occur.[32] Endorsing the assumption of the famous scholar Montesquieu that

[28] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Virginia University Press, 1974)
[29] Ibid 21-30
[30] Alan Watson, 'Comparative Law and Legal Change' (1978) 37 Cambridge Law Journal, 313, 314-315
[31] Alan Watson, 'Legal Transplants and European Private Law' (2000) 4 Electronic Journal of Comparative Law, <https://www.ejcl.org//44/art44-2.html > accessed 27 January 2019
[32] Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 Maastricht J. Eur. & Comp. L. 111, 117

laws should be adapted 'to the people for whom they are framed..., to the nature and principle of each government... to the climate of each country',[33] Legrand finds laws culturally embedded in a society and argues that because legal culture importantly shapes and gives laws a specific meaning, when laws transfer to a new place, the legal culture deciding the meaning cannot transfer with them.[34] As a result, though the legislative texts may be the same in the recipient place, the new legal culture cannot give the borrowed laws a similar meaning as they would have in the original legal culture. Kahn-Freund shares the same view with Legrand that laws are embedded in legal culture, but his understanding of legal transplant differs from Legrand's in an important aspect that there is still a degree of legal transferability.[35] Similar to Legrand, Kahn-Freund endorses Montesquieu's view in recognising the connection between laws and social context; however, he claims that in modern time, social, economic, and cultural forces have lost their importance in deciding legal transferability,[36] rather, it is a political factor, namely 'political differentiation' to take this role.[37] Specifically, Kahn-Freund claims that laws designed to 'allocate power, rules making, decision making, and all above, policy-making power (which are) the ones most resilient to transplantation'.[38]

As such, three main contemporary theories on legal transplantation have been mapped out. First, Watson establishes the theory that laws can easily transfer from one country to another.[39] Second, Legrand posits that laws are non-transferable due to the obstacle caused by the unbridgeable differences in legal culture in which laws operate.[40]

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[33] Baron de Montesquieu, Charles-Louis de Secondat, 'The Spirit of Laws' <https://plato.stanford.edu/entries/montesquieu/> accessed 30 January 2019
[34] Legrand (n32) at 117
[35] Otto Kahn-Freund, 'On the Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review, 1-27
[36] Ibid 8-11
[37] Ibid
[38] Ibid 17
[39] Watson (n28) 314-5
[40] Legrand (n32) 117

Third, Kahn-Freund suggested that it is possible for legal transplant to occur, yet this possibility depends on the extent of compatibility between the transferred laws and the social, political, economic and cultural environment of the recipient country and that political differentiation, as opposed to social forces, has operated as the main hindrance of legal transplantation.[41]

7.1.3 The interplay between comparative law and legal transplantation and their application to the comparison conducted by this thesis

The importance of legal transplants as a central study to comparative law has been recognised elsewhere by legal scholars.[42] For example, as Michaels observed, there remains 'at least three main current approaches other than the functionalism, namely comparative legal history, the study of legal transplants, and the comparative study of legal cultures.'[43] It is apparent that comparative law and legal transplant maintains a close relationship as both the studies allow comparative lawyers to appreciate similarities and differences between legal systems and to be in a position to make recommendations.[44] Since there are different, contrasting theories on legal comparison and legal transplantation, applying them into this research requires a careful selection as well as justification.

In selecting comparative approaches to conduct the research, the thesis agrees with Hoecke in that the research aims and questions will decide which methods should be used.[45] The research recognises the logic of the functional approach in examining whether the rescue laws of the selected jurisdiction have fulfilled their functions, which

[41] Kahn-Freund (n35)
[42] R. Michaels (n13), and Gilles Cuniberti, 'Enhancing Judicial Reputation through Legal Transplants: Estoppel Travels to France' (2012) 60 American Journal of Company Law. 383, 383
[43] Ralf Michaels, Ibid 341
[44] Shen Zongling, 'Legal transplant and Comparative Law' (1999) Revue Internationale De Droit Comparé, 853
[45] Mark Van Hoecke (n9) 1

is to rescue insolvent companies. However, the functional approach cannot sufficiently provide answers to the questions of what the differences are in rescue laws among jurisdiction of the UK, Canada and Vietnam and what factors are decide these differences. In order to answer these questions, the thesis has to rely on a number of comparative methods other than the functional method. For example, analytical method and structural method is used to examine concepts, rules and the framework of corporate rescue law in each country; the historical method is employed to see how historical development has shaped the current laws, and the law-in-context method is used to examine how laws actually operate in the selected countries.

Concerning the application of legal transplant in the attainment of the aims of this thesis, it cannot be denied that legal transplant plays an important role in insolvency law reform.[46] However, evidence on the transplants of insolvency law provided by Martin[47] has invalidated Watson's claim that laws can exist in insolation with social context and thus can be transferred easily. Examining the failure of insolvency laws in a number of countries in Asia and Europe in an attempt to follow the US bankruptcy law, Martin determined that the unique historical and cultural elements in these countries have rendered the imported law to be inapplicable products.[48] The role of social, historical, cultural forces of recipient countries in shaping imported insolvency laws has been well demonstrated by the law reform of South Asia countries, including Vietnam. Though international donors such as the Asian Development Bank (ADB), the World Bank, the IMF, the OECD, and UNCITRAL have developed very similar 'Good Practice Standards'

[46] F.V. Bermudez, 'Legal Transplantation and Commercial Law Reform in the Field of Rule-of-Law Promotion' (2017) 8 Queen Mary Law Journal, 131-150
[47] Nathalie Martin, 'The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation' (2005) 28 B.C. Int'l & Comp. Law Review, 1-77
[48] Ibid

to support Asian countries in insolvency law reform, a report by the ADB found a considerable degree of diversity in nature of laws of these countries.[49]

The case of Vietnam is a very good example supporting Kahn-Freund claims that in the time of global social and economic assimilation there are no other factors other than politics that has worked as the main impediment to the process of legal transplant. In the previous chapter,[50] Gillespie's investigation into legal transplant of insolvency law in Vietnam has attributed the failure of imported laws to a number of factors, among which are the policies of the political party towards preserving state-economic sectors and the government's practice of using administrative orders to settle insolvency of the state-owned enterprises (SOEs) instead of relying on the formal legislation.[51] However, the case of Vietnam also challenges Kahn-Freund's over-reliance on the political factor since other factors such as the hostile traditional precepts towards insolvency and the lack of insolvency institutions have equally contributed to the impediment of the legal transplant in Vietnam.[52]

In light of the above understanding, the following comparison on rescue laws of the selected jurisdictions will not be confined to legislative texts but extended to a consideration of the social, economic and cultural factors. Where there are recommendations to be made for Vietnam, as enlightened by the legal transplant theories, the possibility to apply these recommendations to Vietnamese law will be fully considered through an examination of whether they are compatible with the legal culture in Vietnam.

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[49] R.W. Harmer, 'Insolvency Law Reforms in the Asian and Pacific Region' (2000) Law and Policy Reform at the Asian Development Bank, 8–86, and Roman Tomasic, 'Diversity and Convergence in Insolvency Laws in East Asia' in *Insolvency Law in East Asia* (Ashgate, 2006), at 1-8

[50] See Chapter Six (6.1.2 The failure of two bankruptcy legislation 1993 and 2004)

[51] J. Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Ashgate, 2006), and 'Insolvency Law in Vietnam' in R.Tomasic, *Insolvency Law in East Asia* (Ashgate, 2006)

[52] See Chapter Six (6.1.2 The failure of two bankruptcy legislation 1993 and 2004)

7.2 Comparison on rescue law of the UK, Canada and Vietnam

7.2.1 Comparing the societal context where rescue law operates in the three countries

In light of the above discussion on comparative law, apart from comparing regulations in legislations, a comparison on corporate rescue law must contemplate the need for taking into consideration the societal context, especially the legal culture. Bell defined legal culture as 'a specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts'.[53] The definition suggests that laws are not just legislative texts but also social practices that importantly define their meaning, implementation and roles in society.[54] Therefore, understanding laws in a legal system must be associated with gaining insight into the legal culture where the law has operated.

The UK and Canada are very typical examples of countries following Western legal culture, which is premised on the principles of individualism and rationalism.[55] While individualism refers to the value of individual autonomy and liberty in and against society, rationalism is the belief that humans know, structure and master the reality in an objective manner,[56] which bases their actions or opinions on reasoning rather than emotion or religion.[57] Influenced by the ideology of individualism, the UK and Canada advanced to capitalist societies where the function of the economy relies on two principles of preserving the private ownership and protecting the market liberalism. Insolvency law

[53] John Bell, 'Comparative Law and Legal Theory', in *Prescriptive Formality and Normative Rationality in Modern Legal Systems*, Krawietz, W., Maccormick, N., & Von Wright, H. (eds. Duncker & Humblot, 1995) at 19-31.
[54] Mark Van Hoecke, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47(3) International and Comparative Law Quarterly 495, 498
[55] Ibid 503-505
[56] Ibid
[57] Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/rationalism> accessed 14 February 2019

in these countries is created to support these principles. The law protects individual rights by offering creditors a tool to maximise the collection of debts,[58] while allowing owners of companies to preserve their business through rescue procedure.[59] The protection of the market economy is perceived in the sense that liquidating ineffective companies will give way for companies with higher competitiveness to thrive in the market.[60] Apart from individualism, rationalism is other value underpinning the function of the insolvency law in these countries.[61] Essentially, the value of rationalism allows individual bankruptcy and corporate insolvency to be perceived as a normal phenomenon in economic development.[62] For example, bankruptcy laws in these countries had changed their focus from criminalising individual bankrupts to recognising bankruptcy as a normal phenomenon, therefore, granting honest, unfortunate bankrupt a discharge of debts.[63] Similarly, corporate insolvency has been no longer attributed only to mismanagement; rather economic crisis have perceived as a driving force resulting in corporate failure, which demanded these countries shift their legislative focus from liquidation towards rescue.[64] As a result, bankruptcy and insolvency laws become a source of solution for individuals and corporate to deal with their financial problems.

[58] T. H. Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press,1986)
[59] Karen Gross, 'Failure and Forgiveness: Rebalancing the Bankruptcy System' (1997) 248-49; Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy', (1991) 91Colom. L. Rev. 717; Elizabeth Warren, Bankruptcy policy, (1987); 54 U. Chicago Law Review. 775; Elizabeth Warren & Jay Lawrence Westbrook, 'Searching for Reorganization Realities', (1994) 72 WASH. U. L.Q. 1257
[60] D. G. Bair 'Bankruptcy's Uncontested Axioms' (1998) 108 Yale Law Journal, 581
[61] M.V.Hoecke (n54) 498
[62] The laws in these countries had changed their focus from punishing individuals to recognising the possibility of their bankruptcy caused by misfortune, therefore, granting honest, unfortunate creditor with a discharge of debts. See Charles Jordan, 'The Historical Evolution of the Bankruptcy Discharge' (1991) (65) American Bankruptcy Law Journal, 325-71, <https://ssrn.com/abstract=2312573> accessed 17 February 2019
[63] Charles Jordan, Ibid
[64] See the development of corporate rescue law in UK and Canada in Chapters Four and Five

Vietnamese legal culture offers a contrasting image to those of the UK and Canada.[65] Vietnam can be characterised as Asian legal culture where collectivism and irrationalism have operated as dominating principles to direct the perception of law.[66] As previously examined,[67] the study from the past revealed that collectivism brought by Confucianism is deeply ingrained in Vietnam society, which subjects individual interest to the interest of community and state.[68] Therefore, laws were enacted, to a large extent, to maintain social order instead of protecting individual rights.[69] Furthermore, irrationalism dictates that law was subject to moral values and beliefs. This is well illustrated in the creditor-debtor relation where debtor's performance of an obligation owed to creditors was largely directed by the value of face-saving which does not permit a person to have misconducts that damage the image of his family or community.[70] In a culture where collectivism and irrationalism maintain driving forces, bankruptcy and insolvency was not recognised as a normal phenomenon; rather, it was perceived as a taboo up which a debtor tried to cover to save his honour and reputation.[71]

It should be noted that Vietnamese legal culture had interacted with Western countries in the period of French colonisation and American intervention.[72] However, upon the defeat of the French and American, Vietnamese legal culture changed towards socialist orientation which largely abolished Western legal influence.[73] The shift towards

[65] According to countries comparison by Hofstede Insights, scores for individualism for the UK, Canada and Vietnam are 89, 80 and 20 respectively <https://www.hofstede-insights.com/country-comparison/canada,the-uk,vietnam/> accessed 17 February 2019
[66] M. V. Hoecke (n54) 506-7
[67] See Chapter Six (6.1.1 A complicated legal transplantation of insolvency in Vietnam)
[68] Pham Duy Nghia, 'Confucianism and the conception of the law in Vietnam', in John Gillespie and Pip Nicholson (eds) *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (Asia Pacific Press, 2005)
[69] See Chapter Six (6.1.1 A complicated legal transplantation of insolvency in Vietnam). Pham Duy Nghia, Ibid and Gillespie (n51) at 241
[70] Pham Duy Nghia, Ibid and Gillespie, Ibid
[71] Ibid
[72] Gillespie, Ibid 241-42
[73] Ibid 242-43

socialism with the state-management of economy suppressed the development of private ownership and laws were employed as administrative tools for the state to control the economy.[74] However, still insolvency could not have legal recognition as the government only used administrative orders to restructure ineffective SOEs with the purpose of preserving their reputation.[75] In the context of the economic transformation towards market liberalism, the first two insolvency legislation enacted in 1993 and 2004 incorporated a number of Western insolvency principles.[76] However, the failure of both legislation indicates that the Vietnamese legal culture did not suitable for supporting the application of the law. As examined in the Vietnam chapter, traditional and socialist values have been influential factors that prevent insolvency law to operate effectively in Vietnam.[77]

7.2.2 The convergence and divergence of approach to rescue law in the UK, Canada and Vietnam

7.2.2.1 The existence of different rescue procedures

There is an easily recognisable similarity among rescue laws in the three countries that they are products of the legal reforms in which the legislative focus was shifted from liquidation towards restructuring objective. While the UK and Canada supported the rescue culture in the 1980s, Vietnam has emphasised this objective later with the enactment of the latest insolvency legislation 2014.[78] There is a striking similarity between rescue laws of all selected jurisdictions that they endorse the principle of

[74] Ibid 246
[75] Ibid 246-250, and Pham Duy Nghia, 'Seeking the philosophy of the Vietnamese Bankruptcy Law" (2003), 11 Law-Making Research Journal, 35-47 <http://vibonline.com.vn/bao_cao/gop-y-cua-ts-pham-duy-nghia > accessed 17 February 2019
[76] See Chapter Six (6.1.2 The failure of two bankruptcy legislation 1993 and 2004)
[77] Ibid
[78] See Chapter Four (4.1.2 The rise of rescue culture in the UK), Chapter Five (5.2 The distinguishing characteristics of Canadian rescue law) and Chapter Six (6.4.1 The rescue concept and the extent to which Vietnam places emphasis on rescue)

'business rescue' instead of 'company rescue'.[79] This means that the laws aim at saving only viable parts of a company business instead of saving the company as a whole, which can result in changes in the company management and ownership once the going-concern business is transferred to new owners. As previously examined, in the UK, the pre-packaged sale has emerged as a new trend to sell a company instead of saving it under the administration, and there is a similar trend in the use of the rescue procedure to sell or liquidate a company in Canada.[80] Though this trend has not emerged in Vietnam, the Bankruptcy Law 2014 (BL2014) also endorse the policy of 'business recue' by recognising the transfer of ownership as one of rescue measures.[81] This confirms the argument raised by this thesis that rescue laws of the selected countries reflect the ideology of the traditionalists in supporting corporate rescue and the proceduralists in endorsing liquidation.[82]

Though these countries follow the same path in shifting their legislative focus, their approach to corporate rescue is different. The UK has the most diverse approach with the existence of three rescue procedures, namely the administration, the creditor voluntary arrangement (CVA) under the Insolvency Act 1986 (IA1986) and the Scheme of Arrangement (SA) in the Company Act 2006 (CA2006). The diverse approach is reflected not only in the number of procedures but also in the models of rescue administration adopted by these procedures. For example, the administration procedure follows the Professional-in-Possession (PIP) model that features insolvency practitioners (IPs) replacing the current directors in management; the SA follows the Debtor-in-

[79] See Chapter Four (4.3.1 The emphasis of UK law on corporate rescue) Chapter Five (5.4.5 Whether the BIA and the CCAA proceeding place emphasis on rescue?) and Chapter Six (6.4.1 The rescue concept and the extent to which Vietnam places emphasis on rescue)
[80] Ibid
[81] Ibid and BL 2014, art.88.2 (e)&(g)
[82] See Chapter Two (2.1.1 Two different schools of thought justifying the introduction of insolvency and rescue law)

Possession (DIP) model which permits the company directors to retain in their office; while the CVA has a nature of a hybrid model under which the directors are allowed to manage the company but under the oversight of IPs. Similar to the UK, Canada offers insolvent companies with a degree of flexibility with the introduction of two rescue procedures under the Bankruptcy and Insolvency Act (BIA) and the Companies' Creditors Arrangement Act (CCAA). Both the procedures follow the hybrid model that permits incumbent directors to stay at post; yet, they are designed differently to suit different types of companies. While the rule-based procedure under the BIA purports to restructure small companies, the court-based procedure the CCAA is designed to restructure companies with a complicated structure of debts.[83]

In comparison, with a more diverse approach, the UK rescue law can be thought to provide insolvent companies with the most flexibility. However, the UK's diverse approach to rescue procedures cannot be as flexible as Canada; instead, it has proven more troublesome due to the lack of a moratorium to stay creditors' enforcement against the company under the CVA and the SA.[84] Therefore, in order to take advantage of the moratorium, the CVA or the SA has to be initiated in combination with the administration, which appears to be an inefficient and costly option.[85] The lack of moratorium under CVA and the SA can be explained by the fact that the UK has been a pro-creditor jurisdiction under which insolvency law has been long perceived as a tool for maximising creditor return and providing them with an orderly scheme of distribution.[86] Furthermore, there has been a hostile attitude towards insolvency in the UK, which considers corporate

[83] According to s.3(1) of the CCAA, the Act applies to a company with the total amount of debt being more than C$5,000,000
[84] See the examination in Chapter Four (4.2.2.4 The interplay between the administration, the CVA and the SA)
[85] Ibid
[86] R. Goode, *Principles of Corporate Insolvency Law* (Sweet and Maxwell, 2005), at 5

failure as wrongdoing rather than misfortune.[87] Therefore, although the CVA and the SA allow the directors to stay in the company, the absence of a moratorium proves the UK has been lingering with adopting a debtor-friendly model to its rescue law. Concerning Vietnam, the BL2014 provides for a single rescue procedure featuring the hybrid model that applies to all companies. It is a special feature of the Vietnamese law that rescue procedure cannot be initiated directly, rather it is an outcome of the initiation of the insolvency procedure. Accordingly, when an application is made to initiate the insolvency procedure, it can lead to two possible outcomes, rescue or liquidation, and this will be decided by creditors.[88] An apparent benefit of a single procedure is its simplicity as insolvent companies do not have to spend time and effort in deciding which procedure is suitable for them.

7.2.2.2 Factors deciding the diversity of rescue procedures under rescue laws of the three countries

The diversity of the approach to rescue law in the countries is attributed to factors relating to the historical development of insolvency law. For the UK, the existence of diverse rescue procedures has proved the UK legislature's efforts in providing insolvent companies with flexibility with a wide range of solutions. The introduction of the administration and the CVA under the IA1986 is an example of this. While the CVA was expected to be a less costly procedure to deal with financial difficulty without engaging in formal insolvency, the administration was contemplated as a more formal rescue procedure with the protection of a moratorium to stay creditor's actions.[89] Apart from the

[87] Westbrook 'A Comparison of Bankruptcy Reorganisation in the US with Administration Procedure in the UK' (1990) Insolvency Law and Practice 86, at 88 and G Moss 'Chapter 11: An English Lawyer's Critique' (1998) 11 Insolvency Intelligence 17
[88] BL2014, art. 83.1
[89] Paul J. Omar and Jennifer Gant, 'Corporate Rescue in the United Kingdom: Past, Present and Future Reforms' < http://irep.ntu.ac.uk/id/eprint/27854/1/Pubsub5402_Omar.pdf > at 9-10, accessed 20 February 2019

administration and the CVA, which are products of the insolvency legislation reform, the SA is a rescue practice that has been existing long in the UK company legislations and their initiation is not based on insolvency proof.[90] Though the SA is considered to be time and cost-consuming,[91] maintaining it in the CA2006 reflects the intention of the legislature in providing multiples choices for companies to settle their insolvency affairs.

Canada also has a flexible approach to rescue by offering insolvent companies with two procedures under the BIA and the CCAA. The vision for corporate rescue had been developed in Canada with the enactment of the CCAA in 1933 and with the Supreme Court of Canada upholding the application of the statute.[92] However, the 1953 amendment to tackle the debtor's abuse of the statute to escape debt rendered the Act 'a dead letter' for a long time. The Act revived in application since the 1980s when Canadian courts increasingly interpreted the statute as a restructuring tool to respond to a large scale of corporate failure caused by the economic recession.[93] The rescue procedure under the BIA was introduced later in an attempt to replace the CCAA and enhance the unification of Canadian insolvency law.[94] However, as a strict rule-based procedure under the BIA could not replace the one under the CCAA to solve complicated rescue cases of larger companies; therefore, the latter cannot be abolished. As a result of this, there is a co-existence of the two procedures in Canada, with the BIA available for small companies and the CCAA available for large companies.[95] The bifurcation of rescue procedures

[90] Joint Stock Companies Arrangement Act 1870; 33& 34, Vict c.104, and see John Tribe, 'Companies Act Schemes of Arrangement and Rescue: the lost cousin of restructuring practice?', at 5 <file://nstu-nas01.uwe.ac.uk/users2$/h2-duong/Windows/Downloads/SSRN-id1328487.pdf> accessed 20 February 2019
[91] Omar and Gant (n89) 7
[92] See Chapter Five (5.1 Legal development in corporate insolvency and rescue law in Canada)
[93] Ibid
[94] Ibid See Chapter Five (5.2.3 The bifurcation of rescue law and the significant role of the courts in Canada)
[95] Ibid

under Canadian law appears to be a coincidental result of the insolvency reform instead of the legislature's intention to diversify rescue procedures like the case of the UK.

Unlike the UK and Canada, the Vietnam approach to corporate rescue with a single procedure under the BL2014 featuring the hybrid model that allows directors to manage a company under IP's supervision. This model of administration has been adopted since the first bankruptcy legislation was enacted in 1993. The single rescue procedure under the BL2014 has the benefit of simplicity as compared to the multiple procedures in the UK that require an insolvent company to spend time and effort in evaluating and selecting which is the best option to solve its financial affairs. The adoption of the hybrid model in the rescue procedure under the BL2014 proves the legislature's attempt to correct the failure of the rescue model in the previous legislation. Under the BL2004, company directors allowed to operate the company under the supervision of an asset management and liquidation team dominated by the state officials. As examined, this model contributed to the failure of the BL2004 due to the lack of expertise of people in the team.[96] To overcome this shortcoming, Vietnam adopted the policy of inviting IPs (asset management officers) to participate in the rescue procedure, which creates a new profession in the country.[97]

7.2.3 Comparing the best practices of the rescue laws in the UK, Canada and Vietnam under the evaluation four benchmarks

7.2.3.1 Time and cost

[96] See Chapter Six (6.4.2.2 Expertise)
[97] Vietnamese legislators adopted the UNCITRAL's recommendation to invite IPs to participate in the insolvency procedure. See The People Supreme Court of Vietnam, 'The Statement 33/2013 to the Naitonal Assembly on the Bill of a New Bankruptcy Law'

According to the World Bank, Canada and the UK are among jurisdictions with highly effective insolvency regimes, with the rankings being 13 and 14 respectively.[98] The average time to complete insolvency in the UK is one year, while this figure for Canada is slightly shorter, only 0.8 year.[99] In terms of cost, the recovery rate for creditors is 85.3% in the UK and the figure for Canada is slightly higher at 87.5%.[100] Vietnam is very far behind these jurisdictions with the 133rd ranking, and it takes five years to complete insolvency and the recovery rate for creditors is just 21.3%.[101] However, these figures are of general insolvency cases, including both liquidation and rescue. Therefore, it cannot reveal exactly the amount of time and cost involved in corporate restructuring in the selected countries. Furthermore, not all cases of rescue are officially recorded, such as the Scheme in the UK or the CCAA in Canada. Therefore, it seems to be relevant for the comparison to direct its focus towards the extent to which rescue laws in the selected countries fasten the time and minimise the cost instead of comparing specific figures.

As for the time to complete rescue, the common practice for fastening the rescue procedure under the UK and Canada law is to grant the company a limited time to formulate and submit a rescue proposal. In the UK, the administration procedure is a prominent representation of this. The IA1986 imposes a time limit of eight weeks on the administrator to make a proposal and present creditors for approval[102] and a duration of twelve months to complete the administration.[103] This requirement places a degree of pressure on not only the administrator to fulfil his duty but also company directors, who have to cooperate with the administrator. A similar practice can be found in the BIA

[98] See World Bank, 'Resolving Insolvency' (2018) <http://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency > accessed 26 February 2019
[99] Ibid
[100] Ibid
[101] Ibid
[102] IA 1986, Schedule B1, para 49(5),
[103] Schedule B1, para 76

procedure under Canadian law. The initiation access is available to both the debtor and creditor, and there is no requirement for the court to be involved in the commencement of the procedure.[104] Specifically, a company debtor who already developed a proposal can file it to a licensed trustee, who then files the proposal and associated documents to the official receiver;[105] or if the company has not developed a plan yet, then he can file the notice of intention to make a proposal with the official receiver.[106] For the latter option, the company is given a thirty-day period to file the plan,[107] and it can apply to the court for extension up to five months with each extension not exceeding forty-five days.[108] Apparently, in insolvency time, it is unlikely for a company to develop a viable proposal within a thirty-day period unless it has had proper preparation prior to the initiation of the procedure. Therefore, apart from imposing pressure on a company to fasten the making of a proposal, this provision encourages the company to consider the rescue option as early as possible to have proper preparation for it.

However, the practice of granting companies a limited time to draft proposals has the drawback of weakening the rescue viability or ruining effort because it is insufficient for a viable proposal to be produced under such time pressure. For example, within eight weeks, the UK administrator is more likely to come up with a proposal to sell the company instead of rescuing it, given his unfamiliarity with the company's business and operation. Therefore, the short and strict timescale of the administration and the BIA procedure is only suitable for rescuing companies with simple structures of debts. For more complicated cases, there are other procedures available under the UK and Canadian law that provides for a longer time. For example, in the UK a company can be rescued under

[104] BIA, s.50(1)
[105] Ibid, s.50(2)
[106] Ibid s.50.4(1)
[107] Ibid s.50.4(8)
[108] Ibid s.50.4(9)

the CVA or with the SA under which the time to complete the rescue is subject to negotiation among parties. In some cases, there can be a combination of the administration with the CVA or with the SA to take the advantage of the moratorium under the administration and use it to develop proposals under the CVA or the SA.[109] Canada also has another procedure exclusively available for companies with large structures of debt (C$5millon), which is the CCAA. The procedure is very flexible for a company insofar as it does not impose any limit on the duration for developing proposals or completing the rescue. However, the flexibility provided by these procedures under the two jurisdictions is a trade-off for efficiency as the time and cost involved under these procedures are longer and larger.

In comparison with the UK and Canada, Vietnam provides for a unique way to initiate rescue procedures. Accordingly the BL2014, the procedure can be only initiated when a company becomes insolvent, which means it is unable to pay a debt that has been due for three months.[110] This opens a 'financial restructuring window' of three months[111] for a company to initiate informal rescue or to develop a proposal if it has to enter into formal rescue. A three-month period may not practically sufficient for the company to complete the restructuring,[112] yet, it has a rescue significance in that it makes insolvent companies more cognizant of their financial affairs and thereby initiating informal rescue, such as negotiating with creditors or consulting financial adviser, before resorting to the formal procedure in the legislation.

[109] This is due to the lack of a moratorium under the SA and the moratorium is not available for all companies under CVA, only small companies are eligible to take advantage of the moratorium.
[110] The BL 2014, art.4.1
[111] Phil Smith, 'Creditors to gain from bankruptcy law' (2014), <https://www.vir.com.vn/creditors-to-gain-from-bankruptcy-law-29722.html> accessed 01 March 2019
[112] Ibid

However, under the BL2014, the time for submission of the rescue proposal to creditors is relatively long, around four months since the procedure is initiated.[113] In addition to a grace period of three months, this duration is apparently more generous for a company to develop a rescue proposal than the UK administration with eight weeks and the Canadian BIA procedure with one month.[114] By this way, Vietnamese law not only encourages a company to be aware of initiating informal rescue efforts before entering the formal procedure but also provides the company with a relatively comfortable timeframe to develop a proposal. However, this generosity is associated with a danger that creditors are more likely to lose their patience and tend to vote for a liquidation option. However, this comparison is constrained to the UK administration, the Canadian BIA procedure as the timeframe for initiation and completion of other rescue procedures, such as the CVA and the SA in UK law and the CCAA in Canadian law, largely depends on the negotiation and the terms of the proposals.

As for the rescue cost, creditor return is an important indicator of whether a rescue regime is cost-effective. Improving the creditor return is associated with reducing the insolvency cost, one of which is the IP fees. It is often the case that the IP fee accounts for a dominant part of the insolvency cost, which, as examined, adversely affects the

[113] Specifically, according to the BL2014, after the application is filed at court, there are 30 days for court to decide whether the proceeding will be commenced or not (art.42) If the court decides to commence the proceeding, the company has 30 days to conduct asset inventory and send notice the creditors and make the creditor list (the inventory can be extended by court for two times, each time will be longer than 30 days) (art. 65 & 67). If these works are finished, there are 20 days to call for the first creditor meeting to decide if the company is liquidated or rescued (art.75). If the creditor resolution is to rescue, the company then has 30 days to develop a proposal to send to the asset management officer and the in-charged judge for consideration (art.87.1), who then submit it to the second creditors meeting for final voting within 15days. (art.87.3)

[114] Under s.50.4(9) of the BIA, a company is granted 30 days to develop proposals once it files a notice of intention to make the proposal to the official receiver. It is possible for the company to petition the court for extensions up to five months and every extension is no more than 45 days. However, the court will do it if it is satisfied that the company has acted in good faith with due diligence, there is a viable prospect for the proposal to be made, and the extension does not materially prejudice creditors.

creditor return[115] or even undermines the rescue attempt.[116] In monitoring the IP's fee, the UK and Vietnam share a similar practice of allowing this fee to be agreed between creditors and the IPs.[117] In case of absence of the creditor approval, both jurisdictions have the detailed guideline for the involved parties to determine this fee based on the time given by IPs, the fixed amount or the percentage of creditor return, and court is the final recourse when there is no common ground for an agreement.[118] Canada has a different approach with the UK and Vietnam for allowing the IP fee to be decided by the company and the IPs under the BIA and the court intervention is exercised only in the absence of such agreement.[119] Canadian courts have developed jurisprudence in establishing number of principles that base the fee calculation on a number of factors including asset value, time expended by IPs, expertise, result of work, and cost of comparable services performed in a prudential and economical manner.[120]

By allowing creditors to be the party who determines the IP fee, the approach of the UK and Vietnam appears to be more satisfactory than that of Canada. It should be borne in mind that creditors are those who decide whether a rescue plan should be carried out, therefore, conferring them the right to negotiate this fee will avoid the possibility of a rescue plan to be rejected at the creditor meeting. Besides, this practice encourages the participation of some sophisticated creditors such as banks who are well-equipped with skills and knowledge to be able to make informed decisions regarding which amount of

[115] See the examination on time and cost associated with the rescue laws of the UK (Chapter Four: *4.3.2.1 Time and cost for rescue implementation*) and Canada (Chapter Five: *5.4.1 Time and cost*), and see John Armour, Audrey Hsu and Adrian Walters, Enterprise Act 2002 – Corporate Insolvency Provision: Evaluation Report, (2008) at 111

[116] *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* (2005), 11 C.B.R. (5th) 65, 2005 SKQB 245 (Sask. Q.B.), additional reasons 2005 SKQB 252 (Sask. Q.B.),

[117] UK Insolvency Rules 2016, r.18.18 and art. 21.5 of the Decree No. 22/2015/ND-CP on providing detailed regulations on the implementation of several articles of the Bankruptcy Law 2014 for asset management officers and the practice of asset management and liquidation in Vietnam.

[118] Ibid r.18.16 and the Decree No. 22, art.21.2

[119] BIA, s.39(3)

[120] *TNG Acquisition Inc.* (Re), 2014 ONSC 2754 [Commercial List] ("TNG Acquisition") and *Bank of Nova Scotia v. Diemer*, 2014 ONSC 365

fees should be appropriated.[121] Furthermore, this can avoid the possibility of litigation where the creditors find the fee inappropriate and challenge it at court. By allowing this fee to be agreed between the company and the IPs, the Canadian approach is more likely to invite litigation at court in case of creditors disagreeing with the fee. Though the Canadian court appears to be capable of settling this dispute in determining this fee, the court involvement in settling not only prolongs the time but also adds up cost into the procedure. In addition, lacking provisions allowing creditors to participate in the negotiation of this fee does not create incentives for directors to consider the importance of projecting the IP fees in drafting a rescue plan. By contrast, the approach of the UK and Vietnam in allowing creditors to negotiate this fee makes a company more aware of projecting the fee in a proposal and this can become an important basis for the creditors to evaluate the rescue viability and approve for it.

7.2.3.2 Expertise

Expertise contributed to rescue procedures comes from the company directors, IPs and courts who participate in running the company during crisis time, forming and implementing a rescue plan and monitoring the implementation of the plan. The extent to which these characters contribute their expertise in rescue may vary depending on models of rescue administration adopted by the legislation of the selected jurisdictions as well as the development of corporate rescue practice in each country. For example, in a PIP model such as the UK administration, IPs perform both operating the business and conducting rescue effort, while in the DIP model, this role is normally performed by the incumbent directors. The following examination compares how the laws in the selected

[121] Elaine Kempson, 'Review of Insolvency Practitioner Fees Report to the Insolvency Service' (July 2013) <http://www.bristol.ac.uk/media-library/sites/geography/migrated/documents/pfrc1316.pdf> accessed 08 March 2019

countries ensure main characters sufficiently contribute their expertise in rescue and how the expertise is coordinated under the selected jurisdiction.

The company directors

Directors in the UK has limited power to run the company business during rescue compared to those in Canada and Vietnam. To be specific, under the UK administration, directors are replaced by the administrator who takes the managerial power in operating the business as well as carrying out rescue activities.[122] In the CVA and the SA, although directors can remain in office, it is difficult for them to carry out business activities efficiently due to lacking a moratorium to prevent creditors from enforcing their claim against the company. Therefore, it is likely for rescue strategies devised by the directors to be challenged when creditors are aware that there is nothing to prevent them to take enforcement actions against the company.[123] The policy of limiting the managerial power of directors in the UK is originated from the hostile attitude that sees insolvency as managerial wrongdoing rather than misfortune.[124] A benefit associated with this policy is that replacing directors with IPs under the administration can avoid the likelihood of the directors engaging in risky business activities at the cost incurred by creditors.[125] However, this policy has a drawback that IPs have to struggle to operate the company as well as producing a rescue plan under time pressure given their unfamiliarity with the company business as an outsider.[126] As IPs have to perform their function in a speedy and

[122] IA 1986, Schedule B1, s.59 and 61
[123] Actually, the moratorium is available under the CVA, but it is eligible for a 'small company' as defined by the CA2006 and the IA1986, Schedule A1, para 2(1)
[124] G. Moss (n87)18
[125] David Hann, 'Concentrated Ownership and Control of Corporate Reorganizations' (2004) 4(1) Journal of Corporate Law Studies, 117-154
[126] Finch, *Corporate Insolvency Laws: Perspectives and Principles* (Cambridge University Press, 2edn, 2002), at 434-435

least contentious fashion, they cannot exercise their expertise as effectively as expected.[127]

By contrast to the UK, the hybrid model under Canadian and Vietnamese rescue laws allows directors to hold office during the time of rescue. An advantage of this deployment is that the directors can contribute skills, knowledge and experiences they have possessed in rescue. As not encountering the risk of being replaced by IPs, directors will not incline to hold out important information and the company's financial affairs to prolong their tenure,[128] rather, they are incentivised to initiate rescue in a timely fashion that can lead to a higher prospect of rescue success.[129] However, allowing the incumbent directors to remain in power is effective provided there is a mechanism to monitor their conduct during the exercising of their power to prevent potential abuses.[130] The appointment of a chief restructuring officer (CRO) in Canada is considered to be an advanced approach to enhance director expertise. The CRO is a turnaround specialist appointed by the court to perform the service of co-ordinating rescue efforts for the distressed company.[131] A special feature of CRO is that though being appointed by the court, he is an officer of the company and assists it in negotiation with creditors, formulating and implementing a rescue plan. An undeniable benefit of this practice is that the CRO can combine his turnaround expertise with the directors' expertise in operating the company to produce a well-drafted plan as well as placating creditors who have doubts at the company management.[132] As the CRO has the status of being the company advocate, instead of being the company's monitor, the directors will find a comfort zone

[127] Ibid
[128] Ibid at 400
[129] Hann (n125) 34
[130] This will be discussed more in the comparison on managing potential abuse (see 7.2.3.4 Abuse Management)
[131] *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*., *(Re)* (2007), 33 C.B.R. (5th) 39 (Sask. Q.B.).
[132] R. Wood, *Bankruptcy and Insolvency Law* (Irwin, 2009) at 386

to work along with the CRO and co-ordinate their expertise together. This approach is more satisfactory than the UK administration insofar as it encourages the incumbent directors to contribute their expertise in operating the company and avoids the administrator's unfamiliarity in running the company when he replaces the directors in the administration. Also, the appointment of CRO also proves itself more desirable than the CVA and the SA in the UK and the procedure under BL2014 in Vietnam. This is because though directors are allowed to stay in management under these procedures, they cannot alone manage the company sufficiently for operating a company in normal time of business is not the same as in the time of crisis.[133] Besides, despite the participation of IPs, they have a neutral role of monitoring the company and thus cannot involve deeply in the company affairs.[134] However, these problems can be dealt with if there is the participation of the CRO.

Insolvency practitioners (IPs)

There are different names for IPs taking part in rescue procedures in the selected jurisdictions. In the UK, they are identified as the administrator in the administration, or the nominee and then supervisor in the CVA; in Canada, IPs are the trustee in the BIA procedure or the monitor in the CCAA procedure; in Vietnam, IPs are the asset management officer (AMO). IPs perform a number of roles depending on the rescue procedure they take part in, which range from taking control of the company business,[135]

[133] Ibid

[134] Canadian court is of opinion that the CRO should be conferred protection from liability similarly to the monitor who is a court's officer in monitoring the company in rescue procedure. For example, he/she is not deemed to be a director or an officer of the company and any actions against him should be stayed except with leave of court. See *Re Northstar Aerospace, Inc. et al*. Initial Order of Justice Morawetz, June 14, 2012, issued and entered on June 14, 2012 at paras. 32 to 38 cited by Grant B Moffat, 'CRO: Chief Restructuring Officer or Cost-effective Restructuring Option', <http://www.tgf.ca/resources/publications/publication/cro-chief-restructuring-officer-or-cost-effective-restructuring-option> accessed 12 March 2019

[135] For example, the administrator to replace company directors under the administration procedure

assisting company directors to draft and implement rescue plans,[136] to monitoring and reporting to court the implementation of recue.[137] The UK, Canada and Vietnam have different systems for licensing and monitoring IPs' professions. In the UK, IPs are licensed by five different recognised professional bodies (RPBs) who are self-regulated organisations and monitored by the Insolvency Service (IS) to ensure that these bodies meet common standards.[138] The requirements for a candidate to obtain an IP license are to pass the Joint Insolvency Examination Board (JIEB) exam and to have sufficient amount of experience in insolvency, which is calculated by a certain number of working hours.[139] Once an applicant is successfully granted a license, he is required to adhere to statements of insolvency practice (SIP) issued by the RPBs to maintain professional standards. Furthermore, the RPBs is are charge with monitoring licensed IPs through facilitating a system for handling complaints regarding IPs' conducts and providing disciplinary actions.

The Canadian approach to licensing IPs is different from the UK's in two important respects. First, the Office of the Superintendent of Bankruptcy (OSB),[140] which is a governmental body, directly regulates licenses the IPs (trustee) instead of self-regulated RBPs in the UK. Second, Canadian requirements for licensing IPs are more rigorous than those in the UK. Accordingly, while the UK just requires an applicant to

[136] These roles are performed by the nominee/the supervisor under the CVA, the trustee under the BIA restructuring and the monitor under the CCAA restructuring in Canada and the AMO under the procedure in Vietnamese BL2014. Since the UK administrator replaces the director company, he will be the person who drafts the rescue proposal and the directors have to provide information at his request.
[137] Most of IPs in the examined procedure have to perform this role.
[138] See Insolvency practitioners: recognised professional bodies, <https://www.gov.uk/government/publications/insolvency-practitioners-recognised-professional-bodies/recognised-professional-bodies > accessed 12 March 2019
[139] According to ICAEW, the applicant is often required to have at least 600 working hours of experience over three years. See ICAEW, see 'Become an ICAEW insolvency licence holder', at <https://www.icaew.com/technical/insolvency/become-an-insolvency-practitioner-with-icaew/becoming-an-icaew-insolvency-licensed-practitioner> accessed 12 March 2019
[140] See Office of the Superintendent of Bankruptcy, at < http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/home> accessed 12 March 2019

pass the JIEB exam having certain working experience in insolvency to be eligible for an IP license,[141] an trustee candidate in Canada is required to successfully complete a number of professional courses and exams such as the Chartered Insolvency and Restructuring Professional (CIRP) Qualification Program (CQP), the CIRP National Insolvency Exam, the Insolvency Counsellor's Qualification Course and the Oral Board of Examination.[142] While it seems to be the UK's policy to let IPs themselves earn experience in corporate practice, Canadian policy places the emphasis on providing trustee candidates with extensive professional training at the beginning, then requires them to earn experience with a probation period in which a newly licensed trustee has to actively practise with an active established trustee.[143]

Regarding IP monitoring, with five self-regulated RPBs regulating IPs, the UK system has prompted concerns over maintaining common professional standards and consistency in handling complaints about IPs' conduct among these bodies.[144] A professional survey of insolvency profession finds that while 39% of IPs think there should be one regulator for the profession, 38% feel there should be more than one but less than four, and a vast majority of IPs (72%) think that the UK should introduce a unified monitoring system and a single complaints system.[145] In an attempt to reform IPs regulation, the IS has been considering the proposal for introducing a single regulator for

[141] See ICEAW (n139)
[142] The Office of the Superintendent of Bankruptcy Canada, 'How to become a Licensed Insolvency Trustee'
<https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01128.html> accessed 13 March 2019
[143] Directive No. 13R6, s.20(1)
[144] Adrian Walters and Mary Seneviratne, 'Complaints Handling in the Insolvency Practitioner Profession A Report Prepared for the Insolvency Practices Council' at p. 79
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1094757> accessed 13 March 2019
[145] R3, 'The Future of Insolvency Practitioner Regulation', (2010)
<https://www.r3.org.uk/media/documents/policy/policy_papers/insolvency_industry/The_future_of_insolvency_practitioner_regulation.pdf> accessed 13 March 2019

licensing and monitoring IPs.[146] If the UK can successfully implement this proposal, it will bring its system of licensing and monitoring IPs closer to that of Canada with only a single regulator.

While IP is a long-established profession in the UK and Canada, it has been a primitive profession in Vietnam which was created by the enactment of the BL2014. In Vietnam, IPs participating in insolvency procedures are asset management officers (AMOs) who are licensed by the Ministry of Justice. The regulations on licensing IPs in Vietnam are not as rigorous and effective as those in the UK and Canada. Accordingly, the requirement for an applicant to be qualified as an AMO is very simple in that any lawyers or auditors can become AMOs without having to take a professional training course, professional exam, and experiences.[147] Furthermore, a person holding a degree in law, economics, accounting and banking with five-year working experience in their field can be qualified to apply for an AMO license.[148] In the absence of sufficient requirements for professional training and assessment in insolvency like those in the UK and Canada, the IP's licensing system in Vietnam apparently cannot create a cadre of IPs who are qualified to assist distressed companies in rescue, for example, in drafting and implementing rescue proposals as required under the BL2014.[149]

Nor could this system provide a sufficient degree of oversight over the IP's profession. There are currently three governmental bodies that monitor IPs in Vietnam, namely the Ministry of Justice, the Provincial People Committee, and the Department of

[146] The insolvency Service, 2017 Review of Insolvency Practitioner Regulation (2018), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/706354/Annual_Review_of_IP_Regulation_2017.pdf > accessed 13 March 2019
[147] BL2014: art.12 and Decree 22/2015/NĐ-CP detailing the implementation of articles of the bankruptcy law relating to AMO and asset management and liquidation profession.
[148] Ibid
[149] BL2014, art.87&93

Justice.[150] Vietnam appears to pursue the policy towards borrowing expertise of governmental departments to monitor AMOs, which is similar to that of Canada with the functions of the OSB. However, while the OSB in Canada is a professional department, which has long specialised in bankruptcy and insolvency, the mentioned Vietnamese government departments have to perform numerous functions apart from licensing and monitoring AMOs.[151] Therefore, it is unlikely for them to establish sufficient expertise to deal with monitoring AMOs. Furthermore, though the law provides these organisations are in charge with handling complaints over AMO's conduct, there has been the lack of detailed regulations on how to facilitate assess for lodging complaints and how to handle the complaints as well.[152] With these apparent shortcomings, the system for regulating IPs in Vietnam cannot generate a sufficient degree of expertise and effectiveness like those in the UK and Canada.

Judicial expertise

The insolvency courts are entrusted and empowered to monitor the compliance of the parties with insolvency legislation as well as performing adjudicating functions once there is litigation arising from rescue. The extent of court participation in rescue procedures is very different among the selected jurisdictions. In the UK, the effectiveness of rescue law relies on the role of IPs, while the court involvement in rescue procedure is not significant.[153] For example, under the UK administration, the administrator can be appointed on an out-of-court basis;[154] and courts perform their monitoring role over the

[150] See the Decree 22/2015/NĐ-CP, art.22-24. Ministry of Justice is a ministry of the central government in Vietnam; the Provincial People Committee is the local government in every province. The Department of Justice is a department within the local government, however, it is still subject to the control of the Ministry of Justice.
[151] IPs profession in Vietnam has been officially created by the enactment of the BL 2014 that requires IP to participate in the insolvency procedure.
[152] See Chapter Six (6.4.2.2 Expertise)
[153] However, UK court still have significant involvement in the Scheme of Arrangement under part 26, the Company Act 2006
[154] IA 1986: Sch.B1, para.14,18, 22, 27

administration and the CVA through the functions of the administrator and nominee/supervisor who has a duty to report to the courts at certain stages of the procedures.[155] Furthermore, the UK courts tend to endorse the administrator's discretion in conducting a pre-packaged administration to sell a company in rescue.[156] By contrast to UK courts, Canadian courts have a higher degree of involvement in rescue. For example, under the BIA and the CCAA, a rescue plan approved by creditors must be approved by courts to ensure it is fair and reasonable.[157] Particularly, in the CCAA procedure, courts play the role of screening application to assess its viability and decide whether to grant an initial order that stays creditor's actions against the company.[158] With the approach of liberal interpretation to the CCAA, Canadian courts can flexibly make a number of orders to meet the specific corporate rescue cases.[159] The great degree of flexibility provided by Canadian courts has rendered the CCAA procedure a favourable option over the procedure under the BIA for rescuing companies with complex structures of debts.

The different degree of court involvement in rescue in the UK and Canada stems from the unique development of insolvency law and practice in each country. As previously examined, courts play a significant role in supporting the use of the CCAA in Canada.[160] Since 1970s Canadian courts have adopted the policy of judicial liberation towards interpreting legislation in light of the Parliament policies,[161] which allows the judicial expertise to be accumulated constantly in providing interpretation into a wide range of important matters under the CCAA. Canadian courts have developed an

[155] Ibid s.2, s.4(6), and SchB1 para 53&55, and IR 1.29
[156] See the comparison on abuse management in section 7.2.3.4 of this chapter
[157] BIA: s.59(2) BIA and *Re Keddy Motor Inns Ltd*. (1992), 12 C.B.R (3d) 245 (N.S.C.A) and *Re Mayer* (1994), 25 C.B.R. (3d) 113 (Ont. Ct. Gen.Div)
[158] CCAA s.11.02(1) & (2)
[159] See Chapter Five (5.2.3 The bifurcation of rescue law and the significant role of the courts in Canada)
[160] Ibid
[161] Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974)

institutional structure and judicial specialisation to deal with corporate insolvency.[162] By contrast, the practice of employing professionals such as accountants to solve company insolvency has been used for a long time in the UK. Especially, in the 19th century when the IA1986 was created and shifted its legislative focus towards corporate rehabilitation, IP's roles have become increasingly important in administering the rescue, resulting in the strong growth of IPs profession in the UK.[163] Borrowing IPs' expertise in dealing with corporate insolvency could be the explanation for why the UK legislatures limit the court involvement in rescue.[164]

As provided for by the BL2014, the extent of court involvement in rescue procedure in Vietnam is quite similar to that in Canada. Accordingly, Vietnamese bankruptcy courts perform a number of important functions, including screening insolvency application to decide if the procedure should be initiated,[165] calling for and administering creditor meetings,[166] and giving opinions on the rescue plan drafted by the company before submitting it to creditors for approval.[167] To perform these functions, Vietnamese judges must possess a sufficient degree of expertise like those in Canada. However, while insolvency judges in the advanced countries such as Canada have a long period of time to develop their expertise and been assisted by a well-established IP profession, the judges in Vietnam has just familiarised themselves with the insolvency law since 1993 when the first insolvency law was enacted. Particularly, the shift of legislative focus to corporate rescue has just gained importance with the enactment of the

[162] Wood (n127) 395
[163] J.A.Flood and Eleni Skordaki, 'Insolvency practitioners and big corporate insolvencies' ACCA Research Report 43 (ACCA, London, 1995) 9-22
[164] However, this does not mean that the UK courts are not capable to deal with complicated insolvency cases. It should be reminded that UK courts still have a high degree of involvement in the Scheme of Arrangement procedure under the Company Act 2006
[165] BL2014, art.42
[166] Ibid art. 75, 91.
[167] Ibid art. 87.1

legislation in 2014. Therefore, it seems to be unlikely for Vietnamese courts to draw on enough expertise to efficiently perform their function as prescribed by the legislation. As previously mentioned, Vietnam has been lacking judges who have sufficiently judicial capacity to deal with corporate insolvency in the entire state.[168]

7.2.3.3 Creditor participation

Creditors have a very important role in deciding the likelihood of rescue through approving, monitoring and providing finance to implement rescue.[169] There is a great degree of similarity in respect of creditor participation under the rescue law of three selected jurisdictions. Specifically, the UK, Canada and Vietnam all have a common approach of conferring creditors a right to vote for the approval of a rescue plan.[170] Even though creditors do not have a direct governance role in rescue, they can exercise this role indirectly through the functions of the creditor committee established by the legislation, the terms of the agreement between the company and the creditors, or court, and this practice is similarly developed in all three countries.[171] Conferring creditors such rights has the effect of encouraging them to actively participate in rescuing the company. However, in order for creditors to actively participate in rescuing the company, the first priority is to have a moratorium to prevent their individual enforcement of debts against

[168] See Chapter 6 (section 6.4.2.2 Expertise)
[169] See Chapter 3 (3.5.2.3 (iv) Creditor participation)
[170] According, Under the UK laws, a proposal in the administration must be approved by majority of creditors (rule 2.28, Insolvency Rule 1986), while in the CVA, it is approved when there is approval of 75% by value of all creditor attending creditor meeting (rule 1.19 , IR 1986), in the Scheme of Arrangement procedure, creditors are divided into different classes for voting; and each class, at least 75% by value and more than 50% in number must approve the Scheme (s.899, Company Act 2006). Under Canadian law, both the CCAA and the BIA provides that a proposal must be approved by a majority of creditors representing two-thirds of the value of debt (s.6 (1) CCAA, and s.54(2) and 62(2)(b) BIA). Under the BL2014 in Vietnam, creditor's resolution for rescue and a proposal must be approved by half of unsecured creditors representing 65% value of debt (The BL 2014: art 81(2) art.91(5))
[171] The creditor committee can be established in the UK administration proceeding by the virtue of Part 17, IR2016 or by the terms of the arrangement under a CVA. In Canada, although there is an absence of statutory provisions regulating this practice, courts can exercise their general authority to appoint the creditor committee under the CCAA proceeding. And under the jurisdiction of Vietnam, a committee can be elected at the creditor meeting (art.82 BL 2014)

the company assets. There is the availability of a moratorium under rescue procedures in Canada and Vietnam, however, it is not always a case for the UK as a moratorium is provided for only under the administration.[172] Without a moratorium, it is very difficult to call for creditors to participate in rescue under the CVA or the SA in the UK, which can lead to the combination between the administration and the CVA or the SA.[173] However, as already mentioned, this combination appears to be costly and lengthy for insolvent companies.[174]

Concerning the rescue finance or the 'DIP finance', it plays an important role in funding the implementation of a rescue. However, in order for creditors to provide this finance, there must be a guarantee or security that grants the lender of this finance priority over existing creditors in the queue of payment. In this regard, the approach of the selected countries is very different. Canada endorses the use of the DIP finance as well as granting this finance a super-priority over existing creditors in rescue.[175] The practice of using this finance has been popular in Canada for a long time and courts have been developing judicial expertise sufficiently to deal with defining the priority of this finance over other existing creditors.[176] The current approach under Canadian legislation is to empower courts to make an order that grants the DIP financing a super-security against all or part of the company property and that this security will have priority over those of any secured creditor.[177] The effectiveness of this approach relies largely on judicial expertise because in deciding this matter, the courts have to take into consideration important issues for

[172] As examined, a moratorium is only available under the CVA for small companies (IA 1986, Schedule A1, s.1&2)
[173] See Chapter Four (4.2.2.4 The interplay between the administration, the CVA and the *SA*)
[174] Ibid
[175] See Chapter Five (5.4.3 Creditors' participation)
[176] Michael B. Rotsztain, 'Debtor-in-Possession Financing in Canada: Current Law and a Preferred Approach', (2000) 33 Can. Bus. L.J.283,
< http://www.gsnh.com/wordpress/wp-content/uploads/2014/02/AR2000-4T1.pdf> accessed 14 March 2019
[177] CCAA, s.11.2(1) & (2) and BIA s.50.6(1) & (3)

example, whether the finance will improve the rescue viability and whether there are creditors who will be materially prejudiced as the result of the order.[178] While the Canadian approach to the DIP finance is very straightforward, the issue of whether the rescue finance should be given a super-priority has become controversial in the UK. There is the absence of regulation that directly addresses this finance under the IA1986 although the UK seems to allow a similar practice of granting super-priority under the administration. For example, s.19(4) and para 99 of Schedule B1 allow the administrator's expenses to enjoy security over other security, which may be interpreted to include the DIP finance.[179] However, there is a degree of uncertainty over this interpretation as the issue of deciding which expenses are the administrator expenses has to be dealt with by court on a case-by-case basis.[180] The UK Insolvency Service has already recognised the importance of the DIP finance to the success of rescue implementation and put their proposals for granting this finance a super-priority through their Consultation Paper 2009 and 2016.[181] However, these proposals have not been pursued by the UK Parliament as there has been controversy over how to protect the rights of existing creditors and the effect of the proposals on the UK lending practice.[182] Compared to Canada, the difficulty with incorporating the DIP finance in the UK law can be explained with the difference in the UK prevailing business culture and practice where there is a belief that an existing holder of a floating charge can be in a position to provide

[178] CCAA, s.11.2(4) and BIA s.50.6(5)
[179] IA 1986
[180] *Freakley v Centre Reinsurance International Co,* [2006] BCC 971, and *Bibby Trade Finance Ltd v. McKay* [2006] All ER 226
[181] Insolvency Service, Consultation Paper 2016, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf > accessed 18 March 2019
[182] Jennifer Payne, 'The future of UK debt restructuring' (October 5, 2016), p.11. SSRN: <https://ssrn.com/abstract=2848160 >or <http://dx.doi.org/10.2139/ssrn.2848160> accessed 18 March 2019

the DIP finance.[183] Nevertheless, in the absence of a moratorium and regulations on the DIP finance, the UK rescue law appears not to encourage creditor participation.

The case of Vietnam law is a nuanced distinction in comparison with the UK and Canada. Though the BL2014 provides for this finance, the regulation on the priority of this finance does not provide the lender with incentives to fund the company in rescue. According to art 54, the rescue finance will rank behind the payment for secured creditors, liquidation expense, and the payment for salary, employment leave, social insurance, and health insurance for employees.[184] In addition, the BL2014 does not encourage the participation of secured creditors by allowing these creditors to enforce security against the company's assets out of the insolvency procedure.[185] Due to the lack of priority for the rescue finance, a secured creditor will tend to opt for enforcing debts in the collateral instead of using the secured assets to fund the company.[186] The failure of Vietnam law to consider the important role of the DIP finance in rescue can be explained with the fact that rescue law and practice have still been a new area that demands the legislatures to have more time and experience to be familiar with. As such, of the three selected jurisdictions, Canada has emerged from the comparison as the jurisdiction with the most sufficient response to the issue of creditor participation.

7.2.3.4 Abuse Management

Managing director's abuse

As previously examined, the selected jurisdictions have different approaches to employing models of rescue administration. For example, the UK employs three different models under its rescue law, the PIP in the administration, the DIP in the SA, and the

[183] Ibid 11
[184] BL2014, art.54
[185] Ibid art.91(5)
[186] See Chapter Six (6.4.2.3 Creditor participation)

hybrid model in the CVA. Meanwhile, Canada and Vietnam share a similarity in adopting the hybrid model. Of all the procedures examined, the UK administration most likely open to abuse. Though the PIP model replaces directors in management, the abuse arising tends to be associated with the director's conduct.[187] Accordingly, in a fear of being replaced by the administrator, the directors are likely to conceal as much as the fact that the company has been in insolvency and engage in risky activities with the hope to rescue the company by themselves.[188] This attempt reduces the livelihood of rescue because such risky activities could lead to the loss of the company assets which are necessary for the implementation of a rescue plan.[189] Besides, the directors tend to not co-operate with the administrator once the administration is initiated.[190] The UK law tackles this abuse by imposing a monetary penalty on directors under the IA1986[191] or disqualifying errant directors from serving as director at any company by courts for between two to fifteen years.[192] Nevertheless, the imposition of a heavy penalty is insufficient to tackle the director abuse as once the directors learn they will be replaced in the administration, severe penalties seem not to provide them with incentives to initiate the procedure in a timely manner as well as co-operating with the administrator after the administration is initiated.[193]

In contrast to the PIP model, the procedures following the DIP model allow the directors to remain in office. The SA under the UK Company Act 2006 is a representative of the DIP model under which creditors exercise their vote for approval of rescue proposal

[187] Hann (n125) 139
[188] Ibid at 139
[189] Ibid 139
[190] D. Baird and E. Morrison, 'Bankruptcy Decision Making' (2001) Journal of Law, Economics and Organization 356, 369
[191] The IA 1986, s.214 Wrongful trading
[192] Company Directors Disqualification Act 1986 (CDDA), s. 6 and 10. There is a change in the disqualification of directors that was introduced into the CCDA by the IA 2000, which allows the Secretary of the State to accept a disqualification taking where it is satisfied a person had conducts that make him unfit to be a director of a company
[193] Hann (n125) 134

while the court significantly involves in administering and monitoring rescue. There is potential director's bias in favour of a rescue option rather than other options that produce better results to the creditors, such as liquidation because the rescue option can prolong their tenure and use their control power to get some benefits for themselves.[194] However, this abuse can be effectively tackled with the heavily judicial involvement in hearing important matters, such as the scheme's viability, classification of creditors into voting classes, and sanction of the scheme approved by creditors. Significant involvement of the court can be an assurance to prevent director's abuse of the procedure.

It is a striking similarity that the hybrid model is employed under rescue laws of the selected jurisdictions, with the CVA under the UK1986 in the UK, the two rescue procedures under the BIA and the CCAA in Canada and the rescue procedure under the BL2014 in Vietnam. As the hybrid model employs IP's functions to monitor the directors in rescue, it can produce more satisfactory results in abuse management than in the PIP and DIP model. On the one hand, by allowing company directors to remain in office, the hybrid model encourages rescue decisions to be made by directors in a timely manner as well as incentivising them to contribute their expertise in the implementation of rescue proposals, which is an efficient response to the shortcomings associated with the director's delay in commencement of rescue procedure and director's non-cooperation with IPs under the PIP model, as discussed with the UK administration. On the other hand, the hybrid model enhances the level of monitoring over the directors under the DIP model. The hybrid model brings IPs into the rescue procedure to enhance the monitoring of the court in that IPs are required to report to the court true nature of the company affairs so that the court can make sound judgments. Nevertheless, it should be noted that not all hybrid procedures produce the same degree of monitoring over director's activities. For

[194] Hann (n125) 137

example, the BIA procedure in Canada and the CVA procedure in the UK can be seen to have a low level of monitoring as these procedures are carried out on an out-of-court basis[195] and the courts do not have the role to decide if they should be initiated.[196] As the court's involvement is very limited, these procedures have to rely on the monitoring of creditors and IPs.[197] By contrast, the rescue procedure under the CCAA in Canada and the one under the BL2014 in Vietnam can be considered to produce a high degree of monitoring from not only the creditors and the IPs but also from courts.[198]

Managing abuse arising from pre-pack administration under the IA 1986 and pre-pack sales under the CCAA

The pre-pack administration under the IA 1986 of the UK and the pre-pack sales under the CCAA of Canada share a very similar feature in that they involve an arrangement for sale of assets or business of an insolvent company before the commencement of the formal insolvency procedure, and when the company enters into formal insolvency procedure, the sale will be effected immediately without the need for creditor approval. As previously examined, this kind of sale brings about several benefits, such as retaining the company value, preserving more job and providing better returns for secured creditors.[199] However, this sale poses a danger that it can be purported to provide the purchaser more benefits over other creditors who are not informed about the sale until its completion, or it may be the case where the business is sold back to the company

[195] BIA, s.50.4(1) & (2) and s.62(1) and IA 1986 s.2. Courts only involve in the procedure once there is a creditor challenging the initiation of these procedures
[196] Under the CVA, the nominee has the duty to report the court on the company affair, however, a negative report to court does not have the effect of prevent the CVA to be presented to creditors for approval (IA 1986, s.2)
[197] The trustee in the BIA has a number of statutory duties to perform, while the supervisor in the CVA will perform their duties according to the terms of the arrangement.
[198] See Chapter Five (5.4.2 Expertise) and Six (6.4.2.2 Expertise)
[199] See Chapter Four (4.2.2.1.6 The pre-packaged administration)

directors (phoenix trading)[200] or the parties connected to the directors at an unfair price.[201] Because this practice is not provided for by the BL2014 in Vietnam, the comparison is conducted with the rescue laws of Canada and the UK.

Canada and the UK have adopted a different approach in dealing with such abuse. Under Canadian law, it is the courts who have the power to authorise this sale. Though the sale has been carried out before the initiation of the CCAA procedure, it is subject to the same level of scrutiny as those carried out after the CCAA takes place.[202] In making their decision, the courts have to consider a range of factors such as the monitor's opinion, the effects of the sale on other creditors and the sale consideration in comparison with the market value.[203] For the sale to parties related to the company, the courts only grant their authorisation so long as the sale has been made with good faith effort and the consideration is more than that offered by other parties.[204] While the Canadian approach relies on the judicial scrutiny and approval over the pre-packaged sale, the UK approach is to empower the administrator with discretion to conduct the sale, and there is no need for the administration to call for the initial creditor meeting to approve a proposal for the pre-pack sale.[205] Because the language of the IA1986 does not expressly deal with the

[200] The UK Parliament, 'Phoenix trading' (2017) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN04083> accessed 20 March 2019

[201] R3, 'Pre-packaged Sales', <https://www.r3.org.uk/media/documents/publications/press/Pre-packs_briefing.pdf> accessed 20 March 2019

[202] *Nelson Education Ltd,* Ontario Superior Court of Justice (Commercial List), Court File CV-15-10961-00CL, *and Primus Telecommunications, Inc.*, *et al.,* Ontario Superior Court of Justice (Commercial List), Court File CV16-11257-00CL.

[203] CCAA s.36(3)

[204] Ibid s.36(4)

[205] The para 3, Schedule B1 of the IA 1986 provides that the administrator has to perform his function to pursue hierarchy of three objectives, namely (a) rescuing the company, (b) achieving better result for creditors than in the case of winding up, and (c) realising asset to distribute to secured or preferential creditors. According to this hierarchy, the administrator has to perform the objective (a) and (b) first, yet he can decide to pursue the objective (c) if he thinks it can provide better results for the creditors than the former options.[205] Undertaking the pre-pack can be seen as the pursuit of the objective (c) as it involves a sale of the company asset. Pursuing this objective does not require the administrator to have the creditor approval as by the virtue of para 52 of the Schedule B1, once the administrator thinks it is impossible to achieve the objective (a) and (b), the administrator does not have to call for a creditor meeting.

pre-pack, nor is it the intention of the Parliament,[206] the administrator's discretion to apply this procedure is likely to give rise to litigation at court. However, the UK court appears to consistently endorse the practice of using the pre-pack and are reluctant to intervene in the business judgment made by the administrator.[207] The concern over potential misconduct of the administrator in exercising this discretion has prompted the IP regulators, the RPBs, to introduce solution to deal with creditor complaints over the administrator. The RPBs now requires an administrator to provide creditors with the SIP16 statement under which he must provide the creditors with explanation and justification for electing the pre-pack, disclosing information about the sale and identification of purchaser and valuation.[208] The compliance with the SIP16 is monitored by the Insolvency Service with the breach of this requirement subject the administrator to disciplinary actions.[209]

The UK approach to pre-pack sale is more likely to invite abuse as compared to that of Canada. It can be seen that the decision to sell the company business is not a small matter but an important one for it directly affects the interest of many creditors. While the pre-pack sale can be only decided by courts in Canada, which can command a degree of public confidence, it is discretionarily decided by the administrator, which can result in numerous complaints from creditors who were not consulted in the sale. As the judicial intervention is rarely exercised in the UK to deal with this issue,[210] it appears to be

[206] A. Keay and P. Walton, *Insolvency Law: Corporate and Personal* (Jordans, 3nd, 2012), p.129
[207] *DKLL Solicitors v. HMRC* [2008] 1 BCLC 112, *Re Kayley Vending Limited* [2009] BBC 578, *Re Hellas Telecommunications* (Luxembourg) II SCA [2009] EWHC 3199 (Ch), [2010] BCC 295, cited by Keay and Walton, Ibid at 131
[208] See an example of SIP16 by the R3 at <https://www.r3.org.uk/media/documents/technical_library/SIPS/SIP%2016%20Version%203%20Nov%202015.pdf> accessed 21 March 2019
[209] See Insolvency Service, Report on the Operation of Statement of Insolvency Practice 16, 1 January to 31 December 2011
[210] The courts exercise the intervention only where there is a conflict of interest. For example, in *VE Vegas Investors IV LLC and others v Shinners and others [2018] EWHC 186 (Ch)*, the court removed the administrators who had conducted a pre-pack sale to sell the company to its former management.

shortcomings of the UK legislators for not limiting the administrator's discretion regarding this matter. Without a requirement for a court order or creditor approval, there is a possibility that the UK administrator can make a decision driven by an influential creditor, such as the purchaser. This may happen where an administrator, under the time pressure of eight weeks to present a proposal to creditors,[211] attempts to complete his duty as early as possible, or where the administrator tactically acts as a receiver of a creditor who wants to buy the company business at a good price by the pre-pack though the administrator is required to act in the interest of creditors as a whole.[212] The requirement of submitting the SIP report appears not to be sufficient enough to prevent the occurrence of this abuse because it serves the purpose of disclosing to creditors information regarding a transaction already entered into by the administrator and it does not confer creditors a right to vote against it. Furthermore, failing to comply with this requirement is not serious enough for the administrator to be revoked his license by IP regulators.[213] This thesis takes a view that the imposition of severe penalties on the administrator after granting him with discretion does not seem to be a sound policy because managing abuses associated with the pre-pack sale should be a preventative measure, where the abuses are about to arise, rather than a punitive approach after it has already arisen.

7.3 Recommendations for Vietnam to improve the effectiveness of its rescue law

7.3.1 Should Vietnam have diverse approaches to rescue procedures?

Presently, Vietnam provides for a single procedure for corporate rescue under the BL 2014, following the hybrid model that allows incumbent directors to run the business

[211] IA1986: Sch.B1, para 52
[212] Ibid para 3(3)
[213] The Insolvency Service, *Report on the Operation of Statement of Insolvency Practice 16* (July-December/2009) at 3

under the oversight AMOs and courts. The UK and Canadian diverse approach could be an option for Vietnam to consider. However, the thesis argues that the diverse approach of the UK appears not to be a good recommendation for Vietnam for several reasons. First, in following this approach, a company has to face a number of options and difficulties in evaluating which option is the best for it. Secondly, the diverse approach of the UK suffers the drawback of lacking a moratorium to prevent creditors from taking actions against the company under the CVA and the SA, which makes it difficult for the use of these procedures, while the combination with the administration could be to a more expensive and lengthy procedure. Thirdly, regarding the UK administration, it does not appear to be a suitable recommendation for Vietnam as the foundation of the administration, which is the practice of the appointment of a receiver by a secured creditor to run the company business and realise its assets to pay the creditors, has not been developed in Vietnam. Furthermore, the administration model runs in contrast to the policy of allowing directors to stay in office that has been unchanged since the enactment of the first insolvency legislation in 1993.

The Canadian approach is another model for Vietnam to consider. While simpler rescue cases are settled by a less expensive, rule-based procedure under the BIA, complicated rescue cases will be dealt with by a costly but more flexible procedure under the CCAA.[214] The bifurcation of procedures finds its merit in that simpler rescue cases can be settled in an economical fashion that saves unnecessary costs arising in dealing with the more complex ones. However, the thesis takes the view that Vietnam should not follow this approach as the current single rescue procedure under the BL2014 has offered the benefit a simplicity for an insolvent company. The cost arising from the IPs and court

[214] The CCAA procedure is eligible to the companies with the amount of debt obligation exceeding C$5 million (CCAA, s.3(1))

involvement is not a very problem because simpler rescue cases will be dealt with sooner and cheaper than complicated rescue cases with a procedure.

7.3.2 Recommendation for time and cost involved in rescue

The BL2014 provides a single procedure to deal with corporate rescue and liquidation. Accordingly, when an application is filed at court, it neither serves the purpose of rescuing nor liquidating a company, rather, it petitions the court for commencing the insolvency procedure.[215] When the court decides to commence the procedure,[216] the first creditor meeting is called to pass a resolution on whether the company will be liquidated or rescued.[217] If the decision is to rescue the company, there will be the second creditor meeting initiated to decide the approval of the proposal.[218] In the Vietnam chapter, the thesis has pointed out that the requirement for calling two creditor meetings is not a satisfactory regulation because it unnecessarily adds time and cost to the rescue procedure and does not motivate creditors to vote for the plan.[219] Creditors are likely to opt for rescuing a company at the first meeting so long as the company has provided them with sufficient evidence on rescue viability, such as a well-drafted rescue plan. A rescue plan presented at the first creditor meeting not only provides creditors with a basis to assess the rescue viability but also makes them realise that the company has seriously been aware of their financial situation and has already had a plan to fix it. If the company can do it at the first creditor meeting, there is no need for calling the second creditor meeting. Therefore, in order to save time and cost, this thesis

[215] BL2014, art.26-29
[216] Ibid art.42
[217] Ibid art.83
[218] Ibid art.91
[219] See Chapter Six (6.4.2.1 Time and cost)

recommends Vietnam to amend this regulation to require the company to provide for the approval of the rescue resolution and the rescue plan with only one creditor meeting.

Furthermore, this thesis suggests that Vietnam should shorten the time for presenting a rescue proposal to the creditors. Presently, the BL2014 allows the company a three-month period to sort out its financial difficulty by informal measures before entering into the formal insolvency procedure,[220] which incentivises a company to be aware of its financial affairs and have a course of solutions to it. In addition, when the insolvency procedure is initiated, the legislation still confers a debtor company a generous amount of time, with five months before presenting a proposal to creditors.[221] This duration is very unnecessarily long for the company and can bring danger to the viability of rescue once the creditors have to wait for a long time and tend to select a shorter route for recovering their debts, such as liquidation.

In this regard, the UK administration and the Canadian BIA could be considered a good recommendation for Vietnam. Under the UK administration, the timeframe for the administrator is very strict, within eight weeks of his appointment to formulate a proposal[222] and within ten weeks of his appointment to call for a creditor meeting.[223] Similarly, under the Canadian BIA procedure, where an insolvent company has not formulated a proposal, after filing a notice of intention to make a proposal, it is given a

[220] According to art. 4(1), BL2014, Vietnam does not reply on the cash-flow test or the balance-sheet test to define whether a company is insolvent. Instead, when a company cannot be paid a due debt to a creditor, after three months since the debt becomes due, the creditor can file an application to initiate the insolvency procedure against the company.
[221] Under the BL2014, between the filing of the application and the commencement of the procedure, the company has thirty days to wait for court's decisions (art.42) between the commencement of the procedure to the first creditor meeting, it has the maximum of ninety days to do the asset inventory and prepare for the creditor meeting (thirty days for doing asset inventory with two possible extensions, one of each is thirty days) (art.65) and another thirty-day period between the first and the second creditor meeting to draft the rescue proposal. (article 87)
[222] IA 1986: Schedule B1, para 49
[223] Ibid para 51. There may be an extension, however, subject to creditor consent and court approval (para 107 and 108)

thirty-day period to submit the proposal to the trustee.[224] Vietnam law should have a similar approach to shortening the time for the company to present a proposal to creditors like those in the UK and Canada. Though a time limit can put a certain degree of pressure on the company, this has the advantage of making the company more aware of its financial difficulty to seek professional assistance at the early stage of its crisis. Furthermore, the time limit above seems not to be a difficulty for an insolvent company as before entering into the formal insolvency procedure, the BL2014 gives a debtor company a grace period of three months to resolve its financial crisis. Therefore, in addition to this period, the time limit presented by the UK administration and the BIA in Canada appears not to place much pressure on the company.

7.3.3. Recommendations for Vietnam to enhance expertise contributed to rescue

Following the hybrid model of rescue administration, the BL2014 provides for a procedure that allows the incumbent directors to hold the office under the supervision of the court and AMOs. In the above comparison, this thesis has identified shortcomings of Vietnamese law in regulating the contribution of expertise to the rescue procedure. In overcoming the shortcomings, there are recommendations for Vietnam as follows. First, Vietnam should consider the Canadian practice of appointing the chief of restructuring officer (CRO) to work along with the company directors in running the company during rescue time. The appointment of CRO not only enhances the directors' expertise but also increases confidence in creditors who have doubts at the incumbent directors' ability in running the business, thereby partly gaining their approval for the rescue plan. Second, Vietnam needs to work more on the issue of licensing and governing the IP profession.

[224] BIA, s.50.4

Under the BL 2014, a lawyer, an auditor or a person who holds a relevant degree with five-year working experience in the degree-related areas can file an application to obtain an AMO license. In the absence of professional training and assessment, the regulation on the AMO eligibility is too simple to guarantee that AMO can contribute a sufficient degree of expertise in the rescue procedure. Therefore, Vietnam should consider the approach of the UK and Canada to introduce the IP professional exam as a part of eligibility conditions for issuing an AMO license. Besides, professional education is a key factor in the development of this profession. Vietnam should consider the possibility of offering AMO applicants intensive professional training like those in Canada. It is feasible for Vietnam in doing so because the country has recently received support from international donors, such as the World Bank and INSOL International in providing training for IPs.[225]

Apart from licensing AMOs, what Vietnam should consider is to monitor their profession. Presently, the Ministry of Justice who issues AMO license is also responsible for monitoring their profession.[226] Apart from this department, the local authorities, which are the Provincial People Committee, and its sub-body, which is the Department of Justice are in charge of handling complaints relating to IPs.[227] However, as previously examined, there is a great deal of challenges for these bodies to perform their functions properly because they are responsible for numerous administrative tasks and do not specialise in insolvency, which makes it hard for them to develop expertise in monitoring AMO.[228] Therefore, a recommendation by this thesis is that Vietnam should create a governmental

[225] Chu Van Anh, 'IFC Provides Training to Help Promote Insolvency Resolution in Vietnam', <https://ifcextapps.ifc.org/ifcext%5Cpressroom%5Cifcpressroom.nsf%5C0%5C02AA627112D0F48C85257EE40010FFF8> accessed 27 March 2019

[226] See the Decree 22/2015 of the Government on clarifying provisions of the BL2014 relating to AMOs and AMLC, art.23

[227] Ibid art.24

[228] See Chapter Six (6.4.2.1 Time and cost)

organisation that specialises in insolvency like the Office of Superintendent in Bankruptcy in Canada or the Insolvency Service in the UK. This organisation could be exclusively responsible for licensing and supervising AMOs and it can even consult the insolvency law-making in Vietnam. As a governmental body, this organisation can ensure the same degree of public confidence as the Ministry of Justice and by exclusively focusing its functions in insolvency areas, it can deal with licensing and monitoring AMOs in a more effective way than this ministry. Another possibility for Vietnam to consider is to follow the UK approach in devolving the monitoring of this profession on hands of a self-regulated professional body such as RBPs in the UK. However, the thesis is of the opinion that this approach not suitable for Vietnam because of two reasons. First, the IP profession has just introduced in Vietnam with the enactment of the BL2014, thus it takes time for the establishment of such professional organisation. Second, as the IP profession has been very primitive in Vietnam, a self-regulatory professional body cannot command confidence for the public about its ability and integrity.

Finally, as courts have a considerate involvement in rescue procedure under the BL 2014, insolvency judges should possess a sufficient degree of commercial expertise to perform their functions. As previously observed, insolvency judges in Vietnam need to have more training to enhance their judicial capacity in dealing with insolvency cases.[229] Therefore, the training for insolvency judges should be vehemently enhanced to guarantee that they can effectively participate in the settlement of corporate insolvency and restructuring.

[229] See Neil Cooper, 'Vietnam Insolvency Administrator Training' in the Quarterly Journal of INSOL International (4th Quarter 2015) at 13. Recently, there was a series of a judicial training for Vietnamese judges organised by the Supreme Court with the support of the International Financial Corporation and the INSOL International in the three regions of Vietnam in May 2018, <https://congly.vn/hoat-dong-toa-an/nghiep-vu/hoi-nghi-tap-huan-ve-luat-pha-san-viet-nam-danh-cho-cac-tham-phan-254796.html> accessed 27 March 2019

7.3.4 Recommendation for Vietnam to enhance creditor participation

There are two issues Vietnam should consider to improve creditor participation. First, the timeframe for initiating rescue and submitting the proposal to creditors should be shortened to encourage creditors to approve the proposal. With a three-month period to file an application, followed by a period of more than five months for a rescue proposal presented before the creditor meeting,[230] the creditors would lose their patience and confidence for rescue and tend to favour expeditious procedures such as liquidation. Second, it is very important that Vietnam law should encourage creditors to provide the rescue finance to implement a rescue proposal by amending the priority of this finance under the art 54 of the BL2014. The approach of Canada law in granting the lender of the rescue finance a super-priority could be a recommendation for Vietnam. However, Vietnam should consider this cautiously as a granting super-priority status may result in a conflict with the existing creditors and create potential abuse when the lender of the rescue finance uses his position to influence the company directors to act for the benefit of his interest. Therefore, this thesis suggests that the law should grant insolvency courts a right to decide this matter on a case-by-case basis.

7.3.5 Recommendation on abuse management

The rescue procedure under the BL2014 is based on the hybrid model that allows the company directors to retain their management power. Preventing potential abuse from this model lies in the facilitation of the oversight over director's conduct through monitoring functions legislatively assigned to IPs and court. In doing so, Vietnam should have regulations and provide training to ensure these actors acquire a sufficient degree of expertise to participate in the rescue. Another issue should be mention is that Canada and

[230] See section 7.3.2 of this chapter

the UK have offered Vietnam experiences on how to deal with the pre-pack sale and administration. It is predicted that once the rescue practice is sufficiently developed in Vietnam, it is the matter of time for the pre-pack sale or pre-pack administration to exit. A lesson Vietnam can learn from the two jurisdictions is that while allowing this procedure can bring certain benefits such as saving time sale and preserving the company's value and employment, the abuse arising in this procedure, such as director's phoenix trading must be effectively dealt with.

7.3.6 Facilitating a compatible environment for implementing the new legislation

With the enactment of the BL2014, the rescue law in Vietnam has come very closer to those of the Western countries. In light of the legal transplant theories discussed at the beginning of this chapter and based on the evidence of the failure of Vietnam in adopting foreign insolvency in the past, the thesis suggests that Vietnam must facilitate a supportive environment under which the BL2014 can be fully implemented. To facilitate this environment, Vietnam has to works on the following issues. First, there has to be an attitude change towards corporate insolvency and rescue. Due to the influence of traditional values, corporate insolvency has been perceived as a taboo in Vietnam, which is identified as one of factors that preclude insolvent companies from relying on the formal insolvency procedure to resolve their insolvency although Vietnam shifted its economy from a centrally planned to a market liberalism model.[231] However, once the market economy has become entrenched and developed,[232] the author believes that corporate insolvency will be perceived as a normal phenomenon of the economy instead of a taboo. In this context, the shift of legislative focus towards corporate rescue will lead

[231] Gillespie (n51)
[232] See the World Bank on overview of Vietnam market economy at <https://www.worldbank.org/en/country/vietnam/overview> accessed 28 March 2019

to an attitude change and encourage insolvent companies to rely on the procedure under the legislation. However, it is not sufficient for Vietnam to facilitate a supportive environment for corporate rescue by merely enacting new legislation. There is the need for the government, bankers and other related parties to endorse and support corporate rescue through making and implementing their policies.

Second, the rescue legal framework of Vietnam only functions well like those in Western jurisdictions such as Canada and the UK provided it is supported by insolvency institutions such as courts and the market agencies such as IPs. Therefore, Vietnam should enhance regulations on licensing and monitoring IPs in combination with facilitating professional education and training for IPs and insolvency judges so that these actors can effectively support the implementation of the BL2014

Third, the rule of law should be enhanced in Vietnam. In the past, Vietnam maintained a centrally planned economy under which the state used its managerial power to resolve insolvency of state-owned enterprises (SOEs) through administrative orders instead of recourse to the formal legislation. This practice still occurred when the first and the second insolvency bankruptcy were passed in 1993 and 2004 although Vietnam decided to transform its economy towards market liberalism in 1986.[233] However, when the economic transition has gained its momentum as now, Vietnam is demanded to enhance the principle of 'rule of law' in its legal framework in order to serve economic development.[234] As a result, Vietnam has significantly narrowed the public economic sectors through privatising state-owned enterprises (SOEs),[235] supporting the

[233] Gillespie, (n50)
[234] Ngo Ba Thanh, 'The 1992 Constitution and the Rule of Law The Constitution 1992' in Carlyle A. Thayer and David G. Marr, Vietnam and the Rule of Law (Australian National University, 1993) 81-115. The 'rule of law' principle was first adopted under article 12 of the Constitution 1992 and now article 8, the Constitution 2013
[235] Before 1986 when Vietnam did not initiate the innovation policy, there had been 12000 SOEs in the entire state, however, this number is expected to be only 103 in 2020 according to the Decision No.

development of the private economic sector, and encourage the use of insolvency legislation to resolve the financial difficulty of insolvent companies, including SOEs.[236] Nevertheless, it cannot be denied that there has been still the state's involvement and intervention in restructuring SOEs through the establishment of debt-trading companies. In 2020 when Vietnam is expected to meet the target of privatisation that allows only 103 SOEs to exist,[237] the state's intervention in corporate restructuring should be limited, leaving the insolvency affairs of all companies to be decided by the legislation and the market. If the government consistently implement this policy, the law on insolvency and corporate rescue law will be fully operating in Vietnam.

7.4 Conclusion

This chapter has provided a comparison on the rescue procedures and the rescue administration models of the UK, Canada and Vietnam with the objectives of highlighting the best practice emerging in each jurisdiction, and thereby providing recommendations for Vietnam to enhance the effectiveness of its rescue law. Based on the discussion on the theories on comparative law, this comparison has not been constrained to the functionalism approach that seeks similarities among the rescue laws in performing their function. Instead, the chapter furthered the comparison under an exhaustive comparative approach that emphasises not only the similarities but also the differences among the selected legal systems in respect of their legal culture and legislative framework of corporate rescue. Furthermore, endorsing the theory of legal transplantation that requires the imported laws to be compatible with the legal culture in the host country, the thesis

58/2016/QD-TTg which specified certain categories of enterprises to be restructured from 2016 to 2020 and state ownership ratios in various SOEs and sectors.

[236] As stated by the Minister of Finance, Dinh Tien Dung, in responding to the question by a representative at the Vietnam National Assembly Meeting in October 2018, SOEs who are unable to pay debts will be liquidated under the BL 2014, <https://vov.vn/kinh-te/doanh-nghiep/doanh-nghiep-nha-nuoc-neu-khong-tra-duoc-no-se-cho-pha-san-832359.vov> accessed 29 March 2019.

[237] See the Decision No. 58/2016/QD-TTg (n235)

took into consideration the difference in Vietnamese legal culture when making recommendations for Vietnam to improve its rescue law based on the experiences of the UK and Canada.

The significant similarity among rescue laws of the countries is that all of them follow the policy of 'business rescue' that aims to preserve the going-concern values of a company instead of 'company rescue' that purports to preserve the company as a whole. Despite this similarity, there are striking differences emerging from the comparison. The UK is the jurisdiction that has the most diverse approach to rescue, with three procedures following different models of DIP, PIP and the hybrid model. Meanwhile, though Canada and Vietnam similarly employ the hybrid model in their rescue law, Canada provides for two rescue procedures as compared to the single procedure in Vietnam. The difference in this employment is attributed to the legal development, insolvency legislative policy and the legal culture where the laws have operated.

The comparison of rescue laws of the three countries under the four benchmarks of time and cost, expertise, creditor participation and abuse management produces the following findings. First, for the benchmark of time and cost, rescue laws of the countries perform very differently due to the existence of different procedures. A lesson drawn from the examination is that in reducing time and cost, a company should be provided with a suitable period of time to formulate a proposal to win the creditor approval and that the procedures for dealing with more complicated cases require more time and cost involved in than those designed to settle simpler cases. In reducing the professional fee in rescue, the laws of the UK and Vietnam have a more satisfactory approach than Canadian law in allowing creditors to participate in the negotiation of this fee. Second, as for the benchmark of expertise, among other actors, IPs have proved themselves to be an increasingly important participant in monitoring the company and assisting courts in

making decisions and Canada appeared to be more effective than the UK and Vietnam counterparts in providing rigorous regulations on licensing and regulating IPs. Third, regarding creditor participation, it is important for a rescue law to have a moratorium to stay creditor action as well as encouraging them to contribute the rescue finance to support the implementation of a rescue plan. In this regard, Canadian law has a more satisfactory approach than the UK and Vietnam with the facilitation of a super-priority for the rescue finance to encourage creditors to contribute this finance for implementing rescue. Fourth, the best practice to manage abuse is to rely on the oversight role of IPs and court. For some special cases of pre-pack administration or pre-pack sale, there should be judicial involvement in scrutinising and approving it like the Canadian approach, instead of entrusting IPs with discretion to deal with this matter as under the UK administration.

Based on the results of the comparison, several recommendations have been made for Vietnam to improve the effectiveness of its rescue law. Vietnam should shorten the time for presenting a rescue proposal to creditors, enhance regulations on licensing and monitoring AMOs and have regulations that incentives creditors to provide rescue finance to implement rescue. In tandem with revising the current legislation, Vietnam should facilitate a supportive environment in which insolvency institutions such as courts and market support agencies such as IPs sufficiently participate in the rescue procedure. The facilitation of this environment requires the state's adherence to the 'rule of law' and limit its intervention in the insolvency of SOEs, leaving the insolvency of all companies to be decided by the current legislation.

CHAPTER EIGHT

CONCLUSIONS AND RECOMMENDATIONS

8.1 Research objectives and contribution

This thesis is a comparative study on the corporate rescue laws in the three jurisdictions of the United Kingdom (UK), Canada, and Vietnam. The main objective of the thesis is to offer Vietnam recommendations to enhance the effectiveness of its rescue laws. In pursuing this objective, the thesis conducted the assessment of the effectiveness of the models of rescue administration employed under the rescue laws of the three selected countries, based on the four evaluation benchmarks of time and cost, expertise, creditor participation and abuse management to identify best practices emerging from the laws of the selected countries. The recommendations for Vietnam have been drawn from these practices in consideration of the compatibility between these practices and the distinct legal environment of Vietnam.

In terms of originality, this thesis has proved itself to make a contribution of knowledge insofar as it has launched an examination on the extent to which the models of administration are reflected in the rescue legislation of the UK, Canada and Vietnam and the extent to which they can achieve effectiveness through an evaluation guided by the set of four benchmarks. While much of the literature has already focused on examining rescue procedures in individual countries such as those in the UK and Canada, the thesis departs from this direction by narrowing the research topic to the issue of the effectiveness of the rescue law and the models of administration in the rescue procedures under a comparative approach. By juxtaposing the laws of the selected countries into a critical comparison and establishing a set of benchmarks for conducting the comparison,

the thesis has highlighted the best practices emerging from the laws of the selected countries. In addition to this, the thesis has been conducted against the backdrop of the rarity of studies on Vietnamese corporate rescue law, particularly there is an emerging need for examining the effectiveness of the new insolvency legislation, the Bankruptcy Law 2014, which has been taking effect in the country since 2015. As a critical assessment for the newly applicable legislation, recommendations made by this thesis will offer Vietnam an international perspective to reconsider the issue of how to improve the effectiveness of its rescue law.

8.2 The thesis findings

The models of rescue administration under the laws of the three countries

Three models of rescue administration have been examined by the thesis, namely the Debtor-in-Possession (DIP), the Professional-in-Possession (PIP) and the hybrid model, which combines the features of the DIP and the PIP models. While the DIP model permits incumbent directors to remain in office and operate the companies during the time of rescue, the PIP model offers a contrasting approach, which replaces the incumbent directors with outsider insolvency practitioners (IPs) who take the role of running the company business and conducting rescue procedures. There is the existence of defects inherent in both models. If the DIP model invites the directors' bias of favouring rescue over other better options, the PIP encounters the shortcomings of efficiency as IPs need time to be familiar with running the company business and there is a likelihood of non-cooperation of the directors upon being removed from office. Bearing features of the both DIP and PIP models, the hybrid model can be a solution to overcome the defects of the two models insofar as it allows the company directors to stay in the management and contribute their expertise to rescuing the company, yet the abuse of their power will be

controlled through the IP's supervision. As examined, there is a great degree of divergence in applying these models in the rescue procedures under rescue laws of different countries. For example, the Chapter 11 of the United States law famously features a procedure using the DIP model, Canada and Vietnam have incorporated the hybrid model under their rescue law, while the UK law has the most diverse approach by adopting all three models in three different rescue procedures.

Establishing the benchmarks for evaluating the effectiveness of the rescue law

In evaluating the effectiveness of these models, based on the existing literature, the thesis establishes a set of four benchmarks, namely time and cost, expertise, creditor's participation and abuse management. These benchmarks are expressed as follows: *time and cost* requires rescue to be carried out in a timely and economical fashion; *expertise* demands a sufficient degree of expertise of those who take the role of rescue administration to be contributed in administering the rescue procedure; *creditor participation* examines the extent to which creditors are incentivised to participate in rescue to provide finance for implementing a rescue plan; and *abuse management* evaluates whether a rescue law could provide a sufficient mechanism to tackle potential abuse arising in a rescue procedure. These benchmarks are not only used to examine the effectiveness of the rescue law in each selected jurisdiction but also become criteria guiding the comparison of the rescue laws of the selected countries to induce the best practices among them.

Case study of the rescue laws in UK, Canada, and Vietnam

Differences in adopting rescue models under rescue laws in the three countries

As theoretically examined, there are three models of administrative control of rescue procedure and the main actors participating in administrative control of the procedure are the company's director, the IPs, the court and the creditors. There is a degree of divergence of approaches to selecting and applying these models in insolvency legislation as well as the participation of main actors in these models under laws in different countries. The examination into the rescue laws of the UK, Canada and Vietnam has provided a very good example of this. These countries have incorporated different rescue models in their legislation and the legislative policies have been shaped by unique historical background and distinct societal conditions in which the laws have operated.

Of the selected jurisdictions, the UK has the most diverse approach to corporate rescue which features the availability of the three rescue procedures, namely the administration and the creditor voluntary arrangement (CVA) under the Insolvency Act 1986 and the Scheme of Arrangement (SA) under the Companies Act 2006. These procedures are a full reflection of all the examined models. The administration follows the PIP model under which an administrator will replace the company directors to run the business and supervise the procedure. The SA follows the DIP model that allows directors to retain their managerial power and operate the company business, whereas the CVA is an exemplification of the hybrid model that permits the directors to run the company under the oversight of the IPs. This legislative policy associated with the UK's attempt to offer an insolvent company a degree of flexibility in choosing suitable rescue procedures to settle its financial difficulty. Among these procedures, the administration appears to be the most popular procedure in the UK. The popularity of this procedure can be explained by the most expeditious route it provides for settling the financial affairs of an insolvent company. Apart from this, there has been a hostile attitude towards insolvency that attributes the business failure to the mismanagement of directors, which results in the

favourability of the administration under which the directors are replaced by the administrator. In addition, IP has been a well-established profession and contributed greatly to the effectiveness of the UK insolvency procedure and this provides an incentive for pursuing the policy of replacing the incumbent management team with professional outsiders to manage the company business and control the rescue procedure.

Insolvency law in Canada provides for two rescue procedures under the Bankruptcy and Insolvency Act (BIA) and the Companies Creditor Arrangement Act (CCAA) and both of them follow the hybrid model that allows the company directors to run the company business under the supervision of a trustee or a monitor. While the BIA has the feature of a rule-based procedure, which is used for rescuing small companies, the CCAA is a court-based procedure which provides a great degree of flexibility for rescuing companies with a complex structure of debts. The selection of this model by Canadian law has been historically examined with the influence of the UK and US on the development of insolvency law in the country. Under the influence of UK law, Canada initially allowed the practice of using trust deeds to allow the creditors to participate in restructuring debts of the debtor; however, this practice was abolished due to the requirement for their shares to be listed in the US stock market. When the trust deed was no longer in use, Canada enacted the first rescue legislation, the CCAA which permitted debtor companies to restructure their debts by themselves. A special feature of Canadian rescue law is that courts play an important role in shaping the legislative policies. In the absence of legislative responses to the corporate failure in the 1980s, Canadian courts revived the application of the CCAA by adopting the liberal interpretation to provide clarification to the basic structure of the statute to deal with the insolvency of companies on a case-by-case basis. The effectiveness of the CCAA, which is largely attributed to the flexibility conferred by the court's involvement is the explanation for the survival of the

CCAA after the Canadian legislatures attempted to replace it with the current BIA multiple times. As a result of this, there has been an existence of two rescue procedures in Canada.

As for the case of Vietnam, the transplantation of Western insolvency laws into its domestic legislation without considering the compatibility between the transplanted law and the local conditions rendered two pieces of legislation in 1993 and 2004 inapplicable products. The resistance of Vietnamese local conditions dictated by traditional values and beliefs coupled with the influence of socialism has been the factors that contribute to the failure of the two legislations. Although the first insolvency legislation was enacted in the 1990s, corporate rescue has only gained legislative recognition by the enactment of the Bankruptcy Law 2014 (BL2014). Under this legislation, Vietnam adopts a single rescue procedure following the hybrid model under which the company directors a play role of running the company business under the oversight of IPs and court. The BL2014 makes the participation of IPs mandatory in insolvency, resulting in the creation of the IP profession in Vietnam. Within the hybrid model, IPs will participate in the rescue along with the courts to supervise the company director's activities. The enactment of the BL2014 has demanded Vietnam to sufficiently facilitate and develop market institutions such as IPs as well as improving judicial capacities of insolvency judges to support the implementation of the legislation.

Similarities between rescue laws of the selected jurisdictions

Firstly, the rescue laws of the three countries share a striking similarity in terms of defining the rescue objective. Notwithstanding the philosophical change from liquidation towards corporate rehabilitation which leads to the legislative focus on rescue objective, rescue cannot be a priority if it cannot produce a better result for the creditors

than other options. Following this, all selected jurisdictions pursue the policy of 'business rescue' instead of 'company rescue', which means that only the going concern value of the company business will be preserved instead of keeping a company alive as a whole with the same ownership. Therefore, rescue attempts are more likely to involve a sale of companies to other owners, as indicated in the examination of the laws of the UK and Canada. The second similarity is the participation of IPs in the rescue procedures. IPs undeniably play an important role in delivering the effectiveness of a rescue law regardless of rescue models followed by legislation. Acting as an intermediary party, they contribute to the effectiveness of a rescue procedure by not only supporting the company in the time of crisis but also assisting the courts in making informed decisions. Even where they do not officially take part in the rescue procedure, such as under the UK Scheme of Arrangement, they still have their unofficial involvement through giving the company professional advices on negotiating with creditors and drafting rescue proposals.

The best practices emerging from the rescue laws in the three countries

The comparison on rescue law of the three countries not only highlights the best practice emerging from their laws but also demonstrates how the four benchmarks for evaluating the effectiveness are performed under the rescue laws of the selected jurisdictions. Regarding time and cost, the UK administration and the Canadian BIA appears to be two expeditious routes for dealing with corporate rescue by requiring rescue proposals to be drafted and submitted within a short period of time. However, the examination of other procedures such as the CCAA and the SA affirms the fact that complicated cases of rescue demand more time and cost to be invested as compared to the simple ones. Though Vietnam provides for a more lengthy procedure compared to those in the UK and Canadian, offering insolvent companies with a duration of three

months to initiate informal rescue actions before entering into formal procedure should be appreciated as a good practice of Vietnamese rescue law. Constraining the time for initiating rescue procedures to an appropriate period of time also contributes to the reduction of cost. Along with this, the issue of determining proper remuneration for IPs appears to be equally important as this payment accounts for a part of creditor recovery. In this regard, the best practice is to allow creditors to decide this fee as under the laws of the UK and Vietnam because creditors are the party who decides the approval of the plan.

For the three remaining benchmarks, Canada appears to be the best performer among the selected jurisdictions. In particular, the benchmark of expertise demands expertise to be contributed not only to running the company business but also controlling the rescue procedure. Canadian law satisfies this criterion with the practice of appointing the Chief of Restructuring Officer to assist the company directors in operating the company, and at the same time, bringing other IPs such as trustee and monitor to assist the court in supervising the rescue procedure. Furthermore, the requirement for IPs to practice their profession in Canada is more rigorous than those in the UK and Vietnam, including important aspects of mandatory education, training and assessment. As for creditor participation, Canadian law also appears to be a more advanced practice than those of UK and Vietnam, with the availability of a moratorium (a stay of proceedings) to prevent creditors from enforcing debts against the company and the recognition of the super-priority of the rescue finance. For the final benchmark of abuse management, Canadian law also has a more satisfactory response to the issue of pre-packaged sales with courts having the role to decide the matter on a case-by-case basis, which runs in contrast to the UK approach of granting the administrator a wide latitude of discretion to approve a pre-packaged administration without consulting creditors, which can give rise to potential abuse.

However, this conclusion does not mean a hybrid model for rescue like the one of Canada, will always produce a higher degree of effectiveness than the others. For example, although Vietnam law selects the hybrid model, it cannot deliver the same level of effectiveness as the Canadian law does for failing to satisfy the evaluation benchmarks. The findings, therefore, indicate that regardless of the model followed, in pursuing effectiveness, a rescue law should place a balance in performing the mentioned benchmarks.

8.3 Recommendations

There are several recommendations the thesis would like to make as follows.

First, the examination of corporate rescue law of a country should be linked to the contextual background of legal history development and societal conditions to identify influential factors that shape the legislative policies. This is particularly true for a comparative study of corporate rescue laws under which the compared countries originate from different legal cultures such as the UK, Canada and Vietnam. Even for the countries coming from the same legal culture such as the UK and Canada, a historical approach to their legal development has revealed how their legislative policies on insolvency and corporate rescue have been designed differently due to the distinct cultural features of each country. The approach to societal context allows comparative legal research to fully identify and justify the differences in the laws of different jurisdictions.

Second, following the first recommendation, Vietnam should take into consideration the difference between the legal culture, where its rescue law has operated and those in the UK and Canada before deciding to apply the advanced practices drawn from the laws of these jurisdictions. The first thing Vietnam should do is to develop marketing supporting institutions such as IPs and enhancing the judicial capacity to

support the implementation of the current legislation. When these institutions are fully developed, the country should further effort to enhance 'the rule of law' by encouraging the use of the legislation and minimising the state intervention in settling the insolvency affair of SOEs. Although traditional values act as a strong resistant factor that prevents the legislation from effectively operating in Vietnam, the thesis takes the view that so long as there is sufficient facilitation of insolvency supporting actors such as IPs and courts, the legislation will become an effective legal device and gain popular use.

Third, different countries may have different approaches in choosing and adopting rescue models in their legislation. The availability of multiple rescue procedures, as exemplified by the case of the UK and Canada, can offer an insolvent company greater flexibility in choosing the one that suits it the best. However, this approach is not always a sound policy as an insolvent company has to spend time and effort in evaluating these procedures. In addition, time and cost can be duplicated in case the company elects to combine these procedures or switch among procedures. Rescue law of the UK is a very good example for this where a company has to combine the CVA or the SA with the administration in order to take advantage of the moratorium available only under the latter to stay creditor actions in drafting rescue plans. Therefore, if there is the availability of multiple procedures, a moratorium should be fully provided in each procedure to avoid unnecessary cost arising from switching or combing.

Fourth, for the issue of evaluating the effectiveness of rescue law, time and cost appear to be the first consideration in evaluating a rescue law. However, this benchmark alone does not form a sufficient basis for evaluation of a rescue law because the amount of time and cost involved depends on the degree of complexity of a company. Furthermore, it should be noted that data for time and cost is not always available for an examination due to the confidential nature of rescue. With these reasons, the evaluation

of the effectiveness of a rescue law should rely on other benchmarks such as expertise, creditor participation and abuse management. Importantly, there must be a balance in the pursuit of the rescue law's objectives following these benchmarks.

Finally, the set of benchmarks developed in the thesis provides a critical basis to evaluate the effectiveness of rescue law. The results from assessing rescue laws of the UK, Canada and Vietnam in this thesis suggest that these benchmarks can be used for examining the effectiveness of rescue law in other jurisdictions.

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