TOWARDS AN EFFICACIOUS LEGAL FRAMEWORK FOR DEBT RECOVERY IN DEVELOPING COUNTRIES[1]

OLAYIWOLA O OLADELE

Debt default and debt accumulation threaten the financial systems of many developing countries. They also constitute a potential source of systemic failure of the particular financial systems as well as of the global financial system. Therefore, this article identifies the factors for debt default and debt accumulation to include grant of loans to incompetent borrowers, grant of loans in excess of the regulatory cap on credit exposure, lack of transparency in financial reporting, grant of loans without adequate collateral security, over-valuation of security, application of short-term loans to long-term projects, informational asymmetry, wilful default, fraud by bank officials, inefficient financial system supervision and inefficient judicial systems. It reviews the existing legal framework in Nigeria for debt recovery, particularly banking and financial institutions statutes, insolvency law, corporation statutes as well as judicial and law enforcement systems, and suggests reforms to ease debt repayment and make the legal framework more efficacious.

Key words: debt default, debt recovery, legal reforms.

INTRODUCTION

Debt default plagues financial systems in developing countries. In most of them, it has reached a frightening dimension that threatens the entire financial system. While other factors may be responsible for this problem, it seems that most of these countries do not have legal systems that facilitate debt repayment and debt recovery. Consequently, a sustained and concerted legal system reform is needed to address the problems. While it is difficult to generalise the causes of financial crises in these countries due to macroeconomic differences, debt default seems to be the common factor. In Nigeria, many banks failed within the past decade due to debt default, prompting regulators to review the legal framework for bank lending and loan recovery. Yet, helpful as the reforms made up to the present time may be, they seem not to be far-reaching enough.

Because debt default is a potential source of systemic risk, not only to the particular financial system within which it occurs, but also to the entire global financial system, this article undertakes a critical review of the existing legal framework in Nigeria for debt recovery and suggests reforms. It also identifies the factors for debt default and debt accumulation. These include grant of loans to incompetent borrowers, loan grants by banks in excess of the regulatory cap on their credit exposure, forgery of returns by bank officials to avoid regulatory sanction, undue interference of bank owners with loan granting procedure, and granting of loans without adequate collateral security. Others are over-valuation of security, intricate processes for perfecting security, the application of short-term loans to long-term ventures, high interest rates, asymmetry of information

1 Department of Business Law, Obafemi Awolowo University, Ile-Ife, Nigeria.

about borrowers, wilful default by borrowers who are able to pay, fraud by bank officials, inefficient supervision, and inefficient judicial systems.

The article argues that the existing legal framework for debt recovery has achieved only limited success because it fails in the main to minimise debt default through means that are designed to facilitate and encourage debt repayment. At the same time, it suggests the strengthening of the recovery framework as the other edge of the sword.

Due to breach of banking regulations by the management and directors of some banks that failed in the past decade, the article recommends stricter penal regulation and supervision for banks and their officials. In the light of the slow judicial process that inhibits debt recovery, it critically reviews the efforts that have been made to accelerate debt recovery and to discourage debt default. These include the reduction of information asymmetry by making information on debt defaulters readily available in the financial system to facilitate credit rating, and denying defaulters future access to credit. Others are the de-emphasis of real property collateral security for non-corporate loans, the creation of self-enforcing collateral security and loan agreements, and making corporate directors the guarantors of corporate indebtedness. While such reforms are pursued, this article argues further that the financial systems of developing countries should accommodate the poor of those countries who need loans for self-employment in the primary sector. This important group does not have access to the formal sector loans because its members do not own real property for collateral security. Therefore, this group stands to benefit from loans guaranteed through peer monitoring and social control. This will help to alleviate the poverty of its members and enable them to build self-esteem.

The article focuses on Nigeria because that country has experienced bank failures within the past decade. However, it also draws useful examples from other developing countries, particularly in Asia, which have experienced financial crises of a dimension that heightened the fear of possible systemic failure of the global financial system.

THE PROBLEM OF DEBT DEFAULT

Debt default has caused financial crises in many emerging economies as well as in developing countries, and was a major factor in the banking crises of the 1980s in countries such as Argentina, Chile, The Philippines, Thailand, Malaysia, Uruguay, and Spain (Sundararajan *et al*, 1991: 1). Similarly, heavy short-term foreign currency indebtedness was one of the causes of the Asian financial crisis. The massive outflow of short-term capital that followed the signs of weakness in the Asian financial system caused crisis within and drove the economy into recession (Harris, 1999: 1).

In Nigeria, bad loans, insider lending, dissipation of depositors' funds and loan frauds were a major cause of the insolvency of many banks between 1988 and the end of 1999. Heavy short-term borrowing at the macro level, for long-term ventures, also led to loan defaults and precipitated demonetisation of the economy. Because of cross-defaults and shortage of liquidity, the inter-bank market collapsed. By the last quarter of 1995, net classified loans within the Nigerian financial system amounted to 187% of the equity funds of the banks (Hutcheson, 1995). The ratio of classified loans and advances may have increased through the 1990s as bad loans grew in volume.

In Nigeria, banks dominate financial intermediation. For countries in this category, the terms 'financial crisis' and 'banking crisis' have been used interchangeably (Sundararajan, 1991: 2). There is financial crisis where the liabilities of a major group of financial institutions exceed the market value of their assets, engendering bank runs, collapse of the financial institutions and government intervention. The major causes of financial crisis include substantial non-performing loans, increasing losses and decreasing value of investment, resulting in financial system insolvency, institutional liquidation and restructuring as well as mergers (Sundararajan, 1991: 13).

The financial system may be destabilised once depositors lose confidence in a substantial number of banks or payment difficulties spread within the system, so that banks inter-depend on one another. One effect is that bank customers may be unable to meet their obligations to their creditors (Sundararajan, 1991:13). Since it becomes difficult for bank creditors to know the value of bank loans, the loss of confidence deepens once a bank fails within the system. The disruption of the credit system increases the cost of intermediation (Sundararajan, 1991:13). As discussed in the next segment of this article, the financial crisis in Nigeria follows this trend.

Factors contributing to loan default and loan accumulation

Borrowing to service short-term loans

Loan default and loan accumulation are inevitable when short-term loans are expended on long-term ventures. The 'real bill doctrine' prompts the preference of commercial banks for short-term lending because it enables them to match their assets and liabilities. A review of the Nigerian financial system between 1970–95 shows that most commercial banks loans had a maturity period of three months (Central Bank of Nigeria, 1995). This caused bank customers to borrow elsewhere at higher costs to repay existing loans in order to have access to fresh loans (Fajingbesi, 1995: 20). The 1970–95 period shows a set pattern that may not only be valid today but that also poses a potent danger to the financial system.

Although short-term loans may be important to the commercial banking sector, they are not conducive to long-term planning and development. In addition, the race to pay back in order to access new credit runs business enterprises into more loan commitments, as well as impairing their ability to repay existing loans.

Overvaluation of security

Borrowers, guided by the cooperation of fraudulent bank officials, sometimes over-value the collateral securities they pledge to secure loans. This inevitably leads banks to give loans to unqualified and unintended borrowers, with the attendant consequence that in the event of any default, the sum the bank realises from the security is insufficient to cover the loan. In cases of this nature, the loan guarantor's liability usually is limited by the loan document to specific overvalued properties, and the guarantor could not be made personally liable in the absence of a separate memorandum of agreement. On the face of the transaction, the parties have 'complied' with the regulatory requirement of securitisation, but beneath the facade of 'compliance' lies a harmful fraud. Cases of this

nature reveal that the erring bank officials either have an economic self-interest in the loan, or the borrowers are friends or relatives of the officials (Goldface-Irokalibe, 1995: 66).

The loophole exploited by the fraudulent parties and the loss to the lender are illustrated by the case of *Chief Edu v National Bank of Nigeria and West African Travel Agency Limited* ([1986] 3 NWLR 188, S Ct of Nigeria). Here the plaintiff bank sued to recover the sum of money that the second defendant owed to it, the repayment of which the first defendant had guaranteed. The second defendant admitted liability. While denying liability, the first defendant argued that the loan agreement expressly limited his guarantee to certain properties, beyond which he could not be held liable. On appeal, the Supreme Court of Nigeria held that where the guarantor pledged his credit for the loan repayment by depositing his property title deeds, liability attached to those properties and not to the guarantor personally. Thus the lender was saddled with 'bad loans' where the borrower was unqualified for the loan *ab initio* and the over-valued collateral securities fell short of paying the loan.

The regulatory response by the Banks and Other Financial Institutions Decree (BOFID 1991, No 25, s 18(1)(b)) is to prohibit managers and other officers of banks from granting any advance, loan or credit facility to any person except in accordance with the rules and regulations of the bank, and on condition that they have obtained adequate collateral security from the borrower that is deposited with the bank. In addition, the Decree prohibits bank managers and officers from direct or indirect personal interest in advances, loans or credit facilities that they do not disclose to the independent board of the bank (BOFID, s 18(1)(a)). Any manager or officer who contravenes any of these requirements 'is guilty of an offence ... and liable on conviction to a fine of N100,000 [$1,000] or to an imprisonment for a term of three years'. In addition, the gains or benefit (if any) derived from the transaction are forfeit to the Federal Government (BOFID 1991, s 18(2)).

Undue influence of bank owners and insiders abuse

Undue influence of bank owners and insiders abuse in the loan granting process is another cause of loan default. According to the Managing Director and Chief Executive of the Nigerian Deposit Insurance Corporation, John Ebhodaghe (1995: 18), until the 1990s, most of the Government-controlled or owned banks were treated as 'political banks'. Where this kind of arrangement exists, loans are advanced to borrowers in consideration for political patronage, and there is no incentive to recover such loans because the board members are usually Government supporters and/or party members.

With some 80% of the non-performing and bad debts of liquidated banks being granted to directors of such banks, the practice substantially accounted for their failure (Ebhodaghe, 1995: 18). Further, banks in this category often pursue inconsistent policies, because their board and key management staff change with the changes in the successive governments that control them.

Insider abuse is not limited to Government-owned banks. Even in privately owned banks, directors have granted loans to themselves in gross abuse of their positions. Usually there is no incentive to recover the loans. This abuse caused the distress of the four Nigerian banks liquidated by the Nigerian Deposit Insurance Corporation (NDIC) in 1995. The problem is especially acute in that the 'borrowers' often are incompetent

from the outset, and their default leaves the banks to face the prospect of unprofitable litigation. To curb insider abuses, relevant statutes now require that, among other things, insiders' interest in the loan must be disclosed.

A useful illustration of the problem is found in the cases of *Federal Republic of Nigeria v Christopher I Anyaegbunam* ((1997) 1 FBTR 1). Here the accused was convicted by the Failed Banks Tribunal because he stood on both sides of the loan transaction without disclosing his interest. The charges against him were as follows:

> [T]hat [the accused] ..., being a Director of Group Merchant Bank Limited, failed to disclose [his] interest in a two million naira (N2,000,000.00) credit facility granted to Cobik Supplies and Trading Company Limited in which [he has] substantial share holding interest contrary to section 11(7) of the Banks and Other Financial Institutions Decree of 1991.
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> That [the accused] ... being a Director of Group Merchant Bank Limited, Lagos failed to disclose [his] interest in a ... credit facility granted by a company, Group Merchant Bank Limited, to Cobik Supplies and Trading Company Limited, in which [he had] substantial share holding interest contrary to section 18(3) of the Banks and Other Financial Institutions Decree No 29 of 1991 and punishable under section 18(9) of the same Decree.

The accused was convicted and fined N100,000 in lieu of a three-year jail term because he had repaid the loan. However, had he been unable to repay the loan, the Tribunal had the power to confiscate his personal assets or those of the company in which he was substantially interested, and auction them to satisfy the indebtedness. In cases where the value realised from the assets was inadequate to satisfy the loan, the only alternative was imprisonment (ss 15(5) and 20(1) of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree 1994). In this situation the financial position of the lender is obviously worsened.

Wilful default

Loan default cases abound where borrowers who are able to repay bank loans wilfully refuse to do so. Often some bank managers have acquiesced in this unilateral repudiation of the loan obligations (Umoh, 1994: 33). The attendant result is that by the time recovery proceedings are initiated, so much interest has accrued that the value recoverable from the collateral becomes grossly inadequate.

Grant of credit without collateral security

Grant of credit facilities without collateral security is not only a violation of existing regulations, but also a major cause of loan default. Defaults of this kind often involve bank directors and managers standing on both sides of the transaction by which they granted credit facilities to themselves or corporations in which they are interested, as well as transactions in which they derived personal benefits.[2]

Information asymmetry

Information asymmetry is a frequent cause of loan default. Although the borrower has the intention and ability to repay the loan, lenders often do not have adequate

2 For a useful example, see *Federal Republic of Nigeria v Lord Chief Udensi Ifegwu and Ors* (1997) 1 FBTLR 43.

information to assess properly the borrower's creditworthiness. The collateral security should give the lenders such information, but this may be of little or no value where the collateral security is overvalued, the borrower diverts the loan to a venture that is not viable economically or, unknown to the lender, he or she is indebted to other creditors.

An independent valuation of the collateral security, as well as verification of the borrower's title, should reduce information asymmetry. However, it is often not easy to establish the validity of the borrower's title at the time the loan is granted, because although statutory registration preserves priority of interest, it may not rectify a defect in the borrower's title.

The absence of an adequate credit information system also hinders the credit decision-making process. The existing bank/customer confidentiality rules prevent flow of information to a central credit information system. In effect, loan defaulters are not afraid of loss of access to future credit as well as to credit from other lenders.

Interest rate policy

High interest and inflation rates inevitably increase loan obligations and cause repayment difficulties. Between 1995 and 1998, the prime lending rate (PLR) in Nigeria was an average 21%. As high as that rate was, the NDIC (1995: 1 at 4) believed that many banks exceeded the lending rates they displayed in their banking halls.

Bad and doubtful loans from banks have increased in volume over the years.[3] With this bad portfolio, it is expedient for banks in distress to charge high interest rates on their performing loans in order to make up for the income they lose on bad debts. The axiom, then, is that bank loans become even riskier, because the risky borrowers usually are the most willing to agree to pay high interest rates in order to avoid a formal default (Hutcheson, 1995).

The lesson is that high nominal interest rates may be a suitable response to the high budget deficit and high inflation that characterise the Nigerian economy as well as those of some other developing economies, but they lead to loan default. The result is that 'the banking system has slowly been losing the ability to perform its primary function, which is to mobilize savings and allocate them to the most profitable uses' (Hutcheson, 1995).

Ineffective judicial system

The judicial process in many developing countries is painfully slow, and thus a serious disincentive to debt recovery and debt repayment. It takes so long to dispose of suits, albeit debt recovery suits, that the value of an otherwise just judgment is depleted. In Nigeria, for instance, judges take notes of proceedings in long hand, a markedly unscientific process. Defendants stall the proceedings unduly through seeking unnecessary adjournments, and other abuses of court processes. As the Honorable T Akinola Aguda, a former Chief Justice of the defunct Western Nigeria and a former Chief Justice of Botswana, has noted (1986: 14–15):

> I have often made the point that it is no use singing 'justice delayed is justice denied' without our making deliberate efforts to correct the situation. The present incredibly slow process of

3 For instance, the volume rose to 45% by 1993 (Umoh, 1994: 38).

> judicial administration is frightening and oppressive ... A judicial system which can permit a simple case, for example, of wrongful termination of employment, to remain in the courts for over five years cannot be said to be running smoothly. Whatever happens at the end of such an aberration of court trial can hardly be said to be justice ... [W]e in this country appear not only to be totally immune to, and unaffected by the 20th century developments in technology all around us, but we appear satisfied to continue to live in the 19th century in so far as both our substantive and procedural law continue to operate a system of judicial administration which is totally and completely out-dated, for which reason it cannot enhance any search for true justice.[4]

With increasing litigation, the situation is getting worse. This prompted the defunct Federal Military Government of Nigeria to set up special tribunals to try special cases, including debt recovery matters.

An inefficient judicial system is not limited to Nigeria, or to Africa for that matter, but seems also to pervade the developing countries of Latin America and Eastern Europe (Dakolias and Said, 1999). A recent World Bank survey has identified an inefficient judiciary as one of the nightmares of foreign investors (Dakolias and Said, 1999: 1) and noted that in a recent poll 'more than 90% of businesses cited delay as the main problem of the judiciary in Brazil ... [while] 66% stated that judicial uncertainty directly harmed their business' (Pinheiro, 1998: 2).

In a 1994 survey, 82% of merchant banks and 72% of commercial banks concluded, from their experience, that the judicial system was inefficient in debt recovery issues. The survey stated that 'delays not only erode public confidence in the courts, but they also undermine the entire system of judicial process' (Umoh, 1994: 38). A retired Judge of the Supreme Court of Nigeria has identified applications for amendment of pleadings and failure to identify issues as two principal causes of delay in the judicial process. Offering a solution, he said (Oputa, 1993):

> If pleadings are properly filed and issues for determination are accurately and clearly identified, no bank debt case will last more than a day or two. It is well known that a bulk of the evidence in bank debt cases is documentary. With proper pleading these documents should be admitted on both sides. If evidence is documentary and in the main not disputed, the judge should rule out a full hearing.

Law enforcement problems

Inadequate law enforcement and corrupt practices among law enforcement agents also encourage loan default. There are cases where law enforcement agents assisted bank officials and borrowers who defrauded banks to escape justice. These encourage fraudsters within and outside the banks to regard 'bank money ... as everyone's money to be taken by whoever is opportuned [*sic*]' (Umoh, 1994: 39).

4 The procedural history of *R Ariori and Ors v Muraino Elemo and Ors* (1983) 1 SCNLR 1 illustrates the point. Here the plaintiff filed the action on 15 October 1960. Trial began in the High Court on 18 November 1964, but it was not concluded until 18 July 1974, when the court dismissed the plaintiff's claim. The plaintiff's appeal succeeded at the Federal Court of Appeal (now Court of Appeal). Consequently, the defendants appealed to the Supreme Court, which gave judgment on 21 January 1983, remanding the case for retrial more than 22 years after the action was commenced.

Government ownership of banks

Government ownership of banks contributes to debt default and bank distress. Unlike most privately owned banks, available information indicates that most Government-owned Nigerian banks are in distress (Hutcheson, 1995). Both the Federal Government and the states are heavily indebted to these banks, and a significant portion of the loans are uneconomic loans (Hutcheson, 1995). Those merchant banks owned by the Federal Government, as well as most of the commercial banks owned by the state governments, that failed in the 1990s did so largely because of the debts the respective controlling governments owed them. Yet the affected state governments clamoured insistently for their continued control of the failed banks (Hutcheson, 1995). It is hoped that the privatisation program of the democratic Government of Nigeria will solve the problems associated with Government ownership of banks. If the ones that are going concerns are privatised, and there is no restriction of secondary trading in their shares, market forces should go a long way to ensure managerial discipline and efficiency.

Inefficient financial system supervision

In addition to the factors discussed above, inefficient supervision of the financial system by the monetary authorities seems to have contributed to the problems of the Nigerian banking system. The financial system liberalisation of the last decade appears not to have received adequate supervisory oversight, and the proliferation of banks did not result in a corresponding increased supervisory effort.

In the late 1980s, the Nigerian Government initiated positive reforms to promote financial market competition and more efficient financial intermediation. The Nigeria Deposit Insurance Corporation was established in 1989, while in the early 1990s the Central Bank of Nigeria (CBN) released new prudential guidelines for banks and the Federal Government promulgated the Central Bank of Nigeria Decree 1991, as well as the Banks and Other Financial Institutions Decree 1991. These provide the current legal framework.

Despite these laudable reforms, the CBN issued banking licences to incompetent proprietors of doubtful character. The rush for banking licences was due to a foreign exchange policy that encouraged speculation and reckless exchange rate arbitraging (Hutcheson, 1995). It is submitted that this lapse led to insider abuses of the loan granting process, excessive risk taking by financial institutions, fraud and loan default, as well as bank distress of the magnitude that occurred in Nigeria. The nature of most of the loan defaults makes this conclusion inevitable (see, eg, *The Federal Republic of Nigeria v Lord Chief Udensi Ifegwu and Ors*, above).

Debt default and bank failure

Within the past decade, many Nigerian banks have failed. In the third quarter of 1995 alone, the Central Bank of Nigeria declared 17 Nigerian banks distressed and, jointly with the Nigeria Deposit Insurance Corporation (NDIC), assumed their control and management (NDIC, 1995: 12). The shareholders of the distressed banks had 30 days to recapitalise the banks. At the same time, the CBN initiated action to sell six other state government-owned banks. These and other similar banks were later sold.

By the end of 1995, the Managing Director/Chief Executive of the NDIC reported that:

> ... fifty-seven commercial and merchant banks were severely distressed and the prospect of reviving them [was] gloomy ... In these banks, N47.9 billion or 24.6 percent of the entire banking system's total deposits were ... locked up. The total assets of these banks stood at N68.5 billion and accounted for 18.3 percent of the assets of all banks [Ebhodaghe, 1995: 15–16].

While the insurance fund risk exposure to these banks was N30.6 billion, the Deposit Insurance Fund (DIF) was only N6 billion (Ebhodaghe, 1995). Nigeria was faced with bank failure.

The NDIC identified some factors as responsible for the failure of these banks. They included the downturn of the Nigerian economy, policies that inhibited banks from adapting to changing market conditions associated with the financial market deregulation, capital inadequacy, poor management of the banks, and the bank owners' undue interference in the loan granting process (Ebhodaghe, 1995: 15–17). Poor management of these banks resulted in excessive risk-taking, inefficient administration of loan portfolios, poor credit policies or failure to execute existing good credit policies, weak internal control systems, 'overly aggressive growth policies, interest rate speculation, as well as other poor judgments' (Ebhodaghe, 1995: 17).

Many borrowers in Nigeria – private, corporate governmental defaulted in their loan servicing and repayment obligations. In addition to the default factors discussed in the first segment of this part, the adverse economic condition in the country since the 1980s gave impetus to the distress of the financial system. Inflation reached double digits, the local currency depreciated in value, fiscal deficit as well as external debts increased, the depreciating value of the local currency drove up manufacturing foreign input costs and led to domestic capacity under-utilisation, the unemployment level rose and the growth rate fell. Consequently, borrowers, especially the corporate ones, began a continuing thread of loans and advances obligation default (Ebhodaghe, 1995: 16). In the process, many good loans became delinquent. While this trend continued, many of the banks were undercapitalised. Had they been adequately capitalised, they probably would have been able to absorb abnormal losses not covered by current earnings and regained equilibrium. However, a huge portfolio of non-performing loans eroded their inadequate capital base (Ebhodaghe, 1995: 17).

Implications of bank failures for the economy

Systemic failure of the financial system is the most potent adverse consequence of bank failure. In a depressed economy like that of Nigeria, the likelihood assumes a very dangerous dimension. As bank runs spread, the survival of the healthy ones is threatened (Ebhodaghe, 1995: 25).

The Nigerian experience is a vicious circular recurrence of some of the factors that led to the failure of 21 out of the 24 indigenous banks between 1929 and 1952. The factors included reckless mismanagement of the depositors' funds, politicisation of loans and advances, and the refusal of borrowers to honour their loan obligations, even though they had the means to do so (Ebhodaghe, 1995: 21). Within the past decade, banks have suffered board and management insider abuse, 'empire building', reckless interest and

exchange rates arbitraging, the proliferation of banks as well as shortage of qualitative manpower. Because of insider abuses, banks falsify returns to the regulatory authorities. Loans that are granted in breach of regulations remain unpaid (Ebhodaghe, 1995: 21–22). The speed and contagion of failure erode public confidence in the banking system. This leads to demonetisations of the economy. Investors shift portfolios to safer assets such as treasury bills and foreign currencies. Added to this is capital flight (Ebhodaghe, 1995: 22).

At the macroeconomic level, bank failure impairs the intermediation role of banks. Bank loans do not flow to the real sector of the economy. The GNP falls while unemployment and prices rise. This trend is particularly devastating to developing countries like Nigeria, where poverty is rife and about 60% of the work force is employed in the primary sector.

The ability of banks to grant new loans is also limited. Thus, they tend to give short-term loans and advances to finance foreign exchange purchase as well as commerce. The productive sector, such as manufacturing and agriculture, is crowded out. Therefore, the economy continues down the slope of depression (Ebhodaghe, 1995: 23). Worse still is the plight of the poor, who cannot obtain bank loans because they have no real property to secure them. Bank failure also disrupts the payment and settlements system and hampers the intermediation role of banks. Banks then cease to function effectively in their role as the vital link between the real and the financial sector. When the oldest indigenous bank, the National Bank of Nigeria, failed in 1990, this writer was one of the customers led by that failure to default in their obligations to the other sectors of the economy. The published list of the failed bank's major debtors showed that most of them were politicians and party members of the state governments that owned the banks.

Lastly, bank failures often lock up offshore funds, and ultimately may result in their loss. This drives off foreign investment and results in capital flight. At the very least, foreigners who must do business in the country use foreign banks. The Asian financial crisis aptly illustrates this trend. The relevant governments, in furtherance of their national development policies, 'saddled their banks with uneconomical loans'. Foreign investors gave much credit to Asian financial institutions because of the prevailing high interest rate, as well as the belief that governments backed their bank deposits. Once the weakness of the financial institutions became obvious, the foreign investors pulled out in droves and precipitated the crisis (Eicheengreen, 1996: 189–90).

THE LEGAL FRAMEWORK FOR DEBT RECOVERY

The legal responses to debt recovery include banking regulation, the creation and foreclosure of collateral securities, recovery through judicial proceedings as well as alternative special judicial tribunals, the application of insolvency law, contract enforcement, and the corporate limited liability device. A critical appraisal of these responses is necessary because debt default continues to plague the financial system. The analysis that follows evaluates the responses with a view to suggested reforms.

Banking reform

In the light of the financial liberalisation of Nigeria in the late 1980s, the Banking Act of 1969 became obsolete. The then Federal Military Government of the Republic of Nigeria thus enacted the current legal framework for the regulation of banks and other financial institutions. Two related Decrees, the Central Bank of Nigeria Decree (CBN Decree) and the Banks and Other Financial Institutions Decree (BOFID), seek to ensure the overall safety and soundness of the financial system.

Among other things, the CBN Decree charges the Central Bank (CBN) with the promotion of a sound financial system and monetary stability in Nigeria. Consequently, it supervises banks and other financial institutions. Both the CBN Decree and BOFID seek to ensure sound banking practices, a high standard of conduct by bank management, to curtail excessive risk-taking by banks, as well as to reduce the growing non-performing debt portfolio of banks. In the exercise of its power to make monetary and banking policy, the CBN prescribes the minimum paid-up capital as well as the risk-weighted capital ratio for banks in order to limit their excessive risk-taking (CBN Decree, s 39). In addition, it may by circular require banks to maintain cash reserves, specified liquid assets, special deposits, and stabilisation securities. The CBN may, at its discretion, categorise the reserves according to the periodic deposit liability of each bank (CBN Decree, s 39(2)(3)). For these purposes, it may require periodic 'true and correct statement[s] showing the position of the deposit liability of the bank' (CBN Decree, s 39(3)) as well as a statement, within a reasonable time, of due compliance by the bank with the cash reserves, special deposits, liquid assets, and stabilisation securities requirement (BOFID, s 15(5)). Whenever the capital funds of any bank, in relation to all its assets and liabilities as stipulated by the CBN, are impaired by losses, the CBN may revoke its licence (BOFID, s 14). The CBN also has the power to cap the aggregate amount of loans, advances, and discounts which banks may grant, as well as the total volume of such that may be outstanding at any time. The lending bank must submit to the CBN for approval applications for loans that exceed certain limits (CBN Decree, s 39(5)).

The BOFID defines the concept of related parties in order to limit a bank's total credit exposure to a single party (s 20(1)(a)). No bank shall without the written permission of the CBN, 'grant to any person any advance, loan or credit facility or give any financial guarantee or incur liability on behalf of any person' the total value of which shall exceed 20%, or in the case of a merchant bank 50% of the shareholders fund unimpaired by losses (s 20(1)(a)). It is surprising, however, that the BOFID defines related parties as '... any subsidiaries or associates of a body corporate'. The Decree, for reasons hard to understand, leaves out parties who are related to natural persons. It is submitted that banks may exploit this omission to make excessive loans to natural persons. It is high time the gap was filled.

In order to secure compliance with these provisions, the CBN may prohibit a defaulting bank from granting new loans and from undertaking new investments until the defaulter complies. In addition, the defaulter is liable on conviction to a fine of N500,000 (US$5,000) for every month during which the default continues (BOFID, s 39(7)). Any bank that furnishes false information to the CBN is liable on conviction to a minimum fine of N100,000 (US$1,000) in the first instance, and to a fine of N200,000 (US$2,000) for every subsequent violation (BOFID, s 39(8)). Officials who grant loans in

violation of these provisions are liable on conviction to a fine of N100,000 (US$1,000) or to imprisonment for a term of three years (BOFID, s 18(2)). These provisions are a cause for concern. Considering the risk factor of loans granted in excess of the CBN limit, and the fatal damage they can cause the lending bank before regulators detect them, it is submitted that prison terms of the offending officer be without the option of fine, and that the fine liability of the bank be made stiffer.

The CBN has extensive powers for the promotion of 'monetary stability and a sound financial system in Nigeria' (CBN Decree, s 2(c)). Therefore, it may compile and circulate to all banks the list of all bad debtors discovered by its bank examiners (CBN Decree, s 52)). This important power should be broadened to enable banks to exchange timely information with one another so as to bar loan defaulters from access to future credit. Banks should be able to exchange information on loan portfolios of borrowers generally in order to make an informed judgment of pending credit facilities.

In order to curb insider abuse, the BOFID prohibits the undisclosed direct or indirect interest of bank managers in the advances, loans or other credit facilities the bank grants. The interested party must disclose the nature of his interest to the board of directors of the lending bank as soon as that interest arises (CBN Decree, s 18(1)(a)). No disclosure is necessary where the interest of the party is less than 5% of the shareholding in the borrowing company (CBN Decree, s 18(3)). Any manager who contravenes these provisions is guilty of an offence, and on conviction liable to a fine of N100,000 (US$1,000). In addition, any gains or benefits derived from the transaction are forfeit to the Federal Government.

In all the transactions that require disclosure of interest, the board of the bank has the discretion to determine the materiality of the interest disclosed (CBN Decree, s 18(3)). In the light of this, the real likelihood of abuse is by the board itself, particularly the board of a close corporation (private limited liability) bank.[5] No matter the penalty statutes prescribe for such an abuse, it seems better to require borrowers to seek loans elsewhere, or to obtain the approval of the CBN after a full disclosure of the facts of the transaction.

The BOFID further provides that a bank shall not, without the approval of the CBN, grant unsecured advances, loans or other unsecured credit facilities in excess of N50,000 (US$500) to its directors or any firm, partnership or company in which any of the directors is interested. Advances to any employee of the bank must not exceed one-year emoluments (BOFID, s 20(2)). If a bank breaches this provision, all its directors are liable jointly and severally to indemnify the bank against consequential losses (BOFID, s 20(6)).

In 1994, the Federal Government enacted the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree (1994, No 18, hereinafter referred to as Failed Banks Decree) in response to the endemic debt problem that plagued the Nigerian financial system. Among other things, the Decree penalises the grant or approval by banks of unsecured and inadequately secured loans, loans granted in excess of the statutory limit or in breach of regulatory procedures, as well as loan frauds. A bank director, manager, officer or employee is criminally liable to up to five years' imprisonment as well as forfeiture of all his or her assets, if he or she 'knowingly,

5 See *Federal Republic of Nigeria v Lord Chief Udensi Ifegwu and Ors* (1997) 1 FBTLR 43.

recklessly, negligently, willfully or otherwise' grants or approves, as the case may be, a loan or other credit facility to any person:

(i) without adequate security or collateral, contrary to the accepted practice or the bank's regulations, or

(ii) with no security or collateral where such security or collateral is normally required in accordance with the bank's regulations, or

(iii) with a defective security or collateral, or

(iv) without perfecting, through his negligence or otherwise, a security or collateral obtained ... [Failed Banks Decree, s 19(1)(a)].

Such persons are equally liable for loans granted or approved in excess of statutory limits, as well as in contravention of regulatory procedure, whether they received gratuities for the grant or approval, or recklessly waived interest or principal repayment where the borrower is able to pay (Failed Banks Decree, s 19(1)(a)).

Considering the importance attached by statute to the adequacy of collateral securities, it is important to stipulate by statute the use of independent appraisers and appraisal standards to be certified by the CBN. This will establish clear rules and check the inflation of real estate values by borrowers and bank insiders in order to secure higher loans.

The judicial process and alternative tribunals

In response to the slow functioning of the Nigerian judicial system, s 1 of the Failed Banks Decree established the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Tribunal (Failed Banks Tribunal) in 1994. In May 1999, the Tribunals (Certain Consequential Amendments, Etc) Decree (s 2) transferred the Tribunal's jurisdiction to the Federal High Court (FHC). The FHC is empowered to recover all the debts owed by individuals or corporate entities that arose in the ordinary course of business and remain outstanding on the date the bank is closed or declared failed by the CBN (1999, No 62, s 3(1)(a)). The FHC has jurisdiction to recover such debts 'notwithstanding anything to the contrary in any law, deed, agreement or memorandum of understanding' (1999, No 62, s 9).

The receiver or liquidator of the failed bank must apply to the FHC for the recovery of the debt. Where the bank has no such receiver or liquidator, a person authorised by the CBN or the Nigeria Deposit Insurance Corporation brings the application before the FHC. Section 12 of the Failed Banks Decree then provides that if the debtor admits the indebtedness, the FHC shall give him or her 30 days to pay the principal and whatever interest has accrued. If this is done, the FHC issues a clearance certificate, and releases all the properties as well as documents pledged as security for the loan. If at the debtor's option the issue is tried, and the FHC finds him or her liable, he or she must pay the debt as well as the accrued interest within the time specified by the FHC. Otherwise, the FHC levies execution on the debtor's properties and sells them through the receiver or liquidator of the bank to satisfy the debt obligation and the expenses that the receiver or liquidator incurred in the recovery action (ss 13–15(5)(a)).

Section 15(5)(b) of the Failed Banks Decree provides that where the debtor is a body corporate, a partnership or other association of individuals, the FHC may levy execution on and sell its property even if the Companies and Allied Matters Act (Laws of the

Federation of Nigeria (1990: Cap 59)) or any other relevant statute provides otherwise. If the sum realised from the sale does not discharge the debt, the FHC may impound and sell the personal properties of the directors and other officers to discharge the outstanding portion (1999, No 62, s 7). However, in relation to a company, the FHC may exercise the latter power only if the company took the loan for a specific purpose and, with the intention to defraud the lender, expended it on a different purpose (see also Laws of the Federation of Nigeria (1990: Cap 59, s 290). It is presumed that the statute is silent on the applicability of the latter condition to a partnership and to a group of individuals since the partners and officers, as the case may be, are the guarantors of their indebtedness. Consequently, the FHC may in all situations of default impose the association's liability on them.

Under s 7 of the Failed Banks Decree, in a debt recovery suit, once a *prima facie* claim is made out against the borrower, the FHC may order the preservation of that borrower's properties. A natural person borrower who violates the order is liable on conviction to between two and five years' imprisonment without the option of a fine. A body corporate in breach is liable to a fine of a sum equal to twice the value of the property in question, or N100,000 (US$1,000), whichever is the greater. A fraudulent concealment by the debtor of his or her identity in order to avoid repayment obligations is an offence punishable with a three- to five-year jail term (s 19(2)).

Where the security the debtor pledged to the bank is inadequate, or none was pledged, or the bank cannot find the debtor, the FHC must hold liable to repay the outstanding loan the directors, partners, shareholders, managers, officers and other employees of the bank. In order to escape liability, the latter must prove that they never consented to the grant of the loan (s 16). The FHC has power to try any director, manager, officer or employee of any bank for granting loans, advances or any other credit facility, giving guarantees or any financial accommodation that violates the BOFID, the CBN Decree, the Nigeria Deposit Insurance Corporation Decree (1988, No 22) or the Failed Banks Decree. Here the prosecution must prove that the act was done 'knowingly, recklessly, negligently, willfully, or otherwise' (s 3(1)(b) and (c)).

In addition to the issues and offences above, the FHC also has jurisdiction to 'try other offences relating to the business or operation of a bank under any enactment' (s 3(1)(d)). This omnibus provision seems to vest in the FHC jurisdiction over the recovery of all debts granted in violation of bank regulations, even where the lending bank is a going concern.

Lastly, the FHC may lift the veil of a corporate debtor to subject its members, directors or officers to joint or several liabilities for the corporate debt (s 3(3)(b)). If a company is guilty of any crime under the Failed Banks Decree, the director, manager, secretary or other person who acted for the entity in the criminal transaction, or who aided or abetted the commission of the crime, is liable to a jail term as well as to the forfeiture of their personal assets.

Insolvency law

Bankruptcy proceedings are rare in Nigeria even though the Bankruptcy Act has been on the statute book since 1979. The primary reason for this could be the absence of formal

credit financing for purchases of goods and services, since most purchases are made in cash, or by way of informal credit based on a personal relationship between the seller and the purchaser. While the social stigma of bankruptcy and peer group monitoring provide the debtor with the incentive to pay, the slow judicial system could be an added reason why creditors as well as debtors rarely file for bankruptcy.

The Bankruptcy Act deals with proceedings where a natural person or a partnership is the debtor. It seems, however, that where the receiver or liquidator of a failed bank sues the person or partnership for a debt owed to a failed bank, the Failed Banks Decree applies, '[n]otwithstanding anything to the contrary in any law, deed, agreement or memorandum of understanding' (Failed Banks Decree, s 3(1) and 9). If, in violation of the FHC judgment, the debtor fails to pay the debt within 30 days, the receiver or liquidator of the failed bank has the power to sell the debtor's properties in satisfaction of the debt. The question then is: can the debtor file for bankruptcy concerning the debt or that portion of the debt which the receiver or liquidator could not recover from the sale of the debtor's assets? If so, the debtor should then be able 'to make a proposal for a composition in satisfaction of [their] debts or a proposal for a scheme of arrangement of [their] affairs' to the bank by virtue of s 18(1) of the Bankruptcy Act. However, in the light of the seemingly absolute power of the receiver or liquidator of a failed bank to sell the debtor's property in satisfaction of the debt, the debtor may have been deprived of the options of composition or arrangement with the failed bank. While that may be necessary in the case of fraudulent borrowers, it is submitted that other debtors who genuinely are unable to pay the failed bank should have these options. Where the bank is a going concern, the debtor may propose to the bank a compromise or a scheme of arrangement towards the repayment of the debt and the management of his or her affairs. The bank should explore that possibility since it enhances its chances of recovering the outstanding indebtedness. It also offers a debtor who genuinely is unable to repay a debt on schedule a new 'lease of life'.

The Failed Banks Decree deals extensively with the recovery of the debts owed to a failed bank. It also may be said to deal with the recovery of debts owed to a bank that is a going concern arising from the grant of credit facilities in violation of bank regulations. The corporate insolvency provisions of the Companies and Allied Matters Act 1990 (CAMA) also provide other corporate debt recovery procedures. A creditor of a company is entitled to realise any security the company gives according to the terms of the loan document if the latter defaults on the payment of the principal, premium or interest, or fails to perform any other obligation of the loan (CAMA, s 208(1)(a) and (b)). Once the right accrues, the creditor may appoint a receiver of any asset subject to a mortgage or security given by the borrower (CAMA, s 209(1)). The receiver may, subject to the terms of the loan document, sue the company in a representative capacity to recover the loan or enforce the security, and may realise the security through foreclosure or through a winding-up suit (CAMA, s 209(2)). Further, the receiver is entitled to take possession of the secured properties. Where, according to the terms of the loan document, the receiver is appointed in relation to the whole or most of the assets of the company, he or she, as well as the manager, may manage the affairs of the company to the exclusion of its board of directors (CAMA, s 393(1) and (3)).

As an improvement upon this procedure, the law should permit debtors who are willing to repay to reach an agreement with the creditor. This agreement may suspend

repayment for a period of time in order to allow the debtor to consolidate under the management and supervision of the creditor. The Indonesian Jakarta Initiative provides a helpful example (Schreiber, 1999). In the wake of the Asian financial crises, the Indonesian Government, banks and other institutions introduced by statute the Jakarta Initiative in order to give creditors and debtors the framework to restructure debt obligations. The Initiative was to stimulate the revival of the Indonesian private sector (Schreiber, 1999: 373–74). The framework encourages out-of-court settlement of debt matters, as well as the possibility of corporate restructuring through the assistance of experienced financial advisers. In order to stimulate the debtor's recovery, the parties may also suspend the debtor's repayment obligation, provide interim working capital for the business of the debtor (Schreiber, 1999: 376). The debtor bears the cost of the restructuring and presents to the creditor a business and debt repayment plan (Schreiber, 1999: 377).

Creation and realisation of collateral securities

In Nigeria as well as in some other developing countries, real property is a major security. The Nigerian Land Use Act 1990 (LUA) vests all urban lands within each state in the governor of that state to be held on trust for the people, and vests the control and management of all other lands in the local government of the jurisdiction where the land is situated. The governor may under s 5(1) of the Act grant to all applicants and for all purposes statutory rights of occupancy in respect of all the urban lands in the state. Further, s 6(1) authorises the local government to grant customary rights of occupancy to all applicants in respect of all other lands. The grants are contained in certificates of occupancy. These certificates are title documents that banks favour as evidence of real estate collateral security. The land registry of each of the 36 states in the Federation registers these certificates before it issues them to the holders, as ss 4 and 48 of the LUA provide. The registry also registers them as collateral security for loans. However, the borrower must obtain the consent of the relevant governor in order to mortgage, assign or otherwise transfer the possession of the real property subject matter of the certificate of occupancy (LUA, ss 21 and 22).

As mentioned earlier, banking legislation generally obliges banks to grant loans subject to collateral security. In addition, the registration of the security also should give creditors access to information about the borrower, the existing encumbrances (if any) on the property, as well as priority of the creditor's interest. It also ought to enable the creditor to verify the borrower's title and assess his or her creditworthiness (Cranston, 1995: 779). Despite the consequential advantages of collateral security, it has been observed that a heavy reliance on it often leads the creditor to inadequately appraise the loan. In addition, the depreciation of the collateral value has caused the distress of a number of banks (Cranston, 1995: 779). A further problem is that the demand for real estate collateral security deprives many in developing countries of access to bank credit, since they cannot furnish such collateral due to poverty.

The problem of a slow judicial process was noted earlier. Nigeria has responded by providing for 'fast-track' trials in the FHC for debt recovery where the creditor is a failed bank. Since the FHC also has the power to try other debt recovery cases, it is submitted that the law should set a short time limit for the disposal of such cases. In addition, where the

creditor is a bank that is a going concern, the law should allow in loan agreements extra-judicial security realisation clauses under the supervision of an accredited judicial officer.

In some developing countries such as Indonesia, India and Malaysia, creditors also take 'possessory security' to grant loans. This involves taking possession of the goods and personal properties the borrower pledged for the loan, and releasing them to the latter periodically according to the terms of the loan agreement. Developing countries could use the 'possessory security' device as an alternative to real property collateral for loans to natural persons, whether they be individuals or groups, who do not have real property but do have viable business pursuits. Another useful device is group lending coupled with peer monitoring, similar to that operated by the Grameen Bank of Bangladesh. Dr Muhammed Yunus established the Grammen Bank of Bangladesh in 1993. The Bank gives loans to the rural poor, particularly women, on liberal terms that exclude collaterisation. The loan beneficiaries, who are in small groups, undertake to guarantee the loans given by the Bank to the members of the group, as well as to monitor the latter's activities (Khandker and Khan, 1995: ix). The Bank has set guidelines of activities, as well as a code of conduct for the borrowers. It offers them organisational support to enable them to use their funds efficiently and productively (Khandker and Khan, 1995: ix). It gives individual as well as group loans. Individuals must repay their loans within one year. These loans enable the recipients to generate income, attain better living standards and build self-esteem. Within a decade of its establishment, the Bank provided the funding and technical support needs of half of rural Bangladesh (Khandker and Khan, 1995: ix). It now gives technology loans and housing loans. The Grameen Bank consistently has more than a 90% loan recovery rate, which is one of the highest among development finance institutions that provide rural credit (Khandker and Khan, 1995: ix). The loan recovery success of the Bank is due to peer monitoring that facilitates the flow of adequate information, and relatively easy and reliable risk evaluation, which limits default. The loan beneficiaries operate within a framework of group social control that persuades them to be prudent and compliant. Generally, the fear of denial of access to credit and the social stigma of default give the borrowers the incentive to repay loans. This approach is one that Nigeria would do well to consider emulating.

Corporate debt obligations

The principle of limited liability has in some situations served as a disincentive to pay corporate debts. This is because, traditionally, the corporation is the guarantor of its indebtedness, and the shareholders are liable only to the limit of the value of their shares. Because of the likelihood of management overreaching, which may dissipate the assets of the company, creditors may require directors to provide, by self-enforcing contractual undertakings, additional guarantees for the company's debts. This, coupled with all the safeguards in company statutes, should encourage prudent and efficient management.

In addition to the safeguards above, the creditor should monitor the performance of the borrower during the duration of the loan. The creditor may require in the loan contract periodic reports on the financial health of the borrower, failing which certain penalty measures will be taken against the borrower. The penalty measures may include the suspension of further credit (Cranston, 1995: 777). Some creditors, especially banks, may elect to have a representative on the board of the borrower. Others may elect not to

for fear of being tainted if the borrower becomes insolvent, or because they cannot afford the manpower required (Cranston, 1995: 777).

TOWARDS MORE REFORMS

The legal framework for debt recovery continues to develop because debt default factors are dynamic. It seems that most of the most significant reforms so far are *ex post* recovery procedures after the damage is done. However, key elements of the reforms also should address the problem *ex ante*. Because it is important to minimize debt default, if its elimination proves intractable, ongoing and future reforms should seek first to facilitate debt repayment, and residually to penalise default.

The following areas deserve constructive and concerted attention.

Enforcement of banking regulations and monitoring of bank officials

Bank supervisors must be diligent in their duties. It also is necessary to supervise the supervisors. In Nigeria as well as in some other developing countries, bank statutes are extensive. However, there still are cases of insider abuse of loan granting procedures, loan frauds and the grant of loans in violation of other banking regulations. The central monetary authorities should ensure diligent supervision of banks, as well as penalising breaches of prudential guidelines and statutes timeously.

The consequence of loan default should provide an incentive to repay. Borrowers who know that any default will likely lose them access to future credit are likely to strive to repay the loan. The central monetary authority should circulate among banks a list of bad debtors. In addition, banks should also circulate among themselves information about debtors. Prospective borrowers should be made to waive in writing bank/customer confidentiality in order to enable banks to exchange information about them and to publish their names in the event of default. Banks should require borrowers to disclose their total loan exposure. They should also use credit agencies, who by law should have unlimited access to information relating to borrowers' creditworthiness.

Debts by corporations inevitably will require collateral security of some sort. Therefore, in order to ensure proper valuation of collateral securities, the monetary authorities should provide standard appraisal and valuation measures and license the appraisers. This will provide banks with clear rules and compliance mechanisms. Further, members of the management team, as well as the directors, particularly of close corporation or private limited liability banks, should be made to seek loans outside the corporation, or be compelled to obtain the approval of the Central Bank for internal loans after they have disclosed all the material facts of the transaction.

Privatisation of Government-owned banks

Government-owned commercial and merchant banks should be privatised without exception. Market discipline will engender efficient management and rid these banks of uneconomic loans.

De-emphasise real property collateral security

In order to alleviate poverty through primary sector development, developing countries should adopt the individual and group lending system of the Grameen Bank of Bangladesh. This system is most suited to non-corporation lending. Loans given under this system are not guaranteed by real property collateral security but by peer monitoring and social control, whereby the larger group is held accountable to monitor each borrower within the group and ensure repayment of the loan. In the alternative, possessory security may be used where practicable. The financial system should lean towards de-emphasising real property collateral security in order to alleviate the poverty of the people through a scheme that encourages self-employment. Development and poverty alleviation are of the utmost importance, especially to developing countries with a high rate of unemployment. Therefore, these countries should promote a banking system that also offers rural credit based on peer monitoring and social control.

Judicial system reform

The judicial system should be reformed to facilitate the quick dispatch of cases and the overall administration of justice. Borrowers faced with the possibility of a quick attachment and sale of their property, and erring management faced with certain and swift prosecution, are likely to take their obligations seriously. An efficient judicial system should facilitate the prompt determination of the contractual rights of the parties in disputes generally, and particularly where the parties have a self-enforcing agreement.

Review of insolvency law and proceedings

Where a borrower is genuinely unable to repay, insolvency law should encourage debt restructuring. The Jakarta Initiative provides a model of corporate and debt restructuring that involves the creditor and the borrower in a cooperation that revitalises the borrower's business. While the borrower presents a business and repayment plan and bears the cost of restructuring, the lender provides interim working capital and suspends debt repayment for an agreed period.

Easing the burden of collateral realisation

Self-enforcing agreements and a speedy judicial process go a long way to easing the burden of collateral realisation. While lawyers take great pains to draft and execute the agreements, the debtor may be protected from the enforcement process by ensuring that the creditor effects the realisation under the supervision of an accredited judicial officer. It is important that the court does not allow technical terms to defeat the parties' real intention.

Review of corporate limited liability

Making directors and management the guarantors of corporate indebtedness goes a long a way towards ensuring probity and preventing financial overreaching. This contractual

device should be broadened to impose additional liability for the corporate debt on controlling persons.

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