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Comprehending and resolving the challenges of the Nigerian insolvency law in practice: the performance improvement approach

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ABSTRACT

Meaningful legal change requires the transformation of the law in practice, a dimension that has received limited attention in existing insolvency scholarship. A critical aspect of insolvency law in practice is the regulation of insolvency practitioners, who are often blamed for the failure to deliver on the objectives of the law. The article argues that this charge may be misplaced and that the usual regulatory responses such as training and barriers to entry are too narrow to be effective responses. It asserts that the challenges of practice should be identified through systematic and systemic investigations informed by relevant data. For that reason, it proposes the use of performance improvement frameworks as investigative tools. It demonstrates their utility through an application to the Nigerian context. By offering a structured, inclusive, and data-driven approach, the article provides a valuable tool that can be used in any jurisdiction to advance research and policy in this emerging aspect of insolvency scholarship.

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KEYWORDS Insolvency law in practice; insolvency and performance improvement; insolvency law reform in Nigeria

1. Introduction

Insolvency law reform has taken hold globally, with emerging economies now actively updating outdated insolvency laws alongside developed nations.[1] These reforms focus primarily on the letter of the law.[2] However,

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[1]For example, 'Insolvency Law Reform and Developing Countries in Africa', <https://aclrh.net/category/clrnnspotlight/> accessed 8 February 2024.
[2]There is a changing trend, however.

reforming the law on the books alone is unlikely to drive meaningful change without a corresponding change in the practice.[3] Yet, insolvency scholarship has paid considerably more attention to the law on the books than it has to the law in practice. This oversight is compounded by a scarcity of relevant data on practice outcomes in many countries. In response to both concerns, the article introduces a comprehensive framework designed to advance research and policy in this emerging area of insolvency scholarship.[4] It also delivers reliable insights into the insolvency practice of a major emerging economy in Africa.[5]

Law in practice is particularly critical for administratively organised insolvency systems. In such systems – common to common-law countries influenced by the model of England and Wales – the role of the court is minimised, with substantial control legally or contractually shifted to powerful creditors and/or practitioners.[6] The perceived failures of such systems in achieving their stated objectives are often attributed, amongst others, to practitioner shortcomings.[7] This leads such systems to impose entry barriers and training requirements to ensure that only fit practitioners are appointed.[8] While this article acknowledges the importance of such measures, it argues that their scope remains too narrow to deliver the desired change in practice. A focus on the perceived or even real shortcomings of practitioners overlooks important systemic issues that impact their actions. Moreover, insolvency scholarship has paid limited attention to the desired qualities of practitioners.[9] Accordingly, the article advocates for a systematic and systemic investigation of the law in practice as the essential first step to designing contextually fit solutions that drive real change.

The article offers a structured, inclusive and data-driven approach to diagnosing and addressing the challenges of insolvency law in practice. It frames the challenges of insolvency law in practice as performance challenges – arising from the discrepancy between the actual outcomes of the law and its intended objectives.[10] It argues that resolving this discrepancy also

[3]On the law and practice dichotomy: Bruce Carruthers and Terrence Halliday, *Rescuing Business: The Making of corporate Bankruptcy Law in England and the United States* (OUP 2003), Ch 2.

[4]On Insolvency Law in Practice as an emerging area of research: Rosalind Mason, 'Insolvency Academics Contributing to the Review of Insolvency Laws: An Australian Perspective' (2015) 3 NIBLeJ 14.

[5]For insights on the law on the books in emerging economies: Aurelio Gurrea-Martinez, *Reinventing Insolvency Law in Emerging Economies* (CUP 2024).

[6]John Armour and Sandra Frisby, 'Rethinking Receivership' (2001) 21 OJLS 73.

[7]For a similar point, Elizabeth Streten, 'Insolvency Practitioners: A Phenomenological Study' (2021) 29 Insolv LJ 83.

[8]The barriers were introduced in England and Wales following the recommendations of the Cork Committee. Insolvency Law and Practice: Report of the Review Committee (Cmnd 8558, 1982) para 756.

[9]An interesting conversation on this is underway in South Africa. See, for example: Rajaram Rajaram and Anesh Singh, 'Competencies for the Effective Management of Legislated Business Rehabilitations' (2018) 21 South African Journal of Economic and Management Sciences 1.

[10]On performance improvement, see, Darlene Van Tiem, James Moseley, and Joan Dessinger, *Fundamentals of Performance Improvement: Optimizing Results Through People, Process, and Organizations* (3rd edn, John Wiley & Sons Inc 2012) Ch 1.

requires a clear understanding of expected performance. This requires multiple data sources and a comprehensive approach. Hence, the article advocates the use of performance technologies developed by performance improvement scholarship. Performance technologies apply systematic and systemic processes informed by multiple sources of data to determine the desired performance, diagnose the existence of performance problems and identify the factors that hinder the ability of a system to deliver valued outcomes for its stakeholders.[11] Its processes also facilitate the development of contextually fit solutions, as well as their implementation and evaluation. Specifically, the article generates its insights through the combined use of the framework for diagnosing performance issues created by the International Society for Performance Improvement in 2012 (2012 ISPI model), and Rummler system's approach, which emphasises the diagnosis of performance challenges at multiple levels.

The article demonstrates how performance technologies can empower jurisdictions seeking comprehensive reviews of their insolvency systems by applying its innovative approach to the Nigerian context. Drawing on data acquired through a rigorous convergent mixed-method design and doctrinal methods, the article analyses the performance of the Nigerian insolvency law in practice, revealing performance discrepancies at various levels. Through cause analysis, it identifies the environmental and individual factors driving these discrepancies. Thereafter, it proposes targeted interventions. It argues that the recently introduced entry barriers and training address individual factors but will not resolve concurrent environmental factors. Therefore, the article advocates innovative solutions including performance support interventions, amongst others.

The article is divided into 7 sections. Section 2 outlines frames through which to understand the challenges of the Nigerian insolvency law in practice and the limitations of the latest reforms. Section 3 proposes an improved conceptual and methodological approach. Section 4 undertakes a performance analysis, while Section 5 undertakes a cause analysis. Section 6 applies the conceptual approach to develop targeted interventions and Section 7 sets out the conclusions.

2. Framing the challenges of the insolvency system

The first indigenous company law in Nigeria was the Companies and Allied Matters Act ('CAMA') 1990.[12] CAMA 1990 comprehensively reviewed and codified company law in Nigeria while adapting its provisions to the Nigerian context.[13] Shortly after its enactment however, its insolvency ambit became

[11] On worthy performance, Thomas Gilbert, *Human Competence: Engineering Worthy Performance* (Jossey-Bass Inc. 2013) 15–20.
[12] CAP 59 LFN 1990.
[13] Oladeji Akanki, 'Company Law Development Through the 1990 Legislation' in Akintunde Obilade (ed), *A Blueprint for Nigerian Law* (University of Lagos Press 1995) 62.

the subject of criticisms that grew increasingly stringent. In 2004, provisions relating to takeovers, as well as mergers and acquisitions were extracted into a standalone Act.[14] Thereafter, CAMA 1990 was redesignated CAMA 2004.[15] CAMA 2004 did not introduce any substantial reforms to other areas of the law and so, the criticisms of the insolvency law continued until it was comprehensively overhauled by CAMA 2020.[16] These criticisms will be framed as (i) criticisms of the law, and (ii) criticisms of the practice.

2.1. Criticisms of the law

Before 2020, Nigeria had, at least in principle, two broad categories of corporate insolvency procedures, including (i) non-terminal procedures such as receivership, and arrangements and compromise, and (ii) terminal procedures such as liquidation.[17] The criticisms of the insolvency law largely focused on the non-terminal procedures. Critics highlighted the inadequacy of the non-terminal procedures in facilitating the rehabilitation of distressed companies, widely referred to as corporate rescue.[18] The arrangements and compromise procedure was scarcely used.[19] However, it enjoyed a resurgence when distressed financial institutions required it for their recapitalisation needs following pressures from the Central Bank of Nigeria.[20] It was generally perceived to be practically inefficient and unduly complex.[21] The main non-terminal procedure was therefore receivership. Receivership is primarily a remedy available to creditors whose debts are secured by charges on the debtor's assets. It enables the secured creditors to recover outstanding debts through the appointment of a receiver upon default.[22] A receiver may also be granted management powers, which

[14]It eventually became the Investment and Securities Act 1999.
[15]CAP C20, LFN 2004.
[16]Companies and Allied Matters A32, 2020, No. 3.
[17]For another approach to categorisation, Anthony Idigbe, 'Using Existing Insolvency Framework to Drive Business Recovery in Nigeria: The Role of the Judges' <https://punuka.com/wp-content/uploads/2019/01/role_of_judges_in_driving_a_business_recue_approach_in_existing_insolvency_framework.pdf> accessed 18 August 2023.
[18]Abiodun Layonu, 'Improving the Quality of Bank Credit and Recovery in Nigeria: The Role of the Law and the Judiciary in the Development of Insolvency and Business Recovery' in Bolanle Adebola, 'Corporate Rescue and the Nigerian Insolvency System' (PhD thesis, University College London 2012) <https://discovery.ucl.ac.uk/id/eprint/1385156/7/1385156_Thesis.pdf> accessed 22 August 2023.
[19]Akingbolahan Adeniran, 'A Mediation-Based Approach to Corporate Reorganisations in Nigeria' (2003) 29 NCJ Intl L & Com Reg 291, 292–293.
[20]Okagbue, and Aliko, 'Banking Sector Reforms in Nigeria' (2005) 1 International Legal News 2.
[21]Adeniran (n 19) 292; Tunde Ogowewo, 'The Dual Statutory Procedure for Effecting a Scheme of Arrangement in Nigeria: Law Reform or Retrogression' (1994) RADIC 594; Tunde Ogowewo, '*The Market for Corporate Control and the Investments and Securities Act 1999* (British Institute of International and Comparative Law, London, 2002); Tunde Ogowewo and Chibuike Uche, '(Mis)Using Bank Share Capital as a Regulatory Tool to Force Bank Consolidation in Nigeria' (2006) 50 JAL 161.
[22]Dayo Adu and Esther Randle, 'The Concept Of Receivership Under The Companies And Allied Matters Act, 2020' (2022) Mondaq <https://www.mondaq.com/nigeria/contracts-and-commercial-law/1220774/the-concept-of-receivership-under-the-companies-and-allied-matters-act-2020> accessed 22 August 2023.

enable them to carry on the business of a debtor company. While receivership can facilitate corporate rescue, its effectiveness in that regard is widely contested.[23] It was therefore broadly agreed that the non-terminal ambit of the insolvency system was ineffective, meaning that it did not deliver corporate rescue. Of its measures, receivership was considered the worst option.

2.2. Criticisms of the practice

The surge in the criticism of receivers in Nigeria corresponds to the surge in their appointment during the economic crisis that followed the end of the oil boom.[24] This period was also characterised by substantial legal and institutional reforms, including the establishment of the Nigerian Law Reform Commission (the 'Commission'), which drafted CAMA 1990.[25] At the time, anybody could be appointed into key insolvency offices such as that of the receiver and/or manager, or liquidator, subject to a few prohibitions, such as of bankrupts, underage or mentally unfit persons.[26] During the drafting stages of CAMA 1990, there were calls for the Commission to introduce a certification regime for insolvency practitioners, which would create an entry barrier into the trade. These calls were rejected.[27] Concerns about the lack of professionalisation of the practice subsequently led to the establishment of the Insolvency Practitioners Association of Nigeria (IPAN) in 1994.[28] IPAN was subsequently rechristened BRIPAN – *Business Rescue* and Insolvency Practitioners Association of Nigeria – in 2000 to signal its reorientation towards business rescue.[29] This did not stem the tide of criticisms, however.[30]

It was broadly believed that the failure of receivership was due to the failure of receivers. Many receivers were criticised as understanding neither the nature of receivership, nor their roles as receivers.[31] In the period

[23]On Receivership as a rescue procedure and African variants of receivership, see Bolanle Adebola, 'Diversifying Rescue: Corporate Rescue and the Models of Receivership' (2023) 34 ICCLR 572.

[24]Seyi Akinwunmi, 'Receiverships and Business Recovery'. Copy on file with author. On the crisis, Yusuf Bangura, 'IMF/World Bank Conditionality and Nigeria's Structural Adjustment Programme' in Kjell Havnevik (ed), *The IMF and the World Bank in Africa: Conditionality, Impact and Alternatives* (Scandinavian Institute of African Studies Uppsala, Ekblad & Co 1987) 96.

[25]Nigerian Law Reform Commission, 'Report on the Reform of Nigerian Company Law and Related Matters: Review and Recommendation,' (1988) Volume 1, 2.

[26]CAMA 2004, s 387; Chidi Halliday and Mesach Umenweke, 'Corporate Rescue and Insolvency Law and Practice in Nigeria: Need For Reform' 287 <https://phd-dissertations.unizik.edu.ng/onepaper.php?p=1018> accessed 22 August 2023.

[27]ibid 301–302.

[28]On BRIPAN: <https://www.insol.org/membership/member-associations/business-recovery-and-insolvency-practitioners-ass> accessed 24 February 2024.

[29]Emphasis ours. Both the establishment of IPAN and the change to BRIPAN followed R3 conferences attended by some of the original members of the association. R3 is the trade association for insolvency professionals in the UK <https://www.r3.org.uk/about-r3-insolvency-restructuring/about-r3/> accessed 18 January 2023.

[30]Iyiola Oyedepo, 'The Imperatives of a Vibrant Insolvency Practice in Nigeria' (2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1089345> accessed 21August 2023.

[31]Enyinna Nwauche, 'The Duties of a Receiver/Manager in Nigeria and Ghana' (2005) 14 IIR 71, 90–91.

following the enactment of CAMA 1990, the Nigerian understanding appeared to be that 'receiver' was interchangeable with 'liquidator'; to appoint a receiver was to read the final rites over a company.[32] The lack of professionalisation was regarded by some lenders as responsible for the inability of many receivers to turnaround ailing companies. Receivers earned a reputation for being aggressive towards other stakeholders, creating a breakdown of working relationships and even raising the possibility of communal tensions where the company was a major part of the community's economy.[33] Some used the threat of receivership as a bargaining chip to harass debtors into offering restructured payments.[34] Questions were also raised about the integrity of some receivers, who failed to account sufficiently for funds under their control,[35] or forcibly and grossly undersold assets even where shareholders offered to repay any outstanding sums.[36]

At the same time, critics highlighted the ineffectiveness of the court system in facilitating insolvency procedures.[37] Being a federal unit, Nigeria has a complex judicial system comprising, amongst other things, State and Federal High Courts. While the Federal High Court has exclusive jurisdiction over companies and allied matters, State High Courts have concurrent jurisdiction over issues such as debt.[38] This renders it possible, for example, for some creditors to initiate debt collection proceedings in a State High Court while an arrangement and compromise procedure may be underway at a Federal High Court. Insolvency procedures can also be subverted by delays at the courts. There have been instances where a winding up petition has lasted for eight or even eleven years.[39] There has even been a situation where a motion for leave to advertise an involuntary winding up petition lasted up to four years.[40] Such a pace was unmindful of the exigencies of corporate rescue.[41] Corollary to this, was the limited expertise of some judges in deciding insolvency matters. The inadequacies of the judiciary contributed to an unsurprising forum shift by practitioners from the courts to the Economic and Financial Crimes Commission – a dedicated financial and economic crimes agency – through the imputation of criminal elements to defaulting

[32]Akinwunmi (n 24).
[33]Uchendu Melah, 'AMCON, Delta Steel and Aribisala's Basic InstinctÉ, *This Day* (Lagos, 4 July 2015) <https://allafrica.com/stories/201507061924.html> accessed 30 August 2023.
[34]Bolanle Adebola, 'Corporate Rescue and the Nigerian Insolvency System' (PhD thesis, University College London 2012) < https://discovery.ucl.ac.uk/id/eprint/1385156/7/1385156_Thesis.pdf> accessed 22 August 2023.
[35]Uchendu Melah, 'AMCON, Delta Steel and Aribisala's Basic InstinctÉ, *This Day* (Lagos, 4 July 2015) 48 <https://allafrica.com/stories/201507061924.html> accessed 30 August 2023.
[36]*West African Breweries v Savannah Ventures Ltd* (2002) 10 NWLR (pt775) 401, 432, 436–440.
[37]Layonu (n 18), 9.
[38]Constitution of the Federal Republic of Nigeria 1999, s 251(1)(e).
[39]*Pharma Deko Plc v F.D.C Ltd* [2015] 10 NWLR (pt 1467) 225 – the winding up petition was filed 4 June 1993 at the Federal High Court and finally determined by the Supreme Court of Nigeria 23 April 2004.
[40]*Air Via Limited v Oriental Airlines Limited* (2004) 4 SC (pt 11) 37.
[41]Adebola, 'Corporate Rescue and the Nigerian Insolvency System' (n 34) 97.

customers.[42] Finally, some critics asserted that the apex Companies Regulator in Nigeria – the Corporate Affairs Commission (CAC) – was overburdened and lacked sufficient capacity, staff, resources and expertise to execute insolvency-related functions.[43]

2.3. Post-2020 response and its limitations: the case for a new approach to insolvency law in practice

Although the 2020 reforms did not include a standalone Insolvency Act, CAMA 2020, which replaced CAMA 2004,[44] responded to the criticisms of the law and of the practice discussed in the preceding sections.[45] Its provisions were augmented by the Insolvency Regulations 2022 ('IR 2022').[46] CAMA 2020 and the IR 2022 have since been modified by the Business Facilitation Act 2023.[47]

In response to the criticisms of the law, the new framework officially recognised the concept of corporate rescue, and provided facilitative procedures including (i) administration,[48] through which an insolvency practitioner may be appointed to rescue the company or its business where possible, and (ii) Company Voluntary Arrangement ('CVA'),[49] through which the directors or insolvency practitioner may propose a deal to compromise unsecured debts or rearrange the affairs of the distressed entity. It also introduced a moratorium procedure to accompany the arrangements and compromise procedure, which can be used to compromise both secured and unsecured debts.[50]

In response to the criticisms of the practice, the new framework introduced an authorisation regime for insolvency officeholders, which is set within a co-regulatory system for the supervision of Insolvency Practitioners ('IP'). The framework comprises CAMA 2020 and IR 2022, as modified, as well as the codes of the professional bodies to which insolvency practitioners may belong.[51] There are 5 Recognised Professional Bodies ('RPBs') designated under the IR 2022. These include: (i) the Business Recovery and Insolvency

[42]Layonu (n18), 9.
[43]Chidi Halliday and Mesach Umenweke, 'Corporate Rescue and Insolvency Law and Practice in Nigeria: Need For Reform' 281 <https://phd-dissertations.unizik.edu.ng/onepaper.php?p=1018> accessed 22 August 2023.
[44]It replaced CAMA 2004 on August 7, 2020.
[45]Sections 2(a) and 2(b).
[46]Insolvency Regulations 2022 <https://www.cac.gov.ng/wp-content/uploads/2022/04/Insolvency-Regulations-2022.pdf> accessed 21 August 2023.
[47]Business Facilitation (Miscellaneous Provisions) Act 2022, A97-120 repealed CAMA 2020, s 868 (1) on the definition of an insolvency practitioner, hence only CAMA 2020, s 705(2), s 707(1)(a) and IR 2022, Reg. 1.07(1) and (2) apply to define an insolvency practitioner.
[48]CAMA 2020, s 444.
[49]CAMA 2020, s 434.
[50]CAMA 2020, s 717.
[51]CAMA 20202, s 706 (2).

Practitioners Association of Nigeria ('BRIPAN')[52], (ii) the Institute of Chartered Accountants of Nigeria ('ICAN')[53], (iii) the Institute of Chartered Secretaries and Administrators of Nigeria ('ICSAN')[54], (iv) the Nigerian Bar Association ('NBA')[55] and (v) the Association of Accountants of Nigeria[56] ('ANAN').[57] Under the new framework, RPBs train and regulate the practitioners that they license, while the CAC provides ultimate authorisation and oversight. BRIPAN has been at the forefront, having licensed 1099 practitioners at the time this project was undertaken.[58] Institutional matters have been more challenging to resolve because they are not solely insolvency matters. Issues such as the duration of cases or the allocation of cases to judges cannot be resolved by changes to companies' legislation or even by standalone insolvency legislation. Nevertheless, CAMA 2020 responds by introducing and/or centring procedures that merely require the courts to play a supportive role, with the bulk of the powers and responsibilities statutorily allocated to insolvency practitioners. Where utilised appropriately, this should limit the intervention of the courts.

If Nigeria is to deliver on the goals of the 2020 reforms, then it requires, as Halliday and Carruthers have argued, a change in both the law on the books and the law in practice.[59] Crucially, the ability of reforms to the law on the books to deliver the desired change hinges on the ability of the practitioners to deliver on their statutorily allocated roles. Hence, there is a need for a special focus on the law in practice. Some may argue that the reforms responded to the most important challenge of the Nigerian insolvency law in practice – unfit practitioners – by introducing entry barriers and training for prospective practitioners.[60] They may argue, further, that the system only requires time to gain traction. This article disagrees. While these regulatory measures are important, their focus is too narrow. Thus, they would be insufficient to fully address the challenges of the insolvency law in practice. While practitioners have been blamed for the dearth in corporate rescue, the failures of the system have clearly been driven by a broader range of challenges that the training and barriers to entry will not resolve.[61]

[52]<https://bripan.org.ng> accessed 24 February 2024.
[53]<https://www.icanig.org> accessed 24 February 2024.
[54]<https://icsan.org> accessed 24 February 2024.
[55]<https://nigerianbar.org.ng> accessed 24 February 2024.
[56]<https://anan.org.ng> accessed 24 February 2024.
[57]IR 2022, reg 1.07.
[58]Practitioners licensed under the ICAN process are also members of BRIPAN. Thus, their numbers fall within the BRIPAN numbers. Neither ANAN nor ICSAN had commenced licensing at the time the project was undertaken. The NBA subsequently licensed about 55 practitioners later in 2023.
[59]Terrence Halliday and Bruce Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press 2009) 365.
[60]See Section 2 (b) 4.
[61]ibid 4.

Training as a solution to the inability of workers to deliver on the objectives of their tasks emerged in the industrial era.[62] It was developed by behavioural scientists who proceeded to create instructional design as an area of applied scholarship.[63] Homme, one of its founding scholars, focused on the achievement of results and accomplishments. He realised that training and other products of instructional design may contribute but were often insufficient to resolve performance problems.[64] Rothwell, another lead scholar in the field, asserted that training tends to be premised on the notion of the deficit of the performer, whereas the challenges that they face may be more systemic.[65] In the latter case, training would not improve their ability to accomplish the required results. Additionally, focus on the performer detracted from the need to examine performance challenges and improvements more broadly.[66] Thus, instructional design became a subset of a broader field of study that was named performance improvement.[67] It is now broadly accepted that instructional technologies are designed with the goal of achieving performance improvement.[68]

Performance improvement provides a systematic approach for identifying the challenges that humans face in achieving results and improving their performance. To address these challenges, it offers a broad range of interventions.[69] In the case of insolvency law in practice, it is argued that training would not, by itself, render practitioners in Nigeria able to deliver corporate rescue and/or preserve the interests of the broad range of stakeholders affected by the failure of the entity.[70] To provide more contextually fit interventions, this article draws on performance improvement scholarship to systematically investigate the performance challenges of Nigerian insolvency practitioners and the system in which they operate.

3. A performance improvement approach to understanding the challenges of the Nigerian insolvency law in practice

Performance is the result of human behaviour. Gibert notes that behaviour is important only where it results in the achievement of outcomes that are

[62]Tony O'Driscoll, 'Learning from History: Chronicling the Emergence of Human Performance Technology' (2003) 42 Performance Improvement 9.
[63]On its foundational publication, Burrhus Skinner, 'The Science of Learning and the Art of Teaching' (1954) 24 Harvard Educational Review 86.
[64]O'Driscoll (n 62) 10.
[65]William Rothwell, George Benscoter, Marsha King and Stephen King, *Mastering the Instructional Design Process: A Systematic Approach* (5th edn, John Wiley & Sons Inc 2016) 3.
[66]ibid 3–4.
[67]O'Driscoll (n 62) 13.
[68]William Rothwell (ed) *Performance Consulting: Applying Performance Improvement in Human Resource Development* (John Wiley & Sons Inc 2013) 31.
[69]Donald Tosti, 'The Big Five: The Evolution of the Performance Systems Model' (2007) 44 Performance Improvement 9.
[70]For relevant stakeholders, see Section 4, 12.

valued by stakeholders.[71] Hence, Rothwell defines performance as the achievement of results or accomplishment.[72] It involves the application of human skills, knowledge and attitudes to achieve valued outcomes for stakeholders.[73] Human performance improvement is an aspect of applied research that employs processes derived from scientific research and practical experience to solve performance problems.[74] Several performance technologies have been developed since the 1960s, to respond to the need to appropriately investigate performance problems before solutions are proffered.[75] They all have two common drivers, namely evaluation and change.[76] They seek to examine the reason why desired outcomes are not achieved and to introduce the solutions necessary for change.

Performance technologies provide systematic and systemic approaches to engaging with performance challenges.[77] Their systematic processes start with analysis, through which they identify the performance goals of any system. Thereafter, they investigate the existence of any discrepancies between the identified performance goals and the actual practice.[78] Where discrepancies are observed, then their causes are investigated.[79] It is only after this that the processes consider possible solutions.[80] Their systemic processes add depth to the systematic analysis. Drawing on systems theory, they ensure that investigations, analysis and solutions can be directed at singular or multiple levels of a system.[81] This ensures that performance technologies are suitable for complex problems and solutions.[82] Performance technologies can be applied singularly or in combination with others. This article will combine the 2012 ISPI model with Rummler's system approach to provide a systematic and systemic investigation of the challenges of the Nigerian insolvency law in practice and recommend contextually suitable solutions.[83]

The 2012 ISPI model is a standard model that was created collaboratively by the performance improvement industry.[84] It comprises four components, namely: (i) performance and cause analysis, (ii) intervention selection, design and development, (iii) intervention implementation and maintenance and (iv)

[71] Gilbert (n 11) 15–18; Van Tiem and others (n 10) 14.
[72] Rothwell and others (n 65) 6.
[73] ibid 6.
[74] ibid 6.
[75] On performance technologies, Frank Wilmoth, Christine Prigmore and Marty Bray, 'HPT Models: An Overview of the Major Models in the Field' (2002) 41 Performance Improvement 16.
[76] Van Tiem and others (n 10) 6.
[77] ibid16.
[78] O'Driscoll (n 62) 13.
[79] ibid 13.
[80] ibid 16.
[81] Geary Rummler and Alan Brache, *Improving Performance: How to Manage the White Space on the Organization Chart* (3rd edn, John Wiley & Sons 2012) ch 2 and ch 3.
[82] Tosti (n 69) 9.
[83] Tosti (n 69) 9; Rummler and Brache (n 81) ch 2.
[84] HPT Manual 7150 <https://hptmanualaaly.weebly.com/ispi-hpt-model.html> accessed 15 November 2024.

evaluation. Performance analysis seeks to identify any discrepancies or gaps between the desired performance of a system and its actual performance.[85] Where discrepancies are identified, then a cause analysis is undertaken. Cause analysis is the process by which the factors that drive performance or are responsible for performance gaps are determined.[86] It is an important bridge between performance analysis and the identification of the appropriate interventions. According to Gilbert, the factors that drive performance and performance gaps may be rooted either in the environment or in the individual. It is possible, however, to have a combination of both factors. The performer may lack the required skills, knowledge, capacity, and motivation to achieve desired results. However, their failure may also stem from the lack of resources necessary to perform their tasks efficiently and effectively. Thus, while performance and performance problems result from the actions of the individual, it still is important to examine the environment in which they operate. Where good performance is placed in a bad system, 'the system will win almost every time'.[87]

Rummler's system approach combines with the 2012 ISPI model to provide insights at multiple levels.[88] As a result, its analysis and interventions traverse three levels. It involves an investigation of the systems that produce the results at (i) the performer level: their knowledge, skill, and capacity, (ii) the process level: the procedures, tools, resources, workflow, and ergonomics, and (iii) the industry level: the culture, society, and institutions.[89] The industry level is a modification introduced by this article to replace the organisational level, which was Rummler's third level. Given that the article deals with the problems of an industry, not an organisation, it is fitting that its supra-level is the industry level.

In contrast to instructional design, performance improvement is not premised on pre-determined ideas.[90] To undertake their analysis and inform their recommendations therefore, performance technologies draw on multiple sources of data.[91] To that end, the article combines a convergent mixed-method design with traditional doctrinal methods. The research design took into consideration the nature of the problem, as well as time and budgetary constraints.[92] It received ethical approval from the University

[85]Robert Mager, *Analyzing Performance Problems or You Really Oughta Wanna: How to Figure out Why People Aren't Doing What They Should Be, and What to Do About It* (CEP 1997) 11.
[86]Van Tiem and others (n 10) 163.
[87]ibid 165.
[88]Rummler and Brache (n 81) ch 2.
[89]Van Tiem and others (n 10) Section Two.
[90]Rothwell and others (n 65) 6–8.
[91]Van Tiem and others (n 10) 129.
[92]John Cresswell and David Cresswell, *Research Design: Qualitative, Quantitative & Mixed Method Approaches* (5th edn, Sage Publications Ltd 2018) 10–11; Gert Biesta, 'Pragmatism and the Philosophical Foundations of Mixed Methods Research' in Abbas Tashakkori and Charles Teddlie (eds), *Sage Handbook of Mixed Methods in Social and Behavioural Research* (Sage Publications Inc 2010) 95.

of Reading.[93] The rigorous approach to mitigating the limitations of the study and ensuring the trustworthiness of the data through investigator and method triangulation adds credibility to the findings and aligns with best practices in research methodology.[94]

The qualitative ambit involved the focused use of key informants, which enabled the collection of quality data in a relatively short period of time.[95] The informants were key because of their specific knowledge of the topic, as well as their capacity and interest in engaging in generalised review of the practice.[96] The focused variant differs from the traditional technique in that a larger number of key informants are interviewed within a restricted framework of questions with targeted objectives.[97] Key informants were selected through a flexible sampling technique that considered the needs of the relevant study and the structure of the relevant social group.[98] Accordingly, 24 key informants whose formal roles placed them in prime position to hold the required knowledge, which they were willing to share, were purposively selected. 58% of the sample were insolvency practitioners. The other 42% were drawn from stakeholder groups that interact with practitioners, including businesses, banks, the judiciary, and the regulator (Table 1). Data was collected using semi-structured interviews that lasted between 45 and 90 min. The questions, together with the goals of the study were sent prior to the meeting. A participation and consent protocol was administered to each participant before the interview. Collected data was anonymised and transcribed on an ongoing basis using the six steps of reflexive thematic analysis outlined by Braun and Clarke but with the adaptation suggested by Lochmiller.[99] Accordingly, the initial phase of iterative coding was followed by the development of categories, followed by the construction of themes, before the write-up.[100] Most of the codes were fully developed by the 18th interview.[101]

[93] Its processes safeguard the well-being of participants and the integrity of the study.

[94] John Cresswell and Dana Miller, 'Determining Validity in Qualitative Inquiry' (2000) 39 Theory into Practice, 124; Jeff Rose and Corey Johnson, 'Contextualizing Reliability and Validity in Quantitative Research: Toward more Rigorous and Trustworthy Qualitative Social Science in Leisure Research' (2020) 51 Journal of Leisure Research 432.

[95] They have also been described as Strategic Informants. Marc-Adélard Tremblay, 'The Key Informant Technique: A Nonethnographic Application' (1957) 59 American Anthropologist 688, 690; John Poggie Jr., 'Toward Quality Control in Key Informant Data' (1972) 31 Human Organization 23, 24.

[96] Emilia Dungel and Anne-Séverine Fabre, 'Missing or Unseen? Exploring Women's Roles in Arms Trafficking' (2022) Small Arms Survey <https://www.smallarmssurvey.org//sites/default/files/resources/SAS-Report-Women-Arms-Trafficking.pdf> 29, 31 accessed 24 February 2024.

[97] Tremblay (n 96) 690. Poggie refers to this as Short-term Key Informant Technique, Poggie (n 96) 24.

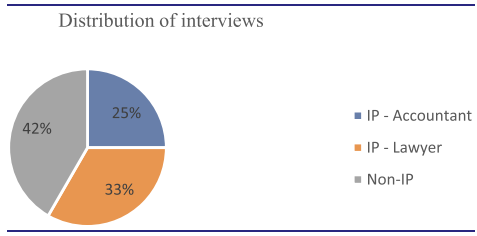
[98] Poggie (n 96) 24.

[99] Virginia Braun and Victoria Clarke, 'Can I use TA? Should I use TA? Should I not use TA? Comparing Reflexive Thematic Analysis and other Pattern-based Qualitative Analytical Approaches' (2021) 21 Couns Psychother Res 37.

[100] Chad Lochmiller, 'Conducting Thematic Analysis with Qualitative Data' (2021) 26 The Qualitative Report 2029.

[101] Albine Moser and Irene Korstjens, 'Series: Practical Guidance to Qualitative Research. Part 3: Sampling, Data Collection and Analysis' (2018) 24 European Journal of General Practice 9, 11.

Table 1. Distribution of interviews.



The quantitative ambit of the study adopts the survey design, which was used to describe the scale of opinions expressed within the Nigerian insolvency practice.[102] The survey instrument comprised 27 close-ended and open-ended questions, which were revised following a pilot. It was administered only to insolvency practitioners in Nigeria. While the IR 2022 recognises five RPBs, only BRIPAN, with ICAN had licensed insolvency practitioners by January 2023 when the survey was administered. At the time BRIPAN had 1099 members. The invitation was sent to the entire population size.[103] There were 52 responses to the survey, providing a response rate of 4.7%. Given the small numbers, statistical significance was not tested. The results showed that respondents have been appointed across several roles in the insolvency system. There appears to be a high percentage of receivership appointments, with considerably more receivers and managers than receivers simpliciter.[104] Respondents indicated the sectors across which they had been appointed.[105] Most of the respondents indicated that they have been active since 2010, with about a fifth indicating that they started to practice after the introduction of CAMA 1990 (Tables 2–4).[106]

4. Applying the performance improvement approach: performance analysis

While all four components of the 2012 IPSI model must be engaged to deliver change in practice, this article is not concerned with the last two stages, namely intervention implementation, and maintenance and evaluation. These two require the actual application of the proposed changes and evaluation of their impact. Instead, the article will apply only the first two components of the IPSI model. For clarity, however, this section undertakes a performance analysis of the Nigerian insolvency law in practice, while the

[102]Surveys can be used to provide a quantitative description of trends and opinions within a social group. Cresswell and Cresswell (n 47) 147.
[103]All insolvency practitioners licensed by ICAN are also members of BRIPAN.
[104]See Table 2.
[105]See Table 3.
[106]See Table 4.

Table 2. Distribution of offices to which survey respondents have been appointed.

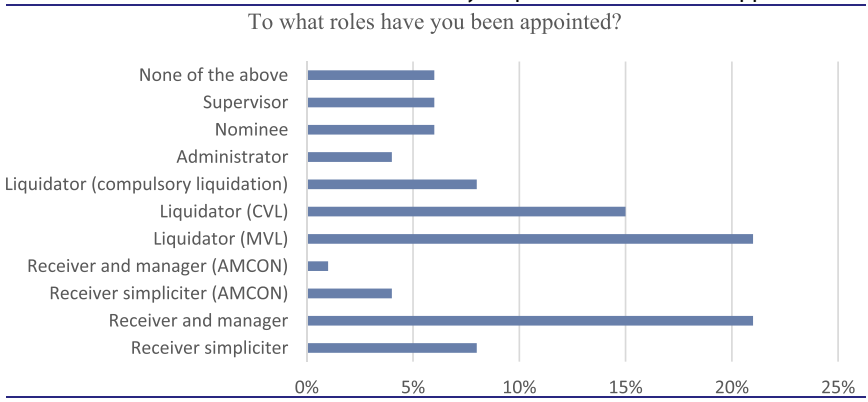
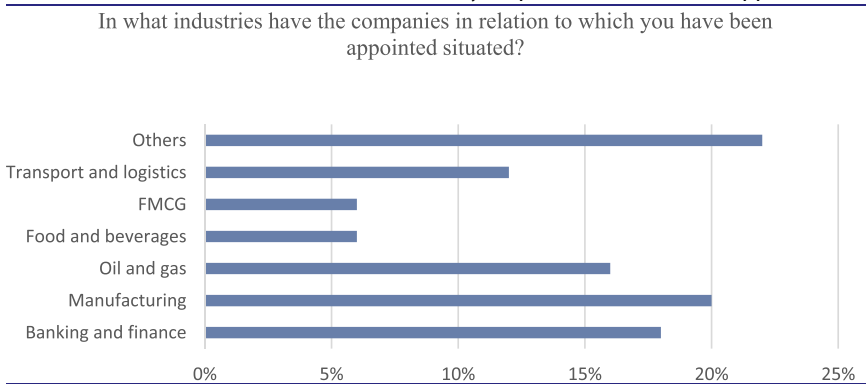


Table 3. Distribution of sectors in which survey respondents have been appointed.

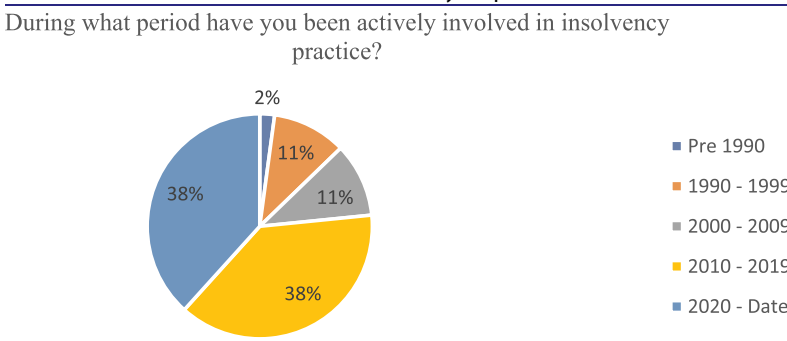


Note: FMCG refers to Fast-Moving Consumer Goods. They are also referred to as Consumer-Packaged Goods (CPGs). These are goods with a short shelf life that are sold quickly at relatively low cost. Nancy Bocken, Alisa Harsch and Ilka Weissbrod, 'Circular Business Models for Fastmoving Consumer Goods Industry: Desirability, Feasibility and Viability' (2022) 30 Sustainable Production and Consumption 799.

next undertakes a cause analysis. The main goal of the performance analysis is to determine whether there are performance discrepancies in the Nigerian insolvency law in practice. This is achieved by comparing desired performance with actual performance. Given that the article is interested not only in the practitioners but the system, the challenges will be assessed at all three levels proposed by the Rummler model.[107] The analysis and interventions will be informed by a combination of insights from the law, literature and the data that has been collected.

[107]See n 9 above.

Table 4. Distribution of time in which survey respondents have been active.



4.1. Desired performance

To understand the desired performance, the article emphasises a positive rather than a normative approach. The focus here is not how to design the law. It is how to discern the vision undergirding the law that has been enacted.

In Nigeria, an important source of our understanding of desired performance is the Idornigie Report that prompted the 2020 reforms.[108] The report reiterated the need for the insolvency system to balance the rights of secured creditors with those of the unsecured creditors and other stakeholders such as the debtor and its employees.[109] It noted, further, that its vision for the reforms was to transform the Nigerian insolvency system from a creditor and liquidation-oriented system to a rescue-oriented system. This is in keeping with both leading normative theories and internationally accepted principles of insolvency law.[110] Although theories and principles may differ in the values that they emphasise, they agree that good insolvency systems should avoid the unnecessary liquidation of viable but distressed entities.

The law is another important source of desired outcomes. Since CAMA 1990 was introduced, it has been concerned, primarily, with creditors, secured and unsecured. However, it has also been and remains expressly concerned with the preservation of the debtor company where possible, so that

[108]The report is so named because the committee that produced it was led by Professor Paul Idornigie, SAN. For more on the committee and review: 'CLRNN in Conversation with Prof Paul Idornigie SAN I' <https://aclrh.net/2021/09/10/clrnn-in-conversation-with-prof-paul-idornigie-san/> accessed 20 June 2024.

[109]'Comprehensive Review of the Institutional, Regulatory, Legislative & Associated Instruments Affecting Businesses in Nigeria: Final Report, (February 2016)' 69 <https://aclrh.net/2021/09/10/clrnn-in-conversation-with-prof-paul-idornigie-san/> accessed 20 June 2024.

[110]For a review of various theories: Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, CUP 2017), ch 2. For international principles, UNCITRAL Legislative Guide on Insolvency Law, Part One and Part Two.

it can achieve the objectives for which it is formed, as well as the preservation of the jobs of employees, wherever possible.[111] This is important because the predominant proportion of companies, small, medium and large, are closely held.[112] The protection of the company and employees protects the entrepreneurial and labour classes, contributing to the delivery of the economic policies of successive Nigerian governments, particularly the development of the private sector.[113] Thus, even where, for example, the administrative receiver was beholden to their appointor in England and Wales, their Nigerian counterpart had a statutory obligation to consider wider interests.[114] As discussed in Section 2(c), CAMA 2020 further promotes these ends by introducing administration and the CVA, which are both aimed at rescuing the distressed entity itself.[115] Additionally, CAMA 2020, and the IR 2022 require practitioners to be fit for their role, while performing their tasks in collaboration with stakeholders, as well as with integrity and dispatch.[116]

The performance improvement approach requires that desired performance must also be understood from the perspective of stakeholders. This contrasts with prevailing theoretical and policy-based approaches that do not typically include direct stakeholder voice. Yet, their opinions matter in shaping the reputation of the practice. Hence, this section includes stakeholder voice. All interviewees welcomed the renewed emphasis on rescue. Yet, they were concerned about its delivery. Interestingly, the interviewees discussed their opinions at Rummler's three levels.

At the performer level, they lauded the new fitness requirements.[117] One interview noted:

> … it is a good thing that we have CAMA 2020 now, because before the CAMA 2020, there was no form of recognition of insolvency practitioners, so what we saw in practice was everybody doing whatever they wanted to do, and they were not subjected to regulations … CAMA 2020 came in and recognized the need to have insolvency practitioners. It regulated the profession, and this was very important.[118]

[111]For example, CAMA 2020, s 553 (CAMA 1990, s 390).
[112]Also, Mariana Pargendler, 'Corporate Governance in Emerging Markets' in Jeffery Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (1st edn, OUP 2018) 735.
[113]In the years following independence, the government sought to promote the rise of the Nigerian entrepreneurial class through the enactment of the Nigerian Enterprises Promotion Acts 1972–1977. These Acts mandated greater Nigerian participation in incorporated companies in Nigeria. They also promoted widespread ownership of companies among Nigerians. Following the return to civilian rule in 1999, successive economic plans have focused on the diversification and ultimate development of the economy through private enterprise. The first such economic plan was delivered by the Obasanjo government in 2003. The National Economic Empowerment and Development Strategy (NEEDS) <https://www.imf.org/external/pubs/ft/scr/2005/cr05433.pdf> accessed 20 January 2025.
[114]Adebola, 'Corporate Rescue and the Models of Receivership' (n 23) 586–587.
[115]See n 5.
[116]CAMA 2020, s 445.
[117]CAMA 2020, s 705; IR 2022, reg 1.07.
[118]Interview 8.

Additionally, they believed that practitioners would need to demonstrate a wide range of competences that are not discussed in the law. For them, fitness requires the practitioner to demonstrate *procedural competence* – knowledge of the appropriate legal steps under each insolvency procedure. This was also expected to make the IPs better aware of the conceptual underpinnings of the insolvency procedures, building their *conceptual competence*.[119] The emphasis on rescue stems from the recognition of the broader effects of corporate failure within any society. As such, interviewees noted that IPs should demonstrate *social competence,* which should guide their approach to delivering on the objectives of their appointment. To engage the broader group of stakeholders, they would require *relational competence*. Relational competence is even more urgent in cases where the owners are the managers. Many such persons typically view the appointment of the IP as the end of their life's work and therefore resist the appointment through every legal and extra-legal means that they can muster. As one interviewee said:

> … understanding that insolvency and business restructuring have both the commercial aspect of the law as well a lot of social impacts factor. Because you find yourself in some situations that for example, we have someone who has been working in a company for so and so years, and it can be a situation where the father works, his son also works there, so by the time the company was going insolvent, the entire lineage up to a point was dependent on the company. So, in carrying out the work of an insolvency practitioner, you have to try and ensure that all these sorts of things are put in place. Not only that, that company more or less fed the community. So, you need to be commercially astute, but also socially aware and human.[120]

At the process level, the IR 2022 sets out the steps required to deliver on the processes outlined in CAMA 2020, such as notice periods, as well as how to convene meetings, amongst other things. Several interviewees noted that the legal framework set out in CAMA 2020 and IR 2022, as amended, should also include rules on due process to regulate the way IPs conduct themselves and the insolvency processes that they administer. It is these processes that would deliver the integrity and speed required of practitioners, by the law. As part of the due process requirements, there would be rules on the valuation of assets and provision of security by the practitioner. The rules on the purchase of property by the insolvency practitioners and/or the appointor would also be clarified.

At the industry level, the Idornigie Report noted that a system that balanced the interests of various stakeholders was necessary to foster growth, as well as the prevention and resolution of financial crises. The

[119]Interestingly, all interviewees from the accountancy sector stated that lawyers were more interested in liquidation than accountants, who have the skills and will to rescue.
[120]Interview 3.

interviewees agreed with these. Crucially, they also noted the role of other stakeholders in the delivering the desired performance.[121] These include the judiciary. Some interviewees stated that a good insolvency system would have a dedicated insolvency or commercial court for two principal reasons. First, it may improve the speed with which matters pass through the courts. The tardiness of cases encourages some parties to simply commence litigation to frustrate the other side. Second, it may encourage either the appointment of judges with the necessary competence or encourage those appointed to develop the same. Some interviewees noted the importance of judges also understanding the principles underlying the insolvency framework, as well as the procedural steps associated with each process. For them, *judicial*, *conceptual*, and *procedural* competence would ensure that the insolvency system can deliver on its objectives. Judges would also require *commercial* competence by which to comprehend the financial concepts and facts underlying the decisions made by the parties and their advisers. Interviewees also asserted the system should have a competent oversight regulator with three key competences. One is *administrative competence*, which would ensure that practitioners can file documents with ease and receive responses to requests promptly. The others are *procedural and conceptual competence* to ensure that they can perform their enforcement tasks appropriately.

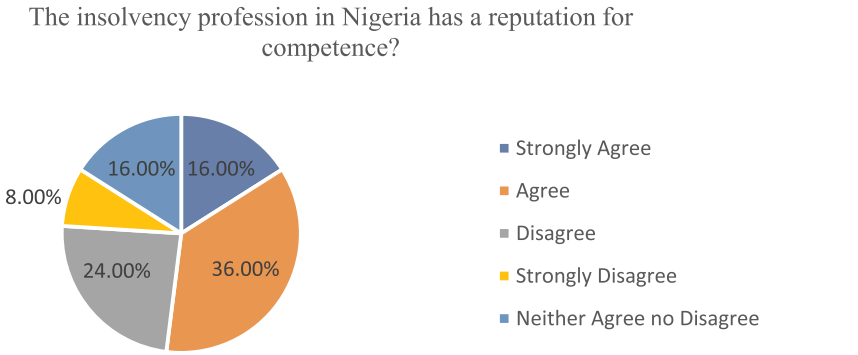
It follows from the above that the law and policy focus primarily on the frame of the rescue procedures and the broad objectives of the system but rely on practitioners to devise the steps necessary for achieving stated ends with integrity and dispatch. Stakeholders, on the other hand, approach their assessment from a more holistic standpoint. They are interested in the articulation of the relevant competences required by practitioners, detailed rules to regulate various aspects of the practitioner's decision-making and the articulation of the requisite competences of other players such as regulators and courts. It must be recognised that this holistic view sets the standards against which they judge the performance of practitioners and system. We turn to their perceptions of actual performance.

4.2. Actual performance

It is not clear whether any companies have been saved since the introduction of the new Act because Nigeria does not collect data on insolvency outcomes. Thus, the discussion on actual performance is based on the outcomes of the survey and the interviews. It is important to note that most interviewees admitted that their views of the actual performance are inextricably linked

[121]Stakeholders as used here includes a broad range of parties involved in any insolvency case, including secured creditors, debtors and their management, courts, judges, as well as the regulator.

Table 5. Survey response on perceived competence of IPs.



to the pre-CAMA 2020 era, given that the new system is just bedding down. As stated already, the pre-2020 regulatory framework was characterised by 'a bit of a free for all approach because there was no regulation'.[122] The general perception was that neither company nor business rescue took place under CAMA 2004. As Section 2 demonstrates, there were documented criticisms about the receivership procedure, which was and remains the key rescue process.[123] Nonetheless, several narrations were about post-2020 cases. Thus, it could be argued that perceptions about the insolvency law in practice have held steady across time.

At the performer level, questions about the integrity, dispatch and competences highlighted in the previous section yielded mixed responses. When asked whether the Nigerian insolvency profession in Nigeria had a reputation for competence, 52% of the respondents agreed, while 32% disagreed, reiterating the mixed views of the interviewees (Table 5).

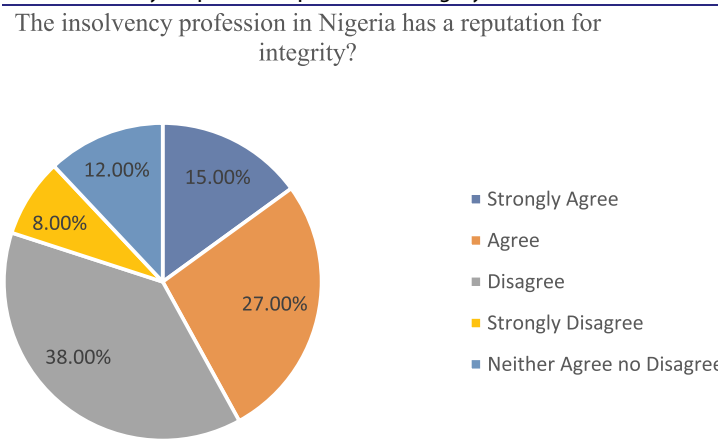
When asked whether the insolvency profession in Nigeria had a reputation for integrity, there was a fairly balanced view with 42% of respondents agreeing, while 46% disagreed (Table 6). An interviewee stated:

> … we throw integrity and professionalism overboard just for the purpose of satisfying the pecuniary interest of the professional here in Nigeria …. There was a large-scale receivership … how much was due to the consortium of x banks was a total debt of ₦1.2 billion, but the assets of the company then was in excess of maybe ₦500 billion … we managed to recover only ₦900 million.[124]

At the process level, interviewees noted discrepancies in various aspects of the legal procedures that raise issues of probity, transparency, and conflicts

[122]Interview 1. The recommendation had been mooted but rejected during the consultations that preceded the enactment of CAMA 1990. See Nigerian Law Reform Commission, 'Report on the Reform of Nigerian Company Law and Related Matters' (Volume 1, Review and Recommendation, 1988).
[123]ibid 4.
[124]Interview 4.

Table 6. Survey response on perceived integrity of IPs.



of interest. Some interviewees noted that the interests of the practitioners and their appointors appear to prevail due to process level deficiencies. One interviewee stated:

> … receivership, that is where you have the greatest challenge, both receivers and receiver-managers. Because in truth, the receiver-manager is not independent of his appointor. They usually only operate on the dictates of the appointor, and there is already a predetermined goal before even the appointment and that might have led to the receiver being unable to rescue the business ….[125]

Several interviewees also noted that advisers and consultants appointed by the practitioner lack independence. An interviewee stated:

> I give an example: x was appointed an IP … You know under the law you have the right to appoint an IP, consultant, advisors … but the advisors were some family members, some business associates, some relatives. So, from the entire gamut of that particular structure, you realise that assignment is bound to be doomed ….[126]

At the industry level, interviewees discussed the performance of key stakeholders and the institutional environment. They raised the challenges that debtor companies and their directors pose in delaying timely commencement. One interviewee contrasted two experiences:

> … we started a CVA in 2021 and somehow first and foremost, the company that we were dealing with was a publicly listed company meaning the corporate governance, the board and all that were exposed. I'm not sure that we may have achieved a CVA if it was a private company … They went with it, the

[125]Interview 13.
[126]Interview 4.

> board took resolutions and appointed professionals - joint professionals to do the work … But if I take another example, we were to start an administration out of court by the directors and on the one hand, 1/3 of the directors were not ready for any reason other than the fact that they were opposing. In as much as we tried to educate the directors that there are personal liability issues if you don't take certain steps in terms of insolvency, and it was a private company, so you can see already the two extremes.[127]

In the case of appointors, interviewees noted poor due diligence in loan processes and record keeping which affects the ability of practitioners to commence insolvency processes timely. As one interviewee noted, appointors 'tend to be very lax in keeping documents and being able to identify them'.[128] Several interviewees also noted the expectation of appointors that the IP would act solely in their interests or according to their pre-determined plans. In fact, interviewees noted that much of the undesirable practices by some practitioners stem from the lack of independence of practitioners from their appointors, particularly in the case of receivership. When some practitioners have sought to proceed independently, some appointors have simply sought other appointees, even while the initial practitioner was still in office.

Several interviewees noted that other large creditors within the consortium holding the all-asset debenture may appoint a concurrent practitioner, while others without priority or security would look to appoint their own nominee as co-appointees to look out for their interests. One interviewee narrated one such incident:

> For instance, we had an insolvency with a company that took money from A co and B co, and we handled the insolvency … One of the clients was not happy and decided to engage an international firm of accountants that also has a legal unit to take over the insolvency from us. So, they engaged R consultants to go for the recovery … they came and said they had been briefed by B co … I showed them the appointment by A co and B co – the joint appointment signed. I also showed them the actions we took at the Federal High Court, the order we received, and attempts to take over … and the people said, if the receiver-manager is in office, is that proper? That was how they wrote to B co, and … declined the brief … The same people went to engage another lawyer and the lawyer engaged took up the brief and went to the State High Court to file an action against the company that I was a receiver for. Meanwhile, the case was already before Federal High Court and Court of Appeal.[129]

Some noted that the CAC is not a fit regulator. Narrating an experience, one interviewee stated:

[127]Interview 1.
[128]Interview 10.
[129]Interview 5.

> One: the CAC is overburdened, and two: capacity is an issue in the CAC, with all due respect … I can give you an example. I have a creditors' voluntary winding-up situation that I am handling. I have filed for interim account, and I have not been able to get an acknowledgement. Even when I was able to get it, there was an error; instead of "creditors voluntarily winding up", they put "members voluntarily winding up". I pointed out the error, but this simple change has not been effected.[130]

Others noted that some judges also pose a problem to the system. Some lack an understanding of commercial terms as one interviewee narrated:

> … probably the most important is the court system itself and the court's understanding of the credit process itself. Do they have the commercial knowledge to adjudicate over credit transactions when they cannot even read statements of account? I have had instances where a judge and a lawyer were looking at a statement of account and they could not see the 'minus' that was stated; meanwhile minus says the account is in debit, but as far as the court was concerned, the company was in good standing.[131]

Additionally, some interviewees noted that some judges do not apply the clear letter of the law, noting that a strong sense of social distributive justice permeates the system. Thus, some judges seek to achieve social distributive justice even where the principles should lead to a different conclusion. For that reason, judges may grant injunctions to debtors even where they have defaulted. Thus, one interviewee asked: *how do we now reconcile a code system that is based on individual accountability with one that wants to distribute justice?*[132]

Ultimately, the performance analysis indicates considerable performance discrepancies in the Nigerian insolvency law in practice. Notwithstanding, some interviewees noted how difficult it is to rate the whole system because some of its segments work better than others.[133] In the case of practitioners, some interviewees noted that the negative perception of practitioners is influenced by the actions of a few bad eggs.[134] Others noted that the recovery teams of banks appoint recovery agents who may not be insolvency practitioners. These persons are not subject to the same rules as practitioners but are wrongly perceived to be practitioners.[135] Crucially, it is clear from the performance analysis that interviewees base their perceptions on a systems view. Importantly, the emerging perception is that the post-2020 reforms omit key processes that are necessary to deliver on its stated vision. Hence, the ensuing cause analysis would explore these further.

[130]Interview 8.
[131]Interview 10.
[132]Interview 11.
[133]Interview 22 noted the effective functioning of bank rehabilitation.
[134]Interview 15.
[135]Interview 17.

5. Applying the performance improvement approach: cause analysis

As cause analysis requires, we split the perceived causes of the discrepancies into environmental factors and individual factors.[136] The discussion commences with the environmental factors because these factors help observers to understand the difficult context in which practitioners have had to operate. This elucidates some of the unusual practices that have been developed by the practitioners.

5.1. Environmental factors

Environmental factors refer to resources and tools that the performer needs to perform appropriately.[137] The empirical ambit of the research reveals that Nigerian insolvency practitioners suffer considerable lack of environmental support, from commencement to the termination of the insolvency process. This is most prevalent in the case of rescue procedures.

Environmental support includes the availability and accessibility of information that helps the performer know what is expected, how to do what is expected and when it is appropriate to do it. It includes the availability of tools such as workflow designs, as well as clear consequences, incentives, or rewards to reinforce or alter behaviour as may be required. A gap between available environmental support and the performance requirements of the worker can cause or drive performance discrepancies.[138]

At commencement, practitioners are accused of gaining entry into the debtor company by using force.[139] This is most prevalent in the case of receivership. One interviewee noted:

> Well, I think the takeover of companies by receivers have the potential of harming the workers in particular, the company itself. That is because in taking over a company, because of our culture, there's usually resistance, and therefore, we have cultivated this habit of getting the police and getting an order of court and then getting the police to back the receiver up, and therefore it's almost always like a forceful takeover, even when it starts.[140]

To assist with the takeover, a process was developed by the practitioners, which involves the application for orders from the court upon appointment. This would include an order for support from the police force.[141] Thus, they would force their way into the premises for the takeover. Practitioners have

[136]Van Tiem and others (n 10) ch 8.
[137]ibid 168.
[138]ibid 168.
[139]Interview 18.
[140]Interview 3.
[141]See 19 below.

asserted, however, that they require armed escorts to protect themselves from adverse actions by directors.

Typically, directors look to prevent the takeover.[142] Some may deliberately provide assets situated in their states or communities of origin as security for loans because they know that no receiver can successfully take them over. In some communities, the community heads and prominent members of indigenous families must be paid before property located within their jurisdiction can be taken over. In other cases, associates of powerful, typically indigenous families, known as *omo-onile* – literally indigenous people – may extract rent from 'outsiders' looking to takeover property within their perimeter. Omo-onile are typically armed and can count on the strength of numbers. The term is fluid, however, and includes powerful armed gangs or thugs unrelated to any indigenous family.[143] As one interviewee said:

> In some states, you go there to take possession and all that, and they say you can't take possession and you know can't because they have a community … I knew beforehand that I had to take some bottles of schnapps and this and that … We went to some other places where you have these warlords … You're surrounded with the warlord who is surrounded with guns. It's almost like a movie … So those sorts of things happen in receivership, and they are not as publicised as people think.[144]

The forceful takeover comes with several challenges. First, it transforms the receivership procedure into a court-based procedure. In fact, appointors and companies have been known to challenge the validity of the appointment of a practitioner who seeks to takeover without the order.[145] A three-part practice has developed in which the practitioner appointed out of court would: (i) Approach the court for an order to takeover, which would (ii) Include an order for the support of security forces – the police – by whom to force a takeover from the directors, and then (iii) The practitioner would install additional security personnel to preserve the assets for the duration of the receivership. One interviewee stated that practitioners *will be resisted nine out of ten times*, even where they have an order and the support of the police.[146] Second, it typically attracts a fight-back from the directors of the company. One interviewee stated that *they will break your head* if you arrived alone to execute.[147] Third, both the process to obtain the order and any subsequent legal or extra-legal challenge increase the costs of receivership. This includes the time cost as they lengthen the

[142]Interview 22.
[143]*Agbero* (touts) according to Interview 16.
[144]Interview 3.
[145]*Onafowokan v. Wema Bank Plc* [2011] 12 NWLR (Pt. 1260).
[146]Interview 3.
[147]Interview 5.

takeover time. They also increase the monetary cost as all the various elements involved must be paid for. As one interviewee noted, *the police going with you is not free*.[148] Further, some corrupt police officers even play both sides to extract the highest rent possible from the situation.

The use of force perpetuates the stigma associated with receiverships. Often, the receiver shuts down the company for a while, which may lead to its demise. They must also place their own security on duty to prevent the owners from returning to possession. These practices also create additional social costs as the expenses are difficult to account for transparently. As one interviewee said:

> I did a receivership which traversed a lot of states a number of years ago and the problem was how do I account for some of the expense? … the community head had to be settled … therefore, you have to go and bring X amount of millions … How do you explain that without someone thinking … ? If you don't, you will not take over.[149]

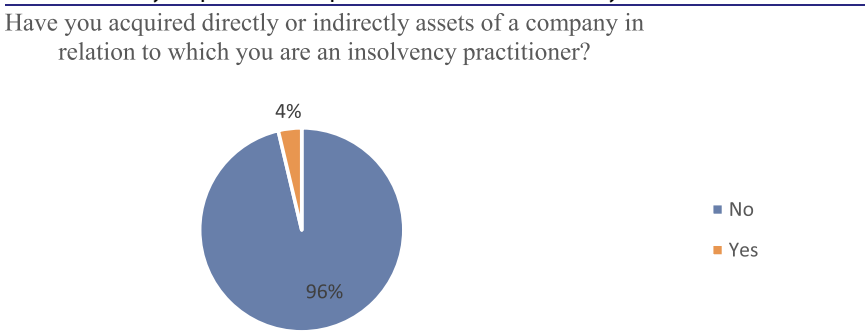
The post-2020 reforms have also introduced some additional challenges at the commencement phase. New procedures such as administration and the CVA require the filing of documents at the court. However, no processes have been created for this at the Federal High Court. Instead, out of court proceedings such as the CVA and Out of Court administrator appointments have been transformed to court-based proceedings as court orders are sought for every appointment. One interviewee explained:

> So, for instance, in the CVA, we're not meant to go to court per se, we're just meant to file in certain report or notices, and the court is just a registry, in the sense that it's just a registry, and you don't have to have the court involved. But we don't really have that, there is no way that you go to a court in Nigeria that you don't come with a certain originating process, the best you can do now is that you make it ex parte. The reason being that even before now, the office of the DCR which is supposed to be the official receiver is not even functioning.[150]

Following commencement, there is deficient guidance on the sale and management of the assets of the debtor by the practitioner. Interviewees noted the lack of transparency in the sale process, as well as poor disclosure practices. There is a common perception that practitioners generally seek to strip assets even in situations where the company could be rescued. Some interviewees attributed the *desperation* to sell to the lack of independence of practitioners, who, therefore, just give in to pressure from their appointors. Some of these appointors push for sales to speed up recoveries, with some 'creditors bringing in ready buyers even at the time when the appointment

[148]Interview 5.
[149]Interview 3.
[150]Interview 1.

Table 7. Survey response on acquisition of debtor's assets by IP.



is being consummated'.[151] Others attributed it to the desire of some practitioners to purchase the assets.[152] There is a question as to how widespread this practice is, however. The survey asked whether respondents had acquired directly or indirectly the assets of a company in relation to which they have been appointed practitioner but only 4% answered yes (Table 7).

Respondents were asked: (i) Whether they had sold the assets of a company in relation which they have been appointed as practitioner to the members of their family or companies in which they have material or financial interests, (ii) Whether they had sold assets to their firms or any of its members, (iii) Whether they had sold assets to the appointing creditor or their members (Tables 8–10).

Some interviewees expressed their concerns about the practice of practitioners directly or indirectly acquiring the assets of the debtor company. An interviewee noted that the appointment typically gives the practitioner *access to a lot of information and assets.*[153] *So, there is always the risk of personal dealing or fraudulent dealing and even indirect self-dealing with proxies*.[154] Further, that the *risk of temptation – financial temptation – is very high*.[155] Another narrated an experience where 'the lawyer was trying to acquire assets both for herself and her friends', stating that:

> … one must try as much as possible to avoid purchasing an asset(s) from an insolvent company. For example, hiring shadow buyers to buy properties from an insolvent company is not right. One must be reasonably transparent in every transaction.[156]

[151]Interview 2.
[152]Interview 22.
[153]Interview 3.
[154]Interview 8.
[155]Interview 4.
[156]Interview 8.

Table 8. Survey response on sale of debtor's assets by IP to own organisation or its members.

Have you sold assets of a company in relation to which you are the insolvency practitioner to your associates including family members or legal persons in which you have financial or material interest?

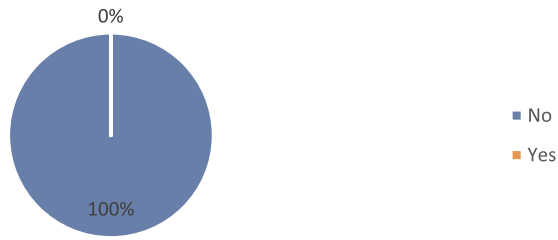


Table 9. Survey response on sale of debtor's assets by IP to own organisation or its members.

Have you sold assets of a company in relation to which you are IP to your organisation or its members?

The survey also indicated low levels of disclosure, even though filings are statutorily required for receivership, administration and the CVA.[157] Only 29% of respondents indicated that they made disclosures to their appointors, while almost 1 in 10 made no disclosures to the appointor or any other stakeholders (Table 11).

One interviewee narrated an experience:

> … anytime I think about that particular assignment, I felt somewhere along the line, we didn't manage the process effectively the way we could have. There were so many non-disclosures on some of the transaction we did. There was one we did, and I realised that the IP had not disclosed. I ran to him that we did this transaction in respect of this property, but we have not disclosed to the people who have appointed you … [158]

[157]CAMA 2020, s 561 on the delivery of accounts by receivers. IR 2022, reg 2.29 on the duty of the Supervisor to keep and render accounts. IR 2022, Part 6 for accounts by administrators.
[158]Interview 4.

Table 10. Survey response on sale of debtor's assets by IP to appointing creditor or its members.

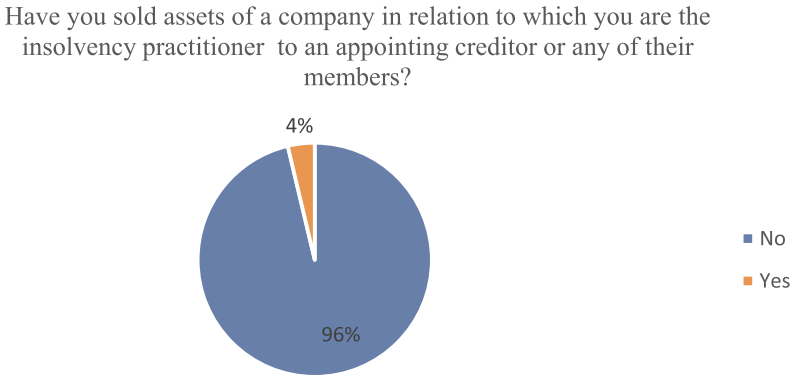
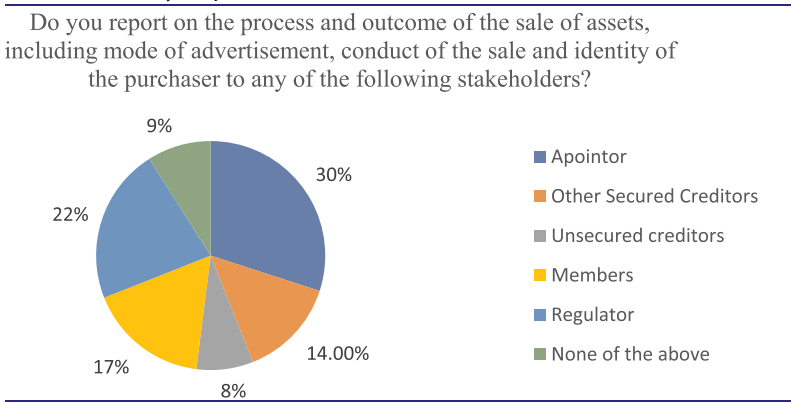


Table 11. Survey response on IP disclosure to stakeholders.



As such, several asset sales are perceived as characterised by conflicts of interest and even fraud. One interviewee said:

> We've come to recognise that there was fraud in the disposition of assets. Assets were under-priced … they sold the assets for ₦x million and what we see in the accounts is ₦y million, so there is ₦x-y million short.[159]

There are no immediate consequences for these actions. In fact, the courts have been described by some interviewees as facilitating the dilatory tactics of creditors and debtors.[160] Interviewees noted that many judges lack the procedural competence required to handle insolvency cases.[161]

[159]Interview 2.
[160]Interview 16.
[161]Interview 15 noted that much of the insolvency cases are filed in Lagos and Port-Harcourt.

For example, where the company is already in an insolvency proceeding and a court before which another action has been brought has been notified of that fact, the judge may not necessarily transfer proceedings to the insolvency court. Ultimately, poor administration of the debtor's assets has corroded trust in the process, as the interviewee continued:

> In fact, right from the beginning of this process, somebody had told me that these guys are only in to share. So, it takes away from even the confidence of the practice, and everybody thinks that this people just come in to come and kill something, or to come and get their own share.[162]

Some interviewees also noted that other key procedures are inadequately regulated. One such process is that of competing, co-and replacement appointments.[163] A competing appointment arises where a subsequent practitioner accepts to act under a subsequent insolvency process with the knowledge that a prior practitioner duly appointed under a prior insolvency process remains in office. For example, where a practitioner is appointed a receiver-manager though administration has commenced. Co-appointment arises when an additional practitioner accepts an appointment to act on behalf of an appointor that believes that a previous appointee is not acting sufficiently in their interests. A replacement appointee may also accept to replace the initial appointee for the same reason.

Interviewees noted that these practices highlight the procedural incompetence undermining the insolvency practice because it suggests that the practitioners accepting these appointments do not understand or ignore the procedures set out by the law. They also highlight the conceptual and social incompetence of practitioners who fail to appreciate the key principles underlying corporate rescue. These practitioners do not appear to understand the consequences of the insolvency for direct and indirect stakeholders such as the other creditors or community respectively. They also appear not to appreciate the role that officeholders play in ensuring that the system works in the right way. Narrating an example of a competing appointment, one interviewee stated:

> They went to court to get a receiver and manager appointment, knowing that an administrator was already appointed; even though they claimed they did not know because the advertisement came around the same time – same day that they obtained the order. But I know for a fact that they have been informed because the counsel that moved the application for the different creditors that asked the court to put the company in administration said that the counsel to this litigant had been discussing with him and he mentioned that we already have administrators who will take care of all these issues.[164]

[162]Interview 2.
[163]Interview 15.
[164]Interview 1.

Another interviewee narrated an example of a co-appointment:

> We are dealing with a situation where someone is appointed as an administrator by the court and one other creditor who is an unsecured creditor of over ₦x billion. They applied that they are nominating someone to be appointed as co-administrators. What does that tell you? It shows their mentality is that they have to be there because the administrator is representing them, not that the administrator is representing everybody.[165]

5.2. Individual factors

While environmental factors clearly contribute substantially to performance discrepancies, they may not be the sole cause.[166] Performance discrepancies can also be caused by performers lacking the required skills, knowledge, and attitude.[167] It is therefore important to determine whether the performer has the types of knowledge, skills and attitude required for the task and whether they have the necessary motivation.[168] The Nigerian framework does not provide information on the types of skills and attitude required. However, by imposing an entry barrier and entry requirements, the post-2020 changes now require prospective practitioners to demonstrate a level of knowledge before they are awarded the authorisation to act.

There was a general feeling amongst interviewees that some practitioners lacked the requisite knowledge. For example, they noted that some practitioners appointed as receivers fail to stay within the remit of the charges pursuant to which they are appointed.[169] In some cases, they may take over the wrong assets while in others, they may go beyond the remit of assets covered by the appointing document. This practice may lead to prolonged actions in the court and harm the reputation of the practice. Others noted that practitioners lack the knowledge of wider business issues. An interviewee narrated an experience with a practitioner who knew 'practically knew nothing about the trade' but had been appointed by a regulator to take over a company.[170]

Other interviewees emphasised discrepancies in the level of skills and attitude demonstrated by some practitioners. In the case of forceful takeovers for example, some interviewees noted that it is possible to take control without the order or use of force, where the practitioner has the right skills.[171] This suggests that such takeovers are motivated by both individual and

[165]Interview 11.
[166]Van Tiem and others (n 10) 173.
[167]ibid 173.
[168]ibid 175.
[169]Interview 15 also noted failure of some receiver/managers to stay within the remit of assisting orders from courts.
[170]Interview 2.
[171]Interview 9.

environmental factors. Others noted a general lack of commercial awareness and experience necessary to effectively manage struggling companies. This is exacerbated by the fact that appointments are based on referrals and personal connections, sometimes unsupported by requisite vetting by the appointors.[172] One interviewee said:

> … you are an IP, but you don't have the experience of every type of company … I have heard about where the IP just put off the lights, because it was very difficult to get in, and the gates were wired up. So, the IP made arrangements with the Power Authority to cut the lights. Unfortunately for the company, once you put off certain machines it costs them an arm and a leg to put them back on. Also, all the refrigeration was already affected and that affected the business.[173]

The lack of knowledge and skill contributes to poor attitudes. For example, some interviewees gave illustrations of the poor relational competence of some practitioners. They noted that these practitioners approach their roles arrogantly and with limited concern for the debtor company, its directors, and other stakeholders. One interviewee narrated the experience of a receiver and manager sealing the premises of a school at which students were writing their WAEC (O-Level) examinations.[174] Another interviewee stated that an insolvency practitioner said in a speech that 'you must be savage, but you must play by the book'.[175] It follows that some practitioners resort to tying the directors up in court, for example, as a means of controlling the process. One interviewee noted that an insolvency practitioner 'uses that (approach) when he wants to get us to negotiate'.[176] Another said that some practitioners see 'the director almost as a criminal'.[177] These attitudes fuel the combative response that practitioners receive from the debtor and other stakeholders at the commencement phase.

As has been stated, the reputation of the practice carries on from the pre-2020 era. Contrary to the statutory provisions, the attitude at the time was generally perceived as liquidation oriented. Some interviewees noted that several IPs did not appear to understand that the goal of the insolvency framework is not simply to liquidate a financially troubled entity but to facilitate rescue, where possible.[178] It appears, nonetheless, that there is a divide between the perception of practitioners with an accounting background and those with a legal background. The interviewees from the accountancy sector noted that most insolvency practitioners are lawyers. For them, lawyers were

[172]Interview 2.
[173]Interview 3.
[174]Interview 15.
[175]Interview 1.
[176]Interview 2.
[177]Interview 3.
[178]Interview 20.

more interested in liquidation than accountants, who have both the skills and will to rescue.[179] One interviewee stated that they were once asked by a client: 'why is it that lawyers just sell, sell, sell?'[180] The *savage* approach and poor stakeholder management also hold serious consequences for the reputation of practice.

Some interviewees suggested that the challenges they faced were exacerbated by the publication of the practitioner's appointment. They asserted that publicity is linked to a show of force by the practitioner prior to and after taking appointment. The public show of force is to create and/or perpetuate a *savage* reputation for the practitioner. Thus, some noted that the need for publicity should be done away with, as one interviewee stated:

> We have done quite a lot of receiverships in this office and one of it was when my Partner was basically the receiver-manager. What we did was not to publicise it because the company was more or less still a going concern, even though with serious financial challenges. We did not publicise the takeover. We did not go out and create a situation that would negatively destroy the company. We took over silently. My partner, as receiver-manager, also appointed a manager who … was accountable to him … We were able to continue running the company, such that the company became attractive to people who were willing to buy it.[181]

Unfortunately, the attitude around publicity has, on the rare occasion, resulted in fatalities. In the infamous case of Mobitel, a telecommunications' company, its Managing Director died during the take-over.[182] Other interviewees noted, however, that the duty to publicise the appointment of the practitioner could be complied with without generating negative publicity. For them, this was a confluence point at which knowledge, skills and attitudes should converge.

In addition, some interviewees also raised the failure of some practitioners to manage their appointors appropriately. As has been noted, many appointors insist on practitioners who represent their sole interest rather than have due regard for wider interests. As one interviewee stated:

> Now let me also say another practice that … many of us do not appreciate … although you are my appointor, you have only told me that you are being owed ₦100 million, but if I now have assets of ₦500 million, then you need to prove what you are being owed … I cannot say that because you are my appointor, I am going to give you the whole money … do you know what they did on one occasion? I had the account opened in the name of the company in receivership in which I was the signatory. Do you know the bank was taking money directly

[179]Interview 18.
[180]Interview 19.
[181]Interview 6.
[182]Interview 7. Dipo Kehinde, Sola Fanawopo and Chris Anuch, 'Mobitel MD dies in Controversial Circumstances' *Online Nigeria* (Lagos, 16 September 2005) <https://onlinenigeria.com/nm/templates/?a=5271&z=17> accessed 23 January 2024.

> from it … I told them that I was a customer of the bank even though they appointed me. Do you believe that was the first time a receiver was doing that … ?[183]

The cause analysis reiterates the emerging perception that the performance discrepancies are not attributable solely to lack of knowledge, skill or competence by insolvency practitioners. Environmental factors contribute substantially. It is argued, therefore, that the regulatory measures introduced by the post-2020 regime would fail, on their own, to resolve the challenges of the insolvency law in practice. The drivers of the discrepancies can be observed across all three levels required by the Rummler approach. They are caused much more by environmental factors, than even the personal factors. Hence, any intervention must target all interconnected levels of performance, and both sets of causal factors, if they are to succeed. Accordingly, the next section examines a suite of interventions that should be considered, if the performance discrepancies of the Nigerian insolvency law in practice and its causal factors are to be addressed.

6. Application of the performance improvement approach: interventions

Interventions are measures developed to resolve performance discrepancies.[184] Before selecting one or more interventions, it is necessary to determine the desired outcomes. These may include establishing performance, improving performance, maintaining performance, or extinguishing performance.[185] For the Nigerian context, it would be necessary to introduce measures that extinguish bad performances, establish new performances in their stead, and improve on sub-par performances. While Van Tiem and others advocate several categories of interventions, the article will focus on two key categories: (i)learning interventions, and (ii) performance support interventions.[186] Learning interventions typically target individual factors and performer level challenges.[187] They are useful when there is a gap between the current knowledge, skill and attitude of the performer and the levels required to perform the work. Performance support interventions target environmental factors and would be required to resolve challenges at the process and industry levels.[188] Both learning and performance support interventions would be necessary to resolve the performance discrepancies across all three levels of the Nigerian insolvency law in practice.

[183]Interview 9.
[184]Van Tiem and others (n 10) 195 - 196.
[185]ibid 197.
[186]ibid 197.
[187]ibid 243–244.
[188]ibid 281–282.

6.1. Resolving performer level challenges and individual factors

Individual level challenges and the individual factors that drive them can be resolved through learning interventions, which can be provided through various means including training.[189] While the use of training is known, it is important to distinguish between its various ends. Training can drive both technical and non-technical learning.[190] Technical learning emphasises the legal and procedural rules necessary to execute relevant procedures. While non-technical learning refers to training designed to facilitate the development of the softer skills that facilitate the administration of procedures. Technical learning aims at improving knowledge and skills, non-technical learning aims at improving attitudes.[191] The emphasis in Nigeria has been on technical learning delivered through formal training. It is argued, however, that this is insufficient to fully achieve the required changes. To ensure that the learning delivered is appropriate, there is a need for the systematic mapping of the softer skills that drive performance. Section 4 demonstrates that stakeholders expect practitioners to demonstrate a wide range of competences.[192] Yet these competences have not received adequate attention and expression in insolvency scholarship.[193] Careful mapping may even distinguish the competences that are required for rescue from those required for liquidation.

The learning should ideally be delivered through action learning sets. These develop learning opportunities around real problems that are complex, systemic and not easily solved.[194] This approach would ensure that the practitioner is equipped to navigate the environmental challenges observed in the Nigerian context. At the industry level, the CAC, which is the oversight regulator, has been responsible for ensuring that RPBs that wish to license practitioners have a training regime. It is argued that the CAC should ensure that the training provided by each RPB follows instructional designs that promote the ends discussed in this section. It is further suggested that an industry-wide approach to training be adopted as is done in England and Wales through the Joint Insolvency Exam Board.[195] However, the learning and assessment should be developed only after the systematic mapping process described in this section.

[189]ibid 243.
[190]ibid 265.
[191]ibid 265.
[192]See 12.
[193]Though a conversation appears to be underway in South Africa. Marius Pretorius, 'A Competency Framework for the Business Rescue Practitioner Profession' (2014) 14 Acta Commercii 1.
[194]Van Tiem and others (n 10) 263.
[195]Joint Insolvency Examination Board (JIEB) <https://jieb.co.uk/> accessed 03 July 2024.

6.2. Resolving process level challenges and environmental factors

Process level challenges and the environmental factors that drive them have been identified as most responsible for the performance discrepancies of the Nigerian insolvency law in practice. Performance support interventions respond to these.[196] They improve both the performer and the process by informing the former and supporting the latter. They can enhance, and even on occasion, replace learning interventions. They include Performance Support Tools, Documentation and Standards, amongst other things.[197]

Performance Support Tools (PST) refer to checklists, flowcharts, and matrix or decision tables and other aids that provide just enough information to assist the performer to complete tasks efficiently.[198] The goal is not to provide training but to offer assistance by giving direction or reducing the amount of information to recall. PSTs would assist practitioners in understanding how to commence the insolvency procedure and remind them of key stages.

Documentation refers to procedures, guidelines, and policies that can guide performance.[199] These could include directions on how to execute the takeover of a distressed entity without the use of force. It can instruct practitioners on the types of actions to pursue or to avoid. Additionally, documentation could set out procedures to follow for filing documents at the courts. This would avoid the current need for *ex parte* filings for out of court procedures, which is simply paradoxical. Documentation could also include directions on how to effect a change in practitioners, which has been fraught with difficulty. They would also address various problematic issues during the administration of the debtor's estate. In England and Wales, for example, Statements of Insolvency Practice (SIPs) were developed at industry level to harmonise the approach of insolvency practitioners to specific areas of practice.[200] They promote and maintain standards by outlining the required practice. Several SIPs can be linked to issues in practice that have raised concerns in practice. They are not law but work alongside the law. A breach of a SIP is a disciplinary issue that can attract regulatory or disciplinary action.[201]

[196]Van Tiem and others (n 10) 281.
[197]ibid ch 11.
[198]ibid 283.
[199]ibid 286.
[200]Institute of Chartered Accountants in England and Wales (ICAEW) 'Statements of Insolvency Practice (SIPs) – England & Wales' <https://www.icaew.com/regulation/insolvency/sips-regulations-and-guidance/statements-of-insolvency-practice/statements-of-insolvency-practice-sips-england> accessed 01 July 2024.
[201]Insolvency Service, 'Statements of Insolvency Practice: For Insolvency Practitioners' <https://www.gov.uk/government/collections/statements-of-insolvency-practice-for-insolvency-practitioners> accessed 01 July 2024.

6.3. Resolving industry level challenges and environmental factors

Industry level challenges and the environmental factors that drive them can be resolved by introducing industry wide standards. Standards are principles that guide the performer and provide criteria against which to judge their performance.[202] They support total quality management at the industry level. The performance analysis demonstrates that the Nigerian insolvency practice lacks clear standards by which to judge performance at key phases. As such, practitioners administer the debtor's estate with almost free rein. There is no insolvency code of ethics at industry level by which to uniformly direct standards. Looking again at the template from which Nigeria drew its reforms, there is an insolvency code of ethics in England and Wales. Its latest version came into effect on 1 May 2020.[203] It outlines the five fundamental principles that should guide the practitioners in executing their functions. It includes a framework through which practitioners can identify and respond to actual or potential threats to the fundamental principles. It provides specific application to specific areas of practice, as well as examples to guide practitioners in the application of the code. A breach of the code would raise disciplinary and possible subsequent regulatory action.

The performance analysis demonstrates that the challenges of the Nigerian insolvency system are not caused solely by the practitioners. Other stakeholders contribute considerably, also. It is argued that the performance support interventions would also provide tools of communicating with these stakeholder groups, who must be made aware of the practices, procedures, and principles that delimit the actions that can be taken by practitioners. They would thus serve an awareness building purpose. At the industry level, RPBs and the CAC can utilise these in engaging with other relevant bodies including the courts, associations of bankers, businesspeople, amongst others. The availability of consequences would provide comfort to these stakeholders who would know that they can seek disciplinary actions against erring practitioners. It may also be necessary to augment these awareness building measures with additional legislation in response to some of the most egregious practices of stakeholders. These would include introducing offences for endangering the lives of IPs.

It is argued that the successful implementation of these interventions would improve performance and deliver the desired change in practice. Implementation can be monitored and evaluated regularly using measures provided by the ISPI model.[204]

[202]Van Tiem and others (n 10) 286.
[203]Insolvency Service, 'Insolvency Practitioner Code of Ethics' <https://www.gov.uk/government/publications/insolvency-practitioner-code-of-ethics> accessed 01 July 2024.
[204]Van Tiem and others (n 10) 443.

7. Conclusion

Insolvency reform and scholarship have traditionally concentrated on changes to the law on the books, with limited attention to the law in practice. Accordingly, administratively oriented systems tend to assume that the challenges of the law in practice stem from unfit or untrained practitioners. This leads to regulatory measures focused on entry barriers and training requirements. This article challenges this narrow focus and its underlying methodology. Combining two performance technologies to undertake a systematic and systemic review of the challenges of the insolvency law in practice, it finds that performance discrepancies are neither solely due to practitioner shortcomings nor solely driven by individual factors such as limited knowledge and incompetence. They also arise from systemic, process and industry level challenges, which are driven by environmental factors that would impede even the most qualified and best trained practitioners. In the case of Nigeria, the blame placed on practitioners is not wholly deserved. The challenges of the Nigeria insolvency law in practice are also caused by environmental factors at process and industry levels. Without addressing these systemic challenges, the Nigerian system is unlikely to achieve the vision of the Idornigie Committee for a rescue-oriented insolvency system administered by fit practitioners.

The article recommends a suite of interventions at the various levels discussed. At the performer level, it advocates targeted learning interventions focusing on both technical and non-technical skills. Non-technical skills have been inadequately discussed in insolvency scholarship. However, they are essential to stakeholders, who use them in their evaluation of practitioner performance. These interventions are likely to drive a comprehensive mapping of the knowledge, skills and competences expected of practitioners. Process level challenges, which are particularly pressing in the Nigerian context, can be mitigated using performance support tools and documentation. These two measures will encourage the development of clear processes and guidance for activities such as the takeover of the company or the sale of assets, benefitting practitioners and insolvency stakeholders. Finally, industry level challenges would benefit from the introduction of industry wide standards, awareness-building initiatives, as well as additional legal reform. These reforms would be necessary to make certain actions, such as 'endangering the lives of practitioners' lives, offences.

Ultimately, this article demonstrates that the performance improvement approach through its comprehensive, data-driven and stakeholder inclusive framework offers a systematic and systemic method for addressing the complex challenges of insolvency law in practice. Though the article applies the model to one jurisdiction, it can be applied to any jurisdiction interested in a systematic and systemic review of the challenges of its

insolvency law in practice. This will enable future scholarship that can fill critical gaps in insolvency theory and practice. It is also expected to facilitate the alignment of legal reform and its implementation.

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