Financing Corporate Rescues, Where Does the UK Stand?

by Akpareva Aruoriwo

Introduction

One of the basic tenets of insolvency within the UK is to offer companies facing insolvency which have good future prospects, the opportunity to be rescued.[1] This is done through restructuring and reorganisation where the business is mainly healthy and has a good forecast of the financial tides turning in its favour.[2] Continuing finance is fundamental to any corporate rescue plan as well as a hindrance when it is in short supply. Without an established provision which clearly outlines prospective post-petition financing i.e. funds needed by the debtor company to enable it to continue trading during the rescue period[3] and how these new creditors who often demand priority payments over pre-existing creditors will fit into the debtor's repayment plans, efforts to effectively rescue a company may amount to an exercise in futility.[4] Convincing potential lenders to fund a business which appears, on the whole, unprofitable, may amount to a difficult task.

Other jurisdictions have surmounted this hurdle through the incentivisation of corporate rescue financing, by according super-priority to these funds.[5] McCormack argues that such financing creates an enabling situation for lenders to advance money on the assured basis of priority repayments. This system of creating provisions for the injection of fresh funds into an ailing business is becoming the norm within model insolvency laws.[6] In the UK, the 2002 Enterprise Act which amended the Insolvency Act 1986 and introduced a new and improved administration regime made provisions for an administrator to borrow funds, grant security[7] and prioritise repayment of debts owing under contracts entered into by the administrator.[8] Though broad in the extent of powers conferred as regards obtaining funds and continuing the business, it nevertheless lacked the incentives required to encourage fresh lending as can be found in jurisdictions like Canada and America.

The aim of this paper is to evaluate the adequacy of the framework available for the funding of corporate rescues in the UK in reference to examples from America and Canada. The paper

[1] See generally the report submitted by the Insolvency review committee headed by Sir K Cork, Cmnd.8558, 1982.

[2] R Goode, *Principles of Corporate Insolvency Law* (3rd edn Sweet and Maxwell, London, 2010) para 1-21.

[3] However, it should be noted that where it is a pre-packed administration such funds are not needed as the business has been sold off prior to the administration commencing.

[4] L Qi, 'Availability of Continuing Financing in Corporate Reorganisation: the UK and US Perspective' (2008) 29 Comp. Law. 162-167.

[5] See Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, s.11.2 and American Bankruptcy code, 11USC s.364.

[6] G McCormack, 'Super-priority New Financing and Corporate Rescue' (2007) JBLR 701.

[7] Insolvency Act, 1986, Sch1, para 14 & 15. See also para 99, s.19 (5).

[8] *Ibid*, Sch B1 at para 99.

begins with a look at the importance of funding in corporate rescues. This is followed by an analysis of how corporate rescue can be funded in the UK. Finally the paper examines past calls for reforms to the law and the preparedness of the UK to adopt any reforms, and then a conclusion will be reached.

Importance of Funding In Corporate Rescues

For a lot of companies going through corporate rescue, the provision of additional funding allows them to continue operation.[9] It facilitates the achievement of the rescue objectives of the debtor company by ensuring that there are funds to meet the essential day to day monetary needs of the debtor company, a position reinforced by United Nations Commission on International Trade Law (UNCITRAL) which affirmed that the continued operation of the debtor's business is crucial to reorganization and additional finance is vital to this objective.[10] It was recommended in the UNCITRAL Legislative Guide on Insolvency Law that where insolvency laws support insolvency proceedings that allow an insolvent business to continue trading, either for reorganization or the sale of the business in liquidation as a going concern, it is important that new funding is tackled.

It therefore appears to be that, finance plays a major role in the success of corporate rescues as it is what drives the rescue process. In the past, research showed that obtaining financing during the rescue process had a correlative effect on the reduced possibility of liquidation.[11] While it seems that finance is recognised to be pivotal to the rescue process, it still poses considerable challenges especially with accessing it and the impact its availability and terms have on stakeholders and the overall integrity of the insolvency system.[12] Differing approaches to rescue finance can be seen in how countries like America and Canada approach the funding of corporate rescue in their various countries.

In America, the problem of business funding during the rescue process has been surmounted by statutory provisions.[13] New priority financing, debtor-in-possession (DIP) funding as it is known in America is financing authorised by the court for a bankrupt firm which has sought the protection of the chapter 11 rescue procedures.[14] Undeniably, the rescue funding provisions along with the automatic stay are the important parts of the chapter 11 procedure. The Code provides a hierarchy for obtaining funds and incentives in the way of super-priority repayments to ensure lenders are more amenable to the idea of advancing money. Canada on the other hand, provides two approaches to business funding. Initially, judges could with the use of judicial fiat approve super-priority financing request by

[9] L J Abbot, S Parker & G F Peters, 'The Effect of Post-bankruptcy Financing on Going Concern Reporting' (2000) 21 AICPA.

[10] UNCITRAL Legislative Guide on Insolvency Law (2005), http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf accessed 24th September 2013.

[11] A Elayan & T Meyer, 'The Impact of Receiving Debtor-in-Possession Financing on The Probability of Successful Emergence and The Time Spent Under (CHAP 11)' (2001). 28(7), BJBFA 905-942.

[12] J Sarra, 'Financing Insolvency Restructurings in The Wake of The Financial Crisis: Stalking Horses, Rogue White Knights and Circling Vulture' (2010-2011) 29 Penn St. Int'L. Rev 581.

[13] 11 U.S.C., s 364.

[14] L J Abbot, S Parker & G F Peters, 'The Effect of Post-bankruptcy Financing on Going Concern Reporting' (2000) 21 AICPA.

debtor companies[15] during corporate rescue. This was later replaced by statutory provisions for super-priority interim financing.[16]

There appears to be a strong support globally for super-priority new financing being a part of Insolvency reforms.[17] This global consensus is evidenced by the proposals put forward by the European Bank for Reconstruction and Development (EBRD) in its 10 Core Principles for insolvency Law Regime. It advocated that where restructuring is appropriate, new priority should be permitted.[18] At first glance, the Insolvency Act 1986 appears to be lacking in this requirement for priority financing. While it is admitted that the UK provision for business funding is not as comprehensive as both the American and Canadian provisions, it allows for the borrowing of funds as part of an administration expenses.[19] The question therefore is does the UK corporate rescue funding provisions measure up when compared to other jurisdictions that have adopted priority new financing? Or are corporate rescues adequately funded in the UK; therefore, new priority financing may not be of immediate necessity in the UK?

Funding Corporate Rescues in the UK

Funding a business during the rescue process in the UK may not be as clear cut as it is in jurisdictions such as Canada and America. These jurisdictions have clear and identifiable provisions with incentives attached, to enable the funding of the rescue process. The process of corporate rescue funding in UK is unique in the sense that it appears to combine a mixture of both formal and quasi-formal procedures. The formal procedure encompasses legislative efforts which are manifested in statute while the quasi-formal routes touch on other policies or strategies developed by the debtor, their lawyers and/ or creditors and/ or bankers.

Legislative efforts towards corporate rescue funding appear to be tied to the company administration process. The company administration procedure was introduced by the report submitted by the Insolvency Review Committee headed by Sir Kenneth Cork which was set up by the Secretary of State for Trade in January 1977.[20] The purpose of the administration procedure was (and still is) to support the rehabilitation or re-organisation of companies facing difficulties in order that they might be restored to profitability or that viable elements of the company business might be preserved as a going concern.[21] However, the Cork Report was silent on how the administration process would be funded, nonetheless the report referred to the fact that where an administration order is

[15] J Sarra, 'Debtor in Possession Financing: the Jurisdiction of Canadian Courts to Grant Super-priority Financing in CCAA Applications' (2000) 23 Dalhousie L.J 337.

[16] Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, s.11.2

[17] M Uttamchandani, 'The Case for DIP Financing in Early Transition Countries; Taking a DIP in The Distressed Debt Pool' (2004) LIT http://www.ebrd.com/downloads/research/law/lit042.pdf See, in particular, text accompanying fnn. 19-22) accessed 24th September 2013.

[18] European Bank for Reconstruction and Development (EDBR) Core principle 8. http://www.ebrd.com/russian/downloads/legal/insolvency/principle.pdf accessed 24th September 2013.

[19] See generally Insolvency Act 1986, Schedule B1, para 14 &15, para 59 and Para 99.

[20] Cmnd.8558, 1982.

[21] A Revised Framework for Insolvency Law (Cmnd.9175 1984) pg. 19 Chap 6 para 31.

discharged, creditors who advanced money or gave credit to the administrator to enable the company's business to be carried on as a going concern should enjoy priority of payment.[22]

It therefore follows that post-petition credit used to fund the rescue process would form part of expenses incurred by the administrator to enable a going concern value and so enjoy priority payment. This notion was consolidated in the Insolvency Act which gives priority to the payment of the administrators' remuneration and expenses.[23] The Insolvency Act[24] also authorises the administrator to do all such things that are necessary for the management of the affairs, business and property of the company.[25] Accordingly, when an administrator is appointed, he assumes all the management powers including the power to borrow money and grant security.[26] Therefore if borrowing money is necessary for the continued running of the business during the rescue, the administrator has the power to do so and lenders who advance the funds would enjoy priority payments. In addition it has been suggested by Gerard McCormack[27] and Vanessa Finch[28] that section 19(5) and schedule B1 paragraph 99 of the Insolvency Act 1986 provides a potential route to post-petition financing. The provisions deals with contracts entered into by the administrator in the course of carrying out his functions. These debts enjoy priority payment over the administrator's remuneration, expenses and all other secured creditors.[29]

This therefore gives the impression that Administrators do seem to have some authority to enter into loan agreements with post-petition lenders. However what is lacking is the incentive to encourage lenders to advance funds. Presently, the provisions appear a bit generalised and do not make direct reference to funding corporate rescues. Be that as it may, the courts have relied on the administrator's powers to enter into contracts to approve super-priority financing in *Bibby Trade Finance Ltd v McKay*.[30] Also in *Freakley v Centre Reinsurance International Co*[31] the House of Lords stated that it was within the administrator's powers to determine what expenses are necessary for the purposes of the administration and which would, subject to the court's supervision, receive priority.

In view of this, it is possible for courts to rely on schedule B1, paragraph 99 of the Insolvency Act 1986 and their inherent jurisdiction to approve post-petition financing and as such establish precedents and court practices to take care of post-petition financing and ensuing super-priority incentives. However, this possibility is not being fully explored. The reason for this have been attributed to the rise of the pre-packaged administrations which have reduced the need for a creative interpretation of paragraph 99 given that "pre-packs" are likely to come with their own funding

[22] Report of the Review Committee on Insolvency Law and Practice (Cmnd.8558, 1982), Chap 9 para 514.

[23] Insolvency Act 1986, Para 99, Schedule B1.

[24] 1986.

[25]Insolvency Act 1986, Schedule B1, para 59.

[26] See generally Insolvency Act 1986, Schedule1, para 14 &15.

[27] G McCormack, 'Super-priority New Financing and Corporate Rescue' [2007] J.B.L. 701-732.

[28] V Finch, 'The Dynamics of Insolvency Law: Three Models of Reform' [2009] Law and financial Markets Review pg 438-448.

[29] Insolvency Act 1986, Schedule B1, para 99(3), (4)-(6).

[30] [2006] All ER 266.

[31] [2006] BCC 971.

arrangements already taken care of by the prospective buyers.[32] Notwithstanding this, there would be some occasions where a pre-packaged administration is not utilized instead, what would be in place would be a trading administration. In a situation as this, rescue funding is primarily important as the administrator will need funds to continue trading during the process.

A pre-pack in its basic terms, is a method of selling the business of an insolvent company as a going concern.[33] It is generally used hand in hand with the administration process and can be traced to the old administration regime which existed under Insolvency Act 1986.[34] There is no provision for the use of pre-packs under the Insolvency Act, but it has enjoyed extensive judicial support.[35] Its use gained popularity following the introduction of the Enterprise Act 2002.[36] Thus, the pre-pack has become a very useful rescue tool in the Insolvency practitioner's arsenal, particularly in view of the fact that the main principle underlying the pre-pack is that a continuing business is worth more to its stakeholders than one that is fully distressed and out of trading.[37]

Therefore, what the pre-pack does is to achieve a rescue of the business with the onus for funding the rescue on the new buyer who would be tasked with injecting fresh funds into the business. Perhaps the fact that funding is somewhat assured with a pre-pack is one of its redeeming features. Frisby in her report on pre-packaged administrations[38] noted that one of the driving forces behind the increased use of pre-packs is the scarcity of resources with which to trade the duration of the administration. She also noted that continued trading is essential if there is to be any prospect of a going concern sale and lack of funding will in many cases is a barrier to the need to continue trading.

Calls for Reforms to the UK Corporate Rescue Procedures

The UK regime has been criticised for being too biased towards creditor interests when compared to other jurisdictions and not offering enough protection and opportunity for troubled companies to rehabilitate.[39] Consequently, in the past, there have been calls for reforms to the UK insolvency law. One of the subjects which have generated a lot of controversial debate and request for reforms has been super priority post-petition financing. Though the Insolvency Act makes provisions for priority financing within the purview of the administration expenses, there are no

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[32] See generally V Finch, 'Pre-packaged Administrations: Bargaining in the Shadow of Insolvency or Shadowy Bargains' (2006) J.B.L. 568; P Walton, 'Pre-packaged Administrations—Trick or Treat? (2006) 19 Insolvency Intelligence 113.

[33] S Frisby, 'The Second-chance Culture and Beyond: Some Observations on the Pre-pack Contribution' (2009) Law and Financial Markets Review 242-247.

[34] M Haywood, 'Pre-pack Administrations' (2010) Insolv. Int. 23(2), 17-22. The new Administration process is the one provided for under Insolvency Act 1986 Schedule B1.

[35] See *DKLL Solicitors v Her Majesty's Revenue and Customs* (2007) EWHC 2067 (Ch), here the court appeared to support the use of a pre-pack as a legitimate technique. See also *RE Kayley vending ltd* [2009] EWHC 904(Ch).

[36] S. Manson, 'Pre-packs from the Valuer's Perspective' (2006) Recovery (summer) 19.

[37] M Hyde & I White, 'Pre-pack Administration: Unwrapped' (2009) Law and Financial Markets Review.

[38] S Frisby, 'A preliminary analysis of pre-packaged administration' (2007) Report to the Association of Business Recovery Professionals.

[39] L Hiestand & C Pilkington, 'Time for (some) Chapter 11' (2008) 27 Int'l Fin. L. Rev. 40.

provisions for chapter 11 style super-priority financing which would encourage new and pre-existing lenders to extend credit to the company.

A system of funding was put forward by the Department of Trade and Industry (DTI) and the Insolvency Service in 1993. After consultations the initiative was abandoned in 1995 on the grounds that it might encourage large, ineffective incentives to lend and unjustifiable financing.[40] In 2000, a Review group was set up by agreement between the Chancellor of the Exchequer and the Secretary of State for Trade and Industry to review company rescue and business reconstruction mechanisms. Their terms of reference included reviewing and recommending the means by which businesses could resolve short to medium term financial difficulties in order to preserve maximum value, avoid liquidation and where this was not possible, preserve as many businesses as possible as going concerns.

The review group in its report acknowledged the fact that the issue of financing was central to any discussion of a rescue culture in the UK[41] and unless finance was made available, businesses would fail and assets would have to be sold piecemeal with the end result being that, the company would be forced into liquidation.[42] While companies can raise new funds to sustain the rescue process with the support of existing creditors and unencumbered assets, the dominance of floating charge makes the availability of unencumbered assets a rarity in corporate insolvencies.

In making recommendations on how to finance companies or business rescues, the committee looked to chapter 11 for guidance. It was acknowledged by the committee that a direct transplant of the DIP mechanism would be unsuitable to the business culture and environment in the UK. Nonetheless, the basic principle of providing additional finance in a properly considered recovery plan to a distressed business, to enhance its value would fit in with the purpose of financing business rescue in the UK. This therefore formed the basis of their recommendations to introduce super-priority financing.

Statutory intervention was to come with proposals to amend insolvency laws with the proposed enactment of the Enterprise Act 2002. However, prior to the enactment of the Act, a draft of the Enterprise Bill which was presented to parliament had missing from it, provisions for super-priority financing which was hitherto recommended by the review group set up to look into company rescue and business.[43] During the debates prior to the passing of the Enterprise Act, Lord Hunt who was in support of the introduction of super-priority financing argued that if an enhanced form of administration was to be used successfully as a rescue tool, it was necessary to tackle the issue of funding as it was important to have a mechanism which provides companies with access to on-going finance during the rescue process.[44] He further proposed provisions for super-priority financing where priority is given to a lender who is willing to advance money to a business to keep it going while a

[40] DTI Consultative Documents, 'Company Voluntary Arrangements and Administration Orders' (1993) & 'Revised Proposals for a New Company Voluntary Arrangement Procedure' (1995).

[41] Department of Trade and Industry & HM Treasury, 'A Review of Company Rescue and Business Mechanisms' (May 2000) No 133. http://webarchive.nationalarchives.gov.uk/+/http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/con_doc_archive/consultation/condoc/condocreport.htm accessed 31st October 2013.

[42] *Ibid.*

[43] *Ibid.*

[44] HL Deb 29 July 2002 vol 638 cc763-806 at para 788.

rescue is being worked out and he stated that failure to introduce super-priority financing, would undermine the ability of administration to operate as an effective tool.[45]

In opposition, the House of Lords decided that the issue of lending to a company in administration was purely a commercial one which was best left to the dictates of the lending market. It was felt that the issue of super-priority was beyond the abilities of the courts and the presence of floating charges made it impossible to have free unsecured assets which would have made the idea of DIP financing more attractive.[46] As to the availability of sources of corporate rescue financing, the company's existing bankers and asset financiers were suggested as possible suppliers of credit.[47] On the whole, the Government was cautious of creating a situation whereby guaranteed priority payments would encourage lenders to advance funds regardless of the viability of the rescue proposal.[48]

The unwillingness by Parliament to delve into the issue of super-priority financing did not put an end to calls for its introduction. Following the enactment of the Enterprise Act 2002 and with the economic recession biting hard and more businesses failing, the debate for and against the introduction of super-priority financing was revived. The issue of super-priority financing attracted political attention when Prime Minister David Cameron, in a speech to the Confederation of British Industry (CBI)[49] on the 15th of July 2008, called for US-style bankruptcy protection laws as well as super-priority financing.[50]

In addition, the Insolvency Service in its Consultation on 'Encouraging business rescue – a Consultation'[51] put forward two main proposals aimed at increasing the availability of rescue finance. Firstly, it proposed that a range of increasingly enhanced security should be offered to lenders of rescue finance as an incentive to lend to companies that would otherwise have difficulty attracting finance[52] and that finance costs properly incurred during the rescue process[53] should have priority over administration expenses.[54] In addition the consultation group stated that, attachment of super-priority repayment to new credit would attract banks, other financial institutions and trade and services

[45] *Ibid.*

[46] *Ibid,* at para 799. In the US there are no floating charges to hamper the availability of free assets.

[47] *Ibid.*

[48] G McCormack, 'Super-priority New Financing and Corporate Rescue' [2007] J.B.L 701-732.

[49] The UK's top business lobbying organisation.

[50] See Speech by David Cameron on the 15th of July 2008; F Elliot & G Gilmore, 'David Cameron Calls for US-style Bankruptcy Rules' *The Times* (London, 16 July 2008) http://www.thetimes.co.uk/tto/business/economics/article2148023.ece accessed on the 21st October 2013.

[51] June 2009. http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/compresc/compresc09.pdf accessed online on the 25th of October 2013.

[52] See The Insolvency Service, 'Encouraging Company Rescue – a Consultation' (2009) para 54

http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/compresc/compresc09.pdf accessed 30th October 2013.

[53] This already attracts priority payment as part of administrative expenses.

[54] The Insolvency Service, 'Encouraging Company Rescue - a Consultation' (2009) proposal C, para 60 http://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/con_doc_register/compresc/compresc09.pdf accessed 30th October 2012.

suppliers to extend credit to the company. It was contended that this would make it easier for the rescue of the business as opposed to a piecemeal sale.

Secondly, it proposed that an administrator should be able to (1) secure new post-petition financing against unencumbered assets or (2) an additional (subordinate) fixed charge on any property or (3) subject to the agreement of a secured creditor or the court and only where there is no scope for new or subordinate fixed charges, as a first charge (ahead of other fixed charges) or an equal first charge on property already subject to a fixed charge. In addition a number of factors were suggested by the consultation group to aid the administrator in reaching the decision on securing new finance. It was proposed that prior to securing new finance, the administrator must be satisfied that (a) the granting of such security for rescue finance is necessary in order to obtain the finance (b) the interest of existing secured creditors are adequately protected (3) obtaining the rescue is in the best interests of creditors as a whole.

An underlying theme runs through most of the proposals put forward regarding the introduction of rescue funding into the UK insolvency system. There is a recognition that a vacuum exists regarding post-petition funding. While the Insolvency Act has in a roundabout way, made provisions for post-petition funding, the jury is still out on whether these provisions are adequate enough to do the job. It does appear that there is a general pre-disposition towards the US chapter 11 style financing as most of the recommendations are fashioned after it.

Those calling for reforms have advocated that finance which has been properly incurred during the course of the rescue should enjoy super-priority over other administrative expenses and remunerations and not rank *pari passu.* The danger in introducing this sort of priority in the UK lies in the fact that the jurisdiction is more creditor-focused and the rescue is managed by an administrator unlike the US chapter 11 which retains management at the helm of the rescue process and is more debtor-oriented. Thus if rescue funding is made to enjoy super-priority, it may have a far-reaching effect on continued trading during the rescue process because it would rank ahead of important trading expenses and this may result in parties being less willing to continue to trade with the company.[55] Also, administrators may be reluctant to take up appointments if they feel their fees may be in jeopardy as a result of super-priority finance.[56]

Is the UK ready to DIP?

The idea of introducing super-priority financing into the UK regime appears not to garner sufficient support to make it a reality especially as it is viewed as an “Americanization” of English insolvency laws. Attempting a direct transplant of the chapter 11 financing provisions, may have unintended negative consequences on the English legal system as no legal system is an exact model of another. This is due to the fact that most systems are shaped by historical, political and economic factors which cannot be duplicated in another jurisdiction.[57] This position was acknowledged by the government when it stated that the idea of looking to US chapter 11 was not premised on a wholesale

[55] Response of the Insolvency Law Committee of the City of London Law Society to the Consultation Document on Proposals to Encourage Company Rescue (8th September 2009).

[56] *Ibid.*

[57] M Graziadei, ‘Comparative Law as the Study of Transplants and Receptions’ in M Reimann & R Zimmermann (eds.) *Oxford Handbook on Comparative Law* (Oxford, 2008).

duplication of it, but an adoption of only the best features of the process[58] which would complement and add value to the administration process.[59]

Those against chapter 11 type reforms have always reiterated that the Insolvency Act makes provisions for rescue financing. They point to the fact that under the Insolvency Act, an administrator has access to unencumbered assets and floating charge assets[60] which he may deal with to raise money. This finance pool has further been augmented by the decision of the House of Lords in *Re Spectrum Plus*[61] which freed up book debts, making them available for administrators as a source of finance. Moreover, it has always been emphasized that the administrator can secure loans on behalf of the company and these would enjoy priority repayment as part of the administration expenses. The right of administration expenses to enjoy priority payment under the Insolvency Act is no different from what obtains under chapter 11 and the Companies' Creditors Arrangement Act.

Champions of chapter 11 style reform have pointed out to the fact that there should be scope for 'priming liens'. In other words, the administrator should be able to grant security over encumbered assets. While, the Insolvency Act[62] authorises the administrator to raise or borrow money over the company's property, it is not clear if this can be extended to encumbered assets. It has been suggested that in principle, nothing stops an administrator from being able to secure new financing by means of a subordinate fixed charge, a possibility which the administrators may already be exploring on a consensual basis; with the permission of the pre-existing secured creditor.[63] The same principle can also be applied to priming the existing rights of a secured creditor for that of a new lender as long as it is agreed upon by all parties involved.

It has been suggested that a change in line with some of the elements of chapter 11 may tip the balance too far in favour of debtors, which in itself would have an unfavourable impact on UK financial markets and the cost and availability of funds to UK businesses.[64] DIP financing is well entrenched within the US legal system and it has been forged from the tracks of railway receiverships to modern day corporate re-organisation, such that the US judiciary has a wealth of experience to draw from and the judges are accustomed to dealing with commercial decisions. Moreover, rescue funding seems to be a company rescue issue and Canada and America took that into consideration in designing their rescue framework.

The UK system, in particular company administration, though initially framed as a company rescue mechanism achieves more of a business rescue and provides only a skeletal framework on how the process can be funded. Perhaps the reason behind this lapse can be traced to the fact that the old administrative receivership formed the basis upon which administration was created. The old administrative receivership despite the fact that it was in some cases used to achieve a rescue, it was

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[58] See Speech by David Cameron on the 15th of July 2008; F Elliot & G Gilmore, 'David Cameron Calls for US-style Bankruptcy Rules' *The Times* (London, 16 July 2008) http://www.thetimes.co.uk/tto/business/economics/article2148023.ece accessed on the 21st October 2013.

[59] L Hiestand & C Pilkington, 'Time for (some) Chapter 11' (2008) 27 Int'l Fin. L. Rev. 40.

[60] See generally, *Re Spectrum Plus*, [2005] UKHL 41. He still has powers to deal with these assets during the ordinary course of business until it crystallises.

[61] [2005] UKHL 41.

[62] See Insolvency Act 1986, para3, schedule 1.

[63] G Yeowart, 'Encouraging Company Rescue: What Changes are required to UK Insolvency Law?'(2009). Law & Financial Markets Review.

[64] *Ibid.*

not created primarily for that purpose[65] and so would not have taken into cognisance the need for business funding. The UK jurisdiction may have a long way yet to attain the level of expertise needed to handle such complex commercial matters especially as there are no specialised bankruptcy courts and judges as is to be found in the US.

Conclusion

Business is all about the availability of credit and more so when the company is insolvent. It may be even more crucial if the business is to be rescued successfully as corporate rescue financing provides the debtor company with working capital which gives it breathing space to identify and remedy the source of its financial distress.[66] The UK appears to lack structured statutory provisions for corporate rescue financing, what is available is a skeletal foundation for super-priority financing which the Government may have missed various opportunities to build on. Super-priority financing is something that can be done as case law has shown.

It can be argued that the UK offers super-priority repayments by default; however there is no scope for priming liens. The ability to prime existing lien may be regarded as an important mechanism for raising rescue funds as it opens up avenues for post-petition funding where all the company's assets have been encumbered. It may be assumed that the lack of such an incentive means that presently, new secured finance is only available to support a rescue procedure in the UK to the extent that existing secured creditors agree, and/or if the company has uncharged assets (or charged assets with sufficient equity) that can be offered as fresh security.[67]

Undoubtedly, availability of funds during corporate rescue is a relevant fundamental issue. Despite calls for super-priority financing to be introduced in the UK, there has not being any moves to do so. Perhaps what funding mechanisms exist within the UK sufficiently takes care of the jurisdiction's needs. In addition, rescue funding appears to be a company rescue issue and at present what usually takes place during corporate rescue in the UK is a business rescue which perhaps fits into the existing funding framework.

Akpareva Aruoriwo

PhD Research Student,
Nottingham Law School,
Nottingham Trent University,
United Kingdom

[65] RJ Mokal, 'Administrative Receivership and Administration- an Analysis' in *Current Legal Problems* (Oxford University Press, 2005) pg. 355-392.

[66] J Sarra, 'Governance and Control: The Role of Debtor-in possession Financing under The CCAA @ ANNUAL Review of Insolvency Law, 2004 (Carswell, 2005) pg 118- 172.

[67] Department of Trade and Industry & HM Treasury, 'A Review of Company Rescue and Business Mechanisms' (MAY 2000) NO 133 http://webarchive.nationalarchives.gov.uk/+/http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/con_doc_archive/consultation/condoc/condocreport.htm accessed 31st October 2013.