

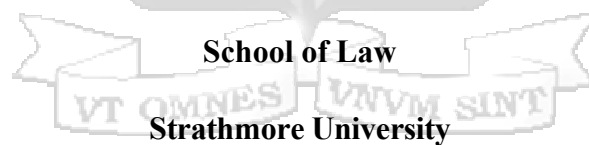
An Appraisal of Company Voluntary Arrangements as a Corporate Rescue Mechanism in Kenya

By

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Submitted in partial fulfilment of the requirements for the Degree of Master of Laws at
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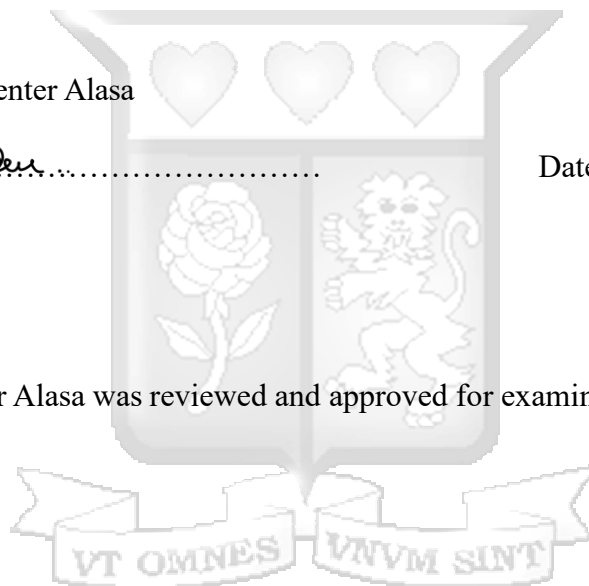
Approval

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Abstract

Before the enactment of the Insolvency Act No. 18 of 2015, insolvent companies in Kenya primarily faced winding up or receivership, with limited negotiation options, such as schemes of arrangement. The Insolvency Act No. 18 of 2015 introduced more flexible approaches, among them Company Voluntary Arrangements (CVAs). Yet, in almost ten years, there has been minimal utilisation of CVAs by financially distressed companies in Kenya.

Using the Explicit values and the communitarian vision theories, this doctrinal legal research evaluates the effectiveness of the law governing the CVAs in Kenya post-2015, examining their adaptation and efficacy given the country's legal, economic and social circumstances.

The study also undertakes to draw best lessons from the United Kingdom legal framework on CVAs, this research will embark on a comparison of their framework, in order to understand what lessons Kenya can borrow to strengthen its framework on CVAs to make it more viable and effective in the country.

Findings reveal that while CVAs offer a promising alternative for debt resolution and avoidance of liquidation, their uptake or utilisation by financially distressed companies in Kenya has been minimal, and their success sporadic. Factors influencing these outcomes include a lack of awareness and understanding of CVAs among stakeholders, a weak regulatory framework, and the capacity of insolvency practitioners. This study underscores the need for targeted legislative reforms, enhanced professional training for insolvency practitioners, and increased public awareness to optimise the effective use of CVAs as a tool for corporate rescue.

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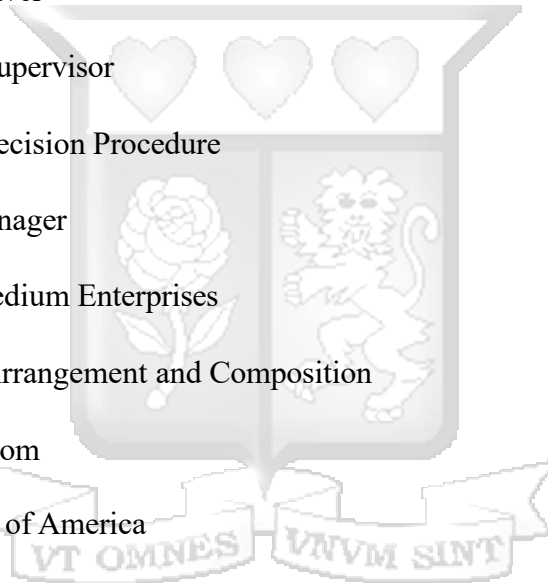
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List of Abbreviations

CIGA	Corporate Insolvency and Governance Act,2020
CVA	Company Voluntary Arrangements
COVID 19	Corona Virus Disease
HMRC	Her Majesty's Revenue and Customs
IP	Insolvency Practitioner
OR	Official Receiver
PS	Provisional Supervisor
QDP	Qualifying Decision Procedure
RM	Receiver Manager
SMEs	Small and Medium Enterprises
SOA	Schemes of Arrangement and Composition
UK	United Kingdom
US	United States of America



List of Legal Instruments

Kenyan Laws

1. Constitution of Kenya, 2010
2. Bankruptcy Act, Cap 531, Laws of Kenya (Repealed)
3. Companies Act (1962) Cap 486, Laws of Kenya (Repealed)
4. Companies Act, (CAP 486) (repealed) Laws of Kenya
5. Insolvency Act, (Act No 18 of 2015), Laws of Kenya
6. Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol. CXVIII – No 29 on 24 March 2016

UK Laws

1. An Act to amend the Laws relating to Bankrupts, 1825, U.K
2. An Act for the Amendment for the Law of Bankruptcy, 1842
3. An Act to establish a Court in Bankruptcy (1 & 2 Will IV c 56)
4. Bankruptcy Act, 1914, UK
5. Bankruptcy (Amendment) Act ,1926, UK
6. Bankruptcy Law Consolidation Act, 1849, U.K
7. Bankruptcy Act, 1930
8. Companies Act, 1862, UK
9. Companies Act, 1948, UK
10. Corporate Insolvency and Governance Act, (2020) Laws of United Kingdom
11. Debtor's Act, 1869, U.K
12. Deeds of Arrangement Act, 1914, UK
13. Enterprise Act, 2002, Cap 40
14. Friendly Societies Act, 1974, Cap 46
15. Friendly Societies Act, 1992, Cap 40
16. Finance Act, 2020, Cap 14
17. Insolvency Act (1986) United Kingdom.
18. The Statute of Bankrupts 1542
19. Insolvency (England and Wales) Rules, 2016

US Laws

1. Chapter 11, United States Bankruptcy Code

India Laws

1. The Indian Insolvency Act, 1848

International Instruments

1. UNCITRAL Legislative Guide on Insolvency Law for Micro and Small Enterprises



List of Cases

Bluecrest Mercentile BV v Vietnam Shipbuilding Industry Group and others (2013) EWHC 1146.

Carraway Guilfold (Nominee A) Limited v Regis UK Limited [2021] EWHC 1294 (Ch)

Debenhams PLC (In Administration) [2020] EWHC 921 (Ch)

Ebrahimi v Westbourne Galleries Ltd [1963] AC 360

In Re Nakumatt Holdings Limited (Under Administration) [2021] KEHC 8603 (KLR) [2021]

In Re Olerai Nurseries Limited, [2022] KEHC 11125 (KLR)

In Re Uchumi Supermarkets PLC [2019] KEHC (KLR) [2019]

In the Matter of Kaluworks Limited, Insolvency Cause No E019 of 2021(unreported)

Kayley Vending Ltd, Re [2009] EWHC 904 (Ch)

Lazari Properties 2 Limited and Ors and New Look Retailers Limited [2021] EWHC 1209 (Ch)

Kiptum vs Blueshield Insurance Company, Miscellaneous Application 238 of 2017, [2023] KEHC 2816 (KLR)

Omar & Another v Wachira, Civil Appeal 67 of 2022 [2023] KEHC 25664 (KLR)

Pizza Express Financing 2 PLC [2020] EWHC 2873 (Ch)

Pradipkumar Harjivandas Paunrana v Muniu Thoiti & George Waweru (As Administrators of ARM Cement PLC (Under Administration)); National Cement Company Limited (Interested Party) [2021] KEHC (KLR) [2021]

Re CANCEL Ltd [1995] BCC 1130

Re Demaglass Ltd [2001] EWHC 2012 (Ch)

Re Franklyn [2015] EWHC 2012 (Ch)

Re Jonathan Karanja, Insolvency Cause E004 of 2022;[2024] KEHC 4521 (KLR)

Re Uchumi Supermarkets PLC[2019] eKLR

Re Uchumi Supermarkets PLC [2020] KEHC 9859 (KLR)

Smith v Mills (1584) 76 ER 441

Uchumi Supermarkets PLC v Topsy Company Limited [2021] KEHC (KLR) [2021]

Uchumi Supermarket PLC V UBA Bank Kenya Limited & 4 Others, Insolvency Petition 25 of 2018 [2023] KEHC 24910 (KLR)

Welman v Marcelle Props 193 CC and Another (33958/2011) [2012] ZAGPJHC 32 (24 February 2012)



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Dedication

For Gweth Amari, Dr. James Philip, Hellen Judith, Stella Grace, Robert John, and Maryanne Joyce.



Chapter One

1.0 Introduction

1.1 Background of the study

In the pre-2015 period, there were few alternatives for insolvent companies; if a company was insolvent, it underwent winding up.¹ The other alternative that was provided by the Companies Act was a provision to place the insolvent company under receivership, and the company management could negotiate for a scheme of arrangement (SOA) and composition.² However, there was a new dawn for insolvent companies with the enactment of the Insolvency Act, 2015. The law introduced the following procedures: Company Voluntary Arrangements³ (CVAs), placing the company under administration and maintaining it as a going concern⁴, and liquidation of the company.⁵

A CVA is an agreement between a debtor company and its secured and unsecured creditors to address the company's debts.⁶ It is a legal mechanism that allows a company to restructure its debts by proposing a compromise between the company and its creditors. The Board of Directors of a company may issue a proposal to the company and its creditors for the approval of a CVA or a scheme of arrangement where the directors and the creditors agree on a way the company can meet its debt obligations under the supervision of an insolvency practitioner.⁷ The main difference between a CVA and SOA is that the latter is proposed by the court, and the former is a proposal by the debtor. CVAs allow financially distressed companies to reach an amicable agreement with their creditors, therefore avoiding unnecessary liquidation proceedings,⁸ and they can result in a

¹ Companies Act Cap 486, Laws of Kenya (repealed)

² Mabe Z, Alternatives to bankruptcy in South Africa that provides for a discharge of debts: Lessons from Kenya, 2019, page 1, 2019 - < <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5364> > on 12 March 2019

³ Division 1, *Insolvency Act*, (Act No 18 of 2015), Laws of Kenya

⁴ Part VII, *Insolvency Act*, (Act No 18 of 2015), Laws of Kenya

⁵ Part VI, *Insolvency Act*, (Act No 18 of 2015), Laws of Kenya

⁶ Walton P, Umfreville C & Jacobs L, *Corporate Voluntary Arrangements: Evaluating Success and Failure*, May 2018, 49. <https://www.icaew.com/-/media/corporate/files/technical/insolvency/publications/cvas-evaluating-success-and-failure.ashx>

⁷ Section 625, *Insolvency Act* (Act No 18 of 2015), Laws of Kenya.

⁸ Walton P, Umfreville C & Jacobs L, *Corporate Voluntary Arrangements: Evaluating Success and Failure*, May 2018, 49. <https://www.icaew.com/-/media/corporate/files/technical/insolvency/publications/cvas-evaluating-success-and-failure.ashx>

binding agreement for debt repayment between a company and its creditors. They can be used by companies going through financial distress, companies that have been placed under receivership, companies that have been taken to court for liquidation, large and small enterprises facing financial distress, SMEs going through a financial crisis and companies that could be facing any insolvency proceedings.

The preamble of the Insolvency Act,⁹ was drafted to meet the needs of both creditors and debtors. It clearly states that the purpose of the Act is to provide an alternative to the liquidation of incorporated bodies including the ones that may be solvent by providing non-liquidation strategies that will enable the affairs of those bodies to become insolvent to be administered for the benefit of their creditors and to provide for related and incidental matters.¹⁰

It has been almost 10 years since the Act was enacted into law. However, since its enactment, there has been little to no appraisal of the legal framework governing CVAs in Kenya. For laws, it is important to rate how well they fit into a country's dynamic, this helps to know if they are performing and how suitable they are to the country's environment.

1.2 Statement of the problem

In any economy, an effective corporate insolvency framework is essential to address inevitable business failures. Such a framework must ensure equitable administration and strike a balance between insolvent debtors and creditors.¹¹ It should allow financially troubled companies to continue as going concerns, preserving viable enterprises,¹² and one way of doing so is by using CVAs.

While the Insolvency Act introduces CVAs as a valuable mechanism for financially distressed companies to reorganise their debts and avoid liquidation, not many companies in financial distress have utilised this mechanism.¹³ Notably, CVA does not seem to be a popular procedure in the insolvency space; from 2015, when the Insolvency Act was introduced, to March 2020,¹⁴ there

⁹ Preamble, Insolvency Act (Act No 18 of 2015), Laws of Kenya

¹⁰ Preamble, Insolvency Act (Act No 18 of 2015), Laws of Kenya

¹¹ Section 3 (1)(a), *Insolvency Act*, (Act No. 18 of 2015), Laws of Kenya

¹² Tolmie F, *Corporate and Personal Insolvency Law*, 2nd ed, Cavendish Publishing Limited, London, United Kingdom, 2003,

¹³ Kieti D N, *Flattening the Insolvency curve: The adaptability and responsiveness of Kenya's corporate insolvency law in tackling pandemic and economic depression insolvencies*, thesis, Strathmore University, 2022, 38

¹⁴ BRS Statistics (Office of the Official Receiver)-2021/2022 < <https://brs.go.ke/or-statistics-2022.php> > on 4 April 2025

were no companies under CVA, and only one company under CVA in 2021.¹⁵ This raises an important question about the effectiveness of the legal framework governing CVAs in addressing corporate distress in Kenya. Therefore, this research examines the provisions of CVAs in the Insolvency Act, 2015, to evaluate whether it sufficiently provides for their use in Kenya. It will investigate the effectiveness of the current legal framework in enabling companies to successfully utilise them and review whether the challenges facing their use are related to the statutory provisions or other factors.

1.3 Objectives of the study

The objectives of this study are:

- a) To examine the legal and regulatory framework governing Company Voluntary Arrangements in Kenya;
- b) To explore the legal framework and the use of Company Voluntary Arrangements in the United Kingdom to ascertain the lessons that Kenya can borrow;
- c) To recommend legislative, policy, and institutional measures that Kenya can put in place to improve the use and effectiveness of Company Voluntary Arrangements as a corporate rescue mechanism.

1.4 Research questions

This research seeks to answer the following legal questions:

- a) What is the existing legal and regulatory framework governing Company Voluntary Arrangements in Kenya, and what possible gaps are there in the laws?
- b) What lessons can Kenya learn from the United Kingdom's legal framework on the use and implementation of Company Voluntary Arrangements?
- c) Based on the findings, what legislative, policy, or institutional reforms are necessary to enhance the use and effectiveness of Company Voluntary Arrangements as a corporate rescue mechanism in Kenya?

¹⁵ BRS Statistics (Office of the Official Receiver)-2020/2021 < <https://brs.go.ke/or-statistics-2021.php> > on 4 April 2025

1.5 Justification of the study

This study is important as it focuses on evaluating the legal and regulatory framework of CVAs in Kenya as a tool to rescue financially distressed companies. While CVAs hold promise on paper, their limited adoption in practice raises questions about their suitability within the Kenyan business landscape. This study is likely to be beneficial to key stakeholders in the corporate world, which include financially distressed companies and their employees, creditors of companies and investors, legal and financial advisors, policy makers and regulators, companies, academic researchers, insolvency practitioners and the general public. This assessment will enable stakeholders to comprehend the legal foundations of Company Voluntary Arrangements, apply this understanding in evaluating options when confronted with insolvency petitions, and consider CVAs as a viable alternative to other insolvency procedures.

1.6 Hypothesis

The limited application of Company Voluntary Arrangements in Kenya can be attributed to the ineffectiveness of the existing legal framework governing their use and implementation.

1.7 Theoretical framework

Scholars from the United States and the United Kingdom have predominantly formulated corporate insolvency theories as they seek to discern the objectives of corporate insolvency law.¹⁶ Generally, two broad schools of thought try to explain the aim of insolvency law, namely, the proceduralist, who tends to focus more on the interests of the creditors during insolvency proceedings¹⁷ and the traditionalist, who focuses on both the interests of the creditors and the stakeholders in corporate insolvency proceedings.¹⁸

In the view of proceduralists, insolvency laws exist for the sole purpose of debt collection and the maximisation of creditors' wealth; they all agree to a collective bargain as opposed to an individualist approach.¹⁹ The traditionalists posit that in insolvency, the people with higher stakes could give way to others in sharing the value of the insolvent debtor,²⁰ and according to Singer J,

¹⁶ Azmi R and Razak, "Theories Underpinning Corporate Insolvency Law: An analysis", 5

¹⁷ Azmi R and Razak, "Theories Underpinning Corporate Insolvency Law: An analysis", 7

¹⁸ Azmi R and Razak, "Theories Underpinning Corporate Insolvency Law: An analysis", 8

¹⁹ Jackson T. H, 'Bankruptcy, no n bankruptcy entitlements and Creditors' bargain, Yale Law Journal,1982, 857 < <https://heinonline.org/HOL/P?h=hein.journals/ylr91&i=879> > on 23 June 2023

²⁰ Finch V, Milan D, *Corporate Insolvency Law: Principles and perspectives*,36

property rights are shared and not vested in an individual.²¹ In the case of insolvency, the community consists of the management, the stakeholders, the creditors, the government, and the employees. Singer opines that property law limits an owner's right to do as they please with the property and therefore protects the rights of the other parties in the community. As such, traditionalists give weight to the view that bankruptcy and insolvency were meant to address a plethora of issues that are caused by business failure.²²

This thesis subscribes to the traditionalist school of thought, and particularly two theories, namely the explicit values theory and the communitarian vision theory.

1.7.1 Explicit values theory

This theory was introduced and made popular by Finch in 2002²³ as an alternative to the existing theories on the justification of insolvency processes and decisions. The theory concluded that the existing theories failed to show any inclusive view of proper measures of insolvency law. She suggests that the insolvency process touches on the interest of the public because the decisions on the survival or demise of the corporation do affect the source of revenue and the public at large.²⁴ Since the insolvency process involves more parties than just the creditors and the debtor, their interests are also at stake, and there is a need for the decision-makers to evaluate and measure the affected parties' interests. Further, she suggested that to give legitimacy to the trade-offs of each party's interest, the decision-makers need to weigh and prioritise each party's interest.

In Finch's view, the insolvency laws can be verified by referring to four values: efficiency, expertise, accountability, and fairness. Efficiency looks to ensure the best ends at the lowest costs, expertise refers to the best judgment by the decision makers, accountability ensures that the control of the process is democratic and per the law, and lastly, fairness considers substantive justice and distribution.²⁵

²¹ Singer J, 'the Reliance Interest in Property', *Stanford Law Review*, 1988, 622 < <https://www.jstor.org/stable/1228814> > on 23 June 2023

²² Too F C, 'A comparative Analysis of Corporate Insolvency Laws: Which is the best option for Kenya?' published PhD Thesis, Nottingham Trent University, Nottingham, 2015, 38. <http://irep.ntu.ac.uk/id/eprint/27951/1/Thesis%20post%20viva%20FINAL.pdf> on 23 June 2023

²³ Finch V, Milan D, *Corporate Insolvency Law: Principles and perspectives*, 36

²⁴ Finch V, Milan D, *Corporate Insolvency Law: Principles and perspectives*, 36

²⁵ Finch V, 'The Measures of Insolvency Law, *Oxford Journal of Legal Studies*, 1997, 227 – 251 < <https://doi.org/10.1093/ojls/17.2.227> > on 23 June 2023

While this theory presents a holistic perspective and resonates with CVA principles, it is not without critics. Some argue that applying these values might involve challenges in practice, such as quantifying and balancing the values in complex insolvency scenarios. Nonetheless, the theory remains relevant to this study as it provides a conceptual framework that aligns with the inclusive approach of CVAs and the exploration of their effectiveness in managing financially distressed companies within Kenya's legal landscape.

CVAs require clear communication of values such as transparency, accountability, and fairness to gain stakeholder confidence. In the context of Kenyan companies, a CVA can serve as a platform to reaffirm the company's commitment to ethical business practices and stakeholder welfare.²⁶ These explicit values help the company negotiate with creditors and employees by ensuring trust and cooperation during restructuring.²⁷ For instance, a company in Kenya proposing a CVA must clearly outline how it intends to balance creditor repayment with maintaining operations, demonstrating adherence to shared values.²⁸

1.7.2 Communitarian vision theory

The proponents of this theory were Karl Marx and Friedrich Engels in their Communist Manifesto in 1848²⁹. However, it dates to 270 AD, as well as the bible in both the Old and the New Testament. This theory is an emphasis on the explicit value principles theory by Finch as it emphasises the fact that insolvency processes are meant to protect not only creditors' interests but also the interests of other stakeholders, including but not limited to employees, the government, customers and the local community.³⁰

This theoretical framework is predicated on the notion of human interdependence, recognising that individuals coexist within a social fabric wherein cooperation is essential for collective survival and progress. It advances the principle that legal and economic systems, including insolvency regimes, ought to prioritise the broader interests of the community over narrow individual gains.

²⁶ Kaufmann, X. Y, *Ethical Practices in Corporate Restructuring*. Nairobi: Business Press, 2025.

²⁷ Mugambi, A. B. Corporate Governance and Restructuring in Kenya, *Kenya Journal of Business Ethics*, 2024 , 15(2), 45-60.

²⁸ Njuguna, C. K. "Balancing Creditor Repayment and Operations in CVAs". *The Kenyan Corporate Review*, 12(3), 2023, 89-102.

²⁹ Longley R, What is Communitarianism? Definition and Main Theorists,2020, < <https://www.thoughtco.com/communitarianism-definition-and-theories-5070063> > on 23 June 2023

³⁰ Keay A, Walton P, *Insolvency La: Corporate and personal*, 2nd Ed, Person Longman, Essex, U.K, 2008, 75

In the context of insolvency law, this perspective legitimises procedures aimed at rescuing distressed but potentially viable enterprises, even where such rehabilitation may not align with the immediate interests of all stakeholders. It endorses a commitment to the common good, urging that insolvency mechanisms be designed to promote equitable resource distribution and maintain a fair balance between the rights and expectations of creditors and debtors alike.

Critics contend that while this theory promotes a holistic and inclusive outlook, it might encounter challenges in balancing individual rights and community interests. Striking an equilibrium between personal autonomy and communal welfare can be complex, leading to potential conflicts and blurred boundaries. Additionally, critics question the practical implementation of this theory, suggesting that defining and prioritising community values may be subjective and open to manipulation.³¹

In the context of this study, this theory offers a relevant framework for evaluating the effectiveness of CVAs as a rescue mechanism for financially distressed companies by considering the collective well-being and shared norms of stakeholders. This theory sheds light on how CVAs impact not only individual entities but also the broader economic ecosystem. However, the theory's critiques highlight the need to address challenges in reconciling individual and communal interests within the insolvency context. By incorporating this theory, this study aims to enhance our understanding of the holistic implications of CVAs while acknowledging the complexities inherent in balancing individual and community perspectives.

1.8 Literature review

1.8.1 The concept of corporate rescue

According to Vanessa Finch,³² the term 'corporate rescue' is described as a sub-theme of insolvency law and a process by which a distressed company may be resuscitated or rejuvenated. The concept of corporate rescue, therefore, is based on processes, mechanisms and steps that are carried out as interventions necessary to avert the eventual failure of the company.³³ Corporate rescue is generally described as the process of enabling companies in financial difficulties to return

³¹ Dalacoura K, 'A critique of Communitarianism with reference to Post-revolutionary Iran', Volume 28, *Review of International Studies*, 2002, 87

³² Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd ed, Cambridge: Cambridge University Press 2009).243

³³ Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd ed, Cambridge: Cambridge University Press 2009). 243

to a state of viability and to prevent them from sliding into insolvency. The term corporate rescue has also been described as a major intervention necessary to avert the eventual failure of a company.³⁴ This involves any fundamental remedial action for a company during a period of corporate crisis, which includes both the formal and informal strategic rescue mechanisms.

According to the author, corporate rescue could also be regarded as an alternative to immediate liquidation of the company, to prevent the death of the company and often involves changes in the management of the company and is usually achieved through reorganising methods such as refinancing, debt composition or rescheduling, downsizing activities, and making redundant part of the workforce to offer temporary relief.³⁵ Moreover, company rescue works towards the restoration of a company in difficulty, which leads to the preservation of the legal entity itself so that the company can continue operations after reorganisation. It therefore provides the opportunity needed to reorganise and restructure the affairs of a debtor; structure a payment scheme with its creditors, while also preserving jobs and allowing the company to continue trading as an economically contributing entity. This study will draw heavily from the author's conceptualisation of the concept of corporate rescue throughout the chapters.

According to Anthony O. Nwafor,³⁶ the rationale behind a rescue mechanism is to preserve the status quo ex-ante while a way forward is negotiated and implemented. A rescue law substitutes the continuous race to seize the assets of the debtor once it is insolvent with a regime that gives the debtor breathing space to reorganise its affairs.³⁷ This regime puts the debtor in possession of its assets and suspends all the rights and remedies of the creditors to ensure the creditors get their returns in full. It recognises the need to preserve the going concern value of the company alongside maximising the returns for the creditor. Rescue mechanisms are not necessarily about saving the company or its businesses in their totality.³⁸ This study will refer to the definition of the term corporate rescue in the next chapters to understand how CVAs allow financially distressed

³⁴ Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd ed, Cambridge: Cambridge University Press 2009).243

³⁵ Finch V, *Corporate Insolvency Law: Perspectives and Principles* (2nd ed, Cambridge: Cambridge University Press 2009).243

³⁶ Nwafor A, "The goal(s) of corporate rescue in company law: A comparative analysis" (2017) 13(2) *Corporate Board: Role* 20.

³⁷ Nwafor A, "The goal(s) of corporate rescue in company law: A comparative analysis" (2017) 13(2) *Corporate Board: Role* 21.

³⁸ Nwafor A, "The goal(s) of corporate rescue in company law: A comparative analysis" (2017) 13(2) *Corporate Board: Role* 22.

companies to reach an amicable agreement with their creditors, therefore avoiding unnecessary insolvency proceedings.

1.8.2 Need for reforms in the insolvency laws

F.C. Too³⁹ provides an examination of the previous insolvency regime in Kenya and the factors that led to insolvency reform prior to the enactment of the 2015 Insolvency Act. The research compares Kenya's Insolvency frameworks to those of the UK and Mauritius, shedding light on the differences. This research adopts a conceptual approach to Kenya's insolvency law and offers theoretical justifications for having insolvency laws. Weaknesses within Kenya's insolvency framework are identified, and potential mechanisms that could improve the structure are analysed. Lastly, it assesses whether Kenya can benefit from the experiences and lessons learned from the reviewed insolvency frameworks. However, this thesis was published before the enactment of the 2015 Insolvency laws, and some of the recommendations were implemented.

Similarly, E.A. Otieno⁴⁰ focuses on evaluating the efficacy of the corporate insolvency regime in Kenya. She begins by emphasising the key components of an effective insolvency system, and she explores the four essential functions that are derived from the philosophical underpinning: Prevention, rehabilitation, distribution, and punishment. While these functions align with the objectives of the Insolvency Act, it is noteworthy that this thesis was published over a decade ago, before the enactment of the new insolvency laws.

There is a growing need to review and enhance the legislation surrounding Company Voluntary Arrangements (CVAs) in Kenya.⁴¹ Authors have noted that reforms in business laws can significantly benefit borrowers and financiers, suggesting that a comprehensive review of the existing CVA frameworks could provide similar advantages.⁴² Current studies have highlighted the importance of improving voluntary compliance mechanisms and review processes, indicating

³⁹ Too F C, 'A Comparative Analysis of Corporate Insolvency Laws: Which is the best option for Kenya?' published PhD Thesis, Nottingham Trent University, Nottingham, 2015, 63. <http://irep.ntu.ac.uk/id/eprint/27951/1/Thesis%20post%20viva%20FINAL.pdf> on 23 June 2023

⁴⁰ Otieno Arwa Eunice, 'Corporate Insolvency Systems in Kenya: A case for reform' Published LL.M Thesis, University of Nairobi, 2005 <https://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/11733> on 20 June 2023

⁴¹ Muriuki, D. "Save ME!: Rescue Options Available for Distressed Companies under the Insolvency Act, 2015, *Legal & Kenyan*, 14, 14-19. < https://www.oraro.co.ke/wp-content/uploads/2022/08/Legal-and-Kenyan_Issue-14>

⁴² Standard Media, "Reforms in Business Laws a Game Changer for Borrowers, Financiers". *The Standard*.< <https://www.standardmedia.co.ke/business/opinion/article/2001510562/reforms-in-business-laws-a-game-changer-for-borrowers-financiers>>

that well-structured legislative reforms could enhance the effectiveness of CVAs as a tool for corporate restructuring in Kenya.⁴³

1.8.3 Need to evaluate the insolvency procedures preferred by financially distressed companies

Mbogo J and Waweru G suggest that prediction and analysis are of great importance in developing Countries such as Kenya, especially considering the closure of businesses, banks, and insurance companies. Financial challenges are a common occurrence for businesses and understanding and addressing them are essential for sustainable growth.⁴⁴ The research contends that the fall of any given company points out to malfunctioning by the management of that company and obviously as expected, the fall of companies leads to firms instituting remedial action such as debt restructuring covenants to improve performance however it is not established that necessarily the measures taken will lead to the performance of these distressed firms.⁴⁵ Mbogo J finds it necessary for companies to evaluate the most favourable way to get up from financial distress and what measures they need to put in place to ensure that the preferred method is effective.

Hart and Moore⁴⁶ suggest that when a company faces financial distress, it will undertake various actions to implement strategies for effectively managing the situation. These actions aim to address the discrepancy between the company's existing liquid assets and its financial obligations arising from contractual agreements.

In their comparative research investigating recovery and non-recovery firms within a sample of 166 financially distressed firms, Sudi and Lai discovered that a larger proportion of non-recovery firms, as opposed to recovery firms, engaged in restructuring their operations, reducing or omitting dividends, restructuring their debts in each of the two years following the financial distress. They observed that the primary distinction between recovery and non-recovery firms was that, for the

⁴³Kenya Revenue Authority, "Enhancing Voluntary Compliance in Kenya; A Study of Digital Platforms and Review of Processes in Kenya". *African Tax and Customs Review*, 8(1), 45-52.<
<https://atcr.kra.go.ke/index.php/atcr/issue/view/12>>

⁴⁴ Mbogo J, Waweru G, 'Corporate turnaround strategies by financially distressed companies quoted at the Nairobi Securities Exchange, Volume 5, No 2, *Research Journal of Finance and Accounting*, 2014, 137

⁴⁵ Mbogo J, Waweru G, 'Corporate turnaround strategies by financially distressed companies quoted at the Nairobi Securities Exchange,139

⁴⁶ Mbogo J, Waweru G, 'Corporate turnaround strategies by financially distressed companies quoted at the Nairobi Securities Exchange,139

latter, the ineffectiveness of restructuring efforts in the early years resulted in a heightened intensification of strategies. However, despite the cumulative intensity of these strategies over the post-distressed period, they did not contribute to the recovery of non-recovery firms.⁴⁷

According to Kose, one of the approaches for addressing financial distress involves engaging in negotiations with creditors and modifying the contractual terms. This modification aims to either decrease the current financial obligation to align it with the cash flows currently generated by the company's assets or postpone the obligation to a future date.⁴⁸

In evaluating the success and or failure rate of CVAs in England, Walton et al stated the research was necessitated by the low frequency of the use of CVA as an alternative to insolvency and as a corporate rescue mechanism as compared to the other corporate insolvency procedures available in the UK.⁴⁹ The reports then noted an alarming rate of failures of CVAs in the country, and the aim was to find out the key characteristics which would allow for practical guidance to insolvency practitioners and policy recommendations to the government. This was especially important to evaluate the performance of CVA as an alternative in the UK and to evaluate its effectiveness.⁵⁰ The Implementation of the Corporate Insolvency and Governance Act (CIGA) in the UK brought about several significant improvements. One of those improvements includes the establishment of a moratorium period, which allows companies to negotiate restructuring plans while being protected from legal action. Additionally, the act enables early intervention measures when companies face financial distress. Furthermore, a new restructuring plan was introduced, providing effective mechanisms for cramdown, aligning with the recommendations of the UNCITRAL Legislative Guide on Insolvency Law. These changes have strengthened and enhanced the UK's insolvency regime, making it more efficient. Valuable lessons can be derived from these advancements.

This study identifies a critical legal gap, the absence of a comprehensive evaluation of the statutory and procedural design of CVAs under the Insolvency Act, and their efficacy in advancing Kenya's

⁴⁷ Sudi S, Lai J, 'Corporate Financial Distress and turn around strategies: An Empirical Analysis, Volume 12, *British Journal of Management*, 2001, 183 – 199.

⁴⁸ Kose J, 'Managing Financial Distressed Securities', Special Issue, *Financial management autumn*, 1993, 60 - 78

⁴⁹ Insolvency Act (1986), Laws of U.K

⁵⁰ Walton P, Umfreville C & Jacobs L, *Corporate Voluntary Arrangements: Evaluating Success and Failure*, May 2018, 5.

corporate rescue objectives. Despite the Act's alignment with international trends favoring business rehabilitation over liquidation, there is limited empirical or doctrinal analysis on whether CVAs, as currently structured, offer a viable path for distressed companies in Kenya. By drawing from the broader conceptualisation of corporate rescue, emphasising business continuity, creditor repayment frameworks, and employment preservation, this study seeks to interrogate whether the legal architecture of CVAs in Kenya effectively serves these ends. In doing so, it aims to assess whether the legislative intent behind CVAs has translated into meaningful corporate rehabilitation practice or remains largely theoretical.

1.9 Research methodology

This study will use doctrinal research methodology, which is concerned with the formulation of legal doctrines through the analysis of legal rules.⁵¹ It will conduct a systematic analysis of statutory provisions and legal principles concerning CVAs, as well as a logical and rational ordering of the legal propositions and principles. It will also give more emphasis on substantive law rules, doctrines, concepts, and judicial pronouncements on the use of CVAs in Kenya. Primary sources include judicial decisions and international and Kenyan legal instruments, such as declarations, conventions, constitutions, and Acts of Parliament. Secondary sources will involve textbooks, periodicals, commentaries, published journals, articles, newspapers, reports, and internet materials on CVAs.

The principal strength of the doctrinal research methodology lies in its capacity to yield clear, authoritative, and precise answers to legal questions, drawing directly from primary sources of law such as statutes, case law, and regulations. It is deeply rooted in legal positivism, and it enables a systematic and objective examination of established legal principles, doctrines, and concepts. By engaging with the law as it is, rather than as it ought to be, doctrinal analysis facilitates a structured and coherent understanding of the legal framework, enhancing the reliability and internal consistency of the research findings.⁵²

The study will also involve an analysis of the legal framework and use of CVAs in the United Kingdom and draw the best lessons that Kenya can borrow. The UK was chosen because the Kenyan Insolvency Act borrows heavily from the UK Insolvency Act 1986. Secondly, CVAs were

⁵¹ Chynoweth P, 'Legal Research, Advanced Research methods in the built environment.' Wiley Blackwell, 2

⁵² Chynoweth P, 'Legal Research, Advanced Research methods in the built environment.' Wiley Blackwell, 2

also introduced by the Cork committee in the UK in 1982 when they identified the need for a simple procedure that would allow the needs of the majority creditors to be made binding on the minority creditors.⁵³

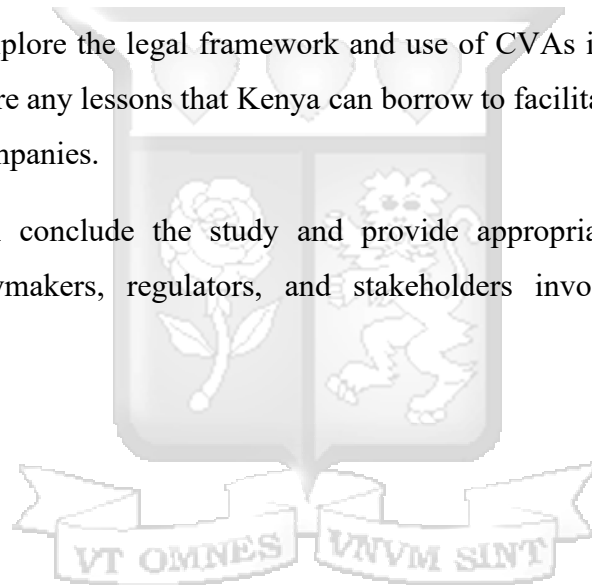
1.10 Chapter breakdown

This thesis will consist of four chapters.

The second chapter will interrogate the legal framework governing CVAs in Kenya. The aim is to determine whether this framework efficiently sets out how the procedure should be followed by financially distressed companies and if it is effective as a corporate rescue mechanism for these companies.

The third chapter will explore the legal framework and use of CVAs in the United Kingdom to ascertain whether there are any lessons that Kenya can borrow to facilitate the uptake of CVAs by financially distressed companies.

The fourth chapter will conclude the study and provide appropriate recommendations for consideration by policymakers, regulators, and stakeholders involved in insolvency and restructuring processes.



⁵³ Walton P, Umfreville C, Jacobs L, 'A snapshot of Company Voluntary Arrangements: Successes, failures and proposals for reform.' *International Insolvency Review*/ Volume 29 issue 2,267 <https://doi.org/10.1002/iir.1381>

Chapter Two

The legal framework governing company voluntary arrangements in Kenya.

2.1 : Introduction

This chapter examines the legal framework governing CVAs in Kenya. It commences by providing a historical background of insolvency laws in Kenya and thereafter critically assesses the existing legal structure to identify its strengths, weaknesses, and any inherent deficiencies.

2.2 : Historical development of CVAs in Kenya

2.2.1 : Pre-colonial and colonial period

In the pre-colonial era, there was no codified law that governed insolvency. The communities in the country used traditional dispute resolution mechanisms, such as negotiation, to address debt-related issues.⁵⁴ When Kenya became a colony in 1920, it adopted the insolvency laws of the British. These laws were applied to settlers and businesses to regulate their business relationships.⁵⁵

During this period, the Indian Insolvency Act, 1848⁵⁶ was the law in use by the British, having been imposed on British-controlled India, and it was extended to Kenya to regulate insolvency matters.⁵⁷ However, the Bankruptcy Act, Cap 53 of 1930,⁵⁸ was the first comprehensive insolvency law to be enacted in Kenya, and it was a complete replica of the English Bankruptcy Act of 1914.⁵⁹ The legislation primarily addressed individual bankruptcy and did not provide for corporate insolvency. Additionally, the Act focused on the liquidation of the debtor's estate to satisfy the claims of the creditor and emphasised the *pari passu* principle of distribution.⁶⁰

⁵⁴University of Embu, Development of Insolvency Laws in Kenya,<
<https://www.studocu.com/row/document/university-of-embu/insolvency-law/development-of-insolvency-law-in-kenya-question-1/118645555>>

⁵⁵University of Embu, Development of Insolvency Laws in Kenya,<
<https://www.studocu.com/row/document/university-of-embu/insolvency-law/development-of-insolvency-law-in-kenya-question-1/118645555>>

⁵⁶ The Indian Insolvency Act, 1848, Laws of India

⁵⁷Koimburi O., 'The origins of Bankruptcy Laws in Kenya.' Forvis Mazars, 6 February 2024 <
<https://www.forvismazars.com/ke/en/insights/the-origins-of-bankruptcy-laws-in-kenya> >

⁵⁸ The Bankruptcy Act, 1930, Cap 53, Laws of Kenya(Repealed)

⁵⁹ The English Bankruptcy Act, 1914

⁶⁰Mbila A, 'From Debtor Repression to Protection: Giving Debtors a Fresh Start under the Kenyan Insolvency Regime.' East Africa Law Review Vol 49 No 1(2022).< DOI:[10.56279/ealr.v49i1.3](https://doi.org/10.56279/ealr.v49i1.3) > on 4 April 2025

2.2.2 : Post-independence

After gaining independence in 1963, Kenya's insolvency framework was largely governed by the Companies Act⁶¹ and the Bankruptcy Act.⁶² The Companies Act was largely derived from the English Companies Act of 1948.⁶³ The legislation was adopted almost in its entirety, and many other investment-related laws in Kenya are similarly rooted in this foundational statute. This legal adoption occurred through a process known as involuntary transplant, whereby colonial laws were imposed through reception clauses, local ordinances, and, in some cases, direct re-enactment of entire British statutes.⁶⁴

Kenya officially recognised and applied English laws as of August 12, 1897. Like many former British colonies, Kenya's legal system absorbed English common law, equity principles, and statutes of general application that were in force at the time in England.

One of the major challenges with the Companies Act 1962⁶⁵ is that it retained procedures and practices originally designed for companies operating under English law.⁶⁶ It recognized only two formal insolvency procedures: receivership and winding up. Both these methods favoured creditors over debtors and, more often than not, led to the close down of the business.

2.2.2.1 : Receivership process

Receivership is a process initiated by a creditor to recover amounts outstanding under a secured loan in the event of the company defaulting on its loan payments. The creditor can appoint a receiver manager (RM) out of court or by petitioning the court. The RM acts as an agent of the company, and any liability for actions taken by the receiver falls on the company rather than the appointing creditor.⁶⁷

⁶¹ Companies Act (1962) Cap 486, Laws of Kenya (Repealed)

⁶² Bankruptcy Act, Cap 531, Laws of Kenya now repealed

⁶³ Companies Act 1948, UK

⁶⁴ Too F C, 'A comparative Analysis of Corporate Insolvency Laws: Which is the best option for Kenya?' published PhD Thesis, Nottingham Trent University, Nottingham, 2015, 87
<<http://irep.ntu.ac.uk/id/eprint/27951/1/Thesis%20post%20viva%20FINAL.pdf>> on 6 February 2025

⁶⁵ Companies Act (1962) Cap 486, Laws of Kenya

⁶⁶ Too F C, 'A comparative Analysis of Corporate Insolvency Laws: Which is the best option for Kenya?' published PhD Thesis, Nottingham Trent University, Nottingham, 2015, 87
<<http://irep.ntu.ac.uk/id/eprint/27951/1/Thesis%20post%20viva%20FINAL.pdf>> on 6 February 2025

⁶⁷ Goode R, Principles of Corporate Insolvency Law, 4th edition, Sweet and Maxwell, 2011, 150

Part VII of the Companies Act⁶⁸ governed receivership. Notably, the Act prohibited corporate entities from being appointed as RM. Receivership could be initiated in two ways: Through a court order at the request of debenture holders or other creditors when a company is undergoing liquidation,⁶⁹ and through an out-of-court appointment, if a creditor has the contractual authority to appoint a receiver.⁷⁰

Once a company is placed under receivership, a formal notification is issued to all creditors and stakeholders. The company must, within fourteen days, submit a statement of its financial affairs in a prescribed format unless the court or RM grants an extension. The receiver then forwards this report to the Registrar, adding comments if necessary.⁷¹

2.2.2.2 : Winding up/liquidation process

Winding up involves the closing of a company's affairs and the distribution of its assets to creditors.⁷² The process can be initiated voluntarily by the company's members or compulsorily by the court. It marks the final stage of a company's existence and was governed by Part VI, Section 212 of the Companies Act.⁷³ It can be initiated through either the creditors' voluntary winding up or compulsory winding up by court order. Although multiple parties can initiate compulsory winding-up proceedings, creditors are the most common petitioners. However, for a winding-up order to be granted, the petitioner must provide valid reasons to the court.

This method of corporate dissolution is one of the oldest and remains widely used in various jurisdictions. For example, English insolvency laws require that similar grounds be presented in a petition, and the petition must be properly advertised.⁷⁴ If the petition is not advertised in line with procedural rules, the court may dismiss it.⁷⁵

⁶⁸ Part VII, Companies Act (1962) Cap 486, Laws of Kenya (Repealed)

⁶⁹ Section 348(2), Companies Act(1962) Cap 486, Laws of Kenya

⁷⁰ Section 348, Companies Act(1962) Cap 486, Laws of Kenya

⁷¹ Too F C, 'A comparative Analysis of Corporate Insolvency Laws: Which is the best option for Kenya?' published PhD Thesis, Nottingham Trent University, Nottingham, 2015, 94
<<http://irep.ntu.ac.uk/id/eprint/27951/1/Thesis%20post%20viva%20FINAL.pdf>> on 6 February 2025

⁷² Goode R, Principles of Corporate Insolvency Law, 4th edition, Sweet and Maxwell,2011, 149

⁷³ Part Vi, Companies Act(1962)Cap 486, Laws of Kenya, (Repealed)

⁷⁴ Too F C, 'A comparative Analysis of Corporate Insolvency Laws: Which is the best option for Kenya?' published PhD Thesis, Nottingham Trent University, Nottingham, 2015, 92
<<http://irep.ntu.ac.uk/id/eprint/27951/1/Thesis%20post%20viva%20FINAL.pdf>> on 6 February 2025

⁷⁵ Insolvency Rules, 1986,UK

Under Section 219⁷⁶, winding-up orders may be issued under various conditions, the most significant being: The company's inability to settle its debts. A court's determination that winding up is just and equitable. The first ground is easier to prove, while the second is subject to judicial discretion. Notably, Kenyan courts have not extensively examined the "just and equitable" standard. One of the most influential precedents on this matter is *Ebrahimi v Westbourne Galleries Ltd*⁷⁷, where the court emphasised that a petitioner must approach the court with "clean hands." If the petitioner's misconduct caused the dispute, they may not succeed in having the company wound up.

The voluntary winding-up process closely mirrors the court-ordered winding-up procedure, following similar steps, including the appointment of liquidators who manage asset distribution under court supervision.⁷⁸ Prior to the Insolvency Act⁷⁹, financially distressed companies faced liquidation as there were no alternatives provided for by the Companies Act, this is what necessitated the reforms in the insolvency Laws. Countries such as the UK had moved on to more suitable and tenable means of dealing with financially distressed companies. The theme around economically distressed companies was business rescue which would provide better outcomes for all the parties involved.

2.2.3 : The enactment of new insolvency laws

Prior to the Insolvency Act's enactment, several bills were proposed, culminating in the Insolvency Bill 2015, which became law.⁸⁰ This marked a significant change in Kenya's approach to corporate insolvency. Previously, the framework was fragmented and focused mainly on liquidation and receivership without considering rehabilitation options.

The Insolvency Act of 2015 introduced key reforms such as the consolidation of insolvency laws into one legislation, the introduction of CVAs as a corporate rescue mechanism, the introduction of insolvency practitioners and including more corporate rescue mechanisms such as administration and liquidation.

⁷⁶ Part Vi, Companies Act(1962)Cap 486, Laws of Kenya, (Repealed)

⁷⁷ *Ebrahimi v Westbourne Galleries Ltd* [1963]AC 360

⁷⁸ Goode R, *Principles of Corporate Insolvency Law*, 4th edition, Sweet and Maxwell,2011, 149 - 176

⁷⁹ Insolvency Act, 2015, Laws of Kenya

⁸⁰ became law via Legal Notice no. 119/2016 on 27 June 2015

The introduction of CVAs has significantly impacted corporate insolvency in Kenya by providing a formal debt restructuring framework that helps companies avoid dissolution, preserve jobs, and contribute to economic stability while balancing debtor and creditor interests, as is seen later in this chapter.

2.3 : The Legal framework for CVAs in Kenya

Kenya's legal framework on CVAs is governed by both primary and secondary sources of law. The primary sources include: The Constitution of Kenya, 2010⁸¹, the Insolvency Act, 2015⁸², the Insolvency Regulations⁸³, and case laws. The secondary sources include law articles and books. Below is a detailed analysis of the provisions of these laws.

2.3.1 : The Constitution of Kenya, 2010

While there are no express provisions governing CVAs in the Constitution of Kenya, it forms a basis upon which the statutory laws governing CVAs were enacted. These laws are discussed below.

2.3.2 : The Insolvency Act, 2015

CVAs are provided for in Part IX, Division 1, of the Insolvency Act, 2015, Cap 53, Laws of Kenya.

2.3.2.1 : The proposal

The initiation of Company Voluntary Arrangements (CVA) is statutorily anchored in the requirement for a formal proposal. Section 625⁸⁴ vests directors of a company with the authority to propose such an arrangement to both the company and its creditors, with the aim of either compromising the company's debt obligations or restructuring its financial affairs⁸⁵. Where the company is subject to liquidation or administration, this prerogative is transferred to the liquidator or administrator, respectively.

Crucially, any proposal advanced by the directors must be accompanied by the appointment of a supervisor⁸⁶, who is mandated to oversee the implementation of the arrangement.⁸⁷ The law

⁸¹ The Constitution of Kenya, 2010, promulgated on 27 August 2010

⁸² Part IX, Division 1, Insolvency Act, 2015, Cap 53, Laws of Kenya

⁸³ Part XI, Insolvency Regulations, Legal Notice 47 of 2016

⁸⁴ Section 625(1), Insolvency Act, 2015, Cap 53, Laws of Kenya

⁸⁵ Section 625(1), Insolvency Act, 2015, Cap 53, Laws of Kenya

⁸⁶ Section 625(2), Insolvency Act, 2015, Cap 53, Laws of Kenya

⁸⁷ Inamdar S., Wako J., ' Insolvency and Restructuring,' 6 October 2020 < <https://cms.law/en/ken/news-information/insolvency-and-restructuring> > on 4 April 2025

expressly requires that this role be undertaken by a qualified insolvency practitioner.⁸⁸ Judicial interpretation has affirmed this requirement in *Re Jonathan Karanja*,⁸⁹ the court underscored the exclusive competence of authorised insolvency practitioners to act as supervisors of CVAs and elaborated the procedure for securing interim orders, including the requisite conditions for their issuance.

However, despite these statutory and judicial pronouncements, several lacunae persist. While section 625 provides for the appointment of a provisional supervisor, it is silent on the criteria governing their selection. This legislative omission creates ambiguity and may inadvertently facilitate arbitrary appointments, potentially undermining the integrity of the CVA process and the values governing CVAs as an insolvency procedure. Furthermore, although the law mandates the engagement of insolvency practitioners as supervisors, it does not prescribe a statutory fee structure. This omission effectively delegates discretion to the practitioners, which may result in exorbitant and unpredictable charges.⁹⁰ The danger here is not merely theoretical; for financially distressed enterprises, such unregulated fees may render the CVA mechanism prohibitively expensive, thereby defeating its core objective as a business rescue tool. Notably, remuneration due to insolvency practitioners is classified as a first-priority claim.⁹¹

The flexibility of the CVA framework was illustrated *In the matter of Kaluworks*,⁹² wherein a company already under administration sought, through its administrator, to pursue a CVA as an alternative to continued administration. The court's accommodation of this request demonstrates the statutory latitude afforded to companies in administration or liquidation to pivot toward CVAs as a means of achieving financial rehabilitation, rather than succumbing to terminal insolvency processes.

⁸⁸ Section 625(3), Insolvency Act, 2015, Cap 53, Laws of Kenya

⁸⁹ *Re Jonathan Karanja*, Insolvency Cause E004 of 2022, [2024] KEHC 4521 (KLR)

⁹⁰ *Kiptum vs Blueshield Insurance Company*, Miscellaneous Application 238 of 2017, [2023] KEHC 2816(KLR)

⁹¹ *Cytonn Investment, Restructuring and Insolvency in Kenya*, 19 January 2025 <
<https://cytonn.com/topicals/restructuring-and-insolvency-2#:~:text=During%20the%20insolvency%20process%2C%20the,and%20Excise%20tax%2C%20among%20others>
> on 6 April 2025

⁹² *In the Matter of Kaluworks Limited*, Insolvency Cause No E019 of 2021, (unreported)

2.3.2.2 : *The procedure to be followed by the provisional supervisor*

Section 626⁹³ outlines the procedural framework applicable where the insolvency practitioner is neither a liquidator nor an administrator, and the directors have not sought a moratorium. In such instances, the provisional supervisor is under a statutory obligation to submit a report to the court within thirty days of receiving notice of the proposal, or within such extended period as the court may allow.⁹⁴ This report must address the viability of the proposed arrangement, specifically, whether it stands a reasonable prospect of approval and successful implementation, and advise whether meetings of the company and its creditors should be convened. Where such meetings are recommended, the report must indicate the proposed date, time, and venue.⁹⁵

To enable the preparation of this report, the directors are required to provide the provisional supervisor with both the terms of the proposal and a detailed statement of the company's financial affairs, including a breakdown of its creditors, liabilities, assets, and any additional particulars as prescribed by the insolvency regulations.⁹⁶ The inclusion of a creditor payment plan within the proposal is not merely procedural but instrumental as it reflects the principles of transparency and good faith which underpin the corporate rescue regime and reinforce creditor confidence.⁹⁷

Where the provisional supervisor fails to file the required report, dies, or is otherwise incapacitated, the law permits the proposers, ordinarily the directors, to apply to the court for the appointment of a replacement. Similarly, where it becomes impracticable or inappropriate for the current supervisor to continue in office, the proposers or the supervisor themselves may seek judicial intervention.⁹⁸ In such cases, the court retains discretion to appoint an alternative authorised insolvency practitioner.⁹⁹ This supervisory oversight was exemplified in *Re Kaluworks*,¹⁰⁰ where dissatisfied creditors applied to the court for the replacement of an administrator, and the court

⁹³ Section 626, Insolvency Act, 2015, Cap 53, Laws of Kenya

⁹⁴ Section 626(1), Insolvency Act, 2015, Cap 53, Laws of Kenya

⁹⁵ Section 626(2), Insolvency Act, 2015, Cap 53, Laws of Kenya

⁹⁶ Section 626(3), Insolvency Act, 2015, Cap 53, Laws of Kenya

⁹⁷ 'Restructuring and Insolvency in Kenya.' Cytonn Report, 13 August 2023. <
<https://cytonnreport.com/topicals/restructuring-and-insolvency-1> > on 4 April 2025

⁹⁸ Section 626(4), Insolvency Act, 2015, Cap 53, Laws of Kenya

⁹⁹ Section 626(5), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁰⁰ In the Matter of Kaluworks Limited, Insolvency Cause No E019 of 2021, (unreported)

acceded to the request. This decision affirms the judiciary's active role in safeguarding the fairness and integrity of the insolvency process.

2.3.2.3 : *Creditor meetings*

Section 627¹⁰¹ mandates the convening of creditors' meetings following a recommendation by the provisional supervisor appointed under Section 625. Where the supervisor is neither the liquidator nor the administrator, they must convene the meetings at the date, time and venue specified in their report, unless the court orders otherwise.¹⁰² Conversely, where the supervisor is the liquidator or administrator, discretion is afforded to convene the meetings at a time and place deemed appropriate for creditors.¹⁰³ Crucially, the statute imposes a duty to notify all known creditors of the meeting¹⁰⁴ and requires that the directors communicate to the supervisor at least seven days in advance any intended modifications to the CVA proposal.¹⁰⁵ The core function of these meetings is to secure creditor approval of the proposal, either in its original form or as amended¹⁰⁶. In *Uchumi Supermarket PLC v UBA Bank Kenya Limited & 4 Others*,¹⁰⁷ the court reaffirmed the statutory imperative for strict compliance with procedural requirements, underscoring that such provisions are designed to guide both courts and parties in the orderly conduct of insolvency proceedings.

Upon the convening of the creditors' meeting, the attendees are required to elect a chairperson,¹⁰⁸ who assumes responsibility for conducting the proceedings. The chairperson must classify the creditors into three distinct voting classes: secured creditors, preferential creditors, and unsecured creditors.¹⁰⁹ Any proposed modifications to the CVA must receive the company's consent¹¹⁰ and may entail the substitution of the provisional supervisor with another authorised insolvency practitioner.¹¹¹

¹⁰¹ Section 627, Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁰² Section 627(1), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁰³ Section 627(2), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁰⁴ Section 627(3), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁰⁵ Section 627(4), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁰⁶ Section 628(1), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁰⁷ *Uchumi Supermarket PLC v UBA Bank Kenya Limited & 4 Others*, Insolvency Petition 25 of 2018 [2023] KEHC 24910 (KLR)

¹⁰⁸ Section 628(2), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁰⁹ Section 628(3), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹¹⁰ Section 628(4), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹¹¹ Section 628(5), Insolvency Act, 2015, Cap 53, Laws of Kenya

Where a proposed modification affects a secured creditor's right to enforce their security, such modification is invalid unless the affected creditor consents, or it is demonstrable that they would be in no worse a position than they would have been under a liquidation scenario. This principle was judicially endorsed in *Re Uchumi Supermarket Limited*¹¹², where the secured creditors withheld their consent to the CVA. The court affirmed that the approval of a CVA requires majority support from the class of secured creditors and that their entitlements must be preserved in priority over junior creditors.

The conduct of the meeting must strictly comply with the procedural requirements prescribed under the Insolvency regulations.¹¹³ Both the company and creditor meetings retain discretion to adjourn where appropriate.¹¹⁴ Upon conclusion, the chairperson bears a statutory duty to promptly report the outcome to the court and to notify all relevant stakeholders, including those who were entitled to attend but were absent from the meeting.¹¹⁵

This provision of having to deal with creditors to obtain their approval is a shortcoming to CVA since it does not provide a cross-class cramdown. A cross-class clamdown is the ability of a majority of creditor classes to bind one or more dissenting classes.¹¹⁶ The lack of cross-class clamdown could cause a delay in the procedure.¹¹⁷ Additionally, CVA may prove ineffective in the case of an emergency because a creditor can block a proposal in cases where it is in the best interest of the creditors. Further, secured creditors may maliciously refuse to join the CVA, which would require the financially distressed company to negotiate with each of them separately, which undermines the objective of reaching an optimal rescue solution and an increase in fees.¹¹⁸

Following the COVID-19 pandemic, the U.K. introduced a cross-class clam down, which allowed secured creditors to be bound by a rescue plan.¹¹⁹ The law in Kenya does not provide for what

¹¹² *Re Uchumi Supermarkets PLC* [2019] eKLR < <https://kenyalaw.org/caselaw/cases/view/181157> >

¹¹³ Section 628(7), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹¹⁴ Section 628(8), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹¹⁵ Section 628(9), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹¹⁶ Harris. J., 'Class Warfare in Debt Restructuring: Does Australia Need Cross – Class Cram Down for Creditors' Scheme of Arrangements?', *The University of Queensland Law Journal*, 2017, 1 < <https://ssrn.com/abstract=3306928> > on 4 April 2025

¹¹⁷ Harris. J., 'Class Warfare in Debt Restructuring: Does Australia Need Cross – Class Cram Down for Creditors' Scheme of Arrangements?', *The University of Queensland Law Journal*, 2017, 1 < <https://ssrn.com/abstract=3306928> > on 4 April 2025

¹¹⁸ Kieti D N, *Flattening the Insolvency curve: The adaptability and responsiveness of Kenya's corporate insolvency law in tackling pandemic and economic depression insolvencies*, thesis, Strathmore University, 2022, 37

¹¹⁹ Schedule 9, Corporate Insolvency and Governance Act, Cap 12, U.K Laws

happens when there is a conflict between secured and unsecured creditors. There is a lack of guidance on what happens to dissenting creditors. They are bound by the provisions of the CVA under Section 630.¹²⁰ Moreover, while the law allows the creditors who were not notified of this meeting the right to challenge the decision of this meeting, it is not specific as to how these creditors should be compensated. This leaves room for inequity in the CVA process, which undermines the communitarian vision theory on insolvency laws.

2.3.2.4 : Approval or rejection of the proposal

Section 629¹²¹ prescribes the framework for the approval or rejection of CVAs. The outcome of meetings is convened pursuant to Section 628¹²² whether of the company's members or its creditors, determines the fate of a director-initiated proposal.¹²³ A CVA proposal is deemed approved where it secures the support of a majority of the company's members present (in person or by proxy), as well as a majority in number and value of each class of creditors present at the creditors' meeting.¹²⁴ Notably, even in instances where the proposal fails to attain the requisite majority among company members, it may nonetheless be approved, provided it garners majority support within each creditor group.¹²⁵

The procedural requirement was tested in *Re Nakumatt Holdings*¹²⁶, where the company, having been placed under administration following prolonged liquidity challenges, presented a CVA proposal to its creditors pursuant to Section 625.¹²⁷ The unsecured creditors, who had petitioned for the company's administration, rejected the CVA by majority vote. Their primary contention was the disproportionate burden placed upon them by the proposed debt restructuring: while they were expected to take a 25% haircut in debt repayments, the secured creditors retained full recovery, a disparity the creditors deemed inequitable.

Conversely, *in the matter of Kaluworks*,¹²⁸ the CVA proposal advanced by the directors received the endorsement of the secured creditors. Their support proved pivotal in facilitating the eventual

¹²⁰ Section 630(1), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹²¹ Section 629, Insolvency Act, 2015, Cap 53, Laws of Kenya

¹²² Section 628, Insolvency Act, 2015, Cap 53, Laws of Kenya

¹²³ Section 629(1), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹²⁴ Section 629(2), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹²⁵ Section 629(2)(ii), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹²⁶ *Re Nakumatt Holdings Limited (Under Administration)* [2021] KEHC 8603 (KLR) [2021]

¹²⁷ Section 625(1), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹²⁸ Insolvency Cause No E019 of 2021, *In the Matter of Kaluworks Limited* (unreported)

adoption and implementation of the voluntary arrangement. These cases illustrate the critical role of creditor class dynamics and perceived fairness in the approval of CVA proposals and underscore the need for balanced treatment across creditor hierarchies.

In determining whether the statutory threshold for approval by value has been satisfied, the Chairperson of the creditors' meeting is vested with the discretion to admit or reject proofs of debt. Where necessary, the Chairperson may adjourn the meeting to complete the assessment of voting rights.¹²⁹ Only those creditors whose claims are admitted are entitled to participate in the vote. After the meeting, any member or creditor, whether supportive or oppositional, who was present or entitled to be present may, within thirty days (or such extended period as the court may permit), move the court to review the decisions made during the meeting.¹³⁰

In exercising its supervisory jurisdiction, the court may confirm the proposal, with or without modifications, or make such other orders as it deems fit in the circumstances.¹³¹ Crucially, judicial approval may be granted even where the proposal fails to attain support at the company meeting or is rejected by a class of creditors, such as unsecured or preferential creditors, provided certain substantive safeguards are met. These include the approval of the proposal by secured creditors, the absence of unjust discrimination against dissenting creditors, and the assurance that no creditor will be worse off than they would be under a liquidation scenario. Importantly, the statutory priority accorded to preferential creditors over unsecured creditors must be preserved.¹³² The court's approach in *Re Uchumi Supermarkets PLC*¹³³ is instructive. There, the court affirmed a CVA supported by the majority of creditors and went further to issue contingent orders designed to ensure compliance in the event of default. This reflects the court's active role in reinforcing the integrity and enforceability of CVA once approved.

Section 630¹³⁴ contemplates the approval of a CVA following a successful application under Section 629(4).¹³⁵ Upon judicial sanction, the proposal crystallises into a binding voluntary arrangement, taking effect either the day after the court's order or on a date expressly stipulated

¹²⁹ Section 629(3), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹³⁰ Section 629(4), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹³¹ Section 629(7), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹³² Section 629(8), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹³³ *Re Uchumi Supermarkets PLC* [2020] KEHC 9859 (KLR)

¹³⁴ Section 630, Insolvency Act, 2015, Cap 53, Laws of Kenya

¹³⁵ Section 629(4), Insolvency Act, 2015, Cap 53, Laws of Kenya

therein.¹³⁶ From the point of its effectiveness, the CVA binds all members and creditors of the company, whether or not they attended the requisite meetings, provided they were entitled to vote. This inclusive binding effect extends to secured and preferential creditors, who are thereby treated as if they had consented to the arrangement.¹³⁷

The provisional supervisor automatically assumes the role of supervisor of the arrangement, unless the creditors or the court appoint a substitute.¹³⁸ If the CVA is implemented to completion without premature termination, any unpaid obligations owed to creditors who were entitled to vote but failed to receive notice remain enforceable against the company.¹³⁹ Additionally, where the company is already subject to liquidation or administration, the court may exercise its discretion to stay proceedings, suspend or terminate an administrator's appointment, or issue directions to facilitate the implementation of the arrangement.¹⁴⁰ However, such interventions are barred within thirty days of the initial court report under Section 628(9)¹⁴¹ during the pendency of an appeal, or within the period allowed for lodging one.¹⁴²

Section 631 further empowers certain people to challenge the CVA by way of an application to the court. Eligible applicants include any person entitled to vote at the company or creditors' meetings, persons who would have been entitled had they received proper notice, the provisional supervisor or arrangement supervisor, and, where applicable, the administrator or liquidator.¹⁴³ Such applications may be brought on two principal grounds: first, that the approved arrangement unfairly prejudices the interests of a creditor, member, or contributory; and second, that a material procedural irregularity occurred in relation to the convening or conduct of the meetings.¹⁴⁴ This provision was enforced in *Re Olerai Nurseries Limited*¹⁴⁵, where the court underscored the imperative of procedural fidelity in insolvency proceedings.

¹³⁶ Section 630(1), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹³⁷ Section 630(2), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹³⁸ Section 630(3), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹³⁹ Section 630(4), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁴⁰ Section 630(5), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁴¹ Section 629(9), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁴² Section 630(6), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁴³ Section 631(1), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁴⁴ Section 631(2), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁴⁵ *In Re Olerai Nurseries Limited*, Insolvency Cause E008 of 2019 [2022] KEHC 11125 (KLR)

Applications must be filed within thirty days from the date the statutory report was filed with the court. However, where a person did not receive notice of the meeting, the thirty-day period runs from the date on which they became aware of the proceedings.¹⁴⁶ Interestingly, objections based on prejudicial impact may still be raised after the CVA has lapsed, provided the arrangement was not prematurely terminated.¹⁴⁷

Where the court is satisfied that a challenge to a CVA is meritorious, it is empowered to annul or suspend the approval of the arrangement or any resolution adopted at the relevant meeting.¹⁴⁸ Additionally, the court may further direct the supervisor to convene fresh meetings to reconsider the proposal or deliberate on a revised arrangement.¹⁴⁹ However, if it subsequently becomes evident that no revised proposal will be tabled, the court is obligated to rescind any prior order mandating such meetings, as well as any order previously suspending or annulling the approval of the arrangement.¹⁵⁰

In addition, the court retains residual discretion to issue supplementary orders as necessary, particularly in relation to acts already executed under the arrangement.¹⁵¹ Notably, decisions made during a meeting conducted pursuant to Section 628¹⁵² retain their legal validity notwithstanding procedural irregularities, thereby safeguarding the integrity of decisions reached in good faith.¹⁵³

This provision is instructive in demarcating the parameters for judicial oversight in CVA processes. It not only delineates the substantive criteria for assessing whether a CVA has been validly approved or rejected but also introduces a framework for timely and flexible judicial intervention. The statutory architecture promotes both accountability and procedural transparency by ensuring that affected parties have a clear window within which to invoke the court's supervisory jurisdiction. The result is a measured balance between creditor autonomy and judicial oversight, an essential feature of any robust insolvency regime.

¹⁴⁶ Section 631(3), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁴⁷ Section 631(4), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁴⁸ Section 631(5)(a)(i), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁴⁹ Section 631(5)(a)(ii), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁵⁰ Section 631(6), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁵¹ Section 631(7), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁵² Section 628, Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁵³ Section 631(8), Insolvency Act, 2015, Cap 53, Laws of Kenya

2.3.2.5 : Implementation of approved CVAs

Section 633 delineates the framework for the implementation of a CVA, vesting the supervisor with the principal duty of overseeing the execution of the arrangement in a manner that safeguards the interests of both the company and its creditors. The supervisor is expected to ensure the company's adherence to the terms of the arrangement, thereby functioning as a quasi-fiduciary intermediary between the debtor and its creditors.¹⁵⁴

Where parties aggrieved by the supervisor's conduct, whether by act, omission, or decision, deem such conduct prejudicial or inconsistent with the CVA, the law permits recourse to the court.¹⁵⁵ Upon reviewing such an application, the court is empowered to set aside or vary the supervisor's actions, or to issue binding directions if the grievance is found to be meritorious.¹⁵⁶ Conversely, where the complaint lacks legal or factual justification, the Court shall affirm the supervisor's decision. Importantly, the judiciary retains discretion to issue ancillary orders necessary to give effect to its rulings¹⁵⁷ as exemplified in *Uchumi Supermarkets PLC v UBA Kenya Limited & 4 Others*¹⁵⁸ where judicial oversight was invoked in response to allegations of breach of the CVA by the supervisor. The court, in reaffirming the integrity of the CVA process, ordered compliance with its terms and directed the supervisor to act in accordance with the legal and procedural expectations imposed by the arrangement.

Moreover, the provision accords the supervisor the prerogative to seek the Court's guidance on complex or contentious issues arising during the course of implementation, including the invocation of formal insolvency processes such as liquidation or administration. In this way, Section 633¹⁵⁹ not only serves as a mechanism for accountability but also underscores the supervisory role as one imbued with both authority and legal responsibility, subject to the oversight of the Court.

Evidently, the statutory framework governing CVAs acknowledges and reinforces the critical role of the courts by permitting a degree of procedural flexibility to safeguard the integrity of the

¹⁵⁴ Section 633(1), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁵⁵ Section 633(2), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁵⁶ Section 633(3), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁵⁷ Section 633(4), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁵⁸ *Uchumi Supermarkets PLC vs UBA Kenya Limited & 4 others* [2023] KEHC 24910 (KLR)

¹⁵⁹ Section 633(5), Insolvency Act, 2015, Cap 53, Laws of Kenya

process. However, despite the clarity regarding the initiation and approval mechanisms of a CVA, a notable shortcoming arises in the regulation of the supervisor's mandate. While the law designates a supervisor to oversee the implementation of the arrangement, it remains conspicuously silent on the precise scope, boundaries, and operational guidelines governing the execution of their duties.

This omission creates a regulatory lacuna, effectively vesting supervisors with a wide margin of discretion in interpreting and executing their responsibilities. In the absence of detailed statutory direction or procedural safeguards, there exists the potential for inconsistent practices and the exercise of arbitrary authority. Such ambiguity not only weakens the predictability of the CVA process but also undermines the broader objectives of transparency, fairness, and creditor confidence that insolvency frameworks are intended to promote.

2.3.2.6 : Pre-insolvency moratorium

Although a company that is already subject to a CVA is statutorily excluded from obtaining a moratorium under Section 640¹⁶⁰ the availability of a moratorium prior to the CVA may serve as a strategic gateway for financially distressed entities seeking to stabilise operations and engage stakeholders in meaningful restructuring negotiations. The jurisprudence underscores the utility of such procedural relief through a notable decision by Justice Blair¹⁶¹ where the Court exercised its discretion to stay enforcement proceedings instituted by two creditors. The rationale for the stay was to protect and preserve the integrity of a proposed scheme of arrangement between the debtor and its creditors. In granting the stay, Justice Blair articulated that such judicial intervention should only be employed in “special circumstances.” In the instant case, those circumstances were evidenced by a demonstrable and realistic prospect of the scheme’s successful execution. Notably, the restructuring initiative had been in progress for over two and a half years and was supported by extensive negotiations involving not only the debtor and its creditors but also the Government of Vietnam and their respective financial and legal advisers. Crucially, the debtor had obtained the requisite lender consents necessary to advance the proposed arrangement. The court thus

¹⁶⁰ Section 640, Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁶¹ Bluecrest Mercantile BV v Vietnam Shipbuilding Industry Group and others (2013) EWHC 1146.

recognised that allowing enforcement actions to proceed would not only jeopardise the proposed scheme but also frustrate broader efforts aimed at achieving a viable financial rescue.

This judicial precedent illuminates the preventive and facilitative role a moratorium can play in the broader insolvency architecture, reinforcing the need to consider CVAs not merely as reactive mechanisms but as proactive instruments of corporate rescue, especially when preceded by carefully structured legal interventions such as stays or moratoria.

2.4: The Insolvency Regulations, 2016

2.4.1 : Applications to court

Rule 10¹⁶² stipulates the formal requirements for applications made to the court under the Insolvency Act. Specifically, each application must set out the name of the company concerned, clearly identify the parties to the proceedings, specify the division of the court seized of the matter, and provide the names and addresses of all persons to be served. Further, it must outline the remedies sought, state the applicant's address for service, and cite the specific statutory provision under which the application is brought. This procedural prescription is not merely a matter of formality but one of substantive legal significance, as underscored in *Omar & Another v Wachira*¹⁶³, the Court unequivocally emphasised the imperative of strict compliance with procedural rules governing the filing of applications and court documents. The court warned that failure to adhere to these rules could result in the premature dismissal of a case, regardless of its merits. This pronouncement affirms the principle that access to substantive justice is inherently linked to procedural discipline. A litigant, however deserving their claim may be, risks forfeiting judicial relief through procedural missteps or ignorance of the requisite formalities.

Accordingly, this Rule serves not only as a procedural guideline but as a safeguard for the integrity and efficiency of insolvency litigation. It reflects the broader jurisprudential objective of ensuring clarity, consistency, and fairness in the administration of insolvency justice.

¹⁶² Rule 10, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁶³ *Omar & Another v Wachira*, Civil Appeal 67 of 2022 [2023] KEHC 25664 (KLR)

2.4.2 : Academic qualifications of insolvency practitioners

Rule 11¹⁶⁴ prescribes the academic and professional qualifications required for individuals seeking recognition as insolvency practitioners under Section 6(1)(a)¹⁶⁵ of the Act. To qualify, a person must possess a degree from a university recognised in Kenya, demonstrate a minimum of five years of relevant professional experience as a member of a recognised professional body, and have at least two years of insolvency practice experience before the commencement of the Act. In addition, the individual must have undergone a four-year apprenticeship under a qualified insolvency practitioner and must satisfy the ethical and integrity standards stipulated under Chapter 6 of the Constitution.¹⁶⁶ Notably, the regulations carve out a special dispensation for advocates who have served for at least two years at the Office of the Official Receiver, who are automatically deemed qualified. Further, the Official Receiver is granted discretionary authority to waive the academic degree requirement in respect of individuals with no less than ten years of insolvency practice preceding the enactment of the law. However, such waivers must be formally communicated in writing within thirty days.

This framework reflects the legislature's intention to balance academic rigor with practical experience, ensuring that insolvency practitioners are not only technically competent but also ethically grounded. It further introduces an element of regulatory flexibility, enabling the profession to retain institutional knowledge and accommodate long-serving practitioners who may not meet the formal academic threshold but possess substantive experience. In this regard, the Rule serves as a cornerstone in safeguarding both the professionalism and integrity of the insolvency practice in Kenya.

2.4.3 : Insolvency practitioner license

Rules 12¹⁶⁷ to 14¹⁶⁸ set out the procedural framework governing the licensing of insolvency practitioners under Section 8 of the Act.¹⁶⁹ To be considered for authorisation, an applicant must

¹⁶⁴ Rule 11, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁶⁵ Section 6(1)(a), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁶⁶ Chapter 6, The Constitution of Kenya, 2010

¹⁶⁷ Rule 12, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁶⁸ Rule 14, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁶⁹ Section 8, Insolvency Act, 2015, Cap 53, Laws of Kenya

submit a completed application using Form 1 in the First Schedule,¹⁷⁰ accompanied by the application fee as prescribed in the Second Schedule.¹⁷¹ Upon preliminary assessment and acceptance, the applicant is required to sit a professional examination administered by the Official Receiver at a specified fee. Following successful completion and receipt of the necessary fees, the Official Receiver is mandated to issue a decision within thirty days, either accepting or rejecting the application and, in the case of the latter, furnishing the applicant with reasons for refusal.

Where an application is accepted, the applicant must secure professional indemnity insurance and deposit a security bond, the amounts of which are stipulated in the Second Schedule, to guarantee the proper execution of their duties. Upon receipt of these prerequisites, the Official Receiver is required to issue an authorisation certificate and publish the practitioner's details in the *Kenya Gazette*, a widely circulating national newspaper, and on the Official Receiver's official website.¹⁷²

Rule 13¹⁷³ provides that the license remains valid for twelve months, with renewal governed by Rule 14.¹⁷⁴ A renewal application must be submitted within the window of one to two months before the expiry of the existing licence, using Form 2 in the First Schedule¹⁷⁵ and paying the prescribed renewal fee in the Second Schedule. If the application remains pending at the time of licence expiry, the current certificate continues to operate until the application is either approved or officially refused. The renewed certificate is also valid for twelve months and may be renewed further in accordance with the same procedure. Failure to submit the renewal application within the specified time frame, or an extended period of up to one month as permitted at the discretion of the Official Receiver, renders the practitioner ineligible for renewal, necessitating a fresh application under Section 8 of the Act.¹⁷⁶ These provisions collectively establish a structured and transparent licensing regime. They reflect the legislature's commitment to maintaining professional accountability and operational continuity within the insolvency practice, while

¹⁷⁰ Schedule 1, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁷¹ Schedule 2, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁷² Rule 12(7), Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁷³ Rule 13, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁷⁴ Rule 14, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁷⁵ Schedule 1, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁷⁶ Section 8, Insolvency Act, 2015, Cap 53, Laws of Kenya

embedding safeguards to uphold the integrity of those entrusted with the administration of distressed entities.

2.4.4 : Particulars of the statement of the company’s financial position

Rule 133¹⁷⁷ delineates the required particulars in the statement of a company’s financial position where the proposed supervisor is neither the liquidator nor the administrator. Pursuant to Section 626(3),¹⁷⁸ such a statement must present a categorised and identifiable breakdown of the company’s assets, with each asset group accompanied by its estimated value. It must further disclose any property over which security interests have been claimed, whether wholly or partially, detailing the nature, extent, method, and timing of the creation of such security. The statement must also include a schedule of preferential creditors and their corresponding claims, a list of unsecured creditors and the amounts owed, as well as particulars of debts owed by or to persons connected with the company. Moreover, it should list the members of the company, detailing their respective shareholdings, alongside any additional information the proposed supervisor may reasonably require in writing for the preparation of their report to the court under Section 625.¹⁷⁹

This statement is to be made not later than fourteen days before the date of the proposal.¹⁸⁰ While the proposed supervisor may permit an earlier preparation date, this must not exceed sixty days before the proposal¹⁸¹ and must be accompanied by a report to the court justifying the deviation.¹⁸² Additionally, the statement must be verified by a statutory declaration made by the proposer, using Form 32 as set out in the First Schedule.¹⁸³

The thrust of these provisions is to ensure transparency, accountability, and procedural integrity in the preliminary stages of a CVA. However, a critical gap persists: the regulations do not impose a statutory obligation on directors to cooperate with the preparation of this financial statement, nor

¹⁷⁷ Rule 133, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁷⁸ Section 626(3), Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁷⁹ Section 625, Insolvency Act, 2015, Cap 53, Laws of Kenya

¹⁸⁰ Rule 133(2), Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁸¹ Rule 133(3), Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁸² Rule 133(4), Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁸³ Schedule 1, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

do they articulate penalties for material misstatements, omissions, or failures to comply. Consequently, the efficacy of the process may be undermined by the lack of enforcement mechanisms or sanctionable consequences for procedural abuses. This regulatory deficiency is accentuated by the heavy procedural burden placed upon the proposed supervisor, who must justify any departure from the standard 14-day timeline, despite the absence of clear sanctions in the event of default.

The case of *Uchumi Supermarkets PLC v UBA Kenya Limited & 4 Others*¹⁸⁴ illustrates the practical significance of these financial disclosures. The Court, in underscoring the importance of compliance and continuous updates, affirmed that timely and accurate financial information is fundamental to the success of a CVA. While Kenya's regulatory framework provides a commendable starting point, it requires more robust enforcement provisions to safeguard the integrity of the process and ensure that stakeholders are not prejudiced by procedural laxity or deliberate obfuscation.

2.4.5 : Conduct of creditors' meetings

Schedule 3¹⁸⁵ meticulously sets out the procedural framework governing the conduct of creditors' and members' meetings within the context of CVAs. The convenor of the meeting is tasked with setting the decision date, which must not be earlier than fourteen days following the issuance of the meeting notice. These meetings may be held either physically or virtually, with the mode of meeting determining specific notice requirements. Crucially, the Schedule permits resolutions to be passed without convening a physical meeting, provided procedural safeguards are met, and stipulates that only creditors whose addresses are known must be served with notice.

The content of the notice is prescribed in detail,¹⁸⁶ it must include the nature of the decision to be made, including voting entitlements, the deadline for submitting proofs of claim, and information on proxy representation. Voting closes on the designated decision date, and only those votes supported by valid proofs of claim are recognised. Creditors are entitled to vote based on the value of their claims as at the date the insolvency trigger event occurred. In instances where the value of

¹⁸⁴ *Uchumi Supermarkets PLC vs UBA Kenya Limited & 4 others* [2023] KEHC 24910 (KLR)

¹⁸⁵ Schedule 3, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁸⁶ Paragraph 5, Schedule 3, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

a claim is unascertainable or unliquidated, the convenor is empowered to assign a nominal minimum value (e.g., KES 1,000 in CVAs),¹⁸⁷ thereby allowing participation without compromising the process.

A proposal is deemed approved if it secures a majority in value of votes cast; however, it is automatically rejected if a majority of unconnected creditors vote against it. Detailed records of the meeting must be maintained, including attendance registers, particulars of claims, resolutions passed, and any objections raised. These records form part of the formal insolvency documentation and are integral to ensuring transparency and procedural accountability.¹⁸⁸

While these provisions demonstrate a commendable effort at codifying the mechanics of participatory decision-making in the CVA process, they are not without their shortcomings. In contrast to the more evolved and judicially guided framework under UK insolvency law, the Kenyan regime exhibits notable weaknesses in the areas of enforcement, stakeholder protection, and redress mechanisms. The absence of stringent penalties for non-compliance or robust oversight to guarantee fairness potentially undermines the democratic ethos that the regulations seek to instil. Thus, while structurally comprehensive, Kenya's framework still demands further refinement to align with international best practices and ensure the equitable treatment of all parties in the CVA process.

2.4.6 : Company meetings

The conduct of company meetings under the CVA framework mirrors the procedural rigour required of creditors' meetings, particularly where members opt for a physical convening. In such instances, the request must be made within fourteen days of the initial notice and must contain a comprehensive list of members supporting the request, each member's voting entitlement, and individual confirmations. Upon acceptance, the physical meeting must be held within twenty-eight days, with a mandatory notice period of at least fourteen days. Judicial pronouncements have underscored the importance of strict adherence to these requirements.¹⁸⁹ In *Re Demaglass Ltd*¹⁹⁰,

¹⁸⁷ Paragraph 6, Schedule 3, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁸⁸ Paragraph 36, Schedule 3, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁸⁹ Paragraph 38, Schedule 3, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁹⁰ *Re Demaglass Ltd* [2001] EWHC 2012 (Ch)

the court held that meetings conducted without proper notice or adequate clarity on voting rights could invalidate the entire CVA approval process, thereby reinforcing the need for procedural integrity and stakeholder inclusivity.

The regulatory framework also takes a balanced approach to addressing exclusions. Where a party is unintentionally excluded from participating in a meeting, the presiding officer is afforded discretion to either proceed with the meeting, adjourn it, or declare it void.¹⁹¹ Importantly, excluded individuals have the right to request access to the meeting details and lodge formal complaints, which must be resolved expeditiously.¹⁹² If it is determined that the exclusion materially impacted the voting outcome, the result may be revised and the affected parties duly notified. This protective mechanism was affirmed in *Re T&N*¹⁹³, where the court stressed that decisions reached in creditors' meetings must meet high standards of transparency and fairness, especially where procedural irregularities or exclusions may have distorted the results.

A notable strength of the Kenyan framework lies in its embrace of modern, flexible modalities such as virtual meetings and proxy voting. These provisions align with global best practices by enabling participation despite logistical constraints, thereby enhancing accessibility and efficiency. The requirement for detailed notices and clearly documented voting rights mirrors the UK's approach, embedding transparency and accountability within the decision-making process. However, while these mechanisms offer procedural robustness and contemporary relevance, their effectiveness is ultimately contingent on vigilant enforcement and judicial oversight, an area where Kenya's framework may still be evolving.

2.4.7 : Proxies and representation

Both creditors and members may appoint proxyholders to act and vote on their behalf during insolvency meetings.¹⁹⁴ Proxies may be either specific to a particular meeting or continuing in nature and must be submitted before the relevant meeting.¹⁹⁵ Notably, only natural persons are

¹⁹¹ Paragraph 39, Schedule 3, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁹² Paragraph 40, Schedule 3, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁹³ *Re T&N Ltd* [2005] EWHC 2870 (Ch)

¹⁹⁴ Paragraph 42, Schedule 3, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

¹⁹⁵ Paragraph 47, Schedule 3, Insolvency Regulations, Legal Notice 47 of 2016, Kenya Gazette Vol.CXVIII- No 29 on 24 March 2016

eligible to act as proxies, and only one proxyholder is permitted to vote per meeting. The presiding officer is obligated to move motions requested by proxies unless justifiable grounds exist to prevent such action. Corporate creditors or members may also participate through duly appointed representatives authorised by board resolutions and accompanied by certified documentation of authority. The procedural gravity of proxy voting was emphasized in *Re Franklyn*¹⁹⁶, where the court held that failure to strictly adhere to prescribed procedural requirements may lead to the exclusion of proxy votes from consideration, thereby preserving the integrity of the decision-making process.

While Kenya's regulatory provisions on proxies are elaborate in form, they exhibit notable substantive deficiencies. First, there is an observable absence of robust enforcement mechanisms. In contrast, the UK's insolvency framework offers significantly enhanced creditor protections. Under Rule 15.11¹⁹⁷ and Rule 15.36¹⁹⁸ strict protocols govern quorum requirements, complaints, and challenges to the conduct or outcomes of meetings. Additionally, legal remedies such as annulment of decisions, personal liability for officeholders, and court-imposed corrections are available for procedural breaches. By comparison, Kenya affords the presiding officer and convenor extensive discretion, particularly in decisions to exclude participants or refuse proxy motions, without imposing commensurate checks or penalties. Although Paragraph 41 provides a remedy for exclusions, it is narrowly constructed and constrained by strict time limits. Furthermore, the regulation fails to expressly guarantee access to judicial review, thereby weakening oversight.

Second, the framework offers limited safeguards to creditors, particularly in ensuring the fairness and feasibility of CVA proposals. While Kenya adopts the 50% in value threshold for unconnected creditors to block proposals, mirroring Rule 15.34¹⁹⁹ of the UK framework, it lacks a mechanism equivalent to the UK's independent nominee assessment. Under Section 2²⁰⁰, the nominee must submit an impartial report to the court evaluating the viability of the proposal. This evaluative function provides a critical check against unfair arrangements and enhances the credibility of the process. Kenya's absence of a similar requirement places undue reliance on the presiding officer

¹⁹⁶ *Re Franklyn* [2015] EWHC 2012 (Ch)

¹⁹⁷ Rule 15.11, The Insolvency (England and Wales) Rules 2016

¹⁹⁸ Rule 15.36, The Insolvency (England and Wales) Rules 2016

¹⁹⁹ Rule 15.34, The Insolvency (England and Wales) Rules 2016

²⁰⁰ Section 2, Part 1, Insolvency Act, 1986, Cap 45

and PS, neither of whom are legally mandated to provide a formal, independent assessment to the court.

Finally, while proxies and representative voting are permitted in Kenya, their regulation is minimal and exposes the process to potential manipulation. In the UK, Rule 8.6²⁰¹ and Rule 15.9²⁰² set out clear standards for the conduct of proxyholders, including obligations to disclose conflicts of interest and limitations on the exercise of discretionary voting. Conversely, Kenya's framework, primarily laid out in Paragraphs 43 to 47, grants expansive discretion to presiding officers without embedding equivalent safeguards. The lack of detailed accountability mechanisms undermines the credibility of decisions reached through proxy voting, especially in closely contested proposals.

In sum, while Kenya's approach to proxy participation demonstrates procedural intent, its comparative weaknesses in enforcement, oversight, and creditor protection reveal areas ripe for reform. Introducing nominee assessments, codifying clearer penalties for procedural violations, and enhancing transparency in proxy conduct would significantly align Kenya's framework with international best practices.

2.5: Identified gaps in Kenya's legal framework governing CVAs

While Kenya's legal framework for Company Voluntary Arrangements (CVAs) demonstrates commendable procedural ambition, it suffers from critical structural, regulatory, and functional weaknesses that impede its effectiveness as a corporate rescue tool. These gaps, rooted in the absence of substantive checks, institutional clarity, and stakeholder protection, render the framework more theoretical than practical. The following deficiencies merit particular attention.

2.5.1 : Lack of enforcement mechanisms and accountability structures

Although procedural provisions exist for creditor and member meetings, including notices, quorums, and voting requirements, the law does not impose clear penalties for non-compliance. This omission creates a regulatory vacuum where procedural abuses—such as failure to give proper notice, irregular proxy appointments, or exclusion of stakeholders—can occur with impunity. The integrity of the CVA process cannot rest solely on assumed good faith; it requires enforceable legal standards backed by consequences.

²⁰¹ Rule 8.6, The Insolvency (England and Wales) Rules 2016

²⁰² Rule 15.9, The Insolvency (England and Wales) Rules 2016

2.5.2 : Absence of independent evaluative oversight before approval

There is no statutory requirement for an independent assessment of a proposed CVA's fairness, viability, or impact on stakeholders. The Provisional Supervisor (PS) is not mandated to prepare or submit a report scrutinising the proposal's substance before it is considered by creditors or members. This absence of a formal evaluative checkpoint undermines confidence in the process and heightens the risk of biased or commercially impractical arrangements being approved without scrutiny.

2.5.3 : Inadequate Regulation of proxy and representative voting

The framework permits the use of proxies and corporate representatives but provides limited regulation on how these votes are exercised. There are no mechanisms to ensure that proxyholders act in accordance with instructions or to challenge conflicts of interest or procedural irregularities. Moreover, the discretion granted to presiding officers in admitting or rejecting proxy motions lacks safeguards, leaving room for abuse during close or contested decisions.

2.5.4 : Weak protection against debtor and director non-Cooperation

While a statement of the company's financial position is required prior to a CVA proposal, the law does not compel directors or company officers to cooperate or provide accurate and complete disclosures. Furthermore, there are no penalties for misstatements or omissions. This gap severely undermines transparency and accountability, placing an undue burden on the PS to verify financial information without legal backing to compel cooperation.

2.5.5 : Discretion-heavy framework with inadequate judicial oversight

Key procedural decisions, including early preparation of financial statements, handling of exclusions, or admission of proxy motions, are left to the discretion of the PS or presiding officer. The framework lacks built-in requirements for court oversight or mandatory review, even in cases of apparent irregularity. Without consistent judicial checks, the process is vulnerable to manipulation, particularly by dominant creditors or insiders.

2.5.6 : Procedural formalism without substantive protection

Although the law outlines detailed procedures for meeting conduct and voting, it fails to provide avenues for substantive redress where injustice occurs. For instance, if exclusion from a meeting affects a vote outcome, the law permits revision, but only in narrow, time-bound circumstances and without guaranteed recourse to a court. This procedural rigidity fails to account for the dynamic realities of creditor interactions and power imbalances.

2.5.7 : Absence of criteria for appointment of insolvency practitioners and provisional supervisors

The law does not prescribe any clear criteria for the appointment of Insolvency Practitioners (IPs) or Provisional Supervisors (PS). There is no reference to minimum qualifications, independence, or ethical standards. This omission permits arbitrary or conflicted appointments, undermining confidence in the impartiality and competence of those charged with overseeing sensitive restructuring processes.

2.5.8 : Lack of statutory fee guidelines for insolvency practitioners

There is no statutory framework for determining, approving, or contesting the fees charged by IPs or PS. This absence opens the door to inconsistency, opacity, and potentially exploitative practices. The cost of insolvency procedures, especially in distressed companies, is a material concern, and their unregulated nature could deter both creditor support and professional engagement.

2.5.9 : Lack of cross-class cramdown mechanism

Kenya's framework does not accommodate cross-class cramdown, where a restructuring plan can be approved despite dissent from a specific group of creditors, provided overall fairness is demonstrated. This absence means that a small group of dissenting creditors can block proposals that might otherwise rescue the company and preserve value for the majority. Without a statutory override mechanism, the CVA process becomes prone to stalemate.

2.5.10 : Lack of mandate for supervisors in implementation and oversight post-approval

Once a CVA is approved, the law provides little clarity on the role of the Supervisor in overseeing its implementation. There is no explicit mandate to monitor compliance, enforce terms, or report deviations to the court or creditors. This creates a post-approval vacuum, where the CVA can be

ignored or undermined without consequence. For a rescue tool to be credible, oversight must extend beyond approval to actual execution.

2.6: Conclusion

The legal framework governing CVAs in Kenya, primarily established under the Insolvency Act of 2015²⁰³ and the Regulations made thereunder mark a significant advancement in the country's approach to corporate insolvency and business rescue. This framework provides a well-structured mechanism for addressing financial distress, incorporating several key strengths that enhance its effectiveness; however, certain deficiencies need to be addressed to enrich the legislation. Moving forward, policymakers and legal practitioners must evaluate the effectiveness of CVAs in achieving their intended goal of business rescue and continuity, making necessary reforms to enhance accessibility and efficiency.



²⁰³ Insolvency Act, 2015, Cap 53, Laws of Kenya

Chapter three

The legal and regulatory framework governing company voluntary arrangements in the UK

3.1 : Introduction

This chapter explores the historical development of CVAs, tracing their origins from early corporate rescue mechanisms to their formalisation in insolvency law in the UK. The chapter aims to assess the lessons or best practices Kenya can borrow from the UK.

The chapter begins by examining early forms of corporate debt restructuring before the establishment of formal insolvency laws, highlighting practices in pre-modern England and the impact of early bankruptcy legislation. The transition from punitive bankruptcy regimes to business rescue-oriented insolvency laws marks a significant shift in corporate rescue philosophy, with key legislative milestones such as the Bankruptcy Act of 1883 and the Insolvency Act 1986 shaping the current landscape.²⁰⁴

3.2 : Historical Origins of Company Voluntary Arrangements

3.2.1 : Early corporate rescue mechanisms

The origin of CVAs can be traced back to Europe. In ancient England, Insolvency was referred to as bankruptcy.²⁰⁵ According to Sir Coke, the word was believed to have originated from the French word, *banque route*.²⁰⁶ The antecedents of the laws of Bankruptcy were harsh in the way that they treated Debtors. In Athens, as observed by Sir Henry Maine, defaulting debtors were subjected to enslavement²⁰⁷. In Rome, they were entitled to be imprisoned, enslaved or death. There was a law known as the 12 tables, which allowed these things to happen.²⁰⁸ However, some laws still protected the debtors from these harsh laws. If a debtor was considered innocent, they would be forgiven and discharged from the debt by ‘giving up everything to the creditors’. This also protected them from future claims by creditors.²⁰⁹

²⁰⁴ Finch, V, *Corporate Insolvency Law: Perspectives and Principles*, Cambridge University Press, 2nd Edition, 10

²⁰⁵ EA Jelf (ed), *Encyclopaedia of the Laws of England*, 3rd edn (Sweet & Maxwell, 1938), vol.2

²⁰⁶ Levinthal E, *The Early History of Bankruptcy Law*. 1918, *University of Pennsylvania Law Review* 223, 237 - 238

²⁰⁷ Treinman I, ‘Escaping the Creditor in the Middle Ages’, 1927 *LQR* 230-233

²⁰⁸ Edelman J, Meehan H, Cheung’ G, *The Evolution of Bankruptcy and Insolvency Laws and the Case of the deed of company arrangement*, *Lloyd’s Maritime and Commercial Law Quarterly*, 573

²⁰⁹ Levinthal E, *The Early History of Bankruptcy Law*. 1918, *University of Pennsylvania Law Review* 223, 237 - 238

In ancient England, businesses employed various informal methods for debt restructuring and financial recovery. These practices were vital in addressing the financial distress faced by merchants and traders. Informal creditor arrangements allowed debtors to negotiate terms directly with their creditors, providing a means to avoid the harsh penalties associated with defaulting on debts.²¹⁰ These early practices laid the groundwork for more structured approaches to corporate debt relief.

One significant aspect of early corporate rescue mechanisms was the practice of composition agreements.²¹¹ These agreements involved a debtor proposing a plan to repay a portion of their debts over time, subject to creditor approval.²¹² Such informal arrangements aimed to balance the interests of both debtors and creditors, allowing businesses to continue operating while addressing their financial obligations. These agreements were often driven by the practical need to maintain ongoing business relationships and sustain economic activities within communities.²¹³

Another important development in early corporate rescue was the role of merchant guilds and trade associations.²¹⁴ These organisations often facilitated debt settlements and provided support to distressed businesses. By mediating between debtors and creditors, merchant guilds played a crucial role in preserving the economic stability of trading communities.²¹⁵ The cooperative nature of these arrangements highlighted the importance of maintaining business continuity and protecting the livelihoods of those involved.

3.2.2 : The development of formal insolvency laws

The Bankruptcy Act of 1542 was one of the earliest legislative attempts to address the issue of debt in England. Under this law, debtors could face imprisonment or even death, reflecting the punitive nature of early insolvency practices.²¹⁶ Despite its harshness, the Act marked an initial step towards

²¹⁰ Fletcher, I. F., *The Law of Insolvency*. 2nd Edition, 1996, Sweet & Maxwell, 7

²¹¹ Syngé C., Bowen B., "Progress in the Administration of Justice During the Victorian Period", in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History* (Little, Brown and Co, 1907), vol.1, 516, 545-546.

²¹² Finch, V, *Corporate Insolvency Law: Perspectives and Principles*, 15

²¹³ Finch, V, *Corporate Insolvency Law: Perspectives and Principles*, 16 - 17

²¹⁴ Edelman J, Meehan H, Cheung' G, The Evolution of Bankruptcy and Insolvency Laws and the Case of the deed of company arrangement, *Lloyd's Maritime and Commercial Law Quarterly*, 575

²¹⁵ Edelman J, Meehan H, Cheung' G, The Evolution of Bankruptcy and Insolvency Laws and the Case of the deed of company arrangement, *Lloyd's Maritime and Commercial Law Quarterly*, 575

²¹⁶ MichLobban, "Bankruptcy and Insolvency", in William Cornish and others, *The Oxford History of the Laws of England: Volume XII: 1820-1914 Private Law* (OUP 2010) 779, 823

formalising the treatment of insolvency. The severe penalties associated with bankruptcy underscore the need for more balanced and humane approaches to debt resolution.

Between 1571 and 1623, several Acts were enacted to address the increasing number of debtors and strengthen creditor protections. In 1571, an Act touching orders for bankruptcy was enacted to include keeping house and taking sanctuary into law as a definition of the acts of bankruptcy.²¹⁷ In 1604, the Act for Better Relief of the Creditors against such shall become bankrupt granted broader compulsory investigative powers, which allowed authorities to uncover fraudulent bankruptcy practices. This led to the introduction of various punishments, including placing perjurious debtors in the stocks and cutting off an ear.²¹⁸ In 1623, An Act for the Description of Bankruptcy and Relief of creditors extended such penalties to those who could not prove that their bankruptcy was solely due to misfortune and not mischief.²¹⁹

However, with the growth of international trade and commerce in the sixteenth century, there was increasing recognition of the need for a more structured approach to insolvency and creditor recovery.²²⁰ By the late seventeenth century, attitudes towards bankruptcy had shifted, recognising credit as essential to public and private economies. The famous legal scholar Blackstone encapsulated this evolving perspective, stating that trade relied on mutual credit, making the contracting of debts both justifiable and necessary.²²¹

As the perception of debt changed from a moral failing to a commercial necessity, bankruptcy laws began to liberalise. This shift culminated in the 1705 legislation, which, for the first time in English law, allowed a bankrupt individual to be discharged from liability for past debts.²²² The rationale behind this change was the growing understanding that bankrupt individuals deserved sympathy rather than punishment in many cases and that indefinite imprisonment of debtors did not benefit creditors financially.

²¹⁷ Edelman J, Meehan H, Cheung' G, The Evolution of Bankruptcy and Insolvency Laws and the Case of the deed of company arrangement, *Lloyd's Maritime and Commercial Law Quarterly*, 574

²¹⁸ Levinthal E, The Early History of Bankruptcy Law. 1918, University of Pennsylvania Law Review 223, 255

²¹⁹ Levinthal E, The Early History of Bankruptcy Law. 1918, University of Pennsylvania Law Review 223, 256

²²⁰ Allsop J, Dargan L, "The History of Bankruptcy and Insolvency Law in England and Australia", in JT Gleeson, JA Watson and E Peden (eds), *Historical Foundations of Australian Law* (Federation Press, 2013), vol.2, 424-425

²²¹ Edelman J, Meehan H, Cheung' G, The Evolution of Bankruptcy and Insolvency Laws and the Case of the deed of company arrangement, *Lloyd's Maritime and Commercial Law Quarterly*, 574

²²² Levinthal E, The Early History of Bankruptcy Law. 1918, University of Pennsylvania Law Review 223, 257

Over time, bankruptcy laws evolved to balance the protection of creditors with the need to avoid undue punishment of honest debtors. One key amendment required four-fifths of creditors to consent before a debtor could be discharged from bankruptcy.²²³ However, non-commercial debtors continued to face harsh penalties under general insolvency laws, as they were perceived as dishonest for failing to repay debts on time.²²⁴

The slow progression of bankruptcy law was caught between two competing concerns: on one hand, there was a growing recognition that traders relied on credit and should not face excessive punishment; on the other hand, there was a need for adequate regulation to prevent fraudulent business practices.²²⁵ As Lord Bowen famously observed, the bankruptcy system was both a source of fear for honest debtors and a tool for delaying payments by dishonest traders. Furthermore, the high costs of bankruptcy administration made the process accessible mainly for punishing fraud rather than offering genuine relief.²²⁶

Despite these challenges, one of the major milestones in the liberalisation of insolvency law was the introduction of discharge from debt, a cornerstone of modern bankruptcy regimes. This principle was expanded upon by the 1825 Bankruptcy Act,²²⁷ which consolidated existing bankruptcy laws and introduced a voluntary bankruptcy declaration process for debtors. The 1831 reforms, led by Lord Brougham, further modernised the system by establishing the Court of Bankruptcy, transferring supervisory powers from the Court of Chancery²²⁸ and appointing official assignees to manage bankrupt estates. Although creditors still had a role in assigning control, the official assignee exercised greater authority over the process.²²⁹

²²³ Allsop J, Dargan L, "The History of Bankruptcy and Insolvency Law in England and Australia", in JT Gleeson, JA Watson and E Peden (eds), *Historical Foundations of Australian Law* (Federation Press, 2013), vol.2, 432

²²⁴ Edelman J, Meehan H, Cheung' G, The Evolution of Bankruptcy and Insolvency Laws and the Case of the deed of company arrangement, *Lloyd's Maritime and Commercial Law Quarterly*, 575

²²⁵ Edelman J, Meehan H, Cheung' G, The Evolution of Bankruptcy and Insolvency Laws and the Case of the deed of company arrangement, *Lloyd's Maritime and Commercial Law Quarterly*, 575

²²⁶ Syngé C, Bowen B, "Progress in the Administration of Justice During the Victorian Period", *Association of American Law Schools (ed), Select Essays in Anglo-American Legal History* (Little, Brown and Co, 1907), vol.1, 516, 545-546.

²²⁷ An Act to amend the Laws relating to Bankrupts, 1825, U.K

²²⁸ An Act to establish a Court in Bankruptcy (1 & 2 Will IV c 56), s 1; Sir William Holdsworth, *A History of English Law*, 7th edn (Methuen & Co, 1956), vol.1, 470-473; V Markham Lester, *Victorian Insolvency* (Clarendon Press, 1995), 45.

²²⁹ Markham V, *Victorian Insolvency*, Clarendon Press, 1995, 45.

Subsequent reforms in 1842²³⁰ and 1849²³¹ strengthened judicial oversight over debt discharge and insolvency arrangements, limiting creditor influence. As a result, judicial control increased, and the need for severe consequences diminished. One of the most significant changes was the gradual abolition of debtor imprisonment.²³² In 1838, arrest on mesne process (pre-judgment arrest) was abolished, and by 1869, imprisonment for debt following a final judgment was largely eliminated, though some exceptions remained.²³³ Further reforms in this Act were the expansion of options such as debt resolution, which permitted extra-judicial settlements through composition agreements.

By the mid-nineteenth century, many fundamental aspects of modern bankruptcy and insolvency law, including judicial regulation, debt discharge, and reduced debtor punishment, were firmly established, shaping the future of corporate insolvency frameworks.²³⁴ The Bankruptcy Act of 1883 introduced trustee-supervised bankruptcies, aiming to create a more organised and equitable process for handling insolvency.²³⁵ The Act sought to protect the interests of creditors while providing a structured means for debtors to address their financial difficulties. The introduction of trustees helped oversee the distribution of assets and ensured a fair process for all parties involved.²³⁶ This legislation represented a move towards a more systematic and regulated approach to insolvency, reflecting a growing awareness of the complexities of financial distress.

The Bankruptcy Act of 1883 was a significant milestone in the development of insolvency law as it marked a move away from the punitive approach that characterised earlier legislation. The Act introduced a more structured and equitable process for dealing with insolvency, including the appointment of trustees to oversee the administration of bankrupt estates and the office of the official receiver, whose main mandate was to investigate debtors. Trustees were responsible for managing the debtor's assets and ensuring that creditors received an equitable distribution of the

²³⁰ Section 37, An Act for the Amendment for the Law of Bankruptcy, 1842, UK

²³¹ Section 198, Bankrupt Law Consolidation Act, 1849, UK

²³² Allsop J, Dargan L, "The History of Bankruptcy and Insolvency Law in England and Australia", in JT Gleeson, JA Watson and E Peden (eds), Historical Foundations of Australian Law (Federation Press, 2013), vol.2, 441

²³³ Section 5, Debtor's Act, 1869. UK

²³⁴ Allsop J, Dargan L, "The History of Bankruptcy and Insolvency Law in England and Australia", in JT Gleeson, JA Watson and E Peden (eds), Historical Foundations of Australian Law (Federation Press, 2013), vol.2, 445.

²³⁵ Edelman J, Meehan H, Cheung' G, The Evolution of Bankruptcy and Insolvency Laws and the Case of the deed of company arrangement, *Lloyd's Maritime and Commercial Law Quarterly*, 576

²³⁶ Fletcher, I. F., *The Law of Insolvency*. 2nd Edition, 1996, Sweet & Maxwell, 10 - 11

proceeds. This approach aimed to balance the interests of debtors and creditors while providing a mechanism for the orderly resolution of financial distress. By 1890, these Insolvency procedures were formally incorporated into corporate insolvency law, which was, at the time, governed by the Companies Act.²³⁷ This development marked a crucial step toward the modern framework of corporate insolvency, which balances creditor rights, judicial oversight, and debtor relief.

The twentieth century introduced progressive changes to bankruptcy and insolvency regulation, aiming to further reduce the severity of consequences while ensuring adequate oversight. These reforms were largely driven by expert committees that reviewed bankruptcy and corporate laws²³⁸. According to Associate Professor van Zwieten, the numerous bankruptcy statutes enacted in the late nineteenth century culminated in the Bankruptcy Act 1914²³⁹ which codified and streamlined insolvency laws.²⁴⁰ Additionally, the Bankruptcy (Amendment) Act²⁴¹ introduced new obligations for traders while addressing hardships and inefficiencies in the system.

Despite these improvements, the legal framework remained incomplete. Deeds of arrangement, which allowed alternative debt settlements, were subject to strict conditions and governed by a separate law.²⁴² Similarly, receivership and management provided an option to prevent immediate liquidation, but this was only available to secured creditors with a charge over nearly all of a company's assets.²⁴³ Concerns also persisted regarding the harsh effects of insolvency laws on "honest but unfortunate" debtors. The 1957 Blagden Committee Report²⁴⁴ identified three key objectives of bankruptcy laws: penalising dishonest debtors, distinguishing honest debtors from fraudulent ones, and relieving honest but struggling debtors from overwhelming debt burdens. However, the Committee concluded that the existing laws failed in all three aspects.²⁴⁵

The economic challenges of the 1970s, particularly stagflation, led to a surge in corporate and individual financial failures, increasing pressure for legal reforms. Following a critical report by

²³⁷ Companies Act, 1862, UK

²³⁸ Edelman J, Meehan H, Cheung' G, The Evolution of Bankruptcy and Insolvency Laws and the Case of the deed of company arrangement, *Lloyd's Maritime and Commercial Law Quarterly*, 576

²³⁹ Bankruptcy Act, 1914, UK

²⁴⁰ Zwieten V, Principles of Corporate Insolvency Law, 5th edition, Sweet & Maxwell, London, 2018. 25

²⁴¹ Bankruptcy (Amendment) Act, 1926, UK

²⁴² Deeds of Arrangement Act, 1914, UK

²⁴³ Fletcher, I. F., *The Law of Insolvency*. 2nd Edition, 1996, Sweet & Maxwell, 14

²⁴⁴ The 1957 Report of the Blagden Committee on the law of bankruptcy and deeds of arrangement

²⁴⁵ Edelman J, Meehan H, Cheung' G, The Evolution of Bankruptcy and Insolvency Laws and the Case of the deed of company arrangement, *Lloyd's Maritime and Commercial Law Quarterly*, 577

JUSTICE, the British section of the International Commission of Jurists, the Insolvency Act 1976 (UK) was enacted as a temporary measure to address urgent flaws in insolvency law.²⁴⁶ A more comprehensive review followed, leading to the 1982 Cork Report, chaired by Sir Kenneth Cork. The Cork Committee emphasised corporate rescue as a priority, advocating for greater flexibility in insolvency regimes to protect creditors while avoiding unnecessary business failures. The report called for more debtor-friendly provisions, aiming to preserve viable businesses wherever possible and modernise insolvency law to balance creditor rights with economic stability.²⁴⁷ The committee concluded that the company arrangements as per the Companies Act²⁴⁸ were unsuitable as they were too burdensome. One of the solutions suggested by the committee was to have the laws extended to allow voluntary arrangements for individuals to companies. This led to the enactment of the Insolvency Act 1986,²⁴⁹ which formally introduced CVAs as a corporate rescue mechanism. This Act provided a structured yet flexible alternative to traditional insolvency processes like liquidation and administration, facilitating the preservation of viable businesses and the protection of jobs. The introduction of CVAs aimed to offer a less costly and more efficient means of restructuring corporate debt, allowing companies to continue operating while addressing their financial obligations.²⁵⁰

The Insolvency Act 1986 marked a shift from punitive insolvency laws to a business rescue-oriented approach, recognising the economic benefits of preserving viable companies and protecting jobs. A key reform was the introduction of CVAs, allowing financially distressed firms to negotiate debt restructuring plans with creditor approval. This flexible and less adversarial mechanism enabled businesses to continue operating while managing financial difficulties. Influenced by international insolvency practices, CVAs reflected a growing emphasis on rehabilitation over liquidation, aiming to reduce economic disruption and safeguard stakeholder interests.²⁵¹

²⁴⁶ Edelman J, Meehan H, Cheung G, The Evolution of Bankruptcy and Insolvency Laws and the Case of the deed of company arrangement, *Lloyd's Maritime and Commercial Law Quarterly*, 577

²⁴⁷ Morrison D, "Deeds of company arrangement and secured creditors" *Insolvency Law Journal*, 2015, 181 - 182

²⁴⁸ Companies Act, 1948, UK

²⁴⁹ Insolvency Act, 1986, UK

²⁵⁰ Finch, V, *Corporate Insolvency Law: Perspectives and Principles*,

²⁵¹ Zwieten V, *Principles of Corporate Insolvency Law*, 5th edition, Sweet & Maxwell, London, 2018, 492

The evolution of insolvency laws introduced corporate rescue tools like administration and receivership, offering businesses tailored solutions to financial distress. Administration provided companies with breathing space to restructure, while receivership prioritised secured creditors' recovery. These mechanisms, alongside CVAs, highlight the complexity of modern insolvency practice and the need for diverse recovery options.²⁵² The shift from punitive to rehabilitative insolvency laws underscores the growing recognition of business preservation and stakeholder protection. This progression laid the foundation for CVAs, ensuring a structured yet flexible corporate rescue framework that continues to adapt to economic and business changes.²⁵³

3.3: The Need for Company Voluntary Arrangements

3.3.1: Limitations of traditional insolvency processes

The traditional insolvency processes in the United Kingdom, namely liquidation and administration, have long been scrutinised for their effectiveness in preserving business value. While these mechanisms serve to address corporate insolvency, they often do so at the expense of economic efficiency and social welfare.²⁵⁴

Liquidation involves winding up a company's affairs by selling off assets to satisfy creditor claims, ultimately leading to the dissolution of the company.²⁵⁵ This process is inherently destructive to the ongoing value of a business. It disregards the potential for restructuring and often results in the loss of established customer relationships, supplier contracts, and employee expertise.

Administration, introduced as a more rescue-oriented procedure, aims to preserve the company as a going concern.²⁵⁶ However, it is frequently criticised for being complex and costly. Administrative processes can be protracted, with fees eroding the assets available for distribution

²⁵² Fletcher, I. F., *The Law of Insolvency*. 2nd Edition, 1996, Sweet & Maxwell, 450

²⁵³ Edelman J, Meehan H, Cheung' G, The Evolution of Bankruptcy and Insolvency Laws and the Case of the deed of company arrangement, *Lloyd's Maritime and Commercial Law Quarterly*, 578

²⁵⁴ Conway. L, Company Voluntary Arrangements, Briefing paper, Number 6944, 11 June 2019, House of commons library, 15 <www.parliament.uk/commons-library /[https://researchbriefings.files.parliament.uk/documents/SN06944/SN06944.pdf#:~:text=A%20Company%20Voluntary%20Arrangement%20\(CVA\)%20is%20a,and%20trade%20its%20way%20out%20of%20insolvency.&text=A%20CVA%20enables%20a%20viable%20company%20in,in%20which%20the%20company's%20debts%20are%20compromised](https://researchbriefings.files.parliament.uk/documents/SN06944/SN06944.pdf#:~:text=A%20Company%20Voluntary%20Arrangement%20(CVA)%20is%20a,and%20trade%20its%20way%20out%20of%20insolvency.&text=A%20CVA%20enables%20a%20viable%20company%20in,in%20which%20the%20company's%20debts%20are%20compromised). > on 6 February 2025

²⁵⁵ Part iv, Insolvency Act, 1986, UK

²⁵⁶ Finch, V, *Corporate Insolvency Law: Perspectives and Principles*, 454

to creditors.²⁵⁷ Moreover, administration may still culminate in liquidation if a viable rescue plan cannot be formulated.

Liquidation often leads to significant job losses, as employees are made redundant without the prospect of re-employment within the company.²⁵⁸ This not only affects the individuals concerned but also has broader social implications, such as increased unemployment rates and loss of skills within the economy.

From the creditors' perspective, liquidation typically results in reduced recovery rates. Forced asset sales commonly yield lower returns than going-concern valuations, leading to diminished distributions to unsecured creditors.²⁵⁹ The transactional costs associated with liquidation further deplete the available assets.

The process also engenders economic inefficiency. Viable businesses are dismantled, leading to a loss of productive capacity and market competition.²⁶⁰ The resulting gap in the market may not be readily filled, especially in specialised industries.

The case of *Re Kayley Vending Ltd*²⁶¹ illustrates the pitfalls associated with liquidation. The company, facing financial difficulties, was placed into liquidation, leading to the termination of its business operations. The court acknowledged that the liquidation resulted in minimal returns to creditors and the loss of employment for staff, highlighting the destructive consequences of the process.

3.3.2 The Shift towards business rescue

In light of the limitations of traditional insolvency procedures, there has been a global movement towards mechanisms that prioritise business rescue over liquidation. Internationally, there is a growing recognition that preserving viable businesses can yield better outcomes for creditors,

²⁵⁷ Armour, J, Mokal, R. "Reforming the Governance of Corporate Rescue: The Enterprise Act 2002." *Lloyd's Maritime and Commercial Law Quarterly*, 2005, 28–56

²⁵⁸ Frisby, S, "In Search of a Rescue Regime: The Enterprise Act 2002." *Modern Law Review*, 2006, 112–138.

²⁵⁹ Finch, V, *Corporate Insolvency Law: Perspectives and Principles*, 380

²⁶⁰ Armour, J, "The Law and Economics of Corporate Insolvency: A Review." ESRC Centre for Business Research, University of Cambridge Working Paper No. 197, 2001

²⁶¹ *Re Kayley Vending Ltd* [2009] EWHC 904 (Ch)

employees, and the economy at large.²⁶² Jurisdictions such as the United States have long embraced corporate rescue through procedures like Chapter 11 bankruptcy, which allows companies to reorganise while continuing operations.²⁶³

The United Kingdom's insolvency framework has been influenced by these global trends, leading to the introduction of CVAs as a means to facilitate business rescue.²⁶⁴ CVAs offer a flexible approach for companies to reach agreements with their creditors to pay back debts over time without resorting to more drastic measures like administration or liquidation.

Legal scholars have advocated for a shift towards rescue-oriented insolvency practices. For instance, Professor Vanessa Finch argues that insolvency laws should promote the rehabilitation of financially distressed but potentially viable companies.²⁶⁵ Finch emphasises that corporate rescue preserves employment, maintains business relationships, and often provides better returns for creditors compared to liquidation.²⁶⁶

Finch's perspective is echoed in the broader legal community, highlighting the need for insolvency mechanisms that balance creditor interests with the preservation of economic value.²⁶⁷ The formal introduction of CVAs under the Insolvency Act 1986 marked a significant development in the UK's approach to corporate insolvency. Under Part I of the Insolvency Act 1986, CVA allows a company to propose a plan to its creditors for the settlement of its debts.²⁶⁸ The inclusion of CVAs aimed to provide a flexible and cost-effective alternative to administration and liquidation.²⁶⁹ CVAs enable

²⁶² Rajak, H, "The Culture of Bankruptcy." *Butterworths Journal of International Banking and Financial Law*, Vol 9(10), 1994, 393–398.

²⁶³ Title 11, Chapter 11, United States Bankruptcy Code

²⁶⁴ Sealy, L. S., Milman, D, *Annotated Guide to the Insolvency Legislation*, 14th edition, 2011, Sweet & Maxwell, p. 54

²⁶⁵ Finch, V, *Corporate Insolvency Law: Perspectives and Principles*, 202

²⁶⁶ Finch, V, *Corporate Insolvency Law: Perspectives and Principles*, 215 - 218

²⁶⁷ Totty, M., Moss, G., & Segal, N, *Tolley's Insolvency Law*, 5th edition, LexisNexis, 2013, p. 310.

²⁶⁸ Section 1 – 7, Insolvency Act, 1986, UK

²⁶⁹ Walters A, Frisby S, 'Preliminary report to the Insolvency Service on Company Voluntary Arrangements', University of Nottingham, 12
<https://www.researchgate.net/publication/228177942_Preliminary_Report_to_the_UK_Insolvency_Service_into_Outcomes_in_Company_Voluntary_Arrangements> on 6 February 2025

companies to restructure debts while continuing their operations, thus preserving business value and employment.²⁷⁰ The process is less formal and typically incurs lower costs, which can result in better outcomes for creditors.²⁷¹

The case of *Re Cancol Ltd*²⁷² serves as an early illustration of the CVA's application. In this case, the company proposed a CVA to restructure its debts and avoid liquidation. The arrangement was approved by creditors, allowing the company to continue trading. The court's support for the CVA underscored its potential as an effective rescue tool. Similarly, in the *Debenhams case*,²⁷³ the company, after being acquired via a pre-pack administration, proposed a CVA, which was accepted by 95% by value of creditors. The CVA helped to rescue the business from the apparent liquidation that was looming over their heads.

3.4: The Insolvency Act 1986

The Insolvency Act 1986 remains the primary legislation governing CVAs, outlining the procedural requirements, eligibility criteria, and effects of an approved arrangement. Below is a detailed analysis of the key provisions under the Act.

3.4.1 : The proposal

Section 1 empowers a company's directors, except in instances where the company is subject to administration or liquidation, to initiate a proposal for a Company Voluntary Arrangement (CVA) to the company and its creditors. Such a proposal may take the form of a composition in satisfaction of the company's debts or a scheme intended to restructure its affairs.²⁷⁴ Critically, any such proposal must nominate a licensed insolvency practitioner, who assumes the role of nominee and is thereafter responsible for overseeing the implementation of the arrangement, whether as trustee or in another supervisory capacity.²⁷⁵

²⁷⁰ Davies. S "The Efficacy of Company Voluntary Arrangements: A Statistical Analysis." 2016, *Journal of Business Law*, 3, 245–270.

²⁷¹ Walton P, Umfreville C, Jacobs L, 'A snapshot of Company Voluntary Arrangements: Successes, failures and proposals for reform.' *International Insolvency Review*/ Volume 29 issue 2, 267 <https://doi.org/10.1002/iir.1381>

²⁷² *Re Cancol Ltd* [1995] BCC 1130

²⁷³ *Debenhams PLC (In Administration)* [2020] EWHC 921 (Ch)

²⁷⁴ Section 1(1). Part 1, Insolvency Act, 1986, Cap 45

²⁷⁵ Section 1(2), Part 1, Insolvency Act, 1986, Cap 45

Where the company is already in administration, the administrator is vested with the authority to propose a CVA; similarly, in the case of winding-up, that authority resides with the liquidator.²⁷⁶ The legislative ambit of Section 1(6) further extends to foreign-incorporated companies operating in Northern Ireland, albeit subject to the precondition that such companies must also maintain a principal place of business in England, Wales, or Scotland. This jurisdictional tether ensures the company's substantive connection to the UK insolvency regime, thereby preserving the integrity and enforceability of the framework.²⁷⁷

The procedural and substantive content requirements of a CVA proposal are set out under Chapter 2 of the Insolvency Rules.²⁷⁸ These include, inter alia, detailed disclosure of the company's assets and liabilities, the nominee's fees and disbursements, identification of the proposed supervisor, particulars of existing and anticipated guarantees, proposed timelines, nature of proceedings, conduct of the business during the arrangement, provision for further credit facilities, treatment of funds arising under the arrangement, any moratorium sought, and other relevant matters. This ensures a holistic presentation of the company's financial and operational posture to enable informed creditor engagement.²⁷⁹

Nevertheless, while the legislative framework under Section 1 is commendably flexible and responsive to the status of the company, it has not been immune to criticism. Academic and practitioner commentary has identified potential areas of concern, foremost among them being the integrity of director-led proposals. Walton, for instance, cautions against the risk of abuse by incumbent management, who may leverage the CVA process to retain control of the company while evading the stricter consequences of formal insolvency proceedings.²⁸⁰ Additionally, Ashurst LLP believes that while nominees are expected to oversee the CVA, they often function in a rubber-stamping role, especially in director-proposed CVAs.²⁸¹ Additionally, the dual structure of regulation, divided between primary legislation and secondary rules, has been critiqued for

²⁷⁶ Section 1(3), Part 1, Insolvency Act, 1986, Cap 45

²⁷⁷ Section 1(6), Part 1, Insolvency Act, 1986, Cap 45

²⁷⁸ Insolvency(England and Wales) Rules,2016

²⁷⁹ Chapter 2, Rule 2.3, The Insolvency(England and Wales)Rules 2016

²⁸⁰ Walton P., 'A snapshot of Company Voluntary Arrangements: Success and Failure, and the impact of the process.' *International Insolvency Review*, Vol 29, no 2 2020, p 267 – 284 < <https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1381> > on 6 April 2025

²⁸¹ Ashurst LLP, 'An Overview of Company Voluntary Arrangements in England and Wales.' Ashurst quick guide,2020 < <https://www.ashurst.com/en/insights/quickguide-an-overview-of-comapny-voluntary-arrangements-in-england-and-wales> > on 6 April 2025

impeding stakeholder comprehension and meaningful creditor scrutiny. The lack of a harmonised or standardised format, particularly regarding the presentation of moratorium provisions and asset valuations, fosters inconsistency and can result in disparate treatment of creditors.²⁸² Such variability not only undermines transparency but also inhibits the comparative assessment of proposals, weakening the equitable foundation upon which creditor approval should rest.²⁸³

3.4.2 : Procedure to be followed by the nominee

Where the nominee is appointed under Section 1²⁸⁴ is neither the liquidator nor the administrator of the company, Section 2 imposes specific procedural obligations upon them. The nominee is required, within twenty-eight days from the date of receipt of the proposal (or within such longer period as the court may allow), to submit a report to the court. This report must articulate the nominee's opinion on two critical issues: whether the proposed Company Voluntary Arrangement (CVA) stands a reasonable prospect of both approval and successful implementation, and whether it ought to be considered at a meeting of the company and its creditors. If such a meeting is deemed necessary, the nominee must specify its proposed date, time, and location.²⁸⁵

To formalise the process, the nominee must issue a notice of consent to the proposer, confirming the date on which the proposal was received. It is this date that triggers the commencement of the 28-day reporting period.²⁸⁶ The burden does not lie solely on the nominee. According to Section 2, the proposer, typically the company's directors, is under a statutory duty to assist in the preparation of the report. This assistance includes providing a comprehensive written proposal detailing the terms of the arrangement, a financial statement outlining the company's assets, liabilities, outstanding debts, and creditor details, as well as any other information prescribed under the relevant insolvency rules.²⁸⁷

Section 2(4) contemplates contingencies that may necessitate the replacement of a nominee. In particular, the court is mandated to appoint a substitute insolvency practitioner where the nominee

²⁸² UK Parliament, 'Company Voluntary Arrangements (CVAs),' House of Commons Library Briefing Paper, no. 6944, 11 June 2019 < <https://researchbriefings.files.parliament.uk/documents/SN06944/SN06944.pdf> > on 6 April 2025

²⁸³ K&L Gates LLP, 'COVID -19:UK Insolvency Reform- Standardising Company Voluntary Arrangement Proposals,' K&L Gates, 3 November 2020 < <https://www.klgates.com/COVID-19-Insolvency-Reform-Standardising-Company-Voluntary-Arrangement-Proposals-11-3-2020> > on 6 April 2025

²⁸⁴ Section 1(3), Part 1, Insolvency Act, 1986, Cap 45

²⁸⁵ Section 2(2), Part 1, Insolvency Act, 1986, Cap 45

²⁸⁶ Chapter 2, Rule 2.4, The Insolvency (England and Wales) 2016

²⁸⁷ Section 2(3), Part 1, Insolvency Act, 1986, Cap 45

fails to file the requisite report, dies, is deemed unfit to continue, or where the proposer makes an application on grounds of impracticality or unsuitability. Either the nominee or the proposer may move the court to effect this replacement.²⁸⁸

In circumstances where the nominee is not the company's administrator or liquidator and has recommended that the proposal be considered by a meeting of the company and its creditors, they must, absent contrary directions from the court, convene such a meeting following the particulars specified in their report. The purpose of the meeting is to facilitate deliberation on the proposal and secure a decision from the creditors on its approval. Where the nominee is the administrator or liquidator, they retain discretion to set the date, time, and venue for the meeting, provided that the company's creditors are afforded a reasonable opportunity to consider the proposal.²⁸⁹

The mechanism by which creditors render a decision on the CVA is through a qualifying decision procedure (QDP), and formal notice of this procedure must be issued to all known creditors. The notice must include adequate particulars, including the creditors' identities, addresses, and claims, thereby ensuring compliance with procedural fairness and facilitating informed participation.²⁹⁰

While the statutory framework under Section 2 aims to establish a clear and efficient path for advancing a CVA, its practical execution has attracted significant criticism. Chief among the concerns is the perceived lack of independence of the nominee. As nominees are usually selected and appointed by the directors, the very individuals whose conduct or mismanagement may have precipitated the company's insolvency, their objectivity in assessing the proposal's feasibility is inherently questionable. This structural conflict of interest casts doubt on the impartiality of the recommendation to convene a creditors' meeting or endorse the proposal's prospects.²⁹¹

Furthermore, the rigid 28-day period within which the nominee must submit a report to the court is often unrealistic, particularly in complex insolvency cases where the assessment of financial viability requires more time and detail.²⁹² The nominee's reliance on information provided by the

²⁸⁸ Section 2(4), Part 1, Insolvency Act, 1986, Cap 45

²⁸⁹ Section 3(1), Part 1, Insolvency Act, 1986, Cap 45

²⁹⁰ Section 3(2), Part 1, Insolvency Act, 1986, Cap 45

²⁹¹ Walton P., 'A snapshot of Company Voluntary Arrangements: Success and Failure, and the impact of the process.' *International Insolvency Review*, Vol 29, no 2 2020, p 267 – 284 < <https://onlinelibrary.wiley.com/doi/full/10.1002/iir.1381> > on 6 April 2025

²⁹² UK Parliament, 'Company Voluntary Arrangements (CVAs).' House of Commons Library Briefing Paper, no. 6944, 11 June 2019 < <https://researchbriefings.files.parliament.uk/documents/SN06944/SN06944.pdf> > on 6 April 2025

company without a statutory requirement for independent verification also opens the door to potentially biased or incomplete representations, thereby undermining the interests of creditors.²⁹³ In addition, the mechanism for replacing an inactive or unsuitable nominee through a court application can lead to delays and added costs, eroding the value of any potential recovery.²⁹⁴ The process also creates inconsistencies, as administrators and liquidators enjoy more procedural discretion compared to external nominees, leading to unequal treatment.²⁹⁵ Lastly, the use of complex QDP for creditor votes can disenfranchise smaller or less informed creditors, reducing meaningful participation and scrutiny of proposals.²⁹⁶

3.4.3 : Decisions of the company and its creditors

The convening of creditors' meetings is a pivotal step in the statutory process governing Company Voluntary Arrangements (CVAs). Under Section 4,²⁹⁷ the company and its creditors may, at these meetings, resolve to approve the voluntary arrangement as originally proposed or with agreed modifications.²⁹⁸ Such modifications may include, among other things, the substitution of a different licensed insolvency practitioner to assume the functions of the nominee. However, the scope of permissible modifications is circumscribed; they must not distort the fundamental character of the proposal such that it ceases to qualify as a voluntary arrangement within the meaning of Section 1.²⁹⁹

Despite the procedural autonomy ostensibly granted to creditors and the company, their powers to approve or amend a CVA proposal are not unfettered. Section 4(3) imposes a categorical restriction on approving any proposal or modification that impinges on a secured creditor's right to enforce their security, unless such creditor provides express consent.³⁰⁰ This provision safeguards the proprietary rights of secured creditors and anchors the CVA process in the foundational principles

²⁹³ K&L Gates LLP, 'COVID -19:UK Insolvency Reform- Standardising Company Voluntary Arrangement Proposals.' K&L Gates, 3 November 2020 < <https://www.klgates.com/COVID-19-Insolvency-Reform-Standardising-Company-Voluntary-Arrangement-Proposals-11-3-2020> > on 6 April 2025

²⁹⁴ Ashurst LLP, 'An Overview of Company Voluntary Arrangements in England and Wales.' Ashurst quick guide, 2020 < <https://www.ashurst.com/en/insights/quickguide-an-overview-of-comapny-voluntary-arrangements-in-england-and-wales> > on 6 April 2025

²⁹⁵ The Gazette, 'Understanding the Company Voluntary Arrangement.' 2019 < <https://www.thegazette.co.uk/all-notices/content/205> > on 6 April 2025

²⁹⁶ R3, 'Company Voluntary Arrangements Explained.' 2025 < <https://www.r3.org.uk> > on 6 April 2025

²⁹⁷ Section 4(1A), Part 1, Insolvency Act, 1986, Cap 45

²⁹⁸ Section 4(1A), Part 1, Insolvency Act, 1986, Cap 45

²⁹⁹ Section 4(2), Part 1, Insolvency Act, 1986, Cap 45

³⁰⁰ Section 4(3), Part 1, Insolvency Act, 1986, Cap 45

of insolvency law, namely, the preservation of security interests absent voluntary waiver. Additionally, no proposal or modification may be approved if it alters the priority of debt payments as provided for. Further constraints are imposed by Section 4(4), which entrenches the statutory payment hierarchy, particularly concerning preferential and non-preferential debts. Under these provisions, preferential debts must be discharged in full before any payments may be made to ordinary unsecured creditors. Within the class of preferential creditors, no preferential creditor may receive proportionally less on their ordinary preferential debt than any other creditor in the same category. The same proportionality rule applies to secondary preferential debts. These rules reflect the policy objective of ensuring equitable treatment within creditor classes and maintaining the integrity of legislative debt priorities.³⁰¹ In the case of companies classified as relevant financial institutions³⁰², further specificity is introduced via Section 176AZA(2) or (3),³⁰³ which stipulate that ordinary non-preferential debts are to be satisfied before the payment of secondary non-preferential debts. These provisions harmonise the CVA framework with the broader regulatory architecture governing financial institutions, ensuring consistency in creditor treatment across insolvency proceedings.

However, any of the above modifications may be approved with the consent of the affected creditor if the nominee's report under Section 2(2) is submitted to the court within 12 weeks after the end of any moratorium under Part A1.³⁰⁴ Neither the company nor its creditors may approve a proposal or modification that results in moratorium debts or priority pre-moratorium debts being paid less than in full unless the relevant creditor consents.

This provision allows creditors and the company to approve or modify a CVA proposal, but its effectiveness has been questioned. It restricts any alteration that affects secured creditors' rights without their consent. While it protects certain interests, it limits flexibility in restructuring and can result in the secured creditors taking enforcement action early, which undermines the rescue objective of CVA.³⁰⁵ Further, this inflexibility may reduce the chances of the company's survival,

³⁰¹ Section 4(4), Part 1, Insolvency Act, 1986, Cap 45

³⁰² Section 387A, Insolvency Act, 1986, Cap 45

³⁰³ Section 176AZA(2) and (3), Insolvency Act, 1986, Cap 45

³⁰⁴ Section 4A, Part 1, Insolvency Act, 1986, Cap 45

³⁰⁵ Walters, A. & Frisby, S. (2011). Preliminary Report to the Insolvency Service on the Outcomes of Company Voluntary Arrangements.

especially when all creditors are willing to compromise.³⁰⁶ Critics also note the potential for directors to misuse the CVA process to delay creditor action while maintaining control, exposing a gap in creditor protections.³⁰⁷

3.4.4 : Members of the company and creditors' meetings

Section 4(5)³⁰⁸ when read in conjunction with Rules 2.25³⁰⁹ to 2.35³¹⁰ of the Insolvency Rules prescribe the procedural framework for convening and conducting meetings to consider a Company Voluntary Arrangement (CVA). This statutory and regulatory architecture assigns the nominee the responsibility of organising both the creditors' and the company members' meetings, thereby ensuring procedural continuity and neutral oversight throughout the process.

The Rules mandate that detailed notice of the proposed CVA, together with the company's statement of affairs and an explanation of voting rights, must be served on creditors and members at least fourteen days prior to the scheduled meeting date. The nominee must also make reasonable provisions to facilitate access to the meeting, including the distribution of proxy forms to accommodate those unable to attend in person. Importantly, the sequencing of the decision-making process is stipulated: creditors must render their decision on the proposal before members may cast theirs. This order ensures that the interests of those with a financial stake in the outcome, namely the creditors, are prioritised over those of shareholders. The chair of the meetings, usually the nominee, is tasked with ensuring that the meetings proceed in accordance with statutory requirements, that votes are correctly tabulated (whether by shareholding rights for members or debt value for creditors), and that the outcomes are reported promptly to the court and all interested parties.

While these provisions ostensibly promote procedural transparency, fairness, and inclusivity, they are not without significant practical and conceptual critique. A recurring concern among practitioners and commentators is that the procedural rigour demanded by Rules 2.25 to 2.27, particularly the extensive notice obligations, the obligation to deliver voluminous proposal documentation, and the tight timelines for vote coordination can impose an onerous administrative

³⁰⁶ Fletcher, I. F. *The Law of Insolvency*, 5th ed. Sweet & Maxwell, p

³⁰⁷ The Times. "Ban for director of 400 companies who subverted insolvency system." 2022

³⁰⁸ Section 4(5), Insolvency Act, 1986, Cap 45

³⁰⁹ Chapter 5, Rule 2.25, The Insolvency (England and Wales) Rules 2016

³¹⁰ Chapter 5, Rule 2.35, The Insolvency (England and Wales) Rules 2016

burden, especially on small and medium-sized enterprises (SMEs).³¹¹ These requirements necessitate a level of logistical sophistication and resourcing that many financially distressed companies are ill-equipped to deliver. The effect is a potential chilling of access to the CVA mechanism by those entities who may stand to benefit from it most. Moreover, although the architecture purports to encourage inclusive stakeholder participation, it has been observed that the decision-making process disproportionately empowers large institutional creditors. Given that voting rights are determined by the value of the creditor's claim, dominant creditors can, and often do, dictate the outcome of meetings with little regard for the views or interests of smaller creditors. This structural imbalance raises normative questions about the legitimacy of the CVA process as a consensual restructuring mechanism, particularly where outcomes are ostensibly creditor-approved but reflect the preferences of a narrow economic majority.³¹² The rigidity of the prescribed timeframes for notice and proxy form submission, although aimed at ensuring orderliness and transparency, also introduces logistical complexities that risk disenfranchising certain creditors, particularly those situated in different jurisdictions or involved in large-scale, document-heavy insolvencies. Where creditors are unable to respond in a timely fashion or experience communication delays, the process may proceed without their meaningful input, undermining the very participatory ideals it seeks to enshrine.³¹³ Furthermore, the procedural formalism embedded in these rules arguably detracts from the CVA's core commercial objective: to serve as a flexible, efficient restructuring tool designed to preserve corporate viability. In practice, the procedural rigidity has led some to view the CVA framework as overly legalistic and bureaucratic, more akin to litigation than restructuring. This perception may discourage companies and creditors from engaging with the process altogether, instead opting for more expedient but often more destructive insolvency routes, such as administration or liquidation.³¹⁴

In sum, while the framework established under Section 4(5) and Rules 2.25 to 2.35 aspires to procedural equity and creditor engagement, it has come under increasing scrutiny for imposing administrative and logistical burdens that may inhibit access to CVAs, particularly for SMEs.

³¹¹ Frisby, S. (2006). Report on Insolvency Outcomes and CVAs. Insolvency Service.

³¹² Walters, A., Frisby, S., 'Preliminary Report to the Insolvency Service on the Outcomes of Company Voluntary Arrangements'.

³¹³ Fletcher, I. F. (2017). The Law of Insolvency, 5th ed. Sweet & Maxwell

³¹⁴ The Insolvency Service, 'Company Voluntary Arrangements research report for the Insolvency service.' < <https://www.gov.uk/government/publications/company-voluntary-arrangement-cva-research-report-for-the-insolvency-service/company-voluntary-arrangement-research-report-for-the-insolvency-service?> > on 6 April 2025

Additionally, the entrenched imbalance in voting power and the challenges associated with strict formalism may render the process less effective in practice than its legislative design intends, thereby calling into question its utility as a truly democratic and commercially viable restructuring mechanism.

3.4.5 : Approval or rejection of the voluntary arrangement

Section 4A³¹⁵ applies to decisions on approving a proposed voluntary arrangement under section 4, as discussed above. The decision is valid if it follows the procedure set out in the rules and is made by both the company's meeting and its creditors or, unless otherwise ordered, by the creditors alone.

In case of a discrepancy in the decisions, section 4A (3) allows a company member to apply to the court within 28 days from the creditors' decision or, if the company meeting's decision was later, from that date. When a voluntary arrangement is approved, it takes effect as if made by the company at the time of the creditors' decision. The arrangement binds all those entitled to vote, including those who would have been entitled had they received notice. If the arrangement ends naturally, but some payments remain unpaid, the company becomes liable for those payments.

If the company is in liquidation or administration, the court may halt proceedings or issue directions to aid implementation. However, the court cannot make such orders until 28 days after the required reports are submitted or while related appeals are pending.

3.4.6 : Challenge of decisions

Section 6³¹⁶ allows certain parties, such as creditors, members, the nominee, or the liquidator/administrator, to challenge a CVA in court. Grounds for challenge include unfair harm to a party's interests or significant procedural irregularities during the approval process. The application must generally be made within 28 days of the court filing or learning of the decision. If successful, the court may revoke, suspend, or order a re-vote on the arrangement. Otherwise, decisions remain valid despite irregularities unless formally challenged.

³¹⁵ Section 4A, Part 1, Insolvency Act, 1986, Cap 45

³¹⁶ Section 6, Part 1, Insolvency Act, 1986, Cap 45

The provisions give the mechanisms to be followed by stakeholders to challenge the approval of a CVA on the grounds of unfair prejudice or material irregularity. However, it fails to define the term unfair prejudice, which could lead to interpretative challenges and inconsistent judicial outcomes, as courts must assess CVAs on a case-by-case basis. An example of this is in the challenge against *New Look CVA*³¹⁷, the court had to dig into the specifics of creditor treatment to determine the presence of unfair prejudice. Notably, this provision brings in procedural hurdles by requiring strict adherence to timelines, i.e. the 28-day window post-approval. This could be burdensome to creditors who may need more time to assess the implications of CVA, as in the case of *Carraway Guildfold Ltd v Regis UK Ltd*³¹⁸ highlighted the complexities and expenses involved in such proceedings. Ultimately, the CVA was revoked, and the court ordered that the nominee's costs be repaid.

3.4.7 : Implementation of proposal

Section 7³¹⁹ speaks of the implementation procedure of voluntary arrangements that have effect under section 4A. When a voluntary arrangement takes effect, the person responsible for overseeing its implementation is known as the supervisor.³²⁰ This may be the nominee or another appointed individual³²¹. If a creditor or any other party is dissatisfied with the supervisor's actions or decisions, they may apply to the court, which can confirm, reverse, or modify the supervisor's decision, provide directions or issue any other appropriate order.³²² The supervisor may also seek court directions on specific matters and can apply for the company's winding-up or administration³²³. If appointing a new supervisor is necessary but difficult without court intervention, the court may appoint a qualified insolvency practitioner to replace or assist the existing supervisor.³²⁴

While this ensures continuity and professional oversight, the wide discretionary powers granted to the supervisor raise concerns over checks and balances. The absence of routine court or creditor

³¹⁷ *Lazari Properties 2 Limited and Ors and New Look Retailers Limited* [2021] EWHC 1209 (Ch)

³¹⁸ *Carraway Guildfold (Nominee A) Limited v Regis UK Limited* [2021] EWHC 1294 (Ch)

³¹⁹ Section 7, Part 1, Insolvency Act, 1986, Cap 45

³²⁰ Section 7(2)(a), Part 1, Insolvency Act, 1986, Cap 45

³²¹ Section 7(2)(b), Part 1, Insolvency Act, 1986, Cap 45

³²² Section 7(3), Part 1, Insolvency Act, 1986, Cap 45

³²³ Section 7(4), Part 1, Insolvency Act, 1986, Cap 45

³²⁴ Section 7(5), Part 1, Insolvency Act, 1986, Cap 45

supervision may create space for inconsistencies in implementation, especially in complex arrangements.³²⁵

3.5: Major amendments to the Insolvency Act 1986 affecting CVAs

Since its introduction, the Insolvency Act 1986³²⁶ has undergone several amendments to improve the efficiency, accessibility, and fairness of CVAs. Key amendments include:

3.5.1 : Enterprise Act 2002

The Enterprise Act 2002 was amended on 26 June 2020. Under Section 255³²⁷ the law was amended to allow friendly societies³²⁸ and unregistered friendly societies³²⁹ to apply CVAs or administration rules, with or without modifications.³³⁰ From the amendment, this was aimed at encouraging corporate rescue even for entities that are not technically companies, as is stated in the heading of the section.³³¹ The provision gives the treasury the mandate to issue orders on the application of CVAs to these entities. However, the orders are only limited to the aforementioned entities³³² and they must be made as a statutory instrument and can be annulled by parliament.³³³

Additionally, the Act revolutionised the use of CVAs for SMEs by creating a shift from creditor-led procedures by emphasising its use. It empowered distressed businesses to propose repayment plans with court-sanctioned protection from hostile creditors. Further, it introduced a ring-fenced fund from floating charge assets for unsecured creditors. This ensures fair returns to unsecured SMEs creditors who were previously sidelined.³³⁴

3.5.2 : Corporate Insolvency and Governance Act 2020 (CIGA)

CIGA came into force on 26 June 2020, and it introduced measures and procedures aimed at rescuing companies in financial distress due to the COVID-19 pandemic. It introduced a

³²⁵Finch, V. & Milman, D. (2017). Corporate Insolvency Law: Perspectives and Principles, 3rd ed., Cambridge University Press, p. 478

³²⁶ Insolvency Act, 1986, Cap 45

³²⁷ Section 255, Enterprise Act, 2002, Cap 40

³²⁸ Section 7, Friendly Societies Act, 1974, Cap 46

³²⁹ Section 7, Friendly Societies Act, 1992, Cap 40

³³⁰ Section 255(2), Enterprise Act, Cap 40

³³¹ Section 255, Enterprise Act, 2002, Cap 40

³³² Section 255(3), Enterprise Act, 2002, Cap 40

³³³ Section 255(6), Enterprise Act, 2002, Cap 40

³³⁴ Section 251 and Schedule 6, Enterprise Act, 2002, Cap 40

mandatory moratorium in Schedule 1.³³⁵ A moratorium is a stay on all proceedings against a debtor, including liquidation and administration. It provides relief to the debtor, allowing them to explore the options that they have for restructuring the debt. Under Schedule 1, Paragraph 2³³⁶, companies that are undergoing an Insolvency procedure are excluded from obtaining a moratorium, and this includes companies that have an ongoing CVA. The Act, under Section 12³³⁷ introduces the suspension of wrongful trading rules, which encourages directors to explore restructuring methods such as CVAs. Previously, under Section 214³³⁸, they were held personally liable if mistakes occurred during their attempts and efforts to save the business.

The Act, under Section 37³³⁹ and Schedule 14³⁴⁰, modernised the conduct of meetings by allowing virtual meetings³⁴¹ and electronic voting.³⁴² This change has helped to streamline the CVA approval process and makes it easier for creditor participation and saving costs associated with getting the creditors to meet in physical locations.³⁴³

3.5.3 : Finance Act 2020

The Act, under Section 98³⁴⁴, has altered the landscape for CVAs in the UK by elevating HMRC's position as a creditor. Their debts have been given priority as preferential debts. Previously, under Section 386 of the Insolvency Act³⁴⁵, they were ranked alongside unsecured creditors. This change significantly alters the structure of payment in insolvency procedures, including CVAs, and it reduces the money that remains for distribution to unsecured creditors.

³³⁵ Schedule 1, Corporate Insolvency and Governance Act,2020, Cap 12

³³⁶ Schedule 1,Paragraph 2, Corporate Insolvency and Governance Act,2020, Cap 12

³³⁷ Section 12, Corporate Insolvency and Governance Act,2020, Cap 12

³³⁸ Section 214, Chapter X, Insolvency Act,1986, Cap 45

³³⁹ Section 37, Corporate Insolvency and Governance Act,2020, Cap 12

³⁴⁰ Schedule 14, Corporate Insolvency and Governance Act,2020, Cap 12

³⁴¹ Schedule 14,Paragraph 3(3) Corporate Insolvency and Governance Act,2020, Cap 12

³⁴² Schedule 14,Paragraph 3(4), Corporate Insolvency and Governance Act,2020, Cap 12

³⁴³ James, Changes in UK Insolvency Law and their Impact on CVAs, Blake -Turner LLP,5 December 2024 <
[https://www.blaketurner.com/creditors-voluntary-arrangement-cva/#:~:text=Corporate%20Insolvency%20and%20Governance%20Act%202020%20\(CIGA\)&text=While%20the%20Act%20primarily%20introduced,easier%20for%20creditors%20to%20participate.](https://www.blaketurner.com/creditors-voluntary-arrangement-cva/#:~:text=Corporate%20Insolvency%20and%20Governance%20Act%202020%20(CIGA)&text=While%20the%20Act%20primarily%20introduced,easier%20for%20creditors%20to%20participate.) on 2 February 2025

³⁴⁴ Section 98, Part 4, Finance Act, Cap 14

³⁴⁵Section 386, Part XII, Insolvency Act, Cap 45

3.6: The Insolvency (England and Wales) Rules 2016

3.6.1 : Procedural framework for CVAs

The 2016 Rules delineate specific requirements for this consideration phase. Rule 2.25³⁴⁶ mandates that the nominee must summon a meeting of the company's members and initiate a decision procedure for the creditors to deliberate on the proposal. Notably, the rules provide flexibility in the decision-making process as discussed above, allowing for various methods such as electronic voting or virtual meetings, thereby accommodating the evolving dynamics of corporate governance and creditor engagement.

3.6.2 : Implementation and supervision of approved CVAs

Upon the successful passage of the proposal through both creditor and member approval, the Company Voluntary Arrangement (CVA) assumes binding legal effect on all parties, irrespective of individual dissent or prior objections. At this juncture, the nominee, previously tasked with shepherding the proposal through procedural scrutiny, automatically transitions into the role of supervisor under Rule 2.39.³⁴⁷ This change in designation signifies a substantive shift in function: from proposal facilitation to active oversight and enforcement of the arrangement's terms.

Rule 2.39(1)³⁴⁸ imposes a positive obligation on the company's directors, or where applicable, the appointed liquidator or administrator, to transfer control of the assets encompassed by the arrangement to the supervisor. This transfer is a cornerstone of the post-approval phase, as it ensures that the supervisor is equipped with the requisite control to discharge their statutory and contractual duties. The supervisor, acting as a fiduciary for the creditors, is entrusted with a wide array of responsibilities, including but not limited to: ensuring adherence to the CVA terms, managing the realisation and distribution of assets, overseeing repayments, and addressing any default, breach, or dispute arising in the course of implementation.

The statutory scheme reflects a deliberate legislative policy to confer substantial operational discretion upon the supervisor. Under Rules 2.39(5)³⁴⁹ and 2.39(6)³⁵⁰ the supervisor is empowered to take any steps necessary to enforce compliance with the CVA terms, including seeking directions

³⁴⁶ Chapter 5, Rule 2.25, Insolvency (England and Wales) Rules 2016

³⁴⁷ Chapter 5, Rule 2.39, Insolvency (England and Wales) Rules 2016

³⁴⁸ Chapter 5, Rule 2.39(1), Insolvency (England and Wales) Rules 2016

³⁴⁹ Chapter 5, Rule 2.39(5), Insolvency (England and Wales) Rules 2016

³⁵⁰ Chapter 5, Rule 2.39(6), Insolvency (England and Wales) Rules 2016

from the court where ambiguities or conflicts arise. This expansive remit is indicative of a broader intent to preserve the integrity of the arrangement and to protect the collective interests of the general body of creditors. The supervisor's role is not merely mechanical but is laced with an expectation of vigilance, professional judgment, and in some cases, quasi-judicial intervention to preserve the arrangement's efficacy.

In addition to their enforcement responsibilities, supervisors are often required, by either the terms of the CVA or by practice standards, to furnish periodic reports to creditors. These reports serve to maintain transparency and foster ongoing creditor engagement, providing visibility into the company's financial performance and the status of distributions. Where difficulties arise, the supervisor may also be called upon to propose amendments to the CVA or to recommend its early termination, subject to creditor consent and, where necessary, court approval.

While the framework is designed to empower the supervisor as the central executor of the arrangement, concerns persist over the adequacy of statutory safeguards ensuring their independence and competence. Given that the supervisor is typically the same individual as the nominee, often appointed by the company's director, questions have been raised regarding the robustness of creditor protections where conflicts of interest may exist. Nevertheless, the legislative and regulatory structure, through Rule 2.39 and related provisions, articulates a clear supervisory mandate: to balance the twin objectives of creditor recovery and debtor rehabilitation, while maintaining fidelity to the terms of the approved CVA.

3.7: Similarities in the legal framework in Kenya and the United Kingdom

A close reading of the statutory frameworks in the United Kingdom and Kenya reveals marked legislative consonance in their respective approaches to company rescue through voluntary arrangements. Both jurisdictions exhibit a shared normative philosophy anchored in insolvency law that privileges business rehabilitation over outright liquidation, reflecting a transnational shift toward debtor-in-possession regimes which balance creditor recoveries with corporate survival.

3.7.1 : Statutory recognition of Company Voluntary Arrangements as a distinct insolvency tool

At a foundational level, both jurisdictions expressly codify Company Voluntary Arrangements as a distinct legal mechanism within their respective insolvency regimes. The UK's Insolvency Act

1986 (as amended), under Part I, enshrines the CVA framework with clear procedural stages and institutional actors, while Kenya's equivalent is found in the **Insolvency Act No. 18 of 2015**, specifically under **Part IX**, which introduces the concept of a **Company Voluntary Arrangement** as a formal restructuring mechanism. In both systems, CVAs are conceptualised not merely as debt compromise instruments, but as comprehensive frameworks that may involve reorganisation, moratoria, and asset restructurings.

3.7.2 : Director-initiated proposals under the supervision of insolvency practitioners

A critical procedural symmetry lies in the power of company directors to initiate the voluntary arrangement. In both the UK Insolvency Act 1986, under Section 1 and the Kenya Insolvency Act 2015, under Section 634, the directors retain agency in proposing an arrangement, even where the company is insolvent. However, the safeguards embedded in each statute require that such proposals be scrutinised and supervised by an independent insolvency practitioner. In both frameworks, the nominee assumes a quasi-judicial role, assessing the viability of the proposal and advising whether it should proceed to creditor consideration. This dual structure preserves managerial initiative while interposing professional oversight to curtail potential abuse by incumbent management.

3.7.3 : Mandatory involvement of a nominee and the role of the supervisor

Both jurisdictions require the appointment of a qualified insolvency practitioner—initially as a **nominee**, and upon approval of the arrangement, as a **supervisor**. In the UK, this progression is detailed in Rules 2.27 to 2.39 of the Insolvency (England and Wales) Rules 2016, while Kenya mirrors this under Sections 637 to 639 and Regulations 103–110 of the Insolvency Regulations, **2016**. The statutory duties imposed on the supervisor are nearly identical: to ensure implementation, monitor compliance, manage distributions, and enforce the CVA where necessary. Both regimes empower the supervisor to apply to the court where guidance or intervention is required, underscoring their pivotal role as the arrangement's fiduciary anchor.

3.7.4 : Approval thresholds and creditor voting rights

A further parallel lies in the mechanism for creditor approval. Both jurisdictions require that the CVA proposal be subjected to a formal vote by creditors, with the UK mandating a 75% majority

in value under a qualifying decision procedure under Section 4 of the Insolvency Act 1986, and Kenya requiring a similar special resolution threshold under Section 638(1)(a). In both systems, secured creditors' rights cannot be compromised without their express consent, preserving the inviolability of security interests and ensuring compliance with foundational creditor protection principles. Further, each regime expressly prohibits modifications that would alter the statutory priority of debts, particularly preferential debts, without requisite consent.

3.7.5 : Judicial oversight and procedural remedies

In both legal systems, the court retains supervisory jurisdiction over the CVA process, particularly at key junctures such as nominee appointment, non-compliance, or disputes concerning the arrangement's terms or implementation. Under Section 7 of the UK Insolvency Act and Section 642 of Kenya's Insolvency Act, aggrieved creditors or members may apply to the court to challenge the CVA on grounds of material irregularity or unfair prejudice. This ensures that both procedural fairness and substantive equity remain cornerstones of the CVA framework across jurisdictions.

3.7.6 : Moratoriums as protective shields

Though more pronounced in the UK, especially post-Corporate Insolvency and Governance Act 2020, both frameworks recognise the utility of moratoriums in stabilising the company during CVA negotiations. Kenya, under Section 625, provides for a court-sanctioned moratorium upon application, akin to the UK's Part A1 moratorium, designed to temporarily suspend enforcement action, preserve going concern value, and facilitate meaningful restructuring negotiations.

3.8 : Best practices to be borrowed by Kenya

In strengthening the credibility, fairness, and functionality of Company Voluntary Arrangements (CVAs), the incorporation of international best practices is both necessary and timely. Jurisdictions with well-developed insolvency regimes, such as the United Kingdom, offer critical insights into how CVAs can operate effectively as rescue mechanisms. While Kenya's legal framework has made commendable strides in codifying CVAs, several aspects of the UK's model present transferable practices that could enhance Kenya's implementation and enforcement framework.

3.8.1 : Statutory regulation of insolvency practitioners

The UK's framework imposes clear statutory requirements for licensing, monitoring, and disciplining insolvency practitioners (IPs). Practitioners must meet competency standards, maintain professional indemnity insurance, and adhere to ethical guidelines enforced by recognised professional bodies. This provides both creditors and debtors with assurance of competence, impartiality, and accountability. Kenya, while outlining qualifications for practitioners under Rule 11, does not operationalise these standards through a structured licensing and monitoring regime, nor does it provide sanctions for non-compliance or malpractice. A move toward a regulated profession with institutional oversight would build confidence in the administration of CVAs.

3.8.2 : Independent evaluation of Company Voluntary Arrangement proposals

Under Section 2 of the UK Insolvency Act 1986, the nominee (a proposed supervisor) is required to submit a detailed report to the court evaluating the viability, fairness, and feasibility of a CVA proposal before it proceeds to a vote. This independent evaluative function ensures that proposals are objectively scrutinised, thereby reducing the risk of abuse or commercially unworkable arrangements being imposed on creditors. In Kenya, this critical gatekeeping function is absent. Embedding a similar requirement would serve as a necessary check before convening decision-making meetings.

3.8.3 : Cross-class cramdown mechanism

The UK introduced a cross-class cramdown provision under Part 26A of the Companies Act 2006, allowing courts to approve restructuring proposals even where one or more creditor classes dissent, provided certain fairness tests are met. This mechanism prevents minority creditor classes from derailing viable arrangements supported by the majority, thus preserving enterprise value. Kenya's CVA framework lacks such a provision, leaving proposals vulnerable to strategic objections by dissenting creditors. Introducing a controlled cramdown mechanism would strengthen Kenya's CVA regime as a commercially pragmatic restructuring tool.

3.8.4 : Supervision and oversight post-approval

In the UK, supervisors are legally mandated to monitor compliance with CVA terms, report breaches, and apply to the court where enforcement or variation is required. This continued oversight ensures that the approved CVA is implemented faithfully and that non-compliance is swiftly addressed. In contrast, Kenya's framework does not clearly define the supervisor's ongoing role post-approval. Assigning a statutory supervisory mandate with reporting obligations would help protect creditors' interests and promote accountability in execution.

3.8.5 : Procedural remedies and judicial safeguards

The UK regime provides a comprehensive set of procedural remedies, including the right to challenge irregular votes, object to proposals, and seek court review of exclusions or abuse of discretion. Provisions such as Rules 15.11 and 15.36 of the Insolvency Rules 2016 offer time-bound, structured mechanisms for redress, ensuring that procedural lapses do not lead to unjust outcomes. Kenya's framework, while allowing some challenges, limits them through narrow timeframes and restricted judicial intervention. Expanding statutory remedies and clarifying judicial oversight would strengthen procedural integrity.

3.8.6 : Enhanced regulation of proxy voting

In the UK, proxies must be submitted in specified forms, adhere to prescribed deadlines, and disclose any conflict of interest. Proxyholders are bound by instructions and may be disqualified from voting if they breach ethical duties. This ensures that proxy voting remains transparent and trustworthy. Kenya's framework permits proxies but lacks detailed regulation on their conduct, authority, or challenge procedures. Establishing more stringent controls on proxy participation would reduce the risk of manipulation, especially in closely contested CVA votes.

3.9: Conclusion

As we conclude this chapter on the legal and regulatory framework for Company Voluntary Arrangements (CVAs) in the U.K., it becomes clear that CVAs have revolutionised the landscape of corporate insolvency. By shifting from punitive measures to rescue-oriented strategies, CVAs have empowered businesses to navigate financial challenges while preserving jobs and economic stability. The legislative milestones, particularly the Insolvency Act 1986, have been instrumental in this transformation, offering a lifeline to companies facing insolvency.

The significance of CVAs extends beyond legal frameworks, they embody a broader cultural shift towards business sustainability and resilience. As we move forward, the lessons learned from CVAs will be crucial in shaping future insolvency practices, not just in the UK but globally.



Chapter four

Conclusion and recommendations

4.1 Introduction

This chapter serves as the culmination of the research study, synthesising the findings, drawing conclusions, and providing actionable recommendations. It begins by revisiting the study's objectives to ensure a cohesive linkage between the preceding chapters and the final discussion. It aims to highlight the significant gaps identified in the legal framework governing CVAs in Kenya, compare them with the UK's approach, and assess the overall effectiveness of the CVAs framework in Kenya.

4.2 Summary of key findings

As highlighted in chapter one, the study aimed to evaluate the effectiveness of the law governing CVAs in Kenya. Based on the discussions in chapters two and three, the study finds that there are key similarities between the legal framework in Kenya and that in the UK and one in Kenya. Below is a summary of the findings of the study.

4.2.1 : Lack of standardised fees for insolvency practitioners

Chapter two of the study reveal that there are no prescribed fees for insolvency practitioners in the law. There are no guidelines on fees payable to them. Additionally, in both chapters two and three, the study finds that there is no standardised selection criteria for provisional supervisors.

4.2.2 : Unclear provisions on creditor conflict

The study in chapter two finds that the law is silent on what happens whenever a conflict arises between the various classes of creditors. There are no provisions for this. This provides a serious gap and an avenue for creditors to prefer other rescue mechanisms.

4.2.3 : Lack of a structured description of duties for supervisors

The study in chapter two also finds that the law is inadequate in stating the appointment and authority of supervisors of CVAs; the law lacks a standardized procedure and selection criteria for choosing them. Supervisors are essential for overseeing the CVA process, ensuring compliance, and balancing interests. However, without clear roles and responsibilities, inconsistencies and inefficiencies arise, leading to conflicts, delays, and a lack of confidence. The absence of standardized guidelines results in varying competence among supervisors, with some lacking

expertise in insolvency matters. To enhance CVA's success, it is crucial to establish a well-defined job description and standardized guidelines for supervisors, ensuring they are properly trained, accountable, and capable. Addressing this gap will create a more reliable and efficient CVA framework, fostering business recovery and financial stability in Kenya.

4.2.4 : Unclear definitions of terms

The study finds in chapter two that there is a lack of defining terms, which leads to different interpretations by courts. For example, the phrase 'unfair prejudice' in creditor meetings has not been defined. It leaves room for discretion in interpretation.

4.3 : Key Takeaways from the UK's Approach

Chapter Three of the study explored the legal framework governing CVAs in the UK, and there were some takeaways from that analysis.

To begin with, Kenya could benefit from introducing a mandatory moratorium on companies experiencing financial distress as this could give them enough breathing space to explore insolvency procedures such as CVAs, which have a better outcome than liquidation.

Secondly, the study finds that enhancing stakeholder protection and participation would promote transparency and fairness, which would make CVAs a more lucrative insolvency procedure for the financially distressed companies.

Third, Kenya could gain by establishing clear rules on debt priority, ensuring that there is protection of all creditors regardless of security.

Fourth, Kenya could gain from simplifying the CVA procedure for SMEs following the model by the Enterprise Act, 2002 UK. This would encourage SMEs to opt for CVAs as a restructuring method for their businesses.

Fifth, the study reveals that both Kenya and the UK have no defining laws on the role of supervisors. Kenya could benefit from defining the roles and responsibilities of Supervisors, especially when the CVA is in effect.

Additionally, Kenya could benefit from introducing a cross-class clamdown similar to the one that has been adopted by the UK. This could help in the dilemma of having a clash between the creditor classes during voting.

4.4 Recommendations

4.4.1 : Insolvency practitioners

The study recommends that the law be amended to include prescribed fees to insolvency practitioners. This will help financially distressed businesses estimate the costs they would incur while opting for CVAs as a rescue mechanism. Additionally, this study also recommends that the law be amended to clear statutory requirements for licensing, monitoring, and disciplining insolvency practitioners (IPs). Practitioners must meet competency standards, maintain professional indemnity insurance, and adhere to ethical guidelines enforced by recognised professional bodies.

4.4.2 : Clarity on definitions

The study recommends that the laws be amended to include clear definitions of words. For example, Kenya could use the case of New Look CVA to clearly define the word ‘unfair prejudice.’

4.4.3 : Introduction of cross-class cramdown mechanism

The study recommends that the legal framework be reviewed to include procedures to be followed when creditors conflict, such as the cross-class cramdown mechanism.

4.4.4 : Procedural remedies and judicial safeguards

To enhance accountability and transparency, the study recommends that clear guidelines be established to govern the exercise of the supervisor's discretionary powers. Additionally, periodic reporting to either the court or creditors should be introduced, particularly in complex arrangements, to provide necessary oversight and minimise the risk of inconsistent implementation.

4.4.5 : Establishment of standardised appointment and Selection criteria of PS

It is recommended that the law be amended to include standardised appointment and selection criteria for CVA supervisors, specifying their qualifications, experience and accreditation. Additionally, the law should also be reviewed to include a well-described job description for them, detailing their responsibilities and putting in place accountability mechanisms.

Further, it is recommended that the law be amended to provide procedural rules on supervisor conduct with regard to their role and oversight during the operation of CVAs. This could help in

guiding supervisors on the scope of their responsibilities. They could adopt similar rules like Rule 2.39³⁵¹ and Rule 2.41³⁵² which provide for the procedure that a supervisor needs to follow on handling the company property and the procedure to be followed on record keeping, accounts and reports.

4.4.6 : Introduction of a statutory moratorium

Kenya could benefit from introducing a statutory moratorium similar to Schedule 1 of CIGA 2020³⁵³. This provision would provide distressed companies with breathing space, preventing aggressive creditor actions while restructuring is explored. It could give directors more time to consider a CVA as a corporate rescue mechanism.

Similarly, they could benefit from widening the scope of the moratorium and the time that they are effective. This could, in turn, increase the popularity of CVA as a rescue mechanism. The study makes a recommendation that the law be amended to this effect.

4.4.7 : Enhance stakeholder protection and participation

The study recommends that the law enhances stakeholder protection and participation by requiring a mandatory consultation with all creditors before approving a CVA, which would ensure that there is transparency in the decision-making process. This is provided for by Rule 2.25 of the Insolvency Rules 2016³⁵⁴ mandates such processes in the UK, and Kenya could adopt similar provisions while incorporating digital platforms for creditor engagement and voting.

4.4.8 : Protection of creditors while balancing interests

Kenya should also protect secured creditors while balancing interests, following the model set by Section 4(3) of the Insolvency Act 1986³⁵⁵. Clear rules on debt priority should be established to prevent the unfair treatment of unsecured creditors. Additionally, Kenya should avoid prioritizing taxes that are on the same level as unsecured creditors as this could undermine the desirability of CVAs as a corporate rescue mechanism, as is seen by the enhancement of HMRC under Section 98 of the Finance Act 2020.³⁵⁶

³⁵¹ Chapter 5, Rule 2.39, Insolvency (England and Wales) Rules 2016

³⁵² Chapter 5, Rule 2.40, Insolvency (England and Wales) Rules 2016

³⁵³ Schedule 1, Paragraph 2, Corporate Insolvency and Governance Act, 2020, Cap 12

³⁵⁴ Chapter 5, Rule 2.25, Insolvency (England and Wales) Rules 2016

³⁵⁵ Section 4(3), Part 1, Insolvency Act, 1986, Cap 45

³⁵⁶ Section 98, Part 4, Finance Act, Cap 14

4.4.9 : Stakeholder sensitisation on CVAs

This study recommends that Kenya explore and put in place methods for stakeholder awareness on CVAs. This can be done through training and capacity building. The government, together with professional associations, should organise various workshops, training sessions and public awareness campaigns to educate stakeholders on the benefits of CVAs as a corporate rescue mechanism. This can be integrated into the legal framework by mandating these trainings.

4.5: Areas for further research

Having appraised the legal framework governing CVAs in Kenya, it would be prudent to conduct subsequent research that delves into researching other factors, such as creditor support, corporate governance of the company, and financial health of the company during CVA, among others, that may affect the use of CVAs in Kenya.



Bibliography

Books

- Berle A. and Means G.C, *The Modern Corporation and Private Property*, New Brunswick: Transactional Publishers, 1932.
- Chynoweth P, 'Legal Research, Advanced Research Methods in the Built Environment.' Wiley Blackwell.
- Finch V. and Milman D, *Corporate Insolvency Law: Principles and Perspectives*, Cambridge University Press, England, 2017.
- Fletcher I. F., *The Law of Insolvency*, 2nd Edition, Sweet & Maxwell, 1996.
- Goode R., *Principles of Corporate Insolvency Law*, 4th edition, Sweet & Maxwell, 2011.
- Jelf E. A., *Encyclopaedia of the Laws of England*, 3rd edition, Sweet & Maxwell, 1938, vol. 2.
- Keay A. and Walton P., *Insolvency Law: Corporate and Personal*, 2nd Ed, Pearson Longman, Essex, U.K, 2008.
- Markham V., *Victorian Insolvency*, Clarendon Press, 1995.
- Sealy L. S. and Milman D., *Annotated Guide to the Insolvency Legislation*, 14th edition, Sweet & Maxwell, 2011.
- Tolmie F., *Corporate and Personal Insolvency Law*, 2nd ed, Cavendish Publishing Limited, London, United Kingdom, 2003.
- Totty M., Moss G. and Segal N., *Tolley's Insolvency Law*, 5th edition, LexisNexis, 2013.
- Zwieten V., *Principles of Corporate Insolvency Law*, 5th edition, Sweet & Maxwell, London, 2018.

Journal Articles

- Allsop J, Dargan L, "The History of Bankruptcy and Insolvency Law in England and Australia", in JT Gleeson, JA Watson and E Peden (eds), *Historical Foundations of Australian Law* (Federation Press, 2013), vol.2.
- Armour J, "The Law and Economics of Corporate Insolvency: A Review." *ESRC Centre for Business Research, University of Cambridge Working Paper No. 197*, 2001.
- Armour J, Mokal R, "Reforming the Governance of Corporate Rescue: The Enterprise Act 2002." *Lloyd's Maritime and Commercial Law Quarterly*, 2005.

Azmi R and Razak, "Theories Underpinning Corporate Insolvency Law: An analysis."

Conway L, *Company Voluntary Arrangements*, Briefing paper, Number 6944, 11 June 2019, House of Commons Library, 15.

Dalacoura K, "A critique of Communitarianism with reference to Post-revolutionary Iran", *Review of International Studies*, Vol. 28, 2002.

Davies S, "The Efficacy of Company Voluntary Arrangements: A Statistical Analysis." *Journal of Business Law*, 2016, 3, 245–270.

Edelman J, Meehan H, Cheung G, "The Evolution of Bankruptcy and Insolvency Laws and the Case of the Deed of Company Arrangement", *Lloyd's Maritime and Commercial Law Quarterly*.

Finch V, "The Measures of Insolvency Law", *Oxford Journal of Legal Studies*, 1997, 227–251.

Frisby S, "In Search of a Rescue Regime: The Enterprise Act 2002", *Modern Law Review*, 2006.

Harris J, "Class Warfare in Debt Restructuring: Does Australia Need Cross-Class Cram Down for Creditors' Scheme of Arrangements?", *The University of Queensland Law Journal*, 2017, 1.

Iheme W, "A Doctrinal Assessment of the Insolvency Frameworks of African Countries in Coping with the Pandemic-Triggered Economic Crisis", *Stellenbosch Law Review*, Volume 32 Issue 2, 2021.

Jackson TH, "Bankruptcy, No Bankruptcy Entitlements and Creditors' Bargain", *Yale Law Journal*, 1982.

James, "Changes in UK Insolvency Law and their Impact on CVAs", Blake Turner LLP, 5 December 2024.

Kaufmann XY, *Ethical Practices in Corporate Restructuring*, Nairobi: Business Press, 2025.

Kenya Revenue Authority, "Enhancing Voluntary Compliance in Kenya; A Study of Digital Platforms and Review of Processes in Kenya", *African Tax and Customs Review*, 8(1), 45–52.

Kose J, "Managing Financial Distressed Securities", Special Issue, *Financial Management*, Autumn, 1993.

- Letza S, Kirkbride J, Sun X, Smallman C, "Corporate Governance Theorising: Limits, Critics and Alternatives", *International Journal of Law and Management*, 2008, Vol. 50 No. 1, pp. 17–321.
- Levinthal E, "The Early History of Bankruptcy Law", *University of Pennsylvania Law Review*, 1918, 223.
- Longley R, "What is Communitarianism? Definition and Main Theorists", 2020.
- Mbila A, "From Debtor Repression to Protection: Giving Debtors a Fresh Start under the Kenyan Insolvency Regime", *East Africa Law Review*, Vol 49 No 1 (2022).
- Mbogo J, Waweru G, "Corporate Turnaround Strategies by Financially Distressed Companies Quoted at the Nairobi Securities Exchange", *Research Journal of Finance and Accounting*, 2014, Vol. 5, No. 2.
- MichLobban, "Bankruptcy and Insolvency", in William Cornish and others, *The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law* (OUP 2010), 779, 823.
- Morrison D, "Deeds of Company Arrangement and Secured Creditors", *Insolvency Law Journal*, 2015.
- Mube Z, "Alternatives to Bankruptcy in South Africa that Provide for a Discharge of Debts: Lessons from Kenya", 2019.
- Mugambi AB, "Corporate Governance and Restructuring in Kenya", *Kenya Journal of Business Ethics*, 2024.
- Muriuki D, "Save ME!: Rescue Options Available for Distressed Companies under the Insolvency Act, 2015", *Legal & Kenyan*, Issue 14, 14–19.
- Njuguna CK, "Balancing Creditor Repayment and Operations in CVAs", *The Kenyan Corporate Review*, 12(3), 2023.
- Nwafor A, "The Goal(s) of Corporate Rescue in Company Law: A Comparative Analysis", *Corporate Board: Role*, 2017, 13(2), 20.
- Rajak H, "The Culture of Bankruptcy", *Butterworths Journal of International Banking and Financial Law*, Vol 9(10), 1994.

Schwartz A, Scott R, "Contract Theory and the Limits of Contract Law", *The Yale Law Journal*, 2003, 541–619.

Shailer G, "Corporate Governance", *Encyclopedia of Business and Professional Ethics*, 2018.

Sheleifer A, Vishny RW, "A Survey of Corporate Governance", *The Journal of Finance*, 1997, vol. 52, issue 2, pg. 737–830.

Singer J, "The Reliance Interest in Property", *Stanford Law Review*, 1988.

Stephens E, "Company Voluntary Arrangements Explained", *Knowledge Hub for Growth*, Harper James, 27 September 2023.

Sudi S, Lai J, "Corporate Financial Distress and Turnaround Strategies: An Empirical Analysis", *British Journal of Management*, 2001, Volume 12.

Synge C, Bowen B, "Progress in the Administration of Justice During the Victorian Period", in *Select Essays in Anglo-American Legal History*, Association of American Law Schools (ed), Little, Brown and Co, 1907, vol. 1.

Treinman I, "Escaping the Creditor in the Middle Ages", *Law Quarterly Review*, 1927, 230, 233.

Walters A, Frisby S, "Preliminary Report to the Insolvency Service on Company Voluntary Arrangements", University of Nottingham, 12.

Walton P, Umfreville C, Jacobs L, "A Snapshot of Company Voluntary Arrangements: Successes, Failures and Proposals for Reform", *International Insolvency Review*, Volume 29 Issue 2, 267.

Wilcher D, "The UK Corporate Insolvency and Governance Act 2020: A Move to a More Debtor-Friendly Restructuring Regime?", June 2020.

Dissertations

Kieti DN, *Flattening the Insolvency curve: The adaptability and responsiveness of Kenya's corporate insolvency law in tackling pandemic and economic depression insolvencies*, thesis, Strathmore University, 2022.

Otieno Arwa Eunice, 'Corporate Insolvency Systems in Kenya: A case for reform' Published LL.M Thesis, University of Nairobi, 2005
<https://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/11733> on 20 June 2023

Too F C, 'A comparative Analysis of Corporate Insolvency Laws: Which is the best option for Kenya?' published PhD Thesis, Nottingham Trent University, Nottingham, 2015, <http://irep.ntu.ac.uk/id/eprint/27951/1/Thesis%20post%20viva%20FINAL.pdf>

Reports

BRS Statistics (Office of the Official Receiver)-2020/2021 < <https://brs.go.kr/or-statistics-2021.php> >

Frisby, S. (2006). Report on Insolvency Outcomes and CVAs. Insolvency Service

The Gazette,' Understanding the Company Voluntary Arrangement.' 2019 < <https://www.thegazette.co.uk/all-notices/content/205> >

The Insolvency Service,' Company Voluntary Arrangements research report for the Insolvency service.' < <https://www.gov.uk/government/publications/company-voluntary-arrangement-cva-research-report-for-the-insolvency-service/company-voluntary-arrangement-research-report-for-the-insolvency-service?> >

R3,'Company Voluntary Arrangements Explained.' 2025 < <https://www.r3.org.uk> >

The 1957 Report of the Blagden Committee on the law of bankruptcy and deeds of arrangement

Restructuring and Insolvency in Kenya.' Cytonn Report, 13 August 2023. < <https://cytonnreport.com/topicals/restructuring-and-insolvency-1> > on 4 April 2025

UK Parliament, 'Company Voluntary Arrangements (CVAs).' House of Commons Library Briefing Paper,no. 6944, 11 June 2019 < <https://researchbriefings.files.parliament.uk/documents/SN06944/SN06944.pdf> >

The Times. "Ban for director of 400 companies who subverted insolvency system." 2022

Walton P, Umfreville C & Jacobs L, *Corporate Voluntary Arrangements: Evaluating Success and Failure*,May2018,<https://www.icaew.com//media/corporate/files/technical/insolvency/publications/cvas-evaluating-success-and-failure.ashx>

Internet Sources

Ashurst, An Overview of Company Voluntary Arrangements in England and Wales, 23 July 2024, < <https://www.ashurst.com/en/insights/quickguide-an-overview-of-company-voluntary-arrangements-in-england-and-wales/> >

Conway. L, Company Voluntary Arrangements, Briefing paper, Number 6944, 11 June 2019, House of commons library, 15 < www.parliament.uk/commons-library / <https://researchbriefings.files.parliament.uk/documents/SN06944/SN06944.pdf#:~:text=A%2>

[0Company%20Voluntary%20Arrangement%20\(CVA\)%20is%20a,and%20trade%20its%20way%20out%20of%20insolvency.&text=A%20CVA%20enables%20a%20viable%20company%20in,in%20which%20the%20company's%20debts%20are%20compromised.](#) >

Cytom Investment,'Restructuring and Insolvency in Kenya', 19 January 2025 < <https://cytom.com/topicals/restructuring-and-insolvency-2#:~:text=During%20the%20insolvency%20process%2C%20the,and%20Excise%20tax%2C%20among%20others> >

Inamdar S., Wako J., ' Insolvency and Restructuring.' 6 October 2020 < <https://cms.law/en/ken/news-information/insolvency-and-restructuring> >

James, Changes in UK Insolvency Law and their Impact on CVAs, Blake -Turner LLP,5 December 2024 < [https://www.blaketurner.com/creditors-voluntary-arrangement-cva/#:~:text=Corporate%20Insolvency%20and%20Governance%20Act%202020%20\(CIGA\)&text=While%20the%20Act%20primarily%20introduced,easier%20for%20creditors%20to%20participate](https://www.blaketurner.com/creditors-voluntary-arrangement-cva/#:~:text=Corporate%20Insolvency%20and%20Governance%20Act%202020%20(CIGA)&text=While%20the%20Act%20primarily%20introduced,easier%20for%20creditors%20to%20participate) >

K&L Gates LLP,'COVID -19:UK Insolvency Reform- Standardising Company Voluntary Arrangement Proposals.' K&L Gates, 3 November 2020 < <https://www.klgates.com/COVID-19-Insolvency-Reform-Standardising-Company-Voluntary-Arrangement-Proposals-11-3-2020> >

Koimburi O.,' The origins of Bankruptcy Laws in Kenya.' Forvis Mazars, 6 February 2024 < <https://www.forvismazars.com/ke/en/insights/the-origins-of-bankruptcy-laws-in-kenya> >


Real Business Rescue, *final draft*,2023, <https://www.realbusinessrescue.co.uk/company-voluntary-arrangement-cva/#:~:text=The%20purpose%20of%20a%20company,voluntary%20arrangement%20is%20in%20place>.

Standard Media, "Reforms in Business Laws a Game Changer for Borrowers, Financiers". *The Standard*.< <https://www.standardmedia.co.ke/business/opinion/article/2001510562/reforms-in-business-laws-a-game-changer-for-borrowers-financiers>>

University of Embu, Development of Insolvency Laws in Kenya,< <https://www.studocu.com/row/document/university-of-embu/insolvency-law/development-of-insolvency-law-in-kenya-question-1/118645555>>

Appendices

Appendix A: Similarity Report

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Appendix B: Ethical Clearance Confirmation



7th February 2025

Ms Sewe Benter,
benter.sewe@strathmore.edu

Dear Ms Sewe,

RE: An Appraisal of Company Voluntary Agreements as A Corporate Rescue Mechanism in Kenya

This is to inform you that SU-ISERC has reviewed and **approved** your above **SU-masters** proposal. Your application reference number is **SU-ISERC2624/25**. The approval period is from **7th February 2025 to 6th February 2026**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used.
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-ISERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-ISERC within 72 hours of notification.
- iv. Any changes anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-ISERC within 72 hours.
- v. Clearance for the export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to the expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days of completion of the study to SU-ISERC.

Before commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Ambrose Rachier".

Mr Ambrose Rachier,
Chairperson; SU-ISERC