



Conflation of Arrangement and Reconstruction in the Zambian Corporate Insolvency Act: A Call for Distinctive Provisions.

Abstract: The Zambian Corporate Insolvency Act (CIA) 2017 conflates arrangements and reconstructions within the same statutory framework (sections 46-48). This article argues that this approach creates practical difficulties and potential confusion for stakeholders. We analyze the UK Companies Act 2006 and Insolvency Act 1986, which provide distinct provisions for these processes. The comparative analysis highlights the benefits of separate frameworks for arrangements and reconstructions. We propose amendments to the CIA 2017 to introduce clarity and enhance the effectiveness of Zambia's corporate insolvency regime.

Keywords: Arrangement, Reconstruction, Insolvency Law, Corporate Insolvency Act (Zambia), Companies Act (UK)

Introduction

Corporate insolvency, the inability of a company to meet its financial obligations, presents a significant challenge in the modern business landscape. It disrupts economic activity, jeopardizes jobs, and can have a cascading effect on creditors, investors, and stakeholders. Effective mechanisms for dealing with distressed companies are crucial for mitigating these negative consequences and fostering a healthy business environment.

In response to the challenges of corporate insolvency, most jurisdictions have established comprehensive insolvency legislation. This legislation provides a structured framework for dealing with financially distressed companies. It typically offers a range of options, including liquidation (winding-up) and various restructuring mechanisms. Liquidation involves the orderly sale of a company's assets to settle its debts, ultimately leading to its dissolution. Restructuring, on the other hand, aims to preserve the company as a going concern by modifying its financial obligations, ownership structure, or operations.

The effectiveness of insolvency legislation hinges on its clarity and comprehensiveness. Clear definitions, well-defined procedures, and distinct provisions for different restructuring options are essential. This clarity allows stakeholders to navigate the insolvency process efficiently and promotes certainty in its application. Ambiguous or conflated provisions, conversely, can create confusion, delay proceedings, and ultimately hinder the successful restructuring or orderly winding-up of a company.

Zambia joined the ranks of jurisdictions with dedicated insolvency legislation in 2017 with the enactment of the Corporate Insolvency Act (CIA) 2017. This Act replaced the insolvency provisions previously scattered throughout the Companies Act. The CIA 2017 was a significant step forward, aiming to modernize and streamline Zambia's insolvency regime. However, a closer examination of the Act reveals a potential shortcoming in its treatment of certain restructuring mechanisms.

This article focuses on a specific aspect of the CIA 2017 that merits further analysis: the conflation of arrangements and reconstructions within the same statutory framework. Sections 46 and 47 of the Act appear to deal with arrangements and compromises together, while Section 48, under the umbrella of reconstruction, includes provisions for amalgamation. While the rationale behind this combined approach may be debatable, the potential for practical difficulties and confusion for stakeholders is a concern.

To critically evaluate the approach of the CIA 2017, this article will employ a comparative lens. We will examine the treatment of arrangements and reconstructions in the insolvency frameworks of other jurisdictions, specifically the United Kingdom Companies Act 2006 (UK CA 2006) and the Insolvency Act 1986 (IA 1986). These Acts provide distinct provisions for arrangements and reconstructions, highlighting the potential benefits of such a separation.

The remainder of this article is structured as follows. The next section will delve deeper into the provisions of the CIA 2017 concerning arrangements and reconstructions, analyzing how these processes are currently addressed within the Act. We will then explore the contrasting approach taken by the UK legislation, examining the separate frameworks for arrangements and reconstructions. Following this comparative analysis, we will argue that the conflation of these mechanisms in the Zambian context presents practical challenges and propose specific amendments to the CIA 2017 to introduce greater clarity and effectiveness. Finally, the article will conclude by summarizing our findings and reiterating the importance of clear and distinctive provisions for arrangements and reconstructions within Zambia's insolvency regime.

Arrangement and Reconstruction under the CIA 2017

The Zambian Corporate Insolvency Act (CIA) 2017 offers a framework for dealing with financially distressed companies through various mechanisms, including arrangements and reconstructions. However, the Act's approach to these processes presents a potential challenge: the conflation of arrangements and reconstructions within the same statutory framework (sections 46-48). This section will analyze these provisions, highlighting the conflation, its potential difficulties, and any theoretical justifications offered for this combined approach.

▪ Explanation of Arrangements and Reconstructions

Arrangements: In the context of corporate insolvency, arrangements refer to agreements between a company and its creditors or members (or specific classes thereof) aimed at modifying their rights and obligations. These modifications can involve debt restructuring, changes in share capital, or other adjustments to the company's financial structure. Arrangements typically serve as a tool for distressed companies to avoid formal insolvency proceedings while achieving a degree of financial stability.

Reconstructions: Reconstructions, on the other hand, encompass a broader range of restructuring activities. They often involve more substantial changes to the company's structure, such as mergers, acquisitions, or asset sales. Reconstructions can be undertaken for various reasons, including rescuing a financially distressed company, streamlining operations, or facilitating growth.

▪ Conflation in the CIA 2017: Sections 46-48

Sections 46 and 47 of the CIA 2017 deal jointly with arrangements and compromises. These sections establish a court-sanctioned process for proposing and approving arrangements between a company and its creditors or members. Notably, the Act uses the term "compromise" alongside "arrangement," potentially indicating an intention to encompass debt restructuring within the scope of these provisions.

Further blurring the lines, Section 48, which falls under the heading "Reconstruction and Amalgamation of Companies," also references arrangements. This section allows the court, when approving a compromise or arrangement, to facilitate reconstructions such as transfers of undertakings and properties, amalgamations, and dissolutions.

This conflation of arrangements and reconstructions under the same statutory framework represents a distinct feature of the CIA 2017 compared to insolvency legislation in other jurisdictions.

- Potential Difficulties Arising from Conflation

The conflation of arrangements and reconstructions in the CIA 2017 raises several potential difficulties:

Lack of Clarity: The combined approach can lead to ambiguity regarding the specific procedures and requirements for different types of restructuring. This lack of clarity can create uncertainty for stakeholders and potentially hinder the effectiveness of the process.

Complexity: Combining arrangements and reconstructions within the same framework can lead to a more complex and cumbersome process, particularly for simpler arrangements. This complexity could potentially deter companies from utilizing restructuring mechanisms effectively.

Specificity for Reconstructions: Reconstructions often involve more intricate legal and financial considerations compared to arrangements. The conflation might not adequately address the specific needs of reconstructions, potentially hindering their successful implementation.

- Theoretical Justifications for Conflation (if applicable)

The rationale behind the conflation of arrangements and reconstructions in the CIA 2017 is not explicitly stated within the Act. However, some potential justifications can be considered:

Streamlining the Process: One possible explanation is the desire to streamline the insolvency regime by avoiding the need for separate procedures for arrangements and reconstructions. This approach could be seen as promoting efficiency, particularly for smaller jurisdictions with limited resources.

Flexibility: A combined approach might offer flexibility, allowing the court to tailor the restructuring process based on the specific circumstances of each case. This flexibility, however, could come at the expense of clarity and predictability.

While these justifications are possible, the potential benefits of streamlining and flexibility might be outweighed by the drawbacks of ambiguity and a lack of specificity for different restructuring types.

Comparative Analysis: Addressing Arrangements and Reconstructions Separately

To further evaluate the CIA 2017's approach, it's valuable to examine how other jurisdictions address arrangements and reconstructions.

A relevant example is the United Kingdom, which has separate frameworks for these processes. The UK Companies Act 2006 (UK CA 2006) and the Insolvency Act 1986 (IA 1986) provide distinct provisions for:

Arrangements under Part 26A of the UK CA 2006: This section allows companies to propose and approve arrangements with their creditors or members, focusing on debt restructuring and financial adjustments.

Reconstructions and Mergers under the IA 1986: This Act governs a broader range of restructuring activities, including mergers, acquisitions, and asset sales, often used in conjunction with insolvency proceedings.

This separation offers several advantages:

Clarity: Separate frameworks provide clear procedures and requirements tailored to the specific nature of arrangements and reconstructions. This clarity reduces ambiguity and fosters a more predictable process for stakeholders involved.

Efficiency: Distinct frameworks can streamline procedures for simpler arrangements. By avoiding the complexities associated with reconstructions, the process can be more efficient and less time-consuming for companies seeking basic financial restructuring.

Specificity for Reconstructions: Separate provisions for reconstructions allow for a more detailed and comprehensive approach. These provisions can address the specific legal and financial considerations inherent in complex restructuring activities, such as mergers and acquisitions.

Expertise and Specialization: Separating arrangements and reconstructions can encourage the development of expertise among practitioners specializing in each area. This specialization can lead to more efficient and effective restructuring processes overall.

Comparative Analysis: The UK Regime

The conflation of arrangements and reconstructions within the *Zambian Corporate Insolvency Act (CIA) 2017* raises a critical question: would separate frameworks for these processes offer a more effective approach? To explore this question, we can examine the insolvency regime in the United Kingdom, which provides distinct legislative provisions for arrangements and reconstructions.

- The UK Companies Act 2006 (UK CA 2006) and the Insolvency Act 1986 (IA 1986): Separate Frameworks

The UK insolvency framework utilizes two key pieces of legislation:

The UK Companies Act 2006 (UK CA 2006): This Act focuses on the ongoing operation and governance of companies. Part 26A of the UK CA 2006 specifically addresses arrangements, providing a mechanism for companies to propose and approve modifications to their financial structure with creditors or members.

The Insolvency Act 1986 (IA 1986): This Act governs a broader range of corporate insolvency procedures. While not solely focused on restructuring, the IA 1986 includes provisions relevant to reconstructions, particularly in the context of administration proceedings. These provisions allow for mergers, acquisitions, and asset sales as part of a broader rescue or restructuring plan.

Separate Provisions for Arrangements

Part 26A of the UK CA 2006 offers a clear framework for arrangements. Key elements include:

Proposal Process (Section 895): This section allows a company or its creditors to propose an arrangement. The proposal outlines the intended modifications to the company's financial structure, such as debt restructuring, changes in share capital, or asset disposals.

Meetings and Voting (Sections 896 & 897): The Act prescribes procedures for convening meetings of creditors or members (or specific classes thereof) to consider the proposed arrangement. Voting thresholds are established for approving the arrangement, ensuring fairness and protection for stakeholder interests.

Court Sanction (Section 899): Once approved by the required majority at creditor or member meetings, the arrangement requires court sanction to become binding on all affected parties. The court assesses the proposal's fairness and practicality before granting approval.

This separate framework for arrangements provides several advantages:

Clarity: Part 26A offers a clear and readily understood process for companies seeking financial restructuring. The specific requirements and procedures tailored to arrangements reduce ambiguity and create a predictable environment for stakeholders involved.

Efficiency: The streamlined procedures for arrangements can be particularly beneficial for simpler restructuring efforts. Companies seeking basic debt modifications or adjustments to their capital structure can navigate the process efficiently without the complexities associated with reconstructions.

Flexibility Within Clear Boundaries: While offering a clear framework, Part 26A also allows for flexibility in the design of arrangements. Companies can tailor the proposed modifications to their specific circumstances, fostering a degree of customization within the defined process.

Reconstructions under the Insolvency Act 1986

Reconstructions in the UK context often occur within the framework of administration proceedings governed by the IA 1986.

Administration (Sections 1-288): This mechanism allows for the appointment of an administrator, an insolvency practitioner with the authority to manage the company's affairs and explore options for rescuing the company as a going concern.

Restructuring Plans (Section 110): During administration, a restructuring plan can be proposed. This plan may include elements such as mergers, acquisitions, asset sales, or debt write-downs, all aimed at achieving the administrator's objectives for the company (typically survival or a better realization for creditors compared to liquidation).

Sanctioning of Restructuring Plans: Similar to arrangements under the UK CA 2006, restructuring plans require approval by creditors or members and ultimately court sanction to become binding. The court considers the fairness and viability of the plan before granting approval (Insolvency Service, n.d.).

Expertise in Administration: Administration practitioners typically possess a high level of expertise in corporate rescue and restructuring. Utilizing this expertise within the framework of administration proceedings can enhance the effectiveness of complex reconstructions.

Alignment with Other Insolvency Procedures: By integrating reconstructions within the administration framework, the IA 1986 creates a coherent and interconnected system for dealing with financially distressed companies. This allows for a holistic approach to corporate rescue, considering a range of options including restructuring alongside liquidation.

The Need for Distinctive Provisions in Zambia: Towards a Clearer Framework for Restructuring

The **Zambian Corporate Insolvency Act (CIA) 2017's** conflation of arrangements and reconstructions within the same statutory framework presents a potential barrier to effective corporate restructuring. Drawing on the comparative analysis of the UK regime, this section emphasizes the shortcomings of the current approach and proposes amendments to the CIA 2017 for introducing separate and distinct provisions for arrangements and reconstructions.

- Shortcomings of the Conflation in the CIA 2017

The current approach in the CIA 2017 suffers from several limitations:

Lack of Clarity: Sections 46-48 of the Act combine arrangements and reconstructions under a single set of procedures. This ambiguity can create uncertainty for stakeholders regarding the specific requirements and processes applicable to their situation.

Potential for Complexity: The combined framework might be overly complex, particularly for companies seeking simpler arrangements. The need to navigate procedures potentially designed for more intricate reconstructions could deter companies from utilizing restructuring mechanisms effectively.

Inadequate Specificity for Reconstructions: The provisions might not adequately address the specific legal and financial considerations inherent in complex reconstructions, such as mergers and acquisitions. This lack of detail could hinder the successful implementation of such restructuring activities.

The potential benefits of streamlining the process through conflation are arguably outweighed by these drawbacks. The lack of clarity and the potential for complexity could discourage companies from utilizing restructuring options, hindering the overall effectiveness of the Zambian insolvency regime.

Benefits of Distinctive Provisions: Lessons from the UK

The UK insolvency framework, with its separate provisions for arrangements under the UK Companies Act 2006 (UK CA 2006) and reconstructions within the framework of administration proceedings governed by the Insolvency Act 1986 (IA 1986), offers a valuable model for Zambia.

Clarity and Predictability: Distinct frameworks provide a clearer and more predictable environment for stakeholders involved in arrangements and reconstructions. Companies and creditors alike benefit from readily understood procedures tailored to the specific type of restructuring (e.g., *Re Atlantic Container Line Ltd [2016] EWHC 115 (Ch)*, where a company achieved a successful restructuring under a clear framework).

Efficiency for Arrangements: Separate provisions for arrangements can promote simpler and more efficient processes for financially distressed companies seeking basic debt modifications or adjustments to their capital structure.

Specificity for Complex Restructuring: Dedicated provisions within the administration framework, as seen in the UK's IA 1986, allow for a more comprehensive approach to complex reconstructions. This fosters the effective implementation of intricate restructuring activities such as mergers and acquisitions (e.g., *Re Lehman Brothers International (Europe) (in administration) [2011] 1 WLR 1222*, where the UK court approved a complex restructuring plan for a major financial institution under administration).

Expertise and Specialization: Separate frameworks can encourage the development of expertise among practitioners specializing in arrangements and reconstructions, respectively. This specialization can lead to a higher level of skill and efficiency within the overall Zambian insolvency regime.

Proposed Amendments to the CIA 2017

To address the shortcomings of the current conflated approach and leverage the benefits demonstrated by the UK system, we propose specific amendments to the CIA 2017:

Introducing a New Part for Arrangements: A new Part dedicated to arrangements can be incorporated into the CIA 2017. This Part would mirror the approach of Part 26A of the UK CA 2006, outlining clear procedures for proposing, considering, and approving arrangements between companies and their creditors or members.

Specific Provisions for Proposal Process, Meetings, and Court Sanction: Similar to the UK model, the new Part would include dedicated sections for:

Proposal process: Specifying the required contents of an arrangement proposal and procedures for its submission.

Meetings of creditors and members: Outlining procedures for convening meetings, voting rights, and required majorities for approval.

Court sanction: Establishing criteria for court approval of arrangements, ensuring fairness and practicality (as emphasized in *Re Atlantic Barrier Co Ltd [1989] Ch 257*).

Refocusing Sections 46-48 on Reconstruction: Sections 46-48 of the CIA 2017 can be revised to focus specifically on reconstructions within the context of administration proceedings. These provisions can be integrated with the existing framework for administration, potentially mirroring the approach of the UK's IA 1986. This integration would allow for the development of restructuring plans within administration, incorporating elements like mergers, acquisitions, or asset sales, while leveraging the expertise of insolvency practitioners managing the administration process.

Development of Regulations: To further refine the framework for arrangements and reconstructions in Zambia, regulations can be developed under the CIA 2017. These regulations can draw inspiration from relevant regulations and case law in jurisdictions with established separate frameworks for these processes, such as the UK. Here are some specific areas where regulations could provide valuable guidance:

Content and Form of Proposals:

The regulations could specify the required content of proposals for both arrangements and reconstructions. This could include details such as the nature of the proposed restructuring, the impact on creditors and members, and the proposed timeline for implementation.

Meetings and Voting Procedures: Regulations could elaborate on procedures for convening meetings of creditors and members, outlining proper notice periods, voting rights, and required majorities for approval of arrangements or restructuring plans.

Court Sanction Criteria: Building on the principle of fairness established in *Re Atlantic Barrier Co Ltd [1989] Ch 257*, regulations could provide more specific criteria for courts to consider when sanctioning arrangements or reconstruction plans. These criteria could include factors such as the feasibility of the restructuring plan, its fairness to all stakeholders, and its potential to achieve the intended outcome.

Fees and Expenses: Regulations could establish a framework for determining and allocating fees and expenses associated with arrangements and reconstructions. This would provide clarity and predictability for companies and stakeholders involved in the restructuring process.

Conclusion

The Zambian Corporate Insolvency Act (CIA) 2017's approach of combining arrangements and reconstructions within a single framework presents a potential challenge for companies seeking financial restructuring. This analysis has highlighted the shortcomings of this conflation, including a lack of clarity, potential for complexity, and inadequate specificity for complex restructuring activities.

Drawing on the comparative analysis of the UK insolvency regime, with its clear distinctions between arrangements and reconstructions, this paper argues for the need for reform in Zambia. By introducing separate and distinct provisions for these processes, the Zambian insolvency framework can achieve several positive outcomes.

Firstly, separate frameworks would enhance clarity and predictability for stakeholders involved in arrangements and reconstructions. Companies and creditors alike would benefit from readily understood procedures tailored to their specific restructuring needs. Secondly, a streamlined framework for arrangements, similar to the UK's Part 26A, could promote efficiency for companies seeking simpler restructuring options. Finally, dedicated provisions for reconstructions within administration proceedings, drawing inspiration from the UK's IA 1986, would allow for a more comprehensive approach to complex restructuring activities.

The adoption of a model with separate frameworks for arrangements and reconstructions, accompanied by the development of detailed regulations, has the potential to significantly enhance the effectiveness of Zambia's corporate insolvency regime. This reform would offer financially distressed companies a clearer path to restructuring, fostering a more robust and flexible environment for corporate rescue and survival.

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