COLLEGE OF ARTS AND SOCIAL SCIENCES

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LLM IN BUSINESS LAW

LEGAL PROTECTION OF REPO MARKET CREDITORS' RIGHTS IN CASE OF INSOLVENCY UNDER RWANDAN LAW: A COMPARATIVE STUDY

A dissertation submitted to the school of Law in partial fulfillment of the academic requirements for the award of a Master's Degree in Business Law (LLM)

By: **UWERA Pacifique**

Reg. No: 218015602

Supervisor: **Dr. MUNYAMAHORO René**

Kigali, September 2022

DECLARATION

I, **UWERA Pacifique**, hereby declare that this dissertation entitled "**Legal protection of repo market creditors' rights in case of insolvency under Rwandan law: a comparative study**" is my original work and that , to the best of my knowledge and belief , It has not been submitted and/or presented before for any Degree or any other academic award in any University or Institution of Higher Learning, and that all the sources I have used or quoted have been genuinely indicated and acknowledged as complete references to appraise their author's intellectual efforts".

Signature: ……

Names: **UWERA Pacifique**

Date: ……

CERTIFICATION

This is to certify that the dissertation entitled "**Legal protection of repo market creditors' rights in case of insolvency under Rwandan law: a comparative study**" is a study conducted by **UWERA Pacifique** under my supervision and guidance.

Signature: ……

Supervisor: **Dr. MUNYAMAHORO René**

Place: **KIGALI**

Date: ……

DEDICATION

To the Almighty God for His unfailing grace, love and blessings

To my beloved husband **KUBWIMANA Emmanuel**

To my Sons **Arnaud, Armand and Armel**

To my beloved Mum and Siblings

To The rest of my relatives

To my friends and colleagues

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ABBREVIATIONS

BRRD	:	Bank Resolution and Recovery Directive
CSDR	:	Central Securities Depository Regulation
DVP	:	Delivery Versus Payment
EMIR	:	European Market Infrastructure Regulation
EU	:	European Union
GC	:	General Collateral
GMRA	:	Global Master Repurchase Agreement
GMSLA	:	Global Master Securities Lending Agreement
ICMA	:	International Capital Market Association
ISDA	:	International Swaps and Derivatives Association
MiFID	:	Financial Instruments Directive
MiFIR	:	Financial Instruments Regulation
MRA	:	Master Repurchase Agreement
NBR	:	National Bank of Rwanda
REPO	:	Repurchase Agreement
SFTR	:	Securities Financing Transaction Regulation
UCC	:	Uniform Commercial Code
UK	:	United Kingdom
USA	:	United States of America

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ABSTRACT

This thesis entitled "**Legal protection of repo market creditors' rights in case of insolvency under Rwandan law: a comparative study**" focuses at examining the Rwandan legislations in the context of the protection of repo market creditors in order to avoid different challenges faced in the repo market transactions. The present thesis examines the foreign legislations like that of United States of America and Europe to assess whether some protection aspects may be borrowed from there. After a thorough analysis was observed that Rwandan legal framework does not clearly guarantee the protection of repo market creditors especially in the event the counterparty falls bankrupt, therefore, the clear protection is needed.

In fact, this thesis is divided into three chapters. The first chapter discusses the key concepts and presents an overview on repo market. The second chapter analyzes the existing legal framework regulating repo whereby imbalances and ineffectiveness of regulations relating to the repo market were highlighted; this part of thesis examines the challenges toward the creditors because of inadequacy of effective regulations which are related to repo market. Furthermore, the case law was examined which is related to repo market. The third chapter suggests about the legal mechanisms from privileges of repo in different countries. In this chapter, foreign regulations were examined in order to learn from their practices within the protection of creditors in repo market. The establishment of particular law relating to repo market was suggested.

In brief, the researcher recommends that a clear protection of repo market creditors against counterparty credit risk should be provided; there should be an effective collateral liquidation in case the repo borrower becomes insolvent; and lastly the amendment of insolvency law is also suggested as an effective mechanism.

KEY WORDS: repurchase agreement, repo market, creditors' protection, insolvency.

GENERAL INTRODUCTION

This part comprises the background of the study to announce the problem statement, the questions of research and the hypotheses. It thereafter provides for the objectives of the study, scope of the study, research methodology, and division of the study.

I. Background of the study

The repurchase (repo) agreement refers to a contract in which the party willing to raise funds sells securities or other assets to the other party (the buyer), and at the same time pledges to buy the same or similar assets from the buyer, at an agreed time in future and at predetermined repurchase price equal to the original sale price plus a return on the use of the sale proceeds during the term of the repo.[1]

According to the National Bank of Rwanda, repo is defined as the agreement of sale and repurchase of assets at a future date for the original value plus a return on the use of the cash.[2] The return on the cash that the Repo buyer effectively lends to the seller is expressed as a percentage per annum rate and is referred to as the repo rate. The return on investment alluded to here, is the difference between the price that the buyer pays at the beginning of a repo and the price he receives at the end of the repo.

In general, repo markets help the movement of cash and securities in financial system. This market helps to establish opportunities supporting the low-risk investment of cash and efficient management of liquidity and collateral of financial and non-financial business companies.[3]

It helps the liquidity and price discovery in the cash market. In this case, it helps to increase the cost of funding for business companies and governments and the efficient

[1] EURO CLEAR; *Understanding repo market*, p. 5, available at https://theotcspace.com/sites/default/files/2011/11/003-the-repo-market.pdf, accessed on 08th June, 2021
[2] X; *REPO, The National Bank of Rwanda*, available at https://www.bnr.rw/browse-in/financial-market/money-market-instruments/repo/, accessed on 10th June, 2021
[3] JAY CULLEN; *The repo market, Collateral Systemic Risk: In Search of Regulatory Coherence*, Research Handbook on Shadow Banking: Edward Elgar, June 2017, p. 2

allocation of capital.[4] Specifically, the Repo is a monetary policy tool that the National Bank of Rwanda uses to keep the liquidity in banking financial System under control.[5]

A repurchase agreement is considered as money-market instrument that functions as a short-term, collateral-backed, interest-bearing loan; whereby the buyer acts as a short-term lender and the seller takes on the role of a short-term borrower while the securities being sold serve as the loan collateral.[6]

Though, the repo appears to be a sale and repurchase of securities and other assets, the fact that the Repo seller commits to buy back the sold securities or other assets means that the buyer has only temporary ownership of those securities while the seller temporarily owns the funds collected from sale of the assets. This bring us to argue that Repo also operates as a secured deposit (the borrowing and lending of cash is primary use of repo).

In case the seller defaults during the life of the repo, the buyer (as the new owner) can sell the asset to a third party to offset his loss. Securities therefore act as collateral and mitigates the credit risk that the buyer has on the seller. However, the Collateralization does not guarantee that counter party may not default; as a result, a collateral obtained from risky counter parties is more likely to be tested by a default and may turn out to be worth less than expected due to fluctuations in price and the impact of liquidation.

Subsequently, collateral should only be considered as insurance against the seller's default, not as a straightforward replacement for his credit risk. Since the initiation of formal bankruptcy proceedings limits a debtor's capacity to perform its pre-petition contractual obligations, resulting in liabilities to creditors, lending through a repo exposes the buyer to credit risk in the event of insolvency of its counter party.

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[4] JAY CULLEN; *supra* note 3, p. 2
[5] X; *REPO, The National Bank of Rwanda*, available at https://www.bnr.rw/browse-in/financial-market/money-market-instruments/repo/, accessed on 10th June, 2021
[6] X; *Repurchase Agreement*, available at https://www.investopedia.com/terms/r/repurchaseagreement.asp,accessed on 28th July 2021

The imposition of an automatic stay, which freezes creditors' rights when a business files for bankruptcy, is a major aspect of bankruptcy protection. The automatic stay has the apparent benefit of assisting the distressed firm's attempts to earn income and optimize its economic value. The company is not obligated to sell assets to satisfy creditors' claims, and it can use available cash flows for operating costs.

Under laws of different countries; such as United States of America (USA); Because repo markets are exempted from bankruptcy's automatic stay, they are subject to favorable treatment under insolvency law.[7] It means that in case of insolvency, creditors have the right to access the securities and liquidate them.

However, in other countries, repo collaterals are not subject to any favourable treatment in case of insolvency, Rwanda included. Rwanda as a county that is struggling to become the business hub in the region needs to improve this emerging market which is being played every day by financial institutions that are likely to be affected by insolvency at any time.

It is in the light of the foregoing that we find that legal clarity must be established with regards to the protection of the rights of buyers in case sellers are affected by the insolvency. The repo market is undoubtedly a crucial aspect of financial markets liquidity. The enablement of an efficient and conducive well-regulated Repo market is something that all financial market players require.

II. Statement of the problem

The Rwandan Parliament has enacted several laws including the Law n° 075/2021 of 06/12/2021 relating to insolvency. This law establishes proceedings for settling issues arising from insolvency of a company, a partnership and an individual in Rwanda.[8]

[7] Title 11 – Bankruptcy, U.S. Code, enacted by pub. L. 95-598, title 1, §101, Nov. 6, 1978, 92 stat. 2549, § 362

[8] Law n° 075/2021 of 06/12/2021 relating to insolvency, in *O.G. nº special of 30/12/2021*, art. 1

However, it should be noted that the aforementioned law is silent in as far as the protection of creditors in repo market is concerned and does not provide a clear solution to issues relating to the protection of repo market creditors in case the borrowers become insolvents. It is in that framework that this thesis reviews the Rwandan legal framework relating to the repo market and examines whether creditors in repo market are protected in case insolvency of the borrowers.

III. Research questions

In analysing the legal issue at hand, there is a need to think on several questions from the inadequacy of national legal instruments to handle creditors' issues, in repo market, with regards to their protection in case of insolvency of the Repo borrowers. It is in that framework that this study answers the following legal questions:

1. What is the legal framework for Repo market in Rwanda?
2. What legal measures available to protect creditors in repo market in case of insolvency of the borrowers?
3. Are there legal measures that should be taken to better protect repo market creditors in case Repo borrowers file for bankruptcy in Rwanda?

IV. Hypotheses

As the automatic stay refers to the ban of the creditors from pursuing actions to recover against the property of the debtor;[9] the review of the Rwandan legal framework regulating repo market will be conducted with an utmost aim to assess whether in the event of bankruptcy of the borrower, the repo creditors need be exempted from automatic stay, so as to enable creditors to have the right to access the securities and liquidate them even if the borrowers files for insolvency.

[9] D. POLK et al.; *In Review: Insolvency Law, Policy, and Procedure in USA*, available at https://www.lexology.com/library/detail.aspx?g=185d9782-8104-48c0-8687-e09f10828c65#:~:text=The%20goal%20of%20US%20insolvency,reorganisation%20value%20over%20liquidation%20value., accessed on 15th June, 2021

V. Objectives of the study

The present thesis reviews the Rwandan legal framework relating to the repo market with utmost aim to assess whether there is a need to improve national legislation so that creditors in repo market can be protected in case of the insolvency of the borrowers. The study shall consist of the analysis whether in the event of bankruptcy of the borrower, the repo collateral should be exempted from automatic stay or should automatic stay be applied if a repo borrower files for bankruptcy.

VI. Scope of the study

The research will include an examination of domestic legislation, particularly commercial Laws and other legal instruments pertaining to the banking and financial industry. However, the researcher will be inspired by foreign legislations relating to insolvency and repo agreement in different countries with utmost aim to analyse how those legal instruments protect repo market creditors from issues raised by the commencement of insolvency process.

VII. Research methodology

During the course of this study, the researcher employed strategies such as data gathering and data analysis research methods. The documentary technique was used to collect data from a variety of written sources, including textbooks, websites, reports, and so on. Various approaches were employed in this study, including a comparative method that has helped in comparing the conditions of creditors' protection in the repo market by referring to both domestic and foreign legislation in developed nations. The analytical method made it easier to sort through all of the data collected and identify the ones that are significant to the regulation of the repo market for the protection of creditors in the event of insolvency. The researcher utilized a synthetic method to collect all data so that she can study those that may be relevant in order to produce an adequate answer and a fruitful outcome.

VIII. Division of the study

Apart from the general introduction and the conclusion followed by the recommendations, this work is divided into three chapters. The first chapter deals with key concepts and overview on repo market; the second chapter deals with the regulatory framework of repo market; and the third chapter deals with the Legal mechanisms from privileges of repo in different countries.

CHAPTER ONE: KEY CONCEPTS AND OVERVIEW ON REPO MARKET

This chapter discusses on the key concepts and overview on repo market. In section one, it focuses on the definitions of key concepts, such as creditor, insolvency, and collateral. In section two, it focuses on the general consideration on repo market, where it emphasizes on the meaning of repo, types of repo, characteristics of repo, importance of repo, and concept of insolvency in repo.

I.1. Definitions of key concepts

For better understanding the present research, several key concepts have been defined. This part gives the readers an understanding of those concepts that are discussed throughout this research. This part focuses on the definitions of key concepts namely the creditor, insolvency and collateral.

I.1.1. Creditor

A creditor is someone who is owed money. Typically, a company's creditors are its suppliers, who have provided it with goods and services in exchange for payment on a predetermined date.[10] Alternatively, the company may owe money to a lender who anticipates repayment at a later date. The funds owed should be shown as accounts payable or loans payable on the balance sheet.[11]

Loans can be categorised as either current or long-term liabilities, depending on their anticipated payback deadlines.[12] In other terms, a corporation's creditor is a person or business that is owed money (or another type of debt) by the company.

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[10] LITOV L. et al.; *Creditor Rights and Corporate Risk-Taking*, J. of Financial Economics, vol. 102, 2011, p. 150-166

[11] X; *Creditor*, available at https://www.merriam-webster.com/dictionary/creditor, accessed on 16th December, 2021

[12] LITOV L. et al.; *supra* note 10, p. 150-166

In general, there are two types of creditor: secured and unsecured.[13] Secured creditors are those who hold a security in respect of a debt or obligation owed to them.[14] In case , for instance, a bank or other financial institution gives an institution a loan for buying the building, the lender will ask the borrower to provide the title deeds of the building as security in case the company fails to repay the loan on the agreed terms.[15]

Unsecured creditors are those whose debt is not secured on any of the company's assets. In case the borrower fails to honor his loan repayment commitments, the unsecured creditors will be paid only if there are remaining funds after paying the secured creditors.[16] A secured creditor is defined by securities law as a person who possesses a security interest in his or her debtor for the purposes of payment priority and security interest registration.[17]

Some scholars describe secured creditors as ones that have debts that are secured by one or more assets, such as real estate.[18] The lender is referred to as a secured creditor when an individual or a corporation borrows money from a financial institution and the lender demands a title deed as security in the event of default.[19] As a result, a secured creditor has priority over the personal or real property pledged as security.[20]

I.1.2. Collateral

Collateral is a type of security that a lender accepts as a loan security. Collateral for a loan might be real estate or other assets, depending on the purpose of the loan.

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[13] LITOV L. et al.; *supra* note 10, p. 150-166
[14] Law n° 075/2021 of 06/12/2021, *supra* note 8, art. 3, 11°
[15] *Ibid*
[16] *Ibid*
[17] Law N°34/2013 of 24/05/2013 on security interests in movable property, art. 2, 18°
[18] X; *Creditor*, available at https://uk.practicallaw.thomsonreuters.com/9-570-3910?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&firstPage=true#:~:text=A%20creditor%20is%20a%20person,financial%20claim%20against%20a%20debtor., accessed on 16th December, 2021
[19] *Ibid*
[20] *Ibid*

Collateral safeguards the lender's interests.[21] If a borrower misses on their loan payments, the lender can seize the collateral and sell it to recoup some or all of its losses.[22]Before granting you a loan, the lender wants to know that you are capable of repaying it. As a result, many of them require some level of protection.[23] Collateral is a sort of security that helps lenders lower their risk. It guarantees that the borrower will meet his or her financial responsibilities.[24]

In the event the borrower fails to honor his commitment, the lender can seize and sell the collateral, with the proceeds going toward the unpaid amount of the loan. The lender can take legal action against the borrower to reclaim any remaining balance. There are many different types of collateral. It usually refers to the type of loan; for example, a mortgage is secured by the home, whereas a car loan is secured by the vehicle.

Unsecured loans typically have higher interest rates than collateral-backed loans. A lien is a legal right or claim on an asset that a lender has on a borrower's collateral to satisfy a debt.[25] The borrowers have a strong motive to honor their commitments because they might risk losing their home or other collateralized assets if they don't repay the loan on time.[26]The type of loan frequently determines the nature of the collateral. Your home becomes the collateral when you take out a mortgage. When you take out a car loan, the vehicle serves as collateral.[27] In general, collateral refers to an asset that a borrower pledges to a lender until the loan is repaid. In the event the borrower fails to settle his loan, the lender has the authority to take and sell the security to repay the debt.[28]

[21] X; *What is collateral? Definition, meaning, and example*, available at https://www.yieldstreet.com/resources/article/collateral-definition/, accessed on 16th December, 2021
[22] *Ibid*

[23] *Ibid*
[24] UDELL G. et al.; *Collateral, loan quality, and bank risk*, Journal of Monetary Economics, 1990, p. 25, 21-42
[25] *Ibid*
[26] *Ibid*
[27] UDELL G. et al.; *supra* note 23, p. 25, 21-42
[28] *Ibid*

In repo transactions, securities such as bonds are the ones that serve as collaterals, which can be classified as movable property. In Rwanda, security interests in movable property is governed by the Law N°34/2013 of 24/05/2013 on security interests in movable property and it only recognizes collaterals registered by the Registrar General.[29] Same goes to the collateral in immovable properties, whereby only collaterals registered by the Registrar General are considered valid.[30]

I.2. Overview on repo market

This part focuses on the general consideration on repo market, where it emphasizes on the meaning of repo, types of repo, functionality, characteristics of repo, importance of repo, and concept of insolvency in repo.

I.2.1. Meaning of repo

A repurchase agreement (repo) is a contract allowing the sale of securities or other assets (sometimes known as "collateral") at a set price and then repurchase them at a pre-determined price at a later date. A reverse repo is a series of transactions in which one party lends money and the counter party receives securities as security.[31]

Repo is a type of short-term borrowing for government securities dealers. Repo is thus economically comparable to a short-term interest-bearing loan secured by specific collateral.[32] Two parties are involved: The seller who acts as a collateral supplier and the buyer who acts as a cash lender; whereby they can achieve their investing objectives of secured finance and liquidity.[33]

[29] Law n°34/2013 of 24/05/2013 on security interests in movable property, art. 7
[30] Law n° 10/2009 of 14/05/2009 on mortgages as amended to date, art.5
[31] COMMITTEE ON THE GLOBAL FINANCIAL SYSTEM; *Repo market functioning, CGFS Papers No 59, April 2017*, available at https://www.bis.org/publ/cgfs59.pdf , accessed on 29th December 2021
[32] X; *Repurchase Agreement*, available at https://www.contractscounsel.com/t/us/repurchase-agreement, accessed on 17th December, 2021
[33] *Ibid*

Other repos with no specified maturity date are considered open. Open repo typically rolls over every night, though it can be terminated by either party at any time, whereas evergreen repo contracts include an agreed-upon notice period before either party can end the agreement.[34] In the instance of a repo, a dealer trades government assets to investors overnight and then buys them back the next day at a little higher price.[35] That small price difference is the implied overnight interest rate. Repos are frequently used to raise short-term financing. They're also a typical strategy employed by central banks in open market operations.[36]

As TAYLOR ELLEN points out, a repo is when one party sells a security and agrees to repurchase it in the future, whereas a reverse repurchase agreement is when the other party buys the security and agrees to sell it in the future.[37]

I.2.2. Mechanics of repo

A repo is a contract concluded by two parties whereby one party (the "seller") sells securities or other assets to the other party (the "buyer") on a specific date (the "purchase date"); and (ii) the seller and the buyer come to an agreement that the seller will repurchase a financial asset of equal value from the buyer at a predetermined price (the "repurchase price") on a specific future date (the "repurchase date"). The repurchase price exceeds the original purchase price.

The difference is the buyer's return on the purchase price during the period between the purchase date and the repurchase date (the "repo term"). Under the conditions of the repo, the buyer agrees to turn over to the seller any payments made on the financial

[34] *Ibid*
[35] TAYLOR ELLEN; *Repurchase Agreements: Good Bye to Collateral?*, Global Custodian, spring, 1998, p. 28-30
[36] *Ibid*
[37] *Ibid*

asset during the repo term, and to exercise any voting or instruction rights in connection to the financial asset as instructed by the seller.[38]

I.2.3. Legal structure of Repo

Repo presents its self as a combination of sale & repurchase of asset, whereby the seller has a temporary ownership of funds and the buyer has temporary ownership of the asset during repo term. However, in case seller defaults, buyer can try to recover cash by liquidating asset which means that the asset, in that case, acts like collateral.

It is in that framework that this part is going to discuss if repo should be treated as a sale/repurchase or collateralized loan. Repurchase transactions operate by legally selling the collateral but also behave economically like secured loan.

I.2.3.1. Repo as a purchase and sale

As previously stated, a repo is a sale of securities or other asset with a concurrent commitment to buy back an asset of same quantity and value at a predetermined time in the future or on demand for the purchase value plus a return on the use of cash.[39] A repo is a contract between two parties in which one promises to sell securities to the other at a stated price in exchange for a promise to buy the securities back at a later date for a different (typically higher) price.[40]

This signifies that repo is a "Sale and Repurchase Agreement" transaction. It is a transaction in which two parties agree to two transactions at the same time: a cash sell of securities followed by a forward repurchase at a predetermined date and price. A

[38] ANGUS D. & ROBERT C.; *Repos of Loans - Now Possible*, available at https://www.cadwalader.com/uploads/books/105f9f59f9b4806acab6368322ebbb31.pdf, accessed on 5th Jan 2022

[39] X; *REPO, The National Bank of Rwanda*, available at https://www.bnr.rw/browse-in/financial-market/money-market-instruments/repo/, accessed on 10th June, 2021

[40] X; *REPO*, available at https://www.fimarkets.com/pagesen/repo-repurchase-agreement.php#:~:text=The%20term%20REPO%20is%20a,to%20as%20a%20repurchase%20agreement., accessed on 17th December, 2021

repurchase agreement is the name for this type of transaction. This transaction involves the lender of cash repurchasing securities and the lender of securities repurchasing securities.

According to GMRA,[41] on the transaction's purchase date, the seller should transfer the purchased securities to the buyer or its agent in exchange for the buyer paying the purchase price. For a brief time, one party transfers legal title to a security to another. Even if he is passing legal title to the other party, the first party is referred to as the lender. Similarly, even if he is assuming legal title to the security, the other party is referred to as the borrower. A true transfer of ownership occurs in conjunction with the temporary transfer of securities or receivables.

Because the seller has agreed to buy back the assets in the future, the buyer has only temporary possession of the assets, while the seller has only temporary possession of the sale proceeds. Although a repo is organized legally as a sale and repurchase of securities, it operates like a secured deposit economically (and the principal use of repo is in fact the borrowing and lending of cash).[42]

I.2.3.2. Repo as a secured loan

Because some elements of both retail and wholesale repo transactions closely resemble short-term loan arrangements, they could be classified as commercial loans.[43] This means that, like other borrowers, repo issuers must pay interest to repo holders for the opportunity of using their money. Second, similar to other loan agreements, the repo issuer promises securities to the repo holder as collateral, ostensibly guaranteeing the

[41] SIFMA & ICMA; *Global Master Repurchase agreement, April 2011, art.3(c)*, available at https://www.icmagroup.org/assets/documents/Legal/GMRA-2011/GMRA-2011/GMRA%202011_2011.04.20_formular.pdf, accessed on 27th December 2021

[42] X; *What is repo?*, available at https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/repo-and-collateral-markets/icma-ercc-publications/frequently-asked-questions-on-repo/1-what-is-a-repo/, accessed on 27th December 2021

[43] X; *What is a repurchase agreement (repo loan)?*, available at https://www.bankrate.com/glossary/r/repurchase-agreement-repo-loan/, accessed on 17th December, 2021

repo holder's return on investment. Third, while repo transactions are theoretically similar to the sale and repurchase of a security interest, these securities serve the same purpose as collateral in loan transactions. Finally, when the issuer repays the repo holder by repurchasing the underlying assets, the holder expects to receive only the amount invested plus a fixed rate of interest that is unaffected by the market value of the underlying securities. A repurchase agreement (repo) is a sort of short-term cash loan that is commonly regarded as securities lending's younger sister.[44]

A fixed income asset is sold with an agreement to buy it back in exchange for cash in a repo transaction. The buyer returns the security and the seller returns the cash payment plus an additional interest payment at the end of the term. The seller of the securities is referred to as the borrower, while the buyer of the securities is referred to as the lender.

The movement of money is referred to as this. The lender is exposed to the risk that the borrower will not repurchase the securities under a repurchasing arrangement. The lender can sell the securities on the market if the borrower fails to repurchase them within the agreed-upon date, however the borrower will commonly supply collateral in the form of securities to offset this risk.

In fact, the main difference between a repo and a securities lending transaction for the owner of securities is that in a repo transaction, the owner of securities pays interest while in a securities lending transaction, they receive interest. Furthermore, the owner of the securities is frequently required to post collateral in a repo transaction, whereas the owner of the securities is frequently given collateral in a securities lending transaction.

Securities lending and repo are both part of the broader category of securities finance since they both allow for the collateralized temporary transfer of securities in exchange

[44] X; *What is the difference between repo and securities lending?*, available at https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/repo-and-collateral-markets/icma-ercc-publications/frequently-asked-questions-on-repo/13-what-is-the-difference-between-repo-and-securities-lending/, accessed on 17th December, 2021

for a daily interest rate. Before we wrap up this section, it's critical to mention the possibility of re-characterization.

One of the legal concerns of repos is that the courts will rule that the repo is a loan to the seller and security issued by the seller, rather than a sale and an agreement to repurchase. Re-characterization risk is the name given to this danger. If the repo seller is a UK corporation, the security will be ineffective since it will not have been registered with Companies House. Only an unsecured claim against the seller for the buyback price will be left to the buyer.[45] The same is true for Rwandan repo lenders, as described in the section on collateral.

I.2.4. Importance of repo

Repo markets aid in the transfer of cash and securities throughout the financial system. They establish and support low-risk, timely investment possibilities, as well as derivatives and collateral markets, by doing so. They also assist in the support of cash market activities and the monetization of assets by financial institutions.

I.2.4.1. Providing a low-risk cash investment alternative

Money market funds, asset managers, central counterparties, and other institutional or corporate investors and businesses rely extensively on reverse repos to invest their capital. As a result, reverse repos with high-quality collateral are well-suited for this function due to their minimal risk. Market risk is reduced by haircuts, while the cash lender's credit risk is reduced by receiving collateral. Reverse repos are a liquid, one-day investment that can be rolled over.

[45] ANGUS D. & ROBERT C.; *Repos of Loans - Now Possible*, available at https://www.cadwalader.com/uploads/books/105f9f59f9b4806acab6368322ebbb31.pdf, accessed on 5th Jan 2022

I.2.4.2. Collateral transformation

Market participants can utilize repo/reverse repo transactions to get certain securities or cash to use in other trades. This means that by enhancing investors' ability to settle trades and meet margin requirements, repos help derivatives markets run smoothly and contribute to the financial system's and real economy's resilience. As a result, securities borrowed via repos can be delivered as part of market participants' duties to custodians or securities settlement systems, for example.

I.2.4.3. Increasing the efficiency and liquidity of the cash market

Market participants utilize repos to take advantage of pricing differences (arbitrage) and finance trading activity that helps maintain market liquidity.[46] Hedge funds and other leveraged institutions utilize repos to fund transactions that take advantage of market dislocations, risk mispricing, and other types of speculation.[47]

This means they help to improve the price efficiency of underlying cash markets, resulting in more efficient capital allocation in primary markets. Repos are frequently used by leveraged financial organizations to fund outright purchases or cover short sales. Dealers need repos to fund their trading inventories and support their market-making activities.[48]

As a result, such intermediation is critical in reducing short-term imbalances between supply and demand for securities while also improving secondary market liquidity. This activity decreases the cost of issuance in primary markets to the degree that it lowers the liquidity premium.

[46] JAN P. F. et al.; *Bond market liquidity and swap market efficiency – what role does the repo market play?*, available at https://www.ecb.europa.eu/pub/economic-bulletin/focus/2020/html/ecb.ebbox202001_05~37e169eb0f.en.html, accessed on 17th December, 2021
[47] *Ibid*
[48] *Ibid*

I.2.4.4. Facilitating risk hedging

Repos can be used to hedge or change a portfolio's risk profile. Underwriters can fund underwriting risk hedging on securities they bring to the primary market.[49] Repo markets also help long-term investors like pension funds manage their assets and liabilities in various jurisdictions.

Such investors can borrow money against government bonds and reinvest the proceeds in bonds with a different (usually longer) maturity.[50] Regulators in many jurisdictions, however, prohibit insurance firms and pension funds from increasing leverage through the repo market due to the dangers involved.[51]

I.2.4.5. Providing investors with the ability to monetize liquid assets

Repo allows investors to monetize liquid assets in the same manner as banks and other financial institutions use repos to offset temporary cash flow deficits in liquidity management. The versatility of repo transactions allows banks to better manage their liquid assets.[52]This means that, during times of stress, a well-functioning repo market can help to maintain financial stability by providing a relatively stable way of acquiring capital without forcing institutions to liquidate assets, avoiding fire sales and contagion.

Central banks employ repo markets in the performance of monetary policy operations to expand/contract banks' holdings of central bank reserves, influence short-term interest rates, and indicate the monetary policy stance, in addition to the activities listed above. As a result, central banks might expand the function of repos in times of stress by

[49] X; *Facilitating Foreign Exchange Risk Management for Bond Investments in ASEAN+3*, available at https://asianbondsonline.adb.org/documents/abmi_facilitating_foreign_exchange_risk_management_7th_sign.pdf, accessed on 17th December, 2021
[50] X; *Facilitating Foreign Exchange Risk Management for Bond Investments in ASEAN+3*, available at https://asianbondsonline.adb.org/documents/abmi_facilitating_foreign_exchange_risk_management_7th_sign.pdf, accessed on 17th December, 2021
[51] *Ibid*
[52] X; *Considering repo on sustainable assets*, available at https://www.insightinvestment.com/investing-responsibly/perspectives/Considering-repo-on-sustainable-assets/, accessed on 17th December, 2021

conducting particular repo operations as part of their financial stability operations to allow banks to monetize liquid assets.

I.3. Insolvency

Under the Rwandan Law, issues of insolvency are the governed by law n° 075/2021 of 06/12/2021 relating to insolvency. This law defines insolvency as a situation in which an individual, a company or a partnership engaged in a business activity can no longer pay their debts as they fall due. An insolvency refers to the state where a person or a business can no longer meet their financial obligations and commitments to their creditors as loans mature, [53] An insolvent company or individual will almost certainly establish informal arrangements with creditors prior to filing for bankruptcy, such as setting up alternative payment arrangements.[54]

Insolvency can result from poor cash management, a decline in cash inflow, or an increase in expenses. Insolvency occurs when a business or individual is unable to meet their financial obligations. It can lead to insolvency procedures, in which an insolvent person or business faces legal action and their assets are liquidated to pay off their debts.[55] If a firm does not have enough assets to repay its debts (i.e. the value of assets is less than the amount of liabilities), or if it is unable to pay its debts when they become due, it is insolvent.[56] Insolvency occurs when a person is unable to pay his or her debts as they become due.[57]

There are various options available to a firm or individual that has gone bankrupt, with some of them leading to a restoration to solvency. Individuals and businesses have varied needs.[58] Business insolvency proceedings begin when the debtor is unable to pay its

[53] X; *Insolvency*, available at https://corporatefinanceinstitute.com/resources/knowledge/finance/insolvency/, accessed on 16th December, 2021
[54] *Ibid*
[55] *Ibid*
[56] Law n° 075/2021 of 06/12/2021, *supra* note 8, art. 3, 5°
[57] *Ibid*
[58] Law n° 075/2021 of 06/12/2021, *supra* note 8, art. 3, 5°

debts when they fall due in the normal course of business or when the debtor's assets are less than its liabilities plus its stated capital, according to article 7 of the aforementioned Law.

When a person becomes bankrupt, an automatic stay can be imposed, preventing creditors, collection agencies, government bodies, and others from pursuing debtors for money they owe.[59] Starting or continuing court proceedings against the debtor; acting to foreclose on a debtor's property; creating, perfecting, or enforcing a lien against a debtor's property; and attempting to repossess collateral are all actions that automatic stay clauses protect the debtor from.[60]

In the event of insolvency, creditors, collection agencies, government bodies, and others may be temporarily barred from pursuing debtors for money owed. Automatic stay clauses prevent activities such as initiating or continuing court proceedings against a debtor, moving to foreclose on a debtor's property, creating, perfecting, or enforcing a lien against a debtor's property, and seeking to repossess collateral.[61]

[59] CLAUDIA A. RESTREPO; *A Pro Debtor and Majority Approach to the "Automatic Stay" Provision of the Bankruptcy Code-In re Cowen Incorrectly Decided*, 59 B.C. L. REV. E. SUPP, 2018, p. 537-553
[60] *Ibid*
[61] Law n° 075/2021 of 06/12/2021, *supra* note 8, art. 11&12

CHAPTER II: REGULATORY FRAMEWORK OF REPO MARKET

The Rwandan Parliament has enacted several laws including the Law n° 075/2021 of 06/12/2021 relating to insolvency. This law establishes proceedings for settling issues arising from insolvency of a company, a partnership and an individual in Rwanda.[62]

As discussed earlier, the aforementioned law is silent in as far as the protection of creditors in repo market in case there is an insolvency and does not provide a clear solution to issues relating to the protection of repo market creditors in case the borrowers become insolvents. That's why this chapter is going to assess the issues in the legal framework regulating repo. Where, it focuses on the global and Rwandan regulatory framework of repo and analyses the case law which is related to the issue at hand.

II.1. Global and Rwandan regulatory framework of repo market

The Global Master Repurchase Agreement (GMRA) is the primary master agreement for cross-border repos and many domestic repo markets around the world. The Master Repurchase Agreement governs repos across the country (MRA). This part discusses both the global and Rwandan regulatory framework of repo market.

II.1.1. Global regulatory framework of repo

Repo contract is a model legal of agreement prepared for parties transacting repos which was developed and published by the International Capital Market Association (ICMA),[63] an organization that represents Europe's cross-border bond and repo markets.

[62] Law n° 075/2021 of 06/12/2021, *supra* note 8, art. 1
[63] X; *About the ICMA Centre*, available at https://www.icmacentre.ac.uk/about, accessed on 19th December, 2021

As a contractual agreement between two parties, one agrees to sell stocks to the other at a stated price in exchange for a commitment to purchase the securities back in the future for a different (typically higher) stipulated price.[64] The Global Master Repurchase Arrangement is the name of this global agreement. The Global Master Repurchase Agreement is abbreviated as GMRA.[65] The GMRA is the primary master agreement for cross-border repos and several domestic repo markets across the world.[66]

In 1992, the GMRA was first published. In 1995, it was revised to include lessons learned from the Baring Brothers crisis, and in 2000, it was updated to include lessons acquired from the Russian and Asian financial crises.[67] The most recent edition was released in 2011. Although this version was released after the Great Financial Crisis of 2007, it was not the consequence of any material flaws revealed by the crisis.[68]

Indeed, the GMRA 2000 performed admirably, even after Lehman Brothers declared bankruptcy in 2008.[69] The revision was primarily motivated by a desire to align the GMRA more closely with other master agreements. The GMRA consists of a pre-printed master agreement with standard provisions that are generic to the market in standard form,[70] as well as Annex I, which outlines particular decisions that the parties must make in order to operationalize the agreement (e.g. fixing minimum delivery periods).[71]

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[64] X; *Repurchase Agreement*, available at https://www.contractscounsel.com/t/us/repurchase-agreement, accessed on 17th December, 2021
[65] X; *GRMA definition*, available at https://www.lawinsider.com/dictionary/gmra, accessed on 19th December, 2021
[66] X; *ICMA publishes 2011 Global Master Repurchase Agreement*, available at https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2011/05/icma-publishes-2011-global-master-repurchase-agreement.pdf, accessed on 19th December, 2021
[67] X; *Global Master Repurchase Agreement (GMRA)*, available at https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/repo-and-collateral-markets/legal-documentation/global-master-repurchase-agreement-gmra/, accessed on 19th December, 2021
[68] *Ibid*
[69] AMIRSALEH A.; *The Bankruptcy of Lehman Brothers: Causes of Failure & Recommendations Going Forward*, Swiss Management Center, 2012, p. 2-19
[70] EDWARD M. et al.; *2011 GMRA*, available at https://www.fieldfisher.com/en/insights/2011-gmra, accessed on 19th December, 2021
[71] X; *GLOBAL MASTER REPURCHASE AGREEMENT AND ANNEXES THERETO (THE "GMRA")*, available at https://www.sec.gov/Archives/edgar/data/1578348/000119312519184337/d666182dex99106.htm, accessed on 19th December, 2021

If the parties want to adapt the master agreement to reflect the unique nature of their business relationship, it gives a place to put supplemental terms and conditions. Confirmations are used to document the particular commercial terms of each transaction, with a model template provided in Annex II of the GMRA.[72]

The GMRA is intended for short-term repos of basic high-quality fixed-income securities that are repurchase transactions between principals under English and Welsh law. There are a variety of national annexes to modify the master agreement to jurisdictions other than England and Wales. The parties can also include unique supplemental terms or conditions in Annex I of the GMRA.

Regulators require repos to be documented under robust written legal agreements such as the GMRA, supported by regularly updated legal advices, in order to recognize the credit risk mitigation by collateral and close-out netting in the calculation of regulatory capital requirements and large exposures.

II.1.2. Rwandan legal framework of repo

In Rwanda, repos are governed by the Master Repurchase Agreement (MRA).This MRA was introduced in 2017 by the National Bank of Rwanda (NBR) through the true repo program.[73] The NBR provided the directive which aims at establishing conditions under which counter-parties in a true repo transaction follow when engaging in true repo activities.[74]

In general, as discussed earlier, master repurchase agreements are the contracts for the buying and selling securities that have the economic effect of allowing the seller of

[72] X; *GLOBAL MASTER REPURCHASE AGREEMENT AND ANNEXES THERETO (THE "GMRA")*, available at https://www.sec.gov/Archives/edgar/data/1578348/000119312519184337/d666182dex99106.htm, accessed on 19th December, 2021
[73] Directive nº 05/2017 of 08/11/2017 on the horizontal repurchase agreement (“true repo”), art. 2.
[74] *Ibid*

securities to receive a collateralized loan from the buyer of such securities. It provides that companies can conclude a repurchase agreement whenever they need liquidity in the event they don’t wish to sell their long-term securities.

These agreements are designed for huge banks and other large financial organizations, but they can also benefit small businesses. Understanding your possible liabilities in a repurchase agreement can help you reduce the cost of putting extra cash on your balance sheet, which can help you control the cost of raising funds.

Repurchase contract should be considered as a debt secured by securities. Bank, for instance, sells bonds to another bank and pledges to purchase them back in the future at a predetermined higher price. A company can arrange something similar by selling certificates of deposit, stocks, and bonds to a bank or other financial institution with the commitment to purchase those assets back at a higher price later.

According to that MRA, the party sells the securities to other party with a pledge to purchase securities back. Meaning that, the party has to honor that commitment to buy securities back. Failure of which, its credibility would be damaged. This may also mean a missed opportunity in case the security's value increased after you repurchased it.

A party might agree on the buyback price when they sign the contract so that they can manage their cash flow and have funds ready for the transaction. The repo rate is the percentage that a party is willing to pay to repurchase back securities. When it comes time to repurchase, a party may have to pay a 10% premium. Margin payments are one possible expense of a buyback agreement. When the value of the security lowers before you repurchase it, a party must make these. The entity owning the securities may demand additional funds to compensate for the loss of value.

Another example is that in case the guaranty is a bond and the market judges that the bond is no longer worth what it was when the repurchase agreement was put into; the party must make a margin payment to repay the company that traded it to.

II.1.2.1 Repo Collateral under Rwandan Law

As discussed earlier, Repo transaction presents itself as a secured loan whereby the Seller entrust securities the repo buyer as collateral that supposedly guarantees the buyer of reimbursement of the funds invested. The Law on security interests in movable property defines a movable property as various personal property either tangible or intangible. It further clarifies what it treats as intangible property to include among others accounts receivable, chattel paper, documents of title**,** negotiable instruments, intellectual property or other assignable rights or money.[75]

In the light of the foregoing, one cannot hesitate to classify Repo collaterals as movable properties since they fall in the intangible properties as defined above. This drives our interest to know the extent to which the law on security interests in movable property is applicable to this type of agreement. Article 5 of the Law N°34/2013 of 24/05/2013 on security interests in movable property states that security interest shall be made when a written security agreement is concluded between the secured creditor and the debtor, value is given by the secured creditor and the debtor has rights in the collateral. The same Law further stipulates that for a security interest to be effective against third, it must be registered in the Office of the Registrar General and the secured creditor has to take possession or control of the security.[76]

For Repo, one can assert that only one requirement out two is complied with since with repo there is a temporary transfer of securities whereby one party gives legal title to a security to another party for a limited period of time. However, it should be noted Repo Creditors are missing the crucial part of registering their security interest with Registrar General. This makes the security invalid as it is not registered as provided for by the Law. The buyer of Repo will be left with only an unsecured claim against the seller for the repurchase price, which simply means Repo Creditor in Rwanda is considered as unsecured creditor.

[75] Law N°34/2013 of 24/05/2013 on security interests in movable property, art. 2(15^0)
[76] Idem,art.8

Even though Repos possibly are considered as commercial loans because several characteristics of both retail and wholesale repo transactions closely resemble short-term loan agreements.[77] It is important to recall that Repo also presents its self as a combination of sale & repurchase of asset, whereby the seller has use of cash and the buyer has use of asset during repo term. This means that one party gives legal title to a security to another party for a limited period of time. As a new owner, the Repo holder can sell it whenever s/he needs liquidity because at the maturity of Repo contract the buy will not be obliged to re-sell the exact securities s/he bought before. In order to keep the repo agreement intact, they swap something else of equivalent value, usually a similar security. The repo's collateral is subsequently replaced by the substitute security.[78] This is the main reason that registering Repo Collateral with Registrar General seems to be impossible.

We cannot, therefore, suggest repo collateral to be registered by Registrar General as we would be treating repo as a secured loan, which would infringe certain privileges normally owned by repo lenders such as re-using the securities and not being required to return the same collaterals.

II.2. Insolvency challenges in repo

In order to mitigate the credit risk by collateral and close-out netting in the calculation of regulatory capital requirements and large exposures, regulators require repos to be documented under robust written legal contract like the GMRA, supported by regularly updated legal advices.[79]

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[77] X; *What is a repurchase agreement (repo loan)?*, available at https://www.bankrate.com/glossary/r/repurchase-agreement-repo-loan/, accessed on 17th December, 2021

[78] X; REPO COLLATERAL SUBSTITUTION, available at https://www.dtcc.com/clearing-services/ficc-gov/repo-subs, accessed on 14 May 2022

[79] EWERHART C. & TAPKING J.; *Repo markets, counterparty risk, and the 2007/2008 liquidity crisis, working paper seriesno 909 / june 2008, p 8*, Available at https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp909, accessed on 31st December 2021

Repo markets, like other financial markets, face operational risk, counter-party credit risk, and market risk. A range of risk management measures, such as the initial margins and the use of collateral , position limitations with counterparties, daily marking to market of collateral and concentration limits for certain assets, are used to reduce but not eliminate these risks. Posting assets as collateral reduces counter-party credit risk, or the risk that one party to a transaction would default. In most cases, the collateral is legally the property of the cash provider, who has the right to sell it if the security lender defaults on the loan.[80]

Market risk is the most significant risk in a repo deal. Price volatility and the ease with which the value of the collateral can be realized in a sale are both sources of market risk. A drop in the price of the securities used as collateral can result in the repo being under-collateralized. To mitigate these risks, repos include an initial margin (or "haircut"), which adjusts the amount of cash (or securities) issued to assure overcollateralization, usually in favor of the cash provider. In other words, a haircut is imposed to the collateral to reduce the cash lender's liability in the event that the borrower is unable to repay the principle plus interest and the collateral's liquidation value falls below the creditor's claim.[81]

Every morning, the collateral is marked to market, and the margin is revised depending on the previous night's closing price. The magnitude of the haircut reflects the market risk of the collateral, with larger margin required for longer-maturity bonds and lower-rated assets due to higher price volatility. Operational risks associated with the transfer and management of collateral exist in repo markets.

[80] X; *Counter-party credit risk definitions and terminology*, available at https://www.bis.org/basel_framework/chapter/CRE/50.htm, accessed on 19th December, 2021
[81] EWERHART C. & TAPKING J.; *Repo markets, counterparty risk, and the 2007/2008 liquidity crisis, working paper seriesno 909 / june 2008, p 8*, Available at https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp909, accessed on 31st December 2021

Delivery versus payment (DVP) is a type of settlement in which cash is handed in exchange for the collateral. However, collateralization has little effect on the likelihood of a counterparty defaulting.[82]

As a result, collateral obtained from hazardous counterparties is more likely to be put to the test in the event of a default, and it may turn out to be worth less than planned due to market volatility and the impact of liquidation. As a result, collateral should be viewed as insurance against the seller's default rather than a straightforward replacement for his credit risk.[83]

Either side to a repo could default. A "failure" to deliver a security occurs when a trade involving a security does not close on time. In the repo market, such a failure is not considered a contractual default. Instead, the failing security provider can supply the following day for the same invoice price. The security provider is vulnerable to price fluctuations in the securities and loses the interest that could have been received by investing the money overnight.

Another operational risk is the possession of collateral. Bilateral repo, tri-party repo, and hold-in-custody repo are the three forms of repo, each having various benefits and costs that are reflected in the repo rate and haircut. In a bilateral repo, the collateral is held on the cash provider's balance sheet, allowing instant access in the case of loan default.

An agent stands between the security lender and the cash supplier in a tri-party repo and physically supervises the securities given as collateral. The original counter-parties remain the transaction's principals, but the agent, usually a custodial bank, handles the collateral, making substitutes as needed, monitoring risk, and collecting payments. In the

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82 ALEXANDRA T.; *Delivery Versus Payment (DVP)*, available at https://www.investopedia.com/terms/d/dvp.asp, accessed on 19th December, 2021

83 X; *Frequently Asked Questions on Repo,p.18*, available at https://www.icmagroup.org/assets/documents/Regulatory/Repo/Repo-FAQs-January-2019.pdf, accessed on 31 December 2021

event of default, the cash supplier retains legal title to the collateral. In a hold-in-custody repo, the security lender keeps the bond in a segregated account on their balance sheet, increasing the risk to the cash provider.

The interest rate at which a repo transaction is agreed reflects the risks indicated. Riskier types of collateral often have higher repo rates than GC collateral. Other factors can have a substantial impact on repo rates. High demand for a particular asset in the special repo market can put significant downward pressure on repo rates for transactions involving that security as it becomes increasingly scarce.

In other words, when cash providers need to borrow a specific security, such as to cover a short position, they will accept a lesser return on their cash. In times of extreme market instability, increased demand for safe government securities and a general aversion to reposing them out might put downward pressure on rates across the GC repo market.

In their repo master agreements, the parties agree on a series of risk mitigation instruments, as mentioned in this section, in particular close-out netting and collateral, as a method of protection.[84] However, if one of the parties fails, the terms are likely to be unenforceable since they conflict with several general insolvency regulations, particularly those designed to protect the paripassu concept.

Returning to Rwandan law, insolvency law provides that:[85]

1° the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations, or liabilities;
2° the execution of judgments related to the debtor's property assets;
3° the right of counterparty to terminate any contract with the debtor;
4° the right to transfer, mortgage, or otherwise dispose of a debtor's property assets.

[84] PHILIPP P.; *Repo and Derivatives Portfolios Between Insolvency Law and Regulation,* available at http://eprints.lse.ac.uk/87558/1/Paech_Repo%20and%20Derivatives_Author.pdf, accessed on 25th December 2021
[85] Law n° 075/2021 of 06/12/2021, *supra* note 8, art. 11

The rights of secured creditors and holders of right of retention are not affected by the start of insolvency procedures, according to this law.[86] It's worth noting that, under Rwandan law, a security interest is only valid if it's been registered with the Registrar General.[87]

All claims, including secured claims and rights of retention, are stayed if the debtor intends to submit a reorganization plan together with the application to begin insolvency proceedings.[88] Within three (3) months of the court case being filed, the debtor must present a restructuring plan to the court. On secured claims, the stay term is limited to six (6) months.[89]

If the above-mentioned term passes without a judicial ruling, the secured creditor is immediately entitled to enforce the security in accordance with applicable laws.[90] An unsecured creditor is someone or a company that lends money without requiring specific assets as collateral.[91] In case the borrower fails to settle an unsecured debt, the creditor cannot confiscate any of the borrower's assets until the creditor first wins a case. An unsecured creditor is a debenture holder. Secured creditors may seize assets as payment for a debt owed to them by the borrower.

Because the borrower stands to lose more if he or she defaults on a secured loan, while the lender stands to gain an asset, this sort of debt carries less risk for the lender. Secured creditors, unlike unsecured creditors, do not have to file a legal case in court and obtain a judgment before proceeding with wage garnishment and other liquidated borrower-owned assets.

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[86] Law n° 075/2021 of 06/12/2021, *supra* note 8, art. 12
[87] Law N° 34/2013 of 24/05/2013 on security interests in movable property, art.7
[88] Law n° 075/2021 of 06/12/2021, *supra* note 8, art. 11
[89] *Ibid*
[90] *Ibid*
[91] X; *Unsecured creditor definition*, available at https://www.accountingtools.com/articles/unsecured-creditor, accessed on 19th December, 2021

Under current Rwandan legislation, repo creditors are considered as unsecured considering that repo collaterals are not recorded by the Registrar General; this poses a higher risk to the creditor in case the repo buyer becomes insolvent during time life of repo contract. This means that this “stay” provided for by this Law infringes the rights of the creditors in repo market since it prevent them to proceed with liquidating the securities for covering their rights against an insolvent debtors. Unsecured loan carries higher interest rates than secured debt due to the lender's higher risk, putting a greater financial burden on the borrower.

Thus, defaulting on an unsecured obligation can harm a borrower's creditworthiness, making it much less likely that an unsecured creditor will offer credit to them in the future; which discredits the repo market as whole. The defaulting on unsecured debt may mean that it is a case of unsecured debt, where there is no collateral that can be taken.

II.3. HomeBanc Case

II.3.1. Summary

This is the case by which HomeBanc was in the business of originating and securitizing residential mortgage loans, and between 2005 and 2007 it financed its operations in part by placing on repo with Bear Stearns certain mortgage-backed securities that it had originated and held on its books.[92]

In 2007, soon after the residential mortgage market first became stressed, HomeBanc defaulted on its obligations to Bear Stearns, filing for bankruptcy protection days later. Upon HomeBanc’s default, Bear Stearns was contractually required to ascertain the value of the reposed securities, and it conducted a bids-wanted-in-competition auction to do so. Eventually, HomeBanc’s bankruptcy trustee took issue with Bear Stearns’ actions and a decade of litigation commenced.

[92] Terminating Repurchase Agreements: In re HomeBanc Mortgage Corp., 945 F.3d 801 (3d Cir. 2019)

II.3.2. Outcome and analysis

The section 559 of the Bankruptcy Code of United States of America provides a safe harbor that allows repo participants to liquidate repo collateral consistent with the parties' contract, notwithstanding the automatic stay that would otherwise protect assets from creditors.[93] It means that this safe harbor recognizes the need for speed critical to the underlying purpose of repo financing arrangements and allows lenders to move quickly in the case of default.

The HomeBanc reinforced this statutory purpose. The court noted that Section 559 is among the congressionally introduced exceptions to the general rule prohibiting *ipso facto* clauses for swaps and certain other types of financial contracts to address volatility in the financial markets.[94]

Basing on that, the absence of such protections would put the non-defaulting party at substantial risk, holding the bag if depreciating assets could not be valued or sold expeditiously. Consistent with the need to allow repo lenders to act quickly, the HomeBanc court also rejected the notion that credit enhancements were not subject to the protection of the Section 559 safe harbor.[95]

Among the securities HomeBanc put on repo were several that the court held were credit enhancements (i.e., additional collateral supporting the existing loan) under the bankruptcy code because the confirmations reflected that these securities were purchased, individually, for zero dollars.

HomeBanc's trustee argued that Section 562 of the code provides a more limited safe harbor, should apply to credit enhancements.[96] The court disagreed, recognizing that obligating a repo lender to isolate credit enhancements from other reposed securities,

[93] Title 11 – Bankruptcy, *supra* note 7, § 559
[94] Title 11 – Bankruptcy, *supra* note 7, § 559
[95] *Ibid*
[96] *Ibid*, § 562

and then auction them separately to value them in the event of default, would be impractical and unduly cumbersome.

The court also concluded that Section 559's protection applied regardless of whether the liquidation satisfied, exceeded, or fell short of the repo debt (and accordingly, whether there were excess funds being returned to the bankruptcy estate) stating, "[t]he text reveals that § 559 can apply when there is an excess, shortfall, or break-even amount."[97]

According to this HomeBanc Case, experience shows that repo default and the lender's response often must occur within a matter of days, if not hours. Litigation challenging repo lenders' actions always will have the benefit of hindsight. However, if financiers are mindful of the road map set by cases like HomeBanc, they will be in the best position to defend their actions and reap the benefits of the protections provided by applicable law.

[97] Title 11 – Bankruptcy, *supra* note 7, § 559

CHAPTER III: LEGAL MECHANISMS FROM PRIVILEGES OF REPO IN DIFFERENT COUNTRIES

This chapter discusses on the legal mechanisms from privileges of repo in different countries. Where, it looks on the US and European repo market, in section one and two respectively. Whereas, in three, it focuses on the strengthening mechanisms in the law; where it considers the Central Bank role; the change of repo structural features; and strengthening market practices and surveillance.

III.1. US repo market

From its commencement in 1918,[98] the US Treasuries repo market has become the largest in the world with a daily volume of more than one thousand billion US dollars ($1,000) billion. However, despite its significance, the law on the treatment of repos is limited.[99] There are some regulations on securities laws or taxation that regulate repos. Laws concerning secured transactions which are also connected to bankruptcy laws governs the main legal matters regarding Repos.

Secured transactions are regulated by the Uniform Commercial Code (UCC),[100] which determines the framework to deal with financial transactions that involve a device known as "securities interest" when an obligation is secured by an interest in personal property or fixtures. It covers "any transaction, regardless of form, which is intended to create a security interest in personal property."[101]

Considered from the law, repos may fall into the definition of secured transactions and if so, they fail to conform to the requirement of perfection and attachment in order to be effectively enforceable as is the aim. There are several cases in which repos are defined

[98] X; *Liberty Bonds*, https://www.federalreservehistory.org/essays/liberty-bonds, accessed on 20th September, 2021
[99] DARRELL D.; *Still the World's Safe Haven? Redesigning the U.S. Treasury Market After the COVID19 Crisis*, Hutchins Center Working Paper, June 2020, p. 2-23
[100] The Uniform Commercial Code (UCC); first published in 1952, art. 9
[101] *Ibid*, art. 9, § 9-101

as secured loans for various reasons, for instance, from an economic point of view, the fact that perfection is created and the underlying intention of the parties.

However, the problem is that, if repos are viewed as secured transactions, they will fail the test in terms of formality and perfection, especially since the buyer can re-use the securities and is not required to return the same ones. If repos fail as perfect security interest, the enforcement of a secured transaction cannot be effectively applied and the whole transaction may collapse.

Hence, there is also the view that repos should not be interpreted as secured loans because this would severely affect the transaction, and it is too enormous and important a distortion from the original concept. In fact, the US bankruptcy laws include protection for failing businesses, as well as bringing order to various creditors, who are trying to obtain a share of the assets of their insolvent debtor.

The UCC provides the main principle applied to address this problem by drawing a line between creditors' protection and debtors' hope for rehabilitation.[102] The UCC focuses on liquidation, which benefits secured creditors more,[103] alternatively aims to preserve economic value for the failed firm's continuous operation, the result of which would benefit others, such as shareholders, employees, customers and suppliers, as well as unsecured creditors.[104]

Still, ***repos (as well as swaps and other derivatives contracts***) are barely mingled in bankruptcy provisions, such as the automatic stay. Apparently the law provides some kind of shield, as critics call it, known as ***safe harbors*** or exemptions for these kinds of contracts.

[102] The Uniform Commercial Code (UCC), *supra* note 103, art. 11
[103] The Uniform Commercial Code (UCC), *supra* note 103, art. 7
[104] *Ibid*, art. 11

This leads to many critics questioning the appropriateness of providing so-called safe harbors for repos (and other similar transaction) because, from their perspective, if repos are exempted from the bankruptcy process, particularly automatic stay, it may affect the stability of the financial system. There are still arguments regarding the characteristics of repos in the US. Different case laws provide different views of the transaction. Since the law has a neutral approach to repos, the issue of their characterization is not a concern. Repos still stand on a line between being treated in the way they were meant to be (true sales) or the way they actually are and as many believe they should be (secured transactions).

The same as in other jurisdictions, there is no specific requirement in terms of the form of repo. Theoretically, the transaction can be made face-to-face or over the telephone; however, if it is done over the telephone, it needs to be confirmed in writing by documents in the form of contract notes. In addition, the International Capital Markets Association (ICMA), a US-based body,[105] developed the market standard documentation for repos in the market inside the US and developed it into a GMRA to be used in the global market, and this agreement has been used as a standard agreement in practice since its inception.

Notwithstanding the aforementioned, there remains a risk of re-characterization. If the repo happens to be interpreted as a secured loan, the perfection under the principle of a secured transaction will be applied to determine if repo complies with the law in order to be effectively enforced or not.

There would be no problem related to the right of the buyer to use the securities during the term of the repo as long as the parties agree. A problem occurs in the US if the seller is declared insolvent and the repo is re-characterized as a secured transaction because the use of any securities that had been made may cause the transaction to lose perfection and the eligibility to obtain the benefit of secured transaction protection.

[105] X; *ICMA Headquarters*, available at https://icma.com/contact/, accessed on 20th December, 2021

Due to the lack of clarity related to whether a repo should be a true sale or a secured transaction, the enforcement of the transaction is a subject for debate, especially in cases where the seller is insolvent. Under US bankruptcy laws,[106] counterparties of derivatives, including repo, are exempted from automatic stay , whereby they allowed to liquidate collateral or to impose any other contractual enforcement remedies against a debtor or its property, namely closing out, netting, and setting off their derivatives positions.[107]

III.2. European repo market

The usage of repo in Europe is governed by a slew of laws and regulations enforced by a variety of regulatory bodies. Since the Great Financial Crisis, regulation has become substantially more stringent. Repo is influenced directly by laws and regulations implementing the EU Financial Collateral Directive[108], as well as the Short Selling Regulation[109] and the Securities Financing Transaction Regulation (SFTR),[110] and indirectly by banking and securities market regulators enforcing the Capital Requirements and similar Directives and Regulations on market users such as commercial banks and investment banks.

Other EU laws and regulations that affect the repo market include the European Market Infrastructure Regulation (EMIR),[111] the Markets in Financial Instruments Directive (MiFID),[112] and Regulation (EU) No (MiFIR). The BRRD (Bank Resolution and Recovery

[106] RICK S.; *BANKRUPTCY BASICS FOR CREDITORS*, available at https://www.pricemeese.com/blog/bankruptcy-basics-for-creditors/, accessed on 20th December, 2021
[107] X; *Automatic Stay, What Is It And Does It Protect A Debtor From All Creditors?*, available at https://www.cacb.uscourts.gov/faq/automatic-stay-what-it-and-does-it-protect-debtor-all-creditors, accessed on 20th December, 2021
[108] X; *Financial collateral arrangements*, available at https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/financial-collateral-arrangements_en, accessed on 21st December, 2021
[109] X; *Short selling*, available at https://www.esma.europa.eu/sections/short-selling, accessed on 21st December, 2021
[110] X; *SFTR Reporting*, available at https://www.esma.europa.eu/policy-activities/post-trading/sftr-reporting, accessed on 21st December, 2021
[111] X; *Derivatives EMIR*, available at https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-markets/post-trade-services/derivatives-emir_en, accessed on 21st December, 2021
[112] WILL K.; *Markets in Financial Instruments Directive (MiFID)*, available at https://www.investopedia.com/terms/m/mifid.asp, accessed on 21st December, 2021

Directive),[113] the CSDR (Central Securities Depository Regulation),[114] a potential Securities Law Directive,[115] and the Crisis Management Directive[116] are among the others.

The repo market is an important part of today's financial ecosystem, since it facilitates a number of crucial services and interacts with a wide range of financial markets. For insolvency procedures in EU member states other than Denmark, there has been a European-wide system of recognition since 2000.[117] The Recast European Insolvency Regulation has now replaced this framework (EU Recast Regulation).[118]

The Recast Regulation's main goal is to codify how a member state determines whether it has jurisdiction to initiate pre-insolvency or insolvency proceedings, as well as to impose a standard approach to the governing law that governs those proceedings.

Following the determination of these considerations, the procedural rules of the member state in which the proceedings are initiated will normally apply. Insolvency proceedings will be automatically recognized throughout the EU under the Recast Regulation. The Recast Regulation establishes a unified code of governing law, which, when combined with the mandatory regime of jurisdiction rules, aims to make it easier for those dealing with a debtor whose main interests are located within the EU to identify with greater

[113] X; *Bank recovery and resolution*, available at https://ec.europa.eu/info/business-economy-euro/banking-and-finance/financial-supervision-and-risk-management/managing-risks-banks-and-financial-institutions/bank-recovery-and-resolution_en, accessed on 21st December, 2021
[114] X; *The Central Securities Depositaries Regulation (CSDR)*, available at https://www.pershing.com/uk/en/news/what-is-big-in-our-world/regulation/csdr#:~:text=The%20Central%20Securities%20Depositories%20Regulation%20(CSDR)%20introduces%20new%20measures%20for,standards%20at%20a%20European%20level., accessed on 21st December, 2021
[115] X; *European Security Law*, available at https://www.coleurope.eu/european-securities-law, accessed on 21st December, 2021
[116] X; *How the EU responds to crises and builds resilience*, available at https://www.consilium.europa.eu/en/policies/eu-crisis-response-resilience/, accessed on 21st December, 2021
[117] CLIFFORD C.; *A GUIDE TO RESTRUCTURING AND INSOLVENCY PROCEDURES IN EUROPE*, Global Restructuring and Insolvency Group, 2019, p. 6-226
[118] Regulation (EU) 2015/848 of the European Parliament and the Council

certainty the substantive legal provisions that will determine their rights in the event of that debtor's insolvency.[119]

The general norm is that the legislation that applies to insolvency procedures and its implications is the law of the member state whose territory the proceedings are started. As a result, unless subsidiary or territorial proceedings can be brought, the law of the main proceedings is likely to prevail. The precise jurisdictional considerations outlined in the latter portion of this letter become relevant after the proceedings are initiated.

The Recast Regulation recognizes that strict adherence to the general rule may conflict with the regulations that govern transactions in other member states, and as a result, the general rule is subject to a variety of exceptions and carve-outs.

'Rights in rem' include, among other things, security rights (including holders of floating security over a fluctuating pool of assets), rights of set-off permitted by the law applicable to the insolvent debtor's claim, rights under a reservation of title clause, contracts relating to immovable property, payment system and financial market rules, and employment contracts.[120]

The placement of asset regulations in the Recast Regulation specifies where an asset is located for the purposes of insolvency proceedings.[121] During judicial reorganization in Belgium, an automatic stay is granted for a period of up to 6 months (which can be extended to a maximum of 18 months if assets are transferred).[122]

A definitive moratorium can last up to 5 years from the date of the collective bargaining agreement's approval. There are exceptions for secured creditors and enforcement

[119] Regulation (EU) 2015/848, *supra* note 121
[120] *Ibid*
[121] Regulation (EU) 2015/848, *supra* note 121
[122] CLIFFORD C.; *supra* note 120, p. 6-17

proceedings that were already well underway when the petition for judicial reorganization was submitted.[123]

The automatic stay is offered in administration in England and Wales. For secured creditors, there are some exceptions (who may enforce security with leave or consent).[124] Mandat ad hoc and conciliation proceedings in France do not have an automatic stay, but a debtor can ask the court for a deferral of payment for up to two years with respect to particular creditors.[125]

The payment of pre-filing debt and the beginning of legal actions are automatically stayed in safeguard, expedited safeguard, accelerated financial safeguard, judicial rehabilitation, and liquidation processes (such automatic stay only affects financial creditors in accelerated financial safeguard proceedings).[126]

In Germany, the insolvency court might impose a provisional stay of execution during preliminary proceedings. Security enforcement is allowed after the start of insolvency proceedings, with the exception of claims allocated for security purposes and assets in the administrator's control, unless a court order prevents it.[127]

The automatic stay is provided in Italy in Composition with Creditors and Restructuring Agreements for a maximum of two years. Security cannot be enforced (except for pledges, which can be enforced according to their terms).[128] In order to combat common apparent abuses by debtors, the insolvency legislation states that such a delay will no longer be automatic, but will be given upon request in the petition for admission of the concordatopreventivo. The court must confirm or revoke the order within 30-45 days. If confirmed, the stay must not exceed 12 months.[129]

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[123] *Ibid*
[124] *Ibid*
[125] *Ibid*
[126] *Ibid*
[127] *Ibid*
[128] CLIFFORD C.; *supra* note 120, p. 6-17
[129] *Ibid*

Thus, European repurchase agreements differ from those in the United States. In fact, three distinctions were discovered. One difference is the legal structure of the repo; the other two are linked to the structure and operation of the repo markets.

III.3.Strengthening mechanisms in the law

Strengthening the law meant reform of legislation and enforcement of it. This part focuses on the strengthening mechanisms in the law; where it is considering the Central Bank role, changing repo structural features, and strengthening market practices and surveillance.

III.3.1. Considering the Central Bank role

The National Bank of Rwanda serves as Rwanda's central bank (NBR). Its purpose is to maintain price stability and a stable financial system.[130] The NBR is crucial in developing ideal policies for repo and creditors, particularly in the event of insolvency.

Indeed, as previously said, securities are exchanged for cash with an agreement to repurchase the securities at a later period in repo transactions. The securities are used as collateral for a loan that is basically a cash loan, and the cash is used as collateral for a securities loan.

Standard repurchase agreements, sell/buy-backs, and securities lending are all examples of transactions that are defined as repos for the purposes of this study. One of the most defining characteristics of repos is that they can be utilized to obtain funds or securities.

Market players value this feature because it allows them to receive the securities they need to fulfil other contractual commitments, such as making delivery for a futures

[130] Law n° 48/2017 of 23/09/2017 governing the National Bank of Rwanda as amended to date, in *O.G. nº 41 of 09/10/2017*, art. 6

contract. Furthermore, repos can be used for leverage, to fund long and short positions in assets, and to hedge interest rate risks.

Repo markets have strong links with securities markets, derivatives markets, and other short-term markets including interbank and money markets because repos are short-maturity collateralised instruments. The NBR uses repo as a tool for monetary policy and as a source of information on market expectations.

Repos are appealing as a monetary policy tool because they have a low credit risk and can be used to manage liquidity in a variety of ways.[131] They can also act as an effective instrument for signalling monetary policy direction. Because the credit risk premium in repo rates is often minimal, repo markets supply NBR with relatively accurate information on extremely short-term interest rate expectations.

They supplement information on longer-term expectations acquired from assets with longer maturities in this regard. An assessment of the risks that repo market players experience can aid in determining the conditions required for healthy repo markets.
Repo markets, like all other financial markets, face credit risk, operational risk, and liquidity risk. As a result, the NBR plays an important role in Rwanda's financial sector.

A number of structural features and market practices should help to ensure that repo markets are sound and efficient. To reduce risks and maintain the effective and sound operation of markets, a proper legal framework and settlement mechanism, as well as good margining techniques, are necessary, while others are probably less so.

In addition to encouraging these features and procedures, the NBR should monitor repo markets to verify that these practices are followed and to detect instances of market manipulation or abuse. For solid and efficient repo markets, a number of traits and market behaviours are particularly important:

[131] X; *REPO*, available at https://www.bnr.rw/browse-in/financial-market/money-market-instruments/repo/, accessed on 22nd December, 2021

i. A sufficient and efficient legal framework: The repo contract (including buy/sell-back and securities loan arrangements) should have a clear legal definition, with unambiguous certainty as to legal rights vis-à-vis the counterparty in the event of a default. Well-structured legal documents should be used to supplement the legal framework.

ii. Reliable and secure settlement systems: Because the securities leg of a repo acts as collateral for the cash leg, failing to settle on time creates a credit risk. Safe settlement techniques based on delivery-versus-payment (DVP) arrangements can be used to mitigate this risk.

iii. Appropriate haircuts and margin call practices: While collateral decreases credit risk, market participants are nonetheless exposed to credit risk due to collateral value volatility, counterparty default, and liquidity risk. Haircuts and margin call processes can help to mitigate these risks if they are set at levels that are proportional to the risks and changes are made as needed.

iv. Adequate transparency: Creditors require enough thorough and relevant information to analyze the risks they encounter on a regular basis in order to successfully manage their risk in repo markets.

III.3.2. Changing repo structural features

The specific repo approach should be implemented since the most pressing legal concern is the enforcement of repo agreements. The way the collateral is treated legally is critical. When counter-party in a repo transaction fails, one of the most important features of legal agreements is the certainty of rights.

When this happens, the legal reasons for exercising rights on the securities (or cash) used as collateral should be clear. A market participant whose counterparty in a repo transaction defaults should have a legally completed stake in the cash or securities received as collateral, according to the legal arrangements (in the sense of being the only claimant).

Because a repo cannot be regarded a collateralized instrument without such a legal foundation, the credit risk reduction benefit of a repo cannot be realized. It's also critical that the legal structure is backed up with proper legal documents, such as a master agreement that specifies out the repo contract's specifics.[132]

Securities settlement systems must be sound in order for repo markets to function properly. Market participants' systems should also be sufficiently developed to handle settlement-related risks and issues. Settlement system limitations might potentially stifle repo market efficiency.

Same-day settlement of repos (particularly on a DVP basis)[133] is limited or unavailable in some jurisdictions, which can stifle the growth of overnight and same-day repos. Authorities responsible for securities settlement systems may want to study if such same-day settlement methods may be supported to support the full range of hedging and funding operations that repo markets can provide.
Finally, some settlement and clearing systems lack independent repos identification to permit intermediate coupon payments. Authorities may wish to consider if this can be supported, as it may limit the use of collateral in repos. Transaction costs can stifle the growth of repo markets by making collateralized markets less appealing compared to uncollateralized markets.

III.3.3. Strengthening market practices and surveillance

In addition to these structural aspects, the regulator could promote a number of market behaviors to help the establishment of sound and efficient repo markets. The impact and

[132] Directive nº 05/2017 of 08/11/2017, *supra* note 77, art. 2
[133] X; *Delivery Versus Payment (DVP)*, available at https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/delivery-versus-payment-dvp/, accessed on 22nd December, 2021

significance of these behaviors differ. To mitigate the risks that develop in repo markets, good haircut and margin call policies are required.[134]

Other practices, such as those relating to timely delivery and fail rules, help to improve efficiency and decrease the potential for market manipulation and abuse. Market liquidity and efficiency are improved through techniques such as the use of substitution rules.The technique of pricing collateral to market, both at the start of the repo and during its life, is critical to the smooth and effective running of repo markets. Lenders should use solid credit standards in repo transactions, such as haircut and margining regulations, as well as limits on unsecured exposures.

These restrictions and procedures should reflect the risks inherent in the repo contract, such as the underlying security's price volatility, liquidity risk, and the repo borrower's creditworthiness. Participants can retain more effective control of collateral by following sound haircut and margin standards. Repo transactions can become under-collateralized exposures if margin and safekeeping practices are not followed.

Participants in repo transactions must be aware of the risks connected with collateral and keep track of changes in its value. Haircutting practices might fall short in a number of ways that need to be addressed.[135] First, repo haircuts are sometimes focused primarily on volatility in the value of the collateral and the counterparty's credit standing, and they tend to overlook other risks such as liquidity risk, which is more difficult to quantify.

Second, haircuts may be vulnerable to competitive pressures, resulting in their being driven below the amount required to compensate lenders for their risks. Third, there is a propensity to rely on collateral as the primary means of risk control, failing to effectively account for the risk of borrowers' total position in financial markets, partly due to a lack of essential information. The haircuts for short-maturity repos, which are typically rolled over,

[134] X*; Haircut and Margin*, available at https://www.oreilly.com/library/view/key-financial-market/9780273750123/html/chapter-029.html, accessed on 22nd December, 2021
[135] X; *The role of margin requirements and haircuts in pro-cyclicality*, available at https://www.bis.org/publ/cgfs36.pdf, accessed on 22nd December, 2021

are determined when the Master Agreement establishing the trading relationship is drafted and can be difficult to amend as market conditions change.

Market surveillance should take into account the fact that repos cover multiple markets, some of which may have a large presence of non-banking organizations and where regulatory and supervisory authority may be shared among several bodies.[136] As a result, market surveillance should take precedence over institutional surveillance.

When a market situation arises that has the potential to negatively impact market functioning and involves many types of institutions, authorities should work together. As a result, the NBR will need to collaborate with other institutions such as exchange authorities and private associations while conducting market surveillance. Another issue is that regulators should have sufficient data about repo markets in order to perform surveillance.

[136] WILL K.; *Market Surveillance*, available at https://www.investopedia.com/terms/m/marketsurveillence.asp, accessed on 22nd December, 2021

GENERAL CONCLUSION AND RECOMMENDATIONS

The objective of this research was to review the Rwandan legal framework relating to the repo market with utmost aim to assess whether there is a need to improve national legislation so that creditors in repo market can be protected in event of the bankruptcy of the borrowers. The study consisted of the analysis whether in the event of insolvency of the borrower, the repo collateral should be exempted from automatic stay or should automatic stay be applied in case a repo borrower files for insolvency.

In chapter one, this research discussed the definitions of key concepts and general consideration on repo market. Where, it focused on the definitions of key concepts, such as creditor, insolvency, and collateral. It focused on the general consideration on repo market, where it emphasizes on the meaning of repo, mechanics of repo, legal structure of repo and importance of repo.

In chapter two, this research assessed the issues in the legal framework regulating repo. Where, it focused on the global and Rwandan legal framework governing repo. Lastly, it analysed the case law which is related to the issues that has been raised. In this part of research, it was realized that individual actions or proceedings regarding the debtor's assets, rights, obligations or liabilities or the right of counterparty to terminate any contract with the debtor among other are all stayed upon the commencement of the insolvency proceedings, except the rights of secured creditors and holders of the right of retention. As discussed in the part of Repo as collateral under Rwandan law, Repo holder are considered as unsecured creditors since repo collaterals cannot be registered with Registrar General; this brings us to affirm that in case a repo borrower commence of the insolvency proceedings Repo claims shall be stayed as any other unsecured loan . We found this as a gap because in this case the repo creditor cannot take any of the borrower's assets without winning a lawsuit first whereas secured creditors may repossess assets as payment for a debt using the borrower's collateral. This infringes the rights of the creditors in repo market since it prevents them to proceed with liquidating the securities for covering their rights against insolvent debtors.

In addition , the where the debtor shows the intention to submit a reorganization plan along with the application to commence insolvency proceedings, all claims including secured claims and rights of retention shall be stayed.[137] With the nature of Repo we find this as gap since repo should not be put on hold in any way as this poses a higher risk to the creditor in case the repo buyer becomes insolvent during time life of repo contract."

In chapter three, this research discussed the legal mechanisms that privilege Repo market in different countries. Where we looked on the US and European repo market. It also focused on the strengthening mechanisms in the law; where it considered the Central Bank role; the change of repo structural features; and strengthening market practices and surveillance.

As discussed in the above chapters, when one party sells securities to another and agrees to repurchase those securities at a better price later, this is known as a repo. The securities are used as security. The interest paid on the loan, known as the repo rate, is the difference between the securities' initial price and their repurchase price. The repo is significant because it allows financial organizations that possess a lot of assets to borrow inexpensively, and it allows people who have a lot of spare cash to receive a tiny return without taking any risks. It helps the central bank to conduct monetary policy.

However, its re-characterisation risk should not be neglected whereby if treated as loan collateral, there is a risk that the security will not be valid as it will not have been registered by Registrar General, which would expose lender to be unsecured lender. We cannot suggest repo collateral to be registered by Registrar General as we would be treating repo as a secured loan, which would infringe certain privileges normally owned by repo lenders such as re-using the securities and not being required to return the same collaterals.

[137] Law n° 075/2021 of 06/12/2021, *supra* note 8, art. 11

In addition, under the terms of the repo, the buyer pays over to the seller any payments made on the financial asset during the repo term and the buyer agrees that any voting or instruction rights in relation to the financial asset are to be exercised by the buyer as instructed by the seller.[138]

Moreover, on the purchase date for a transaction, Seller should transfer the purchased securities to buyer or its agent against the payment of the purchase price by the buyer. However, the commitment of the seller to buy back the assets in the future means that the buyer has only temporary use of those assets, while the seller has only temporary use of the cash proceeds of the sale, which makes the sale an ineffective.

As discussed earlier, due to the lack of clarity related to whether a repo should be a true sale or a secured transaction, the enforcement of the transaction is a subject for debate, especially in cases where the seller is insolvent. Under US bankruptcy laws,[139] counterparties of derivatives, including repo, are allowed to exercise their contractual enforcement remedies against a debtor or its property, including closing out, netting, and setting off their derivatives positions as well as liquidating collateral in their possession notwithstanding the automatic stay of enforcement actions, since repos have been exempted from automatic stay and the trustee's avoiding power.[140]

After the above analysis and discussion, I have suggested the following recommendations:
There should be an effective protection against counterparty credit risk. This means that insufficient protection against counterparty credit risk in a repo transaction, whether actual or perceived, can swiftly deter financial institutions from participating in repo markets;

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[138] ANGUS D. & ROBERT C.; *Repos of Loans - Now Possible*, available at https://www.cadwalader.com/uploads/books/105f9f59f9b4806acab6368322ebbb31.pdf, accessed on 5th Jan 2022

[139] RICK S.; *BANKRUPTCY BASICS FOR CREDITORS*, available at https://www.pricemeese.com/blog/bankruptcy-basics-for-creditors/, accessed on 20th December, 2021

[140] X; *Automatic Stay, What Is It And Does It Protect A Debtor From All Creditors?*, available at https://www.cacb.uscourts.gov/faq/automatic-stay-what-it-and-does-it-protect-debtor-all-creditors, accessed on 20th December, 2021

There should be adequate capabilities for collateral liquidation in case the repo borrower falls insolvent. If the liquidation of repo collateral following the default of a cash borrower does not proceed smoothly, the needs or expectations of the cash lenders will not be met. For cash lenders to quickly recover the full amount of the loan, they must be entitled and operationally able to take possession of repo collateral soon after a default.

In addition, cash lenders must be able to execute the liquidation of repo collateral successfully; this leads to my recommendation for the change in the law relating to insolvency especially its article 12 to exempt repo lenders from automatic applied upon commencement of formal insolvency proceedings. We recommend that Repo claims should not be stayed upon the application to commence insolvency proceedings with the intention to submit a reorganization plan along with it as it is for other creditors including secured ones.

We recommend to amend insolvency law since We cannot, suggest repo collateral to be registered by Registrar General as we would be treating repo as a secured loan, which would infringe certain privileges normally owned by repo lenders such as re-using the securities and not being required to return the same collaterals.

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