COMPANY VOLUNTARY ARRANGEMENTS (CVA) & ADMINISTRATION OF COMPANIES: AN APPRAISAL OF THE INNOVATIVE CORPORATE INSOLVENCY PROCEDURES UNDER THE COMPANIES AND ALLIED MATTERS ACT 2020* **

ABSTRACT

The day to day economic and financial challenges in Nigeria have posed a big threat to the existence of many business entities. So many companies have become insolvent (unable to pay their debts), struggling to carry on as a going concern and are consequently faced with the risk of being wound up by its creditors. In a bid to save such insolvent companies and give them several options at being successful again in the future rather than being dissolved, the current corporate legal framework in Nigeria has recently introduced two new insolvency procedures namely Company Voluntary Arrangements (CVA) and Administration of Companies. To aid the appreciation of these innovations this article sets out to analyze the past corporate insolvency procedures in Nigeria before the introduction of the new procedures under the Companies and Allied Matters Act 2020 while also understudying these new insolvency procedures, the purpose they set to achieve and likely barriers that may hinders the effectiveness of these innovative procedures. It makes recommendations on what can be done to ensure that these new procedures achieve their purpose in the corporate sphere in Nigeria.

KEYWORDS: Administration, Company Voluntary Arrangements CVA, Companies, Insolvency, Insolvent, Court, Nigeria.

INTRODUCTION

Global economic shocks around the world including Nigeria have from time to time had their negative effect on businesses, these situations and sometimes lack of proper business decisions and management have made it tough for many Companies to carry on in business. Thus, countries around the world seek how to save and help businesses in their domain by enacting laws that are business friendly, but until recently such could not be said of Nigeria especially as it relates to corporate insolvency. Companies and Insolvency practitioners in Nigeria expressed several dissatisfactions with the previous framework of corporate insolvency in Nigeria which made it necessary to overhaul and redirect the insolvency laws and practice in Nigeria towards enhancing business stability and preserving corporate entities rather than being dissolution-focused. On the 7th of August 2020, a new Company and Allied Matters Act (hereinafter referred to as CAMA 2020) was signed into law and this marked the beginning of a new era in Nigeria's corporate space. The new CAMA 2020 came with a lot of innovations and one of its many introductions is the legal concept of Company Voluntary Arrangements (CVA) and Administration of Companies in corporate insolvency aimed at preserving and enhancing businesses. To better understand these new corporate insolvency procedures and the importance of their introduction into the corporate sphere in Nigeria, it will be pertinent to examine the state of corporate insolvency before CAMA 2020[1].

THE EVOLUTION OF CORPORATE INSOLVENCY IN NIGERIA (ISSUES BEFORE THE ENACTMENT OF THE COMPANIES AND ALLIED MATTERS ACT, CAMA 2020)

Corporate insolvency involves a company or business organization that is unable to pay its debts and liabilities; in essence, it pertains to the inability of a company to settle its debts with its creditors and suppliers. The main features of an insolvent company are:

a. It is in debt.
b. It is unable to discharge its debts and liabilities as they fall due.
c. Its liabilities exceed its income & assets.

Prior to CAMA 2020 the legal framework of corporate insolvency in Nigeria was embodied in the old Companies and Allied Matters Act, 1990 which has its roots in the British Company Law with some modifications to suit the Nigerian Corporate sphere due to the colonial relationship between

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[1] Olusola Joshua Olujobi, 'Combating Insolvency and Business Recovery Problems in the Oil Industry: Proposal for Improvement in Nigeria's Insolvency and Bankruptcy Legal Framework' [2021] 7(2) Heliyon Journal <https://www.sciencedirect.com/science/article /pii/S2405844 021002280> accessed 23 November 2022

Nigeria/Britain and despite gaining her independence from colonial rule the Company Law and consequently the insolvency law in Nigeria remained fashioned after that of Britain.

Under the old CAMA 1990, the options available to an insolvent company were:

- Receivership[2]
- Arrangement & Compromise[3]
- Winding-up/Dissolution of business[4]

The arrangement & compromise procedure was however largely unused in practice, therefore receivership and winding up were the most popular choices for an insolvent company at that time[5].

Receivership Procedure:

Receivership is a process that often aims at recovering debt using secured assets without necessarily liquidating the company (albeit its typical result was the company's liquidation). When the duty does not involve carrying on the company's business, a receiver is appointed; however, if managing the company's business is required, a receiver/manager is typically appointed. In this situation, a receiver or receiver/manager is appointed and placed in a similar position as the directors to take possession of the assets of the company over which he was appointed and realize the profits thereof for the benefit of the creditor(s). The receiver or receiver/manager is expected to take the interest of stakeholder(s) into consideration when making decisions though an agent of the company the receiver is obliged to exercise his powers not in the interest of the company but in the interests of the person on whose behalf his appointment was made[6]. The receiver or receiver/manager is usually appointed either by a power under the charge instrument or by the court with the prior aim of preserving the assets of the company or applying it to satisfy the debtor(s).In a receivership the assets of the company over which the debt is

[2] CAMA 1990, S 387-421.
[3] ibid, S537-540.
[4] ibid, S422-524.
[5] Bolanle Adenike Adebola, 'Corporate Rescue and The Nigerian Insolvency System' (DPhil Thesis, University College London 2012)
[6] Kennedy v De Trafford [1897] AC 180; B Johnson & Co (Builders) Ltd [1955] Ch 634

charged or the running of the company (as the case maybe) is entrusted in the receiver or receiver/manager who only deals with those assets covered by the receivership[7], the effect is that although the directors of the company cannot deal with the assets covered under the receivership the company does not however lose its personality as an entity, its right over such assets under the receivership is merely suspended during the period of the receivership and the directors can proceed to deal with other assets of the company that are not covered under the receivership or matters not suspended by reason of the receivership because the appointment of a receiver ought not to lead to the liquidation or winding up of the company.

In the 1980s and the 1990s, there was an increase in the use of the receivership procedure, most loan transactions and mortgages usually had provisions in the deed that gives the creditors the power to appoint receivers and managers upon any default to pay the loan or mortgage and as a result, many creditors looked into their contractual right to name a receiver to avoid future debt litigation. After these period the procedure was less frequently used because it was insufficient and did not meet the need of the stakeholders especially due to its technicality, this caused many creditors to change their strategies and some turned to using government agencies like the Police Force and the Economic and Financial Crimes Commission (EFCC) to collect debts by attributing criminal elements to defaulting clients in order to justify the involvement of the Police, the EFCC and other such government agencies. Another challenge was that there were no proper guidelines on the receivership procedure thus, debts that should be treated under receivership were often treated as recovery case. There was also the issue of vagueness, CAMA 1990 was vague on certain issues like who constituted ‘interested persons’ that can apply for the appointment of a receiver manager, reliance were made to case laws in such situations but they often gave conflicting outcomes, a good example is the case of ***Intermarket (Nig) Ltd v Aderounmu***[8], where the court held that creditors, members and directors are all regarded as interested persons and either of them could apply for the appointment of receiver/manager if they can show danger to the property and they make a specific prayer to that effect, however in the latter case of ***Ponson Enterprises Nig. Ltd v Njigha***[9], the Court of Appeal stated that where a court is petitioned to appoint a receiver

[7] *Unibiz (Nig) Ltd V C.B.C.L* (2001) 7 N.W.L.R (Pt. 713) P. 534 at 542
[8] (1998) 12 NWLR (pt576) 141.
[9] (2000) 15 NWLR (pt689) 46.

such appointment should not include management powers except it is requested by the applicant in its order.

Of a truth receivership which was the next most prevalent insolvency procedure after liquidation in Nigeria aimed at being business rescue-focused by extending a life line to the insolvent company to carry on as going concern, however it was less used and usually ended up in liquidation especially where the receivership was one that involved the appointment of a receiver to take over the assets of the company and realize its benefit for the creditor rather than managing the business of the company (which would have involved a receiver manager). The receivership procedure though appearing to be business rescue-focused failed to achieve same because CAMA 1990 was silent on so many issues and procedures which made common law the main authority for receivership, also it is court-driven and attracts so much input from the court which made it technical and time consuming[10].

Arrangement and Compromise Procedure:

Arrangement and compromise though provided for under CAMA 1990 is not a popular insolvency mechanism in Nigeria. Under this approach, an insolvent company may present a scheme and come to a compromise with its creditors, members or both in order to restructure and accept something other than what they were initially entitled to as full payment of the company's debt. The outcome of the process was primarily dependent on the specifics of each case and how successfully the company's management could negotiate the company out of its indebtedness, whatever compromise is reached and the company pays its creditors is deemed as full settlement of the debt and the debtors will not be allowed to bring up the debt in the future but where they fail to reach a compromise, the creditors may proceed to commence a creditor’s voluntary winding-up. C.A.M.A. 1990 provided for two ways arrangement and compromise could be administered which includes:

- Arrangements between a company and its members or creditors
- Arrangements between two entities largely administered by the Securities and Exchange Commission (SEC)

[10] Corporate Rescue and the Nigerian Insolvency System, Supra.

This procedure though established to rescue insolvent companies was very unpopular and unused, it was also characterized by non-statutory and ad-hoc rules and is usually subject to the court's discretion. It proved to be difficult, complex, costly and court intensive which made it largely unused and untested[11].

Winding Up and Dissolution of Companies Procedure:

Though not regarded as an insolvency procedure in the strict sense, winding-up/dissolution of companies is actually a liquidation procedure that is business dissolution-focused as it signals that death of a Company. It is the process by which a company is dissolved and its assets distributed in accordance with the rules of priority for the benefit of its creditors, members and employees[12]. The winding-up procedure does not aim at business rescue because it seeks the end of the business which makes it a dissolution-focused procedure, it applies to both solvent and insolvent companies and its end result is to deal with all affairs of the company to a conclusive end, settle its creditors and stakeholders as far as possible, terminate all legal and business relationships and finally remove the name of the company from the register of companies.

A close look at the insolvency procedures available and issues prior to CAMA 2020 reveals that the options available to an insolvent Company under CAMA 1990 were such that directly or indirectly led to the dissolution of the Company without giving it viable options at survival[13].The receivership procedure and the arrangement and compromise procedure which were made to be a rescue option failed woefully due to technicalities, cost and the fact that they did not provide companies undertaking the procedures with the benefit of a moratorium to protect it from court petitions while exploring any of the procedures, this dampened the confidence of companies in the insolvency regime in Nigeria at that time and discouraged foreign direct investments. With a view to bringing corporate practice in Nigeria to be in line with best international practices and in response to the agitation of insolvency practitioners on the poor state of insolvency practice in Nigeria, a new law was enacted known as the Companies and Allied Matters Act (CAMA 2020)

[11] Ibid

[12] *Tate Industries Plc V Devcom M.B Ltd* (2004) 17 NWLR (PT 901) CA 182 at pg 225.

[13] Perenami Momodu and Odinaka Okoye, 'Nigeria: The Evolution of Business Rescue in Nigeria' (Mondaq, 27 May 2019) <https://www.mondaq.com/nigeria/insolvencybankruptcy/809026/the-evolution-of-business-rescue-in-nigeria> accessed 23 November 2022

which repealed the old CAMA 1990. This new law which is currently the principal law on corporate matters and corporate insolvency in Nigeria, among other things made some introductions that changed the focus of corporate insolvency in Nigeria from business dissolution to business rescue, prioritizing rescuing a business above dissolving it by giving the Company more options and chances to survive before dissolution (which becomes a last option)[14].

RESCUING COMPANIES IN DEEP WATERS

A Company in deep waters is simply a company in a difficult or awkward situation, especially as regards its financial obligation. This is because a Company at inception is established with the hopes of thriving, running and fulfilling its business objectives profitably, paying creditors and rewarding its shareholders and investors as and when due etc., however where the Company becomes unable to pay its debts and carry out its business efficiently such a company can be said to be 'in deep waters'. Thus, the Companies and Allied Matters Act 2020 introduced two new legal concepts of corporate insolvency aimed at rescuing such Companies in deep waters by giving it the hope of resurrecting rather than dissolving it for failure to pay its debt, these introductions include the legal procedures of Company Voluntary Arrangements (CVA) and Administration of Companies.

Company Voluntary Arrangements (CVA)

In a Company Voluntary Arrangement (herein after referred to as CVA) an insolvent company and its unsecured creditors can come to a legally enforceable agreement for the repayment of its debt through a voluntary arrangement that gives the company the chance to work out reasonable repayment terms with its creditors while averting liquidation[15]. It is purely an insolvency procedure and applies only where a company is unable to pay its debts, in other words where a company is solvent it does not need a CVA. The CVA in Nigeria is provided for under Section 434 – 442 of CAMA 2020 which is modelled after the CVA under the United Kingdom (UK) Insolvency Act. In England after which the Nigerian CVA is modelled, CVAs have been used in restructuring the debt of notable firms like Pizza Express in 2020,

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[14] ibid

[15] Kubi Udofia, "An Overview of Company Voluntary Arrangements in CAMA 2020**" (2021)** <https://www.thisdaylive.com/index.php/2020/10/06/an-overview-of-company-volu**ntary-arrangements-in-cama-2020**> accessed 23 November 2022

Mothercare in 2018, Carpetright in 2018, Travelodge in 2012 etc, and were very successful in enabling these companies pay their debt while still being able to carry on as a going concern and avoid liquidation.

CVA under CAMA 2020

Section 434(1) of CAMA 2020 introduces the CVA as an insolvency procedure, it provides that:

> *The directors of a company may make a proposal under this Part to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs (in this Act referred to in either case, as a "voluntary arrangement")*

This section clearly describes a CVA as a composition in satisfaction of a company's debt or a scheme of arrangement of its affairs (known as a voluntary arrangement) aimed at enabling the company come up with a practicable way to pay its debt without winding up and it can be employed whether or not the company is in administration or liquidation[16].

Who can propose a CVA?

Where the company is not in administration or liquidation it is the directors of the company that may propose the CVA to the creditors[17], but where the company is in administration or liquidation it is the administrator or liquidator (as the case maybe) that may propose the CVA[18]. This implies that a member or a creditor of a company do not have the power to propose a CVA.

Who is a Nominee?

A Nominee is the person appointed to supervise and implement a CVA. Section 434 (2) requires that any proposal for a CVA must appoint someone known as a **nominee** who will act as a trustee or otherwise for the purpose of supervising the implementation of the CVA and any person sought to be

[16] Section 434(1) & (3) CAMA 2020
[17] Section 434(1) CAMA 2020
[18] Ibid, Section 434(2)

appointed as nominee must be a person who is qualified to act as an insolvency practitioner[19] in relation to the company.

How to commence a CVA?

Where the nominee in a CVA is not the liquidator or administrator of the company, the nominee shall within 28 days (or such longer period as the Court may allow) after he is given notice of the proposal for a voluntary arrangement, submit a report to the Court stating;

- Whether in his opinion meetings of the company and of its creditors should be summoned to consider the proposal, and
- If in his opinion, such meetings should be summoned, the date on which, time and place at which, he proposes the meetings to be held[20].

To enable the nominee prepare his report, the person intending to make the proposal for a CVA is mandated to submit the following to the nominee;

a. A document setting out the terms of the proposed voluntary arrangement,
b. A statement of the company's affairs containing:
    i. Particulars of its creditors, its debts and other liabilities and of its assets as may be prescribed.
    ii. Other information as may be prescribed[21].

Where the nominee fails to submit the report required by section 435(2) the Court may, on an application made by the person intending to make the proposal direct that the nominee be replaced by another person qualified to act as an insolvency practitioner in relation to the company[22].

[19] Section 868 of CAMA 2020 defines an "*insolvency practitioner*" as a legal practitioner within the meaning of the Legal Practitioners Act or a member of the Institute of Chartered Accountants of Nigeria or such other professional bodies of accountants as are established by an Act of the National Assembly.
[20] Ibid, Section 435(1) & (2)
[21] Ibid, Section 435(3)
[22] Ibid, Section 435(4)

Summoning a meeting for a CVA

Where the nominee is not the liquidator or administrator (i.e. where the company is not in liquidation or administration) and it has been reported to the Court that meetings of the company and its creditors should be summoned, it is the person making the report that shall summon those meetings for the time, date and place proposed in the report (unless the Court otherwise directs)[23], but where the nominee is the liquidator or administrator, it is the liquidator or the administrator that shall summon meetings of the company and of its creditors to consider the proposal for such a time, date and place as he thinks fit[24].

In other words, it can be safely inferred that whether or not the nominee is the liquidator or administrator it is the nominee that summons a meeting of the company and its creditors to consider the proposal for a CVA. This is because the phrase "the person making the report" as stated in Section 436(1) (a) must of certainty be the nominee since by virtue of section 435(2) it is the person appointed as nominee that makes the report to the court and where the nominee so appointed fails to make the report section 435(4) mandates the person proposing the CVA to make an application to the court to replace the nominee with another person qualified to act as an insolvency practitioner who invariably becomes the nominee. Therefore, where a company is not in liquidation or administration it is the nominee that summons the meeting (unless the court orders otherwise), but where the company is in liquidation or administration it is the liquidator or administrator that summons the meeting.

Furthermore Section 436(2) of CAMA stipulates that the persons entitled to attend a creditors' meeting to consider the proposal for a CVA includes every creditor of the company whose claim and address the person summoning the meeting is aware. During the meetings summoned it will be decided whether to approve the proposed voluntary arrangement with or without modifications, such modifications may include conferring the functions proposed to be conferred on the nominee on another person qualified to act as an insolvency practitioner in relation to the company but shall not include any modification by virtue of which the CVA ceases to be a proposal as provided in section 434. Such meetings so summoned shall not have the powers to approve any

[23] Ibid, Section 436(1)(a)
[24] Ibid, Section 436(1)(b)

proposal or modification that affects the right of a secured creditor of the company to enforce his security unless the creditor concerned concurs or to approve any proposal or modification under which any preferential debt of the company is to be paid otherwise than in priority to such of its debts as are not preferential debts or that a preferential creditor of the company is to be paid an amount in respect of a preferential debt that bears to that debt a smaller proportion than is borne to another preferential debt by the amount that is to be paid in respect of that other debt except with the concurrence of the preferential creditor concerned. The meetings so summoned must be conducted in accordance with the rules and after the conclusion of either meeting in accordance with the rules, the chairman of the meeting shall report the result of the meeting to the Court and immediately after reporting to the Court shall give notice of the result of the meeting to such persons as may be prescribed[25].

The decisions to approve a CVA will only have effect where the meetings were conducted according to the rules and the creditors' meeting and the company meeting take similar decisions then the decisions will become effective but where the decision taken at the creditors' meeting differs from that taken at the company meeting a member of the company may apply to Court to make an order for the decision of the company meeting to have effect instead of the decision of the creditors' meeting or to make such other order as it deems fit, the application must be made within 28 days of the decisions. Upon approval, the CVA would be implemented under the supervision of an insolvency practitioner (a supervisor), the nominee may transition to a supervisor[26].

What is the effect of approving a CVA?

If the proposal for a CVA is approved by the meeting of creditors and the meeting of members or by an order of court that the decision of the company meeting should have effect instead of the decision of the creditors' meeting it will be binding on all unsecured creditors and will bind each creditor entitled to vote at the meeting as if he were a party to the arrangement, whether or not such creditor voted at the meeting, was present at the meeting or received notice of the meeting. Even where the arrangement ceases to have effect and

[25] Ibid, Section 437
[26] Ibid, Section 438

the amount payable under the arrangement has not been paid the company shall be liable to pay such amount payable under the arrangement.

Where the company is being wound up or is in administration, the Court may order a of stay all proceedings in the winding-up or provide for the appointment of the administrator to cease to have effect or give such directions with respect to the conduct of the winding-up or the administration as it considers appropriate[27].

Once the company and its creditors have agreed to the terms of the CVA, the directors will continue to run the day to day operations of the company while the company will come up with a plan on how to raise funds to fulfil the terms of the CVA. The supervisor of the CVA will ensure that the company meets its obligations and keep creditors updated as to the CVA's progress.

What happens where there are aggrieved parties in a CVA?

CVAs may be challenged by a creditor, member, nominee or by an administrator or liquidator where the company is in administration or liquidation respectively[28]. It may be challenged on the ground that it unfairly prejudices the interest of a creditor[29], member or contributory, like the case of ***Prudential Assurance Company Ltd v PRG Powerhouse Ltd***[30] where the terms of a CVA were held to be unfairly prejudicial to landlords who had given up their guarantees, but were not given any additional benefit in compensation, similarly in ***Discovery (Northampton) Ltd v Debenhams Retail Ltd***[31], the Court ordered the deletion of a term which required landlords to waive/release rights to forfeit leases, the Court held that landlords' rights to forfeit were proprietary rights and not contractual rights or security interests, hence could not be compromised by a CVA.

A CVA may also be challenged on the ground that there has been material irregularity at or in relation to the creditors' or company meetings[32]as in the case of ***Sisu Capital Fund Ltd v Tucker***[33].

[27] Ibid, section 439
[28] Ibid, section 440(2)
[29] Ibid, Section 440(1)(a)
[30] [2007] BCC 500
[31] (2019) EWHC 2441
[32] Ibid, Section 440(1)(b)

Where the challenge is successful, the Court may revoke or suspend any decision approving the CVA or taken at the meetings or alternatively, the Court may order the convening of further meetings to consider revised proposals, or reconsider the original proposal[34]. A person who is dissatisfied with a Supervisor's act, omission or decision in implementing the terms of a CVA, may apply to court for redress. The court may confirm, reverse or modify the Supervisor's act or decision, or make any order it deems fit[35]:Of notable importance is the provision of section 441(1)(2) which makes it an offence for any person who is an officer of the company to make any false representation or omit to do anything in order to obtain the approval of the company or creditors meeting for the proposal of a voluntary arrangement.

Benefits of CVA to companies in deep waters

When compared to other statutory insolvency procedures, CVAs offer an extremely straightforward process to rescuing an insolvent company that is neither expensive nor complicated despite the involvement of the courts in its procedure. This is because a CVA keeps the company running and under the control of its directors and internal management, there is no interruption of business operations while the company takes steps to settle its debts, which lowers the risk of cash flow insolvency (i.e, a situation in which a company lacks sufficient liquidity to pay off its debts as they become due) and because CVAs are private arrangement between a company and its creditors thus, there is no requirement for customers or the public to be notified of the process which makes it easy to keep the business of the company on-going as suppliers and investors are not necessarily aware of the financial difficulty of the company and are therefore not discouraged them from dealing with or investing in the company. Also, due to their adaptability, CVAs enable the debtor (i.e. the company) to suggest a repayment plan to its creditors based on their financial situation. Another positive side of CVAs is that they do not interfere with or suspend the rights of secured creditors unless they agree to do so and unsecured creditors have a strong prospect of getting their debts fulfilled in contrast to liquidation and administration where they stand little or

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[33] [2005] EWHC 2170
[34] Ibid, section 440(4)
[35] Ibid, section 442(3)

no chance of getting their debts paid and where the laid down procedure in CAMA 2020 is followed CVAs are legally binding on all parties.

Administration of Companies

The legal concept of administration of companies is prevalent among countries in common law jurisdictions of which Nigeria is one of such countries, it is similar to bankruptcy in the United States (US). The concept is one that attempts to prevent or delay the winding up of a company by serving as a rescue mechanism for insolvent companies and giving them the opportunity to pay their debts and restructure the company in order to revive it while they continue to run their businesses rather than folding up. It is designed to protect companies while fashioning out a debt restructuring plan for the company and giving it a chance to be successful again[36]. In other words administration is a temporary position for a company to exist in until it either survives or is dissolved[37]. Before a company can go into administration it must be seen to be insolvent or is probable to become insolvent, the pressure from creditors must be present and there must be fears that the company could be taken to court (usually the creditors would have made threats to compulsorily wind up the company in order to recover what is owed to them), lastly the company must be seen to have little assets and lacking in cash flow to repay the debts.

Administration as an insolvency procedure in Nigeria is provided for under section 443-549 of CAMA 2020. The law requires that when a company goes into administration the control of the company is passed to the person appointed as Administrator who must a person qualified to act as an insolvency practitioner towards the company[38], he has the duty to manage the company for the period the company is in administration. The Administrator is usually appointed by an administration order[39] and whether appointed by the court or not the administrator is regarded as an officer of the court[40], his assignment as an Administrator is to find out if the company has a future and

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[36] Wikipedia, Administration (Law) <https://en.wikipedia.org/wiki/Administration_(law)> accessed 24 November 2022

[37] 'Company Administration' (Real Business Rescue, 23 November 2022) <https://www.realbusinessrescue.co.uk/company-administration> accessed 29 November 2022

[38] CAMA 2020, section 447.

[39] Ibid, section 448.

[40] Ibid, section 446.

if it does how the viable future can be achieved and he must perform his functions as quickly and efficiently as possible[41]. With regards to how an administrator is appointed, section 443(1) provides that an administrator may be appointed by an order of court[42], a holder of a floating charge[43], the company itself[44] or its director[45]. Where the administrator is appointed out of Court as provided under Section 443 (1) (b & C) it is said to be an administration that has a cross-border element and an ex parte application will be made to the Court for approval of such cross border appointment.

The primary purpose of administration includes:

a. Rescuing the whole or any part of the Company's undertaking as a going concern.
b. Achieving a better result for the company's creditors as a whole than would be likely if the company were wound up, without first being in administration.
c. Realizing property in order to make a distribution to one or more secured or preferential creditors.

In other words, the rescue of the company is the primary objective of the administrator in the performance of his functions except where he is of the opinion that it is not reasonably practicable or a better result can be achieved for the company's creditors by pursuing some other course[46].

Moratorium in Administration

Where a company is in administration no step can be taken to enforce the property of the company except with the consent of the administrator or permission of the court[47] this is referred to as a moratorium[48], which means

[41] Ibid, section 445
[42] Under CAMA 2020, Section 449.
[43] Ibid, Section 452.
[44] Ibid, Section 459.
[45] Ibid
[46] Ibid, Section 444.
[47] Ibid, section 480(1) & (2)
[48] A moratorium is a legally authorized period of delay in the performance of a legal obligation or the payment of a debt for example where a moratorium is in force it may suspend a creditor from instituting any legal action or recovering any assets of the company

that where an administration order is in force no creditor can petition for a winding up, appoint a receiver or repossess the company's property. This is aimed at preserving the whole essence of the administration procedure which is to give a life line to a dying company to be rescued from death (liquidation) and allowing creditors to take actions against the company's properties will defeat that purpose hence the importance for a moratorium.

The Effect of Administration

The major effect of an administration order is that it freezes creditors' actions, for example, a Landlord cannot distrain the company's assets, creditors cannot pursue court judgements or seek to enforce court judgements they have already obtained against the company, bailiffs cannot seize company's assets, creditors cannot petition for winding up etc. Thus, if there is a danger that creditors are seeking to take enforcement action against a company, administration can be a very useful tool to freeze creditors action to allow the directors time to act in the best interests of the company and the creditors as a whole.

Another effect of an administration order is that it dismisses any winding up order made against the company and prevents any resolution or order for winding up from being made, it also vacates the office of any receiver appointed, it prevents the enforcement of any security or charge against the company, hinders any legal process and generally places the Company on a comfortable path to recovery[49].

Duration of Administration

A Company cannot stay in administration forever, thus it must make use of the window of administration to decide the future direction of the Company. The appointment of an administrator (and by implication the Administration itself) would cease to have effect at the end of the period of one year from the date on which it takes effect, this is known as automatic cessation, however, by an

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for a specified period. This is usually done to give a company ample time to re-arrange itself into recovery especially when it is undergoing an insolvency procedure

[49] Purnells, 'What is Administration?'<https://www.purnells.co.uk/administrations/what-is-administration> accessed 29 November 2022

order of court it may be extended for a specified period not exceeding six months[50].

Asides automatic cessation, an administration may come to an end where there is a winding up order in public interest[51] or the administrator himself is of the opinion that the purpose of the administration has been sufficiently achieved[52] or cannot be achieved in relation to the Company[53].

Where an administrator dies, resigns, vacates office or is removed an application would be made for replacement of Administrator[54].

What is the process of Administration?

Where an administrator is appointed for an insolvent company, the administrator must not later than 14 days send a notice of his appointment to the company, publish a notice of his appointment in the prescribed manner, obtain a list of the company's creditors and send a notice of his appointment to each creditor whose claim and address he is aware of[55]. The administrator shall also send a notice of his appointment to the Corporate Affairs Commission and shall as soon as is reasonably practicable after his appointment require any relevant person(s) to provide him with a statement of the affairs of the company and the person required to submit the statement of affairs shall do so before the expiration of 11 working days from the day on which he received the notice of the requirement[56], after which the administrator shall make a statement setting out proposals for achieving the purpose of the administration (such proposals may include a proposal Company Voluntary Arrangement CVA or a scheme of arrangement and compromise)[57]. The administrator shall then proceed to summon a meeting of the creditors[58] where the administrator's proposals are presented and considered and may be approved without modifications or with modifications

[50] CAMA 2020, Section 513.
[51] Ibid, Section 520
[52] Ibid, Section 518
[53] Ibid, Section 517
[54] Ibid, Section 528
[55] Ibid, section 483
[56] Ibid, section 485(1)
[57] Ibid, section 486(3)
[58] Ibid, section 487

to which the administrator consents[59], after which the administrator shall as soon as is reasonably practicable report any decision taken to the Court, the Corporate Affairs Commission and such other persons as may be prescribed by the Minister[60] Section 863 defines "Minister" to mean the Minister charged with responsibility for trade (i.e the Minister for Trade and Investment in Nigeria)

Powers of the Administrator

Generally, the powers of an administrator of a company involves doing anything necessary or expedient for the management of the affairs, business and property of the company[61]. The administrator also has the powers to appoint and remove a director of the company, call a meeting of members or creditors of the company, apply to the court for directions in connection with his functions, make a distribution to a creditor of the company, giving consent to the exercise of management powers by a officer of the company, take custody of all the property of the company which he thinks he is entitled to, manage the affairs, business and property of the company, act as agent of the company etc.[62]

Benefits of Administration to Companies in deep waters

One major benefit Administration has above other insolvency procedures is that it gives the insolvent company the benefit of a 'moratorium' which prevents the company from legal actions against it. The status of a moratorium hinders creditors from petitioning the court to wind up the company or taking up any other negative legal action against the company and its assets during the administration[63]. Also, unlike the receivership procedure where the receiver's priority lies only with the particular creditor that appointed him, in an administration the administrator gives equal priority to all the creditors and the company too. Another benefit of administration is that it puts the company in the hands of a licensed insolvency practitioner who acts as the administrator and who ensures that all actions taken during the administration are done with the interest of the company and its creditors in mind. The procedure also helps

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[59] Ibid, section 490(1)
[60] Ibid, section 490(2)
[61] Ibid, section 496 (1)
[62] Ibid, section 498-507
[63] Ibid, Section 480.

to keep the financial position of the creditors from worsening while the administrator outlines ways to conduct the administration and realize the funds of the creditors while also attempting to rescue the company from liquidation [64].

DIFFERENCE BETWEEN CVA AND ADMINISTRATION

The primary aim of a CVA is to give room for a company to pay its debt and still be able to carry on as a going concern by helping the company come to an agreement with its creditors on how to satisfy the debt, while the primary aim of an administration is that of restructuring the company to pay its debt, keep on as a going concern without going into liquation (where possible).

In a CVA the running and management of the company continues to lie with the directors of the company they must however abide by the full terms of the CVA as the company undergoes a voluntary arrangement, while in an administration the running and management of the company lies with the person appointed as administrator as the powers of the directors ceases during the period the company is in administration.

Administration has a moratorium that protects the company from legal action by any creditor during the period the company is in administration but in a CVA there is no provision for a moratorium, thus a creditor who is aware of a proposal for a CVA may proceed to petition for winding up or appoint a receiver or take any other action against the company's properties.

IMPEDIMENTS TO COMPANY VOLUNTARY ARRANGEMENTS (CVA) & THE WAY FORWARD

The major impediment in CVAs under CAMA 2020 is the absence of a moratorium which puts the procedure at the risk of being ruined by creditors who may move fast to repossess goods in the company's possession, appoint a receiver or even petition for a winding up upon notice of a proposed CVA and if this allowed to happen it has the capacity to frustrate the entire motive of rescuing the company from folding up, thus the way out of this challenge would be to commence an administration procedure first before embarking on a CVA since a company in administration is allowed to consider a CVA, by commencing an administration first before the CVA the company will the

[64] Company Administration, supra.

entitled to the moratorium provided under the administration procedure and would be protected from actions by creditors that may ruin the rescue mission of the CVA.

Another challenge is that CVAs are not binding on secured and preferential creditors who may decide to appoint receivers or petition for a winding up. The only way out of this challenge is to obtain the consent of the secured or preferential creditor because that is the only way such persons can be bound by a CVA they must consent to it[65].

It is also a challenge that even where an unsecured creditor opposes a CVA or did not receive notice of the meeting summoned in respect of the CVA he or she is bound by the terms of the CVA and stands the risk of having the terms of the debt altered in a manner that may not favor him. The possible way out of this challenge is for the nominee to do his best to know and give notice of the proposed CVA to all known creditors of the company so as to avoid a situation where a creditor isn't aware of a variation in the debts owed to him by company, also the company must do its best to convince its creditors and reach a joint decision on the terms of the CVA so as to avoid a situation where the courts will have to impose the decision of the company meeting as the decision of the creditors' meeting[66]. Where all of these fail, the aggrieved creditor may challenge the CVA[67].

There is also the fact that directors are allowed to remain in office in the course of a CVA without investigations into conducts that may have contributed to the company's distress which is worrisome as this may create room for fraudulent directors to eat their cake and have it (in other words, they may have been responsible for the financial distress of the company and rather than being called out for their wrong doings they become at liberty to propose a CVA to cover up and pay up for their wrongs)[68]. The integrity of the directors will come to rescue here, directors of an insolvent company should ensure sincerity and honesty in their dealings and call for a CVA, they should avoid misuse of the honest intention of this insolvency procedure and where

[65] Ibid, section 437(3) & (4)
[66] Ibid, section 438(3) & 439 (2)
[67] Ibid, section 440(1)
[68] An Overview of Company Voluntary Arrangements in CAMA 2020, supra.

any creditor has evidence of the directors' fraudulent acts they have the right to challenge the procedure[69].

Another challenge is where the company is not in administration or liquidation and the CVA is being proposed by the directors of the company, the director proposing the CVA may be faced with the challenge of convincing other members of the board of directors of the need to employ a CVA to salvage the company especially where the board is a large one convincing a majority of the directors maybe a difficult task and this can be tackled by employing the professional services of an insolvency practitioner that may help convince other directors of the company on the need for the company to consider the rescue option of a CVA.

IMPEDIMENTS TO ADMINISTRATION & THE WAY FORWARD

One major impediment to the process of administration in corporate insolvency is the Directors' loss of control of the running and management of the affairs of the company to the person appointed as an administrator. This gives the administrator so much powers including the powers to dispose the company's assets, restructure the company and even to put the company for liquidation if he feels it will provide a better return for creditors. Thus, the directors seem to be irrelevant during the period of administration and are likely to see the administrator as a threat to their position in the company, therefore they may become hostile and unwilling to corporate with the administrator which may frustrate the entire procedure. The possible way out for the directors is to do their best to partner with the administrator to rescue the company and where they need to exercise any administrative powers seek the consent of the administrator[70] who may be willing to give his consent due to their co-operation, knowing well that if the company survives they (the directors) stand the chance of getting their jobs back than if the company is being liquidated.

Another hindrance is the negative publicity the company may face when it comes to the notice of the public that the company is under administration because of its inability to pay its debt and carry on business. Such negative publicity may hinder future investors and suppliers from partnering with the

[69] Ibid, section 440(1)
[70] Ibid, section 501

company as they may doubt the viability of the company to give them return on their investment and it will also hinder existing investors and suppliers who are already being owed from continuing in business with the company. Thus, the company's reputation may likely suffer from customers lose confidence which can affect the success of the administration procedure. The burden the lies on the administrator who has become the face of the company to rescue its image and encourage investors by promoting the viability of the company.

Once a company has entered administration the affairs of the company is placed under scrutiny. In this light, Section 484(1) of CAMA 2020 provides that as soon as is reasonably practicable after appointment, the administrator of a company shall by notice in the prescribed form require one or more relevant persons to provide him with a statement of the affairs of the company, it further requires that the statement of affairs so required by the administrator shall be verified by a statement on oath, be in the prescribed form, give particulars of the company's property, debts and liabilities, give the names and addresses of the company's creditors, specify the security held by each creditor, give the date on which each security was granted and contain such other information as may be prescribed. It goes ahead to define a "relevant person" as a person who is or has been an officer of the company, who took part in the formation of the company during the period of one year ending with the date on which the company enters administration, who is employed by the company during that period, who is or has, during the period of one year ending with the date on which the company enters administration, who has been an officer or employee of a company. Such technical scrutiny have the tendency to affect the time frame available to revamp the company where feasible under an administration.

Also, the procedure of administration is not usually a quick process, it can go on for many months and, in some instances, more than a year. The cost of running the procedure of administration in insolvency, including the significant fees paid to the administrator can be a huge cost on the company that is already looking for a life line of survival. Although these fees are usually deducted from what would have been paid creditors, meaning that the directors themselves would not incur a direct cost, it can end up being a more expensive procedure than liquidation.

Another factor that can cause an impediment to Administration in corporate insolvency is the fact that the act and conduct of the administrator can be challenged. Generally, under the provision of CAMA 2020 an administrator has wide powers and discretion in the conduct of an administration thus, the courts are generally reluctant to interfere with the conduct of the administration unless absolutely necessary. An example of such absolute necessities is where an administrator's conduct is being challenged or the administrator has acted improperly and a creditor is harmed as a result.Thus, CAMA 2020 makes provision for the challenge of the administrator's conduct which may delay or frustrate the administration procedure if undertaken, although it has an advantage as it can serve as a check on the possible excesses of an administrator but can also be used as an avenue to frustrate the procedure.

CONCLUSION

The inclusion of Company Voluntary Arrangements (CVA) and Administration of Companies as insolvency procedures in Nigeria is highly commendable as it broadens the rescue options available to an ailing company and gives it a greater chance of being rescued than liquidated in recent times. Unlike previous procedures that were centered mainly on the creditors, these new procedures under CAMA 2020 are centered on both the creditors (how to repay them) and the company (how to rescue it from liquidation) which is very plausible.

Though involving the courts, these procedures especially the CVAs are far simpler and easy to use than the old procedures under CAMA 2020. They have been tested and very successful in the UK from where it was imported into Nigeria, it is however largely untested in the Nigeria corporate space as it is still very new and unexploited, we expect to see it come into full use in the coming years considering the frailty of the economy and challenges confronting businesses in recent times, we expect such business in difficult times to consider the rescue options these procedures afford rather than being wound up for failing to pay their debts. We also anticipate a myriad of possible challenges as already highlighted above, but none of these challenges seem insurmountable.

RECOMMENDATIONS

The corporate affairs commission which is the body responsible for the implementation of the provisions of CAMA 2020 and other professional insolvency bodies should consider a corporate public enlightenment program that would bring to bear the existence and benefits of these new insolvency procedures available under the current insolvency laws in Nigeria while also giving necessary guide on their use. This would help companies come to terms with the new position of our laws on insolvency matters and encourage a rise to an increase in the use of these innovative procedures.