International Insolvency & Restructuring Report 2021/22

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Building a business rescue friendly regime in Nigeria: The Companies and Allied Matters Act, 2020

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There have been significant changes in the Nigerian Insolvency Framework in the last 12 months owing to the introduction of the Companies and Allied Matters Act, 2020 ("the New CAMA") which came into force on January 1, 2021.

Prior to the advent of the New CAMA, the framework for insolvency under the 1990 CAMA focused on liquidation and receivership, management displacing and potentially value-destroying tools. The weak debtor and creditor rights and insolvency framework with a limited restructuring menu meant a weak secondary market for distressed assets. The enforcement and realisation of creditors rights left little room for debtors to manoeuvre. There was debtor resistance to these management displacing tools leading to protracted litigation and erosion of value.

Practitioners at the time would have recourse to the adaptable scheme of Arrangement & Compromise (A&C) tool to promote insolvent business rescue, albeit with its own challenges (requirement of fairness and qualified majority, lack of moratorium).

Some proactive commercial judges on their part also encouraged business rescue through use of their directive powers and amicable dispute resolution powers of the Court available under the law and the Court's rules.[1] This, in some cases, has created a framework for negotiations and multi-creditors' workouts culminating in entry and enforcement/implementation of scheme under a consent judgment.

The new law has, however, introduced two new insolvency and restructuring procedures: Company Voluntary Arrangement (CVA) and Administration while retaining and/or amending the Receivership, Liquidation and A&C Schemes in varying degrees[2]: the overall picture shows a significant shift towards business rescue, a more balanced debtor and creditor rights regime, and deference to the new procedures as opposed to what existed under the old law.[3]

Overview of the new procedures and the framework for regulation of insolvency practice

Beyond the introduction of debtor-friendly and rescue-focused procedures such as CVA/ Administration and the registration of insolvency practitioners – including the recognition of the Business Recovery & Insolvency Practitioners Association of Nigeria (BRIPAN) as a certifying professional body, amongst others, – the new law went even further to both acknowledge the imperative of informal multi creditor or stakeholders' workouts within these new procedures and stated a more limited usefulness of receivership and managership.

Company Voluntary Arrangement

CVA, which can be commenced in or out of court, is tagged "voluntary" because it is ordinarily director-controlled with the directors being able to kickstart the process with a proposal while retaining control and management of the debtor unlike in liquidation and, in most cases, administration.

CVA also offers optimism for debtors given that the procedure can be initiated either by a Liquidator or Administrator and, as such, there is now some statute-backed way out of liquidation which could be explored rather than the previously established "undertaker" liquidation approach to the business of the debtor, particularly as the effect of arrangement, regardless of the source of

the proposal, could lead to cessation or stay of the winding-up or administration proceedings which by implication would lead to a resurrection of the directors' control.

Practically, the CVA is implemented under the supervision of a nominee who shall be qualified to act as an Insolvency Practitioner (IP) concerning the company. The nominee's role consists of advising the Court concerning approval of meeting to consider the Proposal to the company's creditors and to act as a trustee or implement the arrangement eventually reached and sanctioned by the Court.

Except where initiated within an existing Administration or Liquidation, the procedure involves the company making a proposal to creditors, followed by a meeting of the company and its creditors without any provision for a moratorium.

The CVA essentially allows the company to propose composition with its creditors or a scheme of arrangement of its affairs. Its main features would be (a) ease of access (a consensual process under the shadow of the law and the Court); (b) negotiation and implementation of a Plan; (c) in a time(ly) efficient process; and (d) provision of potential protection of interests for all stakeholders.

Further, creditors' adverse decision in respect of the proposal may be sidestepped where the court so orders and this makes CVA an exciting prospect for debtor-oriented framework.

Administration

The expressed primary objective of the Administration process is business rescue while the high point from a debtor's standpoint is in its effects. Where an appointment is made by the Court, all post commencement winding-up proceedings are largely dismissed or stayed; a hitherto ongoing receivership terminates.

A moratorium inures on all other legal processes including execution, attachment, distrain, enforcement of security and institution of legal proceedings amidst others without the consent of the administrator or the leave of court. This scales up the moratorium framework in Nigeria which had been hampered by the decision in *FMBN v. NDIC* supra.

All these are in place to afford the debtor company and the administrator time, without dealing with these claims, to strategise and execute a plan to either paddle out of the distress through a rescue or explore other objectives of the process.

While not expressly spelt out, the new CAMA also admits to the possibility of procurement of rescue finance for debtors including ensuring sustained delivery by critical suppliers. Failing administration, the process will be converted to liquidation.

Moratorium is also available under the new law for creditors consummating a scheme of arrangement or compromise with their creditors: this is a departure from the old law scheme.

Feature wise, an Administrator may be appointed by the Court, the holder of a floating charge, a Liquidator, a company or its directors, where the company is likely to become unable to pay its debt. His powers include the power to manage the company's affairs, displace/retain management, deal with assets, including some level of justifiable interference with secured property for efficient realisation of the objective of the Administration.

Administration combines all the features and advantages of a CVA with additional coercive power of the court and a moratorium protection for the purpose of achieving a formal collective resolution for all creditors participating in the formal process. The potential downsides are issues such as the cost, the longer (though clearly one-year tenured) period, and the formalism.

However, whilst the management displacing feature is optional in this formal business rescue procedure, it could be argued that the strong bias for an involuntary and creditor friendly regime, pre-existing the new law, may remain entrenched as the opportunity to essentially abolish receivership (as was done in the UK with the advent of the UK Insolvency Act) has not been fully taken. Though with regards to a receiver and manager appointed out of court, the law has

stated that he will function as or be deemed for all intents and purposes to be an administrator, it remains to be seen whether Chapter 19 on Receivership would not result in turf litigation between extra curial Receivers and other Insolvency Office Holders.

The new law provides a framework for regulation of insolvency practitioners by – in addition to a minimum formal education- assigning (a) certification of standard of knowledge, continuous training and capacity building in recognised professional bodies such as BRIPAN, and (b) licensing and authorisation to practice to the Corporate Affairs Commission (CAC), being the registry/regulator for companies' proceedings generally saddled with the administration and implementation of the new law.[4]

Other special sector insolvency frameworks

In addition to the above legislative progress, there continues to exist a special rescue framework in the context of regulated industries such as banking and telecommunications through the Government's enactment of AMCON Act, NDIC Act and NCC Act, establishing the Asset Management Corporation of Nigeria (AMCON), Nigerian Deposit Insurance Commission (NDIC) and the Nigerian Communications Commission (NCC) respectively.

In the case of the reform of the AMCON Act introduced in 2015, the legislation allows AMCON to essentially drive an administrative receivership of the affairs of a recalcitrant perennial debtor company where this becomes necessary where the business is one that is critically strategic or too big to fail or to save employees or other such vital objectives of the Federal Government of Nigeria. However, to the extent that it is conceived and functions under bilateral court proceedings and a special law, it is not truly a formal collective procedure.

However, this does not dwarf the seemingly progressive contribution of the AMCON's Act to the current regime particularly through the rescue-focused provisions injected by the 2015 and 2019 amendments to the AMCON Act which enables the receiver to elect to manage the affairs of the debtor company with objectives, processes, and effects like those in administration including one-year moratorium (extendable for an additional year) without prejudice to claims of existing staff of the debtor, appointment of an advisory committee and implementation of a rehabilitation plan drawn up within 90 days of election to explore business rescue along with the possibility of resorting to restructuring schemes like a hive-down, even though the provisions of the Act appear to convey a strong bias for AMCON at the expense of the collective body of creditors which may clog the whole process and strangulate business rescue options available under general law.

Government's response to COVID-19 and efforts at business continuity[5]

After a case of COVID-19 was recorded in Lagos State, Nigeria (the economic and commercial centre of the Federation) on February 27, 2020, the Federal Government of Nigeria through the Central Bank of Nigeria (CBN) announced key economic and fiscal policies/measures calculated at minimising insolvency consequences caused by the pandemic and government lockdown.

These included a one-year moratorium on all principal repayments; interest rate reduction on intervention facilities from 9% to 5%; grant of a three-month repayment moratorium for all government funded loans including government funded loans issued by the Bank of Industry, Bank of Agriculture and the Nigeria Export Import Bank; and regulatory forbearance to Deposit Money Banks for the restructuring of loans for affected businesses and households among other additional incentives to encourage the extension of longer-tenured credit facilities.

The forbearance on interest rates has been extended for another one-year period after its expiration on February 28, 2021 while extension of moratorium is being considered on a case-by-case basis.

The House of Representatives also passed an Emergency Economic Stimulus Bill 2020 (the Bill) on March 24, 2020 to provide a broader framework for the management of COVID-19 induced financial distress. To date, no further progress has been made on the Bill.

New legislative reform efforts or agenda

With the prominent statutory recognition given to it by virtue of its legislative reform advocacy for the past decade, and requirement of certification of practitioners by the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN) and other professional bodies, BRIPAN has commenced engagements with the Corporate Affairs Commission (CAC -- the Regulator) towards the promulgation of procedural legislations which would aid implementation of the new business rescue schemes above mentioned.

Another area which requires urgent attention for insolvency and business restructuring is the creation of a robust framework for cross-border insolvency, cooperation and coordination of courts and insolvency office holders.

Forecast

It is anticipated that the new law would create a conducive framework for the rescue finance market. It is also forecasted that whilst A&C is likely to continue as an alternative tool for achieving business rescue, particularly where it involves the merger and acquisition of more than one company[6], the before-now favoured receivership and managership office will fade away over time in favour of Administration given the new law's provision.[7] The new law is poised to provide for a single portal entry for insolvency through Administration. With the expanded policy space for restructuring, the growth of the rescue market will likely pick up the pace.

The same cannot be said, however, with regards to the personal insolvency framework which sadly remains unreformed.

Notes:

1. Section 483 of CAMA 1990 (s.588 CAMA 2020 new law). Order 18 of the Federal High Court Rules 2019.
2. See Chapter 19 on receivership and management, Chapter 20, on winding-up and Chapter 27 on arrangements and compromise.
3. See Chapters 17 and 18 CAMA 2020 respectively.
4. Sections 705 to 708 CAMA 2020.
5. https://insol.azureedge.net/cmsstorage/insol/media/documents_files/covidguide/30%20april%20updates/nigeria-v3-12-may2021-final.pdf
6. See section 710 of CAMA 2020.
7. Section 452(4) CAMA 2020 provides that appointment of a receiver under a floating charge amounts to administration. An administration is only invalid against a receiver appointed pre-CAMA 2020 by section 454. However, fixed charge holder can appoint a receiver and appointment of administrator required consent of fixed charge holder – see sections 476 and 450 of CAMA 2020.

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