INSOL INTERNATIONAL

COMPARATIVE REVIEW OF APPROACHES TO "RESCUE"OR "DEBTOR-IN-POSSESSION" (DIP) FINANCE IN RESTRUCTURING AND INSOLVENCY REGIMES

INSOL INTERNATIONAL

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PRESIDENT'S INTRODUCTION

I am very pleased to share INSOL International's latest publication, a comparative review of approaches to rescue or debtor-in-possession financing in restructuring and insolvency regimes.

Rescue finance plays a critical role in restructuring – often being the determinative factor in an enterprise surviving or folding. In recent times, local and global factors have created economic and financial pressure, causing access to finance to be a key issue for enterprises of all sizes and across many markets.

This outstanding INSOL International publication provides a comparison of the availability and frequency of the use of rescue finance in 14 jurisdictions. It highlights the differing approach to such finance across these jurisdictions, from formal and established processes to other markets where it is still an emerging trend. There are lessons to be learned from jurisdictions where rescue finance is more commonly used, and interesting trends to watch in regions where its deployment is nascent.

Given the critical role it has in successful restructuring processes, I have no doubt that rescue finance will continue to be a developing and significant area of law reform for restructuring and insolvency regimes across the globe.

This is a compelling and complex topic and this INSOL International publication contains significant detail across a range of mediums – including video – to help practitioners understand the differences and developments in and across various regimes.

On behalf of INSOL International and our global membership, I extend our thanks to Orla McCoy, INSOL Fellow, Clayton Uts, Australia who led the development of this terrific resource and project, and to everyone who contributed to this landmark work.

Scott Atkins
Fellow and President
INSOL International

FOREWORD

The ability of a distressed company to obtain finance to enable it to trade through a restructure, or a formal insolvency administration, can determine the ultimate rescue or demise of the enterprise. For a debtor company in financial distress, any restructuring or sale of the business as a going concern requires cash, or assets which can be turned into cash sufficiently quickly to finance the trade-on or reorganisation. Where credit has been frozen, or selling liquid assets would harm the viability of the business - or where neither is available -rescue financing (or debtor-in-possession financing) can be the debtor company's lifeline. When successful, rescue financing offers the company, and its key stakeholders, the prospect of a viable restructured business. It also offers providers of rescue finance acquisition opportunities via loan-to-own strategies, often attractive interest rates and repayment priority over other debts, potentially on a secured or even senior secured basis. Those attributes alone would seem to make rescue finance an essential tool in the restructuring armoury. Nonetheless, the degree to which different jurisdictions have created formal regimes to cater for such finance, including whether it is even permissible, whether if permissible it can be repaid in priority to existing debt, the extent to which the financier may take security over the assets of the debtor, and with what priority, varies significantly across the globe.

The genesis of this project was an earlier comparative study I had conducted in relation to whether access to rescue finance could be the balm to soothe a spate of retail insolvencies in Australia around that time. It compared the Australian rescue finance and US debtor-in-possession (DIP) finance regimes. A much broader analysis of the availability of rescue finance in restructuring and insolvency regimes around the globe is, of course, a more worthwhile endeavour and INSOL's Technical Research Committee is to be commended for giving this project its seal of approval.

This comparative study of rescue finance regimes consists of chapters written by INSOL members in 14 jurisdictions, each responding to a series of 16 questions in relation to the availability and market prevalence of rescue finance in their jurisdiction. It is intended to be an at-a-glance aid for (often time-poor) practitioners conducting cross-border restructuring, or considering the selection of an appropriate jurisdiction for the commencement of an insolvency proceeding. It should be a valuable resource for the profession.

The results of the comparative review are interesting. Some jurisdictions, like the US (see Craig Martin's chapter 15) and Canada (see Jane Dietrich and Jeffrey Oliver's chapter 4), have deep, well established, rescue finance regimes with sophisticated market participants, developed jurisprudence and large sums of capital available and deployed. However, in recent years a number of other jurisdictions have undertaken significant insolvency reforms, aimed predominantly at facilitating corporate debt restructuring. Examples include the new scheme of arrangement and DIP financing provisions introduced in the Insolvency, Restructuring & Dissolution Act 2018 which, as described by Jo Tay and Ee Jia Min in chapter 12, have now been tested in the Sinagaporean Courts. In January 2021, Law 14.14112/202 reformed the Brazilian Bankruptcy Law, which, as described by Liv Machado in chapter 2, now authorises the Courts in Brazil to approve financing agreements to allow a debtor to fund its activities, restructuring costs or to preserve the value of assets. The caselaw in that jurisdiction on the new legislation is yet to develop but the opportunities are significant. Likewise, India, a beacon for insolvency law reforms to meet the needs of a modern market, introduced the Insolvency and Bankruptcy Code, 2016, which provides for "interim finance" and allows financiers to provide super priority lending to companies undergoing a corporate insolvency resolution process, as described by Dhananjay Kumar and Aishwarya Gupta in chapter 9.

The position in Europe is evolving. The EU Directive on Preventive Restructuring, to be implemented in each member state by 17 July 2021, requires member states to ensure that, in furtherance of preventative restructuring, financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of a restructuring plan is protected. Our comparative review reveals the incremental and different forms of implementation of the EU Directive. In chapter 13 Ferdinand Hengst discusses the position in The Netherlands: rescue finance is available, either via informal (bilateral) negotiation, or under the preventive restructuring framework implemented in the form of the WHOA (*Wet homologatie onderhands akkoord*). In the Czech Republic, Petr Sprinz and Jiri Rahm note (in chapter 6) that although there is no developed market for rescue finance, a (little used) rescue finance framework similar to Chapter 11 of the US Bankruptcy Code exists under ss 41 and 42 of Act No. 182/2006 Coll. of the Act on Insolvency and its Resolution. In other jurisdictions, there may be no formal rescue finance framework, and no established market for rescue finance, but debtors nonetheless have access to forms of rescue finance. Simon Dickson and Nicholas Fox describe this position in the Cayman Islands (in chapter 5), in which rescue finance is made available through schemes of arrangement and formal insolvency proceedings. We learn from Nicholas Partouche (in chapter 7) that in France, forms of finance are available to corporate entities in distress or in formal insolvency proceedings, though there is no codified rescue finance regime or established "market" for rescue finance. The French ordinance transposing the EU Directive should further enhance the promotion of rescue finance in that jurisdiction. To Germany, in chapter 8 Ivo-Meinert Willrodt outlines a similar system to France - forms of finance and financial accommodation are available, albeit via informal systems (rather than a codified regime). The United Kingdom's Corporate Insolvency and Governance Act 2020, which introduced a "restructuring plan" and added features to the already well utilised English scheme of arrangement including a mechanism for "cross-class cramdown" is discussed in chapter 14 by Charlotte Møller. In that jurisdiction, while there is no codified rescue finance regime, there are established "work arounds" which can be utilised to allow a company in financial difficulty to seek rescue financing. The position is similar in Australia. In chapter 2, I (Orla McCoy) describe how rescue finance is addressed in the Australian restructuring market and note that, like other jurisdictions, further legislative reform, potentially emulating some of the successful aspects of the US DIP finance regime, is under consideration. Our final two jurisdictions are the geographically diverse Nigeria and Russia. In chapter 10, Chief Anthony Idigbe explains that, though the market is nascent, rescue finance is possible in Nigeria through certain provisions in the Companies and Allied Matters Act 2020 (which introduced CVAs and administration, with implications for post-commencement financing and, therefore, rescue finance), in addition to finance advanced by the Asset Management Company of Nigeria in respect of assets it has under management. In Russia, Federal Law No. 127-FZ "On Insolvency (Bankruptcy)" dated 26 October 2002 provides some opportunities for post-commencement finance according to Pavel Novikov, Yulia Skiteva and Oksana Tyusina. There is also proposed insolvency reform legislation before the Russian Duma.

If corporate rehabilitation rather than liquidation is to be an imperative of the contemporary global insolvency landscape, the ability of a debtor to obtain fresh credit, and on commercially attractive and acceptable terms may be one further factor which determines the choice of jurisdiction in which proceedings are commenced. More broadly, given the potential opportunities and returns for distressed debt and investment funds, it may also influence where capital is deployed.

The overarching takeaway from the review, as explained by our eminent contributors (the majority of whom are INSOL Fellows), is that while we still have opportunities for improvement, progress is being made across the globe to facilitate corporate restructuring. Lessons can be learned from those jurisdictions in which the market is deep, and developed, as well as from those jurisdictions whose regimes are newer, being road-tested and the wrinkles ironed out. As to the preferred framework, while 11 U.S.C. § 364 is clearly influential, rescue finance via other guises and forms is also possible and enhancements via schemes of arrangement are becoming more prevalent.

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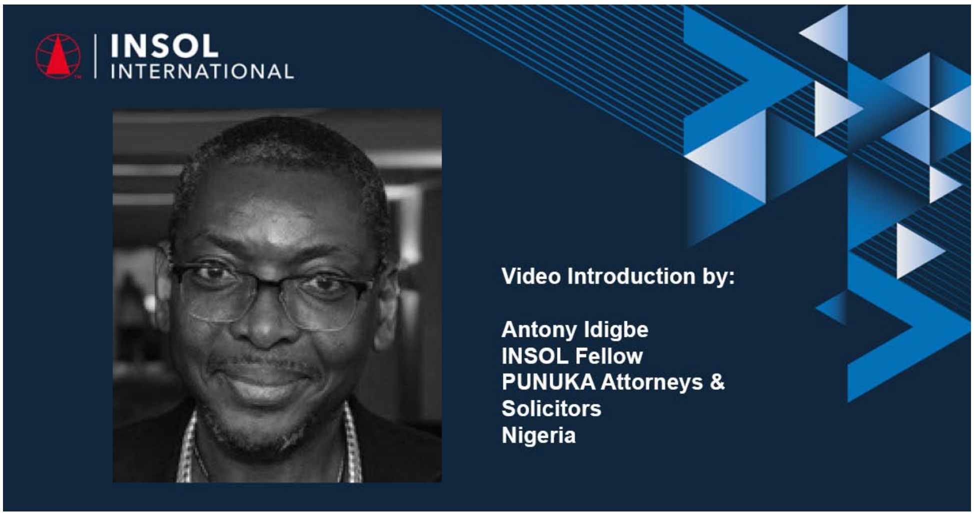

1. Is there an established market for rescue finance?

The market for rescue finance in Nigeria is nascent. Before the Companies and Allied Matters Act 2020 (**CAMA 2020**), the framework for insolvency was liquidation focus with limited provision for business rescue. Receivership was the primary means of creditor recovery, followed by liquidation. Those tools were management displacing and could be value-destroying. 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 is debtor resistance to management displacing tools. The result is that the insolvency system was not efficient enough to attract new investors into the rescue finance market, and the chance of recovery on distressed assets prolonged, as found by the World Bank Ease of Doing Business 2019 Report on Nigeria.

Some proactive commercial judges to attract new investors into the finance market encourage the process by using the directive powers and the amicable dispute resolution powers of the court available under the law and the court's rules. There are few instances where (new) lenders are willing to provide post-commencement finance. In *United Bank for Africa Plc & Tower Aluminium (Nigeria) Plc (in receivership) v Chief (Dr.) Ernest Shonekan & 6 Ors,*[1] the court directed parties to explore settlement, mainly as all the secured creditors were before the court. The parties held OCW meetings, reporting to the court on progress made. The company in-receivership was able to finance corporate reorganisation, and the terms of the settlement entered as a consent judgment.

Consequently, the market for rescue finance was stunted under CAMA 1990. However, CAMA 2020 came into force on 1 January 2021, repealing and replacing the previous CAMA 1990. It introduced two new insolvency and restructuring procedures: Company Voluntary Arrangement (**CVA**) and Administration while retaining Schemes of Arrangement (**Scheme**) and Liquidation (**Winding-up**), which existed under the old law.[2] Under these new procedures, debtors can now propose a business rescue plan to creditors through a CVA without displacing the management, unlike the previous receiver-manager procedure. The Board of a debtor company or qualified creditors can also appoint an administrator

[1] Suit No: FHC/L/CS/178/2016.

[2] See Chapters 17 and 18 CAMA 2020 respectively.

(management displacing procedure) who can also make a similar business rescue proposal to the creditors on the back of a statutory moratorium against creditors enforcing their securities. The old procedures of receivership and managership, winding-up and arrangem ents and compromise were retained under CAMA 2020 in varying degrees.[3] However, the receiver-manager is likely to fade out over time, favouring Administration given the new law's provision. The Scheme of arrangement is likely to continue to be helpful as a way of achieving business rescue, particularly where it involves the merger and acquisition of more than one company.[4]

CAMA 2020 provides for a single portal entry for insolvency as receivership fades. Administration is the entry portal. The purpose of Administration as set out under the law is first to pursue the business or company's rescue, second to get a solution better than liquidation, and lastly to distribute the company's assets to secured and preferential creditors. With the expanded policy space for restructuring, the growth of the rescue market will likely pick up the pace.

2. If not, how do debtors fund or finance corporate reorganisation or trade on?

Debtors fund and finance corporate restructuring primarily through equity contribution. Such contribution could be directly by the shareholder or by related or holding entities or family members. Before CAMA 2020, there was no formal procedure for the debtor-in-possession corporate reorganisation. It follows that the debtor relied solely upon out-of-court workouts to achieve reorganisation. The Scheme under the old CAMA 1990 was more suited to mergers and acquisitions than pure reorganisation.

Another source of funding for reorganisation is cheaper loans from existing or new creditors. Usually, these loans take out the more expensive existing debt giving the debtor relief. However, we observe that obtaining such finance from new creditors could be challenging as existing creditors may be reluctant to continue their exposure with the debtor and reluctant to share their security, resulting in their withholding of consent.

As observed earlier, the debtors are usually reluctant to accede to new investors in their distressed business because of fear of displacement. The CVA now allows debtors to remain in possession and make a proposal to creditors, obtain a moratorium by affidavit and cramdown on dissenting creditors. Such relief may enable the debtor to restructure the business by asset disposal or going concern sale.

On the other hand, although management displacing, Administration provides for an automatic moratorium and allows the Administrator to preserve the business as a going concern, including considering a CVA or Scheme by the debtor.

The purpose of the Administration as provided under the law is to prioritise a) rescue of the business, b) outcome for creditors better than liquidation, and c) realisation and distribution for secured and preferential creditors. Where

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[3] See Chapter 19 on receivership and management, Chapter 20, on winding-up and Chapter 27 on arrangements and compromise.

[4] See section 710 of CAMA 2020.

Administration is the preferred procedure, then the Administrator who has displaced the equity owners can borrow to fund the reorganisation and grant security over the company's property. The receiver and manager have similar powers under the law. However, as noted above, receivership is a diminishing concept.

The Asset Management Company of Nigeria (**AMCON**), a government-owned distressed asset purchaser of bank eligible assets (**EBAs**), has been actively financing some of its acquired assets. Two notable such assets are Arik Air and Aero, two acquired airlines from which AMCON intends to create a national airline called Nigeria Eagle.

The Central Bank of Nigeria (**CBN**) has been licensing private asset management companies (**AMCs**). AMCON has stopped purchasing EBAs from banks. Private AMCs are now active in the distressed asset market. They acquire distressed assets from banks. Private AMCs realise the distressed assets or restructure them for either securitisation or sale to international AMCs.

3. If yes, what are the main sources of funds for rescue finance?

The source of rescue finance in Nigeria depends on the provider of the funding. If the equity holder is providing finance, the source is usually past profit taken out of the company or obtained from other businesses or sources such as loans and family, which they return or invest in the distressed firm if they believe the reorganisation will return the investment.

Existing creditors or subject to the consent of secured creditors if new creditors require security over already encumbered assets, new creditors may provide rescue finance to keep the operations going or restructure the existing debt, thereby providing relief.

Utility providers and critical suppliers are a source of funding for reorganisation upon Administrators' guarantee recognised under the law. The services of critical suppliers and utility providers help the organisation continue as a going concern. The law allows the Administrator to make payment to these providers of critical supplies likely to assist the purpose of the Administration.

The Administrator can borrow from rescue finance suppliers against the company's unencumbered assets or the secured creditors' consent against the encumbered assets.

AMCON issued bonds in exchange for EBAs. AMCON's intervention was in the context of a bank resolution measure for non-performing loans (**NPLs**), which arose in the wake of the 2008/2009 Global Meltdown severely impacting the Nigerian economy by late 2009 and early 2010.

We have seen new investors acquire distressed assets in the context of receivership for creditor realisation without a proposal for reorganisation. Since CAMA 2020 is new, we are yet to see investor funding of asset acquisition as a basis for a CVA or Scheme.

4. Is rescue finance codified or subject to specific legislation?

There is no specific legislation on rescue finance in Nigeria. However, CAMA 2020 has implications for post-commencement financing and, therefore, rescue finance. Post-commencement financing refers to finance provided to the company after the commencement of an insolvency procedure under CAMA 2020. Section 537 generally deals with the charges and liability of an Administrator on vacation or cessation of office. It provides in subsection 2 for priority of the Administrators claims and expenses. The provision further provides that:

- a debt or liability arising out of a contract, including a contract for post-commencement financing, entered into by the former Administrator or a predecessor before cessation shall be–(a) charged on and payable out of property of which the former Administrator had custody or control immediately before cessation; and (b) payable in priority to any charge arising under subsection (2).

In other words, post-commencement financing would enjoy priority over the Administrator's cost, remuneration and expenses. The subsection also recognises the existence of the concept of post-commencement financing or rescue finance without stating any details of what it entails.

However, the scope of post-commencement financing under CAMA 2020 is uncertain but can be grouped according to the priority they enjoy. The first set falls under administration cost. This includes critical utility suppliers under the law, and they require no court order to continue providing their services post-commencement and enjoy priority under the Administrator's cost. Creditors' financing under the Administrator's guarantee enjoys priority under the law as administration cost. The last set of creditors under this head are payments likely to assist the Administration.

Under CAMA 2020, the principal person to raise rescue finance is the Administrator. The law sets the standard of performance, which is to act quickly and efficiently as reasonably practicable. To achieve this, the Administrator can do anything necessary or expedient to manage the company's business or assets. The law vests the power of managing the company, including the Tenth Schedule powers in the Administrator, and stipulates that the Administrator is an officer of the court. Several provisions create criminal liability for the Administrator concerning the formal performance of his / her functions. However, civil liability is prescribed under the law only when the Administrator is found liable for misfeasance. In which case, the court can order restoration or account or contribution to the company property. The Administrator's decisions can be challenged if he or she acted in a manner that unfairly harms the applicant's interest, proposes to act so or does not act quickly or efficiently in the function. There is no specific section imposing personal liability on the Administrator even where the Administrator creates an Administrator Guarantee. It seems that the law manages the risk by discharging the Administrator from liability upon vacation of office and providing priority to the obligations created by the Administrator. Section 537 stipulates that any debt or liability incurred by the Administrator may be charged against the company's property in possession of the Administrator. This suggests that it cannot be charged against the personal assets of the Administrator unless a misfeasance order is made. By directive made under the law, the court can discharge the Administrator in addition to the statutory discharge discussed above.

The second set of post-commencement financing is secured financing over an already encumbered asset. Such financing would require the creditors' consent under the law, and even though no court order is required, a report is sent to the court on the outcome of creditors' consent under the law.

The third set of post-commencement financing relates to the extent to which the priority of secured creditors could be primed without their consent under CAMA 2020. By section 504, the Administrator takes custody and control of the company's property and manages the company's affairs, including implementing any approved CVA or Scheme under section 505. Under section 505(2), the Administrator must comply with all directives of the Court issued under section 500. However, section 505(3) provides that no court direction can be contrary to the approved proposal except for a change of circumstances or desirable misunderstanding.

Under the law, the Administrator can propose to achieve the purpose of the Administration under section 444. The proposal could be in the form of a CVA or a Scheme. Although no such CVA or Scheme can affect the secured creditors without their consent under s.490 (2), the law allows the Administrator to apply to court for directions. The jurisprudence in this area is yet to develop. However, under the law, no payment can be made to unsecured creditors unless the court permits. It is not clear the circumstances where the court would permit because any court direction cannot be contrary to an approved proposal though the law allows the Administrator to make payment likely to assist the purpose of the Administration such as to critical suppliers and utility providers. No court order is required for payment to critical suppliers on the Administrator's guarantee (invites personal liability) and for payment likely to assist the purpose of the Administration. These are in the ordinary course of business.

Under the law, the court may order the Administrator to dispose of property subject to security where the Administrator so applies, and it will promote the purpose of the Administration as set out in section 444 provided that the net proceeds are applied to discharge the secured amount. Even property under hire purchases can be disposed of under the law to promote the purpose. This is similar to the US Chapter 11 moratorium and ipso facto clause. A court order is required to create secured interest post-commencement or realise secured assets as part of a going concern.

The fourth set of post-commencement financing relates to those based on the unencumbered assets of the debtor company. The Administrator can obtain finance based on such an unencumbered asset, and as shown earlier, it would enjoy super-priority over Administration cost. However, it seems that such a transaction would not be in the ordinary course of the Administrator managing the business. Consequently, court direction is required under the law to create secured interest over the company's unencumbered assets.

5. Are there any legislative or regulatory restrictions or requirements for foreign investment which rescue finance providers need to consider?

The Nigerian Investment Promotion Commission Act (**NIPC Act**) allows foreign investors to own 100% of their business in Nigeria except for a few exceptions, such as military and aviation-related business. However, any such foreign investment is expected to have a minimum issued capital of =N=10 million. The NIPC Act offers protection to foreign investors by providing a statutory right to ICSID arbitration.[5] Also, under the provisions of CAMA 2020, a foreign company can conduct business in Nigeria for six months, after which it must register as a Nigerian company. Although a foreign investor can engage in many businesses, any investor, including a foreign investor, must comply with sector-specific restrictions or requirements. For instance, to engage in the finance business, the Banks and Other Finance Institutions Act BOFIA requires a CBN licence. Also, to engage in the investment business, the Investment and Securities Act 2007 (**ISA 2007**) requires registration with the Securities and Exchange Commission (**SEC**). Other sectors such as telecommunications, banking, insurance, aviation and oil / gas sectors, etc., have their requirements.

For a foreign investor to repatriate a dividend from its investment, the investor must import the capital into Nigeria through a licensed bank that would issue a certificate of capital importation (**CCI**). CCI is a CBN certificate issued by banks to a foreign investor as evidence of authorised importation of capital into Nigeria. It is not limited to the importation of capital in cash and applies to consideration in kind, including importation of raw materials, plants, and machinery. CCI enables repatriation of the net of tax proceeds from the investment and capital.

Further, where the investment brings about full ownership of the company, there is the need for a business permit from the Ministry of Interior. Other requirements applicable to a foreign investor include registration of transfer of technology agreements with the National Office for Technology Acquisition and Promotion, expatriate quotas, work / residence permits for foreign officers of the investor, registration for tax, etc. The remittance of license and royalty fees is subject to such registration.

6. Is court approval required for rescue finance or any security granted to the lender?

Whether rescue finance or any grant of security to lender post-commencement requires court approval depends on the rescue finance option adopted by the debtor company. Rescue finance and accession in or grant of security to a lender may be an outcome of various restructuring arrangements under CAMA 2020 (including Liquidation, Administration, Scheme and CVA). In some cases, the sanction of the court is mandatory. For instance, a restructuring done within a Scheme requires the court sanction for holding shareholders or creditors meetings to approve and sanction the Scheme.[6] Also, in an Administration procedure, recourse to the court is mandatory where the Administrator wishes to dispose of

[5] Section 20 of the NIPC Act.

[6] Section 715.

property subject to security other than a floating charge or if not subject to security, where it will promote the purpose of the Administration.

Apart from the limited circumstances mentioned above, court approval is not required for an Administrator to incur administration costs. Administration cost consists of orders to critical suppliers and utilities, issuing an Administrator's guarantee and payment likely to assist the Administration. Also, creating a charge over assets in possession of the Administrator does not require court approval under the law.

The creating of secured financing over already encumbered assets could be done without court approval if the secured creditors give consent. Although it does not require a court order to create such secured financing with secured creditor consent, the Administrator must report to the court regarding the consent of preferential or secured creditors.

Where rescue finance requires court approval, the court's paramount consideration in approving or rejecting the proposal as provided under the law is whether it would promote the purpose of Administration.

7. Is creditor or secured creditor approval required for rescue finance?

The structuring of post-commencement finance (**PCF**) often impacts the rights of secured and preferential creditors. There may be a proposal to increase the tenure of the debt, reduce the interest rate, obtain a haircut on accrued interest and principal or convert the debt to equity. The law provides that an Administrator's statement of a proposal shall not affect the right of a secured creditor to enforce its security except with the secured creditor's consent. Under section 502, an administrator can distribute to secured and preferential creditors without a court approval but not to unsecured creditors unless the court so directs.

It follows that any rescue finance usually included in a proposal / plans for reorganisation requires the approval of secured creditors where their rights are affected. The approval of secured creditors is through the appropriate majority obtained at the creditors' meeting. If the required majority is obtained, a cramdown is effective against dissenting creditors. However, the problem is that CAMA 2020 did not specify the required majority for a CVA. Further, a CVA may not impact secured creditors.[7] Where the consent of secured creditors is required and not obtained, the proposal risk constituting an unlawful preference.

8. What role does a creditors' committee play in approving rescue finance (if any)?

In a liquidation, the law provides that a creditors' meeting may establish a creditors' Committee. The Committee is empowered to engage with the Administrator or Liquidator on the exercise of their function. The report from the Committee would guide the creditors on their decision to approve, reject or modify the Insolvency Practitioner's proposal. The Committee may also endorse a commercially justifiable proposal featuring rescue finance. The Committee can also replace directors or company-appointed Administrators. Where in doubt, it is

[7] Sections 437, 438 and 490 of the CAMA 2020.

advisable to obtain the Creditor Committee approval for significant decisions. They act as the Board to the Administrator as the Board is to the CEO.

9. What priority of repayment is available to unsecured rescue financiers if any?

CAMA 2020 stipulates that the distribution rules applicable to winding up apply to Administration. Ordinarily, as entrenched under the law, the priority rules stipulate the preferential payments such as employees' salaries, wages, cost and expenses of the proceedings, etc., are to be made without prejudice to the settlement of the claims of secured creditors.[8] The equity holders rank last. The unsecured creditors are generally settled before the equity holders from the company's available assets (if any). Section 502 empowers the Administrator to make a distribution to secured and preferential creditors. However, section 502 (3) of CAMA 2020 stipulates that no payment shall be made to unsecured creditors unless the Court permits.

The unsecured rescue financier is an unsecured creditor and so ordinarily does not enjoy any payment priority. However, the court has the discretion to direct payment in priority to an unsecured rescue financier. This is based on the court's discretion to permit payment and give directions under the law. Also, the Administrator has section 503 power to make payments likely to assist the purpose of the Administration under s.444.

As pointed out earlier, there is no personal liability imposed on the Administrator except where there is malfeasance. Any debt or liability incurred by the Administrator enjoys statutory priority. A court order is not necessary to relieve the Administrator from personal liability in those circumstances. However, under section 500, a direction could conceptually be issued discharging the Administrator from personal liability.

10. Can rescue finance be provided on a secured basis?

Yes, an Administrator can provide a guarantee for the rescue finance under the law. The Administrator can also create a charge over assets in his or her possession under s.537(3). He or she may also obtain accession of (new) lender into the security in place or provide unencumbered assets as security to the rescue financier. With the secured creditors' consent, rescue finance could be secured over the encumbered assets.[9] It follows that whether rescue finance can be provided on a secured basis depends on the availability of unencumbered assets or the approval of the secured creditors if available assets are encumbered.

11. Can rescue finance be provided on a super-priority secured basis?

The law provides a window for an Administrator to give super-priority to rescue finance under different options. In certain circumstances, the rescue finance may be treated as Administration Cost, or as being the first charge before the Administration Cost, or when the consent of secured creditor has been obtained as ranking above or *pari passu* with the secured claim (Section 490 and 510 CAMA).

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[8] Section 657 (6) (a) CAMA.
[9] Section 510 (2) (a) CAMA.

Notwithstanding the above flexibility, an Administrator has the discretion to make any payment he thinks is likely to assist the achievement of the purpose of the Administration (s.503). However, the Administrator cannot distribute to a creditor who is not secured or preferential except with the leave of the court. This rule seeks to forestall the unlawful preference of a creditor over and above others. Therefore, an administrator must justify a greater priority given to rescue finance in the ranking of priorities.

Besides section 537, rescue finance can achieve super-priority through negotiation or pari pasu agreement with prior creditors as a basis for the injection of fresh funds. However, the success of this method would depend on prior creditor perception that they would get a better value in the restructuring than in a liquidation.

12. Can priority or additional security be obtained for pre-petition financing?

There is no specific provision allowing pre-petition financing to be rolled into post-petition rescue finance. The risk of unlawful preference requires that fresh consideration be provided for any additional security provided for already existing financing. It is possible that a restructuring of the terms of the pre-petition financing may enable it to be secured as rescue finance.

Any transaction which puts a creditor at an undue advantage over other creditors is considered invalid under the law. Also, where no consideration is offered for a benefit, the transaction is at an undervalue unless the company has benefit. Depending on the structuring, rescue finance could justify providing consideration and benefit, requiring additional security over old credit because of access to new additional finance which it offers.

13. Is security granted for rescue finance be automatically perfected, or is additional perfection required and, if so, what steps must be taken?

There is no requirement for the perfection of additional administration cost under s.537(2) or the grant of super-priority under s.537(3).

There is no provision for automatic perfection in the law. Section 222 CAMA mandates the registration of charges created by the company on its property, including mortgage with the Corporate Affairs Commission (**CAC**) within 90 days after creating the charge. By s.222(14), the registration requirement does not apply to a security financial collateral arrangement such as charges over shares, deposits, and stock lending and repo arrangements.

The perfection also attracts the payment of relevant stamp duties to the Federal Inland Revenue Service (**FIRS**), and in the case of a charge on land or other real property, the consent of the Executive Governor of the state where the real property is located is mandatory. Also, perfection requires registration of security over land at the various states' land registries.

For movable assets, the Secured Transactions in Movable Assets Act 2017 (**STMAA 2017**) provides for filing of financing statement at the National Collateral Registry for security interest created in security agreements to gain priority according to the date of registration. Section 53 of the STMAA provides that the commencement of insolvency proceedings does not displace choice of law respecting the creation, perfection, priority and enforcement of security interest. It follows that post-petition security over movable assets requires registration under the STMAA 2017.

14. Is it common for the rescue finance provider to require milestones or other deliverables to be met, or to exercise control over the bankruptcy process?

There is no codification or specific legislation on rescue finance in Nigeria. The concept was only recently introduced by CAMA 2020. The jurisprudence is still developing. However, the practice of financiers setting milestones and deliverables to be met and exercise control over the debtor through the appointment of a receiver-manager or putting the company in liquidation is fairly developed under the old law CAMA 1990. There is no reason why a CAMA 2020 rescue financing arrangement cannot set milestones and deliverables and assert some control over the bankruptcy process. Our experience includes an insistence on observer position for the creditor on the Board of the distressed company and limitations on dividend payment. Others are budget targets, etc. We have also seen waivers of principal and interest tied to the achievement of agreed instalment terms.

Under the old law (CAMA 1990), the receiver-manager was an agent of thecreditor to realise the collateral. The creditor could sue directly in its name as principal of the receiver-manager. Consequently, the creditor exercised control over the receiver-manage. However, under CAMA 2020, the Administrator is an officer of the Court and expected to act independently of the creditors.

15. Have there been any cases in which the rescue finance provisions have been analysed by the courts?

DIP finance jurisprudence is yet to develop to the best of our knowledge, mainly as most of the provisions considered above were only recently introduced in January 2021.

16. How has the market for rescue finance been impacted by the COVID-19 pandemic?

The index case of the Corona Virus (Covid 19) was recorded in Lagos State, Nigeria, on February 27, 2020, and the relevant framework (CAMA 2020) for the business rescue regime was enacted on August 7, 2020 (effective January 1, 2021). Before the said enactment, the insolvency regime was mainly creditor friendly, and liquidation and receivership prevailed.

The Central Bank of Nigeria (CBN) announced the following stimulus and fiscal measures to support the flow of credit and ameliorate the impact of the COVID-19.

1. The creation of N50 billion target credit facility for affected households and small and medium enterprises;

2. Additional N100 billion intervention fund in healthcare loans to pharmaceutical companies and healthcare practitioners intending to expand / build capacity;

3. Identification of few key local pharmaceutical companies that will be granted funding facilities to support the procurement of raw materials and equipment required to boost local drug production;

4. N1 trillion in loans to boost local manufacturing and production across critical sectors etc.

The Government also introduced some additional employee-specific measures through tax reliefs and incentives in the Finance Act 2020, which amends portions of various extant tax legislations, including that of the Personal Income Tax Act 2007 (as amended). The amendments re-introduce:

- Life assurance premium tax relief and redefines what constitutes gross income for PAYE to prevent the consideration of non-taxable income in the computation of applicable consolidated relief allowance
- Exemption of minimum wage earners from tax liabilities; and
- Redefines the purport of exemption of compensation for loss of office from capital gains tax.

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