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Implementation of the business rescue options under the Companies and Allied Matters Act, 2020 in Nigeria: The journey so far

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There has been some significant implementation of the business rescue options introduced by the Companies and Allied Matters Act, 2020 ("CAMA 2020"), effective on August 7, 2020.

With the advent of CAMA 2020 on January 1, 2021, and the introduction of new business rescue procedures: Company Voluntary Arrangement (CVA) and Administration, some entities in Nigeria have taken steps to utilise these procedures to improve or save their businesses from financial distress.

CVA,¹ with its minimal court interference procedure, offers the directors of a company the opportunity to voluntarily (with the support of a Nominee) propose a composition with its creditors or a scheme of arrangement of its affairs under the shadow of the law and Court. Administration,² on the other hand, empowers the Administrator to manage the affairs of the company, explore available rescue options and indeed tools to achieve a compromise with the creditors and the most practical value that can be obtained for the company for the efficient realisation of the objective of the administration.

Notably, in January 2022, the Corporate Affairs Commission (CAC), in line with its powers under Section 867 of CAMA 2020, is expected to finalise the draft Insolvency Regulations 2022 ("the Regulations") to further provide the framework/modalities for implementing the business rescue options as entrenched by CAMA 2020. Also, the Presidential Enabling Business Environment Council (PEBEC) is working on Insolvency Rules to aid the implementation of CVA and Administration specifically.

Overview of the milestones attained by implementing the business rescue procedures

The Tourist Company of Nigeria ("TCN/the Company," a leading gaming and hospitality

business in Nigeria) undertook the pioneer CVA procedure in Nigeria in 2021. In *FHC/L/CS/1250/2021- Re: Seyi Akinwunmi & Okorie Kalu*, the company, through its joint Nominees, filed an *ex parte* originating application praying for an order sanctioning their appointment as Nominees of the proposed CVA and summoning separate meetings of members and creditors of the company to approve the company's proposal to restructure the terms of shareholder loans.

On November 15, 2021, the Court granted the prayers sought. The Court also noted the absence of specific Insolvency Procedural Regulations. However, it issued relevant directives to the Nominees concerning the conduct of the meetings and notifications to the Court to ensure that the company successfully restructures its obligations to enable it to remain a going concern. After the members and creditors successfully held approval meetings, a report was sent to the Court, and the Court sanctioned the CVA proposal.

Another pioneer out-of-court Administration by the company/directors was initiated in December 2021. In *re Ngozika Onu & Ors. (Administration of Imperial JV Limited) – Suit No: FHC/L/CS/140/2022*, the directors of the company vide *ex parte* originating summons dated January 27, 2022, approached the Court to sanction the appointment of an Administrator over the company's affairs under Ss. 443, 459, 462 – 466, 500 CAMA. In compliance with the provisions of CAMA, the company issued relevant notices and board resolutions in respect of the administration. It lodged the notice of intention to appoint an Administrator by directors to be delivered to

the qualifying floating charge holder with the Corporate Affairs Commission. The said notice to appoint an Administrator by directors was delivered to the qualifying floating charge holder (QFCH). In line with the provisions of CAMA, the QFCH ought to issue a written consent to the said administration within the timeline as stipulated in the notice.

CAMA provides that at least three working days' notice of intention to appoint an administrator in the prescribed form must be served on all parties entitled to nominate an administrator. In the absence of the Insolvency Regulations and the said prescribed form being annexed as Schedules to CAMA, the directors adopted the "deemed approval" (failure of the QFCH to consent within the relevant timeline expressly) as obtainable in the UK (see *Re Tokenhouse VB Limited [2020] EWHC 3171 (Ch)*). However, the Federal High Court was not persuaded by this approach and ordered that the written consent of the QFCH must be sought and obtained before the administration will be sanctioned by the Court, which position may establish a somewhat restrictive precedent and stifle an out-of-court appointment of Administrator by directors. Steps are being taken nonetheless by the Administrator to obtain the written consent of the QFCH. An explanation could be that administration is more of an in-court proceeding (even when initiated out of Court) than a CVA.

From the preceding, the implementation of the spirit and intent of business rescue has achieved mixed results, depending on the commercial orientation/culture and training of the judge (business rescue procedures being novel areas in which capacity building is still ongoing among the judiciary and practitioners). Practitioners have had to be creative by using *ex parte* originating summons to file relevant reports and notices without insolvency rules. An administrative registry for filing insolvency reports is yet to be established. Nonetheless, the CVA procedure has seamlessly taken off in Nigeria.

The pioneer case serves as a precedent for several other entities seeking to explore CVA

as a tool for their business restructuring and reorganisation. We note that the pioneer case has been criticised for the steps taken by the Nominees by applying to the Court for orders to sanction their summoning of the relevant meetings of creditors and shareholders as opposed to merely submitting a report to the Court stating their opinion on whether the meetings should be summoned and the date, time and place of meetings.³ However, it is expected that this practice will become unnecessary once the Insolvency Rules and administrative registry for report filing in Court are put in place. On the other hand, unless creativity and innovation become pervasive, the development of the right culture and jurisprudence regarding administration could be stunted until the introduction of Insolvency Regulations or Rules.

Other particular sector insolvency frameworks

In addition to the above legislative and judicial milestones, a unique rescue framework exists for some regulated industries, such as banking. The Banks and Other Financial Institutions Act, 2020 ("BOFIA 2020/the Act") repealed the BOFIA Cap B3 LFN, 2004 as the significant legislation regulating and supervising banks and non-bank financial institutions' operations and activities in Nigeria. BOFIA 2020 introduced provisions pertinent to the rescue of failing banks and other financial institutions.⁴ The Central Bank of Nigeria ("CBN") remains the apex regulatory agency authorised by the Act to issue and revoke banking, including offshore banking licences.⁵ The CBN must approve any agreement or arrangement for restructuring, reorganisation, merger and disposal of banks in Nigeria.⁶

The Act mandates CBN to intervene in a failing bank to acquire its shares and control the bank, amongst others if it is likely the bank will be unable to meet its obligations under the Act or the bank is about to suspend payment to any extent, or it is insolvent, among other reasons.⁷ In addition, the CBN is empowered to make orders such as

transfer the bank, the whole or part of the banking business to third-party private purchasers as may be necessary to ensure the survival and revival of the bank.⁸ Where all the intervention measures of the CBN to rescue the failing bank fails, CBN may revoke the banking licence.⁹ After that, the Nigeria Deposit Insurance Corporation (NDIC) shall apply to the Federal High Court for a winding-up order.¹⁰ However, to ensure the survival of the failing bank, the Act mandates relevant agencies to cooperate, render assistance, grant waivers or forbearances to resolve a banking crisis occasioned whenever banks that are critically distressed control 12.5% or more of the total assets in the industry, or 12.5% or more of the total industry deposits are threatened.¹¹

Additionally, the CBN may bail in a failing bank or other financial institution by cancellation, modification or conversion of any eligible instrument issued by the bank or other financial institution or which it is a party to or subject to where CBN believes that the qualified instruments ought to be bailed-in to facilitate the rescue of the bank or other financial institution or the available assets of the bank, or other financial institutions do not, or are unlikely to support the payment of its liabilities as they become due and payable. The Act provides a moratorium on the bail-in to the extent that all claims, judgement debt enforcement in respect of an eligible instrument existing or being pursued as at the date of the bail-in certificate automatically becomes suspended and unenforceable against the bank or other financial institution during the period covered by the bail-in certificate or any period as may be determined by the Governor of CBN by a written notice.¹²

Under BOFIA 2020, the CBN may, without the consent of the shareholders of the bank or other financial institution or any third party save for the private asset management vehicle and without complying with any procedural requirements under any law or written contract, utilise the asset separation tool to transfer the assets of a bank or other financial institution to

one or more private asset management vehicles to maximise their value for an eventual sale or organised and measured winding up.^{13 14} The private asset management vehicle owes no duty to the shareholders or creditors of the bank or other financial institution. Also, it has no liability to them for acts and omissions in the discharge of their duties unless in the event of fraud or gross misconduct, which directly affects the rights of such shareholders or creditors. The CBN can also utilize the sale of business tools to sell on commercial terms shares or other instruments of ownership issued by the bank and all or any asset, right or liability of the bank.¹⁵

New procedural reform efforts or agenda

As mentioned earlier, in response to the urgent need for procedural reforms which would support the implementation of the substantive laws governing business rescue and restructuring, efforts are ongoing on two planks with the CAC and PEBC on Insolvency Regulations and Rules, respectively. There are also efforts being made through the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN) to draft Insolvency Practice Directions for the Court. Another area that requires urgent attention is creating a robust framework for cross-border insolvency, cooperation and coordination of courts and insolvency officeholders.

Forecast

The new Insolvency Regulation is anticipated to entrench relevant forms and modalities, further clarifying the jurisprudence and creating a conducive framework for implementing the business rescue options.

Notes:

¹ See Chapter 17 CAMA 2020.

² See Chapter 18 CAMA 2020.

³ Nigeria: A Preliminary Appraisal of Nigeria's First-Ever Company Voluntary Arrangement - allAfrica.com.

⁴ See S.130 BOFIA, s. 34-42 (Part IV) BOFIA.

⁵ See Ss.5, 8 and 12 BOFIA.

⁶ See Ss. 7 BOFIA. This is without prejudice to the provisions of the Federal Competition and Consumer Protection Act. See subsection 6 and section 53 BOFIA.

⁷ See S.34 (3) BOFIA.

⁸ See S.34 (2h) BOFIA.

⁹ See S.34(4) BOFIA.

¹⁰ See S.35 BOFIA.

¹¹ See S.36 BOFIA. Agencies include the Corporate Affairs Commission, Federal Inland Revenue Service, Nigeria Deposit Insurance Corporation, Federal Ministry of Finance, Budget and National Planning, and any ministry, department, or agency determined by the CBN Governor.

¹² See Ss. 37 - 39 BOFIA.

¹³ See S. 41 BOFIA.

¹⁴ Moratorium to the effect that the shareholders or creditors of the bank or other financial institutions and other third parties shall not enforce any right, judgment or claim howsoever described against the assets transferred to the private asset management vehicle.

¹⁵ See S. 42 BOFIA.

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