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A COMPARATIVE STUDY OF CORPORATE REHABILITATION IN NIGERIA AND UNITED KINGDOM

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Abstract

As a company grows from infancy to adulthood, there may come moments where the company may fall ill- that is in distress, this illness at times may point towards the direction of liquidation or winding up the activities of the company, which in the literal sense, signifies the death of the company. It may however not be economically beneficial nor shareholders friendly that the company be allowed to collapse. The company may then begin to seek a means of survival despite its indebtedness. The idea of corporate rehabilitation is thus, premised on the exigency to keep an ailing company as a going concern. This paperexamines the relevant laws in Nigeria and how effective they have been able to provide sustainable survival mechanics for ailing companies in Nigeria. Also, the paper compared the Nigerian corporate rehabilitation procedures with that of the United Kingdom(UK). The study revealed that the present legal framework for companies in Nigeria, especially the Companies and Allied Matters Act (CAMA) does not provide sufficient support system for ailing companies. It concludes that CAMA does not measure as a dependable legal framework for corporate rehabilitation, on the scale of international best practice. It found that UK has a more developed legal framework for corporate rescue; as a consequence, the Company's Voluntary Arrangement and Administration are two convenient corporate rescue/ rehabilitation mechanisms which could serve asmodels for developing a concrete corporate rescue regime in Nigeria.

Keywords: Corporate rehabilitation, Corporate rescue, Nigeria, United Kingdom

INTRODUCTION

It is trite that upon incorporation, a company becomes a legal entity with all the incidence of incorporation attached to it; this is the hallmark of the decision in the*Salomon v. A. Salomon and Co. Ltd.*[1]A company, just like a natural person, after its birth (incorporation) begins to operate through its organs,as the company grows from infancy to adulthood, there may come moments where the company falls into financial difficulties or trauma.The trauma may however be of such intensity that it points towards dissolving the company.It may nevertheless,be the wish of the shareholders that the company continue to be a going concern- the alter egos of the company may then begin to seek ways to rehabilitate the company and set it free from its troubleswithout necessarily shutting down.

The idea of corporate rehabilitation is premised on the belief that a company not doing so well can be savaged, given an enabling legal climate. Central to the idea of keeping a company as a going concern, is based onthe notion that a company forms an integral part of the community in which it operates, neither can it be over emphasized that a company impacts on the economic, social and political fabric of the community where it does business. Thus, the failure of that company may have overwhelming effect on the owners of the company, the directors, the employees, the families and other persons dependent on the employees, and the society at large in situations where such society survives on the corporate social responsibility provided by the

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[1](1896) UKHL 1, (1897) AC 22

company. As poignantly noted by the Cork Committee in England on corporate rescue:

> A concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even a region…. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community….[2](Sic)

As noted by Yebisi and Omidoyin in 'Corporate Rescue Law to the Rescue of Businesses in Trauma in Nigeria' the failure of a company may potentially affect the shareholders- but not the shareholders alone, the managers, labourers, the food and water hawkers, the drivers, daily jobbers within the precinct of the company are also affected.[3]

Halliday and Babalola appositely noted in 'Quest for Reform on Corporate Rescue and Insolvency Procedure in Nigeria' that the consequences of winding-up or liquidation of an insolvent company do not always engender business efficacy, rather the process of liquidation of a company would always at all times produce victims whose loss or injury may not be remedied.[4] Similarly, Nwafor, commenting on the justification of corporate rehabilitation in 'The Goal(s) of Corporate Rescue in Company Law: A Comparative Analysis' recognizes the

[2]Report of the Review Committee on Insolvency Law and Practice (Cork Committee Report, 1982 (Cmnd 8558) para. 204.

[3]Ebenezer T. and Taiye J. Omidoyin, 'Corporate Rescue Law to the Rescue Of Business in Trauma in Nigeria' (2018) 73 Journal of Law, Policy and Globalization; 44

[4]ChidiHallidayand ModupeBabalola, 'Quest for Reform of Corporate Rescue and Insolvency Procedure in Nigeria' (2016) 2(1) *Journal of Business Law;* 353.

need to keep a company as a going concern for economic reasons, such as security of employment of the employees of the company.[5]

Corporate rehabilitation trends are already becoming a globally accepted corporate necessity- many countries like; the United State of America, the United Kingdom and more recently India have experienced reforms and development in their corporate rehabilitation legislation. To this end, the efficacy of a concise and effective corporate rehabilitation regime cannot therefore be overdressed.

This study is predicated on the notion that it is all round purposeful and beneficial to examine the corporate rehabilitation regime in Nigeria. This is important so as to stem the growing chain of corporate failures in Nigeria, so as not to jeopardize the socio-economic advantages offered by already existing companies. This study compares the rescue regime in Nigeria, with that of a more developed regime, United Kingdom, which also serves as Nigeria's model country

In this study, corporate rehabilitation means corporate rescue, as against corporate liquidation. It is an attempt to provide survival opportunities for companies in difficulties. Corporate rehabilitation emphasizes on corporate sustainability and places less focus on corporate liquidation or collapse, it is therefore a 'cure than kill' approach aimed at ameliorating the spate of growing corporate failures, by providing a definitive proper standing for company which would otherwise collapse as a result of its financially or managerial induced trauma.

[5]Nwafor A.O. (2017) 'The Goal(s) of Corporate Rescue in Company Law: A Comparative Analysis'. *Corporate Board: role, duties and composition, 13(2), 20-31.*

Corporate Rehabilitation Models in Nigeria

Nigerian Insolvency Legislation is found primarily in the Companies and Allied Matters Act(CAMA).[6]The CAMA permits companies to restructure their capital structures internally.[7]It could also be inferred that companies may also restructure their capital or operational structures by consolidating with other companies through mergers, amalgamations, takeovers and acquisitions, all of which are outlined in the Investment and Securities Act (ISA) 2007.[8]Paramount to the aim of this study is the need to evaluate the actual workings of the corporate rescue mechanisms in the aforementioned mentioned laws. The CAMA provides two main procedures which may be applied to resolve the affairs of distressed companies when outright liquidation is undesirable.

The company may restructure its affairs by proposing an 'Arrangement and Compromise' to its members and/or creditors, subject to the sanction of the court.[9]Alternatively, a receiver/manager may be appointed to take over the administration of the company's affairs.[10]The latter is, originally, one of the remedies by which a secured lender may enforce its security. The mechanism provides for an outside manager; the receiver/manager to take control of the distressed company's affairs and, hopefully, help reverse its fortunes.

It is not uncommon today in Nigeria for creditors to commence winding-up proceedings against debtor companies for recovering debt which have become due and unpaid.[11] While sometimes this may be a mere bluff to force payment by the business debtor, some other times,

[6] Cap. C20, LFN 2004.
[7]Part V, CAMA 2004.
[8] ISA 2007
[9]Part XVI CAMA 2004.
[10]Part XIV CAMA 2004.
[11] Sanford Mba, "Rethinking Business Rescue in Nigeria: Borrowing Virtues from Chapter Eleven from the U.S. Bankruptcy Code (2015) 58(1) JLS; 86.

such proceedings are pursued vigorously by the creditor(s) as an alternative to commencing debt recovery proceeding. The resort to winding up proceeding as the first option by creditors in Nigeria has certain critical implications. First, it overlooks the benefits- such as job creation/opportunities, continued tax revenue, corporate social responsibility contribution, dividend payout and whole class of wider interests that accrue to society from the continued operation of the business upon rescue.[12] Secondly, it might not be in the best interest of a creditor who might end up with a less favourable standing in the redistribution of the proceeds of the assets realized from the wound up business and may have well benefited more in the long the continued stay in business by the company.

Arrangement and Compromise as a Rescue Device under Companies and Allied Matters Act, 1990

By the provision of section 537 of the CAMA, arrangement means any change in the rights and liabilities of members, debenture holders or creditors of a company or any class of them. The Companies and Allied Matters Act recognizes two types of arrangement and compromise for the purpose of restructuring the affairs of the company to wit: "arrangement on sale"[13] and "creditors and shareholders' compromise or arrangement".[14] Before considering the general procedure under the Act for arrangement and compromise, it is worthy of mention that the arrangement on sale presupposes the voluntary winding up of a company with the authorization of the liquidator to dispose of the

[12] A. Idigbe, "Using Existing Insolvency Framework to Drive Business Recovery in Nigeria: The Role of Judges" <http://www.punuka.com/uploads/role_of_judges_in driving a business rescue approach in existing insolvency framework.pdf.> accessed 14 June 2019.

[13] S. 538 CAMA.

[14] S. 539 and 540 CAMA.

whole or part of the undertaking of the company to another incorporated company (a transferee company).[15] Thus, clearly, what happens in the sale arrangement is not a rescue of a business but the sale of assets by one company to another. The arrangement on sale presupposes that the asset of the liquidating company is sufficient to cater for all its liabilities. This is because as a requirement for voluntary winding up under CAMA, the company is obligated to file a statutory declaration of solvency to the effect that the company is able to pay up its debts within a period not more that 12 months of the commencement of winding up proceedings.[16] It therefore follows that the rationale for this procedure is not to serve as a form of corporate rescue and may not be looked upon as such. Therefore the attention here is focused on the arrangement and compromise carried out between and amongst creditors and shareholders to internally restore the business for the survival of the company.

Arrangement and Compromise Procedure

The procedure under CAMA starts with an application to the court for the meetings to be held by company making the arrangement.[17] This application may be made by the company, its creditors, a member or even the liquidator of the company in the case where the company is being wound up.[18] At the court's direction, the class of interested members or creditors is summoned. At the meeting(s), the proposed arrangement or compromise will be deliberated upon. As part of the notice summoning the meeting, it is required that a document containing the statement which explains the effect of the scheme, as

[15] S. 538(1) CAMA.
[16] S. 538(1) CAMA
[17] S. 539(1) CAMA
[18] Ibid.

well as any material interest of the directors which may be affected by the scheme in a way different from that other interested persons with a shared or similar interest.[19] If at the close of the meeting, the relevant members or creditors agree to a compromise or arrangement by a majority which is not less than three- quarter in value in respect of the shares held by such members or the interest of such creditors as the case may be, the company may now approach the court for the second time for its sanction of the arrangement and compromise reached with the majority.[20] This court sanction doesnot come free of the courts own perception of the fairness of the scheme as in spite of the majority approval, the court may yet refer the scheme to the Securities and Exchange Commission (SEC) for the assessment of the fairness of the scheme and the preparation of written report on same.[21]

Upon satisfying itself on the fairness of the scheme, the court may now sanction it and the arrangement and compromise becomes binding on the members, creditors or the relevant class of them. The implication of this is a cram down on the dissenting minority which may have voted against the scheme.[22] This device is essentially meant to achieve some form of internal restructuring involving the stakeholders of the business.

The most common use of schemes in relation to troubled companies in Nigeria is for the reorganization of the share capital of a company and the injection of additional capital to resuscitate the business. In these scenarios, rather than simply increasing the share capital of the company further, particularly where some of the existing capital is

[19] S. 540 CAMA
[20] S. 539(2) CAMA
[21] Ibid.
[22] S. 539(3)

already lost, existing shareholders of the company will be required to surrender a portion of their shareholding or such pre-determined portion of their shareholding will be cancelled. Thereafter, new shares would be issued to a strategic investor who is willing to finance the company's recovery.[23]

Notwithstanding the above, further research on this subject reveals that other options available to the company to salvage the situation and keep the company afloat as a going concern are:

1. Management Buy-out e.g. shareholders buy out, management /employee buy out[24]
2. Increase of share capital.[25]
3. Share capital reduction.[26]
4. Share consolidation and reconstruction.[27]
5. Conversion and re-registration of the company in order to take advantage of the capital market.[28]
6. Salary Adjustment (Downsizing): This is the latest trend and involves cut down in salaries. However, it is not popular in Nigeria.[29]

Business Rescue Device in the Investment and Securities Act (ISA)

The ISA is the primary statute that regulates the corporate restructuring of firms in Nigeria. The Securities and Exchange Commission is empowered by the ISA to oversee all forms of business combinations

[23]DipoOkuribido, 'The Scheme of Arrangement: A Viable Option for Nigerian Companies in a Downturn?' 2016 Emerging Markets Restructuring Journal 1(1).
[24]RULE 449 SEC RULES 2013.
[25]S.102 CAMA.
[26]S. 106 CAMA.
[27]S. 100 CAMA.
[28]S. 50-53 CAMA.
[29]Ibid (n 7).

including mergers, take over, amalgamations and acquisitions. While opinions have been expressed that the Merger and Acquisition procedure as a business rescue device, it is here submitted that they are not rather, the goals of a Merger and Acquisition and indeed any other form of business combination are not to rescue businesses but they generally revolve around the integration of corporate assets as a source of value enhancement. Thus, the merger of two corporations may result in one stronger and healthier entity with the attendant economies of scale, scope and benefits that come with the integration of the businesses. However, a distressed business certainly does not have the wherewithal to acquire another company and for acquisition to be successful, it will depend on the ability of the acquirer to access sufficient financing to effect the acquisition.[30] In fact, in some instances, a business combination may precipitate the insolvency of the acquiring company.[31]

IsReceivership a Business Rescue Device in Nigeria?

Like much of Nigeria's legislation, the Nigeria receivership has its root in the English receivership which is a debt recovery tool in the arsenal of the English secured creditor.Under the common law practice, the receiver may choose to undertake a rescue. It need be borne in mind that by the very nature, the receivership is generally a creditor-oriented procedure, which has its core, the protection of the interest of the debenture holder(s) who appointed the receiver.[32]

[30] O.O Oladele and M.O Adeleke, The legal Intricacies of Corporate Restructing and Rescue in Nigeria" I.C.C.L.R (2009) 20(5).

[31] David A Skeel, Debts Dominion*: 'A History of Bankruptcy Law in America'* (Princeton University Press, 2001).

[32]BolanleAdebola, 'Common Law, Judicial Precedents and the Nigerian Receivership Procedure' (2014) 58(1)*Journal of African Law;* 129.

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Notably, by the relevant provisions of the CAMA, a receiver/manager is giving a more prominent role which is more conduced to rescuing the business over which is appointed.A receiver as defined under the Act includes a manager.[33] The implication of this statutorily imposed dual role is that in carrying out his duties, the receiver is laden with contradictory obligations, which the Act imposes on a receiver/manager.[34] The Act recognizes that a receiver/manager may be appointed by the court or by the debenture deed executed between the debtor and the debenture holder.[35]Beyond being an agent of the appointer who assumes liability for his misdeeds, the receiver/manager is deemed under the Act to stand in a fiduciary relationship to the company with a duty to observe utmost good faith in his transactions with or on behalf of the company in the case where he is appointed over the whole assets of the company.[36] The receiver/manager is further mandated to always act in a manner he believes to best serve the interest of the company as a whole in order to preserve its assets, further it business, and promote the purposes for which it was formed, and in such manner as a faithful, diligent, careful and ordinary skilful manager would act in the circumstance.[37] The Act further sets the parameters in determining whether a transaction undertaken by the receiver/manager serves the best interest of the company as a whole[38].Regard must thus be given to the interests of the employees, as

[33] Section 567 CAMA.

[34]Section 393 of the CAMA sets out the main duty of a receiver which is to realize the debt on behalf of the person who appoints him. But section 390 mandates the receiver to manage the company over which he has been appointed, in the interest of the company, and for the benefit of all interests concerned.

[35]Section 389 and 390 CAMA.

[36] S. 390(1).CAMA

[37] S. 390(2) CAMA

[38]BolanleAdebola, 'The Duty of the Nigerian Receiver to 'Manage' the Company', (2011) 8 *ICR;* 248.

well as the members of the company, and when his appointment is by a special class of members or creditors, although he is allowed to pay special attention to that class, the receiver however cannot devote his attention to that class exclusively.[39]

Corporate Rehabilitation in the United Kingdom

Corporate rehabilitation/ rescue culture has had a checkered history in the U.K. The modern law relating to corporate rehabilitation in U.K has its development from the Insolvency Act 1986, an enactment inspired by the report and recommendations of Cork Committee[40] in the late 1970s. The Insolvency Act 1986 welcomed the phenomenon of advancing the recovery of companies in financial difficulties. The IA 1986 introduced two new rehabilitation-rescue procedures;

a. Company Voluntary Arrangement (CVA)
b. Administration

However, the IA and its rescue procedures could not live up to full essence, until additional reforms were instituted in the Enterprise Act, 2002[41]. As it stands, a developed and more current corporate rehabilitation-rescue regime can be found in the Enterprise Act 2002.

a. The Company Voluntary Arrangement (CVA) as a Corporate Rescue Device

The company voluntary arrangement (CVA) is a rescue procedure intended to provide a company with a more simplistic approach to

[39] S. 390 (3) CAMA

[40] The Cork Committee was setup and required to come up with recommendations that could be used to improve the existing insolvency practice and procedure, then in the U.K as they were not adaptable to modern business reality. The Cork Report concluded that the United Kingdom insolvency system lacked any real method for rescuing companies in financial difficulties.

[41] E.A 2002.

rescue by a binding agreement with its creditors.[42] A prominent feature of the CVA is that the creditors enter into an agreement with the company allowing it an extra time to pay its debts.[43] This rescue procedure carries no technical requirement within any statutory provision that the company in question needs to be insolvent or unable to pay its debts before it can enter into a CVA. According to Yebisi and Omidoyin,[44] CVA offers a company comparatively simplified and cost economic way to reorganize its affairs. The success of this procedure lies in the fact that the creditors anticipate better payment of debt from the company, thus creating scenery of a win-win situation.[45] Another quite interesting feature of a CVA is that it enables the company's directors to remain in the position of management and control with the supervision of an insolvency practitioner. In understanding the procedure for a CVA, a cursory look at the Insolvency Act 2000 is imperative, the 2000 Act introduced two types of CVA Procedures, namely, CVAs without moratorium and CVAs with moratorium.[46]

CVAs without moratorium are based upon a proposal to the company and its creditors for a composition in satisfaction of its debts or for a scheme of arrangement of its affairs.[47] The effect of a CVA without a moratorium is that it does not provide a company a period of delay in repaying its debts, and the creditors are not prevented from enforcing their rights even while negotiation is still on. By virtue of the provision

[42]Gore- Brown, *On Companies* (45th edition, Jordan Publishing, 2004) 49.
[43]Saquib M. Shadman, 'The Legal Framework of Corporate Rescue Procedure: A Brief Overview' (2013) 5, *The Northern University Journal of Law;* 59.
[44] Supra
[45]*Ibid, note* 43.
[46] Parry R., *Corporate Rescue* (1st edition, Sweet & Maxwell, 2008) 131;Saquib M. Shadman, 'The Legal Framework of Corporate Rescue Procedure: A Brief Overview' (2013) 5, *The Northern University Journal of Law;* 60.
[47]Ibid, n. 42 at 51.

of the law, a person must be nominated to act as trustee and supervise implementation of the CVA proposal.[48] The nominee does not acquire any power to deal in the name of the company nor does he become an officer of the company, any such power he exercises is derived from the CVA.[49] Amongst the duties of the nominee is to convene the meeting of shareholders and creditors to determine the approval of the proposed agreement and also to provide accurate and sufficient information to enable creditors to consider the merit or otherwise of the proposal. Negligence to provide this information may lead to ground for revocation of the arrangement by the court.[50] Upon approval of the CVA by the requisite, usually a simple majority of members voting in person or by proxy and of the creditors, three-quarters majority,[51]the CVA becomes binding on all creditors and the nominee's status changes to that of a supervisor responsible for carrying out the functions conferred on him by the arrangement.[52]

By contrast, CVAs with moratorium is usually commenced by the application of the directors of the company to the nominee. The directors are required to provide sufficient evidence that the company is likely to have sufficient funds during the delay period, to enable it carry on business and the CVA has a prospect of success. This procedure is specifically beneficial to small companies. A company is notwithstanding disqualified for CVA with moratorium if it has a subsisting insolvency procedure or where the company holds a track

[48] This person is referred to as a 'Nominee" see S.1 (2) IA 1986.
[49] L. Sealy and D. Milman, *Annotated Guide to the Insolvency Legislation,* (11th edition, Sweet & Maxwell) 24.
[50] See *Re Trident Fashions* [2004] 2 BCLC 35.
[51]*Ibid, n.3 at 50.*
[5252] See S. 7(2) IA 1986.

record of unsuccessful moratoria in rapid succession.[53] The procedure for a CVA with moratorium is similar to that of CVA without moratorium, the underlying difference lies in the only fact that companies here have a substantial breathing space to carry on its business with the interim indemnity from being sued by creditors, by giving the company protection and insulating it against actions of the creditors.[54]During the moratorium, a company is prevented from making an application for administration nor can a petition for winding up be presented. Most importantly, the moratorium period is aimed to provide the company with opportunity to gain recovery from its distress situation.[55]

b. Administration as a Rescue Procedure

The administration procedure has witnessed dramatic reforms. The current law and procedure is found in the relevant provisions of the Enterprise Act 2002.[56] To create a rescue situation, an administrator may be appointed by the court; by a qualified floating charge holder or by the company itself.

Unlike CVA, the appointment of an administrator ejects the board of directors from the position of control of the company and places the administrator in full control of the properties of the company. The administrator's principal function is to carry out the purpose of the administration, which are: firstly to carry on the responsibility of keeping the company as a going concern; secondly, to put the creditors in better position than had the company go into liquidation; and thirdly, if the above stated objective is

[53]A.J Boyle and J. Birds, *Boyle and Birds' Company Law* (7th edition, Jordan Publishing, 2009) 823.
[54]*Ibid,n.46 at 139*
[55]Ibid, n.53 at 61.
[56]E A 2002.

unachievable, to realize the property of the company to make a distribution to one or more secured or preferential creditors, without harming the interest of the creditors as a whole.

An important feature of administration is the preferential consideration required of the administrator to keep the company as a going concern. If the administrator is able to fulfill the high ranking priority of keeping the company as a going concern, the company may be sold to a willing purchaser in return for a sufficient capital to satisfy debts owed to its creditors or the directors may resume office after the administrator's office ceases.

Evaluating the Two Regime

The totality of research on this study reflects that Nigeria's insolvency system is worrisomely creditor friendly and liquidation focused, making the existing rescue culture inadaptable to modern business practice. There is no specific corporate rehabilitation law save the scheme of arrangement and compromise provisions in the Companies and Allied Matters Act, which is in itself not a redoubtable procedure for companies in dare need for rescue. In agreeing with the position of Halliday in 'Quest for Reform of corporate Rescue and Insolvency in Nigeria'[57] there are dearth of corporate rescue options in Nigeria, as the available options of arrangement and compromise and receivership, has been inundated by technicalities and complexities. It is unclear whether the process of mergers, acquisitions and takeovers under the ISA is intended by its draftsman to serve as a corporate rescue model. Even if it is intended as such, the procedural requirements are too cumbersome to serve a recue purpose.

[57]ChidiHallidayand ModupeBabalola, 'Quest for Reform of Corporate Rescue and Insolvency Procedure in Nigeria' (2016) 2(1) *Journal of Business Law;* 353.pp 372.

The UK regime on the other hand, offers corporate continuity approach. The regime creates a simplistic procedure and convenient atmosphere for companies in financial trouble to seek rescue. It also offers companies the opportunity to buy time and focus on developing strategies to repay its outstanding debts. This however does not suggest that the UK model is a perfect corporate rescue regime, but remarkably and unarguably a better corporate rehabilitation regime than that of Nigeria's.

Conclusion

The idea of corporate rescue is borne out of the need to keep a company as a going concern. The reasons to keep a business alive abound, some of which have been discussed in this paper.

It is worthy to state that the idea of business rescue is calculated to protect wider interests than just of the creditors of the company. The corporate rescue devices in Nigeria have been discussed in this paper and some of the challenges highlighted.

It is believed that the Nigerian business rescue system requires valiant efforts from the cross-section of stakeholders involved in the process. Nigeria needs not only a change of substantive or procedural law but also a change in the insolvency culture. It is imperative that targeted investigations are made into the extant system; highlighting its problems, the needs to be met and assessing solutions. In addition, it is important that the institutional requirements of a business rescue system are well addressed. The judiciary needs to be educated, so do putative practitioners and officers who carry out administrative functions. It is recommended that any change made to the law during the proposed reforms must be well documented and publicized. Those implementing the new system must understand the changes and give them full effect.