THE LEGAL ROLE OF GOVERNMENT IN COMPANY RESTRUCTURING AND THE RESCUE PHILOSOPHY*

Abstract

Before the advent of the idea of salvaging or rejuvenating a company in financial distress is the procedure at some point for a terminally ill company to be wound up and its assets sold, to the extent that is possible, to satisfy any outstanding debts. In most cases under that regime, there was no viable alternative, as the documents which provided for security over a company's property demanded in return for finance by financial institutions to protect the interests of such institutions ahead of those of other creditors. Where a company is unable to satisfy its debts, it was most often the right of the creditors so empowered to place the company under receivership with the priority to be reimbursed even if it led to the creditors receiving nothing or resulted in the eventual liquidation of the company. This result led to thoughts on the fairness or otherwise of such a process, particularly as it relates to those companies that had the potential to be revitalized. These thoughts also gave rise to the philosophical question as to whether it is better to restructure a company in financial difficulties to enable it remain in business as a going concern or to dispose of the remaining assets of the company in liquidation. Since the overall performance of trading companies has a direct impact on the economic well-being of a country, the government cannot afford to play a passive role in ensuring the sustenance of such companies. It is thus the legal role which government plays in this regard and the philosophy of rescuing a company in distress that are discussed here with focus on the situations in Nigeria and South Africa.

Keywords: company, restructuring, philosophy, rescue

1. Introduction

For reasons ranging from inadequate start-up capital to sudden increase in operating cost, to government policies and regulations, many companies experience liquidity challenges. Such companies thus become financially distressed and unable to meet their obligations to creditors in the short-term as well as other obligations of theirs to enable them remain competitively in business. A company in such financial difficulties is faced with a dilemma: either to liquidate or to device a means of possible business recovery and then repay debts. This latter option preserves the going concern value of the company and protects other important values which the continued existence of the company as a going concern will sustain. The other option leads to the end of the existence of the company. Through legislations and policies, the Government whose role it is to determine economic direction of the country, puts in place legal framework to achieve company restructuring[1] through either bringing to an end the existence of a company or turning around the fortunes of a company in financial distress.[2] It is with this role of the government as well as the philosophy of company rescue that this article is concerned.

2. Legal Role of Government in Company Restructuring

In large scale corporate restructuring, the government takes a leading role in order to establish priorities, address market failures and limit the economic and social cost of economic crisis. Although owing to its complexities the role of government in large scale restructuring depends on the jurisdiction and policy inclination of the government, the government usually considers involvement of different elements of the society and the social consequences. The role of the government in this regard is usually evident in bank recapitalisation, establishment of an asset management corporation, government mediation, government financed incentive schemes and restructuring director.

Bank Recapitalisation

Recapitalisation occurs when a company changes its capital structure with the aim of improving the company's debt-equity ratio. As banks are the cornerstone of the economy of a country, economic activities can hardly be smooth sailing without the sustained flow of money and credit. Accordingly, recapitalisation of banks is necessary if corporate debt problems are pervasive enough to undermine the health of the banking system. If not carefully handled through government policy intervention, widespread interruption of corporate loan payments, which often reflects macro-economic instability, will reduce bank capital. If what the bank needs in order to restructure debts is new capital and the new private capital enough to restore the banks to normal operations is not forthcoming,

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[1] Otherwise known as corporate restructuring.

[2] See the Nigerian Companies and Allied matters Act, CAP C20, Laws of the Federation of Nigeria, 2004 (hereinafter simply referred to as CAMA)and Investments and Securities Act, No.29 of 2007 (ISA); English Companies Act of 2006, Insolvency Act of 2000 and Enterprises Act of 2002 (UK); and the South African Companies Act 71/ 2008 which came into effect on 1st May, 2011.

then government financing is needed to restore the capital of banks. In Nigeria, bank recapitalisation and consolidation became prominent during the governorship of Professor Charles Chukwuma Soludo at the apex bank, the Central Bank of Nigeria. In a paper presented on consolidation in the Nigerian banking industry, the identified problems facing the Nigerian banks which necessitated recapitalisation and consolidation in the banking industry included:

(a) weak corporate governance, evidenced by high turnover in the board and management staff, inaccurate reporting and non-compliance with regulatory requirements, falling ethics and de-marketing of other banks in the industry;
(b) late or non-publication of annual accounts that obviates the impact of market discipline ensuring banking soundness;
(c) gross insider abuses resulting in huge non-performing insider related credits;
(d) over-dependence on public sector deposits, and neglect of small and medium class savers.[3]

Specifically, Soludo identified a worrisome development in the banking system in which Nigerian banks significantly depended on government deposits which meant various tiers of government accounting for over twenty *per cent* of total deposit liabilities of deposit money banks. The danger inherent in that unhealthy development is that the resource base of the banks was weak and volatile thereby rendering their operations susceptible to swings in government revenue, arising from uncertainties of the international oil market, oil being the mainstay of the Nigerian economy. Considering the fact that due to the unique position occupied by the banking sector in any economy, that sector required more than just a casual regulatory attention, the Governor proposed a number of reforms which included:

(i) requirement that the minimum capitalisation for banks should be N25 billion with full compliance before December, 2005;
(ii) consolidation of banking institutions through mergers and acquisitions;
(iii) automation process for the rendition of returns by banks and other financial institutions through the electronic Financial Analysis and Surveillance System (e-FASS) to be expeditiously completed, *et cetera.*[4]

By December, 31st of the year 2005 following the reforms introduced above, the eighty-nine (89) banks in Nigeria shrank to twenty-five banks. This number has gradually continued to shrink, mostly through mergers and acquisition, such that as at the first quarter of the year 2020, there are about twenty-two (22) commercial banks in Nigeria.[5]

Asset Management Corporation

If the number of troubled or distressed companies is large and there are macro-economic elements which inhibit restructuring, the intervention of a government financed asset management company becomes expedient. Some of these macro-economic elements include decapitalised and poorly managed banks, lack of corporate capacity and willingness to provide reliable financial information and adverse systemic consequences. An asset management company financed by government can in the face of the foregoing daunting challenges buy bad debts/loans, provide equity to banks and companies, negotiate with debtors and take an active financial and operational role in restructuring. The debt taken or purchased by the asset management corporation can be converted into equity and eventually sold to the public. To be successful, an asset management corporation should have clear and pre-defined goals, avoid politicisation, be sufficiently funded and aim at maximizing loan recovery.

In Nigeria, the Asset Management Corporation of Nigeria (AMCON) was initially established by the Asset Management Corporation of Nigeria Act.[6] AMCON is a multi-purpose resolution device empowered to purchase non-performing loans (assets) of banks and inject capital in the form of appropriate securities. The object of the AMCON is to assist Eligible Financial Institutions (EFIs) to effectively manage and dispose of and obtain the best achievable returns on Eligible Bank Assets (EBAs)[7]. By this, banks are given some relief of sorts by the Corporation mopping up the toxic assets in the financial system, safeguarding the interest of creditors, depositors and other stakeholders in the sector. In order to ensure that the Corporation effectively carries out its functions, it is empowered, among others, to take custody and possession of debtor's property and apply for interlocutory

[3] C C Soludo (Prof) 'Consolidating the Nigerian Banking Industry to meet the Development Challenges of the 21st Century' being an address by Prof. Soludo at the special meeting of the Bankers' Committee, Abuja on 6th July 2004, p.3
[4] Soludo, *op cit,* p.5
[5] https://www.cbn.gov.ng. Accessed on 30th April, 2020
[6] 2010. The extant law is the Asset Management Corporation of Nigeria (Amendment No. 2) Act, 2019 (hereinafter simply referred to as AMCON Act).
[7] Section 4 of the AMCON Act, *supra*

freezing order.[8] There is also a special Rules of Court dedicated to proceedings involving AMCON which under Order 4 thereof captioned 'SPECIAL PROCEEDINGS UNDER THE ACT', AMCON is empowered to obtain *ex parte* in the Federal High Court of Nigeria reliefs of interim possession of property and account freezing of debtors as well as other interim remedies provided for in the Rules.[9]

Government Financed Incentive Schemes

Financial incentives through a pre-set government-financed scheme can help if the corporate distress is systemic, or if market or regulatory failures inhibit restructuring and the government has adequate fiscal resources at hand. The financial incentive schemes usually involve insurance or subsidy incentives made available to creditors and debtors for extending debt maturity grace periods, interest rates and exchange rate guarantees, and equity injection.[10] In order to achieve the aim of this government intervention, the government must trade off the fiscal cost of the plan against the systemic benefits of alleviating corporate distress.

Restructuring Director

In some jurisdictions, the government appoints restructuring directors to oversee the restructuring of companies in times of crisis so as to accelerate the pace of economic reform in the country. A restructuring director will clearly and transparently fashion out and prioritise government financial support, define goals of restructuring, overcome excessive leverage by creditors or debtors and establish an all-inclusive approach forum where other elements of the society that otherwise would have been excluded are accommodated. In a typical situation, restructuring directors are appointed by, and they report back to, the chief executive of the country. He oversees mediation efforts, corporate restructuring committees, assets management corporations and the banking restructuring agency. Recently, restructuring directors have been used in Korea in 1998 when the Financial Supervisory Commission directed financial restructuring in that country.[11] Restructuring directors can help facilitate restructuring when there are a large number of players with conflicting interests. There are, however, potential problems with centralising the supervision of restructuring as is inherent in appointing restructuring directors. These problems include excessive politicization and the absence of market incentives to guide decision-making.

Government Mediation

Where creditors are unwilling or unable to lead corporate restructuring, government mediation will come into play between companies and banks. The reasons for this may include lack of bank capital, lack of incentives for banks or companies to workout debt problems, or excessive negotiating power by either the creditors or the debtors. These factors are indeed avoidable and may even prolong restructuring and result in unnecessary liquidation of debtors. In order to avoid this, government can mediate either informally or in a more structured framework. If corporate restructuring is limited in scope and carried out in a conducive atmosphere, government mediation framework is appropriate. Although this approach is flexible and easily adaptable, it requires a credible government mediator, macroeconomic stability and the appropriate regulatory framework. This approach has, however, proved less effective when there are many creditors, especially foreign creditors.

A well-know and perhaps the best form of government or official mediation is the "London Approach" implemented in the United Kingdom under the auspices of the Bank of England. The London Approach constitutes a set of principles implemented under the aegis of the Bank of England, used to create a standard framework and help bring banks into unanimity. The principles on which the London Approach is based are:

(a) if a company is in trouble, banks keep credit facilities in place and do not press for bankruptcy;
(b) banks work together;
(c) decisions about the debtor's future are made only on the basis of comprehensive information shared among all banks and parties; and
(d) seniority of claims is recognized but there is an element of shared pain.

In order to avoid excess legality, the London Approach is not codified by way of being formally enshrined in any law since the framework needs to be flexible and adaptable and rests on voluntary bank acceptance. The approach has its strength in its adaptability and its application to corporate debt restructuring in the UK is enhanced by the

[8] See sections 49 and 50 of the AMCON Act.
[9] See Order 4 of the Federal High Court Asset Management Corporation of Nigeria (AMCON) Proceedings Rules, 2018
[10] M R Stone 'Corporate Sector Restructuring – The Role of Government in Times of Crisis', *International Monetary Fund Economic Issue No. 31*, June 2002, p.5
[11] Stone, *op cit,* p.10

favourable regulatory environment and macro-economic stability, negligible role of foreign creditors and the infrequency and small scale of corporate debt restructuring.[12]

3. The Philosophy of Company Rescue

The term rescue, has been held to mean 'the survival of the company itself together with all or part of its undertakings as a going concern, an outcome which was incapable of being achieved through…hiving down the company's business into a new company.'[13] The concept of rescue is borne out of the idea that taking calculated risks by business concerns should be encouraged and if failure occurs, there should be a system or mechanism in place to minimize the adverse effect it may have on the company and affected parties and ensure profitable survival of the company as a going concern. The concept of rescue should not be seen as an idea that offers absolute solution to a company in distress. On the contrary, it is a partial response that temporarily relieves financial pressure on a company. In the rescue philosophy, while intervention by way of company restructuring is an intervention providing rescue strategies with the best chance of being successful, rescue does not equate to restoration and does not offer absolute immunity from further distress in the future. Viewed from the perception of a major intervention necessary to prevent the failure of a company,[14] what amounts to this major intervention in a company which will result in the rescue is not absolutely clear. It is also not clear when and if intervention should take place. At what point should such an intervention be regarded as a satisfactory mechanism that efficiently pursues the goal of recue? It also raises the question: what amounts to eventual failure?

It is pertinent to underscore the point that distress and death of a company are not synonymous terms. Accordingly, distress will affect each company in different ways causing the value of the company to depreciate in equally different ways. Thus any attempt to adopt a universal approach or solution to financial distress would be a fruitless venture. Each troubled company should be assessed based on its merit. A distressed company may be an eligible candidate for rescue; but it is, however, the case that such a company may not be a viable entity that can realistically expect to be rescued within the market it operates. Despite this warning, rescue is undoubtedly reserved for such corporations that if given another opportunity can survive. What qualifies a company as one that has the prospects of survival if given a second chance is based on fact-gathering exercise by which the entire structures of a company along with its finances and operations are broken down into figures. If there are advantages to be attained with a reasonable amount of effort in the nature of financial assistance and time which would be more beneficial in the long run than taking the step of terminating the company immediately, then there is a positive indication that the company could be saved.

It should at all times be kept in proper perspective that the act of rescuing a company is an attempt to protect the company from further losses. Nevertheless, a rescue package will only be implemented if it is financially sound and efficient to so do. The critical question in adopting restructuring of a company as a rescue mission is, therefore, a determination of whose benefit the rescue is undertaken for. Is it an attempt to minimize losses for the creditors or to prevent further losses occurring beyond the company itself, for instance, a reduction of the workforce (employees) and the effects it would have on the local community? Generally, rescue packages are seen as bail outs for companies that have themselves to blame for their financial troubles. What must, therefore, be stressed is the rationale for giving a company another opportunity to trade irrespective of the number of times this happens and why a company should be given this option.

A company, no doubt, is much more than one business: its actions and inactions affect not only its own interests but other interests. Viewed parochially as only an economic concern, company restructuring aimed at rescuing a troubled company cannot thrive for the reason that it would be restricted to the analysis of raw financial data without seeing the larger picture of the far-reaching consequences that a rescue would have on the particular business and the community or society in which it operates. Conversely, adopting a broader perspective socio-economic approach to the idea of rescue would enable company rescue to be considered within a broader scope thereby opening up the concept of rescue to a wider selection of possibilities in relation to the values, visions and objectives of restructuring. As observed by an author, the objectives of rescue through company restructuring can be realised in their various facets through incorporating in the rescue agenda a framework based on efficiency. This efficiency principle is so fundamental that when combined with social norms, can enhance realisation of a number of goals that ordinarily would have been neglected in a corporate rescue process.[15]

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[12] Stone, *op cit,* p.10

[13] See Harman J. in *Re Rowbotham Baxter Ltd* (1990) BCC 113 at 115E - F

[14] A Belcher, *Corporate Rescue*, (London: Sweet & Maxwell, 1997) p.12; M. Hunter 'The Nature of a Rescue Culture' *Journal of Business Law*, 1997, 491.

[15] B G Garruthers & T C Halliday, *Rescuing Business: The Making of Corporate Bankruptcy in England and the United States*, (Oxford: Clarendon Press, 1998) pp.69-71

Pure rescue is rare but it is the term that best describes the primary objective of the UK Administration. Full restoration to the former state of the company might pose some interesting questions, particularly if the distress was as a result of bad management. It is accepted that in some case their removal may result in a different result for the company.[16] But this presumption is open to the possibility that another management would not act in the same way. The act of removing management would, therefore, only work if it could be shown that the incompetence was fundamental to the troubles of the company.

Against the backdrop of the philosophy of rescue in company restructuring, the experience of South Africa and Nigeria through legislative framework in company legislation is considered in this work highlighting the emphasis or otherwise in both jurisdictions on rescuing distressed companies.

Until the enactment of the Companies Act[17], South African companies had three re-organistion approaches which served as mechanisms for rejuvenating a failing business. These mechanisms are as follows:

1. Judicial management procedure.[18]
2. An offer of compromise or scheme of arrangement as provided for in the old Act.[19]
3. An informal workout manner (that is, out-of-court arrangement between creditor and debtor) but not under a statutory regime.

According to Gewer,[20] the last two of the three mechanisms above involve –

(a) An offer of compromise or scheme of arrangement and informal workouts, which are costly and take time to enforce through an extended legal process which is often to the detriment of the distressed company; and
(b) Formal workouts, which involve close involvement of the company's financiers not under statutory procedures, were sometimes considered as a direct violation of section 424 of the old Act when workouts were unsuccessful and reckless trading could be proven.

The mechanism under the old regime proved difficult to implement, did not meet their objectives of finding an economic benefit for all involved and until 2011 have only had various degrees of success. Judicial management under the old regime[21] was designed to enable companies avoid liquidation proceedings. It was introduced by the Companies Act[22] and remained largely unchanged until 2011. The 1973 Act provided the circumstances in which a company may be placed under judicial management to include when any company by reason of mismanagement or for any other cause –

(a) is unable to pay its debt or is probably unable to meet its obligations; and
(b) has not become or is prevented from becoming a successful concern, and there is a reasonable probability that if it is placed under judicial management it will be enabled to pay its debt or meet its obligations and become a successful concern. The court may, if it appears just and equitable, grant a judicial management order in respect of the company.

In such an instance, an application to the court for a judicial management order in respect of any company may be made for the winding-up of a company and the provisions of section 346(4)(a) of the Act with respect to the application for winding up shall apply *mutatis mutandis* to an application for judicial management order. When an application for the winding-up of a company is made to the court under the Act and it appears to the court that if the company is placed under judicial management the grounds for its winding up may be cured and it may become a successful concern and that granting of a judicial management order would be just and equitable, the court may make such an order. It is obvious that legal proceedings as are involved in judicial management are costly and time consuming being two commodities which a company in financial distress does not have. The above problems accounted for the unpopularity and unattractiveness of the judicial management as an effective option for business rescue in South Africa signaling that a paradigm shift was imperative. Further, judicial management was creditor-friendly where emphasis was on the financial interest of the creditors and not on

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[16]G Moss, 'Comparative Bankruptcy Cultures: Rescue or Liquidation? Comparisons of trends in National Law – England' (1997) *23 Brooklyn Journal of International Law, 115*

[17] 71/2008 which took effect from 1st May, 2008

[18] This was provided for in s. 427 of the South African Companies Act 61 of 1973 (the old Act)

[19] Section 311 of the 1973 Act

[20]D Gewer, *Legal Aspects of Turnarounds, Turnaround Management & Corporate Renewal – A South African Perspective* (Johannesburg: Wits University Press, 2011) p.560

[21] Under the Companies Act of 1926

[22] *supra*

rescuing the failing business, which most likely ended up in liquidation as that was seen as the easier option and controlled by liquidators as judicial managers.[23]

The above position changed with the coming into force of the new Companies Act[24] which became effective on the 1st day of May, 2011 introducing business rescue. Business rescue is defined in the South African Companies Act as 'proceedings to facilitate the rehabilitation of a company that is financially distressed.'[25] The new Companies Act introduced business rescue in Chapter Six and effectively replaced the judicial management provisions for insolvent debtors. Judicial management is no longer a requirement and companies now have the option to follow a rescue proceedings plan if the company is in distress and needs assistance in saving it from insolvency and eventual liquidation proceedings. Creditors are now under the law limited to their loss recovery actions and need to follow a workout process before liquidation proceedings can be considered.[26] The procedure for rescue under the new Companies Act[27] is that when the management of a company believes that the company and its operations are still viable economically, business rescue will be the next line of action even in the face of financial distress. The business rescue plan is formulated, usually with the assistance of a Business Rescue Practitioner, (BRP) or turnaround practitioner who is licensed by the Companies and Intellectual Property Commission (CIPC). In the case of formal proceedings, the plan is presented to the court or the creditors of the company will present it for approval in the case of informal proceedings.

Irrespective of the laudable improvement on the rescue culture introduced in South Africa by virtue of the new Companies Act, there is also the tendency for abuse of the system and the delay tactics by the companies. This usually takes the form of companies desperately delaying the process simply to avoid the inevitable.[28] Indeed it was underscored in a case that the provisions of the business rescue should be carefully scrutinized because the legislation is open to abuse.[29] In *Southern Palace Investments 265 (Pty)Ltd v Midnight Storm Investments 386 (Pty) Ltd,*[30] the business rescue plan was not concrete and, as stated by the court, was also vague and un-detailed. The business rescue was denied because it was not established that there was reasonable prospect for the business.

In Nigeria, the Companies and Allied matters Act,[31] which is the principal legislation regulating the registration, existence and administration of companies in Nigeria, makes provisions for restructuring of companies without necessarily using the words' rescue' or 'restructure'. These include provisions for arrangement and compromise and winding up.[32] Since winding up of a company is not synonymous with rescue, the rescue mechanism as can be gleaned from the legal regime in Nigeria considered here is the arrangement and compromise. An arrangement is a change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company, other than a change effected under any provision of the CAMA[33] or by the unanimous agreement of all parties thereby affected.[34] Compromise, on the other hand, although not defined in CAMA, is simply seen as the relinquishment of rights by the parties for the common benefit of all parties concerned.[35] The CAMA recognises certain forms of arrangements and compromises for the purpose of restructuring a company. These are 'arrangement on sale' and 'creditors and shareholders' compromise or arrangement'. Arrangement on sale presupposes the voluntary winding up of a company with the authorisation of the liquidator to dispose of the whole or part of the undertaking of the business to another incorporated company called a transferee company.[36] Elaborate provision on this can be found in section 538 of CAMA. Under section 539 of CAMA, a company can be rescued without necessarily going through winding-up procedure. This obviates the damage to reputation always associated with winding-up. This is for the reason that the procedure under that

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[23] R Bradstreet, 'The New Business Rescue: Will Creditors Sink or Swim?' (2011) *Journal of South African Law*, 355
[24] No. 71 of 2008
[25] Section 128 , Companies Act, No.71 of 2008 (hereinafter referred to as the new Companies Act)
[26]Adams & Adams: 'New Companies Act of South Africa Summary.' <http://www.adamsadams.com/articles/attorney-law/new-companies-act-south-africa.html> accessed on 5th May, 2020
[27] 2008
[28] C Rodriguez, 'Coming to the Rescue' (2007) 6 *Journal of Company Law,* 120
[29] *Southern Palace Investments 265 (pty) Ltd v Midnight Storm Investments 386 (pty)* Ltd 2012 2 SA 423 (WCC) para. 3
[30] 2012 2 SA 423 (WCC) para 23
[31] CAP C20 Laws of the Federation of Nigeria, 2004, (CAMA)
[32] See sections 538, 539 and 5 40 (arrangement and compromise) and Chapters 2, 3, 4 and 5, sections 407 -531 (winding up of companies) of the CAMA. See also Part XII, section117 – 151 of the Investments and Securities Act, No. 29 of 2007 for provisions on Mergers, Take-overs and Acquisition
[33] CAP C20, Laws of the Federation of Nigeria, 2004 (hereinafter simply referred to as CAMA)
[34] Section 538 of CAMA
[35] *Re Alabama New Orleans Texas & Pacific Junction* (1891) 1 Ch. 213 at 243
[36] Section 538(1) of CAMA

section can be used to re-arrange the rights of creditors and the members and to impose cram down on the minority. Indeed a change in perception to instill the idea that to be insolvent is not a crime if companies in difficulty are to benefit from the rescue process under the section is called for. The existing management can still be retained and the company can continue to trade except under section 538 of CAMA.

Unlike the business rescue framework in South Africa, taking a closer look at section 538 of CAMA, that section appears to be unsuited for cases in which the company already has manifested signs of insolvency but appears to be tailored primarily towards solvent companies which are desirous of achieving better realization of assets than would be possible by piecemeal sales in a winding-up procedure. The inadequacy of this section as a business rescue procedure or strategy even though a form of corporate restructuring, is that it is not available to the insolvent company which more than any other needs this business rescue provision. Closely related to this is the absence of moratorium on creditors' rights for the duration of the arrangement and compromise process. The absence of provision putting the rights of the creditors on hold or in abeyance pending the exhaustion of the process, (that is a moratorium) is further worsened by the complex nature of the procedure of arrangement and compromise in Nigeria. As part of the complex nature of the procedure, the absence of moratorium to assist companies in the schemes of arrangement or compromise entails that a company desirous of restructuring under that scheme must contend with creditors that wish to enforce their claims. In practice, informal workouts have been utilized to stay such creditors' actions. A threatening creditor can also be paid off to ensure a successful arrangement or compromise. In section 417 of CAMA, for example, there is a provision for stay (moratorium) for companies that are being wound up.

However, section 417 of CAMA has been interpreted by the court as applying only to proceedings before the Federal High Court. In *FMBN v NDIC*,[37] the Supreme Court of Nigeria held that what is prohibited by section 417 of the CAMA where a provisional liquidator is appointed for a company, save with the leave of the court, is an action or proceedings pending instituted in the Federal High Court. In the Nigerian federal system of government, the Constitution[38]vests exclusive jurisdiction in the Federal High Court with respects to the operations of CAMA and as such, it is the only court of first instance with jurisdiction over administration of the arrangement and compromise provisions of CAMA. Meanwhile, recovery of debt is an action which can be entertained by the High Court of a State or of the Federal Capital Territory (FCT), Abuja. The complex nature of the scheme under the present regime becomes apparent when it is realized that while issues on the administration of the schemes are pending at the Federal High Court, a creditor has unrestrained access to the High Court of a State or of the Federal Capital Territory (FCT) Abuja to commence action for the recovery of his debt simultaneously.

Another shortcoming of the current regime of arrangement and compromise as a rescue strategy for financially distressed companies is the propensity of cost inefficiency in the procedure. The procedure requires that the debtor-company approaches the court twice: the first is for the purpose of securing a court-ordered meeting and the second is for the court to sanction the scheme. In so doing, services of legal practitioners will necessarily be retained even in the face of the glaring financial constraints of a company in financial distress. There is also the cost of convening and holding meetings. This may translate to costs that would discourage small companies in financial distress from embarking on the venture. To this end, the rescue model exemplified in the business rescue provisions in the South African Companies Act becomes more effective and result oriented than similar provisions in the Nigerian laws.

4. Conclusion

If the business of the company is a viable one and deserves to be saved, rescue of the company in financial straits becomes imperative. Saving a company so as to enable it continue as a profitable going concern certainly has a direct positive impact not only on the market but also on the economy of any nation. As a trading company pays salaries to its employees and pays taxes to the government treasury, for instance, all these and others who participate in the value and supply chain of developing economies such as Nigeria play a significant role in the overall health of the economy. It is, therefore, a fundamental role of the government to continually assess performance of the company through effective interventionist legal and policy framework and identify signs and risks that point to financial stress and possibility of embarking on rescue-oriented restructuring earlier rather than later. This step will eventually to improve the chances of successfully rescuing the company.

[37] *[1999] 2 NWLR (Pt 591)333*

[38] Constitution of the Federal Republic of Nigeria, 1999 (as amended), s. 251(1)(e)