EXAMINING THE INTRODUCTION OF COMPANY VOLUNTARY ARRANGEMENT AS A RESCUE MECHANISM UNDER COMPANY AND ALLIED MATTERS ACT (CAMA) 2020*

Abstract
Company may become unable not only to pay dividends to its members but also to repay its creditors and *by the provision of repealed CAMA 1990, petitions for winding up could be brought when a company was unable to pay its debt, set at a minimum threshold of NGN 2000, and which debts remains unsatisfied after a period of 3 weeks that a letter of demand had been received. This requirement was pretty much easy to satisfy leading to a flood of petitions that ultimately led to the termination of the life of companies. This state of affairs was helped by the fact that besides winding up petitions there were really no intermediate options open to financially distressed companies to explore in seeking the resolution of a company's bad financial situation. As such, the provisions on insolvency were not aimed at restructuring and preventing the winding up of companies. Indeed, recognizing the need to promote corporate rescue as well as create enabling condition for investment and improve the ease of doing business in Nigeria, CAMA 2020 introduced series of reforms to Nigeria's legal regime whose underlying philosophy arguably is the promotion of corporate rescue as opposed to the termination of the life of the distressed companies. The introduction of corporate rescue changed the narrative of resolving insolvency in Nigeria as it priorities corporate rescue above winding up. This paper therefore examined company voluntary arrangement as one of the rescue mechanisms introduced by CAMA 2020 with a view to finding out the shortcomings of the said rescue mechanism. The paper found out that company voluntary arrangement under CAMA 2020 is not accompanied by any moratorium on enforcement actions. The absence of a stay on the enforcement of creditors' rights may hinder a company that is facing financial distress from adopting this scheme for corporate rescue. Consequently, creditors may unilaterally pursue claims or enforcement actions while the company voluntary arrangement is ongoing and the writers therefore recommended the provision of moratorium which ensures that the process is not torpedoed by the creditors.*

Keywords: Company, Voluntary Arrangement, Rescue Mechanism, CAMA 2020, Nigeria

1. Introduction

In Nigeria, prior to Companies and Allied Matters Act 2020[1], the options available to financially distressed companies are receivership, winding up and arrangement and compromise.[2] While receivership is geared towards the recovery of debt through secured assets, winding up primarily seeks the dissolution of a company.[3] Indeed, winding up is understood by many as the panacea to indebtedness and in practice however, winding up and receivership are most common. Perhaps, winding up[4] of an insolvent company do not ultimately engender business efficacy or endow the creditor, whether secured or unsecured, with any business or commercial advantage. Rather, the process of winding up produces victims whose loss or injury may not be remedied.[5] It is thus the contemporary best practice to develop and allow for the rehabilitation of insolvent corporate entities rather than winding it up.[6] Indeed, the objectives of modern insolvency legislation focus on restructuring of insolvent companies to allow for

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[1] Hereinafter referred to as 'CAMA'.

[2]CAMA, ss 347 – 400; 410 (1) (c); 419 – 421,); 422 – 43; 537 -540. A company is financially distressed when it appears that the company is reasonably unlikely to be able to pay its debts as they fall due and payable over a period of six months or when it appears that the company will be reasonably likely to become insolvent within the ensuing six months. S 128 (1) (f) of the South African Companies Act, 2008.

[3]Momodu and O Okoye, 'The Evoultion of Business Rescue in Nigeria, <https//:www. mondaq.com/Nigeria/insolvencybankrupt/809026/the-evolution-of-business-rescue-in-Nigeria>accessed 21 May 22.

[4]Winding up proceedings are a special form of civil proceedings that aim to terminate the existence of a company. In a winding up process, the assets of the debtor company are dissolved and distributed to its creditors in accordance with the rules of priority. *Utuk v The Liquidator* (2009) LPELR-4322 (CA) P 24, para B; the court in *Tate Industries v Devcon MB Ltd* (2004) 17 NWLR (Pt 901) 182, stated that winding up proceedings is signing the death warrant of a company or the pronouncement of the death of the company.

[5]The Supreme Court in *Air Via Ltd v Oriental Airlines Ltd* (2004) 9 NWLR (Pt 878) 298 stated the adverse nature of winding up proceedings, and the fact that it should not be used as a substitute for a debt recovery action and that this has not deterred litigants and their counsel from resorting to the filing of winding up petitions against debtor companies, and sometimes unnecessary liquidation of the said companies, in situation when an ordinary debt recovery action could have been sufficient.

[6]O Ajayi, *Legal Aspects of Finance in Emerging Markets* (London: LexisNexis Butterworth, 2005) p 603.

recovery and continuity in place of dissolutions.[7] Justification has also been adduced by both the courts and commentators in different jurisdictions for the statutory preference to rescue instead of winding up of companies. In *Koen v Wedgewood Village Golf and Country Estate (PTY) Ltd*,[8] Binns Ward J of the South African High Court, observed thus:

> It is clear that the legislature has recognized that liquidation of companies more frequently than not occasions significant collateral damage, both economically and socially, with attendant destruction of wealth and livelihoods. It is obvious that the incidence of such adverse socio-economic consequences should be avoided where reasonably possible. Business rescue is intended to serve that public interest by providing a remedy directed at avoiding the deleterious consequences of liquidations in cases in which there is a reasonable prospect of salvaging the business of a company in financial distress, or of securing a better return to creditors than would probably be achieved in an immediate liquidation.

Moreover, in Uk, the Cork Committee had while recommending corporate rescue approach in the Uk Insolvency Act of 1986 stated thus:

> A concern for the livelihood and wellbeing of those dependent upon the enterprise which may well be the lifeblood of a whole town or even a region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.[9]

Thus, in Nigeria, the ineffectual effects of winding up of an insolvent company has given rise to the clamour for alternative options to winding up. According to Ajayi, the global trend is to develop and allow for the development and survival of companies especially in our country where death of a company means that of many families and those dependent on the employees of the affected company.[10] Moreover, the dwindling fortunes of companies in the recent time as a result of the harsh effect of the Covid-19 pandemic and many having to wind up business activities as a result of insolvency, becomes imperative that attempts be made to rescue the company from dying rather than wait to give same decent burial by way of liquidation or winding up process. Also, the need to promote corporate rescue as well as create enabling condition for investment and improve the ease of doing business in Nigeria therefore led to the enactment of CAMA, 2020 which seeks to bridge the gap in the existing legal framework for corporate insolvency by introducing a series of reforms and one of such reform is the introduction of corporate rescue mechanisms for insolvent companies in Nigeria. One of such rescue mechanisms is the company voluntary arrangement which lay emphasis on corporate sustainability than liquidation. It is therefore a paradigm shift from the liquidation and receivership process that have been practiced over the years under the repealed CAMA 1990 to a rescue mechanism under the CAMA 2020 with a view to provide for the rehabilitation of distressed companies and businesses in Nigeria.

2. The Concept of Corporate Rescue

The term 'corporate rescue' is a concept in company law and practice that has no universally accepted definition. It is however described as a sub-theme of insolvency law and a process by which a distressed company may be resuscitated or rejuvenated. The concept of corporate rescue therefore is based on processes, mechanisms and steps that are carried out as interventions necessary to avert eventual failure of the company.[11]Corporate Rescue is generally describe as the process of enabling companies in financial difficulties to return to a state of viability and to prevent them from sliding into insolvency.[12]Belcher defined the term corporate rescue as a major intervention necessary to avert eventual failure of a company.[13] This involves any fundamental remedial action to a company at a period of corporate crises, which include both the formal and informal strategic rescue mechanisms.[14] Corporate rescue could also be regarded as an alternative to immediate liquidation of the company, with the aim to prevent the death of the company and often involves changes in the management of the company

[7]P L Davies and S Washington, *Gower and Davies Principles of Modern Company Law*, (9th edn, London: Sweet and Maxwell, 2012) p 1272.
[8] (2012) 2 SA 378 (INCE) para 14.
[9]Report of the Review Committee on Insolvency Law and Practice, Cork Committee Report, 198, Para 204 cited in A O Nwafor, 'The Goals of Corporate Rescue in Company Law: A Comparative Analysis, (2017) 13 (2) *Journal of Corporate Board: Role, Duties and Composition*, 21.
[10] O Ajay, *op cit*, p 603.
[11] V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge: Cambridge University Press 2009) 243.
[12] A Dignam and J Lowry, *Company Law*, (9th edn, Oxford: Oxford University Press, 2016) p 254.
[13] A Belcher, *Corporate Rescue* (London: Sweet and Maxwell, 1997) p 12.
[14] *Ibid*

and is usually achieved through reorganising methods such as refinancing, debt composition or rescheduling, downsizing activities, and making redundant part of the workforce to offer temporary relief.[15]Moreover, company rescue works towards the restoration of a company in difficulty, which leads to the preservation of the legal entity itself so that the company can continue operations after reorganisation. It therefore provides the opportunity needed to reorganize and restructure the affairs of a debtor; structure a payment scheme with its creditors, while also preserving jobs and allowing the company to continue trading as an economically contributing entity.

Perhaps, for clarity purpose, it is necessary to highlight the distinction between corporate rescue and business rescue. In contrast, business rescue implies the termination of the old company, but the actual business and its activities will remain as a cohesive, productive unit under new ownership. Business rescue is commonly achieved through the sale of the company's assets and business as a going concern, which, as commonly believed, could generate more value than assets being sold in a piecemeal fashion. This happens where a company is insolvent but successful steps are taken to retain the business as an operational enterprise, to sustain the employment of groups of workers and to ensure the survival of some economic activity. [16] Business rescue is therefore more concerned with the revival and restructuring of the financial and the organizational structure of the business than the company for the purpose of ensuring the recovery and the continued existence of the business. Indeed, in business rescue, the old company (the shell) is terminated but the core business and its activities will remain intact and thriving unit under a new leadership. This happens where a company is indeed insolvent but pragmatics steps are taken to retain the business as an operational enterprise so as to continue to bury the private sector in particular, and overall economic activities continue.[17] While corporate rescue works towards restoration of a company in difficulty, which leads to the preservation of the legal entity itself so that the company can continue operations after reorganization. These differences often stem from the divergent standpoints regarding the approaches and purposes of rescue actions in response to companies' financial troubles.

Thus, the rationale behind a rescue mechanism is to preserve the status quo ex ante while a way forward is negotiated and implemented.[18] A rescue law substitutes the continuous race to seize the assets of the debtor once it is insolvent, with a regime that gives the debtor breathing space to reorganize its affairs.[19] This regime puts the debtor in possession of its assets and suspends all the rights and remedies of the creditors, to ensure the creditors get their returns in full.[20] It recognizes the need to preserve the going concern value of the company alongside maximizing the returns for the creditor. Rescue mechanisms are not necessarily about saving the company or its businesses in their totality. At the end of a successful rescue driven exercise of an ailing company, the company may be restored to its former state, it may likely be reorganized (managerial reforms), restructured (restructuring of business entities of the company), refinanced (sourcing of additional funds and debts rescheduled), downsized (where operations are reduced or staff reduced and rationed), sell offs or taken over by a completely new company or business entity.[21] The purpose of a corporate rescue is to restore the financial wellbeing and viability of a company's business in a way that either increases the chances of the company continuing in existence as a solvent entity, or results in a better return for the creditors of the company than would be the case assuming the company went into liquidation.[22] This is unlike liquidation where the proceedings to shut the company down have a liquidator appointed to dispose of the assets of the company and pay whatever proceeds might become available to the creditors of the company by means of a legal order of preference. For the purposes of this paper, the term 'corporate rescue' will refer to collective strategic rescue proceedings under a legal framework designed to facilitate either the preservation of the distressed company itself or the rescue of its underlying business by transferring it to a new owner.

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[15]J Armour, A Hsu and A Walters, 'The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings (2006) Report to the Insolvency Service' <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.96.6853&rep=rep1&type=pdf> accessed 4 July 2022.

[16]V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, Cambridge: Cambridge University Press, 2009) 188.

[17] V Finch, *op cit*, p188.

[18] R Paroy, *Corporate Rescue*, (London: Sweet and Maxwell, 2008) p 1.

[19] R Goode, *Principles of Corporate Insolvency*, (4th edn, London: Sweet and Maxwell, 2011) p 2.

[20] This implies that there will be a stay of action against the debtor to avoid a floodgate of claims.

[21]Y U Liman and B O Uruchi, *The Company In Troubled Waters-Rescues* in C C Ohuruogu (ed) *The Law of Business Associations in Nigeria* (Lagos: Princeton & Associate Publishing Co. Ltd, 2022) p 606.

[22]P Momodu and O Okoye, 'The Evolution of Business Rescue in Nigeria, <https://www.mondaq.com/nigeria/insolvencybankruptcy/809026/the-evolution-of-business-rescue-in-nigeria> accessed 4 July 2022.

3. Corporate Insolvency Determined

Technically, the word 'insolvency' is devoid of a concise meaning.[23] Its diverse meanings are incorporated in company legislations, case laws and interpretations/tests derived from the Accountants and Economists. Insolvency can be defined as the inability to pay debt as they fall due or in the usual course of business or the inability to pay debt as they mature. It may also mean failure of a company to fulfill its financial obligations to its creditors.[24] As such, insolvency deals primarily with a debtor's inability to pay rather than a debtor's unwillingness to pay. Insolvency of a company can therefore be determined based on two principal tests. They are the cash flow or commercial insolvency test and the balance sheet or absolute insolvency test.

Cash flow or Commercial Insolvency

This type of insolvency describes insolvency in a situation where a company is unable to pay its debt as they fall due. In otherwords, even where it's overall assets position may not be in deficit, it has cash flow problems that prevents it from paying its debts when they fall due or upon demand. Thus, where a company is indebted to another and such debt is due for payment, the inability of the company to pay on the due date would suggest that the company is insolvent. In essence, under the cash flow test, a company is regarded as insolvent the moment it is not able to pay its debts when they fall and it does not matter whether the company's assets exceed its liabilities or there is assets deficit problem. In the cash flow test, a corporation is considered as insolvent when it is unable to pay its debts as they become due. This means that with the available resources that the debtor owns, the future debt owed to creditors cannot be satisfied. It is irrelevant that the assets of the debtor exceed its liabilities, what is relevant is that it cannot pay for debts that would be incurred in the conduct of its business. This test is not concerned with whether the debtor has not paid his or her current obligations in the past. The main issue is whether the debtor is able to pay. There is a distinction between the ability to pay and the unwillingness to pay. A person will not meet the requirements of insolvency if they have the sufficient funds to meet their obligation but have simply refused to do so.[25] Sauders J in *Thorne Riddell v Fleishman,*[26] held that 'unable' as referred to Canadian section 2(1) of the BIA does not mean 'unwilling'. A debtor is regarded as insolvent under this test regardless of the absence of debts currently due if it is established that the payments will be due in future and the debtor has no means to satisfy the debts.

Balance Sheet Insolvency

This refers to a type of insolvency where the value of the company is less than the amount of its liabilities. The liabilities of the company exceed its assets, taking into account, not only current liabilities but also, contingent [27]and prospective liabilities.[28] In other words, under the balance sheet test, the consideration is on whether the company's assets are insufficient to discharge its liabilities, taking into account its contingent and prospective liabilities. Thus, the cash flow and balance sheet tests provide independent but related basis upon which insolvency of a company can be determined. However, It has to some extent become merged in the United Kingdom based on the decision in *BNY Corporate Trustee Services Ltd v Eurosail & Ors* [29]where it was stated that the cash flow test provided for under Section 132(1) of the UK Insolvency Act, 1986 has an element of futurity because it includes the words '…as they fall due' which connotes that it includes debts in the 'reasonably near future' and that balance sheet test can be relevant. The application according to the court is however fact specific depending on the circumstances of the case. [30]

Indeed, unlike other common law Jurisdiction, such as the United Kingdom, there is no one holistic legislation enacted and dedicated to corporate insolvency in Nigeria. Rather, matters of insolvency in Nigeria are principally regulated by the CAMA 2020 and Section 572(a) of CAMA, 2020 provides to the effect that a company is deemed

[23]C E Halliday, 'The Aftermath of Company's Inability to pay its debt in Nigeria: An Appraisal' (2018) 7 (1) *Port Harcourt Law Journal,* 179.

[24] R J Wood, *Bankruptcy and Insolvency Law* (2nd edn, Toronto: Irwin Law, 2015) p16.

[25]K Udofia, 'Establishing Corporate Insolvency: The Balance Sheet Insolvency Test', <www.blogs.harvard.edu/bankruptcyroundtable/2019/07/02/establishing-corporate-insolvency-the-balance-sheet-insolvency-test/7.> accessed 4 July 2022.

[26] (1983) 47 CBR (NS) 233Cont HCJ.

[27]Contingent liability is considered to be dependent on an event to occur, which essentially triggers the enforceability of the repayment.[27] In *Re A Company NO 006794 of 1983* (1986) BCLC 26,1 it was held that in assessing liability of the company, the contingent liabilities are regarded as to whether, and if so when, they become present liabilities.

[28]In *Re Dollar Land Holdings Plc*[28], prospective liability is stated to include an obligation to repay a loan and an undisputed claim for unliquidated damages for more than a nominal amount. It is a binding liability which is not yet matured; I Sealy and S Worthington, *Cases and Materials in Company Law*, (10th edn, Oxford: Oxford University Press, 2013) p 768.

[29] (2013) UKSC 28.

[30] Liman and Uruchi, *op cit*, p 605.

unable to pay its debts if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N200, 000, then due, has served on the company by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. Thus, in Nigeria, from the aforementioned provision, the test used in determining the insolvency of a debtor is the cash flow test. The law considers the debtors inability to pay past and future debts. The provision does not clearly state that the assets of the debtor will be considered in determining the insolvency of the debtor. Section 572 (b) CAMA include the failure of a debtor to satisfy an order of the court in determining the insolvency of the debtor. These orders given by the court against a debtor could arise in several circumstances and it makes it easy for companies to be wound up in Nigeria once any of those conditions have been fulfilled indeed, this is different from Canada where the cash flow and the balance sheet tests are the two predominate tests used in determining the insolvency of a corporation.[31]

Moreover, the Supreme Court of Nigeria, in *Afrotech Technical Services v MIA & Sons Ltd and Anor*, [32] defined an insolvent person as a person who has either ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not. As such, under Nigerian law, the balance sheet test is not applicable in determining if a company is insolvent, as the assets of the debtor are not taken into consideration in determining the insolvency of a company.

4. Consequences of Corporate Insolvency

Appointment of receiver is one of the consequences of insolvency. A receiver may be appointed by the court, debenture holder or out of court, that is, under the express powers of the debentures or trust deed.[33] Thus, upon the appointment of the receiver or manager, the powers of the company and the directors to deal with the property or undertaking over which the receiver or manager is appointed ceases.[34] In essence, the appointment supersedes the powers of the company and the authority of its directors in the conduct of its business which remains in abeyance during the appointment.[35] It therefore removes the conduct of the affairs of the company from the directors and places it in the hands of the receiver or manager. The receiver or manager becomes the right and proper person to institute, maintain or defend an action in the name of the company or its assets and properties.[36] Indeed, no action can be brought against him or in respect of the property in his hands without the leave of the court.[37] However, it is important to state that with the appointment of a receiver or manager, the powers of the company and the authority of the directors cease only in respect of those assets within the scope of the charge but in respect of the assets that are not within the scope of the charge or where the receiver or manager has refused to act, the company and the directors retain their powers. Simply put, the appointment of a receiver or manager paralyses the powers of the company and authority of its directors in respect of the company's assets in receivership.[38] Insolvency may also trigger the initiation of corporate restructuring options such as Arrangement on Sale, Management Buy-Out, Mergers, Take-Overs or Acquisition and Arrangements and Compromise under Chapter 27 of CAMA 2020[39], where meetings are convened by order of court and an applicant must issue an originating summons with an affidavit unlike company voluntary arrangement which does not require an application to court to summon meetings. Indeed, a hallmark of company voluntary arrangement is minimal court involvement. Moreover, winding up proceedings may be commenced upon insolvency of a company. Winding up proceedings are a special form of civil proceedings that aim to terminate the existence of a company rather than rescue same. Indeed, winding up serve the basic purpose of extinguishing the life an ailing company unlike a rescue mechanism which provide an alternative to the immediate winding of the ailing company and seeks to provide companies in financial difficulty with a period of respite in which compromises and rescue arrangements can be made.

5. Company Voluntary Arrangement

Company voluntary arrangement is a rescue mechanism under CAMA 2020 which involves an arrangement by an insolvent company used to structure debt repayment scheme to their creditors. CAMA 2020 did not specifically

[31] S 2(1) of the Canada Bankrauptcy and Insolvency Act 1985.
[32] (2000) LPELR-219 (SC) P41, paras c-d.
[33] CAMA, s 553
[34] *Ibid*, s 556 (4)
[35] Liman and Uruchi, *op cit*, p 616.
[36] *Ibid*. Also in Inter – Contractors Nigeria Ltd v UAC Nigeria Ltd (1988) 2 NWLR (Pt 76) 303, the court held that the general power of collecting and gathering the assets of the company or its debenture holders vests the right to commence or defend actions on the receiver or manager but such action can only be done with the direction of the court.
[37] C E Halliday, *art cit*, p 185.
[38] *Ibid*.
[39] *Ibid*.

define company voluntary arrangement but drawing from the provision of section 434, company voluntary arrangement can be defined as an arrangement with the creditors of a company which may involve either a composition in satisfaction of its debts, [40]or a scheme of arrangement of its affairs. A company voluntary arrangement is a debtor in possession procedure where the debtor is left in control of its affairs while it continues its business as a going concern under the supervision of a nominee. The writers are of the view that the act of placing the debtor in possession and control of its affairs is a good mechanism that is perceived to aid the smooth running of the arrangement process. This is because the debtor is better equipped with the skills of tracing the business decisions the company may made that led to its financial distress and will then work on returning the company to a better state. Company voluntary arrangement is therefore intended to provide the company with an easy method of rescue achieved by a binding agreement with the creditors. As a general consideration, there is no technical requirement within any statutory provision that the company in question needs to be insolvent or unable to pay its debt before it can enter into a company voluntary arrangement. However, the success of company voluntary arrangement underlies in the fact that the creditors anticipate better payment of debt from the company than that of while not entering into the agreement.[41]

Company Voluntary Arrangement Procedure

Company Voluntary Arrangement can either be commenced through standalone procedure[42] or as an element of a main procedure.[43] The company voluntary arrangement begins by a proposal being made to the creditors by the directors of the company, liquidator or administrator in the case of liquidation or administration respectively.[44] Company voluntary arrangement therefore involves a proposal by a company in a binding agreement, for an arrangement in satisfaction of the creditors' debts. A nominee is appointed for the purpose of acting as a trustee or supervising the implementation of the proposal and must be a qualified insolvency practitioner.[45] Company voluntary arrangement therefore enables the company's directors to remain in control of it under the supervision of a nominee. As such, the nominee neither acquires any power to deal in the name of the company nor becomes the officer of the company and any power he gets must come from the terms of voluntary arrangement itself. It is the duty of the nominee to summon the meetings of the creditors and shareholders to determine the approval of the proposed voluntary arrangement and to provide accurate and sufficient information to enable creditors to consider the merit of the proposal. Indeed, CAMA requires the nominee within 28 days of receiving the notice of the proposal for a company voluntary arrangement to submit a report to the court stating whether in his opinion meetings of the company and of its creditors should be summoned to consider the proposal and if, in his opinion, such meetings should be summoned, the date, time and place at which he proposes the meetings to be held.[46] Thus, section 435 (1) CAMA 2020 requires a report to be submitted to court. It does not require an application to court to summon meetings unlike in schemes of arrangement under section 711 of CAMA, where meetings are convened by order of court and an applicant must issue an originating summons with an affidavit.

Moreover, the nominee will usually collaborate with the proposers of the arrangements in making this report but there are statutory obligations on the proposers to provide him with necessary information.[47] As such, the nominee's report would have to be submitted to court before the nominee can convene any meeting of the members and creditors of the company to consider and approve the proposed voluntary arrangement with or without modifications.[48] However, in situations where the company is already in an administration or winding up, the nominee is not required to submit a report to the court.[49] The writers are of the view that since the nominee is required to convene the meeting of the members and creditors in order to bring the proposals before the meetings for approval and to supervise their implementation if approved, the nominee must be held responsible for the scheme. The chairman of the creditor and member meetings is mandated after the conclusion of either meeting in accordance with the rules to make a report of the result of the meeting to the Court.[50] Perhaps, where the meeting of creditors has reached a different decision from that reached at the creditors meeting, the court may, on application by a member, order that the decision of the company meeting shall have effect instead of the creditors'

[40] that is, provision for creditors to receive a percentage of what is due to them

[41] G M Weisgard and L Doyle, *Company Voluntary Arrangements and Administrations* (2nd edn, Jordan Publishing, 2010) P 3.

[42] Proposal is made by directors of the company.

[43] Proposal is made by liquidator or administrator in the case of liquidation or administration respectively.

[44] CAMA, s 434.

[45] *Ibid,* s 434 (2); Rule 22 of Companies Regulations 2021.

[46] *Ibid*, s 435.

[47] *Ibid*, s 435 (3).

[48] The meetings of members and creditors are required to be held separately

[49] CAMA, s 435.

[50] *Ibid*, s 437(6).

meeting or make such other order as it deems fit.[51] Also, a creditor or member who is dissatisfied with the approved company voluntary arrangement may approach the court to challenge the decision on the ground of unfair prejudice and material irregularity at or in relation to either meeting.[52] Once a company voluntary arrangement is approved, it is binding on the creditors and the nominee becomes the supervisor and is responsible for carrying out the functions conferred on him by the arrangement.[53] It also binds any creditor that was entitled to vote at the meeting as if he was party to the arrangement. This is irrespective of whether or not the creditor voted at the meeting, attended the meeting or received notice of the meeting.[54] The writers are of the view that it appeared unfair for creditors who were not given notice of the meeting to be bound by approved arrangements. Perhaps, company voluntary arrangement do not affect the rights of secured creditors and as such, creditors or members are not permitted to make proposals or modifications to proposals which affect the rights of secured creditors without their consent.[55] However, an arrangement approved by the meetings of creditors and members is binding only on unsecured creditors except the secured or preferential creditors consent to it.[56] Finally, a person who is dissatisfied with the actions of the supervisor may challenge them at the court and upon such application to court, a court may confirm, reverse or modify the act or decision of the supervisor or give directions to the supervisor or make such other order as it deems fit. [57]

Shortcomings of Company Voluntary Arrangement

Company voluntary arrangement enables the company's directors to remain in control of it under the supervision of a nominee. However, company voluntary arrangement under CAMA 2020 is not accompanied by any moratorium on enforcement actions.[58] The absence of a stay on the enforcement of creditors' rights may hinder a company that is facing financial distress from adopting this scheme for corporate rescue. Consequently, creditors may unilaterally pursue claims or enforcement actions while the company voluntary arrangement is ongoing. Under the UK regime, moratorium is available for companies which allows for an automatic 20 business days moratorium to come into force as soon as the documents containing the proposal for a company voluntary arrangement are filed in court.[59] During this period, which may be extended for a further 20 business days, the company may not be wound up and no steps may be taken, at least without the leave of court, to enforce security over the company's property or to take proceedings against it. This provision has been omitted in CAMA 2020. As such, nominees would have to enter into contractual or informal standstill agreement to give nominees the opportunity to prepare and present proposals to the general creditors. Nominees may negotiate standstill on enforcement actions with creditors with significant claims. This would ensure that the process is not wrecked by these creditors. Example of such is the company voluntary arrangement of Tourist Company of Nigeria Plc where the company's directors proposed a restructuring of its loans by waiving accrual and payment of interests from 1st march 2020 to an agreed future date. In their report dated 15th September 2021, the nominees appointed by the directors stated that the proposal was viable and fair to creditors and the company. The nominees also stated that the proposed arrangement had reasonable prospect of being approved by creditors and being implementable. The proposal also had a standstill agreement on contemplated and existing legal proceedings in relation to loans in the proposal.[60] Commendably, Tourist Company of Nigeria Plc proposal had a standstill agreement on contemplated and existing legal proceedings in relation to loans in the proposal. However, by virtue of section 440 CAMA, a standstill agreement will not affect the right of a creditor to challenge the company voluntary arrangement on the grounds of unfair prejudice and material irregularity. Indeed, to enable a distressed or insolvent company to successfully restructure its affairs, it is important that a moratorium is put in place. This is to ensure that the race towards the assets of the debtor is prevented, giving the insolvent company and its creditors an opportunity to agree on a restructuring plan without being interrupted by the claims of creditors who do not consent to the company voluntary arrangement. The lack of a moratorium could work against achieving a corporate rescue for the distressed or insolvent company.

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[51] *Ibid*, s 438 (5).
[52] *Ibid*, s 440 (1) (a) & (b).
[53] *Ibid*, s 442 (2).
[54] *Ibid*, s 439 (b).
[55] *Ibid*, s 437.
[56] *Ibid*, s 437 (3).
[57] CAMA, s 442 (3).
[58] A moratorium prevents the company creditors from instituting insolvency proceedings or legal processes against the company. It acts as a stay of actions against the debtor company when a restructuring process is ongoing. The objective of the moratorium is to provide protection to the company from adverse creditor action for a short period while the directors attempt to restructure and rescue the company. It gives the company substantial protection by restricting creditors and others from bringing actions against it.
[59] S 1 of UK Corporate Insolvency and Governance Act 2020.
[60] 'Nigeria: A Preliminary Appraisal of Nigeria's First -0 Ever Company Voluntary Arrangement', <www.allafrica.com/stories/202201110217.html> accessed 5 July 2022.

Furthermore, section 435 (2) of CAMA 2020 provides for the nominee to submit a report on the arrangement to court within 28 days after he is notified by directors or a longer period as permitted by court. The question is on the mode of submission of the said report. Is it by application to court or by mere filing in court? CAMA is silent on the said mode of submission of the report unlike in the United Kingdom where the nominees report has to be filed as part of the company voluntary arrangement becoming effective, but if there is no challenge to anything, the court probably does not look at it all. It is a matter of record only. Accordingly, the United Kingdom Insolvency Rules only requires a court, upon submission of a nominees report to endorse the nominees report and the copy of it with the date of filing and deliver the copy to the court.[61] As such, the role of the court with respect to nominees report is purely administrative in United Kingdom while in Nigeria the role is not specified since CAMA only provided for the submission of the report without specifying the role of the court as regards the said report submitted to it. Again, there was no prescribed time limit for carrying out the rescue in Nigeria unlike in India where there are prescribe time limits for corporate rescue.[62]

Moreover, section 437 (5) only provided that each of the meetings of the creditors and members shall be conducted in accordance with the rules. In essence, CAMA 2020 is silent as to the specific rule that will govern the meetings of the creditors and members with respect to the approval of the proposed voluntary arrangement. Indeed, CAMA 2020 is silent on the procedural matters like notice of meetings, contents of notice of meetings, chairing of meetings, chairman's discretion, quorum, voting rights, adjournments, combining creditors and members meeting et cetera as regard approval of the proposal. The writers therefore are of the opinion that there is need for the enactment of insolvency rules that would address the above procedural matters.

6. Conclusion and Recommendations

The introduction of the company voluntary arrangement has made significant and commendable revisions to Nigeria's insolvency law. It would also restore the financial well- being and viability of an insolvent company, giving the insolvent company, a greater chance of remaining in business to yield greater returns for its creditors than would have been achieved from other insolvency procedure, this mechanism therefore aims at balancing the interest of the debtor and creditor while preserving the going concern value of the corporation. In other words, the CAMA introduced a shift from corporate liquidation to corporate rescue. The corporate rescue reforms would therefore change the face of corporate restructuring in Nigeria, directly boost foreign investment and ensure that the Nigerian Corporate insolvency regime is in line with International best practice. However, introducing company voluntary arrangement without the benefit of moratorium has the apparent weakness that there is no stay on actions against the company during the period of company voluntary arrangement. In essence, where company voluntary arrangement applies, it does not extinguish the right that any creditor may have against such insolvent company. Creditors may therefore frustrate a possible company voluntary arrangement by enforcing their rights prior to any decisions approving the proposal for the company voluntary arrangement. Indeed, CAMA 2020 is silent on the procedural matters like notice of meetings, contents of notice of meetings, chairing of meetings, chairman's discretion, quorum, voting rights, adjournments, combining creditors and members meeting et cetera as regard approval of the proposal. The writers therefore recommended that there should be moratorium on enforcement actions in relation to company voluntary arrangement. There should also be provision of prescribed time limits within which to exploit any of the available corporate rescue procedure. The Legislature should provide the requisite insolvency rules, which would guide corporate rescue procedure in CAMA 2020.

[61] Rule 2.9 (3) of the UK Insolvency Rules 2016.
[62] India Insolvency and Bankruptcy Code, s 5(14), 1(1) (3)).