

THE AMBIVALENT NATURE OF COMPANIES AND ALLIED MATTERS ACT 2020 ON CORPORATE RESCUE: A LOOK AT COMPANY VOLUNTARY ARRANGEMENTS*

Abstract

A company is a corporate entity recognised by law and clothed with legal personality to do all that is within its constitution and objects, including to borrow money. However, a company can become insolvent and unable to pay its debts due to several reasons. Where this occurs, there are several routes in the statute that such company in trauma can explore. This routes ranges from corporate rescue mechanisms to options that see to the dissolution of the company. Prior to Companies and Allied Matters Act (CAMA 2020), most companies in trauma ended up being wound up or dissolved due to the law that did not encourage the objective of corporate rescue. With CAMA 2020 came improvements to certain aspects of company regulations, particularly that of corporate insolvency. It came with the introduction of the corporate rescue culture, one of which includes the Company Voluntary Arrangements (CVA). CVA as a rescue mechanism is a debtor in possession procedure that ensures the debtor is left in control of its affairs by allowing its directors to retain control of the company while it continues its business as a going concern under the supervision of an insolvency practitioner. The provision of CAMA 2020 on CVA is like that of the United Kingdom (UK) Insolvency Act. This paper examines CVA as a mechanism of corporate rescue. It further comparatively examines the legislations in Nigeria and UK on CVA while highlighting the similarities. This paper then posits that although the embodiment of the rescue culture in CAMA 2020, particularly CVA in Chapter 17 of CAMA 2020, is laudable and a lofty achievement; the lack of provision for moratorium in the Act when CVA is put in motion has made the provision of CAMA 2020 ambivalent, confusing and capable of different conjectures such that it can be used by secured and preferential creditors to defeat the rescue objective while also putting the insolvency practitioner (the nominee) in a precarious position. This paper therefore calls for an urgent review of the Act to address this anomaly.

Keywords: Companies and Allied Matters Act 2020, Company Voluntary Arrangements, Corporate Rescue, Creditors, Insolvency Act 1986.

1. Introduction

A company is an important business organisation which has its incorporation and dissolution procedures, as well as everything in between regulated by provisions of law. Individuals come together to incorporate a company to enjoy the many benefits that accrue to such business entity. However, due to some reasons, a company may become insolvent and unable to pay its debts owed to its creditors. Where this is the case, there are several procedures and routes provided under the statute in dealing with the insolvency of such company which ranges from rescue options like administration, company voluntary arrangement, arrangements, and compromise, to non-rescue options like receivership, and liquidation. Prior to the enactment of the Companies and Allied Matters Act ('CAMA 2020'), what regulated companies in Nigeria was the Companies and Allied Matters Act 1990 ('CAMA 1990')¹, which was fashioned after the English Companies Act 1985 and it remained in force for almost 30 years² despite several amendments made to its English counterpart. Then, CAMA 1990 and the Winding Up Proceeding Rules 2001 regulated transactions and dealings of companies and business entities in Nigeria, particularly the field of corporate insolvency. This old statutory provision, CAMA 1990, on insolvency in Nigeria provided arrangements, schemes and compromise, liquidation and receivership procedures as means of dealing with companies in trauma and did not make provision for rescuing insolvent companies. Under CAMA 1990, most dying companies ended up being wound up or dissolved due to the insolvency provisions under the Act. However, on 7th August 2020, the Companies and Allied Matters Act ('CAMA 2020') came into effect after being assented to by the President of the Federal Republic of Nigeria³. The enacted CAMA 2020 came with new provisions on certain aspects of company regulations, particularly on regulation of corporate insolvency. It came with the introduction of corporate rescue mechanisms like administration, Netting and Company Voluntary Arrangements (CVA) – the focus of this paper.

The regulations on corporate insolvency are not necessarily new in some jurisdictions, particularly the United Kingdom (UK) whose legal regime heavily influence that of Nigeria.⁴ In the UK, the CVA has been in use since 1985 and several companies have adopted the scheme for the purpose of debt restructuring⁵, but it was not until

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¹ Chapter C20) Laws of the Federation of Nigeria 2004.

² Year 1990 to 2019.

³ President Muhammadu Buhari.

⁴ For instance, the Company Voluntary Agreement is set out in Part I of the UK Companies Act 1986 and the Insolvency (England and Wales) Rules 2016.

⁵ Kubi Udofia, 'Nigeria: An Overview of Company Voluntary Arrangements in CAMA 2020.' *This Day* [2020] <Nigeria: An Overview of Company Voluntary Arrangements in CAMA 2020 - allAfrica.com>. Accessed 16/09/2023.

the advent of CAMA 2020 that CVA became part of the insolvency regime in Nigeria. It should be noted that the provision of CAMA 2020 on CVA is modelled after that of the UK Insolvency Act 1986.

A CVA has been described as a rescue mechanism for insolvent companies.⁶ As a rescue mechanism, the CVA allows indebted companies to pay a portion of the debts owed to the creditors while reaching some sort of agreement on how the debt is to be paid. Acting as a contractual arrangement between the company and its creditors, the CVA empowers the company to negotiate agreements with its creditors. This includes freezing existing debts and facilitating ongoing trading under its management, all while committing to repay debts over a predetermined period, typically spanning three to five years.⁷ Thus, the company can go on trading while the creditors receive at least a portion of the debt. It should be noted that with the advent of the CVA in CAMA 2020, the existing structure under CAMA 1990, whereby a company in comatose is 'killed rather than revived/resuscitated', is being jettisoned. This has brought the Nigerian legal regime on corporate insolvency to be on the same pedestal with statutory provisions in other jurisdictions. The implication is that this introduction is a paradigm shift from the liquidation and receivership processes under CAMA 1990 to rescue procedures in CAMA 2020. However, as laudable as the introduction of CVA as a corporate rescue mechanism in CAMA 2020 is, its provision in the Act is ambivalent and capable of being subject to different conjectures such that if care is not taken will defeat the objective of corporate rescue -n the sole purpose of the mechanism.

This article therefore examines the provision of CAMA 2020 on CVA by considering at CVA as a mechanism of corporate rescue. This paper also comparatively considers the legislative provisions on CVA in Nigeria and the UK and argues that although the inclusion of CVA as a corporate rescue mechanism in CAMA 2020 is a lofty one, the lack of salient provision on moratorium can have counterproductive effect and antithetical in nature to the main purpose of CVA which is to ensure that the objective of corporate rescue is achieved. This paper is divided into six sections. Section one is the introduction. Section two examines CVA as a mechanism of corporate rescue. Section three examines CVA under the Nigerian and UK legislations while highlighting the similarities in both legislations. Section four examines the ambivalent nature of the provision of CAMA 2020 on CVA. Section five concludes, and section six makes recommendation.

2. Company Voluntary Agreement as a Corporate Rescue Mechanism

Corporate rescue has been defined to be the process of enabling companies in financial difficulties to return to a state of viability. It works towards the restoration of a company in difficulty by preserving it as a legal entity to ensure its continued operations.⁸ It is seen as a major intervention necessary to avert the eventual failure and winding up of a company as it involves fundamental remedial actions for a company in trauma, which can be formal, informal,⁹ or hybrid rescue mechanisms. Formal rescue mechanism involves the use of legal procedures under insolvency legislation to restructure debt obligations under the supervision of the court or a formal legal structure,¹⁰ while informal rescue, also referred to as 'private restructurings' or 'workouts', are non-judicial processes by which a distressed company and its creditors can, by agreement, restructure the company's debt obligations. It requires no statutory or court intervention and more flexible.¹¹ The hybrid form of corporate rescue mechanism, also known as 'pre-packs', combines the advantages of private restructuring or workouts with some of the properties of the formal procedure.¹² CVA falls more within the border of a formal rescue mechanism as it is regulated by the Act¹³ and monitored by the Court¹⁴. Chapter 17 of CAMA 2020¹⁵ contains provisions on CVA and like a host of other terminologies, CAMA 2020 does not define CVA. CVA has been defined as an agreement for debt repayment between a company and its unsecured creditors which is binding on parties.¹⁶ It allows companies in financial difficulties to enter into an agreement with their creditors, regarding the payment of all or

⁶ Chioma Ezinne Adiele, *Developing a Corporate Insolvency Framework for Nigeria* (Master of Laws Research Papers Repository. 9. 2020) <<https://core.ac.uk/download/pdf/344777855.pdf>>. Accessed 06/04/2023.

⁷ D. Keenan, *Smith, and Keenan's Company Law*. (13th ed. Harlow: Preston Education Limited 2005) 510.

⁸ Trusted, 'Navigating Company Insolvency Rescue Mechanisms and Legal Solutions.' *The Trusted Advisors* [2023]. <<https://trustedadvisorslaw.com/navigating-company-insolvency-rescue-mechanisms-and-legal-solutions/#:~:text=Corporate%20Rescue%20is%20generally%20described,will%20remain%20as%20a%20cohesive>>. Accessed 08/03/2024.

⁹ A. Belcher, *Corporate Rescue* (2nd ed. London. Sweet & Maxwell 2009) 12.

¹⁰ O. Omotoye, and A. Aina, 'Administration or Receivership? Making the Right Choice towards Corporate Rescue.' *University of Ibadan Law Journal*. [2022] (12) (1) 13 <<http://www.journals.ui.edu.ng/index.php/uilr/article/view/1129>>. Accessed 13/01/2024.

¹¹ *Ibid*.

¹² *Ibid* at Pages 16 and 17

¹³ Chapter 17, CAMA 2020.

¹⁴ See Chapter 17 CAMA 2020 and the Insolvency Regulation 2022.

¹⁵ Sections 434 to 442 of Companies and Allied Matters Act 2020.

¹⁶ K. Udofia, 'An Overview of Company Voluntary Arrangements in CAMA 2020'. *Social Science Research Network* [2021] <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956249>. Accessed 09/03/2024.

a part of the debts owed.¹⁷ A CVA is therefore a formal process that enables a company to reach a compromise with its creditors based on votes passed by majority of the creditors of those voting on the proposal.¹⁸ CVA is specifically designed for limited liability companies, and it is a procedure aimed at restoring the financial wellbeing and viability of an insolvent company as it allows such company to:

- a. Formally arrange with the company's creditors on the terms for repaying the debt,
- b. Pay a portion of the debts owed, rather than the full amount.¹⁹

According to Parry²⁰, CVA is a vital tool for navigating financial challenges and difficulties for distressed companies, and as a debtor in possession procedure ensures the debtor is left in control of its affairs by allowing its directors to retain control of the company while it continues its business as a going concern under the supervision of an insolvency practitioner. This arrangement preserves the company's status as a going concern, distinguishing it from other rescue options. CVA is contractual in nature as it is an agreement between the debtor and its creditors. It therefore must be approved by both creditors and members of the company and once a CVA is approved, it holds binding effects on creditors. The advantage of this is that it prevents the exclusion of substantial claims thereby making the arrangement quite effective. Additionally, in a CVA, the rights of secured and preferential creditors are not affected. They retain the ability to enforce their claims independently of the arrangement.²¹

It should however be noted that although CVA as a rescue mechanism is relatively new in Nigeria, CVA has been adopted in the United Kingdom's corporate environment over the years as a means of rescuing businesses in financial difficulties by allowing such distressed businesses to propose options that allow their creditors agree to modes of repaying debts owed to them over an agreed period of time.²² In summary, CVA is a formal company rescue mechanism that allows companies that are insolvent to remain a going concern by restructuring debts owed by them and paying it over a longer period of time.²³ It is binding and allows a company to agree with its creditors to allow the company pay back its debts on achievable repayment terms and avoid liquidation.²⁴

3. Brief Examination of CVA under the Nigerian and UK Legislations

CVA under the Nigerian Legislation

Chapter 17 of CAMA 2020²⁵ makes provision for CVA. In addition to this, Section 867 of CAMA 2020 confers power on the Commission, with the approval of the Minister, to make regulations in respect of the Act²⁶. Pursuant to this provision in Section 867 CAMA 2020, the Commission made the Insolvency Regulation 2022 (IR 2022) which provides extensively on insolvency proceedings in Nigeria. Under the provision of Chapter 17 of CAMA 2020, CVA procedure can be instituted by a liquidator winding up a company²⁷, or by an administrator where the company is in administration²⁸, or directors²⁹ of the insolvent company.³⁰ Where it is the liquidator or administrator that is instituting the CVA, such is referred to as nominee. However, where it is the directors of an insolvent company that is instituting the CVA procedure, then they are to appoint a nominee. Where the company is in administration or winding up, the nominee has power to summon the meeting without having recourse to the court.³¹ The appointed nominee is to act as trustee or otherwise for the purpose of supervising the implementation of the CVA.³² The nominee is required to be a person qualified to act as an insolvency practitioner in relation to the company.³³ Therefore, the proposal must name a qualified insolvency practitioner as a nominee to act as a

¹⁷ O. OC-Chukwuocha, 'Company Voluntary Arrangement under CAMA 2020: A Review.' *Unizik Law Journal* [2023] (19) 2.

¹⁸ Begbies Traynor, 'Understanding the Company Voluntary Arrangement Procedure and Eligibility.' *Begbies Traynor Group* [2024] <Company Voluntary Arrangements (CVA) - Begbies Traynor (begbies-traynorgroup.com)>. Accessed 14/09/2023.

¹⁹ Simon Renshaw, 'What is a Company Voluntary Arrangement (CVA)?' [2024] <<https://www.companydebt.com/company-rescue-solutions/company-voluntary-arrangement/>>. Accessed 14/09/2023.

²⁰ Rebecca Parry, *Corporate Rescue* (London: Sweet & Maxwell. 2008.) Pg. 131.

²¹ (n 18).

²² Udo Udoma & Belo-Osagie, 'Nigeria: The Companies and Allied Matters Act 2020- What You Need to Know- Part 11- Company Voluntary Arrangements.' [2021] <The Companies And Allied Matters Act 2020 – What You Need To Know -Part 11 – Company Voluntary Arrangements - Corporate/Commercial Law - Nigeria (mondaq.com)>. Accessed 14/09/2023.

²³ Trade Finance Global, 'Company Voluntary Arrangements (CVAs).' <Company Voluntary Arrangements (CVAs) (tradefinanceglobal.com)>. Accessed 14/09/2023.

²⁴ (n 17)

²⁵ Sections 434 to 442 of Companies and Allied Matters Act 2020

²⁶ Section 867 9(a) – (e) CAMA 2020.

²⁷ Section 434 (3)(b) CAMA 2020

²⁸ Section 434 (3)(a) CAMA 2020

²⁹ Section 434 (1) CAMA 2020

³⁰ Section 434(2) CAMA 2020

³¹ Section 435(1)

³² Section 434 (1) and (2) CAMA 2020

³³ Section 434 (1) CAMA 2020

trustee or supervise and implement the CVA.³⁴ However, where the company is not in administration and not being wound up, to enable the nominee to prepare his report, the nominee is to receive from the person who intends to make the proposal a document setting out the terms of the proposed voluntary arrangement³⁵, and a statement of the company's affairs containing:

- i. The particulars of its creditors, its debts, and other liabilities and of its assets may be prescribed, and
- ii. Other information as may be prescribed.³⁶

Where the appointed nominee under section 434 CAMA 2020 is not the liquidator or administrator of the company³⁷, and as such the company is not in administration or winding up³⁸, such nominee, upon been given the notice of the proposal for CVA, is required, within 28 days (or such longer period as the Court may allow), to submit a report to the Court³⁹ stating- (a) whether, in his opinion, meetings of the company and of its creditors should be summoned to consider the proposal; and (b) if, in his opinion, such meetings should be summoned, the date on which, and time and place at which, he proposes the meetings to be held⁴⁰. If the nominee fails to submit the mandated report as per Section 435(2), the Court may, on an application by the person intending to prepare a proposal for CVA, instruct the replacement of the nominee with another qualified insolvency practitioner to oversee the process concerning the company.⁴¹ Also, CVA meetings are to be summoned by the nominee, administrator, or liquidator depending on the status of the company.⁴² By virtue of the IR 2022, the proposal is required to contain essential details, including a comprehensive overview of the company's assets and liabilities, the proposed treatment of preferential and secured creditors, details of the nominee and supervisor's fees and expenses, contact information for the supervisor, the intended functions of the supervisor, proposed guarantees, the envisioned duration of the CVA, plans for conducting the company's business throughout the CVA period, any additional proposed credit facilities, and the proposed mechanisms for debt repayment.⁴³ Where a company official makes a false representation or acts fraudulently to obtain approval for a voluntary arrangement, he/she commits a criminal offence punishable by imprisonment, fines, or both.⁴⁴ Where the nominee is not the liquidator or administrator, the consenting nominee must deliver a notice of consent to the proposer within three days of receiving the proposal under section 435(3), specifying the date of receipt.⁴⁵ Where the company is undergoing court-ordered winding up, the liquidator must furnish the official receiver with a copy of the proposal and provide the name and address of the nominee if they are not the liquidator.⁴⁶

The meetings⁴⁷ have the authority to approve the proposal either as presented or with modifications.⁴⁸ As part of its modifications, the meeting can confer the functions proposed to be conferred on the nominee on another person qualified to act as an insolvency practitioner.⁴⁹ However, certain proposals and modifications are not permissible. Thus, any modification which results in the cessation of the CVA, a modification which affects the rights of a secured creditor without their consent, and a proposal which alters the payment priority of preferential creditors without their consent are impermissible.⁵⁰ A proposal must receive the approval of at least three-quarters (75%) of creditors by debt value and over half (50%) of members at the meeting.⁵¹ The decision will take effect and become binding if both the creditors and members' meetings reach a similar decision. Where there are conflicting decisions between the meetings, a member may apply to the Court within 28 days of the decisions made at the members' meeting to have that decision take effect.⁵² The Court may grant such an application or issue any other order it deems appropriate.⁵³

³⁴ Sections 432 (2) and 868 CAMA 2020

³⁵ Section 435 (3)(a) CAMA 2020

³⁶ Section 435 (3)(b) CAMA 2020

³⁷ Here, the directors of the insolvent company appoint the nominee.

³⁸ Section 435(2) CAMA 2020.

³⁹ Section 435(1) CAMA 2020.

⁴⁰ Section 435(2) CAMA 2020.

⁴¹ Section 435 (4) CAMA 2020.

⁴² Section 436 (1)(b) CAMA 2020.

⁴³ Part 2, Regulations 2.01 (1) and 2.02 (1) Insolvency Regulation 2022.

⁴⁴ Section 441 CAMA 2020.

⁴⁵ Part 2, Regulation 2.04 (2) & (3) Insolvency Regulation 2022.

⁴⁶ Part 2, Regulation 2.05 (a)&(b) Insolvency Regulation 2022.

⁴⁷ The Creditors' and Members' Meeting

⁴⁸ Section 437 (1) CAMA 2020.

⁴⁹ Section 437 (2) CAMA 2020.

⁵⁰ Section 437 CAMA 2020.

⁵¹ Part 2, Regulation 2.11(4) (c)(ii) Insolvency Regulation 2022.

⁵² Section 438 (4) CAMA 2020.

⁵³ Section 438 (5) CAMA 2020.

The chairman of the meeting must prepare a detailed report according to the provision of Section 437 (6) CAMA 2020.⁵⁴ This report must include whether the proposal was approved or rejected, specifying whether it received approval from creditors alone or from both creditors and members and if any modifications were made during the approval process.⁵⁵ Additionally, the report should list all creditors and members who participated in or were represented at the meeting, detailing how they voted on each resolution and identifying any creditor considered connected with the company.⁵⁶ Furthermore, the report should contain any additional information deemed relevant by the nominee or chair to disclose to the court.⁵⁷ A copy of this report must be filed with the court within four working days of the company meeting, and the court will endorse the filed copy with the date of filing.⁵⁸ The chairman must notify all parties who received notice of the meeting about the outcome of the proposal consideration as soon as reasonably practicable after filing the report with the court.⁵⁹ Where the decision approving the CVA, with or without modifications, takes effect under Section 438, the supervisor must promptly provide a copy of the chairman's report to the Corporate Affairs Commission.⁶⁰ Upon approval, the implementation of the CVA will be overseen by an insolvency practitioner, who will act as a supervisor.⁶¹ The nominee may transition to this role as a supervisor. Any creditor dissatisfied with the actions of the supervisor can apply to the Court for review or direction regarding the supervisor's actions.⁶² The supervisor may also seek Court directions on specific matters or apply for the company's winding-up or administration order.⁶³ If necessary, the Court can appoint or replace a supervisor.⁶⁴ Additionally, the supervisor must within 28 days, notify all affected parties, provide a summary report detailing receipts and payment, explain any deviations from the original CVA terms, and, if terminated, state the reasons why.⁶⁵ The supervisor must send copies of the notice and report to the Corporate Affairs Commission and file them with the court before vacating office.⁶⁶

Upon approval of the proposed CVA by both the meeting of creditors and the meeting of members, or by a court order, it will be legally binding on all unsecured creditors. This binding effect extends to every creditor entitled to vote at the meeting regardless of whether the creditor voted at the meeting, was present at the meeting, or received notice of the meeting. Even if the arrangement ceases to have effect and the payable amount remains outstanding, the company remains liable to fulfil the arrangement's obligations. In situations where the company is undergoing winding-up or administration, the Court may intervene to halt the winding-up proceedings, terminate the administrator's appointment, or issue necessary directives concerning the conduct of the winding-up or administration.⁶⁷ Following the agreement on the CVA terms between the company and its creditors, the directors will retain control over the company's daily operations while devising strategies to meet the CVA's financial requirements. The CVA supervisor will ensure the company meets its obligations and provide regular updates to creditors regarding the progress of the CVA.

A CVA can be challenged by a creditor, a member, a nominee, an administrator, or liquidator in cases of administration or liquidation, respectively.⁶⁸ It may be challenged on the grounds of unfair prejudice to the interest of a creditor, member, or contributory. Also, a CVA can be challenged based on material irregularity at or in relation to the creditors or members' meetings.⁶⁹ An application challenging a CVA must be made within 28 days from the date when each of the reports mandated by Section 435 (2) CAMA 2020 is presented to the court.⁷⁰ Where the challenge is successful, the Court may revoke or suspend any decision approving the CVA or taken at the meetings.⁷¹ Alternatively, the Court may order the convening of further meetings to consider revised proposals or reconsider the original proposal.⁷² In the case of a material irregularity, at or related to any of the meetings, a new meeting will be called for the company or creditors to reconsider the original proposal.⁷³ If the Court directs the summoning of meetings for a revised proposal but finds that the proposer has no intention of submitting one,

⁵⁴ Part 2, Regulation 2.25 (1) Insolvency Regulation 2022.

⁵⁵ Part 2, Regulation 2.25 (2) (a) Insolvency Regulation 2022.

⁵⁶ Part 2, Regulation 2.25 (2) (b) & (c) Insolvency Regulation 2022.

⁵⁷ Part 2, Regulation 2.25 (2) (d) Insolvency Regulation 2022.

⁵⁸ Part 2, Regulation 2.25 (3) & (4) Insolvency Regulation 2022.

⁵⁹ Part 2, Regulation 2.25 (5) Insolvency Regulation 2022.

⁶⁰ Part 2, Regulation 2.25 (6) Insolvency Regulation 2022.

⁶¹ Section 442 (2) CAMA 2020.

⁶² Part 2, Section 442 (3) Insolvency Regulation 2022.

⁶³ Section 442 (4) CAMA 2020.

⁶⁴ Section 442 (5)(a) CAMA 2020.

⁶⁵ Part 2, Regulation 2.31 (1) & (2) Insolvency Regulation 2022.

⁶⁶ Part 2, Regulation 2.31 (3) & (4) Insolvency Regulation 2022.

⁶⁷ Section 439 CAMA 2020.

⁶⁸ Section 440 (2) CAMA 2020.

⁶⁹ Section 440 (1) (b) CAMA 2020; *Sisu Capital Fund Ltd v. Tucker* (2005) EWHC 2170.

⁷⁰ Section 440 (3) (a) CAMA 2020.

⁷¹ Section 440 (4) (a) CAMA 2020.

⁷² Section 440 (4) (b) CAMA 2020.

⁷³ *Ibid.*

it will revoke the direction and may revoke or suspend any previous approval.⁷⁴ The Court, when issuing a direction or revoking/suspending approval, may also issue additional directions as it sees fit, including regarding actions taken under the voluntary arrangement.⁷⁵

CVA under the UK Legislation

The United Kingdom (UK) has the goal of giving ailing companies a lifeline and a chance to continue as a going concern. The foundation of the current corporate rescue regime in the United Kingdom can be traced back to the recommendations of the Cork Committee. The Committee considered receivership to be limited in use as the existence of a floating charge is necessary. Additionally, receivership was deemed to be uncertain as it did not guarantee rescue. In fact, many receivership procedures resulted in the death of the company.⁷⁶ The Committee also faulted the scheme of arrangement on the fact that it was time-consuming, costly, and required a lot of manpower and court intervention.⁷⁷ The Cork Committee's report led to the enactment of the Insolvency Act 1986 to foster a rescue culture for financially distressed companies, providing mechanisms to prevent insolvency. It introduced two new rescue procedures: the CVA, which covers companies prior to formal insolvency, and the Administration of Companies. The insolvency framework in the UK also includes a standalone moratorium and restructuring plan. Part I of the Insolvency Act 1986 introduced the CVA procedure, in response to recommendations from the Cork Committee. Directors of the distressed company can propose a CVA, even pre-emptively, to its creditors, offering a compensation in satisfaction of debts or a scheme of arrangement.⁷⁸ The directors must prepare a proposal for the CVA, with guidance from a nominee overseeing the process.⁷⁹ This proposal must include various details such as reasons for opting for a CVA, the company's assets and values, the nature and amount of the company's liabilities, the duration of the CVA, distribution dates to creditors, and the nominee's remuneration.⁸⁰ Administrators or liquidators may also initiate a CVA if the company is under administration or liquidation. In cases of administration or liquidation, it falls on the administrator or liquidator, respectively, to propose the CVA.⁸¹ The nominee supervising the CVA must be formally instructed to act through written notice and provided with a copy of the proposal by the directors.⁸² The nominee must within twenty-eight days of accepting the role, submit a report to the court, indicating whether meetings of the company and its creditors should be convened to discuss the proposal.⁸³ The directors must furnish the nominee with a statement of the company's affairs and any necessary information to prepare the report, granting access to the company's accounts and records.⁸⁴

Additionally, the nominee has the authority to convene a creditors' meeting, where creditors can deliberate on whether to approve, modify, or reject the proposed CVA.⁸⁵ It is essential to note that, for voting purposes, all creditors are treated as a single class, and each creditor who receives notice of the meeting is entitled to vote on the CVA draft.⁸⁶ Approval of the CVA requires the support of 75% of unsecured creditors by value.⁸⁷ Once approved, the CVA becomes legally binding on all unsecured creditors and parties who received notice of the meeting, regardless of their attendance.⁸⁸ However, secured or preferential creditors are not automatically bound unless they agree to be so.⁸⁹ Where secured creditors do not consent to be bound, they retain the right to enforce their claims. The rationale behind initiating a CVA lies in the potential for creditors to receive higher returns compared to liquidation, despite receiving less than the total owed. The scheme's approval may be subject to challenge within the first twenty-eight days, but if successful, it can lead to the discharge of administration or winding-up orders. A CVA terminates when either all agreed conditions have been met or when obligations have not been fulfilled.⁹⁰ In the first case, the supervisor distributes assets according to the terms of the arrangement.

⁷⁴ Section 440 (5) CAMA 2020.

⁷⁵ Section 440 (6) (a) & (b) CAMA 2020.

⁷⁶ P.J. Omar and J. Grant, 'Corporate Rescue in the United Kingdom: Past, Present and Future Reforms.' *Social Science Research Network*. [2016] <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3848575>. Accessed 24/03/2024.

⁷⁷ *Ibid.*

⁷⁸ Section 1 (1) Insolvency Act 1986 (IA 1986).

⁷⁹ Section 389A IA 1986.

⁸⁰ Rule 1.3 (1-8) Insolvency Rules 1986.

⁸¹ Section 1 (1) & (3) IA 1986.

⁸² Section 2 (3) IA 1986.

⁸³ Section 2 (2) IA 1986.

⁸⁴ Rules 1.5 & 1.6 Insolvency Rules 1986.

⁸⁵ Section 4 Insolvency Act 1986.

⁸⁶ A. Kastrinou, *European Corporate Insolvency Law: An Analysis of the Corporate Rescue Laws of France, Greece, and the United Kingdom*. (PhD thesis of the University of Leicester 2010). <https://figshare.le.ac.uk/articles/thesis/European_Corporate_Insolvency_Law_an_analysis_of_the_corporate_rescue_laws_of_France_Greece_and_the_United_Kingdom/10099751>. Accessed 24/03/2024.

⁸⁷ Rule 1.19 Insolvency Rules 1986.

⁸⁸ Section 5 (2) IA 1986; Rule 15.34 Insolvency Rules 2016.

⁸⁹ Section 4 (2) & (3) IA 1986.

⁹⁰ (n 21) at 217.

In the latter case, the supervisor works to amend the arrangement terms or, if that's not possible, initiates liquidation proceedings for the company.⁹¹

Similarities between the Nigerian and UK's Legislations on CVA

UK still has the most robust pre-insolvency framework with several options that improves the protection of creditors while also increasing the possibility of corporate rescue. Although UK embraced the idea of corporate rescue decades ago, it was not until recently that Nigeria included corporate rescue into its framework. CAMA 2020 closely resembles the Insolvency Act 1986, aimed at encouraging the rescue of distressed companies. By incorporating CVA and other rescue options into its legal framework on insolvency in CAMA 2020, Nigeria has caught up with the UK and many parts of the world by embracing the rescue culture. Having been modelled after the English Insolvency Act, the Nigerian framework on CVA is like that of the UK in several aspects. For instance, in both countries and under their legislations, an Insolvency Practitioner oversees the CVA process by initially serving as a nominee to assess the proposal's viability, and subsequently as a supervisor following creditor approval.

Also, in Nigeria and the UK, only a qualified insolvency practitioner that is allowed to serve as a nominee in a CVA proceeding and must be named right from the proposal stage. The appointed nominee is to serve as a supervisor and trustee for the CVA and implements the CVA. The nominee can also be the company's administrator or liquidator where the company is being is in administration or in a winding-up proceeding. The nominee is also responsible for convening creditors meetings and liaising with the company's creditors at different stages in the process. The law recognises that creditors in corporate rescue proceedings have vested interests in the outcome of the proceedings which the law protects as it allows them to determine the fate of the debtor company. However, they are not allowed to sabotage rescue proceedings in favour of their interests. In UK and Nigeria, a CVA proposal requires 75% of unsecured creditors' vote for approval as creditors are tasked with the duty to deliberate on, approve, modify or reject the proposed CVA. These are few out the many similarities between the two legislations on CVA.

4. The Ambivalent Provision of CAMA 2020 on CVA

It is a fact that the UK's corporate rescue regime stands out as a well-established model that serves as an example to other jurisdictions, including Nigeria. Despite the efforts made through the enactment of the CAMA 2020 which largely incorporate the English insolvency provisions and copied it wholesale, much is still left to be desired on the provision of the Act on CVA as due to the absence of moratorium in the provision of CAMA 2020 on CVA – which is key to CVA as a rescue mechanism. A distinct feature of the CVA is the unequal treatment of all classes of creditors. The CVA requires approval from both creditors and members of the company to become effective, however, it affords secured and preferential creditors a degree of autonomy, as they are not bound by the terms of the arrangement and has the right to call for administration⁹² or other to take other routes like receivership and liquidation which does not foster corporate rescue, in their campaign of realising their interests. It is therefore a no brainer that if there no moratorium, unsecured creditors may be unable to realise their interests and the whole essence of CVA may be defeated.

In the UK, even though the implementation of a CVA does not automatically result in a statutory moratorium, certain small companies⁹³ that are eligible may benefit from a 28-day moratorium. Whereas medium and large companies can only so benefit where the CVA process takes place together with administration. However, under CAMA 2020, statutory moratorium is not available for small companies. This is disadvantageous because a CVA proposal is most effective where a moratorium is available. The provision of CAMA 2020 on CVA does not provide for moratorium on enforcement actions by other creditors, particularly secured creditors. This major lacuna can defeat the whole essence of the corporate rescue that the CVA is conceived to serve as it gives creditors the freedom and opportunity to pursue claims or enforcement actions independently against the debtor company during the pendency CVA proceedings.

The lack of moratorium in the provision of CAMA 2020 on CVA further places the nominee in a precarious position, particularly where he is also a liquidator or administrator where the company is being wound up or in administration. This is because such nominee is expected to consider the decision of the unsecured creditors and the members without jeopardising the interests of the secured or preferential creditors who in the bid to realise

⁹¹ *Ibid.*

⁹² S.T. James and C.R. Elendu, 'Company Voluntary Arrangement (CVA) & Administration of Companies: An Appraisal of the Innovative Corporate Insolvency Procedures under the Companies and Allied Matters Act 2020.' *Africa Journals Online*. <[https://www.ajol.info/index.php/nba/article/view/254154/240146#:~:text=CVA%20under%20CAMA%202020&text=voluntary%20arrangement\)%20aimed%20at%20enabling,is%20in%20administration%20or%20liquidation16](https://www.ajol.info/index.php/nba/article/view/254154/240146#:~:text=CVA%20under%20CAMA%202020&text=voluntary%20arrangement)%20aimed%20at%20enabling,is%20in%20administration%20or%20liquidation16)>. Accessed 08/03/2024.

⁹³ Having a turnover of not more than £10.2 million; balance sheet assets not greater than £5.1 million and not more than fifty employees.

their interests, have the right to appoint a receiver, receiver and manager, administrator or call for the winding up of the company under the provisions of CAMA 2020. The lack of moratorium, the sole aim of which is to create a moment of respite whereby secured and preferential creditors are prevented from instituting actions or pursuing options that will help in realising their interests and not that of the creditors as a whole or of the company, will make a nominee a puppet whose strings are in the hands of the secured creditors. The absence of a moratorium in CVA makes the mechanism susceptible to disruption by non-consenting creditors whereby they file actions to enforce their claims, leading to a race to claim assets and undermining the restructuring process.

Furthermore, the lack of moratorium in the CVA provision under CAMA 2020 may lead to total jettisoning of the procedure or option as companies in trauma may opt for administration or receivership rather than CVA. It should be noted that in the UK, there used to be a statutory twenty-eight-day moratorium for small companies undergoing a CVA, but with the enactment of the Corporate Insolvency and Governance Act, the UK now has a stand-alone moratorium which applies to all but a few companies. It provides twenty business days of protection from certain creditor actions, which can be extended or terminated early.⁹⁴ This moratorium can be used before or together with a CVA or other rescue mechanisms.

Another defect in the provision of CAMA 2020 on CVA is the requirement placed on the nominee to call separate meetings of the creditors and the members for the purpose of obtaining their votes in relation to the proposal. The position in the UK is quite different as there is no express mention of convening a physical meeting of creditors under the UK Insolvency Act. They may therefore vote on the proposal by e-mail, correspondence, or virtual meetings. In addition, the UK Act further recognises an arrangement ending prematurely⁹⁵, but this is absent in CAMA 2020.

6. Conclusion and Recommendations

CVA no doubt plays a crucial role in helping financially distressed companies overcome challenges while maintaining business operations and minimising economic disruptions due to financial difficulties encountered by companies which may ultimately lead to loss of revenue due to the company being wound up. It empowers companies to retain control under their existing management while ensuring the continuity of business operations. CVA is quite flexible as a rescue mechanism as it allows debtor company to propose customised arrangements to creditors based on their specific financial situations while its directors remain at the helms of its affairs. This ensures a mutually beneficial agreement and an increased chance of successful debt restructuring. Also, beyond restructuring the proportion of debt to be paid back, the CVA can be used to extend the payment period of debt, albeit subject to the creditors' acceptance. Thus, the CVA has so many advantages as a business rescue mechanism, ranging from the fact that it allows the company to remain under control of directors and other internal management officers thereby allowing business to continue as usual to the fact that because the CVA is a private process between the creditors and the company, then members of the public are usually not notified of the process. The inexpensive and simple procedure of the CVA is also worthy of note as well as the guarantee at least that creditors will be paid a portion of their money as opposed to the process under liquidation and administration. As a result of these many advantages, Nigerian companies may seek solace from the CVA as a corporate rescue mechanism under the 2020 CAMA.

Considering the foregoing, although the inclusion of CVA in CAMA 2020 as a rescue mechanism is quite laudable, the absence of moratorium during CVA in CAMA 2020 is a dearth in the legislation, in comparison to what is obtainable in the UK where this procedure has been adopted. The provision of CAMA 2020 on CVA is ambivalent due to this which makes it possible for secured and preferential creditors who are not bound by CVA to engage administrators, receivers, or liquidators. As already established, the CVA mechanism is a welcome corporate restructuring in the Nigerian corporate world. However, there is therefore a need for an amendment of this very new legislation and an immediate need for the legislators to bring the CVA procedure under CAMA 2020 in tandem with the objective of corporate rescue.

This paper hereby recommends that there should be provision for moratorium which should temporarily prohibit secured and preferential creditors from taking actions or continuing actions to recover their debts or enforce their security when a CVA has commenced. This is quite important because if the objective of corporate rescue is to be achieved through the mechanism of CVA, a moratorium must be put in place by the law to allow the company focus on its restructuring scheme rather than being distracted by myriads of other issues including litigations instituted against it. In the alternative, the law makers should find a way of bringing CVA and the administration process under the same scheme so that companies can enjoy moratorium which administration offers. It will be beneficial for CAMA to be revised to include either a statutory moratorium for CVA or a standalone moratorium as this will allow companies to redirect revenue towards strengthening their financial position instead of servicing debts. It will also shield them from legal actions by creditors, which could worsen their circumstances.

⁹⁴ S. Letson, 'UK Corporate Insolvency and Governance Act: Moratorium.' *DLA Piper* [2020] <<https://www.dlapiper.com/en/insights/publications/2020/09/uk-corporate-insolvency-and-governance-bill>>. Accessed 03/04/2024.

⁹⁵ Section 7B.