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TEMPLARS ThoughtLab

Surviving a Fall: Administration of Companies as a Rescue Strategy

Introduction

Companies can in many respects be likened to humans. Typical to humans, companies fall 'sick'. A company is considered sick if its accumulated loss equals or exceeds its net worth; in such instance, such company is deemed insolvent. However, unlike humans, prior to the introduction of Administration of Companies ("**AOC**")[1] and Companies Voluntary Arrangement ("**CVA**")[2] in the Companies and Allied Matters Act, 2020 **("CAMA")**, most sick/insolvent companies in Nigeria faced the dim consequences of "death", by either being in receivership or wound-up.[3] These options were primarily targeted at rescuing creditors' loans rather than rescuing both creditors' loans and the insolvent company. Notable companies that have suffered the harsh consequence of winding up in Nigeria include AfriBank Nigeria Plc, Spring Bank Plc both in 2011;[4] and Evans Medical Plc in 2017.[5]

In countries such as the United Kingdom (UK) where the advantages of robust corporate policies are maximized, administration of companies as a rescue strategy has been increasingly adopted.[6] Between 2018 and 2019, the UK recorded a 21.8% increase in the use of administration of companies, following increased awareness by the UK Insolvency Service. UK companies, such as Debenhams – a popular UK fashion house – which has gone into administration with the prospects of maximizing profits and surviving insolvency is reported to have experienced positive progress in terms of survival.[7]

With the introduction of AOC and CVA, Nigeria is progressively edging towards global business-rescue trends to aid insolvent companies in Nigeria remain a going concern. Insolvent companies in Nigeria entertaining the idea of adopting novel strategies in the company's management with the end goal of rescuing the company and maximizing future profits, can now go into administration to achieve these goals.

[1] Chapter 18 of CAMA.
[2] Chapter 17 of CAMA.
[3] These options are still retained under CAMA 2020. See Chapter 19 of CAMA (Receivership) and Chapter 21 of CAMA (Winding up).
[4] Nigeria Deposit Insurance Corporation, "Closed Financial Institutions" (NDIC, 2023) < https://ndic.gov.ng/failure-resolution/closed-financial-institutions/ >
[5] Odinaka Anudu, "Nigeria's Giant Industries are Silently Disappearing" (Business and Economy, 2022) < https://www.icirnigeria.org/nigerias-giant-industries-are-silently-disappearing-part-two/ >
[6] Sam Forsdick, "Which UK Companies have gone into Administration in 2019?" (NS Business, 2019) < https://www.ns-businesshub.com/business/uk-companies-administration/ >
[7] Ibid.

This article analyses the status quo in Nigeria prior to the introduction of AOC to CAMA while highlighting the consequences of its absence on insolvent companies in Nigeria. It explores the strategies introduced by AOC in Nigeria to aid the survival of insolvent companies and compares these AOC strategies with what is obtainable in like jurisdictions with a view to providing clients and stakeholders alike valuable insights provided by the AOC provisions in CAMA.

The Status Quo Prior to the Introduction of AOC

Prior to the enactment of CAMA 2020, there was an observable vacuum in the Nigerian corporate landscape due to the dearth of legislation and regulation on corporate insolvency practice. The insolvency framework under the Companies and Allied Matters Act, Cap C 20, LFN 2004 (the **"old CAMA"**) was limited only to receivership[8] and winding up[9], the implication being that companies who suffered the risk of insolvency under the old CAMA regime often than not, ended up 'dying'. Between 2009 and 2011, the Nigerian Chambers of Commerce reported the closure of at least 800 companies due to bad debt;[10] the International Centre for Investigative Reporting has also reported a continuous reduction of Nigerian companies due to insolvency risks.[11]

Shortcomings of insolvency options for companies under the old CAMA

The old CAMA exclusively provided for receivership and winding up proceedings as insolvency options for ailing companies. Due to the focus of these insolvency options on the satisfaction of creditors' loans, companies were often left worse than they were before commencement of insolvency proceedings or forced to wind up. Some of the limitations under these insolvency options under the old CAMA are as follows:

a. Cessation of Management Powers

The most glaring feature of receivership and winding up proceedings is the immediate cessation of the powers of the company's management (i.e., directors and officers).[12] In the case of receivership, the power is vested in the receiver while in a winding up proceeding, it is vested in the liquidator. This has a direct impact on the possibilities of continuing the business of the company bearing in mind that the directors understand the company's business, goals, and market better. In comparison to AOC, as will be subsequently discussed,[13] the directors of the company can exercise their management powers with the prior approval of the administrator.

b. Possibilities of Unemployment

This is evident under a compulsory winding up proceeding initiated by a creditor. Commercially speaking, a company put in receivership immediately adopts strategies to cut costs and dismissing employees is one of the immediate means of achieving this. Companies that are forced to go into liquidation are also forced to let go of their workforce particularly because liquidation proceedings end with the company being dissolved. Receivership and liquidation also negatively impact on the shareholders' profit and remuneration of executive directors in the sense that dividends and remuneration will cease until the company is out of murky waters. Under AOC, the administrator's responsibilities include maintaining the company's business and the possibility of recording mass unemployment is limited.

c. Limited Survival Options

A direct implication of the limited insolvency options open to companies under the old CAMA was that an insolvent company against whom winding up proceedings were commenced could not stall/stop same, unless such company was able to show that it could reasonably repay all the debts owed.[14] An insolvent company that is unable to make this call would have no choice but to be wound up. In comparison to what is obtainable with the introduction of AOC, an insolvent company against whom a winding up proceeding has been brought can trigger its power under CAMA by bringing a petition to court for the appointment of an administrator[15] to aid the company's survival and ultimately repay its debt.

d. Loss of Material Assets

A receiver or liquidator primarily focuses on selling the charged assets or the whole assets of the company with the end goal of repaying the creditors. A reduction in the assets of the company significantly impacts on its possibilities of continued survival. In the case of receivership, although an insolvent company's assets may be sold and the company may exit receivership, the loss of its assets while in receivership may impact its continued ability to keep its business lights on. Ultimately, the company may be forced to voluntarily liquidate. In comparison, the administrator in an AOC is charged with the responsibility of managing the assets of the company with the end goal of rescuing the company and achieving better results for creditors,[16] and although the administrator has the power to sell the company's assets, it is only in cases where such sale will help the overall survival of the company.

The Status Quo under CAMA 2020 and Global Trends on AOC

As earlier stated, CAMA has added two insolvency survival options for companies – CVA[17] and AOC.

AOC is a business rescue/survival strategy which allows insolvent companies to appoint qualified insolvency practitioner(s) as administrator(s) to manage the assets and affairs of the company.[18] Under an AOC, there is a presumption that an insolvent company is bankrupt largely due to inefficient management; against this backdrop, AOC allows

[8] Under receivership, a person known as a Receiver is appointed by a creditor or the holder of a debenture secured by a floating charge or by the court upon petition, to take possession of and manage the property, account of a company that is insolvent, discharge all expenditure in respect of the company's property for the benefit of those on whose behalf he is appointed. A Receiver and Manager, however, is one who has the additional power to carry on any business or undertaking on behalf of the company in a bid to realize the principal that was loaned by the creditor. The focus in receivership is that the creditors loan is recovered.

[9] A liquidator is appointed to wind up the assets of the company and sell them so that the money recovered is used to pay back the debts of the company. After this, the company is dissolved.

[10] The Premium Times, "800 Companies Shut Down in 3 Years, Says NACCIMA" < https://www.premiumtimesng.com/business/99757-800-companies-shut-down-in-3-years-says-naccima.html >

[11] Odinaka Anudu, (Nigeria's Giant Industries are Silently Disappearing" (The International Centre For Investigative Reporting) < https://www.icirnigeria.org/nigerias-giant-industries-are-silently-disappearing-part-two/ >

[12] Section 393(4) of the old CAMA.

[13] See more information on the Sub-heading: The status quo under the CAMA 2020 and Global Trends on AOC.

[14] Section 408(d) of the old CAMA

[15] Combined reading of sections 450 and 462 of CAMA.

[16] Section 444(1) CAMA.

[17] CVA is a binding agreement for debt repayment, between a company and its unsecured creditors. It provides an opportunity for the company to negotiate achievable repayment terms with its creditors and avoid insolvent liquidation.

[18] An insolvent company is a company that is unable to pay its debt as at when they fall due, and whose liabilities exceed its assets.

the appointment of administrator(s)[19] to manage the affairs and assets of an insolvent company to achieve three (3) key objectives:

a. rescue the company, (the whole or any part of its undertaking);
b. achieve better results for the company's creditors than would be likely if the company was wound up without being in administration; or
c. realize property in order to make a distribution to one or more secured or preferential creditors.[20]

The aim, at the end of an AOC, is that an erstwhile insolvent company becomes a going concern and that all debts owed and due become fully paid up or favourably negotiated to protect the company and allow the company to continue business on a clean slate. The adoption of AOC by an insolvent company in Nigeria as against other insolvency-rescue options is dependent on diverse factors such as, the insolvency triggers of the company[21] as well as the goal of the company post insolvency survival. This is particularly because, similar to global AOC trends in countries such as the United States of America (US), UK and Ghana, AOC under CAMA has far-reaching effects that are likely to limit the activities and powers of the company as well as the manner in which the company's stakeholders, creditors and the general public interact with the company.

Particularly, CAMA mandates a company under administration to publish on its website, as well as business documents[22] (issued by or on behalf of the company) the fact that it is in administration.[23] Unless a company is looking to source for funds through private placement, or from private equity companies (as against public offer of its securities) post insolvency-survival, the publication by a company of its insolvent status might pose adverse effects to the company. Apart from the AOC precluding officers of the company from exercising management powers over the company's affairs without the prior consent of the administrator, the public's confidence in the company's brand may diminish as well as the market goodwill of the company.[24] Notwithstanding these potentially adverse provisions, CAMA contains detailed favourable measures which preclude interference with the revival of an insolvent company that are not applicable in other business rescue strategies. Some of these survival benefits offered by AOC for insolvent companies are as follows:

a. Any winding up petition brought against the company while in administration will be dismissed by the Court, subject to certain conditions.[25] This is inclusive of any legal proceedings, execution, or distress, brought against the company, whether or not related to winding up.
b. Where the company is in receivership by virtue of an appointment by the holder of a floating charge or the Court, such receiver shall vacate office.[26]
c. No action can be brought to enforce security over the property of the company except with the consent of the administrator or the Court's permission. This aids in the preservation of the company's assets during and post-AOC.

[19] There is no limitation in CAMA on the number of administrators that could be appointed by a company.
[20] Section 444(1) (a)(b) and (c), Companies and Allied Matters Act (CAMA) No. 3 of 2020.
[21] For example, if the continuous insolvency of the company stems from managerial issues, then administration would be best.
[22] Business document includes: an invoice, order for goods or services, business letter, and an order form, whether in hard copy, electronic or any other form.
[23] Section 482 of the CAMA
[24] Where the company still intends to source for funds through public offers and managerial issues do not constitute the core of its insolvency triggers, the company might consider CVA as an alternative survival option to AOC.
[25] Section 477 of CAMA.
[26] Section 478 of CAMA. Where there is a receiver appointed by a holder of a fixed charge in the Company, the Court shall dismiss an administration application (subject to some conditions). See section 476 of CAMA.

d. The company's officers can still exercise managerial powers, albeit with the prior consent of the administrator.[27]
e. In comparison and as an advantage to other rescue options, CAMA mandates the administrator to consider the suitability of other restructuring options and be sure that other options would not aid the survival of the Company as AOC would before the administrator proceeds with an AOC.[28]
f. The company and its directors have the power to appoint an administrator provided that the appointee meets the required qualifications stipulated under CAMA.[29] This implies that the restriction on officers of the company from exercising management power without the consent of the administrator in an AOC, as stated in (d) above, is better managed if the company or its directors appoint the administrator.

Expectedly, stakeholders in the Nigerian corporate space have continued to laud the inclusion of AOC in CAMA 2020.[30] However, it is pertinent to note that the insolvency development in CAMA 2020 is not without its own shortcomings. For example, CAMA does not provide for cross-border AOC provisions and/or specific regulatory bodies for insolvency as is the case in compared jurisdictions.

In comparison, the Corporate Insolvency and Restructuring Act, 2020 of Ghana (the "**CIRA**") contains more robust provisions that make it feasible for the goals of administration to be achieved. Specifically, CIRA contains provisions on cross-border administration proceedings in a bid to promote co-operation between competent authorities in Ghana and foreign states involved in cross-border administration process, as well as promote trade, investment and continuous employment for persons likely to be affected by insolvency proceedings.[31] This aside, the additional creation of an Insolvency Services Division within the Registrar of Companies in Ghana[32] simplifies regulatory interface for Ghanaian companies in the process of administration. In the UK, AOC is regulated under the UK Insolvency Act, 1986 and the Enterprise Act, 2002. The AOC framework in the UK is similar to what is obtainable under CAMA, however the Enterprise Act makes provisions for the application of the AOC provisions to foreign companies outside the UK as well as to non-companies in the UK.[33]

Looking Forward

Globally, corporate sectors have witnessed an uptick in the use of AOC as a rescue strategy for insolvent companies. The same cannot be said of Nigeria since the introduction of the new insolvency provisions particularly because more companies have gone into liquidation since the inception of CAMA 2020 and no record of adoption of AOC has yet been made in the Nigeria corporate sector.

The unwillingness to adopt AOC in Nigeria may not be unconnected with the perception that the adoption of insolvency strategies by an insolvent company in Nigeria implies that such company is leaning closer to its death. This is no longer the case as CAMA provides detailed provisions which make it more feasible for an insolvent company to go into administration and come out better. Insolvent companies looking

[27] Section 501(1) of CAMA.
[28] Section 444(2) of CAMA.
[29] Section 459 of CAMA
[30] Punch Newspaper, "How CAMA 2020 Protects Insolvent Company's Asset" (Punch Newspaper, 2020) < https://punchng.com/how-cama-2020-protects-insolvent-companys-assets/ >
[31] Section 150 of the Corporate Insolvency and Restructuring Act, 2020 of Ghana.
[32] Section 153 of the Corporate Insolvency and Restructuring Act, 2020 of Ghana.
[33] 'Non-companies' as used in the Enterprise Act include registered societies and unregistered friendly societies. See section 255 of the UK Enterprise Act, 2002.

to go into administration in Nigeria must first appoint an insolvency practitioner.[34] It is beneficial for the company or its directors to appoint an administrator for the company (out of court), subject to any restrictions under CAMA. This is because, the directors understand the peculiarities of the company's business, its market, customers, goals as well as factors likely leading to the insolvency of the company and would be best suited to appoint an administrator who is specifically skilled in addressing the company's problems. After appointment, the process of administration and rescue of the company rests largely on the administrator.

Conclusion

Institutionalizing AOC in Nigeria is a step in the right direction as it affords companies who suffer the risk of insolvency, options other than receivership and winding up. We hope that the relevant regulators would in time develop adequate policies which would encompass the establishment of a registry to deal with insolvency concerns and fast-track insolvency proceedings; ensure increased awareness; and establish a framework for cross-border insolvency strategies involving Nigerian companies.

That said, it is expected that with the right expertise and continued development of the insolvency space particularly by stakeholders in the corporate sector in collaboration with relevant regulators, the Nigerian insolvency space will witness increased adoption of AOC and less 'death'.

[34] Entities with power to appoint an administrator are directors of a company; the court suo moto or upon an application submitted to the court; a company; or the holders of a floating charge in a company.