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Business Rescue and Continuity in Nigeria: Keeping the Lights on

Introduction

Universally, countries are exploring legal ways to rescue insolvent and delinquent businesses. Nigeria recently moved towards catching up with the rest of the world when it introduced in the Companies and Allied Matters Act 2020 (the "**2020 CAMA**") robust "business - friendly" provisions for rescuing insolvent businesses which are parallel to Chapter 11 of the United State Bankruptcy Code and the United Kingdom's Administration under the Insolvency Act.

The Previous State of Affairs

Prior to the "2020 CAMA", insolvent businesses were compelled to face the grim reality of Receivership[1] or winding up.

Against the backdrop of the high rate of insolvency induced "death" of businesses, the 2020 CAMA has now introduced business rescue provisions that proffer survival options to the business itself and not just to creditors, in a bid to ultimately promote business continuity.

The New Business Rescue Options under 2020 CAMA

Presently, businesses on the verge of insolvency can seek relief under two options:

1. ***Company Voluntary Arrangement***

2. ***Administration of companies***

[1] A situation where 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.

Company Voluntary Arrangement

"Agreement and Compromise" Arrangement:

This arrangement involves the company appointing a nominee whose main responsibility is to summon a meeting for the proposal of an amicable arrangement to all the company's creditors.

Once the indications of insolvency begin to appear and a company realizes it is unable to pay its debts, the company can by itself, via its directors, introduce or initiate a proposal synonymous to an "agreement and compromise" arrangement with its creditors. This arrangement involves the company appointing a nominee who is referred to as a "supervisor" and is qualified to practice as an insolvency practitioner. The main responsibility of the nominee is to summon a meeting for the proposal of an amicable arrangement to all the company's creditors on some mutual concessions to be made for the settlement of the company's debts, and to supervise the implementation of the arrangement. After negotiations, an agreement will be reached. Such agreement will be taken to court to be sanctioned and all parties including the company and creditors will be bound by the agreement. Each creditor will then get a settlement of the debt owed to them in accordance with the ratio that was negotiated and agreed upon. (It is instructive to note that any proposal that affects the rights of a secured creditor of the company to enforce his security cannot be approved).

Administrations of companies[2]

The first Obligation:

The first obligation of the Administrator, who must also be an insolvency practitioner is to rescue the company and ensure it survives as a going concern.

This is a more elaborate procedure similar to the "Chapter 11 proceedings" of the United States Bankruptcy Code and the "Administration proceedings" under schedule B1 to the United Kingdom Insolvency Act 1986. This option provides for re-organization of a business on the brink of insolvency and proposes a plan to keep its business alive and running. Under this option, an Administrator will be appointed for the company and the powers of the directors immediately cease. The appointment of the Administrator can be by any of the following: (i) the holder of a floating charge (ii) The court upon a petition made by the company, the directors, one or more creditors, a designated officer of the court or a combination of the persons listed and (iii) the company and its directors.

The first obligation of the Administrator, who must also be an insolvency practitioner is to rescue the company and ensure it survives as a going concern. The Administrator identifies the problem with the company and proffers a viable solution to it. Such solutions can come in any form such as, appointing an expert business management personnel, importing funds into the business etc. In addition, an Administrator is expected to represent all the company's creditors equally and perform his/her functions in the creditors' interest as a whole, albeit his/her appointment was by just one of the creditors. This implies that, as funds flow into the company, every creditor (in addition to the creditor that appoints the Administrator) will be refunded a portion of the debt owed to them. It is only where it is practically impossible to rescue the business that an Administrator considers liquidating the assets of the company as a last resort to settle the company's debts.

Differences between a Receiver and an Administrator

The major difference between a Receiver and an Administrator is that an Administrator's first objective as imposed by the law is to ensure that the business survives and continues to do business while a Receiver or a Manager's only objective is to ensure that they recover the debt owed by the company to the creditor(s) who appoints him/her.

Another difference is that an Administrator represents all the creditors' interest as a whole and settles all creditors in proportion to their credit. A Receiver or Manager, however, focuses on just the creditor(s) who appoints him/her.

The interesting thing which is helpful to note is that the same obligation and standard imposed by the 2020 CAMA on an Administrator to first ensure a business survives before liquidating was also imposed by the law on a Receiver, Manager, and a Liquidator. The inference from this is that where a Receiver or a liquidator is appointed, the first obligation of such an appointee is to rescue the business and ensure it survives.

Conclusion

The failure of a business benefits no one, and it is in the interest of the society at large that a business which is struggling with insolvency at a particular period survives. When businesses fail, it is both a social and an economic problem. It is a social problem in the sense that jobs and livelihood are lost, leading to unemployment being on the rise which eventually becomes a problem for the immediate family and the society. It is likewise an economic problem because when businesses fail, the government loses tax. Also, it is in the interest of banks/creditors that business thrives because the continuity of businesses steers the ability to borrow more funds which consequently makes more profit for lenders and ultimately keeps them in business, hence a win-win.

That said, "struggling" businesses in Nigeria no longer have to "pack up" their bags and leave. They now have options they can explore to remain a going concern. These options, which may achieve better results for the company's creditors than would be likely if the business were to wound up, are commendable and a positive development for the continuity of businesses in Nigeria.

[2] Section 443 of the 2020 CAMA