Conflated Arrangements: Comments on the Company Voluntary Arrangements in the Proposed Nigerian Insolvency Act 2014

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Introduction

1 Nigeria is on the threshold of its first dedicated Insolvency Act.¹ The proposed Act sets out, amongst other things, a menu of regimes by which the affairs of insolvent companies may be settled. The Act largely transplants the modern insolvency law of England and Wales into the Nigerian system.² On that account, the Company Voluntary Arrangement procedure ("CVA") will be introduced into the Nigerian insolvency system.³ Unlike the Companies and Allied Matters Act 1990 of Nigeria,⁴ and the Insolvency Act 1986 of England and Wales,⁵ the proposed Insolvency Act 2014 is not accompanied by a report which sets out the precise challenges of the extant procedure and how these will be alleviated by the proposed reform. This reinforces the general lack of information on the Nigerian insolvency system.

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1 A Bill for An Act to Consolidate the Enactments Relating to Company, Individual And Cross Border Insolvency and to Make Provisions for Business Rescue and Other Related Matters. "This Act may be cited as the Insolvency Act, 2014". (section 514).
3 Part I, Chapter I, Insolvency Act 2014.
2 One goal of this article, therefore, is to fill that gap by weaving data from various sources by which to present a more representative picture of the challenges of the present arrangements regime. Simultaneously, it will present a clear picture of the system which the Act seeks to transplant. To that end, the article will set out the background to the CVA procedure in England and Wales and clarify its relationship with the schemes of arrangement procedure. It will then, assess the adequacy of the Nigerian proposals in light of the foregoing. The article will argue that the reformers have focused more on reproducing the CVA procedure as it applies in England and Wales than on adapting the proposed procedure to the precise challenges that presently confront those who wish to propose arrangements in Nigeria. Some of the modifications that have been made, however, are likely to create anomalies. So, the article recommends that the proposed procedure be modified appropriately, if it is to be effective.

3 The article is divided into four sections: Section 1 sets out its goals. Section 2 sets out the history and procedure of the CVA procedure in England and Wales. Thereafter, it briefly discusses some of the present challenges that affect the procedure. Section 3 sets out the Nigerian context. It provides an overview of the proposed Nigerian procedure and gives a contextual analysis. Section 4 sets out the conclusions.

An Introduction to Company Voluntary Arrangements in England and Wales

History

4 At inception, the CVA was an adaptation of the Individual Voluntary Arrangement which was introduced to enable natural persons to avoid bankruptcy and its consequences. The CVA was, in contrast, to enable insolvent companies avoid liquidation. It was proposed by the Cork Committee which had the responsibility to review the network of rules that regulated personal and corporate insolvency at the time, in England and Wales. Before the CVA was introduced, companies could propose arrangements only through the schemes of arrangement procedure which was widely perceived as fraught with fundamental problems. The Cork Committee, for one, asserted that they were overly formal and complex because of the heavy court involvement. An order of the court was necessary to convene the meetings of the classes. At that stage, the court did not assess the

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6 Ibid, at paragraphs 428 – 429.
7 Section 1(4), Insolvency Act 1986 sets out the breadth of companies that can utilise the procedure in the UK within the European Economic Area.
8 See the Cork Report, Chapter 7.
9 Sections 206, 287 and 306, Companies Act 1948 and the Cork Report, at paragraphs 400-430.
10 Above note 5, at paragraphs 409 – 415.
proposed scheme. The scheme was subsequently assessed for fairness at the sanction stage. At that stage, issues relating to the classes could also be heard. The result was that the scheme even where approved at the meetings could be defeated at the sanction stage. During the period of the informal and formal wrangling between the parties, the prospect of success could be derailed by the individual recovery actions of creditors because the schemes procedure was not supported by a moratorium on the enforcement of rights. The Cork Committee noted that the likelihood of success was further depressed by the lack-lustre attitudes of some managers who may either have lost their interest in the business or the will to fight.

The committee believed that a reform of the schemes procedure was outside of its remit because it is not stricto sensu an insolvency procedure; schemes can be used to achieve many ends. Notwithstanding, it believed that the opportunity to propose arrangements was a vital means by which insolvent companies could ultimate failure. Sir Kenneth later stated that his experience in practice informed his conviction that companies could avoid liquidation and be rescued if given an opportunity to propose arrangements to their creditors. The committee believed that a comparably streamlined procedure by which to give effect to arrangements was required; particularly for small companies or simple arrangements. The Cork Committee therefore recommended the CVA as a means by which to avoid the main problems that plagued the schemes procedure. The proposed CVA procedure was given statutory effect when set out in the Insolvency Act 1986.

Procedure

Like schemes, a CVA may be proposed through the stand-alone procedure or as an element of a main or parent-procedure. This means that an arrangement may be proposed during liquidation or administration. In these instances, it would be proposed by the liquidator or the administrator, respectively. The main advantage

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12 Ibid, at paragraph 11.
13 Ibid, at paragraph 12.
16 Above note 5, at paragraphs 406–408.
17 Ibid, at paragraph 417.
18 Ibid, at paragraph 419.
19 Ibid, at paragraphs 428 – 429.
21 Above note 19.
22 The CVA was introduced by sections 20-26, Insolvency Act 1985, but was replaced by Part 1 and Schedule 1A, Insolvency Act 1986.
23 Section 1(2), Insolvency Act 1986.
24 Ibid., section 1(3).
25 Ibid., section 1(1).
is that the process would benefit from the moratorium that accompanies the main or parent-procedure.26 Administration offers a better approach than liquidation because the company can continue to trade while its affairs are reorganised.27 Unlike with schemes, a stand-alone CVA may be proposed with or without the benefit of a moratorium. As can be surmised, a stand-alone CVA without the benefit of a moratorium is susceptible to individual actions by creditors who wish to enforce their rights. Ultimately, the company may end up in liquidation or administration which will be more costly in terms of time and money, for the parties concerned. To protect companies from such practices, the CVA with moratorium was introduced.28 The stand-alone CVA with moratorium is accessible, however, only to companies that qualify as small by law.29

7 The stand-alone CVA can only be proposed by the directors.30 It is not necessary to demonstrate that the company is insolvent.31 To mitigate the problems of focus and interest that plague the schemes procedure as identified by the Cork Committee, the Insolvency Act 1986 instructs the directors to appoint a nominee to supervise the arrangement before it is approved.32 The nominee may be either an insolvency practitioner or a person so authorised to act.33 After the arrangement has been approved, its implementation will be overseen by a supervisor who must also be an insolvency practitioner.34 Typically, the same person will transition from nominee to supervisor but the Act sets out the process by which the practitioner may be replaced.35 The directors must provide the nominee with the necessary information about the company and its liabilities.36 They will be criminally liable for any false representations.37 The practitioner is not appointed simply to administer the CVA. In the case of a stand-alone CVA without a moratorium the nominee must use the information supplied to create a report that comments on the feasibility of the proposed arrangement and its prospects of obtaining the required approval.38 It must also state whether a meeting of the company and the creditors should be convened.39 The nominee must submit the report to the court within 28 days of receiving notice of the arrangement, unless extended by the court.40 Unlike

26 Ibid., sections 112, 130(2) and Schedule B1, paragraphs 42-43.
27 Ibid., section 167(1), Schedule 4, Part II, paragraph 5.
28 Ibid., section 1A, Schedule A1 (introduced by the Insolvency Act 2000).
29 Ibid., section 1A; Schedule A1, paragraph 3(2); see also section 382, Companies Act 2006.
30 Above note 25.
32 Above note 23.
33 Idem.
34 Section 7(2), Insolvency Act 1986; Appleyard Ltd v Ritecrown Ltd [2009] BPIR 235.
35 Ibid., sections 2(4) and 7(5).
36 Ibid., section 2(3); Rule 1.56, Insolvency Rules 1986; Re a Debtor (No.140) [1996] BCLC 429.
37 Ibid. section 6A (introduced by section 2 and Schedule 2, Insolvency Act 2000).
38 Ibid., section 2(2); Rule 1.4(3), Insolvency Rules 1986.
39 Idem.
40 Idem.
with schemes, the court’s role is only administrative; it is not required to grant an order to convene the meeting.

8 The stand-alone CVA with moratorium is available to companies which meet the requirements of a small company in the Companies Act 2006.41 The company must not owe more than GBP 10 million.42 It must not be exempted by any other provision,43 and must meet two of the following provisions: its turnover must be GBP 6.5 million or less; it must have a balance sheet total of GBP 3.26 million or less and have 50 or fewer employees.44 Its procedure is regulated differently from that of the stand-alone CVA without moratorium. In brief, the nominee must submit a report to the directors stating his opinion on the feasibility of the proposed arrangement, the ability of the company to fund its affairs during the subsistence of the moratorium and whether a meeting should be called to consider the proposals.45 The directors must thereafter file documents relating to the proposed arrangement, including the nominee’s report, as well as those relating to the company’s affairs at the court.46 The moratorium comes into effect as soon as those documents are filed.47 It generally prevents creditors from enforcing their rights against the company.48 It comes to an end either at the end of the day on which the meetings of the company and creditors are held or at the end of the 28th day from the day of commencement unless extended by the court or the company.49 The directors must advertise the commencement and termination of the moratorium.50 Their rights to obtain credit over GBP 250 and to dispose of assets during the subsistence of the moratorium are curtailed.51 The nominee has an oversight role during the subsistence of the moratorium.52

9 The meetings of the creditors and the company must be convened as set out in the report submitted to the court.53 Both meetings decide whether to approve the proposals, with or without modifications.54 Unlike schemes, a CVA cannot be structured to affect the rights of secured or preferential creditors, unless prior consent of such creditors has been obtained.55 The creditors and members vote as single bodies which eliminates the need for a division into classes as required by

41 Section 382, Companies Act 2006.
42 Section 1A; Schedule A1, paragraph 4C, Insolvency Act 1986.
43 Ibid., section 1A; Schedule A1, paragraphs 2, 4, 4A, 4B and 4C.
44 Ibid., Schedule A1, paragraph 6.
46 Ibid., Schedule A1, paragraph 8(1).
47 Ibid., Schedule A1, Part II.
48 Ibid., Schedule A1, paragraphs 8 and 32.
49 Ibid., Schedule A1, paragraphs 9–11.
50 Ibid., Schedule A1, paragraphs 24–25.
51 Ibid., section 3.
52 Ibid., section 4A.
53 Ibid., section 4(3)–(4); IRC v Wimbledon FC [2004] EWC Civ 655.
the schemes procedure. At the creditors’ meeting, the proposals will be approved where a majority in number of unconnected persons and three-quarters majority in value of unsecured claims present and voting in person or proxy are in favour. The members require a simple majority to approve the proposal. The outcomes of the meeting must be reported to the court and all relevant persons must be notified. The decision taken by the creditors’ meeting takes pre-eminence but a member may, within 28 days of the meeting, apply to the court which may direct that the decision of the members should take effect in place of that of the creditors’ meeting or make any other order it deems fit.

10 Initially, the CVA bound only those with notice of the meeting but the law was reformed to bind everyone who was entitled to vote at the meeting, whether or not present or represented and anyone who would have been entitled to vote had he had notice of the meeting. Also, at inception, the holders of contingent and unliquidated claims were not entitled to vote at the meeting with the effect that they were not bound by the outcome and so could enforce their full claims against the debtor after the arrangement had been approved. The procedure was subsequently modified to permit them to vote and so be bound, as well. The chairman of the meeting places a value on their claims and they vote to the extent of that value. Unlike with schemes, the court need not sanction the approved CVA. Nevertheless, the outcomes of the meetings may be challenged within 28 days beginning on the day that the result of the meeting was submitted to the court or the day on which the person challenging the arrangement became aware that a meeting had taken place if no notice had been received. Only persons entitled to vote at the meeting, the nominee or the liquidator/administrator where appointed may challenge the arrangement. The persons challenging may claim that there was a serious irregularity in the conduct of the proceedings. The courts are reluctant to upturn the decision of the meeting, however. Thus, not every irregularity is considered to be serious by the courts. The challenge may also be made on the ground that the

57 Ibid., rule 1.20.
58 Section 4(6), Insolvency Act 1986.
59 Ibid., section 4A(6).
60 Ibid., section 5(2); Beverly Group Plc v McClue [1995] BCC751.
63 Re Newlands (Seaford) Educational Trust [2007] BCC195.
65 Ibid., section 6(2).
66 Ibid., section 6(b).
67 Sissu Capital Fund Ltd v Tucker [2005] EWHC 2170 (Ch); [2005] EWHC 2321.
approved arrangement unfairly prejudices his interests.\textsuperscript{69} The actions of directors, nominees and supervisors may also be challenged; they may be held liable for delinquent actions.\textsuperscript{70}

Concept

11 The CVA set out in the Insolvency Act 1986, like the Scheme of Arrangement outlined in the Companies Act 2006, are both procedures by which formal arrangements may be agreed between companies and their creditors. Formal arrangements are creatures of statute and can be described as “statutory deemed” contracts.\textsuperscript{71} Converse to general contracts, the source of their imprimatur is in the statute books and not simply the agreement of the parties.\textsuperscript{72} Consequently, so long as the statutorily required majority approves and the process is fully complied with, the contract will bind even those who dissent.\textsuperscript{73} The contents of the contract set out the relationship between the arrangement and the company’s constitution, the powers of those with the duty to implement, and the modifications to the rights and interests of the creditors, members and company, as agreed.\textsuperscript{74} It is trite that both procedures have different remits which ought to be recognised and heeded.

12 The CVA procedure has never enjoyed as much popularity as other rescue procedures.\textsuperscript{75} Conversely, the once deplored schemes of arrangement procedure is enjoying a renaissance.\textsuperscript{76} In spite of its complexity, it is progressively transforming into a restructuring device of choice for large, UK-registered companies and their foreign counterparts.\textsuperscript{77} The schemes procedure is preferred because it includes the power to cram-down the rights of a dissenting minority in a class of acquiescent secured lenders; unlike the CVA. Nevertheless, both procedures are generally let down by the lack of a moratorium for the stand-alone procedures. Hence, the government has considered extending the availability of the moratorium across board.\textsuperscript{78} The CVA also fares badly against the administration regime which is the

\textsuperscript{69} Section 6(1)(a), Insolvency Act 1986; Prudential Assurance Co Ltd v PRG Powerhouse Ltd [2007] EWHC 1003 (CH); [2007] BCC 500.

\textsuperscript{70} Ibid., sections 6A, 7, 7A and Schedule A1, paragraphs 26, 27, 40 and 41.

\textsuperscript{71} M. West, “Voluntary Arrangements” (Westlaw, Insight, 20 December 2013).

\textsuperscript{72} Simpson v Bowker [2007] EWCA Civ 772.

\textsuperscript{73} In Re Alabama, New Orleans, Texas and Pacific Junction Railway Company [1891] 1 Ch 213.

\textsuperscript{74} Inland Revenue Commissioners v Adam & Partners Ltd [2000] BCC 513; [1999] 2 B.C.L.C. 730; Shaw v Royce Ltd [1910] 1 Ch 138.


\textsuperscript{77} Re Rodenstock GmbH [2011] EWHC 1104 (Ch).

\textsuperscript{78} The Insolvency Service, “Encouraging Company Rescue – A Consultation” (2009), available at: <http://www.detini.gov.uk/encouraging_company_rescue_-_a_consultation.pdf>; The Insolvency
most popular business rescue regime.\textsuperscript{79} Administration comes with a ubiquitous moratorium.\textsuperscript{80} It also gives the main decision-makers the option of avoiding the meetings of creditors.\textsuperscript{81} Hence, the CVA procedure, in practice, is a blunt tool for those wishing to rescue distressed businesses. Bearing these in mind, the CVA in the proposed Nigerian insolvency Act will be assessed to identify how it grapples with these problems, as well as those that are peculiar to the Nigerian context.

An Introduction to Company Voluntary Arrangements in Nigeria

History

13 The Companies and Allied Matters Act 2004\textsuperscript{82} makes no provisions for a CVA procedure; it will be introduced when the proposed Insolvency Act is passed. At the moment, formal arrangements can be proposed, through the arrangement and compromise procedure which finds its roots in the schemes of arrangement procedure of the United Kingdom.\textsuperscript{83} Whereas in England and Wales, the arrangements procedure can be used to achieve myriad ends, in Nigeria, it has been decentralised.\textsuperscript{84} As a result, arrangements by which the capital structures of companies can be adjusted are subject to a separate regime.\textsuperscript{85} Arrangements by which mergers and takeovers are given effect are regulated by the Investment and Securities Act 2007,\textsuperscript{86} which is subject to the mandatory oversight of the Securities and Exchange Commission.\textsuperscript{87} Arrangements which give effect to the internal reorganisation of a single entity are regulated by Part XVI of CAMA 2004, which is subject to the mandatory oversight of the court but only discretionary oversight by the SEC which can be only be triggered upon referral by the court.\textsuperscript{88}

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\textsuperscript{80} Schedule B1, paragraphs 40–45, Insolvency Act 1986.

\textsuperscript{81} In what is known as the “pre-pack”. V. Finch, “Pre-Packaged Administrations: Bargains in the Shadow of Insolvency or Shadowy Bargains?” (2006) (Sep) Journal of Business Law 568-588.

\textsuperscript{82} The Companies and Allied Matters Act, CAP C20, Laws of the Federation of Nigeria, (LFN) 2004 (“CAMA 2004”).

\textsuperscript{83} Part XVI, CAMA 2004. In this section, “schemes of arrangement” and “arrangements and compromise” will be used interchangeably. The “schemes of arrangement” procedure is expressly named “arrangement and compromise” by CAMA 2004. Nevertheless, both terms refer to the same practice.

\textsuperscript{84} On the history of the arrangements and compromise procedure: see Adebola, above note 2.

\textsuperscript{85} Part V, CAMA 2004.

\textsuperscript{86} “ISA 2007”.

\textsuperscript{87} Section 13, ISA 2007.

\textsuperscript{88} Sections 537 and 539(2), CAMA 2007.
14 The reasons for which the CVA has been introduced into the Nigerian system cannot easily be gleaned because there is as yet, no publicly available report setting out the terms of reference on which the reforms were proposed. Its introduction may therefore be attributable to the putative transplant of the Insolvency Act 1986, of England and Wales into the Nigeria system through the proposed Insolvency Act. Nonetheless, practitioners have, over the years, indicated their disenchantment with the arrangements and compromise procedure. In particular, they identify the lack of a moratorium as the core problem.

15 In Nigeria, the absence of a stay on creditors’ rights exacerbates the impact of the complex judicial system on the already complex arrangement and compromise procedure. Nigeria has a two-tiered high court system comprising the Federal High Court (“FHC”) and the State High Court (“SHC”). The FHC has exclusive jurisdiction over matters set out in the constitution, including those relating to the operation of CAMA 2004. In relation to some matters, both courts share concurrent jurisdiction. Consequently, not all issues relating to companies must be determined by the FHC. For that reason, a creditor may initiate a debt recovery proceeding at the SHC though the counterparty is a company. It is where the procedure by which the debt is to be collected is one regulated by CAMA 2004 that the FHC becomes the court with the exclusive jurisdiction to hear such a matter.

16 Given the structure of the court system, practitioners find that an arrangement and compromise can be derailed in various ways. Unsecured creditors may initiate parallel debt collection proceedings at a SHC after the scheme is proposed. Similarly, secured lenders may enforce their security in the absence of a moratorium. Further, those with quasi-security would also be outside of the control of the directors. As a result, the company’s vital assets may be dismantled by recalcitrant creditors, intent on enforcing their individual rights at the detriment of other interests including those of the company.

92 Ibid., section 251; 7-Up Bottling Co v Abiola and Sons [2001] 13 NWLR (Pt 730) SC, 469, 513.
93 N.Y.A.M Co, Plc v All Motors (Nig) Plc [2011] 15 NWLR (Pt 1269) 108, 143.
95 Adebola, above note 2, in Chapter 5.
17 Given the dearth of cases, one can reiterate the observation made by the Nigerian Law Reform Committee in 1988 that the arrangement and compromise procedure continues to be an unattractive rescue tool for insolvent companies. Nevertheless, there have been two periods when arrangements have been in the spotlight. In the first period, attempts were made to restructure non-bank financial companies which had become unable to repay their creditors. Some of these finance houses sought to enter into arrangements with their creditors. Many cases were thrown out by the FHC which was sceptical of the motives of the directors. Of particular interest are two decisions considered below, by which the FHC refused to grant orders to convene the requested meetings of creditors.

18 In *Re-Interfirst Finance and Securities Ltd* and *Andruche Investment Plc v Financial Mediatores*, the FHC appeared to take a restrictive view of the notion of arrangements. It held that the proposals by which the companies set out the manner by which they would repay their debts were not arrangements or compromises because they were unilateral and there was no evidence of mutuality between the company and its creditors. It is argued that the FHC, to the extent that it takes that approach, will limit the flexibility of the arrangements procedure. In any event, the court had only been asked to grant an order to convene a meeting. The creditors had yet to approve or reject the proposals. In the absence of a vote, there could be no mutuality. Both cases were first instance cases, however, and delivered by the same judge; hence one must not generalise hastily. Further, it is imperative to state that the judge’s scepticism was not unfounded. Andruche for example, had placed only 9 of about 119 creditors on notice. Notwithstanding, one can state that extant system may labour under a restrictive approach to the definition of arrangements, as well as a mistrust of the directors who propose arrangements. The mistrust, however, is not limited only to that judge; it is ubiquitous. An air of mistrust generally underlies the Nigerian rescue system.

19 The decentralisation of the arrangements procedure appears to detract from the clarity of the arrangements procedure. A company that seeks to reorganise its affairs will apply under Part XVI of CAMA 2004 which outlines two procedures. Where the company is insolvent, it will require the section 539 procedure because the alternative set out in section 538 requires the company to initiate a members’ voluntary liquidation. Curiously, section 539 is often described by commentators

96 Above note 4, at paragraphs 321–322.
98 (1994) FHCLR 51.
100 (1993) FHCLR 421, at 54-55.
101 Adebola, above note 2, Chapter 5.
102 Idem.
103 A members’ liquidation must supported by a certificate of solvency by which the directors state that the company can repay all its debts within 12 months from the date of commencement: sections 457 and 462, CAMA 2004.
as requiring the company to initiate liquidation before an arrangement can be proposed.\(^\text{108}\) That is not the case. Section 539 merely states on one hand, that it applies to companies which can be wound up by CAMA, which refers \emph{in the main} to companies registered in Nigeria.\(^\text{105}\) It states on the other hand that the procedure may also be initiated by the liquidator but that only arises if the company was already in liquidation.\(^\text{106}\) Further, neither the section 538 nor the section 539 procedure in CAMA 2004 requires the mandatory supervision of the SEC. section 539 merely states that the court \emph{may} decide to refer the arrangement to the SEC for review.\(^\text{107}\) On the contrary, the ISA 2007 does not use permissive language; it states that the SEC \emph{shall} “review, approve and regulate” the arrangements to which it applies.\(^\text{108}\)

20 The following section analyses the proposed CVA procedure to determine how it addressed the challenges faced by the extant arrangements procedure in Nigeria. It will be important to see how it addresses the need for a moratorium; the mistrust of the principal actors; and issues relating to the clarity of the arrangements procedure.

\textit{Procedure}

21 The Nigerian CVA procedure is very similar but not an exact replica of that set out in the Insolvency Act 1986 described in the first section above; so it will not be reproduced.\(^\text{109}\) Some of the differences between the two are minor and relate to the time frames within which certain actions must be taken. For example, whereas the CVA procedure in England and Wales gives a member 28 days from the day on which the outcome of the meetings were reported to the court within which to challenge the outcome of the creditors’ meeting where it differs from that company, its Nigerian counterpart gives 14 days.\(^\text{110}\) Similarly, the nominee is given 28 days in England and Wales to file a report where the directors commence a stand-alone CVA; the nominee is given 30 days in Nigeria.\(^\text{111}\)

22 Other differences are relatively more important and cannot be readily explained. For example, whereas preferential creditors enjoy protected status in England and Wales,\(^\text{112}\) the Nigerian Act is silent on this feature; suggesting that the rights and

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\(^{105}\) Sections 532(b)-(c) and 539(6), CAMA 2004.

\(^{106}\) Ibid., section 539(1).

\(^{107}\) Ibid., section 539(2).

\(^{108}\) Section 13, ISA 2007.

\(^{109}\) See Part 1, Chapter 1, Schedule 1, Insolvency Act 2014.

\(^{110}\) Section 5(10), Insolvency Act 2014.

\(^{111}\) Ibid., section 3(1).

\(^{112}\) Ibid., section 4(4).
entitlements of these creditors can be modified where majority of the creditors voting as a group approve the proposal. It is interesting that the Act excludes creditors with unliquidated claims from the purview of the CVA whereas the procedure in England and Wales includes them so that they would be bound by the approved arrangement. The Nigerian approach leaves those creditors with the right to prove for the full amount of their claims should they become liquidated claims.

The ensuing sections will examine the provisions that have been introduced to address the extant problems faced in the Nigerian rescue practice. Some diverge from the procedure in England and Wales. It is important therefore that the proposed changes should be such as would improve the efficacy of the CVA procedure and not introduce novel challenges.

The Moratorium

Like in England and Wales, the CVA in the proposed Nigerian Act may stand-alone or may be proposed through a main or parent-procedure. Likewise, the stand-alone CVA typically does not enjoy the benefit of a moratorium; though small companies may initiate the CVA with moratorium. A small company in Nigeria is one which meets the criteria listed by section 351 of CAMA 2004. This means that the company must be a private company. It must have a share capital; at least 51% of which must be held by its directors. The net value of its assets must not exceed NGN 1 million and its turnover must be NGN 2 million or less. Its members must all be Nigerian but may not include a government or governmental bodies. The total debts owed by the company must not exceed NGN 1 billion and it must not fall into any other exempted categories. CAMA 2004 has a comparably restrictive definition of small company than other entities in the

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114 Ibid., section 1(1).
115 Ibid., Schedule 1.
116 Ibid., Schedule 1, paragraph 2(3). The paragraph also refers to the ISA 2007, which, interestingly, does not define small companies.
117 Approximately GBP 3,280.53.
118 Approximately GBP 6,561.06.
119 Schedule 1, paragraph 7(1), Insolvency Act 2014. There is no explanation for the limit of NGN 1 billion (GBP 3,280,530).
120 Ibid., Schedule 1, paragraph 2(2); paragraphs 4–7 contain provisions similar to those of England and Wales.
country and across the globe. In fact, its definition better fits “micro” than “small” companies.

25 In England and Wales, the introduction of the moratorium for small companies was directly linked with the government’s enduring quest to support such companies. As in Nigeria, small companies make up a substantial proportion of all private companies in England and Wales. In 2014, the BIS in England and Wales recorded that 99.3% of the private sector business qualified as small. These businesses, in general, employ a vast proportion of all employed persons in the country. Consequently, in England and Wales, the CVA with moratorium was made available to the companies that drive the private sector.

26 It is argued that the reformers ought to have guided themselves by successive governments’ desire to develop the Small and Medium Scale Enterprises (SME) sector than by the desire to reproduce the equivalent of the provision in England and Wales. If the moratorium is to be made available to the companies that drive

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126 Idem.
127 Not all small businesses are small companies but the small companies still employ substantial amounts of employees, as well as their owners.
the Nigerian private sector, then there is a need to modify the proposed Act.\textsuperscript{129} Instead of linking the moratorium to the restrictive criteria used by CAMA 2004 which would be restrictive and costly if strictly enforced,\textsuperscript{130} the reformers ought to create an independent set of criteria which should link access to the moratorium to the size of the company’s total debt. A relevant template is provided by the Asset and Management Corporation of Nigeria.\textsuperscript{131} AMCON classifies its loans into four.\textsuperscript{132} Small loans are those worth NGN 100 million or less. Medium loans are more than NGN 100 million but less than NGN 1 billion. Large loans are more than NGN 1 billion but less than NGN 10 billion.\textsuperscript{134} Strategic loans are more than NGN 10 billion. It has a restructuring method for each category of loans.\textsuperscript{135} It enters into informal arrangements with the companies that fall into the small and medium loan categories; thereafter entered as consent judgments. With the large and strategic loans, a more intrusive approach is taken. Typically, a receiver or receiver and manager may be appointed to take-over the company.

27 The proposed Insolvency Act already caps access to the moratorium to small companies owing NGN 1 billion or less.\textsuperscript{136} By the AMCON schedule, that would mean small and medium-sized loans. Thus, the system of categorization recommended by this article would ensure that a larger tranche of companies have access to the moratorium. The system is consistent with what the biggest loan corporation in Nigeria already does. In addition, it will provide better support for the SME sector than that advocated by the proposed Act.\textsuperscript{137} Ultimately, this proposal, though different from that of England and Wales in actual content, would mimic it in intent.

28 Notwithstanding the above, the preferred option would be to introduce a ubiquitous moratorium for the stand-alone CVA procedure. The England and Wales experience informs that the CVA has not gained much traction. Hence, Nigeria ought to learn from that. Administration which was also introduced by the

\begin{itemize}
\item \textsuperscript{129} One may argue that there is a need to modify the definition of small company in CAMA 2004 because it is extremely restrictive but that is not an insolvency matter.
\item \textsuperscript{130} It may involve a battle of valuation.
\item \textsuperscript{131} About AMCON, available at: <http://www.amcon.com.ng/About_Us/CorporateOverview.aspx> (last viewed 30 January 2015).
\item \textsuperscript{132} See <http://www.amcon.com.ng/About-our-work.aspx> (last viewed 30 January 2015).
\item \textsuperscript{133} Approximately GBP 328,053.
\item \textsuperscript{134} Approximately GBP 32,805,300.
\item \textsuperscript{135} Interviews conducted at AMCON in August 2014, on a grant provided by the British Council Researcher Links Grant. (On file with the author).
\item \textsuperscript{136} Schedule 1, paragraph 7 (1), Insolvency Act 2014.
\item \textsuperscript{137} The system of classification proposed is arguably broader than other definitions of SME which are related to asset size. In any case, in Nigeria, banks lend based on asset-size. It is unlikely that companies with assets of NGN 1 million or NGN 5 million can access loans of NGN 100 million. It may mean, however, that some larger companies may take advantage of the moratorium which is not a demerit.
\end{itemize}
Cork Committee is comparably more successful. One reason may be that its moratorium applies across board. To improve the utility and desirability of the CVA, it is clear that access to the moratorium would be required by all the companies. It is important that the Nigerian reformers take this factor into account. They should be further guided by the realisation that the proposed reforms should address the problems that the complex judiciary structure poses for practitioners and that the Act in its present form fails to do so.

Clarity

29 A CVA may propose a simple composition of debts or scheme of arrangement. In England and Wales, regardless of the nature of the proposed arrangement, so long as a company qualifies as small, and is not otherwise exempt, it can enjoy the benefit of a moratorium. Conversely, Nigeria introduces a puzzling twist. The company must meet the stated qualifications but will have access to the moratorium only when it proposes a scheme of arrangements but not a composition.

30 Section 1(2) states:

“The voluntary arrangement may be for a composition in satisfaction of the company’s debts or a scheme of arrangements of its affairs.”

31 Thereafter, section 2(1) states:

“Where the proposal for the voluntary arrangement is for a scheme of arrangement, the directors may take steps to obtain a moratorium for the company.”

32 It is argued that the distinction between compositions and schemes in the proposed Nigerian Act is needless. It potentially bodes badly for the efficacy of the Nigerian CVA procedure, on one hand and for its efficiency on the other for the law to distinguish between compositions and schemes. Both are types of arrangements and the purpose of the law is to regulate the process by which arrangements can be agreed between companies and their creditors. By distinguishing between compositions and schemes, the proposed Act merely creates an avenue for strategic challenges by stakeholders. Further, where the court takes a restrictive view as demonstrated above, it may lead to unsuccessful but costly attempts to rescue already distressed entities.

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140 Section 1(1), Insolvency Act 1986; Section 1(2), Insolvency Act 2014.
141 Section 1A; Schedule A1, Paragraph 3, Insolvency Act 1986.
33 Conceptually, arrangements include but are not limited to compromises and the composition of debts. A composition of debts refers to payment by the debtor of less than is owed to the creditor; as full and final settlement. A compromise involves the release of some rights or interests by both parties; it is important that both make concessions. Arrangements, however, are basically agreements between the parties which can be sanctioned by the court. It is trite that they include but are not limited to the other two. For example, an arrangement could simply be an agreement for a moratorium or can release guarantees given by third parties. The inclusion of composition in the CVA was not to distinguish it from schemes but to recognise that the term “arrangement” is broad enough to encompass all three types of transactions, and more. What is important is that the procedure is available for both simple and complex transactions; so long as the rights of creditors are not modified without their consent and the limits of the CVA are recognised including the inability to modify the rights and interests of secured lenders without their consent.

34 It is possible that the moratorium was introduced thus, in an effort to remedy the problems created by its absence in the arrangements and compromise procedure. That outcome is attributable to the failure of the reformers to distinguish between the CVA and the arrangement and compromise. Further evidence of the failure to distinguish between both procedures can be found elsewhere in the bill where it is stated that a CVA may be proposed to the members, creditors or classes of them. Yet, the CVA, as stated above, not only streamlines the arrangement procedure, it eliminates the need to split the creditors and members into classes. Whereas a division into carefully constituted classes is important to schemes, it is not applicable at the CVA which is presented to the members and creditors as single units.

35 Although the moratorium is vital for the success of the arrangement and compromise procedure - particularly in light of the complexities of the Nigerian court system - it ought not to be introduced thus. There is nothing that prevents the bill from introducing an arrangement and compromise procedure supported with a moratorium. In fact, it will be easy to achieve that in Nigeria because the procedure is already decentralised. Nonetheless, that must be enacted expressly; the provision its present state is confusing and ought to be modified.

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143 Above note 73, at paragraph 243.
144 Above note 74, at paragraph 148.
145 Idem.
148 Section 4(2), Insolvency Act 2014.
Mistrust

36 The nominee and supervisor positions were introduced to support the directors during the design and implementation of the CVA. They are insolvency practitioners whose expertise would be useful for both the company and the process but they are not officers of the company. Their duties are regulated by the statute and agreement, respectively. In Nigeria, the nominee and supervisor would, in addition, enable the arrangements procedure. It is expected, or hoped at the least, that its introduction will improve the credibility of the process. Like in England and Wales, the nominee in Nigeria must endorse the proposed arrangement in a report that must be submitted to the court before the meetings can be convened. In the report, (s)he must state whether (s)he believes that the CVA has a reasonable prospect of being approved and implemented. The meetings must be convened as described in the report.

37 Again, at this stage, the proposed Nigerian act sets out yet another twist. It introduces the business rescue expert who is given an oversight role:

“A voluntary arrangement shall be endorsed by a rescue business expert (sic) appointed by the Supervisor.”

38 The supervisor is saddled with the responsibility to nominate the business rescue expert. Though the proposed Act stipulates that the nominee and supervisor must be insolvency practitioners, it fails to define or describe its notion of a business rescue expert. Further, it is not clear what the endorsement would entail. Given that the expert will be appointed by the supervisor, not the nominee, it may be argued that the endorsement would take place after the proposals have been approved by the creditors and/or members but just before they are implemented; as the supervisor is appointed only after the proposal has been approved.

39 If that assessment is correct, then the viability endorsement would be much less effective than the reformers expect. Where the expert makes recommendations that would require substantial alterations of the approved arrangement, it is not clear whether that would require a second round of meetings and votes, for example. If

150 Idem.
151 Section 1(4), Insolvency Act 2014.
152 Ibid., section 3.
153 Ibid., section 3(1).
154 Ibid., section 1(10).
155 Idem.
156 Ibid., sections 1(5) and (7).
157 Ibid., section 1(7).
no further meetings are called, then the supervisor can impose on the creditors, arrangements which they have not approved; undermining the effectiveness of the initial meeting. In addition, given that there is no clear direction on the process of endorsement and qualification requirement of the expert, the supervisor is more incentivised to shop for a friendly business rescue expert who would be unlikely to make substantial recommendations; an outcome which would be counter-effective. Consequently, to the extent that independent viability endorsement is considered essential, it would be more prudent for it to be concluded before the proposals are presented at the meetings.

40 Be that as it may, the section presents a very curious case. One can only wonder why it was introduced. Insolvency practitioners have been vocal in their call for the injection of professionalism into the insolvency practice. To that end, it has been recommended that qualifications should be introduced for those who wish to practice in the field. The proposed Act, in contrast to the approach taken when CAMA 1990 was introduced, accepts the opinion and caters for it. For that reason, the nominee and supervisors must be insolvency practitioners. Why the reformers also introduce the business rescue expert is for now, a mystery.

41 It is possible that they sought to replace the oversight role played by the SEC by introducing the expert. As has been stated above, it is imperative to recognise that the role that the SEC played under Part XVI of CAMA 2004 is different from that which it played under the ISA 2007. It must be emphasised that the role of the SEC in the former was discretionary and ought to be engaged only where the court considered it necessary. The business rescue expert’s role here has been made compulsory. In effect, two practitioners will be appointed in relation to the arrangement, which would be costly in time and money at a point where the company has little of both resources. It is submitted that the nominee and supervisor and the creditors-in-meeting would provide sufficient oversight. Perhaps if there is future need to tweak the oversight in future, then alterations may be introduced to improve the efficacy of the system.

Conclusion

42 The article has examined the proposed introduction of the CVA procedure into the Nigerian insolvency system through a new, dedicated Insolvency Act. As the proposed Act seeks to transplant the extant insolvency regimes in England and Wales, it has been necessary to assess that system, as well. At conception, the CVA

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159 The Business Recovery and Insolvency Practitioners Association of Nigeria has been at the forefront of this movement. See <http://www.bripan.org/aboutus.php#missionstatement> (last viewed 7 January 2015). S. Akinwunmi, “Receiverships and Business Recovery” (copy on file with researcher).

160 Ibid; also, above note 88, at 11-12.

161 The reform committee in 1988 deigned to introduce a regime of qualifications for insolvency practitioners: above note 95, at 301-302.
procedure was designed to respond to the challenges that undermined the Scheme of Arrangement procedure in England and Wales. Given that the Nigerian bill has not, thus far, been supported by clear terms of reference stating the challenges to which the proposals respond. The article argues that a principle-based approach ought to be taken to the reform; as opposed to the near-exact transplant that the reformers appear to have favoured. Hence, it has not only identified key challenges which ought to be addressed, it has also contextualised those challenges with particular reference to Nigeria.

43 The proposed Act clearly fails to grapple successfully with the identified inadequacies of the CVA procedure. The reformers will also do well to address some of the challenges as they affect Nigeria. To that end, the article recommends the introduction of a ubiquitous moratorium for the stand-alone arrangements procedure. In addition, it calls for the elimination of the role of the business rescue expert. It advises the reformers to clarify provisions that conflate the CVA procedure with that of arrangements and compromise. It is hoped that the proposed Act will be modified as suggested in order to better support the Nigerian insolvency system. It is also clear that the government must set out a system by which the main actors, including the judges and enforcement authorities, may be educated on the nuances of the Act when it is passed.