AN APPRAISAL OF THE ROLE OF MORATORIUM MECHANISM IN BUSINESS RESCUE IN NIGERIA

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Abstract

One of the Key changes introduced by CAMA 2020 is the introduction of a business rescue, which aims to provide an alternative to liquidation for distressed companies. Business rescue is designed to allow companies to restructure their affairs and avoid liquidation, preserving value for all stakeholders including shareholders, creditors, and employees. It is a significant departure from the traditional insolvency law framework in Nigeria, which had a strong emphasis on liquidation. A central feature of the business rescue is the moratorium mechanism, which temporarily suspends creditor claims and legal proceedings against the company. The moratorium is intended to provide companies with the necessary breathing space to restructure their affairs and avoid the costs and uncertainties associated with liquidation. Despite its importance, the moratorium mechanism has been subject to much debate among legal scholars, practitioners, and policymakers, due to its potential impact on the rights and interests of stakeholders. This paper, using a doctrinal research methodology, examines the role of the moratorium mechanism in business rescue under CAMA 2020, with a focus on its effectiveness in achieving the objectives of business rescue. The paper found that while the moratorium is an essential tool in business rescue, its effectiveness depends on several factors, such as the financial health of the company and willingness of creditors to cooperate. The paper also identified areas of improvement, including the need for clearer guidance on the scope and application of the moratorium. Based on these findings, the paper makes recommendations to enhance the effectiveness of the moratorium and the overall business rescue process in Nigeria.

Keywords: Moratorium, Business Rescue, CAMA 2020, Administration, Company Voluntary Arrangement, Insolvency

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Introduction

The Companies and Allied Matters Act 1990, was the primary legislation regulating corporations and corporate insolvency in Nigeria for more than three decades. The CAMA 1990 remained largely unaltered during this period, leaving Nigerian businesses with limited restructuring options focused on debt collection. The two most frequently employed mechanisms for debt recovery in Nigeria under the CAMA1990 were winding up and receivership.[1] While the former aims to liquidate a company, the latter focuses on debt collection by selling off secured assets. However, the outcome of both processes is the dissolution of the company, demonstrating that neither option was intended to rescue insolvent businesses. This highlights the primary objective of the previous insolvency framework in Nigeria, which focused on safeguarding the debt collection, with no provision for a business rescue process.

The pre-CAMA 2020 insolvency framework in Nigeria was not only lacking in business rescue provisions but also riddled with loopholes, exacerbating the challenges faced by financially distressed companies.[2] As a result, there was a pressing need for a business rescue system in Nigeria that could provide struggling businesses with an opportunity to restructure their operations and debt obligations, allowing them to continue operating as a going concern. In order to provide insolvent companies with an alternative to dissolution, the current corporate legal framework in Nigeria has introduced two new business rescue mechanisms which are Company Voluntary Arrangement and Administration of Companies.[3] These mechanisms aim to give insolvent companies a fresh start, allowing them to restructure their operations and debt obligations and provide an opportunity to re-emerge successful entities in the future.

Perhaps, among the key features of this new regime is the introduction of the moratorium mechanism, which provides a suspension of creditor claims and legal proceedings when a company is in administration.[4] This moratorium mechanism represents a radical departure from the traditional Nigerian approach to insolvency, which prioritized liquidation over

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1 CAMA 1990, ss 422 & 387.

2 C Adiele, 'Business Rescue in Nigeria: A Step in the Right Direction', <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832465> accessed 12 April 2024.

3 CAMA, ss 434 & 443.

4 *Ibid*, s 480 (2).

rehabilitation. While the introduction of the moratorium mechanism is widely regarded as a landmark development in Nigeria's corporate insolvency landscape, concerns have been raised about its potential to disrupt the credit market and undermine the rights of creditors. It is against this backdrop that this paper delves into the role of the moratorium mechanism in business rescue proceedings under CAMA 2020[5], examining its effectiveness in achieving the key objective of business rescue.

The Concept of Business Rescue

Business rescue is an essential intervention in the corporate landscape, designed to prevent insolvent companies from failing by restructuring their affairs in a way that allow them to continue operations.[6] When a company is in financial distress, it typically needs to restructure its debts, which may involve renegotiating arrangements with creditors.[7] This process, known as business rescue, can involve various arrangements, such as restructuring or reorganization, all aimed at restoring the company to a viable financial state. Worldwide, business rescue has become a widely accepted approach, with liquidation viewed as a last resort when rescue efforts fail to restore solvency.[8] While CAMA does not define 'business rescue' explicitly, it is generally understood to be an intervention aimed at preserving going concern value of a company that is facing financial distress.[9] The term 'business rescue' is also often used interchangeably with 'corporate rescue' and both refer to a process of reorganization and restructuring an insolvent company. In this process, insolvency experts assist the company in developing a reorganization plan that is intended to return the company to profitability and avoid liquidation.[10] To further clarify, the South African Companies Act No. 71 of 2008 defines 'business rescue' as a legal process that seeks to facilitate the rehabilitation of a financially distressed

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[5] Hereinafter referred to as 'CAMA'.

[6] V Finch & D Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn, New York: Cambridge University Press, 2017) 197.

[7] A R Keay & P Walton, *Insolvency law: Corporate and Personal* (4th edn, Bristol: LexisNexis, 2017) 137.

[8] I K Udofia, 'An Evaluation of the Adequacy of Nigeria's Sector-Specific Business Rescue Legal Regimes', <http://www.lawyard.ng/wp-content/uploads/2019/11 Lawyard-Ouarterly-journal.pdf> accessed 12 April 2024.

[9] B Adebola, 'An Invitation to Encourage Due Consideration for the Survivability of Rescued Businesses in the Business Rescue System of England and Wales'(2017) 26(2) *International Insolvency Review,* 42.

[10] A O Nwafor, 'Exploring the Goals of Business Rescue through the Lens of the South African Companies Act 71 of 2008', (2017) *Stell LR* 597. The purpose of business rescue is to facilitate the rehabilitation of a company that is in financial distress.

company.[11] A company is deemed financially distressed if it is unlikely to be able to pall all its debts as they become due within the next six months, or if it appears that it will become insolvent during that same period.[12]

The overarching purpose of business rescue, as provided in section 444 (1) of the CAMA, is to restore the financial well-being and viability of a company in distress. This process is aimed at either ensuring that the company continues in existence as a solvent entity or, if that is not feasible, to provide a better return for the creditors of the company than would result from immediate liquidation. Thus, business rescue aims to provide a financially distressed company with the opportunity to restructure its affairs and avoid liquidation.[13] In this way, the company can potentially return to profitability and continue to operate as a going concern.

Business Rescue Options under CAMA 2020

The CAMA 2020 has laid the groundwork for business rescue in Nigeria by introducing options such as Company Voluntary Arrangement and Company Administration, which provide financially distressed companies with alternative avenues to avoid liquidation. These mechanisms aim to facilitate the reorganization and rehabilitation of struggling businesses, thus ensuring the continued existence of viable companies.

Company Voluntary Arrangements

Company Voluntary Arrangements are restructuring mechanisms that allow insolvent corporations in Nigeria to negotiate a voluntary repayment plan with their unsecured creditors, without the need for formal insolvency proceedings.[14] Though, the CAMA 2020 does not explicitly define CVAs, they are modelled after similar practices in the UK, where they are considered a powerful tool for rescuing a company by facilitating an arrangement between company and its creditors, allowing creditors to accept less than what they owed in exchange for a better chance of full

[11] South African Companies Act No. 71 of 2008, s 128.

[12] E Fasken, 'A Beginner's Guide to Business Rescue in South Africa. < https://www.fasken.com/en/knowledge/2022/04/26-a-beginners-guide-to-business-rescue-in-south-africa> accessed 11 April 2024.

[13] N L Ngwenya, 'Revisiting the Scope of the Moratorium in Business Rescue: Ejectment of Unlawful Occupier of a Leased Property', <https://www.proquest.com/openview/c20934a3cc85058ef642a7ab20cd08a5/1?pq-origsite=gscholar&cbl=18750&diss=y>accessed 12 April 2024.

[14] U Udoma & B Osagie, 'The Companies and Allied Matters Act (Repeal and Re-enactment) Bill 2019 - What you need to know', <https://www.uubo.org/media/1755/cama-bill-series-part-10.pdf>accessed 11 April 2024. Hereinafter referred to as 'CVA'.

repayment. CVA, in essence offers an insolvent company and its unsecured creditors the opportunity to strike a legally binding agreement on the repayment of the company's debts, without the need for formal insolvency proceedings. Through a voluntary arrangement, the company can negotiate more favourable terms of repayment with its creditors, offering reasonable payment schedules over an agreed period of time, while simultaneously avoiding liquidation.[15]

Essentially, a CVA is an arrangement between a company and its unsecured creditors to restructure and repay its debts over an agreed period.[16] It is a specific insolvency procedure that only applies when a company is unable to pay its debts, and is therefore insolvent. For companies that are solvent, a CVA is unnecessary, as it is not required to restructure debts that can be paid in full.

In Nigeria, the CVA is governed by sections 434 – 442 of CAMA 2020. Specifically, section 434(1) of CAMA 2020 introduces the CVA as an insolvency procedure that enables a company's directors to make a proposal to its creditors for a composition in satisfaction of the company's debts or a scheme of arrangement of its affairs. This proposal, known as a 'voluntary arrangement', is designed to help the company develop a feasible plan to repay its debts without resorting to liquidation.[17] Thus, the CAMA 2020 affords directors of a financially distressed company the opportunity to propose a CVA to its unsecured creditors, in which the company offers to a all or a portion of its debts through a composition, which is a legally binding agreement that restructures the debts and the payment schedule.

To implement the CVA, qualified insolvency practitioner can be appointed as a trustee or nominee to supervise the arrangement.[18] In addition, a liquidator or administration can also propose a CVA as a means of restructuring and repaying the company's debts.[19] The CVA may be challenged by a creditor, member, nominee or by an administrator or liquidator of the company in question, especially if the arrangement is deemed to unfairly prejudice the interests of a creditor,[20] member or

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15 K Udofia, 'An Overview of Company Voluntary Arrangements in CAMA 2020', < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956249> accessed 11 April 2024.

16 K Udofia,'Insolvency Discourse' <https://babalakinandco.com/the-potential-impact-of-administration-on-secured-creditors-under-cama-2020/> accessed 13 April 2024.

17 CAMA s 434(1).

18 Ibid, s 434 (2).

19 Ibid, s 434 (3).

20 CAMA, s 440(1)(a).

contributory. For instance, in the case of *Prudential Assurance Company Ltd v PRG Powerhouse Ltd,*[21]the terms of a CVA were found to be prejudicial to landlords who had relinquished their guarantees without receiving any additional benefits in return, leading to the CVA being successfully challenged. The ruling in *Discovery Northampton Ltd v Debenhams Retail Ltd*,[22] further underscores the importance of ensuring that the terms of a CVA do not unfairly prejudice creditors or stakeholders. The Court in this case ruled those landlords' rights to forfeit a lease were considered proprietary rights, distinct from contractual or security interests. As a result, the CVA's provision requiring landlords to waive these rights was invalidated, as it amounted to an unfair prejudice to the landlords.[23]

Company Administration

Company Administration is an insolvency procedure that seeks to prevent or delay the liquidation of an insolvent company by providing a rescue mechanism. This mechanism allows the company to continue operating its business while seeking ways to pay off its debts and restructure its operations in order to revive itself.[24] It aims to provide a financially distressed company with a period of breathing space, during which it can assess its current financial state and develop a strategy to deal with its debts. During this period, the company is given the chance to reorganize and restructure its operations, with the ultimate goal of becoming profitable again and avoiding liquidation.

Thus, it serves as a temporary protective state for a company, providing it with the opportunity to develop and implement a debt restructuring plan while shielding it from creditor actions. In essence, it is a reprieve for the company, allowing it to continue operating while finding solutions to its financial difficulties.[25]

Administration, as an insolvency procedure in Nigeria is governed by sections 443 to 549 of the CAMA 2020. Under this legislation, when a

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[21] (2007) BCC 500.

[22] (2019) EWHC 2441

[23] See also the case of *Sisu Capital Fund Ltd v Tucker* (2005) EWHC 2170 where a CVA was challenged on the ground that there has been material irregularity at or in relation to the creditors' or company meetings.

[24] J S Tolulope, & E C Rachel, Company Voluntary Arrangements (CVA) & Administration of Companies: An Appraisal of the Innovative Corporate Insolvency Procedure Under the Companies and Allied Matters Act 2020', (2023) 13 (1) *Nigerian Bar Journal*.

[25] 'Company Administration' <http://www.realbusinessrescue.co.uk/company-administration> accessed 20 April 2024.

company enters administration, control of the company is transferred to the appointed Administrator, who must be a qualified insolvency practitioner.[26] The CAMA 2020 has defined the term "insolvency practitioner" and set out specific educational and professional requirements for practitioners in this field.[27] The appointment of an Administrator for a financially distressed company can therefore be made through various methods, ensuring that the interests of secured creditors are protected. While an out-of-court appointment can be made by a floating charge-holder, the company, or its directors under section 443(1), an administrator may also be appointed by the court upon application by the company, its directors, and one or more creditors, in accordance with section 450(1) of CAMA. These provisions reflect a clear intention to safeguard the rights of secured creditors, regardless of the appointment route taken.

The primary purpose of appointing an administrator of a company is generally to rescue the ailing company as much as possible or to ensure a good return and distribution to creditors in the event the company is wound up. Section 444 (1) of CAMA provides that an administrator of a company may do all such things as may be necessary for the management of the affairs, business and property of the company, and shall perform his functions with the objectives of:

(a) rescuing the company, the whole or any part of its undertaking, as a going concern;

(b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up, without first being in administration; or

(c) realizing property in order to make a distribution to one or more secured or preferential creditors.

Thus, the primary objective of administration is to rescue the company, unless the Administrator believes that such a rescue is not feasible or another course of action would result in a better outcome for the creditors. It is essential to note that administration is a temporary process. Therefore, it is imperative for the company to use the time provided by administration effectively to determine its long-term future, whether it is restructuring, reorganization or liquidation. If the appointment of an Administrator is not terminated earlier, it will automatically cease to have effect after one year,

[26] CAMA, s 447.
[27] *Ibid*, s 868.

known as "automatic cessation".[28] However, the court may extend this period for up to an additional six months, if necessary.[29]

The Process of Administration

As part of the process of the Administration process in Nigeria, the Administrator must perform several additional duties. These include notifying the Corporate Affairs Commission of the appointment[30] and, as soon as reasonably possible, requesting relevant persons to provide a statement of the Company's affairs.[31] This statement must be submitted to the administrator within 11 working days of receiving the notice.[32] Upon receiving the statement, the Administrator will create a proposal that outlines the measures necessary to achieve the purpose of Administration, which may include restructuring plans like a Company Voluntary arrangement or a scheme of arrangement. [33]

After the Administrator has formulated the proposed plan of action, a meeting of the creditors will be called.[34] At this meeting, the Administrator's proposal will be presented and reviewed, and the creditors can either approve them as is or with modifications to which the Administrator consents.[35] Following the meeting, the administrator is required to report any decision made to the court, the Corporate Affairs Commission, and such other persons as may be prescribed by the Minister.[36]

Powers of Administrator

The Administrator is granted extensive powers and authority to manage and oversee the company's affairs in a way that is considered necessary and expedient for the revival of the company.[37] These powers enable the Administrator to take various actions, such as appointing and removing directors, calling meetings with members or creditors, seeking court guidance on his role, making distributions to creditors, permitting the

[28] CAMA, s 513 (1).
[29] *Ibid*, s 513 (2).
[30] *Ibid*, s 483(3).
[31] *Ibid*, s 484 (1).
[32] CAMA, s 485 (1).
[33] *Ibid* s 486 (1).
[34] *Ibid*, s 487.
[35] *Ibid*, s 488 (3).
[36] *Ibid*, s 491 (6). S 866 defines "Minister" to mean the Minister charged with responsibility for trade (i.e the Minister for Trade and Investment in Nigeria)
[37] CAMA, s 496 (1).
[37] *Ibid*, s 496 (1).

exercise of management powers, taking control of the company's property, and managing the company's overall business operations.[38]

The administrator's power to dispose of assets which are subject to security arguably constitutes the most serious threat to secured creditors. An administrator is empowered to dispose of a company's assets which are subject to a floating charge as if they were not subject to the charge.[39] The Administrator power is however subject to a condition aimed at protecting the floating charge holder. In this regard, the floating charge holder must be given the same priority he had in relation to the disposed assets, over the proceeds realized from the disposal of the assets.[40] The Administrator also has the power to sell assets which are subject to fixed charges. This power is subject to more stringent conditions aimed at protecting fixed charge holder.[41] Thus, an administrator wishing to exercise this power must apply for and obtain a court order to this effect. The court in granting the order is required to consider whether the asset disposal would likely promote the purpose of the administrator.[42] Moreover, the court order must direct that the net proceeds of the asset disposal and any additional money should be applied to discharge the debt that was subject to the fixed charge.[43]

Indeed, the Administrator plays a central role in the administration process, using their broad powers and authority to manage the company's affairs, develop restructuring proposals and seek approval from creditors. The successful implementation of the Administration process depends on the skill and expertise of the Administrator, as well as the cooperation and support of stakeholders. Ultimately, the goal is to achieve a restructuring plan that preserves the company's value, maximizes returns for creditors and returns the company to profitability.

Moratorium Mechanism in Business Rescue

Administration under CAMA 2020 provides a powerful tool for protecting companies from legal actions and creditors' claims, commonly known as the Moratorium Mechanism.[44] Once a company enters Administration, any

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[38] CAMA, ss 498-507

[39] CAMA, s 507 (1).

[40] *Ibid*, s 507 (2).

[41] *Ibid*, s 508(1).

[42] *Ibid*, s 508 (2).

[43] *Ibid*, s 508 (3).

[44] A moratorium is a legally authorized period of delay in the performance of a legal obligation or the payment of a debt. For example, where a moratorium is in force it may suspend a creditor from instituting any legal action or recovering any assets of the company.

legal proceedings against it are temporarily halted, and creditors cannot take action to enforce their claims without the consent of the Administrator or the approval of the Court.[45] Section 480 of CAMA 2020 requires that the consent of the administrator or the Court must be sought before the enforcement of security over the financially distressed company or the repossession of goods in the possession of the insolvent company under a hire purchase agreement. A landlord who wishes to exercise a right of forfeiture by peaceable re-entry into the premises demised to the financially distressed company must also require the consent of the administrator or the Court. Similarly, consent of the administrator or the Court must be sought before legal processes including legal proceedings, execution, distress and diligence shall be instituted or continued against the company or its property.[46] The English Court of Appeal case of *Re Atlantic Computer Systems Plc*[47] established a precedent for administrators or courts to follow when considering requests for consent or leave to enforce a right despite the existence of a moratorium in an Administration. According to the guidelines, the burden of proof rests with the creditor or applicant, who must make a strong case for why consent or leave should be granted. If the creditor can demonstrate that granting consent or leave would not hinder the Administration's objectives, the court or administrator may be inclined to grant the request. Moreover, when considering an application for consent or leave to enforce a right, courts may perform a balancing act between the interests of the applicant creditor and the creditors as a whole, as established in the *Re Meesan Investments Ltd*[48] case. If significant and greater loss would be incurred by the secured creditor, leave may be granted. Additionally, proprietary interests are given significant weight when determining whether to grant consent or leave.[49]

Moreover, section 717 of CAMA 2020 imposes a 6-month moratorium on creditors' voluntary winding-up in its Scheme of Arrangement. The 6-months commences when the financially distressed company presents to the court, the proposal which it intends to make to its creditors, its statement of affairs and a statement that it requires protection from being wound up pending the arrangement and compromise. The Court may also require any additional information from the financially distressed company.

[45] CAMA s 480.
[46] *Ibid*.
[47] (1992) Ch 505 at 542-544.
[48] (1988) BCC 788.
[49] *Brsitol Airport Plc v Powdrill* [1990] Ch 744 .

Indeed, business rescue processes in Nigeria, as provided in CAMA 2020, embrace the universally recognized principle of a moratorium on legal proceedings against a company or its assets. This moratorium is automatically activated when a company enters Administration, offering a much-needed reprieve from creditors' claims. Nevertheless, the moratorium may be lifted upon the consent of the Administrator or the approval of the court.

The Role of Moratorium Mechanism in Business Rescue Process in Nigeria

Administration stands out as an insolvency procedure with a significant advantage of moratorium. This moratorium halts creditors' legal actions against the insolvent company and its assets during the administration period. The freezing effect of a moratorium on creditors' actions is multifold, preventing actions such as landlord distrainment, court judgments, enforcement of existing court judgements, and winding up petitions.[50] This critical feature of administration provides the company with the breathing space required to develop and implement a recovery plan that preserves the company's value while addressing the needs of its creditors.

The moratorium in Administration ensures that creditors' rights are preserved while temporarily suspending their ability to take enforcement actions during the Administration period. In essence, the moratorium prevents individual creditors from exercising their rights without extinguishing those rights.[51] This is of critical importance, as secured creditors may initially view the moratorium with apprehension, fearing the loss of their security. However, it is essential to note that the moratorium does not extinguish substantive rights rather it only suspends enforcement actions without affecting the underlying substantive rights, providing the company with much-needed breathing space. [52]

In his observations, Kloppers aptly encapsulated the essence of a moratorium, stating that a moratorium or stay on proceedings is an indispensable component of all corporate rescue procedures.[53] The moratorium forms the bedrock of any business rescue regime, providing the

[50] CAMA, s 480.

[51] I S Paterson, 'Restructuring Moratoriums through an Information-Processing Lens,' (2023) 23 (1) *Journal of Corporate Law*, 37.

[52] *Barclays Mercantile Business Finace v SIBEC* (1992) 1 WLR 1253.

[53] P Kloppers 'Judicial Management ─ A Corporate Rescue Mechanism in Need of Reform?' (1999) *Stell LR* 417 429.

required breathing space for a company to restructure its finances and explore possible solutions to its challenges.[54] The moratorium effectively safeguards the company from potential risk of forced liquidation and enables a more measured and productive approach to financial rehabilitation.

The essence of a moratorium is to stave off the frenzied free-for-all that can result from creditors vying for a company's assets in the face of insolvency. As Jackson cogently noted that:

> The grab rules of non-bankruptcy law and their allocation of assets on the basis of first-come, first-served create an incentive on the part of the individual creditors, when they sense that a debtor may have more liabilities than assets, to get in line today (by, for example, getting a sheriff to execute on the debtor's equipment) because if they do not, they run the risk of getting nothing. This decision by numerous individual creditors, however, may be the wrong decision for the creditors as a group. Even though the debtor is insolvent, they might be better off if they held the assets together.[55]

This can lead to the frantic depletion of a debtor's assets, resulting in the loss of the company as a viable entity. A moratorium is therefore an integral part of any effective business rescue mechanism, offering a critical reprieve for financial distressed companies to reorganize and negotiate with creditors. As a breathing space for debtors, a moratorium presents the opportunity for companies to address their financial difficulties, motivating them seek protection and initiate restructuring processes. Without the moratorium, it is unlikely that companies in financial distress would find a way out, as creditors would be able to aggressively pursue their claims, potentially leading to the company's liquidation.

Perhaps, the *Chetty v Hart*,[56] case solidified the rationale behind placing a company under business rescue, which is to provide the company with the necessary breathing room to revitalize itself and emerge as a financially viable entity. As one of the core features of business rescue, the moratorium offers this essential period of respite, allowing the company to restructure its finances and explore possible solutions to its challenges. Levenstein concurs that the moratorium is a vital component of any effective corporate

[54] M F Cassim, 'The Effect of the Moratorium on Property Owner During Business Rescue', (2017) *Merc LJ* 419 ; see also Kloppers (n 1) 430

[55] T H Jackson, The Logic and Limits of Bankruptcy Law, 1986, P 12-13.

[56] (20323/14) [2015] ZASCA 112

rescue mechanism, especially in situations of financial distress.[57] As such, it is regarded as an integral component of a comprehensive toolbox designed to encourage debtors to initiate corporate insolvency procedures at the onset of financial distress, rather than waiting until their situation has become untenable.[58]

Potential Challenges Associated with the Use of a Moratorium

One significant challenge is striking a balance between the diverse interests of various interests such as creditors, employees and shareholders. These stakeholders often have competing priorities, which can make finding a mutually acceptable solution difficult. Additionally, the legal and regulatory framework surrounding the moratorium is often complex and dynamic, presenting further obstacles in achieving a favourable outcome.

Another issue is the risk of perpetuating a company's financial distress through the moratorium. While the stay of proceedings is intended to provide breathing space, it can also delay creditor recovery and exacerbate the company's financial woes. Moreover, the legal process for obtaining an administrator's consent or court approval for creditor action can be arduous, potentially leading to lengthy delays in resolving outstanding debts. There is also the concern of potential misuse of the moratorium, particularly by companies with no intention of initiating business Rescue. Such opportunistic behaviour can diminish the legitimacy of the moratorium and dissuade creditors from supporting the Business rescue process.[59]

Furthermore, the limited expertise and capacity of administrators and court officials can hamper the effective administration of the moratorium. This lack of expertise can result in inefficient or ineffective decision-making, potentially undermining the efficacy of the process. Again, despite the legal protections offered by the moratorium, the social stigma attached to corporate failure can hinder the willingness of creditors to accept more flexible repayment arrangements, potentially stifling the effectiveness of the moratorium in facilitating corporate rehabilitation. The moratorium may reduce the perceived credit of distressed firms, which can lead to moral hazard issues and encourage managers to take greater risks with creditors' capital. Adebayo argues that this moral hazard concern can undermine the

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[57] E J Levenstein, 'The Need for Moratoria to Facilitate Corporate Rescue' (New York: Oxford University Press, 2009) p 67.

[58] H R Miller, 'Chapter II in Transition – From Boom to Bust and into the Future', (2007) 81 *American Bankruptcy Law Journal*, 375.

[59] L G Fisher, 'The Moratorium in Business Rescue: A Tool or a Hindrance', (2010) 10 (1) *Journal of Corporate Law Studies*, 34.

intended purpose of the moratorium by incentivizing managers to engage in riskier behaviour, ultimately exacerbating the company's financial distress.[60]

Again, determining when an administration begins can be a contentious issue in Nigerian Law, as evidenced in the *Investec Bank Ltd v Bruyns*,[61] Rogers AJ in his judgement, highlighted the ambiguity surrounding this question, emphasizing that a definitive answer remains elusive. This conundrum is particularly relevant in the context of the moratorium, as its effectiveness hinges on when the administration is deemed to have commenced. The problem therefore lies in reconciling section 480 of CAMA, with the ambiguous timeline of when a company is considered to be in administration.

The ambiguity surrounding the start of administration presents several challenges to the effective implementation of the moratorium. Firstly, it introduces uncertainty into the process, leaving administrators, creditors, and courts unsure of when the moratorium takes effect. This uncertainty can result in delayed actions, missed opportunities and ultimately, undermine the desired outcome of a successful business rescue.

Secondly, without a clear understanding of when the moratorium commences, the courts may struggle to adjudicate cases involving moratorium-related disputes. This could lead to inconsistent rulings and perpetuate confusion in the legal framework.

Conclusion and Recommendations

The moratorium, an integral part of the business rescue process provided in CAMA, offers a lifeline to financially distressed companies by staving off creditor actions and safeguarding assets. By fostering this reprieve, the moratorium provides a crucial window of opportunity for companies to develop and implement restructuring plans that promote sustained viability. While serving as a cornerstone of business rescue, several challenges must be overcome to ensure its successful implementation. Based on the foregoing, the writer recommends the clarification of the commencement date of administration in Nigerian Law to eliminate uncertainty and facilitate timely implementation of the moratorium. Encourage early engagement between companies, creditors and administrators to minimize the risk of unintended consequences and moral hazard. Develop guidelines to prevent misuse of the moratorium, such as requiring regular progress

[60] N A Adebayo, 'The Impact of Moratoriums on Creditor Recovery in Corporate Insolvency' (2012) 5 (1) *Journal of Business Law*

[61] (2011) ZAWCHC 423.

reports. Educate stakeholders on the importance of the moratorium and its role in facilitating successful business rescue. This can be achieved through training programs for administration and awareness campaigns for companies and creditors. Moreover, a supervisor should be appointed to ensure the integrity of the moratorium and the restructuring process. Overcoming these hurdles is essential to ensuring the moratorium remains an effective tool in Nigeria's business rescue framework.