

# COMPANIES & MARKETS

## THE COMPANIES AND ALLIED MATTERS ACT (REPEAL AND RE-ENACTMENT) BILL 2019 – WHAT YOU NEED TO KNOW

### PART 10 – COMPANY VOLUNTARY ARRANGEMENTS

By Udo Udoma & Belo-Osagie

#### BACKGROUND

The Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 (CAMA) was enacted in Nigeria as a decree of the military government in 1990, and in the past 28 years, there have been no significant amendments to the CAMA. This is, however, all set to change if the Companies and Allied Matters (Repeal and Re-enactment) Bill 2019 (CAMA Bill), which was passed by the Nigerian Senate on 15<sup>th</sup> May 2018 and by the House of Representatives on 17<sup>th</sup> January 2019, is passed into law. In this series, which is scheduled to run for 12 weeks, Udo Udoma & Belo-Osagie will provide insights and digestible excerpts on the effect of key changes proposed by the CAMA Bill.

#### COMPANY VOLUNTARY ARRANGEMENTS

The CAMA Bill seeks to introduce company voluntary arrangements (“CVA”) into the body of Nigerian company law. CVA is an alternative arrangement available to companies facing financial challenges, that can be used by companies to conveniently structure the repayment of debts to their creditors. The provisions of the CAMA Bill on CVAs are modelled primarily after the UK Insolvency Act 1986, including all subsequent related legislation (“UK legislation”). Although the CAMA Bill does not define a CVA, in practice in the UK, CVAs are described as a form of business rescue arrangement which allows a company in financial difficulties to propose to its creditors to enter into an agreement with them regarding the repayment of all, or a part, of its debts over an agreed period of time. CVAs, in some respects, are similar to a scheme of arrangement. A fundamental difference between a CVA and a scheme of arrangement is that CVAs are contractual in nature and require the approval of the creditors and members of the company to take effect. A scheme of arrangement, on the other hand, involves the courts, and requires orders of the court to convene meetings and to sanction the resolutions passed at such meetings. Furthermore, the CAMA Bill introduces the concept of statutory moratorium under a scheme of arrangement during which period, no winding up petition or enforcement action by any creditor shall be entertained against the company. This feature is not available under a CVA.

#### FEATURES OF CVAs

- CVAs represent a shift from the traditional mindset that the only option available to an insolvent company is to be wound up. The primary objective of a CVA is to restore a company to profitability to be able to meet its financial obligations to its creditors under the CVA.
- Unlike other company rescue options (such as administration) a CVA allows directors to remain in control of the affairs of the company while the company continues to conduct its business.
- The approval by creditors of a company to a CVA only binds the Company and all unsecured creditors (including unsecured creditors that do not agree to the CVA). Secured creditors who do not consent to the CVA, on the other hand, are not bound by the CVA and can proceed to enforce their security regardless of the CVA.

#### MORATORIUM

In order for a potential restructuring or reorganisation to have the best odds for success, it is necessary for a moratorium to be put in place. A moratorium prevents the company’s creditors from instituting or continuing any insolvency proceedings or legal processes against the company during the period of the CVA, thereby giving the company – and its creditors – an opportunity to agree on a plan to restructure the company and/or its debts without having to deal with the constant threat of enforcement action by certain creditors.

A statutory moratorium does not apply to CVAs under the CAMA Bill. In the absence of a statutory moratorium, and in the course of negotiating the terms of the CVA, creditors (including unsecured creditors) that are not part of the CVA may still enforce their rights as they choose without regard to the majority of the creditors who are in support of the CVA. This is similar to the situation in the UK where there is no statutory moratorium applicable to CVAs except in relation to “small eligible companies” and companies in administration; both of these categories of companies enjoy an automatic moratorium once they embark on a CVA. It is interesting to note that a

statutory moratorium is also applicable in the CAMA Bill where a company enters into administration. The experience in the UK has shown that a CVA proposal works best when initiated within the framework of administration unless there are compelling reasons for avoiding administration.

#### PROCEDURE

The CAMA Bill outlines the process for implementing a CVA:

- A CVA proposal is made to the creditors by the directors of the company, or by the administrator or liquidator, as applicable.
- The proposal is made through a person appointed by the directors, administration or liquidator of the company (as applicable) to act as a nominee for the purpose of supervising the implementation of the CVA. The nominee must be qualified to act as an insolvency practitioner.
- Within 28 days of receiving the notice of the proposal for a CVA, the nominee must submit a report to the Federal High Court stating whether, in his opinion, meetings of the company and of its creditors should be summoned to consider the proposal, and the date, time and place at which he proposed the meetings to be held.
- The above requirement for the nominee to submit a report to the Court only applies where the company is not in administration or winding up. Where the company is in administration or winding up, the nominee may proceed to summon the necessary meetings without recourse to the Court. The meetings of the members and creditors are to be held separately.
- The CVA proposal may be approved with or without modifications, provided that the proposal itself or any subsequent modification does not affect the right of a secured creditor to enforce its security or the priority and rights of preferential creditors except with the concurrence of the secured creditor or preferential creditors concerned.
- The CAMA Bill does not provide for the voting threshold for the approval of a CVA at the creditors’ and members’ meetings and this is a significant lacuna in the Bill. It only provides that “...each of the meetings shall be conducted in accordance with the rules.” The CAMA Bill defines the term “rules” to include “rules made by the Chief Judge of the Federal High Court for the purpose of section 519 (i.e. cessation of administration by court on application by creditors) or 582 of this Bill (i.e. official receiver) and all incidental forms together with rules made by the Corporate Affairs Commission.” There is, however, no specific indication of the rules being referred to in the CAMA Bill so, perhaps, the provisions of the current Winding Up Rules, 2001, could be relied on. The Winding Up Rules provide for a simple majority approval of creditors and contributories (i.e. 50% + 1 vote) for a resolution to have been deemed to be passed. Under the UK Insolvency Rules, 1986, approval of a CVA requires the majority in excess of three-quarters (by debt value) of the creditors present in person or by proxy at the creditors’ meeting, and a simple majority approval of the members present in person or proxy at the members’ meeting.
- Where the decision taken at the creditors’ meeting differs from that taken at the members’ meeting, the Court may, on application by a member, order that the decision of the members’ meeting shall prevail or make such other order as it thinks fit. This position applies in similar circumstances in the UK.
- The decision relating to the approval of a CVA has effect if it has been taken by both meetings summoned, or by the creditors’ meeting alone, but in the latter case the decision is subject to an order of the court made on application as mentioned in the preceding paragraph above. The company shall be liable to pay the creditors the amounts approved under the CVA.
- The CVA can be challenged in Court on the grounds of unfair prejudice or material irregularity (or both) in relation to either of the meetings, and where such application is made, the Court may revoke or suspend any decision approving the CVA or direct the nominee to summon further meetings to consider a revised proposal with regard to the CVA.

*Udo Udoma & Belo-Osagie actively participated in the drafting of the CAMA Bill. Corporate Partner, Ozofo 'Latunde Ogiemudia was the chairperson of the Technical Advisory Committee set up by the office of the Senate President to advise on the CAMA Bill and the bill to amend the Investments and Securities Act 2007. Managing Associate, Christine Sijuwade was a member of that committee and led the drafting sub-committee on the CAMA Bill.*