

# Corporate Insolvency and Business Rescue: A Legal Overview for Companies

A company in financial distress has a number of options available to it. This depends on the special circumstances of the company. Where the company is still solvent or may be rescued by a restructuring of its debt, the company has a much wide range of options that is geared towards business rescue as opposed to where the company is insolvent and may not be rescued by a restructuring of its debt. In the latter case, the options available to the company are geared towards liquidation of the company for the settlement of its liabilities.

## Winding Up:

Winding up is the process where a company's assets are liquidated and dissolved and distributed in accordance with rules of priority.<sup>1</sup> It is referred to as liquidation in some jurisdictions. There are three (3) modes of winding up under the Company and Allied Matters Act, 2020, namely:

**a. Winding up by the court:**<sup>2</sup> This mode of winding up is utilized where the company has by special resolution resolved that the company be wound up by the Court; the company has defaulted in delivering the statutory report to the Commission or in holding the statutory meeting; the number of members is reduced below two in the case of companies with more than one shareholder; the company is unable to pay its debts; the condition precedent to the operation of the company has ceased to exist; or the Court is of opinion that it is just and equitable that the company be wound up.

**b. Voluntary Winding-up:**<sup>3</sup> This could either be members' voluntary winding up or creditors' winding-up. The distinguishing factor is that the members' voluntary winding-up is only available to solvent companies whilst the creditors' winding-up occurs where after members' voluntary winding-up has commenced, the liquidator finds that the company is not solvent.

**c. Winding-up subject to the supervision of the court:**<sup>4</sup> It occurs where a company passes a resolution for voluntary winding up and the Court subsequently orders that the voluntary winding-up shall continue but subject to such supervision of the Court, and with such liberty for creditors, contributories, or others to apply to the Court, and generally on such terms and conditions, as the court deems fit.

## Company Voluntary Arrangements:

The directors of a company may make a proposal to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs.<sup>5</sup> The proposal must:

1. appoint a qualified insolvency practitioner to act in relation of the voluntary arrangement for the purpose of supervising its implementation.
2. include the terms of the proposed voluntary arrangement, statement of the company's affairs, particulars of the company's creditors, debts, liabilities and assets among others

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<sup>1</sup> S.657 CAMA 2020

<sup>2</sup> S. 570-690 CAMA 2020

<sup>3</sup> S.620- 648 CAMA 2020

<sup>4</sup> S. 649-653 CAMA 2020

<sup>5</sup> Section 434 CAMA

3. not include a modification of the rights of a secured creditor to enforce his security except with the concurrence of the creditor concerned.

The law also provides additional restrictions on the modification of preferential debts of the company.

## ADMINISTRATION<sup>6</sup>

The purpose of administration is to appoint an Administrator who may do all such things as may be necessary for the management of the affairs, business and property of the company. The Administrator is to perform his functions with the objective 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;
- c. realising property in order to make a distribution to one or more secured or preferential creditors.

Notwithstanding the above the primary objective of the Administrator is the rescue of the company. The Administrator may be appointed on the order of the court where the court is satisfied that the company is or is likely to become unable to pay its debts and administration order is likely to achieve the rescue of the company. The holder of a floating charge may appoint an Administrator of the company in respect of the company's property. The instrument creating the floating charge must state that the appropriate sections of CAMA apply to it and empower the holder of the floating charge to appoint an administrator. The company or its directors may also appoint an administrator out of court in accordance with the provisions of CAMA.

## RECEIVER/ MANAGER

An application may be made to the Court to appoint a receiver on behalf of the debenture holder or other creditors of a company which is being wound up by a court, an official receiver may be appointed. A receiver or manager of any property or undertaking of a company appointed out of Court is deemed to be an agent of the person or persons on whose behalf he is appointed and, if appointed manager of the whole or any part of the undertaking of a company, he is deemed to stand in a fiduciary relationship to the company and observe the utmost good faith towards it in any transaction with it or on its behalf.

## ARRANGEMENT

It means any change in the rights and liabilities of members, debenture holders or creditors of a company, other than a change effected under other provision of this Act or by the unanimous agreement of all affected. Arrangement may be by:

- a. a scheme proposed for a compromise, arrangement or reconstruction between 2 or more companies
- b. the merger of any two or more companies

An application may be made to the court by one or more of the companies for the sanctioning of the scheme.

## CONCLUSION

A company is insolvent if its assets are insufficient to discharge its debts and liabilities. An insolvent company has a number of options including: Winding-Up, Company Voluntary Arrangements, Administration, Receivership and Arrangements. A company will choose any one or more of the options as may be appropriate to it giving regard to its specific circumstances.

6 S. 443 CAMA



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