CORPORATE INSOLVENCY REGIME IN NIGERIA: AN APPRAISAL OF THE INNOVATIONS UNDER THE COMPANIES AND ALLIED MATTERS ACT 2020

Halimat Onigbinde

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Halimat Onigbinde*

ABSTRACT

There is no single insolvency Act in Nigeria. Corporate insolvency in Nigeria was primarily regulated by the Companies and Allied Matters Act 1990[1]("the Repealed Act"), the Companies Winding up Rules 2010, and other sectorial legislations where the insolvent company is in a regulated industry such as financial institutions and Telecommunication Companies. On the 7 August 2020, President Muhammadu Buhari assented to the Companies and Allied Matters Act 2020 ("CAMA 2020" or the "Act") which replaced the Repealed Act. This paper examines the extant corporate insolvency regime in Nigeria in the light of the innovation and appraises the effects of the innovative provisions. This paper concludes that promulgation of the CAMA 2020 is a laudable step towards the system of business rescue and restructuring, compared to the outdated liquidation procedure in Nigeria vis-à-vis other developed jurisdictions. It also makes recommendations to improve the corporate insolvency proceedings regime.

Keywords: Corporate Insolvency, Insolvency, Liquidation, Business Rescue, Debt Recovery, Receiver, Administrator, Company Voluntary Arrangement, Netting.

1.0. INTRODUCTION

There is a bifurcation between the legal framework regulating the insolvency of an individual or natural persons and incorporated bodies in Nigeria. Individual insolvency is primarily regulated by the Bankruptcy Act,[2] but this law has not had much impact because of its requirement for judgment and execution levied as a condition for proof of bankruptcy.[3] On the other hand, corporate insolvency, like

* Onigbinde Halimat Bolu is an Associate of Oluwakemi Balogun LP, a leading insolvency law firm in Nigeria. She can be contacted via email: mzboluhalima@gmail.com.

[1] Companies and Allied Matters Act 1990, Cap. C20, Laws of the Federation of Nigeria (LFN) 2004.

[2] Bankruptcy Act, Chapter B2, LFN 2004.

[3] S. 1 Bankruptcy Act.

every other law in Nigeria, is regulated by common law, judicial precedents, some legislations like CAMA 2020 and other subsidiary legislations where a regulated industry is the insolvent.

The deficient state of the corporate insolvency regime in Nigeria under the Repealed Act has led to criticism by experts and stakeholders in the insolvency sector. These deficiencies have also led to calls for a reform as the relevant provisions of the Repealed Act have been overtaken by developments in the sector, including technological development, thereby, rendering it outdated and not in line with the current best practices.[4] The Repealed Act, which provides the general legal framework for corporate asset recovery or realization in the course of insolvency, proved inadequate in addressing issues bothering on netting, business rescue provisions, cross-border insolvency, co-operation between domestic and foreign courts, coordination of concurrent proceedings or communication of information in insolvency etc.[5] The inadequacies further observed in the corporate insolvency sector include lack of specific insolvency legislation, nonexistence of statutory framework to regulate insolvency practitioners, and dearth of business liquidation oriented practice. However, the CAMA 2020 changes the focus of insolvency practice from business liquidation to business rescue, thereby improving the Nigerian environment for insolvency practice and development of a business rescue culture.

Corporate insolvency involves several processes ranging across actions for recovery of debt, appointment of a receiver, petition for winding up and appointment of a liquidator, arrangement and compromise etc. Corporate insolvency law embodies a variety of objectives, some of which include the following: facilitating the recovery of companies in difficulty, suspending the pursuit of rights and remedies by individual creditors, divesting the directors of their

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[4] E.O. Okolo, "Insolvency Law in Nigeria", available at https://investadvocate.com.ng/2016/10/11/insolvency-law-nigeria/ (Accessed 10 September 2020).

[5] A. Idigbe, "Nigeria: Overview of Insolvency and Restructuring in Nigeria", available at https://www.mondaq.com/nigeria/insolvencybankruptcy/812246/overview-of-insolvency-and-restructuring-in-nigeria (accessed on 10 September 2020).

management powers, providing for the avoidance of transfers and transactions which unfairly prejudice the general creditors, as well as procuring an orderly distribution of the estate.[6]

This paper examines the concept of corporate insolvency and the legal framework in Nigeria for debt recovery of creditors where a debtor company becomes insolvent; discusses the innovations introduced by the recently promulgated CAMA 2020; and makes necessary recommendations.

2.0. OVERVIEW OF CORPORATE INSOLVENCY

The term "corporate insolvency" is incapable of precise definition as there has neither been any statutory nor globally accepted definition for it. However, the term can only be described for understanding of what it entails. This would require a separate consideration of the terms "corporate" and "insolvent".

Upon incorporation, a company is capable of exercising all the powers of and performing all the functions of an incorporated company including the power to hold land and having perpetual succession.[7] Additionally, the law provides that every company shall, for the furtherance of its business or objects, have all the powers of a natural person of full capacity subject to the restrictions imposed by its Memorandum of Association and any other statute.[8] Incorporation of a company limits the personal liability of its members, thus creating a distinction between its corporate liability and members' personal liability.[9] The corporate personality of a company enables it to *inter alia* obtain credit in the furtherance of its objects. The CAMA 2020[10] specifically enables a company to borrow money for the purpose of its business or objects and mortgage or charge its assets, issue

[6] R. Goode, *Principles of Corporate Insolvency Law*, 4th ed. (Sweet & Maxwell: 2011), p. 90; J.H. Farrar, B. Hannigan, and N.E. Furey, *Farrar's Company Law*, 4th ed. (Butterworths: 1998), pp. 625-626.
[7] S. 42 CAMA 2020.
[8] S. 43(1) CAMA 2020.
[9] *Salomon* v *A. Salomon & Co. Ltd* (1897) AC 22.
[10] S. 191 CAMA 2020.

debentures and other securities whether outright or as security for any debt, liability or obligation of the company.

The term, "insolvent person", has been statutorily[11] defined thus;

> "insolvent person" where used in this Act means any person in Nigeria who, in respect of any judgment, Act or court order against him, is unable to satisfy execution or other process issued in favour of a creditor, and the execution or other process remains unsatisfied for not less than six weeks.

Based on the distinct examination of both terms above, we could describe corporate insolvency as a situation that occurs when a corporate body, usually a company, is unable to discharge its debt. Debt is one of the most important financial innovations in the history of the world as the modern economy cannot exist without it.[12] Although, there is no generally accepted definition of debt, the Supreme Court has however described it thus;[13]

> In legal parlance, debt has been differently defined, owing to the different subject-matter of the statutes in which it has been used. In a more general sense, debt is that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay or perform to another. Debt implies an obligation to pay by contract, express or implied. Debt situations can arise in a number of ways, ranging from simple loan agreements to complex loan transactions.

Generally, the definition of corporate insolvency is classified into two categories:

i. Cash flow insolvency: This occurs when a company is unable to pay its debt as they fall due.[14] In other words, the company is unable to meet its financial obligations at the due date.

[11] S. 868 CAMA 2020.
[12] "The Concept of Debt Explained", Financial Planning Tips.
[13] *Uzor* v *Daewoo Nigeria Ltd* (2019) 10 NWLR (Pt. 1680) 207.
[14] Goode, *supra* n 6, at 2.

ii. Balance sheet insolvency: This occurs where the liabilities of a company exceed its assets, taking into account not only current liabilities, but also contingent and prospective liabilities.[15]

These descriptions help in understanding the theoretical basis of determining if a company is insolvent. However, in practice, the test commonly applied by courts is the cash flow test, considering that what the court needs to determine is whether a company is paying its undisputed debts.[16] Section 572 CAMA 2020 provides the statutory test for determining when a company is unable to pay its debt. It states thus;

A company is deemed to be unable to pay its debts if;

> (a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding ₦200,000, then due, has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
>
> (b) execution or other process issued on a judgment, act or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
>
> (c) the Court, after taking into account any contingent or prospective liability of the company, is satisfied that the company is unable to pay its debts.

This provision retains the test under the Repealed CAMA[17] verbatim, except that the Repealed CAMA limits the indebted sum at an amount not exceeding ₦2,000 (Two Thousand Naira only). The implication of

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[15] J. Birds, E. Ferran, and C. Villiers, *Boyle & Birds' Company Law*, 4th ed. (Jordan Publishing Limited: 2000), p. 639.
[16] Goode, *supra* n 6, at 87.
[17] S. 409 Repealed CAMA.

this test is that a company which evidently has the ability to pay its debt but still fails to do so will be deemed insolvent.[18]

Companies borrow from wide range of individuals and institutional lenders, including financial institutions, trade creditors (who supplies goods on credit), debenture holders, or even consumers who pay for goods and services rendered in advance. Since loan is not a gift, provision is always made for recovery of the loan, whether secured or unsecured.[19] The unsecured creditor has the general remedies preserved by common law, while the secured creditors have additional remedies arising from the security for advance that they have obtained by virtue of the secured debenture.[20]

When a borrowing company offers security to its lenders, it proves attractive as the security creates right that takes priority over the claims of unsecured creditors in the case of the borrowing company's insolvency.[21] On the other hand, unsecured creditors are treated on equal footing – *pari passu* – and share in insolvency pro rata according to their pre-insolvency entitlements or sums they are owed. An unsecured lender bears the risk that its debt will be satisfied after the secured creditors have been paid if the debtor company becomes insolvent. Moreover, the unsecured lender has no enforceable interest in the debtor's property prior to the bankruptcy or winding up, only a right to sue for money owed and to enforce judgment against the debtor.[22] Where a company defaults in the repayment of its debt, the steps exercisable by an aggrieved creditor will depend on whether the creditor is secured or unsecured.

3.0. CORPORATE INSOLVENCY REGIME PRIOR TO CAMA 2020

[18] O. Olanipekun (ed.), *Banking: Theory, Regulation, Law and Practice* (Au Courant: Lagos, 2016), p. 435.
[19] *Ogioro* v *Igbinovia* (1998) 13 NWLR (Pt. 582) 426 at 438.
[20] N.C.S. Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (Novena Publishers: 2010), p. 548.
[21] V. Finch, *Corporate Insolvency law, Perspectives and Principles* (Cambridge, 2002), p. 64
[22] *Ibid*, at 66.

The recourse taken by creditors when a company goes insolvent in Nigeria, prior to the enactment of CAMA 2020, are not exhaustive. However, the formal procedures ranged from action to recover the debt, realization of the security created under the debenture,[23] appointing a receiver to bring an action against the company to enforce its security or commencing a winding up proceedings against the company,[24] to presenting a winding up petition to the Federal High Court against the company. A common trend with these procedures was that they paid little attention to business recovery, and the only available remedy to encourage business recovery under the Repealed CAMA is the procedure for Arrangement and Compromise, which requires less intervention from the court but may require efforts from both the debtor and another viable and interested company willing to merge or acquire the assets of the debtor.[25]

3.1. ACTION FOR RECOVERY OF DEBT

This is by instituting a court action for payment of the principal and interest of the sum owed. The Constitution of the Federal Republic of Nigeria (as amended) vests the courts with jurisdiction in civil matters.[26] There are plethora of decisions that uphold the jurisdiction of courts in debt recovery matters.[27] The cause of action for debt recovery accrues after demand has been made for the payment and the debtor refuses to pay.[28] However, where parties have agreed on when the debt is due and payable, expressly barring the requirement for express demand of payment, the cause of action accrues from the stipulated time[29].

[23] S. 208 Repealed CAMA. This is also provided for in s. 232 CAMA 2020.
[24] S. 209 Repealed CAMA. This is provided for in s. 233 CAMA 2020.
[25] A. Idigbe, "Using Existing Insolvency Framework to Drive Business in Nigeria; The Roles of Judges" available http://punuka.com/wp-content/uploads/2019/01/role_of_judges_in_driving_a_business_recue_approach_in_existing_insolvency_framework.pdf (accessed 10 September 2020).
[26] S. 6(6)(b) of the Constitution of the Federal Republic of Nigeria (CFRN) 1999.
[27] *ROE Ltd.* v *UNN* (2018) 6 NWLR (Pt. 1616) 420.
[28] *Edosomwan* v *A.C.B Ltd.* (1995) 7 NWLR (Pt. 408) 472; *Mbu* v *Stanbic IBTC Bank Plc.* (2016) 12 NWLR (Pt. 1527) 397.
[29] *LUTHMB* v *Adewole* (1998) 5 NWLR (Pt. 550) 406.

The determination of the court vested with jurisdiction in any action for recovery of debt depends on the circumstances surrounding the existence of the debt. Where the debt claimed arises from a strictly contractual relationship, the High Court of various states have exclusive jurisdiction irrespective of whether the debtor is a corporation.[30] However, where the debt claimed arises from a banker-customer relationship, the State High Court and the Federal High Court have concurrent jurisdiction.[31]

Various rules of courts[32] provide for a summary judgment procedure where the defendant has no defence to the claim against it. This is a faster procedure as judgment is given on merit without the rigors of full trial. The purpose of the procedure is to prevent a defendant from putting up sham defences to defeat the end of justice, causing great loss to the plaintiff in a bid to enforcing their rights.[33] This medium of debt recovery is available to any creditor, whether an artificial or a natural person, secured or unsecured. The creditor may levy execution of the judgment for the judgment sum after the successful court judgment in his favour. The judgment for payment of money may be enforced by several ways provided by the Sheriffs and Civil Process Act,[34] Writ of fiery facias,[35] Garnishee proceedings,[36] and Judgment summons.[37]

This procedure is not so viable because the time-consuming nature of litigation in Nigeria would have adverse effect on the value of the indebted sum by the time judgment is entered in favour of the creditor. The award of cost of litigation by courts is largely discretionary and usually meagre to cover the expenses incurred by the creditor in the recovery suit. The cost of litigation would not be

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[30] *TSKJ Nig. Ltd.* v *Otochem Nig. Ltd*. (2018) 11 NWLR (Pt. 1630) 330; *FUTA* v *BMA Ventures Nig. Ltd* (2018) 17 NWLR (Pt. 1649) 477.
[31] S. 251(d) CFRN; *NDIC* v *Okem Enterprises Limited* (2004) 10 NWLR (Pt. 880) 107.
[32] Order 1 High Court of Lagos State Civil Procedure Rules 2019; Order 3 High Court of Federal Capital Territory Civil Procedure Rules 2018.
[33] *Macaulay* v *NAL Merchant Bank Limited* (1990) 4 NWLR (Pt. 144) 283.
[34] Sheriffs and Civil Process Act, Cap. S6, LFN 2004.
[35] Order VII Judgment (Enforcement) Rules.
[36] Order VIII Judgment (Enforcement) Rules.
[37] Order IX Judgment (Enforcement) Rules.

recoverable by the creditor as part of the debt except there has been a prior express agreement to that effect between the creditor and the debtor.[38] The judgment creditor may also realize at the point of execution that the judgment debtor has little or nothing to satisfy the judgment debt. Although, it seems this is usually addressed by the practice of seeking mareva injunction against the debtor during the interlocutory stage of the suit to ensure that the assets are not dissipated by the debtor company.

3.2. APPOINTMENT OF A RECEIVER/MANAGER[39]

Receivership is a long-established method by which secured creditors can enforce their security.[40] This is available to only secured creditors. A debenture holder whose debt is due to be paid becomes entitled to appoint a receiver/manager to enforce the security. A receiver's duty is to realise the debenture holder's security by receiving rents and profits over the assets of the company and not to manage the affairs of the company. While a manager has the power to carry on the business of the company, run its undertaking or manage its affairs,[41] a manager is not generally appointed except to carry on the business for the purpose of selling it as a going concern.[42]

Where a creditor enforces his security by appointing a receiver/manager, the assets belonging to the debtor company now come under the receiver/manager. Thus, upon appointment of a receiver/manager, the powers to manage the company's business automatically became vested in the receiver/manager.[43]

The receiver could be appointed by the court where the company defaults on a debenture that is secured by fixed or floating charge over all or most of the company's asset.[44] The court can also appoint a receiver/manager where the debenture deed does not provide for appointment of a receiver/manager. The court grants application to

[38] *Olusanya* v *Osinleye* (2013) 7 NWLR (Pt. 1367) 148.
[39] S. 209 and 389 Repealed CAMA.
[40] Goode, *supra* n 6, at Chapter 9.
[41] S. 393 Repealed CAMA.
[42] *PIP Ltd.* v *Trade Bank Nig. Plc.* (2009) 13 NWLR (Pt. 1159) 577.
[43] *Jukok Int'l Ltd* v *Diamond Bank Plc.* (2016) 6 NWLR (Pt. 1507) 55.
[44] S. 389 Repealed CAMA.

appoint a receiver/manager where it appears just and convenient to do so,[45] and for the protection and preservation of the assets of the company for the benefit of those who have interest in it.[46] A receiver could also be appointed by a debenture holder or the trustee of a debenture[47] where the terms of the debenture deed so provide.[48] Where a mortgage is by deed, the law implies the mortgagee's power to appoint a receiver.[49] A receiver/manager appointed by court shall be deemed to be an officer of the court and not of the company and act in accordance with the directions of the court.[50] A receiver/manager appointed out of court may apply to court for direction in discharging his duties[51] and is also deemed to be the agent of those who appointed him.[52]

The powers of the directors of a debtor company under receivership to deal with the property or undertaking over which a receiver/manager is appointed ceases until the receiver/manager is discharged.[53] Consequently, the receiver/manager has the right to be served with or receive any legal document or court process in the name and on behalf of the company in respect of the assets of the company for which he is appointed.[54] The receiver/manager is entitled to possession of the asset charged subject to prior charges and all rights of set off acquired by debtors to the company.[55]

The receiver/manager appointed out of court can exercise the powers specified in the instrument of appointment in addition to those implied by the law.[56] Sometimes in practice, the receiver/manager would sell off the assets over which he is appointed to liquidate the debt.

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[45] *Fasakin* v *Fasakin* (1994) 4 NWLR (Pt. 340) 597.
[46] *Okoya & Ors* v *Santili & Ors* (1990) 2 NWLR (Pt. 131) 172.
[47] S. 209 Repealed CAMA.
[48] *Intercontractors Nigeria Limited* v *UAC Nig. Ltd. & Ors* (1988) 2 NWLR (Pt. 76) 303.
[49] S. 19 Conveyancing Act 1881; S. 131 Property and Conveyancing Law 1959.
[50] S. 389 (2) Repealed CAMA.
[51] S. 391 and 393 Repealed CAMA.
[52] S. 390 Repealed CAMA.
[53] S. 393(4) Repealed CAMA.
[54] *Dagazau* v *Bokir Int'l Co. Ltd* (2011) 14 NWLR (Part 1267) 261.
[55] *Supra* n 48.
[56] S. 393 Repealed CAMA; 11th Schedule CAMA 2020.

The Repealed Act imposes a number of obligations on the receiver/manager. The receiver/manager has the duty to inform the Corporate Affairs Commission ("CAC" or the "Commission") of his appointment within seven days of the appointment.[57] He is also required to furnish the CAC, the company and all debenture holders abstract showing receipts and payment for particular period.[58] He also has the obligation to render accounts of payments and receipts to CAC for every six months during his appointment and within one month after he ceases to so act.[59] It is a common practice for a receiver/manager appointed out of court to obtain interim and interlocutory injunction against the debtor-company and its agent from interfering with him in the discharge of his duties and to restrain them from dissipating the assets over which he is appointed. However, this practice is only to err on the side of caution as the receiver/manager's power remains unaltered whether or not such court order is obtained.

The receiver/manager stands in a fiduciary position with the company and has the obligation to act at all time in the best interest of the company to preserve its assets, further its business and promote the purposes for which it was formed in a manner that a faithful, diligent, careful and ordinarily skilful manager would act in the circumstances.[60]

The receiver/manager appointed out of court will distribute money realized from the assets over which he is appointed in accordance with the instrument of appointment while the receiver/manager appointed by court will apply to court for an order setting out the manner of distribution.[61]

3.3. PETITION FOR WINDING UP

This procedure is largely regulated by the Repealed CAMA, subsidiary legislations like Winding up Rules 2010, and other sectorial legislations

[57] S. 206 Repealed CAMA.
[58] S. 396 (2) Repealed CAMA.
[59] S. 398 Repealed CAMA.
[60] S. 390 Repealed CAMA.
[61] S. 391 Repealed CAMA.

where the Company sought to be wound up is a regulated one.[62] Winding up by court under section 408 of the Repealed CAMA, may be on a number of grounds, the relevant one to insolvency if the Company is unable to pay its debt. The Repealed Act defines inability to pay debt[63] which has been examined earlier on in this paper. The petition for winding up under the Repealed Act can be presented by a number of person but the relevant ones to insolvency proceedings are the official receiver; trustee in bankruptcy; the personal representative of the creditor; a receiver if authorized by the instrument of appointment or a contingent /prospective creditor.[64] The court with jurisdiction to make a winding up order is the Federal High Court.[65] The Repealed Act goes further to state that the petition must be filed at the Federal High Court within the judicial division of the registered or head office of the company sought to be wound up.[66] This procedure is applicable to both secured and unsecured creditors. However, whilst the unsecured creditor must prove his debt, the secured creditor needs not prove his debt but may rely on his security.[67]

A winding up proceeding is the signing of the death warrant of the company or pronouncement of death of the company.[68] It is a process by which the company is liquidated and dissolved and its assets (if any) distributed in accordance with certain rules of priority for the benefit of the creditors, members and employees of the company.[69] A petition for winding up of a company pursuant to the provisions of CAMA

[62] Investment and Securities Act 2007 (as amended 2015); The Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act 1994; The Nigeria Deposit Insurance Corporation Act 1988 (as amended 2006); The Banks and Other Financial Institutions Act 2004; The Asset Management Corporation of Nigeria Act 2010 (as amended 2019); The Insurance Act 2003; The National Insurance Commission Act 1997; The Federal High Court Rules (Civil Procedure) Rules 2019.
[63] S. 409 Repealed CAMA.
[64] S. 410 Repealed CAMA.
[65] S. 401 and 567 Repealed CAMA.
[66] S. 407 Repealed CAMA.
[67] *National Development Company Limited* v *United Bank for Africa Plc.* (1996) 3 NWLR (Pt. 437) 435.
[68] *Tate Industries Plc.* v *Devcom Merchant Bank Ltd*. (2004) 17 NWLR (Pt. 901).
[69] *Supra* n 18, at 448.

appears to be more commonly used in Nigeria by creditors against debtor companies, than procedure for business recovery such as Arrangement and Compromise which could allow a company to reorganize its operations and finances with a view to eventually paying off its debts.[70] The object of winding-up provisions is to put all unsecured creditors upon an equality and to pay them *pari passu*.[71]

The grant of a winding up order is not automatic, the court is usually wary to grant such order because of its far reaching effect in some instances, for example, where the respondent-company genuinely disputes the debt.[72] In such instance, the petitioner will resort to a debt recovery action to resolve the disputed debt before filing for winding up petition if the need arises.[73] Although, it is not in all cases where the debt claim is disputed that the court will refuse to make a winding up order. The court will only refuse to do so if the debt in issue is so colossal such that the assets of the company, if left untouched, will not in the nearest future, having regard to galloping inflation, be sufficient to pay off the debt when they are realized. In that instance, justice demands that the court exercises restraint in acceding to a winding up prayer and wait for the determination of the suit relating to the disputed debt.[74] However, the mere dispute as to the precise amount owed will not deter a winding up order being made if the court is satisfied that the company is insolvent.[75]

Another instance of winding up by creditors on the basis of insolvency is where the directors in a company's voluntary winding up fail to make the statutory declaration of solvency[76] within five (5) weeks before the passing of the winding up resolution. In that instance, the winding up

[70] *Ibid*.
[71] *Omaghoni* v *Nigeria Airways Ltd*. (2006) 18 NWLR (Pt. 1011).
[72] *Air Via Ltd.* v *Oriental Airlines Ltd*. (2004) 9 NWLR (Pt. 878) 298; *Union Bank of Nigeria Ltd.* v *Tropic Foods Ltd.* (1992) 3 NWLR (Pt. 228) 231.
[73] *Ibid*.
[74] *Ado Ibrahim* v *BCC Ltd*. (2007) 15 NWLR (Pt. 1058) 538.
[75] *Tandy and Freeman* v *Harmony House Furniture Co. Ltd*. (1972) NCLR 163.
[76] S. 462 Repealed CAMA; A statement by directors that having made full inquiry into the affairs of the company, they are of the opinion that the company will be able to fully liquidate its debt within such period not more than 12 months from commencement of the winding up.

shall be deemed to be a creditor's voluntary winding up.[77] A liquidator appointed also has the obligation to summon a meeting of creditors if he forms the opinion that the company will be unable to pay its debt fully within the period stated in the statutory declaration of solvency, and lay before them a statement of assets and liabilities of the company.[78]

The contractual capacity is usually the first casualty upon the issuance of a winding-up order and the appointment of a liquidator. Effective from the date of the winding-up order or the appointment of a liquidator, the liquidator can only carry on the business of the company with the sanction of the court or "Committee of Inspection" so far as may be necessary for its beneficial winding up.[79] The power of the director ceases upon appointment of the liquidator.[80] The leave of the Federal High Court must also be obtained before an action can be commenced or proceeded against a company when a winding-up order has been made or a provisional liquidator has been appointed.[81] Any disposition of assets of the company or alteration in the status of its members after the commencement of winding-up by a court, which is after the presentation of the winding up petition,[82] shall be void.[83]

A liquidator is appointed either by the shareholders, or by creditors of a company through an application to the Court. He is appointed to run the affairs of a company being wound-up, by ensuring all company's debts are settled (if any) and surplus proceeds distributed accordingly. The liquidator in a winding-up by court has the power to do several things listed in the Act with the sanction of the court or Committee of Inspection. The power includes instituting or defending an action on behalf of the company, carrying on its business as is necessary for its beneficial winding up, paying any class of creditors in full, etc.[84] The power of the liquidator to do some acts like selling the assets of the

[77] S. 462(4) Repealed CAMA.
[78] S. 466 Repealed CAMA.
[79] *Gbedu* v *Itie* (2010) 10 NWLR (Pt. 1202) 227.
[80] S. 422(9) CAMA.
[81] S. 417 Repealed CAMA.
[82] S. 415 (2) Repealed CAMA.
[83] S. 413 Repealed CAMA.
[84] S 425(1) Repealed CAMA.

company by auction or private contract, executing documents on its behalf, drawing or accepting a bill of exchange etc., is not dependent on the sanction of court or Committee of Inspection.[85]

Liquidation procedures generally have no effect on existing contracts, except such contracts relating to property are deemed a fraudulent preference which shall render them void.[86] Any floating charge created on the asset of the company within three months of commencement of the winding-up shall be invalid unless it is proved that the company was solvent immediately after the creation of the charge.[87]

Upon the conclusion of the winding up of the company and its dissolution, the costs properly incurred in winding up including the remuneration of the liquidator are paid out of the company's assets in priority to all other claims.[88] There are also other dues like taxes and employees' outstanding remuneration that rank prior to all other debts.[89]

The pitfall of winding up as a mechanism for recovery in corporate insolvency is that the expenses that rank prior to other claims may take a very large proportion of the money realized from sale of the assets, thereby leaving the creditors with little or nothing to contend with. In addition to this, other challenges faced in the liquidation process include laying off employees with attendant difficulty in fully discharging payments of severance packages that becomes due upon termination, and selling the assets of a company at undervalue, as the company must sell its assets. Therefore, creditors are potentially exposed to losses as the company has the obligation to sell its assets at the earliest possible time.

3.4. ARRANGEMENT & COMPROMISE[90]

Arrangement is a change in right or liabilities of the members, debenture holders and creditors of the company or any class of them

[85] S. 425(2) Repealed CAMA.
[86] S. 495 Repealed CAMA.
[87] S. 498 Repealed CAMA.
[88] S. 484 Repealed CAMA.
[89] S. 494 Repealed CAMA.
[90] S. 537 and 539 Repealed CAMA.

by the unanimous agreement of all parties affected.[91] This arrangement alters the obligation of the company to either its members or creditors by relinquishing some of their rights to the company. The relevant scheme of arrangement for the purpose of insolvency is the one arranged with creditors. This enables the company to agree with its creditors to accept lesser than what they are entitled to with the sanction of the court after the fairness of the scheme has been ascertained.[92] An example of the scheme of arrangement that could be proposed to creditors is to propose a relinquishment of their security; permit the creation of a prior or *pari passu* charge; undertake to pay them prior to the reconstruction or convince them to take shares in the company; or part shares and part cash in satisfaction of their debt.[93] The company proposes a scheme of compromise with its creditors and the court orders a creditors' meeting to be summoned, if at least majority representing three-quarter (or 75%) in the value of the creditors being present agree to the compromise, it will be referred to the court which shall sanction the arrangement if satisfied of its fairness. Where the debtor-company is a publicly quoted company, the court will refer the scheme of arrangement to the Securities and Exchange Commission which shall appoint one or more inspectors to investigate the fairness of the said scheme and make a written report to the court in respect thereof, which shall then sanction it. The company, or its liquidator in the case of a company being wound up and its creditors become bound by the scheme after it has been sanctioned by the court.[94]

This seems to be the only restructuring model proposed by the Repealed Act, and it gives the company the opportunity to make the proposal for compromise, although the court's sanction is the only thing that makes it binding on the parties.

4.0. INNOVATIONS IN THE CAMA 2020 RELATING TO CORPORATE INSOLVENCY PRACTICE

[91] S. 537 Repealed CAMA.
[92] *Supra* n 20, at 607.
[93] *Ibid*, at 608
[94] S. 539(3) Repealed CAMA.

The CAMA 2020 provisions, as they relate to corporate insolvency, appear to be largely modelled after the United Kingdom Insolvency Act 1986 (the "UK Insolvency Act"). It is obvious that the draftsmen have realized that when companies experience a downward turn of economic fortune, ailing companies should be encouraged to adopt healthy corporate restructuring options rather than fizzle out by liquidation or harsh legal framework. Therefore, the extant Act appears to be more business rescue and restructuring oriented compared to the liquidation-centric model of the Repealed Act. The innovations in the extant Act as they relate to corporate insolvency are highlighted thus;

4.1. COMPANY VOLUNTARY ARRANGEMENT

This is a proposal by the directors of a company, the administrator of a company in administration, or the liquidator of a company being wound up to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs.[95] It is an agreement between companies and their creditors for the satisfaction of corporate debts or for scheme of arrangement of the companies' affairs.[96] A nominee who must be qualified to act as an Insolvency Practitioner should be appointed as a trustee or supervisor of the voluntary arrangement.[97] The nominee shall within twenty-eight (28) days of notice of his appointment report to court on whether a meeting of the company and its creditors should hold,[98] failing which the nominee may be replaced on application by the person making proposal for the arrangement to the court.[99] The meeting summoned may approve the proposal with or without modifications but no modification can affect the right of a secured creditor to enforce his security without the creditor's concurrence to such modification.[100] The proposal or its modification shall not approve payment of non-preferential debts in priority to preferential debts or a proportion of preferential debt smaller to what is paid other preferential debt holders without the

[95] S. 434(1) and (3) CAMA 2020.
[96] Vannessa Finch *Supra* n 21, at page 146.
[97] S. 434(2) CAMA 2020.
[98] S. 435(2) CAMA 2020.
[99] S. 435(4) CAMA 2020.
[100] S. 437 CAMA 2020.

concurrence of the preferential debt holder.[101] The chairman of the meeting shall also report the outcome of the meeting to the Federal High Court.[102] The decision takes effect if it has been taken by both meetings or by the creditors' meeting summoned pursuant to a court order.[103]

Any person dissatisfied with the decision of the supervisor of the voluntary arrangement may apply to court which may modify, reverse, confirm or make any order as it deems fit.[104] The supervisor may apply to the court for directions in relation to any particular matter arising under the voluntary arrangement, and may apply to the court for the winding up of the company or for an administration order to be made in relation to it when necessary.[105]

Under the UK Insolvency Act, parties to the arrangement are free to agree to almost any terms subject to the protection of secured creditors[106] and preferential creditors.[107]

4.2. APPOINTMENT OF ADMINISTRATORS

An administrator can be appointed pursuant to an administrative order of court, by the holder of a floating charge or the company or its directors.[108]

An administration order may be made by the Federal High Court upon application by company, directors, creditors or any official of the court designated to act as a receiver under the Act or any legislation,[109] where the court is satisfied that the company is or is likely to become unable to pay its debts.[110] The court has wide powers to make any

[101] S. 437(3) CAMA 2020.
[102] S. 437(6) CAMA 2020.
[103] S. 438 CAMA 2020.
[104] S. 442(3) CAMA 2020.
[105] S. 442(4) CAMA 2020.
[106] S. 4(3) Insolvency Act 1986.
[107] S. 4(4) Insolvency Act 1986.
[108] S 443(1) CAMA 2020.
[109] S. 450(1) CAMA 2020.
[110] S. 449 CAMA 2020.

order as it deems fit upon hearing the application for an administrative order.[111]

A holder of a floating charge over the assets of the company may appoint an administrator if the administrator has given at least two (2) working days' of written notice to the holder of a prior floating charge or the latter has consented to the appointment in writing.[112] This provision will only apply where the instrument creating the charge specifies so or where it empowers the holder to appoint an administrator or receiver over the assets so secured.[113] A holder of a floating charge cannot appoint an administrator in a number of instances such as when the floating charge is unenforceable; the provisional liquidator of the company has been appointed under section 585 of the Act; or there is a receiver or manager in office at the time of commencement of the Act.[114]

A company or its directors may also appoint an administrator out of Court.[115] The holder of a floating charge shall not be able to appoint an administrator within 12 months after the court administration order ceases.[116] An administrator cannot be appointed by the company or its director where there is a pending winding up petition or administration application or there is a receiver in office.[117] The court shall also dismiss application for administration where there is a receiver appointed by the holder of a fixed charge. This is the case except the security holder consents to the order in writing or the court considers the security in respect of which he was appointed liable to be released under Sections 232 and 233 CAMA 2020 or challengeable under Sections 558 and 559 CAMA 2020.[118] However, a receiver appointed by a holder of a floating charge or court shall vacate the office where an administration order is made.[119] Also, any

[111] S. 451(1) CAMA 2020.
[112] S. 452 and 453(1) CAMA 2020.
[113] S. 452(2) CAMA 2020.
[114] S. 454 CAMA 2020.
[115] S. 459 CAMA 2020.
[116] S. 460 CAMA 2020.
[117] S. 462 CAMA 2020.
[118] S. 476 CAMA 2020.
[119] S. 478(1) CAMA 2020.

receiver of part of the company's property appointed by a secured creditor shall vacate office upon the administrator's request.[120] In both instances, the receiver is entitled to remuneration out of the company's assets which was under the receivership, immediately before the vacation, and he needs not make any abstract report to the CAC.[121] A company in administration cannot pass a resolution for winding up and the court cannot make a winding up order except the petition is one presented on grounds of public interest or under the legislations applicable to financial bodies.[122] In addition to the foregoing, no step shall be taken to enforce security over a company's property, repossess goods in its possession under a hire purchase agreement, legal proceedings, execution, distress and diligence, right or forfeiture or peaceable re-entry shall be made while it is in administration, except with the court's permission or administrator's consent.[123] Every business document issued by or on behalf of the company or its administrator and all the company's websites while it is in administration must state details of the administrator and that the affairs of the company is being run by an administrator.[124]

When an administration order is made in respect of the company, any winding up petition against such company shall be dismissed or suspended if the application for administration order was made by the liquidator of the company.[125] This would not apply where the winding up petition is presented under special banking provisions of the Banks and Other Financial Institutions Act (BOFIA), Nigerian Deposit Insurance Corporation (NDIC) Act, or any law or rule by a financial services and markets regulator.[126]

The administrator shall be deemed to be an officer of court howsoever appointed.[127] The administrator must be qualified to act as

[120] S. 478(2) CAMA 2020.
[121] S. 478(3) CAMA 2020.
[122] S. 479(3) CAMA 2020.
[123] S. 480 CAMA 2020.
[124] S. 402 CAMA 2020.
[125] S. 477(1) CAMA 2020.
[126] S. 477(3) CAMA 2020.
[127] S. 446 CAMA 2020.

an insolvency practitioner.[128] The primary objective of an administrator in the exercise of their function is to rescue the company as a going concern. They can only pursue other objectives like achieving a better result for the company's creditors as a whole, or realising the asset for distribution to some secured creditor or preferential creditors, where of the opinion that the primary objective is not reasonably practicable or a better result can be achieved for the company's creditors by pursuing some other course.[129]

Furthermore, an administrator shall issue a notice of appointment to the company, all its creditors, the CAC, and publish the notice in any prescribed manner not later than 14 days after the appointment takes effect.[130] An administrator has the obligation to prepare a proposal of how they intend to achieve the purpose of administration which may include the proposal for company's voluntary arrangement, scheme of arrangement and compromise, and explain where necessary why business rescue will not be achievable. The proposal shall be sent to the CAC, the creditors, and members of the company within 30 days of the company being in administration.[131] The administrator shall thereafter summon creditors' meeting where the proposal may be approved or modified. The report of the creditors' meeting shall be made to the court, the CAC, and every other person prescribed by the Minister for Trade.[132] In any instance where the report made to the court is that the creditors refused to approve the administrator's proposal or revised proposal, the court may make interim order or any other appropriate order.[133] The administrator shall summon a further creditors' meeting if it is so requested by creditors of the company whose debts amount to at least 10% of the total debts of the company or ordered by the court.[134]

An administrator shall not be appointed over a company that is not an authorized deposit taker or has as a liability in respect of a deposit

[128] S. 447(1) CAMA 2020.
[129] S. 444(2) CAMA 2020.
[130] S. 483 CAMA 2020.
[131] S. 486 CAMA 2020.
[132] S. 490 CAMA 2020.
[133] S. 492 CAMA 2020.
[134] S. 493 CAMA 2020.

which it accepted in accordance with relevant banking laws.[135] Also, an administrator can only be appointed in respect of an insurance company with the leave of the relevant regulatory body.[136]

An administrator may do anything necessary or expedient for the management of the affairs, business and property of the company.[137] In addition to the wide powers specified in the Eleventh Schedule of the CAMA 2020, the administrator can remove or appoint a director,[138] summon creditors' or company's meeting,[139] take custody or control of all the property to which the company is entitled,[140] etc. The administrator may also apply to court for directions in connection with their functions.[141] The company in administration can only exercise management powers with the consent of the administrator.[142] The administrator of a company acts as its agent in the performance of its duty.[143] Where a provisional liquidator has been appointed upon the presentation of a winding up petition of a company in administration on the ground of public interest or under BOFIA, NDIC Act or financial services Act, the court shall order the administrator's appointment to cease to have effect.[144]

Additionally, the administrator has the obligation to perform their functions as quickly and efficiently as is reasonably practicable.[145] A creditor, member of a company in administration, or both, may apply to the court challenging the conduct of the administrator which is unfair as to harm the applicant's interest or is not performing his function as quickly and efficiently as possible.[146] The court may make any order as it deems fit on this application which may include

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[135] S. 447(4) CAMA 2020.
[136] S. 447(5) CAMA 2020.
[137] S. 496 CAMA 2020.
[138] S. 498 CAMA 2020.
[139] S. 499 CAMA 2020.
[140] S. 504 CAMA 2020.
[141] S. 500 CAMA 2020.
[142] S. 501(1) CAMA 2020.
[143] S. 506 CAMA 2020.
[144] S. 520 CAMA 2020.
[145] S. 445 CAMA 2020.
[146] S. 511 CAMA 2020.

regulating the administrator's actions or order that the administrator's appointment ceases to have effect.

Unless an administrator's tenure is extended for a specified period, by an order of the court on the application of the administrator, or a period not exceeding six months by consent of secured creditor or unsecured creditor of more than 50% of the company's unsecured debt,[147] the administrator's appointment shall cease to have effect within one year after it takes effect.[148] The court order for extension of the administrator's tenure shall not be made after the expiration of the tenure and can be made despite previous extension in whatever form.[149] The court may also provide for the appointment of an administrator of the company to cease to have effect from a specified time upon the administrator's application on the ground that the purpose of administration cannot be achieved in relation to the company; that the company should not have entered into administration; or where the creditors of a company so require the application to be made.[150] The administrator shall also make a similar application in a court ordered administration where the purpose of administration has been sufficiently achieved in relation to the company.[151] The court may also make a similar cessation order upon application by a creditor who proves improper motive of the appointer of the administrator or the applicant where the appointment was based on a court's order.[152] An administrator who thinks that the purpose of administration has been sufficiently achieved in relation to the company may file a notice to that effect with the CAC and the court, and send such notice to the creditors of the company.[153]

[147] S. 513(2) CAMA 2020.
[148] S. 513 CAMA 2020.
[149] S. 514(1) CAMA 2020.
[150] S. 517(2) CAMA 2020.
[151] S. 517(3) CAMA 2020.
[152] S. 519 CAMA 2020.
[153] S. 518(2)(4) CAMA 2020.

An administrator may resign by notice in writing to the appointing authority.[154] An administrator may also be removed by court order,[155] or if they cease to qualify as an insolvency practitioner in which case notice shall be given to the appointing body/authority.[156] An administrator who dies, resigns, vacates or is removed from office can be replaced by the relevant appointing body/authority.[157] Such administrator is discharged from liability in respect of any of their actions as administrator.[158]

4.3. CONVERSION OF ADMINISTRATION TO VOLUNTARY WINDING UP

A company shall be wound up if a resolution under Section 620 of the Act was passed, where an administrator issues a notice to the CAC that the section applies.[159] Upon registration of this notice by CAC, the administrator's appointment shall cease to have effect.[160]

Where the administrator of a company thinks that the company has no property which might permit distribution to its creditors, notifies the CAC of this fact for the purpose of registration, files the notice in court, and sends the filed noticed to all creditors, the company shall be deemed dissolved within three months of the registration of the notice.[161] The court on the application of the administrator has the power to extend or suspend the three-month period or discontinue the entire registration of the notice altogether.[162] Where the court so does, the administrator has the obligation to notify CAC.

4.4. ADMINISTRATION OF INSOLVENCY PRACTITIONERS

[154] S. 525 CAMA 2020.
[155] S. 526 CAMA 2020.
[156] S. 527 CAMA 2020.
[157] S. 529-535 CAMA 2020.
[158] S. 536(1) CAMA 2020.
[159] The provision of that section will apply on the basis that the total amount that secured and unsecured creditors of the company are likely to receive has been paid or set aside.
[160] S. 521 CAMA 2020.
[161] S. 522 CAMA 2020.
[162] S. 522(7) CAMA 2020.

An Insolvency Practitioner ("IP") can act as liquidator, provisional liquidator or official receiver, administrator or administrative receiver, receiver and manager, or as nominee or supervisor of a company's voluntary arrangement.[163] A person is qualified as an IP if such person has obtained a degree in accountancy or law from a recognized institution, has minimum of five years' experience in insolvency practice, is recognized as a member of Business Recovery and Insolvency Practitioners Association of Nigeria ("BRIPAN"), or any other body so recognized and authorized by CAC to act as an IP.[164] These conditions are conjunctive and must co-exist for a person to act as a qualified IP. The recognition of the BRIPAN as a certifying professional body is a laudable innovation as it ensures that insolvency practice is now regulated by a body which will ensure that members are continuously trained to measure up with the international best practices in the performance of their duties. The regulatory body will also be able to impose sanctions on its members in line with its code of conduct. It is also worthy of note that the CAC has the discretion to declare any professional body that meets stated requirements as an authorized professional body.[165] The CAC has the *vires* to authorize any person to act as an IP upon application, if such person meets the stated conditions.[166] The CAC also has the duty to consider if an applicant is fit and proper to act as an IP in addition to the educational qualification,[167] and can refuse or withdraw an IP's authorization if it is of the opinion that the person has ceased to be fit and proper to so act.[168]

A person whose application to act as an IP is refused, or the authorization is withdrawn, may apply by summons on notice to the court having jurisdiction in insolvency matters, within 21 days of the receipt of the notification, for a review of the decision of the CAC. The court, upon hearing the summons, may refuse or grant the

[163] S. 704 CAMA 2020.
[164] S. 705 CAMA 2020.
[165] S. 70 CAMA 2020.
[166] S. 707 CAMA 2020.
[167] S. 708(2) CAMA 2020.
[168] *Ibid*.

summons on such terms as it deems fit.[169] An appeal from the decision of the court shall lie to the Court of Appeal, and the decision of the Court of Appeal is final.

4.5. MORATORIUM ON CREDITORS VOLUNTARY WINDING UP IN A SCHEME OF ARRANGEMENT

One of the innovations of the extant Act relates to arrangement and compromise. It provides that no winding up petition or enforcement action by a creditor (secured or unsecured) shall be entertained against any company or its assets that has commenced a process of arrangement and compromise with its creditors for six months, from the time that the relevant company, by way of affidavit, provides all the requisite documents for such arrangement or compromise, to the court.[170] However, a secured creditor may, by application to the court, file within 30 days of notice of the arrangement and compromise, discharge the six months' moratorium period if: the secured creditor can prove that the asset of the company sought to be enforced by the creditor does not form part of the company's pool of assets to be considered under the arrangement and compromise; or they are perishable goods; the company consents to the security being enforced; or it has been enforced before the security holder got notice of the arrangement and compromise.[171] The company, upon the approval or consent, shall file a further affidavit updating the court of the dissipation of the said asset. This provision avails the secured creditor a leeway out of the moratorium period if any of the conditions so stated can be met.

4.6. NETTING[172]

The concept of netting was not statutorily recognized prior to the enactment of CAMA 2020. Therefore, parties could only avail themselves of its operation based on their private agreement. It specifically relates to the financial industry and financial contracts. Netting is a reconciliation and payment mechanism under which

[169] S. 709 CAMA 2020.
[170] S. 717 CAMA 2020.
[171] S. 717(2) CAMA 2020.
[172] S. 718-721 CAMA 2020.

amounts owed between contracting parties are consolidated into a single, smaller payment from one party to another. Netting is used to denote contractual arrangements by which claims of different parties against each other are reduced to a single balance.[173] Netting may be defined as a method of reducing credit and other risks of financial contracts by aggregating two or more obligations to achieve a reduced net obligation.[174]

The provisions of a netting agreement are enforceable in accordance with their terms, including against an insolvent party, and, where applicable, against a guarantor or other person providing security for a party. The operation of the netting agreement shall not be stayed, avoided, or otherwise limited by the action of a liquidator; any other provision of law relating to bankruptcy, reorganization, composition with creditors, receivership or any other insolvency proceeding an insolvent party may be subject to; or any other provision of law that may be applicable to an insolvent party, subject to the conditions contained in the applicable netting agreement.[175] However, the liquidator may avoid the terms of a netting agreement where there is clear and convincing evidence that the non-insolvent party incurred such obligation with actual intent to delay or defraud any entity to which the insolvent party was indebted or became indebted, on or after the date that such transfer was made or such obligation was incurred.[176]

It has been opined that a strong netting system generally gives rise to a thriving derivatives market, as it provides the most accurate picture

[173] C. Ofili, "Enforceability of Netting Provisions and the Intervention of the CAMA 2020", available at https://businessday.ng/opinion/article/enforceability-of-netting-provisions-and-the-intervention-of-the-cama-2020/#:~:text=%E2%80%9CNetting%E2%80%9D%20is%20a%20reconciliation%20and,reduced%20to%20a%20single%20balanceEnforceability (accessed 22 December 2020).

[174] O. Kalu and T. Nnamani, "Chapter 28 of the Companies and Allied Matters Act 2020 – Netting in Nigeria", available at https://www.mondaq.com/nigeria/securities/982072/chapter-28-of-the-companies-and-allied-matters-act-2020-netting-in-nigeria (accessed 22 December 2020).

[175] S. 721 CAMA 2020.

[176] S. 721(6) CAMA 2020.

of a company's financial position, solvency and liquidity risk and its benefits are; reduction of credit risk; reduction of settlement risk; reduction of liquidity risk; and reduction of systemic risk.[177]

4.7. REGISTRATION OF CHARGES

CAMA 2020 has significantly reduced the total fees payable to the Commission in connection with the filing, registration, or release of a charge. The fees payable for registration of a charge shall not exceed 0.35% of the value of the charge or such other amount as the Minister of Trade may specify.[178] This reduction in the fees payable for the registration of charges which previously cost ₦10,000 (Ten Thousand Naira) for every ₦1,000,000 (One Million Naira) or part thereof for private companies and ₦20,000 (Twenty Thousand Naira) for every ₦1,000,000 (One Million Naira) or part thereof for public companies makes it easier for charges to be registered with the Commission, since it is now cheaper to do so. Also, the public notice of existence of floating charge is a great development as it enables potential creditors of the company to make informed decision on granting the credit facility to the Company.

A person is deemed to have notice of a prohibition in a floating charge where a notice indicating its existence is registered with the Commission.[179]

The holder of a fixed charge shall have priority over other debts of the company including preferential debts, notwithstanding any provision in the CAMA 2020 or any other law to the contrary.[180] The Commission now has an obligation to enter in the register of charges, a notice indicating the existence of any provisions in a floating charge that prohibit or restrict the company from granting any further charge ranking in priority to, or *pari passu* with, the floating charge.[181]

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[177] *Supra* n 173.
[178] S. 222 CAMA 2020.
[179] S. 204 CAMA 2020.
[180] S. 207 CAMA 2020.
[181] S. 223 CAMA 2020.

4.8. INNOVATIONS IN RESPECT OF WINDING UP PROCEEDINGS

The proviso to Section 577 of CAMA 2020 contemplates that where a company is being wound up, only a fixed charge holder, or any other validly created and perfected security interest other than a floating charge holder, will be able to enforce security, sequestrate, attach or levy execution on the assets of the company. The proviso to Section 656 of CAMA 2020 states that nothing shall affect the power of any secured creditor to realize or otherwise deal with his security during the winding up of an insolvent company registered in Nigeria. Another innovation under the new Act is that upon winding up, priority must now be given to deductions made from the remuneration of employees and contributions of the company under the Pension Reform Act, and contributions and obligations of the company under the Employees' Compensation Act.[182] Furthermore, a company's debts shall rank equally among themselves after the expenses of the winding up have been settled and the debts shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.[183]

5.0. CONCLUSION

The CAMA 2020 makes a paradigm shift from the dissolution of insolvent company to the restructuring of insolvent companies to allow recovery and continuity of business. Although the Act still retains some of the debt recovery model under the Repealed Act, this paper has extensively analysed certain modifications and innovations in the Act. The apparent priority of administrators will bring some sanity to the current practice of appointment of multiple receiver/managers and provisional liquidators. It is also of additional benefit that failing administration will be converted to liquidation with the administrator as the liquidator or a separate liquidator is appointed to take over from the administrator. However, the innovations of

[182] S. 657 CAMA 2020.
[183] *Ibid*.

CAMA 2020 will not affect ongoing insolvency proceedings and regime under the Repealed Act.[184]

There is also a call from insolvency law practitioners and stakeholders for a specialized revenue court to be set up, with sole jurisdiction as a court of first instance, to settle disputes, curb the arbitrariness of the current regime and enable speedy adjudication of insolvency matters.[185] However, it appears that this will only be possible if there is a constitutional amendment to limit the jurisdiction of the State High Court and Federal High Court as it relates to insolvency proceedings.[186]

Nigeria stands to benefit enormously from the reform of its insolvency law, particularly in attracting more direct foreign investment and revenue for the government, wherein liquidation becomes the very last option resorted to after restructuring and other business rescue options have failed. The modern trend presently geared towards the restructuring of business entities to allow for the continuation of business would yield prolonged employments, payment of taxes and dividends, and other similar socioeconomic benefits.[187] The expectation is that with the support of insolvency practitioners, judges, the National Assembly, the Commission and every stakeholder in the insolvency practice, a holistic solution that addresses the management and provides sound business recovery and restructuring framework in Nigeria is achievable in the nearest future.

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[184] S. 869(2) CAMA 2020.

[185] E. Uwa, "Restructuring & Insolvency in Nigeria", available at https://whoswholegal.com/analysis/restructuring--insolvency-in-Nigeria (accessed 22 December 2020).

[186] S. 251 and 272 CFRN vests the Federal High Court and the State High courts with jurisdiction to adjudicate over some matters that may arise in the course of insolvency proceedings. The determination of the exclusive or concurrence of each court's jurisdiction depends on the facts and circumstances of each insolvency proceedings. However, the Constitutional supremacy provision entrenched in s. 3(1) of the Constitution makes it impossible to strip these courts of their respective jurisdiction by mere legislation without the attendant amendment of the relevant constitutional proceedings.

[187] *Supra* n 185.