CHAPTER ONE:

INTRODUCTION

1.1. Background to the Study

The universal characteristic feature of a registered or an incorporated company as contained in the various legislations on companies is that from the date in the Certificate of Incorporation, the subscribers of the memorandum together with such other persons as may from time to time become members of the company, shall be a body corporate[1] by the name stated in the Certificate of Incorporation and capable of exercising all powers and functions of an incorporated company.

The notion of a company being a body corporate from the date of incorporation in the Certificate of Incorporation implies in simple terms, that a company as from the date of incorporation acquires in law an existence and personality, which is distinct, separate and independent from that of its members[2] and indeed all other entities in the world. It becomes a legal or juristic person with its own name,[3] capable of suing and being sued in that name, entering into contracts in that name with any person, holding or disposing of land or other property and of living in perpetuity as it were,[4] whether or not the members who formed it are themselves, living or dead.

One of the incidences of incorporation is that every company shall for the furtherance of its authorised business or objects, have all powers of a natural person of full capacity.[5]Beyond a company being vested with all the powers of a natural

[1]Companies and Allied Matters Act, Cap C20 Laws of the Federation of Nigeria 2004 (CAMA), s. 37; Companies Act 2006, s. 16 (2) (UK); Companies Act 2013. s. 14 (2) Ghana.
[2]*Salomon v Salomon & Co Ltd* [1897] *AC 22; Aso Motel Kaduna Ltd v Deyemo*[2006]7 N.W.L.R (pt. 978) 87*; New Resources Int'l Ltd & Anor v Oranusi*[2011] 2 N.W.L.R (pt. 1230) 102; [2011] 3 CLRN 52.
[3]*ibid*; Companies Act, 2008 (as amended), s. 19 (1) (a) (South Africa).
[4]CAMA, *op cit*, s.37.
[5]*Ibid*, s. 38 (1).

person, it has the power to borrow money, charge property and to issue debentures.[6] These powers are primarily conferred on companies for purposes of raising capital for the furtherance of the business of the company. Although the incorporation of a company inures it with supposedly a life in perpetuity, this incident of incorporation does not pretend to assert that a company cannot 'die'. Therefore, there may be circumstances that the existence of a company can be brought to an end.[7] This is usually exemplified by the process of winding up or liquidation of a company on the ground that it cannot pay its debts or discharge its obligations.[8]

It has been observed over time that the consequence of winding up or liquidation of an insolvent company do not ultimately engender business efficacy or endow the creditor, whether secured or unsecured, with any business or commercial advantage. Rather the process of winding up or liquidation produces 'victims' whose loss or injury may not be remedied. While an insolvent company fixed with a winding up order may eventually be dissolved,[9] the creditor may not for certain reasons be able to reap any benefit out of the liquidation of the insolvent company.[10]

Arising from the ineffectual effects of winding up of an insolvent company is the clamour for alternative options to winding up. Ajayi[11] posited, thus:

> … the global trend is to develop and allow for the development and survival of companies especially in our country where death of a company means that of

[6] *Ibid*, s. 166.
[7] P L Davies & S Worthington, *Gower & Davies' Principles of Modern Company Law* (9th edn, London: Sweet & Maxwell, 2012) p. 1271.
[8] CAMA, *op cit*, ss. 408 (d) & 409; Companies Act 2006 (UK), *op cit*, ss. 122 (i) (f) & 123; Bodies Corporate (Official Liquidations) Act 1963 [Act 180] [Ghana] ss. 3 (3) & 4 (2) (d).
[9] *C.C.B Plc v Mbakwe*(2000) F.W.L.R (pt 14) 2351.
[10] G C Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria* (2nd edn, Enugu: Snaap Press Limited, 2014) p. 467. This prolific writer commented on the delays in the Nigerian Court system; O Ajayi, *Legal Aspects of Finance in Emerging Markets* (London: LexisNexis ButterworthsTolley, 2005) p 603, where he stated that since assets of the company realised during winding up is shared among the creditors, winding up on the ground of the company's inability to pay debt may not be a viable option.
[11] Ajayi, *ibid*.

many families and those dependent on the employees

of the affected company… .

While the above-thought for enthronement of corporate rescue mechanisms remain topical, the recent and current development[12] in the corporate world and the state of the Nigerian economy demands for an urgent reform and strengthening of corporate rescue and insolvency law and practice in Nigeria. Without more, the essence of a sound legislation was captured at a public hearing by the Senate Committee on Banking, Insurance and other Financial Institutions on the Bankruptcy and Insolvency (Repeal and Re-enactment) Bill[13] by the Senate President thus, 'Insolvency system and practice always plays an important role in attracting both domestic and foreign investments as well as promoting investments and entrepreneurial development … given these opportunities, there is urgent need for us to repeal and re-enact this Act, which has become obsolete and out-dated'.[14]

It is pertinent to state that while the stakeholders at the said Senate Committee public hearing on the "Bankruptcy and Insolvency (Repeal and Re-enactment) Bill" did approve the repeal and re-enactment of the 37 years old Bankruptcy/Insolvency Act, they were vociferous in pointing out the flaws, contradictions and shortcomings of the proposed Act.

Finally, the need for urgent reform of corporate rescue and insolvency procedure in Nigeria cannot be over emphasised. The economy is in recession and companies, whether in manufacturing or non-manufacturing sectors, are facing

[12]Channels Television Headline News of March 17th, 2016 *"AMCON Liabilities Rise to 6.6 Trillion Naira"*. Prior to this, AMCON had given notice of its delinquent debtors. The only remedy as it stands today in Nigeria, is for AMCON, to appoint a receiver (AMCON Act 2010 s. 48), obtain Order of Possession of the debtor's property (AMCON Act s. 49(1)), freezing of the debtor company's account (AMCON Act s. 50 (1)), Commencement of debt recovery action (AMCON Act, part V) and Winding up (AMCON Act, s. 52);

[13]2015. The Bill was passed into Law by the Senate on the 25th of May, 2016.

[14]O Agbajileke, 'Stakeholders Applaud Repeal of 37 years old Bankruptcy/Insolvency Act', Business Day Newspaper, Tuesday, 15th March, 2016. www.businessdayonline.com accessed 15 March 2016.

business decline and predisposed to imminent collapse, banks are overwhelmed with delinquent debtors;[15] the level of unemployment is on an astronomical scale; crude oil price is on an all-time low; State Governments are facing illiquidity; job losses, redundancy and pay-cuts are the prevailing phenomenon in the labour market, Family disharmony, societal breakdown, incidence of violence and disorientation in values are common place. Arising from this, is the agitation for diversification of the Nigerian economy and call for investments whether foreign or domestic. This can veritably be achieved if there is a sound and robust corporate rescue and insolvency law and procedure in Nigeria.

1.2. Statement of Problem

There are two major modes for a company to raise capital. A company limited by shares may raise capital through equity finance, that is, by obtaining capital through allotment of its shares.[16] This mode of raising capital by allotment of shares attaches certain rights and liabilities on the members or shareholders[17]including the right to dividend, if and when declared out of the distributable profits of the company.[18] Another mode of raising capital is through debt finance. The power of every company registered in Nigeria to borrow money, to charge property and to issue debentures for purposes of its business or objects and to provide security for any debt, liability or obligation of the company or any third party is clearly provided in section 166 of the CAMA. However, there are obvious problems arising from a company raising capital through debt finance. The core problem that typify such form of raising capital is mostly tied to the inadequate provisions and mechanisms for creditors,

[15]Skye Bank Plc publication of List of Loan Debtors, BusinessDay, February 11, 2016, pp. 33-35; Fidelity Bank Plc publication of Names of Delinquent Customers, BusinessDay, February 15, 2016, p.19; AMCON publication of List of Delinquent Debtors, BusinessDay, February 15, 2016, p. 13.
[16]CAMA, *op cit*, s. 117.
[17]*Ibid*, s. 114
[18]*Ibid*, s. 379 (5).

whether secured or unsecured, to realise the credit provided to the debtor company for the furtherance of its business or to enforce the security so provided by the debtor company.

It is common to insert contractual protections in the debt instrument in the form of covenants that generally requires the borrowing company to provide the creditor with periodic accounting information, perhaps including credit ratings, to conduct its operations so as to maintain predetermined financial ratios between assets and liabilities, insertion of negative pledge clauses and to refrain from certain defined acts or activities without the prior consent of the lender. This list of prohibitions usually extends to the disposal of substantial assets, changing the primary activities of the company, taking on additional loans, granting further security, distributing dividends above a nominated level of returns or changing the management or ownership structure. However, there seems to be a problem of enforcement of these contractual covenants when there is a breach.[19]

The oft-relied upon protection for a creditor in debt financing is proprietary security. This is a situation where a borrower is obliged to provide security for the repayment of its debts, mostly by way of a charge. In Nigeria, there are two forms of charge, to wit, fixed and floating charges.[20] By the very ambulatory[21] features of a floating charge, a borrowing company or the floating chargor can deplete, if not, extinguish the assets that are subject to the floating charge. In such a situation, the creditor is eventually left with an empty security. This scenario avowedly throws the

[19]Davies & Worthington, *op cit*, p. 1203.
[20]CAMA, *op cit*, s 178
[21]CAMA, *op cit*,s. 178; *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1997] 2 Lloyds Rep 142; *Re Yorkshire Woolcombers Association* [1803] 2 Ch 284.

problem of the enforcement of proprietary security by way of floating charge and raises certain salient questions.[22]

While in other jurisdictions such as the United Kingdom, the secured creditors have the "right of pursuit",[23] which means that where a company wrongfully and in violation of the rights of a chargee disposes of the property subject to the charge, the chargee is then entitled to enforce the security against any identifiable proceeds of the disposition, such right is not available to a chargee under relevant Nigerian laws. Hence, in the event that the right of pursuit is not provided for in the debt instrument, the security becomes a mere fluke.

The most common modes of enforcement of propriety security in Nigeria are Receivership[24]and Winding up. However, there are doubts on the efficacy of these modes. At present, the primary legislation on receivership and winding up, even on the ground of insolvency, in Nigeria, is the Companies and Allied Matters Act. It is obvious that the provisions of the CAMA is out-dated[25] and not in conformity with international best practices as it relates to receiverships and insolvency proceedings. There is absence of well-defined and adequate provisions on qualifications for a person to be appointed a receiver and/or manager, provisional liquidator, liquidator, etc in the process of receivership and winding up proceedings under the CAMA. Consequently, receivership and winding up proceedings as mechanisms for the enforcement of proprietary security seem not to have achieved much. Suffice to state that there is the problem of out-dated, inflexible and disparate legislations on

[22]What happens when the assets, subject of a floating charge, has been depleted or extinguished? What are the remedies open to a creditor in such circumstances?
[23]Davies & Worthington, *op cit*, p. 1213.
[24]A A Aina, 'Legal and Institutional Framework for Debt Finance by Companies in Nigeria', A PhD Pre-Field Seminar presented at the Faculty of Law, University of Ibadan, Ibadan, Nigeria on October, 2014, p. 1.
[25] A Idigbe, 'Using Existing Insolvency Framework to Drive Business Recovery in Nigeria: The Role of the Judges' A Paper delivered at the Federal High Court Judges Conference at Sankuru Hotel Sokoto, 2011, p. 11.

corporate insolvency in Nigeria. Furthermore, there is a problem arising from the absence of professional standards and regulation of persons who practise as corporate rescue and insolvency practitioners in Nigeria.

Some of the provisions in the CAMA as relating to winding up, particularly the definition of the phrase 'company's inability to pay debts', that is, insolvency, as when a company is indebted in a sum exceeding N2, 000.00 (Two thousand Naira),[26] is for short of words, confusing, laughable, out-rightly obsolete and absurd. According to Idigbe, the definition of 'insolvent person' in the CAMA is "not only inadequate but inefficient".[27] Thus, the definition of insolvency, which problem has made the law and practice of insolvency in Nigeria to be confusing, complex and uncertain.

There is the problem of inadequate corporate rescue mechanisms in the CAMA and other relevant laws in Nigeria. The global trend is to develop and allow for the development and survival of companies.[28] Unfortunately, the available corporate rescue mechanisms in Nigeria under the extant laws are limited to Arrangements and Compromise,[29] Mergers[30] and Receivership.[31] Regulatory Rescue and other informal corporate rescue mechanism such as cherry picking, purchase and Assumption and Debt for Equity Swap. These mechanisms are not only defective and deficient because of the absence of moratorium in them, but are also inadequate and limited when juxtaposed with the expansive corporate rescue mechanisms in other

[26] CAMA, *op cit*, s. 409 (a).
[27] Idigbe, *op cit*, p. 5.
[28] CAMA, *op cit*, Part XVI.; UNCITRAL
[29] Agbajileke, *op cit.*
[30] Investment and Securities Act (ISA) 2007, ss. 119-130.
[31] CAMA, *op cit*, Part XIV, ss. 387-400.

jurisdictions.[32] Hence, there is the challenge of the absence of dynamic, functional and effective corporate rescue mechanisms in the extant legislations.

However, these challenges associated with the archaic and out-dated provisions in the CAMA as relating to corporate rescue and insolvency may soon be over with the on-going deliberation and consideration of the "Bankruptcy and Insolvency (Repeal and Re-enactment) Bill by the Senate of the Federal Republic of Nigeria. This Bill on Corporate and Individual insolvency seeks to provide for a harmonised code on the rehabilitation of the insolvent debtor as well as create the office of the Supervisor of Insolvency.

While there is every reason to applaud and express support for the proposed Bill that repeals and re-enacts the 37 years old Bankruptcy Act, the contradictions and inadequacies[33] observed in the proposed Bill cannot be ignored. Foremost, the issues and challenges working against a viable and credible corporate rescue and insolvency law and practice in Nigeria seems not to have been holistically dealt with in the Bill as corporate insolvency matters were not provided for. Thus, the quest to reform the corporate rescue and insolvency law and practice in Nigeria must be holistic, and, consistent.

Flowing from the statement of problem, the following research questions are elicited:

1. What are the extant law and procedure on corporate rescue and insolvency in Nigeria?
2. What are the available corporate rescue mechanisms in Nigeria?

[32]Insolvency Act 1986, Part 1 (Company Voluntary Arrangements (CVAs)), Part 2 (Administration) (United Kingdom); Companies Act 2008, Chapter 6 ss. 128-155 (South Africa); Bankruptcy Code, Chapter 11 (United States of America); The Insolvency and Bankruptcy Code 2016, Chapter 2, ss. 6-32 (Republic of India).

[33]Agbajileke, *op cit*. Some of the provisions of the proposed Bill, particularly ss. 4, 5, 12, 13 and 68 purportedly contradicts AMCON Act ss. 51, 48, 35 (4) & 35 (2). Also, the inclusion of Dollars instead of Naira.

3. Are the extant corporate rescue and insolvency law and procedure in Nigeria adequate and effective for addressing corporate insolvency matters?
4. Are the extant law and procedure on corporate rescue and insolvency in Nigeria in line with international best practices and principles in resolving corporate insolvency?
5. What are the standards and qualifications regulating persons who practice as corporate rescue and insolvency practitioners in Nigeria?
6. What are the issues and challenges working against the orderly, effective and functional corporate rescue and insolvency in Nigeria?

1.3. Purpose of Study

The purpose of this study is to carry out a comprehensive examination of the extant corporate rescue and insolvency law and practice in Nigeria.

The specific objectives are to:

1. Examine and analyse the extant corporate rescue and insolvency law and practice in Nigeria;
2. Evaluate the effectiveness or otherwise of the extant legal, regulatory and Institutional frameworks for corporate rescue and insolvency in Nigeria;
3. Identify and examine the challenges and constraints to effective and functional corporate rescue and insolvency law and practice in Nigeria;
4. Establish professional standards and benchmarks for regulation of corporate rescue and insolvency practitioners in Nigeria;
5. Suggest reforms and new perspectives and approaches toward improving corporate rescue and insolvency law and practice in Nigeria.

1.4. Scope of Study

Winding up or liquidation[34] of a company as provided in the CAMA[35] can be triggered or activated if:

1. The company has by a special resolution resolved that the company be wound up by the court;
2. Default is made in delivering the statutory report to the Corporate Affairs Commission (CAC) or in holding the statutory meeting;
3. The number of members is reduced below two;
4. The company is unable to pay its debts;
5. The court is of the opinion that it is just and equitable that the company should be wound up;
6. The affairs of the company are being conducted in an unfairly, prejudicial, illegal or oppressive manner.[36]

The scope of this study shall primarily be limited to winding up or liquidation of a company on the ground of inability to pay debts. This is ordinarily known as insolvency.[37] Thus, the scope of study is limited to discussion of winding up by the Court on the ground of a company's inability to pay debts or discharge obligations and creditors' voluntary winding up. In other words, members' voluntary winding up will not be examined in details in this study. Furthermore, this study shall be limited to the examination of corporate rescue and insolvency law and practice in Nigeria and other jurisdictions such as the United Kingdom, the Republic of South Africa, the Republic of India and the United States of America, with the aim of drawing from

[34]N E Mustoe, *Bankruptcy Liquidation and Receivership* (London: Butterworth & Co (Publishers) Ltd, 1939) p. 157 – the word "Liquidation" is frequently used as a synonym for winding up.
[35]CAMA, *op cit,* s. 408
[36]*Ibid*, s. 312 (2) (a).
[37] *Ibid*, s. 409.

their peculiar experiences toward the quest for an effective and viable corporate rescue and insolvency law and practice in Nigeria.

1.5. Significance of Study

Every company needs capital to carry out its business or to function effectively, but as is most often the case; companies do not realize much of the needed capital from equity contribution. Thus, it becomes inevitable to resort to borrowed capital and in this instance; borrowers are often obliged to provide security for the repayment of their debts.[38]

However, the extraction or placement of security does not completely protect the interest of the creditor or lender. This is because the mechanisms for the enforcement of the security so as to realize the borrowed funds seem to be contentious, complex, technical, if not cumbersome.

The benefits of having an effective and functional corporate rescue and insolvency law and practice for the growth of any economy and the attraction of foreign investment cannot be underscored. The Senate President of the National Assembly, Senator Saraki, while declaring open the Public Hearing on the "Bankruptcy and Insolvency (Repeal and Re-enactment) Bill 2015", assured that the reposition of the Nigerian economy to effectively meet the challenges of the 21st century was a major priority of the current Senate and that 'insolvency system and practice would play an important role in attracting both domestic and foreign investments as well as promoting investments and entrepreneurial development, adding that, given these opportunities, there is urgent need to repeal and re-enact the Bankruptcy Act which has become obsolete and out-dated'.[39]

Therefore, the significance of this study are:

[38]Davies and Worthington, *op cit*, p. 1207.
[39]Agbajileke, *op cit.*

1. To provide information and further insight into prevailing theories, models and principles that would engender a friendlier and dynamic corporate rescue and insolvency system in Nigeria;
2. To be a handbook or resource material for students, legal practitioners, magistrates, judges, governments, regulatory agencies, policy makers, legislators, companies, investors, creditors and debtors of contemporary information on best practices as relating to corporate rescue and insolvency law and practice; and
3. To be an addition or contribution to the body of literature on corporate rescue and insolvency law and practice

1.6. Methodology

This study will apply the doctrinal research methodology.[40]This research will review and analyse both primary and secondary sources of information. The primary sources of information is domestic statutes such as the Companies and Allied Matters Act;[41]Investment and Securities Act;[42]Asset Management Corporation of Nigeria Act.[43]Banks and other Financial Institutions Act,[44] Nigeria Deposit Insurance Corporation Act,[45] Bankruptcy and Insolvency (Repeal and Re-enactment) Bill[46]and subsidiary legislation such as the Companies Winding Up Rules;[47] Securities and Exchange Commission Rules and Regulations[48] and Bankruptcy Rules.

[40] C Morris & C Murphy, *Getting a PhD in Law* (Oxford: Hart Publishing Limited, 2011) pp. 30 – 31; M O U Gasiokwu, *Legal Research and Methodology* (Enugu: Chenglo Limited, 2006) pp. 37, 81; A Taiwo, *Basic Concepts in Legal Research Methodology* (Ibadan: St. Paul's Publishing House, 2011) pp. 43 – 44.
[41] Cap C20 Laws of the Federation of Nigeria 2004.
[42] 2007.
[43] 2010 (as amended).
[44] Cap B3 Laws of the Federation of Nigeria 2004
[45] Cap N102 LFN 2004
[46] 2015
[47] 2001.
[48] 2013 (as amended).

Furthermore, this study undertakes an examination, review and analysis of relevant Statutes on corporate rescue and insolvency of other jurisdictions, such as the Companies Act;[49] the Insolvency Act;[50] the Enterprise Act,[51] Small Business, Enterprise and Employment Act[52] and subsidiary legislation such as the Insolvency Rules.[53] Also, Chapter 11 of the United States of America Bankruptcy Code, Companies Act and Bodies Corporate (Official Liquidations) Act,[54] Companies Act and the Insolvency Act[55] and Companies Act and the Insolvency and Bankruptcy Code[56] so as to draw from the international best practices on corporate rescue and insolvency embedded in them.

In addition to the primary sources of information, this study will rely on secondary sources of information that entails a review and analysis of judicial precedents, articles, textbooks, newspapers, academic and conference papers, reports and opinion as related to or connected with corporate rescue and insolvency law and practice.

1.7. Literature Review

We will review a plethora of literature relating to corporate rescue and insolvency law and practice from a theoretical and conceptual framework.

Korobkin, a protagonist of the 'Wider Interest Perspective' on corporate rescue and insolvency argued that, the preservation of employment should be an independent goal of corporate rescue. This perspective holds that in corporate rescue and insolvency proceedings, the law should seek to protect employment and general

[49] 2006 (United Kingdom).
[50] 1986 (as amended) (United Kingdom).
[51] 2002 (United Kingdom).
[52] 2015 (United Kingdom).
[53] 1986 (as amended 2010 & 2015) (United Kingdom).
[54] 2013 (Companies Act) & 1963 (Bodies Corporate (Official Liquidation) Act (Ghana).
[55] 2008 as amended 2011 (Companies Act) & 1936 as amended 2015 (Insolvency Act) (South Africa).
[56] 2013 (Companies Act) & 2016 (Insolvency and Bankruptcy Code) (Republic of India).

community interest as well as providing equality among creditors since a "rescued" or "rehabilitated" company brings benefit to a variety of external constituencies including the government in the form of more taxes; existing and future employees in the form of continued or new employment and /or higher salary levels; local or host communities in the form that the wealth in the locality is increased. Thus, the argument of the protagonist of this perspective is that it will not be unreasonable for secured creditors to bear some of the cost of rescue and reorganization of the insolvent company.[57]

McCormack made a detailed comparative critique of the Anglo-American Corporate Bankruptcy Law when he challenged the prevailing view that United States Law in the area of corporate bankruptcy is "Pro-Debtor" and that of the United Kingdom Law is "Pro-Creditor" and concluded that there is a functional convergence in practice between the two jurisdictions instead of divergence. Although, McCormack acknowledged that corporate rescue model is different from business rescue model, he still held the view that the business rescue model still plays a larger role in corporate restructuring in the United States.[58]

Jackson**,** a proponent of the 'Creditors' Bargain Theory' contended that the cost of reorganisation or corporate rescue and insolvency should not be imposed on secured creditors, who do not benefit from the reorganisation or rescue of an insolvent company, but instead, be imposed on the company itself and on unsecured creditors who may benefit therefrom. The creditors bargain theorist argued that corporate rescue mechanisms and insolvency proceedings exist solely for the protection and benefit of creditors and shareholders and the interest of employees,

[57] D R Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) Tex. L. Rev, 541-554; G McCormack, *Corporate Rescue Law - An Anglo-American Perspective* (London: Edward Elgar Publishing, 2008) p. 18.
[58] McCormack, *ibid.*

suppliers, customers and communities, should be taken into account only to the extent that particular members of those constituencies are creditors with enforceable legal rights against company assets under general law.[59]

The thrust of the creditors' bargain theory seem to be premised on a 'hypothetical agreement' that creditors would reach if they were to bargain amongst themselves before extending credit to the now insolvent company. Simply, the proponents of the creditors' bargain theory held the view that corporate rescue mechanisms and insolvency law should not create rights but instead, act to ensure that pre-existing rights are observed and enforced to the greatest extent possible.[60]

However, Creditors' Bargain theory has been criticised as being notional, hypothetical and an abstraction. In this respect, Goode took a swipe on the theory in the following words:

> … the parties presented are not in truth real world parties at all… . But what is the source of identification of these qualities and how do we know that they have any relationship with the qualities of the actual creditors? Since in practice creditors do not act collectively in taking credit decisions, we have no idea how they would proceed, or what range of factors they will take into consideration if they were coming together... .[61]

The 'Procedural Theory' is significantly same as the 'Creditors' Bargain Theory' to the extent that it posits that the cardinal purpose of insolvency is to

[59] TH Jackson, 'Bankruptcy Non-Bankruptcy Entitlements, and the Creditors' Bargain' (1982) 91 (5) Yale Law Journal, 857-907; McCormack, *op cit*, p. 22.
[60] McCormack, *ibid*, p. 24.
[61] R Goode, *Principles of Corporate Insolvency Law*(4th edn, London: Sweet & Maxwell, 2011)pp 75-76.

maximise recoveries and benefits for those with rights against company's assets. The procedural theorist contended that the secured creditors' proprietary rights (Property rights) should not be sacrificed for the benefit of the unsecured creditors and that "where secured creditors are prevented from enforcing their collaterals during rescue proceedings without being provided with full compensation, the effect is not merely wrong, it is outrageous".[62]

However, the postulation of the procedural theorist that the cardinal purpose of insolvency proceedings is to maximise returns to creditors by protecting pre-insolvency entitlements has been criticised as there are certain issues that emerge in the course of insolvency proceedings and hence proper and right to be addressed at the stage of insolvency proceedings. For instance, issues of fraudulent and reckless trading,[63] acts of delinquent directors,[64] officers[65] and members[66] usually crop up in the course of winding up of a company and logically can only be addressed at that point and not before.

Korobkin, a proponent of the 'More Inclusive Bargain Model', posited a normative framework for insolvency law, hinged on a hypothetical bargain to be devised by the representatives of all interests that might be affected by a debtor's financial distress. The hypothesis is built on the assumption that all those involved in the bargain, including creditors, all know that they may be affected by the insolvency, without being aware, whether as a debtor, an unsecured creditor (whether contractual or involuntary), a secured creditor, an ordinary employee, a member of the

[62] McCormack, *op cit*, p. 26.
[63] CAMA, *op cit*, s. 506.
[64] Goode, *op cit*, p. 82.
[65] CAMA, *op cit*, s. 507.
[66] *Ibid*, s. 508.

community that is otherwise unconnected to the debtor company or somebody in a different kind of relationship.[67]

Mokal, the proponent of the 'Authentic Consent Model' (ACM), posits that although participation in the imaginary negotiation process is extended to parties other than creditors as argued in the 'More Inclusive Bargain Model', the focus on creditors is what makes insolvency law, special. Mokal developed the concept of "dramatic ignorance", which depicts the fact that the parties to the creditors' bargain are held to be ignorant not only of insolvency outcomes, but how other creditors would behave. Therefore, He of the assumption that all parties in insolvency proceedings are free and equal and enter into a bargain that is fair and just.[68]

One of the implicit assumptions of the 'Creditors' Bargain Theory' is that there is a common pool of assets to which creditors have a pre-insolvency entitlement rights. This is not completely correct as in most insolvency proceedings, creditors are often settled from the anticipated stream of income produced by the on-going corporate entity. Hence, LoPucki, developed a 'Team Production Theory' of corporate reorganisation law and contended that corporate reorganisation is not a regulation imposed by Government but instead, an implicit agreement, under which creditors and shareholders agree to subsume their legal rights to the preservation of the company as a going concern.[69] The 'Team Production Theory' has been argued to be the theoretical underpinning of the United States of America Insolvency system.[70]

[67] McCormack, *op cit*, p. 28.
[68] R J Mokal, *Corporate Insolvency Law: Theory and Application* (Oxford: OUP, 2005) pp. 70-87.
[69] McCormack, *op cit*, p. 30; L M LoPucki, 'A Team Production Theory of Bankruptcy Reorganization' (2003) UCLAW Law School, Law and Econ Research Paper, pp.1-12; MM Blair & LA Stout, 'A Team Production Theory of Corporate Law' (1999) 85 Virginia Law Review,247.
[70] The features of Chapter 11 of the United States of America Bankruptcy Code which allows the Board of Directors to continue to manage the business of the company, unlike the United Kingdom, where Administration operates as a management displacement device with the administrator assuming the management task formally entrusted to the Board of Directors.

Warren and Finch, held the view that a single unifying theory of corporate rescue law, while intellectually and theoretically attractive, cannot adequately explain all the issues arising from corporate rescue proceedings. Finch contends that modern corporate insolvency law cannot be explained by a description of existing statutory rules and case law but by a critical appraisal of the concept of modern corporate law from a threefold aim, (i) to outline the law on corporate insolvency… and the procedures and enforcement mechanisms used in giving effect to that law…,(ii) to set out a theoretical framework for corporate insolvency law that will establish benchmarks for evaluating that law and any proposed reforms… and (iii) to move beyond an appraisal of current laws and processes and to consider whether any new approaches to insolvency institutions and rules are called for.[71]

Finch therefore propounded a theoretical framework, which she called the "Explicit Values Approach"[72] or as the "Communitarian Theory", a broad-based, interdisciplinary approach that considers community and public interest in addition to the interest of creditors and set out benchmarks for evaluating the efficacy of corporate and insolvency rescue law, to wit; Efficiency, Expertise, Accountability and Fairness.[73] However, the 'Multiple Values or Eclectic Approach' has been criticised for being vague, uncertain and indeterminate.[74]

Goode and Adebola pointed out that in corporate rescue of an insolvent company, it is the company's business that are capable of contributing value to the economy that is the real subject of rescue, not the entire company's shell. Simply put, corporate rescue is all about protecting businesses of an insolvent company, which

[71] V Finch, *Corporate Insolvency Law: Perspective and Principles* (2nd edn, Cambridge: Cambridge University Press, 2009) p. 54.
[72] *Ibid;* A Keay & P Walton, *Insolvency Law*: *Corporate and Personal* (Essex: Pearson Education Limited, 2003).
[73] *Ibid*.
[74] McCormack, *op cit*, p. 35.

requires a '*hiving-off*' of potentially viable portions of the business for sale as a going concern to another company.[75] This, Business Rescue Model presupposes that the transfer of the business of a distressed and/or failing company to a financially healthy corporate entity may grant the once distressed or failing business a new opportunity to bounce back to buoyancy, if not, liquidity but may also enable a quick resolution of the failed company's distress while giving the previous owners a second chance to succeed at the business through a new corporate entity.[76]

Mokal, stated that the preservation of the corporate entity, or some part, after distress has been remedied should be an objective of corporate rescue proceedings. Mokal posits that the corporate rescue of an insolvent company should not be restricted to the preservation of only the business of the insolvent company but also the preservation of the company as an entity. An arguable advantage of this Model is that by preserving the relationship of pre-distressed owners and managers, there could be initiation of rescue measures in a distressed company at the early stage.[77] However, the notion that rescue, even of the business, was more likely to succeed only when initiated early and that such early initiation depended on the actions of those in charge of the company, is without doubt, correct, as it accords with common sense that persons are unlikely to trigger rescue mechanisms if they would lose their control of the distressed entity during the process.[78]

Frisby, drew a distinction between rescuing the company and rescuing the business of the company, thus:

[75]Insolvency Law and Practice: Report of the Review Committee (The 'Cork Report') CMND 8558(London; HMSO, 1982).
[76] Goode, *op cit,* p. 81; B Adebola, 'A Few Shades of Rescue: Towards an Understanding of the Corporate Rescue Concept in England and Wales', a paper delivered at INSOL Academics' Conference, 9 – 12 October 2014, Istanbul (2014) 6.
[77]Mokal, *op cit*, p. 210.
[78] *Ibid*.

> The former, which might be described as "pure rescue" would involve the corporate entity emerging from the rehabilitation endeavour intact, so as to continue substantially the same operations, with the same work force and in the ownership of the same people. The latter is perhaps most accurately expressed as corporate recycling. The company's business or a viable part of that business is sold as a going concern to a third party... .[79]

Frisby further elaborated on collectivity, fairness and corporate rescue as the ideals or characteristics of a good modern insolvency law.[80] Collectivity refers to the components of a regime that inhibits individual debt enforcement amongst creditors by the imposition of a mandatory moratorium on the bringing of legal proceedings or the enforcement of security interest or other property rights against the insolvent company during the currency of the insolvency procedure.[81]

Goode discussed the historical development of insolvency law, its meaning and proceeded in an illuminating and articulate manner to espouse the framework and fundamental principles of corporate insolvency law.[82] Although, the discourse is situated on the corporate rescue and insolvency practice in the United Kingdom and the European Community, the principles of corporate insolvency set out by Goode, not only meets international best practices[83] but would undoubtedly be relevant in the

[79] S Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002', (2004) 67 (2) MLR, 248-249.
[80] *Ibid*, 247.
[81] *Ibid*, 249-250.
[82] Goode, *op cit*, pp. 1-60*;* Cork Report, *op cit.*
[83] United Nations Commission on International Trade (UNCITRAL) Legislative Guide on Insolvency Law 2005.

quest for a reform of the corporate rescue and insolvency law and practice in Nigeria, which principles and rules are:

1. **Recognition of Pre-Insolvency Rights**

The general rule is that liquidation does not of itself terminate contracts or extinguish rights, though it may inhibit the pursuit of remedies. Hence, corporate rescue and insolvency proceedings respect the rights that accrued prior to the proceedings. In *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc.,*[84] the court held that "the important point is that bankruptcy whether personal or corporate, is a collective proceeding to enforce rights and not to establish them".

2. **Attachable Assets**

It is only the property of the company at the time of liquidation or winding up that comes into its possession thereafter that is available for its creditors. In view of this, assets held by the company on trust do not form part of its estate nor the goods supplied to it under reservation of title. Thus, it is only the company's assets that are available for its creditors. The liquidator has no power as a liquidator, to sell assets not beneficially owned by the company[85] or subject to a security interest, although, if the company is a trustee with management powers under an active trust, the liquidator may, with the consent of the beneficiaries or under an order of the court,[86] manage the trustee property on behalf of the beneficiaries and realize trustee assets as part of that management.

[84] [2007] 1 AC 508, per Lord Hoffman.
[85] CAMA, *op cit*, s. 423.
[86] *Ibid*, s. 424

3. Subsistence of Security Interest and other Pre- Insolvency Real Rights

A creditor holding security interest and other pre-insolvency real rights is unaffected by winding up and may proceed to realize his security or assert other rights to property as if the company were not in liquidation. This principle operates to the extent that were the instrument of charge provides for security over acquired property, the secured creditor can assert rights even over monies or other assets falling in after the commencement of the winding up, provided that the consideration for this was already executed before that time, as opposed to being furnished by the liquidator himself. For example, by performance of a contract entered into by the company.[87]

4. Limitations and Defences to the Powers of the Liquidator

The liquidator in exercising rights in the name of the company stands in no better position than the company itself. He takes them as they stand, warts and all.[88] Simply, the liquidator takes subject to equities. However, it is important to note that the pre-liquidation right of set-off, which is also equity, stands as an exception to the general rule in that it is not exercisable against a party that has gone into liquidation.[89]

5. Maintenance of the Anti-Deprivation Rule

In the course of insolvency proceedings, there shall not be, whether directly or impliedly, an activation of a contractual provision divesting the company of an asset it previously held. Such a provision contravenes the anti-deprivation rule in that its

[87] *Re Collins* [1925] Ch 556; Goode, *op cit*, p. 96.
[88] *Perpetual Trustee Co. Ltd v B.N.Y Corporate Trustees Services Ltd* [2010] Ch 347.
[89] Under the United Kingdom Laws, the pre-liquidation right of set-off is displaced by the Insolvency Rules of set-off. r. 2.85 (Administration) and r. 4.90 (Liquidation).

effect is to remove from the reach of the general body of creditors, an asset held by the company at the time of liquidation.[90]

It is important to state that this principle is distinct from that of *pari passu di*stribution, which is concerned in ensuring rateable distribution among creditors and to avoid transactions which, although not reducing the net asset value of the company, unfairly benefit one creditor at the expense of others. The anti-deprivation rule is aimed at transactions, which improperly reduce the value of the company's assets to the detriment of all unsecured creditors.[91]

6. The *PARI PASSU* Distribution Rule

This Rule is that all unsecured creditors are required to share and share alike in a common pool of assets. This principle is designed to ensure that one creditor does not get more than his fair slice of the pie.[92]

However, the *pari passu* rule has been criticised as being irrelevant in corporate rescue and insolvency process as unsecured creditors usually receive little, if anything, by way of distribution of assets. Hence, unsecured creditors are not material and key players in corporate rescue and insolvency proceedings.[93]

7. Conversion of Personal Rights into a Right to Dividend in Insolvency Proceeding

When a company becomes insolvent, so that there are insufficient assets to go round, the creditor with real rights in an asset (for example, a seller of goods under reservation of title, a mortgagee or a chargee of property) can remove it from the pool of general creditors, but the creditor with a purely personal right, although not deprived of the right itself, loses the ability to engage in individual pursuit of

[90] Goode, *op cit*, p. 98.
[91] Goode, *op cit*, p. 98.
[92] CAMA, *op cit*, s. 494 (a); For the United Kingdom, see Insolvency Act (Voluntary Winding up) s. 107, Insolvency Rule (Compulsory Winding up) r. 4.181; Insolvency Rules (Administration) r. 2.69; Orojo, *opcit*, p. 499.
[93] Mokal, *op cit*, p. 210.

satisfaction and is required to lodge his claim with the liquidator in what is called a 'proof of debt', and participates with other unsecured creditors in such *pari passu* distribution of dividend as the liquidator is able to make from realization of the company's assets after allowing for the expenses of the liquidation and the claims of preferential creditors.[94]

8. Cessation of Beneficial Ownership of its Assets upon Liquidation

Although winding up does not of itself divest the company of legal title to its assets, it ceases to be the beneficial owner and the liquidator holds the assets on trust and to apply them in discharge of the company's liabilities in accordance with the statutory scheme of distribution.[95]

This position is contrary to the position under the extant Nigerian law as winding up order does not *ipso facto* vest the company's property on the liquidator, unless and until, the liquidator applies to the court for a vesting order.[96]

9. Acceleration of Creditors' Right to Payment

When a company goes into liquidation, its liabilities for payment of contingent or future debts or prospective debts, becomes fictionally accelerated as if it has already been earned by performance. This principle is predicated on the fact that a creditor is presumed to have an immediate right of proof of debts not already due to him but for those payable in the future or on a contingency.[97]

[94] CAMA, *op cit*, s. 493; Companies Winding up Rule (CWR) 2001, r. 74-101; Orojo, *opcit*, p. 496.
[95] *Ayerst (Inspector of Taxes) v C and K (Construction) Ltd* (1976) AC 167.
[96] CAMA, *op cit*, ss. 423 & 424. This also finds support in the Australian case of *Commissioner of Taxation v Linter Textiles Australia Ltd* [2005] 215 ALR 1.
[97] CAMA, *ibid*, s. 410 (1) (b); CWR, *op cit*, r. 84; Insolvency Rule, r. 4.94 & 12.3 (1).

While debts payable in the future has to be established in full, where the debts are not due by the date of dividends distribution, they are discounted[98] for the purpose(s) of computing the dividend.[99]

10. Liability for Debts

It is a notorious principle of company law, particularly relevant to insolvency, that where a body corporate, contracts, it is her own contracts and not those of its members and in the same vein, liabilities and debts incurred under such contracts are the liabilities and debts of the body corporate,[100] for which the members do not even bore secondary liability, subject and only to the amount, if any unpaid on the shares respectively held by them.[101] However, members of a company may incur liabilities where the company acts as their agent or were they undertake a collateral liability, for example, under a guarantee.[102]

It is a universal axiom that theories, principles and policies do not have a life of their own and remain at the level of hypothesis until there is an application of such theories, principles and policies. Thus, this study will examine these theories, principles and policies reviewed in this work so as to evaluate how the extant laws and procedures on corporate rescue and insolvency in Nigeria have lived up to the ideals and standards propounded and contained in the theories, principles and policies.

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[98] Insolvency Rule, Rule 11.13; CWR, *op cit*, r. 84. While under the CWR, 2001, the rate of discount (rebate of interest) is stipulated (5% per annum), it is left open under the Insolvency Rule of the United Kingdom (although the formula for calculation of the discount is provided).

[99] Insolvency Rule, *op cit*, r. 4.86 (1).

[100] *Union Bank of Nigeria Plc v Orharhuge* [2000] 2 N.W.L.R (pt 645) 495 at 517; *A.I.B Ltd v Lee & Tee Industries Ltd* [2001]7 N.W.L.R (pt 819) 366.

[101] *Salomonv Salmon & Co Ltd, supra*; CAMA, *op cit*, s. 21 (1) (a).

[102] *AfriBank Nig. Ltd v Moslad Enterprises Ltd & Anor* [2008] All FWLR (pt 421) 877. Instances of exception to this can be found under statutory lifting of the veil of incorporation. See CAMA, *op cit*, s. 506 (1); Failed Banks Recovery of Debts and Financial Malpractices in Banks Act, Cap F2, LFN 2004, s. 1 (3) (b).

Fletcher examined all aspects of insolvency law, individual as well as corporate and with a detailed discussion of the impact of the Insolvency Acts 1986 and 2000 (United Kingdom), the Enterprise Act, 2002 (United Kingdom), Cross-Border Insolvency Regulations, 2006 and the Human Rights Act, 1998 on corporate rescue and insolvency law and practice in the United Kingdom and Europe.[103]

While Fletcher's work is expository on the historical development of insolvency law, the nature and incidence of insolvency, company insolvency procedures, non-liquidation and liquidation procedures and alternatives to winding up in the form of corporate rescue mechanisms in the United Kingdom, this study will attempt to transpose the essence of Fletcher's work into the corporate rescue and insolvency law and practice in Nigeria.

Payne critically examined the use of both member and creditor Schemes of Arrangement ('Schemes') as a corporate rescue mechanism and compared the advantages and disadvantages of Schemes with other corporate rescue mechanisms. Payne further discussed the areas and ways for reform of the law and practice of Schemes.[104]

Payne's work is very illuminating on Schemes as a corporate rescue vehicle. However, as there are no "one fixes it all" corporate rescue mechanisms, his work is therefore limited as other corporate rescue mechanisms beside Schemes were not examined. Thus, this study will examine other available corporate rescue mechanisms aside Schemes.

Bachner examined the mechanisms for the protection of creditors of private companies from the risk of losing borrowed capital under English and German laws

[103] I F Fletcher, *The Law of Insolvency* (4thedn, London: Sweet & Maxwell, 2009) pp. 357-478, 493-670.
[104] J Payne, *Schemes of Arrangement, Theory, Structure and Operation* (Cambridge: Cambridge University Press, 2014) pp. 1-305.

through an illuminating discussion of creditor protection mechanisms such as avoidance of pre-insolvency acts, capital maintenance, unlawful distribution, directors' liability for contraventions of capital maintenance rules.[105] His exposition on credit protection mechanism seems defective as it appears a rehash of the principles of insolvency law and not an espousal of corporate rescue mechanisms. Hence this study will examine the available core corporate rescue mechanisms.

Parry carried out an in-depth analysis and digest of relevant case law and legislation on corporate rescue and insolvency in the United Kingdom by providing an outline of the main procedures for corporate rescue by way of Company Voluntary Arrangements (CVAs), Administration, Administrative Receiverships, Schemes of Arrangement; the structure and procedure of creditors' meetings; the main statutory provisions in the Insolvency Act 1986 (United Kingdom); the Insolvency Rules 1986 and the expected impact of the Companies Act 2006 (United Kingdom) on corporate rescue and insolvency law and practice in the United Kingdom.[106]

While the concise and prosy style adopted in this work is quite commendable, the corporate rescue mechanisms and procedures examined in the work have undergone legislative changes, therefore this study will examine the thrust of the work in line with the legislative changes.

Lynch-Fannon and Murphy discussed the corporate rescue and insolvency procedures available in Ireland, including Examination, Receivership and Winding-up; the rights and liabilities of parties involved in winding-up and the concept of fraudulent and reckless trading.**[107]**While Lynch-Fannon and Murphy made out an articulate exposition on the corporate rescue and insolvency system in Ireland, this

[105] T Bachner, *Creditors Protection in Private Companies: The Anglo-German Perspective for a European Legal Discourse* (Cambridge: Cambridge University Press, 2009) pp. 39-248.
[106] R Parry, *Corporate Rescue* (London: Sweet and Maxwell,2008) pp. 1-294.
[107] I Lynch-Fannon and G Murphy, *Corporate Insolvency and Rescue* (2nd edn, London: Bloomsbury Professional, 2012) Chapters 7-14.

study will examine the relevance of their work to the cause of corporate rescue and insolvency in Nigeria.

Oladele examined the current law on corporate restructuring and rescue in Nigeria with emphasis on mergers and take-overs as well as the rescue option of receivership. However, the non-discussion of or mention of Arrangements and Compromise as a corporate rescue option is a short fall to the obvious remarkable merits of the work.[108] While the scope of this work focused on the examination of mergers and take-overs as well as receivership as corporate restructuring mechanisms, in this study, other corporate rescue mechanisms such as arrangement and compromise, bail outs and regulatory rescue would be examined.

Okoli examined the circumstances and or definitions under section 409 of the CAMA regarding a corporate body being insolvent. Okoli argued that the said statutory grounds for regarding a corporate body as insolvent are by no means exhaustive as parties are entitled by mutual agreement(s) to insert other conditions under which a borrowing company can be regarded as insolvent.[109]Curiously though, Okoli, suggested that lifting the veil of incorporation in order to fix personal liability on members and employees of an insolvent company is an unexploited option/strategy in addressing insolvency. Since there are already provisions in the CAMA for lifting the veil of incorporation in the course of winding up,[110] this Study will proffer practicable reforms to corporate rescue and insolvency law and practice in Nigeria.

Busari identified the different laws in Nigeria that apply to individuals and corporate bodies in cases of insolvency as the Bankruptcy Act 1979 for individuals,

[108] OO Oladele, 'The Legal Intricacies of Corporate Restructuring and Rescue in Nigeria' (2007) *the Calabar Law Journal*, Xi,136-153.
[109] H S N Okoli, 'Corporate Insolvency – Options and Strategies for Lending Institutions', January 1998, *MPJFIL* Vol. 2 No. 1, 55-64.
[110] CAMA, *op cit*, s 506

and the CAMA for Companies. Busari, adopted the definition of insolvency as provided in Black's Law Dictionary and the CAMA, which simply means "the condition of a person or business that is insolvent, inability or lack of means to pay debts…", and proceeded to argue against the general belief that insolvency practice is only relevant when a company or a person is faced with financial difficulties and no more or when the existence of a company is threatened but is relevant in times of expansion or rationalisation or restructuring of a company or its business resources.[111]

Although, Busariis without doubt genuinely interested in the introduction of a robust insolvency practice in Nigeria, he appeared to have misconstrued the fine boundaries between insolvency practice and corporate restructuring. Thus, this study will therefore introduce conceptual clarity to corporate rescue and insolvency law and practice in Nigeria.

Asomugha examined the functions of the Court in schemes of arrangements, reconstructions and mergers under the Nigerian Law and drew the conclusion that while the Courts will still continue to play a prominent part in matters relating to schemes of arrangement, mergers and take-over, notwithstanding the powers now conferred expressly on the Securities and Exchange Commission, the truth is that court procedure is ill-equipped to properly pass judgment on the economic merits of such schemes of arrangement.[112] Although, Asomugha, rightly discussed the short comings of the role of the court in corporate rescue and insolvency proceeding in Nigeria, he failed to proffer solutions or an alternative to the court in corporate rescue

[111] T Busari, 'A Case for Insolvency Law and Practice', October 2000, *MPJFIL* Vol. 4 No. 4, 266-296.
[112] E M Asomugha, 'A Re-Appraisal of the Functions of the Court in Schemes of Arrangements, Mergers and Take-Overs' (1991) JUS Vol. 2 No. 1, 41-53.

and insolvency proceedings in Nigeria. This study will therefore suggest alternatives to the courts in corporate rescue and insolvency in Nigeria.

Mayson *et al,* described the nature of company insolvency and liquidation procedures as obtainable in the United Kingdom by outlining the legislation on company insolvency and liquidation. The author gave a summary description and definition of corporate rescue mechanisms such as an administrative receiver, administration, voluntary arrangements and analysing moratorium clauses and the necessary qualification to act as an insolvency practitioner.[113] While this work is very instructive and elucidative on corporate rescue and insolvency law and practice in the United Kingdom, some of the statements on the position of the law have been subjected to legislative repeals, amendments or modifications. Thus, this study will examine the contemporary and extant corporate rescue and insolvency law and practice in the United Kingdom.

Farrar & Hannigan did not limit their articulate discussions on corporate rescue and insolvency to just a description of its nature and procedure, definition and explanation of some of the corporate rescue and insolvency concepts in the glossary of terms but elegantly outlined and discussed the causes or theories of business failure.[114] However, Farrar and Hannigan' work did not incorporate the recent modifications or amendments to the corporate rescue law and practice in the United Kingdom. Hence, this study will examine the corporate rescue and insolvency system in the United Kingdom in line with the extant legislation.

Hicks & Goo described the sources, scope and development of corporate insolvency law in the United Kingdom; the purpose of corporate insolvency law, the

[113] S Mayson, *et al, Mayson, French and Ryan on Company Law* (25thedn, Oxford: OUP, 2008) pp. 627-683.
[114] J H Farrar & B M Hannigan, *Farrar's Company Law* (4thedn, London: LexisNexis ButterworthsTolley, 1998) pp. 621-746.

requisite qualification to act as insolvency practitioner, the statutory definitions of insolvency, which definitions, they rightly argued were not comprehensive.[115] Although this literature was situated in the 1990's, the contents remain seminal, contemporaneous and illuminating on the subject of corporate rescue and insolvency law and practice. However, the principles, statutory provisions and conclusions should be understood and applied with caution because of the subsequent modifications or abrogation of the law relied upon at the time of publication of their work. Hence this study will examine the corporate rescue and insolvency system in line with contemporary realities and statutory provisions in the United Kingdom.

Sealy & Worthington relied on extant legislations and appropriate case laws to succinctly discuss the nature of corporate rescue and insolvency procedures, analyse the mechanisms and concepts on corporate rescue and insolvency as obtainable in the United Kingdom.[116] While the content of their work is robust, remarkable and profound, this study will proceed to transpose the narration in their work to the corporate rescue and insolvency environment in Nigeria.

Bourne discussed the nature and features of corporate rescue mechanisms such as Receiverships, Voluntary Arrangement and Liquidation generally and argued that where the receivership is sought to enforce the terms of a debenture in the case of a default, the appropriate remedy would be generally to secure the appointment of a receiver, who need not be a qualified insolvency practitioner but where the receivership is to appoint a person under the terms of a floating charge, that person so appointed is generally an administrative receiver, who must be a qualified insolvency

[115] A Hicks & S H Goo, *Cases & Materials on Company Law* (2nd edn, London: Blackstone Press Limited, 1997) pp. 615-705.
[116] L Sealy & S Worthington, *Cases and Materials in Company Law* (10th edn, Oxford: OUP, 2013) pp. 708-825.

practitioner.[117] Furthermore, Bourne defined voluntary arrangement as 'a simple procedure whereby a company which is in financial difficulty may enter into a voluntary arrangement with its creditors, which arrangement may involve either a composition in satisfaction of its debts, that is, provision for creditors to receive a percentage of what is due to them, or a scheme of arrangement of its affairs', and defined Administration as 'a procedure to facilitate the rehabilitation or reorganisation of a company by placing the management of an insolvent company in the hands of an administrator and that for as long as the administration is in force, it is not possible to commence winding up proceedings or any other process against the company or to enforce any charge, hire purchase or retention of title provisions against the company without the leave of the court'.[118]

While Bourne's work remains seminal and elucidating on corporate rescue mechanisms in the United Kingdom, this study will examine and analyse the impact of subsequent legislation on some of the postulation in the work as it relates to corporate rescue and insolvency proceedings in the United Kingdom and the relevance to the development of an effectual corporate rescue and insolvency law and practice in Nigeria.

McLaughlin defined the following concepts: Insolvent winding up to mean when a company is unable to pay its debts; Secured Creditors are those who, in addition to having a contractual right to sue the company for the return of any money owed to them, have taken a property interest in one or more items of the company's property as security for the credit they have made available to the company. Remarkably though, McLaughlin examined loan security in details by putting out

[117] N Bourne, *Principles of Company Law* (3rd edn, London: Cavendish Publishing Limited, 1998) pp. 243-286.
[118] N Bourne, *op cit*, pp. 251, 253.

classification according to a number of criteria, namely, mortgages and charges; legal and equitable property interests and fixed and floating charges and further argued that while a distinction is often made in property law between a mortgage and a charge, this distinction is not usually important in company law as the term 'charge' is regularly used to describe a loan security whether the security established is a charge or a mortgage; analysed and explained concepts or phrases such as 'Avoidance of transactions', 'misfeasance by officers of the company', 'wrongful trading' and 'fraudulent trading'.[119]

Unfortunately, McLaughlin's discourse did not embrace any of the corporate rescue mechanisms. Hence, our discussion in this study will include corporate rescue mechanisms and procedure.

Ajogwu, examined the role of mergers and acquisitions to the growth and health of an economy by being vital tools used by companies for one purpose of expanding their business operations with objectives ranging from increasing their size, long term profitability and relevance within a particular market. Ajogwu stated that although 'mergers' and 'acquisition' are often uttered in the same breath and used as though they were synonymous, the terms mean slightly different things. Thus, Ajogwu, adopting the provision of the Investment and Securities Act 2007 defined a Merger as 'the amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or any part of the undertakings or interest of one or more companies and one or more bodies corporate'. But, 'acquisition' he describes as 'the act of gaining effective control over the assets or management and ownership (of shares in the capital) of another company without any combination of companies', and further posit that 'acquisition' is sometimes referred to as 'take-

[119] S McLaughlin, *Unlocking Company Law* (London: Hodder Education, 2009) pp. 398-434.

over'. Ajogwu further elaborated on the categories of mergers and the threshold thereof.[120]

While the explanation of the concept of 'mergers' and 'acquisitions' is apt and commendable, the definition and description of the nature and procedure of acquisition, categories of merger and the thresholds seem not in line with the current position of the law. This study will therefore fill in the gap on mergers and acquisitions by reviewing and analysing the provisions of the extant legislation and rules[121] as relating to mergers and acquisition in Nigeria.

Sofowora argued that a company having been created by a legal process, that is, by registration, can be brought to an end by a legal process too and further stated four methods of dissolving a company, namely, Winding up, Mergers and Take-up, Reconstruction or Re-organisation and Striking off a defunct company by the Corporate Affairs Commission.[122]

Although, Sofowora provided in a nutshell the procedure for winding up of companies in Nigeria, the contention that winding up, mergers and take-overs means *ipso facto* the dissolution of a company, seems incorrect. This study will therefore attempt to show that it is not in all cases that winding up or mergers and take-overs ultimately lead to the dissolution of a company.

Barber in a simple and erudite manner, defined a scheme of arrangement as 'a flexible and versatile method of resolving problems of variations of rights attached to shares, which cannot be dealt with under variation of class rights'.[123] Also, Barber defined voluntary arrangement as 'a composition in satisfaction of its debts or scheme

[120] F Ajogwu, 'Mergers and Acquisition Opportunities and Pitfalls' Unib Law Journal VOL. 1, NO 1, OCTOBER 2011, 1-35.
[121] Securities and Exchange Commission Rules and Regulations 2013, Rule 433 defines 'Acquisition' to mean where a person or group of persons buy most (if not all) of a company's ownership stake in order to assume control of the target company; Rules 434-439 (Procedure for acquisition).
[122] M O Sofowora, *Modern Nigerian Company Law* (Lagos: Soft Associates, 1992) pp. 505-533.
[123] S Barber, *Company Law* (4thedn, London: Old Bailey Press, 2003) p. 303.

of arrangement of its affairs'.[124] Beyond the definition of scheme of arrangement, Voluntary arrangement and Administration, Barber, aptly discussed the advantages and disadvantages of the respective corporate rescue mechanism of scheme of arrangement, voluntary arrangement and administration and the qualifications to act as an insolvency practitioner.[125]

Although Barber's espousal on corporate rescue and insolvency law and procedure is very enlightening, it was predicated on the Insolvency Act 1986, Enterprise Act 2002 and Companies Act 2006, all laws of the United Kingdom and would therefore have no relevance to corporate rescue and insolvency law and practice in Nigeria if same is not transposed to the Nigerian environment. Thus, this study will attempt to knit the very defining thoughts of Barber and the legal framework of corporate rescue and insolvency law and practice in Nigeria.

Solomon and Palmiter discussed charter amendments, recapitalisations, corporate combinations and dissolution that are often referred to as "organic changes" in the United States of America, which organic changes can be internal or external. Solomon and Palmiter described recapitalisation as an alteration to the corporation's capital structure which can be accomplished by merger. Significantly, they argued that re-capitalisation supplies a flexible tool for adjusting the corporation's financial direction, sometimes making new financing possible or offering shareholders an improved package of rights.[126] Solomon and Palmiter defined some dissolution terminologies[127] such as "dissolution" as the formal extinguishment of the corporation's legal life; "liquidation" as the process of reducing the corporation's assets to cash or to liquid assets after-which the corporation becomes a holding shell,

[124] *Ibid,* p. 314.
[125] S Barber, *op cit,* pp. 315, 318-319, 323-324.
[126] L D Solomon &A R Palmiter, *Corporations Examples and Explanations* (2nd edn, Toronto: Little, Brown & Company, 1994) pp. 520-542.
[127] *Ibid,* p. 520.

"winding up" as the whole process of liquidating the assets, paying off creditors, and distributing what remains to shareholders.

Against this background, they argued that "although dissolution results in the death of the corporation, it does not necessarily mean the death of the business. Because of its going-concern value, the business (meaning its assets) usually would be sold intact and dissolution simply serves as a redistribution device that follows the sale of assets to an outside party or to a shareholder faction. In dissolution, shareholders receive a pro rata share from the proceeds of the sale".

Solomon and Palmiter' work is very illuminating on the explanation of corporate rescue and insolvency concepts in America. However, the meanings ascribed to some of the concepts, for example, dissolution differs from the definitions and interpretations under the extant laws in Nigeria. This study will therefore provide conceptual clarity to these concepts.

Vagts' work is quite profound on the question of fairness in the consideration of mergers and other basic changes.[128] Vagts contended that the question of fairness can be looked at from different aspects. Firstly, the financial issue, that is, are the shareholders in each corporation (or in each class) being given a fair equivalent in value to what they are giving up? This is otherwise known as the appraisal problem. Secondly, is the issue of retroactivity and finally, the aspect of motivation, upon which he posed the question, "if the controlling group in the corporation comes into a change with the sole purpose of eliminating or neutralising an awkward minority, should that motivation initiate the transaction even if the minority receives a payment reasonably equivalent to the value of the investment they are forced to surrender?[129]

[128] D F Vagts, *Basic Corporation law: Materials-Cases-Text* (10th edn, New York: The Foundation Press, Inc, 1989) pp. 684-725.
[129] *Ibid,* p. 725.

Vagts' work is seminal. However, the analysis of the question of fairness and appraisal remedy was limited to the issue of merger and not to any other corporate rescue remedy such as arrangement and compromise as is the case in the extant law in Nigeria where the question of fairness comes to bear in the determination of the Court's sanction of the scheme of arrangement and compromise.[130] Thus, this study will examine the question of fairness as it relates to arrangements and compromise in Nigeria.

Ford and Austin discussed the advantages of debt finance in raising capital for a company.[131] Ford and Austin drew a contrast between a mortgage and security interest in the form of a charge, in that, whereas in a mortgage, the mortgagor transfers, or is treated as transferring the ownership to the mortgagee, a charge does not contemplate such a transfer. A charge is a form of hypothecation rather than assignment. The owner of the property who creates a charge over specific property subjects that property, which he or she continues to own, to a burden in favour of another person. But a 'charge' in company law, is defined as any form of security for discharge of a debt.[132] In other words, a charge in company law could be a mortgage (either legal or equitable) or lien and pledges or pawns. Ford and Austin further discussed reconstructions and amalgamations in the form of schemes of compromise and arrangement. Reconstruction, they defined as a process whereby a scheme is used to transfer the undertaking, assets and liabilities of a company to a new company on terms that shares in the old company will be cancelled and shares in the new company

[130] CAMA, *op cit,* ss. 539 – 540.
[131] H A J Ford & R P Austin, *Ford's Principles of Corporations Law* (6th edn, London: Butterworth & Co (Publishers) Ltd, 1992) pp. 674-960.
[132] H A J Ford & R P Austin, *op cit,* p. 326.

will be allotted to former holders in proportion to their former holdings. This is akin to Arrangement under Sale.[133]

While Ford and Austin did examine scheme of arrangement under section 411 of the Corporations Law of the United States of America, outlined the distinct features of moratorium, role of insolvency practitioners, this study will necessarily examine scheme of arrangements as presently provided for under the extant laws in Nigeria and evaluate the adequacy of the provisions and suggest reforms, if any.

Baxt and Fletcher defined the phrase, 'a company is unable to pay its debts' by looking at the provisions of s 460 (2) of the Corporations Law of Australia, 1989, which is in *pari materia* with s 409 of the CAMA. In the work, Baxt and Fletcher, set out the number of matters that needs to be taken into account in establishing that a company is insolvent for inability to pay its debt, that is, the person making the demand must be able to give a valid discharge of the debt, the debt must be due and owing at the time and the company's liability for the debt must not be in dispute.[134]

Their examination of the remedies or preventative actions which may be taken where companies find themselves in difficulties are noteworthy. Amongst the remedies are investigations and inspections, receiverships and official management.[135] According to Baxt and Fletcher, 'Official management' in Australia, 'contemplates being given a breathing space or moratorium in which to rehabilitate itself and meet the claims of its creditors.

Baxt and Fletcher's work is a very illuminating, simple and concise statement of the corporate rescue and insolvency law and practice in Australia. However, the authors pointed out the limits of their work when they stated that 'at a time of

[133] CAMA, *op cit*, s. 538.
[134] R Baxt and K Fletcher,*Afterman and Baxt's Cases and Materials on Corporations and Associations* (6th edn, London: Butterworth & Co Publisher Ltd, 1992) pp. 809-928.
[135] *Ibid*, p. 860.

financial difficulty. The Australian Law Reform Commission recommended a new form of voluntary administration for insolvent companies (see Report No. 45, para 57) to be accompanied by the removal of the official management'. Hence, this study will not only domesticate but equally update Baxt and Fletcher's literature on corporate rescue and insolvency law and procedure.

Davidson, *et al,* examined the alternatives to straight bankruptcy in the United States of America and argued that while chapter 7 of the Bankruptcy Reform Act of the United States of America deals with liquidation proceedings, commonly referred to as 'a straight bankruptcy'; Chapter 11 of the same Bankruptcy Reform Act provides for a bankruptcy proceedings known as 'reorganisations' used by debtors to avoid liquidations.[136] Furthermore, they pointed out that one of the major advantage of a reorganisation is that it allows a business to continue.[137]

Davidson, *et al,* did not only state that individuals can avail of chapter 11 Bankruptcy proceedings but in a concise, simple and straightforward approach, discussed the chapter 11 proceedings from filing the petition; entering an order for relief; appointment of a trustee or an examiner in the unlikely event that no one asks of the appointment of a trustee; the functions of a trustee or examiner, which usually is to investigate the debtor and the debtor's business activities and business potential; make recommendation to the Court, either in the form of a reorganization plan or a transfer from Chapter 11 to Chapter 7. They further examined the features of Chapter 11 bankruptcy proceedings in the United States of America such as the debtor being in possession where no interested party asks for the appointment of a trustee; the appointment of credit committees; the repayment plan and the role of the court which

[136] D V Davidson, *et al*, *Business Law: Principles and Cases* (4thedn, California: Wadsworth Publishing Company, 1993) pp. 630-643.
[137] *Ibid* p. 631.

highlight is that once the court approves a plan, it becomes binding on everyone affected by it.

Davidson *et al* work is remarkable. However, this study will attempt to switch the features of the chapter 11 bankruptcy proceedings to corporate rescue and insolvency law and practice in Nigeria.

Jennings defined a 'security' as a contract, transaction, or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of a promoter or a third party and in the discussion of types of business combinations, Jennings, defined a merger as a combination of two or more corporations, after which only one corporation continues to exist and outlined the features of three types of mergers, namely, horizontal, vertical and conglomerate.[138]

Although, Jennings's, effort to examine the concepts of security, merger and types of merger stands as a laudable contribution to the body of literature on corporate rescue and insolvency, the work is flawed for being sketchy and not comprehensive enough on the examination of the concepts set out to be explained. In this study, the gaps observed in Jennings' work would be filled up.

Keenan examined receiverships and administration generally in the United Kingdom; the appointment of an administrative receiver; qualifications and procedure for appointment of administrative receiver; effect of appointment of receiver; duties of a receiver; the effect of a winding up on a receiver; methods of appointment of an administrator; purpose of administration; powers and duties of an administrator.[139] Although Keenan's contribution to the literature on receiverships and administration cannot be ignored, the legal justifications and conclusions in the work were premised

[138] M Jennings, *Business, Its Legal, Ethical and Global Environment* (4thedn, Ohio: International Thomson Publishing, 1997) pp. 758-819.
[139] D Keenan, *Smith & Keenan's Company Law* (7thedn, London: Pitman Publishing, 1987) pp. 425-502.

on repealed and otiose laws.[140] Thus, this study will examine and review the extant legislations that did not form the contents of Keenan's work.

Clark *et al* examined the corporate rescue and insolvency law and procedure in the United States of America through a methodical step by step outline of the procedures for straight Bankruptcy under Chapter 7 of the Bankruptcy Code (that is, winding up in the CAMA) and reorganisation under Chapter 11 of the Bankruptcy code.[141] More incisively, this work is a reference guide[142] on chapter 11 Bankruptcy procedure of the United States of America. However, this study will examine the potentials of the Chapter 11 Bankruptcy proceedings being integrated into the corporate rescue system in Nigeria.

Beatty & Samuelson set out an incisive overview of the Bankruptcy Code of the United States of America that is structured into 8 Chapters with odd numbers except one, while Chapters 1, 3 and 5 provide for administrative rules that generally apply to all types of bankruptcy proceedings; Chapters 7, 9, 11, 12 and 13 provide the substantive rules for the different types of Bankruptcies, which objectives can either be for rehabilitation or liquidation. Beatty and Samuelson submitted that the objectives of chapter 11 and 13 are to rehabilitate the debtor and Chapter 7 provides for liquidation, also known as "Straight Bankruptcy".[143]

Beatty & Samuelson, further contend that in Bankruptcy proceedings under the Bankruptcy Code, debtors are eligible to file under more than one chapter and that no choice is irrevocable as both the debtors and creditors have the right to ask the Court to convert a case from one chapter to another at any time during the proceedings.

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[140] Enterprise Act 2002 has limited the use of Administrative Receiver and also amended the provisions of the Insolvency Act 1986 as it relates to Administration.
[141] L S Clark, *et al*, *Law and Business: The Regulatory Environment* (4thedn, New York: McGraw- Hill, Inc, 1994) pp. 953-1000.
[142] *Ibid* pp. 994 – 995.
[143] J F Beatty & S S Samuelson, *Business Law for New Century* (New York: Little, Brown and Company, 1996) pp. 623-645.

Beatty & Samuelson's work is remarkable and commendable for the depth of research and analysis, the coloured highlights and striking style of language. However, this study will examine the implication of Chapter 11 procedure in the United States of America on the quest for reform of corporate rescue law and practice in Nigeria.

Donnell *et al* examined insolvency and reorganisation measures in the United States of America.[144] Donnell *et al* posited that 'debtors are considered insolvent if they are unable or fail to pay their debts as they become due'.[145] They discussed on the types of bankruptcy proceedings under the Bankruptcy Code of the United States of America, liquidation proceedings, which are usually begun by the filing of a petition, whether voluntary or involuntary. Liquidation proceedings by voluntary petition they argued is not necessarily filed by a person who is insolvent. However the person must be able to allege that he or she has debts.[146]

Furthermore, Donnell *et al* examined Chapter 11 of the Bankruptcy Act, a procedure whereby the debtor's financial affairs can be reorganized, rather than liquidated under the supervision of the Federal Bankruptcy Court in the United States of America. They posited that Chapter 11 proceedings are available to virtually all business enterprises, including individual proprietorships, partnerships and corporations (except Banks, Savings and Loan Associations, insurance companies, commodities brokers and stock brokers), which chapter 11 proceedings are begun by petition filed either voluntarily by the debtor or involuntarily by its creditors. Donnell *et al* work suffers from the same deficiency as Beatty and Samuelson' work.

[144] JD Donnell, *et al*, *Law for Business* (Rev edn, Illinois: Irwin Inc, 1983) pp. 709-724.
[145] *Ibid,* p. 709.
[146] *Ibid,* p. 711.

Morse discussed the new frame work for corporate insolvency with aims or themes focused on the tightening up of the controls on the abuses of corporate insolvency system, the need for genuine alternatives to the drastic remedy of liquidation for an insolvent Company, an explanation of the regulation of insolvency practitioners, the concept of wrongful trading, receiverships, administration and voluntary arrangements and winding up by the Court.[147] While Morse's writing is quite expository or illustrative on conceptual terms in corporate insolvency in the United Kingdom, the subsequent amendments, if not repeal of the Laws relied upon in the work, vitiated the relevance of some of the postulations. This study will further contribute to the body of literature on corporate insolvency through an examination of the extant insolvency legislation that did not form part of Morse's writing.

Bhadmus defined corporate restructuring as "the process of rearranging one or more aspects of the company and that Restructuring happens in a company when there is a significant modification made to the debt, operations or structure of a company'.[148] Bhadmus simplified the options for corporate restructuring into two that is, internal and external and did contend that the idea behind internal corporate restructuring is to keep the company as a going concern in any way … as the focus is on survival.

Bhadmus' writing is elucidative on the concepts of arrangement and compromise, merger and other corporate restructuring options as the expositions were predicated on current and up to date statutory provisions. However, Bhadmus' writing on corporate restructuring options were neither backed with rigorous and in depth legal analysis. This study would therefore subject the law and procedure on

[147] G Morse, *Charlesworth & Morse: Company Law*, (15thedn, London: Sweet & Maxwell Limited, 1996) pp. 657-775.
[148] H Y Bhadmus, *Bhadmus on Corporate Law Practice* (2ndedn, Enugu: Chenglo Limited, 2013) pp. 545-585.

arrangement and compromise, merger and takeover in Nigeria to rigorous academic scrutiny with the intention of formulating a functional corporate rescue law and procedure.

Bhadmus in another work examined in a succinct manner the concept of corporate rescue and the procedure for winding up of insolvent companies. Remarkably, Bhadmus devoted a chapter of the book, albeit one and a half page, for discussion on the need for a new legal framework for corporate insolvency. He opined that the extant corporate insolvency law in Nigeria does not secure the rescue of a company as a going concern. Without gainsaying the laudable contribution of this work to understanding of corporate rescue and practice in Nigeria, his recommendations for a new legal framework for corporate insolvency appears not indepth and embracive. Hence, this study will further make recommendations towards the reform of corporate rescue and insolvency in Nigeria.[149]

Ogbuanya in profound discussion on corporate restructuring stated that corporate restructuring options can either be internal or external to the company or a combination of both. Ogbuanya identified the major internal corporate restructuring options as Arrangement and Compromise, Arrangement on Sale and Management Buy-out and some of the main types of external restructuring options being Merger and Acquisition, Take-over, External Restructuring, Purchase and Assumption and Cherry Picking.[150] The work is explicative of corporate restructuring in Nigeria. However, the work seems defective for lack of rigorous analysis.

Chianu critically examined winding up on the ground of a company being unable to pay its debts and explained concepts in Insolvency Law and Practice such

[149] H Y Bhadmus, *Corporate Insolvency Law and Practice in Nigeria* (Enugu: Chenglo Limited, 2009) pp. 1 – 304.
[150] N C S Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (2nd edn, Lagos: Novena Publishers Ltd, 2014) pp. 579-603.

as the definition of the phrase, 'a Company being unable to pay its debts; "Who may Petition for Winding up"; "Debt"; "Demand Notice"; "Court-Ordered Settlement"; "Judgment Creditor"; "Contingent or Prospective Liability" and "Judge's Discretion".[151]Remarkably, having adopted the definition of 'winding up for inability to pay debt' as stated in Section 409 of the CAMA, Chianu proceeded to define 'debt' as 'a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified event or condition'.

Thus, Chianu rightly argued that a winding up petition cannot be based on a debt that is *bona fide* disputed. Chianu, further examined the provisions of Section 409 (c) of the CAMA by defining 'contingent or prospective liability' to mean commercial insolvency, that is, where a company may have wealth locked up in investments not presently realisable, but although this be so, yet it has no assets available to meet its current liabilities. Hence it is commercially insolvent and may be wound up. Against the backdrop of the negative repercussions of winding up for inability to pay the debt on the insolvent company, Government and society at large, Chianu argued for a Court ordered settlement that is activated by the Federal High Court exercising its jurisdiction[152] to encourage and facilitate the amicable settlement of disputes by urging petitioners in a winding up petition to withdraw the petition and consider settling its affairs with the company. Unfortunately, this contention seems not to represent the correct position of the law. Alternative dispute resolution cannot under any guise be foisted on parties as the unanimous pivot on which any of the alternative dispute resolution method stands is the voluntary agreement or consensus of the parties.

[151] E Chianu, *Company Law* (Abuja: LawLords Publications, 2012) pp. 626-637.
[152] Federal High Court Act, cap F12, Laws of the Federation of Nigeria 2004,s. 17.

While the depth of analysis in Chianu' work is profound and remarkable, the definition of insolvency particularly in section 409 of the CAMA still remained foggy and the argument for a Court ordered settlement as a corporate rescue mechanism is still very much inchoate. Thus, this study will provide a better understanding of the concept of insolvency and comprehensively discuss effectual corporate rescue mechanisms.

Orojo discussed in details the law and procedure on Corporate Insolvency, Receivership, Arrangement and Compromise, and Mergers and Take-overs in Nigeria. While stating the essential ingredients or conditions for a Court to make an order of winding up a company, that is:

1. There must be a debt;
2. Which is due, and,
3. The company is unable to pay the debt.[153]

Orojo contended that "once these conditions are satisfied, the company will be wound up". This postulation seems not the correct position under Nigerian law.[154] Chianu had argued to the contrary thus "… in essence, there is no inflexible obligation of a Court to make a winding up order merely because one of the three conditions set out in the section is fulfilled".[155]

Although, this work is a valuable compendium on corporate rescue and insolvency law and practice in Nigeria, it appears bereft of rigorous and in-depth legal analysis[156] and most of the legislation relied upon appears out-dated. This study will therefore carry out an in-depth analysis and discussion of the corporate rescue and insolvency concepts in line with the extant laws in Nigeria.

[153] J O Orojo, *Company Law and Practice in Nigeria* (5thedn, London: LexisNexis ButterworthsTolley, 2008) pp. 435-503, 505-575.
[154] CAMA, *op cit*, s. 411 (1) – powers of the Court.
[155]Chianu, *op cit*, p. 636.
[156] Securities and Exchange Commission Rules and Regulations 2013 as amended 2015.

Akume examined the causes of corporate collapse from an economic perspective and a legal perspective.[157]Akume posits that economic perspective views corporate collapse as being a result of the unproductivity and unviability of the company and the legal perspective in the case of winding up of a company considers the interest of the investors and creditors and whether the company is buoyant or not.[158] Furthermore, Akume contends that in view of the colossal negative impact of corporate failure on the totality of interest involved in the existence of the company, 'winding up should be a matter of last resort where all the other alternatives such as schemes of arrangements, mergers and take-overs, receiverships, etc are inadequate in the circumstances'.[159]

However, Akume did not in the work examine or attempt to examine any of the other alternatives as outlined in his work. Hence, this study will therefore examine in detail all the available alternatives to winding up as mentioned.

Abdulai discussed mergers, acquisition and take-overs as a mechanism by which companies that are under threats of foreclosure could be "bailed out" by a willing purchaser, thus, absolving them of liabilities to their bankers, ensuring labour retention and with the shareholders ending up with some financial consideration for their shares.[160] Furthermore, Abdulai analysed the constraints to merger, acquisition and take-overs in Nigeria such as the absence of "Monopolies or Anti-Trust Laws", technical incompetence of the Securities and Exchange Commission to handle such transactions that should be for an independent body established for that purpose[161]

[157]AA Akume, 'The Phenomenon of Corporate Collapse and its Impact on Developing Economies', ABUJCL, VOL. 1 NO. 1 of 2002, 40-53.
[158]*Ibid,* 42.
[159]*Ibid,* 48.
[160]A Abdulai, 'Mergers, Acquisitions and Take-Overs in Nigeria: The Guiding Philosophy, Laws, Regulations and Practice' [1997] 2 MILBQ, 21-34.
[161] *Ibid,* 34.

and insufficient expertise of the Federal High Court to deal with corporate restructuring transactions.

However, Abdulai' work predated the Investment and Securities Act, 2007 and the Securities and Exchange Commission Rules 2013 as amended 2015. Thus, this study will therefore examine merger, acquisition and take-over transactions as potential corporate rescue mechanisms in Nigeria in line with the extant laws.

Ofili attributed the recent wave of mergers witnessed in the Nigerian corporate scene to the mismanagement of many companies, the regulatory fiat of some government agencies and the prevailing harsh economic conditions which demanded the pulling of resources to ensure the survival of companies.[162] Ofili' work was restricted to an analysis of the provisions of the Investment and Securities Act 2007 regulating merger of companies in Nigeria, definition of merger and types of mergers under the Common Law. Instructively, Ofili, suggested the harmonisation of the provisions of the Investment and Securities Act 2007 and the SEC Rules and Regulations made pursuant to the now repealed Investments and Securities Act 1999.

It is against Ofili's suggestion that this study will examine the provisions of the extant Securities and Exchange Commission Rules 2013 as amended 2015 as it relates to the procedure on mergers, acquisition and take-overs.

Tettenborn discussed whether the seller's interest under a "Romalpa Clause"[163] in sale of goods is a floating charge that transforms sellers of goods from unsecured creditors to secured creditors in cases of insolvency.[164] Tettenborn did not comprehensively discuss the effects of "Romalpa Clauses" in insolvency proceedings.

[162] P N Ofili, 'Mergers of Companies under the Investment and Securities Act, 2007'(2012) 1 JCL, 177-193.

[163] *Aluminium IndustrieVaasen B.V v Romalpa Aluminium Ltd* [1976] 1 WLR 676; G Etomi, *An Introduction to Commercial Law in Nigeria: Texts, Cases and Materials* (Lagos: MIJ Professional Publishers, 2014) pp. 167-168.

[164] A M Tettenborn, 'Reservation of Title: Insolvency and Priority Problems', The Journal of Business Law 1981 May, 173-177.

Hence, this study will examine the effects and application of a Romalpa Clause in insolvency proceedings.

Fletcher discussed the problems associated with the maintenance of two distinct legal and procedural codes for personal and corporate insolvency in the United Kingdom, the piecemeal and antiquated nature of the insolvency legislations in the United Kingdom and argued that any law and procedure on insolvency is to be guided by the philosophy of it being simple, effective and inexpensive.[165]

Fletcher's work is a very resourceful exposition on the principal recommendation of the Cork Report 1982. However, this study will proceed to examine the extant Insolvency Act of the United Kingdom and other legislations and rules on Insolvency that were enacted after the Cork Report.

Asomugha examined the powers of a company to borrow and charge property in the CAMA, defined fixed and floating charges, their distinctive features and the mode of enforcement of a fixed charge by the appointment of a receiver and in the case of a floating charge, by the appointment of a receiver and manager.[166]

Beyond the cursory examination of the effects of receivership, Asomugha did not elaborate much on the law and procedure on receiverships. Against this drawback, this study will comprehensively examine the law and procedure on receivership with the aim of suggesting reforms.

Fletcher[167] discussed the effects of the legislative changes to the corporate insolvency law of the United Kingdom and the impact upon corporate rescue. Fletcher argued that in spite of the legislative changes, the 'UK Insolvency Law has

[165] I F Fletcher, 'The Reform of Insolvency Law- 1', The Journal of Business Law 1983 March, 97.
[166] E M Asomugha, 'A Review of the Borrowing Powers of the Company under the 1990 Companies and Allied Matters Decree' (1990/1991) 13, 14 & 15 J.P.P.L, 41-52.
[167] I F Fletcher, 'UK Corporate Rescue: Recent Developments- Changes to Administrative Receivership, Administration and Company Voluntary Arrangements- The Insolvency Act 2000, The White Paper 2001 and the Enterprise Act 2002' (2004/5) 5 European Organizational Law Review, 119-151.

been unable to embrace the "American way" of corporate rescue, with debtor-in-possession as its core principle, but has instead opted for a "rescue" model in which creditor interests continue to assert a dominant influence'.[168]

Although Fletcher lucidly discussed the impact of legislative changes on corporate rescue procedure in the United Kingdom, this study will proceed further to examine the impact of contemporary legislative changes on corporate rescue and insolvency law and practice in the United Kingdom and the possibility of transposition of the positive impact of the legislative changes to corporate rescue and insolvency system in Nigeria.

Bolodeoku examined of the general nature of receivership, particularly in the context of tax debt enforcement, the distinctive features of receivership under the CAMA and the 'non-CAMA' receivership.[169] Bolodeoku seemed to have treated receivership as an end in itself instead of a process or a vehicle for the enforcement of debt security. Thus, Bolodeoku did not examine the challenges that stymied the use of receivership in the enforcement of debt security, particularly in Nigeria. Hence, this study will robustly examine the law and practice of receivership, particularly in Nigeria.

Candide-Johnson and Alex-Adedipe examined the concept of corporate insolvency, proffered definition of corporate insolvency from the renowned categories of cash flow insolvency and balance sheet insolvency, the effects of corporate insolvency on debtor companies and remedies available to creditors by an exhaustive discussion of the procedures for receivership and winding up in Nigeria.[170]

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[168] Fletcher, *art cit*, 120.

[169] I O Bolodeoku, 'Receivership and Enforcement of Tax Liability' (2004) Vol. 24 The Journal of Private and Property Law, University of Lagos, 29-43.

[170] C A Candide-Johnson & A Alex-Adedipe, 'Debt Recovery: Corporate Insolvency – Receivership, Winding Up and other Arrangements' in O Olanipekun (ed), *Banking: Theory, Regulation, Law and Practice* (Lagos: Au Courant, 2016) pp 430-455.

They were of the view that the focus of corporate insolvency in modern day law deviates from the previous trend of dissolution through winding up of insolvent companies and currently focuses on restructuring of insolvent companies to allow for recovery and continuity in place of dissolution.

While the contemporary perspective of this work is remarkable and profound, it did not examine the flaws in the corporate rescue and insolvency procedures in Nigeria. Thus this study will examine the flaws in the corporate rescue and insolvency procedures in Nigeria.

Oditah examined the limits of the *pari passu* rule in winding up, particularly under English law. Oditah discussed the right of an unsecured creditor in the distribution of assets upon winding up of a company and contended that an unsecured creditor is merely owed an obligation and that at no time both before and after winding up, is the unsecured creditor entitled to a claim in any particular asset of the debtor.[171] Thus, Oditah posited that the distinction between proprietary and personal claims is at the heart of insolvency law and if insolvency law respects this distinction, then, it constitutes a significant qualification to the principle of equal treatment of all creditors. Furthermore, since insolvency law do not accord significant respect to pre-insolvency rights, Oditah argued that the determination of who are equals is not a concern of insolvency law but general law.

In this study, Oditah' seminal analysis of priority claims would be comprehensively examined.

[171] F Oditah, 'Assets and the Treatment of Claims in Winding up', (1992) 108 LQR 459-500.

1.8. Definition of Terms

"Administration"[172] is a procedure introduced by the Insolvency Act 1985 to provide an alternative to receivership and winding up in the case of a company experiencing financial problems. The aim of the procedure is the rehabilitation of the company or its business….

"Administration Order"[173] is an order directing that, during the period for which the order is in force, the affairs, business and property of the company shall be managed by a person ("the administrator") appointed for the purpose by the court.

"Administrative Receiver"[174] means:

i.A receiver or manager of the whole (or substantially the whole) of a company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge or one or more other securities; or

ii.A person who would be such a receiver or manager but for the appointment of some other person as the receiver of part of the company's property.

"Business Rescue"[175] means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for –

i.the temporary supervision of the company, and of the management of its affairs, business and property;

ii.a temporary moratorium on the right of claimant against the company or in respect of property in its possession; and

[172] Farrar & Hanningan, *op cit,* Glossary of Terms.
[173] Insolvency Act, *op cit,* s.8 (2) (UK). There is no equivalent provision in any of the extant laws in Nigeria.
[174] *Ibid*, s. 29 (2): CAMA, s. 393 (3) & Eleventh Schedule. It is important to note that in the CAMA it is not described as administrative receiver but receiver and manager.
[175] Companies Act 2008, s. 128 (1) (b) (South Africa). In Nigeria, there is no equivalent provision for business rescue proceeding as it is an indigenous procedure provided in the South African Statute.

iii.the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

"Capital Market Operator"[176] means any person, whether Individual or corporate, duly registered by the Securities and Exchange Commission (SEC) to perform specific function in the capital market.

"Charge" includes mortgage,[177] an encumbrance on the property which is either fixed or floating. A fixed legal charge is a statutory creation; a fixed equitable charge is a creation of equity. A floating charge is a species of equitable charge which does not attach to specific assets until crystallisation.[178]

"Commencement of winding up"[179] means the date when a winding up is deemed to have started.

"Committee of inspection"[180] is a committee consisting of creditors and members appointed to assist a liquidator in winding up.

"Company Rescue"[181] refers to the preservation of the corporate entity or some part of it, after it has been remedied.

"Compromise"[182] is an agreement which terminates a dispute between parties as to the rights of one or more of them or which modifies the undoubted rights of one or

[176]Investment and Securities Act 2007 (ISA), s. 315.
[177] CAMA, *op cit*, s. 197 (11).
[178] Farrar & Hanningan, *op cit,* xviii.
[179] *Ibid.*
[180]*Ibid,* xix.
[181]Adebola, *op cit,* p. 8.
[182]*Sneath v Valley Gold Ltd* [1891] 1 Ch 447 at 494.

more of them or which modifies the undoubted rights of a party which it has difficulty in enforcing.

"Corporate Rescue"[183] is a collective process whereby the insolvent company is given breathing space.

"Debt"[184] means the liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

"Dissolution of a Company"[185] is the corporate equivalent of death. It usually follows winding up.

"Eligible Bank Assets"[186] means assets of eligible financial institutions specified by the Governor of Central Bank of Nigeria as being eligible for acquisition by the AMCON pursuant to section 24 of the AMCON Act.

"Eligible Financial Institution"[187] means a bank duly licensed by the Central Bank of Nigeria to carry on the business of banking in Nigeria under the Banks and other Financial Institutions Act; and shall include a bank or other financial institution, whose banking license has been revoked by the Central Bank of Nigeria pursuant to the Banks and other Financial Institutions Act.

"Hiving-Off"[188] is a method whereby the receiver and manager or the administrator extracts potentially valuable portions of the distressed company and sells them in units to another company either already in existence or incorporated for that purpose.

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[183] O Modupe, 'The Need for Corporate Rescue in Nigeria'<http://modupeoluwalegalconsultant.com> accessed on 17 July 2015.

[184] Insolvency and Bankruptcy Code 2016, s. 3 (11) (India); Chianu, *op cit,* p. 628, defined a debt as a definite sum of money fixed by the agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition.

[185] Farrar & Hanningan, *op cit,* xix.

[186] Asset Management Corporation of Nigeria Act 2010 (as amended) (AMCON Act), s.61

[187] AMCON Act, *op cit,* s. 61.

[188] B Adebola, 'The Nigerian Business Rescue Model: An Introduction' (2014) NIALS Journal of Legal Studies, 20; also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297824> accessed on 10 May 2015.

"Insolvency"[189] in relation to a company, includes the approval of a voluntary arrangement under Part 1, the making of an administration order or the appointment of an administrative receiver. A company is also deemed unable to pay its debt if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.[190]

"Insolvent Person"[191] means any person in Nigeria who, in respect of any judgment, decree or court order against him, is unable to satisfy execution or other process issued thereon in favour of a creditor, and the execution or process remains unsatisfied for not less than six weeks.

"Liquidation"[192] is the process whereby the affairs of the company are wound up and its business and assets are realized for value. A company may be wound up voluntarily by its members if solvent or, alternatively, if it is insolvent, by its creditors or compulsorily by order of the court.

"Moratorium"[193] is a means by which a company under business rescue is given some breathing space during the subsistence of the business rescue process, and is mainly aimed at preventing a rash of creditors from claiming against what little is left in the company.

[189] Insolvency Act, 1986 (UK), s. 247 (1).
[190] CAMA, *op cit*, s. 409 (c); C S Ola, *Company Law in Nigeria* (Ibadan: Heinemann Educational Books (Nigeria) Plc. 2002)p 237.
[191] CAMA, *op cit*, s. 567 (1).
[192] C Mallon (ed), *The Restructuring Review* (7thedn, United Kingdom: Law Business Research Limited, 2014) p. 8.
[193] M B Halita, 'A Comparative Study of some Issues Relating to Corporate Insolvency Law in Nigeria and South Africa'. Unpublished LL.M Dissertation, University of Pretoria, May 2013, p. 9; Mayson, *et al*, *op cit*, p. 654.

"Official Receiver"[194] means the officer by whatever name called or known charged with control of affairs in bankruptcy and if the appointment is vacant for any reason whatsoever, means the sheriff.

"Other Financial Institution"[195] means any individual, body, association or group of persons; whether corporate or unincorporated, other than the banks licensed under this Act which carries on the business of a discount house finance company and money brokerage and whose principal object include factoring, project financing, equipment leasing, debt administration, fund management, private ledger services, investment management, local purchase order financing, expert finance, project consultancy, financial consultancy, pension fund management and such other business as the Central Bank of Nigeria may from time to time designate.

"Receiver"[196] is an impartial person appointed by the court to manage, collect, and receive pending the proceedings, rents, issues and profits of land or personal estate which it does not seem reasonable to the court that either party should collect or receive or for the same to be distributed among the persons entitled.

"Scheme of Arrangement"[197] is a restructuring tool that sits outside formal insolvency; that is, the company may become subject to a scheme of arrangement whether it is solvent or insolvent. It is a compromise or arrangement between the company and its creditors, or between the company and its members.

"Secured Creditor"[198] is a person who holds a mortgage, charge or lien on the company's property or any part of it as a security for a debt due him from the company.

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[194] CAMA, *op cit*, s. 567 (1).
[195] Banks and other Financial Institutions Act (BOFIA), Revised Edition, Laws of the Federation of Nigeria 2007 (as amended), s.66.
[196] *Uwakwe v Odogwe* [1989] 5 NWLR (pt 123) 562 at 579.
[197] Farrar & Hanningan, *op cit*, xxiii; C Mallon (ed), *The Restructuring Review*, *op cit*, p. 8.
[198] *Omojasola v Plisson Fisko (Nigeria) Ltd* [1990] 5 N.W.L.R (pt 151) 434; Orojo, *op cit*, p. 497.

"Winding up"[199] involves the liquidation of the company/corporation so that its assets are distributed to those entitled to receive them. The process of liquidation of a company is also known as the winding up of the company.[200] This can either be compulsory, that is, winding up by the court, or voluntary. Voluntary winding up can either be a members' voluntary winding up in case of solvency, or a creditors' winding up in the case of insolvency.

1.9. Organisational Layout

This Study is structured into Six (6) Chapters.

1.9.1. Chapter One contains the Background to the Study; Statement of Problem; Purpose of Study; Scope of Study; Significance of Study; Research Methodology; Literature Review and Definition of Terms.

1.9.2. Chapter Two discusses the law and procedure relating to corporate insolvency in Nigeria and examines the types of corporate insolvency; modes of and grounds for winding up of companies in Nigeria; legal appraisal of the CAMA, section 408(d); the procedure for winding up of a company by the Court; commencement of winding up proceedings in Nigeria; nature of proceedings before hearing of winding up petition; the effects of winding up order, nature of proceedings after winding up order and the meaning of dissolution of a company and the consequences thereto.

1.9.3. Chapter Three focuses on the law and practice of receiverships with an examination of the appointment of receiver and manager, consequences of appointment of receiver and manager, the powers, rights and obligations of receiver and manager, remuneration of receiver and manager, liabilities of receiver and manager, termination of appointment of receiver and manager, the administrative

[199] *Amolegbe, Re* [2015] 25 JMLR 213 at 229; [2014] 8 N.W.L.R. (pt.1480) 76.
[200] Farrar, *op cit*, xxiv.

receiver in the United Kingdom and the regulation of persons to practice as administrative receiver in the United Kingdom.

1.9.4. Chapter Four examines corporate rescue mechanisms and procedure in Nigeria and other selected jurisdictions such as the United Kingdom, the Republic of South Africa, the Republic of India and the United States of America.

1.9.5. Chapter Five deals with the issues and challenges in corporate rescue and insolvency law and practice in Nigeria such as the multifarious statutory frameworks, lack of efficient and pragmatic regulatory institutions, absence of moratorium clauses on corporate rescue provisions in the various statute, inadequate regulation of corporate rescue and insolvency practitioners, negative impact of corruption and other sharp practices, and the absence of uniform guidelines for informal corporate rescue mechanisms.

1.9.6. Chapter Six embodies summary of findings in this Study, conclusion and recommendations.

CHAPTER TWO

THE LAW AND PROCEDURE RELATING TOCORPORATE INSOLVENCY IN NIGERIA

Corporate insolvency is not a term that is subject to a concise or precise definition. However, the concept of insolvency is commonly used when a debtor is unable to meet its financial commitments. Where it is an individual, it is known as personal or individual insolvency and where it involves a corporate entity, it is known as corporate insolvency.[201] Although personal or individual insolvency and corporate insolvency are used interchangeably, personal or individual insolvency is governed by the law of bankruptcy. Unlike other common law jurisdictions, such as the United Kingdom, there is no one holistic legislation enacted and dedicated to corporate insolvency in Nigeria. Rather, matters of corporate insolvency in Nigeria are principally regulated by the Companies and Allied Matters Act.[202] However, insolvency provisions are found in some specific statutes that will be examined in this chapter.

Winding up is a term commonly associated with the ending of the life of a company. It is the process by which the assets of the company are collected in and realized, its liabilities discharged and the net surplus, if there is one, distributed to the persons entitled to it.[203] It is pertinent to state that a company being wound up may be solvent or insolvent. Insolvent winding up occurs essentially when companies are unable to pay their debt.[204]

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[201] Ian F Fletcher, *The law of Insolvency* (2nd edn, London; Sweet & Maxwell, 1996) pp. 10-11.
[202] Cap C20 Laws of the Federation on Nigeria 2004 (CAMA).
[203] J H Farrar & B Hannigan, *Farrar's Company Law* (4th edn, London; LexisNexis Butterworths Tolley, 1998) p. 704.
[204] CAMA, *op cit*, ss. 408 (d), 409 and 507 (1); Insolvency Act 1986, ss. 122 (1) (f), 123 (UK); Insolvency and Bankruptcy Code 2016, ss. 6 and 7 (India).

In this chapter, this study will examine the law and procedure relating to winding up in Nigeria.

2.1 Overview of Legal Frameworks and Regulatory Institutions on Insolvency

1. Companies and Allied Matters Act

The Companies and Allied Matters Act[205] is the principal statute on insolvency generally in Nigeria. The CAMA established a body corporate, the Corporate Affairs Commission[206]and vested it with the functions to administer the provisions of the CAMA, including amongst others the winding up of companies.[207]

There were extensive provisions in the CAMA, on insolvency as contained in Part XV, chapters 1, 2 & 5. The procedure for winding up proceedings is provided in the subsidiary legislation.[208] The provisions of the CAMA and the Companies Winding up Rules would be comprehensively examined in later part of this chapter.

2. Asset Management Corporation of Nigeria Act

The Asset Management Corporation of Nigeria Act[209] established a body corporate, the Asset Management Corporation of Nigeria[210] for the purpose of efficiently resolving the non-performing loan assets of banks in Nigeria. The functions and powers of the AMCON included the acquisition of eligible bank assets from eligible financial institutions in accordance with the provision of the AMCON Act,[211] initiation or participation in any enforcement, restructuring, reorganisation,

[205]CAMA, *op cit.*
[206]*Ibid*, s. 1(1) (2) (a). Corporate Affairs Commission is abbreviated in this study as "CAC".
[207]*Ibid*, s. 7(1) (a).
[208]Companies Winding up Rules 2001 ("CWR").
[209]2010 as amended ("AMCON ACT").
[210]*Ibid*, s. 1(1) ("AMCON").
[211] *Ibid*,s. 5(a).

programme of arrangement or other compromise[212] and to compromise any claim or forgive or forbear any debts or other obligation owed to the AMCON in respect of a specified class of eligible bank debts.[213]

It is important to state that where compromise, forgiveness, or forbearance will result to recovery of lower price than that paid by the AMCON for the acquisition of the eligible bank assets, such compromise, forgiveness or forbearance is only exercisable with the approval of the Minister of Finance upon the recommendation of the Central Bank of Nigeria.[214]

In order to exercise its functions and powers under the AMCON Act, the AMCON is further conferred with special power to act as or appoint a receiver for a debtor company, whose assets have been charged, mortgaged or pledged as security for an eligible bank asset acquired by the AMCON.[215] A receiver appointed by the AMCON shall have power to realise asset of the debtor company, enforce the individual liability of the shareholders and directors of the debtor company, and manage the affairs of the debtor company.[216]

Furthermore, the AMCON is vested with special powers to commence winding up proceedings[217] under the provisions of the CAMA against a body corporate where the Federal High Court have given a decision for the debtor company to pay any sum to the AMCON and such sum is not liquidated or paid over to the AMCON within 90 days of the date of judgment.[218]

3. **Banks and Other Financial Institutions Act**

[212] *Ibid*,s. 6(1)(e).
[213] *Ibid*, s.6 (1) (l)
[214] AMCON Act, *op cit*, s. 6(5)
[215] *Ibid*, s. 48(1)
[216] *Ibid*, s. 48(2)
[217] *Ibid*, s. 52(1)
[218] *Ibid*

The Banks and other Financial Institutions Act[219] is an Act to regulate banking and other financial institutions and for matters connected therewith. The BOFIA conferred certain functions on the Central Bank of Nigeria in respect of matters in the BOFIA.[220] Instructively, corporate insolvency provisions are contained in the BOFIA, to wit, the Governor of Central Bank of Nigeria (CBN) may with approval of the Board of Directors and notice published in the Gazette revoke the licence granted to a Bank under BOFIA if such bank amongst other grounds go into liquidation or is wound up or otherwise dissolved[221] or has insufficient assets to meet its liabilities;[222] the definition of a failing bank as where it is insolvent[223] and the making of winding up application to the Federal High Court by Nigeria Deposit Insurance Corporation upon the revocation of licence of the bank.[224]

It should be noted that the provisions of the BOFIA apply without prejudice to the provisions of the CAMA insofar as they relate to banks and winding up by the Federal High Court.[225] Where any of the provisions of the CAMA are inconsistent with the provisions of the BOFIA as is it relates to winding up of a bank, the latter shall prevail.[226] In the case of insolvency of other financial institutions, it is also provided in the BOFIA.[227]

4. **Investment and Securities Act**

The Investment and Securities Act[228] is an Act that repealed the Investment and Securities Act 1999 and established a body corporate, the Securities and Exchange

[219]Revised Edition, Laws of the Federation of Nigeria 2007, as amended (BOFIA).
[220] BOFIA, *op cit*, s. 1
[221]*Ibid*, s. 12(1) (b)
[222]*Ibid*, s. 12(1) (d)
[223]*Ibid*, s. 35 (1) (c)
[224]*Ibid*, s. 40
[225]*Ibid*, s. 55 (1)
[226]*Ibid*, s. 55 (2)
[227]*Ibid*, s. 66
[228]2007 (ISA)

Commission,[229] as the apex regulatory institution for the Nigerian capital market.[230] The functions and powers of the SEC include to regulate investment and securities business in Nigeria as defined in the ISA,[231] register and regulate corporate and individual capital market operators as defined in the ISA and to perform such other functions and exercise such other powers not inconsistent with the ISA as are necessary or expedient for giving full effect to the provisions of the ISA.[232]

The ISA provided for insolvency matters.[233] Furthermore, the ISA established an Investors Protection Fund[234] with the objective to compensate investors who suffer pecuniary loss arising amongst others from the insolvency, bankruptcy and negligence of a dealing member firm of a securities exchange or capital trade point.[235]

5. **Nigeria Deposit Insurance Corporation Act**

The Nigeria Deposit Insurance Corporation Act[236] is an Act that established a body corporate known as the Nigeria Deposit Insurance Corporation[237] and vested on the NDIC the responsibility for insuring all deposit liabilities of licensed banks and such other deposit taking financial institutions, otherwise known as "insured institutions", operating with the meaning of sections 16 and 20 of the NDIC Act so as to engender confidence in the Nigerian banking system[238] and giving financial assistance to

[229] *Ibid*, s. 1 (1) (2) (SEC)
[230] *Ibid*, s. 13
[231] ISA, *op cit*, s. 13 (a)
[232] *Ibid*,s. 13 (dd)
[233] BOFIA, *op cit*, ss.47(1) (c) & 48(1) (c) (Insolvency of a capital market operator); s.53(1) (application to the Federal High Court for winding up by a capital market operator); s.53(2) (Application to the Federal High Court for winding up by the SEC); s.53(3) (powers of the SEC to appoint a provisional liquidator); and s.53(5) (a liquidator to forward to the SEC the copies of any returns which he is required to make under the CAMA)
[234] ISA, *op cit*, s.197(1)
[235] *Ibid*, ss. 198(a) 204(a) & 212 (1) (a) & (b); k Udofia, 'Contributions to Investors Protection Fund and the Fraudulent Preference Risk', LAWYER, a This Day Weekly Pull-out, 18.04.2017, p.11.
[236] 2006 (as amended) ("NDIC ACT")
[237] *Ibid*, s.1(1)(2)(a) ("NDIC").
[238] *Ibid*, s. 2 (1) (a).

insured institutions in the interest of depositors, in case of imminent or actual financial difficulties.[239]

In this Study, the provision of the NDIC Act relating to or connected with insolvency,[240] will be relevant.

6. **The Insurance Act**

The Insurance Act[241] made provisions for presentation of winding up petition against an insurer. Such petition for the winding up of an insurer may be made to the Federal High Court, subject to the approval of the National Insurance Commission by not less than 50 policy-holders, each of whom holds a policy that has been in force for not less than 3 years.[242] Furthermore, the provisions of the CAMA on winding up were made subject to the provision of the Insurance Act.[243] In same vein, the Insurance Act provided its own priority list in the settlement of debts.[244] In other words, the distribution of assets of an insurer upon winding up is not in accordance with the provisions of section 494 of the CAMA and rule 167 of the CWR.

7. **Bankruptcy Act**

[239]NDIC Act, *op cit*, s. 2 (1) (b).
[240]NDIC Act, *op cit*, s. 40 (1) (Appointment of the NDIC as deemed provisional liquidator or liquidator of a failed insured institution) ; s.40(2) (the powers of NDIC to apply to the Federal High Court for winding up of a failed insured institution); s.40(4) (the provisions of sections 427(1) & (2) and 428(1) & (2) of the CAMA shall not apply to the NDIC when acting as liquidator of a failed insured institution) ; s.40(5) (the provision of the companies winding up Rules shall not apply to the winding up of a failed insured institution by the NDIC as liquidator); s.40(6) (the provisions of the NDIC Act shall apply without prejudice to the provisions of the CAMA in relation to winding up by the Federal High Court and where any provisions of the CAMA are inconsistent with that of NDIC Act, the provision of NDIC Act shall prevail); s.40(7) (the referral to the Court of Appeal of any action challenging the revocation of the licence of an insured institution or a petition for winding up of an insured institution or the appointment of the NDIC as liquidator and there is an application for interim or interlocutory injunction, which application shall be determined by the Court of Appeal within 60 days of such referral) and s.41(2) (powers of the NDIC as a liquidator).
[241]Cap 118 Laws of the Federation of Nigeria 2004 (as amended)
[242]*Ibid*, s. 32 (1) (a)
[243]*Ibid*, s. 32 (2)
[244] *Ibid*, s. 32 (4)

The Bankruptcy Act[245] is an Act that made provisions for declaring as bankrupt any person who cannot pay his debts of a specified amount.[246] The Bankruptcy Act provide for what constitute acts of bankruptcy in section 1 and on how to commence bankruptcy proceedings.[247]

While it is unarguable that bankruptcy is the precursor of insolvency, in this study, the focus will be on insolvency and not bankruptcy as provided in the Bankruptcy Act. Although, the notions of corporate insolvency and bankruptcy in the Nigerian context are seemingly synonymous, they differ to the extent that the former relates to corporate entities while the latter relates to individuals.[248]

However, it is important to state that an understanding of the law of bankruptcy and the application of the bankruptcy rules is relevant in discussion on proof and ranking of claims in winding up of insolvent companies.[249]

8. **The Federal High Court**

The Federal High Court is the court vested with jurisdiction[250] on insolvency matters.

2.2. Types of Corporate Insolvency

There are many ways of defining insolvency. According to Candide-Johnson and Alex-Adedipe, the definition of corporate insolvency is classified into two renowned categories of Cash flow insolvency and Balance sheet insolvency.[251] In this study, other type of insolvency, that is, ultimate insolvency and regulatory insolvency will also be discussed. Hence, it is better to define insolvency by way of classification.

1. Cash Flow or Commercial Insolvency

[245]Cap B2 Laws of the Federation of Nigeria 2004
[246]*Ibid*, preamble
[247] Bankruptcy Act, *op cit*, ss.3, 4, 5, 6, 7, 8 and 9
[248]C A Candide-Johnson & A Alex-Adedipe, 'Debt Recovery: Corporate Insolvency-Receivership, Winding up and other Arrangements' in O Olanipekun. *Banking: Theory; Regulation, Law and Practice* (Lagos: Au Courant, 2016) p.430
[249]CAMA, *op cit*, ss. 492 and 493
[250] CFRN, s. 251 (1)(e)(j); CAMA, *op cit*, ss.407(1) & 567(1).
[251]S.494

This type of insolvency describes insolvency in a situation where a company is unable to pay its debt as they fall due. In other words, even where its overall assets position may not be in deficit, it has cash flow problems that prevent it from paying its debts when they fall due or upon demand.[252] Thus, where a company is indebted to another and such debt is due for payment, the inability of the company to pay on the due date would suggest that the company is insolvent.[253] Cash flow insolvency therefore arises from the extension of credit by the creditor to the borrower.[254]This is the most often resorted ground for winding up petition in Nigeria.[255]

2. Balance Sheet Insolvency

This refers to a type of insolvency where the value of the assets of the company is less than the amount of its liabilities. Simply put, this occurs where the liabilities of the company exceed its assets, taking into account, not only current liabilities but also, contingent and prospective liabilities.[256]

It is pertinent to emphasise that a company that is insolvent in balance sheet terms will not necessarily be commercially insolvent. In other words, a company, for instance, that has a heavy potential liability in tort may still for the time being have a perfectly satisfactory cash flow.[257]

3. Ultimate Insolvency

This is a type of insolvency where on the liquidation of the assets of the company there is no sufficient assets to satisfy the claim of the creditors.[258]

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[252] Ian F Fletcher, *op cit,* p. 485; Candide-Johnson & Alex-Adedipe, *op cit,* p. 432.
[253] Candide-Johnson & Alex-Adedipe, *ibid.*
[254] R Goode, *Principles of Corporate Insolvency Law* (4th edn, London: Sweet & Maxwell, 2011) p. 2.
[255] CAMA, *op cit,* s. 408 (d); Insolvency Act s. 122(1) (f) (UK); The Insolvency and Bankruptcy Code 2015, ss. 6 and 7 (India).
[256] CAMA, *op cit,* s. 409 (c); Insolvency Act, s. 123 (2) (UK); Candide-Johnson & Alex-Adedipe, *op cit,* p. 433.
[257] L Sealy & S Worthington, *Cases and Materials in Company Law* (10th edn, Oxford: Oxford University Press, 2013) p. 768.
[258] *Ibid.*

4. Regulatory Insolvency

This type of insolvency refers to where though the assets of a corporate entity could exceed its liabilities such corporate entity is still regarded as insolvent because of failure to meet the regulatory thresholds fixed by the applicable law.[259]

2.3. Modes of Winding up of Companies in Nigeria

The winding up of a company may be commenced by any of the following ways:[260]

i.by the Court; or

ii.voluntarily; or

iii. subject to the supervision of the Court.

It is pertinent to state that in the Republic of India, the initiation of liquidation of a company can only commence after the initiation of a corporate insolvency resolution process to revive and rehabilitate the distressed or sick company. In other words, the liquidation of a company in India is a fall back process.[261]

1. By the Court (Compulsory Winding up).

It is liquidation or winding up of a company by virtue of an order of a court with competent jurisdiction that the company is wound up. Winding up by the court is also called compulsory winding up.

[259]K Ekwueme, 'Failure Resolution' in O Olanipekun (ed), *op cit*, p.493.
[260] CAMA, *op cit*, s. 401 (1); *Corporate Affairs Commission v Davis* [2008] 1 N.W.L.R (pt 1067) 60 at 64.
[261] The Insolvency and Bankruptcy Code 2016, s. 33 (India). The liquidation process of a company is determined by an Adjudicating Authority, that is, the National Company Law Tribunal constituted under s. 408 of the Companies Act, 2013.

Compulsory winding up may be applied to a solvent or an insolvent company, but, in practice, its most often invoked in relation to insolvent companies.[262] The court vested with jurisdiction to wind up a company in Nigeria is the Federal High Court within whose area of jurisdiction the registered office or head office of the company is situate.[263] It is important to state that the "registered office" or the "head office" mentioned in Section 407 (1) of the CAMA means the place which has been the longest registered office or head office of the company during the six months immediately preceding the presentation of the petition for winding up.[264]

Winding up by the court is usually invoked upon the circumstances set out in Section 408 and other relevant provisions of the CAMA. However, the circumstance that a company is unable to pay its debt is the most common ground upon which a petition for compulsory winding up is usually presented.[265]

In the later part of this chapter, the grounds for winding up of an insolvent company will be discussed.

2. Voluntarily

A company may be wound up voluntarily if:

i. the period, if any, fixed for the duration of the company by the articles expires; or the event, if any, occurs, on occurrence of which the articles provided that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily.[266]

[262] S W Mayson, *et al*, *Mayson, French & Ryan on Company Law* (25th edn, Oxford: Oxford University Press, 2008 – 2009) p. 662.
[263] CAMA, *op cit,* s. 407 (1).
[264] *Ibid,* s. 407 (2).
[265] *Gbedu v Itie* [2007] 10 N.W.L.R (pt. 1202) 227; C S Ola, *Company Law in Nigeria* (Ibadan: Heinemann Educational Books (Nigeria) Plc. 2002) p. 467.
[266] CAMA, *op cit,* s. 457 (a); Insolvency Act, *op cit,* s. 84 (1) (UK).

ii. the company resolves by special resolution that the company be wound up voluntarily.[267]

It is pertinent to state that the type of resolution to adopt in a case where the company is to be wound up voluntarily under section 457 (a) of the CAMA was not expressly stated. Hence, there is the argument as to what type of resolution,[268] that is, whether a special resolution or an ordinary resolution that is to be passed at the general meeting.

Usually an Act specifies which type is required and that provision governs. But where the Act is silent about the type of resolution required, then an ordinary resolution is required unless the articles specify a higher level of approval, up to and including unanimity.[269] Thus in this Study, it is contended that since it was not stipulated in the CAMA that it has to be by special resolution, voluntary winding up under section 457 (a) of the CAMA can be initiated by an ordinary resolution of the company at a general meeting unless where the article of the company provides otherwise.[270]

Voluntary winding up can be either a members' voluntary winding up or a creditors' voluntary winding up.[271] A members' voluntary winding up is initiated when the members of a company adopt a resolution for voluntary winding up following a statutory declaration of solvency[272] by the directors of the company in

[267]CAMA, *op cit,* s. 457 (b); Insolvency Act, *op cit,* s. 84 (1) (b).
[268] Ordinary resolution is a resolution passed by a simple majority of votes cast by such members of the company as, being entitled to do so, vote in person or by proxy at a general meeting as per CAMA, s. 233 (1); Special resolution is a resolution passed by not less than three-fourth of the votes cast by such members of the company as, being entitled to do so, vote in person or by proxy at a general meeting of which 21 days' notice, specifying the intention to propose the resolution as a special resolution, has been duly given, subject to the proviso as per CAMA, s.233 (2).
[269] P L Davies & S Worthington, *Gower and Davies Principles of Modern Company Law* (9thedn, London: Sweet and Maxwell, 2012) p. 460.
[270] CAMA, *op cit,* s. 233 (6); Farrar, *op cit,* p. 708; Mayson *et al, op cit.* p. 660.
[271] *Ibid,* s. 462 (4); Insolvency Act, *op cit,* s. 90 (UK).
[272] CAMA, *op cit,* s. 462 (4); S McLaughlin, *Unlocking Company Law* (London: Hodder Education, 2009) p. 399.

accordance with section 462 (1) of the CAMA. Thus, a members' voluntary winding up is generally not regarded as an insolvency procedure as it is mostly invoked in relation to solvent companies. In other respect, a creditors' voluntary winding up is initiated when the members of a company adopt a resolution for winding up without a statutory declaration of solvency by the directors of the company.[273] Creditors' voluntary winding up is an insolvency procedure and is usually invoked in relation to insolvent companies.

The statutory declaration of solvency required under section 462 (1) of the CAMA must state that the declaring directors of the company have made a full enquiry into the affairs of the company and that, having so done, they have formed the opinion that the company will be able to pay its debts in full within such period, not exceeding 12months from the commencement of the winding up as specified in the declaration. A statutory declaration of solvency is of no effect unless it is made within 5weeks immediately preceding the date of the resolution for winding up the company and is delivered to the Corporate Affairs Commission for registration before that date and further embodies a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration.[274] It is not required that the statement be correct in every detail, provided it can be fairly described as being a statement of assets and liabilities.[275]

In the United Kingdom, the provision for a statutory declaration of solvency to be delivered to the registrar of companies before the expiration of 15days immediately following the date on which the resolution for winding up is passed[276] seems reasonable and commercially expedient than the provision under section 462

[273] CAMA, *op cit*, s. 462 (4).
[274] *Ibid*, s. 462 (2).
[275] *De Courcy v Clement* [1971] Ch 693.
[276] Insolvency Act, *op cit*, s. 89 (3) (UK).

(2) (a) of the CAMA that requires the delivery of the statutory declaration of solvency to the Corporate Affairs Commission for registration within 5weeks before the date of the passing of the resolution for winding up of the company.

It constitutes a criminal offence for any director of a company to make a declaration without having reasonable grounds for the opinion that the company would be able to pay its debts in full within the period specified in the declaration.[277] If the company's debts are not paid or provided for in full within the period stated in the declaration, then the declaring directors of the company are presumed not to have had reasonable grounds for making it.[278]

While the provisions applicable to a members' voluntary winding up is as contained in sections 464 to 470, 480 to 485, 491 to 531 of the CAMA, the provisions applicable to a creditors' voluntary winding up is contained in sections 472 to 485, 491 to 531 of the CAMA.

In the later part of this chapter, the procedure for creditors' voluntary winding up will be discussed.

3. **Subject to the Supervision of the Court**

Where a company passes a resolution for voluntary winding up, the Court may on petition order 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 thinks just.[279]

[277] CAMA, *op cit,* s. 462 (3).
[278] *Ibid*
[279] *Ibid*, s. 4-86.

The nature of winding up subject to the supervision of the court was rightly pointed out by the court in *Corporate Affairs Commission v Davis*[280] thus:

> winding up subject to supervision of the Court occupies one unique position in between winding up by the Court and Voluntary winding up as shown in Sections 490 (1) and (2) of the CAMA. Where an order is made for a winding up subject to supervision, the liquidator may, subject to any restrictions imposed by the court, exercise all his powers, without the sanction or intervention of the court, in the same manner as if the company were being wound up voluntarily…. that the powers specified in paragraphs D, E and F of Section 425 (1) shall not be exercised by the liquidator except with the sanction of the court or, in a case where before the order, the winding up was a creditors voluntary winding up, with the sanction of the court or the committee of inspection, or (if there is no committee) a meeting of the creditors... .

The provisions of the CAMA that are not applicable to a winding up subject to supervision of the court are provided in the Twelfth Schedule to the CAMA.[281] In the

[280] *Supra,* at 78 -79, paras. H–F, per Owoade JCA.

[281] CAMA, *op cit,* s. 490 (2); The 12th Schedule to the CAMA provides for the provisions inapplicable to winding up under the supervision of the court, that is, s. 388 (power to appoint official receiver for debenture holders and others), s. 420 (statement to company's affairs to be submitted to official receiver) s. 422 (appointment, remuneration and title of liquidators except subsection 8 - the acts of a liquidator shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification), s. 427 (exercise and control of liquidator's powers) s. 428 (payments by liquidator into company's liquidation account) s. 429 (audit, etc of liquidators' account), s. 430 (books

United Kingdom, there is no provision for winding up subject to supervision of the court as winding up can be either voluntary or by the court.[282]

In the Republic of Ghana, the winding up of a company is either by official liquidation in accordance with the Bodies Corporate (Official Liquidations) Act or by private liquidation in accordance with the Companies Act.[283] In this study, the procedure for winding up of a company by official liquidation will be examined in appropriate circumstance. The modes[284] of official winding up of a company are by:

iv. a special resolution of the company;

v.a petition addressed to the Registrar of Companies;

vi.a petition to the court, or

vii.a conversion from a private liquidation.

Against the forgoing, it is important to state that in the Republic of Ghana, while private liquidation, which is akin to members' voluntary winding up in Nigeria, is governed by the provisions of the Companies Act, official liquidation, which is essentially similar to winding up by the Court (Compulsory Winding up) in Nigeria, is governed by the provisions of the Bodies Corporate (Official Liquidations) Act.

2.4 Grounds for Winding up of Companies in Nigeria

The circumstances upon which a company may be wound up by the court in Nigeria are provided in section 408(a) to (e) of the CAMA, to wit:

i.if the company has by special resolution resolved that the company be wound up by the court;

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to be kept by liquidators) s. 431 (release of liquidator), s. 432 (control over liquidators) s. 433 (powers to appoint committee of inspection, etc), s. 434 (powers, etc of committee of inspection), s. 435 (powers were no committee of inspection), s. 436 (powers to appoint special manager), s. 450 (power to order public examination of promoters, etc) and s. 453 (delegation to liquidator or of certain powers of the court).

[282] Insolvency Act, *op cit,* s. 73.

[283] Companies Act 2013, s. 257 (1) (Ghana).

[284] Bodies Corporate (Official Liquidations) Act 1963 (Act 180), s. 1 (1) (Ghana).

ii.if default is made in delivering the statutory report to the Corporate Affairs Commission or in holding the statutory meeting;

iii.if the number of members is reduced to below two;

iv.if the company is unable to pay its debts;

v.if the court is of the opinion that it is just and equitable that the company should be wound up.

Notwithstanding the provisions of section 408 of the CAMA, a company may be wound up in Nigeria by virtue of section 312 (2) (a) of the CAMA if the court is satisfied that a petition under sections 310 and 311 of the CAMA is well founded. Furthermore, a company may be wound up in Nigeria by reason of the provisions in some extant legislation such as the AMCON Act,[285] the ISA on the ground of cancellation of registration of a capital market operator[286] and the NDIC Act on the ground of the revocation of the licence of the failed insured institution.[287]

In the Republic of India, unlike the case in Nigeria and the United Kingdom, the liquidation of a company is not invoked as an originating process. The liquidation of a company can only be triggered after a corporate insolvency resolution process.[288] In this vein, liquidation of a company in the Republic of India can only be invoked upon the following circumstance, to wit:

1. Where the Adjudicating Authority, that is National Company Law Tribunal, before the expiration of the insolvency resolution process period or the

[285] 2010 (as amended), s. 52
[286] ISA, *op cit* s. 53(4) and NDIC Act on the ground of the revocation of the licence of the failed insured institution
[287]NDIC Act, s.40(3)
[288] Insolvency and Bankruptcy Code, *op cit*, chapter III.

maximum period permitted for completion of the corporate insolvency resolution process under section 12[289] or the fast track corporate insolvency resolution process under section 56,[290] does not receive a resolution plan under (6) of section 30.[291]

2. Where the Adjudicating Authority rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein.[292]

3. Where the resolution professional[293] during the corporate insolvency resolution process but before confirmation of the resolution plan, intimate the Adjudicating Authority of the decision of the committee of creditors to liquidate the corporate debtor.[294]

4. Where any person other than the concerned debtor whose interests are prejudicially affected makes an application to the Adjudicating Authority over the contravention of an approved resolution plan.[295]

In the Republic of Ghana, the grounds for official liquidation of a company are disparate and depend on the mode of winding up of the company. For instance, where the official winding up of a company is by a petition addressed to the Registrar of Companies, it can be on the ground that the company is unable to pay its debts.[296] The meaning of a company being unable to pay its debt is essentially similar to the

[289] *Ibid,* s. 12 – the time limit for completion of insolvency resolution process is a period of 180 days from the date of admission of the application to initiate the process. However, the insolvency resolution process period of 180 days can be extended by the Adjudicating Authority upon an application by the resolution professional for such further period as it thinks fit but not exceeding 90 days and any such extension shall not be granted more than once.

[290] Insolvency and Bankruptcy Code, *op cit,,* s. 56 – the time limit for completion of fast track corporate insolvency resolution process is a
period of 90 days from the insolvency commencement date. However, the fast track corporate insolvency resolution process period of 90 days can be extended upon an application by the Adjudicating Authority upon an application by the resolution professional for such further period but not exceeding 45 days and any such extension shall not be granted more than once.

[291] *Ibid,* s. 33 (1) (a).

[292] *Ibid,* s. 33 (1) (b).

[293] *Ibid,* ss. 22, 23, 25 & 34 (1) – the resolution professional has a meaning and duties that is akin to that of a Liquidator the in liquidation process in Nigeria and the United Kingdom.

[294] *Ibid,* s.33 (2).

[295] *Ibid,* s. 33 (3) (4).

[296] Bodies Corporate (Official Liquidations) Act, *op cit,* s. 3 (2).

definition of inability to pay debt under section 409 of the CAMA except the amount of indebtedness and the period of statutory demand.[297] In the case of official winding up of a company by a petition to the court, it can be on the ground that:[298]

i. The company does not within a year from its incorporation commence to carry on all the businesses which it is authorised by its regulations to carry on or suspends any of such businesses for a whole year;

ii. The company has no members;

iii. The business or objects of the company are unlawful or the company is operated for an illegal purpose or the business being carried on by the company is not authorised by its Regulations;

iv. The company is unable to pay its debts;

v. The court is of the opinion that it is just and equitable that the company should be wound up.

While the grounds for winding up of a company seems to be more expansive in the Republic of Ghana and the United Kingdom, in this chapter, the discussion on the grounds of winding up of a company will be restricted to the provisions of section 408 (d) of the CAMA, which relates to the inability of a company to pay its debt,[299] that is, corporate insolvency.

2.5 Determining Insolvency

The often resorted ground for a petition for winding up of a company is that the company is unable to pay its debts. However, the circumstances when a company can

[297]Bodies Corporate (Official Liquidations) Act, *op cit,* s. 3 (3) – the amount of indebtedness is put in a sum exceeding fifty pounds; the period of statutory demand is twenty-one days as against three weeks stipulated in the CAMA.

[298] *Ibid,* s. 4 (2) (3) – it is instructive that the Attorney-General of the Republic of Ghana can petition for winding up of a company but only where the ground is that the business or objects of the company are unlawful or the company is operated for an illegal purpose or the business being carried on by the company is not authorised by its Regulations.

[299] *C. B. D. I. v COBEC (Nig.) Ltd* [2004] 13 N.W.L.R (pt 890) 376; *Unifam Ind. Ltd v Oceanic Bank Int'l Nigeria Ltd* [2005] 3 N.W.L.R (pt 911) 83.

be held unable to pay its debts are not susceptible to a concise meaning. When a company does not have cash to pay its debts as they fall due, it is easily understandable that such a company is insolvent. There are other scenarios that make it difficult to conceptualise when a company is unable to pay its debts. For instance, where a company refuses to pay a single debt that it could perfectly afford to discharge, can it be held to be unable to pay its debts? It is likewise possible for a company to have sufficient assets but not sufficient liquidity to provide an adequate amount of cash to meet present or even contingent liabilities as they fall due. Can such a company be held to be unable to pay its debts?

2.5.1 Essential Elements of the phrase "Inability to Pay Debts"

There is no express provision in the CAMA or the Companies Winding up Rules on the definition of a debt or what constitutes a *bona fide* dispute of a debt or dispute of a debt on substantial grounds. However, a debt has been defined as a definite sum of money fixed by agreement of the parties as payable by one party in return for the performance of a specified obligation by the other party or upon the occurrence of some specified event or condition.[300]

In the relevant legislation of the Republic of India, a debt is defined as "a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt".[301] In a definitive and unambiguous manner, the words "financial debt",[302] "operational debt"[303] and "dispute"[304] were respectively

[300] Chianu, *op cit* p. 628; *Hansa International Construction Ltd v Mobil Producing Nigeria* [1994] 9 N.W.L.R (pt 366) 76 at 86, per Uwaifo JCA (as he then was). 'A debt is a sum of money acknowledged as owing by the company or at any rate seen objectively from the facts as owing'; *International Merchant Bank Nigeria Ltd v Speegaffs Company Nigeria Ltd* [1997] 3 N.W.L.R (pt 494) 423.
[301] Insolvency and Bankruptcy Code, *op cit.* s. 3 (11) (India).
[302] Insolvency and Bankruptcy Code, *op cit*, s. 5 (8) (India).
[303] *Ibid*, s. 5 (21) – means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority.
[304] *Ibid*, s. 5 (6) – includes a suit or arbitration proceedings relating to – (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty.

defined in the Indian legislation. Financial debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes: -

a. money borrowed against the payment of interest;
b. any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;
c. any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
d. the amount of any liability in respect of any lease or hirer purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other Accounting Standards as may be prescribed;
e. receivables sold or discounted other than receivables sold on non-recourse basis;
f. any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of borrowing;
g. any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
h. any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
i. the amount of any liability in respect of any of the guarantee of indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause.

The phrase "inability to pay debts" is defined in section 567 (1) of the CAMA as having the meaning assigned by section 409 of the CAMA. By virtue of Section 409 of the CAMA, a company is deemed to be unable to pay its debts in three circumstances, namely:

1. CAMA, section 409 (a) - the Statutory Demand

A creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N2000 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.[305]

With regards to section 409 (a) of the CAMA, it has been held in a similar provision in the United Kingdom legislation,[306] that the use of the words "is indebted" … "then due" … and "so due" have the consequence that a debt can only furnish the basis for a statutory demand served under the United Kingdom legislation if the debt is presently due at the date when the creditor seeks to utilise it for this purpose.[307]

A company is deemed to be unable to pay its debt if the court is satisfied that the company is unable to pay its debt, taking into account its contingent and prospective liabilities as well as its debts which are immediately payable. It seems that there are two tests of insolvency here. In other words, a company would be unable to pay its debts if it cannot pay them as they fall due, out of cash or readily realisable assets in its hands, and it will be immaterial that it could pay them over a lengthy period by a steady realization of all its assets. The company will also be unable to pay its debts if it has no reasonable prospects of paying all of them, both

[305] CAMA, *op cit*, s.409 (a*); Gateway Holdings Ltd v Sterling Asset Management & Trustees Limited* [2016] 9 N.W.L.R (pt 1518) 490 at 514 – 515, paras E – C.
[306] Insolvency Act, *op cit*, s. 123 (1) (a) (UK).
[307] *Re Bryant Investment Co. Ltd* [1974] 1 W.L.R 826.

accrued and prospective, by a steady realization of all its assets, and in this case, it will be immaterial that it can pay its accrued debt out of its liquid resources.

In order to determine whether the company is insolvent in this second sense, it must be supposed that the company will cease carrying on its business immediately, except for fulfilling contracts which it has already entered into and it must then be asked whether the company would be able to satisfy its accrued liabilities and its liabilities under those contracts by steadily realizing all its assets. No regard must be paid to the profits which the company might earn or to any further liabilities which it might incur under fresh contracts if it continues to carry on its business.[308]

It is submitted that where a debt is *bona fide* and disputed by a company upon substantial grounds, the company's failure to pay will not afford a creditor the basis to petition for a winding up order, since it has been held that the words "neglected to pay" are to be understood to mean "omitted to pay without reasonable excuse".[309] Hence, a petitioner in a winding up proceeding must establish not only that there is a debt owed but that the company is not disputing the debt in good faith. In a situation where the company disputes a debt, it is important to ascertain whether the dispute is one that is *bona fide* or substantial.[310]

The elaborate interpretation of the word "debt" and "dispute" in the extant legislation of the Republic of India would afford a better understanding of the phrase "inability to pay debts". In view of the obvious lacuna in respect of the definition of these fundamental terms in the CAMA, reliance is ordinarily placed on the pronouncements from the courts in Nigeria as relating to section 409 of the CAMA.

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[308] In *Re: Medipharm Publications (Nig.) Ltd* (1970) (2) African LR (Comm.) 287 at 293-294; E Chianu, *Company Law* (Abuja: Law Lords Publication, 2012) pp. 635-636.
[309] *Re Lympne Investments Ltd* [1972] 2 All ER 385.
[310] Fletcher, *op cit*, p. 524; *Pharma-Deko Plc v Financial Derivates Co Ltd* [2015] 10 N.W.L.R (pt 1467) 225 at 252, paras C – E.

However, there is a consensus that where a debt is disputed in good faith or on substantial grounds, winding up of a company based on its inability to pay debt is not the appropriate remedy. In *Oriental Airlines Limited v Air Via Ltd*,[311] the Court of Appeal held thus:

> But where there is excuse for non-payment within the prescribed time limit has been held not to amount to neglect. So, where the debt is disputed *bona fide*, an order for winding up will not be made. Where the debt is *bona fide* disputed by the company, the creditor must seek his remedy in action to establish the debt. The procedure should not be taken in order to extort the payment of a disputed debt. The machinery of a winding up petition should not be converted to an engine for debt collection in circumvention of the established legal procedure for instituting action in appropriate court for the collection of debts…. Where there is a genuine dispute as to the indebtedness of the company, that issue must first be resolved before the petition proceedings are continued. A winding up order of a company would be refused where the insolvency or the inability to pay the debt is the ground for the petition if the debt alleged is in dispute... .

In determining the substantiality of the debt in a winding up petition, it does not matter whether they were raised early enough to deny the debt or they were put

[311][1998] 12 N.W.L.R (pt 577) 271 at 280-281, per Musdapher JCA (as he then was); *Air Via Ltd v Oriental Airlines Ltd* (2004) 4 SC (pt. 2) 37.

forward after a misguided petition has been instituted. The ground of dispute can be raised at any time.[312] Furthermore, in *Hansa International Construction Ltd v Mobil Producing Nigeria,* the Court of Appeal also held that where a petition is based on a debt which is disputed on substantial grounds, the petition will fail. The Supreme Court of Nigeria in *Ado Ibrahim & Co. Ltd v BCC Ltd*[313] held thus:

> …. However, where the debt in issue is colossal such that the assets of the company, if left untouched, will not in the nearest future, having regards to galloping inflation, be sufficient to pay off the debt when they are realised, 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.[314]

It is unfortunate that the Supreme Court of Nigeria in the determination of *Ado Ibrahim & Co. Ltd v BCC Ltd* failed to take cognisance of the provisions of section 409 (a) of the CAMA to the effect that the quantum of debt required to establish a company's inability to pay debt is when the debt is in a sum exceeding N 2, 000. 00.[315]

[312] *Onochie v Alan Dick & Co Ltd* [2003] 11 N.W.L.R (pt 832) 451 at 461, paras A – D.
[313] [2007] 15 N.W.L.R (pt 1058) 538.
[314] *Ibid,* at 546.
[315] CAMA, *op cit,* s. 409 (a); Insolvency Act, *op cit,* s. 123 (1) (a), the sum of £750 is stipulated in the United Kingdom for England; the Companies Act 2013, s. 271 (2) (a) (India), the sum of one Lakh Rupees is stipulated. However, this provision has been repealed by the Insolvency and Bankruptcy Code, *op cit,* s. 252. Thus, in the Republic of India, the liquidation of a company is invoked not because of the company's inability to pay its debts but by virtue of the circumstances stated in the Insolvency and Bankruptcy Code, s. 33, primarily that the Corporate Insolvency Resolution process with respect to the company failed.

While it seems settled that where a debt is disputed *bona fide* or on substantial grounds, a petition for winding up of a debtor company may not succeed, it still remains arguable if where the dispute is as to the exact amount owed by the debtor company, whether the petition for winding up on the ground of the company's inability to pay its debt will succeed. In *Weide & Co. (Nig) Ltd v Weide & Co. Hamburg,*[316] the Court of Appeal held that "… where a debt is in dispute, the burden is on the creditor to prove not only that a debt is owed but the particular amount owed".[317]

However, the same Court of Appeal in *Unifam Industries Ltd v Oceanic Bank International (Nig) Ltd*[318] in answer to the question: should a court refuse to proceed with a winding up proceedings because there is a dispute as to the amount owed by respondent (company) to the petitioner, stated that:

> … moreover, it seems to me that it would be in many cases, be quite unjust to refuse a winding up order to a petitioner who is admittedly owed monies which have not been paid merely because there is a dispute as to the precise amount owing.

It is pertinent to state that the Supreme Court of Nigeria in *Ado Ibrahim's case* held that "… a court will not decline to entertain a petition from a creditor from winding up a company that is unable to pay its debt because there is a mere dispute as to how much the company is owing the creditor".[319]

In this study, we align with the contention that it would be wrong to refuse a winding up order simply because there is a dispute as to the precise amount owing as

[316] [1992] 6 N.W.L.R (pt 249) 627.
[317] *Ibid,* 640.
[318] [2005] 3 N.W.L.R (pt 911) 83.
[319] *Ado Ibrahim & Co. Ltd v BCC Ltd, supra,* at 573.

long as the debt admitted is in excess of N 2, 000. 00 as provided by section 409 (a) of the CAMA and the company is also commercially insolvent.[320]

Suffice to say that by virtue of sections 408 (d) and 409 (a) of the CAMA, if a company is unable to pay its debt in excess of the sum of N 2, 000. 00, three weeks after demand has been made, then, such company is deemed unable to pay its debt and may be wound up by the court in Nigeria. It is therefore appropriate to state that a petitioner relying on paragraph (a) of section 409 of the CAMA must establish that:

1. There is an existing debt in the excess of the sum of N 2, 000. 00 and due.

In this study, we have established the presumption of insolvency law in Nigeria that the courts are astute to prevent creditors from relying on the provisions of section 409 (a) of the CAMA if the debt is disputed *bona fide* on substantial grounds by the company.[321]

2. A demand has been made for its repayment

It is trite that a statutory demand[322] to the debtor company must be invoked in a creditor's claim for a liquidated sum based upon contract or tort. This is so regardless of the magnitude of the claim. Additionally, the statutory demand must be in the hands of the creditor or its assignee.[323] The issue that was not provided in the CAMA or the Companies Winding up Rules is the prescribed form of the statutory demand.

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[320] J O Orojo, *Company Law and Practice in Nigeria* (5th edn. London: LexisNexis Butterworths Tolley, 2008) p. 454.

[321] *Hansa International Construction Ltd v Mobil Producing Nigeria, supra*; *Air Via Limited v Oriental Airlines Limited, supra; Unifam Ind. Ltd v Oceanic Bank Int'l Nigeria Ltd, supra,* 99; *Home Development Ltd v Scancila Constructing Co. Ltd* [1994] 8 N.W.L.R (pt 362) 250; C C Wigwe, Introduction to Company Law and Practice (Accra: Mountcrest University Press, 2016) pp. 346 – 347.

[322] CAMA, *op cit,* s. 409 (a); *International Merchant Bank Nigeria Ltd v Speegaffs Company Nigeria Ltd, supra,* at 433.

[323] CAMA, *op cit,* s. 409 (a); *Tate Industries Plc v Devcom Merchant Bank Ltd* [2004] 17 N.W.L.R (pt 901) 182- where the court held that a demand under the hand of an external solicitor to the creditor does not constitute a demand under the hand of the creditor; in Chianu, *op cit,* p. 631 – it was stated that to meet the requirement of 'demand under his hand', in the case of a body corporate, the demand should be signed by a director, company secretary or other authorised officer by reason of the provisions of the CAMA, s. 77.

Hence, it has been submitted that the demand need not be in any form.[324] Unlike the case in Nigeria, in the United Kingdom, the demand has to be in prescribed form.[325] The significance of the statutory demand being in a prescribed form in the United Kingdom is that it makes provision or offers an option to the company to make an application to the court for an injunction restraining the creditor from presenting or advertising a petition for the winding up of the company.

The statutory demand is served by leaving it at the registered office or head office of the company. But where no such registered office exists, it has been contended that the demand may be validly served by leaving it at the company's actual place of business for the time being.[326] Furthermore, it has been argued that a demand sent by post will be discountenanced as the extant provision states unequivocally that a demand is served by leaving it at the company's registered office, which provision is *in tandem* with the provisions of section 78 of the CAMA. On the other hand, there is the viewpoint that since the provision did not specify who is to leave the demand at the registered office or head office, it can be left there by the agent of the person making the demand including the post office.[327]

3. The company has neglected to pay after a period of three weeks from the day of demand and failed to secure or compound the debt to the reasonable satisfaction of the creditor.

It has been submitted that the period of three weeks is calculated in accordance with the rule that, for the purpose of establishing the running of a prescribed legal time limit, fractions of a day are ignored. Therefore, the day on which the demand is

[324] Orojo, *op cit,* p. 452.
[325] Insolvency Rules 1986, *op cit,* r. 4.6(1) (d) (as amended) by Insolvency (Amendment) Rules 2010, *op cit,* para 140 (2) (b) (UK).
[326] Fletcher, *op cit,* p. 526.
[327] Chianu, *op cit,* p. 633, relying on the provisions of the CAMA, s. 78 that provides thus: … 'any other document may be served on a company by leaving it at or sending it by post to, the registered office or head office of the company; Mayson *et al*, *op cit,* p. 664.

served on the company is ignored and the period of 21days starts to run from the beginning of the following day.[328] In this study, we respectfully disagree with the contention that the prescribed time limit of three weeks is same as 21 days as the canon of construction of a period of time is as specifically provided in an enactment[329] and not subject to whims.

It is pertinent to state that "secure" in the context of section 409 (a) of the CAMA does not mean the security given at the time of giving the credit. It refers to the security after the debt has become due and the creditor had made a demand to the company to pay the sum due, which the debtor company is expected to pay the sum or secure or compound for it to the reasonable satisfaction of the creditor within the prescribed time limit of three weeks of the demand.[330]

It should be noted that it is not necessary that the creditor who utilises the statutory demand procedure of section 409 (a) of the CAMA to first obtain judgment in respect of the debt upon which the demand is based. On the other hand, if the creditor has already obtained judgment against the company, it is not normally a valid objection to a petition for winding up that the debtor company disputes the claim, or is making a claim for even larger amount against the petitioner, or even that an appeal against the judgment is pending.[331]

However, it is instructive that having grounds for the presentation of a petition does not necessarily entitle the creditor to the making of a winding up order. Winding

[328] Chianu, *op cit*, p. 633.

[329] Interpretation Act, Cap 123, LFN, 2004, s. 15 (day), s. 18 (month, year); contrast with Bodies Corporate (Official Liquidations) Act, *op cit*, ss. 3 (3), 4 (3) (Ghana) – twenty-one days is the prescribed limit for statutory demand. It is instructive that in the Republic of India and under the Companies Act, 2013, s. 271 (2) (a), now omitted in the Insolvency and Bankruptcy Code, *op cit*, s. 252, the prescribed time limit for a demand was 21 days.

[330] *Nationwide Development Company Ltd v U.B.A Plc* [1996] 3 N.W.L.R (pt 437) 435 at 444; J E O Abugu, *Principles of Corporate Law in Nigeria* (2nd edn, Lagos: MIJ Professional Publishers Limited, 2014) p. 755. It is worthy of note that under Companies Act, *op cit*, s. 271 (2) (a) (India) (now omitted), instead of the word 'secure', the words 'provide adequate security' or 'restructure' was used. This provision seems a better phraseology than that in the CAMA.

[331] *Re Douglas Griggs Engineering Ltd* [1963] 1 Ch 13.

up is a collective or class remedy and an order may be refused if the petitioner is merely seeking to obtain some private advantage.[332] If the purpose of the petition is legitimate and not unreasonable, it does not matter that the motive of the petitioner is malicious. In such circumstance, a petitioner can still be entitled to a winding up order.[333]

2. CAMA, section 409 (b) – Unsatisfied Judgment Execution

A company shall be deemed to be unable to pay its debts if the execution or other processes 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. This provision presupposes that a creditor of the company has previously obtained judgment against it and has proceeded to seek enforcement of that judgment by levying execution on the company's property. If such a process fails to realise sufficient value of assets to satisfy the judgment debt, this event in itself is to be treated as signifying the company's insolvent state.[334]

It is pertinent to state that where a creditor relies on section 409 (b) of the CAMA for the winding up petition, the debtor company cannot normally dispute the debt in the winding up proceeding. To raise a valid plea of *bona fide* dispute in relation to a judgment debt, the debtor company may advance the defence that the judgment was obtained by fraud or entered in absence of jurisdiction or the judgment itself is a complete nullity.[335]

However, in *Tony-Anthony Holdings Ltd v Commercial Bank for Africa,*[336] the Court of Appeal curiously held that the plea of *res judicata* applies to winding up

[332] Farrah & Hannigan, *op cit*, p. 712.
[333] *International Merchant Bank Nigeria Ltd v Speegaffs Company Nigeria Ltd, supra*, at 437.
[334] CAMA, *op cit,* s. 567 (1). The definition of an "Insolvent person".
[335] *Nwankwo v Yar'Adua* [2010] 12 N.W.L.R (pt 1209) 518; *Babatunde v Olatunji* [2000] 2 N.W.L.R (pt 646) 557; *Alawiye v Ogunsanya* [2013] 5 N.W.L.R (pt 1348) 570.
[336] [2013] All FWLR (pt 698) 944.

proceedings. In this case, the first appellant was a customer of the respondent bank. It was granted various credit facilities in the course of their transaction. When it failed to pay back the loans, the respondent bank commenced an action in the High Court of Lagos State. It also obtained a *mareva* injunction against the appellant but the High Court granted judgment in the respondent bank's favour. When the appellant failed to pay the judgment debt, the Nigeria Deposit Insurance Corporation (NDIC) appointed Chief Ikoku to recover the debt at Failed Banks Tribunal (Tribunal). The said Chief Ikoku filed an application for the Tribunal to enter final judgment as per his claims. The Tribunal granted the application and also issued a bench warrant against the 2nd appellant. The Federal High Court subsequently became seised of its jurisdiction over the matter upon the return to democracy in 1999. The 2nd appellant thereafter was arrested and remanded in prison. When the appellants still failed to pay the debt, the respondent bank filed an application seeking orders directing confiscation of 1st appellant's properties, sale of same, directing the winding up and committing the 2nd appellant to imprisonment. The appellants in response filed an application seeking order dismissing the action on grounds of *locus standi* of the respondent bank to commence the action and lack of jurisdiction to entertain the suit. The Federal High Court dismissed the application.

The appellants being dissatisfied with the ruling of the Federal High Court filed an appeal to the Court of Appeal challenging the decision of the Federal High Court. They contended that the lower court had no jurisdiction to entertain the suit on grounds that the suit is *res judicata*, the prosecution constituted an abuse of court process and lack of *locus standi* of the respondent bank. The Court of Appeal while allowing the appeal held that:

> … where a court of competent jurisdiction has settled the matters in dispute between the parties, none of them are allowed to re-litigate same by bringing a fresh action. The matter is said to be *res judicata*. Thus, a successful plea of *res judicata* ousts the jurisdiction of the court in which it is raised. In the instant case, where there was a subsisting judgment on the recovery of debt between the parties, the Federal High Court erred by assuming jurisdiction on the matter subsequently commenced.[337]

In this study, it is submitted that the judgment of the Court of Appeal seems not to represent the correct position of the law. Since the respondent bank's claim before the Federal High Court included winding up of the 1st appellant for the inability to pay its debt even after the respective judgment of the High Court of Lagos State and the Failed Banks Tribunal, is one that rightly comes under section 409 (b) of the CAMA. In other words, the provision of section 409 (b) of the CAMA is an exception to the plea of *res judicata.*

While it has been propounded that prescription of time is inapplicable to a winding up of a company for its inability to pay its debts under section 409 (b) of the CAMA,[338] in this study, it is submitted that by reason of the prescription of time as provided in the definition of an insolvent person in section 567 (1) of the CAMA, the prescribed time limit within which a petition can be brought under section 409 (b) of the CAMA is that the judgment execution or other process has remained unsatisfied for a period of not less than six weeks. In the case of winding up upon the application

[337] *Tony-Anthony Holdings Ltd v Commercial Bank for Africa, supra,* at 948.
[338] Chianu, *op cit,* p.634.

of the Asset Management Corporation of Nigeria (AMCON), for non-satisfaction of Judgment debt, the petition can be commenced if the debtor company failed to pay the judgment sum within 90 days from the date of judgment.[339]

3. CAMA, section 409 (c) – Commercial Insolvency

A company is deemed to be unable to pay its debt if 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.[340] A company's inability to pay its debt in this context is ordinarily known as 'commercial insolvency'.

Although this provision has been declared to be somewhat tautologous,[341] it is important to state that this procedure is rarely resorted to as a ground of winding up of a company for its inability to pay its debt because it is more difficult to apply as the assets of the debtor company will have to be valued, which valuation is often a matter of judgment and speculation, with the liabilities of the company, contingent and prospective, being taken into consideration.[342]

However, where a contingent or prospective creditor brings a petition, the court will not hear it until security for costs has been given and a *prima facie* case made for winding up.[343]

2.6 Procedure for Winding up by the Court

The power to make rules of court for carrying into effect the objects of the CAMA so far as they relate to the winding up of companies or generally in respect of other applications to a court under the CAMA is vested in the Chief Judge of the Federal

[339] AMCON Act, s.52 (5)
[340] Insolvency Act, *op cit*, s. 123 (2).
[341] Fletcher, *op cit*, p. 527. It is said to be tantologous because s 123 (1) (e) of the Insolvency Act 1986 of United Kingdom provides that a company is deemed unable to pay its debts if its proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.
[342] Candide-Johnson & Alex-Adedipe, *op cit*, p. 435.
[343] CAMA, *op cit*, s. 410 (2) (c).

High Court[344]. Thus, the Companies Winding up Rules (CWR)[345] is the applicable rule to winding up of companies in Nigeria.[346]

By virtue of the provisions of the Companies Winding up Rules,[347] all proceedings in every winding up under the CAMA shall be governed by the provisions of the Rules. Furthermore, the forms in the appendix, subject to the power of the Chief Judge of the Federal High Court to either alter any forms specified in the appendix or substitute new forms *in lieu* thereof, shall be used where applicable in all winding up proceedings in Nigeria. But where there is no provision in the Rules in respect of any proceedings in or before the court, the Federal High Court (Civil Procedure) Rules shall apply.[348]

The winding up of a company in Nigeria is commenced by a Petition.[349] Every petition shall be in form 2, 3, or 4 in the Appendix with such variations as the circumstances may require.[350] The application to the court for a winding up of a company by Petition can be presented[351] either by:-

i. The Company;

ii. A Creditor, including a contingent or prospective creditor of the company;

iii. The official receiver;

iv. A Contributory;

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[344]CAMA, *op cit,* s. 552 (1)

[345] 2001. It is important to note that prior to the Companies Winding up Rules (CWR) 2001, Companies Winding up Rules 1983 made pursuant to section 375 of the Companies Act 1968 (now repealed) were applicable in all winding up proceedings in Nigeria; In the United Kingdom, the applicable rule is the Insolvency Rules 1986 (as amended).

[346]*Honeywell Flour Mills Plc v Ecobank (Nig) Ltd* [2016] 16 N.W.L.R (pt 1539) 387 at 435, paras C – D.

[347]CWR, *op cit,* r. 2; *Honeywell Flour Mills Plc v Ecobank (Nig) Ltd, ibid.*

[348]CWR, *op cit,* r. 183; *Honeywell Flour Mills Plc v Ecobank (Nig) Ltd, ibid* at 427, para E.

[349] CAMA, *op cit,* s.410 (1); Insolvency Act, *op cit,* s. 124 (1) (UK); Bodies Corporate (Official Liquidations) Act, *op cit,* s. 1 (1) (b) and (c) (Ghana); *Gbedu v Itie & ors, supra*.

[350] CWR, *op cit,* r. 15. Form 2 is the general form of a Petition; Form 3 is for a Petition by unpaid creditor on simple contract; Form 4 is for a Petition by minority shareholders; Insolvency Rules, *op cit,* r 4.7 (UK) – there is one form for winding up petition unlike the case in Nigeria.

[351] CAMA, *op cit,* s. 410 (a) to (h); Insolvency Act, *op cit,* s. 124 (1) (4) (UK). In the Republic of India, the liquidation of a company is not by a petition an originating process but is only invoked after a corporate insolvency resolution process under chapter II of the Insolvency and Bankruptcy Code 2016.

v. A Trustee in bankruptcy to, or a contributory;

vi. The Corporate Affairs Commission;

vii. A Receiver if authorised by the instrument under which he was appointed; or;

viii. By all or any of those parties, together or separately.

Notwithstanding the above provision of the CAMA, it is important to state that the Asset Management Corporation of Nigeria.[352] Nigeria Deposit Insurance Corporation (NDIC), a capital market operator[353] in practice are statutorily empowered to bring an application by petition to the Federal High Court for winding up of a company. However, it is of common knowledge that a winding up petition pursuant to the provisions of section 410 (1) of the CAMA is usually presented by creditors or contributories.[354] A contributory has been defined as "every person liable to contribute to the assets of a company in the event of its being wound up…"[355] It also includes a 'fully paid up shareholder, provided he or she has a tangible interest in the winding up of the company, which is usually demonstrated by showing that the company has a surplus of assets over liabilities'.[356]

In *First Equity Securities Ltd v Anozie*[357] the Court of Appeal while adopting the definition of a contributory as stated in *Ado Ibrahim & Co. Ltd v B.C.C. Ltd*, departed from the pronouncement of the Supreme Court of Nigeria that a contributory shall be entitled to present a winding up petition only when there are assets for distribution to the benefit or interest of the petitioner if the order of winding up was made. Rather, the Court of Appeal held that by virtue of s.410 (4) of the CAMA, a contributory shall

[352] Asset Management Corporation of Nigeria (AMCON) Act 2010 (as amended 2015), s. 52.
[353]ISA, *op cit,* s.53(1) and the SEC s. *Ibid* s.53(2)
[354] Banks and other Financial Institutions Act (BOFIA) Cap B3 LFN 2004 (as amended), s. 38 (1).
[355] CAMA, *op cit,* s. 567 (1); Insolvency Act, *op cit,* s. 79 (1) (UK).
[356] *Ado Ibrahim & Co v B.C.C Ltd, supra,* at 574, paras E-F.
[357] [2015] 12 N.W.L.R (pt 1473) 337.

be entitled to present a winding up petition not withstanding that there may not be available assets on the winding up for distribution to contributories.[358]

In this study, the focus will be mainly on Petition presented by a creditor for winding up of a company for the inability to pay its debt. Hence, it is important to underscore the fact that winding up petition proceeding can have far reaching consequences on the company, its shareholder, employees, creditors and the society.[359] The courts strictly follow the provisions and procedures specified in the CAMA and the Companies Winding up Rules for the winding up of a company. In this respect, the court in *Pharma-Deko Plc v Financial Derivates Co Ltd*, held that "Companies Winding up proceedings are specialised and unique…. This specialised guidelines and procedures have their own implications for the court and the parties. For example, once a law has prescribed a particular method of exercising a statutory power, any other method of exercise of it is excluded".[360]

Thus, where an application for winding up of a company is not presented by petition and in the prescribed form but through other modes of commencement of action such as writ of summons, originating summons or originating motion, the court would be robbed of jurisdiction and the application and entire proceedings void *abinitio.*[361]

1. Presentation of Petition:

A Petition is presented by being filed at the Federal High Court's Registry.[362] Unlike the procedure in Nigeria, in the United Kingdom and in the case of England and

[358] *First Equity Securities Ltd v Anozie*, *supra*, at 365 – 366, paras G – A.
[359]*Air Via Limited v Oriental Airlines Limited supra*, at 56; Chianu, *op cit*, p. 632.
[360]248 – 249, paras H – A; *Honeywell Flour Mills Plc v Ecobank (Nig) Ltd*, *supra*, at 435, paras C – D.
[361] *Obiuweubi v C.B.N* [2011] 7 N.W.L.R (pt 1247) 465; *Madukolu v Nkemdilim* (1962) 2 SCNLR 341; (1962) All NLR 581; *Sokoto State Government v Kamdax (Nig) Ltd* [2007] 7 N.W.L.R (pt 1034) 466 SC; *Bank of Industry Limited v Awojugbagbe Light Industries Limited* [2016] 1 N.W.L.R (pt 1493) 280.
[362] CAMA, *op cit*, s. 407; CWR, *op cit*, r. 16; Insolvency Act, *op cit*, s. 117 (1); *Mercantile Bank of Nigeria Plc v Nwobodo* [2000] N.W.L.R (pt 648) 297.

Wales, it is the High Court[363] that exercises jurisdiction over winding up petitions. This jurisdiction is exercisable by every judge of the High Court. Although it is the practice for winding up petitions to be assigned to the Chancery Division of the High Court and when the Chancery Division of the High Court exercises jurisdiction under the Companies Act and the Insolvency Act, it is often referred to as the 'Companies Court' as a term of convenience. But where the amount of the company's share capital paid up or credited as paid up, does not exceed £120, then the County Court of the District where the registered office or head office of the company is situate can hear the winding up petition.[364]

In the Republic of India, liquidation of corporate person is presented and determined by the Adjudicating Authority, that is, the National Company Law Tribunal constituted under section 408 of the Companies Act[365] having territorial jurisdiction over the place where the registered office of a company is located.[366] Suffice it to say that in the Republic of India, the jurisdiction of a civil court or authority is ousted in respect of any matter on which the National Company Law Tribunal or the National Company Law Appellate Tribunal has jurisdiction.[367] Instructively, there are time limits for determination of liquidation issues by the National Company Law Tribunal, National Company Law Appellate Tribunal and the Supreme Court.[368]

In the Republic of South Africa, the jurisdiction to determine corporate insolvency issues is vested on the Companies Tribunal.[369] In the case of the Republic

[363] Insolvency Act, *op cit,* s. 117 (1).
[364] Supreme Court Act, 1981 (United Kingdom), s. 61 (1) and Schedule 1, para 1.
[365] 2013 (Republic of India).
[366] Insolvency and Bankruptcy Code (Republic of India), *op cit,* s. 60 (1).
[367] *Ibid*, s. 63.
[368] *Ibid*, chapter VI.
[369] Companies Act 2008 (Republic of South Africa), ss. 193 – 195, as amended by Companies Act 2011, ss. 112 and 113.

of Ghana, it is the High Court that has jurisdiction in respect of official winding up of a company.[370]

It is pertinent to state that where a petition is presented at the Federal High Court Registry in the wrong Judicial Division, it may be heard in the Judicial Division where it was presented, unless the court otherwise directs or the Respondent pleads specially in objection to the jurisdiction and in such a case, the presiding Judge shall transfer the matter to the appropriate Division.[371]

However, it is worthy of note that the transfer of a matter to the appropriate Division of the court upon successful objection by the respondent will not invalidate the prior proceedings conducted before the transfer order.[372]

2. Verification of Petition:

It is mandatory that a petition be verified by an affidavit, which affidavit shall be in form 7 or 8 in the appendix with such variations as circumstances may require.[373] Unlike the case in Nigeria, in the United Kingdom, the petition is not verified by an affidavit but a statement of truth.[374] It is provided that an affidavit verifying petition has to be deposed by the petitioner, or by one of the petitioners. If the petitioner is a limited liability company, the affidavit verifying the petition has to be made by some director, secretary or other principal officer of the limited liability company.[375] An

[370] Bodies Corporate (Official Liquidations) Act, *op cit,* s. 66 – interpretation of the court as used in the Act to mean the High Court.
[371] Federal High Court (Civil Procedure) Rules 2009, Order 2, rr 3 & 4.
[372] *Ibid;* J Amadi, *Modern Civil Procedure law and Practice in Nigeria* (Port Harcourt: Pearl Publishers, 2014) p. 168.
[373] CWR, r. 18 (1) & (2). While form 7 is used as affidavit verifying petition of an individual, form 8 is used as affidavit verifying petition of a limited liability company; Insolvency Rules, rr. 4.7 (1), 4.12 (1) & (2) – (7); Insolvency (Amendment) Rules, 2010, rr. 142 (2) & 146 (2) & (3) – Affidavit wherever it appeared was substituted with statement of truth.
[374] Insolvency Rules, *op cit*, r. 4.12 (1).
[375] CWR, *op cit*, r. 18 (1); Insolvency Rules, *op cit*, r. 4.12 (4) (5) (7) (8) – in the United Kingdom, the statement of truth is authenticated and not verified as is the case in Nigeria.

affidavit verifying petition is not to be filed along with the Petition but within four days after the petition is presented.[376]

It is trite that an affidavit verifying a petition is a sufficient *prima facie* evidence of the statements in the petition.[377] Hence, where there is no affidavit verifying a petition, the petition would be struck out[378] as it touches on the jurisdiction of the court.

However, there is a different position of the law that where a petition is not verified by an affidavit, it is against the requirements of the Companies Winding up Rules but such non-compliance does not render the petition void but only voidable.[379] It is important to note that the Court of Appeal in this case interpreted the provision of the repealed Companies (Winding up) Rules, 1949, rule 30, precursor of the extant Companies Winding up Rules[380] which requires any petition to be verified by an affidavit.

In this study, we submit that where a petition is not verified by an affidavit, although it is not in compliance with the Companies winding up Rules, the petition is not void but a defect or an irregularity that can be amended or remedied by an order of the court if such will not occasion injustice to the other party as there are enabling provisions in the Companies Winding up Rules for an amendment of petition and other processes and even extension of time.[381]

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[376] CWR, *op cit*, r 18; *Gateway Holdings Ltd v Sterling Asset Management & Trust Limited, supra*, at 517, paras E –G; 518, paras D – E.
[377] *Ibid.*
[378] *Spectra Limited v Stabilini Vision Limited* [1999] 6 N.W.L.R (pt 608) 631 at 638, para C, per Oguntade JCA (as he then was).
[379] *Melwani v Feed Nation Industry (Nig) Ltd (No.1)* [1986] 5 N.W.L.R (pt 143) 587 at 588.
[380] CWR, *op cit*, r. 18.
[381] *Ibid*, rr 181, 182 (1) and 183; Federal High Court (Civil Procedure) Rules, *op cit*, order 17 (amendment of originating process) *Makinde v Orion Engr. Services (UK) Ltd* [2014] 11 N.W.L.R (pt 1417) 1; *N.D.D.C. v Precision Association Ltd* [2006] 16 N.W.L.R (pt 1006) 527 at 559 – 560, paras E – C; *International Merchant Bank Nigeria Ltd v Speegaffs Company Nigeria Ltd, supra*, at 432, paras G – H; *Gateway Holdings Ltd v Sterling Asset Management & Trust Limited, supra*, at 518 – 519.

3. Service of Petition

Service of Petition is basic or fundamental in the activation of the jurisdiction of the Federal High Court against any respondent. Thus, failure to serve a Petition is fatal to the competence of the Federal High Court to assume jurisdiction to hear and determine the Petition. Service of Petition, therefore, goes to the root of the jurisdiction of the Federal High Court, so that failure to comply with the requirements of service is capable of rendering the proceedings or any step taken in the winding up proceedings to be null and void.[382]

Service of Petition in a winding up proceedings, in the case of a company, is generally in the manner provided in the Rules.[383] Service on a company is by leaving the Petition at its registered office, if any, and if there is no registered office, then service is at the principal or last known place of business of the company by leaving a copy of the petition with any member, officer or servant of the company.[384] Where no such member, officer or servant can be found at the principal or last known place of business, service of petition is by leaving a copy at such registered office or principal place of business or by serving it on such member, officer or servant of the company as the court may direct and where the company is being wound up voluntarily, by service of the petition on the liquidator, if any, appointed for the purpose of winding up the affairs of the company.[385]

In the light of the above, there are two major ways by which a petition could be served on a respondent company under the Rules. The first is by service on the

[382] *Pharma-Deko Plc v Financial Derivates Co Ltd, supra,* at 249*; Tony-Anthony's case, supra,* at 39; *Eimskip Ltd v Exquisite Ind (Nig) Ltd* [2003] 4 N.W.L.R (pt 809) 88; (2003) FWLR (pt 151) 1842; *Sken Consult Ltd v Ukey* (1981) 12 NSCC 1; (1981) 1 SC 6.
[383] CAMA, *op cit,* ss. 78 & 552 (1); CWR, *op cit,* r. 183.
[384] CWR, *op cit,* r. 17 (1); Insolvency Rules, *op cit,* r. 4.8 (1), (2), (3) (UK) – the alternate provision for service on a company is by leaving a copy with a director or other officer or employee of the company instead of member, officer or servant of the company as provided in the Companies Winding up Rules.
[385] CWR, *op cit:* Insolvency Rules, *op cit*

respondent company at its registered office or principal or last known place of business. The other way is by leaving a copy of the petition with any member, officer or servant of the company or leaving a copy at the registered office or principal place of business of the company.[386] Instructively, there is provision for substituted service of a Petition as there are enabling provisions in the applicable rules that confers discretionary power on the Federal High Court as relating to service of petition.[387]

Although, the provision of the Rules that provides for service of petition on a company by leaving a copy of the petition with any member, officer or servant seems understandable on the face of it, in this study, it is submitted that the provision for service of petition on a company by leaving a copy of the petition with any "officer", or "servant" appears redundant and obfuscating. While an "officer" is defined in the CAMA in relation to a body corporate to include 'a director, manager or secretary',[388] a servant is not defined in the CAMA or any other statute in force in Nigeria. Simply put, the word 'servant' is a generic term and ordinarily means "a person who works for a company or organisation; a person who works in another person's house and cooks, cleans, etc …"[389] was inadvertently included among the persons through which service of a petition on a company can be validly effected. In other words, service of petition on a company can be effected by leaving a copy on junior employees of the company such as, messenger, driver, cleaner or any person found in the company, whether employee or not.

[386] *F.B.N Plc v Onukwugha* [2005] 16 N.W.L.R (pt 950) 120.
[387] Federal High Court (Civil Procedure) Rules, *op cit,* order 5; CWR, *op cit,* r. 17 (1); Insolvency Rules, *op cit,* r. 4.8 (6) (7)
[388] CAMA, *op cit,* s. 567 (1).
[389] A S Hornby, Oxford Advanced Learner's Dictionary of Current English (7th edn, Oxford: Oxford University Press, 2005) p. 1334; M Robinson (ed), Chambers 21st Century Dictionary (updated edn, Edinburgh: Chambers Harrap Publishers Ltd, 2004) p. 1281, "Servant" is a person employed by another to do household or menial work for them; a person who acts for the good of others in any capacity; a public servant.

In this study, it is submitted that the provisions of the Rules that validates the service of Petition by service on a servant of the company is unsatisfactory. In a situation where the modern rules of court in civil proceedings have not opened the gate so wide to admit the service of an originating process meant for a company on a junior employee of the company or a "servant",[390] it is not readily decipherable the basis for the provision for service on a "servant" to be valid in companies winding up proceedings.

The proof of service of petition is by an Affidavit of Service[391] as in form 5 or 6 in the Appendix with such variations as circumstances may require.[392] The essence of an "affidavit of service" is to prove that the process emanating from the court has been brought to the notice of the litigant whose presence is required in court.[393] In the United Kingdom, service of petition is proved by Certificate of Service.[394]

4. Advertisement of Petition

The condition precedent for hearing of a petition is the advertisement of the petition fifteen days before the hearing.[395] The procedure is for the petitioner to apply by way of motion on notice for an order of the court to advertise the petition. Where an order for advertisement of the petition is made, the petition shall be advertised once or as many times as the court may direct, in the Federal Gazette and in one national daily newspaper and one other newspaper circulating in the State where the registered

[390] *Kisari Investment Ltd v La-Terminal Co Ltd* (2001) FWLR (pt 66) 766; *Miden System Ltd v Effiong* [2011] 2 N.W.L.R (pt 1231) 354; *Mark v Eke* [2004] 5 N.W.L.R (pt 865) 54.
[391] *Anyaoha v Chukwu* [2008] 4 N.W.L.R (pt 1076) 31.
[392] CWR, *op cit*, r. 17 (2) – while Form 5 is used for Affidavit of service of petition on members, officers or servants, Form 6 is used for Affidavit of service of petition on Liquidator.
[393] *Martin Schroder & Co v Major & Co (Nig) Ltd* [2002] FWLR (pt 128) 1304.
[394] Insolvency Rules, *op cit*, r. 4.9A.
[395] CWR, *op cit*, r. 19 (2) (a); Companies Proceedings Rules 2004, r. 9.

office or principal or last known principal place of business of the company is or was situate or in such other newspaper as directed by the court.[396]

The advertisement must state the day on which the petition was presented and the names and address of the petitioner and of his solicitor and shall contain a note at the foot thereof stating that any person who intends to appear at the hearing of the petition, either to oppose or support, must send notice of his intention to the petitioner or to his solicitor within the time and manner prescribed by the Rule. Where a petition is not advertised within the time prescribed in the Rules or the advertisement did not contain a note, it shall be deemed irregular and liable to be struck out, unless for sufficient reason given, the Court otherwise orders.[397] The advertisement of the petition shall be in Form 9 or 10 in the appendix with such variations as the circumstances may require.[398]

In addition to the fact that the advertisement of a petition notifies all those interested in assets and continued existence of the company, as the contributories, members, directors and creditors, well in advance of the proposals to wind up the company so that they could file in their claims, if they so wish,[399] it is a prerequisite or condition precedent for the appointment of Provisional Liquidator.[400] However, it is important to note that the Court may refuse an application to advertise a petition if satisfied that the petition is not bona-fide but an abuse of the process of the court and

[396] CWR, *op cit,* r. 19 (2) (b); *Pharma-Deko Plc v Financial Derivates Co Ltd, supra,* at 249; *Air Via's case*, *supra*; *Fisher v Waste Management Ltd,* unreported: Appeal No. CA/L/35/85 delivered on 14/5/87 in Abugu, *op cit,* pp. 758 – 759.
[397] CWR, *op cit,* r. 19 (2) (c), (3).
[398]CWR, *op cit,* r. 19 (4). While Form 9 is for advertisement of petition, Form 10 is for advertisement of petition by minority shareholders.
[399] *Santana v Ajede* (2000) 5 W.R.N 35 at 43.
[400]CWR, *op cit,* r. 21 (1); *Savannah Bank of Nigeria Plc v Nigeria Deposit Insurance Corporation* [2006] 9 N.W.L.R (pt 986) 424 at 441, paras E – H; *General and Aviation Services Ltd v Thahal* (2004) 4 SC (pt 1) 109 at 127.

may proceed to terminate the petition by striking it out or dismissing it.[401]

5. Amendment of Petition

Amendment of petition involves the alteration of the contents of the petition. The alteration may be for purpose of correcting an error or rectifying a mistake or omission in the petition. However, it is arguable whether a petition can be amended, having regards to the specialized and unique nature of companies winding up proceedings.[402] In this study, it is the position that a petition can be amended.[403] The basis for amendment of petition is lent credence and justified by the pronouncement of the court in *Makinde v Orion Engr. Services (UK) Ltd,*[404] that:

> The amendment of the petition to join Orion project Services Nigeria Limited as the 1st petitioner for the purpose of complete composition of the action as to parties was properly made by the court below. Even the Almighty God amended creation to bring into existence woman to complement man and complete the sphere of human creation. The essence of the power of amendment is therefore to make whole what has been left undone either inadvertently or by blunder or oversight, in other to avoid injustice.

It is therefore important to state that an application for an amendment of petition is not granted as a matter of course. Although, the Federal High Court has the discretion to grant an application for amendment, such discretion must be exercised

[401] *Unifam Ind. Ltd v Oceanic Bank Int'l Nigeria Ltd, supra,* at 102, paras A – B; 103, paras F – G*; First Equity Securities Ltd v Anozie supra,* at 461, paras A – D.
[402] *Pharma-Deko Plc v Financial Derivates Co Ltd, supra,* at 248.
[403] CAMA, *op cit,* s. 552 (1); CWR, *op cit,* r. 183; Federal High Court (Civil Procedure) Rules, *op cit,* r. 17.
[404] *Supra* at 30.

judicially and judiciously. Thus, where the purpose for an amendment of petition is to clarify the issues in controversy between the parties or to prevent any possible injustice in the matter and is not to overreach the adverse party, an amendment will be granted.[405] Where however, the amendment is for petition that is fundamentally defective *ab initio*, it is incompetent and does not exist at all in law. Consequently, such incompetent petition or process cannot be amended.[406]

6. Opposition to Winding Up Petition:

The Supreme Court of Nigeria in *Air Via Ltd v Oriental Airlines Ltd,*[407] set out four probable methods of answering an allegation of indebtedness or insolvency, to wit:

i. To admit the debt;

ii. To deny the debt;

iii. To counter-claim against the debt;

iv. To set-off against the debt.

It is rare for a debtor company in a winding up petition to admit the debt rather, the usual cause for such debtor company is to deny the debt and raise all manner of preliminary objections to the allegation of indebtedness. The procedure for a respondent in a winding up petition that intends to deny the allegation of indebtedness is to file an affidavit in opposition to the petition within ten days of the service of the petition.[408] But where it is a person other than the respondent, such a person must file an affidavit in opposition to the petition within fifteen days of the date on which the petition was advertised.[409] Notice of the filing of every affidavit in opposition to the

[405] *Makinde v Orion Engr. Services (UK) Ltd, supra; Ogidi v Egba* [1999] 10 N.W.L.R (pt 621) 42; *Kode v Yussuf* [2001] 4 N.W.L.R (pt 703) 392 at 412.
[406] *N.N.B Plc v Denclag Ltd* [2005] 4 N.W.L.R (pt 916) 549; *Akaniwo v Nsirim*[2008] 9 N.W.L.R (pt 1093) 439; *Salisu v Mobolaji* [2014] 4 N.W.L.R (pt 1396) 1.
[407] *Supra* at 52.
[408] CWR, *op cit*, r. 25 (1).
[409] *Ibid*; *Baykam Ventures Ltd v Oceanic Bank Int'l Nig. Ltd* [2005]All FWLR (Pt. 286) 648 at 668, paras. A-E.

petition shall be given to the petitioner or his solicitor. In the United Kingdom, the debtor company that intends to oppose the petition files in court a witness statement in opposition not less than five business days before the date fixed for the hearing.[410]

However, where the respondent fails to file an affidavit in opposition to the petition, the petition would be regarded as an unopposed petition. The full effect of this is unclear except that an unopposed petition is disposed of.[411] In this case,[412] the court unequivocally stated that:

> When a Petition is considered unopposed by the mere fact that an affidavit in opposition was not filed or did not exist, it does not lead to an automatic winding up order. The petitioner or his solicitor shall satisfy the court, on the next adjourned date that the petition has been duly advertised, that the prescribed affidavit verifying the statements therein and the affidavit of service (if any) have been duly complied with the petitioner. No order than the one already made in respect or advertising the petition shall be made on the petition of the petitioner who has not, prior to the hearing of the petition, satisfied the court in the manner required by Rule 22 of the Companies Winding up Rule, 1983.

Unlike writ of summons where pleadings are filed, in a winding up petition, pleadings are not filed. However, in this study, it is the contention that because of the

[410] Insolvency Rules, *op cit*, r. 4.18 (1).
[411] *International Merchant Bank Nigeria Ltd v Speegaffs Company Nigeria Ltd, supra,* at 434.
[412] *Ibid*.

sui generis nature of a winding up petition, the petition, affidavit in opposition and affidavit in reply constitutes pleadings in winding up petition.[413] It is pertinent to state that there are distinctions between affidavit and pleadings. While pleadings are statement of facts, which must be proved on oath in court by a witness before it could constitute evidence, affidavit, on the other hand, though relating to facts sworn on oath, constitutes evidence without the need of oral testimony, subject to exceptions.[414]

Since the primary statute governing the use of affidavit in Nigeria is the Evidence Act,[415] its provisions override that of the Rules of Court or any other Statute.[416] Thus, the parties in a winding up petition must strictly follow the provisions of the Evidence Act in preparing the affidavit in opposition to a petition or affidavit in reply. However, a defective or erroneous affidavit may be amended and re- sworn by leave of the court, on such terms as to time, cost or otherwise as seem reasonable.[417] Furthermore, since the Rules did not provide for the form and contents of either the affidavit in opposition or affidavit in reply, in this study, it is respectfully canvassed that the form and contents of affidavit as generally provided in the Evidence Act[418] would apply.

It is worthy to emphasize that while the contravention of the form of affidavit can almost always be cured,[419] the breach of the requirement as to contents of affidavit may not readily be cured.[420] In this vein, it is advisable that parties in a

[413] *P & C.H.S. Ltd v Migfor (Nig) Ltd* [2013] 13 N.W.L.R (pt 1333) 555; *Agbakoba v INEC* [2008] 18 N.W.L.R (pt 1119) 489.
[414] *Henry Stephens Engineering Ltd v S A Yakubu (Nig) Ltd* [2009] 10 N.W.L.R (pt 1149) 416; *Nigerian Navy v Garrick* [2006] 4 N.W.L.R (pt 969) 69 at 112, para G.
[415] 2011.
[416] *Elabanjo v Dawodu* [2006] 15 N.W.L.R (pt 1001) 76.
[417] Evidence Act, *op cit*, s. 114; J Amadi, Contemporary Law of Evidence in Nigeria, Volume 1 (Port Harcourt: Pearl Publishers, 2011) pp. 1177 – 1184.
[418] Evidence Act, *ibid*, s. 115 (1) – (4) (contents of affidavit); S. 117 (form of affidavit); *Thahal's case supra*, 119 – 120.
[419] Evidence Act, *op cit*, s. 113.
[420] S T Hon, *S.T. Hon's Law of Evidence in Nigeria*, Vol 2 (2nd edn, Port Harcourt: Pearl Publishers, 2013) pp. 1055 – 1072.

winding up petition must adhere to the requirements of the contents of affidavit as provided in the Evidence Act.

2.7 Commencement of Winding up Proceedings in Nigeria

The moment in time prescribed by law as the commencement of winding up is of considerable importance, since it is in relation to the commencement of winding up that many other matters are determined in a winding up proceedings. Where it is a voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution by the company for voluntary winding up.[421] In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.[422] However, in the Republic of Ghana, in other cases other than voluntary winding up, the winding up of a company is deemed to have commenced on the making of a winding up order.[423]

2.8 Interim Protection Measures

1. Avoidance of Property dispositions

Upon the commencement of winding up by the court, any disposition of the property of the company, including things in action and any transfer of shares or alteration in the status of the members of the company, shall, unless the court otherwise orders, be void.[424] Since a compulsory winding up commences with the presentation of the petition, property which should be available to the creditors may have been disposed of in the period between the time of the presentation of the petition and the making of the winding up order. Hence, to preserve such property for the creditors, it is usually

[421] CAMA, *op cit*, s. 415 (1); Insolvency Act, *op cit*, s. 129 (1) (UK); Bodies Corporate (Official Liquidations) Act, *op cit*, s. 13 (Ghana).
[422] CAMA, *ibid*, s. 414 (2); Insolvency Act, *ibid*, s. 129 (2).
[423] Bodies Corporate (Official Liquidations) Act, *op cit*, s. 13.
[424] CAMA, *op cit*, s. 413; Insolvency Act, *op cit*, s.127 (UK); *Utuk v The Liquidator Utuks Constructions and Marketing Ltd* [2011] All FWLR (pt 554) 144 at 159, paras A–B.

provided that all dispositions of the company's property after the commencement of the winding up are void unless the court orders otherwise.

The purpose of preventing the disposal of property after commencement of winding up of a company and the need for court approval of certain transactions was summarised thus:[425]

> this is a wholesome and necessary provision, to prevent during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in *extremis*. But where a company actually trading, which it is in the interest of everyone to preserve, and ultimately to sell, as a going concern, is made, the object of a winding up petition which may fail or may succeed, if it were to be supposed that transactions in the ordinary cause of its current trade, *bona fide* entered into and completed, would be avoided, and would not, in the discretion given to the court, be maintained, the result would be that the presentation of a petition, groundless or well-founded, would, *ipso facto*, paralyse the trade of the company, and great injury, without any counter-balance of advantage, would be done to those interested in the assets of the company.

Unfortunately, the principles governing the exercise of the courts discretion to validate dispositions of property was not provided for in the CAMA or the Rules.

[425] A Hicks & S H Goo, *Cases and Materials on Company Law* (2nd edn, London: Blackstone Press Limited,1997) p. 629.

Hence, the guiding principles considered and approved by the court in *Re Gray's Inn Construction Co. Ltd*[426] in the interpretation of section 127 of the Insolvency Act would apply in the court's exercise of discretion in respect of the provisions of section 413 of the CAMA. These guiding principles postulated by the court[427] are as follows:

i. The discretion vested in the court is entirely at large, subject to the general principles which apply to any kind of discretion, and also subject to a limitation that the discretion must be exercised in the context of the liquidation provisions of the statute.

ii. The basic principle of law governing the liquidation of insolvent estates, whether in bankruptcy or under the companies' legislation, is that the assets of the insolvent company at the time of the commencement of the liquidation will be distributed *pari passu* among the insolvent's unsecured creditors as at the date of the bankruptcy…

iii. There are occasions, however, when it may be beneficial not only for the company but also for the unsecured creditors, that the company should be able to dispose of some of its property during the period after the petition has been presented, but before the winding up order has been made. Thus, it may sometimes be beneficial to the company and its creditors that the company should be able to continue the business in its ordinary course.

iv. In considering whether to make a validating order, the court must always do its best to ensure that the interests of the unsecured creditors will not be prejudiced.

v. The desirability of the company being enabled to carry on its business was often speculative. In each case, the court must carry out a balancing exercise.

[426] [1980] 1 WLR 711.
[427] *Ibid* at 717 – 719.

vi. The court should not validate any transaction or series of transactions which might result in one or more pre-liquidation creditors being paid in full at the expense of other creditors, who will only receive a dividend, in the absence of special circumstances making such a course desirable in the interest of the creditors generally.

vii. A disposition carried out in good faith in the ordinary course of business at a time when the parties were unaware that the petition has been presented would usually be validated by the court unless there is ground for thinking that the transaction may involve an attempt to prefer the disponee, in which case, the transaction would not be validated.

viii. Despite the strength of the principle of securing *pari passu* distribution, the principle has no application to post-liquidation creditors; for example, the sale of an asset at full market value after the presentation of the petition. That is because such a transaction involves no dissipation of the company's assets for it does not reduce the value of its assets.

2. Avoidance of Attachments

Upon the commencement of the winding up of a company by the court in Nigeria, any attachment, sequestration, distress or execution put in force against the estate or effects of the company shall be void.[428] While this provision is explicative enough, the provision does not extend to attachment, sequestration, distress or execution put in force before the commencement of the winding up of the company. In this study, it is the position that a party that intends to avoid such sequestration, attachment, distress or execution has to invoke the power of the court to stay or restrain an action or other proceedings against the company.

[428] CAMA, *op cit*, s. 414; *NDIC v Ifediegwu* [2003] 1 N.W.L.R (pt 800) 56 at 81, paras. D–E.

3. Stay of Proceedings

Another consequence of commencement of winding up of a company is the invocation of the power of court to stay or restrain an action or other proceedings instituted or pending in any court (commonly referred to as "the court's concerned") before the making of the winding up order.[429] By the express provision in the CAMA, it would appear that upon an application to the court concerned for an order staying or restraining an action or proceedings, the court concerned is bound to stay or restrain proceedings or refer the case to the court hearing the winding up petition.[430]

It is the trite position of law that the granting of a stay of proceedings is a matter of discretion depending on the facts and circumstances of each case and where all courts of record, whether trial or appellate, possess inherent powers to stay proceedings pending the determination of an appeal so as to preserve the subject matter of the litigation[431]. In the case of *Klifco Ltd v Phillipp Holzmann A. G,*[432]the court affirmed the principle of law that there has to be a pending appeal before the granting of an application for stay of proceedings in a matter arising from a winding up petition. It would be arguable if this principle of having a pending appeal before the granting of an application of stay of proceedings would apply in the activation of section 412 of the CAMA. It is the position of this study, that since the principles adumbrated by the court in *Klifco v Phillipp Holzmann A.G* was on the stay of proceedings of a winding up order; it would not materially apply in a case of application for stay of proceedings upon the commencement of a winding up petition.

[429] CAMA, *op cit,* s. 412; Insolvency Act, *op cit,* s. 126 (1).
[430] CAMA, *ibid.*
[431] *Nzeribe v Dave Engineering Co Ltd* [1994] 8 N.W.L.R (pt 361) 124.
[432] [1996] 3 N.W.L.R (pt 430) 276.

4. Vulnerable Transactions: Fraudulent Preference

Upon the presentation of a winding up petition, where any conveyance, mortgage, delivery of goods, payment, execution or other acts relating to property of a company in liquidation is tinted with a fraudulent preference of its creditors, such transactions shall be invalid.[433]Unfortunately, the meaning of "fraudulent preference" is not provided for in the CAMA. However, it has been submitted that a company gives preference to a person if that person is one of the company's creditors or a surety or guarantee for any of the company's debts or other liabilities and the company does anything or suffers anything to be done, which in either case, has the effect of putting that person into a position which in the event of the company going into insolvent liquidation will be better than the position he would have been in if that thing had not been done.[434]

In this study, it is respectfully submitted that there seems to be an obvious lacuna in the provision on fraudulent preference under section 495 of the CAMA as same appears vague and ambiguous. For instance, it is provided that certain acts, deed or transactions shall be invalid or void but there are no express procedural steps and on whose jurisdiction is vested the power to declare such acts, deed or transactions invalid or void. This is unlike the position in the United Kingdom and the Republic of India where the court and the Adjudicating Authority respectively, have the powers to declare such acts, deeds or transactions to be invalid or void.[435] Furthermore, unlike the position in the United Kingdom[436] and the Republic of India,[437] there is no prescribed time limit for the invocation of section 495 of the CAMA.

[433] CAMA, *op cit,* s. 495.
[434] Farrar & Hannigan, *op cit,* p. 731.
[435] Insolvency Act, *op cit,* s. 239 (UK); Insolvency and Bankruptcy Code, *op cit*, ss. 43, 44 (India).
[436] Insolvency Act, *ibid,* s. 240.
[437] Insolvency and Bankruptcy Code, *op cit*, s. 43 (4).

5. Avoidance of Floating Charges

It is the law that a floating charge on the undertaking or property of the company created within 3 months of the commencement of the winding up, shall, unless it is proved that the company immediately after the creation of the charge, was solvent, be invalid. This is subject, however, to the exception that the amount of any cash paid to the company at the time of, and in consideration for, the charge together with interest on that amount at the current bank rate, shall not be rendered invalid.[438] Thus, this provision is designed to invalidate floating charges given close to insolvency which simply secure past indebtedness and provide no new benefit, no new money, to the company. In other words, only the charge is rendered void. The underlying debt remains valid and if the debt has been repaid before winding up, the fact that the charge would have been void in the winding up does not affect the repayment. It should be noted that in appropriate circumstances, such repayment may be challenged as a fraudulent preference.[439]

2.9 Nature of Proceedings before Hearing of Winding up Petition

Upon commencement of a winding up petition and after the advertisement[440] of the petition, on the application of a creditor, or of a contributory, or of the company, the court may appoint a provisional liquidator for the purpose of conducting the proceedings in the winding up a company and performing such duties as the court may impose from time to time. The application for appointment of a provisional liquidator must be supported by an affidavit[441] disclosing sufficient ground for the

[438] CAMA, *op cit*, s. 498.
[439] *Mace Builders (Glasgow) Ltd v Lunn* [1987] Ch 191; *Power v Sharp Investments Ltd* [1994] 1 B.C.L.C 111.
[440] CWR, *op cit*, r. 21 (1); *Savannah Bank of Nigeria Plc v NDIC, supra* at 441.
[441] CWR, *op cit*, r. 21 (1).

appointment. In United Kingdom, the application to the court for the appointment of a provisional liquidator is supported by a witness statement.[442]

1. Appointment of a Provisional Liquidator

A provisional liquidator may be appointed by the court upon the application of a creditor or of a contributory of the company after the presentation of a petition and before the making of a winding up order.[443] There are certain statutory provisions that empower some regulatory office holders such as the Governor of the Central Bank of Nigeria to appoint the Nigerian Deposit Insurance Corporation as either the provisional liquidator in the winding up proceedings of failed banks.[444] Where a provisional liquidator is appointed for a company, he is not the agent of any of the parties but an officer of the court.[445] The appointment of a provisional liquidator is not automatic[446] simply because a petition has been filed. A court that is faced with an application for appointment of a provisional liquidator must take into consideration:

i. Proof by affidavit of sufficient grounds for the appointment as a provisional Liquidator;[447]

ii. The previous experience of the provisional liquidator, the particulars of the nature and description of the property with which he had dealt being stated.[448]

It is important to note that the order appointing the provisional liquidator shall bear the number of the petition and state the nature and a short description of the property of which the provisional liquidator is ordered to take possession of and the

[442] Insolvency Rules, *op cit*, r. 4.25 (2).
[443] CAMA, *op cit,* s. 422 (2); Insolvency Act, *op cit,* s. 135 (1).
[444] BOFIA, *op cit,* s. 38 (2).
[445] *Provisional Liquidator of TAPP Industries Ltd v TAPP Industries Ltd &Ors*. [1995] 5 N.W.L.R (pt 393) 9 at 33; D Sasegbon (ed), *SASEGBON'S Laws of Nigeria* Volume 3 (Lagos: DSC Publications, 2005) p. 828.
[446] *General and Aviation Services Ltd v Thahal*, *supra* at 424.
[447] CWR, *op cit,* r. 21 (1).
[448] *Ibid,* r. 21 (2).

duties to be performed by the provisional liquidator.[449] The order appointing the provisional liquidator shall be in Form 11 of the appendix with necessary variations.[450]

2. Purpose, Duties, Powers and Effect of the Appointment of a Provisional Liquidator

The primary purpose for the appointment of a liquidator, whether provisional or otherwise, is to preserve the company's assets and to see that such assets before a winding up order is made by the court, is not dissipated. Where, therefore, the court has appointed a provisional liquidator, he shall be entitled to take into his custody or under his control all the property and choses in action to which the company is or appears to be entitled pending the making of a winding up order by the court.[451]

The powers of a provisional liquidator are specified in the order appointing the provisional liquidator.[452] Where the powers of a provisional liquidator is not restricted in the order of appointment, such a provisional liquidator exercises the general powers of a liquidator; the fact that his appointment is "provisional" qualifies the period of his appointment and not the powers conferred on him. However, the exercise by the provisional liquidator of the powers so conferred is at all times subject to the control of the court.[453] Notwithstanding, the Provisional Liquidator seems not to have authority to wind up the company or to distribute its assets.[454]

A provisional liquidator is generally appointed where the assets of the company are in jeopardy and the primary object of his appointment is to prevent the directors of the company from dissipating such assets of the company. It follows therefore that

[449]CWR, *op cit*, r. 21 (2).
[450] *Ibid*, r. 22(5).
[451] *Provisional Liquidator of TAPP Industries Ltd v TAPP Industries Ltd & Ors*., *supra*, at 38 – 39.
[452] CAMA, *op cit,* s. 422 (2); Insolvency Rules, *op cit,* r 4.26 (1); *Provisional Liquidator of TAPP Industries Ltd v TAPP Industries Ltd &Ors*, *supra; General and Aviation Services Ltd v Thahal*, *supra*.
[453] CAMA, *ibid*, s. 425 (3).
[454] Fletcher, *op cit*, p. 551.

his duty is to preserve the company's assets before a winding up order is made. Unless expressly restricted therefore, the provisional liquidator has the authority of any liquidator to secure the safety of the properties that would appear to belong to the company being wound up.[455] Notwithstanding, the position of the law seems to be that the power of the provisional liquidator cannot be limited by the instrument of appointment and where there are conditions that may be attached to the appointment of a provisional liquidator, such conditions only go towards strengthening the main objective of the appointment and not derogate therefrom.[456] It is worthwhile to state that any creditor or contributory or the company may challenge the exercise of the powers by the provisional liquidator.[457]

It is the primary duty of a provisional liquidator to take into his custody or under his control all the property of the company.[458] Subject to this, his duties depend on the terms of the order appointing him. Most commonly his powers are restricted to taking possession of and protecting the assets of the company. It is further posited that a provisional liquidator has the duty to see to the insurance of the property of the company and to take special care to secure the books of the company. Where the provisional liquidator finds that his powers as contained in the order of court appointing him are not sufficiently wide, he can apply to the Court for liberty to carry on with consequential directions.[459]

3. Effects of the Appointment of a Provisional Liquidator

It is arguable whether on the appointment of a provisional liquidator, all the powers of directors of a company ceases, except so far as the court may by order, sanction the

[455] CAMA, *op cit*; *Anakwenze v TAPP Industry Ltd* [1992] 7 N.W.L.R (pt 252) 142.
[456] *Anakwenze v TAPP Industry Ltd, supra*.
[457] *Ibid; Savannah of Nigeria Plc v NDIC, supra,* at 445; *NDIC v FNB Ltd* [1997] 4 N.W.L.R (pt 501) 519.
[458] *Provisional Liquidator of TAPP Industries Ltd v TAPP Industries Ltd &Ors, supra,* 40.
[459] *Ibid*, paras F–H.

continuance.[460] However, there is the divergent view that the provisional liquidator, although under the control of the court, stands generally within its restricted powers, in place of the board of directors of the company, the board may still exercise some residual powers.[461]

Furthermore, where a provisional liquidator is appointed for a company, no action or proceedings can be proceeded with or commenced against the company except by leave of the Federal High Court given on such terms as the court may impose.[462] It is pertinent to state that the "court" whose leave is required before proceeding with or commencing any action against a company in liquidation is the Federal High Court, not any other court.[463] However, the Supreme Court of Nigeria in *Onwuchekwa v NDIC*[464] clarified the provisions of section 417 of the CAMA when it held thus:

> The provisions of an enactment should not be read so as to deny access to the court. There is nothing in section 417 which prohibits such company as is described in the section from proceeding with action or proceedings against another person. What that section prohibited subject to the leave of the court is proceeding with an action or proceedings against the company…

[460] CAMA, *op cit*, s. 422 (9); *FMB Ltd v NDIC* [1995] 6 N.W.L.R (pt 400) 226 at 245 – 246.
[461] *Anakwenze v TAPP Industry Ltd, supra,* at 159.
[462]*NDIC v Akahall & Sons Ltd* (2004) All FWLR (pt 229) 897 at 922 – 924, paras. G–A; *Progress Bank (Nig) Plc v O.K. Contact Point Holdings Ltd* [2008] 1 N.W.L.R (pt 1069) 514 at 529; *Agro Allied Development Ent Ltd v MV Northern Reefer* [2009] 12 N.W.L.R. (pt 1155) 255 at 268 – 269; *Ezeobi v Daily Times of Nigeria Plc* [2013] All FWLR (pt 672) 1778 at 1788 – 1789, paras G –A; *Atoju v Triumph Bank Plc* [2016] 5 N.W.L.R (pt 1505)252 at 312, paras C – D.
[463] *MV Northern Reefer's case, ibid,* 270, paras E – F.
[464] [2002] FWLR (pt 101) 1015 at 1631, paras. C–D; [2002] 5 N.W.L.R (pt 766) 371 at 393, para F.

Suffice it to say that while section 417 of the CAMA does not prohibit the continuation of proceedings or commencement of an action against a company in liquidation, such proceedings or action can only be continued or commenced only with the leave of the Federal High Court. Where such leave is not obtained, an action commenced or proceedings continued would be incompetent.[465]

4. Termination of Appointment of Provisional Liquidator

While there is no specific provision on the termination of the appointment of a provisional liquidator in the extant Statute or the Rules in Nigeria, in this study, it is respectfully submitted that the appointment of a provisional liquidator terminates upon the happening of the following events:

i. The making of a winding up order

Upon the making of a winding up order, the life of a provisional liquidator automatically ceases. Since upon the making of a winding up order, the next procedural step is the appointment of a liquidator and if no liquidator is appointed, the official receiver shall by virtue of his office become the liquidator.[466]

ii. Vacation of office

The appointment of a provisional liquidator shall be deemed terminated if the provisional liquidator resigns or is removed by the court upon the application of a creditor or a contributory of the company or for failure to notify his appointment to the Corporate Affairs Commission and to give security.[467]

[465] *Atolagbe v Awoni* [1997] 9 N.W.L.R (pt 522) 536; *Ezeobi v Daily Times of Nigeria Plc, supra; Omaghoni v Nigeria Airways Ltd* [2006] 18 N.W.L.R (pt 1011) 310 at 328, paras E – H; 339, paras D – F.
[466] CAMA, *op cit*, s. 422 (3) (b); Insolvency Rules, *op cit*, r. 4.31 (4) (UK).
[467] CAMA, *ibid*, s. 422 (3) (d), (5); CWR, *op cit*, r. 43 (1); Insolvency Rules, *ibid*, r. 4.31 (1).

iii. Dismissal of the winding up petition

The life of a provisional liquidator terminates upon the dismissal of the winding up petition, either on the merits or otherwise.[468]

It is pertinent to state that there are obvious *lacunae* as it relates to the law and procedure relating to the appointment of a provisional liquidator in winding up proceedings in Nigeria. The most prominent drawback in the appointment of provisional liquidator is that there are no concise qualification requirements for the appointment of provisional liquidators. In other words, the office of a provisional liquidator is made to be an 'all comers' position. This is quite unsatisfactory. Furthermore, the office of the provisional liquidator in winding up proceedings is not satisfactorily regulated.

In other countries such as the United Kingdom, the Republic of India and the Republic of South Africa, to practice or function as an insolvency practitioner, whether as provisional liquidator or liquidator or business rescue practitioner or insolvency professional, the person must be qualified as a member of a recognised professional body, subject to regulation of a regulatory body.[469] The essence of providing for qualification and regulation of persons that function as insolvency practitioner cannot be ignored. The powers and duties of a provisional liquidator are quite far-reaching and expansive so that if not conferred on fit and proper persons and subjected to regulatory supervision, may be abused.

2.10 Hearing of Winding up Petition

After the advertisement of petition, the petitioner on the next adjourned date has to satisfy the court that the petition has been duly advertised, the prescribed affidavit

[468] CAMA, *op cit,* s. 411 (1); Insolvency Rules, *op cit,* r. 4.31 (2) (UK).
[469] Insolvency Act, *op cit,* chapter 13 as amended by Small Business, Enterprise and Employment Act 2015, Part 10, ss. 137 – 146(UK); Insolvency and Bankruptcy Code, *op cit,* chapter 4, ss. 207, 208(India); Companies Act, *op cit,* ss. 138 – 140 as amended Companies Amendment Act 2011, ss. 88 – 90 (South Africa).

verifying the statements therein and the affidavit of service have been duly complied with.[470] Subsequently, at the hearing of a petition, the court may dismiss it or adjourn the hearing conditionally or unconditionally, or make any interim other, or any other order that it thinks fit.[471] Where the court is satisfied that the preconditions to a successful winding up petition for inability to pay debt has been established, the court shall exercise its expansive powers under section 411 (1) of the CAMA to make an order winding up the company.[472] In other words, the making of a winding up order is not automatic but subject to the petitioner satisfying the court in the manner required by the Rules.[473]

It is important to state that at the hearing of a petition, upon application, the court can make an order dismissing or striking out the petition or restraining the petitioner from continuing with the winding up petition on the ground that it constitutes an abuse of process or it was not brought *bona fide* particularly in cases where the debt is being disputed.[474] Unfortunately, in Nigeria, unlike in the United Kingdom, the Republic of South Africa and the Republic of India, there are no expansive and streamlined rescue remedies to winding up in the extant statute that can be activated when a company is insolvent.

2.11 Winding up Order

This is an order of the Federal High Court that the affairs of a company be wound up. Where a winding up order is made, copies of the order shall be forwarded by the

[470] CWR, *op cit,* r. 22 (1).
[471] CAMA, *op cit,* s. 411 (1).
[472] *Okafor v Igwilo* [1997] 11 N.W.L.R. (pt 527) 36 at 51 – 52.
[473] *International Merchant Bank Nigeria Ltd v Speegaffs Company Nigeria Ltd, supra,* at 435.
[474] *Air Via Limited v Oriental Airlines Limited, supra; Ado Ibrahim & Co. Ltd v B.C.C. Ltd, supra, UBN Ltd v Tropic Foods Ltd* [1992] 3 N.W.L.R. (pt 228) 231 at 250; *Tony-Anthony's case, supra*; F Uzuegbunam, 'Ecobank Loses in Court against Honeywell', Business Day Newspaper, June 29, 2016, p. 6.

Registrar to the Official Receiver,[475] who will then transmit a copy of the order to the Corporate Affairs Commission which shall make a minute thereof in its book relating to the company.[476] The order for the winding up of a company shall be in Form 16 in the appendix with such variations as circumstances may require.[477] The making of a winding up order by the court attracts some far-reaching consequences in the life of the company wound up.

2.11.1 Consequences of a Winding up Order

Where a winding up order is made, it elicits certain consequences, to wit;

i. Cessation of the Powers of Board of Directors of the Company

Where a winding up order is made, the powers of the board of directors of the company ceases and such powers is then invested on the liquidator, except the court by order[478] or the liquidator[479] sanctions the continuance of the power of the board of directors. It is doubtful if the board of directors of the company can exercise even residual powers without the authorisation of the court.

ii. Commencement, Transfer and Continuation of Actions and Proceedings

Where a winding up order is made, no action or proceeding shall be proceeded with or commenced against the company except by leave of court given on such terms as the court may impose.[480]

The consequence of winding up order as it relates to commencement of action or continuation of proceedings have been discussed in this chapter.

[475] CWR, *op cit,* rr. 28, 29, 30 (1).
[476] CAMA, *op cit,* s. 416.
[477] CWR, *op cit,* r 29 (2).
[478] CAMA, *op cit,* s. 422 (9); *FMB Ltd v NDIC, supra.*
[479] Bodies Corporate (Official Liquidation) Act, *op cit,* s. 14.
[480] CAMA, *op cit,* s. 417; Insolvency Act, *op cit,* s. 130 (2); Bodies Corporate (Official Liquidation) Act, *op cit,* s. 17.

iii.Stay of Winding up Proceedings

Upon the making of a winding up order, the Federal High Court on the application of a Liquidator or the Official Receiver, or any Creditor or Contributory, may make an order staying the proceedings either all together or for a limited time, on such terms and conditions as the court thinks fit.[481] Instructively, it should be noted that a copy of every order of stay made after the winding up order shall be forwarded to the Corporate Affairs Commission which shall enter it in its records relating to the company.[482] As earlier discussed in this chapter, an order for stay of proceedings is not granted as a matter of course.

iv.Submission of Statement of Company's Affairs to Official Receiver

Where the court has made a winding up order and unless the court thinks fit to order otherwise, a statement as to the affairs of the company in the prescribed form, verified by affidavit by one or more of the persons who are the directors of the company, the secretary, or such other persons as the official receiver may direct, is to be submitted to the official receiver within 14 days of the winding up order.[483] The requirement to submit statement of affairs may be dispensed with under certain special circumstances.[484]

v.Settlement of List of Contributories and Application of Assets; Making of Calls:

It is after the making of a winding up order that the court shall settle a list of contributories and may rectify the register of members in all cases where rectification

[481] CAMA, *op cit,* s. 438 (1) (2); Insolvency Act, *op cit,* s. 147 (1); CWR, *op cit,* r. 32 (1).
[482] CAMA, *ibid,* s. 438 (4); Insolvency Act, *ibid,* s. 147 (3).
[483] CAMA, *ibid,* s. 420 (1) (2) (3) (8); Insolvency Act, *ibid,* s. 131(1) (2) (3) (4) (6) (UK) – in this case, the period within which the statement of affairs is to be submitted to the official Receiver is 21 days; Bodies Corporate (Official Liquidation) Act, *op cit,* s. 19 – in the Republic of Ghana, the statement of affairs is submitted to the liquidator, who is the Registrar of Companies; CWR, *op cit,* rr. 35 – 40; Insolvency Rules, *op cit,* chapter 6.
[484] CWR, *ibid,* r. 40; Insolvency Rules, *ibid,* r. 4.46.

is required and cause the assets of the company to be collected and applied in discharge of its liabilities.[485] The court may dispense with the settlement of a list of contributories where it appears not necessary to make calls on or adjust the right of contributories.[486] This power vested in the court to settle a list of contributories, in practice, is exercised by the liquidator as an officer of the court.[487]

Furthermore, the making of a winding up order empowers the court to make calls on all or any of the contributories for the time being settled on the list of contributories to the extent of their liability, for payment of any money which the court considers necessary to satisfy the debts and liabilities of the company and the cost, charges and expenses of the winding up proceedings.[488] This power vested in the court to make calls on contributories, in practice, is exercised by the liquidator as an officer of the court.[489]

vi.Collective Regime

The making of a winding up order activates the notion of collectivity in insolvency proceedings. In other words, the effects of a winding up order does not inure on the petitioner alone but operates in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory.[490] Hence, the making of a winding up order imposes a collective regime involving the abatement of all claims of creditors, who are ranked equally under the *pari passu* rule who now share in the distribution under the winding up proceedings.

[485] CAMA, *op cit,* s. 439 (1); Insolvency Act, *op cit,* s. 148 (1); Bodies Corporate (Official Liquidation) Act, *op cit,* s. 20 (1) – in the Republic of Ghana, it is the liquidator that settles the list of contributories.
[486] CAMA, *ibid,* 439 (2); Insolvency Act, *ibid,* s. 148 (2); Bodies Corporate (Official Liquidation) Act, *ibid*, s. 20 (2).
[487] CWR, *op cit,* rr. 63 – 66.
[488] CAMA, *op cit,* s. 442 (1); Insolvency Act, *op cit,* s. 150 (1).
[489] CWR, *op cit,* rr. 69 – 73.
[490] CAMA, *op cit,* s. 418; Insolvency Act, *op cit,* s.130 (4).

vii.Appointment of Liquidator

It is upon the making of a winding up order by the court that a liquidator would be appointed for the purpose of conducting the proceedings in winding up a company and performing such duties as the court may impose.[491] Where no liquidator is appointed or there is a vacancy, the official receiver shall by virtue of his office become the liquidator or act as liquidator until such time as the vacancy is filled.[492]

viii.Delivery of Property to Liquidator

On the making of a winding up order, the court may require any contributory for the time being on the list of contributories and any trustee, receiver, banker, agent or officer of the company, to pay, deliver, convey, surrender or transfer immediately or within such time as given by the court, to the liquidator, any money, property or books in his hands to which the company is *prima facie* entitled.[493]

ix.Contract of Employment

The making of a winding up order constitutes a ground for the termination by operation of law of a contract of employment.[494] However, in the case of voluntary winding up, the employee may still be entitled to damages.[495] In this study, it is respectfully submitted that winding up order made by a court does not automatically terminate existing contracts of employment but rather constitute an implied notice to the employees of the close determination of their employment.[496]

2.12 The Official Receiver

The Official Receiver plays a significant role in winding up proceedings. Official Receiver means the Deputy Chief Registrar of the Federal High Court or an officer

[491] CAMA, *op cit,* s. 422 (1); CWR, *op cit,* r. 41.
[492] CAMA, *ibid,* s. 422 (1) (3) (b).
[493] *Ibid,* s. 440; CWR, *op cit,* r. 62.
[494] E E Ama Oji & O D Amucheazi, *Employment & Labour Law in Nigeria* (Lagos: Mbeyi & Associates (Nig) Ltd, 2015) p. 341.
[495] *Ibid.*
[496] *Gbedu v Itie & ors, supra,* at 261 – 266.

designated for the purpose by the Chief Judge of the Court.[497] In the United Kingdom, official receivers are officers of the insolvency service, an Executive Agency of the Department for Business Innovation and Skills, attached to courts having bankruptcy jurisdiction. Official receivers in the United Kingdom have the unique distinction of being entitled to act as liquidators notwithstanding that they are not licensed insolvency practitioners under the Insolvency Act.[498]

1. Appointment of the Official Receiver

Where upon the commencement of petition and before the making of a winding up order, no provisional liquidator is appointed, the official receiver is appointed as the provisional liquidator.[499] Furthermore, where upon the making of a winding up order, no liquidator(s) is appointed, the official receiver shall by virtue of his office, act as liquidator until such time as a liquidator is appointed.[500] It is important to state that where the official receiver is appointed liquidator, he is not required before acting in that capacity to give notice of his appointment to the Corporate Affairs Commission and to give security in the prescribed manner to the satisfaction of the court.[501] Where the official receiver is a liquidator of a company, he is described after his individual name as "Official Receiver and Liquidator of (name of the company)".[502] It is worthy to note that though the official receiver as either a provisional liquidator or liquidator, is an officer of the court.[503] The official receiver can be appointed a receiver on behalf of the debenture holders or other creditors of a company being wound up by the

[497] CAMA, *op cit,* s. 419.
[498] Insolvency Act, *op cit,* ss. 388 (5), 389 (2); Davies & Worthington, *op cit,* p. 1276.
[499] CAMA, *op cit,* s. 422 (3) (a).
[500] *Ibid,* s. 422 (1).
[501] *Ibid,* s. 422 (3) (d).
[502] *Ibid,* s. 422 (7) (a).
[503] *Ibid,* ss. 419, 567 (1).

court.[504] In this chapter, the discussion will be limited to the official receiver as a liquidator, whether provisionally or otherwise.

2. Powers and Duties of the Official Receiver

The official receiver is conferred with expansive powers and duties in winding up proceedings. Official receiver is vested with all the powers of a liquidator while acting as a liquidator in winding up proceedings. Some of the powers and duties of the official receiver include:

i. Summon of meetings of creditors and contributories

Since the appointment of official receiver, whether as provisional liquidator or liquidator, is at best temporary, the official receiver is vested with the power to summon meetings of creditors and contributories of the company for the purpose of appointing another liquidator.[505]

ii. Statement of Affairs

Official receiver is empowered to request or direct any person as mentioned under section 420 of the CAMA to submit and verify a statement of affairs of a company,[506] which shall be in Form 19 in the appendix.[507] The statement of affairs is to be submitted within 14 days from the relevant date or within such extended time as the official receiver or the court may, for special reasons grant.[508] Where any person requires an extension of time for submitting the statement of affairs, such person shall apply to the official receiver, who may grant the application as he thinks fit.[509]

[504] CAMA, *op cit*, s. 437.
[505] *Ibid*, s. 422 (3) (c); CWR, *op cit*, r. 95; Davies & Worthington, *op cit*, p. 1277.
[506] CAMA, *ibid*, s. 420 (1) (2).
[507] CWR, *op cit*, r. 35 (2).
[508] CAMA, *op cit*, s. 420 (3) (8); the "relevant date" means, in a case where a provisional liquidator is appointed, the date of his appointment and in a case where no such appointment is made, the date of the winding up order.
[509] CWR, *op cit*, r. 36.

iii. Investigatory Powers

The official receiver is vested with the powers to investigate the causes of the failure of the company and make a report to the court as he or she thinks fit.[510] Furthermore, the official receiver where in his further report under section 421 of the CAMA, is of the opinion that fraud has been committed by the promoters or by any director or other officer of the company, may apply to the court for public examination of such persons.[511]

iv. Application for Declaration of Liability for Fraudulent Trading and of any Misfeasance

The official receiver is among the persons empowered to bring an application to the court to declare that persons who were knowingly parties to the carrying on of the business of the company in a reckless manner or with intent to defraud creditors of the company or creditors of any other person for any fraudulent purpose, shall be personally responsible, without any limitation of liability for all or any of the debts or other liabilities of the company.[512]

v. Application for Appointment of Special Manager

The official receiver is vested with the power, where satisfied that the nature of the estate or business of the company or the interest of the creditors or contributories generally, require the appointment of a special manager of the estate or business of the company other than himself, apply to the court for an order appointing a special manager.[513]

The powers of a special manager are usually contained in the order of appointment. The remuneration of the special manager is usually stated in the order

[510] CAMA, *op cit*, s.421 (1).
[511] *Ibid*, ss. 421 (2) (3), 450; CWR, *op cit*, rr. 44 – 50.
[512] CAMA, *ibid*, ss. 506, 507.
[513] CAMA, *op cit*, s. 436 (1); CWR, *op cit*, r. 33 (1).

appointing him, but the court may, at any subsequent time, for good cause shown, make an order for payment of the special manager for further remuneration.[514] In addition to the powers of the special manager to manage the estate or business of the company, the special manager is required to give security[515] and submit accounts to the official receiver, which accounts shall be verified by affidavit as in Form 18 in the Appendix to the Rules.[516]

vi. Reports

The official receiver, upon receipt of the statement of affairs of a company, owes the duty to make a report and a further report, if any, to the court on the affairs of the company concerning the amount of capital issued, subscribed and paid-up, the estimated amount of assets and liabilities; and if the company has failed, the causes of the failure and his general opinion on the desirability of conducting any further enquiry into any matter relating to the promotion, formation or failure of the company.[517]

vii. Book Keeping

The official receiver owes the duty to keep a book to be called the "Record Book" in which he shall record all minutes, all proceedings had and resolutions passed at any meeting of creditors or contributories or of the committee of inspection. The official receiver shall further keep a book to be called the "Cash Book" in which he shall enter the day to day receipts and payments made by him.[518]

[514] CAMA, *op cit,* s. 436 (2); CWR, *op cit,* r. 33 (2).
[515] CAMA, *ibid*; CWR, *ibid,* rr. 42, 43 (consequences of failure to give required security).
[516] CAMA, *ibid*; CWR, *ibid,* r. 34.
[517] CAMA, *ibid,* s.421.
[518] CWR, *op cit,* rr. 154, 155.

3. Termination of Appointment of the Official Receiver

Appointment of the official receiver as liquidator of a company ceases immediately upon the appointment of a liquidator.[519] However, the official receiver stands to act as liquidator of a company if there is a re-occurrence of a vacancy in the office of a liquidator.

While official receiver is eligible to act as a liquidator of a company, whether provisionally or otherwise, in practice, an official receiver is rarely appointed to act as a liquidator in compulsory winding up proceedings in Nigeria, which may not be unconnected to the incapacitation[520] of the office of the official receiver.

2.13 Committee of Inspection

The Committee of Inspection plays a key role in winding up proceedings. It consists of creditors and contributories of the company or persons holding general powers of attorney from creditors and contributories in such proportion as may be agreed on by meeting of creditors and contributories or as, in case of difference may be determined by the court.[521] The committee of inspection meets at the time(s) appointed in so far as at least a meeting is held once in every month during its existence but the liquidator or any member of the committee may convene a meeting as and when necessary.[522] The quorum of a Committee of Inspection is a majority of members and decisions are taken by majority of members present.[523]

[519] CAMA, *op cit,* ss. 419, 422 (3) (b).
[520] Official receiver being a Deputy Chief Registrar of the Federal High Court or an officer of the court designated as such by the Chief Judge of the Court, has other duties that makes it difficult for him to function as official receiver. It is doubtful if the official receiver will possess commensurate expertise, skills and experience required of a liquidator.
[521] CAMA, *op cit,* s. 434 (1).
[522] *Ibid,* s. 434 (2).
[523] *Ibid,* s. 434 (3).

A member of the committee of inspection loses his membership if he resigns by notice in writing, signed by him and delivered to the liquidator,[524] becomes bankrupt or compounds or arranges with his creditors or is absent from five consecutive meetings of the committee without leave of other members,[525] or is removed by an ordinary resolution of creditors or contributories (depending on the one he represents). It is important to note that where no committee has been appointed, the Corporate Affairs Commission may, on the application of the liquidator, do any of those things or give any directions that are required to be done by the Committee of Inspection.[526]

The members of the Committee of Inspection are not entitled to remuneration except by the express sanction of the court.[527] Furthermore, a member of the Committee of Inspection, except by leave of court, either directly or indirectly, by himself or any employee, clerk, agent or servant, purchase the company's assets or any part thereof[528] or make any profit or derive any profit from any transaction arising out of the winding up.[529]

1. Appointment of the Committee of Inspection

The Committee of Inspection is appointed by the court upon the application of the separate meetings of creditors and contributories (usually the first meeting).[530]In the United Kingdom, the Committee of Inspection is known as the "Liquidation Committee".[531] In the unlikely event that there is any difference in the resolution of the separate meetings in respect of the appointment of the committee of inspection

[524]CAMA, *op cit*, s. 434 (4).
[525] *Ibid*, s. 434 (5).
[526] *Ibid*, s. 435.
[527] CWR, *op cit*, r. 148.
[528] *Ibid*, r. 144.
[529] *Ibid*, r. 146.
[530] CAMA, *op cit*, s. 433 (1).
[531] Insolvency Act, *op cit*, s. 141 (1) (UK); Insolvency Rules, *op cit*, r 4.52 (1) (UK).

and those that are to be members of the committee, it is the court that shall decide and make any order it thinks necessary.[532]

2. Functions of the Committee of Inspection

The Committee of Inspection generally functions in a winding up proceedings in Nigeria to sanction the exercise of some of the powers vested on the liquidator;[533] control and give directions to the liquidator in the exercise of his powers in the course of liquidation;[534] fixing the remuneration of a liquidator, unless the court shall order otherwise[535] and generally to act with the liquidator in the administration and distribution of the assets of the company in liquidation.[536]

2.14 The Liquidator of a Company

The liquidator plays a prominent role in the winding up of a company. The duties and powers of a liquidator in the winding up of a company are enormous and challenging. Upon the making of a winding up order, the court appoints a liquidator for the purpose of conducting the proceeding in winding up a company and performing such duties in reference thereto.

1. Appointment of a Liquidator

On the making of a winding up order, the court may appoint a liquidator(s) for the purpose of conducting the proceedings in winding up a company and to perform such duties connected with the winding up proceedings.[537] However, if the court fails or neglects to appoint a liquidator(s), the official receiver shall by virtue of his office become the liquidator.[538] Where the official receiver acts as the liquidator, he shall summon separate meetings of creditors and contributories for the purpose of

[532] CAMA, *op cit,* s. 433 (2).
[533] *Ibid,* s. 425 (1).
[534] *Ibid,* ss. 425 (1), 427 (1).
[535] CWR, *op cit,* r. 142 (1).
[536] CAMA, *op cit,* s. 433 (1).
[537] *Ibid,* s. 422 (1).
[538] CAMA, *op cit,* s. 422 (3) (b).

determining whether or not to apply to the court for an order appointing a liquidator in his place.[539] If at the separate meetings of creditors and contributories, it was resolved that a liquidator be appointed in place of the official receiver, such official receiver or the chairman of the meeting shall make a report of the result of the separate meetings to the court in Form 20 in the Appendix to the Rules.[540] Further to the report, the court will appoint a liquidator and make necessary orders to give effect to the resolution of the separate meetings.[541] Upon the appointment of a liquidator, he shall not act in that capacity until he has notified his appointment to the Corporate Affairs Commission[542] and given security in the prescribed manner to the satisfaction of the court.[543]

However, if there is a difference in the resolutions of the meetings, the court on application of the official receiver will fix a date for hearing of the resolutions and determinations, which hearing shall be advertised by the official receiver in such manner as the court shall direct in so far as the advertisement shall be published not less than seven days before the date of hearing.[544] Upon the consideration of the resolutions and determinations of the meetings, the court may, by order in Form 21 in the Appendix to the Rules, appoint a liquidator. Subsequently, the order of the appointment of the liquidator shall be given to the official receiver, who shall then transmit it to the Registrar General of the Corporate Affairs Commission. Upon receipt of the order of the appointment of the liquidator, the Registrar General of the

[539]CAMA, *op cit*, s. 433 (1).
[540] CWR, *op cit*, r. 41 (1).
[541] CAMA, *op cit*, s. 433 (2); CWR, *ibid*, r. 41.
[542] Companies Regulation 2012, reg 43 (1) (3).
[543] CAMA, *op cit*, s. 422 (3) (d); CWR, *op cit*, r. 42.
[544] CWR, *ibid*, r. 41 (2) (3).

Corporate Affairs Commission, subject to the liquidator giving security, shall cause notice of the appointment to be gazetted.[545]

Furthermore, the notice of appointment of a liquidator has to be advertised by the liquidator as directed by the court immediately after his appointment and the provision of required security.[546] Where a liquidator dies, resigns or is removed, another liquidator may be appointed in his place in the same manner as in the case of a first appointment.[547]

While there is no specific provision on the qualifications for a person to be appointed liquidator, certain persons are disqualified from being appointed as liquidator or to act as liquidator of a company.[548] It appears from the wordings of section 509 (1) of the CAMA that the disqualification provision as provided thereunder is only applicable to persons to be appointed or to act as liquidator of a company being wound up by or under the supervision of the court or in a voluntary winding up. In *Federal Mortgage Bank of Nigeria v Nigerian Deposit Insurance Corporation,*[549] the court held that the appointment of the N.D.I.C as a liquidator does not conflict with the provision of section 509 (1) (c) of the CAMA in that a body corporate shall not be appointed a liquidator. Relying on section 38 (3) of BOFID, the court further held that N.D.I.C can be appointed, in the public interest as a provisional liquidator and the provision of section 509 (1) (c) of the CAMA is therefore deemed to have been amended to that extent.[550] This position of the Supreme Court of Nigeria

[545] Companies Regulation, *op cit,* reg 43 (1) (c); CWR, *op cit,* r 41 (5). However, in practice, it is the responsibility of the liquidator to notify his appointment to the Corporate Affairs Commission.
[546] CWR, *ibid,* r. 41 (7).
[547] CAMA, *op cit,* s. 422 (1) (5); CWR, *ibid,* rr. 41 (8), 163.
[548] CAMA, *ibid,* s.509 (1); Orojo, *op cit,* p. 477; A Aliyu & M D Saulawa, 'The Role of a Liquidator in Winding up Proceedings in Nigeria: Examining the Inadequacies under Companies and Allied Matters Act (CAMA)', PHJBL 2.1 (2016).227.
[549] [1999] 2 N.W.L.R (pt 591) 333.
[550] H Y Bhadmus, *Corporate Insolvency Law and Practice in Nigeria* (Enugu: Chenglo Limited, 2009) p. 137.

is to say the least, unsatisfactory. The appointment of a provisional liquidator is different from that of a liquidator. Section 509 of the CAMA expressly provides for disqualification of persons for appointment as liquidator. Further, the amendment of the provision of a statute cannot be deemed or implied but must be an express Act of parliament. Hence, in this study, it is submitted that it must be an inadvertent omission on the part of the draftsmen to have excluded or omitted the application of the disqualification provision to persons to be appointed liquidator or to act as a liquidator of a company in a winding up by the court. This position is re-enforced by the fact that the disqualification provision under section 509 (1) of the CAMA is *in tandem* with international best practices that disqualifies bodies corporate from being appointed or to act as liquidators.

2. Effects of the Appointment of a Liquidator

The appointment of a liquidator attracts the following effects on:

i. Power of Directors

The appointment of a liquidator puts an end to the powers of directors'.[551] However, the directors may continue to exercise powers if the Court by order sanctions the continuance thereof.[552] Put in another way, the appointment of liquidator of a company signifies the divesture of the powers of its Board of Directors and the investiture of such powers on the liquidator. When this happens, the Board is said to be *funtus officio.*[553]

ii. Contractual Capacity of the Company

The powers of the company to deal with its assets and of the continued performance of its obligations, contractual or not, comes to an end and by reason of

[551] CAMA, *op cit*, s. 422 (9); *Federal Mortgage Bank of Nigeria v Nigerian Deposit Insurance Corporation, supra*, at 529; M O Sofowora, *Modern Nigerian Company Law* (2nd edn, Lagos: Soft Associates, 2002) p. 522.
[552] *Anakwenze v TAPP Industry Ltd, supra*.
[553] *Gbedu v Itie & ors, supra*, 260.

the appointment of a liquidator and the powers conferred on him, the capacity of the company to sustain its contractual obligations is negated.[554]

Furthermore, the company ceases to carry on its business as same can only be done by the liquidator with the sanction of the court or of the committee of inspection, in so far as it is necessary for the beneficial winding up of the company.[555]

iii. Commencement and continuation of action against the company

Upon the appointment of a liquidator, no action or proceedings shall be proceeded with or commenced against the company without the leave of the court.[556] In this study, we reiterate the arguments canvassed under the effects of appointment of a provisional liquidator as it relates to commencement and continuation of action against the company. Suffice it to say that the provision of section 417 of the CAMA does not debar the company in liquidation from commencing or continuing with actions or proceedings against third parties.[557]

iv. Contract of employment

Contrary to the postulations that the appointment of a liquidator automatically terminates every contract of employment,[558] the correct position of the law is that the effect of the appointment of liquidator on a contract of employment depends on whether the winding up is compulsory or voluntary.[559] Where it is a compulsory winding up, the prevailing position of the law was succinctly stated in *Gbedu v Itie & ors*,[560] that:

[554] CAMA, *op cit,* s. 425 (1) (e) (f); *Gbedu v Itie & ors, supra,* at261, paras C-D.
[555] CAMA, *ibid,* ss. 425 (1) (b), 494 (6) (a); *Gbedu v Itie & ors, ibid*, 260, paras F-H; *Palmer's Company Law*, Volume 3 (London: Sweet & Maxwell) p 15134/1.
[556] CAMA, *ibid*, s. 417; *Onwuchekwa v NDIC, supra*; *Atojuv Triumph Bank Plc, supra.*
[557] *Onwuchekwa v NDC, supra* 1631.
[558] Orojo, *op cit,* pp. 451, 474; Ola, *op cit,* p. 467; Sofowora, *op cit,* p. 232.
[559] *Gbedu v Itie & ors, supra,* at 264, paras A-B.
[560] *Ibid,* at 261 – 262, paras A-B.

> A contract of service is a contract in which both parties have continuing obligations: whilst the employee has an obligation to work, the company has a duty to remunerate him for such exertions by way of the payment of his wages. However, a winding up order hampers a company's capacity to sustain its aforesaid obligations. It, simply, comes to this. A winding up order drains the company of its powers: powers of dealing with its assets and of the continued performance of its obligations! By that winding up order, a new officer: an officer of the court [the liquidator] inherits these powers. The servant must, then, be deemed to know the legal effect of a winding up order. In consequence, such an order operates as a notice to him that the company cannot continue its obligations to him under his contract of service and thus constitutes a breach going to the root of their contract.

Simply put, while the making of a winding up order serves as notice to employees of the wound up company that their contract of employment will not be continued, on the appointment of liquidator, the employees are discharged from the date of the winding up order. However, the employees of the wound up company are entitled to make a claim under the winding up proceedings.[561]

[561] CAMA, *op cit*, ss. 494, 518.

3. Duties and Powers of Liquidator

The liquidator is appointed for the primary purpose to secure that the assets of the company are got in, realised and distributed to the company's creditors and if there is a surplus to be distributed among the members in accordance to their rights.[562] In order to fulfil the primary purpose of their appointment, liquidators are usually given a wide range of duties and powers, some of which can be exercised of their own volition entirely, others of which is exercised with the sanction of either the Court or the Committee of Inspection. In the case of a body corporate such as the AMCON, it is important to state that any act, thing, directive or permission that required the sanction of the Committee inspection may be exercised by the Court.[563]

1. Duties of a Liquidator

The general duties of a liquidator are that as a fiduciary, he must act in good faith and for a proper purpose, he must not fetter his discretion, he must not allow conflict of interest and duty, he must be impartial, he must exercise a degree of care and skill appropriate to the circumstances and he must exercise his discretion personally or where appointed jointly, he must act jointly.[564] Furthermore, a liquidator owes a general duty to collect in and realise the company's assets.[565]

[562]CAMA, *op cit,* ss. 422 (1), 439 (1); Insolvency Act, *op cit,* s. 143 (1) (UK); CWR, *op cit,* r. 61 (1); *Abekhe v NDIC* [1995] 7 N.W.L.R (pt 406); Davies & Worthington, *op cit,* p. 1277; J A Dada, *Principles of Nigerian Company Law* (Rev edn, Calabar: Wusen Publishers, 2001) p. 318.
[563]AMCON Act, *op cit,* s.52(4).
[564] Palmer's Company Law, *op cit,* p. 15130.
[565] *Provisional Liquidator of TAPP Industries Ltd v TAPP Industries Ltd & Ors, supra,* at 9; *Savannah Bank of Nigeria Plc v NDIC, supra,* at 440, paras C – E.

The liquidator has specific functions or duties, namely:

i. Collection of Debts

The liquidator, being an officer of the court, has the duty to secure the payment to him or other discharge of all debts of the company and apply them to the discharge of its liabilities.[566]

ii. Custody of Company's Property

The liquidator owes the duty to take into custody or under his control all the property and things or *choses in action* to which the company is, or appears to be entitled.[567] In the course of carrying out this duty, the liquidator is given the power to disclaim onerous property[568] and to have the property of the company vested in him.[569]

iii. Settlement of List of Contributories

The liquidator exercises the duty to settle a list of contributories as in Form 31 in the Appendix to the Rules.[570] In the course of the settlement of list of contributories, the liquidator may rectify the register of members in all cases where rectification is required. It should be noted that it is only after the settlement of contributories, unless where dispensed by the court, that the collected assets of the company can be applied in discharge of its liabilities.[571] Worthy of note is the fact that the duty for settlement of list of contributories is a delegated duty.[572] However,

[566] Insolvency Act, *op cit,* s. 143 (1) (UK); Bodies Corporate (Official Liquidations), *op cit,* s. 36 (Ghana); CWR, *op cit,* r. 61 (1).
[567] CAMA, *op cit,* s. 423; Insolvency Act, *ibid,* s. 144 (1).
[568] CAMA, *ibid,* s. 499 (1).
[569] *Ibid,* s. 423.
[570] CWR, *op cit,* r. 63 (2).
[571] CAMA, *op cit,* s. 439; CWR, *ibid,,* rr. 63 – 68.
[572] CAMA, *ibid,* s. 453 (1) (b); CWR, *ibid,* r. 63 (1).

the court can dispense with the settlement of the list of contributories where the circumstance does not warrant the making of a call.[573]

The procedure for the settlement of list of contributories require the liquidator to give notice in writing as in Form 32 in the Appendix to the Rules, of the time and place appointed for the settlement of the list of contributories, to every person whom he proposes to include in the list.[574] On the day appointed for the settlement of the list of contributories, the liquidator shall hear any person who objects to being settled as a contributory and after such hearing, shall finally settle the list and issue a certificate as in Form 33 in the Appendix to the Rules.[575] It is the list so settled after hearing that constitutes the list of contributories of the company. Subsequently, the liquidator shall give notice as in Form 34 in the Appendix to the Rules to every person whom he has finally placed on the list of contributories.[576] It should be noted that the liquidator or the court may vary or set aside the list.[577]

iv. Making of Calls

The liquidator has the duty to make calls on all or any of the contributories in the list of contributories to the extent of their liability; and for payment of any money which the court considers necessary to satisfy the debts and liabilities of the company; and the cost, charges, and expenses of winding up.[578] Instructively, this duty is exercised by the liquidator as a delegated duty and subject to either the special leave of the court or the sanction of the Committee of Inspection.[579]

It is important to state that in other to obtain the sanction of the committee of inspection to make calls on all or any of the contributories, the liquidator has to

[573] CAMA, *op cit,* s. 439 (1) proviso; CWR, *op cit,* r. 63 (1).
[574] CWR, *ibid*, r. 64.
[575] *Ibid*, r. 65.
[576] *Ibid*, r. 66.
[577] *Ibid*, rr. 67 and 68.
[578] CAMA, *op cit*, s. 442 (1).
[579] *Ibid*, s. 453 (1) (d) (2); CWR, *op cit,* r. 69 (a).

summon a meeting of the committee by giving notice of the meeting as in Form 36 in the Appendix to the Rules. Such notice shall be sent to each member of the committee in sufficient time, not less than fourteen days to the day appointed for the meeting, which notice shall contain a statement of the proposed amount of the call and the purpose for the call.[580] It is further required that the notice of the intended call and the meeting of the Committee of Inspection shall be advertised as in Form 37 in the Appendix to the Rules, in a national newspaper where the proceedings is in the head office of the court[581] and in any other case, in a newspaper circulating in the division of the court in which the proceeding is pending.[582]

Where there is no Committee of Inspection, the liquidator can only make a call on the contributories with the leave of court,[583] which leave is by summons as in Forms 39 and 40 in the Appendix to the Rules. The summons shall state the proposed amount of the call and be served seven clear days before the day appointed for making the call on every contributory. However, the court may direct that notice of such proposed call be given by advertisement as in Form 41 in the Appendix to the Rules, without a separate notice to each contributory.[584]

v. Keeping of Proper Books

It is a duty of the liquidator to keep proper books in which he shall cause to be made entries or minutes of proceedings at meetings.[585] The book to be kept by the liquidator is the book called the "Record Book" in which he shall record all minutes of proceedings and resolutions passed at any meeting of the creditors or contributories or of the committee of inspection and all such matters that may be necessary to give a

[580] CWR, *op cit*, r. 69 (b).
[581] *Ibid*, r. 184 (2) – it means where the Chief Judge is stationed.
[582] *Ibid*, r. 69 (c).
[583] *Ibid*, r 69 (g).
[584] *Ibid*, r. 70.
[585] CAMA, *op cit*, s. 430.

correct view of his administration of the company's affairs. However, the liquidator is not bound to enter in the Record Book, any document of a confidential nature.[586] Another book to be kept by the liquidator is that known as the "Cash Book" in which he shall enter from day to day the receipts and payments made by him and in trading account where carrying on the business of the company.[587]

It is pertinent to state that the liquidator owes consequential duty to submit the books to the Committee of Inspection when required which is not less than once every three months.[588] Furthermore, the Committee of Inspection shall not, less than once every three months, audit the liquidator's Cash Book and certify the audit as in Form 70 in the Appendix to the Rules.[589] In addition, the liquidator is mandated to transmit to the Registrar-General of Corporate Affairs Commission (CAC) for audit, a copy of the Cash Book in duplicate; vouchers and copies of the certificates or audit by the Committee of Inspection, at the expiration of six months from the date of the winding up order and at the expiration of every succeeding six months thereafter until his release.[590] It is instructive that the Attorney-General of the Federation may order that the books and papers of a company wound up should not be destroyed for such period not exceeding five years from dissolution.[591]

vi. Payments into Company's Liquidation Account

It is a duty of every liquidator of a company to pay money received by him, including unclaimed dividends, into the public fund of the Federation kept by the Corporate Affairs Commission and known as "the Companies Liquidation

[586] CWR, *op cit,* r. 154.
[587] *Ibid,* rr. 155 (1), 159 (1).
[588] *Ibid,* r 155 (2).
[589] *Ibid,* r 157.
[590] CAMA, *op cit,* s. 429; CWR, *ibid,* r. 158 (1).
[591] CAMA, *ibid,* s. 515 (2) (3) – powers of the Corporate Affairs Commission to prevent disposal of books, etc of the company; CWR, *op cit,* r. 178.

Account".[592] However, the liquidator can pay moneys received by him into another bank selected by the Committee of Inspection and an account other than the Companies Liquidation Account, where the Committee of Inspection were able to obtain exemption from the Corporate Affairs Commission on the ground of business expediency and beneficial advantage to the creditors and contributories, which account is known as the "Special Bank Account".[593] It still remains the position of the law that a liquidator of a company cannot pay any sum received by him into his private bank account.[594]

vii. Statement and Information

The liquidator of a company is under a duty to give to the official receiver such information and access to and facilities for inspecting the books and documents of the company.[595] Furthermore, the liquidator owes the duty to send a statement in the prescribed form concerning the liquidation, to the Corporate Affairs Commission[596] and to make available the statement for inspection by a creditor or contributory of the company, on the payment of the prescribed fees.[597]

viii. Distribution of the Company's Assets

Once the liquidator has gathered the company's assets, he is under a duty to distribute surplus among the members according to their rights.[598]

ix. Liquidator's Meetings

The liquidator, subject to the provisions of the CAMA and the control of the court, has the duty to summon, hold and conduct meetings of the creditors or

[592] CAMA, *op cit,* ss. 428 (1), 527 – definition of "Companies Liquidation Account"; CWR, *op cit,* rr 152, 171.
[593] CAMA, *ibid,* s. 428 (1) proviso.
[594] *Ibid,* s. 428 (3).
[595] *Ibid,* s. 426.
[596] *Ibid,* s. 516 (1).
[597] *Ibid,* s. 516 (2).
[598] Orojo, *op cit,* p. 484.

contributories from time to time as may be directed or requested[599] for the purpose of ascertaining their wishes in all matters relating to the winding up. The procedure for meetings including the Liquidator's meetings of creditors and contributories are set out in the Rules,[600] including the right to attend by proxies.[601] Suffice to state that a minor cannot be appointed a general or special proxy.[602] While a general proxy is as in Form 64 in the Appendix to the Rules,[603] a special proxy is as in Form 65 in the Appendix to the Rules.[604]

x. Proof of Debt and Priority of Debt

One of the significant duties of a liquidator is that of proof of debt. It is entrusted on the liquidator the duty to ascertain, examine, admit or reject the proof of debt lodged with him and to ascertain priority of debt.[605] As a corollary, the liquidator is to verify debts ranking for dividends in a winding up by the court.[606] In order to carry out this duty, a liquidator is guided by certain rules such as the "rule against double proof", which seeks to prevent more than one creditor suing the insolvent company for the same debt[607] and the "mandatory set-off rules" which requires the sum due from the creditor to be set off against the sum due from the company where those sums arise from mutual credits, mutual debts or other mutual dealings between the company and the creditor arising in the liquidation.[608]

xi. Returns

The liquidator is under a duty to make various returns, including:

[599] CAMA, *op cit,* ss. 427 (2), 453 (1) (a); CWR, *op cit,* rr. 110 (1), 112.
[600] CWR, *ibid,* rr. 111- 124.
[601] *Ibid,* rr. 129 to 139.
[602] *Ibid,* r. 137 (3).
[603] *Ibid,* rr. 130, 132 and 137.
[604] *Ibid,* rr. 130, 133 and 137.
[605] *Ibid,* rr. 74 to 101.
[606] *Ibid,* r. 102.
[607] Davies & Worthington, *op cit,* p.1290.
[608] *Ibid,* p. 1291.

a) Return of capital to contributories.[609]

b) Notice of his appointment.[610]

c) Account of receipts and payments as liquidator.

d) Copy of the order of dissolution of the company.[611]

e) Statement in the prescribed forms at such intervals as may be prescribed, if the winding up is not concluded within one year after its commencement.[612]

It is pertinent to state that the liquidator's duty to make returns is enforceable by an order of the court.[613]

2. Powers of the Liquidator

In order to carry out the expansive duties, the liquidator is conferred with a wide range of powers, some of which can be exercised on his own volition, others need the leave of court or sanction of the committee of inspection[614] and some exercised with the special leave of court.[615] The liquidator has the power with either the leave of court or sanction of the Committee of Inspection[616] to:

a) Bring or defend any action or other legal proceedings in the name and on behalf of the company.[617] In other words, where no sanction of either the court or the Committee of Inspection is sought and obtained by the liquidator, no legal action or proceedings can be brought or defended by the liquidator,[618]

b) Carry on the business of the company so far as may be necessary for its

[609] CWR, *op cit*, r. 103.
[610] CAMA, *op cit*, ss. 422 (3) (d), 491; CWR, *ibid*, r. 41 (7).
[611] CAMA, *ibid*, s. 454.
[612] *Ibid*, s. 516 (1).
[613] *Ibid*, s. 511 (1).
[614] *Ibid*, s. 425.
[615] *Ibid*, s. 453 (2).
[616] *Ibid*, s. 425 (1).
[617] *Ibid*, s. 425 (1) (a); *Onwuchekwa v NDIC, supra.*
[618] *In Re: Amolegbe* (2015) 25 JMLR, 213 at 232, para. E; [2014] N.W.L.R (pt 1408) 76 at 96 – 97, paras G –A.

beneficial winding up,[619]

c) To appoint a Legal Practitioner or any other relevant professionals to assist him in the performance of his duties,[620]

d) Pay any classes of creditors in full,[621]

e) Make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim against the company,[622]

f) Compromise all calls and liabilities to calls, debt and liabilities and all claims between the company and a contributory and all questions relating to the assets of the company,[623]

g) Making of calls,[624]

h) Rectifying the register of members where required.[625]

The liquidator shall have the power without either the leave of court or sanction of the Committee of Inspection to:

a) Sell the property of the company of whatever nature by public auction or private contract, with power to transfer the whole thereof to any person or to sell the same in parcels,[626]

b) Do and execute all acts, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose, when necessary to use the company's seal,[627]

c) Prove, rank and claim in the bankruptcy insolvency or sequestration of any

[619] CAMA, *op cit*, s. 425 (1) (b); *Gbedu v Itie & ors, supra,* at 260,paras. F–H.
[620] CAMA, *ibid*, s. 425 (1) (c).
[621] *Ibid*, s. 425 (1) (d); *CAC v Davis, supra* at 78-79, paras H–F.
[622] CAMA, *ibid*, s.425 (1) (e); *CAC v Davis, supra* at 78–79.
[623] CAMA, *ibid*, s.425 (1) (f); *CAC v Davis, ibid*.
[624] CAMA, *ibid*, s. 453 (1) (d) and (2).
[625] *Ibid*, s. 453 (1) (b) and (2).
[626] *Ibid*, s. 425 (2) (a).
[627] *Ibid*, s. 425 (2) (b).

contributory for any balance against his estate,[628]

d) Draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company,[629]

e) Raise on the security of the assets of the company any money requisite;[630]

f) Take out in his official name, letters of administration to the estate of any deceased contributory and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company,[631]

g) Appoint an agent to do any business which the liquidator is unable to do himself,[632] and,

h) Do all such other things as may be necessary for winding up the company and distributing its assets.[633]

4. Limits and Control of the Power of a Liquidator

While the liquidator in a winding up by the court is unquestionably endowed or conferred enormous powers to carry out his duties, the liquidator, however, acts in accordance with the directions, limits and control of the court[634] or Committee of Inspection or the creditors and contributories or the Corporate Affairs Commission.

The limits and control of the power[635] of a liquidator includes:

a) The power vested on the court to control and to give directions from time to time to the liquidator in the exercise of his powers as a liquidator, being an officer of the court.[636]

[628]CAMA, *op cit*, s. 425 (2) (c).
[629] *Ibid*, s. 425 (2) (d).
[630]*Ibid*, s. 425 (2) (e).
[631] *Ibid*, s. 425 (2) (f).
[632] *Ibid*, s. 425 (2) (g).
[633]*Ibid*, s. 425 (2).
[634]*Ibid*, s. 425 (3).
[635] *CAC v Davis, supra*, at 78.

b) The liquidator exercises his powers in the administration and distribution of the assets of the company, subject to directions and approvals of the creditors or contributories at any general meeting or by the committee of inspection.[637] However, in the case of conflict between directions given by the creditors or contributories at any general meeting and that of the Committee of Inspection, the directions of the creditors or contributories shall override that of the Committee of Inspection.[638]

c) The requirements for payments by liquidator of money received by him into the Company's Liquidation Account,[639] audit and investigation of the books of account kept by the liquidator.[640]

d) The requirements for the release of a liquidator.[641]

e) The right of any creditor or contributory to apply to the court with respect to any exercise or proposed exercise of any of the liquidator's powers.[642]

5. Cessation of office of the Liquidator

The liquidator ceases to act in a winding up proceedings or vacates the office, if:

a) He resigns his appointment[643]

b) He is removed by the court or Committee of Inspection[644]

c) He is released[645] subject to compliance with the requirements of the Rules,[646] and,

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[636] CAMA, *op cit,* ss. 425 (1) (3), 427 (3), 453 (1).
[637] *Ibid,* s. 427 (1).
[638] *Ibid,* s. 427 (1).
[639] *Ibid,* s.428 (1).
[640] *Ibid*, ss. 429, 432; CWR, *op cit,* rr. 157, 158.
[641] CAMA, *ibid*, s. 431; *CAC v Davis, supra.*
[642] CAMA, *ibid*, s. 425 (3).
[643] *Ibid*, s. 422 (5); CWR, *op cit,* r. 150.
[644] CAMA, *ibid*, s.422(5).
[645] *Ibid*, s. 431; CWR, *op cit*, r. 177.
[646] CWR, *ibid*, r. 163.

d) He is fixed with a Receiver's Order in Bankruptcy.[647]

2.15 Distribution of Assets of the Company

Once the liquidator has collected in the company's assets, they must be distributed in an orderly manner to those entitled to them.[648] There are certain basic rules guiding the distribution of assets. Foremost is that the assets are devoted to first, paying the expenses of the liquidator,[649] then to the preferred creditors,[650] the general unsecured creditors, the deferred creditors and if there is anything left, to the members, according to their entitlements associated with their class rights.[651] If the assets are not sufficient to pay all of a particular class in this hierarchy in full, then they share *pro rata.*[652]

2.16 Completion of Winding up

Winding up is completed by the distribution of assets, filing of the final accounts as in Form 72 in the Appendix to the Rules and the order dissolving the company has been reported by the liquidator to the Corporate Affairs Commission.[653]

It is important to state that if a winding up is not completed within a year; the liquidator must send to the Corporate Affairs Commission, at specific intervals, a prescribed statement giving particulars as to the position of the liquidation[654] and a creditor or contributory may examine the statement and take copies or extracts on payment of a fee.[655]

[647]CWR, *op cit,* r. 151.
[648] *Okafor v Igwilo, supra* at 54.
[649] CAMA, *op cit,* s. 494 (5); CWR, *op cit,* r. 167.
[650] CAMA, *ibid,* s. 494 (1) - (4).
[651]*Ibid,* s. 446.
[652] Orojo, *op cit,* p. 499.
[653] CWR, *op cit,* r. 168 (a).
[654] CAMA, *op cit,* s. 516 (1).
[655] *Ibid,* s. 516 (2).

2.17 Dissolution of a Company: Meaning and Consequences.

While winding up of a company involves a liquidation of the company so that its assets are distributed to those entitled to receive them, liquidation is quite distinguishable from dissolution, which is the end of the legal existence of a company.[656] When a company is under a winding up proceedings, it is not dead but still alive though sick.[657] Thus, the life of a company comes to an end when the court orders dissolution of the company upon an application by the liquidator.[658] However, the court may at any time within two years after dissolution of a company, on the application of the liquidator or any interested person, make an order declaring the dissolution void and the winding up proceedings to be of no effect.[659]

It is important to state that dissolution of a company may occur without liquidation. This usually occurs in circumstances of a smooth transition to the company' legal successor through transformation of legal entities, that is, by a merger, division, change of the legal form of the business corporation, a transfer of assets to its shareholders or a cross-border relocation of the registered office.[660]

[656] *Amolegbe Re, supra,* at 94; *Progress Bank (Nig) Plc v O.K. Contact Point Holdings Ltd, supra* at 531 – 532; *Spring Bank Plc v ACB International Plc* [2016] 18 N.W.L.R (pt 1544) 245 at 255, paras C – F.
[657] *Onwuchekwa v NDIC, supra; C.C.B (Nig) Plc v Mbakwe* [2000] F.W.L R (pt 14) 2351.
[658] CAMA, *op cit,* s. 454.
[659] *Ibid*, s. 524 (1); *Abekhe v NDIC,* supra; *Musa v Elaidiamkhem* [1994] 3 N.W.L.R (pt 334) 544.
[660]*Spring Bank Plc v ACB International Bank Plc,supra,* at 255 – 260.

CHAPTER THREE

RECEIVERSHIP AS A MODE OF ENFORCEMENT OF SECURITY

In order to carry out its business, a company ordinarily requires capital. The needed capital can be equity capital or debt capital. In most cases, equity capital is never sufficient for the flotation of a company; hence, there is understandably a resort to debt capital. The powers of a company to carry out its business through debt capital are provided in the CAMA.[661] Debt capital is in most cases, secured, as unsecured credits often turn out to be a hoax, disappointment and loss to the creditor.[662] Thus, the essence of security in debt capital transactions is priceless. In the case of credits advanced to a company, security can be in the form of mortgage or charge of its undertaking, property and uncalled capital or any part thereof, creation and issue of debentures, debenture stock and other securities.[663]

It is usual for companies in Nigeria to obtain debt capital by issuing debentures, which debentures are secured either by a fixed charge mostly on the specific or ascertained company properties or by a floating charge over the whole or a specific part of the company's undertakings and assets or by both.[664] Notwithstanding the comfort afforded creditors by the provision of security in debt capital transactions, the enforcement of such security are not usually seamless. Worse still, as examined in chapter two of this study, resort to winding up of a company may not ultimately be a beneficial mode of resolving insolvency issues.[665] Hence, there is need to utilise other

[661] Companies and Allied Matters Act (CAMA), Cap C20, Laws of the Federation of Nigeria, 2004, s. 166.
[662] I O Smith, *Nigerian Law of Secured Credits* (Lagos: Ecowatch Publications (Nigeria) Limited, 2001) p. 1.
[663] CAMA, *op cit*, s. 166.
[664] *Ibid*, s. 173 (2); Smith, *op cit*, p. 297.
[665] O Ajayi, *Legal Aspects of Finance in Emerging Markets* (London: London: LexisNexis Butterworths Tolley, 2005) p. 603.

alternatives to winding up. One of the prominent alternatives to winding up of a company in Nigeria is Receivership.

The institution of receivership is one created by the agreement of parties to secured credit arrangements and also by virtue of the provisions of statute.[666] Thus, in the realm of corporate law, the appointment of a receiver and/or manager is provided as one of the potent remedies available to a debenture holder in the enforcement or realisation of securities.[667] Although a receiver and a manager is usually given similar meaning,[668] there are some fine distinctions between a receiver and a receiver/manager. Where the person appointed is mainly to stop the business, collect the debts, receive rents and realise debts, he is only a receiver but where the person appointed is reserved with powers to manage and continue the business of the company as a going concern, he is not only a receiver but also a manager.[669]

In this chapter of the study, the focus would be on a thorough examination of the law and practice relating to receivership in Nigeria.

3.1 Jurisdiction over Receivership Proceedings

The court with exclusive jurisdiction to appoint a receiver and/or manager for companies in Nigeria is the Federal High Court.[670] However, where the subject matter of receivership would not entail recourse to either the CAMA or any enactment

[666] Conveyancing Act 1881, s. 27; Property and Conveyancing Law 1959, s. 131 (Western Region of Nigeria); CAMA, *op cit*, Part XIV, ss. 387 to 400.
[667] CAMA, *op cit*, s. 209 (1).
[668] *Ibid*, s. 567 (1).
[669] *Uwakwe v Odogwe* [1989] 5 N.W.L.R (pt 123) 562 at 589; *PIP Ltd v Trade Bank (Nig) Plc* [2009] 13 N.W.L.R (pt 1159) 577 at 637 – 8; *Ponson Enterprises Nig Ltd v Njigha* (2001) FWLR (pt 16) 1685; *Palmer's Company Law*, Volume 3 (London: Sweet & Maxwell) Pt 14, p. 14068; J E O Abugu, *Company Securities: Law and Practice* (2nd edn, Lagos: MIJ Professional Publishers Limited, 2014) p. 227.
[670] Constitution of the Federal Republic of Nigeria (CFRN) 1999, s. 251 (1) (e); *Bank of Industry Limited v Awojubagbe Light Ind. Ltd* [2016] 1 N.W.L.R (pt 1493) 280 at 327 – 8.

regulating the operations of companies, a State High Court and not the Federal High Court has jurisdiction in such instance of receivership.[671]

3.2 Appointment of Receiver and/or Manager

A receiver and/or manager may be appointed either by the court or out of court, that is, under the express powers of the debentures or trust deed.[672] In this study, the discussion would be on each mode of appointment.

1 Appointment by the Court

The court is conferred with the powers to appoint a receiver and manager.[673] However, the power of the court to appoint a receiver and manager is not exercised as a matter of course. The appointment of a receiver and manager is usually predicated on sound principles of law. The court may appoint a receiver and manager in the following circumstances:[674]

1. Where the principal money borrowed by the company or the interest is in arrears.[675]
2. Where the security or property of the company is in jeopardy.[676]

In *Ceramic Manufacturers Nigeria Plc v Nigerian Industrial Bank,*[677] the court listed three events that must be established before the grant of an order of appointment of a receiver, thus:-

1. That the principal money or the interest thereon is in arrears.
2. That the security or the property is in jeopardy.
3. That the appointment of the receiver was made under a power contained in

[671] *Tanarewa (Nig) Ltd v Plastifarm Ltd* [2003] 14 N.W.L.R (pt 840) 355 at 370, paras B –C.
[672] CAMA, *op cit*, ss. 389, 390.
[673] *Ibid*, s. 389 (1); *Okoya & Ors v Santili & Ors* [1990] 2 N.W.L.R (pt 131) 172.
[674] *Nashtex Int'l Ltd v Habib Bank (Nig) Ltd* [2007] 17 N.W.L.R (pt 1063) 328.
[675] CAMA, *op cit*, s. 389 (1) (a).
[676] *Ibid*, s. 389 (1) (b).
[677] [1999] 11 N.W.L.R (pt 627) 383.

the mortgage deed between the parties.

It seems that the position of the court in *Ceramic's case,* do not reflect the correct position of the law. The pronouncement of the court that among the grounds for appointment by the court of a receiver is that the appointment of the receiver was made under a power contained in the mortgage deed between the parties is not one of the circumstances for appointment by the court of a receiver as expressly provided in the CAMA. Thus, the court seems to have confused the power of the court to appoint a receiver with that of the debenture holder to appoint out of court.[678] Rather, the third condition upon which the court can appoint a receiver or manager is that the charge to be enforced is secured.[679]

While, it is less difficult to establish the circumstances for appointment by the court of a receiver where the principal money borrowed by the company or the interest is in arrears, the proof of the ground where the security or property of the company is in jeopardy can be daunting and challenging. This is not unconnected to the imprecision in the definition of the word "jeopardy". Worst still, the constituent features of the word 'jeopardy' were not provided in the CAMA. However, some events or happenings that imply that a company or its assets is in jeopardy were set out in *Fasakin v Fasakin*,[680] thus:-

1. Where a company about to be wound up is wholly insolvent and other creditors are threatening action against the company for recovery of their debt, or,[681]
2. Where a company was insolvent and its books closed,[682] or,

[678] K Aina, 'Rethinking the Duties of a Receiver and Powers of Directors of Companies in Receivership under the Nigerian Law' (2015) 6 GRBPL No1, 62.
[679] CAMA, *op cit,* s.180 (3).
[680] [1994] 4 N.W.L.R (pt. 340) 597 at 601.
[681] Palmer's, *op cit,* p.14069.
[682] *McMahon v North Kent Iron Works Co.* [1891] 2 Ch. 148.

3. Where judgment had been entered against a company and execution was likely to issue,[683] or,
4. Where a company is proposing to distribute among its shareholders a reserved fund which constituted practically its only assets thereby putting the debenture holders interest at risk,[684] and,
5. Where the company's auditors declared in a general meeting and without being challenged by the directors that after providing for liabilities, the company's assets would only cover principal loans secured and that the company's credit and funds were exhausted.[685]

It is important to state that the events that can imply jeopardy to the assets and property of a company and thereby trigger the appointment of a receiver and/or manager by the court are not circumscribed but depends on the fact of each case.[686] Notwithstanding, it is apt to state that the appointment of a receiver and /or manager by the court is within the province of the equitable jurisdiction of the court. Hence, the granting of same is usually predicated on the fact that it is just or convenient to do so.[687] In other words, the general ground on which the court will appoint a receiver is the preservation or the protection of the property for the benefit of persons who have interest in it. Furthermore, it should be noted that the words 'just and convenient' have been interpreted as meaning "where is practicable and the interest of justice requires it".[688]

2 **Appointment out of Court**

[683] *Edwards v Standard Rolling Stock* [1893] 1 Ch. 574; Palmer's, *op cit*, p.14069.
[684] *Re: Tilt Cove Copper Co.* [1913] 2Ch. 588; Palmer's, *op cit,* p.14069.
[685] *Re: Branstein and Majorline Ltd* [1914] 112 L.T. 25.
[686] H Picarda, *The Law Relating to Receivers and Managers* (London: Butterworths & Co (Publishers) Ltd, 1984) p. 27.
[687] *Atuanya v Atuanya* [1994] 1 N.W.L.R (pt 322) 572 at 580, para P; *Uwakwe v Odogwe, supra*, 579; *Fasakin v Fasakin, supra*; *Okoya & Ors v Santili & Ors, supra*; *Emodi v Emodi* [2007]4 N.W.L.R (pt 1024)412.
[688] *Edwards & Co v Picard* [1909] 2 KB 903 at 907; Picarda, *op cit*, p. 207.

It is common to have the appointment of a receiver and/or manager under the express powers of the debentures or trust deed. The power of a debenture holder or a class of debenture holders entitled to realise his or their security to appoint a receiver of any assets, subject to a mortgage, charge or security is provided in the CAMA.[689] Just as in the case of appointment by the court of a receiver and/or manager, the appointment of a receiver and/or manager out of court also appears as an option that is not embarked upon as a matter of course. It is mostly triggered on the happening of certain events.

The circumstances upon which the option of appointment of a receiver and/or manager out of court can be invoked include:

1. Where the company failed to pay the principal money borrowed of any premium or any instalment of interest, whether in whole or part, within one month after it becomes due.[690]
2. Where the company fails to fulfil any of the obligations imposed on it by the debentures or the debentures trust deed.[691]
3. Where any circumstances provided in the terms of the debentures or debentures trust deed occurs,[692] or
4. Where the company is wound up[693]
5. Where any creditor of the company issues a process of execution against any of its assets or commences proceedings for winding up of the company by order of any court of competent jurisdiction,[694] or
6. Where the company ceases to pay its debts as they fall due;[695] and

[689] CAMA, *op cit*, s. 209(1); *Nashtex Int'l Ltd v Habib Bank (Nig) Ltd, supra* 328, paras A – F.
[690] CAMA, *ibid*, s. 208 (1) (a).
[691] *Ibid*, s. 208 (1) (b).
[692] *Ibid*, s. 208 (1) (c).
[693] *Ibid*, s. 208 (1) (d).
[694] *Ibid*, s. 208 (2) (a).

7. Where any company ceases to carry on business.[696]

It is instructive to note that other additional events not in the CAMA may be specified in the debentures or the debentures trust deed that could entitle the debenture holder or class of debenture holders to appoint a receiver and/or manager. Hence, it is imperative that a would-be receiver should take certain precautions before acceptance of his appointment.[697]

3.3 Status of Receiver and/or Manager

It is pertinent to state that a receiver and/or manager appointed by the court are deemed to be an officer of the court.[698] In view of this, such a receiver and/or manager exercise his duties and powers in accordance with the directions and instructions of the court.[699] Consequently, where such a receiver and/or manager is unreasonably hindered from exercising his duties and powers, it shall amount to contempt of court.[700]

In the case of a receiver and/or manager appointed out of court, he is deemed to be an agent of the person or persons on whose behalf he is appointed.[701]However, the Court of Appeal in *Fadeyibi v I. H. (Beverages) Ltd* appears to have misconstrued the provisions of the law when it pronounced that a receiver appointed pursuant to a court order is also deemed to be an agent of the person or persons on whose behalf he is appointed.[702] It is explicit that the receiver appointed by the court is deemed an officer of the court.[703] The provisions of section 390 (1) of the CAMA that the court

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[695] *Ibid*, s. 208 (2) (b).
[696] *Ibid*, s. 208 (2) (c).
[697] Picarda, *op cit,* p.43
[698] CAMA, *op cit,* s. 389(2); Picarda, *op cit,* p.272.
[699] CAMA, *ibid*; *Dagazau v Bokir Int'l Co. Ltd* [2011]14 N.W.L.R (pt 1267)261 at 330, paras B – C; *Jukok Int'l Ltd v Diamond Bank Plc* [2016] 6 N.W.L.R (pt 1507) 55 at 94.
[700] Picarda, *op cit,* p.64; Abugu, *op cit,* p. 231.
[701] CAMA, *op cit,* s. 390 (1); *Fadeyibi v I. H. (Beverages) Ltd* [2013] 4 N.W.L.R (pt 1344) 353.
[702] *Fadeyibi v I. H. (Beverages) Ltd, supra,* 374.
[703] CAMA, *op cit,* s. 389 (2); Palmers', *op cit,* 14072; Abugu, *op cit*; H Y Bhadmus, *Corporate Insolvency Law and Practice in Nigeria* (Enugu: Chenglo Limited, 2009) p. 70.

relied upon in the *Fadeyibi v I. H. (Beverages) Ltd* is only limited and concerned with appointment of a receiver out of court and not by court.

Although it should be noted that the deemed status of a receiver appointed out of court as provided under sections 389 and 390 of the CAMA, are rebuttable. Since the aforesaid sections of the CAMA are default provisions, where the status of the receiver and/or manager is expressly declared in the debentures or any instrument or court order, the status of the receiver and/or manager as expressly declared in the debentures or instrument or court order shall prevail.[704]

It is pertinent to state that at Common Law, a receiver and/or manager appointed by the mortgagee is deemed to be the agent for the mortgagor so that the mortgagee may sue the mortgagor for any loss resulting from the negligent act or omission of the receiver.[705] Put in another way, while the receiver and/or manager is entitled to take possession of the company's asset and operate the business on behalf of the debenture holder, the debenture holder assumes the position of being virtually a mortgagee in possession through the receiver and/or manager and is thereby liable or answerable for the commitment entered into by his receiver and/or manager in the execution of the business.

Notwithstanding that the receiver is deemed to be an agent for the person or persons on whose behalf he is appointed, where such a receiver is also appointed a manager of the whole or any part of the undertakings of a company, he stands in a fiduciary relationship to the company and is duty bound to observe utmost good faith towards it in any transaction with it or on its behalf.[706]

[704] Picarda, *op cit,* pp. 59 – 60; Palmer's, *op cit,* p. 14080/1.
[705] *Halsbury's Laws of England* (4th edn, reissue, vol 7(2), 1988) p.913, para 1157.
[706] CAMA, *op cit,* s.390 (1).

In the later part of this chapter, the receiver and/or manager fiduciary relationship with the company will be comprehensively discussed.

3.4 Qualifications for Appointment of Receiver and/or Manager

There are no mandatory qualifications imposed or required for a person to be appointed as a receiver and/or manager in Nigeria. Rather, there is disqualification provision in relation to the appointment of receiver and/or manager in the CAMA.[707] Thus, the following persons are disqualified from being appointed or to act as a receiver and/or manager of any property or undertaking of any company, namely: -

1. an infant;
2. any person found by a competent court to be of unsound mind;
3. a body corporate;
4. an undischarged bankrupt, unless such person has been given leave to act as a receiver or manager by the court that adjudged him bankrupt.
5. a director or auditor of the company;
6. any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and who is disqualified under section 254 of the CAMA.

Hence, it is important to state that a body corporate may in certain circumstance be qualified to act as a receiver.[708] This where the statute in force so permits. In this study, the conferment of powers to act as a receiver given to a body corporate such as AMCON is deprecated as it is against international best practices and a receiver and/or manager is a disinterested and impartial person.

It is unarguable that the absence of statutory provision on qualification for appointment of a receiver and/or manager in Nigeria is to say the least, unsatisfactory.

[707] CAMA, *op cit*, s. 387 (1).
[708] AMCON Act, s.48(1)

In the face of the wide ranging duties and powers exercisable by a receiver and/or manager in the course of receivership, it is not appropriate for appointment of a receiver and/or manager to be for "all and every person" insofar as the person is not statutorily disqualified. In this study, it is respectfully submitted that there should be a minimum qualification criterion for persons to be appointed or to act as receivers and/or managers.

3.5 Validity of Appointment of Receivers and/or Managers

The ascertainment of the validity of appointment of a receiver and/or manager is immeasurable and not to be ignored. Where an appointment of a receiver and/or manager is in contravention of the requirements of the law or the terms of the debentures, such appointment would be void and subject to challenge by the company.

The validity of the appointment of receivers and/or managers is mostly ascertained on the following grounds:-

1. Formalities of Appointment

There is no set statutory form for the appointment of a receiver and/or manager out of court. However, any formalities stipulated in the relevant debentures or trust deed must be followed. Where the debenture requires the appointment to be made in writing or by deed, that form must be observed. It is important to state that a deed is required not only where the appointment provision expressly states that the appointment shall be by deed, but also, where the receiver and/or manager is given the power to execute deeds in the name of the debenture holders.[709] Also, where the debenture requires the consent of other debenture holders for an appointment to be made, such consent must be first obtained.

[709] Picarda, *op cit*, p. 44.

2. Conditions Precedent

Where there are express condition precedent to the appointment of a receiver, such conditions must be faithfully satisfied if the appointment is to be valid. Some of the conditions precedent to the appointment of a receiver as provided in the CAMA or the debenture include:-

(i) Necessity for Formal Demand

It is a moot point whether a formal demand for payment of money due is a prerequisite to the appointment of a receiver. It is submitted that the making of a demand is not a prerequisite to the validity of an appointment of a receiver under the extant law in Nigeria. However, it is worthy to note that express words in a debenture or trust deed may make a demand a crucial element in the appointment of a receiver. But in the absence of express words requiring a demand to be made, the necessity of demand cannot be implied.[710]

(ii) Requirement of Time

As a corollary to (i) above, is whether there is a prescribed time limit to be observed prior to the appointment of a receiver. This issue borders more on the time that the realisation of security by the appointment of a receiver and/or manager can be invoked when a company fails to pay the principal sum borrowed or any instalment of interest or any premium.[711] The prescribed time limit provided in the CAMA is within one month after it becomes due.[712]

Arising from the above, is the contention as to whether a receiver and/or manager can be appointed to realise the security for the debenture holder without exhaustion of the prescribed time limit of one month after the payment becomes due

[710] H Picarda, 'Receiver and on Demand Debentures' (1984) 5 Bus L Rev, pp105-107.
[711] CAMA, *op cit*, s. 208 (1) (a).
[712] *Ibid.*

or the happening of the event specified in the debentures. It is submitted that where there is prescription of time in a statute or the debenture as a condition precedent for the appointment of a receiver and/or manager, it must strictly be complied with. Thus, where appointment of a receiver and/or manager did not comply with the condition precedent as to the time or happening of a specified event as provided in the statute or debenture, such appointment may be challenged on the ground of non-exhaustion of prescribed time limit, hence the appointment is premature and incompetent.

(iii) Authority to Appoint.

The validity of an appointment of a receiver and/or manager can be challenged on the ground that the person making the appointment lacked the necessary authority to make the appointment at the time it was so made. In view of this, it is important that the appointment of a receiver and/or manager be made by persons with the appropriate standing to so do as provided in the statute or debenture.[713]

The persons with the requisite authority to appoint a receiver and/or manager under the extant laws in Nigeria are:-

a) The trustee of the covering debenture trust deed,[714]

b) Debenture holder(s),[715]

c) Asset Management Corporation of Nigeria,[716]

d) The court on the application of the trustee[717] or any interested person.[718]

3. Absence of Registration of the Charge

Another issue that can impugn the validity of appointment of a receiver and/or manager is where the charge under which he was appointed was not registered where

[713] CAMA, *op cit*, s. 209(1).
[714] *Ibid*, s. 209(1) (a).
[715] *Ibid*, s. 209(1) (b) (c). *op cit*
[716] AMCON Act, s. 48(1).
[717] CAMA, *op cit*, s. 209(1) (d).
[718] *Ibid*, s. 389 (1).

registration is mandatory. In this respect, the validity of an appointed receiver can be attacked by a liquidator or creditor on the ground that the charge itself is void for want of registration.[719] It should be noted that while the charge remains valid and effective as against the company, in the case of a liquidator and creditors, non-registration of the charge on which the appointment of a receiver and/or manager is derived from is fatal and may subject the appointment to a challenge or attack.

3.6 Procedure after Appointment of Receiver/Manager.

Upon the appointment of a receiver and/or manager, there are certain procedural steps that must be taken. These are:-

1. Notice of Appointment and Registration

Where the receiver and/or manager is appointed by the court, he shall advertise the appointment in the gazette and two daily newspapers.[720] Where the appointment is made out of court, the receiver or manager shall:

a) Immediately send notice to the company of his appointment and the terms.[721]

b) Within 14 days of the appointment, send notice to the Corporate Affairs Commission (CAC) indicating the terms of and remuneration for the appointment.[722]

c) Where a person obtained an order for the appointment of a receiver and/or manager of the property of a company or appointed such a receiver and/or manager under any power contained in any instrument to within seven days from the date of the order or the appointment under the said powers to give notice of the fact to the CAC, which notice of order or appointment

[719]CAMA, *op cit,* s. 197(1).
[720]*Ibid*, s. 181.
[721] *Ibid*, s. 396(1) (a).
[722] *Ibid*, s. 392 (1).

on payment of prescribed fee shall be entered in the register of charges.[723]

2. Statement of Affairs

Upon receipt of the notices as listed above, the following step takes place:

a) The company shall within 14 days or such longer period as may be allowed by the court or by the receiver, submit to the receiver, statement of the affairs of the company in the prescribed form.[724]

b) The receiver shall within 2 months after the receipt of the above-stated statement of affairs, send to:[725]

i. The court, a copy of the statement and his comments on it, if any,[726] or,

ii. The CAC, a copy of the statement and a summary of the statement together with his comments thereon, if any,[727] or,

iii. The company, a copy of his comments and where no comments, a note to that effect,[728]or,

iv. Any trustees of the debenture and every debenture holder, whose address is known, a copy of the summary of the statement.[729]

It should be noted that the statement of affairs must include the matters stated in section 397 (1) of the CAMA. Such statement of affairs is to be verified by affidavit of one or more of the directors of the company and by the secretary of the company.[730] However, the statement of affairs may be verified by the affidavit, subject to the direction of the court, by other persons than directors and the secretary

[723] *Ibid*, s. 206 (1).
[724]CAMA, *op cit*, s. 397 (1) (b).
[725]*Ibid*, s. 396 (1) (c).
[726]*Ibid*, s. 396 (1) (c) (i).
[727] *Ibid*, s. 396 (1) (c) (i).
[728] *Ibid*, s. 396 (1) (c) (ii).
[729] *Ibid*, s. 396 (1) (c) (iii).
[730] *Ibid*, s. 397 (2).

of the company.[731] It is important to state that any person making the statement of affairs, verified by affidavit, is entitled to recoup the costs and expenses incurred from the receiver or his successor as may be considered reasonable.[732]

3. **Publication of Appointment**

There shall be a statement in every invoice, order for goods or business letter issued by or on behalf of the company or the receiver and/or manager or the liquidator of the company, being a document on or in which the company's name appears, the fact of appointment of a receiver and/or manager.[733]

4. Delivery and Showing of Accounts, Receipts and Payments

Where a receiver and/or manager is appointed under the powers contained in any instrument, such receiver and/or manager shall within one month or such longer periods as the CAC may allow, after the expiration of 6 months of his appointment and of every subsequent period of 6 months, and within 1 month after he ceases to act as receiver and/or manager, deliver to the CAC for registration an abstract in the prescribed form showing his receipts and his payment during that period of 6 months, or where he ceases to act, between the date of the last abstract and the date of his so ceasing to act, the aggregate amount of his receipts and payments during all preceding periods since his appointment.[734]

In the case of a receiver and/or manager appointed by court, such receiver and/or manager shall within 2 months or such longer periods as the CAC may allow, after the expiration of 12 months of his appointment and of every subsequent period of 12 months, and within 2 months after he ceases to act as receiver and/or manager, deliver to the CAC for registration an abstract in the prescribed form showing his

[731] *Ibid,* s. 397 (2) (a) (b) (c) (d).
[732]CAMA, *op cit,* s. 397 (3).
[733]*Ibid,* s. 392(1).
[734]*Ibid,* s. 398 (1); Companies Regulations 2012, reg 42.

receipts and his payment during that period of 12 months, or where he ceases to act, between the date of the last abstract and the date of his so ceasing to act, the aggregate amount of his receipts and payments during all preceding periods since his appointment.[735]

It is imperative to state that failure to observe the specified procedure after appointment of a receiver and/or manager constitutes an offence[736] punishable to a fine not exceeding N25 or N50 for every day during which the default continues. However, the non-compliance with the post-appointment procedure does not vitiate or invalidate the appointment.

3.7 Legal Consequences of Appointment of Receiver and/or Manager

There are legal consequences that flow from the appointment of receiver and/or manager, to wit:

1. Legal Personality of a Company

The appointment of a receiver and/or manager does not extinguish the legal personality of the company under receivership. Where a receiver and/or manager are appointed for a company, the company neither loses its legal personality nor title to the goods in receivership.[737] The company in receivership still remains in existence.[738] The life and the legal personality of a company is extinguished only upon its winding up and dissolution thereafter.[739]

[735] Companies Regulation, *op cit*, reg 41.
[736] CAMA, *op cit*, ss. 206 (3), 392 (2), 396 (7), 397(5), 398 (2).
[737] *Solar Energy Advanced Power Systems Ltd (S.P.E.A.S) v Ogunnaike* [2008] 14 N.W.L.R (pt 1106) 1 at 12, para G*; Christlieb Plc v Majekodunmi* [2008] 16 N.W.L.R (pt 1113) 324 at 345, paras C – E*; Union Bank of Nigeria Ltd v Tropic Foods Ltd* [1992] 3 N.W.L.R (pt 228) 231*; Pharmatek Industries Ltd v Trade Bank (Nig) Ltd* [1997]7 N.W.L.R (pt 514) 639.
[738] *Remalo Ltd* v *National Bank of Nigeria Ltd* [2003] 16 N.W.L.R (pt 846) 235 at 243, para F.
[739] *Commercial Bank (Credit Lyonnais) Nig Ltd v Okoli* [2009] 5 N.W.L.R (pt 1135) 446 at 461, paras F-G; *N.D.I.C v Okem Enterprises Ltd* [2004] 10 N.W.L.R (pt 880)107; *Ehiadimhen v Musa* [2000] 8 N.W.L.R (pt 669)540; (2000) 4 SC (pt 11)166 at 184.

Consequently, since the company retains its title to the goods in receivership and its legal personality remains intact, the company has a right to ensure that its property is not dissipated and therefore, has a legal right to seek injunctive reliefs so as to protect its assets.[740]

2. Powers of Directors of the Company

By virtue of the provisions of section 63 (1) and (3) of the CAMA, the board of directors of a company is vested with the powers to manage the business of the company. Hence, it has been argued as to whether the directors of a company may continue to exercise powers over the business, property or undertakings of the company under receivership. It is posited that the effect of the appointment of a receiver and/or manager by the court is that it practically removes the conduct and guidance of the affairs of the company from the directors and places it in the hands of the receiver and/or manager so that the directors become incapable of making any contract on behalf of the company or exercising any control over any part of the property or assets of the company in relation to the particular assets to which the security attaches.

The appointment of the receiver and/or manager supersedes the powers of the company and the authority of its directors in the conduct of its business which remains in abeyance during the appointment.[741] Suffice to state that with the appointment of a receiver and/or manager, the powers of the company and the authority of the directors cease only in respect of those assets within the scope of the charge but in respect of the assets that are not within the scope of the charge or where

[740] *Union Bank of Nigeria Ltd v Tropic Foods Ltd, supra*, 246, para A.
[741] Orojo, *op cit,* p. 439 – 440; Palmer's, *op cit,* p. 14072; *Moss Steamship Co v Whinney* [1912] A C 254.

the receiver has refused to act, the company and the directors retain their powers.[742] Simply put, the appointment of a receiver or manager paralyses the powers of the company and authority of its directors in respect of the company's assets in receivership.[743]

It is therefore indubitable that the appointment of a receiver and/or manager does not end all the powers of the board. The directors still have continuing powers and duties. Thus such appointment does not prevent the company or its directors from suing or being sued in respect of those matters outside the control of the receiver and/or manager.[744] Hence, the surmise of the effect of the appointment of a receiver and/or manager is that the directors of the company do not become *functus officio* upon the appointment of a receiver.[745] The powers of the directors over the company's property and management of the business are only temporarily suspended during the receivership.[746] The company continues to be a going concern and is not thereby liquidated or wound up, the directors are not also removed as directors, and may continue to function as directors of the company over those assets of the company not covered by the debenture.

However, in respect of the assets constituted and charged under the debenture deed, the powers of the directors to deal with the company's assets cease with the

[742] CAMA, *op cit*, s. 393 (3); *Omojasola v Plisson Fisko (Nigeria) Ltd, supra*; *Intercontractors Nig. Ltd* v *N.P.F.M.B* (1983) 1 NSCC 759; *Fadeyibi v I. H. (Beverages) Ltd, supra*, 373, paras F – H; *UBA Trustees Ltd v Nigergrob Ceramic Ltd* [1987] 3 N.W.L.R (pt 62) 600; *Oluyori Bottling Industry Limited v Union Bank of Nigeria Plc* [2009] 3 N.W.L.R (pt 1127) 129; Smith, *op cit*, p. 337.

[743] *Standard Printing & Publishing Co Ltd v N. A. B Ltd* (2003) FWLR (pt 137) 1097 at 1109, para C; *Intercontractors Nig. Ltd v N. P. F. M. B, supra; U.B.N Plc v David Lab Ltd* [2014] All FWLR (pt 714) 157 at 171, paras F – G; *Unibiz Nig Limited v C.B.C.I Ltd* (2003) FWLR (pt 152) 71; *Solar Energy Advanced Power Systems Ltd (S.P.E.A.S) v Ogunnaike, supra*; *Dagazau v Bokir Int'l Co. Ltd, supra,* 325 – 326.

[744] *UBA Trustees Ltd v Nigergrob Ceramic Ltd, supra,* at 612; Orojo, *op cit*, p. 440.

[745] CAMA, *op cit*, s 390 (1).

[746] *Central London Electricity Ltd v Berners* [1985] 1 KBD 160.

appointment of the receiver.[747] The receiver in view of powers invested in him under schedule 11 to the CAMA[748] is empowered to bring an action or defend same in the name of the company and remains the only authority to use the name of the company in actions before the court during the receivership. But the directors may maintain action in the name of the company under certain circumstances.[749]

3. Contracts of Employment

Where the receiver and/or manager is appointed by court, upon his appointment, the company's employees are automatically dismissed and may claim damages for breach of contract even when they are subsequently re-employed by the receiver.[750] But where the receiver and/or manager is appointed out of court and regarded as agent of the company, the appointment does not of itself automatically terminate contracts of employment previously made and subsisting between the company and its employees.[751] However, this proposition of the law as to the effect of appointment of receiver and/or manager as it relates to contracts of employment in a company yields to exceptions. The first exception is that where the appointment is accompanied by a sale or 'hiving down' of the business of the company.[752] The second exception occurs where simultaneously with or very soon after his appointment, the receiver and/or manager enters into a new agreement with a particular employee that is inconsistent with the old contracts. In other words, the existing contract of employment is superseded and *ex hypothesi* terminated.[753] The third exception is where the

[747] *Moss Steamship Co. v Whinney, supra,* at 260; *Newhart Developments v Co-Op Commercial Bank* [1978] 2 All ER 901; *Jukok Int'l Ltd v Diamond Bank Plc, supra* at 96
[748] CAMA, *op cit*, s. 393 (v).
[749] Aina, *art cit,* 68.
[750] Palmer's, *op cit,* p. 14087; Abugu, *op cit,* p. 239.
[751] Palmer's, *ibid,* p. 14088; Picarda, *op cit*, p. 104; Smith, *op cit*, p. 337; Abugu, *ibid.*
[752] *Re Foster Clark Ltd* [1966] 1 All ER 43.
[753] *Griffiths v Secretary of State for Social Services* [1974] QB 468.

continuation of the employees' employment is inconsistent with the role and functions of the receiver as receiver and manager.

It is arguable what the effect of the appointment of a receiver will be on the existing contracts of employment if he is acting as an agent for the debenture holders. Although there is no settled precedence, the preponderance of opinion[754]is that such appointment will terminate the company's existing contracts of employment. In *Dagazau v Bokir Int'l Co. Ltd*, the court pronounced that "… the powers of the board automatically vests in the *defacto* sole administrator who determines the continuity of the secretary and indeed, of all other staff".[755] It should be noted that where the receiver and/or manager adopts the existing contracts of employment, he is bound by them.[756]

4. Commercial Contracts

Upon the appointment of a receiver and/or manager, existing commercial contracts remain binding upon the company but the receiver is not bound to adopt them. The receiver does not, it seems, owe any duty to the other party to adopt the contract. The position of the law is that where the abandonment of an existing commercial contract would affect the goodwill of the business of a company and the beneficial realisation of its assets,[757] the receiver and/or manager should not recline from adopting such contracts. The court in *Tanarewa (Nig) Ltd v Plastifarm Ltd* appeared to have misconstrued the law when it held that section 393 of the CAMA provides that a contract entered before the appointment of a receiver and/or manager is binding on

[754] *Dagazau v Bokir Int'l Co. Ltd, supra,* at 325 – 326, paras H – A; Picarda, *op cit,* pp. 105 – 106.
[755] *Dagazau v Bokir Int'l Co. Ltd, supra*.
[756] S Barber, *Company Law* (4th edn, London: Old Bailey Press, 2004) p. 185.
[757] *Tanarewa (Nig) Ltd v Plastifarm Ltd, supra,* at 380.

him and cannot be renounced.[758] This position of the court seems to be *obiter* as section 393 of the CAMA never dealt with contracts.

It should be noted that where a receiver and/or manager of a company entered into a contract, he or she shall be personally liable, in the absence of express negation of liability.[759] A receiver and/or manager is however, entitled to an indemnity in respect of liability suffered as a result of the contract entered by him in receivership.[760]

5. Crystallisation of Floating Charges

Upon the appointment of a receiver and/or manager, the floating charges crystallise and become fixed charges.[761] Thus, the company loses the benefits that were hitherto derivable from its assets being secured as a floating charge as aptly described in *Siebe Gorman & Co. Ltd v Barclays Bank Ltd.*[762] Hence, all the assets ceases to be available to the company and comes under the control of the receiver and/or manager as the company and its directors loses the right to deal in or use those assets in the normal course of business of the company without the receiver's consent.[763]

6. Execution

The appointment of a receiver and manager does not operate as a stay of execution.[764] However, it is pertinent to state that the attachment and sale will be ineffective against the company's assets that have ceased to be in its custody.[765] Hence, the title of the receiver or manager prevails over those of unconcluded execution creditors.[766]

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[758] *Ibid*, at 379.
[759] CAMA, *op cit,* s. 394 (1); Abugu, *op cit,* p. 239.
[760] CAMA, *op cit,* s. 394 (2) (3); Abugu, *op cit.*
[761] CAMA, *ibid,* s. 178 (1) (a) (b), (2); *UBA Trustees' v Nigergrob Ceramic Ltd, supra; Re: Griffin Hotel Company Ltd* [1941] Ch 129.
[762] [1979] 2 Lloyd's Report 142; *Re: Yorkshire Wool Combers Association* [1903] 2 Ch 284.
[763] Palmers's, *op cit,* p. 14087.
[764] *Intercontractors Nigeria Ltd v UAC Nigeria Ltd* (1988) 1 NSCC 737 at 751.
[765] *Omojasola v Plisson Fisko (Nigeria) Ltd, supra,* at 434.
[766] *Intercontractors Nigeria Ltd v UAC Nigeria Ltd, supra.*

7. **Actions**

The position of the law before the enactment of the CAMA was that since the receiver and/or manager does not have any legal estate in the assets as the company retained its title to assets and legal personality, the receiver and/or manager requires the leave of court to enable him institute or defend an action in the name of the company with respect to assets involved in the receivership.[767] Hence, where the receiver is appointed by the court, no action can be brought against him or in respect of the property in his possession without the leave of court since he is an officer of the court[768] and any interference with the performance of his duties may amount to contempt of court.[769] Where the receiver and/or manager is appointed by a debenture holder, such a receiver and/or manager can institute and defend actions in the name of the debenture holder or the company entitled to the goods comprised in the debenture.[770]

It would appear that the incontrovertible position of the law in Nigeria is that leave of Court[771] is not required by a receiver and/or manager appointed out of court to bring or defend an action in the name of the company. This position of the law found support in *Onofowokan v Wema Bank Plc*[772] thus:

[767] *Solar Energy Advanced Power Systems Ltd (S.P.E.A.S) v Ogunnaike, supra* at 15, para D, 16, para F; Bhadmus, *op cit*, pp. 78 – 79.
[768] CAMA, *op cit*, s. 389 (2); *Dagazau v Bokir Int'l Co. Ltd, supra,* at 330, paras B – C.
[769] *Intercontractors Nigeria Ltd v UAC Nigeria Ltd, supra* at 737; Abugu, *op cit*, p. 231.
[770] CAMA, *op cit*, 11th Schedule, item 5; *Intercontractors Nigeria Ltd v UAC Nigeria Ltd*, *ibid*; *Dagazau v Bokir Int'l Co. Ltd, supra* at 331, paras B – C; *Brifina Ltd v Intercontinental Bank Ltd* [2003] 5 N.W.L.R (pt 814) 540 at 577, paras F – H.
[771] *Unibiz (Nig) Ltd v C.B.C.L Ltd, supra*; *Inter-contractors Nig. Ltd v N.P.F.M.B* [1988] 2 N.W.L.R (pt 76) 280;
[772] [2011] All FWLR (pt. 585) 201 at 219, paras D–F, per Muhammed JSC.

> consequently, as the appointment of the 3rd respondent by 1st respondent as receiver/manager over all the properties of the 2nd respondent company charged under the debenture trust deeds was made in substantial compliance with section 393 (3) of the Companies and Allied Matters Act and Schedule 11 of that Act, the 3rd respondent required no leave of court to institute the action against the appellants to recover the loan granted to the 2nd respondent which is still awaiting liquidation. The cases of *Intercontractors (Nig) Ltd v N.P.F.M.B;*[773] *Intercontractors (Nig.) Ltd v U.A.C (Nig.) Ltd;*[774] *Adegboyega .v. Dina*[775]and *Unibiz (Nig.) Ltd v C.B.C.L Ltd*[776]in which the provisions of section 393 (3) of the Companies and Allied Matters Act and Schedule 11 of that Act did not arise for consideration, are not relevant.

However, it is important to state that the leave of court to institute or defend an action in the name of the company is still required where the receiver and/or manager appointed by the court is not for the whole or substantially the whole of the company's property to be entitled to the powers provided in the Eleventh Schedule of the CAMA. Furthermore, a receiver and/or manager is not entitled to bring an action

[773] *Supra*.
[774] *Supra*
[775] [1992] 7 N.W.L.R (pt. 255) 576.
[776] *Supra*

in his own name as title in the goods in receivership is not vested in him but the company.[777]

3.8 Duties and Powers of Receiver and/or Manager

The receiver and/or manager is conferred with far-reaching powers under the extant statute or debenture instrument in order to function as a receiver and/or manager. The purpose of the appointment of a receiver and/or manager is primarily to work towards paying outstanding debts or redeeming security or freeing property from some jeopardy for the benefit of creditors or debenture holders on whose behalf the appointment is made.[778] In order to carry out the purpose for his appointment, a receiver and/or manager exercises some far-reaching duties and powers. While some of the duties and functions of a receiver and/or manager are usually specified in the court order appointing the receiver and/or manager or the debenture instrument, other expansive general duties and powers of receivers and/or managers are contained in the CAMA. Hence, the dictum of the court that the "the duty and function of a receiver appointed by court is not different from that of a receiver appointed by debenture holders"[779]seems not a correct representation of the law. Although, the general duties and functions of a receiver and/or manager as provided in the CAMA are common to a receiver and/or manager appointed by court and that appointed out of court, in terms of their specific duties and functions, it is circumscribed to the order of appointment and the provisions of the debentures.

In addition to the duties as may be contained in the debenture instrument or order of court appointing him, some of the threshold duties of a receiver and/or manager under statute or common law are:

[777] *Shinning Star Nigeria Ltd v Ask Steel Nig. Ltd* (2011) All FWLR (pt 578) 825 at 861, para B; *Atoju v Triumph Bank Plc* [2016] 5 N.W.L.R (pt 1505) 252 at 308, paras C – D.
[778] CAMA, *op cit*, s. 393 (1) (2); *Anatogu v Anatogu* [1998] 5 N.W.L.R (pt 548) 42; Ajayi, *op cit*, p. 569; Smith, *op cit*, p. 343.
[779] *Solar Energy Advanced Power Systems Ltd (S.P.E.A.S) v Ogunnaike, supra*, at 15.

1. Duty to Receive

The foremost duty of a receiver is, subject to the rights of prior encumbrances, to take possession of and protect the property, receive the rents and profits and discharge all out goings in respect thereof and realise the security for the benefit of those on whose behalf he is appointed.[780] It should be noted that a receiver cannot carry on any business or undertaking of the company unless he is also appointed a manager or receiver of the whole or substantially the whole or any part of the undertaking of the company.[781] The business or undertaking shall be managed by the receiver and/or manager with a view to the beneficial realisation of the security for those on whose behalf he is appointed.[782]Thus, the court in *Ponson Enterprises Nig Ltd v Njigha*[783] drew a fine distinction between the functions of a receiver and a manager, to wit, "a receiver has the duty to stop the business, collect the debts and realise the assets. He has no authority to carry on a going concern. But a manager, on the other hand, has powers to continue a business.[784]

2. Duty to Manage and the carrying on of the Business of the Company

Where a receiver is appointed for the whole or substantially the whole or any part of the undertaking of the company with a view to the beneficial realisation of the

[780] CAMA, *op cit,* s. 393 (1) (2); *Babington-Ashaye v E.M.A Gen. Ent. Nig. Ltd* (2012) All FWLR (pt 645) 256 at 295, Paras. D-E; *P.I.P. Ltd v Trade Bank (Nig) Plc, supra* at 637, paras F – G; *Nashtex Int'l Ltd v Habib Bank (Nig) Ltd, supra* at 329, paras B – E.

[781] *Nashtex Int'l Ltd v Habib Bank (Nig) Ltd, supra,* at 329, per Kekere-Ekun JCA (as she then was); *P.I.P. Ltd v Trade Bank (Nig) Plc, supra,* at 637 – 638, paras F – G; *Intercontractors Nig. Ltd v N. P. F. M. B, supra.*

[782] CAMA, *op cit,* s. 393 (1) (2); *Nashtex Int'l Ltd v Habib Bank (Nig) Ltd, supra*; *P.I.P. Ltd v Trade Bank (Nig) Plc, supra, at* 637 – 638, paras F – G; *Intercontractors Nig. Ltd v N. P. F. M. B, supra.*

[783] Supra

[784]*Ponson Enterprises Nig Ltd v Njigha supra,* at 1700, paras. B–C; *Uwakwe v Odogwe, supra* at 589; *Nashtex Int'l Ltd v Habib Bank (Nig) Ltd, supra,* at 329, paras B – E; *NBCI v Alfijir (Mining)Nigeria Ltd* [1993] 4 N.W.L.R (pt 287) 346; [1999] 14 N.W.L.R (pt 638) 176; *P.I.P. Ltd v Trade Bank (Nig) Plc, supra,* at 637 – 638. J O Bolodeoku, 'Receivership and Enforcement of Tax Liability', Journal of Private and Property Law, 2004, 40.

security of those on whose behalf he is appointed,[785] or a manager, he can carry on the business or undertaking of the company with a view to the beneficial realisation of the security for those on whose behalf he is appointed.[786]

It is pertinent to state that in exercising the duty to manage and the carrying on the business of the company, the receiver and/or manager is not bound to receive directions from the directors but to give directions and must always have regards to the purpose for which he has being appointed. In the exercise of the duty to manage and the carrying on the business of the company, it must be exercised for proper purpose and not for collateral purpose or extraneous reasons.[787]

It is worthwhile to state that the receiver and/or manager's duty is to manage and carry on the business of the company with a view to the realisation of the debenture holder's security may entail the invocation of the power to sell off the assets of the company,[788] which sale can be by public auction or private contract.[789] Furthermore, in exercising this duty to manage and the carrying on business of the company, the receiver and/or manager must act in good faith in the best interests of the debenture holders and having regards to the interests of the company, its members, employees, creditors and other stakeholders.[790]

3. Fiduciary Duty: to Act in Utmost Good Faith

A receiver and/or manager where appointed out of court or by the court stands in a fiduciary relationship to the company and shall observe utmost good faith towards the

[785] *Union Bank of Nigeria Ltd v Tropic Foods Ltd, supra*; *Re: London Iron and Steel Co. Ltd* [1990] BCLC372.
[786] CAMA, *op cit*, s 393 (1) (2); *Nashtex Int'l Ltd v Habib Bank (Nig) Ltd, supra; Intercontractors Nig. Ltd v N. P. F. M. B, supra; Ponson Enterprises Nig Ltd v Njigha, supra*; Abugu, *op cit,* p. 236.
[787] Picarda, *op cit,* p. 791.
[788] *Uwakwe v Odogwe, supra.*
[789] CAMA, *op cit,* s. 393 (3); Eleventh schedule, para 2.
[790] *Ibid,* ss. 390 (1) (2), 393 (2).

company in any transaction with it or on its behalf.[791] Such a receiver and/or manager shall in any transaction, act in utmost good faith, that is, in the best interest of the company as a whole so as to preserve its assets; further its business and promote the purposes for which it was formed.[792]Thus, a receiver appointed by the court has been held as "not only fills a fiduciary position towards all the debenture holders, but his appointment to an office of such responsibility presupposes that he will discharge his duties with punctilious rectitude".[793]

Although, the words "utmost good faith" as used in section 390 (1) of the CAMA was not subjected to precise definition, the Supreme Court of Nigeria in *West African Breweries Ltd v Savannah Ventures Ltd,*[794] adopting Lord Herschell's dictum in *Kennedy v De Trafford*[795]stated thus:

> Granted that the duty of the mortgagee, or receiver, to act in good faith is capable of precise statement, what amounts to good faith cannot be stated with equal precision. … It is very difficult to define exhaustively all that would be included in the words 'good faith' but I think I would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion. Of course, if he wilfully deals with the property in such manner that the interests of the mortgagor are sacrificed, he had not been exercising his power of sale in good faith.

[791]CAMA, *op cit,* ss. 390 (1) (2), 393 (2); *Fadeyibi v I. H. (Beverages) Ltd, supra,* at 374, paras B –D; *Unibiz (Nig) Ltd v C.B.C.L Ltd, supra*.
[792] CAMA, *ibid,* ss. 390 (1) (2), 393 (2); *Fadeyibi v I. H. (Beverages) Ltd, supra,* at 374; *Unibiz (Nig) Ltd v C.B.C.L Ltd, supra, at* 402; Abugu, *op cit,* p. 232.
[793] Palmer's *op cit,* p. 14074.
[794] [2002] FWLR (pt 112) 53 at 77, paras A–C.
[795] [1897] AC 180.

Notwithstanding the impreciseness of the words "utmost good faith", it has been held that a receiver and/or manager has failed to exercise utmost good faith where there is evidence of gross negligence and recklessness[796] of a receiver in dealing with the properties of a company, and collusion[797] with the purchaser of a mortgaged property.

Suffice to state that the fiduciary duties of a receiver and/or manager encompass that:-

1. He must act in the best interests of the company.[798]
2. He must exercise his powers for proper purpose and not for any collateral purpose.
3. He must not have personal interest in the subject matter of the receivership, or in any self-dealing transactions whatever.
4. He must not be negligent or reckless while exercising his duty.[799]
5. He must not be tainted with acts of corruption or collusion in any manner howsoever.[800]

It is arguable whether this fiduciary duty to act in good faith and in best interests is owed only to the debenture holders and not the company or other stakeholders. The quick response would be that while a receiver and/or manager exercises this fiduciary duty in order to achieve the primary purpose for his appointment, that is, the realisation of the security on behalf of persons upon whom he is appointed, in doing that, he must have regards to the interests of the company, its members, employees and creditors.[801]

[796] *West African Breweries Ltd v Savannah Ventures Ltd, supra,* at 84, paras. A–B.
[797] *Ibid,* at 77, para. D.
[798] CAMA, *op cit,* s 390 (1).
[799] *Fadeyibi v I. H. (Beverages) Ltd, supra.*
[800] *West African Breweries Ltd v Savannah Ventures Ltd, supra*; Picarda, *op cit,* p.81.
[801] CAMA, *op cit,* s. 390 (1) (2); Smith, *op cit,* p. 344.

4. Duty of Care

A receiver and/or manager in the conduct of his responsibilities have the duty to exercise due care, skill, judgment, diligence, faithfulness and act in a manner an ordinarily skilful manager would do in the circumstances.[802] In order to underscore this duty, a receiver as a manager is enjoined when considering whether a particular transaction or course of action is in the best interest of the company to have regards to the interest of the employees as well as the members of the company, and when appointed by, or as a representative of, a special class of members or creditors, may give special, but not exclusive consideration to the interest of that class. In other words, the receiver may give special but not exclusive consideration to the interest of the secured creditors on whose behalf he is appointed.[803]

5. Duty to Give Notice of Appointment and Make Returns

Upon the appointment of a person as a receiver and/or manager, he shall give notice of his appointment to the company and the terms,[804] call for a statement in the prescribed form as to the affairs of the company,[805] which statement shall be submitted within 14 days after receipt of the notice of appointment to the receiver in accordance with section 397 of the CAMA and also give notice to the CAC within 14 days of the appointment, indicating the terms and remuneration for the appointment.[806]

The receiver shall within 2 months after receipt of the statement, send a copy to the CAC (in the case of receiver appointed out of court) or to the Court (in the case of receiver appointed by court), and of any comment he sees fit to make thereon and in

[802] CAMA, *op cit*, s. 390 (2) (a); *Cuckmere Brick Co. Ltd v Mutual Finance Ltd* [1971] 1 Ch 949; [1971] 2 All ER 633; Abugu, *op cit*, p. 232.
[803] B Adebola, 'The Duty of the Nigerian Receiver to "Manage" the Company' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297805> accessed on 10 May 2015.
[804] CAMA, *op cit*, s. 396 (1) (a).
[805] *Ibid*, s. 396 (1) (b).
[806] *Ibid*, s 392 (1).

the case of the Corporate Affairs Commission, also, a summary of the statement and of his comments if any thereon,[807] to the company, a copy of any such comments as aforesaid or if he does not see fit to make any such comment, a notice to that effect[808] and to any trustees for the debenture holders on whose behalf he has been appointed, a copy of the said summary.[809]

The receiver shall within 2 months or such longer period as the court may allow after the expiration of the period of 12 months from the date of his appointment, and of every subsequent period of 12 months and within 2 months or such longer period as the court may allow after he ceases to act as receiver or manager of the property of the company, owe the duty to send to the CAC, to any trustees for the debenture holders on whose behalf he was appointed, so far as he is aware of their addresses; to the company, an abstract in the prescribed form showing his receipts and payments[810] of the receivership. Notwithstanding this provision, a receiver owes the duty to render proper accounts of his receipts and payments as he may be required from time to time[811] and deliver to the CAC for registration[812] an abstract in the prescribed form, showing his receipts and payments during that period of 6 months.

Furthermore, a receiver or a manager owes the duty to ensure that every invoice, order for goods or business letter issued by or on behalf of the company shall contain a statement that a receiver or manager has been appointed.[813]

6. Duty to Distribute Company's Assets

It is the duty of the receiver to distribute all moneys realised from sale of assets, in accordance with his instrument of appointment or the order of court. Where a receiver

[807]CAMA, *op cit*, s 396 (1) (c) (i).
[808]*Ibid*, s 396 (1) (c) (ii).
[809] *Ibid*, s.396 (1) (c) (iii).
[810] *Ibid*, s. 396 (2); Companies Regulation, *op cit*, reg 41.
[811]CAMA, *ibid*, s. 396 (6).
[812]*Ibid*, s. 398 (1); Companies Regulation, *op cit*, reg 42.
[813] CAMA, *ibid*, s. 392 (1); Insolvency Act 1986 (as amended), s. 39 (1) (UK).

and/or manager is appointed by an order of court, an application shall be brought for an order of court setting out the manner of distribution among the various claimants.[814] In the absence of express provision in the debenture or the order of court, the receiver and/or manager distribute the proceeds of the receivership as follows[815] :-

i. The cost of realising the security.

ii. Other expenses of the receiver and manager including remuneration and assets;

iii. Costs, expenses, other outgoings and the expenses of trustees under a debenture, trust deed, if any, including their remuneration

iv. Cost of debenture holder's action, if any preferential debts out of the property, subject to a floating charge in priority to the claims of the debenture holder.[816]

v. The debenture debt with interest accruing therein up to the date of payment.

2. Powers of Receiver and/or Manager

The powers of the receiver and/or manager may be set out in the debentures or order of court. However, the powers that are exercisable by him are now regulated by the CAMA.[817] It should be noted that the debenture instrument or order of court upon which the appointment is made may exclude the applications of the provisions of the CAMA where necessary.[818] Furthermore, all other implied and incidental powers which prior to the CAMA were exercisable by receivers and/or managers are now

[814] *Omojasola v Plisson Fisko (Nigeria) Ltd, supra*, at 434.
[815] *Ibid*; Abugu, *op cit,* pp. 241 – 242.
[816] CAMA, *op cit,* s. 182.
[817] *Ibid,* s. 393 (3) & Schedule 11.
[818] Abugu, *op cit,* p. 232.

incorporated in the CAMA. Such implied or incidental powers can only be disregarded if expressly excluded.[819]

It is indisputable that a person appointed a receiver and/or manager shall, subject to the rights of prior encumbrances, exercise powers,[820] namely: -

a) To take possession of and protect the property, subject to the mortgage, charge or security,

b) To receive the rents and profits and discharge all out goings in respect of the charged asset,

c) To sell those assets,

d) To collect debts owed the company,

e) To enforce claims vested in the company,

f) To compromise, settle and enter into arrangements in respect of claims by or against the company on the company's business with a view to selling it on the most favourable terms,

g) To grant or accept leases of land and licences in respect of patent, design, copyright or trademarks, and,

h) To recover any instalment unpaid on the company's issued shares.

Where a receiver or manager is appointed for the whole or substantially the whole of a company's property, in addition to the powers contained in the debenture instrument, such a receiver or manager is empowered to exercise the powers specified in the CAMA to the extent that they are not inconsistent with any of the provisions of the debenture instrument. In the CAMA,[821] a receiver or manager as aforesaid can exercise the following powers:

[819] Abugu, *op cit,* p. 233; *Onofowokan v Wema Bank Plc, supra,* at 218.
[820] CAMA, *op cit,* ss. 209 (3), 393 (1) (2); Bhadmus, *op cit,* p. 74.
[821] CAMA, *ibid,* schedule 11.

1. Power to take possession of, collect, and get in the property of the company and, for that purpose, to take such proceedings as may seem to him expedient;
2. Power to sell or otherwise dispose of the property of the company by public auction or private contract;
3. Power to raise or borrow money and grant security therefore over the property of the company;
4. Power to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions;
5. Power to bring or defend any action or other legal proceedings in the name and on behalf of the company;
6. Power to refer to arbitration any question affecting the company;
7. Power to effect and maintain insurances in respect of the business and property of the company;
8. Power to use the company's seal;
9. Power to do all acts and to execute in the name and on behalf of the company and deed, receipt or other document;
10. Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the company;
11. Power to appoint any agent to do any business which he is unable to do himself or which can more conveniently be done by an agent and power to employ and dismiss employees;
12. Power to do all such things (including the carrying out works) as may be necessary for the realisation of the property of the company;
13. Power to make any payments which is necessary or incidental to the

performance of his functions;

14. Power to carry on the business of the company;
15. Power to establish subsidiaries of the company;
16. Power to transfer to subsidiaries of the company the whole or any part of the business, and property of the company;
17. Power to grant or accept a surrender of a lease or tenancy of any of the property of the company, and to take a lease or tenancy of any property required or convenient for the business of the company;
18. Power to make any arrangement or compromises on behalf of the company;
19. Power to call up any uncalled capital of the company;
20. Power to rank and claim in the bankruptcy, insolvency, sequestration or liquidation of any person indebted to the company and to receive dividend, and to accede to trust deeds for the creditors of any such person;
21. Power to present or defend a petition for the winding up of the company;
22. Power to change the situation of the company's registered office;
23. Power to do all other things incidental to the exercise of the foregoing powers.

Conversely, where the receiver or manager is not appointed for the whole or substantially the whole of a company's property, he does not enjoy and cannot exercise the powers provided in Schedule 11 to the CAMA without the leaveor direction of the Court.[822] Where such leave or direction is not obtained, the receiver or manager enjoys and exercises the rights and powers as contained in the debenture instrument appointing him.

[822] CAMA, *op cit*, ss. 393 (3), 391.

3.9 Remuneration of Receiver and/or Manager

The receiver and/or manager's remuneration is usually payable by the company where there is a rebuttal of the statutory provision that the receiver and/or manager appointed out of court is a deemed agent of the person or persons on whose behalf he is appointed. On the contrary, where the receiver and/or manager remains a deemed agent of the person or persons on whose behalf he is appointed it is the later that shall be responsible for the remuneration.[823]

Instructively, the court is vested with the power on the application of the company or the liquidator of a company, by order, fix the amount to be paid by way of remuneration to any person who, under the powers contained in any instrument, has been appointed as receiver or manager of the property of the company.[824] Furthermore, it should be noted that the court may on an application made either by the company or the liquidator or by the receiver or manager, vary or amend an earlier order fixing the remuneration of the receiver or manager.[825]

3.10 Liabilities and Indemnities of Receivers and/or Managers

The trite position of the law is that a receiver and/or manager of any property or undertaking of a company shall be personally liable on any contract entered into by him.[826] However, the personal liability of a receiver and/or manager in a contract can be avoided where there is an express provision in the contract[827]to the contrary. However, it is also established that a receiver and/or manager may be liable in tort, negligent acts[828] and trespass[829] where the receiver or manager exercises his duty to a property belonging *bona fide* to a third party.

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[823] Picarda, *op cit,* p. 177.
[824] CAMA, *op cit,* s. 395 (1).
[825] *Ibid,* s. 395 (3).
[826]*Ibid,* s. 394 (1); Abugu, *op cit,* p. 240.
[827] CAMA, *ibid*.
[828] *Fadeyibi v I. H. (Beverages) Ltd, supra.*

Notwithstanding, a receiver and/or manager is entitled to indemnity in the following instances:

i. As regards contracts entered into by him in the proper performance of his functions.[830] It does not matter if he is appointed by court or out of court.[831]

ii. Where a receiver and/or manager appointed out of court, he shall be entitled to indemnity as regards contracts entered into by him with the express or implied authority of the person that appointed him under the debenture instrument.[832]

The persons who appointed the receiver and/or manager shall be responsible for the indemnity, though only to the extent in which the receiver and/or manager is unable to recover from the assets of the company.[833]

3.11 Termination of Receivership

A receivership may be determined:

1. By the Parties

The most obvious and frequent mode for determination of receivership is where the receiver and/or manager's duties are fully performed and he is discharged. Such determination is usually consensual and occurs where the receivership has run its course. However, it is pertinent to state that termination of receivership may take place prematurely in the event of the death of the receiver and/or manager[834] or where the receiver and/or manager ceases to act.[835] A receiver and/or manager may cease to act by reason of resignation or removal where such is provided in the debenture instrument. But where there is no provision for resignation or removal of a receiver

[829] *Adetona v I.G. Enterprise Ltd* [2011] 7 N.W.L.R (pt 1247) 1535.
[830] CAMA, *op cit*, s. 394 (2).
[831] Abugu, *op cit.*
[832] CAMA, *op cit*, s. 394 (3).
[833] *Ibid*.
[834] *Ibid*, s. 396 (4).
[835] *Ibid*, s. 206 (2).

and/or manager in the debenture instrument, in practice, a receiver and/or manager may lawfully resign his appointment by notice in writing to the person or persons on whose behalf he is appointed and who must consent or accept the resignation.[836] But it should be noted that where a receiver and/or manager ceases to act, he shall give notice to the CAC to that effect.[837]

2. By the Court

The court may terminate a receivership for so many reasons. It can be for breach of any of the receiver and/or manager duties; invalidity of appointment and abuse of powers and misconduct. Also, the court may in the exercise of its inherent jurisdiction remove a receiver and/or manager appointed by a debenture holder.

3. By the Operation of Law

It is trite that the title of a receiver and/or manager is no better than the title of the debenture holder who appointed him. Thus, where a prior incumbrancer[838] subsequently appoints his own receiver and/or manager, the receiver and/or manager appointed by the later incumbrancer will perforce be replaced. This replacement is automatic and requires no order of the court except there is a dispute as to priorities.[839]

3.12 Administrative Receiver in the United Kingdom

The main innovation made by the Insolvency legislation was the introduction of a special category of receiver and/or manager known as the "Administrative Receiver". An Administrative Receiver is defined as a "receiver or manager of the whole or substantially the whole of the property of a company appointed by or on behalf of the

[836] Picarda, *op cit,* p.188.
[837] CAMA, *op cit,* s. 206 (2).
[838] *Ibid,* s. 393 (1).
[839] Picarda, *op cit,* p. 189.

holders of a debenture of the company secured by a floating charge"[840] or a composite fixed and floating charge.[841]Also, the floating charge must be enforceable and the primary condition for enforcing a charge is that the debt secured by the charge is due and unpaid.[842] Unlike common law receivership, an administrative receiver must report to the unsecured creditors on the progress of the receivership.[843] Furthermore, an administrative receiver of a company is deemed to be an agent of the company unless and until the company goes into liquidation.[844]

1. Effects of the Appointment of Administrative Receiver

i. On Directors

From the time of appointment, an administrative receiver of a company has sole authority to deal with the charged property and the directors of the company no longer have any authority to deal with that property. However, they continue in office and are still liable, for instance, to submit returns and documents to Companies House.[845]

ii. Contracts of Employment

It is the position of the law that when the court appoints a receiver of the company's property, the company's contracts of employment are automatically terminated.[846] However, the appointment of an administrative receiver of a company, as agent for the company, does not alter the personal relationship and so does not terminate the company's contract of employment.[847] Where an administrative receiver of a company can see no hope of selling its business as a going concern, then he/she

[840] Insolvency Act, *op cit,* s. 29 (2) (a).
[841] S W Mayson, *et al*, *Mayson, French and Ryan on Company Law* (25th edn, Oxford: OUP, 2008 -2009) p. 311.
[842] *Ibid*, p. 305.
[843] Insolvency Act, *op cit,* s. 48.
[844] *Ibid,* s, 44 (1) (a); Mayson, *et al, op cit,* p. 643.
[845] Mayson, *et al*, *ibid*, pp. 643 – 644.
[846] *Reid v Explosives Co. Ltd* [1887] 19 QBD 264.
[847] *Griffiths v Secretary of State for Social Services, supra; Nicolle v Cutts* [1985] BCLC 322.

may dismiss the employees forthwith.[848] If an administrative receiver wants any of the company's employee to continue working for it during the receivership, may either adopt their existing contracts of employment, or acting as agent of the company, negotiate new contract between them and the company.

2. Liability and Indemnity

An administrative receiver is personally liable on any contract entered into in the performance of his or her functions, except where the contract otherwise provides.[849] Exclusion of liability may be express or implied.[850] For many years, the position regarding an administrative receiver appointed as agent of the company was that in general, he was not liable for contracts entered into by him, for and on behalf of the company. He was no more personally liable than was a director who entered into a contract, for and behalf of his company.[851] The position now is that an administrative receiver is not personally liable for contracts entered before his appointment. But an administrative receiver is personally liable on any contract entered into by him in the carrying out of his functions, except so far as the contract otherwise provides, but he is entitled in respect of that liability to an indemnity out of the assets of the company.[852]

3. Duties and Powers of an Administrative Receiver

An administrative receiver carries out duties similar to that of common law receiver and/or manager and exercises a plethora of powers.[853] Instructively, the statutory powers of an administrative receiver are *in tandem* with that of a receiver

[848] Mayson, *et al, op cit,* p. 645.
[849] Insolvency Act, *op cit,* s. 44 (1).
[850] Mayson, *et al, op cit,* p. 646.
[851] *Re: Atlantic Computer Systems Plc.* [1992] Ch 505.
[852] Insolvency Act, *op cit,* s. 44 (1); CAMA, *op cit,* s. 394 (1) (2); *Atlantic's case, ibid*; Mayson, *et al, loc cit.*
[853] Insolvency Act, *ibid,* ss. 42, 43 & Schedule 1.

and/or manager in the CAMA.[854] An administrative receiver owes the duty to demand from the directors of the company a statement in a prescribed form of the affairs of the company and in turn, make a report and send a copy to the registrar of companies, to any trustees for secured creditors of the company (in so far as he is aware of their addresses) and to all unsecured creditors of the company (in so far as he is aware of their addresses).[855]

An administrative receiver of a company does not owe any duty of care to the company or to persons who have charges over the company's property ranking under one over which the administrative receiver was appointed. Thus, an administrative receiver appointed under a charge given by a company also owes no duty of care to guarantors of the obligation secured by the charge.[856]

4. Changes in the Law on Administrative Receivership

The Enterprise Act[857] made amendments to the Insolvency Act, which introduced substantial reforms. The amendments introduced by the Enterprise Act were to the effect that, (i) when the assets of a company subject to a floating charge are realised, a certain proportion must be set aside for the unsecured creditors,[858] (ii) an administrative receiver cannot be appointed under a floating charge created on or after 15 September 2003,[859] except as in the cases specified thereunder.[860] The cases in which an administrative receiver can be appointed to enforce a floating charge created on or after 15 September 2003 are:

i. Where a debt of £50 million or more is financed by a marketable loan;

ii. Where a person has step-in rights in relation to a project company (that is,

[854]CAMA, *op cit,* s. 393 & Schedule 11.
[855]Insolvency Act, *op cit*, ss. 47 – 48; CAMA, *ibid*, ss. 396 – 398.
[856] *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295; Mayson, *et al*, *op cit,* p. 648.
[857] 2002 (UK).
[858] Insolvency Act, *op cit,* s. 176 A.
[859]Insolvency Act, *ibid,* s, 72A; Enterprise Act, *op cit,* s. 250.
[860] Insolvency Act, *ibid,* s. 72B – H.

rights to take over responsibility for carrying out the project or arranging for it to be carried out)[861] and the project is a public-private-partnership project,[862] a utility project,[863] an urban regeneration project[864], or will involve £50 million or more of financing.[865] However, a right to appoint an administrative receiver does not amount to step-in rights;[866]

iii. To enforce charges which secure payment for purchases on recognised investment exchanges;[867]

iv. Where the company is a registered social landlord;[868] and,

v. Where the company is a railway, water or air traffic control company.[869]

Suffice to state that while a security holder of assets secured by a floating charge created before 15 September 2003, retained the rights to appoint an administrative receiver and also the option to appoint an administrator, a chargee whose floating charge does not cover the whole or substantially the whole of the company's assets, can still appoint a receiver, who will, by definition, not be an administrative receiver and cannot also appoint an administrator. Thus, chargees of floating charges created on or after 15 September 2003, has the right to appoint an administrator.[870]

In a nutshell, the present nature and features of administrative receivership were described thus:

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[861] Insolvency Act, *op cit,* schedule 2 A, para 6.
[862] *Ibid,* s. 72C.
[863] *Ibid,* s.72D.
[864] *Ibid,* s. 72DA.
[865] *Ibid,* s. 72E.
[866] *Feetum v Levy* [2005] EWCA Civ 1601; [2006] 2 BCLC 102.
[867] Insolvency Act, *op cit,* s. 72F.
[868] *Ibid,* s. 72G.
[869] *Ibid,* s. 72 GA; L Sealy and S Worthington, *Cases and Materials in Company Law* (10th edn, Oxford: Oxford University Press, 2013) p. 780; P L Davies and S Worthington, *Gower and Davies' Principles of Modern Company Law* (9th edn, London: Sweet and Maxwell, 2012) p. 1252.
[870] Insolvency Act, *ibid,* schedule B1, para 14 (1).

> The aim stated in the White Paper preceding the Enterprise Act, 2002, was that "administrative receivership should cease to be a major insolvency procedure". The administrative receiver would instead be replaced by an administrator, who is an officer of the court, and must "perform his functions in the interests of the company's creditors as a whole.[871]

It is the contention that the Enterprise Act reforms, largely doing away with administrative receivership, were intended to favour the rescue culture. An administrative receiver is entitled to put the secured creditor's interest first, and a suspicion prevailed that the interest of unsecured creditors and the company itself, were not always best served. By contrast, an administrator must manage the company's affairs for the benefit of everyone concerned.[872]

Notwithstanding the advantages of receiverships, it has some shortcomings. Significantly, receiverships as a product essentially of private law, is not clothed with moratorium during the period of receivership. Conversely, in administration, there is a moratorium on the enforcement of creditors' rights against the company. This means that so long as the administration is in force, it is not possible to commence winding up proceedings or any other process against the company or enforce any charge except with the consent of the administrator or leave of court. Hence, the concept of receivership seems to thrive better in developed capital market economies where there is market awareness and the judicial machinery is efficient and effective.[873] In this respect, the provisions of sections 387 to 400 of the CAMA are

[871] Davies and Worthington, *op cit*, p 1251 – 1252.
[872] Sealy and Worthington, *op cit*, p. 780.
[873] Abugu, *op cit*, p. 246.

adjudged to offer only a legal remedy, the availability of which is subject to thorny and frustrating legal arguments, in motions and counter motions and invariably resulting in delay of justice.[874]

[874]Abugu, *op cit*, p. 246.

CHAPTER FOUR

COMPARATIVE ANALYSIS OF CORPORATE RESCUE MECHANISMS AND PROCEDURES IN NIGERIA AND OTHER JURISDICTIONS

The words of the Supreme Court of Nigeria in *Air Via Ltd v Oriental Airlines Ltd*[875] clearly capture the essence or rationale for corporate rescue mechanisms. In his usual lucid manner, Onu JSC stated thus:

> Furthermore, care and utmost caution must be exercised by the institution of justice in proceedings involving the termination of the life of a company with responsibility not only to the society but also to the section of the public namely, its employees who may be thrown into economic hardship of unemployment. Hence the need for the court to halt a petition of the type brought by the appellant likely to cause irreversible and incalculable damage especially when the circumstances of the case show that the respondent has disputed the debt alleged to be owed. For the proposition that a court must be slow in terminating the life of a company by way of winding up, this is given credence and support by the Court of Appeal case of *Union Bank of Nigeria Ltd v Tropic Foods Ltd.*[876]

In this chapter, the discussion will focus on the available corporate rescue mechanisms and procedures in Nigeria and other jurisdictions such as the United

[875] (2004) 4 SC (pt II) 37; P L Davies& S Worthington, *Gower and Davies Principles of Modern Company Law* (9thedn, London: Sweet and Maxwell, 2012) p. 1272.
[876] *Air Via Ltd v Oriental Airlines Ltd*, [2004] 4 SC (pt II) 37. .

Kingdom (UK), the Republic of South Africa (South Africa), the Republic of India (India) and the United States of America (US).

4.1 Nigeria

The available corporate rescue mechanism under the Companies and Allied Matters Act (CAMA) is arrangements and compromise. However, some have posited that merger or acquisition is also a common rescue option available to ailing companies and their shareholders.[877] In this chapter, other mechanisms adopted in the rescue of failing companies, particularly in the banking sector, suffering from illiquidity, would be examined.

1. Arrangements and Compromise

Arrangement means "any change in the rights or liabilities of members, debenture holders or creditors of a company or any class of them or in the regulation of a company other than a change effected under any other provisions of this Act or by the unanimous agreement of all parties affected thereby".[878]Arrangements and Compromise are provided for under Part XVI of the CAMA. It has been stated that the Arrangements and Compromise mechanism in Nigeria stems from what is known in England and Wales as "Schemes of Arrangement".[879] It is a corporate rescue mechanism by which a company may propose any scheme to its members, creditors or both, to restructure shareholding or arrive at a compromise on debts.[880] Although the words, "arrangements" and "compromise" are often used interchangeably, they do

[877] J E O Abugu, *Company Securities: Law and Practice* (2nd edn, Lagos: MIJ Professional Publishers Limited, 2014) p. 303; O O Oladele, 'The Legal Intricacies of Corporate Restructuring and Rescue in Nigeria', (2007) the Calabar Law Journal, XI, 136.

[878] Companies and Allied Matters Act Cap C20 Laws of the Federation of Nigeria, 2000 (CAMA), ss. 537, 567 (1); Abugu, *ibid*, p. 304.

[879] B Adebola, 'The Nigerian Business Rescue Model: An Introduction' (2014) NIALS Journal of Legal Studies, 9; also available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297824.> accessed on 10 May 2015.

[880] CAMA, *op cit,* s. 539 (1); Abugu, *op cit,* p. 305; Candide-Johnson & A Alex-Adedipe, 'Debt Recovery: Corporate Insolvency – Receivership, Winding up and other Arrangements' in O Olanipekun (ed), *Banking: Theory, Regulation, Law and Practice* (Lagos: Au Courant, 2016) p. 453.

not necessarily mean the same thing. While 'compromise' implies some element of accommodation on each side, it is not just a total surrender of rights,[881] 'arrangements' on the other hand, implies some elements of give and take. Hence, confiscation is not an arrangement.[882]

The procedural steps for arrangements and compromise are provided as follows:

1. A compromise or arrangement is proposed between a company and its members or creditors or any class of them;[883]
2. An application is made to the court in summary by the company or any of its creditors or members.[884] The application to the court in summary is by originating summons[885] supported by an affidavit, praying for an order to summon a meeting of the creditors or class of creditors or of the members or class of members, as the case may be;[886]
3. If the application is granted, the meeting is summoned pursuant to the order of the court;
4. The notice summoning the meeting which is sent to a member or creditor, must be accompanied by a statement explaining the effect of the compromise or arrangement[887] and in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise and the effect thereon of the compromise or arrangement in so far as it is different from

[881] H Y Bhadmus, *Corporate Insolvency Law and Practice in Nigeria* (Enugu: Chenglo Limited, 2009) p. 25.
[882] *Ibid.*
[883] CAMA, *op cit*, s. 539 (1).
[884] *Ibid*, s. 539 (1).
[885] Companies Proceedings Rules, (CPR) 2004, r. 2.
[886] CAMA, *op cit*, s. 539 (1).
[887] *Ibid*, s. 540 (1) (a).

the effect on the like interest of other persons;[888]

5. At the meeting, the scheme can only be ratified by holders of at least three-quarters in value of the shares of members or class of members or of the interest of creditors or class of creditors, as the case may be, present and voting either in person or by proxy.[889]Consequently, the scheme of compromise or arrangement (the 'Scheme') will be referred to the court for sanction.

6. Prior to the sanction of the scheme of arrangement by the court, it must pass the fairness test.[890] In order to satisfy the fairness test, the court may refer the Scheme to the Securities and Exchange Commission (SEC), which shall appoint one or more inspectors to investigate the fairness of the said compromise or arrangement and to make a written report thereon to the court within a time specified by the court.[891] It is pertinent to state that the Scheme in the case of a publicly quoted company is usually referred to the SEC.[892] In the case of companies other than a publicly quoted company, the court examines the fairness of the scheme.[893]

7. Where the court is satisfied as to the fairness of the Scheme, it shall sanction same.[894] Hence, making it binding,[895]but subject to a certified true copy of the order of the court sanctioning the Scheme being delivered by

[888]CAMA, *op cit,* s. 539 (2) (3); Abugu, *op cit,* p. 307.
[889]*Ibid,* (2); *Oceanic International Bank Ltd v Victor Odili & Ors* (unreported) Suit No. FHC/L/CS/1361/2005; CA/L/171M/2008; Abugu, *op cit,* p. 305.
[890]CAMA, *ibid,* s. 539 (2) (3); Candide-Johnson & Alex-Adedipe, *op cit,* p. 453.
[891]CAMA, *ibid,* s. 539 (2).
[892]Candide-Johnson & Alex-Adedipe, *loc cit.*
[893]CAMA, *op cit,* s. 539 (2) (3); Candide-Johnson & Alex-Adedipe, *ibid*
[894]CAMA, *ibid,* s. 539 (3); Candide-Johnson & Alex-Adedipe, *ibid*.
[895]CAMA, *ibid.*

the company to the Corporate Affairs Commission for registration.[896]

Schemes of arrangement and compromise under the CAMA are subject to the exercise of discretion of the court. Unfortunately, the CAMA did not provide for the factors to be considered by the court when looking at schemes of arrangement. This may account for the misconceived position of the Federal High Court in *Re: Interfirst Finance and Securities Limited*[897]and *Andruche Investment Plc .v. Financial Mediators.*[898] In the two matters decided by the same judge, the Federal High Court appeared to have taken a restrictive view of the notion of arrangements when it held that the proposals by which the companies in the matter set out the manner by which their respective debt would be repaid were not arrangements or compromise because there was no evidence of mutuality between the respective company and its creditors. It is pertinent to note that in the matters under reference, the application that was before the court was for an order to convene a meeting and not a consideration of the proposal or sanction of the scheme of arrangement.

In light of the foregoing, the arrangements and compromise mechanism under the CAMA had not passed unchallenged. Firstly, the procedure for enforcing arrangements and compromise in the CAMA has been held to be difficult and complex, hence the suggestion for a simpler procedure known as the Company Voluntary Arrangement (CVA) by which distressed companies could negotiate simple compromises or schemes of arrangements with their creditors as contained in the extant Insolvency legislation of the United Kingdom.[899]Secondly, arrangements

[896]*Ibid*, s. 539(4).
[897](1993) FHCLR 421.
[898](1994) FHCLR 51.
[899] B Adebola, 'A Few Shades of Rescue: Towards an Understanding of the Corporate Rescue Concept in England and Wales' (2014) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524488 accessed on 10 May, 2015.

and compromise under the CAMA have been ineffectual because of the absence of moratorium.[900] In the words of Adebola:-

> In Nigeria, the absence of a stay on creditor's right exacerbates the impact of the complex judicial system on the already complex arrangement and compromise procedure…. Giving the structure of the court system, practitioners find that an arrangement and compromise can be derailed in various ways. Unsecured creditors may initiate parallel debt collection proceedings at a SHC after the scheme is proposed. Similarly, secured lenders may enforce their security in the absence of a moratorium. Furthermore, those with quasi security would also be outside of the control of the directors. As a result, the company's vital assets may be dismantled by recalcitrant creditors, intent on enforcing their individual rights at the detriment of other interest including those of the company.[901]

Furthermore, it has been propounded that arrangements and compromise mechanism are not only cumbersome, costly, court intensive, bureaucratic but suffers

[900] M B Halita, 'A Comparative Study of some Issues Relating to Corporate Insolvency Law in Nigeria and South Africa', unpublished LL.M Dissertation, University of Pretoria, May 2013, p. 62.
[901] B Adebola, 'Conflated Arrangements: A comment on the Company Voluntary Arrangements in the Proposed Nigerian Insolvency Act', (2015) 3 NIBLeJ 2 also available at http://www.4,ntu.ac.uk/n/s/document_uploads/174811-pdf accessed on 20 November 2016.

from protracted delays.[902] Thus, there is a consensus of opinion that arrangement and compromise have not been a veritable corporate rescue option in Nigeria.[903]

2. Mergers or Acquisition

Merger or Acquisition is principally governed by the provisions of the Investment and Securities Act[904](ISA) and regulated by the Securities and Exchange Commission Rules[905] (SEC Rules). In relation to companies in the banking sector, the prior approval of the Governor of the Central Bank of Nigeria is mandatory before any merger or acquisition is consummated or announced[906]. Merger or Acquisition has been posited as a common rescue option available to failing or ailing companies and their shareholders[907] and may help a company to remain an ongoing concern[908]. Although the terms 'Merger' and 'Acquisition' are often used interchangeably to mean the same thing and in a more common sense used in the twin form of 'Mergers and Acquisitions', they do not necessarily have the same meaning.[909] While a 'merger' means any amalgamation of the undertakings or any part of the undertakings or interest of two or more companies or the undertakings or part of the undertakings of one or more companies and one or more bodies corporate,[910] 'acquisition' means where a person or group of persons buys most (if not all) of a company's ownership

[902]Halita, *op cit*; A Abdulai, 'Mergers, Acquisitions and Take-Overs in Nigeria: The Guiding Philosophy, Laws, Regulations and Practice' [1997] 2 MILBQ, 21-34; S Akinwunmi, 'Corporate Insolvency Law in Nigeria – A need for Reform', http://www.akinwunmibusari.com accessed on 17 July, 2015; This is because, the role of the courts in the process where a company opts to utilize the arrangement and compromise mechanism would necessarily have to consider the exorbitant professional fees, lack of expertise on the bench and delayed court hearing as a result of congested cause list.

[903]S U Mba, 'Recession Preventive Rehabilitation and the Nigerian Draft Insolvency Bill: Lessons for the EU?' LAWYER, a This Day Weekly Pull-out 06-09-2016, p. 7.

[904]2007.

[905]2013 as amended 2015.

[906]Banks and Other Financial Institutions Act (BOFIA) Cap B3, Laws of the Federation of Nigeria 2004, s. 7; F Ajogwu, 'Mergers, Takeovers and Reorganisation of Banks in Nigeria' in Olanipekun (ed), *op cit*, pp. 574 – 580.

[907]SEC Rules, *op cit*, r. 426 (1) (f); Abugu, *op cit*, p. 303.

[908]Oladele, *art cit*, 136.

[909]F Ajogwu, *Mergers & Acquisitions in Nigeria: Law & Practice* (2nd edn, Lagos: Centre for Commercial Law Development (CCLD), 2014) p. 5.

[910]ISA, *op cit*, s. 119 (1).

stake in order to assume control of a or the target company.[911] The SEC Rules have gone a long way in stating the distinguishing features of a merger and an acquisition, hence, clearing the nebulous interpretations of the terms.[912] Furthermore, there appears to be a misunderstanding between 'acquisition' and 'take over'. Thus, 'takeovers' and 'acquisitions' are in some instances assumed to be same and treated as same restructuring scheme. This is probably because acquisition was not treated as a distinct restructuring scheme in the ISA but as a variant of merger[913] or take-over.[914] This is no more the case as acquisition is now regulated[915] differently and take over is also distinctly regulated.[916]

Although, mergers or acquisition are rarely employed in the rescue of ailing companies, it had played a prominent role in the restructuring of companies,[917] particularly in the banking sector to meet up with the recapitalisation and consolidation policy announced by the Governor of the Central Bank of Nigeria in 2004 and 2005[918] to address the then state of illiquidity and mitigate the impact of the global financial crisis. However, the benefits of merger or acquisition transactions are not in doubt. Some of the benefits include the pursuit of growth strategy, risk diversification, economies of scale, efficiency in management, maximising shareholders income, reduction in competition, corporate leverage and corporate

[911]SEC Rules, *op cit,* r 433.
[912]F Ajogwu, 'Mergers & Acquisitions: Opportunities and Pitfalls', Unib Law Journal, VOL 1, NO.1, October 2011, 5 – 10; Abugu, *op cit,* pp. 301 – 303.
[913]ISA, *op cit,* s. 119 (2); Ajogwu, *ibid,* 10.
[914]ISA, *ibid,* ss. 131 – 151; Ajogwu, *ibid,* 9.
[915]SEC Rules, *op cit,* rr. 433 - 444.
[916]*Ibid,* rr. 445 – 448 as amended 2015.
[917]N C S Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (2nd edn, Lagos: Novena Publishers Ltd, 2014) pp. 622 – 624.
[918]F Ajogwu, 'Mergers, Takeovers and Reorganisation of Banks in Nigeria' in Olanipekun (ed), *op cit,* pp. 574 – 580; Ajogwu, *art cit,*7 – 8.

survival.[919] It is important to state that the benefits of mergers or acquisition may not be circumscribed only to the foregoing benefits.

The merger combinations can be commonly classified as horizontal,[920] vertical[921] and conglomerate.[922] In this study, we would examine the classifications of mergers as provided in the investment and Securities Act. The classifications of mergers in the ISA are by reference to thresholds of combined annual turnover and of assets: "a small merger",[923] "an intermediate merger"[924] and "a large merger".[925] The thresholds provided for in the ISA[926] stipulated lower threshold of N500, 000, 000. 00. and upper threshold of N5, 000, 000, 000. 00. Pursuant to the powers conferred on it in the ISA, the SEC has increased the lower thresholds to N1, 000, 000, 000. 00. and the upper threshold to above N5, 000, 000, 000. 00.[927] Simply put, a small merger means a merger or proposed merger with a value below N1, 000, 000, 000. 00. of either combined assets or turnover of the merging companies,[928] an intermediate merger means a merger or proposed merger with a value between N1, 000, 000, 000. 00 and N5, 000, 000, 000. 00 of either combined assets or turnover of the merging companies[929] and a large merger is a merger or proposed merger with a value above N5, 000, 000, 000. 00 of either combined assets or turnover of the merging

[919]Abugu, *op cit,* pp. 302 – 303; Ogbuanya, *op cit,* pp. 616 – 617; Ajogwu, *op cit*, 10 – 15.
[920]SEC Rules, *op cit,* r 421 (1) - mergers involving direct competitors; Abugu, *ibid*, p. 302; Ogbuanya, *ibid,* p. 617 – 618; H Y Bhadmus, *BHADMUS on Corporate Law Practice* (2nd edn, Enugu: Chenglo Limited, 2013) p. 561.
[921]SEC Rules, *ibid*- mergers involving firms in non-competitive relationship; Abugu, *ibid;* Ogbuanya, *ibid*; Bhadmus, *ibid*.
[922]SEC Rules, *ibid* – means other types of mergers; Abugu, *ibid*; Ogbuanya, *ibid*; Bhadmus, *ibid*.
[923]ISA, *op cit,* s. 120 (2) (a); Bhadmus, *op cit,* p. 561.
[924]ISA, *ibid*, s. 120 (2) (b).
[925]*Ibid*, s. 120 (2) (c).
[926]*Ibid*, s. 120 (4).
[927]SEC Rules, *op cit,* r. 427 (1).
[928]*Ibid*.
[929]*Ibid*.

companies.[930] It is important to state that the SEC is conferred with the powers to prescribe or vary the thresholds from time to time.[931]

It is instructive to note that while a small merger may not require prior review, notification and formal approval of the SEC,[932] it shall inform the SEC at the conclusion of the merger,[933] Furthermore, the parties to a small merger may voluntarily[934] inform the SEC of the merger or where the SEC having regard to the provisions of section 121 of the ISA, is of the view that the merger may substantially prevent or lessen competition or cannot be justified on public interest grounds.[935] These provisions appear difficult to enforce as it is unclear how the SEC would become aware of the merger before its conclusion if it was not notified.[936] In the case of an intermediate merger and a large merger, they are subject to prior review notification and approval of the SEC and the sanction of the merger by the court.[937]

It is pertinent to state that the SEC's approval of a merger is not granted as a matter of course. In consideration of a merger, the SEC determines whether or not the merger is likely to substantially prevent or lessen competition by assessing the strength of competition in the relevant market and the probability that the company, after the merger, will behave competitively or cooperatively, taking into account any factor that is relevant to competition in that market.[938] Furthermore, if the merger is likely to substantially prevent or lessen competition, the SEC must determine

[930]SEC Rules, *op cit,* r. 427 (1).
[931]*Ibid,* s. 120 (1).
[932]*Ibid,* s. 122 (1); SEC Rules, *op cit,* rr. 422 (4), 423 (1), 424 (1) b.
[933]SEC Rules, *ibid.*
[934]ISA, *op cit,* s. 122 (2); Abugu, *op cit,* p. 308.
[935] ISA, *ibid,* s. 122 (3). This requirement can only be invoked by the SEC, within 6 months after a small merger has commenced implementation. In other words, it is not a pre-implementation step.
[936]Ajogwu, *op cit,* p. 23.
[937]ISA, *op cit,* ss. 123 (1) (3), 124, 125 (1), 126; SEC Rules, *op cit,* r. 423 (1); SEC Rules (as amended 2015), r. 425 (1); N Dimgba, 'The Regulation of Competition through Merger Control: The Case under the Investment and Securities Act, 2007' A paper delivered at the Nigerian Bar Association Section on Business Law Conference on 16th April, 2009, p. 6.
[938]ISA, *ibid,* s. 121 (1) (a), (2); Abugu, *op cit,* p. 309.

whether, notwithstanding, the merger is likely to result in any technological efficiency or pro-competition gain which will be greater than or offset the effects of any prevention or lessening of competition that may result from the merger.[939] In determining whether the merger can or cannot be justified on substantial public interest grounds[940] the SEC will have to consider the effect of the merger on a particular industrial section or region; employment; the ability of small businesses to become competitive and the ability of National industries to compete in international markets.[941]

The SEC has 20 working days after all parties to a merger have fulfilled all their notification requirements to consider all factors and make a determination approving the merger or approving the merger subject to any conditions or prohibiting the implementation of the merger.[942] Though, the SEC may extend consideration for a single period not exceeding 40 working days.[943] If the SEC is unable to communicate its approval or otherwise within the prescribed time limit, the merger shall be deemed to have been approved.[944] It should be noted that the SEC may revoke its own decision to approve a merger.[945] In the case of a large merger, the SEC shall upon receipt of notification of same, refer the notice to the court and within 40 working days after all parties to the large merger have fulfilled all the notification requirements, forward to the court, a statement as to whether or not implementation of the merger is approved subject to any conditions or prohibited.[946] This provision

[939] ISA, *op cit*, s. 121 (1) (b); Abugu, *op cit.*
[940]ISA, *ibid*, s. 121 (1) (b) (ii), (c).
[941]*Ibid*, s. 121 (3).
[942]*Ibid*, ss. 122 (5) (a small merger), 125 (1) (an intermediate merger).
[943]*Ibid*, ss. 122 (5) (a) (a small merger), 125 (2) (an intermediate merger).
[944]*Ibid*, s. 125 (3).
[945]*Ibid*, s. 127.
[946]*Ibid*, s. 126.

has been adjudged to be impracticable until the parties themselves apply to court for court ordered meetings and the sanction of the court.[947]

It is instructive to note that the procedure for approval of a merger involves a lot of documentation,[948] it is cost intensive[949] and entails much of bureaucratic process. In view of the essence of merger as an available option of corporate restructuring or rescue option in Nigeria, in this study, it is deemed appropriate to give a surmise of the procedural steps for approval of a merger, to wit:

1. Pre-Merger Procedure

i. Preparation of the draft scheme document between the merging companies;

ii. Consideration and approval in principle of the draft scheme document by the boards of directors of the merging companies;[950]

iii. File with the SEC a merger notification and a draft scheme for Evaluation.[951] The requirements for merger notification are provided in the SEC Rules;[952]

iv. Upon notification of approval in principle in respect of the merger notification and a draft scheme for evaluation, the merging companies file an application in the Federal High Court for an order to convene a court ordered meeting of the members of the merging companies;[953]

[947]Abugu, *op cit*, p. 310.
[948]SEC Rules (as amended), *op cit*, rr. 425, 426 (2) (4), 428; SEC Rules, *op cit*, r. 426 (1).
[949]SEC Rules (as amended), *ibid*, r. 426 (2), Appendix VII (c) – prescribed fees for (i) Public Companies – value of shares issued by the resultant company, calculated thus: 1st N500 million – 0.3%; next N500 million – 0.225%, any sum thereafter – 0.15%; (ii) Private Companies – total consideration of the transaction calculated in same way as Public Companies; Companies Regulations 2012, reg. 53 (1) (h); SEC Rules, *ibid*, r. 426 (1) (ix) (g) – merger notification fee of N50, 000. 00. per merging company for intermediate and larger mergers. Furthermore, it is usual in practice to pay solicitors' fees, capital market operators' fees, financial advisers' fees, etc.
[950]SEC Rules, *op cit*, r. 426 (1).
[951]SEC Rules (as amended 2015), *op cit*, r. 425 (1) (a).
[952]SEC Rules, *op cit*, r. 426 (1); SEC Rules (as amended), *ibid*, r. 426 (2) (4).
[953]SEC Rules (as amended), *ibid*, r. 425 (1) (b).

v. The merging companies issue notice of the court ordered meeting to members and publish same in two national dailies and a copy filed with the SEC.[954]

vi. The merging companies hold separate meetings and pass special resolution approving the scheme.[955] The special resolution shall be filled with the Corporate Affairs Commission within 15 days of their passing.[956]

2. Procedure for Formal Approval

i. Upon receipt of favourable response to a merger notification from the SEC, a formal application for approval of the merger is filed accompanied with relevant documents and compliance with requirements for formal approval of the merger;[957]

ii. Approval or otherwise of the scheme document by the SEC;

iii. Upon approval of the merger the SEC shall inform the court by a statement in writing if the merger is approved wholly or subject to conditions or is prohibited;[958]

iv. The court sanctions the scheme.[959]

3. Post approval procedure

After the approval given by the SEC and the court order sanctioning the scheme, there are certain requirements to be complied with by the merging companies, namely, (i) the merging companies shall cause a copy of the order sanctioning the

[954]SEC Rules (as amended), *op cit*,r. 425 (1) (c).
[955]Companies Regulation, *op cit*, reg 53 (1) (a).
[956]*Ibid*, reg 53 (2).
[957]SEC Rules, *op cit*, r. 429; SEC Rules (as amended), *op cit*, r. 428.
[958]SEC Rules, *ibid*, r. 428 (5).
[959]*Ojora v Agip Nigeria Plc* [2014] 1 N.W.L.R (pt 1387) 151. In the instant case, the court interpreted the provisions of section 100 of the ISA 1999, which applies *mutatis mutandis* to sections 121 and 122 of the ISA 2007.

scheme to be delivered to the SEC for registration within 7 days[960] and filed with the Corporate Affairs Commission (CAC) within 15 days[961] of the making of the Order; (ii) a Notice of the Order shall be published in the official gazette of the Federation and at least one newspaper.[962]

4. Post-merger inspection

It is a statutory requirement that 3months after approval by the SEC, a post-merger inspection would be carried out by the SEC to ascertain the level of compliance with the provisions of the scheme documents. Procedurally, the documents[963] to be inspected include;

i. the board minute book;
ii. original certificate of incorporation of the resultant company (where applicable);
iii. copy of the amended Memorandum and Articles of Association (where applicable);
iv. severance benefits of employees of the dissolved companies;
v. final settlement of shareholders;
vi. dispatch of share certificates;
vii. settlement of debt;
viii. report of shareholders' representatives on the merger;
ix. any other document that may be required by the SEC from time to time,

It is important to state that upon a merger, the emerging company takes over the assets, rights, duties and liabilities of the scheme parties. However, it should be noted that the merger companies are not technically dead as to lose their legal personalities

[960]SEC Rules, *op cit*, r. 430 (1).
[961]Companies Regulations, *op cit*, reg 53 (3).
[962]*Ibid*, reg 53 (1) (d); SEC Rules, *op cit*, r. 430 (2).
[963]SEC Rules, *ibid*, r. 431.

but become transformed into the new or emerging company.[964] Although, merger have been proposed as an available corporate rescue option in Nigeria, it is seldom used in the rescue of failing or ailing companies because of the complexity and high transaction cost.

However, the SEC Rules[965] provided for a separate procedure for acquisition of companies. Thus, acquisition is now treated as a distinct transaction. The requirements for acquisition is that an acquirer shall file a letter of intent[966] accompanied with relevant documents, mainly, two draft copies of Information Memorandum[967] and extracts of board resolutions of the acquirer and the acquiree agreeing to the acquisition. The filing of the letter of intent is to be filed by a registered capital market operator registered to function as an issuing house.[968] Furthermore, the letter of intent has to be accompanied by evidence of payment of application fee of N50, 000. 00[969] and processing fee based on the value to be acquired on the graduation fee.[970] It should be noted that publication of the acquisition in at least 2 national dailies after consummation is mandatory.[971] Further, the treatment of dissenting shareholders in acquisition is fully taken care of.[972]

Although, the express powers of the SEC to approve or reject an acquisition was inadvertently omitted in the SEC Rules, the unequivocal implications of the power conferred on the SEC to regulate acquisitions[973] in both private and public quoted companies and to conduct a post-acquisition inspection 3 months after the approval of

[964]*Commercial Bank (Credit Lyonnais) Nig. Ltd v Okoli* [2009] 5 N.W.L.R (pt 1135) 446.
[965]SEC Rules, *op cit,* rr. 433 – 439.
[966]*Ibid,* r. 434 (b).
[967]*Ibid,* rr. 434 (b) (i); 436 (Contents of the Information Memorandum).
[968] *Ibid,* r. 434 (b).
[969]*Ibid,* r. 434 (b) (xiii).
[970]*Ibid,* r. 434 (b) (xiv).
[971]*Ibid,* rr. 434 (b) (xviii), 435 (Contents of Publication).
[972]ISA, *op cit,* ss. 146, 147; SEC Rules, *ibid,* r. 438; Abugu, *op cit,* pp. 320 – 326.
[973]SEC Rules, *ibid,* r. 434.

the application[974] can only suggest that acquisition transactions are subject to approval or otherwise of SEC. Hence, one of the contents of the Information Memorandum includes the effects of the acquisition on the relevant industry.[975]

In light of the foregoing, acquisition procedure appears not to be a rescue option readily adopted to rescue failing or ailing companies in Nigeria. This may not be unconnected to the documentations and cost implication involved in acquisition transactions. It is not far-fetched that the expected outcome of an acquisition is the purchase of the target company and where this is the case, there is nothing left for the target company. In this vein, acquisition is not illustrative of quintessential corporate rescue option.

3. Bailouts

This was a functional mechanism that was used to stem the effects of the global financial crisis in 2007 - 2009. At first, the general impression was that Nigerian financial institutions or banks were sound and insulated from the 2007 – 2009 global financial crisis. This general impression was found to be wrong and misplaced as Nigerian financial institutions or banks were enmeshed in crisis. While some pointed to the global financial crisis as triggering the Nigerian banking crisis, a good number of analysts pointed to domestic events such as lax regulations, bank fraud, excessive margin lending and non-performing unhedged loans to oil importers and other credit malpractices.[976]

In order to forestall a deepening of the crisis and to mitigate and prevent the near collapse of banks, the Central Bank of Nigeria (CBN) introduced a variety of measures aimed at improving confidence in the banking sector, enforcing discipline

[974]SEC Rules, *op cit*, r. 439.
[975]*Ibid*, r. 436 (5).
[976]I Agabi & A Onayemi, 'Troubled Assets Resolution' in Olanipekun (ed), *op cit,* p. 466; K Ekwueme, 'Failure Resolution' in Olanipekun (ed), *ibid,* pp. 494 – 496.

in banking management and most of all, improving liquidity through the establishment of a special purpose vehicle, the Asset Management Corporation of Nigeria (AMCON).[977] The basis for the establishment of AMCON was to help resolve the Non-Performing Loan (NPL)[978] assets of banks and to recapitalise banks. In addition, to improve bank liquidity, the CBN injected N620 Billion of liquidity into the banking sector in the form of unsecured subordinated debt and guaranteed inter-bank deposits for over a two year period.[979] The CBN's power to inject liquidity into a bank having liquidity issues was judicially approved by the Federal High Court in *Izedonmwen v Union Bank of Nigeria Plc.*[980]This is what is commonly known as 'bailouts' in corporate rescue lexicon in Nigeria. This has informed the postulation that there is an insolvency regime for banks different from general corporate insolvency.[981]

Notwithstanding, the opposition to the injection of the bailout funds and the establishment of the AMCON salvaging the financial system, particularly failing banks, have been acknowledged as a cheaper and more veritable means to rescue failing banks.[982]However, it has been posited that AMCON is not a special purpose vehicle *strictu sensu* as it does not have an identity totally distinct from that of its

[977]Asset Management Corporation of Nigeria Act, 2010, s. 1 (1). It should be noted that as a means of addressing the Asian financial crisis, the countries most affected by the crisis, Indonesia, South Korea, Malaysia and Thailand, respectively set up the Indonesia Bank Restructuring Agency (IBRA), Korea Asset Management Corporation (KAMCO), Danaharta Malaysia, and the Thai Asset Management Corporation (TAMC). Further, Asset Management Company has been used in a variety of jurisdictions such as France, Sweden, Mexico and the United States of America.

[978]Agabi & Onayemi, *op cit,* p. 470. NPL is defined in line with CBN Prudential Guidelines as loans for which (i) interest or principal is due and unpaid for 90 days or more; (ii) interest payments equal to 90 days' interest or more, have been capitalised, rescheduled, or rolled over into a new loan (except in cases where they have been reclassified as specified by the CBN).

[979]Agabi & Onayemi, *op cit*, p. 469; Ekwueme, *op cit,* p. 502; K Aina, 'Asset Management Corporation of Nigeria – A Pretentious Special Purpose Vehicle' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617500accessed on 20 June 2015.

[980]Unreported Suit No. FHC/B/CS/209/2009, per Idris J (as he then was); *Gbajabiamila v CBN* (Unreported Suit No. FHC/L/CS/1125/2009), per Buba J in Ekwueme, *op cit,* pp. 503, 505.

[981]Ekwueme, *op cit,* p. 491.

[982]Agabi & Onayemi, *op cit,* p. 472.

promoters and sponsors, lacks independence and without a definite life span unlike other asset management companies.[983]

The resort to bailout appears to be the trend in addressing insolvent situations in Nigeria. Hence, the allure of bailouts has found reception not only in the rescue of failing companies but corporate entities such as State Governments[984] and have also necessitated the clamour of companies in the aviation industry for bailouts from the Federal Government of Nigeria to save them from collapse and distress.[985]

4. Regulatory Rescue

There are rescue procedures in various Statutes in Nigeria empowering regulatory bodies to address insolvency of some corporate entities towards rescuing such failing corporate entities.[986] Such rescue procedures are provided for failing banks,[987] for failing insured institutions,[988] for failing insurance companies[989] and for a failing capital market operator.[990] The circumstances upon which the regulatory institutions can come to the rescue of the failing corporate entity when such a corporate entity:

1. is likely to become unable to meet its obligations under the enabling Act,[991]or
2. is about to suspend payment to any extent,[992] or
3. is insolvent,[993]and/or

[983]Aina, *art cit*; Agabi & Onayemi, *op cit*, p. 473.
[984]It is of public knowledge that about 28 States in Nigeria were able to pay backlog of salaries owed its workers from bailouts given to them by the Federal Government.
[985]'Messy Bailout Proposal for Aviation Industry' <http://www.punchng.com/editorials/messy-bailout-proposal-for-aviation-industry> accessed on 17 July 2015.
[986]Bhadmus, *op cit*, pp. 4 – 19.
[987]BOFIA, *op cit*, s. 35.
[988]Nigeria Deposit Insurance Corporation (NDIC) Act, 2006, ss. 36 – 39.
[989]H Y Bhadmus, *Corporate Insolvency Law and Practice in Nigeria* (Enugu: Chenglo Limited, 2009) pp. 11 – 17.
[990]ISA, *op cit*, ss. 48 – 52.
[991]BOFIA, *op cit*, s. 35 (1) (a).
[992]*Ibid*, s. 35 (1) (b).
[993]*Ibid*, s. 35 (1) (c).

4. is in grave situation.[994]

However, it is worthwhile to point out that despite the statutory provisions for the regulatory rescue of failing corporate entities, such measures appear not to be effective. In the case of failing banks, it is not undeniable that none of the failed banks in Nigeria had survived without being liquidated.

5. Management Buy-Out

It refers to the acquisition by a management team of a company of controlling shares of that company or its subsidiaries, with or without third party financing.[995] Management team usually refers to the Directors and other officers of the Company.

The Procedural Steps for Management buy-out includes an Application for the approval for management buy-out, filed by the management team, accompanied by the following:[996]

1. Resolution of the shareholders approving the Management Buy-out
2. Resolution of the management team to under-take the management buy-out
3. A copy of Certificate of incorporation of the Company
4. A copy of Memorandum and article of association of the Company
5. Two copies of Prospectus, containing

a. A profile of the Company

b. Profile of management team buying over the Company

c. Objectives of the management buy-out

d. 5 years audited financial Statement of the Company or if less than 5 years, the statement of affairs for the number of years in existence and

[994]BOFIA, *op cit*, s. 35 (1) (d).
[995] Securities and Exchange Commission Rules 2013 ("SEC Rules") as amended, r 449(a)
[996]SEC Rules, *op cit*, r.449(a); NCS Ogbuanya, *Essentials of Corporate Law Practice in Nigeria* (2nd edn, Lagos: Novena Publishers Ltd (Best Practice Books Series), 2014) pp.613-614; H Y Bhadmus, *Bhadmus on Corporate Law Practice* (3rd edn, Enugu: Chenglo Limited, 2015) p.535

e. Claims and litigation

6 Sale Agreement between the Company and the management team containing (a) terms and conditions of sale and (b) Indemnity against contingent liabilities by the seller to 3rd parties.

4.2. The United Kingdom

There is a plethora of corporate rescue mechanisms in the United Kingdom, formal and informal corporate rescue procedures. The available formal corporate rescue procedures are discussed below.

1. Schemes of Arrangement

A scheme of arrangement is a flexible and versatile mechanism of corporate rescue. A scheme of arrangement can also come in different forms and shades. Hence, it is impossible to identify a typical scheme of arrangement. In this part of our study, Schemes of Arrangement as contained in Part 26 of the extant Companies Act[997] in the United Kingdom would be examined.

2. Arrangement and Reconstruction

The advantage of a scheme of arrangement in the form of arrangements and reconstructions is "a complicated alteration of rights or of capital structure to be implemented by a simple court order approving the scheme. There is no elaborate follow up action to be taken and in some cases, stamp duty is avoided since there are no instruments of transfer requiring to be stamped.[998] However, there is a disadvantage of using a scheme of arrangement in the sense that it requires the preparation of a document setting out the scheme and of an explanatory circular, with two applications to the court at the start and at the end of the procedural sequence.

[997] 2006 (United Kingdom)
[998] S Barber, *Company Law* (4th edn, London: Old Bailey Press, 2004) p. 303.

For that reason, a scheme of arrangement is likely to be uneconomic unless large companies, with millions of Pounds in assets, are involved.[999]

It is noteworthy that the mechanism of schemes of arrangements in the United Kingdom is almost on all fours with arrangements and compromise as contained in the CAMA. Section 895 (1) of the Companies Act, provides for compromise or arrangement between the company and its members or creditors. Section 896 of the Companies Act, provides for the convening and holding of meeting pursuant to the application to the court. Section 897 of the Companies Act, provides for every notice summoning the meeting that is sent to a creditor or member must be accompanied by a statement explaining the effect of the compromise or arrangement. Section 899 of the Companies Act, provides that the court may sanction the compromise or arrangement if a majority in number, representing 75% (that is three-quarters) in value of the creditors or class of creditors or members or class of members (as the case may be) present and voting either in person or by proxy, agree to a compromise or arrangement, which sanction by the court is binding on all creditors or the class of creditors or members or class of members (as the case may be) and the company, subject to the court's order having been delivered to the registrar of companies.

However, in *Re: Alabama, New Orleans, Texas v Pacific Function Railway Co.*,[1000] the court held that it should exercise its discretion in deciding whether to approve a scheme of arrangement as follows:

[999]S Barber, *op cit*, p. 303.
[1000][1891] 1 Ch 213.

> The court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to it, or such objection that a reasonable man might say that he could not approve it.

Furthermore, the court in exercise of its discretion in deciding whether to approve a scheme of arrangement considers whether it is within the ambit of statutory provisions and whether the initial statutory requirements, in respect of documents, have been complied with.[1001]Arrangement and Reconstruction as a form of schemes of arrangement in the United Kingdom has also faced the same challenges as arrangements and compromise under the CAMA, such as being costly, complex, and time consuming.[1002]

But the significant limitation in the use of schemes of arrangement mechanism in corporate rescue is that, just like receivership, there is no moratorium whatsoever.

3. Company Voluntary Arrangements (CVAs)

This procedure was added to the English Company Law at the behest of the Cork Committee and presently is contained in Part 1 of the Insolvency Act[1003] as a simple procedure whereby a company which is in financial difficulties may enter into a

[1001]*Re: Hellenic and General Trust Ltd* [1975] 3 All ER 382; *Re: Savoy Hotel Ltd* [1981] Ch 351; *Re: Telewest Communications Plc. (No.1)* [2005] 1 B.C.L.C 752.
[1002] Bourne, *op cit*, p. 269; B Adebola, 'Conflated Arrangements: A comment on the Company Voluntary Arrangements in the Proposed Nigerian Insolvency Act', *op cit*; L Sealy & S Worthington, *Cases and Materials in Company Law* (10th edn, Oxford: Oxford University Press, 2013) p. 708.
[1003]1986 as amended,ss.1-7

voluntary arrangement with its creditors. This arrangement may involve either: a composition in satisfaction of its debts, that is, provision for creditors to receive a percentage of what is due to them or a scheme of arrangement of its affairs.[1004]

The procedure for CVAs is segmented into chapters:

1. Chapter 2 of the Insolvency Rules applies when the proposal for the voluntary arrangement is made by the directors of the company and the company is either in liquidation or in administration, and no steps have been taken to obtain a moratorium under Schedule A1 to the Act in connection with the proposal.[1005]
2. Chapter 3 of the Insolvency Rules applies when the proposal for the voluntary arrangement is made by either the liquidator (if the company is in liquidation) or the administrator (if the company is in administration) and in either case, the liquidator or the administrator is the nominee.
3. Chapter 4 of the Insolvency Rules applies in the same case as Chapter 3 but where the nominee is not the liquidator or administrator.
4. Chapter 5 of the Insolvency Rules applies in all the cases mentioned in Chapters 2, 3 and 4 above.
5. Chapter 6 was revoked by Insolvency (Amendment) (No.2) Rules, 2002.
6. Chapters 7 and 8 of the Insolvency Rules apply to all voluntary arrangements with or without a moratorium.
7. Chapter 9 of the Insolvency Rules applies where the proposal is made by the directors of an eligible company with a view to obtaining a moratorium.

The glaring feature of CVAs procedure is that one should be informed of the chapter to apply for a proposal. In other words, a CVA may be proposed through the

[1004]Bourne, *op cit*, p. 251.
[1005]Insolvency Rules, *op cit*, r. 1.1 (2).

stand-alone procedure (proposal is made by directors of the company) or as an element of a main or parent procedure (proposal is made by liquidator or administrator in the case of liquidation or administration respectively).[1006] Where it is a main or parent procedure that is utilized, the CVAs benefits from the moratorium that accompanies the main or parent procedure.[1007] Unlike schemes of arrangement, a stand-alone CVA can obtain a moratorium,[1008] but only to companies that qualify as small by law.[1009] The procedure for obtaining a moratorium in stand-alone CVAs is stipulated in Chapter 9 of the Insolvency Rule.

The mechanisms of a CVA, whether by stand-alone procedure or as an element of a main or parent procedure is that:

1. A nominee is appointed for the purpose of supervising its implementation and must be a qualified insolvency practitioner.[1010]
2. A proposal is prepared by the directors[1011] or liquidator[1012] or administrator[1013]or the nominee.[1014] The proposal should contain the matters as specified in the Insolvency Rules.[1015]
3. Written notice of the proposal is delivered to the nominee (in the case where the liquidator or administrator is not the nominee),[1016] accompanied with a statement of the company's affairs (in the case where the liquidator or administrator is not the nominee),[1017] which must be verified by a

[1006]Adebola, 'Conflated Arrangements…', *op cit*.
[1007]Insolvency Act, *op cit,* ss. 112, 130 (2), schedule B1, paras 42 - 43.
[1008]*Ibid*, s. 1A, schedule A1; the Insolvency Act, 2000.
[1009]*Ibid*, s. 1A, schedule A1, para 3 (2); Companies Act, *op cit,* s. 382 – companies qualifying as small.
[1010]Insolvency Act, *ibid*, s. 1(2).
[1011]*Ibid*, s. (1); Insolvency Rule, *op cit*, r. 1.1 (2) (a).
[1012]Insolvency Act, *ibid*, s. 1 (3) (b); Insolvency Rule, *ibid,* r. 1.1 (2) (b).
[1013]Insolvency Act, *ibid* s. 1 (3) (a); Insolvency Rule, *ibid.*
[1014]Insolvency Rule, *ibid*, r. 1.1 (2) (c).
[1015]*Ibid*, r. 1.3 – proposal by directors; r. 1.10 – proposal by liquidator or administrator and r. 1.12 – proposals by the nominee.
[1016]*Ibid*, r. 1.4.

statement of truth made by at least one director.[1018] The statement of affairs shall be made up to a date not earlier than 2 weeks before the date of the notice to the nominee under Rule 1.4.[1019]

4. The nominee makes a report from the proposal and statement of the company's affairs submitted to him (in the case where the liquidator or administrator is not the nominee), which report he submits to the court stating whether, in his opinion, meetings of the company and of its creditors should be summoned to consider the proposal, and if in his opinion such meeting should be summoned, the date on which and place at which they shall be held.[1020]
5. A meeting is summoned.[1021] Unlike with schemes of arrangement, the court's role is only administrative.[1022] It is not required to grant an order to convene the meeting, but where the nominee is the liquidator or administrator, he shall summon meetings of the company and of its creditors to consider the proposal without submitting his report to the court.[1023]
6. The meeting summoned shall decide whether to approve the proposed CVAs (with or without modifications).[1024] Section 4 (3) and (4) of the Insolvency Act provides for instances when a meeting so summoned shall not approve a proposal except with the concurrence of the creditor or the preferential creditor concerned.

[1017] *Ibid*, r. 1.5.
[1018] Insolvency Rule, *op cit,* r. 1.5 (4).
[1019] *Ibid*, r. 1.5 (3).
[1020] Insolvency Act, *op cit,* s. 2; Insolvency Rule, *op cit,* r. 1.7.
[1021] Insolvency Act, *ibid,* s. 3 (1); Insolvency Rule, *ibid,* chapter 5 – proceedings at meetings.
[1022] Sealy & Worthington, *op cit,* p. 769.
[1023] Insolvency Act, *op cit,* s. 3 (2); Insolvency Rule, *op cit,* r. 1.11.
[1024] Insolvency Act, *ibid,* s. 4 (1).

7. A proposal or modification thereto is approved when a majority of three-quarters or more "in value" of those present and voting in person or by proxy has voted in favour of it.[1025]

8. If the CVAs are approved, the nominee becomes the supervisor of the CVAs.[1026] It is important to know that any person that is dissatisfied by any act, omission or decision of the supervisor may apply to the court for necessary directions.[1027]

The CVAs has been applauded for certain innovations contained therein. It has been argued that since an insolvency practitioner is required to bring the proposals before the meetings for approval and to supervise their implementation if approved, an insolvency practitioner must be found to accept responsibility for the scheme. Hence, if the proposals were deceptive or unlikely to succeed, an insolvency practitioner would unlikely act in connection with the CVAs.[1028] Also, the CVAs can be turned into an administration for the purposes of obtaining a moratorium.[1029]

The CVAs procedure has been argued to be defective not only because of the non-inclusion of the power to cram-down the rights of a dissenting minority[1030] but the lack of a moratorium for the stand-alone procedure, which means that despite the quite lengthy formalities, one impatient creditor could thwart the whole process. Although a way round the issue of moratorium was found by the introduction of CVAs with a moratorium,[1031] this was achieved only at the cost of making the whole procedure more elaborate, public and expensive. In addition, the option is only

[1025]Insolvency Rule, *op cit,* r. 1.19 (2).
[1026]Insolvency Act, *op cit,* s. 7(1)(2).
[1027]*Ibid*, s. 7(3).
[1028]Bourne, *op cit,* p. 315.
[1029]Insolvency Act, *op cit,* s. 8(3)(b).
[1030]A CVA cannot be made binding on secured or preferential creditors without their consent by virtue of section 175 and schedule 6 to the Insolvency Act.
[1031]Insolvency Act, *op cit,* schedule A1.

available to 'eligible companies' (primarily small private companies). The procedure allows for an automatic 28day moratorium to come into force as soon as the documents containing a proposal for a CVA are filed in court. During this period, which may be extended for a further 2 months, the company may not be wound up and no steps may be taken, at least without the leave of court, to enforce security over the company's property or to take proceedings against it. The success of the much sought after provision remains unclear.

However, the advantages of the moratorium may be outweighed by the relative complexity and cost in terms of the companies which are eligible, the role of the supervisor, and the restrictions on directors during the moratorium and the possible liabilities of the directors and the supervisor for actions taken during the moratorium. Furthermore, even the advantages of the moratorium provision, pale in significance now that the Enterprise Act permits the appointment of administrators out of court coupled with their own associated moratorium.[1032]

The newly introduced moratorium provisions in CVAs are unlike administration, which comes with ubiquitous moratorium in the sense that the administrator also has the power to avoid the meeting of creditors.[1033]

4. Administration

Following the report of the Review Committee on Insolvency Law and Practice,[1034]a recommendation for the establishment of a procedure to facilitate the rehabilitation or reorganisation of a company led to the incorporation of administration orders in the Insolvency Act of 1985, which in turn consolidated in the Insolvency Act 1986. In essence, an administration order is to make possible the rescue of a company by

[1032]Sealy & Worthington, *op cit,* pp. 769 – 770.
[1033]Adebola, 'Conflated Arrangements…', *op cit*.
[1034]The CORK Report (CMMD 8558, 1982).

placing its management in the hands of an administrator. For as long as the administration is in force, it is not possible to commence winding up proceedings or any other process against the company or to enforce any charge, hire purchase or retention of title provision against the company without the leave of court.[1035]

However, the Enterprise Act made substantial amendments[1036] which introduced fundamental changes in the purpose, appointment and powers of administrators, although the procedure remains open only to companies that are or are likely to become insolvent.[1037] Administration has now largely replaced receiverships, at least for floating charge holders, and has the merit of being conducted in the interest of all concerned rather than only the secured creditor. The process is associated with a moratorium,[1038] so it provides the company with breathing space, free from creditors' claims, where the administrator can determine the future of the company even where liquidation is inevitable, so that its assets can be realised to better advantage by selling the business as a going concern.[1039]

1. Purpose of Administration

The purposes[1040] for which an administration order may be made are:

1. Rescuing the company as a going concern;
2. Achieving a better result for the company's creditors as a whole than would be likely if the company were wound up;
3. Realising property in order to make a distribution to one or more secured or preferential creditors;

[1035]Insolvency Act, *op cit,* s. 10; Bourne, *op cit,* p. 253.
[1036]Insolvency Act, *op cit,* s. 8, schedule B1. The 'old' provisions on administration contained in Part 2 of the Insolvency Act, are retained and applied to special categories of companies (water companies, railway companies, air traffic services companies and public-private partnership companies).
[1037]V Finch, *Corporate Insolvency Law: Perspective and Principles* (Cambridge: Cambridge University Press, 2002) p. 392.
[1038]Insolvency Act, *op cit,* schedule B1, para 43.
[1039]Sealy& Worthington, *op cit,* p. 771.
[1040]Insolvency Act, *op cit,* schedule B1, para 3 (1).

It should be noted that the administrator must always act in the interest of the creditors as a whole[1041] and as quickly and efficiently as reasonably practicable.[1042] Hence, administrators must pursue rescuing the company as a going concern rather than pursuing the objective of achieving a better result for the company's creditors as a whole than would be likely if the company was wound up unless it is not reasonably practicable to pursue rescuing the company as a going concern.

2. Procedure for Appointment of Administrator

An administrator may be appointed by the court on the application of the company itself or its directors or one or more creditors[1043] of the company or the designated officer for a Magistrate's Court in the exercise of the power conferred by Section 87A of the Magistrate's Courts' Act, 1980 (fine imposed on company) or a combination of the persons mentioned herein before.[1044] Where there is a difference in view as to the choice of administrator, all things being equal, the choice of the largest creditor (in terms of the value of the debt owed to it by the company) is regarded as being the tie breaker.[1045] However, there are certain general restrictions as to persons that may be appointed as administrator of a company.[1046]

The appointment of an administrator out of court can be made by the holder of a floating charge relating to the whole or substantially the whole of the company's property.[1047] For appointment by a floating charge holder, the floating charge must simply be enforceable. However, an out of court appointment must be reported to the court. The preconditions for appointment of an administrator whether by the court or

[1041]Sealy & Worthington, *op cit,* pp. 770 – 771; Insolvency Act, *ibid,* schedule B1, para 3 (2).
[1042]Sealy & Worthington, *ibid*; Insolvency Act, *ibid,* schedule B1, para 4.
[1043]Insolvency Act, *op cit,* schedule B1, para 12 (4) - "Creditor" includes a contingent creditor and a prospective creditor.
[1044]*Ibid,* s. 9, schedule B1, paras 2, 12, 14 and 22.
[1045]*Healthcare Management Services Ltd v Caremark Properties Ltd*[2012] EWHC 1693.
[1046]Insolvency Act, *op cit,* schedule B1, paras 6, 7,8, 9.
[1047]*Ibid,* schedule B1, para 14.

out of court, is that the company must be unable to pay its debts or is likely to become unable to do so.[1048]

The process of appointment of an administrator by a holder of a floating charge is contained in Schedule B1 to the Insolvency Act as it relates to power to appoint,[1049] restrictions on power to appoint,[1050] filing with the court a notice of appointment[1051] (which must include a statutory declaration by and on behalf of the person who makes the appointment, the identification of the administrator and a statement of consent by the administrator), commencement of appointment[1052] and entering of indemnity for invalid appointment.[1053]

In the case of an appointment of an administrator by a company or its directors, the process is contained in Schedule B1 as it relates to power to appoint,[1054] restrictions on power to appoint,[1055] notice of intention to appoint,[1056] notice of appointment,[1057] commencement of appointment[1058] and indemnity for invalid appointment.[1059]

For an administration order to be made by the court, the court must be satisfied that the company 'is or is likely to become' unable to pay its debts and the administration order is reasonably likely to achieve the purpose of administration.[1060]

[1048]Insolvency Act, *op cit*, schedule B1, para 11 (a).
[1049]*Ibid*, schedule B1, para 14.
[1050]*Ibid*, schedule B1, paras 15, 16, 17.
[1051]*Ibid*, schedule B1, para 18.
[1052]*Ibid*, schedule B1, paras19, 20.
[1053]*Ibid*, schedule B1, para 21.
[1054]*Ibid*, schedule B1, para 22.
[1055]*Ibid*, schedule B1, paras 23, 24, 25.
[1056]*Ibid*, schedule B1, paras 26, 27 – Five business days' written notice is given to any person who is or may be entitled to appoint an administrative receiver or an administrator of the company or such other persons as may be prescribed. A copy of the notice of intention to appoint and any document accompanying it shall be filed with the court as soon as is reasonably practicable. Accompanying the notice of intention is a statutory declaration in accordance with Para. 27 (2) (3) and the identification of the proposed administrator.
[1057]*Ibid*, schedule B1, para 29.
[1058]*Ibid*, schedule B1, paras 31, 32, 33.
[1059]*Ibid*, schedule B1, para 34.
[1060]*Ibid*, schedule B1, para 11 (b).

In *Re: Harris Simons Construction Ltd,*[1061] the court interpreted the provision of Section 8 (1) (b) of the Insolvency Act, 'would be likely to achieve' to mean a 'real prospect'. Vinelott, J., in considering whether to grant an order in respect of a company trading in Nigeria, said: "the question must always be, if there is a real prospect that one or more of the stated purposes would be achieved, is that prospect sufficiently likely in the light of all the other circumstances of the case to justify the making of the order.[1062] In *Re: AA Mutual International Insurance Co. Ltd,*[1063] the court interpreted 'is or is likely to become' under Schedule B1, Para 11 (a) to the Insolvency Act to mean 'more probably than not' while 'is reasonably likely' under Schedule B1, Para 11 (b) to means 'real prospect'.

It is instructive to note that the precondition for an administration order, which is predicated on the company's inability to pay its debt, is determined by the definition of inability to pay debt as contained in Section 123 of the Insolvency Act.

3. Powers and Duties of Administrator

An administrator is an officer of the court (whether or not he is appointed by the court),[1064] and must be a qualified insolvency practitioner.[1065]

An administrator is given exceptionally wide powers of management to do what is necessary for the smooth management of the affairs, business and property[1066] of the company. These powers include:

1. Taking possession of the property, selling and otherwise disposing of it, raising or borrowing money, appointing a solicitor or accountant, bringing or defending legal proceedings, effecting and maintaining insurances,

[1061][1989] 1WLR 368.
[1062]*Re: Primlaks UK Ltd*[1989] BCLC 734.
[1063][2004] EWHC 2430.
[1064]Insolvency Act, *op cit,* schedule B1, para 5.
[1065]*Ibid,* schedule B1, para 6.
[1066]*Ibid,* schedule B1, para 1 (1).

appointing agents, carrying on the business of the company, establishing subsidiaries, granting or accepting surrender of a lease or tenancy and the power to do all such things that are incidental to the powers set out in Schedule 1 of the Insolvency Act.[1067]

2. To dispose of property subject to a floating charge without the leave of court and for property subject to any other charge with the leave of court.[1068]

However, the proceeds from such disposition of the property must be deployed according to the statutory priorities.[1069]

3. To call any meeting of members or creditors of the company.[1070]

Flowing from the wide powers given to the administrator of a company, he owes certain duties such as:

1. To make a statement setting out the proposals for achieving the purpose of administration;[1071]
2. To request by notice to the relevant persons in the prescribed form, a statement of the affairs of the company, which must be verified by a statement of truth in accordance with Civil Procedure Rules;[1072]
3. To summon creditors meetings;[1073]
4. To take custody or control of all the property to which he thinks the company is entitled;[1074]
5. To take reasonable steps to obtain a proper price for its assets if in the

[1067]Insolvency Act, *op cit*, schedule 1; B1, paras 59, 60.
[1068]*Ibid*, schedule B1, paras 70, 71.
[1069]*Ibid*, s. 15 (4).
[1070]*Ibid*, s. 14 (2) (b).
[1071]*Ibid*, schedule B1, para 49.
[1072]*Ibid*, schedule B1, para 47.
[1073]*Ibid*, schedule B1, paras 50, 51, 56.
[1074]*Ibid*, schedule B1, para 67.

course of a sale;[1075]

6. To make distribution of the assets of a company as the circumstances determine.[1076]

4. Effect of Administration Order

The appointment of an Administrator engenders certain consequences, to wit:

1. The company in administration or an officer of the company in administration ceases to exercise a management power except with the consent of the administrator;[1077]
2. Dismissal of pending winding up petition.[1078]

   The dismissal shall be upon the making of an administration order but a petition for the winding up shall be suspended while the company is in administration. However, such suspension does not apply to a petition presented under Section 124A (public interest) or Section 124B (SEs) of the Insolvency Act and Section 367 of the Financial Services and Market Act, 2000 (petition by Financial Services Authority);
3. Dismissal of administrative or other receiverships;[1079]
4. Moratorium on insolvency proceedings.[1080]

   However, there are exceptions as provided in Paragraph 42 (4) of Schedule B1 to the Insolvency Act. By virtue of the provisions of paragraph 44 of Schedule B1 to the Insolvency Act, an interim moratorium will avail in the circumstances as provided in the said paragraph.
5. Moratorium on other legal process.[1081]

[1075] *Re: Charnley Davies Ltd (No. 2)*[1990] BCLC 760.
[1076] Insolvency Act, *op cit,* schedule B1, paras 65, 66.
[1077] *Ibid,* schedule B1, para 64.
[1078] *Ibid,* schedule B1, para 40.
[1079] *Ibid,* schedule B1, para 41.
[1080] *Ibid,* schedule B1, para 42.

This is to the effect that no step including the enforcement of security over the company's property;[1082] or to repossess goods in the company's possession under a hire purchase agreement;[1083] or to exercise a landlord's right of forfeiture by peaceable re-entry in relation to premises let to the company[1084] and institution or continuation of legal proceedings, execution, distress and diligence against the company or property of the company, except with the consent of the administrator or with the permission of the court.[1085]

6. Every business document, whether an invoice, order for goods or services, a business letter and an order form, issued by or on behalf of the company or the administrator and all the company's websites must have the name of the administrator and statement that the affairs, business and property of the company are being managed by the administrator.[1086]

5. Termination of Administration

Administration ends at the happening of any of the following events:

1. The appointment of an administrator ends automatically after one year beginning with the date on which it takes effect[1087] unless the term is extended[1088] by the court or by consent;[1089]
2. Pursuant to an application by the administrator to the court.[1090] The grounds upon which an administrator can make an application to the court

[1081]Insolvency Act, *op cit*, schedule B1, para 43.
[1082]*Ibid*, schedule B1, para 43 (2).
[1083]*Ibid*, schedule B1, para 43 (3).
[1084]*Ibid*, schedule B1, para 43 (4).
[1085]*Ibid*, schedule B1, para 43 (6).
[1086] *Ibid*, schedule B1, para 45 (1) (3).
[1087]*Ibid*, schedule B1, para 76 (1).
[1088]*Ibid*, schedule B1, para 76 (2).
[1089]*Ibid*, schedule B1, paras 76 (2), 78.
[1090]*Ibid*, schedule B1, para 79.

to end the administration of a company is provided in Paragraph 79 (2) and (3) of Schedule B1 to the Insolvency Act;

3. Where the purpose of administration has been sufficiently achieved in relation to the company;[1091]
4. Pursuant to an application to the court by a creditor[1092] on the grounds as provided in Paragraph 81 (2) of Schedule B1 to the Insolvency Act, and,
5. Public interest winding up.[1093]

4.3 The Republic of South Africa

The available corporate rescue mechanisms in the Republic of South Africa are the business rescue proceedings and an arrangement or a compromise.

1. Business Rescue Proceedings

Business rescue proceedings is a home grown or an indigenous procedure adopted in the Republic of South Africa to facilitate the rehabilitation of a company that is financially distressed.[1094] The procedure governing business rescue proceedings is provided in the extant law.[1095]

2. Purpose of Business Rescue Proceedings

The primary purpose for business rescue proceedings is to facilitate the rehabilitation of a company that is financially distressed.[1096] A company is financially distressed[1097]when:-

1. It appears to be reasonably unlikely to pay all of its debt as they become due and payable within the immediately ensuing six months;[1098] or

[1091]Insolvency Act, *op cit*, schedule B1, para 80.
[1092]*Ibid*, schedule B1, para 81 (1).
[1093]*Ibid*, schedule B1, para 82.
[1094]Companies Act 2008, chapter 6 (South Africa) (CA).
[1095]*Ibid*; Companies Amendment Act 2011, Part 6 (South Africa) (CAA).; E Levenstein, 'An Appraisal of the New South African Business Rescue Procedure', unpublished LLD Thesis, University of Pretoria, Pretoria, November 2015, pp 1-20
[1096]CA, *op cit*, s 128 (1)(b).
[1097]*Ibid*, s. 128 (1) (f).

2. It appears to be reasonably likely to become insolvent within the Immediately ensuing six months[1099]

Essentially, the purpose of business rescue proceedings is to put the financially distressed company into a temporary supervision.[1100] This is achieved by imposing temporary moratorium on claims against the company[1101] and the development and implementation of a business rescue plan.[1102]

3. Modes of Commencement of Business Rescue Proceedings

The modes of commencement of business rescue proceedings are by company resolution and court order pursuant to the application of an affected person.[1103]

4. Business Rescue Proceedings: Company Resolution

The board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision if the board has reasonable grounds to believe that the company is financially distressed and there appears a reasonable prospect of rescuing the company.[1104]It should be noted that a resolution to begin business rescue proceedings will not be adopted if liquidation proceedings has been initiated by or against the company and a resolution will have no effect until it has been filed.[1105] Where a resolution has been adopted, the company shall within five business days after the adoption or such longer time as the Companies and Intellectual Property Commission[1106] may permit, publish a notice of the resolution and its effective date in the prescribed manner to every affected person

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[1098]CA, *op cit*, s 128 (1)(f)(i); CAA, s 81 (a).
[1099]CA, *ibid*, s. 128 (1) (f) (ii).
[1100]CA, *ibid*, s. 128 (1) (b)(i).
[1101]*Ibid*, s. 128 (1) (b) (ii).
[1102]*Ibid*, s. 128 (1) (b) (iii)(c).
[1103]*Ibid*, s. 128 (1) (a)Affected person mean a shareholder or creditor of the company; any registered trade union representing employees of the company and if any employee of the company are not represented by a registered trade union, each of those employees or their respective representatives.
[1104]*Ibid*, s. 129 (1).
[1105]*Ibid*, s. 129 (2).
[1106]*Ibid*, ss. 1 & 185 (1).

accompanied with a sworn statement of the facts stating the grounds on which the board resolution was founded[1107] and appoint a qualified business rescue practitioner, who has consented in writing to accept the appointment.[1108]

Upon the appointment of a business rescue practitioner, the company must file a notice of the appointment of the business rescue practitioner within two days after making the appointment[1109] and publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.[1110]However, where the company fails to file the resolution upon adoption or publish a notice of the resolution to every affected person or appoint a business rescue practitioner or publish a copy of the notice of appointment of the business rescue practitioner to every affected person, the resolution to begin business rescue proceedings and place the company under supervision, lapses and it becomes a nullity.[1111] Furthermore, if by reason of the foregoing, the resolution lapses or is a nullity, the company will not file a further resolution for a period of three months after the date on which the lapsed resolution was adopted, unless a court on good cause shown on an *ex parte* application, approves the company filing a further resolution.[1112]

Where the board of a company has reasonable grounds to believe that the company is financially distressed but failed to adopt a resolution to begin business rescue proceedings, the board must deliver a written notice to each affected person, setting out the reasons for not adopting the resolution.[1113]Notwithstanding, an affected person can object to company's resolution to begin business rescue proceedings by

[1107]CA, *op cit*, s. 129 (3) (a).
[1108]*Ibid*, s. 129 (3) (b).
[1109]*Ibid*, s. 129 (4) (a).
[1110] *Ibid*, s. 129 (4) (b).
[1111]*Ibid*, s. 129 (5) (a).
[1112]*Ibid*, s. 129 (5) (b).
[1113]*Ibid*, s. 129 (7) as amended by CAA, *op cit*, s. 82.

applying to the court[1114] for an order[1115] setting aside the resolution on the grounds that there is no reasonable ground for believing that the company is financially distressed[1116] or there is no reasonable prospect for rescuing the company[1117] or the company failed to satisfy procedural requirements for making a resolution.[1118] The order of court may be for setting aside of the appointment of business rescue practitioner on the ground that he is not qualified to act as a business rescue practitioner[1119] or is not independent of the company or its management[1120] or lack the necessary skills required, having regards to the circumstances of the company.[1121]

It is pertinent to state that the grant of an order setting aside the resolution for business rescue proceedings or the appointment of a business rescue proceedings is not granted as a matter of course. There are grounds to be established before the court can grant the order setting aside the resolution or the appointment of a business rescue practitioner.[1122] Where the court grants an order setting aside the resolution or the appointment of a practitioner, it may make any further necessary and appropriate order, including placing the company under liquidation[1123] or an order of costs against any director who voted in favour of the resolution *mala fide*[1124] or appointment of an alternate practitioner.[1125]

5. Business Rescue Proceedings: Court Order

Unless a company has adopted a resolution to begin business rescue proceedings, an affected person may apply to a court at any time for an order placing the company

[1114]CA, *op cit*, s. 128 (1) (e).
[1115]*Ibid*, s. 130 (1).
[1116]*Ibid*, s. 130(1) (a) (i).
[1117]*Ibid*, s.130 (1) (a) (ii).
[1118]*Ibid*, s. 130 (1) (a) (iii).
[1119] *Ibid*, s. 130 (1) (b) (i).
[1120]*ibid*, s. 130 (1) (b) (ii).
[1121]*Ibid*, s. 130 (1) (b) (iii).
[1122]*Ibid*, s. 130 (5) (a) (b).
[1123]*Ibid*, s. 130 (5) (c) (i).
[1124]*Ibid*, s. 130 (5) (c) (ii).
[1125]*Ibid*, s. 130 (6) (a).

under supervision and commencing business rescue proceedings.[1126] In this respect, an applicant to the court must serve a copy of the application on the company, the Companies and Intellectual Property Commission and notify each affected person of the application in the prescribed manner.[1127]

The application by an affected person for an order of court placing the company under supervision and commencing business rescue proceedings is not granted as a matter of course. The application is granted where the court is satisfied that:[1128]

i. The company is financially distressed;

ii. The company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation or contract with respect to employment related matters; or

iii. It is just and equitable to do so for financial reasons and there is a reasonable prospect for rescuing the company.

Where the court pursuant to the application makes an order placing the company under supervision and commencing business rescue proceedings, it will make a further order appointing an interim practitioner nominated by the affected person, subject to ratification of the majority of the first meeting of creditors.[1129] Furthermore, it is instructive to state that an application suspends any liquidation proceedings until the court has adjudicated upon the application.[1130]

6. Duration of Business Rescue Proceedings

Business rescue proceedings by company resolution begin when the company files a resolution to place itself under supervision or applies to the court for consent to file a

[1126]CA, *op cit*, s. 131 (1).
[1127]*Ibid*, s. 131 (2) (a) (b).
[1128]*Ibid*, s. 131 (4) (a).
[1129]*Ibid*, s. 131 (5).
[1130]*Ibid*, s. 131 (6) (a).

further resolution.[1131] In the case of business rescue proceedings by court order, it commences when an affected person applies to the court for an order placing the company under supervision[1132] or a court makes an order placing a company under supervision during the course of liquidation proceedings or proceedings to enforce a security interest.[1133] Thus, business rescue proceedings end when (i) the court sets aside the resolution or order that begun the proceedings[1134] or has converted the proceedings to liquidation proceedings (ii) the practitioner files with the Companies and Intellectual Property Commission a notice of the termination of the business rescue proceedings[1135] (iii) a business rescue plan is proposed and rejected without any affected person applying to extend the proceedings[1136] or the business rescue plan is adopted but the practitioner has subsequently filed a notice of substantial implementation of that plan.[1137]

It should be noted that where a company's business rescue proceedings did not end within three months after the commencement of the proceedings or such longer time as the court on application by the practitioner may allow, the practitioner must prepare a report on the progress on the business rescue proceedings and update same at the end of each subsequent month until the end of those proceedings[1138] deliver the report and each update in the prescribed manner to each affected person[1139] and to the court if the proceedings have been the subject of a court order[1140] or the Companies and Intellectual Property Commission , in any other case.[1141]

[1131]CA, *op cit*, s. 132 (1) (a) (i) (ii).
[1132]*Ibid*, s. 132 (1) (b) as amended by CAA, *op cit*, s. 83 (a).
[1133]CA, *ibid*, s. 132 (1) (c) as amended by CAA, *op cit*, s. 83 (b).
[1134]CA, *ibid*, s. 132 (2) (a) (i).
[1135]*Ibid*, ss. 132 (2) (b), 153 (5).
[1136]*Ibid*, ss. 132 (2) (c) (i), 153 (5).
[1137]*Ibid*, s. 132 (2) (c) (ii).
[1138]*Ibid*, s.132(3)(a).
[1139]*Ibid*, s. 132(3)(b).
[1140]*Ibid*, s 132(3)(b)(1).
[1141]*Ibid*, s. 132(3)(b)(ii).

7. Effects of Business Rescue Proceedings

1. Legal proceedings

No legal proceeding, including enforcement action, against the company or in relation to any property belonging to the company or lawfully in its possession may be commenced or preceded, except[1142]:-

a. With the written consent of the practitioner;[1143]

b. With the leave of court;[1144]

c. As a set off against any claim made by the company in any legal proceedings;[1145]

d. Criminal proceedings against the company or any of the directors or Officers;[1146]

e. Proceedings concerning any property or right over which the company exercises the powers of a trustee;[1147]

f. Proceedings by a regulatory authority in the execution of its duties after Written notification to the business rescue practitioner;[1148]

Furthermore, during business rescue proceedings, any right to commence proceedings or otherwise, assert a claim against a company that is subject to time limit is suspended.[1149]

2. Shareholders and directors

There shall not be an alteration to the classification or status of any issued securities of a company other than by way of a transfer of securities in the ordinary

[1142]CA, *op cit*, s. 133(1).
[1143]*Ibid*,s.133(1)(a).
[1144]*Ibid*, s.133(1)(b)
[1145]*Ibid*, s. 133 (1) (c) as amended by CAA, *op cit*, s. 84(a).
[1146]CA, *ibid*,s.133(1) (d) as amended by CAA, *ibid*, s. 84 (b).
[1147]CA, *ibid*, s. 133(1) (e) as amended by CAA, *ibid*, s. 84 (b).
[1148]CAA, *ibid*, s. 84(c).
[1149]CA, *op cit*, s. 133(3).

course of business except as the court otherwise directs or as contemplated in the approved business rescue plan.[1150]

A director of the company continues to exercise the functions of a director, subject to the authority of the business rescue practitioner.[1151] Furthermore, each director of the company has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner.[1152] It is pertinent to state that the director of company continues to function as director but subject to instructions, direction and authority of the business rescue practitioner, who is empowered to apply to a court for an order removing a director from office on the ground of incompetence or obstruction of the business rescue proceedings and the development or implementation of a business rescue plan.[1153]

3. Company's Property

The company retains title to its property during a business rescue proceedings.[1154] However, it may dispose or agree to dispose of its property only, in the ordinary course of its business[1155] or in a *bona fide* transactions at arm's length for fair value approved in advance and in writing by the business rescue practitioner [1156] or in a transaction contemplated within and undertaken as part of the implementation of an approved business rescue plan.[1157]

[1150]CA, *op cit,* s. 137(1) (a) (b).
[1151]*Ibid*, s. 137(2)(a).
[1152]*Ibid*, ss. 137 (2) (b), 140 (1) (b).
[1153]*Ibid*, s. 137(5).
[1154]*Ibid*, s. 134(1); CAA, *op cit,* s. 85(a).
[1155]CA, *ibid,* s. 134(1)(a)(i).
[1156]*Ibid*, s. 134(1)(a)(ii).
[1157]*Ibid*, s.134(1)(a)(iii).

4. Employees and Contracts

The employees of the company immediately before the beginning of business rescue proceedings continue to be employed on the same terms and conditions, except to the extent that changes occur in the ordinary course of attrition or the employees and the company in accordance with applicable labour laws agree to different terms and conditions.[1158]

It should be noted that where the business rescue plan provides for the retrenchment of employees, it is subject to the relevant provision of Labour Relations Act[1159] and other applicable employment related legislation.[1160] However, subject to sections 35A and 35B of the Insolvency Act,[1161] the business rescue practitioner may entirely, partially or conditionally suspend for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings.[1162] Nevertheless, a business rescue practitioner cannot suspend any provision of an employment contract [1163] or an agreement to which sections 35A or 35B of the Insolvency Act would have applied had the company been liquidated.[1164]

6. Appointment of Business Rescue Practitioner

The appointment of a business rescue practitioner is provided for in business rescue proceedings, whether by company resolution[1165] or by court order.[1166] The purpose of

[1158]CA, *op cit*, s. 134(1)(a)(i)(ii).
[1159]Act No. 66 of 1995.
[1160]CA, *op cit*, s. 136 (1)
[1161]Act No. 24 of 1936.
[1162]CA, *op cit*,s. 136(2) as amended by CAA, *op cit*, s. 87(b).
[1163]CA, *ibid*, s. 136(2A) (a)(i) as amended by CAA, *ibid*, s. 87(c).
[1164]CA, *ibid*, s. 136(2A) (a)(ii) as amended by CAA, *ibid*.
[1165]CA, *ibid*, s. 129(3)(b).
[1166]*Ibid*, s. 131(5).

the appointment of a business rescue practitioner is to oversee a company during business rescue proceedings[1167] and it is usually an officer of the court.[1168]

7. Qualification of Business Rescue Practitioners

A person may be appointed as a business rescue practitioner of a company only if the person:[1169]

1. is a member in good standing of a legal, accounting or business management profession accredited by the Companies and the Intellectual Property Commission;
2. has been licensed as such by the Companies and Intellectual Property Commission;[1170]
3. is not subject to an order of probation in terms of section 162(7);
4. would not be disqualified from acting as a director of the company in terms of section 69(8);
5. does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship;
6. is not related to a person who has a relationship as contemplated in 5 above.

8. Effects of the Appointment of Business Rescue Practitioner

The primary effect of the appointment of business rescue practitioner is that the management powers of the company is divested from the board and invested in the

[1167]CA, *op cit*, s. 128(1)(d).
[1168]*Ibid*, s. 140(3)(a).
[1169]*Ibid*, s. 138(1) as amended by CAA, *op cit*, s. 88.
[1170]CA, *ibid*, s. 138(2) as amended by CAA, *ibid*.

business rescue practitioner.[1171] Furthermore, the board ceases to act except as the business rescue practitioner may approve. Hence, upon the commencement of business rescue proceedings, the directors of a company must provide the business rescue practitioner with a statement of affairs.[1172]

9. Cessation of Appointment of Business Rescue Practitioner

The appointment of business rescue practitioner may come to an end if he or she dies,[1173] resigns or is removed from office by the court on the following grounds:

i. The practitioner is not qualified and independent of the company or its management or lacks the necessary skills;[1174]

ii. Incompetence or failure to perform his or her duties;[1175]

iii. Failure to exercise the proper degree[1176] of care in the performance of his or her duties;

iv. Engaging in illegal acts or conduct;[1177]

v. Conflict of interest or lack of independence;[1178]

vi. Incapacitation.[1179]

10. Powers and Duties of Business Rescue Practitioners

In order to achieve the purpose of his appointment, business rescue practitioners are conferred with far-reaching powers and duties. In addition to any other powers and duties set out in the applicable provisions of the extant legislation, the business rescue practitioner has such power and duties to exercise, either with or without the approval of the court as follows:

[1171]CA, *op cit*, s. 140(1).
[1172]*Ibid*, s. 142(3) as amended by CAA, *op cit*, s. 92.
[1173]CA, *ibid*, s. 139(3).
[1174]*Ibid*, s. 130(1)(b).
[1175]*Ibid*, s. 130(2) (a) as amended by CAA, *op cit*, s. 89.
[1176]CA, *ibid*, s. 130(2)(b).
[1177]*Ibid*, s. 130(2)(c).
[1178]*Ibid*, s. 130(2)(e).
[1179]*Ibid*, s. 130(2)(f).

1. Power to exercise full management powers or control of the company in substitution for its board and pre-existing management.[1180] This management power can be delegated by the practitioner.[1181]
2. Power to appoint a person as part of the management of the company or an adviser to the company or the practitioner where such person has a relationship with the company that impugns his integrity, impartiality or objectivity.[1182] This power can only be exercised with the approval of the court.[1183]
3. Power to investigate the company's affairs, business, property and financial situation so as to ascertain whether there is any reasonable prospect of the company being rescued.[1184]
4. Duty to inform all relevant regulatory authorities having authority in respect of the activities of the company to the fact that the company has been placed under business rescue proceedings and of his or her appointment.[1185]
5. Duty to develop a business rescue plan to be considered by affected persons and to implement such plan.[1186]
6. Duty to report to the court as an officer of the court[1187] and to inform the court, the company and all affected persons, to wit, (i) where there is no reasonable prospect for the company to be rescued and hence, apply to the court for an order discontinuing the business rescue proceedings and

[1180]CA, *op cit,* s. 140(1)(a).
[1181]*Ibid*, s. 140(1)(b)(c).
[1182]*Ibid*, s. 140(2)(a).
[1183]*Ibid*, s. 140(2).
[1184]*Ibid*, s. 141(1).
[1185]*Ibid*, s. 140(1A) as amended by CAA, *op cit,* s. 90.
[1186]CA, *ibid*, ss. 140(1)(a); 150, 151 & 152.
[1187] *Ibid*, s. 140(3)(a).

placing the company into liquidation[1188] (ii) where there are no longer reasonable grounds to believe that the company is financially distressed and hence, apply to the court for an order terminating the business rescue proceedings or otherwise to file a notice of termination of the business rescue proceedings.[1189]

7. Duty to take necessary steps to rectify any void transactions or the failure by the company or any director to perform any material obligation relating to the company.[1190]
8. Duty to forward the evidence of any reckless trading, fraud or other contravention of any law relating to the company to the appropriate authority for further investigation and possible prosecution.[1191]
9. Duty to convene and preside over the first meeting of creditors[1192] and the first meeting of employees' representatives.[1193]
10. Power to exercise all the duties of directors as set out in sections 75 to 77 of the CA.[1194]

11. Committee of Affected Persons

The Committee of Affected Persons (Committee) consisting of the committee of creditors [1195]or of employees[1196] is constituted during the business rescue proceedings to carry out the following functions or duties, that is:

i. Consult with the practitioner about any matter relating to the business

[1188]CA, *op cit*, s.141(2)(a).
[1189]*Ibid*, s. 141(2)(b).
[1190]*Ibid*, s. 141(c)(i) as amended by CAA, *op cit*, s. 91.
[1191]CA, *ibid*, s. 141(2)(c) (ii).
[1192]*Ibid*, s.147(1).
[1193]*Ibid*, s. 148(1).
[1194]*Ibid*, s. 140(3)(b).
[1195]*Ibid*, s. 147(1).
[1196]*Ibid*, s. 148(1).

rescue proceedings.[1197] However, the Committee cannot direct or instruct the practitioner in relation to the exercise of his or her powers and duties;

ii. Consider reports relating to the business rescue proceedings;[1198]

iii. Act independently of the practitioner to ensure fair and unbiased representation of creditors' or employees' interests;[1199]

iv. Approve or reject the business rescue plan developed by the practitioner.[1200]

12. Business Rescue Plan

The whole essence of business rescue proceedings is the entrenchment or development of a business rescue plan for a financially distressed company as contemplated in section 150 of the CA. It is the duty of the business rescue practitioner to prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151 of the CA.[1201] The business rescue plan is to be published by the company within 25 business days after the date on which the practitioner was appointed or longer time as may be allowed by the court on the application by the company, or the holder of the majority of the creditors voting interests.

1. Contents of Business Rescue Plan

The business rescue plan (Plan) contains all the information reasonably required to facilitate affected persons in deciding whether or not to accept the plan. Thus, the Plan is divided into three parts,[1202] as follows:

[1197]CA, *op cit*, s. 149(1)(a).
[1198]*Ibid*, s. 149(1)(b).
[1199]*Ibid*, s. 149(1)(c).
[1200]*Ibid*, s. 150(2).
[1201]*Ibid*, s. 150(1).
[1202]*Ibid*, s. 150(2).

Part A- Background

This part[1203] must include the following:

a. A complete list of all the material assets of the company;

b. A complete list of the creditors of the company;

c. The probable dividend that will be received by creditors, in their specific classes, if the company were to be placed in liquidation;

d. A complete list of the holders of the company's issued securities;

e. A copy of the written agreement concerning the practitioner' remuneration;

f. A statement whether the Plan includes a proposal made informally by a creditor of the company.

Part B- Proposals

This part must include the following:

a. The nature and duration of the moratorium attached to the Plan;

b. The extent to which the company is to be released from the payment of its debts, and the extent to which any debts is to be converted to equity in the company or another company;

c. The on-going role of the company, and the treatment of any existing agreements;

d. The property of the company that is to be available to pay creditors' claims;

e. The order of preference in which the proceeds of property will be applied to pay creditors if the Plan is adopted

f. The benefits of adopting the Plan as opposed to benefits that be received

[1203]CA, *op cit*, s. 150(2)(a).

by creditors if the company were to be placed in liquidation;

g. The effect of the Plan on the holders of each class of the company's issued securities.

Part C- Assumptions and Conditions

This must include the following:

a. A statement of the conditions that must be satisfied, if any, for the Plan to come into operation and be fully implemented;

b. The effect, if any, that the Plan contemplates in the number of employees, and their terms and conditions of employment;

c. The circumstances in which the Plan will end;

d. A projected balance sheet for the company; and statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed Plan is adopted.

The projected balance sheet and statement must include a notice of any material assumptions on which the projections are based; and may include alternative projections based on varying assumptions and contingencies.[1204]

Furthermore, a proposed Plan must conclude with a certificate by the practitioner stating that any:[1205]

1. Actual information provided appears to be accurate, complete and up to date; and

2. Projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.

[1204]CA, *op cit*, s. 150(3).
[1205]*Ibid*, s. 150(4).

2. Consideration of Proposed Business Rescue Plan

The practitioner, must within 10 business days after publishing a Plan, commence and preside a meeting of creditors and any other holders of a voting interest for the purpose of considering the Plan.[1206] At the meeting convened for consideration of the Plan, the practitioner must:

i. Introduce the proposed Plan for consideration by the creditors and if applicable, by the shareholders;[1207]

ii. Inform the meeting whether the practitioner continues to believe that there is reasonable prospect of the company being rescued;[1208]

iii. Provide an opportunity for the employees' representatives to address the meeting[1209]

iv. invite discussion, entertain and conduct a vote on any motion to amend the proposed Plan or direct the practitioner to adjourn the meeting in order to revise the Plan for further consideration;[1210]

v. Call for a vote for preliminary approval of the proposed Plan, as amended, if applicable.[1211]

The proposed Plan will be approved on a preliminary basis if it was supposed by the holders of more than 75% of the creditors' voting interests that were voted and the votes in support of the proposed Plan included at least 50% of the independent creditors' voting interest, if any, that were voted.[1212]An independent creditor is a person who is a creditor of the company, including an employee of the company who

[1206]CA, *op cit*, s. 151(1) as amended by CAA, *op cit*, s. 95.
[1207]CA, *ibid*, s. 152(1)(a) as amended by CAA, *ibid*, s. 96(a).
[1208]CA,*ibid*,s.152(1)(b).
[1209]*Ibid*, s. 152(1)(c).
[1210]*Ibid*, s. 152(1)(d).
[1211]*Ibid*, s. 152(1)(e).
[1212]*Ibid*, s. 152(2)(a)(b).

is a creditor in terms of section 144(2) of the Companies Act; and is not related to the company, a director or the practitioner.[1213]

It should be stated that where a proposed Plan is not approved on a preliminary basis, the Plan is deemed rejected, and may be reconsidered subject to section 153 of the CA.[1214] On the other hand, where the meeting approves a proposed Plan on a preliminary basis and does not alter the rights of the holders of any class of the company's security, such approval constitutes the final adoption of the plan, subject to the satisfaction of any contingent conditions.[1215] But if the meeting approves a proposed Plan on a preliminary basis and does alter the rights of the holders of any class of the company's securities, the practitioner must commence and hold a meeting of holders of the class or classes of securities, whose rights would be altered by the plan, and call for a vote by them to approve the adoption of the Plan.[1216] If a majority of the voting rights that were exercised, either support adoption of the Plan, it is deemed to have been finally adopted, subject only to a satisfaction of any contingent conditions[1217] or oppose the adoption of the Plan, the Plan is deemed to have been rejected, and may be considered further only in terms of section 153 of the CA.[1218]

In a situation where a proposed Plan is rejected, the practitioner may seek a vote of approval from the holders of voting interests to prepare and publish a revised Plan or advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders on the grounds that it was inappropriate.[1219] It should be noted that where the practitioner fails or neglects to take any action as contemplated herein before, any affected person present at the

[1213]CA, *op cit*, s. 128 (1) (g) (2) as amended by CAA, *op cit*, s. 81(b).
[1214]CA, *ibid*, s. 152 (3) (a).
[1215]*Ibid*, s. 152 (3) (b).
[1216]*Ibid*, s. 152 (3) (c) (i).
[1217]*Ibid*, s. 152 (3) (c) (ii) (aa).
[1218]*Ibid*, s. 152 (3) (c) (ii) (bb).
[1219]*Ibid*, s. 153 (1) (a) (i) (ii).

meeting may stand in place of the practitioner to so do.[1220] However, any affected person, or combination of affected persons may make a binding offer to purchase for valuable consideration the voting interests of one or more persons who opposed the adoption of the Plan.[1221]

3. Effect of Adoption of Proposed Business Rescue Plan

The adoption of a Plan has the following effects:

1. It is binding on the company, and on each of the creditors of the company and every holder of the company' securities, whether or not such a person was present at the meeting where the plan was adopted; voted in favour of adoption of the Plan; or in the case of creditors, had proven their claims against the company.[1222]
2. Any prior rights to enforce debts and claims by a creditor is abated and is only exercised in accordance with the terms and conditions in the plan[1223]. Suffice to state that if a Plan has been approved and adopted, a creditor is not entitled to enforce any debt owed by the company, except to the extent provided for in the Plan.[1224]
3. The company under the direction of the practitioner must take all necessary steps to attempt to satisfy any conditions on which the Plan is contingent; and implement the Plan as adopted.[1225] In furtherance to this, when the Plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the Plan.[1226]

[1220]CA, *op cit*, s. 153(1)(b) (i) (aa) (bb).
[1221]*Ibid*, s. 153(1)(b)(ii).
[1222]*Ibid*, s. 152(4).
[1223]*Ibid*, s. 154.
[1224]*Ibid*, s. 154(2).
[1225]*Ibid*, s. 152(5) (6).
[1226]*Ibid*, s. 152(8).

4. A moratorium on legal proceedings against the company is provided.[1227]

13. Arrangement or Compromise with Creditors

Another corporate rescue mechanism available under the extant law in the Republic of South Africa is scheme of arrangement or compromise. The unique feature of this mechanism is that it can be invoked by a company, irrespective of whether or not it is financially distressed, unless the company is engaged in business rescue proceedings.[1228]

1. Procedure

The board of a company or the liquidator of such a company if it is being wound up may propose an arrangement or a compromise of its financial obligations to all of its creditors or to all of the members of any class of its creditors.[1229] An arrangement or a compromise is commenced by delivery of a copy of the proposal and notice of meeting to consider the proposal to every director of the company or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by the company and the Companies and Intellectual Property Commission.[1230]

It is the procedure that a proposal contemplated in section 155(2) of the CA must contain all information reasonably required to facilitate creditors in deciding whether or not to accept or reject the proposal and is divided into three parts, namely (i) Part A- Background; (ii) Part B- Proposal; (iii) Part C –Assumptions and Conditions.[1231] A salient feature of the proposal in an arrangement or a compromise is that it makes provision for the nature and duration of any proposed debt

[1227]CA, *op cit*, s. 150 (2) (b) (i).
[1228]*Ibid*, s. 155(1).
[1229]*Ibid*, s. 155(2).
[1230]*Ibid*, s. 155(2)(a)(b).
[1231]*Ibid*, s. 155(3)(a)(b)(c).

moratorium.[1232] This feature is not applicable in arrangement and compromise under the CAMA.

The proposal by the board of a company or the liquidator of such a company if under liquidation proceedings can be either approved or rejected at the meeting convened or called to consider the proposal. Where the proposal is supplied by a majority representing at least 75% in value of the creditors or class, as the case may be, present and voting in person or by proxy at the meeting called to consider the proposal, such a proposal would be deemed to have been adopted by the creditors.[1233]

Where a proposal is adopted at the meeting called to consider the proposal, the company may apply to the court for an order approving the proposal[1234] and the court may sanction the compromise as set out in the adopted proposal if it considers it just and equitable to do so.[1235] In this respect, the court applies the just and equitable principle in the case of proposal by the board of the company, having regard to the number of creditors or any affected class of creditors, who were present or represented at the meeting, and who voted in favour of the proposal.[1236] In the case of a proposal by a liquidator of a company, the court applies the just and equitable principle, having regard to the report of the master.[1237] The master[1238] means the person holding the office of that name in terms of the Supreme Court Act.[1239]

Where the court sanctions a compromise, a copy of the order of the court has to be filed within five business days and attached to each copy of one company's'

[1232] CA, *op cit*, s. 155(3)(b)(i).
[1233] *Ibid*, s. 155 (6).
[1234] *Ibid*, s. 155 (7) (a).
[1235] *Ibid*, s. 155 (7) (b).
[1236] *Ibid*, s. 155 (7) (b) (i).
[1237] *Ibid*, s. 155 (7) (b) (ii).
[1238] *Ibid*, s.1.
[1239] No. 59 of 1959.

Memorandum of Incorporation.[1240] Hence, the order of one court sanctioning a compromise is final and binding on all of the company's creditors or all of members of the relevant class of creditors, as the case may be, as of the date in which it is filed.[1241]

The corporate rescue mechanisms available in the Republic of South Africa are not only home-grown but dynamic, flexible and simple to facilitate the rehabilitation of a company that is financially distressed. Furthermore, the procedure for business rescue proceedings is reasonably holistic to the extent that the interests of all the stakeholders in a company were incorporated. However, while the procedure for business rescue proceedings made obvious references to the rejection of a proposed Plan and thereby dismissal of the business rescue proceedings and placing the company under liquidation proceedings,[1242] the law and procedure relating to the liquidation proceedings after the conversion is still under the provisions of the Companies Act[1243] by virtue of item 9, schedule 5 of the CA seems a descent into retrogression. Also the role of court in the respective corporate rescue mechanism in the Republic of South Africa is minimal and thus saves time and cost.

4.4 The Republic of India

There are two main modes of corporate rescue mechanisms in the Republic of India. These are the Corporate Insolvency Resolution Process[1244] and Fast Track Corporate Insolvency Resolution Process.[1245]

[1240]CA, *op cit*, s. 155(8)(a)(b).
[1241]*Ibid*, s. 155(8)(c).
[1242]*Ibid*, ss. 131(4) (b), 140 (4), 130(5)(c)(1).
[1243]No 61of 1973, chapter xiv.
[1244]Insolvency and Bankruptcy Code 2016 (IBC), chapter 11, ss. 6–32 (India).
[1245]*Ibid*, chapter iv, ss. 55–58.

1. Corporate Insolvency Resolution Process (CIRP)

These are rescue mechanisms provided in the Insolvency and Bankruptcy Code to resolve corporate insolvency matters.

2. Modes of Initiation of CIRP

CIRP may be initiated by a financial creditor,[1246] an operational creditor[1247] or the corporate applicant [1248] itself where a corporate debtor commits a default.[1249]

A financial creditor[1250] either by itself or jointly with other financial creditors may file an application to initiate corporate resolution process against a corporate debtor before the Adjudicating Authority.[1251] Adjudicating Authority means the National Company Law Tribunal constituted under section 408 of the Companies Act 2013 when a default has occurred.[1252] The application filed by a financial creditor shall be accompanied with a record of the default recorded with the information utility,[1253] or such other record or evidence of default as may be specified; the name of the resolution professional[1254] proposed to act as an intern resolution professional; and any other information as may be specified by the Board.[1255]

The Adjudicating Authority shall within fourteen days of the receipt of the application filed by the financial creditor, ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor.[1256] Where the Adjudicating Authority is satisfied that a default has

[1246]IBC, *op cit*, s. 5(7).
[1247]*Ibid*, s. 5(20).
[1248]*Ibid*, s. 3(8).
[1249]*Ibid*, s. 3 (12). "Default" means non-payment of debt when while or any part or instalment of the amount have become due and payable and is not repaid by the debtor or corporate debtor.
[1250]*Ibid*, s. 5(7).
[1251]*Ibid*, s. 5(1).
[1252]*Ibid*, s. 7(i).
[1253]*Ibid*, s. 3(21) -means a person who is registered with the Board as an information utility under section 210
[1254]*Ibid*, s. 3(19).
[1255]*Ibid*, s. 7(3).
[1256]*Ibid*, s. 7(4).

occurred and the application filed by the financial creditor is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit the application.[1257] Where the Adjudicating Authority is satisfied that the default has not occurred or the application filed by the financial creditor is incomplete or any disciplinary proceedings is pending against the proposed resolution professional, it may, by order, reject such application.[1258] It should be noted that where the Adjudicating Authority rejects an application on the ground of incomplete application, it shall give notice to the applicant to rectify the defect in the application within three days of receipt of such notice from the Adjudicating Authority.[1259] In all cases, the Adjudicating Authority within two days of an order of admission or rejection of an application, communicate same to the financial creditor and the corporate debtor.[1260]

An "Operational Creditor"[1261]may, on the occurrence of a default, deliver a demand notice of unpaid operational debt or copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form as may be prescribed, through an information utility, wherever applicable, or by registered post or courier or by such electronic mode of communication, as may be specified. After the expiry period of ten days from the date of delivery of the notice or invoice demanding payment, if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under sub-section (2) of section 8 of the IBC, such operational debtor may file an application before the Adjudicating Authority for

[1257]IBC, *op cit*, s. 7(5)(a).
[1258]*Ibid*, s. 7(5)(b).
[1259]*Ibid*, s. 7(5) proviso.
[1260]*Ibid*, s. 7(7).
[1261]*Ibid*, s. 5(20)- means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred (including a person resident outside India), [1261] "Operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of these payment of dues arising under any law for the time being in force and payable to the central government, any state government or any local authority..

initiating corporate insolvency resolution process.[1262] The application shall be accompanied with a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor; an affidavit to the effect that the corporate debtor has not given notice of dispute of the operational debt; a copy of the certificate from the operational creditor's financial institution confirming that there is no payment of an unpaid operational debt by the corporate debtor and such other information as may be specified.[1263] The operational creditor may propose a resolution professional to act as an interim resolution professional.[1264]

The Adjudicating Authority shall, within fourteen days of the receipt of the application filed by an operational creditor, by an order, admit the application and communicate such decision to the operational creditor and the corporate debtor if[1265]:-

(i) The application filed by the operational creditor is complete;

(ii) There is no repayment of the unpaid operational debt;

(iii) The invoice or notice for payment to the corporate debtor has been delivered by the operational creditor;

(iv) No notice of dispute has been received by the operational creditor or there is no record of dispute in the information utility;

(v) There are no disciplinary proceedings pending against any proposed resolution professional to act as interim resolution professional.

However, where the converse to the above is the case, the Adjudicating Authority shall by order, reject the application and communicate such decision to the operational creditor and the corporate debtor.[1266] It should be noted that before the Adjudicating Authority rejects an application, the operational creditor, shall be given

[1262] IBC, *op cit*, s. 9(1).
[1263] *Ibid*, s. 9(3).
[1264] *Ibid*, s. 9(4).
[1265] *Ibid*, s. 9(5)(I).
[1266] *Ibid*, s. 9(5)(ii).

notice to rectify the defect in the application within three days of the date of receipt of such notice from the Adjudicating Authority.[1267]

A corporate Applicant[1268] may where a corporate debtor[1269] has committed a default, file an application for initiating corporate insolvency resolution process with the Adjudicating Authority.[1270] The corporate applicant shall along with the application furnish the information relating to its books of account and such other documents relating to such period as may be specified and the resolution professional proposed to be appointed as an interim resolution professional.[1271]

The Adjudicating Authority shall within a period of fourteen days of the receipt of the application, by an order, admit the application, if it is complete or reject the application, if it is incomplete.[1272]

3. Disqualification from Initiating CIRP

Although a financial creditor or an operational creditor or a corporate debtor are generally qualified to initiate corporate insolvency resolution process, the following persons are not entitled to make an application to initiate CIRP, namely:

(i) A corporate debtor undergoing a CIRP;[1273]

(ii) A corporate debtor having completed CIRP in last twelve months preceding the date of making the application;[1274]

(iii) A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved twelve months before the

[1267]IBC, *op cit*, s. 9(5)(ii) proviso.
[1268]*Ibid*, s. 5(5)- means (a) corporate debtor; or (b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or (c) an individual who is in charge of managing the overall operations and resources of the corporate debtor; or (d) a person who has the control and supervision over the financial affairs of the corporate debtor.
[1269]*Ibid*, s.3(8)- means a corporate person who owes a debt to any person.
[1270]*Ibid*, s. 10(1).
[1271]*Ibid*, s. 10(3).
[1272]*Ibid*, s. 10(4).
[1273]*Ibid*, s. 11(a).
[1274]*Ibid*, s. 11(b).

date of making of an application;[1275]

(iv) A corporate debtor in respect of whom a liquidation order has been made.[1276]

4. Duration of CIRP

CIRP commences from the date of admission of the application.[1277] CIRP shall be completed within a period of one hundred and eighty days from the date of the application to initiate such process.[1278] However, the resolution professional shall file an application to the Adjudicating Authority to extend the period of the CIRP if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 75% of the voting shares.[1279] It should be noted that while the Adjudicating Authority may by order extend the duration of such process by further period as it thinks fit, it cannot exceed ninety days[1280] and not for more than once.[1281]

5. Effects of Admission of Application for Initiation of CIRP

The admission of an application for initiation of CIRP has the following effects:

(1) The Adjudicating Authority by an order, shall declare a moratorium for the purposes set out in section 14 of the IBC[1282]. A moratorium is declared to prohibit all of the following:[1283]

(i) the institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other

[1275]IBC, *op cit*, s. 11(c).
[1276]*Ibid*, s. 11(d).
[1277]*Ibid*, ss. 7(6) (Application filed by financial creditor), 9 (6) (Application filed by operational creditor), 10 (5) (Application filed by corporate applicant).
[1278]*Ibid*, s. 12(1).
[1279]*Ibid*, s. 12(2).
[1280]*Ibid*, s. 12(3).
[1281]*Ibid*, s. 12(3) proviso.
[1282]*Ibid*, s. 13(1)(a).
[1283]*Ibid*, s. 14(1).

authority;[1284]

(ii) the corporate debtor from transferring, encumbering, alienating or disposing of any of its assets or any legal right or beneficial interests;[1285]

(iii) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act;[1286]

(iv) the recovery of any property by an owner or lesser where such property is occupied by or in the possession of the corporate debtor;

(v) termination or suspension of the supply of essential goods or services to the corporate debtors as may be specified.[1287]

It is worthwhile to state that the order of moratorium declared by the Adjudicating Authority shall have effect from the date of order until the completion of the CIRP.[1288] However, such moratorium will not apply to such transactions as may be notified by the Central Government of India in consultation with any financial sector regulator[1289] and will also cease, if the Adjudicating Authority approves the resolution plan or passes an order for liquidation of the corporate debtor.[1290]

2. The Adjudicating Authority by an order shall cause a public announcement of the initiation of The CIRP and call for the submission of claims.[1291] Such public announcement of the CIRP shall contain the information set out in section (15)(1) of the IBC. It should be mentioned that the public announcement of the corporate

[1284] IBC, *op cit*, s. 14(1)(a).
[1285] *Ibid*, s. 14(1)(b).
[1286] 2002.
[1287] IBC, *op cit*, s. 14(2).
[1288] *Ibid*, s. 14(4).
[1289] *Ibid*, s. 14(4).
[1290] *Ibid*, s. 14 proviso.
[1291] *Ibid*, ss. 13(1) (b), 15(1)(c)(e).

insolvency resolution process is made immediately after the appointment of the interim resolution professional.[1292]

3. The Adjudicating Authority, by an order, shall appoint an interim resolution professional in the manner as laid down in section 16 of the IBC.[1293]

6. Appointment of Interim Resolution Professional

The Adjudicating Authority shall within fourteen days from the date of commencement of the insolvency resolution process, appoint an interim resolution professional.[1294] Where the application for CIRP was made by a financial creditor or the corporate debtor, the resolution professional, as proposed respectively in the application, shall be appointed as the interim resolution professional.[1295] Where the application was filed by an operational creditor, if there was no proposal for an interim resolution professional, the Adjudicating Authority shall make a reference to the Board for the recommendation of an insolvency professional, who may act as an interim resolution professional, but if there was a proposal for an interim resolution professional, the resolution professional as proposed, shall be appointed as the interim resolution professional.[1296] It is important to note that an interim resolution professional acts in that capacity for a maximum period of thirty days from the date of his appointment.[1297]

An interim resolution professional is insolvency professional[1298] enrolled with an insolvency professional agency as its member[1299] and also registered with the

[1292] IBC, *op cit*, s. 13 (2).
[1293] *Ibid*, s. 13 (1) (c).
[1294] *Ibid*, ss. 16 (1), 5 (27) interim resolution professional has same meaning as resolution professional.
[1295] *Ibid*, s. 16 (2).
[1296] *Ibid*, s. 16 (3).
[1297] *Ibid*, s. 16 (5).
[1298] *Ibid*, s. 5 (27).
[1299] *Ibid*, s. 207 (1).

Board as insolvency professional.[1300] Thus, a person can only be qualified to be appointed an interim resolution professional if he is insolvency professional.

7. **Effects of Appointment of Interim Resolution Professional**.

The appointment of interim resolution professional in corporate insolvency resolution process from the date of appointment begets the following effect:-

1. The management of the affairs of the corporate debtor is invested in the interim resolution professional.[1301]
2. The powers of the board of directors of the corporate debtor, stands suspended, and is to be exercised by the interim resolution professional.[1302]
3. The officers and managers of the corporate debtor are to report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be demanded by the interim resolution professional.[1303]

4 The financial institutions maintaining accounts of the corporate debtor shall act on the instruction of the interim resolution professional in relation to such accounts and furnish all information relating to the corporate debtor available to them to the interim resolution professional.[1304]

8. Duties and Authority of Interim Resolution Professional

The interim resolution professional is conferred with some far-reaching duties and authority in order to achieve the purpose of the CIRP. Some of the duties of the interim resolution professional include:

1. collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate

[1300]IBC, *op cit*, s. 3 (19).
[1301] *Ibid*, s. 17 (1) (a).
[1302]*Ibid*, s. 17 (1) (b).
[1303]*Ibid*, s. 17 (1) (c).
[1304]*Ibid*, s. 17 (1) (d).

debtor;[1305]

2. receive and collect all the claims submitted by creditors to him, pursuant to the public announcement made under sections 13 and 15 of the IBC;[1306]
3. constitute the committee of creditors;[1307]
4. monitor the assets of the corporate debtor and manage its operation until a resolution professional is appointed by the committee of creditors;[1308]
5. file information collected with the information utility, if necessary;[1309] take control and custody of any asset over which the corporate debtor has ownership rights as recorded in the balance sheet of the corporate debtor, or with the information utility or the depository of securities or any other registry that records the ownership of assets;[1310]
6. provide all the information, documents and records pertaining to the corporate debtor in his possession and knowledge to the resolution professional;[1311]
7. to perform such other duties as may be specified by the Board;[1312]
8. to take reasonable care and diligence while performing his duties.[1313]

In order to perform his duties, an interim resolution professional is vested with the authority:

1. to appoint accountants, legal counsel or such other professionals as may be necessary,[1314]

[1305] IBC, *op cit*, s. 18 (a).
[1306] *Ibid*, s. 18 (b).
[1307] *Ibid*, s. 18 (c).
[1308] *Ibid*, s. 18 (d).
[1309] *Ibid*, s. 18 (e).
[1310] *Ibid*, s. 18 (f).
[1311] *Ibid*, s. 23 (3).
[1312] *Ibid*, s. 18 (g).
[1313] *Ibid*, s. 208 (2) (a).

2. to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of CIRP,[1315]
3. to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property,[1316]
4. to issue instructions to its personnel as may be necessary for keeping the corporate debtor as a giving concern,[1317]
5. to take all such actions as are necessary to keep the corporate debtor as a going concern.[1318]

9. Committee of Creditors

After the collation of all claims received against the corporate debtor and determination of the financial position of the corporate debtor, the interim resolution professional, shall constitute a committee of creditors.[1319] The committee of creditors shall comprise all financial creditors of the corporate debtor.[1320] All decisions of the committee of creditors shall be taken by a vote of not less than seventy-five per cent of voting shares of the financial creditors.[1321] However, where a corporate debtor do not have financial creditors, the committee of creditors shall be constituted and

[1314]*Ibid*, s. 20 (2) (a).
[1315]IBC, *op cit*, s. 20 (2) (b).
[1316]*Ibid*, s. 20 (2) (c).
[1317]*Ibid*, s. 20 (2) (d).
[1318]*Ibid*, s. 20 (2) (e).
[1319]*Ibid*, s. 21 (1).
[1320]*Ibid*, s. 21 (2).
[1321]*Ibid*, s. 21 (8).

comprise of such persons to exercise such functions in such a manner as may be specified by the Board.[1322]

The first meeting of the committee of creditors shall be held within three days of being constituted.[1323] It should be noted that subsequent meetings of the committee may be by such electronic means as may be specified.[1324] All meetings of the committee shall be conducted by the resolution professional,[1325] who shall give notice of each meeting of the committee to the members of the suspended board of directors of the corporate debtor.[1326] Although, the directors may attend the meetings of the committee, they do not have any right to vote in such meetings.[1327] Furthermore, the absence of any such director at the meeting of the committee shall not invalidate proceedings of such meeting.[1328] Instructively, any creditor who is a member of the committee may appoint an insolvency professional other than the resolution professional to represent such creditor in a meeting of the committee.[1329]

The Committee of Creditors exercise the following functions:

1. Appoint the resolution professional;[1330]
2. Make request for financial information in relation to the corporate debtor during the CIRP from the resolution professional;[1331]
3. Give prior approval of certain actions to be taken by the resolution professional as laid down in section 28 of the IBC;
4. Replace a resolution professional found wanting in the performance of

[1322]*Ibid*, s. 21(8) proviso.
[1323]IBC, *op cit*, s. 22 (1).
[1324]*Ibid*, s. 24 (1).
[1325] *Ibid*, s. 24 (2).
[1326]*Ibid*, s. 24 (3).
[1327]*Ibid*, s. 24 (4).
[1328]*Ibid*.
[1329]*Ibid*, s. 24 (5).
[1330]*Ibid*, s. 22 (2).
[1331]*Ibid*, s. 21 (9).

his duties;[1332]

5. Approve the resolution plan presented to it by the resolution professional.[1333]

10. Appointment of Resolution Professional

It is the duty of the committee of creditors in the first meeting to appoint the resolution professional.[1334] The appointment of the resolution professional[1335] by the committee of creditors may either be by a resolution to appoint the interim resolution professional as the resolution professional or to replace the interim professional by another resolution professional.[1336] Where the committee of creditors resolve to continue with the interim resolution professional as resolution professional, it shall communicate the decision to the interim resolution professional, corporate debtor and Adjudicating Authority.[1337] But where the committee of creditors resolve to replace the interim resolution professional, it shall file an application before the Adjudicating Authority for the appointment of the proposed resolution professional.[1338]

In a situation where the committee filed an application, the Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation. Where the Board confirms the proposed resolution professional, the Adjudicating Authority shall then make the appointment.[1339] If the Board refuses to confirm the name of the proposed resolution professional within ten days of the receipt of the name, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until

[1332]*Ibid*, s. 26.
[1333]IBC, *op cit*, s. 30 (4).
[1334] *Ibid*, s. 22 (2).
[1335]*Ibid*, s. 5 (27).
[1336]*Ibid*.
[1337]*Ibid*, s. 22 (3) (a).
[1338]*Ibid*, s. 22 (3) (b).
[1339]*Ibid*, s. 22 (4).

such time as the Board confirms the appointment of the proposed resolution professional.[1340]

The primary function of the resolution professional upon appointment is to conduct the entire CIRP and manage the operations of the corporate debtor during the period of the CIRP.[1341]

A person is qualified to be a resolution professional if he or she is enrolled with an insolvency professional agency as its member and also registered with the Board as insolvency professional.

11. Powers and Duties of the Resolution Professional

The resolution professional shall exercise powers and perform duties as are provided in the extant law. These powers and duties are exercised by the resolution professional, either on his own volition or with the prior approval of the committee of creditors,[1342] which duty, in the main, is to preserve and protect the assets of the corporate debtor, including the continued business operations of the corporate debtor.[1343] In order to achieve this duty, the resolution professional shall undertake the following actions, namely:

1. Take immediate custody and control of all assets of the corporate debtor, including the business records of the corporate debtor;[1344]
2. Represent and act on behalf of the corporate debtor with third parties, exercise rights for the benefit of the corporate debtor in judicial, quasi-judicial or arbitration proceedings;[1345]
3. Raise interim finances, subject to the approval of the committee of

[1340] *Ibid*, s. 22 (5).
[1341] IBC, *op cit*, s. 23 (1).
[1342] *Ibid*, s. 28 (1).
[1343] *Ibid*, s. 25 (1).
[1344] *Ibid*, s. 25 (2) (a).
[1345] *Ibid*, s. 25 (2) (b).

Creditors;[1346]

4. Appoint accountants, lawyers and other advisors in the manner as specified by the Board;[1347]
5. Maintain an updated list of claims;[1348]
6. Convene and attend all meetings of the committee of creditors;[1349]
7. Prepare the information memorandum in accordance with section 29 of the IBC;[1350]
8. Invite prospective lenders, investors and any other persons to put forward resolution plans;[1351]
9. Present all resolution plans at the meetings of the committee of Creditors;[1352]
10. File application for avoidance of transactions;[1353]
11. Any further actions as may be specified by the Board.[1354]

12. Resolution Plan

Resolution plan[1355] is a plan proposed by any person for insolvency resolution of the corporate debtor as a going concern. A resolution plan is normally prepared on the basis of the information memorandum made by the resolution professional, and submitted by a resolution applicant[1356] to the resolution professional.[1357]

Although, a resolution plan is not mandated to be in any prescribed form under the extant legislation, every resolution plan must:

[1346]*Ibid*, s. 25 (2) (c).
[1347]IBC, *op cit*, s. 25 (2) (d).
[1348]*Ibid*, s. 25 (2) (e).
[1349] *Ibid*, s. 25 (2) (f).
[1350]*Ibid*, s. 25 (2) (g).
[1351]*Ibid*, s. 25 (2) (h).
[1352]*Ibid*, s. 25 (2) (i).
[1353]*Ibid*, s. 25 (2) (j).
[1354]*Ibid*, s. 25 (2) (k).
[1355]*Ibid*, s. 5 (26).
[1356]*Ibid*, s. 5 (25) - means any person who submits a resolution plan to the resolution professional.
[1357]*Ibid*, s. 30 (1).

1. provide for the payment of insolvency resolution process costs[1358] in a manner specified by the Board in priority to the repayment of other debts of the corporate debtor;[1359]
2. provide for the repayment of the debt of operational creditors in such manner specified by the Board.[1360] However, the provision for repayment of the debts in the resolution plan shall not be less than the amount to be paid to the operational creditors in the event of a liquidation of the corporate debtor under section 53 of the IBC;[1361]
3. not contravene any of the provisions of the law for the time being in force;[1362]
4. confirm to such other requirements as may be specified by the Board.[1363]

Upon receipt of any resolution plan, the resolution professional shall examine such resolution plan and confirm that it meets with the requirements or conditions of a resolution plan.[1364] Where the resolution professional is satisfied that a resolution plan meets the requirements of a resolution plan, he or she shall present same to the committee of creditors for its approval.[1365] It should be noted that the resolution applicant may attend the meeting of the committee of creditors in which the resolution plan is considered[1366] but shall not have a right to vote at the meeting unless such resolution applicant is a financial creditor.[1367]

[1358]*Ibid*, s. 5 (13).
[1359]IBC, *op cit*, s. 30 (2) (a).
[1360]*Ibid*, s. 30 (2) (b).
[1361]*Ibid*, s. 30 (2) (b).
[1362]*Ibid*, s. 30 (2) (c).
[1363]*Ibid*, s. 30 (2) (d).
[1364]*Ibid*, s. 30 (2).
[1365]*Ibid*, s. 30 (3).
[1366]*Ibid*, s. 30 (5).
[1367]*Ibid*, s. 30 (5) proviso.

Where the committee of creditors approve a resolution plan, the resolution professional shall submit the resolution plan as approved to the Adjudicating Authority.[1368] If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors met the requirements of a resolution plan and there is no material irregularity in exercise of powers by the resolution professional during the corporate insolvency resolution period, shall by an order, approve the resolution plan.[1369]

Consequently, from the date of order approving the resolution plan, it shall be binding on the corporate debtor and its employees, members, creditors, guarantors and other stake holders involved in the resolution plan. Furthermore, the moratorium order passed by the Adjudicating Authority under section 14 of the IBC shall cease to have effect[1370] and the resolution professional shall forward all records relating to the conduct of the CIRP and the resolution plan to the Board for record in its database.[1371] It is important to state that an appeal against can be made to the National Company Law Appellate Tribunal against an order approving the resolution plan.[1372] Any appeal from an order approving the resolution plan may be filed on the following grounds[1373]:-

1. The approved resolution plan is in contravention of the provisions of any law for the time being in force;
2. There has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
3. The debts owed to operational creditors of the corporate debtor have not

[1368] *Ibid*, s. 30 (6).
[1369] IBC, *op cit*, s. 31 (1) (a) (b).
[1370] *Ibid*, s. 31 (3) (a).
[1371] *Ibid*, s. 31 (3) (b).
[1372] *Ibid*, s. 32.
[1373] *Ibid*, s. 61 (3).

been provided for in the resolution plan in the manner specified by the Board;

4. The insolvency resolution process costs have not been provided for repayment in priority of all other debts;
5. The resolution plan does not comply with any other criteria specified by the Board.

A corporate insolvency resolution process shall come to an end in the happening of the following events:

1. Approval or rejection by the Adjudicating Authority of a resolution plan as approved[1374] by the committee of creditors;
2. Expiration of the corporate insolvency resolution process period as provided for in section 12 of the IBC;
3. The Adjudicating Authority did not receive a resolution plan from the resolution professional before the expiry period of the CIRP;[1375]
4. The committee of creditors passed a resolution that the corporate debtor be placed in liquidation.

13. Fast Track CIRP

A fast track CIRP is a corporate rescue mechanism conducted in accordance with chapter IV of the IBC[1376] and is to be completed within a period of ninety-nine days from the insolvency commencement date.[1377] However, the resolution professional may file an application to the Adjudicating Authority for extension of the period of the fast track CIRP if instructed to do so by the committee of creditors.[1378] In this case, if the Adjudicating Authority determines that the case is of such complexity that

[1374]IBC, *op cit*, s. 31 (1) (2).
[1375]*Ibid*, s. 31 (1).
[1376]*Ibid*, s. 55 (1).
[1377]*Ibid*, s. 56 (1).
[1378]*Ibid*, s. 56 (2).

an orderly fast track CIRP cannot be completed within a period of ninety-nine days, by an order, extend the duration of the process for a period not exceeding forty-five days[1379] and not more than once.[1380]

An application for fast track CIRP may be initiated by a creditor or corporate debtor to the Adjudicating Authority by furnishing the proof of the existence of default as evidenced by records available with information utility or such other means as may be specified by the Board.[1381] However, an application for fast track CIRP may be made in respect of the following corporate debtors, namely:

1. A corporate debtor with assets and income below a level as may be notified by the Central Government;[1382] or
2. A corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government;[1383] or
3. Such other category of corporate persons as may be notified by the Central Government.[1384]

It is pertinent to state that the procedure for conducting a corporate insolvency resolution process as earlier on discussed in this study, applies to fast track CIRP as the context may require.[1385] A fast track CIRP is distinct from a CIRP under chapter 11 of the IBC by the shorter duration of the process.

The available corporate rescue mechanisms in the Republic of India, that is, the Corporate Insolvency Resolution Process (CIRP) and the Fast Track CIRP, stands out

[1379] *Ibid*, s. 56 (3).
[1380]IBC, *op cit*, s. 56 (3) proviso.
[1381]*Ibid*, s. 57 (a).
[1382]*Ibid*, s. 55 (2) (a).
[1383]*Ibid*, s. 55 (2) (b).
[1384]*Ibid*, s. 55 (2) (c).
[1385]*Ibid*, s. 58.

with the remarkable feature that provided for the exhaustion of any of the CIRP as condition precedent for initiation of liquidation proceedings.[1386]

4.5 The United States of America

In addition to the various State Laws, the Bankruptcy Code[1387] (herein after referred to as the 'USBC') governs the cause of bankruptcy in the United States of America. It is important to note that the word "bankruptcy" is used in the USBC to define when an individual or corporate entity is unable to pay debts or discharge obligations, as and when due. Accordingly, the USBC is divided into 8 chapters. While chapters 1, 3 and 5 are administrative rules that generally apply to all types of bankruptcy proceedings, chapters 7, 9, 11, 12 and 13 are substantive rules for different types of bankruptcies, with one or two objectives, rehabilitation or liquidation. In this study, it is chapter 11 of the USBC which deals with rehabilitation of corporate entities that will be examined.

1. Chapter 11 Reorganization or Proceeding

The general purpose of Chapter 11 proceeding is to provide a meaningful opportunity to preserve the debtor's business by restructuring its debts and equity interest through a plan of reorganisation. The procedure for Chapter 11 proceeding follows almost the same steps as Chapter 7 proceedings that deals with liquidation of companies under the USBC.

Chapter 11 proceeding is initiated or commenced by a petition, either voluntary or involuntary. Voluntary petition is mostly filed by a debtor[1388] and an involuntary

[1386] *Ibid*, s. 33.
[1387] 1978 (as amended).
[1388] 11 USC, *op cit*, § 301; J F Beatty & S S Samuelson, *Business Law for A New Century* (New York: Little, Brown and Company Ltd, 1996) p. 626.

petition usually filed by creditors.[1389] However, three creditors with "bona fide unsecured claims" of at least $14, 425 in the aggregate are needed to file an involuntary petition against a debtor.[1390]

The commencement of Chapter 11 proceeding by way of a petition triggers an 'automatic stay'.[1391] An automatic stay operates as an injunction or prohibition against all actions affecting the debtor or its property. It also provides a respite and breathing spell for the debtor and for the creditors, it protects them by bringing to a halt all actions by individual creditors to obtain satisfaction of their claims using the remedies available under State law. However, there are some limited exceptions to the automatic stay that is; (i) it does not protect parties who are not in bankruptcy such as guarantors; and (ii) it does not stay the continuation or commencement of various types of regulatory actions.[1392]

Upon filing a petition, the Bankruptcy Court (Court) issues an order for relief. This order is an official acknowledgment that the debtor is under the jurisdiction of the court and it is, in a sense, the commencement of the whole bankruptcy process, that is, Chapter 11 proceeding.

2. Primary Parties in Chapter 11 Reorganization Proceeding

i. Debtor in Possession or Trustee

This is one of the striking features of the Chapter 11 proceeding. In a Chapter 11 proceeding, the debtor entity and its existing management continue to operate the business as a "debtor in possession".[1393] In other words, the debtor entity and its existing management assume the role of a liquidator under insolvency proceedings in

[1389] 11 USC, *ibid*, § 303 (a); Beatty & Samuelson, *ibid*, p. 627.
[1390] 11 USC, *ibid*, § 303 (b) (1).
[1391] 11 USC, *op cit*, § 362 (a). Automatic stay is akin to moratorium in the corporate rescue mechanisms of the United Kingdom, the Republic of India and the Republic of South Africa.
[1392] *Ibid*, § 362 (b).
[1393] *Ibid*, § 1107 – 8.

the CAMA. In addition, the debtor in possession has the first prerogative to develop a plan of reorganisation. Where a debtor in possession is incompetent or uncooperative, the Court, the creditors or the United States Trustee can appoint a trustee to take over management of the debtor's affairs.[1394]

ii. Creditors' Committee and other Official Committees.

Creditors are not permitted a direct role in operating the on-going business of the debtor in Chapter 11 proceeding. However, since in most cases, there is no neutral trustee, the creditors committee monitors the debtors' on-going operations, consults with the debtor on major business decisions and has a right to develop a plan of reorganisation if the debtor in possession fails to do so. It is pertinent to state that the creditors' committee is constituted of all the secured creditors and seven of the largest unsecured creditors willing to serve and appointed by the United States Trustee.[1395] Where the debtor is a corporation, the United States Trustee may also appoint a committee of equity shareholders to represent shareholders' interest.[1396]

3. Plan of Reorganisation ("the Plan")

The debtor has the exclusive right to propose and file a plan during the first 120 days after the order for relief.[1397] The 120 days period is called the debtor's "exclusivity period" and it is often extended by the Court[1398] for a cause. However, the exclusivity period cannot be extended beyond 18months following the order for relief.[1399] A creditor may file a Plan only if the debtor's exclusivity period for filing a Plan has

[1394]11 USC, *op cit*, § 1104.
[1395] *Ibid*, § 1102.
[1396]*Ibid*, § 1102 (a) (2).
[1397]*Ibid*, § 1121 (b).
[1398]*Ibid*, § 1121 (d).
[1399]*Ibid*, § 1121 (d) (2) (A).

expired or been terminated by the Court or if a Trustee has been appointed in the proceeding.[1400]

The debtor is required to file schedules listing all of its creditors and shareholders. If a particular claim is described as "disputed", "contingent" or "unliquidated", then proof of claim must be filed by the creditor in order to preserve its rights. Otherwise, the creditor need not file a separate proof of claim unless it disagrees with the amount of the claim as listed or if the Chapter 11 proceeding is converted to a Chapter 7 proceeding.[1401] It is important to note that where a proof of claim needs to be filed, it must be filed prior to the "bar date"[1402] established by the Court. Furthermore, all creditors and shareholders are entitled to receive advance notice of the bar date.

Creditors assert their claims by filing a "proof of claim"[1403] in accordance with the form prescribed in the Bankruptcy Rules and attach the relevant supporting documentation such as the written contract or Note, or evidence of perfected security interest. In respect of a holder of an equity interest in the debtor, it asserts its claim by filing a "proof of interest". It is often the case that because the schedule of equity security holders filed by the debtor is usually sufficient evidence of the validity and amount of shareholder interest in the debtor, it is often unnecessary for holders of equity securities to file proofs of interest.

Under Chapter 11 proceeding, all claims of creditors are placed into one or three classes, namely (i) secured claim, (ii) priority claims, (iii) unsecured claims. A

[1400]*Ibid*, § 1121.
[1401]11 USC, *op cit*, § 1111 (a).
[1402]It means the last date stipulated by the Court as the last date by which proofs of claim will normally be accepted. In Chapter 11 proceedings that involves a large amount, the bar date is commonly set by the Court for six months or more.
[1403]A proof of claim is a written statement setting forth the nature and amount of the creditor's claim against the debtor.

secured claim is a claim that is secured or backed by collateral; priority claims[1404] are those claims after the payment of secured claims that are entitled to payment priority over unsecured claims. In the general group of priority claims, it is worthy to note that certain priorities are higher than others. In other words, there are "super-super priority claims", "super-priority claims" and claims for "administrative expenses".[1405] Shareholders are also divided into classes depending on their interests, that is, preferred or common shareholders.

Instructively, it is required that before voting on a Plan, holders of claims and equity interests must receive a Court approved disclosure statement containing adequate information concerning the debtor and the Plan.[1406] Subsequently, the creditors and shareholders vote for or against the Plan. Acceptance by a class of claims require consent of at least 2/3 majority of the class of claims.[1407] Where there is an acceptance of the Plan, it is taken to the Court for confirmation and to make it binding on all parties.[1408]

The confirmation of a plan by the Bankruptcy Court is not granted as a matter of course. The Court makes a number of determinations, to wit:

i. That the Plan complies with all applicable law and has been proposed in good faith;

ii. That the Plan is feasible, that is, that the debtor has a credible business plan and can reasonably be expected to perform its obligations and accomplish the objectives set forth in the Plan;

iii. If any individual creditor voted against the Plan and objects to its

[1404]This is akin to preferential debt under s. 494 of the CAMA.
[1405]11 USC, *op cit*, § 364, 503, 507.
[1406]*Ibid*, §1125; Beatty and Samuelson, *op cit*, pp. 638 – 639.
[1407]11 USC, *ibid*, § 1126 (c).
[1408] *Ibid*, § 1129 (a).

confirmation, that the Plan passes the "Best Interests of Creditors Test".[1409]

Upon consideration of the acceptance of the Plan by the creditors and shareholders, if the Court makes the above determinations in the affirmative, it proceeds to confirm the Plan. Nevertheless, it is instructive to note that the Court can still confirm the Plan even where some classes voted against it under the principle of "crammed down".

This principle applies if at least one impaired class has voted to accept the Plan and the court finds that the treatment provided for the objecting class under the Plan does not discriminate unfairly[1410] and is fair and equitable[1411]. However, where the court rejects the Plan made by the debtor in possession, the creditors would be entitled to develop a new one.

4. Consequences of Confirmation of Plan under Chapter 11 Reorganization Proceeding

[1409]*Ibid*, § 1129 (a) (7)-This test requires the Court to determine that the dissenting creditors or shareholders are receiving under the Plan at least as much as in present value terms as they would receive if the debtor were instead liquidated under Chapter 7 proceeding. Simply put, the test requires the court to compare the probable distribution to the dissenting creditors or equity holders if the debtor were liquidated with the present value of the payment or property to be received or retained by the same creditors or equity holders under the Plan. If the Court determines that the distribution under the Plan is equal to or more than the holders would have received in Chapter 7 proceeding, then the Plan would be held to be in the best interest of creditors as they would receive at least as much as they would have received had the business been liquidated under Chapter 7 proceeding.

[1410]The prohibition against "unfair discrimination" means that, ordinarily, similar claims or equity interests must be treated similarly.

[1411]11 USC, *op cit*, § 1129 (b) (1), (2) (A) (B) (C); The precise determinations required for meeting the fair and equitable test turn on whether the class is secured or unsecured. Cram down of a secured class will be permitted if the Plan provides: (1) the secured creditors in the class will retain a lien to the extent of their secured claims and will receive deferred cash payments which have a present value equal to at least the value of their interest in the collateral, (2) for the sale of the secured creditor's collateral with the creditor's security interest attaching to the proceeds, or (3) for the realisation by the secured creditors of the "indubitable" equivalent of their secured claims. For the unsecured creditors and shareholders, cram down can be permitted if the Plan provides either that the creditors in the class receive (over time) cash payments equal to the present value of their full unsecured claims (i.e payment in full), or if creditors in the Plan are not recovering (over time) payment in full that at least classes junior to the class in question such as subordinated creditors or stockholders.

A confirmed Plan is binding on the debtors, creditors and shareholders. The debtor now owns the assets in the bankrupt estate, free of all obligations, except those listed in the Plan.[1412]

While the Chapter 11 reorganization or proceeding have been criticised for being too friendly to debtors and unfair to creditors because of the veto power conferred on shareholders over any rescue plan,[1413] the ambit and purpose of the Chapter 11 proceeding which is not limited to just rescue of ailing companies but to entrench reorganisation or restructuring of a company even where solvent, is a very laudable step in the pursuit of corporate rescue. In this study, however, it is submitted that Chapter 11 proceedings may not be readily applicable as a corporate rescue option in Nigeria without modification.[1414]

4.6 Informal Corporate Rescue Procedures

An informal corporate rescue procedure focuses on the engagements of corporate restructuring outside formal statutory insolvency procedure. Such procedures give debtor companies a flexible opportunity to attempt to resolve their troubles outside the rigid, lengthy and often time consuming formal insolvency procedures. Informal corporate rescue procedures are by informal 'workouts', 'pre-packs' and 'debt for equity swaps', cherry picking and purchase and assumption.

Workouts is a 'loose' term used to include a variety of approaches implemented differently in respective jurisdictions and equally are different in each restructuring circumstance. Informal workouts depict consensual out of court restructuring through which a financially distressed company and its creditors reach an agreement adjusting

[1412]Beatty & Samuelson, *op cit*, p. 640.
[1413]*Ibid.*
[1414]The principal feature of Chapter 11 proceeding is the debtor being the person in possession, develops the plan of reorganisation. It is a fact that in Nigeria, most of the corporate failures have been linked to corporate mismanagement and misfeasance. In other words, it would be difficult for such directors to continue to steer the affairs of a company which they failed to keep afloat.

their respective obligations. Fundamentally, the creditors agree on a 'co-ordinated approach' by seeking to work with each other to devise a collective response which is in their mutual self-interest. Notable divergences exist in so far as the implementation of workouts in different jurisdictions is concerned but not without similar main characteristics.[1415] An in-depth analysis of how a workout works and its principles are elaborated and expressed under the 'London Approach', 'pre-packs' and 'debts for equity swaps', purchase and assumption and cherry picking.

1. The 'London Approach'

The origin of the 'London Approach' can be traced back to the early 1970's, when a large number of companies, especially multi-bank based companies, encountered financial difficulties during the economic recession and concomitantly the crisis had a bad impact on the secondary banking sector of the United Kingdom.[1416] The 'London Approach' is a non-statutory and informal framework introduced with the support of the Bank of England for dealing with temporary support operations mounted by banks and other lenders to a company or group in financial difficulties, pending a possible restructuring.[1417]

Essentially, the 'London Approach' established a flexible and co-operative informal rescue arrangement for corporate rescue which relies on negotiation with banks and their collective financial support.[1418] Furthermore, the approach does not require the sanction of the court for its efficacy and implementation. Although, there is no such approach in Nigeria, the procedure that is somehow analogous, is the

[1415]UNCITRAL, 'Legislative Guide on Insolvency Law', 2005, p.22; The World Bank, 'Principles for Effective Insolvency and Creditor Rights System' (Revised Draft, 2005); INSOL, 'A Statement of Principles for a Global Approach to Multi-Creditor Workouts' (London: INSOL International, 2000).
[1416]J Armour & S Deakin, 'Norms in Private Insolvency: the 'London Approach' to the Resolution of Financial Distress' (2001) 1JCLS 21.
[1417] C Baird, 'The London Approach' (1996) 12 Insolvency Law &Practice, 87; British Bankers Association, Description of the 'London Approach', Unpublished Memo, 1996, p.1
[1418]A Belcher, *Corporate Rescue: A Conceptual Approach to Insolvency Law* (London: Sweet & Maxwell, 1997) p.118; Armour & Deakin, *art cit*, 35.

approach adopted by the AMCON in the restructuring of its purchased NPL's and toxic loans.[1419]

2. Pre-packs

This basically involves a period of pre-insolvency negotiation with a prospective purchaser of the business of an insolvent company. The assets required by the purchaser will be agreed and a price for the sale of the business settled, invariably by reference to an independent valuation. Where an administration is then entered into, the business comprising the agreed assets and goodwill, contracts, employees and the like, are transferred to the purchaser. Pre-packs may be a business sale to a third party or a 'phoenix' sale where the previous directors take over the new business. While in the US, Pre-pack is a preliminary drafted agreement, in the UK, Pre-pack is a prepared business sale.[1420] In a nutshell, Pre-pack is a method of selling the business of an insolvent company as a going concern.[1421]

The essential features of a Pre-pack include the following:

1. Engagement of an insolvency practitioner to provide pre-appointment advice and assistance with the planning and negotiation of the business;
2. Limited or "clandestine" marketing of the business in pre-appointment period on the basis that the core value of the business (goodwill, employees, customers, suppliers, etc) could quickly dissipate if there was public knowledge of the company's situation (or if an external administration itself were to come to pass before a sale was concluded);
3. Appointment of the same practitioner as voluntary administrator of the

[1419]Agabi & Onayemi, *op cit,* pp.472 – 473.
[1420]K Crawford, 'The Law and Economics of Orderly and Effective Insolvency', unpublished PhD Thesis University of Nottingham, December 2012, pp.170-193
[1421]S Frisby, 'The Second Chance Culture and Beyond: Some Observations on the Pre-pack Contribution'(2009) Law & Financial Markets Review, 242.

company whereupon the administrator executes the contract on the first day of his appointment or immediately thereafter.

3. Debt for Equity Swap

A debt for equity swap can be employed as an informal corporate rescue procedure. This refers to where a creditor agrees to exchange a debt for an equity share in the company with the hope that it will produce a greater return in future. It is an approach that can enable a suitable compromise to be reached with creditors. However, this approach can be constrained as it may be time consuming and expensive to negotiate because the consent of the company shareholders, as well as majority of the creditors are usually required.[1422] Worse still, in Nigeria, debt for equity swap as a form of compromise with creditors require the intervention of the Federal High Court and in deserving circumstance, reference to the SEC.[1423]

4. Purchase and Assumption

This is where another Company or investors purchase the liabilities of a failing company and assume ownership of its assets, usually at auction price. The assumed Company does not go through a formal winding up proceedings but is dissolved through a judicial sale of its assets and liabilities to the purchasing Company or investor through a judicial accent.[1424]

The transaction is perfected by way of duly executed Deed of Purchase and Assumption by the parties and the resolutions approving the transaction or Government white paper in case of Government Company or Company acquired or

[1422]V Finch, *Corporate Insolvency Law: Perspective and Principles* (Cambridge: CUP, 2002) p.230.
[1423]CAMA, *op cit*, s 539 (2) (3).
[1424]Ogbuanya, *op cit*, p.670; A N Ibrahim, 'Resolution of Problem Banks: Purchase and Assumption Option', A Paper delivered at the International Association of Deposit Insurers (IADI) African Regional Committee Workshop at Abuja, Nigeria from May 9-13, 2011, p.3

taken over by a regulatory agency such as the AMCON, Central Bank of Nigeria (CBN) and NDIC.[1425]

In the case of purchase and assumption in relation to reorganisation of banks, there are variants, that is, whole bank purchase and assumption, partial purchase and assumption, loss sharing purchase and assumption and bridge bank.[1426]

5. Cherry Picking

This is akin to Purchase and Assumption but is differentiated by the fact that in this case, the purchasing company or investor is not taking up or purchasing all liabilities of the failing company but is allowed to inspect the books and assets or operations or business activities of the failing company with a view to picking out those aspects it could save by integrating into its own operations.[1427]

[1425] Ogbuanya, *ibid*.
[1426] Ibrahim, *op cit*, p.7.
[1427] Ogbuanya, *op cit*, p.671.

CHAPTER FIVE

ISSUES AND CHALLENGES IN CORPORATE RESCUE AND INSOLVENCY PRACTICE IN NIGERIA

It is quite indubitable that the gloomy economic climate in Nigeria is taking its toll on business. The protracted fall in oil prices, skyrocketing foreign exchange rate and unfavourable government policies have driven the economy into its worst recession in about three decades. Consequently, corporate insolvencies are becoming rampant. In order to stem the effects of the on –going recession, many companies have adopted diverse restructuring, cost- cutting and rescue measures to stay afloat.

Unfortunately, there are certain issues and challenges that debilitate or enervate corporate rescue and insolvency practice in Nigeria. Thus, the essence of this chapter is to examine the issues and challenges in corporate rescue and insolvency practice in Nigeria.

5.1 Multifarious Statutory Framework

The primary Statute governing corporate rescue and insolvency law and practice in Nigeria is the Companies and Allied Matters Act.[1428] In the CAMA, copious provisions were made on corporate insolvency.[1429] However, the procedure on corporate insolvency as provided in the CAMA seems out-dated and not in conformity with global trends. Hence, there have been urgent suggestions for the review of the CAMA so as to bring it in conformity with global trends.[1430]

Furthermore, the inadequacy of statutory framework as relating to corporate insolvency in Nigeria had been attributed to the fact that there are no law specifically

[1428] Cap C 20 Laws of the Federation of Nigeria 2004 (CAMA).
[1429] *Ibid*, part XV, chapters 1, 2 and 5; Companies Winding up Rules 2001(CWR).
[1430] O Abayomi-Olukunle 'Reforms, Revolutions and the Ministry of Trade & Investment: Amendment of the Companies and Allied Matters Act', The Lawyer, a ThisDay Weekly Pull-out13.09. 2016,p. 12.

dedicated to the cause of corporate insolvency.[1431] Rather, there are disparate laws on corporate insolvency as contained in other statutes.[1432] This explains the seeming excitement that stakeholders felt when the 8th Senate of the Federal Republic of Nigeria passed into law the Bill,[1433] which Bill purports amongst other things to be for the rehabilitation of businesses.[1434] However, in this study, it is respectfully submitted that the Bill appears not helpful to the entrenchment of orderly and effective corporate rescue and insolvency law and practice in Nigeria. It has been rightly observed that the reference to the Dollar instead of the Naira as the currency of choice in the Bill[1435] smacks of bad piece of Legislation.[1436]It is difficult to decipher the rationale for the adoption of a foreign currency in the Bill.

In this study, it is respectfully submitted that there is no specific Law on corporate rescue and insolvency in Nigeria and the provisions of the CAMA as it relates to corporate rescue and insolvency are out-dated and at best, inadequate. The available formal corporate rescue option is Arrangement and Compromise[1437] under Part XVI of the CAMA, which option seems to be hardly used.[1438] It is pertinent to state that since there cannot be a single corporate rescue framework or option that holds all the answers to the rehabilitation of distressed companies, the available corporate rescue option of arrangement and compromise only in the CAMA is quite

[1431] CA Candide-Johnson and A Alex- Adedipe, 'Debt Recovery: Winding up and other Arrangement' in O Olanipekun(ed), *Banking: Theory, Regulation, Law and Practice* (Lagos; Au Curant, 2016) p.433
[1432]Asset Management Corporation of Nigeria Act 2010 (as amended), ss.6(1)(e) (l), 48 & 52(1); Investment and Securities Act 2007 (ISA), ss.197(1), 198(a), 204(a) & 212(b) & Banks and other Financial Institutions Act, Revised Edition, Laws of the Federation of Nigeria (as amended), ss.35(1)(c), 40 & 55.
[1433] Bankruptcy and Insolvency (Repeal and Re-Enactment) Bill 2015("the Bill").
[1434] S U Mba, 'Recession Preventive Rehabilitation and the Nigerian Draft Insolvency Bill: Lessons from the EU? LAWYER, a ThisDay Weekly Pull-out 06.09.2016,p. 7.
[1435]The Bill, *op cit,* ss. 30(1)(c), 106.
[1436] Mba, *loc cit.*
[1437] Candide-Johnson &Alex-Adedipe, *op cit*, p.453; Mba, *op cit*;B Adebola, 'The Nigerian Business Rescue Model: An Introduction'(2014) NIALS Journal of Legal Studies, 9; also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297824; B Adebola, 'A Law of Insolvency in Nigeria: A Critical Analysis of the Present Legal Framework', Bripan-NIALS Round-Table, May 2013, p. 8.
[1438] Mba, *ibid.*

inadequate. Worse still, the procedure for arrangement and compromise as provided in the CAMA had been lampooned as absurd, slow and dysfunctional.[1439]

Unfortunately, the Bill did not address or deal with the cause of corporate rescue. Suffice to state that beyond the title and preamble of the Bill, the cause of corporate insolvency and rescue were not within the purview of the 269 sections of the Bill. It is instructive to note that only the Bankruptcy Act was repealed.[1440]Hence, it is difficult to understand the basis for introduction of insolvency matters in the Bill when there have never been any prior insolvency legislation, except as provided in the CAMA.[1441]

Unlike the position in Nigeria, in other common law countries such as the United Kingdom, the Republic of India and the Republic of South Africa, there are statutes specifically enacted and dedicated to the cause of corporate rescue and insolvency. A glaring and peculiar feature of the corporate rescue mechanisms as provided in the legislation under review is the spirited effort to enact home grown and indigenous corporate rescue mechanisms that are genuinely focused on the rehabilitation of distressed companies. Thus, the inadequate and disparate statutory and legal frameworks on corporate insolvency and rescue do not only obfuscate the ease of doing business in Nigeria but constitutes a challenge to the rescue of insolvent companies.

5.2 Paucity of Corporate Rescue Mechanisms

The global trend is to develop and allow for the development and survival of companies in distress, to seek to ‘’rescue’’ a defaulting company rather than winding

[1439] Adebola, The Nigerian Business Rescue Model, *op cit*, p. 18.
[1440]The Bill, *op cit*, s. 269.
[1441] CAMA, *op cit*, ss. 408(d), 409, 567(1); Candide-Johnson & Alex-Adedipe, *op cit*, p. 433.

it up.[1442] It has been correctly stated that the focus of corporate insolvency in modern day law, deviates from the previous trend of dissolution through winding up of insolvent companies and currently focuses on restructuring of insolvent companies to allow for recovery and continuity in place of dissolutions.[1443]Notwithstanding the imperative for viable corporate rescue mechanisms, the only available formal remedy to encourage business recovery under the extant law in Nigeria is the procedure for arrangement and compromise.[1444]

It is important to state that corporate rescue mechanisms that provide the means by which a company can restructure itself or its business to avoid ultimate failure is not same as corporate restructuring through mergers, amalgamation, take – overs and acquisitions, purchase and assumption and cherry picking.[1445] While corporate restructuring mechanisms through mergers, take – over and acquisitions may incidentally rescue distressed companies, the procedural steps and costs for such corporate restructuring mechanisms as provided in the extant legislations[1446] do not make such restructuring mechanisms to be readily conducive to rescue distressed companies.[1447] However, in spite of the shortcomings, merger or acquisition and

[1442] O Ajayi, *Legal Aspects of Finance in Emerging Markets* (London: LexisNexis Butterworth Tolley, 2005) p.603.
[1443] Candide-Johnson & Alex-Adedipe, *op cit*, p.436; PL Davies & S Washington, *Gower and Davies Principles of Modern Company Law* (9th edn, London: Sweet and Maxwell, 2012) p.1272.
[1444] Candide-Johnson &Alex- Adedipe, *ibid*; Adebola, The Nigerian Business Rescue Model, *op cit*, p.6.
[1445]Adebola, The Nigerian Business Rescue Model, *op cit*, p.6.
[1446]Investment and Securities Act 2007, part XII; Securities and Exchange Commission (SEC) Rules and Regulation 2013, part 1, regulation 421 – 432 (Mergers), 433 – 439 (Acquisition), 445 – 448 (Take – over);SEC Amendment Rules 2015
[1447] ISA, *op cit*, schedule1, part C(8). The processing fee for Schemes of Merger, Acquisition and Take – Over, which fee is different from the professional fee to be paid to the solicitor for handling the brief from the application stage to the sanction of the court cannot be corporate rescue "friendly".

other informal rescue mechanisms have been common options available to rescue ailing companies.[1448]

When juxtaposed with the position in some other jurisdictions such as the United Kingdom, the Republic of India and the Republic of South Africa, the available corporate rescue mechanisms in Nigeria, whether arrangement and compromise or receivership or merger or acquisition, pale into insignificance. In the United Kingdom, in addition to the corporate rescue mechanisms of scheme of arrangements,[1449] receivership[1450] administrative receiver,[1451] are company voluntary arrangements (CVA's)[1452] and administration[1453]with moratorium.[1454] In the Republic of India, corporate rescue mechanism of corporate insolvency resolution process[1455] and fast track corporate insolvency resolution process are not only coupled with moratorium[1456] but a mandatory process to be exhausted before the initiation of liquidation,[1457] if at all, against insolvent companies. In the Republic of South Africa, there is a dedicated corporate rescue mechanism in the form of business rescue proceedings[1458] that is coupled with a moratorium.[1459] In the United States of America, the Chapter 11 proceedings are a veritable and available corporate rescue mechanism.

[1448] JEO Abugu, *Company Securities: Law and Practice* (2nd edn, Lagos: MIJ Professional Publishers limited, 2014) p.303;HY Bhadmus, *Corporate Insolvency Law and Practice in Nigeria* (Enugu: Chenglo Limited, 2009) p.48.
[1449] Companies Act 2006, part 26(UK); Davies & Worthington, *op cit*, pp. 1105-1113.
[1450] Insolvency Act 1986, as amended, part III (UK).
[1451]*Ibid*. ss. 72A to 72G, schedule 2A.
[1452]*Ibid*, part 1; Enterprise Act 2002, schedule 17, paras 10,11,12 (UK)
[1453]Insolvency Act, *ibid*, schedule B1; Enterprise Act, *ibid*, schedule 17.
[1454] Insolvency Act, *ibid*, schedule B1, paras 42, 43.
[1455] Insolvency and Bankruptcy Code 2016, chapter II (India)
[1456]Insolvency Act, *op cit*, chapter IV, ss. 13(i)(a), 14.
[1457] Insolvency and Bankruptcy Code, *op cit*, chapter III,s. 33.
[1458] Companies Act 2008, chapter 6 (South Africa)
[1459]*Ibid*, s.133; Companies Amendment Act 2011(CAA) (South Africa), s.84 (a) (b) (c).

Flowing from the above, it appears incontrovertible that the paucity of corporate rescue mechanisms in Nigeria poses a big challenge in the quest for rescue of insolvent companies.

5.3 Absence of Efficient and Pragmatic Institutions

While the enactment of good and functional statutory framework appears to be desiderata for corporate rescue and insolvency practice, an indispensable prerequisite is also the existence of pragmatic, functional, dynamic and capable regulatory institutions. In this vein, the role of the court, particularly the Federal High Court in corporate rescue and insolvency proceedings cannot be over- looked.

The prominent institutions that regulate the cause of corporate rescue and insolvency in Nigeria are the Corporate Affairs Commission (CAC) and the Securities and Exchange Commission. By virtue of the provisions of the CAMA, the CAC is vested with far-reaching functions and powers to administer the provisions of the CAMA, including corporate insolvency.[1460] In this respect and in this study, it is submitted that the CAC seems to lack the capacity[1461] to combine its functions of regulation and supervision of the incorporation, registration and management of companies with that of regulating the cause of corporate rescue and insolvency.

Unlike the position in Nigeria, in other countries such as the United Kingdom and the Republic of India, there is a distinct body that regulates the cause of corporate rescue and insolvency. In the United Kingdom, the Insolvency Service, an Executive Agency of the Department for Business Innovation & Skills (BIS),[1462] regulates insolvency matters. In the Republic of India, the Insolvency and

[1460]CAMA, *op cit*, s. 7 (1) (a).
[1461]Lack of funds not unconnected to the economy now in recession; reduction of budgetary allocation to statutory bodies including the CAC; insufficient personnel
[1462] Davis & Worthington, *op cit*, p.1276.

Bankruptcy Board of India was established[1463] to exercise powers and functions, including the regulation of insolvency and bankruptcy matters.[1464]

Without gainsaying, it is obvious that the CAC and the SEC do not possess the requisite capacity and expertise to carry out their routine statutory functions and also regulate the cause of corporate rescue and insolvency.

The court is another institution at the hub of regulation, even peripherally, of corporate rescue and insolvency proceedings in Nigeria. Instructively, the Federal High Court is vested with jurisdiction to the exclusion of any other court in respect of civil causes and matters arising from the operation of the CAMA[1465] and bankruptcy and insolvency.[1466] Regrettably, the role of the court in corporate rescue and insolvency matters has not been laudable. A situation where the determination of a winding up petition lasts up to eight to eleven years[1467] is unsatisfactory, regrettable and constitutes an albatross to the effectual dispensation or determination of corporate insolvency matters. Worst still, a situation where a motion for leave to advertise Petition lasts up to four years[1468] and suffers unnecessary adjournments is condemnable.

Furthermore, the role of the court in matters of corporate rescue and insolvency is not immune from the malaise associated with the Nigerian court system[1469] such as

[1463] Insolvency and Bankruptcy Code, *op cit*, s. 188(1).
[1464] *Ibid*, s. 196.
[1465] Constitution of the Federal Republic of Nigeria, s. 251 (1)(e).
[1466] *Ibid*, s. 251(1)(j).
[1467] *Air Via Limited v Oriental Airlines Limited*(2004) 4 SC (pt 11) 37.
[1468] *Pharma – Deko Plc v F.D.C Ltd* [2015] 10 N.W.L.R. (pt 1467)225 - the winding up petition was filed on 4th June 1993 at the Federal High Court and finally determined by the Supreme Court of Nigeria on the 23rd of April 2004, a period of about 10 years.
[1469] G C Nwakoby,*The Law and Practice of Commercial Arbitration in Nigeria*(2nd edn, Enugu: Snapp Press Ltd, 2014) pp. 467–468; Nigeria: 'Publication of Financial Sector Assessment Program Documentation-Technical Note on Crisis Management and Crisis Preparedness' (May 2013 IMF Country Report No.13/143) pp.33 & 38.

slow administration of justice, incessant adjournments, ignorance, incapacity, slow proceedings and rigidity.[1470]

5.4 Absence of Moratorium Provisions

One of the foremost challenges that beset the cause of corporate rescue mechanisms in Nigeria is the absence of moratorium[1471] provisions in the extant legislation providing for rescue of insolvent companies.

As already examined in the preceding aspects of this study, the seeming available corporate rescue options under extant statute in Nigeria are arrangement and compromise,[1472] receivership[1473] and merger or acquisition.[1474]

The declaration of a moratorium is one of the most important requisites for a viable corporate rescue. Hence, most of the legislation providing for corporate rescue in different variants have entrenched a moratorium clause.[1475] The salient effect of a moratorium is that it amongst others and from the initiation of a corporate rescue mechanism until the sooner determination of same, set to prohibit the institution of suits or continuation of pending suits or proceedings against the debtor company including execution of any judgment, decree or order or prohibits the taking of any action or step to foreclose, recover or enforce any security interest created by the

[1470]Abugu, *op cit*, p. 307.

[1471]SU Mba, 'Rethinking Business Rescue in Nigeria: Borrowing Virtues from Chapter 11 of the US Bankruptcy Code' Unpublished LLM Thesis, Central European University, Budapest, Hungary, March 2015, p.43. Moratorium is the temporary suspension of legal proceedings, actions or claims against an insolvent company during rescue proceedings.

[1472]CAMA *op cit*, part XVI, ss. 537,539, 540; Candide-Johnson & Alex –Adedipe, *op cit*, p.453; Abugu, *op cit*, pp. 304–308; A Abdulai, 'Mergers, Acquisitions and Take-overs in Nigeria: The Guiding Philosophy, Laws, Regulations and Practice', June 1997 Vol 2 No 2 MILBQ, 33 .The challenge posed by the lack of capacity of regulatory institutions, particularly the Federal High Court can be surmised thus: Of what value is the Federal High Court's involvement in take-over bids, mergers, etc, in view of the fact that this court does not have sufficient expertise with regard to these kinds of truncations? Is it true that reference to Federal High Court has in the past made merger exercises more expensive and frustrating to all concerned?

[1473] CAMA, *ibid*, part XIV; O O Oladele 'The Legal Intricacies of Corporate Restructuring and Rescue in Nigeria', The Calabar Law Journal Volume XI ISSN 0189.0020, 2007, 153.

[1474] ISA, *op cit*, part XII; SEC Rules, *op cit*, part 1; Abugu, *op cit*, p.303.

[1475] Companies Act, *op cit*, s. 133 (South Africa); CAA, *op cit*, s. 84 (South Africa); The Insolvency and Bankruptcy Code, *op cit*, ss.13(1) (a), 14; Insolvency Act, *op cit*, schedule B1, paras 42 & 43(UK).

debtor company.[1476] It is important to state that the declaration of a moratorium under a corporate rescue mechanism can be absolute or subject to exceptions as may be provided in the enabling statute. However, the usual practice is for moratorium provisions to be subject to exceptions. In other words, some of the matters that are under moratorium can be invoked with the permission of the court,[1477] or with the consent of the insolvency practitioner.[1478]

Notwithstanding the obvious desideratum for a moratorium provisions so as to ensure a viable corporate rescue procedure, it is unfortunate that moratorium declarations are manifestly absent in the corporate rescue options in Nigeria such as arrangements and compromise, receivership and merger or acquisition. Hence, against the challenge posed by the absence of moratorium provisions in the extant legislation on corporate rescue, the CAC is in the fore front for a review of the CAMA to provide for Business Rescue and Recovery Proceedings that will give temporary moratorium to financially distressed companies.[1479]

5.5 Absence of Minimum Qualification for and/or Regulation of Corporate Rescue and Insolvency Practitioners

The drivers of any corporate rescue and insolvency system are the practitioners. Corporate rescue or insolvency practitioner is a person appointed to conduct the corporate rescue or insolvency process. In the United Kingdom, a person who is appointed to or acts as a liquidator, provisional liquidator, administrator or administrative receiver or as a supervisor of a company voluntary Arrangement is

[1476] Ian F Fletcher, *The Law ofInsolvency* (2nd edn, London: Sweet & Maxwell, 1996) pp. 435–437; JH Farrar & B Hannigan, *Farrah's Company Law* (4th edn, London: LexisNexis Butterworths Tolley, 1998) p.687; SW Mayson, *et al, Mayson, French & Ryan on Company Law* (25th edn, Oxford: Oxford University Press, 2008-2009) p. 654.
[1477] Companies Act, *op cit*, s. 133 (South Africa); Insolvency Act, *op cit*, schedule B1, para43(2)(b).
[1478] Companies Act, *ibid*; Insolvency Act, *ibid*.
[1479]Mahmud, B, Report of the Corporate Affairs Commission to the 2016 Annual General Conference of the Nigeria Bar Association at Port Harcourt, Nigeria from 19th to the 2th day of August 2016, p. 6.

known as an "insolvency practitioner".[1480] In the Republic of India, a person that conducts corporate insolvency matters is generally known as an "insolvency professional".[1481] Where the insolvency professional is acting to rescue a financially distressed company, such a person is known as a "resolution professional",[1482] or an interim-resolution professional.[1483] In the Republic of South Africa, a person appointed to oversee a company during business rescue proceedings is known as a "business rescue practitioner".[1484] In Nigeria, the drivers of the corporate rescue or insolvency process are the receivers and/or managers for receivership[1485] and a liquidator, whether provisional or otherwise,[1486] in the case of winding up.

Because of the prominent role played by persons appointed or acting as receivers and/or managers or provisional liquidator or liquidator in corporate rescue or insolvency matters, the global trend is the stipulation of certain requisite minimum qualification for persons to be appointed or to act as receivers and/or managers or provisional liquidator or liquidator. Although, the usual practice is the prescription in the various legislation of persons who are disqualified from being appointed or prevented from acting as a receiver and/or manager,[1487] or liquidator whether as provisional or otherwise.[1488] In the Republic of South Africa, it should be noted that in spite of the repeal of the Companies Act,[1489] by reason of section 224(1), schedule

[1480] Insolvency Act, *op cit*, s. 388(1).
[1481] Insolvency and Bankruptcy Code, *op cit*, s. 3(19).
[1482] *Ibid*, s. 5(27).
[1483] Insolvency and Bankruptcy Code, *op cit.*
[1484] Companies Act, *op cit*, s. 128(1)(d)(South Africa).
[1485] CAMA, *op cit*, part XIV, ss. 389, 390.
[1486] *Ibid*, ss. 422–432, 453–454; CWR, *op cit*, rr. 21,41; A Aliyu and MA Saulawa, 'The Role of a Liquidator in Winding up Proceedings in Nigeria: Examining The Inadequacies under Companies and Allied Matters Act (CAMA)', PHJBL 2.1 (2016), 225–236.
[1487] CAMA, *ibid*, s. 387(1); Insolvency Act, *op cit*, ss. 30, 31.
[1488] CAMA, *ibid*, s. 509(1); Insolvency Act, *ibid*, ss. 388(1), 390 (UK) - for liquidator or administrator or administrative receiver; Companies Act 1973, ss. 372, 373 (South Africa).
[1489] No 61 of 1973.

5, item 9 of the Companies Act,[1490] it did not apply to proceedings in respect of winding up or liquidation of companies or the appointment of business rescue practitioner.[1491]

The prevailing practice is for the extant legislation to provide for the regulation of corporate rescue and insolvency practitioners. In other words, a person is not appointed or acts as a practitioner in corporate rescue and insolvency matters merely because he or she is not disqualified under the extant statute. In the United Kingdom, a person can only be appointed or act as insolvency practitioner if he or she is qualified or meets with further requisites.[1492] Such further requisite is that for a person to be an insolvency professional or carry out any insolvency related work in the UK, he must pass the practical examination of the Joint Examination Insolvency Board (JIEB).[1493] In the Republic of India, a person can only render services as insolvency professional if he or she has enrolled as a member of an insolvency professional agency and thereafter register with the insolvency and Bankruptcy Board of India.[1494]In the Republic of South Africa, a person can only be appointed as a business rescue practitioner if he or she is a member in good standing of a legal, accounting or business management profession accredited by the Companies and Intellectual Property Commission of the Republic of South Africa.[1495]

In a nutshell, the global trend and requisites for a person to be appointed or act as a corporate rescue and insolvency practitioner is that he or she must be a member

[1490]No 71 of 2008.
[1491] Companies Act, *op cit*, s. 138(1); CAA, *op cit*, s. 88 (South Africa).
[1492] Insolvency Act, *op cit*, ss. 390(2), 391; Small Business, Enterprise and Employment Act 2015, ss. 137–146(UK); Mayson, et al, *op cit*, pp. 640–641. A person can only act as an insolvency practitioner if he is authorised to so act by virtue of membership of a recognised professional body or by the authorisation of the Secretary of State; having being satisfied that he is a fit and proper person so to act and meets acceptable requirements as to education and practical training and experience.
[1493]http://www.icaew.com/en/technical/insovency/qualifying-as-an-insolvency-practitioner accessed on 19 November 2016; Insolvency Practitioners Association, Insolvency Code of Ethics; Background and Overview (November 2008).
[1494]Insolvency and Bankruptcy Code, *op cit*, s. 207.
[1495]Companies Act, *op cit*, s. 138 (1) (a); CAA, *op cit*, s. 88.

of recognised or licensed professional body or an insolvency professional agency. Furthermore, persons who are appointed or act as corporate rescue and insolvency practitioners are subject to regulation.[1496]

The rationale for further requisites and the regulation of persons appointed to or act as corporate rescue and insolvency practitioners cannot be over-emphasized.[1497] The practice is not only intended to restrain malpractice, abuse but to promote a stringent review by competent and qualified corporate rescue and insolvency practitioners of the distressed or ailing companies.[1498]

Unfortunately, in Nigeria a person can be appointed or act as a receiver and/or manager, liquidator or provisional liquidator in corporate rescue and insolvency matters if he is not disqualified under the extant provisions in the CAMA. In other words, for a person to practise as a corporate rescue and insolvency practitioner in Nigeria, he or she does not require any minimum educational qualification or requisite knowledge and experience to discharge the functions of a corporate rescue and insolvency practitioner. The situation where to practise as a corporate rescue and insolvency practitioner is unregulated is not only regrettable but absolutely unsatisfactory.[1499]

5.6 Corruption and other Sharp Practices

[1496]Insolvency and Bankruptcy Code, *op cit,* s. 204; Insolvency Act, *op cit*, s. 391; Small Business, Enterprise and Employment Act, *op cit*, s. 144. The recognised professional body regulates the members acting as insolvency practitioners, pending when the Secretary of State establishes a single regulator of insolvency practitioners pursuant to the Small Business, Enterprise and Employment Act. An insolvency professional agency regulates the members enrolled with it as insolvency professionals.
[1497]Bhadmus, *op cit*, p.304
[1498] S Barber, *Company Law* (4th edn, London: Old Bailey Press, 2003) p. 324.
[1499] U Melah, 'AMCON, DELTA STEEL AND ARIBISALA's BASIC INSTINCT', This Day, The Saturday Newspaper, July 4.2015. p.48. This article exemplified the abuse and malpractice that can be occasioned by having a corporate rescue and insolvency system where the practitioners are not subject to regulation

The concept of corruption is not subject to comprehensive, precise or concise definition.[1500] However, the word "corruption" has been used to describe conduct that reflects abuse of public office for private gain.[1501] It should be noted that public office is abused for private gain when an official accepts, solicits or extorts a bribe. Private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit.[1502] It is therefore pertinent to state that public office can be abused for personal benefit without bribery, through patronage and nepotism, the theft of state assets or the diversion of state resources.[1503]

It may appear from the above descriptions of corruption that corrupt practices are prevalent only in the public sector, but this is not correct. Corrupt practices can occur in the private sector.[1504] Hence, corruption has been described as the 'abuse of entrusted power for private gain.[1505] In the same vein, corruption has been described as including 'bribery, fraud and other related offences.[1506] Furthermore, the definition of official corruption was not limited to only the public sector, but mentions official duties or in relation to any matter connected with the functions, affairs or business of a government department or corporate body or other organisation or institution in which the person is an official.[1507]

[1500] CC Ani, 'Corruption in Criminal Justice Administration in Nigeria: The Role of the Legal Profession', Nigeria Bar Journal, Vol 7, 2011, 110.

[1501]G Etomi, *An Introduction to Nigerian Commercial Law: Text, Cases and Materials* (Lagos: MIJ Professional Publishers Limited, 2014) p. 450; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; United Nations Convention against Corruption.

[1502] K Yusuf 'Financial Crime' in O Olanipekun, *Banking: Theory, Regulation, Law & Practice* (Lagos: AU Courant, 2016) p.707.

[1503]*Ibid.*

[1504] NS, Okogbule, 'An Appraisal of the Legal and Institutional Framework for Combating Corruption in Nigeria', Journal of Finance Crime Volume 13 Number 1 2006, 96; Etomi, *op cit*, p.457.

[1505]NS Okogbule, *art cit.*

[1506]Corrupt Practices and other Related Offences Act, 2000, Cap C31Laws of the Federation of Nigeria (LFN) 2004 (as amended), s. 2.

[1507] Corrupt Practices and other Related Offences Act, *op cit*, s. 8; C Wigwe, 'Corruption as an Economic Barrier to Development in Third World Countries' PHJBL 2.1(2016),328.

Notwithstanding the difficulty in defining corruption, there is consensus on the effects or impact of corruption on economic and socio-political development of any nation.[1508] It is said that corruption makes business expensive, uncompetitive and results in negative return on investments,[1509] subversion of fundamental rules of economic relations, institution and structure, good governance, an equitable and just legal order and other institutions of state, particularly the Judiciary.[1510]

In consideration of the prominent role of the court in causes of corporate rescue and insolvency in Nigeria, namely, summoning meeting of the creditors, or class of creditors, or of the members of the company or class of creditors, or of the members of the company or class of members in respect of compromise or arrangement;[1511] sanctions compromise or arrangement;[1512] makes a winding up order in respect of compulsory winding up,[1513] an issue of corruption as it affects the court must be of interest. Instructively, it has been opined that:-

> where a state is characterised by corruption endemic, it is most manifest in the judicial sector as legal disputes emanating in the course of economic relationships are increasingly resolved in favour of the party who is able bid the highest for the conscience of the judges rather than by established laws and judicial proceedings.[1514]

It is a fact, albeit in the realm of conjecture, that the judiciary in Nigeria is riddled with corruption or corrupt acts. There are incidences of case files been

[1508] Etomi, *op cit*, p.453; *Ekwenugo v Federal Republic of Nigeria* [2001] 6N.W.L.R (pt 703) 187.
[1509] O, Ajayi, *Legal Aspects of Finance in Emerging Markets* (London: LexisNexis Butterworths Tolley, 2005) p.120.
[1510] Wigwe, *art cit*, 329.
[1511] CAMA, *op cit*, s. 539(1); Abugu, *op cit*, p.307.
[1512] CAMA, *ibid*, s. 539 (3).
[1513] *Ibid, Part xv, chapter 2, s. 407 (1).*
[1514] Wigwe, *art cit*, 329

hidden, officials of the court, whether clerk or bailiffs or registrars, demanding and receiving bribes or other forms of gratification so as to manipulate the process to the advantage of the giver, perversion of justice by judicial officers as a result of monetary inducements, nepotism or external influence.

In order to combat corruption that has been referred to as a 'virus',[1515] a good number of domestic and international initiatives and legislations[1516] have been developed and enacted to tackle corruption.[1517] Notwithstanding the efforts being made to combat corruption, it still remains a cankerworm and a challenge to sustainable economic and socio-political development in Nigeria.

Another challenge to corporate rescue and insolvency practice in Nigeria is the issue of corporate fraud.[1518] It should be noted that there is no general offence of fraud under Nigerian criminal law.[1519] However, there are a number of offences linked to the concept of fraud, including stealing,[1520] obtaining by false pretences,[1521] false accounting, and false statement by directors with intent to deceive members or

[1515] E Chianu, *Company Law* (Abuja: Law Lords Publications, 2012) p. 317
[1516]Corrupt Practices and Related Offences Act, *op cit*; Economic and Financial Crimes Commission (EFCC) Act 2004 (as amended) ; Advance Fee Fraud and Other Related Offences Act 2006; Money Laundering (Prohibition) Act 2011; Foreign Corrupt Practices Act 1977(as amended) (US); Bribery Act 2010 (UK); Fraud Act 2006 (UK); Criminal Code Act, Cap C 38, Laws of the Federation of Nigeria 2004; Criminal Code Laws of different States ; Penal Code; United Nations Convention Against Corruption (General Assembly Resolution 58/4 of 31 October 2003): African Union Convention on the Preventing and Combating of Corruption (adopted in 2003); ECOWAS Protocol on the Fight against Corruption(not yet in force)
[1517] Ajayi, *op cit*, p.120.
[1518]*Ibid*, pp. 211, 212.
[1519] Yusuf, *op cit*, p.175.
[1520] Criminal Code Act,*op cit,* s. 390
[1521]*Ibid*,s.419.

creditors,[1522] fraudulent trading.[1523] It is instructive to note that the issue of corporate fraud has been linked informally with the cause of corporate failure.[1524]

The inability to define the word "fraud" as it is a term of so wide an import remains a challenge in addressing the cause of corporate rescue and insolvency law and practice. However, it has been held that any act which may amount to an infraction of fair dealing, or abuse of confidence, or unconscionable conduct, or abuse of power as between a trustee and his shareholders in the management of a company, constitutes fraud.[1525] On the other hand, it should be noted that "blameworthy irresponsibility" is not sufficient to establish fraud. A deliberate intent to defraud must be established[1526] in all cases of fraud. Thus, the concept of fraud involves actual dishonesty.[1527] Nevertheless, the standard of proof required to establish fraud still remains ambiguous, ambivalent and unsettled. This is not unconnected to the challenge arising from not having a general offence of fraud under extant Nigerian Law. In most of the statutory offences on corporate fraud, the elements are not specifically and clearly spelt out.

5.7 Continuing Financing during Corporate Insolvency and Rescue Proceedings.

Continuing financing[1528] is fundamental to the success of any corporate rescue plan as well as a hindrance when it is in short supply. Without an established provision which clearly outlines prospective post-petition financing, that is, funds needed by

[1522]J Ulph, *Commercial Fraud: Civil Liability, Human Rights and Money Laundering* (Oxford: Oxford University Press, 2006) p.26.
[1523]CAMA, *op cit*, s. 506.
[1524] JEO Abugu, *Principles of Corporate Law in Nigeria*(2nd edn, Lagos: MU Professional Publishers Limited, 2014) p. 677; Farrar' *op cit*, p. 622.
[1525]*Yalaju- Amaye v Associated Registered Engineering Contractors Ltd*[1990] 4 N.W.L.R (pt 145) 422 at 466; *Virgin Technologies Ltd v Mohammed*[2009] 11 N.W.L.R (pt 1151)136 at 150, 153.
[1526] Chianu, *op cit*, p.313.
[1527]*Ibid*.
[1528]It is the continuing financing mechanisms, schemes and options for insolvent companies during rescue proceedings.

the debtor company to enable it to continue business during the rescue period and how these new creditors who often demand priority payments over pre-existing creditors will fit into the debtor's repayment plans, efforts to effectively rescue an insolvent company may amount to an exercise in futility.[1529]

Continuing financing in corporate rescue proceedings has remained a seminal issue in corporate rescue and insolvency law and practice.[1530] While in other jurisdictions such as the UK, the US and the Republic of India, there seems to be commendable efforts towards providing for continuing financing during corporate rescues, in Nigeria, there are no formal continuing financing schemes for corporate entities at times of corporate insolvency or rescue. In the UK, the issue of continuing financing is addressed by the powers conferred on an administrator to borrow funds, grant security,[1531] and prioritise repayment of debts owing under contracts entered during administration.[1532] Although the powers conferred on an administrator to borrow are helpful as regards obtaining funds and continuing the business, it nevertheless lacked the incentives required to encourage fresh lending.

In the US, continuing financing during Chapter 11 corporate reorganization is achieved by the new priority financing, debtor-in-possession funding.[1533] In this vein, and in order to incentivise creditors, there are a hierarchy of claims in the Bankruptcy Code so as to ensure creditors are more amenable to the idea of advancing credits to

[1529] A Aruoriwo, 'Financing Corporate Rescues, Where Does the UK Stand?' (2014) 1(2) IALS Student Law Review, 10.
[1530] J Armour & A Walters, 'Funding Liquidation: A Functional View' (2006) LQR 295; G McCormack,'Super-Priority Financing and Corporate Rescue' (2007) J.B.L, 701-732.
[1531] Insolvency Act 1986 (as amended), sch 1, para 14, 15 (UK).
[1532] *Ibid*, sch B1, para 99; *Bibby Trade Finance Ltd* v *Mckay* [2006] All ER 266; *Frenkley* v *Reinsurance International Co* [2006] BCC, 971.
[1533] Bankruptcy Code 1978 (as amended), s.364 (US).

the corporate entity under reorganization. In the case of India, there is a Fund established to finance corporate insolvency resolution process.[1534]

It is pertinent to state that the viability of any business is often dependent on the availability of credit and more so when the company is within the vicinity of insolvency. Hence, continuing financing is fundamental in corporate insolvency and rescue proceedings. In Nigeria, however, there is abysmal absence of this fundamental prerequisite of continuing finance in corporate insolvency and rescue proceedings under extant statute.

Meanwhile, this Study acknowledges the essence of the establishment of the Investor Protection Fund[1535] with the objective to compensate investors who suffer pecuniary loss arising from the insolvency, bankruptcy and negligence of a dealing member firm of a securities exchange or capital trade point.[1536]

5.8 Absence of Uniform Guideline for Informal Corporate Rescue Procedures

It is common for informal corporate rescue options such as bailout, debt for equity swap, purchase and assumption and cherry picking to be invoked for resolution of insolvency matters in Nigeria. Despite the advantages[1537] of such informal corporate rescue options, it has not been impactful and enduring. This is not unconnected to the absence of clear, certain and transparent guidelines and procedures for such informal rescue options. At present, the guidelines and procedures, if any, for informal corporate rescue options are disparate and sector-based. The end result of having disparate uniform guideline for informal corporate rescue proceedings in Nigeria is incongruity

[1534]Insolvency and Bankruptcy Code 2016, s.224 (India).
[1535]ISA, *op cit*, s. 197(1).
[1536]ISA, *op cit*, ss. 198(a), 204(a) & 212(b); K Udofia, 'Contribution to Investors' Protection Fund and the Fraudulent Preference Risk', LAWYER, a This Day Weekly Pull-out, 18.04.2017, p.11.
[1537]Voluntariness, Dynamism, Speedy Transaction, Cheap and Inclusiveness of parties.

and complexity with the potential for added cost and complication in the resolution of insolvency.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

One of the incidents of incorporation is that a company in furtherance of its business may borrow money by mortgage or charge its undertaking, property and uncalled capital, or any part thereof and issue debentures, debenture stock and other securities whether outright or as security for any debt, liability or obligation for any debt, liability or obligation of the company.

However, the situation may arise where a company may not be able to pay back borrowed capital and in such a circumstance, a creditor would be interested in the mechanism for enforcing or realising the security or borrowed capital. Where a company is unable to pay its debt, the company is deemed insolvent. Under the extant laws in Nigeria, the available procedures to address the cause of corporate insolvency are through the appointment of receiver and/or manager or the commencement of winding up proceedings.

Corporate insolvency proceedings by way of winding up is inexorably terminal and with irreversible consequences. The winding up of insolvent companies is not just a process leading to ultimate dissolution of a company but one that irreparably terminates the life of the insolvent company, throws the employees of the insolvent company into unemployment, causes societal and family breakdown and a remote trigger for the incidences of violence and disorientation in values.

It is against the background of the unviability of winding up petition in addressing the corporate insolvency, the resort to corporate rescue options becomes exigent. However, the formal corporate rescue options that are seemingly available in Nigeria are receivership, arrangements and compromise and mergers or acquisitions. Such

corporate rescue options appear not to have impacted positively in the cause of rescuing insolvent companies. This is not unconnected to the fact that the corporate rescue options are hampered by complex procedure, high processing cost, the absence of moratorium provisions and the non-regulation of corporate rescue and insolvency practitioners have been propounded as the reason for the abuses, sharp practices, malpractices and unethical conducts and behaviour in corporate rescue and insolvency matters in Nigeria.

In view of the essence of a well-defined and viable corporate rescue and insolvency system for development of any economy and the constraints highlighted in this study, the need for reform of corporate rescue and insolvency law and practice in Nigeria is not only imperative but urgent.

The summary of findings of this Study are:

1. The principal statute governing corporate rescue and insolvency in Nigeria is the Companies and Allied Matters Act.[1538] Furthermore, it was found that the provisions of the CAMA are not robust and comprehensive to deal with the cause of corporate rescue and insolvency because CAMA enacted in 1990 is old and the provisions as relating to corporate rescue and insolvency are out-dated, obsolete and neither indigenous nor in line with international best practices. Also, the legislative[1539] efforts of the National Assembly to address corporate rescue and insolvency were found to be a sham as it did not provide for corporate rescue and insolvency at all.

2. Corporate rescue and insolvency provisions were also contained in some other specific statutes such as the Asset Management Corporation of Nigeria Act.[1540]

[1538] Cap C20 Laws of the Federation of Nigeria 2004 (CAMA).
[1539] Bankruptcy and Insolvency (Repeal and Re- Enactment) Bill 2015.
[1540] 2010 as amended (AMCON Act).

Investment and Securities Act,[1541] Bank and Other Financial Institutions Act,[1542] Insurance Act,[1543] and Nigeria Deposit Insurance Corporation Act.[1544]

3. The discernible procedure in Nigeria for winding up proceedings is mainly provided in the CAMA[1545] and the Companies Winding up Rules.[1546] Furthermore, it was found that winding up proceedings as a means to address the cause of corporate insolvency is not a viable option after all.[1547] This is not unconnected amongst others to the obfuscating court system.[1548]

4. The available formal corporate rescue options that have been adopted or available to address issues of corporate insolvency in Nigeria are arrangements and compromise,[1549] receivership,[1550] mergers or acquisition,[1551] and the amorphous bail outs through the vehicle of Assets Management Corporation of Nigeria. It was found that arrangements and compromise has not been an attractive rescue tool for insolvent companies.[1552] The unviability of arrangements and compromise as a rescue option to insolvency have been linked amongst others to the absence of moratorium which

[1541] 2007 (ISA).
[1542] Revised Edition, Laws of the Federation of Nigeria 2007 as amended (BOFIA).
[1543] Cap 118 Laws of the Federation of Nigeria 2004 as amended.
[1544] 2006 as amended.
[1545] CAMA, *op cit*, part XV, chapters 2,5; Companies Regulation 2012, reg 43.
[1546] 2001.
[1547]O Ajayi, Legal Aspects of Finance in Emerging Markets (London: LexisNexis Butterworth Tolley, 2005) p.603.
[1548] Congested cause lists; adjournments, delays and longer period of determination of a winding up from the Federal High Court to the Supreme Court of Nigeria.
[1549] CAMA, *op cit*, part XVI, ss. 537, 539, 540.
[1550]*Ibid*, s. 209, part XIV; Companies Regulation, *op cit*, regs 36, 37, 41, 42.
[1551] ISA, *op cit*, part XII, ss. 119–130; Securities and Exchange Commission Rules and Regulation 2013, (as amended as) part 1, rr. 421–432(mergers); 433–439 (Acquisition).
[1552] Nigerian Law Reform Commission Report in the Reform of Nigerian Company Law and Related Matters Volume 1, Renew and Recommendation.1988, pp.321-322; B Adebola Conflated Arrangements; A comment on the company Voluntary Arrangements in the proposed Nigerian Insolvency Act 2014'(2015) 3 NIBLeJ 2 also available at http://www.4,ntu.ac.uk/n/s/document_uploads/174811-pdf accessed on 20 November 2016.B Adebola, 'The Nigerian Business Rescue Model: An Introduction'(2014) NIALS Journal of Legal Studies, 18; also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297824. accessed on 10 May 2015.

creates an opening for unsecured creditors to initiate parallel debt collection proceedings at a State High Court after the scheme is proposed.[1553]

Furthermore, it was found that the impact of receivership as a corporate rescue option is limited. While receivership is mainly invoked to preserve, receive and protect the interest of a security holder in a company or manage a going concern for the purpose of the receivership, the appointment of a receiver and/or manager is usually restricted to secured charges.[1554] Although the court may invoke its power to grant an injunction or appoint a receiver by interlocutory order in all cases in which it appears just and convenient to do so,[1555] receivership even where successful, resolves the interests of the security holder only, ailing company remained comatose or in an ailing state, other security holders' interest still unresolved and the employees of the ailing company on the verge of losing their jobs.

It was further found that the rescue of failing banks as a result of the 2009 Nigerian Banking crisis was through some form of mergers and acquisition.[1556] However, mergers or acquisition appear not a feasible rescue option for insolvent companies that are not in strictly regulated sectors of the economy. This is not unconnected to the complex procedure for approval of mergers or acquisitions and the prescribed fees that is based on the value of the merging companies.[1557] Suffice to state that insolvent companies cannot afford to utilise corporate rescue option in form of merger or acquisition. It was also found that the legal framework for corporate rescue in Nigeria is grossly inadequate to address the cause of corporate insolvency.

[1553] Adebola, The Nigerian Rescue Model, *op cit*, 9.
[1554] CAMA, *op cit*, s. 180(3).
[1555] Federal High Court Act, cap 134 Laws of the Federation of Nigeria 2004, s. 13(1); Abugu, *Company Securities*, *op cit*, p.227.
[1556] I Agabi & A Onayemi; 'Troubled Assets Resolution' in O Olanipekun (ed), *Banking; Theory*, Regulation, *Law and Practice* (Lagos: AU Courant, 2016) p.469.
[1557] SEC Rules, *op cit*, part 1, appendix VII(c); r. 434 (xiv) – in the case of an acquisition, the value to be acquired on the graduation fee.

Hence, the corporate rescue mechanisms available in Nigeria are more or less puerile as such rescue mechanisms do not debar the rights of an affected creditor to seek for the termination of the life of the insolvent company by winding up proceedings.

5. Corporate rescue and insolvency practitioners in Nigeria are not strictly subject to regulation of any regulatory institution in matters of insolvency. It was found that a person can be appointed a receiver and/or manager, provisional liquidator and liquidator in the cause of corporate rescue and insolvency in Nigeria insofar as he or she is not disqualified under relevant provisions in the extant laws governing such appointment.[1558] He or she is not expected to meet any minimum educational requirements or experience. This is against the findings in other jurisdictions where there is not only a requirement for minimum qualifications for corporate rescue and insolvency practitioners but the establishment of a body to regulate such corporate rescue and insolvency practitioners.[1559]

It was found that because of the absence of minimum qualification and the non-regulation of corporate rescue and insolvency practitioners in Nigeria, there have been incidences of abuse, malpractices and exhibition of ineptitude and sheer incompetence in corporate rescue and insolvency proceedings.

6. There is clear absence of moratorium in the corporate rescue options available in Nigeria. In effect, where any of the corporate rescue option of receivership or arrangements and compromise or merger or acquisitions or even the amorphous construct of bailout applies to an insolvent company, it does not extinguish the right that any third party creditor may have against such insolvent company. Such creditor's right includes that of commencement of action to enforce

[1558] CAMA, *op cit*, ss. 387(1)- (Receiver and Manager); 509(1) (Liquidator).
[1559] Insolvency Act 1986 (as amended), ss. 389, 390 (United Kingdom); Insolvency and Bankruptcy Code 2016, ss. 200,204, 207(India); Companies Act 2008, s 138(1) (South Africa); Companies Amendment Act 2011, s 88 (South Africa).

security or recover the debt owed it, continuation of action, institution of winding up petition and the execution of judgment debt and attachment. This is against the finding in other jurisdictions where moratorium provision is intrinsic to the specific corporate rescue option.[1560]

7. The implications of a winding up order under the extant law in Nigeria are rigid, inflexible and cannot be a means to rescue or restructure insolvent companies. Simply, it was found that the powers of the court and the liquidator in winding up of insolvent companies are circumscribed and do not extend to the initiation of restructuring or rescue plans of such insolvent companies.[1561] This is against the finding in the United Kingdom where the liquidator is vested with the power to initiate corporate rescue proceedings[1562] and the Republic of South Africa, the court, that is the "Companies Tribunal", is vested with the power to commence business rescue proceedings during the course of any liquidation proceedings.[1563]

8. It was found that the initiation of winding up petition does not require prior exhaustion of any of the corporate rescue options. Contrarily, it was found that in the Republic of India, rescue option in the form of "corporate insolvency resolution process" or "fast track corporate insolvency resolution process" must be exhausted before the initiation of any liquidation proceeding.[1564]

9. It was found that there are no prescribed time limits for carrying out rescue and insolvency proceedings in Nigeria. Contrarily, it was found that in the Republic of India, there are prescribed time limits for corporate rescue and insolvency

[1560]Insolvency Act, *op cit*, (United Kingdom); Insolvency and Bankruptcy Code, *op cit*, ss. 13, 14; Companies Act, *op cit*, s. 133; Companies Amendment Act, *op cit*, s. 84.
[1561] CAMA, *op cit*, s. 425; A Aliyu and M A Saulawa, 'The Role of a Liquidator in Winding up Proceedings in Nigeria: Examining the Inadequacies Under Companies and Allied Matters Act (CAMA)', PHJBL 2.1 (2016)235.
[1562] The Insolvency Rules 1986 (as amended), part 1, chapter 3 (Proposal for Company Voluntary Arrangements by Liquidator).
[1563] Companies Act, *op cit*, s. 131(7).
[1564] Insolvency and Bankruptcy Code, *op cit*, s. 33.

proceedings.[1565]

10. It was found that the regulatory institutions lack the requisite capacity to enthrone a viable corporate rescue and insolvency practice in Nigeria. The institutions, that is, the Courts, the Corporate Affairs Commission (CAC) and even the Securities and Exchange Commission (SEC), were found to be over burdened with functions under their respective enabling statute that they do not possess the requisite for regulating corporate rescue and insolvency matters. Contrarily, it was found that in the Republic of India, there is a body corporate established amongst others to make regulations and guidelines on matters relating to corporate rescue and insolvency.[1566]

11. It was found that there are no standing financial mechanisms under CAMA or any other statute to address corporate insolvency matters in Nigeria. Rather, it was found that where the spate of corporate insolvency affects or is likely to affect companies in some perceived critical sectors of the economy such as the banking and aviation sectors, the Federal Government of Nigeria utilised informal corporate rescue options such as bailout and purchase and assumption.

Unlike the case in Nigeria where there is an absence of a statutory standing financial mechanism or fund to address corporate Insolvency matters, in the Republic of India, it was found that a Fund[1567] was created to address the cause of corporate insolvency. Furthermore, it was found that sources of the Insolvency and Bankruptcy Fund were clearly spelt out, namely, the grants made by the Central Government of

[1565]Insolvency and Bankruptcy Code, *op cit*, s. 5 (14), 12 (1) (3) - Corporate insolvency resolution process shall be for a period of one hundred and eighty days but subject to extension by the Adjudicating Authority, that is National Company Tribunal, for a period not exceeding ninety days and such extension can be granted once only.

[1566]Insolvency and Bankruptcy Code, *op cit*, ss. 188(1)(2). The establishment of 'the Insolvency and Bankruptcy Board of India" (the Board) as a body corporate; s. 196 - the powers and functions of the Board.

[1567]*Ibid*, s. 224(1)- creation of the "Insolvency and Bankruptcy Fund". For the purposes of insolvency resolution, liquidation and bankruptcy

India, the amount deposited by persons as contribution, the amount received in the Fund from any other source, and the interest or other incomes received out of the investment made from the Fund.[1568]

6.2 Recommendations

In light of the statement of problem and the summary of findings in this study, it is pertinent to make the following recommendations:

1. The National Assembly as a matter of urgency should enact a single holistic and comprehensive statute to consolidate the extant multifarious laws on corporate rescue and insolvency to be known as the "Corporate, Insolvency and Rescue Act".

2. The National Assembly should abort the passing into Law of the Insolvency and Bankruptcy (Repeal and Re-enactment) Bill 2015, which Bill is at the conference stage.

In the unlikely event that the National Assembly passes the Bill into Law, the President of the Federal Republic of Nigeria should withhold assent.

3. The National Assembly in the recommended Corporate Insolvency and Rescue Act should create a home grown and holistic corporate rescue option to be known as "Corporate Insolvency Rescue Proceedings".

The proposed Corporate Insolvency Rescue Proceedings should be a mix of the best provisions in the business rescue proceedings under Chapter 6 of the Companies Act of the Republic of South Africa and Part II, chapter II of the Insolvency and Bankruptcy Code of the Republic of India and Chapter 11 reorganisation proceedings of the Bankruptcy Code of the United States of America.

[1568]Insolvency and Bankruptcy Code, *op cit*, s. 224(2).

4. In the recommended Corporate Insolvency and Rescue Act, the National Assembly should establish a special insolvency regime for corporate entities in the banking, aviation, telecommunication, insurance and other sectors of the economy as the National Assembly may from time to time determine.

5. In the recommended Corporate Insolvency and Rescue Act, the National Assembly should establish a body corporate to be known as the "Insolvency Commission of Nigeria", which body corporate shall have the power to make regulations and guidelines on matters relating to corporate rescue and insolvency.

6. Corporate rescue and insolvency practitioners should only be subject to regulatory supervision and authority of the Insolvency Commission of Nigeria.

7. The unbundling of the Corporate Affairs Commission (CAC), Asset Management Corporation of Nigeria (AMCON), Nigeria Deposit Insurance Corporation (NDIC), Securities and Exchange Commission (SEC), Central Bank of Nigeria (CBN), National Insurance Commission of Nigeria (NAICOM) and any other regulatory institutions other than the Insolvency Commission of Nigeria of all powers and functions relating to regulation and supervision of corporate insolvency matters.

8. A first degree in Law with at least seven (7) years post-call experience as the minimum qualification for a person to be appointed or to act as corporate rescue and insolvency practitioner in Nigeria, whether as receiver and/or manager or provisional liquidator or liquidator.

9. The creation of a specialised Court to be known as the 'Companies Court of Nigeria' to handle in exclusion to any other court or tribunal, all matters relating to or connected with companies, corporate rescue and insolvency matters.

10. A person shall not be eligible to be appointed a judge of the Companies Court unless the person is qualified to practice as a legal practitioner in Nigeria and

has been so qualified with not less than ten (10) years post-call experience in corporate law and practice or administration for not less than eight (8) years.

11. The National Assembly should amend section 251(1)(j) of the Constitution of the Federal Republic of Nigeria 1999 by removing the exclusive jurisdiction vested on the Federal High Court in respect of Bankruptcy and Insolvency matters.

12. In the interim, the Chief Judge of the Federal High Court should by directive, create divisions of the Federal High Court, including the Companies and insolvency Division.

13. Alternative dispute resolution mechanisms such as Mediation, Negotiation, Conciliation and Arbitration should be statutorily entrenched as means of resolving insolvency matters.

14. Moratorium provisions should be embedded in the recommended Corporate Insolvency and Rescue Proceedings. The moratorium period should be for an initial period of 12 months, subject to extension for a further period of 12 months.

15. Corporate rescue option as provided in the recommended Corporate Insolvency and Rescue Act must be exhausted before the commencement or initiation of winding up proceedings.

16. Informal corporate rescue options such as debt for equity swap, purchase and assumption and cherry picking should be strengthened and encouraged by the National Assembly making uniform and harmonised guidelines for the invocation of such informal corporate rescue options

17. The Corporate Affairs Commission (CAC) should ensure and enforce total compliance with the extant laws and regulations on financial statements and audits of a company, filing of annual returns and maintenance of reserve funds.

18. The statutory offences connected in respect of corporate insolvency as stipulated in the extant laws such as the CAMA should be enforced by the prosecution of offenders, whether directors or other officers of a company.

19. There should be prescribed time limits within which to exploit any of the available corporate rescue and insolvency procedure. In the interim, the Companies Regulation 2012 should be reviewed so as to prescribe time limits within which to exploit any of the available corporate rescue and insolvency procedures. Winding up proceedings should not exceed 180 days from the time of commencement at the court of first instance.

20. There should be regular public lectures, seminars, sensitisation and training programmes for judges, government officials, legislators, regulatory officers, legal practitioners, company executives and students on the essence, dynamics and rudiments of corporate rescue and insolvency.

21. Corporate rescue and insolvency law and practice should be accredited and taught as a compulsory course at the undergraduate level in the respective Faculty of Law of the various Universities in Nigeria.

22. The words, phrases and terms to be used in the Corporate Insolvency and Rescue Act should be simple, clear, unambiguous, modern and devoid of any form of anachronistic language.

23. Application, Processing or Filing fees in corporate rescue transactions and proceeding should be waived.

24. The National Assembly should re-order the list of preferential payments as provided in section 494 of the CAMA by amending same to confer priority to creditors in respect of claims during insolvency proceedings.

25. The creation of a special fund to be known as the "Corporate Insolvency Fund of Nigeria" (CIFN) in the recommended Corporate Insolvency and Rescue Act. The sources of income for the Corporate Insolvency Fund of Nigeria shall be from:

i. grants by the Federal Government of Nigeria;

ii. 3 percent of the profits declared by every company in a relevant financial year;

iii. Such monies as may from time to time be granted or lent to or deposited with the recommended Insolvency Services Commission of Nigeria by the Federal or State Government, any other body or institution, whether local or foreign;

iv. All monies raised for the purposes of the recommended Insolvency Services Commission by way of gifts, loan, grants-in-aid, testamentary deposition or otherwise;

v. The amount received in the CIFN from other sources; and

vi. The interest or other income received out of the investment made from the CIFN.

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