

Rescuing Ailing Companies: Administration as an Insolvency Strategy

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1.0 Introduction

In a similar manner to natural persons, juridical persons such as corporate entities are capable of being unfit or ailing. When a human being ails, such person is considered ill, while an ailing company is considered insolvent. In both cases,

the ideal next step would be to find a solution to improve the adverse situation and restore the health of the ailing persons. While this may be correct in all cases for natural persons, this was not always the norm for companies due to



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the limited recovery options available for insolvent entities. In fact, prior to 2020, the only insolvency options available to companies were receivership and liquidation, both of which were inclined towards the death of the company.

Following the enactment of CAMA 2020, the tides

have turned for this category of companies due to the introduction of rescue options, one of which is Administration. Although not a new concept in the global insolvency space, the introduction of this rescue approach to insolvent Nigerian companies is novel and the potential benefits are yet to be fully harnessed.

2.0 What is Administration?¹

This is a formal insolvency procedure aimed at rescuing distressed companies with a focus on achieving better returns for the creditors whilst ensuring the companies remain as going concerns, where possible. Simply put, Administration is a business rescue approach to helping ailing companies get better while protecting the interest of their creditors.



3.0 Who can Initiate Administration?

The process involves the appointment of an insolvency practitioner referred to as an “administrator” to manage the affairs of the company. The administrator may be appointed by either of the following:²

i

Court via an Administration Order: The court may make an Administration Order to appoint an administrator for a company where the court is satisfied that the company is or is likely to become unable to pay its debts.³ The administration application to the court for the issuance of an Administration Order may be made by either or all of the following persons: company, directors, creditors, liquidator⁴ or a court-appointed receiver.

ii

Holder of a Floating Charge: The holder of a floating charge in respect of the company’s property may also appoint an administrator for a company. CAMA⁵ defines a floating charge as an equitable charge over the whole or a specified part of the company’s assets, the charge of which does not preclude the company from dealing with such assets until the security becomes enforceable, or a receiver/manager is appointed, or the company liquidates.

¹Chapter 18 of CAMA 2020

²Section 443, *ibid*

³Section 449, *ibid*

⁴Section 475, *ibid*

⁵Section 203, *ibid*

For the purpose of appointing an administrator, the floating charge will qualify only if it is created by an instrument (document) which: ⁶

- » states that the provisions of CAMA on administration applies to the charge; or
- » aims to authorise the holder to appoint an administrator; or
- » purports to empower the holder to appoint a receiver.

This suggests that the ability of a holder of a floating charge to appoint an administrator under this heading is linked with the contents of the documentation, in respect of recovery of debt, between the holder and the company.



Company' or its directors: This category of persons may also appoint an administrator out of court. However, the company or its directors are not allowed to make such appointment where a receiver had previously been appointed and is in office, an administration application has been made and is pending, or where there is a pending petition for the winding up of the court.

Notwithstanding the mode of appointment, the Administrator is an officer of the court⁹ saddled with the responsibility to manage the affairs, business and property of the company.

4.0 Focus of Administration

Upon the appointment of an administrator, the main objectives of the administrator are to:

- » rescue the company as a going concern;
- » realise property for distribution to creditors; and
- » ultimately achieve better results for the creditors than liquidation would.

The administrator is also required to assess the business and create a bespoke rescue plan for the company. Where the administration is successful, the company continues trading under new management, otherwise, the company moves to receivership or liquidation which is the last option to be considered.



⁶Section 452 (2), *ibid*

⁷Section 459(1), *ibid*

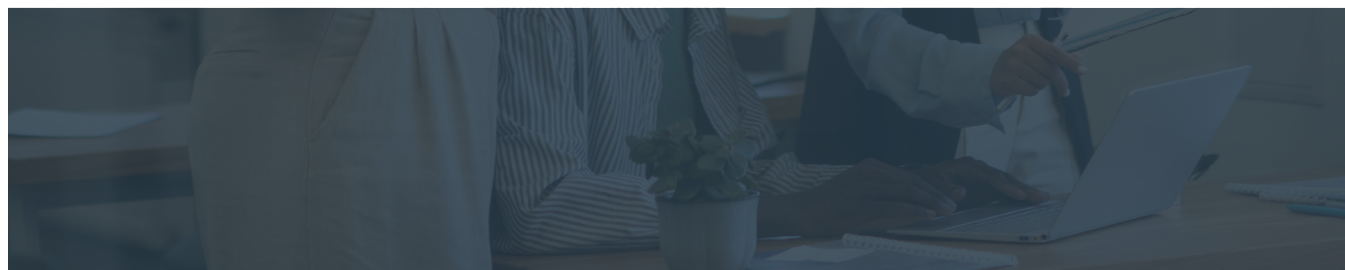
⁸Section 462, *ibid*

⁹Section 446, *ibid*

5.0 Benefits of Administration

The benefits afforded by this business rescue option cannot be overemphasised. Some of these are highlighted below:

- i** The primary objective is to rescue the company as a going concern.
- ii** There is a moratorium period during the administration that prevents legal actions against the company.¹⁰
- iii** Poses a better chance of returns to creditors than liquidation.
- iv** The administrator represents the interests of all creditors equally, notwithstanding the appointor.
- v** The administrator is an officer of the court which infers some level of good judgement and impartiality in the process.
- vi** Administrator is better suited to resolve issues that may have led to the insolvency of the company and is empowered to remove or appoint directors who are deemed fit for the role.
- vii** The process provides an independent and objective perspective into the state of the company.
- viii** The exit strategies are flexible as the company may return to normal operations post-administration.



6.0 Disadvantages of Administration

- >** The process is cost intensive.
- >** Administration does not allow for privacy as the administrator is required to publish his notice of appointment in the gazette or newspaper¹¹.
- >** Potential reputational risk or damage following public knowledge of the distressed company's status.
- >** No guarantee of recovery as the distressed company may end up in liquidation despite business rescue efforts.
- >** May disrupt company's other internal arrangements, such as a Companies Voluntary Arrangement, where secured creditors appoint an administrator.

¹⁰Section 480, ibid

¹¹Insolvency Regulations, 2022.

7.0 Powers of an Administrator¹²

Some of the powers of an administrator include the power to:

- i take possession of, collect and get in the property of the company.
- ii sell or otherwise dispose of the company's property.
- iii raise or borrow money and grant security over the property of the company.
- iv appoint a solicitor or accountant or other professional to assist in the performance of his/her functions.
- v bring or defend any action or other legal proceedings in the name and on behalf of the company.
- vi appoint any agent to act on his/her behalf.
- vii employ and dismiss company's employees.

viii carry on the company's business, including to establish subsidiaries of the company.

ix make any arrangement or compromise on the company's behalf.

x do all things necessary for the realisation of the property of the company.

It is important to note that these aforementioned powers of the administrator are not absolute. A creditor or member of a company in administration may challenge the conduct of the administrator where such complainant is of the opinion that the administrator is acting unfairly and not performing his/her functions as quickly or as efficiently as is reasonably practicable.¹³

Where this is the case, the court has the powers to make such orders as it deems fit in order to regulate the exercise of the administrator's powers, the order of which may include the termination of the administrator's appointment.



¹²Sections 496ff, Tenth Schedule CAMA 2020

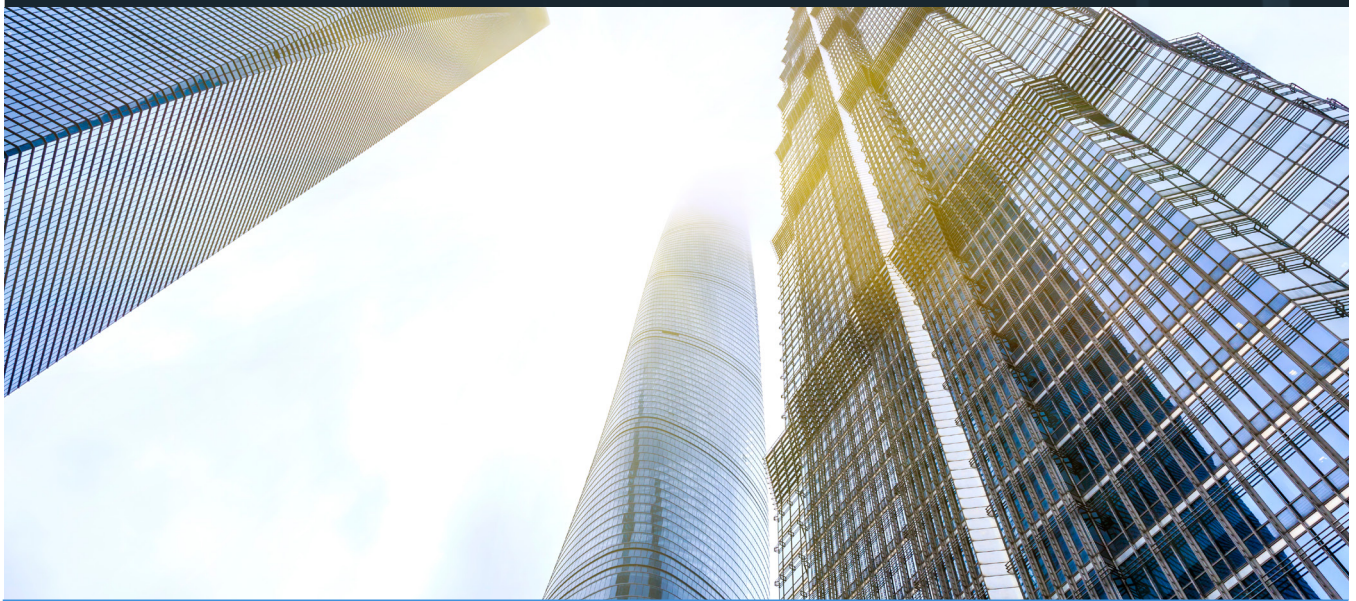
¹³Section 511 CAMA 2020

8.0 Conclusion

It is a new dawn for companies in Nigeria, particularly distressed companies as there are now more hopeful options than receivership and liquidation. As laudable as the introduction of these rescue options into the corporate law framework are, the purpose will not be fully achieved if they are not explored.

There is therefore a lot more work to be done by all stakeholders particularly insolvency practitioners and the regulators who have extensive advisory and oversight functions in this regard. Creditors must also be willing to explore rescue options such as Administration before proceeding to recover their debts through approaches which do not give any recourse to the company's survival. This is especially important and must be embraced since the interest of the creditors is considered a priority for the Administrator, thus leaving the creditor in a state better off than if the company is wound up.

Finally, it is imperative to first painstakingly consider rescue options for ailing companies before proceeding to cut short the lifespan of such company slowly via receivership or quickly via liquidation.



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