

Innovations in corporate insolvency in Nigeria under the Companies and Allied Matters Act, 2020 – Insolvency Practitioners



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Introduction

On 7th August 2020, the President of the Federal Republic of Nigeria, Muhammadu Buhari GCFR, assented to the Companies and Allied Matters Act, 2020 (“**CAMA 2020**”) which repealed and replaced the Companies and Allied Matters Act, Cap. C20, Laws of the Federation of Nigeria, 2004 (“**CAMA 2004**”). The CAMA 2020 provides for the incorporation of limited liability partnerships and limited partnerships amongst other related matters geared towards ensuring ease of doing business in Nigeria. The CAMA 2020 has been described widely as a piece of legislation with far-reaching changes in the Nigerian corporate landscape.

An observable lack in the corporate landscape before the enactment of the CAMA 2020 was the dearth of legislation and regulation in the area of corporate insolvency practice in Nigeria. Although the CAMA 2004 provided for corporate insolvency in Nigeria, there were no provisions in that Act relating to company voluntary arrangements, administration of companies, insolvency practitioners, netting under insolvency framework, winding up of unregistered companies etc. The CAMA 2020 in Chapters 17 to 28 filled the lacunae by enacting new provisions relating to corporate insolvency practices in Nigeria which were not in the CAMA 2004.

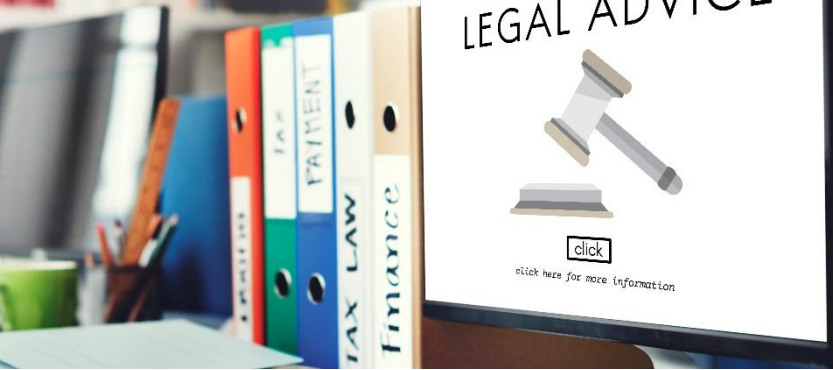
In this article, which is part 1 in the series that will discuss innovations in corporate insolvency practice under the CAMA 2020, **Uzoma Azikiwe, SAN, Festus Onyia FCARB and Mesuabari Mene-Josiah** have considered the legal framework under the CAMA 2020 for the regulation of insolvency practitioners in Nigeria. Where necessary, reference will be made to corresponding or similar provisions in the Insolvency Act, 1986 of the United Kingdom (“**UK Insolvency Act**”) being the law that regulates and governs corporate insolvency in the United Kingdom on which Nigeria modelled the insolvency provisions in the CAMA 2020, as well as the provisions of similar statutes in other jurisdictions.

Insolvency Practitioners in Nigeria and qualifications

The CAMA 2020 provides that a person acts as an Insolvency Practitioner in Nigeria in relation to a company if he acts in any of the following capacities –

- (a) the liquidator, provisional liquidator or official receiver; or
- (b) administrator or administrative receiver; or
- (c) receiver and manager, or as nominee or supervisor of a company’s voluntary arrangement¹.

¹ Section 704 of the CAMA 2020,



From the commencement date of the CAMA 2020, a person is only able to act as an Insolvency Practitioner in Nigeria where he has –

- (a) obtained a degree in law or accountancy or other relevant discipline from any recognised University or Polytechnic;
- (b) has a minimum of five years post-qualification experience in matters relating to insolvency;
- (c) has been issued a certificate of membership authorising him to act as an Insolvency Practitioner by the Business Recovery and Insolvency Practitioners Association of Nigeria (“BRIPAN”) or by any other professional body recognised by the Corporate Affairs Commission (“Commission” or “CAC”); and
- (d) holds an authorisation granted by the Commission².

The requirement for qualification to practise as an Insolvency Practitioner under section 705 appears broader than the definition of an “insolvency practitioner” in section 868 (1) which is the interpretation section of CAMA 2020. There is a conflict between the provisions of section 705 of CAMA on the one hand and section 868 (1) of CAMA 2020 on the other hand in relation to the qualification of members of BRIPAN to act as Insolvency Practitioners in Nigeria. While section 705 recognises members of BRIPAN as eligible to apply for authorisation to practise as Insolvency Practitioners, section 868 (1) of CAMA 2020 excludes members of BRIPAN from the definition of Insolvency Practitioners. The said section 868 of CAMA defines an Insolvency Practitioner “*to mean a legal practitioner within the meaning of the Legal Practitioners Act or a member of the Institute of Chartered Accountants of Nigeria or such other professional bodies of accountants as are established by an Act of the National Assembly.*”

Going by the definition of Insolvency Practitioner in the CAMA 2020, aside from legal practitioners and members of the Institute of Chartered Accountants, the only other persons that can practice as Insolvency Practitioners in Nigeria within the definition of section 868 (1) of CAMA 2020 are “such other professional bodies of accountants as are established by an Act of the National Assembly.”

A review of BRIPAN’s website shows that BRIPAN (formerly known as Insolvency Practitioners Association of Nigeria - “IPAN”) was incorporated on 17th June 1994 under the Companies and Allied Matters Act, 1990 as a company limited by guarantee. BRIPAN is therefore not a professional body of accountants established by an Act of the National Assembly. Since section 705 of the CAMA 2020 already listed members of BRIPAN as persons who are qualified to be accredited and may be issued

² Section 705 of CAMA 2020



certificates by the Commission to act as Insolvency Practitioners in Nigeria, the definition of Insolvency Practitioner under section 868 (1) of the same CAMA 2020 seems to represent an opposing view of who should qualify to practise as insolvency practitioners in Nigeria. Furthermore, section 868(1) of the CAMA 2020 appears to limit or remove the powers of the Commission under section 705(c) of the CAMA 2020 of recognising members of any other professional body from practising as Insolvency Practitioners in Nigeria.

Resolving the conflict between Sections 705 and 868(1)

Where there are conflicting provisions of a statute in respect of the same subject matter, a rule of interpretation is to the effect that the latter provision is deemed to have abrogated and will therefore prevail over the former provision of the statute³. This principle of construction of statutes is predicated on the standpoint that the legislature makes no prescription in vain. It is arguable that the intention of the legislature in restricting the interpretation of insolvency practitioners in section 868(1), which is a latter provision to section 705 of the same CAMA 2020, to mean legal practitioners, members of the Institute of Chartered Accountants of Nigeria or such other professional bodies of accountants as are established by an Act of the National Assembly is that the legislature excluded all professionals other than legal practitioners and accountants from being qualified to practise as Insolvency Practitioners in Nigeria. The effect of this interpretation would be that members of BRIPAN or such other professional bodies recognised by the Commission are not registrable as Insolvency Practitioners in Nigeria, unless they also are either legal practitioners or accountants.

A counter-argument could, however, be made to ground a broader interpretation of the conflicting provisions of the CAMA 2020. It could be contended that the purpose of the extensive review of the statute governing companies administration in Nigeria being to bring its provisions in line with international best practices, the intention of the legislature should be to include members of some other professional bodies including BRIPAN as being qualified to practise as Insolvency Practitioners in Nigeria, as provided in section 705 of the CAMA 2020. The law and practice in the UK, for instance, where members of the Insolvency Practitioners Association are recognised to practise as insolvency practitioners⁴ lend support to this counter-argument based on bringing the administration of companies in Nigeria in line with best international practice.

³ OZURUMBA V. NWANKPA & ORS (1999) LPELR-CA/PH/EP/61/99

⁴ <https://www.gov.uk/government/publications/insolvency-practitioners-recognised-professional-bodies/recognised-professional-bodies>



We, however, recommend that a court faced with interpreting or resolving the conflicting provisions of sections 705 and 868(1) of the CAMA 2020 should apply the principle of harmonious construction of statutes in resolving the conflict. The principle of harmonious construction of statutes states that where there are conflicting provisions in a statute, the conflicting provisions should be interpreted in a manner that would give effect to both provisions. Therefore, an interpretation that would render either of sections 705 and 868(1) of the CAMA 2020 inoperative should not be adopted.

The principle of harmonious construction was adopted in the Indian case of **Raj Krishna vs Binod AIR 1954**. In that case, the Indian Supreme Court was faced with interpreting the provisions of section 33 (2) of the Representation of People Act, 1951 which was in conflict with section 123(8) of the same Act. While the former section states that a government servant can nominate or second a person in an election, the latter section states that a government servant cannot assist any candidate in an election except by casting his vote. The Indian Supreme Court observed that both provisions should be harmoniously interpreted and held that a government servant was entitled to nominate or second a candidate seeking election into the State Legislative assembly as well as cast his vote but no further assistance should be given. This harmony could only be achieved if section 123(8) is interpreted as giving the government servant the right to vote as well as to nominate or second a candidate and forbidding him from assisting the candidate in any other manner⁵.

The Nigerian Supreme Court appeared prepared to adopt this principle of harmonious construction of statutes in the case of **Jumang Sheum & Anor -v- F. Gobang**⁶ where the Honourable Justice FABIYI, JSC stated that "*... when relevant sections of the constitution are being interpreted, there should be a liberal approach. It is sometimes referred to as broad interpretation or a global view. Such an approach often leads to harmonious interpretation which will tally with reason... Related sections of the constitution ought to be interpreted together... A narrow interpretation of an earlier section of the Constitution should not be made in isolation in such manner that will make a later section moribund.*" Adopting the harmonious construction principle, the provisions of sections 705 and 868(1) of the CAMA 2020, could be construed together to mean that the legislature intended that all the persons and professional bodies listed in both sections are qualified to practise as Insolvency Practitioners in Nigeria.

This approach seems to have been adopted by the Commission when it issued the Companies Regulations 2021 (the "**Regulations**") recognising members of BRIPAN and Institute of Chartered Secretaries and Administrators of Nigeria (ICSAN) as some

⁵ Interpretation of Statutes by CA. Rajkumar S. Adukia

⁶ (2009) 7 SCM 165 AT 176 H – I. See also the case of Guting v. Dawwang (2013) LPELR-CA/J/107/2012



of the professional bodies whose members are qualified to apply to practise as Insolvency Practitioners in Nigeria. We consider it important to mention that if a court were to adopt the principle that a latter conflicting provision prevails over the former rather than the harmonious principle of construction in interpreting the conflicting provisions of sections 705 and 868(1) of the CAMA, then the Regulations issued by the Commission, if challenged, may be declared as null and void since they seek to extend the eligibility to practise as Insolvency Practitioners beyond the category of professionals expressly mentioned in section 868(1) of the CAMA 2020.

Conditions for qualification as an insolvency practitioner are conjunctive

Going by the language of section 705 of CAMA 2020, the conditions for qualification as an Insolvency Practitioner are conjunctive or cumulative and not disjunctive. This means that a person can only be qualified to act as an Insolvency Practitioner in Nigeria if he has met all the conditions listed in section 705 of the CAMA 2020 because of the use of the word “and” in the said section. This interpretation aligns with the position of the Nigerian Courts in a plethora of decided cases that when the word ‘*and*’ is used in a statute, it shows that the items listed are conjunctive and must be so construed together⁷.

Although the CAMA 2020 provides for the qualification and requirements to practise as an Insolvency Practitioner in Nigeria, the Act failed to prescribe conditions that disqualify a person from practising as Insolvency Practitioner similar to those applicable to directors, liquidators etc. As an illustration, under the UK Insolvency Act⁸, a person is disqualified from practising as an insolvency practitioner if –

- a. he is not a natural person
- b. he is an adjudged bankrupt
- c. he is disqualified from acting as a director of a company
- d. he is a person of unsound mind.

It is, however, necessary to point out that under section 705 (d) of CAMA 2020, one of the mandatory conditions that must be satisfied before a person is eligible to practise as an Insolvency Practitioner in Nigeria is if he holds an authorisation granted by the Commission. Section 708 (4) of CAMA 2020 gives the Commission the power to withdraw an authorisation granted to any person to practise as an Insolvency Practitioner where it appears to the Commission that the person is not a fit and proper person to act as an insolvency practitioner. While there is no definition or laundry list of what the Commission would take into consideration in determining whether a person

⁷ The Procter and Gamble Company v. Global Soap and Detergent Industries Ltd & Anor (2012) LPELR-CA/L/369/2008

⁸ Section 380 of the Insolvency Act, 1986



has ceased to be a fit and proper person for purposes of acting as an insolvency practitioner, it is expected that the Commission would make this determination on a case- by -case basis. Furthermore, Rule 24 (4) of the Regulations restates the provision of section 708 (4) and goes further to state that the Commission may withdraw accreditation granted to a person where the person is disqualified from practice by the professional body. This means that although the CAMA 2020 failed to expressly prescribe conditions that disqualify a person from practising as an Insolvency Practitioner similar to those applicable to directors, liquidators etc, the effect of the foregoing provisions of the CAMA 2020 and Regulations is that the Commission may either refuse to grant or withdraw an authorisation issued where it appears that the person is not a fit and proper person to act as an Insolvency Practitioner. This appears to be the only condition that would disqualify a person from acting as an Insolvency Practitioner.

It is, however, arguable that (i) the Commission may not have the powers to make regulations that disqualify a person from practising as an Insolvency Practitioner in Nigeria (ii) the powers given to the Commission in section 706 of CAMA 2020 is to make regulations recognising any other professional bodies whose members may be eligible to practise as Insolvency Practitioners in Nigeria (iii) the power to recognise professional bodies and their members as eligible to practise as Insolvency Practitioner may not be said to extend to the powers to prescribe conditions that disqualify a person from practising as an Insolvency Practitioner in Nigeria. Section 10 (2) of the Interpretation Act provides that *“An enactment which confers power to do any act shall be construed as also conferring such other powers as are reasonably necessary to enable that act to be done or are incidental to the doing of it”*. It is arguable, based on this provision, that the power granted to the Commission under the CAMA 2020 to grant authorisation to a person to practice as an Insolvency Practitioner or to prescribe such additional qualifications to practise as an Insolvency Practitioner as it considers necessary implies or includes the incidental power to also prescribe conditions that would disqualify a person from practising as an Insolvency Practitioner. It is, however, debatable whether prescribing conditions that disqualify a person from practising as an Insolvency Practitioner in Nigeria is reasonably necessary to, or incidental to the Commission’s exercise of its powers under section 706 of CAMA 2020.

A review of the qualification requirements in section 705 of CAMA 2020 shows that the law creates a high qualification threshold for Insolvency Practitioners in Nigeria when compared to the position in the United Kingdom. Under the UK Insolvency Act, a person is authorised to act as an insolvency practitioner in relation to a company if he is so authorised to act by virtue of membership of a professional body recognised by the Secretary of State by order declared to that effect, or the person holds an authorisation granted by a competent authority under the provisions of the law. The qualification to act as an insolvency practitioner under the UK Insolvency Act, which



appears to have inspired the relevant provisions of the CAMA 2020 seem to be more liberal than the provisions in Section 705 of CAMA 2020.

Regulations made by the Commission recognising other professional bodies whose members are eligible to act as Insolvency Practitioners in Nigeria

Whilst the CAMA 2020 specifically listed BRIPAN, legal practitioners and members of the Institute of Chartered Accountants of Nigeria as some of the professional bodies recognised under the Act whose members are eligible to be issued qualifying certificates to act as Insolvency Practitioners in Nigeria, the law also gives the Commission the powers to make instruments or orders recognising any other professional body as an appropriate body whose members are eligible to be issued qualifying certificates to act as Insolvency Practitioners. The conditions to be considered by the Commission in recognising such a professional body are outlined in section 706 (2) of CAMA 2020 which provides that a professional body may be recognised if it regulates the practice of a profession and maintains and enforces rules for securing that its members (a) are permitted by or under the rules to act as Insolvency Practitioners or (b) are fit and proper persons to act as Insolvency Practitioners or (c) meet acceptable requirements as to the education and practical training and experience. The Commission has the powers to revoke any instrument or order recognising a professional body by a further order, if it appears to the Commission that the body no longer meets the requirements in section 706 (2) of the CAMA 2020.

In the exercise of its powers under section 705 of the CAMA 2020 to make instruments and orders, the Commission under Regulation 24 of the Regulations has listed members of the following professional bodies in addition to the members of BRIPAN as persons eligible to apply to the Commission for accreditation as Insolvency Practitioners-

- (a) Nigerian Bar Association
- (b) Institute of Chartered Accountants of Nigeria
- (c) Association of National Accountants of Nigeria; and
- (d) Institute of Chartered Secretaries and Administrators of Nigeria.

Regulation 24(2) of the Regulations sets out the requirements for accreditation as Insolvency Practitioners to include the following-

- (a) Duly completed Form CAC-MISC 02
- (b) Payment of prescribed application fee
- (c) Evidence of membership of the relevant professional body



- (d) Evidence of practice as an insolvency practitioner for not less than five years immediately preceding the date of application
- (e) Evidence of eligibility to practise the profession for the current year of the application; and
- (f) Evidence of completion of accredited course of continuous learning administered by the relevant professional body in the preceding year in the case of renewal of accreditation.

The accreditation by the Commission as an Insolvency Practitioner is renewable every two years at no cost and the Commission may withdraw the accreditation where the person is disqualified from practice by his professional body or where it appears to the Commission that the person is not fit to act as an insolvency practitioner. The use of the word “appears” in relation to the Commission’s power to determine that a person is not fit to act as an Insolvency Practitioner makes the decision subjective and discretionary. The Regulations do not define the parameters to be used by the Commission in arriving at such a decision. In our view, however, the Commission is required by law to exercise such discretion judiciously and a person aggrieved by the Commission’s decision could seek redress in the courts for the determination of his rights to continue to act as an Insolvency Practitioner in Nigeria. Our opinion is based on the well established legal principle that where a statutory or an administrative body exercises a discretion that would affect the rights of any person, the statutory or administrative body is bound to act judiciously⁹.

In addition, the CAMA 2020 has a self-contained provision to check or redress any arbitrariness on the part of the Commission in granting or withdrawing authorisations to practise as an Insolvency Practitioner. This is the purport of section 709 of CAMA 2020 which provides that where an application made to the Commission for authorisation to act as an Insolvency Practitioner is refused by the Commission or an authorisation previously granted is withdrawn, the Commission shall within 7 days notify the person in writing stating the reasons for the refusal or withdrawal of the authorisation and the party affected may within 21 days of receipt of the notification apply by summons to the Federal High Court for a review of the decision of the Commission and the Court upon hearing the summons may refuse or grant the summons on such terms as it deems fit¹⁰. The decision of the Federal High Court on such summons may be appealed to the Court of Appeal whose decision shall be final¹¹.

⁹ Fawehinmi v. I.G.P. (2002) 7 NWLR (Pt. 767) 606

¹⁰ Section 709 (1) of CAMA 2020

¹¹ Section 709 (2)



The CAMA 2020 does not adopt the bifurcated requirement to practise as an insolvency practitioner under the UK Insolvency Act

The CAMA 2020 does not adopt the bifurcated requirement similar to what is applicable under the UK Insolvency Act by which a person may be authorised to practise as an insolvency practitioner. Under the UK Insolvency Act, a person is eligible to practise as an insolvency practitioner in the UK if he has complied with either of the following –

- (a) he is authorised to so act by virtue of membership of a professional body recognised by the Secretary of State as eligible to practise as insolvency practitioners¹²; or
- (b) he holds an authorisation granted by a competent authority to act as an insolvency practitioner¹³. The UK Insolvency Act defines a competent authority as (i) the body or person so specified in a direction given by the Secretary of State (ii) the Secretary of State in any other case not falling within a body or person so specified in a direction issued to that effect¹⁴

The CAMA 2020 only provides for a single process of obtaining authorisation to practise as an Insolvency Practitioner in Nigeria. Considering that the CAMA 2020 does not create any other competent authority aside from the Commission, it is understandable why the CAMA 2020 adopted the single process of obtaining authorisation to practise as an Insolvency Practitioner in Nigeria.

No penalty for acting as Insolvency Practitioner contrary to the Act

The CAMA 2020 neither criminalises nor prescribes any sanction against any person who acts as an Insolvency Practitioner in Nigeria without meeting the requirements set out in section 705 of the Act. Unlike the CAMA 2020, the UK Insolvency Act makes it an offence for a person to act as an insolvency practitioner in the UK without obtaining the relevant qualifications. Section 389 of the UK Insolvency Act provides that “*A person who acts as an insolvency practitioner in relation to a company or an individual at a time when he is not qualified to do so is liable to imprisonment or fine or to both*”. The section however exempts official receivers from its application.

Considering that the Constitution guarantees that no citizen should be put through a criminal trial, convicted and punished over an alleged offence not created by any law and that the CAMA 2020 does not expressly criminalise acting as an Insolvency

¹² Section 390(2) (a) and Section 392 of the UK Insolvency Act

¹³ Sections 392 and 393 of the UK Insolvency Act

¹⁴ Section 392 (2) of the UK Insolvency Act



Practitioner in Nigeria without meeting the relevant qualification and authorisation by the Commission, no criminal proceedings can be taken out against any person who violates the provisions of Chapter 26 of CAMA 2020 by acting as an Insolvency Practitioner without the relevant qualifications and authorisation issued by the Commission. Although criminalising unauthorised practice of insolvency would have been the most effective way of ensuring that only qualified and accredited persons engage in insolvency practice in Nigeria, the Commission could through the exercise of its regulatory powers checkmate the activities of anyone who may engage in unauthorised insolvency practice. For instance, the Commission may in the exercise of its powers, refuse to recognise any documents or statutory returns issued or filed by such a person and may not accept such documents for filing.

Conclusion

The novel provisions in the CAMA 2020 for the regulation of insolvency practice in Nigeria are commendable and a welcome development in the corporate domain as it will boost investor confidence. Insolvency Practitioners are now aware that their licence to practise as Insolvency Practitioners may be withdrawn by the Commission in circumstances where it appears that they are no longer fit to continue to practise as such. The CAMA 2020 and the Regulations make it mandatory for anyone who intends to practise as an Insolvency Practitioner in Nigeria to be issued with authorisation by the Commission.

The saving provisions of the CAMA 2020¹⁵ preserve the appointment and decisions of persons who were acting as Insolvency Practitioners (e.g. liquidators) before the commencement date of the CAMA 2020. This means that such persons shall continue to act in their respective capacities as Insolvency Practitioners since their appointment was made before the commencement date of the CAMA 2020.

We note, however, that should any person act as an Insolvency Practitioner without the relevant qualifications and authorisation, the Commission or the state cannot prosecute such person. The Commission may in the exercise of its powers refuse to recognise and/or file any documents issued by such a person. In order to strengthen the regulation of Insolvency Practitioners in Nigeria, we suggest that the CAMA 2020 be amended to criminalise or penalise the unauthorised practice of insolvency in Nigeria.

¹⁵ Section 869 (2) of CAMA 2020

In addition, the provisions of section 868(1) of CAMA 2020 relating to the definition of an insolvency practitioner should be amended to resolve the apparent conflict between sections 705 and 868 of the CAMA 2020, particularly the non-inclusion of members of BRIPAN in section 868 (1) among those that can practice as Insolvency Practitioner in Nigeria.



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