

# COMPANIES & MARKETS

## THE COMPANIES AND ALLIED MATTERS ACT (REPEAL AND RE-ENACTMENT) BILL 2019 – WHAT YOU NEED TO KNOW

### PART 11 – COMPANY ADMINISTRATION

By Udo Udoma & Belo-Osagie

#### BACKGROUND

The Companies and Allied Matters Act (Chapter C20) Laws of the Federation of Nigeria 2004 (CAMA) was enacted in Nigeria as a decree of the military government in 1990, and in the past 28 years, there have been no significant amendments to the CAMA. This is, however, all set to change if the Companies and Allied Matters (Repeal and Re-enactment) Bill 2019 (CAMA Bill), which was passed by the Nigerian Senate on 15<sup>th</sup> May 2018 and by the House of Representatives on 17<sup>th</sup> January 2019, is passed into law. In this series, which is scheduled to run for 12 weeks, Udo Udoma & Belo-Osagie will provide insights and digestible excerpts on the effect of key changes proposed by the CAMA Bill.

#### COMPANY ADMINISTRATION

The CAMA Bill seeks to introduce company administration into the body of Nigerian company law. Administration is an insolvency process that involves the appointment of an administrator to manage the company's assets, with a view to rescuing the whole or part of the company's undertaking as a going concern. As an alternative to the finality of winding up, administration provides the possibility for a company to survive its financial troubles and continue trading as a going concern. Immediately the appointment of an administrator takes effect, no legal action (including legal proceedings, execution, distress etc.) may be instituted or continued against the company or the company's property, except with the permission of the Federal High Court (the "Court") or the consent of the administrator. This moratorium protects the company from enforcement proceedings and legal action from its creditors, thereby enabling the administrator focus on implementing measures that are aimed at rescuing the company.

Even though the rescue of the business is the primary objective of administration, an administrator may pursue some other course which will yield a better result for the company's creditors if the administrator is of the opinion that it is not reasonably practicable to rescue the company. The administrator may in fact decide that it is best that the company be wound up or explore a compromise with creditors through a creditors' voluntary arrangement.

#### How does a company go into administration?

A company can go into administration upon an order of the Court appointing an administrator. An application for an administration order can be made by:

- i. the company;
- ii. its directors;
- iii. one or more creditors;
- iv. the designated officer of the Court appointed to act as receiver;
- v. a liquidator upon the satisfaction of specified conditions;
- vi. the holder of a floating charge in special circumstances; or
- vii. a combination of any of the persons listed in (i) to (iv) above.

Administration can also be commenced out of court. This happens where an administrator is appointed by either the company itself, its directors or the holder of a floating charge that meets the stipulated conditions.

Where an appointment is made out of court, the person that appointed the administrator is required to file a notice of appointment, and such other documents as may be prescribed, with the Corporate Affairs Commission (the "CAC"), and in some instances, the person is also required to file a notice of appointment and such other documents as may be prescribed, with the Court.

#### The administrator

The administrator must be a qualified insolvency practitioner, whose remuneration and expenses are payable out of property which is in the administrator's custody, in priority to the claims of holders of a floating charge. Two or more administrators may be appointed jointly or concurrently. It is noteworthy that the administrator is not an agent of the person that appoints him; upon appointment, an administrator becomes an

officer of the court and an agent of the company. An administrator is required to perform his/her functions as quickly and efficiently as possible.

#### Process of administration

Within 60 days of appointment, the administrator is required to prepare a detailed schedule of assets and submit a copy to the person who appointed him. The administrator is also required to send a notice of their appointment to the company, obtain a list of the company's creditors, and send a notice of their appointment to each creditor of whose claim and address the administrator is aware. The administrator is also required to publish a notice of appointment.

The administrator may issue a notice to an officer (or former officer), any founder or any employee (or former employee) of the company, requiring such person(s) to provide a statement of the affairs of the company. Having considered the state of the company's affairs, the administrator would circulate a proposal to the creditors for achieving the purpose of the administration. Where the proposal is not approved by the creditors, the administrator will apply to the Court for further direction.

#### Effects of administration

While a company is in administration:

- every business document issued by or on behalf of the company or the administrator, as well as the company's website, must state the name of the administrator and clearly indicate that the company is in administration;
- no resolution may be passed for the winding up of the company, and no order may be made for the winding up of the company, except in limited circumstances;
- all pending winding up petitions will either be dismissed or suspended, except in limited circumstances;
- a receiver appointed by the holder of a floating charge will vacate office;
- no steps shall be taken to enforce security over the company's property or to repossess goods in the company's possession under a hire purchase agreement, except with the permission of the administrator or the court;
- a landlord may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company except with the consent of the administrator or the permission of the court;
- the administrator may remove or appoint a director, whether or not the appointment is to fill a vacancy;
- neither the company nor an officer of the company may exercise management powers without the consent of the administrator; and
- the administrator is empowered to take custody of all the property to which he thinks the company is entitled.

#### Bringing administration to an end

The appointment of an administrator expires at the end of a period of one year from the date on which the appointment took effect, except where it is extended by the court for a specified period (prior to expiration) or extended for a period not exceeding six months with the consent of each secured creditor of the company (and qualified preferential creditor(s) where applicable). Prior to the expiration of the administrator's term (or any extension thereof), the court may, upon an application by the administrator or a creditor, order the cessation of the appointment of the administrator. Administration will also come to an end before the statutory period, where the administrator files a notice at the Court and the CAC, stating that the objective of the administration has been sufficiently achieved. Depending on the circumstance, an administration may also end through a public interest winding-up or upon the application of a creditor. Depending on the circumstance, an administration may lead to a creditors' voluntary liquidation or the dissolution of the company.

*Udo Udoma & Belo-Osagie actively participated in the drafting of the CAMA Bill. Corporate Partner, Ozofu 'Latunde Ogiemudia was the chairperson of the Technical Advisory Committee set up by the office of the Senate President to advise on the CAMA Bill and the bill to amend the Investments and Securities Act 2007. Managing Associate, Christine Sijuwade was a member of that committee and led the drafting sub-committee on the CAMA Bill.*