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MECHANISMS FOR ADDRESSING INSOLVENCY MATTERS IN NIGERIAN COMPANY LAW PRACTICE

Obinuchi Chimezule*
Emmanuel O. C. Obidinma**
Matthew Anushiem***

Abstract
Insolvency invokes sentiments from citizens of any country. The reason is simple, it is usually not a pleasant music to the ears and souls of citizenry as it has adverse effects on both individuals and body corporates. One of the notable grounds for winding up of a company in Nigeria and elsewhere is insolvency, otherwise referred to as inability to pay debt. This paper adopts the doctrinal research methodology in this work. Primary Statutes like the Constitution of the Federal Republic of Nigeria 1999 and others like the Companies and Allied Matters Act (CAMA) 2020, Investment and Securities Act 2025 among others are utilized. Textbooks, Journals and other secondary sources will equally be relied upon. Two theories are adopted to buttress this legal research. Fiction Theory which describes a company as a legal fiction. In company law, once a company is incorporated with the commission, it acquires separate legal personality which depicts its new nature. The second is The Legal Positivist Theory of Law which views law as authority backed by sanction. It is well known that where a company defaults in paying debt, insolvency sets in and can lead to winding up of such company. There are findings and recommendations in this research work which include establishment of Insolvency Tribunal to administer insolvency and related matters thereto and the need for a separate institution to administer insolvency matters other than Corporate Affairs Commission.

Key words: Insolvency, company, receivership and winding up

1. Introduction

The debt institution exist side by side with the institution of commodity exchange. People buy and sell goods and services. Some pay immediately after purchase, while others owe with the intention of paying later. Companies also owe with same intention of paying on a later date. Furthermore, companies can also borrow money as the law permits them to do so. The extant law states:

> *A company may borrow money for the purpose of its business or objects and may 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 of the company or of any third p*arty.[1]

The above section demonstrates clearly that companies have powers to borrow fund. The problem arises when such company is unable to pay back the borrowed fund. Insolvency is simply the inability to pay debt upon demand. The statute in Nigeria described inability to pay debt by a company thus:

> *A company is deemed to be unable to pay its debt if: a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding #200,000, then due, has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.*[2]

***Obinuchi Chimezule**, LL.B (RSU PH), LL.M (RSU PH), Ph.D in view (NAU, Awka), Lecturer, Faculty of Law, University of Port Harcourt. obinuchi.chimezule@uniport.ng.edu 08037196554
** **Emmanuel O C Obidinma,** Professor of Law and Provost College of Post Graduate Studies, Nnamdi Azikiwe University Awka eocobidimma@unizik.edu.ng 08034003436
*** **Matthew Anushiem,** LL.B, BL, PhD, Associate Professor, Dept. of Human Rights Law, Faculty of Law, NAU Awka mi.anushiem@unizik.edu.ng 08032641757
[1] Section 191 Companies and Allied Matters Act, 2020
[2] Section 572(a) Companies and Allied Matters Act, 2020

2. Theoretical Framework

2.1 Fiction Theory

Von Savigny is known to have propounded the fiction theory of law. Nyaydristi,[3] wrote that Karl Von Savigny propounded the fiction theory. As per him, a personality attached to the corporation, institution etc., through a legal fiction and the concerned personality is different from the personality of its constituents. There are double fiction in the case of a corporation. In fiction theory, the corporation is clothed with legal personality.

Savigny opined that the personality of a corporation is different from that of its members. It therefore follows that any charge in the membership does not affect the existence of the corporation. The legal fiction theory see the company as being different from its shareholders. The members of a company be rich while the company is broke.

Amadike and Oraegbulam[4] cited Laufer who posit that the legal fiction theory rests on the distinction between natural and artificial persons. According to him, natural persons exists in the form given to it by God of nature while artificial persons are form created and designed by human laws. Thus human beings acts their words but artificial acts the words of another. The authors queried, can the meaning of the concept of person involve both the natural and artificial?[5] This is against the background that using fiction theory a company though an artificial are clothed with natural person. The authors further queried: To what extent would the law justifiably assign artificial personality to the company?[6] The further query from the authors emanates from the fact that the law had already assigned artificial personality to the company. The next query from the duo was; how separate is the separate personality of the company from its members?[7]

In company law, once a company is incorporated with the commission, it acquires separate legal personality which depicts its new nature. It is seen to be separate and distinct from the members of the company. This is in line with the philosophy of the fiction theory and it is what the authors queried in their research work. One interesting statement by the authors which the present researcher completely agrees with is the statement that the legal fiction theorists inferred that the company belongs to the latter categories of artificial person created by law. This is what the legal fiction theory posit.

There are arguments however that the company can only be an artificial person but cannot be a citizen as highlighted in the research work by the authors under review. It is important to add that this paper commends the authors for diligently putting forward a well-researched work. The fiction theory therefore regards the company as a creation of law. The created company stands on its own and is different from members or shareholders as explained earlier in this work. Whatever properties acquired of the company and not its members or shareholders.

Lower,[8] writing about fiction theory asked: 'does the corporation, or any other human grouping or society, have a reality or existence that is independent of its members'?[9] The author actually feels that clothing a corporation with legal existence can be queried. The author feels that it is still human beings that operate the company which is attributed as standing on its own-mere fiction. The author opined that the idea that the corporation is something real is contrasted with the well-known notions that the corporation is a pure fiction and that the underlying reality is that of a contract or nexus of contracts.

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[3] N Dristi, "Jurisprudence of Person: Fiction and Realistic Theory" available on <https://nyaydristi.in.jurisprudence_of_person_fiction_realistic_theory//> accessed 10 May 2024
[4] N Amadike and I K E Oraegbulam, 'Jurisprudence of Corporate Personality: Rethinking the Paradox of Separate Personhood in Fiction Theory' (2018)(2) AJLTLR
[5] ibid
[6] ibid
[7] ibid
[8] M H Lower, 'The Corporation: A Reality or a Fiction?' available on <https://papers.ssrn.com/so/3/papers.cfm?abstract_id-73303> accessed 18 August, 2024
[9] ibid

Gustafsson,[10] wrote about fiction theory thus: 'how can we reach conclusions that are reliable, true and valid, even though we rely on concepts that are apparent fictions: how is it possible that although in thinking we calculate with a falsified reality, the practical results can prove to be correct'?[11] It seems to go against all logics. But history on the other hand is obviously filled with fictions, and science itself was accused of fictional thought, that has been proved more or less successfully. The above author called fiction theory the 'as if' world. The present researcher commends the author's ability writing about fiction theory. Generally, it is submitted that this theory can successfully describe the functioning of the company including the insolvency or bankruptcy of a company in Nigeria or elsewhere.

2.2 Legal Positivist Theory

John Austin is generally regarded as the leader of positive law theory. Proponents of this theory defines law as a command of the sovereign directed against people who must obey it under the threat of sanction.[12] This paper concurs that sanction is part of the ways to enforce law. It has just been defined above what is meant by inability to pay debt. It would soon be explained that such inability to pay debt is followed by sanction which was exactly what the proponent of this theory explained and it is found practicable in company. Therefore, the legal positive theory of law is of the essence in the discourse of this paper relating to the Mechanisms for Addressing Insolvency in Nigeria.

3. Conceptual Clarifications

The concept of insolvency has to do with when a company is unable to fulfill its financial obligation to its creditors in a transaction freely entered into. Insolvency sets in the moment there is inability to pay upon demand made by creditor. The extant law in Nigeria states that after three weeks of demand by the creditor to the company's registered office, if the company cannot pay, it is considered insolvent. Thus, insolvency sets in. Generally, it is one of the grounds for winding up of a company. The Supreme Court in *Afrotech Technical Services v MIA & Sons Ltd & Anor,*[13] defined insolvent person thus:

> *A person is deemed to be insolvent within the meaning of this Act who has either ceased to pay his debt in ordinary course of business, or cannot pay his debt as they become due, whether he has committed an act of bankruptcy or not.*

Njemanze,[14] looked at insolvency as a situation where a person's liabilities exceed his asset resulting to his inability to meet his financial obligations as they become due. Njemanze's definition means that insolvency is the incapability to pay one's debts as they fall due especially relating to body corporates. He does not agree that insolvency affects individuals rather what affects individual according to the learned author is bankruptcy.[15]

Sealy and Hooley,[16] described insolvency as a condition of having more debts (liabilities) than total assets which might be available to pay them, even if the assets were mortgaged or sold. It can therefore be deduced that corporation is insolvent when it has more liabilities than asset. When a company has more liabilities than assets it is certain that insolvency has set in. This is obvious because even if the company has to sell all its assets to pay the debt it would not offset all the debt. This is so because the total money that would be realized from such sales would not be enough to offset the incurred debts so, the company becomes insolvent. The company is insolvent because the liabilities are bigger than the asset.

Sealy and Milman,[17] opined that insolvency is the legal process by which a company is divested of the right to administer its property and business on the ground that it is unable to pay its debts. It applies to

[10] H Gustafson, 'Fiction of Law' available on <https://www.academia.edu/37096720/Fiction_of_Law> accessed on 10 June, 2024
[11] ibid
[12] M T Ladan, *Introduction to Jurisprudence (*Malthouse Press Ltd 2010) 53
[13] (2000) LPELR-219 (SC) 41
[14] L O Njemanze, *Understanding Bankruptcy, Trust and Executorship Law and Accounts* (Rhyee Kerex Publishers Enugu 2003) 1
[15] ibid
[16] L Sealy and W Hooley, *Text, Cases and Materials in Insolvency Law* (Oxford University Press Oxford 2008)
[17] L Sealy and B Milman, *Annotated guide to the insolvency legislation* (Sweet & Maxwell London 2011) 20

corporate failure of business. Corporate insolvencies happen because companies become excessively indebted. When a company become excessively indebted it is unable to pay as at when due, thereby leading to equitable insolvency to crystalize.[18] Sealy and Milman explained further that sometimes insolvency is taken to mean the state of financial affairs of a debtor while bankruptcy refers to the formal states of being put into formal insolvency. Although the present researcher hopes to discuss bankruptcy separately from insolvency it is brought to the fore here because of the analysis by Sealy and Milman. This is slightly different from the views of some authors who separate both concepts and sees insolvency as that which is attributable to a corporate entity while bankruptcy is attributable to an individual. Here the authors explains both concepts as a process and an end point. That is insolvency is the process that terminates at bankruptcy.

The present researcher agrees with the above explanation to a point. Insolvency is actually the inability to pay debt when due and once a debt is due and cannot be paid it leads to bankruptcy. This is understandable. Although they are not too different from what has been discussed all along which is that insolvency from both the definitions given by the statute and learned authors relates to inability to pay debts when demanded over a given period of time while bankruptcy is the state of being insolvent proper. Davies and Worthington,[19] described insolvency as the most common reason for winding up. They argue that though it may not be the only reason but that most companies wound up when they are insolvent. They added that when a company is insolvent; it seems on the face of it, somewhat illogical to treat the process as part of insolvency law rather than company law. According to them, the reason why the legislation relating to liquidation of insolvent companies is in the Insolvency Act in the UK is probably to avoid duplicating those provision that apply whether or not the company is insolvent.

Abdulrahaman,[20] defined insolvency as a situation where a company cannot or is unable to meet its obligation especially financially. He explained that a company can remain solvent as long as their fair value of assets exceeds it liabilities even if it cannot pay its obligation when due. He distinguished solvency and liquidity. Liquidity refers to the company's ability to meet the short-term obligations like payment of wages, salaries and other expenses then such a company is liquid then on the other hand solvency relates to the long-term financial capability of a company which increases the ability to pay long term loans, pay interest on debenture and principal when due. This paper commends the author above especially for the distinction given to liquidity and solvency of a company at a particular point in time. This is most often misunderstood by some. Liquidity does not necessarily translate to solvency and illiquidity on the other hand does not equally mean that a company is insolvent.

Temilola,[21] described insolvency as the inability of a company to pay debt. According to him, insolvency and business recovery practices are not at infancy state in Nigeria, though it has not crystalized to a full profession as it is practiced in other relatively advanced climes. As the global financial sector evolves, the focus of modern insolvency and business recovery practices have shifted from winding up of insolvent companies to reorganizations and restructuring of such companies and its operation to foster economic stability and financial propriety. He concluded that in Nigeria, liquidation is seen as panacea to insolvency.

Adamus,[22] conceptualized insolvency as a doctrine which describes a company's inability to pay its debt. He informed that the insolvency law has travelled a long way from inception to the present day, noting that however, a real revolution in this area of law was still ahead. He retrospect's on insolvency/indebtedness and how it was 'slavery to debt'.[23] He concluded with what he called reasons

[18] ibid
[19] P L Davies and S Worthington, *Gower's principles of modern company law* (Sweet & Maxwell London; 2016) 1151
[20] S Abdulrahaman, 'Business failure, Insolvency and Accounting for Legal Reorganization in Nigeria' *International Journal of Business and Management Tomorrow* (2013) (3)(3) 1-8
[21] O O Joshua and O O Temilola, 'Insolvency Law and Business Recovery Practices in Nigeria's Upstream Petroleum Sector: The Need for paradigm shift' *International Journal of Mechanical Engineering and Technology* (2019) (10)(1) 1609-1628
[22] R Adamus, 'What are the Challenges to the Insolvency law in the 21st Century?' *Societas Et JurIsprudentia* (2021)(9(3) *99-117*
[23] ibid

for insolvency which he divided into two: External and Internal factors. External factors take the form of changes in market conditions including doctrine in demand for goods or services while internal factors among other include: management errors, outdated technologies in the face of technological progress, increasing competition, unsuccessful investment, product obsolesce, loss of strategic business partners, etc.

4. Mechanisms for Addressing Insolvency in Nigeria

4.1 Merger and Acquisition

Mergers and acquisition refers to the coming together of two or more companies to become one. One of the mechanisms to avert liquidation of a company as a result of insolvency is mergers and acquisition, where two or more companies who are operating independently and not maximizing productivity and sometimes running at a loss, such companies can merge together for better and efficient productivity.

4.1.1 Types of Mergers

The three notable types of mergers are horizontal integration, vertical integration and conglomerate integration:[24]

a) *Horizontal Integration:* This occurs where there is a fusion of companies in competitive business. The companies involved in this kind of mergers are often in same line of business. A typical example will be merger between banks. Two independent banks can come together to become one for obvious reasons. It simply means they can maximize their profit from their coming together.

b) *Vertical Integration:* This is merger involving companies in non-competitive relationship. A good example would be companies in complimentary business. A paint producer and plastic company producer used in selling the paint when already produced. Both companies complement each other and can therefore merge into a single bigger company. The companies here don't compete rather they complement each other.

c) *Conglomerate Integration:* This is a situation where companies who are completely unrelated merge together. A typical example would be a bank and brewery company. The present researcher has discussed these different types of merger in an earlier research work.[25]

4.1.2 Reasons for Merger

The reasons why companies merge together and become one are numerous. Some of the popular reasons for merger are briefly treated below:

a) *Diversification of risk:*This can be explained from two angles. First, instead of a conglomerate going into a new business with its attendant risk factor, it can merge with a company in that business if it is a viable one, such merger will reduce or diversify the risks than the parent company going into that other line of business. On the other hand, there are so many risks associated with any business undertakings. Where two or more companies merge, the risks are shared among them. There is reduction of effect of any negative happenings on the company as the aforesaid risk is shared and or diversified.

b) *Technological drive:*Acquisition and transfer of technology is another reason companies merge. Where special skills are required, a company with the requisite skill can merge with another company that has the market for such skills. Where that happens, the new company will easily blossom and maximize the comparative advantage inherent in each of the companies that have come together to become one.

c) *Economies of Scale:*Economies of scale are cost advantages that companies get when production is efficient and there are increases in output. This is one major benefit of mergers. Thus, where different companies come together, there is increase in expertise. This will naturally lead to

[24] J A M Agbonika, *Modern Nigerian Company Law* (Ibadn, Ababa Press Ltd; 2021) 535

[25] O Chimezule, 'Merger: Goodbye Investment and Securities Act: Welcome Federal Competition and Consumer Protection Act' 2023 (4)(1) *Law and Social Justice Review* 102-107

increase in production at a reduced cost. Where there is increase in production at a reduced cost, the company is said to operate on good economies of scale which leads to greater profit.

d) *Technological Advantage:*One positive effect of merger is technological combination. It is usually not very easy for companies to acquire all the needed technology for its operations. Where merger takes place, the merging companies contribute their technological ability for the smooth operations of the new company. This combination of technologies is very much advantageous to the company. Therefore, one of the reasons merger occurs is for combination of available technology to the growth and advancement of the company.

e) *Survival of Regulatory Requirement for Consolidation:*This point can be best explained using the benchmark for Nigerian commercial banks to deposit twenty-five billion deposit with Central Bank of Nigeria. The twenty-five banks[26] that met that requirement did so mostly via merger. Merger affords different banks to fuse and survive such amount imposed the government. Any bank which did not merge and is not able to deposit the aforementioned amount will be liquidated. Sourcing out such amount of money is not easy for an individual bank. Merger between two or more banks was one of the way out of the quagmire and should always be encouraged.

4.1.3 Extant Law on Merger in Nigeria

The current regulatory institution concerned with merger is the Federal Competition and Consumer Protection Commission (FCCPC). The Federal Competition and Consumer Protected Act (FCCPA) is the extant law in Nigeria regarding merger. Merger was formerly administered by Securities and Exchange Commission (SEC), while Investment and Securities Act (ISA) was the law governing mergers in the past.

There is Federal Competition and Consumer Protection Act Notice of threshold for merger notification pursuant to Section 93(4) of the FCCPA. It states:

> Merger shall be notifiable before implementation if, in the financial year preceding the merger:
>
> (a) the combined annual turnover of the acquiring undertaking and the target undertaking (combine figure) in, into or from Nigeria equals or exceeds one billion naira (₦1,000,000,000.00) or
>
> (b) the annual turnover of the target undertaking in, into or from Nigeria equals or exceeds five hundred million naira (₦500,000,000.00).[27]

It can be deduced from the above that where the annual turnover in, into or from Nigeria of the acquiring company is one billion naira then, the threshold for the merger clearly indicates that it is a large merger and notifiable. On the other hand, where the annual turnover of the target undertaking in, into and from Nigeria is five hundred naira and above, it is still large merger and notifiable. It can therefore be further deduced that where the aforementioned are below the two stipulated amounts it is small merger and no notification is required by law.

4.2 Netting

The extant law in Nigeria defines netting thus: Netting means the occurrence of the following:

(a) termination, liquidation or acceleration of any payment or delivery obligation or entitlement under one or more qualified financial contracts entered into under a netting agreement.

(b) calculation or estimation of a close out value, market value, liquidation value or replacement value in respect of each obligations or entitlements terminated, liquidated or accelerated under paragraph(a):

(c) conversion or any value calculate or estimated under paragraph (b) into a single currency.

(d) determination or the net balance of the values calculated under paragraph (b), as converted under paragraph (c), whether by operation of set-off or otherwise[28]

[26] Central Bank of Nigeria Publication available on <https://www.cbn.gov.ng/out/publications/bsd/2006/banks%20with%2025%20billion.pdf> accessed on 1 November, 2024.
[27] FCCPC Notice of Threshold for Merger Notification pursuant to s 93(4) of FCCPA
[28] Section 718 Companies and Allied Matters Act, 2020

Netting entails offsetting the value of multiple positions or payments due to be exchanged between two or more parties. T can be used to determine which party is owed remuneration in a multiparty agreement. Netting is a general concept that has a number of more specific uses including in the financial markets.[29]

In general terms, netting is the process of aggregating multiple financial obligations between parties to simplify transactions and minimize risk. Netting is often used in trading, where an investor can easily offset a position in one security or currency with another position either in the same security or a different one. The main purpose of netting is to offset losses in one position with gains in another. A typical example is where an investor is short 40 shares of a security and long 100 shares of same security, the position is net long 60 shares. Some authors argue that netting is almost same with set-off. For a example in bankruptcy or insolvency cases, where parties tend to net the balances owed to each other. A company doing business with another company who is owing it, may set off any money they owe the defaulting company. The remainder represents the total amount owed.

It is clearly demonstrated from the above that insolvency matters can be addressed through the mechanism of netting. Although, this more practicable where the two companies owe each other whether or not they owe, it is demonstrated to prove that one mechanism of addressing insolvency is netting off.

It is important to briefly outline four major types of netting. They are; close-out netting, settlement netting, netting by novation and multilateral netting[30].

a) *Close out Netting:* This happens when a party fails to make principal and interest payments. Transactions between the two parties are usually netted to arrive at a single amount for one party to pay the other.

b) *Settlement Netting:* Some authors refer to this as payment netting. This type aggregates the amount due among parties and nets cash flow into one payment. That is, only the net difference in the aggregate amounts is delivered or exchanged by the party with the net owed obligation.

c) *Netting by Novation:* This type of netting cancels offsetting swaps and replaces with new obligation. Where two companies owe each other, the debts are cancelled and new one created based on net difference.

d) *Multilateral Netting:* This type of netting involves two or three parties. In this case, a clearing house may be used. The clearing house acts as a central netting centre to all debts owed to each other and sorts them accordingly.

Finally, it is important to add that the central benefit of netting is that it saves companies a great deal of time and cost by eliminating the need to process a large number of transactions per month and reducing the transaction to one payment after netting off. This is equally applicable in foreign exchange. Companies and banks can actually consolidate the number of currencies and the number of foreign exchange deals through the mechanism of netting.

4.3 Receivership

Receivership is one of the mechanisms that can address insolvency in Nigeria and elsewhere. Bhadmus,[31] opined that receivership remains one of the remedies of corporate insolvency as the receiver takes possession of all assets of the company over which he is appointed. The receiver realizes the assets of the company for the benefit of debenture holders as provided in the extent law,[32] it states:

> At any time after debenture holders or class of debenture holders, become entitled to realize his or her security, a receiver of any asset subject to a mortgage, charge or security in favour of the class of debenture holders or the trustee of the covering trust deed, or any other person, may be appointed by:
> (a) …
> (b) …

[29] Marshall Hargrave, 'Netting: Definition, How it works, Types, Benefits, and Examples.' available at <https://www.inestopedia.com/tems/n.netting.asp> accessed on 20 October, 2024
[30] ibid
[31] Y H Bhadmus, *Bhadmus on Corporate Law* (6th edn, Enugu; Chenglo Limited 2021) 463
[32] Section 233 Companies and Allied Matters Act, 2020

(c) debenture holders having more than one half of the total amount owing in respect of all the debentures of the same class
(d) the court….[33]

Where a receiver is appointment as pointed out above, such receiver has enormous powers. The powers listed by the extant Act include but not limited thus:

> *A receiver appointed under this section has, subject to the order made by the court, power to take possession of the assets subject to the mortgage, charge or security and sell those assets and if the mortgage, charge or security extends to such property, collect debts owed to the property, enforce claims vested in the company, 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, grant or accept leases of land and licenses in respect of patents, designs, copyright or trademarks and recover any instatement unpaid on the company's issued shares*.[34]

The extant Act clearly states that the official receiver is the Deputy R egistrar of Federal High Court.[35] It is important to add that not everyone can be appointed as a receiver. The following persons cannot be appointed a receiver or manager of any property or undertaking of any company: They include:

(a) An infant
(b) Any person found by a competent court to be of unsound mind
(c) A body corporate
(d) An undischarged bankrupt, unless he shall have been given leave to act as a receiver of the property or undertaking of the company by the court by which he was adjudged bankrupt.
(e) A director or auditor of the company
(f) Any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude and who is disqualified under Section 280 of the Act.[36]

This paper acknowledges that there exist a huge difference between receivership and liquidation. A receivership entails entrusting the running of the company and charges assets therefore to receivers to control. This is completely different from liquidation as the later imply the winding up of the company as a result of several reasons of which insolvency can be one of the reasons for the liquidation.

In conclusion some of the duties of a receiver as listed by the Act and other literatures includes:

(a) Power to take possession and protect the property of the company
(b) Power to sell or otherwise dispose of the property of the company by either public auction or private contract
(c) Power to raise or borrow money and grant security over the property of the company.

Finally, it is necessary to add that a major effect of the appointment of a receiver is that from the date of such appointment, the powers of the directors or liquidators to deal with the property of the company ceases until the receiver is discharged or the security is realized.[37]

In *Unibiz (Nig) Ltd v C.B.C.L,*[38] the court held that on appointment of a receiver, the powers of the management of the company's business automatically become vested in the receiver. The court in *S.E.A.P.S Ltd v Ogunnaike,*[39] further clarified that a receiver can and is entitled to interface with the assets of the company in receivership. A receiver shall not tamper with the goods or assets of a third party, otherwise, such a receiver will be liable in trespass to the third party. Thus is also *intandem* with the decision in *Tanarewa (Nig) Ltd v Arzai.*[40] It has been argued that the appointment of a receiver

[33] ibid
[34] Section 233(3) Companies and Allied Matters Act, 2020
[35] Section 582(1) Companies and Allied Matters Act, 2020
[36] Section 550(1) ibid
[37] Section 556(1) ibid
[38] [2001] 7 NWLR (Pt. 713) 531
[39] [2008) 14 NWLR (Pt 1106]
[40] [2005] 5 NWLR (Pt 919] 593

prevent the directors from carrying on their business. However, it does not imply that the company losses its personality as an entity or its title to goods. Rather what it means is that the right to deal with the property of the company is suspended as explained in the case of *O.B.I. Ltd v U.B.N Plc.*[41]

4.4 Establishment of Bridge Banks

Establishing a bridge bank is one of the veritable mechanisms to address insolvency especially among banks. A bridge bank is created by either a regulatory agency in a country or the central bank of that country to operate a failed bank pending when a buyer of the failed bank is available. By the provisions of the law, National Deposit Insurance Company (NDIC) in consultation with Central Bank of Nigeria (CBN) can incorporate a bridge bank. It is stated in the Act thus:

> *The corporation (NDIC) in consultation with Central Bank of Nigeria (CBN), may organize and incorporate, and the CBN shall issue a banking license to one or more banks, to be referred to as bridge banks which share be insured institutions to assume such deposits and/or liabilities, and shall purchase such assets of a failing insured institution and perform any other function or business as the corporation may determine*.[42]

It is important to add that notwithstanding the provisions of CAMA, the CBN Act, BOFIA or any other law, the bridge bank shall not be subject to any requirement relating to issued or paid up capital, and the corporation may make available to the bridge bank, upon such terms and conditions and in such form and amount, as the NDIC may determine, funds for the operation of the bridge bank.[43]

In the banking sector of the economy, bridge banks can address insolvency matters and assist to stabilize the economy of a country. In absence of a bridge bank, once a bank fails or is insolvent, such a bank will be immediately liquidated by NDIC with its devastating effect on the economy and even the people. There would be massive loss of jobs and its negative effects. All these and more can be averted with the establishment of bridge banks. It can therefore be opined that the efficacy and efficiency of bridge banks in addressing insolvency matters cannot be over emphasized.

Practical demonstrations are obvious in Nigeria. NDIC in consultation with the CBN established Key-Stone Bank Ltd which in turn acquired assets and liabilities or Bank PHB Plc. Also, Mainstreet bank Ltd was equally established in same manner and it acquired assets and liabilities of Afribank Plc. Also, Polaris Bank is yet another example of bridge bank in Nigeria. According to Act, the operation of a bridge bank shall unless extended as provided in the law terminate at the end of two years. However, it is the discretion of the NDIC to extend it.[44]

4.5 Establishment of Nigeria Deposit Insurance Corporation

The establishment of Nigeria Deposit Insurance Corporation (later in this work referred to as NDIC) till date remains a fantastic idea geared towards addressing insolvency issues especially within the banking sector. The banking industry of any country is very important. The reason is obvious, the wealth of any country is saved in the banks. It is therefore imperative that the solvency of the banks are protected at all times. The NDIC Act 2023 repealed the 2006 Act which had earlier repealed the 1988 Act. NDIC is a body corporate with perpetual succession capable of suing or being sued in its corporate name.[45] One of the central function of NDIC is guaranteeing deposits liabilities of financial institutions authorized to accept deposit from the public in Nigeria.[46] Another important function of NDIC is with the concurrence of CBN, supervise insured financial institution to mitigate the risk of failure.[47]

[41] [2008] 16 NWLR (Pt 1113) 324
[42] Section 54(1) National Deposit Insurance Company Act 2023
[43] Section 54(3) National Deposit Insurance Company Act 2023
[44] Section 54(5) National Deposit Insurance Company Act 2023
[45] Section 1(2) and (b) National Deposit Insurance Company Act 2023
[46] Section 3(a) National Deposit Insurance Company Act 2023
[47] Section 3(b) National Deposit Insurance Company Act 2023

Finally, where a bank fails, it is NDIC that liquidates the failed bank according to the Act.[48] The NDIC has power to give assistance to insured institutions in the interest of depositors in case of imminent or actual financial or technical difficulties, particularly where suspension of payments is threatened, to avoid damage to public confidence in the banking system.[49]

The NDIC with the concurrence or at the request of CBN may acquire a failing or failed insured financial institution who's paid up capacity is lost by an order published in the Federal Government Gazette.[50] This is very important to maintain security and ensure stability at the banking subsector of the economy. The stability of the banking sector and that of the country is seen as important as anything can be in any country.

The establishment of NDIC is a veritable channel to addressing insolvency matters in the financial sector of the economy of a country. It prevents the complete failure and loss of fund by depositors. Its continuous existence and expansion is encouraged.

4.6 Administration

Administration is another mechanism to address insolvency. The primary purpose of administration is to rescue an insolvent company so the company doesn't go into liquidation. It is an alternative to receivership earlier discussed in this research work. While receivership centers on the interest of the creditor, under administration, the interest of all are considered.

4.7 Arrangement and Compromise

The researcher believes that arrangement and compromise is a form of corporate rescue mechanism aimed at solving insolvency matters of a body corporate. Arrangement and compromise is a mechanism to address insolvency issue. It is an approach whereby creditors of company accept less than what they are owed or entitled full satisfaction of its obligation. It enables the company to alter the rights of its members or creditors through the sanction of court.[51]

It is important to inform that arrangement and compromise is totally different from arrangement on sale while the former has been explained above the later means that the process whereby the company and its shareholders arranges or negotiates to sell the company to another corporate body. According to the Act, A company may be special resolution resolve that the company be out into member's voluntary winding up and that the liquidator be authorized to sell the whole or part of its undertaking to another body corporate.[52] It is allowed according to the provisions of the Act for a company to propose a compromise between it and its creditors and the court on application in a summary way, of the company or any of its creditors of member direct and sanction.[53] Arrangement and compromise is therefore one of the effective approach to sustaining a company which has ran into trouble waters of insolvency. The innovations introduced in the new Act is quite interesting to behold.

5. Findings, Conclusion and Recommendations

5.1 Findings

This paper examined the concept of insolvency in company operations in Nigeria. The present researcher found that insolvency is a common occurrence among companies operating in Nigeria and other jurisdictions. Based on the findings, it is important for the above listed mechanisms to address insolvency matters be taken seriously. Where these mechanisms are adhered to, insolvency among companies will drastically reduce. Sick companies can be revived and be brought back as a going business concern.

[48] Section 3(d) National Deposit Insurance Company Act 2023
[49] Section 4 (b) National Deposit Insurance Company Act 2023
[50] Section 53 (i) National Deposit Insurance Company Act 2023
[51] Agbonika (n 21) 523
[52] Section 714 Companies and Allied Matters Act, 2020
[53] Section 715 Companies and Allied Matters Act, 2020

5.2 Conclusion

This paper x-rayed the concept of insolvency among companies in Nigeria. The above listed mechanisms for addressing insolvency in Nigeria are well thought out and if implemented to will greatly address the subject matter of insolvency in company operations in Nigeria. The structure and belief in liquidating a company with insolvency issues needs to be addressed. The above listed mechanisms are so important to a country's economy to continue to boom. Liquidating a company with insolvency issues has multiplier effects and is no longer the way to go in global economy. Rather, concerted efforts are made by government to ensure that companies continue to thrive by all means possible which is also one of the primary responsibilities of government.

5.3 Recommendations

The following recommendations will go a long way in addressing insolvency related matters in Nigerian company law practice and administration.

First and foremost, the need for a separate institution to administer insolvency matters in Nigeria. This will lead to quick resolution of insolvency issues which at the moment are domiciled with Corporate Affairs Commission (CAC). CAC itself is already overburdened with activities of incorporation of companies and other matters related.

Secondly, Establishment of Insolvency Tribunal is equally recommended. The continued existence of companies in any country is very crucial to economic stability of that country. Matters related to insolvency should be addressed by a special court to avoid unnecessary delay associated with our judicial system. Where a separate tribunal is established and saddled with insolvency affairs, it would help to facilitate resolution of insolvency matters in Nigeria and promote efficient and effective company's operation, administration and practice.