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# CRYSTALLISATION OF THE FLOATING CHARGE- NEED FOR ADEQUATE LEGISLATIVE DIRECTION IN NIGERIA

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## **Abstract**

A floating charge is a present security on all or part of the assets of a company which hovers over them but gives the debtor the right to continue trading with the assets until crystallisation. The process of the conversion from floating charge to its becoming fixed is known as crystallisation. This paper critically examines the current legal regime for crystallisation of the floating charge in Nigerian law. There is no framework on how crystallisation may be activated by the events stated in the Companies and Allied Matters Act 2004. The events listed in the law are grossly inadequate and does not take into consideration other events recognised under the common law and commercial practice. Preferential claims are not adequately protected under the current regime. The paper advocates for an urgent legislative intervention to properly define the floating charge and the regulation of crystallisation events to bring it to current international standards.

## **Introduction**

Common law and statute clearly identified circumstances when the floating charge converts into a fixed charge and simultaneously not only determines the charge but also gives the debenture holder the right to realise the security charged in the debenture. It is agreed that the courts

and statute identified the crystallising events of the floating charge, the mode, definition and practical application of the crystallising events are still contradictory and ambiguous leaving each court to apply the events in a very subjective manner which leaves the law in an incoherent and vague position. This paper will therefore critically examine the current position of the law on crystallisation of the floating charge with a view to proffering workable solution for statutory intervention.

### **The need for credit**

The need for credit in the smooth running of companies cannot be over-emphasised. This is because credit helps companies to continue as a going concern, it stimulates production and helps enterprise. Creating security in the property of the debtor not only ensures that in the event of default, the creditor may realise his security, because, the debtor may also take loans from other creditors creating specific interests in the same security offered the initial creditor, the security assures the initial creditor of priority over the subsequent creditors. Goode defines security interest as 'The grant of a right in an asset which the grantor owns or in which he has an interest'<sup>1</sup> This definition can only be descriptive and of course inadequate as it does not cover security given by third parties in favour of the debtor for the purpose of securing the loan on his behalf. Sykes defines security as "an interest vested in a person called "the creditor" in certain property owned by another called the "debtor" whereby certain rights are made available to the creditor over such property in order to satisfy an obligation personally owed or recognised as being owed to the creditor by the debtor or some other person".<sup>2</sup> This definition is also inadequate because it does not take into consideration third party interest such as guarantee or indemnity which are also regarded as security.<sup>3</sup>

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<sup>1</sup> Goode R. *Goode on Legal Problems of Credit and Security*. Gillifer, L. (ed). 4<sup>th</sup> ed.( London: Sweet and Maxwell,2008), 3.

<sup>2</sup> Sykes and Walker (eds). *The Law of Securities*. 5<sup>th</sup> ed.( Sydney: Laws Books Ltd,1993), 12.

<sup>3</sup> See Goode R, *Goode on Legal Problems of Credit and Security*. Gillifer, L. (ed). 4<sup>th</sup> ed.( London: Sweet and Maxwell , 2008),3.

Oditah<sup>4</sup> describes security interest 'as a creditor's interest in property in which the debtor or an associated third party has some interest, whether arising consensually or by operation of law, which renders the performance of the debtor's obligation more assured'. Even this definition Oditah admits to be imprecise.<sup>5</sup> In the determination of whether a security interest exists, the first characteristic is the right of priority to other creditors and whether the right is asserted by virtue of an underlying property interest in the property in which the debtor or an associated third party has some interest and whether arising from a grant, a reservation or howsoever, provided that the debtor or third party has an equity of redemption in the property.<sup>6</sup>

### Power of company to borrow money

All companies are empowered under the law to borrow money. Section 166 of the Companies and Allied Matter Act 2004 (CAMA) provides that: A company

*"may borrow money for the purpose of its business or objects and may mortgage or charge its undertakings, property and uncalled capital, or any part thereof, and issue debentures, debenture stock and other securities whether outright or as a security for any debt, liability or obligation of the company or of any third party.*

The company borrows by executing a debenture with the creditor. A debenture may be viewed from two perspectives, the document evidencing the transaction and the transaction. The legal relationship between the company and the debenture holder is that of contractual relationship of creditor and debtor and where the debenture is secured by the assets of the company then, it is primarily that of mortgagor and mortgagee. Case law and statutes have tried to define debenture but has only been limited to the type of transaction existing within the jurisdictional coverage of the statute.

<sup>4</sup> Oditah, Fidelis, *Legal Aspects of receivable financing*. 1<sup>st</sup> ed. (London: Sweet and Maxwell, 1991), 11.

<sup>5</sup> Oditah, F. Ibid.

<sup>6</sup> Oditah, F. op. cit. p. 9.



In the case of *Union Bank of Nigeria Ltd v. Tropical Foods Ltd*<sup>7</sup> the court defined debenture as 'consisting of a debt owed by a company to another, secured by a deed which prescribes the condition of the realisation of the debt'. This definition is not exactly accurate description of what a debenture is all about. A debenture need not be secured<sup>8</sup> and certainly the debenture is not secured by a deed (admittedly debt transaction) but is secured by the assets of the company or that of a third party on behalf of the company. Omotola is of the view that statute and case law only attempted to describe the essence of what a debenture is all about; which is that 'debentures are a type of transferable security (in this respect resembling shares) whereby a company can raise finance in the form of loan capital instead of share capital.'<sup>9</sup> Nigerian law however, defines debenture as "a written acknowledgement of indebtedness by the company, setting out the terms and conditions of the indebtedness, and includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not."<sup>10</sup>

### Floating charge

The floating charge developed from the common law and was finally settled and approved by the House of Lords in the case of *Holroyd v Mashall*<sup>11</sup>. The court agreed that it is possible to create a charge over all assets of a company not only the present assets but also future assets which are yet to be acquired by the company.<sup>12</sup> The debtor company is allowed complete freedom to deal with the charged properties in the ordinary course of its business without affecting the security interest but postpones its attachment until it finally attach to the assets under the

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<sup>7</sup> (1992) 3 NWLR (pt. 228) 231.

<sup>8</sup> *British India Steam Navigation Co. v IRC* (1881) 7QBD. 165.

<sup>9</sup> Omotola Jelili, *The law of secured Credit* (Ibadan: Evans Brothers Nigeria Publishers Ltd, 2006), 163.

<sup>10</sup> The definition in CAMA is almost in pari materia with the position in England. Section 738 of the Companies Act 2006 (UK) provides that, "debenture" includes, debenture stock, bonds and any other securities of a company whether or not constituting a charge on the assets of the company".

<sup>11</sup> (1862) 10 H.L. Cas. 191.

<sup>12</sup> Pennington R, "The Genesis of the Floating charge" *Modern Law Review*. 23(1960): 630.

provisions in the agreement.<sup>13</sup> English law therefore permits a security that postpones attachment by a contractual arrangement.<sup>14</sup>

The nature and real characteristics of a floating charge was excellently explained by Romer L.J. in the case of *Re Yorkshire Woolcombers Association Ltd*<sup>15</sup> that,

*I certainly do not intend to attempt to give an exact definition of the term 'floating charge nor am I prepared to say that there will not be a floating charge within the meaning of the Act, which does not contain all the three characteristics that I am about to mention, it is a floating charge (1) if it is a charge on a class of assets of a company present and future. (2) if that class is one which in the ordinary course of the business of the company would be changing from time to time, and (3) if found that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way so far as concerning the particular class of assets I am dealing with.*

The distinct attribute of all definitions<sup>16</sup> of the floating charge is that the charge attaches to, not only present assets, but also to "future – acquired property".<sup>17</sup> It is a class of assets that the debtor is free to deal with in the course of its business. In the words of Buckley LJ<sup>18</sup>, [A] floating security is

<sup>13</sup> See Lord Millet in *Agrew v Commissioners of Inland Revenue (also known as Re Brumark)* (2001) 2 A.C. 7 at 717.

<sup>14</sup> Gregory R. and Watch P, "Fixed and Floating Charges", *L.M.C.L.Q.* 123( 2001), Goode Roy, *Goode on Legal problem of credit and security*. Gullifer L. ed. 4<sup>th</sup> ed.( London: Sweet & Maxwell, 2008) 124.

<sup>15</sup> (1903) 2 Ch. 284 at 295

<sup>16</sup> See Land Machaughten in *Ilinsworth v Holdsworth* (1904) A.C. 355 at 358, Killo J in *Stein v Saywell* (1969) 121 CLR 529 at 556 Fletcher Moulton LJ in *Evans v Rural Granite Quarries* (1910) 2 KB 979 at 994, Land Macnaghten in *Governments Stock Investment Co v Manila Railway Co.* (1904) A.C. 355 at 360 .The Supreme Court of Nigeria in the case of *Intercontractors Nig. Ltd v UAC* (1988) 2 NWLR (pt 76) 303 at 322.

<sup>17</sup> Killo J in *Stein v Saywell* (1969) 121 CLR 529 at 556.

<sup>18</sup> *Evans v Rural Granite Quarries* (1910) 2 KB 979 at 999.

not a specific mortgage of the assets, a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some events occur or some act of the mortgagee is done which causes it to crystallise into a fixed security.

Though the law recognises the right of the floating chargor to continue dealing with the charged assets until an event occurs that will convert the floating charge into a fixed charge, which will cause the security to fasten on the assets of the company. The description of Nourse J in the case of *Re Woodroffes (Musical Instruments) Ltd*<sup>19</sup> appropriately captures the position of the law when he said,

*That no doubt is one reason why it is preferable to describe the charge as hovering a word which can bear an undertone of menace rather than its 'dormant'. A cessation of business necessarily puts an end to the company's dealing with its assets. That which kept the charge hovering has now been released and the force of gravity causes it to settle and fasten on the object of the charge within its reach and grasp. The paralysis while it may still be unwelcome can no longer be resisted.*<sup>20</sup>

Fastening on or crystallisation on the charged assets is an integral part of most definitions of the floating charge. . Section 178 of CAMA 2004<sup>21</sup> defines the floating charge as,

*an equitable charge over the whole or a specified part of the company's undertakings and "assets" including cash and uncalled capital of the company both present and future, but so that the charge shall not preclude the company from dealing with such assets until –*

- (a) the security becomes enforceable and the holder thereof, pursuant to a power in that behalf in the debenture or the deed securing the same, appoints a*

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<sup>19</sup> (1986) Ch. 366.

<sup>20</sup> *Ibid.* p. 375.

<sup>21</sup> Cap. LFN 2004 (hereinafter called CAMA)

- receiver or manager or enters into possession of such assets; or
- (b) the court appoints a receiver or manager of such assets on the application of the holders; or
- (c) the company goes into liquidation.

### Crystallisation of the floating charge

A floating charge is said to crystallise when the charge ceases to float or hover over the assets comprised in the debenture but becomes attached to the security in the floating charge.<sup>22</sup> It is the process whereby the charge attaches specifically to all the items of the class of charged assets which the company owns at the date or subsequently acquires, if future assets are within the scope of the particular charge.<sup>23</sup> Crystallisation of the floating charge, has the effect of putting an end to the ability of the company to continue dealing with the assets charged in the ordinary course of business and the charge attaches to the assets and it becomes appropriated to the charge.<sup>24</sup>

However, crystallisation is triggered by an event recognised by law<sup>25</sup> or contractually agreed by the parties.<sup>26</sup> This event is very important because it has the effect of terminating the power of management of the debtor company and allows the creditor to take appropriate steps to realise the security. Lord Macnaughten was of the view that an "event must occur or some act is done which causes it to settle".<sup>27</sup> While Vaughan Williams L.J. is satisfied to simply state the events as a contractually agreed event, only, without any room for other events which may be implied by

<sup>22</sup> Kekewitch J. in *Re Victoria Steamboats Ltd* (1897) 1 Ch. 15 8 at 161.

<sup>23</sup> Omotola Jelili, *The law of secured credit*. (Ibadan: Evans Brothers Nig. Publishing Ltd, 2006) 199.

<sup>24</sup> Karibi – Whyte JSC in *Intercontractors Nig. Ltd v N.P.F. M.B.* (1988) 2 NWLR (pt. 75) 280, *Intercontractors Nig. Ltd v UAC* (1988) 2 N.W.L.R. (Pt. 76) 303.

<sup>25</sup> Section 197 (2) CAMA 2004

<sup>26</sup> Goode Roy, *Goode on Legal Problems of Credit and Security*. Gillifer, L. (ed). 4<sup>th</sup> ed., (London: Sweet and Maxwell, 2008), 130.

<sup>27</sup> *Government Stock and other Securities Investment Co Ltd v Manila Railway Co.* (1899) A.C. 81 at 86.

law when he stated thus; 'that such instruments<sup>28</sup> usually provide for various events on the happening of which the right of the company, or the license given to the company, to carry on its business shall come to an end'.<sup>29</sup>

The recognised events are combination of both statutorily recognised common law events and those contained in the debenture. Basically, we must acknowledge the fundamental event which probably all other events rests on and this is from the understanding of the nature of the floating charge itself, which is to the effect that the chargor continues its business and use the charged assets in the ordinary course of its business. Where the business has ceased to exist, naturally the charge itself should crystallise and become fixed, and the chargee must of necessity take steps to recover the loan.

Crystallisation do not in itself put an end to the company's business where the event involves cessation of business<sup>30</sup>, what it does is to render the company, incapable of continuing to operate<sup>31</sup> or manage the assets charged as before without the consent of the chargee who is not in a position to give permission to continue without refloating the charge.<sup>32</sup> Post crystallisation assets continue to be appropriated after crystallisation<sup>33</sup>. We must also understand that crystallisation is basically a contractual event between the parties to it,<sup>34</sup> however, and unfortunately it has effects on 'third parties who has dealings with the company and who in most cases have no idea whatsoever of the crystallisation events as implied by law or specified in the debenture especially what is now referred to as automatic crystallisation.<sup>35</sup>

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<sup>28</sup> The debenture

<sup>29</sup> *Evans v Rival Granite Quarries Ltd* (1910) 2 KB 976 at 986.

<sup>30</sup> *Re Rayford Homes Ltd* (In Admin. Rec). (2011) EWAC 1948.

<sup>31</sup> *Re Woodroffes (musical instruments) Ltd* (1986) 366.

<sup>32</sup> Lord Scott in *Re Spectrum Plus* (2005) UK HLVI

<sup>33</sup> *NW Robbie & Co Ltd v Whitney Warehouse Co. Ltd* (1963) 1 WLR 323;

*Wellington Woollen Manufacturing Co. Ltd v Patrick* (1935) N Z. L. R 33; *Ferrier v Bottomer* (1972) 126 C.L.R. 597.

<sup>34</sup> *Re Brightlife Ltd* (1987) ch 200.

<sup>35</sup> Automatic crystallisation is discussed hereunder.

### Events leading to Crystallisation

Though as stated above, the events triggering crystallisation were not originally fixed by statute<sup>36</sup>, but are now statutorily recognised.<sup>37</sup> However, the problem with the statutory recognition of the events is that it gives the impression that there are no other events save and except those stated in the law. This has led some writers<sup>38</sup> to wrongly assume that no other event may be allowed to crystallise a floating charge.<sup>39</sup> This position cannot be correct and is not supported by the authorities, as we will soon explain<sup>40</sup>.

Crystallisation events may be classified into three broad groups – (a) events that shows cessation of business of the company as a going concern. (b) events that may lead to direct intervention by the debenture holder to enforce the security and immediately deprive the company of authority to deal with the charged assets and (c) other events or acts specified in the debenture as causing the charge to crystallise. The courts have identified some important circumstances when crystallisation will take place but they all fall within the three broad classification above. Sealy & Worthington also identified the following events as crystallising events, (1) when a receiver is appointed

<sup>41</sup> (2) when the company goes into liquidation<sup>42</sup> since the licence to deal with the assets in the ordinary course of business will then necessarily terminate. (3) in the case where the debenture empowers the charge – holder to convert the floating charge into a fixed charge by giving the

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<sup>36</sup> *Re Brightlife Ltd.* (1987) Ch. 200.

<sup>37</sup> Section 178 CAMA 2004.

<sup>38</sup> Smith I, *Nigerian Law of secured credit*. (Lagos: Ecowatch Publications Limited, 2001) 321 – 322.

<sup>39</sup> Smith relies on Section 178 CAMA 2004 for this assertion.

<sup>40</sup> *Supra*.

<sup>41</sup> Sealy L. and Worthington Sarah., *Sealy and Worthington's cases and materials in Company law*. 10<sup>th</sup> ed.( London: Oxford University Press, 2013), 614.

<sup>42</sup> *Taunten v Sheriff of Warwickshire* (1895) 2 Ch. 319; *Stein v Saywell* (1969) C.L.R. 529; *George Baker (Transport) Ltd v Eynon* (1974) 1 W.L.R. 462; In *Re Peter Gabriel's Controls Pty. Ltd.* (1962) 6 A.C.L.R. 684, it was held that where a charge is to crystallise on the appointment of a receiver crystallisation is not complete until the appointee accepts the appointment.

company 'notice of conversion' and such a notice is given and<sup>43</sup> (4) where an event occurs which under the terms of the debenture causes 'automatic' crystallisation.<sup>44</sup> This depends upon a provision in the document creating the charge which states that the charge will crystallise in the happening of a given event, this will occur without notice from the debenture holder.<sup>45</sup>

### 1. Cessation of business as a going concern

In cases where the business of the company can no longer be managed as a going concern, crystallisation will occur as a matter of law.<sup>46</sup> Goode<sup>47</sup> was of the view that there is no mandatory rule of law which precludes a charge from continuing to float where the company ceases trading, merely that the intention by the debenture holder to allow this to happen is so unlikely that the result in most cases would be 'nonsensical'. It follows that an express provision for crystallisation on cessation of trading or the ability is unnecessary since the law will imply a term to that effect.<sup>48</sup>

There are two types of events within this first category; these are, where the company ceases to carry on trading and where it goes into liquidation. Whether or not the company is being wound up, the law will imply a term in the debenture that the floating charge will immediately crystallise when the company ceases trading.<sup>49</sup> It is implied by law because, the only reason the chargor is allowed to deal with the assets subject to the floating charge was because it was to continue as a going concern, when this is no longer possible, the floating charge must of

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<sup>43</sup> *Re Colonial Trusts Corp; Ex p. Bradshaw* (1879) 15 Ch. D. 465 at 492; *Edwards Nelson & Co Ltd v Faber* (1903) 2 KB 367 at 376; *In Re Obie Pty Ltd (No. 2)* (1983) 8 A.C.L.R. 574 at 581 it was held that the appointment of a liquidator did not crystallise the charge.

<sup>44</sup> *Re Brightlife Ltd*. op. cit.

<sup>45</sup> *Stein v Saywell* (supra); *Re Manurewa Transport Ltd* (1971) N.Z.L.R. 909; *Fire Nymph Products Ltd v The Heating Center Pty Ltd*. (1988) 14 A.C.L.R. 274; *Re Permanent Houses (Holdings) Ltd* (1988) B.C.L.C. 563.

<sup>46</sup> Oditah, F. supra p. 114.

<sup>47</sup> *N.W. Robble & Co. Ltd v Withney Warehouse Ltd*. (1963) 3 All E. R. 613; *Ferrier v Bottomer* (1972) 126 C.L.R. 597.

<sup>48</sup> Goode R. op. cit. p. 38.

<sup>49</sup> *Re Crompton & Co.* (1914) Ch. 954 at 964.

necessity crystallise. Express provisions in the debenture may be added to avoid this occurrence.<sup>50</sup> There is no substantial difference between a company ceasing to carry on business and where the company ceased to be a going concern. Nourse J after reviewing all the old authorities came to the conclusion that there is no difference, because "... these phrases are used interchangeably in the authorities"<sup>51</sup> He<sup>52</sup> went on to observe that, 'A cessation of business necessarily puts an end to the company's dealings with its assets". This is because, "that which kept the charge hovering has now been released and the force of gravity causes it to settle and fasten on the subject of the charge within its reach and grasp. The paralysis, while it may still be unwelcome, can no longer be resisted..."<sup>53</sup> Uwawfo JCA<sup>54</sup> also pointed out that crystallisation will take place" where "... the business has truly collapsed and there is some property or security to be redeemed".

The practical problem is to determine at what point trading ceased. This is important in order to determine when the receiver may be appointed on this ground for the purpose of priority and the preferential debts claims under section 494 of CAMA 2004. It will be appropriate for a statutory definition and clarification of cessation of business. The section provides for the list of preferential creditors having priority over all other debts and in section 494 (4) CAMA 2004, the law provides-

(4) The foregoing debts shall:

(a) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company and be paid accordingly out of any property comprised in or subject to that charge.

It follows that the section does not apply to fixed charges created by the company which will have priority over preferential debts under the section. Where the floating charge had crystallised before the winding up

<sup>50</sup> *Re Woodroffes (Musical Instruments) Ltd.* (1986) Ch. 366.

<sup>51</sup> *Re The Real Meat Co. Ltd.* (1996) B.C.C. 254.

<sup>52</sup> Nourse J in *Re Woodroffes (Musical Instruments) Ltd* supra.

<sup>53</sup> Nourse J. op.cit.

<sup>54</sup> *Ibid.*



order was made<sup>55</sup>, it has ceased to be a floating charge and has been converted to a fixed charge over the assets and will certainly have priority over the preferential debts like any other fixed charge.<sup>56</sup> In the case of *Re Brightlife Ltd*<sup>57</sup> the debenture holder had given the company a notice converting the floating charge into a fixed charge a week before a resolution for voluntary winding up was passed. The court held that the preferential creditors no longer had any right to be paid in priority to the charge. In order to remedy this problem, in England, the Insolvency Act was amended by the introduction of a new section 251 to the Insolvency Act 1986 UK<sup>58</sup>, which provides that a 'floating charge' means a 'charge which, as created, was a floating charge'. It is hereby recommended that the Nigerian law should urgently be amended in like manner. This however, still do not solve the problem of determining when cessation of trading had taken place.

## 2. Liquidation

The winding up of a company whether voluntary or by order of court will cause a floating charge to crystallise.<sup>59</sup> Section 178 (1) (c)<sup>60</sup> acknowledges liquidation of the company as a crystallising event. The law does not give any qualification as to the type or events leading to the liquidation, hence, whether the liquidation is solvent or insolvent does not matter. It also does not matter whether the liquidation was done for the purpose of reconstruction.<sup>61</sup> Statutorily, winding up is deemed to have commenced at

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<sup>55</sup> *Fasakin v Fasakin* (1994) 4 NWLR (pt 340) 597 at 618.

<sup>56</sup> Section 494(5) CAMA 2004 defines relevant date to mean in the case of a company ordered to be wound up compulsory which had not previously commenced to be wound up voluntarily, the date of the winding up order; and in any other case, the date of the commencement of the winding up.

<sup>57</sup> *Re Brightlife Ltd* (1989) Ch. 200.

<sup>58</sup> See also section 754 (1) of Companies Act 2006 UK which defined floating charge the same way.

<sup>59</sup> *Re Panama New Zealand and Australian Royal Mail Co.* (1870) 5 Ch. App. 318; *Re Colonial Trusts Coup.* (1879) 15 Ch. D. 465; *Wallace v Universal Automatic Machines Co.* (1894) 2 Ch. 547.

<sup>60</sup> CAMA 2004

<sup>61</sup> *Re Crompton & Co. Ltd* (1914) Ch. 954

the date of presentation of the petition<sup>62</sup> or the date of compulsory winding up order whichever is applicable.<sup>63</sup> The position of the law in subsection 6(b) of section 178 CAMA 2004 may be difficult to understand<sup>64</sup>. While there may not be any debate on the date when the winding up order is made as the crystallising date, taking account of the date when winding up proceedings is commenced may only introduce confusion and contradiction in the law. The fact that a winding up proceeding was commenced does not guarantee its success, in fact the petitioner may withdraw the petition or the court may refuse the application and no order is made, if this is allowed as a crystallising event, the charge is then crystallised without the intention of the parties to this effect.<sup>65</sup> The law seems to be in haste and assumed that the petition will always succeed. It is possible that the petition fails, and would have deprived the company of further benefits from the security or disorganise the business for nothing, while the order of winding up of the company is yet to be made, the company ought to be able to continue its business if there is no other factor or event that may crystallise the floating charge.

### 3. Crystallisation of another floating charge.

The floating charge will not necessarily crystallise due to crystallisation of a subsequent floating charge. This was the position taken in the case of *Re Woodroftes (Musical Instruments) Ltd.*<sup>66</sup> A bank holding a floating charge contended that this crystallised automatically as the result of the crystallisation of a subsequent floating charge (which was expressly made subject to the bank's charge) through service of crystallisation notice. The Bank's argument which was not acceptable to the Judge was that crystallisation of the latter charge paralysed the business, rendering any further use of the charged assets unlawful and impracticable. Nourse J

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<sup>62</sup> Section 494 (6)(b) CAMA 2004

<sup>63</sup> See Section 494 (6) (a) CAMA 2004; section 129 (2) Insolvency Act 1986UK.

<sup>64</sup> Section 6 (b) provides that, 'the relevant date ' means ' in any other case, the date of the commencement of the winding up'.

<sup>65</sup> *Re Victoria Steamboats Co.* (1897) 1 Ch. 158.

<sup>66</sup> *Re Woodroftes (Musical Instruments) Ltd* (1986) Ch.366 per Nourse J. at 378.

*Re Real Meat Co. Ltd* (1996) B.C.C 254, per Chadwick J at 261, *Re Sperrin Textiles Ltd* (1992) N.I. 323

was of the view that the events causing crystallisation of the banks debenture were those contained expressly or by implication, in the debenture. There was no good reason to imply a term that the charge would crystallise automatically on crystallisation of another charge. It is hereby recommended that there ought to be a legislative intervention in this area of the law. Crystallisation of a floating charge ought to automatically crystallise the others whether prior or subsequently made, as the practical effect is to essentially paralyse the business of the chargor, except this is otherwise stated in the debenture.

#### **4. Intervention by debenture holder to take control of the assets**

As we noted above, the floating charge allows the debtor company to continue exercising full rights of ownership and control over the assets charged in the ordinary course of business until such time as the license is withdrawn pursuant to the terms of the debenture. The law<sup>67</sup> recognise the rights of the debenture holder to intervene and crystallise the floating charge pursuant to the debenture by: (1) appointing a receiver or manager, (2) entering into possession of the assets, or (3) the court appoints a receiver or manager of such assets on the application of the debenture holder, or (4) the company goes into liquidation.<sup>68</sup> (5) Giving notice pursuant to the provisions in the debenture.

The debenture holder may intervene to convert the charge into a fixed charge under the debenture or under the statute. The debenture holder who wishes to intervene must however satisfy the following:

1. The action must be taken with the intention of converting the charge into a fixed charge.
2. It must be done under an express or implied provision in the debenture,
3. It must effectively divest the company of any control of the assets.<sup>69</sup>

The debenture holder may therefore take the following actions to effectively crystallise the charge:

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<sup>67</sup> Section 178 CAMA 2004.

<sup>68</sup> These are the conditions stated in CAMA 2004.

<sup>69</sup> Section 178 (1) (b) CAMA 2004.

- a. **Take Possession:** The debenture holder may take possession physically of the assets comprised in the charge, though it is recognised that taking possession of part of the assets will be enough to show full possession of the entire assets.<sup>70</sup> Though the law specifies taking possession as a crystallising event, there is no direction as to how this is supposed to take place. Should the debenture holder simply by force of arms enter into possession of the assets, or take an action to enforce the rights as stated in the debenture. If there is a court action for possession, surely, no possession will be given until there is a court order to this effect. Where a possession option is taken, will it be necessary for the debenture holder to first give appropriate notice and specify dates and steps to be taken for effective possession of the assets. The law do not help us in this regard, but it is advisable that there are well spelt out provisions in the debenture to allow for peaceful possession failure of which may lead to unnecessary breakdown of law and order.<sup>71</sup>
- b. **Crystallisation by Notice**  
Crystallisation may be by notice if specified in the debenture deed. It is sometimes termed 'semi-automatic'. The notice must be specific and not general and has been recognised in the case of in *Re Woodroffes (Musical Instruments) Ltd*<sup>72</sup> where it was held that the crystallisation of the floating charge by serving notice is effective. In the case of *Re Brightlife Ltd*<sup>73</sup> Holfman J. rejected the argument that crystallisation events are limited to three, which are, winding up, appointment of receiver and cessation of company's business, and held that the question was purely one of contract, and that the Parliament having intervened on various occasions to regulate floating charges-as by requiring their registration and by subordinating them to preferential debts- it

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*Evans v Rival Granite Quarries Ltd* (1910) 2 KB 979 per Fletcher Moulton LJ.

Pollack F. and Wright R, *Possession in the Common Law*, (Oxford: Clarendon Press, 1888) 8, 60-61, 70, 78-79

Automatic-crystallisation provisions will be discussed below.

(1985) 2 All ER.908

was not for the courts to impose additional restrictions on the parties' freedom of contracts on grounds of public policy.<sup>74</sup>

### 5. Appointment of Receiver or Manager

The floating chargee is empowered by law and under the debenture to appoint a receiver or manager or receiver manager. The appointment out of court is the most popular and effective way to crystallise a floating charge. However, in England, the floating chargee is no longer empowered to appoint an Administrative Receiver<sup>75</sup>, Gough<sup>76</sup> has argued that the appointment of the receiver does not crystallise the floating charge and it is until he takes physical possession of the assets of the company covered by the floating charge. But the view is not supported by the authorities.<sup>77</sup> The better view which represents the position of the law is that the appointment of the receiver or receiver/manager will effectively crystallise the floating charge,<sup>78</sup> and the right of the company to manage its business effectively terminated on the appointment of the receiver and not when the receiver takes possession.

The difficulties in the law is not however resolved by the bare provisions of section 178 of CAMA 2004. The law only provides for the appointment of a receiver pursuant to the provisions of the debenture or by the court as a crystallising event. The problem is, at what point can we say such appointment becomes effective if the company institutes action to set aside the appointment. There are series of cases on this in Nigeria, the lapse is simply because there is no specific direction in the law as to how this should be done, and at what point in the process does the appointment crystallise the floating charge. This may be the justification for Gough to suggest that until physical possession is taken by the receiver, the charge is not crystallised. However, one must state that in the absence of contractual stipulation in the debenture, the bringing of a petition for the appointment of a receiver before the court does not and ought not to crystallise the floating charge. This is because in the first instance, the

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<sup>74</sup> (1985) 2 All ER.908

<sup>75</sup> Section 72A of the Insolvency Act 1986 amended by the Enterprise Act 2002. UK.

<sup>76</sup> Gough W. *Company charges* op.cit. p. 120.

<sup>77</sup> Goode R. p. 159.

<sup>78</sup> See Section 178 (1) (a) and (b) CAMA 2004

petition may be dismissed, secondly, in relation to appointment by the court it has been decided that merely initiating proceedings for the appointment of a receiver does not crystallise the floating charge.<sup>79</sup> In Nigeria, there are plethora of cases<sup>80</sup> which shows that in most cases, the company or some other interested parties including other debenture holders may challenge the appointment of the receiver even to the highest court in the land, in which case, the date when crystallisation took place cannot be exactly determined.

The law provides in section 178 (1) (b) that the appointment of a receiver and or manager is a crystallising event. Again, in the absence of statutory amplification it may be a theoretical legal theory and lacks practical effect. This is because, the receiver manager is simply appointed to manage the business as a going concern though in most cases as determined by the debenture to hive down the assets and eventually dispose of them. The duty of a receiver manager is to manage the business and realise the security in a more advantageous manner. The authorities in Nigeria agree that the receivership does not put an end to the company, and the Board of Directors of the company are not dissolved and may still act on behalf of the company for some specified events not covered by the purposes specified in the debenture.<sup>81</sup> Nnaemeka – Agu JCA in the case of *U.B.A. Trustees Ltd v Nigergrab Ceramic Ltd*<sup>82</sup> quoted<sup>83</sup> the statement

<sup>79</sup> *Evans v Rival Granite Quarries Ltd* supra.

<sup>80</sup> *Wema Bank Plc & anor. v Onafowokan* (2005) 6 NWLR (pt 921) 410; *UBA Trustees Ltd v Nigergrab Ceramic Ltd* (1989) 3 NWLR (Pt 62) 600; *Ceramic Manufacturers Nigeria Plc v Nigeria Industrial Development Bank* (1999) 11 NWLR (Pt 627) 383; *Oluyori Bottling Industry Ltd v Union Bank of Nigeria Plc* (2009) 3NWLR (Pt 1127) 129; *Intermarket Nig. Ltd v Aderounmu* (1998) 12 NWLR (Pt. 596) 131; *Christ lieb Plc (In'rec) v Majekodunmi* (2008) 16NWLR (Pt 1113) 324; *Pharmatek Industrial Projects Ltd v Trade Bank of Nig. Plc* (1997) 7 NWLR (Pt 514) 639; *Dagazau v Borkir International Ltd* (1999) 7 NWLR (Pt 610) 293; *Nashtex International Ltd v Habid (Nig.) Bank Ltd* (2007) 17 NWLR (Pt 1663) 308.

<sup>81</sup> *Re Roundwood Colliery Co* (1897) 1 Ch. 373; *Re Hubbard & Co Ltd* (1898) 68 L.J. Ch. 54.

<sup>82</sup> (1987) 3 NWLR (Pt. 62) 600.

<sup>83</sup> For a more comprehensive analysis of the circumstances when the Board may act during period when their company is under the administration of a Receiver see Aina Kunle, " Re-thinking the Duties of a Receiver and Powers of Directors of

made by Street J in the Australian case of *Hawkesbury Development Company Ltd v Landmark Functions Property Co. Ltd*<sup>84</sup> with approval, when he said, 'A valid receivership and management will ordinarily supersede, but not, destroy, the company's own organs through which it conducts its affairs. The capacity of those organs to function bears an inverse relationship to the validity and scope of the receivership and management'.

We should concede the fact that during the receivership, the receiver is concerned mainly with realising the security and the management of the company within the period is only for this purpose. The effect is that to the general public it was being run as a going concern but in real terms it is a concern towards liquidation, in effect, the company may cease trading or its undertaking is disposed off with a view to cessation of business which in itself are crystallising events.

#### **6. When the assets charged are in jeopardy**

Default of the company does not lead automatically to crystallisation of the charge unless provided for under the debenture.<sup>85</sup> The floating chargee must actively intervene to cause the charge to crystallise. A demand for payment does not crystallise a floating charge. Also institution of proceedings to crystallise a floating charge does not act as a crystallising event until there is a court pronouncement to this effect. Section 180 (2) CAMA 2004 further empowers the floating chargee to apply to court, even when the charge has not become enforceable, 'to appoint a receiver or manager if satisfied that the security of the debenture is in jeopardy, and the security of the debenture holder is deemed to be in jeopardy if the court is satisfied that the events have occurred or about to occur which renders it unreasonable in the interests of the debenture holder that the company should retain power to dispose of its assets'. The section do not however specify the 'events' that should have "occurred or are about to

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Companies in Receivership under Nigerian Law". *The Gravitas Review of Business of Property Law*, 6 (2015): 2

<sup>84</sup> (1969) 2 N.S.W.L.R. 782

<sup>85</sup> *Governments stock and other Securities Investment Co. Ltd v Manila Ry. Co. Ltd* (1897) A.C. 81

occur which renders it unreasonable in the interests of the debenture holder that the company should retain power to dispose of its assets". The courts have invented various events which it is believed should render it unreasonable to continue to allow the charge to float over the assets of the company. In the case of *Fasakin v Fasakin*<sup>86</sup> Uwaifo JCA examined the authorities and concluded that a receiver manager is appointed for protecting security or the property tied to one obligation or the other which security or property is found to be in jeopardy<sup>87</sup> he relied on the fuller explanation in the Halbury's laws of England paragraph 897 which states:

A receiver or receiver manager will be appointed by the court where the principal or interest is in arrears; or where the security is in jeopardy, even if no event has happened which either under the debentures or the trust deed makes the security enforceable; or where the company has sold the whole, or substantially the whole of its undertaking and assets otherwise than in ordinary course of business, and has ceased to be a going concern; or an order being made or a resolution being passed for the winding up of the company.<sup>88</sup>

The court ought to be guided therefore accordingly and ought not to assume any discretionary or arbitrary power to arrive at a decision to appoint a receiver in order to crystallise the charge when in fact there is no such threatened jeopardy.<sup>89</sup> A better approach is for a statutory definition of what the court ought to consider as events which may show that the property secured is in jeopardy even where the charge has not become enforceable.

## 7. Automatic Crystallisation

Automatic crystallisation event occurs by and under the terms of the debenture. No action on the part of the debenture holder is necessary to

<sup>86</sup> *Fasakin v Fasakin* (1994) 4 NWLR (Pt. 340) 597.

<sup>87</sup> Gough op. cit. 165 – 166.

<sup>88</sup> Vol. 7, 4<sup>th</sup> ed. Para 897 and 909.

<sup>89</sup> *Nashitex International Ltd v Habib (Nig) Bank Ltd.* (2007) 17 NWLR (Pt. 1063)



crystallise the floating charge and there will be no need to serve any notice on the chargor once any of the events which will make the floating charge to crystallise occurs, the floating charge will crystallise automatically without any further action on the part of the chargee.

There has been considerable debate as to the desirability of automatic crystallisation clauses.<sup>90</sup> The arguments are as to the desirability of such clauses especially because of its impact on third parties who may be dealing with the company without being aware of the automatic crystallising clauses.<sup>91</sup> However, the arguments may not be necessary<sup>92</sup> given the acceptance of the fact that the events of crystallisation were not fixed by law but are largely contractual agreements between the parties. In *Re Brightlife Ltd*<sup>93</sup> Hoffmann J was of the view that it was not for the courts to impose additional restrictions on the parties freedom of contracts on grounds of public policy. In most cases the clause covers areas like creation of a second mortgage, the levy of distress or execution against the debtors assets; default by the debtor in its obligations to the creditor, failure to maintain a given ratio of assets to liabilities or to keep the debtors external borrowing to a given level. Generally, the terms are not registered, even where they are registered, the parties transacting business with the debtor company are never brought into the picture, and their interests are affected wherever the automatic crystallisation clauses are triggered.

However, Hoffman J<sup>94</sup> ruled that the terms are effective and that only the legislature may intervene when he said;

*I do not think that it is open to the courts to restrict the contractual freedom of parties to a floating charge. The public*

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<sup>90</sup> *Re Manurewa Transport Ltd* (1971) NZLR 909; *Stein v Saywell* (1969) 121 CLR 529; *Re Woodroffes (Musical Instruments) Ltd*. *Supra. Re Brightlife Ltd* (1987) Ch. 200 at 214-215.

Goode R. *supra*. p. 164.

<sup>91</sup> Dean R. "Automatic Crystallization of a floating Charge" *Law Institute Journal*, (1984): 842

<sup>92</sup> *Abbas v Ajoge* (1996) 4NWLR (Pt. 444) 596; *SOI Fend Limited v Eherewe* (1996) 8 NWLR (Pt 465) 248.

<sup>93</sup> (1987) Ch. 200 at 214-215.

<sup>94</sup> *Ibid*.

*interest requires a balancing of the advantages to the economy of facilitating the borrowing of money against the possibility of injustice to unsecured creditors. The arguments for and against the floating charges are matters for parliament rather than the courts.*

The Cork committee<sup>95</sup> has argued and submitted that there is no place for automatic crystallisation in insolvency law and that the legislature ought to specify those events which it feels will lead to crystallisation. This may be a supportable position from the point of view of protection of third parties dealing with the company. Parliament in England however decided to the contrary, and allowed automatic crystallisation to stay subject to safeguards which should remove any risks arising from the possibility that it may occur without the knowledge of one or more of the parties concerned.<sup>96</sup> Hoffman J admitted that "The result might be prejudicial to third parties who gave credit to the company" in spite of which he insisted that, 'I do not think that it is open to the courts to restrict the contractual freedom of parties to a floating charge on such grounds'.

It is open to the parties to agree on crystallising events and however trivial, or capricious or invincible to the outside world, as an event which will cause the charge to crystallise automatically.<sup>97</sup> The only qualification is that the event must be sufficiently described with certainty that will have a legal effect. Professor I.O. Smith<sup>98</sup> has posited that, the provision of section 178(1) CAMA has limited the events triggering crystallisation to the events stated in the section only, thus, other events

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<sup>95</sup> Retrieved on 24/08/2013 Available at <https://publications.parliament.uk/pa/cm199900/cmselect/cmtrdind/112/11202.htm>

<sup>96</sup> See the views expressed by Nourse J. in *Re Woodroffes (Musical Instruments) Ltd* (supra) that 'the general body of informed opinion is of the view that automatic crystallization is undesirable'

<sup>97</sup> Note that CAMA 2004 by virtue of its section 178 recognise only the three events, which are – (a) appointment of receiver (under the debenture or by court) (b) enter into possession (c) company gave into liquidation. Cessation of business is not recognised by the law in Nigeria, but should be implied.

<sup>98</sup> Smith I. *Nigerian law of secured credit.* (Lagos: Ecowatch Publications (Nigeria) Limited, 2006)

at common law, like cessation of business or sale of substantial assets other than in the ordinary course of business are no longer applicable in Nigeria. Also, "the provision has rendered inoperative the concept of automatic crystallisation upon the occurrence of a particular event of default prescribed by the charge instrument, or semi-automatic crystallisation in the sense of a mere requirement of notice being given to the chargor by the chargee to terminate the company's license to carry on business, nor does the breach of terms of the charge per se permit crystallisation." He concludes that, "In any event, the charge may bring about crystallisation only by taking possession or by appointing a receiver or manager of the assets"<sup>99</sup>. The only authority offered by the learned author for the foregoing proposition is the provision of section 178(2) CAMA.<sup>100</sup> The validity of this "proposition: however is not supported by any authority whatsoever. The section 178 CAMA relied upon by the learned author does not support his claim. The Nigerian courts have on many occasions been confronted with the interpretation of debentures secured by a floating charge and its crystallising events. The courts have always adhered to the sanctity of the debenture provisions and the intentions of the party. The only omission had been failure by the courts in Nigeria to make specific reference to the technical word 'automatic crystallisation'. In the case of *Ceramic Manufacturers Nigeria Plc v N.I.D.B.*<sup>101</sup> where the respondent granted the appellant a loan in the course of respondent's banking transactions with the appellant. As a security for the loan the appellant executed a Deed of mortgage in favour of the respondent bank. A clause in the deed of mortgage empowered the Respondent to appoint a receiver if any part of the loan or interest is outstanding. There was a breach of the agreement when the appellant breached clause 42 of the agreement and the Respondent appointed a Receiver over the assets of the appellant. The Respondent applied to the court for confirmation of the appointment of the Receiver, though it was refused by the Court of Appeal on the ground that the debt was not proved, the point was made that the appointment of the Receiver based on a clause in the agreement in the form of automatic crystallisation was

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<sup>99</sup> *Ibid.* p321-322.

<sup>100</sup> *Ibid.*

<sup>101</sup> (1999) 11 NWLR (Pt. 627) 383.

validly done. Karibi-Whyte JSC also in the case of *Intercontractors Nig. Ltd v N.P.F.M.B*<sup>102</sup> was of the view that when upon the creation of a floating charge, the 'company is entitled to continue to use the assets in the ordinary course of its business, until the conditions prescribed for its realisation occurs'.<sup>103</sup> In the case of *Intercontractors Nig. v UAC*<sup>104</sup> the same Justice of the Supreme Court also stated the position of the law when he said, "A floating charge, as the assets involved is ambulatory and floats over the property until the event indicated in the debenture deed happens which causes it to settle, remain fixed and crystallise into a fixed charge".<sup>105</sup> Though the cases were decided before the CAMA was enacted, the cases remain the most important authority in this area of the law. The Court of Appeal in the case of *U.B.N. Ltd v Tropic Foods Ltd*<sup>106</sup> not only relied on the two cases cited above but Ejiwunmi JCA (who read the lead Judgement)<sup>107</sup> went on to confirm that the appointment of a receiver as the appointment was based on the terms of the mortgage Debenture Deed. There was no reference to CAMA in this instance, but the determination of the matter was specifically on the powers granted under the debenture deed and not the CAMA 2004.

The Supreme Court of Nigeria had the opportunity of addressing automatic crystallisation clause in the case of *N.I.D.B v Alfijir (Mining) Nigeria Ltd*.<sup>108</sup> In this case; the company borrowed money from the appellant and executed debenture deed with the appellant which detailed the condition for the loan.<sup>109</sup>

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(1988) 2 N.W.L.R (Pt. 76) 280

ibid. These are conditions as stated in the debenture.

(1999) 11 NWLR (Pt. 627) 383.

Note that the Karibi-Whyte JSC referred ' to events indicated in the debenture deed'

(1992) 3 NWLR (Pt ) 231

Adio and Akpabio JJCA concurred.

(1999) 14 NWLR (Pt. 638) 176.

109 . Clause 31 of the agreement provides *inter alia* as follows: "The loan and other moneys herein before covenanted to be paid whether by way of interest or otherwise shall become immediately due and payable on any of the following events: a.If the borrower makes default for a period of 28 (twenty eight) days in payment of any installment or interest of the loan which may have become due under this agreement. B. If an extra-ordinary situation shall here arisen the

The clause consists of other provisions found in any current standard debenture. The Supreme Court in Nigeria not only approved the automatic crystallation clause, but went on to determine the matter based on the interpretation of the debenture. Kalgo JSC who read the lead judgement in construing the agreement said, 'Therefore, the events in paragraphs (a) and (g) of clauses 31 of Exhibit 14 have happened in this case and I am of the view that the whole loan granted to the respondent by the 1st appellant had become due and payable'. Other Justices of the Court<sup>110</sup> agreed and ruled that having 'breached the conditions stated in the debenture, the appellant is entitled to appoint a receiver to take over the assets of the company'. The court did not, rightly, refer to the conditions set out in section 178<sup>111</sup> because it is irrelevant.

Clearly the position of law in Nigeria is different from the views expressed by Professor Smith, the law allows for the parties to enter into agreements which will guide their relationship and the courts will be ready to determine the dispute based strictly on the provisions of such agreement. Even if the implication is to allow automatic crystallisation events, the courts will certainly apply the provisions of the debenture in Nigerian law.

### **The real impact of automatic crystallization clause**

The courts have in all the cases avoided the debate on automatic crystallisation and have restricted themselves to only interpreting the agreements between the parties. This may be partly due to the provisions of CAMA which is not only bare but does not accord with international, acceptable standard and does not take into consideration the needs, and desires of the business community. The law also fails to address the policy issues and the protection of third parties dealing with companies whose assets are under a floating charge secured with automatic crystallising events. The fear had always been that, in view of the non-registration of

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continuance of which in the opinion of the lender shall make it improbable that the Borrower will be able to perform its obligation under the agreement. C. If the borrower shall commit any breach of the provisions contained in or implied in this Agreement

<sup>110</sup> Belgore JSC, Ogbwuegbu JSC, Achike JSC, and Ayoola JSC.

<sup>111</sup> CAMA 2004.

the events, and even where they are registered, the third parties dealing with the companies may never be aware of such clauses only to discover at the end of the day that they have no security whatsoever.

**Preferential creditors:** - The automatic crystallisation clause also affects preferential creditors which the law seem to protect in section 478 CAMA. Because, if the crystallising event have occurred prior to winding up, they will be paid after the floating chargee because the law as it stands currently, crystallisation converts the floating charge into a fixed charge which gains priority over the preferential creditors. Until the law is amended to define the floating charge as a charge which: "as created was a floating charge"<sup>112</sup> the amendment resolved the problem in England, and ought to be immediately effected in Nigeria as well.

**Execution creditors:** - Execution creditors need to be protected as well, and this can only be done through legislative intervention. The effect on a creditor who goes to court and gets judgement against a company who's assets are charged under a floating charge will discover that he cannot levy execution and if he does, the proceeds must be handed over to the floating chargee whose charge would have crystallised automatically on the happening of an event which is not even known to the judgement creditor. Unsecured creditors are totally at the mercy of the floating charge holder and will be left with nothing, but a shell of the company.

**Secured creditors:** - Automatic crystallisation also may affect secured creditors. This is because secured creditors who secured the loans after a prior floating charge will discover that automatic crystallisation clause in the prior floating charge has the effect of crystallising the prior charge and so giving priority to it instead of the latter secured charge.

**Date of crystallisation:** - Crystallisation date is another huge problem that may be encountered with the inclusion of an automatic crystallising event. In most cases, the event which may in fact be very innocuous may occur and the company had continued to trade without any interference. It is not a case of estoppel because the chargee may not even be aware of the triggering of the crystallisation. On winding up, it becomes difficult for the

Receivers and managers to determine at what point in time the charge crystallised.

**The Company:**-The effect on the company requiring more finance is also tremendous. This is because of the freedom to structure the debenture, the nature of the floating charge and the automatic crystallising events, the debenture holder is virtually free to introduce and define all manners of trivial issues. A circumstance which may not have anything to do with the company may cause the business operations of the company to cease and become paralysed as a result of triggering of the crystallising event in the agreement, for instance, a third party may initiate an action against the company over a business transaction which is enough to trigger crystallisation. Draftsmen may in fact devise clauses that are planned to freeze part of the company's assets and render the operations of the company to close down. To address some of these issues the legislature should intervene, not in barring automatic crystallisation as it has its usefulness but to regulate the whole practice in such a way as to protect the company and third parties dealing with it. That the law must make provision for the giving of notice upon a crystallising event and which notice should be well known to all parties, not only the company but also others dealing with it, either by registration or advertisement.

### Conclusion

The floating charge is a flexible arrangement that allows the debtor access to funds on the security of the present and yet to be acquired assets of the debtor. It is flexible because it allows the debtor to continue in possession and use of the charged assets without interference from the charge. The events that will lead to the crystallisation of the charge is not only expected to be properly and clearly stated in the debenture but is also implied by law. Because of the negative effect of crystallisation on third parties who may have dealt with the company without being aware of the existing crystallisation events in the debenture that may crystallise the floating charge to the detriment of unwary third parties, it is important that the legislature actively regulate the crystallising events and ought not leave the matter to be determined by the parties. It is clear that the existing regime of events in Section 178 CAMA 2004 is totally inadequate and does not bear relevance to the practical realities in current

commercial practice. The definition of the floating charge should be amended to avoid the unintended effect of allowing the floating charge priority over preferential creditors and claims. The time and when liquidation is expected to have commenced as a crystallising event should be properly defined and determined by law to avoid the company from being destroyed by the floating chargee when the company is still capable of meeting its obligations. There is also need for a legislative regulation of the automatic crystallisation. There is no doubt that the automatic crystallisation is permitted in Nigerian law, but its statutory regulation is desirable in order to protect all parties involved in the transaction and also third parties dealing with the company.

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