

Insolvency & Restructuring - Nigeria

Fast tracking financial insolvency-related cases: the AMCON Practice Direction

Contributed by **Punuka Attorneys & Solicitors**

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Introduction

The Asset Management Corporation of Nigeria (AMCON) Act of June 2010 was enacted in response to the 2009 Nigerian banking crisis. Nigeria's banks were overexposed in the capital markets and suffering from the impact of the 2008 global meltdown. AMCON was created to excise from banks' books and manage non-performing loan assets, including the pursuit of debt recovery, leaving financial institutions to focus on their critical functions of lending and financial intermediation as an engine for economic growth.⁽¹⁾

Pursuant to his constitutional powers,⁽²⁾ and particularly Sections 53 and 61 of the AMCON Act, the chief judge of the Federal High Court has issued a practice direction aimed at regulating and fast tracking claims brought by, on behalf of or against AMCON involving recalcitrant and insolvent debtors and their non-performing loans.

The practice direction, which is divided into 17 parts, came into effect on March 1 2013. This update highlights its key provisions.

Objectives

Part 1 of the practice direction sets out definitions of key terms and new terms to replace old terminology traditionally used in the existing rules of court. It also sets out the fundamental objective and purpose of the practice direction.

Essentially, the practice direction aims to assist the Federal High Court in dealing with AMCON claims quickly and efficiently. The court is enjoined to administer and interpret the direction purposively, with a view to securing swift determination of every claim. Part 1 makes it clear that the practice direction represents a default procedural template for AMCON proceedings; however, where no provision, or inadequate provision, is made in the practice direction, the generic Federal High Court (Civil Procedure) Rules will guide the court.

All AMCON claims (ie, claims by, on behalf of or against AMCON) must be brought under the practice direction using the prescribed commencement forms. However, Part 1 clarifies that the forms prescribed are not inflexible.⁽³⁾

Part 1 further clarifies that the parties, the judge and counsel are all required to further the fundamental objective of the practice direction, which is the efficient and speedy administration of justice, bearing in mind the sensitive sector of the economy that the substantive act seeks to protect.

Case management and dispute resolution powers

Part 2 sets out the case management and other dispute resolution-related powers of the AMCON track judge. Other parts of the practice direction also outline what the track judge can unilaterally do and must do in relation to the parties and the claim, and generally afford wide discretion to the judge.

Pursuant to the practice direction, and in furtherance of its fundamental objective, AMCON track judge(s) appointed by the chief judge of the Federal High Court may engage in "active case management", unlike under the general rules of court. This includes encouraging the parties to cooperate with each other in the conduct of the

proceedings, and identifying the issues at an early stage. A track judge can give any direction at his or her own initiative in pursuit of the swift dispensation of justice, including convening as many case management conferences as may be necessary, directing the parties to consider alternative dispute resolution, appointing a referee, granting interim relief and ordering security.(4)

Judges must also decide promptly which issues require full investigation and trial, and summarily dispose of the other issues. They must further decide on the order in which issues should be resolved, help the parties to settle the whole or part of the case and deal with as many aspects of the case as possible on the same occasion, even where not scheduled.

With respect to the twin objectives of case management and efficient and speedy justice, Part 6 specifies where such claims can be filed(5) and provides that even where a case is filed inappropriately in a home court, such filing will remain valid. Some suggest that the rule should have gone one step further and provided for subsequent administrative transfer of the case to the proper division at the request of the defendant (s), as defending in a jurisdiction outside the place of residence of the defendant may prove onerous or financially challenging for the defendant.

Procedural rules

Part 3 sets out the procedure for commencement of an AMCON claim. This includes the commencement of suit with the claim form (Form 1A of the schedule),(6) and how to file and serve the claim form(7) and other AMCON track documents. It also specifies the content, the timeframes for serving and filing the claim form, relevant supporting materials (including what constitutes relevant supporting materials), defence and other documents.(8)

In particular, the practice direction envisages that a claimant filing a claim will frontload all its court documents, including the claim form (where the particulars of the claim, the amount involved and relief sought are stated), and supporting materials such as the statement of claim, list of witnesses, witness statements and other supporting document bundles. Where the claimant does not frontload all of its processes, the practice direction allows for deferred frontloading, whereby the claimant must file the statement of claim within 10 days of filing the claim form and can then file all other supporting documentation as the need arises.(9)

Service of the claim form stays all prejudicial operations by or on behalf of the defendant and all persons with notice of the claim, and thus dispenses with the need for the claimant to file applications for interlocutory injunctive and preservative relief, as is usually required in ordinary commercial cases. This may further mean that the defendant and any of its agents will be jointly or severally liable for any prejudicial operation.

In view of the fast-track nature of the proceedings, the defendant must be served within five days of filing. If service is out of time, the usual practice in the State High Court is to declare the proceedings invalid. However, it is doubtful that this approach would be applied in AMCON proceedings, since the track judge has full discretion to treat procedural and formal defects on the face of documents and proceedings as mere irregularities, and even to validate certain irregular steps taken without proper permission of the court(10) in the interests of speedy justice. Part 7 of the practice direction, which specifically guides the court on this issue, also lists five other options open to the AMCON track judge in relation to such defects, including allowing for swift regularisation, imposing costs, directing amendments and issuing other orders, but rarely setting the defective process aside. In the light of the above, the legislative gap may be academic in practice - even more so where there are robust provisions for advance service and satisfactory electronic services(11) which the parties can utilise in the name of efficiency and speed.

Upon service of an AMCON claim, the defendant has a very short timeframe of five days to brief counsel and file a representation notice.(12) Appearance out of time attracts a substantial daily fine of N5,000.(13)

In terms of the timeframe for exchange of pleadings, the rules provide for 10 days upon service of the frontloaded claim form together with supporting documentation within which the defendant should file its defence, and five days for the claimant to reply upon service of the defence. The rules are unclear as to the timeframe where the defence also involves a counterclaim, which general rules and court practice acknowledge as a distinct claim which can be separately treated by the court. It must be assumed in the circumstances that the timelines for normal claim/defence and reply would also apply to the counterclaim.

Part 5 of the practice direction (fast-track rules on court proceedings) also requires disposal of the entire case within three months of commencement and sets out rules on the conduct of court proceedings, including:

- day-to-day hearings;

- extraordinary hearings where necessary;
- inapplicability of any vacation period for track cases assigned to a track judge;
- when judgment must be given;
- the trial schedule;(14) and
- electronic signature requirements.

Part 4 of the practice direction deals with special proceedings under the AMCON Act relating to interim possession or account-freezing orders, applications which can be filed before the claim form is filed or served, and *ex parte* interim relief.

Parts 13 and 14 also deal with various types of interim relief that may be awarded by a track judge, the court's power and discretion in relation to interim remedies being sought, and the manner, format and timeframe for making such applications.(15) A claimant applying for interim remedies is deemed to give an undertaking as to damages.(16) All applications must be made to the court in which the claim has been initiated or is likely to be initiated. Such applications can be oral, without hearing and without notice. However, the judge must take care when exercising his judicial functions not to sacrifice the parties' rights to a fair hearing on the altar of case management.

Part 14 contains further information on what the application and supporting materials must include, and who is to be served notice of such application (each respondent). It further explains how to serve in other situations, such as with the claim bundle, on a defendant that has been served with a claim form but does not appear.

Part 17 deals with written submissions. All legal arguments before an AMCON track judge must be in writing and filed and served on all parties. It further explains that there is no requirement on any party to file written submissions, as these are required only for parties wishing to argue law before the court.

Other highlights

Other parts of the practice direction deal with issues such as service of process, default and summary judgment and amicable resolution.

Part 8, for instance, deals extensively with issues relating to service of a claim form and other frontloaded documents. It specifies the persons that can serve claim forms and explains who qualifies as a document server, when alternative service may be allowed and how to serve certain specified groups of persons and bodies (including foreign corporations and local agents of principal outside the Nigerian jurisdiction). It also includes information on how to prove service, who bears the costs of service, maintaining a service register and what the register must include. In line with the objectives of the practice direction, it views advance service as good and valid service which takes effect on the date of service if the document served in advance is not a claim form and is a copy of that filed. Electronic service is also acceptable and alternative service performed without leave or permission can subsequently be validated by the court as good and valid service.

Part 10 deals with judgment in default, including details of the situations where the claimant can and cannot obtain judgment in default, supplementary provisions to assist the court in granting judgment in default and clarification of when a judgment in default must and may be set aside.

Part 11 deals with summary judgment, which allows the court to decide a claim or issue without trial. It sets out the procedural information required to apply for summary judgment, the grounds for seeking summary judgment and the procedure where evidence is to be relied on for such application.

Part 12 contains detailed provisions on offers to settle, the consequences of an offer to settle and the procedure for payment into court. Among other things, it provides that acceptance of an offer to settle at any time once the trial has begun requires the prior permission of the court. It is expected that this part will be frequently used in practice, in line with the objectives of the practice direction.

Part 15 deals with defendants who pose a flight risk. It sets out guidelines for making an order to show cause as to why security should not be accepted for the appearance of such defendants, as well as measures which the AMCON track judge can take against such persons (eg, warrant for arrest, order for bail, deposit instead of bail and detention if the defendant defaults on any of the aforementioned orders).

Finally, Part 16 deals with claims for foreclosure and redemption. It sets out who qualifies as an eligible claimant and the relief available to such claimant.

Comment

AMCON was established to help resolve the banking crisis, with a seven-year mandate to assume toxic bank assets and allow Nigerian banks to focus on their core function of

lending. It was assumed that its draconian powers under the AMCON Act⁽¹⁷⁾ would allow AMCON to achieve its objective of maximising recovery in the banking sector; but thus far it has found itself mired in litigation in the regular courts. The new AMCON practice direction is therefore an effort to ensure that AMCON can achieve its objectives more easily and swiftly, given the time constraints and increasing pressures on its existence. The International Monetary Fund, for example, recently called for AMCON to be disbanded on the grounds that its continued existence is frustrating proper banking practices: at present, banks have no need to conduct adequate risk management as they can simply offload risky assets to AMCON.⁽¹⁸⁾

The new practice direction is expected to speed up the recovery process and enable AMCON to overcome the numerous legal obstacles placed before it by insolvent debtors. Whether its objectives can be realised will depend on the one hand on the quality of the track judges and the court infrastructure, and on the other on the mindset of litigants. It is questionable whether the practice direction alone will suffice to transform the litigation culture to one that favours speedy trial. There is further a risk that some of its provisions may be struck down as unconstitutional.

It is surprising that AMCON does not regard itself as a stakeholder in a long-term business rescue law that could sustain whatever achievements it records in its short lifespan. Perhaps AMCON would make a greater long-term impact on the Nigerian insolvency system through involvement in wholesale reform of the insolvency and business rescue regime than through piecemeal practice directions which merely scratch the surface of the problem.

The practice direction is nevertheless an additional tool in the special banking business rescue and insolvency regime, in that it seeks to address general challenges of delay in the judicial resolution of commercial debt issues, realisation of assets and business rescue of financial institutions. As with the substantive AMCON Act - which there are currently calls to amend - concerns remain with respect to the protection of constitutional rights of borrowers and debtors.

The practice direction may also be a milestone to future reform of the general Federal High Court Civil Procedure Rules. It has dramatically changed the judicial lexicon and simplified the wording - although its procedures and processes remain complex for ordinary users.

The success of the practice direction will depend on how the track judges approach the issues in practice. While its innovations are welcome, the appointment of track judges must be predicated on prior proper training or retraining in matters pertaining to secured credit, securities law, banking, finance and insolvency. It is also hoped that the practice direction will in some way contribute to development of jurisprudence in insolvency-related litigation and enhance the capacity, skill and expertise of practitioners while legislative reform of the general insolvency regime is awaited.

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Endnotes

(1) For further information on the Asset Management Corporation Act, please see "[Dealing with bank insolvency: Asset Management Corporation of Nigeria Act](#)".

(2) S.254, 1999 Constitution of the Federal Republic of Nigeria (as amended)

(3) Rule 1.3 (2). All of the required forms in the practice direction are annexed in the schedules to the practice direction.

(4) Please see, for instance, Rules 2.2, 2.4, 2.5 and 2.7.

(5) It should be filed in the AMCON track of the defendant or one of several defendants' home court. It also sets out the caveat for filing if there is no appropriate AMCON track home court.

(6) Rule 3.1.

(7) Rule 3.2.

(8) Rules 3.2 and 3.3.

(9) See Rules 3.1 (8), (9) and (10).

(10) Rule 3.2 (4).

(11) Rules 3.2 (2) to (4).

(12) Part 9 of the practice direction contains information pertaining to representation notice, including the form for such notice and its location, the, compulsory information to

be inserted and who can file such notice for a corporate defendant.

(13) See Part 9 on representation notice and particularly Rule 9.3.

(14) The rules lower the constitutional period of 90 days by providing that a track judge should deliver a decision within 21 days of final submissions, and at best should not exceed 90 days in delivering such ruling. It will be interesting to see how this rule plays out in practice

(15) See, for instance, Rule 13.2.

(16) Rule 13.3.

(17) See "[Dealing with bank insolvency: Asset Management Corporation of Nigeria Act](#)".

(18) See International Monetary Fund Multilateral Institution 2012 Article IV Consultation, Country Report 12, released on March 28 2013:
www.imf.org/external/pubs/ft/scr/2012/cr12194.pdf. The report has elicited strong reaction from AMCON and several stakeholders in the Nigerian financial sector. See for instance, www.thisdaylive.com/articles/amcon-faults-imf-s-call-to-close-bad-bank/143830/ and issuu.com/73092/docs/mirror66

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