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Overview of insolvency and restructuring in Nigeria

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"In Nigeria, there is no specific Insolvency Act. There is no definition of who an Insolvency Practitioner is, and there is no statutory framework for the proper regulation of the profession. The Companies and Allied Matters Act (CAMA) enacted as a Decree in 1990 provides the general legal framework for corporate asset recovery or realisation. Whilst the provisions of CAMA have been inadequate in addressing issues bothering on cross-border insolvency, netting, co-operation between domestic and foreign courts, coordination of concurrent proceedings or communication of information in insolvency, etc., there is currently a new bill for the amendment of CAMA which has been passed by the National Assembly and awaiting presidential assent to become law. The passage and implementation of the new Bill are progressive steps that would set a more definitive legal framework for insolvency proceedings in Nigeria." – Anthony Idigbe

Insolvency and restructuring in Nigeria

The UK 1948 Companies Act strongly influences the legal framework for corporate insolvency found in a few parts of the Companies and Allied Matters Act (CAMA), a statute drafted by the Law Reform Commission and enacted as a Decree in 1990. The Decree became an Act under the civilian regime and was consolidated in the 2004 Laws of the Federation of Nigeria. The Act makes provisions for the general legal framework for asset recovery or realisation. It recognises three broad types of insolvency procedures, to wit; Receivership, Liquidation/ Winding-up and Arrangement and Compromises ("A & C").

The insolvency procedures recognised by the Act are, in that sense, either collective or non-collective and undertaken by Insolvency Practitioners ("IP"). In terms of personal insolvency law, there is the Bankruptcy Act of 1979 consolidated in the 2004 Laws of the Federation of Nigeria, but this law has not had much impact because of its requirement for judgment and execution levied as a condition for proof of bankruptcy. Also, the ineffective discharge provisions render bankruptcy an unattractive option for debtors.

There is no specific legislation in Nigeria for the recognition of foreign insolvency proceedings, orders, or judgments as well as for co-operation between domestic and foreign courts, coordination of concurrent proceedings or communication of information. Nigeria only has a limited framework for recognition and enforcement of an international *monetary* judgment which must be final and conclusive, unchallenged on appeal and conditioned on reciprocity. The legislative framework creates a dual regime for Commonwealth countries and other countries. Foreign insolvency orders would scarcely fulfil such requirements while foreign judgments are recognised and enforced through a process of obtaining leave of court and registration of the decision.

Evaluating the process

The Nigerian insolvency system is unduly creditor friendly and liquidation focused. There is no general business rescue law save for the scheme of arrangement provisions under CAMA, which provides a window for encouraging business recovery. However, the jurisprudence has not taken up the challenge primarily due to the conflicting requirements on approval majority of 75% under CAMA and 90% under the Investment and Securities Act (ISA) for a buyout of dissenting minority and the approach of the Securities and Exchange Commission (SEC) to the interpretation of those provisions.

CAMA precludes the appointment of a provisional liquidator before the advertisement of a winding-up petition. Also, the catastrophic decision of the Supreme Court of Nigeria in

FMBN V NDIC [1999] 2 NWLR pt 591, 333, that only actions or proceedings pending or instituted in the Federal High Court (the court that has jurisdiction in bankruptcy cases) is prohibited by the stay provisions of s.417 of CAMA brought uncertainty to the law around the availability of moratorium. The decision has effectively circumscribed the automatic stay regime by the limitation on the bankruptcy court's inherent power to bind everyone by a stay order on the threat of contempt. The absence of automatic stay encourages a race to the bottom as both creditors and debtors resort to various antics to either gain priority or moratorium. There is no effective moratorium even when the company is in liquidation. Creditors have also found a haven in filing for winding-up and obtaining a Mareva injunction (freezing order) when the company has not been found insolvent, and the petitioner is not a security holder but ends up exercising security rights over assets of the company even before judgment or winding-up order.

Notwithstanding the above, there is the existence of a limited rescue framework in the context of regulated industries such as banking and telecommunications through the Government's enactment of AMCON Act, NDIC Act and NCC Act, establishing the Asset Management Corporation of Nigeria (AMCON), Nigerian Deposit Insurance Commission (NDIC) and the Nigerian Communications Commission (NCC) respectively. Whilst AMCON was meant to be a temporary solution designed to last for only seven years for the purchase of eligible bank asset – toxic assets which the regulator – Central Bank of Nigeria (CBN) or the bank itself wants out of their books, it has now become a draconian albatross that has refused to phase out. The NDIC Act, on the other hand, was amended to enable the appointment of a liquidator for a failed or failing bank or financial institution without the need to go through the filing and advertisement of a winding-up petition.

In this regard, the mere withdrawal of the banking institution's operational licence by the CBN Governor suffices to enable NDIC to be appointed liquidator. However, banking regulators have since abandoned the use of the appointment of the liquidator as a tool for liquidation or restructuring of banks. They now prefer the creation of bridge banks as it enables the bank to continue business the next business day after a weekend as a new bank.

The popular view, however, is that the AMCON Act is not an insolvency regime but legislation aimed at protecting banks from sudden collapse. It cannot, therefore, be a permanent solution in that it only purports to give respite to the banks but leaves the debtors entirely at the mercy of AMCON with its draconian powers. The need for a general insolvency and business rescue law that would render AMCON's intervention unnecessary is thus imperative.

Legislative reform efforts

The past decade has seen the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN) champion the growth of insolvency and business rescue practice in Nigeria through training, advocacy and law reform. This commitment resulted in the drafting of a new, business rescue and cross-border insolvency friendly Insolvency Bill for resolution of both personal and corporate insolvency following stakeholders' consultation sponsored by the UK Department for International Development (DFID). Under the current political dispensation, the ninth session of the National Assembly saw a private member's Bill to reform only the Bankruptcy Act, 1979, but the Bankruptcy and Insolvency Bill ("BIB") is yet to pass into law. The BIB was proposed to repeal the Bankruptcy Act of 1979 ("BA"). It seeks to make provision for individual insolvency, some aspects of corporate insolvency, rehabilitation of the insolvent debtor, creation of the office of supervisor of insolvency, cross-border insolvency recognition and enforcement as well as other connected matters.

It is thus arguable that the Nigerian terminology relating to bankruptcy refers to personal or individual insolvency status while insolvency refers to corporate insolvency. The name of the Bill is somewhat misleading as the scope is restricted since virtually all its provisions deal with individual and not corporate insolvency. It is, therefore, neither general corporate insolvency nor business recovery law. It merely introduces a few personal bankruptcy law provisions. There is no indication that it has received presidential assent to date.

The CAC initiative

About 30 years down the line, CAMA has recently been the subject of an arguably detailed review at the instance of the Corporate Affairs Commission (CAC) set up to administer the Act. The CAC proposed a Bill for amendment of CAMA, with new provisions incorporating some aspects of insolvency such as administration and registration of insolvency practitioners including the recognition of the Business Recovery & Insolvency Practitioners Association of Nigeria (BRIPAN) as a certifying professional body, amongst others. However, although the new CAMA Bill has gone through Senate approval, it has also not received presidential assent.

The Bill earned the support of the Presidential Ease of Business Committee (PEBEC) which is pursuing an agenda of reform of commercial omnibus laws because of the difficulty of passing laws through the National Assembly. Consequently, the new Bill was updated by CAC with some assistance from the World Bank and a section added with the subtitle "Business Rescue Procedure", introducing UK-style administration, Company Voluntary Arrangement (CVA) and the UNCITRAL Model Law on Cross-Border Insolvency.

Though there is no standalone insolvency or business rescue law under consideration at this time at the National Assembly, the CAC sponsored Bill addresses some of the current shortcomings of the insolvency framework. By the provisions of the Bill, a liquidator or administrator once appointed has 28 days to submit a report to the court on whether a creditors meeting should be summoned to approve a voluntary arrangement. If the court agrees, then the liquidator or administrator shall convene the meeting to sanction the arrangement. Any member of the company has 28 days to challenge the meeting, and the court can decide whether a members' meeting ought to hold and which of the members' and creditors' meeting to prefer.

Also, under the new CAMA Bill, the effect of administration is the dismissal of any winding-up petition and vacation of any receiver-manager appointed by secured creditors or holders of floating charge. There is also an automatic moratorium on enforcement of any security or repossession of goods and premises. This law, when it becomes effective, will bring some sanity to the current practice of appointment of multiple receiver-managers and provisional liquidators. It will be apparent that the administrator would have priority, and failing administration the procedure will be converted to liquidation with the administrator as the liquidator or a separate liquidator is appointed to take over from the administrator. The CAMA Bill therefore definitely provides a slightly more comprehensive framework for business recovery and a framework for the regulation of the insolvency profession by requiring licensing of practitioners by CAC and recognising BRIPAN as a professional body whose certification is a condition for licensing.

Leading the process

On the whole, managing insolvency and business restructuring in Nigeria in the face of the inadequate legal framework requires creativity and innovation. A combination of understanding of the legal process and the application of the principles of informal workout can be of great assistance in achieving restructuring in a creditor-friendly and liquidation-focused system. The creditors usually respond positively, if the debtor voluntarily appoints a reputable firm to do an independent business review (IBR). Creditor perception of commitment to reform and openness by the debtor through IBR can kickstart and sustain the informal workout process.

Current reform agenda

Agitation by BRIPAN and other stakeholders have had an impact on the reform of some aspects of Nigeria's personal and corporate insolvency laws. The National Assembly and existing institutions like the CAC have been sensitised and seem to be working on some relevance in the reform process. Also, following the amendment of the AMCON Act, the use of the receiver managers by AMCON has improved the environment for insolvency practice and development of a business rescue culture. PEBEC is considering the possibility of an omnibus Insolvency Bill to facilitate the ease of doing business and tackle challenges associated with existing legal impediments to various business indicators, including sound business recovery and insolvency framework. It means that the CAMA Bill is a stop-gap measure.

Further, following constant engagement through training and attendance at INSOL/World Bank African Roundtable, practitioners and judges are now more commercially minded. The judges are more willing to use their authority under their enabling Act and rules to direct litigants to settle disputes amicably, encourage business rescue through negotiations and settlement, thereby creating the environment for multi-creditors workouts. The expectation is that with the support of the practitioners, judges and the National Assembly, a holistic solution that addresses the management and resolution insolvency and restructuring issues in Nigeria is achievable in the not-too-distant future.

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