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INSOLVENCY PRACTITIONERS GROUP

INSOLVENCY PRACTITIONERS' ROLES AND RESPONSIBILITIES - JURISDICTIONAL INSIGHTS

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FOREWORD

INSOL International's Insolvency Practitioners Group (IPG) has decided to prepare a publication that explores the roles and tasks of insolvency practitioners in various jurisdictions. The result of IPG's research is contained in this publication.

Worldwide, insolvency practitioners have similar objectives: to provide all stakeholders with the best possible outcome from the restructuring / insolvency mandate. Interestingly, however, in practice, the manner in which insolvency practitioners operate can vary significantly from jurisdiction to jurisdiction. For instance, many jurisdictions have a myriad of options available which are geared to achieving a maximum payout to creditors. The question to address is whether these procedures are used regularly and are they effective in practice?

Other distinguishing factors include, the manner in which insolvency practitioners are appointed, to whom these office holders must report and how regularly, the effect that a restructuring would have on employees, suppliers and other related parties, the extent and ability to investigate the management and directors, the manner in which claims are dealt with both locally and cross-border and many other aspects which an insolvency practitioner must deal with in the fulfillment of his / her mandate. Other important aspects include what qualifications an insolvency practitioner must have to be able to practice, the need to belong to an accredited member association and the manner in which practitioners are remunerated.

This publication strives to provide a comprehensive overview of the issues stated above and provide answers to these questions in multiple jurisdictions. We hope the readers will find the information useful in their daily work.

Through its excellent network, INSOL International has identified seasoned experts around the globe who have been willing to contribute to this publication. This publication is the product of their hard work and efforts. A big thank you goes out to all the contributors for making this publication come to fruition. Much gratitude is also owed to Dr Sonali Abeyratne, Sarah Mylott and Jelena Wenlock for their invaluable support and assistance in getting this publication completed.

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February 2025

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NIGERIA

1. Insolvency procedures

1.1 What drives the decision in your jurisdiction to use certain insolvency procedures?

From a technical and economical perspective, the decision driver rests on the awareness of the company's management or owners regarding the inability to continue trading or efforts to restructure the business to return it to profitability or solvency. Under the Companies and Allied Matters Act (CAMA) 1990 and emphasised with CAMA 2020 (which became effective 1 January 2021), the directors and decision makers of the company may be personally liable for wrongful or reckless or fraudulent trading. Under CAMA 2020, insolvent restructuring procedures such as Administration and Company Voluntary Arrangement (CVA) were introduced. The introduction of a possible six-month moratorium, when using a Scheme of Arrangement or Compromise, offers further additional options to a company and / or its directors when using insolvency procedures.

Other procedures, such as Creditors Voluntary Liquidation (CVL), encourage initiative and participation from the company and its internal stakeholders.

In a CVA, Administration (commenced by the company or its directors) or a CVL, the managers or owners are usually permitted to remain in office during the restructuring process, notwithstanding the appointment of an IP.

Where the process is involuntary or creditor driven, the choice of an insolvency procedure is primarily driven by the cashflow or liquidity challenges of the business and the creditor's perception of its ability to achieve repayment through recovery or realisation. Tools such as receivership (and management), administration and involuntary winding up[1] come into play.

An Outright Liquidation proceeding - usually by an unsecured creditor- is adopted where a company is insolvent and its business is no longer viable, nor is there a possibility of debt being repaid. This route terminates the company and assets are realised and distributed in accordance with the statutory order of priority.

Receivership (coupled often with Management) is mostly used by secured lenders (holders of global fixed or floating charge or debenture) with the priority aim being realisation, though not in the context of a collective process.[2]

The choice of Administration by creditors (holders of a fixed security or a floating charge) is usually influenced by the consideration of business rescue and the graded objectives of an Administration:

a) to rescue an insolvent company as a going concern, so as to enable creditors receive a better outcome than would be achieved where the company is liquidated; or

b) engage in a process to achieve a better asset realisation than an outright direct liquidation process; or

c) where these two intents may not be achieved, to place the company into liquidation.

1 Winding up by the court or under the supervision of the court.

2 The new CAMA declares that a receiver appointed as manager is for all intents and purposes deemed to be an Administrator. In other words, the new law aims at having the IP to adopt a less selfish, recovery and realisation approach but rather a greater business rescue culture notwithstanding source of appointment.

1.2 Are certain procedures listed but hardly ever used for a corporate insolvency? If so, what are the reasons for non use of these procedures?

Very rarely. Prior to the CAMA 2020, insolvency procedures were restricted to liquidation-oriented processes such as winding up by the Court and receivership.

Where applicable, IPs attempted to use Arrangements & Compromise (A&C) as an insolvent restructuring tool although it had limitations (no moratorium, court process and may be protracted and held to ransom by litigation, or delayed on account of the requirement for a statutory report on the fairness of the scheme by the Nigerian Securities & Exchange Commission).

Practitioners have attempted to use a Members Voluntary Winding Up (featuring a solvent restructuring requirement – through a directors' declaration of solvency) and a Creditors Voluntary Winding Up to facilitate restructurings outside of judicial proceedings.

The new tools introduced by CAMA 2020 are being used, although jurisprudence is slowly being developed for these new tools.

1.3 For those procedures that are used more often, what are the foremost reasons to use the procedures?

- Is it an immediate liquidity event,
- a foreseeable liquidity event (but not yet immediate) or
- do you see other drivers (e.g. incentives for directors to file for administration to avoid insolvent trading liability)?

Compulsory Liquidation and Receivership procedures are used most often, primarily due to the length of time they have been in use. The court, IPs, creditors and debtor companies are also more familiar with these processes. Additionally, because they are creditor-driven, the processes reflect aspects of enforcement of creditors rights and are recognised as debt recovery techniques by those who are not necessarily IPs. CVAs and Administrations are now becoming attractive options for practitioners. Since 2021, some CVAs[3] and Administration processes have been attempted.

1.4 In practice, is the role that the IP has or can play, a factor that is of relevance when determining whether or not to apply for certain types of insolvency procedures?

The choice of an insolvency procedure influences the choice of IP. Considerations such as experience, knowledge and commercial dexterity come into play. Some practitioners are also recognised in the industry as being more experienced towards debt recovery (receivership and liquidation) rather than business rescue (CVA, Administration etc.).

2. Appointment

2.1 Aside from formal qualifications, are there any "soft" requirements in order to be able to take appointments as an IP? For instance, does an IP need to have gained prior experience in another field or under the supervision of a more seasoned IP?

Experience in other fields of businesses, sectors or unique professional skills (e.g. forensics, oil and gas, capital markets, etc.) may influence the appointment but are not critical. An IP may appoint other professionals to assist in the day-to-day administration or to discharge any aspect related to the assignment. Generally, the Insolvency Regulations April 2022 (the Regulations) envisage, as a pre-condition to authorisation to practice, that the IP should receive professional training and capacity

3 A pioneering and successful CVA in Nigeria was effected in 2021 and sanctioned in *ex parte* proceedings in suit FHC/L/CS/1250/2021- Re: Seyi Akinwunmi & Okorie Kalu.

building in the area of insolvency. The Regulations also envisage that the IP should continue to have some form of continuous exposure to professional training which the regulator, the Nigerian Corporate Affairs Commission (CAC) may consider at the point of licence renewal.

2.2 Does the appointing body take prior experience into consideration when appointing an IP?

Yes, and particularly where the debt sum is significant, or the business of the insolvent company is complex. Where a business is of sufficient interest to the government or the economy, or is regulated, the appointing body may also consider the level of recognition of the proposed IP in that regulated field, as the case may be.

2.3 If stakeholders do not appoint the IP, can stakeholders influence who gets appointed?

If so, how does this work in practice?

Stakeholders do appoint or at least influence the appointment of an IP depending on the nature of the insolvency process. Shareholders and directors would appoint (CVA, MVL, Company driven out-of-court Administration) or even influence the appointment of an IP for voluntary insolvency (CVL) processes. However, creditors either appoint extra-judicially or influence the court appointment of an IP (receivership, Administration, winding up). Courts require sufficient materials to show that the proposed IP is competent to grant the appointment reliefs claimed. Regulators also influence the appointment of an IP for a regulatorily initiated or driven insolvency process.

2.4 How does your jurisdiction safeguard that an IP is impartial? Are there any conflict rules and independence requirements, or restrictions on accepting an appointment? If so, how do they work in practice?

There are statutory requirements for the eligibility and qualification of competent professionals under CAMA 2020 and the Regulations of April 2022. Formal education, professional training, licensing with the CAC, rules on ineligibility or disqualification of certain persons as IPs on account of conflict of interest are all factors that may come to play.

Certain persons are restricted by law from being appointed as an IP, for example, directors or auditors of the debtor company, persons of unsound mind, infants, an undischarged bankrupt, persons convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude, and a corporate entity. Where they are otherwise appointed, the court may nullify the appointment by way of application. Whilst there are no other set conflict rules or independence requirements, CAMA 2020 makes provision for seeking redress through the court to either remove or replace an IP who is connected to the debtor company or who may have had past dealings with the company and failed to disclose the same upon appointment. CAMA 2020 included specific provisions which serve as checks on the activities of an IP when there are indications of bias or favouritism in their actions. Most of these checks are initiated through seeking redress in court, seeking relief tailored towards ensuring an IP acts within the bounds of the law, or is replaced. A Committee of Inspection also acts as checks to the powers, activities of an IP.

Recognised professional bodies such as the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN) have specifically developed a Code of Ethics which features some restrictions on appointments on account of conflict-of-interest rules. These restrictions informed the conflict-of-interest restrictions in the Regulations.

3. Dismissal

3.1 Assuming that an IP can be dismissed upon the request of a creditor (or the debtor), in what circumstances can a request be made and how does this practically work?

In a CVA situation, a creditor may seek to challenge the appointment of an IP not only on the basis of substantial irregularity in the process, but also unfair prejudice or on grounds of disqualification contained in the statute or the Regulations.

If the appointment was made by the court, a creditor is entitled to apply to the court to challenge the conduct of an IP and seek their removal. Thus, where an IP is found wanting in fulfilment of the expected duties or fails to act within the bounds of statutory requirements, the debtor company or its members may apply to the court to challenge the IP. Likewise, the creditors of the debtor company over which the IP is appointed, have recourse against a defaulting or unfairly prejudicial IP (Section 440, 511, 512 CAMA 2020).

An IP may be removed or dismissed upon an application by a creditor(s) to the court stating the grounds for dismissal / removal. Circumstances which may ground a removal include where the IP fails to file returns and accounts; where an IP takes certain actions beyond his authority; where an IP fails in their duty to stand in a fiduciary relationship to the debtor company and observe utmost good faith (section 444, 445, 553, 562 CAMA 2020). The directors, who also owe fiduciary duties to the company, may challenge the conduct of an IP which is detrimental to the interests of the company. This is at times witnessed against receiver managers and would likely also feature in Administration initiated by a secured lender or a qualified floating charge holder.

3.2 Does dismissal occur often? If so, what are the consequences (if any) for the IP being dismissed?

Rarely. Where an IP is dismissed, another is often appointed to replace the dismissed IP on an application to the court, if necessary.

3.3 How easy or difficult is it to hold an IP accountable in your jurisdiction and what other measures are available to do so?

Where it is evident that an IP is acting beyond their authority, courts, on application may: give directions sanctioning the IP; instruct the IP to take certain steps; or remove the IP. The Corporate Affairs Commission also has regulatory powers over the activities of an IP to the extent that the CAC licenses IPs and are also required to make periodic returns.

4. Role of the IP

4.1 Aside from the formal / statutory requirements, how does an IP – in practice – perform their role? Is the IP 'self-starting' with a focus on (for instance) realising assets or is the IP more prone to await and act upon instructions by creditors or the court?

In practice, an IP promptly undertakes the execution of the appointments' objectives and only seeks recourse to creditors where absolutely necessary. For example, where there is need to source funds to initiate asset tracing processes or where strategic needs require input from creditors before proceeding with duties. In reality, a secured creditor will generally defer to the IP as regards asset realisation or restructuring. This is also the case when an appointment is made by the court. In voluntary processes, the approach is more balanced and the IP works in a more collaborative, advisory and / or transactional capacity.

4.2 Do IPs have much leeway to determine the manner in which they perform their tasks?

The law does not specifically prescribe how IPs should conduct their day-to-day tasks, as long as their actions align with statutory requirements. To that extent, the IP enjoys flexibility in determining the approach to the assignment, mindful of adhering to best practices and compliance with statutory and regulatory requirements.

The Regulations provide standard content or principles, and the IPs often collaborate with other professionals to fulfil the mandate given. For instance, the presentation of proposals in the case of Administration and the timeframe for providing the same is guided by law and may only be extended within the confines of the law. However, the specific approach to achieve these objectives is not rigidly controlled.

Similarly, there are no strict rules governing how Liquidators, Administrators or Receivers ought to take control of the undertakings. In this context, creativity is permitted, in addition to sound turnaround and practical management skills, effective negotiation abilities and other skill sets suitable to the assignment.

5. Investigations

5.1 Does an IP also have an inquisitive role?

Yes. The directors and the company are required to make full disclosure by way of a statement of affairs, particularly upon request by the IP. In some cases, the IP is required to undertake asset tracing exercises, particularly if realisation of value is contingent on identifying and handling claims or the core business assets of the company.

5.2 Does the IP have an obligation to conduct investigations, or is the IP otherwise generally prone to investigate issues surrounding the insolvency and institute claims as a matter of practice? If so, how often does this occur and is an IP often successful?

An IP has a right to conduct investigations, which may aid the performance of given duties, but this is not necessarily an obligation. An IP may investigate issues pertaining to the assets, rights, interests or claims of the company. Where access to information is restricted by certain individuals of the debtor company, the IP may seek court intervention by applying for orders such as an *Anton Pillar Order*, freezing orders or examination orders. IPs are mostly successful with such applications as they are mostly made *ex parte* and failure to comply may lead defaulters to be held in contempt of court.

6. Supervision

6.1 How on a practical level is supervision of an IP organised?

Depending on the insolvency process, supervision is conducted chiefly through internal bodies such as a committee of inspection or committee of creditors. In the case of voluntary insolvency processes, an IP must periodically report on the status of the insolvent administration and / or obtain resolutions to approve significant steps that the IP wishes to undertake (e.g. making a compromise with a class of creditors). If the appointment is by the court, the court also provides a supervisory function and provides directions to the IP. The CAC may potentially intervene if an IP fails to comply with periodic reporting requirements and may scrutinise reports and seek additional information and particulars.

6.2 Is the supervising body sufficiently equipped to perform its role and do IPs experience that they are genuinely supervised?

Yes, for the court and the CAC. Gradually, there is an increasing trend for other bodies such as members of the Committee of Inspection and Creditors Committee to become actively involved as well. This is due to the deepening knowledge of insolvency amongst practitioners and a more regulated environment, leading to creditors appointing professionals as their representatives in these bodies.

6.3 Do stakeholders have sufficient ability to act against or correct the IP if and when this is deemed necessary? If so, how is this achieved?

Yes, they do, through the court system and the CAC. Please refer to the responses to Question 3.1 above.

7. Disclosure obligations

7.1 Assuming that an IP is obliged to make (periodic) public disclosures for the benefit of creditors / interested parties, do these public disclosures provide sufficient insight into how the insolvency matter is developing? Are they sufficiently detailed and accurate?

They are generally sufficient and are provided to the court or the relevant regulatory body. However, stakeholders including creditors, directors or other interested persons if aggrieved, may seek recourse through the court to demand greater accountability and transparency in the process.

8. Influence by creditors

8.1 Assuming that creditors' committees can be formed, do they in practice have sufficient ability to oversee and / or influence the process? If so, how?

They do have sufficient ability to oversee and where established, they are required to supervise by law. This is achieved through meetings convened by the IP where the committee is kept fully apprised of proceedings. Where a committee of inspection has been established in a winding up, a liquidator can only take certain actions with the sanction of the committee, or the court. A committee may also approach the court for redress where the members are of the view that there are substantial irregularities or unfair prejudice.

9. Remuneration

9.1 Is IP remuneration an issue in your jurisdiction? If so, are IPs insufficiently remunerated?

IPs have, prior to CAMA 2020, been remunerated based on agreements negotiated with appointors, or through directions from the court in the event of a court appointment. Where a liquidator is specifically appointed by the court, arrangements for fair and reasonable fees or commissions may be reached with the committee of inspectors. The Regulations now provide three clear models of remuneration: billable hours, agreed lump sum or commission-based fee. Each is selected based on its suitability to the assignment.

9.2 Are IP fees something stakeholders can object to? If so, does this occur often (and successfully)?

Yes, IP fees may be objected to. The issues are either usually negotiated or voted upon, where there is a Committee of inspection or decided by the court. Commission based fees of 10% to 15%, depending on size and complexity of the assignment, are usual. They could be lower for large transactions (2.5% to 5%).

9.3 Are there any means for an IP to obtain state funding for remuneration and / or investigations?

Unless the insolvency assignment is initiated by the state or by a regulatory agency, funding for investigations may not be readily available. However, in such cases where the government or regulatory bodies are involved, there might be provisions for initial or subsequent justified funding to facilitate the necessary investigations.