

Restructuring & Insolvency

Contributing editor
Bruce Leonard



2017

GETTING THE
DEAL THROUGH

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Contributing editor

Bruce Leonard

The International Insolvency Institute

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



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Law Business Research Ltd
87 Lancaster Road
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Tel: +44 20 3708 4199
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Nigeria

Emmanuel Ekpenyong and Cinderella Agunanna

Fred-young & Evans LP

Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

Insolvencies and reorganisations of companies are generally governed by the Companies and Allied Matters Act (CAMA) Cap, C 20, Laws of the Federation of Nigeria, 2004 and the Companies Winding-up Rules.

The Investment and Securities Act 2007 and Securities and Exchange Commission Rules 2013 regulate mergers, takeover and acquisitions of shares in publicly quoted companies in Nigeria.

The Banks and other Financial Institutions Act (the BOFIA), Cap B3, Laws of the Federation of Nigeria, 2004 regulates restructuring, reorganisation, mergers and disposal of banks.

The Nigeria Deposit Insurance Corporation Act, Cap N 102, Laws of the Federation of Nigeria, 2004 regulates insurance of deposit liabilities of licensed banks and other financial institutions to protect interest of depositors in the event of imminent or actual financial difficulties of banks.

The Assets Management Corporation of Nigeria Act, 2010, which was amended by the Assets Management Corporation of Nigeria (Amendment) Act, 2015, established the Assets Management Corporation of Nigeria (the Corporation) for the purpose of efficiently resolving non-performing loan assets of banks.

The Bankruptcy & Insolvency (Repeal and Re-enactment) Act 2016 (the Bankruptcy Act) and Bankruptcy Rules regulate bankruptcy proceedings in Nigeria.

Section 408(d) provides that a company is insolvent if it is indebted to its creditors;

- in a sum exceeding 2,000 naira and is unable to pay same upon service of three weeks' statutory notice on it;
- upon execution of judgment against and it is returned unsatisfied in whole or in part; or
- where the court considers the liability of the company and is satisfied that it is unable to pay its debts.

Nevertheless, under section 411(2) of the CAMA, the court may refuse to grant a winding-up order against a company on the ground of insolvency if it is not reasonable to do so, or the petitioners have an alternative remedy, or if it is not just and equitable to do so.

Section 4 of the Bankruptcy Act provides that a person commits acts of bankruptcy if he or she, either in Nigeria or abroad, makes an assignment to a trustee for the benefit of creditors, makes fraudulent gift or transfer of property, transfers property that is interpreted to be a fraudulent preference under the Act, leaves Nigeria and remains abroad with intent to defraud his or her creditors, fails to redeem his or her property after 21 days of seizure pursuant to an execution, discloses to his or her creditors statements that he or she is insolvent and gives notice that he or she is about to suspend payment of debts to his creditors.

Section 5 of the Bankruptcy Act states that a creditor may file a bankruptcy petition if the debtor owes him or her a sum of up to 1 million naira or commits an act of bankruptcy within six months before presenting the petition.

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

Section 7 of the Federal High Court Act, Cap F12, Laws of the Federation of Nigeria, 2004 and section 251(1)(e) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) confers jurisdiction to hear insolvency proceedings to the Federal High Court, with judicial divisions in each state of the federation.

The company's creditors and contributories may institute legal proceedings to recover claims against the company before or during winding up of a company at the state High Court with jurisdiction to hear the claims.

Excluded entities and excluded assets

3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

The provisions of the CAMA are applicable to the winding up of an insurance company subject to the provisions of the Insurance Act 2003. Section 32(1) of the Insurance Act provides for the winding up of an insurance company upon the petition of either 50 policyholders who have held a policy for not less than three years or the National Insurance Commission.

Section 31(4) of the Insurance Act provides that the priority of settling debts owed by an insurance company at winding up is:

- liquidation fees;
- secured creditors;
- policy holders;
- other creditors;
- staff; and
- shareholders and directors.

Section 33 of the Insurance Act prohibits the voluntary winding up of a life insurance business except for the purpose of effecting an amalgamation, transfer or acquisition.

Section 7 of the Banks and Other Financial Institutions Act prohibits the restructure, reorganisation, merger and disposal of interest in banks without the prior consent of the Governor of the Central Bank of Nigeria. It is an offence to contravene this provision.

Under the Bankruptcy Act, the debtor's assignment of his or her existing and future wages, commission or professional fees before bankruptcy does not affect his or her wages, commission and professional fees after bankruptcy. Upon the filing of the debtor's proposal, the creditors do not have a remedy against the debtor or his or her property or right of action for the recovery of claims provable in bankruptcy until the trustee is discharged or the debtor becomes bankrupt. Upon the bankruptcy of the debtor, no creditor has any remedy against the debtor or his or her property or shall commence an action for claims provable in bankruptcy until the trustee is discharged.

Public enterprises

4 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

Where there is a need to make a government enterprise more productive or where it is poorly managed, or to raise capital in a period of economic recession, public enterprises may be liquidated by privatising them under the Public Enterprise (Privatisation and Commercialisation) Act, Cap P38, Laws of the Federation of Nigeria, 2004. This is achieved by offering the shares of the public enterprise by public issue at the capital market or share private placement as provided for in section 2 of the Public Enterprise (Privatisation and Commercialisation) Act. The National Council of Privatisation may approve that the shares be offered for sale to a willing buyer or the shares may be disposed to interested investors through a local or international capital market.

Section 4 of the Public Enterprise (Privatisation and Commercialisation) Act provides that a privatised enterprise that requires participation by strategic investors may be managed by the strategic investors as from the date of the privatisation on terms that will be agreed upon.

Public enterprises are usually wholly owned by the government or its agencies but in the event that there are pending claims of creditors, it will be settled before the effective date of the privatisation. The creditors reserve the right to seek a restraining order against the parties to the privatisation until their claims are settled.

Under section 8, commercialised enterprises shall operate as a pure commercial enterprise and, subject to the general regulatory power of the federal government, fix the rates for goods and services, capitalise its assets, borrow money and issue debenture stocks and sue and be sued in its corporate name.

Protection for large financial institutions

5 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

The commercial banks are huge investments that are considered 'too big to fail'. Section 2 of Asset Management Corporation of Nigeria Act 2010 provides the Corporation with an authorised share capital of 10 billion naira wholly subscribed by the federal government and held in trust by the Central Bank of Nigeria and the Ministry of Finance for the purpose of managing and realising the takeover of bad loans of banks in Nigeria in order to keep the banks afloat and instil confidence in the Nigerian banking sector.

The Corporation has the power to dispose eligible bank assets, including the collection of interest, principal and capital due and the taking over of collateral securing such assets.

The Act also empowers the Corporation to apply to court for forfeiture of the debtor's property upon its inability to liquidate its debts.

Also to prevent commercial banks from failing, the share capital of commercial banks was increased from 2 billion naira (about US\$ 6.5 million) to 25 billion naira (about US\$81.9 million). The restructuring, reorganisation, merger and disposal of banks are effected under the supervision of the Central Bank of Nigeria and consent of its governor. Under section 31 of the BOFIA, the governor of the Central Bank of Nigeria shall appoint a director of bank supervision to carry out supervisory duties in respect of banks, other financial institutions and specialised banks.

Secured lending and credit (immovables)

6 What principal types of security are taken on immovable (real) property?

Security on immovable real property is a legal mortgage, charged by way of debenture or a charge on the property in urban areas. Legal mortgage is a security document that protects a lender's rights under a loan. A legal mortgage transfers the title in the property to the lender who may exercise the right of foreclosure and sale without commencing legal proceedings where the borrower is in default of payment.

A charge is a medium of securing debt. It does not transfer the title to the property to the lender. Nevertheless, the lender may enforce the agreement with the borrower by legal proceedings.

Legal mortgage and charge are registrable instruments in most jurisdictions in Nigeria. Where the borrower is a company, the legal

mortgage or charge is filed at the Corporate Affairs Commission (the Company Registry) by filing Form 8 (Particulars of Mortgage or Charge) to notify investors of a charge against the company's assets.

Security on immovable (real) property in rural areas is mostly pledges and equitable mortgage. A pledge is a possessory right in which a borrower grants a lender over the property as security for a loan. In equitable mortgage, the borrower deposits the title documents with the lender to secure the loan. The courts have held inchoate legal mortgage to be equitable mortgage.

Secured lending and credit (moveables)

7 What principal types of security are taken on moveable (personal) property?

The security on moveable personal property is charged on the property itself.

Unsecured credit

8 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

An order for liquidation operates in favour of all the creditors whether secured or unsecured as if made on a joint petition. Nevertheless, secured creditors' claims take priority over unsecured creditors' claims. This is because an unsecured creditor only benefits from insolvency proceedings in the likely circumstance that there is a reminder from the sale of the company's assets after settling the claims of the secured creditors.

Nonetheless, the unsecured creditors have a right to commence an action against the liquidator or official receiver of the company and attach its property to satisfy an unsecured claim. Again, where the debt is a liquidated sum, the creditor may commence a summary judgment action to recover the sum. In this instance, the creditor may enforce the judgment against the company through writ of *fifa*, attachment of immovable property, garnishee proceedings or judgment summons in appropriate cases. The unsecured creditor may also apply to the court hearing the liquidation proceedings to adjourn the hearing of the liquidation petition.

Under the CAMA and the Bankruptcy Act, a foreign representative may maintain proceedings in Nigeria as a creditor, contributory, trustee, liquidator or receiver of the debtor. The claims will be considered by the court in order of the priority of claims. Section 238 of the Bankruptcy Act provides that where there is a bankruptcy or insolvency, reorganisation order made against a debtor in a foreign proceeding, a certified copy of the order is, in the absence of contrary evidence, proof that the debtor is insolvent and appointment of a foreign representative has been made. In such an instance, upon an application of the foreign representative, the court may limit the property in which the authority of the Nigerian trustee extends. On application by a foreign representative in a Nigerian court in respect of a foreign proceeding commenced for the purposes of effecting a composition, an extension of time or a scheme of arrangement, the court may grant a stay of proceeding against the debtor.

Voluntary liquidations

9 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

Under Section 457 of CAMA, voluntary liquidation is commenced when:

- the duration for the company as stated in its article expires;
- the occurrence for which the articles provide for the company to be dissolved has occurred; or
- the company in a general meeting passes a special resolution for the company to be liquidated.

Nonetheless, a creditor or contributory may apply to court to discontinue the voluntary liquidation of the company if it is against its interests.

Voluntary liquidation is an administrative process effected by:

- filing the following documents at the Company Registry;
- publication of notice of the creditors' meeting in the Gazette and two daily newspapers;

- resolution for voluntary winding up;
- appointment of a liquidator;
- publication of notice of appointment of a liquidator in the Gazette and at least two daily newspapers;
- the liquidator's notice of appointment;
- publication of a notice of final meeting in the gazette and at least two newspapers circulating in the locality of where the meeting is being held;
- return of final meeting and account of liquidation as laid before and approved by the meeting;
- original certificate of registration;
- updated annual return; and
- payment of the statutory fees.

Under section 486 of the CAMA, a creditor or contributory may petition the court after the company passes a resolution to voluntarily wind up the company, with the court supervising the winding up. Where the court grants an order for winding up of a company subject to its supervision, the court will appoint an additional liquidator who shall exercise all the powers of a liquidator without sanction or intervention of the court as if the company is wound up voluntarily. Nevertheless, in the case of creditors' winding up, the liquidator shall act with the sanction of court and committee of inspection or the creditors' meeting where there is no committee in inspection.

Involuntary liquidations

10 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

Under section 472, the creditors may call for a meeting to pass a resolution for voluntary winding up of the company after publishing notice of the meeting once in a gazette and two newspapers circulating where the company has its principal place of business. The directors shall upon receipt of the notice compile the statement of the company's affairs, the list of creditors and their claims before the day of the proposed meeting and appoint one of the directors to preside over the meeting. The creditors shall at the meeting appoint a liquidator who shall sell and distribute the assets of the company. The creditors will also appoint a committee of inspection who shall fix the remuneration of the liquidator. Upon appointment of the liquidator, the powers of the directors over the company shall cease. Upon winding up, the liquidator shall prepare an account showing how the winding up was effected and how the assets of the company were disposed of. The liquidator shall, in a general meeting of the company and creditors' meeting, tender the account and explain how the winding up was effected. It is an offence for the liquidator to fail to call the meetings.

The liquidators shall deliver the account and the minutes of the respective meetings to the Company Registry and same will be registered. The company shall be deemed dissolved at the expiration of three months after registration. Nevertheless, a creditor, the liquidator or a shareholder may apply to court for an order for extension of time to deem the company dissolved and deliver the order to the company registry within seven days after it was made. A person is guilty of an offence, if he or she fails to deliver the order to the company registry within seven days from the day the order was made.

Voluntary reorganisations

11 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

Section 538 of the CAMA provides that a company may commence a formal financial reorganisation by passing a special resolution to that effect. The liquidator will be authorised to sell a part or the whole assets of the company to the transferee company in consideration or part consideration of fully paid share and distribute the sum to the shareholders in accordance with their shareholding in the company.

The consequence of a financial reorganisation will be a change in the rights or liabilities of members, debenture holders and creditors of the company or any class of them including the regulation of the company.

Involuntary reorganisations

12 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

There is no procedure for creditors to file for involuntary reorganisation of the company.

Mandatory commencement of insolvency proceedings

13 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

Where a company defaults in holding a statutory meeting; its members decrease below two or it is just and equitable to do so, the company or the Company Registry may commence mandatory liquidation proceedings against the company. Transactions by an insolvent company are invalid, and the directors engaged in such transaction would be held personally liable.

Doing business in reorganisations

14 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?

During reorganisation, the company can carry on business through the liquidator or receiver manager. To effect the reorganisation, a company may by special resolution resolve that it be put into members' voluntary liquidation and the liquidator be authorised to sell the whole or part of its undertakings or assets to another company. The rights of the creditors of the company are not affected by the reorganisation but there is no special treatment given to creditors who supply goods or services after the filing.

The creditors or shareholders may apply to court to order a meeting of shareholders or a class of shareholders or creditors or class of creditors and the meeting would be summoned in a manner as the court may direct. If three-quarters of the shareholders or creditors present agree to any reorganisation plan by voting either in person or proxy, the plan will be referred to the Securities and Exchange Commission (SEC), which will confirm the fairness of the plan by making a written report within the time specified by the court. If the court is satisfied with the fairness of the plan, it shall sanction the same and be binding on all the shareholders and creditors.

Once a special resolution is passed and a liquidator or receiver manager appointed, the directors and officers do not have powers to bind the company.

Stays of proceedings and moratoria

15 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Once a liquidator is appointed, no action shall be commenced against the company except with the leave of court. Nevertheless, where an action is commenced after the presentation of petition, the company or creditor may apply for a stay of proceedings and the court would either stay proceedings or refer the action to the court hearing the liquidation petition.

Post-filing credit

16 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

A company in liquidation may obtain secured or unsecured loans or credit by the liquidator or receiver manager appointed by the court, but such loan must be for the purpose of carrying on the company's

business for the period provided by the court in the liquidation order for the purpose of settling the creditors' claim.

Set-off and netting

- 17 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?**

In the case of an unlimited company, the court may allow to a contributory by way of set-off any money due to him or her which he or she represents from the company of any independent dealing or contract with the company but not money due to him or her as a member of the company. In the case of a limited company, it is a director whose liability is unlimited who is given the same treatment as a contributory of an unlimited company.

Whether limited or unlimited when all creditors are paid in full, the money due on any account to a contributory may be allowed to him or her by way of set-off against any subsequent call.

Sale of assets

- 18 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?**

A liquidator appointed by the court sells the company's assets 'free and clear' of claims by public auction or private contract as may be suitable in the circumstance provided that the exercise of the liquidator's power of sale is subject to the control of the court.

Intellectual property assets in insolvencies

- 19 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?**

Though the IP laws are silent on this aspect, upon commencement of a liquidation proceeding, the IP licences shall continue to be used by the company until the liquidation order is made. An IP licence is an asset of the company and may be sold alongside other company assets, in which case the new owner would continue to use the IP licence with the consent of the licensor.

A liquidator cannot terminate the company's agreement with a licensor and continue to use the IP licence for the benefit of the company in liquidation.

Personal data in insolvencies

- 20 Where personal information or customer data collected by an insolvent company is valuable to its reorganisation, are there any restrictions in your country on the use of that information in the insolvency or its transfer to a purchaser?**

There is no restriction on the use of such information in the insolvency or transfer of the company to a purchaser.

Rejection and disclaimer of contracts in reorganisations

- 21 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?**

Section 506 of the CAMA provides that if in the course of winding up of a company, the liquidator, official receiver, contributories or creditor discover that the company's officers carried out its business in a

reckless manner with intent to defraud the company, the creditors of the company or creditors of another company, the liquidator, official receiver, contributories or creditor may reject the transaction and apply to court to declare that the officers involved be personally liable without limitation to the debts or loss arising from such transaction.

The officers would be guilty of an offence and upon conviction liable to a fine and term of imprisonment of two years.

Arbitration processes in insolvency cases

- 22 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?**

Insolvency matters are not subject to arbitration proceedings. This is because arbitration tribunals do not have coercive powers to make orders to bind the stakeholders of a company before and during winding-up proceedings. Moreover, it is only parties to an arbitration agreement that are subject to the jurisdiction of an arbitration tribunal. Arbitration is commonly used for resolution of commercial disputes.

However, arbitration proceedings commenced by the company against a third party or a stakeholder in the company before the commencement of liquidation proceeding will not be stayed or dismissed because proceeds from the arbitral award in favour of the company is an asset due to the company.

If the arbitral proceeding was commenced by a creditor or contributory against the company before the commencement of liquidation proceeding, he or she may file an application at the court hearing the winding-up proceeding for a stay of proceedings pending the publication of the arbitral award.

In any case, arbitrable commercial disputes that arise in an insolvency case after commencement of winding-up proceedings may be resolved by arbitration as long as there is an arbitration or submission agreement between the parties involved in the disputes.

Successful reorganisations

- 23 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?**

The reorganisation plan must be fair and equitable. See question 14.

Claims for non-debtor parties' liability may be waived except where there is fraud or wilful misconduct.

Expedited reorganisations

- 24 Do procedures exist for expedited reorganisations?**

No.

Unsuccessful reorganisations

- 25 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?**

A proposed reorganisation is defeated where:

- there is an order on the grounds of unfairly prejudicial and oppressive conduct to minority shareholders or for liquidation of the company under creditor's voluntary liquidation, the reorganisation is invalid unless sanctioned by the court;
- the creditor or any class of creditors, or members or a class of members agree on a reorganisation plan, but the SEC's written report shows that the plan is not fair or equitable; and
- where the court for whatever reason refuses to sanction the SEC's written report or the reorganisation plan.

Reorganisation upon a disapproved plan is invalid. Where the court sanctions the plan and the liquidator fails to perform the plan, a shareholder or creditor may apply to court for the plan to be performed.

Insolvency processes

- 26** During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

Upon service of the petition for liquidation on the company, the petitioner would seek and obtain an order of court to advertise the petition in a national daily newspaper or Official Gazette within 15 days of the hearing of the petition. The purpose of advertisement is to inform the company's creditor and persons interested in the company of the pending liquidation petition against the company.

Upon advertisement of the petition, every creditor person who intends to appear at the hearing of the petition shall file an affidavit within 15 days after the advertisement of the petition. The petitioner has five days within which to file his affidavit in response to affidavits against the petition.

In the administration and distribution of the assets of the company among its creditors, the liquidator shall have regard to directions given by resolution of the creditors or contributories at any general meeting, or by the committee of inspection. But where there is conflict, the directions of the creditors will override the directions of the committee of inspection.

The liquidator shall send to the company's registry an account of his receipts and payments as prescribed by the court or at least twice each year of his tenure and the account will be audited.

The management and the company's remedies during liquidation can only be pursued by the liquidator appointed by the court.

Enforcement of estate's rights

- 27** If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

Under section 300 and 301 of the CAMA, the creditors may pursue a derivative action to enforce claims in favour of the company, but the fruits of the remedies go to the company. The creditors are only entitled to declaration and injunction.

Creditor representation

- 28** What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

Where a liquidation order is made by the court and a liquidator is appointed, the court will appoint a committee of inspection from the creditors and contributories or persons holding general powers of attorney from creditors or contributories to inspect the activities of the liquidator. The committee of inspection directs the liquidator on the administration of the company.

The committee of inspection is funded by company funds managed by the liquidator.

Insolvency of corporate groups

- 29** In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

A parent company and its subsidiaries are separate legal entities. In insolvency proceedings involving a corporate group, the parent company and its subsidiaries cannot be combined for administrative purposes except there is a special contract between the parent company and its subsidiaries to that effect or where there is fraud.

Except in a special circumstance where the court directs, the assets and liabilities of the parent company and subsidiaries cannot be pooled for distribution purposes.

Assets may not be transferred abroad except where the claims of all the secured creditors have been fully liquidated and the foreign creditor files an application before the court hearing the liquidation petition before the liquidation order is made.

Appeals

- 30** What are the rights of appeal from court orders made in an insolvency proceeding? Does an appellant have an automatic right of appeal or must it obtain permission to appeal? Is there a requirement to post security to proceed with an appeal and, if so, how is the amount determined?

A winding-up order is a final decision of the Federal High Court, and under section 241(1)(a) of the Constitution of Nigeria, 1999 (as amended), an appeal shall lie to the Court of Appeal as of right. In relevant cases, the court that made the winding up order may order the appellant to post security in an amount in which the court may think fit before proceeding with the appeal.

Claims

- 31** How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

Upon advertisement of the petition for liquidation of the company, the creditors would submit their claim by filing an affidavit stating same within 15 days after advertisement of the petition and serve the same on the petitioner. Nevertheless, any delay in the creditor filing its claim that does not amount to a miscarriage of justice is not fatal to the creditor's claim.

Where a creditor cannot prove his claim it will be disallowed and would not be considered in the liquidation order. Under section 456 of the CAMA and section 240 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), a creditor may appeal against the liquidation order to the court of appeal.

The liquidator may make arrangements, compromise or transfer of claims of the creditor as he or she deems appropriate but same must be disclosed. Claims for contingent or unliquidated amounts cannot be recognised in a liquidation proceeding. The creditor would have to commence an action for the exact amount of the claims to be determined.

Modifying creditors' rights

- 32** May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

No.

Priority claims

- 33** Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Section 494 provides that labour-related claims rank equally among themselves unless the company's assets are insufficient to meet them, in which case they shall abate in equal proportions. After labour claims are claims of holders of debentures and other secured creditors.

Employment-related liabilities in restructurings

- 34** What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

They include all tax deductions, deduction under the pension fund, wages of employees of the company, accrued holiday remuneration and rights under the Workmen Compensation Act.

Update and trends

The Bankruptcy and Insolvency (Repeal and Re-Enactment) Act is a welcome development. It provides for corporate and individual insolvency, rehabilitation of insolvent debtors, creates the office of supervisor of insolvency and recognises insolvency orders from foreign jurisdictions and appointment of foreign representatives. Like a foreign judgment from Commonwealth countries, insolvency orders from foreign jurisdictions may be registered and enforced in Nigeria.

Pension claims

- 35** What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

Pension-related claims ranked *pari passu* with labour-related claims.

Environmental problems and liabilities

- 36** In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Before the liquidation order is made or a liquidator appointed, the directors of the company are liable for environmental problems and remedy. But once a liquidator has been appointed, he or she will be liable to liabilities and remedy of environmental problems.

Liabilities that survive insolvency proceedings

- 37** Do any liabilities of a debtor survive an insolvency or a reorganisation?

No.

Distributions

- 38** How and when are distributions made to creditors in liquidations and reorganisations?

In reorganisations, the distributions are made by the liquidator in line with the reorganisation plan that the SEC had certified to be fair and equitable and that the court sanctioned.

In liquidation, the liquidator shall manage the business of the company and sell the assets of the company for the purpose of settling the creditor's claims within the time stated in the liquidation order. In distributing the assets, the liquidator must have regard to directions of the resolution of the creditors, committee of inspection and the court.

Transactions that may be annulled

- 39** What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

In a reorganisation, the purchase of a company of its own shares or distributions to its shareholders contrary to the relevant portion of the Companies and Allied Matters Act is null and void and liable to be annulled.

In liquidation, any transaction relating to property that would, if made or done by or against an individual, be deemed a fraudulent preference in his bankruptcy, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly. In the same vein, any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

Proceedings to annul transactions

- 40** Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

No.

Directors and officers

- 41** Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

By virtue of section 250 of the CAMA, a person who was not duly appointed as director, but acts as such on behalf of the company, shall not bind the company but be personally liable for his or her actions. In the same vein, under the general grounds for directors' liability, a director shall be personally liable to the company for breach of fiduciary duties and fraud. Section 290 of the CAMA provides that where a director receives a loan, receives advance payment for execution of a contract, with intent to defraud, or fails to apply the money for the purpose it was received, the director will be personally liable to the party from whom the money was received.

In the same vein, under section 502 of the CAMA, if a director before the winding up of a company fails to deliver to the liquidator all the company's property and books in his or her custody, conceals debt due to the company, fraudulently removes any of the company's property, makes any material omission in any statement relating to the affairs of the company, makes a fictitious loss or expense at a meeting with creditors, makes a false representation, or pledges company property that has been obtained on credit in a transaction that is not in the ordinary course of its business, is guilty of an offence and is liable upon conviction to 12 months' imprisonment.

Groups of companies

- 42** In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

A parent company can only be liable to liabilities of its subsidiaries or affiliates and vice versa if there is a contract between them to that effect or evidence of fraud.

Insider claims

- 43** Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

Once an insider claim is liquidated and can be proved, it may be ranked *pari passu* with unsecured creditors.

Creditors' enforcement

- 44** Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Upon making a liquidation order, if there is reasonable proof that a contributory is about to abscond from Nigeria or remove property for the purpose of evading payment of calls, or avoiding examination in respect of company affairs, the court may order the contributory to be arrested and moveable personal property to be seized and kept until a time in which the court may order.

Corporate procedures

- 45** Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

See question 9 for corporate procedures for liquidation of a corporation.

Under the Bankruptcy Act, where a debtor commits acts of bankruptcy, one or more creditors may file a bankruptcy petition in court

against the debtor for a receiving order against the debtor and his or her assets.

Corporate procedure for liquidation of corporation is an administrative process at the Company Registry while bankruptcy is a judicial proceeding in court.

Conclusion of case

46 How are liquidation and reorganisation cases formally concluded?

Liquidation of a company is concluded upon reaching a compromise between the liquidator and the creditors and contributory and settling the claims of employees, secured and unsecured creditors.

Reorganisation of a company is concluded upon distributions of the assets in accordance with the reorganisation plan sanctioned by the court.

International cases

47 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

See question 8.

Foreign creditors have the same rights as local creditors. They may either file a winding-up petition or file an affidavit in court upon receiving notice of winding-up petition against the company. Their claims will be considered by the court in order of the priority of claims. Also, under the Bankruptcy Act, a Nigerian court shall accord respect to orders from a foreign bankrupt proceeding and a foreign representative appointed by the foreign court.

Monetary judgments and orders from Commonwealth countries are enforceable under the Reciprocal Enforcement of Foreign Judgments Ordinance, Cap 175, 1958. An application for leave to register and enforce the judgment is filed at the division of a High Court where the judgment debtor carries on business within 12 months of the date of delivery of the judgment or when the order was made. The Foreign Judgments (Reciprocal Enforcement) Act, Cap F35, Laws of the Federation of Nigeria, 2004, which provides for a six-year period for registration of foreign judgment, is yet to come into operation because the Minister of Justice has not promulgated an order to that effect.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 is applicable in Nigeria. An application for enforcement of foreign awards must be accompanied by the original award and the arbitration agreement or their certified copies.

The recent Bankruptcy Act has adopted some provisions of the UNCITRAL Model Law on Cross-Border Insolvency. The provisions of the Act encourage corroboration between foreign and Nigerian courts in bankruptcy and insolvency proceedings.

COMI

48 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

No.

Cross-border cooperation

49 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

Yes. A Nigerian court will implement arrangement to coordinate both local and foreign insolvency proceedings and give effect to the respective orders. The court may apply legal or equitable rules governing the recognition of foreign insolvency orders and assist foreign representatives as long as it is not inconsistent with the provisions of the Bankruptcy Act.

Cross-border insolvency protocols and joint court hearings

50 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

No. But as the implementation of the Bankruptcy Act takes root, there would be a need for Nigerian courts to hold joint hearings with foreign courts, especially in insolvency cases.

Fred-young & Evans LP

Emmanuel Ekpenyong
Cinderella Agunanna

emmanuel@fredyoungandevans.com
ifeoma@fredyoungandevans.com

Suite 217A, Jinifa Plaza
Plot 1014, Samuel Adesoji Ademulegun Street
Central Business District
Federal Capital Territory
Abuja
Nigeria

Tel: +234 803 491 2096
www.fredyoungandevans.com

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