Insolvency Proceedings in Nigeria

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Introduction

Insolvency has been defined as a situation in which a person or company does not have enough money to pay debts and buy goods.[1] While the Companies and Allied Matters Act , 2020 ("**CAMA**") does not define "insolvency," it stipulates when a company will be deemed unable to pay its debt in as, when (a) a creditor who the company owes a sum exceeding ₦200,000 (Two Hundred Thousand Naira) delivers to the company's head or registered office a written demand and the company has neglected or refused to pay the sum for a period of 3 (three) weeks; (b) the company fails to satisfy the execution of a Court's judgment against it in favour of a creditor either in part or in whole; and (c) the Court is satisfied that the Company is unable to pay its debts.[2]

A common misconception is that an insolvent company automatically enters liquidation and will have to be shut down. However, a company can be insolvent without being put into liquidation. Nigerian corporate insolvency is primarily regulated by the **CAMA**.[3] This article seeks to explore the different options available to struggling companies in Nigeria to help them get back to good financial health or, in the case of creditors, to realise the debt owed to them by the corporation.

Overview Of Insolvency Laws In Nigeria

The laws that regulate insolvency practice in Nigeria are:

i. CAMA;
ii. BOFIA;
iii. AMCON Act;
iv. the National Insurance Commission Act, 1997 (the "**NAICOM Act**");
v. the Business Facilitation (Miscellaneous Provisions) Act, 2023 (the "**BFA**");
vi. the Insurance Act, 2003 (the "**Insurance Act**");
vii. the Pension Reform Act, 2014 (the "**PRA**"); and
viii. NDIC Act.

The insolvency provisions in the CAMA and the BFA are of general application and apply to entities regardless of the sector in which they operate. Sector-specific law like the BOFIA, the NAICOM Act, the Insurance Act, the PRA, the AMCON Act and the NDIC Act will prevail over laws of general application in matters which they regulate.[4]

Key Institutions Involved

A. Federal High Court

The Federal High Court (the "**Court**") has exclusive jurisdiction over insolvency proceedings, per the Constitution, s. 251(e) and 251(1)(f). All petitions and applications for any insolvency proceedings, therefore, must be made to the Court.

B. Corporate Affairs Commission (CAC)

The CAC has primary oversight over all companies. All insolvency proceedings are required to be notified to the CAC after the necessary approvals have been obtained from the Court.

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[1] Cambridge Dictionary, Insolvency | English meaning - Cambridge Dictionary assessed December 3, 2024.
[2] CAMA, s. 572.
[3] Banks and other financial institutions' insolvency is regulated by the Banks and Other Financial Institutions Act, 2020 ("**BOFIA**"), the Nigeria Deposit Insurance Corporation 2023 ("NDIC Act"), and Asset Management Corporation of Nigeria ("**AMCON**") Act ("**AMCON Act**"). Other sector-specific statutes, and regulations also apply.
[4] Ratan Lal Akudia v Union of India, AIR 1990 SC 104.

Corporate Insolvency Procedures

There are a number of corporate insolvency procedures that are available to companies under CAMA. They include receivership, administration, company voluntary arrangement or compromise, and winding up. The above-stated procedures are examined in proper detail in the paragraphs below.

A. Receivership

A company enters into receivership where a Receiver/Manager is appointed on behalf of a secured creditor to recover the debt owed to the creditor. A Receiver can be appointed either by the Court[5] or out of court[6]. Only the company's **secured[7]** creditors can appoint a Receiver **only pursuant to the powers granted to them in a debt instrument[8]**. The implication of this position is that if a creditor is desirous of appointing a receiver without recourse to the court, such creditor should expressly include the power to appoint a receiver in the security agreements evidencing the transaction. In the absence of the express power to appoint a Receiver, a secured creditor may apply to the Court to appoint a Receiver. The purpose of such an appointment is for the Receiver to preserve the assets in which the secured creditor has an interest and realise the security for his appointors' benefit.

Debenture holders, their trustees, or the court upon their application have an unimpeded right to appoint a Receiver in respect of charged or mortgaged assets[9] where[10]:

a. the company fails to pay any instalment of interest, principal or premium under the debenture within one month after the debt becomes due;

b. the company fails to fulfil any of the obligations imposed on it by the debenture agreement or trust deed;

c. the company is wound up; or

d. other event of default as stated under the debenture agreement occur entitling the debenture holder to realise the security.

The Court may appoint a Receiver in favour of a secured creditor or upon the application of interested persons where[11]:

a. a fixed or floating charge has become enforceable; and

b. where the fixed or floating charge has not become enforceable, but the Court is satisfied that the security of the debenture holder is in jeopardy.

c. the principal money borrowed by the company or the interest is in arrears; or

d. security or property of the company is in jeopardy.

All persons except the following can be appointed as a receiver:[12] an infant, (b) any person found by a competent Court to be of unsound mind, (c) a body corporate, (d) an undischarged bankrupt, unless special approval is granted by the Court, (e) a director or auditor of the

[5] CAMA, ss. 205, 551, and 552.
[6] CAMA, ss. 553(1) and 555.
[7] CAMA, s. 205 (3).
[8] CAMA, ss. 203 (1)(a) and 553 (1).
[9] CAMA, s. 233 (1) and (7).
[10] CAMA, s. 232 (1).
[11] CAMA, s. 205 (1) and (2) and CAMA, s. 551 (2).
[12] CAMA, s. 550 (1).

company, and (f) any person convicted of any offence involving fraud, dishonesty, official corruption, or moral turpitude.

Powers/Duties of a Receiver and a Receiver/Manager[13]

Receivers have a wide range of powers detailed in the Eleventh Schedule of CAMA, all geared towards the primary goal of realizing security in favour of his appointor. However, the parties to a security agreement are permitted to agree on the powers of any proposed receiver. Where the provisions of the Eleventh Schedule are inconsistent with the terms of such an agreement, the terms of the security agreement will prevail.[14] The duties and powers of any appointed receiver/manager broadly include the following:

(a) the receiver can take possession of and protect the properties of the insolvent company;

(b) the receiver can receive rents and profits and discharge all outgoings in respect thereof;

(c) the receiver can realise the security for the benefit of those on whose behalf he is appointed; and

(d) if the receiver is also appointed as manager as well, the receiver/manager will manage the undertaking of the company with a view of realizing the security.

B. Arrangement and Compromise[15]

An Arrangement is a change in the rights or liabilities of the members, debenture holders and creditors of the company or any class of them by the unanimous agreement of all parties affected. An Arrangement alters the obligation of the company to either its members or creditors by the members or creditors relinquishing some of their rights to the company.

A company going through financial difficulties may enter into negotiations with its creditors and investors, which can involve the creditors/members relinquishing some of their rights as fairly as possible, to keep the company as a going concern.

No winding-up petition or enforcement action by a creditor (secured or unsecured) can be entertained against any company or its assets that has commenced an "arrangement and compromise" with its creditors for a period of 6 months from the time that the company submits to the Court relevant documents indicating its intention that it has commenced an arrangement and compromise.[16] Where the company puts forward a scheme of compromise to its creditors, the Court may order a meeting of creditors to discuss the proposal. If a majority representing at least 75% of the value of the shares (in the case of members) or of the interests (in the case of creditors) present at the meeting agree to the compromise, the proposal is then referred back to the Court. The Court will sanction the arrangement if it determines that the terms are fair, and the terms of the arrangement will be binding on the company and the creditors or members.[17]

Where the debtor-company is a publicly-quoted company, the Court will refer the scheme of arrangement to the Securities and Exchange Commission ("**SEC**").[18] The SEC will appoint one or more inspectors to investigate the fairness of the scheme and make a written report to the court in respect thereof, which shall then sanction it. Once the Court sanctions the

[13] CAMA, s. 556.
[14] CAMA, s. 556 (3).
[15] CAMA, ss. 710-717.
[16] CAMA, s. 717.
[17] CAMA, s. 715 (2) & (3).
[18] CAMA, s. 715 (2).

arrangement, both the company (or its liquidator if the company is in liquidation) and its creditors will become bound by the scheme's terms.

C. Administration[19]

Although CAMA does not define administration, it defines an "administrator" as "a person appointed under any of the means under this Chapter[20] to manage the company's affairs, business and property…"[21] The purpose of administration is three-fold: (a) to rescue the company, (b) to achieve a better result for creditors than immediate liquidation, or, if neither of these options is viable, (c) to realize the company's assets to pay secured and preferential creditors.[22]

Procedure for Administration

(a) Administration commences by filing at the Court an administration application supported with an affidavit stating the company's insolvent condition, and a written address. The administration application may be made by: (a) the company, (b) its directors, (c) one or more creditors of the company, (d) the holder of a floating charge in special circumstances, or (e) a combination of (a) – (d).

(b) Where the court grants the administration order and appoints an Administrator, the board of directors of the company is deemed suspended. An administration order suspends any winding-up petition against the company, except under specific financial legislation.

(c) Within 14 days after his/her appointment, the Administrator is required to send notice of his or her appointment to the company, the creditors he is aware of and the SEC. The Administrator must prepare a proposal on how to achieve the purpose of administration and send it to the CAC every creditor of the company of whose claim he or she is aware of and every member of the company of whose address he or she is aware.

(d) A creditors' meeting is to be convened to consider the proposal, and the Administrator will report any decision taken to the court and the CAC.

The difference between winding up and administration

While winding up seeks the death of a company and the divestments of its assets in favour of creditors, the primary objective of administration, an innovation in CAMA, is the rescue of a troubled or insolvent company. However, the Administrator is required to consider the interests of the company's creditors in carrying out the goal of rescue.

The difference between Receivership and Administration

The goal of administration is to assist the business survive and continue its operations, while the goal of receivership is to recover the debt owed by the company to the creditor(s) who appointed the Receiver. Also, an Administrator represents the interests of all creditors collectively and seeks to settle creditors proportionately, based on their claims. A Receiver or Manager, however, focuses on just the creditor(s) who appointed him/her.

The first company said to enter into administration in Nigeria is Moorhouse Company Ltd[23].

[19] CAMA, ss 443 -549.
[20] Chapter 18.
[21] CAMA, s. 549.
[22] CAMA, s. 444.
[23] Insolvency - Nigeria's first company in administration set to pay 105 outstanding creditors - Businessday NG, assessed December 4, 2024.

D. Company Voluntary Arrangement (CVA)[24]

The CVA is a new business rescue procedure introduced under CAMA. The CVA allows the directors of a financially-troubled company to have an agreement with the company's creditors to structure the debt repayment of the company. A CVA is a proposal by the directors of a company, the administrator of a company in administration, or the liquidator of a company being wound up to its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs.

The CVA is overseen by an Insolvency Practitioner, who acts as a Nominee and facilitates negotiations between the company and its creditors. One significant difference between the CVA and an Administration or Receivership is that the directors of the company are able to maintain control of the company's business and assets while the procedure is ongoing.

Procedure for CVA

(a) A CVA proposal is made to the creditors by the directors of the company. If the company is already in administration or liquidation, the administrator or liquidator will make the proposal instead. The proposal should contain information like the company's assets, liabilities, nominees' fees/expenses, the supervisor, guarantees, timing, conduct of business during the CVA, and further credit facilities.

(b) The proposal will name an Insolvency Practitioner, who will act as a nominee.

(c) The nominee is required to submit a report to Court within 28 days of notice of his appointment. The request will deal with such issues as the viability of the proposal, and whether meetings of creditors and members should be convened to consider the proposal. If the company is in administration or liquidation, meetings would be convened with recourse to the Court.

(d) Unless the Court orders otherwise, the nominee will convene the meetings. If the company is in administration or liquidation, the administrator or liquidator (respectively) will summon the meetings.

(e) The members and creditors may approve or modify the proposal, but no modification can affect the right of a secured creditor to enforce his security without the creditor's concurrence to such modification.

(f) The chairman of the meeting shall also report the outcome of the meeting to the Court. The decision takes effect if it has been taken by both meetings or by the creditors' meeting summoned pursuant to a Court order.

(g) Any person dissatisfied with the decision of the Insolvency Practitioner or supervisor of the voluntary arrangement may apply to Court which may modify, reverse, confirm or make any order as it deems fit.

(h) Once approved by the Court, the CVA would be implemented under the supervision of an Insolvency Practitioner (a supervisor).

The effect of a CVA is to suspend the creditors' entitlements to repayment while the arrangement is in place. Nigeria's first CVA was done in 2021 with Tourist Company of Nigeria (TCN).[25]

[24] CAMA, ss. 434-442.
[25] A Preliminary Appraisal of Nigeria's First-Ever Company Voluntary Arrangement – THISDAYLIVE, assessed December 4, 2024.

E. Winding-up[26]

The winding up of a company is the process by which a registered company is dissolved. Winding up may be carried out voluntarily, by the Court, or under the supervision of the Court. Grounds upon which a company may be wound up by the Court are:

(a) the company has by special resolution resolved that the company be wound up by the Court;

(b) default is made in delivering the statutory report to the CAC or in holding the statutory meeting;

(c) the number of members is reduced below two, in the case of a non-single member company;

(d) the company is unable to pay its debts; or

(e) the court is of the opinion that it is just and equitable that the company should be wound-up.

A company may be deemed to be unable to pay its debts:[27]

(a) where a creditor of a sum exceeding ₦200,000 has served the company a demand to pay the sum and the company has neglected to fulfil same within three weeks after such demand;

(b) where a judgment of the Court in favour of a creditor returns unsatisfied in whole or in part; or

(c) the company liabilities are such that the Court is satisfied that it cannot satisfy its debts.

Procedure for Winding-up

(a) Winding-up proceedings are initiated by filing a petition that is supported by a verifying affidavit. The winding-up petition can be filed by a company director, a creditor, the official receiver, a contributory, a trustee in bankruptcy, or a personal representative of a contributory or creditor, the CAC, or a combination of any of the above-mentioned persons.

(b) The winding-up petition must be advertised.

(c) If the Court is satisfied that grounds for winding up exist, it may issue a winding-up order.

(d) Upon the making of a winding-up order, the Court may appoint the official receiver or a liquidator to take charge of the winding-up process.

(e) The official receiver or liquidator must notify the CAC of the winding-up order within 14 days of the Court making the said order.

(f) Once the company's assets are fully liquidated, the liquidator may apply for dissolution of the company. It is a dissolution order that is the true death of an insolvent company.

Effect of Winding Up: Once a company enters into liquidation, all dispositions and legal changes in respect of its properties or the rights of its members immediately cease, and any such action taken will be void. In addition, no legal action can be brought against the company

[26] CAMA ss. 564 – 620.
[27] CAMA, s. 572.

without the leave of the Court. All contributories may also be called upon by the Court to make payments into the company's liquidation account and absconding contributories may be arrested. The Court, however, will only order the winding up of a company as a last resort.

The Insolvency Practitioner

Only qualified insolvency practitioners are entitled to undertake insolvency procedures[28] and to act as either receivers, administrators[29], liquidators and nominees[30]. Therefore, a creditor or company desirous of beginning insolvency proceedings in relation to a/the company must appoint a qualified insolvency practitioner for the purpose or risk committing an offence. The law is, however, silent on the punishment or other consequence for insolvency actions taken by non-insolvency practitioners. A person is only qualified to act as an insolvency practitioner where he:[31]

a. has obtained a degree in law, accountancy or such other relevant discipline from any recognised University or Polytechnic;

b. has a minimum of five years post-qualification experience in matters relating to insolvency;

c. is authorised to so act by virtue of a certificate of membership issued by the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), or his membership of any other professional body recognised by the CAC, being permitted to act by or under the rules of that body; and

d. holds an authorisation granted by the CAC.

Netting

Netting has been described by CAMA, essentially, as the acceleration of any payment obligation under an agreement that provides for the calculation or estimation of a close-out value of the sum accelerated and the conversion of such sums into a single currency through a determination by set-off or otherwise.[32] Netting is a crucial concept for risk management for creditors during insolvency proceedings, as it allows creditors to combine multiple financial obligations with a debtor to arrive at a net obligation amount. Prior to CAMA, there were no express provisions allowing for or regulating netting in Nigerian corporate law.

CAMA allows for the terms of a netting agreement to be enforceable in accordance with the terms of the said agreement against an insolvent party. And such an agreement shall not be stayed by any action of the liquidator, or any other provision of law relating to bankruptcy, reorganization or any other insolvency proceeding.[33] Once insolvency proceedings have been started against a company which is party to a netting agreement, the only obligations both the creditor and the insolvent party have shall be equal to their respective net obligations to the other party. Any power of a liquidator to repudiate individual contracts will not prevent acceleration under a netting agreement[34].

Recommendations

Insolvency proceedings are complex and voluminous and, as such, should be contained in separate, dedicated legislation. Considerations for any such law should include laying down rules for the exercise of the court's discretion in determining whether it is just and equitable to wind up a company to avoid

[28] CAMA, s. 704.
[29] CAMA, s. 447 (1).
[30] CAMA, s. 434 (2).
[31] CAMA, s. 705.
[32] CAMA, s. 718.
[33] CAMA, s. 721 (1).
[34] CAMA, s. 721 (4).

arbitrary application of the law. The current position of the law allows the court to exercise its discretion on such a delicate matter without any concrete guidelines as to how such discretion will be applied. In addition, there should be stipulated consequences or penalties for when insolvency actions are undertaken by a non-insolvency practitioner. Otherwise, there is no compelling reason to adhere to the position of the law. Finally, the requirement for the advertisement of a winding-up petition should be qualified. This is because in practice, companies may see a hostile creditor or shareholder arbitrarily seeking the wind up of a company. In such circumstances, advertising winding up proceedings will likely be harmful to the company's image, often resulting in unquantifiable losses.

Conclusion

CAMA has introduced a number of innovative options for insolvent companies in Nigeria. Companies now have detailed legal pointers on what to do, apart from winding up, when faced with financial struggles. Likewise, creditors' rights are adequately protected with options like receivership, netting, and administration, while allowing the troubled company to carry on as a going concern.

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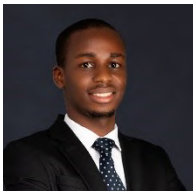

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