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INSOLVENCY LITIGATION

Nigeria

LEXOLOGY

Insolvency Litigation

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Nigeria

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COMMENCING PROCEEDINGS

Litigation climate

How would you describe the general climate surrounding insolvency litigation in your jurisdiction? What are the most common sources of dispute? To what extent is litigation used as a pressure or delay tactic?

In Nigeria, insolvency litigation has progressed rapidly in complexity and is catching up with developments in the rest of the world. For example, the country now has a statutory buyer of toxic bank debts, business rescue regime statutory provisions and netting-off provisions when derivative counterparties become insolvent.

The most common sources of dispute are outstanding bank loans and trade credits.

Litigation is often used as a pressure or delay tactic in insolvency proceedings.

Law stated - 19 September 2024

Sources of law

What key sources of law form the basis of claims arising from insolvency? How does the insolvency regime interact with other laws?

Typically, claims initially come into existence at common law in tort, contract, restitution or statute, with a focus outside insolvency law and prior to insolvency (rather than arising from insolvency). Ordinarily, the creditor seeks to recognise and enforce existing claims using insolvency law tools.

In Nigeria, the primary sources of law that form the basis of most claims arising from insolvency – through invoking insolvency law tools – are:

- the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the Constitution);
- the Companies and Allied Matters Act 2020 (as amended) (CAMA);
- the Bankruptcy Act 1990 (BA);
- the Banks and Other Financial Institutions Act 2020 (BOFIA);
- the Asset Management Corporation of Nigeria Act 2010 (as amended) (the AMCON Act);
- the National Insurance Commission Act 1997 (the NAICOM Act);
- the Business Facilitation (Miscellaneous Provisions) Act 2023 (the Business Facilitation Act);
- the Insurance Act 2003 (IA);
- the Pension Reform Act 2014 (PRA); and
- the Nigerian Deposit Insurance Corporation Act 2023 (the NDIC Act).

The insolvency provisions in the CAMA, the BA and the Business Facilitation Act are of general application, and apply to entities and individuals regardless of the sector of the

economy in which they operate. The statutes that are sector-specific are the BOFIA, the NAICOM Act, the IA, the PRA, the AMCON Act and the NDIC Act.

These laws interact with other laws and procedural rules to govern insolvency litigation in Nigeria. In the event of a conflict:

- the Constitution prevails over all other legislation;
- insolvency-specific provisions prevail over provisions with general application;
- insolvency-specific provisions prevail over earlier provisions on insolvency; and
- all legislation prevails over rules based on convention or the common law.

Law stated - 19 September 2024

Procedure

What procedural rules govern insolvency litigation in your jurisdiction? What common procedural hurdles arise in practice?

The procedural rules that govern insolvency litigation are:

- the Companies Winding-up Rules 2001;
- the Companies Proceedings Rules 1992;
- the Insolvency Regulations 2022;
- the Federal High Court (Civil Procedure) Rules 2019; and
- the Federal High Court Asset Management Corporation of Nigeria Rules 2018.

The broad species of insolvency proceedings include personal bankruptcy, receivership, administration and winding up. Winding up may be carried out voluntarily, by the court or under the supervision of the court.

A common procedural hurdle in Nigerian insolvency practice is the slow pace of litigation and the lack of a specialised court dealing exclusively with insolvency matters. The Federal High Court, which has exclusive jurisdiction to hear and determine insolvency claims, is inundated with numerous other kinds of claims (including tax, administrative law and election-related claims). Furthermore, all decisions of the Federal High Court on insolvency matters are appealable to the Court of Appeal and ultimately to the Supreme Court of Nigeria.

Law stated - 19 September 2024

Courts

Which courts hear insolvency claims? How experienced are they with insolvency litigation?

According to sections 251(1)(e) and 251(1)(j) of the Constitution, the Federal High Court is vested with exclusive jurisdiction to hear and determine insolvency claims, and it is experienced in dealing with insolvency litigation.

Under section 851 of the CAMA, the Corporate Affairs Commission established the Administrative Proceedings Committee (the Committee) responsible for resolving disputes or grievances arising from the CAMA's operations. The decisions of the Committee are appealable to the Federal High Court.

Constitutionally, the Committee cannot hear or determine matters within the exclusive jurisdiction of the Federal High Court. On 18 April 2023, the Federal High Court in Suit No. FHC/ABJ/CS/1076/2020 – ***Emmanuel Ekpenyong v National Assembly and others*** declared section 851 of the CAMA establishing the Committee void for being inconsistent with section 251(1)(e) of the Constitution.

Law stated - 19 September 2024

Jurisdiction

Through what law do the relevant courts have jurisdiction to hear insolvency claims? Does jurisdiction differ for domestic and cross-border matters?

The laws conferring jurisdiction on the Federal High Court to hear and determine insolvency claims are:

- the Constitution;
- the Federal High Court Act 1973 (as amended); and
- the CAMA.

The Federal High Court's jurisdiction does not differ with respect to domestic and cross-border matters. In appropriate cases, for instance, Nigerian courts will enforce final and conclusive foreign judgments awarding monetary claims against insolvent Nigerian debtors. Nigerian courts are specifically empowered to do this based on the principles of reciprocity established under the Foreign Judgments (Reciprocal Enforcement) Act 1961 and the Reciprocal Enforcement of Foreign Judgments Ordinance 1922.

Law stated - 19 September 2024

Limitation periods

What limitation periods apply to bringing insolvency-related claims? Are there any notable exceptions?

There is no specific limitation period for instituting insolvency proceedings. The applicable limitation period depends on the claim and the statutory period stipulated for the underlying claim that came into existence prior to and outside insolvency under pertinent statutes and procedural laws. Actions founded on contract or quasi-contract cannot be brought after a period of six years from the date on which the cause of action accrued. After the expiration of 12 years from the date on which the cause of action accrued, action must not be brought to recover:

- a sum due to a company by a shareholder under the articles of association of the company;

- land; or
- a principal sum of money secured by a mortgage or other charge.

Law stated - 19 September 2024

Interim remedies

What interim remedies are generally available and commonly deployed in insolvency proceedings? How are these used as part of claimants' overall litigation strategy?

Orders of injunction are preservatory remedies commonly used in insolvency proceedings. Such orders may last until either:

- the end of the proceedings, once the other side has been given notice of and heard by the court on the motion for the order; or
- on an emergency basis, the other side can be given notice and heard by the court (interim and interlocutory injunctions, respectively).

A debtor typically seeks the orders as part of a strategy to buy time and delay being declared insolvent or to stop or delay the sale of assets (where the debtor contends that it, in fact, owes nothing or owes less than it is alleged to owe), or when the collateral would otherwise be sold at an undervalue.

Law stated - 19 September 2024

Evidence

What rules and procedures govern the collection and admissibility of evidence in insolvency litigation? To what extent is expert witness testimony allowed? What common evidential issues should claimants be aware of?

The Evidence Act 2011 (as amended by the Evidence (Amendment) Act, 2023) and the Federal High Court (Civil Procedure Rules) 2019 are the main laws that govern the collection, admissibility, and disclosure of evidence to the court. Other laws may also apply, such as the Stamp Duties Act 1939 (as amended) (according to which a document that should be, but is not, stamped cannot be admitted as evidence in court).

The testimony of an expert witness may be required when the court must form an opinion on which the evidence of an expert is needed. Nigerian insolvency law itself is law, not fact, and therefore no question about it can be submitted to a witness, expert or not.

Common evidential issues that the claimants must take into consideration fall into two broad groups. One group includes issues as to the admissibility of documents that are not original, are public or stored on computers. Nigerian law tends to allow photocopies of private documents only where it can be shown that the originals are lost and unobtainable. Public documents are admissible only to the extent that true copies certified by a public authority

can be presented in court. Evidence stored on computers is allowed only to the extent that the storage device is certified to be functioning properly and has not been tampered with.

The second group of issues pertains to the burden and standard of proof. Under Nigerian law, the burden is on the claimant and there must be proof on the 'balance of probabilities' test. Exceptionally, where claims involve allegations of dishonesty, proof beyond reasonable doubt is required.

Law stated - 19 September 2024

Time frame

What is the typical time frame for insolvency claims?

The typical duration of an insolvency proceeding from the commencement of the insolvency action to final judgment (including winding-up proceedings) is up to three years, depending on the complexity of the matter.

Law stated - 19 September 2024

Appeals

What are the requirements to appeal insolvency-related judgments? What is the typical time frame for appeals?

A notice of appeal must be filed within 14 days from the date of an interlocutory decision, and within three months from the date of a final judgment, if it challenges a final judgment. The decision of the Court of Appeal can be appealed to the Supreme Court within 30 days as of right and, after 30 days, with the leave of either the Court of Appeal or the Supreme Court. Where the appeal is against an interlocutory decision of the Court of Appeal, it must be filed within 14 days from the date of such decision.

Most appeals to the Court of Appeal, whether final or interlocutory, take more than 18 months to resolve. This period is at least doubled for the typical appeal from the Court of Appeal to the Supreme Court.

Law stated - 19 September 2024

Costs and litigation funding

How are costs handled and how are claims funded? Can claimants obtain third-party funding to finance the prosecution of claims?

The cost of insolvency proceedings is awarded at the discretion of the court on a case-by-case basis and, in practice, at rates that are heavily below real-world rates. The object of awarding costs in Nigeria is not to punish the unsuccessful litigant but to compensate, nearly always inadequately, the successful party for the time and expenses spent on having to come to court.

There are no specific codes and regulations on third-party funding in litigation matters in Nigeria. Third-party funding of claims is generally frowned upon based on established and existing common law principles prohibiting champerty and maintenance. There are, however, exceptions of still-evolving scope to this position including, but not limited to, bona fide commercial assignments of the benefits of contracts and other arrangements, permissible contingent fee arrangements between legal practitioners and their client, and non applicability of torts of maintenance and champerty to the funding of arbitration by third party.

Law stated - 19 September 2024

AVOIDANCE ACTIONS

Fraudulent transfers and undervalue transactions

What are the essential elements of avoidance actions seeking to claw back fraudulent conveyances and transfers? Can actions be brought for transfers without fraudulent intent based on undervalue of the transfer?

There are two broad rules, one grounded on fraud and the other on undervaluation.

For an action to clawback a fraudulent conveyance to succeed, the following conditions must be fulfilled:

- the conveyance must have:
    - had the effect of giving an undue advantage to the company's creditors or guarantors (for instance, by concluding the conveyance at a highly undervalued price); and
    - been entered into less than three months prior to the time of the presentation of a petition for winding up or the passing of a resolution for winding up; and
- the action must have been instituted after the company went into liquidation or administration.

A transfer made without fraudulent intent may be reversed based on the undervaluation of the transfer, where it was entered into by the company within two years of an administrator being appointed or of the company going into liquidation. However, such a transfer will be saved where it was made in good faith and for the purpose of carrying on the business of the company. If the transfer is not saved, the court will make such orders as it deems necessary to restore the company to the position where it would have been had it not made the transfer.

Thus, 'reversals for fraud' differ from 'reversals for undervalue' in the following ways:

- reversals for fraud must be brought in relation to a transaction entered into with the company's creditor, surety or guarantee, while undervalue actions are not restricted in this manner;
- a reversal for fraud may succeed even where the conveyance was made for full value, while the reversal for undervalue rule does not apply to a transfer that is made for full value; and
-

the reversal for fraud rule applies only to conveyances entered into less than three months from the onset of insolvency, whereas the reversal for undervalue rule applies only to transfers made less than two years from the onset of the insolvency.

Law stated - 19 September 2024

Preference and improvement of position

What are the essential elements of avoidance actions seeking to claw back transactions and payments based on preference and improvement of position shortly before insolvency proceedings?

The essential elements for the avoidance of clawback transactions based on preference are that the transaction must have:

- put one of the creditors or guarantors in a position of undue advantage; and
- taken place in the period of three months ending with the time of the beginning of the winding up.

The transaction will be declared invalid by the court upon the satisfaction of the above-listed elements.

Law stated - 19 September 2024

Liens and floating charges

What are the essential elements of actions for the avoidance of liens and floating charges on subsequently acquired property?

A floating charge on a company's undertaking or property created within three months of the commencement of the winding-up proceeding is void unless it can be proven that the company was solvent immediately after the charge was created. There are no specific provisions under Nigerian law for avoidance actions on liens on properties acquired – as distinct from charges, whether fixed or floating – and the general law applies. A charge will be void against the liquidators and creditors of a company where the charge is not registered with the Corporate Affairs Commission.

Law stated - 19 September 2024

Process and resolution of avoidance actions

Through what process are avoidance actions litigated? What procedural issues often arise and how are avoidance actions usually resolved?

Avoidance actions are litigated in compliance with the Federal High Court (Civil Procedure) Rules 2019, the Companies Proceedings Rules 1992 and the Companies Winding-up Rules 2001. Under Rule 2 of the Companies Proceedings Rules 1992, all applications brought pursuant to Companies and Allied Matters Act 2020 (as amended), except for winding-up applications, must be initiated by an originating summons.

This is the procedure that is ordinarily employed in avoidance actions, and it contemplates the submission of documentary evidence with no oral examination of witnesses. Where the facts are in dispute, a writ of summons will be the appropriate document to file. Under proceedings initiated by a writ of summons, it is anticipated that witnesses will be examined orally.

Some of the procedural issues that often arise include:

- the extent to which the proper mode for instituting the action was followed;
- the standing of the claimant to sue; and
- the lack of formally correct service of the originating papers on the debtor.

Law stated - 19 September 2024

CLAIMS AGAINST DIRECTORS, OFFICERS AND SHAREHOLDERS

Breach of fiduciary duty

What are the essential elements of a claim for breach of fiduciary duty against directors and officers in the context of corporate insolvency?

The essential elements of a claim aiming to remedy an alleged breach of fiduciary duty are:

- proof of a breach of duty; and
- proof of economic loss suffered by the claimant.

The most obvious fiduciary duties are:

- compliance with the mandate
- diligence
- loyally acting in the company's best interests (including the avoidance of conflicts of interest and secret profits)
- care and skill
- keeping and disclosing accounts
- honesty
- confidentiality

Law stated - 19 September 2024

Protection from liability

To what extent does the law in your jurisdiction protect directors and officers from liability for decisions made in connection with the restructuring or insolvency?

Nigerian law does not impose strict liability for economic loss caused by a director or an officer. To be held liable, the director will also need to have:

- exceeded their literal mandate;
- acted without care and skill or with dishonesty; or
- otherwise violated one or more of the fiduciary duties.

Moreover, the law does not impose collective liability (each person is liable only for their own breach). However, the law imposes higher standards of care and skill on directors and officers than on other employees. The law also allows companies to provide liability insurance cover for directors and officers.

No provision in the company's memorandum and articles of association or contracts can relieve a director or an officer from liability. Any provision of the articles of association or contract that stipulates otherwise is void.

There are general law rules that limit the extent to which officers and directors may be sued. For example, statutes of limitation bar common law money claims after five or six years, depending on the limitation law of the state where the cause of action in question arose (Nigeria has 36 states and a federal capital territory), and equitable claims are subject to the doctrines of laches and acquiescence.

Law stated - 19 September 2024

Converting credit to equity

Can credit extended by an insider or shareholder be recharacterised as equity? If so, what is the mechanism by which such an action is brought, and what elements are required to prevail?

Credit can be re-characterised by the liquidator in the event of insolvency, without a need for a formal procedure. Except for fraud or a sham transaction or any debts mandatorily preferred by law, and to the extent that shareholders give credit to the company, they will rank equally with other creditors.

Law stated - 19 September 2024

Illegal dividends

Can dividends received by shareholders be prosecuted as illegal?

Yes, dividends paid illegally and received by a shareholder (eg, dividends paid out of capital rather than profits) can be recovered using civil remedies, even where the payee has received the dividends in good faith. Criminal sanctions will apply where the payment was made not only illegally but also in bad faith.

Law stated - 19 September 2024

Trading while insolvent

How is trading while insolvent treated in your jurisdiction? If actionable, what mechanisms apply and what are the elements of a successful claim?

Once a company winds up or goes into administration or receivership, the directors' power to run the business of the company ceases. During a winding-up process, any person who knowingly carries on the business of the company in a reckless manner or with intent to defraud creditors, or for any fraudulent purpose, may be declared by the court as personally responsible, without any limitation of liability for all or any of the debts or other liabilities of the company. Such a person commits an offence and is liable on conviction to a fine or imprisonment for a term of two years, or both, as the court deems fit. They may also be liable to make whatever contributions the court deems proper to the company's assets. The main elements of a successful claim are that the person:

- knowingly carried on the business while the company was winding up; and
- acted in a reckless manner, with intent to defraud creditors or towards a fraudulent aim.

Law stated - 19 September 2024

Equitable subordination

Is equitable subordination of shareholder claims allowed? If so, what requirements and mechanisms apply?

There is no equitable subordination of shareholder's claims in Nigeria in the US-law sense. Shareholders' claims rank behind those of creditors, but the claims of one creditor will not be subordinated to those of another simply because the former also happened to be a shareholder.

Law stated - 19 September 2024

Other claims

Are any other claims commonly brought against shareholders, directors and officers in your jurisdiction? If so, what mechanisms are used to raise these claims and what elements are required to prevail?

Trustees, liquidators, administrators and receivers (trustees) can sue officers, directors and shareholders (who also happen to be debtors of the company). Trustees can sue to 'lift the veil' of incorporation where there has been fraud or a transaction for private benefit rather than for the sake of the company.

These claims are typically for the breach of fiduciary duty to, or breach of contract with, the company. (A shareholder is not a fiduciary ipso facto, even where it has a majority of the shares.) There are no special mechanisms or elements for trustees to raise or prevail on such claims.

Before insolvency, a shareholder may, in exceptional circumstances where the board is unwilling to act, act on behalf of the company to derivatively sue errant directors, shareholders and officers. Once insolvency begins, the right to start or continue a derivative

action passes to the trustee, since that right belongs to the company and not to the shareholder.

Law stated - 19 September 2024

Risk mitigation

How can shareholders and sponsors mitigate the risk that claims against them will be successful, and minimise the accompanying financial burden?

Internal investigations, mediation and early settlement are tools that shareholders and sponsors widely use to mitigate the risk of being sued when the company becomes insolvent. Other strategies include:

- appointment of risk officers and consultants by the company prior to the onset of insolvency to develop and nurture policies to address risk;
- providing regular training to guide the directors and officers to observe good governance practices; and
- giving directors and officers information only on a strict need-to-know basis.

Among the good governance practices are for directors and officers to always make disclosure and recuse themselves whenever there is a semblance of a conflict of interest, ensuring that they contract with the company only where they can do so clearly on arm's-length terms.

Law stated - 19 September 2024

CREDITOR ACTIONS AND STRATEGIC CONSIDERATIONS

Contesting restructuring plans

Can creditors bring actions contesting the restructuring plan? If so, what law governs such actions? What must the creditor show to succeed and what must the debtor show to successfully defend? How are these actions usually resolved?

A creditor can sue to challenge a restructuring plan on the grounds that it is either unfair or that the procedural steps set out in the legislation have not been followed. By statute, the court must be 'satisfied as to the fairness of the plan'. The key procedural steps needed are that:

- at least 75 per cent of the creditors must have approved of the plan; and
- the court must have sanctioned it.

Law stated - 19 September 2024

Winding-up petitions

Do creditors apply for winding-up orders? If so, what law governs these actions? What must the creditor show to succeed and what must the debtor show to successfully defend? How are these actions usually resolved?

Creditors may apply for winding-up orders where the company:

- is unable to pay its debts as they come due; or
- passes a resolution for voluntary wind-up and the creditor petitions that the wind-up should proceed under the supervision of the court.

The laws governing these actions are:

- the Companies and Allied Matters 2020 (as amended);
- the Companies Winding-up Rules 1992;
- the Federal High Court Act 1973 (as amended); and
- the Federal High Court (Civil Procedure) Rules 2019.

Under the Companies and Allied Matters 2020 (as amended), the inability to pay debts as they come due is critical. Under the Companies Winding-up Rules 1992, the critical factors are that the resolution to wind up has been passed and the presentation of a petition that the wind-up be conducted under the supervision of the court.

For a debtor to successfully defend an action, it must dispute the fact that a resolution has been passed for the voluntary winding up of the company. These actions will be resolved in favour of the party that can prove its claims.

Law stated - 19 September 2024

Stays of proceedings – scope and exceptions

Does the insolvency regime stay any creditor collection actions? If so, what are the parameters of such a stay? Are there any notable or commonly used exceptions?

In Nigeria, the general primary effect of insolvency procedures (except for receivership) is that once commenced, they stay the creditors' actions against the company. During winding up or liquidation, no action or proceeding can progress or be commenced against the company except by leave of the court.

For companies in administration, the consent of the administrator or the court is required for legal proceedings by a creditor to be continued or instituted. Any petition for the winding up of a company will also be dismissed or suspended on the commencement of an administration.

However, the appointment of a receiver or a receiver-manager does not stay creditor collection actions. Therefore, a company under receivership must continue with the cases against its creditors.

The stay of creditor collection actions will be lifted where:

- the creditor obtains leave from the court or administrator to proceed with the action;
- a claim is brought that the administrator is:
    - acting or has acted so unfairly as to harm the interests of the applicant; and
    - proposes to act in a way that unfairly harms the interests of the creditors; or
- a claim is brought that the insolvency procedure is not effective or as quick as reasonably practicable.

Law stated - 19 September 2024

Stays of proceedings – strategy

How do creditors navigate stays in practice? How do stays generally affect their litigation strategy?

Creditors navigate stays through:

- exercising rights of set-off;
- acting swiftly to achieve advantages in fact before the onset of insolvency (eg, getting factual control of disputed assets);
- seeking and obtaining partial lifting of stays from courts or trustees; and
- pursuing their claims expeditiously before the trustees.

Law stated - 19 September 2024

Stays of proceedings – effect on emergence from insolvency

How do stays affect the debtor's emergence from insolvency?

The stay gives the company the opportunity to resolve its financial difficulties by exploring restructuring models; if successful, the company can recover. Creditor claims may also be amicably negotiated and resolved. This is more possible in the case of an administration where the purpose is not to bring an end to the business of the company, but to ensure that it continues as a going concern.

Law stated - 19 September 2024

Subordination and disallowance of creditor claims

Are the courts in your jurisdiction empowered to punish creditors' bad acts or inequitable conduct by pushing their claims down the priority waterfall? Can they void the claims altogether?

Courts are empowered to punish creditors' bad acts or inequitable conduct to the extent that estoppel, negligence, delay, fraud and other reprehensible conduct are grounds for denying or curtailing equitable relief (eg, injunctions), both in insolvency and outside it.

Law stated - 19 September 2024

Vote designation

Can creditors be disenfranchised based on bad-faith conduct?

No. However, courts are empowered to punish creditors' bad acts or inequitable conduct to the extent that estoppel, negligence, delay, fraud and other reprehensible conduct are grounds for denying or curtailing equitable relief (eg, injunctions), both in insolvency and outside it.

Law stated - 19 September 2024

PRE-INSOLVENCY DEBTOR CLAIMS

Available claims

To what extent can claims existing before insolvency be pursued against shareholders and their affiliates and agents during an insolvency proceeding – including any contractual, tort and misfeasance claims and claims for the recovery of company property?

Trustees (such as liquidators and administrators) are empowered to pursue claims brought before insolvency against shareholders and their affiliates and agents, even during insolvency proceedings. The same rules that ordinarily apply before insolvency persist after insolvency.

Law stated - 19 September 2024

Procedure and resolution

What procedural mechanisms and issues should be considered when bringing pre-existing claims? How are they usually resolved?

The procedural mechanisms and issues are the same as those that apply prior to insolvency: compliance with the regular court acts and civil procedure rules.

Law stated - 19 September 2024

Standing and assignment of claims

Who controls the pursuit of pre-insolvency debtor claims? Can creditors or other stakeholders pursue them derivatively if the debtor or trustee refuses to do so?

It is the trustees who generally pursue pre-insolvency debtor claims.

Law stated - 19 September 2024

Risk mitigation for creditors

How can creditors mitigate the risk that pre-insolvency debtor claims and remedies will be successful?

Creditors should take steps to ensure that provisions governing stays of pre-insolvency claims are complied with and enforced. Creditors can:

- set off their claims;
- adopt amicable settlement of the claims; and
- ensure that priority clauses are in their favour and are upheld and complied with.

Law stated - 19 September 2024

Minimising costs for creditors

How can creditors reduce the costs of litigation associated with these claims? What procedures are commonly used?

There is no fixed procedure through which creditors can reduce the costs of litigation associated with pre-insolvency claims against them. However, based on the power of the liquidator and administrator to compromise all claims and remedies against a person liable to the company, creditors can enter into negotiations leading to amicable resolutions of claims. By resolving these claims out-of-court, parties can reduce the associated expenses of litigation. Similarly, alternative dispute resolution options other than negotiation can be explored by the creditors.

Another option available to creditors is ensuring that sufficient due diligence is conducted before advancing a loan to a company to help identify whether there are any indications that, in the future, the company may be unable to pay its debts and must initiate insolvency proceedings by opening its creditors to the possibility of pre-insolvency claims. Creditors can also use terms of contract to ensure that their priority is retained in the event of insolvency and subsequent insolvency claims.

Law stated - 19 September 2024

OTHER CLAIMS

Other claims against creditors

Are there any other major categories of claims that may be pursued against creditors during insolvency proceedings in your jurisdiction? If so, what are the essential elements of such claims?

Trustees are generally at liberty to sue creditors even when insolvency is ongoing. They have powers to disown or cease to perform onerous contracts and other obligations, and thereby compel the counterparty to sue in insolvency.

Law stated - 19 September 2024

Other claims against debtors

Are there any other major categories of claims that may be pursued against debtors during insolvency proceedings in your jurisdiction? If so, what are the essential elements of such claims?

No.

Law stated - 19 September 2024

CROSS-BORDER PROCEEDINGS

Parallel proceedings and international judgments

Are parallel proceedings and international judgments recognised in your jurisdiction? What are the requirements for recognition? Can recognition be challenged? On what grounds?

Parallel proceedings are not permitted under the Nigerian legal system. The court will dismiss the more recently filed case where two cases are on the same subject and between the same parties. Courts regularly do this on the ground that filing and prosecuting the more recent case is an abuse of court process.

Foreign money judgments are generally recognisable and enforceable in Nigeria. In principle, the legal regimes for the enforcement of foreign judgments are stipulated in:

- the Reciprocal Enforcement of Judgments Ordinance 1922 (the Ordinance);
- the Foreign Judgments (Reciprocal Enforcement) Act 1961 (the Act); and
- the common law.

For now, in practice, the only applicable regimes are the Ordinance and the common law. This is because the order required to make the provisions of the Act operative has not yet been made by the Minister for Justice.

Under the Ordinance, money judgments of the High Court of England and a number of former British colonies may be enforced in Nigeria upon an application brought by a judgment creditor within 12 months from the date of the judgment. The practice under the common law is for a judgment creditor to file an action in Nigeria for the enforcement of a judgment of a foreign country with the foreign judgment as the cause of action.

The recognition of foreign judgments may be challenged on the following grounds:

- the foreign court had no jurisdiction to try the case;
- the judgment debtor did not receive notice in time to enable it to defend the proceedings and did not appear in court;
- the judgment was obtained by fraud; and
- the enforcement of the judgment would be contrary to Nigerian public policy.

Law stated - 19 September 2024

Judicial cooperation

To what extent if any will there be judicial cooperation with other courts in relation to insolvency proceedings?

The legal system in Nigeria recognises foreign insolvency only in part. Where the insolvent is a Nigerian entity, applicable Nigerian law will govern the insolvency process throughout the country. However, Nigerian law does recognise and enforce foreign claims and judgments. In contrast, where the entity is foreign, the insolvency process will be regulated by the applicable laws of the foreign country where the entity is domiciled.

Nigeria has neither acceded to nor otherwise passed into law the contents of the UNCITRAL Model Law on Cross-Border Insolvency 1997. Insolvency provisions under Nigerian law apply only to companies incorporated in the country.

Law stated - 19 September 2024

REMEDIES AND ENFORCEMENT

Remedies for debtors

What legal remedies are broadly available to successful debtor-claimants? Have the courts awarded any notable remedies recently?

The legal remedies broadly available to successful debtor-claimants include damages, specific performance, declarative and injunctive reliefs, rectification, rescission, set-off and judicial sale.

Law stated - 19 September 2024

Remedies for creditors

What legal remedies are available to successful creditor-claimants? Have the courts awarded any notable remedies recently?

The legal remedies available to successful creditor-claimants include specific performance, damages, accounting, injunctions, declarations, company wind-up, appointment of trustees, restitution, out-of-court sale of assets to enforce claims, judicial orders to sell assets to satisfy creditors, set-off and the setting aside or rescission of the transaction. In ***Dematic (Nig) Ltd v Utuk*** (2022] 8 NWLR (Pt 1831) 71, the Supreme Court of Nigeria recognised the right of a creditor to restrain the company from acting ultra vires and to enforce rights that are personal to him or her.

Law stated - 19 September 2024

Court enforcement mechanisms

What tools are available to the court to enforce its rulings? Are there any jurisdictional limits to the court's enforcement powers?

Court rulings can be enforced by way of the attachment and sale or other realisation of goods, receivables, other intangibles and land belonging to the insolvent, as well as committals to prison where the debtor is recalcitrant. The courts can also make declarations and order persons who are subject to its jurisdiction to do specific acts even where the asset in question is abroad (eg, injunctions and specific performance orders to sell or transfer assets).

Law stated - 19 September 2024

SETTLEMENT AND MEDIATION

General court approach
Are the courts in your jurisdiction generally amenable to settlements?

Yes, the courts are amenable to settlement at every stage of the proceedings. Indeed, rules of civil procedure encourage and empower judges to grant the parties time to explore the amicable settlement of their disputes. When parties settle out-of-court, the terms of settlement may be entered as consent judgments of the court.

Law stated - 19 September 2024

Timing
When in the course of litigation are settlements most likely to be sought out?

In many cases, settlement is explored before substantive claims are tried or heard, rather than afterwards.

Law stated - 19 September 2024

Court review and approval
How do courts review settlements? What is the legal standard for entry into and approval of a settlement?

Courts ordinarily do not review the terms of settlements voluntarily entered into by the parties unless the terms are illegal. Where there is evidence of fraud, duress or misrepresentation, the court will set aside the terms of settlement. Unless any of the vitiating elements are present and brought to the attention of the court, courts in Nigeria rarely conduct a detailed study of the terms of settlement agreed to by the parties.

Law stated - 19 September 2024

Mediation clauses

Will courts enforce mandatory or voluntary mediation clauses in pre-existing contracts?

Courts in Nigeria enforce mandatory and voluntary mediation clauses in contracts. They also stay proceedings to enable the parties to explore mediation. Rules of civil procedure have provisions on how disputes can be amicably resolved using alternative dispute methods, including mediation.

Law stated - 19 September 2024

UPDATE AND TRENDS

Recent developments

What have been the most notable recent developments in insolvency litigation in your jurisdiction, including any key cases and legislative changes?

Among the most notable developments in insolvency litigation in recent times in Nigeria are the enactment of the Companies and Allied Matters Act 2020 (as amended) (CAMA) and the Insolvency Regulations 2022.

The CAMA enhances business recovery and rescue by providing for the restructuring of insolvent companies. This is a fundamental change of approach from the previous statute. New set-off and netting regimes have also been introduced recently for insolvency in qualified financial contracts and administration, similar to the United States. This manner of administration is aimed at either recovering the company from its financial problems or securing a better result for creditors than would have been obtainable if the company had gone straight to wind-up.

Section 705 of the CAMA sets out the categories of persons qualified to act as insolvency practitioners in Nigeria. In addition to other requirements, persons will be qualified to act as insolvency practitioners only if they are certified members of the Business Recovery and Insolvency Practitioners Association of Nigeria. Persons can also qualify as insolvency practitioners if they are members of any professional body recognised by the Corporate Affairs Commission (eg, a chartered accountant).

Other notable developments are the immunising provisions introduced by amendments to the Asset Management Corporation of Nigeria (AMCON) Act 2010 on tracing the hidden funds of debtors. They allow AMCON to commence debt recovery actions at the supposedly fast-track Special Tribunal for the Enforcement and Recovery of Eligible Loans. It remains to be seen how effective the recent changes are in practice. Also, there are discussions by the Federal Government of Nigeria to wind up the affairs of AMCON.

Finally, the recent decision of the Federal High Court in Suit No. FHC/ABJ/CS/1076/2020 – *Emmanuel Ekpenyong v National Assembly and others* is also a notable development. In this case, the Federal High Court held that section 851 of the CAMA that established the Administrative Proceedings Committee (the Committee) and vested the powers to resolve disputes arising from the operations of the CAMA on the Committee is inconsistent with section 251(1)(e) of the Constitution that vests the exclusive jurisdiction over disputes arising from the CAMA on the Federal High Court. To that extent, the Federal High Court

struck down section 851 of the CAMA for being inconsistent with the provisions of the Constitution.

Law stated - 19 September 2024