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The Journal of the IBA Insolvency Section

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New frontiers in Nigeria's corporate insolvency regime: focus on administration

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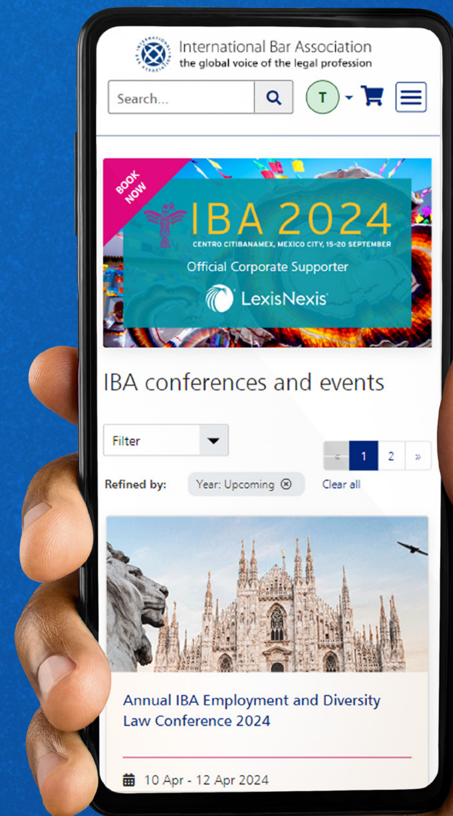

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May 2024

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Welcome to the May 2024 edition of *Insolvency and Restructuring International.* The publication of this edition broadly coincides with the 29th Annual IBA Global Insolvency and Restructuring Conference in Zurich. We are also excited for the IBA Annual Conference in Mexico in September and have no doubt it will continue on the success of 2023 Paris Conference. We encourage you to attend both the Insolvency and Restructuring Conference and the Annual Conference.

The conferences provide fantastic opportunities for our Insolvency Section to hear from leading figures in the restructuring and insolvency world, network with members of our Insolvency Section from over 130 jurisdictions, increase engagement between members and discuss broadening access to the journal.

In light of the positive feedback received on the 2023 editions, this issue continues the focus on recent law reform. Among others, Anna Hermelinksi-Ayache and Igesa Andrea provide important analysis on the new landscape of Luxembourg insolvency procedures, Gilles Podeur and Louis Renucci write on the implications of the 2021 French insolvency law that allows a cross-class cram down to affect the rights of shareholders, Marco Passalacqua provides an update on the most recent Italian case law and legislative reforms, and Amala Umeike writes on new frontiers in Nigeria's corporate insolvency regime.

We are also provided with important insights into jurisdictions from insolvency experts' first-hand experiences and views, including by Adimesh Lochan, Arjun Gupta and Alipak Banerjee on whether a credit contained in an arbitral award can be used to initiate corporate insolvency resolution processes under the Indian Insolvency and Bankruptcy Code 2016 and Rafael Baleroni and Valentina Ramalho on how the lack of enforcement of a Brazilian judgement abroad allows creditors to take measures against debtors' assets.

We thank this issue's authors for their enlightening contributions. We encourage you to submit work for the next edition, set to be published later in 2024. We also welcome all feedback on this edition of the Journal and your ideas for further issues.

New frontiers in Nigeria's corporate insolvency regime: focus on administration

Amala Umeike
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The traditional approach to corporate insolvency in Nigeria, which focused on liquidation and winding-up, has undergone a significant shift with the enactment of the Companies and Allied Matters Act, 2020. This legislation introduced administration as a corporate rescue mechanism with an emphasis on the preservation of distressed companies. Unlike liquidation and winding-up, administration aims to revitalise companies and enhance creditor outcomes. However, challenges such as lack of awareness, stakeholder reluctance and creditor impatience can potentially hinder its adoption. Addressing these challenges through enhanced awareness and stakeholder education can promote the efficacy of administration, thus aligning Nigeria's corporate insolvency regime with global standards.

Introduction

For more than three decades, corporate insolvency proceedings in Nigeria were generally concluded via the liquidation of assets of a debtor company and its eventual winding-up. Dominant from the inception of companies and companies' laws in Nigeria, it could be inferred that this traditional operation has influenced corporate insolvency-related legislation such as the Nigerian Deposit Insurance Corporation Act, 2006 (NDICA) and the Asset Management Corporation of Nigeria Act, 2010 (AMCONA).

For instance, Section 40(2) of the NDICA provides that: 'immediately following the publication in the gazette of the revocation of the licence of a failed insured institution, the corporation shall apply to the Federal High Court for an order to wind up the failed financial institution'.

In the same vein, Section 52 of the AMCONA provides that:

> 'Where the court gives a decision against a body corporate in a debt recovery action under this Act, requiring the debtor company to pay any sum to the corporation and such a sum is not liquidated or paid over to the corporation within 90 days from the date of the order for payment, the corporation may apply to the court to issue a winding-up order against the debtor company.'

These provisions offer insight into the approach of Nigerian lawmakers to corporate insolvency in Nigeria. While the NDICA provided for winding-up and liquidation once a bank was deemed to have failed, the AMCONA stipulated winding-up in the case of a company's inability to pay its debts to AMCON. Neither laws contemplate the possibility of measures to facilitate the turnaround in fortunes of companies or banks. Nor did the Companies and Allied Matters Act 1990 contemplate corporate rescue as an objective of insolvency proceedings.

Understandably, insolvency practitioners have generally considered this traditional mindset to be unprogressive. Following sustained advocacy by insolvency practitioners, the Companies and Allied Matters Act, 2020 (CAMA) was enacted, giving a new lease of life to the corporate insolvency regime in Nigeria.

This article delves into the nuances of Nigeria's corporate insolvency regime under the CAMA. It spotlights administration as an alternative to liquidation and winding-up proceedings in Nigeria.

New frontiers to insolvency in Nigeria

The enactment of the CAMA heralded a new dawn for Nigeria's corporate insolvency regime. Although some of the old insolvency provisions on receivership,

winding-up, liquidation, arrangements and compromise remained, the CAMA introduced new provisions focused on corporate rescue. For instance, Section 444 of the CAMA introduced administration as a corporate rescue mechanism to the Nigerian insolvency landscape. Section 718 of the CAMA also introduced netting to Nigeria's corporate insolvency regime.

Understanding corporate insolvency

In simple terms, insolvency is the inability to pay one's debts or discharge one's obligations.[1] Corporate insolvency refers to the financial distress faced by a company when it is unable to meet its financial obligations as they fall due.[2] In Nigeria, the primary legislation governing corporate insolvency is the CAMA. As aforementioned, there are a number of corporate insolvency procedures under the CAMA. However, the focus of this article is on administration.

Administration in Nigeria

The enactment of the CAMA enabled the rise of administration as a corporate insolvency framework in Nigeria. Unlike liquidation and winding-up, which largely involve the dissipation of a company's assets and its eventual termination, administration is concerned with corporate rescue from a company's financial difficulties, ensuring that it remains a going concern. Countries like England, France, Germany and the United States have various types of rescue proceedings in their legal regime.[3] It is noteworthy that Nigeria has now followed suit.

Section 444(1) of the CAMA provides that:

> 'The administrator of a company may do all such things as may be necessary for the management of the affairs, business and property of the company, and shall perform his functions with the objective of—
>
> (a) rescuing the company, the whole or any part of its undertaking, as a going concern;
>
> (b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up, without first being in administration; or
>
> (c) realising property in order to make a distribution to one or more secured or preferential creditors.'

The above provision shows a clear preference for administration over winding-up and emphasises the need for the administrator to take all necessary measures to ensure that a company in distress remains a going concern.

Section 444(2) of CAMA further emphasises that the rescue of a distressed company is the primary objective of the administrator in the performance of its functions, except where the administrator is of the opinion that it is not reasonably practicable or a better result can be achieved for such company's creditors by pursuing another course of action (in the order of priority specified in that subsection).

Conditions for making an administration order in Nigeria

It is important to note that administration orders in Nigeria are not made as a matter of course. As outlined in Section 449 of the CAMA, an administration order is made when:

- a company is or is likely to become unable to pay its debts; and
- an administration order is likely to achieve the purpose of the administration.

The implication of the above provisions is that unlike in winding-up proceedings, a company does not need to be in a position where it is unable to pay its debts before it will become subject to or eligible for administration. Even if a company is shown to be *likely* to be unable to pay its debts, such a company will be eligible for administration. The framers of the CAMA take the position that oftentimes, it is more prudent to rescue a company that is not fully in distress than to rescue a company that is already unable to pay its debts. The aim of administration is more likely to be achieved when a company whose financial position is not irredeemably bad is made to enter into administration.

The role of the administrator

In administration proceedings in Nigeria, the administrator is integral to the success of the administration. The administrator acts as an independent officer appointed to manage the company's affairs. The administrator's duties range from conducting a thorough review of the company's financial position, developing a restructuring plan, and engaging with stakeholders to garner support for the proposed rescue package, among others. Most importantly, the administrator is required by Section 444(3) of the CAMA to act in the best interests of creditors, while balancing the rights of various stakeholders.

Administration as a matter of priority

The primacy of administration in Nigeria's corporate insolvency regime is underlined by the fact that the appointment of an administrator channels every effort in a company to its survival and rescue. This can be seen

in a number of instances. Section 478(1) of the CAMA provides that where an administrator is appointed over a company, a receiver of the company appointed by a holder of a floating charge or by the court is mandated to vacate office.

In the same vein, where a company is under administration, Section 479(2) of the CAMA precludes the court from making any order for the winding-up of the company. It also prohibits any resolution to be made for the winding-up of the company.

To further emphasise the priority right that is placed on a company under administration, Section 480 of the CAMA provides that the company enjoys a moratorium from legal proceedings relating to the enforcement of security over its property, including repossession of goods in its possession under a hire purchase agreement, except with the consent of the administrator or the court. When a company is going through administration, no legal process – including legal proceedings, execution, distress or due diligence – shall be instituted or continued against the company or its property except with the permission of the administrator or the court.

The foregoing provisions clearly highlight the impressive legislative shift in the corporate insolvency framework in Nigeria. It should be noted, however, that the objective of the moratorium is not necessarily to immunise a company in administration from legal proceedings, but to shield the administrator from distractions that come with legal proceedings, and to allow them to focus fully on the task of rescuing the company from an insolvency situation.

Challenges of administration in Nigeria

While administration offers a viable mechanism for corporate rescue, it is not without its challenges. Some of these challenges are outlined below.

Dual purpose

Research shows that a major shortcoming of administration under the CAMA is the dual purpose it serves. This is because in addition to its application to rescue a failing company, it can easily be utilised as an instrument of liquidation.[4] Since the CAMA does not expressly provide standards to be followed by an administrator to determine that a corporate rescue is impossible, the administrator may easily choose to proceed with liquidation instead of rescuing a failing company. This situation can lead to the utilisation of administration only as a trial-based process, which can be disadvantageous.

Lack of understanding

Administration is a fairly novel concept in Nigeria's legal regime, having only been introduced by the CAMA. The implication is that while the concept remains a pivotal tool for corporate rescue in Nigeria, it will remain underutilised if the vast majority of corporations do not know of its existence.

Stakeholder reluctance

Perhaps due to the preponderance of liquidation and winding-up proceedings, there is still some resistance and reluctance to embrace administration by stakeholders in Nigeria. Understandably, people are inclined to utilise mechanisms that they are familiar with. Another reason behind the reluctance to embrace administration is the fact that administration imposes a higher threshold of responsibility than liquidation. The administrator's role goes beyond liquidation of a company's assets – it extends to taking active steps to ensure that the company is given another chance. As a result, insolvency practitioners (who are eligible to be administrators) are likely to be cynical about adopting administration, especially when there is uncertainty regarding the financial fortunes of a distressed company.

Creditor impatience

Under Section 483(1)(d) of the CAMA, when a company is going through administration, creditors of the company must be informed of the appointment of an administrator. Section 487 of the CAMA also provides that they should be invited to a creditors' meeting, where they are permitted to bring their claims against the company in question, and also to be informed of the administrator's plans for the rescue of the company. When creditors are informed of the company's struggles, there is a high propensity to interpret this as an opportunity to swiftly recover everything that is owed to them by the company, instead of exercising patience while the administration process in under way. Consequently, there is a high likelihood of steering the company towards the path of outright liquidation to recover creditors' capital. This affects the administration framework and practice in Nigeria.

Conclusion

Undoubtedly, the enactment of the CAMA introduced a much-needed breath of fresh air into Nigeria's corporate insolvency regime, and showed a viable departure from the traditional liquidation-centred approach.

There is no doubt that the proper implementation of the corporate rescue provisions will ultimately align Nigeria's corporate insolvency regime with global best practices.

However, to address the challenges outlined, proper awareness of the objectives of administration among corporations in Nigeria is vital. This awareness will not only redirect stakeholders from liquidation and winding-up, but will present the new frontier of administration in Nigeria's corporate insolvency regime in a way that is properly understood and appreciated by stakeholders in the corporate world.

Notes

1 Oxford English Dictionary, 'Insolvency' www.oed.com/search/dictionary/?scope=Entries&q=INSOLVENCY accessed 10 February 2024.

2 Section 62(3) of the Sales of Goods Act, 1893; *Afrotec Technical Services (Nig) Ltd v Mia & Sons Ltd & Anor*, [2000] LPELR-219(SC).

3 Horst Eidenmueller, 'Comparative Corporate Insolvency Law' (7 November 2023) European Corporate Governance Institute – Law Working Paper No. 738/2023, https://ssrn.com/abstract=4625897 accessed 12 February 2024.

4 Chioma Ezinne Adiele, 'Developing a Corporate Insolvency Framework for Nigeria' (2020) Master of Laws Research Papers Repository 9 https://ir.lib.uwo.ca/llmp/9 accessed 12 February 2024.

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Amala served on the World Bank assisted Committee that provided support to the Enabling Business Environment Secretariat on crafting an insolvency framework for Nigeria. This birthed the insolvency regime as contained in the Companies and Allied Matters Act, 2020. He can be contacted at **amalaumeike@strenandblan.com**.