

**International  
Comparative  
Legal Guides**



# **Restructuring & Insolvency**

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## The Trusted Advisors

### 1 Overview

#### 1.1 Where would you place your jurisdiction on the spectrum of debtor- to creditor-friendly jurisdictions?

Nigeria is notably a jurisdiction which favours creditors, particularly in the context of debts held by the Asset Management Corporation of Nigeria (AMCON), which oversees the management of public assets.

#### 1.2 Does the legislative framework in your jurisdiction allow for informal work-outs, as well as formal restructuring and insolvency proceedings, and to what extent are each of these used in practice?

Certainly, informal workouts are prevalent, particularly within the realm of loan restructuring that does not involve alterations to the debtor's corporate structure. In specific cases, regulatory bodies advocate for these informal workouts, often by urging current creditors to consent to a stay and the infusion of fresh capital. The primary advantage lies in affording the debtor sufficient flexibility to sustain its operations, with the ultimate goal of repaying its obligations.

### 2 Key Issues to Consider When the Company is in Financial Difficulties

#### 2.1 What duties and potential liabilities should the directors/managers have regard to when managing a company in financial difficulties? Is there a specific point at which a company must enter a restructuring or insolvency process?

Generally, Directors/Managers owe a fiduciary duty to the company and must continue to observe utmost good faith towards the company in all circumstances. During financial distress, additional duties are imposed on the Directors/Managers, and liabilities can potentially arise where a Director/Manager acts in breach of these duties.

The additional duties include the following:

- (a) a duty to ensure proper accounting books were kept by the company for two years immediately preceding the liquidation period;
- (b) a duty to ensure that the company's business is carried out without the intent to defraud the creditors of the company;
- (c) a duty to properly execute a statutory declaration that the company is able to pay its debts as they fall due;

- (d) a duty to deliver to the liquidator all real and personal property of the company in their custody or under their authority; and
- (e) a duty to ensure that property is not obtained on credit for and on behalf of the company under false pretences.

Potential liability for Directors could be criminal and/or civil, depending on the circumstance of the case.

In addition, in Nigeria, there is no specific point at which a company must enter a restructuring or insolvency process. The decision to initiate such processes typically depends on the financial circumstances of the company and its ability to meet its obligations as they fall due. However, certain events or conditions may trigger the need for a company to consider restructuring or insolvency proceedings:

- (a) **Inability to Pay Debts:** If a company is unable to pay its debts as they become due, it may indicate financial distress and the need for restructuring or insolvency proceedings.
- (b) **Balance Sheet Insolvency:** A company may consider restructuring or insolvency proceedings if its liabilities exceed its assets, indicating balance sheet insolvency.
- (c) **Cash Flow Insolvency:** Even if a company's assets exceed its liabilities, it may still face cash flow insolvency if it cannot meet its financial obligations as they fall due.
- (d) **Legal Actions by Creditors:** Legal actions or enforcement measures taken by creditors, such as the initiation of debt recovery proceedings or the appointment of a receiver, may prompt a company to consider restructuring or insolvency options.
- (e) **Board Determination:** The company's board of directors may assess its financial situation and determine that restructuring or insolvency proceedings are necessary to address financial difficulties and protect the interests of stakeholders.
- (f) **Shareholder Resolution:** Shareholders may also play a role in the decision to initiate restructuring or insolvency proceedings, especially if they have the authority to approve such actions under the company's constitution or relevant laws.
- (g) **Regulatory Requirements:** In some cases, regulatory authorities or governing bodies may impose requirements or guidelines that mandate companies to enter restructuring or insolvency processes under certain circumstances.

Once a company determines that restructuring or insolvency proceedings are necessary, it may consider options such as voluntary administration, receivership, or liquidation, depending on its specific circumstances and objectives.

**2.2 Which other stakeholders may influence the company's situation? Are there any restrictions on the action that they can take against the company? For example, are there any special rules or regimes which apply to particular types of unsecured creditor (such as landlords, employees or creditors with retention of title arrangements) applicable to the laws of your jurisdiction? Are moratoria and stays on enforcement available?**

The terms of the restructuring will determine whether there will be a stay or moratorium on proceedings or enforcement of claims against the debtor. The scheme may prohibit creditors (secured or unsecured) from instituting or continuing proceedings against the debtor for the duration of the restructuring. Upon the commencement of insolvency proceedings, a moratorium is imposed on the enforcement of security against the debtor. Accordingly, a secured creditor may not realise that security itself, but must deliver it to the liquidator for realisation. However, such stay or moratorium does not have extraterritorial effect.

**2.3 In what circumstances are transactions entered into by a company in financial difficulties at risk of challenge? What remedies are available?**

In Nigeria, transactions entered into by a company in financial difficulty are indeed subject to challenge under certain circumstances. The combined reading of Sections 658 to 661 of CAMA 2020 expressly provides that preferential payments, undervalued transactions, transactions to defraud creditors, invalid preferences, improper loans or guarantees, transactions at an undervalue, and preference transactions can be voided subject to the fulfilment of the necessary burden of proof.

Remedies available to aggrieved creditors or members of the company includes the following:

- (a) Avoidance or Setting Aside: Nullifying the transaction through court intervention.
- (b) Reversal of Transaction: Court-ordered reversal or corrective measures.
- (c) Recovery of Assets: Tracing and reclaiming improperly transferred assets.
- (d) Damages or Compensation: Seeking financial redress for losses incurred.
- (e) Injunctions or Restraining Orders: Halting ongoing transactions or preserving assets.
- (f) Appointment of Receiver or Administrator: Installing external management to protect creditor interests.
- (g) Criminal Proceedings: Pursuing legal action against parties involved in fraudulent conduct.

### 3 Restructuring Options

**3.1 Is it possible to implement an informal work-out in your jurisdiction?**

Yes, in some situations companies may elect to apply informal work-outs. Although there are no specific provisions on out-of-court restructuring, informal work-outs are common practice in Nigeria because of debtors' increasing interest in thwarting the liquidation process. This has resulted in heightened interest in using turnaround management to promote corporate recovery. This can happen only where a receiver or manager is appointed over the whole or a substantial part of the company's undertaking, the business is viable, and the creditors are cooperative.

**3.2 What informal rescue procedures are available in your jurisdiction to restructure the liabilities of distressed companies?**

The informal work-out may involve restructuring the company's operations, structure, business, workforce or terms of the company's debt as it responds to the corporate crisis. Such restructuring may involve restructuring the terms of a company's debt contracts to remedy or avoid default achieved by private negotiations with its creditors outside formal proceedings.

Companies may also undergo corporate reorganisation or restructuring, whereby their workforce is reduced through retrenchment, redundancy, or one of several other informal options available to distressed companies.

**3.3 Are debt-for-equity swaps and pre-packaged sales possible? In the case of a pre-packaged sale, are there any restrictions on the involvement of connected persons?**

Yes, it is possible to effect a pre-pack sale of assets, and the security can be released without the creditor's consent in certain circumstances.

#### Restructuring

Before the debtor disposes of any property over which a third party has any security or title interest, it must obtain the consent of that third party, unless the proceeds of such disposal will be sufficient to fully discharge the amount of the third party's secured or protected claim or title interest.

#### Insolvency

The liquidator must act within the authority granted by the meetings of creditors and shareholders. There is no general rule that a purchaser will acquire assets 'free and clear' of claims and liabilities, and there are no specific legislative requirements.

**3.4 To what extent can creditors and/or shareholders block such procedures or threaten action (including enforcement of security) to seek an advantage? Do your procedures allow you to cram-down dissenting stakeholders? Can you cram-down dissenting classes of stakeholder?**

Yes. Dissenting creditors may be crammed down where the court deems the scheme of arrangement or merger to be fair and equitable to the dissenting creditors. In this circumstance the arrangement or merger will continue, despite the dissenting creditors' refusal.

**3.5 What are the criteria for entry into each restructuring procedure?**

Under the Companies and Allied Matters Act, there are generally no eligibility criteria for initiating restructuring proceedings and no entities are explicitly barred from initiating such procedures because there is no formal insolvency restructuring procedure available in that act. However in practice, insolvency practitioners have been relying on and using the neutral Scheme of Arrangements and Compromises in the act.

The provisions on mergers and acquisitions under the Investments and Securities Act 2007 require public companies to meet with certain threshold and compliance conditions before engaging in mergers and acquisitions as a restructuring tool in the best interest of the investing public.

Under Section 48 of the Asset Management Corporation of Nigeria Act 2015, where a receiver has elected to manage the affairs of a debtor company, such receiver must:

- (a) give notice of his or her election by publication in at least two newspapers with nationwide circulation;
- (b) state in the notice the period during which the affairs of the debtor company will be managed; and
- (c) cause to be prepared, within 30 days of the publication of the notice, a detailed and comprehensive plan for the rehabilitation of the debtor company, which must contain plans for the restructuring of the company, its debt and its business.

Under Section 7 of the Banks and Other Financial Institutions Act, there is a bar on the restructuring of banks except with the prior consent of the Central Bank of Nigeria.

### 3.6 Who manages each process? Is there any court involvement?

The Federal High Court is significantly involved in restructuring procedures. It is vested with the power to approve the scheme of arrangement or merger after giving stakeholders the opportunity to be heard and reviewing their presentations.

### 3.7 What impact does each restructuring procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? What protections are there for those who are forced to perform their outstanding obligations? Will termination and set-off provisions be upheld?

Liquidation procedures generally have no effect on existing contracts, except if such contracts relating to property are deemed a fraudulent preference, rendering them invalid.

However, the terms of any existing contract may determine its outcome on the commencement of liquidation proceedings, as they may expressly stipulate that the contract would be determined on the commencement of liquidation procedures.

Also, a liquidator can disclaim contracts which are onerous to the company in liquidation. On the completion of the liquidation procedure, the company's contracts are deemed terminated.

### 3.8 How is each restructuring process funded? Is any protection given to rescue financing?

Restructuring processes in Nigeria can be funded through diverse avenues, with mechanisms in place to ensure a measure of safeguard for rescue financing. Funding is usually sourced in the following ways:

- (a) **Internal Resources:** Companies undergoing restructuring may utilise internal funds, such as cash reserves, asset sales, or profits, to finance the process, bypassing external financing.
- (b) **Debt Procurement:** Additional debt financing can be secured from banks, financial institutions, or private lenders, involving new loans, credit lines, or bond issuances to obtain necessary capital for restructuring activities.
- (c) **Equity Investment:** Companies may seek equity financing by issuing new shares or attracting investment from external sources like private equity firms, directing capital into the restructuring endeavour.
- (d) **Government Aid:** Governments might extend financial support or incentives to critical or strategic companies

undergoing restructuring, including grants, subsidies, or tax benefits.

Rescue financing, pivotal for distressed entities, can be protected in the following ways:

- (a) **Priority Status:** Rescue funds may receive priority status during insolvency, ensuring repayment ahead of other creditors.
- (b) **Superior Liens:** Lenders providing rescue financing might gain super-priority liens on company assets, granting them preferential rights in liquidation or bankruptcy scenarios.
- (c) **Court Oversight:** Approval from the court, integrated into insolvency proceedings, assures fairness and protects all stakeholders' interests.
- (d) **Legal Framework:** Nigeria's legal structure, encompassing laws like the Companies and Allied Matters Act (CAMA) and the Bankruptcy and Insolvency Act, may outline provisions for the treatment of rescue financing.
- (e) **Debtor-in-Possession Financing:** Distressed companies may secure debtor-in-possession financing, empowering them to fund operations while retaining control over assets during restructuring.

## 4 Insolvency Procedures

### 4.1 What is/are the key insolvency procedure(s) available to wind up a company?

#### Receivership

The appointment of a receiver can be initiated by a creditor, group of creditors, or the court with the purpose of collecting funds and liquidating specific assets of a debtor to fulfil payments to creditors. One advantage of this process is its ability to enable the debtor to settle its debts, after which it is restored to its owners. However, a drawback arises if the debtor's receivables are deemed inadequate, potentially leading to its winding-up.

#### Appointment of a manager

Another approach involves appointing a manager for a defined period to oversee the debtor's affairs and facilitate debt repayment. While a benefit is the continuity of the debtor's operations, allowing the directors to resume their roles after settling debts, a drawback lies in the manager possibly entering contracts that pose risks to the debtor's business. Additionally, such an appointment may trigger cross-default provisions in other loan agreements.

#### Winding-up proceedings

Winding-up is typically a final step for a debtor that has reached the end of its viability, whether by agreement among owners, court decision, or creditor consensus. An advantage of winding-up is that all debtor assets are available to satisfy obligations, adhering to the prioritised order outlined in the Companies and Allied Matters Act (CAMA). However, drawbacks include the cessation of the debtor as a going concern and the potential inadequacy of funds and assets to cover all obligations.

### 4.2 On what grounds can a company be placed into each winding up procedure?

A Company can be placed into each of winding up procedures where the company:

- (a) the company's liabilities exceed its assets;
- (b) the company is on the verge of collapsing; or
- (c) the company is a going concern and expansion is desirable.

#### 4.3 Who manages each winding up process? Is there any court involvement?

During a liquidation procedure, the courts are greatly involved and have significant powers. First, the court – particularly the Federal High Court – has jurisdiction to wind up a company, whether in a creditors' voluntary winding up or liquidation caused by a court-ordered winding up.

The court will hear petitions for the winding up of the company on application by the company or its creditors, official receiver or contributories.

During a winding up, the court can stay or restrain proceedings against the company. Once the court has appointed the liquidators, it will order the delivery of the company's properties to the liquidator after a winding-up order has been made, as well as order that payments be made to the liquidator's account. The court has the power to exclude creditors that failed to prove their claims within the fixed time limit or prevent them from benefiting from any distributions made before the debts are proved.

#### 4.4 How are the creditors and/or shareholders able to influence each winding up process? Are there any restrictions on the action that they can take (including the enforcement of security)?

A creditor can present a winding-up petition when the company is unable to pay its debt. The Companies and Allied Matters Act provides that before a petition is filed in court, the creditor must be able to establish that the debt owed by the company exceeds N2,000 and that the company failed or refused to pay this amount after a statutory demand notice had been served on it.

However, a liquidation petition does not automatically lead to liquidation. The court has unfettered discretion to:

- grant or dismiss the petition;
- adjourn the hearing of the petition conditionally or unconditionally; or
- make an interim order or any other order as it deems fit.

During the course of proceedings, creditors cannot exercise their right to enforce their security, as any attachment of or execution against the company's assets after commencement of the proceedings will be void. Further, no recovery action can remain against a company after the commencement of a winding-up petition, as the court would readily stay the proceedings of such action in favour of a winding-up petition. Any execution levied by the judgment creditor on the company's assets in the process of winding up will be rendered void.

During a company's voluntary winding up, the directors will pass a board resolution and the shareholders will pass a company special resolution and appoint a liquidator to wind up the company. In the event of a creditors' voluntary winding up or court-ordered winding up, notices will be given to shareholders before the commencement of the winding-up proceedings. In accordance with Section 464 of the Companies and Allied Matters Act, once the liquidator is appointed in a voluntary winding up, the directors' powers cease, except with regard to the company's general meeting or where the liquidator approves the continuance of their powers.

#### 4.5 What impact does each winding up procedure have on existing contracts? Are the parties obliged to perform outstanding obligations? Will termination and set-off provisions be upheld?

Liquidation procedures generally have no effect on existing contracts, except if such contracts relating to property are deemed a fraudulent preference, rendering them invalid.

However, the terms of any existing contract may determine its outcome on the commencement of liquidation proceedings, as they may expressly stipulate that the contract would be determined on the commencement of liquidation procedures.

A liquidator can also disclaim contracts which are onerous to the company in liquidation. On the completion of the liquidation procedure, the company's contracts are deemed terminated.

#### 4.6 What is the ranking of claims in each procedure, including the costs of the procedure?

Generally, creditors are ranked according to the type of security that they possess over the debtor's assets and whether such security is registered as stipulated under Section 197 of CAMA. Under Section 494 of CAMA, the order of priority is as follows:

- all outstanding payments to employees of the debtor;
- deductions for pensions;
- accrued holiday remuneration;
- claims of creditors with fixed charges;
- claims of secured creditors with floating charges; and
- claims of unsecured creditors.

The liquidator will determine when and how payments are to be made to creditors and or contributories, after a proper assessment of the debtor's assets and liabilities. This may take place from time to time or after the period specified for proof of claims.

#### 4.7 Is it possible for the company to be revived in the future?

Yes, but on rare occasions.

## 5 Tax

#### 5.1 What are the key tax risks which might apply to a restructuring or insolvency procedure?

In Nigeria, certain tax burdens may arise during the course of a restructuring or insolvency procedure.

Depending on the circumstance of the case, applicable taxes include Capital Gains Tax (CGT), Value Added Tax (VAT), Withholding Tax (WHT), Stamp Duty, Thin Capitalization Rules, Transfer Pricing and Exit Taxation.

## 6 Employees

#### 6.1 What is the effect of each restructuring or insolvency procedure on employees? What claims would employees have and where do they rank?

Employees may not bring claims with respect to wrongful termination, but can bring claims regarding payment of their benefits in preference to all other claims. Where employee pension plans or schemes exist, claims for deficiencies in such plans will have priority in liquidation because pensions are now a statutory requirement and, in practice, when unpaid, the employee may have recourse to request the court to enforce same.

## 7 Cross-Border Issues

#### 7.1 Can companies incorporated elsewhere use restructuring procedures or enter into insolvency proceedings in your jurisdiction?

No. Unless they are registered to carry on business in Nigeria, foreign debtors cannot benefit from the restructuring and

insolvency regime in Nigeria. In such case they will be subject to Nigerian company, tax and insolvency laws in the event of insolvency.

### 7.2 Is there scope for a restructuring or insolvency process commenced elsewhere to be recognised in your jurisdiction?

Under the Foreign Judgment (Reciprocal Enforcements Act) (Cap F35, LFN, 2004), a foreign judgment against a member of a group incorporated abroad will be enforceable in Nigeria under strict conditions. However, there is no law on cross-border insolvency in Nigeria, meaning that a foreign insolvency practitioner cannot obtain assistance from a Nigerian court unless there is a final enforceable judgment.

Foreign insolvency judgments and orders may be enforced in Nigeria if they comply with Section 10 of the Foreign (Reciprocal Enforcement) Act, which requires the existence of a wholly or partly unsatisfied foreign monetary judgment debt. The Act is based on the reciprocity of treatment of similar judgments in the original country.

### 7.3 Do companies incorporated in your jurisdiction restructure or enter into insolvency proceedings in other jurisdictions? Is this common practice?

It is not a common practice for Nigerian companies to initiate insolvency proceedings in other jurisdictions. This is because there is currently no law or establishment in Nigeria that deals specifically with the recognition and enforcement of cross-border insolvencies. Nigeria is also yet to domesticate relevant treaties like UNICTRAL Model Law on Cross-border Insolvency, the Hague Convention. It is note-worthy, however, that Nigeria has a framework for recognition and enforcement of an international monetary judgment.

Despite the foregoing, where an insolvent Nigerian company has international creditors, assets located in multiple locations, strategic steps can be taken to achieve the desired result.

## 8 Groups

### 8.1 How are groups of companies treated on the insolvency of one or more members? Is there scope for co-operation between officeholders?

In Nigeria, there is no legal framework for joint insolvency proceedings for corporate groups. Where various insolvency proceedings are initiated against the members of a group, they will be based on separate actions under the doctrine of distinct corporate legal personality.

The current practice is that group members can decide on voluntary insolvency proceedings or apply to the court in separate involuntary proceedings commenced by each group member requesting the appointment of the same liquidator. The proceedings will remain separate.

Where separate involuntary proceedings have been started by creditors against each member of a group before the same judge or different judges, the debtor may apply for consolidation of the proceedings into the main insolvency proceedings (in relation to the controlling corporate member of the group).

The appointment of the same insolvency office holder is more likely to be achieved in a voluntary insolvency procedure where the liquidator is appointed out of court. A court will typically operate at the end of the process to endorse, ratify or sanction the appointment.

## 9 The Future

### 9.1 What, if any, proposals exist for future changes in restructuring and insolvency rules in your jurisdiction?

The Bankruptcy and Insolvency Bill 2016 was declined Presidential assent in 2019. However, there is a growing need for the Bill to be revised to catch up with current and emerging realities.

A revised bill should accommodate relevant provisions to give effect to cross-border insolvency proceedings and also seek to domesticate provisions of all relevant international treaties so as to give the necessary comfort to local and international creditors/investors.



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# International Comparative Legal Guides

The **International Comparative Legal Guide (ICLG)** series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

**Restructuring & Insolvency 2024** features one industry chapter, one expert analysis chapter and 22 Q&A jurisdiction chapters covering key issues, including:

- Key Issues to Consider When the Company is in Financial Difficulties
- Restructuring Options
- Insolvency Procedures
- Tax
- Employees
- Cross-Border Issues
- Groups
- The Future of Restructuring & Insolvency

