Chapter 03

Bankruptcy & liquidation: A contemporary approach
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Procedures for Bankruptcy and Liquidation in Nigeria

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Learning Objectives

Having read this chapter, the readers are expected to be able to:

1. Determine the key laws in Nigeria, which regulate insolvency (CAMA 2020, BOFIA, Investments and Securities Act, Bankruptcy Act).
2. Describe the legal provisions in the Nigerian insolvency and liquidation process.
3. Know the role and responsibilities of the following institutions: CAC, CBN, SEC, FRCN and courts.
4. Explain the position of creditors, debtors, employees and shareholders in insolvency rules in Nigeria.
5. Examine the changes that CAMA 2020 provides administration, business rescue, and regulation of insolvency practitioners.
6. Describe the attachment of insolvency practitioners and accreditation standards.
7. Review the enforcement and weakness of the Nigerian insolvency laws.

INTRODUCTION

The legal theory of bankruptcy and liquidation becomes practical due to the procedural aspect of the process. It forms the basis of the declaration of insolvent parties as bankrupt or wound up, on the identification and realization of assets, and on the allocation of proceeds in a manner likely to cause maximum satisfaction to creditors.

A good process should be fast, transparent, as well as be fair [(1)]. The procedures in Nigeria are predominantly dictated by the Bankruptcy Act (Cap B2, LFN 2004) when it comes to individuals and the Companies and Allied Matters Act (CAMA 2020) with regards to the corporate ones, with the accompaniment of the Insolvency Regulations (2021) and the Companies Regulations (2021).[(2)]

Procedural fairness is also essential as the insolvency sphere is a delicate field of convergence of financial distress, legal rights, and human livelihoods. The insolvency law, according to the explanation of Fletcher [(3)], is not such a closure of the accounting system but a judicial mechanism that restores the economic balance.

DEVELOPMENT

Bankruptcy of a Person Procedural Framework.

Step 1: Acts of Bankruptcy

The initiation of the bankruptcy process is the by taking place of an act of bankruptcy as it is stated in Section 1 of the Bankruptcy Act (2004). [(3)]

A debtor acts in bankruptcy, when he or she:

1. Assigns property to defraud creditors;
2. Makes a fraudulent preference;

3. Departs or keeps out of Nigeria to avoid creditors;
4. Allows execution as to his property to be unsatisfied;
5. Does not abide by a bankruptcy notice of judgment debt payment.

Case Example

In the case of Andrew Nweke Okonkwo v. Cooperative & Commerce Bank (Nig.) Plc & Ors. The court stated that default in relation to the payment of a judgment debt within the stipulated time was a valid act of bankruptcy in this case, which was reported as Okonkwo v. Cooperative Bank (1998) 1 NWLR (Pt. 533) 394.

Step 2: Introduction of a Bankruptcy Petition

Once an act of bankruptcy has been committed, a petition is made in the Federal High Court (Section 3).

The petition may be filed by:

1. Creditor or creditors at least 2000.
2. The debtor himself voluntary adjudication.

The petition is required to be affidavited with:

1. A statement of affairs;
2. Creditors and debtors list;
3. There must be evidence of act of bankruptcy;
4. Court filing fee receipt.

When it is filed, a hearing notice is given to the debtor by the court, typically in 21 days.

Step 3: Bankruptcy Adjudication

During the hearing, provided that the court is convinced that the act of bankruptcy has been established and that the debt is valid, it adjudges that under Section 8 of the Bankruptcy Act.

This order makes the debtor bankrupt, and all the property (other than exempt items) becomes vested in the Official Receiver as trustee.

Effects of Adjudication:

1. Automatic vesting in the trustee is granted to the debtor property (Sec. 25).
2. The creditors are halted in all their actions.
3. The debtor is obliged to provide the books, assets and accounts.
4. An indebted person is not allowed to take credit in excess of ₦500 without the declaration of bankruptcy.

Step 4: Appointment of Trustee

Creditors may at their initial first meeting on adjudication appoint a private trustee to the place of the Official Receiver. The court should approve the appointment of the trustee.

The Trustee has the duties of:

1. Distribution and realization of assets;
2. Research into debtor behavior;
3. Reporting to the court;
4. Assembling creditors meetings;

5. Final Account of Distribution preparation.

The Trustees act under the supervision of the Official Receiver, and also are liable to creditors.

Step 5: Distribution of Assets

The priority of payment, under the Bankruptcy Act, 3744, is in the following order:

1. Expenses of bankruptcy proceedings;
2. Taxes due to government;
3. Salaries of employees (four months before adjudication);
4. Secured creditors;
5. Unsecured creditors (pro rata);
6. Any surplus to the debtor.

The trustee has to keep a separate Bankruptcy Estate Account in the name of the debtor.

Step 6: Discharge of Bankrupt

The debtor can seek a discharge order after satisfying the requirements or even after a time frame (mostly three years) provided by statute.

The court can either award an absolute discharge, conditional discharge or deny discharge in case misconduct (fraud, concealment) is established (Section 5862).

Effect of Discharge:

1. Dismisses the debtor of the majority of provable debts.
2. Has no effects on fraud or fine incurred debts.
3. Recovers the legal capacity of debtor.

CAMA 2020 Procedure of the Corporate Liquidation.

Part XVIII of CAMA 2020 takes a different route to corporate insolvency. It can be done under a compulsory winding-up, voluntary winding-up or court supervised winding-up.

Step 1: Petition for Winding-Up

The winding-up may be presented by:

1. The company itself.
2. A creditor.
3. A contributory (shareholder);
4. or the Corporate Affairs Commission.
5. P571 Attorney-General of the Federation.

Grounds for Petition (Sec. 572):

1. Inability to pay debts;
2. Suspension of business more than one year;
3. Failure to start business in less than one year;
4. Just and equitable grounds.

Example:

In Intercontractors (Nig.) Ltd v. U.A.C. (1988), the court held that the failure to meet debts should be established by documentary evidence e.g. unpaid demand letters. The case is detailed blow:

In the Lagos State High Court, the plaintiff/respondent filed a lawsuit against the defendant, seeking N1,197,775.79 plus interest at the rate of 6% annually from the date of the writ until the entire debt was paid up. Due to the defendant's failure to appear and defend, a judgment was entered against them. After the verdict was enrolled on May 7, 1985, the plaintiff requested the issuance of a writ of fieri facias. In accordance with its authority under the debenture agreement, Savannah Bank of Nigeria Ltd., in whose favor the appellant firm had executed a debenture in July 1978, appointed a Receiver over the defendant/appellant's assets on June 27, 1985.

Despite not appealing the judgment rendered against it, the appellant/company filed an application on December 9, 1985, asking the court to stay the execution of the writ of fieri facias on the judgment dated June 5, 1985, on the grounds that the defendant/appellant is in receivership, all of its assets are contained in debentures issued by it, any judgment obtained before, during, or after receivership cannot attach property subject to receivership, and a judgment creditor takes subject to receivership.

The plaintiff filed a notice of preliminary objection to the application on April 22, 1986, citing, among other things, the defendant/appellant's lack of locus standi and the court's inability to halt the execution of a judgment indefinitely. The trial judge rejected the application after upholding the objection. The Court of Appeal received an appeal from the defendant/appellant. Additionally, its appeal was denied. Thus the case was taking to the Supreme Court for appeal.

Step 2 Court Hearing and Winding-Up Order

On review, in case there is sufficient cause the court makes a Winding-Up Order and appoints a liquidator (Section 574) states the:

Effect of Order:

1. Company no longer conducts business with some exception in winding-up.
2. Any court proceedings towards the company are suspended.
3. Directors' powers cease.
4. Assets are vested in the liquidator.

Step 3: The Liquidator and his/her Appointment and Role

The process revolves around the liquidator. The liquidator under Sections 607619

1. Takes possession of corporate property;
2. Collects debts;
3. Sells property at an auction, by privy treaty;
4. Compensates creditors in that order;
5. Makes accounts to court and CAC.

A liquidator(s) should be a registered insolvency practitioners registered either with BRIPAN or ICAN, or ANAN.

Types of Liquidators:

The following are the various types of liquidator:

1. Official Liquidator (court appointed);
2. Voluntary Liquidator (they are appointed by the members or creditors).

Step 4: Settlement of List of Creditors

The liquidator must follow the various grounds for settlement of creditors:

1. The liquidator will prepare a List of Creditors and Contributories which will be verified by affidavit.
2. Advertisements are placed in official gazette and newspapers.
3. The creditors must establish their claim by documentary evidence.

Step 5: Realization of Assets

1. Cash is obtained by selling assets
2. CAMA demands fair valuation and proceeds of sale must be registered in a Liquidation Account to the Corporate Affairs Commission (CAC).
3. In Section 630, the illegal disposition of assets is a criminal offense.

Step 6: Distribution of Assets

The sequence of distribution is in accordance with the CAMA 2020 of Section 667:

1. Costs of liquidation;
2. Secured creditors;
3. Preferential debts (e.g. employee wages, taxes);
4. The unsecured creditors (pro rata);
5. Remaining to shareholders.

Before final distribution, the account of the liquidator has to be audited.

Step 7: The Dissolution of the Company

On his part, the liquidator submits a Final Account and Return to the CAC and the court on completion (Section 634) for the transactions leading to liquidation. Thereafter, three (3) months later, the Corporate Affairs Commission (CAC) has the name of the said liquidated company struck off the register and it is stand dissolved. Consequently, the dissolution of the company has to be announced in the Federal Gazette.

Voluntary Winding-Up Procedures.

The members or creditors of the company initiate voluntary winding-up internally.

Under the voluntary winding-up of members, there are four categories of members: ordinary members and qualified members, non-qualified members, and nominal members.

Voluntary Winding-Up of members

There are four types of members: ordinary members and qualified members, non-qualified members, and nominal members.

This happens when the company is alive.

Directors should provide a Declaration of Solvency that indicates the fact that debts could be settled within the period of 12 months (Section 625).

Procedural Steps:

1. Board resolution proposing winding-up;
2. Members special resolution;
3. Appointment of a liquidator;
4. Within 14 days, notification to CAC;
5. Report of liquidator and dissolution filing.

Creditors' voluntary winding-up Creditors

In the voluntary winding-up of a company, the creditors are entitled to receive a pro rata share of the common stock dividend (prasugel). This is in case the company is not solvent.

The directors hold shareholder and the creditor meetings separately in the same day. Creditors are also free to appoint their own liquidator, and this appointment overrides the selection of members (Section 629).

Key Documents Required:

1. Statement of Affairs;
2. List of Creditors;
3. Minutes of creditors meeting;
4. Liquidator's consent form.

Receivership and Business Rescue.

Receivership is a process in between liquidation and solvency. A creditor who has a debenture under CAMA 2020 (Sections 553569) may appoint a receiver or a receiver-manager.

Appointment of Receiver

a. It may be through appointment by deed or order of the court.
b. It should be communicated to CAC by receiver in a period of 14 days.

Duties of Receiver

a. Seize the property of a security interest;
b. Collect income;
c. Manage business pending repayment;
d. Report to debenture holders and CAC.

Receivership can then turn into liquidation when the business is unable to bounce back.

Documentation Required in Insolvency Proceedings

Table 3.1. Documentation Required in Insolvency Proceedings

Document	Purpose	Governing Provision
Petition for Winding-Up	Initiates compulsory liquidation	CAMA Sec. 571
Statement of Affairs	Financial position of debtor/company	CAMA Sec. 627
List of Creditors and Contributories	Identify claimants	CAMA Sec. 630
Notice to CAC	Statutory compliance	CAMA Sec. 631
Final Account and Return	Conclude proceedings	CAMA Sec. 634
Affidavit of Service	Proof of notice delivery	Rules of Court

Through proper documentation, procedural integrity is guaranteed and stakeholders are also protected against abuse or fraud.

Accounting Relocation in Liquidation and Bankruptcy

Accountants have critical roles in insolvency:

1. Preparation of Statement of Affairs;

2. Asset Valuation and Verification;
3. Maintainance of Liquidation Accounts;
4. Audit of Liquidator's Report;
5. Final accounts Preparation and compliance with taxes.

John and Ogechukwu [4] state that accountants are the intermediaries between the financial evidence and the legal determination in insolvency practice.

Ethical and Professional Responsibilities

The Insolvency Practitioners Code of conduct (BRIPAN, 2022) [5] highlights:

a. Independence and impartiality;
b. Client information confidentiality;
c. Conflict of interest to be avoided;
d. Proper record keeping;
e. Anti-corruption and money laundering.

Breach of these standards may result in positive disciplinary measures or criminal responsibility.

General Procedural Problems

The following are the general procedural problems:

1. Delays in adjudication in Courts -on account of case backlog.
2. Incomplete Financial Records- companies seldom have updated books.
3. Inadequate Experts in the field- limited number of trained insolvency professionals.
4. Corruption and Asset Diversion- poor supervision of liquidators.
5. High Cost of Proceedings- deters voluntary compliance.

According to World Bank (2022), [6] these procedural inefficiencies put Nigeria at the bottom of the list of countries that were ranked in terms of insolvency indicators resolving.

Reforms and Best Practice Recommendation

The following are the reforms and best practice recommendation:

1. To make the process efficient in terms of procedures:
2. Bring in fast-track insolvency courts.
3. Go paperless in courts and CAC.
4. Institute the pre-insolvency mediation that must be mandated as a way to settle creditor-debtor disputes.
5. Introduce insolvency education in ICAN and ANAN professional practice.
6. Embrace cross-border insolvency modalities in UNCITRAL Model Law (1997).

SUMMARY

This chapter described the process of an individual and corporate insolvency, in Nigeria, in detailed procedures. Starting with the commencement until the definitive discharge or dissolution, all the steps are subject to statutory requirements and judicial control.

The objectivity, the transparency, and the protection of the creditors granted by the procedural clarity, are the necessary ingredients of the preservation of the positive image of the Nigeria business environment in the eyes of the population.

REVIEW QUESTIONS

1. Describe the procedure in declaring an individual bankrupt in Nigeria.
2. Differentiate the compulsory and voluntary winding-up under the CAMA 2020.
3. Talk about the roles of a liquidator with respect to company winding-up.
4. Provide the priority of order in the distribution of assets in liquidation.
5. Elaborate accountant's role in insolvency proceedings.
6. List and comment on three key procedural issues in the insolvency practice in Nigeria.

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