Chapter 06

Bankruptcy & liquidation: A contemporary approach
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Deeds of Arrangement, Trusts, and Executors

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Learning Objectives

By the end of this chapter, the readers are supposed to be able to:

1. Describe the idea of transnational insolvency and international connectedness.
2. Know UNCITRAL Model Law on Cross-Border Insolvency.
3. Comparison of insolvency laws in the U.S., U.K., EU and other jurisdictions.
4. Explain how foreign insolvency proceedings are identified.
5. Examine the preparedness of Nigeria to adopt cross-border insolvency.
6. Consider the advantages and the difficulties of unifying international laws on insolvency.
7. Know the importance of international arbitration and treaties in international insolvency.
8. Evaluate case studies in the context of insolvency of multinational corporations.

INTRODUCTION

The bankruptcy and liquidation cannot be studied without the knowledge of deeds of arrangement, trusts, and executors, which are crucial tools of dealing with the property of insolvent people and deceased persons. These notions guarantee the fair allocation of resources, safeguard of the rights of the creditors, and sustainability in managing estates. These mechanisms in Nigeria are regulated by statutory laws which include the Bankruptcy Act (CAP B2, LFN 2004), the Trustee Law, and Part XX of the Companies and Allied Matters Act (CAMA 2020) [(1)]. The most important is to make the organized management of assets and to avoid fraudulent dispositions and promote accounting transparency of estates and trusts.

Although the bankruptcy involves insolvent individuals and liquidation involves corporate organisations, the deeds of arrangement and trusts offer alternative structures to asset management especially when formal insolvency proceedings can be evaded. In this chapter, the authors discuss the nature, creation, law and accounting of deeds of arrangement, trusts, and executors, with a focus on Nigerian and comparative views.

DEVELOPMENT

Concept and Legal basis of Deeds of Arrangement

A deed of arrangement is an official agreement between an insolvent debtor and his creditors, according to which the property of the debtor is shared between creditors without the need to conduct court proceedings or an actual bankruptcy process. It is a voluntary concession which aims at evading the stigma and the expense of the bankruptcy.

Section 2 of the Deeds of Arrangement Act (CAP 59, LFN 1958) seeks to state that a deed of arrangement comprises:

Any instrument between a debtor and his creditors is the effect of which is the trusting to a trustee of the debts or property of the debtor.

Practically, it follows that the debtor assigns the ownership of some property or control to a trustee who administers it, realizes the value and allocates the resultant amounts pro rata to creditors.

Purposes of a Deed of Arrangement

a. To help an insolvent debtor to settle down the creditors in an orderly manner.
b. To avoid the avoidable legal expenses incurred in bankruptcy.
c. To cushion the debtor against unscrupulous creditor conduct.
d. To ensure that there is fair treatment to all creditors.
e. To restructure the business credit and revive the finances of the debtor.

Parties to a Deed of Arrangement

a. The Debtor -the person who commences the action.
b. The Creditors - parties to which one owes a debt.
c. The Trustee or the Administrator - an impartial individual that is chosen to manage the property and pay out proceeds.
d. The Registrar -in charge of registration of deed as per the Nigerian legal system.

6.3 Legal Requirement and Registration

This action should be taken in writing and both the debtor and trustee sign and then registered within seven days in compliance with the Deeds of Arrangement Act [2]. The registration should be made in the High Court registry either in a place where the debtor lives or conducts business.

The non-registration will make the deed invalid towards creditors (Section 5, CAP 59). Thus, whether an action is valid or not is very much determined by whether it is in accordance with the formalities of the law. The trustee must also present an affidavit revealing:

a. The value of all the property of the debtor.
b. All address and names of creditors.
c. The sum total of the debts.

Responsibilities and Authorities of the Trustee

A deed of arrangement is principally operated by the trustee. Under Section 8 of the Deeds of Arrangement Act, the trustee should:

a. Sale and possession of the property of the debtor.
b. Maintain a record of details of receipts and payments.
c. Allot proceeds to creditors using entitlements.
d. Finalize a statement of account on completion.

The fiduciary responsibility of the trustee is to be honest and diligent and free of bias. They can also be responsible due to negligence, misfeasance or breach of trust in case the assets are misappropriated.[3,4]

Recording Deeds of Arrangement

Preparation of key financial statements to represent the realization and allocation of assets is accounting of a deed of arrangement. These include:

1. Statement of Affairs: indicating estimated realisable of assets and projected

deficiency.

2. Deficiency Account: this is defined as the difference in assets and liabilities.
3. Account of Trustee: is an account of receipts of realizations of assets and payments to creditors.

Example

Assume that the total debt of a debtor is 20million, and the actual value of assets is 15million. The trustee achieves 14,5 million and 500,000 administrative costs. Those who get the distribution are the creditors in a pro-rata manner and this leads to a shortfall of 6 million.

Concept of Trusts

A trust will consist of a fiduciary relationship where property is given over by a party to another party (the settlor) to be held and administered to the benefit of a third party (the beneficiary). The Nigerian trust law is based on the English common law, the Trustee Law (Lagos State CAP T6, 2003), and CAMA 2020 (Part XX).

Trusts are applied in many situations which include the management of estates, investments, charity, and bankruptcy. In insolvency, trusts may be established to secure some assets to prevent them being shared among creditors or to administer finances which are saved up to pay employee pensions or tax.

Types of Trusts

1. Express Trusts: formed pursuant enactment of written instrument.
2. Implied or Constructive Trusts: This occurs by operation of law to avoid unjust enrichment.
3. Charitable Trusts: those which are created in philanthropic or societal interests.
4. Resulting Trusts: arise where the property is returned to the settlor because of failure of purpose.

Trustees Duties and Liabilities

Fiduciary duties require trustees to act in the following ways:

a. Duty of Care and Diligence: Be a sensible businessman.
b. Duty of Loyalty: do not conflict with interest and do not act in your own benefit.
c. Duty of Impartiality: act reasonably to all beneficiaries.
d. Fidelity of Accounting: keep clean financial books.

A breach of these duties by a trustee can result in them incurring personal liability towards beneficiaries. The Public Trustee (by association of Corporate Affairs Commission under CAMA 2020) can serve as trustee in some instances in which an unbiased administration is necessary in Nigeria.

Executors and Administration of Estates

An executor refers to the holder of a will where he is designated to handle the property of a deceased person. The court may appoint an administrator where there is no will under the Administration of Estates Law (CAP A3, LFN 2004).

The executor will have to:

a. Gathering and appraising the assets of the deceased.

b. Covering the costs of funeral and debts.
c. Getting the balance of the estate in order and handing out to the beneficiaries in line with the will or the intestate succession laws.
d. Reporting an administration account to the probate court.

Executor's Accounts

Accounting records kept by executors are as follows:

a. Estate Account: displaying receipts and payments of estate assets.
b. Capital Account: indicates realized capital assets.
c. Income Account: reflecting regular income as rent or dividends.
d. Distribution Account: overviewing the ultimate payments to recipients.

Accounting example Executive Account of Executor

Suppose that Mr. Johnson has as an estate and assets as detailed; Cash: ₦2 000 000; Investments: ₦ 3 000 000; Property: ₦5 000 000 and Debts payable: ₦ 1 500 000

All the assets are sold by the executor who pays the debts and the funeral costs of ₦ 500 000 and allocates the rest to three beneficiaries equally.

Computation:

Total assets = ₦ 10 000 000
Total expenses = ₦ 2 000 000
Net distributable estate = ₦ 8 000 000
Each beneficiary receives ₦ 2 666 667

All receipts, payments, and related schedules will be contained in the report of the executor in the interest of transparency.

Relationship between Trusts, Deeds of Arrangement and Bankruptcy

Although the legal processes of bankruptcy and liquidation are compulsory, they can be considered as voluntary and pre-emptive processes that aim at preventing bankruptcy, like trusts and deeds of arrangement. They are other forms of settling debt, safeguarding of assets and efficient management of estates. The relationship between them can be summed up as follows:

Table 6.1. Relationship between Trusts, Deeds of Arrangement and Bankruptcy

Mechanism	Legal Nature	Purpose	Outcome
Bankruptcy	Statutory	Compulsory liquidation of insolvent individual	Debtor discharged
Deed of Arrangement	Voluntary	Settles debts without formal bankruptcy	Debtor rehabilitated
Trust	Fiduciary	Protects property for beneficiaries	Assets preserved
Executor	Testamentary	Administers deceased's estate	Estate distributed

Ethical and Professional issues

Accountants, executors, and trustees are expected to ensure a set of ethics as set by the Institute of Chartered Accountants of Nigeria (ICAN) and the International Ethics Standards Board of Accountants (IESBA, 2022).[5] Some of the major ethical principles are integrity, objectivity, professional competence, confidentiality and due care.

Lack of prudent management of trust or estate funds may lead to disciplinary penalties, criminal liability and a damaged reputation.

SUMMARY

The conceptual and legal basis of deeds of arrangement, trusts and executors in the Nigerian context has been investigated in this chapter. These processes play vital functions in insolvent estate management, prevention of bankruptcy and management of the property of the dead people. Their legal requirements, accounting practices, and fiduciary practices are made understood to make them transparent and in line with the statutory provisions.

REVIEW QUESTIONS

1. Delimit a deed of arrangement and elaborate its purposes.
2. Talk through the legal aspects of deed of arrangement registration in Nigeria.
3. Discuss what a trustee is expected to do in his/her fiduciary role and what happens when a trustee violates it.
4. Draw the distinction between bankruptcy and deed of arrangement.
5. Get ready the account of a specimen trustee in an insolvent debtor.
6. Demonstrate how to account executor accounts when selling an estate.

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