

The International Comparative Legal Guide to:  
**Corporate Recovery & Insolvency 2009**

A practical insight to cross-border Corporate Recovery & Insolvency



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# Nigeria

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## 1 Issues Arising When a Company is in Financial Difficulties

### 1.1 How does a creditor take security over assets in Nigeria?

A creditor can secure payment or performance of an obligation under a contract or transaction by way of a mortgage or charge, a contractual lien or a pledge.

#### Mortgage

In those States in Nigeria which have retained the received English land law as at 1900, a mortgage can be created over a company's landed property. Although in theory the ownership of the property passes to the creditor, with title to be re-conveyed if the mortgage debt is liquidated, physical control of the property does not usually pass to the creditor, as the immovability of the security affords the creditor sufficient comfort. In States which have aligned their land laws with that of England as at 1925, a mortgage cannot be created; rather the creditor will obtain a charge over the landed assets of the company. In such States, different creditors can take consecutive charges over the same landed property.

#### The Charge

A charge does not involve a transfer of ownership, but is an agreement between debtor and creditor that upon the happening of certain events, charged assets will be appropriated towards the settlement of a debt.

While a fixed charge is in respect of ascertained or ascertainable and definite or definable assets and immediately attaches to the assets charged, a floating charge typically covers present and future assets, such that until some future occurrence/action takes place the company may continue to use the assets in the ordinary course of business.

As a general rule a fixed charge has priority over a floating charge on the same property (§179 of Companies and Allied Matters Act 'CAMA').

#### Contractual lien

A contractual lien is a possessory security, whereby the creditor has a right to detain certain property until money owed to it has been paid off. A deposit of share certificates as collateral for bank borrowings is a common form of such lien. It does not however constitute a transmissible interest nor does it confer a right of sale on the creditor, unless agreed under the contract.

#### Pledge

A pledge is a form of promissory security that merely requires the transfer of possession of an asset, with the intention that it should be held as security.

### 1.2 In what circumstances might transactions entered into whilst the company is in financial difficulties be vulnerable to attack?

A floating charge created over the undertaking or property of the company within three months prior to the commencement of a winding up petition is invalid unless the party affected thereby can prove that the company immediately after the creation of the charge was solvent.

Any dealing in its property which would constitute a fraudulent preference in bankruptcy proceedings would also amount to a company's fraudulent preference of its creditors and would be invalidated. Similarly any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors will be void (§495 of CAMA).

Any transaction relating to the shares of the company may be subject to attack if the transfer of the shares is made after the commencement of a voluntary winding up without the sanction of the liquidator.

### 1.3 What are the liabilities of directors (in particular civil, criminal or disqualification) for continuing to trade whilst a company is in financial difficulties in Nigeria?

Every director in default may be personally liable for a refund of money or property received from a party as advance payment for the execution of a project and with intent to defraud the company fails to apply money for the purpose for which it was received [§290 CAMA].

A director who carries on company business in a reckless manner or with intent to defraud creditors of the company whilst the company is in the process of winding up may be made personally responsible for all or any of the debts or liabilities. A director who is found to have traded with fraudulent intent shall also be guilty of an offence and liable to imprisonment for two years or to a fine of N2,500.00 or both.

If in the course of a winding up a director who has taken part in the formation or promotion of the company, is found to have misapplied, retained or become accountable for any money or property of the company, or been guilty of any misfeasance or breach of duty in relation to the company, he may be compelled to repay or restore the money or property with interest at such rates as the court thinks fit. The court may also order him to contribute to the assets of the company by way of compensation.

Any director who has been found guilty of fraudulent trading may be disqualified from acting as a director of any other company.

Where it appears to the court in the course of a winding up, that any past or present director of the company has been found criminally

liable for an offence, it may direct the liquidator to refer the matter to the Attorney-General of the Federation who may institute criminal proceedings.

## 2 Formal Procedures

### 2.1 What are the main types of formal procedures available for companies in financial difficulties in Nigeria?

The three formal procedures available for companies in financial difficulties in Nigeria are:

1. Receivership.
2. Winding up.
3. Schemes of Arrangement and compromise.

### 2.2 What are the tests for insolvency in Nigeria?

The tests for insolvency recognised by the Company and Allied Matters Act are:

- a) A company's inability to pay a debt exceeding N2,000.00 [approximately US \$15] within three weeks after a demand for payment has been made.
- b) A wholly or partially unsatisfied court process issued in respect of a judgment debt.
- c) A court's determination after taking into account any contingent or prospective liability of the company that the company is unable to pay its debts.
- d) Where the company's liabilities exceed its assets.

### 2.3 On what grounds can the company be placed into each procedure?

#### Receivership

Depending on the terms of the agreement between the company and its debenture holder, a company can be placed into receivership where:

- a. the principal sum borrowed by the company or the interest is in arrears;
- b. the security or property of the company is in jeopardy. The security of the debenture holder shall be in jeopardy if the court is satisfied that events have occurred or are about to occur which render it unreasonable in the interest of the debenture holder that the company should retain power to dispose of its assets;
- c. the company fails to fulfil any of the obligations imposed on it by the debentures or debentures trust deed;
- d. any circumstances occur which by the terms of the debentures or debentures trust deed entitled the holder of the debenture to realise his security;
- e. the company is being wound up;
- f. any creditor of the company issues a process of execution against any of its assets;
- g. the company ceases to carry on business; or
- h. the company's assets lose value amounting to more than one-half of the total amount owing in respect of a class of outstanding debentures.

#### Winding up

A company in financial difficulties may be wound up if it is unable to pay its debts.

#### Schemes of Arrangement and Compromise

There are no grounds specified by statute before a company can utilise this procedure.

### 2.4 Please describe briefly how the company is placed into each procedure.

#### Receivership

Whenever a fixed and floating charge has become enforceable, creditors can either by deed if applicable or by application to the court appoint a receiver and/or manager of the assets of the charge.

Where a company is being wound up, a creditor may apply for the appointment of an official receiver.

#### Winding up

Only a solvent company can be wound up voluntarily. An application to the court for the winding up of a company is made by petition presented by any of the following persons:

- (a) the company;
- (b) a creditor including a contingent or prospective creditor of the company;
- (c) the official receiver;
- (d) a contributory;
- (e) a trustee in bankruptcy or a personal representative of a creditor or contributory;
- (f) the Corporate Affairs Commission under §323 of the Act; or
- (g) a receiver if authorised by the instrument under which he was appointed.

The grounds upon which a winding up petition can be presented are stated in question 2.3 above.

#### Schemes of Arrangement and Compromise

##### Arrangement

A special resolution is required resolving that the company be put into members' voluntary winding up and that the liquidator be authorised to sell the whole or part of its undertaking or assets to another body corporate.

##### Compromise

Where a compromise is proposed between a company and its creditors, the court may order that a meeting of the creditors or a class of creditors, or of the members of the company, be summoned. If a majority representing not less than three-quarters in value of the shares of members or class of members or class of creditors vote in support, the compromise or arrangement may be referred by the court to the Securities and Exchange Commission which then appoints an inspector to investigate the terms of the said compromise or arrangement and make a written report thereon within a time specified by the court.

If the court is satisfied as to the fairness of the compromise or arrangement it will be sanctioned and shall thereafter be binding on all the creditors or class of creditors or on the members.

### 2.5 What notifications, meetings and publications are required after the company has been placed into each procedure?

#### Receivership

A court appointed receiver or manager must advertise his appointment in the gazette and in two daily newspapers. He must also, within seven days of his appointment, give notice of his appointment to the Corporate Affairs Commission which will enter the appointment in the register of charges.

Where a receiver or manager has been appointed out of court by the debenture holders, notice must be given to the Commission within 14 days indicating the terms of appointment and remuneration. Thereafter every invoice, order for goods or business letter by or on behalf of the company shall contain a statement that a receiver has been appointed. The receiver also upon his appointment must send

notice forthwith to the company.

**Winding up**

Where the order for the winding up of a company has been made by the court, §416 of CAMA requires the company to forward a copy of the order to the Commission which is then noted in its record books relating to the company.

**Arrangement and Compromise**

If a compromise has been sanctioned by the court, a certified true copy of the order must be delivered by the company to the Commission for registration and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made.

**3 Creditors**

**3.1 Are unsecured creditors free to enforce their rights in each procedure?**

**Receivership**

There is no law that prohibits an unsecured creditor from enforcing its rights outside of the receivership. Accordingly, an unsecured creditor can commence a recovery action against the company and if judgment is given in his favour, he may cause execution to be issued against the assets in the hands of the receiver or manager.

**Winding up**

Once winding up proceedings have commenced, an action by an unsecured creditor commenced during the pendency of the proceedings can be stayed by the court. Where a company is being wound up by the court, any attachment, sequestration, distress or execution by an unsecured creditor against the assets of the company shall be void.

**Scheme of Arrangement and Compromise**

Once the scheme of arrangement is sanctioned by the court, it is binding on all the creditors even if the secured or secured creditors did not vote in favour of it. Consequently, once the scheme is sanctioned, an unsecured creditor is bound by the terms of the scheme and will not be able to enforce its rights against the company other than as modified by the scheme.

**3.2 Can secured creditors enforce their security in each procedure?**

A secured creditor can enforce his security outside of each procedure, unless he elects or is required by the liquidator in a winding up to surrender his security [Rule 125 Companies Winding Up Rules].

**3.3 Can creditors set off sums owed by them to the company against amounts owed by the company to them in each procedure?**

**Receivership**

There is no statutory provision for the exercise of such right against the company in receivership. In the absence of any contractual agreement, the creditor will not be able to exercise a right of set off.

**Winding up**

There is no statutory provision for the exercise of a right of set off by a creditor against a company in liquidation. A contractual agreement for the creditor to exercise a right of set off ceases to be enforceable once a company has been wound up.

**Scheme of Arrangement and Compromise**

The same position as in receivership above applies.

**4 Continuing the Business**

**4.1 Who controls the company in each procedure? In particular, please describe briefly the effect of the procedures on directors and shareholders.**

**Receivership**

Once a receiver has been appointed the power of the directors and shareholders to deal with the assets over which the receiver was appointed ceases and same is vested in the receiver. If a receiver is also appointed manager, he has power in law to carry on and manage the business of the company although the directors remain in office. Shareholders are unaffected.

**Winding up**

The liquidator takes over the company and all the powers of the directors cease except the company at general meeting or the Committee of Inspection in case of creditors' voluntary winding up or the court or the liquidator sanctions the continuance thereof.

**Scheme of Arrangement and Compromise**

The directors under a scheme of arrangement or compromise remain in control of the company. The powers of the shareholders are not affected under this scheme.

**4.2 How does the company finance these procedures?**

A receiver of the whole of a company's undertakings has the power to borrow money and may do so if finance is required. The lenders or creditors invoking these insolvency procedures may also provide required finance.

**4.3 What is the effect of each procedure on employees?**

A receiver or liquidator appointed under these procedures has no obligation to retain the employees of an insolvent company. Where the employees are disengaged, he has a duty under the Act to settle all their wages and salaries in respect of the services rendered to the company in priority to all other debts.

The status of employees' contracts under a scheme of arrangement would depend on the terms of the scheme document.

**4.4 What effect does the commencement of any procedure have on contracts with the company and can the company terminate contracts during each procedure?**

**Receivership**

The commencement of the receivership exercise does not in any way affect the contracts of the company. The power of the company to continue to deal with the contracts relating to the undertaking or property over which receiver or manager has been appointed ceases from the date of his appointment. He may decide to either carry on with the contract or terminate it.

**Winding up**

The commencement of winding up does not affect the contracts of the company unless the contract itself makes insolvency or liquidation a basis for its termination. Once a company has been wound up, such contracts stand terminated. A liquidator appointed has no power to carry on with the contracts.

**Scheme of Arrangement and Compromise**

The effect on contracts would depend on the terms of both the contract and the scheme of arrangement or compromise, as a reorganisation may be an act that determines a contract.

**5 Claims**

**5.1 Broadly, how do creditors claim amounts owed to them in each procedure?**

**Receivership**

Secured creditors, if not the appointer, will file their claims with the receiver. Unsecured creditors may commence an action against the receiver for the recovery of debt. Where the creditors have recovered judgments, they may levy execution on the assets of the company.

**Winding up**

Creditors must submit proof of their debts to the liquidator, who has power to reject the claims. Once the claims are accepted after proof, the liquidator has power to settle the claims which shall rank equally unless the assets are insufficient to meet the claims.

No recovery action can lie against a company after the commencement of a winding up petition as the court would readily grant stay of proceedings of such action in favour of a winding up petition. Any execution levied by the judgment creditor on the assets of a company in the process of winding up is rendered void in law.

This position is also applicable to schemes of arrangement.

**5.2 What is the ranking of claims in each procedure? In particular, do any specific types of claim have preferential status?**

**Receivership**

The law does not make provision for the ranking of claims in receivership. The duty of a receiver is to realise the security for the benefit of those on whose behalf he is appointed. If there is a surplus, he is empowered to rank other claims for the purpose of liquidation.

**Winding up**

In winding up the ranking of claims are as follows:

- (a) All local rates and charges due from the company at the relevant date, and having become due and payable within 12 months before that date, and all Pay-As-You-Earn tax deductions, assessed taxes, land tax, property or income tax assessed on or due from the company up to the annual day of assessment next before the relevant date, and in the case of Pay-As-You-Earn tax deductions.
- (b) Deductions under the National Provident Fund Act (Cap No. 88).
- (c) All wages or salary of any clerk or servant in respect of services rendered to the company.
- (d) All wages of any workman or labourer whether payable for time or for piece work, in respect of services rendered to the company.
- (e) All accrued holiday remuneration becoming payable to any other servant, workman or labourer (or in the case of his death to any other person in his rights) on the termination of his employment before or by the effect of the winding up order or resolution.
- (f) Compensation due under the Workmen Compensation Act.
- (g) Claims of General Creditors.

**Scheme of Arrangement**

The above ranking of claims in a scheme of arrangement will depend upon the terms agreed by the creditors.

**5.3 Are tax liabilities incurred during each procedure?**

In receivership, winding up and a scheme of arrangement, the receiver or liquidator appointed have an obligation to pay taxes such as ground rent, tenement rates, Value Added Tax and taxes arising on disposal of assets or income earned during the exercise and other taxes owed by the company prior to the exercise.

**6 Ending the Formal Procedure**

**6.1 Is there a process for “cramming down” creditors who do not approve proposals put forward in these procedures?**

There are no processes under the Act for cramming down dissenting creditors.

**6.2 What happens at the end of each procedure?**

**Receivership**

Once a receiver/manager is discharged, the control and management of the company revert to the owners. Every receiver or manager of a company must within one month after he ceases to act deliver to the Corporate Affairs Commission for registration a statement in the prescribed form showing his receipts and his payments during all the preceding periods since his appointment.

**Winding up**

Once a company has been wound up and the liquidator has distributed the assets among the members and creditors in satisfaction of its liabilities, the company can no longer exist in law.

The liquidator prepares his final accounts to be considered by the company’s general meeting and within seven (7) days thereafter to be filed at the Corporate Affairs Commission. The Commission will register it and on the expiration of 3 months from the registration of the return, the company shall be deemed dissolved. The powers of the directors and the members of the company then finally cease.

**Scheme of Arrangement and Compromise**

If the scheme requires the company to be wound up by special resolution, once the liquidator has sold all its assets to another body corporate and distributes the proceeds to members and creditors, the company no longer exists in law. The powers of the directors and members will also cease.

A scheme of compromise with creditors’ documents may be referred to the Securities and Exchange Commission for approval and thereafter must be filed with the Corporate Affairs Commission. Under the scheme of compromise, the company still exists and the powers of the directors are not affected.

**7 Alternative Forms of Restructuring**

**7.1 Is it common to achieve a restructuring outside a formal procedure in Nigeria? In what circumstances might this be possible?**

The increasing resort to court by debtors to thwart the liquidation process has resulted in heightened interest in using turnaround

management to promote corporate recovery. This can only happen however where a receiver/manager is appointed over the whole or a substantial part of the company's undertaking, the business is viable and the creditors cooperative.

**7.2 Is it possible to reorganise a debtor rather than realise its assets and business?**

A receiver who is also appointed as manager has a statutory duty not only to realise the assets of the company but to manage the affairs of the company in the best interest of the company so as to preserve its assets, further its business and promote the purposes for which it was formed. A debt/equity swap may achieve this.

**7.3 Is it possible to achieve an expedited restructuring of the debtor by means of a pre-packaged sale? How is such a sale effected?**

A pre-packaged sale is not provided for under either the Companies and Allied Matters Act or the Companies Winding Up Rules, and so is an unknown procedure. It may be liable to attack as a fraudulent preference of creditors.



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**8 International**

**8.1 What would be the approach in Nigeria to recognising a procedure started in another jurisdiction?**

There is no statutory provision on cross-border insolvency in Nigeria. Also, Nigeria has not as yet adopted the UNCITRAL Model Law on Cross-Border Insolvency although moves are afoot to enact insolvency legislation based on the Model Law. Therefore any procedure started in another country may not be recognised in Nigeria and foreign creditors will not be treated differently from local creditors.

However foreign insolvency judgments and orders may be enforced in Nigeria if they comply with the terms of the Foreign Judgment (Reciprocal Enforcement) Act Cap. F35, Laws of the Federation of Nigeria, 2004 which requires the existence of a wholly or partly unsatisfied foreign judgment debt. The law is based on reciprocity of treatment of similar judgments in the originating country.



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