Insolvency Law Reforms in Nigeria – Where are we Going?

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Introduction

In the Doing Business 2018 World Bank Group Flagship Report ("the DB Report"), Nigeria's Distance to Frontier (DTF) score on resolving insolvency was 30.60 on a scale of 1 - 100. In summary, the DB Report provides that the time frame for resolving insolvency is two years; the cost of resolving insolvency is 22.0% of the estate; and the recovery rate is 27.8 cents on a dollar.

Nigeria's current DTF score on resolving insolvency is a direct fallout of the legal framework governing corporate insolvency in Nigeria (i.e. the Companies and Allied Matters Act, Chapter C20 Laws of the Federation of Nigeria, 2004). This score may not offer comfort to prospective investors or serve as an incentive for foreign direct investment from economies with higher DTF scores.

The need for reform

A valid reason to explain Nigeria's DTF score on resolving insolvency would be the deficiency of Nigeria's insolvency framework in comparison to current global trends and standards. For example, the current legal framework makes no effective provisions for business rescue of financially distressed companies. The corporate insolvency options available to financially distressed companies are receivership, liquidation, and arrangement and compromise. In practice, liquidation and receivership are most common. These options are geared towards a dissolution of the company.

In addition, there are no express legal provisions prioritising claims of secured creditors above preferential payments and all other classes of creditors. Due to the limited nature of the insolvency provisions, and the uncertainties created, creditors and companies often resort to court for interpretation of legal provisions, leading to delays with resolving insolvency.

The proposed reforms - where are we going?

In recognition of the need to promote business rescue, create enabling conditions for investment and improve the ease of doing business in Nigeria, the Nigerian Senate on 15th May 2018, passed the Companies and Allied Matters Act (Repeal and Re-enactment) Bill ("the CAMA Bill"). The CAMA Bill has been presented to the second legislative house of the Nigerian National Assembly, for approval, before it can be assented to by the President.

Although the CAMA Bill has not been passed into law, it seeks to bridge the gap in the existing legal framework for corporate insolvency. The key advantage of the CAMA Bill with respect to corporate insolvency is that it prioritizes business rescue above liquidation and receivership. Therefore, in line with international best practices, the insolvency reforms have introduced corporate reorganization for financially distressed companies (or companies on the verge of financial distress) such as Company Voluntary Arrangement ("CVA") and Administration. It is expected that before liquidation or receivership is considered, options such as CVA and Administration are explored.

In a CVA, the creditors approve a debt composition or scheme of arrangement to rescue the company from its financial distress. A liquidator can also initiate a CVA to rescue the company from liquidation. Likewise, the main objective of administration is for a business rescue of a company in potential financial distress. To ensure that this objective is achieved, the insolvency reforms make adequate provisions (amongst others) for moratorium against enforcement actions by creditors during administration.

With respect to creditors' winding up, the insolvency reforms have increased the trigger debt for commencement of a creditor's winding up from N2,000 (approximately $6) to N200,000 (approximately $552). The reforms have also introduced provisions prioritising claims of secured creditors above preferential payments and all other classes of creditors. In addition, it now allows certain secured creditors to commence enforcement/sequestration or attachment of assets during liquidation.

Furthermore, the insolvency reforms now increase the period for determination of fraudulent preferences with express provisions allowing the courts to make orders restoring the company to the position the company would have been in, had it not engaged in the transaction. Where transactions are suspected to have been carried out at an under value before the onset of insolvency, a liquidator or administrator may apply to court for an order, restoring the distressed company to a position it was in, prior to engaging in the transaction. Also, during an administration, company voluntary arrangement, and or liquidation, a company may enter into contracts for supply of essential services, on certain conditions.

The reforms have also specifically defined the term "insolvency practitioner" and provided the educational and professional requirements for qualification as an insolvency practitioner.

Conclusion

Overall, the reforms will bring about positive developments in resolving insolvency since they significantly change the focus of insolvency in Nigeria from business liquidation to business rescue. This will in turn create and ensure confidence in the insolvency regime in Nigeria.

A brilliant aspect of the insolvency reforms is that it now seeks to balance out the interests of both the creditors and the company (debtor). Without the reforms, the Nigerian insolvency framework has been argued to mostly favour the creditors since they are able to initiate winding up proceedings over a nominal amount. With the reforms however, while creditors have the advantage of approving proposals during administration and CVA, the company will also take benefit from the overall business rescue.

It is anticipated that the reforms would reduce the risk of corporate insolvency and directly boost foreign investment in Nigeria. Consequently, it is expected that the CAMA Bill will improve Nigeria's ease of doing business rankings and its DTF score on resolving insolvency by the year 2019, if the CAMA Bill is passed into law.

Recommendation

Over the past decade, Nigeria has experienced a considerable amount of foreign direct and foreign portfolio investment. In view of this, it is expected that insolvency reforms should take into account provisions addressing cross-border insolvency related issues. While the CAMA Bill makes no provision for this, it is recommended that the UNCITRAL Model Law on Cross-border Insolvency should be adopted in Nigeria. If adopted, this will provide a more robust insolvency regime in Nigeria and reflect Nigeria as a country which seeks to adequately protect the interests of all stakeholders.