

Nigeria

Aina Blankson LP

Non-performing loans in banks

As part of its efforts towards strengthening the Nigerian banking system, the Federal Government of Nigeria recently enacted the Asset Management Corporation of Nigeria Act 2010 (the Act). The Act, which established the Asset Management Corporation of Nigeria (the Corporation) to purchase non-performing loans from Nigerian banks in order to free up the banks' balance sheets, revive lending and restore confidence in the banks, also made substantial modifications to certain aspects of Nigerian substantive law including laws regulating companies, bankruptcy and securities.

Prior to the enactment of the Act, the Companies and Allied Matters Act CAP C20 Laws of the Federation of Nigeria 2004 (Cama) excluded company directors from liability for acts performed on behalf of their companies. This was however made subject to situations where a company received a loan for a specific purpose, and with intent to defraud, failed to apply the loan for the purpose for which it was received.

The Act substantially modifies this rule of company law. Not only does the Act hold directors of debtor companies liable for non-performing loans secured from relevant financial institutions, it grants the Corporation power to hold property of the directors for fourteen days before commencing a debt recovery suit.

The only requirement is for the Corporation to show reasonable cause to believe that the director is the bona fide owner of the property. There is no requirement for proof of wrongdoing in line with Cama. Furthermore, the Act made no reference to Cama on the issue, giving an indication that the provisions of both laws would apply side by side. It remains to be seen how the courts would reconcile the provisions in practice.

The Act further simplifies the process for declaring a person bankrupt in Nigeria, which prior to the Act was quite cumbersome, and required lengthy applications. It removed the requirement for debtors whose loans are non-performing to commit any of the acts of bankruptcy stipulated under the Bankruptcy Act CAP

B2 Laws of the Federation of Nigeria 2004 (BAN), and permits the Corporation to obtain a receiving order against such a debtor from the same court where the debt recovery suit was filed. Once such order is made, BAN sets in to deem the debtor bankrupt pursuant to its provisions.

Substantial reforms were also recorded in Nigerian securities law. To circumvent the difficulties that could arise where assets comprised in a loan agreement are restricted from transfer to third parties, the Act provides for assignments to the Corporation to take effect notwithstanding any restrictions on acquisition, assignment or transfer, or requirement for consent, notification, registration, authorisation or license. This provision is the first of its kind in Nigeria.

In addition, the Act requires relevant financial institutions to act as trustees of the Corporation where it would otherwise be impossible to transfer the underlying assets of a non-performing loan.

The Act is subject to litigations from stakeholders challenging the validity of certain provisions which confer on the Governor of the Central Bank of Nigeria power to designate assets to be purchased by the Corporation without representations from banks, shareholders or debtors.

Nigerian Courts are yet to resolve the pending suits. However, the Corporation has commenced operations and is currently purchasing designated non-performing loans from Nigerian banks. It remains to be seen how Nigerian Courts would resolve some of the uncertainties arising from the Act.

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