
***Implications of the Asset
Management Corporation of
Nigeria Act 2010 on some
Extant Laws: Vol. 2***

Content:

Introduction

Reforms in Securities Law

Procedural Law Reforms

Conclusion

Introduction

The purpose of this newsletter is to examine the implications of the Asset Management Corporation of Nigeria Act 2010 ("AMCON" or "the Act") in the Nigerian legal system. The newsletter specifically examines certain provisions of the Act relating to securities and procedural laws.

This edition is sequel to an earlier edition¹ where the implications of the Act on Nigerian company and bankruptcy laws were examined.

Reforms in Securities Law

The Nigerian legal system has experienced minimal development in this area of law. It is currently still focused on traditional areas of law including contract law, company law, commercial law, banking, bankruptcy law etc. As yet, the only law regulating capital market operations remains the Investment and Securities Act (ISA)² and the attendant Rules and Regulations of the Securities and Exchange Commission 2007.³ The Nigerian Companies Act (CAMA),⁴ as the general corporal law, also regulates certain aspects of the company securities only to the extent that the ISA permits. AMCON has however revolutionised this area of law in Nigeria, bringing it in line with international regulations on asset transfer. Specifically, the Act dealt with the two areas discussed below, loan transfer and collateral securities.

¹ See the Newsletter: *Implications of the Asset Management Corporation of Nigeria Act 2010 on some Extant Laws*

² No 29, 2007

³ As amended in March 2010

⁴ Cap C20, Laws of the Federation of Nigeria, 2004



a) Loan transfer

Most loan agreements restrict lenders' rights to transfer loans without the prior consent of the borrower. These restrictions are found in most loan agreements with banks in Nigeria. The practice seems quite understandable from the borrower's perspective as some borrowers may have certain rights they may wish to protect under the loan contract with the lender which may not survive the transfer to a third party, such as any right of set-off against the lender. There is also the possibility that borrowers may prefer to continue their relationship with the lender due to some long standing relationship between them, as opposed to a third party with whom they have had no prior relations and who may aggressively pursue debt recovery actions against them. Given that the debts in AMCON's case are non-performing, it is likely that the borrowers would prefer to continue their relationship with the original lender.

To circumvent the difficulties that may arise where relevant loan agreements contain such restrictions, the Act provides that any assignment made to the Asset Management Corporation of Nigeria (the "Corporation") shall take effect notwithstanding any contractual restrictions on acquisition, assignment or transfer of the bank asset or any requirement for consent, notification, registration, authorisation, or license.⁵

A Loan or debt is described as a thing (chose) in action; a term used to describe personal rights to property which can only be claimed or enforced by action. Such rights cannot be enforced by taking physical possession. There are several mechanisms by which transfer of debt can be achieved. The transfer may be structured as an assignment, which may be

legal or equitable. It may also be structured as a novation or sub-participation. A debt may also be transferred by a declaration of trust of the benefit of the transferor's rights in favour of the transferee. With respect to AMCON, the draftsman preferred only one mechanism of transfer, transfer by way of assignment, and that forms the focus of the discussion in this part.

An assignment may be legal (or absolute) or equitable. In English Law, section 136 of the Law of Property Act 1925 recognises that a debt or other legal thing in action may be assigned at law. It however sets out the requirements that must be met for such assignments to be valid in law. First, it requires that the assignment be in writing and signed by the assignor. Secondly, it requires such assignments to be absolute and not by way of charge. Thirdly, it requires notice of the assignment to be given to the debtor, trustee or any other person from whom the assignor would have been entitled to claim such debt or thing in action. Where these requirements are met, section 136 of the Law of Property Act stipulates that the assignment will be recognised at common law from the date the notice was given. Consequently, the legal right in the debt and other legal or other remedies is transferred to the assignee, who then obtains the power to give the debtor a good discharge of the debt without the concurrence of the assignor. The assignee therefore obtains the right to sue the debtor in its own name without joining the assignor. The section however makes the rights of the assignee subject to any equities having priorities over it. Equity on the other hand, makes it possible to have assignments in situations where the requirements of the Law of Property Act could not be met, as it does not require any form or procedure. However, even though an assignment may be perfectly valid in equity

⁵ Section 34(2) AMCON



without notice, notice is obviously desirable, since as in the case of statutory assignment, until he receives it the debtor is entitled to treat the assignor as his creditor and to discharge his debts by payment to him; the giving of notice may prevent further equities attaching to the debt; and may affect priorities.⁶

One difficulty with assignments is that even though the rights of a contract may be assigned, it may not always be possible to assign obligations attaching to a contract. Curiously though, AMCON contains provisions that render the Corporation subject to all obligations of the eligible financial institution in relation to concerned assets, debtors, guarantors, surety or any receiver, liquidator, examiner or other concerned person.⁷ By that provision, the relevant financial institution ceases to have those obligations. It is debatable how this provision would work in practice, say for instance where obligations to make further advances to the borrower still exist. Since the loans in this case are non-performing, this may not pose any difficulty, as the obligation to make further advances may have ceased to exist. Even where it exists, the loan agreements may contain provisions restricting the obligation to advance further funds in the event of borrower's non-performance or sole call.

As previously mentioned, parties may by contract prohibit or restrict assignment of a debt. Relying on the leading case of *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*,⁸ Chitty posits that if rights arising under a contract are declared incapable of assignment, a purported assignment will be invalid as

against the debtor.⁹ It may however be effective as between the assignee and assignor, as any attempt to invalidate the latter assignment may be ineffective on grounds of public policy. By the provisions of section 34(2), AMCON has effectively taken care of the difficulties that may have arisen from contractual restrictions on assignment of eligible bank assets. That is not to say however, that banks are completely absolved from liability. The banks may be exposed to liability for breach of the provisions of the loan agreement with the debtor where for instance any requirement for consent was not complied with.

Interestingly, the Act contains provisions requiring eligible financial institutions to give relevant notice of transfer of assets to the borrowers after the transfer has been made.¹⁰ However, it absolves the Corporation from liability for failure or delay in notifying relevant debtors of the assignment to the Corporation.¹¹ It also preserves the validity of transferred assets notwithstanding such failure or delay.

b) Collateral Securities

Traditionally, bank loans are backed by collateral taken from borrowers mainly as a form of guarantee for repayment of debt or as a form of security to the lender in the event of bankruptcy of the borrower. Historically, real property constituted a greater percentage of assets used as collateral for bank loans in Nigeria. Following the market boom a few years ago, in the wake of the recapitalisation of Nigerian banks in 2005, several other assets were accepted as security for the huge loans issued by banks such as shares, bonds and

⁶ *Chitty on Contracts* (28th edn, London: Sweet & Maxwell, 1999), para 19-020, 1171

⁷ Section 34(1)

⁸ [1994] 1 A.C. 85

⁹ *Chitty on Contract* (n5) above, para 19-043, 1182

¹⁰ Section 33(1) AMCON

¹¹ Section 33(2) AMCON



other securities. With the global market crisis, the Nigerian capital market experienced huge losses and these securities became largely devalued. With this came the inability of borrowers to repay their loans. Given that the value of the assets offered as collateral had greatly depreciated with majority of them near worthless, a greater percentage of the loans issued by these banks became non-performing.

The Corporation has now been established to buy up these non-performing loans from Nigerian banks. To aid the process, the Act expressly allows the transfer of eligible assets, as well as any landed property, collateral or other security interests used as security for a loan.¹² Often an assignment of a loan may be construed so as to include any securities for the loan. However, this may not be applicable in all instances. Usually, an assignment of security may need to be registered. Parties may however create a trust in favour of the assignee where registration of the relevant securities poses a problem or becomes impracticable. Nigeria, like most common law countries, recognises the traditional forms of security including, pledge, mortgage and charge.

In Nigeria, in addition to entering into a loan agreement, the borrower may be required to enter into a debenture or security agreement, which is a document under which the borrower creates security in favour of the bank for a loan. This security may be by way of a fixed charge over the borrower's fixed assets (such as plants and machinery).¹³ Consequently, the borrower may be unable to dispose or otherwise do anything to devalue any of those assets without the bank's consent. The bank would also have recourse to the

assets if the borrower defaults on the loan. In addition, the bank may also wish to secure the remaining assets of the borrower which may fluctuate from time to time, e.g. stocks and cash. In such an event, the bank would create a floating charge over the whole undertaking of the borrower.¹⁴ A floating charge allows the borrower to deal with the assets in its ordinary course of business without the lender's consent. However, in the event of a default under the loan agreement, the floating charge will crystallize, and be converted to a fixed charge.¹⁵ Consequently, the borrower would be required to obtain the consent of the lender before it can deal with the assets. Charges are registrable instruments in Nigeria and must be registered to be effective in law.¹⁶ Consequently, where a company acquires a property which is subject to a registrable charge, the company must cause a certified copy of the instrument together with the particulars of the charge to be delivered to the Corporate Affairs Commission (the Commission) for registration within 90 days.¹⁷ If the charge is on land and is registered under some other enactment before the land is acquired by the company, it is sufficient if a duly certified copy of the charge is delivered to the Commission.¹⁸

Banks also use other forms of security for loans including mortgage over assets of the borrower such as land or shares. Possession or retention of such assets entitles the bank to sell in the event of a default by the borrower. The Land Use Act requires that a mortgage over land be registered with the relevant government authority where the land is

¹² Section 36(1) AMCON

¹³ Sections 179 and 173 CAMA

¹⁴ Section 178(1) CAMA

¹⁵ Section 178(2) CAMA

¹⁶ Section 197 CAMA

¹⁷ *J. Orojo*, *Company Law and Practice in Nigeria*, (3rd edn, Mbeyi & Associates (Nig.) Ltd, 1992), 209

¹⁸ *Ibid*



located.¹⁹ To be effective, such property would need to be perfected in accordance with the Land Use Act. Another form of security which banks sometimes utilise is pledge. A pledge can be made over assets capable of delivery such as bearer bonds or shares.

The processes for registration or perfection of some of these securities are usually cumbersome and time-consuming and may require the agreement of all the parties such as eligible financial institution, debtor and the Corporation. The Act has however made provisions to circumvent these difficulties. First, it overrides any requirement for registration of assets under any law applicable in Nigeria.²⁰ Secondly, it declares a trust in favour of the Corporation over assets offered as security for loans. Such that where it becomes impracticable to transfer underlying assets to the Corporation, eligible financial institutions may be appointed trustees over the assets in favour of the Corporation.²¹ The Act uses the word "bare trustee" to describe the trust relationship created between the banks and the Corporation.

Given that the provisions of the Act specifically relate to the assets comprised in the Act, namely non-performing assets of selected financial institutions, the fundamental changes would not be applicable in other transactions relating to sale and purchase of financial assets. There may therefore be need for the National Assembly to embark on a comprehensive reform of the law relating to securities in Nigeria.

Procedural Law Reform

The Act also made procedural reforms. It mandates the Chief Judge of the Federal High

Court to designate any Judge of the Court to determine suits arising under the Act.²² It further stipulates accelerated hearing for such suits. This is a rule of practice for early determination of suits, which is traditionally included in the Rules of Court or Practice Directions. It may have been sufficient to designate the determination of suits arising under the Act to the Federal High Court, pursuant to which the Chief Judge of the Court would make a direction whether or not such suits would be determined by accelerated hearing. It is submitted that scheduling the expeditious hearing of suits emanating from the Act would require careful management by the judiciary, and is a matter which should have been left to the discretion and direction of the Chief Judge of the Federal High Court.

Conclusion

As earlier advocated in the previous edition of this newsletter, there is need for the National Assembly to embark on comprehensive harmonisation of laws in Nigeria, especially in areas the Act attempted reforms. Such would ensure certainty within the system.

¹⁹ Sections 21 and 22 Land Use Act 1978

²⁰ Section 45 AMCON

²¹ Section 36(1) AMCON

²² Section 53 AMCON



Disclaimer: This document serves merely as a note and is not intended to provide legal advice to any person or group of persons whether natural or corporate regarding the issues discussed herein. All persons desirous of legal advice should therefore contact a lawyer. Aina Blankson LP shall not be liable for any breach or loss resulting from reliance on any part of this newsletter.

For further information, please contact:

- *Abayomi Alabi* [**a.alabi@ainablankson.com**](mailto:a.alabi@ainablankson.com)
- *Chinonyelum Uwazie* [**c.uwazie@ainablankson.com**](mailto:c.uwazie@ainablankson.com)
- *Kanayo Okoye* [**k.okoye@ainablankson.com**](mailto:k.okoye@ainablankson.com)
- *Paul Okonji* [**p.okonji@ainablankson.com**](mailto:p.okonji@ainablankson.com)