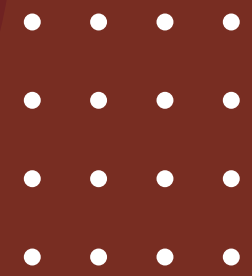


ÁLEX

EVALUATION OF THE LEGISLATIVE FRAMEWORK OF INSOLVENCY AND BANKRUPTCY IN NIGERIA; REVIEW OF PROTECTIVE SCHEMES

Presented at the
National Workshop on the Creation of the 21st Century Credit Oriented Economy (2023)
By OLA OREWALE, FBR.
Partner,
Debt Recovery & Insolvency Practice Group





EXISTING LAWS ON INSOLVENCY AND BANKRUPTCY

Companies

- Companies and Allied Matters Act, 2020
- Insolvency Regulations 2022
- Companies Winding Up Rules, 2020
- Companies Proceedings Rules, 2020
- Constitution of the Federal Republic of Nigeria 1999 (as amended)
- The Rules of Court

Financial Institutions

- Central Banks of Nigeria Act 2004
- Banks & Other Financial Institutions Act 2004
- NDIC Act, 2004
- Federal Mortgage Banks Act 2004
- AMCON Act 2004 (As amended)



AELEX



EXISTING LAWS ON INSOLVENCY AND BANKRUPTCY (CONT'D)

Natural persons

- Bankruptcy Act, Chapter B2 LFN, 2004;
- Bankruptcy (Amendment) Act
- Bankruptcy Rules, 1990

Secured Debts

- The following laws may apply depending on the nature of the secured assets, among others:
 - The Land Use Act, 1978
 - Property and Conveyancing Law applicable in the former Western Region of Nigeria;
 - Conveyancing Act, 1881, applicable in States in the former Eastern Region, which would include River state, Bayelsa state, Cross-River, Akwa-Ibom, Ebonyi, Abia, Imo, Enugu, Anambra, and all states in Northern Nigeria.
 - Mortgage and Property Law of Lagos State, 2010, as amended by the Mortgage and Property Law of Lagos State (Amendment) Act 2015.



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK

Action for recovery of debt

- Before an action to recover a simple debt is commenced in court, a letter of demand must be written, setting out the principal sum owed and the accrued interests thereon, if any, and the same must be served on the debtor (natural or artificial person).
- In an action for debt recovery, the service of the demand letter is a precondition to activating the jurisdiction of the court. See: Mbu v. Stanbic IBTC (2016) 12 NWLR (Pt. 1527) 397
- Upon the service of the demand notice, the following options are available to the debtor:



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK

- Admit and pay the debt in part or full;
- Admit the debt or any part of it without making payment; or/and
- Dispute the existence of the debt or the amount owed.

AELEX



• • • •
• • • •
• • • •
• • • •

EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

Sale of assets

- Unsecured debt:

- An unsecured creditor may only exercise the power of sale if there is a prior (preferably) written agreement to that effect between the debtor and the creditor.

Secured debt:

- A secured creditor or mortgagee may also sell the secured assets upon the debt becoming enforceable if such power is conferred under the transaction document or under a power donated under law.
- The power to sell becomes exercisable upon any of the following events;



• • • •
• • • •
• • • •
• • • •

EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

- Notice requiring payment of the mortgaged money has been served on the debtor, and default has been made in the payment of the mortgaged money, or of any part thereof, for three months after such service; or
- Some interest under the mortgage is in arrear and unpaid for two months after becoming due.
- A creditor/mortgagee has the power to sell the mortgaged property either by public auction or by private contract.

Appointment of a receiver or manager

- The appointment of the receiver or manager can either be done out of the court or by the court.



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

- The court may, on the application of any person interested, appoint a receiver or a receiver and manager of the property or undertaking of a company if the –
 - principal money borrowed by the company or the interest is in arrear; or
 - security or property is in jeopardy.
- A receiver may be appointed out of court by a debenture holder;
 - if the company ceases to pay its debt as they fall due;
 - or if the company fails to pay any instalment of interest, or the whole, part of the principal or any premium thereon, within one month after it becomes due. See: sections 232 & 233 of CAMA 2020.
- The court may appoint a receiver or manager on the application of the holder of a floating or fixed charge upon the security becoming enforceable or before becoming enforceable if the security is in jeopardy. Section 205 of CAMA

AELEX




EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

Liquidation of the company

- Liquidation by Court:
 - A creditor of a company may present a petition for the compulsory winding up of the company based on the company's inability to pay its debt. Section 571(d) of CAMA
 - A company is deemed to be unable to pay its debts upon the satisfaction of any of the following conditions:



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

- a creditor, by assignment or otherwise, to whom the company is indebted in a sum to be determined by a regulation issued by the Commission, then due, has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; (Up until the signing into law of the Business Facilitation (Miscellaneous Provisions) Act, 2023 on 17 February 2023, the monetary threshold for the institution of a winding-up action was exceeding N200,000. The CAC is yet to issue a regulation stating a new threshold).
- 



AELEX



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

- execution or other process issued on a judgment, act, or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- the Court, after considering any contingent or prospective liability of the company, is satisfied that the company cannot pay its debts.

After hearing the petition, a liquidator is appointed is appointed by the court, whose duty is to gather and dispose, and/or distribute the assets of the company in the manner prescribed by law.

- Voluntary winding-up: the company may internally decide to voluntarily liquidate its assets for the purpose of distributing the same to its creditors. The modes of voluntary winding-up available are:



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

- Members' voluntary winding-up: this mode is only available to a solvent company, i.e. a company whose assets exceed its liabilities. In a members' voluntary winding-up, the directors of the company to be wound-up are required to depose to a Statutory Declaration of Solvency ("SDS") before the members' resolution for winding-up is passed.
- The SDS is an attestation to the company's ability to pay its debts within a period not exceeding 12 months of the commencement of the winding-up proceedings.
 - Creditors' voluntary winding-up: A creditors' voluntary winding up is utilized when the company intending to wind up its affairs is insolvent i.e. the company's liabilities exceed its assets, as a result of which it cannot pay its debts. In a creditors' voluntary winding-up, the directors are not required to depose to an SDS. Also, the proceedings are supervised by the creditors of the company



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

Presentation of Bankruptcy Petition

- Bankruptcy is a medium through which the State, acting through appointed officials, realises the assets of a debtor for the purpose of distributing the same among its creditors, subject to the order of priority prescribed by law.
- While a financially distressed debtor may be considered insolvent, the status of bankruptcy arises after such a debtor is adjudged bankrupt.

Commencement of bankruptcy proceedings

- The proceeding is commenced upon the filing or presentation of a bankruptcy petition. The is required to be verified by an affidavit of the creditor or of some person on his behalf, having knowledge of the facts. See section 7(1) (a) of the Act The court may consolidate two or more petitions against the same debtor or against joint debtors. See section 98 of the Act.



• • • •
• • • •
• • • •
• • • •

EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

Grounds for the presentation of a Bankruptcy Petition

- A creditor seeking an adjudication of bankruptcy against a debtor must establish that:
- an act of bankruptcy has occurred or if more than one act of bankruptcy is alleged, acts of bankruptcy; See section 7 (2) of the Act
- and if satisfied with the proof, may make a receiving order in pursuance of the petition; and
- the creditor is entitled to present a bankruptcy petition.

AÉLEX



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

Presentation of Bankruptcy Petition (contd)

- Acts of bankruptcy
 - if a creditor has obtained a final judgment or final order against a debtor for any amount, and execution thereon not having been stayed;
 - if execution against him has been levied by seizure of his goods under process in an action or proceedings in the court, and the goods have either been sold or held by the bailiff for twenty-one days;
 - if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself;
 - if he suspends or gives notice that he is about to suspend the payment of his debts to any of his creditors; or

AELEX



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

- if under a credit agreement the creditor becomes entitled to file a bankruptcy petition; or
- if in Nigeria or elsewhere, he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditor generally; or
- if in Nigeria or elsewhere, he makes a fraudulent conveyance gift, delivery or transfer of his property or any part thereof, with an intent to defeat or delay the claim of his creditors; or

AELEX



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

Presentation of Bankruptcy Petition (contd)

- Acts of bankruptcy
 - if in Nigeria or elsewhere, he makes any conveyance or transfer of his property or any part thereof; or created any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt; or
 - if with intent to defeat or delay the claims of his creditors, he departs out of Nigeria, or being out of Nigeria remains out of Nigeria, or departs from his dwelling, or otherwise absents himself, or begins to keep house.

AELEX



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

- the debtor is ordinarily resident in Nigeria, or within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in Nigeria, or has carried on business in Nigeria, personally or by means of an agent or manager, or within the said period has been a member of a firm or partnership of persons which has carried on business in Nigeria by means of a partner or partners or an agent or manager.
- Upon hearing of the petition, the Court may make a receiving order appointing the Official Receiver to receive the property of the debtor.
- Effect of the receiving order
 - No creditor shall have any remedy against the property of debtor or person of the debtor.

AELEX



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

- No creditor can commence any legal proceedings against the property or person of the debtor except with the leave of court.
- Notice of every order adjudging a debtor bankrupt, stating the name, address and description of the bankrupt, the date of the adjudication and the name of the trustee, shall be published in the Federal Gazette and shall be advertised in at least two newspapers, or as may be prescribed.
- Public examination of the debtor
 - The examination shall be held as soon as possible after the expiration of the time for the submission of the debtor's statement of affairs.
 - During the examination, the debtor will be examined upon oath he will be required to respond to questions posed by the court or by any creditor who has tendered a proof, or his representative authorised in writing, any question concerning his affairs and the causes of his failure.

ÆLEX



EXISTING INSOLVENCY PROCEDURES AND TOOLS UNDER THE LEGISLATIVE FRAMEWORK (CONT'D)

Presentation of Bankruptcy Petition (cont'd)

- Adjudication of Bankruptcy, see section 20(1) & (2) of the Act :
 - The court shall adjudge the debtor bankrupt after the making of a receiving order if the creditors –
 - at the first or any subsequent meeting resolve by ordinary resolution that the debtor be adjudged bankrupt;
 - Pass no resolution: or
 - if the creditors do not meet; or
 - if a composition or scheme is not approved within fourteen days after the conclusion of the examination of the debtor or such further time as the court may allow, and thereupon the property of the bankrupt shall become divisible among his creditors and shall vest in a trustee.
-



ALEA



CHALLENGES POSED BY THE LEGISLATIVE FRAMEWORK

- The insolvency provisions of the Act are outdated and unattractive to direct foreign investment or foreign portfolio investment.
- The procedures in the Bankruptcy Act are extensively cumbersome and antithetical to ease of doing business and promotion of investment in Nigeria.
- Lack of specialised or designated courts for efficient and timely disposal of insolvency proceedings.
- Absence of stand-alone Act on insolvency legislations to promote efficiency and certainty in the insolvency procedures.
- Undue protraction of insolvency proceedings foisted by the lack of efficiency in the conduct of insolvency proceedings.
- Lack of balance between the interest of the creditors and the debtor company: the old regime was more favourable to the debtors and was condemned as being antagonistic to the interest of creditors.

AELEX



CHALLENGES POSED BY THE LEGISLATIVE FRAMEWORK (CONT'D)

- For instance, under the Bankruptcy Act, after the receiving order was made the debtor would be subject to unnecessary public examination and thereby making the procedure uninteresting to the creditors.
- Crippling of the right of the secured creditors to enforce their securities during liquidation and thereby creating unnecessary bottlenecks on lending and investment. See Section 414 of the old CAMA.
- Slim chances of full recovery of debt for instance due to the indiscriminate methods employed in realising the assets of the company during receivership, receivership has been adjudged to be an inefficient way of debt recovery

AELEX



REVIEW OF PROTECTIVE SCHEMES OR INSOLVENCY REFORMS UNDER THE CAMA 2020

- A number of new protective schemes or reforms have been introduced into the Nigerian insolvency and restructuring regime with the advent of the CAMA 2020 and the Insolvency Regulations, 2022.
- The schemes or reforms are aimed at promoting business rescue and restructuring of small, medium and large enterprises. These reforms are;

Companies Voluntary Arrangement (CVA):

- This is a procedure that can be explored internally by a financially distressed company, particularly the SMEs.
- Under a CVA, the directors of a company going through financial difficulty may make a proposal to its creditors for a composition in satisfaction of the company's debts or a scheme of arrangement of its affairs.



ALEX



REVIEW OF PROTECTIVE SCHEMES OR INSOLVENCY REFORMS UNDER THE CAMA 2020

- Such a proposal provides for some person (the nominee) to act in relation to the voluntary arrangement either as a trustee or otherwise for the purpose of supervising its implementation and such a nominee must be a person who is qualified to act as an insolvency practitioner in relation to the company.
- The proposal may be made by the administrator while the company is in administration or the liquidator if the company is in liquidation. See Section 434(3) CAMA 2020.

Administration:

- As a business rescue mechanism, the primary goal of an administration is to ensure the survival of a distressed company, unless it is impossible to do so.
- An administrator may be appointed by the court on the application of one or more of the following persons:





REVIEW OF PROTECTIVE SCHEMES OR INSOLVENCY REFORMS UNDER THE CAMA 2020

- the company;
 - its directors;
 - one or more creditors of the company
 - the designated officer of the Federal High Court appointed to act as a receiver.
- An administrator may also be appointed out of court, either by a company, its directors, or the holder of a floating charge.
 - The duty of the administrator is to do all such things as may be necessary for the management of the affairs, business and property of the company and must perform this function with the following objectives:
 - to rescue the company, the whole or any part of its undertaking, as a going concern;



AELEX



REVIEW OF PROTECTIVE SCHEMES OR INSOLVENCY REFORMS UNDER THE CAMA 2020

- to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up without first being in administration; and
- to realise property in order to make a distribution to one or more secured or preferential creditors.
- The appointment of the administrator is effective for a period of one year subject to a subsequent six-month extension by the court. See Section 513 CAMA 2020.

Advantages of the administration procedure


- A court is barred from making an order for the winding up of the company in administration.



AELEX



REVIEW OF PROTECTIVE SCHEMES OR INSOLVENCY REFORMS UNDER THE CAMA 2020

- The members of the company are barred from making a resolution for the voluntary winding up of the company.
 - The creditors of the company in administration are barred during the statutory moratorium period from enforcing their securities, except with the consent of the administrator or court.
 - No execution, distress and legal process can be issued against the company in administration without the consent of the administrator or court.
 - A desperate secured or preferential creditor can be paid-off by the administrator. See: section 502 of CAMA.
- 




AELEX



REVIEW OF PROTECTIVE SCHEMES OR INSOLVENCY REFORMS UNDER THE CAMA 2020

Advantages of the administration procedure

- Protection of secured creditors
 - A secured creditors can enforce its securities during liquidation and CVA and after the moratorium period during administration. Section 577 of CAMA.
 - Primacy of the interest of secured creditors
 - Secured creditors have now been given prime consideration over the interest of preferential creditors in the distribution of the assets of the company. See section 657(6)(a) of CAMA 2020.
 - Trading and post commencement financing
 - A company in administration, liquidation or CVA is allowed to continue to trade in essential goods and services and obtain post commencement financing for the smooth and effective running of the company. Section 665 & 237(3) of CAMA.
- 



AELEX



REVIEW OF PROTECTIVE SCHEMES OR INSOLVENCY REFORMS UNDER THE CAMA 2020

Arrangement and Compromise

- With respect to arrangement and compromise, no winding-up petition or enforcement action by a creditor (secured or unsecured) shall be entertained against any company or its assets that have commenced a process of arrangement and compromise with its creditors for six months from the time that the company has commenced arrangement and compromise. See section 717 of CAMA 2020.

Netting:

- Under the new regime set-off agreements previously agreed between a company against whom insolvency proceedings have been commenced and any person are enforceable and protected against any liquidator, administrator, nominee, supervisor, receiver, trustee, conservator or other individual, person or entity which administers the affairs of an insolvent party during an insolvency proceeding under the laws of Nigeria. See Section 718 and 721(1) CAMA 2020.
-



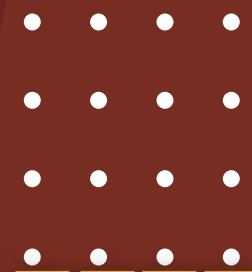
AELEX



EFFECT OF THE INNOVATIONS UNDER THE NEW REGIME

- Efficacious disposal of insolvency proceedings. By specifying timelines for insolvency procedures, the extant regime promotes efficient and speedy conclusions of insolvency and restructuring procedures.
- Enhancement of transparency and accountability of insolvency practitioners in the discharge of their functions.
- Creation of balance between the interest of creditors and debtors: there is a shift from the previous hostile aggressive posturing of insolvency proceedings to a more progressive regime that is more attuned to business rescue.

AELEX



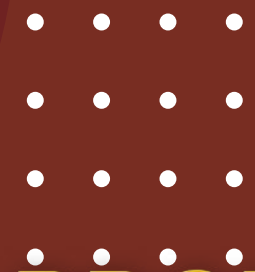
EFFECT OF THE INNOVATIONS UNDER THE NEW REGIME

- Enabling effective business rescue and overall turnaround of companies in financial distress. The current regime has optimised the chances of the rescue of the company. For instance, a financially distressed company that is under administration may be able to access funds from new creditors and continue its business operations. To ensure the continuance of business operations, an officeholder (administrator, the nominee, the supervisor, the liquidator or provisional liquidator) in charge of such company in the course of administration, company voluntary arrangement and liquidation may engage a supplier to provide necessities such as electricity, gas, water and communication services. The officeholder may give a personal guarantee for the payment of the charges in respect of those services. See Section 665 of CAMA 2020.
- Improvement of the insolvency regime in Nigeria to align with international best practices and standards. This has enhanced the ease of doing business in Nigeria and improved its insolvency rating, as well as the lustre of the Nigerian economy to foreign investors.



AELEX





PROPOSAL FOR REFORMS/RECOMMENDATIONS

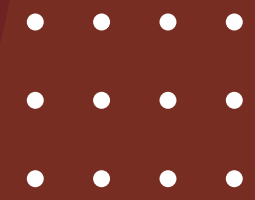
The extant regime can benefit from the following reforms:

Establishment of a framework for cross-border insolvency

- Commendably, one of the proposed amendments of the Bankruptcy and Insolvency (Repeal and Re-enactment) Bill, 2016 (the “Bill”) is to set up a cross-border insolvency framework in Nigeria, which is indispensable in improving the business climate in Nigeria and inviting foreign direct investment into the country.
- The Bill has been passed by the Nigerian legislature and is currently awaiting presidential assent. However, it is unclear when the presidential assent will be given or when the changes in the Bill will become effective. There is a need to further revise the Bill to align with international best practices and subsequently bring it to life.



AELEX



PROPOSAL FOR REFORMS/RECOMMENDATIONS

Awareness, competence and capacity development

- In addition to creating awareness of the procedure and benefits of bankruptcy proceedings, and the present insolvency and restructuring procedures and tools, there is also the need to develop the competence of insolvency practitioners and judges alike in this area.

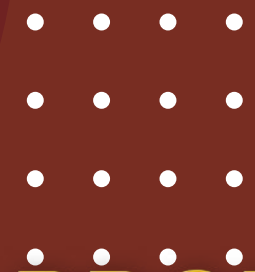
Designation of specialised courts for the resolution of bankruptcy matters

- To ensure expeditious disposal of bankruptcy proceedings in Nigeria, we suggest that certain courts officiated by judges trained in bankruptcy and insolvency procedures be designated insolvency courts to exclusively handle matters related to the same. This will go a long way in reducing the timeframe of these proceedings and ensuring speedy disposal of such proceedings. Specialized courts will also contribute to building the expertise of judges in the sector, thereby providing greater certainty and predictability in the insolvency process as well as the overall growth and development of the insolvency



AELEX





PROPOSAL FOR REFORMS/RECOMMENDATIONS

Developing ethical code of conduct for the insolvency practitioners

- In administering the various insolvency and restructuring procedures and tools available under the current framework, insolvency practitioners play a crucial role in the insolvency ecosystem. The standard of care required of insolvency practitioners in the discharge of their duties and functions must be reflective of the delicate nature of the role.
- Measures should also be taken to enhance the accountability of insolvency practitioners. One of the ways this could be achieved is by providing easily accessible avenues for stakeholders who are dissatisfied with the conduct of insolvency and restructuring procedures to air their grievances and seek redress. Adequate measures should also be put in place for the timely investigation of complaints and meting out appropriate disciplinary actions against any erring professional.



AELEX





PROPOSAL FOR REFORMS/RECOMMENDATIONS

Although welcome regulatory improvements have recently been made in this connection, to ensure the effectiveness and viability of the current framework, there is a need to elevate the standard of performance and accountability required of insolvency practitioners in Nigeria to align with international best practices, through the crafting of a robust ethical code of conduct.

- Reform of the Bankruptcy Act by removing the outdated cumbersome procedures therein such as public examination of the debtor by the creditors, prescription of timelines for the conclusion of bankruptcy proceedings and extension of the 3 months limitation for the presentation of bankruptcy proceedings.
- Public awareness and education: There is a need to create public awareness and education of all stakeholders on insolvency procedures in Nigeria; aiming at promoting a culture of responsible borrowing and lending. This could be done by having key institutional players organise workshops, conferences, training and seminars, and developing educational materials for businesses and individuals and providing training for the various stakeholders involved in the implementation and administration of insolvency procedures and processes.



AELEX



ÁLEX

QUESTIONS/ COMMENTS



AELEX



LAGOS ■ PORT HARCOURT ■ ABUJA ■ ACCRA

4th Floor, Marble House
1, Kingsway Road, Falomo
Ikoyi, Lagos

Telephone: (+ 234 1) 2793367; 2793368
4736296, 4617321-3;
Facsimile: (+ 234 1) 2692072; 4617092
E-mail: lagos@aelex.com

2nd Floor,
Right Wing UPDC Building
26, Aba Road
P.O. Box 12636, Port Harcourt
Rivers State, Nigeria

Telephone: (+234 84) 464514, 464515
574628, 574636
Facsimile: (+234 84) 464516, 574628
E-mail: portharcourt@aelex.com

4th Floor,
Adamawa Plaza
1st Avenue, Off Shehu Shagari Way
Central Business Area
FCT Abuja, Nigeria

Telephone: (+234 9) 8704187, 6723568,
07098808416
Facsimile: (+234 9) 5230276
E-mail: abuja@aelex.com

Suite CCasa Maria
28 Angola Road
Kuku Hill, Osu
Accra

Telephone: (+233-302) 224828, 224845-6
Facsimile: (+233-302) 224824
E-mail: accra@aelex.com