Winding up Insolvent Foreign Companies in Nigeria

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Exordium

Nigerian companies which are unable to pay their due debts may be wound up under section 409(a) of the Companies and Allied Matters Act, 1990 (CAMA). This provision is not applicable to, and cannot be used to wind up, foreign companies which are insolvent. Section 532 of CAMA enables winding-up of unregistered companies. This discourse examines the practicability of winding up foreign companies under section 532 of CAMA.

Prevailing authorities and narrative

There appears to be no direct authority in support of winding up a foreign company in Nigeria. A winding-up petition was filed against an Irish company in Suntrust Oil Company Nigeria Ltd v San Leon Energy Plc, Suit No: FHC/L/CP/402/2018. However, the suit was discontinued by the petitioner following an amicable settlement.

Curiously, there seems to be a widely held view that Nigerian Courts do not have the jurisdiction to wind up foreign companies. A hint of this perception may be seen in A.A.D. Enterprise Ltd v MV Northern Reefer (2009) 12 NWLR (Pt 1155) 255 where an application by the 3rd respondent (a foreign company) which was undergoing liquidation abroad was opposed on the ground of absence of leave of Court pursuant to section 417 of CAMA. Section 417 of CAMA provides that upon the making of a winding up order, no action/proceeding shall be proceeded with or commenced against the company save with leave of Court. The Supreme Court rightly held that section 417 does not forbid companies in liquidation from proceeding with or commencing proceedings. The Supreme Court however proceeded to hold that section 417 did not apply to the 3rd respondent because, as a foreign company, its affairs were not regulated by CAMA. This was an inordinately broad and befogging pronouncement in the circumstance of that case. Perhaps the Supreme Court failed to take cognizance of provisions of CAMA which are applicable to foreign companies such as sections 54 and 532.

The view that foreign companies are incapable of being wound up in Nigeria is also fueled by lack of appreciation of the distinction between the effect of an order for the dissolution of a company and a winding up order. An order for the dissolution of a company effectively
terminates the life of the company and brings its existence to an end. A winding up order does not have a similar effect notwithstanding that it is often a prelude to dissolution. This explains why section 454(1) of CAMA provides for Courts to make a formal order of dissolution at the end of a winding up process. Accordingly, while companies may only be dissolved in accordance with their laws of incorporation, they may be wound up in foreign jurisdictions for a variety of reasons: In re Matheson Brothers Ltd (1884) 27 Ch.D 225 at 229.

**Winding up of insolvent unregistered companies**

Unregistered companies may be wound-up under section 532 of CAMA. Section 532 says that the provisions of CAMA in relation to winding-up of companies will apply to unregistered companies. The circumstances where provisions relating to winding-up of companies will not apply to unregistered companies are also set out. For instance, where an unregistered company is being wound-up, its principal place of business for purposes of the winding-up would be deemed to be its registered office.

An unregistered company may be wound-up if it is unable to pay its debts: section 532(c)(ii) of CAMA. An unregistered company would be deemed unable to pay its debts where it neglects to pay a debt exceeding ₦100 or compound/secure same to a creditor’s satisfaction 21 days after being served with a demand letter: section 532(d)(i). An unregistered company may also be deemed to be unable to pay its debts when it is proved to the satisfaction of the court that the unregistered company is unable to so do: section 532(d)(i).

Clearly, section 532 sanctions winding-up of insolvent unregistered companies. What is unclear is whether foreign companies are unregistered companies under section 532.

**Foreign companies as unregistered companies under section 532**

Section 567(1) of CAMA defines “unregistered company” to include “any partnership, association or company with the following exceptions, (a) a company and an existing company registered under this Act, and (b) a partnership, association or company which consists of less than eight members and is not a foreign partnership, association or company.”

Curiously, the definition seems to focus more on what entity is not an unregistered company. Indeed, the exceptions proffer a better understanding of what an unregistered company is. Accordingly, an unregistered company is neither (i) a company incorporated under CAMA, nor (ii) a Nigerian partnership/association/company with less than eight members.

An unregistered company may be (i) a foreign company/partnership/association, and (ii) a Nigerian partnership/association/company with more than 8 members which is not registered under CAMA. Foreign companies are clearly unregistered companies. First, they do not fall within the two exceptions under section 532. Second, they are not registered under CAMA and are expressly excluded from the exception in paragraph (b) above.

CAMA is a re-enactment of Nigeria’s Companies Act 1968 which was modelled after English Companies Act 1948. The definition of unregistered companies in section 567 of CAMA is a re-enactment of section 395(1) of Nigeria’s Companies Act 1968. This definition is a replica of section 398 of English Companies Act 1948 and its predecessor, section 337 of English Companies Act 1929.

Similarly, section 532 of CAMA which provides for the winding-up of unregistered companies is a re-enactment of section 363 of Nigeria’s Companies Act 1968. These two provisions are replicas of section 399 of English Companies Act 1948 which is a re-enactment of section 338 of English Companies Act 1929. Instructively, in Re Russian and English Bank [1932] 1 Ch 663, Bennett J. stated that it was settled that a company which owes its existence to
foreign law is an unregistered company within the meaning of section 338 of English Companies Act 1929.

**Drawing Lessons from English Law**

There appears to be no reported case of winding-up of a foreign company under CAMA or Nigeria’s Companies Act 1968. In contrast, there are reported cases on the application of section 399 of English Companies Act 1948 and section 338 of English Companies Act 1929. There are also, at least two, reported cases of winding-up of foreign companies in England under section 199 of English Companies Act 1862 (the fore-bearer of the 1929 Act): In re Matheson Brothers Ltd (supra); In re Commercial Bank of India, Law Rep 6 Eq 517.

In *Re Russian and English Bank* [1932] 1 Ch 663, an English Court granted a winding-up petition against a Russian company with a branch in England for inability to pay its debts pursuant to section 338 of English Companies Act 1929. In *Re Russian Bank for Foreign Trade* [1933] Ch 745, an English Court held that a bank incorporated in Russia with business in London could be wound-up on the ground of insolvency in England as an unregistered company under section 337 of English Companies Act 1929. In *Re Tovarishestvo Manufactur Liudvig Rabeneck* [1944] 2 All ER 556, an English Court wound-up a Russian textile company, which had its principal place of business in Moscow and engaged in business transactions in London, as an unregistered company under sections 337 and 338 of English Companies Act 1919. In *Banque Des Marchands De Moscou v Kindsley* (1950) Ch 105, a Russian bank with assets in England was wound-up under section 338(1) of English Companies Act 1929.

In *Re Azoff-Don Commercial Bank* (1954) 1 Ch.D 947, a Russian bank which had assets, but no place of business, in England was wound-up as an unregistered company under section 399 of English Companies Act 1948. In *Re Compania Merabello San Nicholas SA* [1973] Ch 75, an insolvent Panamanian company was wound-up under section 399 of English Companies Act 948. In that case, Megarry J stated that (i) it is not relevant that the foreign company had a place of business or carried on business within jurisdiction; (ii) there must be proper connection with the jurisdiction to show that (x) the insolvent company has assets within jurisdiction, and (y) there are persons interested in the proper distribution of the assets; (iii) the assets need not be assets which will be distributable to creditors. It suffices if creditors will benefit from the making of the winding-up order in some other way, (iv) jurisdiction is excluded if it is shown that there is no reasonable possibility of benefit accruing to creditors from a winding-up order.

Megarry J’s guidelines suggest that if there are assets within jurisdiction and creditors which will benefit from the assets, a Court may make a winding-up order. Even where there are no assets within jurisdiction, an order may still be made if it will be beneficial to domestic creditors. Accordingly, in *Re Eloc Electro-Optieck and Communicatie BV* [1982] Ch 43, an English Court wound up a Dutch company with business in England under section 399 of English Companies Act 1948 notwithstanding that it had no assets in England. The Court found that there was reasonable possibility that the winding-up order would result in payment of the petitioners from redundancy funds in accordance with the relevant law.

**Postscript**

A recalcitrant foreign debtor may be wound up as an insolvent company in Nigeria. In seeking to wind up a foreign corporate, there ought to be a reasonable possibility that the process would be beneficial to domestic creditors.